Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow

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INTRODUCTION

Chattel slavery was a brutally cruel, repressive, and exploitative system of racial subjugation. When it was abolished, the former slaveholders owed the freedmen compensation for the terrible wrongs of enslavement. Ex-slaves sought reparations, especially in the form of land, but few received any sort of recompense. The wrongs they suffered were never repaired.
No one alive today can be held accountable for the wrongs of chattel slavery, and those who might now be called upon to pay reparations were not even born until many decades after slavery ended. For some scholars, the lack of accountable parties makes current reparations claims preposterous. Such reactions are understandable, but they do not settle the matter.

My concern in this paper is not the legal but the moral merits of reparations claims. If we think of such claims as referring only to chattel slavery and as calling for transfers among individuals, these claims face serious difficulties, which I discuss in Part I. Recent legal claims, however, diverge from that pattern by seeking recompense from corporations for their complicity in chattel slavery, or from governmental bodies for their responsibility for more recent wrongs. Although no claim has yet been successful, if such suits were to succeed, they would bring some measure of relief and vindication to current claimants, but they would fail to address the conditions that underlie reparations claims, namely, deeply entrenched systemic conditions that require large-scale corrective programs. The current legal claims do, however, suggest a useful shift in thinking about reparations.

We need first to look more broadly at U.S. history, and second to remind ourselves that racial subordination was not primarily a matter of private arranging but essentially a matter of public policy. Chattel slavery was only the first stage of institutionalized racial subordination. Some freedmen left the rural South, but most ex-slaves remained in the South and entered another form of peonage, as tenant farmers or sharecroppers, in a new system of racial subordination. After a brief, aborted period of Reconstruction, slavery was followed by Jim Crow, another brutally cruel, repressive, and exploitative system of racial subjugation. Jim Crow was maintained until the recent

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5 This point is suggested by John McWhorter. See John McWhorter, Against Reparations, in SHOULD AMERICA PAY? 180, 191 (Raymond A. Winbush ed., 2003). McWhorter criticized the reparations movement for the lack of association between modern black Americans and their slave ancestors, and argued that this lack of association would only get worse with increased inter-racial marriage.

6 See also Unfinished Business, supra note 1, at 294-97.

7 See, e.g., In re African-Am. Slave Descendants Litig., 304 F. Supp. 2d 1027, 1075 (N.D. Ill. 2004) (dismissing plaintiffs' slave reparations claims against various large corporations for lack of standing, absence of necessary parties, exceeding the statute of limitations, and presenting a political question).


9 See discussion infra Part II.

10 See FONER, supra note 4, at 106-108 (chronicling the transition many African Americans faced from slavery to sharecropping).

11 See generally C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (commemorative ed. 2002) (recounting the history of post-Civil War Jim Crow
Those systems imposed massive deprivation, required sustenance from racist ideology, and left a legacy of disadvantage and indignity.\textsuperscript{13}

Most obstacles to validating reparations claims can be avoided by shifting our focus: (a) from reparations for wrongs of the distant past to reparations for wrongs that continued under Jim Crow and persist today; and, (b) from limited transfers of property to comprehensive public programs capable of addressing the persisting legacy of slavery and Jim Crow.

Part II gives reasons for regarding current claims as timely rather than concerned only with injustices of the distant past that can no longer be rectified. For two hundred years, the federal government embraced policies that supported slavery and Jim Crow. It endorsed, in effect, a \textit{Racial Subjugation Project}. At crucial junctures in our history, the government chose not to prevent or repair those wrongs. Although it finally condemned slavery and Jim Crow, it failed on both occasions to address their inequitable consequences—a deeply entrenched, substantial gap between the life prospects of whites and blacks. The federal government is reasonably held accountable for the persisting legacy of those wrongs.\textsuperscript{14}

Part III suggests how the legitimate concerns that underlie current reparations claims can be addressed by a \textit{National Rectification Project}, grounded upon public policies at the federal level.\textsuperscript{15} It also suggests how such a project can be justified by uncontroversial principles of political morality that are central to avowed public policy. Our society places great emphasis on individual responsibility and competition. Fair competition requires equal opportunity. This is particularly true for children who will have little opportunity to develop into adults capable of competing and taking individual responsibility if they are not provided with good housing, strong communities, and a healthy physical environment.\textsuperscript{16} The federal government has an obligation to rectify wrongs in which it has been significantly complicit and therefore is morally obligated to undo past policies that have ensured a lack of equal opportunity for children.\textsuperscript{17} A comprehensive set of programs dedicated to ensuring this opportunity would address most if not all of the legitimate concerns manifested by reparations claims.

\textsuperscript{12} \textit{Id.} at 149-88 (chronicling the decline of Jim Crow discrimination).

\textsuperscript{13} As public facilities and accommodations for African Americans were either unequal or unavailable, economic and social discrimination were pervasive, and violence, coercion and terror were employed to exclude African Americans from the political process, “racial subordination” or “subjugation” is more descriptive of the system than “racial segregation.” \textit{Reparations and Equal Opportunity, supra} note 1, at n.2.

\textsuperscript{14} \textit{Id.} at 180-84 (recounting federal government “complicit[y] in the systematic, grievous wrongs done to African Americans”).

\textsuperscript{15} I suggested such a national project in a previous paper. \textit{See Reparations and Equal Opportunity, supra} note 1, at 183-84.

\textsuperscript{16} \textit{Id.} at 184.

\textsuperscript{17} \textit{Id.}
As this paper regards the federal government’s support for slavery and Jim Crow as part of a continuing history of wrongs, it refers to the morally required rectification not as reparations, which are usually thought of as addressing past wrongs, but under the broader heading of corrective justice. Although corrective justice is sometimes understood as restoring a condition that existed prior to the wrong, such an understanding is not appropriate here. For a brief historical period, the initial wrongs of slavery might have been rectified by freeing, compensating, and returning enslaved Africans to their homes. That time has long since passed. Those Africans who were forcibly brought here and their descendants became founding members of American society. Corrective justice now requires addressing the legitimate claims of African Americans.

I. COMPENSATION, RESTITUTION, AND CORRECTIVE JUSTICE

It is useful to review some of the difficulties facing reparations claims as they are often interpreted—difficulties the subsequent argument of this paper largely avoids. Although some of the terms employed have more or less technical meanings in the law, they are used here in a moral sense, on the assumption that morality requires not only compensation for wrongs done but also restitution for unjust enrichment.

Reparations claims are based, directly or indirectly, on the wrongful treatment of some persons by others, and in the simplest cases call for compensation of the parties wronged by the wrongdoers. Understood in that way, a reparations claim made today based solely on the wrongs of chattel slavery faces serious problems. We cannot now require a slaveholder of the seventeenth, eighteenth, or nineteenth century to compensate his former slaves, nor could those same slaves now be compensated. If a reparations claim today stems only from chattel slavery, it must identify living people who now have derivative claims which are based on wrongs that were visited upon other persons long ago. In addition, it must suggest a principled basis for determining the magnitude of those claims.

Persons with valid reparations claims today may be called claimants. Those who can justifiably be held to account today may be called accountable parties. My use of these terms will not be limited to the compensation context but will extend to the broader reaches of corrective justice as well. Consider now some familiar modes of reasoning about reparations.

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18 Further measures would have been required to address the wrongs done to those who did not survive capture, imprisonment, the Middle Passage, and enslavement in North America.

A. The Moral Debt Model

When slavery was abolished, the former slaves received no compensation from their former masters for injuries they had suffered under them.\textsuperscript{20} Under the moral debt model, the former slaves had valid moral claims against their former masters, whose estates included those unpaid debts. These correlative debts are treated as having been passed down to their respective heirs, from one generation to the next, up to the present day.\textsuperscript{21}

This model assumes that some reasonable basis for estimating the original debts can be found, as well as a basis for translating them into current dollars and dividing them among current descendants. Such moral reasoning, however, tracks notions of legal liability too closely. I am not confident that valid moral claims to compensation can be inherited, or that moral debts can be transmitted to one's heirs, for that suggests the moral guilt of ancestors can be transmitted to their descendants.\textsuperscript{22}

If we focus only on chattel slavery and do not assume that moral debts can be inherited, it is unclear that we can find any accountable individual who is alive today. Reparations claims traced back only to slavery look too narrowly at U.S. history, however, for slavery was followed by Jim Crow.\textsuperscript{23} The wrongs are part of a history of racial subjugation, which has left deeply entrenched racial inequities.\textsuperscript{24}

If we took that subsequent history into account, individuals accountable under the moral debt model might include those who actively supported Jim Crow, those who resisted reform, and those who failed to work as hard against Jim Crow and its legacy as morality required, given the knowledge they had, or should have had, of its visibly aggressive discrimination. The application of these criteria to accountable individuals requires controversial moral judgments.

In focusing only on accountable individuals, the moral debt model ignores the systemic character of racial subjugation in the United States.\textsuperscript{25} To be sure,

\textsuperscript{20} See Reparations and Equal Opportunity; supra note 1, at 179 (observing that "land reform . . . was needed to . . . secure the former slaves' rights," but stressing that "Congress rejected the idea") (citing FONER, supra note 4, at 235-36, 245-46).

\textsuperscript{21} See, e.g., In re African-Am. Slave Descendants Litig., 304 F. Supp. 2d 1027, 1048 (N.D. Ill. 2004) (restating the plaintiffs' allegation that they were injured by "being 'denied the economic wealth of their ancestors' labor,' which they refer[ed] to as a 'derivative and inherited property right in their ancestors' lost pay'" (citation omitted)).

\textsuperscript{22} This does not rule out legal claims by descendants of slaves against descendants of slaveholders, but it suggests that they would not be based on inherited moral debts. Such claims might alternatively be based on unjust enrichment, which I discuss below. See infra text accompanying notes 35-47.

\textsuperscript{23} See generally WOODWARD, supra note 11.

\textsuperscript{24} The historical claims of this section are discussed more fully in Part II.

\textsuperscript{25} See Reparations and Equal Opportunity, supra note 1, at 181-83 (blaming "federal policies [for] promot[ing] racial segregation").
individuals made the relevant decisions, enacted the relevant laws, and framed and implemented the relevant policies; but those decisions, laws, and policies were made, enacted, adopted, and implemented on behalf of the political community by persons acting in an official capacity. Racial subordination in the United States was institutionalized. It was not simply a matter of private action.\textsuperscript{26}

Moreover, merely honoring the valid claims that some individuals may have against others, as the moral debt model contemplates, would not rectify the social inequities that keep reparations claims alive. Reparations claims would probably not be made today if the wrongs of slavery had been fully rectified. It is true that, following the abolition of slavery and during the period called Reconstruction, the United States took important steps toward ending those injustices.\textsuperscript{27} The government, however, later abandoned Reconstruction and permitted the creation of another system of racial subjugation.\textsuperscript{28} Furthermore, although some programs proposed for Reconstruction might have laid the groundwork for adequate reform, the programs actually adopted were not radical enough to enable Reconstruction to succeed.\textsuperscript{29}

The same is true of the twentieth century. Reparations claims would probably not be made today if the wrongs of Jim Crow had been fully rectified. Nearly a century after the first Reconstruction was abandoned, a Second Reconstruction was inaugurated, and the United States took steps toward redressing the injustices of Jim Crow.\textsuperscript{30} Like the First Reconstruction, however, the second was not pursued to completion.\textsuperscript{31} Furthermore, the programs actually adopted during the twentieth century were not radical enough to eliminate the entrenched racial hierarchy.\textsuperscript{32} The United States has made some significant reforms, but the legacy of slavery and Jim Crow

\textsuperscript{26} See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 51 (1993) (exploring federal policies that "institutionalized racial discrimination with urban housing markets").

\textsuperscript{27} See, e.g., U.S. CONST. amend. XIV, XV; FONER, supra note 4, at 587 ("As a period when Republicans controlled Southern politics, blacks enjoyed extensive political power and the federal government accepted responsibility for protecting the fundamental rights of black citizens, Reconstruction came to an irrevocable end with the inauguration of Hayes.").

\textsuperscript{28} See FONER, supra note 4, at 586-87 ("[S]upport for the idea of federal intervention to enforce the Fourteenth and Fifteenth Amendments continued to wane.").

\textsuperscript{29} See Unfinished Business, supra, note 1, at 287; FONER, supra note 4, at 452-53 (1988) (examining political disagreements over how far to push reconstruction, and explaining how increasing political support for the Democrats caused the Republicans to weaken their stance on Reconstruction programs).

\textsuperscript{30} See WOODWARD, supra note 11, at 122-47 (detailing the executive, legislative, and judicial roots of the Second Reconstruction).

\textsuperscript{31} See id. at 209-10 ("The foundations of the Second Reconstruction had, in fact, began [sic] to crumble during the Johnson Administration.").

\textsuperscript{32} See id. at 215 ("All these gains, of course, still left blacks as a whole far behind economic parity with whites and left millions of blacks in poverty.").
remains, with systemic disadvantages for African Americans.33

B. The Material Disadvantage Model

Many theorists assume that a reparations claim based on a wrong of the distant past must be determined by a counterfactual test— that we must estimate how much worse off a potential claimant is than she would have been if the wrong had not been inflicted.34 This counterfactual question, however, generates problems for reparations claims based on slavery alone. When much time has passed and the current state of affairs has been significantly shaped by decisions in the intervening generations, the counterfactual question may have no clear answer.

Suppose Lester’s parents suffered from systematic discrimination and he grew up with substantially fewer resources and significantly more limited options than he would have enjoyed otherwise. Time passes. Lester fares well or badly. His fate depends partly on his own resourcefulness and partly on his circumstances. His ability to make the best of his situation depends partly on psychological factors over which he has only limited control. It is difficult, if not impossible, to determine what contribution the wrongs done to his parents have made to his condition. Such imponderables multiply as several generations pass between the wrongful injury and the current situation.

It has been suggested that the counterfactual test is fatal to reparations claims based on slavery. If Africans had not been brought to North America, the ancestors of those who became African Americans might never have met, and the actual descendants of those ancestors might never have been born. In the unlikely counterfactual event that the same ancestral persons met in Africa and had children, those children would have been conceived at different times and in different circumstances than their actual children, and those counterfactual children would not be identical to those who actually existed. It is almost certainly not true of any African American alive today that she would have fared better had her ancestors not been enslaved, for if they had not been enslaved she almost certainly would never have been born, and would not have fared (well or badly) at all. Therefore, under the counterfactual test all or most of the descendants of enslaved Africans lack valid reparations claims based on their distant ancestors’ enslavement.

The article develops an argument that minimizes these difficulties. Counterfactual judgment is required, but it need not bridge several generations.


34 One problem with the test, as it is usually presented, is that it considers only the material effects of injustice and neglects its “moral aspect.” This will be discussed further in Part III.
We have adequate reason to conclude that the current life prospects gap between blacks and whites is overwhelmingly a legacy of racial subjugation that was maintained for three centuries, at the formal end of which reparations were not forthcoming. As I shall argue, corrective justice requires that the nation marshal its resources to address that gap on a society-wide basis and not merely on an individual basis as most theories of reparations require. The material disadvantage model also does not help identify currently accountable parties – individuals who can be held responsible for any material disadvantage wrongfully imposed. That problem is sometimes avoided in discussions of reparations claims by appeal, in effect, to the notion of unjust enrichment, which will be useful to consider.

C. The Unjust Enrichment Model

If I have profited from someone else’s wrongdoing – been enriched by another’s injustice – I may owe restitution to the party who was wronged, even though I was not complicit in the wrong.\textsuperscript{35} If slavery and Jim Crow benefited some who were not responsible for those systems, those who were wronged may have a valid claim for restitution against those third parties. Some reparations claims employ this reasoning.\textsuperscript{36}

The class of unjustly enriched, and therefore potentially accountable, third parties can be much wider than the class of wrongdoers. In the present context, that difference may be quite important, for no one who can be held responsible for slavery is still alive and relatively few are still alive who can be held responsible for sustaining Jim Crow, as compared with those who might be regarded as unjustly enriched by the effects of racial stratification.

Here’s how the unjust enrichment argument might go. Many slaveholders extracted profits from slave labor and many non-slaveholders profited indirectly. The children of prosperous slaveholders derived benefits from the income, wealth, social standing, and political power their families built with slave labor. Others profited by supplying goods, including slaves, for the plantations or by marketing or processing the products of slave labor.\textsuperscript{37} Commerce based on the slave economy created jobs for non-slave labor and raised the welfare level of European-American workers and their families.\textsuperscript{38}

\textsuperscript{35} See GEORGE E. PALMER, LAW OF RESTITUTION 2 ("[W]hen one person mistakenly confers a benefit on another . . . the sole basis of liability is unjust enrichment and the only remedy available to the mistaken party is restitution at law or in equity.").

\textsuperscript{36} See, e.g., Bernard Boxill, The Morality of Reparation, 2 SOC. THEORY & PRAC. 113, 119-20 (1972) (comparing the case for reparation to the undeniable moral proposition that even if Harry guiltlessly accepts a stolen bicycle from Tom, Harry must give the stolen bicycle back to the right heir of the original owner).

\textsuperscript{37} See, e.g., Deborah Gray White, Let My People Go: 1804-1860, in TO MAKE OUR WORLD ANEW: A HISTORY OF AFRICAN AMERICANS 169, 171 (Robin D. G. Kelley & Earl Lewis eds., 2000) (describing the domestic slave trade as "big business").

\textsuperscript{38} See id.
Those advantages have been sustained through succeeding generations and have been inherited by current European-Americans.

The argument can be extended and strengthened by taking Jim Crow into account. Employers profited by paying African Americans lower wages, providing fewer benefits, and employing them as strikebreakers. Residents of white neighborhoods have benefited from increased services financed by the denial of resources to black communities. European-Americans enjoy the advantages of being classified as white in the racial hierarchy that has been central to our economic, political, and social relations since the seventeenth century. As compared with blacks, whites enjoy longer life expectancy, better medical care, better housing, better educational and job opportunities, higher wages, better benefits, and better public services – in short, substantially better life prospects.

The preceding argument may be thought to show that European-Americans have been unjustly enriched and thus owe restitution to African Americans for benefits that stem from slavery and Jim Crow. It is important that this argument neither assumes nor implies that those who owe restitution are morally responsible for the relevant inequities. It does not cast blame on those it would hold accountable.

The unjust enrichment argument is plausible, but problematic. As a result of slavery and Jim Crow, many whites are significantly better off than many blacks, but it does not follow that all whites have benefited from those systems. Consider, for example, the position of poor Southern whites under slavery. As its defenders noted, the Jim Crow system assured poor whites a position above black slaves and, at least in social terms, above the condition of free blacks. However, the reason why it is plausible to suppose that ex-slaves had a valid claim for reparations is that slaves fared very badly. Even those who were relatively well-treated were denied freedom, wages for their labor, respect, independence, participation in the governance of their communities, and


41 See generally Council of Economic Advisors for the President's Initiative on Race, Changing America: Indicators of Social and Economic Well-Being by Race and Hispanic Origin (1998) (reporting comprehensive data on economic, education, housing, and other statistics by race).

42 See, e.g., J. D. B. DeBow, The Interest in Slavery of the Southern Non-Slaveholder (1860), reprinted in Slavery Defended: The Views of the Old South 169, 174 (Eric. L. McKitrick ed., 1963) (attacking the abolitionist argument that the benefits of the slave trade went to the few large, aristocratic plantation owners of the south and not to the average white southerner).
reasonable redress of grievances. Free blacks, by and large, were also not much better off during slavery. Conditions for African Americans were generally so bad that poor whites could have been better off while still faring badly themselves.

We cannot assume that poor whites fared better under slavery and Jim Crow than they would have fared in a non-racialized economy. The profits derived from slavery were distributed unevenly. The racial barriers that were crucial to chattel slavery and Jim Crow divided laboring people, lessening their leverage in the labor market and their political influence, while enhancing the power of planters and employers. Because slave labor was unpaid, free black labor was discounted, and blacks, who were excluded for so long from trade unions, were available to serve as strikebreakers, the conditions of white workers may have also suffered accordingly.

In sum, while we can safely assume that some whites reaped considerable benefits from slavery and Jim Crow, we cannot reasonably infer that those systems served all European-Americans well. We therefore cannot assume that all European-Americans owe restitution for advantages derived from the institutionalization of white supremacy.

It may be suggested that whites owe restitution simply for living under a system in which they have enjoyed relative advantages due to systematic discrimination against blacks. The notion that whites generally owe restitution could be reinforced by the compensatory justice argument that those who supported Jim Crow or who failed to work as hard against it and its legacy as morality required are complicit in the racial hierarchy. The principal problem with these suggestions, for present purposes, has already been stated. In focusing on accountable individuals, these approaches neglect the institutional nature of racial subjugation in the United States. I suggest that honoring the claims of some individuals against others will not rectify the systemic inequality that underlies the persistence of reparations claims.

D. The Institution Model

A valid reparations claim requires some currently existing party that can be

43 See White, supra note 37, at 173 (detailing the hardships of slave life).
44 Id. at 172 (chronicling the risks to free blacks, including kidnapping).
47 This rebuttal ignores the non-material aspects of racial subjugation - the egregious indignities, humiliations, etc. - to which blacks, but not whites, have been subjected.
held accountable for past wrongs. Institutions, such as corporations and political organizations, can be held accountable and are capable of existing for many generations.\textsuperscript{48} Some public institutions have existed continuously since the founding of the United States. The federal government is a prime example. If the United States long ago illicitly took land from an existing Native American nation, then the United States presumably owes that land or suitable compensation to that Native American nation. Continuing federal accountability is also applicable to the case for corrective justice.

II. THE ROLE OF THE FEDERAL GOVERNMENT\textsuperscript{49}

We normally assume that a government can retain a morally relevant identity for a very substantial period of time, that its acts and practices are subject to moral appraisal, and that it can be held accountable for its past acts. Governments have often accepted accountability for their prior acts and have paid reparations even after significant changes have been made in their character, personnel, laws, and policies. Thus, the United States government has accepted accountability for the Tuskegee syphilis experiment and the World War II internment of Japanese Americans, and it has paid reparations accordingly.\textsuperscript{50} I shall assume here that the federal government can be regarded as an accountable party in such matters, and in this section I will explain why it is reasonable to hold the federal government accountable for the life-prospects gap between blacks and whites.

The story is briefly this: Just as the North American system of chattel slavery had not been imposed by the British government on its colonies but was constructed and color-coded by the colonies themselves,\textsuperscript{51} at crucial junctures in its history (from its founding through the twentieth century) the federal government found itself obliged, time and again, to confront the question of racial equality. Its overall responses—its resulting policies and practices—have been gravely deficient.

I do not mean merely that we can now, in retrospect, imagine different

\textsuperscript{48} For example, Brown & Williamson Tobacco Company, R. J. Reynolds Tobacco Company, CSX, Fleetboston Financial Corporation, Norfolk Southern Railway Company, Canadian National Railway Company, Lloyd's, and Aetna, Inc. were named as defendants in recent reparations litigation. See In re African-Am. Slave Descendants Litig., 304 F. Supp. 2d 1027, 1048 (N.D. Ill. 2004).

\textsuperscript{49} For a more detailed account, see Unfinished Business, supra note 1.

\textsuperscript{50} For other examples, see Raymond A. Winbush, Introduction to SHOULD AMERICA PAY?, at xi, xi-xii (Raymond A. Winbush ed., 2003) (presenting a table summarizing historical reparations payments).

\textsuperscript{51} See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 19-60 (1978) (detailing the legal and social evolution of slavery in Virginia from the time of colonization); Unfinished Business, supra note 1, at 272-79 (recounting the origins of chattel slavery in the Jamestown colony); EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM 327-37 (1975) (explaining how the slave trade grew in colonial Virginia).
directions that might conceivably have been taken. Alternatives were understood well enough by those who made the relevant decisions. Alternative outcomes would have been difficult to achieve, in part because the interests of those who would be adversely affected by the decisions (African Americans most directly) were not represented by those who made them (the colonial elite, the founders of the republic, et al.). That does not refute my point about accountability. To see this, it may help to consider the history that is reviewed below in the light of a more recent case. By the time of the 1942 Wannsee conference in Nazi Germany, it had been decided to exterminate Jews, Roma, and others. The conference participants understood the alternative well enough, and the road taken was not unavoidable in a way that excludes them (and others) from responsibility for genocide. In a parallel way, the federal government is morally accountable for its support of a deeply entrenched racial hierarchy and its failure to repair the consequences of slavery and Jim Crow.

A. The Eighteenth Century

The traditional story of the constitutional framing is that, in order to achieve a settlement that would secure a viable union of the newly independent states under a capable central government, it was necessary for the North to compromise its anti-slavery principles.\textsuperscript{53} An interesting aspect of the story is that, as early as 1787, anti-slavery sentiment was perceived as a threat by Southern states.\textsuperscript{54} Anti-slavery arguments had in fact been circulating in the colonies since 1700 and had spread increasingly as the European Enlightenment influenced colonial thinking.\textsuperscript{55} During the War for Independence, European allies of the rebels had pointedly noted the inconsistency between the colonials' human rights rhetoric and their maintenance of chattel slavery.\textsuperscript{56} By the time of the constitutional convention, three Northern states had abolished slavery, three had enacted gradual emancipation statutes, and three others were about to follow, as would three of the states that were soon to be carved out of the Northwest Territory.\textsuperscript{57} Anti-

\textsuperscript{52} See Unfinished Business, supra note 1, at 279-84 (discussing the entrenchment of chattel slavery).
\textsuperscript{53} Id. at 280; see, e.g., Daniel C. Littlefield, Revolutionary Citizens: 1776-1804, in To Make Our World Anew: A History of African Americans 103, 134 (Robin D. G. Kelley & Earl Lewis eds., 2000) ("[The founders] had to reconcile many differences to form a strong nation, and to come to a compromise between the conflicting principles of freedom and property. In effect, this meant that blacks had to be compromised.");
\textsuperscript{54} Unfinished Business, supra note 1, at 281.
\textsuperscript{55} See Littlefield, supra note 53, at 107 (discussing the intersection of Enlightenment thinking with religious ideals, which both held that slavery was a wrong and that society ought to be reformed).
\textsuperscript{56} See id.
\textsuperscript{57} Paul Finkelman, Slavery and the Founders 40-42 (2d ed. 2001) (discussing the state of slavery at the time of the Northwest Ordinance of 1787).
slavery sentiment was significant in the Upper South, especially Virginia and Maryland.  

The traditional story assumes that anti-slavery sentiment was adequately represented by Northern delegates to the constitutional convention. However, the delegates who attacked slavery, such as Gouverneur Morris of Pennsylvania and George Mason of Virginia, were vastly outnumbered. Northern delegates largely represented commercial interests, who derived profits from the slave system and exerted no significant pressure against slavery. Delegates from New England almost always voted with the Lower South (especially Georgia and South Carolina) when it sought protections for slavery. The possibility of abolition was, however, not beyond the ken of the convention delegates.

Furthermore, it is unclear that all of the constitutional supports for slavery were needed for an agreement among the states. The Lower South was not in the best position to wrest concessions through hard bargaining. Georgia and South Carolina wanted a central government strong enough to aid them against powerful Native American nations, and Georgia was concerned about its southern border with Spanish Florida. Although the representatives from the Northern states could have pressed the slavery issue, the convention agreed without great difficulty to provisions that supported slavery – a fugitive slave clause, a bar (for at least twenty years) against interference with the slave trade, and added representation for states with substantial numbers of slaves. If Northern delegates had actually represented anti-slavery sentiment, the slave states might have agreed to a constitution that tolerated but did not so vigorously support slavery. The federal government instead became committed in law and policy to that institution.


59 FINKELMAN, supra note 57, at 24, 33.

60 See id. at 28 (detailing the alliance between industrial New England and the South).


62 "The Convention debates, however, suggest that the Deep South did not need to be lured into the Union; the delegates from the Carolinas and Georgia were already deeply committed to the Constitution by the time the slave trade debate occurred." FINKELMAN, supra note 57, at 31.

63 U.S. CONST. art. IV, § 2, cl. 3 (fugitive slave clause); id. at art. I, § 9, cl. 1 (protection of slave trade); id. at art. V (no amendment to remove constitutional protection of slave trade for twenty years); id. at art. I, § 2, cl. 3 (three-fifths clause).

64 FINKELMAN, supra note 57, at 32 (arguing that the northern delegates to the Convention gave up without a quid pro quo on the fugitive slave clause).
B. The Nineteenth Century

The next crucial set of federal decisions concerning slavery and its legacy were made at the end of the Civil War. Andrew Johnson supported the maintenance of a racial hierarchy. Over his veto, and for a decade thereafter, Congress endorsed civil rights legislation and aid to poor whites and blacks through the Freedman's Bureau. It laid down requirements for new state constitutions, including universal male suffrage and acceptance of the Fourteenth Amendment, and it mandated equal access to public accommodations.

But the federal government's commitment to reconstruction soon faded. After the Hayes-Tilden agreement of 1877, federal troops were withdrawn from Southern capitals and federal supervision of Southern elections ended. Supreme Court decisions undermined the civil rights acts and the Fourteenth Amendment. Even more crucial, however, was the federal government's failure to endorse a redistribution of Southern land, which was needed to secure economic independence for the freedmen, end the planters' control of Southern society, and make democratic reform possible.

Freedmen recognized their own just claims for land and agitated for a modest allotment. Their proposals were supported by some poor Southern whites, by some agents of the Freedmen's Bureau, and by some political leaders. During and immediately after the war, some land was given to them,

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65 See Unfinished Business, supra note 1, at 279-84.
66 See Foner, supra note 4, at 179, 190 (describing Johnson's lack of commitment to any political role for freedmen, and his commitment to maintaining a government of white men).
67 Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (mandating equal access to accommodations regardless of race); Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (establishing military rule over the rebel States); Freedman's Bureau Act of 1866, ch. 200, 14 Stat. 173 (enacting a federal bureau to assist freedmen and refugees “so far as the same shall be necessary to enable them as speedily as practicable to become self-supporting citizens of the United States, and to aid them in making the freedom conferred by proclamation of the commander-in-chief, by emancipation under the laws of the States, and by constitutional amendment, available to them and beneficial to the republic”); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (securing the rights of citizenship to all persons born in the United States and granting those citizens the same rights to engage in transactions as white citizens).
68 Foner, supra note 4, at 575-82 (1988) (chronicling the political and military disengagement from the south at the end of Reconstruction).
69 See generally Civil Rights Cases, 109 U.S. 3 (1883) (invalidating aspects of the civil rights act of 1875 which proscribed discrimination); United States v. Reese, 92 U.S. 214 (1876) (refusing to punish violators of blacks' right to vote as neither the Fifteenth Amendment or federal law specified a punishment to go with the voting rights); Slaughterhouse Cases, 83 U.S. 36 (1873) (refusing to apply federal bill of rights guarantees to the states through the fourteenth amendment).
70 Foner, supra note 4, at 51-60.
71 Id. at 68-70, 103-10, 153-75, 234-36, 302.
but most of that land was soon restored to its former owners or sold to others. Most significantly, Congress rejected Thaddeus Stevens' proposal for confiscation and redistribution.

The First Reconstruction was thus aborted. Over the next generation, through force, fraud, terror, and various legal devices, blacks were driven from political participation. Neglecting its responsibilities under the amended Constitution, the federal government declined to intervene. Most freedmen became sharecroppers on land that had been restored to its original owners. To secure racial subordination, lynching became increasingly frequent (up to three a week during the 1890s). No longer valuable private property, blacks could be killed with impunity. White supremacy was thus violently re-established and, during the most intense period of lynching, Jim Crow was sanctified by the Supreme Court's 1896 decision in *Plessy v. Ferguson*. Anti-lynching legislation, frequently proposed, never survived in Congress. The United States had officially committed itself to civil and political rights for blacks, but it failed to enforce those rights. It made a promise that it did not keep. African Americans were betrayed, and a brutal white supremacist regime was allowed to replace chattel slavery.

C. The Twentieth Century

The Jim Crow system survived into the second half of the twentieth century. Following the Supreme Court's decision in *Brown v. Board of Education*, the federal judiciary began systematic enforcement of blacks' constitutional rights. Congress enacted significant civil rights legislation,

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72 Id. at 308-10.
73 Id. at 329, 374.
74 See Woodward, supra note 11, at 82-87 (chronicling the violent disenfranchisement of the southern African American).
75 Id. at 31-109 (expounding on the rise of Jim Crow).
76 Foner, supra note 4, at 404-09, 536 (detailing the rise of sharecropping in the 1870s).
77 See generally Philip Dray, *At the Hands of Persons Unknown* (2002) (providing detailed accounts of specific incidents of lynching and discussing the social and political contexts in which they occurred); Robert L. Zangrando, *The NAACP Crusade Against Lynching, 1909-1950*, 3-21, tbls.1-2 (1980) (recounting the history of lynching, including data on lynching by state and race and data on lynching by year and race).
78 163 U.S. 537, 552 (upholding the constitutionality of separate facilities for different races).
80 See Unfinished Business, supra note 1, at 290-94.
81 Woodward, supra note 11, at 149-88 (examining the decline of Jim Crow, beginning in the mid-1950s).
82 347 U.S. 483, 493 (1954) (overturning the "separate but equal" doctrine as a violation of equal protection guaranteed by the Fourteenth Amendment).

During this period, acknowledgment of widespread poverty in the United States led to a “War on Poverty,” including a number of programs funded all or in part by the federal government, such as food stamps, Medicare (for the elderly and disabled), Medicaid (for poor children and some adults), Supplemental Security Income (serving needy aged, disabled, and blind), the Comprehensive Employment and Training Act of 1973 (subsidizing low wage jobs in non-profit and public settings), and Head Start (preschool program for disadvantaged children), and some existing programs were expanded, such as Aid to Families with Dependent Children (“welfare”). Because of African Americans’ disproportionate share of economic disadvantages, such programs are relevant here.

The Second Reconstruction, like the first, secured important changes in public policy. Racist ideology was officially rejected. Openly racist appeals became unacceptable for mainstream political candidates and explicitly racist comments were banished from public policy statements. Anti-discrimination

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96 See MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND
laws were once again enacted, but this time the courts upheld their enforcement.\textsuperscript{97} Opportunities became available for blacks in politics, education, skilled trades, and the professions. Overt discrimination and anti-black violence were reduced.\textsuperscript{98} Unlike the public policy changes of the First Reconstruction, those of the Second have come to seem irreversible.

Once again, however, federal commitment to many of the reconstruction programs soon faded. By the early 1980s, government policy had reduced interventions on behalf of blacks and government assistance was reduced. Nutritional, educational, medical, employment, and housing programs that were developed in the 1960s faced cutbacks, which were severe by the 1980s and are worse today. The real benefits of Medicare and Medicaid have been reduced.\textsuperscript{99} New construction of affordable public housing has virtually ceased.\textsuperscript{100} Federal subsidies for low-income families to rent private housing have decreased.\textsuperscript{101} CETA programs have ended.\textsuperscript{102} Eligibility for food stamps has been restricted.\textsuperscript{103} AFDC has been terminated; its replacement, Temporary Assistance to Needy Families, sets lifetime limits on receipt of aid, requires more work from mothers of young children, and denies four-year college study as a means to improved employment.\textsuperscript{104} Despite increased work requirements,
the government has failed to provide for adequate child care.\textsuperscript{105}

More importantly, the adopted measures failed to address the deep, systemic inequity left by slavery and Jim Crow.\textsuperscript{106} African Americans entered the Second Reconstruction with life prospects substantially lower than that of their white counterparts.\textsuperscript{107} Since then, conditions have in some respects improved, but a substantial gap continues. As of 1996, for example, life expectancy was 76.8 years for whites and 70.2 years for blacks.\textsuperscript{108} Blacks had significantly inferior access to health care.\textsuperscript{109} Blacks experience significant disadvantages in the labor market.\textsuperscript{110} In 1994, for example, the unemployment rates for blacks and whites were 12.0% and 5.4% respectively.\textsuperscript{111}

\textsuperscript{105} \textit{See} \textit{id.} (discussing the Personal Responsibility and Work Opportunity Reconciliation Act’s work requirements for mothers of children older than one year of age).

\textsuperscript{106} \textit{See}, e.g., \textit{WOODWARD}, supra note 11, at 214-17 (remarking that the number of African Americans serving in elected office and the segregated nature of many schools in both the South and North illustrate the continuing inequity between African Americans and white Americans).

\textsuperscript{107} \textit{See \textit{MARABLE}, supra note 96, at 227-30 (discussing the social and economic position of African Americans and the need to strengthen African American identity and the rights of African American and other workers).


\textsuperscript{111} \textit{Id. at 100}; \textit{see also} Rebecca M. Blank, \textit{An Overview of Trends in Social and Economic Well-Being, by Race}, in \textit{AMERICA BECOMING I}, supra note 108, at 21, 25-27 (discussing the widening gap between black children and white children in access to computers and completion of college degrees); Albert M. Camarillo & Frank Bonilla, \textit{Hispanics in a Multicultural Society: A New American Dilemma?}, in \textit{AMERICA BECOMING I},
More significantly, in 1994 the median net worth of whites and blacks was $52,944 and $6,127 respectively, and the median net financial assets of whites and blacks were $7,400 and $100 respectively. At every income level, blacks' net worth is a fraction of whites'. At most income levels, blacks' financial resources — funds available in case of lay-offs, serious illness, and other emergencies — are substantially less: zero or negative. Twenty-five percent of white households lack such financial resources, but sixty-one percent of black households are in that potentially disastrous predicament.

As equity in private housing constitutes the main component of wealth for most American families and the wealth gap appears crucial to the perpetuation of the black-white life prospects gap, public policies affecting the acquisition and appreciation of housing are of special importance here. Prior to the Second Reconstruction, employment discrimination was not merely tolerated but was practiced by government at all levels. Such discrimination generated a black-white income gap, which affected African Americans' ability to purchase homes. Other government policies, however, have greatly promoted home acquisition by whites while inhibiting it for African Americans. Many of those policies promoted residential segregation.

\textit{supra} note 108, at 103, 113, tbl.4-4 (showing family income and poverty by race); Cecilia A. Conrad, \textit{Racial Trends in Labor Market Access and Wages: Women, in AMERICA BECOMING II, supra} note 108, at 124-51 (discussing racial differences in opportunity and access to occupations for women); Holzer, \textit{supra} note 110, at 98-123 (discussing racial differences among men in wages, employment, and labor-force participation); James P. Smith, \textit{Race and Ethnicity in the Labor Market: Trends Over the Short and Long Term, in AMERICA BECOMING II, supra} note 108, at 52, 56 (stating that on average, blacks complete fewer years of education than whites).

\textit{Melvin L. Oliver \& Thomas M. Shapiro, Wealth and Racial Stratification, in AMERICA BECOMING II, supra} note 108, at 222, 228, tbl.10-1 (charting net worth and net financial assets for different ethnicities).

\textit{See id.} at 231, tbl.10-2 (charting net worth and net financial assets for different ethnicities).

\textit{Melvin L. Oliver \& Thomas M. Shapiro, Black WEALTH/WHITE WEALTH 87, 91-125, tbl.4.5 (1995)} (analyzing income, assets, and debt for different ethnicities).

“Forty-three percent of blacks own homes, a rate 65 percent lower than that of whites.” \textit{Id.} at 64; \textit{see MASSEY \& DENTON, supra} note 26, at viii (“Our research indicates that racial residential segregation is the principal structural feature of American society responsible for the perpetuation of urban poverty and represents a primary cause of racial inequality in the United States.”).

\textit{See OLIVER \& SHAPIRO, supra} note 114, at 51 (discussing employment discrimination against African Americans resulting from FHA policies).

\textit{See id.} at 87, tbl.4.5 (analyzing income, assets, and debt for different ethnicities); \textit{see also MASSEY \& DENTON, supra} note 26, at 51-57 (discussing discriminatory federal housing policy).

\textit{Massey \& Denton, supra} note 26, at 49-57 (discussing how discriminatory federal housing policy inhibits African American home ownership).

\textit{See id.} at 48, tbl.2.4 (comparing "black isolation within neighborhoods of thirty
The black urban ghetto was created by the migration of blacks to urban areas and periodic housing shortages that resulted from exclusionary actions by private parties and policies of local officials and federal agencies. One such policy was “redlining,” which identified black neighborhoods within which home purchase and home improvement loans were denied or interest rates inflated. Redlining was embraced by federal agencies, such as the Home Owners Loan Corporation, the Federal Housing Administration, and the Veterans Administration. Federally supported “slum clearance” programs intensified ghetto conditions. Many public housing projects, typically high-density, were located within or adjacent to existing ghettos. As the projects accommodated fewer ghetto dwellers than slum clearance displaced, more pressure was placed upon housing in the ghetto. Public housing authorities employed segregation policies that further promoted black isolation. When the federal courts ordered the housing authorities to reform, funding for public housing was halted. Congress enacted a Fair Housing Act in 1968, but only after it was stripped of enforcement provisions. When such provisions were added by the Fair Housing Amendment Act of 1988, the federal government declined to enforce them vigorously. Blockbusting and “white flight” can occur only when some communities are maintained as white domains. Federal and local governments

120 MASSEY & DENTON, supra note 26, at 51-52 (discussing how private and government actors engaged in discriminatory practices, including redlining).
121 Id.
122 Id. at 55-57.
123 Id. at 56.
124 Id.
125 Id.
126 For example, when the Chicago Housing Authority was ordered by a federal judge to reform its construction practices, the CHA instead halted public housing construction altogether. Id. at 190-91 (discussing Hills v. Gautreaux, 425 U.S. 284 (1976)).
128 See Fair Housing Act § 810; see also MASSEY & DENTON, supra note 26, at 195 (arguing that the Fair Housing Act was “intentionally designed so that it would not and could not work”).
130 MASSEY & DENTON, supra note 26, at 229-34 (discussing enforcement of federal fair housing laws).
131 Id. at 37-38.
132 Id. at 45.
funded and constructed new highways to serve white suburbs. When overt housing discrimination was prohibited, realtors developed covert measures to divert black renters and home buyers from white communities. Such unlawful practices can be identified, but because of law and federal policy, private, non-profit organizations have had the burden of combating them. Their “audits” of such practices have been effective, but their number was substantially reduced with the end of CETA, which had supported a variety of community-based anti-poverty jobs.

By 1940, the isolation of blacks within segregated urban communities was greater than had ever been experienced by any other ethnic group in America. Following World War II, as white suburbs expanded and African Americans of all income levels were excluded from white domains, urban black ghettos increased in size and density, giving rise to a degree of uniquely concentrated isolation that sociologists have dubbed “hyper-segregation.” Hyper-segregation persists partly because of the continuing exclusion of blacks from white communities, partly because federal fair housing legislation has not significantly been enforced, and partly because public policies can adversely affect an established black ghetto without hurting a significant number of whites.

Poverty in the United States is most concentrated in the black urban ghetto. Social contacts with whites are minimized by the isolation of the ghetto, as are job opportunities and access to business networking opportunities. Most importantly, residential segregation promotes the black-white wealth gap. Public policies such as redlining have reduced the opportunity for blacks to acquire, maintain, and improve homes. African Americans who could afford the higher interest rates they were charged on housing loans have paid more than whites for homes of similar value, which has reduced their available financial resources. In periods of economic

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133 Id. at 44.

134 See id. at 198-200 (criticizing the lack of enforcement of the Fair Housing Act by the federal government and discussing private enforcement of the act’s provisions in the federal courts).


136 MASSEY & DENTON, supra note 26, at 74-78 (discussing the high degree of African American isolation).

137 See id. at 152, tbl.6.1; see also OLIVER & SHAPIRO, supra note 114, at 16-23 (discussing suburbanization).

138 MASSEY & DENTON, supra note 26, at 160-62 (discussing how segregated African American communities were provided with few government resources and had few political supporters outside the African American community).

139 OLIVER & SHAPIRO, supra note 114, at 136-51.

140 Id. at 18-19 (discussing blacks’ lack of access to the mortgage market).

141 Id. at 20-21 (discussing the refusal of mainstream banks to loan money to black
hardship, such as the 1930s and 1970s, "demand density" dropped dramatically in the ghetto, commercial outlets and services withdrew, buildings fell into disrepair and were abandoned, and crime and disorder increased. These conditions caused housing values to appreciate at a lower rate in black than in white communities, adversely affecting blacks' net worth and their ability to borrow in order to invest in educational and business opportunities.

The effects are transgenerational and profound. "Nearly three-quarters of all black children, 1.8 times the rate for whites, grow up in households possessing no financial assets. Nine in ten black children come of age in households that lack sufficient financial reserves to endure three months [without income, even at the poverty line], about four times the rate for whites."144 The life prospects of children depend more on parents' wealth than on their income.145 "Asset poverty is passed on from one generation to the next, no matter how much occupational attainment or mobility blacks achieve."146 As a result of the wealth gap, there is, between one generation and the next, both more downward mobility and less upward mobility for blacks than for whites.147

The policies that have promoted hyper-segregation have thus intensified the legacy of slavery and Jim Crow, and the results are not being challenged by public policies.

The foregoing review includes an incomplete but relevant description of the federal government's role relative to African Americans. The government's policies supported both slavery and Jim Crow. Since 1865, the government has violated or failed to enforce its own Constitution and legislative enactments for extended periods. In accepting violations of its own basic law, the federal government allowed the racial caste system to be reconfigured so that it could survive the abolition of slavery. It thereby enabled the entrenchment of inequities for African Americans in a new system – Jim Crow.

It tolerated gross misconduct by officials, frequent public lynchings, rape, harassment, terror, and coercion – in other words, widespread, grievous violations of African Americans’ most fundamental rights. Given the opportunity, it has more than once declined to undertake measures necessary to substantially rectify the long-standing inequities. Of course, this pattern does not fully describe public policy; but it has dominated public policy since the United States was established.

The federal government has thus been party to and partly responsible for the

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142 MASSEY & DENTON, supra note 26, at 137-39.
143 See OLIVER & SHAPIRO, supra note 114, at 137-50 (discussing discriminatory mortgage lending policies and African American home ownership).
144 Id. at 90.
145 Id. at 152-70.
146 Id. at 170.
147 Id. at 158 (discussing economic mobility for African Americans and white Americans).
wrongs done to African Americans. It is the single most important currently existing party that can truly be held accountable to those who have suffered the wrongs of racial subjugation. The federal government is, furthermore, an appropriate recipient of moral demands for corrective justice because of the nature, scope, and magnitude of the inequities that remain to be addressed.

III. WHAT IS TO BE DONE?

Conventional reparations claims require both current claimants and currently accountable parties. The federal government’s role in supporting racial subordination and its failure to rectify its inequitable legacy argue that the federal government may be considered a party—perhaps the principal party—that can be held morally accountable today. The argument assumes that the persisting life prospects gap between blacks and whites is very largely a consequence of racial subjugation. I believe that is a reasonable inference from the history we have reviewed.\textsuperscript{148}

For two centuries, the maintenance of racial subjugation was in effect an American national project, even though it was, for half of that time, inconsistent with our basic law and public commitments. This \textit{Racial Subjugation Project} was implemented by public policy at all levels. Corrective justice calls for a \textit{National Rectification Project} to extinguish the relevant inequities. The argument does not, however, identify individual claimants as would be required by a conventional reparations claim.\textsuperscript{149} We are not in a position to conclude that all African Americans have valid reparations claims or to estimate the magnitude of such claims. For present purposes, neither step is necessary. I take a different approach because the data imply a life prospects gap that cannot adequately be addressed by anything less than a comprehensive set of public programs.

I wish furthermore to show how such rectification can be required by uncontroversial considerations of political morality. For this purpose, my suggestions reflect the following additional considerations:

1. It is less controversial to assume that justice requires a fair social process than any particular set of distributive outcomes. Our society would seem, for example, to place a high value on the idea of fair

\textsuperscript{148} The alternative is to suppose that the life prospects gap is largely a result of choices made by African Americans, that those choices have been freely made, and that they are not themselves largely a result of the African American experience. I regard that alternative account as implausible, but the approach developed below does not require proving the point.

\textsuperscript{149} An alternative approach is to regard the African American community as a collective claimant to which reparations are due, as is suggested by Robert Westley, \textit{Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?}, in \textit{SHOULD AMERICA PAY?}, \textit{supra} note 95, at 127-32 (discussing group reparations). The non-material aspects of the injuries suffered by members of the African American community—the indignities and psychological costs of subordination and terror—lend plausibility to such an approach.
competition in many spheres. Fair competition in what is sometimes called "the race of life" requires a substantially equal set of opportunities and resources.

(2) An implication of the statistical picture is that many African American children grow up with disadvantages that largely reflect the legacy of slavery and Jim Crow. They begin the race of life without a fair share of opportunities and resources. They receive inadequate nutrition, medical care, housing, education, and job prospects. They are exposed to lead, air-borne pollutants, vermin and infestation. They have inadequate time with parents who, because of low wages and benefits, are obliged to work longer hours to secure a subsistence income for their families.150

(3) Children are not responsible for the conditions they inherit.

(4) Insofar as the conditions reflect the entrenched legacy of slavery and Jim Crow, it is implausible to suppose that their parents are responsible for the life prospects gap or can generally be expected to overcome those disadvantages.151 The 1996 repeal of Aid to Families with Dependent Children152 was motivated in part by the notion that many recipients of welfare are responsible to a substantial extent for their unenviable circumstances and have taken unfair advantage of government "handouts." I believe it is demonstrable that such concerns are unfounded and that they have been promoted for political purposes.153 Regardless,

150 See OLIVER & SHAPIRO, supra note 114, 91-126 (discussing the economic status of African Americans as a group); see generally Jewel Crawford et al., Reparations and Health Care for African Americans, in SHOULD AMERICA PAY? 251 (Raymond A. Winbush ed., 2003) (linking the current health care needs of African Americans with the historical treatment of slaves and their descendants).

151 "Studies find either that the savings rate of blacks exceeds that of whites or that black and white rates are identical. Like our analysis, these findings are inconsistent with the conspicuous-consumption thesis...lavish spending on cars, clothes, and cultural entertainment...account[s] for blacks' lack of financial assets." OLIVER & SHAPIRO, supra note 114, at 107-08. "Never married, separated, divorced, and widowed whites all command substantially greater incomes and assets than similarly situated blacks." Id. at 123. "These asset findings pose a clear challenge to the contention that the predicament of female-headed households is primarily a factor of gender....[W]e have found that significant racial resource stratification occurs regardless of family status, gender, or labor force participation." Id. at 124.


153 For example, one of the myths surrounding welfare is that it provided attractive continuing support for successive generations of women and children (usually represented as black). Longitudinal data showed, on the contrary, "that 70 percent of women who receive AFDC leave the rolls within two years, either to work or to marry, and that only 7 percent stay for more than eight years," and that "most of the returnees only used welfare as a short-term economic back-up during a crisis. A small number did need assistance for
the approach I propose avoids this issue by focusing on the needs of children.

(5) Given its overall regulatory responsibilities, it seems reasonable to assume that the federal government has a primary obligation to ensure equal opportunity— to ensure that social arrangements provide a fair share of favorable life prospects for each child. No morally defensible system of social organization would fail in that responsibility.

(6) The moral requirement is not merely prospective. It is also laid down by considerations of corrective justice. *The government is morally bound to eliminate unfair inequalities in opportunity that it has wrongfully promoted.* This connects the present argument to reparations claims.

To render the idea of a *National Rectification Project* even less potentially controversial, my proposals take into account the following considerations:

(7) For much of United States history, many groups have been subjected to prolonged systems of discrimination, and as a result many additional children inherit a legacy of unequal opportunity. I do not want to suggest that all forms of unwarranted discrimination are equal, or that slavery and Jim Crow can properly be understood simply as systems of discrimination. To underscore this, I shall indicate the examples I have principally in mind:

(A) For more than two centuries, Native Americans in United States territory have been subjected to massive thefts of land and other goods, displacement, fraud, and genocide, for which the federal government is primarily responsible;¹⁵⁴

(B) For nearly two centuries, Mexican Americans have been subjected to massive losses of land by illicit means, for which the federal government is primarily responsible;¹⁵⁵

¹⁵⁴ This process began, of course, nearly two centuries earlier, before the United States was established. See, e.g., VINE DELORIA, JR. & CLIFFORD LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 1-24 (1983) (discussing federal policy relating to Native Americans); FRANCIS JENNINGS, THE INVASION OF AMERICA (1976) (discussing the interaction between Native Americans and people of European descent in the new world); NASH, supra note 58, at 284-93, 297-303 (4th ed. 2002) (discussing Native American participation in the American Revolution and the interaction of Native Americans and Europeans).

¹⁵⁵ See, e.g., RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 41-152 (4th ed. 2000) (discussing the federal annexation and colonization policy in Northwest Mexico, Texas, New Mexico, Arizona, and California); MALCOLM EBRIGHT, LAND GRANTS
In each case, vast numbers of individuals suffer the legacy of past inequities and continuing discriminatory practices. In addition to these examples, U.S. history includes a long list of immigrant groups from Asia and Europe that have been subjected to systematic discrimination for varying numbers of decades or generations. Not all groups still experience systematic discrimination, but some individuals may continue to suffer disadvantages that flow from these past inequities.

It is important to address injustice evenhandedly - to promote public policies that address the most pressing needs first, especially needs stemming from past or present wrongs. The programs I shall suggest would focus on the most basic needs of children, in order to ensure equal opportunity on the least controversial basis possible.

A. The Material Component

How can poor children's life prospects be improved? We can begin to sketch aspects of a comprehensive program under familiar categories such as health, nutrition, housing, family life, education, and community conditions. The following sketch does not assume that all programs must be administered by government agencies. It is morally imperative, however, that the federal government ensure that adequate, effective programs be established and maintained for as long as the relevant conditions warrant.

Children's needs must be addressed effectively even before they are born, and must continue to be addressed through the pre-school and mandatory schooling periods. We require adequately funded and staffed programs to provide prenatal care for mothers, postnatal care for mothers and children, and adequate nutrition, which school breakfasts and lunches can help provide. These programs should include substantial outreach components to overcome language barriers and participants' experience with insensitive or overtaxed service providers as well as to persuade families of their children's right to available benefits.

Many poor children live in overcrowded housing; many are homeless. We have massive need for affordable, well-maintained family housing, in well-tended neighborhoods, free of infestations, lead, and other poisons. Children must have adequate individual attention in their public schools. Class sizes

must be small enough to be reasonably managed by the teaching staffs. Educational programs and facilities must provide children with adequate exposure to cultural and technical developments so they are not disadvantaged, relative to others in the same stage of life, as potential employees or as potential continuing students.

Children must have adequate time with their parents. This means that their parents must have jobs such that working only one shift enables the families to live in reasonable comfort. Furthermore, parents should have a range of choices that include the opportunity to care for their young children at home, especially those with special needs. When work or other responsibilities call parents away from the home, the children must have adequately staffed day care. Parents must have available to them adequate transportation to and from their workplaces, medical facilities, shopping, etc.

As the previous points imply, poor children’s life prospects cannot be improved significantly without aiding their parents and their larger communities. Housing and schools must be built and maintained. Wages and benefits must be improved for parents. Public transportation must be expanded. We must increase greatly the numbers of teachers and other human service workers and must value their work in accordance with the inestimable value of their primary responsibility – our children – and must compensate and attract them accordingly.

Most importantly, an adequate rectification project must address the black-white wealth gap. Equal opportunity requires more than prohibitions against discrimination. It is generally denied children in families that lack financial resources. A two-pronged approach is needed. First, economic security programs are required to cushion the effects of lay-offs and illnesses and to provide job training and educational opportunities at minimal cost to families. Second, families must be enabled to acquire homes and other assets so their children can begin their working lives on reasonably equal terms with their peers. Public policies have prevented fair access to wealth formation by African Americans and morality now requires public policies that will rectify that wrong.157

To ensure that basic needs are met and, in some contexts, to minimize the possibility of arbitrary allocation and stigmatization, many of the benefits and services mentioned should be provided without fee. This would probably include not only education, but also school lunches, child care, public transportation, and health care. Such programs would be friendly to the environment and would minimize administrative costs while freeing up labor for an expanded realm of labor-intensive human services.

Crash programs would initially be required for communities in great need. Some of those communities are populated mainly by European-Americans. The children of the rural poor, white as well as black, should be high on such a

157 For suggestions ranging from tax reforms to the creation of asset accounts, see OLIVER & SHAPIRO, supra note 114, at 177-88.
B. The Moral Component

The approach I have sketched would address a good deal of the legacy of past injustices. However, the wrongs suffered by African Americans under slavery and Jim Crow have by no means been limited to material losses. Racist derogation has been a central feature of racial subjugation in the United States. The wrongs have included systematic insults, indignities, and humiliations; political exclusion and social subordination; harassment, terror, murder, rape, and public lynching. I call this the moral aspect of the relevant wrongs.

Although racism is associated with overt hostility, violence, and brutality, those are not its only manifestations. Since the beginning of British settlements in North America, public policy has typically been formed while discounting the interests of African Americans (and of other peoples of color) relative to the interests of those who at a given time are regarded as white.

Consider, for example, the attitude manifested in a judicial decision by Lemuel Shaw, highly respected Chief Justice of the Supreme Judicial Court of Massachusetts. Shaw rejected a habeas corpus petition seeking the release of Thomas Sims, who was being held as an escaped slave under the Fugitive Slave Act of 1850. Shaw cited conventional support for his ruling, such as the Supreme Court's decision in *Prigg v. Pennsylvania*, which upheld the Fugitive Slave Act of 1793. Shaw added to his opinion an appendix in which he sought to justify the inclusion of the fugitive slave clause in the Constitution. Shaw argued that the welfare of the states was served by the clause, because it prevented conflict among the states.

Shaw ignored obvious differences between the statutes. Unlike the 1793 Act, the 1850 Act explicitly required summary hearings to determine whether someone who was being held as an alleged fugitive should be turned over to a slaveholder, it barred testimony on behalf of the alleged fugitive, and it gave hearing officers a financial incentive to decide in favor of slaveholder claimants.

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158 The approach I have sketched does not directly address inequities suffered by adults who do not have children. By and large, their needs would be addressed indirectly. The programs required to provide equal opportunity for children would improve most, if not all, relevant conditions that affect all individuals (housing, services, and transportation, for example) and would provide many new jobs with pay and benefits that would in effect establish new minimum standards. I assume independently that a decent society will provide for those who are retired, unable to work, or unemployed.


161 41 U.S. 539, 625-26 (1842) (invalidating a Pennsylvania statute as unconstitutional).


163 Thomas Sims's Case, 61 Mass. at 311-19. Noteworthy too is the fact that Shaw ignored obvious differences between the statutes. Unlike the 1793 Act, the 1850 Act explicitly required summary hearings to determine whether someone who was being held as an alleged fugitive should be turned over to a slaveholder, it barred testimony on behalf of the alleged fugitive, and it gave hearing officers a financial incentive to decide in favor of slaveholder claimants.
return of escaped slaves would have led to warfare between slave and non-slave states. That is plausible, but in considering its significance, Shaw ignored the well-known fact that thousands of slaves escaped during the War for Independence. His reasoning simply ignores the interests of African Americans, especially slaves.

Such moral blindness has been a common feature of political dispositions. Consider the national toleration of lynching—a phenomenon that was frequently reported, about which there were national protest campaigns from the nineteenth century on. For decades, Congress was reminded annually by bills seeking a federal anti-lynching statute, which it always rejected. Given the stakes—thousands of human lives taken in brutally cruel and excruciatingly painful ways—a relatively uninformed person who learned of the practice could reasonably be expected to investigate further. A failure to do so, when it was understood that blacks were the typical victims, is culpable ignorance.

The moral attitudes thus manifested—which were encouraged by the seventeenth century creation of a racial caste system, sustained by the eighteenth century embrace of that system, and renewed by the nineteenth century endorsement of Jim Crow—function like tacit manifestations of the idea that was given expression by Roger Taney, Chief Justice of the United States Supreme Court, that African Americans "had no rights which the white man was bound to respect." These attitudes are poisonous ingredients of the persisting legacy of slavery and Jim Crow.

It would seem, then, that an essential element of the required rectification is an informed acknowledgment of the moral as well as material aspects of the wrongs of slavery and Jim Crow and an effective undertaking to combat racism. It is, moreover, imperative that the moral aspects of racial subordination in the United States be addressed directly. The persistence of racism helps to account for the lack of political will to implement a genuine reconstruction.

Given the magnitude of what corrective justice requires and a realistic assessment of the political prospects, the National Rectification Project I have described may be regarded as utopian. That is one reason I have tried to present a case that is based on well-grounded factual claims and minimally controversial principles. We have at least two reasons for imagining such a Project. First, we need a benchmark, an understanding of what corrective justice requires, so that we can identify intermediate objectives that are now more feasible. Second, circumstances change, and objectives that seem

164 See id. at 317 (discussing the tension between slave and non-slave states).
165 See NASH, supra note 58, at 278-80 (discussing the escape of slaves from bondage during the American revolution).
166 See, e.g., Holden-Smith, supra note 79 (arguing that anti-lynching legislation was not passed during the progressive era because of the fear of interracial sexual relationships).
unreachable today may become practical tomorrow. The civil rights bills of the mid-1960s lacked any chance of realization until shortly before they were enacted; changed circumstances made what had been impossible achievable. We must try to create conditions that are conducive to morally imperative changes and be prepared to take advantage of such opportunities as they arise. Given the disastrous current direction of U.S. foreign and domestic policy, we might find before long that political circumstances will be radically altered. New conditions may offer new opportunities for rectifying the massive legacy of slavery and Jim Crow.