# Volume 8 Issue 2 Spring 1991 Social Philosophy & Policy

# REASSESSING CIVIL RIGHTS

## Contributors

|                     | Introduction   |      |
|---------------------|--|------|
| LLOYD L.WEINREB     | What Are Civil Rights?   | 1    |
| Cass R. Sunstein    | Why Markets Don't Stop<br>Discrimination   | 22   |
| Richard A. Epstein  | Two Conceptions of Civil Rights  | 38   |
| Jennifer Roback     | Plural But Equal: Group Identity<br>and Voluntary Integration  | 60   |
| Thomas C. Grey      | Civil Rights versus Civil Liberties:<br>The Case of Discriminatory Verbal<br>Harassment              | 81   |
| Thomas Æ. Hill, Jr. | The Message of Affirmative Action  | *108 |
| Margaret Jane Radin | Affirmative Action Rhetoric  | 130  |
| Mark Tushnet        | Change and Continuity in the<br>Concept of Civil Rights: Thurgood<br>Marshall and Affirmative Action | 150  |
| W.B. ALLEN          | Black and White Together: A<br>Reconsideration   | 172  |
| Geoffrey P. Miller  | Rights and Structure in <sup>*</sup><br>Constitutional Theory  | 196  |

Published by BASIL BLACKWELL, Oxford, UK and Cambridge, USA

Edited at the Social Philosophy and Policy Center Bowling Green State University Bowling Green, Ohio 43403, USA © Social Philosophy & Policy 1991

#### ISSN 0265-0525

### Editor Ellen Frankel Paul Managing Editor Dan Greenberg

Associate Editors Fred D. Miller, Jr. Jeffrey Paul

Editorial Board David Bravbrooke Dalhousie University Baruch Brody Rice University lames Buchanan Center for Study of Public Choice, George Mason University Jules Coleman Yale University Maurice Cranston London School of Economics Jack Douglas University of California, San Diego **Richard Epstein** University of Chicago Law School James Fishkin University of Texas, Austin

Antony Flew Social Philosophy and Policy Center Charles Fried Harvard Law School Martin Golding Duke University John Grav Jesus College, Oxford University Gilbert Harman Princeton University William Kristol Kennedy School, Harvard University Seymour Martin Lipset Stanford University Eric Mack Tulane University

Harvey Mansfield Harvard University Wallace Matson University of California, Berkeley Jan Narveson University of Waterloo Robert Nozick Harvard University Nicholas Rescher University of Pittsburgh David Sidorsky Columbia University Hillel Steiner University of Manchester James Q. Wilson University of California, Los Angeles Leland B. Yeager Auburn University

Social Philosophy & Policy is an interdisciplinary journal with an emphasis on the philosophical underpinnings of enduring social policy debates. Each issue is dedicated to a particular theme chosen by the editors, with the advice of the editorial board, designed to appeal to both academic specialists and a broader scholarly audience. While not primarily a journal of policy prescriptions, several contributions to each issue will typically connect theory with practice. The editors encourage and actively pursue diversity of viewpoints of contributors. Diversity is also encouraged by selecting authors from among different disciplines, especially philosophy, economics, political science, and the law. Readers' suggestions for future themes are always welcome, as are inquiries about the topics of issues already planned.

Subscription and back-issue information is on the inside back cover.

## CONTRIBUTORS

Lloyd L. Weinreb has been professor of law at Harvard Law School since 1965. He teaches in the areas of jurisprudence, moral and political philosophy, criminal law and procedure, and copyright; he has written extensively on all those subjects. His most recent book is *Natural Law and Justice* (1987). He is also the author of *Denial of Justice* (1977). He is currently working on a project about the nature and substance of rights.

**Cass R. Sunstein** is Karl N. Llewellyn Professor of Jurisprudence in the law school and department of political science at the University of Chicago. He is author of *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1990), coauthor of *Constitutional Law* (Little, Brown, & Co., 1986), and author of numerous articles on administrative, environmental, and constitutional law and policy.

Richard A. Epstein is James Parker Hall Distinguished Service Professor of Law at the University of Chicago, where he has taught since 1972. He has been the editor of the *Journal of Legal Studies* since 1981, and a member of the American Academy of Arts and Sciences since 1985. His books include *Takings: Private Property and Eminent Domain* (1985), *Cases and Materials on Torts* (5th ed. 1990), and *Modern Products Liability Law* (1980). His book *The Antidiscrimination Laws in Employment Markets: A Legal and Economic Analysis* will be published later this year. He has taught courses in civil procedure, contracts, land development, property, torts (including defamation and privacy), jurisprudence, legal history, Roman law, and workers' compensation. He has written extensively in these areas, as well as in those of constitutional and labor law. Before joining the University of Chicago faculty, he taught at the University of Southern California Law School from 1968 to 1972. He is a graduate of Columbia College, Oxford University (Juris.), and the Yale Law School.

Jennifer Roback is an Associate Professor of Economics at George Mason University and a Research Associate at the Center for Study of Public Choice. She received her B.A. from Ohio State University and her Ph.D. from the University of Rochester. She has written extensively on the economics and history of American ethnic groups, including immigrant groups, Mexican-Americans, African-Americans, and Native Americans. Her articles have appeared in such diverse publications as *Economic Inquiry*, the *Journal of Political Economy*, the University of Chicago Law Review, the Journal of Economic History, and Publius. She is currently working on a book on the origins of the American Civil War. Thomas C. Grey, Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law at Stanford Law School, was educated at Stanford, Oxford, and Yale Law School, and has taught at Stanford since 1972. He has written a number of articles on constitutional law and constitutional theory, as well as a number of jurisprudential topics, most recently the place of American pragmatism in legal theory. On that subject, he has two books forthcoming, one on pragmatism in the thought of Justice Holmes, the other on the lawyer-poet Wallace Stevens. Professor Grey is also the drafter of the recently-adopted Stanford University campus ordinance on discriminatory verbal harassment.

Thomas E. Hill, Jr. has been a professor of philosophy at the University of North Carolina at Chapel Hill for six years. Previously, he taught at the University of California at Los Angeles, Pomona College, Johns Hopkins University, and (as a visiting professor) Stanford University. He has written articles on various moral problems; these papers, with others, are soon to be published together by Cambridge University Press under the title *Autonomy and Self-Respect*. He has also written on various aspects of Kant's moral philosophy, and a collection of his papers on this subject is forthcoming from Cornell University Press.

Margaret Jane Radin is professor of law at Stanford Law School, where she teaches property and jurisprudence. Prior to joining the Stanford faculty, she was the Carolyn Craig Franklin Professor of Law at the University of Southern California. She obtained her A.B. from Stanford University and her J.D. from the University of Southern California. She also holds an M.F.A. from Brandeis University in the history of music. She is currently at work on a book, *The Moral Meaning of the Market*. Her recent articles include "The Pragmatist and the Feminist" (forthcoming in *Southern California Law Review*), "Diagnosing the Takings Problem" (forthcoming in the *Nomos* volume on *Compensatory Justice*), and "Reconsidering the Rule of Law" (*Boston University Law Review*).

Mark Tushnet, J.D., M.A. Yale 1971, is Professor of Law, Georgetown University Law center. He is the author of *Red, White, and Blue* (1988), *The NAACP's Legal Strategy Against Segregated Education, 1925–1950* (1987) which won the Littleton-Griswold Prize of the American Historical Association, and co-author of *Constitutional Law: Cases and Materials* (2d edition forthcoming). He has written extensively in constitutional law and history. His article in this issue is based upon a chapter in his forthcoming biography of Justice Thurgood Marshall.

William B. Allen is professor of government at Harvey Mudd College. He is a member, and was formerly the chairman, of the United States Commission on Civil Rights. He is the editor of *George Washington: A Collection* (Liberty Press, 1988). Geoffrey P. Miller is Kirkland & Ellis Professor at the University of Chicago Law School and an editor of the *Journal of Legal Studies*. He received his A.B. *magna cum laude* from Princeton University in philosophy, and his J.D. from Columbia University Law School, where he was editor-in-chief of the *Columbia Law Review*. Miller served as law clerk to two federal judges, including Justice Byron R. White of the United States Supreme Court. He spent two years in the U.S. Department of Justice and a year in private legal practice before coming to the University of Chicago Law School in 1983.