

“Dissecting Bioethics,” edited by Tuija Takala and Matti Häyry, welcomes contributions on the conceptual and theoretical dimensions of bioethics.

The section is dedicated to the idea that words defined by bioethicists and others should not be allowed to imprison people’s actual concerns, emotions, and thoughts. Papers that expose the many meanings of a concept, describe the different readings of a moral doctrine, or provide an alternative angle to seemingly self-evident issues are therefore particularly appreciated.

The themes covered in the section so far include dignity, naturalness, public interest, community, disability, autonomy, parity of reasoning, symbolic appeals, and toleration.

All submitted papers are peer reviewed. To submit a paper or to discuss a suitable topic, contact Tuija Takala at tuija.takala@helsinki.fi.

Dissecting “Discrimination”

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Discrimination is a moral and a legal issue. It is regulated in national and international law. The rationale for regulation is the assumption that discrimination is unfair; the legal issue presupposes the moral one. If discrimination does not measure up as a moral concept, the legal regulation is not a regulation of “it” but of an ad hoc set of behaviors that we dislike, possibly for good reason. I start by trying to identify what discrimination is taken to be in the moral and legal discourse. I will go on to set up a number of requirements an account of discrimination should meet and assess what I

understand to be the standard view in light of these requirements.

Pinning discrimination down as a legal issue in need of regulation makes it more difficult to account for it in a meaningful way as a moral issue. There seems to be a conflict between these two concerns. I will end by spelling that conflict out.

Setting the Scene

It is difficult to infer from existing legislation what discrimination is understood to be. Consider these two legal documents:

I have presented my views on discrimination in various forums. For their valuable comments and criticisms I am indebted to the participants in the Practical Philosophy Seminar at Lund University, the SCASSS Seminar at Uppsala University, the Philosophical Society at Uppsala University, the Practical Philosophy Seminar at Stockholm University, the ELSAGEN Workshop in Tartu, 2004, and the ELSAGEN/ESPMH Conference in Reykjavik, 2004. I particularly thank the project group ELSAGEN and the editors of the Dissecting Bioethics series.

Every effort should be made to ensure that human genetic data and human proteomic data are not used for purposes that discriminate in a way that is intended to infringe, or has the effect of infringing human rights, fundamental freedoms or human dignity of an individual. (*International Declaration on Human Genetic Data*, Article 7, UNESCO; 2003)

An employer may not disadvantage a job applicant or employee with a disability through treating him or her less favorably than the employer treats or would have treated persons without such a disability in a similar situation, unless the employer shows that the disadvantage is not connected to the disability. (*Act Prohibiting Work Related Discrimination of Persons with Disabilities*, SFS 1999:132 Paragraph 3; my translation from Swedish.)

In the first example, discrimination is a way of expressing that someone's human rights are violated. In the labor law example, discrimination is essentially a matter of interpersonal comparison. A person is discriminated if treated less favorably than someone else because of a property that he or she has but the other person lacks. If they are treated equally there is no discrimination, even if both are treated badly (there might then, of course, be a violation of something else). In the first example, discrimination is assessed in relation to a moral standard. In the second example, it is assessed in relation to how other people are treated.

In the human rights example, "discrimination" seems redundant. The article says that you may not violate anyone's human rights, but we know that already from the meaning of *right*. In the labor law example "discrimination" is used to describe a particular type of decisionmaking, where differentiations are made between people on the basis of a personal characteristic. Here *discrimination* signifies a particular form of unfairness and is not redundant. For this reason, this is what I will focus on.

We now have a place to start. From the semantics of the word we know that discrimination involves making distinctions or noting differences. We discriminate between P and Q when we note in which ways P and Q are different, rather than in which ways

they are similar or the same. The presumption of unfairness tells us that the reason why discrimination enters into moral and legal discourse is that making distinctions or noting differences and letting this influence the way we treat some relative to others is sometimes unfair.

In a sense discrimination is a morally neutral concept, because we necessarily discriminate between people all the time. If we didn't, we couldn't even single out an acquaintance in a crowd. I will, however, use it as a normative concept: When an action has been correctly described as an instance of discrimination, it has at the same time been correctly described as unfair.¹ Words have different meanings in different contexts and we are not obligated to bring general or historical meanings of a word into our moral discourse and stick *unfair* or *immoral* in front of it to signify why we are concerned about it. Because behavior is impossible without discrimination in the sense of noting differences, we do not need to burden our moral debate with it.

On the same note, discrimination does not apply in all contexts. In all relationships we are in, personal and nonpersonal alike, we make decisions that disadvantage some individuals in relation to others because of personal characteristics. If Jane dates Bob rather than Bill because Bob has conversational skills that Bill lacks, Jane still does not discriminate against Bill. The relationship between them is not one where discrimination applies because it is not one where fairness applies. Jane does not have an obligation to date a man she does not like. There is controversy over the domain of fairness, coinciding with the controversy over which relations are public and which private. Here it is enough to note that only in those relations and settings where issues of fairness apply—

whatever they are—can the issue of discrimination apply, because discrimination is a form of unfairness.

The Standard View

From the literature, and from law and legal practice, we can identify what I call the Standard View on discrimination. The descriptions we get tend to contain two features: “differential treatment” (or “treating less favorably”) for “arbitrary,” “irrational,” or “irrelevant” reasons. The variations of the second feature amount to the same thing, because reasons are supposed to be arbitrary or irrational because they are irrelevant. Here are some examples that I treat as falling within the Standard View: A classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike”;² “Discrimination is narrowly conceived as ‘irrational’ decision making, unrelated to differences in the productivity enhancing characteristics of particular workers”;³ “Sex discrimination, as commonly interpreted, involves the arbitrary or irrational use of gender in the awarding of benefits or positions.”⁴

Piecing together the operative parts of these descriptions (I doubt whether they qualify as, or are intended to be taken as, definitions) we get *the Standard View*: Discrimination is decision-making representing (or resulting in) a disadvantage for someone (P) on grounds that are irrelevant in the decisionmaking context (C). The ground (X) is a personal characteristic.

Consequently, “P is disadvantaged because of X in C” and “P is discriminated against because of X in C” are equivalent if and only if X is irrelevant in C. A familiar example is an employer choosing an able-bodied job applicant

over an applicant with a disability when the disability does not affect the person’s capacity for doing the job.

I have said that I use discrimination as a normative concept. That is not the same as saying that the meaning of the term *discrimination* contains a moral component. Even if we choose a value-neutral definition of it, we *use* it in argument with the purpose of conveying that an unfairness has been done. In saying that an act qualifies as discrimination, we pronounce it as or convey the message that it is unfair.⁵

General Requirements

If an account of discrimination is to qualify as an aspect of a theory of fairness, then it needs to satisfy certain requirements. What they are will always be contentious. As we have seen, there is not even agreement over the area of application for a theory of fairness. The requirements that I suggest here seem reasonable and I hope that my discussion of them will make the case for each. I do not claim that the list is exhaustive. All I claim is that an account that satisfies these requirements is stronger than one that does not. I suggest, then, that an account of discrimination should

- a. specify where the badness lies
- b. be context sensitive
- c. not be conditioned on bad intention
- d. offer a stable criterion for fairness
- e. be resilient against unfair background factors
- f. contain a nonarbitrary and non-question-begging principle for ground selection.

I will spell these requirements out and see how well the Standard View fares. To anticipate, the Standard View can meet the first three requirements but struggles with the last three. Moreover,

the merit of meeting item b is somewhat spoiled by its inability to meet item e.

Item a: Where the Badness Lies

We need to know what it is that makes discrimination a concern. On the Standard View, it either represents or results in disadvantage. On the first alternative, the disadvantage resides in the unfairness itself. There is a widely accepted assumption that people who are relevantly similar should be treated alike. Take John and Jerry, who are equally good at their jobs. John is passed over for promotion solely because he is gay. Jerry, who is not gay, gets promoted. Provided that sexual orientation is irrelevant for the kind of work they both do, John suffers an injustice. That injustice is the disadvantage, regardless of the effects it may have on his life. The disadvantage condition is satisfied automatically by the unfairness of the procedure. On the other alternative, two conditions for unfairness have to be satisfied separately: decisionmaking on irrelevant grounds *and* negative effects on the person's life resulting from this decision, like a loss of income or emotional trauma. It is reasonable to require that the disadvantage is not trivial.

We do not need to decide on the relative merits of these positions. It is enough to note that the Standard View has an answer to where the badness lies.

Item b: Context Sensitivity

An account of discrimination should be context sensitive in two ways.

First, it should be able to explain the difference between these two cases: (1) Sara is passed over for employment as a bus driver because she is a woman. (2) Sara is passed over for employment as a therapist in a male support group because she is a woman.

These cases illustrate the difference between different types of relevance: context relevance and moral relevance. Sex is *morally* irrelevant—it should not be allowed to influence our moral principles—but may still be *context relevant*, as in the second case. It is perfectly possible that a woman is unsuitable as a therapist for males with shattered egos. If that is the case, passing Sara over is not a decision made on context irrelevant grounds, even though sex is, as always, morally irrelevant.⁶ On the Standard View, as I understand it, “relevance” is context relevance.

It would be possible to piece together a position resembling the Standard View (or perhaps even a variant of it) where the relevance criterion is taken as moral relevance. Jan Narveson's position is an example: “Discrimination is treating some people less favorably than others for morally irrelevant reasons.”⁷ But it is difficult to see how this position could work. A characteristic is morally irrelevant as a matter of principle and remains so irrespective of context. With such a criterion, we could never make decisions that affect individuals based on factors like sex, religion, or sexual orientation. Gay organizations would not be allowed to favor gay people, churches would not be allowed to favor believers, and shelters for battered women would not be allowed to hire women only. In the Standard View, “relevance” is the relevance of a property in a given situation, that is, context relevance. So the Standard View satisfies the first part of this requirement.

The second part is that the context irrelevant characteristic should be the correct explanation for the disadvantage in the case in question. An account of discrimination should be sensitive to how a context irrelevant characteristic features in a decision. Say that Sara is passed over for employment at an assembly line and this

has to do with the fact that she is a woman. The way in which her sex features in the decision is that she is 164 cm tall. The height requirement for working at the assembly line is 170 cm, which means that women of average height, like Sara, are excluded. Men of average height are not. If the assembly line could be adjusted without unreasonable cost to suit women better, then the context irrelevant property of being a woman does feature among the reasons for the decision not to employ Sara, and the decision might amount to discrimination. This is sometimes referred to as “indirect discrimination,”⁸ meaning that a selection criterion that looks neutral systematically leads to disadvantage for a particular group. If, however, the height requirement is determined by technical factors (changing it might result in risk for employees), then the height requirement is independently motivated.

The Standard View lives up to this second part of the context sensitivity requirement as well. The two aspects of context sensitivity are shown by the emphasized passages in this formulation of it: P suffers discrimination if she is disadvantaged *because of X* in C and *X is irrelevant in C*.

Item c: Independent of Bad Intention

The Standard View describes discrimination through describing a selection process and its effects externally. The decisionmaker’s reason can be prejudice, ignorance, or even misguided benevolence. The reason is not part of the ground for classifying an act as discrimination. The disadvantage caused or represented by the decision need not be intended. This is a strength.

Stereotypes and prejudice influence and reinforce attitudes and behavior without us always being conscious of it. If the classification of the action

turns on an intention to disadvantage someone, this is lost from view. People tend to believe that their actions are justified. An employer may sincerely believe that women make bad workers or are better off at home. Prejudice and misconceptions result in disadvantage, but the intention may be to secure production. The Standard View does well to resist including a condition of bad intention.

Item d: A Stable Criterion for Fairness

The Standard View relies on the intuition that decisions affecting individual persons should be made on relevant grounds. But here is a potential conflict with other intuitions about fairness.

Let me exemplify. In some countries, insurance companies are prohibited from asking individuals seeking health or life insurance to undergo or disclose results from genetic tests. The reason for regulating “genetic discrimination” is to ensure that people are not disadvantaged because of their genetic makeup. There is a strong intuition at work here as well: It is not fair to be disadvantaged because of something one cannot control, and one cannot control one’s genetic makeup. But this intuition collides with the relevance criterion in the Standard View. In assessing health risks, genetic information is certainly relevant.

Many characteristics that are irrelevant in other contexts are relevant in insurance decisions. As far as it is statistically true that women live longer than men, sex is relevant for calculating premiums on pension insurance. A disability is relevant in calculating the risk of illness and premature death. According to the second intuition, allowing such information to be used against an individual’s interests is unfair. According to the first intuition—the one that feeds the Standard View—it is not.

Still, we might believe that allowing genetic information (or any medical information for that matter) to be used in insurance decisions is unfair because it makes insurance unavailable for those people who need it the most. If we believe that, then in all likelihood we will find regulation of insurance decisions legitimate on that ground.⁹ Proponents of the Standard View might agree with this as a matter of general fairness.¹⁰ However, this point seems to collide with the intuition about fairness upon which their view of discrimination relies. They can try and deal with this by offering an order of priority between these two intuitions. If they believe that the intuition feeding the Standard View overrides the intuition explaining the regulation of the insurance market, then they are committed to objecting to regulating the insurance market. If they accept that the intuition that supports regulation overrides the intuition feeding the Standard View in this instance, then they are at least committed to arguing that “genetic discrimination” is the wrong label. An unregulated state of affairs may well be unfair, but it is not discrimination. In the first option, the Standard View allows unfairness in the name of fairness without having the resources within itself to explain why we should find this order of priority compelling. What the second option reveals is that the criterion for discrimination advocated by the Standard View—context relevance—can seem arbitrary from the point of view of the victims of decisionmaking. When the disadvantage is real, the relevance criterion seems, well, irrelevant.

Item e: Resilience against Unfair Background Factors

The Standard View satisfies the requirement of context sensitivity specified in

item b. I have, however, indicated that the merit of that is countered by an inability to provide resilience against unfair background factors.

A personal characteristic can be context relevant—and unfit to ground a claim of discrimination—for reasons that are unfair. Powerful groups shape positions to suit their interests and the work they do is more highly valued.¹¹ Inequality and hierarchy, on the labor market and elsewhere, have an effect on how positions are formed and valued and on who does what where.¹² The Standard View struggles to deal with that.

Let’s return to Sara, who is too short for the assembly line. The requirement works to the disadvantage of most women but not most men. Earlier, I said that if the height requirement is motivated by technical factors only, then passing Sara over for employment is not discrimination. But let’s pause for a moment. If the “typical worker” were shorter than 170 cm, how likely is it that an assembly line would be constructed in such a way that only people taller than that can operate it? It is likely that the technical factors that explain the height requirement and make it relevant are, in turn, explained by the male norm on the labor market. Indirect discrimination does not solve this problem. What makes a rule or criterion—rather than an individual decision—context relevant may also be unfair, as this example shows.

The Standard View cannot reach behind relevance to assess *why* something is relevant in a certain context. It might be argued that this problem would be lessened, or even solved, if the Standard View relied on moral relevance—as Narveson seems to think that it does—rather than context relevance. But that would not help the Standard View overall. The context sensitivity of the Standard View is a

strength. I have indicated that it purchases this strength with an inability to meet the requirement currently under consideration. Anyone tempted to try and meet this requirement by switching to moral relevance, abandoning context relevance, would, as I have argued, do so at the cost of not meeting requirement b and ending up with an unworkable account.

The inability of the Standard View to offer resilience against unfair background factors does, I think, partly explain why discrimination law has proved so comparatively powerless. There is always “something else” to explain why, for example, women make less money than men—less experience, more absences, less bargaining power—all of which can be traced back to gender inequality. As long as there is a context-relevant “something else,” the Standard View sees no discrimination even if the “something else” is unfair.

Item f: A Nonarbitrary and Non-Question-Begging Principle for Ground Selection

Decisions can be taken on all sorts of irrelevant grounds, but we tend to believe that there is something special about those characteristics that can be ground for discrimination (let’s call them D-characteristics). If so, we should be prepared to offer a principle for why things like sex, religion, ethnicity, sexual orientation, and disability are on the list whereas hairstyle or eating habits are not. There are a number of possible principles. The question is whether any of them works, both in general and specifically for the Standard View.

One suggestion is that a D-characteristic is such that it can be the focus of group identification. The characteristic *matters* to the collective identity of people who have it. But we are after a principle to evaluate the intuition that

religion and sex are D-characteristic whereas hairstyle probably is not, and people can identify with others on the basis of anything they want. We cannot decide in advance what really matters to people. This principle is question begging.

Even if it did work in general, this principle would not work for the Standard View. If we made identity a condition, the D-status of a characteristic would depend on how people conceive of themselves. Take the Deaf community. People who identify with the Deaf community—not all deaf people do—regard themselves as a linguistic minority, not as disabled. If discrimination requires self-identification, disadvantage based on deafness is discrimination on the ground of disability only if the affected person regards him- or herself as disabled. This does not suit the Standard View, in which discrimination is a matter of external description. The Standard View does not enter into anyone’s mind.

Alternatively, a D-characteristic is immutable. The idea is that it is particularly bad to be disadvantaged because of a characteristic one cannot help having. The first problem with this suggestion is that it does not fit “the list.” Converts and transsexuals may suffer discrimination on the basis of religion and sexual orientation not because of what they cannot help being but of what they have turned themselves into. Neither is it obvious why adopted characteristics should be less worthy of protection. Even if this principle were convincing on its own, it would not work for the Standard View. We have already seen (under d) that one intuition on which the Standard View relies—fairness requires that decisions are taken on relevant grounds—may come into conflict with the intuition that it is unfair to be disadvantaged because of a factor one cannot control. Immutability as ground for selecting

D-characteristics would seem to require adherence to that second intuition.

A final suggestion is that D-characteristics are particularly potent sources of disadvantage. As we have seen, though, the Standard View does not require a notion of disadvantage separate from the unfairness. Even if it did, using it to determine beforehand which characteristics are D-characteristics would again beg the question.

A Potential Conflict between Legal and Moral Concerns

A reason why it is so difficult to come up with a principle for selecting D-characteristics is related to the failure of the Standard View to meet the requirements that it provides a stable criterion for fairness and shows resilience in the face of unfair background factors. Discrimination tends to be identified and assessed independently of the network of inequalities and sources of social vulnerability that explain why discrimination occurs. If our criterion for fairness is context relevance whereas the reason why a certain characteristic—like sex or ethnicity—is in need of being assessed for context relevance is that some people are socially more vulnerable to abuse than others, then discrimination is in danger of becoming irrelevant as an aspect of justice. There is a tendency to talk about discrimination in legal terms—I plead guilty to having done so myself—which has influenced how we talk about it as a moral issue. Discrimination cannot be legally regulated and regulation cannot be enforced unless discrimination is isolated as a phenomenon and described in a way that does not require contestable value judgments. At the same time, the legal issue presupposes the moral one and the presumption of unfairness. And discrimination cannot play a meaningful part within the confines of what fairness requires

unless it is de-isolated and put back into that contested value terrain.

Notes

1. Needless to say, an action can be unfair for other reasons too. Discrimination is merely one form of unfairness.
2. *Reed v. Reed* 404 U.S. 71; 1971.
3. Conaghan J. Feminism and labour law: Contesting the terrain. In: Morris A, O'Donnell T, eds. *Feminist Perspectives on Employment Law*. London: Cavendish Publishing; 1999:31.
4. Kymlicka W. *Contemporary Political Philosophy*. Oxford: Oxford University Press; 1990:240.
5. Compare the distinction between locution (meaning) and illocution (force) in Austin JL. *How to Do Things with Words*. Oxford: Oxford University Press; 1975:94, 98, 109.
6. When John Rawls talks about “things that are irrelevant from the standpoint of justice” (*A Theory of Justice*. Oxford: Oxford University Press; 1971:18f), he is referring to *morally* irrelevant factors.
7. Narveson J. *Moral Matters*. Peterborough, Ontario: Broadview Press; 1993:243.
8. European Council Directive 97/80/EC on The Burden of Proof in Cases of Discrimination Based on Sex, Article 2. *Official Journal of the European Community* 20.1.98.
9. It might be argued, not unreasonably, that the best solution to this problem is a general public health insurance rather than regulation of the private sector. Indeed, the effects of an unregulated private insurance market may not be very serious in welfare states where there is protection available for everyone. This is a consideration applicable to that variety of the Standard View that includes a condition of nontrivial negative effects (see item a). However, the intuition feeding the Standard View still stands. If I want to top up my public health insurance with private insurance, then fairness requires that decisions taken in my case, as well as in others', should be taken on context-relevant grounds.
10. Because discrimination applies only where fairness applies, it is possible to argue against regulation on the libertarian grounds that private companies are not constrained by considerations of fairness. If so, one would, of course, have to argue against all discrimination laws that apply outside of the narrow sector that libertarianism recognizes as public.

11. See Radcliffe Richards J. *The Sceptical Feminist. A Philosophical Enquiry*, new ed. London: Penguin; 1994:152. See also the Swedish court case *Midwife v. Örebro County Council* (Labour Court, AD 1996 no. 41). The court argued that a wage difference between a female midwife and a male hospital engineer was not discrimination because the man's qualifications had wider labor-market appeal.
12. See Bradley H. *Gender & Power in the Workplace. Analysing the Impact of Economic Change*. Basingstoke: MacMillan; 1999:ch. 5, for how inequalities are attributed to "natural" fea-

tures, like female domesticity, and therefore not discriminatory. On background inequalities making differences relevant: "the assumption [is] that where such differences [in productivity enhancing characteristics] *do* exist and, howsoever derived (for example, as a consequence of unequal access to educational or training opportunities, or the gendered allocation of labour in the home) they *are* relevant to decision making, regardless of the gendered consequences which may flow from them." See note 3, Conaghan 1999:31-2.