

12 Race, Reparations, and Justice as Fairness

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Although John Rawls offered an elaborate and wide-ranging account of justice in *A Theory of Justice*, he did not directly address well-known problems of racial injustice. His efforts were largely devoted to explaining and justifying the principles that would regulate a fully just society, what he called a “well-ordered society.”¹ Rawls was convinced that ideal theory was the most fundamental part of a theory of justice. He thought we needed first to establish what justice requires before we could gain a systematic grasp of the principles that should guide our responses to injustice (*TJ* 1999, 216). The parts of nonideal theory he did discuss were limited to “nearly just societies” and focused on the political morality of resistance, international relations, and just war (*TJ* 1999, 319–43; *LP*, 89–120).

Rawls’s ideal theory would be seriously defective if its principles did not condemn and rule out racial injustice. But they do. The veil of ignorance prevents the parties in the original position from selecting principles that would favor one racial group over another. Rawls explicitly states that all racial groups possess the moral powers necessary to be full and equal participants in a just society (*TJ* 1999, 443). Justice as fairness, the name Rawls gives to his theory, is obviously incompatible with slavery, genocide, colonial subjugation, land expropriation, political disfranchisement, lynching, segregation, and racial discrimination in education, employment, housing, law-enforcement, and lending. Elsewhere, I have argued at length that justice as fairness is also incompatible with institutional racism, ghetto poverty, and mass incarceration (Shelby 2016).

¹ “Now let us say that a society is well-ordered when it is not only designed to advance the good of its members but when it is also effectively regulated by a public conception of justice. That is, it is a society in which (1) everyone accepts and knows that the others accept the same principles of justice, and (2) the basic social institutions generally satisfy and are generally known to satisfy these principles” (*TJ* 1999, 4).

Yet it is less clear what justice as fairness has to say about how we ought to rectify *past* racial injustice. Rawls provided little explicit guidance about how we should think about reparative justice claims for racial oppression. Since he did not address the question directly, some might conclude that the issue of reparations cannot be taken up productively within Rawls's framework or that Rawls thought the question unimportant. Charles Mills (2017b, 2018), for example, has famously argued that the pressing need to rectify racial injustice cannot be adequately understood or defended within the framework of Rawls's theory. Mill's arguments are provocative and challenging but, I believe, can be met.

In this chapter, I argue that reparations for racial injustice can be defended within the framework of justice as fairness. In previous work, and specifically in response to Mills, I suggested that reparative justice is compatible with Rawls's theory but did not attempt to justify this claim (Shelby 2013). I have also speculated that if African Americans had the full benefits of a just society, in particular the advantages that come with equal basic liberties and fair equality of opportunity, few would demand reparations (Shelby 2004). Yet I have said little about whether such a demand would nonetheless be justified. So here I offer a more extended discussion of the political morality of reparations and its relation to racial justice.

12.1 Reparations and Rawls's Framework

I will situate the familiar concerns about race and reparations within a broadly Rawlsian framework. By a "broadly Rawlsian framework," I mean, principally, Rawls's methods of justification (agreement in original position, reflective equilibrium, and public reason).² I mean his two principles of justice with their priority rules. I have in mind the centrality he gives to the basic structure of society. The account of reparative justice must be compatible with his deontological (or non-teleological) approach to political morality. And it must properly observe Rawls's distinction between ideal and nonideal theory. I think the idea of reparations for racial injustice coheres with all these ideas. This doesn't necessarily mean that, say, land restitution to Native Americans for settler colonialism or reparations to African Americans for slavery can, in the present moment, be justified on Rawlsian grounds. Showing that reparative justice for past racial injustice can be justified, in principle, within the framework of justice as fairness is not the same as showing that any specific reparations claim can be so

² On Rawls's methods of justification, see Scanlon (2003).

justified. Reparations for racial injustices of the distant past – say, more than three generations ago – pose well-known special problems of justification within any theory of justice, not only justice as fairness.

Rawls insists that his two principles are not merely standards for evaluating institutions and social systems but represent goals of reform or revolution that individuals, social groups, and state agents should try to realize (TY 1999, 215). This might involve writing, rewriting, or amending a constitution and instituting various laws and policies that bring the basic structure more in line with the principles of justice. The point is to create a just basic structure that is stable from one generation to the next and that can garner the warranted allegiance of those who are born and live their lives within the social order. The four-stage sequence of application could be a practical guide (TY 1999, 171–76). But Rawls's theory seems most useful for identifying abstract goals of institutional or legal reform and specifying the general duties of individual citizens and obligations of government officials. On its face, it does not give much guidance about how to respond to injustices of the past.

In *A Theory of Justice*, Rawls twice mentions that he considers “compensatory justice” to be part of nonideal theory (TY 1999, 8, 309). Yet he doesn't explain what he had in mind by that phrase. He does explicitly invoke the language of “reparation” when discussing the moral psychology of citizens within a just social order (TY 1999, 411–12). And these brief remarks are a helpful clue to how reparative justice fits within justice as fairness. Rawls tells us that in a just society members develop robust bonds of civic friendship and mutual trust, bonds that tie them securely to their system of cooperation. When these bonds are established, the members of the society feel a sense of guilt when they fail to comply with public rules of justice and when they fail to do their fair share in maintaining the social system of cooperation. Such feelings of civic guilt, as we might call them, exhibit themselves as a familiar set of moral dispositions.

First, those who wrong others seek to repair the harm they have caused. It is this repair of harmful wrongdoing that Rawls calls “reparation.” There is also the disposition to acknowledge that one has treated others wrongly. Persons who wrong others feel compelled to apologize for having done wrong. They agree, says Rawls, that censure and perhaps punishment would be appropriate responses to this wrongdoing. They also find it more difficult to be indignant when others fail to act justly (presumably because they would then feel like hypocrites). When these moral dispositions are absent, Rawls claims, this suggests that bonds of civic friendship and mutual trust are also absent or severely damaged.

This brief discussion is suggestive. Yet it takes place within the development of ideal theory and Rawls's early defense of the stability of a well-

ordered society. It is not readily apparent what implications, if any, these remarks have for the cases that mainly concern us. For example, what is their relevance for thinking about wrongdoing that occurs in a highly unjust society, a society that is not “nearly just” by Rawls’s standards? What implications, if any, do these ideas about interpersonal wrongs have for wrongs that occur because the society is itself unjust? What do they mean for the attitudes citizens should have toward past injustice during a period of transition to a more just social system? And what is their significance for wrongs committed by one nation or people against the members of another society?

However, Rawls could and probably should say, at a minimum, that these dispositions – toward reparation, acknowledgment, apology, and self-reproach – would be present, at least in embryonic form, among citizens sincerely committed to creating and maintaining a just society. Citizens so committed would seek to make amends for the harm caused by the unjust social structure. They would publicly acknowledge the injustices of the past. They would recognize that an apology to the victims of these injustices is fitting. And they would accept that some penalty or sacrifice (particularly for those directly involved in the injustice) is an appropriate response to these past failings.

Rawls introduces several principles besides his two main principles – for example, the principle of redress, the principle of the common interest, the principle of fairness, the principle of paternalism, the principle of equal political participation, the principle of political settlement, and the principle of self-determination. This gives us another reason to think that there might be room for a principle of reparation within justice as fairness. However, such a principle would presumably be part of nonideal theory. Thus, the case for a principle of this sort must be like the ones he made for civil disobedience and just war, the most developed parts of his nonideal theory.

Rawls can easily accommodate a reparation principle for interpersonal wrongs or for wrongs committed by a private organization against an individual or group, provided these wrongs occur within a basically just society. The familiar principles of criminal law and tort law would apply in a just constitutional democracy. A just state would be bound to enforce such rightful claims. The question is whether Rawls can also accommodate a reparations principle that applies to an unjust action when, at the time of the injustice, the action was not legally prohibited or even widely regarded as wrong. During the era of US slavery, for example, if a free person were unlawfully enslaved, they could claim reparations for the harm done (McDaniel 2019), as could a slaveholder who had a slave stolen or wrongly harmed by another. Yet slavery itself

was a legally permitted practice. To claim reparations for a legally permitted practice, one would have to appeal to natural law or perhaps to what Rawls sometimes calls “natural duties.”

It is not difficult to understand why reparations might be owed when state officials violate existing laws or regulations. Something like this happens when, for instance, a government pays compensation to a victim of police brutality. So maybe Rawls would regard the state just like a liable private actor when it comes to reparations for publicly recognized wrongs. Things are more challenging when the injustice is a consequence of an unjust basic structure (according to the two principles) but is not out of step with the prevailing public conception of justice. Consider the evils of the Jim Crow regime, where many wrongs against Black people were perpetrated by state officials or were legally permitted. Can the public incur a debt for a wrong that is compatible with its recognized conception of justice? Again, there would need to be a valid natural duty to repair harms due to wrongdoing. I will return to this.

12.2 Rectification of Injustice

When injustices occur, they should be corrected, rectified, or redressed in some way, taking the most serious injustices first where feasible. When it comes to rectification (or what is sometimes called “corrective justice”), I believe there are important moral and practical differences between working to establish a just basic structure and protecting the legitimate interests of the unjustly disadvantaged as we carry out this necessary work. The first kind of action concerns institutional reform and ultimately building a well-ordered society. The second entails considering what changes are feasible now and then doing our best to defend the justice-based interests of all concerned, as we work toward full social justice. This second aim might involve some temporary compromises with injustice or difficult trade-offs.

If we were to achieve a well-ordered society (which might be a long-term project), these legitimate interests would then also be adequately secured. However, the most disadvantaged should not have to wait (and often cannot wait) for a fully just or even nearly just society to have their basic interests protected and their life prospects enhanced. As we make our way toward, for example, fair equality of opportunity, it may be necessary to institute temporary remedial policies aimed at evening out undeserved advantages and disadvantages. These policies would be aimed at bringing about (or approximating) conditions where those with similar talents have a roughly equal chance to attain valuable social

positions regardless of their race, gender, or class background. Some affirmative action policies might fall into this category.

Reparations are different, as they have a different goal. Reparative justice is not a matter of bringing the basic structure – the system of public rules – in line with what justice requires. Nor is it a matter of temporary ad hoc policies meant to improve the life prospects of the unjustly disadvantaged. Thus, when it comes to corrective justice, we need a distinction between rectification aimed at (a) fully implementing the principles of justice system-wide, (b) preventing or attenuating systemic injustice on the path to realizing a well-ordered society, and (c) repairing harms due to injustices that have already occurred.

Injustice, in its many forms, causes harm to individuals and social groups. This harm can be caused by an existing unjust social structure. For example, people are harmed when they are denied basic liberties or their liberties are wrongly curtailed. They are harmed when denied opportunities or social benefits they should have or when unjust obstacles prevent them from taking full advantage of the opportunities they do have. They are also harmed when they are denied or deprived of economic resources to which they are entitled.

Injustices in the distant past can cause harm in the present. For example, people may have inherited disadvantages (e.g., with respect to wealth or property) because their parents or grandparents were treated unjustly (e.g., suffered employment discrimination, had their property stolen, or were prevented from acquiring wealth). They may grow up in families that are deeply disadvantaged because their parents or grandparents suffered educational, physical, or psychological harms and thus were unable to provide a healthy home environment. They may suffer from a stigma associated with their group's previous inferior civic status, including degrading stereotypes and unconscious biases. The same individuals or groups can be harmed by both ongoing and past injustices. And some ongoing injustices are long-standing, reaching back generations, what Jeff Spinner-Halev (2007) has termed "enduring injustice."

When structural injustice is ongoing, the correct response is naturally to end the unjust practice and to establish practices or institute policies that prevent the injustice from recurring. If the problem is employment discrimination, then anti-discrimination measures should be instituted. Yet is that all? What about the harm already done because of the unjust practice? Certainly victims should be free from further unjust treatment. But it wouldn't be reasonable to expect victims to be satisfied that the unjust practice has ended if that practice has left them greatly injured or significantly set back their legitimate interests. Some effort to repair the harm is called for, assuming it is reparable.

What about when the unjust practice ended some time ago (for example, US slavery) but people are still suffering because of its after-effects? The appropriate form of rectification will depend on *why* these harms continue. For instance, it could be, appearances notwithstanding, that the unjust practice was never fully dismantled. Debilitating remnants remain, though perhaps are not generally recognized as such. These too would need to be remedied as part of an effort to completely eradicate the injustice. Or it could be that *other* unjust practices, old or new, prevented victims from fully recovering from their injuries. Perhaps those previously oppressed by the racial regime were inhibited from escaping poverty and political marginalization by injustices related to class, gender and the family, or law enforcement. This should be a reminder that true rectification cannot be limited to a single domain like racial justice. Yet some would insist that current disadvantages linger because reparations were not made for past injustices. Such compensation might have enabled victims to recover fully from their injuries. Or if reparations were offered, those compensatory measures were far too meager to truly repair the harm done. Much of the contemporary US debate over reparations turns on whether reparative justice is the way to respond to this problem of continuing racial disadvantage.

12.3 Reparative Justice

What are reparations? Not all compensation is reparation (Boxill 1972, 2003). A person may be owed compensation for damages even if the harm is not due to injustice. If I rent a car and then accidentally crash it into a tree, I may owe the owner compensation for the damage even if the accident was not due to any wrongful act on my part. (Maybe I swerved to avoid hitting a crossing deer.) However, a valid reparations claim is based on having been harmed through another's unjust actions. Reparation, in the strict sense, is compensation for harm due to injustice.

Let's distinguish four ways of thinking about the compensation that reparation involves. All concern repairing harm due to injustice. They differ in *who* should repair the harm and *why*. On the first conception, compensation may be paid by persons who were not themselves at fault for the unjust harm. Such reparations might be paid *on behalf* of those who did owe them, that is, the perpetrators of the injustice (who may now be deceased or otherwise incapable of paying). But those who pay them cannot then be said to *owe* them, to have a "debt" that they must pay to avoid wrongdoing. It would thus be a stretch to say that those who receive such compensation had a *claim-right* against those who paid,

though there might be good consequentialist reasons for such compensation to be offered nonetheless.³

On another conception, those who pay reparations may owe them but not because *they* perpetrated the injustice that caused the harm. They owe them because *they* received (perhaps unwittingly) ill-gotten gains or undeserved advantages, which they would not have received had it not been for unjust harms to others.⁴ They possess something they have no rightful claim to and thus should forgo these gains or advantages to compensate those who suffered the wrongs.⁵ It follows from this conception that reparations are not owed if no beneficiaries of the injustice exist, even if victims were harmed in ways that could be repaired.

On a third conception of reparative justice – and the one I will primarily rely on – those who have reparations claims have them only against those who committed the injustice that harmed them. The debt isn't really paid unless the unjust actor pays the costs. Here the point is not simply to repair the harm (which an innocent third party might be able to do) but to set things right between the wrongdoer and the wronged, to make amends. Only then is the grievance fully resolved and the case closed. It is also worth noting that on this conception, a moral debt can be created even if the perpetrator acquired no tangible benefits from their wrongful action. The harmful wrongdoing alone creates the duty of repair, not the benefits (if any) that accrued to the wrongdoer.

There is a fourth way of thinking about reparative justice that merits brief mention. Some are just as concerned (or perhaps more concerned) that victimizers *pay* for what they have done as they are that victims recover from their injuries. They don't want those who perpetrated the wrong to “get away with it” – that is, to have done the wrong without it costing them in some way. They want those who wronged them to suffer some loss or to be deprived of something valuable. On this view, those who do wrong should pay a penalty even if so doing doesn't repair the harms or prevent future such wrongs. This makes reparative justice

³ Martin Carcieri (2010) offers a Rawlsian defense of reparations for African Americans relying on a conception of reparations along these lines. Invoking the idea of collective responsibility for corrective justice, he does not believe it is crucial to assign fault or liability for the harms in need of repair. Nor does he make a sharp distinction between reparative justice and distributive justice.

⁴ For defenses of reparations for African Americans relying on this conception, see Hugo Adam Bedau (1972), Howard McGary (1999), and William A. Darity and A. Kirsten Mullen (2020).

⁵ If ill-gotten gains are sufficient to owe reparations, then many African Americans owe reparations to Native Americans for benefits acquired by living on stolen land. Such a debt might be owed, in some form. But the point is rarely noted, nor its ramifications explored.

too much like retribution. I don't believe this conception of reparative justice is compatible with justice as fairness, as it suggests that those who wrong others deserve to suffer.

We should distinguish material reparations (e.g., money, property, or land) from reparations that do not involve the transfer of economic resources. Sometimes the claim of reparation is not for money or property that was stolen, destroyed, or damaged but for lost *opportunities* to acquire money or property. In this case, the victims were unjustly prevented from taking advantage of opportunities (educational, work-related, or financial) that should have been theirs. We can think here of slaves who were prevented from earning money, owning land, or starting a business. But we can also think of gross violations of fair equality of opportunity (e.g., the denial of access to schools or discrimination in employment and lending).

Sometimes the past injustice is cultural imperialism or otherwise involves a loss of a cherished culture or collective identity. African Americans who are descendants of slaves have been largely cut off from their native cultural heritage and their connection to a specific ancestral place in Africa. The harm done is incalculable, made worse by the fact that many whites refuse to treat them as equals in the developing American cultural mix. This kind of harm is not best rectified by money or property, if it can be rectified at all. It is like what Native Americans have lost due to war, conquest, and colonialism.

It is not unusual for the *descendants* of victims of injustice to make a claim of reparations, particularly when they regard themselves as having been negatively affected by the wrongful harm to their ancestors. There will also be many persons who are not descendants of the victims of past injustice but who nonetheless have been negatively affected by the injustice. I believe there is a moral difference between being *treated* unjustly and being negatively affected by the fact that *others* have been treated unjustly. Reparations is most obviously due if a person or group has had their basic rights violated and were thereby harmed. It is less clear that reparations are due to a person or group who is harmed because some other person or group had their rights violated. When someone is unjustly convicted of a crime or injured through police brutality, they are treated unjustly, and their family, friends, and neighbors may also be negatively affected by the wrong. I suspect that only the one who has been treated unjustly has a right to reparations, but I am not confident about this. Much will turn on how tightly the causal connection between an injustice and its harms must be. Must the injustice be the direct and proximate cause of the harms, or are all harms traceable to an injustice – including indirect harms and harms years, perhaps decades, after the

injustice occurred – a suitable basis for reparations claims? I am not sure and will take no firm position on the matter.

12.4 Closure, Reconciliation, and Restorative Justice

There is a more expansive conception of reparative justice that is not principally about compensation. Rather than seeking merely to repair harms (psychological, physical, cultural, or material), the idea is to repair moral relationships between people that have been broken or damaged due to injustice. Margaret Urban Walker calls this aim “restorative justice” to distinguish it from conceptions of reparative justice centered narrowly on compensation.⁶

There may have been an existing relationship that was damaged or made worse by an injustice. At other times, the perpetrator and victim had no real relationship prior to the injustice. They might even have been strangers. In that case, we can speak of the bad relationship that was created by the wrong. Previously unacquainted, now they are at odds, perhaps enemies. In both cases, there is often resentment, mistrust, and sometimes hostility and enmity that stand between the parties. These negative sentiments can fester and harden in the absence of concerted efforts to repair the damaged or broken relationship.

Through what legitimate and effective means can these negative sentiments be dispelled and the relationships repaired? Compensation alone is generally insufficient. The perpetrator must also acknowledge the wrong and accept responsibility for the harm done and maybe even apologize. Some might wonder that if full compensation is made, what further goal is achieved by acknowledging and accepting responsibility for the wrong. In other words, what do such attempts at moral repair add to the compensation? There is reason to believe that it could bring closure to a tragic episode and at least lessen resentment. To refuse to acknowledge the wrong is an insult. It suggests that the victim didn't merit better treatment or that the perpetrator might again engage in similar wrongful acts if they believed they could get away with it. Moreover, a payoff to silence complaints or quell anger is not the same as justice and generally won't be received as such.

There are injustices to which compensation would not be an appropriate response or whereby the harm done is irreparable. Though material reparations would have no place, restorative justice could still have a role to play. Public acknowledgment, acceptance of responsibility, and formal

⁶ See, for example, Margaret Urban Walker (2006).

apology can mend a broken relationship.⁷ However, these acts of moral communication generally need to be backed up with concrete actions that demonstrate sincere regret and repudiation of the wrong.⁸ Otherwise, they won't be believable. This show of good faith is especially important when those involved have a relationship that requires trust, cooperation, and solidarity, such as the relationship among fellow citizens. The actions that function to demonstrate sincere regret and commitment to refrain from similar injustice can resemble compensation, which is why some call them "symbolic reparations" (Meyer 2006). But the aim is not to return the victim to the well-being they would have enjoyed if the wrong had not occurred.

Thus, we can think of restorative justice as having two distinct goals, one more demanding than the other. Sometimes the objective is simple *closure*. The aim is to end resentment and conflict so that all sides can move forward with these past wrongs, not necessarily forgotten but behind them – no longer serving as a source of strife. It is a matter of closing the books on a grievance. There need be no expectation of ongoing cooperation or even future interaction. At other times, the objective is, or should be, *reconciliation*.⁹ The aim is a renewed relationship on terms of equal respect and mutual trust. Depending on the nature of the wrong and how long it goes unaddressed, closure may be as much as can reasonably be expected, but reconciliation is often worth striving for.

I should note that, on some conceptions of restorative justice, moral relationships between groups are not fully repaired unless a collective narrative of the past is forged and affirmed by those in need of closure or reconciliation (Kutz 2004; Spinner-Halev 2007; Espindola and Vaca 2014). Here, not only is the moral relationship broken but collective memory is damaged, if not lost. The conception of restorative justice that I would endorse, and that I think is compatible with justice as fairness, includes public acknowledgment of past injustices. Certain critical and well-established historical facts should be widely known and rarely if ever denied. For example, the facts that constitute the wrong and (when possible) the identity of those who bear primary responsibility

⁷ It might seem that an apology is appropriately given only by those at fault. But perhaps it can be offered by those in the right relationship to those at fault (e.g., those who share a social identity with those responsible or those who have benefitted from the wrongdoing of others).

⁸ For discussion of the value of such symbolic gestures, see Waldron (1992) and Walker (2006).

⁹ For a discussion of why reparative justice does not require reconciliation and need not aim at it, see McGary (2010).

for that wrong should be public knowledge. We also need mutual recognition of sufficient historical detail to grasp what made the wrong a wrong.

However, we must allow that reasonable people, acting in good faith and with a healthy sense of justice, can disagree about the precise details of history – about exactly who did what, to whom, when, and where – and about the broader moral significance of any given historical fact. And sometimes it's not possible to establish what really happened, at least not using commonly accepted standards of historical inquiry. The requirements of public reason may place some practical constraints on how robust such a collective narrative can reasonably be expected to be.

12.5 Justifying Reparations

I propose that we view reparative justice as a component of a complete *conception of right*, which Rawls defines as “a set of principles, general in form and universal in application, that is to be publicly recognized as a final court of appeal for ordering the conflicting claims of moral persons” (Tŷ 1999, 117). I also propose that we regard reparative justice as a *natural duty* – a moral requirement that holds regardless of whether one has voluntarily accepted the benefits of a just social arrangement or institution (Tŷ 1999, 303).

Like the duty of justice and the duty of mutual respect, a natural duty of reparative justice would hold in a variety of circumstances. It would seem to apply at least to three distinct subjects of justice. It applies to injustices between individuals within a society and is thus a matter of private law or criminal law. It applies to the injustices perpetrated by the society itself (say, through its laws or public officials' actions) against individuals or groups within the society. And because justice includes international relations, the duty of reparative justice would apply to injustices perpetrated by one state against the people of another state or against a stateless people (e.g., when a state engages in war for glory, power, revenge, material gain, or territory). The society of peoples would share such a principle, just as it would have principles of just war and rules governing the punishment of war crimes.

Reflecting on the natural duties of justice and mutual respect, one can already see why Rawls would want to make a place for reparative justice. The duty of justice enjoins us not only to support and comply with institutions that are already just but also to rectify injustice by helping to bring about just social arrangements where they fail to exist (Tŷ 1999, 99, 293). The duty of mutual respect requires us to show everyone the respect due them as a person with a sense of justice and a conception of the good (Tŷ

1999, 297). Everyone benefits from the public acknowledgment of these duties. The same is true, I believe, of the duty of reparative justice.

To see this, let's turn to how reparative justice could be justified within a Rawlsian framework. The original position is the natural place to turn. The principles of reparative justice are to be chosen only after the fundamental principles of justice have been selected, and these ideal principles place constraints on and shape the content of other principles of justice. For the methodological purposes of ideal theory, the parties in the original position assume *strict compliance* – that is, all are presumed to act justly and to do their part in upholding just institutions – when choosing the principles of justice that apply to the basic structure taken as a whole (Tŷ 1999, 8, 216). Yet the parties will have to allow that serious injustices might have occurred in the past and could occur in the future, given what we know human beings to be like. What is more, though they don't know their particular place in history or their specific circumstances, the parties will have to allow that injustices may be presently ongoing, and thus they will need to agree on required and permissible ways of responding to past and existing injustice.

The need for such principles should be clear from the case of civil disobedience, which Rawls argues can be justified in a nearly just society when serious violations of equal liberty or fair equality of opportunity are persistent (Tŷ 1999, 326). But, again, first the parties need a public conception of justice to settle what is to count as “injustice” and to give reform efforts a clear objective. They can then choose principles of nonideal theory – principles of rectification – that are consistent with their shared view of justice.

Why would the parties in the original position acknowledge a natural duty of reparation? Not even a well-ordered society could ensure that injustices never occur. Since anyone could be the victim of injustice and harmed as a result, it would be rational for the parties to agree to such a principle to protect their legitimate interests. They wouldn't want to be forced to absorb the costs of repairing harms wrongfully imposed on them by others.

The parties would agree that those who wrongfully harm others should pay the costs of repair. As each is presumed to have an effective sense of justice, each can avoid the burdens of repair by refraining from violating the rights of others. One often cannot avoid being the victim of another's unjust actions. But as free and rational agents with a sense of justice, we can avoid acting unjustly. So principles of reparative justice adequately protect everyone's interests.

Recall also that the parties have reason to create and maintain just institutions that are stable. If individuals or groups were harmed due to

injustice but had no recourse for getting their injuries repaired, this would likely weaken their resolve to support the social arrangement. For the sake of stability, then, the parties will want to avoid this situation if they can. Agreeing to a duty of reparative justice is a rational way to do so. And as with criminal sanctions, the threat of having to compensate others can serve as an incentive to take due care to respect others' rights (Wenar 2006). A just social arrangement will have greater stability with a mutual acknowledgment that each should repair harms caused by their own unjust actions.

These considerations can, I think, be extended to collective agents, such as peoples and governments. Such collectivities, too, would naturally seek to avoid involuntarily internalizing the costs of repair for wrongs that others have committed, and they have the capacity, qua collective agent, to refrain from injustice. When political conditions are favorable (for example, when governance is responsive to public demands and democratic processes), the public is responsible for the consequences of government actions and policies, even when these actions and policies run afoul of what justice requires.¹⁰ There is a collective responsibility, shared among citizens, to create and maintain a just social system. The collective liability for reparation should be shared accordingly. But it is less clear that current citizens should be held responsible for an unjust basic structure in the distant past, as they couldn't have done anything to change that structure.

12.6 Rectification and Distributive Justice

Can Rawls's focus on the basic structure of society teach us anything about reparative justice? Does the theoretical primacy of the basic structure entail a *practical* primacy, in terms of what is most urgent to rectify? Does the primacy of the basic structure place limits on what form reparations can take? To explore these questions, I will concentrate on the case of injustices against African Americans in the United States.

¹⁰ We must distinguish harm caused by government action permitted by the basic structure (the system of public rules, including the constitution) and harm caused by government action contrary to the public conception of justice. The latter type of harm is sometimes (partly) the responsibility of the specific government officials rather than (solely) the responsibility of the public. So, for example, there is legally permitted slavery and Jim Crow segregation and the harms they caused. Then there is police-assisted lynching and other wrongful acts by officials that are contrary to law. Still, some unlawful acts by government officials could and should have been anticipated and efforts made to prevent them. Here the public may share responsibility for the harmful wrongdoing despite having prohibited the wrongs.

When individuals or groups within the same society wrong one another under otherwise just social conditions, it is easy to see why material reparations may be due and how they could be implemented. Reparative justice questions are more challenging when the wrongful harm took place under seriously unjust social conditions. Returning a victim back to their pre-harm state of wellbeing (should this even be possible) would still leave them living within an unjust basic structure. Often the violated property claims were part of a system of legal rights that was itself unjustified. It is not that no one can have legitimate expectations about property and its transfer under unjust circumstances. It's just that when such violations are compensated, ill-gotten gains and arbitrary advantages inevitably remain.

If the harm done through past injustice is economic, there is also a question about whether material reparations would be called for once distributive justice for the social structure was secured.¹¹ For instance, there are reparative justice claims that seem to presuppose that some form of welfare-state capitalism is just. But Rawls maintains that such a society is incompatible with his principles of justice. Justice as fairness in a property-owning democracy requires (1) wealth to be widely dispersed (to maintain political equality), (2) highly limited intergenerational wealth transfers within families (to maintain fair equality of opportunity and to ensure the fair value of political liberties), and (3) limited economic inequality (to satisfy the difference principle). Liberal socialism requires means of production and finance capital to be held as public assets and eschews the very idea of a right to inherit productive assets. Both forms of political economy would secure an adequate minimum income so that all can participate in political life on fair terms.

So when some African Americans protest "racial disparities" due to past racial injustice, the complaint is often best interpreted as a charge that there is *ongoing* injustice that should be ended, that there is an *existing* failure of justice quite apart from any past racial injustices that impact the present. The racial disparities that call for remedy are forms of group-based oppression or political subordination, examples of one group using its collective advantage to dominate or exploit another. This is one reason that special voting protections for Black US citizens are needed to ensure fair political participation.

¹¹ For a helpful discussion of how some reparations claims are best interpreted as distributive justice claims or as a strategy for achieving distribute justice, see Wenar (2006, 401–2). For a good discussion of why distributive justice often takes priority over reparative justice, see Kutz (2004, 291–96).

Sometimes the focus on racial disparities centers on differences in wealth between groups. African Americans are, on average, greatly disadvantaged with respect to wealth when compared to their white counterparts. From the standpoint of justice as fairness, though, there are many affluent African Americans who have unjust advantages over other Black Americans and, indeed, over some white Americans. These are forms of socioeconomic inequality that cannot be said to improve the prospects of the most disadvantaged in society. When people speak of the need to rectify disparities between racial groups, they sometimes ignore these other socioeconomic disparities between individuals and households, which also call for redress. We must avoid entrenching economic injustice as we redress injustices of the past. That would mean, for example, scrutinizing the right of inheritance and seeking to establish egalitarian economic arrangements that benefit everyone.

One trouble with material reparations claims is that they often presuppose claims of inheritance that may themselves be unjust or otherwise indefensible. If individuals have limited inheritance rights (not according to existing law but according to what justice requires), then members of historically oppressed groups will also have limited claims to material reparations insofar as these claims are based on the idea that their ancestors were owed reparations that were never paid.¹² The thought here is that descendants of those unjustly treated inherit their ancestors' claim to reparations. Yet we would first need to know how much each can legitimately inherit before we can say how much in reparations should be paid.

These problems don't seem to arise within a historical entitlement theory of justice of the sort Robert Nozick proposed (1974, 150–53). If economic justice is fully defined by natural rights to acquisition, transfer, and rectification, then inheritance rights are effectively unlimited. There is no concern about how material reparations might upset an egalitarian social structure or inhibit our ability to establish such a structure. Here private ownership of the means of production is treated as a matter of basic justice, and individuals are permitted to transfer all their assets to their descendants (or to whomever they please). Things are otherwise with justice as fairness.

If a strong egalitarian principle holds for social and material advantages (e.g., fair equality of opportunity and the difference principle), then wealth transfers as reparations will be severely limited. These transfers would have to be compatible with creating and maintaining a just social

¹² For a Rawlsian defense of a limited right of inheritance and an explanation of its bearing on reparative justice, see Thompson (2001).

structure. To ensure that class background does not hurt anyone's chances to acquire valued social positions, there cannot be great economic inequality. Otherwise, those within wealthy families would have an unfair advantage in competing for these positions. If socioeconomic inequalities are justified only if they improve the life prospects of the least advantaged, we must be mindful of how material reparations would impact the broader social structure.

Things are different when those who should pay reparations and those who have a reparations claim are not, or do not expect to be, fellow citizens within a single polity. Sometimes the injustice has been perpetrated by a foreign power against a culturally cohesive people with a right of self-determination.¹³ The victims reasonably want their injuries repaired – to be returned to their previous level of well-being –and to live a life apart from those who wronged them. Creating a just basic structure inclusive of victims and perpetrators is not an aim. So victims can be somewhat indifferent to how the transfer of wealth would affect economic relations among those who wronged them.

Some “peoples” themselves have been made possible by injustice. When a social group faces oppression over many generations, they may develop bonds and systems of organization as strong as any people. Perhaps this is (or once was) true of African Americans. Maybe they have (or at one time did have) something akin to a right of self-determination, as many black nationalists – Martin Delany, Marcus Garvey, and Malcolm X – have claimed. A demand for material reparations makes perfect sense when the plan is emigration or secession.

Things are also different when there is little hope that a (nearly) just social structure is on the horizon. When achieving a just society doesn't appear to be feasible anytime soon, those who have been harmed by past injustice will naturally have a difficult time committing to the creation of just social arrangements if that means suffering unfair hardships now and for the foreseeable future. They might demand their injuries be repaired while we work for structural transformation. Indeed, they may refuse to work toward creating a just social structure until they receive adequate reparations. In their most pessimistic moments, they demand reparations now and adjust their expectations to living with broader systemic

¹³ For an argument that African Americans are not the right kind of “cultural entity” to make a collective claim to reparations on this basis, see Hill (2002). Hill does believe, however, that African Americans can claim reparations for slavery as a right of inheritance, because their ancestors were owed a debt for unpaid wages. Here she relies on a helpful distinction between harm to the group qua collective and harm to the group's individual members (perhaps because they are a part of the group).

injustice. There is a question of whether all these attitudes are reasonable even if they are understandable.¹⁴

It might be that what attitude one should have toward reparations for racial injustice depends on how unjust the existing social structure is. A nearly just society (as Rawls calls it) could encourage those with valid reparation claims to moderate their demand for material compensation. If they don't face poverty and have something approaching fair equality of opportunity, insisting on greater material resources *as reparations* may even be unreasonable.

When African Americans press a claim for material reparations, they are largely responding to their current economic disadvantage in US society. It is difficult to flourish without some measure of wealth, and many African Americans lack sufficient economic resources to function as equal citizens in America. They often attribute this economic disadvantage to past injustice, sometimes tracing this back to slavery or Jim Crow segregation. But insofar as the concern is with improving their present economic position in society, we don't need to settle whether this disadvantage is traceable to some past injustice or is attributable to ongoing injustice.¹⁵

Black people certainly resent the suggestion that their current disadvantages are their own fault or that these disadvantages exist because they are failing to take advantage of adequate educational and economic opportunity. To avoid this implication, a public acknowledgment of past injustice and the harm it has caused is critical. But so is a public recognition of serious existing structural injustice.

To summarize, for the domestic case under unjust conditions, which is the situation of contemporary African Americans in the United States, I believe that justice as fairness calls for the following approach to rectification (corrective justice):

- (1) Strive, individually and collectively, to create and maintain a just basic structure, prioritizing this objective over reparative justice.
- (2) Institute temporary remedial measures to attenuate existing injustices and to approximate just conditions, thereby enlarging the

¹⁴ Refusing to help create a just social structure is not only incompatible with our duty of justice, but it could also potentially rob future generations of a society that would enable their flourishing. The oppressed have children and grandchildren, too. What are we to say to these descendants about our refusal to make a better world for them? Can we say we were standing on principle, defending our self-respect? I don't know how compelling that answer would be.

¹⁵ For a discussion of some of the perils and obstacles that defenders of reparations face when sorting out the different causes of existing racial disparities, see Darby (2010).

freedom and enhancing the material life prospects of the unjustly disadvantaged.

- (3) Practice restorative justice (including symbolic reparations where appropriate) to bring closure to past racial injustice, thus laying the groundwork for ultimate interracial reconciliation.
- (4) Pay reparations to victims of recent, unlawful wrongdoing (whether perpetrated by private actors or public officials), provided such payments are compatible with creating or maintaining a just basic structure.

The view defended here shares much in common with the one David Lyons's advanced in *Confronting Injustice* (2013). Lyons's rectification project for African Americans cannot be reduced to a general call for reparations. It is, however, meant to be a response to the underlying concerns of those who advocate for reparations – namely, the deep and enduring disadvantages that many blacks continue to face because of the legacy of slavery and Jim Crow.

I agree with much of Lyons's argument. Yet, I'm not so sure that the National Rectification Project he proposes responds to all the legitimate concerns of those who make reparations claims. At times, Lyons seems to elide the difference between correcting an *ongoing* injustice and rectifying a *past* injustice. Reparation is a moral project – it is about paying moral debts, making amends, and acknowledging past wrongs. It is not fundamentally about making people materially equal or reforming an unjust practice.

In some ways, then, Lyons has changed the subject. We have reasons of basic justice to ensure equality of opportunity and to combat racism quite apart from whether the federal government has played a role in past racial subjugation. Insofar as Lyons is calling for fair equality of opportunity regardless of the *source* of existing inequalities, the *backwards-looking* dimension of reparations appears to be lost. Lyons could respond that the fact that the government contributed to and sustained a system of racial hierarchy provides a *further* reason to hold it accountable for these inequities. But this wouldn't give Blacks a greater claim for redress than others (including many whites) who also do not have fair equality of opportunity.

Lyons does say, “an essential element of the required rectification is an informed acknowledgement of the moral as well as material aspects of the wrongs of slavery and Jim Crow” (2013, 111). This points us in the right direction. But this public acknowledgment should be taken two steps further – that is, if genuine closure and interracial reconciliation are to occur.

Yes, there should be a general acknowledgment of these wrongs and their consequences, as restorative justice requires. But this

acknowledgment should include further symbolic acts to demonstrate sincerity. For instance, following a suggestion by Jeremy Waldron (1992), we might publicly affirm those groups who have suffered injustices – and, as a result, whose identities have become stigmatized – and publicly recognize their sacrifices in making America wealthy and more just. This could be done through commemorations, national holidays, museums, and monuments. Indeed, symbolic reparations could be paid to unjustly disadvantaged groups, not in a futile attempt to make them “whole” but to demonstrate that this public acknowledgment is offered in good faith. This would be analogous to offering a gift with an apology for some wrongful act. Public actions of this sort would include the backwards-looking dimension of rectification and thus could have a salutary effect on damaged interracial relationships.

A second necessary aspect of this public acknowledgment is that Blacks should not be blamed for their disadvantages and whites should not resent efforts to rectify these disadvantages even if they must pay some of the costs and won't materially benefit from these temporary corrective justice programs. African Americans might reasonably demand, not only public recognition of the history and legacy of white supremacy but also some public acknowledgment that their existing disadvantages have been caused by past and ongoing practices of racial subordination. Too often, people insist that Black disadvantages are self-imposed due to the moral failings and blameworthy improvidence of Blacks themselves. Blacks generally interpret this as an affirmation of racist ideology and a refusal to take responsibility for rectifying racial injustice. In light of this, the trouble with “universal” or “race-neutral” policies aimed at creating conditions for fair competition is that they implicitly suggest that Blacks are not actually due equal concern and respect. For they are allowed to benefit from social policies only insofar as whites benefit as well. Anything more targeted at improving Black life chances is generally met with hostility, resentment, resistance, and backlash.

12.7 Conclusion

The view of reparations and racial justice I have sketched and defended, though perhaps controversial, is not new. For the most part, the ideas I have presented already exist in the literature on reparative justice and historical injustice. What I have tried to show is how these ideas might fit together within the broader political morality of justice as fairness. One of the great virtues of Rawls's conception of justice is that, though incomplete, it is highly systematic and wide-ranging, a true attempt to offer a philosophical theory with practical implications.

Like Mills, I wish Rawls had said more about how questions of racial injustice should be handled within his theory. Also like Mills, I would urge more philosophers to attend to white supremacy and its enduring legacy. But I remain convinced that justice as fairness cannot only account for but also illuminate racial injustice and its remedies, including historical injustice and the question of reparations.¹⁶

¹⁶ For helpful feedback, I would like to thank the participants at the “John Rawls’s *A Theory of Justice* at Fifty” Conference at Notre Dame. I’m also grateful for comments and questions from audiences at UC Berkeley and the University of Kansas. Special thanks to Joshua Cohen for particularly perceptive comments and to Paul Weithman for organizing this whole effort and editing the volume.