1. Introduction

In the past two lectures we examined three theories of equality of opportunity—meritocracy, fair equality of opportunity, and luck egalitarianism. In this lecture and the next we’re turning to a slightly more practical focus, by ethically examining concrete practices: discrimination (this lecture); affirmative action (next lecture). Our aim will be to assess the moral standing of these practices or policies—are they wrongful? If wrong, what is the nature of the wrong at hand? If, on the other hand, they are justified, what justifies them?

One of the questions we’ll be interested in will be whether the theories of equality of opportunity we studied in the past two weeks can shed light on the moral standing of discrimination and affirmative action. That being said, we won’t focus exclusively on explanations that are grounded in the value of equality of opportunity.

2. Defining Discrimination

An intuitive definition of discrimination might be that discrimination occurs when someone chooses not to give someone else a job, position or benefit simply on the grounds of their race, ethnicity, gender, sexual orientation, or such.

Kasper Lippert-Rasmussen (2006, ‘The Badness of Discrimination’) tries to make this intuitive definition more precise and more general:

- **Discrimination**: X discriminates against Y in dimension W if and only if:
  1. X treats Y differently from Z in dimension W;
  2. the difference in treatment is believed to be disadvantageous to Y;
  3. the difference in treatment is suitably explained by Y’s and Z’s being from different socially salient groups.

One of the good things about this philosophical definition of discrimination is that it squares well with the way discrimination tends to be defined in the law: In the UK Equality Act of 2010 (Part 2, Chapter 2, Section 13), for instance, it says that “A person (A) discriminates against another (B) if, **because of a protected characteristic, A treats B less favourably than A treats or would treat others**”. Protected characteristics are defined as: “age; disability; gender; marriage & civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.” And discrimination, thus defined, is legally prohibited. So, as in the philosophical definition cite above, the law condemns treating people unfavourably on the basis of a socially salient “protected” characteristic.

However, you may be wondering about the third clause in the definition of discrimination. What is a socially salient group? For Lippert-Rasmussen, a “group is socially salient if perceived membership of it is important to the structure of social interactions across a wide range of social contexts” (2006, 169). Examples of socially salient categories might be race or gender, which bear importantly on what social constraints and enables one encounters. An example of a property that is not socially salient would be eye colour: in most cases, the
fact that you have green eyes and I have brown eyes is hardly noticed and hardly affects how people interact with each other.

But you might have doubts regarding whether it makes sense to focus only on socially salient groups in our definition of discrimination. After all, even if eye colour is generally not a basis for differential treatment, it might be in some cases: some eccentric employer could conceivably decide not to hire you simply because you had green eyes. And you might think that in those cases, this would be as discriminatory and wrongful as not selecting someone simply on the basis of their gender or race.

Now, there are two possible reasons for focusing, at least in the first instance, on differential treatment on the basis of membership in a socially salient group.

1) **Pragmatic.** According to Lippert-Rasmussen (2006), even if discrimination on the basis of eye colour were just as bad as discrimination on the basis of race, as a matter of fact it is very unlikely to occur. Since the law is a blunt tool and is already quite difficult to implement, it should focus on prohibiting the core cases of discrimination. This is a pragmatic reason for focusing on socially salient groups, a reason related to the feasibility of implementing laws.

2) **Methodological.** A second reason has more to do with our aim here. Our aim is to use philosophical and ethical tools to explore an existing policy practice: the practice of condemning discrimination as wrong and of legally prohibiting it. And it so happens that this practice often restricts itself to socially salient groups: as we saw a few moments ago, the UK Equality Act’s definition of discrimination focuses on “protected characteristics”. So our question is going to be: what, if anything, justifies this practice? What makes discrimination wrong, so that it should be legally prohibited?

We may find that the way discrimination is defined in the law is imperfect.

- Firstly, the current definition might be too broad: it may be that not all instances of discrimination (as defined in the law) are wrong.
- Secondly, the current definition may be too narrow: it may be that some things which are wrongful and should be considered discriminatory are currently excluded from the definition. In particular, it may be that the moral reasons underpinning the wrongness of discrimination in fact recommend that we abandon the third clause and focus not just on socially salient groups.

So, in summary: the second reason for keeping the focus on “socially salient” groups in the definition of discrimination we use here, is that we want to evaluate existing policies, and existing policies tend to include such a focus.

Before we proceed to examining the wrongness of discrimination, note that we are going to focus primarily on discrimination in hiring for jobs. However, there is also a very interesting and complex question about discrimination in the private or personal sphere. For example, there is a legal debate about whether private sports clubs or religious associations should be prohibited from excluding people on the basis of their age, gender, or race. Here, however, simply because of considerations of time, we’re going to bracket these questions. But if you’re interested in exploring this further, I recommend looking at Matt Zwolinski’s paper (“Why Not Regulate Private Discrimination?”)

What—if anything—makes discrimination wrong? One of the most influential suggestions in public discourse is that discrimination is wrong and should be prohibited legally because it violates equality of opportunity. But, as we’ve seen, there are many different accounts of equality of opportunity. Let’s look at luck egalitarianism first. Luck egalitarianism, recall, states that we should eliminate inequalities (in well-being) if and only if they result from bad luck rather than from genuine choice. Can luck egalitarianism explain why discrimination is wrong?

On the face of it, appealing to luck egalitarianism seems promising because it helps explain why typical definitions of discrimination focus on socially salient groups. Membership in certain socially salient racial groups, gender groups, religious groups, and so on, has historically been the basis for oppression and injustice. Insofar these injustices persist, members of historically-disadvantaged socially salient groups have fewer opportunities for welfare through no fault of their own. As a result, Shlomi Segall (2012) claims that if we are luck egalitarians, if we care about equalizing opportunities for welfare, we should care strongly about making sure that these socially salient groups are not made even worse off.

But despite this initial appeal, luck egalitarianism has trouble accounting for the wrongness of discrimination. Indeed, it has been argued that there is nothing in luck egalitarianism that is inherently opposed to discrimination. All luck egalitarianism says is that we should make sure that there are no undeserved inequalities in welfare. Now, in principle, you could discriminate against a group G (excluding them, say, from certain jobs), and then compensate them financially for the loss of welfare which results from discrimination. Since the undeserved loss of welfare generated through discrimination would be balanced out through financial compensation, luck egalitarianism would have no problem with this situation. Ultimately, even some defenders of luck egalitarianism concede that nothing in luck egalitarianism inherently forbids discrimination (Arneson 1999 ‘Against Rawlsian Equality of Opportunity’; Segall 2012 ‘Should the Best Qualified Be Appointed?’). What can the luck egalitarian say in response to this?

One possible answer comes from Richard Arneson (1999: 88): he says that it is not a problem that luck egalitarianism doesn’t inherently rule out discrimination, because some instances of discrimination are not wrong. For example, some professional networking associations are exclusively open to women. And this seems like it isn’t necessarily wrong, perhaps because it helps to offset existing unfair socioeconomic inequalities between men and women. The point of this reply is that since not all discrimination seems wrong, it is not necessarily a problem if luck egalitarianism allows some forms of discrimination.

But even if you agree that some forms of discrimination are not wrong, this reply is insufficient. This is because, contrary to the case of the networking association, some instances of discrimination that luck egalitarianism allows do seem intuitively wrong. In particular, consider the following case, adapted from Cynthia Stark (2013, ‘Luck, Opportunity, and Disability’). Imagine a caste society where members of one racial group are prohibited from applying to legal or political jobs. However, this racial group receives financial compensation via a tax on the income of other racial groups. Now, suppose that this financial compensation is sufficiently large to offset the loss of welfare that results from being excluded from legal and political jobs. The discrimination in this case this seems deeply
wrong. But luck egalitarianism says that there is nothing wrong in this case, because equality of opportunity of welfare is preserved between all groups.

In response, luck egalitarians could deny that there really is equality of opportunity for welfare in the case I’ve just described. Segall (2012, ‘What’s so bad about discrimination?’) for instance, suggests that discrimination which prevents members of a racial group from accessing prestigious jobs harms their self-respect. And it’s unclear that this lack of self-respect can be compensated through financial means. That is, the kind of welfare involved in having the right to apply for prestigious positions is not necessarily the kind of welfare that you can buy. If you agree with this, then this suggests that in the example of the caste society, there isn’t really equality of opportunity for welfare, because the group that is discriminated against isn’t compensated for their loss of welfare. As a result, luck egalitarianism would say that this caste society is wrong.

But there’s another problem for luck egalitarians, which Sophie Moreau (2010, ‘What Is Discrimination?’) raises. Imagine a situation where it is not just one group discriminating against another. Instead, you have 3 groups with equal power in a society: A, B, and C. A discriminates against B, B against C, and C against A. Because each group is being discriminated against, there is no inequality of welfare. Each group’s welfare and self-respect is equally lowered by discrimination. According to Moreau, the discrimination involved in this case is wrong. But since there is no inequality of opportunity for welfare, luck egalitarianism can’t explain the wrongness of discrimination in this case. So it seems there are at least some cases of wrongful discrimination where luck egalitarianism can’t explain why it is wrong.

4. Equality of Opportunity II: Meritocracy & FEO

Let’s see if the other theories of equality of opportunity we looked at—Meritocracy and Fair Equality of Opportunity (FEO)—can do better. Meritocracy says that desirable jobs or positions should be offered to the best-qualified applicants through competitions that no one is excluded from entering. FEO keeps Meritocracy, and combines it with a further principle: Fair Background, which says that access to qualifications should not be influenced by individuals’ socioeconomic background. I’m going to consider FEO and meritocracy together, here, because the component of FEO that is most directly relevant to assessing the wrongness of discrimination is Meritocracy, rather than Fair Background. So let us bracket Fair Background and focus instead on Meritocracy’s requirement that we should choose people according to their qualifications.

Meritocracy, it is widely held, is well placed to explain the wrongness of discrimination: it seems to entail more or less directly that discrimination is wrong. Meritocracy says that the only basis for distributing jobs and positions should be qualifications. This entails that you shouldn’t select candidates on the basis of things that are unrelated to qualifications. And therefore, you shouldn’t reject candidates simply because of their race, gender, sexual orientation, ethnicity, etc.

Note however, that meritocracy does suggest that the current legal definition of discrimination is too narrow. We are supposed to select candidates based on their qualifications. Rejecting candidates because of their race or gender is one way to violate this. But so is selecting according to eye colour or shoe size. So meritocracy seems to suggest that, ideally, our definition of discrimination should be changed, so that it doesn’t focus
exclusively on socially salient groups. Our definition should instead say that discrimination occurs when differential treatment is due to factors having nothing to do with qualifications.

One problem with using meritocracy to explain the wrongness of discrimination is that you may think that meritocracy is unfair—for the reasons considered in the first lecture. But even if we set these considerations aside, there are actually other problems with appealing to meritocracy to condemn discrimination.

\textit{a) Reaction Qualifications}

The first problem is the problem of reaction qualifications. Some qualifications don’t depend on the reactions of others. Knowing how a car engine works is a qualification for being a mechanic which has nothing to do with other people’s attitudes. A reaction qualification, by contrast, is an attribute that contributes to performing a job because of the reactions or attitudes of other people to that attribute (Miller 1999, ‘Deserving Jobs’). For example, imagine a car dealership in a bigoted society, where white people are prejudiced against people of colour. In such a society, white customers may be disinclined to buy anything from a person of colour, because they believe that people of colour are untrustworthy. In this context, being white becomes a qualification for being a good car salesman because of the prejudiced attitudes involved in the society.

Why is this a problem for meritocracy? Meritocracy requires considering people’s qualifications. Now, in the case of reaction qualifications, whether one is qualified depends on people’s attitudes. So, in contexts where people have discriminatory or prejudicial attitudes, selecting the best qualified makes hiring depend on patterns of discrimination. Because what makes something a qualification is people’s discriminatory attitudes, selecting the best qualified becomes a conduit for discrimination.

How can meritocracy avoid this problem? The first option is to say that reaction qualifications should not count at all when one is selecting the best qualified. But this is implausible. In many jobs, the job’s point is largely to elicit certain reactions. This is true, for instance, of teaching, where good candidates should have attributes that make students want to learn; or being a salesperson, where a good salesperson disposes customers to buy things (Mason 2001, ‘Equality of Opportunity: Old and New’). Because these jobs are crucially about producing reactions in people, we would have hardly any basis on which to choose good candidates if we discounted all reaction qualifications. In fact, it even seems as though in some cases, race or gender serve as legitimate reaction qualifications. It seems perfectly fine to prefer a black actor to play the role of Martin Luther King in a film because everyone prefers to see a black actor in that role (on this point, see Arneson 1999, ‘Against Rawlsian Equality of Opportunity’). So reaction qualifications should sometimes be allowed to count.

The second option for meritocracy is to adopt what David Miller (1999, ‘Deserving Jobs’) calls a ‘moralised’ account of qualifications: on this view, reaction qualifications can count in hiring practices, but only if they are based on morally legitimate and unprejudiced attitudes. This is more plausible: it allows the unproblematic reaction qualifications mentioned above to count; but at the same time, it rules out cases where bigoted attitudes make being white a qualification. However, this option poses a problem in our context: it is no longer meritocracy itself that explains the wrongness of discrimination. Rather, it is an external standard of moral legitimacy (see Lippert-Rasmussen 2009, ‘Reaction Qualifications’).
Revisited’: 423; and Mason 2001, ‘Equality of Opportunity: Old and New’: 778). Meritocracy tells us to hire the best qualified. And we then constrain meritocracy by saying that we should follow it only when the attitudes which make certain attributes qualifications are morally legitimate. It is this constraint on meritocracy which rules out discrimination via reaction qualifications—not meritocracy itself. Thus, reaction qualifications appear to constitute a case where meritocracy does not explain the wrongness of discrimination.

b) **Statistical Discrimination**

There’s another possible problem with appealing to meritocracy in order to explain the wrongness of discrimination: the issue of ‘statistical discrimination’. Statistical discrimination occurs when members of a socially salient group G are treated worse than others because there is statistical evidence that members of G perform less well in some important respect than others. Statistical discrimination is different from normal discrimination insofar as members of G are not treated worse simply because they belong to G. Rather, their belonging to G is used as a proxy for something that is relevant to the decision. For example: in the case of a job hire, statistical discrimination would occur if we have statistical evidence that members of a given socially salient group tend to perform less well in the job, and we reject a candidate from that group as a result.

Why is statistical discrimination problematic for meritocracy? Assessing an individual based on statistical evidence about their group may sometimes be an efficient way of finding out whether that individual is qualified for a job. So meritocracy seems to call for statistical discrimination. And yet, many people think that statistical discrimination is unfair. It seems unfair, to many commentators, to reject a candidate simply because other members of their social group have underperformed at a given job. And the reason it may seem unfair is the intuition that individuals deserve to be judged on their own merits, not those of the group to which they belong. So meritocracy calls for an unfair form of discrimination.

Defenders of meritocracy will need to respond in one of two ways: either 1) by denying that statistical discrimination is an efficient way of finding out about people’s qualifications; or 2) by suggesting that assessing people based on statistical evidence about their group is not necessarily wrongful. For an influential defence of the second strategy, I recommend looking at Richard Arneson’s argument in ‘What is Wrongful Discrimination?’ Briefly put, Arneson claims that all judgments about qualifications involve making inferences from statistical evidence about a group to the likely properties of individuals. The reason is this. All the evidence we have about people (references, CVs, etc.) is about their past. But we want to find out how they will perform in the future (when we hire them). Accordingly, we always need to make an inference based on statistics concerning how people who had similar track records tended to perform later on. So Arneson suggests that if statistical discrimination is wrong, then all assessments of qualifications are wrong and unfair. And that seems false.

5. **Other accounts of the wrongness of discrimination**

a) **Harm**

On the harm-based account, which Lippert-Rasmussen defends, discrimination is wrong insofar as it makes those who are discriminated against worse off. What’s promising about
the harm-based account is that it seems capable of accommodating the intuition that not all instances of discrimination are wrong. Earlier, we saw the case of women-only professional network associations, which, at least on the face of it, didn’t seem to be morally problematic. If it can be shown that these associations don’t harm anyone, then the harm-based account of discrimination’s wrongness can make space for such associations.

Now, one question with the harm-based account is what baseline we should adopt for determining whether someone is harmed or made worse off:

(a) Non-moralised baseline. Some suggest that discrimination harms someone if it makes them worse off than they would be if the discrimination had not occurred.
(b) Moralised baseline. Others, like Lippert-Rasmussen (2006), think discrimination harms someone if it makes them worse off than they would be in a just world.

These can come apart. For instance, suppose I have stolen lots of money, and this increases my well-being. I am then discriminated against when I apply for a job. This discrimination makes me worse off than I would be if the discrimination hadn’t occurred. But since my stolen money greatly enhances my welfare, I am still better off than I would be in a just world. (Because in a just world I wouldn’t have all of this stolen money.) That being said, I’m going to bracket the question of which baseline we should prefer for determining if someone has been harmed. This is because the main problem with the harm-based account doesn’t depend on what baseline you prefer.

The main problem with this account is that there seem to be instances of discrimination that are wrong but which benefit their target. Imagine the following case. A country is engaged in a war. Assume, moreover, that it is a just war (or at least as just as a war can be). The country, say, is intervening to prevent terrible abuses of basic human rights. Now, suppose a person of colour applies for the armed forces, and is rejected because he is a person of colour. Suppose, further, that had he joined the armed forces, he would have been killed in action. It seems that the discrimination is wrong—but it also saved his life, and therefore made him better off, not worse off. So the harm-based account seems problematic, as there are cases of beneficial but nevertheless wrongful discrimination.

b) Bad Attitudes

The last account of the wrongness of discrimination I’ll mention here is the bad-attitude account, which Richard Arneson puts forward. On this account, what makes discrimination wrong is that it is motivated by “unjustified hostile attitudes toward people perceived to be of a certain kind or faulty beliefs about the characteristics of people of that type” (2006, ‘What is Wrongful Discrimination?, 779). There seems to be something intuitively correct about this view: discrimination often seems to involve a bad or prejudiced attitude from the discriminator.

But there are potential counterexamples: cases of wrongful discrimination in the absence of bad attitudes. Take the following case, inspired by Lippert-Rasmussen (2006). George, though not a Scandinavian has an inflated conception of Scandinavians’ skills. He mistakenly believes that all Scandinavians are incredibly talented. So, when hiring, he always gives Scandinavians the job because they are Scandinavian. However, George’s assessment of the abilities of non-Scandinavians is accurate. Hence, George doesn’t seem to be hostile or
prejudiced toward anyone. So although George is discriminating against non-Scandinavians, he doesn’t do so because he has bad views about non-Scandinavians: instead, he does it because he has excessively good views about Scandinavians.

One possible reply is that George necessarily does have false and overly-negative attitudes about non-Scandinavians, since he sees them as inferior to Scandinavians. In other words, thinking that Scandinavians are superior in skill entails that everyone else is inferior in skill to Scandinavians.

But even if George’s positive belief about Scandinavians entails a negative belief about others, it is possible that George has never thought about this logical entailment of his positive judgment. Indeed, it is very common for people not to have thought through the implications of some of their current beliefs. So the general point remains that it seems possible to have excessively positive views about people without entertaining negative views about others—and such positive views, you may think, can serve as the basis for wrongful discrimination.

c) Pluralism?

We’ve now seen a number of attempts, from equality of opportunity as well as other sources, to give a unified account of the wrongness of discrimination. But each account faces important difficulties. As a result, you might wonder if instead we shouldn’t be pluralists about the wrongness of discrimination. On this view, there is no single account that explains all that is wrong with discrimination. Equality of opportunity explains some of it, intentions explain another part, and harm explains yet another part.

There is something appealing about this approach, but it’s also important to notice that it comes at a cost.

1) you might have the intuition that there is something common about what is wrong in all instances of discrimination. If so, pluralism will be unsatisfying.

2) Secondly, when we adopt pluralism, we lose some measure of explanatory power in ethics. That is, if we appeal to several independent values we may face conflicts between these values. When this happens, we may have no resources to adjudicate between these values and so to determine what we ought to do.