By JAMES BOLNER

Toward a Theory of Racial Reparations

ONE OF THE CHIEF CONCERNS of contemporary public law in the United States is also one of the most ancient — the treatment of nonwhite minorities, especially the Negro minority. During the major portion of the post-slavery period the "liberal" ideal in treatment of Negroes has been "nondiscrimination." [1] There are few, if any, indications that this policy is proving successful in assimilating Negroes into the social order. The successor to nondiscrimination is benign racial treatment, and it is this policy which this paper explores. Specifically, the essay examines certain aspects of the attempt to render legitimate and orderly the assimilation of Negroes through benign racial treatment of them. A sketch of a theory of racial reparations and the major criticisms of the approach are examined and, finally, the prospects for racial reparations programs are surveyed.

TWO JUSTIFICATIONS OF RACIAL REPARATIONS

Reparations in the sense used here denotes benefits extended in various forms to those injured by racial discrimination practiced by, or with the acquiescence of, the government of a representative democracy. Reparations are not to be understood as an indiscriminate bonus for nonwhites, but merely as payment of damages to those nonwhites who have been injured by racial discrimination.[2] Claims advanced by a nonwhite resident of a jurisdiction which has observed a policy of nondiscrimination should be viewed in a different light from claims pressed by a resident, say, of Alabama. It would seem untenable to assume that a nonwhite, regardless of how successful he seems to be in life, has not been injured by discrimination. Neither are we suggesting a sophisticated retaliation against living white persons for the misdeeds of their ancestors.

A quite different approach — one which perhaps is more persuasive — must now be considered: reparations extended to minority groups humiliated or injured in the past is a simple way out of a nasty problem. Justice in this connection is a bonus. The interest in civil order, public tranquility and public peace is considered so great that it is per-

[1] In support of this proposition see Vern Countryman (ed.), *Discrimination and the Law* (Chicago, 1965) and Robert J. Harris, *The Quest for Equality* (Baton Rouge, 1960).

[2] One may consider the government extending reparations to be upholding the conditions of the "social compact" by compensating parties whose terms of agreement have been violated. For an elaboration of this aspect of social compact theory see Joseph Tussman, *Obligation and the Body Politic* (New York, 1960), especially Chap. 1.

missible to single out individuals on the basis of their race where social malaise is demonstrably associated with that group. Assuming that social and economic disorder are chronically associated with a particular racial group, one may argue that the community may employ race as a criterion in breaking the vicious cycle. On this rationale, integration, or the deliberate bringing together of individuals because of their race, is considered good since it contributes to the general welfare in the broadest sense. The use of racial criteria to separate individuals and groups, the argument continues, is sometimes bad and sometimes good, depending on the circumstances. What proportion of the racial mix to prescribe would depend on the circumstances.[3] There will be those, of course, who will recommend benign racial treatment of minority group members precisely because it seems to buy racial peace at the same time that it gives nonwhites their due. A federal district judge approximated this position when he noted:

> It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors.[4]

A CRITIQUE OF THE THEORY

At the outset two objections can be anticipated. The first concerns constitutional color blindness; if the first Mr. Justice Harlan's felicitous phrase, "Our constitution is color blind,"[5] were taken to bar any and all treatment on the basis of race, then the country would be deftly laced into a constitutional straitjacket and prevented from dealing with a major social problem. The remarks which follow assume that the Constitution permits racial treatment save where such treatment is oppressive. The second objection is that any reparations program is by definition a show of preference to nonwhites. In one sense, benign treatment on racial grounds does not mean adverse treatment for certain individuals (in the present case these are whites) with whom they compete; when persons compete for housing, jobs, or school assignments, there will be winners and losers. But rigging the process so as to make whites the automatic losers can best be explained by saying that whites here are being called upon to assist the community in meeting its obligation. That the disappointed white applicants may never have inflicted racial injury is not a relevant consideration. It is not a case of "an eye for an eye," but a case of doing one's duty in setting aright a community wrong. It is difficult to

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[3] See Owen M. Fiss, "Racial Imbalance in the Public Schools: the Constitutional Concepts," *Harvard Law Review*, LXXVIII (January, 1965), 571; Robert F. Drinan, "Racially Balanced Schools: Psychological and Legal Aspects," *Catholic Lawyer*, II (Winter, 1965), 16; Robert L. Carter, "De Facto School Segregation. An Examination of the Legal and Constitutional Questions Presented," *Western Reserve Law Review*, XVI (May, 1965), 502; and *Morean* v. *Board of Education*, 210 A. 2d 97 (1964).

[4] *Barksdale* v. *Springfield School Committee*, 237 F. Supp. 543, 546 (1965).

[5] *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896).

see how an approach which would treat whites as having been deprived of their rights can provide a satisfactory and realistic point of departure.

Now let us assume that a political regime embarks on a thoroughgoing racial program based on either the reparations or the buying peace foundations. What happens to the keystone principle of the humanitarian credo: treat each individual on his intrinsic merits and not on the basis of the accident of color? While it might be more conducive to the public order, is racial integration less violative of public morality than racial segregation? If barring nonwhites from "private" public places and housing and "private" employment is offensive to good morals because it rests on an accidental factor such as color, and if the essence of the wrong is the refusal to treat them like everyone else, is it permissible to base a decision on the same accidental factor in granting them benefits? It would seem that in discriminating in favor of the individual the individual may be gleeful during the entire operation, but moral injury would be perpetrated just the same. (One may also suggest that benign racial treatment of nonwhites is a substitution of a community paternalism for the paternalism of a former "master"; on this basis benign racial treatment ought to be as offensive as the post-slavery dependency of Negroes upon their former masters, since it implies a judgment of racial inferiority.)

Treatment on the basis of race, as an attempt will be made to show below, is not per se indefensible; the worthiness of the objective is a salient consideration. Nevertheless, it is not a pretty business, for there remains the implication of inherent racial inferiority of the minority group members; nonwhites' "special characteristics and circumstances" (analogous to those of physically handicapped or neurotic persons) are found to be occasioned by racial differences parallel to "physiological, psychological or sociological variances from the norm occasioned by other factors." [6]

A most forceful judicial statement critical of benign racial treatment was set forth by Judge Van Voorhis in his dissenting opinion in a recent New York case upholding the principle.[7] Said the judge:

> Where is the line to be drawn between allocating persons by law to schools or other institutions or facilities according to color to promote integration, and doing the same thing in order to promote segregation? Is the underlying principle not the same in either instance? Both depend on racism. If one is legally justifiable, then so is the other. . . .[8]

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[6] See *Springfield School Committee* v. *Barksdale*, 348 F. 2d 261, 266 (1965).
[7] *Allen* v. *Hummel*, 258 N. Y. S. 2d 77 (1965).
[8] *Ibid.*, p. 82. Continued Van Voorhis: "There is an important difference between obliterating the color line by admitting a boy or girl or man or woman to school, to employment, to a residential location or to a place of public accommodation without regard to color, and allocating people to locations, employments or facilities because of their color . . . . It is one thing to insist that a person should not be excluded by law from a vocation, school, theatre, hotel, restaurant or public conveyance because of race; it is quite another matter and, as it seems to me, doing the reverse, to allocate these advantages according to racial quotas or on some other proportional basis."

The argument that benign racial treatment would "force governmental authorities to re-enter the field of racial classification," [9] cannot be lightly dismissed. Today the governmental attitude might be sympathetic only to benign racial laws, but tomorrow the result might well be different. Consider the best known example of a justifiable use of race by government: the *Japanese Exclusion Cases* [10] decided during World War II. There the Court sanctioned military orders employing race as a criterion for segregating Japanese-Americans from allegedly "more loyal" citizens. In attacking the majority's deference to military expediency, Justice Murphy declared that "racial discrimination" in any form and in any degree had no justifiable part whatever in our democratic way of life." [11] In even stronger language Justice Jackson accused the majority of sanctioning "the principle of racial discrimination . . . and of transplanting American citizens." That principle, he argued:

> . . . then lies about like a loaded weapon ready for the hand of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as the tendency of a principle to expand itself to the limit of its logic.[12]

Even in the 1955 decree in *Brown v. Board of Education* [13] the Supreme Court spoke of "public schools [administered on a racially nondiscriminatory basis]" [14] as the goal toward which it was striving. In the companion case of *Bolling v. Sharpe* [15] in which the *Brown* was applied to the District of Columbia, the Court specifically said: "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." [16] Indeed, it would seem that the Supreme Court and federal courts generally were unaware that benign racial programs would be needed or forthcoming. In any event, it is clear that it is as easy to extract support for such programs from the school desegregation litigation as it is to find, in the same place, absolute condemnations of the use of race as a criterion by public authority.

It would seem that if an ethnic minority's reparations claims can never be met on the basis of ethnic differences, then the damage would go unrepaired. If the wrong consists in using race as a criterion, it would seem curious to repair the damage with more of the same. Yet, the in-

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[9] John Kaplan, "Segregation Litigation and the Schools—*Part II:* The General Northern Problem," *Northwestern University Law Review,* LIII (May-June, 1963), 188. See also the dissenting opinion by Moore, Circuit Judge, in *Taylor* v. *Board of Education,* 294 F. 2d 36, 40.
[10] *Hirabayshi* v. *United States,* 320 U. S. 81 (1943) and *Korematsu* v. *United States,* 323 U. S. 214 (1944). See Eugene V. Rostow, "The Japanese-American Cases—A Disaster," *Yale Law Journal,* LIV (June, 1945), 489.
[11] *Korematsu* v. *United States,* 323 U. S. 214, 242 (1944).
[12] *Ibid.,* 246, citing Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, 1921), p. 51.
[13] 349 U. S. 294 (1955).
[14] *Ibid.,* 301.
[15] 347 U. S. 497 (1954).
[16] *Ibid.,* p. 499. The Court cited as authority the *Korematsu and Hirabayshi* cases (see note 10 above).

jured individuals are identifiable solely by their ethnic traits. A way out has been suggested above. In order for the community to make reparations to injured members of a racial minority, it must use factors other than race. The community must be attributed a duty to extend reparations to all injured by governmental action or inaction before reparations for racial injuries may be justified. ("Community" injury to American Indians and the poor, and the victims of crime come to mind.) Proponents of benign racial treatment may contend that their claim deserves high priority because of the gravity of the community's offense. The approach is appealing, since individuals are not being compensated because they are members of a racial minority, but simply because they were injured and the community considers itself responsible. The relevant questions then become: what constitutes racial injury and how may persons so injured be afforded benign racial treatment.

It is only possible here to suggest how such questions may be answered. The definition of *racial injury* could be prescribed by statute, or left to emerge from the body of rules created by the adjudicating agency, subject, of course, to modification by statute. Very probably a case by case approach would be necessary. The form benign racial treatment would take would pose certain problems. Where simple racial discrimination is involved it is possible to redress grievances by declaring discriminatory acts amenable to the judicial process; where racial identification is to be followed by treatment on a racial basis, the problem is different.[17] Once minority group members can no longer claim that they are being denied access to education, public accommodation, employment, the political process, and housing because of their race their claims become blurred. It cannot be argued, at least not convincingly, that nonwhites should be given a handicap in the courtroom by barring witnesses from appearing for their adversaries, or that nonwhites should be given two votes while majority group members have only one. Indeed, if direct cash payments or tax benefits are ruled out, the areas in which compensation for racial injury are plausible are limited to those in which such programs are physically practicable. The chief areas are housing, education and employment; these are the very areas which seem to loom large in the mind of the policy planner as he searches for racial peace.

THE FUTURE OF RACIAL REPARATIONS

The prospects for full-fledged racial reparations programs brighten with the increase in the incidence of racial disturbances and with the increase of the political strength of nonwhites. To proponents of such

[17] This is the course followed in Titles II and VII of the Civil Rights Act of 1964, 78 Stat., 241, and in Title IV (Housing) of the proposed Civil Rights Act of 1966. (see H.R. 14765 and S. 3296, 89th Cong. 2nd Sess). The technique of the 1965 Voting Rights Act, 79 Stat. 437, whereby Negroes disfranchised arbitrarily in the past may be summarily placed on the voting rolls is somewhat different.

programs, the passage of the 1964 Civil Rights Act [18] and the 1965 Voting Rights Act [19] seems a logical step to the enactment of reparations programs. The thrust of the 1964 and 1965 legislation, however, was largely directed against the values of Southern whites; the support of the non-Southern public for the housing provisions of the proposed Civil Rights Act of 1966 [20] was less than overwhelming. If the federal executive and legislative branches decide on a policy of racial reparations, however, there are indications that the judiciary would erect no obstacles in their path.[21]

The national commerce power seems to be an inexhaustible source of federal authority. The federal government has effectively preempted regulation of labor relations. Where dwellings are constructed with materials and by persons obviously involved in activities affecting interstate commerce, can there be any doubt that legislation barring the creation of nonwhite concentrations would be upheld? [22] The constitutional rationale for reparations legislation has already been suggested by the Supreme Court in its 1964 opinions in the *Civil Rights Cases*.[23]

Moreover, it is significant that the Supreme Court has sanctioned the use of race in administering public programs so long as the use was for a "good" purpose. While the Court has relied on its 1954 *Brown* v. *Board* [24] precedent in overturning racial segregation in a variety of public endeavors,[25] in 1961 the Court let stand (by denying *certiorari*) a lower federal court ruling compelling local authorities to take corrective steps to balance the schools' nonwhite and white populations.[26] In 1964 the Court let stand another ruling asserting that no one has a constitutional right to attend a racially balanced school.[27] Apparently the Justices

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[18] 78 Stat. 247.
[19] 79 Stat. 437.
[20] See H.R. 14766 and S. 3296, 89th Cong. 2d sess.
[21] For some insights as to why state and local antidiscrimination laws are ineffective see Duane Lockard, "The Politics of Antidiscrimination Legislation," *Harvard Journal on Legislation*, III (December, 1965), 3; Michael I. Sovern, *Legal Restraints on Racial Discrimination in Employment* (New York, 1966), Chap. 2; and Herbert Hill, "Racial Inequality in Employment: the Patterns of Discrimination." *The Annals*, 1957 (January, 1965), 30. Testifying before the House Judiciary Committee in support of H.R. 14765, the Attorney General of the United States noted that "some seventeen states, the District of Columbia, Puerto Rico, the Virgin Islands, and a large number of municipalities" had enacted fair housing laws. The work of volunteer groups, judicial and executive action, and the "patchwork of state and local laws" were found inadequate. Department of Justice, "Statement by Attorney General Nicholas de B. Katzenbach," May 4, 1966.
[22] For an enlightening treatment of this point see Boris I. Bittker, "The Case of the Checker-Board Ordinance: An Experiment in Race Relations," *Yale Law Journal*, LXXI (July, 1962), 1387. *Mulkey* v. *Reitman*, 50 Cal. Rptr. 881, 413 P. 2d 825 (1966), gives a summary of the open housing controversy in California; for a survey of the open housing controversy in Michigan see Normal C. Thomas, *Rule 9: Politics, Administration, and Civil Rights* (New York, 1966).
[23] *Heart of Atlanta Motel* v. *United States*, 397 U. S. 241 (1964); *Katzenbach* v. *McClung*, 397 U. S. 274 (1964).
[24] 347 U. S. 483 (1954).
[25] *Baltimore* v. *Dawson*, 220 F. 2d 386, *aff'd* 350 U. S. 877 (1955), (public beaches and bathhouses); *Holmes* v. *Atlanta*, 233 F. 2d 93 *aff'd*, 350 U. S. 879 (1955) (golf course): *Gayle* v. *Browder*, 142 F. Supp. 707, *aff'd*, 352 U. S. 903 (1956) (city buses); *New Orleans Park Improvement Assn.* v. *Detiege*, 252 F. 2d 122, *aff'd*, 358 U. S. 54 (1958) (public park facilities). See also the cases cited by Clark, J., in *Goss* v. *Board of Education*, 373 U. S. 683, 687-688 (1963).
[26] *Taylor* v. *Board of Education*, 191 F. Supp. 181, *aff'd*. 294 F, 2d 36, *cert.* denied, 368 U. S. 940 (1961).
[27] *Bell* v. *School City of Gary*, 213 F. Supp. 819, *aff'd*, 324 F. 2d 209 (1963), cert. denied, 377 U. S. 924 (1964). See John Kaplan, "Segregation Litigation and the Schools—Part II: The Gary Litigation," *Northwestern University Law Review*, LIX (May-June, 1964), 121.

were satisfied that Gary, Indiana, public schools were operated on a "neighborhood school plan, honestly and conscientiously constructed and with no intention or purpose to segregate the races." [28] Later in 1964 the Court refused to review a New York state court decision upholding the authority of state officials to take steps to correct racial imbalance by rearranging school attendance zones.[29] In March, 1965, the *Gary* principle was reaffirmed as the Court concurred in a lower federal court's approval of "honest" neighborhood schools in Kansas City, Kansas, despite the resulting racial imbalance.[30] At the opening of its 1965 Term the Court once again endorsed New York's deliberate use of race as a factor in administering its schools; the Court declined to review a state court ruling that state officials were not acting "arbitrarily or illegally" in taking steps to correct racial imbalance in public schools.[31] In none of these cases has the Supreme Court written an opinion, but the constitutional rule seems to be as follows: while members of racial minorities have no constitutional right to attend racially balanced (or even integrated) schools, state authorities may use race as a criterion in administering the educational system (presumably to achieve racial balance or integration, but not to achieve segregation).

If public authority may use race as a criterion in providing quality, integrated education, it would seem that parallel steps in the housing and employment areas would be permissible. Laws guaranteeing integrated neighborhoods by limiting nonwhite concentrations to certain quotas and providing incentives to attract whites into nonwhite neighborhoods would seem beyond constitutional reproach. To require employers to hire a certain percentage of nonwhites (say, corresponding to the local or national nonwhite percentage of the labor force) would seem equally defensible.

SUMMARY AND CONCLUSIONS

Members of racial minorities have a justifiable claim to reparations from the community which has either participated, directly or indirectly, or acquiesced in racial discrimination. If one accepts the principle that individuals should be treated on their merits and not on the basis of color, then racial treatment, whether benign or adverse, is inconsistent with this principle. However, the community may proceed to extend reparations in the form of special treatment, in such areas as housing, employment, and education to individuals injured by racial discrimination. The implementation of reparations programs by the executive and legislative branches of the central government would probably not be blocked on constitutional grounds by the judiciary.

[28] 313 F. Supp. 819, 823 (1963).
[29] *Balabin* v. *Rubin*, 248 N. Y. S. 2d 574, *aff'd*, 250 N. Y. S. 2d 281, 199 N. E. 2d 375, *cert.* denied, 379 U. S. 881 (1964).
[30] *Downs* v. *Board of Education*, 336 F. 2d 988 (1964). Justice Douglas was of the opinion that *certiorari* should have been granted.
[31] *Vetere* v. *Mitchell*, 251 N. Y. S. 2d 480 (1965), *aff'd* in *Allen* v. *Hummel*, 258 N. Y. S. 2d 77 (1965), *cert.* denied in *Vetere* v. *Allen*, 86 S. Ct. 60 (1965); *Addabbo* v. *Donovan*, 256 N. Y. S. 2d 178, *cert.* denied, 86 S. Ct. 241 (1965).