

The Irrationality and Inefficacy of Pursuing Anti-Discrimination Legislation

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### Abstract

This research paper examines and explains the irrationality and overall inefficacy of anti-discrimination laws (ADLs). The purpose is to show how ADLs are either ineffective or actually increase discriminatory behavior displayed by individuals. By analyzing studies performed by the Mises Institute, the National Research Council, the Georgetown Journal, Yale University et al., this paper will illustrate why government non-interference in the market will be most effective in decreasing the number of instances individuals engage in irrational discrimination. Rational biases, as described in this study, are those held to further an individual's self-interest, justified by his or her perceptions of a group. Irrational biases are defined as those that are held even though they limit productivity or otherwise act to the detriment of the one holding that belief. Efficacy is determined by whether or not an ADL achieved its desired effect, or if it is responsible for a change in a trend.

*Keywords:* Behavioral Economics, Discrimination, Efficacy, Rationality, Anti-Discrimination Laws, Rational vs Irrational Discrimination,

## The Irrationality and Inefficacy of Pursuing Anti-Discrimination Legislation

Numerous studies have been conducted on the rationality and effectiveness of various anti-discrimination laws (ADLs) pursued by the United States Government, as well as those pursued by state legislatures within the U.S. Perceived discrimination against LGBT individuals, criminals, blacks and others have been documented, but the efficacy and rationality of policies enacted by governments is debatable. The National Research Council (2004) and O'Neill (2009) show that the pursuit of currently-proposed anti-discrimination laws is inherently irrational as those laws seek to eliminate all forms of discrimination, including those that bear little to no effect on either those holding or those subjected to certain beliefs. Furthermore, Hebl et al. (2016) and Leguizamon and Christafore (2013) show that the efficacy of many of the laws enacted is dubious at best, and Agan and Starr (2016) proved that some policies have the reverse effect of what was intended. This paper examines their arguments to prove further legal attempts to combat discrimination are irrational.

### Definitions

**Types of Discrimination** The manifestations of discrimination vary greatly in form. The National Research Council (2004) identified, for the purposes of their study, four distinct types of discrimination. The first is **intentional, explicit discrimination**, which could manifest in avoidance of a certain group, verbal or physical hostility, or denial of employment. (National Research Council 56-58) The second is **unconscious discrimination**, which does not typically result in specific behavior, but can lead to more subtle forms of discrimination, such as unbalanced portrayals in the media, anxiety around or avoidance of out-groups. The links unconscious biases have to active discrimination are ambiguous at best, yet many in the public sphere perceive those

links to be clear, despite a lack of substantial evidence. (National Research Council 58-61) The third is **statistical discrimination**, or profiling, which entails an individual judging a group based on overall beliefs, usually rooted in prior knowledge. Profiling can cause employers to deny a member of an out-group opportunities based on his or her perception of that group being disproportionately represented in felony convictions. (National Research Council 61-63) The fourth and final theory is **organizational processing**. This is defined as when legislation and/or societal pressures cause segregation of groups. (National Research Council 63-65) Historically, immigrants of different backgrounds tended to stay amongst their own kind when first coming to the country; this was in part due to tribalism and mutual discrimination and also a result of housing prices being vastly different between separate regions. Organizational discrimination persists even in an era when no such laws enforce it. It manifests in families being bundled together in relatively isolated neighborhoods with those in the same income groups. The National Research Council also evaluated the efficacy of a variety of government programs designed to compensate for such discrimination. Their conclusion was that societal pressures have made open discrimination undesirable, therefore existing government methods, which target more overt discrimination, are ineffective at combatting irrational discrimination and new methods of analysis are required before prescribing solutions (National Research Council 70).

**Rational vs Irrational** According to Behavioral Economic Theory, people make irrational decisions, but objects<sup>1</sup> can be neither rational nor irrational. Therefore, for the purposes of this study, we focus on the perceptions of individuals targeted by the laws and the rationality of lawmakers trying to pass them. The morality of the varying forms of discrimination, as well as

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<sup>1</sup> In the grammatical sense

the laws pertaining to them, is disregarded in this paper due to the subjectivity of ethical positions. Simonson defines **Rational Discrimination** as behavior intended to improve one's own situation. It is justified by real or perceived differences between individuals in the labor market and elsewhere. (Simonson 288-289) An example of this is when an employer chooses to deny opportunities to those of a certain appearance, whether it be race, hygiene, mode of dress, or some other factor related to sensory perceptions. That employer may perceive that person as bearing negative characteristics that would harm his or her business, so refusing to employ that individual would be rational. Similarly, if a storeowner denies service to an individual based on an odor the potential customer emits, justifying that action with the belief that his or her odor would drive away other customers, he is acting rationally. Simonson defined **Irrational Discrimination** as behavior a person displays without regard to his or her situation, typically serving to the detriment of all parties involved. (Simonson 288-289) For example, if an employer can find no characteristic that he believes would do his business harm, and the applicant possesses skills that the employer knows would benefit him, it would be irrational to deny the applicant an opportunity. If a storeowner denies service to an individual based on the potential customer's race, it would be irrational if the storeowner's perception is that the customer could not possibly harm his business but is possessing of an irrelevant characteristic he deems undesirable.

The forms of discrimination identified by the National Research Council can each be rational or irrational, depending on the situation. If an individual partakes in explicit discrimination, it can be rationally justified by experiences with members of a group the individual may have had that negatively impacted him, so long as he believes the behavior, the displays will not stand to harm him. However, if he harasses a member of a group with the belief or knowledge that it will only worsen his own situation, whatever his justification, it is irrational. Similarly, if a

taxi driver has experienced that the majority of the members of a certain race stiff cab fares, it would be rational for him to engage in statistical discrimination and pick up fewer members of that race he sees; it would also be rational for him to pick up a passenger of a different racial group if presented with the option. There are some who would suggest it would be irrational for that taxi driver to deny all the members of the aforementioned group if some of them do pay their fares, but it could be rational if the taxi driver bases his judgement on the high probability of being stiffed, as well as his inability to decide which of the members of that group represent the outliers. If he were able to differentiate with certainty, it would be irrational for him to deny who he identified as an outlier. Organizational processing could be rational if a government or society believes they would stand to benefit by segregating groups based on one or more characteristics.

**Efficacy** For the purpose of this study, the efficacy of a law is determined by the degree to which the passage of the law achieved its desired effect. *Ceteris paribus*<sup>2</sup>, should a new law pass and a reduction in undesired behavior is observed, that law is considered effective. Should the passage of a law result in an increase in the undesired behavior or no change at all, then the law will be considered ineffective.

### **Literature Review**

O'Neill (2009) examined government programs designed for curbing discrimination. He explained that ultimately those programs do nothing to solve irrational discrimination, but rather punish those who exercise rational judgement, i.e. taxi drivers who avoid picking up suspicious-looking individuals in high-crime districts of cities. People who hold irrational biases will still

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<sup>2</sup> *Ceteris Paribus* is defined as "all other factors remaining constant". If an ADL passes, but at the same time there is an unrelated perception shift that changes the tendencies of most individuals in the market, the law may not be responsible for a change in data.

hold onto their intrinsic beliefs regardless of what a government tells them and will find a way to act on their beliefs. He cited that such behavior is based on predictive characteristics which are based in statistics, and therefore forcing those who engage in such judgement to ignore their common sense, which can lead to increased crime. Race, age, sex and other observable characteristics are all statistically linked to certain negative behaviors; those who engage in discrimination based on those intrinsic qualities are frequently acting rationally, as they are likely to be aware of those statistics. Therefore, enacting laws that punish such persons is irrational and tyrannical. (O’Neill)<sup>3</sup>

On the contrary, Hebl et al. (2016) presented arguments for the passage of further ADLs. She examined discrimination against LGBT individuals in the employment sphere and found that attitudes toward those in the LGBT community are negative in states without ADLs in place, but there was no quantitative evidence that discriminatory actions are taken against them in the workplace. Their primary study was performed in Texas and involved two applicants who had similar similar resumés, but one wore a “Texan and Proud” hat while the other wore a “Gay and Proud” hane. They found that the first applicant was given more time and shown more respect and kindness over the second, and they linked that to discrimination against homosexuals. (Hebl 451) They did not say if either was accepted, or provide any further evidence proving a link. Therefore, legislation targeting workplace discrimination has little to no quantitative effect. They instead focused on the symbolic effect an ADL would have – stigmatizing discrimination. (Hebl 453) The findings of their own studies, are however by their own admission questionable in accuracy. They noted that states with ADLs tended to already fewer instances of discrimination before the passage of those laws, and the little data they presented that regarded discrimination in

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<sup>3</sup> Article was a continuous scrolling web editorial, so there were no page numbers.

the same regions before and after the passage of an ADL also showed discrimination was already on a downward trend. (Hebl 454) Additional points are presented in the Discussion section of this paper.

Hebl et al.'s study presented identical data and findings as older studies that all used the same or similar metrics; some believe this may have caused previously-unaccounted for flaws worth noting. Because of this, Leguizamon and Christafore (2013) re-examined evidence of sexual orientation discrimination in the labor market. on the wages of male homosexuals, which they found in were on average lower than married male heterosexuals. (L & C 213) There was, however, no evidence of a wage gap between hetero- and homosexual women, or between hetero- and homosexual men in higher-earning groups. The laws they discussed had been implemented in 21 states and nearly 200 jurisdictions. (L & C 213-214), they observed that after the initial passage of an ADL, there is no observable change, but over time, unmarried low-earning hetero- and homosexual men experienced wage increases, and the gap between them narrowed. (L & C 221) There was, however, no evidence beyond circumstance that directly linked the gap to discrimination, and strong evidence exists that there were other factors that might have caused it, which will be presented in the Discussion section.

There is also a perception that former convicts have been historically discriminated against. Grgić-Hlača et al. (2018) conducted a study regarding perceptions of risk of criminals repeating illicit behavior after being released from prison. They cited the high rate of recidivism is in no small part a result of the difficulty a person has finding employment with a criminal record. While most studies regarding fairness focus on inequity as a result of discrimination, Grgić-Hlača et al. examine peoples' perceptions regarding unfairness in decision-making. They found that those perceptions extend far beyond discrimination of out-groups. Rather, they are based on



the specific properties of each felon described, ranging from what crime they committed to their education levels. (Grgić-Hlača)<sup>4</sup>

Simonson (2006) analyzes existing policies designed to increase employment opportunities for ex-offenders. She cites as an example New York's Article 23A, passed in 1976, and how it has affected former criminals, as well as how it has influenced the decisions employers make. (Simonson 286) Article 23A states an employer may only deny an opportunity based on a criminal conviction when (1) there is a direct relationship between the past conviction and the duties of employment or (2) the applicant's criminal history indicates that employing him/her would constitute an unreasonable risk to public safety. (Simonson 290) Furthermore, Correction Law § 753 directs employers to consider the circumstances of the conviction when applying an exception, namely (a) the public policy of the state, (b) the responsibilities the employment opportunity entails, (c) how the crime committed by the applicant would affect his ability to perform all related duties, (d) the time elapsed since the occurrence of the crime, (e) the age of the applicant, (f) the seriousness of the offense, (g) any information produced by the applicant supporting his commitment to his rehabilitation and good conduct and (h) the interest, welfare and safety of the employer and the public. (Simonson 297-298) The author found that the application of the law varies on how the New York State Court of Appeals interprets it. At present, the court allows employers to deny opportunities on the basis that honesty is a general requirement of employment, and dishonesty is a tangential element of crime. (Simonson 286-287) The author also examines disparate data between ex-felons of different race and ethnicity. She found that minorities with criminal records had historically been disproportionately denied employment, though that

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<sup>4</sup> No page numbers were given in the article

argument carries little weight as most recent Supreme Court rulings have been in favor of employers; they claimed they were acting rationally due to their accurate assessment of groups that disproportionately present “risky behavior”. (Simonson 290-293)

To combat the employment disparities similar to those Simonson mentioned in her study, “Ban-the-Box” (BTB) policies have been adopted in a total of 21 states and over 100 jurisdictions (Agan & Starr 2). Agan and Starr (2016) examine the efficacy of those policies, which prevent employers from requesting criminal histories on job applications. (Agan & Starr 2) There is a sound basis for the passage of such laws: applicants without a criminal record are 63% more likely to receive callbacks than those who have one (Agan & Starr 4), and ex-convicts have a five-year recidivism rate of 77%<sup>5</sup>. A secondary objective was to lessen the 7% gap in employment between white and black applicants; the gap was thought to be at least partially the result of statistical discrimination against blacks – 25% of black Americans have felony convictions, compared to 6% of non-blacks. (Agan & Starr 3)<sup>6</sup> The authors found that the policies ultimately had the opposite effect as they were intended, with the gap between callbacks of white over black applicants with similar resumés increasing from 7% to 45%. (Agan & Starr 16) This is likely due to the statistic-based perception that blacks are more likely to commit violent crimes than whites<sup>7</sup> – if employers are prevented from knowing whether or not an applicant has a record, they are more likely to act on the assumption that applicants of a certain appearance or possessing questionable resumés are more likely to have once been imprisoned. Therefore, they end up hiring even fewer people of a given out-group.

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<sup>5</sup> According to the United States Bureau of Justice Statistics

<sup>6</sup> Agan & Starr cited for those numbers the 2011 study, GROWTH IN THE U.S. EX-FELON AND EX-PRISONER POPULATION, 1948 TO 2010 by Sarah Shannon, Christopher Uggen, Melissa Thompson, Jason Schnittker, and Michael Massoglia

<sup>7</sup> According to a 2015 Study by the United States Department of Justice

## Discussion

There is a consensus among the data presented in the aforementioned literature. All the studies show the inefficacy of the policies and call into question the rationality of passing such laws. Some of the authors agree that some form of legislation could potentially be beneficial, both those currently in place do little other than harm the population.

**Limitations of the Studies** The accuracy of some of the studies described in this paper can be called into question by their metrics, more so those suggesting the broader implementation of existing ADLs. Many of the tests were performed in controlled environments, which in a Neoclassical utopia<sup>8</sup> would be entirely accurate, but real behavior varies too greatly for any such study to completely measure discrimination. In addition, examinations of real-world data cannot account for all relevant factors, which will be explained. Many of the tests measuring discrimination with and without the implementation of an ADL do not look at measurements in the same region before and after its passage; rather they compare regions that have ADLs next to those that do not.

**Limitations of Evidence of Discrimination** The data in Leguizamon & Christafore's and Hebl et al.'s studies may have been at least partially inaccurate as many homosexuals might be hesitant to reveal their sexual orientation, with or without an ADL in place. If homosexuals outright lied during the surveys, it would offset the data. An explanation for the gap observed in Leguizamon & Christafore's study could be the metrics used – differences in skill and productivity, as well as marriage premiums and household specializations, were not incorporated into the data. The authors also noted conflicting data between the studies they utilized, with some pointing to discrimination as a driving factor of the wage gap and others point to advantageous social

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<sup>8</sup> According to Neoclassical Economic Theory, people are inherently rational and make decisions based on perfect knowledge.

institutions such as marriage. Hebl et al. focused almost purely on attitudes and attempted to link them to behaviors previously observed without empirical data, and consistently used very small *n*-groups. The results of the Texas study could be explained by, among other reasons, an employer's own love and pride for his state, a discomfort of a person overtly displaying his or her sexuality, or a combination of the two. Their other studies used virtually the same idea: one person is displayed to have features or accolades with a universal appeal, while the other had features or accolades specific to a gay niche. It is not unlikely that employers found those applicants who had features or achievements beyond their niches to be more desirable precisely because of a feature's broader appeal, or an accolade received from among a larger, more-encompassing pool of nominees.

**Additional Possibilities for Employment Gaps** Most anti-discrimination laws and similar employment protections are based on the notion that employers discriminate almost purely by race. Grgić-Hlača et al.'s studies of perception suggest that other factors are likely to be involved; Agan and Starr's field experiments concurred with their findings. Most studies do not take into consideration an applicant's education, income or perceptions of income, differences in neighborhoods or the social lives of applicants as they state them on resumés, all of which employers factor into their decisions. When Agan and Starr controlled for those elements, they found the differences in callbacks was far more marginal than other studies had suggested. Leguizamon and Christafore were open about the possibility marriage premiums affected the gap between hetero- and homosexual men, as homosexual and unmarried heterosexual men had roughly the same wages; it was only when married heterosexuals were brought into the equation that a statistically significant gap was found. They therefore suggested that the ADL may have

been unnecessary, and the continual rise in the wages of homosexuals may create a gap in their favor among unmarried individuals.

**Irrationality of Passing ADLs** This paper has demonstrated the consistent lack of efficacy of the ADLs currently in place, but there is another element to them that makes passing them irrational. Firing ineffective employees or hiring applicants with poor resumés would be rational, as not doing so would harm business. However, If an employee of a given out-group is underperforming, and his superiors wish to fire him, he can claim false termination on the grounds of discrimination, he can file a legal claim that would, regardless of the outcome, be of high cost to the business. A minority applicant with a poor resumé could file a similar suit. Even though, as Simonson suggests, courts tend to favor employers, legal fees can be very high and the fines incurred if the company does lose can drive them out of business. This incentivizes minorities to underperform to the detriment of the businesses that employ them. Legislators have frequently claimed their ADLs are designed to end irrational discrimination and ultimately help employers and employees alike, but by preventing employers from utilizing rational judgement to improve their businesses, they are only doing harm. Some of those legislators could be acting rationally if they are willfully being hypocritical to earn the votes of poor performers and remain in power, but for those who genuinely seek to find rational solutions to help the public, repeating the same action and expecting a different result is the definition of insanity, and by extension evidence of irrationality.

### **Conclusions and Future Study**

Anti-discrimination laws have seldom proved successful, and the few times they have they created negative externalities that outweigh the benefits. There is limited research available

related to less paternalistic approaches to discrimination, so further studies on such measures taken should be conducted. It is indisputable that there is no single solution to dealing with, let alone measuring, all forms of discrimination, but continuing to pursue the same policies that, as proven in this study and countless others, have no proven substantial positive effect, is irrational.

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