

## **Discrimination and Harm**

**Richard Arneson**

*{Final version published in Kasper Lippert-Rasmussen, ed., Routledge Handbook of the Ethics of Discrimination, 2018}*

Discrimination in a familiar morally charged sense is making a selection that favors or disfavors a member of a group on a morally inappropriate or problematic basis. Selecting Jane over Janis as a friend on the ground that Jane is a white-skinned person and one prefers to befriend those who are white-skinned is arguably discriminating against Janis.

Discrimination might be thought to be a wrong uniquely perpetrated by governments or by public officials acting in an official capacity. Ronald Dworkin (2000) maintained that the state coerces its members and claims to act with authority in their name, and by virtue of these facts has a special moral obligation to treat all these members as equals, favoring none over others. In contrast, individuals executing their private affairs might be deemed to be under no such obligation. Another related position is that norms against discrimination bind one when one is acting in a public sphere role, as when one chooses among candidates for promotion in a business enterprise, or engages in political activity, or acts in a capacity as state employee.—I shall assume that norms against discrimination can bind individuals acting in a purely private capacity, but readers should be aware that the scope of these norms is contested.

Discrimination can be morally horrendous, with horrible consequences, as when a dominant racial group enforces systematic mistreatment of a disfavored group, gays suffer relentless persecution, or women are confined to inferior status and life prospects. Discrimination can be benign, or idiosyncratic, or harmless, as when members of an oppressed group club together in solidarity, or when someone tries to confine his friendship circle to those who attended a particular rock concert in 2005, or sports fans bestow their esteem disproportionately on home team favorites.

Arguably some but not all discrimination is morally wrongful. What makes acts of discrimination morally wrong when they are wrong? (For seminal discussion see Alexander, 1991 and Dworkin, 1978.) This chapter considers the relationship between discriminatory acts or policies being harmful and their being rightly deemed morally wrong. The discussion aims to clarify contending options; no conclusions are reached.

### **Must discriminatory wrongdoing be harmful?**

An act might be *pro tanto* morally wrong or morally wrong all things considered. A *pro tanto* wrong act has a significant wrong-making feature, sufficient to render the act wrong unless there are significant countervailing considerations. An act is wrong all-things considered just in case the overall balance of moral reasons bearing on the act determines that it is wrong to do. In argument about whether an act as specified is morally wrong, the reader needs to ask whether the disputants are attending to this distinction, and clear about what they mean.

The claim that an act is morally wrong, or permissible, or mandatory, might be interpreted in a belief-relative sense, or an evidence-relative sense, or a fact-relative sense, as Derek Parfit (2011) has observed. An act by an agent is wrong in the ordinary sense, says Parfit, when the act is rightly deemed wrong, on the assumption the agent knows all facts that might be material for choice. An act is wrong in the belief-relative sense just in case it would be wrong in the ordinary sense if the agent's beliefs about the morally relevant facts were all true; wrong in the fact-relative sense just in case it would be wrong in the ordinary sense if it were the case that the agent did in fact know all of the morally relevant facts; wrong in the evidence-relative sense just in case it would be wrong in the ordinary sense if the agent's beliefs about the morally relevant facts were in conformity with the available evidence. These are Parfit's

formulations. He urges that we can and do speak about what is morally wrong in these different ways, which when clearly distinguished we can see not to be in conflict.

Certainly many acts of discrimination that look to be plainly wrong will be acts that select among people in a way that proceeds from bigotry or prejudice or some other hostile attitude. Hating blacks, one refuses to serve black people who seek to be customers in one's restaurant. One possible view about discrimination and harm is that harmdoing is not necessary for acts to qualify as wrongful discrimination. Even if the blacks one turns away from one's restaurant invariably find better food at restaurants nearby that welcome their trade, and suffer no psychic harm just bemusement at one's prejudiced behavior, and even if one's discriminatory acts cause no harm in more indirect ways, still, a prejudiced refusal to treat potential customers on equal footing, motivated by prejudice or similar hostile attitude, can be morally wrong. So some think (Arneson, 2006).

An opposed view holds that harmdoing is a necessary condition for wrongful discrimination (Lippert-Rasmussen, 2013). This view allows the possibility that harmless discrimination proceeding from bigotry or prejudice or some similar hostile attitude can be blameworthy. Acting in this way is failing to show due consideration to others and culpable. But, some might insist, wrongful discrimination involves some connection to harm (different accounts might spell out the idea of harmdoing in play here in different ways).

Although there are many possible views regarding the relation between discriminatory harming and discriminatory wrongdoing, this essay focuses on the following possible positions:

1. To be morally wrong, a discriminatory act must impose harm or excessive risk of harm.
2. To be morally wrong, a discriminatory act need not impose harm or excessive risk of harm.

Someone who affirms 1 might interpret "harm" in at least two different ways:

1a. "Harming" an individual is doing what brings it about that the person is worse off in well-being all things considered, by comparison with the alternative in which one refrains from doing that thing. Harming is distinct from failing to benefit.

Or

1b. "Harming" an individual is causing the person to be in a harmful condition, to be suffering any one of a list of bads, regardless of whether the person is rendered overall worse off. For example, if I break your leg, I harm you, whatever further consequences ensue.

Someone who affirms 2 might hold one or the other of two further views.

2a. To be morally wrong, a discriminatory act need not impose harm or excessive risk of harm, but must be brought about by morally impermissible motivation or by morally defective deliberation on the part of the discriminating agent.

2b. To be morally wrong, a discriminatory act need not impose harm or excessive risk of harm, but must frustrate some interest of the discriminatee that is protected by a moral right.

More needs to be said, to clarify 1a as intended. Consider the examples of a surgeon who slices into a patient as the first step of an operation that fixes her heart, and of a taxi cab driver whose faulty driving causes a crash that results in the passenger's both suffering a broken leg and missing a plane flight that crashed and so would have killed him. Of these examples, 1a says that neither the surgeon nor the cab driver harms the individual affected by his action. What about omissions? If I fail to invite you on a holiday, have I harmed you, given that you are worse off, not going on the holiday, than you would have been, going on it? At a first pass, the response is No. Omitting to do what would make someone better off is not, generally speaking, harming the person. Omitting is not doing. But complications abound. When drawing bath water for an infant, omitting to shut off the tap may bring about a drowning. Also, omitting to

provide someone a benefit one was duty-bound to provide should count as harming the person to whom one owed the benefit. Further discussion of these complications would be desirable.

Someone might hold specifically that harming is a necessary feature of any act that qualifies as wrongful discrimination, or might hold the wider view that harming is a necessary feature of any act that qualifies as wrongdoing.

The positions regarding wrong and harm canvassed here can be contrasted with act consequentialist views. Act consequentialism holds that one morally ought to do whatever would bring about the best outcome, so regarding discrimination, one morally ought to discriminate when and only when doing so would bring about the best outcome. On this view, harming is neither necessary nor sufficient for its being the case that a candidate act one might do is morally wrong all things considered (an act consequentialist account of discrimination is sketched in Arneson, 2013, following the lead of Wasserstrom 1968). A nonconsequentialist might affirm any of 1a, 1b, 2a, or 2b (but no claim is made here that these specified options are exhaustive of the possibilities).

A nonconsequentialist who holds that all wrongdoing is wrongful harming may find discriminatory acts to be wrong that an act consequentialist will endorse as right, and may find discriminatory acts to be permissible that an act consequentialist will judge to be impermissible. Here are stylized, simple examples. Consider employment discrimination that favors members of formerly oppressed groups. The consequentialist will judge the compensatory discrimination permissible, and in fact required, just in case its overall consequences are better than anything else one might instead have done. The standard for assessing consequences might take into account various features of people who might possibly be affected by alternative policies. In contrast, a nonconsequentialist might find certain discriminatory policies to be wrong, regardless of their all things considered consequences, by virtue of the fact that they would impose harm or risk of harm on people who have moral rights against being harmed in that way. A nonconsequentialist might also judge a proposed compensatory discrimination program to be not morally required, even if permissible, on the ground that no one has any affirmative duty to be bringing about overall benefits to people in this way, in these circumstances.

Denying 2a and affirming 2b chimes in with the nonconsequentialist view that an act can be wrong by virtue of what is done, independently of the motivation or intention of the agent, but what makes an act morally wrong need not involve affecting the well-being or welfare of agents who might be affected. Judith Thomson (1991) states the irrelevance-of-intention-to-moral-permissibility idea in this way: "It is irrelevant to the question whether X may do alpha what intention X would do alpha with if he or she did it." (See also Kamm, 207 and Scanlon, 2008.) One possibility is that moral permissibility turns in whole or in part on whether one's conduct would violate someone's moral rights. On such a view, if X's doing alpha now would violate someone's moral rights, then it would be impermissible for X to do alpha, independently of the intention with which he would do alpha if he were to do it. This position also affirms the possibility of harmless wrongdoing. For example, suppose the rights advocate holds that among the rights we have is a right that other people refrain from trespassing—venturing on someone's property or using someone's property without the consent of its owner. Such trespassing can occur without bringing about any harm to the owner. You might trespass on my land when I am elsewhere, and you might trespass without damaging even a leaf or twig that belongs to me. The rights theorist will hold that your trespassing is morally wrong, a violation of my rights as property owner, even if it is, as in this case, entirely harmless (Ripstein, 2006).

#### **Harm and Harmdoing.**

A person suffers a harm when her condition is made worse in some way. The unfolding of natural events can cause harm, as when lightning strikes. Human acts or omissions can cause

harm. A person can be harmed either *in a respect* or *all things considered*. You are harmed, but not harmed all things considered, if a taxi in which you are riding crashes, breaking your leg but thereby preventing you from flying on your scheduled flight, which crashes in the ocean killing all on board.

Ordinary usage might allow that one is harmed if one suffers loss in resources or opportunities even if this loss triggers no loss in well-being, no loss in how intrinsically well one's life goes for one. If someone steals an extra shirt from my bottom drawer, but I never notice the loss and never suffer any well-being loss from lacking the shirt, am I harmed?

From a nonconsequentialist moral perspective, the moral significance of harming is generally thought to be modulated by two distinctions, one between doing and allowing, and another between harm and benefit. Doing harm might be thought worse, other things equal, than allowing harm. Causing someone to suffer harm might be thought worse, other things equal, than causing someone not to gain a benefit. Are there clear lines here? If we fail to put in place good schools for children are we harming them by causing them to be ignorant and lacking in reasoning skills or are we rather failing to provide them the benefit of good education? The idea of harming someone seems to include the idea of making the person's position worse by comparison with some baseline. Different ideas of harming might invoke different baselines.

One position is that the crucial line is that an act that is rightly deemed morally wrong must be making a negative difference in the overall well-being of those affected by the act by comparison with other acts that might instead have been chosen including doing nothing. Whether one's choice of acts makes a difference in well-being depends on a counterfactual: if I do A or some other available act, what would have happened if I had chosen and acted differently, done some other act instead? If the answer is "no difference at all," then on this view it cannot be morally wrong to do A rather than some alternative.

Making a difference is not exactly the same as the common-sense notion of causing effects. Suppose one is invited to join a firing squad that is going to execute an innocent man unjustly convicted of crime at dawn tomorrow. The invitation specifies that if one accepts, one will shoot a fraction of a second sooner than other squad members and will (let us stipulate) be causing the death of the innocent person. But given that one's act only deprives the condemned person of a fraction of second of anxious life and we can suppose makes no difference at all to his well-being, one's act, on the making-a-difference view, cannot be morally wrong. At least, this is so if there is nothing else one could do instead of joining the squad that could make any difference to the person's lifetime well-being. The example illustrates the controversial character of the suggestion.

An alternate view is that one harms another by causing that person to be in a harmful condition, which might be true even if the person is not all things considered worse off. Elizabeth Harman (2009) suggests that "an action harms a person if the action causes pain, early death, bodily damage, or deformity to her." Another view relies on the distinction between a harm and a benefit, and holds that morality places greater weight on duties to refrain from harm than to duties to provide benefits (with intermediate status for duties to provide relief from threatened harm) (see Shiffrin, 1999).

If I operate a nuclear reactor in my basement for fun, my act imposes a large risk of causing an explosion that would harm my neighbors. Let us suppose, as is plausible, that this large risk imposition is unjustified. Suppose it turns out that no explosion occurs and no one is actually harmed. We might yet claim my act is harmful by virtue of imposing risk of harm on my neighbors. This is stretching the idea of the harmful, because imposing a risk of harm on someone might not involve imposing any actual harm on anyone. But the stretch is arguably

defensible. At least if we focus on excessive and unjustified imposition of risk in harm, it is plausible to allow that doing what imposes risk of such harm can be wrongful whether or not any actual harm materializes.

The idea that one's act is right or wrong, depending on the difference it makes, compared to alternative acts one might have done, is integral to an act consequentialist morality. If one faces a choice of doing A or B or C, the question is, what will come about if one does one or another of these options, and how good or bad is the outcome in each case. The act consequentialist holds that one ought always to do whatever would bring about the best outcome. (If one does not know what the outcomes of one's available acts would be, one will not know what one ought to do.) An alternative version of act consequentialism, also relying on the idea of the difference it makes, holds that one ought always to do whatever would bring about the expectably best outcome (Pettit, 1997). On this view, for each act one might do, identify its possible outcomes and their value, multiply the value of each possible outcome by the probability that it will occur if one does this act, sum the results for each act one might do, and do the act associated with the highest expected value.

The expectably-best version of act consequentialism condemns as wrong the act of a physician who selects a treatment for her patient based on consulting the astrological signs, even if by a fluke the superstitiously selected treatment happens to deliver a cure. This version also condemns as wrong the act of a person who conducts nuclear experiments in her basement for fun, even if by good luck her conduct does not actually bring about a nuclear explosion destroying the neighborhood and harms no one.

The very same idea, that an act is right or wrong, depending on the difference it makes, can be deployed in a deontological morality of constraints and options. A morality of this type will hold that one is not always morally permitted to do whatever would bring about the best outcome, because the act that would produce the best outcome might violate a moral constraint such as one against stealing, assaulting, or lying. A deontological morality will also hold that one is not always morally required to do whatever would bring about the best outcome, even if that would violate no moral constraints, because each person has moral options, up to a point, to act as she chooses even if that brings about a less than best outcome. These formulations are fully compatible with the idea that moral constraints are constraints on making a difference in a way that harms someone (or fails to provide someone a benefit one owes that person; count that also as harming). On this type of deontological view, all wrongdoing is wrongful harming, with the exception of omitting to do what would bring about the greater good when the greater good is of sufficient magnitude to override moral constraints barring the acts that would bring it about. On this type of view, there are no acts of wrongful discrimination that harm no one. Or to be a bit more precise, since a deontological morality might take the ex ante (expectably harmful) rather than ex post approach, a deontological morality that relies on the notion of making a difference will hold that all acts of wrongful discrimination either harm someone or impose excessive risk of bringing about harm to someone. No harm, no foul, in a slogan.

In passing, I just note that one might also hold that whether one's discriminatory act involves opportunistic rather than merely eliminative agency can also affect the degree to which harming another by what one does is morally wrong. In opportunistic harmful agency, one benefits from the presence of the person whom one is harming, as when I grab a bystander and use his body to shield myself from a rockslide that is about to hit me (Quinn, 1989). Using someone in that way might be deemed especially wrong. Discrimination can involve harmful opportunistic agency. For example, suppose a committee examining applicants for a prestigious prize ignores all applicants except white-skinned males and chooses the best of these applicants

for the prize, part of whose prestige value arises from the fact that it attracts so many apparently highly qualified applicants. The discriminator in this example is wrongfully using the ignored applicants.

**For and Against the Claim that Harmless Discrimination Can Be Wrong.**

Here is an example of a harmless discriminatory act, one involving racial discrimination.

Marta is an Hispanic female who has just graduated from law school and is applying for entry-level positions in law firms. Her application is passed over by one firm acting on racial prejudice. The members of this firm's committee charged with assessing applications dislike the idea of having any coworkers except males of European ancestry, and on this basis decline to give her application a fair hearing. However, Marta's application is favorably reviewed at another law firm and she is offered a job on terms better than she would have received had the discriminating firm treated her application fairly. Given that her first-choice potential employer has offered her a job, it is a matter of indifference to Marta that the other firm has not followed suit. Moreover, given the current market pressures on law firms, the committee members of the discriminating firm know when they decline seriously to consider Marta's application she will likely get very good job offers from other hiring firms. Finally, we add that the members of the hiring committee that is discriminating are aware that their discriminatory act will not cause harm to any other job applicants. Their discrimination against Martha will not cause any other applicant to fail to get a job for which he or she is best qualified.

Adam Slavny and Tom Parr (2016) introduce a similar example, which they regard as a counterexample to the claim that wrongful discrimination cannot be harmless. They suggest that certain defects in deliberation leading to choice can render the chosen action morally wrong, even if the action is harmless. The certain defects on their view involve failing to accord some person who might be affected by one's choice a proper consideration that respects the moral status of the individual. Brushing aside an application for employment on the basis of the race or ethnicity of the applicant fails to respect the equal moral status of the applicant—she is a person the same as any other person, and so entitled to equal consideration and fair hearing.

The contrary position would be to affirm that wrongful discrimination must, on the evidence available to the discriminating agent, impose harm or excessive risk of harm on the target—the person who will suffer the discrimination. If Marta is not harmed, the law firm committee cannot be guilty of wronging her.

Suppose in the grip of rancorous and hostile emotions, while standing on the sidewalk of a busy part of the city, I angrily stick pins in a Justin Bieber doll, expressing my unjustified hostility to him, but knowing this expressive act is harmless. This act might well be stupid, but it seems a long stretch to say this is morally wrong. Same goes if I stop eating pasta because I am angry at a victory by a team representing Italy in some international soccer competition. The intuition is, no harm, no wrong. Notice that in each of these examples, as in *Marta*, the act in question issues from morally faulty deliberation and morally bad attitudes. The claim would be that, contra Slavny and Parr, these features of acts are never sufficient to establish their wrongdoing.

One might still maintain that Marta is harmed, in a sense. She applies for a job at the discriminating firm and her application is not given fair treatment. This is in itself a setback to her interest in seeking a job. The discriminating firm harms her even though at the end of the day, given everything that happens, she is made overall no worse off. So one could accept that wrongdoing is necessary for its being the case that a discriminatory act is wrong, but insist that in the *Marta* example—unlike the Justin Bieber and soccer resentment examples-- the discrimination is harmful. This would be to affirm a 1b position.

Depending on the details of the account one gives of harming as not requiring bringing about reductions in anyone's well-being, one might end up with a position close to the 2b positions. What 1b calls harming, 2b may identify as perpetration of harmless acts that are nonetheless violating someone's moral right.

But if we stand fast by 1a and stipulate that in the *Marta* scenario the discriminating hiring committee knows for sure that no loss will befall the discriminatee, doubt is cast the judgment that the firm's behavior is wrong. The firm after all does not do what in the evidence-relative or belief-relative sense imposes any risk of harm (welfare loss) all things considered on the target of discrimination. The behavior of the firm's agents nonetheless displays a nasty disposition and motivation, and may rightly be considered blameworthy on this basis. But regarding the committee members as culpable is compatible with holding that they do no wrong. Adopting that point of view is rejecting 2b. According to this way of looking at things, a morally bad deliberative process leading to action is one thing, the moral quality of the action chosen is another. You can never read off the second from the first.

The example of *Marta* resembles an example introduced by Derek Parfit (2011, at 216) to press the claim that having a culpable disposition and frame of mind toward a person one is treating in a certain way might not force the judgment that what the agent does in this culpable spirit is morally wrong:

Mobster. A hardened criminal wants to get hold of a pack of cigarettes, and to achieve this end enters a convenience store and gives the clerk the purchase price of the cigarettes and leaves the store with his purchase. The criminal has a thoroughly nasty disposition in this transaction. He would just as soon kill the convenience store clerk as look at him, if doing that would be advantageous. He is willing to run roughshod over other people's rights in order to satisfy his trivial self-interested desire—here, a desire for having cigarettes. But the criminal knows before thinking of entering this particular store that shooting a convenience store clerk to get cigarettes would be a hassle, and the most effective way for him to get the pack of cigarettes is just to behave in the ordinary way—that is, ask for the cigarettes, and pay the requested price.

Parfit says the criminal displays bad character and a very bad disposition here, and is blameworthy on that account. But he does not do anything to the clerk that imposes harm or risk of harm on him, and so it is plausible to deny the criminal is here guilty of wrongdoing. One might suppose that if the mobster is a loose cannon, his merely being near other persons renders it the case that he is imposing risk of harm on them. We have to understand the case as not involving risk imposition of that sort. —The same is true in the *Marta* example, no harm or risk of harm is imposed on Marta, so on Parfit's view as just construed the hiring firm here does not commit wrongful discrimination.

One might suppose that we should see two acts here, one being the act of deliberating about a choice one faces, the other being choosing-and-pursuing one or another option from that set of choices. One might hold that the act of deliberating can be wrong, because done in a way that imposes excessive risk of harm on others, while the choosing-and-pursuing that results can be permissible, because it neither harms anyone nor imposes undue risk of harm on anyone. But this way of proceeding does not settle the questions, whether the deliberation leading to a further act can taint the further act as wrong, and whether one's being disposed in an evil way toward the person toward whom one is acting can make one's act wrong even if the disposition does not here affect what is done.

We could heighten the disconnect between morally faulty deliberation and disposition leading to choice and the act that as a result is chosen. Imagine that someone sees a stranger approaching, and deliberates in a thoroughly nasty way, thinking seriously about the ways he

might dismember and kill this poor stranger just for the fun of it. In the end the person decides this rampaging would be too much hassle and just tips his cap politely to the stranger as he passes. The deliberation and choice-making are horrible in this example but the actual act done is harmless and arguably not morally wrong. This example is now similar in relevant respects to the Slavny and Parr example. The judgment they make regarding it can be resisted, although whether this would be best advised is an exercise left to the reader. This essay just seeks to clarify some of the disagreements without settling them.

“Wrong in the evidence-relative sense” needs a qualification or at least a footnote. Consider an individual who intends to kill an innocent person for no morally respectable reason and chooses the best means available for this purpose. Unfortunately for his plan, the best means available is terrible for the purpose at hand. The best he can do is shoot an arrow into the air, aiming at the distant figure of his intended victim. The distance is so great, and the winds so balky, that there is only a very small chance that the arrow will hit home. But it does, and the intended victim is killed. This is surely wrongful murder. But can the account that says harmdoing in the evidence-relative sense is a necessary condition or wrongdoing deliver this verdict? What the would-be murderer does has a tiny chance of imposing harm on the intended victim. But the risk of harm that is imposed is nonetheless excessive in the circumstances; there is no good reason to expose the arrow’s target to any risk of harm at all, so any risk imposition is excessive. So there is excessive harm imposition in this sort of example. Moreover, the intention to kill for no good reason, and the choice of the best means at hand to achieve this bad end, surely contribute to the act’s wrongfulness.

#### **Beneficial discrimination?**

In another type of example, the discriminatee is not only not harmed, but benefited by being treated in the discriminatory fashion. This sort of case might be thought to cast further doubt on the claim that harmdoing is a necessary condition or wrongdoing and a fortiori that discrimination must be harmful to qualify as morally wrong (Slavny and Parr, 2016; for critical discussion, see Lippert-Rasmussen 2011). Here’s a version:

*Selection for dangerous duty.* The commanding officer of a military force is assigned the task of selecting soldiers who will then under his leadership carry out an extremely dangerous mission, one that is almost certain to result in death or grievous injury for those who do it. The commander is prejudiced against Jews and women, and is repelled by the thought of carrying out this heroic mission in such company. So he passes over eligible and qualified Jews and women under his command, and chooses English males for the mission. His deliberation leading to his selection is surely morally faulty, and faulty in a way that is wrongfully discriminatory. But his selection itself is clearly a benefit to those who suffer this discrimination, since any reasonable person prefers to stay able and alive and to be passed over for this assignment. So the view that wrongful discrimination must involve harmdoing seems incompatible with the judgment that in this example the discriminatory action of the commander is morally wrong. However, the example tugs us toward the judgment that the commander is indeed guilty of wrongful discrimination.

In response, it is not obvious that the example is one in which the discrimination is harmless, so this is not an example that tells against the view that says, no harm, no wrong. The discrimination brings about an unfair distribution of risk of serious harm among potential victims. If we accept the stipulation that being denied the opportunity to embark on a suicide mission is a benefit, then the discrimination in the example shifts risks that ought to be more equally shared. So interpreted, the example of beneficial discrimination pushes us to give up the idea that to be wrongful, discrimination must impose harm or excessive risk of harm on the target of the discrimination. In *Selection for dangerous duty* the discrimination might be



claimed to be wrongful on the ground that it harms people other than those who are the targets of the discrimination.

In other cases of beneficial discrimination, the intuition that the target of the discrimination herself is wrongly treated, though not harmed, persists. Consider

*Nazi University.* The chancellor of a German university in the 1930s fires all Jewish professors without any good cause, as part of a campaign to rid prestigious institutions of non-Aryans. The professors cannot gain employment and free the country, escaping the worst crimes of the Nazi era. They are better off for being fired.

As stated, the chancellor's act looks to be wrong in the belief-relative and evidence-relative senses even if, by historical fluke, fact-relative permissible. If one alters the case so that the evidence is that inducing the threatened Jewish professors to leave the country will benefit them and their firing is necessary to the inducement and the chancellor knows this, the advocate of the harm-is-necessary view will deny this revised case should be classified as wrongful discrimination.

Another possible move is to say that if the relevant baseline for deciding whether discrimination harms is a possible alternative scenario in which no one is treated unjustly at all, then the chancellor's act, even if necessary to benefit the professors in actual circumstances, is still wrong. But this just shows that the proposed baseline is inadequate for drawing lines of moral permissibility. Even if the chancellor is a secret anti-Nazi doing everything he can to save as many Jews as possible from death, his manipulation of the professors' circumstances intended to benefit them and actually bringing about this result still counts as morally wrong. This view we should definitely reject.

#### **Discrimination as Harmless Violation of Moral Right.**

One who denies that the intention with which an agent does an act matters to whether his act is morally permissible might yet hold that there can be harmless wrongdoing and in particular harmless discriminatory wrongdoing. This type of view might also hold that the quality of an agent's deliberation leading to choice of action is morally independent of the moral assessment of the action that is chosen as permissible or impermissible. One view that has these implications affirms that violating someone's moral rights is always *pro tanto* morally wrong and that there are moral rights the violation of which need not be harmful to the right-holder.

Assessing this view would require assessing all of the possible specifications of what moral rights people have that imply the possibility of harmless rights violations. Such an assessment is beyond the scope of this essay.

To convey something of what is at issue, consider a non-discrimination example, harmless trespassing. Some hold that moral rights assign to each individual a morally protected sphere of liberty, and that acts that take away protected liberty are wrong even if harmless. One sort of liberty that might be protected in this way is the liberty of a property owner to determine what uses anyone will make of what she owns. If Smith is absent from her property and Jones crosses onto this property without her consent, Smith is wronged, even if no damage whatsoever is done and Smith never learns of the incursion so suffers no displeasure or anguish arising from it. On the view under review, Smith is not harmed but is nonetheless wronged. Sophia Moreau (2010 and 2013) develops an account of the wrong of discrimination that centrally involves the idea that norms against discrimination protect certain important freedoms of individuals, violations of which wrong the individuals even if they happen to be harmless.

The advocate of the idea that wrongdoing necessarily involves harming can respond by appealing to a conception of moral rights as a set of important instruments for protecting people's welfare interests. Consider legal norms and allied public morality norms regarding

discrimination. These are coarse-grained instruments. A good law might prohibit or otherwise disfavor a type of discrimination on the ground that it is generally harmful, and especially if it is generally harmful to members of the group that tends to suffer that type of discrimination. To be an appropriate law it is not necessary that each and every instance of the kind of discrimination that the law targets be an instance of harmdoing in some appropriate sense. If the law is justified in consideration of these general tendencies, then enforcement of the law will tend to reduce the morally disfavored harmdoing. Looking the other way and declining to enforce anomalous instances of harmless discrimination might not generate more fine-grained justice but rather decrease the degree to which there is deterrence of the legally prohibited conduct across the board. The law, and associated public morality norms introduced to support the law, can be defended in favorable circumstances as a more or less effective instrument for decreasing the discrimination that is genuinely wrongful according to fundamental moral principles.

Regarding the harmless trespassing example, one who denies harmless wrongdoing will say that in the example, if the trespass is really harmless, it is really not morally wrong. But in reaching this judgment one needs to take into account the good consequences for welfare of well designed norms against trespass and the indirect harm that can result in acts are committed that erode these useful norms. A similar analysis will be available to defuse purported examples of harmless but genuinely wrongful rights-violating discriminatory acts.

**Harmless Discrimination Motivated by Prejudice.**

Another kind of case to ponder when considering whether discriminatory wrongdoing must involve harmdoing is discrimination directed against powerful, privileged, entrenched groups on the part of oppressed groups that propose separatist strategies aimed at reducing unfair distribution of opportunities that are hurting their group. For example, in the U.S. in the twentieth century, where black-skinned people of African lineage formed a racial underclass, some blacks turned their backs on integration in the larger society and proclaimed doctrines of racial self-help, independence, and separate black institutions. Some urged Back to Africa. Some sought political secession with the aim of establishing a separate black republic on land carved from part of the U.S. Although such movements often espoused doctrines of racial supremacy that denigrated possessors of white skin, their general aims and effects seemed benign to many observers.

We should accept that there can be separatist campaigns that involve no tincture of bias or hostile attitudes toward any social groups. The separatism is proposed as an effective strategy for improving the welfare prospects of group members, undoing oppression, and promoting social justice. If harmless, acts promoting separate institutions for different social groups are surely not morally wrong.

But suppose members of an oppressed group form an organization that promotes the separation of members of the group from the larger society and promulgates a doctrine that proclaims the inherent superiority of this group compared to others. Promulgation of such an ideology might have harmful effects. Today's oppressed can become tomorrow's oppressors. But suppose that in some situation no harm or risk of harm is being imposed; how should we assess the discriminatory practice and doctrine? Consider

*Harmless prejudice.* The Greens are an oppressed minority in a society dominated by Blues. A group of Greens urges that fellow group members should club together and favor each other, withdrawing from interaction with Blues. They urge that Greens should undertake this separation strategy because their blood is purer and better than the blood of the dominant Blues. Despite this pernicious and fanciful ideology, the acts of the Green separatists, though motivated by anti-Blue sentiment, have only beneficial consequences. The Greens form

cooperatives and churches that increase the average labor force participation, income, years of schooling, and family stability of group members. We can sharpen the issue by stipulating that any similar reform movement by Greens that lacked the group superiority organizing doctrine would bring about less beneficial consequences.

A view that denies that harmdoing is necessary for discriminatory wrongdoing can find the Green separatist discriminatory acts morally wrong on the basis of their motivation and the character of the deliberation that gives rise to them, even though the acts are entirely beneficial not harmless. Such a view could allow the good consequences to weigh on the scales that determine moral wrongfulness status, and if the good consequences are sufficiently desirable, the all things considered judgment could be that these acts are permissible. But the harmlessness of the acts would not be a decisive bar to a judgment of wrongdoing.

### **Conclusion.**

The view that acts of discrimination are morally wrong only if harmful is supported less by a particular interpretation of the nature of discrimination than by the fact that this view is in harmony with a general moral position that wrongdoing is always harmdoing. This position allows that harmless discriminatory acts, even if harmless and therefore permissible, can proceed from bad motivation and qualify the doer as culpable. The advocate of this view probably should allow that someone who fails to provide morally required benefits to others counts as doing harm in a broad sense. Whether the view should be acceptable depends on the best account of what we owe to one another, whatever that turns out to be.

### **References.**

- Alexander, L. (1992) "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies," *University of Pennsylvania Law Review* 141, 149-219.
- Arneson, R., (2006) "What Is Wrongful Discrimination?" *San Diego Law Review*
- Arneson, R. (2013) "Discrimination, Disparate Impact, and Theories of Justice," in D. Hellman and S. Moreau (eds), *Philosophical Foundations of Discrimination Law* Oxford: Oxford University Press, 87-111.
- Dworkin, R. (1978). Chapter 9 of *Taking Rights Seriously*,. Cambridge, MA: Harvard University Press.
- Dworkin, R. (2000) *The Sovereign Virtue: Equality in Theory and Practice*, Cambridge, MA: Harvard University Press.
- Harman, E. (2009) "Harming as Causing Harm," in M. Roberts and D. Wasserman (eds.), *Harming Future Persons, Ethics, Genetics, and the Non-Identity Problem*, Dordrecht: Springer, pp.137-154.
- Kamm, F. (2007) *Intricate Ethics: Rights, Responsibilities, and Permissible Harm*
- Lippert-Rasmussen, K. (2013) *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination*, Oxford: Oxford University Press.
- Moreau, S. (2010) "What Is Discrimination?," *Philosophy and Public Affairs* 38, 143-179.
- Moreau, S. (2013) "In Defense of a Liberty-Based Account of Discrimination," in
- Parfit, D. (2011) Chapters 7 and 9 of *On What Matters*, vol. 1, Oxford: Oxford University Press.
- Parfit, D. (1984) "What Makes Someone's Life Go Best?," Appendix I in *Reasons and Persons*, Oxford: Oxford University Press.
- Parr, T. and Slavny, A. (2016) "Harmless Discrimination," *Legal Theory*, 1-15.

Pettit, P. (1997) "The Consequentialist Perspective," in M. Baron, P. Pettit, and M. Slote (eds.), *Three Methods of Ethics: A Debate*, Oxford: Blackwell, 92-174.

Quinn, W. (1989) "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy and Public Affairs* 18, 287-312.

Ripstein, A. (2006) "Beyond the Harm Principle," *Philosophy and Public Affairs* 34, 215-245.

Scanlon, T. (2008) *Moral Dimensions: Permissibility, Meaning, Blame*, Cambridge, MA: Harvard University Press.

Shiffrin, S. (1999) "Wrongful Life, Procreative Responsibility, and the Significance of Harm," *Legal Theory* 5, pp. 117-148.

Thomson, J. (1991) "Self-defense," *Philosophy and Public Affairs* 20, 283-310.

Wasserstrom, Richard, *Journal of Philosophy*

### **Further reading.**

For three recent, thorough, and contrasting accounts of the wrongness of discrimination, see Hellman, D. (2008) *When Is Discrimination Wrong?*, Cambridge, MA: Harvard University Press, Moreau, S. (2010) "What Is Discrimination?" *Philosophy and Public Affairs* 38, 143-179, and Lippert-Rasmussen, K. (2013) *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination*, Oxford: Oxford University Press.