THE LIMITED CASE FOR DISCRIMINATION'S LEGALITY

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I

INTRODUCTION

Antidiscrimination law in market settings is asymmetrically structured.[1] Employers may not discriminate against would-be (and current) employees; no obligation of this sort runs in the opposite direction.[2] Similar asymmetry holds in the housing market as antidiscrimination duties stop when house-seekers discriminate against landlords or owners.[3] And more generally, some providers of goods or services may not be allowed to refuse to serve customers, though the latter is at unrestrained liberty to discriminate against these providers.[4]

There is nothing inherently problematic in giving horizontal interactions (that is, among private persons) an asymmetric cast. Many legal schemes in and around market settings feature some such asymmetry—for instance, laws regulating disclosure, product safety, and workplace safety focus almost single-mindedly on one party in the transaction, to the near exclusion of the other. Information asymmetries and power imbalances, more generally, can explain many of these cases. Asymmetry in laws governing horizontal interactions can be discerned even beyond market settings, as when negligence law, reacting to the normative priority of bodily integrity over liberty of action, enforces different standards of

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1. *See, e.g.*, TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 195–214 (2015) (asserting that antidiscrimination duties are "typically imposed on the state, on employers on landlords, and on providers of goods and services" rather than on employees, tenants, and consumers because the "liberty costs and expressive dangers are too high" for the latter group). For more on the structural claim, see *infra* Part II.

2. For example, Title VII of the Civil Rights Act of 1964 defines employment discrimination in terms of discrimination by an "employer." 42 U.S.C. § 2000e-2(a) (2018).

3. *See, e.g.*, Fair Housing Act, 42 U.S.C. § 3604(a), (f) (2018) (declaring discrimination in connection with selling and renting houses illegal).

4. For instance, Title II of the Civil Rights Act of 1964 prohibits "discrimination or segregation in places of public accommodation" but in fact limits this prohibition to discrimination and segregation *by* places of public accommodation. 42 U.S.C. § 2000a. That is, the Act focuses exclusively on the responsibility of sellers, to the exclusion of buyers. *See id.* § 2000a(b) (listing business establishments and commercial bodies serving "the public" as places of public accommodation).

due care on risk-creators, on the one hand, and on risk-takers, on the other.[5] What all these, and many other, examples share is the commitment to subjecting the terms of private law interactions to a standard of *substantive* equality—that is, the law takes difference seriously and, so, resists treating the interacting parties as formally equal.

What might explain the asymmetric structure of antidiscrimination law in market settings? In these pages, I focus on what seems to me to be the more challenging prong of this question—why, if at all, should the likes of the employees, home-seekers, and consumers be relieved of the antidiscrimination duties that typically apply to their counterparties?[6] My answer is normative and a-historical.[7] That is, I look for an explanation of the asymmetric structure of antidiscrimination law that is *neither* a way station toward *nor* an imperfect substitute for a wholly symmetric regime of antidiscrimination law. Put affirmatively, I seek to explore what, if anything, could support a liberal legal order's reluctance to impose antidiscrimination duties on the likes of consumers, employees, and home-seekers.[8] I do that by distinguishing between two different ways in which consumers engage in market activities: Transacting *bilaterally* and transacting *multilaterally*. By bilateral transacting, I mean to refer to a consumer deciding whether to buy a particular product from a particular seller at a particular time—say, the consumer may consider whether or not to make a one-off stop at the bookstore on her way back home from work. By contrast, a transaction is multilateral in its economic structure when the consumer's choice features a class-wide dimension so that deciding not to purchase from one seller is instantly supplanted by a decision to consider buying the thing from another seller. Thus, multilateral transactions feature a consumer seeking to buy a product from any one of many potential sellers who offer the product for sale—say, forming a plan to purchase a certain book from any single seller who happens to sell this book. I find *limited* support for the liberal reluctance to impose antidiscrimination duties on consumers: Discrimination arising in connection

5. *See* Avihay Dorfman, *Negligence and Accommodation*, 22 LEGAL THEORY 77, 77 (2016) (arguing that "defendants are expected to discharge an objectively fixed amount of care, whereas plaintiffs are generally assessed using a subjective measurement of reasonable care").

6. I take a first stab at the case for imposing antidiscrimination duties on these counterparties elsewhere. *See* Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 LAW & PHIL. 171, 201 (2018) [hereinafter Dagan & Dorfman, *Justice*] (arguing that "the justice requirement to respect others as substantively free and equal individuals can sometimes be adequately discharged only if the relevant private persons are held responsible for its realization"); Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1395–96 (2016) (asserting that the private law system should "openly embrace the liberal commitment . . . to substantive equality").

7. For a penetrating historical account, see generally 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014). I have criticized Ackerman's account for obscuring the (normatively) important distinction between two conceptions of equality that might underlie the civil rights revolution—relational and distributional equality. *See generally* Avihay Dorfman, *Discovering Private Law: Two Comments on Bruce Ackerman, We The People: The Civil Rights Revolution*, 13 JERUSALEM REV. LEGAL STUD. 39 (2016).

8. By *liberal* legal order, I mean laws whose basic commitment is to treat people as free and equal persons.

with bilateral transacting should not count as a legal wrong. However, the liberal case for the legality of discrimination does not apply to multilateral transacting, which means that there is *no* principled basis to relieve consumers engaging in the latter market activity of antidiscrimination duties.

This is a normative argument, as I asserted, but it is normative in a special way. Commonly, the study of antidiscrimination law's asymmetric structure proceeds by identifying a fundamental value—for instance, autonomy or welfare—followed by an attempt to determine what could be required by a commitment to this value within a particular sphere of action (say, in market settings or in a certain subset thereof).[9] The requirement generated by this analysis would then serve as a basis for assessing the current law's asymmetric structure and, in particular, its insistently favorable treatment of the consumer side of the interaction. The assumption widely shared by these accounts is that the legal and economic forms of market interaction are akin to dependent variables in the moral analysis leading up to the recommendation to revise or preserve the law in the appropriate way. On this approach, the asymmetry at issue is questioned from a purely moral perspective without appreciating that the question, and its answer, cannot be understood apart from the legal and the economic construction of the moral landscape. By contrast, I argue that the law, together with the transaction structures to which it gives rise, construct the moral landscape, rather than merely reflect, accommodate, or make it more determinate. As a result, the key to assessing the asymmetric structure of antidiscrimination law lies in understanding how the *law* of voluntary undertakings with its doctrines of offer and invitation to make offers, along with the structure of transactions to which this law gives rise, make a difference in *moral* space.

The argument proceeds in three stages. Part II sets the scene by explaining the sense in which the asymmetry in question is structural. In the course of doing so, I seek to deny certain widely accepted explanations of the asymmetry, such as those emphasizing that sellers often hold themselves open to the public, that they should be seen as quasi-public officials, that they are the Goliaths of the market, or that consumers possess a right to do wrong. Part III shows how a certain concern for free agency can make *some sense* of the asymmetric structure of antidiscrimination law—more precisely, it develops a liberal case for the legality of discrimination in what I call a bilateral transaction structure. Part IV takes up the scope of this case—that is, whose free agency trumps the demands of antidiscrimination law and under what conditions.

9. For a very thoughtful analysis, see Katherine T. Bartlett & Mitu Gulati, *Discrimination by Customers,* 102 IOWA L. REV. 223, 227 (2016), which argues that a commitment to efficiency would logically lead to a blanket ban on discrimination by customers, but would ultimately be more inefficient and counterproductive. Other important contributions include, among many others, Michael Blake, *The Discriminating Shopper*, 43 SAN DIEGO L. REV. 1017 (2006); Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349 (2017); Richard H. McAdams, *The Need for a General Theory of Discrimination: A Comment on Katherine T. Bartlett & Mitu Gulati, Discrimination by Customers*, 102 IOWA L. REV. ONLINE 335 (2017).

Two methodological points before I begin. First, I develop a liberal case for the legality of discrimination in *market* settings. To do so, I presuppose that these settings can be studied in some measure of isolation from other partially overlapping social spheres, such as the spheres of intimacy and democratic politics. Note that I am not making the strong claim that patterns of discrimination in market settings and the legal response to them are, strictly speaking, distinctive. After all, the legal institutions that govern market interactions, contract and property in particular, also establish non-market forms of human interactions (for instance, a private owner who grants permission to others, strangers included, to make free-of-charge use of her resource for certain recreational purposes). Instead, my discussion presupposes a weaker claim, namely, that the market is an especially interesting—and important—sphere of interpersonal, voluntary undertakings in modern, liberal-egalitarian societies. This general point is reinforced by the challenge of defending asymmetry in matters of discrimination in market settings. Indeed, it is one thing to support forms of asymmetry in *vertical* interactions between political authorities and their constituents; quite another to make sense of the law's asymmetrical treatment of *horizontal* interactions, especially when participants on both sides of these interactions exhibit (at least sometimes) morally indistinguishable repugnant behavior.

Second, by focusing on antidiscrimination law and its structure, I seek to distinguish between "the antidiscrimination law" of this or that polity and "antidiscrimination law" as an *idea* of a legal institution shared, with some variations, among all or many liberal legal orders.[10] To this extent, I treat antidiscrimination law as private-law theorists often approach the subject matter of contract, tort, or property. Rather than zooming in on the contract, tort, or property law, say, of a particular jurisdiction in a particular time, they assume, and indeed reclaim, *an idea* of—and for—contract, tort, or property. This is not to say that there must be an integrated idea of antidiscrimination law. However, the asymmetry on which my argument focuses is so overwhelmingly present in the legal schemes of many liberal legal orders, described in this Article, as to justify a prima facie belief in antidiscrimination law as an idea, or a repository of ideas, implicit in these schemes.

II

SETTING THE SCENE: THE STRUCTURAL BASIS OF ANTIDISCRIMINATION'S ASYMMETRY

In this Part, I seek to explain the sense in which the asymmetry of antidiscrimination law is structural. It is structural, I argue, in the sense that it abstracts from both the economic conditions of the market and conceptions of a

10. Although illiberal legal orders (that is, orders whose basic commitments are at odds with treating those subject to them as free and equal persons) may, for some reason, prohibit discrimination in market settings, I shall set them aside for the purposes of this Article.

good life of (most) market participants. By "economic conditions," I mean a set of factors that define the actual workings of a market in a particular time and place. These would include the number, size, and power of the relevant actors, as well as the extra-market norms that superimpose on market transactions (such as national or religious ethos). By "conceptions of a good life," I refer to the particular ways in which participants integrate their market experience into their more general pursuit of meaning. The significance of these two abstractions comes to this: The asymmetrical application of antidiscrimination law does not reflect, or even loosely track, the most commonly-held views on the empirical and normative differences between the interacting parties. This approach leads to my argument in Parts III and IV—that the asymmetry in question cannot be specified without reference to the legal and economic form of the market transaction. And as I show presently, it can be partially justified and partially criticized by reference to such formality.

A. David-and-Goliath Dynamics?

Singling out consumers or employees for favorable treatment cannot be supported by empirical differences between the interacting parties. Market interactions are not necessarily—indeed, not even typically—about a David-and-Goliath rivalry. Many sellers and employers are anything but Goliaths (or any other variation on the common law's categories of common carriers and innkeepers); that said, they may still be subject to certain antidiscrimination duties.[11] Consider, for example, a cafeteria owned by a sole proprietor.[12] At the same time, consumers and employees are not subject to such duties, *regardless* of their market influence as individuals acting separately or in concert. More generally, the asymmetry cuts across familiar distinctions such as the one between artificial and natural persons. Accordingly, consumers, employees, and home-seekers are not relieved of antidiscrimination duties by virtue of their status as natural (and private) persons. Indeed, sellers and employers may owe these duties even when they possess a similar status.

B. Is Discrimination Predominantly Harmful to Consumers, Not Sellers?

This way out rests on historical grounds. I say historical grounds because, in principle, the adverse consequences of discriminatory practices can visit *either* side in a market interaction. Discrimination against consumers and employees

11. It is true that "small" landlords may be treated more leniently than most other landlords. The Mrs. Murphy exception is a case in point, but it seems that the reason for this treatment has to do with the reality of co-housing, rather than the landlord's economic size or market power. *See* 42 U.S.C. § 3603(b)(2) (2018) (exempting dwellings occupied by four or less families when the landlord occupies one of the units or rooms in the dwelling from antidiscrimination laws applicable in renting or selling property). *See also* Avihay Dorfman, No Exclusion 1, 31 (Nov. 11, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3488149 [https://perma.cc/8GCE-2TV7] (asserting that a landlord sharing a small dwelling with a tenant "implicates the parties in forms of intimacy and rapport as they literally share a living space").

12. *See* 42 U.S.C. § 2000a(b)(2) (subjecting "any . . . cafeteria" to non-discrimination duties).

can bring about harmful consequences ranging from economic setbacks, to social stigma, to humiliation. However, these and other adverse consequences *could* also result from discrimination against *some* sellers and employers (including, most dramatically, sole proprietors, small firms, and businesses managed by members of a minority community). So it has to be a historical observation to the effect that consumers (and employees) have been the most immediate victims of discrimination. Against the backdrop of this observation, it is not surprising that antidiscrimination law identifies sellers (and employers) as the source of the problem.[13] Or so the historical argument might go.

However, historical and present cases suggest otherwise. For instance, although discrimination against Black people during Jim Crow is often associated with White sellers excluding Black consumers, studies show that Black-owned businesses fell victim to systemic discrimination by White consumers.[14] As the influential Black leader W. E. B. Du Bois suspected at the end of the nineteenth century, "it is [the] density of Negro population in main that gives the Negro business-man his best chance."[15] His suspicion would soon become real as Black-owned businesses during the early twentieth century had to rely almost exclusively on Black clientele in the face of discrimination by White consumers.[16] This is, unfortunately, unsurprising, as the morally repugnant behavior associated with discrimination in the market need not run in one particular direction; rather, the class of victims of discrimination cuts across the buyer-seller distinction.

C. Do Service- and Good-Providers Hold Themselves Out as Serving the Public?[17]

It might be tempting to attribute an egalitarian undertaking to these providers and, so, to explain antidiscrimination law in terms of a backup plan in case they

13. To be sure, this is *not* an explanation as to why consumers are not targeted, *too*.

14. JOHN SIBLEY BUTLER, ENTREPRENEURSHIP AND SELF-HELP AMONG BLACK AMERICANS: A RECONSIDERATION OF RACE AND ECONOMICS 144–45, 147 (1991) (finding that Black-owned businesses experienced discrimination by White customers with the enactment of Jim Crow laws).

15. W. E. B. DU BOIS, THE NEGRO IN BUSINESS 7 (1899).

16. *See* Robert L. Boyd, *Demographic Change and Entrepreneurial Occupations: African Americans in Northern Cities*, 55 AM. J. ECON. & SOC. 129, 129 (1996) (asserting that demographic changes led to a decline in African American businesses serving White populations and an increase in serving African American populations); Martin Ruef & Angelina Grigoryeva, *Jim Crow, Ethnic Enclaves, and Status Attainment: Occupational Mobility among U.S. Blacks, 1880-1940*, 124 AM. J. SOC. 814, 817 (2018) (stating that under Jim Crow, Black people had to develop a "group economy" based on their forced ethnic enclaves).

17. *See generally* Joseph William Singer, *Property and Sovereignty Imbricated: Why Religion is not an Excuse to Discriminate in Public Accommodations*, 18 THEORETICAL INQUIRIES L. 519, 542 (2017) (noting that "a public accommodation is, by definition, open to the public," which means that "[p]ublic accommodations extend a general invitation to the public to come in and do business" without being able to "choose which customers to serve"). But as I argue in Part III, it is not clear that this analysis is ultimately right in imputing a "general invitation to the public" to the owner without begging the essential question. After all, owners had, and in some places can still have, the legal privilege to decide how inclusive their invitation should be. *See, e.g.*, Miss. Code Ann. § 97-23-17 (2019). In imputing inclusive intentions, Singer's analysis assumes away the very conflict it purports to explain and resolve. For recent

fail to make good on their undertaking. The undertaking at issue is egalitarian in the sense that these providers make their facilities all-inclusive. There are two ways to understand the argument from an egalitarian undertaking perspective. One might be a factual observation about the actions and intentions of actual providers. Another might also be a conceptual argument concerning the nature of the role occupied by those engaging in the business of service and good provision.

That said, neither the former nor the latter is true. Concerning the factual observation, the reality that some providers are motivated by egalitarian commitments does not make it the case that service- and good-providers *as such* are so motivated. A better interpretation of why antidiscrimination law exists in the first place is that many providers could refuse, and have refused, to adopt an egalitarian stance. If anything, it seems that sellers, *and buyers*, may often be motivated not so much by egalitarian commitments but rather by their interest in advancing their own well-being, broadly conceived to include material and aspirational aspects. Concerning the conceptual understanding of the undertaking at issue, the notion that there is a built-in feature of egalitarianism in the service- or good-provider context is difficult to sustain. The difficulty lies in characterizing the link between egalitarianism and the role of a seller in conceptual or foundational (or Platonic) terms.[18] It is one thing to say that discriminatory serving or selling practices are unjustified; quite another to say that they do not count as serving or selling at all. The trouble with discrimination by providers is not one of overstepping the role of the provider but rather that of (wrongful) discrimination.

D. Are Service- and Good-Providers Public Entities?

Another familiar, but ultimately mistaken, distinction is between private and public (or quasi-public) entities. The argument to which it gives rise is that antidiscrimination law is a creature of public law so that its proper scope of application covers only public officials or those who partially act on behalf, or in the service, of the public.[19] By contrast, a private person is at liberty to pick and

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support, on grounds of formal equality, for the egalitarianism underlying commercial practices of offer-making, see PETER BENSON, JUSTICE IN TRANSACTIONS 466 (2019).

18. Plato's idea of professionalism underlies his argument as to why the guardians should not have private property. It can support viewing providers as public actors in nature. *Cf.* Jonny Thakkar, *Public and Private Ownership in Plato and Aristotle*, *in* THE CAMBRIDGE HANDBOOK ON PRIVATIZATION (Avihay Dorfman & Alon Harel eds., forthcoming 2021). However, it is not clear whether this argument can successfully re-describe commercial providers operating in a *liberal* society in terms of public officials. I do not deny the possibility of redescribing lawyers as public officials (officers of the court or so forth). Instead, my skepticism focuses on the possibility of generalizing about commercial providers from the special cases of lawyers and physicians.

19. *See* Arthur Ripstein, The Division of Responsibility 2.0 (Mar. 15, 2017) (unpublished manuscript) (on file with author). For an earlier (and different) development of an argument that providers of "necessities" owe antidiscrimination duties in virtue of occupying the traditional, common-law position of public accommodations, see Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1292–93 (1996).

choose whether to be a party to a commercial or an employment transaction—this is her freedom of, and from, contract.[20] For present purposes, suffice it to say that the commercial transactions on which my argument focuses, and to which antidiscrimination law applies, concern *private* entities on either side of the commercial or employment transaction; neither entity acts as a public official, and both pursue *their own* (read, private) ends, subject to constraints.

E. A Legal Right to do Moral Wrong?

The asymmetry at issue also does not align with familiar substantive considerations. In particular, it is false to suppose that antidiscrimination duties bear more heavily on the autonomy of the consumer or employee than that of the seller or employer. Accordingly, the one-sidedness of antidiscrimination law cannot be explained by resort to the consumer's right to wrong sellers. The supposition I reject is two-fold: That the seller's autonomy interest necessarily, or overwhelmingly, comes down to its economic aspects (that is, profit maximization); and that the consumer's or employee's autonomy interest necessarily, or overwhelmingly, encompasses non-economic aspects as well (to be sure, for many employees work is indeed irreducible to its economic returns). Both parts hold only contingently; neither captures what is necessarily true. Certainly, the autonomy interests of some sellers and employers cannot be identified with profit maximization only—I suspect that many of them find deeper meaning in pursuing a business leadership role, for example. And the autonomy interests of consumers and employees need not extend beyond the brute economic aspects of consuming a mundane good and getting paid to make ends meet, respectively—I suspect that this characterization fits a non-trivial class of consumers and employees nowadays. And yet, antidiscrimination law displays uncompromising *indifference* to such intricacies. That is, consumers and employees are kept outside the purview of the antidiscrimination duties that their counterparties do, with some exceptions, owe them.[21]

To conclude, it is not surprising, based on the preceding discussion, that contemporary reactions to the asymmetric structure of antidiscrimination law range from hostility, to puzzlement, to grudging acceptance.[22] This state of affairs makes it tempting to look for instrumental and inescapably tentative explanations—excuses, really—for distinguishing between parties whose discriminatory behavior is deemed wrongful and those whose similarly morally repugnant and harmful behavior counts as perfectly legal. For instance, epistemic difficulties in proving discrimination by consumers and employees may be argued

20. Elsewhere, I argue that both propositions—that commercial entities are quasi-public officials and that private persons are necessarily free to discriminate—are false, doctrinally and normatively speaking. *See* Dagan & Dorfman, *Justice*, *supra* note 6, at 183.

21. Religion-based discrimination by sellers can, and in many liberal-leaning jurisdictions does, give rise to a legal wrongdoing; a similarly motivated discrimination by consumers does not. *See* 42 U.S.C § 2000a(a) (prohibiting religious discrimination against consumers).

22. For instance, the sources cited *supra* note 9 exhibit, at different points, some or all of these reactions.

as a reason of this purely contingent nature. By contrast, my ambition is to consider, on principled grounds, what might justify the asymmetric structure of antidiscrimination law. My answer has two parts. On the one hand, in Part III, I defend a liberal case for the legality of discrimination by the likes of consumers and employees insofar as they make their transactions bilaterally structured. On the other, Part IV shows that this case *cannot* justify relieving consumers and employees of antidiscrimination duties insofar as they engage in a multilateral transaction structure.

III

A LIMITED CASE FOR THE LEGALITY OF DISCRIMINATION: FREE AGENCY

The asymmetric application of antidiscrimination law is independent from the economic conditions of the market as well as from the conceptions of the good of its participants. However, it is not independent from the transaction structure. In particular, it is not independent from the distinction between bilateral and multilateral transaction structures. A bilateral structure—consisting of a one-off buying decision—explains why a morally repugnant act of discrimination on the part of the consumer may not give rise to a legal wrong. I argue that this explanation finds its grounds in a basic liberal commitment to recognizing persons as free agents. And since it goes to the structure of the interaction, it does not turn on the specific conception of the good of either party in the interaction; nor does it make essential reference to the actual economic conditions of the market in which the parties interact (say, whether or not sellers are economic Goliaths and consumers are Davids). As I explain in Part IV, however, the case for the legality of discrimination does not hold for consumers engaging in multilateral transactions—that is, seeking the purchase of a certain good from any one seller.

I will use consumer-side discrimination as my stock example; in particular, I focus on a clear case of discriminatory behavior, racial discrimination, so as to set aside considerations that might unnecessarily complicate the discussion.[23] The analysis and conclusions, however, can be extended (as I suggest in Part IV) to

23. By using this case, I can leave for another occasion the question of precisely what forms of discriminatory behavior should count as morally and legally wrongful. One aspect of this question is what to make of the *numerus clausus* of protected groups found in many statutory prohibitions on discrimination—in particular, does this restriction reflect a foundational commitment to protect a limited class of traits and characteristics against discriminatory behavior? Elsewhere I argue this in the negative. *See generally* Dagan & Dorfman, *Justice*, *supra* note 6. The restriction is better viewed as reflecting an institutional concern: The transition from morality to legality brings rule-of-law considerations into the picture. Most importantly, law must provide effective guidance to owners of places of public accommodation precisely because they are legally empowered, *qua* owners, to fix other peoples' normative situations. Resorting to clear categories of protected traits helps to defuse the potentially intrusive and demanding aspects of the duty to include. In that, the *numerus clausus* methodology in and around antidiscrimination laws establish an intersubjective frame of reference that is capable of guiding participants' deliberation and behavior by minimizing resort to individualized knowledge and radically ad hoc judgments. *Id.* at 176.

the cases of employees and home-seekers engaging in discriminatory behavior.[24] Consider a White supremacist who decides to dine out but returns home upon learning that the restaurant he entered was owned and managed by a non-White person. There is no other underlying reason for his refusal to dine there other than that of plain bigotry—neither the cost of the food nor the quality of the food or service plays any role in his decision.

While the White supremacist's discriminatory behavior is certainly morally repugnant, I argue that it should not count as a *legal* wrong within a liberal legal order. The argument commences with the observation that his behavior lacks a wrongful act *apart* from the immoral motive it exhibits. The outward act of refraining from either accepting the owner's offer or responding to the owner's invitation to make an offer is innocent—offer or invitation to make an offer of this sort is non-committal. People may decline, not to mention forgo, this offer or invitation to make an offer on any number of perfectly legitimate grounds. They may decide that they are no longer interested in dining out, that they cannot afford it, that they should rush back home, and so on. This is the sense in which the very act of forgoing fails to exhibit genuine wrongfulness. What distinguishes the bigot from these other people is, therefore, not the brute act associated with declining the offer (or the invitation to make an offer) extended by the restaurant owner, but rather his *hostile attitude* toward the owner's identity.

This is not to say that attitudes and motives must always remain beyond the reach of liberal legal orders. In fact, liberal legal regimes do, and should, consider attitudes and motives insofar as their outward manifestations are illegitimate in and of themselves. Liberal legal orders do that, say, in connection with torts such as fraud and, most straightforwardly, crimes requiring *mens rea*. In these instances, attitudes and motives figure prominently in the decision to impose liability and in determining its appropriate scope.[25] But the reason for taking a profound interest in illicit attitudes cannot be specified apart from the outwardly *wrongful acts* that accompany these attitudes—for instance, the act inducing another person to rely on one's knowingly false representation can hardly be re-described as non-wrongful.

The question I pose is, rather, can attitudes *alone* serve as a basis for deeming a private person's act of declining an invitation or offer illegal? Conceptually speaking, this is surely a possibility all too common in the lived experience of totalitarian regimes. There, disloyalty is fundamentally a failure to adopt the right attitude toward the ruler—this is why law enforcement agencies in these states are often described as thought police (or Thinkpol in George Orwell's parlance). Some religions have advanced a somewhat similar interest in the independent

24. *See infra* Part IV.

25. *Compare* RESTATEMENT (SECOND) OF TORTS § 531 cmt. c (1977) (noting that an action for fraudulent misrepresentation will lie if, among other things, "the actor either acts with the desire to cause it or acts believing that there is a substantial certainty that the result will follow from his conduct"), *with id.* § 552 cmt. a (noting that, with respect to negligent misrepresentation, "[w]hen there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences").

significance of people's attitudes—the various inquisition campaigns pursued by the Catholic Church during the middle ages targeted souls, rather than merely outward acts of religious conformity.[26]

That said, making attitudes dispositive is not a valid option for a liberal legal order.[27] Holding a person legally responsible for acquiring morally unacceptable motives or attitudes while executing a perfectly legitimate act contrasts with a liberal principle of recognizing private persons as free agents. Indeed, imposing adverse legal consequences on account of one's attitude alone undermines free agency as it denies the opportunity to act on the basis of a more appropriate attitude by *revising* the current one.

Note that the opportunity to revise need not be restricted to the act of refusal itself (which would reduce the act of revising to that of accepting the restaurant's invitation or offer). Rather, it can also make the *same* act of refusal accompanied by a revised attitude. For instance, our bigot may decide not to order food from the restaurant based on a perfectly legitimate reason. In this scenario, his disapproving attitude toward the owner's identity no longer bears on the decision—for example, he may refuse based on financial grounds. This view of revisability in the domain of motives or attitudes reflects a principled commitment on the part of a liberal legal order to recognize people as free agents and, so, as persons capable of changing their minds (or attitudes).

The preceding analysis finds ample support, and further elucidation, in the civil and criminal law of some respectable liberal legal orders. For instance, it figures prominently in the leading case of *Mayor of Bradford v. Pickles*.[28] There, the defendant prevented percolating water from entering the plaintiff's neighboring reservoir in order to force the latter to buy the defendant's land at a high price.[29] The court denied liability because *malice alone* could not render legally wrongful a legitimate act of using one's land to capture percolating

26. *The Forced Baptism of Jews in Christian Europe: An Introductory Overview*, *in* CHRISTIANIZING PEOPLES AND CONVERTING INDIVIDUALS 157, 163 (Guyda Armstrong & Ian N. Wood eds., 2000) (noting that "the aim of the Inquisition was to obtain confession, and then to impose the appropriate penance in order to reconcile the accused with the church and save their mortal soul").

27. It may be tempting to read Oliver Wendell Holmes as suggesting that mere malice can figure as an *independent* ground for legal liability. *See* ARTHUR RIPSTEIN, PRIVATE WRONGS 163–67 (2016) (interpreting Holmes's account of malice as being "prima facie wrongful to intend to inflict a loss on another person," therefore leading to the conclusion that, in Ripstein's view, Holmes asserted that actually "causing or intending harm are the basic categories of tort law"). I do not believe that this was Holmes's suggestion, though. Holmes developed the view that harming another person, rather than infringing her rights, is what grounds tort liability—he explicitly characterized "temporal damages" as an "evil," and asserted that causing a foreseeable evil triggers liability unless "special grounds" either privilege or excuse the injurer. *See* Oliver W. Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3, 4–5, 7 (1894). For this reason, Holmes's analysis of maliciously causing "temporal damage" to another person combines morally unacceptable motive with an act causing "evil" consequences. In other words, malice does not offer a freestanding reason for the law to impose liability even for Holmes. Rather, he invoked it to defeat a privilege the defendant would have had to cause temporal damage had he not acted with malice. Roughly speaking, malice was, for Holmes, akin to abuse of a privilege to cause evil, rather than a ground of liability. *See id.* at 9.

28. Mayor of Bradford v. Pickles [1895] A.C. 587 (H.L.).

29. *Id*. at 595.

water.[30] But perhaps the most vivid instantiation of the free agency principle developed above arises in connection with criminal law, where it is well established that the mere "imagination of the mind" is not punishable.[31] This point is brought home most vividly by criminal law's doctrine of *locus poenitentiae*, under which mere preparations to engage in a criminal act cannot trigger liability: The reason is that the space, the locus, between preparing and completing a criminal enterprise reflects the recognition of the actor as a free agent and, so, as someone who *could*—rather than merely would—change his or her mind before consummating the crime.[32]

One might suspect that the rationale for this principle is, at bottom, purely epistemic, picking out the familiar problem of unverifiability. This suspicion is not without merits, as many everyday cases of discrimination by consumers occur off the legal radar.[33] Although at the operational level it can sometimes be difficult to ascertain the content of one's attitudes and their weight in the decision to decline an invitation to make offers, the deeper issue is substantive, rather than epistemic. Once again, it is about the normative implications—in terms of recognizing persons as free agents—of denying people the opportunity to act on the basis of more appropriate attitudes by *revising* the current ones. Hence, recognizing what responsible agents *could* do does not rest on what they *would* do (or even *would most likely* do).[34] Accordingly, the non-epistemic case for sustaining an arena of revisability remains firm even in the face of a perfectly credible, publicly-conveyed announcement never to enter a transaction with a place owned, say, by this or that person.[35]

Must a similar analysis apply in the case of the restaurant owner? Not necessarily and, typically, not at all. Extending an arena of revisability to the discriminating owner opens up only two possible courses of action: The owner can either refrain from discrimination or close down his business.

To see this, I will focus on a simple case featuring a White supremacist restaurant owner who refuses to serve a non-White customer in good standing during the restaurant's normal hours of operation. In order not to prejudge the

30. *Id*. What about legal systems that recognize abuse of rights? My (normative) argument is that even then it is inappropriate to impose adverse legal consequences under these circumstances because doing so denies one the free agency underlying the ability to change one's mind.

31. Hales v. Petit [1562] 75 Eng. Rep. 387, 397 (C.B. 1562).

32. *See* R. A. Duff, *Criminal Attempts*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 191, 202 (Andrei Marmor ed., 2012) (explaining that *locus poenitentiae* gives reason to "limit the law of nonconsummate offenses to 'last-act' cases").

33. On epistemic difficulties of this sort, see IAN AYRES, PRIVATE PREJUDICE? UNCONVENTIONAL EVIDENCE ON RACE AND GENDER DISCRIMINATION 127–36 (2001).

34. This is true, once again, in the analogous case of criminal law's distinction between mere preparations and criminal acts. A nice illustration is the Spielberg film MINORITY REPORT (20th Century Fox 2002).

35. The space of revisability need not be confined to motives or attitudes formed prior to the decisive act of refusal. In principle, it may capture a sincere change of motive that occurs *after the fact*. That is, a repugnant motive underlying an otherwise perfectly appropriate act of refusing to rent a wedding venue from an owner could, on reflection, be repudiated and supplanted by a legitimate motive (say, concerning economic costs or aesthetics).

question, the refusal should be considered legal—this may be so if the case predated the Civil Rights revolution, because current antidiscrimination law does not apply to sole proprietors,[36] or simply because there is no such legal obligation at all.[37] Further suppose that the customer is in good standing in the sense that he or she fully complies with all the *housekeeping* requirements set out by the restaurant owner. These requirements are meant to reflect uncontroversial prerequisites such as not violating the (morally sound) criminal law, treating the restaurant's employees and other customers with appropriate respect, and so on. Normal hours of operation are just another housekeeping rule. Properly conceived, housekeeping requirements exclude non-conforming customers on *un*controversial grounds in the sense that they do not, in fact, sustain impermissible exclusionary rules (say, enforcing a particular dress code may indirectly but effectively, and illegitimately, target certain populations).[38]

Against this background, the restaurant owner's refusal does not leave a critical gap between the act and its underlying motive or attitude. The outward act of not inviting one class of people to dine *cannot* be a surface manifestation of perfectly legitimate grounds. Rather, it is an act of racial discrimination against them. The reason why this case cannot reasonably be re-described to reflect a legitimate attitude is that the restaurant owner has already expressed and acted on his commitment to inviting people, including strangers who do not share the owner's bigotry, to trade with him. His undertaking makes the act of refusing to trade with non-White people the unequivocal upshot of hostile motives or attitudes. It precludes the possibility of attributing the refusal to serve non-White people to considerations that arise independently of his hostility toward dealing with these people.[39] That is, his undertaking eliminates the arena of revisability since there is no non-hostile motive that could correspond with his decision to refrain from serving Black people.[40] Instead, he can either invite the latter to dine or shun service entirely.

To be sure, my analysis does not turn on whether the owner's voluntary undertaking takes the form of an *offer*, which would mean that the owner

36. Title II of the Civil Rights Act of 1964 does not distinguish between sole-proprietors and corporations for the purpose of determining what a place of public accommodation is. However, it does not seem to subject *retailers* (say, as opposed to hotels, restaurants, and cafeterias) to the Act's purview. *See* 42 U.S.C § 2000a(b)(1)–(4) (2018); Singer, *supra* note 19, at 1288 (stating that "retail stores, after the Civil War, were not thought to be public accommodations").

37. The latter is currently upheld by Mississippi law. Miss. Code Ann. § 97-23-17 (2019). *See also* Barber v. Bryant, 193 F. Supp. 3d 677, 711, 716 (S.D. Miss. 2016) (holding that Miss. H.B. 1523 (2016) is unconstitutional), *rev'd on other grounds*, 860 F.3d 345 (5th Cir. 2017) (finding no standing).

38. *See also* Fair Housing Act, 45 U.S.C. § 3604(f)(9) (2018) ("Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.")

39. To be sure, whether or not these considerations count as legitimate depends on their correct characterization, rather than on the owner's subjective view of them.

40. By saying *no non-hostile motive*, I include motives that are facially neutral but that, in truth, conceal hostile ones.

undertakes to defer to the discretionary right of customers to accept that offer. In some commercial cases, the undertaking at issue takes the form of offering the goods or services for sale, in which case a customer is entitled to bind the owner to a contract by accepting the offer. However, under the appropriate context, some commercial undertakings are better seen as instances of *inviting* customers to make offers, in which case the owner reserves the right to accept (or decline) the deal. Nothing in my argument turns on the context-driven distinction between an offer and invitation to treat or trade. For even a restaurant owner whose act takes the form of inviting cannot reasonably re-describe the refusal of all and only offers made by non-White people as exhibiting non-hostile motives or attitudes. That is, his undertaking ultimately to transact with everyone except for non-Whites precludes the possibility of driving a wedge between the *act* of refusing to deal with non-White people and the hostile *attitude* toward dealing with them.

IV

ELABORATION: ON THE SCOPE OF THE FREE AGENCY CASE

I now wish to move from the paradigm case of consumer discrimination to the more general characterization of the liberal case for the legality of discrimination in the market context. In particular, the argument going forward addresses two basic questions: First, what might generate the different implications of discrimination made by consumers, on the one hand, and by providers, on the other; and second, what is the scope of the liberal case for discrimination's legality, by which I mean who should be relieved of antidiscrimination duties? These two questions are intimately related so that the answer to the former informs, in some measure, the answer to the latter.

The discussion in the preceding Part answers the first question. Again, the structure of the interaction is the source of the difference between the legal implications of consumer discrimination vis-à-vis provider discrimination. The key inquiry is whether one's transactional undertaking eliminates the gap between an act and its accompanying attitude so that a subsequent refusal to interact unequivocally manifests a hostile attitude. The undertaking at issue, recall, can take the form of making an offer, though even an invitation to make an offer suffices. On this analysis, the commercial engagement between the consumer and the provider need not feature equally situated parties: The provider has formed intentions to engage in some commercial dealings with certain buyers; however, unlike the consumer, the provider has also specifically *acted on these intentions* by making or inviting offers. This asymmetry in consumer–provider interaction matters because the free agency of the former, rather than the latter, is at stake. Whereas the consumer *can* revise the hostile attitude underlying her refusal to interact with the other party, the provider may not. Deeming the consumer's refusal legally wrongful fails to recognize her as a free agent, that is, as a person capable of acting on the basis of a revised, non-hostile attitude.

A. Limiting and Extending the Scope of the Case

Characterizing the asymmetry between the consumer and the retailer in terms of the structure of their interaction provides the normative resources with which to answer the second question concerning the scope of the case for the legality of discrimination. Two propositions follow from identifying the *structure* of the interaction as key: First, that the case for the legality of discrimination does *not* apply to all cases of consumer discrimination; and second, that this case could apply not only to consumer markets but also, under the appropriate circumstances, to transactions in employment and housing markets.[41] Hence, the analysis of the stock example of consumer–provider interaction should be *limited* to a certain kind of discrimination by consumers but, at the same time, *extended* beyond the category of consumers, or even buyers, to capture other market actors whose acts of refusing to engage in certain transactions could admit of non-hostile attitudes toward their transactees. I take each of these claims in turn.

1. Bilateral and Multilateral Transaction Structures: A Limitation

The free agency case for the legality of discrimination turns on the existence of an arena of revisability in the domain of attitudes. The *scope* of this case should therefore track this arena's existence. I argue that a certain distinction between bilateral and multilateral transaction structures determines the existence question and, therefore, also the scope of the case of discrimination's legality. A transaction has a bilateral structure for the consumer when it features a one-off plan to purchase a thing. Its bilaterality reflects the fact that the consumer's plan comes down to a choice between, on the one hand, purchasing that thing here and now and, on the other, forgoing the purchase. That, recall, was my stock example in Part III—a White supremacist who returns to his home upon learning that the restaurant he has just entered is owned by a non-White person. By contrast, a transaction is multilateral in its structure when the consumer's choice features a class-wide dimension so that deciding not to purchase from one seller is immediately supplanted by a decision to consider buying the thing from another seller. Thus, the consumer's plan involves choosing among *providers* of a thing, rather than merely whether or not to have this thing.[42] Thus, the White supremacist would not merely forgo dining out, but rather find an alternative restaurant that better suits his racist preferences.[43]

What is the significance of the bilateral–multilateral distinction? Most importantly, it places a principled constraint on the free agency argument for discrimination's legality. An arena of revisability works if, and only if, consumers

41. My present discussion is limited to commercial interactions only. It is possible, I believe, to extend the analysis to certain non-commercial interpersonal interactions as well. I leave this possibility to another occasion.

42. It should be clear by now that my talk of bilateral and multilateral transaction structures concerns economic, rather than juridical or legal, forms.

43. I shall assume that those engaging in the business of selling and employing typically structure their transactions multilaterally—as I argue below, this assumption need not hold with respect to consumers, employees, and house-seekers.

adopt a bilateral transaction structure. That is, the outward act of refusing to buy does not necessarily presuppose an underlying illicit attitude. A free agent could so act on the basis of a revised attitude, including, in particular, a non-illicit one.

By contrast, no such arena of revisability works when consumers adopt a multilateral transaction structure. There, the act of refusing to transact, say, with one provider of a generic good, becomes the unequivocal manifestation of an illicit attitude toward him or her. Buying the same good from another, otherwise identical provider eliminates the possibility of justifying the refusal to buy from the former on legitimate grounds.[44] Hence, the argument from free agency cannot make good on discrimination that arises in the course of engaging in transactions of a multilateral structure. By implication, relieving consumers of antidiscrimination duties under these circumstances should be understood as resting on instrumental and, so, necessarily contingent arguments. Contrary to the bilateral transaction structure, its multilateral counterpart could provide no more than a *conditional* protection from the demands of antidiscrimination law. For instance, if the difficulty of verifying consumer discrimination explains current reluctance to impose liability, then no such reluctance is warranted when the epistemic difficulty at issue becomes sufficiently negligible (as when consumers, home-seekers, or employees make their market choices based on a smart phones apps' built-in discriminatory characteristics).[45]

Deploying the bilateral–multilateral distinction to determine the scope of the free agency case for discrimination's legality generates an implementation challenge. The challenge is one of making antidiscrimination law adequately responsive to the normative implications of distinguishing bilateral from multilateral transaction structures. And it is anything but straightforward. An adequate response will have to resist ad hoc implementation of the bilateral–multilateral distinction without thereby obscuring it. Ad hoc implementation should be resisted because it undermines some of the rule-of-law's values, such as guidance. Adopting the opposite extreme of ignoring the difference between bilateral and multilateral transaction structures fares no better as it undermines the very distinction at issue. Indeed, the bilateral–multilateral distinction leads to *contrasting* normative judgments concerning the legality and illegality of discrimination, respectively. Treating all instances of consumer discrimination as either legal or illegal necessarily fails to appreciate the argument for free agency *and* its limit. Both transaction structures figure prominently in the lived experience of consumers, so there is no reason to marginalize either one. Certainly, multilateral transaction structures are ubiquitous. So too are bilateral ones. Indeed, consumers often find themselves contemplating a one-off

44. The situation I consider in the main text is one in which the consumer's *sole* motivation for refusal is illicit one. I set to one side both in-between cases of mixed motives (involving illicit and non-illicit ones) and non-discriminatory cases (involving purely legitimate reasons to prefer purchasing from one provider than the other).

45. For more on the growing resort to apps (and other online tools) and their discriminatory implications in the housing markets context, see Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349, 403–06 (2017).

transaction (say, going on a shopping spree); home-seekers may sometimes pursue their one and only dream house; some job-seekers may be willing to give up the independence of self-employment for the sake of joining a specific firm. Against this backdrop, the argument for free agency supports a bifurcated antidiscrimination law. The organizing question is not an all-or-nothing one concerning whether consumers should owe, or be relieved of, antidiscrimination duties. Rather, because they should sometimes owe and at other times be relieved of these duties, the live question—the challenge mentioned above—is how to implement this dualism in the practice of antidiscrimination law. I leave this challenging question to another occasion.

This way of identifying what might be the (limited) case for discrimination's legality should be contrasted with the autonomy-based argument for and against relieving consumers of antidiscrimination duties. The key distinction of the free-agency account I have been developing in these pages is a formal one, as it concerns the difference between bilateral and multilateral transaction structures. By contrast, the autonomy-based case for the legality (or illegality) of discrimination turns on the substantive distinction between transactions based on their contribution to the participant's autonomy—for example, the identity of a generic goods provider may have very little impact on the autonomy of the buyer and, so, makes no compelling case for relieving the latter of antidiscrimination duties. This approach confronts a very difficult challenge, though: It is not clear how autonomy can launder a morally wrongful discrimination in a market setting simply by saying that doing wrong proves very beneficial to the wrongdoer's autonomy. The free-agency case that I prefer faces no such difficulty as it appeals to a more fundamental concern about law's impact on freedom and responsibility—liberalism's commitment to respecting the basic capacity to change one's mind.

2. Asymmetry in Reverse Order: An Extension

Because it is grounded in a concern for free agency, the limited case for the legality of discrimination need not single out consumers or buyers whose transactions are bilaterally structured. The labor market can render this point more vivid: Discrimination by "sellers" of labor does not count as illegal, whereas discrimination by its "buyers" is typically deemed legally wrongful.[46] To be sure, I do not suggest that buying labor is the exact same commercial activity, say, as purchasing commodities and services. Rather, I assume that the formal similarities are substantial enough to characterize recruiting practices as in some measure instances of buying labor.

Now consider the case of an employer inviting potential candidates to make employment offers or making employment offers to candidates. Either way, a decision to make the invitation or offer only to White people implicates the employer in the same situation in which the restaurant owner, acting as a seller, is willing to make commercial transactions with everyone save for non-White

46. *E.g.*, 42 U.S.C. § 2000e–2(a) (2018).

consumers. The employer's refusal to hire certain people on account of their race does not leave a critical gap between this act and its underlying hostile attitude. That is, the discriminatory act *cannot* be a surface manifestation of perfectly legitimate grounds. Rather, it is an act of racial discrimination against potential candidates. The only ways for the employer to revise his or her hostile attitude are to either treat Black candidates with equal respect or refrain from hiring new employees entirely.[47] On this account, prohibiting discrimination by employers does not undermine the law's respect for the free agency of the employer.

On the other hand, the gap between an employee's hostile attitude toward Black employers and his ultimate act of declining the invitation made by these employers may sometimes parallel the bilateral transaction structure of the White supremacist consumer facing a one-off choice concerning dining out at a restaurant owned by a Black person. The parallel in question does not concern simultaneous submissions of job applications to multiple employers, which is to say a multilateral transaction structure. Rather, it concerns a one-off attempt at getting a job offer from a particular firm (because only employment in this firm can be as attractive as self-employment, it is the only firm in the candidate's field of expertise, or any other reason motivating a bilateral transaction structure). Against this backdrop, declining the employer's invitation can be a manifestation of any number of non-hostile attitudes, which means that the employee *could* act—accept or decline the Black employer's invitation or offer—on the basis of a more appropriate attitude by *revising* the hostile one. Hence, respect for this employee's free agency requires the existence of an arena of revisability; it supports the legality of discrimination by employees.

The case of employment-related discrimination shows, among other things, that the legality of discrimination does *not* turn on occupying the role of the buyer—employers are not, and should not, be relieved of general antidiscrimination duties. This conclusion is not peculiar to labor markets, to be sure. Indeed, it can be replicated in markets for goods or services. Begin with a concrete case: competitive bidding for services. There, the buyer of goods or services invites offers from various manufacturers, distributors, or service-provides (who occupy the positions of potential sellers, in which case it is the *buyer* who gets to decide whose offer merits acceptance). The asymmetric structure in such situations puts the auctioneer-buyer in a position similar to those of the restaurant owner and the employer. By undertaking to invite bids from non-Black service providers, the buyer makes its act of restricting the invitation an unequivocal outward manifestation of a hostile attitude toward Black people. And in contrast, a service-provider declining on racist grounds to take the bid *could* keep himself off the bid, but this time on the basis of a revised, legitimate motive.

The example of competitive bidding can be generalized so as to explain the broader category of firms making buying offers to, or inviting buying offers from,

47. Treating these candidates with respect is not inconsistent with setting uncontroversial housekeeping rules, say, against hiring unqualified workers. *See supra* text accompanying note 38.

potential sellers. Take, for instance, a car dealer who offers to buy cars from vehicle owners, including past clients. The dealer's role in such a transaction can be characterized as a buyer, whereas the car owner, who is typically a private person, occupies the role of the seller. Suppose the car dealer reaches out with such an offer, or an invitation to make an offer, but declines to extend it, say, to potential sellers with qualifying vehicles based solely on their race. At the same time, consider a potential seller (or a seller class) who refuses to accept the offer or the invitation based on identical repugnant reasons (which would be the race of the owner or manager of the dealership). On my analysis, the buyer's discriminatory behavior is properly considered legally, not just morally, wrongful—this is because there is no way for the car dealer to act on the basis of a non-hostile attitude other than by either eliminating the racist components in the buy-back program or eliminating the program entirely. By contrast, consider the circumstances of the car owner, the would-be seller, insofar as he or she is facing a bilateral transaction structure involving a one-off opportunity for a sell-back. Under these circumstances, a car owner may refuse the offer for any number of legitimate reasons, which means that this owner *could*, regardless of whether he or she *would*, in fact, change his or her mind and act on the basis of a non-hostile attitude toward the buyer's race. Deeming the car owner's immoral behavior illegal necessarily fails to recognize him or her as a free agent in precisely this way.

B. Discrimination, Artificial Persons, and Free Agency

The argument has so far sought to explain the asymmetric framework of antidiscrimination law by uncovering a hitherto overlooked connection between the structure of market interactions and a certain concern for the free agency of the interacting parties. From this connection, an important question arises with respect to the scope of the case for the legality of discrimination: Does it cover incorporated persons? To start, the analysis has been sufficiently formal and abstract to accommodate the existence of non-natural market actors of all sorts, be they buyers or sellers, employers or employees, and so on. Indeed, my focus on the structure of the interaction makes it conceptually possible to conceive of either party to an interaction as an incorporated person. That said, the normative significance of this approach lies in considerations of free agency—more specifically, that the legal order recognizes the capacity of the parties to manifest their free agency in the world by revising their attitudes in response to the demands of the right reason. One might suspect that incorporated persons are far removed from these considerations or that they are only loosely and indirectly implicated by such innate capacity. This is because, the objection could go, an organization does not acquire attitudes or motives of its own and, so, does not call for an arena of revisability.

It might be protested that a corporation's discriminatory decision, say, to refrain from purchasing goods or services from a certain person is not a decision made purely by an artificial person. As an empirical matter, the corporation's

agents who are entitled to speak and act in its name are the ones behind the decision and, for this purpose, adopt attitudes and motives that characterize such a decision. Normatively, treating corporations as purely artificial constructs, to the exclusion of the moral agents who own, run, and work for them, is counterintuitive at least from a liberal (as opposed to a utilitarian) point of view. Accordingly, considerations of free agency need not wither away when natural persons, occupying the roles of owners, managers, and workers, speak and act in the name of a corporation.

That said, the nature of the connection between organizations and the idea of agency (properly conceived) remains unclear. Furthermore, addressing it presupposes an elaborate theory of incorporated persons and the precise connection between them and the natural persons who function as their owners, managers, and workers—for instance, should this connection be viewed in terms of incorporated persons extending the agency of natural persons and, if so, in what ways and to what extent? These complex questions must be addressed before we can determine whether or not incorporated persons fall within the scope of the free-agency case for the legality of discrimination.

V

CONCLUSION

The limited liberal case for the legality of discrimination discussed in these pages identifies an important connection between the asymmetric structure of antidiscrimination law and the capacity for free agency, which is part of what it means for a liberal legal order to respect its constituents, taken separately, as free and equal agents. It is perhaps plausible to suppose that in a world in which both sides of every market transaction are subject to antidiscrimination duties, the chances of suffering discrimination would be lower than in our world in which these duties fall only one-sidedly. This would not be the only important divergence between the two worlds, though. In the world with less discrimination, no one is treated by the law (of antidiscrimination) as an agent capable of acting on the basis of a revised attitude by responding to the demands of right reason in a way in which, in our world, everyone holds an entitlement to be treated as such.