What Is Discrimination and When Is It Morally Wrong?

by Bert Heinrichs

Abstract: In this paper I propose to examine the concept of discrimination from an ethical viewpoint. In a preliminary part, I will point out which aspects of the subject matter I will focus on and which I will leave aside (II). On the basis of the Aristotelian principle "treat like cases alike", I will continue with a very formal definition, according to which discrimination can be understood as acting in a way that implies that like cases are not treated alike. This leads to the difficult question of which cases are to be considered as "alike", or which traits can serve as morally valid reasons for identifying cases as "unlike" (III). I will argue that this question cannot be answered independently from the specific circumstances and the normative premises referred to for describing these circumstances. My conclusion is that the concept of discrimination derives its "moral strength" solely from these normative premises. As a consequence, the use of the concept of discrimination can often be misleading since it falsely presupposes that there is agreement about the underlying normative premises (IV). Finally, I will illustrate the argumentation using "genetic discrimination" in connection with insurance contracts as an example (V).

Keywords: Discrimination, principle of relevance, health insurance, predictive genetic tests.

I.   Introduction

Once a morally neutral term, "discrimination" has in recent decades "become identified with a specific way of distinguishing between people, and its negative valence has become dominant."[1] The term is widely used to criticize actions that disadvantage people or groups of people because of certain traits such as sex, race, ethnicity, religious beliefs, but also disability, weight, age or genetic constitution. At first sight, "discrimination" may seem to be a clear ethical concept. Almost everyone agrees that treating women or blacks less favorably than men or whites just because they are women or blacks is morally wrong.

However, in a detailed article published in 1992, Larry Alexander argues that answering the question, "What explains and justifies the distinction we make between discrimination that is wrongful and discrimination that is not?", is "much more dif-

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[1]   WASSERMAN 1998, 805; cf. *The Oxford English Dictionary*, Vol. IV, 758.

ficult than most people assume."[2] Unfortunately, his finding that "there are no good systematic treatments of the morality of discrimination"[3] is, to a large extent, still true. Most authors dealing with "discrimination" focus either on special forms of discrimination, e.g. weight discrimination[4], age discrimination[5] or genetic discrimination[6] or discuss methods of reducing the unwanted effects of discrimination, especially "affirmative action"[7], taking for granted that there is general agreement as to *what discrimination is and why it is morally wrong*.[8] And even the few attempts that have been made to provide a broader ethical analysis of what "discrimination" is and why it is morally wrong are often only of limited systematic value. A case in point is James W. Nickel who states in his article in the *Routledge Encyclopedia of Philosophy*: "Discrimination is morally wrong because its premise that one group is less worthy than another is insulting to its victims, because it harms its victims by reducing their self-esteem and opportunities, and because it is unfair."[9] This analysis is too simplistic: On the basis of an ordinary understanding of the concept, not every discriminatory act rests on the premise that one group is less *worthy* than another. Frequently, the concept of discrimination just suggests that some people are treated less favorably than others in specific circumstances which does not necessarily mean that they are supposed to be generally inferior or less worthy. Even if an act through which people are treated differently has harmful effects on some of them and reduces their self-esteem and opportunities, it seems rather unclear that this implies that all such acts are unfair and morally wrong. That is to say, it is rather unclear if every way of distinguishing between people is a morally wrongful form of discrimination.

Consider the following example: An employer rejects applicant A for a job because he does not have the necessary qualifications. This decision may harm the rejected person and reduce his self-esteem and opportunities. Nevertheless, the decision normally does not count as a form of (wrongful) discrimination. Let us

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[2]   ALEXANDER 1992, 151.

[3]   Ibid., 154.

[4]   Cf. e.g. ROEHLING 2002.

[5]   Analogously to "sexism" and "racism" the term "ageism" has been coined, which "may be defined as wrongful or unjustifiable adverse discrimination on the grounds of age." (LESSER 1998, 87). "Age discrimination" has recently become most relevant in connection with the allocation of resources in the health care sector; cf. e.g. LESSER 1999.

[6]   Cf. infra Section V.

[7]   Cf. e.g. DWORKIN 2002, especially Chap. 11 ("Affirmative Action: Does It Work?") and Chap. 12 ("Affirmative Action: Is It Fair?").

[8]   One exception worth mentioning is HALLDENIUS 2005: She thoroughly criticizes what she calls "the Standard View on discrimination". Thereto she suggests a total of six requirements that an appropriate account of discrimination must satisfy and shows in some detail how common understandings of discrimination fail to meet these requirements. Cf. also HALLDENIUS 2007 where she tries to develop an alternative view of discrimination based on the concept of dominance relations.

[9]   NICKEL 1998, 103.

assume now that A has the necessary qualifications and they are on the same level as those of another applicant B. If A is rejected just because the employer likes B's hair style better, A may think that the decision is unfair. But still, most people would not regard it as a form of (wrongful) discrimination. However, the situation might be judged differently if A is black and B white or if A is a woman and B a man. In that case, many people would say the employer discriminated against A (in a morally wrongful way).[10]

The above example shows that with respect to some traits, e.g. sex or race, we are quite sure that they *should not be taken into account to differentiate between people* – at least in most circumstances. If someone does so, we consider this a form of morally wrongful discrimination. Other traits are intuitively less suspicious, e.g. qualification. Finally, there is a lot of controversy about the question whether it is morally legitimate to distinguish between people on the basis of traits such as age (especially with regard to the allocation of resource in the health care sector) or genetic constitution (especially with regard to insurance contracts).

II. Preliminary remarks

1. Discrimination and rights

Many authors discuss the concept of discrimination in the context of *rights*, which raises the question which forms of discrimination can be *legally prohibited* in a liberal state.[11] Even if there is agreement about the moral wrongfulness of an act this does not at once imply that it has to be prohibited by law. On the contrary, there are persuasive arguments that – to a certain degree – one should have the freedom and the right to act morally wrongfully. Nevertheless, this does not mean that the wrongfulness of such acts is irrelevant. It is one thing to clarify *what we should do*, quite another thing what we can legally *force others to do* – yet both are equally important. The following is dealing with the question which acts – if any – are morally wrong without regard to the question which of the morally wrong acts should at the same time be *legally prohibited*. However, most of the examples are taken from the field of eco-

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[10] For the sake of simplicity, here and in the following I consider cases of rather simple organizational structures such as small private enterprises owned and managed by one person. In reality things are often much more complex and it can be quite difficult to identify reasons for (wrongful) discrimination. It might, for example, be that institutional rules lead to discrimination and that the acting persons are almost unblamable.

[11] Cf. e.g. GREENAWALT 1992, especially Chap. 7 ("Fairness in Classification"). Although Alexander does not primarily focus in his article on the question of legal prohibition of discriminatory acts, he discusses this aspect in some detail; cf. ALEXANDER 1992, 201-208.

nomics where legal enforcement may be more persuasive than elsewhere (e.g. personal relations).[12]

2.   Discrimination and consequences

I will also, at least as far as possible, exclude aspects of consequences and costs for society. It might be that we think an action is a form of (wrongful) discrimination just because of its undesired effects, although the act itself seems to be morally neutral. Ezorsky, for example, distinguishes between two concepts of discrimination, "overt discrimination" (exemplified by what is traditionally called racism or sexism) and "institutional discrimination". According to her, the second concept "is exemplified when an organization (e.g. a business firm) uses an intrinsically *bias-free* selection procedure that has disproportional adverse impact on minorities or women."[13] She continues: "While these practices could exist in an entirely bias-free world, they are linked in our society to past, present, and future overt discrimination."[14] I do agree with Ezorsky. However, the ethical analysis is designed to examine the acts themselves and the question if they have to be considered morally wrong in general, without taking into account the link to past wrongs and future effects. Additionally, this approach provides a broader basis for the analysis so that the specific conditions and traditions of a given country can be ignored.

Consequentialists, of course, will not agree on this point since they claim the wrongfulness of an act solely depends on its bad consequences. Yet, from a purely consequentialist viewpoint the concept of discrimination seems to be problematic, anyway. If an act is morally wrong just because of its consequences, any form of distinguishing between people can be morally right. As long as the (overall) consequences of an act are positive, the act is morally right or perhaps even mandatory. Consider the following case: An employer rejects an applicant A although his qualifications are adequate, just because of his religious beliefs. According to the ordinary understanding of the concept one would say the employer discriminates against A. Assume now that the reason why the employer rejects A is that he considers it to be likely that all future colleagues of A are not going to get along well with A because of their prejudice against the religious community A is a member of. Depending on what one considers to be the relevant scale (e.g. utility, preferences) in this scenario, one could argue that the employer's decision not to hire A is morally defensible. Since all future colleagues of A want him not to be hired and only A is interested in

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[12]   On libertarian grounds one might object to this, arguing that the private sector should be free of any such regulations. For this problem cf. infra Section IV.

[13]   EZORSKY 1992, 264.

[14]   Ibid. In fact, some hold that the opposite is also possible: A morally wrongful act of discrimination becomes permissible because of past wrongs. This is the main argument for "affirmative actions" or quotas.

being hired, the positive consequences can outweigh the negative ones. Of course, the example is based on the fact that all of A's colleagues-to-be have certain prejudices, and having these prejudices might be morally wrong. Nevertheless, from a purely consequentialist viewpoint the employer's decision is not morally wrong. But, according to the ordinary understanding of the concept of discrimination – and contrary to fundamental assumptions of consequentialism – actions that disadvantage people or groups of people because of certain traits are morally wrong *regardless of the consequences.*

3.   Direct discrimination and proxy discrimination

Some authors distinguish between discrimination that refers directly to certain traits of a person and "proxy discrimination" where one trait serves as a proxy for another trait. An employer might, for example, refuse to hire women not because he does not like women or he thinks women are generally inferior to men, but because he wants to avoid extra costs caused by pregnancies. For the employer, the trait "being a woman" serves as a proxy for "causing higher costs by pregnancies". The basis for this are significant correlations between "being a woman", "becoming pregnant" and "causing extra costs". In doing so, the employer does not act irrationally. Moreover, Alexander is right when he says: "We could not function without proxies and the stereotypes on which they are based."[15] The correlation between the trait and the proxy trait can be of at least two different kinds.[16] Either a (statistical) "law of nature" or a (statistical) "psycho-sociological law of human personality and culture" can serve as rationale. Obviously, though not generally irrational, the use of proxy traits causes special problems that "direct" forms of discrimination, i.e. referring to traits instead of proxy traits, do not bring about. First of all, the assumed correlation can simply not exist. Then the decision is based on a factual error. Or, it is possible that the correlation applies only with a significant probability (< 1). The individual in question may fall into the "class of exceptions", i.e. not follow the majority of cases. It might very well be that the woman mentioned in the example does not want to become pregnant or even cannot become pregnant for biological reasons. Not to hire her can be seen as a form of "guilt by association".[17] These and some other problems may suggest treating direct discrimination and proxy discrimination as different. This is especially true if one approaches the problems associated with the concept of discrimination from a preference perspective.[18] In the following I

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[15] ALEXANDER 1992, 167.

[16] Cf. ibid., 168 f.

[17] Ibid., 171.

[18] Cf. Alexander who gives a "taxonomy of various discriminatory preferences" (ibid., 190) on the basis of which he tries to identify what distinguishes wrongful discrimination from permissible forms; cf. ibid., 151-154.

shall rather focus on the traits themselves or, more precisely, on the question which traits can serve as morally valid reasons for treating people differently. Starting with the preferences of *the one who discriminates against someone else,* it appears more important to analyze the rationality of these preferences. For that reason the special problems due to proxy discrimination are more relevant in such an approach. Starting with the traits of *the one who might be the victim of discriminatory acts* leads to a slightly different perspective which makes it permissible to assume that the traits in question are always "real" traits and not proxy traits. It might thus be necessary to "trace back" to the "real" trait which lies behind a proxy trait. The fact that a person might have this trait only with a certain probability can be ignored.

III. "Like" and "unlike" cases

From an ethical perspective the central question with respect to the concept of discrimination is whether having a trait x is a morally valid reason for treating two persons A and B differently or not. A first, quite provisional answer could be based on a thesis advanced by Aristotle. He states in Book V of the *Nicomachean Ethics*:

> "The just, therefore, involves at least four terms; for the persons for whom it is in fact just are two, and the things in which it is manifested, the objects distributed, are two. And the same equality will exist between the persons and between the things concerned; for as the latter – the things concerned – are related, so are the former; *if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints – when either equals have and are awarded unequal shares, or unequals equal shares.*"[19]

The underlying ethical principle can be stated as follows: It is morally mandatory to treat like cases alike and unlike cases unlike. Presumably, almost everyone can agree on this principle: If "equals" or "like cases" are treated "alike", then they have and are awarded "equal shares" and there is no reason for "quarrels". Now, it seems that all forms of discrimination can be subsumed under this very principle: *When someone discriminates against person A he treats her differently than another person B although he should not do so because they are not different.*

Unfortunately, the Aristotelian principle does not help very much to clarify the concept of discrimination any further, because it offers no criterion for deciding which cases are "alike" and which are "unlike". Or, to put it differently, even on the (plausible) assumption that the Aristotelian principle is generally accepted, the ques-

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[19] ARISTOTLE, *Ethica Nicomachea*, 1131a 18-25 (emphasis added).

tion remains unanswered which traits can serve *as morally valid reasons* for identifying cases as "unlike".

According to a fundamental rule taken from the theory of judgment three answers are possible:

(a) *All* personal traits can serve as morally valid reasons to treat persons differently.

(b) *No* personal traits can serve as morally valid reasons to treat persons differently.

(c) *Some* personal traits can serve as morally valid reasons to treat persons differently.

For the sake of completeness all three possibilities shall be briefly addressed:

Answer (a) simply denies the possibility of (wrongful) discrimination in general. If *all traits* can serve as morally valid reasons to treat persons differently, two persons are "alike" if and only if they share *exactly* the same traits. Consequently, whenever someone treats two persons A and B differently, he is justified in doing so, because he can always find a trait that person A has and person B does not have.[20] Even if one agrees that the Aristotelian principle is correct, answer (a) renders it irrelevant, since the set of "alike" cases is empty and as a result the concept of discrimination would be empty, too. Thus, answer (a) is logically possible, but highly contra-intuitive.

In contrast, answer (b) implies an extreme form of egalitarianism. If *no trait* can serve as a morally valid reason to treat persons differently, all humans are considered to be "alike" regardless of their individual sets of traits. While we may argue that this is correct in very few areas (e.g. with respect to fundamental rights[21]), this position is highly implausible in relation to *all* possible fields of action. It is absurd to think that we have to treat *all persons at any time equally*, i.e. as "alike" cases. Thus, answer (b) is, as the previous one, logically possible, but also highly contra-intuitive.

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[20] This is obviously true, since "being person A" is a trait that person B does not have by definition.

[21] That is to say, the trait "being human" is most fundamental for having rights. With respect to this trait all humans are by definition "alike". At the same time, many authors consider this trait to be a sufficient ground for claiming that all human beings share the same basic rights, i.e. must be treated "alike" when it comes to granting fundamental rights. Some object to this. Peter Singer, for example, argues that only the trait "being a person" is such a sufficient ground. But, according to Singer, neither are all persons human beings nor are all human beings persons. Not to distinguish between the two traits is a special form of discrimination, which Singer calls "speciesism"; cf. SINGER 1993, especially 55-62 and 86-88. Halldenius, in contrast, argues that in the context of human rights the concept of discrimination tends to be redundant since prohibiting discrimination in this general sense only means that one may not violate one's human rights which is already implied in the idea of human rights; cf. HALLDENIUS 2005, 456.

The remaining answer (c) seems to cover our ordinary understanding of discrimination much better. Some traits can serve as morally valid reasons for treating persons differently (e.g. qualification) while others may not (e.g. sex or race). Unfortunately, answer (c) still does not help very much to clarify the concept of discrimination. Because even if it is agreed that the Aristotelian principle is correct and that only some traits can serve as morally valid reasons to distinguish between "alike" cases and "unlike" cases, we are still lacking a criterion to identify those traits. The troublesome task is now to identify *which* traits belong to the first category (i.e. those traits that may serve as morally valid reasons for differentiation) and which to the second.

Probably, the easiest way to establish a criterion would be to identify a fixed list of traits. In order to decide whether an act is a (wrongful) form of discrimination or not it would suffice to see whether it refers to a trait which is listed or not. The "anti-discrimination principle" suggested by Nickel is essentially based on this idea. He states:

> "The moral norm that makes discrimination wrong can be formulated as follows: *The anti-discrimination principle*. When distributing educational opportunities and jobs [*list of items*], never exclude whole groups of persons or choose one person over another on grounds of [...] ethnicity, religion, or race [*list of excluded characteristics*] unless the use of these characteristics in particular circumstances is demonstrably legitimate and important."[22]

Nickel admits that the "formulation of the anti-discrimination principle [...] is too narrow. The two bracketed clauses [...] mark slots that need to be filled in more adequately."[23] How could that be done? Nickel continues: "The list of excluded characteristics could be expanded beyond race, ethnicity and sex to include national origin, political beliefs, being a non-citizen, sexual orientation, income and age."[24] It is true that by expanding the "list of excluded characteristics" the anti-discrimination principle becomes less narrow. However, the important question is: Which "characteristics" can be included on the list, and, moreover, why these and not others? Unfortunately, Nickel does not give any reasons why he included *these* traits and left others aside, e.g. genetic constitution or disability.[25] Yet, at least three criteria seem to be

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[22]   NICKEL 1998, 103.
[23]   Ibid., 104.
[24]   Ibid.
[25]   In fact, Nickel writes: "It is sometimes suggested that an anti-discrimination principle should exclude reliance on characteristics that are 'irrelevant' or 'arbitrary'." (Ibid.). But he does not apply this to the characteristics on the list he suggests. I shall discuss the criterion of "relevance" in more detail in Section IV below.

defensible here, (1) fault, (2) immutability, and (3) special relevance for personal identity.[26]

(1) *Traits through no fault of one's own:* If we take a closer look at the traits which normally occur in the context of discrimination, it is remarkable that many of them are "through no fault of one's own". Especially race and sex fall within this category, but age and genetic constitution as well.[27] There is a strong case particularly for including such traits on a list as mentioned above. It may seem *unfair* that person A is treated differently than person B, just because of a trait A is not responsible for having. Intuitively, one may think of A being punished for something he is not responsible for. This aspect supports the idea that such traits should not be considered when distinguishing between people.

(2) *Immutable traits:* Closely related to "fault" is the aspect of "immutability". Many of those traits that are "immutable" are at the same time traits "through no fault of one's own". However, there are some cases in which a person is responsible for having a trait, but once occurred, this trait is "immutable" (e.g. disabilities caused by accidents for which people are themselves to blame). Again, it may seem *unfair* if person A has such a trait and is therefore treated differently than person B without that trait. Because even if A spends much effort on being "like" B, by definition she can not become "alike". This aspect of "inability" also supports the idea that such traits should not be considered when distinguishing between people.

(3) *Traits with special relevance for personal identity:* Finally, those traits may be put on a "list of excluded characteristics" which have a special relevance for personal identity. Religious and political beliefs, for example, are neither "through no fault of one's own" nor "immutable" (in a strict sense). Nevertheless, it seems to be problematic to treat persons differently on the basis of such traits. One may argue that the importance of these traits for personal identity should make them "untouchable". A certain set of "core traits" should be beyond access of others, especially while considering whether two persons are "alike".

All traits listed by Nickel, probably except for "income", might be justified by one or more of the above mentioned arguments: At least race, ethnicity and sex are covered by all three; age is certainly "immutable"; religion, political beliefs and sexual orientation are for most people central to their personal identity; national origin and being a non-citizen is in many cases both "through no fault of one's own" and "immutable" and sometimes even central to personal identity. At the same time, some traits which are not covered by any of these arguments seem to be truly valid reasons for treating persons differently, e.g. qualification. However, even if all three criteria can be used for the exclusion of certain traits while considering whether two persons are "alike" and thus should be treated "alike", it is rather dubious whether the traits mentioned *must not be considered under any circumstances.*

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[26] A slightly different set is put forward by WASSERMAN 1998, 807.

[27] For the sake of argument sex change by surgical interventions as well as modifications of the genetic constitution by means of gene transfer shall be ignored.

IV. Relevance and circumstances

Consider the following three examples:

(1) A manufacturer of bikini wear is looking for models to present his new collection. Applicant A is rejected because he is male. Presumably, no one would say that the manufacturer discriminated against A, although "sex" is one of the traits on the list. Most probably, one would argue that "being female" is a core qualification for this job and thus not hiring applicant A is legitimate.

(2) A small internet start-up is looking for a new web designer. Applicant B is rejected because she is a young female who just married. In this case many would say that the employer discriminates against B, pointing out to the fact that "sex" is a trait on the list. The employer might reason that the likelihood of B getting pregnant is relatively high. Due to the fact that the company is a small start-up "not to cause extra costs e.g. by pregnancies" is a core qualification, too.

(3) A transport business is looking for a new truck driver. Applicant C is turned down because he is a Protestant. Again, many would say that the employer discriminates against C, referring to the fact that "religious beliefs" is a trait on the list. The employer argues that he simply hates Protestants and, therefore, does not want any of them to work for him.

The three examples show that a fixed list of traits is too inflexible as a criterion to decide which traits are morally valid reasons for treating different persons differently. While it is plausible to argue that in many circumstances the listed traits should not be considered, it is most obviously necessary to do so in some circumstances. Nickel's principle of anti-discrimination takes this into account by including the proviso, "unless the use of these characteristics *in particular circumstances* is demonstrably legitimate and important."[28] Yet, this leads to another question: Under which conditions is the use of certain traits "legitimate and important"? Frequently, the answer is that the trait in question has to be "relevant" for the given circumstances. In example (1) the trait "being female" is unquestionably relevant, in example (3), however, the trait "being Protestant" is not. Hence, instead of trying to identify a fixed list of traits it might be more appropriate to refer to the "principle of relevance" as a criterion for the moral validity of a specific trait.

Two components would then be central to the concept of discrimination: (a) the Aristotelian principle "treat like cases alike"; and (b) the principle of relevance according to which a certain trait is a morally valid reason to treat persons differently if and only if the trait in question is relevant to the given circumstances. Or, to put it differently: two persons A and B are to be considered "alike" and thus to be treated "alike" if and only if they share all traits *relevant to the given situation.*

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[28]   NICKEL 1998, 103 (emphasis added).

The reader may have noticed that an analysis of example (2) is still missing. In fact, it is difficult to say whether the trait of applicant B, "being a woman", is relevant to the given circumstance. Some may tend to agree with the owner of the start-up while others would claim that the employer is acting in a morally wrongful way. What is most troublesome, the explanation of discrimination given above cannot help to decide which of the two parties is right in this controversy. Both, those who are in favor of the employer's decision and those who are against it, can agree on the Aristotelian principle "like cases should be treated alike", and they can also agree on the central role of the principle of relevance. However, they do disagree on the specific relevance of the "potential of extra costs caused by pregnancies for a small start-up". Those who join the employer's line of argumentation may emphasize that the potential extra costs could ruin the entire business and thus cannot be regarded as "irrelevant". On the other hand, those who think the female applicant should not be rejected may stress that in a modern social market economy men and women should be treated equally when it comes to the filling of a post. The essential question is therefore: What is a "relevant trait" *in a particular situation?*

At first sight, the meaning of the term "relevant trait" seems rather clear. In many cases, as in the above mentioned example (1), it is beyond doubt that a trait is relevant. Moreover, the "relevance" of the trait in question seems to be determined in an *objective manner* through the circumstance. E.g. bikini wear is made for women only; thus, a model which is expected to present bikini wear has to be female, too. If the male applicant would object that he can present the bikini wear as well as a female model, it seems appropriate to reply that this is simply not true. On the contrary, in example (3) the Protestant truck driver might argue that he can drive a truck as well as e.g. a Catholic, a Jew or a Muslim. The essential point here is that there is no *factual link* between "driving a truck" and "religious beliefs", while between "modeling for bikini wear" and "being a female" there is such a link.

Now assume that the owner of the transport business announces the following job vacancy: "Looking for non-Protestant truck driver!" Still, the Protestant truck driver might object that he can drive a truck as well as a non-Protestant one. However, now there is a link between the qualification asked for and the trait "religious belief". The owner of the transport business is in a way right when he argues that according to *his* job advertisement, "not being a Protestant" is a *relevant trait.* The same is true of example (2) from above. The owner of the small internet start-up just would have to declare: "Looking for a *male* web designer!"

If this line of argumentation is correct, then the relevance of a certain trait with respect to given circumstances depends heavily on *the deliberate specification of parameters.*[29] Or, to put it more pointedly, whether a trait is relevant or not depends profoundly on whether someone *claims it to be relevant.* Of course, many will object that certain claims are rational while others are not and that *being claimed by someone to be relevant is not equivalent to being relevant.* The owner of the transport business might be

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[29] Cf. NARVESON 2001, 316-318.

charged with being irrational – but does this really imply that asking for a non-Protestant is a form of (wrongful) discrimination? Furthermore, example (2) proves that "relevance" is not solely a question of rationality. The argument provided by the owner of the internet start-up is thoroughly rational.[30] Nevertheless, according to an ordinary understanding of discrimination rejecting a female applicant on the basis of her sex is a form of (wrongful) discrimination. To be sure, "relevance" and "rationality" are closely linked. But, in the context of discrimination, "rationality" alone seems to be insufficient in order to decide whether a certain trait is relevant or not. In many contexts one may consent that it is not entirely "irrational" to consider a certain trait to be relevant. Still, one may think that this particular trait cannot serve as a morally valid reason to treat persons differently. Rather than asking *what is relevant*, the essential point seems to be *what should be relevant*.

At this point, one question appears to be crucial: Are there more general considerations which have to be taken into account in order to decide what is relevant in given circumstances? The three examples discussed above are taken from the sphere of economics. However, there are fundamentally different ways of constructing this sphere, ranging from strong libertarianism to socialism or communism. Each of these "background theories" includes various *normative premises*. It is most obvious that the question what *may be considered to be relevant depends profoundly on these normative premises*. In a libertarian system interventions and regulations by the state are strictly limited, whereas in a socialist or communist system the freedom of entrepreneurship is highly restricted by other principles. Without commenting on which system is the more appropriate one, it is beyond doubt that those normative premises affect the question *what is of relevance in given circumstances*. In a libertarian system the owner of the internet start-up and even the owner of the transport business is justified in rejecting the applicant. In a social market economy they may be not, since in the latter not only the "free market principle" is considered to be relevant, but also several "social principles". In a libertarian system the employer has *the moral authority to decide what is relevant*, whereas in a social market economy society as a whole agrees on certain principles that limit this kind of authority of the individual.[31]

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[30] Cf. Greely who acknowledges that an "insurer or employer might well *rationally* decide to discriminate against those people [i.e. people who carry inherited genetic variations that put them at high risk for serious illness, B.H.] if they receive their health insurance or are in an employment market in which such discrimination is even possible." (GREELY 2001, 1500; emphasis added).

[31] In his analysis "On Discrimination in Hiring" Narveson distinguishes between the "private" and the "public" sector, because *different premises* are relevant for either of the two. However, supporting a libertarian theory he argues: "It is of the essence in that sector [i.e. the private sector, B.H.] that freedom, as much as possible, should reign. And of course the very existence of the public sector is problematic from the point of view we are considering." (NARVESON 2001, 319). Consequently, he considers the concept of discrimination to be problematic (cf. ibid., 320). In contrast, Halldenius states: "Because

An objection might be made here: Contrary to the preliminary remarks[32], it may seem as if – according to the normative premises of libertarianism – the employer has the *right* to act in such a way. Nevertheless, one might argue that it is *morally objectionable*. However, the normative premises that govern libertarianism (and, at least to a certain degree, any other system) do not only lay down what is *legally permitted*, but also – sometimes in a rather implicit way – what is *morally right*. Strict libertarians, for example, do not only claim that legal interventions should be limited to a minimum, but also claim that anybody is *morally justified* to do whatever he wants as long as he does not violate the freedom of somebody else.

What has been demonstrated in the previous paragraphs is not limited to the economic sphere, but is applicable to any context where the concept of discrimination can play a role. What is *relevant in given circumstances* relies to a large extent on the *normative premises* referred to *for describing these circumstances* or the *framing of the larger system* which a *concrete state of affairs* is part of.[33] The crucial point is that, from this point of view, the *concept of discrimination in itself is rather descriptive than prescriptive*. It derives its "moral strength" from the underlying normative premises. To say "someone discriminates against person A" is to say he treats person A "unlike" another person B although A and B are "alike", i.e. they share all traits, which, *according to the underlying normative premises, should be considered*.[34] Yet, the concept of discrimination is often used to criticize actions that disadvantage people or groups of people because of certain traits *although there is no agreement on the normative premises referred to*. In such instances, the proponent who disqualifies a certain action by arguing that it is a form of (wrongful) discrimination falsely presupposes that the opponent has to agree on that. In fact, what matters is *which* normative premises are

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discrimination applies only where fairness applies, it is possible to argue against regulation on the libertarian grounds that private companies are not constrained by considerations of fairness. If so, one would, of course, have to argue against all discrimination laws that apply outside of the narrow sector that libertarianism recognizes as public." (HALLDENIUS 2005, 462, Note 10).

[32] Cf. supra Section II.1.

[33] Some further remarks might be useful to clarify this important point: If somebody is in favor of a weird "theory" according to which the worth of a person depends on the color of his eyes, he might consider this trait as relevant with respect to the question whether he should accept someone as a squash partner or not. If he refuses to play squash with a blue-eyed person just because he is blue-eyed, almost everyone will agree that this is a form of morally wrongful (though not legally prohibited) discrimination. Indeed, the agreement is based on the fact that his "theory" and its normative premises are wrong. As long as we do accept the background theory, the eye color is a relevant trait. But we *need not accept* this theory.

[34] As noted above (Note 21), Halldenius argues that in the context of human rights the concept of discrimination is redundant. To me, it seems that once the normative premises are set the concept of discrimination is *always* redundant. If, however, these premises are not set, the concept of discrimination is empty.

more appropriate in the actual circumstances. But in order to defend the one or other set of such normative premises *further arguments* are required.

The necessity to provide further arguments is sometimes difficult to realize, particularly for two reasons: First, the question what is a "relevant trait" implies an alleged (morally neutral) "objectiveness". It can easily be overlooked that in many cases also normative premises are needed in order to determine what is "relevant". Second, even if there is agreement that in a particular "subsystem" (e.g. the political sphere) a certain trait cannot serve as a morally valid reason to treat persons differently because of the underlying normative premises, that is to say, the trait is not "relevant" in this subsystem, it is likely that there is no agreement on that as for another subsystem (e.g. the economic sphere). Yet, the fact that the trait in question is not relevant in a particular subsystem is easily expanded to other subsystems without making explicit that further arguments are needed to justify such an expansion.

V.   Example: genetic discrimination

In this final section I want to illustrate briefly the foregoing argumentation using a current and controversially discussed topic: the use of predictive genetic tests in connection with health insurance policies.

In recent years the development of genetic tests has made significant progress. Such tests can be used to predict the outbreak of certain monogenetic diseases such as Chorea Huntington long before they become manifest, or an increased risk for diseases such as (the hereditary form of) breast cancer.[35] There is an ongoing controversy whether it should be permitted for private health and life insurance companies to require an applicant to carry out such tests in the run-up to the conclusion of a contract.[36] Some authors argue, if applicants have to pay higher premiums or are even rejected because of their "bad genes", this must count as "genetic discrimination".[37] Thus, they demand to prohibit the use of predictive genetic tests in connection with insurance contracts. Others, however, including representatives of private

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[35]   The *National Institutes of Health (NIH)* fund a website that provides comprehensive and up-to-date information on genetic tests; cf. http://www.gentests.org (accessed: June 2007); for Germany information can be obtained from the website http://www.hgqn. org (accessed: June 2007), hosted by the *Berufsverband Deutscher Humangenetiker e.V. (BVDH)*.

[36]   For references cf. NATIONAL REFERENCE CENTER FOR BIOETHICS LITERATURE, *Scope Note 22: Genetic Testing and Genetic Screening*, http://www.georgetown.edu/research/ nrcbl/publications/scopenotes/sn22.htm; (accessed: June 2007), especially Part 2, "Privacy/Discrimination", and Part 3, "Insurance".

[37]   Cf. e.g. GREELY 2001; GELLER 2002; LAUNIS 2003; REHMANN-SUTTER 2005.

insurance companies, maintain that using genetic tests is just another method of calculating fair premiums.[38] Persons with a significantly higher risk to fall ill with a severe disease are at the same time more likely to cause higher costs. They, consequently, have to pay a higher premium.

Against the background of the foregoing argumentation it is clear that the question whether "bad genes" have to be considered as a morally valid reason for treating people differently, i.e. to assign their carriers to different premium categories, cannot be decided without referring to more general considerations about the life and health insurance sector as a whole. It is not sufficient to claim that insurers will discriminate against people with "bad genes" if they request higher premiums from them or even reject them. The crucial question is rather: which normative principles should govern the health insurance sector?

Roughly speaking, two fundamentally different viewpoints are possible: (1) The health insurance sector as an ordinary kind of private enterprise is part of the free market economy. (2) Due to the enormous significance of health insurance for the individual in modern societies this sector cannot be an ordinary kind of private business. Proponents of (2) claim that not, or, at least, not only the "free market principle" should govern the health insurance business, but that rather the "principle of solidarity"[39] is relevant in this context: Insurance must then be offered to everyone at the same price, and those who do not need medical services finance, with their premiums, also the treatment of those who need more than is covered by their premiums. On the basis of the principle of solidarity, asking for predictive genetic tests to calculate the individual risk of an applicant can justly be considered as a form of (wrongful) discrimination.[40] For if solidarity is the fundamental prin-

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[38] In view of life insurances Nowlan, for example, has argued: "As long as purchasing life insurances is a matter of personal choice, fairness dictates that insurers classify risk properly and charge accordingly." (NOWLAN 2002, 195). At the same time he points out that the threat of genetic discrimination seems at present "largely theoretical"; according to him, the *American Society of Human Genetics* reported that they had been unable to identify any case of discrimination by health insurers. This corresponds with information provided by GREELY 2001, 1489. Geller, however, states: "It is now generally accepted that genetic discrimination occurs." (GELLER 2002, 268). Given that there are only few empirical studies on genetic discrimination she calls for more research in this area; cf. ibid., 281 f. For Germany, the association of insurance companies *(Gesamtverband der Deutschen Versicherungswirtschaft e.V. (GDV))* has in 2001 agreed on a self-commitment not to ask for predictive genetic tests as a precondition for insurance contracts except for very high insurances.

[39] Cf. LAUNIS 2003, especially 92-96.

[40] The prohibition set by the principle of solidarity is, of course, not limited to the use of genetic tests. In this perspective also other individual traits that might be relevant for the individual risk such as sex, age or ethnicity must not be taken into account for the calculation of insurance premiums. However, Deborah Hellmann has suggested that "genetic discrimination may be meaningfully different (and worse) than health status

ciple of health insurance, then "having bad genes" is not a relevant trait. Conversely, proponents of (1) argue that the "free market principle" as well as the goal to make profit are fundamental for health insurance companies. Hence, it is legitimate that the insurers try to calculate the individual risk and the costs to be expected as accurately as possible. If an applicant has a significantly higher risk to fall ill with a severe disease, he has to pay higher premiums or will be rejected. From this perspective, it is beyond doubt that both, manifest diseases as well as higher risks to fall ill in the future, are highly relevant traits. So, it is not a form of (wrongful) discrimination to take these traits into account. Finally, if predictive genetic tests are an appropriate means to find out individual risks their use cannot be opposed to.[41]

The crucial point is that those who think that (2) is the only morally acceptable position cannot justify this by saying that treating people differently because of their different genetic constitution is a form of (wrongful) discrimination. Instead, they need to provide a *further argument* why the principle of solidarity is the only morally acceptable principle for the health insurance sector.[42] For example, Ronald Dworkin has a strong case arguing: "Basic health insurance must be provided for everyone, and it must be financed out of taxation computed by modeling a hypothetical insurance market in which insurance is offered to everyone at 'community rating,' that is, at prices assuming that each candidate presented the average risk."[43] Moreover, he thinks that the possible consequences of using predictive genetic tests in health insurances are "a finally irresistible argument that basic health and life insurances should no longer be left in the private sector."[44] The ethical problem is not that, in a private system, health insurance companies discriminate against people with "bad genes" – they do not. Rather, organizing the health insurance system as part of the private sector is problematic from an ethical point of view.

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discrimination." (HELLMANN 2003, 79). If this should be correct then it could be taken as an argument for especially regulating *genetic* discrimination.

[41] Taupitz correctly observes that prohibiting only the use of predictive genetic tests while at the same time allowing other means that can reveal genetic traits (such as family anamnesis) is problematic. According to him such a partial ban could be seen as a "discrimination of methods"; cf. TAUPITZ 2001, 269.

[42] Although Greely, eventually, favors a legal regulation for genetic discrimination, he acknowledges that a proper justification for such regulations is often missing: "But calling decisions made on the basis of genetic variations 'discrimination' comes easily because such variations share some of the characteristics of other grounds that our society has concluded *are* improper discrimination." (GREELY 2001, 1492).

[43] DWORKIN 2002, 435.

[44] Ibid. Others have argued in a similar direction. E.g. Niklas Juth has maintained that one should "resurrect the collective, obligatory insurance systems in which the individual risk profile does not constitute a basis for premium determination." (JUTH 2003, 25). Greely thinks that genetic discrimination is "almost exclusively an American problem" because among the wealthy nations only the United States do not provide a public health insurance system to their citizens; cf. GREELY 2001, 1488, 1497.

VI. Conclusion

The analysis has demonstrated that two principles are central to the concept of discrimination: the Aristotelian principle, according to which like cases should be treated alike, and the principle of relevance, according to which a certain trait is a morally valid reason to treat persons differently if and only if the trait in question is relevant to the given circumstances. Yet, the application of the latter principle is – at least in many cases – not possible without reference to a "background theory" that includes normative premises. Only on the basis of such a theory it is possible to decide whether a trait has to be considered as relevant or not. As a consequence, the concept of discrimination has no "moral strength" independent of the "background theory".

That does not mean that the concept of discrimination is *never* directly applicable. For some contexts (e.g. the political sphere) the relevant normative premises are presumably well-founded and widely accepted, so that it is indisputable what it means to discriminate against someone and why it is morally wrong. The claim, however, that a certain action is a form of (wrongful) discrimination obscures in many cases the fact that *further arguments* are needed in order to justify the underlying normative premises.

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