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978-0-521-76086-7 - Should Race Matter?: Unusual Answers to the Usual Questions

David Boonin

Excerpt

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I

Thinking in Black and White

*An Introduction to the Moral Questions that America's
Past Raises about Its Present*

Two facts about black and white people in the United States give rise to a number of important moral questions. This book attempts to answer five of them. The two facts are that for much of our nation's history, black people as a group were treated worse than were white people as a group and that by many uncontroversial measures of human well-being, black Americans on average aren't doing as well today as white Americans are doing. The five moral questions that arise from these facts, and that constitute the subject of this book, concern the moral status of slave reparations, affirmative action, hate speech restrictions, hate crime laws, and racial profiling.

One way to respond to these five practices would be to focus on something they all have in common. All five practices involve treating racial distinctions, in one way or another, as morally relevant. Someone might claim that racial distinctions should never be treated as morally relevant, and so oppose all five practices. Or someone might claim that racial distinctions may always be treated as morally relevant, and so think that there's nothing wrong in principle with any of them.

Attempting to reach a moral conclusion about these five issues by appealing to either of these general principles, though, is implausible. Despite much talk about the prevalence of color-blind or color-conscious thinking, no one really believes that racial distinctions should never matter or that they may always matter. Supporters of affirmative action who think that racial distinctions should matter when the post office is deciding who to hire, for example, don't think that such distinctions should matter when the post office is deciding how much to charge people for stamps. They think that the postal service's stamps should be distributed in a color-blind manner, that is, but they don't think that its jobs should be. Similarly, opponents of affirmative action who think that racial distinctions shouldn't matter when a public hospital is deciding which doctors to hire don't insist that such distinctions shouldn't matter when those doctors are deciding how to diagnose or treat their patients. They think that the doctors' jobs should be distributed in a color-blind manner, that is, but if the race of a patient proves to be relevant to diagnosing or treating a particular medical condition,

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they don't think that the medical care the doctors provide should be. The attempt to resolve any particular racial controversy by insisting that racial distinctions should never matter or that they may always matter is therefore bound to fail.

A second way to respond to these five issues would be to focus on the distinction between conferring a positive benefit on someone because of their race and imposing a sanction on someone because they targeted a person for unwelcome treatment because of that person's race. Slave reparations and affirmative action would go hand in hand, on this account, since both involve preferential treatment according to race. And hate speech restrictions, hate crime laws and a ban on racial profiling would stand or fall together, too, since all involve penalizing someone for targeting people by race for unwelcome treatment. But there would be no reason to treat all five cases as being morally on a par. One might consistently oppose affirmative action programs on the grounds that they use race to favor some people over others, for example, while at the same time supporting hate crime laws on the grounds that criminals who select their victims by race do something worse than criminals who don't.

This second way of approaching these five practices is a bit more promising. But it, too, is ultimately unsatisfactory. There's no reason to view all cases that involve preferential treatment by race as being morally on a par. Nor is there reason to view all cases that sanction those who target people by race for unwelcome treatment as being morally on a par. The moral status of targeting a person by race for unwelcome treatment, for example, might turn out to depend in part on the moral status of the kind of unwelcome treatment in question. Insulting a person in nonracial contexts is objectionable but it isn't prohibited by legal or academic regulations. Committing a crime against someone in nonracial contexts is objectionable and is also prohibited by the law. A cop pulling someone over for speeding in nonracial contexts is neither objectionable nor prohibited by the law. Whether the targeting of a person by race for unwelcome treatment makes the act in question more objectionable or more worthy of sanction than it would otherwise be, then, might depend in part on whether the act would be objectionable or worthy of punishment if it were performed in a purely nonracial context. Since insulting people, committing crimes against them, and pulling them over for speeding in nonracial contexts each differ from the other two in terms of their moral status, their legal status, or both, we might well be led to reach substantially different conclusions about the moral status of targeting people by race for each of these forms of treatment or about the moral status of imposing sanctions on people who target people by race in these different ways.

And while slave reparations and affirmative action each involve conferring benefits on some people because of their race, there's no reason to assume that these two practices must go hand in hand morally, either. One could support reparations while opposing affirmative action, for example, if one thought that the latter but not the former involved a certain kind of rights violation. And one might support affirmative action while opposing slave reparations if one's support for affirmative action arose from considerations, such as the importance

of promoting diversity, that are independent of claims about compensation and reparation. Trying to reach a moral conclusion about these five cases by considering them in presumptively comparable groups, then, is bound to fail as well.

This leaves a third possibility: considering these five issues one at a time, on their own individual merits, recognizing that the most reasonable conclusions might entail support for some, opposition to others, and perhaps at times positions that lie somewhere between embrace and condemnation. That is the approach that I've tried to take in this book, and it's led me to a somewhat eclectic set of conclusions that as a whole can't readily be characterized as left or right, color blind or color conscious: support for slave reparations, a position on affirmative action that lies between that of its supporters and its opponents, opposition to hate speech restrictions but support for hate crime laws, and a limited but nonetheless substantive defense of the permissibility of racial profiling, at least under certain sorts of conditions. Taken as a whole, these positions may seem not just eclectic but downright inconsistent: how could one oppose hate speech restrictions without also opposing hate crime laws? Who could endorse slave reparations, widely dismissed as the most radical of racial practices, while also supporting racial profiling, almost universally reviled as the most reactionary? Why maintain that practicing affirmative action is morally permissible but then maintain that not practicing affirmative action is morally permissible, too?

Virtually everyone who reads this book, I suspect, will initially agree with at least some of the positions I defend here. Virtually no one who reads this book, I suspect, will initially agree with all of them. In the chapters that follow, though, I'll try to show that they should agree with all of them. And I'll try to show this by appealing to assumptions that virtually everyone who reads this book, regardless of their initial views about these various issues, already accepts. In this way, I hope to show that my apparently unusual combination of positions does, in fact, offer a coherent and defensible response to some of the most difficult and controversial moral problems raised by the use, and the misuse, of race in this country.

WHAT'S BLACK AND WHITE AND CONTESTED ALL OVER?

I've started out by writing as if it's clear what it means to say that someone is black or white. It isn't. Some people treat the line between black and white as essentially a matter of biology. Birds come in different varieties, dogs come in different breeds and, on this account, people come in different races. We recognize a line between white people and black people on this view because nature itself has drawn this line. Others treat race as something that's a fundamentally social construction. Nature doesn't tell us whether to call Pluto a planet, for example. We decide whether to call it a planet. And if we decide not to call it a planet, this isn't because it "really isn't" a planet. Rather, it really isn't a planet because we've decided not to call it one. In the same sort of way, many people have argued, truths about racial identity are created rather than discovered. It isn't that a man

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with three Swedish grandparents and one African grandparent is called black because he “really is” black. Rather, he’s black because that’s what we call him.¹

This debate about the reality of race is a confusing one in part because the people who engage in it often seem to mean different things when they use the word “race.” As a result, it’s often unclear whether those who claim that race is real and those who claim that it isn’t are really disagreeing with each other about anything. Consider, for example, two recent books that, at least on the face of it, defend diametrically opposed views about the reality of race: *Race: the Reality of Human Differences* by anthropologist Vincent Sarich (written with journalist Frank Miele) and *The Race Myth: Why We Pretend Race Exists in America*, by evolutionary biologist Joseph Graves Jr., both published in 2005. Graves sets out to demonstrate that “The traditional concept of race as a biological fact is a myth” and that “The fact is that no biological races exist in modern humans.”² Sarich and Miele, on the other hand, set out to show that race is real and that denying this is no more than political correctness run amok. Both sides have impressive scientific credentials and both appeal to plenty of scientific data to support their positions. One would therefore expect to find a powerful clash of positions.

But a careful study of both books reveals that, in this case at least, the two sides of the debate are talking entirely past each other. And this is so precisely because the two sides are using the term “race” to mean fundamentally different things. When Graves attacks the claim that race is real, for example, he describes himself as attacking the claim that “biological races can be unambiguously identified within the human species, and that these races have an innate essence that distinguishes them from other races.”³ On this use of the term, a race is a subset of the human species that has some fixed, immutable essence that’s shared by every human being who is a member of the subset and by no human being who is not. But when Sarich and Miele argue that race is real and not a mere social construction, they are equally clear that by “race” they mean something very different: a group of humans who have largely similar ancestry in terms of how recently their ancestors migrated from sub-Saharan Africa and in terms of where they ended up settling when they first left.⁴

While each of the two books defends the truth of its own claim about the reality of “race” when the word is used in one sense, moreover, neither of the books denies the truth of the claim about the reality of race made by the other book when “race” is used in the other sense. Referring to some of the facts that have been cited in favor of the claim that race is real, for example, Graves writes that “All this data really does is allow us to get a better handle on the past migratory history of our species, as opposed to identifying or assigning individuals to discrete racial categories.”⁵ While denying the reality of “race” in his Platonic sense of the term, that is, Graves acknowledges the reality of race in the genealogical sense of the term employed by Sarich and Miele. And the arguments that Sarich and Miele stress in favor of the view that race is real just as clearly apply to their sense of the term “race” but not to the sense used by Graves. As an important

argument for their thesis, for example, Sarich and Miele cite the case of a 2003 investigation into a series of killings in and around Baton Rouge, Louisiana. In March of that year, as they report the story, Tony Frudakis of DNAPrint Genomics told the task force working on the case that it should shift its focus away from white suspects and toward “an African American of average skin tone, because his analysis indicated the perpetrator had 85 percent sub-Saharan African and 15 percent Native American ancestry. The seventy-three-marker DNAPrint, which became sufficiently developed for this type of investigation only in early 2003, determines an individual’s proportion of East Asian, Indo-European, Native American, and sub-Saharan African ancestry and then compares these proportions against a database of 300 to 400 people already typed to produce a comparable skin tone.”⁶ Sarich and Miele take this as evidence that objective biological facts about a person’s genetic makeup can be used to determine which race the person belongs to precisely because by race they mean facts about the person’s ancestral history and not some eternal, immutable essence that he shares with all and only other members of his group. The police were looking for a white person, that is, objective DNA analysis told them to look for a black person, and when the killer was finally identified he did, in fact, turn out to be black. Or, at least, he turned out to be “black” given what Sarich and Miele mean by that term: a person with a sufficiently high proportion of relatively recent sub-Saharan African ancestry. Sarich and Miele don’t claim that he (or anyone else) was black in the sense of having a fixed and essential quality that links him to all and only black people.

So is race real? A reasonable response to the debate between Graves on the one hand and Sarich and Miele on the other would seem to be: yes and no. Race is real in the sense that there really are physical differences between different human populations grouped together by genetic ancestry. Race is not real in the sense that there really are no natural fault lines that perfectly divide the world into a discrete number of groups each bound together by its own eternal essence. The subtitle of Kenan Malik’s excellent 2008 book on the subject, *Strange Fruit*, is “Why Both Sides Are Wrong in the Race Debate.” But a more charitable assessment of the situation, and one that seems equally consistent with Malik’s own analysis, is that both sides are right.⁷ Each side makes a claim about the reality of race that turns out to be correct given what it means by the term. Neither side offers an argument that undermines the claim about the reality of the race made by the other side given what the other side means by the term.

Whether this conclusion about the debate between Graves on the one hand and Sarich and Miele on the other can successfully be extended to the vast literature on the subject as a whole is a deep and vexing question. But for the purposes of this book, answering this particular question won’t be necessary. The reason for this is simple. In order for any theory of race or of racial identity to be successful, it must produce results that are accurate across a broad range of cases about which virtually everyone agrees. Abraham Lincoln and Jefferson Davis, for example, were white. Frederick Douglass and Harriet Tubman were black. Will

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Smith and Denzel Washington are black; Russell Crowe and George Clooney are white. Hillary Clinton is white. Condoleezza Rice is black. Any theory of racial identity that fails to produce the correct results in such cases is unacceptable for that very reason. And for the purposes of this book, all we really need to assume is that these particular kinds of judgment are generally correct.

The problems I want to discuss in this book, after all, arise because of the two facts that I mentioned at the outset: that for much of our nation's history, black people on the whole were treated significantly worse than were white people as a whole, and that by many current indicators of basic human welfare, black Americans today are doing considerably worse on average than are white Americans. In order to affirm that these two basic claims are true, we need to be able determine which people should be counted as black and which should be counted as white when we look at such questions as who was legally entitled to vote prior to the Civil War or who is more likely to graduate from college today. But while we do need to be able to say who is black and who is white for these sorts of purposes, we don't need to be able to say what theory best explains why the black people are black and the white people are white. Any theory that gets it right in the clear, uncontroversial cases will be as good as any other. And so, for the purposes of this book, I'll simply assume that we by and large agree about which people are black and which people are white, even if we don't agree about what exactly this means or about what theory best accounts for our agreement. What ultimately explains the nature of racial differences is a widely contested topic. But it won't be contested here.

BEYOND BLACK AND WHITE

In assuming that we generally agree about who is black and who is white, though, it may seem that I also mean to be assuming that everyone is one or the other. I don't mean to be assuming this. In the first place, some people might most reasonably be characterized as simply falling in between these two categories. In the United States, we no longer use such terms as "mestizo," "mulatto," "creole," and "quadroon," all of which were once commonly used to designate people who were neither "fully black" nor "fully white."⁸ We tend instead to consider people to be black if it seems clear to us that they are at least partly black. Tiger Woods, for example, tried for a while to refer to himself as "Cablinasian," as a way of acknowledging his Caucasian, African, (American) Indian, and Asian ancestry, but when most Americans looked at him, they simply saw a black man. In other countries, however, it continues to be common to make more fine-grained judgments than simply dividing people into black and white, and the project of this book in no way depends on the assumption that this alternative approach is mistaken. If it proves in the end to make more sense to refer to a particular individual as half-black and half-white, for example, this need pose no problem for the various questions I will want to raise or the various conclusions I will want to draw. It will simply follow that what I say about black people will apply

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to this person to the extent that he is counted as black, and not to the extent that he is not. Since we Americans do tend to push most people of mixed ancestry into one category or the other, though, and since this is a book about a distinctly American problem written primarily for an American audience, I will largely follow the current American convention of calling most of the people I refer to either black or white.

There's a second and much more obvious reason, of course, for not assuming that everyone is either black or white: a great number of people are neither black nor white nor partly both. They are Asian or Latino, Maori or Inuit, or many other things besides. It may also seem, then, that by carving the world up into black and white for the purposes of this book, I am diminishing the importance of these further groups. But the point of this book is not to catalog humanity in all of its racial or ethnic diversity, or to suggest that some groups matter more than others. The point is simply to focus on one particular set of questions that Americans have found, and continue to find, particularly vexing. These questions involve the line between black and white Americans, in particular, because much of what is distinctive of our national history and current racial demography involves the relationship between black and white people in particular. This is the reason that I will discuss the practices that I focus on here primarily by thinking of ethics in terms that are black and white.

While the explicit focus of most of what follows will be presented in black and white, however, this doesn't mean that what I have to say isn't relevant to many other important groups. What I say about slave reparations in Chapters 2 and 3, for example, is likely to apply to Native Americans as well. What I conclude about affirmative action in Chapters 4 and 5 probably goes for many other groups, including Hispanics and women. My discussion of hate speech restrictions in Chapters 6 and 7 and of hate crime laws in Chapters 8 and 9 could plausibly be extended to cases involving bias against gay people, and my argument about racial profiling in Chapters 10 and 11 almost certainly has implications for the treatment of Arabs and people perceived to be Muslim.⁹ While all of these other groups of people are obviously important, however, I will generally leave it to the reader to consider how readily, if at all, the arguments I develop here can be made to apply to them. The arguments themselves can best be developed if they remain narrowly focused. And so, for the reasons already mentioned, I will treat the moral problems with which this book is concerned as issues that can most clearly be seen in black and white.

DON'T KNOW MUCH ABOUT (BLACK) HISTORY

February is Black History Month. It's also the shortest month. It's easy enough to joke about this, to anticipate the predictable complaint that there isn't a White History Month, and the equally predictable rejoinder that every month is White History Month. It's less easy to know how to initiate a responsible discussion of the moral problems that this book is concerned with given that Black History

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Month exists largely because so many Americans don't know that much about black history in the first place. In order to understand the background that gives rise to the various questions that I want to address in this book, though, and in order to think fairly and responsibly about the different positions that can be taken in response to them, it's necessary to have a clear and explicit grasp of some basic, and regrettable, facts about the history of black people in America. So while there's a great deal to celebrate and to be grateful for in our nation's history, and while there's surely much more to the history of black people in America than a tale of victimization, I will focus in this section exclusively on identifying some of the important ways in which the United States hasn't always been so good to black people.

The point of this brief exercise, I should emphasize, is not to insist that the ways in which America has been bad to black people are more important or more representative than are the ways in which it has been good to black people. Nor is it to insist that black Americans should care about or identify with the negatives more than the positives, or that they should not, on the whole, be happy and proud to live here. The point, rather, is simply to make clear those particular circumstances that in one way or another give rise to the questions I want to discuss in the chapters that follow. If a man used to beat up his neighbor once in a while and steal from him on occasion, for example, it is these specific incidents that would require clarification in order to determine what, if anything, he now owed his neighbor in response to his past wrongdoings. Facts about all of the other times that he was perfectly nice to his neighbor, left his neighbor alone, or even went out of his way to do favors for his neighbor would be considered irrelevant. In the same way, and for the same reason, what matters for the purposes of understanding the problems to be addressed in this book, for better or worse, is the worse and not the better of the history of black people in the United States. With this understanding of the limited purpose of this section in mind, then, it's important to take account of the following facts about the past before we begin to consider what we should say about their moral implications, if any, for the present.¹⁰

As far as we can tell, the first black people to settle in the English Colonies that were later to become the United States arrived in 1619. They came neither as free people nor as slaves. Like many of the white people who lived in the New World at the time, the first black Americans came as servants. They entered the country as part of a larger system in which workers were compelled to serve for a predetermined amount of time, typically four or five years, after which they would gain their freedom. Some servants found themselves in this position involuntarily, as a result of their having been convicts or prisoners of war. Others freely consented to take on their roles as apprentices or indentured servants, usually in exchange for passage to their new home and some kind of professional training. But regardless of how they found themselves to be servants in the New World, the defining feature of their servitude was that it was temporary, and there is no evidence that black people were treated differently from white people

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in this respect, at least in the first few years in which there were black people in the Americas.¹¹

While black people may therefore have been treated in the same way as white people when they first arrived on this continent, however, this equality of the races didn't last long. In 1625, a mere six years after the earliest known arrival of black people in America, a Virginia court was called upon to settle the case of three indentured servants who had escaped and fled to Maryland before being captured and returned. Two of the men were white, and they were each sentenced to four years of additional service. But the third, a black man named John Punch, was ordered to "serve his said master or his assigns for the time of his natural life here or elsewhere."¹² Punch, in effect, became the first American slave. And while the black population remained relatively small through the middle of the 1600's, the number of black people who were burdened with permanent servitude began its slow and steady rise.¹³

This enslavement of black laborers in America was not initially authorized by any legal statutes, but it was quickly accepted and enforced by the courts nonetheless. And before long, the Colonies began the formal process of adopting laws to officially recognize slavery: Massachusetts in 1641, followed by Connecticut in 1650, Virginia in 1661, and Maryland in 1663.¹⁴ Near the beginning of this series of events, it may be worth noting, a small number of people attempted to enslave some members of the Native American population as well, but this was a largely isolated and generally unsuccessful practice. By 1675, at least, as the numbers involved continued to increase, American slavery had become, for all intents and purposes, black slavery. It would continue to be so until its abolition nearly two hundred years later.¹⁵ By the time the Colonies finally declared their independence in 1776, moreover, all thirteen of them had positive laws on the books permitting and regulating the practice of slavery.¹⁶

The country we live in today was born in 1776, but the government we live under today came into existence in 1789, when the Constitution was officially ratified. When calculating the population of a given state for the purposes of determining the size of its representation in Congress, the Constitution counted each slave as three-fifths of a person, but when calculating his importance for the purposes of determining his legal rights, a slave counted as no person at all. So far as the Constitution was concerned, slaves were property. Indeed, Article IV, Section 2 of that document contained the explicit stipulation that a slave who escaped from his master was to be treated as property that would simply be "delivered up" to his master regardless of what the law said in the state to which he escaped.¹⁷ And Article I, Section 8 authorized Congress to use the state-based militias to "suppress insurrections," a provision that was clearly understood at the time to be aimed at preventing slaves from rebelling against their masters.¹⁸

The active role that the federal government thereby played in protecting the rights of slave owners in the ownership of their slaves was reinforced by the Fugitive Slave Act of 1793, a law that was later strengthened even further in the revised version that came to be known as the Compromise of 1850.¹⁹ This

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latter version of the law, in particular, helped slave owners to get around various obstacles that some Northern states had attempted to erect in the years between. Some Northern states, for example, which had since outlawed slavery within their borders, also passed laws guaranteeing a fugitive slave's right to a hearing in the court of the state to which the slave had escaped. But the revised federal statute of 1850 mandated that a slave owner merely had to go to the court in his own (of course, slaveholding) state in order to be granted a legal document authenticating his right to recover the slave in question. And at that point, the return of the slave became a federal matter to be carried out by federal officials. From the very moment of the creation of our national government, then, the state played an active role in maintaining the system of slavery, and while a number of individual states retreated from this practice in the years leading up to the Civil War, the government of the nation as a whole stepped in to fill the void. Slavery, in short, wasn't simply a bad thing that happened in America, the way that poverty, disease, or crime are bad things that sometimes happen. Rather, it was a bad thing that was authorized, facilitated, and protected by the United States government.

Not all of the black people who lived in the newly created United States of America were slaves, of course, but even those who are often referred to as "free blacks" were subject to important restrictions that didn't apply to white people. In the first place, no black people in the United States were citizens. The first Federal Naturalization Act, passed in 1790, explicitly restricted citizenship to "free white persons."²⁰ All black people in America, free or not, were prohibited from voting and from holding public office. An 1810 law even forbade them from working for the Post Office.²¹ In addition, in the years leading up to the Civil War, the federal government actively enforced the rights of individual states to impose even further limits on what free blacks could do. South Carolina, for example, was one of several states to pass a Negro Seaman Act, the point of which was to ensure that black sailors arriving from abroad couldn't spread any dangerous ideas by making contact with black people in America. When a ship originating from a foreign country arrived at a South Carolina port, the law required all the black people on board to be arrested and jailed until the ship was ready to depart. John Berrien, the Attorney General under President Andrew Jackson, explicitly confirmed in his statement about this case that the United States government recognized and protected "the general right of a State to regulate persons of color within its own limits."²² Even Northern states imposed severe legal limits on what free blacks could do, including in some cases prohibiting them from serving on juries, testifying in court, carrying guns, and attending public schools.²³ And black Americans in the North lived in constant fear of being kidnapped and enslaved, especially as the market value of American slaves reached new heights in the early part of the nineteenth century and Congress continued to reject calls for federal antiskidnaping legislation or improved protection in the fugitive slave laws.²⁴

The Civil War brought an end to the practice of slavery in America.²⁵ Whether fought for that reason or not, the result was that, in one enormously important