

Report from the Institute for

ISSN
1067-2478

Volume 16

Number 2

PHILOSOPHY & PUBLIC POLICY

Spring

1996

School of Public Affairs • University of Maryland
College Park, Maryland 20742 • 301-405-4753

Antidiscrimination Law and Social Equality

Many and perhaps most Americans readily endorse the following propositions. (1) Part of what defines a free society is that it is none of the government's business what citizens believe and that the shaping of citizens' beliefs is not a legitimate task of a liberal state. (2) Racism, sexism, and similar ideologies are so evil and destructive of the proper workings of a free society that the state should do whatever it can to eradicate them.

The two propositions are, of course, contradictory, and ever since the Civil War antidiscrimination law has attempted to devise some accommodation between them. The approach first taken was to weaken the second principle in order to accommodate the first. This move is perhaps clearest in *Plessy v. Ferguson*, the 1896 decision in which the Fourteenth Amendment was held to permit a law that required racial segregation. The Supreme Court declared that "[t]he object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality." This distinction between social and political equality, and exclusion of the former from antidiscrimination concerns, was taken for granted by the sole dissenter as well: "Every true man has pride of race," wrote Justice John M. Harlan, "and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express

To make its research readily available to a broad audience, the Institute for Philosophy and Public Policy publishes this quarterly newsletter. Articles are intended to advance philosophically informed debate on current policy choices; the views presented are not necessarily those of the Institute or its sponsors.

In This Issue

ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY

Andrew Koppelman1

VALUE PLURALISM AND POLITICAL LIBERALISM

William A. Galston7

IN DEFENSE OF ENLIGHTENMENT LIBERALISM: A REPLY TO WILLIAM GALSTON

Andrew Altman13

"ASIAN VALUES" AND THE UNIVERSALITY OF HUMAN RIGHTS

Xiaorong Li18

such pride and to take such action upon it as to him seems proper."

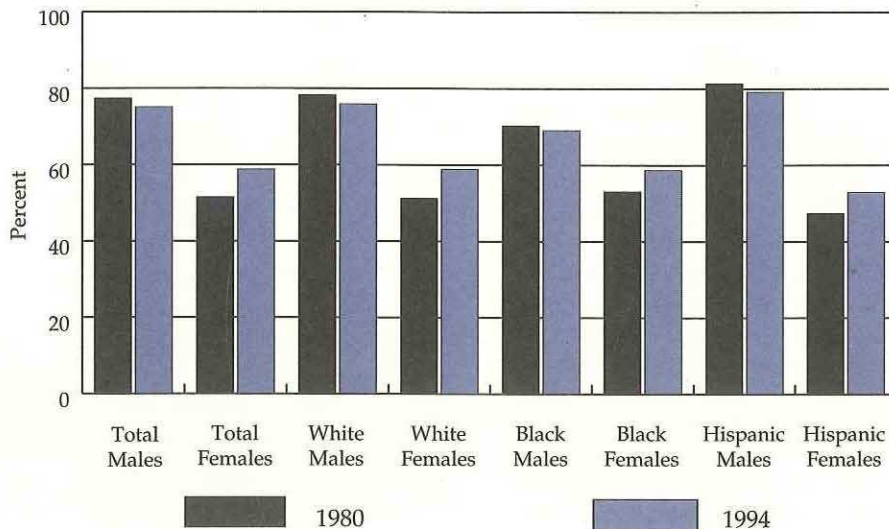
In recent years, the distinction between social and political equality that all the justices apparently took for granted in *Plessy* has been widely questioned, and many judicial and academic discussions of antidiscrimination envisage instead an increasingly ambitious project of cultural transformation. The growing tendency is to weaken the first of the two contradictory propositions in order to accommodate the second. This movement arguably began with *Brown v. Board of Education*, the case that effectively overruled *Plessy* by declaring that government-imposed segregation was unconstitutional. As Alexander Bickel observed, *Brown* relied on the argument "that the detrimental consequences of school segregation were heightened — merely heightened — when segregation had the sanction of law." The movement for social equality was accelerated by the Civil Rights Act of 1964, which involved massive government intrusion into private economic choices. It also could be seen in the critique of societal racism that the civil rights movement of the 1960s made a part of ordinary political discourse.

Expanding Demands

Today this project of cultural transformation is reflected in a broad range of demands that are made in the name of antidiscrimination. Traditional controversies over de facto school and housing segregation, school busing, and affirmative action have not abated, and they have been joined by new debates over discriminatory acts previously regarded as outside the reach of law, such as those by private clubs. It is thought that the same considerations that made segregated schools wrong also make it wrong to tell certain jokes even if (perhaps especially if) no one in the company in which they are told is likely to be offended. There is now enormous sensitivity to the often subtle racial messages conveyed by everything from movies to school curricula. Some now call for the legal suppression of racist speech.

The recent extension of antidiscrimination concerns from race to sex reaches even deeper into the workings of civil society. The recently developed law of sexual harassment, for example, is forcing a significant shift in the mores of the workplace. There is also pressure to extend the antidiscrimination project to other groups,

Percent of the Population in the Civilian Labor Force (CLF)
by Population Group, U.S. Summary, 1980 and 1994



Sources: U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2307
and unpublished data from the Current Population Survey (CPS).
Reprinted from Indicators of Equal Employment Opportunity – Status and Trends,
U.S. Equal Employment Opportunity Commission, 1995.

most controversially to lesbians and gay men, who are asking not only for protection against discrimination but also for legal recognition of their right to marry and raise children. These demands are far more modest than those being made on behalf of blacks and women, since they involve only the equality before the law that was denied to blacks in *Plessy*. Nonetheless, they elicit vociferous resistance, for they would tend to change social mores, increasing the likelihood that eventually homosexuality would be regarded as in no way inferior to heterosexuality. It is the *social* equality of gays that opponents of gay rights are primarily concerned to resist.

The Antidiscrimination Project

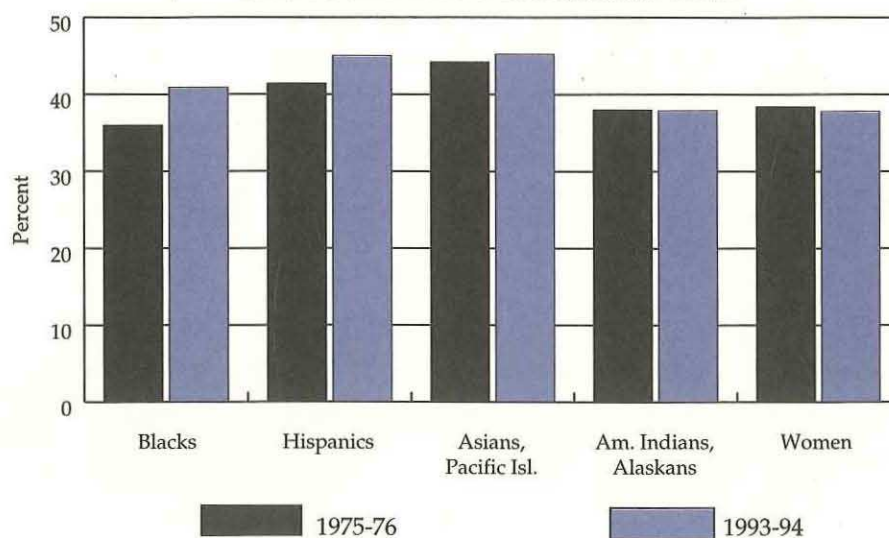
These movements for social equality increasingly involve friction not only with conservative concerns for the preservation of traditionally valued institutions but also with such core liberal goals as freedom of speech, freedom of association, and freedom of religion. The question arises whether this broadening of antidiscrimination's ambitions is justified — more specifically, whether it rests on a legitimate inference

from past cases whose proper resolution is already settled.

Discourse on antidiscrimination law today, for all the division it reflects, rests on a solid consensus. Those as far apart as Jesse Jackson and William Bradford Reynolds agree that slavery was wrong; that theories of racial inferiority were wrong; that *Plessy v. Ferguson* was wrong; that *Brown v. Board of Education* was correct; that the civil rights acts of the 1960s, which outlawed private discrimination in employment and housing, were good laws; that sex discrimination is wrong for the same reasons that race discrimination is wrong. The disagreements have to do most fundamentally with what principles underlie these agreed-upon cases. What is the evil that antidiscrimination law seeks to remedy? Is it simply a failure of impartiality on the part of government? Or is it a broader societal problem? If the latter, precisely what is the problem and why is it something that society is obligated to address?

Put baldly, the original formulation exemplified by both opinions in *Plessy* held that while the white majority had a duty to govern without racial partiality, it had no duty to stop being racist. Today many people

Minority and Women Full-Time Tenured Faculty in
Higher Education, U.S. Summary,
1975-76 and 1993-94 Academic Years



Sources: Equal Employment Opportunity Commission, *Higher Education Staff Information Reports* and U.S. Department of Education, *Integrated Postsecondary Education Data System – Fall Staff Survey*.
Reprinted from *Indicators of Equal Employment Opportunity – Status and Trends*, U.S. Equal Employment Opportunity Commission, 1995.

feel that there is such a duty, and that it extends beyond racism to forbid prejudice against women and gays. In this modern view, government efforts at institutional restructuring and ordinary citizens' condemnation of racism and other invidious beliefs are best understood as part of a single project. This project seeks to reconstruct social reality: to eliminate or marginalize the shared meanings, practices, and institutions that unjustifiably single out certain groups of citizens for stigma and disadvantage.

*A project of cultural transformation
is reflected in the broad range of demands
that are made in the name
of antidiscrimination.*

What I am calling the antidiscrimination project represents a claim of enormous moral power: the demand that society recognize the human worth of all its members, that no person arbitrarily be despised or devalued. Because there is now intense controversy over attempts to reshape culture in the name of antidiscrimination, it has become important to clarify what the project is and to what extent it is justified. I begin by looking at the rationale for antidiscrimination in the paradigmatic case of race.

The Evil to be Remedied

All theories of antidiscrimination ultimately rest on the same ethical claim: the denial of the belief that some persons, because of their race, deserve less concern and respect. But there are different accounts of the specific evil that the antidiscrimination project is meant to address. Some theorists emphasize the defectiveness of the decision-making *process* when it is tainted by this false belief. Others focus on the *stigma* that the false belief imposes on black people. Still others cite *group disadvantages* that are worse than the general run of material inequality because they are the product of the false belief and help to perpetuate it.

Each of these theories focuses on one of the harms through which a stigmatizing reality perpetuates itself. But the wrong of racial oppression is reducible neither to a tainted decision-making procedure, nor to a set of stigmatic meanings, nor to a maldistribution of material goods. Rather, it is all of these. Each is necessary to the social construction of ascribed stigma, and the disruption of any one of them would help to derange the process.

It does not follow, however — and this is the weakness of each theory standing alone — that attacking any one of the parts is sufficient to destroy the whole. The decision-making process cannot be repaired with-

out sealing off the source of the contamination, which turns out to be the racism entrenched within the larger culture. Racial stigma cannot be ended without changing the social facts in which that stigma is inscribed and which in turn daily reinscribe it. Material inequalities cannot be addressed without changing the process by which they are generated and legitimated. Each of the problems described by the theories points beyond itself to a larger system of injury: the embedding, in habitual social practice, of the idea that certain classes of people are intrinsically inferior and unworthy because of their race.

Taken together, the theories suggest three reasons why the antidiscrimination project is worth undertaking. First, justice and democracy require the government to exercise a level of impartiality among citizens that can only be attained if racism and similarly invidious beliefs cease to pervade the culture from which governmental decision makers are drawn. Second, every human being has a need to be recognized as a valued, respected member of society; justification is required whenever such recognition is withheld, and no such justification is possible for racial prejudice. Third, the extreme material disadvantages that some citizens suffer, and that no one should have to endure, are reinforced and perpetuated by these prejudices.

Assaults on Tradition

The antidiscrimination project already engages many Americans who are persuaded that there are unconscious racist connotations to many meanings and practices they once took for granted, and who are working toward change. The state, too, is often engaged in such a transformative project. It is careful *not to encourage* racism, as when it (and here "it" sometimes means the judiciary) resists political demands for laws that disadvantage blacks, and it *discourages* racism, without directly relying on its coercive power, when it refuses to enforce racially restrictive covenants, or when it registers interracial marriages.

*Every human being has a need to be
recognized as a valued, respected member
of society, and justification is required
whenever such recognition is withheld.*

In other cases, the state does use coercion to transform citizens' racial consciousness. Schools are desegregated against parents' wishes, and part of the justification offered for this is that desegregation will produce less racism among children. Similar justifications have been offered for the compulsory desegregation of the workplace, or of housing.

Predictably, this transformative project calls forth resistance. As soon as we begin to create a politics of social reconstruction, we find ourselves in collision with other moral considerations, equally powerful, that demand that the project be a limited one: social order, efficiency, communal solidarity, individual liberty. The defender of communal identity, for example, may argue that stigma based on ascribed characteristics is sometimes deeply rooted in traditions that give coherence to the daily life of existing communities. Any assault on those traditions risks being an assault on those communities.

Yet the antidiscrimination project derives its moral force from its understanding of the importance of community. Its goal is not to burn down the ancient halls, but to bring more people inside. To be sure, such efforts are best launched from *within* communities, by members who seek to reinterpret their tradition so as to include those who have, in the past, been wrongly excluded. It is better if a community voluntarily desegregates its schools, because that is what its own ideals require, than if a federal judge orders it to do so. Sometimes, however, communities cannot be reformed from within. When they cannot, coercive intervention from outside may be justified. Eisenhower was right to send the troops to Little Rock.

Nonetheless, the project of eradicating racism and its practices and institutions is so large that, perhaps paradoxically, it entails a limited role for the law. The extent of the problem is such that it cannot be remedied by the state alone without totalitarian control of civil society, and probably not even then. The law's proper role, therefore, is one of abetting, rather than leading, a movement for social equality.

Beyond the Paradigm Case

Because the three kinds of harms described by theories of antidiscrimination are present, and mutually reinforcing, in the lives of black people, a project of cultural reconstruction directed against racist meanings and practices is justified. These same theories provide a framework for examining the condition of other groups, such as women and gays, and for determining whether they also should be included in the antidiscrimination project.

In the case of women, there is little doubt that all three of the relevant harms are present. The applicability of the group-disadvantaging theory is the easiest to show: although discrimination against women has diminished in recent years, their economic status remains inferior to that of men, and prosperous women tend to owe their status to their economic dependence on men. The identification of social practices that express and perpetuate stigma is more difficult, since social meanings are highly contestable. But

even if traditional sex roles (unlike racist practices) are not generally agreed to entail the degradation of a group, evidence of the implicit devaluation of women in our culture is overwhelming. For example, stereotypes of women and blacks of both sexes are similar: as Sandra Lee Bartky notes, both "have been regarded as childlike, happiest when they are occupying their 'place'; more intuitive than rational, more spontaneous than deliberate, closer to nature, and less capable of substantial cultural accomplishment." Our language and institutions alike regard women as deviations from the prototypical norm of humanity. This stigmatization of women leads to their exclusion from full participation in the political sphere, and it is the source of unconscious prejudices injected into ostensibly neutral decision-making processes.

Antidiscrimination Law and Social Equality

Andrew Koppelman

This important book addresses the controversy over attempts to reshape society in the name of antidiscrimination. Andrew Koppelman discusses how to reconcile Americans' commitment to eliminating discrimination with their commitment to such values as individual liberty, merit-based access to education and employment, and communal solidarity. His book clarifies the moral principles that should guide a society in which some groups — such as blacks, women, and homosexuals — are unfairly stigmatized. Koppelman concludes his study by examining the issues raised by legal penalties for hate speech and pornography.

"This is the best guide to the philosophical and constitutional questions raised by the culture wars. Koppelman's clarity and insight set a new standard for the debate."

— Bruce Ackerman, Yale University

"This excellent study of inequality combines boldness and creativity with much careful thinking and detailed scholarship. . . . Koppelman's valuable discussion of how we should work towards equality should challenge most people and enlighten all."

— Susan Moller Okin, Stanford University

256 pages, \$32.50

Yale University Press
P. O. Box 209040
New Haven, CT 06520-9040
Tel.: 1-800-YUP-READ
FAX: 203-432-0948
Credit cards accepted

While it is a fairly straightforward task to show that discrimination based on sex falls within the ambit of the antidiscrimination project, the case of lesbians and gay men is more complicated. Unlike blacks or women, gays do not disproportionately suffer poverty, though they do experience material disadvantages such as discrimination and exclusion from the economic benefits that are accorded to married heterosexuals. The oppression of gays differs from that of blacks or women in that the characteristic form of gay oppression has been the closet. Thus, the *main* effect of extending discrimination laws to protect gays would not be to give them jobs and housing from which they have been excluded, but to allow them to stop hiding their sexuality, as they often must in order to keep their jobs and housing. As I have noted, however, the withholding of social recognition from any group requires a justification, and the availability of the closet for lesbians and gay men does not diminish this demand. The closet is equally available for religious dissenters, but it is clear that the government may not take actions that, even indirectly, stigmatize certain religions.

*The oppression of gays differs
from that of blacks or women
in that the characteristic form of
gay oppression has been the closet.*

Lesbians and gay men also experience the other harms described by theories of antidiscrimination. Prejudice against gays is often reflected quite overtly in political decisions affecting them, as when proposals to monitor hate crimes against gays, or to reduce the spread of AIDS through education about safe sex, are unable to win legislative approval. Although it is possible to remain celibate and hide one's homosexuality, there remain ways in which this stigma, like racial and sexual ones, is inescapable. The stigmatization of homosexuality typically has destructive effects on even the closeted gay's self-respect that are probably more severe than the analogous damage done by racism and sexism. Both blacks and women know their status from the earliest stages of their lives, and their parents typically begin teaching them to cope with that status in childhood. For gays it is different: one typically does not discover one's sexual orientation until adolescence, by which time one is likely to have internalized the prevailing stigmatization of homosexuality. As with impermissible stigma generally, government has, at a minimum, an obligation not to place its own imprimatur on this one.

Appropriate Limits

The civil liberties worries raised by the antidiscrimination project in general are now being emphasized by those who oppose extension of the project to lesbians and gay men. They argue that enforcement of antidiscrimination laws in this area deprives individuals of the liberty to choose with whom they will associate, and raises other liberal concerns as well. As we have seen, these conflicts among liberal commitments are not peculiar to gay rights, but are endemic to the entire antidiscrimination project. Such conflicts can be adjudicated persuasively not by the invocation of any abstract principle, but only by weighing the harm done by the cultural practice in question, on the one hand, against the importance of the liberty, on the other. In some cases, for example, religious freedom will constitute a limitation on what the state can do in furtherance of the project. In other cases, the project must press fairly hard against certain religious beliefs.

In the present political climate, it has become fashionable to denounce the transformative ambitions of the antidiscrimination project as the "cult of political correctness." However, even acknowledging that it would be terrible if government were to pursue the antidiscrimination project single-mindedly, we must also acknowledge how terrible it would be if government did not pursue it at all. No formula can dictate how to resolve conflicts among values when they arise. The formulation of the antidiscrimination project that I have set forth is useful because it permits the people doing the balancing to understand as fully as possible the values they must weigh against one another. Unless decision makers understand what the antidiscrimination project is and why it is important, they are unlikely to strike the correct balance between it and other values.

The Transformation of Daily Life

Some reforms necessary to the antidiscrimination project must be undertaken by large institutions, and private citizens should organize and do what they can to bring pressure on these institutions to act. But this does not exhaust our responsibilities. Each of us has the ability, and therefore some obligation, to help reshape the culture in which we live, because we, in our daily lives, *constitute* that culture. A key step in this process of change is the public identification and condemnation of routine but stigmatizing behaviors.

It should not be surprising if this activity makes many people feel self-conscious and uncomfortable. Doubtless many who engage in it are humorless, heavy-handed, dogmatic, and intolerant. Some activists have embraced foolish ideologies of racial determinism and education-as-therapy that are as dan-

gerous as the tendencies they seek to combat. The monitoring of culture is, however, absolutely indispensable if the goals of the antidiscrimination project are ever to be attained. Opponents of such monitoring charge that its purpose, even when it does not attempt to invoke the coercive power of the state, is to create a new orthodoxy. But orthodoxy is what the antidiscrimination project must create — not in the sense that some central scrutinizer should be empowered to punish deviations from it, but in the sense that on certain issues there ought to be a high degree of uniformity of opinion among the citizens. The popular press no longer debates about whether blacks are genetically closer to apes than to whites, or whether there is an international Jewish conspiracy to dominate the world. The absence of diversity of opinion on these matters is a great social good.

Ultimately, the antidiscrimination project is not just a matter for lawyers, judges, politicians, bureaucrats, academics, and other specialists. Without the active

and committed participation of ordinary people, the project must become tyrannical or fail, or (most likely) both. It is therefore important that everyone understand the harms constituted and caused by the perpetuation of unjustified stigmas and know why they need to be eliminated. The antidiscrimination project can hope to succeed only to the extent that it is an antidiscrimination movement.

— Andrew Koppelman

Andrew Koppelman is assistant professor of government at Princeton University. Adapted from *Antidiscrimination Law and Social Equality*, by Andrew Koppelman. To be published in May 1996, by Yale University Press. Copyright 1996 by Yale University. Reproduced by permission.

Value Pluralism and Political Liberalism

A free society will defend the liberty of individuals to lead many different ways of life. It will also protect a zone within which individuals will freely associate to pursue shared purposes and express distinctive identities, creating a dense network of human connections called civil society. But the boundaries of this protected zone are contested. The laws and regulations of the political community can conflict with the practices of voluntary associations.

Consider the case of *Wisconsin v. Yoder*, decided by the Supreme Court a quarter century ago. This case presented a clash between a Wisconsin state law, which required school attendance until age sixteen, and the Old Order Amish, who claimed that high school attendance would undermine their faith-based community life. The majority of the Court agreed with the Amish and denied that the state of Wisconsin had made a compelling case for intervening against their practices.

I believe that this case was correctly decided, not only from a constitutional standpoint, but also in accordance with the soundest understanding of citi-

zenship and state power in a liberal democracy. We are familiar with the moral advantages of central state power; we must also attend to its moral costs. If, as I shall argue, our moral world contains plural and conflicting values, then the enforcement of overarching public principles runs the risk of interfering with morally legitimate individual and associational practices. A liberal polity guided by a commitment to value pluralism will be parsimonious in specifying binding public principles and cautious about employing such principles to intervene in the internal affairs of civil associations. It will rather pursue a policy of maximum feasible accommodation. This imperative is clearest with respect to faith-based associations, which I will take as my model case.

The Master-Ideas of Liberal Thought

The current debate over the relation between value pluralism and political liberalism began when the British philosopher John Gray — an ardent foe of the “new liberalism” represented by John Rawls and com-