Property Rights, Human Rights,
and Minorities*

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I. Introduction

Any American who can cite the Preamble of the Declaration of Independence knows what the historic ideals of American society are. But there is hardly any agreement on how those ideals should be implemented in the realm of race relations. The question of what can be done to cope with the problems of prejudice and discrimination in America has been argued since the beginning days of the republic. Thomas Jefferson died without having reached an answer in his own mind. Sometimes the social and political solutions put forth have been consistent with American ideals, but more often they have been advanced and implemented in betrayal of those ideals. The disagreement has been over means and ends and is generally argued from two perspectives represented by Supreme Court decisions separated by eighty-one years of change in the American government’s approach to civil rights. In 1875 Congress passed a Civil Rights Act that forbade operators of hotels, theaters, and transportation facilities to discriminate against Negroes in the rendering of service. But in 1883 the Supreme Court declared this “places of public accommodation” law unconstitutional on the ground that it was a police power measure regulating private conduct and as such beyond the scope of the powers granted Congress in the Constitution. In 1964 the Supreme Court upheld the constitutionality of the public accommodations section of the 1964 Civil Rights Act. The Court unanimously ruled that the Constitution’s commerce clause, which gave Congress the power to regulate interstate commerce, gave Congress broad enough authority to ban racial discrimination that might affect interstate commerce.

The differing interpretations of the Constitution by the Supreme Courts of 1883 and 1964 reflect not only the extent to which the American government is willing to go to eliminate racism, but it also shows the degree to which the concept of human rights has been redefined during the twentieth century. The 1883 Supreme Court ruling against the unconstitutionality of the 1875 Civil Rights Act was consistent with the definition of human rights as natural, absolute, and

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objective, the exercise of which should be protected from the interference of others. It also sanctioned private conduct as a realm that must not be interfered with by the government. But the 1964 Supreme Court decision expresses the theory of human rights as arbitrary, absent of any universal standard of right and wrong, and defined according to what the law prefers at any given time. "The original notion of the natural right to freedom," writes Tibor Machan, "was that people in a human community are free to do wrong within their own spheres, with what is their own — print wrong ideas, buy dirty literature, and even select to trade only with those who belong to one (favored) race. That is the liberty which human rights guarantee, even in the face of public condemnation. [Now, according to] U.S. Law, one has no rights to do what the 'public' considers wrong. (That is, what those in power identify as wrong, sometimes with and other times without public or the majority's explicit or tacit support.)"

It is their concept of human rights that has determined the direction Americans and their government have taken in deciding how to solve the problem of racism. The question before them always is whether the humanness of racism is to be dealt with according to the standards of human rights, or whether it is to be eliminated by whatever legislative and judicial decree those in power happen to think best at a given time. Two speeches by Lyndon B. Johnson, separated by sixteen years of change (in the man and in the nation), further illustrate the division among Americans in answering this question. While running for the Senate in 1948, Johnson denounced the civil rights portions of Harry Truman's Fair Deal Policy as

a farce and a sham — an effort to set up a police state in the guise of liberty. I am opposed to that program. I have fought it in Congress... I am against the FEPC [Federal Employment Practices Commission] because if a man can tell you whom you must hire, he can tell you whom you cannot employ. I have met this head-on. ²

But in 1964, sixteen years later, Johnson was president, representing a broader constituency than the state of Texas he sought to represent in 1948, and as president he signed the Civil Rights Act, saying:

We must not approach the observance and enforcement of this law in a vengeful spirit. Its purpose is not to punish. Its purpose is not to divide, but to end divisions — divisions which have lasted too long. ... [The act] relies first on voluntary compliance, then on the efforts of states and local communities to secure the rights of citizens. It provides for the national authority to step in only when others cannot or will not do the job. ... We have come to a time of testing. We must not fail. Let us close the springs of racial poison.³

¹Machan, Human Rights and Human Liberties, p. 43.
²Gettleman and the Mermelstein, eds., The Great Society Reader.
So it was that Johnson, like so many Americans, had come to believe that closing "the springs of racial poison" justified the restriction of human rights as called for in the Civil Rights Act, yet all the while referring to the act, in the words of Whitney M. Young, Jr., as "the greatest single triumph for human rights in our country since the Emancipation Proclamation."

There were those who were not so enthusiastic, however. "You can't legislate goodwill, and therefore the only thing that will eliminate discrimination and segregation is education, not legislation," said Black Muslim leader Malcolm X.

Governor George C. Wallace of Alabama warned, "It will take a police state to enforce it."

In his announcement on June 18, 1964, that he would vote against the bill, Senator Barry Goldwater had said that while he was opposed to all discrimination, he believed it to be a problem that "is fundamentally one of the heart." Some law can help, he said, "but no law ... [with] provisions which fly in the face of the Constitution and which require for their effective execution the creation of a police state." Goldwater, who was campaigning for the presidency at the time, was denounced by many as a racist demagogue, and Governor Nelson Rockefeller said Goldwater had "effectively abandoned the Republican party on the most fundamental issue of our time."

It is now eighteen years since the 1964 Civil Rights Act and while a great deal of discrimination and segregation has been eliminated, Americans are still divided on the morality of using legislation to eliminate private racism. One position, the laissez-faire approach, taken partially in Johnson's 1948 speech, is that the problems of race relations are best left to private, voluntary action for solution; that (antiracism) legislation cannot be enforced in the private sector without violating the rights of individuals; that such laws are unenforceable because they represent an attempt to overcome prejudice and discrimination by law, a venture that is doomed to failure; that they only stir up new antagonisms, thereby interfering with private, voluntary efforts to improve race relations.

The second position, the statist approach, taken in Johnson's 1964 speech, favors antiracism legislation on the basis that racial discrimination, in private as well as public affairs, is antisocial and un-American and that it is proper for the state to outlaw it; that no right is ever absolute; that all rights are subject to restriction where the greater social good overrides the individual interest; that while outlawing racial discrimination does not produce an overnight utopia, the presence of such laws on the statute books, coupled with an enforcement program, speeds up the absorption of minority groups into the mainstream of American life; that the choice of methods to eliminate racial discrimination is not an "either/or" one between compulsory regulation under statutes and voluntary action through education and similar methods, but that law and education both have roles to play in safeguarding the civil rights of minorities.
“It is evil that the nonviolent resister seeks to defeat, not the persons victimized by evil,” wrote Martin Luther King, Jr. “If he is opposing racial injustice, the nonviolent resister has the vision to see that the basic tension is not between races. . . . The problem is not a purely racial one, with Negroes set against whites. In the end, [the struggle for equality] is not a struggle between people at all, but a tension between justice and injustice. Nonviolent resistance is not aimed against oppressor but against oppression. Under its banner consciences, not racial groups, are enlisted.”

By so divorcing men from their actions, civil rights activists advocated an integrated society without reference to the individuals living in the society. Their goal was not just to challenge unjust laws and statutes against the rights of Negroes, but also to “seek a social order of justice permeated by love” — to change the hearts and minds of white America and, as Miller put it, “rescue the wrongdoing oppressor from his misdeeds” by enlisting the law as a regulator of morality and conduct. But while legal action was taken to correct injustices incurred by the subjection of Negroes to the will of white racists, the enforcement of those laws had the effect of subjecting those whites to the will of Negroes. Thus, the rights of racists are now restricted in order to achieve the greater good of a nonracist society.

In choosing to eliminate racism without consideration for the human source of racism — i.e., individuals and their natural right to free thought — antiracism legislation has necessarily broken the historical pattern of the American sanction and protection of individual rights. Indeed, the implementation of such legislation by enforcement programs as affirmative action has resulted in the unprecedented politicization of ethnic and racial categories. American public policy has coped with the humanness of racism not by making it insignificant in social relations but by making it more important than ever before. Glazer draws the picture of the assault by antiracism legislation on human rights thusly:

Larger and larger areas of employment came under increasingly stringent controls so that each offer of a job, each promotion, each dismissal had to be considered in the light of its effects on group ratios in employment. Inevitably, this meant the ethnic group of each individual began to affect and, in many cases, dominate consideration of whether that individual would be hired, promoted, or dismissed. In the public school systems, questions of student and teacher assignment became increasingly dominated by considerations of each individual’s ethnic group: Children and teachers of certain races and ethnic groups could be assigned to this school but not to that one. The courts and government agencies were called upon to act with ever greater vigor to assure that, in each housing development and in each community, certain proportions of residents by race would be achieved, and a new body of law and practice began to build up which would, in this field, too, require public action on the basis of an

*King, *Strike Toward Freedom*, pp. 82, 175.

*See Levy and Kramer, *The Ethnic Factor*. 
individual's race and ethnic group. In each case, it was argued, positive public action on the basis of race and ethnicity was required to overcome a previous harmful public action on the basis of race and ethnicity.\textsuperscript{6}

For the first time the federal government gives legal status to ethnic and racial categories and the wrong of racism is "corrected" by the wrong of still more racism. What has made it possible for antidiscrimination laws to become the tools by which reverse discrimination is implemented? What has enabled the quest for equal opportunity and equal justice to degenerate into legal sanction of preferential treatment? Very generally the cause lies in the changing American consensus, which subscribes to the priority of equality over freedom and individual rights, the redefinition of equality of opportunity to mean equality of condition or result, the practice of sacrificing principles to pragmatic expediency, and the reliance on government to force into existence solutions to social problems. Specifically, however, the instrument of such programs as busing, "open admissions" in colleges and universities, preferential hiring, and affirmative action marketing plans for even statistical distribution in housing is the 1964 Civil Rights Act.

Five of the act's eleven titles variously prohibit segregation or discrimination "on the ground of race, color, religion or national origin." The act could be read, writes Glazer, "as instituting into law Judge Harlan's famous dissent in Plessey v. Ferguson: 'Our Constitution is color-blind.'" In his analysis of the act's legislative history and passages from the act itself, Glazer demonstrates that the context of the law and the "clear and unambiguous intent" of Congress was "granting not group rights but individual rights." This was indeed the stated intent of the act, but, in giving government a role in banning private discrimination, it contradicts that intent and its provisions extend the administrative context to allow for subsequent affirmative action rulings and enforcement plans.\textsuperscript{7}

It does not matter that during the debate on the bill several congressmen expressed abhorrence to the idea of quotas, preferential hiring, busing, and the like, and so specified this sentiment in the provisions of the act. What cancels out their lofty intentions and nullifies the language of the provisions is the breach of property rights in the public accommodations and employment titles. It is in the antidiscrimination clauses of these titles that the act grants administrative agen-

\textsuperscript{6}Glazer, \textit{Affirmative Discrimination}, pp. 31-32. It should be noted that Glazer does not question the morality of affirmative action, only its effectiveness, its necessity, and the justice of its implementation. His criticism of preferential hiring, for instance, is not on principle but because it generally does not do anything to benefit those who need it. He writes: "For me, no consideration of principle — such as that merit should be rewarded, or that governmental programs should not discriminate on grounds of race or ethnic group — would stand in the way of a program of preferential hiring if it made some substantial progress in reducing the severe problems of the low-income black population and of the inner cities."

\textsuperscript{7}For my discussion of Titles 1 and 8 as the basis for extending the statistical-distribution approach to education and employment, see Anne Wortham, "An Open Letter to Nathan Glazer."
cies the power to discriminate in favor of some citizens at the expense of others, and thus does not grant rights but political privileges instead. It is here that it violates an individual's right to discriminate on the basis of race, color, or national origin. Granted, such nonviolent discrimination is immoral, but its immorality does not justify legislative prohibition of it, no more than does the desire to reduce discrimination justify the use of coercion to bring it about. Yet, the use of coercive legislation against persons engaging in private racial discrimination is just how the American people have chosen to cope with the humanness of racism.

II. Rights of the Discriminator

For ninety-five years, since the Declaration of Independence until the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, the United States developed under the black cloud of being a nation in search of freedom for white men while denying it to Negroes. However, eliminating slavery did not eradicate the contradiction of racial oppression existing in the land of the free. For another eighty-four years until 1954 the contradiction persisted with legal discrimination and segregation succeeding slavery as the breach of the human rights of Negro Americans. Then within a year after the March on Washington in 1963, Congress passed more legislation to protect the rights of Negroes than it had during the whole period since 1875 when the first civil rights bill was passed. With the 1966 Civil Rights Act, "the legal foundations of [white] racism in America had been destroyed," as Brooks puts it.

"Southern Segregation Falls Silently, Without Violence," reported the Columbia, South Carolina, State on July 4, 1964. But the contradiction of the nation's guarantee of civil rights for some at the expense of the human rights of all continued. (For instance, while the 1966 Civil Rights Act assured the selection of state and federal juries without regard to race, it banned racial and religious discrimination in the sale, rental, and financing of about 80 percent of all housing in the United States.) The walls of segregation and discrimination came tumbling down, but what of the segregationist and discriminator? What of their rights?

On July 2, 1964, the day Congress passed the Civil Rights Bill and two days before the 187th anniversary of the signing of the Declaration of Independence, Lester G. Maddox, owner of the Pickrick Restaurant in Atlanta, Georgia, declared his rights to a group of Negro civil rights activists who had come to test the new law: "You're not going to eat at the Pickrick today or any other time! This is my property, my business, and the Constitution guarantees me the right to operate it my way!"

*Quoted in Brooks, Walls Come Tumbling Down, p. 260.

*I have purposely chosen Lester Maddox's situation as an instance where the discriminator's rights are violated because he is so despised by so many people for his segregationist views. But segregationist or not, Lester Maddox is human too; and as such, he has human rights as do all the rest of us.
When one of the men continued to leave the car to approach the restaurant, Maddox, armed with pistol and pick handle, ordered him off his property. "Get out of here now," he said. "I have the right to protect my property and myself, and that's what I'll do."

Most twentieth century Americans have no sympathy for Maddox's position and every Supreme Court since 1964 would surely rule against his assertion of his right to property. But at that moment Lester Maddox, the dissenter, was championing a fundamental principle of human survival and human liberty and in so doing joined the ranks of the men who signed the Declaration of Independence and the Constitution of the United States. The drama of the moment — Maddox wielding gun and pick handle as the blacks approached him — was unpleasant and ugly, to be sure, and its star, a contemptible fellow to many; but none of these elements have any bearing on the fact that Maddox was justified in his disobedience. The three Negroes disagreed and sued Maddox, contending that the public accommodations clause of the Civil Rights Act required him to serve them. On July 22 a three-judge federal panel in Atlanta ordered the Pickrick Restaurant to admit Negroes within twenty days. Ruling that the restaurant was subject to the powers of Congress to regulate interstate commerce and thus bound to obey the public accommodations clause, the panel issued a temporary injunction for its integration pending a possible ruling by the United States Supreme Court on whether the public accommodations clause was constitutional on all grounds.10

On August 10 Supreme Court Justice Hugo L. Black denied Lester Maddox's motion to delay the integration of his restaurant past the August 11 deadline set by the panel in Atlanta. On December 14 the Supreme Court upheld the constitutionality of the public accommodations section and ruled simultaneously that the section barred state prosecutions of demonstrators who had tried by peaceful means to desegregate business places covered by the act. President Johnson hailed the Court's decision and declared: "There already has been encouraging and widespread compliance with the act during the five months it has been law. Now I think we all join in the hope and the resolution that this kind of reasonable and responsible acceptance of law will continue and increase."11

Not everyone felt that such acceptance of the law was reasonable or responsible. Indeed, there were responsible people who questioned the very existence of the law. In a 1963 article on racism Ayn Rand had written: "If the 'civil rights' bill is passed, it will be the worst breach of property rights in the sorry record of American history in respect to that subject."

On August 13, before the Supreme

10The panel's injunction applied also to the Heart of Atlanta Motel, the owner of which sued to stop the government from enforcing the act at his motel, maintaining that travelers ceased to be involved in interstate commerce once they entered his establishment.


Court ruled on the constitutionality of the public accommodations section, Lester Maddox announced that he was closing his restaurant. Why did he not comply with the law — allow Negroes to eat there — and keep his business open? Maddox writes: "It was simply that I was not going to knuckle under to a law that I believed went against the basic precepts of freedom as set forth in the Constitution, and so I shut down my business rather than violate a law I felt was unjust, as many were doing in the so-called civil rights movement."

To many Americans, especially the liberal press, the Pickrick became a symbol for the South’s holdout segregationists; its closing was a symbol of the triumph of Negro demands for equal rights, equal opportunity, and an integrated society. But for Lester Maddox, the Pickrick represented the business “I had painstakingly built over a period of two decades.” For him the “closed” sign he hung on the door in September 1964 was not a symbol of the triumph of civil rights but “symbolic of the door that had been closed to individual opportunity and private property rights all over this land.”

After his 1974 defeat in a bid to return to the Georgia governorship, ten years after the passage of the Civil Rights Act, Maddox reopened his Pickrick Restaurant and Negroes went through the cafeteria line just like everybody else. "If it’s something you can’t do anything about," Maddox told a reporter, "you go along with it. The battle is over." He did not say whether he meant his personal battle against integration or the battle to preserve individual rights. It is likely that to Maddox they were one and the same battle: his right to discriminate had been sacrificed to imposed integration. And in losing his battle to determine who he would allow to patronize his restaurant, he had lost a measure of his right to property, as well as a measure of his right to freedom of expression. As journalist Edith Efron puts it: "A free mind and a free market are supportive of each other and one cannot be violated without violating the other. Men who cannot think freely cannot produce freely. And men who are prohibited from free production are not free to think." Maddox’s freedom of expression had been constrained but he had not lost his right to think. "By its nature, internal thought, reason, is free, it is literally an inalienable right," writes Efron. "It does not need a First Amendment to protect it. It cannot be regulated by the State. It is totally autonomous, totally self-regulated, totally private. Indeed, there is no form of private property more absolute than the ownership of his own thoughts."

The law was imposed to regulate Lester Maddox’s behavior, but his thoughts were the same in 1974 as they had been in 1964. His restaurant was now integrated but he remained a segregationist. "I believed then, as I do now, that it was my right under the Constitution to serve whomever I chose to serve in my place of

"Ibid.
business," he writes in his autobiography. "I am a segregationist and I chose to operate my business on a segregated basis. Because of this I was called a racist, although the words are far from synonymous. A segregationist is an individual — black, white, or any other color — who has enough racial pride and racial integrity and love for his fellow human beings to want to see all races protected and preserved."  

Maddox’s observation that segregationists exist in all races is correct. His concept of segregation comes very close to the separatism once advocated by the Black Muslims. The similarity is there even though Malcolm X saw in them a distinct difference:

Every time I mentioned "separation," some of them would cry that we Muslims were standing for the same thing that white racists and demagogues stood for. I would explain the difference. "No! We reject segregation even more militantly than you say you do! We want separation, which is not the same! . . . Segregation is when your life and liberty are controlled, regulated, by someone else. To segregate means to control. Segregation is that which is forced upon inferiors by superiors. But separation is that which is done voluntarily, by two equals — for the good of both!"  

What is interesting about the Black Muslim’s concept of separatism is that apparently it does not require the force of government for implementation, as does the territorial separatism advocated by Roy Innis and the economic nationalism implemented by government-subsidized "black capitalism" schemes. This is not to say that Black Muslim separatism is at once antistatist, only that its voluntary implementation is not a statist position. This is, of course, not true for most forms of segregation practiced in the United States. The "Black Codes" of Reconstruction, Jim Crow laws, as well as the separate-but-equal doctrine sanctioned by the Supreme Court were all forms of institutionalized, coercive segregation.

Maddox claims not to advocate coercive segregation but the protection of his right to discriminate, and in this his position is like that of the Muslims who until 1976, did not allow whites to participate in their schools and businesses. The law has regarded the activities of the Muslims in a different light from those of Maddox, however. Black Muslims could demand to be served in Maddox’s restaurant and be assured of legal sanction. But Maddox would not likely receive such legal insurance were he to have demanded to patronize Muslim schools and shops. A similar double standard has operated in the area of higher education. Since 1954, one after another of the all-white universities and colleges have opened their doors to black students under the threat of punishment by federal agencies. But no law has been imposed on black students who demand that the universities provide them with all-black living quarters and cultural centers. The difference be-

14Maddox, op. cit., p. 54.
tween private segregation and voluntary separation is that while the former is outlawed, the latter is allowed as the quid pro quo for law and order. Malcolm X’s description of racial segregation as a means of control is correct, but so are coercive integration and voluntary racial separatism.

Both the white segregationists and the hard-line black separatists advocate the protection and preservation of their races and both deny being racists. But it is hard to imagine a nonracist advocating any scheme to protect and preserve the races, let alone that of segregation. One might ask: protect and preserve them from what? — the answer to which is: from each other. Why? To prevent their mixing, say the segregationists. To escape their control, say the separatists. But why is this necessary? To ensure the “purity” of that race which is superior, say the segregationists. To ensure a means of gaining power, say the separatists.

If the desire of the segregationist or the separatist to see all races protected and preserved is interpreted as the desire to prevent the biological mixing of the races, and if they are against such amalgamation and miscegenation because each believes another race mixed with his own will somehow taint his with “inferior” traits, then one would have to call them racists. Even if they are not against miscegenation where it exists but merely want to associate with people of their own race, one would still have to describe their attitude as race consciousness or racially prejudiced.

The ideas of Maddox and those of Malcolm X are clearly racist, and racism is most assuredly immoral. But was Maddox’s dissension on July 2, 1964, a matter involving his prejudiced ideology or his property rights? Should his closing of the Pickrick Restaurant be seen as the act of a die-hard segregationist, or the act of a man who would rather close his place of business than have the government or other citizens tell him how to run it? Only Maddox knows what his motives were. But whether his was an act of courage or villany, no one had the right to force him into such action.

Before the passing of the 1964 Civil Rights Act, the law protected the right of men like Maddox and Malcolm X to practice voluntary racial segregation; the same law protected the right of men like Martin Luther King, Jr. to practice voluntary racial integration. It also sanctioned their right to persuade others to follow their ideas and actions, but it did not recognize a right to force others to think and act as they did. Yet to force Maddox’s thinking and action is precisely what the Civil Rights Act provided for. At the price of his property rights, blacks were granted the privilege (not the right) to force their ideas of integration on Maddox. As already noted, political privilege cannot exist without the violation of human rights in the process. The standard used to determine whether Maddox should keep his business was not that of property rights, but the standard of political force. The question decided was not whether he could compete (successfully) with other restaurants on the segregationist terms he chose, but whether he would obey a law forcing him to integrate against his will. Of course, we will never know whether Maddox could have remained in business as a “holdout segregationist.”
Human rights to do not entertain the question of whether men should possess certain attitudes and values, but whether they are free to express those attitudes and values in a manner that does not interfere with the rights of others. A man may hate others merely because they look and act differently from him. He is wrong in his judgment but he has the right to be wrong, and that right ought to be protected by law. Objective law should not take a position one way or another on the morality of a person’s ideas; it ought to exist solely to protect his right to those ideas. Those persons hated by the discriminator may feel a lack of dignity because they are so hated; they may wish to change his attitudes, but they may neither seek legislative coercion to do so nor destroy his property in protest against his ideas. To quote Rand: “‘Racism is an evil, irrational and morally contemptible doctrine — but doctrines cannot be forbidden or prescribed by law. . . . Private racism is not a legal, but a moral issue.’” One man’s private expression of his race consciousness may conflict with the desires and preferences of others, but it does not interfere with their rights. But institutional racism necessarily entails the violation of individual rights, whether it be in the form of oppression as with public segregation ordinances or in the form of redress, as in the case of preferential hiring policies “to correct past discrimination.”

We simply cannot begin to justly cope with the humanness of racism without first accepting the fact that every human being has the right to be wrong and that no one has the right to force an individual to be good. Adolph Hitler had the right to dislike Jews and others who were not of his illusionary “Aryan race”; and the German people had a right to blame their economic and political troubles on the Jews and other minorities. But they had not the right to force these immoral and prejudiced beliefs into practical expression because the only way such ideas could be so expressed was by punishing those whom they wrongly judged, and thereby violating their rights. Hitler did not think the Jews had the right to exist, but he did not have the right to remove them from existence. So long as Hitler’s ideas remained just his own thoughts and he did not attempt to transform them into concrete reality, no one had the right to harm a hair on his head. But when he began to put his ideas into action by initiating force against the lives of those whom he hated and feared, he forfeited thereby all rights to his own life and deserved the retaliation that should have been immediately directed against him.

It may seem preposterous to suggest that so vile a man as Hitler could have the right to hate Jews. But the objectivity of human rights requires that private racism be regarded as the breach of morality that it is (and therefore not subject to legal punishment) until such time that it becomes the motivation for criminal behavior. And even then, it is the crime that should be punished, not the motive. Unfortunately, in its attempt to eliminate prejudice and discrimination, civil rights legislation has intruded on the morality of men and made a crime of their

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\[Rand, \textit{The Virtue of Selfishness}, p. 134.\]
hatred and fears. How, then, should the government respond to the ideas and noncriminal behavior of discriminators in our society? In an essay critical of the introduction into our legal code of the category of “political crimes,” Ayn Rand offers what seems to be the best approach to coping with the humanness of racism. She writes that under the American system of law the state may neither penalize nor reward an individual for his ideas. “It may not take any judicial cognizance whatever of his ideology.” It may neither punish the noncriminal who holds and propagates the most reprehensible ideas nor allow to go unpunished the criminal whose ideas are considered most edifying. Since ideas do not violate the rights of others, they cannot be called a crime and cannot serve as the justification of a crime. It is not a crime to believe that whites are biologically, intellectually, and morally superior to Negroes. However, one’s belief that all men are created equal is no justification for initiating force against a white supremacist. In a free society, the egalitarian and the racist have the same status under the law: it is between the criminal and noncriminal that the difference in status exists.

In this instance, what should be the proper relationship between citizens and the government is equally valid for private relations among citizens. For example, the regents of a private university may deplore the Marxism and racist rhetoric of Angela Davis and for that reason refuse to give her a teaching position. Miss Davis has the right to hold any views she pleases but she does not have the right to force the university to hire her. The issue here is not which doctrines are right, those of Davis or the regents, but whether each will be allowed to hold his ideas without sacrificing his judgment to that of someone else. A free society simply must allow for men to disagree, and its system of justice must extend even to those whose ideas are thought to be the most irrational and immoral.

III. Rights of the Discriminated Against

When Rosa Parks decided to sit in the front of a city bus in Montgomery, Alabama, she challenged a mode of transportation financed by her taxes as a citizen of that city. The city could not morally operate a segregated transportation system so long as it was run for the benefit of all the citizens and paid for by them. Mrs. Parks disobeyed the law in order to challenge its injustice. She said her feet were tired and she wanted to sit down, a purely personal desire, but resting her feet in the white section of a city-owned bus, as she did, turned the incident into a matter of public concern.

However, Lester Maddox’s desire to run a segregated restaurant was never a matter that should have involved the society at large. He owned the restaurant and for twenty years had poured his labor into it without public assistance. Thus, it was an extension of his person. Its purpose was to offer a service to the public, but it was owned neither by the public nor a political agent of the public — i.e.,

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the government. Thus, according to natural law and the Constitution, all members of the public and the government were prohibited from interfering with Maddox's ownership of the service he offered or the manner in which he offered it. But even though the Fifth and Fourteenth Amendments respectively prohibit the federal and state governments from depriving him of his right to property, that right has long since come to be treated as less than absolute by both government and citizens alike. It is generally thought that liberty and property are not absolute when the welfare of society is involved. And as civil rights leaders, legislators, and the Supreme Court saw it, how Lester Maddox ran his restaurant was a matter involving the welfare of society as they defined it at the time. Thus, while their definition of society's welfare required that legal protection be given to Mrs. Parks's right to sit where she wished on a public bus, that same definition required that protection be denied to Lester Maddox's right to serve whomever he chose in his privately owned restaurant.

The Parks and Maddox cases show that, having rendered human rights as arbitrary, legislators and the courts have progressively evaded the differences between public and private property. In addition they have become even bolder in applying the double standard of denying the rights of discriminators in favor of the rights of the discriminated against. But there is no way in a free society that the law can be used to the advantage of one citizen at the expense of another without infringing on the rights of both. Thus, once the government was given the power to violate the rights of men like Lester Maddox in behalf of the discriminated against, the way was also opened for men worse than Lester Maddox to use political force to violate the rights of the latter. As Maddox himself put it: "I was trying to protect not only the rights of Lester Maddox, but of every citizen, including the three men I chased off my property, for if they could violate my right of private property, then there would be nothing to prevent me from violating theirs."20

In 1964 not many people were in sympathy with Maddox's concern for a single standard of justice for discriminators and the discriminated against. But five years ago, his position was explicitly supported by the events surrounding a civil rights case in Mississippi that threatened to bankrupt the N.A.A.C.P., one of the defendants.21 The circumstances that led to the court case began in 1966 when, in order to pressure officials of Port Gibson, Mississippi, for job programs and voting rights, the N.A.A.C.P. joined other civil rights groups in a boycott of white merchants, which lasted from April 1966 to February 1967 and continued on and off during the decade that followed. In a 1976 ruling, which awarded twelve white merchants a $1.2 million settlement against the N.A.A.C.P. because of the boycott, Judge George Haynes of the Chancellery Court in Hinds County, Mississippi, called the boycott illegal because the merchants had no say in the

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20 Maddox, op. cit., p. 57.
21 The facts of the case are cited here from reports in the New York Times, August 12, October 1, 9, 21, 1976.
granting or withholding of the civil rights sought and therefore the boycott was "secondary" — a distinction between "public issue activity" (primary) and "private issue activity" (secondary).

The lawsuit was filed after a law was passed by the Mississippi legislature that sought to outlaw "conspiracies" to boycott businesses. The law had been introduced by a Port Gibson legislator who was one of the twelve complaining white merchants. Judge Haynes ruled that the N.A.A.C.P., the Mississippi Action for Progress, a federally funded antipoverty organization, and 132 persons had "wrongfully combined and colluded a civil conspiracy." He said the defendants had "illegally created a monopoly" for black businesses and "unlawfully interfered with business relations between the merchants and their customers."

The ruling said that the black objectives were "highly laudable and praise-worthy for the most part" but that the dispute had been between blacks and public officials in Clairborne County, not between blacks and white merchants. Citing Mayor Charles Evers of nearby Fayette, who was then the N.A.A.C.P. field secretary for the state, as the "unquestionable leader of this endeavor," Judge Haynes wrote, "The white merchants were conscripted into the controversy because the defendants believed them to be in a position of control or having the power to exert pressure to compel the public officials to grant their demands."

In a plea to Judge Haynes to overturn his ruling the attorney for the N.A.A.C.P. argued that the boycott had concerned "public issue activity" rather than "private issue activity" and thus had been "primary," and therefore legal, rather than "secondary." To hold that the boycott was illegal would be tantamount to abridging the right to free speech, he said. "The defendants were attempting to persuade the merchants of the town to abide by the laws of the United States."

The attorney for the merchants countered that "the fact that the boycott was designed as a means to an end and that the end might have been lawful does not make the boycott lawful." He added that because he frequently represented labor organizations in court, authorization of secondary boycotts would "give me and my clients a great weapon. But that is not the law, and I don't think it ever will be."

Having no legal expertise nor a working knowledge of the laws of the state of Mississippi, I cannot comment on the legality of the Haynes ruling, but I can question the moral implications of his statement and, therefore, whether the suit against the N.A.A.C.P. was just. (What is legal or illegal does not always square with what is just.)

The right to liberty entails the right to act, without the use of force or fraud, according to dictates of one's conscience. It also entails the requirement that one bear the consequences of his actions, which includes the judgment held of him by his fellowmen. They may be mistaken in their judgment of him but their right to liberty entails their right to think as they please (in this case, about him) and to act
accordingly, without violence unless in retaliation of violence. The N.A.A.C.P. and civil rights activists in Port Gibson apparently felt that they would need the support of the white merchants in the town in order to secure jobs and voting rights. (News reports did not say whether blacks had sought employment from the twelve merchants.) When the merchants refused to use their influence, the civil rights groups called on blacks to boycott their stores. The issue is not whether the boycott was justified or even legal, but whether those who felt discriminated against had the right to boycott the businesses of those merchants they believed were supporters of the discrimination against them.

Judge Haynes was correct in characterizing the boycott as an interference with business relations between merchants and customers, but he and the Mississippi legislature were unjust in making such activity “unlawful.” For a private economic boycott (for whatever reasons) can be deemed illegal only by abrogating the economic relationship between merchant and customer and violating the rights of both.

The relationship between merchant and customer ought to be based on the fact that each has something the other wants. Each ought to be free to produce and trade what he produces. However, in a free society the businessman may not force the customer to purchase his product and the customer may not force the businessman to sell his product. The buying and selling that results between them should be determined by each man’s choice to solicit what he needs from one who has it in exchange for a value equal to that of the goods, service, or money sought. The extent of the buyer-seller arrangement between merchant and customer is determined by the nature of their reliance on each other and the availability of the commodity or service each has to offer. Many buying and selling arrangements are secured by contracts that hold each party to an agreement that is binding over an extended period of time. But most transactions between buyer and seller are immediate, involving products that are in abundance and for small amounts of cash.

The primary interest that the merchant and customer have in each other is economic. The freedom to exercise his right to property entitles the merchant to create and otherwise acquire goods and sell them to willing buyers. The customers exercise their right to property by offering their monetary earnings or some other form of payment in exchange for the goods. Each person has the right to create, own, and dispose of his own property, not that of someone else. Accordingly, each may withhold his property from the market in general or from individual buyers or sellers and for whatever reason he may choose, whether wisely or foolishly. Provided that neither party is bound by contractual relationships with the government that dictate the nature of his participation in the market, the action taken is entirely personal and private. Thus, Judge Haynes was correct to call the black boycott a private issue activity and the N.A.A.C.P. attorney committed a disservice to his clients by insisting that theirs was a public issue activity (implying that public action should meet with greater favor from the law than private action). But the Mississippi law and Judge Haynes were unjust in outlawing the boycott on the basis of its private nature. They would have been more
justified had it been indeed "public" — i.e., action against private merchants by government agents or representatives.

I have said that the primary interest that merchant and customer have in each other is economic, but their action in the market may be motivated by anything but economic concerns. When a merchant opens his business each day he places himself in the position to be judged by customers not only on the basis of the goods and services he sells but also on the basis of his attitudes and behavior in the community. Some customers may refuse to give him their patronage simply because he does not offer the goods or services they would like to purchase. Others may withhold their business because the merchant is known to hold certain views they disapprove of. Customers have passed up certain merchants because they are members of certain racial or ethnic groups. In some cases even the sex of the merchant makes a difference to customers. The reasons for doing business or not doing business with a merchant are as varied as there are customers. But however motivated, the customer's purchasing power, which is entailed in his right to property, is inalienable, sanctioned by the Constitution, and ought to be preserved and protected by the law. The Mississippi court chose to do precisely the opposite: it called the purchasing power of the black boycotters an "interference" and punished them for it.

No law or statute is just that purports to protect civil rights at the expense of the basic human rights from which they are derived. Yet it was in the name of justice that the federal government violated the property rights of Lester Maddox, the discriminator, and the Mississippi state government violated the right of free speech of the N.A.A.C.P., the discriminated against. In providing that a person exercising his "right to demand service" at any business in a "named category" cannot be "lawfully" ejected from it or arrested for trespass, the public accommodations title of the 1964 Civil Rights Act violated the rights of merchants who chose to withhold their goods and services from customers of a given race, color, religion, or national origin. The Mississippi law prohibiting the economic boycotts violated the rights of customers who chose to withhold their patronage from merchants whom they believed were supporters of racial discrimination. As blacks had claimed the right to demand service from men like Lester Maddox, the Mississippi merchants claimed, in effect, the right to demand patronage from blacks. The judicial system that had made trespassing legal in 1964 was now making boycotting illegal in 1976. The system that punished white men for refusing to sell was now punishing black men for refusing to buy! When such injustices are suffered by both discriminators and the discriminated against in the name of equal justice for all, one has to wonder whether such solutions will contribute to the elimination of racism in America or to the reinforcement of it.

IV. The Steady State of Justice

When the Constitution abolished slavery and involuntary servitude it also made illegal the use of force to obtain service from another. A businessman who cannot
serve whom he pleases is not a businessman but a slave. The only right customers have is to request a man’s services; but they have no right to force him to provide that service. In its sanction of a man’s choice to request the services of another and in its simultaneous sanction of that person’s right to refuse the service wanted, the Constitution reflects the principle that there are no conflicts of interest between rational men, that one man’s gain is not necessarily another’s loss. The only way such an imbalance can be created in the affairs of men is when they resort to the rule of force instead of the rule of reason. In throwing its weight behind enforcing the alleged “right” to demand service the government necessarily violates the actual rights of the individual who owns that means of service. And, thus, it attempts to get around reality by claiming that the existence of property has no cause, no effect — no reason for being.

In a free society one is free to hold contradictory premises — that is, an individual may be prejudiced against others or prejudiced in favor of them and participate in an open market that makes no distinction among men except in the realm of their economic role in the community. He may express his prejudice through various acts of discrimination for or against certain individuals or groups. He is free to express his biased judgment of others; but he is not free to escape the consequences of that choice, and he is not free to force others to implement his judgment or to comply with it. As he owns his business, so too does he own his bigotry and is responsible for the consequences of holding such an attitude.

If he is a restaurateur who discriminates against Negroes, the consequence of his bigotry is that I am forbidden to eat in his restaurant. What means do I have to change this consequence? I may attempt to change the attitudes that make the consequence possible by persuading him of the irrationality, immorality, and injustice of his bigotry. If I fail to persuade him I may act to punish the consequences by affecting the economic expression of his bigotry: either by persuading his patrons to boycott the restaurant and thus cause him to lose profits, or by setting up my own restaurant (or encouraging others to do so) and force him out of the market by competition. These are the only just and voluntary actions I may take without violating his rights. As Tibor Machan puts it, “Knowing what is right does not entitle one to force others to do what is right.”

But I may take another route — the criminal action. I may act to change the consequence of his bigotry by forcing him to serve me (acting against his judgment) at the point of a gun. I may affect the economic execution of his bigotry by blackmail, by destroying the restaurant itself, or by killing him.

Or, I may seek legislative action against him that would declare his discrimination against Negroes illegal. Thus by making his ideas and behavior illegal I have used the law to force into existence the consequence I preferred (integrated restaurants) and prevented the consequence he preferred (segregated restaurants). But have I been just? Race consciousness is immoral; the expression of it in acts of prejudice and discrimination is unjust. But should we, on the basis of its immorality and injustice, make prejudice and discrimination illegal?
An answer to this question lies in Machan’s observation that the implementation of moral values by edict with equality and efficiency would be impossible because “those doing the implementing would necessarily enjoy unequal status.”

Men must be free to discover the right and the wrong, the good and the bad; but their being free is no guarantee that they will choose to be good or bad. Political freedom is necessary for the expression of man’s good, and it is just as necessary to identify the bad. Morality legislation interferes with the individual’s ability to judge what or who is good or bad, beneficial or inimical to his interests.

The issue of political freedom is not to judge the moral rightness or wrongness of sociopolitical decisions by individuals (and to assign consequential rewards or punishments to these decisions), but to determine the best means of assuring that such decisions may be made without coercive constraints from other individuals or institutional entities. Just laws do not sit in moral judgment on those decisions, but judge whether they are freely made, whether the person executing them is engaged in voluntary or compulsory activity, and whether that activity threatens the freedom of others. In other words, the concern of political liberty is not to decide what decisions men should (or should not) make within the boundaries of their own lives, but to determine that they are able to make such decisions (rightly or wrongly) in the absence of coercion and that they have the freedom to experience the consequence of those right or wrong decisions.

When morality legislation makes it illegal for a prejudiced restaurateur to follow the dictates of his conscience, it not only punishes him for his ideas and his consequential behavior at the expense of his right to private property, but by preventing the actualization of his bigotry, the law removes from reality the factual evidence men need by which to judge his character. Once he is forced to act against his biased judgment, those deplored immorality such as his and committed to fairness are no longer in a position to know whether he is a racist or not and are therefore without means to oppose him. The flow of justice is further interrupted when, finding that there is now no rational way to perceive the “intent” to discriminate, civil rights administrative agencies such as the Equal Employment Opportunity Commission (EEOC) now equate the “underrepresentation” of minorities in jobs with “exclusion” and “discrimination.” Statistics and percentages — i.e., quotas — have become the means by which discrimination is proved or disproved. Contrary to the very backbone of the American judicial system, employers are considered guilty (by omission or commission) until they prove themselves innocent of discriminatory practices.

It would be well to remember that a restaurateur or merchant owns his place of business not as a means for intimidating Negroes as such, but for the purpose of providing a livelihood for himself. And this is the ground on which he must be

\[\text{Machan, Human Rights and Human Liberties, p. 49.}\]

\[\text{Thomas Sowell, Affirmative Action Reconsidered: Was It Necessary in Academia?}\]
objectively rewarded or justly punished. That a restaurant owner is prejudiced and that this is his motive for refusing service is irrelevant in judging whether he has violated a potential customer’s rights. What is relevant is that he is the owner and may determine how his establishment should be used, who should use it, whom he should hire and fire, etc.

That he may not purchase goods and services from someone who wishes not to sell (for whatever reasons) is the only fact the customer can consider in judging whether he has been treated fairly. That he believes integrated restaurants make the best kind of restaurants and contribute to racial harmony is irrelevant. What is relevant is that he does not own the restaurant and may not impose his morality on the person who does. In a free society, the rules of ownership of an enterprise and the terms by which the enterprise is conducted are set by the owner. Patrons and other entrepreneurs who disagree with how an establishment is run are, as Rand puts it, “free to go elsewhere and seek different terms.”

There are those who argue that while this prescription may be suitable in dealing with just one discriminator, surely the application of justice must be altered when there are a thousand such merchants discriminating against all Negroes as a group. But such a proposal negates the objectivity of the standards of justice. The whole point of justice is that its principles are universal and absolute, that they must be applied to the same degree whether in relations between two people on a desert island or among the nine million inhabitants of New York City. The nature of justice and the extent to which it is applied are not determined by the number of people involved but by the laws of reality and the natural rights that all men possess.

Justice does not ask whether an action is “fair” according to conventional standards. It is, rather, the rule of conduct that repels or retaliates action inimical to the requirements of human nature (rights) and encourages action beneficial to human survival. The legal minded Romans of antiquity, whose mission it was to give laws to the world, defined justice as “the steady and abiding purpose to give every man that which is his own” — what Rand defines as “neither seeking nor granting the unearned and undeserved, neither in matter nor in spirit.” The purpose of justice, then, is to establish and maintain a steady state between the rights inherent in human nature and the implementation of those rights. As Rand points out, justice forbids “the material implementation of [rights] by other men; it includes only the freedom to earn that implementation by one’s own effort.”

Justice is the maintenance of a steady state between the facts of reality and one’s moral appraisal of his fellows, what Rand further defines as “the act of judging a man’s character and/or actions exclusively on the basis of all the factual evidence available, and of evaluating it by means of an objective moral

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*Rand, The Virtue of Selfishness, p. 97.*
That objective moral criterion must be based on a man's nature as a rational being who requires certain rights of existence and whose survival depends on his capacity to think and choose among alternative ideas and actions he judges to be in his self-interest.

Every human being owns his person, his thoughts, his actions, and their consequences. When we force consequences into existence other than those that would naturally occur as the result of a person's thought and action, we upset the balance between his identity and the laws of reality. Some consequences must be prohibited — such as those of the criminal — in order that the consequences from the implementation of rights may be manifest. We must prohibit or punish stealing, for example, as the just consequence for men who take from others what they have not earned or produced, and as a protection of men who produce and earn their means of livelihood. This is why men in a rational society establish the law — to curtail action and to punish action taken in violation of it. But not all laws are just. Laws like the public accommodations title of the 1964 Civil Rights Act, affirmative action regulations, and the Mississippi antiboycott ruling are offensive — offensive because they strike at justice and because the enforcement of them requires exempting men from the laws of reality and exempting reason from their nature, nullifying it as the requirement of their survival.

The purpose of moral (just) law is not to regulate morality, but to prevent or punish the violation of human rights. "The law may not make a man love me," said Martin Luther King, Jr., "but it can keep him from lynching me." The law may punish the violation of an individual's rights, but it has no inherent power to reform the attitudes of the violator. Yet, the expectation of the civil rights movement was and is that under the condition of being forceably brought together, men will come to love one another. No consideration is given to the rights of the individuals involved and every effort is directed toward imposing on some men the ideal of a "good society" held by others.

The desire for a "beloved community" has no value outside the context of the rights of those who are to compose such a community. The desire for a "social order of justice" has no value outside the context of justice. The goal to change the hearts and minds of men has no value outside the context of man's right to his ideas and actions. The struggle for equal opportunity has no value outside the context of man's independence. The achievement of racial integration has no value outside the context of voluntary association. The desire to cure the "disease of racism" is of no value outside the context of the lives of the men so "infected."

The end does not justify the means.

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14Rand, Introduction to Objectivist Epistemology, p. 49. See also Atlas Shrugged, pp. 1019-20.
V. **Concluding Remarks**

On August 28, 1963, amid what one writer called "a mood of quiet anger and a mood of buoyant exuberance," before a sea of over two hundred and ten thousand Americans that stretched from the Washington Monument to the Lincoln Memorial, Martin Luther King, Jr. told the world about his "dream" for his country, his fellow Negroes, and his children:

> I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident; that all men are created equal."

> I have a dream that one day on the red hills of Georgia the sons of former slaves and the sons of former slaveowners will be able to sit down together at the table of brotherhood. . . .

> I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

And he dreamed of the day when all men could join hands and sing: "Free at last! Free at last! Thank God Almighty, we are free at last!"

It was a noble dream and the millions who heard it felt ennobled by it. Said one writer: "It was no private vision, nothing esoteric, but a personalized translation of the American heritage taught to every schoolboy, forged anew in a context of the Negro experience and detailed in terms of his, Martin King's, identity as part of that experience, its legacy and destiny. . . . Right out of elementary civics, the lesson, in this context, formed an ironic exegesis of our democratic platitudes." But however noble and however deeply embedded it lies in the American expectation, the dream of brotherhood cannot be forced on men as the solution to the "humanness of racism."

Two wrongs never make a right.

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23Miller, *Martin Luther King, Jr.*, p. 166.