# Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination

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*A central trend in the development of discrimination law, in every jurisdiction, has been the movement from a requirement of intention to ground a complaint to the recognition as actionable of indirect or adverse effect discrimination. Initially, liability for discrimination was circumscribed very narrowly, requiring a form of intention that was tantamount to malice. The practical consequences of this narrow conception were apparent early on, and those concerned about them have long been agitating, with some success, for a reading or redrafting of anti-discrimination statutes that would yield broader liability. Advocacy (both practical and theoretical) in the discrimination law context has tended to swing wildly between two extremes — from a virtually exclusive focus on the moral blameworthiness of the defendant to an attempt to focus solely on the effects of discrimination on its victims. This article seeks to reexamine the gradual expansion of liability in discrimination law from the perspective of the key conceptual elements of liability in tort law in order to reexamine the normative underpinnings of this area of law. Viewed from a tort perspective, the enlargement of the scope of discrimination law can best be understood as resulting from an implicit expansion of the concept of fault appropriate to this context of human interaction, a change linked to an expanding conception of the human interests that discrimination*

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*law protects from infringement. From its beginnings, discrimination law implicitly recognized that deliberately refusing to contract with others out of ill will or prejudice toward an important aspect of identity such as race or sex constituted an affront to human dignity that could not be justified by the value of freedom of contract. The expansion of liability over time reflects an expansion of the concept of human dignity bound up with fair access to important opportunities and due consideration of the needs and interests of differently situated groups in the design of important social institutions. This conception of dignity constructs it as an objective interest that can be affected by implicitly discriminatory behavior as well as by conduct motivated by prejudice, requiring more robust justification than the mere claim to liberty. This approach can explain many of the advances in modern discrimination law without resorting to end-state distributive principles.*

## INTRODUCTION

A central trend in the development of discrimination law, in every jurisdiction, has been the movement from a requirement of intention to ground a complaint to the recognition as actionable of indirect or adverse effect discrimination.[1] The doctrinal starting point for this body of law circumscribed liability very narrowly. The practical consequences of this narrow conception were apparent early on, and those concerned about them have long been agitating, with some success, for a reading or redrafting of anti-discrimination statutes that would yield broader liability. One might

1 The clarity and consistency of this trend have varied from jurisdiction to jurisdiction. For example, although the American courts led the way in introducing the adverse effect or disparate impact idea, they have since confined its application to a relatively narrow set of cases, reverting elsewhere to a narrow intention-based test of liability. Thanks are due to Reva Siegel for crystallizing this point for me. By contrast, although the Canadian courts were slower to adopt the adverse effect doctrine, it appears to have taken firmer root there than in the U.S. The doctrine is also more secure in the U.K. jurisprudence as a result of specific legislative enactment. Despite these variations, it is fair to say that one — perhaps the central — theme in academic debate about the scope of discrimination law has been the assessment of the move from intention to adverse effects. My analysis of this trend will not try to follow all the ins and outs of legal developments in every jurisdiction in which some sort of trend to this effect can be identified. Instead, I want to focus on the normative foundation for these developments, using cases or legislative initiatives from various jurisdictions to the extent that they are useful in exemplifying the normative issues.

argue that advocacy (both practical and theoretical) in the discrimination law context has tended to swing wildly between two extremes — from a virtually exclusive focus on the moral blameworthiness of the defendant to an attempt to focus solely on the effects of discrimination on its victims. This article seeks to reexamine the gradual expansion of liability in discrimination law from the perspective of the key conceptual elements of liability in tort law. Viewed from a tort perspective, the intention-based account of discrimination law adopts the narrowest possible standard of fault as the foundation for liability. Yet the conception of fault embedded in the adverse effects conception of discrimination remains obscure. This may be in part because the fault notion characterizing the early doctrine has not itself been fully explicated, at least not in the context of the corresponding conception of human interests that ought to be legally protected. An examination of the early doctrine can achieve a better understanding of why its standard of fault was/is indeed too narrow. We can then map developments in discrimination law onto alternative fault standards and show that the enlargement of the scope of discrimination law can best be understood as resulting from an implicit expansion of the concept of fault appropriate to this social context, a change linked to an expanding conception of the human interests that discrimination law protects from infringement.

My focus here is on the regulation of discrimination in the private context, that is, between ordinary citizens, rather than on the regulation of the state's treatment of citizens. Discrimination considered in this private law context is related to tort in *that* it is an extension of the realm of non-voluntary obligation giving rise to a private right of action.[2] Indeed, in some jurisdictions, efforts have been made to persuade the common law courts to recognize a cause of action for discrimination,[3] and there are common law causes of action that overlap with the statutory right not to be discriminated

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2 The English literature, in particular, tends to draw out this similarity between tort and discrimination law. *See, e.g.*, Christopher McCrudden, *Changing Notions of Discrimination, in* Equality and Discrimination: Essays in Freedom and Justice 83 (Stephen Guest & Alan Milne eds., 1995); John Gardner, *Liberals and Unlawful Discrimination*, 9 Oxford J. Legal Stud. 1, 4 (1989), analyzes at least direct discrimination in this light.

3 In Canada, this argument was made explicitly in *Board of Governors of Seneca College v. Bhadauria*, [1981] 124 D.L.R. 193, but rejected by the Supreme Court, which ratified the rejection in *Christie v. York Corp.*, [1940] S.C.R. 139, where a clumsier effort was made to convince the Court to conceptualize a refusal of service on racial grounds as a legal wrong. The academic literature has also advocated the creation of a cause of action in tort for various forms of discriminatory behavior. *See, e.g.*, Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982).

against.[4] Since a central ingredient in a tort action is the standard of fault, we might expect this concept to play an important role in a discrimination action as well. In principle, three standards of fault can be distinguished in tort law: malice, intention, and negligence. Completing the picture is the limiting case of strict liability — that is, the imposition of liability for any voluntary conduct causing harm without proof of fault. Discrimination law standardly divides liability into two categories: intentional or direct discrimination and indirect or adverse effect discrimination. Early cases restricted liability to cases of intentional or direct discrimination, which is usually described as having developed in two stages: grounding liability first in illicit motives, and then in intentionally treating members of one group differently from those of other groups.[5] Liability has been further expanded in at least some contexts or some jurisdictions to cover indirect or adverse effect discrimination. When we try to map the two forms of liability in discrimination law onto the recognized standards of fault in tort, we discover both confusion around the understanding of intentional discrimination and obscurity in the underpinnings of indirect or adverse effect discrimination.

This essay traces key developments in discrimination law and discrimination law scholarship in light of the tort concept of standard of fault in order to better understand developments so far, and clarify the normative underpinnings of the cause of action for discrimination. This will require elucidation of the range of human interests implicitly protected by the law, since some account of these interests is the natural corollary of the fault standard by which behavior is properly judged. Through this exercise it will be possible to provide an account of discrimination law that firmly justifies the move that has already been made beyond a narrow liability rule grounded in the demonstration of prejudice and yet holds back from adopting the more wide-ranging redistributive rationales often thought necessary to ground the move to disparate impact analysis.[6] A satisfactory rationale for

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4 For example, the tort of intentional infliction of nervous shock or mental suffering is sometimes used to seek redress for harassment in cases that would also be covered by most human rights codes. *See* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 Stan. L. Rev. 1 (1988); Joanne Conaghan & Wade Mansell, The Wrongs of Tort 127-47 (1993) (Chapter 7); Krista J. Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. Penn. L. Rev. 1461 (1986).

5 This is how Blumrosen describes the first two stages of the law's development in the U.S.; Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59 (1972). *See also* Beatrice Vizkelety, Proving Discrimination in Canada 1-58 (1987) (Chapter 1).

6 This is not to deny that redistributive rationales might have some legitimate role

discrimination law requires that the legitimate interests of both constituencies — potential defendants and potential plaintiffs — be taken into account in the design of the cause of action. Reconfiguring discrimination law in terms of the range of interests that deserve legal protection and the corresponding standard of fault appropriate to provide that protection will enable us to construct such a balanced account. In other words, I will offer a sketch of a rights-based analysis of discrimination law that treats it as an extension of and analogous to other forms of rights protection accomplished through the law of torts.

One caveat is in order before beginning this exploration. In the final analysis, a complete normative account of discrimination law cannot be provided without considering the role played by the explicit statutory enumeration of characteristics on the basis of which discrimination is prohibited and the explicit confinement of the prohibition on discrimination to specific contexts of interaction such as employment, the provision of accommodation, and access to goods and services. Both these elements are crucial to defining the scope and limits of the rights and duties created by the legislation, and they require theoretical and normative analysis as much as the standard of fault does. It is also undoubtedly the case that my analysis of the fault standard will be informed by unspoken understandings of the limits imposed by the prohibited grounds of discrimination and the contexts covered by the prohibition. Nevertheless, however artificially, I will treat the standard of fault issue as though it can be isolated from the others for the purpose of beginning the search for a normative foundation for discrimination law. The result will be an incomplete theory, but not, I hope, without interest.

## I. THE CONNECTION BETWEEN THE LEVEL OF FAULT AND PROTECTED INTERESTS IN TORT

The objective standard of fault developed in negligence law has steadily gathered steam as the dominant conception of fault in tort law. The other standards can therefore best be described by their difference from the negligence standard. The objective standard of care measures conduct by reference to the conduct of the reasonable person. This is most commonly described by the idea of reasonable foresight of harm; that is, behavior will be judged to be wrongful if it involves taking a level of risk that the reasonable

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to play in determining the final scope of discrimination law, but just to say that exploring these rationales is beyond the scope of this effort.

person would have foreseen and avoided. Using this as a benchmark, strict liability involves holding someone liable for causing harm even if it was not reasonably foreseeable and avoidable. In the opposite direction, intentional wrongdoing involves acting with subjective knowledge[7] of the likely harmful consequences of one's actions. Malice involves an even higher level of wrongdoing, referring to action based on a harmful motive — acting not only with knowledge of the likelihood of injuring another, but in order to cause harm to another or desirous of causing harm. Its limits as a standard of fault are obvious, covering, as it does, even less territory than criminal liability typically does.

Dividing up liability according to different standards of fault in this way is largely an invention of the nineteenth and twentieth centuries. Before the abolition of the forms of action, the criteria for establishing a cause of action latched on to a variety of distinguishing features of various harm-causing behaviors, but did not clearly isolate the degree or type of fault involved as important.[8] The distinction between malicious, intentional, and negligent behavior was imposed on pre-existing case law by a generation of academics determined to make substantive sense of the wrongs previously defined as side effects of the procedures shaping civil litigation.[9] The new approach strove to offer a unified conceptual framework for all of tort law. At its most comprehensive, that framework postulates the existence of a general duty to avoid causing harm to others without justification.[10] This

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7 On some versions, such as that of Oliver W. Holmes, *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1 (1894), knowledge is judged "externally" rather than subjectively. That is, intention will be attributed to an actor when the harmful consequences of her actions would be obvious to the reasonable observer, rather than merely when they are reasonably foreseeable. One might say that when likely consequences are obvious, a court is justified in imputing subjective knowledge to a defendant. Thus, the external version of intention is designed to deal with the endemic difficulty of proving intention.

8 Frederick Pollock, The Law of Torts 2 (1887) ("The ancient common law knew nothing of large classifications founded on the substantive nature of what was in issue."). *See also* Percy Winfield, *A History of Negligence in the Law of Torts*, 42 Law Q. Rev. 184 (1926).

9 Leading figures in the effort to rationalize the common law were Frederick Pollock, *supra* note 8, in the U.K. and Oliver Wendell Holmes, *supra* note 7, in the U.S., on both of whose accounts I shall rely.

10 This framework takes its inspiration from, but is not entirely true to, the accounts of Pollock and Holmes. Neither Pollock nor Holmes offered an account of tort law that purported to be this comprehensive. Instead, their formulations covered only intentional or negligent causing of harm without justification. Holmes, *supra* note 7, at 3; Pollock, *supra* note 8. Pollock recognized the existence of pockets of strict liability and malice, but never fully integrated them into his overarching framework.

schema uses the notion of justification to create several tiers of fault. Yet it requires an explanation of what distinguishes those sorts of situations in which no fault-based justification is available (strict liability) from those in which a justification restricts liability to negligence, and both of these, in turn, from situations involving justifications that work to restrict liability to intention or malice. If strict liability is recognized as a possible basis for liability, proof of negligence, intention, or malice seems superfluous unless there is some additional reason for requiring a greater degree of fault in some contexts in order to justify the imposition of liability. Likewise, recognition of negligence as a form of wrongdoing obviates proof of intention or malice. Any defendant who has knowledge of the consequences of her action is necessarily also reasonably able to foresee those consequences. For there to be space for both negligence and liability grounded in intention, there must be some cases in which not being able to foresee the consequences of one's behavior is regarded as a justification for that behavior, a justification that does not extend to circumstances in which there is knowledge of the consequences. Similarly, for there to be a distinct conceptual space for malice-based liability, there must be circumstances in which acting with knowledge that someone will suffer harm is justified, a justification that does not apply when the defendant's reason for acting was to cause such harm.

Historically, the notion of standard of fault has been connected to our understanding of the harm done by particular conduct and whether it counts as *injuria* as opposed to merely *damnum*.[11] In this connection, we may find at least part of the explanation of why certain torts require proof of malice or intention and others only negligence or even mere voluntary-causal connection. In the limiting case, an interest may be thought not to warrant legal protection, so that infringing on it is not regarded as the causing of harm at all, however harmful it may be in the ordinary sense of that term or however much the plaintiff may experience it as such, and however deliberate

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Holmes sought, through his account of fault, to rationalize strict liability out of existence. Similarly, he only reluctantly conceded that malice might be crucial to a cause of action. An account that broadens the framework to cover all cases of causing harm without justification would be conceptually capable of covering the full array of fault standards, including the "no-fault" standard.

11 Street argues that frequently a particular type of damage starts its legal career as merely parasitic damages, tacked on to a damage award grounded in a cause of action centered around another type of harm. However, "[t]here really seems to be no good stopping place after an element of damage has once been recognized in any guise until it is recognized as an independent basis of liability." Thomas Atkins Street, The Foundation of Legal Liability: A Presentation of the Theory and Development of the Common Law 470 (1906).

the infringement may be.[12] When a harm is considered to be less tangible, less securely included in the roster of misfortunes from which we are entitled to be protected, the inclination seems to be to require a greater degree of fault in its imposition in order to make conduct unlawful.[13] The firmer the conviction that a certain kind of harm is serious, the easier it seems to be to extend the standard of fault making its imposition wrongful.[14] The history of tort law

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12 This seems to be the traditional assumption underlying the denial of liability for certain kinds of economic loss. As Holmes notes, the shopkeeper who enters into economic competition with a neighboring shopkeeper may be fully aware that his lower prices will cause a loss of business to his competitor — indeed, his objective is to persuade customers to buy from him rather than from his competitor. Yet, the economic interest in avoiding the effects of competition has not been regarded as deserving of legal protection. Holmes, *supra* note 7, at 3.

13 William L. Prosser, *Intentional Infliction of Mental Suffering*, 37 Mich. L. Rev. 874, 878 (1939) ("There has been much more readiness to grant a remedy where mental suffering is inflicted intentionally than where it is the result of mere negligence."). This assessment is borne out by the reasoning offered in the case that first created a cause of action of intentional infliction of nervous shock, *Wilkinson v. Downton*, [1987] 2 Q.B. 57. Around that time, the courts were struggling with claims for compensation for negligently inflicted nervous shock, typically the result of an innocent bystander witnessing a negligently-caused accident befall someone else. The typical response to this type of negligence claim was to deny them on the grounds of remoteness. There was high level authority to this effect when the Court of Queen's Bench came to consider in *Wilkinson* the plaintiff's claim for damages for injury suffered as a result of a cruel practical joke. In an explicit attempt to avoid the impact of these authorities, Justice Wright constructed the new tort as an intentional one: the argument seems to be that even if it may not be appropriate to impose liability for this kind of harm if it is merely the side effect of negligence, there is no impediment to finding actionable *intentional* conduct inflicting such loss.

14 For example, not that long ago there was no liability for causing economic harm through the communication of inaccurate information. The assumption seemed to be that one was entitled to assume that others would not rely on the accuracy of the information, but would double-check it themselves. This assumption was held to be sufficient to protect the supplier of information against the imposition of liability for negligent misinformation, but it did not fully extend to intentional misinformation. If one knew that one's information was inaccurate and that its recipient was bound to rely on it, this was regarded as tantamount to deceit or fraud, so that arguing that one was entitled to assume that the plaintiff would not rely seemed forced. Over time, this expectation that others would double-check information came to seem less fair, opening the door to the introduction of liability for merely *negligently* misinforming someone so as to cause economic harm. Hedley Byrne v. Heller & Assocs., 1964 A.C. 465. However, in line with the continuing uneasiness with economic loss and word-inflicted loss, it is arguable that the conception of negligence informing this branch of the law is narrower than that operating to redress negligently caused physical harm.

reveals a common pattern: when a new right or novel form of legal protection is first claimed, the conduct identified as wrongful is typically confined rather narrowly, in part through the standard of fault used to define liability. In other words, the right is construed narrowly so that only a limited duty need be imposed for its sake. As experience develops with related fact situations involving a similar kind of wrong, the criteria governing the imposition of liability may widen gradually.

Thus, some sense of what counts as the human interests that the law should protect and what level of protection is afforded through the fixing of a particular standard of fault are two sides of the same coin. Together, these elements constitute the core of a definition of a cause of action. The description of the interests attracting protection is an account of the rights recognized by law; in this way, the perspective of those who risk injury is taken into account. The standard of fault describes the correlative duties imposed in order to protect those legally-recognized rights. Through the articulation of the appropriate standard of fault, the law takes account of the legitimate competing interests of those whose behavior may cause harm. In a well crafted cause of action, these two elements are in balance: the standard of fault reflects the level of protection appropriate to the importance of a given interest; the degree of fault exhibited by particular conduct influences our understanding of the interests affected.

Transposed to the discrimination context, this analysis of the interplay between the conceptual elements grounding liability in tort helps make sense of developments in discrimination law so far and frames the debate about the appropriate limits of liability.

## II. Fault and Protected Interests in Discrimination Law

Legislation now exists in many jurisdictions to make it unlawful in a variety of contexts to refuse to contract[15] with another person because of any of a number of enumerated characteristics that he or she may exhibit. The standard analysis of discrimination law is that these statutes were initially interpreted to confine liability to intentional behavior and that we have now, for the most part, moved past this. Thus, it is sometimes said that it is no longer necessary to prove intention in order to establish discrimination.[16] I

15 I use "refuse to contract" here as shorthand for the variety of restrictions on freedom of contract covered by anti-discrimination laws, many of which extend to controlling the terms of contract as well as the decision whether to contract at all.

16 This is certainly the standard analysis of Canadian law. See, for example, Vizkelety,

shall argue that it is more accurate to say that early cases required not just intention but a very particular intention: the desire to cause harm because of one of the enumerated characteristics. In the early cases, both defendants and adjudicators simply assumed that one could only be held liable if one acted out of a desire to do ill grounded in bigotry or prejudice. From a tort perspective, this looks more like malice than mere intention; yet it has been difficult in the discrimination context to pry the two concepts apart. This initial grounding of liability in malice seems anomalous: in every other area of civil responsibility, a more expansive concept of fault is the norm, with malice playing only a minor role if it is acknowledged as an independent standard of fault at all.

I shall argue that this starting point betrays a particular conception of the nature of the harm against which protection is warranted: the affront to dignity involved in causing harm to a person for the sake of causing harm. Once this conception and its relation to the malice standard are explicated, developments in discrimination law become understandable in terms of the simultaneous expansion of the law's understanding of protected interests and the standard of fault appropriate to their protection. This leads to an exploration of what an intention standard not limited to malice amounts to and how it fits with an expansion of our conception of the interests protected by discrimination law. We have, for the most part, left malice behind as the gist of the cause of action, but the question remains whether the law actually has transcended an intention standard of fault or merely changed its conception of what consequences of one's behavior must be intended to ground liability. In other words, developments so far may only have taken us to a concept of intention more in line with its standard use in tort law.

## A. The Origin in a Malice Standard: The Emergence of Dignity as a Protected Interest

Prohibitions on discrimination were introduced in a legal climate within which freedom of contract was a powerful value. Its standing was such as to lead common law judges to deny the existence of any legal right requiring someone to enter into any particular contractual relationship.[17] In

*supra* note 5, at 52, citing the Canadian Supreme Court's decision in *O'Malley v. Simpson-Sears*, [1985] 2 S.C.R. 536.

17 An exception at common law to this freedom to refuse to contract was recognized in respect of innkeepers and common carriers; but rather than allowing this pocket of liability to grow organically, as has happened with most other forms of tort liability, the common law courts have mostly seemed to let it atrophy. *See* Henry L. Molot, *The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation*, 46 Can. Bar Rev. 612 (1968); Amnon Reichman, *Overlooking the Common Law:*

other words, at common law, being refused the benefit of some contractual arrangement was simply not considered a harm, legally speaking. After all, when a benefit such as housing or employment is distributed under conditions of scarcity, some people will inevitably be disappointed. In such a context, there is no automatic right to such benefits; therefore the mere fact of refusing to provide them cannot be considered a wrong. Anchored in this starting point, the common law declined to look into the reasons for refusal or any other circumstances surrounding it to see if a right not to be refused might sometimes be justified even if a general right to the benefits of contract does not exist. Against this backdrop, anti-discrimination laws created a new legal right, reducing the scope of freedom of contract in the process. Interpreting the new cause of action meant explicating the harm protected against by the statute and the corresponding restriction on those whose behavior is regulated. Given that the right created represented an interest that previously had never been given any legal protection, it is perhaps only to be expected that adjudicators would exploit any ambiguity in the statute to read that right and the corresponding duties as narrowly as possible.

The first generation of cases standardly assumed that one could be held liable for discriminating only if one's refusal to contract was grounded in prejudice or ill will directed at the group to which the plaintiff belonged.[18]

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*The False Premise of Vriend*, Can. J.L. & Jurisprudence (forthcoming); Note, *The Antidiscrimination Principle in the Common Law*, 102 Harv. L. Rev. 1993 (1971).

18 William Black, *From Intent to Effect*, [1980] 1 Canadian Hum. Rts. Rep. at D/1; Blumrosen, *supra* note 5. This focus on prejudiced motive seems to characterize the starting point of both U.S. and Canadian jurisprudence, although it seems to have had less influence in U.K. thinking, largely because the relevant U.K. statutes provided a more precise definition of discrimination, one more in line with the differential treatment idea. *See* Laurence Lustgarten, Legal Control of Racial Discrimination 4 (1980); Vizkelety, *supra* note 5, at 26. A smattering of examples from the early Canadian case law should suffice to demonstrate the common assumption of the need to prove prejudice. In *Henry v. Rajewsky* (Ont. Bd. Inquiry Mar. 4, 1969) (Arthurs) (unreported, on file with author), a complaint of discrimination on the basis of race in accommodation was held to be "not proven" on the ground that "the course of dealing between Mr Rajewsky and the Human Rights Commission ... does not clearly demonstrate an intransigent and discriminatory attitude." *Id.* at 7. In *Massey v. Castlefield Apartments* (Ont. Bd. Inquiry Jan. 24, 1969) (Krever) (unreported, on file with author), another accommodation case, the Board commented that

> ... in such an inquiry it is necessary to examine not only the objective facts, but also, where those facts are susceptible to a reasonable suspicion of discrimination, the mind, intention, or motives of the respondents to determine whether the apparently suspicious appearance of the facts are not capable of an innocent or fortuitous explanation.

*Id.* at 17. And again, in *Clarke v. Camelot Steak House & Tavern* (Ont. Bd.

In other words, early adjudicators read the injunction not to refuse to contract with others "because of" or "on the ground of" their race, sex, etc., as a prohibition on acting on *animus* toward people of a certain race, sex, etc. This approaches reading a malice standard of fault into anti-discrimination statutes. Malice normally signifies animosity toward an individual, a desire to cause harm for the sake of causing harm. The relevant variant for discrimination law purposes would presumably be antipathy toward and desire to cause harm to others as members of a group identified by reference to a characteristic enumerated in the statute. Evidence of racial animosity, for example, or of a belief in the inherent inferiority of certain people would ground an inference that a refusal to contract was based on the desire to deny its benefits for the sake of doing harm to someone so identified.

This approach constructs discrimination as a cause of action in which malice is intrinsic to the wrongdoing — that is, in which the behavior complained of is otherwise legitimate and is rendered wrongful only because of the motive to cause harm. Malice-based causes of action are rare at common law; indeed, there is considerable controversy over whether malice ever functions as an independent standard of fault.[19] But when it does, the

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Inquiry Sep. 23, 1971) (Mackay) (unreported, on file with author), employment discrimination was held not to be found, the Board having decided that although the burden of proof was the civil burden,

> ... the degree of persuasion or of being "reasonably satisfied" varies with the nature and consequence of the fact or facts to be proved and that where an act alleged is reprehensible or morally opprobrious, so that its proof would rightly subject a person to the contempt of all right minded citizens ... then the proof of such conduct will not be lightly found.

*Id.* at 10. The implication seems to be that proof of conscious racially-based animosity is necessary because only this would attract the "contempt of all right minded citizens."

19 The role of malice in defeating a privilege is well-established — in defamation law, for example. However, this context presupposes that the underlying cause of action is grounded in some other criteria establishing its wrongfulness. The privilege asserted by the defendant precludes these normal grounds of liability from operating, unless that privilege can itself be defeated by proof that the defendant acted not in keeping with the rationale for the privilege, but solely out of spite or ill will. The defeat of the claim of privilege leaves the underlying foundation of the cause of action in place and brings it into play. Outside this context, courts have occasionally vociferously denied that malice can ever turn what would otherwise be lawful behavior into a wrong. *See, e.g.*, Allen v. Flood, 1898 A.C. 1; Bradford v. Pickles, 1895 A.C. 587. There are exceptions, *see, e.g.*, James Barr Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 Harv. L. Rev. 411 (1905), *reprinted in* Selected Essays on the Law of Torts 155 (1924),

presupposition is that the behavior in question is otherwise lawful.[20] In the discrimination context, the relevant behavior would be the decision not to hire or promote someone or the decision not to rent accommodations or provide services. The presupposition underlying the early discrimination cases, then, is that refusing to contract with any particular individual, even intentionally, is normally lawful conduct. Nevertheless, such conduct might be converted into a wrong if an employer rejected a particular candidate purely for the sake of causing him or her harm. Anti-discrimination legislation, therefore, was initially read as having added a new right not to be harmed to fulfill the desire of others to harm, a right specific to the use of certain criteria to deny contractual benefits in certain contexts.

To so explicate the malice standard brings out what is, in effect, a new kind of harm, which I label harm to dignity. Recognizing this type of harm helps clarify the logic of the first stages of the development of discrimination law. However, the interest so identified has not yet been fully articulated in the case law or literature. I hope to contribute to such an articulation, not only in order to understand better the origins of the doctrine, but also to provide a better account of further developments in discrimination law and project its growth into the future by allowing for the organic development of our understanding of the interest in dignity and the circumstances that implicate it.[21]

Harm to dignity exists independently of any harm arising out of the refusal of the benefit in issue. To deny someone a job out of racial or other *animus* or out of a belief in her inferiority is not just to deprive her of the benefits of the job, but to treat her as unworthy of basic human respect, to insult her humanity. It is to make the target of ridicule and abuse an aspect of her identity in which she is entitled to take pride.[22] Anti-discrimination legislation in any given jurisdiction picks out those aspects of identity that are socially understood as important[23] and that have tended to be made targets

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but little has been done to rationalize them and explain their relationship to cases in which a cause of action grounded on malice has been denied.

20 Ames, *supra* note 19; Ernst Freund, *Malice and Unlawful Interference*, 11 Harv. L. Rev. 449, 461 (1897-1898).

21 Whether this strategy falls into the trap, criticized by Gardner, *supra* note 2, at 16-17, of trying "dogmatically" to fit new principles based on new social reality or understandings into old justificatory principles will have to await another occasion to be addressed.

22 Gardner, *supra* note 2, at 18.

23 Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 Cal. L. Rev. 1, 17 (2000).

of abuse in that society.[24] Such abuse stigmatizes and often humiliates.[25] The connection between prejudice and the humiliation it often causes makes it easy to slip into treating the harm to be protected against as a kind of emotional harm — the bad feelings typically aroused in the victims of malicious conduct.[26] But this would be to subjectivize and potentially trivialize the nature of the interest in issue. It threatens to turn the harm of discrimination into a suspect kind of intangible harm, impossible to disprove and dependent on potentially self-serving victim reports. Rather, the harm must be understood to inhere in the denial of respect *per se*. In other words, harm to dignity is better understood as an independent, objective harm, not a matter of hurt feelings.

Recognizing human dignity as an independent interest deserving of legal protection provides a comprehensive limitation to the comprehensive argument in favor of freedom of contract that grounds the assumption that refusal to contract is, normally, lawful behavior. Whatever we take to be the point of freedom of contract, insulting the dignity of others is not connected to an employer's legitimate pursuit of his own interests: it can only be understood as causing harm for harm's sake. To argue otherwise would be to say that one is entitled to regard injuring another as itself conducive to one's own well-being. One might be tempted to argue that this has been the unarticulated point of malice-based torts all along: to recognize that attaching positive value to the violation of others' interests, as opposed to merely refusing to sacrifice one's legitimate interests for the sake of others, is itself a form of harm and not merely a way of causing some other sort of harm.[27] This approach amounts to recognizing a right to dignity that is capable of attracting the protection of the law even if there is no right to the benefit itself that is insultingly denied.[28]

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24 Gardner, *supra* note 2, at 6-8; Mark Kelman, *Concepts of Discrimination in General Ability Job Testing*, 104 Harv. L. Rev. 1157, 1169 (1991).

25 Kelman, *supra* note 24, at 1165.

26 Arguably, this is the trap that Paul Brest falls into; Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976). For this he is criticized by John Gardner, *supra* note 2, at 6, on the basis that emotional harm-based accounts cannot explain why discrimination is actionable even if the victim is not emotionally affected.

27 This would provide a rationale for a unified approach to the malicious causing of harm of the sort argued for by Percy Winfield, Textbook of the Law of Tort 71-72 (2d ed. 1943).

28 Freund, *supra* note 20, described the same basic idea as amounting to a right of security against malice: "This right would be an extension of the sphere of what might be called social security, which is already protected by causes of action for fraud, negligence, libel and slander, and conspiracy."

However, to ground liability for discrimination exclusively in a malice standard betrays the assumption that in the contract formation setting, the only legally cognizable interest is in not being treated as someone whose well-being counts negatively in the satisfaction of the preferences of others. This way of understanding the harm and, therefore, the right is very narrow. It defines the harm exclusively from the defendant's perspective: if the defendant did not mean to insult, then there was no insult.[29] This is undoubtedly the kind of thinking that lay behind early employer exculpatory pleas that the employer was not prejudiced, but acting with good or at least neutral intentions.[30] This led to arguments that an employer may have acted out of ignorance or paternalism, but because he did not mean his conduct to be insulting, the discrimination complaint should be rejected. Refusing to hire a woman out of a belief that the work is too dirty or unpleasant for women or that the long hours might interfere with their family responsibilities, for example, would not be unlawful by this standard as long as the employer thought he was doing female applicants a favor.

Malice requires that the reason for the refusal to contract be to cause hardship; the injury to the other must be an end in itself rather than merely a means to another end. This allows the refusal to be justified by reference to an unlimited range of ulterior ends. Suppose an employer were explicitly to refuse to hire members of a particular group and claim that this was not because of animosity, but in order to achieve some ulterior goal. Provided the ulterior end was not itself infected with the employer's animosity toward members of that group, the employer would escape liability. So, a malice standard would exonerate an employer who excluded a certain class because

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29 This is what Alan Freeman calls "the perpetrator perspective" in Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049, 1052 (1978); *see also*, Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 Tulane L. Rev. 1407 (1990).

30 In a much discussed English case, chivalrous intentions were accepted to defeat a claim that letting female employees leave work five minutes early constituted discrimination against the male employees. Peake v. Automotive Prods. Ltd., [1979] 1 All E.R. 106. In particular, Shaw L.J. (*id.* at 110) relied on the employer's good intentions to deny that the practice was "inherently adverse or hostile to the interests" of the male employees. At least Lord Denning has reconsidered and repudiated this view in *Ministry of Defence v. Jeremiah*, [1979] 3 All E.R. 883. An example of chivalry working against a female employee is found in the employer's argument, ultimately rejected, in *Robertson v. Metropolitan Investigation Security (Canada) Ltd.* (Ont. Bd. Inquiry Aug. 10, 1979) (unreported, on file with author), that a job as a security guard would be too dangerous for a woman.

of the prejudices of his customers, or because his other employees would object to working with a person belonging to that group, or because members of that group are less likely to be well-educated or exhibit a strong work ethic, or because they are likely to have competing family responsibilities. Likewise, an employer who claims that he excluded employees over a certain age for the sake of public safety,[31] or a college of physicians requiring that immigrant doctors work for a period of time in under-serviced communities for the sake of improving their quality of medical care,[32] or a municipality that allows women but not men between ages 60 and 65 free access to public facilities because men are more likely to be able to afford to pay[33] would all escape liability. In each case, the ulterior objective could be offered as the reason for denying the benefit to the plaintiff, not the desire to harm members of the particular group.

On this understanding of the nature of the harm of discrimination, there is very little difference between a malice standard and an intention standard of fault, possibly explaining the stubborn tendency of litigants and adjudicators to conflate the two. An intention standard refers to the defendant's knowledge of the likelihood of his behavior causing harm. In this context, intention would require that the defendant have had knowledge of the likelihood of the plaintiff suffering affront to dignity. If the injury is defined by the meaning the defendant places on his behavior, knowledge of likely injury to the plaintiff (being deliberately insulted) collapses into desire to offer an affront to dignity. Whether the language used is that of malice or intent, the result is that only someone who acted out of conscious prejudice would be found liable. The transition from a malice standard to a genuine intention standard requires an enlargement of the conception of the harm done by discrimination.

### B. From Malice to Intention: Dignity Enlarged

It quickly became apparent that an action grounded in malice made it very easy for bigots who kept their views to themselves to escape liability. Given that the benefits of contracting are a scarce commodity, anyone refusing any particular contractual relationship could usually find some plausible reason for the decision that did not involve animosity.[34] As long as this

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31 Ontario Hum. Rts. Comm'n v. Borough of Etobicoke, [1982] 1 S.C.R. 202.

32 Human Rts. Comm'n v. College of Physicians & Surgeons (B.C. Bd. Inquiry May 27, 1976) (unreported, on file with author).

33 James v. Eastleigh Borough Council, [1990] 2 All E.R. 607.

34 Black, *supra* note 18, C/1; Blumrosen, *supra* note 5; Vizkelety, *supra* note 5, at 37.

was the standard implicitly adopted by discrimination law, the result was that only if the employer or landlord was very stupid or the person seeking employment or accommodation was such a sterling candidate that it was impossible to imagine another reason for turning her away was liability likely to be imposed. Similarly, a defendant could credibly argue that although the plaintiff may have found his use of certain racial epithets on the shop floor insulting, he meant it entirely amiably; therefore, he had done no wrong. Malicious motive is notoriously difficult to prove.

One way to put the objection to this state of affairs is to say that unemployment has the same effect on someone whether imposed maliciously or not[35] or that a malice standard is not effective enough in changing employment patterns for members of historically-excluded groups.[36] But this presupposes either that some individuals are entitled to particular jobs or that some groups have a right to a particular pattern of job-holding. In other words, this objection requires an understanding of the harm that anchors it exclusively in the denial of the benefits of the job. However, the challenge for such an approach has always been to explain how there can be an individual right to a scarce commodity. If every applicant for a job has a right to the job itself, but there are fewer jobs than there are applicants, an employer cannot help but violate someone's rights. Alternatively, one might argue that the law of discrimination is grounded in aggregative policy considerations that dictate pursuit of a particular pattern of distribution of jobs. Some such policy arguments may indeed be valid; however my project here is not to explore these kinds of arguments. Instead, I hope to show that another basis for criticism of the malice standard is available that neither makes exaggerated rights claims nor concedes the field entirely to patterned theories of distributive justice.

The right not to be discriminated against by private actors such as employers boils down to a right not to be denied the benefits of contract, the scope of which right is contested. Given the novelty of such a claim, it is perhaps not surprising that the case law began with a very narrow reading of this right. But in accordance with the pattern discernible in tort law, we might expect that over time, the degree of fault required to impose liability will fall, signifying an enlargement of our conception of the interests given legal protection. Movement away from the malice standard can only take place once we grasp affront to dignity as a harm that can exist independently

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35 Vizkelety, *supra* note 5.

36 Bob Hepple, *Have Twenty-Five Years of the Race Relations Acts in Britain Been a Failure?, in* Discrimination: The Limits of the Law 20 (Bob Hepple & Erika M. Szyszczak eds., 1992); Vizkelety, *supra* note 5, at 42-45.

of the meaning with which the defendant imbues his actions. We must define the relevant harm neither subjectively from the defendant's point of view nor subjectively from the plaintiff's point of view, but according to the objective meaning of particular behavior. The harm must be defined as the meaning socially given to certain sorts of behavior, whether that is the meaning desired by the actor or not.[37] Malicious conduct having made vividly present to us a kind of harm not fully recognized before, we can question whether the proper understanding of the interest grounding the right is limited to the interest in not having others take pleasure in one's misfortune and whether, correspondingly, the only duty we owe to potential contract partners is not to treat them as intrinsic *loci* of negative moral value.

In the treatment over time of the variety of ulterior goals offered by defendants to justify their behavior, we can see an evolution in the understanding of the protected interest. The employer's argument that he himself was not prejudiced, but merely responding to pressure from others, was rejected at an early stage.[38] This rejection marked the first step toward recognition of an objective form of harm to dignity and, with it, the possibility of an intent standard that can be distinguished from a malice standard. An account of affront to dignity as an objective harm allows us to separate intentional discrimination from malicious discrimination by allowing for the separation of insult to dignity as an end in itself from its infliction as a means to another end. For example, an employer who refuses to hire women or people of color because his customers are prejudiced may not wish to cause harm and therefore would not be acting maliciously; he may sincerely regret having to bow to the prejudice of his customers. Yet if we can intelligibly say that being refused a job because of customer prejudices is, objectively, an affront to dignity, we can formulate a new version of the intent standard: did the defendant act with knowledge that these sorts of job applicants will be insulted by their exclusion? If he has adverted to the dignity-affronting

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37 This argument seems to me to be in line with the suggestion made by Robert Post, *supra* note 23, at 20, that the point of discrimination laws is to alter the norms by which characteristics that have been used to stigmatize are given social meaning.

38 Berry v. Manor Inn, 1 Canadian Hum. Rts. Rep. at D/152 (1980); Bish v. Chez Moi Tavern, 2 Canadian Hum. Rts. Rep. at D/372 (1981); Dupnicksky v. J.L.K. Kiriakopoulos Co., 2 Canadian Hum. Rts. Rep. at D/485 (1981); EEOC Dec. No. 70-11, EEOC Decs. (CCH) ¶ 6025 (July 8, 1969) (rejecting the argument made by an armored car company that it is entitled to hire only men because customers would not have as much confidence in female guards). *See also* Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (U.S. Supreme Court 1971).

consequences of his behavior, his behavior is intentional in the usual sense of this term in tort law. Once second-hand insult is recognized, objectively, as a form of insult, such an employer will have intentionally caused it.

It is easy in this way to capture second-hand insult with an intention standard. By definition, an employer responding to external prejudices knows that the motivation of these parties is grounded in animosity based on an enumerated characteristic. It is hard to imagine an employer who is truly part of our political culture truthfully claiming that he did not realize that the rejected employee would be insulted by the decision to reject her because of the prejudices of others. It is not a huge stretch to decide that a sense of violated dignity is the "natural and probable" outcome of such a decision and to impute knowledge of such consequences to those responding to such pressure. However, not all cases in which we might conclude, objectively, that the reason for rejection was insulting are ones in which the employer was bound to know that it would be so regarded. There is, therefore, still the logical possibility of an interaction that leaves the plaintiff insulted without the defendant having known that this was the likely outcome of his actions. For example, an employer might exclude women from a certain kind of job because it is dangerous or involves long hours, thinking he is being chivalrous and without any awareness that women might find his reasoning insulting. Or a landlord might prefer not to rent to members of certain groups based on inaccurate ethnocentric stereotypes without realizing their inaccuracy or the insult contained within them.

The clear articulation of an intention standard requires that adjudicators first develop an account of what kind of attitudes related to any of the enumerated characteristics in anti-discrimination legislation are legitimate and which are objectively a violation of human dignity; they must then ask whether a particular employer or landlord or shopkeeper was aware that that meaning is attached to the criteria he used. It is not possible to trace the clear development of such an account in the case law because it has very often been the case that plaintiffs first had to convince the adjudicator of the insult implicit in the defendant's behavior before the defendant's responsibility for that behavior could be assessed.[39] That is, it has often been the case that

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39 An example of this problem can be found in *Ahmad v. City of Toronto* (Ont. Bd. Inquiry Feb. 28, 1973) (unreported, on file with author), in which the ethnic jokes and slurs complained of were not found to indicate racism on the part of the employer and, indeed, were characterized as mere insensitivity to the complainant's feelings. The first aspect of this finding negates malice: the employer meant no harm by his comments. The further chastisement of the complainant for being hypersensitive indicates that insofar as it might have been recognized, whether

adjudicators and employers shared the same assumptions about members of various groups. In such a situation, adjudication gets bogged down in the issue of whether the employer's assumptions are insulting and, therefore, never gets to the question of whether it matters that the employer may not have known that they are. Conversely, in cases in which adjudicators have recognized the behavior as insulting, they have tended to impute to the defendant knowledge of its likely insulting effect.

This sudden gestalt shift from seeing no harm to seeing obvious harm that the defendant must also have seen is a side effect of the fact that harm to dignity is more intangible than the sorts of harm that the legal system is accustomed to managing. What dignity is and, therefore, what sorts of behavior infringe it are much more a matter of social construction than the notion of physical or even economic harm. Harm to dignity is a matter of the social meaning of one's treatment by others rather than tangible effects such as broken bones. Herein lies the central difficulty of discrimination law: the interest that grounds it is intangible, yet reliance on *received* wisdom to determine its contours would forever put disadvantaged groups at the mercy of the prejudices and misconceptions of the majority as they may be from time to time. If the law is to lead social change rather than merely confirm it, adjudicators must take up the task of constructing a concept of dignity suitable to the discrimination context. Their articulation of such a concept will then help crystallize new social understandings about how people should treat one another.

Once the objective meaning to be attributed to particular behavior has crystallized, it becomes possible to re-describe the intention that is relevant for purposes of assigning fault as the intention to act on reasons that are, objectively, insulting, rather than the intention to act on reasons that one intends to be insulting. Thus, an employer intends to discriminate if he intends to exclude women from a certain job because it is unladylike work or for other paternalistic reasons. The plausibility of imputing knowledge of insulting consequences to defendants is fostered by the fact that the employment contexts in which stereotype and paternalism come into play tend to repeat predictably, making it harder and harder over time for an employer credibly to claim innocent ignorance. To begin with, the first time a particular kind of complaint is adjudicated against a given employer, if

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by the employer himself or the tribunal, that the complainant took offense at the employer's behavior, this reaction is invalidated and thereby rendered irrelevant as an effect of the employer's conduct that can be assessed independently of his subjective meaning.

the adjudicator decides that the complainant was right to be insulted, but the employer meant no insult, the employer has been put on notice that the attitudes that informed his behavior are inappropriate. Should there be a next time, ignorance will not be a credible excuse. Just as each dog gets one bite, so each employer might be allowed one insult (of a particular type), but thereafter can be assumed to have knowledge of the relevant consequences. Second, the better publicized official determinations that certain stereotypes or paternalistic beliefs are insulting, the less likely any employer will be able to persuade a tribunal that despite the general public debate on the matter, he remained ignorant. The more firmly rooted in social consciousness the meaning of certain conduct becomes, the easier it is to assume that the defendant shared that understanding in the sense of being aware of it.

Not only is the realm of credible ignorance likely to dwindle over time, the fact that complaints of discrimination often arise in ongoing relationships means that an ignorance excuse is very often going to be unpersuasive. While the interaction between a prospective employee and an employer might be confined to a discrete instance of the employee's application being rejected, once an employment relationship has been established, discriminatory conduct by an employer is likely to meet with objection. For example, the employee exposed to what she finds insulting name-calling or other language in the workplace may well complain to the employer. Once the complaint is made, the employer must confront the question of whether the challenged behavior is insulting, objectively speaking. If nothing is done, the employer must be found to be carrying on this practice with knowledge of its effect on some employees. To maintain that his judgment about whether the conduct was insulting should prevail even if an adjudicator finds the conduct to be objectively insulting is to collapse the standard back into malice.

Thus the struggle to move fully away from a malice standard was the struggle to develop a publicly-articulated notion of affront to dignity that is defined objectively — in effect, to create, legally, the interest in the protection of dignity. Bit by bit, adjudicators began to accept the argument that assumptions about the inherent suitability of women or some racialized or age-defined groups to this rather than that sort of work or assumptions about willingness to engage in this rather than that sort of work are objectively an affront to dignity.[40] This can be seen as the

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40 In *Grieg v. Community Industry*, [1979] I.C.R. 356, the employer's argument that he acted in the best interests of the female job applicant in not giving her a placement with an otherwise all-male team was rejected as justification for the refusal to hire. In *Hurley v. Mustoe*, [1981] I.C.R. 490, it was held that refusal to hire women

incorporation of a notion of self-determination or autonomy as an element of the concept of dignity. At least part of what is wrong with an employer making decisions on the basis of presumed characteristics of members of a group is that this denies important opportunities, ones crucial to an individual's sense of agency, without regard to the attributes and ambitions of the affected person. This therefore arbitrarily denies the latter any control over an important part of her life choices. To treat people according to a stereotyped view of who they are is not just mistakenly to underestimate their qualifications. It is to participate in a social practice that confines them to a way of life not of their making and a life whose social meaning is bound up with markers of inferiority. This is especially so when acting on stereotypes is a widespread phenomenon in the labor market, because victims of stereotype will not easily be able to avoid the constricting effects on employment opportunities. Even accurate generalizations about particular groups may violate this notion of self-determination.[41] All these developments signify an expansion of the concept of human dignity underlying the prohibition on discrimination. Now violation of dignity occurs not only when one stifles the aspirations of another person for the sake of doing so, but also when one makes decisions that categorically deny her ability to pursue her ambitions despite her capabilities.

This change in legal consciousness was crystallized by a shift in the interpretation of anti-discrimination provisions, marking the emergence of the differential treatment conception of discrimination.[42] In rejecting the focus on the defendant's subjective attitudes and whether they exhibit animosity, adjudicators began to ask simply whether the defendant differentiated between members of various groups, rather than whether he intended to insult.[43] This enabled all cases of explicit use of one of the enumerated characteristics to be captured as instances of wrongful behavior, producing a move from the language of intentional discrimination to that of direct discrimination. Often treated as a clear departure from the search for "intentional discrimination,"

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with small children on the grounds that they are generally unreliable is unlawful discrimination. This same result was reached ten years earlier in the U.S. in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). In *Sprogis v. United Airlines*, 444 F.2d 1194, 1199 (7th Cir. 1971), a ban on the employment of married women was declared unlawful discrimination. In *Gill v. El Vinos Co.*, 1983 Q.B. 425, it was declared unlawful to require female customers to sit at tables if men are served at the bar.

41 City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1985).

42 Blumrosen, *supra* note 5; Owen Fiss, *A Theory of Fair Employment Law*, 38 U. Chi. L. Rev. 235 (1971).

43 *See, for example*, Equal Opportunities Comm'n v. Birmingham City Council, [1989] 1 All E.R. 769, 774.

the differential treatment model can, instead, be regarded as the next stage in the process of defining the concept of human dignity and the sorts of behavior that violate it while remaining within a framework of intentional wrongdoing. As adjudicators began to realize that many forms of differential treatment are at least implicitly insulting, they began to read the legislation as a judgment by the legislator that, objectively speaking, no explicit use of one of the enumerated characteristics could be anything other than insulting because of its blanket exclusion of all members of a given group.[44]

However, there may not be a perfect fit between using an enumerated characteristic in decision-making (treating one group differently from another) and doing that which is objectively insulting. That is, it may not be possible to argue that any instance of the use of an enumerated characteristic is necessarily insulting. If there were a very considerable gap between the rationale of protecting dignity as here conceived and the prohibition of explicit use of certain criteria as the means to this end, one would have reason to reject the differential treatment interpretation of the law as designed to protect dignity. Yet some gap should be tolerable: one might conclude that the legislature may be justified in defining the scope of liability in a categorical way in order to prevent adjudicators who have an unduly narrow conception of human dignity from imposing it on plaintiffs. In a legal climate in which the legislature can be seen to be trying to change public consciousness rather than just reflect it, it might well simply deem certain conduct to be wrongful rather than leave discretion in the hands of adjudicators. Legislation in some jurisdictions anticipated this problem of overbreadth by allowing for a *bona fide* occupational requirement defense. This permits defendants to escape liability even for explicitly excluding members of a particular group if they can show that the demands of the job require it. In these circumstances, the same developments traced above have tended to be played out under the rubric of whether a particular exclusionary or disadvantaging rule is *bona fide* or not. With the growing conviction that certain stereotypes and attitudes simply are insulting, the standard in this context too moved from a focus on the subjective meaning to the employer of his behavior to the objective meaning of certain forms of exclusion.

If the legislation is read this way, a more straightforward intention standard can be seen to inform the prohibition against discrimination.

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44 See, for example, Robert Post's description of this plateau in American jurisprudence, relying on *Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432, 440-41 (1985) (per White J.), and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236 (1989), in Post, *supra* note 23, at 9-10.

The legislation itself can be taken to put employers on notice that the use of one of the enumerated characteristics as a criterion in selecting applicants or determining working conditions is wrongful and the question of whether the defendant did so intentionally is just a question of whether the defendant knew that this — using an enumerated characteristic — was what he was doing.[45] Notification by the legislature justifies imputing knowledge to defendants of the insulting consequences of the use of enumerated characteristics. On this understanding of the law, all cases of direct discrimination are necessarily cases of intentional discrimination. An employer cannot have a policy of not hiring women or Aboriginal persons or anyone over 60 without knowing that this treats some applicants differently on the basis of an enumerated characteristic. That which has been legally deemed wrongful is inherent in the hiring policy.

This development in the jurisprudence makes suspect any attempt to ground discrimination law in considerations of efficiency. To a certain point, one can argue that prohibiting discrimination is a means of encouraging employers to abandon irrational selection criteria that, in fact, hamper productivity and are therefore inefficient. Negative attitudes toward members of a particular group grounded in beliefs that are wholly or predominantly false are inefficient, since they lead to a serious rate of error about who is best qualified for the job. However, to the extent that an enumerated characteristic is used accurately as a proxy for another characteristic that is productivity-related, use of the enumerated characteristic will often be the most efficient selection criterion. It must be a conception of human dignity as including the right to be judged for oneself that grounds the categorical prohibition on the use of the enumerated characteristic, rather than efficiency.

### C. From Intention to...?: Making Sense of Disparate Impact Analysis

So far I have argued that if we ground the right not to be discriminated against in the fundamental interest in dignity, we can understand the shift from "intentional discrimination" to direct discrimination as a move from a malice standard to a genuine intent standard, an expansion of liability made possible by an expansion of the concept of human dignity. The next major development in discrimination law, of course, is the inclusion within the cause of action of indirect discrimination or behavior that has the effect of

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45 James v. Eastleigh Borough Council, [1990] 2 All E.R. 607, 618 (Lord Goff).

excluding or disadvantaging members of a group identified by reference to an enumerated characteristic. Although it is common for adjudicators and equality advocates alike[46] to herald this shift as establishing the irrelevance of intention in defining discrimination, I shall argue that so far acceptance of the adverse effect concept, whether through interpretation of the general anti-discrimination provision or explicit legislative decree,[47] has merely put the final nail in the coffin of the malice-based definition of discrimination. There is a plausible interpretation of the adverse effect doctrine that is consistent with an intention standard of fault, and the fact situations in which invocation of the doctrine would clearly imply the imposition of something more like a negligence standard have, so far, been elusive.

Indirect discrimination involves the use of a policy that does not explicitly refer to one of the enumerated characteristics as a criterion for eligibility and is, therefore, facially neutral, but has the effect of denying or reducing access to the relevant benefit for those identified by such a characteristic. The prohibition on explicitly using one of the enumerated characteristics as a criterion is capable of catching a limited number of instances of indirect discrimination, but in order to do so, the adjudicator has to find that the facially-neutral policy is simply a covert means of excluding members of an enumerated group. So, for example, an employer who invokes a sex-related characteristic such as a minimum height requirement merely in order to exclude women, most of whom will fall below the stipulated minimum height, is behaving just as wrongfully as an employer who directly invokes sex as a selection criterion. Likewise, a minimum education requirement invoked for the reason of excluding members of a racial minority who are known to be less well-educated is tantamount to an explicit exclusion and is just as great an insult to its victims. However, an indirect discrimination doctrine so construed is subject to all the same difficulties of proof as malice. It would not be hard for an employer to come up with a proxy for a forbidden characteristic that has enough of a shred of plausibility as a *bona fide* qualification to be able to defeat a claim of covert use of a forbidden ground.

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46 See, for example, the Supreme Court of Canada's judgment in *O'Malley v. Simpson-Sears*, [1985] 2 S.C.R. 536.

47 In Canada, the adverse effect doctrine was originally introduced interpretively, followed by legislative ratification in most jurisdictions. In the U.S., the doctrine was a judicial invention (Griggs v. Duke Power Co., 401 U.S. 424 (1971)) that has yet to be given the legislature's explicit seal of approval. In the U.K., Parliament moved to introduce the concept explicitly to foreclose the argument that discrimination is confined to the direct variety.

It is a testament to the enduring attraction of the malice standard in some circles that even after it had been at least implicitly rejected through the rejection of a range of ulterior ends as excuses for explicitly exclusionary criteria, employers continued to defend against claims of unlawful discrimination in adverse effect cases by arguing that they should not be held liable because their policy indicated no ill will toward those excluded.[48]

Given, however, that intending to differentiate on the basis of an enumerated characteristic, in the sense of simply using such a characteristic to allocate jobs, etc., has been accepted as constituting discrimination (subject to the establishment of a BFOQ), the real question is whether there are circumstances in which causing a similar outcome without actually using the enumerated characteristic is similar enough to justify extending the concept of discrimination. Answering this question requires that we address both of the elements that constitute the cause of action: is the defendant's behavior intentional in the relevant sense, and if it is, when does intentionally causing a disparate impact violate another's dignity in the relevant sense? Using a touchstone like the protection of dignity provides a starting point for responding to the central concern arising out of the use of the adverse effect concept: without some such anchor, the concept can be read as claiming that any decision or practice that has a negative effect on a member of a historically disadvantaged group is by that very token wrongful. This comes close to saying that members of disadvantaged groups have a right to a job and any other contractual benefits covered by discrimination law.[49] In other words, adverse effect, *per se*, cannot be wrongful without implying a right

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48 Even more striking is that some adjudicators took the same view, at least in the first round of claims made under this rubric. An example is the Ontario case of *O'Malley v. Simpson-Sears*, [1982] 36 O.R.2d 59, in which the Divisional Court took the view that absent evidence of prejudice by the defendant toward Seventh Day Adventists, the cause of action could not be made out. This result was overturned by the Supreme Court of Canada in O'Malley, [1985] 2 S.C.R. 536, thus introducing the doctrine of adverse effect into Canadian law.

49 In addition to expressing an overly ambitious claim, this approach is also difficult to reconcile with the wording of most if not all legislation. To avoid *reductio ad absurdam*, a similar right cannot extended to members of privileged groups; men are not thought to be discriminated against, for example, by the fact that a hiring policy disqualifying someone with a criminal record is likely to affect them disproportionately by comparison with women. Thus, this line of argument would implicitly confine the legislation's protection to the historically disadvantaged — in this example, women. Yet discrimination statutes do not make it unlawful to discriminate on the basis of femaleness, but, rather, on the basis of sex.

to certain benefits, a right not easily justified. But there may be something about some, even if not all, instances of adverse effect that gives them a social meaning that is demeaning to human dignity.

An outline of some of the sorts of fact situations that have given rise to disparate impact claims will facilitate our search for that something. The earliest claim to succeed was that in *Griggs*, in which it was held that the use of educational requirements and tests that had the effect of keeping black workers out of the better jobs in the plant was unlawful.[50] A requirement to be clean-shaven[51] or to wear a particular sort of headgear[52] has been challenged in circumstances in which such requirements exclude Sikh men from employment.[53] Likewise, a requirement that all employees be available for work on Saturday has been challenged on the basis that it works to the detriment of members of religious groups that celebrate the Sabbath on Saturday.[54] Height and weight requirements that tend to exclude women and members of some ethnic or racial communities have also come under attack,[55] as have maximum age requirements that exclude women who have taken time out early in their careers to have children.[56] Perhaps most controversial, seniority schemes have been challenged for their tendency to benefit white men at the expense of members of more recently hired groups.[57]

Can the imposition of these kinds of policies be understood as an affront to dignity in a way that expands the concept of dignity already found, on my account, to be implicit in the law? So far I have sketched a concept of dignity that includes being able to feel at home with those features of oneself that are important elements of identity. Anti-discrimination legislation seeks to identify the elements that are salient given current social understandings, including our knowledge of the facets of identity

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50 *Griggs*, 401 U.S. 424.

51 Singh v. Rowntree Mackintosh Ltd., [1979] I.C.R. 554.

52 Singh v. Security & Investigation Serv. Ltd. (Ont. Bd. of Inquiry May 31, 1977) (unreported, on file with author); Bhinder v. Canadian Nat'l Ry., [1985] 2 S.C.R. 561.

53 In the U.K., the same issue arose in the context of admission to a school in *Mandla v. Dowell Lee*, [1983] 2 A.C. 548.

54 O'Malley v. Simpson-Sears, [1985] 2 S.C.R. 536.

55 Dothard v. Rawlinson, 97 S. Ct. 2720 (1977); Colfer v. Ottawa Bd. of Comm'rs of Police (Ont. Bd. Inquiry Jan. 12, 1979) (unreported, on file with author); British Columbia Pub. Serv. Relations Comm'n v. British Columbia Gov't & Service Employees Union, [1999] 3 S.C.R. 3.

56 Price v. Civil Serv. Comm'n, 1978 I.C.R. 27.

57 See Louise Dulude, Seniority and Employment Equity for Women 56-57 (1995), for a survey of the American seniority cases.

that have historically been used to undermine human dignity; the additions to the list of enumerated characteristics over the years demonstrate the evolution of our concept of identity and self-esteem. A positive sense of self requires, first, that one not be subjected to malicious attacks based on a protected characteristic. Second, I have argued that respect for dignity requires not making categorical judgments driven by stereotype about the capabilities of people identified by an enumerated characteristic or their suitability for particular endeavors, but rather requires judging them on their own abilities in accordance with their own ambitions. Both these concerns link dignity to the value of autonomy;[58] the objective is to remove arbitrary barriers hindering people's efforts to fashion a worthwhile life. Can policies that have a disparate impact on enumerated groups raise related concerns? I think many if not all of the disparate impact claims that have been raised so far do. This way of understanding adverse effect doctrine may not enable the doctrine to do as much work as some advocates may want, but it will go some considerable way, building on the normative moorings already established.

One common problem with policies that seem neutral but negatively affect women or racial or religious or ethnic minorities is that they reify the attributes of the typical incumbent employee, thereby creating a standard image of the job's model occupant and building it into the job description. These attributes are not intrinsically connected with the enumerated characteristics (sex, religion, race, etc.), but they tend to be associated with historically privileged categories of workers (male, Christian, white, etc.) so that their use continues to exclude members of those groups that have historically been excluded. When a security firm prescribes wearing a uniform that includes a cap, it presumes workers who have no competing obligations with respect to headgear. When a company requires staff to work on Saturdays, it assumes Christian patterns of religious observance as the norm around which it designs expectations of work availability. Height and weight restrictions for employment as a police officer or firefighter are based on the image of the traditional male occupants of such jobs. Failure to include pregnancy benefits in sick benefits assumes that only physical limitations on availability for work that typically affect men count as the sorts of things that an employer need cover to adequately meet workers' temporary income maintenance needs. This phenomenon has been identified in feminist legal literature as the implicit adoption of a male norm in the

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58 Gardner, *supra* note 2; John Gardner, *Private Activities and Personal Autonomy: At the Margins of Anti-discrimination Law, in* Discrimination: The Limits of the Law, *supra* note 36, at 148.

design of institutions and policies.[59] The point can be generalized: the setting of norms implicitly based on the attributes of members of the dominant group that are associated with their dominant status will inevitably tend to exclude or disadvantage those who do not share them. In many cases, the adoption of such norms is traceable back to a time when the excluded groups were not a noticeable presence in a given labor market or to an ideology within which certain groups were thought unsuited for particular endeavors.

To the extent that this is true, implicitly exclusionary policies stand to infringe dignity in a way similar to explicit ones. To design the rules of the workplace around the characteristics of men — their physical attributes and needs, their family commitments, their perceptions of efficacy — and then admit women only to the extent that they can match these qualities is to assume that women are not entitled to be equal participants in the workforce on their own terms. To design job requirements around the Christian calendar is to assume that non-Christians must either abandon their own religious commitments or personally shoulder the cost of being out of step with the majority through reduced access to employment — a choice members of the dominant religion typically do not face. Goods such as employment and housing are too important to participation and survival in modern society not to be made accessible to all on fair terms. Being systematically, if imperfectly, excluded from them confines some members of society to an impoverished life — not just in material terms but in terms of their hopes and ambitions. The continued absence of members of marginalized groups will feed stereotypical attitudes, making it harder for the few who do manage to get admitted to fit in comfortably. In these ways, the continuation by implicit means of patterns of exclusion from participation originally accomplished more explicitly cannot help but continue to send a message that those excluded are less worthy than others.

The problem with implicit dominant group norms is two-fold. First, they deny the possibility that different packages of attributes and skills based on different personal characteristics can be equally effective in performing a given job. Second, they deny the possibility that there may be sufficient value in some divergences from the assumed "norm" to justify some sacrifice in productivity or convenience to accommodate them. The imposition of

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59 Catharine MacKinnon, Feminism Unmodified: Discourses on Life and Law 36 (1987); Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 Pac. L.J. 1493 (1992); Martha Minow, *Supreme Court Forward: Justice Engendered*, 101 Harv. L. Rev. 10 (1987); Denise G. Réaume, *What's Distinctive About a Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law*, 2 Legal Theory 265 (1996).

liability for disparate impact can be understood as incorporating within the concept of human dignity the idea of respect for a variety of aspects of human personality as having intrinsic value; it resists the measuring of worth exclusively by reference to instrumental criteria. The enumerated characteristics contained in anti-discrimination legislation can be regarded as the legislature's best effort to identify those identifying features (race, sex, etc.) that are likely, in our age and social context, to have been one-sidedly included in the image of the typical worker.

To assess a disparate impact claim is to subject to scrutiny the assumptions that underlie a policy giving rise to the exclusionary effect. It requires us to verify, rather than take the employer's word for it, that being over a certain height really is necessary to being an effective police officer, that wearing a turban rather than a hardhat poses a serious safety concern, that being a high school graduate really is necessary to adequate performance in the job. If genuinely neutral reasons for the policy cannot be found, to allow the policy to stand anyway is to tell the members of the adversely affected group that they are not entitled to a fair opportunity to participate in the workforce as they are, that their aspirations and ambitions count for nothing. This is, it is true, not as bad as categorically judging certain groups to be disentitled to participate fully, but it is close. On the other hand, to provide a sound justification for a policy is to neutralize any insult that might otherwise be perceived as implicit in the policy.

Admittedly, this is to postulate a more robust right to a fair opportunity to participate as part of the concept of human dignity.[60] How much more robust than the right not to be categorically excluded from opportunities depends on the standards according to which the reasons in favor of a particular policy are judged. This introduces a new element to a discrimination action: not all disparate impacts give rise to a valid discrimination complaint — only those occasioned by a policy that cannot be justified. Both the judicial creators of disparate impact analysis and the legislatures that have adopted it have included an escape hatch for employers in the form of the opportunity to establish that the policy challenged is necessary to the enterprise. In a case in which no justification can be offered beyond the convenience of maintaining past practices, it seems easiest to make out the case that this is tantamount to an explicit exclusion from employment. For example, a firm that chooses a uniform based on majority tastes and refuses to adapt it to the religiously

60 For an analysis of U.K. legislation reflecting a similar notion of fair opportunity to participate, see Christopher McCrudden, *Institutional Discrimination*, 2 Oxford J. Legal Stud. 303 (1982).

mandated dress requirements of members of a religious minority even though no connection between the required uniform and job performance can be demonstrated does, objectively speaking, seem to be making a judgment about the worth of that religion's practices. The employer's claim that he just likes the look of the cap and does not want to change the dress requirement rings hollow. This is not to retreat to a malice standard by implying that such an employer must subjectively bear animosity toward members of this religion, although such an inference may often be appropriate. Rather, it is to say that the continued enforcement of an exclusionary policy for which no justification can be offered will be taken to mean and, objectively, does mean that the prospective employee's fair access to employment counts for so little that her employer thinks he is entitled to discount it on a whim. That would be to show inadequate regard for one's employees' dignity.[61]

Cases that hinge on the validity of unexamined assumptions about the attributes of the ideal worker raise a problem similar to that encountered in the first generation of challenges to explicitly discriminatory selection criteria. If the adjudicator does not "see" the problem with the image of

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61 For a contrary analysis, see Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. Pa. L. Rev. 149, 178-82 (1992). Alexander concludes that preferences grounded in unconscious bias cannot be "morally defamatory." His argument seems plausible only because of the rather artificial example that he chooses in order to analyze the issue, that of a sports fan who switches allegiance from one team to another subconsciously because he is put off by the takeover of one team by players of a particular race. Alexander argues that the preference for a hockey team over a football team does not indicate that one thinks football players are inherently inferior (whatever other reasons one might have for such a conclusion). This seems to me to trade too much on the fact that the choice between hockey and football as pastimes is inherently arbitrary. Substitute, however, the case of an employer who refuses to allow an employee to wear a turban to work. The claim that preferring bare heads or capped heads to turbaned heads is the equivalent to preferring hockey to football in the objective meaning it conveys is implausible. Part of the argument that disallowing turbans is an affront to dignity relies on the fact that the employer is made aware of the implications of his choice, whereas Alexander's analysis begins with preference grounded in unconscious bias. However, Alexander goes on to argue that a preference that may originally have been born of prejudice may remain a preference even once its origins are exposed to the holder of the preference without blame attaching. Again, the plausibility of the argument hinges on the triviality of the example. Since it is fully possible to prefer hockey to football without it having anything to do with the race of the participants, continuing to prefer hockey does not send a public signal of inferiority. Can the same be said for an attempt to impose a particular dress requirement on someone who has religious objections when the prescribed uniform serves no work-related purpose?

the tall, strapping police officer (or the lithe, sexy airline attendant, for that matter), the complaint will not get to first base. When this happens, it signals that equality seekers have not yet succeeded in expanding the objective conception of dignity to ensure that implicitly excluding certain categories of persons from the standard conception of the ideal worker is understood as an insult. This process of legal consciousness-raising is likely to go on for a longer period of time and involve more ups and downs than in the direct discrimination context, because the inclusion in disparate impact law of the opportunity for an employer to defend his policy as justified provides a ready hook for employers and adjudicators alike to hang continuing stereotypes and outdated ideology on until a shift in understanding occurs to reveal them to be unfair and outdated.

For these reasons, the proper scope of the protected interest in a fair opportunity to participate in important activities and social institutions will emerge from a consideration of what is capable of justifying a policy that has the effect of excluding a disproportionate number of people in a group identified by an enumerated characteristic. Asking an employer to abandon an irrational practice or one that has no connection to productivity does not seem too great a sacrifice to demand for the sake of fair participation. Insisting on a search for alternative practices that achieve the employer's objectives without sacrificing the employment prospects of members of enumerated groups reduces a bit further the employer's ability to govern his workplace as he sees fit, but seems no more onerous than a huge variety of restrictions we place on freedom for the sake of other important competing interests. Resistance to these kinds of adjustments for the sake of fair opportunity for all probably betrays a continuing allegiance to the idea that the only real harm of discrimination lies in the particular insult caused by overt bigotry.

The more difficult cases arise when the adjustment asked of an employer has a significant impact on profitability or when the attribute that makes some workers less productive than others and is related to an enumerated characteristic is neither intrinsically valuable nor of the employer's making. Provided one thinks that bearing and raising children, for example, is an intrinsically valuable activity, one can plausibly argue that employers must adapt their work rules to the demands that children place on parents, even when those demands are largely met by mothers. If, however, substandard education is correlated with an enumerated characteristic and lower productivity, it is harder to argue that it should be accommodated rather than steps be taken to eliminate it. Inadequate education — provided it has been accurately identified as such — is to be remedied, not treated as a way of life worthy of respect. This, in turn, raises questions of who is

responsible for this substandard education in the first place, and if it is society as a whole, rather than a particular employer, it may[62] be considered unfair to require the employer to shoulder, single-handedly, the burden of fixing the problem.[63] That is not to say that nothing need be done about such problems, merely that employment law may not be the best place to look for solutions.[64] The law defining our civil responsibilities does impose obligations on each of us for the sake of protecting especially valued interests of others, but its fairness depends on the balance it achieves with competing interests.

In light of this sketch of a dignity-based interest in fair opportunity sufficiently important to impose obligations on employers to accommodate at least some religious, ethnic, race, and sex differences, I return to the question of what standard of fault is entailed in holding someone liable for disparate impact discrimination. While it is clear that in adopting disparate impact analysis, the law has moved past the imposition of liability solely for malice, it is not quite clear whether it has moved past intention into a negligence standard. The cases in which it has been proclaimed that "intention" need not be proven to establish discrimination have been fact situations involving ongoing employer policies or conduct. An employer institutes a rule that all employees must work on Saturdays or that applicants must meet certain height and weight standards, for example. Any complaint against such a policy is as much forward-looking as backward-looking: the aim of the complaint is to get the policy changed. Litigation arises after an employee or group of employees has brought to the attention of the employer the discriminatory impact of the policy and the employer has refused to change it. From the moment that employees put the employer on notice about the effects of the policy, the only further justification he can offer for his behavior is that the impact is not wrongful in law. If he loses on this point, the employer must be found to have known the consequences

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62 I say "may" because I do not want to close the door entirely to an argument that there may be circumstances in which employers can fairly be considered the appropriate parties to shoulder this burden. If an argument can be made that such a burden can be relatively evenly distributed across employers, one significant fairness obstacle is overcome. This raises complex moral and empirical questions well beyond the scope of this paper.

63 This sort of problem was considered by the English Court of Appeal in *Ojutiku v. Manpower Services Commission*, [1982] I.C.R. 661, where the Court held that if an employer imposes a condition on prospective employees that is justifiable, its policy does not become discriminatory merely because some applicants are unable to meet the condition because of discrimination previously suffered.

64 McCrudden, *supra* note 60, describes these sorts of alternatives as supply side interventions.

of his behavior and, therefore, to have discriminated intentionally. In other words, the cases that have declared the demise of an intention standard have really only definitively excluded malice as the relevant standard.

It may be the tendency to consider the formulation of the policy in question as the act being challenged, rather than its application to a particular (prospective) employee that has concealed the adequacy of an intention standard in explaining the disparate impact cases.[65] While it may very well be the case in many of the cases litigated so far that when the challenged policy was formulated, the defendant had no idea that it stood to affect some groups adversely, it is hard to see why that should be relevant when the case only comes to be litigated after the defendant has been asked to change the policy and has refused. The ongoing nature of the defendant's conduct makes it unlike a typical tort case in which a discrete action whose consequences have already accrued is assessed for its lawfulness. One wonders whether the courts have not been influenced here by the standard way of thinking about the cognate analysis of an equality claim in the constitutional context. In that context, insofar as the target of the complaint is a piece of legislation, the question is analyzed as one of the validity of the act. There is no need to import this into issues of civil responsibility. The question in a discrimination complaint is not whether the employer's policy should be "struck down," although this language is often used, but whether its application to members of a particular group unfairly deprives them of opportunity in the employment market and therefore requires redress and change.

The kind of fact situation that would require a decision as to whether the standard is intention to cause a disparate impact (that is unjustified) or cause a disparate impact that one ought to know is unjustified is one involving a discrete interaction between plaintiff and defendant involving harm to the plaintiff that cannot be rectified by a change of behavior once the impact becomes known. Examples are hard to imagine in the normal employer/(prospective) employee relationship. Such situations do arise, however, in the context of workplace harassment, although here too, the plaintiff's objective in bringing a complaint is usually as much if not more to prevent future harassment as it is to recover recompense for the past. Interestingly, jurisdictions that recognize harassment as a form of discrimination tend to invoke an objective standard to judge it, indicating that a reasonableness or negligence-like standard for discrimination as a whole may not be that farfetched. After all, harassment is a species of

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65 This seems to me to lie behind the Supreme Court of Canada's analysis in *O'Malley v. Simpson-Sears*, [1985] 2 S.C.R. 536.

disparate impact discrimination, since sexual harassers, for example, rarely target every woman in a given workplace. And one can argue that the rationale for prohibiting harassment is similar to the dignity-based argument sketched above, but that is for another day.

This analysis underscores the bitter irony of the developments in the U.S. since the landmark case of *Griggs*.[66] Although the U.S. Supreme Court led the way in developing the disparate impact analysis, apparently making motive, and hence malice, irrelevant to grounding liability, shortly thereafter it refused to extend the disparate impact line of analysis to related discrimination cases.[67] More worrying is the Court's reversion to what is essentially a malice standard in dealing with challenges to seniority systems that have the effect of excluding women and minorities.[68] The test for liability adopted in these cases takes its inspiration from cases like *Personnel Administrator v. Feeney*, in which the Court said,

> "Discriminatory purpose", however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of", not merely "in spite of", its adverse effects upon an identifiable group.[69]

To say that a seniority scheme is discriminatory only if adopted in order to deprive women or minorities of employment is to limit liability to circumstances in which the employer's purpose is to cause harm for the sake of causing harm to an identifiable group. It might well be argued that the considerations that have so far been taken into account in order to determine if a discriminatory impact is justified as necessary to the operation of a business are inadequate to deal with the complexities of challenges to seniority. However, to retreat to a malice standard in response is virtually to immunize seniority, whatever its impact.

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66 Griggs v. Duke Power Co., 401 U.S. 424 (1971).

67 These developments are charted by Freeman, *supra* note 29, at 1422. *See also* Reva Siegel, *Why Equal Protection Law No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111 (1997).

68 Mark S. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. Rev. 943 (1984), explicitly argues that the intent standard employed in seniority cases is a malice standard.

69 442 U.S. 256, 278-79 (1976).

## CONCLUSION

Early on in the evolution of disparate impact analysis, Blumrosen noted the conceptual similarity of discrimination law to tort doctrines.[70] Oddly though, he also argued that imposition of liability for discriminatory disparate impact amounted to a species of strict liability, in tort law terms.[71] This seems to me to ignore the intention element in the cause of action and the fact that typically, someone against whom a complaint of discrimination is made is given an opportunity to alter the policy when its effects are brought to his notice. It is only after refusal to do so that a lawsuit is likely to ensue. If employees challenge an employer to justify a discriminatory policy and he is unable to do so, but nevertheless insists on its application, I cannot see how imposing liability once an adjudicator determines that the policy cannot be justified amounts to strict liability.

Only if malice is surreptitiously read back into the notion of intent can one argue that disparate impact analysis imposes liability without intent, making it even remotely appear a candidate for classification as a strict liability cause of action. In any event, strict liability involves the imposition of liability even if an actor made all reasonable efforts to avoid harm. By definition, an employer who has failed to justify his policy has not made all reasonable efforts. Although one might, with some plausibility, argue that the objective standard against which justification is to be measured in disparate impact cases introduces an element of negligence into the cause of action, we are still a long way away from strict liability.[72] Again, it seems to be the intangibility of harm to dignity and its uncertain status as a legally-protected interest that creates this tendency either to argue for the confinement of liability to cases involving malice or to characterize a wider liability rule, even if one thinks it can be justified, as an instance of strict liability. The middle ground between these two extremes has had trouble emerging into legal consciousness. In order for it to do so, we need a clearer articulation of the interest in fair access

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70 Blumrosen, *supra* note 5, at 71-72.

71 *Id.* at 67.

72 These aspects of the cause of action seem to be overlooked by Andrew Morris in his characterization of disparate impact liability as an instance of strict liability. Andrew Morris, *On the Normative Foundations of Indirect Discrimination Law: Understanding the Competing Models of Discrimination Law as Aristotelian Forms of Justice*, 15 Oxford J. Legal Stud. 199 (1995). The same quick slide into characterizing disparate impact doctrine as a species of strict liability is evident in Brodin, *supra* note 67, at 957.

to opportunities as an aspect of human dignity, along the lines I have tried to provide here.

Taking the structure of tort law as my model, with its matching of human interests worthy of protection and level of care appropriate to their protection, I have sought to uncover in discrimination law a similar structure. By grounding discrimination law in a concept of human dignity that has expanded over time, we can make sense of changes in the fault standard invoked as well. Much more needs to be said about this concept of human dignity to make it an attractive and sound normative foundation for the cause of action. I hope I have said enough to lend plausibility to the effort. In its early days, discrimination law was informed by a criminal law model — the fault standard consisting of the narrowest of subjective intentions. It has been very difficult to shake this model. Frustrated with the slow pace of progress, some have pushed for a more frankly redistributive rationale, using disparate impact analysis as their vehicle. The use of redistribution opportunistically — when and wherever the bringing of an individual complaint allows — has provoked something of a backlash. A return to a standard of fault closer to the criminal model is said to be the remedy for the excesses of the redistributive effort. We are doomed to oscillate between these two extremes or get stuck at one pole or the other as long as we lack an account of discrimination law, including indirect discrimination, that seeks to embody a fair balance between the competing interests at stake.