

Chapter 2

Reconstructing Reparations

In his *Discourse on the Origins of Inequality*, Jean-Jacques Rousseau describes the social contract as a ploy by the rich to dupe the poor into an agreement which ends up serving the former's interests. In the development of society in the state of nature, property had become very unequally distributed, and the rich sought to maintain their advantage by the imposition of rules that, while formally equal, systematically favored their material interests. "Let us join,' the rich said to the poor, 'to guard the weak from oppression, to restrain the ambitious, and secure to every man the possession of what belongs to him: let us institute rules of justice and peace, to which all without exception may be obliged to conform; rules that may in some measure make amends for the caprices of fortune, by subjecting equally the powerful and the weak to the observance of reciprocal obligations...' All ran headlong to their chains, in hopes of securing their liberty." The point Rousseau is making is that ostensibly equal rules can simply reproduce the material inequality that has been established over time. If, under one set of rules or conditions, a group is able to garner material advantages and accumulate wealth and opportunities for itself, then rules of formal equality enacted after this do not threaten those advantages. Instead, in the absence of any attempt to address those accumulated (dis)advantages, formally equal rules simply reproduce the inequality.

Charles Mills (2000) has suggested that Rousseau's account can be read through the prism of race, that it describes a "domination contract" not only along class lines but racial ones as well. Drawing on Mills, I would suggest, more specifically, that what Rousseau describes captures an important facet of the transition that occurred in the

United States during the civil rights era with respect to African Americans. In effect, a kind of formal equality was endorsed: nondiscrimination became the law of the land, de jure segregation was outlawed, and the federal government committed itself to enforcing the basic rights of African Americans. All of this, needless to say, was a significant advance over the previous racial regime. Yet it also partakes in the Rousseauian "domination contract" in that the equality to which the new regime was committed was in most respects merely formal. There are exceptions to this characterization, of course, some of which will be discussed later—such as affirmative action policies (see chapter 5) and attempts to integrate public schools (see chapter 7). But overall the transition that took place involved no frontal assault on the material inequalities that had accumulated along racial lines under slavery and Jim Crow. Whites, in effect, said to blacks, "Let us unite..." but in a way that, as in Rousseau's story, did not seriously threaten their interests.

This is the issue that activists and scholars attempt to highlight through the language of reparations, a language that draws attention to the failure of American society to address the material inequalities that accumulated along racial lines during the centuries before the civil rights era. The literature on reparations is now so well developed that one might reasonably wonder what more there is to be said on the issue, and positions on the issue, at least among those familiar with the debate, often appear rather hardened and impervious to further argument. Yet this chapter attempts to build upon recent developments in the discourse on black reparations in the hope of engaging both opponents and proponents. It advances a more historically detailed argument for black reparations than (as far as I can tell) has been offered to day, and at the same time

attempts to meet philosophical objections to reparations. This strategy of emphasizing historical context as a way of framing black reparations is motivated by a conviction that the debate over the issue, conducted at a fairly abstract philosophical level, has reached an impasse. Rather than further philosophical refinement, what the debate really needs is a dose of reality, and placing the issue in historical context illuminates it in a way that philosophical reflection alone cannot.

The chapter proceeds as follows. I first review the philosophical debate over black reparations, and examine how the usual objections to intergenerational reparations has led to two developments: first, the focus on the injustices of Jim Crow, rather than going all the way back to slavery; and, second, the focus on racial injustice as an ongoing, enduring injustice rather than as one that occurred only in the past. Both of these trends are promising, I suggest, because they avoid difficulties in traditional arguments for reparations for slavery. In the following section, I attempt to detail some of the most egregious racial injustices perpetrated by the federal government from the New Deal onwards. New Deal policies had the effect, and were intended to have the effect, of advantaging whites and disadvantaging blacks. Hence, for much of the middle of the twentieth century, the federal government played an active role in exacerbating racial inequality. It is because these injustices are recent, because federal complicity is clear, and because their present day effects can be demonstrated, that the case of black reparations is strong. I then review the debate over black reparations during the civil rights era, emphasizing that reparations, or something like them, were widely discussed during this period in mainstream venues. Yet the idea was eventually dropped, leading to the perpetuation of much of the inequality that had built up to that time. Hence, the New

Deal and civil rights eras present us with two missed opportunities: if the New Deal had not enshrined and deepened racial inequality, or if the reparations considered during the civil rights era had been enacted, then the issue may well have been moot today. But since both of these opportunities were missed, the issue of racial inequality has been bequeathed to the present generation.

Philosophical Arguments over Black Reparations

Traditional accounts of reparations begin (if sometimes implicitly) with the model of compensation enshrined in tort law, and attempt to extend this model to compensation "over time and between groups" (Hill 2002). The tort model posits two individuals, one of whom wrongly harms another, entitling the latter to compensation from the former. How that compensation is measured varies, but the most standard conceptions are that the wronged party should be restored to her status quo ante condition, or that she be compensated to the point where she is as well off as she would have been had the violation not occurred. In the individual case, it is relatively easy to identify the parties, the violation, and the appropriate remedy (though of course the parties often have different views on this).

However, in extending the notion of compensation to large-scale cases, all of this becomes much less clear. With large-scale violations of rights, it is sometimes unclear who the parties to the case are. During the initial injustice, it might be said that only those who directly partake in the injustice are implicated as being liable to pay, or in a position to receive, compensation. But are only perpetrators liable? What about those

who do not get their hands dirty, but who nevertheless benefit from the systematic violations? And what of those who are aware that crimes are occurring, but do nothing? There is no single, obviously correct answer to these questions. And the issue of the parties gets even more complicated in subsequent generations. Are all descendants of the original victims (equally) entitled to receive compensation for the harms done their forebears? And from whom are they to receive such compensation? Is it fair to ask the descendants of the perpetrators to pay compensation, especially if they have received no benefit from the actions of their ancestors? Again, it is not obvious how to answer these questions, and it is even less clear that they can be answered in a way that would support the argument for reparations [cites].

If it is difficult to identify the appropriate parties, is it also sometimes difficult to specify or characterize the relevant wrong. In the case of African Americans, some have argued that the relevant wrong, at least for the purposes of calculating reparations, is the unremunerated labor that slavery involved. The thought is that, if we can calculate how much slave labor would have been worth in a free labor market, then we can calculate what would have been owed as compensation to the slaves themselves. Yet others have argued to the contrary that it is not the unpaid labor that is most relevant, but the loss of freedom and the violation of the most basic human rights. This lack of clarity about how to specify the original wrong is only exacerbated when attempting to specify the wrong suffered by subsequent generations. As we will see below, this can be specified in various ways, most prominently in terms of lost inheritance or in terms of having been made worse off than would otherwise have been the case [cites].

If it is difficult in large-scale cases to specify the parties and the wrong, both initially and in subsequent generations, then it is no surprise that determining the remedy, if any, is similarly difficult. Focus on the unpaid labor of slaves leads naturally to a method that calculates the present-day value of such labor, using compounded interest (see Marketti 1972), the implicit assumption being the descendants of African American slaves are entitled to inherit what their forebears were owed. Yet as Cowen (1997) has shown, small differences in interest rates over long periods of time lead to vast differences in the estimation of the current value of past violations. If, however, the original harm that should drive the analysis is the loss of freedom and the violation of basic human rights, then it may be that this is the sort of harm that cannot generate liability for reparations in subsequent generations (see Hill 2002).

In recent debates about reparations, two distinct arguments have emerged that attempt to address all of these complications. The counterfactual argument holds that individuals are entitled to reparations if, in the absence of wrongs committed against their forebears, they would have been better off than they actually are. The most prominent version of this argument is found in the libertarian theory of Robert Nozick (1974), who endorses (though he does not fully articulate) a principle of rectification. The principle holds that if the present-day distribution of goods has been shaped by past violations of rights, then there is an obligation to bring the distribution to what it would have been in the absence of those violations. Strictly speaking, this is an impossible task because it requires detailed knowledge about long chains of actions and reactions involving large numbers of individuals across many generations—both those that actually occurred and those that would have occurred in the absence of past crimes. At the individual level, the

precise consequences of past wrongs clearly cannot be known, creating a serious epistemological problem for reparations claims. Realizing this, Nozick proposed the use of "rules of thumb"—that is, simplifying assumptions that allow for reasonable estimates about the impact of past wrongs on present-day individuals. For example, being "black" in the United States could be taken as an indication that one has likely been harmed by past racial injustice. Yet critics of reparations argue that the use of such rough rules of thumb risks doing further injustice by violating individuals' settled and reasonable expectations, and by misdirecting reparations to some who may not deserve them.

If our knowledge of what would have occurred in the absence of past wrongs is one problem with the counterfactual argument, it is not the only one. Another is the non-identity problem, which is that the present-day individuals making reparations claims might not exist in the absence of the very injustices for which they claim compensation. After all, historic injustices often involve the movement of large numbers of people, affecting who meets whom and which combinations of men and women produce offspring. If this is the case, it would seem to undermine the claim to reparations, since it may be more plausible to think of the present-day individuals as having benefitted from the past wrongs, rather than having been harmed by them (on the assumption that existence is better than, or preferred to, nonexistence). In other words, in the absence of the past wrongs, contemporary claimants would not be better off; rather they would not exist at all. If present-day individuals have benefitted from past injustices, it would seem they can hardly claim compensation for those very injustices (Morris 1984).

A third problem that the counterfactual argument for reparations must confront is that the events subsequent to the initial injustice may generate new legitimate claims to

the very resources or items that are claimed by would-be recipients of reparations. This is the argument that Jeremy Waldron makes in his well known paper, "Superseding Historic Injustice" (1992). Waldron argues that many reparations claims cannot overcome the objection that intervening circumstances and actions can undermine reparations claims because changed circumstances change entitlements. Illegitimate possession can become legitimate over time, Waldron suggests, through subsequent developments. The argument that reparations claims can be "superseded" by subsequent events, appears particularly relevant to the case of claims to particular lands, because, after the initial taking, subsequent generations may labor on those lands—arguably creating new, legitimate entitlement to them. Yet some scholars have argued that these considerations undermine claims to black reparations was well [cites].

Now, none of these problems is necessarily insuperable; resolutions to each of them have been proposed. For example, Simmons has argued that "historical rights can be sensitive to changing circumstances without simply dissolving in the [face] of change" (1995, 174). Still, the difficulties with the counterfactual argument for reparations have led some scholars to search for an alternative.

The inheritance argument attempts to get around the difficulties in the counterfactual argument by suggesting that present-day descendants of past individuals who were wronged are entitled to inherit what their forebears were owed (Boxill 2003; Sher 2005). This argument would seem not to rest heavily on a counterfactual claim about the circumstances that present-day individuals would have faced in the absence of past wrongs. They make their claim on behalf of their forebears, so the focus is on the

actual wrongs that occurred to actual individuals, rather than on comparisons to counterfactual states of affairs.

Yet there are two problems with the inheritance argument. The first is that it rests on a strong moral right to inherit what was owed to one's ancestors. If there is no such right, or if the right is limited to, say, being entitled to inherit only enough to ensure a decent level of wellbeing, then it is not clear that the inheritance argument can sustain strong claims to intergenerational reparations (Cohen 2009). Second, it is not clear that the inheritance argument can entirely avoid counterfactual claims, and therefore it may be subject to some of the same problems that the counterfactual argument for reparations faces. The inheritance argument assumes that in the absence of the initial wrongs, or in the case that such wrongs were rectified soon after they were committed, present-day descendants of the victims would have inherited (much of) what their ancestors had or were owed. The inheritance argument may avoid the non-identity problem—the present day claimants are, let us suppose, the descendants of the wronged parties. But it is not clear that it avoids the other problems with the counterfactual argument, that we lack knowledge of what would have occurred in the absence of the wrong (perhaps the inheritance would have been lost by other means) and that competing legitimate claims may have arisen in the intervening period. Hence it is not clear that the inheritance argument avoids the problems with the counterfactual argument.

While there is no consensus on whether the objections to the main arguments for intergenerational reparations are decisive, for some observers, at least, they do considerably undermine the plausibility of claims to such reparations. Yet it may be that philosophers' focus on the intricacies of the arguments misses the essential point about

them. Reparations are usually claimed for those who continue to suffer some disadvantage, a disadvantage that is causally related to injustices in the past. It is this combination of past injustice and present disadvantage which lends reparations claims their plausibility, and this suggests that the combination of these two factors is necessary for a compelling reparations claim. For example, in the case of African Americans, it is not just the fact of slavery that underwrites reparations claims, but the system of Jim Crow that segregated and oppressed African Americans in the latter part of the nineteenth century and for much of the twentieth. And it is not just slavery and Jim Crow in themselves, but the fact that substantial racial inequality persists in American society, and that current inequality is plausibly seen as causally related to past injustice. Hence we arguably have a case of what Jeff Spinner-Halev (2007) has called an "enduring injustice," one that persists through time rather than being an isolated event in the distant past. The failure to compensate an historic wrong may constitute an ongoing wrong, one that is perpetrated upon each new generation that feels its effects (Boxill 2003). Indeed, many advocates of reparations to African Americans urge that proponents focus on the wrongs that are of more recent vintage, rather than slavery (see, for example, Bittker 1973). With this focus, there is no nonidentity problem, since some living individuals could claim compensation for harm that they themselves have suffered.

While I think that many of the arguments against black reparations canvassed above are overstated and can be overcome (see Valls 1999), the argument that I wish to make attempts to sidestep them entirely. I wish to make a version of the enduring injustice argument for black reparations, one that begins within living memory—the middle decades of the twentieth century. The argument avoids or at least mitigates the

non-identity, epistemological and "supersession" objections. I argue that the claimants are living individuals or their immediate (not distant) descendants, and the liability for payment rests with the federal government because of its complicity in—indeed, its active promotion of—policies that shape present-day racial inequality. And since I do not advocate payments to individuals, but rather public policies aimed at diminishing racial inequality, precise knowledge of the effects of past discrimination on present-day individuals is not required. What we need to know, and what we do know, is that past policies have led to severe racial inequality in the aggregate. We are entitled to use Nozickian rules of thumb to target those are reasonably seen as suffering today the effects of past injustices. Or so I will argue.

A New Deal—For Whites

To reframe the issue of black reparations in a more helpful light, we need only review a number of well-established facts about racial inequality in the twentieth century. Thanks to the work of historians, we now know a great deal about the way in which explicit policy at the federal level served to reinforce, perpetuate, and indeed exacerbate racial inequality during the New Deal, immediately after World War II, and during the subsequent decades. These policies, and their effects, which can be traced to today, are a more sound foundation on which to build the case for reparations.

When one examines the development of the welfare state in the United States, it is impossible to avoid the conclusion that it was decisively shaped by race—arguably to the detriment of all, but certainly to the detriment of African Americans. As we will see in a

moment, several patterns emerge across policy areas and across the pieces of legislation that help constitute the welfare state, each of which contributed to disadvantaging African Americans. First, many programs that were adopted during the New Deal involved federal funding, but also state or local control, and often federal oversight of state and local entities implementing the policy was poor. This was often by design. Many members of Congress, especially Southerners but not only them, wished to protect their states from an overbearing federal government. The intended (at least on the part of some actors) result was that local administrators used their discretion to discriminate against African Americans, thus denying them many of the benefits of the New Deal.

Second, as the federal government became more deeply intertwined in the "private" market, the net effect was often to give official recognition to, and to codify, prejudice and discrimination. Since Jim Crow practices and racial attitudes were so deeply entrenched, the federal government often had to accommodate itself to them in order to accomplish any New Deal legislation. In doing so, however, it often gave recognition and sanction to those very practices. In many cases, what had been "merely" private racism occurring in the marketplace, came to have the force of federal law. It made the racism of the period official, federal policy.

Third, by doing so, the federal government set the tone for the nation, further entrenching Jim Crow. That is, it not only made previously private discrimination public policy, but it also positively encouraged more discrimination by private actors. The way in which private and governmental entities encouraged each other in their racial discrimination constitutes what Massey and Denton (1993, 57) have called, in the context

of housing and lending, an "unholy marriage" that strengthened Jim Crow segregation and the many forms of discrimination that African Americans faced.

Perhaps the best known policy area in which African Americans faced segregation and discrimination during Jim Crow was education. But until the late 1950s and 1960s, education continued to be mostly a local matter with little direct federal involvement (Pulliam 1982, 137-41). In permitting states and localities to segregate public school students on the basis of race, the federal government certainly committed a grave wrong. And it is a wrong that Boris Bittker (1973) has argued could be the legal basis for the case for black reparations. Yet the wrong committed by the federal government in this area was largely a wrong of omission: it failed to protect the basic human and constitutional rights of African American citizens. The federal government, however, was much more actively involved in promoting and sustaining Jim Crow in other policy areas, where its wrongs are ones of commission. Relying on the work of historians and others, I wish to briefly summarize these wrongs in three specific policy domains: housing and lending, employment, and social security.

Federal involvement in housing and lending discrimination has been described by other theorists and philosophers (see McCarthy 2004; Kaplan and Valls 2007), so here I wish only to briefly touch upon the essentials. With the creation of the Home Owners Loan Corporation in 1933 (and then the Federal Housing Authority in 1934) and later in the GI Bill, the federal government got into the business of promoting home ownership. By insuring home mortgages, and, later, by actually buying those mortgages from banks, it fostered the housing boom that was so essential to creating the post-war American middle class. The government became deeply involved in the housing market by, for

example, establishing national standards for home appraisals. The FHA's policies favored new construction and detached homes, so it was important to the suburban housing boom after World War II. By promoting suburbanization, however, it at the same time drained urban centers of middle class residents by luring them to the suburbs with more favorable loan terms than they could receive on much of the older housing stock in the city. The appraisal standards introduced redlining, the practice of not insuring mortgages in certain residential areas—often those neighborhoods dominated by African Americans. Indeed, the presence of any African Americans was enough to lower the rating of a neighborhood, and the FHA Underwriting manual infamously direct that "If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes" (quoted in Jackson 1985, 209). The FHA also actively promoted the use of racially restrictive covenants and thus, according to Kenneth Jackson, "embraced the discriminatory attitudes of the marketplace. Previously, prejudices were personalized and individualized; FHA exhorted segregation and enshrined it as public policy... The lasting damage done by the national government was that it put its seal of approval on ethnic and racial discrimination and developed policies which had the result of the practical abandonment of large sections of older, industrial cities" (Jackson 1985, 213, 217).

Massey and Denton reach similar conclusions. They write: "the distinguishing feature of racial segregation in the postwar era is the direct role that government played not only in maintaining the color line but in strengthening the walls of the ghetto... What was new about the postwar era was the extent to which the federal government became involved in perpetuating racial segregation... It lent the power, prestige, and support of

the federal government to the systematic practice of racial discrimination in housing" (1993, 42, 51, 52). More recently, John Kimble (2007) has shown that the FHA's commitment to segregation was even deeper than some researchers had thought. He shows that the FHA viewed racial integration as a "serious evil" and segregation as a social good. Its documents use terms such as "invasion" and "infiltration" to characterize African Americans moving into previously all-white areas, thus "cast[ing] African Americans in the role of enemy combatants" (2007, 408). Even after the Supreme Court declared racially restrictive covenants unconstitutional in 1948, the FHA continued to promote them. It changed the language in its manuals to avoid explicit reference to race, but the policies continued to promote racial segregation through more coded language.

With regard to employment, the first thing to note is that the federal government is itself a major employer. As Desmond King has shown, during the middle decades of the twentieth century the federal government "used its power to impose a pattern of segregated race relations among its employees" and thereby set the norm for the entire country (2007, 4). King documents that, beginning in the Wilson administration, the federal government segregated its employees based on race, and engaged in systematic discrimination against African Americans, usually relegating them to more menial jobs (2007, chaps. 2-3). During World War II, it did hire blacks into more skilled positions due to a lack of manpower, but after the war many were fired to make room for whites. On King's account, "[s]egregation in Federal departments began to be tackled resolutely [only] in the 1960s, though instances of its persistence remained" (2007, 107).

But of course it was not only in its capacity as an employer that the federal government contributed to disadvantaging African Americans in employment during this

period. New Deal legislation played an even more important role. In 1933 the United States Employment Service was created, which matched employers with employees. Like many other federal programs, this one was supported by federal funds, but administered at the state and local level. As a result, blacks were consistently matched with menial jobs and USES policies explicitly deferred to employers' discriminatory practices (King 2007, 182). Other New Deal programs, such as the Civilian Conservation Corps also tolerated the denial of benefits to blacks (Harris 1982, 102).

The National Recovery Act, passed in 1933, and then the National Labor Relations Act (also known as the Wagner Act), passed in 1935, had an even greater impact, because these acts regulated labor relations for large portions of the economy. The National Recovery Act established minimum wages and maximum hours for every industry, and these varied not only by industry but also by region of the country. But the act did not regulate agricultural or domestic sectors, where seventy percent of African Americans worked (Hill 1977, 97). In the sectors that it did regulate, the act established lower wages in the South, but even these wages were sometimes considered "too high" for "Negroes." So in many cases African Americans were fired in favor of whites who, in the context of the Great Depression, were willing to work for "Negro wages." Among African Americans, the National Recovery Act was often known as the Negro Removal Act or the Negro Run-Around (Moreno 2006, 166). In other cases, blacks and whites did similar work, but blacks' positions were classified in categories that permitted them to be paid lower wages (Moreno 2006, 166). Hence one effect of the act was that "it merely legalized for all American industry the pattern of racial discrimination that had long been the practice of Southern employers... In acquiescing to the wage differential, the New

Deal placed the government's stamp of approval on the principle of Negro inferiority" (Foner 1974, 200-01).

Even more important was the way in which the federal government interacted with unions under these acts. One effect of these acts was to strengthen unions, but in doing so they also supported, and gave federal support to, unions' racist practices. Many unions did not admit blacks, and those that did often relegated them to unskilled and low-paying positions. A provision in the Wagner act that would have denied federal protection to racist unions was rejected by Congress (Harris 1982, 110; Jones 1998, 343; Moreno 2006, 172). The racial implications of federal support of unions was not lost on observers at the time—especially black leaders. The NAACP clearly saw the danger: "It is needless to point out the fact that thousands of Negro workers are barred from membership in American labor unions and, therefore, that if the closed shop is legalized by this act Negro workers will be absolutely shut out of employment" (quoted in Moreno 2006, 172). When the Taft-Hartley Act was passed in 1947, outlawing closed shops and weakening federal support for unions in other ways, it arguably helped African Americans (Moreno 2006, 212). After the passage of the act, many states, especially in the South, passed "right-to-work laws," which actually benefitted some African Americans by making previously all-union jobs available to them, albeit usually at lower wages.

The main effort by the federal government to combat racial discrimination during this period was the Fair Employment Practice Committee, which was established by executive order in 1941. The order was issued as part of a deal with A. Philip Randolph, the head of the Brotherhood of Sleeping Car Porters, in exchange for him canceling his

proposed march on Washington to protest racial discrimination in defense industries. The executive order prohibited discrimination by defense contractors and the FEPC was charged with monitoring and enforcing this. While the FEPC did modestly improve the situation of black workers in this industry, its effect was weakened by its poor funding and lack of genuine enforcement powers (Harris 1982; 117; Jones 1998, 351). In any case, the FEPC was disbanded in 1946.

The 1950s saw modest improvements in black employment, but the federal government's role in supporting this trend was limited. There were executive orders banning racial discrimination by federal contractors after 1951, but these were even weaker than the FEPC (Moreno 2006, 238-39). Federal courts played a role by requiring that unions engage in fair representation, but the National Labor Relations Board did not hold racial discrimination to be an unfair labor practice until 1962 (Moreno 2006, 239).

On the whole, then, employment legislation passed during the New Deal was at best a mixed blessing for African American workers. New Deal legislation failed to protect them and in many cases made their lot worse. As one scholar concludes, the failure of the federal government to insist on equal treatment in federal employment programs "established a new degree of government complicity in economic racial discrimination... [The New Deal provided] legal protections and benefits to white workers and [made] black workers more vulnerable to job discrimination... [Under New Deal legislation] informal discriminatory practices became structured and legally sanctioned" (Hill 1977, 98, 97, 100n).

Perhaps the single greatest and most lasting legislative achievement of the New Deal was the Social Security Act of 1935. The act established three main programs: Old

Age Insurance (what we now commonly call "social security"), Aid to Dependent Children, and Unemployment Insurance. As a number of scholars have pointed out (see Brown 1999; Lieberman 1998; Neubeck and Cazenave 2001; Poole 2006; Skocpol 1995), each of these programs discriminated against African Americans and denied them benefits extended to whites, but in different ways. The result was what Brown (1999) calls "truncated universalism," where the ostensibly universal benefits of the programs in fact were channeled to certain groups and away from others. Though there is no explicitly racial language in the act, its policies were nevertheless "race-laden" (Lieberman 1998), where the specific compromises that shaped the act were driven by concerns that blacks benefit from it as little as possible. Furthermore, the act created the distinction, still operating in American social policy today, between earned benefits (in the case of Old Age Insurance) that go disproportionately to whites and unearned benefits (in the case of Aid to Dependent Children) that go disproportionately to blacks, hence bolstering whites' sense of entitlement to certain benefits, while stigmatizing blacks (Brown 1999).

Old Age insurance was the only truly national program of the three. It was administered by the federal government, and hence was not subject to the vagaries of state and local administration. The main mechanism of racial exclusion turned on the occupations to which the benefits applied: OAI excluded the agricultural and domestic sectors, where, as we have already noted, most African Americans worked. Hence the most universal of the three programs, and the one to which the least stigma was attached because the benefits were earned through employee and employer contributions, by design disproportionately benefited white workers and excluded most blacks. This was

changed only in 1954, when the act was amended to include agricultural and domestic workers, but as Theda Skocpol points out, this means that many African Americans missed out on twenty years of building benefits: "such service and agricultural employees had already (compared to most other workers) lost many years of building eligibility for generous retirement pensions... Thus African Americans have received less even from this relatively universal part of U.S. social provision than have whites" (1995, 143).

In the case of Aid to Dependent Children, it was clear that, as a means-tested program designed to benefit the poor, African Americans would be overrepresented among those who would be eligible. So other mechanisms of exclusion had to be found—and they were, in the form of local administration of this federally-funded program (Lieberman 1998, 48-56). In the context of Jim Crow, local administration virtually assured that African Americans would not receive benefits to which they were entitled. This implication was not lost on actors at the time, as evidenced by the fact that a provision in the bill banning racial discrimination in ADC was removed (Neubeck and Cazenave 2001, 47). Indeed, states were granted wide discretion in setting eligibility requirements for ADC, and some states adopted provisions that limited assistance to "suitable homes" and that recipients could not refuse "suitable work," which, in the case of African American women, implied menial, domestic labor. And sure enough, data indicate that blacks were underrepresented among recipients of benefits (Neubeck and Cazenave 2001).

Robert Lieberman (1998) depicts Unemployment Insurance as a hybrid of the national model exemplified by OAI and the "parochial" model of ADC. It was federally funded and had more uniform standards than ADC, yet it was to be state-administered,

with some scope for variation in policy from one state to another. More important, however, is that, like OAI, domestic and agricultural workers were not included, and this was not changed until 1976. Furthermore, the system that was adopted, where only the previously employed were eligible for benefits, involved the explicit rejection of the alternative of universal unemployment insurance. The upshot was that only those employed for a period of time, and only in certain occupations, would be eligible for benefits. Not surprisingly, race closely tracks those eligible and those ineligible for benefits. African Americans tended to be in sectors excluded from the program, were more likely to be unemployed, and for longer. Hence, they were less likely to be eligible for benefits and more likely to exhaust them if they did become unemployed. In failing to be a truly universal program, Unemployment Insurance "ignore[d] the most serious problems of employment and unemployment for African-Americans" (Lieberman 1998, 178).

As I have emphasized, none of the racial implications of the policies were accidental. They were fully foreseen, and in the case of many actors, fully intended. As the NAACP noted about the New Deal, "from a Negro's point of view it look[ed] like a sieve with holes just big enough for the majority of Negroes to fall through" (quoted in Skocpol 1995, 142). And so it was. From the advent of the New Deal through the 1950s, and even into the 1960s and '70s, federal social policy continued to bear the marks of the Jim Crow context in which the New Deal was originally conceived. The New Deal was, then, a good deal for whites, and, usually, a raw deal for blacks. If you were black in the middle of the twentieth century in the United States, you were much less likely to benefit from the American welfare state, either because you were more likely to be in the

"wrong" occupation, more likely to be unemployed, less likely to have accrued social security benefits for retirement, less likely to be able to buy a home, and therefore less likely to benefit from the wealth-generating advantages of home ownership. While in the popular imagination it is blacks to tend to be on welfare, the fact is that during this period, and beyond, it was disproportionately whites who were on welfare, through all of the federal benefits that they received.

The Reparations Debate During the Civil Rights Era

The history just reviewed suggests that a strong case for black reparations could be made for any African American living during the civil rights era. For almost any African American individual living in, say, 1960, 1965, or 1970, he or she would have been harmed by at least one, and probably more, of the policies we have considered. S/He would most likely have attended a segregated public school; would be less likely to own a home, and if s/he did own a home, probably purchased it on less favorable terms and the value of that home would probably have been depressed due to federal policies such as redlining; if old enough to have worked in the 1930s and '40s, s/he would have likely built up fewer social security benefits due to the racially-motivated exclusion of certain occupations from coverage; would have been less likely to receive benefits from Aid to Dependent Children than similarly situated whites; would have faced discrimination in employment, including employment with the federal government.

In retrospect, then, justice clearly required African Americans to be compensated for the wrongs they had suffered that had led to their relatively deprived and

disadvantaged circumstances. The case for black reparations, understood as a set of policies designed to compensate African Americans for the material disadvantages that they suffered as a result of past segregation and discrimination, would have been overwhelming during the civil rights era. There would have been no question but that African Americans had been denied access to benefits on an equal basis. There was no difficulty, therefore, in identifying the victims or the harm. The non-identity issue would not have arisen, since during the civil rights era, in the immediate aftermath of Jim Crow, the violations had been committed against living individuals. There would be no need for recourse to an inheritance argument, and the counterfactuals would not have been particularly problematic, either. In addition, it is clear that the federal government was a primary perpetrator of the violations of African Americans' rights. It is of course true that much discrimination took place in the private sector, but the discrimination perpetrated by the federal government was so pervasive, and its complicity in even private discrimination so obvious, that there is little room to deny federal liability.

And indeed, as Stephen Steinberg (1995, 109-13) points out, there was a lively debate during the civil rights era over the issue of compensating African Americans. As we will see, however, this debate, while at times quite substantive and even sophisticated, also suffered from a number of liabilities. At times the issue of black reparations was equated with the issue of affirmative action—which, while potentially a part of a black reparations program raises distinctive problems that other aspects of black reparations do not. Arguments for compensation to African Americans were also merged with arguments for more general redistributive programs such as the Great Society agenda and the War on Poverty. Finally, and most surprising, much of the debate focused on slavery

and therefore foundered on the epistemological and non-identity issues that, I have just suggested, attention to more recent history successfully avoids.

That the federal government should take positive measures to compensate African Americans for the material inequalities that resulted from past discrimination was an idea defended by many, not the least of whom was President Lyndon Johnson himself. In his speech at Howard University in June 1965, Johnson famously said, "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to a starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair" (Johnson 1967, 126). Johnson's speech, and this passage in particular, has often been interpreted as an endorsement of affirmative action, but there is little warrant for this interpretation. Later in the speech Johnson briefly lays out a policy program grounded on his observation that African Americans continued to be disadvantaged in American society. The program included jobs (with no mention of preferential treatment in hiring; the emphasis is instead on creating jobs), housing, reformed welfare and social policies, and health care (1967, 130-31). Indeed, Johnson does not even state that any such policies would be explicitly race-conscious; rather, the program he briefly describes is essentially his Great Society agenda, so one might fairly ask whether what Johnson endorses in the speech can reasonably be characterized as a program of black reparations.

I believe that it can, if we understand the notion of black reparations in a particular way. I suggest that a policy can be seen as part of a program of black reparations if at least part of its justification is to compensate African Americans for the disadvantages and costs that they bear due to a history of discrimination and oppression.

This can be so even if a policy is administered on a race-blind basis, and if some non-blacks directly benefit. Here I take a position similar to that taken by Robert Nozick on the issue of what constitutes a policy of redistribution. Nozick states that "the term 'redistributive' applies to the types of reasons for an arrangement, rather than to an arrangement itself" (1974, 27). By the same token, a policy that has as one of its principle rationales compensating African Americans should count as (part of a program of) black reparations, even if it is also supported by other reasons and if nonblacks also benefit. I would also add the stipulation that to constitute reparations, a policy must have the intended effect in order to rule out counting as reparations a policy that is enacted for the purpose of redressing the effects of past racial wrongs, but that fails to do so.

This may seem like an overly broad conception of reparations, precisely because it could include many policies that are race-neutral and that benefit many whites. Yet I think that this conception of reparations captures what went on in much of the debate during the civil rights era. Many political actors, perhaps including Johnson, saw the need to go beyond the formal extension of rights to African Americans embodied in the Civil Rights Act of 1964 and the Voting Rights Act of 1965, to the provision of material resources that would compensate for previous discrimination. Yet for political, strategic reasons, the compensatory intent, while acknowledged, had to be combined with other considerations, and the policies themselves, to be politically viable, had to be made formally race-neutral. On my conception of reparations, such policies may still be a part of a reparations program, as long as the compensatory element is one of the main justifications. After all, whether a policy benefits or harms a particular group is not necessarily related to whether it is explicitly group-conscious. As Ira Katznelson details

in his book, When Affirmative Action Was White (2005), and as we saw above in the discussion of New Deal policies, formally race-blind policies can have the devastating, intended effect of disadvantaging African Americans. It would be a mistake to think that policies intended to address the effects of such disadvantage must be explicitly race-conscious, or must benefit only African Americans, to count as reparations.

This move, from focusing on explicitly race-conscious remedies to formally race-neutral ones that nevertheless retain their concern for racial inequality, is exemplified in Martin Luther King, Jr.'s book, Why We Can't Wait (1963). In the final chapter of the book, King clearly endorses the idea of compensation to African Americans, invoking the Marshall Plan and the GI Bill as precedents. He calls for a "massive program [of] compensatory measures" (1963, 127). "Such measures would certainly be less expensive than any computation based on two centuries of unpaid wages and accumulated interest," King wrote, in an obvious reference to slavery (1963, 128). Yet in the next paragraph, King calls for a "Bill of Rights for the Disadvantaged," which would include, he says disadvantaged whites who have also been harmed by racial discrimination that had the effect of lowering overall wages (1963, 128). This move was motivated, according to Taylor Branch, by King's desire that his proposal comport with Johnson's legislative program. "In the final book manuscript," Branch (1998, 211) tells us, "his 'Negro Bill of Rights' became a 'Bill of Rights for the Disadvantaged.'"

The idea of a program to attack accumulated racial inequality had broad support among both blacks and progressive whites during this period. The idea of a domestic Marshall Plan, aimed at black communities and modeled on the U.S. policy to pour resources into the ravaged countries of Western Europe after World War II, was

advanced by Whitney Young, Jr., the executive director of the National Urban League—widely thought of as among the more conservative civil rights organizations (See Young 1963; 1965). This, in turn, was seconded by Tom Wicker of the New York Times, who, citing King's endorsement of the idea, and more specifically his plan to spend \$10 billion a year for the next ten years on the effort, said that it was "Time to Pay the Piper" (Wicker 1966). Indeed, even the mainstream and decidedly moderate group of public figures who made up the Kerner Commission concluded in their report that a concerted national effort, including "unprecedented levels of funding," was needed to address the problems associated with black urban poverty. Although they did not use the language of reparations, they did make it clear that such policies were owed because, as they put it, "white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it" (Report of the National Advisory Commission 1968, 2).

Of course, the idea of compensating African Americans had its critics, too—on both the left and the right. Those on the right generally argued that extending formal equality was sufficient, and to do more to pursue greater material equality went beyond the proper scope of governmental powers and unjustly harmed whites. On the left, some, such as Michael Harrington (1969, 318), argued that to focus on racial inequality was to "divert precious political energies from the actual struggle," which, for Harrington, is the one along class lines. Still, while the idea of compensating did not win universal support, it was certainly mainstream. Indeed, reading interviews, magazine articles, debates, and writings from the period, one cannot help but be struck by a tone of both possibility and

urgency. Many writers convey a sense both that something can be done about racial inequality through concerted government effort, and that something must be done.

What generated more widespread (though not universal) opposition among whites was the idea of "preferential treatment" for African Americans, particularly with regard to hiring. Yet the two issues—reparations on the one hand and what would come to be called affirmative action on the other—were often not adequately distinguished. For example, in a debate between Whitney Young and Lyle Haselden in the New York Times Magazine over compensating blacks for "long years of deprivation," Young details his idea of a domestic Marshall Plan, which includes investment in housing, education, health and welfare, and employment. Only Young's proposals under employment could plausibly be characterized as an endorsement of preferential treatment, yet in his response, Haselden argues against the whole idea of compensation by focusing on the perceived ills of "preference in employment." In the course of his discussion, however, Haselden endorses the idea of a "domestic Point Four" program, a reference to Truman's policy of giving aid to poor countries. So Young and Haselden are talking past one another: while presented as a point/counterpoint debate, they in fact agree on the need for a broad policy to attack poverty in the black community. While they may disagree on "preferential treatment," this disagreement on a subordinate issue (involving as it does one possible mechanism of compensation) is permitted to overwhelm their more considerable areas of agreement (see Young 1963; Haselden 1963).

If the slide from reparations to affirmative action as a remedy was problematic, so too was another common feature of the debate during this period: the assumption that slavery was the source of reparations claims. This assumption was often used by

opponents of reparations, no doubt because placing the focus on slavery raises familiar non-identity, epistemological and other obstacles for a reparations argument. Hence Haselden claims that reparations (which, as noted, he equates with affirmative action) are unjust because they are "a debt owed by the dead. The 20th-century white man is... [not] to blame for the fact that his ancestors bought and held slaves" (1963, 128). Similarly, Bayard Rustin seemed to invoke slavery when he stated that "If my great-grandfather picked cotton for 50 years, then he may deserve some money, but he's dead and gone and nobody owes me anything" (1969). Yet slavery was also often invoked, if implicitly, by proponents of reparations as well. As I have already mentioned, Martin Luther King cited "two centuries of unpaid wages and accumulated interest" in his discussion of compensatory measures (1963, 128). And Arnold Kaufman, in his reply to Michael Harrington's rejection of reparations, also frames the issues as involving the legacies of slavery (1969, 319). As I have suggested, reference to slavery, while certainly not entirely inappropriate, is not necessary for an argument for black reparation in light of the pervasive forms of discrimination perpetrated during the middle decades of the twentieth century. In light of the difficulties that intergenerational arguments raise, it makes sense that opponents would want to frame the issue this way, but proponents had ample basis for their arguments in more recent history.

While there was a lively discussion of black reparations during the civil rights era, within a few years the idea became marginalized and was virtually unheard of for a generation. There are no doubt many reasons for this, including the generally rightward shift of political discourse in subsequent years, but one reason may be that the call for black reparations was taken up by black nationalists who wedded it to notions of

community control and self-determination. The most dramatic example of this is the Black Manifesto, introduced to the public by James Forman when he interrupted the services at Riverside Baptist Church in New York on May 4, 1969, which demanded \$500 million from white churches and synagogues to support black institutions (see Lecky and Wright 1969). Forman's Manifesto gave rise to a debate that turned out to be the last gasp for black reparations during the civil rights era. Among scholars—particularly economists (see America 1972; Browne 1972; Main 1972; Marketti 1972), philosophers (see Bedau 1972; Boxill 1972), and law professors (see Bolner 1968; Collins 1970; Hughes 1968; Bittker 1973)—the discussion persisted for several more years. The high water marks from this period are probably the seminal article by philosopher Bernard Boxill (1972) and the book by law professor Boris Bittker (1973).

So during the civil rights era there was widespread (though of course not universal) recognition of the justice of a program of compensating African Americans for the disadvantages and privations that they suffered as a result of past policies and practices. In light of this, the civil rights era is clearly a missed opportunity. As a result, the inequalities created during the Jim Crow era continued to shape the prospects of African Americans for generations afterward.

[SPP colleagues: the chapter is incomplete, and I need at least one more section to complete the argument. The section to follow will canvas evidence of racial inequality today and its causal connection to past policies. It will argue that the failure to enact policies to combat racial inequality during the civil rights era and immediately afterward has led to the persistence of a large racial gap in well-being. This, too, avoids non-

identity and epistemological problems since in many cases those disadvantaged today are the very individuals who were entitled to compensation in during the civil rights era, but did not receive it (or their immediate, not distant, descendants). I may also write a section that discusses the convergence of reparations claims with more forward-looking, equity-based arguments for policies to address racial inequality. But I hope to have provided enough here to get an interesting conversation going...]

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