But some groups are more equal than others – a critical review of the group-criterion in the concept of discrimination

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Introduction

In this article I aim to discuss what I consider an underappreciated problem in the conceptualisation of discrimination, to wit limiting the definition to particular groups.

That some form of grouping, and the divisions between people this implies, plays a necessary part in the definition of discrimination is obvious, in that the basis of discrimination is differential treatment, which presupposes distinguishing between those to be treated one way and those to be treated another. Any way of doing so may be said to rely on dividing people into groups, even if inexplicit and unreflective. Using groups in this rather trivial sense is uncontroversially necessary to the definition, because unless such distinctions are drawn no form of discrimination, even understood in its widest, non-normative sense, would be possible.

But it is not this trivial sense with which I am concerned here. My concern is rather what I shall call the "group-criterion": the idea, prominent in both legal and philosophical definitions, that *particular* groups are the subject-matter of the concept of discrimination, that these can be established prior to any specific case of discrimination, and, most importantly, that not all groups can be subject to discrimination. Typically, this condition is expressed in the form of what we might call "the prohibited list": a selection of traits that must not be the basis of disadvantageous differentiation. Let me

take as a clearly formulated example suitably close to the common-sense understanding the definition of the European-wide EU anti-discrimination initiative, where discrimination is said to occur: "…when a person is treated less favourably than another in a comparable situation *because of their racial or ethnic origin, religion or belief, disability, age or sexual orientation*."[1] Note that, although the definition is not phrased in the form of a strong conditional (*iff*), I think it is clear that it means to imply that discrimination does *not* occur when a person is treated less favourably than another in an otherwise comparable situation because of any trait not mentioned, so that the prohibited-list serves to exclude those traits that cannot form the basis of discrimination.[2]

Although the group-criterion has a certain common-sense appeal, it is somewhat surprising how uncritically the notion that discrimination must apply to a particular set of traits, and only to those, has been adopted in the philosophical literature. Although it has received little explicit support it is frequently taken for granted, or understood as necessary even when discussed critically. Most discussions of discrimination prior to the 1980's consistently equate discrimination with racism and misogyny – religious discrimination making intermittent appearances – in line with public concerns at the

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[1] For Diversity Against Discrimination Campaign, *What is Discrimination*, (European Commission, Office of Employment, Social Affairs and Equal Opportunities, 2003) my emphasis. The traits included here constitute something like the standard prohibited list, with the exception that gender, normally an obvious candidate for a prohibited list, is curiously absent. Cf. Michael Connolly, *Discrimination Law*, (Suffolk: Sweet & Maxwell Ltd., 2006): p.21-24, 39-57. See also e.g. the EU Directive on Equal Treatment *Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin*, (2000), the UK Equality Act *Equality Act 2006*, (United Kingdom: Office of Public Sector Information, 2006), or the European Convention on Human Rights *Convention for the Protection of Human Rights and Fundamental Freedoms*, (1950), albeit such lists sometimes appear with the vague opening of including "any other grounds", subject to judicial discretion.

[2] If the strong conditional was not intended, one would expect the definition to include an "e.g.", signifying that the traits mentioned are only the most prominent candidates.

time.[3] Although this focus does not strictly speaking commit such authors to limiting discrimination conceptually, the lack of qualifications seems to me to suggest as much. It is, I think, only as public debate gradually expands to include e.g. homosexuals, ethnic minorities and the disabled among the groups potentially in need of protection from discrimination that the question emerges of how many and which groups ought to be on the prohibited list.

Such implicit endorsement continues in recent articles on the topic. Let me illustrate this with definitions from three prominent philosophical encyclopaedias: the Routledge Encyclopaedia of Ethics, the Routledge Encyclopaedia of Philosophy and the Academic Press Encyclopaedia of Applied Ethics. The entry in the first of these is said to concern: "Discrimination *against* a group of persons that marks them out for unfair, harmful treatment."[4] Although this initial definition sounds suitably broad and the scope of the concept is never explicitly limited, it is soon clear from the consistent references to gender and race that the author equates discrimination with unfair, harmful treatment of these particular groups, as when she concludes from a more abstract analysis that: "…the adverse impact characteristic of institutional discrimination may plausibly be

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[3] cf. e.g. Paul Brest, "Foreword: In Defense of the Antidiscrimination Principle", *Harvard Law Review* 90 (1976); Richard A. Wasserstrom, "Racism, Sexism, and Preferential Treatment: An Approach to the Topics", *UCLA Law Review* 24 (1977)

[4] Gertrude Ezorsky, "Discrimination", *Encyclopedia of Ethics*, Charlotte B. Becker and Lawrence C. Becker (eds.), (New York: Routledge, 2001): p.412. The definition is problematic for other reasons. On standard accounts of discrimination, discriminating against someone does not "mark them out" for unfair, harmful treatment – discrimination *is* unfair, harmful treatment. Thus, the act of discrimination is not a form of designation; rather, labelling someone as belonging in group A, and not in group B, must be done prior to discriminating against them, so as to enable discrimination to take place at all. It makes more sense, I believe, to understand the marking out to relate to the group-belongingness in a causal manner, so that in effect discrimination against a group of persons consists of unfair, harmful treatment of them *because* they are marked out as members of the group in question. I return to this below.

termed *racist* or *sexist* impact."[5] In the second we get a more explicit version of the criterion, when the 'anti-discrimination principle' is said to require that: "When distributing educational opportunities and jobs [*list of items*], [we] never exclude whole groups of persons or choose one person over another on grounds of race, ethnicity, religion or race [*list of excluded characteristics*]…"[6] The prohibited list, Nickel recognizes, could be expanded: "…to include national origin, political beliefs, being a non-citizen, sexual orientation, income and age", but although no specific reasons are given for this particular selection, the list is certainly not open-ended, nor are any of the groups already on the list subject to potential removal.[7] Finally, in the third: "A person is said to discriminate if she disadvantages others on the basis of their race, ethnicity, or other group membership."[8] Here, although Wasserman pursues an interesting discussion of the scope of the concept the "group membership" remains non-trivial, even if, as Wasserman notes, this raises serious difficulties, in the form of: "…the obvious and controversial questions of what groups besides racial and ethnic ones can be discriminated against, and of why adverse generalizations involving those groups are particularly objectionable."[9] Thus, conceptualisations of discrimination by and large

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[5] Ibid.

[6] James W. Nickel, "Discrimination", *Routledge Encyclopedia of Philosophy*, E. Craig (ed.), (London: Routledge, 1998), italicized brackets in original. The inclusion of an item list strikes me as another strange addition to the concept of discrimination. Certainly this could make sense if we were discussing a legal principle, but Nickel is explicitly formulating a *moral* principle. The reason, as he explains it, is a liberal concern with not extending the requirements of the principle into the private sphere of e.g. selecting one's friends. But this limitation seems to require a more foundational normative principle as justification, which would make an item list superfluous, by delineating the scope of the anti-discrimination principle prior to and independently of such a list.

[7] Ibid.

[8] David Wasserman, "Discrimination, Concept of", *Encyclopedia of Applied Ethics*, Ruth Chadwick (ed.), Academic Press, 1998): p.805

[9] Ibid.: p.807 Some ambivalence is perhaps indicated by the use of "particularly", as this, on one reading, implies a much less demanding criterion, one where differential treatment against non-prohibited-list groups would be discrimination, just not particularly wrongful discrimination.

remain wedded to the idea that we must limit discrimination to being, as Richard Arneson puts it: "…responsiveness of the wrong sort to *certain classifications of persons.*"[10] Indeed, the articles are representative of three common approaches to the issue, in that the first simply assumes a given prohibited list, the second merely considers which groups to add to the list and the third goes further only to question which criterion to employ in deciding whether a group should be on the list or not. The issue that is discussed, when an issue is raised at all, is not whether there should *be* a group-criterion, but how, given the difficulties involved, to compile the list.

My question is what reasons can be advanced to support limiting discrimination to predefined groups in this manner? On the one hand, it will initially strike many people as odd to hold that someone could be the victim of idiosyncratic discrimination, such as e.g. that based on the number of syllables in their first name (equal to or less than two versus more than), or the numerical sum of the numbers in their year of birth according to CE-reckoning (odds vs. evens). On the other hand, if the reasons for applying a group-criterion will not stand critical scrutiny, the distinction is arbitrary and would appear itself to constitute a form of discrimination against all those groups excluded who thereby do not enjoy the protection granted by the norm against discrimination. After all, it is not immediately obvious why the wrong done to someone who is

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[10] Richard J. Arneson, "What is Wrongful Discrimination?", *San Diego Law Review* 43 (2006): p.795, my emphasis Note, however, that Arneson moves from seemingly endorsing the group-criterion to abandoning it. Arneson, "What is Wrongful Discrimination?": p.795-796 One reason for this is the apparent difficulty of establishing the common denominator of the different groups: "However, it is tough to say what renders certain classifications problematic or especially apt for running afoul of a correct antidiscrimination norm. This becomes clear when we extend the list of classification types past supposed race and skin color. Prominent candidates include ethnicity, sex, religion, age, disability status, and sexual orientation. The common thread, if any, is not so easy to discern." Arneson, "What is Wrongful Discrimination?": p.795 It is not entirely clear from the text what his reasons for the initial endorsement are.

discriminated against, e.g. by being fired from her workplace for belonging to a certain group, should *ceteris paribus* be any less serious when that group is "those with three syllables in their first name", than when it is the group blacks/muslims/gays/etc.

I shall argue that this is precisely the case: the reasons for applying a group-criterion will not stand critical scrutiny, and as such it must be dropped from the definition. Just as in the Orwellian fable I have paraphrased for my title, we should be highly suspicious when someone suggests that some groups are more equal than others.[11] In part one, I examine whether it is possible to justify the group-criterion by arguing that there are some groups that are *inherently relevant* to the concept of discrimination.[12] I move from intuitions about relevance to luck-egalitarianism as it relates to immutability of the trait in question, arguing that no viable argument has been offered yet for the inherent relevance of particular groups. In part two, I discuss whether some groups might nonetheless be *contextually relevant* given socio-historic circumstances, examining the role of identity and the additional harms-argument. I dismiss these as insufficient to establish the conceptual difference required by the group-criterion, and conclude that it is unsustainable. Finally in part 3, I tentatively discuss some of the implications of discarding the group-criterion, both for practice and for the definition.

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[11] George Orwell, in what has always seemed to me a stroke of authorial brilliance, has the villainous pig Napoleon supplement article 7 of the *Animal Farm*'s constitution – "All animals are equal" – with the smoothly poisonous "but some animals are more equal than others" in his 1945 novel.

[12] Note that in the present context I use relevance in the strongly constricting sense where non-relevance equals irrelevance, i.e. implies falling outside of the scope of discrimination as per the group-criterion.

What's in a definition?

Before diving headlong into the arguments, let me say a few words about what I take it to be to discuss the definition of a concept like discrimination.

One important consideration is how to balance our considered views about the concept with broader or more common linguistic practices. Some might hold that we should frame our definition of discrimination in line with common usage of the term, and that since it is not ordinarily used except in connection with particular groups, the group-criterion is part of the definition. Kasper Lippert-Rasmussen's influential analysis of the concept of discrimination proceeds roughly along these lines, when he takes our common usage of discrimination, in which, he claims, we limit it to 'socially salient groups', as a starting point and proceeds to explore when and if such differential treatment is morally bad.[13] A parallel point is made by Joshua Glasgow in a recent article on racism, where he suggests that definitions that run counter to and aim to revise common usage must count such lack of fit as a "cost" of these definitions.[14]

While I am sympathetic to these points, I believe that if framed as an objection to the enquiry that I wish to pursue in the present article it would be mistaken. Firstly, I am sceptical that common usage is sufficiently restrictive to support the group-criterion. After all, even if it is true that 'discrimination' is most commonly used in connection with particular groups, this seems a contingent rather than a necessary feature of our

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[13] Kasper Lippert-Rasmussen, "The Badness of Discrimination", *Ethical Theory and Moral Practice* 9 (2006); Kasper Lippert-Rasmussen, "Discrimination: What is it and What Makes it Morally Wrong?", *New Waves in Applied Ethics*, Jesper Ryberg, Clark Wolf and Thomas Søbirk Petersen (eds.), (Chippenham and Eastbourne: Palgrave Macmillan, 2007); Kasper Lippert-Rasmussen, "Private Discrimination: A Prioritarian Desert-Accommodating Account", *San Diego Law Review* 43 (2007)
[14] Joshua Glasgow, "Racism as Disrespect", *Ethics* 120 (2009)

usage. Few people would, I believe, bat an eyelid were I to refer to my being fired because my employer dislikes persons whose first name starts with an "F" as a case of discrimination. Not so for other parts of the definition. So that if we imagine e.g. that I was not treated differentially, disadvantaged by the treatment or no agent carried responsibility, we might well expect people to be puzzled at the label. Secondly, presumably, if discrimination is a normatively interesting concept it is so because it points to a particular kind of wrong associated with a particular type of action, one which does not rely on how the term "discrimination" happens to be used in a particular context.[15] One need not be a Platonist to believe that those types of actions which we now commonly refer to as discrimination were morally wrong, had the same features in common and were wrong *because* of (some of) the features they share, before the term was ever applied to them. Nor to agree that whatever makes what we actually happen to *call* discrimination wrong will, barring a morally relevant difference, make similar actions wrong for the exact same reasons, even if we happen to not ordinarily call such actions discrimination. Whether the group criterion maps onto such a morally relevant difference *is* the issue I wish to examine. Of course, we could, as a matter of pure terminology, collectively decide to reserve the term "discrimination" for the kind of action directed at particular groups, but on top of being arbitrary this seems needlessly

[15] This is not, I should stress, a requirement that the concept be moralized, that is, that it is a necessary a part of the definition of discrimination that it is morally wrong. Although I believe that an argument can be made for moralizing the definition based on how the word is commonly used, and indeed that is how I use it in this article, my claim is the more modest that if discrimination is normatively interesting it must be because there are particular wrongs contingently associated with it. That is, it must be true that discrimination *can* be wrong for reasons that have to do with the particular type of action it constitutes. I return to this point briefly in the section on contextually relevant groups below.

complicated and potentially confusing if there are related phenomena that share all relevant features.[16]

So if not solely a fit with common usage, what are we looking for, when we consider whether to include the group-criterion in a definition of discrimination? A different approach will take a definition suitably close to the way the concept is used in ordinary language as its starting point and then evaluate the extent to which this usage maps onto the normative contours of the phenomenon the concept is meant to encompass. My argument in the following proceeds along these lines towards the conclusion that no explanation of the wrong involved is consistent with a tight fit between normative distinctions and the element of our ordinary usage which constitutes the group-criterion. This is revisionary, but at the gain of removing a potential conceptual obfuscation.

Let me demonstrate by way of example how I intend to proceed. Perhaps the most commonsensical way of justifying the group-criterion is by arguing that there are some traits which are determinate of the wrongness of what is going on when someone discriminates. Discrimination is wrong, on this account, because it involves treating A differently *because* A is X (where A is a person or a group of persons, and X is a trait on the prohibited list). Thus, many of us will feel intuitively e.g. that it is profoundly unfair to treat a woman different than a man *because* she is a woman. Gender is important because it is constitutive of the wrong perpetrated in a way that having three first-name syllables is not. There are, however, two problems with this understanding, which helps us illuminate the requirements for a definition.

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[16] If English was capable of diminutives we might then apply such to the idiosyncratic part of the concept, as in the German neologism “Diskriminatiönchen”.

The first problem with the common-sense understanding, as I have portrayed it here, is that the differential treatment on which it relies is insufficient to establish the wrongness. We all of us differentiate between people on a daily basis, and in myriad ways which clearly prove advantageous to some and disadvantageous to others: If e.g. I invite my four male friends to dinner, but not my female friends, because I feel like a "boys' night", I have given to them the good of a free meal and (so I hope) pleasant company, which I have not provided to my female friends. But although this is clearly selection on the grounds of gender, calling it discrimination, in the pejorative sense we are concerned with here, does not seem right. Differential treatment, whether of prohibited groups or not, does not independently establish moral wrongness then. Rather, we need to limit discrimination to those cases where differential treatment on the grounds of X is morally wrong.[17] Thus, in the following, I adopt roughly the definition that discrimination against occurs when an agent differentially treats two groups, because of one agent's possessing trait X, which the other agent does not possess, and the differential treatment is morally wrong.[18]

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[17] What, exactly, it is that makes discrimination morally wrong is a contentious issue. Current debate tends to divide into disrespect- and harm-based accounts. Janet Radcliffe Richards, "Practical Reason and Moral Certainty - the Case of Discrimination", *Reasoning Practically*, Edna Ullmann-Margalit (ed.), (Oxford: Oxford University Press, 2000); Lena Halldenius, "Dissecting Discrimination", *Cambridge Quarterly of Healthcare Ethics* 14 (2005); Arneson, "What is Wrongful Discrimination?"; David Edmonds, *Caste Wars - A Philosophy of Discrimination*, (Abingdon: Routledge, 2006); Lippert-Rasmussen, "The Badness of Discrimination"; Lippert-Rasmussen, "Discrimination: What is it and What Makes it Morally Wrong?"; Lippert-Rasmussen, "Private Discrimination: A Prioritarian Desert-Accommodating Account"; Bert Heinrichs, "What is Discrimination and When is it Morally Wrong?", *Jahrbuch für Wissenschaft und Ethik* 12 (2007); Deborah Hellman, *When Is Discrimination Wrong?*, (Cambridge: Harvard University Press, 2008); Glasgow, "Racism as Disrespect"; Sophia Moreau, "What is discrimination?", *Philosophy & Public Affairs* 38 (2010); Andrew Altman, "Discrimination", *Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), 2011); Shlomi Segall, "What's so bad about Discrimination?", *Utilitas* (Forthcoming) For present purposes, however, I need take no stance for or against a particular account.

[18] The definition I here employ is heavily indebted to, although less sophisticated than, Lippert-Rasmussen's work in Lippert-Rasmussen, "The Badness of Discrimination". Note, though, that in the

The second problem with the common-sense understanding, at least in the form I have given it above, is that its central claim – that differential treatment of A is morally wrong if it is because A is X – is flagrantly question-begging. It does indeed appear that any argument for the group-criterion would need to rely on a moral difference of this kind, but what we require is an explanation as to *why* gender, or any other trait, should have this special status, not merely an assertion that it is so. Note however the difference between a justification of the group-criterion and a *wrong-making principle*. Any explanation of what is wrong with discrimination will need to rely on a moral principle, which as a matter of course will distinguish between those situations in which differential treatment is morally permissible and those in which it is discrimination, i.e. morally wrong. Thus a harm-based account will hold that discrimination is wrong when it harms the discriminatee, e.g. by stigmatizing her, damaging her self-esteem or depriving her of goods which she ought to have enjoyed. In a certain sense, this constitutes a form of prohibited list with one trait: liable to be harmed by the differential treatment. And again, this trait could be said to be defined prior to any actual cases of discrimination. My claim, therefore, is obviously not that operating with a form of group-criterion in *this* sense is untenable. But this form of group-criterion is clearly not

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present context I deviate from Lippert-Rasmussen's use, common in much of the literature, of qualifiers such as "wrongful discrimination" and follow Lena Halldenius in simply reserving the term "discrimination" for the morally wrongful type of action. Halldenius, "Dissecting Discrimination" Doing so more generally is defensible I think – my experience is that most ordinary language users are confused by the suggestion that there can be morally permissible cases of discrimination – and I do so primarily for pragmatic reasons. As morally benign forms of discrimination (permissible (dis-)advantageous differential treatment) fall outside the scope of the article, I trust that this pseudo-abbreviation shall not cause undue confusion; it should not, in any case, make any difference to the argument I pursue. Note also that the requirement should be understood only to be that discrimination is *pro tanto* morally wrong, not that it is morally wrong all things considered. Thus, the claim is that there are plausible cases, such as the discrimination in favour of four friends invited for dinner, where discrimination does not even in and of itself constitute a wrong, irrespective of whether there might also be additional reasons that would have outweighed the reasons not to discriminate had it been wrong.

what adherents typically have in mind, nor is it an actual addition to the definition. We are looking for a reason to circumscribe the concept of discrimination in a particular way, because the wrongness is linked to the quality of particular traits. A substantial group-criterion will need instead to argue that only particular groups can suffer the wrong spelled out by the wrong-making principle.

A final complication concerns what degree of resemblance between the list provided by a group-criterion and the standard prohibited list should be considered sufficient. The question is how closely the boundary should be drawn to a way which fits with the traits generally considered to be on the prohibited list (race, gender, religion, etc.) and those not to be included (such as number of first-name syllables). If a criterion includes too little, too much or entirely the wrong traits, it loses intuitive plausibility. Additionally, the practical interest in an argument which failed to include any of the traits we normally consider important to social justice, and thus to prohibit racism, homophobia, misogyny, etc., might likely be limited. Even so I do not think we should overstate this requirement. Arguably, if we had solid grounds for why a particular set of traits should be considered inherently more relevant we might wish to base a prohibited list on these traits, even if the set was radically different from the set commonly conceived (gender, race, religion, etc.). If the arguments supporting a version of the group-criterion were sound, there is no obvious reason why similarity to the list of traits we tend to consider relevant should be considered a *sine qua non*.

Introductory remarks concluded, let me turn at last to the examination of the various arguments for the group-criterion.

Inherently relevant groups

A common-sense way of justifying the group-criterion is, as I have tried to illustrate above, by arguing that there are some traits which are inherently important when it comes to discrimination and others that are not. To avoid being question-begging this relevance must be explained. Attempts to provide such an argument essentially break down to arguments about the particular irrelevance of some traits to decision-making, and the moral wrongness of acting on irrelevant grounds. Harry Frankfurt, in his discussion of egalitarianism, suggests that: "Treating a person with respect means, in the sense that is pertinent here, dealing with him exclusively on the basis of those aspects of his particular character or circumstances that are actually relevant to the issue at hand."[19] However, as Nickel observes, when viewed on the face of it "relevance" as such does not seem to be a criterion that will give the right answers, at least on a broad, instrumental construal of relevance. Excluding traits on the basis of instrumental relevance is too context-sensitive to be capable of generating a stable list, much less one that resembles the standard list: "What makes [excluding on the basis of irrelevance] plausible is the fact that one's religious beliefs, for example, have little bearing on one's qualifications to work in a construction company. Choosing people for construction work on the basis of their religion just seems irrational. But if the owners of a large construction company seek to employ only fellow Christians because they think they are more likely to be honest and hard-working, or because they want to create a certain religious atmosphere within the company, they cannot be faulted for making arbitrary

[19] Harry Frankfurt, "Equality and Respect", *Social Research* 64 (1997): p.8 Frankfurt's argument is not explicitly concerned with discrimination, but with the related concepts of equality and equal treatment. In explicating these, however, I believe Frankfurt in effect provides at least the initial steps in an argument for the disrespect-based account of discrimination.

choices or using irrelevant criteria. The problem is rather that these selection procedures are inappropriate for a large company in a diverse country because they are unfair to non-Christians."[20] If circumstances could determine whether or not a trait can legitimately be the focus of discrimination, then the prohibited list would become something more like a rule of thumb, and the relevance or irrelevance of any trait would be dependent not only on context but on individual preferences.[21]

A promising-looking answer to this problem is to adopt a more limited notion of relevance, such as *moral* relevance, which might be what Frankfurt has in mind when he qualifies relevance with "actually", and is certainly suggested by Nickel's considerations of fairness. Explaining irrelevance in terms of a moral principle such as unfairness will undoubtedly weed out a number of problems – it will narrow the field of preferences which determine relevance. But it is not immediately apparent that shifting the focus to a moral principle can generate a stable list of traits either. This presupposes that we are capable of determining that there are some traits which when used as the distinguishing marks in differential treatment of different individuals will make that action discriminatory, e.g. by virtue of being unfair, in all circumstances.[22]

The standard argument to this effect in the context of discrimination, featuring prominently in legal theory, focuses on responsibility for possessing the trait, often

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[20] Nickel, "Discrimination"

[21] cf. also Halldenius, "Dissecting Discrimination": p.459-460; Radcliffe Richards, "Practical Reason and Moral Certainty - the Case of Discrimination": p.154-155

[22] Note that this is required, because only a stable list will support the group-criterion. Therefore the plausible suggestion of e.g. relying on a notion of fairness that is context-sensitive, which is to say that it determines fairness through the appropriateness of differentiating on the basis of *this* trait in *this* context, will establish a wrong-making principle rather than a prohibited list and as such will not do. For a fairness-based account of the wrongness of discrimination, see Segall, "What's so bad about Discrimination?".

formulated as a question of the immutability of the trait, as the quality of those traits which can give rise to the distinctively discriminatory wrongness. Now, while this line of argument is generally critically received in the literature it is given relatively short shrift, and may warrant a brief, closer look.[23] As Lena Halldenius describes it: "The idea is that it is particularly bad to be disadvantaged because of a characteristic one cannot help having."[24] The thrust of this argument relies on our notions about the relation between fairness and responsibility, specifically the argument has intuitive plausibility because it fits with widespread sentiments about the difference between being disadvantaged due to circumstances which we have choices about, and being disadvantaged due to circumstances we do not. Thus, if somebody is refused a job because she lacks various technical qualifications, one reason this will strike many people as not unfair is because most people are, at least partially, responsible for which qualifications they have.[25] My current qualifications are (partially) the result of choices I have made, and if I do not have the qualifications necessary for a job that I desire, I

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[23] Michael E. Levin, "Responses to Race Differences in Crime", *Journal of Social Philosophy* 23 (1992); Wasserman, "Discrimination, Concept of" ; Halldenius, "Dissecting Discrimination"; Heinrichs, "What is Discrimination and When is it Morally Wrong?" This also means that a certain amount of reconstruction and speculation is necessary, so as to conceive of how a case for immutability *might* look, with all the dangers and difficulties implied by such interpretive exercises. I believe however that the problems I identify in the following will afflict any version of such an argument, so my analysis is not heavily dependent on correctly reconstructing any specific account.

[24] Halldenius, "Dissecting Discrimination": p.461 Or, as Wasserman puts it in his argument for discounting mutable traits: "However, annoying or offensive it is to be disadvantaged because of one's "membership" in an accidental or transient group (for example, to be frisked because one happens to be on a crowded subway car just after a gun is fired), this hardly counts as discrimination." Wasserman, "Discrimination, Concept of": p.807 Note that both of these accounts allow that there can be other reasons why an action is morally wrong that apply to a case of discrimination. Whether the wrongness traceable to immutability is then conceived as a threshold-argument or an argument for an entirely separate type of wrongness is not clear.

[25] This will be less true the more difficult it is for the average person to obtain the requisite qualifications, such as the far too common situation where gaining access to the education providing these qualifications is expensive enough that it is essentially out of reach of some members of society, but I do not mean to suggest this example as illustrative of a universally valid principle, only to explore the thrust of the intuition.

can attend classes and obtain them. But if I am refused a job because I am black or female, then I am disadvantaged even though there is nothing I have done to bring the state of affairs about, or can do to alter it.

If we turn to the analysis of how this line of argument could work several things bear mentioning. First, note the crucial ambiguity well captured in Halldenius' formulation that the relevant traits are traits "we cannot help having". As Bert Heinrichs points out and the example above illustrates, this could mean both a future- and a past-oriented lack of responsibility.[26] This distinction is important because although the two possibilities can rely on similar moral principles, the way they point in different directions will have implications for the contents of the prohibited-list. The past-oriented interpretation relies on the idea that it is unfair to be disadvantaged (or advantaged) because of possessing a trait which one was not responsible for coming into the possession of. The alternative, future-oriented account, does not track my past responsibility for possessing a trait. It concerns rather my responsibility for possessing it now and in the future, in the sense that it assesses whether possessing it now and in the future is I can chose to do or not to do.

The immutability-argument, strictly speaking, concerns the (postulated) unfairness of being disadvantaged because one possesses a trait which one cannot alter, no matter

[26] Heinrichs, "What is Discrimination and When is it Morally Wrong?": p.104-105 Heinrichs is, to my knowledge, the only one to draw this useful distinction, but he fails, I feel, to fully develop the normative implications of it. This may be due to the fact that his argument proceeds in the opposite direction, from the rejection of fixed criteria due to their inability to accommodate contextual relevance, to what seems to me an essentially relativist conception of discrimination.

how one came to possess it, that is future rather than past responsibility.[27] And although the two will sometimes coincide, as they do in the example for the trait "race", it is quite possible both to carry past-oriented responsibility for obtaining an immutable trait and to not be so responsible for obtaining a mutable trait. Developing an example in Heinrichs, we could say that the first is the case if I drive recklessly, crash and suffer an incurable disability, whereas the second is the case if I become disabled through an accident whose occurrence I have no responsibility for, but am then given a standing option of undergoing a therapy that will remove the disability.[28] This leaves us with three versions of the argument: past-responsibility, future-responsibility and a combination of the two. However, as I shall argue, only the immutability, and therefore the future-responsibility account, could even hypothetically support the group-criterion, and it too is ultimately incapable of plausibly doing so, in addition to which all three suffer from common problems.

Let me start with those issues common to the three. One initial problem, which is often taken to be decisive, is that in none of the three versions does the account fit particularly well with what we consider the standard prohibited list.[29] The accounts are by turns both too inclusive and too exclusive to provide a list that resembles our intuitions.

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[27] This strict sense is not, however, the way the immutability-argument is normally presented. Rather, it is either paired with or understood to imply traditional luck-egalitarian norms. The idea in the later case seems to be that immutability, while not morally relevant in itself, will serve to pinpoint those traits which we can be certain that agents are not responsible for possessing. See e.g. Larry Alexander Larry Alexander, "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies", *University of Pennsylvania Law Review* 141 (1992), quoted below.

[28] Heinrichs, "What is Discrimination and When is it Morally Wrong?": p.105

[29] cf. e.g. Halldenius, "Dissecting Discrimination"

The accounts are too inclusive because there are an unlimited number of traits that will meet any and all of the versions, but are not regularly considered to be constitutive of groups that can be subject to discrimination. The numerical sum of the numbers in CE-reckoning birthdate that I used as an example earlier would be one. As such, any version of the argument will either require additional conditions that can narrow down the field, if it is to approximate the standard prohibited list, or accept expanding it essentially without limits.

The accounts are also too exclusive because a number of the standard traits on the list are traits for which the discriminatee can be both past- and future-responsible. Thus, discrimination on the basis of religion is one of the classic traits for any prohibited list, but consider the case of a religious convert: Person A has consciously and voluntarily changed from Religion R_1 to Religion R_2, and when queried responds affirmatively (and plausibly) that should she desire to do so, she could change her religious affiliation again. She is therefore responsible for her current religion in both the past- and future-oriented sense, but this will, of course, still be her religion, and were she discriminated against on that basis she would enjoy the protection granted by religion figuring on the standard prohibited list.[30] Even gender, probably as solid a candidate for an involuntarily acquired and immutable trait as any on the standard prohibited list, is principally subject to choice after the advent of modern sex-change surgery. In summation: responsibility for possessing the trait simply does not fit the list.[31]

[30] It is possible, of course, to deny that the convert is responsible for her religion, but doing so seems to narrow responsibility to the extent that very few, if any, traits will be traits which the person is responsible for possessing.

[31] cf. Halldenius, "Dissecting Discrimination": p.461; Wasserman, "Discrimination, Concept of": p.807

However, as noted initially, I do not think we should consider the lack of fit with the standard list a decisive argument, so let us look at further problems.

A second problem for the argument, some might suggest, is that it will appeal only to those who believe that the normative notions upon which it relies should play some role in our ethical deliberations, and further that they should have this determinate role in the conceptualisation of discrimination. The underlying notion is, I believe, luck-egalitarian.[32] Utilitarians and libertarians, to take just two of the most obvious candidates, are unlikely to be willing to grant the required credence to such notions to get the argument off the ground.[33] However, I do not think we should give too much weight to this objection. The intuition supporting the argument will find favour enough with many, including non-philosophers and those of us who are still somewhat agnostic (or just plain confused) about fundamental moral principles, to be worth investigating. As such, let us grant for the sake of argument that some form of luck-egalitarianism could hypothetically support the case for the group-criterion.

Note however, how quaint the idea that it *actually* does so really is: when, as in the example above, someone is refused a job because of possessing the trait "being black", is it really that this is unfair because she did not and cannot *choose* not to be black? Is it not the requirement, rather than the person's lack of responsibility for meeting it, which

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[32] Luck-egalitarianism is, I recognize, itself a complicated and contentious concept. In the present I assume simply that luck-egalitarianism means that it is morally bad when a person is disadvantaged through no choice of her own. This is, I take it, broad enough to be uncontroversial, while sufficient for present purposes.

[33] For very different reasons, of course. For the first because, roughly speaking, what matters is the end-state total amount of good, not how distribution of it occurs or the individual position of any one person. For the latter because, roughly speaking, no individual carries moral responsibility for the position of other individuals except in so far as she is personally and unjustly the cause thereof.

is central to the issue? As Tom Campbell observes: "It is only when the unchangeable requirement is in fact irrelevant, or the right in question is too fundamental to be denied to any human being, that unchangeability begins to have moral bite. […] But why should we have to change these aspects of ourselves? It is the propriety of the requirement, not simply the possibility of meeting it that is at issue."[34] This is well illustrated by the fact that there are situations in which it seems perfectly reasonable to treat persons differently because of their possessing (or not possessing) trait X, no matter whether trait X is voluntarily acquired, optional or both. As Alan Wertheimer argues in a parallel discussion of how to assess reaction qualifications: "It is not obviously wrong to prefer the teacher without a foreign accent [who facilitates learning by being easier for the students to understand] or the left-handed pitcher [who will fit best against the opposing baseball team], although accents and handedness are (relatively) uncontrollable."[35]

If a trait's being both involuntarily acquired and immutable fails to establish the moral relevance to discrimination of that trait, in that these qualities neither intuitively explain the wrongness nor uncontroversially imply the wrongness of differential treatment on the basis of that trait, it fails to establish these same groups as inherently relevant. One possible answer to this objection is that there could be more wrongs involved with

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[34] Tom D. Campbell, "Unlawful Discrimination", *Ethical Dimensions of Legal Theory*, Wojciech Sadurski (ed.), (Amsterdam: Rodopi, 1991): p.158-159

[35] Alan Wertheimer, "Jobs, Qualifications and Preferences", *Ethics* 94 (1983): p.103; cf. also Heinrichs, "What is Discrimination and When is it Morally Wrong?": p.106 Some traits, such as race, might rarely, if ever, be contextually relevant. But one example that will strike many of us as legitimate is for a movie-director to hire only actors who are physically similar to the historical characters they are meant to portray, including sharing the same race. While the idea of a black actor playing Napoleon Bonaparte in a historical drama is not untenable, it seems reasonable to allow movie-directors to prefer a white person for the role. Or to put it differently: the reason that it is normally discriminatory to treat black persons differently than white persons *because* of their blackness is not that it is irrelevant because it is race, but that race is normally irrelevant.

discrimination, and that the wrongness of discriminating on the basis of a trait that the discriminatee is not responsible for possessing generates only a *pro tanto* reason. If so, it may well be that the wrongness of discrimination is outweighed by other reasons, and so perhaps the benefits to the team or the students is what makes the use of a left-handed pitcher and a teacher with a native accent allowable, despite the wrongness of discrimination. I am undecided about how successful such a rescue attempt could be, but take it that overall the plausibility of the argument for inherently relevant groups is at the very least weakened at this point.

But a final and very serious problem remains: past-oriented responsibility is not capable of supporting the group-criterion, and limiting the implications of a luck-egalitarian principle to future-oriented responsibility appears arbitrary, nor is there any obvious way of bridging the gap between the two. To see how this problem arises, consider first the list of traits that would be generated by the past-responsibility-account. Any trait, which the person possessing it is not responsible for having acquired, will go on the list. However, this seems to exclude no traits at all. Surely, the list of the traits that a person can be responsible for acquiring is limited by human nature, resources and inventiveness, but it is difficult to imagine a trait that a person could not somehow involuntarily acquire.[36] And even worse, we would have not one, but as many lists as there are persons, given that each must correspond to the traits that person was or was

[36] At least setting aside traits that are, by their very definition, voluntarily acquired, such as the trait of "having voluntarily decided to do X". Nor are such beyond the scope of realistic cases – consider e.g. discrimination against those who voluntarily join the armed forces in a system composed of both conscripted and volunteers. Even so, I believe that the number of exclusions are sufficiently few as to make the resulting list implausible. As above, I would not want to claim that this "lack of fit" constitutes a definitive argument against a suitably strong account, but it does lend some weight to our concerns about basing the group-criterion on past responsibility.

not responsible for acquiring. The past-responsibility account seems to lead not so much in the direction of a prohibited list as in that of a wrong-making principle, precisely because responsibility for acquiring a trait, on whatever account of responsibility we choose to apply, relates not to a quality of the trait but to the history of the person possessing it. As such, the past responsibility account cannot generate a stable list of traits, and cannot support the group-criterion.

The future-responsibility account could still support the group-criterion, however, and fits better with the traditional legal concern for immutability in any case. Even if there are potentially an unlimited number of immutable traits, there are also traits which will be excluded from the list, so the prohibited list will serve some purpose. But why should we accept a limitation to future-responsibility? Certainly, standard accounts of luck-egalitarianism would if anything tend to emphasize past-responsibility. Unless we have good reason to limit the scope of luck-egalitarian principles to future-oriented responsibility, the limitation is arbitrary. But such reasons not only have not been advanced, but it seems very difficult to imagine what they could be.

The fundamental problem, then, is that no matter the specific account of responsibility we adopt, it will tend towards a wrong-making principle rather than a trait-selecting principle and therefore will not fit something like immutability. To draw the distinction instead around immutability, we need a further argument, but it is not easy to see what one could look like. It is possible, of course, that one could be produced. But given the other difficulties the argument for inherently relevant groups faces, I think that until one is actually provided we can justifiably conclude that the argument does not seem

capable of supporting the group-criterion.

Contextually relevant groups

The alternative way of justifying the group-criterion is to focus instead on contextually relevant groups, that is, to specify which groups should be the focus of discrimination relative to the current socio-historic circumstances, rather than relative to the innate and universally applicable qualities of traits.

Establishing the prohibited list within this approach relies on the connection between the traits and contextually determined social circumstances or identity. The pertinent groups are groups with a history of past discrimination,[37] or groups that are, as Lippert-Rasmussen has aptly put it, "socially salient" in that: "… perceived membership of it is important to the structure of social interactions across a wide range of social contexts. Having green eyes is obviously irrelevant in almost any social context, whereas an individual's apparent sex, race, or religion affect social interactions in many social contexts."[38] The focus is thus on a relatively well-defined set of traits, which are constitutive of groups that stand out because of their socially and historically specific group-identity. Identity can serve to do so both by internally constituting the group, through members' identifying with each other and any common problems, and by externally constituting the group, that is making it both possible and likely for other agents to act towards (and to *have* acted towards, in the past) members of the group *as* members of the group.

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[37] Hellman, *When Is Discrimination Wrong?*,
[38] Lippert-Rasmussen, "The Badness of Discrimination": p.169

However, it still remains a pressing question why we should focus our attention on select contextually relevant groups. Why should discrimination be restricted to groups that are socially salient and exclude idiosyncratic acts? Certainly there are good reasons to focus on groups with a shared identity from a practical point of view. Differential treatment involving members of these groups is likely to be where discrimination is most widespread and most invidious. But even if this makes it perfectly sensible to give special attention and more careful scrutiny to differential treatment on the basis of such group-membership, it hardly justifies applying the group-criterion to the definition.

The best argument for the special relevance of socially salient groups seems to be that they are subject to harms which do not manifest to the same degree in idiosyncratic acts of wrongful differential treatment, i.e. what I shall refer to as the "additional harms-argument". Why do practices directed at socially salient groups cause additional harms that do not occur in idiosyncratic cases? Wassermann suggests several factors that may "contribute to the moral onus of taking group membership into account".[39] Let me mention just two: cumulative harm to individuals and social disharmony.

The cumulative harm of practices concerns the increased weight of burdens added to the already deprived: "If members of certain groups have been subject to worse treatment in a wide array of circumstances, it adds to the imbalance to disadvantage them on the basis of group membership. That effect will be amplified if members of those groups have a heightened concern about the treatment of other members, or about the fact that

[39] Wasserman, "Discrimination, Concept of": p.808

the adverse treatment they suffer is based on their membership."[40] Similarly, the additional harm of social disharmony relies on the preponderance of a particular form of discrimination in combination with the possibility of self-identification of the discriminatee with the discriminated group. In Larry Alexander's formulation: "One idiosyncratic use of a particular trait by a single discriminator is unlikely to affect the perception by members of the group defined by that trait of their general likelihood of obtaining positions and goods. For instance, if a particular employer wants his employees to have red hair, this is unlikely to affect brunettes' and blondes' perception of their life prospects and thus their motivation and development of talents. On the other hand, if many discriminators use the same trait to exclude, motivational and psychic effects are more likely to occur, especially if many people perceive their personal identity largely in terms of possession of that trait."[41] The costs of this effect must be counted both in terms of the stigmatization experienced by the discriminatees and by the loss of opportunities and productivity experienced by society as a whole, which results from the stigmatization, divisions and loss of confidence engendered.

The basic thrust of the additional-harms argument is therefore that discrimination must consist of actions that are capable of being social practices. An individual act of disadvantageous differentiation, while perhaps lamentable, can not amount to discrimination because it is incapable of causing the additional harms created by practices of disadvantageous differentiation. And since any and only socially salient groups can be the object of practices – the two are coextensive because any group that

[40] Ibid.: p.807-808
[41] Alexander, "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies": p.198

can be subject to a widespread set of similar responses, i.e. a practice, must be socially salient – social salience supports the group-criterion.[42]

However, promising this might initially appear, I believe that in this form the additional-harms argument is unable to support the group-criterion. To see why, consider first that it seems obvious that harm can be done through idiosyncratic acts of discrimination. Indeed, proponents of the argument will typically admit as much, claiming only that additional harms occur in cases of discrimination against contextually relevant groups. But, if the additional-harms argument is an argument about *additional* harms, then it requires a threshold-argument to support the distinction involved in the group-criterion. That is, it needs to argue that there is a moral threshold at a certain level of harm, where the quality of the action changes, morally speaking, and that only discrimination against socially salient groups will cause sufficient harm to cross the threshold.

Adopting a threshold, however, poses two challenges for the contextual relevance account. First, we will require an argument for why we should assume that only discrimination on the basis of socially salient traits will ever cross the threshold. This looks odd, for surely, we can imagine some act of idiosyncratic discrimination that caused more harm than standard acts of discrimination directed against members of a salient group? We can hypothesize very unlikely circumstances to produce an exceedingly great harm in a case of idiosyncratic discrimination if necessary, such as

[42] I intend here to include only realistic scenarios, although I admit that it is strictly speaking theoretically possible that a great number of people could simultaneously decide to apply idiosyncratic discrimination on the basis of the same non-salient trait. Some might hold this against the argument for contextually relevant groups, but I am willing to grant proponents that we should restrict our concerns to realistic scenarios in this manner.

the complete lack of self-confidence and emotional vulnerability of the discriminatee, the fact that the discrimination and the trait in question is blatantly advertised, and the resulting dramatic impact of this particular case of discrimination on the wellbeing and life prospects of the discriminatee, etc. The claim that in no hypothetical case will the harm of idiosyncratic discrimination exceed that of a reasonably defined threshold met by standard acts of discrimination against a socially salient group strikes me as utterly implausible. But the second requirement strikes me as even harder to fulfil, because the additional-harms argument also needs to provide a reason why we should adopt a threshold in the first place. This requirement is similar to but importantly different from arguments for limiting legal prohibition to offences that cross a certain harm-threshold, and much harder to provide I believe. Indeed, I am hard pressed to imagine what such an argument would look like, and certainly, none has so far been provided.

The concern with weighing harm above might be taken to illustrate the consequentialist character of these arguments, but similar problems will afflict deontological accounts based on disrespect. Take that of Paul Woodruff as an example. On his account: "…an act of discrimination is wrong when it is wrong not simply because it is discriminatory, but because it is part of a pattern of discrimination that is wrong. A pattern of discrimination is wrong when it makes membership in a group burdensome by unfairly reducing the respect in which the group is held. It may accomplish this, for example, by making group membership a prima facie reason for failure. One act of discrimination cannot do that. If an applicant fails at one bank because of his race, and at other banks for other reasons, his race is not the reason for his unemployment, and his failure is not an insult to his race. Discriminating, like walking on the grass, is to be judged with

reference to how much of it is being done. Walking on the grass is harmful only if enough people are in the habit of doing it to ruin the grass. So it is with walking over the feelings of a group."[43] Here too, it seems clear that there is an implicit and implausible threshold-argument. After all, contrary to what Woodruff claims, the discriminatee's trait which led to her being discriminated against *will* be the reason why she is unemployed, at the very least for the period of time between being denied that particular job and applying for the next, and so even an idiosyncratic act of disadvantageous differentiation will have some impact on respect, however miniscule. To deny this strikes me as a case of what Derek Parfit has labelled "the fifth mistake in moral mathematics": the fact that an individual act causes only a very small amount of harm does not mean that the act does not cause harm, and therefore does not mean the act is not (very slightly) wrong.[44] On top of this, if Woodruff means to hold that there is not a continuous spectrum of greater and lesser but qualitatively identical wrongs, this seems to leave him beholden to the strange view that there is some point where adding one extra idiosyncratic act of disadvantageous differentiation directed at a particular non-salient trait somehow transmutes the collection of those acts into discriminatory acts proper, an act of ethical alchemy that I consider highly dubious.[45]

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[43] Paul Woodruff, "What's Wrong with Discrimination?", *Analysis* 36 (1976): p.159

[44] Derek Parfit, *Reasons and Persons*, (Oxford: Oxford University Press, 1984): p.75-82

[45] Some proponents of the disrespect-account who focus on contextually relevant groups recognize this. In a move parallel to Arneson's Deborah Hellman considers and initially apparently supports the idea of a group-criterion before eventually dismissing it, because of the greater potential for demeaning groups with a "history of mistreatment or current social disadvantage" (HSD): "Distinguishing on the basis of HSD traits may be morally different than doing so on the basis of non-HSD traits because the former reinforces or entrenches the caste-like aspects of our society. Laws that disadvantage groups without a social identity – people whose last names begin with A, for example – cannot reinforce a caste as there is no such social group whose status can be harmed or reinforced." Hellman, *When Is Discrimination Wrong?*: p.22 She finally concludes, however, that: "Drawing distinctions on the basis of HSD traits has more potential to demean because of the social significance of such distinctions. But as I explained above,

Failing this, the most that the additional-harms argument can say is that there are some forms of discrimination that are frequently worse than others, specifically that the forms of discrimination that focus on socially salient groups are for that reason more likely to cause harm, and likely to cause more serious harm, than those which are idiosyncratic. In practice there will be something like a graded scale of offences where some idiosyncratic acts of discrimination are in fact worse than some acts of discrimination directed at a member of a socially salient group; the overlap might be small, and even non-existent in some contexts, but this provides pragmatic reasons rather than conceptual ones for giving greater attention to socially salient groups. Contextually relevant groups, it therefore seems, cannot support the group-criterion.

Consider one last possible line of defence for the group-criterion. We have concluded that although there is no sharp normative distinction between discrimination against contextually relevant groups and idiosyncratic discrimination, there is a difference of tendency between the two. Might this difference be sufficient to justify a weaker form of the group-criterion on pragmatic grounds? That is, might it be sufficient justification for including the criterion that usage thereby would track the tendency for the first to be worse than the second? Proponents of modelling the definition on common usage need not, I take it, be committed to the view that similar differential treatment directed against non-salient groups is necessarily morally different. Lippert-Rasmussen speaks in favour of this when he explains that: “An employer might be more inclined to hire applicants with green, rather than brown or blue, eyes. This idiosyncrasy might not

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not all distinction-drawing on the basis of HSD traits is demeaning, as other aspects of the situation also affects whether one demeans. Moreover, categorizing on the basis of non-HSD traits can also demean; however, more contextual factors are required for this to be the case.” Hellman, *When Is Discrimination Wrong?*: p.28-29

amount to discrimination in the sense that interests us here, even though, obviously, the employer differentiates between different applicants. This is not to deny that such idiosyncrasies can be as bad as, and reflect as corrupted a character as, genuinely discriminatory acts. *It is just that in the great majority of cases they will not seriously harm the disadvantaged party, precisely because of their idiosyncratic nature*."[46] And recall that although I expressed some reservation about tying the definition too closely to common usage, my main concern was that including a distinction that was mere convention and tracked no interesting differences between the phenomena included and excluded was arbitrary and potentially misleading. This concern, it seems, might be alleviated when it emerges that there is in fact a difference, even if only of tendency, which the distinction tracks. Here, I confess to being less certain. It seems to me that as much may be lost by excluding phenomena that might warrant our consideration as instances of discrimination, as will be gained by focusing our attention on those cases likely to be the worst. But as we are now dealing with pragmatic grounds for choosing a convention, the issue is not one that need be resolved here; the group-criterion in the form I have sought to challenge remains untenable, even should we eventually decide that pragmatic reasons do speak in favour of a suitably circumscribed pragmatic group-criterion.

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[46] Lippert-Rasmussen, "The Badness of Discrimination": p.169, my emphasis Note that, as such, Lippert-Rasmussen cannot be said to employ a group-criterion in the sense I have discussed, because strictly speaking the restriction to 'socially salient groups' is conventional and tendential, rather than suggestive of the sharply delineated moral distinction required by the criterion. I owe thanks to Lippert-Rasmussen for helping me clear up my initial confusion on this point.

…but some groups are more vulnerable than others - conceptual and practical implications

In the course of this article I have attempted to show that what I have dubbed the group-criterion, i.e. the notion that there are certain, predetermined groups which are relevant for the concept of discrimination, and that by implication all others are not, must be considered untenable. I have examined two approaches to justifying the criterion, one based on inherently relevant groups and one based on contextually relevant groups, and found both incapable of doing so, rendering the distinction ultimately arbitrary. It remains possible of course, although I think it unlikely, that unexplored arguments could support the criterion. Until they appear, we must examine instead what will happen if we drop it from the definition of discrimination.

But what happens then, if we abandon the group-criterion and construe discrimination as possible along any trait? Perhaps the most immediate and important implication of abandoning the group-criterion is that predetermined groups plainly can no longer serve to explain the wrongness of discrimination. This need not be considered a particularly troublesome conclusion. Even though there is no consensus on what does make discrimination wrong when it is morally wrong, the notion of a group-criterion tends to serve as an appendage rather than a central explanatory feature in the most recent literature on the topic. It simply means that there is no reason why we should consider discrimination against e.g. blacks or women to be worse than other forms of

discrimination *per se*, and that we will need to look elsewhere for an account of what is wrong with discrimination.[47]

Having said that, we should recognize and retain the important insight of the additional harms-argument: that discrimination as a social phenomenon normally becomes the more grievous the more frequently and the more widely it targets a particular trait. A person who is discriminated against, e.g. as an applicant who is wrongfully denied a job, has suffered a wrong, no matter whether the act of discrimination is idiosyncratic (i.e. applies an unusual distinction) or an instance of a practice (i.e. applies a socially salient distinction). But she will be affected worse the more common this form of discrimination is in society, both because the harm to her self-esteem is likely to be greater and because of her diminished prospects. If it is idiosyncratic her overall situation on the labour market is unlikely to be affected, but if it is widespread her chances of finding a job at all may be severely hampered, with all the losses of goods that this entails (economic, status, dignity, etc.).

A second and more dramatic conceptual implication is the way abandoning the group-criterion forces us to rethink indirect discrimination. On at least some accounts, indirect discrimination against group A is understood to occur when group A, which is on the prohibited list, is disparately affected by the non-discriminatory differential treatment of group B, which is not on the prohibited list but with which group A is either partially or fully co-extensive. Or, in the words of the EU-initiative: "When an apparently neutral

[47] As I mentioned initially this is a contentious issue (See note 18 above). However, as none of the three approached mentioned there rely centrally the group-criterion, I take it that the loss of the group-criterion need not cause particular consternation.

specification, criteria or practice would disadvantage people on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation…"[48] So a work-place, for example, which refuses to hire workers below 175cm of height is, on the conventional view, not engaging in direct discrimination against persons with a certain height, because this is not a relevant group. But it will probably be engaging in indirect discrimination against women, because many more women than men are members of this group, and as such women are disproportionately disfavoured by the requirement. However, if women are no more – and no less – protected than any other group, then explaining indirect discrimination in these terms no longer seems to make sense. This implication, although not in itself an argument for the group-criterion (at least not one that can avoid the fallacy of appeal to consequences), might be another reason that the criterion is hard to shed.

Third, what of anti-discrimination legislation? As we have seen, the group-criterion appears in the EU anti-discrimination-initiative's definition, and indeed in all legal definitions that I am familiar with. But the question of how to transform our ethical obligations into law is a complicated one that hinges, among other things, on whether one adopts a liberal stance that considers many forms of discrimination to fall below the threshold or outside the scope of harms that would justify legal prohibition, or a more restrictive stance that considers the harms of discrimination grave enough for justifiable prohibition to be fairly encompassing.[49]

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[48] Campaign, *What is Discrimination*,

[49] cf. e.g. Brest, "Foreword: In Defense of the Antidiscrimination Principle"; Campbell, "Unlawful Discrimination"; Stephen Cohen, "Arguing About Prejudice and Discrimination", *The Journal of Value Inquiry* 28 (1994); John Gardner, "Liberals and Unlawful Discrimination", *Oxford Journal of Legal*

My feeling is, however, that whatever approach to prohibition one favours, the ramifications of abandoning the group-criterion will be less dramatic than one might fear. Thus, the immediate implication of abandoning the group-criterion is likely to be the necessity of specifying in greater detail what is discriminatory and when. As wrongful discrimination does not simply follow a division along the traits that form the basis of the discrimination, and as a general prohibition on "discrimination" would, given the lack of consensus, beg the question of when differential treatment is or is not morally wrong, we may need to focus legislation on those situations in which specific forms of differential treatment is uncontroversially wrong. This is not necessarily an unwelcome consequence. One unfortunate effect, it seems to me, of the current use of the group-criterion in legislation is that it often serves to gloss over underlying and controversial obscurities. I basically agree with Richard Arneson, albeit for different reasons, when he suggests that: "…the idea of wrongful discrimination is not going to do much heavy lifting for the task of determining what social justice requires with respect to policies for dealing with suspect classifications."[50] We will have to look carefully at the specific context and the specific trait in question instead. And it might turn out to be both more just and more expedient to make prohibitions more specific, seeing as how blanket prohibitions against any form of discrimination involving groups on a prohibited list are not, as I have tried to show, normatively sustainable.

Studies 9 (1989); John Gardner, "Discrimination as Injustice", *Oxford Journal of Legal Studies* 16:3 (1996); Christopher McCrudden, "Changing Notions of Discrimination", *Archiv für Rechts- und Sozialphilosophie* 21 (1985); Christopher McCrudden, "Institutional Discrimination", *Oxford Journal of Legal Studies* 2 (1982); Jeremy Waldron, "Indirect Discrimination", *Archiv für Rechts- und Sozialphilosophie* 21 (1985)

[50] Arneson, "What is Wrongful Discrimination?": p.796

In conclusion, it is worth stressing the following point: that my argument against the group-criterion means neither that all kinds of discrimination are equal in practice nor that discrimination is not morally wrong. There are some forms of discrimination – racism, misogyny, islamophobia and homophobia to name a few obviously important cases – that have been and continue to be invidious and shameful social problems in a way that the various hypothetical cases of idiosyncratic discrimination I have discussed are not. As such, they undoubtedly merit much greater attention and concern. Only, I would say, for pragmatic rather than conceptual reasons.

What clarifying our concepts in the way that I have attempted should do ideally, I suppose, is to heighten our awareness of the obligations enshrined in the principle of non-discrimination as part of a larger set of moral norms, which are perhaps both more extensive and more demanding than we tend to imagine. Discarding the group-criterion, with its insistence that some groups are more equal than others, does not mean giving up the ideals inherent in the principle of non-discrimination, but rather forces us to think more carefully about what it means for persons to be equal, and what challenges this poses for us as moral beings.