

Private Discrimination: A Prioritarian, Desert-Accommodating Account

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TABLE OF CONTENTS

| | | |
|------|---|-----|
| I. | INTRODUCTION | 818 |
| II. | PRIVATE DISCRIMINATION DEFINED..... | 819 |
| | <i>A. Variables</i> | 820 |
| | <i>B. Disadvantageous Treatment</i> | 820 |
| | <i>C. Discrimination Against Versus Discrimination in Favor</i> | 820 |
| | <i>D. Species of Discrimination</i> | 821 |
| | <i>E. "Suitably Explained" Differential Treatment</i> | 823 |
| | <i>F. Socially Salient Groups</i> | 824 |
| III. | SOME PRELIMINARY OBSERVATIONS..... | 829 |
| IV. | DESERT-PRIORITARIANISM..... | 833 |
| | <i>A. Distinctiveness of the Wrong of Discrimination</i> | 837 |
| | <i>B. The Special Significance of Harms to Discriminatees</i> | 838 |
| | <i>C. Beneficial Discrimination</i> | 839 |
| | <i>D. The Moral Permissibility of Harmful Discrimination that Maximizes Moral Value</i> | 840 |
| V. | THE RESPECT-BASED ACCOUNT..... | 842 |
| | <i>A. The Falsehood Account</i> | 845 |
| | <i>B. The Comparative Falsehood Account</i> | 848 |
| | <i>C. The Irrational Comparative Falsehood Account</i> | 848 |

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| | | |
|-----|--|-----|
| VI. | THE RIGHT TO ENGAGE IN WRONGFUL PRIVATE DISCRIMINATION: A CONCEPTUAL MAP..... | 850 |
| A. | <i>Alternative 1: A Legal Duty to Engage in Wrongful Private Discrimination.....</i> | 852 |
| B. | <i>Alternative 2: A Legal Right to Engage in Wrongful Private Discrimination.....</i> | 853 |
| C. | <i>Alternative 3: A Legal Duty Not to Engage in Wrongful Private Discrimination.....</i> | 854 |
| D. | <i>Alternatives 4 & 5: A Legal Duty or Permission to Engage in Private Discrimination that Is Not Wrongful</i> | 854 |
| E. | <i>Alternative 6: A Legal Duty Not to Engage in Private Discrimination that Is Not Wrongful.....</i> | 855 |

I. INTRODUCTION

Most of us would consider a state's discrimination against its citizens—say, by refusing to hire them on account of their sex, race, religion, or ethnicity—clearly unjust, something in urgent need of rectification. Yet we often take a less censorious view of discriminatory acts by private individuals who choose not to share their neighborhood with, associate with, trade with, work with, befriend, marry, or be buried in the same graveyards as people of a different sex, race, religion, or ethnicity. On reflection, this asymmetry is puzzling.¹ It cannot be explained by saying that state discrimination has graver consequences involving more people than private discrimination. True, considered on their own, private discriminatory acts often have negligible consequences; but together such acts often form patterns that are no less consequential than, say, the passing of a piece of discriminatory legislation. We need a better understanding of the morality of private discrimination.²

Part II offers both an account of private discrimination and an overview of its subvarieties. Parts III through V review two accounts of the moral unacceptability of private discrimination: the desert-accommodating, prioritarian account and the respect-based account. Part IV supports the first of these, and Part V challenges the second. Finally, addressing the issue from the perspective of the desert-accommodating prioritarian account, Part VI asks when, morally speaking, there ought to be a legal right to engage in private discrimination. The approach to private discrimination is consequentialist, because it holds discrimination to be

1. See MATT CAVANAGH, *AGAINST EQUALITY OF OPPORTUNITY* 169 (2002).

2. I do not mean to imply that we have a firm grasp of the nature and badness of non-private discrimination. My focus here, however, is on private discrimination, albeit on the view I propose, basically, that there is no intrinsically morally relevant difference between private and non-private discrimination.

bad in virtue of its bad consequences, and egalitarian, because it holds the badness of these consequences to be greater the worse off the negatively affected individuals are.

II. PRIVATE DISCRIMINATION DEFINED

We are all familiar with lists of victims of discrimination. Yet few of us would be able to define discrimination with any real exactitude. This unfortunately means that we have no explicit criteria for determining when to delete items from, or add items to, the well-known lists. It also means that it is hard to tell why and, hence, when discrimination is morally wrong. Clearly, until we know which non-moral properties make acts discriminatory we will be unable to say which of these properties make discrimination morally wrong.

In one sense, *discriminating* against people is more or less equivalent to differentiating them in a way that harms some of them or displays a preference for some over others. In another sense, to discriminate against people is to act in a morally impermissible way.³ The former sense is obviously very broad. Not only does discrimination in this sense have no automatic condemnatory force, but there is also no *prima facie* reason to think that someone who discriminates in this very broad sense acts in a way that is morally worse than someone who does not. In fact, to discriminate in this sense is something we can hardly avoid.⁴

Discrimination in the latter sense is an inescapably evaluative term; accordingly, its descriptive content will have to be much narrower than it is in the first sense. If we use the term in this second sense, we cannot meaningfully ask: “Are all kinds of discrimination unjust and morally unjustified?” Yet many scholars have asked this question.⁵ An intermediate sense of discrimination must be captured in order to make room for this

3. Thomas E. Hill, Jr., *The Message of Affirmative Action*, in *THE AFFIRMATIVE ACTION DEBATE* 169, 174 (Steven M. Cahn ed., 1995).

4. This is the sense of discrimination at work when “refus[ing] to sit next to people who haven’t bathed recently” is offered as an example of pretty harmless discrimination. Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 151 (1992). I owe several other examples of discrimination in the broadest sense appearing in this section to Professor Alexander. *See id.* at 158-96.

5. *See, e.g.*, CAVANAGH, *supra* note 1, at 153; JAN NARVESON, *MORAL MATTERS* 306-25 (2d ed. 1999); JAN NARVESON, *Have We a Right to Nondiscrimination?*, in *RESPECTING PERSONS IN THEORY AND PRACTICE* 203 (2002); Peter Singer, *Is Racial Discrimination Arbitrary?*, 8 *PHILOSOPHIA* 185 (1978).

question—a sense which, on the one hand, is not inescapably evaluative but, on the other hand, is much narrower than discrimination in the first sense indicated above:

X discriminates against (or in favor of) *Y* if: (i) *X* treats *Y* differently from *Z* (or from how *X* would treat *Z*, were *X* to treat *Z* in some way); (ii) the differential treatment is (or is believed by *X* to be) disadvantageous (advantageous) to *Y*; and (iii) the differential treatment is suitably explained by *Y*'s and *Z*'s being (or being believed by *X* to be) (members of) different socially salient groups.⁶

The following fills out the elements of this formula.

A. Variables

The variables *X*, *Y*, and *Z* range over individuals, groups of individuals, and super-individuals. Private discrimination includes just those forms of discrimination where *X* ranges over agents, such as employers, sellers or service providers, lovers, friends, clubs, and so on, whose relevant discriminatory activities are, in some suitable sense, independent of the state.

B. Disadvantageous Treatment

X's differential treatment of *Y* and *Z* is (believed by *X* to be) disadvantageous to *Y* if and only if (*X* believes that) *Y* will benefit less from or be harmed more than *Z* as a result of the differential treatment. The relevant disadvantage is interpersonal, not intrapersonal. Hence, my definition of discrimination implies that an act of discrimination against *Y* may improve *Y*'s situation relative to the way it was prior to the discriminatory act and relative to how it would have been had the discriminatory act not taken place, and be believed by *X* to do both. This seems right. If a privately funded aid agency declares that it will devote most, but not all, of its resources to help male, middle-aged, Protestant white people, few would deny that it discriminates on the ground that it harms no one in either of the intrapersonal senses of harm employed just above.

C. Discrimination Against Versus Discrimination in Favor

It is only when someone is treated in what is, or is believed by the agent to be, a *disadvantageous* way that we speak of discrimination against. The reverse point applies to favorable discrimination. My

6. Any act of discrimination involves a particular dimension in which the discrimination takes place. Often, the dimensions in which discrimination takes place vary across groups. See Alexander, *supra* note 4, at 158.

formula allows that the disadvantage involved in discriminatory treatment may be actual but unforeseen by the discriminator or nonexistent but believed to exist by the discriminator. The latter possibility must be allowed so as to accommodate failed attempts to favor one over another. The former must be allowed because, according to many observers, this is the most common form discrimination takes.

D. Species of Discrimination

X can treat *Y* and *Z* differently in innumerable ways. Hence, there are many different species of discrimination. These species include direct and indirect discrimination, and cognitive and noncognitive discrimination. Cognitive and noncognitive discrimination may be brute or valuation-based, which in turn can be divided into hierarchical and nonhierarchical forms.

Direct discrimination is differential treatment that involves representing those who are subjected to discrimination as belonging to the relevant socially salient group, membership of which explains the differential treatment. An employer who prefers not to hire women for top managerial posts and, accordingly, ignores female applicants is involved in direct discrimination. An employer who hires people on the basis of sheer physical strength is not involved in direct discrimination against women, even if he hires few women. Whether he indirectly discriminates against women in hiring on the basis of strength depends on why he hires on that basis. He may, for instance, hire on that basis because the relevant jobs involve operating heavy machinery, and the reason machines are so designed is explained by failure to design the machines in such a way that men and women are equally capable of operating them. If this in turn is explained by male dominance, then our employer may be (perhaps blamelessly) involved in indirect discrimination.⁷

7. Suppose that, from the standpoint of the individual employer, it is a matter of "business necessity" that nearly only men are hired to operate the relevant machines, but that the manufacturer who produced the machines could easily and costlessly have designed them otherwise and would have done so in the absence of male dominance. *Cf.* *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), *quoted in* GERTRUDE EZORSKY, *RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION* 39-40 (1991). It would seem arbitrary to consider a situation morally bad if people are hired on the basis of requirements that, although nondiscriminatory in intent, are "discriminatory in operation" and do not reflect "business necessity," but not consider the state of affairs just described morally bad from the point of view of discrimination.

Cognitive discrimination is differential treatment that involves being less inclined to form beliefs somehow (un)favorable to *Y* than to form beliefs (un)favorable to *Z* given the same evidence for these beliefs. A job applicant may be a cognitive discriminator if, given the same evidence of excellence, he is more inclined to believe that one company, managed by men, will be successful than he is to believe that another, managed by women, will be. The same applicant is a noncognitive discriminator if he is less inclined to apply for a job with a company with a female executive manager because of a brute desire not to have a female boss. Often cognitive and noncognitive discrimination go hand in hand, but conceptually speaking they can easily be pried apart. In principle, one can engage in cognitive discrimination in favor of a group while at the same time engaging in noncognitive discrimination against that group, and vice versa.⁸

Cognitive as well as noncognitive discrimination can be brute or valuation-based. It is valuation-based if and only if it satisfies either of the following two conditions: (1) it reflects *X*'s view that *Z*'s interests count for more, morally speaking, than *Y*'s; or (2) it reflects *X*'s view that, while their interests count equally, *Z* and *Y* should not relate to each other or to *X* in the way they should relate to members of their own group. An example of the former would be discrimination against blacks under apartheid. An example of the latter would be discrimination based on traditional sex roles.⁹ If discrimination satisfies neither of these conditions, it is brute discrimination. Discrimination in favor of physically attractive people may often take this form; it is not that we think their interests count for more, or that they ought to relate to others in different ways; it is simply that we have brute desires in favor of them.

Brute as well as valuation-based discrimination divides into hierarchical and nonhierarchical forms. In the former, the discriminator's desires or values favor some groups over others. In the latter, this is not the case. Rather, the discriminator prefers or values some groups over others in

8. Consider someone who always over-generalizes and thinks of people in terms of stereotypes. Being brought up in a culture of guilt he is more inclined to do so when it comes to people of his own kind. So while he makes ungrounded and unfavorable generalizations about people of, say, other religions, he makes even more ungrounded and unfavorable generalizations about people of his own religion. This person is involved in cognitive discrimination *in favor of* people with a religion different from his own. Offhand, this may seem odd. Normally, we assume that a person who makes ungrounded and unfavorable generalizations about people of religious denominations different from his own is involved in *negative* cognitive discrimination. This, however, is because we assume that people normally are not inclined to make ungrounded and unfavorable generalizations about people of their own kind.

9. Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 590 (1977).

some contexts and for some purposes and that this preference or valuation is reversed in a number of equally important contexts.

E. "Suitably Explained" Differential Treatment

The formula requires the relevant differential treatment to be *suitably explained* by membership of different socially salient groups because there are undeniably cases in which *X* treats *Y* differently from *Z*, this is (believed by *X* to be) disadvantageous to *Y*, *Y* and *Z* are members of different socially salient groups, and yet this differential treatment does not constitute discrimination.¹⁰ Consider a case in which, by an odd twist of nature, men can die from birth and onwards and will never become older than seventy years old, whereas no woman can die before she reaches the age of one thousand years nor become older than 1070 years. Suppose that in a situation of scarcity requiring a choice between a man and a woman, healthcare resources used to save lives are devoted to men, on the ground that any woman in need of life-saving healthcare will enjoy at least 930 more years than any man in need of such assistance. Suppose, moreover, that if two men, or two women, are admitted to hospital for life-saving treatment and only one of them can be treated, the youngest one will receive treatment. This practice involves treating women differently in a way that is disadvantageous to them. Yet it is not a case of sex discrimination because the patients' sex does not suitably explain the disadvantageous treatment of women. The doctors attach no intrinsic significance to a patient's sex.

A complication must be brought into the picture: suppose the notion that "men enjoy power over women" explains why men (or people generally) came to believe, or presently believe, it to be just to devote life-saving healthcare resources to those who have enjoyed the least number of years. Consider first the case in which male domination explains why people once came to hold a certain belief, but does not explain why people believe it now. Had a different causal story brought them to where they are now, they would still now believe that life-saving medical treatment should be distributed on the basis of the number of years people have already enjoyed. While neither the *content* of the

10. On a parallel point in relation to racism, compare Bernard R. Boxill, *The Morality of Preferential Hiring*, 7 PHIL. & PUB. AFF. 246, 257 (1978), with J.L.A. Garcia, *The Heart of Racism*, 27 J. SOC. PHIL. 5, 26 (1996), reprinted in RACE AND RACISM 284 (Bernard Boxill ed., 2001).

belief allocating life-saving health care resources nor the fact that people presently *hold* this belief is tainted, the way in which people came to hold this belief is tainted. Would this imply that the differential treatment of men is, after all, suitably explained by men and women being members of different socially salient groups? We might plausibly assume that the present case is morally equivalent to a case which is identical with the first except that the same belief about the provision of health care has a genesis that is not tainted. However, we would build a morally irrelevant distinction into our notion of discrimination if we were to answer this question affirmatively.

Consider next the case in which male domination is part of the explanation of why people now believe that life-saving medical treatment should be distributed on the basis of the number of years a person has already enjoyed. In this case, differential group membership explains the differential treatment. The fact that some people are members of the same, dominant group explains why they are being favored over women by the dominant norms, and this fact in turn explains why they are being favored. Even if we suppose that a fully informed, impartial being would recommend that life-saving medical treatment be distributed on the basis of the number of years already lived, we would still say that women are subjected to discrimination in the case described; after all, their disadvantageous differential treatment in this particular context, though by accident entirely just, is explained by their not being members of the dominant group.

F. Socially Salient Groups

The formula refers to discrimination for and against different *socially salient groups*. A group is socially salient if perceived membership in it is important to the structure of social interactions across a wide range of social contexts.¹¹ “Skill at making widgets” is irrelevant to almost any kind of social interaction. Hence, a manufacturer who produces widgets and prefers not to appoint applicants lacking skills in widget-making does not, in the present sense, discriminate against such people. Having green eyes is also irrelevant in almost any social context. In contrast, an

11. For a slightly different, subjective account of social salience, see H.E. Baber, *Gender Conscious*, 18 *J. APPLIED PHIL.* 53 (2001) (“A property is socially salient . . . to the extent that . . . [people] take it to predict or explain beliefs, character traits, tastes or other socially significant psychological characteristics.”). While the property of being a member of a certain group may in fact structure social interactions even if people do not ascribe explanatory relevance to it, and vice versa, one might suppose that there is a tendency for people to ascribe explanatory significance to being a member of a certain group if in fact perceived membership of it structures a wide range of social contexts, and vice versa.

individual's apparent sex, race, or religion will affect social interactions in many social contexts.¹²

Having green eyes is special in the sense that, apart from being insignificant in almost any social context, it is very easily perceived in face-to-face encounters. Membership in many other groups will not be immediately visible in this way. Perceptions of such membership may, however, be very important to the structure of social interactions. Being gay in a homophobic society presumably tends not to structure social interactions in very many contexts because gays often have a strong incentive to conceal their sexuality; yet being perceived to be gay in the same society will have an important influence on social interactions. For our purposes, a group is socially salient even if membership of it is not easily established as long as perceived membership of it has an important influence on social interactions in a wide range of context.

If membership in a certain group structures social interactions in a wide range of contexts, it is very likely that such membership is also quite central to the members' sense of who they are. Given the former, membership in the relevant group is likely to be seen either, by members, as quite central to their own sense of who they are or, by others, as quite central to who the members are. In the latter case, this will tend to affect members' own sense of who they are by increasing the centrality of group membership to the members themselves.¹³ While importance to the structuring of social interactions and centrality to people's self-conception will therefore tend to go hand in hand, analytically these are separate issues. Hence, there could be cases of people who are treated disadvantageously on grounds of membership in a nonsalient group, membership of which is crucial to their sense of who they are; or there could be cases of people who are treated disadvantageously on the basis of membership in a salient group, membership of which, however, is insignificant to their sense of who they are.

An example of nonsalient but crucial membership would be nationalists singled out for unfavorable treatment by colonial masters, where being *Indonesian* is very important to the nationalists' self-

12. See Wasserstrom, *supra* note 9, at 586, 590 (drawing a similar contrast).

13. Anti-Semitism, for instance, tends to make being Jewish play a more prominent role in the self-conception of those people who are subjected to it. G.A. COHEN, IF YOU'RE AN EGALITARIAN, HOW COME YOU'RE SO RICH? 34 (2000) (commenting that Jean-Paul Sartre's extravagant claim that "it is the anti-Semite who creates the Jew," although an exaggeration, contains some truth).

conception, but, initially, something not recognized by other *Indonesians* as important.¹⁴ An example of salient but insignificant membership would be people in South Africa under apartheid who were brought up to think of themselves as whites but who, due to surprising facts about their ancestry, later in life suddenly came to be thought of by others, including the authorities, as colored people. Given the above definition of socially salient groups, only the latter kind of case might involve discrimination.

This concept of social salience introduces two scalar dimensions: perceived membership in a group may be anything from slightly important to wholly dominant in the structure of social interactions, and it may be important in more or fewer social contexts. In principle, group *X* may be just as salient, all things considered, as group *Y*, even though perceived membership in *X* structures social interactions in fewer social contexts than membership in *Y*, as long as *X* carries greater importance in the contexts it actually structures.¹⁵

At least two reasons tie discrimination to socially salient groups. Almost all groups on whose behalf the charge of being discriminated against is voiced are socially salient groups. Women, elderly people, disabled people, gays and lesbians, and ethnic and racial minorities are all socially salient groups in this sense. In fact, it appears that only one kind of discrimination does not involve a socially salient group: the use of genetic information by insurance companies to “discriminate” against people with certain kinds of bad luck in the genetic lottery. This practice does not qualify as discrimination because these people do not constitute a socially salient group—at least not presently. Nothing is lost, and perhaps some clarity is gained, if we discuss cases of “genetic discrimination” as cases of unjust, albeit (in the less than all-inclusive sense mentioned above) nondiscriminatory, uses of genetic information.

There are cases involving disadvantageous differential treatment that we would probably consider discriminatory if the relevant groups were socially salient, but in which the term *discrimination* is not entirely apt precisely because the relevant group is not socially salient. An employer might be more inclined to hire applicants with green, rather than brown or blue, eyes. This idiosyncrasy might not amount to discrimination in the sense that interests us here, even though the employer obviously differentiates between different applicants in a way that is disadvantageous

14. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 110-12 (1983).

15. To elaborate the notion of social salience further one would have to say something about the individuation of social contexts and about the sorts of structuring of these that are relevant for present purposes. Although it is somewhat unclear when a group is socially salient, this is not a flaw with the formula. It simply reflects the fact that the contours of our concept of discrimination are somewhat fuzzy.

to some of them.¹⁶ This is not to deny that such idiosyncrasies can be as bad as, and reflect as corrupted a character as, genuinely discriminatory acts. However, they will not seriously harm the disadvantaged party in the great majority of cases, precisely because of their idiosyncratic nature. People with green eyes may find other employers who are indifferent or, in rare cases, idiosyncratically attracted to their eye colors and will, if informed of the reason they did not get the job, infer that the employer was an oddball; diminished self-respect will not be an automatic effect of the information they receive.¹⁷

Generally speaking, we are more likely to view differential treatment as discrimination to the extent that the following three conditions are met: (1) membership is evidenced by a dichotomous distribution of individuals in the relevant and contrasting groups; (2) all individuals are a member of only one group; and (3) it is evident whether or not someone is member of a certain group. "People of a similar outlook," for instance, satisfies neither of these conditions. For very many sets of three persons, it is very hard to tell if *X* or *Y* is the person with an outlook that is most similar to *Z*'s. Moreover, for any individual there is a group consisting of individuals with a similar outlook and very few, if any, are not members of more than one such group. Things are different with the groups that we most readily think of as being subjected to discrimination. You can be a man or a woman; (almost) everyone is either a man or a woman but not both. "Physical attraction" is somewhere between people with similar outlook and sex. Although in principle there is a wide spectrum of degrees of physical attractiveness, most people use a coarse-grained system of classification as evidenced by the fact that our ordinary language contains rather few predicates relating to people's looks such that these predicates together form an ordinal ranking from best to worst. Moreover, while people vary somewhat with regard to how they classify different people, their judgments tend not to differ very much when they differ and tend to agree at the extremes.

The restriction of the scope of discrimination to differential treatment of socially salient groups also explains why we do not talk about discrimination against non-family members or against unqualified applicants. While it is true of each of us that we are not members of

16. David Wasserman, *Discrimination, Concept of*, in 1 ENCYCLOPEDIA OF APPLIED ETHICS 805, 807 (1998).

17. See Alexander, *supra* note 4, at 198 ("[T]he social costs of particular kinds of discrimination are a function of how widespread those kinds of discrimination are.").

most families, there is no group of people made up of non-family members as such. Similarly, everyone is unqualified for some jobs, although, arguably, the category of people who are unqualified for *any* job has no members.¹⁸

Still, it is not clear that the above account of discrimination in terms of differential treatment of members of socially salient groups is entirely satisfactory. Let *Y* designate the group of people whom, morally speaking, *X* ought to treat worse than *Z*. Assume *Y* is the group of morally undeserving people, whereas *Z* is the group of morally deserving people. Suppose *X* treats *Y* worse than *Z* and does so believing that he himself treats *Y* disadvantageously compared to *Z*, and suppose that differential group membership suitably explains why *X* treats *Y* worse than *Z*. Suppose, finally, that the morally deserving and the morally undeserving are socially salient groups. This would qualify as discrimination. But *X* ought morally to treat *Y* worse than *Z*; *X* simply does what he ought to do by “discriminating against” *Y*. It follows that, if we do not want to allow ourselves to say that we ought to discriminate against some groups, we will need to revise my account.

In practice, this objection might be ignored, of course. People differ greatly over the question of who is morally undeserving, and even where they do not differ, they rarely have sufficient information to tell whether or not someone with whom they interact is morally deserving. Hence, discrimination against the undeserving is unlikely for conceptual as well empirical reasons. However, if we want our definition of discrimination not just to apply to actual but also possible cases of discrimination, we need to address this challenge. So suppose that, due to an emerging moral consensus and technological improvements, moral desert is as transparent as sex. In that situation, it would be in no way odd to say that someone discriminates against the undeserving if he treats them worse than they deserve to be treated, thinks of them in terms of stereotypes, is insensitive to differences between different gradations of undeserving persons, and so on. Of course, if someone treated everyone exactly as he ought to treat them, he would, let us suppose, treat people differently. But barring a cosmic coincidence, his differential treatment would not be suitably explained by the differential group membership of different individuals, but rather by their individual desert levels, in

18. In a society divided into a few enlarged families, or clans, where people are treated differently depending on family membership, we might well approach a situation in which differentiating between people on the basis of family membership involves discrimination to the extent that clan membership is a socially salient group identity. (Of course, it is likely that clan membership would be socially salient in that way.) A similar point may apply to a group of people who are literally unqualified for virtually any job where membership of the group is easily detected.

which case it would not qualify as discrimination. If it were, then the fit between the actual treatment and the deserved treatment could not be perfect.¹⁹

III. SOME PRELIMINARY OBSERVATIONS

How should one approach the question of the moral wrongness of private discrimination? Part II defined private discrimination with three separately necessary and jointly sufficient conditions. The first two look morally irrelevant; treating one person better than another and believing that one is doing so are not wrong-making features. Hence, what is morally distinctive about discrimination is the fact that one's differential treatment of people is suitably explained by their membership of different socially salient groups. Does this in itself have any moral significance? This may depend on the relevant contrast.

First, the relevant contrasting cases might be those in which the fact that some are treated better than others is suitably explained by their membership of groups that are not socially salient. To test whether this contrast makes a moral difference, we could compare a case of genuine discrimination, as defined, with a suitably similar case in which the differential treatment is explained by membership of different groups that are not socially salient. For example, we could compare a case of racial discrimination against African-Americans (or, to take an example that is closer to home for this Author, Danish citizens of Arab descent) with an otherwise comparable case of idiosyncratic racial discrimination against people from Inverness and people who, however distantly in time, have an ancestor from Inverness. Looking at matters this way, it is very hard to see how social salience could be morally relevant. While discrimination tends to involve all sorts of harms, hatred, and crazy supremacist ideas that differential treatment of people on grounds of membership of different socially nonsalient groups does not involve, this is a contingent difference; it does not show that discrimination is worse

19. Suppose *Y* is very deserving and *Z* is very undeserving, and yet *X* treats them in a way that is equally beneficial to them because *Z*, unlike *Y*, is a member of a socially salient group with which *X* identifies. Surely, this constitutes discrimination against *Y* and yet my definition seems to suggest that it is not because *X* acts in a way that is equally beneficial to them and, thus, does not treat *Y* differently from *Z*. However, *X* does treat *Y* and *Z* differently since he is less inclined to reward *Z*'s deserts than *Y*'s and this is suitably explained by their differential membership of socially salient groups. More generally, I suspect that any putative counterexample of equal treatment constituting discrimination will also involve unequal treatment.

than corresponding cases of differential treatment involving socially nonsalient groups.

Could the relevant contrast be between cases in which the differential treatment is suitably explained by different *individual* properties, excluding the property of being a member of a certain group?²⁰ If this contrast makes a moral difference, discrimination may be morally wrong because, like nondiscriminatory differential treatment, it involves differential treatment of people that is suitably explained by their membership of different groups. However, it is not in itself morally wrong to treat people on the basis of their differential membership of different socially salient groups. To take just one example from the literature, it is not morally wrong to temporarily segregate prisoners during a race riot.²¹

It might be argued, however, that while it is not necessarily morally wrong it is always morally preferable to treat individuals on the basis of their *individual* properties rather than on the basis of their membership in socially salient groups. In the example just mentioned, it would be preferable, other things being equal, to segregate prisoners on the basis of their individual properties even if this segregation will be largely equivalent to racial segregation. However, even the weaker claim that, while it is not necessarily morally wrong, it is always morally preferable to treat individuals on the basis of their *individual* properties rather than on the basis of their membership in socially salient groups is dubious.

First, differential treatment on the basis of group membership will in some cases lead to stigmatic harm, suspicions about hostility, and so on. But so may treatment on an individual basis. For instance, members of a group that would on average be treated better given differential treatment based on group membership than they would given differential treatment based on individual properties may see the latter as yet another way of stigmatizing and expressing hostility toward group members. Moreover, in cases in which groups struggle for recognition, the struggle may well involve the demand that in some contexts people are treated as members of groups rather than on the basis of individual properties.

20. There is a difference between being treated on the basis of properties of groups of which one is a member and being treated on the basis of one's membership of a certain group. If, for instance, I ascribe to a certain individual the property of being more likely than other individuals to engage in violent political acts because the religious group to which he belongs is more likely to engage in violent political acts, I treat him solely on the basis of properties of the group to which he belongs. If I ascribe the property to him of being more (or less) likely to engage in violent political acts on the basis of my knowledge about him, including my knowledge about his religious affiliation, then I do not treat him solely on the basis of properties of the group to which he belongs. In the second situation I remain open to information suggesting a gap between his properties and the properties of a group to which he belongs.

21. Paul Brest, *The Supreme Court, 1975 Term—Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 15 (1976).

Members of a religious minority may prefer, for instance, food to be served to its members that is cooked in accordance with religious rules rather than in accordance with each member's food preference. Even members who otherwise do not care much for traditional food may prefer to be treated on the basis of group membership, because this is a way of securing the positive opposite of stigmatic harm. Attributes of the beneficiaries are rendered "deeply crediting," and the bearer of the relevant religious identity is restored to "wholeness" and "usualness."²²

Second, differential group membership will often involve treating individuals in a way that they ought not to be treated given their individual properties. For example, prisoners of different races in Brest's example²³ may be separated even if people who knew their individual characters, relations to one another, and so on, would not segregate them. But the same may happen in the case of differential treatment on the basis of individual properties. Any such treatment must rely on the discriminator's beliefs about individual properties; but these may be false and the differential treatment flowing from them, thus, misplaced. If the discriminator estimates individual properties poorly, the resulting differential treatment may be even more misplaced than differential treatment based on group membership. In that case, it would seem reasonable for individuals to demand that they be treated on that latter basis, not on the basis of what their individual properties are believed to be. Individuals might have a claim to be treated in the way that they deserve to be treated in virtue of their individual properties. Whether this claim is best satisfied by treating individuals on the basis of their believed membership of groups or on the basis of their believed individual properties is an empirical matter. In conclusion, the modest claim that it is morally preferable to treat individuals on the basis of their individual properties is false.

The next preliminary observation further supports the claim that, offhand, it seems very hard to argue that discrimination is morally wrong *per se*. First of all, as we saw, discrimination need not harm the discriminatee relative to how well off he or she was prior to the discriminatory act or to how well off he or she would have been in the absence of the discriminatory act. For obvious reasons, discussions about the morality of discrimination tend to focus on cases in which

22. Cf. ERVING GOFFMAN, *STIGMA* 2-3 (1963).

23. See Brest, *supra* note 21.

discriminatees suffer relative harm in these senses, but, as we have seen, discriminatory acts may leave the discriminatees better off than they otherwise would have been. If morally supererogatory acts are possible, *X*'s discriminatory act against *Y* may even leave *Y* better off than *Y* would have been had *X* acted in a way that morally permissible for him to act but refrained from—say, because he donated all of his possessions in a supererogatory, discriminatory way.

Accordingly, libertarians can hardly claim that the discriminating philanthropist violates anyone's rights by giving away what he himself owns and has a right not to give away in the first place.²⁴ Virtue ethicists, who see no vice in failure to be equally concerned for everyone's welfare, can hardly say that the discriminating philanthropist necessarily displays a vicious character. Kantians cannot say the philanthropist treats those whom he benefits less than others as mere means rather than as ends in themselves; after all, he has an intrinsic concern for their welfare, only it is not as great as his intrinsic concern for the welfare of members of other socially salient groups.

Nor need it be true that the discriminating philanthropist violates a right to be treated with equal respect and concern, supposing for a moment that we have a right to be so treated by the state and by private individuals. The philanthropist might do what he does because he correctly takes his preference to be, so to speak, counterbalanced by the different preferences of other discriminating philanthropists. In this case one might indeed argue that at a basic level, the former treats everyone with equal respect and concern even if, given his factual assumptions, he allows himself to treat some with greater concern than others.²⁵ Teleological egalitarians cannot claim that discrimination is necessarily bad, since discrimination against the otherwise better off may reduce inequality.²⁶

24. They might deny, however, that it follows from the fact that you have a right not to do *p* that you have a right to do *p* without doing *q*. Many people believe that there is a limit to how much you are morally required to do for your children. However, they also believe that if you do more than you are morally required to do, you are still morally required to treat your children equally. Some left-libertarians believe that you do not have full ownership over your external resources. See Peter Vallentyne, *Libertarianism*, STAN. ENCYCLOPEDIA PHIL., July 24, 2006, at 1, 4-5, <http://plato.stanford.edu/entries/libertarianism/>. Accordingly, they might want to argue that although you have the right to keep "your" external resources for yourself, you do not have the right to dispose of them in a discriminatory manner if you decide to give them away.

25. Many parents might respond precisely this way if they were accused of not treating everyone with equal concern and respect by favoring their own children over others' children.

26. For an example of a teleological egalitarian, see generally LARRY S. TEMKIN, *INEQUALITY* (1993) (describing teleological egalitarianism as holding that undeserved inequality is always objectionable).

The second reason it is hard to argue that discrimination is morally wrong per se is that, as we saw, there are many different ways of discriminating against individuals. Offhand, some of them seem to be morally much less problematic than others, if morally problematic at all. For instance, differential treatment on the basis of preferences for goods and services that came to be available in a tainted way but are now held for non-tainted reasons may amount to discrimination, but it can hardly be claimed to be intrinsically morally wrong.²⁷

The conclusion to draw from these observations is that discrimination is in itself neither morally wrong nor morally undesirable in the way that some ethicists take, say, killing an innocent person to be. This leaves us with two positions, either or both of which may be correct. One possibility is that some, though not all, forms of discrimination are necessarily morally wrong; the other is that while some forms of discrimination are not wrong, many kinds are, and perhaps often for similar reasons. The following Parts explore the first possibility,²⁸ and critique respect-based accounts of why the second possibility is an actuality.²⁹

IV. DESERT-PRIORITARIANISM

Desert-accommodating prioritarianism might best explain the moral wrongness of private discrimination. Richard Arneson expounded this view, in another context, in the following terms:

Institutions and practices should be set and actions chosen to maximize moral value, with the moral value of achieving a gain (avoiding a loss) for a person being (i) greater, the greater the amount of well-being for the person the gain (averted loss) involves; (ii) greater, the lower the person's lifetime expectation of well-being prior to receipt of the benefit (avoidance of the loss); (iii) greater, the larger the degree to which the person deserves this gain (loss avoidance). We ought to maximize well-being weighted by priority and responsibility.³⁰

27. Alexander, *supra* note 4, at 187-89. Such differential treatment might, of course, be experienced as humiliating and offensive, but this does not establish that it is intrinsically morally wrong, as can be seen if we imagine that everyone is unaware of the tainted history of the preferences.

28. *See infra* Part IV. This exploration ignores the highly defensible view that discrimination that fails to maximize moral value on the prioritarian, desert-accommodating view is necessarily wrong.

29. *See infra* Part V.

30. Richard J. Arneson, *Egalitarianism and Responsibility*, 3 J. ETHICS 225, 239-40 (1999). Strictly speaking, desert-accommodating prioritarianism is not a particular moral principle, but a family of moral principles whose members differ from each other in terms of how much weight they give to the three factors held to be intrinsically

On this view a given amount of well-being has greater moral value when it accrues to a badly off, deserving person than it does when it accrues to a well off, undeserving person. Extra benefits to people always increase moral value. Hence, an act that leaves some worse off and no one better off cannot be morally right (unless it affects people's levels of desert).

Desert-accommodating prioritarianism differs from utilitarianism. First, it leaves open whether well-being should be construed along perfectionist lines. Second, it ascribes intrinsic, not just instrumental, moral significance to considerations about desert.³¹ Finally, it is not indifferent to the distribution of well-being among an act's beneficiaries. All other things being equal, desert-accommodating prioritarianism favors a more equal distribution over a less equal distribution. Equality in itself, however, has no moral significance on this view, not even when the desert levels of different individuals are equal. Hence, desert-accommodating prioritarianism may favor more unequal distribution where some redistribution involves a loss of resources, if some people better convert resources into well-being, or if equality unavoidably erodes incentives and thus reduces the pool of resources.

Desert-accommodating prioritarianism explains some of the moral distinctions that we want to make between different ways of discriminating. Consider first the issue of "reverse discrimination" or affirmative action. Assuming that such discrimination tends to favor people who are worse off and no less deserving than others, desert-accommodating prioritarianism can explain why it is morally different from the kinds of "non-reverse discrimination" which we know of and which, almost without exceptions, tend to harm those who are worse off.³² Second, we tend to consider discrimination worse the more harm it imposes on discriminatees and the worse off they are. The present account explains why discrimination against vulnerable and stigmatized groups tends to be morally worse than idiosyncratic discrimination against privileged and non-stigmatized groups (and against otherwise privileged but stigmatized groups). Third, suppose, contrary to an earlier suggestion,

morally significant. This Article does not attempt to specify these weights. Such specifications can only be done in a rough and intuitive way. See Derek Parfit, *Equality and Priority*, in IDEALS OF EQUALITY 1, 12 (Andrew Mason ed., 1998) (noting, however, that such specifications will be clear in many cases).

31. This raises the worry of a problematic circularity: What X deserves at t_1 depends on whether X performs the right act at t_1 ; that act in turn depends partly on what X deserves at t_1 . One view that avoids this problem says, as many do, that what one deserves depends wholly on what one did in the past. I thank Larry Alexander for pressing me on this point.

32. This is not to deny that other accounts apart from the desert-accommodating prioritarian account may explain this as well.

that the group of unqualified applicants is a socially salient group. In that case, the desert-accommodating prioritarian account does not imply that discrimination against unqualified applicants (based on their lack of qualifications) is necessarily morally wrong. For it is reasonable to assume that, for reasons of efficiency, maximization of moral value requires there to be a general fit between a person's qualifications and the job that he or she obtains.

The desert-prioritarian view, like other accounts of the wrongness of discrimination that appeal to considerations of harm, provides a satisfying, two-pronged explanation of why we have a concept marking differential treatment based on membership of socially salient groups. First, stigma is a major type of harm involved in discrimination, perhaps the most grievous harm distinctive to discrimination. Stigmatic harm renders attributes of the victim "deeply discrediting" thereby reducing the bearer "from a whole and usual person to a tainted, discounted one."³³ It is unlike pain in that one individual's pain will not harm another individual, unless this individual cares about the first individual, for example, because they are related as child to parent.³⁴ In contrast, stigmatic harms spread across persons belonging to socially salient groups even when they do not harbor external preferences for the well-being of other members of the group. If an African-American person is treated as a "tainted, discounted one" by virtue of being African-American, then the stigmatization will likely harm other African-American persons; they will also be seen by some as "tainted, discounted" individuals.³⁵ Where a person with green eyes (or another socially nonsalient property) is treated in a likewise manner on account of his green eyes, other people with green eyes are unlikely to suffer.

The second reason we have a concept marking differential treatment of people based on membership of socially salient groups is that when individuals suffer disadvantageous treatment of this kind, the "individual acts of discrimination" are likely to "combine into a systematic and inequitable frustration of opportunity."³⁶ When individuals suffer

33. GOFFMAN, *supra* note 22, at 3.

34. Hence, to care about whether others of one's own kind are subjected to stigmatic harm, one need not have a preference that is intrinsically external, that is to say, intrinsically about how someone else fares.

35. GOFFMAN, *supra* note 22, at 3.

36. Brest, *supra* note 21, at 10. Stigmatic harm tends to be a species of cumulative harms; the stigmatic harm is not a result of a singular act or a small number of singular acts, but the cumulated result of a large set of acts.

disadvantageous treatment based on membership of socially nonsalient groups (or on the basis of most *individual properties*), no such cumulative harm is likely to ensue. The harm involved in each act of discrimination may be very close to zero.³⁷ However, the marginal harm from discriminatory acts is likely to rise steeply when a certain threshold number of discriminatory acts against a particular individual has been reached.³⁸ Individual acts of discrimination may, were they to take place in an otherwise discrimination-free social context, harm no one or involve only imperceptible harms.³⁹ Hence, when applying the prioritarian principle, we should not apply it merely to individual acts of discrimination; we need to apply it to sets or series of acts. A single act that does not fail to maximize moral value may nevertheless be a member of a set of acts that is wrong, because there are other sets of acts that bring about more moral value.⁴⁰

Summing up these two observations, the harm involved in disadvantageous differential treatment based on membership of socially salient groups is likely to spread across individual acts and to accumulate across individual acts. The same is not true of disadvantageous differential treatment based on membership of socially nonsalient groups or individual properties.

This section has described some implications of desert-accommodating prioritarianism vis-à-vis the morality of private discrimination. These implications are welcome, and support desert-prioritarianism. However, some of the implications combine equally well with moral positions

37. Indeed, each such act may, considered on its own rather than as a member of a large set of discriminatory acts, be beneficial as a result, say, of the draconian social sanctions imposed on people belonging to different, hierarchically ordered groups who relate to one another in a nondiscriminatory way.

38. What will at first constitute a violation of formal equality of opportunity will turn into a serious violation of substantive equality of opportunity. Unless one is extremely unlucky and differential treatment on whimsical grounds common, differential treatment on whimsical grounds is unlikely to turn into a serious violation of substantive equality of opportunity. See Richard Arneson, *Equality of Opportunity*, STAN. ENCYCLOPEDIA PHIL., Oct. 8, 2002, <http://plato.stanford.edu/entries/equal-opportunity/>; see also Paul Woodruff, *What's Wrong with Discrimination?*, in THE AFFIRMATIVE ACTION DEBATE 39, 40-41 (Steven M. Cahn ed., 1995) (discussing disrespect-related harms).

39. An applicant who is denied a job as result of discrimination in an otherwise discrimination-free social context is, of course, harmed in that he does not get the job. However, the applicant who in fact got the job would otherwise have been harmed in this way. The distinctive kind of harm involved in discrimination tends to arise only in social contexts that are permeated with discrimination.

40. Compare Frank Jackson, *Group Morality*, in METAPHYSICS AND MORALITY 91, 98-103 (Philip Pettit et al. eds., 1987) (ignoring the effects of sets of acts), with DEREK PARFIT, REASONS AND PERSONS 70-73 (1984) (arguing that individual acts which are not morally wrong can be made wrong by membership in a wrongful set of acts).

other than desert-prioritarianism,⁴¹ so that a discussion of the morality of discrimination does not alone provide sufficient grounds to accept desert-prioritarianism. Pressing on, the following sections test the implications of desert-prioritarianism, taken to be independently plausible, in the area of private discrimination. We turn first to some implications of desert-prioritarianism which seem somewhat problematic.

A. *Distinctiveness of the Wrong of Discrimination*

One challenge to the desert-prioritarian is that if discrimination is wrong simply because it fails to maximize the sum of moral value, then there is nothing distinctively wrong with discrimination. It is wrong in exactly the same way that all other sorts of harmful or desert-level reducing acts are wrong. This cannot be right, because we know discrimination to be wrong in distinctive ways. For instance, Matt Cavanagh objects that an account of the wrongness of discrimination that appeals to the ideal of equality “does not seem to capture what is *distinctively* wrong with discrimination.”⁴²

This challenge can be answered.⁴³ There are two ways in which discrimination might involve a distinctive wrong. First, it might violate a basic moral principle that pertains to discrimination in the same way that some deontologists think that basic moral principles pertain to lying or to the killing of innocents.⁴⁴ Second, it might often cause or involve kinds of harm or reductions of levels of desert that are associated only with discrimination, for example, a sense of shame of one’s social identity or a sense of being inferior or, at least, as being regarded as inferior.⁴⁵ It seems question-begging to object that desert-prioritarianism does not show that there is anything distinctively wrong with discrimination in the first sense. To object that it implies that there is nothing distinctively

41. Whether some of the implications support a respect-based account as well is discussed later. *See infra* Part V.

42. CAVANAGH, *supra* note 1, at 155.

43. Despite Cavanagh’s challenge, it turns out that even he does not think that there is anything distinctively wrong with discrimination. He thinks discrimination is wrong when it involves treating someone with unwarranted contempt. *Id.* at 166. But if that is the case, then presumably wrongful discriminatory acts are wrong for the very same reason as other acts that are nondiscriminatory but involve treating someone with unwarranted contempt.

44. *See* CHARLES FRIED, *RIGHT AND WRONG* 30-53 (1978).

45. *See* Wasserstrom, *supra* note 9, at 593; *see also* LAWRENCE BLUM, “I’M NOT A RACIST, BUT . . .” 8-11 (2002) (discussing inferiorization caused by racism).

wrong about discrimination in the second sense is plainly wrong. As we have seen above, defenders of the desert-prioritarianism and other harm-based accounts can say that the harm involved in discrimination is distinctive, either in terms of the kinds of harmful effects that discrimination involves or in terms of the kinds of harm that being discriminated against may be thought to constitute.

B. The Special Significance of Harms to Discriminatees

A different challenge says that insofar as discrimination is wrong because someone is harmed, it must be primarily wrong because it harms those who are subjected to discrimination. So any account tying the wrongness of discrimination to harm must make sure that it is somehow tied especially to the harm suffered by those who are subjected to the discrimination.⁴⁶ It might be denied that the desert-prioritarian account does that.

Suppose *X* discriminates against *Y*, and third-party *Z* is neither subjected to discrimination nor discriminates. There are then two cases to consider: whether it is worse that *Y* is harmed rather than *Z*, and whether it is worse that *Y* (or *Z*) is harmed rather than *X*. Assuming that one does not necessarily become morally more deserving by being subjected to discrimination, it follows that, all other things being equal, it could be morally irrelevant whether the harm involved in *Y*'s being discriminated against falls on *Y* rather than *Z*.

This implication is not damaging. Suppose an ethnic majority discriminates against an ethnic minority. Suppose we initially regard this as morally wrong, but we then discover that, contrary to what we had supposed, the discrimination does not harm the ethnic minority. The harm we thought fell on this minority actually falls on another ethnic minority, one that is *not* discriminated against. I doubt that we would then conclude with some relief that the discrimination in question is less bad than we had thought initially. A second point is this: assuming that the actions one performs determine desert, being discriminated against (or being subjected to unjust treatment in general) cannot in itself affect one's desert status. This, of course, is consistent with the expectation that if two people enjoy the same level of benefits and one of them has been subjected to discrimination, this latter person is likely to have a higher level of desert than the other because he had to strive harder to obtain his benefits.

46. *E.g.*, CAVANAGH, *supra* note 1, at 157 (asserting this objection against meritocratic accounts of the wrongness of discrimination).

This clarification implies that it is morally irrelevant whether *X* or *Y* (or *Z*) is harmed. One might urge that this implication is damaging. However, in cases in which we think it matters morally whether harms or benefits fall to the discriminator, *X*, or to others (including the victim of discrimination, *Y*, or a third party, *Z*), the discriminator is presumably morally less deserving by virtue of being a discriminator. Given this, it follows from the proposed account that it is worse for a given harm to fall on *Y* or *Z* rather than *X*.⁴⁷ To many this will seem to favor desert-accommodating prioritarianism over straight prioritarianism and other views according to which desert has no intrinsic moral relevance.⁴⁸

C. Beneficial Discrimination

Consider a case in which someone is subjected to discrimination and, perversely, this maximizes moral value on the specifications described above; perhaps the discriminatee benefits because adversity strengthens his will to succeed and dramatically increases his level of desert,⁴⁹ perhaps the benefit to others more than compensates for, morally speaking, the harm to the discriminatee. On the present account, such discrimination is not morally wrong. This implication is bound to be seen as problematic, just as some would say that, against the desert-prioritarian principle, the mere fact that a given act of lying, deceiving, or killing an innocent maximizes moral value does not render it morally permissible.

Friends of desert-prioritarianism can concede that something may well be morally amiss in cases involving beneficial discriminatory acts, but insist that what is morally amiss is *not* that the act is wrong. To deny that a certain discriminatory act that maximizes moral value is bad is not to imply that the agent cannot be criticized for performing it; the agent

47. In cases where discrimination is not wrong, being a discriminator presumably does not render one less deserving. Accordingly, it is not clear that one may convincingly object to the proposed view on the grounds that it does not discount harms to the discriminator in such cases.

48. Some may object that the proposed view does not go far enough. For example, they may retributively think it morally better that the discriminators' well-being is lowered; it is not merely that the moral value of a given level of well-being for them is reduced. Alternatively, they may reject that in cases in which all other things are not equal—for example, the discriminators are much worse off than those whom they subject to racial discrimination—it may be better that the resulting loss of well-being falls on those who are subjected to discrimination, rather than on those badly-off people who discriminate.

49. See Alexander, *supra* note 4, at 188.

might, for example, have had reason to believe that the act would on balance harm the discriminatee, and thus attract blame for performing the act. Nor need it oblige us to deny that it is bad that the agent's character predisposes him to perform the discriminatory act; on most occasions, discriminatory acts far from maximize moral value, so we should cultivate a character that does not lead us to perform them.⁵⁰ Hence, if a discriminatory act maximizes moral value, in all likelihood we can still criticize the discriminator for his conduct, his moral reasoning, or his character, even if we cannot say that the discriminatory act is bad as such.⁵¹ Admittedly, there could be cases in which we could do neither of these things, but then in such cases—such as a case in which the discriminator intends his act to strengthen the discriminatee's resolve and thereby benefit him—we are unlikely to have any firm moral intuitions to the effect that there really is something morally amiss with the discriminatory act.

*D. The Moral Permissibility of Harmful Discrimination
that Maximizes Moral Value*

Suppose the only way to maximize moral value is through formal discrimination—for example, legal discrimination forbidding some socially salient groups to do what other socially salient groups are permitted to do—and substantive discrimination—that is, differential treatment that makes members of some socially salient groups worse off than they would be in the absence of such treatment. On the view proposed here, discrimination would be morally required under such circumstances. This is bound to strike some as implausible. Is it seriously so?

One reason for answering in the affirmative involves a misunderstanding and is therefore best set aside at once. It may be suspected that anyone who considers a certain kind of action (such as lying, killing, or discriminating) morally permissible in circumstances very different from those under which we live is somehow committed to the view that this kind of action is not so morally wrong, after all, in our actual circumstances. Although the claim that a certain type of action would be morally wrong under any possible circumstance is often taken to imply that the action is

50. See R. M. HARE, *ESSAYS IN ETHICAL THEORY* 212-30 (1989) (distinguishing between judgments of rightness of the act, judgments of moral rationality of the act, and judgments of character of the agent).

51. For a related point about intentions and moral impermissibility, see Judith Jarvis Thomson, *Physician-Assisted Suicide: Two Moral Arguments*, 109 *ETHICS* 497, 515-18 (1999), and T. M. Scanlon & Jonathan Dancy, *Intention and Permissibility*, in *Supp. 74 THE ARISTOTELIAN SOCIETY* 301, 301-17 (2000).

seriously morally wrong, this does not strictly follow.⁵² One could, in principle, consider a certain kind of act to be mildly morally wrong whatever the circumstances. In that case, someone who thought the relevant kind of act was wrong only under some circumstances might consider the act to be morally *more* wrong under the circumstances in which they are wrong than the person who finds them mildly morally wrong whatever the circumstances. Therefore, the present view does not involve a morally lax view of discriminatory acts performed in our actual circumstances—circumstances in which formal and substantive discrimination do not maximize moral value.

To evaluate the allegation of implausibility properly, we need to consider it in more detail. Let us focus on formal discrimination, since many people view this as even more wrong than substantive discrimination. Suppose that sexist laws forbidding women to do certain kinds of work are required to maximize value. Several reasons could explain this requirement: (1) because in the absence of these laws people would be less deserving and, hence, benefits to them would count for less, morally speaking; or (2) because in the absence of these laws people would benefit less. Those who would not be willing to harm women to secure nonsexist laws would not be bothered by at least some versions of the first scenario.⁵³

Things might be different if men are better off than women and women will benefit only marginally from sexually nondiscriminatory laws, whereas men will lose a lot. If men are better off than women, their losses will have to exceed the gains of women to outweigh the latter on the prioritarian approach. If men are worse off than women, it may not seem so counterintuitive that for some size of benefits to men, and for some size of loss to women, formally discriminatory laws might be morally permissible. To insist that this implication is implausible, it seems that one would have to subscribe to an absolute deontological constraint against discrimination, and most observers rightly consider absolute deontological constraints implausible.⁵⁴ In fact, the situation would be akin to our own situation in which many of us favor efficient,

52. This conversational implicature is thought to hold because the most obvious explanation of why something is always morally wrong is that the moral reasons by virtue of which the act is morally wrong are infinitely strong.

53. Cf. Richard J. Arneson, *Against Rawlsian Equality of Opportunity*, 93 PHIL. STUD. 77, 77-93 (1999).

54. See, e.g., SHELLY KAGAN, *NORMATIVE ETHICS* 79 (1998).

sexually discriminatory laws implementing affirmative action in favor of women.

The preceding Parts presented and defended a positive account of the circumstances under which private discrimination is wrong. Since this defense is far from conclusive, Part V provides further support for the desert-prioritarian account by comparing its merits with those of a serious competitor: the respect-based account.

V. THE RESPECT-BASED ACCOUNT

According to some, discrimination is morally wrong because it involves a failure to respect discriminatees.⁵⁵ An act or practice fails to respect an individual if and only if it involves an underestimation of that individual's moral status. The act or practice might directly represent the individual as having a lower moral status than he actually has, or it might inaccurately represent others as having a higher moral status.⁵⁶ An individual's moral status is roughly determined by the moral weight given to his interests. On the plausible assumption that failures to respect do not necessarily overlap with failures to maximize moral value, the respect-based account and the desert-prioritarian account will in some cases deliver different moral verdicts.⁵⁷ Notably, on the respect-based account, discrimination may be morally wrong even if it harms no one and does not reduce anyone's level of desert.

Like the desert-prioritarian account, the respect-based account is really a family of accounts. Its adherents may differ, for instance, over the properties by virtue of which we merit respect and over when an act or a practice presupposes that someone has a lower moral status. On some accounts only those properties by virtue of which one qualifies as a

55. Absence of respect does not imply disrespect. For example, in certain contexts, such as public transportation, displaying indifference towards another is neither respectful nor disrespectful.

56. On a different account, "[t]reating a person with respect means . . . dealing with him exclusively on the basis of those aspects of his particular character or circumstances that are actually relevant to the issue at hand." Harry Frankfurt, *Equality and Respect*, 64 SOC. RES. 3, 8 (1997). On this account, respect is essentially nonrelational. Hence, if discrimination is wrong because it involves a failure to respect in this sense, discriminatory acts may be wrong for the same reason as nondiscriminatory acts that involve treating people equally, but on the basis of equally irrelevant properties. On the account explored here, if failing to respect an individual is to treat him as if he has a lower moral status than he in fact has, then the concern for respect is also nonrelational. The basic reason why it is morally bad to treat one person as if he has a lower moral status than another, when in fact they have the same moral status, is that one treats at least one of them as if he has a moral status different from the one he in fact has. It is only derivatively morally bad that one treats them differently.

57. If the harms are losses of well-being, it seems plausible to think that not all failures to show respect involve harm.

person are properties by virtue of which one merits respect. On this view, discrimination against human beings not qualifying as persons (perhaps newborn infants or people in late stages of Alzheimer's) is not morally wrong for the same reasons as discrimination against human beings who do qualify as persons and thus merit respect.

The respect account is often embedded in a Kantian moral framework which involves an agent-centered duty to avoid disrespecting other persons; but in principle consequentialist theories can incorporate concern for disrespect by treating respect as a maxim.⁵⁸ The following challenges to respect-based accounts are neutral as between these two kinds of respect-based account.

Respect-based accounts may appear ill-equipped to explain the badness of several of the forms of private discrimination identified above. First, it seems possible to be a cognitive discriminator even if you have no beliefs about the moral status of those you are discriminating against, and it is not clear how the mere biased formation of a belief presupposes anything about the moral status of the individuals represented in one's beliefs. In fact, it is even possible, albeit psychologically extraordinary, to be firmly convinced that individuals belonging to a group have a higher moral status than they in fact have and yet, in some contexts, be involved in cognitive discrimination against them. Second, non-valuational discrimination simply involves brute desires and hence need not rest on any value judgments about moral status.

To steer around these problems one should focus on the case in which the respect-based approach to the wrongness of private discrimination is most plausible: valuational, noncognitive discrimination.⁵⁹ It might be argued that this species of discrimination marks a crucial difference between respect-based accounts and desert-prioritarianism, since on the former it is necessarily morally wrong, while it only tends to be morally wrong on the latter. A closer look at the carefully elaborated respect-based account proposed by Larry Alexander helps respond to this suggestion.⁶⁰

According to Alexander, most forms of discrimination are wrong, when they are, for consequentialist reasons.⁶¹ However, he thinks one

58. See DAVID CUMMISKEY, KANTIAN CONSEQUENTIALISM 124-27 (1996).

59. For a description of valuational, noncognitive discrimination, see *supra* Part II.D.

60. See Alexander, *supra* note 4.

61. See *id.* at 151.

species of discrimination is wrong for a different reason: differential treatment of the members of different groups that manifests a judgment of differential moral worth. Here, Alexander submits, the consequentialist account must be supplemented by a respect-based account. While I find myself in agreement with most of Alexander's treatment of the issue of discrimination, I find I am disinclined to follow him at this point.

Alexander's notion of moral worth is a specific kind of what may be labeled "moral status." Why is this kind of discrimination morally wrong? Alexander's article suggests three answers. First, he writes: "[B]iases premised on the belief that some types of people are morally worthier than others are intrinsically morally wrong because they reflect incorrect moral judgments."⁶² On this view, the fact that the bias reflects a false moral judgment explains why it is morally wrong. Call this the *falsehood interpretation*. Second, commenting on Nazi biases: "Their biases were intrinsically morally wrong because Jews are clearly not of lesser moral worth than Aryans."⁶³ One might read this passage as specifying something that was implicit in the first passage. It is not the mere fact that a bias reflects a false moral judgment that renders it intrinsically wrong, but rather the fact that it reflects a false moral judgment about comparative worth.⁶⁴ Call this the *comparative falsehood interpretation*. A third interpretation of Alexander's view focuses on the occurrence of the qualification "clearly" in the excerpt about Nazi biases. On this interpretation, it is not the falsity of a moral judgment about comparative moral worth that renders the consequent bias intrinsically morally wrong, but the irrationality of this judgment. The Nazis had available to them abundant reasons for thinking that people of different races (however defined) have identical moral worth, yet they managed to form spectacularly false beliefs about the matter. Call this the *irrational comparative falsehood interpretation*. The following analysis assesses the strength of Alexander's position under each of these interpretations.

62. *Id.* at 161; *see also id.* at 159 (adding that such treatment is morally wrong regardless of the gravity of its effects).

63. *Id.* at 158-59.

64. This passage could be read in other ways as well. First, it might be suggested that what is morally relevant is that the bias reflects a false moral judgement to the effect that some have a lower moral worth than others. Someone who fails to believe what his beliefs entail may falsely judge some to have a higher moral status without judging that others have a lower moral status. This complication is ignored below. Second, it might be suggested that what is morally relevant is that the discriminator's moral judgement favors people of his "own kind" and that the individuals judged to have different moral worth in fact have the same moral worth.

A. The Falsehood Account

According to the falsehood account, valuational discrimination is wrong because it is based on a false moral judgment. This has several noteworthy implications. First, on this account discrimination against and discrimination in favor of are morally symmetrical. Favorable treatment based on a false belief that someone has a higher moral worth than he has is no more, and no less, based on a false moral judgment than unfavorable treatment based on a false belief that someone has a lower moral judgment than he has. Accordingly, the two kinds of treatment are wrong for the same reason.

Second, if *X* has a positive bias for *Y* and this is based on his incorrect judgment that *Y* is more worthy than he is, then this is no less wrong than if *X* thought himself to be worthier than *Y*, since both involve a false judgment about moral worthiness.⁶⁵ So, by way of illustration, it is no more wrong for a male sexist to be biased in favor of men, himself included, due to his false belief that men are more worthy than women than it is for an oppressed woman to be biased in favor of men due to her false beliefs that men are more worthy.

Third, incorrect moral judgments about a person's moral worth can be absolutely or relatively incorrect, or both. This makes no moral difference on the falsehood account. An individual, *X*, may incorrectly consider himself morally slightly more worthy than *Y* and at the same time consider himself *and Y* to be morally much more worthy than they are in fact. The falsehood account does not have the resources to explain why discrimination based on this false belief is morally less problematic than discrimination based on a slight absolute error and a great comparative error.

Evaluation of the falsehood account requires clarification of two issues. First, we need to clarify what it is for treatment of someone to be based on a false judgment about moral worth. One suggestion is that an act which is disadvantageous to the target, or believed to be so by the agent, can be said to be based on the target's moral status if and only if that moral status is the lowest possible compatible with this treatment's being morally permissible. Hence, if I treat someone in a way that would be morally permissible only if this individual was a nonhuman animal, my act is based on the belief that his moral status is lower than it is in fact. Thus, I fail to respect him.

65. This and the prior observation are both true of the two other accounts discussed.

This suggestion should be rejected. First, it implies that one does not treat another person disrespectfully when one acts towards this individual in a morally permissible way. Yet it would seem possible for me to treat someone in a way that is morally permissible, but for reasons that make my treatment disrespectful. For example, as a borrower I might punctually and despite my dire situation repay someone the tiny sum I owe him thereby signaling my contempt for his, let us suppose, unreasonable insistence on repayment whatever the circumstances. Second, because of false information I may act impermissibly in treating an individual in a certain way and yet have the deepest respect for this individual. In such cases, saying that I fail to treat this individual with respect seems to add nothing to the claim that I act impermissibly. Finally, the account of presupposing something about someone's moral status implies that whenever an act is morally impermissible, it is based on a falsehood about the discriminatee's moral status. However, it also implies that the act is not morally wrong by virtue of this basis. For this to be the case, being based on a falsehood about the person's moral status would have to be something other than being morally impermissible. Yet friends of the respect-based account want to say that being based on a falsehood about moral worth is different from, and hence something by virtue of which, acts are morally impermissible. Accordingly, an act can be based on an assumption about the moral worth of the affected individual if and only if this act is somehow motivated by the actor's judgment of the individual's moral worth.⁶⁶ On this account, a sufficiently unreflective wrongdoer may make no assumptions about the moral status of his victims.

Second, we need to clarify the concept of moral worth and who can possess it. One possibility is that some sentient beings have moral worth and the rest have none. When Kant famously contrasted persons that have worth with mere things that only have a price, he had this possibility in mind.⁶⁷ Kant thought that all rational beings have worth by virtue of their rationality and that their worth does not vary, say, with varying cognitive abilities. Variations above the threshold of rationality are irrelevant to personhood and do not affect moral status. Although almost all adult human beings are persons, not all human beings are persons in the relevant moral sense, that is, rational beings who have the capacity for

66. Note that one can make a false moral judgement concerning someone's moral status, treat this person as if this person had a lower moral status, and yet not treat this person as such *because* one holds this false moral judgement (it may be causally inert). We can leave as undecided whether such an act is based on the relevant incorrect judgement about moral worth.

67. See IMMANUAL KANT, *THE MORAL LAW* 113 (H.J. Paton trans., Routledge Classics 2005) (1785).

self-consciousness (fetuses, newborn infants and irreversibly comatose people are exceptions; of course, fetuses and newborn infants have the potential to become persons).⁶⁸ Hence, if we tie the wrongness of discrimination to a failure to respect, and if this in turn is tied to the moral worth of persons, we cannot explain the wrongness of certain kinds of discrimination. Consider, for instance, someone who does not disrespect persons whatever their sex, but discriminates against fetuses and newborn infants (potential persons) on the basis of sex. Imagine that this person will not perform an abortion when the fetus is male but is happy to do so when it is female.⁶⁹

Another way to think about moral worth is that all sentient beings have moral worth, but in varying degrees. This is likely the sense of worth Alexander has in mind. He explicitly allows for, but does not commit himself to, the view that virtuous and deserving persons have a greater moral worth than vicious and undeserving persons.⁷⁰ According to most versions of this view, the function that takes us from a given degree of virtuousness to a resulting degree of moral worth is continuous, so different individuals have different levels of moral worth. Moreover, there is a huge difference between the most deserving (say, Gandhi) and the least deserving (say, Hitler).

With these clarifications in mind, the question becomes whether the mere falsity of the judgment of moral worth on which one's act is based renders that act morally wrong. Consider first a case in which *X* treats *Y* worse than *Z* in a way that is impermissible because, through no fault of his own, *X* holds the false belief that *Y* is very undeserving and *Z* very deserving. Consider next a case in which *X* treats *Y* worse than *Z* in a way that is impermissible because, through no fault of his own, he does not falsely believe that *Y* is very undeserving and *Z* very deserving. The question then is: do these cases differ, morally speaking, and if so which is worst?

In answering this question we should ignore two confusing factors. First, harmful behavior that reflects a judgment of lower moral status is often more harmful, other things being equal, than behavior that does not

68. See JEFF MCMAHAN, *THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE* 6 (2002) ("Roughly speaking, to be a person, one must have the capacity for self-consciousness.").

69. Defenders of a respect-based account are, of course, free to say that this kind of discrimination is wrong, not because of any failure to respect the worth of the fetuses, but because it is hurtful and thus harmful for some existing persons, in this case women.

70. See Alexander, *supra* note 4, at 159.

reflect such judgment, and for that reason it is often morally worse. This is merely a contingent truth and as such does not support Alexander's account. Second, when we think of cases in which someone misjudges the moral worth of others, we tend to have in mind cases involving epistemic vice—cases in which the discriminator, for example, applies epistemic double-standards in evaluating evidence of moral worth. Such vices, however, should be disregarded; they need to be considered instead in relation to the irrational comparative falsehood account.

Returning to our question, one view is that the two cases do not differ morally speaking, since while *X*'s beliefs about *Y*'s and *Z*'s levels of desert are relevant to our evaluation of his moral character, they are irrelevant to moral evaluation of his act. This view seems most promising. However, for present purposes we can set this aside and note that if *X*'s beliefs about *Y*'s and *Z*'s levels of desert are relevant to evaluating his act, it would seem that what *X* does in the second case is worse than what he does in the first. Although *X*'s actions in the first case were wrong, he at least believed (or had beliefs to the effect) that the person he treated badly was thoroughly undeserving. In the second case not only were *X*'s actions wrong, but he also lacked the belief that the person he treated disadvantageously was thoroughly undeserving. If this makes any moral difference at all, it suggests that the latter act is worse. But if one's discriminatory activities are in some cases less bad when accompanied by a false judgment about the moral worth of the person affected by those activities, it follows that discrimination cannot be bad simply because it reflects an incorrect judgment of moral worth. Hence, we should reject this account.

B. The Comparative Falsehood Account

If the argument above shows that we should reject the falsehood account, a similar conclusion is sound here. Comparing a case in which *X* treats *Z* better than *Y* and this treatment is based on the false belief that *Z* is more worthy than *Y*, with a case of differential treatment in which *X* has no such false belief suggests the false belief is either irrelevant to our moral evaluation of the acts or reduces the moral badness of the act.

C. The Irrational Comparative Falsehood Account

Now compare a case in which *X* treats *Z* better than *Y* and this treatment is based on the false *and irrational* belief that *Z* is more worthy than *Y*, with a similar case of differential treatment in which *X* has no such belief. Is the former morally worse than the latter?

One possibility that needs exploration is whether the falsity of the judgment of *Y* and *Z*'s comparative worth drops out of the picture as irrelevant to moral evaluation of differential treatment. To see what motivates such a line of inquiry, consider a case in which the discriminator correctly judges the comparative moral worth of *Y* and *Z* based on an irrational, false moral judgment about the relevance to one's moral worth of membership in the socially salient groups to which *Y* and *Z* belong. So suppose a discriminating, sexist agent falsely believes that *Y* is a particularly morally virtuous person—indeed so morally virtuous that the discriminator irrationally believes *Y*, despite being a woman, is more worthy than *Z*, who is a man. Suppose additionally that *Y* is in fact morally worthier than *Z*. Here, we might assume, *X* makes an irrational, but correct judgment about the comparative moral worth of *Y* and *Z*. From the point of view of respect, this case seems no different from an otherwise comparable case in which *X* does not falsely believe that *Y* is a particularly virtuous person and thus makes a false judgment about *Y* and *Z*'s comparative moral worth. This suggests that the falsity of the judgment about the comparative worth of *Y* and *Z* is in itself irrelevant from the point of view of respect. What matters is the fact that the comparative judgment is held irrationally.

Sheer irrationality seems intrinsically morally irrelevant and, thus, cannot explain the moral badness of discrimination. However, it may be different with irrationality tied to moral flaws.⁷¹ Assume *X* irrationally believes that *Z* is more worthy than *Y* because *X* has an unjustified hatred of *Y* because of *Y*'s membership in a certain socially salient group. It is no longer immediately clear what we should say about the moral credentials of our two cases of differential treatment. One possibility is to say that the fact that a given differential treatment is based on irrational beliefs about differential moral worth, where the irrationality involved reflects a moral flaw, renders it intrinsically morally wrong. Another possibility is to say that the fact that a given differential treatment is so based is irrelevant to the moral evaluation of the *activity* of differential treatment but is highly relevant to the moral (and epistemic) evaluation of the *character* of the agent involved.

The second of these possibilities allows us to say, in some cases, that an agent did what he ought to do, morally speaking, despite his vicious,

71. Irrationality may reflect moral virtues. For example, if you continue believing that your friend is telling you the truth, despite evidence to the contrary, you may be a better friend than if your view of the matter simply tracked the evidence.

irrational false beliefs about comparative moral worth. Suppose a sexist male professor denies a female colleague some sabbatical on account of his irrational, false beliefs about the differential moral worth of men and women. Suppose, moreover, that unbeknownst to the professor his colleague is a thoroughly undeserving person with a long history of misconduct and ought, morally speaking, to be denied the sabbatical. Here we might like to say that the professor's action was morally right; it just happened to be based on an irrational and false belief about the differential moral status of men and women which, in the circumstances, led to a correct judgment about the moral status of the colleague.⁷² Of course, the professor's motivation displays a flaw of character.

Having now reviewed all three interpretations, the desert-prioritarian account is clearly not inferior to Alexander's respect-based account. This is not to say that respect is irrelevant to the morality of private discrimination. Perceived lack of respect often affects the degree of harm involved in differential treatment, the desert level of individuals, and thus the moral qualities of discriminatory acts.⁷³ Again, lack of respect is relevant to the moral evaluation of a person's character or motivation. Both of these observations are, however, consistent with the desert-prioritarian account.

VI. THE RIGHT TO ENGAGE IN WRONGFUL PRIVATE DISCRIMINATION: A CONCEPTUAL MAP

There is a right to engage in private discrimination if and only if it is not the case that there ought, morally speaking, to be a law that prohibits engaging in such activities.⁷⁴ To determine the conditions under which there ought to be such a law, we return to desert-accommodating

72. Hence, here we have a case of a bias based on a correct judgment of differential worth that, however, in turn is based on an incorrect judgment of differential worth. Alexander's account implies that a bias is wrong, not just if it is immediately grounded in a false judgment of differential worth, but also if any link in the chain of grounding beliefs of a bias involves an incorrect judgment of differential moral worth. See Alexander, *supra* note 4, at 217-18.

73. Accordingly, the desert-prioritarian account is compatible with cases where "doing *X*" has a different moral status than "doing *X* with the intention of *Y*," "doing *X* out of motive *Z*," and "doing *X* thereby expressing an attitude of *W*." The latter cases may have different consequences than the former. See Arneson's discussion of thin versus thick act descriptions. Richard Arneson, *What Is Wrongful Discrimination?*, 43 SAN DIEGO L. REV. 775, 779-86 (2006).

74. This ignores cases in which a law forbidding a certain kind of private discrimination is neither one that ought, morally speaking, to exist, nor one that ought not to exist—either will have exactly equally good consequences—and the law must either forbid or permit the behavior. If, in such a case, we decide to forbid the relevant kind of private discrimination, there is no right to private discrimination even if the condition stated in the main text is not satisfied. I owe this point to Peter Vallentyne.

prioritarianism; other moral principles will lead to different conclusions about which kinds of discrimination ought to be legally forbidden. Desert-prioritarianism implies that there ought to be a law prohibiting a certain kind of wrongful private discrimination if and only if that law maximizes moral value. In fact, on this view there ought to be a law that enjoins private discrimination that is morally wrong if the existence of such a law maximizes moral value. There are six cases to consider:

| | Private discrimination in which there ought to be a legal duty to engage. | Private discrimination in which there ought to be a legal right, but not a legal duty, to engage. | Private discrimination in which there ought to be a legal duty not to engage. |
|---|---|---|---|
| Private discrimination that is morally wrong. | 1. | 2. | 3. |
| Private discrimination that is not morally wrong. | 4. | 5. | 6. |

The world we live in may well instantiate all six possibilities—some more often than others. The examples below describe some considerations relevant to the classification of different cases. Before doing so, one issue must be briefly addressed: how we determine which alternatives are relevant to determining which laws maximize moral value.⁷⁵

Laws that maximize moral value in one set of alternatives may be very different from those that maximize moral value in another. Assume, for instance, that in one alternative people engage in neither morally wrong discrimination nor other kinds of unjust behavior and most private

75. One question here is whether one should use the same range of alternatives for the purpose of determining which kinds of private discrimination are wrongful and for the purpose of determining which kinds of private discrimination ought to be legal. Using different sets of alternatives may render it too easy to find examples of wrongful private discrimination that ought to be legal and examples of morally permissible private discrimination that ought to be illegal.

discrimination is legal. That alternative might well realize greater moral value than one in which most people engage in various kinds of morally wrong private discrimination and most kinds of private discrimination are illegal. Equally, it might realize greater moral value than an alternative in which people engage in neither morally wrong private discrimination nor other kinds of unjust behavior and most kinds of private discrimination are illegal (say, because of the costs involved in having laws that are never transgressed). This might show that in a world that is pretty ideal from the point of view of nondiscrimination there ought to be a right to engage in wrongful private discrimination; but it would not show that, given the non-ideal worlds that we could realistically hope to maintain, there ought to be a legal right to engage in such behavior. To properly explain which kinds of wrongful private discrimination ought to be legal, one must specify the full range of alternatives relative to which one answers the question. This undertaking is beyond the scope of this Article. Hence, the following examples assume that the relative alternatives will parallel ours, in terms of people's dispositions to behave in certain ways, but will have different laws on private discrimination. The evaluation of these alternatives will be rough, sketchy, and done from the armchair. At best, it identifies some considerations that will be relevant to the issue.

A. Alternative 1: A Legal Duty to Engage in Wrongful Private Discrimination

In cases involving widespread biases, it might emerge that there ought to be a legal duty to engage in wrongful private discrimination. Consider a country whose population is divided into a large Protestant majority and a small Catholic minority. Some members of the Protestant elite are anti-Catholic, and as a result there are certain laws which, in effect, impose on Protestants a legal duty to engage in private discrimination against Catholics. For instance, Protestants are not allowed to hire or live together with Catholics. Members of the Protestant elite and Protestants generally care about these discriminatory laws mainly as a symbolic manifestation of Protestant supremacy. Hence, Protestants and Catholics who engage in the legally forbidden private interaction experience little trouble: few inform on lawbreakers, the police give low priority to violations of these discriminatory laws, and only a few lawbreakers experience social sanctions.

Generally speaking, it is morally wrong for Protestants to discriminate in the ways they are legally obliged to discriminate. However, trying to change the laws would cause an uproar, possibly civil war, and hence the laws, morally speaking, ought to be retained for the time being. More

generally, in cases involving widespread biases that focus mainly on the symbolic significance of discriminatory laws, a gap between legally required and morally permissible discriminatory acts may develop. Such situations are normally best construed as partial compliance situations that are not optimal from the point of view of nondiscrimination.

*B. Alternative 2: A Legal Right to Engage in Wrongful
Private Discrimination*

There are plenty of discriminatory acts that are wrongful and yet ought to be legally permitted. First, some wrongful private discriminatory acts are likely to be so rare that little good will come from outlawing them. For a wide range of commodities people will purchase whatever is the best offer from a purely commercial point of view. Hence, if some consumers will not buy petrol produced by companies that predominantly employ people of a certain ethnicity, they might act in a wrongful way and yet denying them a legal right to do so might not, given the rarity of this behavior, improve the situation.⁷⁶

Second, in connection with some kinds of wrongful private discrimination, enforcement of the laws would be very difficult and costly. For instance, people who discriminate on the basis of race, ethnicity, and religion in their choice of spouse may act wrongly, especially in situations of racial, ethnic, or religious tension. But often it will be difficult, and harmful to many parties, to prove that someone has discriminated in his or her choice of spouse.

Third, as the example just provided illustrates, effective law enforcement may destroy some important goods altogether. The law can force a company to hire a higher proportion of its workforce with a minority background without seriously affecting, for better or worse, its economic viability; but a person cannot be forced by law to marry a person with a race, religion, or ethnicity different from his own without seriously affecting his love life.⁷⁷ (Imagine: “This court finds beyond a reasonable doubt that had you not been such a bigot, you would have married *Y* rather than your present spouse, *Z*.”)

76. Jobs and services may differ from many commodities, in that these involve a much greater density of social interactions. See NARVESON, *Have We a Right to Nondiscrimination?*, *supra* note 5, at 213.

77. The state might through indirect and non-legal means try to reduce the amount of private discrimination of this sort.

In these cases, laws cannot create a state of affairs that is ideal from the point of view of nondiscrimination. This requires a certain kind of ethos manifested in people's lawful choices.

C. Alternative 3: A Legal Duty Not to Engage in Wrongful Private Discrimination

The claim that this case is instantiated is much less controversial, and very little shall be said about it. For instance, there ought to be laws forbidding private employers from paying women less than men for doing the same job when these are easily enforced at little cost and with little harm to employers, female employees, or consumers. One highly relevant factor is the way in which laws will affect the strength and existence of the relevant discriminatory preferences. When discriminatory preferences are a rather superficial feature of people's identity, outlawing conduct reflecting such preferences may make them almost extinct, strengthening the argument for outlawing the relevant conduct.⁷⁸

D. Alternatives 4 & 5: A Legal Duty or Permission to Engage in Private Discrimination that Is Not Wrongful

Affirmative action programs will often be of this kind. Consider first the case for a legal duty. Suppose a certain minority has suffered from very bad forms of discrimination and other injustices. Suppose that as a result people from this minority suffer from substandard levels of education and income. Suppose, finally, that affirmative action programs at private universities and companies will either not make things worse or make them considerably better from the point of view of desert-accommodating prioritarianism—because they redistribute resources to badly-off people who are in some cases more deserving, and because they lead to a society with less discrimination that makes better use of the pool of talent. In the latter case where affirmative action programs at private universities and companies make things considerably better from the point of view of desert-accommodating prioritarianism, a legal duty to engage in affirmative action might be justified because it ensures that more private universities and companies engage in affirmative action. In the former case where affirmative action programs at private universities and companies simply do not make things worse from the point of view of desert-accommodating prioritarianism, a legal duty might be justified because it sends a powerful message of inclusion which may have

78. See Alexander, *supra* note 4, at 163.

positive consequences quite independently of the consequences resulting from various agents' efforts to comply with the law.

There may be cases in which (i) the net benefits from universities and companies adopting affirmative action programs in response to a legal requirement are negative; and (ii) where a mere legal permission to adopt such programs will involve roughly the same symbolic benefits as a legal requirement. Equally, there may be cases in which (i) these symbolic benefits of legal permission will be smaller than the symbolic benefits of a legal duty; but (ii) there is a somewhat greater net loss involved in having some companies and universities adopting affirmative action programs that they would not have adopted had the law not forced them to do so. In both situations, desert-accommodating prioritarianism favors legal permission to engage in affirmative action over a legal duty to do so.

E. Alternative 6: A Legal Duty Not to Engage in Private Discrimination that Is Not Wrongful

Consider, finally, the case of a community that is prone to ethnic and religious tension. In cases involving disaster relief, people prefer to donate money to aid agencies providing assistance to people with the same religion and the same ethnic background as themselves. Partly as a result of this, only sectarian aid agencies exist. Suppose that each act of discriminatory donation brings about more moral value than would be brought about by not donating and, hence, is not wrongful.⁷⁹ It may nevertheless be the case that there ought to be law prohibiting discriminatory donations. The pattern of sectarian donations might be such as to fuel ethnic and religious tension considerably. If this were so, a nonsectarian pattern of private donations would be a collective good from the point of view of all donors. Alternatively, legal enforcement of a pattern of nonsectarian donation might not appreciably reduce the total sum of donations.

These observations strongly suggest that, for the desert-accommodating prioritarian, the wrongfulness of private discrimination where it arises should not, morally speaking, always be tracked by unlawfulness. That is, cases can be described in which there should be a legal right to engage in private discrimination even though that discrimination is

79. The sets of sectarian donations may well be wrongful then, but I disregard this complication.

morally wrong; and other cases can be described in which there should be a legal duty to avoid private discrimination even though that discrimination is not morally wrong. In these respects, wrongful private discrimination is no different from other kinds of wrongful behavior; and while some moral theories may not allow such gaps between the moral status and the morally desirable legal status of discrimination, desert-accommodating prioritarianism is not alone in allowing such a gap.