

Discriminating Shoppers Beware

DANA K. NELKIN*

In *The Discriminating Shopper*, Michael Blake starts with two settled points upon which liberals seem to agree: racial discrimination is wrong and freedom of association is a fundamental human right.¹ These points appear to conflict when it comes to the morality of discrimination in employment, and in the related case of private discrimination in shopping—for example, decisions to patronize only stores owned by whites, or men, or redheads. These two cases coincide in instances of “rational discrimination,” situations in which hiring employers have no racist attitudes themselves (or any other attitudes that make them favor characteristics other than talent and motivation to do the job), but, knowing that their customer base prefers to be served by members of a certain racial group, choose to discriminate in their hiring decisions.

Is rational discrimination ever permissible? Blake suggests that to answer the question, we need to first answer the question of whether the customers’ preferences and related shopping behavior are legitimate in the first place.

Blake begins by eliciting intuitions about two cases. The first is taken from Dworkin’s discussion of the famous *Regents of the University of*

* Associate Professor of Philosophy, University of California, San Diego, and Affiliated Scholar, Institute for Law & Philosophy, University of San Diego School of Law. This commentary is a slightly revised version of comments on Michael Blake, *The Discriminating Shopper*, presented as a part of the *Conference on the Rights and Wrongs of Discrimination*, held at the University of San Diego School of Law, April 28-29, 2006. This revised commentary does not reflect any changes Blake may have made to his article in light of the conference session. I learned a great deal from the conference participants, and am especially grateful to Richard Arneson, Michael Blake, David Brink, and Sam Rickless for helpful discussion.

1. Michael Blake, *The Discriminating Shopper*, 43 SAN DIEGO L. REV. 1017, 1017 (2006).

California v. Bakke case, in which he seems to recognize as legitimate African-Americans' preferences for African-American doctors.² Blake suggests that because Dworkin sees these preferences as legitimate, he concludes that being African-American counts as a talent when it comes to serving the community and so the medical profession ought to cater to its desires. Thus, the UC Davis medical school is not violating Bakke's right to be judged on talent when it accepts black students with lower test scores over Bakke, who is white and has higher scores.

Blake agrees that it is permissible to cater to the preference for African-American doctors, but offers a second case that he claims gives us reason to reject Dworkin's conclusion.³

In 1947, the Jacksonville Parks Commission voted to cancel a game in which Jackie Robinson would be playing as a member of the Brooklyn Dodgers. In 1953 the Jacksonville Beach Chamber of Commerce voted to officially ban integrated baseball in the city, even though they claimed there was no prejudice involved on *their* part. The reason given for the ban was simply that patrons of the local team preferred to watch an all-white team. In this case, Blake rejects the claim that it is permissible to cater to these patrons' preferences. And yet it would seem that this preference for light skin on baseball players is akin to the preference for dark skin on doctors; if dark skin counts as talent, so should light skin.

If, like Blake, you have different intuitions about the two cases, you face an interesting challenge, namely, to find a theory that will distinguish the cases in a principled way, explaining why the discriminatory shopping in favor of black doctors is permissible and that of the baseball fans is not.

To meet this challenge, Blake first distinguishes between comprehensive and political liberalism.⁴ The former view extends its egalitarian principles over the whole realm of human life; the latter is a moral theory worked out for the specific domain of the political. Blake is skeptical that any version of a comprehensive liberalism will work because the two doctrines of liberalism will apply everywhere and come into direct conflict. Thus, Blake pursues a theory of political liberalism, a strategy that neatly sections off one of the two apparently conflicting doctrines by limiting it to a restricted domain; the egalitarian doctrine that says racial discrimination is wrong only applies in the political domain.

Such a theory suggests that we need to answer the following question in judging the moral permissibility of discriminatory shopping: Is this act of discriminatory shopping likely to undermine the public equality of

2. See RONALD DWORKIN, A MATTER OF PRINCIPLE 293-303 (1985).

3. Blake, *supra* note 1, at 1022.

4. *Id.* at 1025.

our society? To answer this question in turn requires that we check two ways in which public equality could be undermined: first, by people interpreting our actions as sending a message of social inferiority and internalized shame; and second, by exacerbating and amplifying preexisting relationships of injustice.

The discriminatory shopping in the Jackie Robinson case is impermissible because the shopping does both of these things, whereas the discriminatory shopping of African-Americans does not do either. The shopping preference of the latter is likened to a simple inclination to be served by redheaded men. According to Blake, there is nothing wrong with catering to that inclination either, and it requires nothing in the way of justification; in neither case is anyone wronged because no history of irrational discrimination makes this impermissible.⁵

In sum, we can discriminate when it does not result in an internalized sense of inferiority or exacerbate a history of inequality. Here is a neat way, then, of adjudicating between the two settled points of liberalism with which we began.

Blake's article poses a central question concerning the morality and political legitimacy of discrimination; he makes the abstract concrete by means of an intriguing puzzle, and he provides an ingenious solution. In the remainder of this paper, I would like to raise two challenges for his solution; they are not necessarily consistent with each other, but my hope is that thinking about them will both further illuminate the key features of Blake's view and provide a start in evaluating it.

First, we might simply reject the intuition that the African-Americans' preferences for African-American doctors should be catered to, particularly if they are mere desires to be served by those with dark skin color, with no further benefit in view. Indeed, one might argue that even avoiding shops with non-redheads simply because they are non-redheads is problematic. We might wonder what makes either of these kinds of cases different from, say, favoring beautiful people in secretarial jobs, or avoiding people who are overweight or disfigured. Could people who are not beautiful be wronged, even if there are just a few being turned away?

Blake seems to accept that the African-Americans' preference could be wrong from some moral points of view, although not the one of political liberalism. But the dialectic is not entirely clear at this point.

5. *Id.* at 1032.

Political liberalism is supposed to help explain our moral intuitions,⁶ but there is a problem if we have additional (or simply different) intuitions that political liberalism cannot explain, a problem that is exacerbated if a modified comprehensive liberal doctrine can explain the whole set.⁷

Second, one might share Blake's intuitions (or at least some of them—agreeing that sometimes discrimination is permissible, and sometimes not), but think that a different account better explains *why* we have them, or even better, *why we should*. A brief comparison of Blake's account to a different reading of Dworkin's treatment of *Bakke* suggests that Blake's account might produce some problematic results. This comparison, while useful, is not meant to endorse this different reading of Dworkin as the correct theory.

Blake seems to read Dworkin as seeing the African-Americans' preference for African-American doctors as legitimate, regardless of their motivation. But there is a more natural way to read Dworkin, according to which motivation matters. On this alternative reading, African-American doctors would simply better serve the African-American community because as a matter of contingent fact they are willing to go into those communities, and because there might even be a significant statistical likelihood that they take more time with African-American patients once there. These further facts about the situation, above and beyond the mere existence of preferences without a history of irrational discrimination,⁸ are important in determining the legitimacy of the African-American preference for African American doctors. On this view, the preferences are legitimate if they are simply responses to these facts, but they would not be if they were borne simply of contempt. Consider Dworkin's own words on this point:

Affirmative action programs aim to provide more black doctors to serve black patients. This is not because it is desirable that blacks treat blacks and whites treat whites, but because blacks, through no fault of their own, are now unlikely to be well served by whites, and because a failure to provide the doctors they trust will exacerbate rather than reduce the resentment that now leads them to trust only their own.⁹

6. *Id.* at 1028 (“[Political liberalism is] an alternative approach able to more directly capture our intuitions . . .”). Further, Blake is clear that in his own view, “there can be some cases of private discrimination that are at the very least morally permissible,” and this is one reason Blake offers for preferring the political liberalism account to any comprehensive one. *Id.* at 1027.

7. One response to this problem would be to recast the argument as offering political liberalism as a framework and seeing where and how far it can take us. But that would be a different project.

8. *Cf.* Blake, *supra* note 1, at 1027-28 (describing a preference for red-headed workers as not representing a wrong to blonde applicants because there is “no history of irrational discrimination” against blonde people).

9. DWORKIN, *supra* note 2, at 295.

Notably, Dworkin *would* regard their preferences as illegitimate under certain circumstances—in particular, if they were born of contempt, of the attitude that there is something inferior about whites, simply by virtue of their being white.¹⁰ Appealing to the idea of contempt, it is possible to tell a consistent story about why the African-Americans' preference for black doctors is legitimate and so permissibly catered to, while the Jackie Robinson-haters' preference is not and should not be catered to. In the African-American case, by hypothesis, there is no contempt; in the Jackie Robinson case, there is.¹¹ One could see this view as a liberal doctrine that does not deal with the tension within liberalism by restricting conflicting principles to different domains, but rather restricts by qualifying the principles so that they apply in different circumstances.

In a sense, Blake's account is all about consequences. The question for his view is simple: does acting on or catering to the preferences have a particular effect of undermining a society of equals? In contrast, this alternative reading of Dworkin considers the attitudes associated with the discrimination. Dworkin cares very much about consequences, too, of course—but these come into play only *after* we ensure that no one is being wronged.

10. See Richard Arneson, *What Is Wrongful Discrimination?*, 43 SAN DIEGO L. REV. 775, 779 (2006), for a subtle development of the closely related idea that “discrimination that is intrinsically morally wrong occurs when an agent treats a person identified as being of a certain type differently than she otherwise would have done because of unwarranted animus or prejudice against persons of that type.”

11. Dworkin clearly holds that (i) preferences ought not be catered to if they are accompanied by contempt; and (ii) the African-Americans' preferences ought to be catered to. See DWORKIN, *supra* note 2, at 301-02. However, accepting these claims leaves open at least two possibilities: (1) as long as discriminatory preferences are unaccompanied by contempt, they can be legitimately catered to; and (2) only if discriminatory preferences are well-grounded in tracking nonarbitrary (although perhaps contingent) benefits are they legitimately catered to. I thank David Brink for helping me see this point. The view captured by (1) is the reading discussed in the text; interestingly, the view captured by (2) is, I think, closer in some ways to the first kind of objection raised in the text. In essence, it reserves judgment about whether the African-Americans' preferences are legitimate until more information is provided, and would only grant the permissibility of catering to African-American preferences to the extent that those preferences are based not primarily on preference for skin color, but for good service which happens to be contingently (but systematically) related to skin color. One might even add that catering to such preferences must be the only realistic way to provide such benefits or that it must be done with the idea of eventually leading to less color consciousness rather than more. This last idea is a hope to which Dworkin gives eloquent expression at various points in his article.

One result of this aspect of Blake's account is that it might have some counterintuitive results not present in others, including this reading of Dworkin. To see why, it is important to distinguish between two senses of "sending a message." In one sense of "send a message," a message is sent if the sender intends to convey information to another person, and no receipt of the information is necessary for successful sending. In another sense of "send a message," a message is sent if someone receives some information conveyed by the actions of another, and no intention on the part of the other to send that information is required. These can come apart.¹² Returning to Blake's example, what if no message of inferiority is sent to non-redheads, but that is the message understood by the brunette next door? The problem here might be irrational or simply mistaken "uptake," so to speak. Blake's account would have us treat these cases differently, while intuitively it is not clear that we should. If discriminating against non-redheads is permissible in Blake's original case, why not in the case in which, through no fault of the sender, it is misinterpreted? If the account cannot accommodate this intuition, it cannot claim to provide a sufficient condition for impermissibility.

The account also seems vulnerable when seen as offering a necessary condition for impermissibility—for reasons that do not only have to do with actions being wrong from some particular comprehensive point of view. Imagine this time that you hate redheads, cannot stand them, and think they are inferior. You discriminate, trying to send this message, but those non-redheads are just too thick to get your message, try as you might. You might even be part of a movement with a mission to discriminate, but the message just fails to get through or to be internalized. This is the "no uptake" problem. If it would still be wrong to behave this way, then the wrongness of the discrimination does not require that the message actually get through.

Blake's view might be modified to account for these worries; the question would then be whether the modified version is superior to one in which at least part of the explanation of why certain types of discriminatory action are wrong is to be found in the attitudes with which they are committed.¹³ Both of the examples described earlier press on the idea that merely a particular kind of effect of the discriminating behavior bears on moral permissibility.

12. Teaching is a good way of experiencing this phenomenon.

13. Cf. Arneson, *supra* note 10, at 775. In making an evaluative comparison, it is important to note, as Arneson points out at the start of his article, that it may be morally permissible to legally prohibit discriminatory conduct even if the conduct being prohibited would not be immoral in the absence of legal prohibition. Thus, legal prohibitions of discriminatory behavior unaccompanied by attitudes of contempt could be permissible, even if contempt is a central morally wrong-making feature of wrongful discrimination.

Finally, a friendly suggestion. On the framework Blake sets out, it might be appropriate to add an element to the account, namely, that discrimination could be impermissible if it *begins* a trend. Suppose I am among the leading edge of discriminators, a real trendsetter. Before long, all non-redheads (or non-Aryans, say) are losing customers and getting a bad message. But no history of this exists until now. It would seem that the existence of a history of irrational discrimination should be irrelevant in this framework. What matters is the contribution to inequality my discrimination makes.

