

Chapter 2

Racial Equality

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Racial equality has been a moral and political demand from people of color for hundreds of years. But discussions within philosophy of this concept, and what it would take to realize it as an ideal, are still comparatively rare. Various explanations might be advanced for this omission. It might be felt that racial equality as a concept and an ideal is already subsumed in the large literature on egalitarianism (Arneson 2013). Why pick out race, when there are so many dimensions on which people can be unequal, and isn't there a danger of leaving the abstract level of the philosophical and descending into particularistic sociology? Moreover, can one really talk about "racial" equality in any interestingly thick sense considering that anthropology and genetics tell us that races don't even exist? Wouldn't a philosophical exegesis of racial equality just turn out to be a set of familiar banalities about anti-discrimination, standard liberal boilerplate to which we can all give a reflexive and bored acceptance before moving on to the really challenging issues?

I will argue that this dismissal comes too swiftly, and that racial equality as a concept and an ideal is indeed worthy of philosophical exploration. Moreover, given (what I will claim is) the centrality of race and racial inequality to modernity, racial equality as an achieved reality would have far-reaching implications that would dramatically reshape the world. It is no accident that at the 1919 post-World War I Paris Peace Conference the six "Anglo-Saxon nations" (Britain, the United States, Canada, South Africa, Australia, New Zealand) vetoed the Japanese delegation's proposal to include a "racial equality" clause in the League of Nations' Covenant (Lake and Reynolds 2008, ch. 12), causing the African National Congress activist S. M. Molema later to comment bitterly on the "hollowness" of Western liberalism, and its empty "professions of 'Morality', 'Liberalism', 'Justice', 'Making the World Free for Democracy' and so forth" (Molema 1920, 352; cited in Lake

and Reynolds 2008, 305–6). For people of color, racial equality as a theme and an aspiration is not yawn-inducing liberal boilerplate at all, for the non-achievement of this goal despite liberalism's promise is the central problem that has constrained their lives for hundreds of years. In this chapter I will look at some of the different dimensions of racial in/equality, the theoretical problems it poses for Rawlsian justice theory, and offer some suggestions as to how I think these challenges might be addressed.

RACE AND RACISM

Let us begin with some background discussion of race and racism. I will be going into far more historical detail here than is usual for a philosophy essay, but my belief is that it is necessary in order to correct what I see as the misleading framing of these issues in mainstream social justice theory, particularly Rawlsianism.

Race

To start with, there is the question of the reality (or not) of races. In contemporary critical philosophy of race, the main metaphysical divide runs between those who deny that races exist in any sense (eliminativists) and those who agree that races exist, while disagreeing on the nature of that existence (anti-eliminativists). (See Figure 2.1.)

The dominant position in critical philosophy of race is (3) anti-eliminativist constructionism. Races are seen as real, but as social constructs brought into existence through discriminatory socio-political processes (Haslanger 2012; Taylor 2013). Eliminativism (1) has been most famously defended by

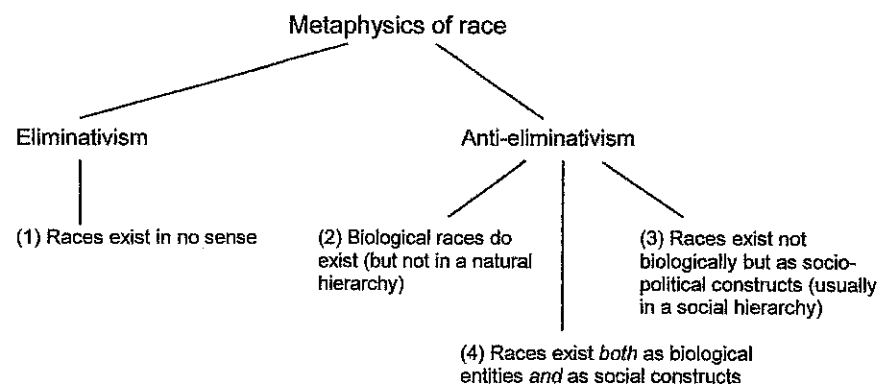


Figure 2.1 The Metaphysics of Race

Anthony Appiah (1992). Two minority positions are that biological races do exist, though not in a hierarchy (2), and that the presumptive opposition between constructionism and biologism is mistaken, since races can exist as both biological entities and social constructs (4). Note that eliminativism and anti-eliminativism both come in different versions, depending on the theory of social causality and social ontology presupposed. Liberal eliminativism (people basically as individuals) is the most important contemporary variety, but a distinctively Marxist eliminativism (people basically as members of social classes) also exists and, in that (distant) period when Marxism was more influential than it is now, was of considerable historical significance. Eliminativists, whether liberal or Marxist, are of course not at all constrained to deny *racism's* existence; what they reject is the reality of races. In what follows, I will myself assume (3), anti-eliminativist constructionism.

Racism

"Racism" as a term is used in at least two main senses: racism as ideational/mental (including some or all of: ideas, values, beliefs, attitudes, willings) and racism as socio-institutional (including some or all of: social institutions, practices, policies). There is also racism as individual racist actions, but I am going to set those aside as not relevant to racial inequality as a broad social phenomenon.

Racism as Ideational

Recent debates in philosophy have been divided on the question of whether racism is best construed in cognitivist/doxastic terms or in volitional/affective terms. The volitional account is most closely associated with Jorge Garcia (1996), who has defended it over a series of articles. Garcia suggests that racism is best seen as a vicious disposition toward people because of their race: "ill-will" as active racial malevolence or at the very least racial disregard. For him, belief is neither necessary nor sufficient for racism, since one can have racial ill-will toward people without the corresponding beliefs and beliefs about people's racial inferiority without racist sentiment. Various people have critiqued this position, such as Tommie Shelby (2002) and myself (Mills 2003), and I would contend have shown it to be fatally flawed. So I will assume throughout the superiority of the doxastic analysis of racism, which (for what it is worth) more closely accords with the common-sense view of the term.

On the doxastic account, racism is best seen as a matter of *beliefs*, at a minimum (a) The human race is divided into discrete races, R1s, R2s, R3s . . . (b) Some races are superior to others. The "some" is obviously compatible

with a variety of possibilities, for example: $[R1 > R2 > R3 > R4]$ or $[R1 = R2, R3 = R4 \ \& \ R1, R2 > R3, R4]$ or $[R1 > R2, R3, R4]$ and so forth. The extent of the superiority (where this is quantifiable) might also need to be spelled out. For example, is it that all R1s are superior to all R2s (meaning that the least able R1 is superior to the most able R2)? Or is it that R1/R2 abilities would be mapped on standard distribution curves, with the median of the superior R1s ahead of the median of the inferior R2s by some number of points?

I have been assuming without argument throughout that some set of R2 traits is responsible for their inferiority to the R1s. Kwame Anthony Appiah (1990) designates this position extrinsic racism, and distinguishes it from intrinsic racism, for which the R2s are morally inferior even without such characteristics. So this is different from Garcia's account in still being belief-based, but similar in that beliefs about the races' characteristics are not relevant. The R2s are just viewed as inferior. I am dubious, in the light of what we know about human psychology, that such a belief could really be floating free, unsupported by any other beliefs. So I will continue to assume that the "externalist" view is the more plausible one. We then have: (a) The human race is divided into discrete races, R1s, R2s, R3s . . . (b) Some races are superior to others. (c) This superiority is based on distinctive R traits and tendencies of the superior and inferior races.

Now what are the candidates for these metrics of inferiority? Historically, there has been a variety: the intellectual/cognitive; the characterological; the aesthetic; the physical (also sometimes the spiritual, though in an age of growing secularism, this becomes less and less significant). The first two will be the most familiar, since they have been invoked with the greatest degree of consistency. The superior race is thought of as more intelligent and of better moral character than the inferior race(s). The enduring appeal of the first is manifest in today's IQ tests, and the use of racial differentials in test results as "proof" of innate R2, R3 . . . inferiority. Here, of course, we have the most "successful" attempt to quantify one dimension of supposed racial difference.

I would suggest, following various theorists, that these belief-systems are most illuminatingly seen not as an aggregate of individual beliefs, but as an *ideology*, a set of justificatory ideas related to a system of domination (racism in the second socio-institutional sense). So this ties the two together nicely. George Mosse (1985) argued many decades ago that racism should be categorized as the most important ideology of modernity, and a valuable reconstruction of racism as ideology has been done by Tommie Shelby (2003; 2014). In this broader sense of a (relatively) coherent set of ideas functional for the reproduction of social domination, racism could be seen as falling into three major families: the theological, the cultural, and the biological. Theological racism makes necessary reference to supernatural causation, for example in

the views of Native Americans as devil worshippers, Jews as deicides, blacks as the accursed descendants of Ham (or Canaan). Cultural racism highlights the cultural traits of the inferior race, as in some varieties of anti-Semitism and Islamophobia, or in postwar depictions of the culture of poverty. Biological racism, sometimes called "scientific" racism for its pretensions to scientific validation, locates the traits in the defective bodies of the inferior race. Nonetheless, combinations are obviously possible: for example a theological racism that attributes to supernatural causation the creation of humans with deficient physical bodies (verifiable by science) and inferior cultures.

Explanations of the origins of racism have varied widely, and the debate among competing accounts remains unresolved. Some theorists have posited an innate human tendency towards ethnocentrism, the privileging of one's tribe over others (us vs. them), with racism then developing out of this tendency. Recent work in cognitive psychology and implicit bias has given renewed plausibility to this explanation, which would once have been rejected by the left as asocial and ahistorical. European color-symbolism (for white racism in particular) has been a favored candidate for some theorists: the positive associations of the color "white" in many European languages, especially English, and the negative associations of "blackness." Partially overlapping the foregoing are psychosexual accounts focusing on the anal and genital regions of the white body, and their associations with shame, disgust, and a corporeal "darkness." Militant Christianity's jihads against the religious Other have sometimes been taken to segue into a similar war against Others now seen as racial as well. Sociobiology, insofar as it claims a general capacity to explain the social, can obviously field an entry here, as can straightforwardly strategic rational choice/power politics frameworks. Finally, there is a long history of Marxist political economy attempts to explain racism, though they have tended to be class-reductionist.

The localization of racism in time is also contested. The dominant postwar position among theorists of race was that race as a social concept and racism as a phenomenon only come into existence with modernity. However, a dissenting minority has always challenged this periodization, and in recent years their voices have grown louder. In an important book of his own, *The Invention of Racism in Classical Antiquity* (Isaac 2004), and in a follow-up conference volume he co-edited, *The Origins of Racism in the West* (Eliav-Feldon, Isaac, and Ziegler 2009), classicist Benjamin Isaac argues that the conventional scholarly wisdom is quite wrong. He contends that Aristotle—drawing on Hippocrates's *Airs, Waters, Places*—is the pioneering racist theorist of the Western tradition, insofar as his "natural slaves" are ethnically marked. So there are two main competing periodizations in the literature, racism as going back to the ancient world and racism as a distinct product of modernity.

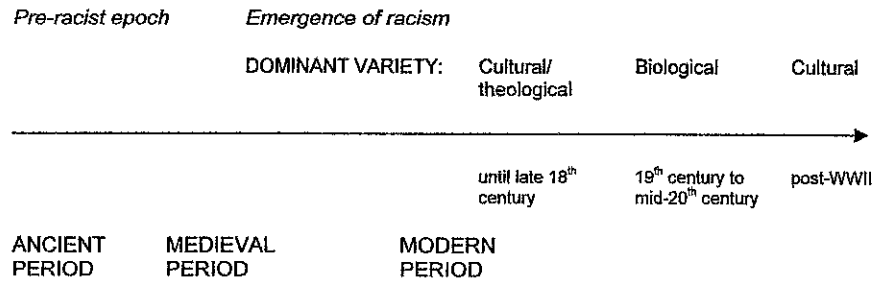


Figure 2.2 The Periodization of Racism

However, since our focus is modernity, there is no need to try to adjudicate these questions. The late historian George Fredrickson (2002), a well-regarded scholar of racism, endorses the conventional chronology (racism as distinctively modern) and in his last book, the widelyused *Racism: A Short History*, he offers the periodization in Figure 2.2.

These are, of course, only rough demarcations. Fredrickson points out, for example, that an early manifestation of biological racism, the use of the *limpieza de sangre* (purity of blood) standard against Jews who had converted to Christianity under the terror of the Inquisition, dates back to the late fifteenth century. But this variety of racism would not become dominant until the late eighteenth century. Before that, racism would have been largely cultural and theological in form: Sepúlveda's representation of Amerindians as "natural slaves" in the great 1550–1551 Valladolid debate with Las Casas; Africans depicted as the descendants of the accursed Ham (or Canaan), and thus a slave race; various peoples being characterized as "savages" and located at a lower level on stadial schemes of human progress. Modern "scientific" biological racism emerges in the late eighteenth century and, especially after the 1859 publication of Charles Darwin's *Origin of Species*, becomes the most important variety. Claims about the innate superiority/inferiority of different races are thus asserted to be scientifically provable and proven.

Racism as Socio-structural

Up to World War II, then, biologically racist theories of race are predominant, which—and this point is crucial, especially given the sanitization of the historical record in Rawls and the secondary literature—inform Western public policy and justify racist socio-political structures, not merely nationally but internationally. As David Theo Goldberg (2002) insists in his *The Racial State*, the modern state in general is racialized, not just (what are taken to be) the special cases of the American South, Nazi Germany, and apartheid South Africa. Races are conceptualized as natural sub-sections of the human race,

which are in hierarchical relations along axes of intellectual ability and moral character. Whites see themselves globally as the superior race, ruling inferior races in the European colonial empires (British, French, Dutch, Portuguese, Belgian, Italian, German) and the independent Euro-settler states, whether Anglo (Canada, the United States, South Africa, New Zealand, Australia) or Iberian (Latin America) (Mills 1997; Andrews 2004; Lake and Reynolds 2008; Vucetic 2011). These views, it cannot be over-emphasized, are not at all aberrant but constitute the white "common sense" of the age, manifest not merely in lay opinion and popular culture but scientific treatise and scholarly textbook.

In the postwar period, "scientific" racism is largely discredited by Nazism and the Holocaust, while being, of course, completely impolitic in a globally decolonizing world with dozens of new black and brown nations. But many theorists of race argue that it is replaced by a "cultural" racism, which locates nonwhite inferiority no longer in defective genes but defective cultures. So white domination is still justified (though no longer presented as such), insofar as whites possess the superior culture. Thus the crucial continuity is maintained of an ongoing structural racial inequality, a systemic white advantage, both nationally and globally.

Fredrickson (2002, 100–3) distinguishes "overtly racist regimes" (e.g., the U.S. South under Jim Crow, Nazi Germany, apartheid South Africa) from what he calls "racialized societies" (e.g., the U.S. North, Latin America, the colonial world). The crucial demarcators of overtly racist regimes are: (a) an official racist ideology (b) racial "purity" as an ideal (c) mandatory *de jure* segregation (d) prohibitions on the political activity (voting, holding public office) of the subordinated race(s) (e) deliberate impoverishment of the subordinated race(s). But the point is that even in the "racialized societies" where such demarcators are absent, the systemic structural advantaging of whites is pervasive.

Now what are the implications of this history for Rawlsianism? For a Western political philosophy resurrected by Rawls (1999) to be oriented towards the normative evaluation of a society's "basic structure," it might seem that racism as socio-institutional should be a natural and central focus of inquiry. But the problem is that race as a subject and a national and global reality fundamentally disrupts the grounding set of assumptions of *A Theory of Justice* (1999).

A racist society (such as the Western democracies have been) structured from the inception of modernity onwards around colonialism, imperialism, indigenous expropriation, and chattel slavery can in no plausible way be represented as a "cooperative venture for mutual advantage."

Rather—particularly in the various "New Worlds" created by these nations—it would more accurately be conceptualized as "a coercive venture

for white advantage.” And to take even as a starting-point the framing of society “as a closed system isolated from other societies” ignores the obvious fact that these imperial relations will fundamentally shape from the beginning both colonizing and colonized powers. So the reality of systemic racial inequality overturns Rawls’s seemingly innocuous—but actually deeply theoretically loaded and misleading—assumption of a polity constructed by political equals undifferentiated by color. And internationally, race rewrites the sanitized Rawlsian narrative, diminishing the importance of 1648 and the putative birth of the Westphalian international system and highlighting instead the dates of European conquest of the non-European world, from 1492 onward, and the eventual creation, with the partitioning of Africa at the 1884–1885 Berlin Conference, of a white-supremacist planet. For Rawlsianism to have any applicability to the actual non-ideal world, and the hope of achieving a “realistic utopia,” this history would have to be confronted and the apparatus rethought accordingly from the ground up.

RACIAL EQUALITY

Against this background, let us now turn to racial equality, its different senses, and the changes I suggest we would have to make in Rawlsian theory. I propose that we demarcate four senses: racial equality as *ontological*; racial equality as *capability*; racial equality as *norm of treatment*; racial equality as *social goal*.

Racial Equality as Ontological

Historically, and perhaps conceptually, the natural starting-point is racial equality in what I am going to call the “ontological” sense of equal personhood. Far from being an uncontroversial normative baseline, already subsumed in the all-encompassing egalitarianism of modernity’s famous revolutions, the equal personhood of people of color has traditionally had to be defiantly asserted in the face of its *denial*. The history into which I went into such detail above—the history highly unusual for a philosophy essay—is not at all part of the standard accounts one finds in discussions of modernity, liberalism, justice, and so forth. But my claim is that it is absolutely crucial to all three discussions, and that the standard accounts are fundamentally misleading. If modernity is supposed to eliminate the hierarchies of the pre-modern Western world, the reality is that it only does so (to the extent that it does) for white males. John Locke’s *Two Treatises of Government* is routinely taken to signal the victory of modernity’s Whig egalitarianism over the hierarchically ranked view of humanity defended by Sir Robert Filmer’s

patriarchalism. So we are now in a world of “persons,” whose freedoms will be advanced by the British “Glorious” Revolution and the later American and French Revolutions. But as feminists from the second wave onwards, and some from the time of the first wave, pointed out, white women’s inequality is not eliminated but put on a different foundation, in nations now supposedly based on “contract” rather than “status” (Pateman 1988). And in the case of people of color (assuming Fredrickson’s [2002] periodization), a new structure of ascriptive hierarchy is created. As Fredrickson underlines, the very fact that equality is supposed to prevail universally itself sharpens the contrast with those who are deprived of that status. In a pre-modern society filled with hierarchies of all kinds, racial hierarchy would be just one more example (46–47). In a modern society where the attainment of equal individuality is supposed to be the norm, on the other hand, racial exclusion from this status is all the more shocking, making one less than human (11–12).

Part of the problem with mainstream ethical and political philosophy is its failure to recognize and explore this category, what I have called the category of subpersonhood (Mills 1997; Mills 1998). Rather, it is taken for granted that all adults, or at least all functioning adults, are (socially recognized) persons, and that the real debate is over what this equal personhood entitles them to. But for hundreds of years, and arguably even now to a certain extent, people of color were not seen by whites as full persons in the first place. Presupposing a transracially and transnationally recognized personhood in modernity thus obfuscates the centrality of the global nonwhite racial struggle for equal personhood, a struggle unacknowledged in conventional political narratives. Hence the subtitle of historians Marilyn Lake and Henry Reynolds’s (2008) book: *White Men’s Countries and the International Challenge of Racial Equality*. The Marxist critique claims that a liberal atomistic ontology obfuscates the material economic differences (capitalist and worker) between morally equal “individuals.” But the racial critique, largely unacknowledged in mainstream Western theory, makes the more dramatic claim that people of color, independently of class membership, do not attain equal normative status in the first place. They were seen—“ontologically”—as entities of an inferior order, a different kind of being, and hence appropriately undeserving of equal respect. The social ontology of a racialized world is characterized not merely by economic differences but an intra-human partitioning between full and less-than-full humans. In the famous words of Jean-Paul Sartre (1968, 26), in his preface to Frantz Fanon’s *Wretched of the Earth*: “[T]here is nothing more consistent than a racist humanism. . . . On the other side of the ocean there was a race of less-than-humans.”

So liberalism evolves so as to be consistent with racially dichotomized norms, racial hierarchy displacing intra-white class hierarchy. All people were equal, but some people, it would turn out, were more equal than others.

For gender theory, this is, of course, an old and familiar story, the story of patriarchal liberalism. But only comparatively recently has the corresponding theorization of the development of an “imperial” liberalism, a “racial” liberalism begun to be systematically articulated, and even now the literature is far more advanced in political theory than in political philosophy (Pitts 2005; Mills 2008). The implications for the hegemonic frameworks in the field—above all Rawlsianism’s perspectives on justice, national and global—have not yet been worked out; indeed, any such racially sensitive reframing is actively resisted. My claim is that we need a self-conscious investigation and theorization of the workings of racial liberalism, a liberalism overtly or tacitly predicated on white normativity, so as better to reconstruct it as genuinely (not just nominally) racially inclusive. The thematic ignoring of racial justice in the secondary literature is itself the clearest piece of evidence that such a reconstruction has yet to be carried out.

Racial Equality as Capability

Racial equality as capability might seem an otiose category. But the assertion of ontological equality does not necessarily commit you to the assertion of capability equality. Someone could claim an R1 > R2 hierarchy of natural capabilities (slightly separated medians on R1/R2 distribution curves) while denying that this makes him a racist, since for him racism is defined as treating people as less than full persons because of their race, and he is not saying that R2 inferiority is so extreme as to lower them *below* the threshold for personhood. R2s are in general not as able, but not so inept as to merit separate treatment.

But the main reason this distinction is important is because of the difference between potential and realized capabilities, and the implications for how best to understand racial equality of treatment and the achievement of social racial equality. Consider Figure 2.3.

Suppose we define racism as the claim that people’s intrinsic abilities vary by (biological) race (even in cases where the putative variation does not

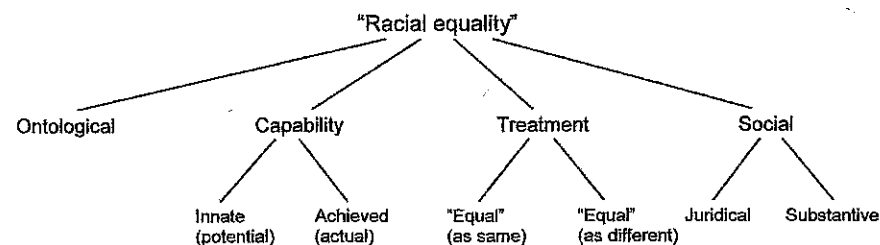


Figure 2.3 Racial Equality

leave racial inferiors below the “personhood” threshold level). What about the view that innate racial potentials are equal, but *achieved* potentials vary because of “cultural” traits? In the United States, for example, as earlier mentioned, there is a longstanding gap between average white and black IQ test scores. Explanations that attribute this to cultural bias in the tests, or “stereotype threat,” or inferior educational resources for blacks, or huge wealth differentials between median white and black households, would be seen as non-racist. But what about explanations that attribute it to black culture, for example the alleged development of an “oppositional” ghetto culture that resists mainstream (“white”) norms, or a pervasive stigmatization of certain behaviors as “acting white”? Are these (culturally) racist or non-racist explanations? The issue is important because in many Western countries today, white resistance to public policy aimed at remedying R2 differentials will not take the form of asserting the “ontological” (biological) inferiority of the R2s, as manifest in innate potential deficiencies in capability, but rather the supposedly problematic R2 culture that is holding them back from achieving their potential. Equal innate potential capability is affirmed, but the gap between achieved and innate potential is given an explanation precluding state remediation.

Racial Equality as Norm of Treatment

The point, then, is that what actually counts as “equality” of treatment will now become highly contested. Liberal norms of non-discrimination prescribe that traits such as race should be irrelevant in such contexts as hiring decisions, bank loans, university admissions, and so forth. Since historically racism in the ideational sense has been the rationale for differential and prejudicial treatment, the natural corollary has seemed to many that racial equality means treating all candidates, all people in the situation, the same regardless of race: color-blindness. In a state evolving from its past as an overtly racist regime (juridical inequality), we want the commitment to “ontological” racial equality (the equal personhood of the members of all races) to translate somehow into a (substantive) racial equality in the everyday social realms. So the full schedule of liberal rights and freedoms—equality before the law, the right to run for office, equal opportunity in the marketplace, and so forth—should be extended to the members of the previously stigmatized races, with the hope that substantive equality will eventually result. Correspondingly, the argument has been that differential treatment by race of the R2s in the form of affirmative action for jobs or preferential admissions to universities is simply “reverse discrimination” against the R1s, to be put on the same conceptual and (im)moral level. In the 2007 judgment of the Chief Justice of the Supreme Court of the United States, John Roberts, when voting against two

communities' attempts to remedy segregation in education by using race as a factor to maintain "diversity": "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

So proponents of such a position are assuming a causal sequence by which the advent of socially recognized "ontological" racial equality and the corresponding institutionalization of equality of treatment (in a putatively uncontroversial sense: sameness) should lead to substantive social racial equality:

RECOGNIZED ONTOLOGICAL EQUALITY + EQUAL CAPABILITIES
+ EQUAL TREATMENT ("EQUAL" AS SAME) → SUBSTANTIVE SOCIAL EQUALITY (FAIR)

Defenders of differential racial treatment, on the other hand, will argue that equality of treatment does not necessarily mean sameness of treatment. The most obvious and uncontroversial contemporary illustration is equality of access, which will require not just stairs but ramps for those in wheelchairs. In the case of race, the equivalent argument is that the race or set of races in question are so differentially disadvantaged by the history of discrimination against them that compensatory measures for them, the R2s, will require the cancelling out of the unfair edge the R1s have. So sameness of treatment will not lead to substantive (as against juridical) social racial equality but continuing racial inequality. The claim is that putatively "equal" treatment (as sameness, "colorblindness") is actually *still* unequal treatment because of the different positioning of R1s and R2s in the system. So that gives us:

RECOGNIZED ONTOLOGICAL EQUALITY + EQUAL CAPABILITIES
+ EQUAL (AS SAME) TREATMENT (ACTUALLY UNEQUAL) → SUBSTANTIVE SOCIAL INEQUALITY (UNFAIR)

The formal juridical granting of equal rights does not on its own constitute racial equality in treatment because of the continuing disadvantaging of the R2s. A racialized basic structure tends to reproduce racial privilege even under conditions of formal equalization of rights. What is required then are measures to undermine this privilege through differential treatment (affirmative action, preferential admissions) which, though formally unequal, actually counts as substantively equal, or at least as tending to equalize an unfairly tilted playing field:

RECOGNIZED ONTOLOGICAL EQUALITY + EQUAL CAPABILITIES
+ EQUAL (AS DIFFERENT) TREATMENT → SUBSTANTIVE SOCIAL EQUALITY (FAIR)

But the problem is, of course, that once formal equalization has been achieved, the door is opened to competing explanation-schemes to account for continuing racial differentials. Statistics on continuing social racial equality will not be taken as *prima facie* evidence of continuing racial injustice, but of continuing racial incompetence. Adherents of an unreconstructed biologically racist framework, though in a minority, may be emboldened to declare they were right in the first place. The ending of formal discrimination only reveals more clearly that inferior intrinsic R2 capabilities were the real problem all along:

ONTOLOGICAL INEQUALITY (NATURAL) + INNATE CAPABILITY
INEQUALITY + EQUAL (AS SAME) TREATMENT → SUBSTANTIVE
SOCIAL INEQUALITY (FAIR)

On culturalist accounts, on the other hand, the R2s in general (or at least some of them) are refusing to take advantage of the opportunities now opened up for them. So the fault is theirs.

ONTOLOGICAL EQUALITY (NATURAL) + INNATE CAPABILITY
EQUALITY (POTENTIAL) + CULTURAL DEFICIENCIES + EQUAL
(AS SAME) TREATMENT → UNEQUAL ACHIEVED CAPABILITY →
SUBSTANTIVE SOCIAL INEQUALITY (FAIR)

What counts as liberal "equality" of racial treatment will now become deeply controversial, resting not merely on liberal values but on competing causal stories. South Africa's formal repudiation of apartheid is historically quite recent, but even here attempts to institutionalize an "equality" that goes beyond sameness of treatment to differential treatment that is supposed to be genuinely "equal" have been met with white hostility. In the United States, the civil rights revolution of the 1950s–1960s is much older, and a white backlash has effectively terminated affirmative action. Crucial racial indicators are not only not improving but in some cases getting worse. But this is not interpreted as ongoing white racial injustice but ongoing black fecklessness.

Racial Equality as Social Equality

The key problem is thus the adjudication, within a liberal framework, of rival conceptions of equality of treatment and rival explanation-schemes for accounting for continuing substantive racial social inequality (usually measured by R1/R2 disproportionality in the relevant social statistics). Racism as overt discrimination is uncontroversially wrong for most liberals, such as Rawls, and is condemned as such by him. But as the Roberts quote illustrates,

racism as social-structural disadvantage requiring race-sensitive remedial measures is another story altogether. If the system so functions as to privilege the R1s at the expense of the R2s through reproductive mechanisms largely independent of individual discrimination, then anti-discrimination measures alone will do little to achieve social racial equality. To justify differential treatment for the R2s and not have it categorized as impermissible "reverse discrimination" a sophisticated theorization of a racialized "basic structure" and its workings would be required. And neither in Rawls nor his myriad commentators and disciples has any interest been shown in such a project.

What this silence brings home, I suggest, is the deep theoretical inadequacy of Rawlsianism as it has developed over the past forty years. Racism in the first sense (R2s as subpersons) would seem to be a classic violation of the Kantian injunction to respect each other's personhood, and thus a moral transgression even deeper than utilitarianism's putative failure to take seriously the difference between persons conceived of as equal. Racism in the second sense would seem to be a blatant contravention of the Rawlsian political-philosophical ideal of a just "basic structure" to which all citizens could reciprocally agree. Why then—considering the pervasiveness of racialized social systems (and thus racialized basic structures) in what Srdjan Vucetic (2011) calls "the Anglosphere," the world of Anglo colonialism and Anglo settler states, which is precisely where analytic philosophy, including analytic political philosophy, has flourished—hasn't racial injustice, as manifest in racial inequality, been a central theme in the revival of Western political philosophy over the last four decades?

Various reasons and causes could be advanced to explain this silence, not at all necessarily competing with one another but possibly complementary. First, there is the general pattern Ann Cudd (2006) has recently pointed out in the profession as a whole: a long history of silence on oppression and complicity with injustice, arguably rooted at least in part in its demography. Note that causality here works at more than one level. One is socialized into norms of what counts as philosophy (and what doesn't), and if one is socially privileged by race and gender, there is no incongruity of these norms with one's white-male group experience, and no conflict with one's group interests. Thus although in theory philosophers are disincarnate, it is noteworthy that feminist philosophy and a concern with gender justice only becomes an issue with the influx of women—female bodies—into the profession from the 1970s onwards. But the degree of under-representation of people of color in the profession is far worse than that of (white) women. So we would expect a corresponding "whiteness" of conceptual concerns.

More charitably, it might have been thought that with postwar decolonization and 1960s–1970s official repudiation of past state racist policy in many of these nations (e.g., the United States, Canada, Australia) that a new civil rights

epoch was already in the making anyway. A *Theory of Justice*, for example, came out in 1971, after most of the important American civil rights legislation had already been passed: the *Brown vs. Board of Education* Supreme Court decision (1954) ending officially sanctioned educational segregation in public schools; the Civil Rights Act (1964); the Voting Rights Act (1965); the *Loving vs. Virginia* (1967) Supreme Court decision, which prohibited state bans on interracial marriages; the Fair Housing Act (1968). Race had been shown to be biologically non-existent, racist legislation was being repealed, and race as a social factor in everyday life was going to wither away.

Moreover, conceptualizations of the polity—certainly in the United States, probably elsewhere in the West also (if not in overtly racist apartheid South Africa)—militated against any representation of race as central to the basic structure. As Rogers Smith (1997) has argued, dominant framings in U.S. political culture, going back though Louis Hartz to Gunnar Myrdal and Alexis de Tocqueville, represented race and racism as anomalies to an inclusive liberal society. So insofar as "race" appeared as a category it was primarily, as noted, as ideational "racism." Representing the polity as itself a racist one might have been a conceptual leap simply too great to expect Rawls and other mainstream white political philosophers of the time (or even today, for that matter) to make, especially when unsupported by contemporaneous mainstream social science literature.

At any rate, whatever the cause or causes were (are), the consequence has been a social justice literature remarkably obtuse about and indifferent to the racial realities of the Anglo white settler societies, for all of which racial injustice has been central to their creation. Carole Pateman's "The Settler Contract" (Pateman and Mills 2007, ch. 2) is a far more useful framework for understanding these issues than Rawls's supposedly race-inclusive contract. For today, half a century-plus after 1960s decolonization, forty-plus years after Rawls's book, race has *not* disappeared. And the pattern in all these countries—not just the Anglo settler states (Vucetic 2011), but also the Iberian settler states (Andrews 2004), and the former colonizing powers—is very similar: one of white resistance to further racial equalization and racial justice measures (assuming, that is, that there was ever any sustained attempt to introduce such measures in the first place). Indeed, in the United States such language ("racial justice") is not even used any more. What are invoked are "diversity" and "multiculturalism."

So political philosophy as a potential ally has generally been MIA. Affirmative action was the subject of a fair amount of philosophical literature in the United States in the 1970s–1980s. But this work was generally categorized under "applied ethics," a low-prestige section of the field. The more prestigious social justice literature generally ignored and ignores race. This is true across the liberal spectrum, from right-wing market liberalism (Nozick

[2013] et al.) to left-wing social democratic liberalism (Rawls [1999] et al.). In the recent *Cambridge Companion to Nozick's Anarchy, State, and Utopia* (Bader and Meadowcroft 2011), for example, "race" cannot even be found in the index (nor "racism," "affirmative action," "reparations," etc.), despite the fact that—to his credit—Nozick (2013, 152–3) does explicitly incorporate "justice as rectification" into his theory of justice, and does direct the reader in an endnote to Boris Bittker's (2003 [1973]) then-recent *The Case for Black Reparations*. By contrast, the most extensive discussion of rectification in the *Cambridge Companion*, David Schmitz's chapter, is generally negative in tone, concluding that "Descendants of victims, for their own sakes, must accept that guilt is not a weapon to be used against a perpetrator's descendants forever" (Schmitz 2011, 217).

In Rawls's own work, as I have repeatedly pointed out elsewhere (Pateman and Mills 2007; Mills 2009), mention of race in his five books does not exceed half a dozen pages, and does not include any discussion, or even mention, of affirmative action, the most important measure of corrective racial justice in the postwar period. Thomas Nagel (2003) claims that in a personal conversation Rawls told him that he thought affirmative action was constitutional, but admits that Rawls never said so directly in any of his work. And it is noteworthy that what is easily the most impressive and sophisticated treatment of the subject in the last decade (or perhaps ever)—Robert Taylor's 2009 "Rawlsian Affirmative Action" article in *Ethics*—concludes that whatever Rawls himself thought his principles would permit, they only allow the weaker forms of affirmative action. (It is also noteworthy—in bringing home the marginality of this topic in the field—that Taylor is *not* a philosopher but a political theorist.) The secondary literature on Rawls continues, four decades later, to exclude this subject. Nowhere in the just-published 2014 Blackwell *Companion to Rawls* (Mandle and Reidy 2014), for example, is there the slightest attempt to engage with the racially informed critiques of Rawls made over the years by philosophers like Bernard Boxill (1992), Howard McGary (1999), Elizabeth Anderson (2010), and myself (Mills 1997; Mills in Pateman and Mills 2007; Mills 2009), or even the sympathetic attempts to develop Rawls to deal with racial justice and affirmative action in the work of Tommie Shelby (2004) and Taylor (2009). Appearing more than a decade after Samuel Freeman's 2003 *Cambridge Companion to Rawls*, the book exhibits a parallel indifference to issues of race, but with even less excuse considering the body of work produced in the intervening years.

The question then is: what would be required to change this situation? A crucial starting-point, in my opinion, must be the exit from ideal theory, which has long since become a self-contained normative world rather than, as it was originally advertised, the preliminary training-ground for moving

on to grapple with the problems of our non-ideal world. Apart from all the other possible factors cited above, "ideal theory" has itself, I would contend, become a central obstacle to discussing and realizing racial justice.

Ideal theory, recall, is not merely normative theory but the normative theory of a perfectly just society, a society conceived of, to begin with, as a cooperative venture for mutual advantage, and, in addition, one in which people generally accept the rules and do what they can to uphold them. But a racialized society is not slightly but *radically* different from such an ideal. Far from being founded on consent, they are societies (in the colonial world) founded on violence. Far from the rules having been designed to benefit everybody, they will have been designed to benefit whites. And far from reciprocity among the citizenry having been the norm, whether as (comprehensive liberal) Kantian moral interpersonal respect or (political liberal) civic regard, interpersonal relations will have been marked by a dominant asymmetry of racialized contempt. In every sphere of the Rawlsian conceptual cartography, such societies will be utterly deviant from his model. In a phrase, they will be *ill-ordered societies*.

Moreover, the precise nature of their ill-orderedness needs to be spelled out. In terms of the differences Rawls (1999, 109–10) demarcates in *Theory*: these are not societies where, because of an objective shortage of natural resources, scarcity is so extreme that "fruitful ventures must inevitably break down"; nor are they societies whose populations, through some degeneration of human nature, are unable to be morally motivated in situations of conflict of interest, so there is no intersubjective capacity for justice; nor are they non-Western societies whose traditions are alien to the liberal-democratic "overlapping consensus" that becomes Rawls's later, post-*Theory* normative standpoint. Rather, they are rich Western or Western-implanted societies, with resources quite ample, whose white citizenry refuse to share fairly with people of color not because of innate character defects but their racist socialization and their racial group interests, rationalizing their non-reciprocity toward nonwhites through a racialized "overlapping consensus."

So what? Rawlsians will reply. We are doing normative theory, and we are mapping an ideal to which we can aspire. But the problem is that when the ideal is so remote from the actual—when existing societies do not even conform to the cooperative-venture characterization, let alone the well-ordered ideal—the normative target becomes too distant to serve as a useful guide. Rawls's principles of justice, we must always remember, are principles of justice for his well-ordered society. They are not principles of justice for our own societies, or principles of justice meant to guide us (directly) in the *transition* from our actual societies to his own. Rawls's (1999, 8) promise was that, having developed the necessary understanding of justice from ideal theory, we would then move on, appropriately equipped, to non-ideal theory.

But this promise was not kept. Forty-plus years later, mainstream Rawlsian political philosophers are still immersed in ideal theory: a segregated white refuge, a philosophical “whitopia” (to adapt the coinage of Rich Benjamin [2009]), that renders any “realistic” achievement of an actual utopia impossible since it would require them to step out of their Jim-Crowed and gated moral community to study the actual racialized world in which they live.

In sum, what we need is a theorization of ill-ordered societies to complement the theorization of well-ordered societies, so that we can locate them both in the same conceptual space, thus enabling us to chart a path for getting from one to the other. In this final section, I will gesture at one possible line of development for such a revisionist enterprise.

Consider Rawls’s well-ordered society, and the kind of inequalities he is concerned about. The basic liberties, BL, will be equal, but people will be born into different class locations and with varying bundles of natural talents. So a well-ordered society will compensate for these “morally arbitrary” differences through fair equality of opportunity, FEO, and the difference principle, DP. A simple way of formulating Rawls’s two principles of justice will then be as follows (the arrows indicate lexical ordering):

$$BL \rightarrow (FEO \rightarrow DP)$$

(The basic liberties principle is lexically dominant over the second principle, in which, in a subordinate ordering, fair equality of opportunity is lexically dominant over the difference principle.)

Now as just mentioned, the hegemonic focus on these principles in the world of Anglo-American ideal-theory Rawlsian political philosophy makes it easy to forget how very limited (by Rawls’s *own* stipulation) their scope is. In the absence of any developed complementary discourse on non-ideal theory, they have in a sense—despite Rawls’s warning—expanded to fill almost completely the normative space of Rawlsian discourse on justice. So as a graphic representation and reminder of what is actually their severely restricted zone of application, let us enclose them within identifying and boundary-setting brackets:

$$PDJ [BL \rightarrow (FEO \rightarrow DP)]_1$$

That is, these are principles of *distributive justice* for an ideal (I) *well-ordered society*, that being a society which is (i) a cooperative venture for mutual advantage, in which (ii) the rules are designed for fair and reciprocal benefit, and (iii) people generally follow the rules. In such a society, race does not specify a relevant standpoint, since the society will be non-racist, and in fact Rawls is explicit that his principles of justice apply only to “modern

democratic societies” (conceived of as cooperative ventures for mutual advantage) not racist societies (Rawls 2001, 14, 21).

But we are not, of course, in such a society. So what we need are the principles that are to guide us in the transition from “modern” societies supposedly democratic, though racist (like the United States), to “modern” non-racist and *genuinely* democratic societies where his principles do apply (Rawls 2001, 64–6). Unfortunately, however, neither Rawls nor the secondary literature on Rawls has ever chosen to explore this question.

So let us try to reconstruct them. Consider an ill-ordered society of a racist kind. In actuality, of course, racism will be combined with sexism and other systems of discrimination, thereby generating “intersectional” complications. But set these aside for simplicity’s sake. Focusing just on race, then: the citizenry will be divided between R1s and R2s, with the R2s disproportionately clustered on the lower rungs of the social ladder. What explains their situation is historic discrimination (and its current legacy) that violated their basic liberties, BL, and the historic (and continuing) denial to them not just of fair equality of opportunity but, more fundamentally, simple (formal) equality of opportunity, EO. In other words, even when R2s with the same credentials as R1s applied (apply) for jobs and positions they did not (do not) receive equal consideration. So racial inequality as a guiding norm of treatment founded on a racial disrespect for the R2s will have been central to the architecture of the “basic structure.” (Thus a simple way of summarizing the goal of this alternate social justice project is: the dismantling of a *racialized* basic structure.) Rather than a cooperative venture for mutual advantage, then, this non-ideal (~I) ill-ordered society has been founded as (i) a coercive and exploitative venture for differential white advantage, with (ii) the rules being generally designed for white benefit.

What we want, then, are principles of corrective justice that will eliminate *illicit white advantage*. How should these be conceptualized? In *A Theory of Justice*, in the attempt to establish the continuity of his approach to these issues with the classical, here Aristotelian, tradition, Rawls (1999, 9) refers to *pleonexia*, “gaining some [illicit] advantage for oneself by seizing what belongs to another, his property, his reward, his office, and the like, or by denying a person that which is due to him, the fulfilment of a promise, the repayment of a debt, the showing of proper respect, and so on.” I suggest that we think of illicit white advantage/white privilege as a form of *racial pleonexia*, historic and current, which needs to be corrected for. In effect, R1s will have had differential racialized basic liberties, increased at the expense of the R2s’ basic liberties, and differential opportunities expanded at the expense of the R1s’ opportunities. If R1s have been owed a reciprocal respect, R2s have been systematically disrespected. Let us represent these illegitimately expanded rights and opportunities, and differential respect, with a Δ . So we have:

R1s (Δ BL) and R1s (Δ EO) and R1s (Δ Respect)

And let us represent the violation of the basic liberties and opportunities of the R2s with a V (which combines the virtues of the appropriate initial with a graphic complementary “inversion” of the R1s’ advantage):

R2s (VBL) and R2s (VEO) and R2s (Disrespect)

An intuitive way of thinking of these three areas of violation, which would link this attempted “Rawlsian” framing to everyday discourse, would be to see the R2s as suffering from second-class citizenship, racial exploitation and marginalization, and a societal “dissin”. (Note that I am excluding from discussion the DP and FEO [as against just formal EO]. The reason is that we are trying to address racial inequality in actual societies. But no actual society has ever implemented the DP, so there would be no R1/R2 divergence in its implementation. And though social democratic states have made some attempt to provide a good education for all students, regardless of class background, overall measures will have fallen far short of Rawlsian FEO, while in countries like the United States, of course, nothing close to such reform has ever even been tried. So we are limiting ourselves to norms in some sense actually operationalized, though in a racist way.)

Now how should this situation be addressed normatively? Some theorists, such as Tommie Shelby (2004) and Robert Taylor (2009), think that we should utilize FEO. They both recognize that we are in non-ideal circumstances, and that FEO is a principle for ideal circumstances. But they both believe that FEO can nonetheless be adapted to non-ideal circumstances. My own view is that this is a category mistake. Rawls’s recognition that these are morally and conceptually different kinds of situations is shown by his explicitly refraining—as just mentioned above—from using FEO to cover race, since this is a problem of partial compliance theory. Disadvantaging from social oppression in a non-ideal racist society is categorically different from disadvantaging because of class membership in an ideal society.

Instead, I suggest, what we are seeking here is what Rawls (1999, 8, 309) calls “compensatory justice,” whose principles are to be worked out after the ideal-theory principles have been chosen. Never in his entire corpus does he ever discuss the concept, so there is very little to go on. But I take it that he is referring to what Nozick (2013, 152–3) calls “rectification of injustice in holdings,” going back to Aristotle’s (2000) distinction between distributive and rectificatory justice. However, some theorists distinguish between “rectificatory” and “compensatory” justice, so to avoid begging any questions, let us just use “corrective” justice as an umbrella term to cover these different variants. In some cases rectification may be possible and appropriate; in other

cases compensation may be possible and appropriate. What Rawls is clear on (in *Theory* [1999, 175, 216]) and *Justice as Fairness* [2001, 13]) is that the principles of non-ideal theory, which presumably include the principles of compensatory justice, should follow the same priority ordering as the principles of ideal justice. For well-ordered societies, the establishment of the basic liberties, BL, trumps other considerations, coming before fair equality of opportunity and the difference principle: $BL \rightarrow (FEO \rightarrow DP)$. I am going to suggest, correspondingly, that *correction of violations* of the basic liberties should have similar lexical priority. Let us call this principle PCJ (VBL), the principle of corrective justice for violations of the basic liberties. That gives us:

PCJ (VBL) R2s \rightarrow (Δ BL) R1s

And likewise for the correction of violations of equality of opportunity:

PCJ (VEO) R2s \rightarrow (Δ EO) R1s

These two principles cover the two crucial areas of society Rawls distinguishes, one’s equal liberal citizenship and one’s access to socio-economic opportunities. However, as noted above, I have also included one’s entitlement to equal respect. In keeping with the Kantian inspiration of his project, Rawls (1999, 386) says that “perhaps the most important primary good is that of self-respect,” and indeed “the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect.” But since he is working within the framework of a well-ordered society, he is taking reciprocal respect among citizens for granted. So there is no formal principle of justice stipulating respect, since interpersonal respect is the societal “default mode.” The issue only comes up for him in the situation where socio-economic differences become so great that they threaten the self-respect of those at the lower echelons of society. But Rawls thinks he can pre-empt such an eventuality through the regulation of the basic structure by BL, FEO, and the DP. Respect then “falls out” of these principles being properly applied. But with a racist ill-ordered society it is different since, as emphasized, racial disrespect, the “dissin”, of the inferior R2s is *foundational to the polity*. So I suggest that in this case we do need a separate third corrective principle to cover this set of systemic violations. That gives us:

PCJ (Disrespect) R2s \rightarrow (Δ Respect) R1s

Now how should these three principles be ordered? Because Rawls’s own discussion is focused on a society so remote from this real-world example,

extrapolations of his view are necessarily somewhat speculative. We do know that for the two areas corresponding to his two principles, the ideal-theory ordering should be emulated. But where would this third principle fit? Bearing in mind the Kantian inspiration of the project, it does not seem unreasonable to suggest that the correction of the legacy of disrespect for the R2s should take pride of place. To a certain extent, of course, such a correction will overlap with the correction of BL violations, since the most obvious manifestation of disrespect for the R2s will have been VBL. But there could also be symbolic aspects to corrective justice that are not exhausted by the formal rectification of rights-violations. Thomas McCarthy (2002, 2004), for example, has argued for a national debate on slavery and Jim Crow that would reconstitute public memory, and other theorists have suggested truth and reconciliation commissions, acknowledgments of wrongdoing, rituals of atonement, community repair, and so forth. So the correction of historic and current R1 racial disrespect for R2s opens up for non-ideal social justice theory important questions about the social and psychological construction of "whiteness," and its necessary reconstruction. (Thus we see illustrated once again the complete conceptual inappropriateness of FEO as a principle for handling these issues.) For the sake of simplicity, though, let us bracket this question till another time, and just focus on the two areas dealt with in ideal theory, basic liberties and opportunities. That gives us finally:

$$PCJ [(VBL) R2s \rightarrow (\Delta BL) R1s] \rightarrow \{(VEO) R2s \rightarrow (\Delta EO) R1s\}]_I$$

Spelled out: the correction of the violation of the basic liberties of the R2s in a non-ideal racist society must take lexical precedence over the correction of the violation of the equal opportunities of the R2s, and both (respectively and separately) should trump the retention of the illicitly expanded liberties and opportunities of the R1s.

And let us now restate Rawls's two principles to highlight the contrast:

$$PDJ [BL \rightarrow (FEO \rightarrow DP)]_I$$

$$PCJ [(VBL) R2s \rightarrow (\Delta BL) R1s] \rightarrow \{(VEO) R2s \rightarrow (\Delta EO) R1s\}]_I$$

Putting these two formulas side by side should, I hope, bring out more clearly and sharply the conceptual and normative difference between the two sets of principles, and the kind of justice (distributive vs. corrective) they are respectively regulating. It should also bring home what I earlier claimed to be the fundamental mistakenness of the attempt (as in Shelby and Taylor) to extract racial justice from principles designed with a completely different end in mind. In the absence of any disciplinary attempt to derive PCJ_I , these

two theorists have become convinced that PDJ_I —with appropriate twisting and stretching—can somehow be turned to corrective ends. But Rawls's PDJ_I have a quite distinct normative mandate and Rawls tells us so unambiguously. If the above exegesis has been plausible, it should now be evident how differently structured the two sets of principles would have to be. Unlike the case of a well-ordered society, with no racial discrimination, the lexical priority relations here have to take into account the non-ideal history of the illicit privileging of the R1s: the unjust expansion of their basic liberties at the expense of the R2s, and the (positive) inequality of opportunities they have enjoyed to the diminution of the R2s' opportunities. It is not—of course—that the correction of the violations of the basic liberties and opportunities of the R2s can trump the basic liberties and opportunities of the R1s. That would be unjust, and would indeed constitute "reverse discrimination." But here what are being trumped are the *illicitly* expanded liberties of the R1s, the *differential* rights they acquired from the racial subordination of the R2s, and their correspondingly *unfairly* expanded opportunities.

Albeit more cumbersome in appearance than FEO, then, the formula above tracks the moral reality (a more complicated reality) accurately in a way that FEO does not. What is involved is the correction of racial oppression (VBL, VEO), and its attendant violations of R2 personhood (Disrespect), not the making-up for class disadvantage in a non-oppressive well-ordered society where everyone's personhood has been respected. Rawls's commitment to substantive egalitarianism (a commitment rejected by right-liberals) is what motivates his FEO and DP, since it is "morally arbitrary" that people should be born with dis/advantages of social position and natural talents. But the rationale here does not at all depend on such controversial social-democratic claims, which would be disputed by the right in the name, e.g., of Nozickian "entitlement." The rationale here is that dis/advantages stemming from racial group membership are the consequence of racial social *oppression*, which should uncontroversially be rejected across the liberal spectrum, from left to right, as a violation of R2 personhood. Social racial equality as a normative target is quite separate from material egalitarianism, since it is just seeking the elimination of inequalities that stem from invidious differential racial treatment and its legacy, not a general levelling.¹ So in theory at least, there should be convergence across the liberal spectrum on the wrongness of inequalities arising from a racialized opportunity structure. But what will, of course, be required is a philosophical theorization of racialized and, more generally, ill-ordered societies that will be able to confront and refute the competing analyses that seek to limit racial wrongs to discrete acts of discrimination, and to exclude social-systemic, "basic structural" causation. Rather than principles of justice for a well-ordered society, we would be seeking appropriate principles of transitional justice. (See Figure 2.4.)

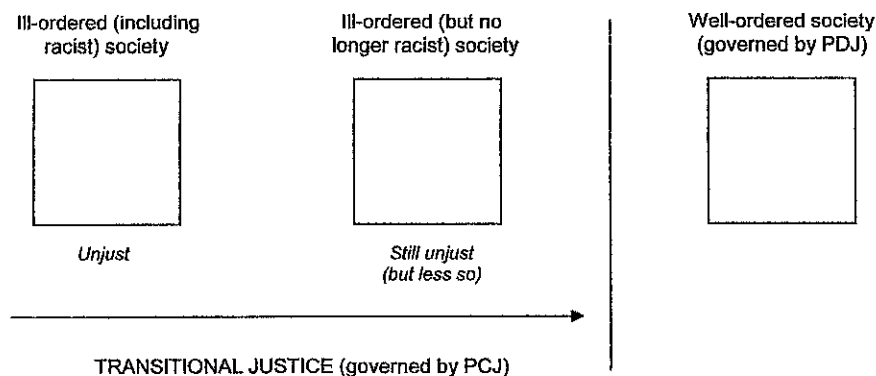


Figure 2.4 Transitional Justice

Let me give a concrete example. The basic liberties include, according to Rawls, personal property rights, though not as strong as unqualified Lockean ones. Now in a racial polity, people of color will have diminished property rights while whites have expanded property rights. In the diagnosis of a famous essay by Cheryl Harris (1993), whiteness will have functioned as “property,” a set of differential racialized entitlements not to be encroached upon, and including both actual physical property and “settled expectations” of enhanced opportunities. Affirmative action policies, not to mention the more radical policy of reparations, will then be viewed as violating white property rights, which would seem to be protected by their lexical priority in BL. But by virtue of this formulation, we can now see that such claims are illegitimate, or at least contestable, since they presuppose an (inappropriate) ideal-theoretical framework. Bringing in the non-ideal history, as corrective justice requires, makes clear that what is being “violated” are *illicitly* expanded rights and opportunities, Δ BL and Δ EEO, which are legitimately trumped by principles of person-respecting justice. So no actual violation is involved at all, since whites did not justifiably have such rights and opportunities in the first place. Rather, they are the result of unjust “opportunity hoarding” (Charles Tilly), which violates Rawlsian norms of reciprocity and equal respect for nonwhite personhood. The lexical prioritizing of the basic liberties, BL, which will obviously be problematic for the attempt to use FEO as a corrective principle (given its lexical subordination to BL), becomes a trumping ally once these liberties are racially disaggregated in the light of the non-ideal history, and BL itself recruited to the task of rectification.

Here are some additional resources such a modified Rawlsianism could offer:

- i. A standard retort of opponents to demands for corrective racial justice is that (certainly in the case of slavery, though not for Jim Crow) the original victims are long since dead. The standard reply of advocates is that these wrongdoings have nonetheless had long-lasting effects that have been intergenerationally transmitted. Insofar as Rawls (1999, 111), working in ideal theory, takes as his reference point not single individuals located at a particular point in time but “continuing lines of claims,” this component of his apparatus would lend itself well to the making of the case under non-ideal circumstances. “Races” are enduring social entities that inherit advantages and disadvantages. Even under ideal conditions, Rawls (1999, 7) emphasizes that what warrants making the basic structure “the primary subject of justice” is that “its effects are so profound and present from the start. . . . [T]his structure contains various social positions and . . . [people] born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances.” But this claim will go through even more forcefully when these “positions” are not merely colorless locations in a class structure but caste-like *racially* demarcated color “lines” in a white-dominant social order. The “color-blind” reluctance to recognize the reality of racialized causality could thus be contested with resources drawn from this revisionist Rawlsianism.
- ii. Similarly, the overall trend of recent Supreme Court decisions to impose ever-higher standards of “strict scrutiny” where race is involved, and to demand proof of discrete acts of discrimination—which have essentially terminated affirmative action—can then be combated by citing and documenting the workings of a racialized basic structure, which continues to reproduce illicit white advantage, Δ , even with nominally guaranteed civil rights. Likewise the ahistorical framing of “discrimination” which underpins Roberts’s 2007 judgment, and makes possible the moral and conceptual equating of Jim Crow “discrimination” and anti-Jim-Crow remedial measures, is pre-empted by a structural understanding of the complete moral asymmetry between the two. Rawls famously concedes that the “basic liberties” must have “equal worth” for all citizens, and be substantive rather than nominal for those in less favorable as well as more privileged social locations. So under racially non-ideal circumstances he would have to be committed even more strongly to the measures necessary to undo the hollowing-out of paper rights and freedoms by the combination of racial *and* class disadvantage. What counts as racial “equality” of treatment (see earlier discussion) is thus located in the appropriate framework of constraining structural causality.
- iii. Finally, let us return to the bracketed third principle, the correction for racial disrespect. Kant, in common with most Western moral-political

philosophers, had little to say about corrective justice; as Samuel Fleischacker (2004) has documented, even distributive justice as a concept is actually very recent in the tradition (even for white males), let alone corrective justice for subordinated groups (nonwhite, non-male). But we do know that with respect to punishment, which falls under non-ideal theory, Kant famously takes a hard-line retributivist position (requiring the execution of the last murderer before society dissolves). Imagine, then, a reconstructed anti-racist Kant, a hard-liner, extrapolating his inviolable commitment to respect for personhood to the correction of the situation of the R2 sub-persons, citizens of a polity founded on "the social bases of disrespect" for them. If, to repeat the earlier quote from Rawls (1999, 386), "the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect," would this imperative not be far more "categorical" in its demandingness for people *already* born into such a "basic structure" and motivated, accordingly, to seek its urgent transformation? Once reoriented by non-ideal theory, the implications of the lexical "trumping" power of Kantian personhood are, I would suggest, far more radical—indeed revolutionary—than commonly realized, and would easily normatively override most of the standard objections raised by critics of the various measures of remedial racial justice attempted over the last few decades. For the imperative is to transform what has historically been (and is in various ways still) a *Rassenstaat* into the *Rechtsstaat*.

I am not, of course, claiming that the mere putting down of these formulas on paper settles the matter; obviously many complexities are involved and considerable argumentation will be required to make the case.² And there is in fact a significant body of literature on affirmative action and reparations, though not for the most part developed with respect to a Rawlsian framework.³ The point rather is to illustrate, in simple intuitive form, and by comparison with Rawls's own two principles, the lines along which I think the project of reconstructing "Rawlsian" principles of corrective justice so as to enter into these debates should be developed. The power and influence of the Rawlsian apparatus, which has had such a huge impact on the discussions of justice of the last forty years, could thus be harnessed to a corrective justice agenda, above all by tracking the causal consequences and normative implications of a "basic structure" now explicitly conceptualized as racialized. The vast body of social-science literature on race standardly ignored by Rawlsians can now be afforded a legitimate conceptual entrée, since we are now firmly in the realm of non-ideal theory. Obviously, many of the claims I have made above will be viewed as highly controversial by mainstream political philosophers, and challenged. But such debate is the life of the profession—the point

is that it would now be contiguous with rather than utterly removed from the racial justice debates in other disciplines, and within the American civil rights community. Political philosophy would be a valued participant in this national dialogue, rather than a remote and irrelevant subject engrossed in the ever-diminishing returns and esoteric in-house minutiae of "ideal theory."

For hundreds of years, racial inequality has constituted a flagrant violation of liberal modernity's promise. It is high time for the most well-respected justice theory within the liberal tradition to start playing a more active role in addressing this problem, especially considering liberalism's role in creating it in the first place. Surely forty years in the white wilderness of Rawlsian ideal theory is long enough.

NOTES

1. I am myself sympathetic to material egalitarianism, so this characterization is not meant to be hostile. What I am trying to bring home is that racial equality as a norm and ideal is conceptually distinct.
2. For a detailed attempt to provide argumentation of this kind to justify reparations within a modified Rawlsian framework, see chapters 3 and 4 in Pateman and Mills (2007).
3. In the *Blackwell Companion* (Mandle and Reidy 2014), for example—a book of nearly 600 pages—an index search for "affirmative action" turns up a single endnote reference consisting of a single sentence (182n13).

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