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### The Cultural War Over Reparations for Slavery

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## THE CULTURAL WAR OVER REPARATIONS FOR SLAVERY

*Alfred L. Brophy\**

### INTRODUCTION

American democracy is a most dramatic form of social organization, and in that drama each of us enacts his role by asserting his own and his group's values and traditions against those of his fellow citizens. Indeed, a battle-royal conflict of interests appears to be basic to our conception of freedom, and the drama of democracy proceeds through a warfare of words and symbolic actions by which we seek to advance our private interests while resolving our political differences. Since the Civil War this form of symbolic action has served as a moral substitute for armed warfare, and we have managed to restrain ourselves to a debate which we carry on in the not always justified faith that the outcome will serve the larger interests of democracy. Unfortunately, this doesn't always work out, and when it doesn't, the winners of a given contention are likely to concern themselves with only the fruits of victory, while leaving it to the losers to grapple with the issues that are left unresolved.

Ralph Ellison, author of *Invisible Man*<sup>1</sup>

Reparations for slavery and its claims for accounting of past injustice, for apologies and truth commissions, for a reconciliation of de-

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1. RALPH ELLISON, *Going to the Territory*, in *THE COLLECTED ESSAYS OF RALPH ELLISON* 591, 595 (John Callahan ed., 1995). Ellison noted:

Having won its victory, the North could be selective in its memory, as well as in its priorities which developed following the end of Reconstruction. And even the South became selective in its memory of the incidents that led to its rebellion and defeat. Of course a defenseless scapegoat was easily at hand, but my point here is that by pushing significant details of our experience into the underground of unwritten history, we not only overlook much which is positive, but we blur our conceptions of where and who we are.

*Id.*

decades-old debts and forward-looking relief, and for group-based relief represents yet another front on what has been called the culture wars of the 1990s and the present. The case for reparations rests on how we view the past and what one should do about it. Indeed, reparations taps into a decades-old debate over how to deal with inequality in American society. Should we try to ensure equality of outcome or equality of opportunity? Is racial progress best achieved by demanding equal treatment through the courts or by a gradual process of accommodation? By having a reckoning with slavery and the legacy of Jim Crow or by focusing with single-minded devotion on the present? At the beginning of the twentieth century, the debate on these issues was between Booker T. Washington and W.E.B. DuBois. More recently it has been between public intellectuals and reparations skeptics like John McWhorter<sup>2</sup> and Ward Connerly and reparationists like Charles Ogletree.<sup>3</sup>

The case for reparations rests, in large part, on determining critical issues like what is the value of truth commissions and can racial reconciliation take place without a remedy? This Article first identifies the issues at stake in the culture war over reparations. Then it turns to an in-depth exploration of the arguments against reparations. It addresses how reparationists view those arguments, as well as the independent arguments reparationists put forward. The Article concludes with an assessment of the utility, as well as disadvantages of reparations, and what we might expect to gain (and lose) through a comprehensive reparations program.

## II. THE CONTROVERSIAL NATURE OF REPARATIONS

Reparations payments—even apologies—are deeply controversial. When the *Mobile Register* polled Alabama citizens on the issue of reparations in the summer of 2002, it found that the question of reparations was the most racially divisive issue since it began polling. (See Table 1.) The differences between whites and blacks outstripped even the gap seen during the civil rights struggle over integration. Why is it that only five percent of white Alabamians support reparations for slavery, while sixty-seven percent of black Alabamians support them? Why did some whites become so enraged at the mere suggestion of

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2. See, e.g., John McWhorter, *Against Reparations, Why African Americans Can Believe in America*, NEW REPUBLIC, June 19, 2001, at 32.

3. See, e.g., Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003). See also Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309 (2003).

reparations that they could not complete the survey?<sup>4</sup> Lest one think that Alabama is out-of-step with attitudes in the United States, that racial gap is fairly constant nationwide. According to a study by Harvard University and the University of Chicago that researchers reported in the spring of 2003, only four percent of whites support reparations payments. (See Table 2.)

The opposition even to apologies, which are free from financial obligation, suggests that something very important is at stake—it is how we view ourselves and our place in the world. It is, in short, about what is known as the culture wars—a conflict between liberals and conservatives over how they view issues as diverse as abortion, religion’s role in public life, affirmative action, and the United States’s culpability for racism.<sup>5</sup> Reparations touch on these issues in several places. Reparations relate to how we view the United States’s history—is it a narrative of the United States as a place of opportunity or oppression? They also relate to how we view the legacy of slavery and what we should do about it now. Is there continuing culpability? Do we need to do something to repair past harms? Do ideas of personal culpability free current taxpayers from liability?

TABLE 1: ALABAMIANS’ ATTITUDES TOWARD APOLOGIES AND REPARATIONS<sup>6</sup>

Should there be:	Blacks	Whites
Apology for slavery	73%	24%
Corporations that benefitted apologize	76%	31%
Corporations that benefitted from slavery establish scholarship funds for descendants of slaves	87%	34%
Corporations that benefitted from slavery pay descendants of slaves	69%	15%
Reparations payments from the government	67%	5%

4. Sam Hodges, *Slavery Payments a Divisive Question*, MOBILE REG., June 23, 2002, at 1A; Jeff Amy, *Professor wants UA apology for slavery*, MOBILE REG., March 16, 2004, at 1A. See also James Cox, *Activists Challenge Corporations That They Say Are Tied to Slavery*, USA TODAY, Feb. 21, 2002, at A1 (summarizing similar results in CNN/USA TODAY poll).

5. See, e.g., James Davison Hunter, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991); DANNY GOLDBERG, *DISPATCHES FROM THE CULTURE WARS: HOW THE LEFT LOST TEEN SPIRIT* (2003).

6. See Hodges, *supra* note 4. Some further evidence of attitudes towards apology appears in Daniel J. Hemel, *Oglethorpe Vows to Continue Lawsuit*, HARV. CRIMSON, Mar. 25, 2004, available at <http://www.thecrimson.com/article.aspx?ref=358515> (last visited Apr. 25, 2004) (discussing response to suggestion that University of Alabama faculty senate apologize for the faculty’s use

TABLE 2. ATTITUDES OF BLACKS AND WHITES TOWARD APOLOGIES AND REPARATIONS<sup>7</sup>

Should the government:	Blacks	Whites
Apologize for internment of Japanese Americans during World War II	75%	43%
Pay compensation to those interned	59%	26%
Apologize for slavery	79%	30%
Pay compensation for slavery	67%	4%

A central feature of the culture war is how we view American history.<sup>8</sup> There is something more at stake with reparations. Reparations are more controversial—that is, more people oppose them—than most issues in the culture war. There is some basic parity in many issues relating to the culture war. With reparations, at least judging by public opinion right now, there is little parity. Reparations are simply viewed with disdain by many. What else is it? It is a conflict that appears frequently when race enters political discussion—of fear of issues of group identity and group liability. So frequently, group members see themselves as being asked to pay more than their fair share. And group members think that they are receiving less than they deserve. Those sentiments are heightened when one deals with racial group identity.

### III. WHAT'S AT STAKE? WHY ARE REPARATIONS CONTROVERSIAL?

Perhaps some of the opposition comes from the sense that there will be both extraordinary liability and that there will be more humiliation attached to apologies and reparations payments.<sup>9</sup> In order to understand reparations further—indeed, to arrive at some sense of what reparations will be like—it is necessary to understand what reparations mean. What is it that reparationists *want*?

The goals of reparations are varied. Most people writing about reparations begin by talking about truth commissions that acknowledge

of slaves, their discipline, and their advocacy of proslavery doctrine); Jay Reeves, *University of Alabama Apologizes for Slavery*, CHI. TRIB., Apr. 21, 2004, available at 2004 WL 77184717.

7. See Harbour Fraser Hodder, *The Price of Slavery*, HARV. MAG., May-June 2003, at 12, available at <http://www.harvard-magazine.com/on-line/050319.html> (last visited Jan. 29, 2004).

8. See, e.g., MONA CHAREN, *USEFUL IDIOTS: HOW LIBERALS GOT IT WRONG IN THE COLD WAR AND STILL BLAME AMERICA FIRST* (2003).

9. For the suggestion that the opposition comes from racial prejudice, see Lee A. Harris, "Reparations" as a Dirty Word: *The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409 (2003). See also Sasha Polakow-Suransky, *Sins of Our Fathers*, BROWN U. ALUMNI MAG., July-Aug. 2003, at 36 (discussing division over support for reparations).

the scope of the problem, along with an apology. United States Representative John Conyers of Michigan, for example, has introduced a bill, H.R. 40, in every congressional term since 1989 to study slavery and to understand its effects, which encompass the benefits it has conferred as well as the harms it has entailed on subsequent generations.

#### A. *Apologies and Truth Commissions*

Some of the more moderate proponents of reparations see truth commissions and apologies as critical parts of reconciliation. Indeed, for some, those may be the center of a reparations plan. Eric Yamamoto's work in *Interracial Justice* focuses on reconciliation.<sup>10</sup> Yamamoto sees reconciliation as a two-sided project. Once there is truth and apology, then payments can help solidify that contrition.

Others propose truth commissions for limited parts of Jim Crow and slavery, like the Tulsa Race Riot of 1921, the Rosewood Massacre of 1923, and the thousands of wrongful prosecutions and lynchings and dozens of riots that took place throughout the country in the period from Reconstruction through the Civil Rights Era.<sup>11</sup> Professor Sherrilyn A. Ifill has suggested recently that local communities ought to establish truth commissions to investigate local complicity in such crimes as lynchings. She makes a compelling case for the centrality of lynchings to American society in the early part of the twentieth century, and that we should do something to investigate them. But we also need a theory of how those truth commissions, once established, will help. Certainly, they will uncover ugly chapters of American his-

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10. ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1998) [hereinafter YAMAMOTO, *INTERRACIAL JUSTICE*]. See also Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477 (1998). Yamamoto focuses on what reparations mean to the people receiving them in their attitudes towards the government. That focus may be somewhat more possible with Japanese Americans than African Americans because the former actually have received reparations. Hence, it may be easier to ask that community to accept the payments and move forward. There may be a greater possibility for what Yamamoto calls "contributing to institutional and attitudinal restructuring." *Id.* at 479 (citing Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT'L L. & POL'Y 223, 233 (1992)). See also Ibrahim J. Gassama, *Confronting Globalization: Lessons from the Banana Wars and the Seattle Protests*, 81 OR. L. REV. 707 (2002).

11. See, e.g., Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263 (2003); Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557 (2003); Alfred L. Brophy, *Reparations Talk: The Tort Law Analogy and Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 81-138 (2004) (discussing reparations in the context of Jim Crow, for such diverse crimes as segregated libraries, lynchings, and exploitation of convict labor).

tory. But once that has happened, will they do anything else?<sup>12</sup> At other times, truth commissions come in the form of prosecution of decades-old crimes.<sup>13</sup>

The new knowledge that the truth commissions will produce will, one suspects, have several consequences. First, it will give a new sense of power to those whose version of history is vindicated. The power of historical stories is strong—it gives listeners a sense of place and importance—and when there are stories about the community, it will lead to a renewed sense of power and pride. The value of historical stories appears to be great. One can gauge the power of stories and apologies by how difficult it is to obtain them. Look at the struggle that has taken place over whether the United States government, meaning a president, will apologize for slavery. In 1998, President William J. Clinton flirted with an apology for slavery when he visited Goree Island, the place of embarkation for many slaves being taken to the Americas.<sup>14</sup> Indeed, some of his remarks come pretty close to an apology—and they certainly represent condemnation and contrition—even though he never claimed that he had apologized.<sup>15</sup> Why, one asks, is it enormously difficult to obtain even an apology? Clinton represented the age of apology. He apologized profusely for the United States government's past crimes, discussed apologizing for, or was part of, apologies for slavery,<sup>16</sup> the genocide in Rwanda,<sup>17</sup> execu-

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12. See, e.g., Ifill, *supra* note 11; Jordan, *supra* note 11 (suggesting lynching as centerpiece of Jim Crow reparations strategy). Can apologies be made the site for reconciliation?

13. See, e.g., Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003); Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225 (2003); Alfred L. Brophy, *Law as a Character of Society: Legal Change in Twentieth Century America*, 30 REV. AM. HIST. 631, 638 n.2 (2002) (commenting in regard to prosecution of a bomber of the 16th Street Baptist Church in 1963, that what historians think of "as almost ancient history—an impetus to the civil rights legislation of the 1960s—is still, in many ways for the people of Birmingham, an event that is only recently past").

14. Ann Scales, *Clinton, in Senegal, Revisits Slavery's Horrors, Emotional End to Historic Trip*, BOSTON GLOBE, Apr. 3, 1998, at A2 (discussing President Clinton's condemnation of slavery during his visit to Goree Island).

15. Roger Simon, *Clinton Ends Visit by Touring Slave Port: Africans Praised for Their Role in Building the U.S.*, CHI. TRIB., Apr. 3, 1998, at 1. Many people have interpreted his remarks as an apology. See, e.g., William F. Buckley, *No on Liberia*, NAT'L REV., July 8, 2003, at <http://www.nationalreview.com/buckley/buckley070803.asp> (last visited Jan. 29, 2004). ("We are not beholden to Liberia in the sense that the British, French and Belgians can be thought to be beholden to Rhodesia, Sierra Leone, the Ivory Coast and Congo. To talk about responsibilities traceable to events a century and a half past gets you into the kind of historical sandpit Clinton got into when he decided to apologize, in Africa, for slavery.") Walter Williams, *Reparations for Slavery*, CAPITALISM MAG., Jan. 12, 2001, at <http://capmag.com/article.asp?ID=89> (last visited Jan. 29, 2004). ("Incidentally, President Clinton apologizing for slavery in Africa, of all places, is stupid—apologizing to descendants of slave traders for slavery in America.")

16. Deborah Orin, *W. Pledges Liberia's Dictator Is Outta There*, N.Y. POST, July 6, 2003, at 6 ("Former President Bill Clinton made headlines by apologizing for U.S. inaction on Rwanda

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tions of civilians during the Korean war,<sup>18</sup> the United States's support of Guatemala's military while it committed genocide,<sup>19</sup> medical experiments on African Americans at Tuskegee,<sup>20</sup> radiation experiments,<sup>21</sup> and deprivation of Native Hawaiians' land.<sup>22</sup>

Well, given the opposition one sees to apologies, it must have meaning to the people who are asked to give the apology, as well as to those seeking it. Indeed, the apology's meaning appears in what it signals about blame and responsibility for the consequences of that crime. President George W. Bush's recent statements regarding the crime of slavery suggests both the power of reparations arguments and the current limitations on them.<sup>23</sup> For it is doubtful that President Bush would have made such an acknowledgment about the harms of slavery if there had not been extensive reparations talk in the months leading up to his statement. But his refusal to apologize for slavery also suggests limitations.<sup>24</sup>

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genocide, U.S. support for African dictators and nearly apologizing for slavery when he said America was wrong to profit from it."). There are some reports that Clinton worried about the legal implications of an apology. Paige A. Fogarty, *Speculating a Strategy: Suing Insurance Companies To Obtain Legislative Reparations for Slavery*, 9 CONN. INS. L.J. 211, 216 (2002) (citing Douglas Stanglin, *Clinton Opposes Slavery Apology*, U.S. NEWS & WORLD REP., Apr. 6, 1998, at 7).

17. Elizabeth Sullivan, *World Tunes Out Bloody Congo*, CLEV. PLAIN DEALER, May 29, 2003, at B9.

18. Richard Pyle, *U.S. Commanders Told Troops To Shoot Korean Civilians*, MILWAUKEE J. SENTINEL, Nov. 25, 2001, at 4A (President Clinton rejected calls for formal apology, but issued statement of regret instead.).

19. *Cold War Debts and Credits*, WASH. POST, Mar. 14, 1999, at B6; Elspeth Macdonald, Letter to the Editor, *Stop Aiding Brutality Now, Offering Empty Apologies Later*, SEATTLE TIMES, Mar. 28, 1999, at B11.

20. Matthew Kauffman, *The Debt; the Cost of Slavery Was High. But Who Will Pay for It?*, HARTFORD COURANT, Sept. 29, 2002, at 72 (discussing President Clinton's apology for Tuskegee experiments).

21. *Human Guinea Pigs Another Example of 'Scientific' Abuse*, PITTSBURGH POST-GAZETTE, June 10, 2002, at A8.

22. Jean Marbella, *A Mellow Revolution Stirs Among Hawaiians; Sovereignty: Some Envision the Islands Not as the 50th State - but as an Independent Country*, BALT. SUN, May 10, 2003, at 1A (discussing joint resolution of Congress, signed by President Clinton, apologizing for deprivation of land); Ediberto Roman, *Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits*, 13 BERKELEY LA RAZA L.J. 369, 379 (2002).

23. Richard W. Stevenson, *Bush, in Africa, Promises Aid but Offers No Troops for Liberia*, N.Y. TIMES, July 9, 2003, at A8. President Bush stated:

Years of unpunished brutality and bullying and rape produced a dullness and hardness of conscience. Christian men and women became blind to the clearest commands of their faith and added hypocrisy to injustice. A republic founded on equality for all became a prison for millions.

*Id.*

24. John Donnelly, *Bush Condemns Slavery as One of 'Greatest Crimes': Speech at Source of African Trade Gives No Apology*, BOSTON GLOBE, July 9, 2003, at A1.



Second, it will serve as a basis for subsequent arguments about equality and reparations. At least reparationists will argue that with this new understanding of the centrality of race, we should take racial categories into account more often.<sup>25</sup> Far from leading to a society in which race is not important, reparations and truth commissions will likely lead to a color-conscious society. This question of what truth commissions do is at the center of debates about reparations throughout the world.<sup>26</sup> For there is a certain value in truth—it tells us about how we view the world.<sup>27</sup>

For many, the truth commission and apology are merely opening steps to a larger program of reparations. By preparing people to understand the nature of the harm and why reparations are needed, they are a way of making the claim before the public. One recent anonymous assessment of reparations from the April 2002 *Harvard Law Review*, entitled “Bridging the Color Line: The Power of African-American Reparations to Redirect America’s Future,”<sup>28</sup> focuses on winning political acceptance of the idea of reparations. As the author observes, “before achieving victory in a court of law, African-American reparations must succeed in the court of public opinion.”<sup>29</sup> It might be possible to achieve limited victories in court, of course, before conversion of the national conscience to the idea of reparations. However, transformative reparations will almost certainly come through the legislature, if at all. The anonymous author of “Bridging the Color Line” proposes a gradual political<sup>30</sup> process of accommodating the national conscience to reparations—first, through study of the effects of slavery and Jim Crow, then through exploration of remedies, which emphasizes issues of justice and economics, rather than race. That author sees studies of the impact of slavery on the nation and on slaves and their descendants as critical to the case for reparations and as only the first step in making the case:

Incrementalism that focuses first on the creation of a commission to investigate the wrong will provide politicians and reparationists with

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25. See, e.g., Cheryl I. Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487, 2489-92 (2003) (discussing the Supreme Court’s colorblind jurisprudence and its implications for remedying racial inequality).

26. See, e.g., ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* (2000).

27. See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 42-90 (1998).

28. Note, *Bridging the Color Line: The Power of African-American Reparations To Redirect America’s Future*, 115 HARV. L. REV. 1689 (2002).

29. *Id.* at 1693.

30. *Id.* at 1704 (“Politicians and community leaders, not just lawyers, should frame the public debate over reparations.”).

the opportunity to lay the evidentiary groundwork necessary to educate the public regarding the effects, past and present, of slavery and Jim Crow—creating a strong moral and economic claim for reparations in the second place.<sup>31</sup>

The note makes some suggestions about how such a reparations program would look. The initial study of the effects of slavery and Jim Crow would both lay the groundwork for a national consensus on reparations and also serve a cathartic purpose, which would offer emotional closure for victims.<sup>32</sup> Some will likely say that the Note is overly optimistic in its assessment of the likely effects of a truth commission. Recently, Eric Yamamoto and several colleagues advanced a similar analysis, which suggests that as the United States struggles with international terrorism, it will reinforce its moral position by supporting domestic racial justice.<sup>33</sup>

Yet that leaves the question open: once we get past studying, talking about, and apologizing for slavery and Jim Crow, what will reparations look like? As Richard Newman of the W.E.B. DuBois Institute at Harvard University said in June 2001, “[N]othing is going to make history go away.”<sup>34</sup> By analogy to the Marshall Plan, which rebuilt Germany following World War II, he suggested a domestic Marshall Plan.<sup>35</sup> Newman could not state, because indeed it is impossible, the likely cost of reparations. For in talking about reparations, one is “talking about something colossal.”<sup>36</sup>

### B. *The Goals of Reparations*

Before we talk about spending colossal amounts of money, we should have some sense of what it is that we want to accomplish. In essence, why reparations? What is the point? Here, as with reparations plans, the goals are diverse. They include a range from correc-

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31. *Id.* at 1706.

32. *Id.* at 1708. That is certainly an important goal; and study must, obviously, precede action. One is concerned, however, that the author of *Bridging the Color Line* is placing too much hope in the ability of a study to transform American thought. One thinks of similar episodes in history, like the Kerner Commission Report on racial violence, and their inability to transform fundamentally values. The politics of historical commissions is itself an important topic, deserving substantial attention. *Id.*

33. See Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269 (2003).

34. Richard Newman spoke on the National Public Radio show, *The Connection*, on June 1, 2001, on a show about the Tulsa Race Riot and reparations. Newman’s comments on the Marshall Plan appeared at thirty minutes into the show. The show is available at: <http://archives.theconnection.org/archive/2001/06/0601a.shtml> (last visited Apr. 13, 2004).

35. *Id.*

36. *Id.* Newman’s comments on the cost appear at 31:25 into the show.

tive justice—acknowledging and repairing past harm—to distributive justice.<sup>37</sup>

Professor Charles Ogletree, one of the leading reparationists and a leader of the Reparations Coordinating Committee, a group of lawyers and social scientists whose goal is to coordinate reparations lawsuits, has recently emphasized four features of reparations:

- (1) a focus on the past to account for the present;
- (2) a focus on the present, to reveal the continuing existence of race-based discrimination;
- (3) an accounting of the past harms or injuries that have not been compensated; and
- (4) a challenge to society to devise ways to respond as a whole to the uncompensated harms identified in the past.<sup>38</sup>

Ogletree sees “acceptance, acknowledgment, and accounting” as central elements of reparations.<sup>39</sup> Phrased another way, reparations mean truth commissions that document the history of racial crimes and the current liability for those crimes, apologies that acknowledge liability, and payment to settle the account. Ogletree concludes with an appeal to the consciousness of his readers and with a grand theme:

I envision an America where we focus not on our own personal, selfish needs, but on the needs of the voiceless, faceless, powerless, and dispossessed members of the African-American community. We must continue the fight for justice and equality by imagining a world that cares for those who would be left behind. It is a dream that we must make . . . a reality for everyone.<sup>40</sup>

Professor Manning Marable of Columbia University sees justice and equity as the goals of reparations. Reparationists like Marable see reparations as a movement to reconceptualize politics and society. They want an America that builds the African-American community, that recognizes the African-American contributions, and that is freed of the legacy of disadvantages suffered by African Americans. In essence, they ask for society to be as it would have been without state-sponsored or state-allowed slavery and later discrimination. Marable has summarized the demands:

White Americans, as a group, continue to be the direct beneficiaries of the legal apparatuses of white supremacy, carried out by the full weight of America’s legal, political, and economic institutions. The

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37. See Ken Cooper-Stevenson, *Theoretical Underpinnings for Reparations: A Constitutional Tort Perspective*, *forthcoming*, in UNIVERSITY OF WINDSOR YEARBOOK OF ACCESS TO JUSTICE (2004).

38. Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1055 (2003).

39. *Id.* at 1056.

40. *Id.* at 1071-72.

consequences of state-sponsored racial inequality created a mountain of historically constructed, accumulated disadvantage for African Americans as a group.<sup>41</sup>

Marable grimly concludes that “America’s version of legal apartheid created the conditions of white privilege and black subordination that we see all around us every day. A debt is owed, and it must be paid in full.”<sup>42</sup> Marable is aiming at the wholesale remaking of American institutions, which he sees as premised on and structured around white supremacy.<sup>43</sup> In an important talk at Columbia Law School in 2002, Marable stated “[T]he goal of the black freedom movement is freedom.”<sup>44</sup> Reparations are part of that movement. In contrast to many in the civil rights movement of the 1950s and 1960s, the goal for Marable is not integration. “Integration,” Marable said, “is only a tool to freedom.”<sup>45</sup> “The two things we’ve never had are freedom and justice. . . . What is a black theory of justice? Black people as a whole are in a hole they will never get out of.”<sup>46</sup> Marable argued that we need to address the material differences. And that naturally leads to the question, are reparations a way of maneuvering to address those material differences?

Robert Westley’s 1998 article, “Many Billions Gone,” which was published in the *Boston College Law Review*, is one of the most important articles ever written on reparations for slavery. Westley aims at establishing a “legal norm reflecting and reinforcing the interests and perspectives of the subordinated.”<sup>47</sup> He draws on the 1987 article

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41. Manning Marable, *Along the Color Line: In Defense of Black Reparations*, (Oct. 2002), available at <http://www.manningmarable.net/works/pdf/oct02a.pdf> (last visited Apr. 13, 2004).

42. *Id.*

43. Manning Marable, *Along the Color Line: In Defense of Black Reparations, Part II*, available at <http://www.manningmarable.net/works/pdf/oct02b.pdf> (last visited Apr. 13, 2004). Marable notes:

First, and perhaps foremost, is the fact that white racism is structural in character, and is largely grounded in institutional processes rather than by individuals’ behavior. Racial prejudice is reproduced by America’s basic institutions—economic educational, social, and political—of our society. The racial myths of white history are used to rationalize, explain away, and justify white supremacy and black inequality.

*Id.* That Marable is seeking to reform the entire society is apparent from his 1983 book, *How Capitalism Underdeveloped Black America*. For him, reparations talk is a vehicle for advocating those changes.

44. Manning Marable, *Forty Acres and a Mule: The Case for Black Reparations*, the 2003 Paul Robeson Lecture, Columbia Law School (Feb. 27, 2003) available at [http://www.law.columbia.edu/law\\_school/education\\_tech/streaming/video\\_1](http://www.law.columbia.edu/law_school/education_tech/streaming/video_1) (last visited Mar. 15, 2004).

45. The quotes appear at 1:37 and Marable repeats those themes around 1:58. *See id.*

46. *Id.*

47. Robert Westley, *Many Billions Gone: Is It Time To Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 432 (1998) (defining “critical legalism”) (citing Mari J. Matsuda,

by Mari Matsuda, who used reparations as an idea that sprung from the minds of common people—and, one suspects, comes from their ideas of what is fair.<sup>48</sup> Westley, like Matsuda before him, seeks a “committed, concerted, and visionary appeal.”<sup>49</sup> He wants to aid blacks *as a group*.<sup>50</sup> Westley sees the movement for black reparations as part of a larger movement, which must take account of reparations to other oppressed groups. In fact, he admits that other groups, like Native Americans, may have an even better claim on reparations than do blacks.<sup>51</sup>

Westley sees distinct advantages to the group-focused remedies:

[T]he payment of group reparations would create the need and the opportunity for institution-building that individual compensation would not. Additionally, beyond any perceived or real need for Blacks to participate more fully in the consumer market—which is the inevitable outcome of reparations to individuals—there is a more exigent need for Blacks to exercise greater control over their productive labor—which is the possibility created by group reparations.<sup>52</sup>

Even though there will be only limited payments to individuals, Westley sees money as the central element of a reparations plan:

Compensation to Blacks for the injustices suffered by them must first and foremost be monetary. It must be sufficient to indicate that the United States truly wishes to make Blacks whole for the losses they have endured. Sufficient, in other words, to reflect not only the extent of unjust Black suffering, but also the need for Black economic independence from societal discrimination. No less than with the freedmen, freedom for Black people today means economic freedom and security. A basis for that freedom and security can be assured through group reparations in the form of monetary compensation, along with free provision of goods and services to Black communities across the nation. The guiding principle of repa-

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*Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 326 (1987)).

48. See Matsuda, *supra* note 47, at 324. Matsuda notes:

This article suggests that those who have experienced discrimination speak with a special voice to which we should listen. Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.

*Id.*

49. Westley, *supra* note 47, at 433.

50. See *id.* at 468 (“[B]ecause it is my belief that Blacks have been and are harmed as a group, that racism is a group practice, I am opposed to individual reparations as a primary policy objective.”).

51. *Id.* at 436.

52. *Id.* at 468.

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rations must be self-determination in every sphere of life in which Blacks are currently dependent.<sup>53</sup>

He proposes achieving that by making payments to the most impoverished and by establishing a trust fund. African-American beneficiaries could then elect the trustees, who would decide where to spend trust income and assets.<sup>54</sup> Such a plan offers hope of putting control over money into the hands of the people for whom the money should be spent. He concludes with an optimistic, though vague, assessment that reparations will bring equality to blacks:

[F]or those who long for the millennium in which Black equality with whites ceases to be the American dilemma and becomes the American reality, reparations contain within them at least the promise of closure. The closure afforded by reparations means that no more will be owed to Blacks than is owed to any citizen under the law. . . . Once reparations are paid, Blacks will be able to function within American society on a footing of absolute equality. Their chance for public happiness, as opposed to private happiness, will be the same as that of any white citizen who currently takes this concept for granted because the public so utterly “belongs” to him, so utterly affirms his value, his humanity, his dignity and his presence.<sup>55</sup>

Randall Robinson’s best selling book, *The Debt: What America Owes to Blacks*, takes much of its format and framework from Westley’s article.<sup>56</sup> Robinson, like Ogletree and Westley, focuses his attention on the poorest African Americans. The critical issue, as the leading proponents of reparations, Randall Robinson and Charles Ogletree, both point out, is to aid the most disadvantaged—the people who have been left furthest behind. For, as Robinson says, affirmative action “programs are not *solutions* to our problems.”<sup>57</sup> He recognizes that they are too little and that they are not aimed at the most impoverished:

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53. *Id.* at 470. Others see money as central to reparations, even though they do not propose payments to individuals. As Molefi Kete Asante has phrased the issue, “[O]ne way to approach the issue of reparations is to speak about money, but not necessarily about *cash*. Reparations will cost, but it will not have to be the giving out of billions of dollars of cash to individuals, although it will cost billions of dollars.” Molefi Kete Asante, *The African American Warrant for Reparations: The Crime of European Enslavement of Africans and Its Consequences*, in *SHOULD AMERICA PAY?* 12 (Raymond A. Winbush ed., 2003).

54. Westley, *supra* note 47, at 470.

55. *Id.* at 476.

56. See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* ix (2000) (crediting Ibrahim Gassama and Robert Westley with providing legal precedent for the argument). Moreover, many of Robinson’s specific proposals, such as a trust fund, come directly from Westley. See *id.* at 470.

57. See ROBINSON, *supra* note 56, at 8.

They are palliatives that help people like *me*, who are poised to succeed when given half a chance. They do little for the millions of African Americans bottom-mired in urban hells by the savage time-release social debilitations of American slavery. They do little for those Americans, disproportionately black, who inherit grinding poverty, poor nutrition, bad schools, unsafe neighborhoods, low expectation, and overburdened mothers.<sup>58</sup>

Money is important, obviously, because that is what makes it possible for people to move out of poverty. However, an important part of Robinson's reparations movement goes beyond money. Robinson sees an important goal—and maybe the most attainable one—as spiritual growth. He sees reparations as repairing that damage, which stretches across generations:

[T]hrough keloids of suffering, through coarse veils of damaged self-belief, lost direction, misplaced compass, shit-faced resignation, racial transmutation, black people worked long, hard, killing days, years, centuries—and they were *never* paid. The value of their labor went into others' pockets—plantation owners, northern entrepreneurs, state treasuries, the United States government.<sup>59</sup>

Even if Congress never pays a penny in reparations, Robinson sees great promise in the ability of reparations talk to bring about psychological change. He concludes *The Debt* with the prayer:

We must do this in memory of the dark souls whose weary, broken bodies endured the unimaginable.

We must do this on behalf of our children whose thirsty spirits clutch for the keys to a future.

This is a struggle that we cannot lose, for in the very making of it we will discover, if nothing else, ourselves.<sup>60</sup>

Robinson also draws upon the widely publicized work of Richard America, particularly his 1993 book, *Paying the Social Debt: What White America Owes Black America*.<sup>61</sup> America sets out to calculate the amount that African Americans have contributed to the United States economy, for which they have not been compensated. He computes the debt using the formula:

Restitution Owed = The Net Present Value of the Sum of  
(Deviations from Fair Standards in Prices + Wages + . . . All  
Other Transactions)<sup>62</sup>

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58. *Id.*

59. *Id.* at 207.

60. *Id.* at 247.

61. RICHARD F. AMERICA, *PAYING THE SOCIAL DEBT: WHAT WHITE AMERICA OWES BLACK AMERICA* (1993).

62. *Id.* at 3. I think it is appropriate to omit the calculation of interest from America's formula because he has already accounted for that with the reference to present value.

America offers no off-set for restitution that may already have taken place in the form of welfare payments and so may inflate, perhaps dramatically, the value of the debt. America does, however, provide a detailed outline of ways to pay the debt, including creating an anti-trust law that breaks down social concentration (what he calls “subsidizing social divestiture”), narrowing inequalities in wealth, encouraging affirmative action, investing in reducing crime, and discouraging immature parenting and welfare dependency.<sup>63</sup>

Other reparationists have vaguer, but similar, goals. Some sense of what reparationists want may be gained by looking more generally toward critical race scholarship. For that movement—of which reparations is now a significant part—provides some detailed plans. One key tenet is white privilege.<sup>64</sup> The “breakdown of white privilege” entails a whole host of other assumptions, probably including the redistribution of property, so that it is distributed equally on a per capita basis among racial groups. Or, as William Bradford has recently summarized, the opposition to reparations comes in large part because it is about breaking down privilege:

More than any other remedy, reparations transforms the material condition of recipients. Moreover, it connotes culpability: for a majority that rejects group hierarchy, harm, and responsibility, reparations is a radical redistribution of wealth, rather than a disgorge and reallocation of an unjust acquisition, that exacerbates unrest. Reparations thus yields resistance, backlash, and “ethnic elbowing.” As it would strip their racial privileges along with their currency, reparations is opposed by all but the most altruistic whites.<sup>65</sup>

There is, I suspect, a considerable debate that has yet to take place on the value of white privilege. What does that mean? How is it measured?<sup>66</sup> What is the value of the privilege for white people living in

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63. *Id.* at ch. 4-8.

64. Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1721 (1993) (“White identity and whiteness were sources of privilege and protection; their absence meant being the object of property.”); Erin E. Byrnes, *Unmasking White Privilege To Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity To Make the Case for Affirmative Action Programs in Education*, 41 ARIZ. L. REV. 535 (1999); John A. Powell, *Whites Will Be Whites: The Failure To Interrogate Racial Privilege*, 34 U.S.F. L. REV. 419, 438 (2000). See also STEPHANIE WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996); PAULA S. ROTHENBERG, *WHITE PRIVILEGE: ESSENTIAL READINGS ON THE OTHER SIDE OF RACISM* (2001).

65. William Bradford, *With a Very Great Blame on Our Hearts: Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 99-100 (2003). On redistribution in reparations, see Alfred L. Brophy, *The World of Reparations: Slavery Reparations in Historical Perspective*, 3 J. L. SOC’Y 105 (2002).

66. One might begin the investigation with STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* (1999); MICHAEL K. BROWN ET AL.,



poverty or who have no college education or who are above the poverty line, but are trapped in low-paying jobs? For example, one wonders what privilege is possessed by the five percent of white Americans living in poverty or the eight percent of white children who live in poverty?

But reparationists have a somewhat different and wider goal: the redistribution of wealth and political power.<sup>67</sup> The differences between the demands of reparationists and critical race theorists more generally, certainly warrants attention. Along those lines, one might contrast Eric Yamamoto's work on interracial justice,<sup>68</sup> Mari Matsuda's early work on reparations,<sup>69</sup> Anthony E. Cook's more recent work on reparations,<sup>70</sup> and Jerome McCristal Culp's work on white privilege.<sup>71</sup> Such a comparison suggests the differences in goals—interracial justice and peace in Yamamoto's case, corrective justice in Matsuda's, a mixture of distributive and corrective justice in Brooks's case, and more of an emphasis on redistribution of privilege in Cook's and Culp's cases.<sup>72</sup> It is becoming difficult to answer, "What are reparationists' goals," because they have so many different—and perhaps even contradictory—goals.

Many of the reparationists who seek wholesale redistribution of wealth take inspiration from Martin Luther King Jr.'s prescription in his 1964 book, *Why We Can't Wait*,<sup>73</sup> that there be reparations. As Yale Law Professor Boris Bittker writes: "[I]n proposing a Bill of Rights for the Disadvantaged," Martin Luther King, Jr. argued that "[t]he moral justification for special measures for Negroes is rooted in the robberies inherent in the institution of slavery."<sup>74</sup> Reparationists

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WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY (2003); and KIRBY MOSS, COLOR OF CLASS: POOR WHITES AND THE PARADOX OF PRIVILEGE (2003).

67. Recently, Christian Sundquist has criticized reparations for aiming too narrowly and failing to attack white privilege. Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659, 661 (2003) ("[C]urrent models of reparations present a narrow understanding of the 'debt' owed, limit the potential of spirit-healing within the Black community, do not seek to undermine privilege, and promote white backlash and intra-community divisiveness.").

68. See YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 10.

69. See Matsuda, *supra* note 47.

70. See Anthony Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959 (2000).

71. Jerome Culp, *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637 (1999).

72. We have a good history of the critical race movement, which helps us place these differing goals into context. See Bernie Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1 (2002).

73. MARTIN L. KING, JR., *WHY WE CAN'T WAIT* (1964).

74. BORIS BITTKER, *THE CASE FOR BLACK REPARATIONS* 8-9, 141 n.8 (citing MARTIN L. KING, JR., *WHY WE CAN'T WAIT* 152 (1964)). See also David Boyle, *Unsavoury White Omissions? A Review of Uncivil Wars*, 105 W. VA. L. REV. 655, 689 (2003) (reviewing DAVID

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have often focused on King's call for payments. Georgetown University Professor Anthony Cook's recent article, "King and the Beloved Community: A Communitarian Defense of Black Reparations," uses King's call for reparations as a starting point:

No amount of gold could provide an adequate compensation for the exploitation and humiliation of the Negro in America down through the centuries. Not all the wealth of this affluent society could meet the bill. Yet a price can be placed on unpaid wages. The ancient common law has always provided a remedy for the appropriation of the labor of one human being by another. This law should be made to apply for American Negroes. The payment should be in the form of a massive program by the government of special, compensatory measures which could be regarded as a settlement in accordance with the accepted practice of common law. Such measures would certainly be less expensive than any computation based on two centuries of unpaid wages and accumulated interest.

I am proposing, therefore, that, just as we granted a GI Bill of Rights to war veterans, America launch a broad-based and gigantic Bill of Rights for the Disadvantaged, our veterans of the long siege of denial.<sup>75</sup>

Cook sees reparations as part of a "new paradigm" that arrives as reconciliation through atonement, which includes confession and restitution-based repentance.<sup>76</sup>

Adjoa Aiyetoro, one of the leading—perhaps the leading—activist for reparations in the United States is a leader of N'COBRA, the National Coalition of Blacks for Reparations in America. As an activist, Aiyetoro has spoken and written extensively on the reparations movement. Her concerns are in mobilizing support, so much of her work relates to raising consciousness about reparations issues. Because of that, Aiyetoro's work involves advocating a broad and flexible agenda, which can change as the reparations movement evolves. While academics like Robert Westley have suggestions for specific

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HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* (2002)) (discussing King and reparations).

75. KING, *supra* note 73, at 137. This is quoted in Cook, *supra* note 70, at 962; James Forman, Jr., *A Little Rebellion Now and Then Is a Good Thing*, 100 MICH. L. REV. 1408, 1415 n.22 (2002). King's relationship to reparations is discussed by, among others, Ogletree, *supra* note 3; Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45 (2004). For his importance for legal thought more generally, see Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989). Lee Harris's article correctly observes that "while Martin Luther King and several civil rights leaders of the time did believe in reparations, that issue to them was never central." Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S.U. L. REV. 25, 37 (2001).

76. Cook, *supra* note 70, at 963.

plans and Mari Matsuda hypothesizes causes of actions for reparations lawsuits, Aiyetoro establishes grand goals:

[T]o stay visible and increase that visibility, to posture ourselves to be a part of the discussion that will more than likely take place behind the scenes on the form reparations should take to assure that a package of reparations and not appeasement is developed, and to stay principled, demanding accountability to African descendants.<sup>77</sup>

One of the surprising elements is that even in the most recent major book on this topic, Raymond A. Winbush's edited volume *Should America Pay?*,<sup>78</sup> we have hundreds of pages of discussion on whether the United States government and corporations should pay reparations. But there is very little discussion on *what* they would pay, if they were going to do so. So let us turn now to the specific proposals that can be wrung from reparacionists' writings.

### C. Community-Building Programs and Payments to Individuals

Most people who talk about reparations as a serious goal envision a whole-sale reordering of American society. Their agenda includes re-distribution of wealth and breakdown of racism and white privilege. How the later goals will be accomplished is rarely specified. Indeed, a critical problem with reparations is that reparacionists have not yet specified what they want.<sup>79</sup> And it is exceedingly difficult to get somewhere until you know where it is you are going. Or, as Arthur Serota has phrased the problem, "Revolutions cannot work without a realistic finance plan."<sup>80</sup> We have some statements, such as Clarence J. Munford's in *Race and Reparations* that we should "demand it all!"<sup>81</sup>

77. Adjoa A. Aiyetoro, *The National Coalition of Blacks for Reparations in America (N'COBRA): Its Creation and Contribution to the Reparations Movement*, in *SHOULD AMERICA PAY?*, *supra* note 53, at 209, 225. In some of her more academic writings, Aiyetoro explores strategies for lawsuits. See, e.g., Adjoa A. Aiyetoro, *Formulating Reparations Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457, 464 (2003) (discussing ways to fit reparations claims into categories required for a lawsuit). For more on the specifics of unjust enrichment claims, see Margalynne Armstrong, *Reparations Litigation: What About Unjust Enrichment?*, 81 OR. L. REV. 771 (2002); Brophy, *supra* note 11; and Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 521-23 (2003).

78. WINBUSH, *supra* note 54.

79. See Peter Schuck, *Slavery Reparations: A Misguided Movement*, at <http://jurist.law.pitt.edu/forum/forumnew78.php> (last visited Apr. 14, 2004) (listing questions in implementation, which must be answered in order to determine the content of reparations programs).

80. ARTHUR SEROTA, *ENDING APARTHEID IN AMERICA: THE NEED FOR A BLACK POLITICAL PARTY AND REPARATIONS NOW!* 147 (1996).

81. CLARENCE J. MUNFORD, *RACE AND REPARATIONS: A BLACK PERSPECTIVE FOR THE 21ST CENTURY* 413 (1996). Munford continues:

Insist on collecting everything owing to us as a people historically, down to the last penny, and not one whit less. Make indemnification item number one on the Black

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Even Robert Westley, who is a brilliant scholar and leading theorist of reparations, does not provide a comprehensive plan. He does, however, offer a somewhat more detailed picture than most other reparations articles. He sees monetary payments to individuals, as well as commitment to community-building programs as central to the reparations agenda.<sup>82</sup> His goal is “black economic independence from societal discrimination” and civil equality.<sup>83</sup> That will occur through two ways. First, the people most in need will receive cash payments. He makes no attempt to specify the amount of those payments. Those payments must await, one suspects, some assessment of the damage that will flow in turn from the truth commissions that will study reparations. Second, Westley proposes the establishment of a trust fund, with trustees elected by African-American descendants of slaves. Westley acknowledges that his plan needs considerable refinement.<sup>84</sup> In fact, now is a good time to begin to explore such a plan in more detail.

Randall Robinson, who bases much of his legal argument on Westley, also proposes a trust fund. The exact amount of the trust, Robinson believes, should be determined once “an assessment can be made of what it will cost to repair the long-term social damage.”<sup>85</sup> Robinson proposes that the trust fund provide for at least two generations of precollege education (with boarding schools for at-risk children), college for those who cannot afford it, and additional weekend schools that teach “the diverse histories and cultures of the black world.”<sup>86</sup> He also proposes the following: a study of the extent to which companies and families have been enriched by slavery, followed by recovery of that money, which would be reinvested in the trust; funding of black civil rights and political organizations; and commitments to Caribbean and African countries, including “full debt relief, fair trade

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political signboard. We need to calculate the gigantic debt owed the African creators of the wealth luxuriated in by the white industrialized North and once that is done, get right down to negotiating the forms, accrued interests and period of amortization. As Manning Marable observes, public policy toward Afro-Americans has been up in the air ever since desegregation was legally won 30 years ago and more. . . . *Reparations*—and its Siamese twin, Black empowerment—are imperative if the end of formal segregation is ever to amount to anything but a sham leading absolutely nowhere.

*Id.* at 413-14.

82. Westley, *supra* note 47, at 437.

83. *Id.* at 470.

84. *Id.* (“In the end, determining a method by which all Black people can participate in their own empowerment will require a much more refined instrument than it would be appropriate for me to attempt to describe here.”).

85. ROBINSON, *supra* note 56, at 244.

86. *Id.* at 245.

terms, and significant monetary compensation.”<sup>87</sup> But that is only the beginning, not a comprehensive plan.<sup>88</sup>

Professor Molefi Kete Asante provides a similar statement to Westley about the range of potential reparations strategies: “Among the potential options are educational grants, health care, land or property grants, and a combination of such grants. Any reparations remedy should deal with long-term issues in the African-American community rather than a onetime cash payout.”<sup>89</sup> Other reparations plans are more outlandish. Perhaps the most radical plan that I have seen is that of Lee Harris, who adopts the black nationalist perspective. He proposes establishment of separate states for blacks. The proposal, which would almost surely require a constitutional amendment, is radical indeed. It is reminiscent of Nation of Islam’s Lewis Farrakan’s statement at the reparations rally in the summer of 2002: “We cannot settle for some little jive token. We need millions of acres that black people can build.”<sup>90</sup>

It is easier to state aspirational goals, rather than concrete plans. But sometimes even the general goals are hard to articulate. Perhaps Arthur Serota has given us the best statement of what reparations promise:

[T]here can be no elimination of poverty in America, no rebuilding of lives for millions of Black Americans sweltering in urban chaos and isolated by rural deprivation, no chance for millions of urban black youth staring through prison bars, hiding from warrants, dropping out of school or negotiating the violence of urban battlefields, to contemplate and develop their futures without reparations. Reparations is not merely long overdue, it is a finance plan to implement a change.<sup>91</sup>

With that sense of what reparationists want, we can now turn to the next part of the cultural war: the reasons people oppose reparations. I think we will see that reparationists and their opponents rarely talk to one another. For reparationists so frequently talk about repairing past harm, which antireparationists do not believe is the fault of the pre-

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87. *Id.* at 246.

88. *Id.* (“The ideas I have broached here do not comprise anything near a comprehensive package.”). See also Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531 (2001) (reviewing ROBINSON, *supra* note 56) (discussing Robinson’s reparations proposals). **R**

89. Asante, *supra* note 53, at 12. Asante also proposes a commission to study reparations, educate the public about their importance, and make recommendations about further reparations. *Id.* **R**

90. See Thomas Bray, *Granholt Tries To Slip Reparations Hook*, DETROIT NEWS, Oct. 9, 2002, at 11A.

91. SEROTA, *supra* note 80, at 147. **R**

sent society. In fact, they place blame on an entirely different set of causes than the causes that reparationists identify. The antireparationists are, in essence, speaking a different language. They inhabit a different world, really, from the reparationists. Antireparationists place blame on black culture, rather than white society; in many instances they seek a color-blind society, while many (though by no means all) reparationists seek a society that takes account of race. Antireparationists, even if they saw a society with a racist past, do not think the current generation should pay for that past or make up for those past harms. What we have is a conflict over how we view America's racist past, as well as how best to go forward. Viewed in that way, the conflict over reparations is one of the most recent skirmishes in a decades-old war over race in the United States. The antireparationists have a whole set of arguments, which we must explore in the effort to take reparations seriously.

#### IV. THE ARGUMENTS AGAINST REPARATIONS

The most famous statement of the arguments against reparations comes from David Horowitz, who took out a series of advertisements in college newspapers in the spring of 2001. His advertisement, entitled, "Ten Reasons Why Reparations for Slavery are a Bad Idea and Racist, Too," established the basis for the arguments against reparations. Horowitz' ten points are:

1. There Is No Single Group Clearly Responsible For The Crime Of Slavery
2. There Is No One Group That Benefitted Exclusively From Its Fruits
3. Only A Tiny Minority Of White Americans Ever Owned Slaves, And Others Gave Their Lives To Free Them
4. America Today Is A Multi-Ethnic Nation and Most Americans Have No Connection (Direct Or Indirect) To Slavery
5. The Historical Precedents Used To Justify The Reparations Claim Do Not Apply, And The Claim Itself Is Based On Race Not Injury
6. The Reparations Argument Is Based On The Unfounded Claim That All African-American Descendants of Slaves Suffer From The Economic Consequences Of Slavery And Discrimination
7. The Reparations Claim Is One More Attempt To Turn African-Americans Into Victims. It Sends A Damaging Message To The African-American Community.
8. Reparations To African Americans Have Already Been Paid
9. What About The Debt Blacks Owe To America?

10. The Reparations Claim Is A Separatist Idea That Sets African-Americans Against The Nation That Gave Them Freedom.<sup>92</sup>

Others have made more modest, though perhaps more persuasive, cases against reparations. Probably the best way to address the multitude of arguments against reparations is to classify them according to broad categories, then explore the nuances of each category. The arguments may be broken down into five main categories:

- (1) Those asked to pay have no liability;
- (2) Compensation has been made;
- (3) Compensation is immoral or compensation was never due;
- (4) Compensation is impracticable or politically unworkable; and
- (5) Reparations are divisive and focus attention on the past rather than the future.

A. *No Moral (or Legal) Liability*

It appears that the type of argument that has gained the most attention—and is advanced most seriously against reparations—is that the people currently asked to pay had nothing to do with the injustices of the past. This argument draws on a popular thought in the United States, and western culture more generally, that liability should attach to fault, that people should receive punishment (or rewards) based on their personal culpability. Carried to an extreme, as many reparations skeptics do, that implies that one should be liable only for the harms one causes, that there is no general societal culpability.

Of course, we see legislatures, even courts, acting on ideas of general culpability in many places. There are many crimes committed by government officials that lead the entire community to be liable for the actions of those officials. After Rodney King obtained a damages verdict, that verdict was satisfied by the taxpayers of Los Angeles. Very few taxpayers were actually responsible for the crime, but they had to pay for the crime. Perhaps many antireparationists will object to that example. Corporations, which are really a collection of individual shareholders, are liable for the acts of their employees. In cases of environmental pollution, companies (meaning their shareholders) are frequently held liable for decades following the pollution. For example, in 1994, Mobile Oil Company was held liable for polluting the waters of the little town of Cyril, Oklahoma, as early as the

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92. David Horowitz, *Ten Reasons Why Reparations for Blacks Is a Bad Idea for Blacks—and Racist Too*, at <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=1153> (last visited Mar. 15, 2004) [hereinafter Horowitz, *Ten Reasons*]; see also *We Won't Pay: The Home Page for Those Drawing the Line*, at <http://www.wewontpay.com> (last visited Mar. 15, 2004). It is also conveniently reprinted in DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* 12-16 (2002) [hereinafter HOROWITZ, *UNCIVIL WARS*].

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1940s. It is likely that none of Mobile's shareholders had any direct culpability for the actions of the company's officers who decided to pollute in the 1940s. Yet the shareholders had to pay.<sup>93</sup>

Corporate liability is premised on the idea that shareholders, even those who had no direct influence on the decisions, have to pay. In the United States, culpability attaches even without fault in many instances. It is natural to expect that corporations, or government bodies, will have liability for the decisions they made, sometimes decades ago.

But antireparationists will say that even though in some cases there is continuing liability, the taxpayers are the people who will have to pay. And many of those individual taxpayers have no culpability. Where is the fairness in asking people whose ancestors were not even in the United States during the period of slavery (or maybe even the period of Jim Crow) to pay reparations for crimes occurring in that time?<sup>94</sup> Moreover, other entities besides the United States government have culpability for slavery, such as African nations themselves.<sup>95</sup> Closely allied to the argument of innocence is the argument that there is no benefit that has been retained.<sup>96</sup>

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93. *Town of Cyril v. Mobil Oil Corp.*, 11 F.3d 996 (10th Cir. 1993).

94. David Horowitz phrased the argument in this way:

The two great waves of American immigration occurred after 1880 and then after 1960. What logic would require Vietnamese boat people, Russian refuseniks, Iranian refugees, Armenian victims of the Turkish persecution, Jews, Mexicans [or] Greeks, or Polish, Hungarian, Cambodian and Korean victims of Communism, to pay reparations to American blacks?

HOROWITZ, *UNCIVIL WARS*, *supra* note 92, at 13. Journalist Walter Williams has a similar argument:

If we acknowledge that government has no resources of its very own, and that to give one American a dollar government must first confiscate it from some other American, we might ask *what moral principle justifies forcing a white of today to pay a black of today for what a white of yesteryear did to a black of yesteryear?*

Williams, *supra* note 15.

95. See Williams, *supra* note 15 ("In Africa, Moslems dominated the slave trade in the 18th and 19th centuries. Africans also engaged in slave trade with Europeans. In fact, there was plantation slavery in some parts of Africa, such as the Sudan, Zanzibar, and Egypt.") (emphasis omitted); HOROWITZ, *UNCIVIL WARS*, *supra* note 92, at 12 ("Black Africans and Arabs were responsible for enslaving the ancestors of African-Americans. There were 3,000 black slave-owners in the antebellum United States. Are reparations to be paid by their descendants too?").

96. See, e.g., Stephen Kershner, *The Inheritance-Based Claim to Reparations*, 8 *LEGAL THEORY* 243, 261-62 (2002) (suggesting that crime by blacks and welfare payments to blacks should be considered as off-sets against an unjust enrichment claim on behalf of descendants from slaves). See also Joseph Jenkins, *Inheritance Law as Constellation in Lieu of Redress: A Detour Through Exceptional Terrain*, 24 *CARDOZO L. REV.* 1043 (2003) (suggesting importance of inheritance and ways that intergenerational wealth transfers—or the lack of them—should be accounted for in reparations).

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Reparationists have two responses. First, that governmental bodies, like corporations, have a continuing existence. Governments are liable for the judgments issued against them and, unfortunately, they have to satisfy those judgments using taxpayer money. The new immigrants take their new government subject to the liability existing at the time. We all take America with the good and the bad at the same time. There are a lot of opportunities here; there are also some disadvantages.<sup>97</sup> Reparationists' second response is more general. It denies that the people who are claiming innocence actually are innocent. As Professor Ogletree has recently phrased it, "while black folks were sitting at the back of the bus; generations of white immigrants got to go straight to the front."<sup>98</sup> It is debatable how much privilege some immigrants, particularly those from southern Europe, Asia, and the Spanish Americas, received. But the point is important and worthy of significantly more study. For if currently living whites are the beneficiaries of past discrimination against blacks, then the claims of innocence are harder to make convincingly.

It is at this point that the debate runs up against strong emotions: Americans believe they are where they are today because of their own hard work and innate talent, rather than the good fortune of their birth. That is an issue for which we need further debate, but at the present it appears that the truth is somewhere in the middle: undercompensated black labor and lack of opportunities made it possible for whites, even those whose ancestors came to the United States after the era of slavery ended, to advance more quickly than they otherwise would have. It is likely—indeed hard to dispute—that some privilege is retained.

There is yet another way that antireparationists argue that there is no liability: there is no (or little) continuing effect of slavery. Reparationists commonly argue that reparations are for the continuing effects of slavery and Jim Crow. Adjoa Aiyetoro, for instance, has said: "We're not raising claims that you should pay us because you did something to us 150 years ago. We are saying that we are injured

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97. See, e.g., Ogletree, *supra* note 38, at 1069. Ogletree states:

I believe that suing a corporation is much different than suing a person. Legally, corporations are immortal; they do not die except by their own hand. So a company that is around in 2002 can be the same company that was around in 1602. And where that company owes its present profitability to its slave trading, that company should acknowledge that fact and make some form of restitution. Now, this principle of corporate responsibility is neither new, nor controversial. Holocaust victims have successfully sued corporations to recover the property stolen from them during the Second World War.

*Id.*

98. *Id.* at 1068-69 (crediting Cornel West with the analogy).

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today by the vestiges of slavery, which took away income and property that was rightfully ours.”<sup>99</sup> Yet antireparationists frequently maintain that the current inequality in wealth is due to black culture, not the legacy of slavery. Journalist Walter Williams, like many antireparationists, places blame on single-parent black households:

Illegitimacy among blacks today is [seventy] percent. Only [forty-one] percent of black males [fifteen] years and older are married, and only [thirty-six] percent of black children live in two-parent families. These and other indicators of family instability and its accompanying socioeconomic factors such as high crime, welfare dependency and poor educational achievement is claimed to be the legacy and vestiges of slavery, for which black Americans are due reparations.<sup>100</sup>

Yet Williams points out that the incidence of single-parent families is relatively recent. In 1940, for instance, less than twenty percent of black children were born into single-parent families. Williams refers to Herbert Gutman’s book, *The Black Family in Slavery and Freedom*, which found that in Harlem between 1905 and 1925, eighty-five percent of black children lived in two-parent families.<sup>101</sup> As Williams says:

The question raised by these historical facts is: If what we see today in many black neighborhoods, as claimed by reparation advocates, are the vestiges and legacies of slavery, how come that social pathology wasn’t much worse when blacks were just two or three generations out of slavery? Might it be that slavery’s legacy and vestiges have a way . . . of skipping generations? In other words . . . that devastating seventy percent rate of black illegitimacy simply skipped six generations—it’s a delayed effect of slavery?<sup>102</sup>

That is a central argument among reparations opponents and critics of the Great Society programs of the 1960s more generally.<sup>103</sup>

It is important to try to distinguish the effects of slavery and Jim Crow discrimination from other causes in determining the current wealth gap between blacks and whites. Obviously, that is central to the case for reparations. For if slavery has no lingering effect, then there is no reason to try to repair it!<sup>104</sup> But we do not need to think about generation-skipping effects to link the current sad condition of the black family to slavery. The family structure is only the latest

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99. See Walter Williams, *The Legacy of the Slavery Hustle*, CAPITALISM MAG., July 16, 2001, at <http://capmag.com/article.asp?ID=968> (last visited Mar. 15, 2004) (quoting Aiyetoro).

100. *Id.*

101. *Id.*

102. *Id.*

103. See generally CHARLES MURRAY, *LOSING GROUND* (1992).

104. See, e.g., Keith Hylton, *Slavery and Tort Law* (Jan. 28, 2003), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=374200](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=374200) (last visited Mar. 15, 2004).

manifestation of a social policy, borne in the years after the Civil War, that did not seek to help blacks move into the mainstream of the American economy and education system. Even though the current United States social welfare policy has good intentions—which we cannot say of the policy in the years before World War II—it is designed to discourage two-parent families. It makes sense to consider the current policy as a vestige of the Jim Crow era, which was necessary because of the limited economic opportunities of that era. It is reasonable to consider the problems with single-parent black families as yet another legacy of slavery and the neglect during the Jim Crow era and as the result of lack of job opportunities.<sup>105</sup>

### B. Compensation Has Been Made

The next most popular argument is that reparations have been paid in the form of Great Society programs, like the war on poverty and affirmative action, as well as welfare.<sup>106</sup> And are not reparations being paid right now through welfare? Why is that not enough? Those are important and reasonable questions. As Journalist Walter Williams has said:

[T]oday's blacks benefitted immensely from the horrors suffered by our ancestors. . . . In fact, if we totaled the income black Americans earned each year, and thought of ourselves as a separate nation, we'd be the 14th or 15th richest nation. Even the [thirty-four] percent of blacks considered to be poor are fairly well off by world standards. Had there not been slavery, and today's blacks were born in Africa instead of the United States, we'd be living in the

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105. WILLIAM JULIUS WILLIAMS, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1990). For two excellent introductions to these issues, see Michael Fumento, *Is the Great Society To Blame? If Not, Why Have Problems Worsened Since '60s?*, *INVESTOR'S BUS. DAILY*, June 19, 1992, at <http://www.fumento.com/greatsociety.html> (last visited Jan. 24, 2004), and James Q. Wilson, *Slavery and the Black Family*, *PUB. INT.*, Spring 2002, at <http://www.frontpagemag.com/Articles/Printable.asp?ID=1496> (last visited Jan. 24, 2004).

106. Reparations skeptics frequently point to President Lyndon B. Johnson's Great Society and war on poverty as a form of reparations—and claim that those programs have paid off the debt. See Williams, *supra* note 15 (“Would reparations payments accomplish what the 6 trillion dollars spent since 1965 on the War on Poverty didn't?”). Horowitz phrases the argument in this way:

Since the passage of the Civil Rights Acts and the advent of the Great Society in 1965, trillions of dollars in transfer payments have been made to African-Americans in the form of welfare benefits and racial preferences (in contracts, job placements and educational admissions)—all under the rationale of redressing historic racial grievances. It is said that reparations are necessary to achieve a healing between African-Americans and other Americans. If trillion-dollar restitutions and a wholesale rewriting of American law (in order to accommodate racial preferences) [for African-Americans] is not enough to achieve a “healing,” what is?

HOROWITZ, *UNCIVIL WARS*, *supra* note 92, at 14.

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same poverty that today's Africans live in and under the same brutal regimes.<sup>107</sup>

There are some important questions about how much the United States owes to descendants of slaves.

To answer that, one needs to ask: What is the basis for reparations claims? If the claim is against the United States government for unpaid labor—and only unpaid labor—then it is natural to ask, how much have the slaves and their descendants received from the United States government in the form of welfare payments? It is possible that the compensation that has been paid will, on average, compensate for the unpaid labor. But one must remember that welfare is not a race-based program; everyone who meets the eligibility requirements receives assistance, regardless of race. Why should we consider welfare payments as paying down the debt? Perhaps because we lump all debts and all payments together. When reparationists argue what is owed, based on undercompensation for labor, as Richard America argues, then it is important to talk about the compensation that has already been paid. Perhaps it is right to add in welfare payments or costs spent on affirmative action as ways of off-setting the debt. This is an area in which we need substantial additional work, to explore the value that slaves contributed to the American economy and how much of that value is still retained, as well as how much value has been returned. At this point, it is impossible to make even rough guesses about how the balance sheet stands—and that is due to failure of either side to seriously address this issue. The only person who has even attempted to compute the value of the slave labor to the United States, Richard America, has made no effort to provide for an offset. Those who argue that welfare has paid the debt, conversely, make no effort to identify the size of the welfare payments that should be counted as offset, or to compare that value to the amount blacks contributed without compensation in the eras of slavery and Jim Crow, to say nothing of whether those benefits have been retained. Reparationists, by their frequent reference to ideas of “unjust enrichment,” have brought on the comparison of how much has been contributed and how much has been paid. However, most reparationists compute what is owed based not on uncompensated labor alone. The huge gap between black and white economic and educational achievement stands as testimony to the legacy of slavery and Jim Crow discrimination. That gap testifies to the continued harm, which, tragically, as happens so often, is greater than the value retained. If we view the

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107. Williams, *supra* note 15.

amount owed as not only the amount of value contributed, but as also including the harm imposed by slavery and Jim Crow, then full reparations have likely not been paid. For the gap in wealth between blacks and whites testifies to the lack of full reparations.

There is, moreover, the question of equal treatment. One of the great principles of American law is the equal protection principle, which requires that similarly situated people be treated alike. Have people who are making reparations claims been treated differently and worse than others? If there has been unequal treatment, then that may be a separate basis for reparations. The issue ought not to be how people would be living if their ancestors had not been brought to the United States or freely immigrated but how they are treated relative to other people here. While David Horowitz is fond of pointing out that the average annual income of residents in Benin is less than one thousand dollars, that has little relevance to how people are treated in the United States. Life is better than it would be in another country, but the relevant comparison group is other citizens of the United States. The fact that voting rights are denied to serfs in Russia does not mean that people of Russian descent in the United States are not entitled to vote, or do not have a claim if they are denied the right to vote.

There are other ways of paying the debt, though, besides cash payments. Part of the argument that reparations have been paid is the assertion that the Civil War paid that debt. Lincoln scholars are particularly active in advancing the argument that the Civil War was part of abolishing the debt to African Americans.<sup>108</sup> David Horowitz' formulation is that white Christians began the antislavery movement, which ended more than two millennia of slavery.<sup>109</sup> That interpreta-

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108. See Allen Guelzo, *Reason in Disrepair*, WALL ST. J., Nov. 22, 2002, at W19; Allen Guelzo, *Reparations Then and Now*, 124 FIRST THINGS 32-36, June-July 2003, available at <http://print.firstthings.com/ftissues/ft0206/articles/guelzo.html> (last visited Mar. 15, 2004).

109. Horowitz phrases it in this way:

Slavery existed for thousands of years before the Atlantic slave trade, and in all societies. But in the thousand years of slavery's existence, there never was an anti-slavery movement until white Anglo-Saxon Christians created one. If not for the anti-slavery beliefs and military power of white Englishmen and Americans, the slave trade would not have been brought to an end. If not for the sacrifices of white soldiers and a white American president who gave his life to sign the Emancipation Proclamation, blacks in America would still be slaves. If not for the dedication of Americans of all ethnicities and colors to a society based on the principle that all men are created equal, blacks in America would not enjoy the highest standard of living of blacks anywhere in the world, and indeed one of the highest standards of living of any people in the world. They would not enjoy the greatest freedoms and the most thoroughly protected individual rights anywhere. Where is the acknowledgment of black America and its leaders for those gifts?

tion leaves a great deal out of the historical record, of course. The Christian nations of Western Europe and North America contributed to the market for slaves; they provided an incentive for African nations to enslave Africans and then those western countries participated in “one of the greatest crimes in history.”<sup>110</sup> To credit the United States with abolishing slavery does not quite wipe the slate clean. For there would have been no need for abolition of slavery in the United States unless it had been imposed by law here. Even if we say that the United States fought a war to free slaves, which only begins to describe the process of the Civil War, we cannot ignore the reasons why that war was necessary.

### C. *Reparations Are Divisive*

Despite the marked socioeconomic progress black Americans have made in this country over the past half century, the reparations movement, at bottom, encourages minorities to believe that they are really lost souls. The leaders of this movement do not talk about how such a distant crime has led to specific damages in present lives of most minorities. For them, feelings of victimization in general, not damages in the specific, are the point. So they fervently maintain that all full-grown, capable minorities ought to blame the missed opportunities of their lives on the slavery that transpired centuries ago as though their pains were interchangeable with those endured by slaves.<sup>111</sup>

The final group of arguments are at the center of the culture war. They revolve around a consideration that reparations talk divides the country along racial lines. By talking about the past and by focusing on past injustices, blacks alienate themselves from the rest of the country. Reparations talk leads blacks to see themselves as victims who deserve government payments. Within the genre of “reparations are divisive,” there are several subcategories. First, that blacks have a cult of victimhood. Perhaps the best-known proponent of that cult of victimhood is Professor John McWhorter of the University of California at Berkeley. Even talk of reparations or the sins of the past causes African Americans to focus improperly on the task at hand: gaining an education and rising economically.

The second subcategory is that focusing on the injustices of the past alienates blacks from American society, at a time when they should be

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HOROWITZ, *UNCIVIL WARS*, *supra* note 92, at 15. See also Horowitz, *Ten Reasons*, *supra* note 92 (reason nine).

110. Bennett Roth, *Bush: Slavery's 'Bitter' Legacy Still Haunts U.S.*, HOUSTON CHRON., July 9, 2003, at A1.

111. ARMSTRONG WILLIAMS, *Presumed Victims*, in SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS 167 (2003).

focusing on the benefits that American society has to offer. This is central to the culture war; we have heard versions of this same argument since at least the Vietnam War era, when those who criticized the United States were told they were being un-American. The argument is, in essence, that it is more productive to spend time focusing on the benefits that blacks have by virtue of United States citizenship than the injustices they have suffered.

The third subcategory is that reparations talk divides people along racial lines. It makes blacks think that whites as a group are their oppressors; it makes whites who have no responsibility for the sins of the past feel like oppressors and plays on feelings of guilt. That division falsely (in the minds of reparations opponents) continues the harmful focus on race. At a time when the government and everyone else should be moving toward a colorblind society, reparations talk reemphasizes race. It reestablishes racial divisions that we are eliminating (or at least ought to be eliminating).

All of this leads up to the cultural war at stake over reparations. Reparations are not just about redistribution of wealth, though they certainly are controversial for that reason alone. Reparations, and the apologies that surely precede them, are about a microcosm of how we view United States history. Do we see the United States as a place of plentiful opportunity, where people can go as far as their ability and energy will take them, or as a haunted landscape full of oppression? Do we view the chasm between black and white wealth in this country as the fault of blacks and the Great Society, which intervened in the mid-1960s, to destroy the black families and the economic progress they were about to make? Or do we view it as a legacy of past state-sponsored discrimination and racial crimes? That self-image, and the accompanying narratives we tell ourselves about how we view our own accomplishments carry powerful weight: I'm wealthy and well-educated because of my merit, not because of the fortunate circumstances of my birth, or I'm poor and poorly educated because of a racist society, not because of my lack of ability or motivation.

*D. Are Reparations the Best Way of Overcoming the Past?*

There is one question that is rarely discussed in antireparations literature, but is nevertheless critical: are reparations the best way to spend society's limited resources? For there may be better uses for the money. Part of the decision about whether to advocate reparations turns on how much they will benefit us—and how much benefit we could get by spending our efforts elsewhere. Perhaps reparations should focus most on the people who are most in need right now and

in that formulation, it looks less like reparations and more like a Great Society program to lift everyone.<sup>112</sup>

#### V. THE UTILITY AND DISADVANTAGES OF REPARATIONS

Much of the utility of reparations is obvious. They offer hope of realizing the contributions that African Americans have made to the American economy and society as well as the disadvantages they have suffered; they offer the hope of restoring justice, to the extent that can be done, for some of the worst crimes of history; and they hold out the promise of helping us all build a better future, together. Looked at from the black perspective, they also promise to repair past damage, incorporate blacks more fully into the benefits of American society, and let everyone know the crimes and sacrifices—the history of brutalization that is so important a part of American history—have been remembered. For whites, reparations promise some closure, some sense that injustices have been corrected, and, perhaps most importantly, an opportunity to improve the entire community. We can, one hopes, all move away from the centuries of human suffering and wasted opportunities with a commitment to improve the future. We can struggle for the future to overcome the past, to paraphrase Ralph Ellison.

But there are significant costs to reparations. They may tend to divide people along racial lines, for recalling past tragedies are, indeed, painful. Even more than recalling the past tragedies, however, reparations will require the government to draw further lines on the basis of race. For many reparationists see reparations not as a way of achieving integration and a color-blind society; they see it as a way of achieving further race-conscious action.<sup>113</sup>

Eric Yamamoto is one of the rare reparationists who takes seriously the disadvantages of reparations. He acknowledges the potential of reparations to lead to feelings of victimology and political backlash.<sup>114</sup> Victimhood is not just a mind set, however. There are other problems with it. Reparations talk can be distracting. Reparations may cause people to focus on past injustice, at a time when the energy should be focused somewhere else.

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112. See, e.g., Miller, *supra* note 75.

113. Watson Branch has summarized the goals of many reparationists as trying to find a new approach to racial inequality, that is not based on integration: “Because integrationist policies and affirmative action based on civil rights statutes have failed to solve the problems of racial discrimination and subordination of blacks, it is time to undertake a new program of race reform—namely reparations.” Watson Branch, Comment, *Reparations for Slavery: A Dream Deferred*, 3 SAN DIEGO INT’L L.J. 177, 194 (2002).

114. See YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 10.



Reparations may also lead to an increased division in society. At a time when many people think we ought to be moving in the direction of a colorblind society, reparations talk makes that difficult. Or at least it raises the prospect of continued focus on race. At the same time, two groups of commentators, reparationists and some conservatives, see reparations as a way of ending the significance of race. For reparationists like Rhonda Magee-Andrews, the author of one of the most important articles ever written on reparations,<sup>115</sup> the prospects of reparations offer the hope of someday, perhaps someday soon, ending the legal significance of race. We may be able to get to the point at which the damage has been repaired. Then, as Magee-Andrews argues in a recent pathbreaking article, "The Third Reconstruction," maybe then we can move on to a focus on helping those in the community who need help the most.<sup>116</sup> The central element of attention will be need. There are also conservatives, with whom Magee-Andrews shares little in philosophy, who see reparations as a way to end the focus on race. Once there is a reckoning, the reparations can be paid and the government will stop paying attention to race. There will be no more affirmative action or other race-conscious action. However appealing such a world may appear, as a simple solution to age-old problems, it is unlikely that reparations offer that kind of closure. Difficulties of racial equality are unlikely to be solved overnight.

The reparations movement may end with some further recognition of the role of slavery and Jim Crow in American history. There may also be payments to a limited class of identifiable victims and perhaps payments to aid those most in need. There may never be a complete accounting of the costs imposed by hundreds of years of forced labor and decades of gross discrimination in voting rights, education, and employment. This may be yet another instance in which African Americans will have to be content not with what is just, but with the knowledge that they have contributed yet again to the enrichment of American society, though they have not received adequate compensation for their labors. And perhaps that makes this one of the greatest of American stories: people laboring to benefit others and building and enriching the community for the benefit of everyone. That may also be the best ground for continued advocacy of reparations: that we all have a shared future and if the many are to become as one, to

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115. Rhonda V. Magee, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993).

116. Rhonda V. Magee-Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Color Blindness in Post-Slavery America*, 54 ALA. L. REV. 483 (2003).

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paraphrase Ralph Ellison, then the community must work together. For the tragedy that is the legacy of slavery is a problem that visits us all and will continue to do so until it is overcome.

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