

THE TORT OF DISCRIMINATION

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This Essay integrates two ambitions. It seeks to both lay out new theoretical foundations for antidiscrimination law, and demonstrate the practical significance of these foundations to tackling instances of wrongful discrimination beyond the reach of the current legal regime. Concerning theory, we articulate an account of wrongful discrimination grounded in private law's basic commitment to reciprocal respect for the self-determination and substantive equality of private persons. Concerning practice, we argue that antidiscrimination law is currently at its pre-MacPherson v. Buick stage, namely, consisting in isolated pockets of liability for discriminatory behavior. The gaps left by its existing pockets are indefensible as they necessarily undermine people's fundamental right to be treated equally by holders of normative powers, such as proprietors, employers, and lessors. Nothing short of a full-blown tort of discrimination can suffice for antidiscrimination law to have its own MacPherson moment. The theoretical account we develop provides the necessary framework for embarking on this crucial endeavor: a clear articulation of the normative foundations of such tort as an integral, and indispensable, part of private law in a liberal society. Drawing on existing tort doctrines, we identify important legal tools that can be utilized for prescribing the proper elements—duty, breach, injury, causation, and remedy—of a novel, generic tort of discrimination.

INTRODUCTION

Private law, and tort law in particular, protect some of the most fundamental rights we hold against others. For instance, the torts of assault and battery protect bodily integrity, the tort of defamation protects our good name, and the tort of private nuisance picks out our right to use and enjoy our land. The list of fundamental rights is never static as courts, and other lawmakers, have kept revising its contents by subtracting and adding rights in response to changing social and economic circumstances and in the light of changing perceptions of right and wrong. Straightforward illustrations are the relatively recent admission of rights to privacy, products safety, and emotional well-being to the law of torts.¹

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¹ See *Pavesich v New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916); William L. Prosser, *Intentional Infliction of Mental Anguish: A New Tort*, 37 MICH. L. REV. 874 (1939), respectively.

One right has gone missing, though.² It is the right to be treated as an equal. This right entitles one to interact with another private person on terms that respect them as substantively free and equal person. A claim-right held against other private persons, the right implies that, all else equal, our traits and certain choices we make must not be held against us in a wide range of voluntary interactions (market as well as non-market ones). It aims to dismantle certain transactional barriers that these others erect in applying their normative powers. Having this right implies that the terms of voluntary interactions must conform to reciprocal respect for self-determination and equality. It entails a corresponding duty of nondiscrimination and warrants a tort of discrimination that further entrenches this duty and addresses its breach.

Talk of voluntary interactions might mislead one to believe that the wrong of discrimination, say, in the context of employment, consumption, housing, and educational institutions, can be specified independently of the property and contract laws governing these interactions. On this belief, the difference between discrimination in the choice of one's friend and one's employee pertains to the context in which choice is being made. Both instances seem to suggest that at a basic level, the right to make discriminatory choices is already implicit in the freedom to choose, say, one's friend, employee, and so forth. Hence, the only live question on this view is one of legal intervention: should law impose limits on the freedom to choose friends, employees, and so forth. The answer may vary depending on the context, but the structure of the problem remains the same: discrimination is integral to our freedom to engage in voluntary interactions.

We reject this view because it rests on an indefensibly reductive understanding of legal rules and institutions.³ Rather than merely tracking, or even facilitating, our extra-legal voluntary interactions, the law sometimes plays a constitutive role in making these interactions possible in the first place. It does so by introducing legal powers and correlative vulnerabilities that do not merely preserve our rights and duties, but rather empower us to change them, including even by creating new ones. The institutions of property and contract do precisely that—they vest right-holders with the power to make choices that change the normative situation of others. This means that voluntary interactions that are partially constituted by law cannot be analyzed on the model of voluntary interactions that exist apart from such legal fiat. Therefore, the thought that discriminatory choices are integral to our freedom of choice is untenable when this freedom is not some natural right that we have, but rather a normative power artificially manufactured by operation of law.

Empowering some people over others, as in the cases of private proprietors, employers, and lessors, suggests that normative powers must not undermine the status of parties to voluntary interactions as free and equal agents. Unlike the case of choosing a friend, the laws of property and contract cannot legitimately confer on employers (for example) the normative power to subordinate employees (or potential employees) to impermissible behavior, including wrongful discrimination. Accordingly, the proposed tort of discrimination establishes and protects the right

² It is not, to be sure, the only one. A horizontal right to free speech is another, fundamental right that has failed to receive its proper recognition in the law of torts. See Avihay Dorfman, *Conflict between Equals: A Vindication of Tort Law* ch. 13 (unpublished manuscript).

³ See *infra* text accompanying note 91.

to be treated as an equal by preventing holders of normative powers from incorporating the freedom to discriminate others into their legally-constructed voluntary interactions. This means that this tort does not intervene with how people exercise legitimate normative powers; instead, it denies the very existence of the power to make such discriminatory decisions to start with. As a result, wrongful discrimination is not merely an instance of one or another substandard behavior, but rather one of *ultra vires*, namely, acting beyond one's legal power.⁴

Our case for a tort of discrimination does not end with defending new theoretical grounds for wrongful discrimination in voluntary interactions between private persons. It also carries significant practical contributions to the actual design of contemporary antidiscrimination law. Currently, the right to be treated as an equal receives some protection by a variety of isolated statutes that tackle discrimination on a *retail* basis—one set of statutory provisions focuses on employment, another on housing, a third one picks out places of public accommodation, education provides yet another, and so forth.⁵ In addition, the definition of wrongful discrimination in law is specified on a narrow basis. Unlawful discrimination is given by a closed and exhaustive list of grounds, be they race, sex, and so forth.⁶ The existing cluster of retail duties also suffers from a range of substantial shortcomings. To mention a few: liability for wrongful discrimination is typically predicated upon deliberate behavior, to the exclusion of negligence⁷; private contractors and gig-economy workers are not entitled to the antidiscrimination protection afforded to all other workers⁸; unjustified gap in pay between occupations of comparable worth is currently not illegal even when the disparity in question reflects gender, racial, or any other bias⁹; and according to some courts, virtual places of public accommodation (such as online stores) are not duty-bound to make their website accessible to people with disabilities (such as deaf and hearing impaired individuals).¹⁰

⁴ The term *ultra vires* is typically associated with the limited legal capacity of some legal persons, but we use it deliberately here in order to convey the proposition that once we appreciate the nature of property and contract as power-conferring institutions, owners and potential promisees must not be able to use these legal devices in discriminatory ways. (Consider, by [crude] analogy, the claim that, properly interpreted, trading in certain body parts is *ultra vires* [liberal] contract, since it abuses the very normative foundation on which contract's legitimacy is founded.)

⁵ See 42 U.S.C. § 2000e-2 (employment discrimination); 42 U.S.C. § 3604 (housing discrimination); 42 U.S.C. § 2000a (discrimination in places of public accommodation); 20 U.S.C. 1681 (discrimination based on sex in federally funded educational institutions), respectively.

⁶ See, e.g., 42 U.S.C. § 2000e-2 (deeming employment discrimination unlawful if based on employee's race, color, religion, sex, or national origin). Even the vastly under-enforced 42 U.S.C. §1981 has a retailish character, as it prohibits discrimination on the basis of race.

⁷ See, e.g., *Jalal v. Columbia Univ.*, 4 F. Supp. 2d 224, 241 (S.D.N.Y. 1998) ("Title VII, however, provides no remedy for negligent discrimination.").

⁸ See *infra* text accompanying note 45.

⁹ See Paula England et al., *Progress toward Gender Equality in the United States has Slowed or Stalled*, 117 PROC. NAT. ACAD. SCI. 6990, 6995 (2020).

¹⁰ *Anderson v. Macy's Inc.*, 2012 WL 3155717 (W.D. Pa., 2012).

In theory, there is nothing wrong with a retail-based strategy of protecting the right to be treated as an equal.¹¹ Indeed, it is possible to imagine a comprehensive scheme of retail duties that could address these—as well any other—conceivable shortcomings in current antidiscrimination law. In practice, however, cutting the antidiscrimination law into bits and pieces might weaken, rather than strengthen, the wholesale right to be treated as an equal; further, it might even weaken the more particular rights on which the retail strategy focuses. As it turns out, both of these practical concerns plague contemporary law of antidiscrimination. The (wholesale) right to being treated as an equal is rarely recognized as a valid basis for imposing duties of nondiscrimination.¹² And, as just noted, even the particular rights, say, to be treated as an equal in commercial settings, receive (at best) partial protection.¹³

There is, moreover, a broader cost to tort law's failure to both recognize a right to be treated as an equal and establish a tort of discrimination, nicely captured by the notion that current antidiscrimination law cannot see the forest for the trees. The generic wrong involved in failing to treat persons as equals implicates the most basic commitment of private law in a liberal legal order, namely, to reciprocal respect for self-determination and substantive equality. Its absence reifies the traditional, though normatively indefensible, default rule according to which private persons are *generally* at liberty to choose whom, and on what terms, to serve, sell, or interact with, more broadly.¹⁴

We do not argue against distinguishing between instances of discrimination on the basis of context (such as employment, commerce, housing, education, and so forth). Nor do we argue that legal standards for unlawful discrimination should ignore suspicious classifications and grounds for discrimination. Nor, finally, do we object to distinguishing between types of discrimination, say, by dividing instances of discrimination into ones of disparate treatment, disparate impact, or failure of accommodation (as in the case of disability). Rather, we argue that the *success* of a retail strategy hinges on the prior recognition of a tort of discrimination, one which protects our basic right to be treated as an equal by other private persons whenever they hold and, therefore, can exercise normative powers, such as the ones associated with property and contract.

The ambition of the argument going forward, therefore, is to defend the normative case for this tort, explain what this tort consists of, and identify its proper scope of application. Part I identifies the conceptual mistake that can account for the failure of traditional private law to recognize the right to be treated as an equal. We argue that denying this right was a feature, rather than a bug, of a certain (misguided, to be sure) interpretation of the public/private distinction. We further explain why contemporary antidiscrimination law cannot meet the normative demand for such right. Part II provides the theoretical basis for the right to be treated as an equal by holders of

¹¹ To be sure, even a consolidation of the different statutory provisions into one code or statute cannot change the retailish nature of the antidiscrimination law at issue. Arguably, England's Equality Act of 2010 is a case in point.

¹² See Part I.

¹³ See *infra* text accompanying note 43; see also Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929 (2015).

¹⁴ See Part I.A.

normative powers, discussing both its nature and scope of application. Part III draws the contours of a tort of discrimination befitting for a liberal legal order.

I. PRIVATE DISCRIMINATION LAW: FROM DENIAL TO PARTIAL ACCEPTANCE

The right to be treated as an equal is not simply a case of a legal entitlement gone missing. Indeed, it is not a story of neglect; nor is it a matter of an otherwise respectable right that, perhaps tragically, had to give way to other, more important rights. Instead, the traditional approach to private law denies its very existence. On this approach, a right to be treated as an equal undermines the normative order on which this body of law maps. Recognizing this right can, therefore, change, rather than merely revise, that order in fundamental ways. We explain these claims by reference to two sets of distinction: first, private versus public; second, formal versus substantive freedom and equality. There can surely be other explanations, such as historical ones, to the absence of the right to be treated as an equal. Our goal is to identify, and criticize, a *conceptual* explanation—that is, we do not ask why this right has failed to get recognition, but rather what conception of private law and of its normative underpinnings might have justified its exclusion.

A. *The Normative Starting Point: The Permissibility of Private Discrimination*

There are many normative accounts that seek to render intelligible the *a priori* exclusion of the legal right to be treated as an equal in the private law.¹⁵ We focus on what is probably the most comprehensive and sophisticated theory of this exclusion, namely, a Kantian understanding of relational freedom and equality and its related account of the public/private distinction.¹⁶ We present it and, subsequently, reject it on normative—relational justice—grounds.

Consider a small, casual restaurant refusing to serve green-eyed customers. Should this practice be legally permissible? Traditional private law answers this question in the affirmative. The normative basis for this answer is given by a principled understanding of the difference between the public and the private in terms of a distinction between inclusion and exclusion. On this account, the public sphere, which includes institutions, entities, and goods governed by public-law norms, is structurally egalitarian. Discrimination against green-eyed persons, say, when recruiting new employees to the government workforce or upon entering a public park is not just unethical but rather also flatly illegal. The private sphere contrasts with the all-inclusive character of its public counterpoint: voluntary transactions between private persons should not be governed by

¹⁵ For libertarian and welfarist accounts, see, e.g., Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC (Aug. 31, 1963) at 22; Richard A. Epstein, *Public Accommodations under the Human Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1260-61 (2014).

¹⁶ The text refers to the dominant position among modern Kantians, even though some scholars offer competing understandings of Kant.

public-law norms and should, therefore, not be subject to prohibitions on discrimination.¹⁷ The key to this picture lies in a commitment to independence and formal equality.

Thus, on this Kantian account, the justness of an interaction between private persons should be assessed by reference to independence and formal equality.¹⁸ This form of assessment suggests that private persons are generally at liberty to choose their party to a voluntary transaction as they see fit, which means that it is up to the restaurant owner to decide whom to serve. Precluding this prerogative undermines the independence of the owner as it subjects them to other persons' choice. The subjection is not predicated on whether green-eyed customers have actually visited the restaurant; indeed, it is the very existence of a right not to be discriminated against on the basis of the color of one's eyes that puts the owner in a normative status of subjection. At the same time, the absence of a duty of nondiscrimination does not impinge on the independence of the green-eyed diners because it may only affect the *context* within which they could still set and pursue ends.¹⁹ For instance, they can eat elsewhere or cook for themselves. Moreover, treating the parties as formally equal—in the sense that they equally possess the capacity for choice—requires that neither party should be able to fix the terms of the interaction unilaterally.²⁰ Instead, both must agree to these terms, including to the term concerning the identity of the customer. A duty of nondiscrimination violates this maxim, however, because it entitles the latter to demand the owner to serve them.

There are two ways for this analysis to escape the problematic (i.e., pro-discrimination) prescriptions of independence and formal equality. One is to preclude discrimination indirectly by attributing a different wrongdoing to the restaurant owner, namely, misrepresentation or even deceit. The argument is that the restaurant undertakes to hold itself open to the public and, therefore, presents itself as fully committed to serve people irrespective of the color of their eyes.²¹ Excluding green-eyed customers is certainly wrong, but its wrongness does not lie in discriminating against green-eyed diners. Rather, it stems from deceiving green-eyed customers and, relatedly, frustrating their reliance on the owner's representation.

¹⁷ Although modern Kantians do not explicitly concede this interpretation, we have argued before that it follows from the way they understand both the public/private distinction and the entailments of independence and formal equality. See Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 L. & PHIL. 171, 175, 183 (2018) [hereinafter: Dagan & Dorfman, *Justice in Private*]; Hanoch Dagan & Avihay Dorfman, Public Nuisance for Private Persons (unpublished manuscript).

¹⁸ See ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL THEORY 4, 35 (2009); ERNEST J. WEINRIB, RECIPROCAL FREEDOM: PRIVATE LAW AND PUBLIC RIGHT 9 (2022).

¹⁹ See ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL THEORY 14-45 (2009).

²⁰ See ERNEST J. WEINRIB, CORRECTIVE JUSTICE 36 (2012); Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163, 181 (2011); Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 109, 112 (1995).

²¹ See also Joseph William Singer, *Property and Sovereignty Imbricated: Why Religion is not an Excuse to Discriminate in Public Accommodations*, 18 THEORETICAL INQ. L. 519, 542 (2017) (noting that "[p]ublic accommodations extend a general invitation to the public to come in and do business" without being able to "choose which customers to serve").

The second escape route takes the form of publicization.²² Instead of analyzing the case in terms of a horizontal transaction between two private persons, it may sometimes be more accurate to emphasize its public aspects. One such aspect has to do with the kind of function on offer. Certain private entities, on this argument, cannot discriminate against green-eyed customers because they provide inherently public functions. Common carriers is a familiar case in point²³; shopping malls and, more recently, major social media platforms possess some of the public qualities that characterize the traditional town square for free speech purposes.²⁴ Another public aspect concerns monopolistic market power over the provision of basic goods—for instance, being the sole grocery or pharmacy in a small, isolated town can elevate this business to a position of domination.²⁵

Both escape routes can hardly explain why our restaurant owner should not be legally entitled to deny service to green-eyed customers.²⁶ The owner can avoid liability for misrepresentation simply by explicitly announcing his or her discriminatory policy; moreover, it is highly artificial to redescribe him or her as a *quasi* public official and the restaurant as providing an inherently public or governmental function. At any rate, resort to the logic of misrepresentation or publicization merely explains away what is really wrong about the discriminatory policy in question—to wit, that in applying their normative powers restaurant owners must not treat would-be customers as not their equals simply because of the color of their eyes. This failure, as just explained, is no accident as it is entailed by uncompromising commitment to independence and formal equality.²⁷ We argue, by contrast, green-eyed customers have a basic right to be treated as equals, and that this right, like any other basic right in the law of torts, is necessary and sufficient to impose a duty of non-discrimination on their discriminator.

²² Cf. Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285 (2003).

²³ The Civil Rights Cases, 109 U.S. 3, 37-39 (1883).

²⁴ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017); *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341 (1979) *aff'd*, 447 U.S. 74 (1980).

²⁵ See Richard A. Epstein, *Takings, Exclusivity, and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 21, 39 (1997); Aravind Ganesh, *Wirtbarkeit: Cosmopolitan Right and Innkeeping*, 24 LEGAL THEORY 159, 166-69 (2018).

²⁶ Other possible accounts encounter parallel difficulties. See Hanoch Dagan, *Liberal Property: Clarifications and Refinements*, 33 KING'S L.J. 3, 17-18 (2022).

²⁷ This relationship of entailment can be resisted by adopting a non-absolutist conception of independence. See generally ANNA STILZ, *TERRITORIAL SOVEREIGNTY: PHILOSOPHICAL EXPLORATION* 112, 116 (2019).

B. *The Civil Rights Acts: Revolution Incomplete*

The civil rights revolution of the 1960s—and especially the creation of statutory duties of nondiscrimination in connection with public accommodations, employment, housing, and education—set out to change the traditional identification of voluntary interactions between private persons with independence and formal equality.²⁸ Thus, instead of the broad entitlement to choose their parties as they see fit, the various Civil Rights Acts impose duties of nondiscrimination on providers of goods, services, and employment; other liberal jurisdictions have followed suit.²⁹ It is less clear, however, what to make of this change and, in particular, what is its nature and scope. We discuss two familiar answers and argue that both render the civil rights revolution incomplete. Both, that is, leave ample normative space for a freestanding tort of discrimination.

The first approach suggests that prohibitions on discrimination in public accommodations, housing, education, and employment markets are best understood in terms of extending the reach of constitutionalism to some areas of the private sphere.³⁰ The extension is made by enlisting right-holders in the service of meeting the demands of social justice. In particular, the state commandeers the support of certain private persons—commercial providers, landlords, and employers—to realize collective goals associated with democracy and distributive justice.³¹ The animating concern is, therefore, the justness of society as a whole, rather than the justness of discrete interactions between persons. The underlying rationale is that although they may not be as powerful and coercive as state institutions, some private institutions have profound influence on the democratic credentials of society. The ability of citizens to claim their equal say in politics and in other dimensions of their public life depends, in large part, on sufficiently inclusive markets for goods and services, employment, education, and housing.³² On this approach, the Civil Rights Acts are designed primarily to remedy political inequality and, so, reinforce the equal footing of citizens in a democracy.³³

Advocates of this approach can discern some supporting evidence in these Acts. For instance, there is no general duty against discrimination. Instead, the duty identifies a limited number of prohibited grounds and at the same time places limits on the identity of duty-owners. To fix ideas, discrimination grounded in a trait or a choice other than the ones listed is permissible; and some

²⁸ See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 154, 211, 215 (2014).

²⁹ See, e.g., Ontario Human Rights Code, R.S.O. 1990, ch.19.

³⁰ See TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* 201 (2015); JOHAN VAN DER WALT, *THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY* 22 (2014).

³¹ Jürgen Habermas refers to this idea as the “radiating” or “third-party effect” of a new basic right to a more just distribution of social wealth on “the classical areas of property law and contract law.” JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 402-03 (1996).

³² See, e.g., ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* chs. 6-7 (2010); JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 79–88 (1991).

³³ See further Anthony Sangiuliano, *Against Moralism in Antidiscrimination Law*, U.T.L.J. (forthcoming 2023).

providers of goods, work, and housing are not bound by these Acts (as when a workplace employs less than fifteen employees or when the place of public accommodation is a retail establishment³⁴).

There is, however, another, more fundamental reason why this interpretation of statutory duties of nondiscrimination falls short of fully addressing the pitfalls of traditional private law. Its constitutional justification is conditional, and hence contingent, on the need to remedy political inequality in our society. The case for these Acts loses momentum when political inequality recedes or even sufficiently narrows—it would then mean that throwing out a person from a restaurant due to the color of their eyes is unethical but entirely legal. Moreover, these Acts represent a mere means to achieve the ends of political equality and thriving democracy. They can, therefore, be replaced with other, legal and extra-legal, means if it turns out that the latter introduce more effective and less costly technology of realizing the ends at issue.³⁵ Thus, generous programs of public housing and robust social practices of ethical consumerism could provide effective substitutes for existing statutory prohibitions on private discrimination in housing, places of public accommodation, and employment, respectively. Indeed, it is not implausible to suppose that under certain circumstances these alternatives may prove effective in promoting political equality.

The second approach is one we defended elsewhere (in addition to, not at the expense of the public law of antidiscrimination). It understands the Civil Rights Acts and their corollaries in other jurisdictions as a case of internal reform of the traditional private law approach. Rather than viewing private duties of nondiscrimination and private rights of action against discriminators as private-law means to achieve public-law ends, these Acts are designed to turn reciprocal respect for self-determination and substantive equality into a basic requirement of relational justice. The animating concern is with how things stand between the interacting parties, rather than its collective effects on the political community as a whole. Moreover, the interacting parties are viewed as, no more and no less than, private persons, as opposed to members of a political community.³⁶ Essentially, the Civil Rights Acts change the balance of legal power enshrined in the traditional private-law doctrines of trespass to land, ownership, and freedom of contract. This change is not contingent on realizing political equality. Instead, it accounts for a principled transformation of the theory of justice underlying interactions between private persons: the terms of such interactions should secure the status of their parties as substantively free and equal persons.³⁷

³⁴ See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1288–93 (1996).

³⁵ See Tarunabh Khaitan & Sandy Steel, *Wrongs, Group Disadvantage and the Legitimacy of Indirect Discrimination Law*, in FOUNDATIONS OF INDIRECT DISCRIMINATION LAW 197, 199 (Hugh Collins & Tarunabh Khaitan eds. 2018).

³⁶ *Contra* Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEO. L.J. 855, 865 (2020).

³⁷ See Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1438–45 (2016).

This private law approach is grounded in the mundane observation that one's ability to lead their life is influenced at almost every turn by interpersonal interactions, which means that in a genuinely liberal regime private law must not abdicate the responsibility to their self-determination and substantive equality. "It is one thing for the state to respect its constituents as genuinely free and equal persons; it is quite another to live in a society that expects individuals themselves to comply with the ideal of just relationships between free and equal agents."³⁸ Therefore, the narrow scope of the Civil Rights Acts must be understood as reflecting *institutional* constraints on the realization of the moral right to be treated as an equal in the law. A closed list of prohibited grounds need not mean that discrimination on the basis of non-enumerated grounds should be deemed permissible. Instead, it reflects rule-of-law principles of providing duty-owners effective guidance and constraining the powers of public officials to enforce duties of nondiscrimination.³⁹ That said, the private law approach does not take these statutory duties to be exhaustive. Nor should it, as we now seek to show.

C. Wholesale and Retail Duties of Nondiscrimination

In a common-law system, a tort of discrimination will most likely take the form of judge-made law. We set aside the question (that one of us discusses elsewhere) of whether this tort should be judge-made or rather entrenched in a statutory provision by a legislature.⁴⁰ We presuppose that a tort of discrimination will likely be the product of common law innovation just like other major torts created during the twentieth century—in particular, negligence, products liability, privacy, and intentional infliction of emotional distress. The question would then concern the relationship between this tort's wholesale duty and the various retail duties of nondiscrimination. We argue that a combination of the two is normatively superior to having either one.

Begin with a legal system featuring a wholesale duty of nondiscrimination and nothing more. Its broad coverage is an asset but also a liability. Indeed, although in principle it can address all instances of wrongful discrimination, a wholesale duty lacks the context-sensitivity that is often consequential to identifying, proving, and responding to instances of discrimination that occur against a specific backdrop. For example, although addressing discrimination on the basis of a social condition of poverty is certainly entailed by the demands of relational justice, accommodating poverty should not be covered by the generic duty of non-discrimination, but rather via other private law doctrines, which we discuss at some length elsewhere.⁴¹ Context also matters beyond the case of poverty. Consider the workplace and the employment relationship that stands at its center. Viewed abstractly, discriminatory practices at work need not be entirely

³⁸ *Id.* at 1459-60.

³⁹ See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 378 (Peter Laslett ed. 1988).

⁴⁰ See AVIHAY DORFMAN & ALON HAREL, *RECLAIMING THE PUBLIC* ch. 3 (forthcoming).

⁴¹ See Hanoch Dagan & Avihay Dorfman, *Poverty and Private Law: Beyond Distributive Justice*, *AM. J. JURIS.* (forthcoming 2023).

different from discrimination against consumers of goods and services. In both cases, the bottom-line complaint of victims of wrongful discrimination is that their rights to be treated as an equal have been violated. However, the specific context in which the violation takes place often does matter.⁴² The legal and social construction of the employment relationship does not track the buyer/seller relationship in many different ways—consider, for instance, the long-term, ongoing employment relationship versus a one-off purchase of a good. Their respective meanings and the ways participants experience them are, accordingly, substantially different. Hence, the legal and factual questions arising in connection with employment discrimination are not reducible to the ones addressed by the law of consumers’ discrimination. A stand-alone, wholesale duty of nondiscrimination might lose its appeal when faced with the circumstances of discrimination in and around established or categorical relationship (such as employment).

Now consider the opposite scenario where there is no wholesale duty of nondiscrimination. A retail-based strategy of tackling discrimination will almost certainly suffer from any number of gaps—cases that fall beyond the reach of any one specific duty of nondiscrimination. For instance, sex and sexual orientation are not enumerated in the list of prohibited grounds under Title II (concerning discrimination in places of public accommodation). That is no reason to render discrimination on these bases legally permissible. Likewise, many courts interpret Title II as mandating equal access to places of public accommodation, but they do not extend this norm to prohibit inferior treatment or service.⁴³ There is no reason to believe that the exclusion of the latter from the purview of Title II should also entail its legal permissibility.⁴⁴ Finally, existing statutes, such as Title II and the Fair Housing Act, may not be suitable to take on discrimination in the platform and gig economies.⁴⁵ Once again, there is no reason to allow for discrimination, say, by ride-sharing and short-term rental platforms, simply because statutory duties of nondiscrimination may fail to capture the business models of such platforms.

But the problem runs deeper than identifying clear instances of legislative omission (such as failure to include sex as a prohibited ground or retail establishment as a place of public accommodation). For discrimination is an *evolving* phenomenon. Just like the failure to discharge a duty of care is bound to take new forms as society changes, so do attempts to use normative powers in defiance of others’ right to be treated as equals can be, and likely will, manifested in different, including unanticipated, ways. This is true not only for ad hoc instances of discrimination, but rather also with respect to structural or systemic discrimination—roughly, discrimination that is built into the basic rules and institutions of society—as the latter can persist

⁴² See also George Rutherglen, *Concrete or Abstract Conceptions of Discrimination?*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 115 (Deborah Hellman & Sophia Moreau eds. 2013).

⁴³ See Suja A. Thomas, *The Consumer Caste: Lawful Discrimination by Public Businesses*, 109 CAL. L. REV. 141, 206 (2021).

⁴⁴ See Singer, *supra* note 334, at 1290-91.

⁴⁵ See, e.g., Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1276, 1297-98 (2017).

because (retail) duties of nondiscrimination outlaw *some* discriminatory practices meanwhile leaving all other such practices up for grabs. Because discrimination is, in some cases, structural or systemic, the absence of a wholesale duty amounts to a passive authorization of discriminatory practices that fall beyond the reach of existing, retail duties.

Recognizing a wholesale duty of nondiscrimination addresses this significant lacuna. Because a wholesale duty is, by definition, inclusive of wrongful discrimination of any sort, it can breed dynamism into the law of discrimination and, in particular, its particular, retail duties. On this latter front, a wholesale duty can perfect the ability of discrimination law to tackle wrongful discrimination by propelling desirable change to retail duties. A stream of claims for the violation of the wholesale duty can, for example, expose a vulnerability in existing law and direct the adaptation of retail duties—for instance, employment discrimination law should add political views and affiliations to the list of prohibited grounds.⁴⁶ Furthermore, a wholesale duty helps to identify the need for, and lead to the creation of, new retail duties of nondiscrimination. One such case in point is when substantial number of lawsuits out of the motley collection of claims for discrimination happens to form a coherent category—say, a cluster of claims for discrimination made by gig-economy workers (or contractors) can move the legislature, or courts, to create a new duty of nondiscrimination that is appropriately attuned to the realities of this economy.⁴⁷

These methods of revising the law of discrimination suggest that a wholesale duty is not merely a rule of conduct but also a potentially powerful engine of legal change. They also imply that, as we further explain below, the path of the law such a wholesale duty anticipate is not one of *ad hoc* decisionmaking. Rather, as with the other standards at the heart of private law, such as negligence law's reasonableness or contract law's good faith, we assume that law's daily operations will be mostly governed by a list of established categories with relatively well-defined retail duties,⁴⁸ which is incrementally adapted and refined.

Finally, a wholesale duty changes the nature of law's commitment to eliminating wrongful discrimination. A multiplicity of retail duties of nondiscrimination implies that private persons can be effectively protected against discrimination in this or that sphere of action, taken severally. Missing from this picture is a more holistic commitment against wrongful discrimination in the application of normative powers, irrespective of the particular context in which it occurs. To this end, freeing the right to be treated as an equal from its various contextual manifestations expresses

⁴⁶ Political view is absent from major employment discrimination laws such as U.S.'s Title VII and U.K.'s Equality Act 2010.

⁴⁷ See, e.g., Naomi Chan et al., *Discrimination by Design?*, 51 ARIZ. ST. L REV. 1, 54-55 (2019).

⁴⁸ See Dorfman, *supra* note 2, at ch. 10; Hanoch Dagan & Avihay Dorfman, *Justice in Contracts*, 67 AM. J. JURIS. 1, 24-28 (2022).

the moral significance of this right simply as such (just as we approach most other basic rights, such as the right to bodily integrity, privacy, good name, and so forth).⁴⁹

* * *

The argument has so far focused on motivating the case for a tort of discrimination. The place of duties of nondiscrimination has seen an important normative transformation, namely, from a principled rejection to principled endorsement of such duties. This transformation, however, remains incomplete. What is missing, we have argued, is a tort of discrimination. Only it could establish and protect the basic, interpersonal legal right to be treated as an equal. The next Part sets out to explain the normative basis of this tort whereas Part III takes up its doctrinal makeup and highlights some of its major implications.

II. THE HORIZONTAL RIGHT TO BE TREATED AS AN EQUAL

The right to be treated as an equal is an entitlement that a person's constitutive choices and traits may not be held against them when other private persons with whom they engage or seek to engage apply their normative powers. The significance of this right springs from the freestanding role our voluntary interpersonal interactions play in our ability to lead a life, let alone a successful one, as free and equal agents. Wrongful discrimination is a violation of this right. We analogize discrimination to the erection of a transactional barrier and we argue that discrimination is wrongful if this barrier prevents the discriminatee from interacting with the discriminator on terms that reflect the status of both parties as substantively free and equal persons.

Contrary to accounts of wrongful discrimination that view the discriminatee as a member in a certain social group,⁵⁰ our account makes no such essential reference. Instead, the discriminatee figures as a person *even when* this person is not a member of one or another social group.⁵¹ Moreover, contrary to those who view wrongful discrimination as a failure to treat the discriminatee as an equal *to others in society*,⁵² our account suggests that the basic failure is strictly relational or pairwise—the discriminator's basic failure is in not treating the discriminatee as an

⁴⁹ Cf. JOSEPH RAZ, THE MORALITY OF FREEDOM 170-71 (1986), who explains the legal significance of invoking the right to education even though the specific duties it entails on others depend on the identity of these others and the circumstances of the society at hand.

⁵⁰ See, e.g., SOPHIA MOREAU, FACES OF INEQUALITY: A THEORY OF WRONGFUL DISCRIMINATION 50-51, 59, 62 (2020).

⁵¹ Relatedly, even if (or when) the public ills of current discriminatory practices against marginalized groups are eliminated—say: when residential segregation is fully overcome—discrimination would still be wrongful and must be treated as such. See Hanoch Dagan & Roy Kreitner, 52 *The Other Half of Regulatory Theory*, 52 CONN. L. REV. 605, 649 (2020).

⁵² See MOREAU, *supra* note 50, at 191, 227.

equal of the *discriminator*. We invoke the comparative dimension that all instances of discrimination share⁵³ as an indication of this relational failure.

We first take up the basic elements of our account: constitutive choices, traits, and the notion of holding either one against its bearer. Only then can we address the scope of this claim.

A. *Wrongful Discrimination as Relational Injustice*

1. *Constitutive choices.* At the root of our account lies a conception of the person as substantively, rather than formally, free and equal agent. It contrasts with reducing persons to either possessors of a capacity for choice or preference-maximizers. On our conception, the *kind* of choice, rather than merely the bare capacity to make it, matters. Further, the moral significance of choices, or at least some of them, is not given by the fact that they are manifestations of the preferences of those who make them.

In particular, we argue for a distinction between the choices that make us who we are and choices that reflect our sheer preferences. Begin with sheer preferences. Choices that are driven by such preferences address the realization of people's superficial ends, whose frustration bears very little, if at all, on their broader plans, goals, and conception of the self. Thus, an ice cream parlor that decides to discontinue the sale of raspberry flavor (say, for whimsical reasons) surely discriminates against those who prefer this flavor. It could also be the case that the seller is acutely aware of this fact and that it is the only ice cream parlor in town, but so discriminating against raspberry lovers is not wrongful. This judgment has nothing to do with the intensity with which preferences for raspberry are held. The reason is that the choice to consume raspberry, because it reflects sheer preferences, does not impact who the discriminatees are.

By contrast, there are choices that reflect, to use Bernard Williams's words, "ground projects," namely, "projects which are closely related to [an individual's] existence and which to a significant degree give a meaning to his life."⁵⁴ So understood, ground projects are important aspects in one's life—religious, ethical, professional, ideological, and familial commitments may plausibly be described in these terms.⁵⁵ We normally do not understand them as choices that reflect our

⁵³ KASPER LIPPERT-RASMUSSEN, *BORN FREE AND EQUAL: A PHILOSOPHICAL INQUIRY INTO THE NATURE OF DISCRIMINATION* 16 (2014). *But see* Denise Réaume, *Dignity, Equality, and Comparison*, in *supra* note 42, at 7, 8-13.

⁵⁴ Bernard Williams, *Persons, Character and Morality*, in *MORAL LUCK* 1, 12 (1981). To be sure, nothing in our argument turns on Williams's development of the concept of a ground project, including his psychological argument that the demands of impartial morality exert unreasonable pressure on the personal integrity of those who pursue such projects.

⁵⁵ One may object to the way we privilege these issues over, say, growing flowers, being a fan of a sports team, or improving one's ability to play the piano. Insofar as this critique suggests that "intensive hobbies" should also be distinguished from sheer preferences, we tend to agree. But this does not—and should not—imply that no generally-applicable classification is acceptable. To be sure, neither the Kantian view of respect to others' abstract personalities nor its economic counterpart in which ground projects are merely preferences whose intensity happen to be high

preferences. In fact, it is possible to commit oneself to a ground project even as it runs against one's preference to remain free from the grip of this project. Rather, ground projects represent choices that reflect who we really are. Accordingly, discrimination based on a person's ground project is *prima facie* wrongful because it is an instance of failing to treat that person as the person they are.

2. *Traits.* In addition to constitutive choices, unchosen conditions partially define who we are. These conditions consist in personal and socially constructed traits, ranging from a person's height, to race, to disability, and to socio-economic condition. Most of these traits carry social salience because having them immediately links a person to a certain social group and, so, subjects them to a set of expectations, assumptions, and biases that people hold with respect to that group. Other traits, however, have no social salience and their significance can be purely personal—for instance, eye color is a trait that, in some societies, cuts across many social groups. As mentioned above, purely personal traits can evolve to attract social salience (including negative stereotypes). Alternatively, they can also serve as a proxy for another, socially salient trait.

That said, a purely personal trait is literally part of who one is. Holding it against them is, therefore, *prima facie* wrongful.⁵⁶ For instance, suppose that having green eyes does not turn one into a member in a certain social group. Throwing a person out of a restaurant or rejecting one's job candidacy on this basis amounts to wrongful discrimination because the discriminator fails to interact with the green-eyed person as the person they are. It does not matter whether the discrimination at issue is motivated by intelligible reasons, say, green eyes induce in the restaurant owner or employer traumatic flashbacks of her past assailant. Ruling out a person on account of their eye color is inconsistent with treating this person as who they really are. The fact that (currently or even potentially) this trait does not carry any badge of social inferiority cannot launder that wrong.

3. *Wrongful Discrimination.* On our account, private discrimination is wrongful when it violates a person's right to be treated as an equal. This right places at its moral center the constitutive choices and traits of the right-holder. It implies that people are *prima facie* entitled that others don't hold their constitutive choices or traits against them when they exercise their normative power. Put differently, it means that the terms of possible interactions these normative powers enable—the interactions they facilitate, for example, to owners, employers, and market actors—must conform to the maxim of reciprocal respect for self-determination and substantive equality. Using these powers in defiance of this maxim is a *prima facie* wrongful discrimination.

requires such classification. But neither approach offers an acceptable normative foundation for private law. As long as interacting people cannot seamlessly observe each other's inner-selves and figure which features of each person they encounter are germane to their life-plan—a pretty despotic scenario, to be sure—we need to assume something general about the types or categories of projects that are significant to people's identity. The assumptions on offer, we think, are sufficiently thin, and should thus be no more objectionable than John Rawls' assumptions regarding human nature and the goods that individuals prefer to have more rather than less (the “primary goods”).

⁵⁶ *Contra* Kasper Lippert-Rasmussen, *The Badness of Discrimination*, 9 ETHICAL THEORY & MORAL PRACTICE 167, 169 (2006).

We elaborate this claim by reference to two sets of distinction: motive versus conduct and harm versus injustice.

a. Motive versus Conduct. Wrongful discrimination can be variously motivated. Discriminators are often moved by attitudes associated with bigotry or animus toward their discriminatees. Discriminators may sometimes act out of rational concerns, say, for the economic prospects of their business. This could be the case when a business owner has reason to believe that she will lose many of her White customers if she does not discriminate against Black ones. Another motivating reason behind instances of discrimination is ethical or religious. There, a discriminator acts on ethical or religious beliefs that militate against serving, hiring, or simply interacting with another person in a particular context or in general.

The question that arises, then, is whether motives should matter for deeming a discriminatory act wrongful. Our answer is in the negative.⁵⁷ Discrimination can be wrongful even when it is *unmotivated*. Moreover, discrimination should count as wrongful not because it is accompanied by this or that motive (or attitude), but rather because it is an act of a certain kind, namely, that of denying the ability of the discriminatee to interact with the discriminator in terms that reflect their status as a substantively free and equal person. To be sure, we do not argue that motive never matters. For instance, as we indicate below, it does matter for the purpose of determining what is the fitting response—say, in terms of a proper remedy—to an instance of wrongful discrimination. Our argument at this stage, by contrast, is that ill motive should not be necessary for determining what counts as wrongful discrimination.

To see why discrimination can be unmotivated and at the same time wrongful, consider a straightforward case of indirect discrimination (a.k.a. disparate impact). It features a rigorous audition process, say, for a professional orchestra that ends up admitting, year after year, mostly or even only white men players.⁵⁸ In making their selection decisions, the auditors could be motivated solely by their desire to recruit the most qualified players in terms of their musicianship and technique. The failure to select musicians that are neither white nor male, therefore, makes no reference to discriminatory motivations. In tort law parlance, it reflects inadvertence on the part of unconsciously biased auditors.

Inadvertently failing to include non-trivial number of female and non-white musicians is an instance of discrimination, and wrongful at that. Its wrongness amounts to holding certain traits—race and sex—against the musicians who did not make it to the orchestra despite being as good as the admitted ones. The ‘holding’ does not take the form of motives, but rather represents the terms of the interaction that seem to govern the job selection process. In particular, one of the terms implies that certain musicians are less likely to be considered solely on the basis of their

⁵⁷ *Contra* John Gardner, *Discrimination: The Good, the Bad, and the Wrongful*, 118 PROC. ARISTOTELIAN SOC’Y 55, 57-58 (2018); BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT 17 (2015).

⁵⁸ Based, in part, on a true story. See Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000).

professional qualities because of who they are. Adopting this term is akin to erecting a transaction barrier, preventing candidates from interacting with their auditors (or would-be employers) as substantively free and equal persons.

To be sure, we do not argue that the barrier erected by this term reflects a conscious, let alone deliberate, decision to exclude female and non-white musicians. Instead, using their normative powers in a way that denies certain candidates of their right to be treated as equals reflects inadvertence on the part of the auditors: the latter *could* have adopted a more impartial selection process but neglected to do so. Taking seriously the right of female and non-white musicians to be treated as equals implies that this neglect—like parallel neglects pertaining to other fundamental rights we hold against other private persons (say, to our bodily integrity)—is in and of itself what renders the process wrongful discrimination.

b. Harm versus Injustice. Now consider the distinction between harm and relational injustice. Influential accounts of discrimination often identify its wrongfulness with one or another harmful consequence. One such approach has it that discrimination is wrongful because it is demeaning or subordinating.⁵⁹ Other accounts locate discrimination's wrongfulness in the cost it imposes on certain freedom interests of the discriminatees. For instance, discrimination can undermine the discriminatee's ability freely to deliberate about where to work, live, or dine⁶⁰; discrimination can also undermine another aspect of freedom when it limits or reduces the range of available options to choose from.⁶¹ We do not deny that wrongful discrimination can often give rise to these (or other) adverse consequences. That said, discrimination can count as wrongful even when no such consequences follow or are likely to follow.⁶²

To see that, consider a case of harmless discrimination featuring a baker who refuses to bake a wedding cake for a same-sex couple.⁶³ In many occasions a discriminatory act of this sort might generate any number of harms to the couple and further perpetuate social and political inferiority of the social group with which they are associated (by themselves or by others). However, this may not be the case if the market for wedding cakes faces robust competition *and* the society in which the parties live is overwhelmingly liberal and inclusive.⁶⁴ The refusal at issue, then, does

⁵⁹ DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* (2008).

⁶⁰ Sophia Moreau, *What Is Discrimination?*, 38 PHIL. & PUB. AFF. 143, 147-53 (2010).

⁶¹ John Gardner, *Liberals and Unlawful Discrimination*, 9 OXFORD J. L. STUD. 1, 18-19, 21 (1989).

⁶² *Contra* LIPPERT-RASMUSSEN, *supra* note 51, at 157, 161, 173-74.

⁶³ As will become clear, we do not discuss the true case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018), but rather a substantively modified one. We also set aside the question of whether bakers (or, for this matter, website designers, architecture firm, and other professional service providers) engage in artistic activity. We remain skeptic whether a typical good or service provider can really count as an artist or as engaging in artistic expression.

⁶⁴ For a different discussion of the idea of harmless discrimination, see Adam Slavny & Tom Parr, *Harmless Discrimination*, 21 LEGAL THEORY 100 (2015).

not reflect the baker's "social power" to subordinate the couple.⁶⁵ He does not intend, and his message is not interpreted by most other members in this society as an attempt, to treat the couple as unworthy or otherwise inferior. The same holds when we switch from accounts that emphasize the demeaning impact of subordination to those who take discrimination to be wrongful because it might result in marking the social group to which the discriminatees belong as inferior while perpetuating the superiority of the discriminator's social group.⁶⁶ The case under consideration does not generate any of these concerns for social subordination as the social and political power imbalance between superiors and inferiors works in precisely the opposite direction. Indeed, the baker may be part of a small and vulnerable religious community. His refusal reflects—and is widely understood to reflect—his attempt to preserve a traditional way of life in the face of strong cosmopolitan pressures.⁶⁷ If wrongful discrimination is identified with its demeaning connotations, or with its contribution to social subordination, the baker is not necessarily guilty as charged.

Moreover, placing the demeaning aspects of this hypothetical case at the root cause of what makes the discrimination wrongful is not only unnecessary in the hypothetical case just discussed; in addition, it may not be sufficient. The reason is that appealing to indignities and emotional setback immediately opens the door to the discriminator's own complaint.⁶⁸ His complaint, recall, is grounded in a sincere religious or ethical commitment. Coercing him to serve the couple, the complaint might go, can be experienced by him, and many fellow adherents, as demeaning and even humiliating, especially given the existence of many other, equally competent bakers out there.

Does this baker harm the freedom of the couple by inviting or even forcing them to "factor into their deliberations" their conception of marriage and family life "*as costs*"?⁶⁹ That is, is it really the case that the couple is wronged by being forced to "always have before their eyes, as they deliberate" their traits or conceptions of the good?⁷⁰ Alternatively, does he harm their freedom by limiting the range of available options to advance their autonomous life or by undermining a public culture of autonomy?⁷¹ The answer to both is in the negative. Because the couple is facing nearly unlimited alternatives, discrimination at the hands of one baker *only* cannot really threaten their freedom to deliberate without having to internalize the cost of their choice of conception of the good life. Indeed, there is hardly a loss of deliberative freedom when in

⁶⁵ Deborah Hellman, *Discrimination and Social Meaning*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION 97, 102 (Lippert-Rasmussen ed. 2018).

⁶⁶ See MOREAU, *supra* note 48, at 50-51, 59, 62.

⁶⁷ Cf. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 52, 59 (2007).

⁶⁸ See further Ontario Human Rights Commission v. Brockie, 222 DLR (4th) 174 (Ont. Div. Ct., 2002) at para. 20, in which a Canadian Court defined the matter in terms of a "conflict of dignities."

⁶⁹ Moreau, *supra* note 58, at 149.

⁷⁰ MOREAU, *supra* note 48, at 191. See also *id.* at 83, 84, 85, 91, 94, 105, 109.

⁷¹ Gardner, *supra* note 61, at 21.

contemplating which baker to pick, the couple would take into account two hundred competent bakeries instead of two hundreds and one of them. A similar conclusion holds when the consequential harm is cast in terms of diminishing the range of options from which to choose and undermining the public culture of autonomy: one less option cannot destabilize the range itself and the multitude of attractive options. Moreover, the baker's refusal cannot derail society's public culture of autonomy as the impact of his discriminatory practice is more than offset by the inclusive commitments of all other service providers in this and in all other market contexts.

That said, the discrimination in question may be harmless and yet wrongful. Its wrongfulness lies in the baker's use of his normative powers in a way that fails to respect the couple's right to be treated as equals. Indeed, it is strikingly analogous to deeming a physician's interference with their patient's bodily integrity without their consent (where it could have been secured) wrongful, even if otherwise harmless.⁷² Validating the use of normative powers in defiance of the couple's right to be treated as equals would *entitle* the baker to turn a constitutive choice of the couple (concerning marriage, family, and love) into a transactional barrier. An entitlement to erect such a barrier is incompatible with interacting with the persons making up this couple as the persons they are.

The baker's wrongful conduct (again, like in the case of the physician who failed to secure their patient informed consent) reflects a normative shortfall in how things stand between the parties, irrespective of its harmful consequences. Therefore, private discrimination is wrongful whether or not it carries overtones of contempt or diminishes opportunities. The only way out of this relational injustice is to take back the entitlement in question and hold commercial bakers independently responsible for making their services sufficiently inclusive. In the case at hand, the baker should owe it to the couple not to hold their constitutive choice against them. Their terms of voluntary interaction in applying their normative powers must meet the basic threshold of treating the couple as self-determining and substantively equal persons.).⁷³

* * *

To sum up, the relational justice argument for discrimination's wrongfulness dispenses with mental states and deliberative processes on the part of the discriminator. It also disentangles wrongful discrimination from the consequential harms it often inflicts on discriminatees, certain social groups, or society as a whole. Instead, discrimination is wrongful because it represents a failure to interact with the discriminatee as the person they are, which includes the constitutive choices and traits that shape them. Our focus on constitutive choices and traits reflects the underlying normative commitment of relational justice to substantive freedom and equality. Terms of voluntary interactions, on this view, can count as just only insofar as they meet the principle of

⁷² See *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905).

⁷³ Cf. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 170-71 (1986), who explains the legal significance of invoking the right to education even though the specific duties it entails on others depend on the identity of these others and the circumstances of the society at hand.

reciprocal respect for substantive freedom and equality. Releasing the tort of discrimination from the shackles of intentionality and of harmful consequences is necessary if it is to properly address the most fundamental wrong of discrimination, which is one of overreaching the power property and contract can legitimately confer in a liberal society.

B. *The Scope of the Claim: Intrinsic and Extrinsic Limits on Nondiscrimination*

The argument has so far focused on the *prima facie* case for identifying wrongful discrimination with relational injustice. We now take up the scope of this case, explaining why, and when, duties of nondiscrimination must give way to countervailing considerations.

1. *Intrinsic limits.* Begin with considerations that are integral to relational justice. The preceding discussion argued that a duty of nondiscrimination fixes a floor below which providers of goods, services, and employment (*et alia*) cannot go when exercising their normative powers. This discussion, however, does not consider what should be the ceiling of duties of nondiscrimination. Relational justice requires such a ceiling because its foundational commitment is to *reciprocal* respect for self-determination and substantive equality. Ensuring that people's normative powers do not defy this maxim requires that the interactions these powers enable respect everyone's rights to self-determination and substantive equality, including the right of these power-holders themselves. Pressing owners, employers, and market actors with a duty of utmost accommodation for the constitutive choices and traits of their parties might end up annihilating the former's own substantive freedom and equality.

The necessity of a ceiling remains latent when the cost of refraining from wrongful discrimination is relatively small. On other occasions, however, the necessity of a ceiling claims center stage. This will be the case when duties of nondiscrimination can become excessively costly. It will be impossible for a restaurant owner to tailor the height of the restaurant's tables to the precise height of each and every potential costumer, to render the restaurant accessible to every possible condition of physical disability, or to create a menu that could meet all existing dietary restrictions. Doing all of these is (arguably) technically feasible, but is still normatively undesirable. Imposing on restaurant owners terms of interaction that incorporate a requirement of utmost accommodation is incompatible with treating them as substantively free and equal persons. Hence, we can say that to the extent that it requires some measure of accommodation, a duty of nondiscrimination grounded in reciprocal respect for substantive freedom and equality must not require more than reasonable accommodation. It also means that if the costs of accommodation drop down substantially (say, due to a series of technological breakthroughs), duty-owers may have to extend reasonable accommodation of constitutive choices and traits beyond the current *status quo*.

Limiting the duty of nondiscrimination to a requirement of reasonable, rather than utmost, accommodation does not apply across the board, however. Sometimes reasonable accommodation requires nothing short of utmost accommodation. This would be the case when an act of

discrimination reflects the *categorical* rejection of the standing of the discriminatee to relate to the discriminator as a substantively equal, namely, as the person whom they are. The case of the baker discussed above fits this description—indeed, although the baker may not refuse to sell the couple a generic cake, his refusal to bake for them a wedding cake is, nonetheless, categorical in the sense that it involves rejecting the couple for who they really are—and so does the case of a racist restaurant owner who singles out people of color for inferior treatment or simply exclusion. Indeed, unlike discrimination against unusually tall restaurant-goers in the design of tables, chairs, and bathroom sinks, a categorical refusal to serve patrons because of their constitutive choice or traits should get no solace from the morality of relational justice. Whereas the former reflects the need to consider the freedom and equal standing of both parties, the latter features the outright repudiation of the equal standing of the discriminatee.⁷⁴ Thus, departing from a standard of utmost accommodation in the former case can be made fully compatible with the demands of relational justice; by contrast, doing the same in the latter case is inimical to everything that relational justice stands for. (Once again, the repudiation at issue need not mark the discriminatee as socially inferior to the discriminator. At times—recall the baker/couple hypothetical—it could be the case that the discriminator already occupies the position of social inferiority with respect to the discriminatee.)

Finally, in mentioning earlier that the daily operations of a wholesale duty of nondiscrimination should be mostly governed by a list established categories with relatively well-defined retail duties,⁷⁵ we were not only reflecting legality's constraint of the rule of law. The rule of law values of stability and predictability are also entailed by relational justice, which requires respect for duty-owners' self-determination and thus their ability to form expectations based on stable frames of reference. Relational justice, on its own terms, cannot be oblivious to the rule of law, and therefore must not imply overly particularistic, ad-hoc judgments.⁷⁶

That said, it is important to see that reciprocal respect for self-determination and substantive equality, which lies at the foundation of the intrinsic limits of the nondiscrimination duty, also places constraints on the class of ground projects that can qualify as putative justifications for applying a normative power in a discriminatory fashion. Not all ground projects can be the object of interpersonal respect among free and equal persons: Some personal choices, policies, and conceptions of the good deny certain others the very standing to relate to the deniers as equals—the animating ambition of both the murderer and the racist, for example, is the repudiation of their victims' equal standing. Choices that are inimical to the ideal of relational equality cannot lay a compelling claim as plausible candidates for grounding any limit on liberal private law's nondiscrimination duty.

⁷⁴ See Dagan & Dorfman, *supra* note 35, at 1418; Dagan & Dorfman, *Justice in Private*, *supra* note 16, at 192; HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY 124-25, 131-39 (2021); Avihay Dorfman, *When, and How, Does Property Matter?*, 72 U. TORONTO L.J. 81, 103-04 (2022).

⁷⁵ See *supra* text accompanying note 46.

⁷⁶ See Hanoach Dagan, *The Jurisprudence of Liberal Property*, 13 JURISPRUDENCE 668, 680-82 (2022).

2. *Extrinsic limits.* Two such limits stand out. Contrary to the previous ones, they find their grounds in values and ideals that do not directly stem from relational justice's maxim of reciprocal respect for the substantive freedom and equality of the interacting parties, but are nonetheless compatible with—and possibly even entailed by—the core liberal commitments to self-determination and substantive equality. We cannot hope to adjudicate here the demands of relational justice and these competing values and ideals: this would require a *complete* theory of justice in a liberal society, which is surely beyond the scope of our argument. But our account of the freestanding private wrongfulness of discrimination is nonetheless critical for addressing these hard cases as it helps to shape the normative dilemmas that they present.

The first category of such external limitations arises out of social practices whose value turns on what would otherwise count as a core case of wrongful discrimination. An easy case for this category comes from friendship and romantic love. Choosing one's friends and loved ones is influenced in deep and profound ways by the actual choices and traits of these people. Indeed, we often find ourselves attracted to those who possess certain traits or leading certain ways of life as opposed to those who do not. This means that friendship and romantic love might lose their value when subjected to the demands of nondiscrimination. Furthermore—and this helps explain why we see this as an easy case—whereas some of the practices surrounding these types of intimate relationships implicate holding and exercising normative powers, and can thus at times be legitimately subject to a duty of nondiscrimination, people's choices of friends and lovers don't. Therefore, the exclusion of these choices from the coverage of the private law of nondiscrimination also emerges from within our account of its core prescription, which addresses the application of normative powers in relationally unjust ways.⁷⁷

(The distinction between practices that hinge on intimacy and authentic choice and those that do not can sometimes be subject to borderline cases.⁷⁸ There, voluntary interactions that could not be formed independently of law's normative powers also create the condition for the formation of relationships that lie somewhere between the legal and the personal. Consider a case of co-housing in which a private owner rents out a room of her own dwelling house to a stranger.⁷⁹ A landlord/tenant interaction, for which the right to property is constitutive, creates the condition for another form of relationship to evolve. Notice that the former does not merely allow for the latter to arise, but rather creates a social dynamic that typically leads the parties to experience each other as more than landlord and tenant. Indeed, the leasing transaction implicates the parties in forms of intimacy and rapport as they literally share a living space (not to mention the case of relating as roommates⁸⁰). One way of addressing such in-between cases can be done by drawing on the

⁷⁷ The text relies on and further supports Elizabeth Emens' account of intimate discrimination. See Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009).

⁷⁸ The discussion in this paragraph draws on Dorfman, *supra* note 74, at 111-12.

⁷⁹ See, e.g., Mrs. Murphy's exemption in the Fair Housing Act (42 U.S.C. § 3603(b)(2)). Note that the example in the main text below delineates a narrower basis for exemption than the one articulated in this Act.

⁸⁰ Cf. *Fair Housing Council of San Fernando Valley v. Roommate.com*, 666 F.3d 1216 (9th Cir. 2012).

particular legal and extra-legal contexts in which they are embedded. For instance, it may be apt to consider the physical structure of the building subject to a practice of co-housing: Sharing a living space in a small apartment could yield a different conclusion when compared with co-housing in a ridiculously large multiple-unit dwellings—the former might suggest that property is predominantly incidental to, and the latter predominantly constitutive of, the parties’ interaction. We leave the operational difficulties of coping with these situations for another occasion.)

Other social practices may pose more challenging dilemmas. The value of these practices does not hinge on intimacy and authentic choice. Thus, they could incorporate duties of nondiscrimination. But doing so will necessarily transform them in radical ways. This would be the case of social practices that thrive for excellence and sometimes even perfection, say, in sports or performance dance (such as ballet). It is possible to insist that all classical ballet companies respect everyone’s right to be treated as an equal. As a result, these companies would consist of dancers of varying performance levels, including dancers that for objective reasons (say, not being flexible enough) cannot exhibit the aesthetic value that accompanies the skill, discipline, and self-expression of superb ballet dancers. The trade-off between an egalitarian and meritocratic practice of classical ballet clarifies the dilemma at hand: whether the value inherent in professional classical ballet, or in professional soccer for that matter, merits its inherently discriminatory character.⁸¹ While, as noted, our relational justice account cannot resolve this question, we hope that this case can demonstrate what *might* count as an extrinsic consideration that potentially justifies judging such instances of discrimination as not wrongful.⁸²

A second set of extrinsic limits on the right to be treated as an equal arises in connection with certain practices of affirmative action. To be sure, the justificatory foundation of contemporary programs may well be over-determined. In particular, many of these programs may be justified in relational justice terms given the systemic ways in which many admission practices are tilted in structurally-unjust ways akin to the orchestra case we’ve discussed a few pages ago.⁸³ This type of cases does not pose any real dilemma for our account, since the affirmative action at hand *removes* a structural barrier to relational justice: its *absence* implies an unjustifiable favorable treatment of members of the majority group (white men) at the expense of other candidates.

⁸¹ Two caveats are in order. The meritorious quality of a particular practice should be defined narrowly to include its core aspects only. Thus, professional ballet dancers may be required (by the internal demands of the practice) to a certain dress code while on stage; however, they may not be subject to discrimination for their dress-related choices elsewhere. Moreover, some meritorious practices may be (and perhaps have always had been) corrupt or seriously deficient, in which case our argument for merit-based exemption does not apply to them.

⁸² We leave to another occasion the question of whether religious and certain expressive associations fall under the first or the second type of social practices we identify in the text (or somewhere in between).

⁸³ See *supra* text accompanying note 58. The cautious language of the text is intentional: if—but only if—the *only* reason for disqualifying an otherwise perfectly qualified candidate is the need to increase representation of members of disenfranchised groups, that candidate has a *prima facie* complaint for relational injustice, which then needs to be considered against the distributive justice premises of the pertinent affirmative action program, along the lines of the main text following this footnote.

Alongside these relatively easy cases there are more difficult ones that come up where affirmative action is not entailed by relational justice. Here increasing the participation of systemically marginalized communities and persons in major private and public institutions forces employers, universities, and other private entities to reject competent candidates simply because they happen to be members of non-marginalized social groups. But the unjust distribution of opportunities that still prevails in our societies seems so overwhelming so as to justify these programs although they flout the demands of relational justice. Hard cases may (hopefully!) emerge once this competing (distributive justice) consideration is also significantly shrunk, so that affirmative action can rely only on past injustices, rather than their current consequences.

III. TOWARD A TORT OF DISCRIMINATION

Contemporary legal doctrine tends to classify retail duties of nondiscrimination into two different forms—direct and indirect discrimination (often also referred to as disparate treatment and disparate impact, respectively).⁸⁴ The distinction is viewed as qualitative one as it reflects the difference between different approaches to the nature of responsibility for discrimination—motive-based and outcome-based responsibility, echoing the distinction between deliberate and strict liability torts.⁸⁵ It is also treated by many philosophers and legal theorists as fundamental to the normative analysis of discrimination.⁸⁶ Accordingly, substantial portions of the debates in practice and theory about what renders discrimination wrongful are organized around this distinction.

The relational justice account of wrongful discrimination challenges the terms of such debates. Discriminatory motivations should be deemed irrelevant for the purpose of identifying an act or decision as wrongful discrimination—they are, therefore, neither necessary nor sufficient to characterize discrimination as wrongful. The true basis for rendering discriminatory outcomes wrongful is negligence, rather than strict or absolute liability. On our account, the generic tort duty of nondiscrimination is akin to—but, importantly, does not overlap with—negligence law’s duty of care or, in this case, a duty of accommodation.⁸⁷

The duty at hand requires that holders of legal powers (e.g., in their capacities as providers of goods and services, employers, and educators) take reasonable measures to make the terms of their

⁸⁴ See, e.g., *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); KHAITAN, *supra* note 29, at 151-52.

⁸⁵ See David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PENN. L. REV. 899, 919 (1993).

⁸⁶ See, e.g., Deborah Hellman, *Indirect Discrimination and the Duty to Avoid Compound Injustice*, *supra* note 35, at 105; EIDELSON, *supra* note 55, at 19; MATT CAVANAGH, *AGAINST EQUALITY OF OPPORTUNITY* 199 (2002); IRIS YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 196 (1990).

⁸⁷ The connection between wrongful discrimination and negligence is not new. See Oppenheimer, *supra* note 78, at 933 (1993); see also MOREAU, *supra* note 48, at 205. But as the main text mentions and the discussion of the injury element clarifies, on our account there is also an important distinction between the (proposed) tort of discrimination and that of negligence.

voluntary interactions with others inclusive of the constitutive choices and traits of the latter. Failing to meet this requirement can be made deliberately or inadvertently.⁸⁸ To be sure, we do not argue that the difference between the two is negligible, but rather that it should not matter for this stage of the legal analysis. The difference between deliberate and inadvertent failures to comply with the duties of nondiscrimination and proper accommodation becomes crucial for later stages of the legal analysis, notably for shifting the burden of proving causation and for imposing punitive damages for incidents of flagrant discrimination.

Driving a (partial) wedge between wrongful discrimination and motivation is an implication of relational justice' theory of discrimination, as we have argued above. It is further reinforced by the human psychology of discrimination. Indeed, empirical studies suggest that unconscious or implicit bias—viz., when “people act on the basis of internalised schemas of which they are unaware and thus can, and often do, engage in discriminatory behaviours without conscious intent”⁸⁹—figures prominently in our lives.⁹⁰ Tackling implicit discrimination is certainly challenging for those who identify wrongful discrimination with antisocial or immoral motivations. No such challenge arises in respect to the relational justice account of wrongful discrimination. Implicit bias can be deemed wrongful discrimination in structurally the same way in which a driver may be liable in negligence for inadvertently harming a pedestrian. To this extent, although the tort of discrimination is not strictly speaking a de-biasing mechanism, it does give potential discriminators a mandatory reason—a legal duty—to be vigilant of the impact of their decisions on others' rights to be treated as equals.

The argument going forward prepares the ground for this new tort of discrimination, consisting of the following elements: duty, breach, injury, and causation. We take each in turn, raising key questions and identifying ways of addressing them. In addition, we discuss the question of remedies by elaborating a distinctive remedial response to instances of wrongful discrimination.

1. Duty. This element determines the identity of duty-owners. Two important aspects guide this inquiry. The first is that discrimination presupposes some normative power held (or claimed to be held) by the discriminator vis-à-vis the discriminatee. This power manifests itself in the allocation of goods, broadly defined to include opportunities, and it operates by fixing the normative situation of those who receive these goods. Property and contract are straightforward examples of legal institutions whose animating rules are power-conferring in the sense that they empower right-holders to fix the entitlements of others in relation to certain goods.⁹¹

⁸⁸ Note, moreover, that this characterization also captures discrimination on the basis of proxies—for instance, denying service, or charging higher prices, based on their zip code address is often an indirect way to target people on the basis of their race or socio-economic condition.

⁸⁹ Cheryl Pritlove et al., *The Good, the Bad, and the Ugly of Implicit Bias*, 393 LANCET 502, 502 (2019).

⁹⁰ See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006).

⁹¹ For property, see Avihay Dorfman, *Private Ownership*, 16 LEGAL THEORY 1 (2010); Avihay Dorfman, *Private Ownership and the Standing to Say So*, 64 U. TORONTO L.J. 402 (2014); DAGAN, *supra* note 74, at 60-62; Hanoch

As a first approximation, therefore, the duty of nondiscrimination attaches to holders of normative powers. But the paradigm case of duty-owers comes down to for-profit and non-profit providers of goods and services. Indeed, as we have argued above, some normative powers may fall outside the purview of any liberal legal order because, and insofar as, they consist in personal choice of intimate relationships (say, concerning romantic love and friendship). Other instances of exercising normative powers may not be subject to legal oversight due to either substantive or institutional considerations. Substantive considerations have to do with free agency. A consumer deciding not to purchase a certain good, say, because the seller is black may reach the same decision (of not buying) for perfectly legitimate reasons as well, such as those pertaining to the price of the good. Thus, there exists a space between motives and actions, which means that a free agent *could*—rather than merely *would*—change their mind before consummating the act. To respect free agency, therefore, a liberal legal order must furnish this consumer an arena of revisability in the domain of motives or attitudes so as to allow his or her the opportunity to act on the basis of a more appropriate attitude by revising the current one.⁹² Institutional considerations, by contrast, largely stem from the epistemic difficulty of verifying discriminatory decisions on the part of consumers.⁹³ These substantive or institutional considerations (arguably) explain why existing duties of nondiscrimination do not apply to how consumers, employees, lessees, and students exercise their normative, contractual powers vis-à-vis their respective providers. Discriminating in the choice of provider, that is, can be ethically wrongful though not necessarily legally impermissible.

Subject to these exceptions, the relational justice account implies that providers of goods and services are duty-bound, irrespective of how big the provider is or how essential is the provided good. It applies to common carriers as well as to small businesses held by sole proprietors (such as an ice cream parlor). Moreover, it applies irrespective of the availability of equivalent options provided by either other market providers or the state.

2. *Breach.* The breach element fills out the content of the duty. It tells us what duty-owers owe in terms of measures they have to implement and decisions they have to refrain from making in order to lower, and at times even eradicate, transactional barriers. We have already argued that doing so requires a standard of conduct of reasonable accommodation. In what follows we explain

Dagan, *Liberal Property and The Power of Law*, *CAN. J.L. & JURISP.* (2023); Dagan, *supra* note 76, at 671-74. For contract, see HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 37-39 (2017); Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, in *RESEARCH HANDBOOK ON PRIVATE LAW THEORY* 112 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020). See also Hanoch Dagan & Irit Samet, *Express Trust: The Dark Horse of the Liberal Property Regime*, in *PHILOSOPHICAL FOUNDATIONS OF TRUST LAW* * (Simone Degeling et al. eds., 2023); Avihay Dorfman, *On Trust and Transubstantiation: Mitigating the Excesses of Private Ownership*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 339, 356 (Andrew S. Gold & Paul B. Miller eds. 2014).

⁹² See Avihay Dorfman, *The Limited Case for Discrimination's Legality*, 83 L. & CONTEMP. PROB. 175 (2020).

⁹³ See IAN AYRES, *PRIVATE PREJUDICE? UNCONVENTIONAL EVIDENCE ON RACE AND GENDER DISCRIMINATION* 127-36 (2001). See also Katherine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 IOWA L. REV. 223 (2016).

the determinants of this standard, arguing that the reasonableness element in the ‘reasonable accommodation’ standard is made up of epistemic, substantive, and legality conditions.

a. The Epistemic Condition. The first, epistemic condition is known in tort law as reasonable foreseeability.⁹⁴ In order to refrain from wrongful discrimination, duty-owners must be able to know that the terms of their interactions with others do not discriminate the latter by holding their constitutive choices or traits against them. At times, it is relatively simple to know this much—for instance, when an ice parlor refuses to serve foreigners, it is most certainly the case that the parlor’s owner is fully aware of the discriminatory terms of interaction in question. At other times, foreseeability with respect to the discriminatory character of terms of voluntary interaction may be less straightforward. This would be the case if auditions to professional orchestras are governed by terms of interaction that turn out to be discriminatory in fact, though not by intentional design. Reasonable foreseeability, then, becomes the only live question. If duty-owners cannot reasonably be cognizant of the pertinent fact, holding them strictly liable in discrimination necessarily undermines their status as free and equal agents as there is nothing they can do in terms of accommodation to avoid liability for the discriminatory outcome. If, by contrast, they could be aware of a non-trivial possibility that the audition process treats women and non-whites much less favorably than white men musicians, duty-owners can be required to take some measure to rule out that possibility.

Although they can exist in theory, cases of voluntary interactions resulting in unforeseeable indirect discrimination would rarely exist in practice. Indeed, we could imagine a historical moment in which no reasonable auditor would have realized the discriminatory character of the audition process. But at some point—when complaints and studies begin to pile up—appeal to ignorance will not do. This is true not only with respect to the particular case of auditions for orchestras, but rather to most other cases. This is because people today are, or can reasonably be assumed to be, acutely aware of the ever-present risk that even generally-applicable terms of interactions might have discriminatory implications. It means that the threshold placed by the epistemic condition of foreseeability is fairly low, which happily implies that a tort of discrimination would be especially receptive to claims by members of liminally recognized groups.⁹⁵

b. The Substantive Condition. The second, substantive condition is more demanding and it is meant to insulate the standard of reasonable accommodation from the exacting demand of utmost accommodation. As already discussed in Part II, utmost accommodation is inconsistent with relational justice because it threatens to annihilate the duty-owner’s self-determination and equal standing. For this reason it is not enough that duty-owners could be aware of the discriminatory

⁹⁴ Foreseeability is most famously associated with the duty and proximate cause elements of the prima facie case of negligence. That said, it can also inform the analysis of the breach element. The *locus classicus* is *Adams v. Bullock*, 128 N.E. 93 (N.Y. 1919).

⁹⁵ Cf. Lihi Yona, *Identity at Work*, 43 BERKELEY J. EMP. & LAB. L. 139 (2022) (discussing such claims of asexuals, poor whites, and fat people).

overtones of the terms of their interactions with others. In addition, defusing these overtones must be made commensurate with the resources held by duty-holders (including in the form of state subsidies).

Once again, in many cases conforming with a duty of nondiscrimination requires only negligible burden, such as simply refraining from excluding green-eyed people from one's restaurant, and thus can, and indeed should, be demanded from duty-owners. But there are more challenging cases, involving costly accommodation—structural changes to the built environment and substantial adjustments of production processes and modes of operation in the workplace are paradigm instances. There, a key role of the standard of reasonable accommodation is to fix a ceiling beyond which taking additional measures of accommodation is not required. Fixing such a ceiling can be made directly by the standard of accommodation; alternatively, it can be made indirectly by introducing state subsidies to lower the (economic) burden placed on duty-owners by the duty of nondiscrimination.⁹⁶

c. The Legality Condition. The substantive condition immediately invites a third one which is the *legality* condition. It concerns the rule-of-law implications of a standard of reasonable accommodation. The animating problem is that meeting the latter condition might collapse into ad hoc tailoring of dos and don'ts. As we argued above, taking this path is unacceptable for rule-of-law as well as relational justice reasons. To avert this, the standard of reasonable accommodation should be made to possess recursive structures that would enable duty-owners and courts to identify more or less definitive answers to particular questions.

Resort to regulation provides a straightforward solution, as in the analogous case of disclosure law.⁹⁷ Helpful examples come from the work of two major agencies that deal with discrimination whose regulations include both prohibitions and affirmative obligations aimed at shaping the pertinent parties' rights and obligations in a way that complies with the injunctions of relational justice: the Equal Employment Opportunity Commission (EEOC) and the Office of Fair Housing and Equal Opportunity in the Department of Housing and Urban Development (FHEO).⁹⁸

Thus, EEOC guidelines include a presumption that “prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably” is discriminatory⁹⁹ as well as a requirement (subject to certain exceptions) that employers “make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability” and to “the religious practices of an employee or prospective employee” (e.g., by way of creating “a flexible work schedule”).¹⁰⁰ Similarly, one

⁹⁶ See EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* 255 (2010).

⁹⁷ See Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 *LEGAL THEORY* 89, 113-14 (2022).

⁹⁸ See Dagan & Kreitner, *supra* note 49, at 648, on which the following paragraph draws.

⁹⁹ 29 C.F.R. § 1606.7(a).

¹⁰⁰ 29 C.F.R. §§ 1630.9(a) & 1605.2.

FHEO rule prohibits “imposing different sales prices or rental charges for the sale or rental of a dwelling upon any person because of race, color, religion, sex, handicap, familial status, or national origin,”¹⁰¹ and another prescribes that it is unlawful to “refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.”¹⁰² Courts can further reinforce these prescriptions by treating violations of these and other regulatory provisions as discrimination *per se*, in line with the familiar tort of negligence *per se*.¹⁰³

3. *Injury*. Infringing a person’s right to be treated as an equal can give rise to any number of consequential harms. Some of them are pecuniary ones, such as lower earning, whereas others are non-pecuniary ones, concerning emotional distress and other forms of non-monatizable sufferings, such as feelings of inferiority and stigma. As we argued above, however, the right in question is not reducible to any of these consequences. Indeed, these are all surface manifestations of a deeper setback to a victim of wrongful discrimination, namely, to the very ability to relate to others as a substantively free and equal person. A discriminatory act of erecting a transactional barrier is wrongful merely because of its various adverse consequences to the victims, to the social group in which they are members, or to society as a whole, but rather because this person is denied the possibility to relate to others—employers, providers, educators, lessors, and so on—as a free and equal person.

This way of characterizing the injury element puts this aspect of the tort of discrimination closer to torts such as assault and battery, rather than negligence. Thus, the breach of the duty of reasonable accommodation is *per se* a violation of the discriminatee’s right to be treated as an equal (as when the victims are denied bakery services on the basis of their sexual orientation).

Two clarifications are in order. The *per se* quality of the tort of discrimination does not deny the victim’s entitlement to recover the legally cognizable consequential harms that may result from the discriminator’s failure. Moreover, our account is consistent with a practice of awarding super-compensatory damages (often called punitive damages) under the right circumstances.¹⁰⁴

4. *Causation*. Finally, there must exist a causal connection between the failure to conform to the standard of reasonable accommodation and the injury for which the discriminatee complains. Neither the act nor the injury can alone satisfy a *prima facie* case of wrongful discrimination. It must be the case that the injury results, in the right sense, from the discriminator’s (deliberate or careless) failure of reasonable accommodation. After all, a failure to render the workplace reasonably accommodative of physically disabled job-candidates does not mean that turning down

¹⁰¹ 24 C.F.R. § 100.60.

¹⁰² 24 C.F.R. § 100.204.

¹⁰³ See *Martin v. Herzog*, 126 N.E. 814 (N.Y. 1920).

¹⁰⁴ On identifying these circumstances, see Hanoch Dagan & Avihay Dorfman, *Substantive Remedies*, 96 NOTRE DAME L. REV. 513, 537-38 (2020).

a physically-disabled candidate necessarily amounts to wrongfully discriminating against this person. It could be the case that the reasons behind the rejection have nothing to do with this person's disability.

The causation doctrine, as practiced in the common law of torts and as further developed in the context of contemporary antidiscrimination law,¹⁰⁵ is up to this task.¹⁰⁶ The epistemic difficulties that may arise in proving causation in the present case are not qualitatively different from the ones addressed in contemporary antidiscrimination law.

5. *Remedies.* The discussion so far seems to imply that the tort of discrimination entitles victims to the familiar types of remedy available in other familiar torts, ranging from compensatory, super-compensatory and nominal damages to injunctive relief. There is, however, another way to approach to remedies of the tort at issue. Apart from tort law's ordinary remedial toolkit, tackling wrongful discrimination can also be made more effective by resorting to a private-law version of what Owen Fiss has called structural injunction. This court-centric remedy can supplement in appropriate cases regulators' authority to establish a rigorous *ex ante* enforcement regime.

Injunctions, according to Fiss, are structural when they vest a judge with the power to order the reorganization of an "ongoing bureaucratic organization," typically a governmental entity, to bring it into conformity with the commands of the constitution.¹⁰⁷ A familiar instance is the structural injunctions granted by the U.S. Supreme Court to implement the right to non-segregated education in public schools.¹⁰⁸ Rather than either awarding damages for each plaintiff-victim or enjoining public schools from not enrolling Black students, the structural injunction purports to transform an ongoing entity so as systematically to prevent future deprivations of constitutional rights.

An analogous remedy could, and we think should, be implemented in and around the tort of discrimination. Such a structural injunction does not target the government and its agencies, but rather private entities. In fact, it can make a difference especially when administrative agencies, and regulators more generally, run out of authority or simply fail to provide the needed correction.¹⁰⁹ It is initiated by discriminatees or on their behalf, rather than by citizens or the

¹⁰⁵ Causation in antidiscrimination law has developed its own standards of proving causation and, most importantly, rules on burden-allocation with respect to causation (i.e., shifting the burden of persuasion in 'mix-motive' cases of employment discrimination). See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹⁰⁶ We do not argue that this or the other doctrine is in a perfect shape or that it does not require some (including substantive) revisions. See further Sandra F. Sperino, *The Causation Canon*, IOWA L. REV. (forthcoming 2022); Sandra F. Sperino, *Discrimination Law: The New Franken-Tort*, 65 DEPAUL L. REV. 721 (2016). As one of us argues elsewhere, it should undergo substantial revisions. Dorfman, *supra* note 2, at ch. 12. Rather, we argue that this doctrine provides a sensible basis from which to begin.

¹⁰⁷ See Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273, 1247 (2009); Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 2, 5 (1979).

¹⁰⁸ *Brown v. Bd. of Edu. (Brown II)*, 349 U.S. 294 (1955).

¹⁰⁹ A particularly promising trajectory for the use of such structural injunction may be their gradual replacement by a robust specialized regulatory apparatus, as was the case regarding unconscionability doctrine. See Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor"*, 102 GEO. L.J. 1383 (2014).

public officials representing them.¹¹⁰ Moreover, its point is not to bring about conformity with constitutional rights, but rather with the private-law right to be treated as an equal. Such a remedy can be consequential to confront systemic discrimination; moreover, it may be put to work most effectively against major private entities, such as employers holding many different places of employment, major chain stores, and a sector-wide class of similar entities, such as universities. In these, and other cases, several discrete cases of violating the standard of reasonable accommodation can provide a prima facie evidence of systemic violation of the right to be treated as an equal. If the prima facie case is further substantiated, the structural injunction can then serve to tackle the systemic aspects of the discrimination in question.

CONCLUDING REMARKS

When a general, privity-independent duty of care was first pronounced in *MacPherson v. Buick* (or, for English tort law, in *Donoghue v. Stevenson*) it added a wholesale tort on top of existing retail duties of care prescribed by preexisting law. This is now rightly considered both a paradigm shift in the history of tort law and an indispensable feature of private law in a liberal legal order.¹¹¹ The private law of discrimination, we claim, is in its pre-*MacPherson* moment. The gaps left by its existing retail duties are indefensible and its retail structure fails to properly vindicate people's fundamental right to be treated equally by others when they exercise their normative powers. Nothing short of a full-blown tort of discrimination can suffice if the revolution instigated by the Civil Rights Acts is to be completed. Fortunately, as we've just seen, existing doctrines, in and around tort law, offer important tools that can be utilized for prescribing the proper elements—duty, breach, injury, causation, and remedy—of this new tort. The relational justice account we developed in these pages offers, we hope, the missing piece for this crucial endeavor: a clear articulation of the normative foundations of such tort as an integral, indeed indispensable, part of private law in a liberal society.

¹¹⁰ OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 18-22 (1978).

¹¹¹ See further John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998).