What is Discrimination?\footnote{For helpful comments on earlier drafts, I am grateful to Ronald Dworkin, Evan Fox-Decent, Barbara Herman, Thomas Nagel, Denise Reaume, Arthur Ripstein, Seana Shiffrin, David Velleman, Jeremy Waldron, Noah Zatz, and audiences at the N.Y.U. Colloquium in Legal, Political and Social Philosophy, the U.C.L.A. Legal Theory Workshop, the McGill Legal Theory Workshop, and the Faculty Workshop at the University of Toronto.}

I.

Most countries have laws at the federal and state levels prohibiting individuals working in the private sector from discriminating against others, at least on certain grounds and in certain contexts. Employers are prohibited from discriminating when hiring, promoting, or structuring the workplace; landlords are prohibited from discriminating in their treatment of tenants; and businesspeople who hold out their goods or services to the public at large are prohibited from discriminating when choosing which clients they will deal with.\footnote{Here, and throughout the paper, I use the term “discrimination” to mean wrongful discrimination.} If an organization does discriminate, then it is generally regarded not merely as having exacerbated inequalities or injustices between various groups, but also as having personally wronged the victims of its discrimination, in a manner akin to a tort: most anti-discrimination laws permit victims to bring personal complaints against organizations for treating them in these ways, and if their complaints are successful, the organization must itself cover the costs of accommodating the victim’s needs.
While the substance of such complaints of discrimination appears obvious to most of us, it is strikingly difficult to offer a principled account of what they involve. What exactly is discrimination? And why is it unjust? More precisely, why is private sector discrimination unjust in such a way as to amount to a personal legal wrong perpetuated by the discriminator against the victim? Why don’t we just treat it as an unfortunate side-effect of pre-existing inequalities and injustices between different groups in society, a problem that it is the state’s responsibility to rectify? There are at least three features of private sector anti-discrimination law that make these questions particularly difficult to answer. The first is a feature shared by anti-discrimination law in the public sector; for it involves a difficulty in articulating what discrimination of any kind involves. The second and third features, however, are particular to private sector anti-discrimination law, and they can make it seem especially problematic from a theoretical standpoint.

3 For several excellent recent philosophical attempts to answer this question, see Deborah Hellman, *When is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008); Matt Cavanagh, *Against Equality of Opportunity* (Oxford: Oxford University Press, 2002); and Larry Alexander, “What Makes Wrongful Discrimination Wrong?” University of Pennsylvania Law Review 141 (1992): 149-219. Cavanagh and Alexander both start from the assumption that what is problematic about any instance of discrimination is the intent with which it is done. For my criticisms of this view, see the latter parts of this first section of the paper. Hellman offers a broadly expressivist account; for criticisms of this type of account, see section III of the paper.

4 Some prominent accounts of discrimination by the state against individuals conceive of it in just this way, that is, not as involving a wrong against individuals, but as involving an injustice between different social groups. See, for instance, Owen Fiss’ Group Disadvantaging Principle, discussed in “Groups and the Equal Protection Clause”, *Philosophy and Public Affairs* 5 (1976): 107-77; Cass Sunstein’s discussion of the origins of the Fourteenth Amendment in “The Anticaste Principle”, *Michigan Law Review* 92 (1994): 2410-2455; and Glenn Loury’s *The Anatomy of Racial Inequality* (Cambridge, MA: Harvard University Press, 2002). My focus in this paper is not on discrimination by the state; and my arguments leave open the possibility that it may be wrong in part because of injustices done to particular groups. But my aim in this paper is to explore a unique feature of private sector discrimination –namely, the fact that it appears to involve a personal wrong by the discriminator against the victim, akin to a tort. And this individual wrong is not best explained in terms of the historical injustices or disadvantages suffered by groups. (I should emphasize, though, that my account does not deny the existence of group injustices; and indeed, my account may help to explain why so many of the groups marked out by prohibited grounds of discrimination have been demeaned or stigmatized).
First, our idea of discrimination depends on a distinction between traits that amount to objectionable bases for distinction or disadvantage, and those that do not. Most anti-discrimination laws contain lists of prohibited grounds of discrimination, such as race, sex, age, disability, or religion; and a claimant must show that the allegedly discriminatory practice disadvantages her because she possesses one of these traits, if she is to succeed. This reflects our ordinary, intuitive sense that what is objectionable about discrimination is not the mere fact that some people are denied benefits that others possess, but the fact that some are denied these benefits because they possess certain traits. It is acceptable to give someone a lower merit raise if she has not been working as many hours as her colleagues; but it is not acceptable if the reason for her having worked fewer hours is that she is pregnant. Likewise, it is acceptable to deny someone a job because you dislike their disheveled appearance; but it is not acceptable to do so because you dislike their turban. But what is it about such traits as “being pregnant” or “wearing a turban” that makes it unjust to disadvantage others because of their possession of them? What is it, in other words, that makes something a ground of discrimination? The answer cannot be these are the traits that are out of our control. For whether one becomes pregnant and what religion one practices are often matters of choice; and appearing disheveled –at least when one is poor-- often is not. Nor can the answer be simply that the grounds are traits that are not relevant to the decisions at hand. It is probably true that a woman who is pregnant will put in fewer

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6 A version of the ‘relevance’ argument I discuss here is of course reflected in the American legal doctrine pertaining to the Fourteenth Amendment, which requires courts to assess the extent to which particular
hours at work; hence her pregnancy is probably quite relevant to an assessment of how productive she will be as an employee in the near future. And if the hiring criteria used by an employer include “looking like an anglophone, in order to put our customers at ease”, then it may be relevant whether a particular candidate wears a turban. The problem here is not lack of relevance to the employer’s own chosen criterion, but lack of relevance to legitimate criteria—which is to say that it is not a problem of relevance at all, but a question of which criteria are legitimate or acceptable for the employer to use under the circumstances. And to explain that, we need more than the idea of relevance. One might be tempted, instead, simply to offer a historical answer to the question of what distinguishes grounds of discrimination. We could, for instance, appeal to the injustices suffered in the past by groups marked out by the grounds. But these historical facts about group injustices cannot on their own explain all of the grounds: what about “age”, for instance? And past injustices that have been done to a group do not necessarily translate into a personal injustice done by this employer to this particular employee, even where this employee is a member of that group.

Furthermore, our answer to the question of why it is objectionable to disadvantage individuals on the basis of certain traits but not others must be consistent with a plausible explanation of why it is not objectionable to do this in cases where accommodating individuals would cause extreme hardship to the organization. Most jurisdictions make a number of classifications are appropriately tailored to their objectives. I do not mean to dismiss this approach with my brief criticisms of the relevance argument; rather, my aim here is to raise questions that illustrate the difficulty of making sense of grounds of discrimination, and in order to pave the way for my own account in the next section of the paper. For a more extensive discussion of the idea of relevance or accuracy of classifications, see Hellman, supra note 3.

See, for instance, the discussions of Owen Fiss, Cass Sunstein and Glenn Loury in the articles cited in note 4.
defences available to alleged discriminators, one of which is referred to in the United States as the defence of “business necessity” and in Canada as the defence of “undue hardship”. I shall use the Canadian terminology in this paper, as it is more general and points more clearly to the function of the defence. The idea underlying this defence is that if there is no reasonable means of accommodating the victim that falls short of imposing excessive hardship on the alleged discriminator, then no discrimination has occurred even if the victim remains disadvantaged on the basis of one of the grounds. It is of course possible to imagine pragmatic justifications for this defence that appeal to values quite distinct from the values that discrimination law is trying to protect (for instance, the value of economic efficiency). But such pragmatic justifications leave us with little explanation of why, when this defence is successfully made out, we tend to think not that the objective of discrimination law needs to be sacrificed because of some other value, but rather that the objective of discrimination law has not been sacrificed because there has been no discrimination in such cases. This means that the task of explaining the grounds of discrimination is more complicated than I indicated above. We need some account of the grounds of discrimination that not only explains why disadvantaging people on the basis of these traits is unjust while disadvantaging them on the basis of others is not, but also explains why it is not an injustice to disadvantage individuals with these traits when accommodating them would cause undue hardship to the alleged discriminator.

A second puzzling feature of anti-discrimination law concerns the fact that, in many jurisdictions, individuals can be found to have engaged in discriminatory treatment even in the absence of any proven intent to discriminate. As long as one’s rules or practices have the effect
of denying some people a benefit by virtue of their possessing a trait marked out as a ground of
discrimination, then they can be found discriminatory; no intent or desire to exclude need be
proven. So, for instance, the Royal Canadian Mounted Police had for a long time a policy
requiring all officers to wear the traditional Stetson hat on ceremonial occasions. This was
challenged in the 1980’s as discrimination against practicing Sikhs, who were unable to wear the
Stetson hat over their turbans. It was not the purpose of the policy to exclude Sikh officers. But
because it had the effect of excluding them given their religious practices, it came to be publicly
regarded as discrimination and was retracted by the R.C.M.P.

Why is this a particular problem for discrimination in the private sector? It is also true of
discrimination against individuals by the state that it can occur without an explicit intent to
discriminate on the part of public officials. But there is no mystery about how the state could be
held responsible in the absence of an intent to discriminate: most of us agree that it is the state’s
responsibility to eliminate certain unjust inequalities, whether or not it deliberately created them.
In the case of private sector anti-discrimination laws, however, the absence of an intent to
discriminate can seem problematic. For how could private organizations be responsible for the
disadvantages suffered by some people as a result of their possession of certain traits, when these

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8Discrimination of the sort that involves one organization wronging a particular individual, but with no
demonstrable intent to do so, is referred to in the U.S. as “disparate impact” discrimination, and in Canada as
“adverse effect” discrimination. The U.K. employs a somewhat different distinction: theirs is between “direct
discrimination”, in which the individual is directly treated less favourably than others because she possesses a
certain trait, and “indirect discrimination”, where the disadvantage to her results indirectly from a facially neutral
policy. The U.K. distinction does not always line up with the North American distinctions; for indirect
discrimination can be intentional, and direct discrimination can sometimes be unintentional.

9 The R.C.M.P. actually changed its policy prior to any litigation on the matter; but the history of this case is
described in a subsequent case that challenged the new policy permitting mountees to wear turbans, Grant v.
organizations did not intend to exclude or otherwise disadvantage these people? As I mentioned earlier, most private sector anti-discrimination laws make the alleged discriminator cover the costs of accommodating individuals, at least up to the point of undue hardship. These costs are not covered by a general public fund devoted to eliminating inequalities; rather, they are treated as the discriminator’s problem. If I convert a building with a long flight of stairs into a cinema and people in wheelchairs are therefore unable to watch my movies, anti-discrimination law treats this as my problem --regardless of whether I intended to exclude people in wheelchairs or not. It is my job to make the cinema accessible, at least insofar as this can be done at reasonable cost; and I am at fault if I do not do so. But why? In what way have I been at fault, if I have not desired or intended the exclusion of this group?  

One response to this dilemma is to claim that in fact, there always is an objectionable motive lurking behind such cases; it is just convenient for litigants not to have to prove it. On this view, so-called “disparate impact” or “adverse effect” discrimination is really just what New Zealand’s early Human Rights Commission Act referred to as “discrimination by subterfuge”: 

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10 Note that I am using “fault” here, and throughout the paper, in the legal rather than the moral sense. So, as I am using the term, it does not imply that the agent is morally blameworthy. He may indeed be; but he need not be morally blameworthy for the same reasons that make his action legally prohibited. My discussion is intended only to address the question of what justifies treating discrimination a legal wrong, not the question of what makes such behaviour morally wrong. So one could pair my account of the legal wrong of discrimination with any number of accounts of what makes discrimination morally wrong —including those that appeal to an agent’s intentions or motives.

that is, it is a malicious or prejudicial motive hidden behind an apparently neutral act or rule.\textsuperscript{12}

But because it can be difficult for victims of discrimination to have access to the evidence necessary to prove these objectionable motives, we often require proof only of differential treatment based on a ground of discrimination, and not of an intent to discriminate.\textsuperscript{13}

This response seems false both to our experience of discrimination and to our understanding of the goals of anti-discrimination law. Many cases of adverse effect discrimination seem poorly described as involving a concealed intent to discriminate. To return to my earlier example of the R.C.M.P., it seems implausible to suggest that the head officers of the R.C.M.P. really did wish to exclude practicing Sikhs. At the time the policy was drafted, there were no Sikh officers. When Sikhs did join the forces, it likely never occurred to those in high positions to think about the impact of the policy on them. And when this was finally brought to their attention, they felt it was regrettable but more important to preserve tradition and uniformity of appearance. Many cases of adverse effect discrimination have this pattern of initially failing to think about a particular group and then finding it too costly or inconvenient to change one’s policies; and this seems quite different from actively seeking to exclude a particular group. Moreover, this view would require drastically curtailing our ambitions for anti-discrimination law. Many countries look to such laws to do much more than ferret out cases of

\textsuperscript{12} Human Rights Commission Act, 1977, s.27 (N.Z). This legislation was subsequently replaced by the Human Rights Act, 1993 (N.Z.), which eliminated the concept of “discrimination by subterfuge” and recognised disparate impact discrimination as a distinctive form of discrimination.

\textsuperscript{13} On this view, disparate impact or adverse effect discrimination functions as a kind of \textit{res ipsa loquitur}. That tort doctrine allows us to treat the defendant’s act in the circumstances as “speaking for itself” and obviating any need for further proof of negligence on the defendant’s part. Similarly, on this view of discrimination, we allow the objectionable consequences to speak for themselves and render proof of ill motives unnecessary.
concealed intentional discrimination: they look to these laws to help combat oppression; to redistribute resources to underprivileged groups; and, most broadly, as the *Canadian Human Rights Act* states, to ensure “that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated”. It may be a mistake to take this expansive statement too literally. But it is surely also a mistake to abandon such lofty goals entirely. We need to see, then, whether there is some account of private sector discrimination that can make sense of it as fault-based without implying that the fault in question is located in the agent’s intent or motives.

The third difficult feature of private sector anti-discrimination laws also concerns the fact that private individuals and organizations can be held responsible for what looks as though it is simply an unfortunate side-effect of an innocent action. But what generates this third problem is not the absence of an intent requirement, but the fact that a substantial portion of anti-discrimination law is structured in such a way as to suggest that discriminators have committed a personal wrong against victims of discrimination, akin to a tort. Most systems of private sector discrimination law use an individual complaints procedure: that is, they rely on individual claimants to instigate legal proceedings against alleged discriminators. And the process is

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15 I do not here take up the suggestion that there should actually be a tort of discrimination, because I take it that this question raises complex issues of institutional design that are not relevant to the more basic philosophical question of what discrimination consists in. It may be, for instance, that given that we now already have human rights legislation that prohibits private sector discrimination, it would be confusing and even unjust to permit claimants also to bring tort actions for discrimination. See, for such an argument, the Canadian Supreme case of *Board of Governors of Seneca College of Applied Arts and Technology v. Bhaduria* (1981) 124 D.L.R. (3d) 193 (S.C.C.). For discussion of whether there should be a tort of discrimination, see Amnon Reichman, “Professional Status and the Freedom to Contract: Toward a Common Law Duty of Non-Discrimination”, *Canadian Journal of Law and Jurisprudence* 14 (2001): 79-132 and the Honourable Louis LeBel, “La protection des droits fondamentaux et la responsabilité civile”, McGill Law Journal 49 (2004) 231 - 254.
conducted throughout as an investigation into whether the claimant has been treated differently from others in a way that amounts to her having been wronged by the alleged discriminator.\(^{16}\) Although carriage of the complainant’s case is sometimes given to a legal body that is acting in the wider public interest, such as a human rights commission, it is still the case that this body’s primary role in the proceedings is to bring forward and resolve what is viewed as a personal dispute between the complainant and the alleged discriminator. And although the claimant’s case often has significant implications for the treatment of a particular group—but the way the claimant proves her case is by showing that a particular policy disadvantaged everyone with a particular trait—the claimant’s aim is still to show that she personally has been wronged. Moreover, many jurisdictions allow for special “dignitary” damages to be paid to the victims of discrimination, over and above the costs of redressing whatever inconveniences or material losses the victims have suffered. These special damages seem to be a symbolic acknowledgment of the fact that these individuals have been wronged. The very structure of private sector anti-discrimination law, then, suggests that discrimination is not what Justice Cardozo might have called “wrongdoing in the air”.\(^{17}\) Rather, it is the kind of wrongdoing that generates a personal claim on the part of the victim, akin to a tort.

\(^{16}\) It is true that many jurisdictions also recognize “systemic discrimination” as a distinct type of discrimination, and that the wrong here involves the persistent disadvantage suffered by a group, rather than the treatment of a particular individual. But this just shows that there are really two different kinds of claims that anti-discrimination law attempts to recognise—claims of groups, and claims of individuals. As I have mentioned, my paper focuses on the claims of individuals. I believe that one flaw of most current anti-discrimination law regimes is that they fail to separate out these two very different kinds of claims, and I hope to do more work on this in future.

\(^{17}\) In *Palsgraf v. Long Island Railroad* 248 N.Y. 339, Justice Cardozo spoke of negligence as a tort that should be conceptualised not as “negligence in the air”, but rather as negligence toward a particular person or group of persons, in respect of a certain action. I am suggesting here that this is also how we normally conceptualise discrimination. For a further parallel between negligence and discrimination, see my own account of discrimination in section II of the paper.
This can seem odd, particularly given that private individuals do not stand under any
general duty to treat other individuals as equals. Nor do private individuals, in tort law or
contract law, have duties to look out for each other’s well-being. Indeed, as Richard Epstein has
argued, the values at the heart of private law—values such as freedom of contract and freedom of
association—seem to be in direct conflict with anti-discrimination law, which seems to function
mostly to limit people’s ability to decide with whom they will contract or associate.18 So why
should we think it is acceptable to limit individuals’ freedom in the ways that discrimination law
does? And why should we think, more strongly, that if individuals do discriminate, they have
committed something akin to a personal wrong against the victims and should be held
responsible for the cost of rectifying it?

One response to this third problematic feature of discrimination law is to deny that we
can glean any deep truths about what discrimination really is from the mere structure of anti-
discrimination law. That is, it may be true that most anti-discrimination laws use complaint
models and invite particular claimants to bring claims as though they had had personal wrongs
committed against them; but it does not follow that the injustice of discrimination is best
conceptualized as a personal wrong committed by the discriminator against the victim. It may be
simply that a complaint model is the most efficient way of bringing certain inequalities to the
attention of public authorities, so that they can be eliminated. This is the view defended by John

18 R. Epstein, “The Place of Caste under the Civil Rights Laws: From Jim Crow to Same-Sex Marriages,” Michigan
Discrimination Laws (Cambridge, MA: Harvard University Press, 1992) and “Standing Firm on Forbidden
Gardner. He argues that anti-discrimination laws are simply instruments for redistributing opportunities to the disadvantaged. On Gardner’s view, the individuals and institutions to whom private sector discrimination law applies are “agents of distributive justice”. Their positions give them access to valuable opportunities; and consequently, they are well-placed to redistribute these valuable opportunities from “the opportunity-advantaged” to “the opportunity-disadvantaged” in accordance with the principles of distributive justice that our society has chosen. To say that an action is discriminatory, on this view, is just to say that the agent of distributive justice has not divided up important opportunities in the manner that best accords with society’s chosen principles of distributive justice. So although discrimination is a legal wrong in the positivist sense that it is forbidden by actual laws (and indeed Gardner himself repeatedly refers to it as “wrongdoing”), it does not depend on the perpetrator having in any deep sense wronged the victim. It just depends on his having been a poor or incompetent agent of distributive justice.

Although Gardner may be right that this is the best understanding of anti-discrimination law, it seems preferable to start by seeing whether we can locate an account of discrimination that takes the structure of private sector anti-discrimination law at face value. Why should we suppose that discrimination is not exactly what anti-discrimination law tells us it is —namely, a personal wrong against the victim? Surely reasons of explanatory economy suggest that we should favour the latter type of account, if there is such an account available. Moreover,

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Gardner’s instrumentalist story seems implausible for empirical reasons. It proposes that the individual complaint model is the most efficient way of achieving the broader public purpose of redistributing opportunities to the disadvantaged. But complaint procedures are notoriously slow and notoriously costly. And they are dependent on victims coming forward to make their complaints public and trusting in the justice system, in circumstances where many of them have everything to gain from not creating a public disturbance and at the same time have a deep-seated mistrust of governmental authority. So on the basis of current experience, and assuming realistic rather than utopian levels of funding for the enforcement of anti-discrimination laws, it is hard to believe the empirical claim that this account rests upon.

In what follows, I shall outline and defend an account of discrimination that attempts to make sense of these three puzzling features of private sector anti-discrimination law. I shall argue that discrimination does involve fault or wrongdoing. But the fault has nothing to do with the agent’s motives or purposes. Rather, it consists in interfering with another person’s rightful claim to equal freedom of contract and association. And when you do this, you commit a personal wrong against the individual whose freedom you have interfered with. The core idea of the account is this. Most of us enjoy certain freedoms of contract and association; and we believe, moreover, that everyone ought to have access to these same freedoms because such access is necessary for full participation in society. These freedoms include both freedoms to enter certain contracts and associate with certain people, and freedoms to deliberate about what to contract for and whom to associate with in a manner that is insulated from pressures stemming from certain facts about us, such as our race or religion. When someone else’s actions interfere
with your important freedoms, then the action can amount to discrimination. Whether it does will depend on whether the measures that this person would have to take in order to accommodate you would constitute a greater intrusion into his important freedoms. So the aim of anti-discrimination law, on this view, is to protect each individual’s right to a certain set of important freedoms of contract and association. It is to help secure the conditions of equal freedom. And grounds of discrimination function, on this account, to spell out the kinds of freedoms which we as a society believe are important enough to give protection to. Let me turn now to the task of spelling out this account in more detail.

II.

Most of us enjoy certain freedoms when we contract with others or enter into association with them. Some of these freedoms are freedoms to do certain things. We are free to accept jobs that we have been offered without having to turn them down because our religion prevents us from working on those days of the week that are required by the job. We are free to take public transit without having to get off one stop early because the stop nearest our destination is not accessible to us. Other freedoms that we normally enjoy are freedoms to have our deliberations about whom to contract with insulated from certain pressures, pressures caused by the way others view certain facts about us.20 We are free to consider which apartment to rent without having to factor in the contempt that the management might show for us because of the gender of

our partner; free to decide where to shop without worrying about who will ask us to leave and breastfeed “somewhere more discrete”; and free not to have to think at all about which sex’s washroom to use, because we need not fear retaliation from people who see cross-dressing or sex-change surgery as evidence of vice.

Most of us enjoy these freedoms because, when people enter into the provision of goods and services, or employment, or accommodation, they tend to arrange their affairs in such a way as to accommodate most people’s needs. The Sears Company schedules its workers’ shifts in such a way as to accommodate those whose Sabbath falls on a Sunday; the transit system designs its stations in such a way as to accommodate those who walk; and washrooms are assigned to one or the other of two sexes in accommodation of conventional views about gender. In other words, most of us enjoy these freedoms only because of constant accommodations which are taken for granted and so remain invisible. But just because these freedoms are enjoyed by most of us and the acts of accommodation that give rise to them are invisible, this does not mean that there is no right to reasonable accommodation in play in these common cases. On the contrary, of the freedoms that I listed above, we believe not just that many people happen in fact to have these freedoms, but that each of us has a right to be accommodated in such a way as to have access to them ourselves.

We can see this by contrasting these freedoms with others, which we do not think each person has a right to. There are many freedoms of contract and association that we do not think people can rightfully demand: for instance, the freedom to take up a job regardless of your
qualifications for it or the freedom to decide which apartment to rent only on the basis of the aesthetic qualities of the apartment, without having to factor in whether you can afford it or whether it is close to your children’s schools. Such pressures of finance and family needs are ones that we treat, to borrow a phrase from Lord Keith in the torts case of *Baker v. Willoughby*, as “the ordinary vicissitudes of life”. When he wrote this, Lord Keith was not using ‘ordinary’ to refer to the frequency of these obstacles. That is, he was not making an empirical claim, the claim that because they are so commonplace, each of us must live with them. Rather, he was making a normative claim, the claim that there are some burdens that we believe *ought* to lie where they fall, some freedoms that people do not have a right to. The same is true, I am suggesting, of the freedoms we enjoy with respect to our contractual relations and associations with others. There are some that we think are not freedoms that anyone can rightfully demand; though some of us may be privileged enough to enjoy them as a matter of fact. But there are other freedoms that most of us enjoy, and that we believe each of us has an equal right to enjoy.

I want to suggest that laws prohibiting discrimination in the private sector are one way of giving substance to these equal rights to certain freedoms in our contractual relations and associations with others. For one of the things that adverse effect discrimination does is to interfere with a person’s freedom of contract and freedom of association –either by preventing him from entering into certain relations with others or by interfering with his freedom of deliberation about which relations to enter into, by introducing extraneous pressures into his

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decision-making. Most often it interferes in both of these ways. Laws prohibiting
discrimination in the private sector work to combat such interference. But significantly, they do
not forbid every interference with another’s freedom. All that they forbid are those interferences
that would not have affected the victim in this way had it not been for her possession of a trait
that constitutes a prohibited “ground” of discrimination, and that cannot be eliminated by some
reasonable accommodation of the victim without causing undue hardship to the agent. We can
see both of these conditions as ways of protecting equal freedom of contract and association for
all.

Consider first the function of prohibited grounds of discrimination. Grounds of
discrimination can be seen as expressing our judgments about which sorts of freedoms of
contract and association we can rightfully claim of others, and which we cannot. For instance,
every country that has anti-discrimination laws recognises race, religion, and sex as prohibited
grounds of discrimination. This reflects our shared belief in the importance of being free to
contract without obstacles or pressures based on these factors or on other people’s opinions about
them. Interestingly, the types of traits that these the grounds consist in differ markedly. Some
constitute chosen commitments, such as religion. Others, such as sex, are traits over which we
have no immediate control; and indeed, it may seem important to protect us from the impact of
others’ views about these traits precisely because there is little we can do to alter them. Still
other grounds, such as disability, involve some traits that can become the basis for important
commitments (think of the community of the culturally deaf) and others that we are just saddled
with (think of A.D.D.). What matters for the purposes of discrimination law, it seems, is not
whether the trait is chosen or unchosen, an important part of our life or something we would rather be rid of. It is that, whatever the nature of the trait, the conflicts between the needs of those who possess this trait and the needs of others, and the pressures stemming from others’ beliefs about this trait, are not ones whose consequences the bearers of this trait can rightly be asked to bear. Their freedom of contract or association cannot rightly be curtailed simply because they possess these traits.

One might at this point object that although I have been using the terms “freedom of contract” and “freedom of association” to refer to the different freedoms that the grounds of discrimination are intended to demarcate and protect, these terms are in fact inaccurate: this is not freedom of contract or freedom of association in the normal senses of these words. Normally, we understand “freedom of contract” and “freedom of association” to mean “the freedom to contract with or associate with whomever happens to want to contract with you”, and not “the freedom to enter into the same relations that others do, even in circumstances where the other party wishes to have nothing to do with you.” On the proper understanding of freedom of contract and freedom of association, one might argue, victims of discrimination do not lack these freedoms at all. They may in fact be unable to find anyone who is willing to contract with or associate with them, and so their freedoms may not be of any value to them. But it is inaccurate to say that they lack freedom of contract or association. They just lack the social conditions that would enable them to make fruitful use of these freedoms.\footnote{I am grateful to Ronald Dworkin for pressing this objection.} If this is right, then it is misleading to suggest that anti-discrimination laws are about freedom of contract and association; and
misleading, also, to suggest that these laws attempt to limit the freedom of some in order that others’ rights to equal freedom will not be infringed. For on this view, anti-discrimination laws do not increase anyone’s freedom of contract or association. On the contrary, they reduce the freedom of contract and association of discriminators by denying them the right to refuse to enter into relations with certain people on certain grounds; and although they do give something to victims of discrimination, it is not freedom of contract or association. It is the social conditions that enable these people to use the freedoms that they already have.

But are freedom of contract and freedom of association properly understood as “the freedom to contract or associate with whomever happens to want to contract with you”? Arguably, this is not how the law has historically understood these kinds of freedom. In quite a number of contexts, the law denies us the right to refuse to deal with others, either on certain grounds or point blank. Consider, for instance, the old common law restrictions on public carriers, which required operators of such public facilities as ferries and taverns not to deny admission to certain sectors of the public; or the common law position with respect to professionals, which required them to provide services to all members of the public. Consider also the many rules within the law of labor and employment that prohibit employers and employees from entering into, or backing out of, certain kinds of agreements. If we take these laws as our basis, we may be inclined to define freedom of contract and association precisely as “the freedom to enter into those contracts and associations that others can enter into, even in circumstances where the other contracting party wishes to have nothing to do with you.” For this

23 See Amnon Reichman’s discussion, supra note 15.
reason, I shall continue to use the terminology of “freedom of contract” and “freedom of association” throughout the paper. However, if one disagrees then I believe one could, without draining my account of discrimination of any of its significance, replace my references to these freedoms with references to the freedoms that give value to freedom of contract and association. As I mentioned above, the freedoms that I have been invoking as the basis for anti-discrimination law are all freedoms that help give freedom of contract and association (in the narrower sense) their usefulness or point: without them, we are not able to make much use of these freedoms. So my second response to the above objection is to suggest that those readers who prefer to use “freedom of contract” and “freedom of association” in the narrow senses should substitute “the freedoms that give freedom of contract and association their value” for my appeals to “freedom of contract” and “freedom of association”. This will not affect the substance of my account of discrimination.

Grounds of discrimination, I have said, reveal what we as a society take to be important freedoms of contract and association at any given time—freedoms that are so important that access to them is necessary for full participation in society. If this is a correct analysis of the function of grounds, then it helps to explain why so many human rights tribunals (and academics!) have faltered in attempting to locate a single criterion for something counting as a prohibited ground. On the view I have been suggesting, whether some trait should be recognised as a prohibited ground is a normative question whose answer depends on whether people have a right to be free from the sorts of social pressures and obstacles that are encountered by those with that trait, and whether this freedom is necessary for full participation in society. Because there is
no reason to suppose that all of the freedoms that are necessary for full participation in society are valuable for the same reasons, there is likewise no reason to think that all grounds of discrimination will meet some single criterion for constituting a ground. On the contrary, it seems quite likely that the reasons will be diverse.24

I have argued that prohibited grounds show us which freedoms we feel individuals have a right to claim in their dealings with others. I want now to turn to the requirement that organizations must attempt to make reasonable accommodations, but only up to the point of undue hardship. On the view that I am proposing, the function of this requirement is to ensure that the freedoms of those who face discrimination are protected, but not at the expense of even greater intrusions into the freedoms of the alleged discriminators (and the freedoms of those for whose benefit they are acting, such as their other employees, tenants, or clients). In other words, the requirement ensures that potential victims of discrimination are given access to the same freedoms that others commonly have, but only insofar as this is compatible with the agent and other individuals retaining their access to such freedoms. If you are a full-time employee in my bookstore and I have a policy of requiring all full-time employees to work one Saturday a month, I must make an exception for you if you are a Seventh Day Adventist and need Saturdays for religious observance—at least, as long as my store is large enough that other employees can

24 One might object that unless something more general can be said of what ties together all of the various freedoms that underlie the different prohibited grounds, we have no reason to think that the victims of discrimination have been wronged. For we have no single principled explanation of that wrong. But in my view, we do have a principled explanation: it is that victims of discrimination have been denied a freedom to which they have a right, a freedom that is necessary for full participation in society. Which freedoms these are will vary depending on the institutions that are central to a given society; and so, on the account that I have offered, it is inappropriate to look for a more detailed explanation of the wrong that would hold true across all societies. But I do not think this is a flaw in the view. It is a consequence of the fact that some of these freedoms vary from society to society.
cover for you. For requiring me to accommodate you gives you the important freedom to work at a job that you are qualified for, and the freedom to deliberate about the job without having to consider the impact of your religion on your work (or the impact of your work on your religion). And the only freedom of mine that this interferes with is a freedom which we do not think everyone has a right to, namely the freedom to dictate every aspect of the running of my business myself. However, if you are my only employee and my bookstore would be forced to close on Saturdays if you did not work that day, and if such closure would substantially interfere with the viability of the bookstore, then I can reasonably demand that you work on Saturdays. The law, then, requires reasonable accommodation, but only to the point of undue hardship, because it is concerned not just with the freedoms of those who face discrimination but also with the freedoms of others. It is concerned to ensure that each of us is given no more and no less freedom of contract and association than others enjoy.

I have tried to explain how we might see prohibitions on discrimination in the private sector as attempts to promote equal freedom of contract and association for all. And I have offered a principled explanation of the function of grounds of discrimination on this approach. But can this approach explain the other two puzzling features of private sector discrimination: namely, how it could be fault-based in the absence of an intent to discriminate, and how it could involve a personal wrong to the victim?

With respect to explaining how discrimination could be fault-based, one might be concerned that on my account, the objectionable features of discrimination seem to consist solely
in its effects, and not at all in the nature of the action leading to these effects. On the view I have articulated, discrimination is objectionable because it results in the denial of equal freedoms to some people. This seems to be just a matter of the effects of an action, and to have little or nothing to do with what the agent was doing. So, far from helping us understand how discrimination could be fault-based, this account may seem to take us even farther away from notions of fault. But to see that this is not the case, it may help to compare discrimination to a tort that shares some features with discrimination: namely, the tort of defamation. This tort involves publishing a statement that has the effect of damaging another person’s reputation, or image in the community. Defamation is a legal wrong because of its effects, rather than because of the kind of action that the agent performed. For the plaintiff need not show that the defendant published the statement maliciously, nor even that he published it intentionally.\textsuperscript{25} The wrong of defamation seems to lie simply in the harmful effects on the individual’s reputation. As one commentator has said, defamation is “defined by the character of the injury it causes, rather than by the character of the insult which it produces”\textsuperscript{26}. The same could be said about discrimination.

But is this not problematic? In the case of defamation law, it might be. For defamation law contains no other components that might help us locate wrongdoing on the part of the defendant. Although there are a number of defences to defamation—such as the truth of the statement published; or the “privilege” of publishing defamatory statements in the discharge of

\textsuperscript{25} Note, though, that unintentional publications can only be defamatory if they were published negligently, because the defendant could not otherwise be regarded as their author.

\textsuperscript{26} R. Browne, \textit{The Law of Defamation in Canada}, 2\textsuperscript{nd} ed. (Toronto: Carswell, 1999); my italics.
certain private or public duties; or the need to allow for “fair comment” on matters of public importance—these defences do not focus on legitimating features of the defendant’s actions. So they do not work to suggest that, in the absence of these legitimating features, we can impute wrongdoing to the defendant. Rather, the defences seem to articulate a series of policy-based exceptions that focus on the importance of free speech and its ability, in certain circumstances, to outweigh the harmful effects of the defamatory statement on the plaintiff’s reputation. However, in the case of discrimination, there is a further feature that helps us explain how the agent’s actions could amount to wrongdoing. This is the requirement that the agent must provide only reasonable accommodations, and only up to the point of undue hardship. Because this requirement allows us to deny that discrimination has occurred at all in cases where there is no way of reasonably accommodating others short of undue hardship, it implies that in all cases where there is discrimination, there must have been reasonable measures of accommodation available to the agent and he must have failed to take them. Hence, it is not really accurate to say that discrimination consists solely in the creation of certain effects. A better suggestion is that it consists in the agent’s failing to make reasonable accommodations for others. It follows that those who engage in discrimination are acting unreasonably. We can therefore impute unreasonableness to agents who persist in discriminatory actions. Their fault, then, can be understood as readily as the fault in the tort of negligence.27

27 Note that this account of where the fault lies in cases of disparate impact or adverse effect discrimination applies equally well to cases of intentional discrimination, and may provide a more attractive account of intentional discrimination than an account that appeals to the objectionable nature of individuals’ motives. Intentional discrimination is wrong because it too interferes with someone else’s rightful freedoms. On this view, the distinction between intentional and unintentional discrimination is not of much legal importance. It may be of minor importance to the question of damages: if victims of intentional discrimination suffer more because they have been maliciously or purposively excluded, then they may be deserving of additional dignitary damages. But the
My proposed account also makes sense of the third puzzling feature of private sector discrimination, namely, that it appears to involve a personal wrong by the discriminator against the victim of discrimination, akin to a tort. My account suggests that this appearance is correct. The wrong of discrimination does not lie primarily in the fact that the discriminator contributes to some general social inequality or injustice, but in the fact that he has denied the victim her right to equal freedom of contract and association. In denying her a freedom equal to his own or to that of others, the discriminator commits a personal wrong against her; and it is quite appropriate for her therefore to demand that he pay the costs of accommodating her.

III.

One might at this point wonder whether, even if my account succeeds in grappling with the three puzzling features of discrimination that I identified earlier, it overlooks an important feature of any discriminatory action. This is the message that such actions send to others about the value of those who have been excluded, the contempt or disregard that the actions express. Intentional discrimination—at least, where it involves malice or prejudice—obviously expresses such contempt. But even disparate impact or adverse effect discrimination may send a certain message about those who are excluded. To fail to accommodate others in circumstances where you could do so without undue hardship may, in some circumstances, send the message that their additional harms such individuals suffer are, on my view, further effects that the discriminator is responsible for because he is already responsible for the discrimination; they are not part of the reason why the discriminatory action is wrongful.
freedoms are not worth worrying about; and so your actions may express the view that these other people are second-class citizens, even if you do not hold this view or intend to convey it. Deborah Hellman argues, in a persuasive new book on discrimination, that it is this expressive feature of discriminatory actions that explains why they should be legally prohibited.\textsuperscript{28} And philosophers who hold more general expressivist theories of value, such as Elizabeth Anderson, have made similar arguments.\textsuperscript{29} According to these scholars, when we enter the public sphere by offering employment or accommodation or services to the public, we must act in a way that expresses equal concern and respect for others. Discriminatory actions fail to express this. Hence, a natural way of understanding why these actions are legally prohibited is in terms of their failure to express the right sorts of attitudes about others. Indeed, Hellman argues that we can only properly understand the function of grounds of discrimination if we adopt the expressivist’s account of discrimination. Grounds of discrimination are not, on her view, just any trait of which we think that the person bearing the trait should not have to shoulder the costs associated with it and others’ attitudes about it. On the contrary, they are traits that have in the past been used to express demeaning messages about others: think of race, sex, religion, or indeed any of the traits that have made it onto any country’s list of prohibited grounds of discrimination.

Before I discuss expressivism and the reasons why, in my view, it seems problematic, I should note that my account, too, can explain why the traits that are recognised as grounds seem


to be associated with stigmatization. When a particular freedom of contract or association is sufficiently important to warrant protection through discrimination law, then its importance to us, combined with the fact that most people enjoy this freedom, means that the denial of this freedom to some people will likely take on a certain social significance: it will imply that these people are second-class citizens. Hence, my view, too, allows for the recognition that denying someone a benefit based on a ground of discrimination will often send a demeaning message about her. It just does not treat this as the reason for legally prohibiting discrimination.

I want now to suggest that expressivist views of why discrimination is legally prohibited are in a number of respects problematic. My comments are not intended to cast doubt on expressivism as a general theory of value or as an explanation of why discrimination is objectionable from a moral standpoint; and they may still leave room for expressivism as a legal theory that applies to other areas of law. I shall be arguing only that, as an explanation of why discrimination should be legally prohibited, expressivism is inadequate.

It will help to begin by clarifying several features of expressivist views of discrimination. Expressivism, we have seen, focuses on the attitudes that actions convey. As Hellman, Anderson and Pildes have emphasized, an action can convey a certain attitude without being caused by it. It can also convey that attitude even if the agent does not intend to communicate it to others. So the idea of what an action expresses is not to be confused with the idea of what intentions cause it, or what the agent intends to communicate through it. Rather, what an action expresses depends on the social context and our shared sense of what different actions mean in that
context. There are, as Anderson and Pildes state, “objective criteria for determining the meanings of action”. These criteria are what we look to, when we determine what an action expresses. So expressivism “holds people accountable for the public meanings of their actions”. 30

A natural question that this account raises is: why should we hold people accountable for these public meanings of their actions? How is it that they can be justifiably coerced simply on the basis of what their actions publicly express –when this public expression is not a function of the agent’s own intentions, and not even something that a reasonable person in the agent’s position would necessarily always recognise? If the objective meaning of an action is a function, not just of what a reasonable person in my position would take it to mean, but of what it actually does mean given the relevant social conventions and the surrounding context, then it is possible for an action to “express” something that even a reasonable person in the agent’s position might not have been aware of. And this leaves it mysterious how we can regard these expressions as being the agent’s fault. How can something be my fault, if I did not know that I was expressing it, and if even a reasonable person in my position would not have known?

A deeper problem with expressivist accounts of discrimination is that the same attitudes that are expressed by actions that anti-discrimination law prohibits can equally well be expressed through other actions, actions that are not regulated by anti-discrimination law and indeed are not subject to any legal sanctions at all. Suppose I own a small pharmacy. I am not free to deny jobs

30 Anderson and Pildes, p.5.
at my pharmacy to women on the grounds of their gender: this would constitute discrimination and would be prohibited by law. But I am perfectly free to stage a peaceful demonstration against hiring women pharmacists on the street outside and to wear a placard stating that women should not be hired as pharmacists. This would constitute a legitimate exercise of free expression and would not be prohibited by private sector discrimination law, since it is not something I do in the context of being an employer. And this suggests that what is wrong with my denying jobs to women as an employer is not reducible to what my action expresses. For surely most of this is also expressed by my perfectly legal placard and my demonstration. So the expressivist owes us an explanation of why, if what is wrong with discrimination is really what it expresses, it is perfectly acceptable to express this same demeaning message in other ways in other contexts.

Moreover, it seems significant that discrimination law gives no role at all to the discriminator’s interest in freedom of expression – as one might expect it would if the wrong done by discrimination concerned the message that the action expressed. No jurisdiction of which I am aware invites the alleged discriminator to put forward the claim that his interest in freedom of expression would be harmed if he were required to accommodate the victim; and there is no opportunity for the adjudicating body to weigh his interest in freedom of expression against the victim’s interest in being accommodated. So this too suggests that the focus of discrimination law is not on the discriminator’s action qua expression.
I have argued that expressivism runs into difficulties as a theory of why discrimination can justifiably be prohibited by law. But I want now to suggest that it does point us in the direction of an important truth about many cases of intentional discrimination, and about the ways in which the presence of malice or prejudice can aggravate the wrong that is done by discriminatory actions. Expressivism starts from the plausible claim that many discriminatory actions constitute expression of contempt for others. This is obviously true of intentional discrimination, or more exactly, those acts of intentional discrimination that are motivated by malice or prejudice. In such cases, the agent has not just overlooked a particular person and her needs; rather, he has actively trampled on them, and this does express contempt and disdain for her. This expression clearly causes additional anguish to the victim; and it may also increase the social stigma associated with possessing the trait in question. So in such cases, the contemptuous nature of the action *qua* expression seems to aggravate the wrong that is done. This may be why many jurisdictions award special damages in cases of intentional discrimination. So expressivism helps us to see that when discrimination is done intentionally and is motivated by malice or prejudice, the contempt that it expresses aggravates the wrong that is done to the victims. It is important to note, however, that it is the particular way in which the action is done in such cases that makes it an expression of contempt, and that this is not, at least on my view, an essential feature of the action as a discriminatory action. So the fact that a discriminatory action expresses contempt for the victims may aggravate the wrong or add a further consequential loss which we think the discriminator can rightly be held accountable for. But it is not what the initial wrong of discrimination consists in.
It also seems plausible that disparate impact or adverse effect discrimination, too, can send the message that certain individuals are less worthy than others. When it does, it likely causes emotional suffering and social stigmatization quite similar to—though perhaps not as severe as—those caused by discrimination that is motivated by malice or prejudice. So perhaps the special additional damages that we now reserve for intentional discrimination should also be made available in certain other cases; though one might expect lesser amounts to be awarded in those cases.

In this paper, I have argued that we should understand discrimination in the private sector in terms of wrongful interference with another person’s right to equal freedom of contract and of association. This account offers us a principled explanation of the grounds of discrimination: they reflect our judgments about which sorts of freedoms of contract and association we can rightfully claim of others, and which we cannot. And it enables us to make sense of discrimination both as fault-based and as involving a personal wrong on the part of the discriminator towards the victim. As this last section of the paper suggests, there remains work to be done in clarifying the precise role that should be given in this account to the effects upon the victim of the attitudes that discriminatory acts express, and in particular to the emotional suffering and stigma resulting from this. But I hope that this paper has provided at least the beginnings of a workable theoretical account of discrimination in the private sector and has shown why it is a perplexing and philosophically interesting phenomenon.