

# Defining the Antidiscrimination Norm to Defend It

MARK KELMAN\*

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## I. INTRODUCTION

We may mean very different things when we say that an actor (the putative defendant in a lawsuit designed to alter the behavior in which he would engage but-for legal intervention) “discriminates” against another person (the suit’s putative plaintiff). Recognizing this difference is helpful because it demonstrates that we should be extremely clear in using a term that does not have a single, uncontested meaning. More importantly, it reveals why we have certain norms against private discrimination, particularly in the employment market and a subset of markets in which customers purchase goods and services.<sup>1</sup> Thus, we

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\* William Nelson Cromwell Professor of Law and Vice Dean, Stanford Law School.

1. One could derive a descriptive or normative theory of the legally cognizable “wrongs” of discrimination by asking whether customers are harmed more or differently if not sold on equal terms the subset of goods or services covered by most antidiscrimination statutes (for example, service at “public accommodations,” housing, loans) than they are harmed by the failure to sell goods and services in legally unregulated markets (for example, sales of cars, most retail commodities). Such a theory

must examine how the plaintiff's interests are compromised by *each* form of discrimination. We must also see how the defendant's interests are compromised if he cannot engage in a particular sort of discrimination in a particular setting. Part III discusses four broad "definitions" of discrimination. The first is that discriminating simply involves making distinctions among persons. In this view, the putative defendant discriminates unless he allocates the "good" that the putative plaintiff seeks without regard to *any* of the plaintiff's discernible traits. The defendant could do this either by granting the desired good to all who seek it or, if it is scarce, allocating it on a lottery basis. The second definition is that a defendant discriminates if the defendant allocates goods because of the status of the person seeking the good. Third, one can say that a person discriminates when he does not allocate a good to a person seeking the good, even though the person has met the legitimate set of criteria for receiving the good.<sup>2</sup> The fourth definition is that a person discriminates not only when he rejects a person with the same market-relevant traits as one he accepts, but also when he refuses to reasonably accommodate a person seeking inclusion. This is especially the case if nonaccommodation segregates "social groups" or significantly increases the chances of creating subordinated castes. In Part III, I elucidate these categories. At the same time, I demonstrate how difficult defining and confining each distinct discrimination type is and also explain why it is unlikely that the legal regime could settle upon any single definition of discrimination.

However, before doing that, Part II runs through briefly, but does not defend, a loose utilitarian framework for assigning entitlements. This section aims to provide a meaningful framework to ask the questions asked in Part III.<sup>3</sup> In this framework, the critical questions concern the (broadly) "hedonic" (negative) consequences that putative plaintiffs will face if exposed to distinct forms of unregulated discrimination. Additionally, the framework addresses the consequences that putative defendants and those affected by a regime that regulates those in the defendant's position will face if regulated. My view of this loosely

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would likely center on real or imagined distinctions in the degree to which access to public accommodations or housing was more vital to "membership in the community" than access to a broad range of commodities. I suspect, though, that the particular coverage limits reflect nothing more than the perceived need to respond to what were seen as the actual, historically contingent instantiations of Southern race prejudice at the time the antidiscrimination political movements first flourished.

2. One might further say that only a subset of putative plaintiffs victimized by the failure to receive goods they are "qualified" to receive can legitimately vindicate claims against this form of discrimination.

3. That is, attempting to define distinct forms of discrimination, to identify the distinct interests that distinct sorts of discrimination compromise, and to a lesser extent, to evaluate the strength of claims against prohibiting these distinct forms of discrimination that would be made by distinct putative defendants in distinct settings.

utilitarian exercise is admittedly peculiar and idiosyncratic. Most importantly, I discount the standard welfarist claim that there are coherent ways of simply observing how a subject evaluates her own life, by her own lights, without regard to our “weak perfectionist” ideas about what is the proper way to evaluate one’s own experience.<sup>4</sup> I also disclaim views which strike me as indefensibly rigid and narrow.<sup>5</sup> In this regard, I reject the idea that the antidiscrimination norm’s propriety should be evaluated solely by reference to its impact on a mere subset of experiences or capacities to engage in certain activities, for example, a claim that what is relevant in deciding whether the plaintiff merits protection is the plaintiff’s legitimate sense that, absent protection, he is not treated as a “first-class” citizen.<sup>6</sup> At the same time, I hope that in briefly elucidating a loosely utilitarian framework, we can more readily see why some of the canonical critiques of adopting utilitarianism as an across-the-board, ethical decisionmaking system (particularly its unduly stringent demand for agent-neutral rather than agent-relative behavior) will help us better comprehend some of the reasons we ought to limit the reach of one or another version of the antidiscrimination principle.

## II. A LOOSELY UTILITARIAN NORMATIVE FRAMEWORK

There are a host of questions—certainly bigger questions than I can address here—about how to think about establishing valid legal claims. Doubtless, it is possible to believe that one ought to establish an entitlement framework by considering what rights would be agreed to by contractors with suitably restricted aims or information about their particular situations. Alternatively, we might look to justify an entitlement scheme using only some acceptable set of arguments.<sup>7</sup> It is also possible

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4. For a fuller exposition of my views in this regard, see Mark Kelman, *Hedonic Psychology and the Ambiguities of “Welfare,”* 33 PHIL. & PUB. AFF. 391 (2005).

5. I disclaim those views whether they are framed as overtly perfectionist, autonomy-oriented, or deriving from views that there are particular, restricted domains in which the state rightly *cares* about its citizens’ experience.

6. See, e.g., Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in FREEDOM OF ASSOCIATION 75 (Amy Gutmann ed., 1998). Rosenblum argues that certain forms of discrimination by private associations are permissible not only because of the discriminator’s strong interests, but because such discrimination does not implicate the putative plaintiffs’ sole legitimate interest, their interest in “first class citizenship.” See *id.*

7. For instance, one might believe that only some entitlement frameworks are consistent with the injunction that we treat each subject’s interests as equally valid and do not rely on adopting any particular conception of the good life.

that one best establishes an entitlement framework by deriving what one believes are the concrete rights that follow inexorably from respecting some acceptable limiting principles,<sup>8</sup> or deriving them from more affirmative injunctions.<sup>9</sup> I am incredibly dubious about all such efforts, but for now, my skepticism is neither here nor there.

It is also possible to believe that one can and should follow a deceptively simple consequentialist decision rule in establishing an entitlements framework. Such a rule would state that society prohibits conduct when the aggregated hedonic consequences of permitting the conduct are negative.<sup>10</sup> In the simplest cases—and it is unlikely *any* cases are so simple given the possibility of widespread “rule-utilitarian” consequences to forbidding or permitting any particular *instance* of conduct—we simply ban conduct when its negative impact on the person seeking prohibition exceeds the affirmative impact on the person who wishes to engage in the conduct.<sup>11</sup>

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8. Perhaps, for example, the separateness of persons, a rule against expropriating from *X* to benefit *Y*, or a rule of self-ownership.

9. For example, to maximize each person’s capacity to realize so much of her autonomous will as is consistent with valid expressions of autonomy by those around her.

10. The (loose) utilitarian evaluations of alternative discrimination forms are meant to be made quite cautiously. It is worth cataloguing possible “harms” and “benefits” associated with distinct forms of behavior that we choose to restrict or permit without forgetting the myriad ways in which these are, at best, suggestive lists.

11. In this analysis, I simply duck a fundamentally administrative question, often mislabeled a question about the proper nature of obligations, of whether we should ever prospectively regulate activity that *risks* hedonic loss or regulate only the subset of persons who *cause* loss. Whatever serious problems quasi-utilitarian frameworks have, it is *not* a good answer to those who think that our goal in assigning entitlements is to insure that people do not cause (net) harm to say that we characterize conduct as wrongful even when it turns out to be harmless. In other words, we are not banning behavior without regard to its harmfulness when we ban either risk-taking or attempts.

I am dubious that we can identify with certainty *any* class of cases in which we are strongly predisposed to ban behavior though we are *certain* that no one will be hedonically or experientially harmed by the behavior, even at the moment when the actor engages in the behavior, before the behavior’s actual consequences have been revealed. Take one of the canonical supposed counterexamples: Government agents may breach a “right to privacy” if they find out what Web sites you visit even if you will never learn they are doing so, and thus cannot be hedonically harmed by their conduct. I am skeptical that our intuition that the conduct is wrongful, in any case, was formed in a world in which we could really comprehend that there was absolutely no way of becoming aware that we were being snooped on. This is true in the contingent empirical sense that experience tells us that the existence of some such spying will leak, just as some subset of another group who bear rights though rights-violation is hedonically empty, unconscious rape victims, *will* learn that they have been violated. It is also true, less contingently, that each of us would actually *know* that there is some expected level of spying—each of us would feel there is some chance that we are being spied on, would have the *experience* that it is possible that we are being embarrassed—so long as such spying were permitted, even if we knew for sure that we would never be certain. It would be quite odd to say that one is psychologically injured if one *knows* that someone is watching you undress at the department store, but uninjured if one thinks there is, say,

But assuming one follows such a simple decision rule, a number of obvious questions follow. What will the putative plaintiff *P* experience if discriminated against in the relevant way? Will others not directly discriminated against also suffer aversive experiences? What sorts of aversive experiences will they suffer, and do the distinctions in the *forms* of the aversive experiences help us judge the likely *intensity* of the negative experience, its likely impact on future experience, and the possibility that it is averted at lower “cost” by the “victim” than the perpetrator?

At the same time, we must look at what the defendants and those affected by the defendants’ decisions will *lose* if they cannot make a certain type of discriminatory decision. Presumably, of course, defendants lose different things depending on the sort of discriminatory decision they would prefer to make if allowed to do so. In all cases, we make assumptions about the distribution of likely hedonic reactions to an end-state, knowing that there could always be outliers. For instance, we might intuit that people will be bothered less if “forced to deal” over the Internet with order processors from a disfavored religious group than they would be if they could not reject one who sought to give a speech about her beliefs at the front door. We say so, though, knowing that

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a 99.9% chance that someone is, but would never be certain. If 99.9%, why not 0.9%? In either case, you readily picture the bad event, and it is the capacity to envision the true event that causes the relevant sense of disquiet.

At the same time, I am dubious that we ban or permit conduct whenever we strongly suspect that the *net* effects are hedonically negative or positive. Thus, for instance, I am skeptical that the canonical rule-utilitarian defenses of permitting certain agent-relative breaches of simple act-utilitarian decisionmaking really do much work. Rule-utilitarians may argue that parents may save their drowning kid rather than two nearby strangers *because* if we forbade them to do that, by rule, parents generally would not develop the sorts of deep ties to their kids that utilitarians should cherish (or because such a rule would be so burdensome to follow that insisting on it would merely encourage a utility-eroding breakdown of general legal authority). But I think these sorts of rule-utilitarian just-so stories are not doing much real work. I would also be skeptical of playing with the direct “welfare” numbers and saying that the loss to parents of having failed to save their own kid would outweigh the abstract loss of multiple lives. I return in the text, in discussing the *domain* of antidiscrimination law, to the question of whether there are more plausible rule-utilitarian arguments that suggest that we should restrict the situations in which we *demand* that people take utility-maximizing action. And I note only for now that this question is distinct from the question of whether each person is duty-bound to be a utilitarian in each of his life decisions. One can plainly believe that utilitarianism is solely a theory of how to make judgments about public governance. This historical reading of early utilitarian writers as interested in rules for public legislation, not private ethics, is emphasized in Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 118-19 (2000).

there could be someone who is not only fervent about not doing business with someone in the hated group, but more fervent in her reactions to giving money than having any personal contact. In the face-to-face reaction, she might, for instance, feel she can show her distaste. It is hard to know whether (loose) utilitarians are indifferent to the outliers because it is administratively too costly to tailor legal practices to account for them, because they despair that people will *develop* these abnormal and undesirably cost-imposing tastes if they gain exemptions from ordinary obligations, or because they launder preferences and treat some atypical preferences as illegitimate. In any case, these are not my main concerns.<sup>12</sup>

It is worth noting that the (loose) utilitarian's jumbled use of these three moves renders lots of (loose) utilitarian arguments difficult to distinguish from arguments assigning entitlements without regard to hedonic consequences, but rather on the basis of some deontological rights-granting principles.<sup>13</sup> Think about the following problem in distinguishing discrimination-as-differentiation from discrimination-as-aversion to those of a particular status. Imagine that despite meeting all stated conventional economic productivity criteria, one class of putative plaintiffs does not receive a job because of the employer's aversive racism. Another class is rejected because they are incapable of "doing

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12. Similarly, it is not my main concern that I do not think the concepts of "aversive" and "positive" experiences provides any truly tractable measure to do something like scientific policymaking. The problems are both practical and, more powerfully, conceptual: at the practical level, constructing cardinal *social* welfare measures from incomplete ordinal rankings of end-states by individuals is not really feasible. More conceptually, none of the "surrogates" for "welfare" are satisfactory. Conventional Benthamite utilitarianism (extolling pleasure and pain-avoidance) takes inadequate account of the diversity of tastes and preference utilitarianism cannot overcome the problem that we cannot ascertain the domain of respectable preferences (those that are adequately prudent and informed) without solving the problem that preference utilitarianism is designed to avoid: having a prior theory of what welfare is. Unless a person knows the "true" hedonic consequences of her decisions, she is inadequately informed and unless she chooses in a way that advances her hedonic ends, she is imprudent. But how do we know what *the* hedonic consequences of a decision are unless we know what welfare is? It is certainly not practically feasible (and arguably conceptually troublesome as well) to tell a subject all consequences of her decision and let her figure out herself which ones count as dysphoric and as pleasurable in the ways that are relevant to her. At core, we are well off in a host of quite distinct ways, and policy observers can elicit views of how life is going from a wide array of perspectives: the choice to emphasize one or other perspective is at core the policymakers' choice, not the view of the subject. For a fuller discussion, see Kelman, *supra* note 4.

13. See generally Barbara Fried & Mark Kelman, *The Pragmatic Consequences of Foundational Principles* (2004) (unpublished manuscript) (arguing that welfarist arguments blur into deontological arguments, just as deontological arguments gain content from the surreptitious invocation of welfarist ones, so there is little at stake in making distinct "foundational" commitments, especially in relation to issues thought of as involving "distributive justice").

the job,” as defined in a fashion that even the rejected applicants find legitimate. It is not obvious, a priori, that the particular hedonic losses associated with feeling victimized by racism are worse than those associated with learning of one’s actual inadequacy along dimensions that one thinks are perfectly legitimate bases for judgment.<sup>14</sup>

Ignoring, for now, more direct utilitarian arguments that the rejected plaintiff’s pain is more likely to be *outweighed* in the case in which the plaintiffs are “unqualified” because defendants will lose more if ordered to hire the unqualified than if directed to hire those towards whom they feel racist aversion, most utilitarians would use one or the other technique to question how weighty the plaintiffs’ interest is in avoiding feeling awful when “legitimately rejected.” The loose utilitarian argument may take a direct preference-laundering form (it is simply no better to feel slighted than it is to feel sadistic pleasures or envy, unless one is slighted for “bad reasons”).<sup>15</sup> It may take a moral hazard form (if people get protected from “just” refusals to hire certain persons only if they feel bad enough about them, they will develop the bad feelings though there is no gain to do so and we should discourage forming emotional reactions that threaten to reduce other actors’ freedom to engage in highly utility-enhancing activity). It may take an administrative form (unlike negative reactions to aversive racism, feelings about “merited” rejection are too diverse to use a general rule). I suspect, in fact, we would see all such forms of manipulation.<sup>16</sup>

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14. Think of the classic warnings sounded in MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY* 114 (Transaction Publishers 1994) (1958) (noting that a true meritocracy might be insufferable for those who did not “measure up”).

15. To the extent that utilitarian theorists engage in preference-laundering, the distinction between the purportedly opposed deontological and consequentialist traditions blurs considerably. The distinction between arguing that one’s claims depend on having “legitimate” interests rather than on having “entitlements” or “rights” is, to put it kindly, slender. See Fried & Kelman, *supra* note 13.

16. Naturally, this is also true on the defendant’s side. When I casually state that aversive racists will not lose much hedonically if asked to hire those towards whom they are aversive, I am burying, through some combination of preference-laundering and moral hazard fears, the possibility that their hedonic losses are indeed severe.

Think about the distinction between accommodation and standard disparate treatment: even those commentators, like Bagenstos and Stein, who claim that they believe that the distinctions between conventional discrimination and nonaccommodation are normatively nonexistent and descriptively thin argue that what is wrongful is the failure to engage in “reasonable accommodation.” See Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 836-37 (2003); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 645-49 (2004). But there is

### III. DEFINING DISCRIMINATION

By exploring four of the ways that a person might be said to discriminate against others, as well as the difficulties of defining each purportedly distinct conception of discrimination, we can elucidate more about what sorts of harms those burdened by discrimination might complain of and how parties resisting regulation of their choices would argue that regulation worsens their lots.

1. *A person may discriminate in allocating a (broadly defined) good if he attends to distinctions between persons seeking the good. Unless he makes the good available to all or allocates a good for which demand exceeds supply by a form of lottery in which the chances of “winning” are in no way trait-dependent, he “discriminates.”*<sup>17</sup>

In intimate relationships, each of us obviously discriminates in this way. For instance, by choosing dinner guests, we explicitly or implicitly

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no such reasonableness limit on the conventional disparate treatment law's reach that either commentator seems to favor. It is not a defense to the requirement to serve African-Americans at a lunch counter that one really, really, really hates to do it, in the same way that it is a defense to the requirement to accommodate a disabled patron that it is too costly to do so. Nor do Stein or Bagenstos propose that it ought to be a defense to racist exclusion despite their ostensible commitment to obliterating the normative distinction between accommodation and “antidiscrimination.” One could put this distinction in terms of the line between “rights” and “policy-balancing *interests*” but I never had any stake in this formulation because I actually do not believe in the possibility of drawing stable distinctions between deontological rights thinking and welfarism. So how do we defend the distinction in these more standard “cheat-on-strict-welfarism” ways? Perhaps we are just guessing about typical tastes and then refusing to *administer* a system sensitive to outliers, merely guessing that there are not enough public accommodation owners who really experience commercial association especially aversively to bear the costs of figuring out whether there are *any*. Perhaps we are instead, or also, worried about moral hazard. Finally, and most plausibly in my view, we may simply be engaged in standard preference-laundering.

For those, like Stein or Bagenstos, who want to disclaim the preference-laundering interpretation, see, for example, Bagenstos, *supra*, at 885-89, because it implies a moral distinction between nonaccommodators and discriminators, it might be necessary to argue that the restriction of the antidiscrimination norm to “public” life *does* permit a “reasonableness” limitation for “pure” discriminators, but that it does so at the “wholesale” rather than “retail” (case-by-case) level. That is to say, that we permit people to discriminate in their choice of mates reflects the fact that *we know* they get *lots* of utility out of these sorts of discriminatory decisions but we despair about fact-finding in cases in which they act on the “distaste” for association in, say, public accommodations. In this sense, the argument against allowing “reasonable” pure market discrimination is not so much a preference-laundering argument as an administrative costs argument. I am sure the argument that it is nothing but administrative costs could be logically made; I just doubt it could be made sincerely.

17. We ordinarily associate this “meaning” of the term *discriminate* with phrases like “a discriminating palate” that carry no immediate pejorative connotation.



*reject* people who seek a good (the chance to have dinner with us) because of the different, individual traits we discern they have. Similarly, we do so just as obviously in “commercial life”; one is unlikely to get the head surgery job with only a law degree and unlikely to get service at the lunch counter unless one has a demonstrable willingness and ability to pay.

Those who do not get goods they seek plainly experience some hedonic loss simply because they do not get something they want. Remembering this is important, because even when we think about conventionally legally problematic discrimination (refusals to deal because of racial animus, for instance), we must recall that *one* of the putative plaintiff’s objections to discrimination is that it deprives him of something he wants. At the same time, if the good being allocated is inexorably scarce, then picking out some people to get what they want causes no incremental increase in hedonic loss *on this account alone*. Selectivity will affect the *identity* of those with frustrated desires, but not the *quantity* of frustrated desire.<sup>18</sup> For example, if one hundred people want *X* and only twenty-five can get it, seventy-five will be disappointed whether those who get *X* win a lottery or appeal more to *X*’s purveyor. So, being subject to this sort of discrimination causes hedonic loss to the *class* of potential goods claimants, compared to being free from it, only if the putative defendants selectively choose to ration a good that need not be rationed, or if the experience of being rejected causes hedonic harm distinct from, and greater than, the experience of merely holding a losing lottery ticket.

The fact that we do care about “mere” frustrated desire—and care enough to prohibit imposing it in situations in which the putative defendants’ interests in making choices for reasons are especially weak—is readily seen when reflecting upon common carrier obligations. Obviously, it is possible to describe the *form* of discrimination in which a common carrier may not engage according to our third definition of discrimination, that is, failure to supply a good for which the putative plaintiff meets all legitimate qualifications.<sup>19</sup> But what seemingly drives the requirement that a common carrier offer service to all well-behaved, paying comers is not that putative rejected plaintiffs will feel some special psychological loss because their objective qualifications are ignored. Rather, it is the sense that the rejected plaintiffs may not get a service that they desire.

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18. Of course, this is true unless the basis of selection is intensity of preference.

19. Surely the common carrier *is* allowed to engage in some differentiation, for example, on the basis of ability to pay for the services.

That there were no ready substitutes for those with common carrier obligations increased the chance of frustrated desire, and thus distinguished common carriers from ordinary shopkeepers with the legal privilege to refuse service for any reason. The existence of a monopoly-like power did *not* increase the inherent psychological wound in being rejected despite having relevant qualifications.<sup>20</sup>

Obviously, though, defendants in many situations have strong and legitimate interests in making trait-based decisions.<sup>21</sup> In fact it is hard to imagine, in the absence of scarcity, why we would observe the markets that antidiscrimination law typically regulates. Ergo, in the traditional domains in which antidiscrimination law has held sway, we will surely not supplant discrimination with a demand for universal access.<sup>22</sup>

Lotteries may protect putative plaintiffs against much stigmatic rejection<sup>23</sup> and may prevent certain people from bearing repeated, concentrated loss of

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20. Thus, to the degree that antidiscrimination norms are meant to protect plaintiff access to wanted goods, the answer to whether subordinated but not hierarchically dominant groups should be protected is grounded entirely in how we answer a wholly empirical inquiry. If owners can discriminate, blacks will not get lunch counter service *anywhere* (or find it difficult or costly to get) because white racism is systemic and whites own most lunch counters, while a white rejected by a lunch counter owner, either because of anti-white racism or more idiosyncratic distaste for the particular customer, is likely to be able to get a lunch readily from a nearby competitor. I have raised this point before, in a mildly different fashion. See, e.g., Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 863-65 (2001) (arguing that members of socially advantaged groups are unlikely to face idiosyncratic discrimination persistently); Mark Kelman, *(Why) Does Gender Equity in College Athletics Entail Gender Equality?*, 7 S. CAL. REV. L. & WOMEN'S STUD. 63, 90 (1997) (same).

21. That is, interests so "legitimate" that even preference-laundering utilitarians are liable to respect them.

22. Of course, though, many public accommodation owners could in fact serve *all* paying customers: a common carrier obligation comes closer in some ways to requiring universal *access* than a lottery could.

23. Violations of all versions of the antidiscrimination norm, with the exception of the version that identifies discrimination with any form of individuated differentiation, bear what is thought of as some sort of special injury associated with feeling one's been subjected to unjust treatment. The theories of injustice, though associated with distinct theories of discrimination, may differ modestly. However, broadly speaking, each identifies injustice with the failure to recognize a relevant sort of merit (the theories of merit differ some between the third and fourth, or accommodationist, theory of discrimination), while the second (conventional disparate treatment) theory assumes that the injury is intensified when the reason for the failure to recognize merit is status. This is so because status is inescapable (which increases the sense of injustice) and because people identify with their status positions and thus feel a special wound from mistreatment that grows from undervaluation of the group that they would not feel from individual trait undervaluation. In any case, the third and fourth theories largely ignore the special injuries inherent in being treated badly for a *bad* reason. The costliness of recognizing virtue (and the associated inevitable accidental mistakes) may be of little moment under theory three (at least when groups are adversely impacted, and so affected persistently) and the rationality of nonaccommodation is of little moment under theory four.

access to desirable social goods which, given the declining marginal utility of goods, might reduce social welfare. Requiring lotteries seems more feasible than demanding universal access. However, if all who seek the goods are entered without regard to productivity as workers or willingness and capacity to pay as customers, they are still unlikely to be mandated in the commercial domain. This is so because requiring them implicitly establishes a (generally rejected) strong duty to share material goods.<sup>24</sup>

Oddly, we are more likely to see lotteries demanded in a subset of private settings “more intimate” than the market. This is so even though we typically increasingly protect the defendants’ freedom of action as we move from state to market to intimate spheres. However, we might think it quite legitimate to ban selective fraternities or sororities (that is, to “force” students to associate with housemates not of their own choosing) both because of the stigmatic losses associated with “reasoned” rejection and because we think social welfare will generally increase by randomly distributing college housing.<sup>25</sup> If “spontaneous” patterns of living arrangements generate a set of cognizable harms—snootiness, lack of empathy, narrowness of tastes—then the lottery distribution may be better than the distribution generated by allowing people to act on reasons. These gains, parallel to those sometimes attributed to racial integration, might be best obtained by forms of mandatory social mixing that will only occur through mandatory lotteries.<sup>26</sup> The correlative losses

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24. One would likely justify demands for universal access using conventional distributive justice and equality arguments, not arguments based on anything special about the fact that those poorer citizens faced discrimination from these particular providers who initially possessed goods that the poor sought. This distinction between justification modes may be overstated, though: think about Bernard Williams’ canonical (if reasonably criticized) argument that attempted to justify a high degree of equality of access to medical care by focusing on whether *doctors* engaged in one form of impermissible discrimination—distributing their medical services on the basis of something other than *the* appropriate reason (need for care)—rather than on the basis of a more general egalitarian argument sounding in utility, or ontological claims to capacity, or equal respect. See Bernard Williams, *The Idea of Equality*, in *PHILOSOPHY, POLITICS, AND SOCIETY* 110, 120-23 (Peter Laslett & W. G. Runciman eds., 2d s. 1962).

25. Thus, the more routine supposition that we will merely redistribute identical welfare losses from one party to another if the supply of a desired good remains constant (as the supply of the “most desirable” housing will remain constant) may not be true.

26. The racial integration analogy is deliberate. One reason to ban decisions based on racial animus is that permitting such decisions may well generate segregation; a (loose) welfarist must account for the gains to integration. Naturally, too, one of the chief reasons we may demand accommodation is that it generates a level of integration of persons with distinct experience-based perspectives that would not otherwise exist. Figuring out in detail when integration is “beneficial” and why is no easy matter. Do we

(for example, fewer or impaired intimate relationships; difficulty in using social groups to develop one's own sense of identity) are also obvious, and not worth belaboring.

The most conventional view of the antidiscrimination norm forbids the putative defendant from making decisions for a particular set of reasons, but neither forbids selectivity as such nor establishes a set of exclusive, legitimate grounds for differentiation.

2. *A person discriminates when he withholds a (broadly defined) good the putative plaintiff desires because of the plaintiff's protected status (most obviously race, gender, disability status, national origin, religion, and sexual orientation, though any list of potentially protected statuses is socially contingent and unlikely to be exhaustive).*

In ways I will return to, I find this formulation is at once impossibly ambiguous and so manifestly over and underinclusive that, despite its canonical status as *the* definition of discrimination, I am dubious that anyone can take seriously the notion that it can serve as an exclusive working definition. It is a definition that worked reasonably well in response to the particular form of discrimination most salient for those in

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care if there are white kids (displacing Asians with higher scores) in the San Francisco public schools? A mix of many racial and ethnic groups in public housing projects that will still have no whites at all? Do we care that whites go to public schools because they will provide an otherwise-unheard voice, or is "white voice" in America so numbingly inescapable that students of color at a particular school do not need it embodied in their classmates? Do we care instead that white kids go to public schools because "green follows white" (that is, the schools will be under-funded unless white voters have a more direct stake in school quality)? Is integration a positive good because multicultural blending is invariably a virtue, or is segregation merely contingently bad because all existing forms of segregation entail not mutually respectful voluntary separation, but hierarchical domination by a group that enforces norms of interaction and separation so as to solidify its dominance and communicate negative messages about subordinated groups? "Segregated" systems, after all, often permit and encourage a good deal of "social mixing" as long as one group is in a plainly subordinate position when the groups are in social contact. This familiar point is emphasized and neatly elucidated in Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995).

To the extent that we worry about segregation only as a form of subordination, we can readily imagine a school permitting black-only but not white-only fraternities. For some reflections on these issues, focusing especially on the question of whether integrating distinct groups comprised of "people of color" makes sense in distinct contexts, see for example Selena Dong, Note, "*Too Many Asians*": *The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027 (1995) (discussing challenges to policies that reserved spaces for white pupils in selective public high schools); Alexandra Natapoff, Note, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059 (1995) (noting the inherent problems in applying equal treatment to groups with intergroup conflicts).

the political movements establishing legal regimes countering public<sup>27</sup> and private practices that restricted African-Americans' access to public accommodations and jobs.<sup>28</sup> This form of discrimination was the simplest sort of refusal to deal based solely on membership in the group: all the discriminator did was classify a good-seeker as a member of the status group and exclude him accordingly. Such discriminators *plainly*, and often unabashedly, made their decisions *because of race*, just as VMI plainly made its decision to reject female cadets *because of gender*.<sup>29</sup>

This is a definition of discrimination that would likely *not* have emerged as even a plausible first approximation had the first politically successful movement resisting subordination, stigma, and exclusion been comprised of those seeking an end to discrimination against homosexuals. Much of the discrimination associated with homophobia *entwines* reactions to pure "group-wide" ascribed *status* ("is that a person who has sex with someone of his or her same gender?") and intragroup differentiated *behavior* ("is he too 'effeminate'?" or "she too 'butch'?"). For reasons I return to, characterizing the rejection of a *subset* of gay men as either unambiguously forbidden by a norm deriding decisions made because of sexual orientation or unambiguously acceptable given the norm's limit seems quite problematic.

Before dealing with the definition's ambiguities, though, recall that actors both in intimate situations and more conventionally commercial ones discriminate in ways plainly comprehended by this discrimination definition. For example, people choose to date or marry only those of a certain religion or race. They might reject someone out of hand, for instance, if he is non-Catholic or white. People also refuse to serve or hire people of a certain race or gender. Whether we protect certain

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27. For example, Jim Crow laws were existing public practices of discrimination.

28. Patterned categorical status-based discrimination causes pretty much the whole laundry list of problems for putative plaintiffs and those within the status-group not directly discriminated against. It precludes people from getting a desired good, it precludes them from getting goods even when they feel they merit them (which makes the failure to get the desired good even more vexing), it communicates derogatory attitudes towards the group and in so doing impairs the group members' sense of self-worth, it helps establish castes (interfering with both the functioning of political democracy and the realization of social equality), it puts people in the position of being unable to escape certain life limits no matter what efforts they make (and provides strong disincentives to acquiring generally socially valued traits since possessing them will do people no good), and it creates significant segregation (and thereby decreases possibilities of pluralist or multiculturalist sharing of information and culture).

29. See *United States v. Virginia*, 518 U.S. 515, 519 (1996).

forms of intimate discrimination like the former entirely because of the discriminator's strong interests in making these associational decisions or whether the putative plaintiffs' losses are interestingly distinct and "lower" when they face "intimate" rejections is a question to which I will return.<sup>30</sup> In the most conventional analyses of the difficult "border" cases between the intimate and commercial sphere,<sup>31</sup> commentators generally assess *both* the putative plaintiffs' losses if not guaranteed access and the defendants' losses if association is compelled.<sup>32</sup>

As mentioned, I am quite skeptical that the canonical account of unacceptable race or gender discrimination—that it proscribes decisions made "because of" race, gender or sexual orientation—is interpretable or, to the degree it is interpretable, normatively compelling. The most critical ambiguity is the problem of subclasses, or of "trait discrimination" (the putative defendant refuses to hire or serve some, but not all, African-Americans, women, or homosexuals). I will elucidate this problem by referring to several stylized examples: to wit, an employer who willingly hires African-Americans but refuses to hire a subset of African-

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30. By lower, I mean that the putative plaintiff's losses are lower in either some sort of unalloyed hedonic sense or given some sort of preference-laundering.

31. Examples of these border cases include memberships in clubs where business contacts are made, owner-occupied rental units, and generic, secular jobs done at the headquarters of organizations with strong self-defined ideologies that call for making status-based distinctions in roles.

32. Here is the standard exemplar: Female plaintiff sues (almost surely unsuccessfully) the Catholic Church because she was turned down for a job as priest because of gender. One could imagine rejecting her claim based solely on the free exercise and anti-entwinement interests vested in the Church, thought to be so strong (in consequentialist terms) or so absolute as rights that no balancing is worth the bother. One could do this without reaching the question of whether the refusal to hire substantially interferes with the plaintiff's individual interests in access to a "job for which she is qualified" or more general social interests in things like the eradication of sexism or nonmeritocratic hiring. But one will also see simultaneous efforts to question the strength of the plaintiff's interests (as compared to the interests that she would have if turned down by a law firm with a no-female-lawyers rule). So, for instance, one might see an argument of the form, "One cannot really want to be a *priest*—so that one is not really frustrated in an actual desire that could genuinely be realized—of the Catholic Church if one is rejecting one of its canonical tenets, the incapacity of women to give the Sacraments, and the desire to 'play a priest-like role' in a nonexistent religion of one's private imagination is simply not enormously powerful" or an argument of the form, "Members of a status group will not be profoundly disadvantaged even if they are prohibited from playing any role in a particular intimate or associational sphere because profound disadvantage comes only from exclusion from positions of general social power. Not being invited to a dinner party or to lead one of the innumerable organizations in a pluralist culture—even if it is because of race or gender—does not deprive a particular person, or those who witness the decision, of truly important capacities to live a good life." My point for now is not that such arguments are good or bad (though I think they are generally bad makeweights), but that it is tempting to downplay plaintiff-side losses whenever one thinks defendant-side gains are especially great.

American men who he feels have a belligerent, unassimilated style,<sup>33</sup> an employer who hires many women but not those he views as “aggressive” or “bitchy;”<sup>34</sup> or an employer who hires “femme” but not “butch” lesbians. In each case, does the employer discriminate *because of* race or gender or sexual orientation?<sup>35</sup>

In the first instance, it is useful to explore whether we might differentiate between subgroups defined in terms of behavioral “traits” and those defined in terms of status “features.”<sup>36</sup> Or, perhaps it is more

33. See Joleen Kirschenman & Kathryn M. Neckerman, “*We’d Love to Hire Them But . . .*”: *The Meaning of Race for Employers*, in *THE URBAN UNDERCLASS* 203, 224 (Christopher Jencks & Paul E. Peterson eds., 1991) (discussing anecdotal accounts of subgroup discrimination).

34. See Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 *TEX. L. REV.* 167, 172 (2004) (arguing that workplace equality requires the breakdown of the gender norm that caps the prospects of aggressive women).

35. The stylized hypotheticals permit me to avoid what is often a difficult question in real cases: in many situations in which we observe discrimination against a subclass, what we would really be seeing could best be described as “intensification” of negative reactions to the (still-subordinate) whole group. Thus, it may well be the case that blacks with physical features most stereotypically associated with blacks face more aversive reactions than others classified as black. See generally, e.g., Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *PSYCHOL. SCI.* 383 (2006) (analyzing data suggesting that persons with more stereotypically “black” features are more likely to be sentenced to death); Keith B. Maddox & Stephanie Gray Chase, *Manipulating Subcategory Salience: Exploring the Link Between Skin Tone and Social Perception of Blacks*, 34 *EUR. J. SOC. PSYCHOL.* 533 (2004) (discussing skin color trait as apart from other physical traits). But it is not the case that those with less stereotypically “black” appearances face the same treatment as whites.

It may be best to imagine that we are dealing with situations in which only the subgroup faces problematic treatment. However, we must recognize not only that it will be difficult to *observe* whether we are dealing with a situation in which only the subgroup faces such bad treatment, but that the analytical distinction between the “intensification” of prejudice story and the “prejudice only against the subgroup” story is slippery. If there is *some* prejudice against “lipstick lesbians” and *lots* against “butch lesbians,” what would it mean to say that butch lesbians face intensification of generic prejudice against lesbians rather than a distinct form of special subgroup prejudice? Only in the case in which the lipstick lesbians faced *no* prejudice would this line be really completely useful.

36. The line between “trait-based” and “status-based” discrimination is blurry for a multitude of reasons. For a fascinating discussion of the blurriness in the context of discrimination against gay service members, see JANET E. HALLEY, *DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY* (1999).

Frequently, the discriminator uses nonbehavioral status markers as proxies for behavioral traits. The proxies may be processed as fairly conscious information-cost economizing proxies (for example, employers may consciously use an applicant’s address, or perhaps his given name as a proxy for nonassimilation) or unconsciously (as skin color

apt to place the line between traits that the discriminator (in a world in which status-based discrimination has become “shameful” or unacceptable)<sup>37</sup> would admit to<sup>38</sup> and those that continue to violate the new social consensus against judgments based on irrelevant status, like prejudice against a subset of blacks with dark skin color.<sup>39</sup> The primary reason to make this distinction is that if the subgroup is defined in terms of status, there is no conceptual need to reformulate the traditional categorical view of discrimination, rather than to recognize that we historically used

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may be a proxy for nonassimilation). To the extent that the antidiscrimination norm is grounded in arguments that proxy use is especially demeaning, or that using proxies creates perverse disincentives to develop human capital (because those possessing the proxy traits will be assumed to have poor employment attributes anyway), then the antidiscrimination norm may be violated by the use of imperfect (even if statistically helpful) proxies. This is true whether the proxy is membership in the traditional group (“blacks are lazy”) or a subgroup (“blacks who went to a particular set of inner city schools will be too belligerent to subject to a reasonable level of labor discipline”).

37. See Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism, in PREJUDICE, DISCRIMINATION, AND RACISM* 61-65, 67-73, 80-85 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (discussing the fact that today’s society views overt racial discrimination as unacceptable).

38. For example, relevant traits the discriminator would admit to differentiating between could be obedience to authority at work or “nonbelligerence.”

39. There is an additional and quite serious problem in distinguishing those who make status-based distinctions from those who make behavior or trait-based distinctions: we may come to define a disability status-group around any set of traits that are socially valued or devalued. Here is how I described the problem:

One might argue that we should define simple discrimination negatively rather than affirmatively. There is no canon of rationality, no sense that a rational actor accounts for *A*, *B*, and *C*, but not *X*, *Y*, and *Z*. Instead, the market actor can base his decision on anything but group membership (e.g., national origin) or traits strongly associated with group membership (e.g., accent). Disability law is, of course, the main challenge to the maintenance of the line that we can define “permissible rationality” negatively, rather than affirmatively. The elasticity of the concept of the “disabled” will preclude us from framing the negative definition in terms of either group motivation (discrimination based on status) or impact (discrimination on the basis of a “soft” trait atypically correlated with status). Virtually anyone possessing the sorts of widely culturally devalued traits that might give rise to the sort of persistent, non-idiosyncratic discrimination which the state will most typically need to counter through legal intervention can be deemed disabled on that account. If (significant numbers of) market decisionmakers value physical attractiveness, those who are unattractive enough to face wage penalties are (at least arguably) physically disabled. If they value certain personality traits, those with different traits are (at least arguably) mentally/emotionally disabled. (Thus, if the employer claims to want workers who are more cheerful, he may discriminate against those who could be described as depressed; if he wants employees who are less irritating to those they interact with, he may avoid hiring narcissists, paranoids, and the borderline personality disordered.)

Kelman, *Market Discrimination and Groups*, *supra* note 20, at 873-74 (footnote omitted).

The politically-contingent mutability of the “status-group” concept makes me wary of relying on whether people *think* they are engaged in socially impermissible group-based discrimination to ascertain some objective feature of their behavior.



broader categories than we should have. That is, prejudice *is not* pure racial prejudice against blacks as we historically understood it; it is a mix of ethnic and racial prejudice against African-Americans rather than Africans, or racial prejudice against *dark-skinned* blacks. Anti-lesbian homophobia was understood as directed against women who have sex with other women when it is “actually” (at least now, possibly always) against “butch lesbians.”<sup>40</sup>

Obviously, it is also important to ask whether the traits that form the basis of intensified prejudice or exclusive prejudice within the historically subordinated group are present *only* in the historically subordinated group or are *merely* disproportionately represented in the historically subordinated group. However, one must concurrently recognize that there are *severe* problems in conceptualizing whether the *same* trait really exists across groups in a world in which “groups” are socially salient.<sup>41</sup> Thus, although socially encoded as “bitchiness” when present in females, it is a tough question whether female “assertiveness” really exists in males. By the same token, whether any non-African-American kid can dress “like” a black kid, even if he puts on precisely the same clothes, is also a tough question. It may be more plausible to say that a white kid can dress like an African-American hip-hop kid than to say that a man wearing a dress is “behaving” precisely as a dress-wearing woman, rather than to say that one is “cross-dressing” and the other is not. Still, it is not entirely plausible: the white kid’s *form* of voluntarily outgroup-identified anti-authoritarianism signaled by dress is not precisely the

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40. To the degree that a norm prohibiting race discrimination tolerated discrimination against dark-skinned blacks because dark skin does not equal “race,” and because the discriminator was perfectly tolerant of a subgroup of lighter-skinned blacks, the norm seems patently underinclusive under most plausible factual scenarios. But thinking about situations in which it would not seem underinclusive is, of course, a good way of sharpening our sense of what makes discrimination wrongful: to the degree that some particular putative defendant’s prejudices against those with dark skin were completely idiosyncratic—akin to a distaste for those with cowlicks or hair parted in the middle—we might think it tolerable. The putative plaintiff would not even be deprived of the wanted good (unless the provider had the sort of monopoly power that historically gave him common carrier obligations that would preclude *any* differentiation), let alone face the special personal harms associated with being the object of socially sanctioned discrimination (in terms of bolstering negative images) or helping to create social castes or undue segregation. It is a contingent social fact that prejudice against those dark-skinned blacks would create personal stigmatic injury and social castes in much the same way that discrimination against the whole group of blacks would, while discrimination against those with parts in the middle by a particular seller or employer would be mere social noise in the allocation of goods, services, and jobs.

41. This is the key *critical* contribution in Yuracko, *supra* note 34.

same as the African-American kid's form of nonassimilated anti-authoritarianism.<sup>42</sup>

Those who think it reasonable to set aside the question of whether it is meaningful to talk about pan-group traits generally ask two questions designed to revitalize the notion that we can talk about discrimination "because of status." The first question is whether the treatment of the "same" trait is affected by group membership. That is, as a statistical matter, is there an interaction effect between trait and status? And even if the trait is treated uniformly negatively,<sup>43</sup> is the trait devalued *because* of its association with the group? Consider a standard example in this view: we will find prejudice because of homosexuality even if only the subclass of "effeminate" gay men face prejudice, so long as "effeminate" straight men are treated less harshly. Alternatively, this view holds, there is prejudice "because of homosexual status" even if all straight or gay effeminate men are treated equally badly, if the devaluation of effeminacy is inseparable from its association with homosexuality, especially if the trait is disproportionately present in gays. I am willing to concede that the first inquiry may work in a subclass of cases in which the putative defendant cleanly identifies the devalued trait that he acted upon and the trait has no cultural specificity. There is no doubt that while it might be acceptable to fire employees who are tardy for work, it is unacceptable to fire all tardy black employees but not tardy whites. However, figuring out how it works when assessing more ambiguous traits less likely to have clear cross-group correlates is far harder: I believe that in a race-defined and divided culture, no white job applicant can have the same "difficult" attitude about dealing with "white" authority that a black applicant can have, even if both white and black applicants could be generally described as *sharing* a "problem with authority."

The second inquiry is, at core, one into deep internal motivation that will never yield passably clear answers. The employer who fires all workers who let their pants sag may or may not care more about sagging because it is associated with black youths, but in a world where race is salient, we will never really be able to rule out the possibility that his

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42. To the degree that groups have anything resembling a set of recognizable cultural practices, *labeling* behavior without regard to its culturally-suffused *meaning* will be difficult. So, Samoan public housing tenants in Hawaii were late with rent because they spend their scarce funds to give wedding gifts or attend weddings of kin. We can say that a non-Samoan tenant might have had the *same* bad excuse for nonpayment (going to the wedding of a second cousin), but unless we know what meaning these family or kin obligations have, it is hard to say that the action is the same in terms of the sense of obligation or "voluntariness" of the nonpayment. For a fuller discussion, see Richard Lempert & Karl Monsma, *Cultural Differences and Discrimination: Samoans Before a Public Housing Eviction Board*, 59 AM. SOC. REV. 890 (1994).

43. In other words, there are no interaction effects between trait and status.

judgments are “infected” by racial meanings. If he does care more, the discrimination against the behavioral trait is to some extent discrimination because of race or racial prejudice.<sup>44</sup>

Oddly, perhaps, the nature of the second problem with identifying discrimination with decisions made “because of” status is ambiguous. I am unsure whether it is better characterized as an ambiguity problem or overinclusiveness problem. In its narrow form, the problem arises when one thinks of the canonical ambiguous case that arises after the enactment of “hate crime” legislation, which proscribes assaults made “because of race.” What if the assailant selects his victim because of race, but not because of racial animus or stereotypes? Consider the case where race is merely a useful identifier. For example, an assailant is in an accident with an at-fault, hit-and-run Asian driver. The assailant sees the driver jump out of his car and enter a bar. The assailant follows him in and slugs the only Asian in the bar. Should one say that because he selected the person based solely on his racial identity, that he therefore assaulted the victim “because of race”?

The case is ambiguous. The phrase “because of race” may be meant to instantiate “with the *motive* of expressing subordinating or other negative attitudes towards the race” or “with the motive to harm members of that group” or it may be read as proscribing only a narrower, conscious goal; that is, when he entered the bar, he was race conscious and used race to select his victim.<sup>45</sup> It is not hard to exclude the “identifier” cases from

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44. One might still argue—as Ford does—that the norm decrying race discrimination is overinclusive unless it is read to forbid merely discrimination because of immutable race. Because the employee can choose not to sag, the fact that he faces a bad consequence that he would not face but-for an attitude that would alter but-for race is beside the point normatively. The strength of the plaintiff’s claim against defendant free action in Ford’s view is dependent upon the fundamental unavoidability of the injury. See Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM / LEFT CRITIQUE* 38 (Wendy Brown & Janet Halley eds., 2002) (criticizing the idea that employer rules are actionably discriminatory wherever they forbid plaintiffs from making choices that express their deep cultural norms).

I disagree. I agree that it is dubious; antidiscrimination norms ought to protect the preservation of “important” subcultural expressions (does *sagging* qualify?). I agree to that the particular plaintiff may never suffer enormous injury if he can avoid injury entirely by making easy behavioral changes. Still, it strikes me that blacks as a group will indeed be stigmatized as part of a lower caste if they come to see that whatever traits are indeed statistically prevalent in their community become the traits that are more generally socially devalued. So I think the problem is an insoluble fact-finding problem, not a conceptual one.

45. The notion that a putative defendant’s actions are taken “because of race” whenever he is race-*conscious* resonates in the tradition that the antidiscrimination

the domain of a norm against discrimination “because of race,” but I suspect that is only true because I have drawn a hypothetical which minimizes “group meaning.” The case, as drawn, does not look much different than a case in which the assailant follows a tweed jacket-wearing driver into the bar and picks him out as the only guy wearing a tweed jacket. As posed, it would be quite odd to say that he assaulted him “because of his tweed jacket.” So *if* we say that this decision is discriminatory because it was made “because of status,” then that definition of discrimination is plainly overinclusive.

Ultimately, it is not fruitful to figure out what it *means* to make a decision to assault because of race, rather than to ascertain why we aggravate punishment for “hate crimes.” Presumably, we are either attempting to identify defendants who reveal more troublesome character or those who cause more harm than the typical assaulter because they are more prone to alarm a community that justly worries about patterned violence when certain crimes occur.<sup>46</sup>

But what if putative defendants select people with a certain status-marker as a method of identifying a statistically common, relevant trait? In this instance we must first limit ourselves to cases in which the trait is in fact statistically common and those in which the stereotype is false. We should also think of traits that are “flattering” and those that are demeaning.<sup>47</sup> Thus, the car dealer offers those customers who are

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regime’s goal is to create a world (or at least a substantial zone of) *race blindness*, a world in which race is no more salient and noticeable than eye color. I share my colleague Rick Banks’s sense that the world in which we live is one in which it is unrealistic to expect race to disappear, *perceptually*, so that we must construct an antidiscrimination regime acknowledging substantial levels of race consciousness. See, e.g., R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001) (assuming that a truly colorblind American society is impossible).

46. For now, it is beside the point that I, and many others, find arguments about both atypical moral character and atypical harm less than overwhelmingly persuasive. Most assaults really do reveal one or another variety of especially loathsome character, and it is not easy to single out racism as the worst character marker. Assaulters regularly cause different levels of “spill-over” harms to people who are not their direct victims, and we generally ignore distinctions in such secondary harms for a variety of reasons.

47. Judgments about what is flattering and what is demeaning are not readily made. Say that the mugger picks out Asian victims walking in his particular neighborhood because he believes them to be richer and more prone to carry cash than others (also assume, for argument’s sake, that he is right if comparing group statistical norms). Is this a flattering judgment or part of a pattern of beliefs entwined with Asian bashing that attributes atypical success to Asians? Might it be demeaning because the belief in this form of “superiority” is so entwined with efforts at group subordination, rather than because the trait, looked at in the abstract, is a negative one?

Think too about the mugger who picks out women because he believes they are less likely to fight back *or* because they are less likely to fight back successfully: I am skeptical that much turns on the question of whether one thinks that women’s relative reluctance to use violence is a virtue or vice, or whether one thinks that relative physical

female and those who are black—customers identified solely on the basis of gender and race—higher prices for cars. The dealer believes that both groups share a relevant trait: neither is likely to shop around for a bargain. Both initial offers and the customer counteroffer prices he will reject are higher.<sup>48</sup> Assume he does this to all women and all blacks and either (a) does it to the subset of men and non-blacks he thinks have the same revenue-relevant trait; or (b) that he has never discovered any dependable nonrace or gender-based price insensitivity signal and thus uses *only* race and gender to signal the willingness to pay higher markups.

At this point, we must look *directly* at the harms those encountering what may or may not be called the dealer's "discrimination" may face. It is simply not possible to ascertain in a vacuum whether this decision is made "because of race or gender" rather than "because of price insensitivity."<sup>49</sup> Certainly, the putative plaintiffs are victimized in the fashion that all subjected to differentiating regimes face: they do not get the good they desire at the best price. They are not, though, subject to the sense that they are held in low regard on account of their status alone. Neither do they experience the associated sense that, in this

weakness is a neutral fact or a charged insult. I am not even deeply convinced that much turns on whether the perception or reality of women's physical weakness is entwined with their subjugation. Finally, I am also not sure much turns on whether either belief is true or not.

48. See IAN AYRES, *PERVASIVE PREJUDICE?* 20-36, 46-55, 72-78, 91-100, 123-24 (2001) (analyzing statistical data indicating that dealers do charge blacks and women more, rightly believing they are less likely to shop around).

49. One of the reasons I believe this inquiry so analytically difficult is that resolving it requires making wholly untenable distinctions between purportedly relevant purpose and purportedly irrelevant motive. This is a big issue, and one I want to set aside. I would note, though, that some would argue that it is the seller's purpose here to harm women and his motive to make more money. Like Binder, I believe that what is described as motive in this formulation is nothing but a more remote intention. See Guyora Binder, *The Rhetoric of Motive and Intent*, 6 *BUFF. CRIM. L. REV.* 1, 5, 47 (2002) (discussing goals as "remote intentions").

This case also demonstrates the impossibility of drawing a distinction that seems critical to those who have argued that the conventional antidiscrimination norm requires cost-increasing steps so long as the decisionmaker has made a decision because of race. See, e.g., Bagenstos, *supra* note 16, at 834, 850-52 (arguing that cleansing one's decisionmaking requires "non-costless" techniques). One simply cannot tell in these cases whether it is apt to describe the decisionmaker as acting because of race or not. The relative acceptability of using race as an identifier of the individual who hit one's car before one assaults him compared to using it as an identifier of an economic trait (price insensitivity) has nothing to do with the second use more transparently violating a norm against making decisions "because of race," but rather, the legal conclusion that the second use is more likely to be dubbed to have arisen from conventional disparate treatment merely instantiates the conclusion that it is more bothersome in consequentialist terms.

particular setting, people with similar status markers face persistent disadvantage regardless of their actual traits. They are not subjected to the frustration of not getting something on the same terms though there is no reason, other than irrelevant ones, that they did not. However, unlike the Asian assault victim in the bar, the customers are hurt not because of an *individual* action that has nothing to do with their race, but because they belong to a social group assumed rightly or wrongly to have certain traits. Moreover, the customers are cognizant that some of these traits, if not unambiguously unflattering or negative, are occasions for social disadvantage. And permitting the seller to think in group terms—even when doing so merely allows him to consider, in this case, neutral and true traits<sup>50</sup>—facilitates a regime in which much thinking about subordinated groups is derogatory and falsely stereotypical.<sup>51</sup>

At first blush, it seems we might be able to avoid thorny inquiries into whether a decision is made because of the putative plaintiff's status by saying that the putative defendant discriminates whenever he allocates a job or good for an irrelevant reason. Thus:

*3. Discrimination can be defined as the failure to give a person a desired good though he has met all the valid prerequisites to receive the good<sup>52</sup> or to put him on equal footing for lottery*

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50. For example, blacks *are* generally less able to shop around and because they are more often captive buyers, a trait that in no way reflects upon them negatively, they are likely to be willing to pay more.

51. We are left with some related questions: for example, is it true that the same dealer who recognizes that blacks are captive buyers will be more prone to think some subset of blacks make poor workers, or will it make other employers more likely to do so if “racialized” categories are acceptable in economic life? Will the failure to intervene to forbid using group markers make eradicating both the statistically false and the subordinating generalizations more difficult, even if the particular dealer can sort out benign from malevolent uses of both false stereotyping and bothersome statistical discrimination?

52. To map this up to conventional legal categories, most disparate impact suits have this form. It is possible that disparate impact doctrine was dominantly motivated by the desire to *prove* disparate treatment (treatment “because of race”) in cases in which there was inadequate direct evidence of race-motivated treatment. It is also possible that disparate impact suits were dominantly meant to evade the thorny problem of characterizing employer reactions to traits associated with, but not identical to, status as either race-infected or neutral (we need not decide whether the employer would have had the same negative reaction to a certain syntactical or grammatical style but-for the race of those who use it if we decide instead that insisting upon “mainstream” syntax or grammar disproportionately harms blacks and is unrelated to performing job functions). But it is most plausible that the disparate impact cause of action instantiated the belief that the failure to receive meritocratic treatment was adequately harmful to justify legal remedy. However, disparate impact law assumes we will not proscribe the nonmeritocratic treatment unless a group is adversely affected: even if the high school diploma is irrelevant to success for *any* employee of Duke Power and even if a single black plaintiff without such a diploma can demonstrate that the diploma is irrelevant to success, we will not ban its use if blacks and whites are burdened proportionately. So we may believe that we need to end practices that create needless social inequality, or believe that

*allocation of the good if it cannot be distributed to all who are qualified.*

I want to set aside an issue I have discussed at some length in the past. Even if *all* people who do not receive a good or an equal lottery chance at a good are discrimination victims, we might only give legal protection to plaintiffs from historically subordinated groups who face discrimination thus defined. It follows that a qualified black person rejected from a job has a cause of action; a straight white male rejected though equally qualified might not.<sup>53</sup>

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“merely” irrational practices without adverse impact on groups will not ultimately frustrate any applicant’s longer-term prospects of being treated meritocratically because he should be able to find some equivalent job in another setting if he is merely facing a practice that is in error. For a further discussion of the “administrative” point, see *infra* note 53.

53. Simply tracing the reasons we believe putative plaintiffs are injured helps us see why this is the case. For instance, if the white applicant is rejected for *idiosyncratic* reasons (whether the idiosyncratic distaste a particular employer has for certain real but job-irrelevant traits, for example, his astrological sign or random error in assessing his actual virtues or an overworked personnel department never read certain parts of his file), we would expect that he would not even be deprived of the desired good. Multi-actor markets, without state intervention, are unlikely to generate systematic rejection of those who were idiosyncratically rejected; blacks are far more likely to face persistent devaluation whether we can satisfy ourselves that the particular employer rejected the black applicant because of race or not. Moreover, rejected Capricorns are not likely to feel that the employer is reminding them of the more general social derogation of his talents, nor do we fear the creation of segregated communities if Capricorns do not get *particular* jobs that match their talents or get service at a particular establishment when they can pay for it. What is trickier, for reasons that take little imagination to work through, is what to do about more patterned, but nonracialized, widespread market irrationalities that will likely correspond to *class* markers: should white males be protected against job-irrelevant rejections based on “bad grammar” or tattoos?

Still, one must acknowledge Ford’s view that to protect blacks from all job requirements that a court thinks mindless not only has the problems I discuss in the text—that courts may not know what really is and is not properly job-relevant—but gives more protection than we need to avoid personal stigma and social castes. So long as blacks face job requirements with which they *can* comply (for example, *stated* dress codes that they might not comply with if they did not have to), no involuntary castes will be created. I am skeptical, both because I think many of the job requirements will be too amorphous to comply with (most are implicit requirements about “attitude”) and because the possibility that employers in a race-divided world will keep shifting requirements, devaluing a moving set of targets grounded in their perception of whatever the current manifestation of nonassimilated black culture is, makes it unavoidable that blacks will get the standard message associated with categorical group racism: whatever you are (in the dominant group’s perception) is precisely what is no good.

It is worth noting that I am not clear whether an applicant who is rejected because of “random error” in assessing her actual qualifications (rather than distaste for a correctly perceived but irrelevant trait) *is* a victim of discrimination in this sense, because she might be described as someone who in fact had an appropriate *lottery* chance at getting

I also want to set aside another significant issue I have discussed on several occasions. It is extraordinarily difficult to ascertain when someone has met “reasonable prerequisites” for a job, though it is ordinarily more transparent when customers have met the far thinner qualifications to be served by a public accommodations owner.<sup>54</sup> This is true not merely in a technical sense (given the difficulty in measuring output in group production situations) but also because the theoretical status of what are referred to as *reaction qualifications*<sup>55</sup> is so difficult to ascertain. What is most critical to note, however, is that one good way of exploring my intuition that the simple discrimination norm’s affirmative view (*P* is entitled to market-rational treatment) trumps the negative (*P* wins only if he failed to get something because of a bad reason) is to think about how *easy* the “trait discrimination” cases become when “qualifications” are actually readily established. Whenever there is a strong and easily defined affirmative entitlement (for example, customers able to pay and behave nondisruptively deserve service at a restaurant), we see quickly that the canonical antidiscrimination norm is not really negative but affirmative (you must be inclusive to people with *X* traits). Thus, while it may be a difficult employment law case when an employer excludes only “black English” speaking blacks, it is an easy public accommodations case that he cannot exclude “black English” speakers. This is true *solely* because we know that speech is an irrelevant virtue for customers but not for workers, not because we are more certain that the public accommodation owner is “really” a “racist” rather than some sort of speech purist.

While the norm forbidding employer discrimination directly regulates employers only, I have argued that it normatively extends to workers’ “true employers,” or the customers for whom the people who hire workers should be understood to serve merely as agents.<sup>56</sup> Thus, the

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the job. Maybe the problem is simply a procedural or burden-of-proof problem: should we make the employer prove that the qualified, rejected applicant was merely misassessed in some random way? Moreover, the *compliance costs* of forcing defendants to correct “random error” are enormously high, whether they are borne before (in a more exacting screening process) or after the fact (in defending or revisiting negative hiring decisions). The high costs seem especially unreasonable because plaintiffs gain so little: there is no reason to believe any particular plaintiff will even be deprived of a good he seeks over a relevant time period when his qualifications are merely randomly misperceived.

54. “Eligibility” for housing is probably an intermediate case, modestly closer to the public accommodations case.

55. See Alan Wertheimer, *Jobs, Qualifications, and Preferences*, 94 *ETHICS* 99, 99-100 (1983) (defining as “reaction qualifications” those qualifications that depend on how a customer or coworker relates to the employee, and asserting that reaction qualifications are crucial to a wide spectrum of jobs).

56. In the vast bulk of cases in which Jolls and Stein claim that the antidiscrimination norm forces employers to bear real social costs—like Bagenstos, they often use the term *sacrifice profits* though those contrasting the accommodation and



reason that an employer cannot refuse to hire a black or woman merely because his customer base prefers to deal with men or whites is that doing so would permit the “true employers” to refuse to do business with the applicant, even though the applicant had the valid prerequisites to perform the functions the customer legitimately sought. What I have emphasized in the past is that *if* the customer is implicitly regulated by an antidiscrimination regime that explicitly governs the employer, and *if* the antidiscrimination *norm* forbids refusing to deal with those who are *qualified*, then we need to determine when a customer’s adverse reactions bespeak the worker’s lack of qualifications and when they bespeak this form of discrimination.<sup>57</sup> We know that restaurant customers are entitled to insist that waiters promptly bring the right food. The tougher question is whether they may also legitimately value obsequiousness, conventional stuffy manners, and physical attractiveness, even if doing so has a disparate impact on protected group members.<sup>58</sup>

What I want to focus more on are situations in which customers *directly* devalue status, rather than traits which have disparate impacts on distinct protected status groups. I do so because it calls into question the claim that rules requiring employers to ignore customer preferences actually extend the antidiscrimination regime to customers. That question, of course, is closely tied to one of this conference’s themes: whether

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antidiscrimination norms are interested in the distinct forms of costs that must be borne in integrating an establishment, not the profits earned by any given putative defendant—lost revenues that arise from bigoted customer preferences are at stake. Most others are either administrative costs, information costs, or transitional costs. Each cost would disappear in a world in which the putative plaintiff’s true economic traits were known, in which there would be no prior history of discrimination, or in which the putative defendant sought to comply with the demands of the antidiscrimination regime. This is not true for a putative plaintiff in an accommodation case, so to the degree that *part* of what injures a putative plaintiff about discrimination is the sense that his own personal economic virtues are ignored, the accommodation case plaintiff will be less injured. See Bagenstos, *supra* note 16, at 848-50 (emphasizing cases of statistical discrimination in which no individual *known* to be as productive as a member of the favored group is excluded); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 686 (2001) (customer preference cases); Stein, *supra* note 16, at 620-22 (citing customer preference cases and cases of statistical discrimination that raise issues of imperfect individualized information).

57. That is, refusal to deal despite the presence of qualifications.

58. The demand for obsequiousness might have disparate impact on blacks, for instance, given the possibility of black resistance to reenacting obsequious social scripts that have long, ugly racial histories. The demand for “attractiveness” may have an adverse impact on older workers or workers with disabilities given prevailing norms of beauty (whatever the source of these norms).

people have the right to engage in what most would concede is discrimination.

I have three stylized cases in mind. In the first case, female patients at a medical clinic substantially prefer to use female OB/GYNs. In case two, white patients at a clinic with a predominantly white client base prefer to use white and Asian doctors because they believe, for conventionally racist “reasons,” that blacks and Latinos are less competent.<sup>59</sup> In case three, the white patients at the same clinic strongly believe that standardized test scores are the best measures of aptitude, and further believe that affirmative action programs have led to an atypically high proportion of blacks and Latinos with low test scores getting medical degrees. These white patients are thus wary of going to non-white, non-Asian doctors.

Now, imagine four stylized legal responses: (a) The employer (the clinic) need not hire applicants that patients are reluctant to see, regardless of the patients’ reluctance; (b) The employer must hire any applicant, regardless of customer preferences, so long as that applicant has the same job qualifications as the other doctors hired. However, the employer need not direct patients to doctors they do not want to see, and a doctor’s pay may be tied to how many patients she serves; (c) The employer must hire all equally nonreaction qualified candidates. It cannot direct patients to see doctors they are reluctant to see, but it must establish a pay scheme that is either divorced from patient service levels or adjusts for “illegitimate patient refusals to deal”;<sup>60</sup> or (d) Not only

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59. Other equally racist reasons include discrimination because the patients are averse to seeing blacks or Latinos in positions of obvious authority, or because they are averse to being touched by black and Latinos, believing them to be of some “lower station” in life.

60. I recognize, but essentially set aside, how difficult it would be to administer a legal rule that purported to squash commission systems when and only when distinctions in the commissions earned by different social groups were a function of customer prejudice. There are two obvious and enormous administrative problems. First, even if the court could *recognize* that commission-based pay disparities between groups were solely a function of customer bigotry, the remedies (either forbidding commission-based systems or mandating bonuses for members of the historically subordinated group) are intrusive. Second, fact-finding would be extremely difficult: disentangling the degree to which, say, women failed as salespeople because of prejudice rather than competence or effectively focused effort at a job with an inexactly defined skill-set would be no easy task.

It is clear that commission-driven pay differences between protected and nonprotected group members are currently valid. *See, e.g.,* *Diamond v. T. Rowe Price Assocs.*, 852 F. Supp. 372 (D. Md. 1994) (upholding a compensation system based on quantity or quality of work). It is also worth noting that empirical evidence suggests customers may treat blacks and whites who deliver services differently: for instance, black cab drivers appear to receive lower tips from customers of all races. *See* Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 *YALE L.J.* 1613, 1627 (2005) (providing statistics which explore the difference in tipping of drivers of different races).

must the clinic hire and provide equal pay to those with the same nonreaction qualifications, but where possible the clinic must assign patients to qualified doctors regardless of patient preferences. Obviously, the clinic cannot force patients go to the doctor, but it can be legally required to impose significant search and waiting costs on patients with certain racist reactions. Obviously, we would not demand that clinics take this last step unless we believed that the antidiscrimination norm covered patients to some extent.

The loose utilitarian will ask certain questions about these hypothetical cases and remedies. First, even if we believe that the antidiscrimination norm fully extends to customers, why differentiate among these purely status-oriented, reaction qualifications? For instance, what is driving the shared intuition that women seeking female gynecologists are behaving the most permissibly, that those who think blacks and Latinos are categorically unqualified are behaving least permissibly, and that those who engage in race-based statistical discrimination with certain forms of job quality indicators are intermediate cases?<sup>61</sup> The woman seeking a female gynecologist plainly violates the antidiscrimination norm (though perhaps justifiably) *if* the norm is defined in terms of gender-conscious decisionmaking.<sup>62</sup> However, she less plainly violates the norm if we think that male doctors are entitled only to jobs for which they are qualified and that femaleness is a permissible reaction-qualification for the job.<sup>63</sup> Or, we may believe that the judgment about whether female patients may choose female gynecologists always instantiates judgments about how allowing and forbidding her to make that decision impacts putative plaintiffs, putative defendants, and third parties.

Second, even if we believe that the customer's reactions are most plainly unacceptable (for example, pure status-oriented racism of the "blacks are not competent" or "don't want to be touched by a black doctor" form), we may believe either that the customers' interests in nonassociation are strong enough that we will do little to induce unwanted association

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61. Readers most skeptical of the validity of tests will think them close to the status-oriented racists; those most favorable to standardized tests will think the behavior more benign.

62. Though once more, it might be worth noting the "trait-based" reinterpretation: she is not interested in a woman doctor, she is interested in a same-sex doctor in order to avoid a certain sort of privacy intrusion, and all such doctors happen to be women.

63. For example, in the same way that it would be plainly treated as a qualification for an acting job in which one must play a female character.

or that the putative plaintiffs' interests are adequately vindicated by remedies directed only at the employer.<sup>64</sup>

Any judgment that female patients should be entitled to select female gynecologists is nothing more than the vector function of the relevant interests. On one hand, even a preference-laundering utilitarian believes that the putative defendants' privacy gains and the increase in which they will effectively disclose medical problems are substantial. At the same time, the possible effective exclusion of *all* men from doing OB/GYN work would likely have only modest impact on those who lost an opportunity (given the capacity to substitute other subspecialties), little impact on men's general capacity to fill socially powerful roles in a fashion that would threaten the capacity of men to maintain adequate social standing, and little stigmatic impact either on the rejected individual doctors or on men who learn of the rejection. The most stigmatic interpretation of the rejection—that either the particular rejected doctor or men generally are sex-obsessed creeps who treat even gynecological exams as occasions to sexualize an interaction—is likely counterbalanced by less stigmatic interpretations that the women simply seek privacy and conventional modesty.<sup>65</sup> Obviously, one could treat the female patients' associational "rights" as even stronger: we could either believe that the *customer's* right to discriminate (even if based on the purer forms of sexism or racism) is absolute, or believe that it is absolute so long as the defendant has some *good* reason to engage in what would otherwise be seen as discrimination under two definitions (differentiation, decision because of gender). However, in either case we would ignore whether or not the putative plaintiff is especially injured by the decision.

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64. It is an interesting question, which I will largely set aside, whether an employer-focused remedy directing equal pay regardless of customer service *really* permits customers to continue to act on illegitimate preferences. Even if the legal regime does not *order* that the clinic make it difficult for clients to manifest race or gender preferences, the clinic will surely be given strong incentives to do so if it must pay doctors with few patients as much as it pays those with many patients.

65. Compare this to a case in which the male clinic patients refused to see women physicians, so long as the physician would make *any* contact with their bodies or see them undressed. Unless women patients had a symmetrical aversion to all male doctors, this taste would interfere both with individual female doctors' desires to get a job of a certain broad form and, given the social esteem in which the job is generally held, would interfere with women achieving "caste" equality with men. Moreover, it is hard to know whether the hypothesized male preference is stigmatizing or not, both because ascertaining whether it is motivated by something more akin to modesty or by distrust of women's competence or distaste for women in positions of authority is difficult and because, even if motivated by distaste for physical exams from women, it is hard to know whether one can disentangle this preference from two plainly stigmatizing beliefs, namely that women are unclean and even if women are technically *competent* doctors, women's touch should be reserved for sexual situations given women's normatively predominant sexual role.

The argument for treating the customer's associational right as more absolute, that is, without regard to the impact on the plaintiff, could be grounded in deontological theory, but it could also rise from the idea that putative plaintiffs get adequate relief if the institutional actor—the clinic employer in this case—ignores individual customer preferences when making hiring and perhaps pay decisions.<sup>66</sup> The theory that they get enough so long as they get the job title and money plainly emphasizes certain aspects of the antidiscrimination regime. These are the aspects that emphasize the individual plaintiff's access to a desired good and to some degree his and the group's access to immediately visible aspects of social prestige and status. However, this theory put little emphasis on other aspects such as freedom from derogatory communication and access to the aspects of status less associated with material rewards. So, the black doctors who idly sit at the clinic, drawing a check while the white patients refuse to see them, are hardly freed from degrading communications. Blacks, as a group, continue to live in a world in which such degrading beliefs maintain an undue measure of social respectability.

What about the possibility that the customer's right is absolute, not because plaintiff claims are adequately vindicated if we regulate the employer, but because customers, unlike business owners, should simply be free to do business with whom they choose? The best argument for this position finds common ground with arguments against utilitarianism generally, narrowed to view the arguments as persuasive accounts why we should limit the domain in which we think utility-maximization is a proper decision rule. Here is a narrow reading of the attack on the utilitarian preference for universal agent neutrality: although it may be appropriate for a public official to choose to invest in equal-cost infrastructure that saves two lives rather than one, a mother need not save two kids who fell out of a boat at the expense of her own drowning child. As a mother, she is entitled to take her own positional, agent-relative interests seriously. We legally instantiate this intuition by

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66. As I have noted, if the employer must not only hire underutilized male gynecologists but pay them commensurate with fully-booked female gynecologists, the legal regime will almost surely interfere with the factual capacity of women to choose female gynecologists since the clinic will, to avoid financial losses, make it difficult for patients to select their doctors. I also noted that while there is substantial legal authority that the clinic cannot use certain customer preferences to justify failures to hire (though it may use customer preferences for bodily privacy or unadorned sexual titillation), there is no authority that it cannot establish pay schemes, like commissions, that differentiate pay based on customer preferences.

saying that she has a right to free action when it comes to saving her kid. As such, many of the classic deontological “rights” meant to be good against social welfare claims can be seen as protecting the legitimate preference for a partial viewpoint, a viewpoint that treats the intense interest in and preference for one’s own life and the life of those with whom one has special relationships as legitimate.

In a related fashion, regulating the employment market may be done using the same welfare-maximizing “principles” used in allocating safety infrastructure expenditures. However, imposing a decision rule on individuals that requires them to maximize welfare (assuming that the rejected black doctor, and blacks more generally, will gain more than the patient loses if the patient is “forced” to be treated by a competent person, though racism prevents her from acknowledging such competence) is to deny them the capacity to treat their own sense of comfort and confidence as primary. Put differently, this denies them appropriate partiality.

Though of clear weight, I ultimately find the argument unpersuasive though I will not detail why here.<sup>67</sup> However, it is worth noting that if we think of agent-relativity as appropriate in particular restricted domains, that (a) utilitarians can offer plausible second-order rule-utilitarian explanations of why it is bad for each actor to act as a utilitarian calculator on particular occasions; and (b) that *convincing* pleas for agent-relativity all involve agent-relative preferences we wish to encourage (strong attachment to one’s children) rather than those we discourage (irrationally devaluing black doctors’ competence). There may be contingent welfarist arguments that we should not pressure people to deal with doctors they do not want to deal with—assuming the reluctance is *actually* recalcitrant and people will forego highly valuable medical care—but they are not arguments that question whether customers are in fact obliged to allocate the relevant good (their patronage) to all those possessing requisite qualifications, especially when their illegitimate judgments about job quality have an adverse impact.

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67. If the argument is at least partly correct, then Bagenstos is correct that the employer’s associational interests are just as powerful as the customer’s associational interests. See Bagenstos, *supra* note 16, at 881-82 (arguing that libertarian interests in free association are strong). However, what this suggests is not what he thinks it does—that the conventional civil rights regime requires sacrifices from putative defendants no different from those required of defendants asked to accommodate—but that in each case, a civil rights regime should tailor its remedy to account for the *distinct* interests of all affected by a particular rule. Thus, the fact that every imaginable sort of defendant has “an interest” in free action does not mean they have the same interest or as strong an interest. If, for instance, we think the customers’ associational interests radically exceed those of “the clinic,” then we might try to protect customers from limitations on their choice of doctors, while protecting (some of) the plaintiffs’ interests by protecting them from commission-based pay schemes.

To the extent that we identify discrimination's chief *harms* as failure-to-satisfy-the-qualified in terms of its stigmatic impact on individuals and in terms of constructing social caste, we must immediately wonder whether there is any reason to distinguish the conventional antidiscrimination norm from an accommodation norm. Certainly, it would be possible to *define* the accommodation norm so as to demand lottery distribution of jobs and goods.<sup>68</sup> Obviously, though, the accommodation norm's ordinary articulation (mandating only *reasonable* accommodations of those applicants who are *qualified* if accommodated) suggests both narrower obligations and a narrower conception of the problems antidiscrimination law is meant to address.

4. *A person discriminates by refusing to accommodate (at no charge) an employee or potential employee if the employee's gross output (but not her output net of accommodation costs) is equal to that of nonaccommodated employees (or discriminates against a customer if he will not serve the customer at conventional market prices when all that differentiates the customer from other customers is the higher cost of serving her that results not from her "tastes" for distinct goods or services but from her status-based "needs").*

There is a debate I will only advert to briefly about whether accommodation norms can be distinguished from either of the prior two antidiscrimination norms. The debate is somewhat ambiguous; three of the most renowned legal academic advocates who suggest that the norms are fundamentally indistinguishable (Stein,<sup>69</sup> Bagenstos,<sup>70</sup> and Jolls<sup>71</sup>) move, at times imprecisely, between the claim that there are no interesting *descriptive* distinctions between situations that call for accommodation and those in which the plaintiff will be included if not faced with conventional discrimination and the claim that although the demands are descriptively distinguishable, they are of equal, and fundamentally indistinguishable, *normative* force. Then, assuming that the accommodation norm demands that defendants take factually distinct steps from the steps

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68. For example, an employer could be said to be asked to do no more than accommodate an "unqualified" applicant by giving her an aide that effectively did his job, or paying him without regard to his contributions to firm profitability.

69. Stein, *supra* note 16.

70. Bagenstos, *supra* note 16, at 830.

71. Jolls, *supra* note 56, at 686.

they take if governed only by the antidiscrimination norm's theory two or three, I will briefly investigate what harms plaintiffs facing (conventional) discrimination face which nonaccommodated plaintiffs do not. Further, I investigate what legitimate interests defendants have in resisting accommodation demands that those resisting demands to stop simple discrimination do not have. I will then discuss the common harms and sources of defendant resistance.

Those of us who believe that the second and third antidiscrimination norms differ from the accommodation norm highlight several analytical distinctions and make descriptive predictions based on these analytical distinctions.<sup>72</sup> Fundamentally, what distinguishes the putative antidiscrimination defendant from the putative accommodation defendant is that the accommodation defendant's private attitudes and beliefs are fundamentally irrelevant to the costs of accommodation while these attitudes are essentially *all* that is relevant in any truly pure antidiscrimination case. The plaintiff-defendant dyad is crucial in an antidiscrimination suit; it is relevant in a true accommodation suit only to the degree that we believe that the defendant has atypical expertise in supplying accommodations.<sup>73</sup> Secondly, the cases are distinguishable to the degree that one adopts a modernist rather than strongly postmodernist view of the constraints on social institutions. To the extent one sides with hyper-postmodernists that all constraints are socially constructed in the relevant sense—what drives the relative difficulty of accomplishing two ends is merely the social actor's willingness to accomplish it in only one particular way, and the decision to favor one resolution is largely a function of the social power of those favored by one resolution—one believes that all accommodation costs are a function of a *decision* to organize production or distribution of goods in a fashion that makes it

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72. In order to take on what he thinks of as the harder challenge, Bagenstos identifies what I refer to as simple discrimination with the second ("because of disability") norm. See Bagenstos, *supra* note 16, at 833-36. However, I have always plainly stated that defendants be subject to a more demanding requirement, encapsulated in the third version of the norm, that they cannot exclude a person with a disability unless it is "capitalistically, impersonally rational" to do so. This leaves no room for the use of facially neutral, but economically nonprobative non-job-related qualifications that victimize members of all "outsider" groups. Thus, in my view, job applicants with dyslexia cannot be legitimately excluded by a nonpredictive reading requirement or by nonpredictive job tests, without regard to whether the requirements are proxy covers for ontological discrimination.

73. And, even then, the question of whether it is reasonable for the "expert" defendant to *pay* for an accommodation whose *cost* is not attributable to anything special about the defendant remains a difficult issue. This is so unless one believes, as I do, that compensating the defendant interferes with his incentives to accommodate in the most cost-effective fashion.



more costly to employ or serve “outsiders.” The modernist view is that this is simply wrong-headed Utopian romanticism.

Although it is plausible that more inclusive equal-cost production methods could become available,<sup>74</sup> it is also contingently plausible that this is not the case, or not the case in any time-frame relevant to decisionmakers who should instead treat the costs as fixed.<sup>75</sup> Maybe

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74. This contingent possibility is *extremely* significant in the actual practice of overcoming the exclusion of people with disabilities. Here is how I put this point in *Market Discrimination and Groups*:

It is clearly one of the real achievements of the disability rights advocacy movement to demonstrate repeatedly that the failure to grant accommodations is in fact a form of simple discrimination because the accommodations are not in fact nearly so costly as bigoted or ignorant employers believe they will be. More generally, civil rights groups will invariably note the degree to which socially powerful actors mistake difference for inferiority.

... [Moreover,] [a] person may be less productive (in the employment context) or costlier to serve (in the public accommodation context), *given* the defendant’s current mode of organization. If, though, the defendant is forced by legal fiat to employ the worker or serve the customer, it might have the capacity to reorganize in such a way that net product or net receipts equalize.

Kelman, *Market Discrimination and Groups*, *supra* note 20, at 877 n.71.

75. Stein, alone among the critics of the antidiscrimination-accommodation distinction, plainly recognizes this point, though his view that the failure to engage in a “reasonable” accommodation cannot be meaningfully differentiated from a failure to engage in a wholly costless one seems transparently analytically unsound. *See* Stein, *supra* note 16, at 602, 641. Stein, though, also gives much more explicit positive attention to what I am describing as the postmodernist view associated with the “social model of disability” proffered by the “disability studies movement.” *See id.* at 599-602, 640-45.

Bagenstos is more ambiguous. There are plainly points at which he states that there are “real costs” associated with accommodation, and that his only point is that the refusal to bear these costs is not normatively distinguishable (at either the level of wholly individualized morality or, more relevant, in terms of an individual morality whose contours are dictated by an awareness of the social consequences of conduct) from the refusal to stop engaging in classic discrimination. *See, e.g.*, Bagenstos, *supra* note 16, at 830, 836, 869-70. At other times, he falls into the “postmodernist trap,” failing to make or notice descriptive distinctions in the mechanisms that lead to exclusion, most importantly by ignoring the significance to the plaintiff of the defendant’s identity and tastes. For example, Bagenstos states that “[t]he employer [in an accommodation case] is the only party in a position to dismantle the structure of occupational segregation . . .” *Id.* at 870. The statement—true of a discriminating employer—is patently untrue of a nonaccommodating employer unless (a) that employer has unique expertise in constructing appropriate accommodations, like retrofits that increase access for mobility-impaired customers; *and* (b) the employer will waste social resources constructing these if compensated to do so. I believe that these conditions sometimes obtain and justify uncompensated accommodation requirements, but the notion that one can assume that they always obtain them, as a logically entailed feature of nonaccommodating putative defendants, is indefensible.

dyslexics can do some subset of reading-heavy jobs as effectively as nondyslexics, at the same cost, if we decrease the amount of reading in the job or use text-to-voice software to assist slow readers; maybe not. In digging ditches, maybe people with bad backs can compete with those with healthy backs because digging machinery is cheap enough to compete with manual labor; maybe not. Maybe there are reliable substitutes for visual inspection that would permit blind workers to perform all inspection tasks as cheaply as sighted inspectors; but maybe not.<sup>76</sup> The predictive lesson, of course, is that all things equal, free entry and competition will *tend* to undermine simple discrimination while it will *tend* to make efforts by a subset of employers to accommodate unstable. Globalization and unregulated competition would make any single nation's mandated accommodation regime less stable unless others adopted the regime, just as it would make the private imposition of simple discrimination more difficult.

It might be easiest to think about “dyads” and “social construction” by moving outside antidiscrimination theory and thinking instead about problems of “coercion.” Imagine three situations involving young competitive swimmers and their relationships with their coaches. In all cases, the swimmers would like to skip predawn practices. But in each of the three cases, the coaches tell them that they can only choose between choices (2) and (3), though each would prefer (1).

Case One. *Fast Swimmer*: Her preference order is: (1) Swim faster + no early practices. (2) Swim faster + early morning practices. (3) No early morning practices, no improvement in her times.

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76. I confess it is possible that I first came to the view that antidiscrimination and accommodation norms were plainly distinct in the special education context, a context in which advocates for dyslexic pupils did *not* really urge an equal-cost reorganization of education or social reordering that would minimize the significance of reading skills. Rather, what the advocates sought was smaller classes taught by more trained teachers that would permit dyslexic students to gain reading skills. No one questioned that this involved the choice to use more resources, otherwise readily transferable to other pupils, for the subset of disabled students. Similarly, advocates for blind students did not claim it was as cheap to communicate the details of complex diagrams (for example, body parts in anatomy texts) through description by paid readers as it is to communicate them with drawings to sighted persons; moreover, the claim was not that drawings gained currency simply because a world dominated by sighted persons had used the method that benefited the sighted. In my view, it is a proper use of resources to permit a blind student to get the information in the anatomy diagram if he is able to absorb it, but the idea that it merely “appears” to cost resources because we assumed a world of sighted persons is baseless. The demands were plainly and unambiguously thought to differ (factually, if not necessarily in moral force) from a demand to stop excluding disabled students from mainstreamed classes because of the distaste of teachers or other pupils. Further, noting that even a regime that merely insisted on forbidding distaste-based exclusion would also be resource costly (for example, because of administrative enforcement, information, or transitional costs) would not make the underlying distinctions disappear.

Case Two. *Fastest Swimmer*: Her preference order is: (1) Win races + no early practices. (2) Win races + early morning practices. (3) No early morning practices, lose races.

Case Three. *Please the Coach Swimmer*: (1) Keep her coach + no early practices. (2) Keep her coach + early practices (the coach disrespects swimmers unwilling to get up early to swim because they do not seem to care enough about the sport, or about pleasing him). (3) No early practices, lose her coach.

What is crucial to note is that in determining whether she “must” go to predawn practices, neither swimmer in case one or two is in a significantly dyadic relationship with her coach. In each case, she may well feel constrained and unable to get what she most wants, but the coach is doing nothing but informing her of a constraint he does not control. Cases one and two differ in the sense that needing to practice at ungodly early times to *win* races is to a greater degree socially constructed. That is, if *no* swimmers practiced so much, she could possibly beat the other, moderate-practice swimmers.<sup>77</sup> Note that the coach plays no interesting role in either case. Compare this to the third case, where the swimmer’s beef is with the coach (and where we traditionally begin to think some about problems of “coercion” as well as problems of constraint).<sup>78</sup> The coach is not only the main source of her disempowerment,<sup>79</sup> but his judgmental statements are potentially wounding (for example, she is lazy or undevoted).<sup>80</sup> The parallels to the

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77. It is important to remember also that the fact that her “need” to practice early is socially constructed and contingent does not make it *bad*. It may or may not be a good thing that the young must trade off sleep for competitive swimming success; however, it is plainly not inevitable. I think that those of us with a modernist disposition believe that the connection between swimming faster and practicing more is not a contingent one.

78. I am suspicious that it is *useful* to think about the problem of coercion separate from the problem of constraint and power, because an undue focus on coercion’s special problems misleads us into ignoring remediable problems of undue constraint whenever the constraining party has no independent legal or moral duty to undo the constraint. I discuss problems of coercion at some length in Mark Kelman, *Thinking About Sexual Consent*, 58 STAN. L. REV. 935, 964-71 (2005).

79. He could lose his power as well if he is costlessly replaceable by other coaches with distinct preferences about swimmer behavior (just as a racist employer would do nothing of economic consequence to rejected black applicants if each employer were perfectly, costlessly replaceable).

80. It is an interesting question whether the putative plaintiff is injured when coerced (or subject to discriminatory preferences) simply by the forced reminder that power hierarchies exist. That the coach’s preferences determine her options is a brutal reminder that he enjoys power over her; the fact that one must swim early to swim fast

accommodation cases are rather transparent. Of course, we would most prefer to sacrifice no output when we hire a disabled worker who requires accommodation, but if the employer tells us that we cannot have what we most prefer, he is nothing but a messenger.<sup>81</sup> But if he refuses to deal with disabled workers or patrons, he bears an atypical relationship to the frustration of both the disabled plaintiff's desires and our desire to insure social exclusion without economic sacrifice. If the employer shifts or restrains his preferences, or if he is replaced by a different, less bigoted employer, the disabled plaintiff is no longer socially excluded. Moreover, his desires communicate all the nasty messages we do not wish the plaintiff to hear.

Of course, there remains a "contested" bad message whenever a putative defendant refuses to accommodate: that the employer and a "society" that refuses to order accommodation does not value the

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tells her nothing about her place in the social power hierarchy. The accommodation-discrimination parallel is fairly obvious: the discriminating employer's refusal to deal because of his preferences enacts his relative social power while the nonaccommodator is merely a medium for the message that cheaper and more expensive ways to produce the widgets exist.

81. The fact that he bears no special responsibility for our inability to get our fondest wish does not mean that we will not impose on him a legal obligation to get us to our next best preferred position. (Our next most preferred position may often be that we sacrifice some goods that the particular defendant might otherwise be able to produce in exchange for higher levels of social inclusion for workers with disabilities.) In MARK KELMAN, *STRATEGY OR PRINCIPLE?* 8, 126 (1999), I argued that we may *sometimes* impose an accommodation duty on a particular private defendant, even though we think she bears no special *moral* responsibility for the plaintiff's exclusion. This is so because she will deliver accommodation services more cheaply than any other provider could, but only if she is forced to provide them without being compensated for their cost. A vital observation flows from this view of why we impose an accommodation duty on private defendants who did not create the need to accommodate. Whatever one makes of my argument that the duty not to engage in discrimination because of status or to fail to allocate goods to which people are entitled applies to individual customers, the duty to accommodate almost certainly does not. If an employer refused to hire an applicant because it would cost the employer's customers more to deal with the applicant, they could plainly do so (though they might be bound to eliminate those costs at the institutional level). In my view, this is not because the duty to discriminate does not run to customers, but because the duty to accommodate is not coextensive with the duty not to discriminate. Think back to the medical clinic case: the *clinic* might be obliged to provide a sign interpreter that would permit a deaf doctor to communicate with her patients, but even if we think we should do what we can to impel patients to go to the deaf doctor if communication is facilitated, the patients would and should not be required to pay more to provide a sign interpreter.

However, I can think of almost no situations in which we would not want the discriminating defendant to provide inclusion. First, it is not only invariably cheapest for her to shift her preferences without compensation (if we pay people to restrain their racism or disability-phobias, they will falsely claim bad attitudes or, worse, develop them). Second, we have preference-laundering reasons to discount the defendant's gains. And, finally, what we return to discuss in the text is that the pure discriminator gives worse messages and interferes to a greater extent with the plaintiff's most legitimate desires to be treated justly.

excluded plaintiff's inclusion as much as it values the foregone goods. Equally obvious, we *do* value whatever the standard discrimination case's plaintiff gains from inclusion over whatever psychic income the discriminator gets from discriminating. Because "goods" have value only because they generate "psychic income," the cases could never be utterly conceptually distinct.<sup>82</sup>

However, conceptual distinctions may be doing little work if we are trying to distinguish among putative plaintiffs' *injuries* or putative defendants' legitimate interests. I have already briefly adverted to the reasons that the discriminator's interests may be less worthy of protection in discrimination cases by discussing how "loose utilitarianism" may blur into more classically deontological theories and will thus simply review these reasons hastily. First, we may disbelieve claims or have trouble distinguishing true from false claims when defendants claim that they have been injured when forbidden to discriminate. It is hard to know if discriminators really experience psychic loss from "forced association," and if so, how much, while the losses accommodators experience from foregone production have readily measured market prices. Second, we may believe as long-term utility-maximizers that we should discourage people from developing certain negative preferences because their development will lower aggregate social utility.<sup>83</sup> A rule that allows public accommodations owners to exclude a patron, grounded in the idea that he genuinely finds the patron distasteful, empowers and encourages those with bigoted tastes.<sup>84</sup> Finally, and most powerfully, there is the moralism of straight-out preference-laundering.<sup>85</sup>

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82. That last sentence probably represents a good quick summary of the *overlap* between my position and the position taken by Bagenstos. See Bagenstos, *supra* note 16, *passim*.

83. For instance, envy may be a counter-utilitarian preference. If each of us could be encouraged to gain utility when others consume, rather than see our own utility positions worsen, aggregate utility would rise.

84. There would be less perverse incentive to "develop" bigoted tastes if nonassociation rights, contingent on higher levels of distaste, were not capable of being waived. If they can be waived, of course, "fake" bigots will charge those who face their fake bigotry to waive exclusion rights.

85. These borderline utilitarian/deontological arguments seem entirely consistent with the arguments made on the distinction between unprotected spite fences and fences built with some other consumption purpose. If we are deciding *whether* a fence is a nuisance (using something like a Learned Hand cost-benefit formula), we may despair that we can calculate the true intrapsychic gains that annoying one's neighbor really brings, while a fence used to muffle sound or block light may increase the (easily observed) market value of the fence owner's property. Moreover, if spite fence owners

Considering the distinct ways in which “discrimination” and “nonaccommodation” injures putative plaintiffs is more interesting. Obviously, many of the injuries are the same. This is true not only in the most trivial sense that each putative plaintiff does not get something he desires, but in the far more relevant sense that the widespread prevalence of either traditional discrimination or nonaccommodation leads to a highly segregated, hierarchical society. Groups will not only be separate, but it will be clear that some groups occupy less esteemed positions.<sup>86</sup>

The difference revolves around the questions of how putative plaintiffs define *merit*, how they define *irrationality* and *animus*, and how they experience the distinctions between having desires frustrated for bad reasons only, for reasons that seem merely adequate, and for perfectly acceptable reasons. At core, my suspicion is that the person seeking accommodation will recognize that the discriminator’s reluctance does not come from the bad reasons that drive the theory two discriminator or even the unacceptable reasons that drive the theory three discriminator.<sup>87</sup> Instead, he and the accommodation resister share

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are protected (but can waive the right to construct the fence) only if they feel considerable spite, more people ought to develop considerable spite, though it is destructive of social welfare to do so. And finally, most obviously moralistically, there seems to be little reason to protect people precisely because of their bad traits. Rather, we want them to change, and if they are unwilling to change, we hardly feel like rewarding them for being who they are.

Moralism may be even more transparently present when the putative defendant acts as a surrogate for a social planner, as he arguably does as an employer. Employment markets may allocate resources to meet “socially legitimate” demands. In this regard, think about a standard criminal justification case raising parallel issues, in which the putative defendant’s status as social representative is even more transparent: two defendants violate general laws against speeding or running red lights. One claims justification because he is rushing a heart attack victim to the hospital, the other because he truly gets an enormous charge out of speeding, scaring others, making them reenact in real life the chase scenes he loves in the movies. Now of course we may disbelieve the second would-be justifier’s claims that he gains as much hedonically as we all gain when a heart attack victim is rescued, and we may believe that to allow recklessness when one develops enough of a taste for it encourages a welfare-reducing set of tastes. However, I think what is even more apparent is that the criminal defendant invoking a justification defense is not speaking on behalf of himself: his claim is that the legislature enacted a rule in generalities (it is *usually* a bad idea to speed and run lights), but that the general rule is inexorably inaccurate, *by the legislature’s own lights*. The legislators *want* him to speed if he was carting the heart attack victim to emergency care: he invokes the defense because he is the immediate decisionmaker, not because his particular tastes are of any great moment.

86. I believe the accommodation norm, at core, is dominantly a norm designed to desegregate in the relevant fashion. That is why, I argue, it is far harder to understand how an individual abstracted from a socially salient group identity could make a viable accommodation claim, though it is far easier to understand an antidiscrimination regime in which we had no knowledge of social groups or fear of castes. This is the critical point in Kelman, *Market Discrimination and Groups*, *supra* note 20, at 834, 836-37.

87. *See supra* Part III.

similar preferences for tangible goods that neither prefers to sacrifice. At the same time, the nonaccommodated putative plaintiff will feel frustrated by the failure to recognize merit that he would not feel were he frustrated simply by his inability to do the job capably. I think the standard intuitions on merit—as well as the associated feelings of injustice and injury that come when merit-based claims are breached—are complex in a market economy. As I have long noted, I do not think there is absolute identity between one’s sense of relevant “skill” and one’s net marginal product. Instead, people suppose their “talent” or “skill” is manifest in their gross output, ignoring distinctions in input costs, so long as the “special” inputs that they seek are not especially helpful to others.<sup>88</sup>

#### IV. CONCLUSION

We are injured whenever we do not get the things we want, and further injured when we lose out in some way other than in a lottery distribution. People who distribute the “goods” we want (for example, service at a store, jobs, companionship, whatever) have a variety of reasons to distribute to some people and not others. Sometimes, we figure injuries may be high,<sup>89</sup> but we think these injuries to plaintiffs are

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88. See Mark Kelman, *Concepts of Discrimination in “General Ability” Job Testing*, 104 HARV. L. REV. 1157, 1204 (1991).

What I suspect actually supports intuitions that there is a difference between output capacity and net-value-added capacity is the ill-defined sense that the worker actively produces output, while her added input costs are passively caused by her peculiar status; in the absence of activity there can be no merit. Alternatively, there may be a sense that the job from the employee’s perspective is to produce output; if the employee does that as well as the next person, she is as good as the next person at the task that has been set for her. Capital costs are somehow the concern of the employer. If one sees merit as metaphorically measuring performance in a contest or race, employees with equal outputs seem, perhaps, to have “tied” in the race, as long as the added equipment that only one contestant requires does not bolster her capacity to run faster. Contestants in a race are almost surely considered equal, even if one is wearing more expensive orthopedic shoes, as long as the expensive shoes would not have benefited all other contestants as well.

*Id.* For further discussions of when and why accommodations may be needed to permit a putative plaintiff to demonstrate her merit rather than being taken as a signal that she is less meritorious, *ceteris paribus*, than those who do not require accommodations, see MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE* 164-80 (1997).

89. For example, there may well be nothing more wounding at the individual level than being rejected for a really *good* reason, though rejections for good reasons will not create (though they might well *re-create*) social castes.

outweighed because putative defendants typically have strong, legitimate interests in rejecting for good reasons. Other times, injuries are substantial, and the gains to discriminators seem small. This is particularly the case when the gains are measured by loose utilitarians suspicious of both atypical and malevolent preferences.<sup>90</sup>

One can see that injuries are fairly context sensitive. Even the simple pain of being deprived of a wanted good (over time) may depend on whether the particular putative defendant has unique control over a resource or a relatively commonplace basis for rejecting the putative plaintiff's wish. Also, depending on the mode of discrimination, the stigmatic injuries both to the rejected plaintiff and to those who feel that they could have been in the plaintiff's shoes differ subtly. Core cases of racist animus and stereotyping create a distinct stigma from core cases of irrationality. In turn, nonaccommodating defendants who compromise the plaintiffs' sense that they have been treated in accord with "merit" or with sensitivity to their inclusion in civil society produce yet another sort of injury.

I am skeptical that the second and third norms fundamentally cover "institutions" rather than individuals, and one can investigate that intuition by looking at whether it covers customers as well as employers. Individuals will often be free to discriminate, because we think the short-term utility balance suggests that they should,<sup>91</sup> and sometimes because we believe that the individual should be free from the stringent demands to act as an impersonal utilitarian calculator. In the case of nonaccommodation, in which we wisely choose to make a social investment in desegregation and anticaste destigmatization, it would be rational if the polity generally funded the needed expenditures or if private institutions best suited to efficiently provide accommodation services funded them. It is hard to imagine any situation in which isolated individuals, like customers, ought to bear accommodation costs.

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90. Ultimately, I cannot overemphasize the degree to which the "welfarist" case for an antidiscrimination norm rests to a considerable extent on varieties of preference-laundering, whether it is "pure," grounded in the inability to ascertain the sincerity of claims of "outlier" tastes, or grounded in moral hazard arguments.

91. For example, it is just too hard to be married to someone you do not want, whatever the reason you rejected them.