

Should Americans Be Allowed to Discriminate? (A debate with Dan Klein)

Presentation notes

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1. What is discrimination?
 - Just being selective?
 - Issue of which sorts of discrimination are bad, and which ought to be prohibited (not all bad things should be prohibited). We will focus on the law and prohibition here. Two issues: Which personal characteristics? E.g., talents vs. race. Which spheres of social life? E.g., marriage vs. employment.
 - A matter of judgment and social choice, not application of a single blanket principle. But I will argue that there are principles at stake.
 - A lot of ground to cover. Basically I will examine the following:
 - (1) *Ethics of discrimination*. Nondiscrimination as a requirement of justice: the principle of equal opportunity, and other principles. I will suggest that legal prohibition of discrimination is most compelling when discrimination causes harm, in the form of systematically reducing opportunities for some types of people. Does this happen? This brings me to:
 - (2) *Economics of discrimination*. How discrimination limits opportunity and causes harm, and why markets and voluntary action are inadequate to prevent that harm in some cases. Here the focus is theoretical, but the degree of harm is really an empirical question. Here we can take some guidance from:
 - (3) *History of discrimination*. Lessons from the U.S. experience with racial discrimination in the labor market
 - For the sake of focus and brevity, I will emphasize racial discrimination, esp. against African-Americans, in the United States, and mostly in employment.

2. Discrimination law overview (skip if possible)
 - A variety of federal and state laws deal with discrimination. In addition to the equal protection language of the constitution and its amendments, the Civil Rights Act of 1964 was probably the most important federal anti-discrim. legislation. “Discrimination might occur when an individual tries to vote; rent, or buy a home; use a public facility; get a job, an education, or a bank loan, or do many other things. Discrimination is treating one person differently than another because of a particular characteristic. Not all kinds of different treatment are illegal or even unfair; for example, States allow only their own residents to vote in State elections.”
 - Employment: “Various Federal laws protect you from discrimination in employment on the basis of race, color, sex, religion, national origin, age, or disability. Discrimination by employers with 15 or more employees is prohibited in all aspects of the hiring and employment process: job application, hiring, firing, promoting, training, wage earning, or any other terms, privileges, or conditions of employment provided or imposed by the employer.” Exemptions: religious organizations can restrict employment to members of their religion. Federal law only if interstate commerce.
 - Housing: race, color, national origin, religion, sex, disability, or family status (having children)
 - Credit: sex, marital status, race, color, national origin, or religion
 - (Quotes from U.S. Commission on Civil Rights web site, “Getting Uncle Sam to Protect Your Civil Rights”)

3. Philosophical underpinnings of anti-discrimination law: the principle of equal opportunity
 - We agree that bigotry is morally bad. But what exactly is the justification for the law stepping in?
 - *Equal opportunity*: the central principle. There are different conceptions of equal opportunity.
 - One common one is nearly synonymous with *non-discrimination*: in employment, for example, this conception would say that in decisions over employment and pay, individuals should be judged only in terms of attributes relevant to their performance of the job in question. This would include, say, skills, but not race. The philosopher John Rawls calls this conception “careers open to talents.” Actually, there is some ambiguity here because it’s possible that race could affect job performance, if for example customers care about the race of the employees they deal with. More on this in a moment.
 - Non-discrimination is a very weak form of equal opportunity. A second notion of equal opportunity requires considerably more than non-discrimination: a level playing field, in the sense of *equal life chances for people with equal potential*, that is, who are equally talented and/or hard-working. To provide equal opportunity in this sense requires at the very least equal access to quality education, and probably more. Rawls calls this *fair equality of opportunity*.
 - Equal opportunity in its stronger form (equal life chances) is a very appealing principle of justice. It demands equal respect for persons. By providing a level playing field, it strives to eliminate the effects of arbitrary differences in family background that are beyond any individual’s control. At the same time, it also respects individual autonomy, in the sense that it does not demand equal outcomes. Thus equal opportunity is closely related to the ideas of meritocracy and desert. There are many complications, but those are for another occasion.
 - The principle of “equal life chances” does not necessarily require that each and every opportunity be equally available. For example, suppose a random 1/100 of employers discriminated against blacks, another 1/100 discriminated against whites, and 98/100 were “color-blind.” Chances are that whites and blacks would have equal opportunity to succeed. We would still find bigotry reprehensible, but it would not really be violating equal opportunity. Bigotry in this case might be considered “harmless wrongdoing,” as the philosopher Joel Feinberg calls it.
 - I want to come back to this point because it suggests that from the point of view of equal opportunity, discrimination is a problem where it causes *systematic disadvantage* to certain groups. There may exist employers who discriminate against redheads, but my life opportunities have not been severely compromised as a result. So in some sense when we take what seems to be a stronger interpretation of equal opportunity, we have to make further arguments for why it would lead us to outlaw discrimination.

4. Philosophical underpinnings of anti-discrimination law: Other principles
 - Before moving on, I want to mention some other principles that might also be used to defend laws against discrimination
 - A couple of principles that could be sometimes appealed to, but not very compelling in my view: (1) Equality of outcomes: but nondiscrimination is at best a very indirect way to get this. (2) Restitution: compensate for past ill treatment and its lingering effects. This would seem to require *preferential* treatment, not equal treatment, so not a strong defense of anti-discrimination law unless the enforcement of that law imposes preferences (which it may).

Two better justifications:

- Promoting virtue: attempt to change social norms or values so as to reduce prevalence of bigotry. Government regulation is itself a public expression and affirmation of “correct” norms; forces people to associate who might otherwise remain ignorant of one another; provides a legal shelter for those who would resist discrimination.
- Equal respect for persons: Even if discrimination does not produce a systematic denial of opportunity, individual discriminatory acts can cause harm through public humiliation and stigmatization. Many private contracts have a public component: e.g. being forced to pay in advance for food at Denny’s. True, one has alternatives to Denny’s. But there is real harm in the single incidence, for it serves to reinforce what Glenn Loury has defined as *racial stigma*: “a withholding of the presumption of equal humanity is the ultimate mechanism of racism in American life” (*The Anatomy of Racial Inequality*, p. 88).
- I don’t deny that there may be other competing principles

5. Discrimination as a violation of equal opportunity: is there harm?

- Let’s return to the question of equal opportunity. Does private discrimination lead to systematic disadvantage for some categories of people, depriving them of equal life chances? This is ultimately an empirical question, but to guide our look at the evidence it is useful to explore some of the theoretical and conceptual issues first.
- If market mechanisms or private voluntarism could be counted on to eliminate the adverse effects, we wouldn’t need the law. So first, I want to consider in some detail the economics of how discrimination functions in markets-- in particular, the labor market. Then some remarks on the role of collective behavior.

6. On market forces and labor-market discrimination

- Explain Becker-type argument, if Dan did not. Discriminating employers pass up profit opportunities, in the form of missing some qualified workers or the opportunity to pay less for labor. In a competitive market, they will suffer, and tend to be displaced. Pay and employment opportunities should tend to equalize.
- The Becker model is powerful, but it has limitations. First, *employers may be willing to pay* out of their own pocket to indulge their bigotry. So there is an issue of how many bigots with how much capital.
- Second, there is the possibility of *collective action* by the majority group with or without the state. Enforcing discrimination through social pressures: a gentleman’s agreement.
- Third, labor *markets are not necessarily so competitive*. Workers are not perfectly mobile between employment opportunities. In that case employers may possess market power (*monopsony*), and discrimination, even by a minority of employers, may lead to systematic disadvantage for the oppressed group.
- Fourth, *discrimination can be profitable* or at least not unprofitable, in which case it will not be a handicap in the market. There are three classic cases in which this is true, all of which are empirically important.
 - (1) *Statistical discrimination*: (a) Using race as an *indicator of perceived average qualifications* when it is difficult to ascertain qualifications. This is profitable if in fact the perception is accurate, on average. In that sense it may also be economically efficient, because on average the better qualified workers are selected for the appropriate positions. But it violates equal life chances, because equally qualified whites and blacks are not being judged solely on their merits. (b) Noisy judgement of

qualifications.

- (2) *Customer discrimination*: Customers prefer to deal with whites. If so, being white actually enhances job performance, thus warrants preference by employer.
- (3) *Employee discrimination*: what if white workers refuse to work with blacks? If feasible, segregate.

7. The importance of *feedback effects*

- Any of the forms of discrimination may lead members of the affected group to reduce effort or underinvest in human capital, because they perceive the rewards to be lower. There are also adverse effects on self-esteem and “stereotype anxiety,” as identified in the work of Glenn Loury and Claude Steele.
- Examples: schooling choices of African-Americans. Married women and career/family tradeoffs.
- This implies that over time the perception that the target group is less capable or qualified is self-fulfilling, even if it was incorrect to begin with. Thus discrimination can lead to stigma.
- Many economists now view this as the most pernicious effect of discrimination, whether “taste” discrimination (bigotry) or statistical.

8. How state prohibition can make a difference

- Direct harm reduction: By coercing equal treatment, reduce the harm, whether in the form of systematic denial of equal opportunity or public humiliation.
- Reduce/reverse bad feedback effects
- Symbolic/expressive: The law may influence the evolution of norms by expressing desired values. In areas where there’s a bad social equilibrium, the law may protect employers who deviate in the right direction.

9. Choosing which groups and which spheres

- This leaves us with the difficulty I mentioned at the beginning of deciding for which categories of people and which types of social interactions discrimination should be legally prohibited. *Lines must be drawn*. Just because it is hard to draw lines does not mean it should not be done.
- I would say two common-sense ideas should guide us in deciding.
 - (1) How much harm? I have elaborated on how discrimination can cause harm by systematically denying equal opportunity. We might judge that discrimination causes more harm to African-Americans than to redheads; more harm in employment and housing decisions than in golf club memberships.
 - (2) Competing principles. For instance, we view some decisions or contracts as more intimate and personal than others: marriage versus employment. We rightly are hesitant to regulate individual decisions over choice of spouse. We must also be sensitive to the costs of government intrusiveness.
- History matters: The fact of severe historical repression helps us identify groups that may need special protection due to systematic disadvantage. And the existence of feedbacks has served to magnify the disadvantages of some groups (e.g. African-Americans) but not others (redheads).
- Symbolism matters: the expressive role of state action, affirming non-discriminatory values, is most important for groups subject to greater historical oppression and stigma.

10. Lessons from African-American labor history
 - Has private discrimination limited the life chances of African-Americans? Did anti-discrimination laws change this?
 - Evidence of private discrimination in the 20th century: Everyone knows of legal oppression of African-Americans, especially in the South. Denial of voting rights, Jim Crow segregation, separate and unequal schooling.
 - Less appreciated: *the law generally did not place restrictions on employment or pay*: Gavin Wright: "...racial practices of employers were almost completely unregulated by law in the southern states. Explicitly racial laws enforced segregation in public conveyances, marriage, schools, places of public accommodations, amusement, and burial, but not employment" (*Old South, New South*, pp. 178-81).
 - Of course, the fabric of governmental oppression of blacks affected their opportunities in the marketplace. A debate has long raged within labor economics over the extent to which African-American economic disadvantage was the result of differential treatment "pre-market" (especially quantity and quality of schooling in the South) versus labor-market discrimination; and over how much of the relative improvement is due to improved schooling versus diminished market discrimination (due to legal or other changes)

11. Explicit discrimination
 - The evidence of explicit and widespread racial discrimination in U.S. labor markets prior to the 1960s is very well documented. Just to give one example: The Harvard economic historian Claudia Goldin has examined survey of personnel practices among private firms employing clerical workers in a number of cities (many outside the South). A 1940 survey asked about "policies with reference to race and color." Almost half the firms said they had a written or unwritten rule against employing blacks as clericals. Corn Products, a Kansas City firm, responded to the question by writing, "no colored hired in office, no discrimination as to race" (*Understanding the Gender Gap*, p. 147). What they meant by race was probably other (white) ethnicities.
 - Clerical work was the predominant occupation for women with a high-school education at mid-century. Such jobs would have been highly desirable to black women, whose single largest occupational status was domestic servant. Yet even high-school educated black women were almost entirely excluded from clerical jobs. In 1940, fewer than 10 percent of HS educated black women were clericals, compared with nearly half of HS educated white women.
 - Still, to answer the harm question, we need to determine whether this discrimination was a significant source of overall African-American economic disadvantage. How can we separate out the effects of pre-market versus labor-market discrimination? A logical approach is to see whether anti-discrimination law had any major effect on black economic status.

12. Explaining the economic progress of African-Americans during the postwar period
 - To me, the most convincing evidence is the work of Nobel-winning Chicago economist James Heckman and a number of co-authors. Heckman, in general no friend of government regulation, has shown that the relative economic progress of black Americans has been *episodic, rather than continuous*. Because improvements in average human capital (e.g. education) in the labor force change only slowly, the pre-market argument suggests strongly that we should observe gradual (continuous) progress. But in fact black economic progress has been very discontinuous.

- The most dramatic period of improvement was during the 1960s, primarily for southern blacks, and in fact more precisely during the *late 1960s* as federal antidiscrimination laws came into effect.
 - Show and explain:
 - the textile employment plot
 - the wage premium plot (explain the basic idea of the regression)
 - the clerical cohort plots (why within-cohort effects are interesting)
 - I don't deny the important role of improved educational opportunity.
 - Nor should we oversimplify the effects of the civil rights laws. Heckman, in fact, feels that the direct effect of prohibition of discrimination was less important than the political and "moral" effect of the laws: when the federal government made discrimination explicitly illegal, it gave southern employers an excuse to use against the prevailing discriminatory norm: I'm sorry, guys, but the Yanks are forcing me to hire them...
 - And I don't deny that serious problems still exist that have not been solved after nearly 40 years of federal antidiscrimination law, because black economic and social status remain well below that of whites.
13. But I would ask two questions about antidiscrimination law: Where would we be without it? And can we now do without it?
- I think the historical evidence suggests that without it, African-Americans would now have significantly fewer economic opportunities, especially in the South.
 - But in the new millennium, are discrimination and racism now sufficiently uncommon that we could live without these laws? I suspect not. Even in the absence of significant explicit bigotry, the cycle of statistical discrimination and stigma requires continuing governmental attention.
 - There remains evidence of discrimination: employment audits, and even professional basketball: several studies find that black players earn about 15% less than whites, controlling carefully for performance. It appears that much of this can be attributed to the effect white players have on TV viewership and hence team revenue: customer discrimination?
14. Conclusion
- After 250 years of slavery, 100 years of legally sanctioned repression, and about 40 years of legal equality, the problem of racial inequality remains the fundamental social issue in the United States.
 - I have no illusions that discrimination, conventionally defined, can account for the persistence of this inequality.
 - But I think there is very good reason to believe that, given the feedback mechanisms that drive this persistence, removal of the legal protections against explicit discrimination could make matters significantly worse.

Sources

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