Affirmative Action and the Rights Rhetoric Trap

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Why can’t we reach consensus on affirmative action? The question is a bit daunting, and discussions about affirmative action always make me feel stuck. We have a crisis in persuasion, to which almost everyone responds by attempting to increase the volume or the complexity of their arguments. However, few people seem to change their minds. Rather than reargue the merits of affirmative action, I want to explore whether there is something in the nature of the arguments being made on all sides that causes us to be stuck. My conclusion is that we will remain stuck until we adopt a different strategy of persuasion, a strategy that does not depend so completely on express claims of moral and legal rights.

The Dispute Is Not “Merely” About Means

At a very simple level, the explanation of robust disagreement over affirmative action is easy: in the wake of the civil rights enlightenment of the '60s, there is broad consensus on the aspirational ideal, but disagreement over means. That ideal, stated succinctly, is that racial difference ought not mean disadvantage.

1. I mean “affirmative action” to include “quotas,” except where otherwise obvious from the context. There are several reasons, including my sense that most people lump together all remedial racial preferences, whether they favor or oppose them. I do, however, mean to distinguish “equal opportunity,” in the narrow sense that is usually intended, namely, absence of overt discrimination against minorities. I suspect that most if not all of what follows is relevant for nonracial groups that have been systematically and pervasively discriminated against and disadvantaged by individual attitudes and state practices. I do not randomly intersperse references to women, Native Americans, or Mexican-Americans, for example, because (a) it would be stylistically confusing, (b) I am not prepared in this essay to “prove” the similarities I suppose to exist across groups, and (c) I’ve thought more about the case of blacks because I am one.

2. At the conference for which this essay was initially prepared, I participated on a panel with William Bradford Reynolds, assistant attorney general for civil rights in the Reagan administration, Richard Wasserstrom, a legal philosopher noted for his scholarship supporting affirmative action, and Orlando Patterson, a noted sociologist. Speaking immediately after the diametrically opposed presentations of Wasserstrom and Reynolds, I observed that locking the two of them in a room together from now until the millennium would produce insanity before it produced agreement. Remarkably, scholarship, debate, and conferences continue.

3. I mean something distinguishable from “color-blindness,” which implies that differences should be
This is the essential racial justice goal, with affirmative action simply one means of attaining that goal. This disagreement over "mere" means can be regarded as a technical detail about which reasonable people, like-minded as to goals ex-hypothesi, can reach accommodation if only they will communicate effectively about their differing instrumental calculations.

There are three important errors in this rosy formulation. The first and most limited one is that the supposed empirical dispute about affirmative action arises to some extent because of the differing vantage points of the empiricists: black and white observers will see things differently because their perceived worlds are different. A black may sense an oppressive climate of discrimination and "otherness" in a given setting, while the white will dismiss such claims as overreactions and hypersensitivity.

The second error is the claim that the instrumental correctness of affirmative action can be resolved because it is an argument about objective "facts" rather than about subjective "values." However, facts and values are not neatly separable. There is a value dispute lurking within the empirical dispute — indeed, dominating it. The crux of the conflict has less to do with different estimates of how long it will take for race-blind hiring to produce equitable minority representation in a work force, and more to do with how urgently one wants to make progress, and one's willingness to pay the required price for that progress.

Third, and most important, racial justice is only one of several ideals which describe the kind of community we want. The defining of appropriate forms and limits to affirmative action is not merely a problem of instrumental calculations to pursue a stated goal. Those calculations require subjective, controversial choices, and the goal involves several, sometimes inconsistent goals, that require (inter- and intra-personal) subjective, conflictual accommodations.

Thus, conflict over affirmative action is not simply an empirical dispute about instrumental means to achieve some well-understood and broadly accepted end. In fact, this could not be the case, because a helpful distinction between means and ends is impossible in such a value-laden and dispute-ridden field. Moreover, the conflict is inescapably moral — expressing in terms of legal and moral rights what would otherwise be merely the willful, political preferences of this or that legislator or judge.

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1. Ignored or invisible. The difficulty with the color-blindness theme is that to many people, this means an extreme kind of assimilationism. Majority group members may well find this attractive for a variety of reasons, but minority group members may have a strong desire to preserve aspects of groupness, such as their special cultural identity. More abstractly, the reasonable fear is that color-blindness may require that I surrender or deny those parts of my person or self which have to do with my color and subgroup affiliation. This theme of tension between self-liberating and self-disregarding impulses was sounded by W.E.B. DuBois, in DUBOIS, SOULS OF BLACK FOLKS, 26th edition chap. 1 (1903). From a minority perspective, the goal is to reduce the burdens of disadvantage which now flow from different color, without giving up the felt benefits of subgroup affiliation. One must embrace unreservedly the assimilationist ideal only if one supposes some sociological law that group differences must always generate costs for the minority, rather than benefits alone. The costs and benefits of heterogeneity to the majority seem even more ambiguous. See Weinreb, The Complete Idea of Justice, 51 U. Chi. L. Rev. 752, 797, 800-02 (1984). An extreme conception of "equality" can require extreme homogeneity; but "(A) harmonious community will subscribe to principles of liberty and equality that are congruent and give a coherent shape to its members' conceptions of self."

4. There is also the matter of risk-aversion. People differ on what kinds of risks they will take in order to make "progress." Many disputes about remedies, such as thumb-on-the scale affirmative action, are disputes about risk-aversion and, therefore, underlying differences in commitment.

5. By "subjective" I mean significantly subject to dispute, based on our individual differences in preferences, values, and perceptions.
Rights-Based Arguments Are Deeply Problematic

Arguing about rights hardly offers a means of resolving the dispute. Claims concerning rights, particularly in this context, are notoriously controversial and anything but objective. Therefore, an argument that appeals to "rights," undermines most of the desired objective basis for agreement. The knock-'em-dead, objectively compelling, rights-based argument to end the conflict has not been found because it cannot exist.  

Political and legal advocates in our culture have become adept at stating positions and demands utilizing the rhetoric of rights. Not only has the rights-privilege distinction been abandoned in constitutional doctrine and eroded in political discourse, the rights-"stake" distinction is fast becoming a dead letter. This is perhaps most clear in the evolution of standing doctrine, where even Burger Court retrenchment has not disturbed the basic expansion of standing. A plaintiff is required to have a genuine stake in the outcome, and does not need to demonstrate an effect on a legally protected right. In political discourse, the point is clearer still as advocates increasingly seem to frame support for an interest group’s stake in a controversy in terms of rights.

The accelerating use of rights rhetoric in politico-legal discourse and the simultaneous devaluation of rights currency underscore important features of the dilemmas inherent in rights-based theories. Most rights are, by their nature, alienating because they erect barriers around the individual or group, ostensibly to provide protection against hostile state or individual acts. For better or worse, such barriers separate the individual or group from the community. This separation has several dimensions. A countermajoritarian right protects the minority from democratic consensus by placing the group outside the reach of that consensus, and perhaps outside the community’s processes of consensus-formation or reform. In other words, to the extent that a right trumps the community’s democratic processes, those processes and the sense of community they would create are impaired. We usually consider this desirable on net, but it has its costs.


7. The three core elements of the standing requirement articulated in Article III of the U.S. Constitution now appear to be: the plaintiff has suffered some injury (perhaps negligible), that has been caused by the defendant (perhaps only remotely), which the court has remedial powers to redress. Further prudential standing requirements include plaintiff’s injury be peculiar rather than shared in common with the public at large, the interests sought to be protected are within the zone of interests intended for protection under the statute, and the interests are those of the plaintiff rather than of some third party. See generally Chayes, Foreword: Public Law Litigation and the Burger Court, 96 HARV. L. REV. 4, 22-23 (1982).

8. For example, farmers have an asserted right to price supports; present and even prospective homeowners have a right to the mortgage interest deduction on their federal tax returns; commercial and recreational interests have asserted rights to exploit fish, wildlife, and other natural resources without colorable legal claims to do so. These conflicts seem most pointed when Native American uses are given preferential status because of treaty provisions; the Anglos are offended and embittered. The comparisons with affirmative action are striking.

9. See, e.g., Unger, The Critical Legal Studies Movement, 96 HARV. L. REV. 563, 597 (1983): (O)ur dominant conception of right imagines the right as a zone of discretion of the rightholder, a zone whose boundaries are more or less rigidly fixed at the time of the initial definition of the right. The right is a loaded gun that the rightholder may shoot at will in his corner of town. Outside that corner the other licensed gunmen may shoot him down. But the give-and-take of communal life and its characteristic concern for the actual effect of any decision upon the other person are incompatible with this view of right and therefore, if this is the only possible view, with any regime of rights.

See also CHARLES FRIED, AN ANATOMY OF VALUES 203-06 (Cambridge MA: Harvard University Press, 1976) (going so far as to define the ordinarily communal notion of equality in alienated terms of self-protection).
Relatedly, by asserting the right to stand apart from the majority or consensus view, the holder of a countermajoritarian right is boycotting the continuing, dialectical process of community formation and self-definition of which democratic processes are a part. Thus, while the familiar and positive picture of rights is that they provide an escape valve for those occasions when democratic processes go awry, the flip side of the coin is that they distort structures of inclusion, participation, and accountability. Members of a community are the same in that each enjoys a set of rights, but any individual asserting a right becomes different and alien by insisting on exemption from some collective purpose or judgment.

Another Face of the Same Problem: Resorting to Analyses of Fault and Causation

If we are properly skeptical about the power of rights-based analyses to dissolve value-laden conflict that surrounds affirmative action, what other modes of analysis are available? The common law framework for liability which stresses individual fault and causation is closely related to, if not derived from, rights-based theories. The common law generally presumes that everyone has a "right" not to be a "victim" of private or state action unless one has been at "fault." An extreme version of this can be found in the writing of Charles Fried, whose essential position is that in order to protect liberty we must impose liability only in cases in which the defendant intended the act, because the voluntariness implicit in intention provides the moral justification for invading the personal sphere. For Fried, liability must proceed from moral choice, and moral choice requires intention, not merely volition. While there are of course exceptions within the common law, those exceptions clearly have the burden of justification.

This common law framework for liability has precisely the same difficulties as rights rhetoric. In terms of subjectivity, it is clear that in negligence a determination of the relevant standard of care and the permissible length of causal chains is a judgment which cannot be termed objective in any useful way. No rigid application of preformed neutral rules will provide easy answers to interesting cases. Second, when we weigh alienation against community interests, the emphasis on fault and causation as prerequisites for loss-shifting is a recognition that each of us has a right not to have costs imposed on us if we had nothing to do with the injury. However, a prerequisite for personal responsibility conflicts with the alternative personal duty to help discharge responsibilities owed by the community, where obligations are defined by community aspirations rather than by personal autonomy. Thus, the required proof of personal fault and causation simultaneously protects the defendant from state-enforced loss-shifting and shields him from

10. CHARLES FRIED, RIGHT AND WRONG, chap. 2 (Cambridge, MA: Harvard University Press, 1976). This is, in a sense, Fried’s attempt to avoid the slippery slope and subjective, or political, character of liability rules based on causation or foreseeability. Its failings as an overarching theory, in terms of rights and liability schemes, are that it forces a destructively alienating emphasis on the individual in opposition to the community, and it actually fails to escape subjectivity. The latter point is clear simply from asking what, in Fried’s scheme, would be the method for defining or characterizing the “act” which Fried would make a prerequisite to and limitation on liability. And what, if not some version of reasonableness, will constitute evidence and proof of intent? I can imagine no solution to these definitional issues that avoids the problem of policy- and politics-ridden subjectivity in drawing lines.

11. Common law exceptions to fault-based liability include the doctrines of vicarious liability (blameless employer is liable for the negligence of employee); and strict liability for trespassing animals and abnormally dangerous conditions, substances, or activities (one who brings onto his land a non-natural substance “likely to do mischief” is liable for damages if the substance escapes, regardless of the absence or presence of fault). See generally, PROSSER & KEETON HORNBOOK, 534 (Minneapolis: West Publishing, 5th ed. 1994). Even for these exceptions, however, there is a nexus or attenuated link of causation.
responsibility for the problem of the needy plaintiff-citizen. Again, a barrier is created between the individual and the community.

There is another connection between the rights strategy and the fault-causation strategy, but this time on the victim side. To the extent that rights are conceived as protective devices for individuals against others and the community (acting through the state), it has been argued that rights belong to individuals rather than to groups. "Groups do not have rights," is a common response to minority demands for affirmative action or other remedies. The individualist conception of rights thus serves to divide and alienate members of the minority group one from another. An alternative, group-based conception of rights would have the opposite effect, emphasizing the shared social experience of the group. In, the affirmative action context, one might focus on the social condition and opportunities of the group, rather than searching for evidence that individual would-be beneficiaries of affirmative action were discriminated against by an employer or disadvantaged through illegal acts of nondefendants.12

The claim that justice and morality demand that the black worker, recently hired in a program to reverse decades of black exclusion, should be protected from layoff, to the detriment of more senior white workers, has some force if and when it evokes a certain aspiration for society.13 In that aspiration, lingering effects of past discrimination are finally eliminated, and blacks are free to achieve without the myriad handicaps of historical deprivations and contemporary prejudgments.14 Although we have the ability to identify opposing rights of black and white workers, this moral vision is not fruitfully expressed in terms of rights because of our inability to order those competing claims convincingly.15 The reciprocal checkmating is inescapable hence, a draw; but, neither side will abandon the game.

The Ontology of Victims

Perhaps the favorite argument these days is that many discrimination remedies, especially quotas, create a new class of victims, victimized because they happen

12. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW chap. 4 (Cambridge MA: Harvard University Press, 1980). John Ely has used the phrase "virtual representation" in another context to assess the reasonableness of indirect political representation and participation as legitimate democratic devices. In the racial context, the phrase might be "virtual victimization."

13. A digression seems in order. To a great extent various social welfare interventions of governments can be seen as struggles to throw off the yoke of rights and personal fault analysis in preference for collective choice and community self-realization. Odd testimony for this proposition is the extreme libertarian objection to such government actions: the communal goal of, say, redistribution is an infringement of an autonomous, alienated conception of liberty. Suffice it to say that arguments for redistribution from "haves" to "have nots" are more easily made if the "haves" do not have legitimated claims of faultless innocence and a consequent "right" to be left alone. In other words, however much redistributive measures, including racial justice, may be advanced by the rhetoric of rights (a voting right, a fair housing right) or fault/causation (disadvantage, reparations), these rhetorical strategies at the same time create costs and limits to full realization of the redistributive goal—costs and limits which have political, doctrinal and perhaps moral significance.

14. See Firefights Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2586 (1984) (majority opinion by Justice White): "...Title VII protects bona fide seniority systems, and it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern or practice suit such as this." See also, Stotts v. Memphis Fire Dept., 679 F.2d 541 (6th Cir. 1982) (decision below).

15. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, rev. ed. (Cambridge MA: Harvard University Press, 1977), chap. 9 (reverse discrimination). Dworkin's effort to parse the claims of discrimination and reverse discrimination based on a difference between a right to equal treatment and a right to be treated as equals is powerful only if one is already skeptical about the reverse discrimination claim. Like all rights-based arguments for affirmative action, it has something of the quality of preaching to the converted. See also Brest, The Supreme Court, 1975 Term — Foreword: In defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 42-43 (1976); Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. CHI. L. REV. 723 (1974).
to be white. It is a clever attack because Americans usually love victims, and our legal system tries to favor them with relief. Courts, however, consistently reject such sweeping logic. Chief Justice Burger, never accused of extremism in these matters, has written that “a 'sharing of the burden' by innocent parties” is permissible if the remedy is carefully tailored.\textsuperscript{16} That view is sensible because virtually every form of collective action entails some elements of sacrifice from many. Usually the sacrifice is by the less politically powerful, but sometimes a principle or a law forces the majority to sacrifice in aid of the minority.

Public policy decisions almost always benefit some people and hurt others. When the new highway is built over there instead of over here, a few people get financial compensation for condemnation of their property as required by the Fifth Amendment to the Constitution. However, people injured by the traffic, the noise, or the fact that another neighborhood gets the commercial benefits just have to bear the loss.\textsuperscript{17} It all reflects the overhead of living in a community and engaging in collective activity.

In this context of public policy choices that burden certain individuals or groups, the moral content of “victim” is quite different from the criminal model that comes most readily to mind, and different even from the tort context, dominated as tort is by the concepts of fault, duty, and privilege.

We can imagine several ways of analyzing the assignment of social burdens. The first approach,\textit{ culpable causation}, emphasizes that the state should let a loss lie where it falls unless there is a specific defendant at fault in the sense of having caused the injury. In the affirmative action area, the victim of reverse discrimination will argue that he is not at fault. He hasn’t done anything, so why impose costs on him?\textsuperscript{18} If background events far beyond this white person’s control, including past events, have disadvantaged the black applicant, the state should let the consequential losses lie. The black should be required to find a culpable, discriminating defendant to bear the costs of any remedy. But the disadvantaged black might well ask why this should be so. Is the disadvantaged, faultless white a victim of black aspirations, or is he simply finding himself on the expensive side of a proposition about redistribution because both the disadvantaged black and the innocent white are dealing with a problem bigger than all of us?

A second approach might be labeled one of\textit{ collective correction}, we emphasize some collective responsibility to address dangers and injuries. This may be a collective expression that we are all in this together and costs of corrective action are to be broadly distributed rather than heaped on the unlucky (innocent). It is an acceptance of responsibility for healing the damage. There is also the possibility of responsibility for the injury itself, in the sense of blame. But the two are distinguishable. Accepting responsibility for healing need not entail accepting blame and the associated moral judgment; conversely, accepting blame would definitely suggest some moral obligation to help heal a collective version of the culpable causation framework, as in arguments for reparations.\textsuperscript{19}

Still a third approach (some might view it as a pragmatic advance on the first two) is\textit{ interest accommodation}. Rather than the winner-take-all vision of moral calculation, rights-based litigation, or raw majority power, the interest accommodation

\textsuperscript{16} Fullilove v. Klutznick, 448 U.S. 448, 484 (1980).
\textsuperscript{17} Here are additional situations to consider. Have your taxes been raised to finance some government program you oppose or that doesn’t help you except in the most remote sense (a new strategic bomber, welfare benefits, dairy price supports)? Consider the fairness when you pay insurance premiums but never have occasion to file a claim. They both demonstrate the inevitable loss-shifting that occurs in a community.
\textsuperscript{18} Compare Charles Fried’s argument that liability should attach only for the intended consequences of a moral actor’s choices. \textit{Supra} note 10.
vision would emphasize the search for common ground, community, and compromise. Perhaps black workers and white workers can each give a little, rather than insisting that one side has all the entitlement marbles and the other side must bear all the costs. For example, in the situation where layoffs of last-hired workers threaten to obliterate gains from affirmative action, some commentators have suggested job-sharing or wage reduction schemes. This is a familiar model of pluralist politics, rather than a model of moral calculus. As such, its results seem contingent, indeterminate, and subjective. It is not a conventional legal approach, because it lacks the trappings of Rule of Law “objectivity.” This subjective, non-legal character is troubling to us. Interest accommodation is attractive, however, because it offers an honest characterization of the judgments and tasks implicit in the culpable causation and collective correction frameworks. This honesty has its advantages, but also its costs. One cost is legitimacy, if, for example, the parties to the dispute have it in their minds that reified, determinable “rights” are at stake. Accommodation does not square with the objective demands of justice, yet in truth the search for objectivity, as in culpable causation, offers only illusory certainty.

The Collectivist Break with Private Law Categories

If affirmative action and remedies for racial injustice are approached with an emphasis on collective arguments distinct from familiar patterns in private law, new possibilities might arise. Before the Stotts v. Memphis decision by the Supreme Court, federal Courts of Appeals in the First and Sixth Circuits had ruled that seniority rules of last-hired, first-fired could be modified at the expense of white workers in a situation of threatened layoffs in order to preserve some of the recent minority employment gains brought about by court-approved affirmative action plans. In those opinions, there are suggestions that white workers benefited from the employer’s earlier discrimination, therefore, the social costs must be borne by white workers in the struggle to end racial injustice. There is, of course, timidity in these assertions. But the attractiveness of embracing a framework unlike the personal rights/culpable causation approach of private law is noteworthy, even though it was ultimately rejected by the Supreme Court in Stotts. I believe the attractiveness is rooted in a conception of antidiscrimination policy as a problem of understanding and structuring social categories, not private rights, and therefore a matter more appropriate for “collectivist” modes of analysis. Except for a few academics, it is customary to ignore the theoretical conceptions of property, contract, and tort as matters of social category and culture. Instead, these are too often analyzed as legal attributes or claims tied to the individual, rather than matters contingent on social organization or policy. Seeing antidiscrimination as part of a category of discourse different from private law enables the court to reach for a different calculus of remedies.

The question is whether the collectivist kinds of judgments, as in my paradigms of collective correction and interest accommodation, are “appropriate” for judges, legislatures or administrative agencies established by legislatures. The conventional view is that this concern has to do with a judicial role as defined by feasibility or institutional competence. Institutional competence (usually unsupported by genuine comparative empirical work) is boot-strapped to arguments using the form of separation of powers “principles.” Nevertheless, the core instinct is that judges are not as good at making the kinds of judgments implied in the more collectivist schemes. However, the anxiety about the kind of doctrinal restructuring I have

sketched has more to do with modes of permissible reasoning than with demonstrated institutional competence.

The rhetoric of causation, rights and duties is termed judge-like; the rhetoric of pluralist accommodation is not consistent with objectivity and the Rule of Law, and is therefore the province of the political branches. Ultimately, the allocation of dispute resolution and rule formulation to courts and legislatures respectively is less dependent on the nature of the problem or the feasibility of resolving it with judges or legislators, and more a matter of the mode of analysis we perceive to be entailed. Yet, if one sees that these modes of analysis (politics, Rule-of-Law fairness and instrumental efficiency) are inextricably linked and impossible to describe in isolated purity, then the sharp assignment of each mode of analysis to its institutional pigeonhole appears wrong-headed.

Forms of Argument about Quotas

We should put aside the wishful thought that the disagreement over affirmative action is based on mere differences in empirical judgments about the instrumental need for racial preferences. Furthermore, we should put aside the naive view that a proper understanding of "rights" as now captured in legal doctrine (or plausibly accommodated by it) will solve the problem. This is no modest task, politically or intellectually, because it requires that tomorrow we rethink the great many familiar notions to which I have already referred, such as the pretense of shared definitions of racial justice, or reliance on fault-based liability, and try to come up with an alternative way of reasoning and persuading. To what extent do our current ways of debating affirmative action recapitulate the problematic and unresolvable divisiveness inherent in these concepts I would have us put aside?

Consider these general lines of argument — arguments that find their way into both legal analysis and political discourse:

- Proponents of affirmative action are concerned with results and substance; opponents with opportunity and procedure.
- Proponents stress the public role of the state and the social importance of group identity and rights; opponents stress autonomous, private spheres of action, and individual identity and rights.
- A special variation on the preceding argument: proponents emphasize welfare and reparations; opponents emphasize fault and injury.

With the underlying dispute drawn along these lines, it is no wonder that consensus is elusive. How can the dispute be resolved if the contenders understand the problem as one of choice between equally incoherent alternatives? The disagreement must be understood in different terms. To explore why this is so, let us consider the three broad forms of rhetoric seriatum.

Opportunity versus Results; Procedure versus Substance

Opponents of quotas are said to be committed to equal opportunity, while proponents are concerned with equal results. This disagreement has the trappings of a dispute between those who want to make sure that the foot race is "fair," and those who pay attention to the winners and losers. One group has an eye, it seems, on the process rather than the outcome: they want to make sure that the contest is not fixed, and that a facially neutral criterion, "fleetsness," controls the result. The alternative is to put aside the difficult search for unbiased process and neutral

21. This is an extension of an analogy used by President Lyndon Johnson in his historic commencement address at Howard University in 1965. See "JOHNSON PLEDGES TO HELP NEGROES TO FULL EQUALITY," New York Times June 5, 1965, 1:5 (Tom Wicker): "You do not take a man, who for years, has been
rules, and examine instead the distribution of winners and losers. Having embraced the unavoidable problem of subjective choice, you may decide it’s the wrong game.

It is now fairly common for law teachers to demonstrate to students that they should be especially wary of doctrinal arguments based on supposed neat distinctions between substance and procedure. In most circumstances, something that seemed procedural can be recast as substantive, and vice versa. At the very least, any problem that at first glance appears to be quite largely the one can, on close inspection, be seen to contain important elements of the other. Thus, the seemingly "procedural" notion of equal opportunity has "substantive" content of enormous significance: opportunities available to different individuals or groups must be compared, and a value-laden decision must be made as to what constitutes "equality." This entails deciding which differences to ignore, and which to count. Grounding this dispute on the opportunity-results distinction has the same conceptual and practical problems as the procedure-substance distinction itself: both sets of distinctions are problematic whenever things get interesting.

A truer explanation of the dispute lies in a conflict about whether the measure of "equal" opportunity ought to reflect the meaningful disadvantages worked by the lingering poisons of slavery.

A case in point is the large body of employment discrimination law that has grown up around Title VII of the 1964 Civil Rights Act, as interpreted by the Supreme Court in the leading case of Griggs v. Duke Power Co. For our purposes, the key insight in that large body of case law is that employment tests and qualifications that are statistically shown to have a racially disparate impact must be presumed to constitute proof of employment discrimination even though they are facially neutral. The employer must then rebut the presumption of discrimination with proof that the test or qualification is job-related. In this genre of employment discrimination suit, therefore, it is not sufficient for a defendant to say or even prove "I am not a racist," where "racist" means, in the narrow sense, a racial supremacist. Title VII and Griggs represent a decision that facially neutral criteria that have a disparate impact because of lingering effects of past societal discrimination, even without proof of present intentional racism, will be deemed discriminatory. As such, this aspect of antidiscrimination law collapses the distinction between process (the facially neutral employment criterion) and substance (the racially disparate effect). It is, therefore, controversial among those who would oppose effects tests by denying the relatedness of procedure and substance.

Private versus Public; Individual versus Group

Another characterization of the affirmative action dispute is that opponents believe a sphere of private autonomy must be preserved and protected against encroachments by the state. Private interests and values should be subordinated to public will only under extraordinary circumstances. Proponents of quotas, on the

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23. This is for suits brought on a disparate impact theory. For suits based on a theory of disparate treatment, the plaintiff must show injury as a result of intentional discrimination. A major consequence of bringing the suit under the disparate treatment theory is that plaintiffs who prove personal injury may recover personal damages and, in some circumstances, compensatory seniority. See generally sources cited supra note 22.
other hand, are ready to displace the primacy of individual autonomy with emphases on group identity and government coercion.

This argument, distinguishing public and private, is coherent only in the extreme form of libertarianism, if then. Once we admit the possibility of collective action to pursue social welfare goals, we cannot help but blur the attempted definitions of individual and community spheres. When the state acts to advance or protect the interests of individual X, but must do so at the expense of individual Y, the latter may perceive the action as an incursion on his or her autonomy. But X’s perspective is quite different. Whose view is correct? Neither. The public-private distinction is of little use in answering the question; the issue is one of power and fairness, and it cannot be addressed with absolute rules such as radical individual autonomy. We gave that up long ago when we came into the cave together to escape saber-toothed tigers and the cold.

On the other hand, we did not surrender everything to the state. The opposite extreme view, that the public sphere absorbs the private, is no more tenable than radical individual autonomy. If we must choose to side with X or Y, and we sensibly refuse to embrace extreme views of the citizen’s life, then we must argue about the messy, bloody dispute at hand. The context is almost everything.

Thus, the civil rights dispute cannot profitably or honestly be lifted to the plane of dispute about individual and state, despite recurrence of that tension in countless other areas of the law, or perhaps because of that recurring and undissoluble antinomy. The typical opponents of aggressive affirmative action, are concerned not with the possibility or appropriateness of government intervention in some general, theoretical case: they don’t mind tort, bankruptcy proceedings, highway construction, or reasonable environmental protection. Their problem is with the moral and social case for intervention on behalf of minorities. The problem is not individual versus state. It’s black versus white.

**Fault versus Welfare; Injury versus Reparations**

Quota opponents want to base legal and social policy on notions of individual rights and wrongs, while proponents are willing to press claims based on supposed group interests. Thus the black person benefits from the quota by virtue of being black, rather than by virtue of some individualized characteristic. Likewise, the white worker or job applicant who is disadvantaged by an affirmative action program, perhaps only remotely, has been penalized without the familiar demonstrations of personalized fault and proximate causation which inform so much of our legal order.

Here, too, it is easier to characterize the disagreement than to make sense of it, because line-drawing problems abound and implicate deeper disagreements. Regarding the injury-fault inquiry, it is not an overreaching of moral analysis to argue that descendants of slaves are currently burdened by a legacy of disproportionate poverty, lingering prejudice, and all their incidents. Whatever contributory responsibility an individual black person may have to his or her own condition, a very substantial residuum is rooted in the outrages of enslavement, Jim Crow, and all the rest. One’s life chances are still strongly affected by one’s skin color. Surely that is injury enough. The culpable fault of the individual white person confronted with affirmative action is in some respects the flip side of the coin. Is their’s an entitlement to the undisturbed enjoyment of the fruits of past injustice, or can that enjoyment be taxed ever so slightly to destroy the legacy?

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25. See infra.
As I have suggested, this decision is not solely a matter of inquiry into the rights of the individual. It involves a consideration of the individual's responsibilities as a member of a community. The disagreement is both empirical and value-based. Does the significance of the slavery residuum rise to a level deserving political and legal attention? Does the white "victim" possess a precious autonomy that should immunize him or her from the demands of a community aspiration, in this case racial? Such questions demand moral choices, not logic chopping about injury, fault or causation.

Rhetorical Styles — Summation

That these axes of debate track the three conceptual puzzles I explored earlier. The rhetorical dispute of opportunity versus results is the unworkable contrast between instrumental means and racial justice ends. The conflict between the regime of private autonomy plus fault-based liability versus the regime of communalism plus welfare is the stalemate of rights-talk.

Again, imagine instead an emphasis on collective historical correction for wrongs suffered by blacks, wrongs reflected in and implemented by the state, not just by certain old or dead individuals. This alternative conception of fairness proceeds from a conviction that there is a collective responsibility to repair injuries inflicted by the collective, quite apart from pinning blame on particular people. In other words, society has a duty to provide a remedy. For these purposes, privity, or connectedness substantial enough to trigger liability, flows from community.

Several years ago in his detailed analysis of reparations, Professor Borris Bittker of Yale Law School suggested that the appropriate solution to these problems is a public fund to compensate victims.26 However, political society is democratically controlled not by victims, but by perpetrators and beneficiaries of perpetrators. The majority declines to establish Bittker's public fund, yet recognizes, by statute, legal causes of action for discrimination. No one is before the courts to bear the burden of remedy except the individual defendants and associated third parties, such as white workers. Now what? Within the framework of collective historical correction it is natural to argue that such defendants and their associates have a social-contract obligation to bear some of the costs.

Finally, as a purely descriptive matter, society as a whole is not approaching affirmative action and quotas within either the culpable causation or collective correction frameworks. There is no collective moral judgment being made, only a series of private ones. (Could it be otherwise?) The practical process is one of rights accommodation, which graciously recognizes many interests, including those of the black victims, the whites enjoying the status quo, and the blacks and whites who hope to enjoy the status quo. This process seeks to strike compromises which will be "fair" because they are "political." Assuming the particular group is reasonable, the remedy will not be too offensive. In fact, the range of achievable remedies will change over time, as attitudes of the various groups evolve to reflect changing norms. Thus, school desegregation remedies, which in 1955 might have seemed far too intrusive to be politically supportable, were by 1975 entered into voluntarily. By 1985, the Justice Department was trying, with little success, to reopen and dismantle those remedies.27

26. See Bittker, supra note 19, at 14.

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Attempting Persuasion without Rights Rhetoric: Rhetorical Persuasion versus Experiential Conversion

I am not arguing that rights are unimportant. Even in their bloodless positivist form, they are an undeniable component of justice and an indispensable tool of advocacy.28 Instead, I have tried to show how and why rights rhetoric is necessarily an unreliable strategy of persuasion, specifically in the affirmative action debate, and especially now. But what alternative or additional strategies are available?

My point of departure is a loose analogy to the religious concept of conversion. When and how does a person decide to embrace a religion like fundamentalist Christianity, or a cause like nuclear disarmament? I once asked a cardinal of the Catholic Church why he was so confident that racially motivated violence and intolerance could be overcome in certain communities. He said, “Because I believe in the possibility of conversion.” When I asked why he is so confident in that belief, he replied, “Because Christ has risen.” Charitably, he allowed me to press him for an answer that might be more reassuring to those lacking his religious faith. He continued by voicing confidence in human nature.

What he may have had in mind is a collection of things: our search for a stable civil community; our inquiring and flexible natures; and, growing out of those two, our human ability to adapt our conceptions of community and self over time in reaction to experiences and reflection.

The kind of conversion I have in mind cannot plausibly be accounted for in terms of the power of rational argument that tips the balance and makes someone understand the “Word of God.” It will not be some particularly well-crafted argument about rights that finally persuades the apartheid supporter in South Africa that his or her society is diseased. There may be political, economic, or military developments that coerce acceptance of a new moral order. However, whether those are sought out or thrust upon him, the actual conversion of the moral universe of that South African will come about through transformative experiences. Of course, those experiences may well include rational arguments, among them rights-based arguments. But the power will be from a collection of such experiences, because rights rhetoric alone will have difficulty doing anything more than legitimating what is already that person’s moral reality.

The integrationist tenet about the withering away of racial injustice can be stated consistently with my theme here. Rubbing shoulders in classrooms, in workplaces, and in social settings will add the decisive experiential element to the quest for racial equality that an argument simply about blacks’ right to be equal cannot have. Rather than an argument about rights, the rubbing of shoulders will provide an experience proving equality. This, at least, is the integrationists’ hope.29 Rights rhetoric, in a sense, codifies this tenet. It does not inspire it.

The civil rights movement in the United States is also suggestive. The moral transformation brought about in the two decades following Brown30 is one of the more remarkable accomplishments in American history. Racial discrimination passed from the status of entrenched state policy to the target of nearly universal moral condemnation. Was it rights rhetoric that converted millions of Americans, or was it experience in combination with that rhetoric? The power of those television images was enormous, the growling dogs, fire hoses, and “Bull” Connor; the dignity of Martin Luther King, Jr.; and the focus of President Kennedy and other white

28. See, e.g., Weinreb supra note 3, at 2; Dworkin, supra note 15, at 13 (justice requires rights, with equality the most fundamental among them).
29. The conditions of integration can obviously be negative, too. Prisons are a good example. See also Murray, Affirmative Racism, New Republic, Dec. 31, 1984, 18-23.
leaders on inequalities ranging from child mortality to retirement income. My contention is that these experiences had at least as much to do with the process of conversion as did rights rhetoric. Experiences and images led people to reimagine the kind of community they wanted. \(^3^1\) That community did not include ugly racism and innocent children condemned to dispiriting disadvantage.

To be more precise, the conversion may involve reimaging both the membership of the community and the terms of social relations within the community. White tolerance of racial injustice and inequality will continue so long as blacks are the "others," and social relations are strictly stratified. Law and litigation may be only a codification or reification of socially transformative shifts in the vision of community held by elites in the judiciary, the legislature, or the media. That process of reification in turn reinforces the transformative vision and propels it beyond the intellectual and social elites.

This is, of course, only one possibility. There is no fixed relationship between the legitimating and transformative functions of law. It depends on the moment, the problem, the other social forces, and even the individuals on hand. Whatever one's view of the past importance of rights rhetoric in either motivating or merely codifying social transformation, as a theoretical and practical matter today, the strategically "correct" role for rights rhetoric is up for grabs. It may well be a trap, keeping us from persuading each other to reach a new consensus.

Self-Conscious Strategies for Creating Community

If this notion of conversion and moral development generated through experiences is a plausible one, what are its implications for strategies of persuasion? Short of a blueprint, some possibilities are suggested by postliberal writing. These have attempted to emphasize communal values and goals in a framework that acknowledges and seeks to avoid the alienated conception of rights, without adopting the search for objectivity as its principal mission. Emphasizing the connectedness of people (rather than a notion of autonomous liberty) is consistent with my previous arguments that conversion is most likely to come about as a part of reimagining community membership and relations. A sense of connectedness, therefore, must be the goal of the experiences we self-consciously construct in order to accomplish the transformative conversion. It is the integrationist ethic writ large and extended, but without any implication of a self-denying assimilation. \(^3^2\) It is a strategy that, to extend the cardinal's thought, both depends upon and nurtures the human spirit in its qualities of curiosity, bonding, and caring.

What kinds of practices would be consistent with this, given the objective of moving toward consensus on affirmative action? To begin, there must be more shared experiences with the "other." For example, black and white members of Congress on opposite sides of the issue should spend time with each other's constituents — richly textured and intimate time, not stilted panel discussions. Black and white workers facing together the conflict between affirmative action and layoffs should try to understand each other's experiences and perspectives, rather than only...
drawing the battle lines and arguing about “rights.” More shared experiences might promote understanding and thereby create the possibility for different answers to the very real problems. The same kind of approach would be appropriate for people in almost every context: newspaper editorial boards, school administrators, parents of children in integrated school systems, police officers. You can’t feel a sense of community with someone you don’t know. The point is not that exposure will make us see that our similarities are more significant than our differences, which may not even be true in particular circumstances. Exposure will, however, give us a better understanding of our differences and promote acceptance or accommodation of them.

This strategy of constructing transformative experiences may require a fancy theory of psychodynamics to seem academically plausible. Viewed more concretely, however, this is a program of concerted, grass roots politics, not a call for multiracial encounter groups. Politics usually flows from a sense of community, but it can also be a force in creating a community.

In another vein, there has been a persistent “packaging” problem for the civil rights and antipoverty movements in the last fifteen years. The message has lost the attention of the American people, while other messages have come to the fore in mass organizing or political agendas including the environment, arms production, capital formation, tax reduction, “Christian” education, “basic” education, and abortion.

Crudely put, Madison Avenue skills are an important part of persuasion. Yet the civil rights movement has within its cadres of experts far more people who understand the problems of proving discriminatory intent under the fourteenth Amendment to the Constitution than it has people who understand how to organize a media campaign to focus attention on black unemployment, voter registration, or victimization by crime. Thankfully, we have no figures who are as widely visible, scarily legitimate, and therefore morally compelling as Sheriff “Bull” Connor with his dogs, or the White Citizens’ Councils. What images and experiences will generate the next stage of America’s moral conversion to a better ideal of racial justice?

We could, I believe, profitably invest some time in considering precisely what kind of experiences, and for whom, will best promote conversion or persuasion. It is certainly not a conventional task for lawyers, however broadly one defines advocacy.

Indeed, lawyers are probably part of the problem. The conventional wisdom, at least among lawyers, is that a great deal of the progress in civil rights has been the result of persuasive arguments about rights. One implication of the argument in this essay, however, is that such rights-based arguments may in the past have been less the persuasive engines of enlightened consensus than merely the language to express a consensus emerging as a result of other means of persuasion and forces of social transformation. As for the future, the role of rights rhetoric is even more problematic.

Without any alternative strategy for argument, and without any other language for expressing means and goals, participants in the civil rights debate will remain stuck. For now, however, the most that seems possible is a heightened awareness of the limits of rights analysis.

It is appropriate for me to conclude on a note of pragmatism, because that hymn has been our reliable bridge from Sabbath inspiration to daily action. The victors in Brown v. Board of Education knew the Constitution did not require that change occur overnight. When the Supreme Court announced the ill-starred “with all deliberate speed” formula, it was implicitly attempting to reconcile the civil rights of

33. 349 U.S. 294, 301 (1955) (remedial decree).

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blacks with an interest in the Court’s legitimacy, if not an interest in the very stability of society. Now the opponents of effective affirmative action, those who would settle for aspirational affirmative action, argue that white rights are at stake and must not be compromised in order to advance the interests of minorities. This is a straightforward issue, and your position depends on which you care about more: the moral and worldly urgency of black progress, or the moral and other consequences of deviating from the newly embraced principle of a color-blind society. That principle is a convenient invention, and an oppressively ahistorical one. It is both two hundred years late and two generations early.

Of course, some people made up their minds on this question quite awhile ago and refuse to revisit the hard issues. For them, I suppose, low gear is deliberate enough speed even some thirty years after Brown.

Justice Harry Blackmun said it well in his opinion in the Bakke case: “In order to get beyond racism we must first take account of race... (a)nd in order to treat some persons equally, we must treat them differently. We cannot— we dare not—let the Equal Protection Clause perpetuate racial supremacy.”34 Indeed, rights rhetoric may be a trap.