



# 9

## Political Philosophy, Law, and Public Policy

### Introduction

Altogether, political philosophy, law, and public policy make up the official positions and practices regarding racial difference in society. However, it is useful to distinguish these different fields of research and practice. Standard political philosophy does not have a separate subfield addressing racial difference, although the tradition has resulted in principles of liberty and individual autonomy, as well as universal human rights, which many philosophers have applied to their concerns about race, for example, ideal theory and nonideal theory as developed by John Rawls in his 1971 *A Theory of Justice*.

Law consists of what is written, the rules for implementing it, and practices of interpretation and application, for example, the Fair Housing Act of 1965 that prohibited discrimination in public housing. Public policy consists of practices by government officials and other employees that create programs and institutions and their accompanying bureaucracies, which have different effects on racial groups, for example, Affirmative Action in higher education or the use of school busing to achieve integration in K-12. Also, there may be undesired effects of unspoken public policy on local levels, such as police killings of black people that have been preceded by racial profiling. While it is tempting to imagine that there is a path from political philosophy, to law, to public policy, with decreasing degrees of abstraction, in reality these levels of analysis are often all mixed up, for example, in litigation about public policy that seeks to

change how laws are interpreted, and which is motivated by principles of political philosophy. This chapter is oriented toward contemporary examples of public policy and their associated laws, judicial interpretations, and underlying political principles. But first, a note on the democratic political tradition is in order.

In Chapter 2, several official oppositions to racist ideas and practices were discussed: key elements of the 13th, 14th, and 15th Reconstruction Amendments to the US Constitution, civil rights legislation, and the 1948 United Nations Declaration of Universal Human Rights. These egalitarian pronouncements have now become part of a contemporary living tradition that is invoked in reaction to racial injustice. The core ideas, for which legal support can be found in both US and international law, are that all human beings have the same legal and societal rights, regardless of race, and that law offers remedies when those rights are violated. Scholars draw on this tradition to argue that certain practices are just or unjust and lawyers and judges reason from elements of it in court cases.

It is comforting to think that the egalitarian legal tradition protects non-whites, but as we know, there is often a slippage between what is written and promulgated in official and lofty language and how people are treated in concrete reality. Moreover, the egalitarian legal foundations provided from the Reconstruction Amendments onward, were additions to more foundational philosophical and legal doctrines of liberty and individual autonomy. And those foundations, for example, the US Constitution, although now revised by progressives as more inclusive today than they were in their time, were not intended to ground justice for everyone. The US Constitution originally allowed for slavery, and beyond that explicitly oppressive measure, in the late eighteenth century, women and poor white men who did not own property were not permitted to vote.

As we have seen in Chapter 1, historically, the philosophical tradition has not been racially egalitarian and anti-nonwhite racism was explicitly expressed by writers such as Hume, Kant, Hegel, and even John Stuart Mill. Nevertheless, there is a consensus about racial equality among contemporary political philosophers. Differences exist in their views of how racial equality should be interpreted and applied, but those differences do not preclude the shared commitment to racial equality or as it is sometimes called, **social justice**. The first part of this chapter takes up several contemporary philosophical/theoretical approaches to justice and injustice; the second part addresses issues of public policy in Affirmative Action and racial profiling by police officers.

## Contemporary Philosophical/Theoretical Approaches to Justice and Injustice

John Rawls (1921–2002) provided a new paradigm for considering justice as a political ideal and is considered by many philosophers to have revitalized political philosophy from the 1970s on, with his idea of justice as fairness. Nonetheless, criticism of Rawls's project has been robust (Douglass 2012). The economist Amartya Sen (1933–) believed that Rawls's contribution was too abstract and he introduced the *capabilities approach*. Furthermore, if we begin with ideas of justice, as theorists, we may miss what most people care about, which is injustice. And beginning from injustice calls for new theoretical work.

### John Rawls and Justice as Fairness

John Rawls's famous core idea is that justice is a universal social concept among all human societies, but that in specific application, it requires a *conception*. Rawls's conception of justice is that justice is fairness. He proposed a way to arrive at fairness through a thought experiment in which all stakeholders in society, who share background core democratic principles, deliberate behind a *veil of ignorance*, which means that they do not know their own interests in real life or their identities—rich, poor, male, female, black, white, able-bodied, disabled, and so forth. The task of the deliberators is to agree on the design of the basic institutions of their society. It is important to remember that Rawls is providing an ideal theory for liberal societies that are already **well-ordered**: citizens know what the laws are, accept them as just, and know that others regard them in the same way. In *Justice as Fairness* (1985), Rawls posits two fundamental principles to govern the basic institutions:

First, each person has the same absolute claim to equal basic liberties, which is compatible with the same liberties for all.

Second, Social and economic inequalities must meet two conditions: They must be attached to offices and positions open to all under conditions of *fair equality of opportunity*; They must be to the greatest benefit of the least-advantaged members of society (the *difference principle*). (Rawls 1999a, 42–3)

The difference principle has received great attention from Rawls's scholars because it addresses distributive justice, or how real goods ought to be distributed in society, given preexisting inequalities that may be unearned,

such as inborn talents. According to Leif Wenar, writing for the *Stanford Encyclopedia of Philosophy*:

The difference principle is partly based on the negative thesis that the distribution of natural assets is undeserved. A citizen does not merit more of the social product simply because she was lucky enough to be born with the potential to develop skills that are currently in high demand. Yet this does not mean that everyone must get the same shares. The fact that citizens have different talents and abilities can be used to make everyone better off. In a society governed by the difference principle, citizens regard the distribution of natural endowments as a common asset that can benefit all. Those better endowed are welcome to use their gifts to make themselves better off, so long as their doing so also contributes to the good of those less well endowed. (Wenar 2017, 4.3)

The difference principle thus takes into account natural inequalities and in *A Theory of Justice*, Rawls introduces the idea of moral equality which contains within it an awareness of justice in those individuals who are morally equal:

Moral persons are distinguished by two features: first they are capable of having (and are assumed to have) a conception of their good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree. ... One should observe that moral personality is here defined as a potentiality that is ordinarily realized in due course.

This definition of moral equality is politically important because it entitles moral persons to just treatment. Thus, Rawls added, “We see, then, that the capacity for moral personality is a sufficient condition for being entitled to equal justice” (Rawls 1999a, p. 442).

There are problems with the egalitarian nature of Rawls’s definition of moral personhood. First, universal human subjectivity is impossible to confirm and can only be imagined. Some human beings may not have Rawls’s features for moral personhood, for example, the cognitively disabled, those who are unjust themselves, and those who have been so severely oppressed as to lose or not develop a sense of justice. In addition to the lack of universality of Rawls’s features of moral equality, it does not tell us what it is that human beings all share that makes moral equality, or the moral equality of some of them, self-evident or factually grounded. Obvious candidates for universal human equality are not convincing, because they have been known to those who have acted unjustly: biological similarities; shared

species identity; common basic needs; distinctive human subjectivity; being an actual or potential object of sympathy or compassion; the intrinsic goodness of human happiness, pleasure, and flourishing and the intrinsic badness of human suffering, pain, and destruction; a common creator of all humankind. Also, some of these candidates for human equality refer to what is distinct about human beings as though they could not be changed by distinctly human inventions and constructions, for instance, biological and species similarities could change due to genetic engineering. Furthermore, moral equality based on species identity may imply that humans do not have to behave morally to other forms of life.

As a result of the inability to define human equality in any factual sense that moral equality could be based on, there are problems with any political philosophy based on external ideas of human equality, because the fact of equality would not be sufficient to stop some people from acting as though other human beings were not equal to them. If, as in the past, the idea of equality comes from religion, there are no objective directives for which religion is the right one to follow and impose on others (Zack 2014, pp. 262–4).

Influential as he has been, Rawls's positive conception of justice was aspirational. He intended it to be a goal aimed for by well-ordered societies and his project was thus *ideal theory*. He recognized that others in seeking to address real-life problems would engage in *nonideal theory*, although it is generally understood that nonideal theory cannot have any effect on ideal theory (Simmons 2010). Regardless, in *Law of Peoples*, Rawls assumed that ideal theory was necessary before engaging in nonideal theory that would have the long-term goal of bringing society to the condition of being just according to ideal theory: "Nonideal theory asks how this long-term goal might be achieved, or worked toward, usually in gradual steps. It looks for courses of action that are morally permissible and politically possible as well as likely to be effective" (Rawls 1999b, p. 89; Simmons 2010, p. 7).

## Amartya Sen and the Capabilities Approach

In 1998, Amartya Sen, who was born in India but lives and teaches in the United States and the United Kingdom, was awarded the Nobel prize for his contributions to welfare economics. **Welfare economics** is the study of how people benefit from different economic structures and systems. Sen's contributions have included original insights, backed up with statistical evidence and mathematical formulae, about the material conditions of some of

the poorest people in the world who are non-European and nonwhite. Sen's research supported conclusions that: decline in aggregate food availability is less a cause of famine than is government inflation of currency and speculative hoarding; in India, specifically, illiteracy, government bureaucracy, and poor health care affect distribution among the poor. Sen's **capabilities approach** is a focus on the ability of individuals to transform goods available to them into instruments for their own well-being. Freedom of choice and security support capabilities and specific capability indexes have been developed for different countries (Shailesh 2016).

The importance of Sen's work lies in his specific and practical study of poverty, which is more nuanced and detailed than Rawls's abstract thought experiment, including his difference principle. Sen's conception of justice is meant to represent common sense ideals and expectations. Like Rawls, Sen assumes that the correct description of a just social structure is important for progress toward justice. However, unlike Rawls, Sen describes his point of departure as starting with perceptions of injustice:

The requirements of a theory of justice include bringing reason into play in the diagnosis of justice and injustice. Over hundreds of years, writers on justice in different parts of the world have attempted to provide the intellectual basis for moving from a general sense of injustice to particular reasoned diagnoses of injustice, and from there to the analyses of ways of advancing justice. (Sen 2009, p. 5)

That is, Sen is concerned with peoples' real lives in a given society, rather than with the justice or fairness of formal institutional structures, or what he calls Rawlsian "transcendental institutionalism" (Sen 2009, pp. 4–12 and 24–7). Against transcendental institutionalism, Sen has argued that there may not be a uniquely just institutional arrangement, so in order to make social institutional choices under less than ideal conditions, we do not need to know what a perfect or fully just arrangement might be. His famous example is that in choosing between paintings by Dali and Picasso, it does not matter if we know that the Mona Lisa is the most perfect painting in the world (Sen 2009, 15–6).

Sen sums up the difference between his approach and Rawls's, with the distinction between *niti* and *nyaya* from Sanskrit literature on ethics and jurisprudence: *Niti* refers to "organizational propriety and behavioural correctness"; *Nyaya* refers to "the world that actually emerges." Sen writes, "A realization-focused perspective also makes it easier to understand the importance of the prevention of manifest injustice in the world, rather than seeking the perfectly just" (Sen 2005, pp. 20–22). We should note, however, that the distinction between *niti* and *nyaya* is like the expression, "The best laid

plans of mice and men often go awry.” Our focus may need to be not so much on the world that emerges in contrast to our ideals and plans, but more simply and directly, on the world that is.

## Injustice Theory

An approach to racism and other social ills from the experience of injustice is more pragmatic and concrete than both ideal and nonideal theory. This approach is “justified” by the fact that ordinary people (i.e., neither academics nor specialists) are not concerned with abstract theories of justice but with the injustice they experience or observe in the experience of others.

*Applicative justice* is the process of extending justice already applied to some people to new groups or individuals, for example, granting women suffrage, freeing slaves, and enforcing civil rights for minorities. There can be applicative justice only when some are already treated justly. That is, the idea and process of applicative justice are relevant to situations where some are treated justly in specific ways, while others in the same society are not treated justly, and the principles of justice that some already enjoy are stated as though they apply to everyone. Often, there already is legal language implying universality, but practice or application is not universal. For example, the fourth amendment to the US constitution, granting voting rights to all, required the Voting Rights Act of 1965 for it to be extended to African Americans. Applicative justice is only as just as the justice already practiced, but, like Rawls’s conception of justice, it aims to be fair.

However, applicative justice does not always work to correct injustice. For instance, just laws that presume equality of opportunity do not result in just outcomes for both the majority with access to opportunities and minorities who do not have access to those opportunities. Although the idea of rewarding merit is just, not everyone may have the opportunity to acquire the merit that gets rewarded, for example, poor children who cannot concentrate in school due to food insecurity at home, or students in communities without adequate resources for schools may not be able to develop the skills necessary for college preparation. Sometimes, the justice enjoyed by the majority is a norm to which those who do not conform, would not wish applied. Examples include Native Americans who may prefer their traditional ways of life over becoming part of majority consumer culture (Churchill 1983; Worland 2016), or deaf people who value their deaf culture as such and do not want cochlear implants for their children (Sparrow 2005). It cannot be assumed that even if conformity to a norm brings

beneficial treatment, all who do not conform would be willing to pay the price of conforming, for a further example, Muslim women who resist giving up religiously modest clothing (Rubinaug 2016).

A broad view of people whose existential situations are unjust could require a broad view of injustice. This theory is difficult to construct because it breaks with philosophical tradition and may not seem abstract enough. What is injustice? We could say that injustice exists where there is great material inequality, although an absence of recognition and respect or of commitment not to repeat the same unjust acts and omissions in the future, are also factors. Injustice may also be viewed as dangerous, leading to social disruption. For instance, it has already been noted in Chapter 1 that in his *Letter Concerning Toleration*, John Locke referred to the dangers of what we could call racial discrimination, as an example to support religious toleration. In a similar way, the Preamble to the 1948 United Nations Universal Declaration of Human Rights (UDHR), warns that all human beings have inherent dignity and equal rights: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.” And then:

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people. (United Nations 1948)

That is, like Locke, the writers of the Declaration thought that the common people could only be pushed so far.

The beginning of injustice theory should define injustice, although that would be only the beginning. We’ve seen that this is more than simple unfairness, because not everyone who experiences injustice wants to be treated fairly or is able to be treated fairly. Some philosophers have thought it important to be able to distinguish between someone who is suffering from injustice and someone whose unwanted condition is her responsibility or who has suffered bad luck. They may believe that those who are disadvantaged because of their own acts or omissions have brought misfortune on themselves, so that others are, therefore, not morally required to help them and neither is it the job of the government to help them. For cases of bad luck, where no one is to blame and there is no real injustice, help may occur domestically as philanthropy and charity, or internationally as “humanitarian response” to disaster victims, civilian war refugees, and

victims of disease and famine. Help in this sense is voluntary and optional, although it may be a cultural norm. But bad luck may turn into injustice if there have been opportunities to help and no one has stepped forth. (For example, natural disasters are not in themselves unjust but ongoing situations in which victims could be helped and are not helped may be unjust.) This would mean that injustice theory does not require proving that wrongs have been deliberately inflicted (Zack 2017). Justice theory, by contrast, is often an attempt to put deliberate wrongs right or prevent future wrongs.

## **Public Policy—Affirmative Action and Police Racial Profiling**

Public policy is a set of directives for practices that establish routines and norms of behavior in society. In the United States, public policy is often the result of implementation of laws, which is designed by administrative agencies within the executive branch of the federal government, but it is not limited to that. Public policy also pertains to practices that are neither mandated by law nor prohibited by law. These policies often have controversial outcomes that become the basis for litigation on behalf of those who believe they have been treated unjustly. US Supreme Court rulings based on interpretations of the US Constitution, and legal precedents, do tend to settle these matters, although only until the Court agrees to consider fresh litigation. We will consider some of these legal mechanisms in terms of Affirmative Action and racial profiling, practices that in spirit seem to be in opposition: affirmative action seeks to support and assist racial minorities in employment and higher education; racial profiling by police seems to target racial minorities as criminal suspects.

### **Affirmative Action**

Affirmative action has been practiced among government contractors, the military, and large business corporations, but it has received the most attention pertaining to higher education (Knowles 2014; Parloff 2015). Twentieth-century affirmative action began among federal contractors in 1961, when President John F. Kennedy issued Executive Order 10925 that instructed federal contractors to take “affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex, or national origin”; Kennedy also created the Committee on Equal

Employment Opportunity. After President Lyndon B. Johnson signed the Civil Rights Act of 1964, employment discrimination was prohibited by all employers with over 15 employees and the Equal Employment Opportunity Commission was created; in 1965, Johnson established the Office of Federal Contract Compliance in the Department of Labor, which required that government contractors and subcontractors expand job opportunities for minorities (in 1967, affirmative action for women was included). Johnson's initiatives continued under the Nixon administration with the Minority Business Enterprise Contracting Program in 1971–1973, but **quotas** (specified numbers of minorities) were by then prohibited (Martinez 2014).

Part of the rationale for affirmative action was that discrimination against minorities, which was believed to be widespread, was difficult to prove. Despite the 1964 antidiscrimination civil rights legislation, there was little change in the numbers of minorities in employment and higher education admissions outcomes—desirable employment and colleges and universities remained disproportionately white. While affirmative action was strongly supported by minorities and white progressives as a way to “level the playing field,” from the beginning, it met opposition as “reverse discrimination.” The reasoning was that whites would lose places as minorities gained them and it was widely believed that minorities were not as qualified as whites (Pious 1996). In *California v. Bakke* (438, US 912), in 1978 the US Supreme Court ruled that the University of California Medical School practice of setting aside 18 out of 100 admissions for minority students was unlawful. However, in *Bakke*, the Court also ruled that race could be considered as one factor in choosing among qualified applicants, stating in its opinion: “The goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances” (*California v. Bakke* 1978, Syllabus).

After *Bakke*, the Court's qualified acceptance of affirmative action has continued. In *United Steel Workers of America, AFL-CIO v. Weber*, 444 U.S. 889, in 1979, the Court upheld temporary race-conscious affirmative action, provided that the rights of white employees were not violated. In 1989, in *City of Richmond v. J.A. Croson Co.* (488 U.S. 469), the Court banned a minority contracting program as unconstitutional and required that such programs fulfill a “compelling interest” and be “narrowly tailored” to do only that. This case was an example of the Court's application of the doctrine of *strict scrutiny* to practices involving race. The Court interpreted the Constitution as having zero tolerance for any degree of racial preference or racial discrimination, so that only a compelling government interest, such as ending discrimination, could override this principle of racial neutrality (Winkler 2006).

Some states have independently curtailed affirmative action. The effectiveness of affirmative action for nonwhite admission in higher education was demonstrated after Proposition 209 was passed in California, banning all affirmative action programs, beginning in 1998. Also In 1998, voters in Washington state passed Initiative 200 that prohibited affirmative action in higher education, public contracting, and hiring. In 2000, the Florida legislature passed the “One Florida” Plan, banning affirmative action (Martinez 2014). As a result of Prop. 209, UC Berkeley had a 61% drop in admissions of African American, Latino/a and Native American students, and UCLA had a 36% decline. However, the broader question is whether affirmative action in higher education has results that are beneficial to society.

In their 1996 book, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, William G. Bowen and Derek Bok, former presidents of Princeton and Harvard universities present the results of a long-term study of “race-sensitive” admissions policies at elite schools, beginning in 1951. (They focussed on 28 elite schools because 60% of US colleges and universities admit close to 100% of all who apply.) Bowen and Bok examined the academic records of 80,000 students and conducted interviews and submitted questionnaires to black and white students who began college in 1976 and 1989. Among black enrollees in 1989, 79% graduated, compared to a national 32% rate of black college graduation. Highly qualified black students were three times as likely to be admitted as highly qualified white applicants. Among about 700 black graduates who would not have been admitted without affirmative action, there were 60 lawyers, 70 physicians, and 125 business executives. Bowen and Bok predicted that without affirmative action policies, black enrollments at elite schools would fall from about 7 to 2%, with law and medical school enrollment to less than 1% (Bowen and Bok 1998) Recent surveys have found that affirmative action bans in medical schools in California, Washington, Florida, Texas, Michigan, and Nebraska have been followed by a 17% decrease in minority enrollment in medical schools (Garces and Mickey-Pabello 2015). Between 1993 and 2008, minority enrollment in US law schools also decreased (Lewin 2010).

In its first major higher education case after *Bakke*, in 2003, the US Supreme Court ruled in two University of Michigan cases. In *Gratz v. Bollinger* (539 U.S.) the Court rejected the undergraduate admissions program that granted automatic points for nonwhite race and ethnicity, without reviewing whole files (*Gratz v. Bollinger et al.* 2003). But in *Grutter v. Bollinger* (539 U.S.), the Court upheld the constitutionality of the Law School’s use of race in considering candidates for admission, holistically,

so that race is one factor among many. Nevertheless, the Court did not whole-heartedly approve even this restricted consideration of race and Chief Justice Sandra Day O'Connor speculated that it would be unnecessary by 2028, writing: "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" (*Grutter v. Bollinger et al.*, 539 U.S. 306, 2003, Opinion III, B.).

The two cases of *Fisher v. University of Texas at Austin* upheld the Court's perspective in *Bakke* and *Grutter*. The University of Texas has two ways in which minority students have opportunities for admission. Under UT's Top Ten Percent Program, the top ten percent of all high school graduates in the state are automatically admitted. Because this plan covers schools primarily attended by minorities as well as whites, it has been successful in increasing black and Hispanic enrollment. The second part of the UT program holistically considers applicants, with race as a factor among qualifications. In 2013, the Court first considered the case of Abigail Fisher, a white applicant who was denied admission under the second part of the program, but its ruling about whether she had unconstitutionally been denied admission on the grounds of race was inconclusive. However, in its second 2015 hearing of *Fisher v. University of Texas at Austin*, the Court once more upheld holistic affirmative action, after applying strict scrutiny and deferring to the institutional value of a diverse student body (*Fisher v. University of Texas at Austin*, 2013; Liptak 2016).

The value of diversity in higher education is not only a benefit to members of underrepresented groups who are admitted, but includes their distinct contribution to a whole cohort of students and professors, as a result of their different backgrounds and perspectives—Bowen and Bok's study has been received as confirmation of such claims about the wider benefits of affirmative action in higher education (Hacker 1998). It is commonly acknowledged that the US leadership class throughout societal sectors is trained in college. Having contact with racially and ethnically different people during formative years would seem to be an important component of future leadership skills. Part of the US Supreme Court's deference to institutional diversity, in this sense, is future-oriented. However, in accepting the overriding principle that any degree of racial preference is suspect, the Court has consistently refused to consider the effects of past discrimination on nonwhite college applicants who may not be as competitive as white applicants. The Court thereby considers racial difference without regard to status or inherited disadvantage. It may approve of limited affirmative action to correct past discrimination within an institution, but it has shown

no acceptance of affirmative action as a remedy for inherited harms due to slavery and Jim Crow (Thomson 1973). Furthermore, the idea that affirmative action is “reverse discrimination” has not died out since it was first aired in the 1960s (Pojman 1998).

About two-thirds of Americans do not have college degrees (Ryan and Bauman 2016). But no one doubts the importance of a college degree for success in adult life in complex society. And no one doubts that minorities disproportionately lack college degrees. Therefore, part of what is at stake with the permissibility of affirmative action in higher education is upward socioeconomic mobility, from parents to children. In the early twenty-first century, only 35% of blacks, compared to 50% of whites, exceeded their parents’ economic status by more than 20 percentiles (Upward mobility is highest for White men, followed by White women, Black men, and Black women.) (Mazumder 2008).

Upward socioeconomic mobility requires higher education. Grades on standardized tests administered in middle school are a stronger predictor of upward socioeconomic mobility from the status of parents, than any other indicator, including race and gender. According to a study by Columbia and Harvard University economists, which tracked 2.5 million elementary and middle school students over 20 years, good preparation for standardized tests affects college admission: Students whose teachers helped them raise standardized test scores had fewer teenage pregnancies, higher rates of college enrollment, and higher earnings at age 28 (Chetty et al. 2011). Returning to Amartya Sen’s insights about capabilities, it may be that affirmative action is one way to support human capabilities and that teacher attention to college preparation is another.

Affirmative action can be judged on its intent and its result. If the intent of affirmative action is to unfairly give some people unearned advantages, it is not difficult to see why some call it “reverse discrimination.” However, holistic consideration of minority candidates presupposes that these candidates are otherwise qualified. What remains is a small degree of preference based on race, again, “given all things equal,” and that may or may not disrupt cherished principles of reward based on merit, and fairness. In considering those principles against the reality of college attendance, it should be kept in mind that there are other groups who are given boosts for admission that are not strictly related to their academic qualifications. The children of alumni have an easier time of getting admitted to most colleges and universities, as do athletes, in comparison to those who do not have such advantages (Massey and Mooney 2007).

## Racial Profiling

**Racial profiling** is the use of nonwhite race or ethnicity by police officials to select likely criminal suspects. General US legal principles support **probable cause** or independent evidence of criminal behavior, before police are justified in interfering in the lives of civilians. But racial profiling may lead to police intervention in the absence of probable cause, for several reasons: anti-nonwhite racial bias on the part of individual law enforcement officers; high crime rate areas that are mainly populated by nonwhites; police suspicion of the presence of nonwhites in largely white areas; known high criminal conviction and incarceration rates for nonwhites. Racial residential segregation—minorities are more likely to live in segregated neighborhoods, regardless of their income—works together with high conviction and incarceration rates among minorities. For instance, 1 in every 15 African American men and 1 in every 36 Hispanic men are incarcerated in comparison to 1 in every 106 white men (Kerby 2013). The result is that minorities are more likely to live in high crime neighborhoods with other minorities (Andrews 2015), so that minority identity alone may be associated with crime in the minds of law enforcement officers.

Hearts-and-minds racism is difficult to predict or prove as existing in particular individuals. However, after the 2012 death of Trayvon Martin (CNN 2017), there has been heightened public concern about killings of unarmed young black men by law enforcement officials, followed by legal impunity for police perpetrators (Yancy and Jones 2013; Funke and Susman 2016). Reports indicate that young black men are nine times as likely as other demographic groups to be killed by police officers in the United States (Swaine and McCarthy 2017). Ongoing outrage and protests have been visible in mass and social media, perhaps most notably in the Black Lives Matter movement (Black Lives Matter 2017), which began after the killing of Michael Brown in 2014 (BBC News 2014). Such demonstration has been opposed by organizations in defense of police officers, pointing out the dangers of their jobs and objecting that “blue lives matter” and “all lives matter” (Blue Lives Matter 2017; All Lives Matter 2017). As of 2016, according to the Pew Research Center, about four in ten Americans support Black Lives Matter, while less than one in five strongly oppose it, although there is some confusion about what the slogan actually means (Horowitz and Livingston 2016). On the one hand, extra-judicial killings of black people by police officers send a message that the lives of black people do not matter; on the other hand, to emphasize that black lives matter suggests to some who are not black that *their* lives do not matter.

Many who support the Black Lives Matter Movement, and others, believe that police killings of unarmed young black men, in the absence of probable cause, and followed by legal impunity, are unjust. However, it is necessary to distinguish between what is just and what is legal, because final outcomes are not determined by strong intuitions of what is morally wrong, but by written law as interpreted by courts. US constitutional rights such as Fourth Amendment rights against searches and seizures without legal cause and Fourteenth Amendment rights to equal protection by government officials also seem to be at stake. But strictly speaking, racial profiling is not against the present law and neither is the fact that police homicide occurs with no legal penalties—even though both are unjust. In reality, the actions of police officers are no longer bound by “probable cause,” and police discretion plus legal definitions of manslaughter and murder block indictments and convictions for police homicide. Several US Supreme Court Decisions have allowed for expanded police discretion and destroyed the doctrine of “probable cause” that would have required that police have an objective reason for stops and frisks or attempted stops and frisks: *Graham v. Connor*, *Plumbhoff et al. v. Rickard*, and before then, *Terry v. Ohio*.

In *Graham v. Connor*, 1989, the Court introduced the “reasonable officer standard” for the use of deadly force: whether officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation*. This case is of particular importance because it renders it legally irrelevant whether or not an officer is racially biased, to begin with. The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and “its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation” (*Graham v. Connor*, 490 U.S. 386 (1989)).

This reasonable officer standard inevitably refers to what is considered reasonable within police culture and it does not preclude the legality of using deadly force when the officer has instigated a confrontation that he then believes endangers his life. In *Plumbhoff et al. v. Rickard*, the US Supreme Court ruled in 2013 that individuals’ Fourth Amendment rights violations—that is the right against unreasonable stops and seizures, where death counts as a “seizure”—must be balanced against an official’s *qualified immunity*, unless it can be shown that the official violated a statutory or constitutional right that was “clearly established” at the time of the challenged conduct.

In other words, police homicide in the recent high profile cases is protected until the laws or Supreme Court rulings change. We also need to recognize

that the first attack on probable cause, and the background to both *Graham* and *Plumbhoff* came with Justice Earl Warren's 1968 Opinion in *Terry v. Ohio*:

It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. (*Terry v. Ohio*. 392 I/S/1(1968))

That is, police officers may intrude based on evidence that falls short of the evidence needed to make an arrest. And if such intrusions escalate into the use of deadly force, police immunity applies, particularly if events have escalated to the point where an officer's life is in danger, or the officer so believes or is willing to claim.

Despite legal backing for police discretion culminating in what many view as unjust violence, public policy remains relevant for how these issues will ultimately play out. Changes in "Broken Windows Policy" are a case in point. The Broken Windows Theory was introduced by James Q. Wilson and George Kelling, in 1982 (Wilson and Kelling 1982). They proposed enforcing public order on a neighborhood basis, through police **stop-and-frisk** actions, to prevent more serious crime. Wilson and Kelling believed that minor offenses, such as drinking in public, loitering, and disorderly conduct, undermined civic pride and involvement. An important part of the new policy would involve community outreach programs with members of communities served. However, community outreach programs have not always been implemented when Broken Windows crime detection programs have been put into effect, especially in New York City. Also, it has not been confirmed that Broken Windows procedures put into practice in New York City, Chicago, and Los Angeles by the early 2000s, were effective in reducing more serious crime. A 2001 study by George Kelling and William Sousa about crime data from 1989 to 1998 in New York City suggests that there is no direct correlation between public disorder and serious crime (Harcourt and Ludwig 2005). Serious crime, especially violent crime, decreased by 48% from 1993–2011, a trend that began before widespread stop-and-frisk policies were adopted (Weisser 2014). Broken Windows type interventions have been curtailed in a number of municipalities, in favor of building better police-community relationships and interactions (Childress 2016).

Let's return now to the statistics on race and crime. As noted above: 1 in every 15 African American men and 1 in every 36 Hispanic men are incarcerated in comparison to 1 in every 106 white men (Kerby 2013). What is overlooked in this picture is that the figures entail that most African

American and Hispanic men, like most white men, *do not* commit the kinds of crimes for which police seek suspects. The problem with both racial profiling by police and the reasoning of those who defend it is a focus on the racial makeup of the criminal population. In *Floyd v. The City of New York*, Judge Schleindin ruled that NYPD's practice of stop-and-frisk in which half of 4.4 million suspects stopped from 2002–2012 were black, was unconstitutional because it did not represent actual crime statistics in the communities policed. What NYPD's policy did mirror was the proportion of blacks in the US prison population and it was not surprising that of all their stops and frisks in the period resulted in over 90% of suspects let go without further police action. Schleindin was removed from the case due to mayoral politics, but the subsequent administration has begun to implement the reforms she ordered, which included curtailment of stop-and-frisk based on racial profiling (Paybarah et al. 2016).

Further changes in policy in response to public outcry may be grounds for optimism. Among these is mandatory use of body cameras by police officers and growing awareness within local police departments of the need for positive relationships with members of minority communities in order to conduct their core work of fighting crime. But, body cameras are not a panacea and may raise privacy concerns (Pearce 2014). Still, new policies can be developed within police departments, requiring calls for backup, and again, white police officers can be trained in communication with minority suspects (Johnson 2017). In the meantime, disturbing violent incidents and reactions to them are likely to occur and recur (Zack 2015, pp. 93–100).

## Conclusion

In democratic political life, political philosophy, law, and public policy are often interrelated. However, high theory, such as John Rawls's abstract thought experiment to develop basic institutions for already well-ordered and law-abiding societies, may not be directly relevant to the correction of practical injustice. Amartya Sen's idea of addressing human capabilities and practices of applicative justice, as well as injustice theory more generally, may be more effective for addressing practical concerns. As a policy, affirmative action has been a controversial method for achieving racial integration in employment and higher education. The US Supreme Court has upheld affirmative action by protecting the consideration of race in admissions only when it is part of a full range of individual qualifications. Police racial profiling has led to high profile homicides against young black men, although the police discretion involved has been upheld by the US Supreme Court. Policy changes in police

methods are likely to change what is perceived to be unjust and racist about such extra-judicial killings, but there are no simple solutions to this problem or answers to the questions raised by it.

## Glossary

**Affirmative action**—practice of positively considering nonwhite race and female gender for hiring and college admissions.

**applicative justice**—process of extending justice already applied to some people, to new groups or individuals.

**autonomy**—self rule.

**capabilities approach**—an economic focus on the ability of individuals to transform goods available to them into instruments for their own well-being.

**difference principle**—restriction on inequality in society, according to John Rawls, so that the least well off benefit from changes in distribution.

**ideal theory**—principles of justice for well-ordered liberal societies.

**injustice theory**—a method of starting from actual injustice instead of constructing ideals of justice.

**nonideal theory**—theories of justice for nonideal societies that seek to bring them closer to ideal societies.

**probable cause**—evidence of criminal behavior that justifies police intervention.

**public policy**—official practice that establishes routines of behavior in society.

**racial profiling**—the use of nonwhite race as a cause for police intervention.

**quotas**—unpopular practice of specifying numbers of minorities to be included.

**strict scrutiny**—judicial practice of closely examining the purpose of using race for employment and college admissions and determining that such usage does not exceed its purpose.

**welfare economics**—economic study of how people benefit from different economic structures and policies.

**well-ordered society**—people know what the laws are and know that others do also and that their society is just.

## Discussion Questions

1. Explain how the relationship between political principles, law, and public policy may be complicated.

2. Describe how the consensus of racial equality among contemporary political philosophers is not grounded on foundational principles of democracy in a historical sense.
3. What are the major problems with moral equality as Rawls posits it? What are the problems with a factual basis for human equality? How is ideal theory related to nonideal theory, according to Rawls?
4. Explain why applicative justice does not always correct experiences of injustice.
5. Why does Amartya Sen call Rawls's ideal theory "transcendental institutionalism"? How does his capabilities approach avoid the pitfalls of ideal theory?
6. If legacies, or the descendants of alumni, and athletes receive preference in college admission, how is that different from race-based preference?
7. How is racial profiling related to residential racial segregation? Is it unjust?
8. In what ways are high profile cases of police homicide legally protected, based on Supreme Court rulings?
9. Discuss the relationships between "Black Lives Matter," "Blue Lives Matter," and "All Lives Matter."
10. Explain how public opinion is relevant to police behavior. What does this imply about the democratic nature of the US society?

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