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Discrimination and Future Generations[2]

In this paper, I analyse whether the present generation's choices to, e.g., deplete resources, shift environmental burdens towards the future, and discount the lives and interests of future generations, can be instances of *discrimination against future generations*. This has been tentatively suggested in both legal theory and philosophy; I review such suggestions briefly in section 1. However, a more rigorous analysis – outlining the concept, relevant grounds, and wrong-making features of discrimination, and applying these to future generations – is still lacking. To address this lacuna, I propose a theory of discrimination and analyse why it might seem to apply – yet ultimately fails to apply – to the differential treatment of future generations. More specifically, I propose a definition of discrimination (section 2.1) and an account of the moral wrongness of discrimination (section 2.2). I moreover explore the connection between discrimination and theories of social (in)justice (section 2.3). I then apply this theory to the problem of differential treatment of future generations. While discrimination may occur between collectives, such as generations (section 3.1),

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my analysis shows that the specific temporal status of future generations is not comparable to other grounds of discrimination, such as gender or race (section 3.2). Moreover, due the non-identity problem and the problem of lack of a "community of social meaning" between generations, future generations cannot be claimed to be subjected to worse treatment by the present generation (section 3.3). Hence, their differential treatment due to the present generation's choices does not amount to discrimination. Section 4 concludes and outlines some upshots of my analysis.

1. Introduction

The recently adopted *Maastricht Principles on The Human Rights of Future Generations* state, under the heading of §I.6. Equality and Non-Discrimination:

> "Future generations must be free from intergenerational discrimination. This discrimination includes but is not limited to:
>   i. The waste, destruction, or unsustainable use of resources essential to human life;
>   ii. Shifting the burden of responding to present crises to future generations; and
>   iii. According less value to future lives and rights than the lives and rights of present generations, including discounting the impacts and burdens of present conduct on the lives and rights of future generations."[3]

The *Maastricht Principles,* which are based on the United Nations report *Our Common Agenda,* develop human rights standards to increase the protection of the human rights of future generations. They aim to guide political and legal institutions, as well as social movements, on regional, national, and international levels.[4] The principles define future generations as "those generations that do not yet exist but will exist and who will inherit the Earth [which includes] persons, groups and peoples" (§ I.1). Though the principles are framed mainly in terms of the human rights of future generations, they do contain a few paragraphs specifically on discrimination.[5] However, they do not spell out what exactly is meant by 'discrimination', neither legally nor colloquially speaking.

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[3] Adopted at the *Maastricht Centre for Human Rights*, on 3 February 2023; https://www.rightsoffuturegenerations.org/the-principles.

[4] (Franco and Liebenberg 2023).

[5] The *Maastricht Principles* also contain paragraphs applying to states' obligations of non-discrimination: "Violations of [state] obligations to respect the human rights of future generations include [...]: Engaging in conduct that results in discriminatory access to natural resources and benefits enjoyed by future generations as compared to present generations" (§ II.17).

The idea of discrimination against future generations has long roots in legal theory. Published 1978, "Discrimination against Future Generations" is one of the first articles that systematically examine the US Constitution's provision to "Posterity". Legal scholar Jim Gardner argues that this provision implies a policy of intergenerational fairness which may "in certain circumstances limit the power of state and federal governments to impose disadvantages on future generations".[6] The article makes frequent reference to the US Constitution's fourteenth amendment, which includes the provision of *equal protection of the laws* for all US citizens. Recent work in US legal theory keeps up this focus on the fourteenth amendment, mandating non-discrimination, in light of the ever more urgent climate crisis.[7]

However, among recent climate lawsuits by young activists against states (such as the US, Sweden, Germany, the Netherlands), none have invoked discrimination law as pertaining to future generations, in the sense specified by, e.g., the above Maastricht Principles: as those generations who do *not yet exist*. When discrimination law is invoked in these lawsuits, it concerns discrimination against young – i.e., *existing* – individual complainants or generations. Consider the description of two such cases:

> "The problem of birth cohort discrimination is raised in the currently pending Duarte Agostinho case, initiated by Portuguese children and minors before the ECtHR. The applicants launched their complaint against Portugal and 32 other States for violating Article 2 (right to life) and 8 (right to family life) in conjunction with Article 14 (non-discrimination) of the ECHR. They argue, that due to the respondents' failure to adopt stringent mitigation measures, the *complainants* will experience extreme weather events, including heatwaves, which affect *their* living conditions and health.
> [...]
> Anti-age discrimination claims are also filed with domestic courts. In Canada, the Superior Court of Justice Ontario in Mathur deemed the "adverse effects of climate change on *younger generations*" to be "self-evident" and allowed the claim to proceed to trial."[8]

When it comes to moral and political philosophy, there is a similar fissure. Also in these fields, climate inaction has been discussed under descriptions such as "discrimination between generations",[9] "discrimination by date of birth",[10] and "discrimi-

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[6] (Gardner 1978, 33).

[7] See e.g. (Campbell 2019), (Nguyen 2017).

[8] (Sulyok 2023), my italics.

[9] (Attfield 2010).

[10] (Stern 2014).

nation against future generations".[11] However, the lion share of the philosophical debate around intergenerational inequities concerning climate change does not refer to the concept of discrimination.[12] And in the texts that do, the specifics concerning discrimination – as, at a conceptual minimum, *unequal disadvantageous treatment* – of future generations are not spelled out in any detail. That is, there is a lack of a more rigorous analysis, of outlining the concept, relevant grounds, and wrong-making features of discrimination – and applying these to future generations. We are therefore not in a position to determine whether and when discrimination against future generations is instantiated, nor when and why it is wrong.[13] My aim in this paper is to address this lacuna. I propose a theory of discrimination and analyse why it might seem to apply – yet ultimately fails to apply – to the differential treatment of future generations.

I proceed as follows: in section 2, I outline a theory of discrimination with the following steps: I propose a definition of discrimination and show how it gives rise to four distinct forms of discrimination (in 2.1). Then, I propose an account of the moral wrongness of discrimination, employing a broad (unorthodox) concept of harm (in 2.2). I moreover argue that this account still does not exhaustively capture what makes the phenomenon of discrimination problematic. I therefore, finally, explore the connection between discrimination and theories of social (in)justice (in 2.3). In section 3, I apply the theory developed in section 2 to the problem of differential treatment of future generations. I closely analyse four cases, which seem to instantiate the four distinct forms of discrimination, respectively. Yet, while discrimination arguably may occur between collectives, such as generations (in 3.1), my analysis shows that the specific ground of discrimination – temporal (future) status – is not comparable to other grounds of discrimination, such as gender or race (in 3.2). Moreover, due the non-identity problem and the problem of lack of a "community of social meaning" between generations, future generations cannot, in the end, be claimed to be subjected to worse treatment by the present generation (in 3.3). Hence, their differential treatment does not amount to discrimination. Section 4 concludes and outlines some upshots of my analysis.

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[11] (Gardiner 2017).

[12] E.g., the search terms "discrimination" AND "future generations" return 13 papers on PhilPapers, while "justice OR injustice" AND "future generations" return 291 papers (as of 2024-01-11).

[13] Gosseries has examined the conditions for successful climate lawsuits in terms of age discrimination within different legal frameworks (Gosseries 2015). While such a legal approach may point towards a pragmatically promising venue towards climate justice, it does not seriously consider the philosophical foundations of such a strategy. I am here interested in precisely this foundation. For my pragmatic response to Gosseries' approach, see section 4 below.

2. A theory of discrimination

So, what is discrimination? In its widest sense, to discriminate is to distinguish or differentiate between things. Obviously, I'm here interested in a much narrower sense. I want to capture the specific phenomenon of discrimination that most of us are concerned with in real life. I propose, tentatively, that this concerns the differential *treatment* of others (paradigmatically: persons), which is in some sense *detrimental* to them, and typically connected to some (perceived) *group* membership. Moreover, instances of the phenomenon typically appear to us as *problematic* (this captures the negative valence contained in utterances such as "But that's discrimination!", or the normative status ascribed to it in legal documents).

2.1. Definition

The following generic definition of (group) discrimination aims to accommodate the above concerns.[14]

> *Definition*: An agent, X, (group) discriminates against someone, Y, in context C by ɸ-ing if and only if:
> (i) there is a property, P, such that Y has P (or X believes that Y has P),
> (ii) by ɸ-ing, X treats Y worse than X would have treated Y, had Y not had P (or had X not believed Y to have P),
> (iii) it is because Y has P (or because X believes that Y has P) that X treats Y worse by ɸ-ing, and
> (iv) P is the property of being a member of a socially salient group in C.

This generic definition is meant to capture both direct and indirect discrimination, as commonly understood. In fact, this definition helps expand our conceptual framework to accommodate further forms of discrimination, by bringing out that the orthodox distinction 'direct/indirect' is conflated and in need of clarification. To see this, consider that conditions (ii) and (iii) can each be interpreted in (at least) two different ways. Combining the resulting two distinctions provides a conceptual map of four (rather than two) distinct forms of discrimination.

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14 See (Berndt Rasmussen 2019), (Berndt Rasmussen 2020), (Berndt Rasmussen 2023). The definition is close to a number of other definitions in the literature. See e.g. (Lippert-Rasmussen 2014) and many of the entries in (Lippert-Rasmussen 2017).

To start, consider (ii). This condition can be interpreted as:

> (ii') X *would have π-ed,* rather than ɸ-ed, had Y not (been believed to) have P*,* and ɸ-ing toward someone constitutes worse treatment of them than π-ing,

or as:

> (ii") had Y not (been believed to) have P*,* X *would still have ɸ-ed,* but ɸ-ing toward someone with P constitutes worse treatment than ɸ-ing toward someone without P.

The first interpretation gives us discrimination as *differential treatment*: comparing two different acts, ɸ-ing vs π-ing. The second gives us discrimination as *disparate impact*: comparing how one "facially neutral" act, ɸ, impacts differently on someone with P vs someone without P.

Even condition (iii) can be interpreted in two alternative ways, as:

> (iii') it is because *X has P-related intentions* (e.g., X dislikes people with P and believes that Y has P) that X treats Y worse,

or as:

> (iii") it is not because X has P-related intentions that X treats Y worse, but rather because of some *other P-related cause.*

The first interpretation gives us *intentional* discrimination: property P plays a motivational role for X's action, by figuring in the content of X's motivating beliefs or desires. The second gives us *non-intentional* discrimination: property P has an explanatory role with regard to X's action, but not by figuring in the content of X's motivating beliefs or desires.

Combining these two pairs of distinctions results in four possible forms of discrimination. *Table 1* systematises these and exemplifies each form with a paradigmatic case of *race discrimination in enrolment/employment decisions*, where a gatekeeper (X) refuses to accept (ɸ) an applicant (Y), making the applicant worse off by denying a sought opportunity, just due to the applicant's being black (property P).

	Differential treatment	Disparate impact
Intentional	(1) A university in the early 1950's US South accepts a white applicant but turns down an *equally* qualified black applicant, stating: "This is a whites-only university. Blacks are referred to apply to some 'separate-but-equal' university for African Americans."[15]	(2) An employer turns down a *qualified* black applicant, stating: "We don't hire people who lack high school education", while intentionally using this criterion because of its ability to track politically induced, race-correlated educational deficits.[16]
Non-intentional	(3) A university accepts a white candidate for their PhD-programme but turns down an *equally* qualified black candidate, ranking the latter as less qualified, where the ranking is due to the evaluators' implicit biases.[17]	(4) An employer turns down a *qualified* black applicant, stating: "We don't hire people who lack high school education", without any awareness of the criterion's ability to track politically induced, race-correlated educational deficits.[18]

Table 1: Four forms of discrimination with paradigmatic examples.[19]

I will, in the rest of this paper, rely on the above generic definition of group discrimi-nation. In section 3, I will return to the four forms of discrimination specified in *Table 1*, in order to analyse the disadvantageous treatment of future generations by the present generation's climate inaction. In the remainder of this section, I will consider the problematic features of discrimination, analysing them in terms of wrongness and injustice.

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[15] This example resembles Sweatt v. Painter; see (Lavergne 2010). Note that there may but need not be disparate impact under disparate treatment: if (contrary to historical fact) the educational facilities had been separate and relevantly equal, blacks might not have been worse off than whites in the labour market, but such non-disadvantageous yet differential treatment would still constitute discrimination and may still be marked as morally wrong as such.

[16] This example resembles Griggs v. Duke Power Company; see (Khaitan 2015, 31), but with the addition that the criterion "is covertly used to target members of a protected class" (Mendoza 2017, 258). Cf. even Altman's "Jim Crow era" example (Altman 2016, para. 2.1).

[17] This example may be posited as a specific instantiation of the unequal rankings of identical CVs under different (racially or gender coded) names, which have been extensively studied (Zschirnt and Ruedin 2016). Cf. (Alesina et al. 2018) for the correlation of teachers' implicit anti-immigrant bias and their grading of immigrant vs. native middle school students.

[18] This example resembles Griggs v. Duke Power Company under "absence of a discriminatory intent" (Khaitan 2015, 31). There is, of course, the separate but related problem of discrimination at the educational level.

[19] *Table 1* appears originally in (Berndt Rasmussen 2020, 738).

2.2. Moral wrongness

The definition of discrimination, as it stands, is non-moralised. But it brings out a normative feature that should be captured by any plausible account of the moral wrongness of discrimination: that Y is subjected to *worse treatment* by X, in some sense, as stated by condition (ii). This allows different accounts of moral wrongness to be plugged in here, spelling out worse treatment in terms of, e.g., disrespect,[20] demeaning,[21] freedom violation,[22] or harm.[23] These accounts offer different explanations of the prima facie wrongfulness of discrimination. What they have in common is that they focus on how the discriminatee is wronged by the discriminator's action – they simply differ in spelling out the details of this wronging.[24]

I have, in a previous paper, argued for a counterfactual-harm based account – albeit one that appeals to an unorthodox, broad concept of harm.[25] This concept has a welfarist component (capturing the orthodox sense of harm[26]): by ϕ-ing, X makes Y worse off, i.e., lowers their well-being compared to the counterfactual where Y had not had (or had not been believed to have) P. The broad harm concept also has a non-welfarist component, of being treated as inferior in some sense. This latter component captures features in the vicinity of the above-mentioned disrespect and demeaning accounts. We may here fill it in by using Deborah Hellman's influential account: discrimination is wrong when it is demeaning, in the sense that it, first, "expresses that a person or group is of lower status [...] and, second, the actor or institution expressing this meaning must have sufficient social power for this expression to have [the capacity to have] force".[27]

This account could also be spelled out as a hybrid harm-*and*-inferior-treatment (e.g., demeaning) approach. The issue is mainly terminological, although I believe that there is something to be said for the idea that being treated as inferior can reasonably be seen as a kind of (relational) harm to the individual. In any case, the welfarist and non-welfarist components are meant to capture what is intuitively problematic with paradigmatic cases of discrimination: that people – individually or in groups – suffer from such differential treatment; that it is a wrong that is directed

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[20] (Eidelson 2015); cf. (Beeghly 2017).

[21] (Hellman 2008), (Hellman 2017).

[22] (Moreau 2010), (Moreau 2013), (Moreau 2017).

[23] (Arneson 2006), (Lippert-Rasmussen 2014).

[24] Note that these accounts are not mutually exclusive; several of these might be combined to provide hybrid or pluralist accounts of the wrongness of discrimination.

[25] (Berndt Rasmussen 2019)

[26] Cf. (Parfit 1986, 487).

[27] (Hellman 2017, 102); cf. (Hellman 2008).

against them.[28] I will not defend this account here, but merely stipulate it as a basis for further discussions of the structural dimensions of discrimination:

> *Moral wrongness*: An instance of (group) discrimination, ɸ-ing, by X against Y, on grounds of P, is (prima facie) wrong because X by ɸ-ing treats Y worse, in the following sense:
>   (a) making Y worse off, or
>   (b) treating Y as inferior (in the sense of demeaning),
> than X would have, had Y not had P (or had Y not been believed to have P).[29]

Note that the definition of discrimination, while formulated in evaluative terms of 'treating worse', does not make any moral claim. Such a claim is introduced by the separate and non-definitional account of the wrong-making feature of discrimination. The definition is thus non-moralised. The theory in its entirety of course is not – and should not be. Recall that I set out to capture the specific phenomenon of discrimination that most of us are concerned with in real life: as a phenomenon that typically appears to us as *problematic*. Now, my definition carves out a very specific social phenomenon (group discrimination), which most of us take issue with. The wrongness account then merely spells out why we are morally justified in taking issue with it, i.e., why it is an apt candidate for at least *prima facie* moral wrongness.

However, I now want to bring out that the proposed wrong-making feature does not exhaust the problematic features of discrimination. On my view, discrimination is (prima facie) wrong because it constitutes a harm (in a broad sense) to the discriminate – but the problem does not stay there. The harm is not just any kind of arbitrary harm; it is harm due to the discriminatee's (believed) group membership: the socially salient property P. This is what makes discrimination especially pernicious; and this should be brought out and analysed by a theory of discrimination. I briefly sketch this idea in the next section, before I turn to applying my theory of discrimination to future generations.

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[28] It should be noted that my account is similar to Scanlon's; see (Scanlon 1998).

[29] Note that the suggested wrong-making feature can capture the wrongness of even structural forms of discrimination. It focuses on the discriminatee, Y (who might be an individual or a group, supposing that we can make sense of groups being made worse off or treated as inferior). It can thus get a grip even on cases where there is no (individual or collective) discriminating agent, X, but rather a social entity involving social structures (which is something that, e.g., mental state accounts of the wrongness of discrimination would struggle with).

2.3. Injustice

Until now, I have not considered conditions (i) and (iv) of the above definition of discrimination:

> (i) there is a property, P, such that Y has P (or is believed to have P), and
> (iv) P is the property of being a member of a socially salient group.

To know where and when these conditions apply, we need to know what 'socially salient group' means. A standard way to understand the expression is this:

> "A group is socially salient if [and only if] perceived membership of it is important to the structure of social interactions across a wide range of social contexts."[30]

This seems to be on the right track, but we should dig deeper at this point. Why is social salience a relevant feature? Why should the definition of discrimination make reference to properties that are "important to the structure of social interactions across a wide range of social contexts"?

I propose that such a structure of social interactions becomes relevant for a definition of discrimination when it reflects systematic and unjustified social inequalities between groups of people – the kinds of inequalities which theories of social justice (and injustice) help us identify.[31] What makes discrimination especially problematic is that the harm done to discriminatees latches onto, reproduces, and over time exacerbates such social inequalities. Specifically, we take issue with instances of such harms when they are done to individuals or groups who are already on the systematically disadvantaged side of the social inequalities in question – and where this is, moreover, *due to* them belonging to this side in the first place.

To capture this, I propose the following analysis of 'socially salient group':

> A group is socially salient if and only if its members are subject to systematic, unjustified social disadvantages within the given social context.[32]

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[30] (Lippert-Rasmussen 2014, 30).

[31] E.g., (Rawls 1999).

[32] I here want to note (although I do not have space to develop and defend) the upshot that this limits discrimination to socially disadvantaged groups. Those on the systematically advantaged side of the social inequalities in question can thus not be discriminated against, according to my account. This may seem counterintuitive at first, but arguably has the advantage of classifying, e.g., affirmative action (of the kind just recently ruled out as unconstitutional by the US Supreme Court) as non-discrimination. (Cf. https://www.washingtonpost.com/politics/2023/06/29/affirmative-action-supreme-court-

This analysis allows us to spell out a deeper problematic feature of discrimination. It is not only morally wrong but also unjust:

> *Injustice*: An instance of (group) discrimination is unjust when and because it reproduces and exacerbates systematic, unjustified social disadvantages.

Given this analysis, we can now plug in our preferred theory of social justice into the theory of discrimination (just as we did with our preferred account of moral wrongness – here: the broad harm account). Such a theory is needed to spell out, e.g., the relevant distributive patterns and the relevant currency of justice. It can then serve to provide us with the criteria to find whatever are the specific *grounds* of discrimination in a given context. In many of today's societies, these grounds will turn out to be the well-known categories of race, gender, disability, religion, and so on. And such exact categories arguably need to be specified, e.g., in legal statutes and institutional policies, in order to allow for the efficient and orderly application of such rules in real-life situations. However, behind any such specific categories, there should be a general criterion.[33] And this should be made explicit by a theory of discrimination – not least so that we, from time to time, can re-evaluate the specific grounds of discrimination that currently happen to be codified in our legal statutes and institutional policies.

The theory can now be summarised as follows:

> *Definition*: An agent, X, (group) discriminates against someone, Y, in context C by φ-ing if and only if:
>   (i) there is a property, P, such that Y has P (or X believes that Y has P),
>   (ii) by φ-ing, X treats Y worse than X would have treated Y, had Y not had P (or had X not believed Y to have P),
>   (iii) it is because Y has P that X treats Y worse by φ-ing (or because X believes that Y has P), and
>   (iv) P is the property of being a member of a socially salient group in C, where a group is socially salient in C if and only if its members are subject to systematic, unjustified social disadvantages within C.

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ruling/).

[33] Such a criterion need not, of course, solely pick out single-dimensional categories. This approach may thus provide a new pathway for taking on the intersectionality challenge (a possibility that I'm hoping to explore further).

> *Moral wrongness*: An instance of (group) discrimination, ɸ-ing, by X against Y, on grounds of P, is (prima facie) wrong because X by ɸ-ing treats Y worse, in the following sense:
>> (a) making Y worse off, or
>> (b) treating Y as inferior (in the sense of demeaning),
> than X would have, had Y not had P (or had Y not been believed to have P).

> *Injustice*: An instance of (group) discrimination, ɸ-ing, in C, is unjust when and because it reproduces and exacerbates systematic, unjustified social disadvantages in C.

On this theory, then, group discrimination is a bridge concept. As such, it is a distinctive and particularly useful concept exactly because it connects wrongness to injustice: the moral domain (where individuals can be harmed, and thus *prima facie* wronged) to the political domain (where there are unjustified inequalities between social groups, i.e., social injustice). Normatively speaking, this theory brings out that discrimination is, in fact, doubly problematic. It is a driver of social injustice, and it operates by wronging (harming) already disadvantaged individuals – adding, as it were, injustice to injury.

3. Applying the theory to the problem of differential treatment of future generations

Is there conceptual space for wrongful and unjust discrimination against future generations in this framework? From the outset, it may seem so. I.e., it seems we could easily fit different cases of differential treatment of future generations into my taxonomy of four forms of discrimination, according to *Table 2*.[34]

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[34] These descriptions are modeled on the Maastricht Principles' formulations; see (i–iii) in the first quote above.

	Differential treatment	**Disparate impact**
Intentional	(ii) The present generation (X) shifts the burden of responding to present crises (φ) to future generations (Y), by intentionally excluding their interests from political decision-making processes, because they are future generations (P). This amounts to treating these future generations worse. (iii) The present generation (X) accords less value (φ) to the lives and rights of future generations (Y) than the lives and rights of present generations, because they are future generations (P). This amounts to treating these future generations worse.	(i) The present generation (X) wastes, destroys, and unsustainably uses resources essential to human life, under the facially neutral rationale of "ensuring economic growth" (φ), while intending – or knowingly accepting – that the resulting environmental damages accumulate over time. This amounts to treating future generations (Y) worse.
Non-intentional	(iii*) The present generation (X) discounts (φ) the impacts and burdens of present conduct on the lives and rights of future generations (Y), not because they are future generations, but due to epistemic uncertainty concerning present actions' future consequences. This amounts to treating these future generations worse.	(i*) The present generation (X) wastes, destroys, and unsustainably uses resources essential to human life, under the facially neutral rationale of "ensuring economic growth" (φ), without being aware that the resulting environmental damages accumulate over time. This amounts to treating future generations (Y) worse.

Table 2: Four cases of differential treatment of future generations.

Does the attempt to fit these different cases of differential treatment of future generations into my taxonomy actually succeed? In the following three subsections, I will analyse the proposed cases in more detail to answer this question. I will examine, firstly, the proposed agent (X) and subject (Y) of discrimination; secondly, the proposed ground (P); and finally, the claim that the assessed actions (φ) amount to worse treatment.

3.1. The agent and subject of discrimination

Consider, first, the agent of discrimination (X). As the examples in *Table 1* (in section 2 above) demonstrated, it is conceivable and intuitively plausible that a discriminator may be a collective*:* e.g., a university (or other form of sufficiently organized collective entity with at least minimal collective intentionality[35]). Thus, even a generation, such as the present one – possibly partitioned into multiple collectives of citizens, represented by state officials who decide policies on their behalf – might be an agent of discrimination. Analogously, it is conceivable and intuitively plausible that the subject of discrimination (Y) may be a collective entity. Indeed, at a minimum, it may just be the group of people sharing a socially salient property, such as race or gender.

3.2. The socially salient property

Second, then, can 'being a future generation' be argued to be a socially salient property (P)? To answer this question, we first need to know how 'being a future generation' should be understood. As noted in the introduction above, cases of, e.g., unsustainable resource use by the current generation have been discussed under descriptions such as "discrimination by date of birth",[36] and "discrimination against future generations".[37]

"Date of birth", it should be noted here, is ambiguous as a ground of discrimination. It may refer to chronological age, such that the discrimination amounts to the (synchronic) disadvantageous treatment of certain age groups: e.g., a policy disadvantaging everyone under the age of 18 by not permitting them to vote. Or it may refer to birth cohorts, such that the discrimination amounts to the (diachronic) disadvantageous treatment of certain birth cohorts; e.g., a policy disadvantaging everyone born after a certain year, by raising the age threshold for pension benefits.[38] In the present context, it is the latter, the birth cohort reading, we are concerned with. However, this is still too general here, since we are not concerned with the disadvantageous treatment of different birth cohorts, across the board, but rather with the disadvantageous treatment of different birth cohorts marked by their different temporal status: future (as opposed to present or past), to be precise.

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[35] Cf. (List et al. 2011). In an unpublished paper, I furthermore argue that there can be non-agential forms of discrimination, i.e., structural discrimination. It turns out that, properly described, cases of implicit bias discrimination are cases of such non-agential, structural discrimination: Berndt Rasmussen (mimeo) "Structural Dimensions of Discrimination".

[36] (Stern 2014).

[37] (Gardiner 2017).

[38] Note that both conceptions can be rendered equivalent by time-indexing chronological age: specifying age-at-t refers to a specific birth cohort (Gosseries 2015).

To make this clear, we should use 'future temporal status' as the relevant property P in this context. That is, we are here concerned with what may be called 'temporal status discrimination'.

So, can temporal status (past–present–future) be argued to be a socially salient property (P)? If we just think of a socially salient group as a group "perceived membership of [which] is important to the structure of social interactions across a wide range of social contexts",[39] this seems rather uncontroversial. Apart from epistemic challenges, lack of reciprocity, etc., in our interactions with the future, in any set of social contexts, there is the (nomological) *impossibility* for any generation to interact with past generations in ways that affect them; e.g., aiming to benefit or harm them (at least on the intuitively plausible assumption that there cannot be posthumous benefits and harms).

However, as proposed above, the key factor making the structure of social interactions relevant for discrimination is that it reflects systematic and unjustified social inequalities between groups of people – the kinds of inequalities which theories of social justice (and injustice) help us identify. Yet then it is rather doubtful that temporal status (past–present–future) qualifies as a socially salient property (P). This is so especially when we consider cases where it is the purported discrimination itself that gives rise to systematic and unjustified social inequalities between the present and future generations. And this seems to apply to the above cases of (i–iii), of resource depletion, of burden shifting, and of discounting of future lives. Absent already existing such inequalities, prior to the purported discrimination, the property of future temporal status does not yet qualify as 'socially salient'. And this, I want to emphasise, is as it should be: it captures the intuition that what makes discrimination especially problematic is that the (broad) harm done to discriminatees latches onto, reproduces, and over time exacerbates already existing social injustices. Thus, when it comes to the above cases (i–iii), they constitute the very choices that give rise to an injustice between the present and future generations – an injustice which then, on pain of circularity, cannot serve as a condition for classifying these cases as instances of intergenerational discrimination.

This result will turn out to be in line with the overall analysis of the differential treatment of future generations, once we consider the next hurdle for the discrimination account.

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[39] (Lippert-Rasmussen 2014, 30).

3.3. The claim of "worse treatment"

The third question is whether the actions of the present generations in cases (i–iii) really amount to treating future generations worse. At first sight, this seems quite uncontroversial. Future generations will have to pay – with their money, health, security, opportunities, and even their lives – for the present generation's choices of resource depletion, burden shifting, and discounting of future lives. Surely, one might argue, they would have been better off, if the present generation had chosen resource conservation, had taken on the burdens themselves, and had valued future lives equally. Hence, by making these choices of (i–iii), the present generation treats future generations worse.

However, recall that on the above (broad) harm account of the wrongness of discrimination, 'treating worse' was interpreted in a person-affecting manner. Both the welfarist and non-welfarist components aim to capture what is intuitively problematic with discrimination: that people – individually or in groups – suffer from such differential treatment; that it is a wrong that is directed against them. Consider first the welfarist component, requiring that by ϕ-ing, X makes Y worse off, i.e., lowers Y's well-being compared to the counterfactual where Y had not had (or had not been believed to have) P. Now of course, as stated, the theory allows for discrimination to be directed against collectives of individuals. Still, the concern with well-being ties the harm account to the individuals constituting these collectives, rather than the collectives themselves. Claiming that a collective's well-being is lowered, such that the collective is harmed, presupposes that there are individual members whose well-being is lowered. Lowering the collective's well-being by, e.g., reducing the number of its individual members (such that the collective's total welfare is reduced), does not constitute a relevant harm: all else equal, no one suffers or is wronged by this.

Of course, such a person-affecting view is vulnerable to Parfit's infamous non-identity problem when it comes to future people.[40] The present generation's choice between, e.g., resource depletion or conservation will have global effects on people's consumption and traveling patterns, education and lifestyle choices, etc. It will thus arguably affect which people will be born to such an extent that already within the next few generations' time, there will be virtually no overlap between the sets of people who would exist under either alternative of the choice. But then, there will be no individual member of these future generations who is made worse off by the present generation's choice to deplete rather than conserve resources. Had the present generation chosen conservation, none of them would have existed. Hence, no one is treated worse in this sense. As long as all have a life worth living – and this

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[40] (Parfit 1986, 302–31).

is of course an important proviso – arguably no one suffers or is wronged by the choice to deplete.

How about the other, non-welfarist sense of being treated worse: being treated as inferior? I suggested to fill this in by reference to Hellman's demeaning account: discrimination is wrong when it is demeaning, in the sense that it, first, "expresses that a person or group is of lower status [...] and, second, the actor or institution expressing this meaning must have sufficient social power for this expression to have force".[41]

The first condition may not be satisfied in all of the cases analysed above. E.g., if the present generation discounts the impacts and burdens of their choices on the lives and rights of future generations, *not* because they are future generations, but due to the epistemic uncertainty concerning present actions' consequences for these future generations (case iii'), this need not express any inferiority of status. Such a case will then not be an instance of wrongful, *qua* demeaning, discrimination. Still, some of the other cases explicitly mention a lowering of status: e.g., if the present generation accords less value to the lives and rights of future generations than their own, just because they are future generations (case ii), or when it intentionally excludes their interests from political decision-making processes, thereby arguably denying their political equality (case iii).

The remaining question is then whether Hellman's other condition is satisfied in these cases as well. Does the agent expressing this meaning have sufficient social power for this expression to have force? This is doubtful. Of course, in one sense, the present generation has a clear power overtake on future generations: it is in a position to call all the shots as to resource depletion, of burden shifting, and of discounting of future lives – choices that undoubtedly affect the living conditions for future generations. But the main issue for Hellman's account is one of *social* power, which presupposes what we may call a "community of social meaning" within which the present generation's status lowering has force. To assess whether this holds for our cases, we need to consider the question of who is the relevant audience generating the required uptake, such that the expression of the inferiority of future generations has force. Is it the future generations? If so, it seems doubtful that the present generation really would have the social power to mark future generations as inferior *in their own view*. Is it all generations, i.e., all of humanity? Again, it seems doubtful that *one* generation would have the social power to mark future generations as inferior in the view of all generations to come (and they definitely lack this power for past generations). Is it just the present generation, then? But then, if it is merely an internal status lowering that does not carry over to future

generations (more than that it affects what living conditions they will find themselves with) it no longer seems to concern any other generations, and thus it seems doubtful that it really treats *them* worse by demeaning them. (And note that the just mentioned living conditions that future generations will find themselves with fall under the welfarist component of the broad harm concept – which, again, leads us back to the non-identity problem.)

At the bottom of the problem from lack of "community of social meaning" lies the idea that treating someone worse by treating them as inferior, in the sense of demeaning, tracks a relational concern, which presupposes a community in which social meaning is expressed and given uptake. And it is doubtful that there is such a community between temporally non-adjacent generations. If this is so, Hellman's second condition is not fulfilled, and hence, the choices of present generations fail to be demeaning of future generations.

In sum, if these choices neither make individuals belonging to future generations worse off, nor demean them, we cannot classify them as instances of *wrongful* discrimination on the proposed broad harm account. Indeed, on the above definition, we cannot even classify them as *discrimination* in the first place: they do not constitute worse treatment, neither in the welfarist nor in the non-welfarist sense.

4. Conclusions and upshots

In this paper, I have set out to assess whether the present generation's choices – of resource depletion, burden shifting, and discounting of future lives – can be classified as discrimination: as disadvantageous treatment of future generations due to their future temporal status. Drawing on my preferred theory of discrimination, I have examined whether such choices can fit the taxonomical and normative framework of this theory. Such a fit would have repercussions on the moral and political-philosophical evaluation of these choices. It might, further, call for bolder advances in legal theory, to find new ways for litigation under existing bodies of discrimination law.

Despite a promising start, granting that both discriminator and discriminatee may indeed be collectives such as generations, I eventually arrived at the conclusion that these choices do not fall under my definition of discrimination. This is so since, firstly, the property of future temporal status does not qualify as 'socially salient' on my injustice-based criterion of social salience, which generates context-specific grounds of discrimination. And secondly, a closer analysis of the "worse treatment" claim made for each of the cases in *Table 2* revealed that this claim does not hold up. In the welfarist sense of making future generations worse off, it suffers from the infamous non-identity problem. And in the non-welfarist sense of treating them as

inferior in the sense of demeaning, it suffers from what we may call the problem from lack of "community of social meaning".

My analysis is admittedly still sketchy and open for improvements. It might, e.g., turn out – although I am highly doubtful of this – that there are independent reasons to favour a disrespect account of the wrongness of discrimination (as a pure mental state account).[42] On such an account, arguably, the present generation's choice to accord less value to the lives and rights of future generations than those of present generations is morally faulty. Plugging this account into my definition of discrimination would render a theory that could classify the present generation's choices as wrongful discrimination. Theoretical options, such as this one, surely deserve further scrutiny.

However, if my arguments hold up, there is something to be said for this negative result as well. For one thing, my theory of discrimination can explain why people sometimes are tempted to describe the present generation's choices to deplete resources, etc., as "discrimination by date of birth" or "discrimination of future generations". At first sight, future temporal status seems to be a socially salient category, and future generations seem to be harmed (in a welfarist or non-welfarist sense) by these choices. It takes a more careful analysis – employing a coherent theory of discrimination – to reveal that this is not so. Further, my analysis also helps explain why virtually no climate lawsuits have appealed to discrimination law when it comes to climate change affecting future generations in the Maastricht Principles' sense: as "those generations that do not yet exist but will exist".[43] Such a legal move may simply not be the most feasible route for combating climate change, given the conceptual and normative difficulties it carries.

On the other hand, and more practically speaking, it may seem worrying that my negative result might dissuade climate activists' attempts to make use of discrimination laws in climate lawsuits, when this *is* feasible. E.g., Axel Gosseries has examined the viability of litigation strategies that appeal to age-discrimination statutes and policies, under EU, US or domestic laws;[44] a proposal that has recently been further developed by Refia Kaya.[45] Concerning this worry, and these constructive suggestions, I want to end on a pragmatic note. In order to solve or mitigate the ongoing climate crisis, we should use whatever reasonable means available. Discrimination law is, of course, distinct from the philosophical analysis employed here. In legal contexts where such laws currently are formulated in a way that it makes climate litigation possible, we should go for it – without any philosophical headache.

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[42] (Eidelson 2015).
[43] https://www.rightsoffuturegenerations.org/the-principles.
[44] (Gosseries 2015).
[45] (Kaya 2019).

References

Alesina, Alberto, Michela Carlana, Eliana La Ferrara, and Paolo Pinotti. 2018. 'Revealing Stereotypes: Evidence from Immigrants in Schools'. Working Paper 25333. National Bureau of Economic Research. https://doi.org/10.3386/w25333

Altman, Andrew. 2016. 'Discrimination'. In The Stanford Encyclopedia of Philosophy, edited by Edward N. Zalta, Winter 2016. Metaphysics Research Lab, Stanford University.
https://plato.stanford.edu/archives/win2016/entries/discrimination/

Arneson, Richard. 2006. 'What Is Wrongful Discrimination?' San Diego Law Review 43 (4): 775. https://digital.sandiego.edu/sdlr/vol43/iss4/4

Attfield, Robin. 2010. 'Global Warming, Equity and Future Generations'. Human Ecology Review 17 (2).

Beeghly, Erin. 2017. 'Discrimination and Disrespect'. In The Routledge Handbook of the Ethics of Discrimination. Routledge.

Berndt Rasmussen, Katharina. 2019. 'Harm and Discrimination'. Ethical Theory and Moral Practice 22 (4): 873–91. https://doi.org/10.1007/s10677-018-9908-4

———. 2020. 'Implicit Bias and Discrimination'. Theoria 86 (6): 727–48. https://doi.org/10.1111/theo.12227.

———. 2023. 'Age Discrimination: Is It Special? Is It Wrong?' In Ageing without Ageism?: Conceptual Puzzles and Policy Proposals, edited by Greg Bognar and Axel Gosseries, 0. Oxford University Press.
https://doi.org/10.1093/oso/9780192894090.003.0002

Campbell, Terry Ann. 2019. 'Environmental Constitutionalism: Marrying the Due Process Clause and the Equal Protection Clause with Climate Change'. SSRN Scholarly Paper. Rochester, NY. https://papers.ssrn.com/abstract=3457043

Eidelson, Benjamin. 2015. Discrimination and Disrespect. Oxford University Press. http://www.oxfordscholarship.com.ezp.sub.su.se/view/10.1093/acprof:oso/97801 98732877.001.0001/acprof-9780198732877

Franco, Ana María Suárez, and Sandra Liebenberg. 2023. 'The Maastricht Principles on the Human Rights of Future Generations'. Future Generations. Global Policy Forum. https://www.globalpolicy.org/en/multilateralism/future-generations

Gardiner, Stephen M. 2017. 'Geoengineering: Ethical Questions for Deliberate Climate Manipulators'. In The Oxford Handbook of Environmental Ethics, edited by Stephen M. Gardiner and Allen Thompson, 0. Oxford University Press. https://doi.org/10.1093/oxfordhb/9780199941339.013.44

Gardner, Jim. 1978. 'Discrimination against Future Generations: The Possibility of Constitutional Limitation'. Environmental Law 9 (1): 29–60. https://heinonline.org/HOL/P?h=hein.journals/envlnw9&i=37

Gosseries, Axel. 2015. 'Environmental Degradation as Age Discrimination'. E-Publica 2 (2): 26–39.

Hellman, Deborah. 2008. When Is Discrimination Wrong? Cambridge, MA: Harvard University Press.

———. 2017. 'Discrimination and Social Meaning'. In The Routledge Handbook of the Ethics of Discrimination, edited by Kasper Lippert-Rasmussen. London; New York: Routledge.

Kaya, Refia. 2019. 'Environmental Vulnerability, Age and the Promises of Anti-Age Discrimination Law'. Review of European, Comparative & International Environmental Law 28 (2): 162–74. https://doi.org/10.1111/reel.12279

Khaitan, Tarunabh. 2015. A Theory of Discrimination Law. Oxford University Press. http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199656967.001.0001/acprof-9780199656967

Lavergne, Gary M. 2010. Before Brown: Heman Marion Sweatt, Thurgood Marshall, and the Long Road to Justice. University of Texas Press.

Lippert-Rasmussen, Kasper. 2014. Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination. Oxford; New York: Oxford University Press.

———. 2017. The Routledge Handbook of the Ethics of Discrimination. Routledge Handbooks in Applied Ethics. New York: Routledge. https://ezp.sub.su.se/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=1581310&site=ehost-live&scope=site

List, Christian, Philip Pettit, Christian List, and Philip Pettit. 2011. Group Agency: The Possibility, Design, and Status of Corporate Agents. Oxford, New York: Oxford University Press.

Mendoza, José Jorge. 2017. 'Discrimination and Immigration'. In The Routledge Handbook of the Ethics of Discrimination, edited by Kasper Lippert-Rasmussen. London ; New York: Routledge.

Moreau, Sophia. 2010. 'What Is Discrimination?' Philosophy and Public Affairs 38 (2): 143–79.

———. 2013. 'In Defense of a Liberty-Based Account of Discrimination'. In Philosophical Foundations of Discrimination Law, edited by Deborah Hellman and Sophia Moreau, 71–86. Oxford University Press. http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199664313.001.0001/acprof-9780199664313-chapter-5

———. 2017. 'Discrimination and Freedom'. In The Routledge Handbook of the Ethics of Discrimination, edited by Kasper Lippert-Rasmussen. London ; New York: Routledge.

Nguyen, Ylam. 2017. 'Constitutional Protection for Future Generations from Climate Change'. UC Law Environmental Journal 23 (1): 183. https://repository.uclawsf.edu/hastings_environmental_law_journal/vol23/iss1/2

Parfit, Derek. 1986. Reasons and Persons. Oxford, New York: Oxford University Press.

Rawls, John. 1999. A Theory of Justice: Revised Edition. Cambridge, MA: Belknap Press.

Scanlon, Thomas. 1998. What We Owe to Each Other. Cambridge, Mass.: Belknap Press of Harvard University Press.

Stern, Nicholas. 2014. 'ETHICS, EQUITY AND THE ECONOMICS OF CLIMATE CHANGE PAPER 2: ECONOMICS AND POLITICS'. Economics & Philosophy 30 (3): 445–501. https://doi.org/10.1017/S0266267114000303

Sulyok, Katalin. 2023. 'A rule of law revolution in future generations' litigation: intergenerational equity and the rule of law in the Anthropocene'. https://doi.org/10.25360/01-2023-00005

Zschirnt, Eva, and Didier Ruedin. 2016. 'Ethnic Discrimination in Hiring Decisions: A Meta-Analysis of Correspondence Tests 1990–2015'. Journal of Ethnic and Migration Studies 42 (7): 1115–34. https://doi.org/10.1080/1369183X.2015.1133279