

Indeterminacy in Social and Political Norms

In all of its parts this book is concerned with rules and with norm-governed behavior. In particular it is concerned with the far-reaching social and political significance of normative indeterminacy.¹ The thesis of indeterminacy asserts that norms whose meaning and proper application are unknown or unclear cannot be used without the intervention of interpreters. Indeterminate norms cannot be used without the direct and vital intervention of human agency in social structures, such as society's political and legal regime or cultural understandings. Only the interpreters, never the indeterminate norms themselves, can decide which meanings and which applications are politically or morally acceptable, and which are not. A norm that cannot be understood or applied without first being interpreted is indeterminate. The need for an interpreter signals indeterminacy; merely to experience difficulty in applying norms, where the difficulty can be resolved without an interpreter, does not. Thus the mundane traffic norm—automobiles and pedestrians shall stop on the red light—is clear in meaning and application, whereas the constitutional norm that all citizens are legally equal is quite useless until the meaning of *equality* is specified with respect to the relevant concrete social context. Specification can only be cultural and political, that is, contingent and valid only intersubjectively; it can never be valid absolutely and objectively.

Indeterminacy in the meaning and application of norms is not peculiar to any one kind of norm or any specific set of social, political, or legal issues. It characterizes many kinds of norms, though hardly all aspects of all norms in all instances. Indeterminacy is a problem only for some norms, and only some of the time. But those norms for which indeterminacy is a problem tend to be ones among the most significant for a country's social and political organization.

In the introduction I discussed several examples of normative indeterminacy without benefit of an explicit definition. I offer one now. *Normative* I define in a special and perhaps unusual way. I refer to a subclass of rules or standards that are embedded in, and expressive of, commitments to a way of life, or worldview, or political vision, or to other systems of profound cultural values. Normative rules (what I shall simply call *norms*) are rules or standards that are everything other than indifferent or disinterested; they are everything other than “neutral” or “objective” or “valid as such.” By contrast, non-normative rules or standards are either technical (as in instructions for operating a machine) or conventional (like the rule that traffic keeps to the right).

Technical or conventional concerns imply nothing about right conduct in a moral or political sense. They involve right conduct solely in the instrumental sense of achieving a pre-given and morally unquestioned goal. (In many cases, but not all, the goal here admits to no moral consideration, as for example in questions of mathematics or the solution to problems of mechanical engineering.) This is precisely the point: Questioning a goal, especially with respect to its moral desirability, is a normative issue and never technical or conventional. In this book the word *norm* either implies, or entails, or presupposes, this or that normative worldview. Even though a conventional or technical worldview is not a logical impossibility, it is empirically unlikely because no individual life can be lived, and no human society is possible, without confronting and coping with normative questions, day in and day out. Norms are forms of moral commitment, whether conscious or not. They are forms of commitment within some overarching perspective, one having to do with what people should believe and how they should behave (according to the norm in question), with how they should think or act in some sense moral or political. In this way I associate norms and norm-governed behavior with human agency, particularly in association with a person's free will. I affiliate norms with behavior, which the individual can thematize, reflect upon, cognitively challenge or defend, rationally reject or embrace, consciously preserve or modify. I focus on the individual's normative behavior given his or her interests in constructing or furthering *this* kind of society rather than *that*.

This book examines a variety of norms, each—as I shall show—a system of profound cultural values: social and political norms in general (this chapter), procedural norms (chapter 2), pragmatist norms upheld by people conscious of the norms' own relative validity (chapter 3), norms of social critique (chapter 4), norms that might guide public policy (chapter 5), and the sometimes competing, sometimes complementary norms of law and morality (chapter 6). In this broad span of ordinary human behavior, indeterminacy is not often a problem of politically paralyzing proportions. But I treat precisely those circumstances in which it is, and I propose ways to cope with problems of this magnitude.

The present chapter examines central aspects of normative indeterminacy by understanding how it occurs in different kinds of social, political, or legal rules. Humans employ norms because norms do valuable work for them. They do valuable work in people's daily confrontation of the unceasing demands of social life. To accomplish the tasks demanded of them, norms need to be determinate. In each particular instance, norm users need to know what the norm in question means and how to apply it. Many legal and political norms are as determinate as most technical norms; but some are deeply indeterminate, and they tend to be norms of unusual social significance. Norms significant to the lives of millions of human beings in profound ways tend to be the broadest, the most philosophical, and for that reason the most culturally contingent, the least technical, and the

least “objective.” By contrast, the constitutional rule that the president of the United States shall be at least thirty-five years of age is highly determinate; a claim for example that “years” in this sense be understood in terms of “dog years” (whereby one year in the life of a human being somehow corresponds to seven in a dog’s life) has no purchase in American political culture. The meaning of this particular constitutional provision is not hard to elicit: It is a hypothesis about calibrating the kind of maturity in experience, thought, and vision that would seem appropriate to the highest office in the land, and even if one might disagree with the precise number of years specified, no one will argue about the intention of the rule’s authors, and none will disagree with their goal.

Consider the socially profound norm of that part of the Fourteenth Amendment to the U.S. Constitution specifying that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” In 1896 the Supreme Court interpreted the Amendment’s norm of legal equality to mean that equality allowed separate but “equal” public facilities for Americans of different races.² In 1954 the Court rejected this interpretation entirely on the claim that such separation is inherently and necessarily unequal.³ The constitutional words in question in 1896 were precisely those again in question in 1954. Their indeterminate meaning allowed for mutually exclusive plausible interpretations.

The norm of racial equality is indeterminate in the following question: Would the racial segregation of public schools facilitate equal citizenship or undermine it? Making determinate that which is initially indeterminate is a cultural and political act. Any answer presupposes norms or values not contained in the question itself. The norm user is like the person who creates private property on John Locke’s (1632–1704) theory—namely, by “mixing” his labor with the natural environment: The norm user brings about determinacy by introducing into the given norm something of him- or herself. Different norm users likely introduce different considerations (or values, goals, or needs), at least sometimes, and likely come up with different answers. Under these circumstances normative questions will not find answers valid in the eyes of all affected parties, relevant persons, and concerned citizens. Validity, then, cannot be absolute but only dependent, resting on the various contingencies of specific cases. Coping with contingency is a matter of political judgment, such that “doing norms” is deeply political business: With what authority does any given interpreter interpret? On what grounds should one interpreter’s construction trump a competing construction? What renders one interpretation valid (even in the normatively minimal sense of “legally enforceable”) and another not valid?

These are vital social questions. To secure its existence over time, every society must find at least temporarily satisfactory answers to at least some of them. But how can a society reconcile one answer with a different answer to the same question it may reach at a later time? How can a society reconcile a current

answer with one to the same question reached earlier, perhaps by a previous generation—or perhaps more recently but under different circumstances, in terms of a different cultural and political *Zeitgeist*? In most cases any one answer to an indeterminate question will not forever solve the problem of indeterminacy for that particular question. For example, legally binding interpretations of legal equality and inequality in the United States have, over long periods of time, changed dramatically, and of course we have no reason to expect that currently obtaining interpretations will obtain in the future. Elsewhere I have argued that successive majorities on the Supreme Court over time have tended to expand the definitional inclusiveness of legal equality.⁴ We have no reason to assume this trend is waning, let alone exhausted.

Again, indeterminacy is not always a problem, nor is it often a problem in many aspects of the daily social life of many citizens. But when indeterminacy is a problem, likely one or the other of the following seven theses applies: norms are not self-interpreting, the meaning and application of norms are contingent, norms are inherently incomplete, indeterminate norms can be interpreted only in ad hoc ways, the purely formal application of indeterminate norms is impossible, systems of norms contain inconsistent premises, and any one normative choice is subsumable under competing norms.⁵

NORMS ARE NOT SELF-INTERPRETING

To apply a norm is to interpret it; to interpret it is to reconstruct its meaning and therefore the criteria of its validity. The very identity of a norm first emerges with its interpretation. Because it is interpretive, identity is variable or changeable, never settled. Meaning is created time and again. The creation of meaning is contingent on all sorts of factors such as the interpreter's choice of method, or various kinds of presuppositions, or the speaker's political beliefs. Canons of interpretation cannot eliminate these interpretive uncertainties. A canon is a set of interpretations formally or informally recognized by an authoritative interpreter, such as a court of law. Canons are themselves general norms for the use of language. They employ general terms that themselves require interpretation and that cannot, any more than other norms, provide for their own interpretation (Hart 1961:123).

Norms by themselves are insufficient either as explanations of, or directives to, action. Particular situations do not await human actors, already marked off from each other, labeled as instances of a general norm whose application is in question. Nor can any norm itself step forward to capture its own instances (*ibid.*).

These epistemological claims illuminate concrete political phenomena. In this chapter I return to the norm of racial equality I considered in the introduction. That norm is not self-interpreting, which creates a dilemma for public schools trying to understand and practice it. Does it mandate race conscious-

ness or color-blind neutrality? Could the experience of colored pupils in a color-blind school ever transcend the larger society's racial culture? Or does color blindness suppress all cultures but the socially dominant one, assimilating black pupils to the norms of white, middle-class pupils? Does color blindness pursue racial integration as the emancipation of black students from second-rate citizenship (itself entailed by second-rate education)? Does integration pursue emancipation into racial neutrality—or emancipation into the specific practices of white Europeans and white North Americans whose “traditional categories of liberal and enlightenment thought do not constitute an a-racial or culturally neutral standard that measures social progress in overcoming partiality, parochialism, and bias” (Peller 1995:142)? Parochially local are assertions to superiority by one race over another. Universalist are assertions that “all men are equal” and that race is therefore irrelevant politically, legally, and morally. But if the universalist assertions in fact fail to challenge the parochially local ones, they (unintentionally or not) merely perpetuate aspects of the subordination of one race by another. (In the coda I shall revisit the question of universalism.) An enlightened localism, by contrast, does not offer a negative understanding of race (either as the idea of superior and inferior races, or the idea that all race consciousness is racist); it offers a positive one, as a racial group's positive self-image. The norm of racial equality might then be interpreted (in public schools, for example) as mandating a positive form of race consciousness, not chromatic agnosticism.

Enlightened localism, then, offers a critical perspective on the supposed universalism of racial neutrality. The beliefs of the businessperson, the teacher, the nun, or the journalist are unlikely to be politically or morally neutral. Their normative beliefs are likely to be highly relevant to what they believe and how they act; their beliefs are likely to guide what they advocate in the public sphere, or would advocate given the chance. But in North America or Western Europe the social paradigm of the businessperson, the teacher, or the journalist may be one of normative neutrality—their racial identity supposedly irrelevant to their position. But in societies dominated by members of the white race, “professionally correct” businesspeople or journalists perhaps are expected to be “culturally white” and “culturally middle class” (which after all is what “neutrality” often means). Even as the white, middle-class mainstream understands itself as ethnically and racially neutral, for people of color to be middle class, and to be members of the professions, may then mean to deny their racial or ethnic identity. A culture of neutrality may equally subsume ethnic difference and identity among whites. The goal of authentic, group-specific identity (a self-conscious form of localism) reveals another, unconscious form of localism: the localism of racial whiteness. It reveals the fact that whiteness is not some racially neutral category, an unmarked marker of others' race. To have forebears from Ireland or Sweden, from Poland or Italy, is to be something other than simply and neutrally “white”;

it is to be, no less than every nonwhite race, situated in a racial localism. But this realization hardly condemns us to racism; not all localism is parochial. *Enlightened* localism, as I shall show, is a means to race consciousness that, unlike race blindness, can facilitate racial equality and resist racial subordination (hidden or otherwise, conscious or unconscious).

Whereas universalism stresses similarity and blends out difference, enlightened localism highlights plurality and recognizes difference. In the context of racial politics, it highlights the plurality of ways in which race offers itself for definition. In part it does so by recognizing the different work that each definition might do. On one definition, race in a racist society is a metaphor for the subjugation of some groups and the privileging of others, for the stigmatization of some communities to the benefit of others. On another definition, race is understood as a mode of political resistance, exposing the problems of defining racism as only the overt, frontal rejection or exclusion of people of color. Racism understood only as formal exclusion is blind to (and thereby facilitates) more subtle forms of racism that manifest themselves in devastating statistical disproportionalities: unemployment, rates of crime and incarceration, single-parent households, teenage pregnancies, lack of health care, lack of health insurance, reduced life expectancies—but also relative absence in a variety of social spheres, from scholarship at universities and research institutes to leadership positions at the various levels of politics. If formal exclusion were the whole of racism, then such jarring disproportionalities and conspicuous absences from sites of social power and prestige could not be ascribed to racism.

Yet a third definition of race is cultural, race as self-identified by its own members rather than by a definition imposed by nonmembers. Thus the “literal biological truth that blacks (or members of any other racial or ethnic groups) are not born with genetic inclination for ‘things black’ . . . obscure[s] the fact that ‘black’ (like most racial or ethnic classification) also defines a culture” in the sense of a “shared heritage of language patterns, habits, history, and experience” (Williams 1995:192). Race understood as a self-identifying culture does not entail race as some essential or monolithic or genetic culture—as if all members shared all the same beliefs, or all members behaved the same way, or approached the world exclusively in terms of their local culture. Nor does race defined as a self-identifying culture (a fourth way to understand race) entail blindness to the overlapping of an individual’s multiple identities. In other words, a self-identifying racial group can still identify ways in which members’ identities are composite and are differently composite: A black woman is no less female than African American; Supreme Court Justice Clarence Thomas is no less black than a committed political conservative.

A fifth definition combines aspects of previous definitions: It combines race as a self-identifying culture with race as a mode of resistance. The categorization of a group in terms of race need not be unilateral where the categorized and

thereby subordinated group reappropriates the category for itself and even unites around it, subverting race as a means of subordinating people of color into race as a means of empowering them. In this sense Kimberlé Crenshaw distinguishes

between the claim “I am black” and the claim “I am a person who happens to be black.” “I am black” takes the socially imposed identity and empowers it as an anchor of subjectivity. . . . “I am a person who happens to be black” . . . achieves self-identification by straining for a certain universality (in effect, “I am first a person”) and for a concomitant dismissal of the imposed category (“black”) as contingent, circumstantial, not determinant. (1995a:375)

Black people seeking to make determinate the norm of racial equality might deploy one claim in one social location, and another claim in a different social location. Instead of withdrawing from a marginalized social location, they would deploy it as a strategy of identity politics, toward wringing positive or progressive political and economic consequences from racial categorizations.

MEANING AND APPLICATION OF NORMS ARE CONTINGENT

We have no evidence that any norm refers back to something beyond the reach of time and change, to something based on some essential human nature or human purpose that might be disclosed once and for all by the right theory, if only we could uncover, discover, or recover it. Rather the creation, interpretation, and application of norms are themselves contingent, some given by historical chance, some embedded in culture and institutions that change only over generations.⁶ Other definitions and interpretations of norms are constructed in individual situations rather than carried over from the past. For example, in the twentieth century the apartheid Republic of South Africa classified visiting Japanese businessmen as “honorary whites.” The racial norm of white could not be self-interpreting or entirely stable even in a regime constructed around rigid understandings of race and the massive privileging of the white race in particular. Because norms are not self-interpreting, the meaning of a norm is not stable but rather contextual. Some normative decisions are made as the occasions require, and groups and individuals often can entertain conflicting sets of norms (such as the apartheid state’s “white Japanese”), inasmuch as the conditions of correct choice are ambiguously defined.⁷ Norms, then, can operate “well” or “properly” even as they operate inconsistently. In this example: Japanese are not “white” as apartheid intended “white.”

History and experience provide ample evidence that the meaning and application of some very important norms are contingent on the context of use. Thus a particular race, or the female sex or a disfavored religion or the language

of an ethnic minority, has often been treated as a deviation from the norm of socially dominant groups. Of course none of these identities or descriptors is neutral or a-normative, including those of the dominant groups, even if the latter may appear neutral in the peculiar sense that provides the standard by which others are classified or judged or placed within some kind of hierarchy. In precisely this sense great civilizations through the ages have defined themselves as superior to their neighbors (the Chinese word for “China,” *zhōng guó*, is literally “country at the center,” at the center presumably of the entire world). In this sense the culture of the white race for the past several centuries has defined itself as superior to races of color.⁸ In this sense, across all cultures and all times, most males have defined themselves as superior to females; and today many heterosexuals define homosexuals as deviant from the norm—namely (and conveniently), themselves. In these cases *white*, *male*, and *heterosexual* function as norms by which *black*, *female*, and *homosexual* are defined as inferior, and therefore often as the subjugatable other.

In North America and Europe for hundreds of years now the unmarked marker of race is the racial category of “white.” In a culture of whiteness only nonwhite “appears,” that is, becomes the object of a great deal of social, political, and cultural categorization in which the question of race appears. In these contexts the racial category white is often invisible—or rather “negatively” present as the “not other” in terms of which all other races (all “others”) are identified. The majority culture identifies the minority cultures without being defined itself—and certainly not being defined by the minority cultures it identifies. In this way the dominant culture reifies a racial norm (or a norm of sex, or of sexual orientation, or some other norm), positing the “natural” superiority of what in fact is a thoroughly social construction: the supposed superiority of one race over another. In this way the meaning and application of some norms are contingent on the context of their use.

NORMS ARE INHERENTLY INCOMPLETE

Any specific application of a norm, chosen from a range of possible applications, is context-dependent, and is so for a variety of reasons. First, norms never define an activity’s character or possible range of conduct completely or exhaustively. Nor can all the conditions be specified under which an account holds up; sometimes an account formulated to interpret one situation will not offer an equally valid interpretation of another, even though the account employs the same terms. The norm of merit, as a criterion for the distribution of social goods—such as entrance to universities or professional schools or the granting of governmental contracts or the distribution of broadcasting licenses—is indeterminate in some respects. Race in a racist society has a different political value and social status than in a nonracist one. In a nonracist society the meritocratic norm might well

function in a color-blind fashion. In a racist society, however, color-blind meritocracy may subvert plausible goals of meritocracy if in fact it perpetuates a system of entrenched privileges for one race and systematically deprives others, such that members of the disfavored race or races never really have a chance to compete with others on the basis simply of merit (an argument from the uneven playing field).

Second, the gap between norms and their context of application limits the capacity of norms to affect individual and group behavior. No possible meaning of a norm can be exclusively valid; no norm can imply one and only one kind of behavior. The meaning of a norm may change as the norm is applied under different circumstances, or to different concrete situations. In circumstances or situations in which racism prevails, a meritocratic norm cannot be racially neutral in the sense of operating “outside the economy of social power—with its significant currency of race, class, and gender” (Peller 1995:132). The meaning and proper application of the norm of meritocracy differs according to whether it is applied in a society where race, class, or sex are predicates of inequality.

Third, the very invocation of a norm alters the situation to which it is applied. It does so because actors, norms, and situations ceaselessly inform and mutually elaborate one another. Like actors and situations, norms do not appear except in a weave of practical circumstances. The actor, norms, and the present definition of the situation are intertwined and together constitute that situation; no one of these elements can be abstracted out and treated as either cause or effect. Norms are useful only if they are usable within such practical, contingent circumstances. Because of actors’ ever-shifting body of social knowledge and practical interests, actors never judge a situation once and for all. Every judgment is only situationally “absolute,” based on the realization that some later determinations may well change the certainty of the here and now. Judgments about legal equality, equal opportunity, and racial equality cannot be made independently of the social context of their application, for we (the persons affected, the participants, the concerned) can know *only situationally* what “equality” is. For example, standardized tests designed to generate scores to guide the allocation of college admissions and scholarships might be thought to be meritocratic but in fact, perhaps because socially privileged groups likely design them, may reflect unnoticed preferences that have a racial or economic bias. The word *yacht*, to be associated with the related word *ship* on a multiple choice question on the Scholastic Aptitude Test, is less likely to enter the experience and vocabulary of a young, inner-city student from an impoverished background than that of a solidly middle-class student. Not knowing this word indicates nothing about scholastic aptitude even though the missed question would be scored as scholastic inaptitude. In this case the criterion of selection is not merit, and the distribution of resources and opportunities merely reflects existing, nonmerit-based privileges. And even if the invocation here of the meritocratic norm may alter the situation (it might have the

unintended consequence of drawing attention to important inequalities among the norm's addressees), the meaning of meritocracy cannot be independent of its context of application.

Because of their abstract character, norms are incapable of specifying what to do in every contingency and must be defined in terms of the occasions of their application; this is their core ambiguity. Any competent norm user must construct what a norm means with reference to a larger organizational context (Rhoads 1991:194). Just as typifications gloss the particulars they typify, so norms cover an indefinite range of contingent, concrete possibilities. Because norms must be applied to specific configurations of circumstances that may never be identical with each other, norms are applied again and again for the "first time." Thus the meaning of the norm of racial equality in the United States changes as the racial status of whites (and not just blacks) change. In this sense, when Derrick Bell (1995a:22) claims that racial equality is not possible for blacks in America wherever equality "threatens the superior societal status of middle- and upper-class whites," he is claiming that racial equality can only be achieved when it is a goal not solely of the victims of racism but also of nonvictims, indeed only when the respective interests of black and white Americans converge.

INDETERMINATE NORMS CAN BE INTERPRETED ONLY IN AD HOC WAYS

The meaning of a norm is "found" or "discovered" within the situation in which the norm is applied. In the end, every instance of an indeterminate norm's application can be accounted for only separately, by reference to specific, local, and contingent determinants. The meaning of a norm is elaborated in ad hoc ways to cover the idiosyncrasies of a situation within which it is applied. The norm may be "stretched" if need be to fit the particular situation. Alternatively, the relevant events of a situation are reconstructed to fit the criteria of the norm.⁹ Where "black" functions as a norm of positive political identity, the racial marker may function only if it is neither monolithic nor essentialist. It may function only where it does not posit a unitary definition of that group or community; it may function only where it does not misrepresent the ad hoc features of the group.

In the case of African Americans it may function only where it does not portray or assume the group to be cohesive simply because all members have colored skin (in fact not all African Americans have colored skin); where it does not assume a singular, unified "black point of view"; where it does not infer from membership in a racial group that all members share the same set of cultural or ethical beliefs or practices; where it does not presuppose that members of a racial group who do share some kind of group consciousness do so because they work and reside in the same geographic area. Where "black" functions as a norm of positive political identity, there it can be interpreted solely in ad hoc ways. At the

level of the individual this means, for example, that a black person “must *learn* to be ‘black’ in this society, precisely because ‘blackness’ is a socially produced category” (Gates 1992:101). Accordingly, as the category “blackness” changes over time, what one learns when one learns to be black changes, too. At the level of the group this means that no one segment of black America can represent all of black America, because members of a racial group may experience their race differently in different parts of the country (in this context one thinks of the multiple differences between the Deep South, the San Francisco Bay Area, and Idaho). No one segment of black America can represent all black America because different members of the same race may not share precisely the same identity (consider, for example, the ways in which differences in economic and social status may produce subjective differences in racial identity). And no one segment can represent the entire group because not all members of the same race share all the same race-related interests.

If the norm is one of positive political identity, then it fails in a political sense where it is interpreted in under-inclusive ways, privileging some members of the identity group by subsuming other members under the ones it privileges. In this sense feminism fails where it essentializes the category “woman,” as if all women were essentially the same (in other words: as if white, middle-class women could be proxies for all other women). The struggle against racism fails politically where it essentializes color (as though, for example, black men could be proxies for black women *tout court*). Toward realizing the norm of positive political identity, groups can reinterpret the situation to fit the norm, rather than interpreting the norm to fit the situation; in such a case, the norm is treated as determinate, and the social or political meaning of the situation as indeterminate. In this sense the corrective to essentializing identity is the recognition that each individual is an intersection of multiple identities. Membership (chosen or, more often, ascribed by others) in any given group captures only some of the individual’s multiple identities. Any group identity excludes most of the identities of each of the members and privileges some intersecting identities (for example, black and male) to the exclusion of others (black and female). The corrective to essentializing identity is politics at the intersections of multiple identities. This is the politics of coalition building, the politics of coalitions of various intersections of some identities and across others. Crenshaw sees in such coalitions the “basis for reconceptualizing race as a coalition between men and women of color,” such that “in the area of rape, intersectionality . . . explain[s] why women of color must abandon the general argument that the interests of the community require the suppression of any confrontation around intraracial rape” (1995a:377). Coalitions among any number of marginalized identities would seem possible. For example, “race can also be a coalition of straight and gay people of color, and thus serve as a basis for critique of churches and other cultural institutions that reproduce heterosexism” (ibid.). Bell points to possible coalitions across racial difference on the basis of class identity: “[M]any

poorer whites oppose social reform as ‘welfare programs for blacks’ although, ironically, they have employment, education, and social service needs that differ from those of poor blacks by a margin that, without a racial scorecard, is difficult to measure” (1995a:23).

PURELY FORMAL APPLICATION OF INDETERMINATE
NORMS IS IMPOSSIBLE

Formalism describes a process in which the arbiter derives and applies norms whose content is completely independent of the process of their application. The arbiter applies or enforces a norm without contributing to or modifying its content.¹⁰ But in cases in which the relevant norm cannot itself provide guides for its “proper” application, the arbiters necessarily go beyond formalism in their interpretation of that norm, thereby exceeding any purely formal application. In this sense litigation “tests” relevant indeterminate legal norms against their possible applications. Because none of the alternatives that arbiters have at their disposal is necessary, the preference for one alternative over another is likely to be guided by influences quite beyond the norm itself. To apply an indeterminate norm, the arbiter must make a substantive judgment, quite beyond all formalism.

The formal application of a norm of racial equality might be thought to exclude any consideration of race in governmental or legal classifications of persons for distributing social benefits or social burdens. *Brown v. Board* holds the classification of citizens in terms of their race to be unconstitutional because it is violative of the Fourteenth Amendment’s guarantee of equal protection—unless a particular racial classification serves a “compelling governmental interest” and is narrowly tailored to accomplish that goal (in the sense of being neither over-inclusive nor under-inclusive). The Civil Rights movement (in which *Brown* played a significant role) urged Americans to focus not on racial differences among themselves but on characteristics shared by them, “universal” characteristics of the unencumbered subject of political liberalism, for whom race is a merely personal characteristic of no particular valence. On this view, race consciousness can only be racism, the only alternative to color blindness. On this view, legal norms can function as racially neutral instruments for identifying and eradicating racial bias, discrimination, and inequality in the organization and reproduction of social life, and in the integration of individuals into mainstream society. This is the view of the majority opinion in *Metro Broadcasting, Inc. v. F.C.C.*,¹¹ which found that “any set-aside designed to increase the voices of minorities on the airwaves was itself based on a racist assumption that skin color is in some way connected to the likely content of one’s broadcast” (Crenshaw 1995a:375).

The purely formal explication of a norm of racial equality misses its own goal of racial neutrality or color blindness. In a society marked by racism, an appeal to color-blind law, or an appeal to constitutionalism free of race consciousness, can

itself be racist in the sense of sustaining the position of the dominant race and the subordination of disfavored races, in this way preserving racial hierarchies. Neil Gotanda (1995) shows how legal norms that mandate color blindness in the interpretation and application of the laws are inevitably race conscious. He shows how constitutional interpretation that would be color blind in fact employs one or the other of as many as four distinct notions of race. (1) Race as a traditional marker of social status, although now largely discredited, “remains important as the racial model for efforts aimed at eradicating intentional forms of racial subordination, with their implication of racial inferiority” (257). (2) Race is formal as a politically neutral descriptor of skin pigmentation or ancestry, in ways entirely “unrelated to ability, disadvantage, or moral culpability . . . [and quite] unconnected to social attributes such as culture, education, wealth, or language” (ibid.). (3) Race marks experience when it refers to “past and continuing racial subordination” (ibid.) and entails the likely unconstitutionality of any racial classification by the state. (4) Race marks culture (“broadly shared beliefs and social practices”), community (in the “physical and spiritual senses of the term”), and a group’s self-understanding (ibid.:258).

Another notion of the purely formal application of norms is the idea of law as something entirely independent of politics. The idea here is that legal institutions can mediate competing interests, and apply and interpret the laws, in apolitical or politically neutral ways, in ways free of power politics. But the very categories with which law picks out certain aspects of social and political life and ignores others—the categories that construct the law’s view of the world, the categories that represent social and political life in a legally relevant way—are hardly apolitical. Technical categories such as jurisdiction or standing—or, for that matter, procedure, the topic of chapter 2—allow for a great deal of discretion in their interpretation and application. Here norm usage is neither automatic nor consistent because following a norm is not necessarily, or always, or perhaps often, a process of logical deduction, yielding unambiguous conclusions. Relevant norms do not merely emerge once a social situation is determined. No purely formal invocation of norms and the deduction of conclusions from them can be sufficient for every authoritative legal choice; jurisprudence must be supplemented by norms external to itself. Equality, for example, makes noncircular commands and imposes nonempty constraints only in the presence of concrete ideals (Tribe 1988).

Positing such ideals is a choice of values, not an explication of meaning by allegedly neutral professional standards of craft (such as allegedly neutral “reasoned elaboration”). The norm of racial equality cannot itself determine whether a colorblind or a color-conscious approach best realizes, or approximates, or embodies that norm. (In the coda I shall entertain yet a third option: that these two approaches might be complementary and might both be used, but differently, according to circumstances.) The norm of racial equality can tell us that race should not be a marker of social status. But it cannot tell us if race should never be used

by the state to classify (thus it cannot tell us if race-based affirmative action realizes or contradicts the norm of racial equality). It cannot tell us if communities might be formed on the basis of race, or if any such community necessarily violates the norm of racial equality (hence it cannot tell us if the creation of all-black electoral districts realizes or contradicts the norm of racial equality). The answer to these various questions can only be given by concrete ideals beyond the norm itself. In other words, the meaning and proper application of indeterminate norms depends on factors external to those norms. Meaning and application are then likely to be ad hoc, shifting as the external factors shift (in a racist society, race-based affirmative action might be consistent with the norm of racial equality, but could become inconsistent as society overcomes its racism).

SYSTEMS OF NORMS CONTAIN INCONSISTENT PREMISES

An open set of unstated conditions of the norm's application always remains. Not only do the rules of a game not cover all possible contingencies (does the norm of racial equality change somehow if society becomes less racist?), the explicit rules fail to cover the full range of contingencies of their own application (does the norm of racial equality entail color-blind or color-conscious means to the goal of that equality?). Differences among situations falling under the jurisdiction of norms reduce the fit between norms and their contexts of application; exceptions arise that limit their generality. Carried to an extreme, this process leads to a complete denial of the existence of norms, which then dissolve into the complete uniqueness of any given situation. Consequently, for many norms and resulting conclusions, one could probably identify a counter-norm justifying a contrary conclusion.¹² On the other hand, some highly formalized sets of norms may apply consistently to mutually inconsistent descriptions of behavior, events, or circumstances.

The norm of racial equality illustrates both aspects of this thesis in concrete ways. For it admits the premise of equal treatment according to neutral norms as well as the contrary premise that, in a racist society, color blindness only perpetuates existing racial inequalities. It admits the premise that race should be irrelevant in relations among citizens; that any form of race consciousness is likely racist; that discrimination on the basis of race is irrational in its choice of criterion by which to distinguish people; and irrational when measured against the basically color-blind spirit of the Constitution and the political system in general; and that participation in the public sphere can be race blind. This premise supports the claim that racial segregation in America has harmed black citizens deeply and enduringly, and that racial integration is the antidote and only plausible alternative. The norm of racial equality equally admits the contrary claim that liberal integrationism actually (but unintentionally) sustains a racial hierarchy by presupposing that civil rights for black Americans above all means the right of blacks

to associate with whites (that, in the words of Malcolm X, “what the integrationists . . . are saying, when they say that whites and blacks must go to school together, is that the whites are so much superior that just their presence in a black classroom balances it out” [1970:17]).¹³ In fact probably few integrationists are saying this, although they nonetheless may be blind to certain aspects of the situation. For it remains that, here, racial justice is not racial neutrality; that here, race consciousness need not be racist in the way that white or black supremacist consciousness can only be racist.

Again, the norm of racial equality admits the premise that “blacks must gain access to white schools because ‘equal educational opportunity’ means integrated schools, and because only school integration will make certain that black children will receive the same education as white children” (Bell 1995b:7).¹⁴ And it equally admits the contrary premise that a

segregated school system, or a segregated community, or a segregated school, is a school that’s controlled by people other than those who go there. But in an all-white neighborhood, where you have an all-white school, that’s not a segregated school. Usually they have a high-caliber education. . . . So the schools in Harlem are not controlled by the people in Harlem, they’re controlled by the man downtown. . . . On the other hand, if we can get an all-black school, that we can control, staff it ourselves with the type of teachers that have our good at heart, with the type of books that have in them many of the missing ingredients that have produced this inferiority complex in our people, then we don’t feel that an all-black school is necessarily a segregated school. It’s only segregated when it’s controlled by someone from outside. (Malcolm X 1970:16-17)

ANY ONE NORMATIVE CHOICE IS SUBSUMABLE UNDER COMPETING NORMS

One normative decision may be subsumable under more than one competing norm. To make a normative decision is to choose among competing norms, all of which may fit many past decisions yet each of which might urge different action in the instant case. A norm does not compel (or preclude) a particular action in which particular action or result can be incorporated into that norm, once reinterpreted.

Hence, in any given case, precedent or *stare decisis* neither leads to nor requires any particular result. Available to choice are a wide range of precedents, and a still wider variety of past interpretive decisions. Choice may be guided, consciously or not, by factors external to law, such as social and political judgments about the case’s substance, parties, or context. Further, not precedent itself but

how one chooses to read any particular precedent controls. Choice is guided not by strict logic but by interpretive goals and interests of persons or institutions with the authority to interpret. These are influenced by contingent factors such as which categories currently obtain, or by what types of argument are currently considered (by whoever decides) appropriate to the kind of case at hand. With respect to law in particular, even if *stare decisis* were an ideal basis for decision, it applies only after a precedential ruling; the precedent establishing a norm is itself outside that norm. *Stare decisis* cannot justify the manner in which it interprets law in that all-important first decision or holding or opinion on a particular matter, and to which it refers from the other end of a chain of decisions.

That first decision (about a norm's "proper" meaning or application) is unavoidably *ad hoc*. This example is instructive for areas of norm usage quite beyond the legal sphere. At least two interpretive problems faced by the first interpreter are similar to those faced by the latest interpreter, and precisely these problems hold equally for all areas of norm usage. First, no categorical distinction can be drawn between matters of definition and matters of fact. Even allegedly "analytical" truths are simply those for which no one has yet offered any alternatives that might lead us to question them. "Facts" and texts are unavailable apart from interpretation: Observation is theory-laden and theory is value-laden. Interpretive strategies are not put into execution only after reading; these strategies themselves give texts their shape, making them rather than passively arising from them (and sometimes remaking them subsequently, for example, upon an interpreter's reexamination his or her theories). Linguistic meaning to some extent is conferred by the reader or readers; it is not wholly given *a priori* or objectively.

Second, the constitutive responses of the text's reader(s) are variable. Further, the intentions of the author(s) may well be unavailable to other individuals, especially to succeeding generations. Hence even if the authors' intent is an appropriate guide to interpreting a rule, a piece of legislation, or a constitution—and proponents of this view have yet to convincingly tell us why this should be the case—only the authors can have known exactly what that intent was, and the authors may be long dead or otherwise unavailable, and/or may have had conflicting intentions submerged in compromise such that intentions are unclear (as often happens in jointly authored legal and political texts). The meaning and application of norms can only be contingent upon the authoritative readers at any given time. Individual readers may offer different readings at different times, and over time the authoritative readership will change.

Consider the norm of localism, of local control, of local control of schools. This norm can in turn be subsumed by the idea, expressed for example in cases such as *Milliken v. Bradley*¹⁵ and *Dayton Board of Education v. Brinkman*,¹⁶ that "local autonomy" is a "vital national tradition."¹⁷ "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of com-

munity concern and support for public schools and to quality of the educational process.”¹⁸ But the norm of localism can also be subsumed under a contrary norm, on the claim that local control, as understood in the previous sentence, “may result in the maintenance of a status quo that will preserve superior educational opportunities and facilities for whites at the expense of blacks” (Bell 1995a:24). The counter-norm might advocate localism in the form of “model” all-black schools, or all-black magnet schools, or at least predominantly black schools. In that case, “judicial rejection of the ‘separate but equal’ talisman seems to have been accompanied by a potentially troublesome lack of sympathy for racial separateness as a possible expression of group solidarity” (Tribe 1988:1479), as well as a possible resource in cultural strength, “especially given the importance racial solidarity and exclusivity can have for associations organized to promote the interests of oppressed minorities” (ibid.:1480).¹⁹

This chapter, having analyzed central aspects of indeterminacy in normative rules, sets the stage for the entire book. It completes the book’s first part, identifying the basic problem of indeterminate norms. The second part examines two ways of coping with indeterminacy. The first is proceduralism. I shall argue for a form of proceduralism sensitive to significant contingencies at the local level. The enlightened localist accommodation of local factors saves proceduralism from the unintended but unavoidable perpetuation of inequalities that would in fact violate its own logic of neutrality.