The Moral Foundations of Civil Rights

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Preface

THE CENTER FOR PHILOSOPHY AND PUBLIC POLICY was established in 1976 at the University of Maryland in College Park to conduct research into the values and concepts that underlie public policy. Most other research into public policy is empirical: it assesses cost, describes constituencies, and makes predictions. The Center's research is conceptual and normative. It investigates the structure of arguments and the nature of values relevant to the formation, justification, and criticism of public policy. The results of its research are disseminated through workshops, conferences, teaching materials, the Center's newsletter, books published in the Maryland Studies in Public Philosophy series, and other publications.

The chapters in this book originated in a conference on the moral foundations of civil rights policy held in October 1984 at the University of Maryland to commemorate the twentieth anniversary of the Civil Rights Act of 1964. The conference was supported by grants from the Ford Foundation and the Prudential Foundation. The views expressed by the authors are, of course, their own and not necessarily those of the foundations supporting the conference, of the Center, or of the institutions or agencies for which the authors work.

Special thanks are due to David Luban, from whose initial idea the conference eventually sprang and who co-directed it, and to Lori Owen, who managed its arrangements expertly. Thanks are also due to Susan Mann, Carroll Linkins, and Louise Collins for preparation of this book.

Robert K. Fullinwider
Claudia Mills

Contents

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SECTION I

Race

PART ONE

Beginning and Ending

1

Race and Equality: Introduction

Robert K. Fullinwider

THE CHAPTERS IN THIS BOOK emerged from a conference to honor the twentieth anniversary of the Civil Rights Act of 1964. The Civil Rights Act was a remarkable watershed in American social legislation and race relations, unleashing changes across society whose effects have yet to be reckoned. It provided broad legal machinery for a sustained assault against racial discrimination (and, although it was an afterthought at the time, against gender discrimination as well).

The act contained sweeping prohibitions of racial discrimination in public accommodations, public facilities, federally assisted programs, and employment. It promised federal technical assistance to states in desegregating their public schools, mandated a survey of registration and voting statistics, and established the Community Relations Service. It gave to the Department of Justice extensive enforcement powers and created, in addition, a new enforcement agency, the Equal Employment Opportunity Commission. The provisions of the act rested on diverse legal grounds, including the federal government's right to regulate the use of its funds, the right of Congress to regulate interstate commerce, and the right of Congress to enforce the Fourteenth Amendment.

The Civil Rights Act passed into law ten years after the Supreme Court's ruling in *Brown* v. *Board of Education,* a decade marked by tumultuous school desegregation in the South, sit-ins, marches, demonstrations, and freedom-rides—and by mob violence, "massive resistance," murder, and legal mayhem. Bull Connor, Ross Barnett, and George Wallace, no less than James Meredith, Martin Luther King, and James Farmer, brought about a crystallization of political consensus to do something about civil rights. The Civil Rights Act became law at a moment of broad agreement on the necessity for governmental action to discard policies of official racial separation and to act against egregious denials to blacks of basic liberties and

opportunities. From this broad consensus emerged not only the Civil Rights Act, but its progeny: the Voting Rights Act of 1965, Executive Order 11246 of 1965, the Education Amendments of 1972, the Equal Employment Opportunity Act of 1972, and hundreds of state and municipal civil rights laws and ordinances.

Nevertheless, the broad consensus around the unacceptability of official policies of racial separation and the intolerability of denying basic political and civil liberties to blacks masked underlying fissures and fault lines in the way Americans understood race relations and perceived the problems of discrimination. As the initial legal and social barriers to black progress were cleared away, public divisions emerged over evolving policy. School desegregation suits against northern cities and desegregation orders involving school busing provoked a backlash. New concepts of discrimination evolving from case law led to legal actions against many of the largest and most distinguished business firms in the country, producing protracted and acrimonious litigation and extensive changes in the employment practices of the affected firms, frequently to the displeasure of their labor unions. The executive order subjecting all federal contractors to extensive affirmative action regulations produced confusion and controversy about "goals" and "quotas," preferential treatment and "color-blind" policy.

The breakdown of consensus has been manifested most dramatically in recent years by the explicit efforts of the Reagan administration to dismantle fifteen years of policy on affirmative action and by the increasingly fragile relations between blacks and Jews, who had been long-time allies in the civil rights struggles.

Because so much of the recent controversy about civil rights is framed in moral terms, an underlying motif of the conference from which this book emerged was whether a reexamination of the moral foundations of civil rights policy would clarify matters and produce some ground for rebuilding a consensus. But do the divisions over affirmative action, busing, and other civil rights controversies actually reflect deeper moral differences? What are the issues that produce friction?

The Meaning of Discrimination

According to the simple and innocent aspirations of Congress in 1964, the Civil Rights Act would turn the full force of law against the "whites only" sign in the motel window, the segregated departments in the textile factory, the "colored entrance" at the movie house, the "no blacks hired" policy at the automobile dealership. The act would

prohibit racial discrimination, but Congress did not bother to define "discrimination." Against worries that this could cause difficulties, the Senate floor managers of the Civil Rights Act were sanguine: "It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meaning."[1] But by 1972, the Supreme Court had found in Title VII of the Civil Rights Act a notion of unintentional discrimination,[2] and Congress was talking about the complexity, not the simplicity, of discrimination:

> During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization. . . . Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. . . . The forms and incidents of discrimination . . . are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance.[3]

In other words, far from being transparent and obvious, discrimination requires "trained observation" to spot!

Because Congress did not define "discrimination," the courts had to do so in applying the Civil Rights Act. They were soon faced with cases that pushed them toward conceptualizing discrimination not just as a consequence of a deliberate act or policy *designed* to exclude or hinder blacks, but also as a consequence of acts or policies that have the *effect* of excluding or hindering blacks, regardless of their original aim or design. For example, an employer who segregated blacks and whites into different departments prior to the Civil Rights Act might drop that policy to comply with the law, but his transfer and seniority rules, while neutral on their face and not specifically intended to work against blacks, would have the effect of locking black employees into their old, low-paying departments, i.e., have the effect of continuing to penalize older black employees for having been the victim of the employer's past discrimination. Unless such rules were upset, the employer's old discrimination would be allowed to "carry-through" into the present, even though he had abandoned his overtly discriminatory policies. Courts began to attack such rules, and the "effects" test of discrimination was born. The test was soon extended to cover practices that worked a hardship on black employees not by carrying through the employer's own past discrimination, but by carrying through the effects of past discrimination in general. Thus, the *Griggs* standard in 1971 made illegal those employment

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practices that especially disadvantage blacks and that cannot be justified as "business necessity," regardless of their intended purpose.

The idea that rules and practices that maintain and support the racial separation and exclusion produced by past discrimination can count as present discrimination is not an unreasonable one, especially in a world built around the exclusion of blacks and able, like a spinning top, to maintain its inertia even after the discriminatory hand is lifted from it. Nevertheless, the effects test introduces into the legal definition of discrimination a considerable elasticity, greatly enlarges its scope of application, and detaches it from the paradigmatic cases of deliberate discrimination around which consensus was built. The effects test can be used not only to require a business to stop using an invalidated aptitude test or an irrelevant height requirement for selection of workers, but potentially to prevent a state from subjecting teachers to minimum competency exams because a disproportionate number of black teachers fail.[4] In the end, the effects test comes down to a judgment about whether it it reasonable to make an institution, firm, or government forgo convenient, efficient, traditional, profitable, or even quality-improving practices in order that blacks will have more opportunities. This is the kind of judgment that will, in a wide range of cases, generate disagreement rather than agreement.[5]

Affirmative Action and Racial Preferences

The flashpoint of the most intense public and political controversy is affirmative action. Affirmative action programs have generated confusion, misunderstanding, resistance, hostility, and political backlash. The term "affirmative action" has a dual provenance. It occurs in Title VII of the Civil Rights Act in a remedial context. Section 706(g) of Title VII tells a court what to do when it has found an employer guilty of discrimination: it "may enjoin the employer from engaging in such unlawful employment practice, and order such *affirmative action* as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . , or any other equitable relief as the court deems appropriate."[6] Courts would require offending employers to make whole the victims of their discrimination and, in those cases involving deeply entrenched discriminatory practices, order a restructuring of employment practices and, frequently, the hiring of a fixed number or percentage of blacks.

The other occurrence of the term "affirmative action" is in Executive Order 11246, issued a year after Title VII. The order applies to all

federal contractors and requires each to include as a contract stipulation that he

> will not discriminate against any employee or applicant because of race, color, religion, sex, or national origin. The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.[7]

In the one case, affirmative action is what an employer does to make up for his past discrimination. In the other case, affirmative action is what an employer does in order not to discriminate. Affirmative action in the two cases may not prescribe the same course of action, or even compatible courses.

The executive order left it to the secretary of labor to set out rules to implement affirmative action. With one eye to the developing Title VII case law, the Department of Labor first tackled the construction industry. Beginning with the Philadelphia Plan in 1967 (modified in 1969), it imposed (or elicited) a number of regional plans aimed at integrating the construction industry. The Philadelphia Plan involved numerical "goals" for the involvement of blacks in the lucrative craft jobs from which they had been excluded, and this feature was upheld by federal courts in 1970 and 1971.[8] Utilizing the strategies and ideas worked out in its construction industry plans, the department at the end of 1971 issued Revised Order No. 4, a detailed set of regulations covering all other federal contractors, from airplane manufacturers to universities. Thus were born the "goals and timetables" that became a part of the fabric of most business firms, manufacturers, utilities, and educational institutions.

The revised order never succeeds in disentangling two quite separate, though very close, concepts. The first is that of a *goal* in the dictionary sense, as something you aim at. The second is that of a *prediction*, that is, of what you expect to happen. Revised Order No. 4 tells the contractor that "in establishing the size of his goals and the length of his timetables, he should consider the results which could reasonably be expected from his putting forth every good faith effort to make his overall affirmative action program work," a program whose objective "is equal employment opportunity."[9] Here is the germ of one concept of "affirmative action goal." The contractor *aims* at nondiscrimination, and in order to assess his progress in achieving this aim, predicts how many blacks he would employ over a period of time were he successful in achieving nondiscrimination. Such a prediction ("goal") gives him, and the government, a standard by which to evaluate a program after it has been in operation for some time.

But the germ of a different concept is also present. Contractors are to take stock of their "underutilization" of minorities, and affirmative action goals "must be designed to correct any identifiable deficiencies." This implies the goals *are* what the contractor aims at, not the predicted by-product of his aiming at something else. The scenario here is of the contractor aiming to achieve proportional representation, which is not the same thing as aiming to achieve equal opportunity.[10]

The second concept of goals immediately raises the specter of racial preferences. If a contractor cannot meet his goals without taking the race of applicants or employees into account, then he will (must) meet them *by* taking race into account.

Revised Order No. 4 seeks to head off this interpretation by declaring that affirmative action plans are not "intended to encourage or permit the granting of preferential treatment to any individual or to any group because of race, color, religion, sex or national origin of such individual or group."[11] This disclaimer guided some early official interpretations of affirmative action. Thus, Stanley Pottinger, whose Office of Civil Rights in the Department of Health, Education, and Welfare (HEW) had responsibility for applying Revised Order No. 4 to institutions of higher education, sought in 1972 to assure universities and colleges that affirmative action did not call for preferential treatment. He offered an interpretation of goals consistent with the first concept noted above:

> Universities are required to commit themselves to defined, specific steps that will bring the university into contact with qualified women and minorities and that will ensure that in the selection process they will be judged fairly on the basis of their capabilities. Universities are also required to make an honest *prediction* of what those efforts are likely to yield over a given period of time, assuming that the availability of women and minorities is accurately approximated, and assuming that the procedures for recruitment and selection are actually followed.
>
> This *predictive* aspect of Affirmative Action could be called any number of things. . . . They happen to be called "goals."[12]

But other affirmative action efforts exemplified the second concept. When the Department of Labor, along with the Equal Employment Opportunity Commission (EEOC) and the Federal Communications Commission (FCC), entered into a consent decree in 1973 with AT&T—a decree founded on the executive order program as well as on Title VII and FCC regulations—the "goals" and "targets" were incorporated into the company's Model Affirmative Action Plan as straightforward requirements, not predictions, and forced the company to use extensive sexual and racial preferences.[13]

Two different concepts of "goals" were embodied from the very start in the revised order, and this Janus-faced aspect of affirmative action has produced policy confusion ever since. Field offices of the Labor Department and HEW gave uncertain and conflicting interpretations of the affirmative action regulations. Heavy-handed enforcement activities were not uncommon and generated hostility. "Deficiencies" were identified whose "correction" would apparently require employers to hire blacks at rates proportionately greater than their availability. And "availability" itself, upon which goals were to be founded, was a matter hotly disputed and variously interpreted. When one university mathematics department noted that there were hardly any black Ph.Ds in mathematics, it was told (informally) by an HEW official to drop the requirement for the Ph.D.[14] And official efforts to distinguish "goals" (good) from "quotas" (bad) were often mealy-mouthed and confused.

Critics of affirmative action saw the regulations as intellectually dishonest and the disclaimers of discriminatory intent as disingenuous: goals was just another word for quotas. Or they conceded that goals need not imply quotas, but would nevertheless be treated as if they did by employers who wanted to avoid troublesome explanations to the government; or they held that whatever the actual concept of goals embedded in the revised order, the iron law of bureaucracy would produce a system of quotas. In any case, the critics viewed affirmative action as involving substantial, and unacceptable, uses of racial preferences.

This brings us to the heart of the matter. Can it be legitimate to use racial preferences? Why?

How to Think About Race

Discussions about race quickly become discussions of principle and right. But it is unclear, often, exactly what principle or principles are at stake, and how one should understand the role of principles and of other relevant considerations.

In 1974 the Supreme Court entertained the case of *De Funis* v. *Odegaard* involving a policy of the University of Washington Law School to set aside a certain number of its admissions for minority students.[15] The Anti-Defamation League (ADL) of B'nai B'rith offered a friend-of-the-court brief firmly in opposition to the law school's policy. "For at least a generation," it said,

> the lesson of the great decisions of this Court and the lesson of contemporary history have been the same: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and

> destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. . . . A state-imposed racial quota is a *per se* violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution because it utilizes a factor for measurement that is necessarily irrelevant to any constitutionally acceptable legislative purpose. A racial quota is a device for establishing a status, a caste, determining superiority or inferiority for a class measured by race without regard to individual merit. . . . Here lies the inherent evil of quotas that reverse the objective of Anglo-American democracies to move toward freedom by the rejection of status, measured by immutable factors like race, for assigning an individual his place in our society.[16]

The brief presents an eloquent, stirring, much-quoted, and obscure case—obscure because it blends together a variety of considerations without indicating how they are to be weighed against one another should they point in different directions. One set of concerns is captured by the claims that "a racial quota is a device for establishing status" and that "the use of race is destructive of democratic society." We have certainly used racial classifications in the past to establish status or caste, but is this a necessary feature of such classifications? Past uses of race have been destructive and divisive, but need every use be? The brief seems engaged here in making empirical and historical claims—claims that ought to be amenable to some sort of clarification and limited testing. We can try to imagine different kinds of racial classifications in different kinds of conditions with different purposes, and then speculate on the consequences. We can look in detail at past practices of racial classification to identify what was wrong in them, how the wrong was brought about, and whether it was specific to the particular aims of the practices or a function of features common to any aim. Might it not be possible to imagine—or even to construct—racial preferences that in specific historical circumstances supported and strengthened democratic society and undermined and diminished caste?

Such questions and inquiries would lead us to look at the actual effects of affirmative action on institutions, whether those effects varied in different situations, what courts and government agencies were trying to accomplish by devising the rules or issuing the orders they did, and what alternative courses of action might have been available with what results. Should, however, its historical and empirical concerns be put to rest, the ADL brief still does not seem prepared to yield its opposition to racial preferences. A second line of argument there holds such preferences to be "inherently wrong"—they are wrong as a matter of "fundamental principle."

The principle at issue seems to be a principle of nondiscrimination to the effect: "Do not burden or benefit people on the basis of immutable characteristics." Clearly this principle is not fundamental, however, but derivative. Its acceptability as a principle must lie in its expressing some deeper value of equality or freedom or human dignity; "immutability of characteristics" is by itself a concept without any moral import. More important, it remains unclear what role the principle is supposed to play, what its "logic" is. In the ADL brief, it seems to trump other considerations, and no considerations are allowed to count against it. Regardless of purpose or outcome, all uses of racial preferences are proscribed, apparently, by the principle.

Once the argument devolves to claims of principles and rights—rights to equality or dignity, rights not to be discriminated against—have we reached a ground where common understanding can be forged? Obviously, rights and principles have a place in moral and political thinking, but what place? How shall their presence guide thought? What human realities are they rooted in, what hopes do they speak to? Are they perfect instruments or imperfect guides?

Alexander Bickel, in *The Morality of Consent*, contrasted two ways of political thinking—the "Contractarian tradition" and the "Whig tradition." The former, he said, rests upon "a vision of individual rights that have a clearly defined, independent existence" to which society "must bend." "The Whig model, on the other hand, begins not with theoretical rights but with a real society. . . . Limits are set by culture, by time- and place-bound conditions, and within these limits the task of government . . . is to make a peaceable, good, and improving society." The Contractarian approach "is moral, principled, legalistic . . . weak on pragmatism, strong on theory." The Whig approach, on the other hand, is "flexible, pragmatic, slow-moving, highly political."[17]

Bickel favored the Whig model, whose style he summed up in quoting Edmund Burke: "Every virtue, and every prudent act, is founded on compromise and barter. We balance inconveniences; we give and take; we remit some rights, that we may enjoy others; and we choose rather to be happy citizens, than subtle disputants."[18] Yet, ironically, Bickel was also co-author of the ADL brief in the De Funis case, a brief that is unyielding and adamant in its resistance to the use of racial preferences, and that, in the final analysis, appeals to the very sort of abstract principle that stocks the arsenal of the Contractarian. There is reliance on individual rights that must be protected even if this hinders "improving society"; there is no flavor of compromise, barter, and balancing of inconveniences.

Although the Bickel of *The Morality of Consent* may be reconciled

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