

DISCRIMINATION: THE LAW VS. MORALITY

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But if thought corrupts language, language can also corrupt thought.

—George Orwell

INTRODUCTION

Racial issues can be contentious, but they can be made even more so when the terms used in discussions of racial phenomena are ambiguous. Because words can and do have multiple meanings in everyday usage, one goal of this paper is to suggest operational definitions of terms such as “discrimination,” “preferences,” and “prejudice,” so that one phenomenon is not confused with another. Part I of this paper will attempt to give these terms operational definitions and discuss how these definitions might help us to analyze various racial phenomena that are otherwise routinely viewed as racism. Part II examines whether certain behaviors that are often described as racism are correctly characterized as such. Part III outlines the ways in which various legal scholars have

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approached the canonical idea of anti-discrimination in the United States within the contexts of freedom of association and racial segregation. Part IV explores the issue of government-subsidized preference indulgence, particularly in regard to minimum wage laws.

I. LANGUAGE AND RACE

Do people have a right to discriminate? This question can be approached in at least two ways: (a) what is the legal answer and (b) what might be the moral answer? The distinction is important because acts that are legal might not be moral and, conversely, those that are moral might not be legal. South Africa's apartheid was both legal and constitutional, yet morally repugnant. During the era of slavery in the United States, assisting a runaway slave was moral, but it was in violation of the Fugitive Slave Act of 1850.¹ To approach the question of whether people have, or should have, a right to discriminate, we might begin by attempting to give the term discrimination operational meaning to avoid confusing different forms of behavior.

One legal dictionary defines discrimination as:

unequal treatment of persons, for a reason which has nothing to do with legal rights or ability. Federal and state laws prohibit discrimination in employment, availability of housing, rates of pay, right to promotion, educational opportunity, civil rights, and use of facilities based on race, nationality, creed, color, age, sex or sexual orientation.²

The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as:

any distinction, exclusion, restriction, or preference made on a particular basis, such as race, sex, religion, national origin, marital status, pregnancy, or disability, which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of life.³

¹ Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200.

² THE REAL LIFE DICTIONARY OF THE LAW, at <http://dictionary.law.com> (last visited Sept. 13, 2003).

³ International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195.

Australia's Racial Discrimination Act of 1975 defines racial discrimination as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁴

Finally, a United Nations Convention Against Discrimination in Education defined discrimination as follows: "The term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment."⁵

While these definitions of discrimination might be useful, they fail to be operationally useful in that they mix several kinds of behavior, which leads to confusion. Increased understanding can be achieved if we simplify the definition such that one act is not confused with another.

A. DISCRIMINATION

More generally, and inclusive of legal attempts to define the term, discrimination might be operationally defined as the act of choice or selection. All selection necessarily and simultaneously requires non-selection. In other words, choice requires discrimination. When one chooses to attend the University of Chicago, he non-selects Harvard University as well as every other university. When one selects a Bordeaux wine, he non-selects a Burgundy wine. These choices could be characterized as university discrimination and wine discrimination. Similarly, when the term discrimination is modified with the nouns "race" and "sex," we merely specify the criterion upon which the choice is made; instead of university and wine discrimination, it is race and sex discrimination.

One might ask if there is any conceptual distinction between discriminating for or against particular universities, wines, and other goods and services, and discriminating for or against particular races and sexes. Should one discriminate at all? Is it possible for one to make a case for indifference or random choice among objects of desire?

⁴ Racial Discrimination Act, 1975 (Austl.), available at <http://scaleplus.law.gov.au/html/pasteact/0/47/0/PA000170.htm> (last visited July 25, 2003).

⁵ Vernon Van Dyke, *Human Rights Without Discrimination*, 67 AM. POL. SCI. REV. 1267, 1273 (1973) (quoting the Convention Against Discrimination in Education (1960) sponsored by UNESCO).

In practice, indifference and random choice are hardly ever the case. Our lives are largely spent discriminating in favor of or against selected activities, objects, and people. Some of us discriminate against those who have criminal records, those who bathe infrequently, those who use vulgar speech, or those who have improper social graces. Most of us choose mates within our own racial, ethnic or religious group, thus discriminating against mates who, save for their race, ethnicity, or religion, might be just as suitable. According to the 1992 census, only 2.2 percent of Americans were married to someone outside their own race.⁶ There is also evidence of discrimination based on physical characteristics in politics; not many short men have been elected president of the United States. In fact, twenty-three out of forty-three presidents have been 5'11" or taller, well above the population's average height.⁷ This is not an expected random outcome. Furthermore, discrimination is not consistent. Sometimes people discriminate against theater entertainment in favor of parties, or against women in favor of men, and, at other times and under different circumstances, the same people discriminate in the reverse manner.

One might be tempted to argue that racial discrimination in marriage does not have important social consequences, and, therefore, unlike other forms of racial discrimination, it is not in need of a legal or political remedy. However, this form of racial discrimination does have significant social effects. When there is assortive (non-random) mate selection, it heightens whatever group differences exist in the population.⁸ For instance, consider the result when individuals with high IQs marry other individuals with high IQs, and when individuals earning high incomes marry other individuals earning high incomes. To the extent there is a racial correlation between these characteristics, racial discrimination in mate selection exaggerates the differences in the population's intelligence and income distribution. There would be greater income equality if high-IQ and high-income people mated with low-IQ and low-income people. But most people probably would be horrified by the suggestion of a mandate requiring this.⁹

⁶ U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SER. P-20, NO. 468, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1992, XI (1992).

⁷ See Camp Vishus.org, *Presidents by Height*, at <http://www.campvishus.org/presrelhtAFF.htm> (last visited Oct. 6, 2003).

⁸ Assortive or non-random selection of mating partners with respect to one or more characteristics is positive when like people mate more frequently than would be expected by chance and is negative when the reverse occurs.

⁹ See Gary S. Becker, *A Theory of Marriage: Part I*, 81 J. OF POL. ECON. 813, 827 (1973) (stating that it is far more common for similar people to mate than those who are unlike each other).

It would appear that the term “discrimination,” defined simply as the act of choice, is morally neutral in the sense that there are no unambiguous standards that permit us to argue that the choice to attend University of Chicago or the choice to purchase a Bordeaux wine is more righteous than the choice to attend Harvard University or purchase a Burgundy wine. And more importantly, no logical argument can be made to permit the government to force a person to select one university or wine over another. Moreover, one cannot produce a reasonable argument in favor of forcing individuals to grant equal opportunity when choosing universities or wines.

If people are free to discriminate in favor of, or against, a particular university or wine, what argument can be made against people having that same right with respect to choosing any other object of desire, including the race or sexual characteristics of their mates, employees, tenants, or club members? If one shares the value of freedom of association, why should some associations by choice be permitted and others denied? If a man is not permitted to bring a court action against a woman who, for any arbitrary reason she chooses, refuses to have a dating relationship or establish a marital contract with him, what is the case for bringing court action for other similarly arbitrary refusals to deal with another, such as in the contexts of employment, renting or selling a house, or club membership?

Noble Laureate Kenneth Arrow has stated that “[t]here are many modern varieties of liberalism, which draw the boundaries between social and individual action in different places, but all agree in rejecting racial discrimination, by which is meant allowing racial identification to have a place in an individual’s life chances.”¹⁰ However, if “allowing racial identification to have a place in an individual’s life chances” means refusal to deal with certain individuals for arbitrary reasons, what policy recommendations emerge? Refusal to deal with particular individuals can occur in various contexts, including activities like marriage, friendship, and invitations to social gatherings, all of which have the possibility of affecting one’s “life chances.” If refusal to deal with certain people is permitted in one activity, for any arbitrary reason, what case can be made for not permitting refusal to deal with certain people in other activities? The practical answer to this question has more to do with the threat of government violence against people who, in a prohibited manner, refuse to deal with certain people, than with any kind of internally consistent logic.

¹⁰ Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 J. OF ECON. PERSP. 91, 91 (1998).

B. PREFERENCES

In discussions on race, descriptive terms and phrases like discriminatory “values”¹¹ and “discriminatory tastes”¹² are used. Sometimes the behavior in question is described as prejudice, defined as “an antipathy based upon a faulty and inflexible generalization.”¹³

For the most part, choices reflect preferences. In economic theory, it is postulated that each individual has a set of preferences. He selects a preferred set of objects of desire from his available alternatives. There are no objective criteria by which one set of preferences can be judged as “better” or “worse” than another set, because there are simply no commonly accepted standards for evaluation. In other words, it is impossible to demonstrate that preferring Bordeaux wines is superior to preferring Burgundy, or that a preference to attend the University of Chicago is superior to a preference to attend Harvard University.

Preferences are generally accepted as given. The most that can be objectively determined is whether, given an opportunity set, the individual is optimizing. Our reasoning about preferences suggests that it also applies to preferences for human attributes such as race, sex, nationality, religion, beauty, or any other attribute. From a strictly analytical view, there is no conceptual distinction to be made between preferences for race, nationality, and sex, and preferences for universities and wine.

One might assert that racial preferences are not comparable to other kinds of preferences in terms of the consequences they have for society and for individuals.¹⁴ The indulgence of racial preferences has specific effects that the indulgence of preferences for certain wines do not have; but are the preferences basically different? If so, how do they differ? A widespread preference for Bordeaux wines “harms” Burgundy producers by reducing the value of resources held in Burgundy production. If the harmful consequences of preferences are generally thought of as reducing the value of some resources while increasing the value of others, then preferences for human physical attributes have similar effects. One important, and by no means trivial, difference between preferences for certain racial attributes and those for wines is that the latter are not as specialized as the former. If Burgundy producers see a widespread preference for Bordeaux wines, they might be able to convert their resources

¹¹ *Id.* at 92.

¹² *Id.* at 95 (explaining that the “discriminatory tastes” of employees affect the labor market).

¹³ GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 9 (1954).

¹⁴ See John J. Donahue III, *Discrimination in Employment*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 617, 617 (Peter Newman ed., 1998).

into Bordeaux production. Racial attributes are more specialized. That is, people who are black generally cannot become white.¹⁵

The fact that racial attributes are specialized and unchangeable (or immutable, if using the U.S. Equal Employment Opportunity Commission's language)¹⁶ does not place them in a class by themselves. Persons with average and higher IQs are generally preferred to those with below-average IQs; persons who are not physically disabled are preferred to those who are; non-stutterers are preferred to stutterers; women with attractive features are preferred to those who are unattractive. In each of these cases, and many others, the less-preferred attribute is unchangeable. In each case the less-preferred person might suffer a competitive disadvantage in some arenas. An inevitable consequence of freedom of choice in a free society and differences in individual tastes, abilities, and traits is that some individuals will be advantaged while others will be disadvantaged.

Human preferences, whether for physical attributes, such as race, or for other objects of desire, such as food, childrearing practices, alcohol consumption, addictive drugs, or entertainment can have a moral dimension. A moral consensus condemning preferences for certain forms of entertainment, such as pornographic movies, might exist. A moral consensus condemning certain race and sex preferences also might exist. The fact that a consensus exists on what constitutes moral or immoral preferences does not alter the fact that people do exhibit preferences, and that there is no commonly agreed-upon standard by which we can objectively decide whether one set of preferences is more moral or righteous than another. Moreover, there is no objective standard or proof that neutral or indifferent racial preferences should be held with respect to any association, be it dating and marriage, or employment and renting. Professor Larry Alexander disagrees, stating:

Where harmful social effects will ensue from bias, given the numbers and group characteristics, there is probably a case for legally prohibiting biased choices in certain realms otherwise left to private choice, particularly the economic realm. . . . There is therefore less reason to believe there is a moral right to make biased choices when they produce harmful consequences, even within a

¹⁵ However, one study estimated that, between 1930 and 1940, approximately 2,600 Negroes became white—"passed into the white race"—each year. E. W. Eckard, *How Many Negroes Pass?*, 52 AM. J. OF SOC. 498, 500 (1947).

¹⁶ U.S. Equal Employment Opportunity Commission, *Facts About Race/Color Discrimination*, at <http://www.eeoc.gov/facts/fs-race.html> (last visited Aug. 24, 2003).

framework that meets the minimum standards of justice.¹⁷

Alexander concludes:

In short, in an otherwise just society, discriminatory preferences are intrinsically morally wrong if premised on error, moral or factual, about the dispreferred. Discriminatory preferences are extrinsically morally wrong if their social costs are large relative to the costs of eliminating or frustrating them. And if a discriminatory preference is morally wrong—and if there is no moral right that protects its exercise—then there is a case for legally prohibiting its exercise if the costs of legal prohibition and enforcement are low relative to the social gains to be achieved.¹⁸

Another legal scholar, Charles R. Lawrence, carries the argument against preference indulgence a step further, arguing that unfairness is inherent in the legal requirement that litigants should bear the burden of proving that the plaintiff intentionally discriminated against them.¹⁹ Lawrence argues that individuals living in a racist society unconsciously discriminate without even knowing it because of stereotypes and attitudes that dwell deep in their psyches.²⁰

C. PREJUDICE

In much of the racial discrimination literature, prejudice is usually described as suspicion, intolerance, or an irrational hatred of other races. In other instances, prejudice is seen as oppression. In other words, as one legal scholar suggested, “if racial prejudice, the subordination of people of color, and White supremacy persist, they do so largely because the legal system sanctions them.”²¹ Other times prejudice is seen as racial preferences. For instance, in his dissenting opinion in *Fullilove v. Klutznick*,²² Justice Stevens wrote:

because [the] perception [that statutes giving special preferences to certain people rest on the assumption that those who receive preferences are less qualified in some

¹⁷ Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 163 (1992).

¹⁸ *Id.* at 219.

¹⁹ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

²⁰ *Id.* at 329–36.

²¹ Khiara M. Bridges, Note, *On the Commodification of the Black Female Body: The Critical Implications of the Alienability of Fetal Tissue*, 102 COLUM. L. REV. 123, 133 (2002).

²² 448 U.S. 448 (1980).

respect based on their race] . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor.”²³

These visions of prejudice expose analysts to the pitfalls of making ambiguous statements and advancing faulty arguments. A useful operational definition of prejudice can be found by examining its Latin root, *praejudicium*, meaning “an opinion or judgment formed . . . without due examination.”²⁴ Thus, we might define prejudicial acts as decision-making on the basis of incomplete information.

Making decisions based on incomplete information is often necessary and is to be expected in a world of scarcity, uncertainty, complexity, and costly information. Other common experiences in decision-making include erroneous interpretation of information and inconsistent conclusions—that is, it is common for different individuals to arrive at different interpretations even when confronted with the same information. Furthermore, individuals frequently reach different decisions on just what constitutes the optimal quantity of information to gather prior to making decisions.

Consider a simple, yet intuitively appealing, example of how decisions might be made on the basis of incomplete information (and possibly erroneous interpretation of evidence). Suppose a fully-grown tiger suddenly appeared in a room. A reliable prediction is that most individuals would endeavor to leave the area with great dispatch. Such a response to the tiger’s presence is not likely to be based on detailed information about the behavioral characteristics of that *particular* tiger. The response is more likely to be based upon one’s stock of information held about tigers as a class. The individual prejudices; we might even say he employs stereotypes. He is not likely to seek additional information because he calculates that the expected cost of an additional unit of information about that tiger, such as talking to or petting him, is likely to exceed the expected benefit. He simply ascribes known or surmised group characteristics to the individual tiger.

Most often when people use the words prejudice and stereotype, they are pejorative judgments to refer to those whose chosen quantity of information for decision-making is deemed insufficient by the observer. However, what constitutes the optimal quantity of information collected before decisions are made is subjectively determined by the individual’s calculation of his costs and benefits.

²³ *Id.* at 545.

²⁴ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1788 (Philip Babcock Gove ed., 1993).

A significant factor in decision-making is the recognition that information is not costless. To acquire an additional unit of information requires a sacrifice of time, effort, or other resources. Thus, people seek to economize on information cost. In doing so, people tend to substitute less costly forms of information for more costly forms. Physical attributes are cheap to observe. If a particular physical attribute is perceived as correlated with a more costly-to-observe attribute, then people might use that physical attribute as an estimator or proxy for the more costly-to-observe attribute. The cheaply-observed fact that an individual is short, an amputee, black, or a woman provides what some people deem sufficient information for decision-making or predicting the presence of some other more costly-to-observe attribute. For example, if asked to identify individuals with doctoral degrees in physics only by observing race and sex, most people would assume that white or Asian males are more likely to hold such degrees than are black males or women. Such behavior is what decision theory expects where an unobservable attribute must be estimated from an observable one.

Stereotyping and prejudging can be independent of preferences. Observing a person's decision-making behavior permits us to say nothing unambiguous about that person's personal preferences with regard to race, sex, ethnicity, or nationality. A simple example can demonstrate this. Imagine the reader is on a particular university campus and he is given the opportunity to pick a five-person basketball team from a group of twenty students. The group consists of five black males, five white males, five black females, and five white females. The reader has zero information about the students' basketball proficiency and they are otherwise indistinguishable except by race and sex. That is, they are identical in terms of other physical characteristics: weight, height, etc. The reader is told that if his selected team wins the basketball game, he will win a \$10,000 prize. Assuming that the reader's objective is to maximize his winnings, he would probably be more likely to select black males for the team.

What can an observer, watching that person's choices, say about his race or sex preferences? There is absolutely nothing unambiguous that can be said about the person's racial or sex preferences simply by observing choices based on race and sex. Moreover, a person having antipathy against blacks would select in the identical fashion provided that maximizing winnings dominated his objective. Furthermore, given the high correlation between race, sex, and basketball proficiency, would anyone care if a racial preference for white males were indulged by the chooser? He would personally bear the cost of preference indulgence.

Physical characteristics can be used as proxies for other costly-to-observe characteristics. Some racial and ethnic groups have higher inci-

dence of, and mortality from, various diseases than the national average. In 1998, mortality rates for cardiovascular diseases were approximately 30 percent higher among black adults than among white adults.²⁵ Cervical cancer rates were almost five times higher among Vietnamese women in the U.S. than among white women.²⁶ The Pima Indians of Arizona have the highest known diabetes rates in the world.²⁷ Prostate cancer is nearly twice as common among black men as white men.²⁸

Whether genetics, environment, or some other factor accounts for the association between race and certain diseases, it is undeniable that such an association exists. This means that a physical characteristic like race can be used as a proxy for the probability of the existence of some other characteristic, such as prostate cancer or cervical cancer. In this case, the reliance on proxies in decision-making is used for beneficial purposes, as the potential correlation between physical characteristics and race that permits health providers to better assess patient screening needs.

II. EXAMINING BEHAVIORS FREQUENTLY CHARACTERIZED AS RACISM

Now that “discrimination,” “preferences,” and “prejudice” have been defined in ways that do not confuse one form of behavior with another, we might employ that advantage to examine how behavior frequently characterized as an exercise of racial preferences or racism might not be that at all.

A. RACIAL INDICATORS

One might take the position that, while it is legitimate for doctors to use race or ethnicity as indicators of the higher probability of certain diseases, it is not legitimate to use race or ethnicity as indicators for worker productivity, criminal behavior, or basketball proficiency. Other than simply stating that it is acceptable to use race or ethnicity as an information acquisition technique in the case of medicine and not in other areas of life, is there really a difference? Surely race and ethnicity are not perfect indicators of the risk of prostate cancer or hypertension,

²⁵ Press Release, Centers for Disease Control and Prevention, Fact Sheet: Racial and Ethnic Disparities in Health Status (May 14, 2002), at <http://www.cdc.gov/od/oc/media/pressrel/fs020514b.htm>.

²⁶ University of North Carolina at Chapel Hill School of Medicine, Asian American Medical Student Association, *Did You Know?: Medical Facts on Asian Americans and Pacific Islanders*, at <http://www.med.unc.edu/aamsa/dyk.htm> (last visited Oct. 25, 2003).

²⁷ Diabetes Foundation of Mississippi, Inc., *High Risk Groups—Native Americans*, at <http://www.msdiabetes.org/nativeamericans.html> (last visited Aug. 23, 2003).

²⁸ University of Maryland Medicine, *Urological Disorders, Prostate Cancer*, at <http://2g.isg.syssrc.com/urology-info/proscan.htm> (last updated May 16, 2003).

and neither are they perfect indicators of SAT scores, criminal behavior, or athletic proficiency. However, there are concrete factual data that surely indicate such associations. For example, in 2002 the average black score on the combined math and verbal sections of the SAT test was 857; the average white score was 17 percent higher at 1060.²⁹ While blacks comprise 13 percent of the population, they are 80 percent of professional basketball players and 65 percent of professional football players.³⁰ More than 95 percent of the best times in sprinting are held by blacks whose ancestry traces back to West Africa.³¹ Between the years 1976 and 2000, blacks, who account for 13 percent of the general population, comprised 51.5 percent of all homicide offenders, while 46.4 percent were white.³²

Using race as an indicator does not necessarily tell us anything about the decision-maker's racial preferences. The case of Bryan Greene illustrates this point. The Washington Lawyers' Committee filed a lawsuit in April 2001 on behalf of Greene, a black man, against Your Way Taxicab Company for violations of the District of Columbia's Human Rights Act and of 42 U.S.C. § 1981, which prohibits discrimination in the making of contracts.³³ As Mr. Greene approached a hotel entrance, the doorman was helping a passenger out of a Your Way Taxicab.³⁴ The doorman saw Mr. Greene approaching and tried to hold the cab for him.³⁵ However, the driver drove away after seeing that Mr. Greene was black.³⁶ After mediation, the parties reached an out-of-court settlement.³⁷ In a number of cities there have been complaints by blacks of similar behavior by taxicab drivers. The question we might ask is, are the drivers' decisions based upon racial preferences or might they fear being asked to go into a neighborhood where there is a high probability of being robbed, assaulted, or murdered? By simply knowing that a driver refused a black passenger we cannot make an unambiguous state-

²⁹ *The Expanding Racial Scoring Gap Between Black and White SAT Test Takers*, 37 THE J. OF BLACKS IN HIGHER EDUC. 15 (Oct. 31, 2001), available at http://jbhe.com/latest/37_b&w_sat.html (Oct. 31, 2001).

³⁰ JON ENTINE, TABOO: WHY BLACK ATHLETES DOMINATE SPORTS AND WHY WE'RE AFRAID TO TALK ABOUT IT 19 (2000).

³¹ *Id.* at 31.

³² James Alan Fox & Marianne W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States* (2002), available at <http://www.ojp.gov/bjs/homicide/race.htm#ovrelrace> (last revised Nov. 21, 2002).

³³ *Taxicab Discrimination*, UPDATE (Washington Lawyers' Committee for Civil Rights and Urban Affairs, Washington, D.C.), Spring 2003, at 6, available at <http://www.washlaw.org/news/update/publicaccommodationsspring2003.htm> (last visited Sept. 13, 2003).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

ment about whether the decision was motivated by racial preferences or not.

Evidence that driver decisions very well might be based on criteria other than racial preferences is seen in a 1999 story written by James Owens entitled “Capital Cabbies Salute Race Profiling.”³⁸ In the story, Owens states:

If racial profiling is “racism,” then the cab drivers of Washington, D.C., they themselves mainly blacks and Hispanics, are all for it. A District taxicab commissioner, Sandra Seegars, who is black, issued a safety-advice statement urging D.C.’s 6,800 cabbies to refuse to pick up “dangerous looking” passengers. She described “dangerous looking” as a “young black guy. . . with shirttail hanging down longer than his coat, baggy pants, unlaced tennis shoes,” etc. That’s one typical description—but the cabbies know, from fear-filled experience, about many other “looks” of black-male threat, especially at night. She also warned cabbies to stay away from low-income black neighborhoods (which comprise much of Washington, D.C.). Her action was triggered by the most recent murder of a cabbie in Southeast Washington.³⁹

Another example of race as an indicator is seen in the case in which residents of Southwest Washington, D.C. filed suit in U.S. District Court after Domino’s Pizza repeatedly refused to make home deliveries in certain neighborhoods and instead made customers meet drivers at the curbside to pay and receive their delivery orders.⁴⁰ The lawsuit alleged racial discrimination by Domino’s Pizza Inc., and Team Washington Inc., a company that operates more than 50 Domino’s stores.⁴¹ According to the plaintiffs, Domino’s delivers to the door in Georgetown and other mostly white areas of Northwest Washington.⁴² The suit also alleged that deliverymen engaged in similar delivery decisions in Southeast Washington’s Potomac Gardens, where another customer filed a bias lawsuit.⁴³ Again, the question is whether the drivers are indulging their racial preferences or acting out of fear of assault or robbery.

³⁸ James Owens, *Capital Cabbies Salute Race Profiling* (1999), at <http://home.netcom.com/~owensva/cabbie.html> (last visited Aug. 23, 2003).

³⁹ *Id.*

⁴⁰ *Bell v. Domino’s Pizza*, No. CIV.A.99-2376, 2000 WL 1780266, at *1 (D.D.C. 2000).

⁴¹ Peter Slevin, *Domino’s, U.S. Reach Accord on Deliveries, Race Can’t Be a Factor in Limiting Service*, WASH. POST, June 6, 2000, at A03.

⁴² *Id.*

⁴³ *Id.*

According to *Pizza Marketing Quarterly*, similar charges of racial discrimination were levied in St. Louis, Missouri against Papa John's pizza delivery.⁴⁴ Cathy Juengel, a Papa John's district manager in St. Louis, said she could not and would not ask her drivers to put their lives on the line.⁴⁵ She added that the racial discrimination accusation is false, given that 75 percent to 85 percent of the drivers in the complaining neighborhood are black and, moreover, most of those drivers lived in the same neighborhood to which Papa John's had denied delivery service.⁴⁶

B. PUBLIC POLICY

If one assumes that a racial preference against blacks drives a particular decision, then he is likely to call for a policy such as the one implemented by the San Francisco Board of Supervisors. After a pizza deliveryman was shot and killed in a San Francisco housing project, Domino's suspended pizza deliveries in the highest crime areas of the city.⁴⁷ In response, the San Francisco Board of Supervisors enacted an ordinance making it illegal for Domino's (or any other fast-food deliverer) to refuse to deliver in areas the company believes would put its employees' lives in danger.⁴⁸

One seriously doubts that racial preferences against blacks were the motivating force behind Domino's delivery policy. However, the actions taken by the San Francisco Board of Supervisors indicate that the board reached that very conclusion. Similarly, decisions made by taxicab drivers not to cruise high crime areas, or to refuse to pick up passengers that drivers surmise are destined to high crime areas, cannot be unambiguously interpreted as negative racial preferences for blacks.

There is no question that law-abiding black citizens are offended by, and bear the cost of, taxicabs refusing them as passengers, or of delivery drivers treating them on terms different from those afforded to white customers. They are treated unequally through no fault of their own. But policy should not be based on moral indignation against what is seen as an injustice. Such an approach takes only benefits into account; the costs should enter the calculation as well. Thus, we should confront the question of how many pizza deliveries are worth how many injured, robbed, or dead pizza delivery drivers. Confronting the real-world options this way might cause policymakers to direct attention away from charges of preferences against blacks and, instead, to the real villains—namely,

⁴⁴ Stephen Rosamond, *What Do You Say or Do in a Public Relations Nightmare?*, *PIZZA MARKETING Q.*, at http://www.pmq.com/pr_nightmare.shtml (last visited Aug. 23, 2003).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *The Week in Review*, *SAN FRANCISCO BUS. TIMES*, July 22, 1996, at <http://www.sanfrancisco.bizjournals.com/sanfrancisco/stories/1996/07/22/weekinbiz.html>.

⁴⁸ See *id.*

those blacks who have caused the terms “black” and “high crime” to be perceived as synonymous.

III. WHAT LAWYERS SAY

The canonical idea of “anti-discrimination” in the United States condemns the differential treatment of otherwise similarly situated individuals on the basis of race, sex, national origin, or other protected characteristics. As one legal scholar has put it, “[s]tatutes prohibiting racial discrimination in public accommodations, employment, or the housing market are by now reasonably uncontroversial.”⁴⁹ However, not everyone agrees: “Forced associations are in principle no better than legal prohibitions against voluntary associations.”⁵⁰ Indeed, the true test of one’s commitment to freedom of expression does not come when one permits others the freedom to express ideas with which he agrees. The true test comes when one permits others to express ideas he finds offensive. The same test applies to one’s commitment to freedom of association, namely when he permits others to associate in ways he deems offensive. “An antidiscrimination law is the antithesis of freedom of contract, a principle that allows all persons to do business with whomsoever they please for good reason, bad reason, or no reason at all. . . . By its nature the antidiscrimination principle is interventionist.”⁵¹

A. FREEDOM OF ASSOCIATION VS. FORCED ASSOCIATION

Consider the case, as outlined in *Loving v. Virginia*,⁵² of Mildred Loving, a Negro woman, and Richard P. Loving, a white man, Virginia residents who traveled to Washington, D.C. in June 1958, and were married pursuant to its laws.⁵³ When they subsequently returned to Virginia, the grand jury of the Circuit Court of Caroline County indicted the Lovings on charges that they violated Virginia’s ban on interracial marriages.⁵⁴ Specifically, section 20–58 of the Virginia Code stated:

If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20–59, and

⁴⁹ Robert J. Cottrol, *The Long Lingered Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 TUL. L. REV. 11, 21 (2001).

⁵⁰ RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 142 (1992).

⁵¹ *Id.* at 3, 4.

⁵² 388 U.S. 1 (1966).

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 3.

the marriage shall be governed by the same law as if it has been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.⁵⁵

Section 20–59 provided: “If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.”⁵⁶

On January 6, 1959, the Lovings pleaded guilty to violating Virginia’s antimiscegenation laws and were sentenced to one year in jail.⁵⁷ However, the trial judge offered to suspend the sentence for a period of 25 years, provided that the Lovings would leave the State and not return to Virginia for 25 years.⁵⁸ The Virginia Supreme Court of Appeals upheld the decision and the constitutionality of the antimiscegenation statutes.⁵⁹ Ultimately, however, the U.S. Supreme Court struck down the Virginia statutes as unconstitutional.⁶⁰

Today, most Americans accept interracial marriage. According to a 1994 survey conducted by the National Opinion Research Center, nearly three-quarters of Americans would not favor laws banning interracial marriages.⁶¹ Most Americans would probably agree that a law prohibiting interracial marriage is a gross violation of freedom of contract or association; a law mandating interracial marriage, however, would be no less offensive to the concept of freedom of contract and association. As Richard Epstein said, “Forced associations are in principle no better than legal prohibitions against voluntary associations.”⁶² It would appear that we could generalize that any prohibition against association or any mandate to associate are equally offensive to basic human rights.

Recently, the all-male membership policy of Augusta National Golf Club, the home of the Masters Tournament, has come under considerable criticism.⁶³ Whether one approves or disapproves of the Club’s decision not to admit women as members, the more important issue is whether it would violate civil rights if the Club were mandated to do so. In consid-

⁵⁵ *Id.* at 4.

⁵⁶ *Id.*

⁵⁷ *Id.* at 3.

⁵⁸ *Id.*

⁵⁹ *Id.* at 3.

⁶⁰ *Id.* at 12.

⁶¹ The National Opinion Research Center, *1972–1974 General Social Survey Cumulative File*, at <http://list-socrates.berkeley.edu:7502/GSS/Doc/gss008.html#racmar> (last visited Aug. 24, 2003).

⁶² EPSTEIN, *supra* note 50, at 142.

⁶³ USA Today.com, *Golf: Masters Controversy Timeline* (Apr. 8, 2003), at http://www.usatoday.com/sports/golf/masters/2003-04-08-augusta-timeline_x.htm.

ering this question, it would seem that an answer to a very simple question would help us: does a person have a property right entitling them to do business with an unwilling buyer or seller? It would appear that the answer is clearly that there is no such right. The essence of a property right is the unrestricted liberty to decide with whom you shall share, or exclude from, those things or activities that are deemed yours. Clearly, those who are offended by the Augusta National Golf Club's sexually discriminatory practices are free to exercise their own property rights by refusing to do business with the club or its membership and to use their free speech rights to try to persuade others to do the same. That is consistent with basic civil rights.⁶⁴ However, by using the coercive powers of the state to forcibly deprive the Club of its right to exclude whomever it chooses to exclude, for whatever reason, we descend closer to the totalitarian state.

B. RACIAL SEGREGATION

Related to issues of association is the term racial segregation. The legal literature is steeped with ambiguous usage of racial segregation. For instance, Yale University professor Robert A. Burt has stated:

Residential segregation was the dominant instrument for regulating social interactions between blacks and whites in the North. Segregated schools, for instance, were the norm in both North and South, but whereas Southern school segregation involved busing white and black students from their adjacent homes to separate, racially designated schools, Northern school segregation was accomplished by assigning students to schools within their own racially segregated neighborhoods.⁶⁵

Michelle Adams has stated that "[t]riggered by 'systematic avoidance' of interracial contact, white migration from urban public schools is a perceptible phenomenon, and public schools in metropolitan areas are increasingly becoming racially segregated."⁶⁶ Elizabeth S. Anderson has opined that

[s]egregation is therefore a proper target of direct remediation, whether it is de facto or de jure, whether

⁶⁴ See 42 U.S.C. § 2000a(e) (2002).

⁶⁵ Robert A. Burt, *Liberals' Labors Lost*, LEGAL AFFAIRS, Jan.-Feb. 2003, at 55, available at <http://www.legalaffairs.org/issues/January-February-2003/storyburtjanfeb2003.html> (last visited July 26, 2003).

⁶⁶ Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1143 (2002) (citing Charles T. Clotfelder, *Are Schools Still Fleeing? Racial Patterns and Enrollment Shifts in Urban Public Schools, 1987-1996*, 20 J. POL'Y ANALYSIS & MGMT. 199, 217 (2001)).

caused by prior illegal discrimination or not. . . . Racial segregation in the institutions of American civil society operates at three main levels: residential, educational, and occupational. Residential segregation is the norm for most African Americans. According to a study based on 1980 census results, in the thirty metropolitan areas containing a majority of all blacks in the United States, sixty-eight percent of blacks would have to move to achieve a uniform racial composition across the metropolitan area.⁶⁷

Finally, in discussing Delaware's Neighborhood Schools Act, Leland Ware has said that

[t]he Neighborhood Schools Act is an unlawful obstacle to the goal of equal educational opportunities. It will reinforce racial and economic isolation by disregarding the effects of residential segregation. Proponents of neighborhood schools did not consider the legacy of racial segregation that is reflected in current residential patterns. They erroneously assumed that families have exercised a choice in deciding where they reside and, therefore, a choice as to which schools their children will attend.⁶⁸

The way the term segregation is used in these statements is quite common but nonetheless confusing, and thus gives rise to "fuzzy thinking." Consider the following hypothetical. Blacks comprise about 65 percent of the Washington, D.C. population. Reagan National Airport serves the Washington, D.C. area and, like every airport, it has water fountains. At no time have I seen anything close to blacks being 65 percent of water fountain users. It is a wild guess, but suppose that at most five or ten percent of the users are black. To the extent that this observation approximates reality, would anyone move to declare that Reagan National Airport water fountains are racially segregated? Casual observation of ice hockey games would suggest that the percentage of black spectators is by no means proportional to their numbers in the general population; a similar observation can be made about opera attendees, dressage performances, and wine tastings. The population statistics of states such as Maine, Montana, and Vermont show that not even one

⁶⁷ Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1197, 1199 (2002).

⁶⁸ Leland Ware, *Redlining Learners: Delaware's Neighborhood Schools Act*, DEL. LAW., Fall 2002, at 19.

percent of these states' populations is black.⁶⁹ On the other hand, in states such as Georgia, Alabama, and Mississippi, blacks are over-represented.⁷⁰ Would anyone use racial segregation to account for these observations?

It is not analytically useful to assert that an activity is racially segregated, at least in the ordinary usage of the term, based on the fact that blacks are not proportionally represented in that activity. Using the above hypothetical as an example, it seems that a more useful test to determine whether an activity, such as using water fountains, is racially segregated is to determine whether a black person is free to drink at any water foundation he chooses. If the answer is in the affirmative, then the water fountains are not segregated, which is true even if a black person never uses the water fountains. The identical test applies to the question of school segregation. If a black student lives within a particular school district, is he free to attend that district's school? If he can, then the school is not segregated, even if not a single black student attends that school. The same test would be useful in determining whether ice hockey games, operas, wine tastings, housing, and other activities are racially segregated.

Of course, the United States does have a history that includes racial segregation. In the past, the use of water fountains by black Americans was often denied by law. Similarly, because of their race, blacks were frequently prohibited by law from attending certain schools. Today, there are no such prohibitions. When an activity is not racially mixed today, a better term for it is racially homogeneous, which does not mean that it is racially segregated. Surely, it would be deemed ridiculous, foolhardy, and a gross abuse of government power if, for example, one were to conclude that because blacks do not use Reagan National Airport water fountains according to their numbers in the general population we should order the busing of blacks from water fountains where they are overrepresented to those where they are underrepresented. Similarly, I doubt whether one would propose compelling blacks to move from Georgia to Montana, and whites to move from Montana to Georgia, until there was some sort of preconceived notion of what constitutes racial integration across states.

IV. GOVERNMENT-SUBSIDIZED PREFERENCE INDULGENCE

People do have racial preferences, but there is no evidence to suggest that they will indulge those preferences at any cost. However, public policy can lower the cost of preference indulgence, thereby giving

⁶⁹ U.S. Census Bureau, *State Population Estimates: Characteristics*, at <http://eire.census.gov/popest/data/states/ST-EST2002-ASRO-04.php> (last revised Sept. 17, 2003).

⁷⁰ *Id.*

people inducement to indulge them more. In general economic terms, any law that fixes prices lowers the cost of preference indulgence. Let us explore a hypothetical and then discuss some actual examples.

It is fairly safe to say that, holding all else constant, most people would prefer filet mignon to chuck steak. While filet mignon is preferred to chuck steak, chuck steak has no problem selling. It would be a simple task to get more people to indulge their preferences for filet mignon and discriminate against the consumption of chuck steak. One would only have to fix the price of chuck steak so that it was equal to or close to the price of filet mignon. Suppose that initially chuck steak sold for \$4 per pound and filet mignon \$10 per pound. Even though chuck steak is less-preferred, it sells because it can offer buyers a “compensating difference.” That is, in effect, chuck steak offers the buyer \$6, the difference in price between it and filet mignon. Thus, it costs buyers \$6 to indulge their preferences for filet mignon.

However, if it were established by law that both filet mignon and chuck steak sell for the same price, say \$10 per pound, chuck steak could not offer a compensating difference. The cost of indulging one’s preference for filet mignon would be zero, the difference in price. A basic postulate of economic theory states that the lower the cost of indulging one’s preference for an object of desire, the more one can expect to see people exercising that preference.

A. MINIMUM WAGE LAW

The Fair Labor Standards Act establishes minimum wage, overtime pay, record-keeping, and child labor standards affecting workers in the private sector and in federal, state, and local governments.⁷¹ The current minimum wage is \$5.15 an hour.⁷² While Congress can legislate that any employer must pay each of his employees \$5.15 an hour, Congress cannot mandate that the value of an employee’s hourly output be in fact worth \$5.15.

The minimum wage discriminates against the less-preferred worker. One component of being less-preferred has to do with worker productivity. That is, employers will view it as a losing economic proposition to hire a worker who is so unfortunate as to have skills that allow him to produce only \$4 worth of value an hour and pay him \$5.15. Another measure of whether an employee is less-preferred from a particular employer’s point of view might be the race of the employee. If an employer is forced to pay \$5.15 an hour to no matter whom he hires, and both an equally productive white worker and a black worker show up for the job,

⁷¹ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2000).

⁷² *Id.* at § 206.

then there is no economic criterion for selection. Thus, the employer will have to use non-economic criteria. One of those non-economic criteria might be the race of the employee. If the employer prefers white workers to black workers, the cost of indulging that preference, like in the steak example above, will be zero.

The minimum wage law is one of the most effective tools in the arsenal of racists everywhere. During South Africa's apartheid era, white workers supported wage regulation. White unionists "argued that in the absence of statutory minimum wages, employers found it profitable to supplant highly trained (and usually highly paid) Europeans by less efficient but cheaper non-whites."⁷³ In fact, "equal pay for equal work" became the rallying slogan of the white labor movement. During his visit to South Africa in 1907, Keir Hardie, a British labor leader was met with rotten eggs, because he was said to have supported equality between whites and Indians.⁷⁴ However, when the workers learned that he advocated "equal pay for equal work, regardless of colour or creed," Hardie was allowed to speak.⁷⁵ One South African union leader lamented: "There is no job reservation left in the building industry, and in the circumstances I support the rate for the job [minimum wages] as the second best way of protecting our White artisans."⁷⁶ When Frederick Creswell became South Africa's Minister of Labour, he introduced the Wage Bill of 1925, stating, "If our civilization is going to subsist we look upon it as necessary that our industries should be guided so that they afford any men desiring to live according to the European standards greater opportunities of doing so, and we must set our face against the encouragement of employment merely because it is cheap and the wage unit is low."⁷⁷ The Economic and Wage Commission of 1925 responded to the Wage Bill, stating:

While definite exclusion of the Natives from the more remunerative fields of employment by law was not urged upon us, the same result would follow a certain use of the powers of the Wage Board under the Wage Act of 1925, or of other wage-fixing legislation. The method would be to fix a minimum rate for an occupation or craft so high that no Native would be likely to be employed. Even the exceptional Native whose efficiency would justify his employment at the high rate, would be

⁷³ G. V. DOXEY, *THE INDUSTRIAL COLOUR BAR IN SOUTH AFRICA* 112 (1961).

⁷⁴ EDWARD ROUX, *TIME LONGER THAN ROPE: A HISTORY OF THE BLACK MAN'S STRUGGLE FOR FREEDOM IN SOUTH AFRICA* 125 (1964).

⁷⁵ *Id.*

⁷⁶ G.M.E. LEISTNER & W.J. BREYTENBACH, *THE BLACK WORKER OF SOUTH AFRICA* 28 (1975).

⁷⁷ DOXEY, *supra* note 73, at 155.

excluded by the pressure of public opinion, which makes it difficult to retain a Native in an employment mainly reserved for Europeans.⁷⁸

Sheila T. van der Horst's findings tend to support the Commission's conclusions:

Neither the Industrial Conciliation Act nor the Wage Act permits differential rates to be laid down on the ground of race. Consequently, where Non-Europeans, in practice principally the Cape Coloured, are employed as artisans they are subject to the same statutory minimum rates as Europeans. Wage legislation of this type has tended to restrict the openings for the less capable workmen and particularly for Non-Europeans as they are prevented from offsetting lack of skill by accepting lower wage rates.⁷⁹

In the 1930s, white workers approved of the Wage Board's efforts to extend statutory minimum wages to nonwhites.⁸⁰ Boydell, the Labour Party Minister for Posts and Telegraphs, complained that "whites were being ousted from jobs by 'unfair competition', particularly by the Indians in Natal."⁸¹ Boydell urged that employers be forced to pay Indians the same wages they pay whites.⁸²

Identical discriminatory forces were at work in the United States. In 1909, the Brotherhood of Locomotive Firemen called a strike against the Georgia Railroad.⁸³ One of their demands called for the complete elimination of blacks from the railroad.⁸⁴ Instead of elimination, the arbitration board decided that black firemen, hostlers, and hostlers' helpers should be paid wages *equal* to the wages of white men doing the same job.⁸⁵ The white unionists were delighted with the decision, stating, "If this course is followed by the company and the incentive for employing Negroes thus removed, the strike will not have been in vain."⁸⁶

The power of wage regulation to promote racially discriminatory ends is also seen in the famous Washington agreement between the

⁷⁸ *Id.* at 155-56.

⁷⁹ SHEILA T. VAN DER HORST, *Labor, in HANDBOOK ON RACE RELATIONS IN SOUTH AFRICA* 133-34 (Ellen Hellman ed., 1975).

⁸⁰ MERLE LIPTON, *CAPITALISM AND APARTHEID: SOUTH AFRICA, 1910-84* 189 (1985).

⁸¹ *Id.*

⁸² *Id.*

⁸³ STERLING D. SPERO & ABRAM HARRIS, *THE BLACK WORKER* 289 (1931).

⁸⁴ *Id.* at 290.

⁸⁵ *Id.*

⁸⁶ *Id.* at 290-91.

Brotherhood of Railway Trainmen and the Southern Railroad Association, signed in Washington, D. C. in January 1910:

No larger percentage of Negro trainmen or yardmen will be employed on any division or in any yard than was employed on January 1, 1910. If on any roads this percentage is now larger than on January 1, 1910, this agreement does not contemplate the discharge of any Negroes to be replaced by whites; but as vacancies are filled or new men employed, whites are to be taken on until the percentage of January first is again reached.⁸⁷

That part of the Washington agreement was followed by:

Negroes are not to be employed as baggagemen, flagmen or yard foremen, but in any case in which they are now so employed, they are not to be discharged to make places for whites, but when the positions they occupy become vacant, whites shall be employed in their places.⁸⁸

The Brotherhood of Railway Trainmen, like their union brothers in South Africa, recognized that “where no differences in the rates of pay between white and colored employees exists, the restrictions as to percentage of Negroes to be employed does not apply.”⁸⁹ This section of the Washington agreement reaches the same conclusion reached by South Africa’s Mine Workers’ Union in 1919, when it declared:

The real point on that is that whites have ousted by coloured labour. . . . It is now a question of cheap labour versus what is called “dear labour”, and we consider we will have to ask the commission to use the word “colour” in the absence of a minimum wage, but when that [minimum wage] is introduced we believe that most of the difficulties in regard to the coloured question will automatically drop out.⁹⁰

Both the U. S. Brotherhood of Railway Trainmen and the South African Mine Workers Union recognized the power of wage regulations as a means to accomplish racist goals. They both realized that setting a floor on wages could be more effective and politically more viable than the imposition of quotas and color bars. This is due, in part, to the fact

⁸⁷ *Id.* at 293.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ FREDERICK A. JOHNSTONE, *CLASS, RACE AND GOLD: A STUDY OF CLASS RELATIONS AND RACIAL DISCRIMINATION IN SOUTH AFRICA* 158 (1976).

that such wage regulations are seldom seen as racially discriminatory, and are therefore more politically acceptable among decent people (even among those victimized by it) and less susceptible to constitutional challenge.

B. SUPER MINIMUM WAGES

The Davis-Bacon Act, enacted in 1931 and still in effect today in an amended version, mandates the payment of “prevailing” wages for the various construction trades in all federally financed, or assisted, construction contracts.⁹¹ The Secretary of Labor sets the prevailing wage as the union wage or higher.⁹² As such, the Davis-Bacon Act has the same racial effect that minimum wages have, albeit a super-minimum wage. The desire for the racial effect was expressed by its congressional supporters. Congressman Allgood, for example, referring to a contractor who used “bootleg” labor, stated, “That contractor has cheap colored labor that he transports, and he puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country.”⁹³ In support of Senator Bacon’s Bill, and in response to a description of a construction project in Bacon’s district, Representative Upshaw of Georgia remarked, “You will not think that a southern man is more than human if he smiles over the fact of your reaction to the real problem you are confronted with in any community with a superabundance or aggregation of Negro labor.”⁹⁴ Senator Bacon replied, “I just merely mentioned that fact because that was the fact in this particular case, but the same would be true if you should bring in a lot of Mexican laborers or if you brought in any nonunion laborers from any other state.”⁹⁵

Congressman John J. Cochran of Missouri echoed similar sentiments, saying he had “received numerous complaints in recent months about southern contractors employing low-paid colored mechanics getting work and bringing the employees from the South.”⁹⁶ William Green, president of the AFL, made clear what the union’s interests were: “Colored labor is being brought in to demoralize wage rates [in Tennes-

⁹¹ Davis-Bacon Act, 40 U.S.C. § 276a (2000) (current version at 40 U.S.C. § 3142 (2003)).

⁹² *Id.*

⁹³ 74 CONG. REC. 6407, 6513 (1931).

⁹⁴ *Hours of Labor and Wages on Public Works: Hearing Before the House Comm. on Labor*, 69th Cong. 3 (1927) (statement of William D. Upshaw, Member, House Comm. on Labor).

⁹⁵ *Id.* at 4 (statement of Robert L. Bacon, Rep., N.Y.).

⁹⁶ *Employment of Labor on Federal Construction Work: Hearings Before the Committee on Labor on H.R. 7995 & H.R. 9232*, 71st Cong. 2–27 (1930) (statement of John J. Cochran, Rep., N.Y.).

see].”⁹⁷ Ralph C. Thomas, executive director of the National Association of Minority Contractors, lamented that a contractor has “no choice but to hire skilled tradesmen, the majority of which *are* of the majority [white]. . . . Davis-Bacon . . . closes the door on such activity in an industry most capable of employing the largest numbers of minorities.”⁹⁸ Government paperwork requirements for compliance with the Davis-Bacon Act also hamper small contractors. Unlike major contractors, small contractors typically do not have attorneys and personnel with the expertise necessary for paperwork compliance. This confers a competitive advantage to larger, usually unionized contractors who do have the resources.⁹⁹

According to scholars Vedder and Gallaway, black and white construction unemployment was similar prior to the enactment of the Davis-Bacon Act. However, after the enactment of the Act, black unemployment rose relative to that of whites.¹⁰⁰ Vedder and Gallaway also argue that the period from 1930 to 1950 was a period of unprecedented, rapidly increasing government intervention into the economy.¹⁰¹ It was during this period that the bulk of legislation restraining private wage setting was enacted, such as the Fair Labor Standards Act, the Davis-Bacon Act, and the National Labor Relations Act.¹⁰² The Social Security Act also played a role by “forc[ing] employers to pay a fringe benefit not previously provided.”¹⁰³ Vedder and Gallaway also note that it was during this period that there was a rapid increase in the black/white unemployment ratio.¹⁰⁴

CONCLUSION

In today’s America there is a broad consensus that race-based discrimination in many activities is morally offensive, and in many cases rightfully illegal, as it should be when there is taxpayer-based provision of goods and services such as public schools and universities, libraries,

⁹⁷ *Wages of Laborers and Mechanics on Public Buildings: Hearings Before the Sen. Comm. on Manufactures on S. 5904*, 71st Cong. 10 (1931) (statement of William Green, President, American Federation of Labor).

⁹⁸ *Oversight Hearings on the Davis-Bacon Act: Hearings Before the House Subcomm. on Labor Standards*, 99th Cong. 425 (1986) (statement of Ralph C. Thomas III, Exec. Dir., National Association of Minority Contractors).

⁹⁹ See Patrick Barry, *Congress’s Deconstruction Theory: How Congress is Beating the Low Cost of Construction*, *The Wash. Monthly*, Jan. 1990, at 12.

¹⁰⁰ RICHARD VEDDER & LOWELL GALLAWAY, *CRACKED FOUNDATION: REPEALING THE DAVIS-BACON ACT* 12 (1995) (on file with author).

¹⁰¹ RICHARD VEDDER & LOWELL GALLAWAY, *OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA* 279 (1993).

¹⁰² *Id.* at 279–80.

¹⁰³ *Id.* at 280.

¹⁰⁴ *Id.*

and social services. Even though people should be free to interact with, or refuse to interact with, anyone in strictly private matters, there is little evidence that race-based discrimination is widespread in modern America. After all, there is a difference between what people *can* do and what they will find it in their interest to do.

That this is the case is suggested by laws that once codified racial discrimination in the United States and elsewhere. In the U.S. there were antimiscegenation laws and restrictive covenants. During South Africa's apartheid era there were job reservation laws and laws that reserved certain amenities such as theaters, restaurants, and hotels for white use only. One of the primary implications of the existence of a law is that, in the absence of the law, not everyone would voluntarily behave according to the specifications of the law. If they would, there would be no need for the law. After all, there is no law, to the writer's knowledge, that mandates that people shall eat or people shall not toss their weekly earnings onto the street. While people are free to abstain from eating and free to toss their weekly earnings onto the street, we need not worry because most will not find it in their private interest to do so.

Those concerned about issues dealing with race might focus their attention on those governmental activities that subsidize preference indulgence. This paper has examined the minimum wage law and the Davis-Bacon Act, but there are others to consider: occupational and business licensing laws; union monopolies; rent controls; and other legal restrictions on peaceable, voluntary exchange.