most discriminations between human beings based on the above differences are unquestionably unjust. But when such philosophers attempted to answer the question of why all human beings possessed rights by specifying their ground or basis, they identified a characteristic(s) that is not shared by all human beings. Thus their projects are better understood as defenses of the rights of *persons* rather than of *human beings*. As so construed, their projects remain interesting and important. I have tried to show why philosophers should not lament the passing of *human* rights....

"Civil Rights—a Challenge"

Robert Bork

Passions are running so high over racial discrimination that the various proposals to legislate its manifestations out of existence seem likely to become textbook examples of the maxim that great and urgent issues are rarely discussed in terms of the principles they necessarily involve. In this case, the danger is that justifiable abhorrence of racial discrimination will result in legislation by which the morals of the majority are self-righteously imposed upon a minority. That has happened before in the United States—Prohibition being the most notorious instance—but whenever it happens it is likely to be subversive of free institutions.

Instead of a discussion of the merits of legislation, of which the proposed Interstate Public Accommodations Act outlawing discrimination in business facilities serving the public may be taken as the prototype, we are treated to debate whether it is more or less cynical to pass the law under the commerce power or the Fourteenth Amendment, and whether the Supreme Court is more likely to hold it Constitutional one way or the other. Heretical, though it may sound to the constitutional sages, neither the Constitution nor the Supreme Court qualifies as a first principle. The discussion we ought to hear is of the cost in freedom that must be paid for such legislation, the morality of enforcing morals through law, and the likely consequences for law enforcement of trying to do so.

Few proponents of legislation such as the Interstate Public Accommodations Act seem willing to discuss either the cost in freedom which must accompany it or why this particular departure from freedom of the individual to choose with whom he will deal is justified....

There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate. In part the willingness to overlook that loss of freedom arises from the feeling that it is irrational to choose associates on the basis of racial characteristics. Behind that judgment, however, lies an unexpressed natural-law view that some personal preferences are rational, that others are irrational, and that a majority may impose upon a minority its scale of preferences. The fact that the coerced scale of preferences is said to be rooted in a moral order does not alter the impact upon freedom. In a society that purports to value freedom as an end in itself, the simple argument from morality

From "Civil Rights—a Challenge," *The New Republic*, August 31, 1963. Reprinted by permission of the publisher.

to law can be a dangerous non sequitur: Professor Mark DeWolf Howe, in supporting the proposed legislation, describes southern opposition to "the nation's objective" as an effort "to preserve ugly customs of a stubborn people." So it is. Of the ugliness of racial discrimination there need be no argument (though there may be some presumption in identifying one's own hotly controverted aims with the objective of the nation). But it is one thing when stubborn people express their racial antipathies in laws which prevent individuals, whether white or Negro, from dealing with those who are willing to deal with them, and quite another to tell them that even as individuals they may not act on their racial preferences in particular areas of life. The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.

Freedom is a value of very high priority and the occasions upon which it is sacrificed ought to be kept to a minimum. It is necessary that the police protect a man from assault or theft but it is a long leap from that to protection from the insult implied by the refusal of another individual to associate or deal with him. The latter involves a principle whose logical reach is difficult to limit. If it is permissible to tell a barber or a rooming house owner that he must deal with all who come to him regardless of race or religion, then it is impossible to see why a doctor, lawyer, accountant, or any other professional or business man should have the right to discriminate. Indeed, it would be unfair discrimination to leave anybody engaged in any commercial activity with that right. Nor does it seem fair or rational, given the basic premise, to confine the principle to equal treatment of Negroes as customers. Why should the law not require not merely fair hiring of Negroes in subordinate positions but the choice of partners or associates in a variety of business and professional endeavors without regard to race or creed? Though such a law might presently be unenforceable, there is no distinction in principle between it and what is proposed. It is difficult to see an end to the principle of enforcing fair treatment by private individuals. It certainly need not be confined to racial or commercial matters. The best way to demonstrate the expansiveness of the principle behind the proposed legislation is to examine the arguments which are used to justify it.

Perhaps the most common popular justification of such a law is based on a crude notion of waivers: insistence that barbers, lunch counter operators, and similar businessmen serve all comers does not infringe their freedom because they "hold themselves out to serve the public." The statement is so obviously a fiction that it scarcely survives articulation. The very reason for the proposed legislation is precisely that some individuals have made it as clear as they can that they do not hold themselves out to serve the public.

A second popular argument, usually heard in connection with laws proposed to be laid under the Fourteenth Amendment, is that the rationale which required the voiding of laws enforcing segregation also requires the prohibition of racial discrimination by business licensed by any governmental unit because "state action" is involved. The only legitimate thrust of the "state action" characterization, however, is to enable courts to see through governmental use of private organizations to enforce an official policy of segregation. There is a fundamental difference between saying that the state cannot turn over its primary election process, which is actually the only election that matters, to the "private" and all-white Democratic Party and saying that a chiropodist cannot refuse a Negro patient because a state board has examined him and certified his competence. The "state action" concept must be confined to discerning state enforcement of policy through a nominally private agency or else it becomes possible to discern the hand of the state in every private action.

One of the shabbiest forms of "argument" is that endorsed by James Reston when he described the contest over the public accommodations bill as one between "human rights" and "property rights." Presumably no one of "liberal" views has any difficulty deciding the question when so concisely put. One wishes nonetheless, that Mr. Reston would explain just who has rights with respect to property other than humans. If A demands to deal with B and B insists that for reasons sufficient to himself he wants nothing to do with A, I suppose even Reston would agree that both are claiming "human rights" and that this is in no way changed if one of the humans is colored and the other white.

How does the situation change if we stipulate that they are standing on opposite sides of a barber chair and that B owns it?

A number of people seem to draw a distinction between commercial relationships and all others. They feel justified, somehow, in compelling a rooming house owner or the proprietor of a lunch counter to deal with all comers without regard to race but would not legislate acceptance of Negroes into private clubs or homes. The rationale appears to be that one relationship is highly personal and the other is just business. Under any system which allows the individual to determine his own values that distinction is unsound. It is, moreover, patently fallacious as a description of reality. The very bitterness of the resistance to the demand for enforced integration arises because owners of many places of business do in fact care a great deal about whom they serve. The real meaning of the distinction is simply that some people do not think others ought to care that much about that particular aspect of their freedom....

Though the basic objection is to the law's impact upon individual liberty, it is also appropriate to question the practicality of enforcing a law which runs contrary to the customs, indeed the moral beliefs, of a large portion of the country. Of what value is a law which compels service to Negroes without close surveillance to make sure the service is on the same terms given to whites? It is not difficult to imagine many ways in which barbers, landlords, lunch counter operators, and the like can nominally comply with the law but effectively discourage Negro patrons. Must federal law enforcement agencies become in effect public utility commissions charged with the supervision of the nation's business establishments or will the law become an unenforceable symbol of hypocritical righteousness?

It is sad to have to defend the principle of freedom in this context, but the task ought not to be left to those southern politicians who only a short while ago were defending laws that enforced racial segregation. There seem to be few who favor racial equality who also perceive or are willing to give primacy to the value of freedom in this struggle. A short while back the majority of the nation's moral and intellectual leaders opposed all the manifestations of "McCarthyism" and quite correctly assured the nation that the issue was not whether communism was good or evil but whether men ought to be free to think and talk as they pleased. Those same leaders seem to be running with the other pack this time. Yet the issue is the same. It is not whether racial prejudice or preference is a good thing but whether individual men ought to be free to deal and associate with whom they please for whatever reasons appeal to them. This time "stubborn people" with "ugly customs" are under attack rather than intellectuals and academicians; but that sort of personal comparison surely ought not to make the difference.

The trouble with freedom is that it will be used in ways we abhor. It then takes great self restraint to avoid sacrificing it, just this once, to another end. One may agree that it is immoral to treat a man according to his race or religion and yet question whether that moral preference deserves elevation to the level of the principle of individual freedom and self-determination. If, every time an intensely-felt moral principle is involved, we spend freedom, we will run short of it.

Civil Rights—a Reply

The New Republic editors

The New Republic's commentary on civil rights over the years should make it obvious that the editors disagree emphatically with Mr. Bork's thesis. Yet his fears about the proposed legislation are shared by many Americans, including many readers of the *New Republic*, so they deserve both a forum and an answer.

In discussing the law we share Justice Holmes' preference for appeals to experience rather than logic. In the light of recent American experience Mr. Bork's argument seems to have several defects.

First, Mr. Bork speaks about the "freedom of the individual" as if the owners of hotels, motels, restaurants and other public accommodations were today legally free to serve whomever they please. This, as everyone knows, is seldom the case. For centuries English common law obligated innkeepers to accommodate any well-behaved traveller, and his horses. Most states have today embodied this tradition in public accommodation statutes. In the North, these statutes generally require a restaurant, hotel or motel to accept all sober and orderly comers, regardless of race. In the South, Jim Crow legislation enacted at the end of the nineteenth century until recently required the owners of public establishments to segregate their facilities. The Supreme Court has now declared the Jim Crow statutes unconstitutional, but even today the owner who wants to serve both Negroes and whites is likely to have difficulty exercising his newly acquired "right" in many areas. Mr. Bork would presumably deplore the whole tradition that "public accommodations" must provide public service as well as private profit. But he cannot maintain that new legislation in this field would mean a sudden increase of government intervention in private affairs. The Administration's civil rights bill would simply extend to the national level principles and practices long employed locally.

Experience also argues against Bork's equation between the distress caused by having to serve a Negro and the distress caused by refusing to serve him. Both exist, and both deserve consideration, but no amount of rhetoric about freedom can give them equal weight. Despite what Mr. Bork says, the "loss of freedom" caused by having to serve Negroes is in most cases pecuniary, not personal. If personal freedom were to be protected we would need legislation allowing individual waitresses, hotel clerks and charwomen to decide whom they would serve and whom they would not. The fact is, however, that such people must serve whomever their employer tells them to serve, and refuse whomever he tells them to refuse. The right to segregate is, as everyone but Mr. Bork admits, a right deriving solely from title to property. It is neither more nor less sacrosanct than other economic privileges. It can be regulated in the same way that the right to build a restaurant on one's residential property is regulated.

There are, of course, some owners of public establishments who have personal contact with the clients—the much debated case of Mrs. Murphy's boarding house. Perhaps such establishments should be exempt from the proposed public accommodations law. But even here the claims of private freedom must be weighed against the claims of public convenience.

Government without principle ends in shipwreck; but government according to any single principle, to the exclusion of all other, ends in madness. Mr. Bork's principle of private liberty is important, and his distrust of public authority often justified. But to apply this principle in disregard of all others would today require the repeal of the industrial revolution. Perhaps, however, that is what Mr. Bork wants.

From *The New Republic* Editors, August 31, 1963. Reprinted by permission of the publisher.