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Some Challenges for Moreau's Theory of Wrongful Discrimination

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Abstract

At the heart of Sophia Moreau's theory of wrongful discrimination is the moral duty to treat others as equals. This article raises some challenges regarding the contours of this duty and suggests some ways to make the theory stronger. In particular, it suggests that we incorporate a cosmopolitan view of the duty's scope, that we illuminate the features at the basis of individuals' equal moral status to determine its grounds, and that we identify some considerations about important interests to articulate its contents. The relation between Moreau's theory and human rights discourse is also briefly examined, and more engagement with the latter is recommended.

Résumé

Au cœur de la théorie de Sophia Moreau sur la discrimination répréhensible réside le devoir moral de traiter les autres comme des êtres égaux. Cet essai soulève quelques questions sur les contours de ce devoir et suggère des moyens de renforcer la théorie. En particulier, il suggère d'intégrer une vision cosmopolite de la portée de ce devoir, d'éclairer les caractéristiques à la base du statut moral égal des personnes afin d'en identifier les fondements, ainsi que d'identifier certaines considérations relatives à des intérêts d'importance afin d'en préciser le contenu. La relation entre la théorie de Moreau et le discours sur les droits humains est également brièvement examinée, et une discussion plus approfondie de ce dernier est recommandée.

Keywords: discrimination; duty of equal treatment; equality; rights; human rights; dignity

1. Introduction

In *Faces of Inequality*, Sophia Moreau offers an egalitarian and pluralist theory of wrongful discrimination.¹ According to this theory (hereafter, EPTWD),

¹ All standalone page citations are to Moreau (2020).

discrimination consists in acts and policies undertaken by some private or public agents (the discriminators) that directly or indirectly disadvantage other people (the discriminatees) relative to others, on the basis of specific traits such as their race, gender, sexual orientation, or disability. Discrimination is wrongful when, and because, the discriminators fail to treat the discriminatees as the equals of others. The failure to treat others as equals can take a variety of forms. EPTWD identifies three specific types of inegalitarian treatment in which discriminators contribute to the unfair social subordination of the discriminatees, infringe their right to deliberative freedom, and deny them access to basic goods. EPTWD is a moral theory, which we can use to explain and orient the formulation, justification, and implementation of anti-discrimination laws and other formal and informal initiatives that block discrimination or facilitate our equal treatment of others in social life.

Moreau's book is an impressive achievement. Written with great clarity and in a lively prose, the book is accessible to a wide audience of readers in philosophy, law, and political science. The novel theory of wrongful discrimination it offers is plausible, and its relevance and explanatory power is made apparent through compelling engagement of actual cases in law, public policy, and daily life. In this short article, I will raise a set of challenges concerning how EPTWD delineates the duty to treat others as equals. My aim is to invite Moreau to clarify some aspects of her theory and to explore some lines of further development.

2. On the Scope of the Duty of Equal Treatment

At the heart of EPTWD is the moral duty to treat others as equals. Discrimination is wrongful, when it is, because it violates this duty. My first challenge concerns the *scope* of such duty. The book makes important points about duty-bearers, arguing that the duty applies to a variety of agents. It argues that a state can fail to fulfil the duty when it introduces regulations that directly or indirectly disadvantage some people with respect to their social standing, their deliberative freedom, or their access to basic goods. It also shows that the duty applies to individuals in institutional positions, for example, to employers or sellers of products in a market. Finally, the book shows that to some extent the duty also constrains individuals' personal choices — regarding how they treat friends, family members, and other people in daily life. The book does not, however, explore the question of how to provide a morally compelling identification of the set of right-holders. Who is owed equal treatment? The book seems to proceed under the assumption that the right-holders are human beings living in the same society as the duty-bearers. But this focus seems too narrow. Shouldn't we treat people living in other societies as equals too? If so, shouldn't the policies of our state (as well as our decisions as individuals) be appraised in part on the basis of whether they generate social subordination, infringement of deliberative freedom, or denials of access of basic goods across the globe? How we answer this question has significant implications about how we think about immigration policies, the shaping of international negotiations about trade and investment, environmental protection, control of land and natural resources, and foreign aid. If equal treatment should apply across borders, then it would also constrain how we treat each other within borders, as what is done domestically has

significant consequences abroad. The question also presses us to determine, at the level of moral argument, whether the most appropriate (feasible and desirable) way to envision the treatment of other people as equals calls for a cosmopolitan rather than a nation-state-based framework. The book invokes “our shared social commitment to creating a society of equals” (p. 232). But shouldn’t we also be committed to creating a world of equals? Might the relevant “society of equals” have to be, in some sense, global?² Moreau does not in this book say that EPTWD cannot have a global scope, and more recently (Moreau 2021, p. 610) she has expressed openness to an extension of her theory beyond borders.³ But I believe that a direct and explicit discussion of the relevance of global considerations is needed. This is so because there could be cases in which our commitments to our co-nationals conflict with commitments to non-co-nationals. In those cases, we should determine when we should prioritize the interests of the former over the interests of latter or vice versa. There is a real risk that if EPTWD focuses only on domestic injustices, it will ignore — and unwittingly help to further entrench — global injustices.⁴ In their current form, international affairs arguably display elements of what Moreau aptly calls “structural accommodation” (pp. 42–43, 55–62): the disproportionate catering for the interests of world’s most privileged individuals is systematically baked into the rules of the game.

3. On the Grounds of the Duty of Equal Treatment

The second challenge concerns the question of the *grounds* of the duty to treat others as equals. Why do we owe others this kind of treatment? Moreau explores four answers to this question, settling for the fourth.⁵ The first argument invokes an alleged pre-existing commitment on our part “to creating a society of equals.” This argument is insufficient, because some of us might lack that commitment (pp. 220–221). The second argument — “the argument from democracy” — relies instead on a commitment to living in a democratic society, which in turn seems to carry with it an implicit commitment to creating a society of equals. This argument also relies, albeit indirectly, on a pre-existing commitment to creating a society of equals, and the difficulty of the first argument is not really avoided. “We need a reason to think that people actually *are* the equals of others” (p. 222). The third argument — the “argument from empirical facts about human beings” — tries to go further by noting that people have claims to equal status on the basis of certain natural properties of them, such as their rationality (p. 223). One difficulty for this approach, however, is that for any alleged natural property cited as the basis of claims of equal status, there will be at least one human individual who lacks it. The approach

² For a helpful discussion of the issue of the scope of the duty of egalitarian treatment, see Kasper Lippert-Rasmussen (2018, pp. 146–153).

³ Moreau (2021, pp. 610–611) expresses appreciation for Rebecca Cook’s (2021) suggestion that her theory could apply to international and transnational relations.

⁴ In addition to a nationalist bias, EPTWD could be saddled with a speciesist one. Is equal treatment owed only to human individuals or might some form of it also be owed to non-human animals?

⁵ These answers focus on the state as duty-bearer (pp. 218–226), but recall that, for Moreau, the duty of egalitarian treatment is also held by individuals.

thus risks being exclusionary towards some persons, such as those with profound disabilities (p. 223). Another difficulty is that this approach misunderstands our commitment to treating others as equals, which “is not a recognition of some prior fact about each person, but a commitment that we make going forward ... to treat everyone within our society in certain ways, so that no one is treated as the superior, or the inferior, of anyone else” (p. 224). Moreau settles for a fourth argument, which — instead of searching for an empirical property as the foundation of our equality — identifies “*another moral fact*,” viz. “the fact that our lives matter, and that each person’s life matters just as much as, and no more than, every other person’s life” (p. 225). According to this “argument from our equal moral worth,” “we are all of equal moral value” (p. 225). On this view, “the moral fact of people’s equal value generates in each of us a duty to treat others as equals” (p. 227). The reason this argument gives “is a moral reason,” which exists even if it is not already accepted or reflected in the commitments some of us happen to have (p. 226).

I have two worries about Moreau’s discussion of these arguments. The first worry concerns the assessment of the first two arguments. I agree that relying on conventionalist or subjectivist arguments is problematic. Although these arguments might be rhetorically and motivationally effective when directed to those who already have pro-attitudes towards equal treatment, they might, as Moreau notes, fail to persuade those who don’t. And even in cases in which commitments to equality exist, we might add, the structure of these arguments falls prey to a version of the Euthyphro question, “Is equal treatment morally owed to people because I am committed to it, or am (or should) I be committed to give equal treatment because people are owed it?” Surely the most plausible answer is to pick the latter option. I want to note, however, that the book often relies on conventionalist or subjectivist patterns of argument. It regularly relies on descriptive reports about what we think or about our existing culture when justifying critical assessments of various forms of discrimination, such as those that limit deliberative freedom (p. 101) or our autonomy (pp. 148, 154), and it eschews any reference to what is “objectively good” when identifying basic goods (pp. 131–132). How do moves like these fit with the moral objectivism or realism that seems to underlie the preference for the fourth argument for the duty of equal treatment when compared to the first two? I understand and appreciate that Moreau is concerned with both discovering certain attitude-independent moral (and perhaps even prudential) facts and engaging people’s actual lived experience and projects. But the structure of the moral arguments relating these dimensions is not always fully clear to me.⁶

The second worry concerns the contrast between the third and the fourth arguments. Although I agree that his answer to the worry about exclusion is insufficient, I think that Jeremy Waldron (2017), the proposer of the third argument, could

⁶ An important plank in Moreau’s arguments is to note the relevance of the experiences and beliefs of the victims of discrimination (see, e.g., p. 28). Attending to victims’ perspectives is crucial as a form of respect for them, and because they have important cognitive insights sometimes missed by the privileged. But, as Moreau also notes, people in every position can make mistakes about what is good (pp. 127, 137). If, as the fourth argument for the duty of equal treatment says, people have reason to treat others as equals even if they do not believe they have that reason, then people can also make mistakes about what is right. Taking something to be good or right does not necessarily make it so.

counter the worry that he misunderstands the commitment to equal treatment. Moreau's worry is that the argument does not acknowledge that "our commitment to treat others as equals is a practical one rather than a theoretical one" (p. 225). But Waldron could acknowledge that the commitment is practical. His quest is for finding the grounds for that normative commitment. This is, after all, the question that Moreau is addressing in this part of the book (i.e., why do we owe equal treatment to people?). Moreau recommends, in her fourth argument, that we give up the search for natural properties lying at the basis of moral status, and instead invoke the moral fact that the life of each person matters, and matters equally. I think, however, that this suggestion is unsatisfactory as it stands. It is unclear what saying that every person has equal moral worth adds to the thought that every person is owed equal treatment. What is the difference between having equal moral worth and being owed equal (favourable, i.e., respectful, concerned) treatment? It is not clear that we get here a normative explanation of why all human individuals are owed equal treatment. And even if there is an explanatory step taken, a similar question recurs regarding the fact of moral equality. Why do all persons have equal moral worth? Waldron's inquiry about persons' properties at least tries to answer this question, which is left unaddressed by Moreau's fourth argument. We seem, then, to be faced with a dilemma. We can either provide an account that answers the explanatory questions but risks being unduly exclusionary, or we can offer an account that is inclusive of all persons but is not really, or sufficiently, explanatory. The options are underwhelming.

I would like to suggest an alternative that escapes this dilemma. It involves two modifications to the third argument as canvassed in the book. The first modification is that although the new argument talks about natural properties of individuals, it does so through conditional claims of the form "If an individual has natural properties $P_1 \dots P_n$, then that individual has a positive moral status, which is equal to that of every other individual with these properties." This claim is not simply an empirical report of the properties of individuals. It is, instead, a normative claim stating a moral standing for the individuals who have certain properties. The claim is also not a statement of a logical implication, but a substantive claim. So, no naturalistic fallacy is incurred here. The second modification is to construe the list of properties $P_1 \dots P_n$ evaluatively and broadly. The items in the list would be valuable properties such as capacities for prudential and moral reasoning, sentience, cooperation, and the like, not neutral or potentially problematic features such as colour of eyes or the capacity for cruelty. Furthermore, the list of features could be expansive and disjunctive, and in this way capture the standing of persons with diverse profiles of capacities. This modified version of the argument would be explanatory by saying something about what gives rise to people's moral status as entities that are owed equal (favourable) treatment. And it has resources to respond to the worry of exclusion. In exercises of moral inquiry that search for reflective equilibrium, we could develop a version of it that is all-things-considered satisfactory.⁷

⁷ As a referee for this journal notes, the proposed strategy faces difficult questions of its own. How can we ensure that we have a list that effectively covers all human beings? If one includes sentience, then can we

4. On the Contents of the Duty of Equal Treatment

The foregoing discussion helps me formulate a third challenge to the book's delineation of the contours of the duty of equal treatment. This challenge concerns the question of the *contents* of that duty. How do we determine the respects in which people should be treated as equals? What forms of advantage and disadvantage should be tracked? Why is it so important to consider relative disadvantages regarding social subordination, deliberative freedom, and basic goods, and which instances of them rise to the level of morally obligatory responses? These are difficult issues for any egalitarian theory. But I worry that if EPTWD is only grounded on the bare assertion of equal moral worth of all persons, it provides insufficient resources to tackle them. A moral defence of equal treatment of the kind suggested at the end of the previous section would offer further clues. The strategy would be to focus on the features of people that give rise to their standing as moral equals, and consider various predicaments they face, in which the maintenance, development, and exercise of their valuable capacities is socially threatened or could be socially protected or facilitated, and then formulate equal rights to specific forms of social support. The correlative duties would include feasible institutional and individual acts and policies through which the duty-bearers provide this support (and this in ways that are reasonable, i.e., do not unduly threaten the maintenance, development, or exercise of the valuable capacities of the duty-bearers themselves). Discrimination would be wrongful when the unequal treatment it involves disadvantages some people regarding the objects of these rights. A weaker version of this strategy would be to say that these cases of discrimination are especially problematic, and should be seen as matters of greater moral priority in institutional and personal deliberation.

In both forms, this strategy would add a moral layer of reasoning to the theory of wrongful discrimination, allowing us, for example, to critically appraise conventional and subjective pronouncements about what forms of subordination, deliberative freedom, and basic goods should be on our normative radars. Notice that this strategy can also help address the worry (stated in Section 2) about unduly parochial views of the scope of the duty of equal treatment, as it would, in principle, mandate feasible and reasonable support for all individuals with the relevant valuable capacities, regardless of their geographical location or current social position. It is not that associative facts and roles can play no role in normative explanations. The key point is that any such role would arise downstream from more fundamental considerations, and would have to be defensible by reference to them.⁸

still distinguish between the status of humans and other animals? If not, then is it right to say that discriminating against non-human animals is the same as discriminating against humans? What connects P1, P2, ... Pn (that is, how can we ensure that the list is not just an *ad hoc* collection of properties)? I develop the strategy and tackle these questions in Gilabert (2022, 2023, Chapter 1, *forthcoming*). It is important to note, however, that *any* account that tries to be explanatory besides being inclusive must face questions like these. If Moreau tries to overcome the dilemma between unexplanatory inclusivism and explanatory exclusivism, she would have to tackle them too.

⁸ Worries about speciesism could be addressed too, as non-human animals might have some of the same, or other, valuable capacities that call for favourable treatment.

5. On the Significance of Human Rights

I conclude by registering two qualms about the book's discussion of the relation between EPTWD and *human rights approaches*. The first qualm concerns the articulation of claims against discrimination regarding access to basic goods. The book characterizes these goods as the resources and opportunities to which people need access in a certain social context, to be — and to be seen by others and by themselves as — full and equal participants in their society. When some indigenous communities in Canada are not supported by governmental agencies to have access to safe drinking water while others have it readily available, for example, the members of the former group are denied a basic good. Now, the book says that denial of access to basic goods should not only be seen in terms of the violation of prior moral, human rights to them (pp. 122, 124–125). The latter rights would concern what is necessary for survival. But wrongful discrimination can exist even when the goods denied are not of that kind. I think this is true. But it is important to also say, first, that wrongful discrimination regarding basic goods (in Moreau's sense) that are also necessary for survival should be considered morally worse than discrimination regarding those that are not.⁹ Additionally, and more importantly, human rights doctrine already encodes concerns about full and equal participation in one's society, and it also challenges discrimination regarding access to goods involved in such participation.¹⁰ A more extensive and charitable exploration of human rights discourse than the book provides would have been desirable. It is not clear that the points made by Moreau cannot be made within that discourse as well.

Another example of why a closer engagement of human rights discourse would have been desirable concerns the issue of pluralism. This is my second qualm. Addressing the difficult case of the ban on the practice of “dwarf-tossing” by some municipalities in France, Moreau argues that human rights discourse on the case seems to be too narrowly focused on one particular good, “dignity.” The municipalities invoked that good to say that the practice of dwarf-tossing is degrading, and Manuel Wackenheim also invoked it to say that the practice should be allowed (as it gives people like him, who live with the condition referred to as “dwarfism,” one

⁹ As a referee for this journal points out, Moreau could agree with this point. Moreau writes:

The water crisis does not just deny indigenous peoples something basic to survival, to which they have a human right. In the process, it prevents them from participating fully and as an equal in Canadian society. And it also denies them the ability to be seen as full and equal participants, and to see themselves as such.” (p. 125)

It seems that Moreau could recognize that this case is overdetermined and accept that wrongful discrimination affecting the basic human right to survival is morally worse than other cases. But making the latter point would require further engagement with human rights discourse than the book undertakes, to recognize the combination of reasons flowing from human rights with those flowing from EPTWD.

¹⁰ For an illuminating characterization of various types of human rights, including equality rights, see, e.g., James Nickel (2007, Chapter 6). The International Covenant on Civil and Political Rights makes reference to discrimination in Articles 4.1, 20.2, 24.1, and 26. The International Covenant on Social and Economic, Social and Cultural Rights makes reference to discrimination in Article 2.2, which frames provisions regarding specific rights, including the right to work, which is a key right covered by this Covenant (Articles 6–7). The Convention on the Rights of Persons with Disabilities identifies provisions to block discrimination and facilitate access to work by people with disabilities (e.g., in Articles 4.i, 8.2.iii, 9.1.a, 27).

of the few opportunities of employment available). EPTWD offers instead a broader platform. It unifies discussion about wrongful discrimination under the overarching worry about unequal treatment, but it also identifies a plurality of forms of wrongful discrimination that enables a more fine-grained articulation of the claims at stake in cases like *Manuel Wackenheim v. France*. This case may involve specific claims against unfair social subordination, infringement of the right to deliberative freedom, and denial of access to basic goods. The case remains hard, but looking at this plurality of considerations at least helps address the issues in greater and more illuminating detail than by referring only to the good of “dignity.” The pluralism of EPTWD also enables us to say that, even if all things considered a policy is permissible, an individual may still have residual moral objections. So, perhaps the banning of the dwarf-tossing practice is permissible because, in the circumstances, the consideration regarding the social subordination of people with dwarfism is weightier than that regarding their access to the basic good of employment, but the latter still calls for some response. Something structurally similar would happen if the weighting of the considerations were reversed. The key point is that the pluralism of EPTWD allows for the recognition of conflicts, the need for weighting exercises, and residual attention to a variety of relevant moral considerations. I agree that the pluralism of EPTWD is one of its real strengths. But I think that a defender of human rights discourse could reply that a dignitarian approach can also be unifying and pluralistic in the way Moreau wants. Dignity can first be seen, in a general and fundamental way, as a basic moral status that grounds the totality of human rights.¹¹ It can then be specified in terms of a variety of dignitarian norms that state specific rights, including rights to employment and against various forms of discrimination.¹² The fulfilment of these rights can be in tension in certain circumstances, and the resolution of conflicts can leave remainders calling for further responses.¹³

It appears, then, that the desiderata about unification and pluralism that Moreau rightly aims to serve with EPTWD can also be served by human rights discourse. Moreau could perhaps accept this point and say that her challenge was not to dignitarian approaches to human rights in general, but to specific versions that assume a unitary understanding of dignity. But engaging pluralistic understandings of dignity would make the discussion of human rights approaches fairer and richer.

¹¹ The Preambles of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights assert that human rights “derive from the inherent dignity of the human person.” I explore various dimensions of dignity in human rights discourse in Gilibert (2019).

¹² This point could be strengthened by linking dignitarian human rights discourse to the strategy of justification of equal treatment suggested in Sections 3–4. Article 1 of the Universal Declaration of Human Rights states that “[a]ll human beings are born free and equal in dignity and rights” and “are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” The latter phrase appears to mention some capacities at the basis of dignity. The list can be broadened to render it more inclusive, and provide resources for articulating and defending specific human rights as dignitarian requirements.

¹³ Nickel (2007) provides (in Chapters 3 and 5) illuminating discussions of the possibility of conflict between human rights, and shows (in Chapter 10) how human rights can be specified to protect various minority groups.

Further engagement with human rights discourse might also lead us beyond EPTWD in its current form, and help us develop it to make it better. As I have pointed out in this section, referring to human rights could help in assessing the gravity of different instances of wrongful discrimination and could orient us in capturing a plurality of considerations that bear in cases in which important claims conflict. Additionally, and importantly, keeping human rights firmly in view could help us tackle the worries mentioned in Section 2, and avoid unduly parochial understandings of the scope of the duty of equal consideration. Human rights constitute a universalist moral framework, according to which clearly the life of *every* person matters and matters equally. Domestic and international policies that ignore or downplay the important interests of others — whoever they are and wherever they are — can then rightly be seen as facing a heavy burden of justification.

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