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Race Matters

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Book Reviews

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SHOULD RACE MATTER?: UNUSUAL ANSWERS TO THE USUAL QUESTIONS. By David Boonin.[1] Cambridge, Cambridge University Press. 2011. Pp. vii + 441. $99.00 (cloth), $34.99 (paper).

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One frequently hears that America has a race problem. We agree, but the race problem we identify is not what is usually meant by those who invoke it. It is not discrimination, intentional or otherwise, but rather obsession with race that is America's more consequential "race problem" today. America has vanquished slavery, segregation, and long-standing racial discrimination only to succumb to an almost equally destructive race obsession. Despite the biological arbitrariness of dividing a single, interbreeding biological species into "races," despite the sorry history legally and socially of the use of race, and despite the Civil Rights Movement's original ambition to substitute the content of character for the color of skin as the basis of decision making, America today is in many ways as race conscious as it was in the era of Jim Crow.

For that reason we welcome David Boonin's *Should Race Matter?* Boonin takes up five topics that constitute a good portion of the current obsession—reparations, affirmative action, hate speech, hate crimes, and profiling—and he subjects each to philosophical scrutiny. Boonin is sober and fair-minded in tone, and purports to be careful and comprehensive in method. Unlike many discussions of race, Boonin's tries to shed

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light, not heat. He deserves to be read by everyone who takes a serious interest in public policy as it bears on race.

Boonin's book has its limitations, as we will suggest. Moreover, Boonin discusses only race, not sex, ethnicity, nationality, religion, disability, or sexual preference, although most of the policies he considers have been urged or actually extended beyond race to some or all of these other categories. Nonetheless, Boonin's analyses of these policies as they bear on race would have direct implications for these other categories. Given that Boonin takes 350 pages to examine five racial policies, we think limiting his focus to race was quite justifiable.

Although we believe Boonin's is a worthwhile treatment of contemporary racial policies, we take issue with him on several points. We think that his arguments in support of affirmative action and hate crimes are incomplete and thus unpersuasive, and we consider his case for reparations a failure on its own terms. Nonetheless, we admire the effort at fair-mindedness and the care with which he makes the case for these policies.

I. HATE SPEECH

We begin with the topic on which Boonin and we are in full agreement: hate speech. Boonin is opposed to bans on racial "hate speech" because he believes such bans can only be justified by repudiating current free speech doctrines that we would and should be loath to reject. In his exemplary two-chapter discussion of the issue, he canvasses the major rationales that are offered to support bans on racial hate speech and finds them all wanting. In the first chapter on this subject (Chapter Six), Boonin analyzes arguments that try to assimilate racial hate speech to categories of expression that are already deemed unprotected speech by today's constitutional free speech doctrines. Not all racial hate speech is a true threat; and true threats are already prohibited (pp. 210–13). Not every instance of racial hate speech constitutes "fighting words," which are insults rendered face to face and likely to provoke a violent response (pp. 216-17).[4] Racial hate speech cannot be assimilated to the libel of some corporate entity (pp. 217–25), nor is every instance of it a case of actionable harassment (pp. 226–29). In

4. Boonin also expresses reservations about the moral case for banning fighting words: the rationale for banning fighting words extends to legitimate commentary on public policy, and it unjustifiably places the responsibility for altercation on the speaker rather than his audience (pp. 213–16).

sum, a broad ban on racial hate speech could not be justified under current free speech doctrines.

In Chapter Seven, Boonin then considers and rejects justifications for banning racial hate speech as such, rather than as instances of other categories of legally unprotected expression. "Words that wound" is a justification that sweeps in far too much expression that a free society would want to protect (pp. 230–36). Nor can hate speech be properly construed as a "subordinating speech act" (pp. 236–41): either the speaker lacks the authority required to subordinate, or the notion of authority has to be expanded to the point where speech that almost everyone would want to protect would be deemed subordinating. Finally, hate speech cannot be banned on the ground that it "silences" without again sweeping in lots of quite legitimate speech (pp. 241–45).

At the conclusion of Chapter Seven, Boonin asks whether the fact, if it is so, that hate speech wounds, subordinates, *and* silences makes a case for banning it even though each of those harms, individually, would not do so (pp. 245–48). He compares a white student's calling a black student a "nigger" in the presence of other students with a Catholic student's publicly calling another Catholic student a "dangerous heretic" for supporting abortion and gay rights. He concludes that if the first student's speech wounds, subordinates, and silences, the second student's can do so as well. If the second student's speech should be protected—and Boonin believes that it surely should be—then so, too, should the first student's. The "combination" of harms justification for hate speech bans fails.

Depending on the circumstances, the first student's speech might be banned as "fighting words" under well-established constitutional law. But in principle, we are in agreement with Boonin on the issue of hate speech. Arguments for hate speech bans consist of some normative premise (speech with characteristic X should not be protected as free speech) and a factual premise (racial hate speech has characteristic X). In Chapter Six Boonin takes on arguments in which the factual premise fails to hold. In Chapter Seven he takes on arguments in which the normative premise fails. Although racial hate speech is ugly and regrettable, so too is much other speech. The power to cleanse public dialogue of ugly and hurtful speech is a dangerous power that, for reasons Boonin adumbrates, would likely be

used either selectively in a divisive, partisan way, or much too broadly.[5]

II. RACIAL PROFILING

In the final two chapters of the book, Boonin examines the vexed topic of racial profiling. In the book's penultimate chapter he asks whether racial profiling is rational, and he concludes that it can be. In the final chapter he asks whether racial profiling, even if rational, is nonetheless immoral, and he concludes that it is not. With some qualifications regarding the moral question, we believe Boonin is essentially correct in both chapters.

In thinking about the rationality of racial profiling, it is useful to be clear about what profiling is.[6] When we profile or stereotype—these are essentially synonymous—we use a given trait that is relatively easy to identify as a proxy for the trait in which we are ultimately interested. The relation between the proxy trait and the target trait is a probabilistic one. The existence of the proxy trait makes it more likely that the person who possesses it has the target trait than a person picked at random. The rationality of using a given proxy trait depends upon its correlation with the target trait and the relative costs and benefits of using a different proxy or a more refined proxy that has a higher correlation with the target trait. But there is no question but that using proxy traits to predict target traits is

5. It is a shame that Boonin wrote his book prior to the publication of Jeremy Waldron's book on hate speech, a book that has already received considerable scholarly attention. JEREMY WALDRON, THE HARM IN HATE SPEECH (2012); *see also* Brian Leiter, *Book Review* (reviewing WALDRON, THE HARM IN HATE SPEECH), *Notre Dame Philosophical Reviews*, http://ndpr.nd.edu/news/32077-the-harm-in-hate-speech/ (2012)). Waldron supports bans on written but not oral hate speech. The principal harm that Waldron believes supports such a ban is not the offense or hurt felt by its targets, whether from the mere presence of the written words or, more realistically, from the knowledge that there are some among one's fellow citizens who hold the views expressed. Rather, the real harm is the insecurity regarding one's status in society caused by the fear that the visible expression of such views might persuade others to hold them as well.

Although we can only guess at how Boonin would respond to Waldron's argument, he would probably argue that we do and should protect "illiberal speech," speech that takes issue with the fundamental values of liberal society, including equality. Of course, free speech extended to protect illiberal ideas exposes an oft-noted paradox: free speech protects speech that rejects the normative basis of free speech. For an argument against free speech protection for some illiberal speech, see Carl. A. Auerbach, *The Communist Control Acts of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173 (1956). On the paradox more generally, see LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 147–81 (2005).

6. An excellent treatment of this topic is found in FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES (2003).

rational. Indeed, we *must* do it, for we must act on the basis of imperfect information about others all the time. It is not only insurance companies predicting our life expectancy, our health, or our traffic accidents, or political pollsters predicting our likely votes, or sociologists predicting behavior more generally who must rely on proxies. All of us do, all the time. It is inconceivable that we could dispense with proxies, so the rationality of their use is beyond question.

That still leaves open the question of whether the use of race as a proxy is ever rational. Race is, after all, an imprecise characteristic, and its use will require some arbitrary judgments. Nonetheless, despite the arbitrary boundaries of the proxy, in some contexts its use can be quite rational. If one is testing for sickle cell anemia, it makes sense to focus on persons who appear to be descended from the pre-colonial peoples of sub-Saharan Africa, just as if one is testing for Tay-Sachs, it makes sense to focus on Ashkenazi Jews. And even those who purport to object to racial profiling probably take greater precautions for their personal safety when in some neighborhoods rather than others, with the racial or ethnic composition of the neighborhood serving as their proxy for relative dangerousness.

Of course, if there are more predictive proxies available at a low enough cost to obtain—or if, again at a cost-benefit justified cost to obtain, there are ways to refine the proxy by combining it with other traits—then race will cease to be the most rational proxy for its purpose. A neighborhood's ethnic makeup might be less predictive of danger than its wealth or poverty. Or its economics combined with its racial makeup may be more predictive than either proxy by itself.

Boonin's focus is on a paradigmatic use of racial profiling: the decision by the police to stop, among drivers who are violating traffic laws, a disproportionate number of black offenders on the ground that they are more likely than the average offender to be committing drug or weapons offenses. If it is true that they are more likely than average to be committing these offenses, and given the finite resources of the police, then Boonin concludes that this type of racial profiling is rational.

Boonin first considers some arguments that contest the claim that black drivers are more likely to be committing drug or weapons offenses, and he finds them to be unsound (pp. 308–19). Boonin then considers some arguments against such profiling's rationality that do not rest on the denial that black drivers are

more likely than others to be committing drug or weapons offenses. One such argument, the "elasticity" argument, posits that profiling blacks will lead to an increase in crime by whites, so that there will be no net decrease in crime or increase in the percentage of criminals caught offending (pp. 319–23). (This is why rational profilers, like El Al's security agents, do not publicize the profiles they employ.) Another such argument is that racial profiling will not be implemented rationally and will be used when proxies more predictive than race or race alone are available (pp. 323–25).

Boonin believes, and we agree, that the "elasticity" and "over use" objections are cogent and may render many instances of racial profiling irrational. Nonetheless, he concludes, correctly, that racial profiling can sometimes be rational (pp. 325–26).

Boonin's last chapter examines racial profiling's morality given its rationality. Boonin concludes that even though racial profiling burdens the proxy group—in this case, black drivers—more than others, it is not for this reason immoral. Boonin points out that if racial profiling is rational, it will yield more arrests for serious offenses per drivers stopped than would random stops. It does so at the cost of disproportionately burdening black drivers, most of whom will be innocent. But that fact will not render the profiling immoral.

Boonin's defense of the morality of the disproportionate racial burden consists of an argument by analogy (pp. 342–47). He asks us to imagine a city that is 75% white and 25% black. He then imagines that there is a pipe leak that will require shutting down one or the other of two streets. On one street live 100 people, 50 white and 50 black. On the other street live 120 people, 90 white and 30 black. He argues that everyone would (and should) agree that it would be proper to shut down the less populated street, even though doing so will disproportionately burden blacks. Or, again in the same city, suppose there is an incident of rioting and looting, and two vans are fleeing the scene, one with three whites and one black, the other three whites and three blacks, and the police can only pursue one of the vans. Boonin asserts that everyone would (and should) agree that it would be proper to pursue the van with more looters in it, even if it includes a disproportionate number of blacks.

In principle, we agree with Boonin about the morality of racial profiling. We think, however, that Boonin's discussion of

its morality, as opposed to its rationality, is incomplete. First, Boonin should have distinguished the use of race to predict *voluntary conduct* from its use to predict some matter beyond voluntary control. People have a different reaction when they are disadvantaged by a prediction of their voluntary conduct from their reaction when they are disadvantaged by a prediction of some natural event over which they lack control. To tell a male that he is paying a higher life insurance premium than a comparable female because males do not live as long on average will elicit a shrug of the shoulders. To tell a female that she is not getting the job despite otherwise having credentials slightly better than her male competitor because women are on average much more likely to quit at an early age in order to have children will likely elicit outrage. "I can control whether I quit," she will rightly say, "and if I say I won't, I won't." The employer may respond that his statistics are predictive even for women who at the time they are hired insist they won't quit. Yet that will not likely stanch the woman's sense that she has been deemed "guilty by association" because of the conduct of other women, conduct that she feels confident she won't emulate.

Disadvantaging predictions based on sociological generalizations—i.e., profiles, stereotypes—have a different feel and elicit a different reaction from those based on the natural sciences, the truths of which are not hostage to our choices. This is not to deny that sociological predictions can be quite accurate. Political polling is now quite good at predicting election outcomes, and the National Safety Council is uncannily accurate in predicting traffic deaths on holiday weekends.

Racial profiling is based on sociological generalizations, not natural scientific ones, which at least partly explains the negative reactions it provokes. This is not to deny its legitimacy in some situations, especially if, unlike the denial of a job, it results in only a temporary intrusion on the innocent. Nonetheless, we wish Boonin would have discussed this specific aspect of racial profiling in his discussion of its morality. For in the absence of that discussion, his case for its morality will seem to many to be incomplete.[7]

7. For a discussion of the use of sociological predictions in the context of antidiscrimination norms, see Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 168–73 (1992).

There is yet another aspect of the moral case for profiling that merits discussion. Finite resources will often require selectivity in investigating criminal or terrorist activity. The criteria for selection will mean that some innocents will be burdened and thus sacrificed to some degree for the benefit of everyone else. In this respect, it makes no difference whether the criteria for selectivity are racial, ethnic, religious, or even completely random.[8]

Finally, racial profiling is often yoked to other practices that make profiling even more problematic than it would be in isolation. Boonin's paradigm of racial profiling is the decision by the police to stop, among drivers who are violating traffic laws, a disproportionate number of black offenders on the ground that they are more likely than the average traffic offender to be committing drug or weapons offenses. But if the traffic laws "on the books" are almost never enforced as written, then the police already exercise essentially unlimited discretion about whom to stop, and indeed about whom to charge with a violation. Posted speed limits, at least in many states, are an example. This alone has corrosive implications for the idea of the rule of law. If virtually unbounded police discretion is linked to racial profiling, it is almost inevitable that disproportionately targeted groups will feel that they are the object of unjust racial discrimination in law enforcement.[9]

In the abstract, we think the moral case for racial profiling might be no weaker than it is for random stops or interrogations. The historical baggage of racial discrimination and harassment makes many Americans especially wary of racial profiling, however, and understandably so. We favor a presumption against racial profiling, but a presumption which could be overridden for sufficient practical reasons, depending on the circumstances. We are also open to the idea that the moral case for investigatory intrusions, whether based on profiles or at

8. Ex post, those investigated will always have had a 100% chance of being investigated, even if they were selected based on drawing numbers from a hat. For example, assume ten numbers drawn from 100 numbers in a hat represent the traffic stops that will result in a search for drugs and weapons, or the specific passengers going through airport security who will be subjected to interrogation. It makes no difference whether those numbers are drawn at the time of the stops or were drawn hours, days, or years before. In either case, if, say, 23 is the number for a stop with a search, then driver or traveler 23 had a 100% chance of suffering the extra burden, whether he or anyone else knew that ahead of time.

9. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) for exceptionally thoughtful, well-informed, and troubling reflections on this and related matters.

random, might be strengthened if those burdened and who are innocent of the activities that are the target were given a small token of gratitude for bearing a burden for the benefit of the public—perhaps a voucher of some kind depending on how intrusive or burdensome the investigation. Indeed, in Boonin's example of a street closure, regardless of the racial makeup of the street closed, it would seem only fair for those on the streets left open to contribute something to those on the street that is closed.

III. HATE CRIMES

In contrast to his positions on hate speech and profiling, Boonin finds nothing problematic about hate crimes—ordinary crimes, the punishment for which is increased if committed because of race, sex, religion, and so forth. Although such hate crime enhancements may be morally justifiable, we do not believe Boonin's arguments are sufficient to make that case.

We begin with those points on which we agree with Boonin. We agree with him that, however drawn, the distinction between intention and motive is immaterial in assessing a criminal's desert (pp. 258–73). Moreover, we agree that a criminal's negative desert can be increased both by the harms he believes his act may cause and by his reasons for acting.[10]

Boonin believes that hate crime enhancements are justifiable because hate crimes can both cause more harm and also reflect more culpable motivation than the underlying crime

10. Specifically, we believe criminal desert is a function of culpability, and culpability is a function of (1) the perceived risks of various harms and (2) the reasons for imposing those risks. With respect to (1), the greater the harm and the greater the perceived risk of its occurring, the greater the actor's culpability. With respect to (2), a distinction should be made between justifying reasons and motivating reasons. Justifying reasons are facts the actor believes exist, discounted by his perception of their probability, that would justify his imposing the risk of harm he believes his act will impose. If those facts, discounted by their probability, justify the risk of harm, then the actor's act is not culpable, *even if he is not motivated by the justifying facts*. If, for example, the actor believes turning the trolley will save the lives of five trapped workers but likely kill one trapped worker on the siding, his turning the trolley will be morally permissible and thus nonculpable *even if he is not motivated by saving the five and is motivated only by his desire to kill the one*. On the other hand, if his imposing the risk is *not* justifiable in light of the justifying facts he believes exist, then his motivating reasons can render it more or less culpable. A person who drives at high speed through a school zone will, in the absence of special circumstances, be acting culpably. But his culpability will be lower if he is merely impatient but hopes not to injure anyone than if he is speeding with the hope of injuring or killing children. On these points, see LARRY ALEXANDER , ET AL., CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 23–65 (2009).

itself (pp. 274–83). We find Boonin's arguments in support of these claims unpersuasive.

Hate crime laws can be of different types. One type focuses on the criterion by which the defendant chose his victim. Did he, for example, choose a black victim in whole or in part because he was black? Another type focuses not on the criterion of selection but on the underlying reason for the selection, such as a belief that blacks are not due equal concern, or a visceral dislike of blacks.

Boonin focuses on the first type, the criterion of selection form of hate crime. He thinks that such a crime—say, a murder in which the victim was selected because he was black—can be more harmful than an "ordinary" murder because it can create greater fear (pp. 280–81). But on that criterion, is it true?

Does a serial killer who kills only blacks cause more harm than a serial killer whose victims are chosen at random and are of all races? It is difficult to see why that would be the case. A serial killer on the loose whose victims could be anyone would presumably cause fear throughout the entire community, whereas one whose victims were only of one race would cause fear only in a racial sub-community. Moreover, a serial killer who targets groups with large populations—e.g., whites, or anyone regardless of race—might, by the logic of quantum of fear caused, be committing more serious crimes than one who targets smaller groups—e.g., blacks—or very small ones, such as the Roma.

Most hate crime statutes, moreover, include sex as one of the enhancing categories. Does a heterosexual rapist, who rapes only women, cause more harm or create more fear than a bisexual rapist, who rapes both men and women? What would be the argument that he does? In practice, if sex is an enhancing category, virtually all rapes or sexual assaults could be categorized as "hate crimes." It is far from clear that such an across-the-board enhancement of existing penalties would really be desirable on this basis.

Of course, pointing out the implications of hate crime enhancements based on the quantum of fear caused is not to deny that secondary harms, such as fear, that the defendant realizes he might be causing, might affect the level of his culpability. But it does suggest that if fear is their rationale, hate crime statutes are woefully underinclusive. Suppose there are more blondes or more lawyers than there are members of some

racial groups. A killer who targets blondes or lawyers will presumably then be worse than a killer who targets, say, Roma. But hate crime statutes do not make victims' hair color or occupation a basis for punishment enhancement.

The amount of harm risked is but one part of the culpability calculus. The other is the reason for which the actor imposes that risk—his motive for doing so. As we said, we agree with Boonin that there is no relevant distinction to be drawn in terms of culpability between the actor's intention and his motive. We also believe, with Boonin, that motivating reasons affect culpability. The killer who kills out of hatred for the victim and the killer who kills out of mercy for the victim both intentionally kill their victims, but the former is surely more culpable than the latter. Finally, we agree with Boonin in rejecting Heidi Hurd's argument that basing punishment on motives punishes character, which is not under one's voluntary control, rather than choice (pp. 284–87). As Boonin quite rightly responds, although we cannot, at the time of action, choose the reasons for which we act, we can nevertheless choose *whether*, given those reasons, we act or refrain from acting. Punishment based on the defendant's reasons is not punishment for an involuntary status.

So we are with Boonin to this point with respect to the legitimacy of varying punishment based on the defendant's reasons for acting. The question for the hate crime proponent, however, is whether killing because of racial animosity is really worse than the myriad other reasons that might motivate a killer. How about killing people because they are ugly or stupid? How about killings based on thoroughgoing misanthropy? We can think of all sorts of reasons for committing crimes that might be as bad as or even worse than racial animosity or those other specific forms of animosity that hate crime statutes pick out.

Boonin acknowledges the underinclusiveness charge. His response to it is that "[w]hat matters is that a crime committed from a racially biased mental state is a worse crime than one that isn't but *that resembles the first crime in all other respects*" (p. 282, emphasis added). The problem, however, is that when we remove the racially biased mental state, we have to substitute for it some other reason why the defendant committed the crime. We cannot just compare the hate crime to an objectively similar crime committed for no reason whatsoever. Every crime will be motivated by some reason. Some will be less heinous than racial bias, others might be more heinous. The latter "resemble" the

hate crime as much as the former. The underinclusiveness charge still stands.

Indeed, whether harm-based or motive-based, the categories covered by hate crimes seem quite underinclusive. One might therefore conclude that hate crime laws are better explained by political pressures than by careful consideration of which crimes are the most harmful or which reasons are the most heinous. Boonin's treatment of hate crimes is good insofar as he refutes some bad arguments against hate crimes. However, his arguments are inadequate to persuade anyone wary of enhanced prosecution and punishment that might depend on the political clout of the group to which the victim belongs.

IV. AFFIRMATIVE ACTION

Boonin argues that racial preferences in education and employment are neither morally required (Chapter Three) nor morally forbidden (Chapter Four). We are convinced of the former but find Boonin's defense of the latter deficient in two major respects.

Boonin defends the permissibility of racial preferences essentially by contesting the notion that there is some morally mandatory goal that universities and employers must pursue and that racial preferences thwart. Universities can, for example, accept some reduction in academic quality in order to have winning sports teams (athletic preferences) or loyal alumni (legacy preferences). Nor must employers pursue efficiency at the expense of other goals. Therefore, even if racial preferences disserve one goal of universities or of employers, they may still serve other legitimate goals. And if racial preferences serve legitimate goals, then those who are dispreferred by their use have no rights that are thereby violated. Hence racial preferences are morally permissible.

One problem with this argument is that the civil rights movement had as its target a racial preference system—one that favored whites over blacks. If that system was morally illegitimate, why is a racial preference system favoring other groups any better?

Boonin attempts to deal with this objection (pp. 191–94), but he dismisses it much too quickly. He denies that current racial preference systems are ill-motivated, unlike those of the Jim Crow past (p. 193); and he denies that those victimized by present racial preferences are in the same circumstances as

blacks victimized by preferences for whites (p. 194). The latter point leads naturally to the topic of reparations, which we will address in the next section. So we put it aside and deal solely with the motivational point—that is, that racial preferences today are well-motivated.

Let us assume that increasing "diversity," providing role models, and the other non-reparative rationales offered by defenders of racial preferences are sincere and morally permissible. These rationales would also support preferences for whites whenever whites were underrepresented and in need of role models (NBA basketball?), as Boonin concedes (p. 194).

But if diversity in the student body or workforce is sometimes a good thing, might homogeneity also sometimes be a good thing? ("I hire only white workers here because white workers are more comfortable around other white workers, and much less afraid of inadvertently causing offense.") If so, would a "whites only" policy be morally permissible if motivated, not by ill will or racial hostility, but by the (perhaps plausible) benefits of homogeneity? The 1964 Civil Rights Act would surely forbid such a policy, but the policy could be morally permissible even if illegal.

Boonin points out, correctly, that there is nothing objectionable about preferring a black for, say, the role of Othello or for going undercover to infiltrate a black criminal gang (pp. 181–84). By the same token, he presumably would not object to preferring whites to play Simon Legree or to infiltrate the Klan. The implications of Boonin's argument go beyond these cases, however, where one's (apparent) race makes one either suitable or unsuitable for the job at hand. Given what Boonin says about affirmative action in universities, he would have to concede the moral permissibility of racial preferences that disserve any legitimate goal so long as they serve another. Thus, if the military believed too few whites were going into the armed forces because of, say, the absence of sufficient role models, Boonin would have to conclude that the military would be justified in preferring white applicants to otherwise better qualified black ones.

In a world that did not have our racial history, Boonin's argument might be both correct and unremarkable. Race, however difficult to define, may in some instances be a good proxy for traits that serve legitimate secondary and tertiary goals of institutions. It may even sometimes be a good proxy for traits

that serve the institution's primary goals. But is race a good proxy here and now, given our racial history?

We agreed with Boonin that race might be sometimes be used to profile suspected criminals. For what hangs in the balance for those who are profiled but are innocent is the inconvenience, irritation, and potential embarrassment or humiliation of a temporary interrogation, for which we suggested they should perhaps be compensated. When it comes to denials of jobs or admission to universities, however, the stakes are much higher, compensation is out of the question,[11] and the role that race plays is more overt and corrosive.

Affirmative action preferences have become institutionalized in various settings, but perhaps in none so extensively—and so much as a matter of institutional credo—as in higher education. Boonin's defense of affirmative action is consequentialist and moral. If a policy is harmful on balance, therefore, its moral standing is compromised if not refuted, especially if those engaged in affirmative action are public institutions using taxpayers' dollars. Taking higher education as a prominent example, then, and considering affirmative action as it is actually carried out at American colleges and universities, it seems to us that the consequentialist scorecard is considerably less encouraging than Boonin suggests.[12]

What are the benefits and costs of affirmative action? Some students who are admitted (and some faculty members who are hired) on an affirmative action basis are surely benefitted: in the case of students, young people who would not have attended an elite university but for racial preference, yet having been admitted, go on to achieve success in school and beyond. There is evidence, however, that many students who are "beneficiaries" of affirmative action suffer significantly—both educationally and in other ways—from institutional mismatch: having been admitted with notably lesser qualifications than other students, they do less well, not only than their better qualified classmates, but then they themselves would do on a campus where their qualifications were nearer the mean. In disproportionate numbers, they fail to graduate or to qualify professionally. They

11. What would "compensate" one who is denied admission to the school of his or her choice because of race? Perhaps the monetary equivalent of the lost value, or admission to an equally good school. But these are not feasible nor available.

12. The consequentialist criterion is in counterpoise to the thought, sometimes attributed to the late Prime Minister Garrett FitzGerald of Ireland, that "That's all right in practice, but will it work in theory?"

also gravitate away from rigorous courses of study, scientific and otherwise, which they might pursue successfully at institutions where their qualifications were not compromised.[13] As a further counterweight to the benefit that preferences might provide to those preferred: there would, of course, be other students and faculty who would have been admitted and hired and thus benefitted, but for the preferences. To this extent, the benefits for those preferred are offset by the benefits forgone by others as a result of affirmative action.

Advocates of preferences cite racial diversity as an academic benefit to all students—not just to those preferred—and to the educational enterprise as a whole. Suffice it to say that we think the academic benefits of racial preferences are speculative at best. Intellectual diversity on a faculty is a good thing, we believe, and it is probably a good thing in a student body. It is conceivable that geographic diversity, too, or diversity of parents' occupations might marginally contribute to students' knowledge in a valuable way (as compared to a student body admitted more nearly on the academic merits); but the benefit, if any, is uncertain. The idea of geographic diversity was originally developed at elite universities to limit the number of Jewish students: its "intellectual" justification was a fig leaf. It seems to us that race, likewise, is a poor proxy for promoting genuine intellectual diversity or for ascertaining whether a given student's admission will benefit other students or the academic goals of a college or university.

Racial preferences in higher education are said to produce broader social benefits as well. They are said to provide role models for minority young people, to provide highly-trained graduates who will serve under-served minority communities, and to foster greater inter-racial understanding and cooperation. We accept that if racial preferences generate these effects, then to that extent their consequences are positive. The evidence that they do so is at best uncertain, however. The importance of role models of a particular race or ethnicity, and the numbers that are desirable as such, are speculative and controversial. Likewise for whether and to what extent minority communities benefit from the services of those admitted preferentially. And certainly likewise for whether preferences foster inter-racial understanding and cooperation, or rather the reverse.

13. *See* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

In considering benefits and costs, of course, even if racial preferences in academic admissions and faculty hiring have some positive effects, these must be weighed against the negative effects. It seems to us that the negative consequences are much clearer than the positive ones.

The most obvious negative consequence is that the most academically qualified student body and faculty are forgone. That is surely a social cost, although it is difficult to quantify its magnitude. It is not, however, the only social cost of racial preferences.

One further cost is the perpetuation of racial consciousness. Humans are one inter-breeding species, the division of which into races is, from a biological point of view, quite arbitrary. The civil rights movement in the era of its major triumphs marched on the principle that race, both biologically and sociologically, was a shallow and irrelevant distinction, and that, in Martin Luther King, Jr.'s words, we should be judged by the content of our character, not the color of our skin. The Civil Rights Act of 1964 embodied the principle that race should be abandoned as a criterion upon which individuals' fortunes turned. Racial preferences teach a different lesson. One's race *is* important. It can get one into a school or on its faculty, or it can stand in one's way in these respects. Race is not an arbitrary, superficial, and irrelevant characteristic within a common humanity. Rather, race to some considerable extent is destiny.[14]

The negative effects of this on campuses are plain to see. Students admitted because of their race, who are less qualified academically, tend not to integrate but to segregate. That is an understandable defense mechanism, but it works against the "promotion of understanding" diversity rationale.

Another negative consequence of racial preferences—both in student admissions and in faculty hiring—is the creation of ghettoized academic departments: what are sometimes called "grievance studies" departments. These departments tend not to be rigorous and disinterested but rather to be polemical, partisan, and grievance generating. They disproportionately attract preferentially admitted students, as a kind of safe haven.

14. Universities must now dust off the racial codes of the old South, of South Africa, or of Nazi Germany in order to have at hand formal definitions of "races" to make sure that the wrong people don't claim racial preferences. And given the arbitrariness of racial definitions, they will not be able to escape the charge of arbitrariness in employing those definitions, let alone the obnoxiousness of doing so.

These departments, their faculty and their students, tend to be among the more ardent advocates of the hate speech codes and of the norms of political correctness that Boonin dislikes: not so much to defend against wounding and silencing as to stifle the speech of those who might oppose affirmative action or who might dare to point out that admission standards have been lowered.

Moreover, because no one likes to be admitted under "lowered" standards, affirmative action tends to have two additional negative consequences. The first is the debasement of honest dialogue: students or faculty members are not "less qualified" but rather are "differently qualified." Second, and relatedly, the fear of being considered less qualified generates attacks on the academic norms by which qualifications are gauged. Legitimate norms are claimed to be no better at determining academic mettle than "different"—racially or ideologically freighted—norms.

The extent of these negative effects of affirmative action is obviously controversial. We write about them as long-time denizens of universities, without illusions about proving them conclusively to the satisfaction of everyone. But neither have the claimed beneficial effects of affirmative action been proved. We think the negative effects we have cited are more probable than the positive ones. In any event, we do not believe the morality of affirmative action can be determined without considering these effects. Boonin is correct that dispreferred students have no moral "right" that institutions should serve goals for which they happen to be qualified. And he is correct that institutions such as universities may morally permissibly serve a plurality of goals. But these considerations do not show that morality is indifferent to the consequences of the pursuit of those goals. It seems to us that Boonin fails to confront the negative consequences of racial preferences which he claims to be morally permissible.

Racial preferences, in reality, were first adopted and justified as a form of reparations. The constitutionality of that justification was undermined by the U.S. Supreme Court's decision in *Bakke*,[15] and only then did "diversity" become the new and constitutionally more defensible rationale. We believe, however, that diversity has always been a legal fig leaf, and that the reparative goal is what has always motivated the use of racial

15. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (denying the constitutionality of the use of racial preferences by a University of California medical school).

preferences. So it is to Boonin's treatment of reparations that we now turn.

V. REPARATIONS FOR SLAVERY

Boonin's chapters on reparations for slavery are the first two substantive chapters of the book, and they are by far the longest. Boonin claims that he was at one time persuaded by David Horowitz's critique of the case for reparations[16] but then, upon careful if not agonizing reappraisal, came to the opposite conclusion, namely that the case *for* reparations was compelling. He does not address the form reparations should take, but he does believe reparations in some form are owed to blacks Americans.

Boonin's argument for reparations consists of five steps. Here is how Boonin describes them and the conclusions they justify.

> *Step one—the compensation principle:* if a government wrongfully harms someone as a result of the authorized actions of some of its public officials, then it incurs a moral obligation to compensate its victim for the harms that it has wrongfully caused.
>
> *Step two—the historical claim*: in the past, the U.S. government wrongfully harmed previous generations of Africans and African Americans by supporting the institution of slavery and subsequent forms of legalized segregation and discrimination.
>
> *Step three—the causal claim*: the acts by which the U.S. government wrongfully harmed previous generations of Africans and African Americans by supporting the institution of slavery and subsequent forms of legalized segregation and discrimination in the past continue to cause harmful consequences for the currently living generation of black Americans today.
>
> *Step four—the surviving public obligation principle*: if a government incurs a moral obligation as a result of the authorized actions of some of its public officials then this obligation doesn't cease to exist when the officials in question die.
>
> *Step five—the unpaid balance claim*: the U.S. government has

16. *See* DAVID HOROWITZ, UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY (Encounter Books, 2002).

> not yet fully compensated the currently living generation of black Americans for the harmful consequences they continue to incur as a result of slavery and its aftermath.
>
> It seems to me that all five of these steps must be accepted, and on grounds that opponents of slave reparations themselves already accept. It also seems to me that if all five of these steps must be accepted, then the reparations position itself must be accepted: the first two steps justify an obligation on the part of the past government to past black Americans, the third justifies extending the obligation from one owed to past black Americans to one owed to present black Americans, the fourth justifies extending the obligation from one owed by the past government to one owed by the present government, and the fifth justifies the conclusion that the present government's obligation has not yet been fully discharged. Since each of the steps taken individually seem to be justified, and since all of the steps taken together seem to justify the conclusion, the conclusion itself seems to be justified: the U.S. government does indeed have a moral obligation to benefit the currently living generation of black Americans because of the wrongful harms that were inflicted on past generations of Africans and African Americans by the institution of slavery and its aftermath (pp. 53–54).

Very fairly, Boonin quotes at some length from David Horowitz's ten-point case against reparations. Among Horowitz's points are (Point 1) there is no single group responsible for the crime of slavery (from whom reparation should be sought); (Point 3) only a minority of white Americans owned slaves, while others gave their lives to free them; (Point 6) the reparations argument is based on the unsubstantiated claim that all African Americans suffer from the economic consequences of slavery and discrimination; (Point 7) the reparations claim sends a damaging message to the African American community of victimhood and alienation; and (Point 9) slavery, which traditionally existed in all societies, was brought to an end largely at the initiative of the Anglo-American anti-slavery movement, and would not have ended in America when it did, were it not for the sacrifices of American soldiers and an American President who gave his life to sign the Emancipation Proclamation.

Boonin rejects all of Horowitz's points summarily—too summarily, we think. It seems to us that Boonin underestimates some of the difficulties implicit in his own argument; and more broadly, that there are questions of practical wisdom which he

fails to consider, and which militate against the idea of racial reparations today.

Boonin stipulates (Step Two of his argument) that the U.S. government harmed previous generations of African Americans by supporting slavery and post-slavery discrimination. But slavery was lawful in the British colonies in America prior to American Independence, and in other British colonies for some years thereafter. It was lawful in the newly independent American states under the Articles of Confederation, when the states were virtually sovereign countries. It remained lawful under the laws of some states after the ratification of the Constitution. As is generally recognized, there probably would not have been a United States had the Constitution attempted to disestablish slavery in the states.

Boonin has two responses to this point. The first is to argue that the non-slave states could have adopted a Constitution and created a smaller country, one without the slave states in it. In this way, the United States could have avoided wronging the slaves. But had it done so, essentially washing its hands of the problem of slavery, slavery might have persisted in the southern states long after it was in fact eliminated.

Boonin's second response is to distinguish wrongness from culpability. Even if the Framers were not culpable for not abolishing slavery—because they could not have done so—their failing to do so was nonetheless a wrong.[17] An alternate view, however, is that "ought must imply can." If the United States could not have abolished slavery at the outset without being stillborn as a country, but later—when the loyalties built up by the nation and the "mystic chords of memory" made it possible—incurred civil war and the loss of hundreds of thousands of its citizens' lives in order to abolish it, then the initial acquiescence in slavery can plausibly be said not only not to have been culpable (as Boonin concedes) but also not wrong, at least not in the sense of a wrong that calls for further reparations centuries later.[18]

17. Boonin seems to suggest that the government's acquiescing in wrongs that it cannot prevent is itself a wrong. But to state such a position is to see its absurdity. The government of the United States today "acquiesces"—by declining to intervene—in countless horrible brutalities around the globe, brutalities that it cannot eradicate, if at all, without sacrificing considerable blood and treasure. Such acquiescence cannot plausibly count as a wrong. Or if it is, then all of us are guilty of countless such "wrongs," and the charge that we are loses all sting.

18. Boonin does not discuss the wrongs of the slave states and their potential obligations with respect to reparations. Given the mobility of the black population over

Boonin's Step Three, the causal claim, is problematic as well. Boonin's argument is that the only explanation for why black Americans on average are faring worse than other Americans on average must be because of the past wrongs of slavery, Jim Crow, and discrimination.

The emphasis on a group's lower-than-average welfare, of course, deflects attention from the members of the group who are not worse off than the national average: in the case of black Americans, a significant African-American middle and upper middle class. On a "causality" argument, it is not clear why people in this category are owed reparations. Moreover, even the lower-than-average welfare of a group as a whole might not be so easily attributable to any single cause or set of causes. Over the course of a century and a half since the abolition of slavery, a great many intervening causes have had time to develop. Moreover, groups—however defined—do not have the same average outcomes in life, even in the absence of invidious discrimination. Almost any group is likely to be either above or below average: whether the group is defined by race, ethnicity, religion, or virtually any other criterion.

Boonin suggests that reparations need not consist of payments to individual black Americans. Rather, Boonin proposes that reparations can consist of payments to organizations and schools that are "predominately black" (p. 126). He points out that Germany's form of reparations for the Holocaust has been to give money to the State of Israel, even though not everyone who benefits is Jewish and not every Jew is benefitted. Boonin believes this provides a model for reparations for slavery, even though black Americans have no "state" or corporate form.

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time and the migration of many blacks to the North and West, the reparations arguments would be enormously more complex at the state level than at the federal level. In any event, because Boonin does not consider state liability, neither shall we.

Could Boonin have built his case for reparations by the U.S. government on Jim Crow rather than on slavery? Could he have argued, in effect, that although the U.S. government could not have ended slavery until the Civil War, it could have or prevented the enactment of Jim Crow laws immediately thereafter? One question is whether the Fourteenth Amendment *did* outlaw Jim Crow laws, and the Supreme Court mistakenly held otherwise in Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding the racial segregation, by law, of railroad cars in Louisiana). (What is the responsibility of the U.S. government for an erroneous constitutional interpretation by the Supreme Court?) If the Fourteenth Amendment did *not* outlaw Jim Crow, could it have been ratified had it done so? If it could not been ratified, is the U.S. government nonetheless responsible for the racial harms of the Jim Crow era? Again, because Boonin does not take up these questions, neither shall we.

There are further causation problems, however. One is that but for the wrongful policies of the past, many or most black people the United States today would not exist, because those wrongs affected who had children with whom, and when. Had slavery ended when the United States began, there undoubtedly would be black people living in America today; and if Boonin is correct, they would, as a group, be better off than black Americans, as a group, are today. But these black Americans would be different individuals from those who are today's black Americans. The latter would not exist but for the past wrongs such as slavery.

A lot of philosophical ink has been spilt on this general topic. How can future generations be wronged by policies that affect their identity, and but for which they would not exist?

Boonin argues that most people—even those inclined to oppose reparations—would support compensation to those blinded by wrongful pollution, even if the people in question would not have come into existence but for the pollution (pp. 109–10). Hence, the "non-identity" problem should not be a barrier to compensation for wrongs.

Yet Boonin rightly senses that to make the case for reparations air tight, which is his ambition, he cannot so easily dismiss the non-identity problem. Therefore, Boonin goes on to present another case that he believes is a convincing one for compensation even in the face of the non-identity problem. In this case a child, Charlie, is born blind because of the effects of pollution on his parents. Moreover, the pollution affected the time of his conception, so that in its absence, a different child would have been conceived. Charlie would not have existed but for the wrongful pollution; therefore, his blindness cannot be a worsening of his condition. Charlie's blindness would be reversible, however, but for the lingering effects of the pollution, which impede recovery. In such a case, Boonin argues, the polluter would owe Charlie compensation, not for his being born blind, but rather for his continued blindness due to the lingering toxic effects of the pollution. And likewise, black Americans can be owed reparations for the harmful lingering effects of past wrongs even if the very existence of the people in question is a product of those wrongs (pp. 110–11).

We think the non-identity problem might not be refuted so easily. Boonin assumes Charlie in his example would definitely have a valid moral claim based on the present effects of the

pollution that led to his very existence. If the pollution and its after-effects are a package deal—with one you get the other—then the after-effects are as much a condition of Charlie's existence as the initial pollution. Boonin admits that if Charlie's blindness were irreversible, the non-identity problem would stand in the way of his claim that the pollution was a wrong *to him*. Why, then, is he wronged by its after-effects, even if in their absence his blindness could have been cured?

The point can be made another way. Suppose a demon offers you life with irreversible blindness from birth. That is the only way he'll grant you life. If your life would still be worth living, you'll take the deal.

Now suppose the demon changes the deal to this extent. He'll offer you life with otherwise reversible blindness that he will prevent being reversed. You are no worse off under this deal than you were under the previous one, so you'll take it. And if, after having been born blind, you are prevented by the demon from curing it, you cannot claim the demon is wronging you. A deal is a deal, and you, not the demon, are the one attempting to renege.

Others have attempted to get around the non-identity problem in the context of reparations by basing reparations on wrongs to the slaves themselves, not their descendants. The argument is that the slaves would have wanted what was owed them in compensation to go to their descendants *whoever they might be*. Perhaps this is a better theory, and a more tenable argument for reparations. But it is not the theory that Boonin adopts. Boonin's theory founders on the non-identity problem: his Step Three, and with it his case for reparations, fails.

Some might argue that in addition to the non-identity problem, there is another problem with Boonin's Step Three causal claim. It concerns the way that the past wrongs of slavery and Jim Crow are presently causing many blacks to fare poorly.

Boonin thinks that it plausible that America's past racial wrongs cause present harms to black Americans by having spawned an underclass subculture that is dysfunctional in the modern social and economic environment. He cites works by John McWhorter and Shelby Steele which describe that culture and how it probably arose.[19] The dysfunctional aspects of that

19. *See* JOHN H. MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA (2001); SHELBY STEELE, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA (1998).

subculture are well known: high illegitimacy rates; anti-intellectualism (deprecating "acting White"); and high crime rates, with high levels of violence. We think this subculture's contribution to social and economic problems in the black community is more than plausible.[20] Indeed, Boonin implies that he might agree.

Boonin believes that slavery and Jim Crow contributed to the creation of this troubled subculture. We shall assume Boonin is correct on this point, though there is some reason to be skeptical. The spread of the "oppositional" culture of the late 1960s and early 1970s surely played a big role, as have other more recent changes in the general culture, some of which may be the unintended effects of the Great Society welfare programs and their successors; for the differences between black and white Americans with respect to family, education, and crime were considerably smaller in the 1950s than they are today.

Even if Boonin is correct about the causal antecedents of the underclass subculture, those making the argument we are considering would object to Boonin's conclusion that the past wrongs are responsible for the individual choices that constitute and perpetuate that culture. They would point to the law's treatment of voluntary acts. Such acts are generally (though not universally) held to be "intervening, superseding causes" that "break the causal chains" that otherwise link the results of those acts with the acts' causal antecedents.[21] They would point to the law's refusal to recognize so-called "cultural defenses," whether for Muslim honor killings or for the crimes of gangbangers. Moreover, they might argue, the law is correct in doing this, for it dignifies people by not viewing them as helpless captives of their cultural mores. They are not "blaming the victim" but dignifying people who make moral (or immoral) choices.

20. We should not be taken to be denying that there are many attractive features of so-called "black culture." What we are claiming is that certain aspects of that culture—the aspects that are in direct opposition to traditional middle-class values—and the multitude of individual choices that constitute and perpetuate those aspects of black culture, produce a lower than average income, a poorer than average academic performance, and a higher than average crime rate. Neither do we deny that these aspects of the culture may even have been adaptive and functional during the slavery and Jim Crow eras; nevertheless, they are highly maladaptive and dysfunctional today.

21. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 195 (6th ed. 2012). Michael Moore rejects the idea that causal chains are "broken" by voluntary choices, but he does believe those intervening choices attenuate the causal responsibility of acts antecedent to those choices. *See* MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY 249–323 (2009).

This second argument against Step Three, however, is one that we believe is too strong. The law's treatment of cultural causation may be correct for the law's purposes, but it is too stark and one-sided to rebut Boonin's causal claim. It may be possible to choose in opposition to the norms of one's community, but it will often be so difficult that responsibility for choosing in accord with those norms is surely diminished if not totally extinguished. Moreover, because community norms are usually implanted in childhood, when the information, critical skills, and motivational strength necessary to reject them is absent, it is unduly harsh to regard the later choices that constitute and perpetuate those norms as fully voluntary and responsible. We conclude that Boonin's Step Three fails because of the non-identity problem, but not because of the law's notion of intervening, superseding causes.

Despite the failure of Boonin's Step Three, his causal step, many will agree with him that not only were slavery and post-emancipation Jim Crow laws great evils, but also that they ought to be but have not been atoned, and that reparations are owed. So let us look then briefly at Boonin's Step Five, his unpaid balance claim.

It seems to us Boonin is facile in rejecting the idea that American society has already gone a great distance in making reparation. The Civil War itself meant, in Lincoln's words, that America would pay for "every drop of blood drawn with the lash" with "another drawn by the sword". Since the mid-twentieth century, America not only enacted comprehensive laws outlawing racial discrimination, it also adopted wide-ranging social policies whose goals and raisons d'etre clearly amounted to reparation. These include social welfare programs that black Americans would be disproportionately eligible for—programs openly motivated at least in large part by bad conscience about past racial injustice—as well as the growth of affirmative action in virtually all the important institutions of American life. The reparations have been spiritual as well as material: the adoption of Martin Luther King, Jr. as a national hero, and the emphasis in many school curricula on Civil Rights history, sometimes virtually to the exclusion of other aspects of American history. Boonin's suggestion that social welfare programs adopted in the Civil Rights era cannot be regarded as reparations because black Americans were not the exclusive beneficiaries is unconvincing: as though German reparations to

Jewish victims would not "count" if the reparations were offered to Roma or to other victims as well.

Boonin's other rejoinder to David Horowitz and others who maintain that reparations have already in effect been made is that whatever has been done is not enough because it has not succeeded: the welfare of black Americans, on average, is still less than that of white Americans on average. But this thought is double edged. As we suggested, and as Boonin acknowledges, various observers consider that many of the social programs that gathered momentum in the 1960s, including welfare programs and affirmative action, tended to aggravate rather than to mitigate the condition of many black Americans: by fostering family collapse, dependency, alienation, and disassimilation. We incline to that view ourselves, although Boonin presumably does not. Boonin's conclusion is that more reparations are necessary. But in practice, further programs in the name of reparations would almost certainly resemble the redistributive and preferential programs which may have done, as Boonin grudgingly acknowledges—or which did in fact, as we believe—more harm than good. In short, the case for reparations seems to be that the late-twentieth century remedies made things worse, so let us have more of them.

Boonin's case for reparations takes little account of such questions of phronesis or practical wisdom. Reparations can be a destructive remedy, especially inasmuch as they might reinforce the sense of victimhood, grievance, and alienation which have been fostered—in many cases surely with the best of intentions—by public policy and by broader cultural forces over the past half century. This was an era in which the Civil Rights revolution did away with pervasive racial discrimination and segregation; and in which many black Americans, probably a majority, became members of the broad American middle class. But it was also an era of growing social dysfunction among other parts of the black community: greatly increased rates of illegitimacy, family breakdown, educational failure, drugs, and violence.

Amy Wax has written eloquently about how those who have been injured by wrongdoing must themselves take painful measures in order to recover, measures that cannot be undertaken by the wrongdoers no matter how willing.[22] A person

22. AMY L. WAX, RACE, WRONGS, AND REMEDIES: GROUP JUSTICE IN THE 21ST CENTURY (2009).

injured in an auto accident that was the fault of the other driver can have his lost income and the cost of his medical treatments compensated by the wrongdoer. At some point, however, he will have to undergo painful rehabilitative measures in order to recover fully. The wrongdoer cannot undergo those measures for him. The victim can perhaps be compensated for the pain he must endure to recover, but he cannot avoid the pain itself and hope to recover.

Racial reparations, at this historical juncture, might actually worsen the condition of those for whom they are meant to be reparative: for they will not eradicate the dysfunctional culture but are liable to reinforce it. The best reparations might instead be a sober effort to alter that culture.

VI. CONCLUSION

We admire Boonin's effort to take an open-minded tone about these controversial racial topics and especially his willingness to consider arguments that might be thought "politically incorrect." Although we have disagreed with Boonin on various points, we think this book is both provocative and serious. We give one and one-half cheers for *Should Race Matter*?