Contract and Domination

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polity

First published in 2007 by Polity Press

Polity Press
65 Bridge Street
Cambridge CB2 1UR, UK

Polity Press
350 Main Street
Malden, MA 02148, USA

ISBN-13: 978-07456-4003-7
ISBN-13: 978-07456-4004-4 (pb)

A catalogue record for this book is available from the British Library.

Typeset in 10.5 on 12 pt Monotype Times
by Servis Filmsetting Ltd, Manchester
Printed and bound by MPG Books Ltd, Bodmin, Cornwall

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Contract of Breach: Repairing the Racial Contract

Charles W. Mills

I want to turn now to the normative use, within this suggested alternative non-ideal contract theory, of the idea of the domination contract. I will focus on race, and use as my illustration the subject of reparations to African Americans.

After decades of virtually complete marginalization, black reparations as an issue has once again become topical. Its renewed life in the black American community, and the grudging acknowledgment it has begun to receive in at least some sections of the white community, can be attributed both to the untiring efforts of local activists and the increased global sensitivity in recent years to issues of atonement and apology for governmental wrongdoing. One anthology, for example, *When Sorry Isn't Enough* (Brooks 1999; see also Winbush 2003; Salzberger and Turck 2004; McGary, forthcoming), suggests that we are now living in an "age of apology," and has a planetary sweep, including sections on successful as well as so far unsuccessful demands for reparations to Jewish and Romani victims of Nazi atrocities during the Second World War, Korean "comfort women" kidnapped and subjected to gang rape by the Japanese military, Japanese Americans interned by the American government, expropriated Native Americans, black Americans suffering the legacy of slavery and Jim Crow, and South African victims of apartheid.

An outsider might expect that philosophy would be in the vanguard of such a movement, since it is political philosophers and ethicists who are by their calling supposed to be professionally concerned about matters of justice. But an outsider would be quite wrong. While a tiny handful of black philosophers, such as Bernard Boxill (1992) and Howard McGary (1999), have played a pioneering role for 30 years in

trying to get the issue of reparations for racial injustice taken seriously by the profession, mainstream philosophical discussions of social justice have for the most part ignored it. The most obvious and revealing indicator of this pattern of exclusion is the silence on race in the Rawls industry. Rawls's *A Theory of Justice* (1999h) is widely credited with reviving Anglo-American political philosophy after the Second World War, and making it again possible, after the doldrums of metaethical noncognitivism, to do political theory in the old-fashioned grand style. Insofar as Rawls is tackling nothing less than what is required to make a society just, one would think that here is the ideal framework to discuss the legacy of racial injustice in the United States. But in Rawls's own writings, and in the literally thousands of articles his work has generated, the subject of race, and the history of American slavery and post-bellum Jim Crow, barely appear. Indeed, as mentioned in the previous chapter, in the recently published *Cambridge Companion to Rawls* (Freeman 2003), not one of the 14 essays has racial justice as a topic or even a subtopic. Nor is it discussed except in a passing sentence or two by any of the authors contributing to a special 2006 symposium on Rawls's legacy in *Perspectives on Politics*, the official journal of the American Political Science Association (Ackerley et al. 2006).

How is it possible for political philosophers in the United States, a country where racial *injustice* has been so flagrant, to be so indifferent to this issue? As with any complex social phenomenon, the causality involved is multiple, and for an answer, one would have to look both at the peculiar sociology of the profession itself (its overwhelming demographic whiteness, with its obvious implications for the shaping of experience, group interests, concerns, and priorities) and the de-racialized conceptions of the polity dominant in the culture at large (see, for example, R. Smith 1997). But apart from these factors, a significant contributory cause, I would claim, is the hegemony of "ideal theory" in political philosophy and the not unrelated adoption of a contractualism that abstracts away from embarrassing questions of corrective justice. As Rodney Roberts has recently observed, in the huge literature in Western philosophy on justice, surprisingly little attention has been paid "to questions of injustice and its rectification." Far from flowing smoothly, almost as a matter of logical implication, from the subject matter of justice, injustice as a normative topic has tended to be bracketed and sidelined, so that "a privileged perspective on justice" has been the outcome, with "questions regarding compensation which may be due to victims of injustice" being "well outside the 'central debate,' " and "relatively speaking, of little concern to philosophers" (R. Roberts 2002a: 1).

I have argued elsewhere (Mills 2005a) that this preference in the profession for "ideal theory" is not innocent, not a neutral methodological

decision, but itself a deeply *ideological* one in the pejorative sense classically associated with left theory of the adoption of a set of ideas/values/approaches/framing assumptions that reflect and reproduce the perspectives of the privileged (here, whites). Ideal theory has proven to be patently *non*-ideal for the theorizing of racial justice. For when racial oppression has been central rather than marginal – as has obviously been the case in the United States – it is absurd to utilize without modification a conceptual apparatus that presupposes race-neutral inclusion, color-blind universalism, and egalitarian political input as the actual dominant norms. If, in the terminology of Rogers Smith (1997), racism and white supremacy had been "anomalies" in a generally inclusivist and race-neutral polity, then conventional contract theory, classically predicated as it is on individualist egalitarianism, would be an apparatus appropriate to determining justice. If on the other hand racism and white supremacy have been norms in their own right, whether in tension with race-neutral liberalism as part of a complex of "multiple traditions" or, more ominously, as "symbiotic" with and rewriting liberalism in racialized terms, then a different theoretical normative approach is required. Instead, we should start with the reality of *exclusion and inegalitarianism* as the norm, and a "contract" that theoretically registers that fact: a "contract of breach," in the sense that the very foundation of the contract is the breach of universalism and respect for all, so that oppression is normative. In this demystified framework – which corresponds to reality, unlike the mainstream one – injustice is located at center-stage, making impossible its marginalization. The normative task of contract theory within this alternative approach, then, would be to replace the domination contract, a "contract of breach," with a contract that repairs and corrects for that breach, thereby achieving racial justice – rather than the unhelpful and ultimately evasive abstracting away from questions of race altogether which has been the rule in white political philosophy.

In what follows, I will (1) argue for the unacknowledged "whiteness" of mainstream social contract theory; (2) demonstrate how the "domination contract," in this case the racial contract, can serve as a useful tool for working in non-ideal theory; (3) show how to justify reparations within a modified Rawlsian contractual framework.

The "Whiteness" of the Contract

The enduring appeal of the contract idea inheres in large measure in its elaborating on a simple image, a picture, a metaphor, resonant with complex implications (Hampton 1993, 2001): that the sociopolitical order is created by morally equal human beings (descriptive claim) and

as such the structure of the sociopolitical order should reflect that equality (normative claim).[1] The many and obvious criticisms that can be directed at the concept if taken too literally are in a sense irrelevant, defeated by the simple power of the idea of society as a human creation that should be morally bound by egalitarian norms.

Thus in his classic analysis of what he sees as the "political voluntarism" of social contract theory, Patrick Riley reminds us that "the central concept in social contract theory is will," thereby, in Michael Oakeshott's contrast, demarcating the modern political conceptual world of "will and artifice" from the "reason and nature" of antiquity (Riley 1982: vii–ix). From Hobbes's famous description in *Leviathan* of the commonwealth as "an Artificiall Man; though of greater stature and strength than the Naturall" (1996: 9), onward through the work of his successors Locke, Rousseau, and Kant, the emphasis is on the artificial, that is humanly created, character of the society and the polity. Similarly, though contemporary Rawls-inspired contractualism drops the historical claims, it is noteworthy that Rawls still begins *A Theory of Justice* with the suggestion that we think of society as "a cooperative venture for mutual advantage" (1999h: 4). So though the contemporary contract may have forsworn the robust explanatory pretensions of the original, the "thin" but still significant commitment to the shaping role of human causality remains.

The other – normative – commitment is, of course, not attenuated at all. In the non-Hobbesian mainstream of the tradition, it is manifested in Locke's assertions about equal rights in the state of nature and Kant's claims about the categorical imperative to respect our moral personhood. In the words of Murray Forsyth: "The emergence of the notion of the social contract is hence linked intimately with the emergence of the idea of the equality of human beings" (1994: 37). And in Rawls's updating, of course, it is manifested in the use of the contract idea to bring out "the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association" (1999h: 10). So the contemporary Rawlsian contract is a classic example of the moral contract: the mapping of a just order appropriate for a society of equals.

In what ways, then, can the contract be said to be "white," Eurocentric? After all, surely these two basic claims (society as a human creation, moral egalitarianism among humans) are perfectly reasonable ones, indeed (the latter in particular) to be applauded and highlighted by people of color seeking remedies for racial discrimination. My objection

[1] Hobbes is of course the notorious exception here.

is not, of course, to this foundation of the "contract" – I completely agree that these claims are to be endorsed. The "whiteness," I suggest, reveals itself in two ways. First, there is the historic fact, at least arguably, that the original contract theorists had overt or tacit racial restrictions on who counted as a full "person" with equal rights. Nonwhite "savages" and "barbarians" were generally seen as lesser beings covered by a different set of normative rules, as manifested both in the actually color-coded moral code obtaining and the racist sociopolitical institutions imposed on nonwhites by Europeans in the modern period. In other words, contra Forsyth, some humans were less human, and so less equal, than others. If moral egalitarianism is true, that does not mean that it was recognized to be true for the nonwhite population. I have made these arguments before (Mills 1997, 2006b) and will not repeat the evidence here.

Nonetheless, the obvious rejoinder to this criticism (even if its validity is conceded) is that these racial exclusions, deplorable as they were, can be simply eliminated from the theoretical apparatus, and are not a feature of the contemporary contract. If the contract was admittedly historically white, with equality limited to whites, it does not have to remain so. But this brings us to the second, deeper kind of "whiteness." My claim will be that – as with the corresponding feminist critique of the originally gendered contract (Pateman 1988; Okin 1989) – a genuine and substantive (as against merely nominal and verbal) rewriting of the "contract" to take account of the distinctive concerns of people of color *will require a fundamental rethinking of the depiction of the creation of society and what real egalitarianism now morally requires of us*. If the "political voluntarism" that defines social contract theory represents a "moral causality," as Riley argues, then this notion must necessarily be rethought for populations who, for racial reasons, have been denied – as moral inferiors – the equal capacity to will, and have been subjected instead to the immoral causal imposition of a racialized *white* will in the founding of the polity. So while it is true that humans create the sociopolitical order, they certainly do not all have an equal say in its shaping. The "will" involved is not the unanimous will of all, Riley's idealized "moral causality," but rather an *immoral* causality that reflects the differential power of whites.

A useful reference-point in this respect is an unwittingly revealing passage in a classic essay by David Gauthier, "The Social Contract as Ideology." Gauthier begins with the observation that "The conception of social relationships as contractual lies at the core of our ideology." But unlike most white contract theorists, he immediately goes on to ask "Who are 'we'?," and answers with commendable frankness: "In this essay, first-person plural references are intended to denote those persons

who have inhabited Western Europe, who are descended from such inhabitants, or who live or have lived in social structures developed from those of Western Europe during the past three to four hundred years" (1997: 27).

Gauthier thus implicitly limits the "contract" to whites (in fact a subset of whites: the fully white Western European, so to speak, as against the off-white Eastern European (Jacobson 1998)) and those others living in the social structures created by whites in the period of Western modernity. In a way he anticipates, in an essay originally published in 1977, Rawls's shift from the 1971 *Theory of Justice* representation of the contract as a device with transhistorical, meta-ethical pretensions to the later more modest 1993 *Political Liberalism* representation of the contract as a political (not metaphysical) device for summarizing the "overlapping consensus" of ideas and values in ("our") modern liberal Western societies. As such, his judgment is both interestingly right and interestingly wrong. What makes it right is that he basically restricts the scope of contract ideas to his primary reference group of Europeans at home and abroad (to be fully accurate, of course, a further gender restriction would be necessary). It is really this population who, in the modern period, become free and equal "persons" who should have equal input into the creation of social structures and political institutions. Invaded and expropriated Native Americans, enslaved Africans, colonized Third Worlders, certainly had no such choice about the sociopolitical institutions imposed on them, so that the contract metaphor does not capture their political experience.

But what makes his judgment simultaneously wrong, of course, is that these oppressive social structures were also "developed from those of Western Europe during the past three to four hundred years," and imposed on people of color *by this very same population* of Europeans at home and abroad, so that while nonwhites lived (and – more often – died) within these social structures it was not as "contracting" citizens. As black and Third World political theorists have repeatedly and insistently pointed out: European imperialism, African slavery, and Aboriginal expropriation cannot licitly be conceptually Jim-Crowed in doing political theory, segregated from the standard triumphalist narrative that runs from Plato to Rawls, for they also are part of the modern political history of the West (Gilroy 1993; Mehta 1999).

The whiteness and Eurocentrism of the contract, then, do not inhere most fundamentally in the verbal and semantic exclusions, which can obviously be easily remedied with the stroke of a pen or a computer key. The whiteness and Eurocentrism of the contract inhere most fundamentally in the fact that this apparatus was originally designed for a population with a different history and facing a different set of problems.

The contract idea epitomized the birth of a European modernity that challenged patriarchalist and absolutist sociopolitical structures on a foundation of the moral equality of all (white) men. What it does not, of course, capture is the dark side of European modernity, the imposition of "absolutist" sociopolitical structures on morally inferior non-Europeans. So it is not the fact that nonwhite Aborigines, slaves, and the colonized were not included in the population of original "contractors" that makes the contract most deeply white, since this can nominally be corrected for. Rather, what marks the contract, even in its updated modern version, as white is that this contemporary inclusion *is* typically only nominal, that the history and legacy of Aboriginal expropriation, slavery, and colonialism are *not taken into account* in the conceptualization of the crucial issues and the framing of discussions of justice, so that nonwhites are simply conceptually assimilated to the white population. The mainstream contract takes moral equality as substantially recognized and achieved, and then asks what kind of polity would be voluntarily created by equal contractors. But the concerns of nonwhites are focused on what happens when a state is nonvoluntarily imposed upon them as *unequals* originally excluded from the contract, and what measures of justice would then be required *to correct for* that historic imposition of conquest, expropriation, and slavery. It is the deep theoretical orientation toward the first rather than the second set of problems that characterizes the contract as profoundly rather than merely superficially white.

Non-ideal Theory and the "Domination Contract"

The failure to deal with race, then, both in Rawls's own writings and in the huge secondary literature on Rawls, is a consequence not merely of the demographic whiteness of the American philosophical population, but of the methodological focus inherited from the original orientation of social contract theory.[2] In its incarnation as the moral contract, the apparatus – in keeping with the priorities of the population for whom it was originally designed – is aimed at working out what an ideally just social order would be assuming one is starting from ground zero, the state of nature for the classic contract, the original position for the Rawlsian updating. Thus *A Theory of Justice* (1999h) is, famously, an exercise in

[2] Obviously it can be argued – and I would indeed argue – that these two facts are sociologically, if not logically, connected. As the racially privileged population, whites do not suffer racial oppression themselves, and so do not have the same motivation to seek alternative methodologies as nonwhite philosophers have. There is, in other words, a "fit," an "elective affinity," between this community and this approach to issues of justice, since reparative justice is not a priority for them.

"ideal theory," aimed at elucidating "the principles of justice . . . defining a perfectly just society, given favorable conditions," and presuming "strict compliance" (pp. 308–9). But the issue of racial justice is, by definition, a matter of *non-ideal* theory, since it presupposes the need for corrective measures to remedy the legacy and ongoing practices of racial oppression. The Rawlsian contractors will presumably not choose a white-supremacist (or any other racially supremacist) society from behind the veil, since they do not know what race they will be when the veil is lifted. So the ideal Rawlsian society will not be a racist one, and its "basic structure" will not have been founded on racial exclusion, thereby reflecting "our" confidence that racial discrimination is unjust, indeed that "explicit racist doctrines . . . are irrational" (pp. 17, 129). In this framework, then, there is no need for affirmative action, reparations, or other measures of corrective racial justice because no racial group will have been discriminated against in the first place. But this will obviously be of scant comfort and little guidance to those members of groups who in the actual, non-ideal world *have* been discriminated against. Their starting-point is not ground zero and their justice priorities are understandably different, shaped by a different history and a different relationship to the orthodox contract.

Ideal theory is thus likely to seem evasive or just irrelevant. Simply put: in ideal theory, certain problems do not even arise in the first place; but given that in the non-ideal world, they *have* arisen, what should now be done to address them? If as a person of color I want to know what corrective justice demands in what has historically been a white-supremacist polity like the United States, of what value will it be to inform me that if the United States had been founded on Rawlsian principles, then there would have been no need for corrective justice? This is likely to seem a patent non sequitur. Yes, if it had been, there would not have been – but it wasn't, and so there is. (Cf. the classic retort: "And if your grandmother had had wheels, she would have been a bicycle.")

It seems to me that the proponents of ideal theory face a dilemma, which can be simply expressed as follows: either ideal theory is *not* ultimately intended to assist with the determination of justice in a non-ideal world, or it is so intended. If the former, then this, of course, would only confirm the worst suspicions of critics: ideal theory is an essentially onanistic exercise, divorced from any real intercourse with the world, and – in violation of the classic mission of ethical theory – severed from practical reason. If, on the other hand, the latter is the case and it *is* intended to be practically useful in this world, then surely ideal theorists owe us an account of why so little work has been produced in the thousands of articles over the past few decades on such an application (especially with respect to race), and also what the bridging concepts would

be that are supposed to assist this application. Since Rawls himself formally endorsed the second position (pp. 8, 343), then if his authority carries any weight, this should indeed be the ultimate goal of ideal theorists. Are we not then entitled to ask why, up to the time of his death 30 years later, no progress from this "beginning" had yet been made, either in his own work or that of his followers?

For as noted at the start, it is a mistake to think that non-ideal theory is just the converse of ideal theory, to be addressed by simply flipping the crucial concepts over, as it were. When there has been injustice – when one is starting *not* from a moral ground zero, but from an already unjust situation – determining what remedial justice requires of us is more complicated than simple modus ponens or modus tollens. The righting of wrongs and the sketching of rights are two different enterprises. Prescriptions for remedial justice in a racist social order are not the same as prescriptions for ideal justice in a non-racist social order, nor can they be straightforwardly extracted from them by, say, the invocation of "justice as fairness," since the very question at issue, obviously, is exactly *what* fairness demands of us in the situation.

If this has not always been clearly seen, a contributing factor, I suggest, is the ambiguities in the term "ideal" itself (Mills 2005a). Determining what is ideally required for justice in an ideal situation is the task of ideal theory. Determining what is ideally required to redress injustice in a non-ideal situation is *not* the task of ideal theory, and ideal theory, contra Rawls, may not even be that useful in trying to adjudicate it. Reference to what would counterfactually, ideally have been the case may be simply irrelevant or unhelpful, for example because the ideal situation cannot be restored (as in the case of wrongful deaths during slavery, or the return of the Americas to Native Americans), or because we have to work with continuing non-ideal realities which Rawlsian concepts of an idealized polity or economy do little to illuminate. (For example, in trying to achieve proportional democratic representation in an electoral arena historically dominated by exclusionary white majoritarianism, or in giving people of color equal access to economic opportunities that encroach on what are seen as the legitimate entitlements, the racialized "property," of historically privileged whites.) (Corlett 2003; Guinier 1994; C. Harris 1993.)

Insofar as the normative use of the social contract idea has been oriented toward establishing the moral principles of an ideally just society, and thus to ideal theory, it is really focused on a different set of problems, and this is manifested in a conceptual array that is not well designed to map and clarify the actual non-ideal realities. Indeed, a case could be made that if ideal theory initially seems methodologically attractive, it is in part because "ideally just" as a term trades on the

ambiguity between reference to a society with *no* history of injustice and reference to a society whose past history of injustice has been *corrected for*, so that the "ideal" represents a moral goal to be approached, if only asymptotically, thereby guiding our theory. Once it is realized that Rawls is actually talking about the former, not the latter, it will be appreciated that he is mapping an ideal of limited usefulness for tackling issues of racial justice, since by definition this involves the remediation of past injustice.

It might be thought, then, that a social contract framework is of little use, and that we should turn to some other approach. But as made clear in the previous chapter, I think that such a conclusion would be premature. Liberalism and the discourse of rights are globally triumphant, and contractualism is one of the best-established vehicles for expressing these normative commitments. So it remains of great value as a framework for establishing a dialogue with mainstream white theorists and translating the moral demands of people of color into a familiar language. What I will argue is that by drawing on the Rousseauean precedent – the only classic contract theorist to describe *two* contracts – we can reorient the tradition to address non-ideal matters.

Rousseau's famous contract is of course the second one, the agreement described in *The Social Contract* (1968, 1997d) to found a society based on the "general will." It is this contract that Rawls invokes as "definitive of the tradition" in *A Theory of Justice* (along with Locke's *Second Treatise* and Kant's writings) when he is sketching the genealogy of his own "contract" (Rawls 1999h: 10 n4). But as discussed in the previous chapter, in Rousseau's earlier *Discourse on Inequality* (1984, 1997a) he also describes, albeit very briefly, a fraudulent contract imposed on the poor by the rich under the pretext of guaranteeing the rights of all. Thus he is the only theorist in the classical tradition to expressly use the contract idea to map and theorize *injustice*. In Patrick Riley's assessment, he is, ironically, both "the purest social contract theorist of the eighteenth century (and simultaneously the deepest critic of contractarianism after Hume)" (2001a: 1).

The purpose of the *Discourse on Inequality* is to explain the origins of (class) inequality and to delegitimize conservative accounts that represent that inequality as natural. As such, it is clearly an exercise in *non-ideal* theory, in that he is expressly setting out to explain, demystify, and condemn the inequalities of an oppressive society, here class society. The "contract" is not the egalitarian inclusive contract of mainstream contract theory (though arguably, as noted, this contract is not really egalitarian and inclusive either!), but a contract of domination, that is hierarchical and exclusionary in character. Though the poor are conned into thinking that their rights will be respected (giving a whole new

meaning to "con-tract"),[3] in reality the legal and political system established by the contract gives differential powers to the rich, and makes permanent, in the name of justice, the disadvantages of the poor.

One way of reading the two books, then, is as a linked account of what the major kind of social injustice is, how it ramifies through the sociopolitical order, and what measures would be necessary to avoid it. In Christopher Brooke's gloss:

> Rousseau's conjectural history of the emergence and the entrenchment of [inequality] in human society, presented in the *Discourse on the Origins of Inequality*, seeks to explain how humankind passed from an original state of contentment to one of degradation, corruption, and misery. . . . [F]or Rousseau it is . . . social existence that produces these bad effects in the first place, perverting natural *amour de soi* into awful *amour-propre*. . . . The democratic citizen republic of the *Social Contract* describes the institutions within which a people may live together without inflaming their *amour-propre*. The rough economic equality of citizens prevents the development of hierarchies and of certain forms of dependence and oppression. . . . Rousseau's politics deals with the collective moral transformation of an entire people. (2001: 110, 115–16)

So Rousseau's conceptual starting-point is the bad contract, the non-ideal domination (here class) contract, which then serves to guide his positive prescriptions for the good (general will) contract. The two are related in that the first serves as an antimodel for the second, and in that respect he is working within non-ideal theory. I want to follow Rousseau's precedent, but with a crucial difference (apart from my focus on race, that is). After introducing this innovation, Rousseau still – like Rawls – sets out to map an ideally just society, which is conceived of as separate from the first corrupt society. The additional innovation I am suggesting in this recommended shifting of contract justice away from ideal theory is to ask instead what would be necessary to transform the society *already* established by the first contract into a more just society, rather than, as he does, simply beginning anew with the second contract. (Obviously, this is not a realistic option for us.)

For the great virtue of the domination contract is that it identifies the ways in which an unjust basic structure affects not merely sociopolitical and economic institutions, but the psychology and the very nature of the human beings themselves enmeshed in these institutions and relations. It provides a "naturalized" account of the sociopolitical, as against the idealized account of Rawls, and thereby sensitizes us perceptually and

[3] I owe this wonderful line to my colleague Samuel Fleischacker, and wish I'd thought of it myself.

conceptually to what needs to be changed to make society more just. Rawls refers to his contract and the original position as an "expository device" (1999h: 19), a "device of representation" (1999d: 400), for ideal theory. I suggest that the domination contract can be thought of comparably as an "expository device/device of representation" in the realm of non-ideal theory for making vivid the extent to which the basic structure has been deformed by *injustice*, and orienting us to what corrective measures would be required to change it.

Rousseau's bad contract was, of course, one of class domination. I have argued in my work (Mills 1997, 1998a, 2003c) that race has been as central to the modern world as Rousseau claimed class was. And the implication, I contend, is that we need to change our contract apparatus. If racism was an "anomaly," then one can utilize the same conceptual framework endorsed by mainstream contract theorists (the United States as a raceless liberal democracy), since this framework is basically accurate. If, on the other hand, white racial domination/white supremacy was/is a well-established system in its own right, constitutive of the basic structure, then a new and distinct theorization of its logic will be required.

That this was in fact (and arguably still is) the case has been documented (outside of philosophy) by numerous theorists of race. Thus historian Leon Litwack points out: "America was founded on white supremacy and the notion of black inferiority and black unfreedom" (1998: xvi). Another historian, George Fredrickson, describes the United States as "a kind of *Herrenvolk* society in which people of color . . . are treated as permanent outsiders" (1981: xii). And political scientist Anthony Marx writes:

> Selective [racial] exclusion was not tangential to nation-state building, as liberals argue, but was instead central to how social order was maintained. . . . [B]y specifying to whom citizenship applies, states also define those outside the community of citizens, who then live within the state as objects of domination. . . . The original "deal" of a white coalition was made and remade, with outcomes varying to limit ongoing conflict. Indeed, such continued tensions kept alive the intrawhite dynamic refining racial domination in an ongoing process. (1998: 3, 5, 14)

Clearly, then, we need a philosophical concept adequate to this political picture: the founding and ongoing contract is better seen as a racial one, a "white coalition" which establishes white supremacy as the actual basic structure, and unfair white advantage as the norm. This reality is captured by the domination contract, which provides for us a corrective mapping of, an expository device for grasping, the *real* "basic structure." Not merely the obvious manifestations like educational and residential

segregation, political majoritarianism, juridical bias, differentials in wealth, and racially coded occupations, but the very "construction" of whites and nonwhites out of previously unraced individuals, with all its implications for their typical moral psychologies, can also be seen as a consequence of the domination contract that likewise needs to be eliminated in the ideal contract. What are taken to be natural "racial" traits are products of the social order, as is race itself. But these traits do have a real influence on patterns of social interaction. Insofar as the achievement of justice requires the appropriate moral education of the citizens of the polity, this framework sensitizes us, in a way that Rawls's de-raced individualism does not, to the ways in which white domination will negatively affect whites' moral cognition, their capacities for transracial empathy, and their ability to relate justly to their fellow citizens of color.

So non-ideal theory then asks us to work out what would be required for the achievement of justice *against this background.* The deficiency of ideal theory is thus plainly brought to the fore: the problem does not inhere in the exploration of the ideal, since all moral theory necessarily deals with the ideal in some sense. The problem is the exploration of the ideal as an end in itself without ever turning to the question of what is morally required in the context of the radically deviant *non-ideal* actuality.

Repairing the Breach

Reparative racial justice as a matter of non-ideal theory, then, can be approached within the framework of repairing a "contract of breach." If the domination contract (in the case of race) is founded on a breach of respect for persons of color, a refusal to recognize them as full persons in the first place, then justice in reparations will require us to correct for this. Obviously, as just illustrated above, there will be many aspects to this "breach," and in fact I have argued elsewhere (Mills 2003f) that white racial domination/white supremacy has at least six dimensions: juridico-political, economic, cultural, somatic, cognitive-evaluative, and ontological. I will focus exclusively on the economic aspect here, but I would claim that these other dimensions of injustice can also be tackled via this approach.

The strategy is as follows. Rawls's great innovation of the "original position" and the "veil of ignorance" was designed to shift the traditionally controversial problem of moral choice, and what rationality required in that sphere, on to the less contested terrain (theoretically anyway) of prudential choice (not in general of course – just for the thought-experiment). The combination of self-interested motivation and ignorance of key features of oneself was supposed to provide a

rough functional equivalent to other-regardingness. (In effect, you looked out for the other because you might be the other.) So the objectivity derives both from self-ignorance and social ignorance. People don't know whether they're white/nonwhite, male/female, rich/poor, ascetic/hedonistic, and so forth. They do "know the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology." But they "do not know the particular circumstances of their own society . . . its economic or political situation" (Rawls 1999h: 118–19). So they choose principles of justice self-interestedly on the basis of this ignorance and the fear that they might be disadvantaged in the resultant social order.

The alternative contractualism I am suggesting retains this key feature – self-ignorance – of the Rawlsian apparatus (cf. Okin 1989).[4] The crucial difference centers on the range of choices, and the extent of our *social* ignorance. We are not choosing an ideal "well-ordered" society, since that option is simply not open for us. Instead we are choosing, through a thinner veil (so our social ignorance is less), among various "ill-ordered" societies, all shaped to a greater or lesser extent by the legacy of white supremacy. The reason is, of course, that we are employing the veil to adjudicate matters of corrective justice. The point of retaining the descriptive contract – here as the "domination contract" – is then to model the sociopolitical reality that already exists. Ideal theory starts from ground zero; non-ideal theory starts from an already existing social order. So as with Rousseau, our starting-point is not the state of nature or its Rawlsian equivalent (the original position), but a particular social stage of an already-existing unjust society (the "later position"?).

The descriptive "racial contract" can then serve as a way of illustrating, dramatizing, and summarizing the non-ideal history involved (the actual workings of the state, the legal system, economic institutions, dominant white moral psychology, and so forth) that needs to be corrected for by the prescriptive normative contract. Precluded by the veil from knowing whether one is white or nonwhite, one would then have to choose prudentially among alternative societies evolving from that history, and based respectively on principles correcting strongly, weakly, or not at all, for its legacy. Such measures would not have been necessary in an ideal society because there would have been no discrimination to begin with. But here we are dealing with a non-ideal society, and

[4] So Tommie Shelby (2004: 1700 n10) gets me wrong when he claims that my critique of Rawls shows that I misunderstand the point of restrictions on self-knowledge behind the veil.

trying to make it better, as against (impossibly) constructing an ideal society from scratch. A "device of representation" appropriate for ideal theory needs to be altered to deal with non-ideal theory.

So what we are looking at here is patterns of economic distribution as they will have been affected by race. The debate about different patterns of economic distribution in Rawls is, of course, not at all new. Indeed it was central from the start to Rawls and the secondary literature on Rawls because "the principal economic and social arrangements" are among the "major institutions" that constitute the "basic structure of society" and "determine the division of advantages from social cooperation," thereby having a "profound" effect on people's life prospects (Rawls 1999h: 6–7). In particular, there are "especially deep inequalities" which are pervasive and "affect [people's] initial chances in life" (1999h: 7). Rawls's left-liberal/social-democratic concern about these inequalities is what motivates his difference principle and his radical "democratic" version of equality of opportunity, and in the original debate about *A Theory of Justice* (far less so for the more metatheoretically oriented *Political Liberalism* (1996)), the critique and defense of these claims was crucial. (In effect, this was one of the few concessions in the book to the "non-ideal": Rawls says explicitly that the difference principle, while "not the same as that of redress," "gives some weight to the considerations singled out by the principle of redress," and so "does achieve some of the intent of the latter principle" (1999h: 86–7).) In this respect, much of the secondary literature of the time could be plotted straightforwardly on a traditional left–right political spectrum of perspectives on class inequality, with Marxists and radical egalitarians arguing for greater equality while more traditional liberals, conservatives, and libertarians argued that Rawls's recommendations would illegitimately infringe on people's freedoms and property rights.

Now my suggestion is that with reference to the nontraditional (and hardly ever discussed) subject matter of *racial* economic inequalities, which obviously also have a very great and pervasive effect on people's life prospects, we can avoid most of these debates. The narrow focus on corrective racial justice, as against distributive justice in general, does *not* require us to take a stand on the wide range of positions in the secondary literature. Instead all we have to do, I claim, is to imagine ourselves behind the veil, but not in the original position of establishing an ideal society from ground zero, but rather of considering the possibility of ending up as a member of the subordinated races in a society whose basic structure *has already* been shaped by the racial contract.

So to repeat, an ideal non-racist society is not one of the available options. The choice is between various *non*-ideal options, and we have to

make the best selection among them, given the reality of white supremacy as a common ancestral historic factor across all societal variants, and the motivation to eliminate or reduce as far as possible its legacy of racial economic disadvantage. (Not just for ourselves but for our children and grandchildren, since we represent "a continuing line of claims" (Rawls 1999h: 111). And if, for example, we turn out to be black, and the "one-drop rule" is retained, they will be black also.) For this limited purpose, and under the constraint of not violating the "overlapping consensus" of values and norms, I claim that (1) we would seek simply to eliminate illicit racial differentials; (2) we would need nothing more than a principle derivative from the weakest, least controversial sense of equality of opportunity – formal equality of opportunity – to achieve this goal.

(1) To see how this case can be made, consider the following. Take three theories of distributive justice: egalitarian (E), Rawlsian justice-as-fairness (F), and libertarian (L), and assume that they are all non-racist theories. Now imagine as said that in a given society, there has been a history of racial injustice, so that one group, the R2s, have been systematically discriminated against by the R1s. Finally, let us suppose that the actual structuring of the society is neither according to E, nor F, nor L principles, but, as in the United States, an intermediate position I_1 that veers more toward the L model than the others, though with differential and inferior treatment for the R2s. So there are not only huge property differentials between classes,[5] but in addition huge property differentials between R1s and R2s, with R2s disproportionately concentrated at the bottom of the economic ladder.

What does corrective racial justice for the R2s require? Racial justice requires (analytically) the elimination of racial injustice. But the elimination of racial injustice does not require that the society be reorganized on E, F, or L principles, since that would take it out of the sphere of corrective justice to the different sphere of justice in general.[6] What racial justice requires is that people not be differentially and invidiously treated by race,[7] and that where such treatment has left a legacy, it

[5] Libertarians would, of course, deny that hugely unequal property differences follow from a free market situation, but the historical evidence is against them.

[6] Or at least it does not require it as a matter of logical necessity. I set aside here the interesting and important question of whether it might require such reorganization as a matter of social or political necessity, for example the traditional left claim that racism is functional for capitalism and so cannot be eliminated within a capitalist framework.

[7] It's necessary to include "invidiously," since where there has been racial injustice, corrective justice *will* require differential treatment by race.

should be corrected for. Assuming that E, F, and L are nondiscriminatory in their scope, meant to extend to the entire population, including both R1s and R2s, then whatever their other differences as theories of justice, they will agree on this. There is a core, a commonality of principle having to do with equal nonracist treatment, and it is this core that is violated for all three theories by racial injustice, despite their wide differences on other points. So racial justice will not require that distributive patterns be egalitarian, or Rawlsian, or libertarian (a nonpattern, in this case), since advocates of the other two theories will obviously contest this conception of justice. All it requires is that in the new pattern, I_2, there not be invidious treatment of the R2s, and that the legacy of past invidious treatment not be perpetuated.

In other words, the limited nature of racial justice must be appreciated. Racial justice is not supposed to be a comprehensive theory of justice, capable of standing on its own. Racial justice is simply the correction of the differential and unfair treatment of an "inferior" race, R2, *by the actual standards that prevailed in the polity* for the "superior" race, R1. (The exception, of course, will be that subset of standards themselves predicated on racial subordination, which now becomes impermissible, for example the enslavement of others because of their race.) These standards may well be unfair by other criteria and other conceptions of justice, but that is not because of "racial" reasons, and as such it is irrelevant to the debate. As Jules Coleman points out:

> [C]orrective or rectificatory justice is concerned with wrongful gains and losses. Rectification is, on this view, a matter of justice when it is necessary to protect a distribution of holdings (or entitlements) from distortions which arise from unjust enrichments or wrongful losses. The principle of corrective justice requires the annulment of both wrongful gains and losses. In order to invoke the principle of corrective justice . . . the distribution need not itself be just. (1983: 6)

The implication, then, is that a society could be racially just, but unjust in other ways. Three societies organized on E, F, and L principles will respectively all be unjust for proponents of the other two conceptions of justice. But if they are nonracist societies, then egalitarians, Rawlsians, and libertarians would be able to agree that they are all at least *racially* just. Similarly, if a racially corrective I_2 reorganization of the social order is brought about in the case posited above, then there will still be huge property differentials between classes. So by egalitarian or Rawlsian standards, E or F, the society will still be grossly unjust. But the point is that since there is now, say, proportional R1/R2 representation at all social levels, it is no longer *racially* unjust. An R2 capitalist whose business had been burned down by R1s in the I_1 order (as

actually happened to many black businesses in the early twentieth century, for example, in the famous 1921 Tulsa Riot, where the "Black Wall Street" was destroyed by white mobs (Hirsch 2002)) would deserve to be compensated for his loss. So in the new nonracial I_2 order, he would have his property restored, thereby becoming, by E standards, a member of the exploiting class that must be expropriated for social justice to be achieved. Yet, I would claim, an egalitarian committed to eliminating racial injustice – as part of transitional justice – would be morally bound to support this local restoration of private property, even if he would go on to argue globally – as a long-term ideal – that private property in the means of production should be eliminated.

So the debate about justice would continue, insofar as egalitarians and Rawlsians would challenge I_2 for its unfairness to the poor and the least advantaged. But these debates would not be about racial justice, since racial injustice (at least on this dimension) would have been eliminated. What may initially seem paradoxical and counterintuitive only appears so because we are thinking of racial justice in the same terms as egalitarian justice, Rawlsian justice, libertarian justice. Once it is appreciated that it is really in a different category, and its limited corrective nature is fully apprehended, the appearance of paradox should disappear. (Of course, the very fact that this conceptual separation is possible raises questions about Rawls's crucial claim that ideal theory "provides . . . the only basis for the systematic grasp of these more pressing problems [i.e. of non-ideal theory]" (1999h: 8), which is why we supposedly have to begin with it.)

(2) Let us turn now to the second question of the principle of choice. Behind the veil, of course, one is choosing on prudential rather than moral grounds. Through a thinner veil than Rawls's, a veil that admits a knowledge more detailed than that of "general social facts," one makes a decision based on the possibility – the danger – of ending up as oneself (with one's heirs) a member (members) of the subordinated race, R2, in a range of societies all of which have R1-supremacy as their ancestor. So given the alternatives of no corrective measures, weak corrective measures, and strong corrective measures, one will presumably on self-interested grounds choose societies with stronger rather than weaker corrective measures, though weighed in some computation against the interests we would have if we ended up as R1s instead.

What, though, would this balance point be, and how would one uncontroversially determine it? (Remember here the general difficulties and wide spectrum of positions in normative rational choice theory, and the fierce debates about Rawls's claim in particular that one would use maximin (choosing the highest floor) as a principle of choice in his

original position.) Moreover, the principles for rationally furthering one's interests chosen prudentially behind the veil need to converge, suitably translated, with principles of justice chosen morally outside of the veil. They should not be radically discrepant with a "reflective equilibrium" among what Rawls (1999b) would later characterize as an "overlapping consensus" of values in the Western democratic tradition. So the question is what principle would meet these criteria, especially given that the later Rawls (1999c) also argues that claims about justice must meet the test of "public reason," that is be capable of being put forward under conditions of pluralism, without assuming any "comprehensive doctrine," whether secular or religious. In other words, it is not merely a matter of finding a common liberal core among egalitarians, Rawlsians, and libertarians as liberals of a far-left, left, and right-wing variety. The normative core must be able to pass the test of meeting with the approval of nonliberals also (though excluding racists, obviously, and other proponents of "unreasonable" doctrines).

I suggest that for economic questions, which is our focus here, the principle that is indeed capable of meeting this test is "weak" formal equality of opportunity, and I will argue that once the realities mapped by the domination contract are taken into account, we will appreciate that in the context of white supremacy this seemingly innocuous principle has "strong," radical implications, and can in fact justify a case for reparations.

To make this argument, I need to begin by saying something about exploitation. Exploitation is, of course, antithetical to the Rawlsian ideal of society as "a cooperative venture for mutual advantage" among individual "persons" who for the most part recognize and act in accordance with fair principles of conduct (Rawls 1999h: 4). So one might expect that Rawls would provide an analysis of exploitation, if only as an illuminating antipode to be avoided. But in the 500+ pages of *A Theory of Justice*, his discussion is limited to a few sentences, couched in the language of neoclassical economic theory, about what happens when "factors of production" do not receive "their marginal products," so that "persons receive less than the value of their contribution." He concludes that "the notion of exploitation is out of place here," since that would imply "a deep injustice in the background system," which is precluded by his ideally just basic structure (1999h: 271–2).

Similarly, in his book *Exploitation*, Alan Wertheimer points out that liberal theorists have generally followed Rawls in his neglect and suggests three possible reasons for this lack of interest in the subject: the concept's historic associations with Marxism, contemporary liberalism's Rawls-inspired orientation toward ideal theory, and the fact that exploitation is typically a micro-level wrong while the focus of recent

theorists on justice has been macro-issues of the fair distribution of rights and liberties, benefits and burdens, and resources (1996: ix, 8). But while I would completely agree with the first two, I would claim that the third is egregiously, question-beggingly wrong (except, perhaps, as a revelation of what mainstream white liberals like Wertheimer believe to be the case) and perfectly illustrates my point at the start about the sanitization by white political philosophers of the actual historical record. Clearly in the treatment of people of color, macro-level questions of unfairness *have* been involved, since in such economic practices as Aboriginal expropriation, slavery, and Jim Crow, rights, liberties, benefits, burdens, and resources have not been fairly distributed, and entire populations have been deprived of their just entitlements. Whites as a group have subordinated people of color as a group (Native Americans, blacks, Mexican-Americans, Asians) for unfair white advantage.

Obviously, then, the kind of economic transactions (if it makes sense to characterize Aboriginal expropriation and African slavery as "transactions") typical of the actual American polity in its founding and evolution do not remotely conform to the Rawlsian ideal of "a cooperative venture for mutual advantage." Rather, as I have argued in greater detail elsewhere (Mills 2004), these practices are more meaningfully thought of as part of a historic pattern of *racial exploitation*, predicated on and justified by the inferiority of nonwhites. To say that they are non-ideal "deviations" from the norm radically misconstrues the reality. They are guided by completely *different* norms (the norms of the domination contract), norms that take moral inequality and the legitimacy of the differential and inferior treatment of nonwhites for granted. So group rather than individual relations are the crucial ones. If, in Ruth Sample's (2003a) formulation, exploitation involves unfair benefit resulting from degrading treatment that does not recognize the other's personhood, then obviously the experience of people of color in the United States – as an inferior group seen as less than fully human – is a paradigm case of racial exploitation.

Now the important implication of this revisionist account is that one gets a picture very much like the Marxist portrayal of class society, in which group exploitation is central to society's workings, since Rawlsian primary goods like "rights, liberties, and opportunities, and income and wealth" (Rawls 1999h: 54) are continually being "transferred" from the subordinated to the privileged group rather than being distributed equitably. But the difference in this case, of course, is that the social groups in question are *races*, and the claim that the "basic structure" is unjust, resting on systemic exploitation and thereby reproducing illicit privilege and disadvantage at two poles, does *not* require controversial

or discredited Marxist notions like the labor theory of value, but simply the consistent, "color-blind" application of *mainstream* norms. So once white supremacy is recognized as a system in itself, established by the racial contract, its condemnation by any "reasonable" conception of justice should be straightforward. Yet because of the idealized picture of US history hegemonic among mainstream normative theorists (wonderfully illustrated by the Wertheimer reference above), this pervasive pattern of racial exploitation has not even been acknowledged, let alone theorized as such in the literature.

Moreover, by contrast with the individualist focus of the mainstream contract, the domination contract points us toward resulting *group advantage*, the ways in which whites as a group are illicitly benefited by racial exploitation. Racial exploitation is unjust enrichment, a kind of racial *pleonexia* – in Rawls's gloss of Aristotle, "gaining some advantage for oneself by seizing what belongs to another . . . or by denying a person that which is due to him" (Rawls 1999h: 9). Through various mechanisms that have only recently begun to be adequately documented by sociologists and economists – slavery, the denial to the freedmen of their promised 40 acres and a mule, Jim Crow, debt peonage, land theft, trade union exclusion, the restriction of job opportunities and the imposition of ceilings on promotions in those jobs permitted, the blocking through housing segregation of an equal chance to build wealth, the refusal of bank loans, the outright destruction by white mobs of black businesses, unequal allocation of educational resources with the corresponding limitation on possibilities for building human capital, inequitable transfer payments by the state, market discrimination in goods and services, relocation of jobs and industries on the basis of a racialized geography, and many others – blacks have been denied an equal chance to succeed, and whites have benefited from this (America 1990; Massey and Denton 1993; Oliver and Shapiro 1995; Lipsitz 1998; Conley 1999; L. Williams 2003; T. Shapiro 2004; Katznelson 2005).

Charles Tilly has coined the useful phrase "opportunity hoarding" to describe this situation, when "members of a group acquire and monopolize access to valuable resources or privileges" (cited in M. Brown et al. 2003: 17). The virtue of this concept is that it takes discrimination out of an individualist paradigm and makes the causal link between black failure and white success: the "diverging fates of black and white Americans" are conceptualized within the "same analytic framework":

> Discussions of racial inequality commonly dwell on only one side of the color line. We talk about *black* poverty, *black* unemployment, *black* crime, and public policies for *blacks*. We rarely, however, talk about the gains

> whites receive from the troubles experienced by blacks. . . . In our view, the persistence of racial inequality stems from the long-term effects of labor market discrimination and institutional practices that have created cumulative inequalities by race. The result is a durable pattern of racial stratification. Whites have gained or *accumulated* opportunities, while African Americans and other racial groups have lost opportunities – they suffer from *disaccumulation* of the accoutrements of economic opportunity. (M. Brown et al. 2003: 22)

Similarly, in their important and prizewinning book *Black Wealth/ White Wealth*, Melvin Oliver and Thomas Shapiro conclude that: "Just as blacks have had 'cumulative disadvantages,' whites have had 'cumulative advantages.' Practically, every circumstance of bias and discrimination against blacks has produced a circumstance and opportunity of positive gain for whites. . . . [A] focus on job opportunity is not sufficient to the task of eradicating racial disadvantage in America." Instead what is necessary is "to close the wealth gap" (1995: 51, 177).

For perhaps the clearest manifestation of this history of exploitation is differentials in wealth. At the time of the 1863 Emancipation Proclamation, blacks owned only 0.5 percent of US wealth, unsurprising considering that most blacks were slaves. But by 1990 – more than a century later, after all the civil rights legislation of the 1950s and 1960s, and the seeming dramatic progress in blacks' national status – this figure had only risen to 1 percent, though black Americans make up more than 12 percent of the US population (Conley 1999: 25). Or, looking at it another way: according to the most recent available figures (2004), the median white household has a net worth (assets minus debts) that is a startling ten times the figure for the median black household. Moreover the white-to-black ratio for median financial wealth (liquid and semi-liquid assets, including mutual funds and pensions) is even more remarkable: more than *100 to 1* (Mishel et al. 2006: 258–9). And the overall implication of this huge differential in wealth – along, of course, with continuing segregation, inferior education, and discrimination – is that white life-chances of getting good jobs and opportunities will be significantly greater than black life-chances.

Against this background, let us now examine how Rawls partitions his discussion of equality of opportunity. He distinguishes three ways in which people may lack equal opportunity: they are discriminated against by law and/or custom;[8] they come from a disadvantaged class background and so do not get an equal educational chance to develop their natural talents; they are born with a thinner bundle of natural

[8] Actually, Rawls does not mention custom, but this is a standard extension of the formulation to which I assume he would not object.

talents in the first place (1999h: 62–73). Correspondingly, he demarcates three varieties of equality of opportunity: formal (no discrimination: people have "the same legal rights of access to all advantaged social positions" (1999h: 62); fair (no discrimination + compensatory measures for class disadvantage: "those with similar abilities and skills should have similar life chances" (1999h: 63); and democratic (fair equality of opportunity + the difference principle: "the distribution of income and wealth" should not "be settled by the distribution of natural assets" (1999h: 64). He himself endorses the third of these, which requires compensatory measures not merely for disadvantaged class positions but also for natural deficiencies, and this of course is what makes his position a radically redistributivist one condemned as unjust both by more traditional liberals and libertarians. But my point is that we do not have to take such a controversial position to achieve the correction of racial injustice. Focused on ideal theory, and in any case intellectually blinded by the analysis of the United States through traditional European class categories, Rawls does not see how his cartography needs to be revised once white supremacy and the reality of systemic racial exploitation are taken into account.

I suggest that the non-ideal reality mapped by the domination contract and the concept of racial exploitation requires a partitioning of inequality of opportunity into at least *four* categories. Obviously the differential opportunity disadvantage suffered by R2s and their children is not (except for racists) due to their inherently inferior natural abilities, so this is not an example of Rawls's third category. But it needs to be appreciated that it is not an example of his second category either. Rawls's implicit reference group here is really the white working class. But while for Marxists, class disadvantage may be the result of exploitation, this is not conceded in a mainstream liberal framework. White working-class children will be poorer, and thus handicapped, but assuming there has been neither force nor fraud, this disadvantage is fair given the standard liberal picture of individual market competition, and an outcome of winners and losers, the former of whom can then legitimately pass on differential advantages to their children. So because the poor have lost fairly (by mainstream standards), it is *unfortunate*, but not *unjust*, that their children should be socially handicapped. (I am not endorsing this view myself, merely emphasizing that racial disadvantage is conceptually different.) Entitlement to our natural assets, and to the proceeds of those assets, trumps needs-based claims; the property rights of the winners override demands for equalization of opportunity. So not only "democratic" but also "fair" equality of opportunity would be opposed by theorists to the right of Rawls's social-democratic left-liberalism, who would only recognize as legitimate the first – "formal" – kind of equality of

opportunity. (Indeed some far-right figures, like Richard Epstein, would repudiate even this variety.)

In the case under consideration here, though, R2s and their children inherit a disadvantaged position that, as argued above, is *not* the result of fair market competition, *but of discriminatory practices wrong by mainstream standards, and their cumulative outcome over decades*. So this kind of inequality of opportunity is not the result of subordinate class membership in the colorless sociopolitical systems of white social contract theory, but of subordinate *racial* membership in a polity of a white-supremacist kind which is not conceptually recognized, let alone theorized, by mainstream contract theory. The children of the R2s have *not* lost fairly by mainstream liberal standards – they have lost because of practices that in a (de-racialized) liberal framework are unjust. So if they inherit a disadvantaged position (their parents have fewer resources, they get inferior schooling, they live in the ghetto far from the better jobs, and so forth) then this should count as a denial of equal opportunity on *weak* and uncontroversial rather than strong and controversial grounds. But their situation is not covered by Rawls's first category in its unmodified form, since the likelihood is that as a result of these negative factors, their credentials *will* be inferior. So even if formal equality of opportunity is implemented they will often not be competitive with R1s. In other words, though equally qualified candidates will, given this policy, have the same employment chances, independently of race, many R2s will continue to lose through having weaker credentials that are themselves the result of earlier discrimination against their parents. The R2 candidate loses out to the R1 candidate apparently "fairly," under conditions of formal equality of opportunity, because the R1 candidate's credentials are better. But the reason for this edge (in most cases) is *the history of inherited advantages that come from systemic and intergenerational racial exploitation*.

What this shows, then, is that we need a fourth category to cover these cases of "opportunity hoarding," where whites have an illicit advantage that comes about through the inherited legacy of past discriminatory practices sanctioned by law and/or custom. And such a category is extendable, I would claim, from *weak* formal equality of opportunity, once this uncontroversial mainstream value is applied to circumstances that Rawls himself, because of his ideal theory focus, did not envisage. The first kind of formal equality of opportunity, which is the only one Rawls recognizes, proscribes discrimination by law or custom at the point of assessment of candidates' credentials (R1s and R2s). The second – derivative – kind that I am arguing for would proscribe in addition the admission of R1s' differential and superior credentials when they arise illicitly out of that history of discrimination

against R2s by law or custom. (And note, to repeat, that this is conceptually distinct from class inequalities in a colorless capitalist economy, and Rawls's "fair" equality of opportunity as a corrective left-liberal measure.)

In practice, of course, we would not be able to make this determination on an individual basis; the point is rather to establish the conceptual groundwork for justifying on the macro-level the corrective public policy measures that would be required to make the "basic structure" less unjust once the history and long-term effects of white supremacy are conceded. Since Rawls himself admits that "the distribution resulting from voluntary market transactions will not in general be fair unless the antecedent distribution of income and wealth and the structure of the market are fair" (1999e: 257), this extrapolation should be completely consonant with his own principles. Formal equality of opportunity in a racial polity needs to be thought of as having two dimensions.

The case for reparations, then, can be based on at least two (linked) grounds: (a) the ending of present racial exploitation, and the redistribution of the unjust proceeds of past racial exploitation (since the Rawlsian society is supposed to be a non-exploitative "cooperative venture for mutual advantage"); (b) the achievement in both its aspects of formal equality of opportunity – the least controversial kind of equality of opportunity, which should be endorsed by public reason as a common principle in all "reasonable" views, and which requires no "comprehensive doctrines" for its justification.

Thus, Oliver and Shapiro end *Black Wealth/White Wealth* with the conclusion that to eliminate the "artificial head start accorded to practically all whites," racial reparations are a possible "practical and moral approach," though it should be just "the first step in a collective journey to racial equality" (1995: 188–9). Similarly, in *Being Black, Living in the Red*, Dalton Conley points out that antidiscrimination measures against *present-day* discrimination will not be sufficient to eliminate illicit white advantage. He goes on to argue that the cycle of continuing black disadvantage is no longer primarily, or at all, a result of continuing market discrimination, but rather the product of the fact that median black assets are such a small fraction of median white assets, which is the result of *past* discrimination:

> What these results indicate is that merely creating equal opportunity in the housing, securities, and credit markets will not do to rectify the racial imbalance because parental asset levels (which were presumably fixed in the past) engender advantages and disadvantages that are very important for the next generation. . . . [M]erely eliminating remaining discrimination – be it individual or institutional – will do little to alleviate the wealth gap, which has already been set into intergenerational motion. Only a

> radical, progressive, wealth-based policy will redress the issue. . . . While young African Americans may have the *opportunity* to obtain the same education, income, and wealth as whites, in actuality they are on a slippery slope, for the discrimination their parents faced in the housing and credit markets sets the stage for perpetual economic disadvantage. (1999: 53, 152)

And he too concludes by considering reparations as one appropriate policy option.

What I have tried to show, then, is that social contract theory can indeed be helpful in theorizing issues of racial justice, but that the conventional approach needs to be modified. Racial justice is pre-eminently a matter of non-ideal theory, and correspondingly requires a modification of the orthodox contractual apparatus, producing a "device of representation" – the racial contract – that accurately maps the non-ideal realities in question rather than unhelpfully abstracting away from them. Behind the veil, it would no longer be a matter of choosing self-interestedly, under conditions of ignorance of one's race, an ideal polity, for obviously a nondiscriminatory polity will be the preferred choice. But as argued, this is not enough to guide us in determining what corrective justice now requires in a polity whose basic structure *has* been founded on systemic discrimination and racial exploitation. The thought-experiment here would be to imagine what one would prudentially choose to correct for the disadvantage of being born a member of the subordinated race in such a polity.

I have argued that because of the peculiar nature of racial justice, such a correction requires only a derivative form of the weakest kind of equality of opportunity, the kind that in theory should be unobjectionable across the political spectrum. So paradoxically, in one sense the prescriptions are far less radical than Rawls's own, since one is only asking that formal equality of opportunity be implemented (not the difference principle, or even the less extreme "fair" equality of opportunity), and the legacy of its lack be corrected for. But from this seemingly weak requirement, very strong and dramatic conclusions follow, since a case can then be made that reparations in the form of the transfer of wealth are morally required for justice and the realization of genuine formal equality of opportunity for the racially subordinated.

Moreover, whereas Rawls's response against centrist and right-wing criticisms had to take the form of a controversial repudiation of any role for desert, a violation of strong Lockean property rights, and a metaphysics of the self that some critics have found incompatible with his original ostensible commitment to robust Kantian personhood, corrective justice in this modified contractualism needs no such assumptions.

Rather, property rights *are* being respected – indeed with far greater seriousness than in contemporary right-wing discussions, insofar as illicitly acquired property based on racial exploitation would then be returned to its owners or their heirs (Boxill 2003) – while desert and Kantian personhood need not be modified for the argument to go through, since normatively it depends just on a weak equality of opportunity accepted across the board by all "reasonable" views. The key premises are really the factual ones that assert the historic reality and continuing legacy in its many different manifestations of white supremacy. If white political philosophers are serious about social justice, then it is time for them to begin to acquaint themselves with these facts and to swear off the addictive evasions of ideal theory.

POSTSCRIPT: The Difference Principle and Race

I want to address the objection that (assuming equal liberties to be guaranteed by the antidiscriminatory first principle) the difference principle is all that is needed to deal with issues of racial justice, so my recommended modifications are not in fact necessary. (I thank George Klosko of the University of Virginia for pressing me on this point.) My response would be that the difference principle cannot do the job because (1) it is too strong; (2) it is too weak; (3) it is conceptually and normatively inappropriate.

(1) Even if the difference principle could handle the issue, its assumptions (the moral arbitrariness of our natural assets and consequent irrelevance of "desert") are far too strong. As earlier argued, the desideratum for a principle of racial justice is that it be acceptable across the political spectrum of "reasonable" (nonracist) views. But only those on the left-liberal end of the spectrum accept Rawls's position; traditional liberals, centrists, and the right reject it. It should not be a prerequisite for endorsing racial (corrective) justice that one has to endorse a left-liberal position on distributive justice. Rather, what we want is an uncontroversial, more minimalist position that can be accepted by all committed to redressing racial inequities. The difference principle cannot fulfill this role. (Though less extreme, "fair" equality of opportunity is also controversial for the political right.)

(2) But in any case, the difference principle cannot handle the issue because it is too weak. It is targeted at the "least advantaged" (Rawls 1999h: 266), and as such, will not extend to middle-class blacks who are better off than their "underclass" brothers and sisters, but who nonetheless are worse off than they would have been without the legacy of racial discrimination against their ancestors. Their situation may not be as urgent as those lower down the socioeconomic ladder, but, as Bernard

Boxill (1992) has emphasized, they are entitled to racial justice nonetheless.

(3) Finally, and perhaps most importantly, the difference principle is simply conceptually and normatively inappropriate. Rawls is quite clear that "the difference principle is not of course the principle of redress" (1999h: 86). But redress is precisely what is called for here. "Redress" is *rectificatory/reparative* justice, the measures called for when a wrong has been committed which needs to be corrected, and as such a part of *non-ideal* theory. The difference principle is a principle for *distributive* justice under *ideal* theory, where there has been no past history of wrongdoing. (Cf. Roberts 2002a.) Someone born physically handicapped and someone born into a socially stigmatized and oppressed race are both disadvantaged, but the nature of the disadvantage is very different. To conceptually assimilate them because in both cases justice might require a transfer of resources is to conflate heterogeneous cases that need to be clearly distinguished. Rawls points out that "[t]he natural distribution is neither just nor unjust. . . . These are simply natural facts" (1999h: 87). The situation of blacks, by contrast, is a *social* fact, and an obviously unjust one, resulting from a history of past discrimination. Moreover, full rectificatory justice would arguably require measures additional to a material transfer of resources, such as an official apology for slavery from the United States government (Roberts 2002a), rewritings of national narratives (McCarthy 2002, 2004), and transformations of white moral psychology to end the social "dissin'" of blacks in the national moral economy. None of these issues arise for ideal theory because, to repeat, ideal theory is focused on a perfectly just society. So when Rawls later writes in his unfinished *Justice as Fairness* that "distinctions of . . . race give rise to further relevant positions to which a special form of the difference principle applies" (2001: 66), I would have to say that, absent further details, this is either a contradiction of his original statement, or a gesture towards a *revision* of the difference principle ("a special form") for specific application in non-ideal theory. But if the latter is the case, my point still holds, since I was referring to the difference principle in its familiar, ideal-theory version, not a difference principle modified to deal with redress. Rawls's remark would then be an intriguing theoretical promissory note that unfortunately, because of his death, will never be redeemed.

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