

# The Case for Discrimination

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## 1 Introduction

This paper defends the use of asymmetric legal norms which grant greater privileges to members of minority groups than to members of majority groups. In contrast to previous attempts to justify minority privileges, this paper defends asymmetric norms on pure utilitarian grounds without making any assumptions concerning justice, rights, or public policy. The norms we discuss are norms facilitating or prohibiting the establishment of minority-only or majority-only institutions, neighborhoods, or associations. For instance, we address the question of why the legal system differentiates between norms governing black-only colleges and white-only colleges (and imposes much greater legal obstacles in establishing the latter than in establishing the former). We argue that to defend the privileges of minorities under asymmetric norms one need not deviate from the weak assumption that society should maximize total utility.

The justifiability of asymmetric norms is debated in the literature and legislators, courts and theorists are ambivalent with respect to them. At the same time it is evident that even the opponents of asymmetric norms do not perceive these norms as pernicious and reprehensible as simple racist laws, i.e., laws that benefits members of majority groups or discriminate against minorities. It seems much more reprehensible to exclude blacks from a white college than to exclude whites from a black college. The exclusion of blacks from a certain neighborhood is considered to be a blatant expression of racism

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while maintaining the black character of traditional black neighborhoods such as Harlem is regarded by many as dictated by principles of justice. Similar attitudes are prevalent when the relevant minority is a religious rather than ethnic minority. Many seem to be willing to accept the resistance of the ultra-orthodox residents of Monsey, NY to having a Wal-Mart store in their neighborhoods, resistance that is based on the argument that this will expose local residents (and especially their children) to alien lifestyles. At the same time, few will be willing to tolerate communities that exclude members of Munsey's Hassidic sects from residing within them.<sup>1</sup>

Theorists who justify the existence of asymmetrical norms believe that one can justify them simply on the grounds that some preferences (e.g., the exclusion of blacks) ought not to be respected because they are immoral and unjust, or because they are external preferences relating to the life style of others, or because such preferences are unstable and can be easily transformed and their transformation is socially desirable. We examine each of these claims.

One attempt to exclude preferences is based on the view that there are some preferences — for example, those of murderers and rapists — that are too hideous or pernicious. Filtering or censoring preferences is legitimate and therefore such preferences ought not to count in the social calculus (see e.g. Goodin (6)). Moreover, there are cases in which individuals have second order preferences, i.e., preferences over what preferences they want to have (see Frankfurt (5)). Thus, even without excluding preferences simply because of their content, it is possible to justify the exclusion of racist preferences to the extent that individuals wish they did not have such preferences.

It is easy to see how one can use these arguments to justify the asymmetric regulation of segregation, namely rules that differentiate between whites only and black only neighborhoods. Individuals may judge that their preferences for living in a white only community are morally inappropriate and therefore that these preferences ought not to count; they may also believe that, in contrast, the preferences of blacks to live in a black only community are not morally inappropriate and therefore that they ought to be counted. The first type of preferences is founded on hatred or prejudice that ought to be ignored while the second is founded on feelings of solidarity and therefore ought to count.

Another suggestion was raised by Ronald Dworkin (3, pp. 234–238). In

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<sup>1</sup>See [nytimes.com/2008/03/12/nyregion/12monsey.html](http://nytimes.com/2008/03/12/nyregion/12monsey.html).

his view preferences ought to be divided into external and internal, where the former are preferences about the extent to which the preferences of other people ought to be satisfied. In contrast, internal preferences are preferences relating exclusively to one's own tastes and inclinations.<sup>2</sup> In Dworkin's view only the second type of preferences ought to be calculated. For example, the fact that the majority of personal preferences favor a sports stadium rather than an opera house counts as an argument for subsidizing the stadium. But the fact that the majority regard homosexuality as immoral does not count as an argument for legislating against homosexuality because the preferences here are external ones; they concern the assignment of liberties not to the individual who wishes to bar homosexuality but to other individuals. Dworkin argues that although individuals may in their personal lives act upon at least some of their external preferences, governments and legislators must base their decisions entirely on personal preferences as doing otherwise consists of a form of double counting. In the context of racially-related preferences, one can easily maintain that racial hatred is an external preference and therefore segregation grounded in racial hatred ought to be barred.

A different approach to segregation is based on the view that racist preferences are manipulable and may be transformed by regulating segregation. The idea that the law has a role in changing preferences is common among law and economics scholars. For instance, Dau-Schmidt (2) maintains that criminal law is primarily designed to transform and change preferences. In our context the simplest and the most commonsensical conjecture is that by prohibiting segregation or forcing desegregation racial preferences for segregation disappear, or at least diminish in intensity. People who are forced to live in a multicultural community transform their preferences to suit their environment. Prohibiting segregation is therefore a means of manipulating preferences.

Each of these solutions raises problems of its own. Resorting to non-utilitarian considerations (as suggested by Goodin), in particular resorting to the principle differentiating between "good" and "bad" preferences is founded on the conviction that utility alone cannot justify asymmetric norms; justice and public policy need to be brought in to salvage what utility alone cannot accomplish. But determining what the just preferences are is controversial and even dangerous. It may undermine the legitimacy of the legal system if it is required to examine the justness of preferences. The traditional view in

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<sup>2</sup>For a discussion and a critique of Dworkin, see Ely (4).

the legal literature on cost benefit analysis is that it ought to rely on actual rather than informed or ideal preferences (see Adler and Posner (1)).

Furthermore, racial animosity often disguises itself as a cultural preference. Arguably, symmetric norms favoring members of the majority can be condemned as incompatible not only with the pursuit of utility but also with the autonomy and freedom of choice. Why should not a person who likes American food and American norms of behavior in the public sphere be able to exclude foreigners who may not speak his language, do not share his preferences in food or share his enthusiasm for football? It seems that the boundaries between pernicious racial preferences and benign non-racial preferences are not always as clear as most people tend to believe. Moreover, the need to resort to normative judgments as to what preferences are legitimate and what preferences are illegitimate seems to be incompatible with legal ideals of neutrality. Judges who resort to such arguments are accused of imposing their own moral convictions on citizens.<sup>3</sup> Why should judges (and even legislatures) be assigned with the power to make these judgments? Given these forceful considerations, it is not surprising that judges who are subjected to such hard questions are inclined to give up the use of asymmetric norms altogether and strike down affirmative action programs on the grounds that these programs are discriminatory. The powerful appeal of “color neutrality” provides an effective weapon in the hands of opponents of affirmative action.

Dworkin’s distinction between external and internal preferences is equally problematic. Regan (9, p. 1221 (note 18)) has argued forcefully that most preferences have external and internal aspects and that an endorsement of Dworkin’s proposals would exclude many of the most legitimate preferences. In fact, as Regan has pointed out, Dworkin concedes the relevance of external preferences in the appendix to the book in which he argued forcefully in favor of the distinction.<sup>4</sup>

The claim that racial preferences are unstable seems empirically dubious and much more empirical work ought to be done before it can be substantiated. The proponent of assimilation on the grounds that assimilation can contribute to racial harmony is likewise questionable as the factual basis for that view has to be established. Furthermore there is a strong sense that

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<sup>3</sup>The ideal of neutrality is a central liberal one. See Kymlicka (8).

<sup>4</sup>In this appendix Dworkin says: “[People] will vote their external preferences; they will vote for legislators, for example, who share their own theories of political justice. How else should they decide for whom to vote?” See Dworkin (3, p. 358).

irrespective of whether such preferences are stable or not, they ought to be ignored. Last the proponents of this view ought to assume that minorities' preferences for separate accommodation are not as unstable as majorities' as the former preferences are not sanctioned by the legal system. This conjecture (the distinction between majorities' preferences and minorities' preferences) also seems to be dubious.

The present paper maintains that instead of resorting to controversial value judgments, or to the dubious distinction between internal and external preferences, or even to empirical conjectures concerning the stability of racial preferences, a simple utilitarian calculus can justify the use of asymmetric norms. Under certain reasonable assumptions, asymmetric norms would maximize aggregate sum of individual utilities and consequently justify the use of asymmetric norms. A utilitarian should then support the establishment of black colleges or Hassidic-only neighborhoods while at the same time opposing exclusion of blacks or Jews from white or Christian neighborhoods.

To simplify the discussion we analyze a stylized problem, where people of two types (eg. language, religion, nationality) share a country. Individuals belong either to a minority group, e.g., blacks or Hispanic or to the majority group, e.g., Caucasians. The country is divided into three (disjoint, but not necessarily non-empty) parts:  $J$  and  $N$ , which are used exclusively by members of the majority and the minority groups, and  $M$ , which is shared by both types. Ceteris paribus individuals prefer to live with members of their own group. Furthermore the larger the percentage of individuals of one group residing in their neighborhood, the higher is the well-being of each such individual is. Thus, under our view, the utility of each person is increasing with the size of part of the country that is kept for the exclusive use of his type, with the size of the mixed area, and with his type's density in that region.

We show below that under some intuitive assumptions regarding the shape of the utility function the utilitarian solution to favor the minority while restraining the majority. In the above example, the optimal division of the country is into two areas only, one which is for the exclusive use of the minority group and one which is open for all. No majority-only segment is allowed. According to the utilitarian approach, the minority should "discriminate" against the majority, but the majority does not possess similar reciprocal rights.

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