What's so Bad about Discrimination?

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The article argues that discrimination is bad as such when and because it undermines equality of opportunity. It shows, first, that other accounts, such as those concerning intent, efficiency, false representation, prejudice, respect and desert cannot account for the badness of discrimination as such. The inequality of opportunity account, in contrast, captures everything that is bad about discrimination. The article then addresses some counter-examples of practices that are discriminatory without arguably entailing inequality of opportunity, where the notable case is that of segregation. It is further demonstrated that the 'equality of opportunity' account successfully handles some of the tricky aspects associated with discrimination, such as those concerning the confinement of discrimination to salient groups, 'buying off' discriminatees by means of financial compensation, 'discrimination' in the selection of life partners, and the duties of employers.

Philosophers and lawyers often inquire *when* discrimination is wrong, or what makes for wrongful discrimination.[1] With few notable exceptions,[2] the question *why* discrimination might be wrong or bad is seldom asked. This is perhaps not all that surprising. Finding out when discrimination is bad is of obvious practical importance (e.g. for legal purposes). Inquiring into *why* discrimination is bad might not be of equivalent import. It does not tell us, at least not directly, what selectors are allowed or not allowed to do. Still, I hope this article will show that inquiring into why discrimination is bad is not only interesting in its own right, but also that it can tell us something about *when* discrimination is bad.[3]

Why, then, is discrimination bad? Discrimination is bad *as such*, I want to claim, because and only because it undermines equality of opportunity. This statement calls for some qualification and

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[1] See for example, Larry Alexander, 'What Makes Wrongful Discrimination Wrong?', *University of Pennsylvania Law Review* 141 (1992), pp. 149–219; Richard J. Arneson, 'What is Wrongful Discrimination?', *San Diego Law Review* 43 (2006), pp. 775–807; Deborah Hellman, *When is Discrimination Wrong?* (Cambridge, MA, 2008).

[2] Kasper Lippert-Rasmussen, 'The Badness of Discrimination', *Ethical Theory and Moral Practice* 9 (2006), pp. 167–85.

[3] I draw inspiration in this undertaking from Hannah Pitkin's 'Obligation and Consent', *The American Political Science Review* 59 (1965), pp. 990–9. Part of Pitkin's innovative approach to political obligation consisted in identifying different questions (four, as it turns out) that one might ask about political obligation.

clarification. I said that I speak of why discrimination is bad, and not of when it is wrong. This means that I do *not* search here for a comprehensive definition of discrimination. Rather, I try to trace what, if anything, is bad about it. One implication of this is that I search here for a necessary condition of discrimination, not a sufficient one. A second point of clarification follows: by searching for the root cause of the badness of discrimination I do not presume to be saying something about what makes discrimination unique. In other words, I am not searching for what distinguishes discrimination from other incidents of injustice, but rather for what, at bottom, makes it bad. Third, I refer to the badness of discrimination 'as such'. Particular incidents of discrimination might be bad for a variety of reasons. In speaking of the badness of discrimination as such I search for what source of badness, if anything, is common to *all* incidents of discrimination. Fourth, by 'equality of opportunity' I mean not equality of opportunity for a certain job or position, but rather overall equality of opportunity (e.g. equality of opportunity for welfare). Fifth, I assume (without argument) equality of opportunity to be a component of fairness (or distributive justice). I shall therefore use 'equality of opportunity', 'fairness', and 'distributive justice' interchangeably, even though they are no doubt distinct. Finally, in speaking of 'equality of opportunity' I do not presume to know what the reference group for assessing it is: one's city, country or the globe as a whole. I claim that discrimination is bad when it undermines equality of opportunity, in whatever the relevant reference group is taken to be.

Discrimination, then, is bad when and only when it upsets equality of opportunity. The view may not seem all that controversial, perhaps. But in fact, it is almost universally rejected.[4] Indeed, some have gone so far as to say that if there is a 'connection between anti-discrimination laws and equality it is at best negligible, and in any event is insufficient to count as a justification'.[5] The 'equality of opportunity' account seems in fact to be very much the minority view.[6] I shall begin my defence of that

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[4] Sophia Moreau, 'What is Discrimination?', *Philosophy and Public Affairs* 38 (2010), pp. 143–79; Hellman, *When is Discrimination Wrong?*; Matt Cavanagh, *Against Equality of Opportunity* (Oxford, 2002); Elisa Holmes, 'Anti-Discrimination Rights without Equality', *The Modern Law Review* 68 (2005), pp. 175–94; Alexander, 'What Makes Wrongful Discrimination Wrong?'; Arneson, 'What is Wrongful Discrimination?'.

[5] Holmes, 'Anti-Discrimination Rights without Equality', p. 194.

[6] Owen Fiss has put forward an account basing discrimination on inequality between *groups*. Owen Fiss, 'Groups and the Equal Protection Clause', *Philosophy and Public Affairs* 5 (1976), pp. 107–77. My account, in contrast, is not limited to groups. Similarly, Cass Sunstein, 'The Anticaste Principle', *Michigan Law Review* 92 (1994), pp. 2410–55, has argued that anti-discrimination laws are better understood as an anti-caste requirement, where the concern is for the impact of policies on the overall status of members of vulnerable groups. Nevertheless his account is different from mine. Sunstein's principle is concerned with turning 'highly visible differences' into social disadvantage. My account is not limited to discrimination on the

view by looking into alternative accounts of what makes discrimination bad, and showing that none of them is successful in accounting for the badness of discrimination as such. This is the concern of section I, and it thus lays the ground for the defence of the equality of opportunity account. Section II takes on the challenge (to that thesis) presented in cases which appear discriminatory despite not involving inequality of opportunity. The notable case here is that of segregation. Finally, in section III, I address some further potentially tough cases for the equality of opportunity account. These concern the confinement of discrimination to salient groups, 'buying off' discriminatees by means of financial compensation, 'discrimination' in the selection of life partners, and the implications of discrimination for the duties of employers.

I. WHY IS DISCRIMINATION BAD?

Discrimination could be bad for a variety of reasons. We may initially divide relevant accounts between those that locate the badness of discrimination in the harm to the person being discriminated against (the discriminatee), as opposed to accounts that locate it outside her.[7] The latter group of reasons, which I first want to address, may be further divided into two: badness which resides with the discriminator (or selector), and badness residing in society as a whole. Looking at the first sub-group, we may say that discrimination is bad because it corrupts the moral character of the discriminator. When discrimination is wrong (and in this article I shall always refer to 'discrimination' in the pejorative, rather than the literal and neutral sense, namely to imply wrongful discrimination) then we might think that to commit it is to undermine one's own moral virtue. This is familiar enough to us from characterizations of discrimination that focus on the morally repugnant intentions of selectors.[8] Bad intentions are therefore a necessary condition of discrimination under this account.

basis of those highly visible differences. In a more recent paper, Lippert-Rasmussen ('The Badness of Discrimination') has claimed that discrimination is bad when and because it disadvantages the discriminatee. Although he invokes 'disadvantage', Lippert-Rasmussen, in fact, focuses on what counts as *harm* for the purposes of discrimination. The account I attempt to provide here, in contrast, is more specifically focused on delimiting discrimination to undermining equality of opportunity. So while Lippert-Rasmussen focuses on 'harm', I focus on the narrower concept of 'disadvantage'. This is important because, obviously, some harms do not constitute disadvantages: a progressive tax policy may harm the interests of the very rich without disadvantaging them (relative to others).

[7] John Gardner's account, for example, addresses these two quite distinct sources of badness, namely the harm to the discriminator and the harm to the person being discriminated against. See John Gardner, 'Liberals and Unlawful Discrimination', *Oxford Journal of Legal Studies* 9 (1989), pp. 1–22.

[8] For one such account see Arneson, 'What is Wrongful Discrimination?'.

But this is disputable. Think of the following example (introduced by Kasper Lippert-Rasmussen).[9] Consider an employer who, while not a Scandinavian herself, has a somewhat inflated view of Scandinavians. Consequently, whenever a Scandinavian applicant comes along, she gives careful consideration to all other candidates but then, perhaps somewhat unwittingly, judges the Nordic applicant to be superior, even when that is blatantly not the case. The selector has an inflated view of Scandinavians, while having a correct and unprejudiced view of all others. This seems like a case of discrimination, even though there is nothing repugnant about the employer's intentions (or beliefs). Corrupting the moral character of the selector is therefore a type of bad which, while plausibly associated with discrimination, does not seem to be true for discrimination as such.

Consider now accounts that locate the badness of discrimination in society as a whole. One such account purporting to explain why discrimination is bad concerns efficiency. Namely, discrimination is bad because it deprives society of the benefit of having a workforce made up of the best qualified.[10] We are, indeed, often repelled by discrimination for the waste which it typically brings about. But it is possible to think of cases of discrimination which are not necessarily inefficient. Think of cases such as discrimination against women for reasons of maternity, statistical discrimination against minority groups who are likelier to engage in absenteeism or crime, and discrimination on the basis of reactive attitudes (not hiring someone based on the judgement that one's clients prefer not to be served by members of these minorities). We think of these practices as discriminatory and yet they are not obviously inefficient.

A third source of badness is one which it is not so easy to categorize (at least not initially) in terms of whether the badness resides within or outside the discriminatee. This particular account of badness says that discrimination is bad because it manifests a lie.[11] Discrimination represents the discriminatee as lacking in qualifications which in fact she does have. This may lead to depicting her as having a lower status than she in fact has. Notice that this claim is different from a related, and more common, account of discrimination (which we shall discuss shortly), according to which discrimination is bad because it is disrespectful. According to the claim under investigation here,

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[9] Lippert-Rasmussen, 'The Badness of Discrimination', p. 181.
[10] An argument perhaps first made in John Stuart Mill, *On the Subjection of Women* (New York, 1869).
[11] This is Larry Alexander's account. Discriminatory practices are wrong, he says, 'because they reflect incorrect moral judgments' ('What Makes Wrongful Discrimination Wrong?', p. 161).

the badness lies with the false representation, independently of any disrespect it may convey.

Now, this badness account could be interpreted in (at least) two ways. First, it could be said that it is harmful for individuals to be falsely represented. And second, it may hold that it is bad when actions (hiring) convey untruths, independently of any harm they may cause. In other words, a world which contains actions that manifest some untruth is worse than one which does not. Notice the following implication of the first variant of the claim. Since the badness resides in the lie (as distinct, I said, from a message of disrespect) this badness account is forced to condemn (in equal measures, mind you) falsely representing someone as having *better* qualifications than she actually has.[12] (It might be said, in reply to this point, that representing Jones as better than she is invariably entails representing Smith as worse than he in fact is. But as we already saw, this does not follow: I may discriminate against Smith, having a *correct* view of her, by virtue of having an inflated view of Jones.)[13] Yet, it does not seem harmful to the person selected to be represented as better qualified than she really is. Harmful lies cannot therefore account for the badness of discrimination.

All this does not, however, undermine the second variant of the falseness account. That version of the claim says that it is simply bad for there to be acts which manifest lies (regardless of harms to the misrepresented individual). The problem with this claim, however, is that while it portrays a plausible enough bad, it is one which does not seem necessarily discriminary. While it might be bad (because false) to represent Jones as more qualified than she really is, this does not seem to explain the badness of *discrimination*, of all things. If and when discrimination is bad it is surely so because someone else (Smith) has been discriminated against. And if that is the case, then surely the badness of the overall act must be somehow associated with that other (disadvantaged) person.

A fourth potential source of badness is the already mentioned disrespect account. This account, again, might locate the badness of discrimination either in the discriminator or in the discriminatee. Discrimination might be bad because it is bad for selectors to be disrespectful.[14] Alternatively, discrimination is bad when and because it causes the discriminatee loss of (self-)respect. We already saw that concern for the moral virtue of the selector cannot account for all

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[12] See Kasper Lippert-Rasmussen, 'Private Discrimination: A Prioritarian, Desert-Based Account', *San Diego Law Review* 43 (2006), pp. 817–56, at 845.

[13] Lippert-Rasmussen, 'The Badness of Discrimination', p. 181.

[14] Matt Cavanagh sides with this account of the badness of discrimination, whereby he speaks of treating people 'with unwarranted contempt' as the factor underlying the badness of discrimination. See his *Against Equality of Opportunity*, p. 166.

cases of discrimination (the case of discrimination in favour of Nordic candidates), so let us turn to the badness residing in the person being discriminated against, and the loss of respect she allegedly suffers. This badness account is vulnerable to the obvious counter-example of covert discrimination of which the discriminatee is unaware. Think of a policy whereby only male employees receive a bonus, and where the female employees never find this out. They are unlikely to experience a reduction of self-respect and yet we probably think that they are nevertheless discriminated against.[15] It therefore cannot be the case that the underlying badness of discrimination lies with some demeaning impact.[16]

A fifth account locates the badness of discrimination squarely with the discriminatee. It says that discrimination is bad for reasons of desert, namely when and because it deprives the most qualified person of the job to which she is entitled.[17] This account relies, obviously, on a series of controversial premises. First, it must assume that desert is, in fact, a principle of justice, which is far from obvious.[18] Second, it assumes (the no less controversial view) that individuals deserve rewards for (at least in part) their natural talents. And third, it assumes that these rewards must take the shape of jobs, of all things. Notice that this account locates the source of badness not simply in the inefficiency that *society* must endure owing to not recruiting the best qualified (which we have already examined and dismissed), but rather in the wrong committed *against the talented* who are arguably deserving of those jobs.

Even setting aside the series of controversial premises that one would have to swallow in order to accept this account, it is still doubtful that the principle of desert successfully explains the badness of discrimination as such. Think, for example, of a particular job for which there are several qualified candidates, and suppose that one of them stands out in such a way which makes it pretty obvious from the start that she is the most qualified for the job. We might still think it wrong, because discriminatory, at least in some cases, not to open up

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[15] This example is also, I think, fatal for an account of discrimination as denial of some 'deliberative freedoms', such as Moreau's. Her response, namely that the lack of opportunity undermines one's deliberative freedom whether or not one is aware of it ('What is Discrimination?', pp. 170–1), does not seem to me very persuasive.

[16] Lippert-Rasmussen offers a series of additional counterexamples to show why discrimination need not involve a demeaning message. See his 'Intentions and Discrimination in Hiring', *Journal of Moral Philosophy*, forthcoming.

[17] I note, of course, that desert and entitlement are distinct. X may be entitled to job Y due to a variety of reasons (need, legitimate expectations), only one of which can be desert. I am grateful to Brad Hooker for pointing out the importance of this distinction for my claim here.

[18] See John Rawls, *A Theory of Justice* (Oxford, 1971), p. 313.

the competition for the job and not to give each application at least some consideration. If this is so, then it would suggest that the badness of discrimination is motivated by reasons other than rewarding desert (e.g. by respect for applicants, or by some idea of equal chances to compete for the job).[19] To give a perhaps even stronger case, suppose (to use Andrew Mason's example) that the best qualified person for the job is very shy, and consequently would refrain from applying for it. Or suppose, further, that even if she did apply she would do badly on the interview due to her shyness.[20] On a strict desert view, this would seem to call for headhunting rather than for an open competition. But once again, it seems discriminatory (at least in some cases) to deny the other candidates the chance to compete in this case. The desert of the talented, thus, does not seem to capture the badness of discrimination.

The final competing badness account I can think of is the view that discrimination is bad because it is bad for people's lives to be determined by other people's prejudice. Paradigmatic cases of discrimination, we may notice, typically do involve prejudice (e.g. on the basis of race or sex). Thus, some philosophers hold that discrimination is bad because we do not 'want to see people succeeding or failing because of other people's prejudice'.[21] Now, it would be hard to dispute that for people to fail because of other people's prejudice is bad. But why exactly is it bad for people to *succeed* on the basis of someone else's prejudice? Some of the things we have already mentioned may account for this: it is inefficient to hire on the basis of prejudice; prejudicial hiring does not reward talent; and it is potentially demeaning to be hired for the colour of your skin rather than for your ability to perform the job. But even if all these reasons do explain why it is bad to allow someone to succeed on the basis of prejudice, still none of them explains why it is *discriminatory* to do so. In other words, on all these occasions, hiring someone based on prejudice can indeed potentially be bad but is not obviously discriminatory (at least not on its own). Once again, one reason why hiring X on prejudice might be both bad *and* discriminatory is that it implies *the failure of Y* to get the job, and through prejudice, which is certainly bad (and arguably discriminatory). But if this is where the badness of discrimination resides then we are back at a

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[19] One might say, in response, that the practice of open competition is a rule of thumb motivated by the ideal of rewarding the most suitable person for her talent. This would suggest that desert is still the source of badness in discrimination. But this would commit one to the idea that an open competition has no value independently of desert, which would imply that there would be nothing bad in headhunting in this case, and that seems wrong.

[20] Andrew Mason, *Levelling the Playing Field: The Idea of Equal Opportunity and its Place in Egalitarian Thought* (Oxford, 2006), pp. 20–1.

[21] Cavanagh, *Against Equality of Opportunity*, p. 137. This seems to be also Holmes's view.

concern for equality of opportunity. Hiring X on prejudice is bad, on this account, because Y did not really get an equal opportunity to compete for the job. So the claim that discrimination is bad for reasons of prejudice in fact boils down to a concern for equality of opportunity.[22] Prejudice, then, does not provide an independent (let alone convincing) badness account.

None of the potential sources of badness reviewed so far captures what is bad about discrimination. Now, it might be suggested that discrimination is bad for a multitude of compatible, overlapping reasons, and that there is no point searching for one source of badness that captures all incidents of discrimination.[23] If this is true, it would follow that it is wrong to dismiss this or that account of badness when it fails to account for the badness of a particular incidence of discrimination. I find this implausible. It is certainly true that particular incidents of discrimination will be bad for a variety of reasons. But there must be at least one reason, I maintain, underlying why discrimination is bad *as such*. Here is why.

Consider the implications that would follow were discrimination to have only overlapping, non-exhaustive sources of badness, some accounting for the badness of incidence X and some accounting for the badness of incidence Y. In many particular incidents of discrimination the different sources of badness clash. Suppose an employer adopts a consciously racist hiring policy, preferring members of his own race just for that reason. Virtue-wise the action seems bad. It could also be bad for reasons of efficiency: preferring members of his own race, the employer overlooks other, perhaps better qualified candidates. (And the same could be said for the deceit and desert accounts: the action does not truthfully represent the fitness of the appointee for the job, and it does not reward the desert of those truly suitable for the job.) Suppose, however, that the action is desirable on account of equality of opportunity. The employer in question is hiring disproportionately more (sufficiently qualified) blacks (like herself). To decide such a case we would first need to know which source of badness here trumps, as it were, the others. Ought the bad intentions, inefficiency, deceit and desert trump the concern for equality of opportunity? In a case similar

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[22] In that respect, Sophia Moreau's account improves on Cavanagh. For she locates the badness of discrimination not in people succeeding or failing through others' prejudice but only in the unfreedom of being at the mercy of someone else's prejudice. This is what she calls the deliberative freedom 'to live insulated from the effects of normatively extraneous features of us, such as our skin colour or gender'. Moreau, 'What is Discrimination?' p. 147.
[23] This, implicitly, is Gardner's view, for he sees a separate source of badness for direct discrimination (what he calls 'harm'), and another for indirect discrimination (distributive justice or equality of opportunity). See his 'Liberals and Unlawful Discrimination'.

to this (*United Steelworkers v. Weber*), the US Supreme Court decreed that 'private affirmative action' is not discriminatory.[24] We may deduce from this that, at least in the Court's view, equality of opportunity was the weightier concern, even when all other concerns were stacked up against it. What this case shows, quite apart from the centrality of equality of opportunity (henceforth EOP) for discrimination, is that even if there are overlapping sources of badness (which I doubt), there must be some hierarchy between them. That is, there must be some way of adjudicating between the different bads entailed in a particular incident of discrimination. And, if there is one account of badness which can capture *all* incidents of discrimination then surely it deserves to be at the pinnacle of that hierarchy. The bottom line, then, is that we are searching for a badness account that successfully explains all incidents of discrimination. We want to know, in other words, why discrimination is bad *as such*.

In the rest of the article, then, I want to focus on the view that discrimination is bad because and only because it is unfair, that is, because it undermines equality of opportunity. To suffer unequal opportunity (that is, to be disadvantaged relative to others) is the one and only bad accounting for the badness of discrimination.

II. DISCRIMINATION WITHOUT INEQUALITY?

To scrutinize the equality of opportunity (EOP) account we must examine cases which are (or seem) discriminatory while not involving inequality of opportunity. These would pose an obvious challenge to the view defended here. Think of the following example (discussed by Deborah Hellman).[25] A high school headmaster addresses his students and orders the black students to sit on the right of the hall and the white students to the left.[26] The headmaster's order appears offensive.[27]

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[24] Cited in Gardner, 'Liberals and Unlawful Discrimination', p. 14. Although, as Gardner comments, there is a proviso here that the corporation undertaking 'private affirmative action' must be atoning, as it were, for its own personal historical discrimination rather than for society's past wrongs. That should not, however, affect the point I am making here.

[25] Hellman, *When is Discrimination Wrong?*, pp. 26–8.

[26] Of course, he might do so as part of some educational experiment meant to convey the repugnance of segregation, in which case we would probably not think the overall action to be wrongful. (Notice that the specific action, taken out of context, would still be wrong, and it is the overall educational context which makes it permissible. If the specific, isolated action was not wrong to begin with then the educational experiment would not be effective.) But suppose the order has no educational purpose and thus no redeeming characteristic.

[27] It might be useful to notice that the extent of offensiveness may depend on, among other things, the following two variables. First, the case would carry slightly less offence were it to be a request rather than an order. And second, it would be slightly less offensive if made by one of the teachers, rather than the headmaster. The latter corresponds with

Importantly, there seems to be no disadvantage here. Seats on the left are no better than seats on the right. Still, given the historical and social context of racism, the headmasters' order strikes us as offensive.

This seems a difficult case for the EOP account, but is easily explained by its rival accounts. For example, it might be suggested that the headmaster's motive in this case is racist (which would suggest corruption of moral virtue as the source of badness). Then again, he might do so because he likes the aesthetic effect of this form of seating, not an obviously wrong motive.[28] Alternatively, and more plausibly, the order is bad because demeaning to the black students.[29] Other accounts, then, seem to fare better than the EOP account on this particular case. Still, we might be able to understand the badness of such acts of segregation also in terms of equality of opportunity, I suggest. The headmaster's order is wrong in that it separates two groups and, given the social context, brands one of them as inferior.[30] 'Separate but equal' treatment is thus bad, we may say, because given a certain context it affords one group a *lesser opportunity for respect*. Respect is (obviously) a social good, and what segregation (when it is bad) does is to lower the social standing and opportunity for respect of the vulnerable of the two (or more) groups.

Equal but separate treatment, then, may count as discrimination when it disadvantages a vulnerable group in terms of its access to respect. A similar sort of disadvantage, we may notice, can occur also when the vulnerable group is isolated for the purpose of *superior* (and not merely equal) material treatment. Deborah Hellman cites from Nelson Mandela's biography his recounting how black prisoners in South Africa were compelled to wear shorts, whereas white prisoners were ordered to wear long trousers. The intention behind this policy, we may plausibly speculate, was to infantilize the black prisoners.

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the intuition that discrimination is made worse the higher the selector is located in the hierarchy (a point I shall return to in the next section). In the particular example before us, we could think of variations on it which would not be offensive. For example, if the separation were along eye colour rather than skin colour then this would strike us as idiosyncratic but not offensive. Or, the headmaster could have ordered the seating to be based on alphabetic order of surnames, with those whose surname begins with the letters A–M to sit on his right and those whose name begins with the letters O–Z on his left. Such an order seems neither offensive nor especially idiosyncratic.

[28] Hellman, *When is Discrimination Wrong?*, p. 26.

[29] This is Hellman's position. *When is Discrimination Wrong?*, p. 27.

[30] As Charles Black has written following the ruling of *Brown v. Board of Education*: 'the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority'. Charles L. Black, 'The Lawfulness of the Segregation Decisions', *Yale Law Journal* 69 (1960), pp. 421–30, at 427 (cited in Hellman, *When is Discrimination Wrong?*, p. 54). Elizabeth Anderson develops a similar account, according to which the absence of integration is hindrance to justice and equality. See her *The Imperative of Integration* (Princeton, 2010).

However, given the South African climate, being allowed to wear shorts rather than long trousers could actually be considered an advantage.[31] The fact that black prisoners were being advantaged in terms of comfort is nevertheless consistent with them being disadvantaged in terms of social standing. It follows that superior treatment which isolates a socially vulnerable group can be discriminatory also on the equal opportunity account.

I say that separate but equal (or even better) treatment 'can be' discriminatory on the EOP account because not all such treatment is discriminatory to begin with. For one thing, separate treatment must be pursued for no good reason to qualify as discriminatory. The qualifier 'for no good reason' (known in legal terminology, confusingly I think, as the 'bona fide requirement')[32] is obviously important here. A sign at the front of a bus saying 'these front seats are reserved for passengers who are black' is offensive in a way that a sign saying 'these front seats are reserved for the elderly and handicapped' is not. Of course, we need not deny that even the latter could potentially be stigmatizing. Yet, when balanced with other effects of the policy (allowing better and quicker access to those whose movement is restricted) the sign does not seem repugnant. The same, of course, goes for separation of toilets between whites and blacks compared to such separation between men and women or between those who are disabled and those who are not. Another indication that the qualifier 'for no good reason' is essential here is found in affirmative action. That practice can imply the isolation (for the purpose of a favourable treatment) of a historically disadvantaged group, something which is potentially stigmatizing. Still, the practice might not be discriminatory precisely because the temporal isolation might better facilitate future integration. (We think affirmative action is desirable even though it might expose black medical students, say, to potential stigma, because we hope the policy would lead to a more diverse health-care workforce in the future.) The temporal potential loss of opportunity for respect is thus balanced against a greater increase in opportunities, both immediate ones (in employment) and future ones (in respect).

Let us turn to other prominent challenges to the thesis that discrimination is bad always and only for reasons of inequality of opportunity. Elisa Holmes explicitly rejects that view and offers the following argument in support. Suppose someone accidentally gives her daughter more pocket money than she gives her son (and suppose

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[31] Hellman, *When is Discrimination Wrong?*, p. 5. See also Lippert-Rasmussen, 'The Badness of Discrimination', p. 180.
[32] The term 'bona fide' seems to put the emphasis on the selector's intentions, whereas the condition could (and should be in my opinion) be independent of such intentions.

that for some reason this cannot be rectified immediately). We do not normally think of this as an act of discrimination. This shows, says Holmes, that discrimination is not about equality (but rather about having the correct attitude or intention, say).[33] Contra Holmes, this example does not refute the EOP account of discrimination, for the simple reason that that account never purported to claim that every instance of inequality of opportunity is thereby discriminatory. The claim, recall, was that inequality of opportunity is a necessary, not a sufficient, condition for discrimination. The suggestion that inequality-inducing accidental gifts are *not* discriminatory therefore does not undermine the EOP account of discrimination.

Here is another challenge to the EOP view of discrimination. In the famous *Palmer v. Thompson* case a mayor in the south of the United States, following Federal desegregation legislation, decided to close down a public swimming pool, stating that he wanted to end what to him was the offensive spectacle of whites and blacks splashing in the same waters. This seems to present a challenge to my thesis since there is no obvious inequality of opportunity here and yet the mayor's action is manifestly condemnable. But we need to know more about the case to see if it represents a challenge to the EOP thesis. Suppose that prior to the closure the public pool was used disproportionately more by blacks (say, because, proportionally, whites had greater access to private swimming pools). In that case the order to close the pool does undermine equality of opportunity, and would thus be (potentially) discriminatory also on my account. If the closure did not undermine equality of opportunity (suppose whites and blacks were truly equally harmed by it) then the mayor's decision might be repugnant (simply for the racist views it manifests), but not obviously discriminatory.[34] This touches on an obvious point, but one which is nevertheless worth repeating: not every repugnant policy is a discriminatory one. Policies can be morally wrong for reasons other than discrimination.

Another challenge to the view that discrimination is bad for reasons of equality of opportunity is offered by Matt Cavanagh. Suppose, he says, that an island is hit by some natural disaster and that you are a captain of a rescue ship that can save people in either of the towns in that island. To simplify matters, assume that all relevant features (number of inhabitants, distance from the rescue ship, etc.)

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[33] Holmes, 'Anti-Discrimination Rights without Equality', p. 186.
[34] Which is, incidentally, precisely what the Supreme Court reasoned in allowing the mayor's racist decision to stand. Justice Black wrote: 'Nothing in the history or language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of the 'equal protection of the laws". Cited in Helen M. Cake, 'Palmer v.. Thompson: Everybody Out of the Pool!', *Hastings Law Journal* 23 (1971), pp. 889–912, at 889.

are equal between the two towns. Suppose also that the captain has personal attachment to neither town. Under those circumstances, fairness requires, it is safe to assume, that the captain should quickly flip a coin to decide which town to head for. All the same, says Cavanagh, we do not think it impermissible if the captain opts to skip the coin toss and rather to decide on a whim to head to one of the towns. If we accept the story so far (which I do), Cavanagh claims, then it follows that the moral requirement underlying the limits placed on the captain's conduct are not those of equality of opportunity. What we care about in this case is that the fate of the two towns would not depend on the prejudice of the selector. We would object, for example, if the captain chose one town over another because it contained fewer Jews. Our underlying concern here is thus the avoidance of prejudice and *not* ensuring that the towns' inhabitants have some equal opportunity to survive the disaster. This is evidenced by our willingness to forego the coin toss, or so says Cavanagh.[35] I do not find this persuasive, and for the following simple reason. Although a coin toss is, to be sure, a good way of ensuring equal chances, it is by no means the only way. Allowing a selector to act on a whim, *when it is truly a whim*, also accords equal chances. If the captain has no access to information that might bias his decision (anything from the composition of races to the number of individuals in each town) then his choice seems to be truly made on a whim. And choosing on a whim, crucially, is a procedure that distributes equal chances. It is, in this sense, precisely like flipping a coin.[36]

Consider, finally, the following counterexample. Think of a society made up of five ethnic groups, whereby group A discriminates against group B, group B discriminates against C, and so forth. There is no inequality of opportunity here but the state of affairs nevertheless seems repugnant.[37] This proves, some may say, that the badness of discrimination is owed to reasons other than some unequal distribution of opportunities.[38] One thing we could say here is that this state of affairs involves (avoidable) dignitary harm. While each is equal to

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[35] Cavanagh, *Against Equality of Opportunity*, pp. 135–6.
[36] See also John Broome, 'Selecting People Randomly', *Ethics* 95 (1984), pp. 38–55, at 55.
[37] See Lippert-Rasmussen, 'Intentions and Discrimination in Hiring', p. 14. Or consider a slightly different example, in which a multiracial committee selects applicants, whereby in each case an applicant from one racial group is being rejected because of a racist vote by one of the committee members. Overall, no one is being disadvantaged, because of her race, compared to others. See Lippert-Rasmussen, 'The Badness of Discrimination', p. 173.
[38] Moreau, 'What is Discrimination?', p. 172, gives an example of a community that has an equal number of restaurants, each discriminating against a different clientele (Jewish, Muslim, etc.), and says that even though there is no inequality, there is still discrimination here.

others in terms of opportunities, each has also suffered dignitary harm. If this state of affairs is bad, then, it is so because the treatment is demeaning. Crucially, however, and in difference from the paradigmatic cases of segregation, here the loss of respect is suffered equally by all. The EOP account therefore fails to detect anything bad about this state of affairs. In my view, however, the example represents a case which is bad (or even wrongful), but not discriminatory. It is bad because it entails some universal reduction in respect, but it is not discriminatory.

To see this, consider the following variant of the above story. Suppose that group A is viewed as quirky and idiosyncratic by group B, but its judgment is highly esteemed by groups C to E. And suppose that group B is viewed as quirky and idiosyncratic by group C (the group it will end up discriminating against), but highly valued by everyone else, and so forth. It might be the case that when A discriminates against B (and B against C, and so forth) it causes a slight reduction in B's self-respect but an increase in C's through E's self-respect (and one whose accumulated amount is larger than the decrease in B's). It is easy to see where this is going. We have here what seems like multiple discrimination (consistent, recall, with equality of opportunity) which results, on the whole, in an increase in the absolute amount of self-respect in society (or, at the very least, no reduction in that absolute amount). Is there something bad about this state of affairs? Perhaps there is, but if so, it does not seem to me to be for reasons of discrimination (but if anything, to something like social cohesion), and thus does not pose a problem for the EOP account.

III. SOME (FURTHER) TOUGH ISSUES

Defending the view that the badness of discrimination resides exclusively in inequality of opportunity entails, mainly, fending off objections and counterexamples. Before resuming that undertaking let me quickly point out three, perhaps rather obvious, advantages of the thesis. These concern disparate impact, affirmative action and so-called age-discrimination.

Consider first disparate impact. This occurs when a seemingly neutral selection procedure ends up disadvantaging a vulnerable group. A paradigmatic example is the inclusion of a physical strength test in hiring for firefighters, thus ending up excluding women from the job. Cases of disparate impact are normally seen as presenting a challenge to intent- or respect-based (or in general, deontological) accounts of discrimination.[39] And it is not difficult to see why. Such cases show that

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[39] See Arneson's difficulty with responding to this challenge, in 'What is Wrongful Discrimination?' pp. 793–4.

some action may constitute wrongful discrimination even if there was no discriminatory intent and even if there was no loss of respect, either manifested or incurred. On my account, in contrast, discrimination is wrong because it exacerbates inequality of opportunity, which is precisely what disparate impact does and, perhaps more pertinently, why we think it to be bad.

Think, next, of affirmative action. Affirmative action arguably poses a challenge to desert-based accounts of discrimination.[40] In contrast, affirmative action is normally pursued *for* the sake of equality of opportunity, and is thus easily accounted for on my account. Consider finally so-called ageism or age-discrimination. My account sides with the practice of many European countries which opted *not* to follow the United States in abolishing mandatory retirement. Mandatory retirement is not discriminatory precisely because, over their whole life, the old are not disadvantaged (compared to the young) with respect to employment opportunities.[41]

As promised, I want to end my inquiry by presenting four issues that pose a potential challenge for the EOP account. These are: the confinement of discrimination to salient groups, 'paying off' discriminatees through material compensation, 'discrimination' in the selection of life partners, and the duties of employers. Here is the first issue. Accounts of discrimination often rely on what is called 'socially salient groups' or 'groups with HSD (history of social disadvantage) traits'.[42] Socially salient groups are groups that are recognizable by their distinguishing trait, and that have a history of being disadvantaged on account of it. The appeal to social saliency helps explain why discriminating against a person based on salient group membership (race, say) is much more offensive than rejecting her on the basis of a non-salient trait (having freckles, say). Arguably, speaking of the badness of discrimination exclusively in terms of equality of opportunity fails to explain why discrimination on the basis of salient features is so much worse than discrimination based on mundane features (even when both of them are arbitrary).[43] There are two points to be made in reply here. First, perhaps the main reason why 'socially-salient groups' is central to discrimination is precisely the fact that

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[40] See David Miller, *Principles of Social Justice* (Harvard, 1999), ch. 8.

[41] See also Lippert-Rasmussen on this ('The Badness of Discrimination', p. 177).

[42] For the former see Lippert-Rasmussen, 'The Badness of Discrimination', p. 168. For the latter, see Hellman, *When is Discrimination Wrong?*, pp. 21–2. Cf. Arneson, 'What is Wrongful Discrimination?', p. 794. Arneson resists placing any moral importance on historically disadvantaged groups. But consequently, he is forced to maintain that if a procedure is neutral then the fact that it yields a disparate impact for black children is of as much consequence as if 'the affected children were green in colour'. I find this implausible.

[43] Cavanagh raises an objection to that effect: *Against Equality of Opportunity*, p. 154.

these groups are already disadvantaged in terms of opportunities.[44] It is no wonder, then, that accounts of discrimination accord these groups a prominent place. Second, as mentioned in the previous section, one of the opportunities that individuals potentially care about is the opportunity to gain the respect of others. Crucially, discrimination would typically cause a greater disadvantage (in terms of respect) when it is directed at members of salient groups compared to when it is directed at members of *ad hoc* groups (such as 'the untalented', 'people who are not family members of mine' and 'people whose surname contains seven letters'). In other words, disadvantageous hiring on the basis of salient group membership presents a much greater undermining of equality of opportunity with regard to a particular good, namely access to self-respect, compared to discrimination on the basis of non-salient traits.

Here is a second difficult issue. Suppose someone is being denied a job based on her skin colour but is then offered some cash as compensation. And suppose that that package of compensation makes her as well off as others in that given society. Since the discriminatee is *not* made worse off here, and given that my account makes inequality of opportunity a necessary condition, it would imply that there is no discrimination involved. Still, the practice seems quite repugnant. I bite the bullet on this: if, given the choice, Smith would not turn away the package of compensation in favour of the denied job (thereby indicating that there is no inequality of welfare) then this indeed does not strike me as a case of discrimination. Note, of course, that we are assuming an ideal situation, whereby Smith's preference for the compensation package is fully informed and voluntary.[45]

The third tough issue (for the EOP thesis) that I want to examine concerns discrimination in private spheres of life, where the paradigmatic case is that of selecting life partners. Few would endorse the view that the state should regulate the way we choose life partners (beyond, say, prohibiting us from marrying an underaged person, or a blood-relation of ours). But importantly, that does not mean that the choices individuals make in that sphere are beyond reproach.[46] In particular, we may think that there is something morally wrong about

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[44] See also Lippert-Rasmussen, 'Private Discrimination', p. 834.

[45] It might also be useful to note that our sense of counter-intuition in such cases might be motivated by some practical benefits of restricting anti-discrimination legislation to 'in-kind' measures. As Mark Kelman, 'Antidiscrimination and Groups', *Stanford Law Review* 53 (2001), pp. 833–96, at 884, rightly observes, compensating an individual for discrimination on the basis of her skin colour does little to prevent such future discrimination against other people of colour. But this is a practical consideration rather than one of justice.

[46] See Lippert-Rasmussen, 'Private Discrimination', pp. 851ff., on a similar point.

individuals choosing a priori never to marry individuals of a certain
race. If this is a form of discrimination (allowing that it is one that
the state should, nevertheless, not attempt to curtail), then it is one
that does not concern equality of opportunity, at least not obviously
so.[47] If we think there is something repugnant about individuals
making such choices then the problem does not seem to rest with some
putative inequality of opportunity (to marry) but is rather grounded
in the morally reprehensible motive of the discriminator. I concede,
in response, that there is something morally wrong in the conduct of
racist grooms and brides-to-be. And I further concede that these cases
do not concern equality of opportunity. But I deny that they represent
discrimination. The reason is that in these cases, typically, the rejected
individuals cannot be said to be disadvantaged (as distinct from being
harmed), with regard to marriage opportunities or otherwise. This is so
because a priori the selector is not in any particular position of power
over the discriminatee.[48]

The fourth and final challenge to the EOP account shifts the focus
back to the discriminating agent. My claim in this article has been that
discrimination is bad because and only because it is unfair (because it
undermines equality of opportunity). This seems to suggest, the critic
might say, that what is wrong about employers who discriminate is
that they fail to promote distributive justice. To put this differently,
discriminators are at fault for not using their power (the ability to
award jobs) in a way that would curtail inequality of opportunity (and
moreover, for welfare!). And this, the claim goes, is counterintuitive, and
in at least two ways. On the one hand, this objection reveals my account
to be potentially too wide. For it seems to suggest that employers are
under a greater burden to advance distributive justice than are other
citizens, which is implausible.[49] On the other hand, the EOP account
is revealed by this objection to be, in a different way, too narrow: it
seems to miss the point of what is wrong about the employer's conduct.
Our intuition is that she is at fault not for her failure to promote
a worthy social goal (equality of opportunity) but for something else
and much more repugnant (e.g. showing disrespect to the applicant,
allowing prejudice to affect her decision, etc.).

One thing to note about this objection is that it may apply to other
badness accounts as well. The view that discrimination as such is bad
because of efficiency reasons (it fails to appoint the person who would

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[47] Cavanagh, *Against Equality of Opportunity*, p. 201; Lippert-Rasmussen, 'Intentions
and Discrimination in Hiring', p. 22.
[48] See Hellman on this requirement of asymmetry of power for discrimination to take
place. *When is Discrimination Wrong?*, p. 37.
[49] Gardner also raises this doubt. See his 'Liberals and Unlawful Discrimination',
p. 10.

be the most useful one in carrying out the job) would suggest, arguably, that the sin of discriminators is the failure to promote the greater good. This equally seems to miss the point of what is repugnant about the very act of discrimination. This does not, of course, get the EOP account off the hook. Recall, then, that my claim was that discrimination *as such* is bad because and only because it undermines equality of opportunity. I do not deny, I have said, that particular incidents of discrimination might be repugnant for additional reasons (such as disrespect or inefficiency). A discriminatory act might be repugnant for a variety of reasons, but there is only one reason, I said, that explains why discrimination *as such* is bad. This is why, I think, the EOP account is innocent of the narrowness objection: it never purported to, and need not, capture everything that is condemnable about each and every instance of discrimination. Because it never purported to exhaust everything which is bad about particular acts of discrimination, it also never meant to exhaust discriminators' *culpability*. To sum up the point: the badness of discrimination as such is tied up with the person being discriminated against and is always one and the same. The extent of the culpability of *the selector*, on the other hand, will vary depending on her intent, knowledge, the grounds on which she chose to discriminate, etc. This, in my view, shows the strength rather than weakness of the EOP account. For, it categorizes as discriminatory even actions that appear to have a rather minimal amount of culpability on the part of the selector (such as those concerning disparate impact, say).

Let us turn, finally, to the wideness objection. The objection said that locating the badness of discrimination in equality of opportunity implies that employers are under a greater duty, compared to non-employers, to promote distributive justice. But we can now see that this also does not follow. The accusation would have been true had my claim been that undermining equality of opportunity is a sufficient condition for discrimination. This *would* have entailed that the sin of the selector was in not promoting social justice. But my claim, recall, was that it is only a necessary condition. Undermining equality of opportunity therefore does not purport to exhaust why discriminating selectors are culpable; what exactly they are culpable of; nor what their duty in terms of hiring was to begin with.

IV. CONCLUSION

I began this inquiry by suggesting that it might be useful to tackle discrimination by asking why it is bad, which is different from what most commentators are concerned with (namely, the question of when it is bad). If my inquiry has been informative then it might

vindicate that strategy. I have defended here the thesis according to which the badness of discrimination (as such) is always one and the same, namely, when and because it is unfair (for reasons of equality of opportunity). I have tried to argue why other accounts of the badness of discrimination, such as those concerning intent, efficiency, false representation, prejudice, respect, and desert are partial and unsatisfactory. I then argued that inequality of opportunity captures everything that is bad about discrimination as such, and I tried to show that this account successfully handles some of the tough cases associated with discrimination, such as those concerning segregation, salient group membership, and the duties of employers. If and when discrimination is bad (as such) it is so for reasons of fairness, and nothing else.[50]

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