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# Discrimination and Equality of Opportunity<sup>1</sup>

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## Introduction

Discrimination, understood as differential treatment of individuals on the basis of their respective group memberships, is widely considered to be morally wrong.<sup>2</sup> This moral judgment is backed in many jurisdictions with the passage of equality of opportunity legislation, which aims to ensure that racial, ethnic, religious, sexual, sexual-orientation, disability and other groups are not subjected to discrimination. This chapter explores the conceptual underpinnings of discrimination and equality of opportunity using the tools of analytical moral and political philosophy.

## Discrimination

Though discrimination is widely considered to be morally wrong, there are in fact forms of conduct that would meet the ‘differential treatment of individuals on the basis of their respective group memberships’ criterion, but not be considered wrong. The clearest case would be so-called ‘affirmative action’, which offers more favourable treatment for members of (historically) disadvantaged groups, and which is often referred to as ‘reverse’, ‘positive’, or ‘compensatory’ discrimination (Nagel 1973; Dworkin 1977: ch. 9). Whatever one’s attitude to particular real world cases of affirmative action, one is likely to accept that some possible cases of affirmative action would not be morally wrong: for instance, a policy that lowered a racial minority’s university admission requirements by  $x\%$  where high school examiners are known with certainty to systematically discriminate in their marking against members of this group by  $x\%$ . This shows that discrimination is not, of itself, wrongful, and that identifying something as a case of discrimination does not, by itself, tell us whether to be positively or negatively disposed towards it.

The important question, then, is *what makes discrimination wrongful (where it’s wrongful)?* Several answers to this question have been advanced.

A first account says that discrimination is wrongful where it shows *disrespect* towards the discriminatee. This account typically focuses on the *objective meaning* of the discriminatory act – a meaning that demeans or shows contempt for the discriminatee (Lippert-Rasmussen 2013, ch. 5). For instance, Deborah Hellman (2008: 6, 8) writes that ‘to demean is to treat another in a way that denies her equal moral worth’, which is contrary to the ‘bedrock moral principle’ of the ‘equal moral worth of all persons’. The disrespect account, in its various guises, is widely held in the literature (Cavanagh 2002; Hellman 2008; Scanlon 2008; Glasgow 2009; Clayton 2012).

A second account holds that discrimination is wrongful where it is based on *prejudice* towards the discriminatee. This account typically focuses on the objectionable *mental state* of the discriminator (Lippert-Rasmussen 2013: ch. 4). For example, Peter Vallentyne (2006: 982-983) says that ‘invidious discrimination’ involves ‘the treatment of an individual less favourably because of some feature one believes the individual to possess, where (1) the person is not morally or prudentially responsible for having the feature in question; and (2) the treatment is based on (a) a mistaken belief in the moral inferiority of those having the feature, (b) a significantly mistaken empirical belief about people having the feature, or (c) hatred of those having the feature’. Other versions of the prejudice account identify wrongful discrimination with biases based on mistaken moral judgments, or flaws in how beliefs about the discriminatee were formed (Alexander 1992; Arneson 2006).

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<sup>1</sup> In Kasper Lippert-Rasmussen (ed.), *The Routledge Handbook of the Ethics of Discrimination* (Routledge, 2017). Earlier versions of this chapter were presented at Keele University in November 2016 and the University of Glasgow in December 2016. I thank the audiences on those occasions, and especially Kasper Lippert-Rasmussen and an anonymous reviewer for their written comments.

<sup>2</sup> Discrimination in this sense is ‘group discrimination’. For discussion see Lippert-Rasmussen 2013: ch. 1.

A third account maintains that discrimination is wrongful where it *harms* the discriminatee. This account typically focuses on the loss of advantage (e.g. welfare, resources, or capabilities) suffered by the discriminatee. However, it clearly cannot be the case that *any* discrimination that reduces an agent's advantage level is wrongful. Among other things, that would imply that all forms of affirmative action are wrongful, no matter how well they furthered justice and other moral goals. Thus, harm accounts must specify further conditions for reductions in advantage levels to amount to (wrongful) harm. Kasper Lippert-Rasmussen (2013) suggests a 'desert prioritarian' view according to which acts are morally right if and only if they maximize moral value, which depends on (1) the amount of well-being thereby realized, (2) how badly off well-being recipients are, and (3) the desert levels of well-being recipients (see also Arneson 1999a, 1999b). On this view, discrimination is wrongful where it does not maximize moral value, and 'a given amount of well-being has greater moral value when it accrues to a badly off, deserving person than it does when it accrues to a well-off, undeserving person' (Lippert-Rasmussen 2013: 166). (Equality of opportunity views can be construed as a different kind of harm view – specifically, as a view about *comparative* harm. As I will treat these views at length in the next section, I will here focus on Lippert-Rasmussen's non-comparative version of the harm account.)

Finally, there are hybrid views, which include elements of more than one of the above accounts. For instance, Thomas Scanlon (2008: 73) seems to endorse a view according to which discrimination is wrongful on the grounds of both its disrespectful and harmful character, while Alexander's (1992) account of wrongful discrimination, while foregrounding prejudice, seems also to contain elements of the respect account.

In considering actual cases of wrongful discrimination, it is likely that disrespect, prejudice, and harm are all present. For instance, a sexist employer that refuses to promote female employees is, under usual circumstances, certainly disrespecting and harming them, and almost certainly on the basis of prejudice. This helps to explain the appeal of the disrespect account, prejudice account, and harm account: each captures a prominent feature of actual cases of wrongful discrimination. But it also means that, in order to find which of the features of disrespect, prejudice, and harm are actually responsible for the wrongfulness, we must consider unusual cases of apparently unjust discrimination in which one or more of these features is absent.

There is a kind of case that seems to defeat the disrespect view, by identifying cases of wrongful discrimination that would not be identified as such by the view. Lippert-Rasmussen (2013: 146-147) describes two such cases:

it seems that not all kinds of intentional discriminatory acts involve a judgment of inferiority, e.g., a patriarch who avoids hiring a certain applicant simply because she is a woman and thereby intends to avoid hiring women, not because he thinks, as most patriarchs do, women are inferior, but because he thinks that there is a clear division of labor between the sexes and women's place is in the home. A further complication derives from the fact that an employer may refrain from "giving a person a certain benefit," i.e., hiring him, because he thinks that the job is inferior and that it ought only to be performed by inferior persons. Should one say here that it is permissible not to hire the applicant—say, a Brahmin—considered superior by the employer, but not permissible not to hire the Brahmin with the intention to avoid hiring a superior person for an inferior job—say, a job the employer deems suitable only for Dalits?

The first example is trickier, perhaps because a liberal will interpret the idea that 'there is a clear division of labor between the sexes and women's place is in the home' as a façade intended to disguise the true intention of subjugating women. But in the second case it seems clear that there is no disrespect to the discriminatee conveyed by the discriminator - the

discriminator's reason for denying the applicant the job is precisely the high status the discriminator assigns to the discriminatee. Furthermore, we can extend the case so that this seems to be clearly wrongful. Suppose, for instance, that there are many Brahmins left unemployed by hiring decisions of this sort, and that this is not even of benefit to other groups, who are not interested in these jobs.

Such cases are also problematic for some versions of the prejudice view. An employer that refuses to hire Brahmins because she believes they are too good for the job is not acting out of hatred to Brahmins. Nor is she acting on an opinion that Brahmins are inferior - quite the contrary! It might be said, however, that she is acting on a faulty, or faultily formed, belief about Brahmins. Epistemic versions of the prejudice view therefore do not seem to be undermined by this case.

A different kind of case does challenge these views, however. Suppose Alexandra treats Barbara worse than Christina, because she falsely believes that Christina is more deserving than Barbara. This is, on the face of it, *less* wrongful than a second case in which Diana treats Barbara unjustifiably worse than Christina where she does not falsely believe that Christina is more deserving than Barbara (Lippert-Rasmussen 2013: 120). In the first case, it intuitively seems that Alexandra has at least something of an excuse for treating Barbara less favourably, namely, that she believes Barbara to be less deserving. The prejudice view says that holding that false belief makes the discrimination wrongful; but in fact it seems, if anything, to reduce the amount of wrongfulness. In the second case, there is no false belief, and the prejudice view under consideration takes that fact as implying that there is no wrongful discrimination. But in fact, the absence of a false belief that might explain why Diana treats Barbara unfavourably does not seem to remove any wrongfulness from her behaviour (it may well make it worse). There are similar difficulties with epistemic versions of the prejudice view that say that wrongful discrimination is based on faultily *formed* beliefs. If Alexandra's views about Barbara's and Christina's desert levels were faultily formed, while Diana's were not, that hardly seems to justify the conclusion that Alexandra's harsh treatment of Barbara is wrongful but Diana's similarly harsh treatment of Barbara was not. If anything, Diana's epistemic advantage removes a possible excuse for her behaviour, making it more blameworthy. Thus, it seems that there will be cases of wrongful discrimination in which none of the conditions for prejudice are satisfied. Just as wrongful discrimination is possible without disrespect, so too is it possible without prejudice. If we want an account of what it is that makes discrimination wrongful, we must look elsewhere.

This naturally takes us to the harm account. We should notice right away that this account, as set out by Lippert-Rasmussen, has little difficulty with the kind of case that sunk the disrespect and prejudice accounts. The employer that would not hire Brahmins would, typically, create disadvantages for Brahmins that are discriminated against. In some cases, such as that described above where the jobs are not taken by others, there would be no (or insufficient) offsetting advantages for other groups, in which case the discrimination is condemned by desert-accommodating prioritarianism. In others, there are sufficient advantages for other groups to offset the discrimination (e.g. they take the jobs), in which case the discrimination is not condemned by desert-accommodating prioritarianism and is instead considered a case of affirmative action. This seems like a plausible way of responding to the case.

There is, however, a further case that proves more problematic for desert-accommodating prioritarianism as an account of wrongful discrimination. Suppose that two applicants for a job are identical in all respects except one: their religious affiliation. Their expected job performance is identical. The employer discriminates against one of the applicants on religious grounds, and appoints the other applicant. Desert prioritarianism has no complaint with this outcome. The two applicants are, *ex hypothesi*, identical in well-being and desert levels, so assuming that there is only one job to be allocated and it cannot be divided, it makes no difference who the recipient is, nor – and here's the kicker – on what grounds the allocation is

made. This seems to be a case where wrongful discrimination is overlooked by desert-accommodating prioritarianism.

Responding to a case that is in some respects similar to this, Lippert-Rasmussen (2013: 173) comments that

Friends of desert prioritarianism can concede that something may well be morally amiss in cases involving beneficial discriminatory acts, but insist that what is morally amiss is not that the act is wrong. To deny that a certain discriminatory act that maximizes moral value is bad is not to imply that the agent cannot be criticized for performing it; the agent might, for example, have had reason to believe that the act would on balance harm the discriminatee, and thus attract blame for performing the act.

He adds that one may criticize the moral *character* of an agent, even where their *action* is morally right (see Lippert-Rasmussen 2013: 123-124, 160, 173). I agree that in many cases, an agent acts correctly, but for reasons that reflect badly on their character, perhaps leaving them open to blame. But I do not see that this could be a desert prioritarian's description of a case in which an employer deliberately satisfies desert prioritarianism, and with this done acts in a gratuitously discriminatory way. Such an agent is not even slightly criticisable from a desert prioritarian perspective. Moreover, we can criticize not just the agent's reasoning, but action. Our intuitive response to the case is not that the employer acts correctly, for the wrong reason, as where a would-be wrongdoer inadvertently does right. It is that the employer acts wrongfully, for the wrong reason. She should not have discriminated against the applicant on religious grounds, just as she should not have been motivated by irrelevant religious reasons. I therefore conclude that, in spite of its strengths, the desert prioritarian harm account fails to identify some cases of wrongful discrimination.

### **Equality of opportunity**

It is time to consider an alternative approach to discrimination – equality of opportunity. In this section I survey the three main accounts of equality of opportunity found in the normative political theory literature. It should be emphasized that these have not been developed primarily as accounts of wrongful discrimination, but rather as principles of justice. Nevertheless, on the assumption that a discriminatory act that breaches a principle of equality of opportunity amounts to wrongful discrimination, each principle yields a distinctive view of wrongful discrimination. I will argue that none of these three principles, by itself, offers a fruitful account of wrongful discrimination. In the next section I suggest that one of them can be combined with desert prioritarianism to make such an account.

A key section of John Rawls' famous *A Theory of Justice* considers two possible interpretations of the principle that 'social and economic equalities are to be arranged so that they are ... attached to positions and offices open to all' (Rawls 1999: 53). The first of these he refers to as 'careers open to talents'. This specifies 'a formal equality of opportunity in that all have at least the same legal rights of access to all advantaged social positions' (Rawls 1999: 62). Formal equality of opportunity requires that positions are allocated on the basis of a 'fair contest', in which 'one should be judged only on those characteristics relevant to one's future performance in the position for which one is applying' (Fishkin 2014: 25). This position rules out not just de jure but also de facto discrimination, such as racist or sexist hiring decisions.<sup>3</sup>

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<sup>3</sup> Here I follow conventional interpretation of Rawls – see, for instance, Freeman 2007, 88-90; Mandle 2009, 27-28. It is worth noting, however, that Rawls' definition quoted in the text does not explicitly say that formal equality of opportunity rules out de facto discrimination or requires a 'fair contest'. Everyone having 'at least the same legal rights of access to all advantaged social positions' could just mean that there are no legal restrictions on who can apply for which jobs, but that employers can review applications according to whichever criteria they choose. This

Rawls (1999: 63) himself rejects formal equality of opportunity, noting that it ‘permits distributive shares to be improperly influenced by ... factors so arbitrary from a moral point of view’. For instance, according to formal equality of opportunity, a person that attended a private school that offers a high standard of education, and whose talents are therefore developed more effectively than equivalent state-educated people, will legitimately have a competitive advantage when it comes to applying for university places or jobs. Concerned to address such arbitrary factors, Rawls instead favours the second interpretation of ‘attached to positions and office open to all’, which he refers to as ‘fair equality of opportunity’:

The thought here is that positions are to be open not merely in the formal sense, but that all should have a fair chance to attain them. Offhand it is not clear what is meant, but we might say that those with similar abilities and skills should have similar life chances. More specifically, assuming that there is a distribution of natural assets, those who are at the same level of ability and talent, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system (Rawls 1999: 63).

Fair equality of opportunity is clearly a far more demanding principle than formal equality of opportunity. It requires not just that a contest is ‘fair’ at the moment of decision, but that certain background conditions are in place to ensure that people have a fair chance to develop their natural talents. As Rawls (1999: 63) notes, this requires that the ‘school system, whether public or private, should be designed to even out class barriers’. It also justifies an inheritance tax in order to prevent inequalities growing so large that equal education is threatened (Rawls 1999: 245-246). In terms of discrimination specifically, fair equality of opportunity would seem to justify radical policies of affirmative action. As it requires those with similar natural abilities to have similar life prospects, it would appear to require that, where an individual’s natural abilities have not been cultivated as well as others’ (for instance, due to substandard state schools), they should be admitted to jobs and universities with lesser qualifications than persons who did not have this developmental disadvantage (see Arneson 1999b: 81). To see the radical implications here, note that the rationale for the affirmative action is not that the qualifications are thought to have failed to accurately estimate future performance.<sup>4</sup> Rather, the applicants are thought likely to underperform compared to non-disadvantaged people with better qualifications, but are admitted anyway in order to provide them with similar prospects to these people. A failure to provide affirmative action of this sort would amount to wrongful discrimination against those with a disadvantageous background.

Fair equality of opportunity faces some serious problems. Arneson draws attention to the fact that fair equality of opportunity only requires that people who are similarly talented *and motivated* have similar prospects. This implies that there is no injustice if men assume all positions of advantage in a society that socializes its women to believe that seeking positions of advantage is unladylike (Arneson 1999b: 78). In such a society, fair equality of opportunity simply considers men and women to have differential ‘willingness’ to use their natural talents, so differential outcomes are justified. A further objection is noted by Rawls himself. While fair equality of opportunity aims to neutralize the effects of social circumstance on people’s life chances, it does not aim to neutralize the effects of natural circumstance, such as native talent. As Rawls (1999: 64) observes, ‘[t]here is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune’.

Rawls’ response to this latter difficulty is to complement fair equality of opportunity with the difference principle, which ensures that inequality is to the benefit of the worse off and

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shows that the ‘fair contest’ version of formal equality of opportunity is far from trivial; it rules out much actual discrimination that weaker versions of equality of opportunity would not.

<sup>4</sup> Joseph Fishkin (2014: 33-34) mentions a ‘formal-plus’ equality of opportunity that would take this kind of strategy.

thereby mitigates the impact of lower natural talents. Some writers question whether it really achieves this objective (Kymlicka 2002: 70-74). In any case, the difference principle is of little interest for our purposes as it clearly cannot provide a more successful account of equality of opportunity.

A more promising response to the concerns about natural abilities is to develop a form of equality of opportunity that is even more radical than fair equality of opportunity. This third and final account of equality of opportunity is *luck egalitarianism* (Arneson 1989). As the name suggests, it aims to equalize (or neutralize) the effects of luck on distributions. In a famous formulation, luck egalitarianism is overtly presented as an account of equality of opportunity – specifically, as ‘equality of opportunity for welfare’ (Arneson 1989; see also Cohen 1989).

Shlomi Segall has recently presented an appealing luck egalitarian account of the badness of discrimination. According to Segall, ‘[d]iscrimination ... is bad when, and only when, it upsets’ equality of opportunity for welfare (Segall 2013: 109). To see the appeal of this kind of view, note that an individual’s natural talents are, just like her social circumstances, a matter of luck for her. Luck egalitarianism therefore aims to prevent natural talents from influencing distributions. This allows it to sidestep the objection to fair equality of opportunity that it arbitrarily distinguishes between social and natural contingencies. Affirmative action for those with social disadvantages *and* those with natural disadvantages would be justified. Luck egalitarianism would also not be satisfied, as fair equality of opportunity is, with a situation in which women are socialized to accept less advantaged positions: such a situation clearly disadvantages them as a matter of luck.

In spite of its attractions, luck egalitarianism faces significant difficulties. A variant of a familiar objection points out that luck egalitarianism, as a form of egalitarianism, will favour *levelling down* (Parfit 2000). Luck egalitarianism aims to reduce inequality of opportunity for welfare, and one way of doing that is to *reduce the opportunities for welfare of the better off*. Consider a case of discrimination with this feature. A council planning officer in a Western country is considering an application to build a Hindu temple. The town could easily accommodate the temple, and this would have beneficial welfare effects for local Hindus. However, it happens that the Hindus have greater opportunities for welfare than do other groups. If the planning officer denies planning permission for the temple, squandering the possibility of a welfare gain for local Hindus, luck egalitarianism will have no complaint with this decision. Nor, if we add that the planning officer’s decision was a discriminatory one, will a luck egalitarian account of discrimination identify any badness with that discrimination, since it reduced inequality of opportunity for welfare.

Segall anticipates concerns about levelling down. He replies, firstly, that an unequal distribution makes the worst off ‘potentially envious’ of the better off, and secondly, that the inequality ‘calls for a justification, whether or not there is a preferable alternative to it’ (Segall 2013: 31). I am not quite sure what the relevance of the possible envy is intended to be, but in any case, it is easy to construct a case in which there is inequality but no envy – indeed, there is no reason to suppose that the non-Hindus in the above example are in any way envious. This leaves the fact that the inequality ‘calls for a justification’, but there seems absolutely no difficulty in providing such a justification. It could, for instance, be said that the inequality is justified because it benefits some members of the community and does no one any harm. Contra Segall (2013: 26-27), surely the defender of levelling down owes at least as much of a justification – his suggested defence for equality of ‘why the hell not!’ seems positively offensive in a case where people are being forced to forego significant improvements to their lives, for the sake of a distribution that benefits no one at all. Of course, there is much more that could be said about levelling down,<sup>5</sup> but I doubt that it is compatible with a plausible account of the badness of discrimination.<sup>6</sup>

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<sup>5</sup> Segall (2013: 138) gestures towards the different defence that levelling down is a problem for rules of regulation, rather than justice. But many would deny that levelling down is compatible with justice – it is plausible not just that

## Discrimination and equality of opportunity

We have so far surveyed several accounts of wrongful discrimination and several accounts of equality of opportunity, but have found none of them truly satisfactory. In this section I argue that the desert prioritarian account of wrongful discrimination can be combined with an account of equality of opportunity to yield a successful overall account of wrongful discrimination.

To see the motivation for this combination, we should return to the case that seemed to defeat desert prioritarianism, in which a job application was rejected on religious grounds but in such a way that desert-prioritarian moral value was maximized. The discussion of equality of opportunity provides several different ways of branding this a case of wrongful discrimination. Formal equality of opportunity provides the most straightforward: it requires that there is a fair contest between applicants – that equally qualified candidates have equal chances – a condition that is clearly breached by the employer’s actions. Careers are not open to talents if people of a certain religion are excluded.

We have seen the advantage of including a principle of equality of opportunity, but why include desert prioritarianism? The reason is that it answers the same challenges to formal equality of opportunity and, in turn, fair equality of opportunity, that luck egalitarianism does. On any plausible account of desert, individual desert levels do not decrease with poor social circumstance or natural talent. But advantage levels do decrease with these factors. Thus, the person with disadvantageous social circumstance or low natural talent will have a lower advantage level than their desert recommends. Desert prioritarianism treats such people as of high priority, as luck egalitarianism does.<sup>7</sup> And it does so without facing the difficulties of luck egalitarian accounts of wrongful discrimination, such as the implication that discrimination that levels down is not bad. This is because prioritarianism focuses on the absolute rather than relative position of the worse off, and their absolute position is not improved by levelling down. The disadvantaged’s absolute position *will* be improved by (justified) policies of affirmative action, and other benign cases of discrimination.<sup>8</sup> Thus, desert prioritarianism seems to account for many cases of discrimination in a plausible way. Its one weak point can be reinforced by equality of opportunity.

Two questions lie before us. First, *which* form of equality of opportunity should be combined with desert prioritarianism? Second, *how* should equality of opportunity of the chosen kind be combined with desert prioritarianism? I will take these in turn.

It may seem that luck egalitarianism offers the most suitable form of equality of opportunity, given its accommodation of concerns about social and natural contingencies. However, it could be argued that this accommodation is otiose given the role of desert prioritarianism in the combined account. Indeed, it could even be counterproductive given the problems we noted with levelling down – problems that are avoided by prioritarianism. Fair equality of opportunity also cannot work for our purposes: its requirements of background fairness are partial, favouring those with social disadvantages over those with natural

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the planning officer’s discrimination was bad or wrongful, but also unjust. And Segall’s response does not, in any case, look promising as a defence of a luck egalitarian account of the *badness* of discrimination, which is not on the face of it a matter of justice. For further relevant discussion that would take us too far afield see Segall 2016: ch. 6.

<sup>6</sup> There are additional objections to the luck egalitarian account of the badness of discrimination. For instance, Sophie Moreau (2010: 172) considers a case in which there are many instances of prima facie discrimination but in such a way that they counterbalance one another, with an equal upshot. Segall denies that there is discrimination here, a position I find implausible. For discussion see Knight 2013a: 53-55.

<sup>7</sup> A different route to a similar outcome would be to endorse *responsibility-sensitive prioritarianism*, which can be construed as a kind of luck egalitarianism (Arneson 2000). Indeed, I have done just this elsewhere (Knight 2009: ch. 6). In the text I focus on the very closely related view of desert prioritarianism for the sake of simplicity.

<sup>8</sup> An example may be Arneson’s (1999b) communal workplace in which all employees are gay, which ‘being small-scale and excluding members of a dominant majority that suffers no dearth of opportunities, does not impose significant costs on anyone’.

disadvantages, and (like luck egalitarianism's similar but more demanding requirements) unnecessary given the role of desert prioritarianism.

What we need is an account of equality of opportunity that will filter out discriminatory acts. Adjustment of background conditions is already taken care of by desert prioritarianism. I believe, therefore, that formal equality of opportunity provides the appropriate supplement to desert prioritarianism.

To explain that claim, I need to explain the spheres in which the two principles are intended to operate. Desert prioritarianism provides an axiological account of the intrinsic goodness or badness of a distribution. If we were only interested in how good or bad a distribution was, we would need nothing in addition to desert prioritarianism. With some further assumptions, desert prioritarianism would also provide a full account of the justice or injustice of a distribution.

When we are asking about *wrongful* discrimination, however, we are asking about a certain kind of *action*. (This is why a naturally occurring distribution or event might be bad, but not wrong.) One way of identifying wrongful action is to check whether an individual's choices make a distribution as good or just as they can be in the circumstances. This explains the role of desert prioritarianism within my account. But this cannot be the whole account of wrongful action. A failure to promote desert prioritarian moral value is not a necessary condition for wrongful discrimination. As we have seen, someone may do everything they can to promote desert prioritarian moral value, but still wrongfully discriminate. In other words, *a good or just distribution may have been arrived at in a wrongful way*. This is where formal equality of opportunity comes in.

I now move on to our second question of *how* desert prioritarianism and formal equality of opportunity should be combined. I suggest the following 'hybrid account':

*First principle: maximize desert prioritarian moral value.*

*Second principle: satisfy formal equality of opportunity.*

*Wrongful discrimination is discrimination that fails to satisfy the first principle in any circumstance, or fails to satisfy both principles where both can be satisfied.*

The hybrid view grants lexical priority to desert prioritarianism, as it says it must always be satisfied, whereas formal equality of opportunity must only be satisfied where this is compatible with desert prioritarianism. One motivation for this priority is to accommodate affirmative action. Some affirmative action will satisfy desert prioritarianism, but no affirmative action will satisfy formal equality of opportunity. For reasons already mentioned, some affirmative action, at least, is not wrongful. The hybrid view reflects this by allowing that violations of formal equality of opportunity are not wrongful provided they are necessary to satisfy desert prioritarianism, as I believe is true of some affirmative action.

To further illustrate the hybrid view, consider the case that created difficulties for desert prioritarianism, in which a discriminatory hire on the basis of religion, which was irrelevant to job performance, was perfectly consistent with desert prioritarianism. The first principle is satisfied, but the second principle is not satisfied, as a fair contest has not been provided - equally qualified candidates were not given equal chances of acquiring the job. As both principles could have been satisfied, but were not, this is a case of wrongful discrimination.<sup>9</sup> Had the

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<sup>9</sup> Kasper Lippert-Rasmussen and Hugh Lazenby suggested to me that friendships or romantic relationships may be more problematic for the hybrid view. Here equality of opportunity and/or desert prioritarianism seem to identify some ordinary and seemingly permissible conduct (e.g. choosing one person as a friend rather than another more disadvantaged person) as wrongful discrimination. There are at least three possible responses. First, I could distinguish public from private acts, and apply the hybrid account only to relevantly public acts. Second, I could bite the bullet, and accept that much prima facie permissible private conduct is in fact wrongful. Finally, I could argue that though the hybrid account applies to private acts, this does not generally have counterintuitive implications after all. The last of these responses is the most promising, I believe. It seems particularly important that the 'goods' of private acts, such as friendship, would often cease to be goods at all were they given only in order to satisfy moral

employer flipped a coin, this would not have been a case of wrongful discrimination, as equally qualified candidates would then have been given an equal chance and a fair contest would have been provided.<sup>10</sup>

While a full defence of the hybrid account is not possible here, I hope to have said enough to offer some motivation for it. In short, it aims to capture considerations of both distribution, which explain why discrimination that disadvantages unfairly disadvantaged groups is wrongful, and procedure, which explain why some discrimination that is distributively fair is nevertheless wrongful.

## Conclusion

The chapter first explored disrespect, prejudice, and harm-based accounts of wrongful discrimination, finding that each failed to identify some cases of wrongful discrimination. Three accounts of equality of opportunity – formal equality of opportunity, fair equality of opportunity, and luck egalitarian equality of opportunity – were then considered, and it was found that these too were subject to counterexamples. It was, finally, argued that an account combining desert prioritarianism and formal equality of opportunity provided a plausible account of wrongful discrimination.

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requirements. A friendship or romantic relationship founded on, and sustained by, one party's begrudging sense of duty is likely to be harmful to both parties. Thus, desert prioritarianism, which has lexical priority on my view, would treat friendships or relationships that are primarily motivated by duty as usually self-defeating, creating space for more ordinary private conduct.

<sup>10</sup> Some may feel that the coin toss is in a sense unfair. It may, for instance, fall foul of Segall's (2013: 86, 100) requirement that 'hiring must not be based on morally arbitrary considerations', construed as 'hiring for relevant reasons alone'. This suggestion is perhaps supported by Segall's (2013: 5) hostility to a lottery-based equality of opportunity. But I cannot see a fairer, less arbitrary, or more 'relevant reason'-based decision procedure in this case, given that both the candidates' qualifications and wider distributive considerations are conclusively tied. This is despite the fact that I share Segall's wariness of lotteries, and even go beyond him in identifying their outcomes as problematic from the perspective of equality where they only affect people that have chosen to take part. (That is, I endorse, all-luck egalitarianism, a view which aims to neutralize brute luck and option luck alike, and which Segall has powerfully criticized; see Knight 2013; Segall 2010, ch. 3.) Of course, in practice a coin toss would almost never be a sensible procedure to use, as a recruiter would rarely have our example's certainty that there is a tie. Something that initially looked like a dead heat would almost certainly change if further enquiries were taken (e.g. rereading CVs, considering additional opinions, further interviews, etc). But if a recruiter really were unable to split two candidates, a randomizing device seems a better last resort than the alternatives (such as discriminating on the irrelevant grounds of religion).

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