

DOCUMENTING THE COSTS OF SLAVERY, SEGREGATION, AND CONTEMPORARY RACISM: WHY REPARATIONS ARE IN ORDER FOR AFRICAN AMERICANS

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I. INTRODUCTION

Without significant reparations for African Americans, the deepest racial divide in the United States will never be eliminated. As Randall Robinson has put it in *The Debt: What America Owes to Blacks*, “if . . . African Americans will not be compensated for the massive wrongs and social injuries inflicted upon them by their government, during and after slavery, then there is *no* chance that America can solve its racial problems.”¹ This is a strong statement, yet true.

In this Article, I examine why large-scale reparations should be made to African Americans and how that task might be accomplished. In a pioneering 1973 book, *The Case for Black Reparations*, Yale law professor Boris Bittker argued that the oppression faced by African Americans was more extensive than that faced by other racial groups and required major reparations in compensation.² At the time, almost no one paid any attention to his analysis. Today, however, many analysts have finally resurrected the idea of reparations and have begun to take action on that idea. There are many voices concerned about the high costs of anti-black oppression that have continued over four centuries. It seems ever more likely that reparations in some form will be paid to African Americans over the next half century.³

II. UNJUST ENRICHMENT AND UNJUST IMPOVERISHMENT

What are the grounds for large-scale reparations for African Americans? The basic rationale for group compensation lies in the stolen labor

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1. RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 204 (2000).

2. BORIS BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973).

3. This Article was originally prepared for the Center for Social Development symposium Inclusion in Asset Building, St. Louis, Missouri, Sept. 21–23, 2000. Revised here, it utilizes and greatly extends arguments made in JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* (2000), and JOE R. FEAGIN & CLAIRECE B. FEAGIN, *RACIAL AND ETHNIC RELATIONS* (7th ed. 2003). I am indebted to Ken Nunn, Roy Brooks, and Bernice McNair Barnett for helpful comments and to Danielle Dirks for research assistance.

and lives of the millions enslaved until 1865, the stolen labor and lives of those legally segregated from the early 1880s to the late 1960s, and the continuing theft of labor and lives of those who face much racial discrimination today. This theft of labor and lives was carried out not only by whites acting as individuals, but also, for at least its first 350 years, by corporations and various local, state, and federal governments whose actions were often backed by law. Many millions of white Americans have been involved, individually and collectively, in the exploitation and oppression of African Americans now for nearly four centuries.

In his probing book *The World and Africa*, the distinguished sociologist W. E. B. Du Bois argued that the poverty in Europe's African colonies was a "main cause of wealth and luxury in Europe."⁴ Enormous amounts of African resources, including great human resources, and much socioeconomic development had been sacrificed to make European countries very wealthy. There is a similar connection between the great immiseration of African Americans and the enrichment and prosperity of most European Americans. Over several centuries, most whites, as individuals and families, have benefited handsomely from anti-black oppression and the transmission of ill-gotten wealth and privilege from one generation to the next.⁵ Today, the relative prosperity, long life expectancies, and high standard of living of white Americans are significantly rooted in centuries of exploitation and impoverishment of African Americans and other Americans of color.

A. *Unjust Enrichment and Unjust Impoverishment Defined*

The concept of unjust enrichment is an old legal idea traditionally associated only with relationships between individuals. From a legal perspective, unjust enrichment involves circumstances that "give rise to the obligation of restitution, that is, the receiving and retention of property, money, or benefits which in justice and equity belong to another."⁶ In United States court decisions, the defendant has been required to give up the unjust enrichment, including gains later made from it.⁷ For example, these decisions do not generally permit a thief's children to benefit from the father's theft. "[I]f a thief steals so that his children may live in luxury and the law returns his ill-gotten gain to its rightful owner, the children cannot complain that they have been deprived of what they did not own."⁸

Thus, one can argue that a coerced taking of possessions by an individual criminal is similar to a coerced taking of labor by a slaveholder or other white discriminator ("crimes against humanity"). One might thus extend the idea of remedies for unjust enrichment to the conditions of large-scale group oppression, including the extreme oppression and exploitation faced by African Americans over nearly four centuries. Whether

4. W. E. B. DU BOIS, *THE WORLD AND AFRICA* 37 (new enlarged ed., International Publishers 1965) (1946).

5. See FEAGIN, *supra* note 3, at 39–86.

6. JAMES BALLENTINE, *BALLENTINE'S LAW DICTIONARY* 1320 (1969).

7. See Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191–1242 (1995).

8. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 101 (1991).

or not this might make strict legal sense under current legal institutions,⁹ it is a useful analogy. Indeed, it does make moral sense and might conceivably be one basis for new legal institutions aimed at restitution and reparations for the enrichment stemming from past “crimes against humanity”—such as slavery, extreme segregation, and lynchings—that have been directed specifically and substantially against African Americans. Under this latter circumstance, group remedies should encompass stopping the unjust extraction of benefits now and in the future as well as the making of restitution to the victim group for past oppression. Implicit in the idea of unjust enrichment is the counterpart idea of *unjust impoverishment*, which describes the conditions of those who have suffered at the hands of those who have been unfairly enriched.

This unjust impoverishment has, on occasion, been recognized by liberal whites. Thus, in a 1984 federal appellate case, *Williams v. City of New Orleans*,¹⁰ appellate justice John Wisdom argued that the anti-slavery amendments and the civil rights acts enacted near the Civil War’s end were designed to grant the federal government power to:

provide for remedial action aimed at eliminating the present effects of past discrimination against blacks as a class. Wholly aside from the fourteenth amendment, the thirteenth amendment is an affirmative grant of power to eliminate slavery along with its “badges and incidents” and to establish universal civil freedom. The amendment envisions affirmative action aimed at blacks as a race. When a present discriminatory effect upon blacks as a class can be linked with a discriminatory practice against blacks as a race under the slavery system, the present effect may be eradicated under the auspices of the thirteenth amendment.¹¹

Since there are close historical connections between past and present white privileges and black disabilities, it is not surprising that most whites wish to deny the historical linkages with such phrases as “my family and I never owned slaves” or “slavery happened hundreds of years ago—get over it.”¹² Recognition of historical linkages is essential to building strong arguments for restitution and reparations for African Americans.

White privilege entails the array of many benefits and advantages inherited by each generation of those defined as “white” in United States society. These racialized advantages are both material and symbolic, and they penetrate and encompass many interactions among whites and between whites and others over the course of lifetimes.¹³ White privilege is ubiquitous and imbedded even where most whites cannot see it; it is the foundation of this society. It began in early white gains from slavery and has persisted under legal segregation and contemporary racism. Acceptance of this system of white privileges and black disadvantages as nor-

9. There is the qualification under law of the good faith purchaser, for example. This, however, does not usually apply to theft.

10. 729 F.2d 1554 (5th Cir. 1984).

11. *Id.* at 1577 (footnotes omitted) (citation omitted).

12. FEAGIN, *supra* note 3, at 123–25.

13. *Id.* at 180–86.

mal has conferred advantages for whites now across some fifteen generations.

B. The Transgenerational Transmission of Wealth

Looking across nearly four hundred years of colonial and United States history, one finds that racial oppression targeting African Americans encompasses the intertemporal reproducing of ill-gotten wealth, as well as the organizational structures and ideologies buttressing that wealth reproduction. Socially reproduced over time are racially structured institutions, such as the economic institutions that perpetuate the exploitation of black labor and the legal institutions protecting that exploitation. Each new generation of Americans has inherited this persisting framework of racial inequality and privilege. From at least the early 1700s to the mid-1800s, much of the surplus capital and wealth of the country's white families and communities came directly, or by means of economic multiplier effects, from the African slave trade and the slave plantations and related enterprises.¹⁴ The worldwide trade generated by British and French plantations in the Americas was the source of much capital for European commercial and industrial revolutions. Much of British, French, and American industry, shipping, naval development, and banking was directly or indirectly grounded in the enslaved labor of millions of Africans in the United States and the Caribbean. Indeed, from the late 1600s to the 1800s, the *majority* of major agricultural exports in the Western-dominated world trade were produced by enslaved Africans. Without this extensive labor, it seems unlikely that there would have been a successful British and United States textile industry, which depended heavily on slave-produced cotton. Without that first major industry, it is unclear how or when Britain and the United States would have become major industrial powers.¹⁵ Interestingly, perhaps the *most important* technological development of the eighteenth century, James Watt's improved and successful steam engine, which greatly accelerated industrialization (for example, railroads and textile mills), was bankrolled by British investors with capital accumulated in the West Indies trade in slaves and slave-produced products.¹⁶ Without the often profitable enterprises around African and African American enslavement, it is unclear how or when the United States would have developed as a modern industrial nation.¹⁷

14. See FRED BATEMEN & THOMAS WEISS, *A DEPLORABLE SCARCITY: THE FAILURE OF INDUSTRIALIZATION IN THE SLAVE ECONOMY* (1981); STANLEY LEBERGOTT, *THE AMERICANS: AN ECONOMIC RECORD* (1984); FEAGIN, *supra* note 3, at 9–68.

15. See William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 *CORDOZO L. REV.* 1711–92 (1996); Robert Browne, *Achieving Parity through Reparations*, in *THE WEALTH OF RACES: THE PRESENT VALUE OF BENEFITS FROM PAST INJUSTICES* 199–206 (Richard F. America ed., 1990).

16. FEAGIN, *supra* note 3, at 50–52.

17. Barbara L. Solow & Stanley L. Engerman, *British Capitalism and Caribbean Slavery: The Legacy of Eric Williams: An Introduction*, in *BRITISH CAPITALISM AND CARIBBEAN SLAVERY: THE LEGACY OF ERIC WILLIAMS* 8–11 (Barbara L. Solow & Stanley L. Engerman eds., 1987).

C. Labor Stolen Under Slavery

Since the mid-1600s, now for some fifteen generations or so, the exploitation and oppression of African Americans has redistributed income and wealth earned by black labor to generations of white Americans, thereby leaving the former relatively impoverished as a group and the latter relatively privileged as a group. Consider just the value of the African American labor that was expropriated. The white owner's cost for maintaining an enslaved African American was generally very low, and under many circumstances large profits could be generated from the labor of such a subordinated worker.¹⁸ For example, researcher Larry Neal has calculated that the current (1983) value of the slave labor expropriated by whites from 1620 to 1865 ranges from about \$963 billion to as much as \$97,064 billion, depending on the rate of interest chosen for the long intervening period.¹⁹ Historical economist James Marketti estimates the dollar value of the labor taken from enslaved African Americans from 1790 to 1860 to be, depending on the historical assumptions, from \$7 billion to as much as \$40 billion.²⁰ Such a figure roughly indicates what black individuals and families lost in income because they did not control their labor.²¹ Marketti suggests that, if that stolen income is multiplied by taking into account lost interest from then to the present, the current (1983) economic loss (income diverted) for black Americans ranges from \$2.1 to \$4.7 trillion.²² Updating these 1983 estimates to today would place the current value of the diverted income from black labor, plus interest, into many trillions of United States dollars.

Numerous white analysts have attacked the idea of white society owing such back wages for slavery; they argue that figuring out the debts of a supposedly too-distant history is just too difficult.²³ Yet such an argument almost always fails to note that the damages done to African Americans did not end with slavery, but persisted for another one hundred years in the form of legal segregation, and then for several more decades in present-day discrimination. The era of black enslavement was *not* followed by a century of redress, justice, and equality, but rather just the opposite. Moreover, today, there are *millions of living African Americans* who suffered severely *under legal segregation*, and many more *continue to*

18. W. E. B. Du Bois, *Black Reconstruction in America: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880* (1935).

19. David H. Swinton, *Racial Inequality and Reparations*, in *The Wealth of Races: The Present Value of Benefits from Past Injustices* 156 (Richard F. America ed., 1990).

20. James Marketti, *Estimated Present Value of Income Diverted During Slavery*, in *The Wealth of Races: The Present Value of Benefits from Past Injustices* 107–12 (Richard F. America ed., 1990). Marketti estimates slave prices and the number of those enslaved for the decades between 1790 and 1860, with allowance for price variations by age and other status, and uses these figures to estimate the value of slaveholders' income from slaves. He also calculates the value of the diverted labor income (compounded via interest) for later points in time.

21. I say roughly because reasonable living costs would have to be figured in if African Americans controlled their own labor.

22. MARKETTI, *supra* note 20.

23. See ROBERT PENN WARREN, *Who Speaks for the Negro?* 434–35 (1965).

suffer today from racial discrimination at the hands of many white Americans.²⁴

D. *More Labor Stolen: The Era of Legal Segregation*

After the Civil War, white southerners used open terrorism for some years in order to win a major goal of that war—the continued oppression of African Americans and the extensive use of their labor. Organizing Ku Klux Klan violence and other coercion, whites, including those in the ruling elite, worked to deny newly freed blacks access to land, credit, political power, and education.²⁵ There was much anti-black discrimination, and soon legal segregation was established in all southern and some northern states. Significantly, many government officials, including those in the judicial system, were actively involved in maintaining this racial oppression.²⁶ Under legal segregation, the income and other economic losses for black Americans were again extremely high. One research study estimated the cost of labor market discrimination for 1929–1969 (in 1983 dollars) at \$1.6 trillion.²⁷ Calculating the cost of anti-black discrimination from the end of slavery in 1865 to the year 1968, the end of legal segregation, and putting that calculation into year-2004 dollars would likely increase that wage-loss estimate to several trillion dollars.

E. *Continuing Theft of Labor Today*

Since the end of official segregation black Americans have suffered additional economic losses. A number of economic studies have suggested how much African American workers annually lose from continuing discrimination and informal segregation in employment. Just for one year in the 1970s, the cost of continuing racial discrimination in employment has been estimated at about \$94 to 123 billion.²⁸ Estimating a dollar figure for the period since the end of segregation to the present day would doubtlessly bring this figure of lost income and purchasing power from continuing discrimination to another several trillion dollars.

In addition, William Darity reminds us that what blacks lose whites often gain:

These are pretty good calculations, but they are all made on the assumption that if racial discrimination were eliminated everything else would be much the same. Discrimination appears as a deadweight loss to *all* Americans. No attention is given to the interdependence between the incomes of blacks and whites, and the

24. See JOE R. FEAGIN & MELVIN SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (1994); FEAGIN, *supra* note 3.

25. See Roger L. Ransom & Richard Sutch, *Growth and Welfare in the American South in the Nineteenth Century*, in *MARKET INSTITUTIONS AND ECONOMIC PROGRESS IN THE NEW SOUTH 1865–1900*, at 150–51 (Garry M. Walton & James F. Shepherd eds., 1981); FEAGIN, *supra* note 3.

26. See FEAGIN & FEAGIN, *supra* note 3, 163–79.

27. Swinton, *supra* note 19, at 156.

28. William Darity, Jr., *Forty Acres and a Mule: Placing the Price Tag on Oppression*, in *THE WEALTH OF RACES: THE PRESENT VALUE OF BENEFITS FROM PAST INJUSTICES* 11 (Richard F. America ed., 1990).

possibility that the incomes of whites are higher because the incomes of blacks are lower.²⁹

Thus, one can see much of these dollar figures as added and undeserved income for white Americans, not just losses for African Americans.

Thus, by even rough calculations, the sum total of the worth of all the black labor stolen by whites through the means of legal slavery, legal segregation, and contemporary racial discrimination is truly staggering—many trillions of dollars. The worth of all that labor, taking into account lost interest over time and putting it in today's dollars, is perhaps in the range of \$5 to \$24 trillion.

E. Yet Other Economic Costs

Labor lost means capital lost, both that directly generated and that which might have otherwise been borrowed. As David Swinton has noted,

Discrimination and racism reduced the historic accumulation [of] capital by blacks and increased accumulation by whites. The resulting disparities in ownership of capital are transmitted intergenerationally. These capital disparities would prevent attainment of racial equality even if current discrimination ended and blacks and whites had identical tastes and preferences.³⁰

Recall that after the Civil War some congressional proposals were aimed at giving those recently freed arable land—the famous forty acres and a mule. Yet most black families never got any access to the land promised, and the inequality in wealth-generating agricultural land has been a major cause of persisting racial inequality. Passed under the Abraham Lincoln administration, the Homestead Act provided access to productive land and wealth, mostly for white families, from a long period of United States history—from the 1860s to the 1930s. Some 246 million acres were provided by the federal government—typically at no, or minimal, cost—for some 1.5 million homesteading families.³¹ Research by Trina Williams estimates that—depending on calculations of multiple ownership, mortality, marriage, and childbearing patterns—somewhere between twenty and ninety-three million Americans are now the beneficiaries of this large wealth-generating program over several generations.³² Williams suggests that the most likely figure is in the middle range, perhaps forty-six million, a figure equal to about one-quarter of the current population.³³ Almost all these beneficiaries have been white because only four thousand African Americans were able to make entries under the Homestead Act. (And very large numbers of African Americans would likely have taken advantage of such opportunities at the time, had they been permitted access.) In order to build successful families and provide for their children,

29. *Id.* at 11.

30. Swinton, *supra* note 19, at 157.

31. TRINA WILLIAMS, *THE HOMESTEAD ACT: A MAJOR ASSET-BUILDING POLICY IN AMERICAN HISTORY*, 5–6 (Center for Social Dev., Working Paper No. 00-9, 2000).

32. *Id.* at 8.

33. *Id.* She includes the two most recent generations in these calculations.

parents need access to significant wealth-generating assets, and land is one major asset. Indeed, Stephen DeCanio's research indicates that those formerly enslaved who were propertyless and emancipated without arable land were destined to endure major long-term economic disparity with whites.³⁴ Indeed, this initial gap in access to wealth-generating land assets can be shown to have likely produced *most* of the long-term white-black gap in income, even without taking into consideration such other factors as persisting job discrimination.³⁵

Added to the lack of land was the rigid legal and de facto segregation that developed, in the South and in the North, in the decades just before and after 1900. This further prevented black Americans from getting good jobs, buying decent homes, and thereby generating the family assets necessary to compete effectively with whites over many lifetimes. Because of pervasive discrimination, there has been relatively little economic inheritance across generations of African Americans. In contrast, most white families garnered some economic resources in the past and enhanced those assets over a few, or many, generations.³⁶ Historically, a majority of whites have accumulated material advantages by the transmission of assets such as some savings, land, small businesses, or homes. Many decades of discrimination in employment and housing have resulted in black families being less likely to be homeowners.³⁷ Discriminatory practices in home sales and insurance have long limited the ability of black Americans to build housing equities that might be used to start a business or help children get a good education. Because of discrimination in securing mortgages for homes, as well as for businesses, African Americans are losing an estimated \$100 billion in equity over this current generation as compared to whites.³⁸ Moreover, over the last few generations this lost home equity doubtlessly totals many tens of billions of dollars. In addition, recent research indicates that the current white-black differential in assets is not the result of differences in savings rates.³⁹

G. *The Current Bottom Line: Economic Inequality*

For recent decades United States census data show the black median family income to be consistently in the range of fifty-five to sixty-one percent of the white median family income.⁴⁰ Today, as in the past, black families face poverty at a much greater rate than white families and an unemployment rate roughly twice that of whites.⁴¹ Black workers are often the first laid off during economic recessions and the last to be recalled.

34. Stephen J. DeCanio, *Accumulation and Discrimination in the Postbellum South*, in *MARKET INSTITUTIONS AND ECONOMIC PROGRESS IN THE NEW SOUTH 1865-1900* 103-25 (Garry M. Walton & James F. Shepherd eds., 1981).

35. *Id.*

36. FEAGIN, *supra* note 3, at 180-85.

37. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY* 36-50 (1995).

38. *Id.* at 36-50.

39. WILLIAM A. DARITY, JR. & SAMUEL L. MYERS, *PERSISTENT DISPARITY: RACE AND ECONOMIC INEQUALITY IN THE UNITED STATES SINCE 1945*, at 150-52 (1998).

40. FEAGIN & FEAGIN, *supra* note 3, at 176.

41. *Id.* at 176-77.

Coupled with a high unemployment rate is a high underemployment rate. In recent decades this rate has ranged to one-third or more of black workers in many communities, a much greater figure than for whites.⁴² Perhaps the most dramatic indicator of generations of white access to the acquisition of material and educational resources can be seen in measures of family net worth. The median net worth of white households is about *ten times* that of black households.⁴³ In addition, black families have most of the assets they hold in cars and houses, while white families are far more likely than black families to have interest-bearing bank accounts and to hold stock in companies.⁴⁴

III. OTHER PERSONAL AND SOCIAL COSTS

The costs of slavery and segregation are far more than economic, for there are many large human and community costs. For example, in the United States, African Americans average significantly shorter lives than whites. Thus, in 1900 the life expectancy for an average black person was about thirty-two to thirty-five years, some sixteen years less than that for a white person.⁴⁵ Today, this black-white gap has closed somewhat. Life expectancy for black Americans is about sixty-nine years, compared with about seventy-five to seventy-six years for whites.⁴⁶ In sum, it still costs six to seven years of one's life to be black in America.

Contemporary social science research suggests the many and severe effects that socially generated dehumanization can have on the health of human beings as individuals and as groups. Drawing on recent research, let me describe briefly some physical, psychological, family, and community costs of racial oppression.

A. *Many Physical Costs to Everyday Racism*

Stress, anger, and rage created by the discriminatory practices and prejudices of everyday racism lead to serious health consequences. When asked in interview studies about the costs of discrimination they face, black respondents cite a broad range of problems—from hypertension and stress diabetes to stress-related headaches and heart and stomach conditions.⁴⁷ One study researched the connection between racial stress and high blood pressure for nearly two thousand black Americans and found that those who reported substantial discrimination tended to have higher blood pressure than those who reported less.⁴⁸

42. *Id.* at 176.

43. *Id.* at 177.

44. U.S. BUREAU OF THE CENSUS, HOUSEHOLD WEALTH AND ASSET OWNERSHIP: 1991, CURRENT POPULATION REPORTS 70-134 (1994).

45. THOMAS F. PETTIGREW, A PROFILE OF THE NEGRO AMERICAN 99 (1964).

46. JOE R. FEAGIN & KARYN MCKINNEY, THE MANY COSTS OF RACISM 30 (2003).

47. *Id.* at 32.

48. Nancy Krieger & Stephen Sidney, *Racial Discrimination and Blood Pressure*, 86 AM. J. PUB. HEALTH 1370 (1996). See also FEAGIN, *supra* note 3, at 139-57; FEAGIN & MCKINNEY, *supra* note 46, at 76-82. Interestingly, those black respondents who reported no racial discrimination had blood pressure as high as those who reported much racial discrimination, which Harvard researcher Nancy Krieger interprets to mean that the former are likely underreporting. I have found this underreporting in response to

To illustrate the health impact, let me quote a few black middle-class respondents in a recent focus group study of my own. In one focus group a social services coordinator described some physical and psychological costs linked to dealing with hostile whites in the workplace:

I was having severe headaches, and chest pains It would be times when I would almost be in the office hyperventilating. And . . . it was just a lot of physical things happening to me. I would pull hair more, because, just the stress, you know? You just, you're trying to do so much, and collect your thoughts and do what needs to be done. . . . And the headaches were just, just terrible, just unbearable And it's also a psychological kind of ill, in that, well you know, if [white] people are constantly watching you But it's just amazing the psychological ill that it does to you. And even though you know you're competent? People can do that so much to you They can get in meetings and try to show you up and make you look like you just don't know anything. And it is so many of them, you are outnumbered! Sometimes, you come out, and lash out, and you almost validate what they're trying to say about you, because you feel outnumbered! . . . So, you, you begin to doubt yourself, you begin to psychologically feel somewhat incompetent So, it can take a toll on you, and I think it takes more of a psychological toll on us than we even care to admit.⁴⁹

In the focus groups several participants gave details on how they came to view their hypertension and other physical ailments as, at least in substantial part, linked to the stress they faced at the hands of discriminatory whites in the workplace and in other arenas outside their homes.

B. *Some Serious Psychological Costs*

Not surprisingly, the psychological impact of racism includes a broad range—from anxiety and worry to depression, anger, and rage. Several decades back, in what is still the only book on the subject, psychiatrists William Grier and Price Cobbs documented the anger of black Americans that is created by persisting, accumulating racial discrimination.⁵⁰ Today, anger over racial discrimination is still commonplace, and this anger can lead to inner turmoil, emotional withdrawal, or serious physical problems.⁵¹ Commenting on racially hostile or unsupportive workplaces, some focus group participants described general feelings of frustration and anger, and some told of incidents that generated these feelings. Common sources of anger are racist epithets and similar derogatory references.

questions asking directly about "discrimination" sometimes to be the case in my own research and that of my graduate students. This is likely because many African Americans suppress or deflect painful recollections of discrimination just to survive a racist world.

49. Feagin & McKinney, *supra* note 46, at 71–72.

50. WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* 4 (1968). *See also* Price M. Cobbs, *Critical Perspectives on the Psychology of Race*, in *THE STATE OF BLACK AMERICA* 61–70 (Janet Dewart ed., 1988).

51. *See* FEAGIN & MCKINNEY, *supra* note 46.

Thus, a black professional described her reaction to an incident with a white administrator:

I have felt extremely upset, anger, rage, I guess you would call it. One incident that comes to mind happened in a social setting. I was with some, with my former [white] boss and some co-workers and a man who ran, like, a federal program. And we were having dinner, and he made a comment, and he had been drinking *heavily*. And he referred to black people as “niggers” “I’m sitting—he’s there, and I’m here” And as soon as he said it, he looked in my face. And then he turned beet red, you know? And I said, “Excuse me, what did you say?” And he just couldn’t say anything. And then my boss, my former boss, intervened and said, “Now, you know, move his glass, because he’s had too much to drink.” And you know just making all these excuses. So, of course, I got up and left. I said, “Good night,” and left. And the next morning, the man called me and apologized His excuse was that he had been drinking, you know. And I said, “Well, [gives name] we don’t get drunk and just say things that we wouldn’t otherwise say. You know, I don’t get drunk and start speaking Spanish. This was already in you in order for it to come out”⁵²

We should recognize that the cost of everyday racism includes much sapping of physical and psychological energies. A retired educational psychologist explained this eloquently in another study done by the author and Melvin Sikes:

If you can think of the mind as having one hundred ergs of energy, and the average man uses fifty percent of his energy dealing with the everyday problems of the world . . . then he has fifty percent more to do creative kinds of things that he wants to do. Now that’s a white person. Now a black person also has one hundred ergs; he uses fifty percent the same way a white man does, dealing with what the white man has [to deal with], so he has fifty percent left. But he uses twenty-five percent fighting being black, [with] all the problems being black and what it means.⁵³

Evidently, racism has been costly in destroying much vital human energy that could have been used in building up a better society.

C. *Accumulating Family Costs*

Still, individual costs are not the only impact of everyday racism, past or present. Thus, in another focus group an engineer made clear the way in which his personal energy costs of dealing with whites at work had a family impact. His focus group was discussing the “eight whole hours of discrimination” they experienced daily, and he gave his account of the impact of a time when there was racial discrimination in his workplace:

52. *Id.* at 46–47.

53. FEAGIN & SIKES, *supra* note 24, at 295–96.

One of the things, though, that really has had an effect on my family personally was, me having [less] time to really spend with my son. As far as reading him stories, talking, working with him, with his writing, and, all of that. And those things really, really hurt us, and it hurt my child, I think, in the long run, because he never had that really. I know when, when the program was really, really running, some, some days I would come home and I would have such excruciating headaches and chest pains that I would just lay on the bed and put a cold compress on my head and just relax. . . . And by the time I come home, I'm so stressed out. And he runs up to me, and you know I give him a hug, but when you're so stressed out, you need just a little period of time, maybe an hour or so, just to unwind, just to relax, you know? . . . to just watch the news or something, to kind of unwind and everything. And you know you're almost energy-less So, by the time you get home, you have your family.⁵⁴

Thus, the pain of workplace mistreatment can have a domino effect, with chest pains and headaches being linked to a loss of energy, and that in turn resulting in less energy for relating to family members. Note too the impact on a person's own sense of his ability to be an adequate parent in the midst of a continuing racist society.

D. Yet More Damage from White Racism: Community Costs

The spin-off effects of racial mistreatment by whites in employment settings include an impact on community. One respondent noted the negative impact on participation in church activities:

I have withdrawn from some of the things I was involved with at church that were very important to me, like dealing with the kids at church. Or we had an outreach ministry where we would go out into the low-income housing and we would share about our services . . . and I was just so drained . . . if we are all so drained, and we stop doing that, then we lose our connection. But I, physically, by the time I got home at the end of the day, I was just so tired, I didn't even feel like giving back to my community, I didn't feel like doing anything. And so I withdrew from church activities, to the point where I just really was not contributing anything. And it was pulling all that energy; I was exhausted from dealing with what I had to at work.⁵⁵

The impact of workplace racism is graphically described, for even community activities become more difficult. For many white commentators, whatever anti-black discrimination remains is to be dealt with on an individual basis. However, we see here that the assaults of racism have effects not just on black Americans as individuals but also on larger social circles, for the pain of discriminatory acts is often shared with relatives and friends.

54. FEAGIN & MCKINNEY, *supra* note 46, at 60.

55. *Id.* at 115.

While these focus group accounts deal with recent events and the damage done by whites who discriminate in the contemporary United States, these accounts resonate in many ways with the accounts of oppression given by enslaved African Americans during the centuries of slavery,⁵⁶ as well as with the accounts given by African Americans oppressed severely under legal segregation for its many decades.⁵⁷ Similar psychological, physical, family, and community costs have burdened many millions of African Americans from the seventeenth century to the present, and thus should be factored into any careful consideration of the reparations due to those who are currently both victims of continuing racial oppression *and* the descendants of those who were victims of similar racialized oppression. Indeed, one could well argue that reparations should begin with compensation to *most African Americans living today* for the racial oppression they have actually received *over their lifetimes*.

E. Institutional Costs

As these focus group quotes suggest, there is much more to the costs of four centuries of racial oppression than just individual and family costs. Indeed, one of the major costs of this oppression is the loss of much large-scale institutional development within black communities. Until the desegregation of the late 1960s, it was almost exclusively whites who had access to key types of resources for institution building. For example, after World War I, the Air Commerce Act gave air routes to *exclusively* white-run companies.⁵⁸ Access to many other government-controlled, wealth-generating resources, such as mineral deposits and the radio and television airwaves, were kept from black taxpayers by means of blatant and overt racial discrimination and legal segregation.⁵⁹

Today, African Americans' lack of socioeconomic resources and accumulated wealth links closely to the continuing lack of access to key organizations with powerful influence over the structural realities of United States society. To take one major example, note the mass media. African Americans have no control over any of the major television or newspaper networks, which means that they do not have significant control over the stereotypical images and information on African Americans often circulated nationally by these media. Nor can they circulate the positive information necessary for socializing their children and building their communities as effectively as they could if they had the power of the white-controlled corporations that regularly push their own agendas and interests through the media. Research shows that whites have controlled the often negative images of key government programs, such as affirmative action, that are of great concern to African Americans.⁶⁰ African Americans do not even

56. See BENJAMIN ALBERT BOTKIN, *LAY MY BURDEN DOWN: A FOLK HISTORY OF SLAVERY* (1945).

57. See JOHN L. GWALTNEY, *DRYLONGSO: A SELF-PORTRAIT OF BLACK AMERICA* (1981); STETSON KENNEDY, *JIM CROW GUIDE: THE WAY IT WORKS* (1959).

58. THEODORE CROSS, *THE BLACK POWER IMPERATIVE: RACIAL INEQUALITY AND THE POLITICS OF NONVIOLENCE* 515–18 (1984).

59. See *id.*

60. Robert M. Entman, *Manufacturing Discord: Media in the Affirmative Action Debate*, 2 *HARV. INT'L J. PRESS/POLITICS* 36 (1997).

have the power to get the issue of affirmative action or reparations fully into the mass media for a full positive discussion of the implications of such programs. Thus, most of the discussion in the mainstream media of such issues has had a decidedly white, usually conservative, orientation. Contemporary African Americans would have much more control over the mass media images and discussions if their ancestors—who were in fact in the United States in large numbers at the time the media were initially established (and unlike recent immigrants, who often do better in institutional building and control)—had possessed anything close to equal access to resources for institution building in their communities.⁶¹

IV. PREVIOUS REPARATIONS FOR SOCIAL INJUSTICE

In summary, then, each year in the United States literally millions of racist attacks—blatant, covert, and subtle racist acts—are mounted by white Americans against black Americans in all major institutional arenas—from housing and schools, to workplaces and transportation, to shopping, recreation, and police contacts. If the many instances of discrimination are counted up over the lifetime of a typical older African American, they doubtless reach into the thousands. For all recent and current African American lifetimes, many millions of lifetimes, taken together they thus mount into *tens of billions* of racist, discriminatory acts and incidents.⁶² Given this sobering reality, it is obvious that a *huge debt* is owed to African Americans by white Americans.

A. Civil Rights Efforts

Yet little of this debt has been paid. The proclaimed civil rights laws of the 1960s are thought by many whites to have “solved” most or all of the problem of racial discrimination in the United States.⁶³ Yet such laws have brought, at best, only a modest redress of discrimination and some equality of opportunity in everyday settings. Few of the millions of cases of discrimination perpetrated by whites each year against black targets are *ever* redressed by private or government remedies.⁶⁴ Moreover, recent research on progress in civil rights, including such things as civil rights laws, shows that these policies against discrimination do not represent significant compensation, much less significant atonement, by whites as a group for the long-term racial oppression. Thus, these changes did not come because the white majority suddenly became committed to implementing the ideal of social justice. Instead, civil rights changes and policies since the 1950s are mostly the result of broad social forces coming together. First, the circumstances of recent wars (including the Cold War) have necessitated that the white political leadership seek to reduce internal turmoil in order to create a nation united against an external political enemy—a condition encouraging governmental action to reduce racial

61. I am indebted to Kenneth Nunn for reminding me of this key point.

62. See JOE R. FEAGIN & HERNAN VERA, *WHITE RACISM: THE BASICS* (1995); FEAGIN, *supra* note 3; FEAGIN AND MCKINNEY, *supra* note 46.

63. FEAGIN, *supra* note 3, at 123–29.

64. *Id.* at 242–43.

conflict. Secondly, change has come when black leaders led millions of African Americans in community protests pressuring vulnerable white leaders to act on the country's putative social justice ideals.⁶⁵ Historical data show that, in bringing racial change, the political and international interests of white America's leaders have been more important than commitments to racial justice.⁶⁶

In general, the idea of going beyond civil rights enforcement to reparations for African Americans is rejected by most whites. For example, one 2002 opinion survey in New York found that nearly three quarters of the white respondents were opposed to the idea of reparations for African Americans. (In contrast, three quarters of black respondents, and just over half of Latino respondents were supportive.)⁶⁷ Interestingly, in contrast to what might have been expected, the majority of all respondents were not personally offended by discussions of the reparations issue.⁶⁸

One argument against reparations is that societal oppression against black Americans has been too impersonal for the development of specific remedies. In recent years some federal courts have accepted the view that, while there may still be societal discrimination, no one can determine who in particular is responsible and who has benefited; thus, no compensation is necessary. Thus, in *City of Richmond v. J. A. Croson Co.*, Justice Sandra D. O'Connor referred to "the sorry history of both private and public discrimination in this country"⁶⁹ and recognized the reality of "past societal discrimination."⁷⁰ Emphasizing the "past," not the present, O'Connor naively characterized societal discrimination as "amorphous" with no clear link to present-day discrimination against African Americans—especially to black businesses—in contemporary Richmond, Virginia.⁷¹ Yet the evidence of past and present anti-black discrimination in *any* United States city, as we have noted above, is major, well-documented, structural, and *anything but amorphous*.⁷²

The problem in Supreme Court decisions like *Croson*, as in many other recent decisions, is that the white majority on the Supreme Court no longer listens to the voices, views, and experiences of the overwhelming majority of the African American community.⁷³ Nonetheless, there are numerous examples of reparations and compensation being addressed by United States courts or paid by United States legislatures. Let us examine a few examples.

65. See DANIEL KRYDER, *DIVIDED ARSENAL: RACE AND THE AMERICAN STATE DURING WORLD WAR II* (2000); PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* (1999).

66. *Id.*

67. Siena Research Inst., *Most New Yorkers Oppose Reparations For Slave Descendents* (2002), available at <http://www.siena.edu/sri/results/2002/02JuneReparation.htm> (last visited Feb. 19, 2004).

68. *Id.*

69. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 499 (1989).

70. *Id.*

71. See *id.* at 72.

72. See FEAGIN, *supra* note 3.

73. For documentation on this point of neglect, see Joe R. Feagin, *Heeding Black Voices: The Court, Brown, and Challenges In Building A Multiracial Democracy*, U. PITT. L. REV. (forthcoming summer 2004).

B. *Precedents for Reparations: Corporate Cases*

There are many precedents supporting the idea of extensive reparations for the damage done by whites, historically and in the present day, to African Americans. For example, some United States courts have required corporations to compensate the deformed children of mothers who in the past took harmful drugs during their pregnancies without knowledge of the drugs' destructive side effects. Some courts have held that such harm done to later generations was foreseeable by the corporate executives in power at that earlier point in time. The argument that those executives are gone or deceased—that too much time had elapsed—was *not* allowed to take current corporate executives and their corporations off the hook.⁷⁴

C. *Precedents: Reparations for Victims of World War II Atrocities*

Significantly, the United States government has been very active in efforts to force the German government to make reparations to the victims of Nazi atrocities. As Richard Delgado has noted, "The United States required that Germany make reparations to Israel and the victims of the Holocaust, even though the Nazi government had been disbanded and most of its leaders executed or imprisoned."⁷⁵ For twelve years the Nazis inflicted extreme repression and cruelties, and millions of deaths, on the Jews in Germany and other Nazi-controlled territories. Later German governments have paid more than \$60 billion in reparations to individual victims of the Holocaust, as well as to the nation of Israel on behalf of those victims, even though that nation did not exist at the time of the atrocities.⁷⁶ The United States government has put similar pressure on Swiss banks, which recently offered \$1.25 billion in compensation to Nazi victims to settle a class action lawsuit targeting questionable actions of Swiss banks and insurance companies during the Holocaust.⁷⁷ In addition, the United States government has pressured at least nineteen German corporations, whose executives have admitted using slave labor during World War II, to compensate those laborers and their families, to the extent of several billion dollars in reparations.⁷⁸

Moreover, in 1997 the United States House passed a concurrent resolution condemning the sexual *enslavement* of Chinese and Korean women by the Japanese army in World War II. It called on the Japanese government to pay immediate reparations for the enslavement and other crimes and supported an international court ruling of compensation of at least \$40,000 for each victim.⁷⁹ This is an extraordinarily ironic resolution, as it has clear parallels to the rape and other abuse of African American women

74. RICHARD DELGADO, *THE COMING RACE WAR?* 103 (1996).

75. *Id.* at 104.

76. Hubert Kim, *German Reparations: Institutionalized Inefficiency*, in *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN JUSTICE* 77, 77 (Roy L. Brooks ed., 1999).

77. Amy Waldman, *Holocaust Accord Ends Plan for Sanctions*, N.Y. TIMES, Aug. 14, 1998, at A8.

78. *Id.*

79. House Con. Res., 105th Congress, 1st Session (1997) (enacted).

by white men in the United States under slavery and the near-slavery of legal segregation in most of the South. If reparations are fair for Chinese and Korean women, why not for African American women, many of whom are still living?

D. Precedents: Token Reparations for Japanese Americans

United States leaders, almost all of them white men, have recognized a reparations principle in regard to discriminatory action by the United States government against United States citizens during World War II. After years of resistance to the idea, in the late 1980s the federal government finally agreed to pay modest reparations to Japanese Americans wrongfully interned in concentration camps during World War II.⁸⁰ For years Japanese American organizations pressed the United States government for repayment of losses suffered from racist government action. In 1987, after years of foot-dragging, the House finally passed a law with an apology for the internment and \$1.2 billion in reparations.⁸¹ Surviving internees or their heirs received \$20,000 each for the economic losses and the pain and suffering. As modest as this compensation was, it signaled an official admission of the damage done by governmental discrimination and some willingness to make reparations.⁸² Yet, even this modest compensation was not made until Japanese Americans had a strong partner in a now powerful Japanese government and economy.

E. Precedents: Reparations for "Ethnic Cleansing" in the United States

Some reparations have also been provided to Native Americans for lands long ago taken with little or no compensation, and often in contravention of official United States government treaties. In recent decades many indigenous groups have pressed land claims in federal court, and some have won their cases, with monetary compensation or illegally taken lands restored.⁸³ For example, in 1980, after a lengthy court battle, the United States Supreme Court awarded the Lakota Sioux \$122.5 million for more than 7 million acres taken illegally in the 1870s.⁸⁴ Significantly, this cash award was refused by the Lakota, who insisted that their sacred land was not for sale and that the land itself should be returned.⁸⁵ In recent years Sioux leaders have taken their case to the United Nations, where some have been part of the U.N. committee writing a Declaration on the Rights of Indigenous Peoples. Provisions included in the declaration are the "restitution of the lands, territories and resources" and the "enforcement of treaties."⁸⁶ The Native American Rights Fund, a national legal

80. FEAGIN & FEAGIN, *supra* note 3, at 272–75.

81. *Id.*

82. *Id.* at 273–74.

83. *Id.* at 133–34, 144–46.

84. JAMES S. OLSON & RAYMOND WILSON, *NATIVE AMERICANS IN THE TWENTIETH CENTURY* 197 (1984).

85. *See id.*; Ward Churchill, *The Earth Is Our Mother*, in *THE STATE OF NATIVE AMERICA* 151–69 (M. Annette Jaimes ed., 1992).

86. *See Shattering the Myth of the Vanishing American*, 22 *FORD FOUNDATION LETTER* 1–5 (1991).

defense firm, has represented various Native American groups in negotiations for treaty-guaranteed natural resources and for restoration of their treaty status as sovereign nations.⁸⁷

Moreover, on September 8, 2000, at a ceremony marking the 175th anniversary of the Bureau of Indian Affairs, the head of the Bureau, Kevin Gover, described the evolution of the agency from a War Department office to one that supervised the lives of Native Americans on reservations and noted that "this agency participated in the ethnic cleansing that befell the Western tribes. This agency set out to destroy all things Indian. The legacy of these misdeeds haunts us."⁸⁸ Gover then proceeded to make a formal apology to Native Americans on behalf of the bureau: "Let us begin by expressing our profound sorrow for what the agency has done in the past."⁸⁹

Clearly, under some circumstances, the United States government has recognized the right to reparations or other compensation for racial and ethnic oppression—but not, as yet, for black or Latino Americans. Puerto Rican and Mexican Americans have also pressed for some reparations for racial oppression, albeit so far unsuccessfully. In the 1960s a new organization, the Alianza Federal de Mercedes, was founded by a Mexican American activist, Reies Lopez Tijerina. Researching old Mexican land grants in the Southwest, he found that land had long ago been stolen from Mexican families by new white immigrants coming into the area. A group of Alianza members marched on the state capital in Santa Fe and presented a statement of grievances about that theft of land; another group camped out without a permit on Kit Carson National Forest land, once part of a Mexican communal land grant. As a result, United States forest rangers were seized and tried for violating old land-grant boundaries.⁹⁰ More recently, some Mexican Americans in the southwestern states have filed lawsuits seeking the return of stolen lands or compensation for those lands.⁹¹

In addition, Puerto Ricans have pressed for compensation for oppression. The Puerto Rican Independence Party has called for dollar compensation from the United States government.⁹² In recent decades, residents of the island of Vieques near Puerto Rico have seen their island become the target for massive bombing by the United States Navy; they have asked for reparations for decades of damage to the physical environment and to the health of the island's citizens.⁹³

V. INTERNATIONAL PRECEDENTS: REPARATIONS FOR SOUTH AFRICANS

The principle of reparations for major human rights violations is also well established in international law. The International Court in the Hague,

87. *See id.*

88. David Stout, *Bureau Delivers Apology to Indians*, GAINESVILLE SUN, Sept. 9, 2000, at 5A.

89. *Id.*

90. FEAGIN & FEAGIN, *supra* note 3, at 217–18.

91. *Id.* at 228–31.

92. *Id.* at 245.

93. E-mail from Eduardo Bonilla-Silva, Department of Sociology, Texas A&M University (Aug. 31, 2000) (on file with author).

among other international tribunals, has now awarded reparations a number of times.⁹⁴

Moreover, recent government actions in South Africa have included payment of reparations to the victims and survivors of human rights violations. These reparations have been recommended by the South African Truth and Reconciliation Commission (TRC), an organization that offers an important model for those setting up programs to deal with past racial oppression.⁹⁵ Not only does the Commission have the power to grant amnesty after a full hearing on human rights violations, but it has also set in motion programs for the payment of reparations to those who suffered the violations.⁹⁶ Interim payments to victims of rights violations were started in 1998, and the movement to permanent reparations was set in motion.⁹⁷ The TRC recommended to the government that the victims and survivors of human rights violations should receive reparation payments totaling \$430 million paid over several years. It also recommended reparations in the form of community programs for housing, health care, and education—programs geared at rehabilitating communities hurt by the large-scale human rights violations.⁹⁸ Today, the payment of adequate reparations is part of a continuing political struggle in South Africa, but the moral and institutional precedent for reparations for racial oppression is now well established at an international level.

VI. THE LONG STRUGGLE FOR BLACK REPARATIONS

Beginning in the eighteenth century, African American leaders and their white allies argued for the abolition of slavery and for restitution enabling those freed to provide for their families. After the Civil War, reparations were increasingly seen as essential to the eradication of the “badges and disabilities” of previous enslavement. Several black and white leaders called for compensation for those newly freed from slavery.⁹⁹ For example, at a Republican convention in Pennsylvania, Thaddeus Stevens called for the taking of 400 million acres from former slaveholders to provide some compensation and assets to those once enslaved. Also, Senator Charles Sumner called for land grants to those recently enslaved because legal equality did not eradicate the disparities in assets and power.¹⁰⁰ However, with the terrorist suppression of Reconstruction

94. ROBINSON, *supra* note 1, at 221.

95. See, e.g., *Apartheid Victims Government*, JOHANNESBURG DAILY MAIL & GUARDIAN, Sept. 24, 1999; *Truth Commission Pays out Pittance*, JOHANNESBURG DAILY MAIL & GUARDIAN, DEC. 14, 2003; *Apartheid Victims Need Holistic Help*, JOHANNESBURG DAILY MAIL & GUARDIAN, Nov. 23, 2003; *Govt Hedges on TRC Reparations*, JOHANNESBURG DAILY MAIL & GUARDIAN, May 10, 2000; Truth and Reconciliation Commission, at <http://www.doj.gov.za/trc/index.html> (last updated Apr. 10, 2003).

96. See Truth and Reconciliation Commission, at <http://www.doj.gov.za/trc/index.html> (last updated Apr. 10, 2003).

97. See *id.*

98. Truth and Reconciliation Commission, A Summary of Reparation and Rehabilitation Policy, at <http://www.doj.gov.za/trc/reparations/summary.htm>.

99. 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, 885 (1993).

100. *Id.* at 886.

and the capitulation of the United States government to this white terrorism and subsequent legal segregation, the efforts for compensation and reparations virtually came to an end. It would be nearly a century before strong proposals for reparations would return to the public forum.

Many decades later, during the 1960s, Dr. Martin Luther King, Jr., called for significant compensation for slavery, segregation, and continuing anti-black discrimination. He supported the principle of compensation for stolen wages.¹⁰¹ Other black activists also pressed the issue. In 1969 James Forman, another African American civil rights leader, made his appeal for reparations by interrupting a service at New York's Riverside Church.¹⁰² He addressed a *Black Manifesto* to the "white Christian Churches and Jewish Synagogues in the United States of America and All Other Racist Institutions."¹⁰³ It called for a beginning of reparations and detailed economic demands such as the creation of banks, universities, and training centers for African Americans.¹⁰⁴ The white reaction was mostly negative and focused mainly on the disruption of the church service. There was little analysis of the key idea of reparations. One authoritative mouthpiece of the white elite, the *New York Times*, published a commonplace misjudgment that is still encountered in much of the white response to calls of reparations for African Americans. Boris Bittker quotes a 1969 editorial in the *New York Times* that argues that "there is neither wealth nor wisdom enough in the world to compensate in money for all the wrongs in history."¹⁰⁵ However, this is disingenuous and the wrong question, as Bittker noted at the time: "A better response is the counter-question. Should no wrongs be corrected unless all can be? In both public and private life, we constantly compare competing demands for the redress of injustice, knowing full well that the pit is bottomless . . ."¹⁰⁶ A critical point that is ignored in such arguments, then as now, is: Who decides which important wrongs are to be redressed, and when?

Interestingly, shortly thereafter at a 1972 National Black Political Convention meeting in Indiana, a call was issued for reparations for the "moral horrors of slavery" and the "human indignities" of discrimination suffered since. It spelled out a procedure for starting reparations; it asked the United States president to set up a commission with a black majority to "determine a procedure for calculating an appropriate reparations payment in terms of land, capital and cash and for exploring the ways in which the Black community prefers to have this payment implemented."¹⁰⁷ Clearly, for decades now, African Americans have articulated the idea of restitution and reparations.

101. MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 24-25 (1963).

102. See Joe R. Feagin & Eileen O'Brien, *The Growing Movement for Reparations*, in *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN JUSTICE* 341, 342 (Roy L. Brooks ed., 1999).

103. *Id.*

104. *Id.*

105. BORIS I. BITTKER, *COLLECTIVE LEGAL ESSAYS* 87-88 (1989) (quoting *N.Y. TIMES*, SEPT. 9, 1969 at 46).

106. *Id.*

107. BITTKER, *supra* note 2, at 108.

A. *A Call for Reparations: The Organization of African Unity*

Major international efforts have been directed at reparations for Africans both in Africa and in the African Diaspora around the globe. For example, in 1992 the Organization of African Unity convened the first pan-African conference on reparations for African casualties of European colonialism. Representatives from thirty countries drafted a statement that called on “the international community to recognize that there is a unique and unprecedented moral debt owed to African peoples which has yet to be paid—the debt of compensation to the Africans as the most humiliated and exploited people of the last four centuries of modern history.”¹⁰⁸

In addition, in 1996 the British House of Lords had a serious debate on the impact of slavery on Africa and Africans, with a few members of that House proposing reparations to Africa from Britain and other colonial nations. Lord Anthony Gifford eloquently defended the idea that international law has for some time required those who commit crimes against humanity, including enslavement, to make significant reparations to their victims or their descendants.¹⁰⁹ He noted there is no statute of limitations for crimes against humanity, so the still-harmed descendants of earlier victims of oppression deserve reparations. He also offered a concrete procedure:

The claim would be brought on behalf of all Africans, in Africa and in the Diaspora, who suffer the consequences of the crime, through the agency of an appropriate representative body The claim would be brought against the governments of those countries which promoted and were enriched by the African slave trade and the institution of slavery The amount of the claim would be assessed by experts in each aspect of life and in each region, affected by the institution of slavery.¹¹⁰

It is interesting that the British House of Lords has, for some time now, been much more advanced in examining these matters of reparations than either house of the United States Congress.

It is also significant that Lord Gifford has officially raised the question of slavery being one of the “crimes against humanity” in which Europeans have engaged. Such crimes, as he notes, have no statute of limitations, which is one effective response to the common white, especially white American, claim that “slavery happened hundreds of years ago” and is thus beyond compensation.¹¹¹

B. *A United States House Bill: A Reparations Study Commission*

Since 1989, United States Representative John Conyers, Jr. (D-Mich.) has regularly introduced a bill in Congress to set up a commission to:

108. ROBINSON, *supra* note 1, at 220.

109. See Anthony Gifford, *The Legal Basis of the Claim for Reparations*, First Pan-African Congress on Reparations, Abuja, Nigeria (Apr. 27–29, 1993) available at <http://www.arm.arc.co.uk/legalbasis.html>.

110. *Id.*

111. See *id.*

acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequent *de jure* and *de facto* racial and economic discrimination against African Americans, and the impact of these forces on living African Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.¹¹²

A key feature of the commission would be to educate the public, especially the white public, on the racist realities of United States history. While Conyers has been unable yet to secure hearings on his bill or get it out of the Republican-controlled House Judiciary Committee, he has found several dozen congressional co-sponsors and has been working patiently for a public discussion of reparations.¹¹³ Conyers has commented that some day the “most hidden, important, silent subject we’ve ever had in this country” will come to the forefront.¹¹⁴ He added, “What we’re trying to do now is just get the debate going to see where it will lead us.”¹¹⁵

By the mid-1990s the idea of reparations for African Americans had moved into the political and religious mainstream. Since the 1990s several state and city governments have passed resolutions supportive of Conyers bill or the forming of a national commission to investigate the issue of substantial reparations for African Americans. In May 2000, the Atlanta city council passed a resolution supporting a national commission to study slavery’s long-term impact and the payment of reparations.¹¹⁶ Thereby, they joined the city governments of Dallas, Cleveland, Detroit, and Washington, D.C., in such a view.¹¹⁷

VII. ATTEMPTS TO GET BLACK REPARATIONS: STRATEGIES AND TACTICS

The data presented above provide the justification for making reparations in the form of dramatic new asset-building programs for African Americans, both individually and collectively. The payment of reparations would compensate the black community for the unpaid labor of their forebears and provide contemporary African Americans with their fair share of the national wealth that they would have had if given the same advantages white Americans had secured over nearly four hundred years.¹¹⁸

112. Commission to Study Reparations Proposals for African Americans Act, H.R. 3745, 101st Cong. (1st Sess. 1989).

113. Al Swanson, *Analysis: Reparations Fight Will Continue*, UNITED PRESS INT’L, Jan. 27, 2004, at <http://www.upi.com/view.cfm?storyID=20040127-012118-5919r>.

114. *Id.*

115. Kevin Merida, *Did Freedom Alone Pay a Nation’s Debt?*, WASH. POST, Nov. 23, 1999, at C1.

116. Jane DuBose, *Conference to Address Reparations for Slavery; Fisk University Event is Part of Efforts Around U.S. to Seek Compensation for African-Americans for Historical Wrongs*, ATLANTA J. & CONST., Jan. 15, 2001, at 4A.

117. *Id.*

118. Robert S. Browne, *The Economic Basis for Reparations to Black America*, 21 REV. BLACK POL. ECON. 99–110 (1993).

In recent years some African Americans have sought to go beyond the idea of a commission to study reparations and attempted to secure monetary compensation. Their attempts provide some insight into how the expropriation of African American labor and wealth over nearly four centuries might be compensated, as well as into the difficulties of such an undertaking.

A. *An Attempt at Reparations Through the Courts*

In a 1995 case, several black plaintiffs tried to sue the United States government and collect damages of \$100 million “for forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character.”¹¹⁹ The litigants asked the court to order an apology for slavery and for discrimination against freed slaves and their descendants. Not unexpectedly, the U.S. district and appellate courts found that these reparations claims were barred by the sovereign immunity principle—the principle that the United States government generally has to agree to its being sued.¹²⁰ Thus, while recognizing that the Federal Tort Claims Act (FTCA) has allowed limited civil claims against the United States government, as of January 1945, the appellate court held that the statute of limitations barred the black plaintiffs’ suit. The appellate court justices argued that “[b]y its own terms, therefore, claims arising out of the fact of slavery, kidnapping, and other offenses to Cato’s [the lead black plaintiff] ancestors that occurred prior to 1945 or were not pursued within two years of their accrual, fall outside the FTCA’s limited waiver of sovereign immunity.”¹²¹ This argument, however, is problematic if one considers the larger context of international law, for as noted previously, “crimes against humanity,” as certainly enslavement was (and is), have no statute of limitations.¹²²

The appellate court also noted that the lawsuit “draws on the legislative history of the Thirteenth Amendment and the Civil Rights Act of 1866 to contend that the federal government had an obligation to end the vestiges of slavery, but has failed to keep the promise.” Yet the court rejected this argument with characteristic individualism: “Without a concrete, personal injury that is not abstract and that is *fairly traceable to the government conduct that she challenges* as unconstitutional, Cato lacks standing.”¹²³ The court further asserted that “[n]either does Cato have standing to litigate claims based on the stigmatizing injury to all African Americans caused by racial discrimination.”¹²⁴ It appears, from this perspective, that black Americans will not be able to secure reparations through the federal courts until the United States Congress explicitly acknowledges

119. *Cato v. United States*, 70 F.3d 1105, 1106 (9th Cir. 1995).

120. *Id.* at 1107.

121. *Id.* at 1107.

122. *See supra* Part VI.A.

123. *Id.* at 1109 (emphasis added).

124. *Id.* at 1109–10.

the United States government's long-term responsibility for racial oppression.

B. State Legislative Action: One Important Precedent

In the 1920s, Rosewood, Florida, was a relatively prosperous black town of about 350 people. On January 1, 1923, the town was attacked by whites, and at least eight black residents were massacred, with dozens more being injured, and the town was burned.¹²⁵ This massacre took place with the collusion of law enforcement officials. In the early 1990s a black survivor working to recover damages contacted a lawyer who pointed out the difficulties and suggested instead that the survivor present the issue to the state legislature.¹²⁶ After some powerful legislators got involved, and momentum developed, the Florida legislature passed the Rosewood Compensation Act (1994).¹²⁷ This seems to be the first time that any level of government in the United States has openly acknowledged a role in racist violence against African Americans and then provided significant compensation to victims. The state of Florida acknowledged the role of its officials in not preventing the massacre. Each involved black family was eligible for \$20,000 in compensation, plus up to \$150,000 for documented losses; those present at the time were eligible for an additional payment up to \$150,000. Yet even here no public apology was made by the legislature.¹²⁸ Perhaps the most significant lesson coming from this example is that reparations for African Americans are *not* a radical idea, but one that can gain support even from conservative white legislators if the case is presented well.

Significantly, the Rosewood legislation is a precedent that has influenced current efforts for reparations in Tulsa, Oklahoma, where 175 or more African Americans were killed in a massive massacre (usually called the Tulsa "race riot"). In late May and early June of 1921 a white mob came together at the Tulsa court house to lynch a black man.¹²⁹ When black veterans of World War I organized to resist the lynching, the police department deputized several hundred white men to put down what was termed a "negro uprising." Armed white men, including the deputies, went into the black community and burned many homes and stores, killing and injuring black Tulsans as they went. Although the Tulsa Race Riot Commission recommended paying of reparations in February 2000, government officials and the Oklahoma State Legislature have rejected monetary reparations for the race riot survivors.¹³⁰ Furthermore, a federal judge recently dismissed a lawsuit brought by 108 survivors and 271 descendants of the Tulsa Race Riot against the city of Tulsa and the state of Oklahoma ruling

125. Kenneth B. Nunn, *Rosewood*, in *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN JUSTICE* 435, 435 (Roy L. Brooks ed., 1999).

126. *Id.*

127. Fla. House Bill 591 (1994).

128. *Id.*

129. Alfred L. Brophy, *In Oklahoma, Another Debate about Reparations*, *HIST. NEWS SERVICE*, July 21, 2000, at <http://www.h-net.msu.edu/~hns/articles/2000/072100a.html>.

130. *Id.*

that the lawsuit was blocked by a statute of limitations that expired in 1923. The plaintiffs have vowed to appeal.¹³¹

In both the Rosewood and Tulsa cases, clear documentation of the government-sanctioned atrocities committed under legal segregation has helped to make the case for reparations. There are doubtless more such cases that could be documented for the period of legal segregation—in both southern and northern states. In my own research and in that of my students who have interviewed elderly African Americans with extensive experience under legal segregation, we have documented numerous instances of brutal killings by whites, often as groups, that have not only been uncompensated, but often not even recorded in white-controlled newspapers and local libraries.¹³² Such documentation, together with pressure on state and federal legislatures for redress, might be a way to help create a larger national movement for reparations. Today, government action for reparations for African Americans is not beyond the realm of possibility.

VIII. SOME PRACTICAL QUESTIONS: IMPLEMENTING REPARATIONS

What are the steps that might be taken to provide reparations? How might this be done? One step in moving toward reparations might be in the area of education. Many, if not most, whites are inclined to deny the reality of widespread anti-black discrimination, and also are inclined to romanticize past efforts at change—such as by asserting that most racial discrimination has been eliminated by civil rights laws.¹³³ The knowledge that most white Americans have about past and recent racial history is so limited that, without major educational efforts, it will be difficult to get them to understand some of the key arguments made by advocates of reparations.

Another early step might be pressing aggressively for a national apology to African Americans—which might also have some modest educational value. It was not until the late 1990s that any United States president entertained the idea of a public apology for the government role in enslavement. Then-President Bill Clinton stated that apologies for slavery could be important in national racial healing, but after white protests he retreated from making an apology. Clinton also asserted the common argument that “the nation is so many generations removed from that era that reparations for black Americans may not be possible.”¹³⁴ Again, in 1997 House member Tony Hall (D-Ohio) proposed a bill to Congress (co-sponsored by sixteen other House members) demanding a national apology for slavery.¹³⁵ Making an apology may be a good place to start, but it is only a start. A much more substantial congressional step would be to

131. David Harper, *Judge Dismisses Race Riot Lawsuit*, *TULSA WORLD*, Mar. 23, 2004, at A1.

132. Ruth Thompson-Miller, *Desegregation: The Impact on an African American Community in the South*, *J. UNDERGRADUATE RES.* (forthcoming).

133. FEAGIN, *supra* note 3, at 123–29.

134. Mary E. Smith, *Clinton and Conservatives Oppose Slavery Reparations*, in *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN JUSTICE* 370–71 (Roy L. Brooks ed., 1999).

135. Robert Lusetich, *Reconciliation in America—Still Too Hard to Say Sorry*, *AUSTRALIAN*, July 10, 2000, at 9.

begin to provide monetary and nonmonetary reparations for centuries of oppression.

A. *How Might Reparations to African Americans Be Paid?*

The previously cited precedents suggest that both individual and collective compensation can be considered. For Japanese Americans, there were payments to individual claimants or their heirs. Individuals and families were compensated for the harm done. In contrast, German reparations to Jews went both to surviving individuals and to the Jewish state of Israel, which became the collective representative of the victims of the Holocaust.

Some advocates of reparations for African Americans press for individual compensation, while others have proposed collective compensation. There are at least two approaches to individual reparations. Government reparations funds could be paid out directly on a one-time per capita basis to African Americans, or, alternatively, they could be put into income-earning investments, whose returns could be paid out each year on a per capita basis.¹³⁶ Darrell Pugh has suggested a different approach: The organization chosen to represent African Americans could invest the reparations for the entire community, and black individuals could then apply to this coordinating organization “for funds that would be used to foster the goals that ‘self-help’ sought to achieve—namely, economic independence and self-sufficiency.”¹³⁷ Some might point out a number of difficulties with per capita reparations for African Americans, including the wide differences in monetary and nonmonetary damages suffered by individuals. However, as I will discuss below, *justice*, not individual need, has been the central issue in most cases of compensation for oppression.

Probably for both practical and political reasons, the emphasis among most current black and white advocates of reparations is placed on collective policies and group programs. Thus, the aforementioned 1969 Black Manifesto called for \$500 million in reparations by white religious and other organizations for such institutional investments as job training centers in black communities, a welfare recipients organization, a land bank in the South, and a black university.¹³⁸ More recently, the National Coalition of Blacks for Reparations in America (N’COBRA) has sought nearly \$400 million in reparations—both for individual compensation and for the provision of programs for institutional asset-building in black communities.¹³⁹ According to one N’COBRA plaintiff, “[w]e’re seeking reparations for our ancestors who aren’t here to bear witness Nobody was paid forty acres and a mule because Lincoln was assassinated before it could go through.”¹⁴⁰

136. Browne, *supra* note 15, at 205–06.

137. Darrell L. Pugh, *Collective Rehabilitation*, in *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN JUSTICE* 372, 373 (Roy L. Brooks ed., 1999).

138. Feagin & O’Brien, *supra* note 102.

139. Stephen Magagnini, *Descendants Suing U.S. Over Slavery*, *SACRAMENTO BEE*, Apr. 14, 1994, at A1.

140. *Id.*

Moreover, the community focus of reparations under South Africa's Truth and Reconciliation Commission is perhaps a model for reparations for African Americans. A leading legal scholar on reparations, Robert Westley, has argued that because African Americans "have been and are harmed as a group . . . I am opposed to individual reparations as a primary policy objective."¹⁴¹ Instead, he accents the way that group reparations could help with critical institution-building and asset-building within black communities. Similarly, in his pioneering 1973 book Bittker suggested that reparations should involve collective compensation directed at institution building.¹⁴² He expressed concern that individual payments would go mostly for current consumption, and not for the necessary longer term investments in black communities.¹⁴³ However, one should note in this regard that white Americans have been able to do as they please with their accumulated wealth, much ultimately from the unjust enrichment that their ancestors, and they, have gained from long term racial discrimination targeting African Americans.

Most advocates of collectively focused reparations desire governments in the United States to fund directly *large-scale* job training, educational, and housing programs designed to improve socioeconomic conditions in black communities.¹⁴⁴ Reparations in the form of community rehabilitation—such as for first-rate public schools and housing, and for seed capital to build small businesses—seem critical to the full rebuilding of black America. Yet others suggest the transfer of an appropriate amount of compensating assets to a huge investment fund that would be used to create many new job-creating enterprises—thus providing a real economic "takeoff for black communities."¹⁴⁵ The rationale of the group approach is that racial oppression was, and is, a collective effort by whites that has affected the entire black community—even supposedly "free" blacks during slavery and middle class blacks today. For that reason, the solution must also be one of restoring communities, not just individuals, to wholeness.¹⁴⁶

B. *What Amount of Compensation Would Be Paid?*

Some have suggested taking the average earnings gap between black and white workers and multiplying that by the number of black workers to suggest an annual compensation figure.¹⁴⁷ Using census data, I calculated that the current annual earnings gap between full-time, year-round white and black workers is \$9,724 for men and \$3,440 for women. Assuming an average gap for black workers taken as a whole (some would

141. Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. THIRD WORLD L.J. 469 (1998).

142. BITTKER, *supra* note 2, at 71–73.

143. *Id.*

144. See Joe R. Feagin & Eileen O'Brien, *The Long Overdue Reparations for African Americans*, in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN JUSTICE 417 (Roy L. Brooks ed., 1999).

145. Browne, *supra* note 15, at 205.

146. E-mail from Roy L. Brooks, Warren Distinguished Professor of Law, University of San Diego School of Law (Feb. 20, 2004) (on file with author).

147. Pugh, *supra* note 137, at 372–73.

be more, some not at all), when these figures are multiplied by the total number of full-time, year-round black workers, the total monetary differential is today about \$71.1 billion annually. An alternative calculation would be to capitalize the wages gap. If the average market rate of return is ten percent, then the total capitalization required would thus be about \$711 billion, to generate \$71 billion annually. We should note two things. First, this figure does not take into account the costs of part-time or unemployed workers. Adding them in would likely increase this figure substantially. Secondly, these calculations do not take into account the large gender gap in United States workers' incomes, which is indeed about \$9,500. If that gap is included in the final calculation, a much larger amount would be necessary to bring women workers, including black women workers, up to the level of white men.

In addition, closing the current income gap would only be part of an asset-building strategy. There would also need to be a much larger effort to close the *wealth gap*, which is larger than the income gap because of fifteen generations of white head-starts and advantage in income and other assets. Thus, over these years many whites used access to material and educational resources to build up family net worth. Recent data indicate that the median net worth of white households is nearly *ten times* that of black households.¹⁴⁸ This huge wealth gap could only be closed by major efforts to provide African Americans with land, homes, securities, and other equity and income-generating assets.

By any reasonable calculation of the unjust impoverishment, the reparations required just to close the income and wealth gaps are enormous. In addition, to make provision of large reparations more politically acceptable to white Americans, they would have to be paid out over some period of time—though, from the black perspective, such a period could not be so long as to continue the harsh reality of a dream deferred.

C. Who Would Represent African Americans Collectively?

Several scholars have suggested that a widely accepted black-led organization would need to be chosen to represent African Americans in the process of developing and distributing reparations, a step with a number of practical difficulties such as choosing which organizations to include.¹⁴⁹ Still, major African American organizations, especially civil rights organizations, would likely be involved. Potential black beneficiaries could elect their group representatives. A private trust organization might be set up, which would be administered by elected trustees and financed by United States government funds, perhaps for a specifically limited period. The trust funds would then be distributed to projects for the educational, economic, and political empowerment of African Americans.¹⁵⁰ Pugh suggests that a national trust fund administered by representatives of African Americans might be structured similar to the government's Small Busi-

148. U.S. Bureau of the Census, *supra* note 44.

149. Bittker, *supra* note 2, at 81–82. He notes some of these: Would leaders in existing black organizations be chosen? Or other black notables such as poets and intellectuals? Which organizations?

150. Westley, *supra* note 141, at 470.

ness Administration, with a board of governors responsible to Congress.¹⁵¹

D. *Who Should Be Paid?*

Some whites may object that not all African Americans deserve reparations, for some, such as those in the upper middle class, are alleged to be doing well, at least from a commonplace white perspective. Indeed, this point has often been made in numerous white complaints about current affirmative action programs. Yet this argument misses the essential point that reparations are *due because of just entitlement* and not because of economic need. Thus, Japanese Americans and European Jews got reparations because of the damage done to them, *not* because of economic need. The traditional idea of unjust enrichment does not focus on need but rather on restoring to those who have suffered loss their rightful assets and position in society.¹⁵²

Moreover, white complaints about black middle class' success are often exaggerated and made from ignorance or with a lack of candor. Field research shows that middle-class African Americans still pay a very heavy price, both in material terms and health-wise, for the continuing discrimination they face.¹⁵³

The costs of racism have hit African Americans as individuals and families—as well as harmed their communities. If the unjustly lost wealth is to be restored, it will have to be returned, to a substantial degree, to those individuals and families.

We should also note the problem of identifying beneficiaries. Such identification would raise the question of “who is black?” in a potentially divisive form. There would likely be much opposition to setting up a bureaucracy using official criteria in deciding who is black. (Indeed, “white” opponents of reparations might claim to be “black.”) Arguments against individual reparations include this type of argument. Yet, group reparations may face some of the same problems, though the collective approach would allow groups already seen as legitimate and black-managed, such as civil rights organizations and community and religious groups, to supervise programs of group reparations.¹⁵⁴ This would focus reparations implementation within existing black communities and reduce the likelihood that non-blacks would clamor for participation. Still, there would be hard choices to be made, and much debate would likely follow any beginning on a government-funded program of reparations.

E. *Who Is Responsible for Payments?*

Most whites would likely say that they should not be held accountable, perhaps adding famous but naïve phrases like “my family never owned any slaves.” Indeed, Representative Henry Hyde (R-Ill.), then chair of the House Judiciary Committee, has commented that the idea of col-

151. Pugh, *supra* note 137, at 373.

152. See generally Westley, *supra* note 141.

153. See generally FEAGIN & SIKES, *supra* note 24; FEAGIN & MCKINNEY, *supra* note 46.

154. BITTKER, *supra* note 105, at 121–23.

lective responsibility for slavery “is an idea whose time has gone. I never owned a slave. I never oppressed anybody. I don’t know that I should have to pay for someone who did generations before I was born.”¹⁵⁵

Nonetheless, as I have shown above, the majority of white individuals and families have benefited, in varying ways, from the enslavement and segregation of African Americans, as well as from continuing patterns of discrimination. Certainly too, the United States government was directly and heavily involved in buttressing and perpetuating slavery, such as by putting fugitive slave laws into operation (including in the United States Constitution itself). Enslaved African Americans built much of the Capitol itself, as well as other government buildings. Indeed, and rather ironically, enslaved African Americans put up the statue of freedom on top of the Capitol.¹⁵⁶ Later on, local, state, and federal government agencies were implicated directly in buttressing or winking at legal segregation (near-slavery for most African Americans in the South) across various institutional areas. The federal government has been involved as well in the lack of effective enforcement of civil rights laws since the 1960s. For such reasons, federal, state, and local governments should be seen as responsible for making reparations to African Americans as individuals, families, and communities.

Aggressive government involvement seems essential to building up institutions that provide both monetary and cultural assets. Restitution might take the form of extensive and well-funded programs for upgrading the education and job skills of all black Americans who seek such aid. Added to this would be the creation of major job networks radiating out of black communities so that black applicants can get into the traditionally white networks that feed many employers with potential workers. All of these could be established in every black or multiracial community. Related programs could provide government resources for start-up businesses and mortgages and significantly upgrade the quality of public schools and other public facilities in black communities. A key feature of these programs would be their substantiality. One can begin on the modest scale, but if reparations are to destroy the extreme patterns of unjust impoverishment and enrichment in the long term, they would have to be large-scale programs, and far more substantial than anything tried by governments in seeking social justice goals in the past, such as the modest 1960s’ War on Poverty programs. Over time, the scale of reparations funding would need to be very large, ultimately in the trillions, and at least as large a commitment as the federal government commitment to national defense. Moreover, the funding would need to last for a long time. Racial oppression has endured for fifteen generations, so it is likely that the provision of meaningful reparations will also take several generations.

F. Nonmonetary Reparations

Reparations would need to be nonmonetary as well. One type of nonmonetary reparations would be to guarantee voting rights and represen-

155. Merida, *supra* note 115, at C1.

156. See ROBINSON, *supra* note 1, at 5.

tative participation for African Americans in all local, state, and national legislatures, so that they could have an appropriate voice in government decisions affecting the nation and their communities. The United States has a long history of making voting difficult, if not impossible, for African Americans.¹⁵⁷ So far I have only considered compensatory damages for the harm done to African Americans, usually in reference to calculations of income and other economic loss. Yet, psychological, physical, familial, and community costs have burdened many millions of African Americans from the seventeenth century to the present, and thus should be factored closely into any careful consideration of the reparations due to those who are currently the victims of racialized oppression, as well as the descendants of those who were victims of similar racialized oppression. In legal cases involving individuals, compensatory damages paid by the perpetrators of harm are often accompanied by punitive damages whose purpose is to punish or deter a perpetrator who has acted willfully, maliciously, and in bad faith. Clearly, many acts by whites motivated by racism have been willful, malicious, and in bad faith, whether committed under the guise of slavery, legal segregation, or modern racism. Given the persisting and costly brutality of American racism, African Americans would not be unjustified in asking for substantial punitive damages as well. Yet, as noted previously, in our legal system the federal government can only be sued under certain limited circumstances, and never for punitive damages. Nonetheless, according to some interpretations of international law, crimes against humanity have a different character from ordinary individual wrongs. At a minimum, if African Americans forgo punitive damages, this should add a moral incentive for white Americans to undertake a program of actual compensatory reparations.

IX. CONCLUSION

African Americans have been the targets of racial discrimination for one of the longest sustained periods in the entire history of the human race. Only indigenous groups in various colonized areas have seen more, and more sustained, oppression over such a long period—nearly four centuries.

Given the long history of generalized racial oppression and economic theft from African Americans by white Americans, and the trillions of dollars in costs, the idea of reparations need not be seen as “radical,” but rather as necessarily flowing from an expanded—and morally collective—legal doctrine of redressing conditions of unjust impoverishment and enrichment. Of course, whites with power and wealth must be made to see this connection between just compensation and past and present damages—which is essential if a program of reparations is to become public policy. Once again, aggressive education of the white public about the truths of American racial history is very important. That is perhaps the first task to be undertaken in regard to a successful, long-term reparations strategy.

157. FEAGIN & FEAGIN, *supra* note 3, at 178–84.

One important benefit of reparations is the psychological and symbolic impact. The provision of reparations would have significance beyond the tangible compensation, for it would constitute a symbolic recognition of centuries of systemic racism. At a 1993 Pan-African Conference on Reparations in Nigeria, Chinweizu argued that

More important than any monies to be received; more fundamental than any lands to be recovered, is the opportunity the reparations campaign offers us for the rehabilitation of black people, by black people, for black people; opportunities for the rehabilitation of our minds, our material condition, our collective reputation, our cultures, our memories, our self-respect, our religions, our political traditions and our family institutions; but first and foremost for the rehabilitation of our minds . . . the most important part of reparation is our self-repair.¹⁵⁸

Here we also see that the issue of reparations for African Americans, as well as for others enslaved in the African Diaspora, is now an international human rights question. Recently, some black leaders from the United States and other parts of the Americas have pressed the United Nations Working Group on Minorities to consider the impact of slavery on African Americans and other African-origin peoples of the Americas.¹⁵⁹ One point they make is that the long term, unredressed disabilities stemming from slavery still constitute a violation of the International Covenant on Civil and Political Rights.

How will real change come? Clearly, getting white Americans to make reparations in the trillions of dollars for four hundred years of racial oppression will, to put it mildly, be very difficult. Perhaps the best that we can hope for is a good start in the form of community reparations through federal government programs. Moreover, if history is our guide, it is likely that the impetus for change will have to come from African Americans, yet one more time. As legal scholar Rhonda Magee has put it, "The master's house may be dismantled . . . by use of the master's tools. But it is folly to expect that the master himself will use his tools against his property in so self-destructive a way. The job of doing that, rests, as it has always in the past, with those forced to shoulder the increasingly unbearable weight of the well-appointed structure that the master built: those at the bottom."¹⁶⁰ While there are many whites who support such anti-racism efforts, it will probably have to be African Americans who trigger, and press for, such changes.

What does the society as a whole have to gain from a large-scale program of reparations? Robert Browne has argued that reparations in the form of internal capital transfers would "involve no loss of resources to the economy, but rather a redistribution away from heretofore favored

158. Chinweizu, *Reparations and A New Global Order: A Comparative Overview*, Second Plenary Session, Pan-African Conference on Reparations, Abuja, Nigeria (Apr. 27, 1993).

159. S. A. Reid, *Groups Urge U.N. Meeting on Reparations for Slaves' Kin*, ATLANTA J. & CONST., July 13, 2000, at 8JD.

160. Magee, *supra* note 99, at 916.

classes.”¹⁶¹ There might even be a boost to the economy from such transfers. In addition, there will likely be a society-wide energy gain as black Americans emerge from under the shroud of racism and gain much new energy for seeking broader group and societal goals. At the same time white Americans could put new energy into broader societal goals. Clearly, there is a major moral gain here for the United States, since for the first time in its history there will be a real national commitment to implementing the goals of liberty and justice for all. In the long run, such reparations may also save society from upheaval. Just societies are likely to work better and last longer than those with great social inequalities. Societies sustainable in the long run may well require ever-expanding social justice.

161. Browne, *supra* note 15, at 205. This would be true only if the reparations were paid directly through taxes and land reform.