

When is discrimination pernicious and when is it benign? And if it is pernicious, if its intent to the statue of a group, or its logic is based on ideas of inferiority, or superiority, what is to be done? Alon Harel, with the finely equipped razor of the lawyer, wants to distinguish between good and bad discrimination, while Tzvia Greenfield, with the sharp knife of the philosopher, argues that at least in the case of ultra-orthodox women, Harel distinguished incorrectly.

Harel begins with the idea that all societies find some gender separation acceptable. We have different bathrooms in public places, for example, gender segregated bathrooms, and different sports leagues for men and for women. This means that we cannot *prima facie* condemn gender segregation. Of course, one can take issue this sort of segregation, but Harel's point is that gender segregation is rooted in difference, not inferiority and superiority. This is a point well worth making, because ever since *Brown v. Board* much of the discourse surrounding segregation is that separation is inherently unequal. Certainly in some contexts that is the case, but not all.

Will Kymlicka, who both authors cite, made a similar point about *Brown*, though with different implications, in regards to cultural minorities a few years ago. Kymlicka argued that many minorities do not want integration into the dominant culture, what they want is protection from it. They want to be able to uphold their way of life. Yet at a key point, Kymlicka in a certain way evades a key issue. He wants ethno-cultural groups (explain who this includes and excludes) to have what he calls external protections from the dominant society, yet he also says these groups should not impose internal restrictions on their own members. Many of them do, of course, to which Kymlicka only says we should try to persuade them to do otherwise, but barring barbaric practices we should not impose our will on them.

I do not want to dismiss Kymlicka's arguments quite yet: for Kymlicka, a religiously dispersed group, one that does not have claims to be a nation, should not receive much in the way of special group rights. Perhaps some weak financial support here and there. Certain accommodations may be in order, but these should be decided on a case by case basis, and there is no principled reasons that impel the state to give them these accommodations. What Kymlicka leaves us with, then, is the tools of traditional liberal theory, the distinction between public and private, and the idea of the voluntary association, should do most of the work.

These ideas, however, do not have much of a presence in Harel and Greenfield's papers, which want to look at the idea of the morality of the discrimination. Both seem to assume that the state has the right to regulate gendered practices. Harel suggests that when the practice is discriminatory, the state can step in. But then he also argues that practices rarely have one agreed upon meaning, but elicit a multitude of interpretations. The Muslim hijab, one of Harel's examples, has many meanings. The French decided that it one had meaning, however, a religious one, and a discriminatory one at that, and so should be banned. Politically, Harel notes, this was seen as an anti-Muslim stance. Moreover, Harel argues that practices can be severed from their roots: original intent is not everlasting. If the French simply ignored the hijab, then Muslim women, some

wearing the hijab, would become better integrated into French society. And if we have professional Muslim women wearing the hijab, then interpreting it as a sign of inferiority becomes harder to do.

Harel looks at bus segregation on Orthodox bus lines in the same vein. He says that the state should allow the segregation, but insist that instead of sitting in back of the bus, women sit on one side and men on the other. Sitting in parallel fashion may then transform the discriminatory intent of bus gender segregation.

Greenfield accepts the fact of gender distinctions, and other sorts of distinctions, but she also argues that when segregation and discrimination at women is pernicious, when it rests of ideas of inferiority, then gender segregation is not any different from racial segregation.

Greenfield disagrees with Harel's conclusion on this one, and she has the upper hand. With a curtain to separate the genders, it is hard to see how sitting on either side of the bus will change the meaning of gender separation in the ultra-orthodox community. Indeed, if Harel says that the meaning of gender separation depends on the context, Greenfield gives us the context to show how discrimination is pervasive in the OU community. It is hard to disagree with her, nor do I think Harel would do so. So the dispute between them in some ways is whether bus separation is inherently discriminatory, or whether it can be transformed into something more benign.

Greenfield probably disagrees. Perhaps more important, she argues that bus segregation is not rational, that it is, it has not internal logic to it; or the logic is mistaken. And so the OU argument that men are "walking testosterone bombs" unable to control themselves in front of women and their general view that men should be in control is not rational, so we (or the state) need not give too much credence to their views.

In some ways this seems to me right and wrong. That a practice cannot be rationally defended is not, in itself, a problem. Some practices lack have internal logic, but serve a function anyway. (Keeping kosher maintains boundaries, for example. Religious may have little meaning, but bind people together in a community.) But if the practice has a pernicious effect, then that may be a concern.

I say maybe because I want to return to the issue of public and private. Neither Harel nor Greenfield use the lens of private and public to look at discrimination. If the issue was only one of the morality of discrimination, that would be fine. But they both mention the state enough to suggest that their concerns are also political. At one point Greenfield does mention the idea of the private sphere, but then she suggests that deep rooted gender biases trump the idea of the private (quote from page 5).

But if we use the toolkit of liberalism: public and private, the meaning of a voluntary association, and the idea of neutrality, then some issues become clarified, while others become muddled. Schools are public, and so dress codes are acceptable there. But they must be neutral; they cannot have discriminatory intent, as the French ban on the hijab did. And while the French can ban all religious symbols at schools, what we wear is to a

certain degree a matter of our own private choice. This can be overridden but only for good cause: for safety's sake. It's hard to think of too many other grounds, however, that can be used to ban the hijab. And so here Harel is on strong ground. Indeed, one can expand on his transformation argument, and suggest that the more the liberal state brings in people from traditional societies into the mainstream, the more they are likely to take on liberal values. (Immigrants in the U.S., for example).

But the difference between the hijab and bus cases are clear on this ground: the hijab case is about the terms of inclusion, and the bus case is about the terms of exclusion. I don't see, however, why the base case is complicated: private discrimination, say within the home, may be deplorable but is usually not an issue for state concern. If the bus line is private, as seems to be the case, then that really ends the matter. Or it perhaps turns our direction elsewhere.

It seems to me that the issue of bus separation is really a mask for how we – the state, academics, the courts – should view the deep gender separation in the OU community. There is no question that women face considerable discrimination (though for a contrary view, see Jan Feldman's *Lubavitchers as Citizens*), but the real question here is whether it is voluntary or not. Liberals allow for discrimination of all kinds at home and in associations as long as it is voluntary. So the question then is whether membership in the OU community is voluntary. How do we decide what is voluntary? Awareness of outside society, and minimal levels of education. (Explain this a bit.) None of this suggests that leaving is easy, nor is an easy way to leave necessary to say an association is voluntary. (Explain why this is the case.)

Finally, a few words on modern Orthodox women (not Haredi) and whether their separation is pernicious. (In the end, it seems to me not to be pernicious, though much of the rationale for the separation is the same as it is for the Haredi. But many Orthodox women are professionals, have good careers, are equal in the home. I find this to be both surprising and true. Which leads us back to questions of how we maintain both difference and equality.)