

Abstract

Is there a relevant difference between a case of reaction qualification, in which one's skin colour (say: being white) counts as an employment qualification (e.g. for serving a racist community), and a case of affirmative action, in which one's skin colour (say: being black) counts as an employment qualification (e.g. for achieving work place diversity)? Could any such difference help explain why one, but possibly not the other, constitutes wrongful discrimination? In this article, I examine a recent account of discrimination and its wrong-making feature, in harm-based terms. I show that this proposal draws counterintuitive conclusions in the abovementioned cases, and point out additional problems stemming from the orthodox concept of harm it presupposes. In the light of this criticism, I propose an improved account of discrimination and its wrong-making feature, which relies on a non-orthodox – but even elsewhere proposed – hybrid concept of harm. I argue that the improved account provides us with better resources to understand our intuitions concerning, and to address the injustices underlying, these two cases. On my account, affirmative action constitutes discrimination, and is as such *prima facie* wrong – just as e.g. reaction qualification discrimination. This may seem counter-intuitive. But it points us to two important insights: (1) the overall wrongness of discrimination never lies exclusively at the individual level, but depends on the social context and its other justice-relevant features, and (2) the individual grievances and justified complaints that individuals may have towards such instances of discrimination should be captured and recognised by a theory of discrimination.

1 Discrimination and meritocracy: two troubling cases¹

In 1946, Heman M. Sweatt applied to enrol in the School of Law at the University of Texas, in Austin. He had all the relevant qualifications, but his application was rejected on the grounds that he was black, and that the Texas State Constitution did not allow integrated education. Backed by the National Association for the Advancement of Colored People, Sweatt filed a lawsuit against the university, represented by the head of the School of Law, Theophilus Painter (*Sweatt v. Painter*).

The state of Texas, in its capacity of provider of higher education, reacted swiftly – by setting up the Texas State University for Negroes. It was an entirely new, small (initially only consisting of a law department), and even geographically separate institution in Houston. The state district court could then rule against Sweatt's lawsuit, under the 'separate but equal' doctrine. This decision (though not the doctrine itself) was appealed and in the end reversed by the US Supreme Court in 1950, on the grounds of unjustified unequal treatment.²

¹ Robert Huseby, Sune, Dag Einar Thorsen, Gustaf Arrhenius, Mats Lundström, Magnus Jedenheim, Krister Bykvist, Per Algander, Andrew Reisner, Olle Risberg, Jens Johansson, Jessica Pepp, Simon,

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² Lavergne, *Before Brown*. The case was an important stepping stone in the formal desegregation of education, culminating in the 1954 case of *Brown v. Board of Education*, which repealed the 'separate but equal' doctrine itself.

This final verdict matches most people's intuition on this case: that the rejection of Sweatt's application, on grounds of his race, was an act of *wrongful discrimination*. The verdict also lines up with our idea of the *meritocratic requirement*: that a candidate ought to be chosen if and only if they are at least as qualified – by the relevant standards – as any competitor.³ Sweatt did have all the qualifications for acceptance, except for his race. And, clearly, one's race is not relevant to one's abilities to study law and work as law practitioner. So, rejecting Sweatt was also anti-meritocratic.

Judgments of meritocracy and non-discrimination don't necessarily coincide so neatly, however. To see this, consider the following thought experiment.⁴ Assume that (unrealistically, even in Texas in the 1940's-50's), there was virtually no market for black lawyers, due to widespread beliefs about black people's competence, such that white and non-white people alike would have preferred a white lawyer. There would then not have been any point spending public resources to educate black lawyers. Sweatt's skin colour would thus have been relevant to disqualify him from being accepted to the School of Law.

The thought experiment effectively turns this case into an instance of what is known as reaction qualification: in so far as some property of job applicant (such as their race) elicits a reaction in potential clients that undermines their work efficiency (such as clients' refusal to be legally represented by the applicant), this property counts as a relevant disqualification.⁵ In this hypothetical scenario, the rejection of Sweatt's application would thus have been in accordance with the meritocratic idea – though still intuitively wrongfully discriminating.

Now let's fast-forward some 60 years, while remaining in the same place. In 2008, Abigail N. Fisher applied to enrol at the University of Texas in Austin, but was rejected. Backed by the Project on Fair Representation, a conservative legal defence fund, Fisher filed a lawsuit against the university (*Fisher v. University of Texas*). Fisher's complaint was that she was discriminated against on the grounds of being white, since the University of Texas uses race as an admission factor, as part of its affirmative action program. The District Court ruled against the lawsuit, upholding the university's admission policy. This ruling was eventually affirmed by the U.S. Supreme Court in 2016.⁶

Intuitions on this case are much more divided, mostly along the lines of political ideology. The court's decision was both cheered and protested. Interestingly, then, many people would judge Fisher's rejection *not* to be an instance of *wrongful discrimination* – while clearly condemning Sweatt's rejection as just such an instance. This raises the two main questions for

³ The *if and only if*-clause works on the underlying assumption that there is no shortage of vacant positions.

⁴ Cf. Dworkin, *Taking Rights Seriously*.

⁵ Cf. Wertheimer, "Jobs, Qualifications, and Preferences."

⁶ Cf. [https://en.wikipedia.org/wiki/Fisher_v._University_of_Texas_\(2013\)](https://en.wikipedia.org/wiki/Fisher_v._University_of_Texas_(2013));
[https://en.wikipedia.org/wiki/Fisher_v._University_of_Texas_\(2013\)](https://en.wikipedia.org/wiki/Fisher_v._University_of_Texas_(2013)).

this paper: what exactly is the relevant difference between these cases? And why are people's judgments so divided in the latter case?

A further question concerns whether Fisher's rejection was in accordance with our idea of the *meritocratic requirement*. The University's complex admission criteria (weighing individual scores on talents, leadership qualities, family circumstances, race, on top of applying fixed high school quotas) makes this question difficult to answer. A host of observers judged Fisher to be *less* qualified than her more successful – non-white – competitors. However, to bring things into contrast with our first case, let's assume that the *only* reason Fisher didn't get accepted was her being white, and that there currently is a substantial market for white University graduates in Texas. This hypothetical case then clearly isn't an instance of reaction qualification, and equally clearly violates the meritocratic requirement.

The two hypothetical cases thus have the following diametrically opposed qualities: the first is an instance of meritocratically justified wrongful discrimination, while the second is one of anti-meritocratic non-discrimination – if you ask the one side – or anti-meritocratic wrongful discrimination – if you ask the other. Despite their structural similarities, the cases elicit contrary verdicts on several counts.

In the following, I will take a closer look at the – as it were – moral anatomy of discrimination, to answer my two main question: is there a relevant difference between the (hypothetical) Sweatt and Fisher cases, which can help us explain why one, but not the other, constitutes wrongful discrimination? And is there a principled way of acknowledging, and accounting for, the division of judgments in the Fisher case?

Section 2 presents an initial proposal of defining discrimination and its wrong-making feature, in harm-based terms. It shows the proposal to draw the wrong conclusion in the Sweatt case and to fail to account for the division in judgments in the Fisher case. Section 3 then points out additional problems for this proposal, stemming from the notion of harm it presupposes. In the light of this criticism, section 4 proposes an improved account of discrimination and its wrong-making feature. Section 5 applies the improved account to the two cases, ties back to the meritocratic requirement, and argues that the account helps answer our two main questions in a plausible way.

2 Discrimination and harm: an initial proposal

Most philosophical accounts of discrimination and its wrongness focus not so much on the harm it inflicts on its victims, but rather on the perpetrator's objectionable motivational states, or on the degrading social meaning conveyed by the discriminating act itself.⁷ However,

⁷ Cf. Lippert-Rasmussen, *Born Free and Equal?*; Altman, "Discrimination."

in other areas of academia and life, harm to victims is essential for both recognizing instances of discrimination and explaining why we are concerned about them. Here are some examples.

In a psychological study assessing lay judgments about discrimination in experimental settings, the researchers let participants observe the differential treatment of men and women. In the setting, the information about the agent's intent and about the amount of disadvantage or harm to the victim was varied. It turned out that, when participants were in doubt about the agent's intent to discriminate, or were informed that the agent had no such intent, an increase in perceived harm correlated with an increase in the likelihood to judge the action as discriminatory. When participants were given information that the agent did act from prejudice against some of the victims, the correlation was weaker but still persisted. The study thus corroborates the hypothesis that while intent plays an important role in lay people's judgments of discrimination, harm too is significant.⁸

Research into the history of anti-discrimination law, across a range of Western jurisdictions, shows that liability due to malice (a motive to harm) has been replaced by liability due to actual harm (regardless of motive). Legal scholar Denise Réaume writes that the earlier approach to discrimination "constructs discrimination as a cause of action in which malice is intrinsic to the wrongdoing — that is, in which the behavior complained of is otherwise legitimate and is rendered wrongful only because of the motive to cause harm". However, the current approach focuses on legal liability due to the "effect of denying or reducing access to the relevant benefit for those identified by [a certain] characteristic".⁹ It seems thus that the law captures our concern with harm, while also trailblazing a path away from focus on intent.

In a recent survey article covering studies in social epidemiology which relate discrimination to decreased well-being, Nancy Krieger systematises the "major theorized pathways [by which discrimination could harm health]:

- (1) economic and social deprivation;
- (2) excess exposure to toxins, hazards, and pathogens;
- (3) social trauma;
- (4) health-harming responses to discrimination;
- (5) targeted marketing of harmful commodities;
- (6) inadequate medical care; and
- (7) especially (but not only) for Indigenous peoples, ecosystem degradation and alienation from the land".¹⁰

⁸ Swim et al., "The Role of Intent and Harm in Judgments of Prejudice and Discrimination."

⁹ Réaume, "Harm and Fault in Discrimination Law."

¹⁰ Krieger, "Discrimination and Health Inequities."

The list is illuminating since it conveys that both causal effects and inherent features of discrimination are of interest to the researchers. Causal effects are assessed by (3) and (4): they are the (collective or individual) responses to the *perception* of being treated differently, manifested as e.g. stress reactions. Conditions (1), (2), and (6), on the other hand, point out racially differentiated patterns of risk that are not the effects of discrimination, but rather what *constitutes* discrimination. They are, in other words, instantiations of the intrinsic features of discrimination – and may therefore serve as evidence for the occurrence of discrimination, absent better explanations for these patterns.

Discrimination harms in the causal sense, as clearly shown by these studies. Such harms can thus constitute extrinsic wrong-making features of discrimination. I'm here, however, interested in its intrinsic wrongness, and the question whether an intrinsic wrong-making feature can be plausibly spelled out in terms of harm, capturing what social epidemiology researchers, legal theorists, and lay folks are concerned about.

The most thorough harm-based account of the wrongness of discrimination is Kasper Lippert-Rasmussen's recent book-length treatment of group discrimination. I here sketch a slightly cleaned-up version, and provide some paradigmatic examples to highlight the most important features.

- (GD) An agent X group discriminates against someone Y by ϕ -ing, if and only if:
- (i) There is a property, P, such that (X believes that) Y has P,
 - (ii) By ϕ -ing, X makes Y worse off than Y would have been, had Y not had (or had X not believed Y to have) P,
 - (iii) It is because (X believes that) Y has P that X by ϕ -ing makes Y worse off, and
 - (iv) P is the property of being a member of a socially salient group.¹¹

The 'because' in (iii) is meant to cover direct and indirect discrimination. A paradigmatic example of direct discrimination is when an employer rejects an applicant's, Elliot's, job application, only because Elliot is black, and the employer considers blacks to be inferior. The 'because' here refers to the employer's motivating reason. A paradigmatic example of indirect discrimination is when an employer rejects Alex's job application, only because the job (matter of fact) requires lots of traveling and overtime, and the employer believes that Alex (being a woman with a certain social role) is unlikely to meet this requirement. The employer's motivating reason is here a possibly justified, though possibly false belief that Alex is a primary caregiver or home keeper. The 'because' rather refers to the explanatory reason for the employer's decision, viz. that Alex is a woman (P) within a sexist (gender-segregated) society.

¹¹ Cf. Lippert-Rasmussen, *Born Free and Equal?* pp. 15; 26.

In either case, Elliot and Alex are made worse off, by not being hired, than they would have been, had they not belonged to their respective group.

The idea of social salience is the following: a group is socially salient if and only if perceived membership of it is important to the structure of social interactions across a wide range of social contexts. Social salience is thus a matter of degrees, co-varying with the membership's degree of importance for the social structure, and with the range of social contexts it affects. I'm here concerned with clear-cut cases, such as being black, or being female, which clearly satisfy this condition in modern Western societies. Of course, and equally clearly, so do being white, or being male. I'll return to this point in below.

Note that there may be cases where, had the target, Y, not had property P, they would (or could) have had another property Q that would have functioned in an analogous way, such that Y still hadn't been better off. E.g., had Elliot not been black, it would still have been the case that she hadn't been hired due to her (also) being a woman (old, gay, disabled, ...). Suffice it to say, for my purposes, that if there is some property R (e.g. being a white, middle-aged, heterosexual, able-bodied, ..., male) such that, had Y had this property instead of P, Q, ..., Y would have been better off (and such that the other conditions are satisfied), Y is being group discriminated against by X.

To bring out specifically which features of this definition of discrimination are relevant to its wrongness, the following claim is added:

(H) An instance of discrimination, ϕ , by X against Y is (prima facie) wrong, when it is, because it harms Y in the following sense: Y is worse off than Y would have been, had Y not had (or been believed to have) P.¹²

The wrong-making feature is, thus, that Y is made worse off than Y would have been in some counterfactual state tracked by reference to Y's socially salient property P. Since the features picked out by (H) are essential properties of discrimination as defined by (GD), (H) specifies (1) an *intrinsic* wrong-making feature. It is also (2) a *distinctive* wrong-making feature for all instances of discrimination, since these properties are common to all instances of discrimination, again by definition. It should also be noted that (H) explicitly specifies (3) a *prima facie* wrong-maker. This is reasonable, since an action's being an instance of discrimination may not settle all moral questions. Rather, it constitutes one reason against the action, which may then be outweighed by other reasons.

Now let's reconsider the two initial, thought experiment-amended cases. Heman Sweatt was rejected because of his race – had he not been black, he would have been admitted. Being

¹² Cf. Lippert-Rasmussen. p. 154f.

black is clearly a socially salient category, in Texas in the 1940's as well as in modern day Western societies. But was Sweatt made worse off by the rejection? The thought experiment set-up stipulated that there were no jobs for black lawyers at that time and place. Thus, even though Sweatt clearly would have been better off short-term by being accepted to the School of Law, one could argue that his life overall had been much worse, had he spent time, money and energy on a career path that would have left him without a qualified job. When morally assessing acts and policies, we should look to overall, life-time, rather than partial, short-term harm or benefit. But if this is correct, then rejecting Sweatt in this hypothetical scenario was not an act of wrongful discrimination.

Abigail Fisher was rejected because of her race – had she not been white, she would have been admitted (I assumed). Being white is clearly an equally socially salient category as being black. If being black (read: being non-white) is important to the structure of social interactions across a wide range of social contexts, then being white is equally important for the same (though reversed) structural reasons. Arguably, however, Fisher was made worse off by the rejection. As a white University of Texas graduate, she would plausibly have found a higher status or higher wage employment than she will as a graduate from a less prestigious school. But if this is correct, then rejecting Fisher was an act of wrongful discrimination.

The present account thus gives us the wrong result in the first case, and, for many of us, even in the second. It doesn't have the resources, either, to help explain the profound division of judgments in the second. On top of all of this, there are further problems, having to do with the concept of harm built into (GD) and (H).

3 Harm: the concept and its problems

The intrinsic, distinctive, and prima facie wrong-making feature picked out by (H) is a comparison between Y's actual welfare level and her counterfactual level absent the relevant property P. This just is the orthodox welfarist, comparative, counterfactual concept of *harm* (qualified by the social salience requirement). As the recent debate on the concept of harm has shown, the orthodox concept faces devastating counter-examples. These are known as omission, pre-emption, and over-determination cases, among others.¹³ Does relying on the orthodox concept invite these problems into the account of discrimination? Let's consider these problems in some more detail.

Starting with omission, it might seem that there is hope: it turns out that the discrimination account can handle false positives that spell trouble for the orthodox harm concept. Consider the classic version.

¹³ Cf. Bradley, "Doing Away with Harm"; Norcross, "Harming In Context"; Holtug, "The Harm Principle".

Classic Batman: “Suppose Batman purchases a set of golf clubs with the intention of giving them to Robin, which would have made Robin happy. Batman tells the Joker about his intentions. The Joker says to Batman, ‘why not keep them for yourself?’ Batman is persuaded. He keeps the golf clubs. The comparative [counterfactual, welfarist] account entails that Batman has harmed Robin, because Robin would have been better off if Batman had not kept the clubs. But it seems implausible to say that Batman has harmed Robin.”

Omission clearly is a problem for the orthodox harm concept. But now imagine this case in a discrimination context:

Transphobic Batman: Batman buys a set of golf clubs as a gift to Robin, as he knows this will make Robin happy. He then learns from the Joker that Robin is in fact transgender. Because of this fact, Batman decides to keep the golf clubs for himself.

Intuitively, Batman’s omission to give the golf clubs to Robin, just because Robin is transgender, does make for an act of (prima facie) wrongful discrimination. It is an instance of wrongful discrimination because it harms Robin, making them worse off than they would have been. But it is discrimination, to start with, only because it is due to the socially salient property of being transgender.

Unfortunately, other harm-based problems remain. Consider the following cases, adapted to the discrimination context.

Preemption: Sasha is not hired for a job in 1939 Germany only because she is Jewish. This causes her to start her emigration journey the very same day, to another part of the world where she then has a good life. Had she not been (perceived to be) Jewish, she would have been hired and returned to her apartment, where she would have been killed by an accidental (non-discriminating) gas explosion during the night.¹⁴

Clearly, not being hired makes Sasha’s life go better for her – she escapes death that very night. Equally clearly, not hiring Sasha only because she is Jewish is wrongful discrimination. But (GD) and (H) draw the opposite conclusion.

¹⁴ Cf. Lippert-Rasmussen, *Born Free and Equal?* The usual version of this case ends with Sasha being arrested and deported instead of being killed by a gas explosion. I use this amended case to accommodate one of Lippert-Rasmussen’s proposals of excluding all further acts of discrimination (such as being arrested and deported for being Jewish) when assessing the relevant counterfactual.

Overdetermination: Kim applies for a job. Her application is rejected by two members of a hiring committee, one of whom holds disabled people to be incompetent, and has observed Kim using a wheelchair. The other, however, skipped lunch, and rejects all applicants due to low blood sugar. Unanimous acceptance is required for hiring decisions.

Kim wouldn't have gotten the job even if she had not been (believed to be) disabled, so she wouldn't have been better off. Still, it seems clear that she has been wrongfully discriminated against. Some may want to object that the hiring committee's final and combined decision is not wrongfully discriminating (even though it may be flawed in other ways). Still, as long as we want to maintain that at least the first committee member's decision is wrongfully discriminating, (GD) and (H) fail to back us up, just because Kim wouldn't have been better off anyway.

The orthodox, comparative, counterfactual, welfarist harm concept is known to face problems, and now shown to bring some of these into the discrimination context. Could we shut these problems out by replacing the orthodox concept with e.g. a non-counterfactual or even a non-comparative harm concept? One problem with this suggestion is that these face serious problems of their own.¹⁵ Another problem is that defining discrimination in comparative counterfactual terms is quite apt and useful, at least to my mind. But such a definition then calls for a matching wrong-making feature, and is as such committed to a comparative counterfactual concept of harm. However, we should not let the third qualifier, 'welfarist', fly under the radar. In fact, for a significant number of harm theorists, the idea that harm is a welfarist notion is so obvious that it doesn't even merit mentioning.¹⁶ But acknowledging this qualification, and bringing it into question, can help us solve the current issues. As I will argue below, a few other harm theorists have found this strategy useful; and I will explore whether the proposal I sketch in the next section can point us into a similar direction.

4 Discrimination and harm: an improved proposal

There is, in fact, an unexplored clue in Lippert-Rasmussen's original definition of discrimination that points us in the direction of revising our orthodox harm concept. His definition is stated not in terms of 'making worse off' but in terms of 'treating worse'. Let's take a look at his formulation.

"An agent, X, [group] discriminates against someone, Y, in relation to another, Z, by ϕ -ing (e.g., hiring Z rather than Y) if, and only if:

- (i) There is a property, P, such that Y has P or X believes that Y has P, and Z does not have P or X believes that Z does not have P,

¹⁵ Bradley, "Doing Away with Harm."

¹⁶ See e.g. Sumner, *The Hateful and the Obscene*. p. 40f.

- (ii) X treats Y worse than he treats or would treat Z by ϕ -ing,
- (iii) It is because (X believes that) Y has P and (X believes that) Z does not have P that X treats Y worse than Z by ϕ -ing” and
- (iv) ”P is the property of being a member of a socially salient group (to which Z does not belong)”.¹⁷

The reason I initially suggested an amended version is that the wrong-making feature Lippert-Rasmussen proposes is formulated in welfarist terms of ‘making worse off’, which connects badly to the essential features of his original definition. He writes:

“an instance of discrimination is wrong, when it is, because it makes people worse off, i.e., they are worse off given the presence of discrimination than they would have been in some suitable alternative situation in which the relevant instance of discrimination had not taken place.”¹⁸

My proposal is to instead amend the concept of harming, to be understood as ‘treating worse’, rather than ‘making worse off’. Here’s how amending (GD) looks then.

- (GD*) An agent X discriminates against someone Y by ϕ -ing iff:
- (i) There is a property, P, such that (X believes that) Y has P,
 - (ii) By ϕ -ing, X treats Y worse than X would have, had Y not had (or had X not believed Y to have) P,
 - (iii) It is because (X believes that) Y has P that X by ϕ -ing treats Y worse, and
 - (iv) P is the property of being a member of a socially salient group.

My proposal is, further, that ‘treating worse’ can be understood in such a way as to give the right conclusions in my previous examples, involving pre-emption and over-determination. As we saw, not hiring Sasha and Kim only because they are Jewish and disabled, respectively, does not in the end make them worse off. But there is a sense in which they are treated worse, than they would have been treated otherwise, had they lacked these socially salient properties. It is this sense that I will try to capture in the remainder of this section.

¹⁷ Lippert-Rasmussen, *Born Free and Equal?*, pp. 15, 26. Lippert-Rasmussen suggests an additional condition: (v) “ ϕ is a relevant type of act, policy, or practice, and there are many acts etc. of this type, and this fact makes people with P (or some subgroup of these people) worse off relative to others, or ϕ is a relevant type of act etc., and many acts etc. of this type would make people with P worse off relative to others, or X’s ϕ -ing is motivated by animosity towards or dislike of individuals with P or by the belief that individuals who have P are inferior or ought not to intermingle with others.” (p. 28) This is a cumbersome and – to my mind – non-necessary condition which I’ll ignore here. However, one could easily add it onto my final proposal.

¹⁸ Lippert-Rasmussen., p. 154f.

The expression ‘treating someone worse’ harbours a crucial ambiguity: it can be read as ‘making someone worse off’, that is, in a welfarist sense. But there is also a non-welfarist interpretation of ‘treating someone as inferior’ in some sense. Consulting the above non-hiring cases, it seems that this latter sense is apt for characterising the situation. In being rejected, Sasha and Kim are treated as less worthy of consideration, less capable, or of lesser standing, due to their respective group membership. In brief, in rejecting them, the employer pays them *less than equal respect*. From this rough assessment, we can sketch the following improved claim.

(H*) An act of discrimination ϕ by X against Y because of P is (prima facie) wrong, when it is, because Y is treated worse by X’s ϕ -ing, in the following sense:

- (i) Y is made worse off, or
- (ii) Y is treated with less than equal respect,

than Y would have been, had Y not had (or had X not believed Y to have) P.

The gist of (H*ii) can be found in many rival accounts of the wrongness of discrimination. These state that discrimination distinctively *wrongs* its victims, or constitutes *a wrong* to them, over and above possibly being wrong for other reasons.¹⁹ The common denominator for these accounts is an appeal to equality: e.g., discrimination is wrong in virtue of violating equal entitlement to certain freedoms,²⁰ in virtue of expressing “the unequal humanity of the other”,²¹ of acting on an attitude that some are not entitled to equal respect,²² or in virtue of being “premised on the belief that some types of people are morally worthier than others” in the sense of meriting “greater moral concern”.²³ By spelling out ‘treating worse’ as ‘making worse off or treating with less respect’, my account can accommodate this sense – but without making individual welfare entirely irrelevant.

It may now be objected that my proposal is only nominally saving the harm-based account of the wrongness of discrimination. Isn’t this really a hybrid harm-and-respect account, rather than a proper harm account? On the other hand, isn’t this just an arbitrary question of how to cut the conceptual cake?

I think there is a non-arbitrary case to be made for my proposal: apart from being useful for our present purposes (I’ll return to this in section 5 below), it aligns with useful proposals in

¹⁹ Cf. Altman, “Discrimination” §4.1; Moreau, “What Is Discrimination?” pp. 145f.; Hellman, *When Is Discrimination Wrong?* (2008: 15f.).

²⁰ Moreau, “What Is Discrimination?”.

²¹ Hellman, *When Is Discrimination Wrong?* p. 38. While Hellman takes a slight detour in analysing the wrongness of discrimination first in terms of being “demeaning”, which in turn is analysed as requiring “an expression of the unequal humanity of the other” (as well as a certain status of the agent), we will here go straight for the expressivist analysis (and broaden the scope of application by ignoring the relative status of agent and subject).

²² Dworkin, *Taking Rights Seriously*.

²³ Alexander, *What Makes Wrongful Discrimination Wrong?* pp. 160f.

other contexts. The idea that harm has these two dimensions is not new. Of course, some mention this idea only to reject it. Ben Bradley discusses ‘harm’ in general and concedes:

“Perhaps the point, instead, is that there are different concepts answering to the name ‘harm’: a consequentialist one and a nonconsequentialist one. I don’t want to rule out this possibility. But it strikes me as misleading to use the term ‘harm’ to refer to this nonconsequentialist notion.”²⁴

Nils Holtug proposes that the concept of harm needed for a plausible moral version of the harm principle should be construed “not entirely in prudential [welfarist] terms, but (also) in moral [rights-based] terms”, but complains that this presupposes a moral theory, leaving the harm principle with only a “limited and hypothetical role” of a decision procedure.²⁵ That is, he claims that the concept of harm that best fits the harm principle is inadequate, since it renders the principle morally superfluous. However, these rejections of a two-dimensional harm account point out that ‘harm’ may have this double connotation in everyday talk and thought.

Others rather point out the usefulness of the two dimensions of harm. Woodward analyses harm in the context of the Non-Identity Problem. He emphasises a non-consequentialist dimension of harm, over and above a consequentialist, welfarist dimension (which he acknowledges without discussing it further):

“On a nonconsequentialist approach we think of a person as harmed [...] whenever an action is performed which violates some right possessed by or obligation owed to that person. We resist the temptation to think *just* in terms of some single dimension of moral assessment (how well off overall a person is) [...].”²⁶

Woodward states this dimension in terms of rights-violations, but his crucial point is that purely consequentialist approaches (to harm, but even to acting wrongly) are unsatisfactory regarding a number of problems. I here want to add the problem of wrongful discrimination to that number.

Feinberg analyses ‘harm’ within a legal context. He carves out two distinct but non-exclusive senses of harm: (1) the set-back of an individual’s interests (corresponding to my welfarist dimension), and (2) the wronging, or unjust treatment, of the individual (my non-welfarist dimension).²⁷ Feinberg uses this distinction to qualify “the harm principle as a guide to the

²⁴ Bradley, “Doing Away with Harm” p. 402.

²⁵ Lippert-Rasmussen, *Born Free and Equal?* pp. 377; 382.

²⁶ Woodward, “The Non-Identity Problem.” p. 818, my italics.

²⁷ Feinberg, *The Moral Limits of the Criminal Law* pp. 98ff; 53ff; 38ff. Feinberg interprets the wronging or unjust treatment of individuals in terms of rights violations.

moral limits of the criminal law”, which licenses liability only for acts that (tend to) cause interest-setback harms *and* wronging harms.²⁸ Along similar lines, my proposal is that morally wrongful (as separate from legally liable) discrimination requires harming in *at least one* of these senses. Also within the legal-philosophical context, Raz states that “one harms another when one's action makes the other person worse off than he was, *or is entitled to be,*” and thereby highlights a non-welfarist dimension of harm in terms of entitlement.²⁹

When it comes to theories of discrimination specifically, my account is furthermore similar to Scanlon's hybrid idea that discriminatory acts are “wrong because of their consequences – the exclusion of some people from important opportunities – and because of their meaning – the judgment of inferiority they express and thereby help to maintain.”³⁰ Opportunity loss is a specific form of welfare reduction; demeaning expressions are one form of disrespectful treatment. My account is generic in the sense that its two components can be interpreted along Scanlonian lines. But even other currencies of welfare, and other requirements of equal treatment, can be plugged into clauses (H*i) and (H*ii), respectively.

Saying that ‘harm’ should be understood in a welfarist and a non-welfarist, hybrid sense of ‘treated worse’ thus has some advantages. It helps us solve the problems stemming from a purely welfarist (comparative, counterfactual) harm concept. It also connects to the concerns of lay people, legal scholars, empirical researchers and others. And it aligns with a number of fruitful attempts to make harm matter in other moral philosophical contexts, and regarding other phenomena. One upshot of my arguments is thus that maybe there's hope for the concept of harm.

There's now one thing left to do. I need to check whether this improved account of discrimination and its wrongness, in terms of two-dimensional harm, helps us draw the right conclusions in the two initially considered cases of Sweatt and Fisher.

5 Applications: the Sweatt and Fisher cases revisited

Let's look again at the case of Heman Sweatt. In its though experiment version, I turned it into a case of reaction qualification, by assuming that being black, under certain (hypothetical) circumstances, could be seen as a disqualifying property. Since Sweatt then would not have been made better off, in the long run, by being accepted to the School of Law, the initial account of discrimination ran into the problem of failing to identify his rejection as an instance of wrongful discrimination. However, the revised proposal uncovered a non-welfarist sense of ‘being treated worse’ which here becomes relevant. Was Sweatt treated with less than equal respect then? To my mind, whatever the precise interpretation of this condition, this seems to me one of its paradigm instantiations. In fact, in the proposed hypothetical, his rejection is

²⁸ Feinberg. p. 36.

²⁹ Raz, *The Morality of Freedom* p. 414, my italics.

³⁰ Scanlon, *Moral Dimensions*. p. 73.

part of the very same structure of disrespect as the lack of demand for black lawyers. If this is the case, (H*ii) is satisfied, identifying this case as one of (prima facie) wrongful discrimination.

What about the original, real-life case? It is quite obvious that the assumption, that there was no job market for black lawyers, in Texas at the time, is purely hypothetical. Black lawyers worked i.a. on *Sweatt v. Painter* and other anti-segregation cases, showing that they as a matter of fact already were in demand. Thus, Sweatt was clearly made worse off by not being allowed to benefit from the high-quality education – as well as alumni network and other resources – of the School of Law at the University of Texas in Austin. And obviously, even in the real-life case, his rejection was a paradigm instance of lack of respect.

Let's next reconsider Abigail Fisher's case. In its though experiment version, I assumed Fisher to have been relevantly qualified, such that had she not been white, she would have been accepted. Moreover, I assumed that there would be a job market for white University of Texas graduates in modern day Texas and beyond. Thus, being rejected made Fisher worse off than she would have been, had she been allowed to benefit from the high-quality education provided by the University. Moreover, being rejected only because of her skin colour seems to constitute another paradigmatic example of lack of respect. Being white is as socially salient a property as being non-white (e.g. black), so why should this property's role in the motivating reasons behind the rejection convey more respect than its counterpart's? But then, against many people's initial intuition, Fisher's rejection would also be a case of (prima facie) wrongful discrimination.

On a superficial level, it may seem that this is where the disagreement between Fisher's allies and her antagonists lies. To be specific, they may disagree about the *counterfactual* that determines whether Fisher was made worse off, i.e. (H*i). While Fisher's allies mostly seem to hold that she would have been admitted, had she been non-white, many antagonists seem to deny this. But this would turn the controversy into one about Fisher's qualifications – which does not seem to be the main concern on either side. Also, this would imply that, at least in the counterfactual case, there is wrongful discrimination, a conclusion I suspect many of Fisher's antagonists still wouldn't buy.

The disagreement might instead be about the claim to *lack of respect*, i.e. (H*ii). It seems plausible that Fisher's allies would accept the claim that differential treatment because of one's skin colour is always disrespectful, while antagonists may question that this is the case specifically when the skin colour in question is white (e.g. due to "white privilege", which insulates white people from any pervasive effects of occasional disadvantages). Strictly speaking, however, this reply cannot be anchored in my proposal of discrimination and its wrongness. Again, being white is as much a socially salient property as being non-white, and if some differential treatment due to the latter counts as disrespectful then relevantly similar differential treatment due to the former should count so too.

Fisher's allies and antagonists could thus be understood as disagreeing about the proper account of discrimination. But I believe there is a more fruitful way to frame their disagreement. I want to propose that they all can – and should – accept the claim that there is wrongful discrimination even in the Fisher case, possibly due to Fisher being made worse off (if it is the case that she would have been admitted, had she been non-white), but, in any case, due to a lack of respect on the grounds of one's skin colour. The important point is that this is a judgment of *prima facie* wrongfulness. It does constitute a moral reason against rejecting Fisher – just as there is an analogous *prima facie* reason against rejecting Sweatt. All else equal, we shouldn't reject either of them. Of course, all else isn't equal. There are other moral reasons involved, and these need to be weighed against one another. The disagreement, on my proposal, is – or is most fruitfully construed – on another level. It concerns the question whether there are various other such reasons, and whether the reasons against rejecting Sweatt and Fisher, respectively, are outweighed by these other considerations.

The overall permissibility of rejecting Sweatt or Fisher cannot reasonably depend only on their respective claims to not be wrongfully discriminated. We need to take into account facts about society at large, about the patterns of distribution of other goods and opportunities.³¹ These differ considerably between both cases, not at least since the relative position of whites, within these patterns in 2008-Texas, differs considerably from the relative position of blacks, within the patterns of 1946-Texas. Given these facts, there is virtually no theory of justice that would provide reasons for rejecting Sweatt, which could outweigh the reason from wrongful discrimination against rejecting him. This can explain why most of us agree that it was impermissible to reject Sweatt.

However, I take it that there is considerable disagreement about what the right theory of justice implies in the Fisher case. Can an individual's claim against wrongful treatment be outweighed by requirements of social justice? Does the former posit constraints for which redistributions are permitted? Different theories of justice will answer these questions differently. Hence, disagreement about the permissibility of rejecting Fisher should be expected. But this should not be taken to imply that the disagreement must be about the discrimination claim.

In agreeing that there is wrongful discrimination, even in this case, we validate the complaint of Abigail Fisher. We acknowledge the harm (in a welfarist or non-welfarist sense) to her, that is due to her socially salient group membership. The claim she has against this treatment

³¹ Even meritocratic considerations may be among these other considerations: if the candidate is at least as qualified, by the lights of the institutions own goals, as any competitor, then there is a reason from (thin) rationality in favour of admitting them. If, in addition, the institution's goals are morally justified, this would also constitute a moral *prima facie* reason for admitting the candidate.

should not simply be discarded by appeal to some greater good. Compare this case with a case of allocating a scarce medical resource. A 70-year old patient needs a drug to survive. This gives her a claim to the only available dose, such that the doctors have a (prima facie) moral reason to give it to her. In comes a 25-year old needing the very same drug, giving her the same claim to the dose. Clearly, the doctors now need to adjudicate these conflicting claims to the indivisible good, and the resulting prima facie reasons. Adjudicating these claims, however, doesn't invalidate either of them. It is still prima facie wrong not to give the dose to the 70-year old, even if, all things considered, the sum of reasons tips the scale in favour of the 25-year old. Analogously, we can agree that it is prima facie wrong not to admit Fisher to the University of Texas due to her skin colour, even if we want to maintain that all things considered, the sum of reasons tips the scale in favour of admitting someone else in her stead.

On my view, then, we should claim that Fisher was wrongfully discriminated against, as this acknowledges her grievances, but insist that this does not imply that affirmative action of the type involved is overall wrong and should be banned. We can concede that Abigail Fisher and her allies do have a point, without taking this point to settle the matter.³²

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³² This paper was written within the project "Harm: The Concept and its Relevance", at the Uppsala University Philosophy Department, as well as at the Institute for Futures Studies (Stockholm). The project was generously funded by Riksbankens Jubileumsfond. I also want to thank the audience of the political philosophy section at Filosofidagarna 2017 (Uppsala), for valuable questions and comments.

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