INTRODUCTION

This book is about enlarging the boundary of racial justice by recognizing and addressing private racism. This book defines "private racism" as racial injustice that happens in the private sphere. By focusing on racial injustice that happens outside the governmental or public sphere, we expand the scope or boundary of racial justice. Usually, when we discuss racial injustice, we discuss racism in our public or political life, namely public racism. This means that we often focus on how the state discriminates on the basis of race in its application and enforcement of laws and policies. This book draws on the synergy of political theory and civil rights law to expand the boundary of racial justice and consider the way in which racial discrimination happens outside the governmental or public sphere.

In particular, this book discusses racial injustice that happens in the television and movie industry, cyberspace, our intimate and sexual lives, and the reproductive market. I argue that these are some of the places where racial injustice happens in private.

In drawing on political theory, this book takes a methodologically diverse approach to understanding racial justice. The focus of methodology may be a familiar one in other subfields in political science. Political theorists also care about methodology. Like other political scientists, we too deploy tools, instruments, and frameworks to study a particular issue. Our tools are often conceptual and evaluative in nature rather than empirical. But they are tools nonetheless, representing different and often contrasting ways of arriving at our normative conclusions.

One such conceptual methodological difference, and the focus of this book, is the distinction between ideal and nonideal theory,[1] or what this book will call for clarity purposes "the ideal society approach" and the "actual society approach" respectively. These represent two distinct methodologies of justice. There are of course other such methodologies. I draw on these two because they strike me as two prominent ways of understanding or thinking about racial justice.

Put in general terms, the "ideal society approach" says that in an ideal society race would not matter. Racial discrimination would not occur. The ideal society approach is most often associated with John Rawls's *A Theory of Justice*, so the book will treat Rawls's argument as a representative of this approach. According to this approach, racial discrimination is wrong, because society should treat race as something that is "arbitrary from a moral perspective."[2] The ideal society approach defines racial injustice in terms of racial discrimination. It's wrong for society to discriminate.

This methodology of justice also has political and legal significance. The Republican Party's 2016 platform references it:

> We reaffirm the Constitution's fundamental principles: limited government, separation of powers, individual liberty, and the rule of law. We denounce bigotry, racism, anti-Semitism, ethnic prejudice, and religious intolerance. Therefore, we oppose discrimination based on race, sex, religion, creed, disability, or national origin and support statutes to end such discrimination. As the Party of Abraham Lincoln, we must continue to foster solutions to America's difficult challenges when it comes to race relations today. We continue to encourage equality for all citizens and access to the American Dream. Merit and hard work should determine advancement in our society, so we reject unfair preferences, quotas, and set-asides as forms of discrimination.[3]

Taking the ideal society approach seriously means that racial discrimination is wrong, and society should seek to prohibit it. This approach finds "quotas," "set asides," and other kinds of remedial policies based on race to be unfair. Merit and hard work, not race, should be all that matters. As a representative of the ideal society approach, Chief Justice

[1] See, e.g., Farrelly 2007, Geuss 2008, Valentini 2012, Wiens 2012.
[2] Rawls 1999 [1971]: 64.
[3] www.gop.com/the-2016-republican-party-platform/

John Roberts says: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[4] This means that he and those jurists who favor this approach will likely strike down race-based affirmative action policies, because these policies discriminate on the basis of race.

Put also in general terms, the "actual society approach" says that in our actual society, race does matter. This approach draws attention to racial inequality and stereotypes that exist in our actual society. We can associate this kind of approach with a range of work by scholars such as Elizabeth Anderson, Charles Mills, Martha Nussbaum, and Iris Marion Young. This book will treat arguments by these scholars as representative examples of the actual society approach. According to this approach, racial inequality or stereotypes are wrong and therefore society should do something about this. There may be disagreement about what society should do under the actual society approach. (Disagreement that I discuss in more detail in Chapter 1.) At the very least, it's wrong for society to further racial inequality or stereotypes under this approach.

This approach also has political and legal significance. The Democratic Party's 2016 platform references it:

> Democrats will fight to end institutional and systemic racism in our society. We will challenge and dismantle the structures that define lasting racial, economic, political, and social inequity. Democrats will promote racial justice through fair, just, and equitable governing of all public-serving institutions and in the formation of public policy. Democrats support removing the Confederate battle flag from public properties, recognizing that it is a symbol of our nation's racist past that has no place in our present or our future. We will push for a societal transformation to make it clear that black lives matter and that there is no place for racism in our country.

Taking the actual society approach seriously means that society should seek to recognize and address racial inequality, transforming society to be more equal in terms of race. As a representative of the actual society approach, Justice Sonia Sotomayor says: "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race,

[4] *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1* (2007) at 748.

and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."[5] This means that she and those jurists who favor the actual society approach will likely uphold race-based affirmative action policies, because these policies seek to remedy racial injustice.

Those who reject affirmative action policies often do so by deploying the ideal society approach. They view such policies as instances of racial discrimination, discrimination that is otherwise unjust or wrong. Those who favor such policies often do so by deploying the actual society approach. They view such policies as seeking to remedy racial injustice. And jurists and legal scholars also deploy these approaches in either defending or rejecting affirmative action policies. This is why we usually view those who adopt the ideal society approach as ideologically conservative and those who adopt the actual society approach as ideologically liberal in matters of race.

In a methodological diverse fashion, this book will draw on both approaches. I argue that both methodologies of justice support the conclusion that private racism is a form of injustice. Both support the book's core normative claim that we should enlarge the boundary of racial justice. I use both to create an overlapping moral consensus that will underwrite this claim. In *Brown* v. *Board of Education* (1954), these approaches also formed an overlapping moral consensus that recognized that racism in the public or governmental sphere is wrong. In *Brown*, Chief Justice Earl Warren asks: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" He concludes it does. Warren's opinion references both the ideal and actual society approaches. In a reference to an ideal society, *Brown* focuses on the idea that discrimination "solely on the basis of race" is wrong. "Separate but equal" is, as *Brown* famously says, "inherently unequal."[6] In an ideal society, society would not separate or discriminate against individuals on the basis of race, because society would treat race as morally irrelevant. In a reference to our actual society, *Brown* makes clear that this policy also deprives "the children of the minority

[5] *Schuette* v. *BAMN* (2014) at 381, dissenting.
[6] *Brown* (1954) at 495.

group of equal educational opportunities."[7] Segregation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[8] *Brown* recognizes that racial inequality and stereotypes exist in our actual society and that segregation only contributes to and furthers this injustice. It is no wonder that *Brown* is considered by most, if not all, of us, regardless of ideology or methodology, as the iconic "symbolic" case that condemns racism in our public life.[9]

In drawing on this moral consensus, this book argues that we should also condemn racism in our private life. Both approaches or methodologies of justice enlarge the boundary of racial justice by supporting that moral conclusion. Because this argument draws on both approaches, it makes an argument that cannot be characterized as either ideologically liberal or conservative.

I will argue that the ideal society approach expands the boundary of racial justice by treating racial discrimination as the relevant injustice. If we should treat race as a morally irrelevant characteristic, it does not matter whether racial discrimination happens in public or private. I show that according to the ideal society approach, individuals who discriminate on the basis of race in private also act unjustly. This provides us moral reasons for enlarging the boundary of racial justice.

I will argue that the actual society approach expands the boundary of racial justice by treating racial inequality and stereotypes as the relevant injustice. If we treat racial inequality as the moral wrong, it does not matter whether this inequality or these stereotypes happen in public or private. I show that according to the actual society approach, individuals who further this inequality or these stereotypes in private act unjustly. This also provides moral reasons for enlarging the boundary of racial justice.

We need not look just to political theory. Civil rights law also expands this boundary. The legal part of this book will draw on landmark civil rights statutes such as the Civil Rights Act of 1964 and the Fair Housing Act of 1968 and the cases that importantly interpret these statutes, such as *Jones* v. *Mayer* (1968), to flesh out this expansive view of the boundary of racial justice. The book's legal argument will work in

[7] *Brown* (1954) at 493.
[8] *Brown* (1954) at 494.
[9] See generally Rosenburg 2004.

tandem with the ideal and actual society approaches. That synergy between political theory and civil rights law will be an important feature of the book.

We can see this synergy at work in *Jones* where a white homeowner refused to sell his house to Joseph Lee Jones, because he was black. The US Supreme Court held that this violates Section 1982 passed by the Reconstruction Congress after the Civil War. The Court references both the ideal and actual society approaches in doing so. It concludes that Section 1982 "bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."[10] In reference to discrimination, the conclusion draws on the ideal society approach that says racial discrimination is wrong. In reference to the Thirteenth Amendment, the conclusion draws on the actual society approach that says racial inequality and stereotypes – the "badges and the incidents of slavery"[11] – are wrong. In that one sentence, *Jones* references both. This book will do the same by discussing both approaches in each chapter.

In drawing on both methodologies, *Jones* makes clear that these laws sought to combat racism in public and private.

> For the same Congress that wanted to do away with the Black Codes also had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation.[12]

The Court goes on to reference various kinds of private injuries, injuries that are not part of the public or political sphere but the private one.

> "Accounts in newspapers North and South, Freedmen's Bureau and other official documents, private reports and correspondence were all adduced" to show that "private outrage and atrocity" were "daily inflicted on freedmen . . ." The congressional debates are replete with references to private injustices against Negroes – references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the

[10] *Jones* (1968) at 413.
[11] *Jones* (1968) at 440–441.
[12] *Jones* (1968) at 427.

> permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities.
>
> Indeed, one of the most comprehensive studies then before Congress stressed the prevalence of private hostility toward Negroes and the need to protect them from the resulting persecution and discrimination.[13]

By referencing "private hostility" and "private injustices," *Jones* acknowledges and repudiates racism that happens outside the governmental or public sphere. This book will do the same, devoting each chapter to a different instance of private racism.

The book makes claims that are descriptive, normative, and legal in nature. I show that racism does take place in our private lives (the descriptive claim), that this kind of racial discrimination is wrong under both the ideal and actual society approaches (the normative claim), and that the law already prohibits certain instances of private racism (the legal claim). This book argues that racial injustice happens in private. So, just as we care about racial equality in public, we should enlarge the boundary of racial justice and also care about racial equality in private. The moral consensus provided by the ideal and actual society approaches to racial justice supports that conclusion or so I argue. In doing so, these methodologies of justice affirm an expansive view of the boundary of racial justice.

In positively commenting upon Justice Sotomayor's words from above, former Attorney General Eric Holder warns that we should not focus solely on the "high-profile expressions of outright bigotry."[14] For if we do

> we are likely to miss the more hidden, and more troubling, reality behind the headlines.
>
> These outbursts of bigotry, while deplorable, are not the true markers of the struggle that still must be waged, or the work that still needs to be done – because the greatest threats do not announce themselves in screaming headlines. They are more subtle. They cut deeper. And their terrible impact endures long after the headlines

[13] *Jones* (1968) at 427–28.
[14] www.washingtonpost.com/politics/transcript-attorney-general-eric-holders-speech-to-morgan-state-university-graduates/2014/05/17/d6b72284-ddd0-11e3-b745-87d39690c5c0_story.html

> have faded and obvious, ignorant expressions of hatred have been marginalized.[15]

Holder is correct that racism can sometimes be "more hidden" or more "subtle." One way this can happen, and the focus of this book, is when racial injustice happens in the private sphere. This book takes seriously the idea, most often associated with feminist political theory, that the personal is the political. In doing so, it expands the boundary of racial justice by showing that racism happens in private. This book has five chapters followed by a conclusion.

The first chapter ("Enlarging the Boundary of Racial Justice") elaborates upon the moral consensus that will drive the rest of the argument, drawing on the synergy of political theory and civil rights law to expand this boundary. This consensus draws on both the ideal and actual society approaches to explain that racism which occurs outside the governmental or public sphere is also unjust. According to the ideal society approach, racial discrimination is unjust, because society should treat race as a morally irrelevant characteristic. Racial discrimination that occurs in our private lives is wrong. According to the actual society approach, racial inequality and stereotypes are the relevant injustice, because these inequalities make it more difficult for racial minorities to find various goods and services. Furthering or facilitating this inequality or these stereotypes in our private lives is wrong. Both frameworks will form the overlapping moral consensus that will motivate the book's argument.

I also show that civil rights law enforces this consensus by prohibiting racial discrimination and racial steering. Racial discrimination may be the more familiar practice that occurs in private like the discrimination Joseph Lee Jones faced in finding housing. Racial steering occurs when individuals, most notably real estate agents or brokers, "steer or channel a prospective buyer into or away from an area because of race."[16] Steering can facilitate racial discrimination and therefore further racial inequality or stereotypes. The ideal and actual society approaches justify the law's ban on racial discrimination and steering,

[15] www.washingtonpost.com/politics/transcript-attorney-general-eric-holders-speech-to-morgan-state-university-graduates/2014/05/17/d6b72284-ddd0-11e3-b745-87d39690c5c0_story.html

[16] *Zuch* v. *Hussey* (E.D. Mich. 1975) at 1047.

respectively. The ideal society approach says that racial discrimination in private is wrong. The actual society approach says that encouraging or furthering racial inequality or stereotypes in private is wrong. These acts of discrimination and steering will figure prominently in the book.

The second chapter ("Casting Racism") considers the injustice of racial discrimination by television and movie studios in their casting decisions. I argue that casting racism is a form of employment discrimination. This chapter argues that this kind of private racism is wrong and unlawful. I argue that casting racism violates formal equality of opportunity and furthers the harm of cultural imperialism. Both the ideal and actual society approaches repudiate it. Federal law also prohibits casting racism, making no exception for this kind of discrimination. This chapter then considers whether television and movie studios have a First Amendment right to expressive association that would permit them to engage in this kind of racial discrimination.

The third chapter ("Digital Racism") considers racism in our private, digital lives. According to a 2018 Pew Research poll, one quarter of adults in the United States say they are "almost constantly" online.[17] This means that we conduct much of our private lives online or digitally. This chapter discusses two kinds of digital racism, digital discrimination and digital steering. Digital discrimination occurs when users on websites and platforms discriminate on the basis of race. I show that although discrimination is a well-documented phenomenon, it is difficult to hold websites responsible for it. This is because, as a matter of law, they are not held responsible for what their users do. This chapter argues we can more effectively combat digital racism by banning digital steering. Digital steering occurs when websites and platforms encourage or direct us to discriminate on the basis of race. This chapter argues that we should hold websites responsible for steering. In doing so, this chapter draws on the ideal and actual society approaches to treat websites and platforms as digital public accommodations. These sites structure how we interact, communicate, and transact in the world. As such, this chapter argues that it's wrong

[17] www.pewresearch.org/fact-tank/2018/03/14/about-a-quarter-of-americans-report-going-online-almost-constantly/

for websites to encourage or direct their users to discriminate on the basis of race. We should ban them from doing so.

The fourth chapter ("Sexual Racism") considers racism in our intimate or sexual lives. I show that racial discrimination, stereotyping, and intersectionality happen in our intimate lives. This makes it more difficult for those who are not white to find intimacy, where intimacy is the opportunity to be in a romantic or sexual relationship. I argue that this is a form of racial injustice, because it denies individuals an important social primary good under the ideal society approach and a capability central to human dignity under the actual society approach. The chapter suggests how society can address sexual racism by banning websites and platforms from steering us to discriminate on the basis of race in our intimate lives.

The fifth chapter ("Reproductive Market Racism") argues that racism is a prominent aspect of the market for gametes, because in selling sperm and ova, reproductive banks also provide buyers the option to exclude donors on the basis of race. Reproductive banks provide this option by discriminating against potential donors on the basis of race and steering buyers to do the same. Most notably, these banks engage in racial steering by disclosing the race of the donor. In doing so, they provide buyers the option to form a biological family that is racially homogenous. This allows buyers the option to avoid racially integrating their families. This is how banks sell segregation, or so this chapter argues. Drawing on both the ideal society and actual society approaches to racial justice, this chapter argues that selling segregation is wrong.

The conclusion ("Private Injustice") acknowledges that we may face other kinds of private injustices besides private racism. As a way to spur further conversations about enlarging the boundary of justice in other ways, the concluding chapter will consider private homophobia and private economic injustice. Treating these as two types of private injustice also stands to enlarge the boundary of justice. I focus on these two, because the Court has recently discussed the first and because political philosophy, in particular G.A. Cohen's article "Where the Action is: On the Site of Distribute Justice,"[18] discusses the latter.

[18] Cohen 1997.