

Why Not Regulate Private Discrimination?

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I. INTRODUCTION

In the United States, individuals have the legal right to choose their friends, spouses, and many other sorts of associates on whatever grounds they like. No law forbids them from discriminating in these choices on the basis of race, gender, religion, sexual preference, or any other traditionally “suspect” category. Moreover, most people seem to believe that individuals *ought* to have the legal right to discriminate in these ways.¹ Morally, we might find a person who chooses friends or spouses only from among a certain race to be anything from shallow to

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1. This is the case, I believe, even when we view the discrimination as morally wrongful. Thus, throughout this essay, I will use the term *discrimination* to refer specifically to morally wrongful discrimination.

repugnant. But this moral condemnation of her conduct does not affect our judgment that she ought to have a legal right to engage in it. Thus, even while we make a moral judgment condemning her conduct, we make another moral judgment that legal institutions ought not punish it.

Things are different in the world of commerce. Many employers are forbidden from discriminating in their hiring practices on the basis of race, sex, color, religion, and national origin.² For current employees, promotion and pay decisions are also subject to federal antidiscrimination regulations. And many of the ways in which businesses are forbidden from discriminating against employees or potential employees also extend to their treatment of other groups. For instance, the Federal Civil Rights Acts³ prohibit racial discrimination in independent contractor relationships and bar businesses that are deemed public accommodations from discriminating against customers on various grounds. Not only are federal and state laws prohibiting discrimination within businesses ubiquitous, but they are also generally the subject of moral approval. Most people make the moral judgment that laws *ought* to exist barring businesses from discriminating in these sorts of ways.

In this Article I examine the disparity between attitudes toward regulating private discrimination and those concerning the regulation of what I will call “commercial” discrimination. My hope is to find a theory that can simultaneously *explain* these divergent attitudes by providing an account that fits the various aspects of our legal practices and our attitudes toward them, and *justify* those practices by providing an account that makes the divergence attractive from a moral point of view.⁴ I focus on an explanation of the disparity that is grounded in three different sorts of considerations: differences in our epistemological access to private and commercial discrimination, different effects these forms of discrimination have on their victims, and differences in the relative importance of the value of autonomy at stake. I conclude that while considerations of autonomy provide the best explanation for the disparity in attitudes toward the legal treatment of discrimination, they still fall well short of an explanation that completely fits and justifies our current practice. The account I defend is thus *revisionist* in that it will

2. For an overview of employment discrimination law in the United States, see THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 3-11 (2001).

3. 42 U.S.C. § 1981 (2000).

4. Throughout this paper, I will generally use the terms *explain* and *explanation* in a broad sense, referring to an account or the provision of an account that both fits and justifies a practice in the senses described above, reserving use of the terms *justify* and *justification* for those instances where I want to place special emphasis on the moral evaluation of a practice or attitude. The task of this project, then, is to look for an explanation that plays the role of an *interpretation*, in Dworkin’s sense. See RONALD DWORKIN, LAW’S EMPIRE 45-86 (1986).

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suggest that for our practice toward discrimination to be a coherent whole, it must be modified in significant ways. Specifically, I suggest that the disparity between our current legal treatment of private versus commercial discrimination is based on what I believe to be a mistaken belief about the greater importance of autonomy in the private realm than in the commercial sphere. Because this belief is mistaken, a practice designed to consistently respect the value of autonomy ought to differentiate less between private and commercial discrimination, either by regulating the former more heavily, or by regulating the latter less heavily.

II. EPISTEMOLOGY

One possible reason for regulating commercial and private discrimination differently is that the former might be easier and less costly to detect than the latter. This approach leaves open the possibility that both forms of discrimination are equally wrong from a moral point of view. The decision not to prosecute individuals for private discrimination is made not on the grounds that such discrimination is not wrongful, but rather on the grounds that the epistemic hurdles to discovering such discrimination make it a poor target for legal regulation.

There are several things to be said in favor of this argument. First, *any* kind of discrimination, whether private or commercial, has the potential to manifest in a great variety of forms, and this can make its detection difficult. One individual might choose friends of only a certain race, while another might have friends of all races but treat those friends in subtly different ways depending on the race to which they belong. Some individuals will discriminate consciously, perhaps even proudly, while others might be surprised to learn that they are discriminating at all. The fact that discrimination can take so many shapes makes it difficult to know what to look for, and this means that the epistemic hurdle is already set fairly high for *all* types of discrimination.

But private discrimination does set additional epistemic barriers to regulation, for it often manifests in the most intimate choices of an individual, choices about which the individual alone may have information, and which she is not typically called upon to justify to others in any sort of written or documented form. The reasons for an individual's choice of romantic partners, for instance, are often and at best known only to that individual. She is not called upon to provide any publicly accessible record of her choice; indeed, she might not

discuss the reasons behind her choice with anyone at all, her romantic partner included.

This private context stands in stark contrast to the way certain economic decisions are made in large corporations, especially hiring and promotion decisions. In these decisions, two factors tend to make the detection of discrimination easier. First, more people tend to be involved in commercial decisionmaking. The bureaucratic structure of corporations generally entails that more than one person will be involved with, or at least have knowledge of, decisions that significantly affect the interest of the corporation. The more people that have knowledge of discriminatory decisions, the more sources of information investigators will have. Second, corporate decisions often leave a “paper trail” at which investigators can look to determine whether discrimination occurred. Hiring decisions, for instance, involve at a minimum the resumes and other documents submitted with each candidate’s application. They might also involve emails between key decisionmakers, records of meetings held to discuss the candidates, and similar sorts of documents. Of course, discriminatory corporate decisionmakers are unlikely to document the fact that they rejected a candidate’s application on wrongfully discriminatory grounds. Nevertheless, even if the documents do not provide any explicit statements of discriminatory intent, they can support a prosecution by providing evidence of the candidates’ objective qualifications for the job, records of features considered (and not considered) by the decisionmaker, and so forth. This sort of hard evidence makes prosecution of discrimination in the corporate context much easier than it would be in a case involving private discrimination.

The difference in the law’s stance toward discrimination in large versus small places of employment provides a final point in support of the claim that epistemic considerations are what distinguish the legal treatment of private discrimination from the treatment of commercial discrimination. While federal law prohibits discrimination by large employers, it does not prohibit such discrimination by small employers.⁵ The kinds of epistemic considerations I have been discussing provide a plausible justification for this disparity. Hiring decisions made by small employers are more likely to involve a single person than those made by larger employers. Furthermore, the bureaucratic requirements of documenting and justifying decisions are likely to be less of a factor for small employers. If a single person is in charge of hiring decisions and is not required to maintain any documentation of the reasons behind her decisions, investigators are likely to have a difficult time establishing that wrongful discrimination has taken place in all but the most blatant

5. 42 U.S.C. §§ 2000e(b), 2000e-2(a) (2000).

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cases. On this argument, then, small employers are thus legally free to discriminate for the same reason that private individuals are—because it would be too difficult to gain the information necessary to prove their discrimination in a court of law.

However, for all there is to be said in favor of epistemic considerations as *one* factor distinguishing the legal regulation of commercial and private discrimination, I do not think we can conclude that they are the *sole* factor for at least four reasons.

First, epistemic considerations cannot be the only reason for the absence of legal regulation of private discrimination because the same epistemic considerations pervade other areas of private life which *are* subject to legal regulation. The most obvious instances in recent history are the prohibitions imposed by many states against sodomy, even when it occurs within the privacy of the actor's own home.⁶ The fact that it is extremely difficult for the state to gather information about the occurrence of sodomitic acts was no obstacle to their ban, and arguments about such considerations appear to have played little or no role in the repeal of such statutes when they have been repealed.⁷ Further examples of laws prohibiting difficult-to-detect behavior can be multiplied indefinitely: drug use, various forms of tax evasion, polygamy, and so on.⁸ For better or for worse, the law's ignorance seems to be no deterrent to its taking action.

Second, while it is certainly true that it is difficult to gather information about *some* forms of private discrimination, there are many instances of private discrimination about which information is readily available. Some individuals are outspoken about their racial, religious, or other biases. Some even go so far as to document their biases in writing. Epistemic considerations would present little barrier to the legal regulation of at least these more overt forms of discrimination.

The third reason epistemic considerations cannot be the sole grounds for differentiating between commercial and private discrimination is

6. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 187-88 (1986).

7. *Lawrence v. Texas*, 539 U.S. 558 (2003), for instance, is based almost entirely on the liberty interest of individuals to control their intimate lives, and makes no mention of the sort of epistemological considerations discussed here.

8. Laws regulating or prohibiting difficult-to-detect consumption or trade of certain opiates and narcotics, for instance, exist at the state, federal, and international levels. See, for example, the Harrison Act of 1914, ch. 1, 38 Stat. 785, or the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, S. TREATY DOC. NO. 101-4 (1989), 1582 U.N.T.S. 164.

simply the flip side of the second. Not only is private discrimination sometimes easy to detect, but commercial discrimination is often difficult to detect. Proving discriminatory intent, or even adverse effect, can be difficult, especially in an era where managers have been exhaustively socialized to be sensitive to the wrongness of discrimination and are likely to take great pains to cover their tracks should they engage in discriminatory behavior.⁹

Finally, the idea that disparate legal stances toward private and commercial discrimination are based on epistemic considerations alone depends on an incorrect assumption about the purpose of law. Lack of epistemic access to a type of behavior might be a definitive reason to not legally regulate that behavior *if* considerations of effective enforcement were central to the justification of legal regulation. But while such considerations might be important, they are not central. Legal regulations can serve an important role, even if they are very difficult to enforce, by sending a message to the public that they ought not engage in a certain behavior.¹⁰ For most individuals most of the time, receipt of this message will be enough to give them a reason not to engage in the prohibited behavior, regardless of the likelihood that their disobedience would be successfully detected and prosecuted. It is therefore arguable that this expressive, or communicative, aspect of law is even more central to our understanding of law's function than the enforcement aspect. Thus, the fact that private discrimination is not legally regulated cannot be adequately explained by epistemic difficulties, for by regulating private discrimination, the law could effectively send a message of disapproval regarding such behavior, regardless of whether its regulations could be effectively enforced. That it chooses not to do so must be explained by other considerations.

III. EFFECTS ON THE VICTIM

If the disparity between the legal regulation of commercial discrimination and the complete lack of regulation of private discrimination cannot be explained by epistemic considerations, perhaps it can be explained by differences in the way these types of discrimination affect their victims. In other words, perhaps the reason that commercial discrimination is regulated while private discrimination is not is that the former causes more serious harm to its victims than the latter.

9. See HAGGARD, *supra* note 2, at 59-107, for a discussion of these difficulties.

10. See, for example, H.L.A. Hart's discussion of the way in which enforcement of the criminal law via prosecution is indicative of a failure of the law to perform its primary purpose of guiding and controlling life outside of the courtroom. H.L.A. HART, *THE CONCEPT OF LAW* 38-42 (2d ed. 1994).

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Commercial discrimination causes two distinct sorts of harm. The most obvious harm, and the most obvious ground on which to distinguish commercial from private discrimination, is a lack of access to a certain kind of good—in this case, the full range of goods provided by commercial exchange. Let us call these *benefit harms*. Someone who is denied a job because of a discriminatory hiring decision, for instance, loses out on the wages she would have earned at that job, the knowledge she might have acquired from the work, and the pleasure of engaging in meaningful work of that particular sort. A firm that is denied a contracting position because of a discriminatory decision is denied the monetary benefits of that position, the opportunity to possibly expand the business, and so on. Customers who are discriminated against by businesses lose the opportunity to buy the products they desire.

The second sort of harm inflicted by commercial discrimination has less to do with the lost benefits of commercial exchanges than with the message communicated by the act of discrimination itself. Discrimination, according to many arguments, is a way of failing to respect an individual—what we can call a *respect harm*. What precisely is meant by this claim will vary with the argument under consideration. What such arguments tend to have in common, however, is that they consider the wrongness of discrimination to be a matter of treating the victim as being unworthy in some respect.¹¹ For instance, some arguments claim that discrimination signals that the actor views the victim as being of a lower moral status—of being less worthy of consideration and care than the agent herself or than other members of society.¹²

However, respect harm only occurs when discrimination is based on what Larry Alexander has called a “bias,” and not all forms of wrongful discrimination involve biases.¹³ Some forms of wrongful discrimination are based instead on prejudices. And prejudices do not necessarily involve viewing the victim as bearing a lower moral status. Instead, prejudice involves judging an individual to possess a certain characteristic based solely on his possession of some other characteristic such as

11. For an example of such an argument, see Paul Woodruff, *What's Wrong with Discrimination?*, 36 *ANALYSIS* 158, 158-60 (1976).

12. Michael Blake, in this volume, claims that some sorts of discrimination can send a message of “social inferiority and internalized shame.” Michael Blake, *The Discriminating Shopper*, 43 *SAN DIEGO L. REV.* 1017, 1030 (2006).

13. See Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 *U. PA. L. REV.* 149, 158-63 (1992).

membership in a certain racial group.¹⁴ Discrimination based on prejudice can still be disrespectful to the victim because it can still convey to her that she is unworthy, but the sense of unworthiness involved with prejudice is more limited. Discrimination based on bias proclaims the victim to be worthy of less moral concern and care because of her group membership. In contrast, discrimination based on prejudice proclaims the victim to be unworthy of the *job* because of her supposed possession of some undesirable characteristic, or lack of possession of some desirable characteristic, for which her membership in the group is evidence.

The case could be made that commercial discrimination creates more serious benefit harms than private discrimination. People need jobs to survive. Travelers need to be able to find hotels that will rent them a room. Being denied an education can set back not only the individual who is denied, but that individual's family as well. Considering that individuals who lose these needed goods due to discrimination suffer in serious ways, it is easy to assume that the costs of personal discrimination are less severe. However, there are three reasons why this is not clearly so.

First, the benefit harms caused by commercial discrimination might not always be as high as I have suggested. The purported harmfulness of commercial discrimination is generally based on the value of the good that is denied. Jobs, lodging, and access to education are undoubtedly important. But the effect of commercial discrimination on a victim depends not just upon the value of the denied good, it depends also upon the available options for obtaining that good elsewhere. A thirsty man's interest in getting a drink of water is not seriously set back by a broken drinking fountain if a working one is just a block away. Likewise, even if the value of a job lost due to discrimination is high, the magnitude of the benefit harm suffered by the victim will be small if another equally good job is available to her. Thus, the degree of benefit harm caused by commercial discrimination depends on how widespread that discrimination is, whether most other businesses discriminate on the same grounds, whether the discrimination takes place in all contexts or only in certain ones, and so forth.¹⁵ As discrimination becomes rarer, the benefit harm of any token of discrimination becomes less severe.

14. See *id.* at 167-74 (referring to prejudicial discrimination as "discrimination based on proxy traits").

15. This point is widely acknowledged in the literature surrounding the wrongness of discrimination. See, e.g., *id.* ("If [discriminatory preferences] are idiosyncratic and variable, uncommon, or context-specific—'I'm uncomfortable around Italians in my private club but not at work'—rather than categorical—'I prefer to avoid Jews in all contexts'—and do not disprefer the already relatively disadvantaged, their adverse social effects may be relatively minimal."). Similarly, Kimberly Yuracko notes that "[i]rrational but idiosyncratic discrimination is less harmful—both to individuals and socially salient

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It is plausible, then, to suppose that the benefit harms imposed by some forms of commercial discrimination are fairly low. For example, if a small employer in a major metropolitan area like Atlanta decides to discriminate against white, Anglo-Saxon Protestants in his hiring, the benefit harm will be almost nil, even if the quality of the jobs he is offering is terrific. As beneficial as the jobs might be, the victims are likely to have numerous other options. Atlanta has many equally terrific jobs, and most employers likely do not discriminate against white, Anglo-Saxon Protestants.

Second, even if the benefit harms imposed by commercial discrimination are more severe than those imposed by private discrimination, it is still possible that private discrimination imposes greater respect harms. There is pressure in a market economy for businesses to base important personnel decisions on factors directly relevant to the maximization of profit, and to base their decisions on *only* such factors. This could lead to employment discrimination against members of certain groups if managers are prejudiced against those groups—if they believe that members of those groups possess certain *other* characteristics that are relevant to their ability to contribute to the firm's profit. This pressure could also cause discrimination due to "reaction qualifications" if managers are concerned about the way in which their discriminating customers or stockholders will react to their employment of members of the group in question.¹⁶ But the effect of outright biases—simple dislike for members of another group—is likely to be checked by the pressure of a competitive market to base decisions exclusively on considerations of profit.

Victims of discrimination in the commercial sphere are thus, *ceteris paribus*, more likely to be victims of prejudice than of bias. And it seems plausible to suppose that to the extent this is true, victims of commercial discrimination will suffer less in the way of respect harms because discrimination based on prejudice does not amount to a lack of respect for the victim as such, in the way that discrimination based on bias does. Job candidates who are rejected because of prejudice are not

groups—than irrational and systemic discrimination." Kimberly Yuracko, *Sameness, Subordination, and Perfectionism: Toward a More Complete Theory of Employment Discrimination Law*, 43 SAN DIEGO L. REV. 857 (2006); see also Mark Kelman, *Defining the Antidiscrimination Norm to Defend It*, 43 SAN DIEGO L. REV. 735 (2006) (describing the context-sensitive nature of the injuries caused by discrimination).

16. See Alan Wertheimer, *Jobs, Qualifications, and Preferences*, 94 ETHICS 99, 99-101 (1983).

rejected because their potential employer views them as less worthy of respect or inherently morally inferior. They are rejected because their employer believes, perhaps falsely, perhaps correctly, that their membership in a certain group is evidence of their possession of some other profit-affecting trait. The rejection is not of the candidate as a person, but of the candidate as the supposed possessor of some undesirable trait.¹⁷ Indeed, it will often be a trait that the victim herself would find undesirable. In these cases, the candidate can possibly find some detachment from the discrimination, and perhaps even partially and imperfectly sympathize with it. Even while offended at being seen as undesirable for the job, it would still be possible for the victim to think, “If I were deciding who to hire and believed that I had evidence that a candidate was lazy, potentially violent, and so on, I would not hire them *either*.”

Thus, even while the benefit harms of commercial discrimination might be greater than those imposed by private discrimination, the latter might impose greater respect harms than the former. And such harms can be significant. The feeling of social isolation that results from private discrimination can be psychologically devastating. This is especially true for children, who are particularly prone to question their own self-worth in reaction to discrimination from their peers, but the effects hold for adults as well. Private discrimination can have a tremendous impact on the psychological well-being of even the most self-assured adults.

As is the case with commercial discrimination, the magnitude of the harm caused by private discrimination will depend on the extent to which the discrimination is widely practiced, in a variety of contexts, and so forth. But the nature of the dependency will often differ. In commercial discrimination, the primary form of harm resulting from discrimination is benefit harm—commercial discrimination prevents individuals from realizing the various goods of commercial exchange.

17. One could, I suppose, push on this argument by claiming that racial biases do not amount to a rejection of the person *qua* person either, but simply a rejection of the person as possessor of a certain racial/gender/religious trait. Does it follow that victims of biases are thus not disrespected? I think not. The traits which the discriminating manager is trying to avoid in cases of prejudice are very often those about which there exists a good deal of consensus regarding their “badness,” such that it is likely that even the victim of prejudicial discrimination will herself view those characteristics as bad and alien to herself. The traits targeted by biases, however, are generally *not* viewed as bad by the people who hold those traits, and are indeed often held to be a valuable part of their personal identity. Thus, if you refuse to associate with me because you believe that I am violent, I will probably at least partially sympathize with your motives, since I share a desire to disassociate myself from violent people. But if you refuse to associate with me because I am black, I will be offended because I do *not* view my blackness as a trait that merits such a response; rather, I view my blackness as part of who I am, and I therefore regard your rejection of my blackness as partly a rejection of *me*, and of a part of me which I *value*.

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Benefit harms can be minimized if there are a variety of alternative sources available from which the victim can secure the benefit in question. But it is not so clear that the respect harms caused by private discrimination function in the same way. A child who is socially excluded by a discriminatory group of peers at school does not negate this harm entirely by finding another group of individuals that will accept her. She might negate the benefit harm of the first group's discrimination—they denied her the good of friendship, but she was able to realize that good elsewhere—but the disrespect they have done to her remains. The harmful stigmatization, or respect harm, that results from discrimination is not merely a matter of being denied access to some good, it is a positive evil that cannot simply be erased by the addition of other goods. The fact that respect harms cannot be “balanced out” by the addition of other goods is one way in which such harms are even *worse* than the benefit harms characteristic of commercial discrimination.

Finally, it is not at all clear that the benefit harms of commercial discrimination *are* indeed greater than those of private discrimination. Glenn Loury, for instance, argues that private “discrimination in contact” can be even more damaging to minorities’ long-term socioeconomic status than the formal “discrimination in contract” that takes place in the commercial sphere.¹⁸ The most compelling reason for thinking that he is right is found in the phenomenon of assortative marriage. Alan Wertheimer, in his contribution to this volume, makes a compelling case that assortative marriage—the tendency of individuals to marry individuals who are like them in certain relevant respects—can, in conjunction with private discrimination of various kinds, yield socioeconomic consequences that significantly affect numerous groups and individuals for generations.¹⁹ This is especially so in a country like the United States, with a long history of racial discrimination against certain minority groups and a relatively high degree of socioeconomic inequality among the relevant ethnic groups.

Blacks, for instance, have a much lower socioeconomic status on average than whites. If, as Wertheimer notes, “blacks and whites married each other without respect to race, in which case most whites would marry whites and most blacks would also marry whites, racial inequality as such would vanish within a generation, although class

18. See GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 95-96 (2002).

19. See Alan Wertheimer, *Reflections on Discrimination*, 43 SAN DIEGO L. REV. 945, 954 (2006).

inequality would remain.”²⁰ However, blacks and whites do not marry each other without respect to race; racial intermarriage between blacks and whites is, in fact, still relatively rare.²¹ The cause of this need not be racial discrimination as such. Persons tend to mate with individuals who share similar cultural backgrounds, educational levels, economic status, and so forth.²² Given that these traits are unequally divided among racial groups, racially assortative mating is likely to occur even without the contribution of racial discrimination. Still, discrimination undoubtedly plays a role, and to the extent that patterns of assortative mating are the result of that discrimination, it is fair to blame private discrimination for at least a part in perpetuating inequality between the races, and all the ills associated with it. These are very serious harms indeed.

I do not think it is plausible, then, to suppose that the difference between the legal regulation of private versus commercial discrimination can be adequately explained by the allegedly greater harm imposed by the latter. For I do not think it is *true* that the harms of commercial discrimination are necessarily, or even typically, greater than the harms of private discrimination.

IV. AUTONOMY

The last, and I believe most plausible, explanation of the difference between the legal treatment of private versus commercial discrimination is based on the idea of a sphere of personal autonomy. On this theory, it is wrong to regulate private discrimination because the kind of activity it involves falls within an area in which individuals should be free to act as they choose, even if their actions are morally wrong. Commercial discrimination, however, and commercial activity in general, falls outside of this protected sphere. Therefore, even if both forms of discrimination are equally wrongful, commercial discrimination is properly subject to legal regulation and private discrimination is not.

Conceptions of autonomy vary greatly in their details.²³ All that is needed for the current position, however, is a basic understanding with

20. *Id.* at 957.

21. *See, e.g.*, U.S. Bureau of the Census Data on Interracial Marriage, <http://www.census.gov/population/socdemo/race/interractabl.txt> (last visited Dec. 20, 2006) (demonstrating that in 1992, interracial marriages in the United States counted for only 2.2% of all marriages).

22. For a classic economic explanation of why assortative mating occurs, see Gary Becker, *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813, 813-46 (1973).

23. *See* John Christman's entry on the topic in the *Stanford Encyclopedia of Philosophy* for a useful overview of the competing conceptions and their relative merits. John Christman, *Autonomy in Moral and Political Philosophy*, in STAN. ENCYCLOPEDIA PHILO. 2-3 (Edward N. Zalta ed., Fall 2003 ed.), *available at*

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which we can say that even when *A*'s discriminatory actions are morally wrong, it would also be morally wrong for the state to prohibit *A* from performing those actions.

The most plausible argument for an understanding of autonomy that protects private discriminatory actions is one based on the individual's *interest* in being free from state regulation of private activity. Such an argument would begin by noting the nature and importance of the interest that individuals have in being free to live their lives without interference. This sort of argument is commonplace in liberal theorizing, and probably found its most persuasive expression in John Stuart Mill's *On Liberty*.²⁴ According to Mill, each individual has an interest in defining the contours of her own life.²⁵ This interest of course encompasses making one's own decisions on the "big issues" of life, such as whether and whom to marry, what sort of career to pursue, and whether and what kind of religious belief and practice to adopt, but it also extends to smaller matters. The seemingly insignificant aspects of everyday life are, after all, the stuff of which the grand themes of a life are composed. Decisions which seem small in themselves—decisions about what sorts of clothes to wear, what to do in one's spare time, what style of speech to use with others—can, in the aggregate, help define one's self-image and the image one presents to others. These are matters of tremendous personal significance.²⁶

The question, then, is whether this interest in individual self-definition entails an interest in the freedom to engage in morally wrongful private discrimination. This question cannot be settled merely by looking at the ways in which people do define themselves as a matter of contingent fact. It is no doubt true as an empirical claim that many individuals define themselves partly in virtue of their wrongfully discriminatory attitudes and behaviors. Klan members and neo-Nazis, to name just two of the most obvious and extreme examples, often derive a large part of their self-identity from their discrimination against others. The question, however, is not whether they *can* do so but whether they have an *interest* in doing so free from state regulation. This question is a moral one, not a sociological one.

<http://plato.stanford.edu/archives/fall2003/entries/autonomy-moral> (last visited Dec. 20, 2006).

24. JOHN STUART MILL, *ON LIBERTY* (1877).

25. *Id.* at 100-32.

26. *Id.*

I believe that a fairly convincing case can be made for an affirmative answer to this question along Millian lines. The argument, like Mill's, is based on skepticism regarding the ability of government regulators to acquire or use the knowledge necessary to effectively regulate wrongful private discrimination.²⁷ This skepticism comes in two forms. The first is a skepticism regarding the ability of potential regulators to correctly identify that subcategory of discrimination that is genuinely morally wrongful. Not all discrimination, of course, is morally wrongful. Discriminating between productive and unproductive employees, for example, or between loyal and disloyal friends, is almost certainly morally admirable, not wrongful. What is it, then, that distinguishes morally wrongful discrimination from morally benign or praiseworthy discrimination? Unfortunately, no clear answer to this question appears to exist. What *is* certain is that there is no one thing that divides all cases of morally permissible discrimination from morally impermissible ones.²⁸ Beyond that, there is little theoretical agreement regarding which features of discrimination are wrong-making, and how wrong-making they are.²⁹ Some believe that the consequences of wrongful discrimination are what make such discrimination wrong, though there is disagreement regarding what those wrong-making consequences are.³⁰ Others believe that the wrongfulness of discrimination is a matter of the wrongfulness of the attitude or intention on which it is based.³¹ Still others are doubtful that many of the paradigm cases of discrimination are even wrong at all.³²

All this disagreement about what constitutes wrongful discrimination exists at the level of theory, but things get even murkier when we move to the level of practice. Even if we could agree, for instance, that discrimination is wrongful when it negatively affects the most vulnerable members of society, it would still be difficult to figure out when this condition is met. And it would often be equally difficult to discern the

27. See *id.* at ch. 2 (arguing that government regulators cannot safely censor false opinions while protecting true ones because they do not know which opinions are true and which are false). The argument I consider in this section is similarly based on doubts about the knowledge of government regulators, but extends the subject of their ignorance in various ways.

28. See Alexander, *supra* note 13.

29. The diverse array of positions advocated in this volume, fourteen years after Alexander's initial stab at the question, are evidence enough of this.

30. See, e.g., Richard Arneson, *What Is Wrongful Discrimination?*, 43 SAN DIEGO L. REV. 775, 790 (2006); Kasper Lippert-Rasmussen, *Private Discrimination: A Prioritarian, Desert-Accommodating Account*, 43 SAN DIEGO L. REV. 817, 817 (2006).

31. See Alexander, *supra* note 13, at 192, saying this is at least part of a correct account of wrongful discrimination.

32. For a qualified version of this argument, see Peter Vallentyne, *Left Libertarianism and Private Discrimination*, 43 SAN DIEGO L. REV. 981, 984 (2006).

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intention of a discriminator with the degree of precision and certainty required for effective regulation. This is especially true when it comes to the paradigm cases of private discrimination that we think the law ought not to regulate. How might the would-be regulator know whether *X*'s choice of mate, religion, or political associates is motivated by impermissible animosity or by legitimate, if eccentric, personal tastes? What sort of investigative powers would be required to find out? And how well can judges and juries make such fine-grained judgments about the morality or immorality of these intimate choices?

There is a second sort of Millian skepticism relevant to the present inquiry. Not only is it unlikely that regulators and enforcers can effectively distinguish between wrongful and non-wrongful discrimination, it is also unlikely that they can arrive at universally correct judgments about the significance of the freedom to engage in discrimination, wrongful or not, in an individual's life. It is possible that discriminatory attitudes and behaviors, while morally wrong in certain respects, nevertheless also serve some morally praiseworthy goals for the individuals who hold or practice them. By allowing different individuals to hold and practice discriminatory attitudes and behaviors to different extents, we allow them as individuals and society as a whole to learn whether particular kinds of discrimination are constructive. The mere moral wrongfulness of an activity does not make it insignificant for an individual's project of self-definition.³³ And if a discriminatory activity *is* significant, we might wish to allow individuals the freedom to engage in it, despite its wrongness.

Those who defend an autonomy-based right to engage in private discrimination, then, can argue that even when such discrimination is not right, from a moral perspective, it need not necessarily violate anyone's

33. The Boy Scouts of America, for instance, discriminate against homosexuals and atheists in their membership criteria. But this discrimination, the ability to exclude, is part and parcel of the ability to define what they *are*, as an organization. From the perspective of the group, this freedom to self-define is part of what makes membership meaningful to its individual members. And from the perspective of a society in which a plurality of such groups exist, defining themselves along a variety of different lines, this freedom is what makes a flourishing civil society possible. On the relationship between freedom of association, discrimination, and civil society, see NANCY ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* (1998). For a detailed case study of the ways in which groups which are morally objectionable in some respects can nevertheless provide valuable social goods, see DAVID BEITO, *FROM MUTUAL AID TO WELFARE STATE* (2000).

moral rights.³⁴ It is proper for the state to use its coercive force to protect people's moral rights, the argument could continue, but not to prevent individuals from acting in a morally wrongful way.³⁵ Indeed, so long as they are not violating anyone's moral rights, we could conclude, individuals themselves have a moral right to be free from coercive interference, so that state regulation of non-rights-violating private discrimination would itself be rights-violating, and thus impermissible.

Still, even if the above argument provides a convincing account of why we ought not regulate private discrimination, this is still only half of what is necessary to draw a *distinction* between the proper legal treatment of private and commercial discrimination. If, for instance, we believe that wrongful private discrimination cannot properly be regulated because it is not rights-violating, why should we not also say that commercial discrimination, while wrong, is equally non-rights-violating? Most arguments that commercial discrimination *is* rights-violating, I suppose, will rely upon claims either about the more serious harms caused by commercial discrimination, or about the lesser interest commercial agents have in the freedom to engage in wrongful discrimination. Part III of this Article considered and rejected the first consideration. A response to the second consideration leads to an evaluation of an argument previously examined in this section—that individuals have an interest in being free to engage in wrongful discrimination—and leads us to ask whether this interest is held by commercial actors as well.

The belief that commercial agents do not have such an interest is, I think, based largely on the belief that the *only* interest commercial agents have, *qua* commercial agents, is profit. This assumption is frequently reflected in the literature on defining "job-relevant characteristics," where the claim is often made that a characteristic is job-relevant if and only if it affects the employer's profits.³⁶ On this assumption, commercial agents do not have an interest in wrongful discrimination except in those cases where engaging in wrongful discrimination can help to maximize profit, and in these cases their interest is simply insufficient to justify the discriminatory acts.

The argument that commercial agents have no interest in wrongful discrimination, or a nominal interest at most, is reliant upon a sharp distinction between individuals in their private capacity and individuals in their capacity as economic agents. In their private capacity, individuals might have any of a variety of goals, aspirations, and projects, and

34. See JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990).

35. *Id.*

36. See, e.g., D.W. Haslett, *Workplace Discrimination, Good Cause, and Color Blindness*, 36 J. VALUE INQUIRY 73, 76-77 (2002).

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therefore ought to be allowed the freedom to act in ways that contribute to their freely chosen self-identity. As economic agents, however, individuals have only one goal—the maximization of profit—and the state may legitimately prohibit or regulate any activity that is not required for this goal, if it can serve some legitimate state interest by doing so. This argument has a certain plausibility to it; a large corporation governed by a board of directors which serves at the mercy of its stockholders might fairly be presumed to have the maximization of profit as its primary interest. Moreover, the cases in which the argument seems *least* plausible are cases where the law makes exceptions to allow for commercial discrimination. For small, family-run businesses, the primary goal might often be something intangible, such as the continuance of a family tradition or the provision of meaningful work for people about whom one cares deeply. Such businesses might well have a multitude of interests other than profit maximization, some of which might constitute an interest in wrongful discrimination. But such businesses, unlike large corporations, are not subject to federal antidiscrimination regulations.

Nor are associations whose primary purpose is judged to be “expressive,” rather than “economic,” subject to such laws. In her concurring opinion in *Roberts v. United States Jaycees*, former Justice Sandra Day O’Connor argued that expressive organizations, such as private clubs, might have the right to discriminate since discrimination might be essential to the expression of their identity and purpose.³⁷ Economic organizations, on the other hand, do not have the liberty to discriminate, because their purpose is assumed to be the production of profit through the provision of goods and services to the general public as customers.³⁸

Although the distinctions between various types of businesses seem to neatly correlate with the law’s stance toward discrimination, we must take care not to exaggerate the justificatory strength of this explanation. First, not all businesses—even large ones—have the production of profit as their primary goal. The goals expressed in a company’s mission statement must be viewed with some skepticism, but there is no doubt *some* truth to some companies’ claims to have a core mission of producing excellence in a certain type of product or strengthening the community of which they are a part.³⁹ It is, of course, a further question

37. 468 U.S. 609, 631-40 (1984) (O’Connor, J., concurring).

38. *Id.*

39. Ben & Jerry’s, for instance, includes in its mission statement a “social mission,” which says that the company aims “[t]o operate the company in a way that

whether the non-profit-related interests of a company entail an interest in the liberty to engage in wrongful discrimination, and it is difficult to see how the relatively benign interests described above would justify such discrimination. But we should not be as quick as is the argument under consideration to assume that this is impossible.

Furthermore, even if most businesses *do* have as their primary aim the production of profit, this is not necessarily something we should wish to encourage by incorporating it into our definition of an economic entity. Part of the *problem* with business activity exemplified in the wave of corporate scandals over the last ten years is that individuals have been too ready to view business as nothing more than a tool for the production of profit.⁴⁰ Arguably, these individuals were *too successful* at divorcing their personal values from their business life, and were too ready to sacrifice or ignore those values in order to make a profit.⁴¹ And while it is certainly true that we should not encourage businesses to govern themselves in discriminatory ways, we should nevertheless also avoid encouraging them to view themselves as entities standing completely detached from the values and projects of the individuals who constitute them. Making room for businesses in which the integration of personal and economic values is accomplished in a good way might mean making room for ones in which it is done badly.

V. CONCLUSION

This Article's quest for an account of the difference between the legal treatment of private and commercial discrimination has been only partly successful. Respect for the value of autonomy appears to provide a better explanation and justification of the disparity than either epistemological or consequentialist considerations. But there are good reasons to doubt that even an autonomy-based account can completely vindicate the current legal practice. That practice seems to presuppose that the value of autonomy is significantly greater in private than in commercial contexts. And it is not clear that this assumption is warranted.

Since the current antidiscrimination regulatory scheme cannot be wholly vindicated by appeal to autonomy or any other plausible values,

actively recognizes the central role that business plays in society by initiating innovative ways to improve the quality of life locally, nationally & internationally." Whether or not one thinks they are successful in this mission, the activities of the company seem to support that they are sincere in their intentions. Ben & Jerry's, http://www.benjerrys.com/our_company/our_mission/index.cfm (last visited Dec. 20, 2006).

40. For a popular discussion of some of these recent corporate scandals and the moral failures behind them, see DAVID CALLAHAN, *THE CHEATING CULTURE* (2004).

41. For a detailed analysis of this divorce in the case of Enron, see BETHANY MCLEAN & PETER EKLIND, *THE SMARTEST GUYS IN THE ROOM* (2004).

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the legal practice ought to be changed. But the arguments that I have provided in this Article leave room for discretion in the direction of that change. That the value of autonomy is not significantly greater in private than in commercial contexts demonstrates that we cannot appeal to interests in autonomy to justify differential regulation. But there are two ways in which we could make regulation nondifferential: we could regulate commercial discrimination less, or we could regulate private discrimination more.

Whether it is more appealing to deregulate commercial discrimination or to begin regulating private discrimination cannot depend solely on the relative value of autonomy in private and commercial contexts, since, as I have tried to show, the interests in each context are not as disparate as has commonly been supposed. Rather, the decision will depend on the *absolute* value we assign to autonomy, and the way in which this value compares with other values at stake in cases of discrimination. How important *is* autonomy as a value, and how does it compare with the negative value of the harms caused by discrimination? I personally assign a fairly high weight to considerations of autonomy, and this pushes me in the direction of regulating commercial discrimination less rather than regulating private discrimination more. But an argument for this belief is beyond the scope of this paper. My goal here has not been to suggest a particular way of resolving the inconsistency between the legal regulation of private and commercial discrimination. My goal has simply been to point out that there *is* such an inconsistency, and that it cannot be completely explained and justified by appeal to any plausible set of values. Our legal treatment of discrimination must change, but it remains to be seen exactly how.

