

Statistical Discrimination and Treatment as an Individual¹

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Introduction

In contemporary democratic societies, the treatment of every person as an individual is a fundamental value. In the Constitution of Japan, for instance, Article 13 states that “[a]ll of the people shall be respected as individuals.” The requirement to treat everyone as an individual, or the principle of individualism, has been brought to bear against many instances of what are discriminatory practices. Notwithstanding the initial appeal of this idea, the principle of individualism has been recently encountered serious challenges in the fields of legal and moral philosophy. In his influential book *Profiles, Probabilities, and Stereotypes*, Professor Frederick Schauer argues that usually, what appears to be individualized treatment is ultimately based on a generalization. He argues that the requirement to avoid all generalized judgments is both impossible and undesirable, concluding that the principle of individualism is an unpersuasive explanation for the moral wrongness of (certain kinds of) statistical discrimination based on a generalization.

In this paper, I will examine the problem of statistical discrimination and argue that the objections to the principle of individualism raised by Schauer are misplaced, largely because they fail to grapple with the central idea of the principle; further, I show that the principle of individualism, properly understood, can provide an important ground for arguing that certain kinds of statistical discrimination based on a generalization are morally wrong. First, I will identify the type of statistical discrimination I will focus on in this paper, namely non-spurious statistical discrimination based on imperfect proxies. Then, I will examine certain objections against the principle of individualism raised by Schauer. After a demonstration of the failure of his arguments, I will examine Benjamin Eidelson’s recent defense of treatment as an individual, which he calls “the autonomy view.” I will conclude that, provided an additional condition is added, Eidelson’s view has potential to provide one (albeit not exhaustive) explanation why certain kinds of discrimination are morally wrong.

I. Statistical Discrimination

What is “discrimination”? In this paper, I define the term “discrimination” in a broad and morally neutral sense as follows:

¹ I thank professor Jimmy Chia-Shin Hsu and Dr. Nadire Özdemir for helpful comments on my earlier version of this paper, which I delivered at IVR Japan 1st International Conference (2018. 07. 08 Doshisha University).

X treats Y less favorably than Z because (X believes that) Y has P and (X believes that) Z does not have P (cf. Lippert-Rasmussen 2014: 15; Eidelson 2015: 17).

The statistical discrimination I focus on here is to be distinguished from non-statistical discrimination. Non-statistical discrimination is the kind of discrimination which makes the disparate treatment between Y and Z on the basis of P the goal itself or whose aim of the disparate treatment is morally problematic (Schauer 2018: 43). When an employer (X) treats black candidates (Y) less favorably than white ones (Z) in his or her hiring decisions on the belief that some races are superior to others, this is non-statistical racial discrimination.

By contrast, the aim of statistical discrimination is morally unproblematic. It “starts with some (presumably legitimate) goal” but the disparate treatment on the basis of P is then based on the belief that it will, instrumentally, further the pursuit of that goal (Schauer 2018: 43). The imposition of a maximum age for commercial airline pilots (55 or 60) is an example of statistical discrimination. The intention of this discrimination, the prevention of accidents that could involve many deaths, is legitimate. Age, the basis of the discrimination (P), is considered a reliable indicator of poor vision, impaired hearing, and slower reflexes (cf. Schauer 2003: 108–130), which are associated with increased prevalence of accidents.

Second, statistical discrimination can be spurious or non-spurious. Spurious here means there is, as a matter of fact, little correlation between the possession of some traits (P) and the other traits (P') closely connected to the aim of the disparate treatment (Schauer 2018: 45; Schauer 2003: 12–15). If women were denied the right to vote because they were believed to be less intelligent in general than men and therefore incompetent to make political decisions, this would be an example of spurious statistical discrimination: there seems to be no empirical basis grounding the correlation between being female (P) and being incompetent (P').

By contrast, for non-spurious statistical discrimination, there should be some correlation between having some traits (P) and having the other traits (P') closely connected to the aim of the statistical discrimination; in other words, P should be a reliable (though imperfect) proxy for P'. First, we can imagine a case where almost³ all members (or a majority) of some class (P) have a certain additional trait (P') that we are interested in (Schauer 2018: 45). For instance, if we seek people for a task requiring complete linguistic fluency in Japanese (P'), restricting our applicant pool to those born and educated in Japan (P) would produce an applicant pool almost all of whose members possessed the sought-after ability. Second, some traits (P) may be reliable proxies for some other attribute (P'), even where the attribute is in fact possessed by less than a majority of those who possess the trait (Schauer 2018: 46; Schauer 2003: 11). For instance, less than a majority of males are molesters. However, almost all molesters are male.⁴ One way to understand the phenomenon of women-only cars in Japan is that a passenger's gender (P) is used as a reliable (though imperfect) proxy for the tendency to molest women on crowded trains (P'). From here on, I will focus on non-

³ Here, I omit the cases where literally all members of the class have the relevant trait because the focus is on problems of engaging in non-spurious statistical discrimination based on *imperfect* proxies.

⁴ Note that this comparative dimension is present in the former case as well. If almost all members (or a majority) of group A possess(es) the relevant attribute (P'), and almost all members (or a majority) of any other group also possess(es) P', then it is misleading to say that being a member of group A is a reliable proxy for the relevant trait (Schauer 2003: 11–12).

spurious statistical discrimination based on imperfect proxies.

II. Schauer's Argument against Treatment as an Individual

Schauer regards the belief that “all human beings . . . deserve to be treated as individuals and not simply as members of a group” as “[the] belief in the wrongness of reliance on . . . statistically sound but nonuniversal generalizations” (Schauer 2003: 19). In his understanding, the requirement to treat everyone as an individual, that is, the principle of individualism, is not compatible with any non-spurious statistical discrimination based on imperfect proxies.

Schauer challenges the requirement. First, he argues that purely individualized treatment is impossible: any treatment that at first glance appears to be individualized must in the final analysis be based on generalizations (Schauer 2018: 50–51; Schauer 2003: 68-69). He gives an example of a maximum age for commercial airline pilots which I have mentioned earlier (Schauer 2003: chap. 4). Against such a policy, some pilots may argue that while there are some pilots under the maximum age who have poor vision, impaired hearing, and slower reflexes, there are some pilots over the age who do not suffer from such lowering abilities. If this is the case, they continue, then we should impose the same aptitude test on all the pilots periodically regardless of their age and assess their ability individually. Therefore, the imposition of a maximum age fails to treat each pilot as an individual. However, from Schauer's standpoint, such an objection is misplaced. For the seemingly individually-tailored aptitude test imposed on all the pilots is also based on a generalized judgment that a person who had no problem with his or her eyesight and hearing ability would *on average* achieve the required scores (Schauer 2003: 122-124). The same is true of the prediction of a student's academic performance in the future based on his or her performance in the past (Schauer 2018: 51).

Second, he argues that even where purely individualized treatment is possible, it is undesirable. He contends that, in a world where resources of time, personnel, and money are limited, avoiding any judgment based on generalizations would involve enormous costs and increase the possibility of error (Schauer 2018: 51). The license system of lawyers and physicians is put forward as an example (Schauer 2003: 71). Since the system is an attempt to impose controls in advance of transgressions, and thus itself based on generalizations about who are capable of practicing law and surgery competently, any purely individualized treatment in this case must be that we let anyone practice law and surgery freely, and impose liability and restrictions only on those who have done it incompetently. However, no society would be willing to adopt this solution.

Two objections can be made to Schauer's position, as stated here. First, with regard in his second criticism, Schauer has only shown that the requirement of individualized treatment cannot be an absolute value. However, many values are important and thus worth pursuing even though they can be overridden where absolute adherence to them would lead to catastrophe. Furthermore, even if Schauer is right in his first criticism that any apparently pure individualized treatment is in fact based on a certain degree of generalization, some treatments are more individualized than others. Thus, it is arguable that more-individualized treatment is, *ceteris paribus*, preferable to less-individualized treatment from a moral point of view, and the principle of individualism would still retain its moral (though not absolute) force.

Second, and more importantly, Schauer's argument confuses the treatment of everyone as an

individual with the treatment based on an individualized judgment. As I will argue below, the point of the principle of individualism is respect for the individual as an autonomous agent. The problematic nature of certain kinds of statistical discrimination is not that they engage in generalizations per se but that they engage in generalizations in a way that disrespects one's autonomy. When Schauer equates the requirement to treat everyone as an individual with the demand for the complete abandonment of all generalization, he is arguing against a strawman and trivializing the real issue at stake.

III. Eidelson's Autonomy Account

Eidelson construes the requirement to treat everyone as an individual as a form of respect for autonomy (Eidelson 2015: 138). He claims that respect for the autonomy of another requires not only allowing a person to shape his or her own life but attempting to see that person as the person he or she has made of him- or herself (Eidelson 2015: 142). That is, "we respect a person's individual autonomy . . . by attending to the influence that her exercise of autonomy has had on who she, individually, is" (Eidelson 2015: 143). Within this understanding of autonomy, above, Eidelson formulates a view of the principle of individual treatment, which he calls "the autonomy account," as follows:

In forming judgements about Y, X treats Y as an individual if and only if:

(Character Condition) X gives reasonable weight to evidence of the ways Y has exercised her autonomy in giving shape to her life, where this evidence is reasonably available and relevant to the determination at hand; and

(Agency Condition) if X's judgments concern Y's choices, these judgments are not made in a way that disparages Y's capacity to make those choices as an autonomous agent (Eidelson 2015: 144).

The character condition demands that we pay reasonable attention to the relevant ways in which a person has exercised autonomy, insofar as these are discernible from the outside, in making him- or herself the person he or she is. The agency condition demands that we recognize that, because a person is an autonomous agent, he or she is capable of deciding how to act for him- or herself (Eidelson 2015: 145). For example, if an employer refuses to hire a female candidate solely on the basis of her gender, failing to give due weight to the manner in which she has constructed her life (among other possible factors, whether she has always put her career ahead of her personal life, or disclaims any interest in children), he violates the character condition (Eidelson 2015: 146). He also violates the agency condition if he considers a female applicant's (would-be) decisions excessively by appeal to the so-called "the first-order desires"—such as the maternal drive to nurture one's children—with little attention to how she may exercise reflective choice among such desires (Eidelson 2015: 148). The result of ignoring this autonomy is to treat her as a mere stimulus–response machine rather than as an autonomous maker of choices. Note that in Eidelson's view, the requirement to treat everyone as an individual is compatible with the treatment based on generalizations and thus non-spurious statistical discrimination based on imperfect proxies. From the standpoint of the autonomy view, the problem of engaging in certain kinds of non-spurious statistical discrimination does not

lie in the fact that they are based on generalizations but that they engage in generalizations in a way that disrespects one's autonomy. (Eidelson 2015: 146). In fact, the judgment that someone who has always put his or her career ahead of his or her personal life would probably not take parental leaves is itself a generalization.

Eidelson's autonomy view is generally defensible as an account of treating others as individuals. However, in judging whether the evidence that would be most relevant to the decision is reasonably available, I suspect his conception of autonomy can lead to a problematic conclusion. In the decision on what information to procure or attend to in making a judgment about someone, he contends that it is reasonable to factor in the cost of gathering the information (Eidelson 2015: 156). He also believes that visibility from the outside is an important part of the cost (Eidelson 2015: 148, 156). Thus, it appears likely that traits as race or gender, which are (usually) visible from the outside, could be used as proxies more often and easily than a person's own past behavior is, which reflects his or her autonomous choice but may be more difficult to discern. Because there is nothing wrong, in this autonomy view, with the use of race or gender as a proxy per se (as long as they are to some extent reliable ones), it appears that taking an applicant's gender into account, together with all the other evidence that reflects her autonomous choices, when making hiring decisions would be compatible with the character condition.

However, one reason why race and gender have been or are over- or misused is that they are (mostly) visible from the outside (cf. Schauer 2018: 49; Schauer 2003: 187; Ishiyama 1987: 310). And because of their visibility from the outside, both race and gender have been rendered socially salient, in the sense that they are seen to be important for social interactions across a wide range of social contexts (cf. Lippert-Rasmussen 2014: 30; Altman 2015). During the course of our daily interactions with others, we tend to care about their race or gender, even when knowledge of this information is irrelevant in deciding how we should treat them. Sensitivity to other people's race or gender is such a deep and entrenched feature of human being that we tend to give greater than necessary weight to race or gender as a reliable proxy (cf. Eidelson 2015: 166; Ishiyama 1987: 305). Moreover, race and gender are immutable traits, so their use as proxies appears to be in conflict with respect for personal autonomy. In short, considering that race and gender are easily and frequently used throughout the whole range of social contexts, even when they are not necessary, and we cannot change them by using individual effort alone, it appears unfair to require that to avoid discrimination an individual provide the evidence that she or he is not a typical representative of her or his race or gender in a visible way.

The considerations above lead to the suggestion that the following condition be added to Eidelson's formulation of the autonomy view:

(Fairness Condition) if X discriminates against Y on the basis of her socially salient and immutable trait(s) to achieve a goal, the goal should be important and no alternative means exist to achieve the same goal.

The fairness condition can cope with the problem mentioned earlier. If an employer is able to determine whether a particular applicant will take parental leaves with reference only to the other evidence that reflects her autonomous choices, the use of her gender as a proxy (even for a complementary purpose)

violates the fairness condition.

IV. Conclusion

In this paper, I argue that Schauer's arguments against the principle of individualism are unsuccessful. I also argue that Eidelson's autonomy view is defensible as grounds for determining the moral wrongness of certain kinds of statistical discrimination if we incorporate an additional condition into its formulation.

The principle of individualism is, of course, not the only explanation why certain kinds of non-spurious statistical discrimination based on imperfect proxies are morally wrong. Statistical discrimination may be found morally wrong in a number of ways.⁷ Identification of other causes and consideration of whether those plural explanations could be integrated would be an interesting project.

Additionally, I do not sufficiently discuss the practical implications of the view I expound here. In the U.S., the moral permissibility of different types of racial profiling has been enthusiastically discussed (cf. Risse & Zeckhauser 2004; Eidelson 2015: 173–222). In Japan, the phenomenon of women-only cars during rush hour has been discussed with reference to its possibly wrongful discrimination against men (cf. Matsuo 2016). These instances of practice deserve further examination from the point of view expressed here.

For reasons of time and space, I will address those issues at another time.

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⁷ For those other possible reasons, see Alexander (1992), Hellman (2008), Lippert-Rasmussen (2014: 153-89), and Moreau (2010), for example.

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