

Justice for Large Earlobes! A Comment on Richard Arneson's "*What Is Wrongful Discrimination?*"

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Suppose that we have nothing to eat but canned tomatoes, and that we need to open the cans somehow. You suggest that a good way to open the cans would be to hit them with a sledgehammer. One way of responding would be to show you a can opener, explain how it works, and compare the likely results of using the can opener versus the sledgehammer. Of course, there is another strategy: let you use the sledgehammer and see what happens. After you take a whack at the problem, you probably will be ready to consider other methods.

Richard Arneson's paper, "*What Is Wrongful Discrimination?*," is (perhaps unintentionally) an example of this second strategy. At different points in his paper, Professor Arneson offers two inconsistent descriptions of what his paper tries to accomplish. The first is to answer his title question.¹ The second is to answer that question within "a deontological morality that holds, contrary to act consequentialism, that what is morally right and wrong . . . is fixed by . . . moral constraints [which] mainly take the form of moral rights of others that are correlative with moral obligations that one must not violate these rights."² In a footnote, Professor Arneson explains that this assumed

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1. Richard Arneson, *What Is Wrongful Discrimination?*, 43 SAN DIEGO L. REV. 775 (2006).

2. *Id.* at 778-79.

moral framework “is not the one I would ultimately endorse. The project of this essay is to explore what one should hold about discrimination, given that one adheres to a deontological morality.”³ In other words, he is going to try to do the job with a tool that he thinks is flawed. He is not going to show us how to open the can. He is going to show us how to open the can with a sledgehammer. It is therefore unsurprising—and not necessarily a criticism of Professor Arneson—that the exercise is messy and results in less nourishment than we might have hoped for.

Within the deontological framework, Professor Arneson suggests, one should hold that “[d]iscrimination 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.”⁴ “Animus is hostility or, more broadly, a negative attitude, an aversion.”⁵ Prejudice is “faulty belief,” which means not simply “responding to individuals on the basis of statistical indicators their broad characteristics suggest,” but specifically “beliefs . . . formed in some culpably defective way,” as for example if “I simply am . . . lazy in forming beliefs.”⁶

Professor Arneson defends his view against Judith Thomson’s claim that an action’s moral permissibility can be fully assessed on the basis of a thin description of that action, unencumbered by whether the agent would be at fault if he did it or with what intention the agent would do the action if he were to do it.⁷ Intentions, he argues, might render morally wrong an otherwise permissible action. He then considers some possible thin description accounts of wrongful discrimination, for example, a right of the most qualified applicant to be selected for a job, and shows that they will not adequately capture the wrongfulness that we are after.

After filling out his conception of wrongful discrimination, Arneson shows that this conception is not very helpful in determining which kinds of discrimination are particularly wrongful. The definition can encompass, for example, discrimination against persons with large

3. *Id.* at 778 n.7.

4. *Id.* at 779.

5. *Id.* at 787.

6. *Id.* at 779, 787-89. This part of Arneson’s paper is under-theorized. What would it mean to be reprehensibly lazy in forming one’s beliefs? Accuracy has costs. Everyone believes things on the basis of dubious hearsay, if only because it is not worth the trouble to investigate further. Some further account—which probably will turn on the kinds of considerations of historical and cultural context that I emphasize at the end of this paper—is necessary before we can know what sometimes makes otherwise normal laziness reprehensible.

7. *Id.* at 779-84.

earlobes if done with animus or prejudice.⁸ The upshot is that “clarifying the idea of wrongful discrimination is not going to do much heavy lifting for the task of determining what social justice requires with respect to policies for dealing with suspect classifications.”⁹ He surveys discrimination based on age, sex, sexual orientation, and beauty or ugliness to show that they “pose radically separate and distinct questions of justice that require remedies specifically attuned to each type of classification’s particular set of issues.”¹⁰ So, Arneson concludes, “the antidiscrimination norm does not help in formulating policies which adequately respond to the motley of issues we face.”¹¹

I agree with Professor Arneson that the antidiscrimination norm he formulates is not much help in deciding concrete discrimination issues. However, unless better tools can be shown, the case for the sledgehammer has not been refuted. Everything he says can be admitted, and the deontologist can still respond, “Well, Richard, do you want the tomatoes or not?”

The crucial flaw in deontology as Professor Arneson conceives it is that it considers the discriminator in isolation: wrongful discrimination is identified wholly in terms of the discriminator’s defective intentions. Social context disappears from the analysis. According to Arneson, discrimination against people with large earlobes, if based on animus or prejudice, is indistinguishable from discrimination against African-Americans.

Because Arneson focuses so tightly on the discriminator’s intentions, the discrimination itself disappears from his analysis. His description in defining the wrongful conduct is as thin as anything Thomson proposes, but unlike Thomson, Arneson focuses on the perpetrator’s mental state rather than the discriminator’s external conduct. It is not clear that he needs to look at external conduct at all. I can unfairly subject a person to my unwarranted animus simply by scowling at them, unnoticed, as they

8. *Id.* at 796.

9. *Id.*

10. *Id.* This part of the paper is itself encumbered by unfortunate stereotypes, as when he asks us to suppose that “in a sexually tolerant society, gay men are not significantly involved in the childrearing, on the whole and on the average.” *Id.* at 802. The 2000 Census found that, of the nearly 600,000 same-sex couples who reported themselves as “unmarried partners,” children were present in 34% of lesbian couples and 22% of gay male couples. For comparative purposes, consider that Census also found 46% of married heterosexual couples were raising children. SEAN CAHILL, SAME-SEX MARRIAGE IN THE UNITED STATES 43-46 (2004).

11. Arneson, *supra* note 1, at 796.

pass by my window. Perhaps such scowling is intrinsically wrong in all contexts. But discrimination thus understood has little to do with the kind of discrimination in which most of us are interested. If all discrimination were of that kind, then it is unlikely that anyone would have bothered to organize this symposium.

Professor Arneson is right that thick description is what is needed, but the description we need is thicker than the one he describes. At the end of his paper, he describes the larger project as “liberating society from the social pathologies inherited from past caste hierarchies (and about preventing the rise of new invidious caste hierarchies)”¹² Yet his account of wrongful discrimination has no necessary place for history or culture. Any account of discrimination that does not rely on history or culture will be a poor tool for the job of identifying wrongful discrimination.

If one examines the prevailing theories of antidiscrimination law, one finds that some focus, as Professor Arneson does, on the process by which discriminatory decisions get made, some focus on discrimination’s stigmatizing message, and some focus on the bad tangible results. All capture a part of the problem.

Process theory, which focuses on racism’s contaminating effect on the way in which decisions get made, is the type of approach that Professor Arneson has offered us. It focuses on the decisionmaking process to see whether that process is contaminated by unwarranted animus or prejudice. As we have seen, this approach has difficulty distinguishing racism from earlobe discrimination. Yet at the same time, it depends on this very distinction: Professor Arneson’s paper implicitly relies on race as the paradigmatic case of discrimination from which he wants to generalize. Process theory thus points beyond itself toward a larger problem that lets us understand why some kinds of discrimination are especially problematic.

That larger context is the focus of result-based theories. But those theories, too, are incomplete. A theory that focuses on stigma fails to specify which sorts of stigma are impermissible and why. A stigma-focused theory also points beyond itself to a larger social reality in which stigma is inscribed and reproduced. Group-disadvantage theories focus directly on social reality. But if we only look at material disadvantage, we lose sight of any specific concern about discrimination. In order to capture this, we must pay attention to process. The search for the central

12. *Id.* at 807.

project of antidiscrimination law thus moves in a circle. Each theory is incomplete and points toward one of the others.¹³

The theories are thus connected because each of them identifies one moment in a process by which inequality is institutionalized. In the decisionmaking process, stigmatic meanings such as racism (which wrongly attributes inferior worth to some people) are externalized into the world. Once externalized, they become objective in a distribution of prestige (or lack thereof), power, and tangible goods. Through the experience of this objective reality, society's members internalize the meanings anew.

Each theory focuses on one of the moments through which a stigmatizing reality reproduces itself.¹⁴ Process theorists focus on the moment of externalization, when stigmatizing meanings manifest themselves in decisionmaking. Group-disadvantage theorists focus on the moment of objectivation, the concrete reality that these meanings create. Stigma theorists focus on the moment of internalization, when the meanings are absorbed by the participants in the culture. Strictly speaking, none of these theories are wrong; indeed, all have part of the beast in their grip. Moreover, because each of these moments is necessary to the meaning-producing process, the disruption of any one of them would help derange the process.

One can better fight the beast if one can see it whole. Each of the three diagnoses of the problem points to an aspiration that cannot be realized if only that particular symptom is addressed. Repairing the decisionmaking process is impossible without sealing off the source of the contamination. The contamination's source turns out to be the racism entrenched within the larger culture in which the process is situated. Racial stigma cannot be ended without changing the social facts in which that stigma is inscribed and which in turn daily reinscribe it. Material inequalities cannot be addressed without changing the process by which they are generated and legitimated. All three theories point toward a larger problem, one that is deeply embedded in our culture.

Each of us, in our daily activities, constitute the culture in which we live, and to that extent each of us has the ability, and therefore the

13. The claims I make here are defended in detail in ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 1-114 (1996).

14. Descriptions of the wrongs of discrimination can, of course, be disaggregated even further. See, e.g., Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 *UCLA L. REV.* 519, 519-20 (2001).

obligation, to reshape that culture. This means that we have an obligation to avoid racial discrimination that does not apply to discrimination against those with large earlobes. It is true, as Professor Arneson says, that different kinds of discrimination present different issues. But it is possible to say more than that, and to note some unifying themes. What unites discrimination against African-Americans, women, and gay people is that they are all, in American culture, subject to discrimination based on a belief that they are less worthy and deserving than others, and that by virtue of their status, their welfare matters less than that of others.¹⁵

Finally, both Professor Arneson and I have been very hard on deontology here, so let me end with a few words on deontology's behalf. There is nothing in the structure of deontology that demands that it be indifferent to the issues of social context raised in this essay. The premier minimal-state deontologist is Robert Nozick, for whom we have no obligations other than the avoidance of force and fraud.¹⁶ But even Nozick cannot be indifferent to whether prejudice infects the culture. Nozick is as devoted to state impartiality as any process theorist, and so cannot tolerate racism, even unconscious racism, in government decisionmaking.¹⁷ In a culture in which racism, conscious or unconscious, is pervasive, government decisionmakers who have internalized that racism will be incapable of neutrality, even with respect to the minimal range of government functions that Nozick deems legitimate. Killers of blacks will receive less harsh treatment than killers of whites. Thugs who attack gay people may not be sanctioned at all. Rape and sexual harassment of women will not be taken seriously by the state. Transformation of the culture is necessary if impartial government decisionmaking is to become a reality. If, as Nozick thinks, people in the state of nature have good reason to establish an impartial state, then they have equally good reason to purge their culture of pervasive prejudice.¹⁸ And this can generate an

15. Here this is only a summary assertion. For extensive supporting arguments, see KOPPELMAN, *supra* note 13, at 115-76; Andrew Koppelman, *Are the Boy Scouts Being As Bad As Racists?: Judging the Scouts' Antigay Policy*, 18 PUB. AFF. Q. 363, 364-73 (2004).

16. See generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (arguing that the nonviolation of individual rights serves as a moral constraint on action rather than as an end state to be achieved). However, Nozick's libertarianism is an unattractive position. See THOMAS POGGE, REALIZING RAWLS 15-62 (1989) (arguing that Nozick's institutional scheme "is not sensitive to what sort of social world his ground rules would tend to engender given full compliance . . ."). Moreover, in his later work Nozick abandons his libertarian position. See ROBERT NOZICK, THE EXAMINED LIFE 286-96 (1989).

17. See KOPPELMAN, *supra* note 13, at 182.

18. See *id.* at 172, 183-84.

obligation not to discriminate.¹⁹ Where this obligation obtains will depend on history and culture: there will be reason to worry about racism that is not present with the occasional idiosyncratic prejudice against those with large earlobes. Perhaps deontology is not such a sledgehammer after all.

19. *See id.* at 181-90.

