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# What Is Wrongful Discrimination?

RICHARD J. ARNESON\*

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Legal prohibition of some types of discriminatory conduct may be morally acceptable even though the conduct being prohibited would not be immoral in the absence of legal prohibition. Consider Thomas Schelling's analysis of patterns of racial segregation in residential housing.<sup>1</sup> If one sees a sharply segregated housing segregation pattern (for example, African-Americans living next to African-Americans, whites living next

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1. Thomas C. Schelling, *MICROMOTIVES AND MACROBEHAVIOR* 135-66 (1978).

to whites, and African-Americans living next to whites only at the neighborhoods' edges) even though there is no legal requirement that forces this result, one might suppose that what explains the segregation is a strong desire of almost all members of one or both groups not to live in proximity to any members of the other group. Schelling presented a simple model of the dynamics of residential housing choice that showed that mild racial preferences could lead to strongly segregated outcomes.<sup>2</sup> For example, if nobody wants to live in a neighborhood in which members of his racial group are a minority, and individuals occasionally move in and out of neighborhoods, eventually a strongly segregated pattern emerges.<sup>3</sup> In other words, segregation can emerge even if no one is averse to living in proximity to members of another race.

Plausibly, the mild racial preferences that Schelling showed capable of inducing segregated housing patterns are morally innocent. It is not merely the case that they are not seriously morally wrong or not viciously racist. Arguably, they are not wrong at all.

Nonetheless, the segregated housing patterns induced by a Schelling mechanism might be the cause of serious social harms. To generate a simple example, imagine that children interact with other children who live nearby, that whites are wealthy and educated and African-Americans are poor and uneducated, and that interacting with children whose parents are wealthy and educated is a great boon if you are a child of poor and uneducated parents. Also assume that contact with children whose parents are richer and more educated than yours increases your expected lifetime wealth and education prospects, and to a far greater degree than interacting with children whose parents are poorer and less educated diminishes your lifetime prospects. Segregation in these imagined circumstances would do little, if anything, to help white children and would do a lot to hurt African-American children. Specifically, segregation would deprive African-American children of an important educational resource. In this setting, prevention of serious harm to African-American children might constitute sufficient grounds for passing a fair housing act that forbids discrimination on the basis of race in the rental housing and home sales markets.<sup>4</sup>

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2. *Id.*

3. *Id.*

4. One might object to my description of the example by claiming that if housing residence choices based on mild racial preference generate great social harm in the aggregate even if the each individual choice looks to be morally permissible when assessed in isolation, then the choices, despite superficial appearances, are morally wrong. They cause harm and, ex hypothesi, any gains they secure do not sufficiently counterbalance the harms to render the acts that produce these net effects morally permissible, all things considered.

In some cases, each member of a set of acts may cause harm taken together, but be

Even if discriminatory choices about where to live cause aggregate harm, none of the acts need be morally wrong according to nonconsequentialist moral principles.<sup>5</sup> The acts might exhibit no more than morally permitted partiality toward those near and dear to us and violate no individual's moral rights.

The Schelling analysis of residential housing segregation suggests the question, when an act of discrimination on the basis of race is morally wrong, what features of what is done determine that result? More broadly, what is morally wrongful discrimination? This essay seeks to answer this question.

## I. INTRODUCTION

Antidiscrimination norms single out particular categories of traits and forbid discrimination among persons in certain contexts on the basis of these traits. Neither theory nor practice tell us much about the principle for selecting these categories, if such there be, and the justification for this principle, if any. The principle of selection does not leap out and confront us when we inspect the particular categories of traits that are commonly agreed to be illegitimate determinants of choice. The idea

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such that no individual act taken by itself is a but-for cause of harm. Regarding some of these cases, I say a deontological theory that includes a duty of beneficence ("Do some good on some occasions!") and a general duty not to cause harm in certain ways, even if the act that harms is not intrinsically wrong would allow that none of some sets of acts, each set causing significant harm, includes any individual morally wrong acts.

In passing, I note that an act consequentialist should allow that some acts that are members of sets of acts that in the aggregate do significant harm are nonetheless acts that bring about an outcome no worse than the outcome any alternative choice of acts would have brought about instead, and hence morally right by this standard. Suppose it is given that to do any good, one thousand individuals must converge in doing a certain type of act (cooperate), and it is given that whatever I do, the one thousand-act threshold will not be reached and the good will not be achieved. Then some noncooperating act may well be the act that, in my actual circumstances, I morally ought to do, notwithstanding its being a member of a set of acts that together produces a very bad result, the loss of the good that could have been achieved had one thousand of us cooperated.

5. An act consequentialist principle holds that one ought morally always to do an act that brings about overall consequences no worse than those that would have been brought about by any other act one might have done instead. See SHELLY KAGAN, *THE LIMITS OF MORALITY* (1989); Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYCLOPEDIA PHIL., Feb. 9, 2006, <http://plato.stanford.edu/entries/consequentialism>. Conversely, a nonconsequentialist ethic is one that rejects consequentialism. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 28-33 (1974); F. M. Kamm, *Non-consequentialism, the Person as an End-in-Itself, and the Significance of Status*, 21 PHIL. & PUB. AFF. 354 (1992).

that it is wrong to discriminate on the basis of race, creed, or color commands wide assent. The idea that it is wrong to discriminate on the basis of talent, virtue, citizenship, or friendship and family ties does not. Beyond that, the status of many classifications is uncertain, and the principle of selection looks elusive.

Discrimination that is wrong in one context may be acceptable in another. Inviting only old people to my sixtieth birthday party may be ill-advised, but would not be regarded as morally troubling in the way that refusing to extend an employment offer or university admission to an otherwise best-qualified applicant on the ground of old age is thought to be. In broad terms, home ground for an antidiscrimination norm is a public sphere of activity as distinguished from a private sphere. How to draw the relevant boundary line between public and private spheres for these purposes is not clear and is also contestable. An analytic account of the nature of wrongful discrimination should be able to explain why antidiscrimination norms apply only in certain contexts, and ideally should provide a principle of demarcation. On the other hand, the importance of this split between public and private should not be exaggerated. If I refuse to date an African-American woman or to befriend a Chinese-American man solely on the ground that I regard only people who are white-skinned as meritorious candidates for personal friendship, surely these prejudiced refusals are morally wrong if discrimination on the basis of race or skin color is ever morally wrong.<sup>6</sup>

The exploration of this topic will proceed within a given moral framework. This framework is assumed, and not even cursory attempts are made to defend it. The framework is not idiosyncratic.<sup>7</sup> Arguably, it is part of the plain common sense of contemporary culture. At any rate, it is worth asking, what is the most sensible account of wrongful discrimination, given the framework? The framework is a deontological morality that holds, contrary to act consequentialism, that what it is morally right and wrong<sup>8</sup> to do is fixed by constraints and options.<sup>9</sup> There are moral constraints on conduct that restrict what it is permissible

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6. The proposal about what makes discrimination wrongful that this essay endorses does not distinguish public and private discrimination. Nor does it distinguish discrimination by the state or public officials from discrimination by nonstate agents.

7. For the record: The moral framework I assume in this essay is not the one I would ultimately endorse. The project of this essay is to explore what one should hold about discrimination, given that one adheres to a deontological morality. On the nature of deontology, see generally DEONTOLOGY (Stephen Darwall ed., 2003).

8. That is, what is permissible, impermissible, and required.

9. The terminology of “constraints” and “options” is explained in Kamm, *supra* note 5, at 354.

to do in pursuit of any of one's goals.<sup>10</sup> These moral constraints mainly take the form of moral rights of others that are correlative with moral obligations that one must not violate these rights.<sup>11</sup> So long as one conforms one's conduct to the moral constraints, one is not morally required to bring about the greatest good that one's choice of act could achieve within these constraints.<sup>12</sup> Thus, one has wide liberty to live one's life as one chooses so long as one does not violate any moral constraints. In the leeway that constraints leave open, one has options.

Discrimination that is intrinsically morally wrong occurs when an agent treats a person identified as being of a certain type differently than she otherwise would have done because of unwarranted animus or prejudice against persons of that type.<sup>13</sup> In other words, wrongful discrimination is a subcategory of defective discrimination. One person may fail to respond to another in the right way given the circumstances, or respond by treating the other in ways that fail to adequately respond to the reasons that dictate how the other ought to be treated, without the failure amounting to wrongful discrimination. The extra bit that when added to generic defective discrimination constitutes wrongful discrimination is the fact that one is led to defective conduct toward the other by unjustified hostile attitudes toward people perceived to be of a certain kind or faulty beliefs about the characteristics of people of that type.<sup>14</sup>

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10. The locus classicus on moral constraints on morally acceptable conduct that apply independently of social convention is JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C.B. Macpherson ed., 1980) (1690), chapters I-II.

11. *Id.*

12. Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (on the intuitive oddity of a morality that denies moral options).

13. Here I want to record indebtedness to the exploration of the topic of wrongful discrimination in Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149 (1992).

14. An initial query: Why not specify that wrongful discrimination involves treating a person of a given type *worse*, rather than merely differently, than one otherwise would have done, had one not been motivated by animus or prejudice against persons of that type? I submit one can be guilty of wrongful discrimination when one treats a person morally appropriately (so far as one's behavior is concerned) and better than one would have done had one not been moved by negative attitudes or bias against the group of which one holds the person to be a member. Consider this example: One treats a person better than one otherwise would have done from animus or prejudice against persons of that type. One says to oneself, "I'd better pay what I owe to Sally, because she is a pushy Jew, or an uppity black, or whatever, and would respond more aggressively to not being paid than other persons of better type."

## II. THE ALLEGED IRRELEVANCE OF INTENTION, FAULT, AND MOTIVATION TO PERMISSIBILITY

At the outset, a serious objection applies to this proposal. The objection derives from work by Judith Thomson in clarifying the structure of a morality of moral constraints and moral options.<sup>15</sup> Thomson's idea is that we should separate cleanly the issues (1) whether or not an action by some agent would be morally permissible; (2) whether the agent would be at fault if he were to do the action; and (3) with what intention the agent would do the act if he were to do it.<sup>16</sup> Issue (1) is claimed to be entirely independent of issues (2) and (3).<sup>17</sup> Whether going to the store and buying bread right now is permissible depends on the features of that act, and according to Thomson, the crucial point is whether my doing this right now would violate anyone's moral rights (that are not overridden by counterbalancing factors).<sup>18</sup> The act can be completely innocent even if the actor intends something bad in doing the act, or would be (culpably) at fault in doing it. My hatred of Sally might induce me to repay a debt to her on time, because I know that she will be distressed that my right conduct in this instance, a rare phenomenon, deprives her of yet another opportunity to lament my failure to fulfill my obligations. My intention is bad but the bad intention does not taint the act, which remains the morally required thing to do. So, any proposal to characterize a type of wrong action in terms of the agent's intention or the agent's culpability of conduct is mixing up categories that for clarity's sake had better be kept in separate bins.

Thomson illustrates her thesis by considering examples in which the distinction between what the agent is actually doing, in the thin sense, and what the agent intends to be doing is clear and sharp.<sup>19</sup> For example, assume I intend to kill my wife in circumstances in which she plainly has a right not to be killed. I offer her what I take to be deadly poison and seek to persuade her to ingest it. In fact, the stuff I am giving to her is the medicine that she must take if she is to survive some threatening lethal disease. What I am doing is saving her life; what I intend to be doing is murdering her. Clearly what I am actually doing is morally right, despite my evil intent. I am morally at fault or culpable

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15. See JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990); Judith Jarvis Thomson, *Physician-Assisted Suicide: Two Moral Arguments*, 109 *ETHICS* 497 (1999); Judith Jarvis Thomson, *Self-Defense*, 20 *PHIL. & PUB. AFF.* 283 (1991).

16. Thomson, *Self-Defense*, *supra* note 15, at 292-97.

17. *Id.*

18. *Id.* at 298-303.

19. *Id.* at 293-94.

here in doing what is actually the right thing. The culpability arises from my evil intention.

The Thomson position does not officially deny that the permissibility status of proposed acts is independent of the motivation that would lead the agent to do the act if he were to do it, but the considerations that drive a wedge between the assessment of the act and its fault on one side and the agent's intention on the other would appear to press motivation on the fault and intention side of the divide. I treat her position as striking down on these general grounds my proposed account of wrongful discrimination.

I do not wish to deny that one may characterize an agent's act in given circumstances in abstraction from the motive, intention, or fault that might attach to the agent's doing of that action. Call this the act thinly described. For example, suppose that from spiteful malice I decline to share my large ice cream cone with my little brother, who strongly desires some licks. My act can be thinly described without reference to the spiteful malice. One can raise the question whether the act thinly described is morally permissible or not. Let us suppose this question is settled in a deontological framework by inquiring whether any true thin description of an act characterizes it as a violation of someone's moral right. If the act fully described violates someone's right, then it would be morally wrong for the agent to do it, unless all the agent's alternatives would violate more weighty rights, or unless failing to violate the moral right on this occasion would bring about excessively great losses for other people (affected non-rightholders). Here I am just assuming that a reasonable theory of moral rights and corresponding obligations can operate on acts thinly described and determine their moral status as permissible, forbidden, or required. This assumption might be open to challenge, but that discussion would take us too far afield.

Let us also grant the assumption that assessments of an agent's intention in acting reflect on the quality of the agent's exercise of agency in doing the act and maybe on the character of the agent, but not directly on the act itself (thinly described). Likewise, whether an agent would be at fault or culpable if she were to do an act does not bear on the different question whether the act itself, again thinly described, is permissible, impermissible, or required.

But all of this leaves open a further assessment of the act thinly described combined with the intention with which the agent acts. And we can assess the package of the act thinly described combined with the



features of the agent's doing of it that render her at fault or culpable in the doing. These combination assessments might issue in judgments to the effect that the combination is permissible, impermissible, or required. Given the above, I see no reason to suppose that combining assessments is impossible or illegitimate. Thus, such assessments will be made.

There is a purely verbal issue, whether to say that an assessment of an agent's motivation, intention, or fault in action counts as part of an assessment of the "action itself." The resolution of that issue depends on how one defines one's terms. If there is a substantive issue, it is whether or not it can be morally wrong to perform bodily movements that constitute an unobjectionable act thinly described, if it is also the case that if one were to perform those movements, one would be acting with morally objectionable intentions, motivations, or be engaged in a doing that is faulty when viewed from a perspective that encompasses more than thin description.

Returning to the example of my refusal to share my ice cream cone, it might be the case that this act thinly described is morally permissible, doing it from spiteful malice is bad, and the combination of the act thinly described and doing it from spiteful malice is impermissible. It is not wrong to decline to share your ice cream, but declining to share it for that reason is wrong. These judgments do not conflict; they can be true together. We could say the act I propose to do thinly described is permissible, but this leaves entirely open the further issue, whether the act thickly described is permissible. Put another way, I suggest that what an agent proposes to do (thinly described) may not be wrong as such, yet it would be wrong to do the thinly described act with a certain intention, or from a certain motivation, or if one would be culpable if one were to do the act.

Thomson tends to treat examples in which there are very strong reasons to do the act thinly described.<sup>20</sup> Although it would be best to do the right thing for the right reason, if the thing is important enough it is likely better to do the right thing for the wrong reason than not to do it at all. However, consider examples of acts that thinly described are merely permissible, not supported by a compelling weight of moral reasons. For such acts one might hold that it would be better not to do the act at all than to do the act with an evil intention or in a manner such that one's performance of the act would render one culpable. For example, it might be permissible to hire a white male rather than a more qualified Hispanic female for a job, there being no right of the most qualified applicant to be offered the position, but this permission evaporates if

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20. *Id.*

what I would be doing is passing over a qualified candidate from racial animus or misogyny.

### III. THIN DESCRIPTION ACCOUNTS OF WRONGFUL DISCRIMINATION

Although the Thomson Irrelevance-of-Fault-and-Intention-(and Motivation)-to-Moral-Permissibility claims should probably be rejected, the considerations adduced against them do not amount to a decisive rebuttal. So it may be worthwhile to inquire how to conceive of wrongful discrimination on the assumption that what makes discrimination intrinsically wrong has to do with features which show up in the thin description of such acts.

One possibility is that in contexts such as selection among applications for employment, bank loans, and university admission, the Lockean right in question is the right of the most qualified applicant to be selected first and offered the position in question, then the second best applicant if the applicant chosen first declines the offer, then the third best on the same terms, and so on down to the worst ranked applicant.<sup>21</sup> What it is to be best qualified varies from context to context. For example, the best qualified applicant for a university course of study is the one whose aptitude and background preparation plus the likelihood that she will work hard at it, taken together and appropriately weighted, render her reasonably expected level of success at that course of study higher than any other applicant's level. The best qualified applicant for a bank loan is the one to whom giving the loan increases the bank's reasonably expected profits the most. The best qualified applicant for employment is the one whose hiring would most advance the hiring enterprise's morally innocent goals, appropriately weighted.<sup>22</sup>

A further qualification must be noted. An applicant for employment, a bank loan, or a position as a university student participates in a procedure. The procedure specifies a selection process. An applicant can be best qualified and yet fail to be selected owing to various causes: (a) the procedure is ill designed; or (b) the procedure is well designed, but even so is imperfect, so perfectly following the procedure does not

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21. Norman Daniels, *Merit and Meritocracy*, PHIL. & PUB. AFF. 206 (1978); Judith Jarvis Thomson, *Preferential Hiring*, PHIL. & PUB. AFF. 364 (1973) (describing and rejecting the idea that private employers have a duty to hire the most qualified in this sense).

22. Of course, these indeterminate formulations leave lots of room for disagreement as to what, in any given case, really does constitute being best qualified.

guarantee selection of the best applicant; or (c) the procedure is well designed, but not correctly followed in this instance, and so on.

Given this clarification, the right of the best qualified applicant for selection might be understood as the right of the person who is really, from a God's eye perspective, best qualified. The right might also be understood in a more down-to-earth sense, for example, as the right to have one's application processed by a reasonable procedure and to be selected if that procedure, correctly followed, would single out one's application as top ranked. The down-to-earth specifications of "best qualified" slide closer to a purely procedural understanding amounting to the right to a fair process. Here, the right is considered in its ideal sense and in a proceduralist interpretation after that.

On this view, what is morally wrong about wrongful discrimination is that it tends to produce the result that the meritocratic right of the best qualified to be selected is violated.

The difficulty in this approach is that the idea that there is any such moral meritocratic right is on its face not plausible. Consider whimsical hiring. I am hiring persons to work in a doughnut shop I own. There are several other doughnut shops in the neighborhood, so it will not be a great loss to any actual or potential customer if my doughnut shop is not run as well as it might be. I announce that I will respond to the applications according to my subjective mood and select an applicant to be hired by arbitrary whim. This does not seem to be in the ballpark of wrongful discrimination. Nor is it plausible that my whimsically hiring Fred to man the cash register violates the right of other, better qualified applicants to man cash registers instead.

In many hiring cases, whimsical hiring would violate fiduciary obligations to firm shareholders. The manager of the firm is contractually obligated to the shareholders to run the firm in a way that is profit-maximizing, and whimsical hiring fails this test. However, one can contract out of such duties. For example, hiring Arneson as manager, it is agreed in advance among all concerned parties that Arneson is bent on whimsical hiring. A similar point holds respecting obligations a business enterprise might be thought to have toward potential customers. Again, explicit announcements of one's intentions would suffice to eliminate any such obligations. But, then it seems that in cases where such obligations are in force, it is explicit or implicit contracting—voluntary deals one makes when one could instead have made a deal on different terms—that is the source of any obligation to engage in meritocratic hiring that might plausibly be thought to exist. If there is a violated right, it is the right that contracts be fulfilled if one has done one's contractually specified part. This has nothing per se to do with wrongful discrimination.

If there is no right for hiring selections in the order of the comparative merit, wrongful discrimination cannot be analyzed in these terms. What goes for hiring holds also for distributing bank loans and filling student slots in universities.

Turn now to the idea that the right that wrongful discrimination violates is the right, operative in certain familiar contexts, to submit an application and to have one's application considered according to some process reasonably related to the goals that are supposed to be furthered by the posts for which applications have been solicited. To be fair, the process need not be perfect and need not be perfectly followed. Imperfect procedures and mistakes in the administration of the process can be morally innocent, not wrong at all. But one's fair process right is violated if one is excluded from consideration or not given consideration comparable to other applicants on grounds that have no reasonable relation to the underlying goals the process supposedly serves.

The objection to the idea that one has a basic moral right that one's applications be given due process is a diluted version of my objection to the supposed right of the best qualified to be selected. Against the latter, whimsical selection can be morally permissible on any reasonable deontological view and against the former whimsical application processing can equally well be morally permissible.

Return to the doughnut shop example. Advertising for job applicants, I announce that there is no implicit promise, in soliciting applications, to give any application any sort of consideration. I reserve the right to exclude batches of applications on arbitrary and subjective grounds and to short-circuit any application handling process by simply picking a random application and offering that applicant the job. Alternatively, I might single out a whimsical process for selecting applicants and follow that process rigorously, awarding the job to the candidate singled out by that procedure. Such an irritating announcement might reduce the volume of applications received, but the announcement itself does not plausibly violate any potential applicant's standing right to due process.

Another possibility is that wrongful discrimination is discrimination that disfavors persons of a certain type in a way that expresses hostile or otherwise morally inappropriate attitudes toward persons of that type. Whimsical hiring does not express these morally untoward negative attitudes toward any group of people, and will not qualify as wrongful discrimination on this account.

Arguably, this proposal satisfies the Thomson constraints. An agent's acts can express an attitude whether or not the agent actually has the attitude in question. For example, one can deliberately express an attitude one does not hold. That is, one can express an attitude inadvertently, without oneself holding the expressed attitude. Perhaps it is better to say that one is behaving as though expressing the attitude that the reasonable observer of one's behavior will come to believe that one is expressing.

Given the above, one might propose that wrongful discrimination is discrimination that reasonable observers of the discriminating behavior will interpret as conveying hostile or other morally inappropriate attitudes toward the object of the discrimination.<sup>23</sup> But suppose that if I raise the Confederate flag over my doorstep, many of my neighbors will unreasonably but innocently misinterpret my act and take me to be expressing hostility to my non-white, non-Asian neighbors. This is not a reasonable interpretation of my conduct, because all concerned parties know of my adulation of historical tidbits.<sup>24</sup> Still, many people will suffer seriously wounded feelings from their sense that I am expressing inappropriate attitudes. One might hold that in these circumstances my act is wrongful discrimination, independently of my intention in doing it, my motivation, and the possible culpability I accrue from doing it.<sup>25</sup> In the same spirit, one might assert that if one's discriminatory behavior would be interpreted by reasonable but culpably misinformed observers as expressive of morally inappropriate attitudes, that set of facts would not render it wrongful.<sup>26</sup>

However, what makes discrimination wrongful (when it is wrongful) is a thick description matter and not a matter that shows up adequately in an act thinly described. In the absence of strong reasons to accept Thomson's claims of the Irrelevance-of-Intention-(and Motivation)-and-Fault-to-Moral-Permissibility, no strong reasons exist to accept them as a constraint on the characterization of wrongful discrimination.

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23. For discussion of related issues, see Mathias Risse & Richard Zeckhauser, *Racial Profiling*, 32 PHIL. & PUB. AFF. 131 (2004).

24. For example, shards of ancient Egyptian pots and an inedible Soviet-era wilted beet are displayed from my living room window.

25. One should not respond to this example by going to the other extreme by stipulating that one's behavior constitutes wrongful discrimination if it is interpreted by the actual observers of the behavior as expressive of morally inappropriate attitudes. This stipulation would yield the result that if one's impeccable behavior would be interpreted by people with culpably overwrought sensibilities as expressing bad attitudes, the behavior might then, if discriminatory, qualify as wrongful discrimination.

26. I have no serious objection to this proposal. It seems excessively indirect and roundabout, but that may be merely an aesthetic judgment.

## IV. DISCRIMINATION FROM ANIMUS AND PREJUDICE

After a long detour, this takes us back to the idea that wrongful discrimination occurs only when an agent treats a person identified as being of a certain type differently than she otherwise would have done from unwarranted animus or prejudice against persons of that type. Animus is hostility or, more broadly, a negative attitude, an aversion. One might suppose that to be defined as “animus,” the negative attitude must rise to a threshold of negativity. The slightest whisker of aversion to a group might be unwarranted but hardly seems seriously morally wrong. For an example of a permissibly slight level of aversion, suppose that in a society composed of people from different ethnic backgrounds, each individual prefers to live in a neighborhood in which no more than ninety-five percent of the residents are members of ethnic groups other than her own. On the other hand, a large negative reaction in one’s behavior toward a member of some group that is motivated by very slight aversion can be culpable.<sup>27</sup> Perhaps to count as “wrongful,” the discrimination must proceed from aversion that is, considered in tandem with the motivating character, above some threshold of culpability.

Although in the current cultural climate there is considerable support for the idea that one must respond to each individual with whom one interacts as a unique individual, on the basis of a good faith effort to determine that individual’s particular qualities relevant to one’s potential interaction with the person, this idea is hopeless. There is nothing morally untoward about responding to individuals on the basis of statistical indicators their broad characteristics suggest. Being a member of the class of people who are physically uncoordinated may be a relevant consideration if you are deciding on a cleanup hitter on a sandlot baseball team, and being an alcoholic may be all one needs to know to decide an applicant is not suited to be chosen as corporate CEO. After all, one is always interested not in how an individual will behave in general, but in how the individual will behave on specific occasions when her performance affects other individuals or a favored enterprise’s success. The fact that an individual is prone to absenteeism is only a statistical indicator of the feature one really cares about when deciding whether to select that individual for a job.

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27. This might be a case of morally tainted whimsicality.

So if prejudice is not to be equated with relying on stereotypes, what is it?<sup>28</sup> One wrongfully discriminates against a person of a certain type from prejudice when one treats the person differently than one otherwise would have done on the basis of beliefs about the person's characteristics that are either inferred from one's beliefs about persons of that type or directly caused by one's reaction to the type, these beliefs being formed in some culpably defective way.

The beliefs about a person formed defectively on the basis of beliefs about that person's group need not be negative beliefs. In the pre-Civil War United States, within abolitionist thought one finds a strain of romantic racialism that ascribes fancifully noble qualities to enslaved African-Americans.<sup>29</sup> If the romantic racist abolitionists formed these beliefs via some culpably defective process, discrimination on the basis of these beliefs would constitute wrongful discrimination.

On this account, whether one is acting from prejudice does not depend on whether one's beliefs happen to be true. If one forms beliefs about most people on the basis of generally reliable and epistemically nondefective rules and procedures, but then drops these standards when one forms beliefs about African-Americans and simply assumes African-Americans must be bad (or good), the beliefs are prejudiced by virtue of their faulty origin. This is true even when one's normally reliable procedures lead to massively false beliefs about most people, and following one's defective procedures respecting African-Americans happens to lead to correct beliefs about African-Americans.

Whether the process by which one forms beliefs is defective to the point of culpability hinges on varying standards depending on what is at stake. If I hand out trivial good conduct badges in a Cub Scout troop, and nothing of consequence hinges on making correct assignments, it is acceptable to invest less energy seeking out, assessing, and integrating evidence regarding who deserves a badge than if I am handing out scarce lifesaving medical treatments according to the comparative benefit that potential recipients would gain.

One's culpability with respect to the epistemic quality of the process by which one forms beliefs about people with whom one might interact or whose lives one's behavior might affect might have its source in morally inappropriate attitudes and desires concerning those people. Alternatively, it might have its source in purely epistemic faults. I might have an unwarranted aversion to Korean-Americans, and my aversion

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28. By stereotypes, I mean beliefs about an individual's characteristics by inference from the characteristics statistically associated with groups of which the individual is a member.

29. For example, HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (1852) displays romantic racist beliefs.

might cause me to form beliefs about Korean-Americans that are biased downward. This aversion taints my belief formation process as culpably faulty. In another type of case, I simply am lazy in forming beliefs. I harbor no animus against Korean-Americans, but I discriminate against them on the basis of negative beliefs about the characteristics of Korean-Americans that I lazily absorb from the prevailing culture. I do not subject these beliefs to the critical scrutiny that is epistemically warranted due to the general unreliability of popular beliefs. In this case I am culpably at fault for forming my beliefs about this group in this way, even though no animus against the group plays a role in the process.

On the proposed view, one might be wrongfully discriminating against certain types of people if one treats them differently than one would have done if one had not had prejudiced beliefs about those people, the beliefs counting as prejudiced because of their culpably defective origination. This is true even if one forms beliefs in exactly the same culpably defective way across the board, regardless of whether the people in question are Jews, WASPS, African-Americans, or whatever. One is still treating these people differently than one would have done if one did not have the prejudiced beliefs concerning them. Perhaps the account should be amended so that defective belief acquisition processes ground the complaint of prejudice only when the processes vary in defectiveness depending on the type of person about whom beliefs are being formed.

## V. AN OBJECTION

Imagine that one has no animus against African-Americans and holds no prejudiced beliefs about them. One lives in a Jim Crow society with a fixed racial caste hierarchy. Social norms dictate that African-Americans are to be hired only for menial jobs. One perceives that one will gain advantages for oneself if one follows the norm and refuses to hire highly qualified African-Americans for skilled jobs. We may suppose the norm is not enforced so rigidly that the noncompliance penalties would be severe. One could probably flout the norm with relative impunity. One also sees that one can gain special advantages from willingly complying with the Jim Crow norm. One sells a product, and seeing one's conformity, customers will become more fiercely loyal to that product and profits will increase. Apparently, my proposal counts this as *not* a case of wrongful discrimination, which on the face of it looks absurd.



However, what is described here is a secondary phenomenon with respect to the idea of wrongful discrimination. Many people in the Jim Crow society are motivated by animus and prejudice, and the individual we are imagining reaps benefits for himself by catering his behavior to them. One acts wrongly because one fails to act against this massive wrongful discrimination practice, and in so doing one contributes to the maintenance of a vicious caste hierarchy.

Another objection arises once we amend the example. Imagine that nobody harbors racial animus or prejudice. The Jim Crow norm arises and lasts via the strategic recognition on the part of the cooperators who initiate and sustain this norm that acting in this way will be beneficial to them. Each gains by acting as though he were a wrongful discriminator. On my account, none is a wrongful discriminator. Yet, something still smells fishy.

This analysis emits no bad odor that I can detect. I am happy with this description of the heinous situation: all the Jim Crow cooperators are acting as though they were wrongful discriminators and are doing so in a manner that unfairly harms people.<sup>30</sup>

## VI. INNOCENT DISCRIMINATION

An attractive feature of the animus and prejudice account of what makes discrimination intrinsically morally wrong is that it facilitates acceptance of the notion that innocent forms of discrimination exist that involve the classificatory categories such as race that have been previously thought inherently wrongful as bases of discrimination. For example, there can be morally innocent instances of racial discrimination. These are simply the ones that are not driven by animus or prejudice.

Reiterating an already asserted claim, I am not merely claiming that some acts of racial discrimination are only slightly morally wrong or not sufficiently seriously morally wrong to be worth bothering about. No doubt there are such trivially wrong discriminatory acts. I claim that there is a further class of discriminatory acts the instances of which not morally wrong at all, rather, they are morally innocent. They are neither mortal sins nor venial sins, either.

Of course, acts that are not intrinsically morally wrong may become morally wrong for extrinsic reasons. This is so when an act takes place

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30. Here, the norm of unfairness that is being violated is a distributive justice norm, not the antidiscrimination norm. The norm in question is that it is wrong to form a cartel to extract greater gain for cartel members than they could expect to gain on a competitive market. This behavior is exploitive as judged by the standard of a competitive market. See John Roemer, *Exploitation, Alternatives, and Socialism*, 92 *ECONOMIC J.* 87 (1982) (characterizing several conceptions of exploitation).

in circumstances where it causes bad consequences to an extent that outweighs its intrinsic innocence.

Consider discriminating between my family and friends and those outside this circle when I decide who should be the recipients of gifts. If I give a bicycle to my niece rather than to a stranger, my selection need not involve any hostile attitude toward the stranger, no judgment that he is of lesser basic moral worth or lesser earned merit than my relative. Favoritism toward those near and dear to me is motivated by positive attitudes toward them, not negative attitudes towards any others. Or it may be that I am simply conforming to conventional role expectations in favoring my narrow circle over those outside it, but again if these conventional role expectations themselves are established and sustained by social processes that do not involve prejudiced beliefs and hostile attitudes, my desire to conform to them is unlikely to be tainted by any such attitudes.

A wide variety of deontological views will agree that within a broad range, and in certain social contexts, favoring my friends and relatives over other people exhibits morally permissible partiality. Some might hold in addition that there are moral constraints dictating that partiality to friends and relatives is required to meet minimal commitments of the relationships. But consider just options, the moral freedom that deontological moralities assign to each of us to live as we choose within broad limits of constraints formed by other people's rights. In a wide variety of contexts, favoring family and friends over non-kin and non-friends is accepted, morally permissible discrimination.<sup>31</sup>

But the same moral freedom can be in play when individuals discriminate among persons on the basis of classifications that are home ground for antidiscrimination norms. Lesbians can favor lesbians without holding hostile attitudes or prejudiced beliefs toward heterosexuals. Co-religionists can discriminate in favor of co-religionists in the same way, and for that matter atheists can exhibit morally permissible partiality to fellow atheists. Some commentators characterize African-American partiality toward other African-Americans in a similar spirit.<sup>32</sup> They describe an

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31. For discussion of moral requirements and permissions to be partial to family members, friends, fellow countrymen, and those regarded as near and dear in various ways, see the essays in SAMUEL SCHEFFLER, *BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT* (2001).

32. Lionel K. McPherson & Tommie Shelby, *Blackness and Blood: Interpreting African American Identity*, 32 *PHIL. & PUB. AFF.* 171, 189-92 (2004).

attitude of racial solidarity that they suppose is common in the African-American community, and which is reasonable and morally unobjectionable.<sup>33</sup> Identifying with fellow African-Americans, one is disposed to include within the favored group those who (a) have at least one traceable African ancestor; and (b) have detectable physical features associated with the “African-American” stereotype, features that render the possessor apt to be subject to mistreatment.<sup>34</sup> Commentators somewhat nervously associate the racial partiality they are characterizing with a larger concern for social justice and special consideration for those who belong to groups that have been in the past and today still are denied just and fair treatment.<sup>35</sup> But as noted, one who manifests racial partiality is not thereby exhibiting partiality toward all those who suffer injustice of whatever race or ethnic origin.<sup>36</sup> Their speculation may be right that the association of being African-American and being subjected to vicious mistreatment is a partial cause of African-American racial solidarity. But whatever its cause, racial partiality is racial partiality, not simply a solidarity with the oppressed. On the view defended here, there is no deontological case for holding racial partiality to be intrinsically morally wrong when it does not proceed from animus or prejudice against those who are singled out for inferior treatment.

The combination of (1) the deontological tolerance for partiality toward those who are near and dear; and (2) the fact that my analysis of wrongful discrimination does not restrict the classifications of persons engendering conceptions of the near and dear for purposes of determining the permissible partiality’s moral limits is strong medicine. The direct implication is that partiality toward members of suspect classification groups can be the basis of legitimate partiality on the model of acceptable partiality to friends and kin.<sup>37</sup> This view, if accepted, has serious moral implications.

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33. *Id.* at 187-89.

34. McPherson and Shelby put the *b* point in different terms; they say that one who passes as white forfeits membership in the African-American community. This formulation allows that one who satisfies condition *a* and fails to satisfy condition *b* but nonetheless identifies in a public way as an African-American thereby counts as one. *Id.* at 184.

35. *Id.* at 188-89.

36. McPherson and Shelby consider the view of Kwame Anthony Appiah that if irrational and confused conceptions of race are set aside, “African Americans lack a rational or non-mythological basis for limiting their political solidarity to those who identify as, and are treated as, racially ‘black.’” Their reply is that if people who share supposed racial characteristics such as skin color are victimized on that basis, partiality on the part of members of this group toward one another is at least morally permissible. *Id.* at 189.

37. For an attempt, unsuccessful in my judgment, to distinguish among classifications for purposes of deciding the limits of permissible partiality, see Thomas Hurka, *The Justification of National Partiality*, in *THE MORALITY OF NATIONALISM* 139-57 (Robert McKim & Jeff McMahan eds., 1997).

Consider that partiality to those near and dear to us can play significant roles in public policy and in governmental action. Consider the familiar view that it is acceptable for the policies of our military to sharply distinguish deaths of American combatants and American noncombatants from deaths of combatants and noncombatants of other nations. The same goes for the military forces of any other country. This is discrimination on the basis of citizenship, not ruled out by my account of wrongful discrimination.

## VII. DISPARATE IMPACT

Suppose that an action or policy, otherwise justifiable, has a disparate impact on a group of people. Its results include imposing a disadvantage on some group—for example, women as opposed to men, whites as against Hispanics, or Danes by comparison with Swedes. Suppose also that the action is not motivated by animus or prejudice against the disadvantaged group. So, on the view this essay asserts, the action is not intrinsically morally wrong.

These suppositions leave it open that the action in question brings about disadvantage as intended or as the unintended side effect of the pursuit of other goals. Perhaps the Swedes are bombed because they are perpetrating an unjust war to which the bombing is a proportionate response. Perhaps a drug is discovered and distributed that raises life expectancy when ingested by men but unfortunately does nothing when ingested by women.

The classification that picks out the groups in question might or might not be a classification that shows up in the statement of fundamental moral principles. Take the first alternative. For example, fundamental principles might identify moral rights and specify retribution against *blameworthy violators of these moral rights*, and the italicized phrase singles out the group that the action disadvantages. In this sort of case, if the action is justifiable, it will be mandated or permitted by fundamental moral principles.

Alternatively, the classification that identifies the group in question might not appear in the statement of any fundamental moral principle. This will be so if the classification is one of those that figure in discussions of arbitrary discrimination: supposed race or lineage group, ethnicity, skin color, nationality, sex, sexual orientation, and the like. These sorts of features are morally inert. That is why discrimination just on the basis of possession or non-possession of these features is morally

arbitrary and intrinsically wrong if motivated by animus or prejudice against these defined groups. It simply does not matter morally whether one is white-skinned or brown-skinned or yellow-skinned.

This has a further implication. If an act is otherwise justifiable, in terms of (correct) fundamental moral principles, it does not matter morally that the act happens to result in advantage or disadvantage for people singled out in terms of some morally neutral classification scheme. Any act will collect a myriad of such descriptions and is sure to result in favoring and disfavoring people classified in one arbitrary way or another. My act may provide advantage to some people born before the year 2000 and not to those born after that date, or to some of those born in pink hospitals as opposed to hospitals painted some other color, and so on. No matter, morally speaking.

The result is that disparate impact per se is morally inconsequential. If an act or policy is otherwise morally justifiable, the fact that its consequences favor or disfavor some group of people singled out by some morally arbitrary or neutral classification scheme is not alone a consideration that tends to render the act morally unjustifiable.

The reader might protest that I am engaged in sleight of hand. Have we not already agreed that when residential segregation occurs, and is explainable in the way Schelling described, the disparate impact of the segregation on African-American children warrants state action? The disparate impact appears then nothing like a moral “don’t care.” But what actually occurs is that costs fall on children and are not morally outweighed by gains to anyone else. A variety of moral principles might equally well explain and justify the need for state action in such a case. Any plausible such principles should not mention race or skin color. The same state action would be called for if the affected children were green in color, or were a mixed lot including brown-skinned, white-skinned, and yellow-skinned.

Salient lines in social life that mark the morally arbitrary borderlines, such as those marking off race and ethnicity that have been wrongly treated as morally significant throughout recurrent, oppressive histories, have an odd, elusive standing in moral principles. Racism and sexism are great evils, and so we expect that race and sex will loom large when formulating fundamental moral principles. We expect that fundamental moral principles will prescribe equal treatment of groups singled out by these morally irrelevant classifications, but since the classifications are really morally irrelevant, this turns out not to be so. To vindicate this hunch would require an articulation and defense of the fundamental moral principles, a task that lies beyond the scope of this essay.

Disparate impact might offend against a substantive principle of equal opportunity such as John Rawls's fair equality of opportunity principle.<sup>38</sup> This principle requires that all those with the same ambition and the same native endowment of talent (or prototalent) should have the same prospects for competitive success.<sup>39</sup> If otherwise unobjectionable actions and policies bring it about that fair equality of opportunity is not satisfied, these policies will be regarded as wrong if the fair equality of opportunity principle is assigned moral priority over the principles that justify these policies. However, fair equality of opportunity is objectionably meritocratic and should be rejected on that ground; yet, this issue is complex.<sup>40</sup> Fair equality of opportunity can be satisfied, or fail to be satisfied, whether or not wrongful discrimination occurs.

### VIII. SUSPECT CLASSIFICATIONS

Discrimination that is intrinsically morally wrong is responsiveness of the wrong sort to certain classifications of persons. We say that discrimination on the basis of race, creed, or color is wrong. The paradigm classification that features in wrongful discrimination is race or, perhaps even better, skin color and similar superficial racial characteristics. Treating African-Americans worse because they are African-Americans encapsulates a long history of United States racial caste hierarchy from slavery to Jim Crow and beyond. Persecuting people on the ground that they adhere to a socially disfavored religion is another paradigm source of wrongful discrimination, and the long history of Jewish persecution by Christians and others combines elements of racial and religious discrimination.

However, it is tough to say what renders certain classifications problematic or especially apt for running afoul of a correct antidiscrimination norm. This becomes clear when we extend the list of classification types past supposed race and skin color. Prominent candidates include ethnicity, sex, religion, age, disability status, and sexual orientation. The common thread, if any, is not so easy to discern.

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38. JOHN RAWLS, *A THEORY OF JUSTICE* 57-101 (rev. ed. 1999).

39. *Id.* at 63.

40. Compare Richard J. Arneson, *Against Rawlsian Equality of Opportunity*, 93 PHIL. STUD. 77 (1999) (arguing against the fair equality of opportunity principle), with Seana Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 FORDHAM L. REV. 1643 (2004) (defending fair equality of opportunity).

Perhaps this issue does not have to be faced. The proposed characterization of wrongful discrimination identifies it with discrimination on the basis of unwarranted animus or prejudice against persons of that type. If one discriminates against dishonest persons on the basis of warranted negative attitude toward those people or on the basis of accurate beliefs about the associated traits of those persons relevant to decisions as to how to deal with them, no wrongful discrimination occurs. If you discriminate against persons with large earlobes on the basis of unwarranted animus or prejudice, this is wrongful discrimination, even if there is no history of wrongful treatment on this basis and no likelihood that you are setting a trend.

This solution is fine as far as it goes, but it should heighten the reader's sense that clarifying the idea of wrongful discrimination is not going to do much heavy lifting for the task of determining what social justice requires with respect to policies for dealing with suspect classifications. To switch the metaphor, the idea of wrongful discrimination is not going to provide the whole carpet, nor show the pattern in the carpet. This idea, the subject matter of this essay, is just a thread. However, the larger question lingers: What constitutes fair treatment of people across the suspect classifications of race, skin color, ethnicity, religious creed, and sex and across the arguably suspect classifications of age, sexual orientation, disability status, and perhaps gender orientation?<sup>41</sup> The categories are surely important, even if analyzing the nature of wrongful discrimination does not illuminate the categories.

A bit of reflection suffices to strengthen the lesson that these various suspect classifications pose radically separate and distinct questions of justice that require remedies specifically attuned to each type of classification's particular set of issues. Suppose that the role and significance of a properly formulated antidiscrimination norm differs as one moves from classification to classification. What results is that the antidiscrimination norm does not help in formulating policies which adequately respond to the motley of issues we face.

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41. By "gender orientation" I mean the orientation of one's will toward acquiring either conventionally "masculine" or "feminine" traits or some mix of one's desiring. Some men might strive to be masculine, some to be feminine; likewise some women might strive to be masculine, others to be feminine. Some of either sex might strive to be hypermasculine or hyperfeminine; others might studiously cultivate gender androgyny or some balanced mix. People who are not biologically fully male or female might also vary along this range of gender orientations. The possibility then arises that some might wrongfully discriminate against others on the basis of animus or prejudice against persons of a particular gender orientation.

*A. Age*

Consider age and age discrimination, and in particular, discrimination against old people.<sup>42</sup> Our contemporary world is one in which life expectancy is increasing and also a world in which efficiency wages are common in many sectors of the economy.<sup>43</sup> The latter fact means that many people are occupying jobs that someone else would be willing to do equally well for significantly less compensation.<sup>44</sup> Otherwise stated, occupants of these jobs would be significantly worse off in their next-best employment. These jobs tend to be good and excellent jobs, and their occupants are a privileged group compared to holders of jobs for which markets clear at equilibrium.<sup>45</sup> Now add another stylized fact of the world we inhabit: The effects of advancing age include serious declines in mental acuity and in the physical vitality that enables sustained concentrated work effort. These effects vary enormously in pacing and magnitude from person to person, but the trends are inevitable and not everyone can be an exception to the general trend. Moreover, in many settings, individualized competency determinations for individuals with long tenure in their jobs would be messy, costly to administer, subject to error, and in many cases would impose psychic wounds on those negatively assessed. In the world of these stylized facts, here is a pressing issue of fairness in distributing good and excellent jobs across people who belong to different age cohorts: Old people who occupy such jobs are among the better off members of society, and a wide range of plausible distributive justice norms would require transfer of benefit from them to worse off groups.

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42. See generally RICHARD A. POSNER, *AGING AND OLD AGE* (1995).

43. See *EFFICIENCY WAGE MODELS OF THE LABOR MARKET* (George A. Akerlof & Janet L. Yellen eds., 1986); see also STIGLITZ, *INFORMATION AND ECONOMIC ANALYSIS* (1993); J. E. Stiglitz, *The Causes and Consequences of the Dependence of Quality on Price*, 25 *J. OF ECONOMIC LIT.* 1 (1987).

44. See George Akerlof & Janet L. Yellen, *Introduction to EFFICIENCY WAGE MODELS OF THE LABOR MARKET* 9 (George Akerlof & Janet L. Yellen, eds. 2001).

45. If wages above the market-clearing rate are paid to reduce turnover costs, this factor will not be in play for jobs that are entirely unskilled and require no training. If wages above the market-clearing rate are paid to reduce shirking when shirking is hard but not impossible to detect, this factor will tend to be in play for jobs for which close supervision is unfeasible and output hard to measure. If wages above the market-clearing rate are paid to attract higher ability applicants when ability is better known by the applicant than by the employer, again this factor will be more in play when ability will strongly affect productivity. All of these factors are associated, not necessarily but contingently, with good jobs not dead-end jobs. See generally *id.* at 9-10.



In this setting it may well be fair, for example, to impose mandatory retirement at a specified age for surgeons, to favor younger applicants for posts as surgeons, to favor choice of aged surgeons for layoffs when economic conditions necessitate contraction of employment, and to have generic employment contracts that automatically provide demotion for aged surgeons (so they give up the knife and move into family practice at lower pay and prerequisites).

These policies might be implemented by economic contracting, or legally mandated, or legally encouraged by noncoercive state action. Social norms might also play a useful role. In all cases, I am envisaging policies that classify people by age and treat people at different ages differently according to correct determinations of the classified group's characteristics. In other words, as a member of the group, I am treated according to reasonable, accurate stereotypes. Such policies would not run afoul of the antidiscrimination norm, but that does not settle the question of their fairness and moral appropriateness. All the action occurs at the level where we ask what classifications that divide people into groups should be the coarse-grained basis for determining how they ought to be treated.

Policies that subject old people to rough just treatment in the labor market should not be intended to drive old people from productive employment, at least not at too early an age. With rising life expectancy and advancing medical technology, the prospect opens that I might stay at my job, blocking a more qualified and worse off younger person, until a very advanced age. I could then retire at age eighty and become a basin of attraction for scarce medical resources, keeping me barely alive to age one hundred, when the resources could have been instead used to improve the chances of afflicted young people to live a decent quality of life through a reasonable life span. The scenario just depicted is not fair. But it would not be a good idea to drive old people from high-wage employment into an early retirement at age fifty, thus prolonging the number of years when we would be living from the labor of others worse off according to a lifetime measure. A better idea is to promote the shift of the old to less demanding lower-wage work when that is efficient and fair, and also to ration the allocation of expensive medical treatments in ways that are age sensitive (so if curing my cancer at a cost of a million dollars would yield one QUALY<sup>46</sup> and curing your cancer at the same

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46. QUALY: Quality-Adjusted Life Years. I favor weighting QUALYS by priority to the lifetime worse off in medical allocation decisions. On the stark conflict between what might naively seem to be fair medical rationing schemes and the requirements of some conceptions of antidiscrimination norms, see Dan W. Brock, *Health Care Resource Prioritization and Discrimination Against Persons with*

cost would yield two QUALYS, you stand in front of me in the queue waiting for a fair allocation of medical treatment).

These cursory remarks are not intended even as toy model social policy analysis. Social policy analysis requires registration of empirical facts at a level of thoroughness beyond the scope of this essay. So, if your response is to think that old people merit different treatment than described, your response does not conflict with the point on which I mean to insist. Your disagreement should be couched in terms of proposed policies that divide people into groups according to age and determine how people should be treated in part according to their group status. Justice requires treating people according to reasonable, accurate stereotypes, the degree of coarse-grainedness supported by a morally sensitive cost-benefit analysis.

### *B. Sex*

To illustrate the same points from another angle, consider sex, another suspect classification. The broad issue is how to achieve fairness in the treatment of people who are biologically male or female (with some intermediate cases) given the significant differences, on the whole and on the average, between the groups. The nature and extent of the differences (that either cannot or should not be eliminated by sensible and feasible social policy) are not presently known, but they are likely to be significant. For one example, women on the whole and on the average are physically less strong than men, so achieving a high level of enforcement of the moral right not to be physically attacked, not to be subject to extortion by threat of physical attack, not to be placed in reasonable apprehension of physical attack and so on, is extremely important for securing real freedom for women at the level that justice demands. For another example, suppose that over time women will more often assume primary responsibility for childrearing.<sup>47</sup> Assume also that women's labor force participation and engagement in entrepreneurial self-employment increase, and women have the same profile of career aspirations that men do. The question then becomes how to arrange the economic marketplace alongside childrearing so that men and women

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*Disabilities*, in AMERICANS WITH DISABILITIES 223 (Leslie Pickering Francis & Anita Silvers eds., 2000).

47. See VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 68, 140-41 (1988).

participate in the marketplace on a relatively level playing field. In the end, to state a banal truth, we want both men and women to lead lives of fairly distributed high quality and children to be well raised.

My sense is that we are only in the beginning stages of devising laws, policies, institutional arrangements, and social norms that will secure egalitarian justice in a world of difference. Presently, we do not know what the appropriate norms of sexual regulation are in a world where mainly heterosexual men and women work together as colleagues, teammates, and competitors on an equal footing in the workplace. We do not know where on the line between enforced prudery and hanky-panky tolerance at work the morally correct policy lies, or even if it lies in different places for different work contexts. If the interests of men and women differ in stable ways, the issue is how to arrange fair levels of satisfaction of these clustered interests. Nor do we know what social policies and norms will best facilitate fair terms of cooperation in the interactions of men and women over issues of work, career, and childrearing.

It is often correctly noted that women seeking to rise in careers are often unfairly treated by stereotyped assumptions that figure in manager's minds when deciding who shall be promoted or hired to fill a choice post. If the manager assumes the woman will rear children shortly and therefore hiring her for the responsible post would be ineffective, the woman applicant who either will not have children or can juggle demanding responsibilities is penalized by lying on the tail end of the curve of relevant expectable behavior. Foreseeing this scenario, women who should be leading the pack are not provided with proper incentives to develop their human capital so they can compete for top slots. The effects on women's choices reverberate. This is all true, but one should also note another type of unfairness. Suppose in their early twenties men and women enter a highly competitive profession and must endure years of low pay and demanding work that is compensated to a considerable extent by a tournament. After competing in their twenties, in their thirties some small percentage of these young professionals will secure highly desirable positions. These are the tournament winners. This could all be reasonably fair, except suppose that one-half of the women in their twenties will in fact veer onto a childbearing track in their thirties. These women are then being compensated now in part with lottery tickets that will be of no use to them when it comes time for the tickets to be redeemed.

I will not try to specify a fair arrangement for this scenario, but will note that the fair arrangement might well involve making employment offers to women not offered to men or even setting different legal standards for men and women. Again, if such discrimination is well

motivated by fairness considerations it will not count as wrongful discrimination in my conception, but the wrongful discrimination idea itself does not settle what constitutes fair terms of cooperation between groups of people with different characteristics. In a phrase not to be repeated, the idea of wrongful discrimination cuts little ice with respect to fair policy determination and may even be a red herring that cuts no ice.

Another policy issue highlights the question of what constitutes fairness as between members of groups in a world of difference. Suppose in advanced democracies we see a trend toward imprudent, delinquent, and subpar behavior among male adolescents compared to women adolescents. This trend gets reflected in a trend of higher ratios of young women than of young men becoming qualified for college admission and being admitted. In the face of these hypothetical facts, should we institute affirmative action for young men and make sex-based adjustments to our norms of expected good conduct and academic achievement? Should we simply allow men to internalize the social costs of their delinquency by letting the chips fall where they may? Should we channel educational resources to boys to help them meet the common standards of conduct and achievement we wish to impose on all adolescents (resources that of course have alternative uses that would advance social justice goals)? These are not rhetorical questions and this essay is not the place to venture answers to them. Whatever answers we give should register an awareness that although at the fundamental moral level our principles are individualistic,<sup>48</sup> at a derived policy level, these norms will require treating people in coarse-grained ways on the basis of rough categories like being male or being female.

### *C. Sexual Orientation*

Another example to ponder is sexual orientation. Assume sexual orientation is either heterosexual or non-heterosexual. Here it might seem that a nondiscrimination norm might do real work. If people do not behave with animus or prejudice towards gays and lesbians, one might suppose the world is fair and just so far as the treatment of non-heterosexuals goes. However, an evangelical Christian might hold that homosexuality is devil's work and should be stamped out from the world, yet adhere to a hate the sin, love the sinner mentality so that the

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48. That is, nothing matters except what happens to individual persons.

behavior he exhibits toward non-heterosexuals does not proceed from any animus or negative attitudes towards this classification. Rather, he endorses efficient policies to save their souls. The evangelical Christian promoter of what might be called an antigay political agenda also need not exhibit any false empirical beliefs about this group of people. He differs from tolerant people only in regarding non-heterosexual sexual activity as always sinful, sin as bad, and helping people avoid sin an appropriate activity of a compassionate and fair government. The evangelical Christian might fully endorse the norm that one ought always refrain from wrongful discrimination. According to me, he is wrong on the substantive moral issues regarding what sorts of sexual conduct are good, morally right to undertake, and worthy of state promotion.

Again, here is a fairness issue that a just society must face even if everyone agrees that sexual pleasure and sexual friendship are equally good and worthy of promotion independently of whether they happen to occur in heterosexual or non-heterosexual sexual activity. Suppose that in a sexually tolerant society, gay men are not significantly involved in the childrearing, on the whole and on the average.<sup>49</sup> A question of fairness arises: How should the costs, benefits, joys, and sorrows of childrearing be fairly distributed across the individuals in society, hence across members of different groups? We might hold that gay men are for purposes of this inquiry indistinguishable from heterosexual males who choose to be bachelors and not involve themselves in childrearing, but this is probably not correct. A variety of causes might conspire to make it the case that non-heterosexual men have little chance of participating in childrearing whereas heterosexual single men have wide opportunities. What then? We might imagine social policies, changes in the law, and attempts to influence the evolution of social norms that would target non-heterosexual men as a category for special treatment. One might imagine tax law designed to require that non-heterosexual men contribute a fair share of the cost of educating children, a collective enterprise from which we all benefit and in which we all therefore have a stake.

More fancifully one might imagine norm changes like the following: In the desirable future a family is conventionally defined as a heterosexual couple<sup>50</sup> affiliated with a gay man or a gay couple. The gay man or couple has a godparent role with respect to the children produced and

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49. I set to the side the childrearing dispositions of lesbian women, which are presumably quite different and would require separate treatment.

50. Recall that I am just setting aside the issue of lesbians and family life, so I ignore the necessary qualifications to the formulation in the text.

raised in this “extended family.” The gay godparent role involves sharing significant childrearing responsibilities and for contributing to the godchildren’s education costs. The new practice is enforced by an accepted social norm. No coercive penalties fall on you if you are an unaffiliated straight couple having children or if you are a gay couple not part of a wide family, but people will look at you strangely and regard your conduct as borderline inappropriate. I do not make this suggestion as any sort of contribution to the moral theory of social norms. I simply want to illustrate that treating people according to reasonable accurate stereotypes can be fair and morally proper all things considered.

#### *D. Beauty and Ugliness*

This category may well be suspect though it is not often lumped with race, creed, color, sex, age, sexual orientation, and the other classifications thought to be the axes of wrongful discrimination.<sup>51</sup> Suppose that in a wide range of contexts people tend to treat people that they perceive to be physically attractive—and believe most other people will also find physically attractive—better than those they perceive to be physically unattractive.

It is not merely that when one seeks a movie star to be cast in a film, one seeks physical attractiveness. In wide ranges of interactions, people prefer interactions with someone who looks like a stereotypical movie star than someone less attractive. For most people in the undistinguished middle range of the physical attractiveness spectrum, this form of discrimination may not matter much, especially given the nonuniformity of different people’s ratings of attractiveness. At the scale’s extremes, however, significant differences in life prospects result from being treated with deference if one is at the top of the scale and with disdain if one is at the bottom. On my account, the treatment of ugly persons may often qualify as wrongful discrimination because the ugly person is being treated worse than he would be if he were not a member of a group that excites revulsion, and the revulsion may qualify as an unwarranted hostile attitude. The attitude is not benign.

The question then arises, what is an appropriate response to the problem that a social stigma attaches to extreme physical unattractiveness?

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51. Michael Blake called my attention to the idea that discrimination on the basis of physical appearance is a morally serious issue.

One proposal is that a decent society teaches people sound values that include rejection of the ideology of natural aristocracy<sup>52</sup> and inculcation of a disposition to be attracted to people on a wide basis and perhaps even at the limit to see beauty in every human body.<sup>53</sup> I have no objection to this proposal, though I have some doubts as to how far the project of changing people's hearts and minds on this dimension can succeed. We can surely train people to do more to inhibit their disdainful and offended responses in face-to-face interactions with those perceived as physically unattractive. But an inhibited response is still a response, and likely communicates itself to its target, causing pain. However, the pleasure of responding to physical beauty seems per se innocent, and there is evidence that human biology constrains what one can experience as beautiful or ugly. There is also the obvious point that some forms of social response that involve singling out extremely unattractive people for special treatment would reinforce that stigma and be counterproductive. Perhaps a just society would include in its publicly funded health care coverage opportunities for cosmetic surgery and other corrective medical treatments for those meeting an unattractiveness threshold.<sup>54</sup> If beauty is only skin deep, lack of beauty should be amenable to a technological fix.<sup>55</sup>

#### IX. DISCRIMINATION, DEONTOLOGY, AND CONSEQUENTIALISM

The speculative examples in the previous paragraphs may attract the objection that the discussion has drifted from exploring the nature of wrongful discrimination within a deontological framework to consequentialist musings on what cost and benefit calculations would indicate about how to bring about best outcomes by any means necessary. This objection is off the mark.

A deontologist is someone who rejects consequentialism and instead holds that people (1) have options, moral permission to do many

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52. That is, beautiful people are a higher species than the rest of us and they inherently deserve better treatment.

53. See Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *ETHICS* 287, 335-36 (1999).

54. Such a scheme would not be self-defeating if the pain of qualifying for the procedure is amply offset by the gains that flow from the increased attractiveness the procedure delivers. The pain of qualification could be reduced by reasonable privacy shrouding the qualification process.

55. In these remarks, I am assuming that what truly triggers a condition that merits a social response is not merely being less attractive than other members of the population but being less attractive when there is a considerable gap in absolute terms between one's attractiveness level and the median and average attractiveness levels in the population. If that were not so, successful aid to the worst off in this regard would just shift the burden of stigma to the next worst off.

innocent acts that would not bring about the best outcome that could be reached in their circumstances; and (2) are under constraints, moral prohibitions from doing certain types of acts even if those acts would bring about the best outcome that could be reached in their circumstances.<sup>56</sup> Adherence to (1) and (2) leaves it entirely open that one's morality pays heed to consequences. For starters, on any sensible nonconsequentialist morality, consequences will determine the line at which any given moral constraint gives way and ought to be infringed. Moreover, a deontologist can and should hold that institutions and social practices ought to be set so that they operate over time effectively to bring about good consequences within the limits of moral constraints.<sup>57</sup>

#### X. THE ASSIMILATIONIST IDEAL

In a justly famous essay exploring the nature of racism and sexism, Richard Wasserstrom contrasted different conceptions of an ideal society that had entirely transcended these evils.<sup>58</sup> One conception he labels the "assimilationist ideal."<sup>59</sup> This would be a society in which people differ in superficial racial traits such as skin color and would differ in being male or female. However, these traits would make no difference in anybody's treatment of or responses to others.<sup>60</sup> Racial and sexual traits would function just as eye color likely does in current society.<sup>61</sup> People differ in eye color and the differences are noticeable but nobody pays any serious heed to these differences. For all practical purposes, it makes little difference to anybody's life or their interactions with other people that they are brown-eyed or blue-eyed. One can extend Wasserstrom's ideal so that it encompasses all suspect classifications, or whatever classifications are best regarded as suspect in the way that race and sex classifications are suspect.

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56. *See supra* notes 5, 7.

57. John Rawls is a paradigm instance of a deontological theorist, but the ethics he proposes are sensitive to consequences of policy and action choices. See RAWLS, *supra* note 38, at 26, where he writes, "All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy."

58. Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 603-15 (1977).

59. *Id.* at 604.

60. *Id.*

61. *Id.*



One should qualify Wasserstrom's characterization of the assimilationist ideal by introducing the idea of a bona fide qualification (BFQ) on analogy with the BFOQ of occupational discrimination law.<sup>62</sup> Lacking suntan lotion and wanting a companion for a long trek in the hot sun, one would find dark skin color to be a BFQ, and treating people differentially in this way would be compatible with Wasserstrom's assimilationist ideal. In a similar way, wanting someone to carry on the labor of childbearing, one would choose a woman rather than a man; here, being a woman would be a BFQ. Again, wanting a companion who will enjoy homosexual sex, one who picks a companion on the basis of sexual orientation does not violate the assimilationist ideal because in this context being homosexual is a BFQ. This amendment to Wasserstrom is intended to be a friendly amendment, but does water down the ideal to a variable extent depending on how narrow or expansive one's conception of what constitutes a BFQ for each suspect classification should be.

The Wasserstrom assimilationist ideal is attractive. My point in introducing it is simply to note that it is not plausibly construed as morally required according to any reasonable deontological morality. Whether the best versions of consequentialism would require adherence to Wasserstrom assimilation is a possibility I leave open. Responding differently to people on the basis of their group classifications is not intrinsically immoral when it does not proceed from animus or prejudice. Moreover, the permissible partiality toward those who are near and dear (according to a broad range of rights-based deontological views), if exercised, will result in a social world that does not satisfy the assimilationist ideal.

Consider a decidedly noncosmopolitan world. In this world people limit their interactions to fellow members of groups with which they identify. Likes consort with likes according to similarity metrics that are perhaps quite arbitrary. Immigration between nations is sharply restricted. The boundaries of nation states correspond to residential boundaries of nationalities, so that the people who happen to be citizens of a single state are united into a people bound together by common language, shared culture, and perhaps clan lineage. Within these nationality groups, there is further subdivision into a wide variety of "us versus them" groupings. Men club with men, and women with women. Heterosexuals interact mainly with heterosexuals and non-heterosexuals with other non-heterosexuals. The religious flock with those of like faith; the irreligious shun these churchy people and hang together. Young people

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62. The notion of a bona fide occupational qualification is explained in Alexander, *supra* note 13, at 204-08.

shun the old and the old return the favor. In this world, the assimilationist ideal is flagrantly and massively unsatisfied. However, nothing in this description entails that any wrongful discrimination is occurring, and indeed there might be none.

We can further specify that the world is arranged so that these groupings and exclusions do not yield bad consequences rising to the level of violating anyone's moral rights. No moral duties are breached toward the targets of discrimination in the noncosmopolitan world. How binding this constraint is depends on the best theory of social justice for a deontologist. The constraint binds not at all for a Lockean libertarian and binds tightly for an egalitarian.<sup>63</sup> However, even on a stringent egalitarian view of social justice demands, nothing precludes the noncosmopolitan world with non-wrongful discrimination from being arranged so that compensation is always provided to anyone who suffers unfair harm from the aggregate consequences of people choosing to consort with those they regard as "us" rather than "them" and thereby exhibiting morally permissible partiality toward those with whom they identify. On a global scale, this would mean that while Norwegians and Danes might preclude immigration to their lands from people who are not Norse and Danish in culture and ancestry, these exclusions would bar no one on earth from enjoying a close to equal standard of living and life prospects (if equality of condition is mandatory) or are above the threshold that marks the good enough level of condition (if justice demands sufficiency).

The noncosmopolitan world might be undesirable in various ways. It would be condemnable on consequentialist grounds, if there are feasible alternative arrangements that would bring about more mixing of people, a better fit of complementary types in productive schemes of cooperation, and better outcomes for people according to the right standard for assessing outcomes. Even a nonconsequentialist might regret the loss of the values that the noncosmopolitan world fails to deliver.

Whether this is so and whether the Wasserstrom assimilation ideal sets a desirable social goal is a question in value theory and moral sociology. Once again, this result illustrates the main point of this essay: that the

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63. On Lockean libertarianism, see generally NOZICK, *supra* note 5, at 235-38 (arguing that the rights of a legitimate owner of a firm to hire at will trump the supposed rights of applicants to be hired on the basis of qualifications for the post and more generally that rights of ownership of property trump supposed rights to equal opportunity). On egalitarianism, see generally Richard Arneson, *Egalitarianism*, STAN. ENCYCLOPEDIA PHIL., Aug. 16, 2002, <http://plato.stanford.edu/entries/egalitarianism>.

antidiscrimination norm, properly conceived and calibrated with a proper understanding of wrongful discrimination, is less consequential for choice of action and social policy than those who care about liberating society from the social pathologies inherited from past caste hierarchies (and about preventing the rise of new invidious caste hierarchies) may suppose.