

2004

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Recommended Citation

Tommie Shelby, *Race and Ethnicity, Race and Social Justice: Rawlsian Considerations*, 72 Fordham L. Rev. 1697 (2004).

Available at: <https://ir.lawnet.fordham.edu/flr/vol72/iss5/15>

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RACE AND SOCIAL JUSTICE: RAWLSIAN CONSIDERATIONS

*Tommie Shelby**

Philosophy may study political questions at many different levels of generality and abstractness, all valuable and significant. . . . I don't say that the more general questions are the more philosophical, nor that they are more important. All these questions and their answers, so far as we can find them, bear on one another and work together to add to the knowledge of philosophy.¹

Some political philosophers and legal theorists, including Anita Allen and Seana Shiffrin in this volume, have expressed puzzlement and disappointment that Rawls does not take up questions of racial justice more explicitly and at greater length in his seminal writings on social justice.² When liberal thinkers make this complaint they generally do not mean to deny what is no doubt obvious to anyone who has studied Rawls's work, namely, that he was concerned about racial problems and that this concern influenced how he constructed and defended his theory. For example, the formal and substantive dimensions of Rawls's theory, properly understood and applied, would arguably rule out most if not all familiar forms of racial injustice. Moreover, his theory would seem to have important implications for contemporary problems of race—such as the permissibility of racial profiling, the fairness of affirmative action, and the enforcement of antidiscrimination statutes. Nevertheless, it is certainly true that Rawls does not himself draw out these implications or elaborate upon them.

There are also some questions of racial justice that Rawls treats as simply outside the purview of his main theoretical concerns. Rawls is primarily interested in the principles that would regulate a well-ordered society. Within such a society, all are presumed to act justly and to do their part in upholding just institutions. Or as he sometimes puts it, "strict compliance is one of the *stipulations* of the original

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1. John Rawls, *Political Liberalism* lxi (paperback ed. 1996).

2. See Anita L. Allen, *Race, Face, and Rawls*, 72 *Fordham L. Rev.* 1677 (2004); Seana Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 *Fordham L. Rev.* 1643 (2004).

position; the principles of justice are chosen on the supposition that they will be generally complied with.”³ He does not give much attention to partial compliance theory, which studies the principles that govern how we should respond to or rectify *injustice*. But of course many of the most vexing and urgent questions of racial justice fall within the domain of partial compliance theory.⁴ For example, this domain would include questions of compensatory justice for past racial wrongs and what to do about the persistence of racial discrimination in housing and employment. Indeed, Rawls’s relative silence on issues of race and his focus on ideal theory has led even some critics to be skeptical of the potential of his theoretical framework to further our understanding of the problem of racial injustice, leading them to opt for an alternative theoretical structure.⁵

While it is true that Rawls’s explicit remarks about racism and racial disadvantage are sparse, what he does say can still aid those of us who do focus our theoretical energies on questions of racial justice. In fact, some of his insights may prove to be indispensable for such projects. In this Essay I highlight and extend Rawls’s admittedly all too few remarks about race. I emphasize the significance of Rawls’s main subject—the justice of the basic structure—for such important questions as how to address institutional racism, the legacy of past racial injustice, and the persistence of individual racist attitudes in civil society. Though the discussion that follows is necessarily only a brief sketch, I hope to better enable us to appreciate the significance of Rawls’s theory for evaluating the racial justice of social arrangements and thereby to point the way toward, and hopefully to encourage, future research in this area.⁶ Some familiarity with the basic features of Rawls’s theory is assumed.

I. CONSIDERED CONVICTIONS AND THE VEIL OF IGNORANCE

Rawls states that among our pre-theoretic considered convictions is the belief that racial discrimination is unjust.⁷ While such convictions can of course be revised as we seek wide and general reflective equilibrium, they function as “provisional fixed points” that allow us

3. John Rawls, *A Theory of Justice* § 39, at 215 (rev. ed. 1999) (emphasis added).

4. Rawls would seem to concede this point. See *id.* § 2, at 7-8; Rawls, *Political Liberalism*, *supra* note 1, at xxx.

5. See, e.g., Charles W. Mills, *White Supremacy and Racial Justice*, in *From Class to Race: Essays in White Marxism and Black Radicalism* 195-218 (2003).

6. Though far too few, there have been other efforts to demonstrate the relevance of Rawls’s theory for questions of racial justice. See, e.g., Bernard R. Boxill, *Blacks and Social Justice* 212-25 (rev. ed. 1992); Michele M. Moody-Adams, *Race, Class, and the Social Construction of Self-Respect*, 24 *Phil. F.* 251 (1992-93); Howard McGary, *Race and Social Justice* (1999); Laurence Thomas, *Self-Respect: Theory and Practice*, in *Philosophy Born of Struggle: Anthology of Afro-American Philosophy from 1917*, at 174-89 (Leonard Harris ed., 1983).

7. Rawls, *A Theory of Justice*, *supra* note 3, § 4, at 17-18.

to construct our interpretation of the original position and thereby to gain greater clarity about, and to increase our confidence in, our most basic general principles. In this way, Rawls treats the belief that racial discrimination is unjust—like the belief that slavery is unjust—as among our firmest moral convictions, which the principles of justice should account for and be in accord with.⁸ This substantive judgment about racial justice is thus a key ingredient in justice as fairness, his preferred liberal conception of justice. So while I agree with Shiffrin that race has something of a strange presence in Rawls's theory—both central and peripheral—there can be no doubt that the role it plays has a significant influence on the content of the two principles: The conviction that racial discrimination is unjust helps to shape Rawls's sense of what is morally relevant and what is morally arbitrary from the standpoint of social justice.

For instance, considerations of racial disadvantage have a role to play in the construction of the veil of ignorance. As Allen and Shiffrin rightly note, the parties in the original position are excluded from knowing the racial identity of those they represent.⁹ It is instructive to see exactly why this is so, as some commentators have misunderstood the point of this restriction.¹⁰ Recall that the parties in the original position must evaluate principles solely on the basis of *general* considerations, not particular contingent facts about existing persons or societies.¹¹ The rationale is that “[i]f a knowledge of particulars is allowed, then the outcome [of the choice situation] is biased by [morally] arbitrary contingencies.”¹² Thus, the parties must not know the contingencies, social or natural, that would put them in conflict or that would give some a superior bargaining advantage. In particular, in the original position the parties do not know the class position, social status, or occupation of those they represent; nor do they know their fortune in the distribution of natural assets and abilities (e.g., native intelligence, strength, imagination, etc.).

Now whether we understand “race” as a status designation in a social hierarchy, a socially constructed identity, or a natural division of the human species—and for our purposes here I will remain agnostic on this question—this constraint of general considerations would entail that the parties do not know the racial identity of those they

8. See also Rawls, *Political Liberalism*, *supra* note 1, at 8.

9. In *Political Liberalism*, Rawls explicitly states that the representatives in the original position are not to know the race or ethnicity of those they represent. *Id.* at 24-25; see also John Rawls, *Justice as Fairness: A Restatement* 15 (Erin Kelly ed., 2001).

10. See, e.g., Iris Marion Young, *Justice and the Politics of Difference* 96-116 (1990); Charles W. Mills, *Race and the Social Contract Tradition*, 6 *Soc. Identities* 441, 451-53 (2000).

11. Rawls, *A Theory of Justice*, *supra* note 3, § 24, at 118-19.

12. *Id.* §29, at 122; see Rawls, *Justice as Fairness: A Restatement*, *supra* note 9, at 15-16; Rawls, *Political Liberalism*, *supra* note 1, at 23.

represent. The parties should not know whether they are members of an advantaged or disadvantaged racial caste, regardless of whether these advantages and disadvantages were the result of social circumstances, the "natural" traits and tendencies of different racial groups, or both. Nor do the parties know the particular circumstances of their own society: "[T]hey do not know its economic or political situation, or the level of civilization and culture it has been able to achieve."¹³ So, for instance, they do not know whether their society has a history of racism or is currently plagued by racial strife; they do not know the racial demographics of their society. Nor do they know the relative social status or class advantage of the racial groups in their society. The parties are also excluded from knowing their particular conception of the good or their peculiar psychological tendencies. Thus, they do not know whether their attitudes toward their own racial identity or that of others will be positive, negative, or neutral; nor do they know if their determinate conception of the good includes enduring attachment or loyalty to the members of their own race.

By depriving the parties of the particular facts and contingencies that have historically put individuals and groups into conflict, Rawls rules out the selection of a range of principles that would entail, encourage, or exacerbate racial injustice. Since the parties do not know their racial identity or the relative social position of the various racial populations, they have no rational basis for choosing principles that would favor one race over another. Given the thickness of the veil, Rawls contends that no party in the original position would "put forward the principle that basic rights should depend on the color of one's skin or the texture of one's hair. No one can tell whether such principles would be to his advantage."¹⁴ Indeed, he goes further:

Inevitably, then, racial and sexual discrimination presupposes that some hold a favored place in the social system which they are willing to exploit to their advantage. From the standpoint of persons similarly situated in an initial situation which is fair, the principles of explicit racist doctrines are not only unjust. They are irrational. For this reason we could say that they are not moral conceptions at all, but simply means of suppression. They have no place on a reasonable list of traditional conceptions of justice.¹⁵

Thus it is a mistake to think, as some have, that abstraction from the social realities of race within the contractarian model is necessarily a way of obfuscating or denying the centrality of racial domination to the historical development of modern societies.¹⁶ On the contrary, within Rawls's theory this abstraction insures that racial bias is not codified in or further entrenched by our shared conception of justice.

13. Rawls, *A Theory of Justice*, *supra* note 3, § 24, at 118.

14. *Id.* at 129.

15. *Id.* at 129-30.

16. *See* Mills, *supra* note 10, at 451.

It is precisely because there are unjustified racial inequalities that the parties in the original position are prevented from knowing the racial identity of those they represent.

II. RACE, PERSONHOOD, AND EQUAL CITIZENSHIP

It is a central if not defining tenet of liberalism that all *persons* are to be regarded as free and equal in a just society. Within contractarian versions of liberalism (as opposed to, say, utilitarian accounts), the parties to the social contract choose the terms of their association based on the presumption that each regards all others as free and equal persons. Charles Mills has argued, however, that classical liberal contractarianism (i.e., the political philosophy pioneered by Locke, Rousseau, and Kant), while explicitly affirming the equal moral personhood of all humans, implicitly and perhaps surreptitiously extends equal moral status to whites only, specifically white men.¹⁷ He suggests that in the socio-historical context within which these theories of justice were initially articulated, there existed a “racial subtext,” a kind of racial background knowledge that assumed that the parties to the social contract are really only white people, as only these individuals were widely regarded as full moral persons at the time. Non-white racial groups were tacitly and sometimes explicitly excluded, as they were regarded as moral *sub-persons*. To regard non-whites as sub-persons is not necessarily to deny their humanity—though it arguably comes quite close.¹⁸ Rather, it is to regard them as falling below some threshold for complete personhood, as lacking the capacities necessary for full participation in social life on the basis of equal civic standing. It is to conceive their status as similar or analogous to the severely disabled, the mentally ill, or children who never mature and thus never develop adequately their capacities as rationally autonomous agents. In short, it is to regard normal, non-white adults as inferior or degraded persons. Those “liberal” whites who regard non-white peoples in this way are naturally led to take up paternalistic or worse attitudes toward such peoples. Mills therefore suggests that the social contract tradition includes an intellectual legacy that implicitly affirms white supremacy, a legacy that, if not forthrightly confronted, threatens to weaken if not undermine the validity of the normative prescriptions of

17. See Charles W. Mills, *The Racial Contract* 15-17, 55-59 (1997). On this same theme but in a less iconoclastic fashion, Allen says, “[T]he contractarian intellectual tradition is not inherently liberal. As an historical matter, famous social contract theorists have not had a lot to say about race or the betterment of disadvantaged racial minorities, and what they have had to say has often been disheartening.” Allen, *supra* note 2, at 1678.

18. See Richard Wasserstrom, *Rights, Human Rights, and Racial Discrimination*, 61 *J. Phil.* 628-41 (1964), *reprinted in Race and Racism* 180-92 (Bernard Boxill ed., 2001).

contemporary liberal political philosophy.¹⁹ Accordingly, Mills urges a form of political theory that engages the history of global white supremacy in a more thorough and serious manner than contemporary liberal theorists have so far been willing to do.

Mills's argument should be taken seriously, though unfortunately few liberal political philosophers have chosen to engage with it. I regret to say that I will not take it up here in any detail either, except to show that Rawls, as an heir to the legacy of classical liberal contractarianism, is not vulnerable to the charge of implicitly endorsing white supremacy or the racial status quo. In fact, Rawls's theory explicitly rules out regarding the members of any racial group as anything less than full moral persons. According to Rawls, all legitimate conceptions of justice must satisfy certain formal constraints: generality, universality, publicity, ordering, and finality.²⁰ Although perhaps each of these constraints has implications for problems of racial justice, I here focus on the constraint of universality. It holds that principles of justice must apply to everyone in virtue of their being moral persons.

In *A Theory of Justice*, Rawls claims that moral persons have two characteristics: (1) "they are capable of having (and are assumed to have) a conception of their good (as expressed by a rational plan of life)"; and (2) "they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree."²¹ Rawls maintains that the capacity for moral personality "is a *sufficient* condition for being entitled to *equal* justice."²² (He leaves aside the question of whether the capacity for moral personality is also a necessary condition.) No claim about the degree to which normal, adult persons embody or realize the powers of moral personality can justify unequal justice. From the standpoint of social justice, then, there is no distinction to be made between complete and incomplete moral persons, i.e., there are no sub-persons in a legitimate conception of justice. Now not only does Rawls assume that the overwhelming majority of humankind are moral persons in his sense, but he explicitly denies that any race is without the capacity for moral personality: "There is no race or recognized group of human beings that lacks this attribute."²³ Indeed, he urges that we simply assume that the requirement of a capacity for moral personality is always met, noting that to suppose otherwise would be imprudent, as this could

19. Mills, *supra* note 17, at 30-31.

20. Rawls, *A Theory of Justice*, *supra* note 3, at 112-18.

21. *Id.* at 442.

22. *Id.* (emphasis added).

23. *Id.* § 77, at 443.

lead to injustice.²⁴ Thus it is quite clear that, within justice as fairness, the principles of justice apply equally to all regardless of race.

The principle of equal justice regardless of race is also firmly secured in *Political Liberalism*, where Rawls explicitly defends a strictly political (as opposed to a metaphysical) conception of justice and a corresponding political conception of persons. A political conception of justice aims to be, as far as possible, independent of contested and incompatible, comprehensive philosophical, moral, and religious doctrines, as these controversial views cannot form the basis for reasoned, informed, and voluntary political agreement among citizens in a democratic society.²⁵ Instead, the content of a political conception of justice should be derived solely from fundamental ideas, values, and principles that are implicit in what Rawls calls the “public political culture” of a democratic society. This public culture is composed of “the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge.”²⁶ The public political culture of a society is to be distinguished from its “background culture,” which includes all sorts of comprehensive doctrines, the many beliefs, norms, and practices of everyday social life, and the internal cultures of various associations in civil society. Moreover, a political conception of justice is to rest on currently accepted general beliefs and modes of reasoning as understood in common sense, along with the methods and conclusions of science provided these are uncontroversial.²⁷ This conscious move away from relying on controversial views is part of Rawls’s effort to defend a conception of justice that satisfies the demand for political legitimacy given the existence in society of a plurality of reasonable but conflicting and incommensurable doctrines.²⁸

Against this background, Rawls contends that the familiar tradition of democratic thought, as implicit in our public political culture and according to current canons of interpretation, enjoins us to regard all citizens as free and equal persons. This means that all persons who are capable of citizenship—i.e., all who can fully participate in a fair system of social cooperation over a complete life—should be treated as free and equal.²⁹ As in *A Theory of Justice*, participation in a fair system of cooperation requires a sense of justice and the capacity to develop a rational plan of life (to formulate, revise, and rationally pursue a conception of the good). But now, given our primary aim of

24. *Id.*

25. Rawls, *Political Liberalism*, *supra* note 1, at 11-15.

26. *Id.* at 13-14; *see also id.* at 220-22.

27. *Id.* at 224-25.

28. *Id.* at 134-40, 216-27.

29. *Id.* at 18-22, 299-302; *see also* Rawls, *Justice as Fairness: A Restatement*, *supra* note 9, at 170-71.

developing a political conception of justice, Rawls insists that we assume that all normal human beings (i.e., those without severe disabilities or mental disorders) have these two moral powers, along with the capacity for reason, i.e., judgment, thought, and inference, needed to exercise these powers. There is no basis in shared political values or in uncontroversial, well-established scientific findings to maintain that there is a known race of humankind—should “races” exist, in any meaningful sense, at all—that is incapable of citizenship. Thus Rawls holds that within a political conception of justice all persons, regardless of their racial identity, should be regarded as free and equal.

Now it might be argued that Rawls’s exclusive reliance on ideas that are implicit in our public political culture actually supports Mills’s contention that contractarian liberal political philosophy implicitly endorses the view that non-whites are sub-persons and thus not due equal justice. After all, many of the “founding fathers” of our democratic institutions and many of the authors of canonical founding texts in the democratic tradition (including the framers of the U.S. Constitution) had racist views, were apologists for slavery, held slaves themselves, or advocated the resettlement of black Americans to Africa or elsewhere outside the United States.³⁰ Moreover, at the founding of these institutions and the publication of these historical documents, many, if not most, citizens of would-be democratic regimes would have interpreted the core elements of their public political culture as excluding non-whites (and white women) from the status of equal citizenship.

Yet, Rawls does not enjoin us to interpret our public culture from the standpoint of its founders, as if the object of our inquiry were to discern *their* conception of justice. Rather, he argues that, in our ambition to arrive at a shared political conception of justice, *we*—those of us currently seeking clarification about what justice requires for a democratic society—should interpret the fundamental ideas and principles latent in our public political culture from *our own* standpoint, i.e., “here and now.”³¹ The hypocritical and racist interpretations of the democratic tradition by some of the founders of our democratic institutions must be ignored given the primary aim of political liberalism, “to uncover the conditions of the possibility of a reasonable public basis of justification on fundamental political questions.”³² A political conception of justice that rested on such perverse interpretations of our democratic ideals could not possibly be reasonably acceptable to non-white citizens, and thus could not form a public basis of justification.³³

30. See Mills, *supra* note 17, at 20-31, 59-62, 64-72.

31. Rawls, *Political Liberalism*, *supra* note 1, at 22-28.

32. *Id.* at xxi.

33. Compare Glenn Loury’s response to Mills’s argument in Glenn C. Loury, *The*

III. FORMAL JUSTICE AND INSTITUTIONAL RACISM

As is well known, Rawls contends that the subject of a political conception of justice is the configuration of the fundamental institutions of society, what he calls the “basic structure,” not individuals and their actions in particular circumstances.³⁴ He characterizes an institution as “a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defenses, and so on, when violations occur.”³⁵ According to Rawls, there are at least two ways of thinking about an institution: (1) as a possible form of conduct expressed by a public system of rules (an institution as an abstract object); or (2) as the realization of these rules in the thought and conduct of particular persons (an institution as realized). Rawls maintains that it is best to conceive of questions of social justice in the second sense, as applying to institutions as realized. Moreover, we should assume that these realized institutions will be “effectively and impartially administered.”³⁶ This means that we should take up the question of the substantive justice of an institutional arrangement on the assumption that in practice it will be *formally* just.

Formal justice, or what Rawls sometimes calls “justice as regularity,” is the “impartial and consistent administration of laws and institutions, whatever their substantive principles.”³⁷ When formal justice obtains, the officials and administrators who operate on the basis of institutionally defined authority treat similar cases similarly (where the relevant similarities and differences are specified by the existing rules of the institution), and they regularly adhere to and properly interpret the institutional rules and procedures. While talk of “formal” justice might suggest that this principle is somehow trivial (or worse) from an egalitarian point of view, Rawls rightly insists that it rules out significant forms of injustice; not just *de jure* but *de facto*.

For example, formal justice in the case of legal institutions is a component of the rule of law.³⁸ Thus, it is unjust when judges fail to apply the appropriate law or to interpret it correctly. The kinds of injustice that Rawls mainly has in mind here include “the subtle distortions of prejudice and bias as these effectively discriminate

Anatomy of Racial Inequality 118-21 (2002). *But see* Charles W. Mills, *The “Racial Contract” as Methodology*, in *From Class to Race: Essays in White Marxism and Black Radicalism* 248-49 (2003) (offering Mills’s brief reply).

34. Rawls, *Political Liberalism*, *supra* note 1, at 257-88.

35. Rawls, *A Theory of Justice*, *supra* note 3, §10, at 47-48.

36. *Id.* at 48.

37. *Id.* § 10, at 51; *see id.* at 206-07.

38. *Id.* § 38, at 206-13.

against certain groups in the judicial process.”³⁹ He surely means to include racial prejudice and bias among the distortions that lead to unfair discrimination in the administration of justice.

We can also assess the formal justice of many non-legal institutions in society, for justice as regularity applies to all institutions that are components of the basic structure. The administration of these social institutions, too, is susceptible to corruption or distortion by prejudice and bias. Indeed, I would suggest that we conceptualize one important form of “institutional racism” in just this way. We can think of a social institution—e.g., a criminal justice system—as embodying institutional racism when the administration or enforcement of its rules and procedures is frequently distorted by the racial prejudice and bias of its officials. Such prejudice and bias need not operate on the basis of crude racial stereotypes, but may be more subtle, implicit, or even unconscious. Nor is it necessary that such prejudice and bias spring from malicious motives or hatred. Whatever the degree of individual blameworthiness of officials who possess these skewed perceptions and attitudes, when the influence of racial prejudice and bias on decision-makers causes them to misapply institutional rules or to fail to properly enforce these rules, we are dealing with a form of racial injustice. It is also important to recognize that these decisions would violate formal justice even if the content of the system of rules were more or less in accord with the substantive principles of justice. Thus, we might say, drawing on Rawls’s idea of formal justice, that when the distorting effects of racial prejudice and bias pervade the operation of an institution, the institution as realized is itself unjust, notwithstanding the justice of its rules and procedures when viewed abstractly.

IV. FOUR-STAGE SEQUENCE AND ANTIDISCRIMINATION PRINCIPLES

Now Shiffrin would, I think, concede that Rawls has the aforementioned theoretical resources at his disposal and thus can rule out many forms of racial injustice without revising the basic framework of his theory. But she wonders why he does not simply include an explicit antidiscrimination provision in his two principles, and argues that his conception of justice would be improved if such a provision were incorporated.

In order to offer a Rawlsian reply, we should observe that Rawls does not assume that once the two principles of justice are chosen we will then judge all claims of justice from this abstract point of view. Rather, he suggests that we think of the principles as applied in a several-stage sequence, where “[e]ach stage is to represent an

39. *Id.* § 38, at 207.

appropriate point of view from which certain kinds of questions are considered.”⁴⁰

In the second stage (after the principles of justice have been agreed to in the original position), the parties, now called delegates, should move to the constitutional stage. Constrained by the principles already chosen, they select a system of constitutional powers of government and the basic rights of citizens. At this stage, the veil of ignorance is partially lifted. The delegates to the constitutional convention still do not know their social status, class position, natural assets, or determinate conception of the good. But they now know the general facts about their society—its natural resources, level of economic advance, political culture, and so on. They also know “the beliefs and interests that men in the system are liable to have and of the political tactics that they will find it rational to use given their circumstances.”⁴¹

Though Rawls does not say as much, it seems clear that among the general facts of their society to which the delegates would have access at the constitutional stage are: (1) whether racial identity engenders conflict in the society; (2) whether there are some in the society who have, or who are prone to develop, racist beliefs and attitudes; and (3) whether some racial groups in the society are or have been politically, socially, or economically disadvantaged because of racism. If the answer to any of these questions is affirmative, then given that the delegates do not know the racial identity or relative social position of those they represent, it would be rational for them to select constitutional provisions that explicitly prohibit racial discrimination in the institutions of the basic structure, and even to grant special powers to the government to insure that all citizens, regardless of their race, receive the equal protection of the law. This seems all the more clear once we recognize that Rawls would have the delegates at the constitutional stage “select from among the procedural arrangements that are both just and feasible those which are most likely to lead to a just and effective legal order.”⁴² Given the tragic history of genocide, chattel slavery, and other forms of racial violence and domination in the modern era, such special provisions to combat racial discrimination and to affirm the equal citizenship of racial minorities are needed in most, if not all, democratic societies. The long struggle to overcome racial barriers to equal citizenship, which reaches back at least to the abolitionist movement against slavery, has shaped our public political culture, for example, through various constitutional amendments. Moreover, these hard won victories of the civil rights

40. *Id.* § 31, at 172; see Rawls, *Political Liberalism*, *supra* note 1, at 334-40. For a particularly helpful discussion of Rawls’s idea of the four-stage sequence, see Jon Mandel, *Having It Both Ways*, 75 *Pac. Phil. Q.* 295-317 (1994).

41. Rawls, *A Theory of Justice*, *supra* note 3, § 31, at 174.

42. *Id.* § 31, at 173.

movement help to reinforce our sense that the injustice of racial discrimination can operate as a fixed point as we seek to arrive at a shared political conception of justice. But these are all contingent facts about the history of existing modern democracies. A theory of justice that is meant to apply to all societies in the circumstances of justice should not build in the peculiar features of particular constitutional regimes, not because these lessons are not ones that we all can learn from, as no doubt we can, but because then we could not be sure that the most fundamental principles of our philosophical theory are sufficiently general in form and universal in application.

Shiffrin might agree that a principle that explicitly prohibited *racial* discrimination is too specific to be included at the highest level of generality in our conception of justice. But she nevertheless insists that Rawls should simply include a *general*, positive antidiscrimination principle within the two principles of justice, preferably at the highest level of priority. After all, we know that in any pluralistic society there is likely to be some disfavored out-group(s), routinely victimized by discrimination. She argues that the parties in the original position, knowing of the tendency of identity-based forms of domination and exclusion to develop in systems of social cooperation, would naturally choose an antidiscrimination principle in order to protect citizens from such arbitrary discriminatory treatment.

However, Rawls's two principles, understood within his wider theoretical framework, can accommodate these concerns without further complicating the two principles. As I have argued above, both *de jure* and *de facto* discriminatory treatment of citizens is already prohibited by the joint commitment to equal citizenship and formal justice, including the rule of law. No citizen is to be subject to partial or arbitrary treatment by the institutions of the basic structure, but rather all are to be regarded as free and equal persons who are entitled to equal justice. There will of course be specific forms of discrimination that will be prevalent in some societies, and thus those societies will want to take extra measures, perhaps even constitutional provisions, to deal effectively with these and other social problems that undermine the proper regulation of just institutions and that deny some citizens their equal basic liberties and fair opportunities.

Apart from affirming equal protection and formal justice, or perhaps introducing historically contingent factors in order to apply the principles of justice in particular circumstances, it is not clear to me that we can give content to the idea of "general discriminatory treatment." Discrimination, as we have come to understand this thick concept, is not simply a matter of arbitrary or inconsistent treatment, regardless of whether such unfair treatment is intentional. Rather, discrimination is at work when a characteristic (or set of characteristics) possessed by or ascribed to the members of a social group is widely but wrongly treated as a source of disvalue,

incompetence, or inferiority.⁴³ Thus discrimination is never discrimination *in general*, but discrimination based on race, ethnicity, gender, religion, sexuality, or some other (real or merely ascribed) human characteristic. When prejudice against such groups is sufficiently widespread or entrenched, we will of course want to affirm publicly our collective commitment to the protection of citizens of these groups from unfair treatment, not only through constitutional and legislative means, but through more informal means as well, such as organized public protest and persistent moral criticism.

V. RACIAL DISADVANTAGE AND FAIR EQUALITY OF OPPORTUNITY

In applying the two principles of justice to the basic structure of a society, Rawls would have us evaluate the society's system of public rules from the standpoint of certain representative positions defined by that structure. We evaluate how well the system of social cooperation satisfies the principle of equal liberty and the principle of fair equality of opportunity from the position of equal citizenship. We evaluate how well the system satisfies the difference principle from the position of the least advantaged group. In a well-ordered society that is effectively regulated by the principle of equal citizenship (i.e., where the basic liberties and fair opportunities of all citizens are equally secure), the position of the least advantaged is defined, not by their racial identity, but by their place in the distribution of income and wealth, that is, by their class position.⁴⁴ Here, again, we assume that the principle of formal justice is observed, such that the equal civic status of persons is not diminished by the prejudice and bias—racial or otherwise—of public officials. Under these circumstances, the worst off in society (i.e., those with the lowest expectation of primary goods over their lives) will be those in the lowest socioeconomic position. Rawls should not be understood as asserting here that racial disadvantage is, or can be reduced to, class disadvantage. Racism, from a Rawlsian point of view, is an insult to human dignity and unjust in its own right, for example, in its denial of equal citizenship on morally arbitrary grounds. Further, racism creates peculiar forms of disadvantage that are not strictly speaking a matter of socioeconomic disadvantage, for instance, in its tendency to produce in its victims a diminished sense of their own worth as persons.⁴⁵

But Rawls also allows that it may be necessary to assess some social systems from the standpoint of other social positions, such as those determined by some "fixed natural characteristic," e.g., sex, caste, or

43. See Adrian M.S. Piper, *Two Kinds of Discrimination, in Race and Racism* 193-237 (Bernard Boxill ed., 2001).

44. Rawls, *A Theory of Justice*, *supra* note 3, § 16, at 81-84.

45. See Boxill, *supra* note 6, at 186-204. See generally Moody-Adams, *supra* note 6.

race. This approach might be required in a society that lacks a political conception of equal citizenship, or when social conditions are so unfavorable in a given society that an effective and stable system of equal basic liberties cannot be established. If such a social system assigns basic rights based on race and whites are favored in this scheme, then these inequalities would be justified by the general conception of justice (as opposed to the more stringent two principles with their lexical ranking) only if they would be to the advantage of non-whites and acceptable from their standpoint.⁴⁶ Although he does not elaborate on the point, Rawls maintains, surely correctly, that such inequalities would rarely, if ever, be to the advantage of the least favored. Thus we should assume that in a just society race would not define a relevant social position for specifying the least advantaged. Rawls, so it would seem, is led to ignore racial characteristics in articulating his theory of justice because he holds that racial inequalities could only be the product of injustice. Moreover, Rawls does not claim, contrary to Shiffrin's suggestion, that racial discrimination (say, within education or the employment market) should be evaluated from the standpoint of the difference principle (in the special conception) or from the standpoint of the general conception of justice.⁴⁷ In a democratic constitutional regime, such treatment would be ruled out by the requirements that all persons who are capable of participating in a fair system of cooperation (and here we assume this includes everyone) should be accorded equal citizenship and that all offices and positions should be open to all citizens under conditions of fair equality of opportunity. It is also worth noticing that one need not accept the more controversial difference principle in order to appreciate how racial discrimination is incompatible with justice as fairness.⁴⁸

In most modern democratic societies, however, many, though by no means all, of the socioeconomic disadvantages that racial minorities currently suffer are caused by racial injustice perpetrated in the past—e.g., chattel slavery, genocide, land expropriation, colonization, disenfranchisement, denial of basic liberties, relentless terrorism and intimidation, and forced segregation. The racially disparate distribution of income, wealth, and opportunities that currently obtains in the United States, for example, can be partly explained by the cumulative impact of this history of racial violence and

46. Rawls, *A Theory of Justice*, *supra* note 3, § 16, at 84-85, § 26, at 130-32.

47. Shiffrin says that in *Justice as Fairness*:

[Rawls] argues that inequitable treatment based on race would be permissible if and only if it maximized the position of those disadvantaged by such treatment. In other words he subjects discriminatory treatment to the analysis of the second principle, while registering that it would almost surely fail such a test.

Shiffrin, *supra* note 2, at 1660.

48. I owe this observation to Erin Kelly.

domination.⁴⁹ Past racism has led to the development of a class structure in which the members of certain racial minorities (e.g., Native Americans and African Americans) are disproportionately located in its lowest ranks. Given that ideal theory does not directly address matters of compensatory justice, how, if at all, can Rawls's theory be useful for addressing this injustice?

Here it is helpful to appreciate the richness of Rawls's fair equality of opportunity principle. This principle, were it to be institutionally realized in a well-ordered society in which the basic liberties were secure and their fair value guaranteed, would mitigate, if not correct, these race-based disadvantages by insuring that the life prospects of racial minorities are not negatively affected by the economic legacy of racial oppression. Rawls glosses the principle of fair equality of opportunity this way:

[T]hose who are at the same level of [natural] talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system. In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed. The expectations of those with the same abilities and aspirations should not be affected by their social class.⁵⁰

While I am not sure what set of institutional reforms would be required to realize the principle of fair equality of opportunity in the United States, it seems clear that it would require, at a minimum, considerable redistribution of wealth, the expansion of educational and employment opportunities, and aggressive measures to address discrimination in employment, housing, and lending. My main point here, though, is that a basic structure that provided fair equality of opportunity for all citizens regardless of race would remove many of the socioeconomic burdens that racial minorities presently shoulder because of the history of racial injustice. Even though, as a member of an historically disadvantaged racial group, one could not be sure that one's current degree of wealth or income is not lower than it would have been in the absence of our history of racial domination (perhaps this is in principle unknowable), one could be sure that one's life prospects will be roughly the same as that of others similarly gifted and motivated regardless of the social position to which one has been born. Rawls is not advocating mere formal equality here; nor is he simply endorsing that familiar brand of American welfare liberalism that emphasizes antidiscrimination law and an economic safety net,

49. See generally Dalton Conley, *Being Black, Living in the Red: Race, Wealth, and Social Policy in America* (1999); Loury, *supra* note 33; Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* (1995); William Julius Wilson, *The Declining Significance of Race: Blacks and Changing American Institutions* (2d ed. 1980).

50. Rawls, *A Theory of Justice*, *supra* note 3, § 12, at 63.

but leaves a highly stratified system of class in place. Rawls not only wants to see an end to discrimination and poverty, but he thinks a just society is one where each has a fair chance to realize his or her conception of the good, to carry out an autonomously arrived at rational plan of life, without being inhibited in this pursuit by one's race or class origin.

In this way, the fair equality of opportunity principle addresses one of the most urgent concerns of members of the least favored races, namely, to insure that their life prospects are not unfairly diminished by the economic inequalities that have been created by a history of racism. Were this principle institutionally realized and widely recognized, it might also have the effect of sharply reducing the resentment for past racial injustice that some members of disadvantaged racial groups harbor, maybe even leading them to reconsider their insistence on claims to reparations.⁵¹

VI. RACIST ATTITUDES AND SOCIAL JUSTICE

As we have seen, the primary subject of social justice is, for Rawls, the basic structure of society, and thus the principles of justice should not be confused with the principles that regulate the conduct of individuals in particular circumstances or the internal organization of associations within society. But of course persons are often harmed by the racism of individual citizens (e.g., through racial insults, contemptuous attitudes, and various other modes of devaluation) and the racist stances of private associations (e.g., white supremacist organizations and other associations hostile to the interests of racial minorities). Moreover, currently within the United States, racism is rarely publicly defended as an explicit political doctrine or institutional rule, but nonetheless continues to inhere in the hearts and minds of all too many American citizens.⁵² Because the overt expression of racist beliefs and attitudes is no longer publicly acceptable, the effects of existing interpersonal racism are not so readily observable and thus more intractable, though nevertheless keenly felt by the victims of such covert forms of racial contempt. It might therefore be thought that Rawls's theory fails to account for important race-based moral wrongs, forms of wrongdoing that arguably could be considered types of social injustice or at least contributors to such injustice.⁵³ In one sense, this assessment is

51. *But see* McGary, *supra* note 6, at 119-22.

52. *See* Lawrence Bobo et al., *Laissez-Faire Racism: The Crystallization of a Kinder, Gentler, Antiblack Ideology, in* Racial Attitudes in the 1990s, at 15-41 (Steven A. Tuch & Jack K. Martin eds., 1997); Martin Gilens, *Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy* (1999); Tali Mendelberg, *The Race Card: Campaign Strategy, Implicit Messages, and the Norm of Equality* (2001).

53. *See, e.g.,* Lawrence Blum, "I'm Not a Racist, But . . .": The Moral Quandary of Race (2002); J.L.A. Garcia, *The Heart of Racism*, 27 *J. of Soc. Phil.* 5 (1996). *But*

absolutely correct. Rawls does not give much attention to the conduct or character of individuals or private associations. But this is not as damaging an omission as it might initially seem, if it is a weakness at all.

Rawls's theory takes the basic structure as its primary subject, not just because he wants to limit the scope of his project to classical problems of social justice, but also because the basic structure has a "profound and pervasive influence on the persons who live under its institutions."⁵⁴ It is largely through the mediation of institutions that the social, natural, and fortuitous contingencies that mark differences between persons come to affect the overall life prospects of individuals in society. Justice as fairness seeks to insure that the life prospects of citizens are not unfairly limited by contingencies that are morally arbitrary. As we have observed, the fact that a person is a member of a particular racial group is not a morally relevant distinction from the standpoint of basic justice, and thus no one's life prospects should be circumscribed because of his or her racial identity. Thus, if the basic structure of a society is well-ordered and just, then even if racist beliefs and attitudes continue to circulate in this society, these beliefs and attitudes should not inhibit any person, regardless of race, from fully participating in the society as an equal citizen, with all the accompanying liberties and opportunities. Nor would the existence of individual racism be an obstacle to any person's effective choice and active pursuit of a rational plan of life under conditions of fair equality of opportunity. So, while the fact that some individuals harbor racist attitudes would still be a moral problem of some concern, were the overall system of social cooperation a just one or nearly so, this disturbing problem would not be such an urgent practical matter from the standpoint of disfavored racial groups. In this way, justice as fairness, if fully realized in a well-ordered society, would sharply reduce the influence of individuals' racist misdeeds and attitudes on the life prospects of other citizens. There is of course no way to realize such a well-ordered society without also sharply reducing the incidence of individual racism and containing the offensive activities of racist organizations. For as we have said, racial prejudice and bias, if not effectively combated, can lead to unjust forms of discrimination within the basic structure, even to institutional racism. But the establishment of a just and well-ordered society does not require that individual racism be altogether extinct, as desirable as that state of affairs would be. The complete eradication of all forms of racism, overt and covert, is probably more than a "realistic utopia"

see Tommie Shelby, *Ideology, Racism, and Critical Social Theory*, 34 *Phil. F.* 153 (2003); Tommie Shelby, *Is Racism in the "Heart"?*, 33 *J. Soc. Phil.* 411 (2002); Tommie Shelby, *Review of "I'm Not a Racist, But . . ." by Lawrence Blum*, 112 *Phil. Rev.* (forthcoming 2003) (book review).

54. Rawls, *Justice as Fairness: A Restatement*, *supra* note 9, at 55.

can hope to achieve, which is not of course to deny that this is a moral goal well worth striving, even fighting, for.