

GETTING CIVIL RIGHTS RIGHT

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by

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Why is civil rights a vexing question today and why is the 1991 Civil Rights Act, particularly, vexing to consider? Two issues have run head-up against each other in the discussion of this Act. We find on the one hand, the issue of quotas. Now, you won't find the word *quota* in the proposed legislation anywhere, but you certainly will have noticed throughout the United States that it is the word most often invoked to describe what the legislation means. I will try to explain to you why people use the word quotas in talking about it.

On the other hand, there's a discussion of two terms that are included in the legislation—those are the terms punitive and compensatory—as applying to legal damages.

These two questions—quotas on the one hand, punitive and compensatory damages on the other—have run head-on into each other in the debate over civil rights from opposite perspectives. They're engaged in a clash that will seem to any ordinary and fair understanding wholly irreconcilable, and what I hope to do is to suggest why, upon further consideration, they can be reconciled and in what way that will be of advantage to us.

Let's start with last year, the Civil Rights Act of 1990, about which also you probably heard a considerable amount. You certainly heard this much, namely, that the Civil Rights Act of 1990 was vetoed by President Bush last October. The President vetoed it on the grounds of its being a quota bill. You may not have heard, but it's true even if you didn't hear, that I endorsed the 1990 Civil Rights Act. I didn't endorse it because it was a quota bill, I endorsed it because, in addition to containing quotas, it contained a provision for punitive and compensatory damages, which seemed to me to open a door for a certain kind of progress in racial harmony in the United States which we have not had occasion to develop heretofore.

Even at that, the measure I endorsed was in the draft stage of the bill and consisted of unlimited punitive and compensatory damages, but, of course, by the time the bill was approved by Congress and vetoed by the President, compromise had produced a cap of \$150,000 on the punitive and compensatory damages, which rendered it much less worth the effort as far as I was concerned.

Nevertheless, I did endorse the bill that the President dismissed as a quota bill and so I need to say a word about what quotas had to do with the 1990 Act before you can understand where they play a role in 1991.

The Act, itself, as I indicated, did not mention the word quota. Those who have argued that it would require or impose quotas are making an argument along the following lines: what the Act is concerned to do is to distribute burdens of proof with respect to allegations of discrimination and principally, by nature, against employers. It distributes burdens of proof by laying out the conditions for establishing a case of discrimination. The conditions for

establishing a case of discrimination are primarily statistical. That is to say, a plaintiff, able to demonstrate some disparity in an employer's work force, some statistical disparity, succeeds under the terms of the legislation in establishing a *prima facie* case of discrimination. When the plaintiff succeeds in establishing a *prima facie* case of discrimination, the burden of proof then shifts to the defendant to prove that there was not discrimination. In short, the purpose of the legislation is to make a specific exception to what is otherwise a general practice of Anglo-American legal procedure, namely, to impose the burden of proof on plaintiffs, not on defendants, to operate on the basis of an innocent-until-proven-guilty regime, rather than the reverse, which is rather more like continental or administrative procedures, the inquisitory procedures through which one is generally assumed to be guilty and faces the burden of proof in one's innocence.

Now, it is said by those who oppose this new scheme, this shift of the burden of proof to the defendant, that defendants will not run the risk of a trial if this legislation becomes law. It is said, that what they will do is to impose quotas, so as never to have a statistical disparity in their work forces and, therefore, never being subject to being found in violation of the law and never being subjected to the extensive and expensive litigation procedures that follow.

So the argument of quotas is an argument of indirect consequences. That is why you will not find the word in the legislation. Is it a reasonable argument? By all accounts, it is a reasonable argument. That is to say, it is fairly clear that the kinds of decisions businesses will make will be made along the concerns or considerations of the proverbial "bottom line." The businesses will be much less concerned with the outcome from the perspective of justice or social progress than they will be concerned from the perspective of how to minimize cost and exposure to themselves. If a quota regime will minimize cost and exposure, then, in fact, quotas will be imposed by businesses.

It is indeed the case that the quotas are being imposed by the businesses and not by the Congress of the United States along this path of reasoning. But if the quotas become reality, as it is argued they would, it then would follow as well that one might as well have seen them imposed by Congress, for they will enjoy a tacit, legal protection, insofar as: 1) no *prima facie* case of discrimination can be established in the courts, and 2) any claim of reverse discrimination will run up against the legal argument that the practices complained of seemed to be consistent with, and in compliance with, the will and findings of Congress. To that extent then, the quota regime will become a *de facto*, legal regime.

So President Bush vetoed the 1990 Civil Rights Act to avoid that consequence, and that raises an immediate question. Is it then the case, since President Bush vetoed the 1990 Civil Rights Act, that, there are no quotas in the United States? Unfortunately, the answer is no. In vetoing the 1990 Civil Rights Act, what the President specifically stated was that he would prefer to the legislation approved by Congress a bill he had proposed and which, in his words, "served to codify the legal reasoning from the 1972 Supreme Court decision called *Griggs vs. Duke Power Company*." The *Griggs* decision is, in the United States, the proximate cause of such quotas as we live with today. The President's veto never removed it and his veto message, in fact, endorsed the consequences of *Griggs*, leaving many people to wonder exactly what it is the President means when he runs around the country declaiming against quotas but, by the same token, nevertheless declares that he wishes to codify the proximate legal cause of the existence of quotas insofar as they exist and are practiced in the United States.

That leaves people to think that perhaps this is just political posturing rather than any serious consideration of legal or moral principles in the discussion of these weighty issues. There was something else in his veto message last fall. He specifically contrasted the codification of *Griggs* with, what he referred to as the “instrumentalities of Title VII of the 1964 Civil Rights Act.” By that he means agencies like the Equal Employment Opportunity Commission and, in general, the entire bureaucratic edifice which has grown up in support of civil rights legislation and for the express purpose of managing civil rights questions in the United States. What he said was that he regards this, which is tied in with the *Griggs* decision, as an approach to civil rights questions in the United States preferable to reliance upon punitive and compensatory damages, which were also a part of the 1990 Act. So he had these two main grounds and several lesser ones for vetoing the Act. One, quotas, but not quotas altogether, and, two, punitive and compensatory damages, and those absolutely.

In reasoning then, from the President’s message and the Act last year, we’re left with certain questions that are to be resolved in 1991. The first thing to notice is that since the President isn’t absolutely opposed to all quotas or the entire system of racial preferences, will it make any difference if the indirect consequence of the 1990 Act’s redistribution of the burden of proof leads to more quotas? Will it, in fact, make any difference morally and legally in the United States?

As I reasoned a year ago, the answer was no, it would make no difference. In fact, it was potentially salutary and beneficial for the United States to embrace the quota regime wholeheartedly, openly, and candidly, rather than covertly, as we have done heretofore. The reasoning is very straightforward; when it becomes clear to everyone what we are doing; when we say what we’re doing and mean what we say; then we, of course, invite a fair judgment on the part of all who can understand about what it is that we’re doing. So long as our practices remain disguised or covert, we then run the risk of experiencing all the worst consequences without reaping any potential benefits because we leave all the contention and dispute in place while nevertheless changing the general legal, social, and moral practices of the society.

Therefore, it seemed to me, that perhaps we had spent enough time in the argument about quotas, unless we were prepared to go ahead and give the people of this country a fair judgment, doing it straight-forwardly, open-handedly, and without reserve.

Secondly, it seemed to me that the argument about quotas had gone too far, because it had become hopelessly confused. Hopelessly confused in the sense that it’s generally talked about as a form of injury to white males—quotas being defined as “reserved preferences for minorities and women.” That, by the way, is the very language with which the 1990 Act was described when it was originally legislated, and I will point out to all of you, parenthetically, how crucial it is in trying to interpret legislation, to pay attention not only to the terms of the legislation but, above all, to what the people who must vote for the legislation say about it within the respective bodies where they act. The so-called legislative history plays a major, if not the predominate role in legal interpretation in the United States today and if we were to go through the *Congressional Record* and read the records of the committee hearings about the 1990 Civil Rights Act, you would find, uniformly presented, claims that the language of this law was intended to provide express protections for minorities and women. Repeated again and again. Now as a defining term it can only mean one thing, that can only mean the exclusion of all non-stated categories. The stated categories, by definition, exclude white males. That, then, leads

some to say the problem with quotas is it is a form of injury against white males. I believe that is a mistake.

I believe the language in the legislative history points to a different, and a more insidious problem in a free society, but the argument about damages to white males is itself misleading and harmful. Why? I will give you a practical example of this that comes from the state of Kentucky. Kentucky's state government, starting roughly ten years ago, say twelve, thirteen years ago, arrived at the decision that it was behind in representation (and people like to use this word representation when they speak of employment—I'm not sure what it means, but that's what they say), in the representation of black people in the work force of the state, in the public work force. Kentucky has a population of roughly 7.3 per cent black overall, and its state workforce at the time this observation was made, was less than 4 per cent. Kentucky then embarked on a vigorous program to raise representation of black people in its state work force. It proceeded to move from around 4 percent, or whatever, systematically, year after year, up to 7.3 per cent. In fact, starting in about 1975 you get changes on the following order every two years: 5.8 percent, 6.0 per cent, 6.6 per cent. Then, in 1981, 7.2 per cent, so, six years later we've arrived essentially, at so-called "parity." November 1983, 7.3 per cent, November 1985, 7.3 percent, November 1987, 7.3 per cent, November 1989, 7.3 per cent. We haven't seen 1991 yet, but you can imagine what it's going to look like, can't you?

That little recitation tells you something that no intelligence can deny, namely, that in the state of Kentucky, there are necessarily black people who are being refused employment on the ground of their race today. It's a necessary conclusion to draw from those statistics, for there is no way in a work force of 40,000 people to sustain the same percentage year after year, over a ten-year period unless, once you hit that magic number, 7.3, you then refuse to hire anyone who presents himself that would carry a representation beyond that number. In fact, the probabilities of this happening by chance rather than by design are somewhat greater than the probability that there's intelligent life elsewhere in the universe.

So, what does it mean then? If Kentucky now operates with quotas, *Griggs*-sponsored quotas, and they lead in the end, to black people being refused employment simply because their numbers would carry beyond their level of representation in the work force in general, or society in general, what does that mean? Does that mean this is a form of licensed discrimination against people on the basis of race? It does! Are these people white males? No. They are black, male and female.

Now, it's not hard to figure out how this could happen, by the way. Just think for a moment about some of the general social circumstances you know. You know, for example, that there has been, since the mid-1960s, persistently high unemployment, particularly among black males and black youths.

How does high unemployment compute in the face of so-called "quotas"? Shouldn't quotas operate, given the small, relative numbers of black people in society, to eliminate all unemployment among blacks? Shouldn't quotas, if we have them, operate to fill the board rooms in corporations, shouldn't they fill the lecture chairs in universities, shouldn't we see great changes in this country if there had been quotas? The answer intuitively is "yes," isn't it? You would think "well, why not?" Two reasons why not. University of California gives you a great example of this. The University of California began, after the *Bakke* decision, before the *Bakke*

decision actually, but particularly after the *Bakke* decision in 1978 to implement aggressive affirmative action.

I went back in 1989, some eleven years later and made an assessment of what they had accomplished. I discovered, after a decade of aggressive affirmative action, that there were in this entire university system in the state of California, (that is the University of California system I'm speaking of now)—that when they began the program there were among black males, roughly 20, and a decade later, there were among black males, in the faculty, on the order of 27. You say, why complain about racial preferences, why complain about quotas, if they don't change anything? A good question. One of the reasons they don't change anything is because what happens at the University of California and elsewhere throughout this country is what I call the revolving door. When you play numbers games there are certain perverse incentives that are built in. You get credit for changing your numbers. The more you change your numbers the more difficult it becomes to change your numbers significantly. This is a strictly arithmetic function. As you approach 100 per cent you get much less credit for the next increment by definition. From zero to 10 per cent is a wonderful accomplishment. From 10 per cent to 11 per cent is no big deal. So how can you retain the benefit of credit for great change, at the same time as not running up against the declining significance of every change you make? It's simple, you hire and you fire. You don't grant tenure. You create revolving doors. You go from zero to 15 per cent to zero to 15 per cent, systematically, and you can send your reports in annually to the Department of Education, and to the EEOC, and they may look wonderful because you keep the numbers moving. That's how you can have quotas and preferences, at the same time that nothing changes, which largely has transpired.

Now, that will not explain persistently high unemployment, we need to take another step to do that. That's not hard either. Remember I said in Kentucky black people constituted 7.3 per cent of the general population and, therefore, of the work force. Now, in order to apply literally a population percentage to a work force calculation you have to make one crucial assumption, namely, that all the relevant populations in the comparison groups all participate in the work force at the same rate. If you don't make that assumption, then general population figures don't tell you anything about people exposed to discrimination or their chances to benefit from discrimination.

We know without having to labor at great length about it that there was a time when, for American blacks, the labor force participation rate was 100 per cent. That was, of course, in the time of slavery. There were virtually none who were exempted from the labor force. During that same era labor force participation rates for most of the rest of society was roughly 50 per cent, not much more, for obvious reasons, right? We never counted people who worked in the home as being at work, we counted them as wives, mothers, whatever, but not as laborers. So, if you were to compare labor force participation rates rather than simply general population rates, you would have to multiply the general population rate by a factor determined by the labor force participation rate. So, in the case of black people, if it were 100 percent, and you were looking at Kentucky, you'd have to make that 14.6 per cent in order to have parity.

Since slavery, these things have of course declined for American blacks, and increased for virtually everyone else, particularly since the 1960s when very many women have entered the work force. Groups have much more nearly approached one another. Nevertheless, there has been throughout this century and remains today a consistent gap between them for, after slavery

and though it was no longer legally required, it was certainly economically required that most of American blacks should labor, which meant that most women worked. The change in labor force participation for the 1960s did not affect American black females, they were already at work when that change began.

How then, can it be, that quotas can put black people out of work and, at the same time, be unfair to white males? It's very simple, if you calculate the quota on the basis of general population and not labor force participation, you are actually, by quotas, keeping black people out of work to the extent of the difference between the general population rate and the labor force participation factor.

Now, this may sound like extremely subtle reasoning, probably not to Princeton students, but in Washington they would say, "Oh, that's subtle-reasoning Commissioner Allen; you can't expect us to believe something like that; that's just too technical, too clever." I say, "But it's right," they say, "Yeah, but that's beside the point." Well, sometimes being right is not beside the point. Sometimes being right is the way to get out of syndromes and errors that are pernicious and harmful, and certainly the country today faces the task to be right on a question about which it has been so long wrong, more than it ever has before.

This shows up, then, again in 1991, when the new Civil Rights Act has been proposed, containing some of the problems of last year's without, apparently, much advantage held out of the sort that inclined me to approve of last year's Civil Rights Act. This year I'm opposing the proposed legislation. I oppose also the President's substitute, though I think there are certain compromises that can be made that will make it more palatable.

Let me explain what has transpired and why I take the position I now take. Let's go back for a minute and say a word about redistributing burdens of proof, which I talked to you about earlier.

I said that traditionally in Anglo-American jurisprudence burden of proof is assigned to the plaintiff, whether the plaintiff is a state in a criminal case, or a fellow citizen in a civil case. The Civil Rights Act redistribution alters that, but alters it not with respect to all citizens equally. There was another case decided in 1987, called, *Johnson vs. Santa Clara Transportation Agency*, which was a case involving affirmative action for women. The plaintiff litigant, being a white male, Paul Johnson, argued that the woman, Diane Joyce, who was given a job over him, was given it on grounds that were unacceptable because she was less qualified and only gender preference determined the outcome. The court, in an opinion written by Justice Brennan, rejected Mr. Johnson's argument, and laid out the scheme by which he would have been able to prove that what was done was unfair. The scheme laid out by Justice Brennan runs roughly like this: "What you have to do, Mr. Johnson, is not only to show that gender entered into this decision, but that it entered in improperly. You have to prove that the existing affirmative action program in the county of Santa Clara, which is a *prima facie* legitimation to consult gender, was not required in this case and that a decision was made specifically intending to disadvantage you, Mr. Johnson. You must carry that burden of proof. You have not done that; therefore, Diane Joyce may keep her job." That was the end of the road for Paul Johnson, but that was not the end of the road for the burden of proof scheme laid out by Justice Brennan. Where do we find it echoed? You find it echoed in the 1989 Supreme Court opinion, *Wards Cove vs. Atonio*, except, in that case, the roles are reversed. In *Wards vs. Cove* there are minority plaintiffs arguing that they've been discriminated against in favor of white males primarily, not exclusively. And,

speaking for the court, Justice White, echoing Justice Brennan, said, “This is all very well, but mere statistics won’t show it. What you have to do is prove your case, that they meant to cause you some harm,” just the way Paul Johnson had to do. So, according to Justice White, there was a single rule of law, a single standard of proof or evidence for all Americans wherever they fell, by race or gender.

As you know, the 1990 and 1991 Civil Rights Act both are thought to be in reaction to that decision in *Wards Cove*. Certainly the burden-of-proof schemes are in reaction to *Wards vs. Cove*. The language in the legislative history, which says the Act intends to protect minorities and women, essentially acknowledges the purpose to set up a double standard, a *Johnson* standard for white males’ civil rights and a *Wards Cove* standard for everyone else.

I submit that this is the most significant problem with the legislation. That whatever legislative approach you take to remedy social ills, the fundamental standard of fairness requires that all be treated in the same way. For if you fail to do so, what you will establish is so enormous a divergence in the interest of different categories of citizens that you will leave them totally undisposed to cooperate with one another.

This is what I believe George Washington had in mind when he repeated so often and so characteristically that what the United States had to promise was the same justice for rich and for poor. He wasn’t a proto-Marxist. What he was saying is that unless rich and poor can count on the same legal processes, the same forms, the same standards of judgments, the same standards of evidence, there’ll be no reason for them to cooperate with one another, and that will leave only the war between the rich and the poor to establish the dynamics of social interaction. The same thing is true in our day with respect to the differences between males and females and various ethnic or racial groups. Our law must treat all in the same way if we expect all correlatively to deal with one another on the same equitable grounds, the same leveled playing field. The proposed law didn’t in 1990; it does not in 1991. I find that objectionable and, therefore, I oppose the legislation. I go beyond that in providing the explanation of my opposition.

I’ve hinted that punitive and compensatory damages play a large role in this consideration. You have a right to ask, “How large a role? What, after all, are punitive and compensatory damages and why should we be worried about them?” To answer the first one, what are punitive and compensatory damages? The response is clear. They constitute, in the model of tortuous litigation, the single most effective, longstanding, instrument of self defense that Englishmen and Americans have ever known. But they’re not a recent invention. They weren’t invented in slavery in the United States, they were invented thousands of years ago. They constitute an instrument of deterrence and of self defense, a principle of justice that has shaped what we see today as a consequence of this long process of constitutional development, and nothing is more deeply troubling to me than the way we so easily discard this heritage in recent times.

I had a debate with the author of the 1964 Civil Rights Act some seven, eight years ago about civil rights in general, affirmative action in particular, and we came to the question of exactly what was meant to be accomplished by the 1964 Civil Rights Act, and I posed to him this question. I said, “Look, leave all things else aside and just explain this to me, why is it you’ve labored so hard in writing this legislation to discourage recourse to standard tort processes in dealing with problems of discrimination and segregation? Why did you exclude that as an

option?" He looked at me and he must have thought I was from *Amos and Andy* or someplace; he just laughed and threw up his hands and he said, "Are you crazy? That would bankrupt the society." I didn't think it was funny and I looked back and said, "I don't understand. How is it that taking it out of your pocket and putting it into mine bankrupts the society? I am part of the society!" He had no answer for that. I have not found an answer since, because the reality is it doesn't bankrupt the society. There is no net social loss as a consequence of tort litigation and punitive and compensatory damages. There is, in fact, a net social gain if using this powerful instrument both deters injury and compensates actual injustice suffered.

One thing government cannot do very well is to make an injured party whole. If you think about this morally or philosophically there is never any return to the status quo ante. If you have been insulted, no matter how profusely the insulter apologizes, the insult becomes a part of you. There's nothing the government can do to take it away. It will always be there, but what government can do, in fact I think the very most the government can do, is to arrive at a monetary equivalent of the damage. And I've never quite understood people who dismiss this appeal by saying, "What are you trying to do, weigh my suffering in material terms?" No, of course not. But are you saying, alternatively, that because the suffering cannot be measured on a material scale, therefore you should receive nothing? What government can do is to find monetary equivalents, and monetary equivalents not only restore in some small way the injured party, but much more profoundly, operate to deter injury far more powerfully than nasty letters from bureaucrats, which is what we depend on now with the EEOC and similar systems. Do you know that we spend a billion dollars a year, by the way, in the federal budget to enforce civil rights? I'll bet you didn't know that. That's how much it costs just to enforce civil rights. One billion dollars. I leave it to you to calculate how effective that is using cost-benefit analysis.

Alternatively, let me give you an example of something that happened recently, just three years ago. There are some young children who lived in a family in Florida and who were segregated, kept out of school impermissibly. They filed a suit, a tort suit. The school district didn't even wait to get to court, they settled the suit for \$1.1 million dollars. That's what the Ray family received. Their little boys had the HIV infection and so, were kept out of school, and it cost that school district \$1.1 million. And you have not heard since of a single school district in the United States impermissibly segregating children with the AIDS infection. Not once. Contrast that with the story of segregation for American blacks. A story which, as you know, is replete with social traumas, but never once with a monetary award. *Never once* this entire century with a monetary award. Never once, I repeat, because I know you won't believe me, but you can do the check yourself. You'll find countless children bussed hundreds of miles, you'll find all kinds of schools districts that have been placed under special masters, and school teachers that have been moved here and there, you find a regime of race management, thoroughly installed but, never once, this handy little device, over a thousand years old, repeatedly tested, proved to work, never once, tried.

Now, if you're as skeptical as I am, at this point, you're going to ask, why? Why is it we haven't done the one thing, which for every other case you can think of, always works. People say, "Well, good heavens, how would they get money to get lawyers to go to court?" I've seen homeless people run over in the streets by cars who could find lawyers to defend them, because usually, with that kind of litigation, all it takes is a case you can win. If there's money in it, usually there are lawyers in it. No, it's not true, that people can't afford lawyers. What's true is the laws have been written to discourage litigation, to take the money out of it.

Now, why then my concern with this new Act? Have you heard talk of the business round table getting involved in the debate? (end of tape).