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When Is Discrimination Wrong?

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female sex) is more likely to demean than is treating people differently according to the first letter of their last names or their eye colors. But again, this is a rule of thumb, not an absolute requirement. It is possible that grouping people according to a novel trait (i.e., one that has not been used to disadvantage people in the past) can be done in such a way that even that first instance of negative treatment itself demean. If our government were to suddenly declare that all people with last names beginning with A would be ineligible to vote or would be forbidden from working, for example, this instance of distinction drawing would demean those whose last names begin with A.

The discussion of this example and others in this chapter raises the question of what one ought to say about disagreement. Surely there will be disagreement about whether particular classifications demean. What does this disagreement mean for the theory of wrongful discrimination presented here? It is to this question that we now turn.

CHAPTER 3

Interpretation and Disagreement

A worker who is a biological male but dresses and lives as a woman requests that her employer designate some bathrooms as unisex or alternatively allow her to use the female bathroom. The employer refuses and instructs the employee to use the men’s bathroom. The employee refuses and is fired as a result.¹

In 2005 the U.S. Food and Drug Administration (FDA) approved the first drug specifically targeted to a particular racial group. BiDil won approval for use in the treatment of African Americans for heart failure. Shortly after its approval, NitroMed (which holds the patent for and markets the drug) announced that it would sell BiDil for a significantly higher price than analysts had predicted. At the same time, the company announced a complimentary charitable program intended to provide the drug to the 75,000 or so patients the company estimates could benefit from the drug but who have no prescription drug coverage. "We believe it’s a mandate," said B. J. Jones, the marketing director for NitroMed, ‘that BiDil should be available for every black heart-failure patient."²

This chapter will address two related questions. First, how do we determine whether drawing distinctions among people in a particular context does demean? Second, given that people are likely to disagree about whether particular policies or practices that distinguish among people demean, what is the significance of this disagreement to the theory of wrongful discrimination I advance?
How Does One Determine Whether a Particular Practice Demeans?

Critics of the FDA’s approval of BiDil argue that designating a drug specifically for African Americans sends a message that blacks are genetically or biologically different from whites. For example, Gregg Bloche, a professor of health law and policy at Georgetown University, complained that “it invites people to think there are significant biological distinctions between racial groups when in fact the evidence shows nothing of the sort.” To Jonathan Kahn, a professor of law at Hamline University, the problem is that “you have the federal government giving its imprimatur, its stamp of approval, to using race as a biological category.” Judy Ann Bigby, director of the Office for Women, Family, and Community Programs at The Brigham and Women’s Hospital, worries that “if people get one little inkling that there’s a biological basis to race, we could potentially lose ground into understanding racial differences in disease. . . . biology could be an excuse for not looking at the social basis of disease.”

These critiques are largely formulated in terms of the bad consequences likely to flow from the confusion between a social and a biological category. Black or African American is a social category—it refers to those people who self-identify or whom others identify as black. It does not pick out a group of people who share a common genetic or biological trait. The BiDil critics worry that the FDA approval of the drug specifically for treating African American heart failure patients will cause people to confuse these two ways of conceiving of race, which in turn will have negative consequences—failing to investigate the social dimensions of the disease, for example. And they may well be right.

Another way to capture the heart (no pun intended) of their complaint, however, is to say that race-specific drugs demean blacks because the concept of a biologically distinct race is bound up in our culture with notions of racial inferiority. If so, the FDA’s action is not just a misguided policy recommendation but possibly worse, possibly wrongful discrimination.

Defenders of the racially targeted drug could reply that while the use of a racial classification in health care runs the risk of demeaning, this one is not. Given the context—where a population long underserved by the health care industry stands to benefit from a targeted treatment—the potential for denigration to the population is neutralized by a clear benefit. In addition, the decision by the drug’s maker to price the drug as they did—a mechanism for using insurance companies to subsidize the care of sick African Americans who lack drug coverage by spreading the cost of their care among people of all races—further neutralizes the potential for denigration. How should one determine who is right?

The Nature of the Question

To determine whether the racial classification used in the FDA approval of BiDil demeans requires interpretation. To put the point more generally: The determination of whether the use of a classification in a particular context demeans requires an interpretive judgment similar in nature to the determination of whether an utterance is an order or merely advice. The identity of the speaker, the context in which the utterance occurs, and the words of the utterance itself are all important factors affecting this interpretive judgment. For example, when a boss says to his employee, “Get me some milk,” this is an order. But when the coworker says the same thing to her colleague who is heading to the cafeteria, this is best characterized as a request rather than an order. Like ordering, demeaning usually occurs in the context of a power imbalance. It is easier for a boss to order or to demeans than it is for an employee to do so. The identity of the speaker is thus centrally important to the interpretive judgment about whether distinguishing between people on the basis of a particular trait in a particular context deems.

An utterance is an order (or is not) whether or not it is obeyed. For example, when a 4-year-old says to his parent at the breakfast table, “Get me some milk,” the parent is likely to reply, “I will be happy to when you can ask me politely.” In other words, though the parent does not obey the child’s order, it is still an order. If the worker above does not heed the boss’s order and comes back from the cafeteria without the milk for her boss, it is still the case that the boss ordered the employee. The employee just has not obeyed. To assess whether an utterance is an order, we need only know who is the speaker, what has been said, and in what context. What happens afterwards is not relevant.

Let us return to the example of a 4-year-old. Does this example belie the claim that the identity of the speaker is crucial? One might think that a parent can order a child but that the child cannot order the parent just as the boss can much more easily order the employee than the other way around. The example of the 4-year-old’s impolite behavior is useful for
clarifying how these interpretive judgments work. First, while the identity of the speaker often matters, it does not always matter. Here I use the term “speaker” loosely to refer to whoever issues the utterance whether orally or in a written form. Second, it is not the case that a coworker can never order another coworker or that an employee can never order her boss. Rather, the fact that an utterance is made by a coworker or employee affects the best interpretation of what has transpired. The difference in status between the speaker and those to whom he speaks affects the interpretation of what has taken place.

So why can the child order the parent? Some might say that she cannot, that the best interpretation of the seeming order is that it is not an order but something else, an awkward request. And perhaps in some households in some cultures that would be the best interpretation of the son’s statement. Even in our culture perhaps there would be disagreement about whether the child has ordered the parent or not. The fact of disagreement and its implications for the theory of discrimination I advance will be discussed later in this chapter. For now, let me explain why I think the child has in fact ordered the parent to get him some milk. (Doing so will highlight other factors that affect this kind of interpretive judgment.) First, the relationship between parent and child is one in which the child has some power over the parent as well. In fact, perhaps it is because current parenting styles increasingly minimize the hierarchical aspects of the parent/child relationship that it is possible for the child to order the parent. Second, the child’s tone of voice may be relevant. The way in which he says, “Get me some milk” has a different stress or emphasis than the way in which the coworker is likely to speak to a colleague. Third, the speech of children is interpreted differently than the speech of adults because we know that children are just learning the cultural rules that govern polite interactions. We interpret the coworker’s speech as a request because we know that coworkers do not generally order each other around. Children, having not learned politeness conventions, are more likely to do so. In other words, the presence of customs about how people generally relate to one another affects the way we interpret individuals’ actions. But children are different. In fact, it is in order to teach him precisely these customs that the parent might say: “I’ll be happy to get you the milk if you can ask me politely.” The parent would be a better teacher yet if he helped the child learn what constitutes asking politely by saying: “I’ll be happy to get you the milk if you can ask me by saying ‘please.’"

This discussion has taken us pretty far a field from the subject of discrimination, but for a reason. I argue in Chapter 1 that it is wrong to draw distinctions among people when doing so deems some of them. Next, I explain that assessing whether differential treatment does demean is the same kind of assessment as that involved in judging whether an utterance is an order or advice. This determination depends on the identity of the speaker, on the context, and on the content of the utterance itself. In particular, when the speaker has some power or authority over the person to whom that utterance is directed, this makes it more likely that the utterance is an order. The same can be said regarding demeaning. But context is also key. The example of the child highlights how we interpret utterances through understandings about how people generally use such words.

To flesh out how these three dimensions—speaker, context, and the words used—affect interpretive judgments of speech and action, I started with less controversial and easily accessible examples like the distinction between an order and a request. The next step is to examine an example of discrimination to see how attention to the person, the context, and the content helps one determine whether a particular classification demean.

In the BiDil example, the FDA approved a drug specifically for use by African Americans. This action is simultaneously a license (allowing the drug to be marketed) and a recommendation. Once the FDA approves a drug, the drug may be used for purposes and in patients other than those stipulated in the approval. This so-called off-label use of drugs is common. In that sense the FDA action that approved BiDil, thereby allowing it to be marketed and sold here in the United States, did not limit BiDil to African American patients, nor even to patients in heart failure. What it did was to recommend that BiDil be used for (and only for) these patients. This recommendation distinguishes between patients on two different grounds—race and health condition. Does this action (classifying on the basis of race and health status) by the FDA demean any of the groups affected: African Americans, non–African Americans; heart failure patients, non–heart failure patients?

The data on which the FDA based its approval are themselves somewhat controversial. For the purposes of this discussion, we will put aside that aspect of the controversy. Assume that the data supporting the approval of BiDil for use in African Americans are solid data that adequately support the recommendation to use the drug in this population.

Does the recommendation demean African Americans? (While one could ask whether the FDA’s action deems non–African Americans, heart-failure
patients, or other sick people as well, the claim that it demeans African Americans has the most potential and reflects the actual criticism of the FDA's action so it is this claim I will explore.

The fact that it is the FDA that issues the regulations matters to the determination of what sort of action the FDA performs. The FDA is an actor with authority (in terms of determining which new drugs are available to patients and doctors) and with status (as an expert in matters of health). In addition, the FDA is an organ of the state and therefore when it acts, acts for the state. I am not here making a legal point about what actions constitute "state action" under constitutional law. Rather, I am making a claim about what sort of action the FDA approval of a new drug is.

To know whether the FDA action demeans African Americans, we need to look at the actor, the content of the regulation, and the context. The authority and status of the actor increase the possibility of demeaning. To demean is to subordinate, to put down, to degrade. An actor with low status may try to subordinate or degrade but his actions are simply less powerful than are those issued by a higher-status speaker—at least in most instances. So the fact that it is the FDA that approves the new drug application raises the possibility of a demeaning classification in a way that would be less pressing if this classification occurred in another context—a recommendation by an author of a scientific article for example.

Next, consider the context. Although it may seem as if the drug approval is a form of license or permission, this is so in a far more limited way than may initially appear. The FDA action makes the sale of this drug legal. But the part of its action that concerns us here is the part that involves classification. The FDA approved BiDil for use in African American heart failure patients. Because physicians routinely prescribe drugs for off-label use, this classification is best understood as a recommendation rather than a license or permission. The interpretation of the action as a recommendation derives not from the language of the approval or from the background law. Rather, the classification is best understood as a recommendation because of the background practice (i.e., the context) in which it is issued.

The context plays a similarly important role in determining whether the agency's action demeans African Americans. Here one must look at the local context (i.e., understanding what FDA approval means, practices of off-label use, etc.) and at the broader society and culture in which the agency action occurs. This latter includes the ways in which race-based classifications, particularly in the context of health and biology, have been made and used in the past. The FDA approval treats patients of one "race" differently from patients of another "race." I put the term race in scare quotes because there is an important ambiguity in the FDA recommendation regarding whether the category should be understood as biological or social—and therein lies much of the problem. The term African American could refer to a class of people who are biologically distinct from non–African Americans. Alternatively, it could identify the group of people socially understood as black or African American. The use of the distinction (between African American and non–African American) in a health context relating to the approval of a new drug suggests that it is the biological conception of race that the FDA is using and, more importantly, thereby providing its imprimatur to. In fact, the data on which the FDA approval rests does not provide evidence for a biological versus a social basis for the observed difference in treatment outcomes. Here race may be operating as a proxy for any number of factors more germane to why blacks fare better with BiDil than do whites—diet, lifestyle, or any number of unknown environmental factors.

The fact that a government agency responsible for making decisions based on science issues a recommendation using a racial classification is important because it gives the impression that the FDA supports the view that races (understood as social categories) are biologically distinct. This position is troubling if endorsed by an authoritative body like the FDA because claims about the biological differences between races have a troubling history. Biological difference has been used to support the view that blacks are less intellectually capable and morally regulated, more prone to violence and sexual promiscuity. As this background identification of blacks is insulting, one can see how the FDA's racially specific recommendation could demean African Americans. Whether that is indeed the best interpretation of the FDA's racial classification, I am unsure. What I want to suggest here is that it is plausible and, more important, that it is precisely such a concern that troubles some people about the recommendation. In other words, one reason why the FDA's use of the racial classification may be morally problematic is that it risks demeaning African Americans.

But wait, you may be thinking. Don't throw the baby out with the bathwater. Maybe the social category "black" significantly overlaps with a relevant genetic difference (i.e., "blacks" may be significantly more likely than "non-blacks" to have a particular genetic trait that would also make them more likely to benefit from a particular therapy). Is there no way to be
attentive to these differences without thereby endorsing the falsehoods
historically associated with claims of biological difference? In other words, the
social category “black” may be one that is useful to employ in recom-
mending drugs or other health care approaches—useful in the sense that it
is the best available surrogate for an as yet unknown genetic difference be-
tween the group of people who would benefit from a particular therapy and
those who would not. If blacks stand to benefit from racially distinctive rec-
ommendations, does not one hurt the very people one is allegedly trying to
help in prohibiting such racial categorizations?

Given the power of social stereotypes—the ways in which the social cate-
gory of race has been encoded in our consciousness—this baggage is heavy
indeed. Glenn Loury argues that blacks are tainted by what he terms “racial
dishonor,” which he defines as “an entrenched if inchoate presumption of
inferiority, or moral inadequacy, of unfitness for intimacy, or intellectual
incapacity, harbored by observing agents when they regard race-marked sub-
jects.” If he is right, then any use of racial classifications in the health
context—where racial categories may be read as biological categories—
risks “dishonoring” (Loury’s term) or demeaning blacks. But risking and
doing are not the same. Any use of racial categories in the health care con-
text risks demeaning blacks. Whether it will depend on a more detailed ac-
count of the particular context and the content of the policy or practice em-
ploying the racial classification.

This risk, however, has moral implications. At the least, it makes sense
(moral as well as scientific) to work hard to determine if the racial classi-
fication is a proxy for another trait that itself is causally related to the
different treatment responses of the two groups. Of course scientists should
always strive to disentangle correlation from causation but the moral con-
cern with racial classification in the health care context provides an es-
specially strong reason to do so. As such, it may warrant spending more re-
sources than one would otherwise in trying to untangle these two. Second,
to the extent possible, the FDA should act in ways, including speaking, that
attempt to mute the degree to which its use of racial classifications endorses
the view that race is a biological, as distinct from a social, category.

NitroMed (the company marketing BiDil) did try to take action to miti-
gate criticism of its decision to market a racially targeted drug. But the ac-
tion it took was of a very different kind, aimed at a very different concep-
tion of what might be morally troubling about its action. NitroMed adopted
an unusual pricing policy: pairing a higher than normal price for the drug
with a commitment to provide the medication free to African American
heart failure patients who lack prescription drug coverage. If the wrong of
wrongful discrimination were a matter of whether a policy or practice rein-
forges the caste-like hierarchies of our society, then this policy would be
morally responsive. In other words, one could think that the marketing by
NitroMed of a drug for African Americans may harm African Americans as
a group (by stigmatizing them or in some other way). If so, a policy de-
dsigned to benefit the group (providing needed medication to African Amer-
icans who lack prescription drug coverage) may well succeed in offsetting
the group harm with a group benefit.

The twin policies (high drug pricing combined with free drugs to those in
need) may well benefit blacks as a group and may be laudable in that re-
spect, but it does not affect whether the racially specific medical recommen-
dations wrongly discriminates. If instead one conceives of the morally
troubling aspect of the racially specific drug recommendation as related to
whether the policy demeans African Americans, one gets a very different
idea of what actions one could take to avoid this moral wrong. If the wrong
does not in whether the group is harmed (which might be offset with a group
benefit) but in what the FDA or the drug company does in issuing its rec-
ommendations, then ameliorative actions should be geared to ways in
which the actor can change the character of her action. Jonathan Kahn of-
fers a recommendation that is attentive to this conception of the moral
wrong. He recommends that “any federal agency or institution conducting
research with federal funds that reviews, approves, or itself uses race as a bi-
ological category or as a surrogate for a biological category be required to
offer a clarification of their terms of analysis and a justification for using
them in such a manner.” This recommendation would help to change
what the FDA or other agency expresses in recommending a drug specifi-
cally for African American patients.

If the social category “African American” is helpful in predicting who
will likely benefit from the drug and no other substitute can be found (like
diet or environment), perhaps the use of this classification does not—after
all—demean blacks. Part of the context in which we analyze whether the
FDA action demeans blacks includes the fact that the health needs of
African Americans have historically been neglected. It is for this reason
that ethical guidelines governing clinical medical research require the in-
clusion of minorities as research subjects. In other words, the context in
which we analyze whether the classification demeans is itself multifaceted.
When Is Discrimination Wrong?

On the one hand, the use of race as a biological category has historically been associated with the dishonoring of blacks. On the other hand, the medical establishment has historically been less sensitive to the health needs of blacks. Both elements—as well as the strength of the data supporting a strong correlation between the social category “black” and the group of people most likely to benefit from the therapy (an issue we set aside because of its controversial nature)—affect how we ought to interpret whether approval of a drug specifically recommended for African Americans demeans them.

Disagreement

People are likely to disagree about whether any particular practice that distinguishes among them demeans any of those affected. BiDil is one example. The issue of whether single-sex bathrooms demean transsexuals and ambiguously gendered people is another. Transsexuals who have not yet completed sex change operations claim that policies requiring them to use the bathroom designated for their birth sex rather than their identified gender demean them. Ambiguously gendered persons (people who do not feel themselves to be clearly one gender or another) find that bathroom segregation practices demean people who do not consider themselves to be either one or the other. Do sex-segregated bathroom practices demean transsexuals or ambiguously gendered people? Earlier I presented single-sex bathrooms as an example of a policy that distinguishes between people on the basis of sex but does not demean. Though single-sex bathrooms do not, in my view, demean either men qua men or women qua women, the claim that they demean trans- or ambiguously gendered men and women has more traction. Others may disagree. Separating bathrooms by sex in deference to the privacy concerns of most men and most women as well as the safety concerns of women does not express disrespect or denigration for trans- or ambiguously gendered persons, one might argue. While it is surely true that trans- and ambiguously gendered people have suffered ill-treatment in many spheres of life, this mistreatment is not sufficiently connected to sex-segregated bathroom use to render that practice demeaning. Moreover, the legitimate reasons for sex-segregated bathrooms neutralize any denigrating associations. The best interpretation of the practice is that it is a reasonable accommodation to the privacy concerns of men and the privacy and safety concerns of women.

Who is right? Perhaps more pressing still, is anyone right? Is there a right answer to the question whether sex-segregated bathrooms demean transsexuals and ambiguously gendered people? Would such an answer be objective? How would we go about determining who is right when people disagree? And finally, what does disagreement itself mean for the theory of wrongful discrimination that I put forward here? It is to this constellation of questions that we now turn.

Concern about objectivity seems particularly pressing because there is likely to be significant disagreement as to whether particular acts of differentiation demean. Perhaps only a subjective sense of whether a practice demeans is possible, and no way to decide among those that differ. If so, perhaps there is no real answer to the question whether a particular practice—single sex bathrooms, for example—demeans.

What Exactly Is Objectivity?

A claim to objectivity can have several meanings, of which at least two are relevant to our discussion. Sometimes objectivity is used to characterize a judgment or decision in a way that distinguishes it from bias. The umpire’s call, the judge’s decision, the teacher’s grade are objective to the extent that they are made on the basis of the appropriate criteria and not on the basis of inappropriate or distorting criteria. Here objectivity is related to impartiality. Objectivity can also refer to the status, if you will, of the object of the judgment. Is there a right call, a correct judicial decision, a proper grade? If so, baseball, law, and scholarship are objective disciplines because there are facts of baseball, law, and scholarship that are capable of being either true or false. Both senses of objectivity seem relevant to our inquiry here. First, one might wonder whether it is possible to specify appropriate versus inappropriate criteria on which to base a judgment that a particular policy is demeaning. If the two types of criteria cannot, at least in theory, be distinguished, then objectivity—in the sense of basing judgment on appropriate criteria—is not possible in this area. Second, one might wonder whether judgments about whether a practice or policy demeans can be true or false. If objectivity requires that there be a right answer to such questions, then disagreement would seem to threaten objectivity.

The claim that a law or social practice demeans is an interpretive judgment (i.e., the best understanding of the practice given its cultural context). In this respect, the judgment that a social practice is demeaning is analogous
to the claim that a legal decision is correct. Whether A's conduct renders her liable depends on whether there is an answer to the question of what the law requires. To answer such a question requires an interpretive judgment of the relevant legal material. In other words, there must be a way to distinguish appropriate from inappropriate criteria to use in making this decision. And, there must be a fact of the matter such that the claim that the law requires X can be either true or false. Similar questions can also be raised about the objectivity of judgments about art ("that painting is beautiful") and literature ("this book is a masterpiece"). Are claims that a painting is beautiful objective? In other words, is it possible to specify appropriate versus inappropriate criteria that bear on this question (objectivity as impartiality) and is there a right answer to the question whether a given painting is beautiful (metaphysical objectivity)?

In drawing these analogies to the objectivity of law or aesthetic judgments, I do not mean to suggest that the objectivity of judgments in each of these areas stand or fall together. Of course, it is possible for legal judgments to be objective, while aesthetic and social (as to whether a policy demeans) ones are not, for example. But some of the doubts one might have about the objectivity of judgments regarding whether particular practices demeans are the same as those one might have about the objectivity of legal and aesthetic judgments. This is important because the aims of the book should not be understood too broadly. The book attempts to define when and why it is sometimes wrong to draw distinctions among people on the basis of their traits. To summarize the argument so far: It is wrong to draw distinctions among people when doing so demeans any of those affected. Because there are likely to be significant disagreements among people as to whether particular practices demean, the question as to whether objectivity is possible arises. While the concept of objectivity is itself complicated and controversial, two aspects of objectivity, highlighted by the following questions, appear germane: (1) are there appropriate versus inappropriate criteria that bear on such a judgment, and (2) are claims that a practice is demeaning capable of being either true or false? Although I believe that such judgments can be objective, I cannot defend this claim in a way that answers the many philosophical doubts one might have about whether objectivity in law, aesthetics, or morality (which has been subject to similar attacks) is possible. Doing so would make this a very different book.

Instead, what I hope to do here is, first, to briefly describe the sort of objectivity I think is possible for interpretive judgments about laws, policies, and practices in our culture. Second, I hope to address the particular worries one might have about the objectivity of this sort of judgment, over and above any general concerns about the objectivity of law, aesthetics, and morality.

Aside: Type versus Token Objectivity

Gerald Postema draws a helpful distinction between what he calls "type" versus "token" objectivity. Type objectivity refers to whether judgments that fall into a certain class or type can be objective—regardless of whether any particular judgment is. For example, if one were to ask whether legal judgments are objective in a type-objectivity sense, one is asking whether any legal judgments are objective, whether law is something about which one can be objective, whether legal facts are of the kind that they can be either true or false, and so on. As Postema explains, type objectivity is "an eligibility notion." Token objectivity, by contrast, refers to whether a particular judgment is objective—it is taken as given, then, that judgments of that type can be objective. As Postema explains, "Token objectivity is a success notion and expresses a direct, conclusory assessment of the judgment."

This distinction is important to emphasize because in considering whether interpretive judgments about social practice or policies can be objective, we are discussing type objectivity. The relevant question then is whether this type of judgment—interpretive judgments about the meaning of social practices—can be objective, not whether any particular judgment is objective. A related point worth emphasizing is that in arguing that it is possible to make judgments that a particular practice like single-sex bathrooms does (or does not) demean ambiguously gendered persons, I am not claiming that I am right in any conclusion I might draw. In fact, about this particular issue I am especially uncertain. Rather, in focusing on type-objectivity for judgments about whether particular policies that distinguish among people also demean, I am claiming that these judgments can be true or false, not that any particular judgment is correct or objective.

The Objectivity of Interpretive Judgment

Let us focus more closely on objectivity. Jules Coleman and Brian Leiter describe three conceptions of objectivity, which they call minimal, modest, and strong. A domain—like law, morals, or aesthetics—is minimally objective so long as what is right is fixed by the view of the majority of
relevant decision makers.\textsuperscript{19} Leiter thinks fashion is like this.\textsuperscript{20} What is fashionable is what trendsetters in the fashion industry think fashionable. There are objectively correct answers to the question "what is fashionable" because all we need to do is determine whose opinions count and what they think. Whatever the majority of such people think fashionable is fashionable. Leiter himself thinks law is minimally objective in this sense. A legally correct decision is the one that is thought legally correct by the majority of relevant officials.\textsuperscript{21}

A minimal conception of objectivity seems inapt—both to law and to interpretive judgments about which policies or practices demean. If what is—objectively—demeaning is (just) what the majority thinks is demeaning, this standard is likely to reproduce the oppression of minorities that a prohibition on wrongful discrimination seems concerned to eradicate. A majoritarian conception of what demeanes allows dominant practices and understandings to stand and to be labeled objectively unobjectionable. Surely the majority can be wrong about whether particular practices demean. The most egregious cases of wrongful discrimination are likely to be recognized as demeaning by the majority. But there is no guarantee. For example, racial segregation was probably recognized as demeaning by a majority of whites and blacks. Justice Brown’s majority opinion in \textit{Plessy v. Ferguson}, if it is sincere, is an important counter-example, though. He famously observed that the plaintiff misinterpreted the meaning of racial segregation: “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.”\textsuperscript{22} Whether his opinion reflects the honest assessment of the majority of people at that time is unclear. The first Justice Harlan, dissenting in \textit{Plessy}, interpreted the practice of racial segregation differently—as demeaning. He saw the law as one that “puts the brand of servitude and degradation upon a large class of our fellow citizens.”\textsuperscript{23} If we agree that Justice Brown has misinterpreted the real meaning of segregation \textit{at that time}, this is because that real meaning is independent of the majority’s view about it.

Laws and policies “protecting” women provide another apt example. Although such laws (like those in the past that restricted women’s employment\textsuperscript{24} or those more recently that restrict women from hazardous employment\textsuperscript{25}) may not have been viewed by the most people at the time as demeaning, they are (I believe) nonetheless demeaning. Today, the majority of people would likely not find that the practice of sex-segregated bathrooms demean transgendered or ambiguously gendered people. However, this fact ought not to settle the question about whether such practices demean.

A minimal conception of objectivity has another important flaw. It makes some sense to say that what is objectively fashionable is what the majority of cognoscenti thinks is fashionable because fashion seems to simply be about what people think. Some aspects of manners are like this. It is good manners to shake hands when meeting someone just because most people in our culture think that shaking hands is the polite thing to do when meeting someone. But where the judgment is evaluative rather than merely descriptive, a minimal conception of objectivity will be inadequate. What the majority of people think matters to determining what the conventional practice is, but the fact that a majority of folks think something is right cannot make it right. Because demeaning carries normative weight—it is, at least prima facie, wrong to demean—a minimal conception of objectivity will be inapt to explain the objectivity of judgments that practice X demean.

In fact, the minimal conception of objectivity may not work even for fashion or manners. To call something fashionable is sometimes not merely to refer to what others do and think; it can also be a term of approbation, a compliment. If so, it refers to an evaluative judgment as well as a descriptive judgment. The judgment that something is fashionable may be ambiguous as between these two meanings (merely descriptive, or descriptive and evaluative). Sometimes to call something fashionable has no normative connotations, as in “I think nose and lip piercing is creepy, but it is fashionable.” But other times, to call something fashionable is more normatively freighted: “she is a very fashionable dresser” generally means not that she follows the fashions but that she culls from the current styles and wears only the best of the current offerings. On this conception, “fashionable” means to be a style that is currently in vogue and a style that is beautiful or artful or whatever the aim of fashion is. To the extent that what is fashionable has this evaluative bite, a minimal conception of objectivity will not suffice. The fact that the majority of relevant decision makers think something is fashionable will not be decisive because the majority could be wrong. Nose and lip piercing may only appear fashionable, if to be fashionable requires both that the style is one currently in vogue and that it is beautiful. If so, a more robust conception of objectivity may be necessary for a style to be objectively fashionable.\textsuperscript{26}
made a minimal conception of objectivity inapt), demeaning also depends on conventional practices and norms. I cannot demean you by folding my hands when speaking to you, even if in my mind that gesture is equivalent to spitting. Because hand folding has no meaning in our culture, my hand folding cannot demean you (unless we tell some complicated story that invests it with meaning). To demean requires a reliance on conventional methods for showing disrespect. As such, the fact that practice X demeans cannot be objectively demeaning in this strong sense because it cannot be true irrespective of how anyone would interpret the action in any context.29

A Modest Proposal for Modest Objectivity

Coleman and Leiter articulate and defend a conception of objectivity for law that they term modest objectivity. As they define it, “[a]ccording to modest objectivity, what seems right under ‘ideal epistemic conditions’ determines what is right.”30 What makes it modest is that it stands between minimal and strong objectivity in the following sense. Like minimal objectivity, the truth or true nature of things is not completely independent of human experience and perception. But like strong objectivity, it is possible for everyone to be wrong about the real nature of the thing perceived. As Philip Pettit points out however, this modest objectivity is fairly robust. In defending the objectivity of ethical values, Pettit points out that colors also do not have a true nature independent of how they are normally perceived by people. Yet we think of colors as objective, and statements about color (“the chair is red”) as capable of being true or false. As he says with regard to ethical values, “it would be an important win for those who believe in the objectivity of ethics to be able to argue that values and disvalues are on a par, for example, with colors.”31 So too for interpretive judgments about social practice. It would be an important win too for those who believe in the objectivity of these interpretive judgments to be able to argue that they are on a par with the objectivity of colors. Objectivity need not require independence from human experience and perception to be meaningful. If interpretive judgments are objective in a way similar to that of colors, that is pretty good.

Coleman and Leiter’s particular idea about what modest objectivity consists of—perception under ideal epistemic conditions—is appealing, but not without problems. It is no easy task to specify what the ideal epistemic conditions are for making ethical judgments, legal judgments, or interpretive
judgments about social practices. Coleman and Leiter’s list of the ideal epistemic conditions for legal judgment are not, as Connie Rosati points out, as self-evident as they appear to think. For example, Coleman and Leiter specify that the ideal judge should be “maximally empathetic and imaginative,” among other criteria. But specifying what it means to be maximally empathetic is not easy—Rosati makes precisely this point. To bring this critique home to the issue at hand, consider how we should specify the ideal epistemic conditions for determining whether single-sex bathrooms do or do not demean ambiguously gendered people. Does maximal empathy require adopting the position of the ambiguously gendered? It cannot simply require the uncritical adoption of their position, else modest objectivity would not be judgment under ideal epistemic conditions but instead the judgment of the aggrieved party, whatever its merits. On this view, any claim of wrongful discrimination would be legitimate. This does not seem objective. Rather, it is simply to adopt one particular perspective.

My rough sense of how to navigate this issue is that one ought to listen closely and well to the perspective of the aggrieved, but then one must, always, make an independent assessment of its value. Is this maximal empathy? Modest empathy? I do not think these labels will help. How much empathy one ought to have and, perhaps more importantly, what one ought to do with this empathetic response is not easy to specify.

This difficulty in fully specifying the ideal epistemic conditions that yield objective judgment relates to the first sense of objectivity identified earlier. At the start of this section, I identified two senses of objectivity that are important to the assessment of whether interpretive judgments of social practices can be “objective.” First, a person judging is objective if he or she is free from bias, if he or she brings only the relevant criteria to bear in making a decision. This sense of objectivity is related to impartiality. Second, a judgment or assertion is objective if it is capable of being true or false because there is a real truth of the matter against which to test it. So far, we have largely been exploring the ways in which interpretive judgments are objective in this second, metaphysical, sense. Do these judgments assert claims about how things really are that are capable of being true or false? In answering this question, we have explored three senses of what that objectivity may entail (minimal, strong, and modest). We have so far rejected both minimal and strong as unable to provide a good sense of how interpretive judgments could be objective. In settling, tentatively, on the modest conception of objectivity, I am agreeing that we ought to look for a way that such claims can be objective that neither reduces objective truth to mere majoritarianism nor demands complete independence from human experience. One version of modest objectivity defines the objective judgment as that which would be adopted by someone under ideal epistemic conditions. In wrestling with the question of what such conditions might include, I find that we are returning to the first sense of objectivity, as a decision using only appropriate and no inappropriate criteria. Both the methodological and metaphysical conceptions of objectivity thus require that one specify the appropriate criteria for objective judgment.

So where we, tentatively, end up is as follows: For interpretive judgments about social practices to be objective, we must be able to specify relevant from irrelevant criteria for these judgments—so that we can insure that the people interpreting the social practices are being objective (methodological sense) and so that we can tell whether their judgments are objective (metaphysical sense—using a modest conception of objectivity). Can we do that? Yes, but not fully. Coleman and Leiter are surely right that empathy with the perspective of others is important. Also on their list of ideal epistemic conditions is that the ideal judge must be “free of personal bias for or against either party.” This is a criterion for the ideal epistemic conditions for judging what the law is, but we can easily translate it to the situation involved in interpreting social practices: The ideal “judge” must be free of personal bias for or against any of the people acted upon by a policy that distinguishes among people. These criteria help us to separate relevant from irrelevant criteria. The subjective experience of those acted upon by a discriminating policy is relevant. The personal like or dislike that the interpreter may feel for the individual people affected by the policy is not relevant. That is a start.

But what should we say about a person who holds the following view? It is wrong, morally, to change genders or it is not healthy to fail to clearly identify with one gender or the other. Do these views count as a personal bias that renders a decision non-objective? What about the following view? I see their point (the position of the ambiguously gendered), but the needs of the majority for privacy and safety should trump the needs of the minority, unless something vital is at stake, which it is not here. Does this view exhibit a lack of adequate empathy? Each of these viewpoints could affect whether one perceives single-sex bathrooms as demeaning. These and other similar questions are not easy to answer. We have some sense of appropriate versus inappropriate criteria, but there are many shades of gray in between.
I am not dismayed by this result or despairing of the possibility of the objectivity of interpretive judgment for several reasons. First, the idea of modest objectivity is promising. Objectivity about interpretive judgment should allow for the possibility that everyone is wrong (about whether a given practice demeans) and make recognizable reasonable disagreement (rather than simply disagreement about what people think). At the same time, objectivity about interpretive judgment cannot require that a practice does or does not demean regardless of how anyone under any conditions would perceive it. So I think the basic idea of modest objectivity sets us on the right track. Second, I am hopeful that as we learn more about what practices demean (through conversations with others, empathetic thought experiments, etc.), we will come to have a clearer sense of what the ideal epistemic conditions are for making such judgments. Though it would be wonderful if we had a firm grasp of these conditions first, and then used them to determine which interpretive judgments are demeaning and which are not, I do not think it will happen this way. I think we will learn about what counts as demeaning through using our best understanding of the ideal conditions for objective judgments about interpretive matters and will, simultaneously, learn about what these ideal epistemic conditions are as we learn more about which practices do or do not demean. The two inquiries will go hand in hand.

Thirdly, the limitations of this account of the objectivity of interpretive judgments about social practices are not unique to this domain. Rather, they are familiar philosophical worries about the objectivity of law and morality. Just as Pettit thought that if values could be seen as objective in the sense that colors are, it would comprise a significant accomplishment, so too I would argue that if interpretive judgments about social practices have no bigger problems with regard to objectivity than do law and morals, that is not too bad. This is a book about discrimination, after all. Its aim is to articulate and defend a conception of what makes discrimination wrong. The view I put forward is that it is wrong to draw distinctions among people when doing so demeans. This position gives rise to the question: Can a judgment that practice X demeans be objective? The answer provided by this section is a tentative yes—modestly objective. But perhaps more important, the worries about its objectivity are the same worries we have about the objectivity of law and morality more generally, at least those worries that have been raised thus far. But are there reasons to be particularly concerned about the objectivity of interpretive judgments about social practices, over and above those that plague claims for the objectivity of law and morality? It is to this question that we now turn.

Special Concerns about Objectivity

Is the claim that the judgment practice X demeans group Y particularly problematic in terms of its ability to be objective? In other words, are there reasons to worry about the objectivity of such judgments over and above the more general worries one might have about the objectivity of claims about law or morality? In order to answer this question, we must identify the reasons one might think judgments of this type are particularly problematic in terms of their objectivity. First, one might note that there is likely to be substantial disagreement about whether particular policies or practices that distinguish among people do so in a way that demeans. Second, one might worry that one cannot know whether a social practice that distinguishes among people demeans without being inside the culture and thus that any judgment about the practice may be biased or limited. Third, one might worry that in practice the views about which practices are demeaning that will be seen as true will be those of the majority or dominant group so that adoption of this approach will lead to defective and skewed judgments about what practices wrongfully discriminate and which do not. If so the theory I advance could become a tool of legitimation by the powerful.

Disagreement

Let us address each concern in turn, starting with the likelihood of disagreement. It is surely true that there is likely to be significant disagreement about whether many practices that distinguish among people do so in a way that demeans, especially with regard to any practice that is controversial, and even some that are not. Does affirmative action demean black students, who are helped by the preference? Do single-sex colleges demean women or men? Does genetic discrimination in insurance demean people with genetic mutations predisposing them to disease? Do single-sex bathrooms demean ambiguously gendered people? On the other hand, there is likely to be significant agreement about the meaning of some practices. Separation by race in the use of public drinking fountains demeans blacks. Barring women from specific professions (like law) demeans women. Laws that prohibit
people with disabilities or disfigurement from public spaces demeans such people.

So, while there is likely to be significant disagreement about whether certain policies that distinguish among people demean, there is likely to be significant agreement as well. Is the likely amount of disagreement too much? How much is too much? There is also significant disagreement about many other ethical issues: Is abortion morally permissible? What about suicide or assisted suicide for terminally ill patients? In this section, we are asking whether there are special reasons to be concerned about the objectivity of judgments that a particular practice demeans. The first reason offered was the likelihood of significant disagreement about such matters. While there is likely to be disagreement, it does not strike me as likely to be more pervasive (or at least not significantly so) than disagreement about moral matters more generally. Thus, the fact of disagreement ought not to pose a special problem for the objectivity of interpretive judgments about social practice.

Moreover, the focus on whether a practice demeans helps to change the discussion in some cases that generate disagreement. Affirmative action provides an apt example. Today discussion about affirmative action (in legal and non-legal contexts) tends to focus on when and whether it is ever permissible to treat people differently on the basis of race. If instead one were to ask whether the practice demeans any of those affected, the claim of wrongful discrimination by white candidates who narrowly miss getting a job, a place at school, or a contract would be substantially undermined. Consider the college or university context as an example. While an affirmative action program may result in a highly qualified white student not being admitted, an affirmative action policy does not express denigration of whites qua whites. While there can surely be disagreement about the best understanding of this social practice, the claim that it demeans whites has little traction. Ronald Dworkin makes precisely this point in a 1985 essay on the Supreme Court’s decision in The Regents of the University of California v. Allan Bakke. In exploring the nature of the complaint that Bakke could raise against the university, Dworkin asks “He [Bakke] says he was kept out of medical school because of his race. Does he mean that he was kept out because his race is the object of prejudice or contempt?” Dworkin concludes “[t]hat suggestion is absurd.” There is no history of whites qua whites being excluded that gives this interpretation traction. More plausible is the claim that the school’s decision demeans blacks because the lowering of standards seems to track the stereotype of blacks as intellectually inferior or the claim that the school’s decision demeans lower-class whites as it fits with meritocratic understandings that attribute lower economic status to inferior ability. The theory thus helps to identify better and worse arguments regarding controversial policies—the claims of lower-class whites versus the claims of whites qua whites, for example. Thus while the theory of wrongful discrimination as drawing distinctions that demean will not eliminate disagreement about controversial practices, it will channel that disagreement into different (and in my view more fruitful) lines of inquiry.

But will the focus on whether a practice demeans invite people to be extra sensitive to insult or easily affronted by practices that distinguish among them? Will this approach make “grievance the coin of the realm”? If it would, this would be a serious concern as a diverse community such as ours should encourage thick skin as a civic virtue. However, we should note that if implementation of this account into law or policy did make grievance the coin of the realm, this failing would not suggest that this account of wrongful discrimination is wrong in theory. Rather, it would provide a reason not to implement it in practice. What is the right theory and what is the best way to implement that theory in practice are two distinct questions. That said, there are reasons to doubt that this account will encourage a culture of complaint, even at the level of practical implementation.

First, this account of wrongful discrimination grounds the moral wrong in whether a practice is objectively demeaning, not in whether an individual or group of people feels demeaned or stigmatized. It therefore provides no encouragement for people to be especially sensitive. Rather, it frees them to articulate the complaints they may have about practices they find demeaning while simultaneously developing a strength of character that allows them not to feel lowered by such practices. The fact that a person or group does feel demeaned by a practice is not determinative of whether the practice is best understood as demeaning, though it is surely relevant.

Second, an empathic response to others’ suffering can free people to move beyond that suffering and, inversely, a denial of empathy can cause that suffering to grow. If so, a theory that allows people to articulate the ways in which they believe a practice that draws distinctions among people does so in a way that demeans may well liberate people from these feelings of diminishment. Once heard and acknowledged—because the theory provides a way to conceptualize the wrong they feel—they may be able to see the viewpoints of those holding other views. In a diverse society, encouraging such paths to understanding is critical.
Accessible to Insiders Only

Perhaps interpretive judgments about social practices may fail to be objective because one cannot understand or interpret such practices without being inside them. If so, these judgments are not accessible to all, and those to whom they are accessible can only provide biased or partial judgments—or so the objection goes. There are two parts to this objection. First, people outside the culture will be unable to say anything about whether one of its distinguishing practices demeans. For example, one might think that non-Muslims are unable to really understand the practice of veil wearing and its cultural and social significance, so they cannot judge whether veil wearing by observant Muslim women demeans women. Second, the opinion of those on the inside is tainted by their inability to get outside of their individual perspective and view the practice from the outside, to see it how it really is. Participants in a culture cannot get outside to see it how it really is because the view from the outside does not include the cultural knowledge required to read and understand the practice. So, one is stuck between a rock and a hard place.

But is this correct? While participants in a culture usually understand the cultural significance of its practices better than outsiders, this is not always so. One can be too close to something to see or understand it well, for example. Also, the fact that one is not a member of a culture or a participant in its practices and rituals does not preclude one from entering it imaginatively. As Joseph Raz points out, such a claim is implausible. He argues that the claim that a culture is inaccessible to outsiders requires one to make the “implausible supposition” that “people have the capacity to acquire the concepts of one culture only.” A more plausible claim is that it takes time, investment, and openness to understand the meaning of another culture’s practices. This is surely true and an important fact to keep in mind—along with a healthy dose of humility—when interpreting and judging the practice of cultures other than our own.

But what of insiders? The argument against the inaccessibility of culturally laden practices to outsiders also emphasizes how insider judgment can be biased or partial. No more so perhaps than outsider judgment, but both are views from somewhere. If, as Thomas Nagel spoke of it, objectivity is the view from nowhere, then objectivity, in that sense, unattainable?

To the extent that understanding social practices (ours or others’) requires drawing on what we know about cultures and practices, it cannot be

the kind of knowledge knowable from nowhere. Cultural practices are understood through immersing oneself actually or imaginatively in those cultural practices. Even this imaginative immersion requires drawing on analogies or similarities to concepts or cultural practices one knows or inhabits. Again, I do not think this is necessarily a problem for the objectivity of such judgments. What one must know and understand is the culture, its history and its way of doing things. This detailed knowledge is what allows one to form judgments about what a cultural practice means.

This does not mean that the moral judgment one makes about practice—that it is demeaning, for example—is somehow relative to the culture and its traditions. What the practice means is relative to that culture of course. Taking one’s hat has a different meaning in different cultures but showing respect for others is morally worthy everywhere.

Cultural Hegemony

Finally, one might worry that practices of dominant cultures will be large unchallenged and practices of subordinate cultures will be more likely to be judged as demeaning. This could happen when members of one culture examine the practices of another or when members of a dominant group within a culture examine the practices of a minority group. Bad intentions need not be the cause of such lopsided judgment. For example, the claim that transgendered people that single-sex bathrooms demean them may be summarily dismissed by non-transgendered people who simply do not see the practice as demeaning anyone—they see it as a reasonable way to accommodate the privacy preferences of most people. The fact that the preferences of some are not accommodated need not condemn the practice, nor policies that distinguish between people routinely produce winners and losers. The relevant question is whether the discriminating practice demean the losers or simply denies them something of value. The interpretive judgment of those in power (of the dominant group or culture) may be predictably and routinely flawed such that the claims of minority groups are rejected, notwithstanding their merits, again and again.

This first thing to note about this reservation regarding the objectivity of interpretive judgments is that it raises an objection to the objectivity of particular interpretive judgments, rather than to the objectivity of this type of interpretive judgment. Remember Postema’s distinction between type and token objectivity. Type objectivity refers to whether judgments of the kind θ
issue can be objective and is thus, as he terms it, an “eligibility notion.” Token objectivity, by contrast, relates to whether any particular judgment—of a type for which objectivity is possible—succeeds in being, in fact, objective and is thus, as he terms it, a “success notion.” In claiming that judgments by dominant groups (who may be in control of decision-making in a particular culture) regarding the practices of minority groups are likely to be biased, one is making an assertion about whether these judgments succeed in being objective. As such, the objection is more limited and more internal (i.e., one would have to look at particular judgments to determine whether the claim is warranted) than it might initially appear.

That said, let us look at the objection more closely. It raises an important practical worry about how a theory like the one I propose is likely to play out in the real world—the claim being that it is likely to reinforce the dominance of dominant groups. First, is that so? I am skeptical about the degree to which any theory about when or whether discrimination is wrong will either exacerbate or ameliorate the dominance of dominant social groups. For the dominant group to cede power, they must recognize that what they are doing is wrong, when it is wrong. This theory perhaps makes that more explicit, but the ability to see things differently is required to change one’s mind, whatever theory one is using to evaluate one’s actions.

Second, and more important, even if adoption of my view were likely to lead to more wrongful domination by dominant social groups, this fact would not provide a reason to reject the theory at the theoretical level. If objectivity is possible but poor judgment likely, we would have reason to substitute other tests for political or judicial decision makers to use when deciding public policy.\(^{45}\) If another test (of what ought to count as wrongful discrimination) is more likely to reach the right result than asking decision makers to directly examine whether a classification demeans, then this is a reason to adopt another test. But note that to adopt this viewpoint, one must have a prior conception of what counts as the right judgment. It cannot be the decision that would be adopted with the substitute test, as that would be circular. It must be the decision that would be right using the right theory of when discrimination is permissible and when not—a theory whose value cannot be assessed in terms of whether people are likely to misapply it.

Finally, I do not believe that telling people to focus on whether a classification demeans will yield more incorrect decisions than would an alternative test with less room for interpretive judgment. Candidly and explicitly focusing on the question of whether a particular practice demeans any of the groups affected may help illuminate the flaws of the dominant position, when it is flawed. It will facilitate critique of the dominant group’s outlook—an outlook that would also influence how that group applies any test one might substitute. Use of this approach thus might ultimately lead to more real movement in how a dominant group perceives and understands its differentiation practices.

To recap: When is it morally wrong to distinguish among and then treat people differently? When the differentiation demeans. People are likely to disagree about whether any actual practice demeans. No theory could, nor should, hope to eliminate such disagreement entirely. The theory I propose helps to channel that disagreement to the right question. Of course as a society we need mechanisms for dealing with disagreement, whether disagreement about when discrimination is wrong or anything else. In our society, these methods include democratic and judicial decision making.