

## Chapter 10

### Discrimination and rights

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Abstract: I claim that there is no kind of non-moralized discrimination for which there is a *general moral right* not to be discriminated against by private citizens. All that matters for justice is that people get their fair share of resources (including social resources, such as opportunities) and this is compatible with being subject to discrimination.

#### 1. Introduction

Discrimination can create serious injustices—ones for which there is often a moral duty to reduce or counteract the associated harms. Nonetheless, I claim that there is no kind of non-moralized discrimination for which there is a *general moral right* not to be discriminated against by private citizens. All that matters for justice is that people get their fair share of resources (including social resources, such as opportunities) and this is compatible with being subject to discrimination.

I will only be clarifying and motivating this claim, not defending it (except perhaps in a minor way). I will simply assume that individuals have a robust right to a fair share of resources, and I will give some examples where, I claim, there is no right against even despicable forms of discrimination. Dealing with discrimination via appeal to fair shares of resources is a well-known

strategy, and it is subject to important objections. My goal here is extremely modest. It is simply to clarify and motivate the fair share of resources approach to discrimination issues. I will not be resolving any of the difficult substantive issues.

My focus throughout is on whether there is a general moral right against discrimination. I will not be discussing any of the important issues concerning legal rights against discrimination.

## **2. Discrimination**

I will argue that there is no kind of non-discrimination, in a non-moralized sense, for which individuals have a general moral right that others not discriminate against them in that way. I shall do this by focusing on the very worst kind of discrimination—having all the problematic features that are sometimes invoked. If there is no general right against such discrimination, there is, I claim, no general right (independently of contractual obligations, etc.) against any kind of discrimination.

I shall focus on despicable discrimination, where this is (1) harmful differential treatment of someone, (2) due to her membership in a significant and salient social group, (3) where the person is treated—subjectively (e.g., intentionally) and intersubjectively (e.g., in terms of social meanings)—with contempt (i.e., as though she had diminished moral status) and animosity on account of her group membership, and (4) the treatment makes the person more vulnerable to empirical domination (or subordination or oppression) by others. (Here I incorporate features discussed in Young 1990, Hellman 1998, and Lippert-Rasmussen 2014.) This should be

understood as including the effects and expressive force of institutional discrimination, which need not involve any animosity, contempt, etc. on the part of discriminator. I focus on cases where both the social meaning and the discriminator's meaning involve animosity and contempt so as to make the discrimination as morally problematic as possible.

Readers are free to add on additional conditions. The only stipulation I make is that discrimination is to be understood in the *non-moralized sense* that it is not a conceptual truth that discrimination in this sense pro tanto infringes someone's moral rights (instead, it depends the correct substantive moral principles are). Understanding discrimination as a kind of wrongful (rights-infringing) differential treatment would trivialize the question of whether discrimination infringes someone's rights and shift the question to whether there is any discrimination so understood. It seems clearer to understand discrimination in a non-moralized sense.

### **3. Rights and Wronging**

Most people (e.g., Hellman 2008) think that despicable discrimination is morally wrong. The most natural thought is that it is wrong because it *wrongs the discriminatee*, that is, it infringes a right she has not to be so treated. I claim, however, that there is no general *moral right* against (non-moralized) despicable discrimination. In this section I clarify how I understand rights. Throughout, I am only concerned with moral rights (e.g., as opposed to legal rights). For simplicity, I focus on a choice-protecting (as opposed to an interest-protecting) conception of rights, but my core points apply to both.

In the broadest sense, a right is any of the four Hohfeldian normative advantages, or any combination thereof: *claim-rights* over the actions of others (e.g., a claim right that other not discriminate in certain ways), *liberty-rights* over one's actions (e.g., a liberty-right to hire whom one wants), *powers to change* normative relations (e.g., making a contractual commitment not to discriminate), and *immunities* to such change (e.g., no non-contractual loss of one's claim-right against discrimination of a certain type). Our focus is on claim-rights that others not discriminate against one, and rights should be so understood in what follows. (See Kramer, Simmonds, and Steiner 1998 for a superb analysis of various aspects of rights.)

What, then, is a claim-right? One has a claim right that an agent not do something just in case the agent *owes one a duty* not to do that something. The agent's doing that something *wrongs one* (and similarly for a right that the agent do something). That is to say that it is pro tanto (prima facie) wrong (impermissible) for the agent to do that something *without suitable authorization* from that person. For example, you have claim-right that I not slap your back. It is pro tanto wrong for me to slap your back without your authorization (e.g., valid consent), but it need not be pro tanto wrong for me to do so with your authorization. The pro tanto constraint protects *you* in the sense that it does not apply when the action (or failure of action) *is authorized by you*. For simplicity, we can here assume that authorization, for autonomous beings, is given by their valid consent (e.g., as opposed to advancing their interests), but nothing here depends on this.

Rights need only have pro tanto force in that it may be permissible to infringe them when there is an overriding justification (e.g., killing one person to save a million lives). Even when it is

permissible to infringe a right, however, the rightholder is wronged. For example, the infringing agent may owe the rightholder a duty to rectify the situation (e.g., apologize and provide compensation), at least in those cases where he is suitably responsible for the harm from the infringement.

So, an action can wrong someone (infringe her rights) and still be permissible. It is also conceptually possible for an action to be wrong (impermissible) even though it wrongs no one. This can be so if there are *impersonal wrongs*, which are actions that are wrong even if they wrong no one (e.g., destroying an ancient religious relic, even if one fully owns it and no one's interests, now or in the future, are adversely affected). I'm skeptical of such impersonal wrongs, but I do not address them here.

Compared with the claim that such discrimination is typically permissible, my claim that there is no right against discrimination is weaker in one sense and stronger in another. It is weaker, since it is compatible with discrimination typically being impersonally wrong. It is stronger in that it denies that discrimination as such even *pro tanto* wrongs the discriminatee (and thus overriding justifications are irrelevant).

I focus on *general* moral rights against discrimination, where these are rights that all right-bearers have, except as lost consensually (e.g., contractually) or in virtue unrectified past wrongings. I do not question that some individuals have rights against discrimination against specific individuals in virtue of a contract or owed rectification for a past wronging.

Finally, I do not assume that rights must be *enforceable*—that is, that the rightholder (or someone she has authorized) has a liberty-right to use force to prevent the infringement. Although I believe that rights are typically accompanied by such enforcement rights, I deny that this is a conceptual necessity. Nothing in my argument, however, depends on this.

#### **4. Some Problems with Despicable Discrimination**

Consider an employer's refusal to hire the most qualified applicant because of her race, where (1) this disadvantages the applicant (e.g., because her other opportunities are not as good), (2) the employer intends this refusal to express his contempt and animosity toward the applicant because of her race, (3) this is also the social meaning attached to the act, and (4) the act is part of a racist system of domination. This despicable discrimination is morally problematic in several respects.

First such discrimination is *morally undesirable*. It harms the discriminatee, expresses a mistaken view of her moral status, and creates or supports problems for social cooperation. That, however, leaves open whether it is *wrongs* the discriminatee to perform such actions. Not everything that is morally undesirable need wrong someone. It may be morally undesirable for me to decline to help my neighbor shovel her snow, but it need not wrong her.

Second, such despicable discrimination may be impersonally wrong, even if it wrongs no one. As indicated above, I'm skeptical that there are any impersonal wrongs, but here I leave open this possibility.

Third, such despicable discrimination typically creates serious problems of injustice, for which the discriminator and others may have a moral duty to provide additional resources to offset the harms imposed. Even if (as I shall claim) despicable discrimination need not wrong the discriminatee, it harms her and often leaves her with less than her *fair share of resources* (where this includes social resources, such as opportunities). When this is so, she has a right against certain others that they provide her with additional resources. (One possibility is that she has this right against the discriminator, even if his discrimination does not wrong her. Below, I shall suggest, however, that she has this right against those who have more than their fair share of resources.)

Our question is *not* whether despicable discrimination is (1) morally undesirable (it is), (2) impersonally wrong (I doubt it, but I leave this open), or (3) generates duties in others to provide additional resources to offset the harms imposed (it does). Our question is whether despicable discrimination wrongs (i.e., infringes a right of) the individuals discriminated against.

Here we need to distinguish between the actions of private citizens and those of government officials in their official capacities. There are many controversial issues concerning the proper role of government, but it seems quite plausible that the government owes a duty to its members not to engage in various forms of discrimination, including despicable discrimination. In addition, it seems plausible that governments are morally permitted (and perhaps owe a duty to its members) to require all *government contractors* not to engage in despicable and other kinds of discrimination. (Given that no one need be a government contractor, the government is permitted, within reason,

to promote justice by imposing conditions on contractors.) Indeed, the government might also be morally permitted to require this of all *corporations*, as a condition of incorporation (which grants legal limited liability). In what follows, however, I shall focus on private discrimination, understood as excluding government official officials, and employers who contract with the government, acting in these capacities.

So, our question is whether there is a right, against *private individuals* (either in their private lives, or in their public business lives), that they not engage in despicable discrimination. For brevity, let this be implicitly understood below.

Despicable discrimination sometimes *contingently* infringes the rights of others. This happens, for example, when the discrimination involves wrongful physical force, when the discriminator has a contractual duty not to discriminate, or when she has a rectificatory duty (for a past wrong) not to do so. I therefore set aside such cases in what follows. Our question is whether despicable discrimination *as such* (always) infringes the rights of the person discriminated against, that is, whether there is a general right not to be despicably discriminated against.

## **5. There Is No Right against Discrimination**

Individuals, I assume, have some *negative (claim) rights* to their bodies and to certain things. These include the right not to be killed or assaulted and the right that others not use, damage, or destroy certain objects. What makes a right a negative right is a bit murky, but here I simply mean (roughly) that the rights are not infringed by a choice that initiates no new causal impacts on the world

(beyond those of the mere presence of the agent's body in its current state). For example, your right that I (as an agent) not kill you is a *negative right*, since it is not infringed by my current choice, if it initiates no new causal impacts on you (e.g., I choose not to turn the trolley track to save your life). (Of course, some earlier choice of mine may infringe your negative right, as when I earlier turn the trolley switch so as to kill you, and then do nothing to change it back.) By contrast, *positive rights* can be infringed by a choice, even if it initiates no new causal impacts on you (e.g., your positive right to be saved is infringed, if I choose not to turn the trolley track to save your life).

The right against discrimination is a *positive right*, since it can be infringed by a choice that initiates no new causal impacts. Choosing not to initiate the hiring process, for example, can be a way of discriminating against someone. It can thus infringe a right of non-discrimination.

I claim (1) that there is a positive right to a fair share of resources, and (2) if there is such a positive right, then there is no (positive) right against despicable (or any other kind of) discrimination. I will explain, but not defend the first claim, and I will motivate, but not fully defend, the second claim.

Individuals, I assume, have a *right to a fair share of resources*. This right is sensitive to the adverse effects of discrimination, but it is compatible with despicable discrimination not wronging anyone, because its adverse effects can in principle be offset by other kinds of resource. Sometimes, of course, someone's right to a fair share of resources requires that agents not engage in despicable

(or other kinds of) discrimination. Where it does not, I claim, there is no right against despicable discrimination.

It's crucial that resources are here understood broadly to include *opportunities*, and not merely things (land, machines, money, etc.). Two individuals with equally valuable property rights in things may have unequally valuable resources, if one has more valuable social opportunities (for cooperation or friendship, for self-respect and respect by others, for freedom from domination, etc.). Social resources are indeed extremely valuable, and any theory of fair shares of resources that ignores them is implausible.

I leave open here how shares of resources are evaluated: in terms of wellbeing, brute luck wellbeing, economic resource value, brute luck economic value, functionings, capabilities, etc.—except that I assume that they assign significant value to resources that are *significantly valuable to individuals*. I also leave open here the criteria for a fair share: a minimally decent share, an equal share, a prioritarian-maximizing share, etc. —except that I assume that the criteria for a fair share are *reasonably demanding*. For example, my own view (not invoked here) is that a fair share requires equality of initial opportunities for wellbeing to the extent compatible with certain other rights (e.g., bodily integrity). The demandingness is important, since it helps ensure that significant harms from discrimination tend to deprive a person of her fair share of resources.

I shall now identify four cases of despicable discrimination in which I claim that the discriminatee is not wronged (cf. chapter 12).

Case 1: Consider a society in which there are two equally sized groups with mutual animosity and contempt, where each group has roughly equal overall power over the other group. Suppose further that each of the major institutions/industries of society (e.g., the shipping industry vs. the trucking industry) is controlled entirely by one group or the other group, but in ways that give each group equal overall power over the other. Each group engages in despicable job discrimination (in hiring, promotion, etc.) against members of the other group (and thus individuals are subject to domination with respect to participation in the institutions controlled by the other group). Suppose further that each member of society has a well-protected right to bodily integrity (and certain other negative rights) and *has her fair share of resources*.

This is not an attractive society, and its practices are probably very inefficient, but, I claim, no one is wronged by the despicable discrimination. Despicable discrimination definitely matters morally, given that it reduces the value of a person's share of resources, but an individual is not wronged by the treatment as long as it is compatible with her having a fair share of resources. Although there is, I would argue, a duty to try to reduce the amount despicable discrimination in society (because it inefficiently increases the burdens on fair share duties), this does not mean that the discrimination wrongs the discriminatee.

In this example, I stipulated that each individual has her fair share of resources. In the remaining three cases, I drop that stipulation, but I keep the other background assumptions. For concreteness,

I will focus on despicable discrimination by an employer in hiring. We can suppose, for example, that an employer refuses to hire an applicant because of her race (a significant and salient social group), where this disadvantages the applicant, expresses (subjective and intersubjectively) animosity and contempt, and subjects her to domination (with respect to employment in the company and industry). I will assume that in these cases non-discrimination imposes some costs on the employer (e.g., because the prejudices of his customers). Discrimination when non-discrimination is costless may well wrong the discriminatee.

Case 2: Like in Case 1 except for the fact that the employer has *less than his fair share* of resources even after the benefit (if any) to him of discriminating.

Here, I claim, the despicable discrimination need not wrong the discriminatee. One kind of case is where the applicant has *more* than her fair share of resources, even after the harm of despicable discrimination. Why would the employer, who has less than his fair share of resources, owe a duty to bear a cost (imposed by non-discrimination in this case) for the benefit of an applicant who has more than her fair share of resources? Discrimination is typically a way of depriving individuals of their fair share of resources (and thus wrongs them), but it need not do so. When it does not so deprive them, it does not, I claim, wrong them. A second kind of case is where the applicant has *less* than her fair share of resources, but the employer is even more disadvantaged relative to his fair share of resources. Unlike the first kind of case, here non-discrimination does indeed move the applicant closer to her fair share of resources. Nonetheless, it seems implausible that the employer, who has a greater shortfall from his fair share, owes the applicant a duty to bear a cost

for the benefits of the applicant (who is less disadvantaged with respect to fair shares).

Case 3: Like in Case 1 except for the fact that the employer has *more than his fair share of resources, and so does the discriminatee*.

Again, I claim, the discrimination does not wrong the discriminatee. The employer does indeed have a positive duty to aid owed to those with less than their fair share, but the applicant is not such a person.

Case 4: Like in Case 1 except for the fact that the employer has *more than his fair share of resources and the discriminatee has less than her fair share*.

Sometimes, in such cases, the employer may indeed owe the applicant a duty to hire her. My claim is only that this is not always (or even generally) so. First, the employer may not owe the applicant a duty of aid because he owes his aid (e.g., a job) to others who are even more disadvantaged with respect to fair shares than the discriminatee. (Note that the fact that the employer has a duty to hire someone else is fully compatible with this being a case of despicable discrimination.) Second, even if the employer owes the discriminatee a duty of aid, the aid need not take the form of hiring. A sufficiently large check might be better for the applicant (e.g., to go to college) and for the employer.

The core claim (Cases 1-3) is that despicable discrimination does not wrong the discriminatee

when either the discriminator has less than his fair share of resources or the discriminatee has more. In addition (Case 4), despicable discrimination need not (although it can) wrong the discriminator when he has more than his fair share and the discriminatee has less. Obviously, the view just expressed is rejected from many moral perspectives. I shall not attempt a systematic defense. Instead, I will focus on two crucial assumptions implicit in the fair share view, and I will briefly comment on why they are rejected by social (relational) egalitarians (cf. chapter 35).

The above view assumes that social resources (e.g., opportunities for self-respect and respect by others, non-domination, etc.) matter for rights only to the extent that they affect the value of people's shares of resources. Moreover, it assumes that, for this purpose, all social resources can be *traded off* for other resources (e.g., enough money can offset the harm of domination). Social egalitarians, however, reject one or both claims. They may claim, for example, that individual have a right to be treated with respect (or as an equal) and/or a right not to be dominated, independently whether they have their fair share of resources. Moreover, they may claim, these basic social relationship goods (e.g., being treated with respect or not being dominated) are (morally) either lexical prior, or incommensurable with, other sources of individual wellbeing or advantage. (See, for example, Young 1990 (ch. 1), Anderson 1999, Hellman 2008, Allen 2014, Scheffler 2015, and Wolff 2015.)

These objections are indeed important and they deserve careful answers. The debate between social egalitarians and fair share of resources theorists is a fundamental debate in political philosophy, but it is beyond the scope of this chapter to address this issue carefully. I shall simply

state how I would attempt to answer them.

I fully agree that having opportunities that are free of animosity, contempt, and domination is an extremely important factor in determining whether one's fair share rights are respected. The more one is subject to such treatment, the less valuable one's opportunities are, and this can result in having less than one's fair share of resources. I merely insist that (1) such opportunities are not the only resources relevant to the fair-share rights that people have, and (2) tradeoffs between such resources and other resources are often possible and relevant to people's fair-share rights. What matters for people's rights to resources is *the value to them* (e.g., on the correct theory of wellbeing, which need not be subjective and need not be sensitive to prejudiced preferences) of the overall package of resources. Compared to one set of resources, a second set may involve more animosity, contempt, and domination, but it may be more valuable to the rightholder overall (e.g., more wellbeing), if it involves sufficiently more other resources. (Of course, I do not claim that this is always so.) It seems like a fetish to require that each kind of resource be adequate when this involves a less valuable package for the rightholder. This is, however, merely to state my position. It does not adequately address the important concerns of social egalitarianism. For supporting discussion, see Fiocco (2012), Segall (2012, 2013), Arneson (2013), Lippert-Rasmussen (2012, 2014), Mason (2015), and Tomlin (2015). See also Vallentyne (2005, 2006).

## **6. Conclusion**

I have suggested that there is no general right against despicable discrimination, and hence no general right against discrimination of any sort. Discrimination does often wrong the

discriminatee, but when it does it is because the discriminator has more than his fair share of resources, the discriminatee has less, and the discrimination is incompatible with the discriminator's duty to the discriminatee to increase the value of her share of resources.

This does not mean that various sorts of discrimination are not seriously morally problematic. They are. They are often morally bad or undesirable. They may be impersonally wrong (even if they infringe no one's rights). They may be social inefficient in that they impose costs on others to offset the harms imposed in order to give the discriminatee her fair share of resources.

The most fundamental challenge to this view is social egalitarianism, and I have only sketched why I think its focus on social relations to the exclusion of other resources is mistaken. So, I have only motivated and outlined a position, not defended it.

I have also only addressed discrimination by private individuals. Discrimination by government officials in their official capacities, by government contractors, and by corporations is quite another matter.<sup>1</sup>

**Bibliographical note:**

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## Further Readings

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Sophia Moreau (2010) “What is Discrimination?” *Philosophy and Public Affairs* 38: 143–179. (An argument that the right to a roughly equal set of deliberative freedoms requires non-discrimination.)

Related Topics: Discrimination, Justice, and Morality; Discrimination and Equality of Opportunity, Discrimination and Freedom, Discrimination and Personal Life

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