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TABLE OF CONTENTS

LETTER FROM THE EDITOR-IN-CHIEF *Patrick E. Smith* vii

ARTICLES & ESSAYS

ACHIEVING REPARATIONS WHILE RESPECTING
OUR DIFFERENCES: A MODEL FOR
BLACK REPARATIONS *Adjoa Aiyetoro* 329

RACIAL RECONCILIATION THROUGH
BLACK REPARATIONS *Roy L. Brooks* 349

REPUBLICAN, REBELLIOUS REPARATIONS *Eric J. Miller* 363

AFRICAN AMERICAN REPARATIONS:
A ROUGH SKETCH OF THE ROAD TO
EDUCATIONAL AND ECONOMIC RESTORATION *Carlton Waterhouse* 393

NOTES & COMMENTS

LAND OF THE FREE? AN EXAMINATION OF THE
CONSTITUTIONALITY OF FORCED LABOR IN
U.S. IMMIGRANT DETENTION CENTERS *Jamila S. Cambridge* 405

A CLASSROOM AS AN OPPORTUNITY TO LEARN,
NOT AN OBLIGATION TO FILL A SEAT:
ACCOMMODATING HIDDEN DISABILITIES
IN MARGINALIZED COMMUNITIES *Kamali Houston* 431

LETTER FROM THE EDITOR-IN-CHIEF

Since 1869, the Howard University School of Law has trained and groomed social engineers at the forefront of the black freedom struggle movement. From abolitionists to Supreme Court Justices; from the Black Panthers of the 60s to today's Black Lives Matter movement; from Pauline Murray to Wiley A. Branton, the Howard Law family has helped to frame civil rights agendas for the past 150 years. Now, we look to the future. Now, we begin to plan a new civil rights agenda for the next 150 years.

To celebrate 150 years of Howard's contributions to the civil rights agenda, the *Howard Law Journal* presented the Sixteenth Annual Wiley A. Branton Symposium, "The Next 150: Shaping A Civil Rights Agenda for the Future," on October 29, 2019. Through thoughtful programming, our invited scholars discussed topics such as the future of economic empowerment in the black community, climate change and social justice, ease of inter-class mobility, the future of the criminal justice system, reparations, and more. This terrific group of speakers offered their views on how our civil rights agenda has evolved and what the next civil rights agenda will look like. We are so pleased that they were able to join us in this extremely timely and interesting discussion.

For the past sixteen years, the *Howard Law Journal* has dedicated the third and final Issue each year to the legacy of former Howard University School of Law Dean and notable civil rights leader, Wiley A. Branton. The Branton Symposium gives students, faculty, staff, and our surrounding community an opportunity to come together and engage in difficult legal discussion alongside notable legal scholars. The works of those legal scholars together with two student pieces make up our Sixteenth Annual Wiley A. Branton Symposium Issue. The topics encompassed in this Issue touch on matters including topics previously discussed at the Symposium, African American reparations, our ever-growing immigration crisis, and the discrimination those with learning disabilities face.

This year's Branton Symposium featured three panels. Our first panel, "A Reflection on Civil Rights Agendas of the Past", focused on past civil rights agendas. Our second panel, "Framing the Next Civil Rights Agenda," then discussed preparing a new civil rights agenda for the years to come. Lastly, our third and final panel, and the subject of this issue, "A New Model for Black Reparations?: Reflections on the Debate" discussed the growing call for black reparations. Panelists from our third panel were asked to focus on Roy L. Brooks' second edition of his book entitled "Atonement and Forgiveness: A New Model for Black Reparations," which was originally published in 2004 and was forthcoming at the time.

Many of our panelists have written pieces reflecting on Brooks' book continuing the discussion of what a model for black reparations should look like. And so, they have been included here in our Sixteenth Annual Branton Symposium Issue. With that being said, it is our honor to introduce you to the Third and final issue of the 2019-2020 academic year, Issue 3 of Volume 63 of the *Howard Law Journal*.

Our first article, *Achieving Reparations While Respecting Our Differences: A Model for Black Reparations*, written by Adjoa Aiyetoro, takes a historical approach when assessing the need and demand for African American reparations. Aiyetoro presents a brief history of the demand for reparations that began in the 18th century and its several iterations. She then describes how the demand for reparations is often a reflection of demands made in relation to enslavement. After a description of the demand for reparations, Aiyetoro provides a class and race analysis of resistance to the specific demands, including Brooks' caveats on passage of legislation. Aiyetoro concludes by presenting a model for the form that reparations should take for slavery, Jim Crow, and their continuing legacies.

Reparations is a topic that many call for, but few have the answers to. How can the government attain moral clarity in the aftermath of slavery, the nation's worst atrocity? What conditions are necessary to repair the broken relationship between the government and the victims of that atrocity? In his article, *Racial Reconciliation Through Black Reparations*, Roy L. Brooks explains and defends a reparations model that answers these delicate and complex questions. For African Americans and the nation as a whole, the question of reparations is the most significant issue in the quest for racial equality since the passage of civil rights legislation in the 1960s. Race relations today are severely challenged and unfortunately, due to our President's often racist rhetoric and actions, socially divisive policies, and general disinhibiting conduct, they seem to be getting worse. While Brooks acknowledges that black reparations can be an opportunity to turn things around, he mentions that this call must be seized upon with probity and intelligence. Brooks believes that his model presented is the best model for black reparations as it offers the best path toward racial reconciliation.

Thereafter, in his article, *Republican, Rebellious Reparations*, Eric J. Miller uses the Tulsa Race Massacre as a backdrop for his discussion on reparations. The Tulsa Race Massacre was a deadly race riot that has been called "the single worst incident of racial violence in American history" and destroyed, what was at that time, the wealthiest black community in the United States, known as "Black Wall Street." Miller explores the manner in which the Tulsa Massacre process exemplifies the role of apology as a strategic opportunity to engage in rebellious resistance. After discussing the brief history of the Tulsa Massacre, he uses the concepts of rebellion and resistance to demonstrate that litigation and apology are useful, if at all, as a means of empowering those on the bottom to engage in the activity of de-

manding respect for themselves. Miller concludes his article by suggesting some reasons to think that both litigation and apology are easily coopted by top-down demands for respectability, demands that often undermine the core activity of resisting and rebelling characteristic of reparations.

Carlton Waterhouse finishes off our discussion on reparations with his article, *African American Reparations: A Rough Sketch of the Road to Educational and Economic Restoration*. In this article, Waterhouse presents exemplary proposals for remedying community harms and identifies critical pathways to reparations. This article contends that the construction, renewal, restoration, and expansion of black economic and educational institutions represent essential components of African American reparations. While acknowledging these components, Waterhouse comments that the viable paths to repair harms caused by the continuing legacy of slavery and segregation require easy access ramps that allow people at all levels to cross. Thus, routes most related to African Americans' daily lives, experiences, and wellbeing like education and economics enable the least advantaged African Americans to get the benefits of redress. It is upon these two avenues that Waterhouse focuses his article in two parts. One part engages the educational pathways to redress, and the other examines the economic road to reparations. Both are critical pathways to redress for American slavery and segregation.

We are also proud to announce that the final two works are each authored by Senior Notes & Comments Editors of the Volume 63 *Howard Law Journal*: Jamila Cambridge and Kamali Houston.

Our first student note is authored by Jamila Cambridge, and is entitled, *Land of the Free? An Examination of the Constitutionality of Forced Labor in U.S. Immigrant Detention Centers*. In her note, Cambridge examines whether the deprivation schemes in migrant detention centers are a violation of the protections against involuntary servitude guaranteed by the Thirteenth Amendment of the U.S. Constitution. Cambridge analyzes immigrant detention center deprivation schemes and how these practices violate the Thirteenth Amendment's prohibition against involuntary servitude. After arguing that the practices violate the Thirteenth Amendment, Cambridge concludes by offering up two solutions to remedy this problem.

We close out this Issue and Volume with a piece by Kamali Houston entitled, *A Classroom as an Opportunity to Learn, Not an Obligation to Fill a Seat: Accommodating Hidden Disabilities in Marginalized Communities*. While laws have been created to protect the rights of people with disabilities, problems identifying and accommodating struggling children remain. The correlation between marginalized communities and disparities accessing mental health resources deepens the educational divide for students with undiagnosed hidden mental disabilities. In her note, Houston discusses the link between education, socio-economic status, race, and undiagnosed children with mental health disabilities. Houston makes a call for lawyers to

use students' lawsuits to bring light to the need for legislation that protects students with hidden disabilities from low socio-economic backgrounds. She advises this be done through 1) amending legislation and creating a new approach to the Americans with Disabilities Acts and 2) proposing that Congress use its "power of the purse" to require all states to adopt mental health programing. Such lawsuits and proposed legislation would increase Congress's awareness of the need for legislative reform as well as the need for a new law that mandates action to remedy the effects of hidden disabilities on students of low socio-economic status.

The works encompassed in this Issue are both shocking and empowering. The submissions by these authors address mainstream issues from unique perspectives which highlight the mission and history of both Howard University School of Law and the Howard Law Journal. It is our hope that the scholarship within this issue be thought provoking and that it will contribute to a deeper understanding of the complex issues we face today, inspire you to do your part in improving the community, and push forward the academic discourse around the topics discussed.

Writing my final Letter from the Editor-in-Chief is very bittersweet. Serving as Editor-In-Chief of the *Howard Law Journal* has been one of my greatest honors. Over the past year, I have learned so much in my capacity and would personally like to thank all the authors that contributed to this Volume. The scholarship, advocacy, and dialogue that have stemmed from this Volume have been both inspiring and insightful. The submissions by these authors represent compelling additions to the expansive discussion of one of our most fundamental rights and exemplifies the principles and attitudes that make our society so unique. I would also like to personally thank my Executive Board and the members of the *Journal*. Your dedication to excellence, good cheer, and faith in the leadership of the Executive Board has made serving as your Editor-in-Chief the highlight of my law school experience. I am confident that the *Howard Law Journal* will continue to produce exemplary scholarly writing, will continue to be at the forefront of difficult conversations, and will continue to carry on our longstanding legacy of excellence. On behalf of the entire *Journal* and members of Volume 63, I sincerely thank you all for your leadership over this past year, and in the years to come.

PATRICK E. SMITH
EDITOR-IN-CHIEF
VOLUME 63

Achieving Reparations While Respecting Our Differences: A Model for Black Reparations

ADJOA AIYETORO

INTRODUCTION

On October 29, 2019, I participated on a panel of reparation scholars as a part of the Howard University School of Law's Branton Symposium. The panel was asked to focus on Roy L. Brooks' second edition of his book entitled "Atonement and Forgiveness: A New Model for Black Reparations," which was originally published in 2004 and was forthcoming at the time.¹ Brooks' work is well researched and written and provides a meaningful resource to reparations activists who seek to combine theory with practice, known in the academy as "praxis."

Brooks does not propose a new paradigm for reparations. Instead, the model presented by Brooks is a reworking and refinement of older reparations proposals that hold the principle that the United States government is obligated to make reparations for not only its role in the enslavement of African people, but also its continuous oppression of their descendants through structural racism after the Emancipation Proclamation. Brooks integrates apology research into his model through a number of scholars who address the importance of apology and taking responsibility for the healing of injury.² Some reparationists like Maulana Karenga identify full acknowledgment of the injury as essential to an ethical reparations plan, which is seemingly less than Brooks' proposal for an apology.³ The uniqueness of

1. ROY L. BROOKS, *ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS* (3d ed. 2019).

2. See Adjoa A. Aiyetoro, *Truth Matters: A Call for the American Bar Association to Acknowledge Its Past and Make Reparations to African Descendants*, 18 *GEO. MASON U. C.R. L.J.* 51, 92–96 (2007).

3. *Id.* at 92.

Brooks' proposal to the reparations debate is adding the component of "forgiveness" to his model. In offering his model for reparations in "Atonement and Forgiveness," Brooks suggests that the legislative process is the only way to implement a plan for reparations because courts cannot order an apology or forgiveness in a tort model.⁴ In a recent Op-Ed, he also asserts that reparations activists who blame "white people" for the injuries of slavery and its legacies will be responsible for the failure of the legislative strategy.⁵

As a reparations activist, litigator, and scholar who has been on the frontline of the work to obtain reparations through federal and state legislation and litigation since the mid-1980s, I am concerned that Brooks' presentation of his model feeds a race and class divide, rather than promoting a proposal that can be considered by the Commission to Study Reparations if H.R. 40 is passed as Brooks recommends. Brooks' centering of his model as the only one that would provide effective or satisfactory reparations and his negative critique of other "zealous supporters of black reparations"⁶ is reminiscent of the race and class critiques of other proposals for reparations over the past 150 years. His inclusion of forgiveness as a component of his model sets it apart from the Civil Liberties Act of 1988,⁷ the law that served as the model used by Congressman John Conyers when he crafted what became known as H.R. 40 and introduced it in the House of Representatives in 1989.⁸ The Civil Liberties Act did include an acknowledgment and apology to those of Japanese ancestry for the evacuation, relocation, and internment during WWII.⁹ However, there is nothing in the Act nor the literature about it addresses forgiveness as a component of the reparations package provided Japanese Americans.¹⁰ In practical terms, including the component of

4. See generally, BROOKS, *supra* note 1. There can be a reasonable debate among litigators concerning whether an acknowledgment of the wrongs, short of forcing an apology, would be within the court's authority – much like a statement of facts.

5. Roy L. Brooks, *Reparations are an Opportunity to Turn the Corner on Race Relations*, L.A. TIMES (April 23, 2019, 10:14 AM), <https://www.latimes.com/opinion/op-ed/la-oe-brooks-reparations-20190423-story.html>.

6. *Id.*

7. The Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 904 (1988).

8. Adjoa A. Aiyetoro, *The National Coalition of Blacks for Reparations in America (N'COBRA): Its Creation and Contribution to the Reparations Movement in SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS 217–18* (Raymond A. Winbush, Ph.D ed., 2000).

9. See *supra* note 7.

10. See generally, Roy L. Brooks, *Japanese Americans, in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 153–228* (Roy L. Brooks ed., 1999).

forgiveness in H.R. 40 would require that it be amended. Doing so would lessen Congressional support for its passage as it would raise significant opposition from African descendants and their allies. A forgiveness amendment would serve as a death knell to H.R. 40. Indeed, even if forgiveness made it into the text of a reparations proposal, how would it be implemented? Given the diversity of African descendants, who would be authorized to offer this forgiveness? Much like the Japanese Americans who were the focus of the Civil Liberties Act of 1988, there are numerous conflicting views on reparations in the African-descendant community.¹¹ A forgiveness component, therefore, adds no value to a legislative approach and likely jeopardizes passage of H.R. 40.¹²

This article will present a brief history of the demand for reparations that began in the 18th century and has a number of iterations. The article will describe how this demand is often a reflection of when the demand is made in relation to enslavement. After a description of the demand for reparations, a class and race analysis of resistance to the specific demands, including Brooks' caveats on passage of legislation, will be provided. Finally, this article will present a model for the form that reparations should take for slavery, Jim Crow, and their continuing legacies.

FORMS OF REPARATIONS RAISING THE DEMAND IN PRINCIPLE

The first recorded calls for reparations were made during the period of enslavement, and with the exception of Belinda's Petition discussed in the following section, were very non-specific. In 1830 David Walker made no specific demand other than to identify the responsibility to acknowledge and repair: "The Americans . . . have to raise us from the condition of brutes to that of respectable men, and make a national acknowledgement to us for the wrongs they have inflicted on us."¹³ At an 1854 emigrationist convention, there was a call for a "na-

11. In his introduction to the chapter on Japanese Americans, Brooks describes the lack of unanimity in the Japanese American community: "And yet, conflicting attitudes between generations made this an uneasy legacy. While Nisei preferred to move beyond the traumatic experience, their Sansei children sought to confront the past." *Id.* at 159.

12. I recognize that inclusion of acceptance of the reparations package and forgiveness, although optional, may be important in cases of apology that are more personal, for example, an individual apologizing for an act committed by her that injured another.

13. DAVID WALKER, *DAVID WALKER'S APPEAL* (Black Classic Press 1993) (1830).

tional indemnity” as “redress of our grievances for the unparalleled wrongs . . . which we suffered at the hands of this American people.”¹⁴

After the Civil War, there were more specific demands for reparations that included land and money to support institutional responses to redress the injury suffered by African descendants that are connected to slavery and post-slavery’s legacy of oppression.¹⁵ At least one demand made during slavery and within the first few decades post-emancipation were for cash payments that would compensate African descendants for work done for which the laborer was not paid¹⁶ or for pensions to provide support for those who worked without pay.¹⁷ The contemporary demands for reparations vary across groups of advocates; however, several advocates also include the demand for money to individuals and organizations to support efforts to heal injuries of African descendants caused by slavery and its legacies.¹⁸

MONETARY REPARATIONS

Raymond Winbush documents one successful claim for monetary reparations made in 1782-1783, when Belinda, an African woman formerly enslaved by Isaac Royall, petitioned the Massachusetts legislature to receive a pension for herself and her child from the Royall estate.¹⁹ The petition appeared to be based in a claim for unjust en-

14. Adjoa A. Aiyetoro and Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N’COBRA) and Its Antecedents*, 16 TEX. WESLEYAN L. REV. 687, 693 (2010). Also note that neither David Walker nor those at the emigrationist convention identified themselves as “Americans.” Instead, the oppressor was the Americans.

15. See generally, Robin D. G. Kelley, “A Day of Reckoning”: *Dreams of Reparations, in FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* 110-35 (Beacon Press) (2002) (after the Civil War, racial and gender activist, Sojourner Truth, distributed a petition calling on the United States government to provide land to freed Africans as payment for forced, unpaid labor). See also; Lori Robinson, *Righting a Wrong*, EMERGE MAG., Feb. 1997; RAYMOND A. WINBUSH, *BELINDA’S PETITION: A CONCISE HISTORY OF REPARATIONS FOR THE TRANSATLANTIC SLAVE TRADE* (2009); CHARLES P. HENRY, *LONG OVERDUE: THE POLITICS OF RACIAL REPARATIONS* (2007).

16. WINBUSH, *supra* note 15.

17. MARY FRANCES BERRY, *MY FACE IS BLACK IS TRUE: CALLIE HOUSE AND THE STRUGGLE FOR EX-SLAVE REPARATIONS* (2005).

18. Local and state legislators have recently embraced the call for reparations by linking it to the disparities in the black and white communities due to discrimination. Evanston, Illinois City Council adopted a resolution to end structural racism and achieve racial equity by using money raised by tax on marijuana and the role it played the enslavement of African people. City of Evanston, www.cityofevanston.org/government/city-council/reparations (last visited Mar. 10, 2020); Harriet Tubman Community Investment Act, Md. Reparations Comm’n HB 1201 (introduced Feb. 7, 2020).

19. WINBUSH, *supra* note 15.

richment, as Belinda described to legislators that she had been forced to perform services for Isaac Royall without pay for more than 40 years, and was now in need of financial support to care for herself and her child. Her request was granted by the Massachusetts legislature and she was provided £15, 12 shillings per year.²⁰

Belinda's successful petition is a precursor to the unsuccessful pension demands made in the 1890s for those Africans who were "freed" by the Emancipation Proclamation and Thirteenth Amendment. Neither Belinda nor the demands for pensions in the 1890s asked for an apology or acknowledgment of wrongdoing by United States. This makes sense considering the fact that at that time, enslavement had not been considered wrong by those from whom an apology would have been given. Yet, the generally-accepted facts of slavery supported a claim for pensions. Africans and their descendants had been forced to work for no compensation under a system supported by the federal and state governments until slavery was abolished. These petitions for pensions were consistent with the view that workers would receive money to care for themselves when they were no longer able to work. The added dimension to these petitions was the fact that those seeking pensions were forced, by law, to work for no compensation. Neither Belinda nor the 1890s pension legislation called for an apology or acknowledgment of the moral turpitude of slavery. Instead, these petitioners were focused on practicality and providing for themselves and their families after a system of forced, unpaid labor rendered them unable to work and meet their needs. Here, the petitioners were simply seeking justice. In the case of the legislation presented to the U.S. Congress after the end of slavery, the majority of those in Congress held the view that enslaved Africans were not workers that were deserving of a pension that whites would deserve.²¹

The language of Belinda's petition, written in the style of the day, was beseeching the legislature to see the injustice of being left penniless by a rich man who earned his riches from her uncompensated labor. The legislative approach in the 1890s was not as lyrical or beseeching. Rather, it was straight forward, calling upon Congress to

20. Medford Historical Society & Museum, *The Petition of Belinda Sutton (previously known as Belinda Royall)*, medfordhistorical.org, <http://www.medfordhistorical.org/medford-history/africa-to-medford/the-mark-of-belinda-sutton/> (last visited Mar. 11, 2020); WINBUSH, *supra* note 15, at 23.

21. See discussion *infra*, "Recalcitrance of whites."

recognize that by ending slavery without a provision for the enslaved, Congress had left the formerly enslaved Africans in a condition of destitution, having to “make a way out of no way.” The pension bills were introduced in Congress between 1890 and 1903 by a number of Representatives, including Congressmen William A. Connell (1890) and Mark Hanna (1903). The bills were introduced at the urging of Walter Vaughan, who was raised in Alabama and whose father included enslaved Africans among his property. In 1890, Vaughan was a newspaper editor in Omaha, Nebraska.²² The introduced pension bills were not reparations for unpaid labor. Instead, they provided for less support for younger freed Africans than older ones, suggesting that the pensions were tailored towards those who were less capable of providing for themselves after slavery.²³ Providing some pension for those under fifty was a nod, although very slight, to the view that the government owed the formerly enslaved something for their forced, uncompensated labor that it allowed. Yet, this formula denied responsibility to the formerly enslaved for having supported their ancestors’ forced, uncompensated labor since the founding of the country and its former colonies and the significant economic benefits reaped by individuals and the government.²⁴

The demand for monetary reparations has not been made to Congress since the pension bill. H.R. 40 calls for the Commission to determine “[h]ow, in considerations of the Commission’s findings, any form of compensation to the descendants of enslaved African[s] is calculated.”²⁵ Rather, noted reparationists and organizations have put monetary reparations in their various programs of action, litigation demands and petitions to national leaders, and international bodies and religious community.

22. BERRY, *supra* note 17, at 34.

23. HENRY, *supra* note 15, at 46–47. (Ex-slaves over 70 years old received \$500 plus \$15 per month; between 60 to 70 years old they received \$300 plus \$12 per month; between 50 to 60 years old, \$1000 and \$8 per month; and under 50 years old, they received no flat amount and only \$4 per month).

24. Callie House and the Ex-Slave Mutual Relief, Bounty and Pension Association filed a lawsuit in 1916, after the failed attempts to obtain passage of the pension legislation. See Aiyetoro & Davis, *supra* note 14, at 703; see also Johnson v. McAdoo, 45 App. D.C. 440, 441 (1916). See generally, Kevin Outterson, *Slave Taxes*, in SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS 135 (Raymond A. Winbush, Ph.D. ed., 2003).

25. Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 116th Cong. § 1 (2019). Introduced by Congressman Conyers in 1989, and reintroduced in every Congressional session by him until 2017, and then introduced by Congresswoman Sheila Jackson Lee in 2019.

Queen Mother Audley Moore put forward a demand for monetary reparations in 1952. The demand was the theme of a pamphlet she wrote called, *Why Reparations? Money for Negroes*.²⁶ In 1963, she presented a petition to President John F. Kennedy that was signed by a million people, and later sought the intervention of the United Nations in obtaining some portion of the unjustly gained “wealth created by our foreparents through centuries of unrequited labor.”²⁷ Moore’s demands for money were followed by demands made by a number of organizations and independence movements including the Republic of New Africa (RNA) and New Africa People’s Organization (NAPO) that embraced her views of reparations. The RNA, in its 1968 founding, demanded \$400 million.²⁸

In 1969, the National Black Economic Development Conference produced the Black Manifesto, which included monetary demands for \$400 million in reparations.²⁹ The Black Manifesto was presented by James Forman, who was at that time the leader of the Student Non-violent Coordinating Committee, to New York’s Riverside Church by interrupting its service.³⁰ This \$400 million was to be used for initiatives to address the injuries caused by slavery and Jim Crow—including establishing a southern land bank, publishing and printing industries, training centers, and a research institution, and providing support to organizations focused on the poor and labor.³¹

Organizations and individuals seeking reparations through litigation have included money as a significant part of the remedy. The money is seen in these cases as either the recovery of unjust enrichment, similar to the legislative demand of Belinda, or as damages.³² The Florida legislature was the first United States governmental entity to acknowledge responsibility for its role in racial violence committed against African descendants in the United States. The Rosewood Compensation Act, signed into law on May 4, 1994, provided compensatory reparations to (1) families who had real and personal property losses; (2) any African descendant residents of Rosewood at the time

26. Aiyetoro & Davis, *supra* note 14, at 707.

27. *Id.*

28. WINBUSH, *supra* note 15, at 43.

29. HENRY, *supra* note 15, at 64–65.

30. *Id.*; WINBUSH, *supra* note 15, at 43.

31. WINBUSH, *supra* note 15, at 44–45.

32. *Johnson*, *supra* note 24, at 441. *See generally* Alexander v. State of Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131 (N.D. Okla. Mar. 19, 2004); Cato v. United States, 70 F.3d 1103 (9th Cir. 1995); In Re African-American Slave Descendants Litigation, 471 F.3d 754 (7th Cir. 2006).

of the massacre who were “present and affected by the violence that took place” (who could receive additional compensation up to \$150,000); and (3) twenty-five yearly post-secondary scholarships, up to \$4,000 each, to be made to “minority persons with preference given to the direct descendants of the Rosewood families.”³³

Land was also a focal point of demands for reparations, in conjunction with money or alone. It flows from both a connection to the land based on the primary role enslaved Africans played in the development of the land in the South, as well as recognition of a need for a land-base for African descendant political independence.

LAND

The demand for land followed freedom from legal enslavement more immediately than the demand for money. Sojourner Truth’s petition for land³⁴ may have coincided with the offer of 40 acres of land by Lincoln to those freed by the Emancipation Proclamation through General Sherman’s Field Order No. 15.³⁵ The Freedmen’s Bureau Act allocated “not more than 40 acres” designated “for the use of loyal refugees and freedmen”; however, this land was not a gift—the government charged rent for the land for the first three years, then required payment of the value of the land to purchase.³⁶ Of note is that all formerly enslaved Africans were not identified as recipients of this land, even as rental property. Rather, the land was only available to those whom the government felt were loyal to and otherwise deserving of it. Newly freed Africans, despite the less than full support by the federal government for the allotment of land to them, supported and lobbied for the “confiscation, division, and redistribution of large plantations” as their right for the centuries of unpaid, forced labor, much of which was on Southern land.³⁷

33. 1994 Fla. Laws, ch. 94-359 §§ 3–5.

34. Kelley, *supra* note 15, at 205.

35. WINBUSH, *supra* note 15, at 34; THE FORTY ACRES DOCUMENTS: WHAT DID THE UNITED STATES REALLY PROMISE THE PEOPLE FREED FROM SLAVERY? *Minutes of an interview between the colored ministers and church officers at Savannah with the Secretary of War and Major-General Sherman*, January 12, 1865, 38 and *Sherman’s Special Field Order 15*, January 16, 1865, 51 (The Malcolm Generation, Inc. 1994)(On file with author.). Berry also reports that the Secretary of War went to Savannah in 1865 to meet with black leaders and General Sherman land for the black population. BERRY, *supra* note 3, at 11–12.

36. THE FORTY ACRES DOCUMENTS, *The Original Freedmen’s Bureau Act*, at 62–63.

37. Martha Biondi, *The Rise of the Reparations Movement*, in REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES, *supra* note 15, at 256.

The demand for land has continued and is frequently, although not always, coupled with the demand for monetary reparations.³⁸ The RNA and NAPO demand both.³⁹ Indeed, they are very specific about their land demand seeking the five states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina.⁴⁰

RESISTANCE TO THE DEMANDS FOR REPARATIONS

Demands for reparations in the forms of pensions and land met with resistance from many groups, resulting in only one successful attempt – that by Belinda in 1782-83. The failure to be successful in obtaining redress in the form of money or land after 1783 from any government body, most notably the federal government, can be laid at the feet of (1) the recalcitrance of whites in power to acknowledge they owed a debt to the freed Africans and to provide land and money to pay that debt;⁴¹ (2) the resistance from white so-called benefactors, like Vaughan, to share leadership, if not give it over totally to freed enslaved Africans; and (3) the class and perspective divisions within the black community.

RECALCITRANCE OF WHITES

The efforts to pass pension legislation were unsuccessful – the majority of Congress did not see the value in providing pensions to previously enslaved Africans or their immediate descendants.⁴² Congress evidently felt that Civil War veterans were more deserving of a pension than those who had been forced to work for nothing for almost 250 years. It passed the Dependent Pension Act of 1890 providing for a pension for Civil War veterans regardless of whether they were disabled by service in the Civil War.⁴³ In 1906, Congress amended the Act to clarify that it was a pension bill for those who

38. *Id.* at 257.

39. *Id.*

40. WINBUSH, *supra* note 15, at 43.

41. The 1994 Florida Legislature was an exception to this statement when the overwhelming majority of white Democrats voted in support of the legislation (72.4% of the white representatives and 80% of the white senators) and along with somewhat less than half of the Republicans supported the legislation (42.3% of the Republican members of the House and 45% of the Republican senators). Steven Tauber, *African Americans in the Contemporary Florida Legislature*, in *POLITICS IN THE NEW SOUTH: REPRESENTATION OF AFRICAN AMERICANS IN SOUTHERN STATE LEGISLATURES* 43, 69, TABLE 3.11 (Charles E. Minifield & Steven D. Shaffer eds. 2005).

42. WINBUSH, *supra* note 15, at 38–39; HENRY, *supra* note 15, at 47.

43. HENRY, *supra* note 15, at 47.

served in the Civil War, regardless of whether they were disabled.⁴⁴ Neither the 1890 Act nor the amended Act provided support for previously enslaved Africans unless they served during the Civil War. And many of the formerly enslaved Africans who served during the Civil War, especially those in the South, could not benefit from this law because they could not obtain documentation of their service.⁴⁵ The passage of the Dependent Pension Act of 1890 during the same year the Ex-Slave Pension legislation was introduced supports the conclusion that Congress maintained its disdain for and insensitivity to formerly enslaved African descendants by denying it owed them a debt due to its support of enslavement. In maintaining its commitment to the ideology of White Supremacy, however, Congress did provide reparations to former slaveholders for the loss of their “property”—the freed African.⁴⁶

The demands for reparations became more publicly known after the founding of the National Coalition of Blacks for Reparations in America (NCOBRA) in 1987. White resistance followed this increase in public dialogue. Most famously, in 2001, David Horowitz placed an advertisement in several college newspapers entitled *David Horowitz’s Ten Reasons Why Reparations for Slavery is a Bad Idea—and Racist, Too*.⁴⁷ The noted black historian, John Hope Franklin, responded to the advertisement and indicated factual errors, and therefore incorrect conclusions, that were in the advertisements.⁴⁸ Surveys taken in 2003 by Harvard University and University of Chicago researchers showed a clear racial divide between whites and blacks in support for reparations with thirty percent of whites surveyed supporting an apology for slavery and four percent supporting compensation for slavery, compared to seventy-nine percent and

44. BERRY, *supra* note 17, at 47.

45. *Id.* at 48.

46. See, e.g., JOSEPH A. RANNEY, *IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW* 59–60 (2006) (Compensation for freed slaves was so important to slaveholders in Maryland and Kentucky that “the 1867 legislature formally petitioned Congress for compensation “for the inconveniences, public and private, produced by such changes of system . . .”).

47. Horowitz, David, “Ten reasons why reparations for slavery is a bad idea—and racist too” (2001). *Brown Olio*. Brown Digital Repository. Brown University Library. <https://repository.library.brown.edu/studio/item/bdr:40830/>; David Horowitz’s “Ten Reasons Why Reparations for Slavery is a Bad Idea for Blacks—and Racist Too”, 31 *The Black Scholar* 2, 48 (2001), DOI: 10.1080/00064246.2001.11431145.

48. See Alfred L. Brophy, *Reparations Talk in College*, 11 *MICH. J. RACE & L.* 195, 200 (2005) (reviewing DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* (2002)).

sixty-seven percent, respectively, of blacks surveyed.⁴⁹ In 2016, in a survey done by Marist, fifteen percent of whites surveyed and fifty-eight percent of blacks surveyed supported payment of compensation to descendants of enslaved Africans and eleven percent of whites and sixty-three percent of blacks surveyed supported payment of compensation to African Americans for slavery and the legacies of slavery.⁵⁰ Similarly, in a 2019 Gallup Poll, sixteen percent of whites and seventy-three percent of blacks polled supported payment of compensation to descendants of enslaved Africans.⁵¹

RESISTANCE OF WHITE SUPPORTERS TO FULLY EMBRACE THE DEMAND FOR REPARATIONS

The phenomenon that some label “white supremacy,” that we experience in what is now the United States, has its roots in the genocidal and oppressive force that whites who came to the colonies exerted against the original peoples and the Africans who were brought in 1619.⁵² This phenomenon birthed not only a sense of superiority among those who are white, it birthed a sense of inferiority among those who were black or brown. Given this sociological creation of perspectives of superior and inferior, necessary to maintain control of African people in enslavement, whites who saw the need to provide some form of reparations assumed they should lead the effort – to be the beneficent benefactor.⁵³

Walter Vaughan, the initiator of the effort to obtain pensions for formerly enslaved Africans between 1890 and 1903, fits this profile.⁵⁴ The son of a Selma, Alabama holder of enslaved Africans, Vaughan did not oppose slavery.⁵⁵ Rather he expressed the view that the con-

49. ALFRED L. BROPHY, *REPARATIONS PRO & CON* 5 (2006).

50. *Point Taken*, Marist Poll (May 2016), http://maristpoll.marist.edu/wp-content/misc/usapolls/us160502/Point%20Taken/Reparations/Exclusive%20Point%20Taken-Marist%20Poll_Reparations%20Banner%201_May%202016.pdf#page=4.

51. Mohamed Younis, *As Redress for Slavery, Americans Oppose Cash Reparations*, GALLUP (Jul. 29, 2019), <https://news.gallup.com/poll/261722/redress-slavery-americans-oppose-cash-reparations.aspx> (It is revealing how the views of “Americans” do not actually reflect the views of “African Americans,” yet the title of the article would lead one to believe otherwise.)

52. See A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 8 (1996); Khushbu Shah and Juweek Adolphe, *400 Years Since Slavery: A Timeline of American History*, THE GUARDIAN (Aug. 16, 2019, 2:00 PM), <https://www.theguardian.com/news/2019/aug/15/400-years-since-slavery-timeline>.

53. HENRY, *supra* note 15, at 46.

54. See WINBUSH, *supra* note 15, at 37–38; HENRY, *supra* note 15, at 46–47; BERRY, *supra* note 17, at 34–37.

55. BERRY, *supra* note 17, at 37.

dition of formerly enslaved Africans had plummeted because of Emancipation and that efforts needed to be made to improve their situation.⁵⁶ Vaughan wanted to control the effort to obtain pension legislation, including the participation of formerly enslaved Africans and other African descendants from whom he sought support.⁵⁷ He reached out to these communities, primarily through the black church, creating Ex-Slave Pension Clubs, for which members had to pay 10 cents to join and pay monthly dues of either 5 cents or 25 cents.⁵⁸ Vaughan did not want any competition for membership in his clubs nor for leadership in the effort to pass the pension bills.⁵⁹ He denounced anyone who was involved in organizing pension groups who did not work for him, and colluded with government officials to criminally charge Isaiah Dickerson and Callie House, although Dickerson subsequently worked with Vaughan in 1902, organizing the Vaughan Justice Party.⁶⁰

There have been whites who have openly supported specific reparations claims and have gained credibility in the reparations movement because of this support.⁶¹ Yet, with some exceptions, their support has been limited in scope – they are not reparationists who support the reparations movement generally.⁶² They may have some understanding of the heinous crimes committed against African people, however, their support for reparations, particularly compensatory reparations, is often hinged on the establishment of a direct line from

56. *Id.* (“[Vaughan] mixed concern for the freedpeople with disdain and economic opportunism. As he explained it, seeing groups of freedpeople in a “tattered condition” while on a trip through Mississippi in 1870, he had decided that the government should pension the ex-slaves, who, he asserted, had been well cared for until Emancipation had left them poverty-stricken.”).

57. HENRY, *supra* note 15, at 49-51.

58. *Id.* at 49 (Vaughan formed the Ex-Slave Pension Association, “a national organization with chapters run by Negroes to lobby for passage of the bill,” with dues being five cents a month); WINBUSH, *supra* note 15, at 38 (25 cents monthly dues).

59. HENRY, *supra* note 15, at 52-55.

60. *Id.* at 51-53 (Dickerson was charged and convicted of fraud in March 1901 based on his work with the Ex-slave Mutual Relief, Bounty and Pension Association.); Miranda Booker Perry, *No Pensions for Ex-Slaves: How Federal Agencies Suppressed Movement to Aid Freedpeople*, NATIONAL ARCHIVES (2010), <https://www.archives.gov/publications/prologue/2010/summer/slave-pension.html> (Dickerson’s conviction was overturned by the Georgia Supreme Court in 1901); BERRY, *supra* note 17, at 190 (Callie House was charged in 1916 for “obtaining money or property by false or fraudulent pretenses” by “us[ing] the mails to promise that which the postmaster considered impossible to perform,” which was obtaining pensions for formerly enslaved Africans.).

61. There is a history of some whites supporting reparations after the Civil War. For example, Rep. Thaddeus Stevens of Pennsylvania, and more contemporarily, Ida Hakim, founder of Caucasians United for Reparations and Emancipation (CURE). Lori Robinson, *Righting a Wrong*, reprinted in THE BEST OF EMERGE MAGAZINE 609, 616 (George E. Curry ed., 2003).

62. *Id.*

government action or inaction – the cause – to the loss suffered by African descendants – the injury.⁶³ Their at-arm’s-length analysis of the more general claims often supports the arguments of reparations opponents. Their whiteness is often used to bring legitimacy to reparations in the broader, non-activist community, but it also brings legitimacy to opponents of reparations who would be opposed despite their analysis.

BLACK RECALCITRANCE

Blacks’ resistance to reparations was often class-based, with those with sufficient income and status, who did not struggle to feed and clothe their families, being more interested in education and other things that would “uplift the race,” as opposed to compensatory reparations.⁶⁴ In addition to class differences in those demanding compensation for their and their ancestors enslavement, others in positions of power, perhaps embracing the self-help philosophy of Booker T. Washington (“cast your buckets where you are”), refused to support monetary compensation.⁶⁵ For example, the three black sitting Congressmen opposed the ex-slave pension bills ostensibly because they thought education was the path to progress for the now-free African descendant.⁶⁶

There was little support for reparations among the black middle class between the passage of the 13th Amendment and the introduction of H.R. 40. Callie House was ignored at best, and ridiculed at worst by the black middle class, receiving only symbolic support when she hired a prominent black lawyer to represent the Ex-Slave Mutual Relief, Bounty and Pension Association in its unsuccessful lawsuit against the federal government for cotton taxes.⁶⁷ Reparationists such as Queen Mother Audley Moore and repatriation leaders such as Marcus Garvey, founder of the Universal Negro Improvement Association (UNIA), were embraced by black nationalists.⁶⁸ Representatives of the mainstream black community, largely the black middle class, however, ignored or disparaged those calling for reparations or

63. See ALFRED L. BROPHY, REPARATIONS PRO & CON 98-101 (2006); see also ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION (2002).

64. See WINBUSH, *supra* note 15, at 38; BERRY, *supra* note 17, at 39-40.

65. WINBUSH, *supra* note 15, at 38; BERRY, *supra* note 17, at 66-67.

66. WINBUSH, *supra* note 15, at 38.

67. See BERRY, *supra* note 17, at 65-79, 173-181, 190.

68. HENRY, *supra* note 15, at 107, 134-35.

repatriation as they continued efforts to obtain voting rights, education, business development, and to end lynching, not couched in the terms of reparations.⁶⁹ After the founding of the National Coalition of Blacks for Reparations in America (NCOBRA) in 1987, and the introduction of H.R. 40 by Congressman John Conyers in 1989, the black middle class became visible in its support of reparations.⁷⁰ Yet, class divisions continued and some raised the concern that the demand was seen as coming largely from the Black Nationalist community.⁷¹

Brooks' statement suggesting that the legislative demand for reparations will fail if it includes the language that is identified more with nationalists and non-erudite blacks smacks of the class bias within the black community:

A primary risk comes from the poor judgments of zealous supporters of black reparations. Too many of them have branded black reparations as a campaign for cash reparations, white punishment or white guilt. Framing the matter in this way is too inelegant a response to the exceptional acts of human degradation wrought by slavery and Jim Crow.⁷²

As a member of the black middle class (perhaps upper class) and although a supporter of reparations, Brooks repeats the dismissal of the experiences of those many African descendants who see the problem and express it as needing to punish white people and obtain compensations from white people for white people's brutality and abuse of African people from slavery to today. It appears that his class position and education may have influenced his perspective and leading him to be disdainful of less erudite presentations of the demand, believing that his polished way of presenting the demand is the only way that will be successful. And perhaps even more importantly, he suggests if H.R. 40 is not passed it will be the fault of those who point the finger at whites, ostensibly African descendant reparationists, the victims of the heinous crimes perpetrated by the United States government upon their ancestors in slavery and through the legacies of

69. See WINBUSH, *supra* note 15, at 38, 40-43 (W.E.B. DuBois, for example, leveled personal insults at Garvey.); see also BERRY, *supra* note 17, at 39, 41, 68.

70. Aiyetoro, *supra* note 8, at 220-25.

71. See HENRY, *supra* note 15, at 107 (quoting historian Clarence Mumford: "[NCOBRA] must break with nationalist sectarianism" if it is to develop a true mass base).

72. Roy L. Brooks, *Op-Ed: Reparations Are an Opportunity to Turn the Corner on Race Relations*, LOS ANGELES TIMES (Apr. 23, 2019, 10:14 AM), <https://www.latimes.com/opinion/op-ed/la-oe-brooks-reparations-20190423-story.html>.

slavery, rather than the lack of integrity and good will on the part of the government.⁷³ In this way, he continues the historic pattern of black voices with some footing in the effort to being accepted and embraced as “Americans,” to want to accommodate those in power by acceding to what they think will pass muster, rather than putting the crimes of white America fully on the table along with a demand for full repair. In this sense, he and others who embrace this approach are negotiating against themselves, whittling down the demand to what they “feel” or “think” will be acceptable.⁷⁴ Compromise should not be made on the righteous demands for reparations that are based on calculations of benefits to white America and detriments to African people in the United States that can be made with some specificity until the fullest plan for repair is placed on the table.

I agree with Brooks that reparations are most likely to be achieved through the legislative process. We have examples of successful efforts in Rosewood, Florida and the local legislative initiative in Evanston, IL discussed *infra*. H.R. 40, the bill initially filed by Congressman John Conyers in 1989 and each Congressional session until 2017, the year he left Congress, and refiled in 2019 by Congresswoman Sheila Jackson Lee, has more support than ever with 125, and rising, legislators co-sponsoring the bill.⁷⁵ It is likely, given this level of co-sponsorship, that the bill will make it out of the Judiciary Committee and onto the floor of the House in the summer of 2020. The voices of the most strident nationalists, including those calling for cash payments couched in language of punishment of whites, have been raised throughout this process and have not stopped the momentum around the bill – why would it now? Rather than seeking to silence advocates who embrace a cash payment rather than funds for institutional development, education, health and community development, those advocates’ voices aligning more with the movement for pensions between

73. *Id.*

74. I experienced the use of this approach with the work done to address Clinton’s crime bill proposals. I was sitting in a room on Capitol Hill in a meeting of activists led by the ACLU strategizing about how to respond to the crime bill proposal and the discussion centered around modifying our responses based on what the organizers thought would be acceptable. This approach was a dismal failure and rather than mounting a strong fight against the bill, was a weakened response that did not stop this bill from becoming law and being the source of significant injury.

75. Corey Williams, *Groups Bringing National Reparations Debate to Detroit*, ASSOCIATED PRESS (May 14, 2019), <https://apnews.com/19f04e3f44c44a21b533cae539772373>; Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 116th Cong. (2019). See also www.congress.gov (current level of co-sponsorship).

1890 and the early 1900s, all the voices for reparations should be encouraged to present their ideas on “what form reparations.”⁷⁶ If the legislation passes, and I am hopeful that it will, the Commission that it creates should receive multiple proposals to review, and the organizations and individuals in the movement for reparations, which is now larger than ever, can lobby that Commission to support the proposals they view as best. We cannot, nor should we attempt to, control the voices that support reparations. As Dorothy Benton-Lewis said in 1997, the victory is in seeing more African descendants supporting the demand for reparations: “We are seeing the necessity to support our own in a way we haven’t done before. Whether we ever get a dime, our going for it is going to be the greatest value.”⁷⁷ Yet, we will obtain reparations if we stay the course.

REPARATIONS IN WHAT FORM?

Recognize that because slavery created the economic gulf between black and white wealth and because mature capitalism maintains it, blacks have limited capacity to make a substantial difference in their economic lives and the life of their community. Therefore, it is necessary to marry economic resources to law in order to make economic equality possible, so that the democratic promise of America becomes a reality for blacks.⁷⁸

The economic crime of slavery, initiated by the theft of Africans from Africa and slavery’s legacies, necessitated the commission of social and psychological crimes such as denial of the right to speak their language, maintain their names, the ongoing denials of fundamental rights to equal pay, equal access to health care, and education and, the continuing infliction of disparate and harsher punishments in the criminal punishment system. Numerous articles and books have been written about these subjects, some specifically addressing injury, others describing the historical periods – what was done and how.⁷⁹ These

76. In the past few years there has been a rise in voices that seek to silence NCOBRA and sully its reputation as the foremost, grassroots reparations organization. These voices have used false accusations against NCOBRA, such as suggesting it has presented a “fake” narrative, to elevate itself and its platform. This attack has taken the class differences described herein that devalue certain reparations to a whole new and dangerous level.

77. Lori Robinson, *Righting a Wrong*, reprinted in *The Best of Emerge Magazine* 609, 617 (George E. Curry ed., 2003).

78. RONALD W. WALTERS, *THE PRICE OF RACIAL RECONCILIATION* 171 (2011); see also ERIC WILLIAMS, *CAPITALISM AND SLAVERY* (1964).

79. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978); A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM*, *supra* note 49; WALTERS, *supra* note 78; RANDALL ROBINSON, *THE DEBT: WHAT*

books and articles provide the resources from which a comprehensive reparations proposal for slavery and its legacies can be developed. A reparative package must be developed even if, as some have suggested, there are difficulties in quantifying the injuries. A reparative package should also be developed even if there are difficulties in determining the causative effects of slavery and its legacies on the chasms between black and white in all indicia of well-being including wealth, health, education, criminal punishment, housing, and homelessness.⁸⁰ Developing a direct line of causation is a distraction and one indulged in by those who, consciously or unconsciously, seek to avoid the responsibility borne by the United States government and its predecessor colonies for the implementation of a barbaric and dehumanizing system of slavery and its refusal to completely dismantle it, instead creating and supporting barriers to African descendants' well-being after the almost 250 years of legal bondage. The inability to disentangle the causal factors and develop an accurate accounting is the fault of the system and should not be borne by its victims. The crimes against humanity and the violations of human rights inflicted on African people through their enslavement and through the Jim Crow era, and some continuing to this day, that if an error is made, it should be an error that benefits African descendants.

THE "SHOULD" OF REPARATIONS

Reparations should come from government entities, federal, state and local, that supported and maintained slavery and its legacies. Institutions such as universities and churches as well as corporations that built their wealth on slavery should also make reparations.⁸¹ We must

AMERICA OWES TO BLACKS (2000); Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (Jun. 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

80. See Kehinde Andrews, *The West's Wealth is Based on Slavery. Reparations Should be Paid*, THE GUARDIAN (Aug. 28, 2017, 3:00 PM), <https://www.theguardian.com/commentisfree/2017/aug/28/slavery-reparations-west-wealth-equality-world-race-2/>; *Research Confirms that Entrenched Racism Manifests in Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INSTITUTE OF JUSTICE (May 3, 2018), <https://www.vera.org/newsroom/research-confirms-that-entrenched-racism-manifests-in-disparate-treatment-of-black-americans-in-criminal-justice-system>; *Health, Homelessness, and Racial Disparities*, NATIONAL HEALTH FOR THE HOMELESS COUNCIL (Apr. 2019), <https://nhhc.org/wp-content/uploads/2019/08/health-homelessness-and-racial-disparities.pdf>. See also, Adjoa A. Aiyetor, J.D. and Tara V. DeJohn, Ph.D., *Rejecting the Wrongs of Yesterday: A Multifaceted Approach to Eliminating Racial Disparities in the Arkansas Criminal Justice System*, 6 Tenn. J. Race Gender & Soc. Just. 105 (2017).

81. Jamiel Law, *Slavery Reparations Seem Impossible. In Many Places, They're Already Happening*, THE WASHINGTON POST (Jan. 31, 2020), <https://www.washingtonpost.com/outlook/>

speak this truth. We cannot dishonor our African ancestors who suffered through slavery and Jim Crow by presenting half-truths and engaging in misdirection by focusing on the way some African peoples may have participated in their own victimization. This devalues the injury and accommodates those who do not want to hear the truth nor take responsibility for it.

Today, the movement should be focused on the passage of the federal legislation, H.R. 40 and its Senate companion bill, S. 1083. It will provide reparations from the biggest, most culpable participant in slavery and its legacies – a government that by its laws and practices allowed for heinous crimes to be committed against a people based on their color and nationality – brown and African. The years of work putting forward and advocating for H.R. 40 by former Congressman John Conyers, NCOBRA and others has resulted in it having significant traction at this time.⁸² Continued and increasing support will move it from a bill to a law.

The passage of the legislation would lead to the creation of a thirteen-member Commission, six members of which will be selected by “the major civil society and reparations organizations that have championed reparatory justice.”⁸³ Rather than insisting that we have one voice, as suggested by Brooks, all proposals for reparations from the various voices in the African descendant community should be encouraged and evaluated. We should not repeat the error of the past where elitism among the black middleclass undermined support for proposals that would have addressed the most pressing needs of the poor, formerly enslaved masses.

Legislatively-obtained reparations should include the creation of a federally insured and endowed fund, the amount being determined by economists, with African descendant economists playing a leading role, based on fifty percent of the value of the forced, unpaid labor of enslaved Africans and one hundred percent of the value of the disparity between black and white wages between 1863 and the year the legislation passes and is signed into law by the President of the United States. The endowed fund should be used to provide grants to Afri-

2020/01/31/slavery-reparations-seem-impossible-many-places-theyre-already-happening/?arc404=true.

82. Mike Lillis and Scott Wong, *Reparations Bill Wins New Momentum in Congress*, THE HILL (Apr. 4, 2019, 6:00 AM), <https://thehill.com/homenews/house/437286-reparations-bill-wins-new-momentum-in-house>.

83. Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 116th Cong. §4(a) (2019).

can descendants, including African descendant-led and controlled organizations engaged in the healing and advancement of African descendants. African descendant-led means that at least seventy percent of the top positions in the governing bodies as well as administrative positions are held by black people of African descent. Priority should be given to those individuals, organizations, and groups that have a history of work on behalf of black people of African descent. The categories for funding through this endowment should be created in the spirit of the Black Manifesto, but broadened to incorporate injury areas that flow specifically from slavery and its legacies including health, education, wealth development and poverty diminution, criminal punishment, and peoplehood – investment in developing a sense of pride in self.

A federally insured and endowed fund should also be created for payments to descendants of enslaved Africans based on fifty percent of the value of the forced unpaid labor of enslaved Africans. The United States has the burden to disprove any claim of descendancy from Africans enslaved in the United States if the claim is reasonably supported by documents from which an inference of descendancy can reasonably be made. There should be a one year period from the passage of the law to the determination of the fund amount, and a four year period from that determination for claims to be filed and decisions made on their legitimacy. The amount to be given to each claimant or their survivors will be determined by dividing the fund amount by the number of approved claimants.

CONCLUSION

Reparations for the enslavement of African people and the legacies of enslavement are long overdue. Rather than silencing voices that support reparations we must acknowledge that the variety of voices, both in the specifics of what is being sought and in the way it is expressed, are evidence of the diversity among the injured and the breadth and depth of the injury. The diversity only underscores the need to develop meaningful reparations for enslavement of African people and its legacies. We should stop attempting to control the process through fear that the type of proposals or the manner in which they are presented will thwart the efforts to obtain reparations. Such an attitude has historically been an accommodation to the ideology of White Supremacy and has strengthened the government's ability to deny its responsibility and refuse to make reparations. Rather, let

each reparations group and individual reparationists raise their proposals for reparations, respecting the right of others to have different proposals and manners of presentation. If we believe, as Congressman John Conyers, Congresswoman Sheila Jackson Lee, the 125 co-sponsors of H.R. 40 and Senator Cory Booker who introduced the first companion bill to H.R. 40, S.1083,⁸⁴ that the creation of a Commission to study the forms reparations should take is a viable path, let us work to get the legislation passed and Commissioners who are principled and have a commitment to racial justice appointed and put forth our plans. Onward ever!

84. Commission to Study and Develop Reparation Proposals for African-Americans Act, S. 1083, 116th Cong. (2019).

Racial Reconciliation Through Black Reparations

ROY L. BROOKS

Warren Distinguished Professor of Law
University of San Diego School of Law

INTRODUCTION

A commission to study government redress for the atrocities of slavery and Jim Crow—what is popularly referred to as “black reparations”¹—is the subject of bills introduced in Congress in 2019.² Most Democratic presidential contenders have also come out in support of

1. The scholarship on black reparations is voluminous. *See, e.g.*, WILLIAM A. DARITY & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* (2020); ANA LUCIA ARAUJO, *REPARATIONS FOR SLAVERY AND THE SLAVE TRADE: A TRANSNATIONAL AND COMPARATIVE HISTORY* (2017); ALFRED BROPHY, *REPARATIONS: PRO AND CON* (2006); *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (Roy L. Brooks ed. 1999) (anthology of redress movements around the world); BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973); Carlton Waterhouse, *Reparations: The Problem of Social Dominance*, 6 *WORLD ENV'T & ISLAND STUD.* 11 (2016); Adjoa A. Aiyetoro, *Why Reparations to African Descendants in the United States Are Essential to Democracy*, 14 *J. GENDER RACE & JUST.* 633 (2011).

2. “H.R.40—Commission to Study and Develop Reparation Proposals for African-Americans Act,” H.R.40—116th Congress (2019-2020), <https://www.congress.gov/bill/116th-congress/house-bill/40> (accessed Dec. 3, 2019). Originally introduced in the House by Rep. John Conyers in 1989 (D-Mich.) and in each succeeding year, H.R. 40 was reintroduced by Rep. Sheila Jackson Lee (D-Texas) on January 3, 2019, after Congressman Conyers left the House. In the same year, Sen. Cory Booker (D-NJ) introduced S.1083 in the Senate as a companion to H.R.40. “H.R. 40 Commission to Study and Develop Reparation Proposals for African-Americans Act,” S.1083—116th Congress (2019-2020), <https://www.congress.gov/bill/116th-congress/senate-bill/1083> (accessed Dec. 3, 2019).

H.R. 40, the House bill, and S.1083, the Senate bill.³ This puts the reparations issue back on the table for discussion.⁴

For African Americans and the nation as a whole, the question of reparations is the most significant issue in the quest for racial equality since the passage of civil rights legislation in the 1960s.⁵ Race relations today are severely challenged and seem to be getting worse. This is due in no small part to President Donald Trump's inflammatory, often racist rhetoric and actions,⁶ socially divisive policies,⁷ and general

3. Examples of positions taken by the candidates include the following. Senator Warren: "Slavery and government-sanctioned discrimination are a stain on this country that, among many consequences, has robbed Black families of wealth in America for generations. This commission will help inform the conversation about the kind of systemic, structural changes we need to begin to heal." Senator Sanders: "For centuries, America's economic rise relied on treating millions of Black people as literal property. We have still not come to terms with the horrors of legalized slavery and its continuing impacts on our society. I am proud to co-sponsor the H.R. 40 Commission to Study and Develop Reparation Proposals for African-Americans Act to finally bring the truth about slavery into the open." Senator Klobuchar: "As we fight to make America more just for all who live here, we must continue to address the immorality of the past. In order to invest in the communities that still bear the scars of slavery, we have to start by understanding its lasting effects. That is why I support this critical legislation." "Booker Reparations Bill Reaches 12 Senate Cosponsors," https://www.booker.senate.gov/?p=press_release&id=937 (accessed Dec. 3, 2019).

4. As I shall explain in due course, the reparations issue is not new. See *infra* text accompanying notes 10-11.

5. For a distillation of this legislation, see, e.g., ROY L. BROOKS, *THE RACIAL GLASS CEILING: SUBORDINATION IN AMERICAN LAW AND CULTURE* 35-36 (2017).

6. See David Leonhardt & Ian Prasad Philbrick, *Donald Trump's Racism: The Definitive List*, N.Y. TIMES (Jan. 15, 2018), www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html (accessed Dec. 1, 2019) ("Donald Trump is a racist. He talks about and treats people differently based on their race."). Most Americans agree with the authors: "Fifty-seven percent of all adults, including more than 8 in 10 blacks, three-quarters of Hispanics and nearly half of whites, said they think Trump is racist." Emily Swanson & Russell Contreras, *AP-NORC Poll: Most Americans Say Trump Is Racist*, U.S. NEWS & WORLD REP. (Feb. 28, 2018, 4:32 PM), <https://www.usnews.com/news/politics/articles/2018-02-28/ap-norc-poll-most-americans-say-trump-is-racist> (accessed Dec. 1, 2019). The authors back up their charge with facts that go beyond Trump's well-known statement finding moral equivalency between both supporters and opponents of white supremacy at Charlottesville, Virginia in August of 2017:

Donald Trump . . . had a history of making racist comments as a New York real-estate developer in the 1970s and '80s. More recently, his political rise was built on promulgating the lie that the nation's first black president was born in Kenya. He then launched his campaign with a speech describing Mexicans as rapists.

. . .

Trump's real-estate company tried to avoid renting apartments to African-Americans in the 1970s and gave preferential treatment to whites, according to the federal government.

Trump treated black employees at his casinos differently from whites, according to multiple sources. A former hotel executive said Trump criticized a black accountant: "Black guys counting my money! I hate it. . . . I think that the guy is lazy. And it's probably not his fault, because laziness is a trait in blacks."

. . .

In 1989, Trump took out ads in New York newspapers urging the death penalty for five black and Latino teenagers accused of raping a white woman in Central Park; he ar-

Racial Reconciliation Through Black Reparations

gued they were guilty as late as October 2016, more than 10 years after DNA evidence had exonerated them.

...

He began his 2016 presidential campaign with a speech disparaging Mexican immigrants as criminals and ‘rapists.’

...

In December 2015, Trump called for “a total and complete shutdown of Muslims entering the United States,” including refusing to readmit Muslim-American citizens who were outside of the country at the time. Trump said a federal judge hearing a case about Trump University was biased because of the judge’s Mexican heritage.

...

At the White House on Jan. 11, Trump vulgarly called for less immigration from Haiti and Africa and more from Norway.

...

Trump called Obama (who was editor in chief of the Harvard Law Review) “a terrible student, terrible.”

...

He is quick to highlight crimes committed by dark-skinned people, sometimes exaggerating or lying about them (such as a claim about growing crime from “radical Islamic terror” in Britain). He is very slow to decry hate crimes committed by whites against dark-skinned people (such as the killing of an Indian man in Kansas last year).

...

He has retweeted white nationalists without apology.

He called some of those who marched alongside white supremacists in Charlottesville, Va., last August “very fine people.”

After David Duke, the former leader of the Ku Klux Klan, endorsed him, Trump was reluctant to disavow Duke even when asked directly on television.

Trump hired Steve Bannon as his campaign head and later White House chief strategist. Under Bannon’s leadership, the website Breitbart made white nationalism a central theme. It featured a section, for example, on “black crime.”

...

In a November 2017 meeting with Navajo veterans of World War II, Trump mocked Senator Elizabeth Warren as ‘Pocahontas.’

...

Trump once referred to a Hispanic Miss Universe as “Miss Housekeeping.”

At a June 2016 campaign rally, Trump pointed to one attendee and said: “Oh, look at my African-American over here. Look at him.”

Leonhardt & Philbrick, *supra*. See also Lydia O’Connor & Daniel Marans, *Here Are 16 Examples of Donald Trump Being Racist*, HUFFINGTON POST (Dec. 13, 2016, 1:12 PM), https://www.huffingtonpost.com/entry/president-donald-trump-racist-examples_us_584f2ccae4b0bd9c3dfe5566 (accessed December 1, 2019) (offering a litany of examples to support showing a pattern of racism throughout Trump’s personal and professional life). Summarizing Trump’s appeal to racism, Steve Almond remarks:

The story Trump told about America was of a holy land infiltrated by foreigners who lurked beyond, and within, our borders. Whites unsettled by a rising demographic tide flocked to his rallies to partake in a grand drama of national reclamation whose central feature was an orgiastic denunciation of those dark, and dark-skinned, forces aligned against their cause.

...

... The rest of us never quite grasped how persuasive this appeal was.

STEVE ALMOND, *BAD STORIES: WHAT THE HELL JUST HAPPENED TO OUR COUNTRY* 42, 45 (2018).

7. President Trump’s Administration has made numerous troubling proposals affecting housing, education, food stamps, and Medicaid. Perhaps his most controversial proposal would make work a condition for receiving federal aid, including Medicaid. See Tracy Jan, Caitlin Dewey & Jeff Stein, *HUD Secretary Ben Carson to Propose Raising Rent for Low-Income Amer-*

“disinhibiting” conduct.⁸ Black reparations can be an opportunity to turn things around—but only if we seize upon this moment with probity and intelligence.

A primary risk comes from the poor judgments of zealous supporters of black reparations. Too many of them have branded black reparations as a campaign for direct cash payments to each descendant of the enslaved, white punishment or white guilt.⁹ Framing the matter in this way is too inelegant a response to the exceptional acts of human degradation wrought by slavery and Jim Crow.

Any commission on reparations has a more delicate and complex task. It must ask: How can the government attain moral clarity in the aftermath of slavery, the nation’s worst atrocity? What conditions are necessary to repair the broken relationship between the government and the victims of that atrocity? In this article, I shall explain and defend a reparations model that answers these questions. It is, in my view, the best model for black reparations as it offers the best path toward racial reconciliation.¹⁰

BRIEF HISTORICAL BACKDROP

It may be useful to begin with a very brief outline of the history of the movement for black reparations. The request for black reparations is not a recent idea. Public calls for reparations were first made after the Revolutionary War and throughout the antebellum period. At the end of the Civil War, ex-slaves sought redress from Congress. In response, an ex-slave pension bill was introduced in Congress, but

icans Receiving Federal Housing Subsidies, WASH. POST: WONKBLOG (Apr. 25, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/04/25/hud-secretary-ben-carson-to-propose-raising-rent-for-low-income-americans-receiving-federal-housing-subsidies/?noredirect=on&utm_term=.0b62b756287b (accessed Dec. 1, 2019) (discussing Trump’s issuance of an executive order as part of an effort to reduce federal assistance programs). Another proposal from HUD Secretary Ben Carson would triple rents paid by the poorest households. *Id.*

8. By which I mean conduct that gives his followers license to unleash their racial intolerance and racism. Racism is a pronounced cultural trait of the white working class who make up Trump’s political base. BROOKS, *supra* note 5, at 92 (discussing sources that posit that “working-class whites draw racial and class boundaries between themselves and groups to whom they feel superior,” which is expressed through a negative cultural tradition of racism). *See id.* at 192, n. 63 (sources indicating that nearly 20% of Trump supporters believe that freeing blacks from slavery was a bad idea). With Trump, they no longer feel inhibited; they feel emboldened. For a comparative cultural analysis of the American working- and middle-classes. *See generally id.* at 70–96.

9. This is the “tort model,” which is, though discussed in this article, *see infra* text accompanying notes 16–23, is extensively discussed in my book, ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS ch. 4 (3d ed. 2019).

10. This is the “atonement model,” which, though discussed in this article, *see infra* text accompanying notes 23–38, is extensively discussed in *id.* at chs. 5 & 6.

Racial Reconciliation Through Black Reparations

went nowhere fast. Since then, each generation of African Americans has made requests for redress.¹¹

The Holocaust plays an important role in the history of black reparations. Indeed, my conceptualization of the best model for black reparations—the atonement model¹²—is heavily shaped by the Federal Republic of Germany’s response to the Holocaust after World War II. German political leaders took, as the primary lesson from the Holocaust, the understanding that atrocities can occur (even in a government run by highly educated and sophisticated individuals) when a nation’s leadership fails to identify with a segment of its society. Even though the Holocaust predated his administration, Konrad Adenauer, the first chancellor of the Federal Republic of Germany, stated: “In our name, unspeakable crimes have been committed and demand compensation and restitution, both moral and material, for the persons and properties of the Jews who have been so seriously harmed.”¹³ Adenauer was speaking for the German government, its people, and himself personally.

Although Adenauer may not have held this moral position at the beginning of his new government¹⁴—wisdom is so rare that it ought not be rejected merely because it comes late—his response to the Holocaust is quite instructive. It teaches that the fundamental purpose for redressing atrocities is to accentuate a common humanity between perpetrator and victims. Thus, properly understood, *a reparation is the revelation and realization of this common humanity.*

This same kind of understanding helped to persuade Congress to commission a 1980 study of the internment of Japanese Americans during World War II. The commission’s report resulted in a redress program that, not unlike Germany’s program, extended a governmen-

11. For more detailed discussion, *see, id.* at ch. 1.

12. *See infra* text accompanying notes 23-38.

13. *See* BROOKS, *supra* note 1, at 61. This quotation is taken from a report by the United States Department of Justice Foreign Claims Settlement Commission, titled, “German Compensation for National Socialist Crimes,” published in *WHEN SORRY ISN’T ENOUGH*, *supra* note 1, at 61.

14. Adenauer’s statement was, in fact, made a few years after the founding of the Federal Republic in 1949. More significantly, his government initially sought to dismantle the Allied program of purges and reeducation of former Nazis and Nazi supporters, including judges, political officials, and teachers, as well as soldiers. Those implicated in Nazi crimes could lose their government jobs or their property as well as face imprisonment. Adenauer thought it more politically expedient to forgive and move on, rather than pursue denazification. Whether he came around willingly to his subsequent position of moral accountability is a matter of some debate among historians. For an engaging discussion, *see, e.g.*, Norbert Frei, *Adenauer’s Germany and the Nazi Past: The Politics of Amnesty and Integration*, (Joel Golb, trans., (New York: Columbia University Press, 2002)(1996).

tal apology and redress payments in various forms to those who were relocated and imprisoned in camps. Republicans and Democrats alike supported the authorizing legislation known as the Civil Liberties Act of 1988, which President Reagan signed it into law.¹⁵ The next year, Rep. John Conyers (D-Mich.) introduced the first H.R. 40, calling for the creation of a commission to study black reparations. He reintroduced it every year thereafter until 2017, but the bill never made it out of committee. The current H.R. 40 is sponsored by Rep. Sheila Jackson Lee (D-Texas), and the companion bill S.1083 is sponsored in the Senate Sen. Cory Booker (D-N.J.).¹⁶

TORT MODEL V. ATONEMENT MODEL

Since the initial introduction of H.R. 40 in 1989, scholars have fashioned two competing redress models. The first is the “settlement model,” also called the “tort model.”¹⁷ It is backward-looking and victim-focused. Its reparative scheme is designed to financially compensate victims for their demonstrable loss (most especially stolen labor), and, to sometimes deliver punitive justice. The government or even a private beneficiary of slavery writes a check for ‘x’ number of dollars to every enslaved descendant. Supporters believe that wrongs as mortal as slavery and Jim Crow should not go unpunished, and that the victims should not go without individual relief.¹⁸

Litigation is a major vehicle for the tort model.¹⁹ Yet, litigation is a nonstarter because of procedural hurdles such as the statute of limitations, standing, and the lack of subject matter jurisdiction.²⁰ Though I am not a proponent of the tort model, I have criticized the existing law on the ground that:

If the slave descendants’ claims are morally compelling, then they must be cognizable under U.S. law. Otherwise, the extant law stands as the ‘present embodiment’ of America’s worst atrocity and the corrupt laws that made it possible. This is a credibility check no less important than the Supreme Court’s landmark 1954 school desegregation case of *Brown v. Board of Education*.²¹

15. See BROOKS, *supra* note 1, at Part 4.

16. See H.R. 40.

17. See BROOKS, *supra* note 9, at ch. 4.

18. *Id.*

19. *Id.*

20. *Id.* at 138.

21. *Id.* at 137-38.

Racial Reconciliation Through Black Reparations

Notwithstanding my own argument, litigation under the tort model is deficient in that it is essentially a legal claim, not a moral claim, in which the quotidian language of tort litigation—including the calculation of individual damages for millions of people—takes center stage. This approach, in my view, exaggerates the complexity and contentiousness of what ought to be a mutual movement toward racial reconciliation.²²

Critically important, there is no apology or admission of guilt by the perpetrator under the tort model whether pursued through litigation or legislation. There is no personal accountability; there is only a settlement. The perpetrator is thereby allowed to declare victory and go home. White neoconservative Charles Krauthammer would gladly have the government write that check as a means of closing the books on the American race problem.²³ In my view, this is a kind of justice on the cheap. It does less well by the victims. I am part of an international group of scholars and activists who meet to study reparations. One of the members, a South African attorney, told me that victims of apartheid who received cash reparations were poor again within a year of receiving them.

The atonement model, by contrast, is forward-looking and perpetrator-focused. Redress is designed to move our country toward racial reconciliation. It offers the perpetrator an opportunity to reclaim its moral character by initiating conditions that help repair its broken relationship with the victims. This model of redress imbibes a post-Holocaust vision of heightened morality, egalitarianism, identity, and restorative justice. Most importantly, the perpetrator, not unlike Konrad Adenauer,²⁴ comes to recognize and identify with the victims' humanity.

Under the atonement model, redress comes in two stages. First and foremost, the perpetrator issues an apology and tenders some form of reparations to make the apology believable. Apology is an acknowledgment of guilt rather than a punishment for guilt. When the perpetrator of an atrocity apologizes, it confesses the deed, admits the deed was an injustice, repents, asks for forgiveness.²⁵ The victims

22. For a more detailed criticism of the tort model, *see id.* at 138-40.

23. *See* Charles Krauthammer, *Reparations for Black Americans*, *TIME* Dec. 31, 1990, at 4.

24. *See supra* text accompanying note 13.

25. BROOKS, *supra* note 9, at 144. In 2009, Congress passed a concurrent resolution apologizing for slavery and Jim Crow. The resolution: “[a]cknowledges the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow laws. Apologizes to African-Americans on behalf of the people of the United States for the wrongs committed against them and their

then calculate the sincerity of the apology by the weight of the reparations. Meager reparations diminish the sincerity of the apology. Hence, more than the victims' loss—for no reparation can fully compensate the victims of an atrocity—reparations give substance to the perpetrator's apology.

Reparations can be paid at the individual level (“compensatory reparations”) in the form of direct payments to the victims or in-kind outlays (e.g., family recognition) or at the community level (“rehabilitative reparations”) in the form of conditional cash payments to the victims (e.g., scholarships or trust funds) or in-kind expenditures (e.g., commemorations or museums).²⁶ Compensatory cash reparations can be justified on the basis that enslaved descendants as the current victims of slavery ought to be allowed to exercise agency, including blowing their reparative funds gambling in Las Vegas. After all, it is their money. The legacy of slavery gives the victims the right to do whatever they want with reparative money. We do not place constraints on white control over their money. To do so for slave descendants is a form of racism. I beg to differ.

Reparative funds are responsive not to an individual injury but to an institutional injury—slavery. This atrocity unfolded at the group level; it was directed toward blacks as a group, not to blacks individually. Institutional wrongs call for institutional remedies.²⁷ It would be different if reparations had been provided by slaveholders to their former slaves *in personam* at the end of the Civil War. Compensatory cash reparations would seem more appropriate under such circumstances. But in dealing with the descendants of the enslaved, I believe rehabilitative reparations should be the basic form of reparations.

Thus, I support conditional cash payments to the victims—rehabilitative over compensatory cash reparations—mainly in the form of an atonement trust fund.²⁸ The payments should ultimately attempt

ancestors who suffered under slavery and Jim Crow laws. Expresses Congress's commitment to the principle that all people are created equal and endowed with inalienable rights to life, liberty, and the pursuit of happiness, and calls on all people of the United States to work toward eliminating racial prejudices, injustices, and discrimination from our society. Declares that nothing in this resolution authorizes, supports, or serves as a settlement of any claim against the United States.” S. Con. Res. 26, 111th Cong. (2009) (A concurrent resolution apologizing for the enslavement and racial segregation of African Americans). This apology fails under my conceptualization of a genuine apology. In addition, the apology lacks believability as it explicitly is not solidified by a redemptive act—a reparation.

26. BROOKS, *supra* note 9, at 155-56.

27. *Id.* at 157.

28. *Id.* at 160-62.

Racial Reconciliation Through Black Reparations

to create wealth accumulation rather than provide supplemental income. In other words, reparations should not be just another form of welfare.²⁹ They should, instead, target wealth disparity. “Today, Black Americans constitute approximately 13 to 14 percent of the nation’s population, yet possess less than 3 percent of the nation’s wealth.”³⁰ Also, the median white household owns 86 times the assets of the median black household.³¹ Minority school districts annually receive \$23 billion less in K-12 funding than similarly sized white school districts.³² Although income disparity remains a serious problem—“the median black household earn[s] just 59 cents for every dollar of income the median white household earned”³³—wealth disparity is the larger problem. Thus, rather than providing a yearly income stream of say \$120,000 of supplemental income for a family of four (\$30,000/person/year) to allow them to do whatever they wish with the additional disposable income, that money should be sunk into property (home ownership) or investments (property or financial) or education (K-12 or college grants) on behalf of individual families. No school financing reform will ever equalize school funding as rich parents will always be able to pour their own private money into their children’s public schools. Rehabilitative cash reparations can help equalize educational resources, such as by paying for homework su-

29. See WHEN SORRY ISN’T ENOUGH, *supra* note 1, at 89 (The Comfort Women, who were victimized by the Japanese government during World War II, rejected the Japanese government’s tepid attempt to redress this past atrocity because they viewed it as a welfare system.).

30. *Commission to Study and Develop Reparations Proposals for African-Americans Act: Hearing on H.R. 40 Before the Subcomm. on Constitution, Civil Rights, and Civil Liberties of the H. Comm on the Judiciary*, 116th Cong. (2019) (statement of William Darity Jr., Professor, Duke University), <https://sanford.duke.edu/sites/sanford.duke.edu/files/images/Dr.%20Darity%20Reparations%20Remarks%20for%20Congress.pdf>. Professor Darity, it is worth noting, is the Samuel DuBois Cook Professor of Public Policy, African and African American Studies, and Economics and the Director of the Samuel DuBois Cook Center on Social Equity, at Duke University.

31. Brian Thompson, *The Racial Wealth Gap: Addressing America’s Most Pressing Epidemic*, FORBES (Feb. 18, 2018), <https://www.forbes.com/sites/brianthompson1/2018/02/18/the-racial-wealth-gap-addressing-americas-most-pressing-epidemic/#1cdf43bf7a48> (last visited Dec. 12, 2019).

32. Lauren Camera, *White Students Get More K-12 Funding Than Students of Color*, U.S. NEWS & WORLD REPORT (Feb. 26, 2019), <https://www.usnews.com/news/education-news/articles/2019-02-26/white-students-get-more-k-12-funding-than-students-of-color-report> (last visited Dec. 12, 2019).

33. Valerie Wilson and Jhacova Williams, *Racial and ethnic income gaps persist amid uneven growth in household incomes*, ECONOMIC POLICY INSTITUTE (Sept. 11, 2019), <https://www.epi.org/blog/racial-and-ethnic-income-gaps-persist-amid-uneven-growth-in-household-incomes/> (last visited Dec. 12, 2019) (These are 2018 figures, which were the same for 2017.). The racial gap has actually widened since 1975. See ROY L. BROOKS, *RACIAL JUSTICE IN THE AGE OF OBAMA*, 140-41 (figs. 22-25) (2009).

pervision, coding classes and other afterschool enrichment programs which many wealthy school districts now provide to their students.³⁴

I would not want the government to determine the permissibility of expenditures for rehabilitative reparations, cash or in-kind. Otherwise, these expenditures could easily fall victim to partisan politics. Instead, I would want these reparative funds to be held in trust under the control of private citizens. As I have stated on another occasion:

A board of commissioners, consisting of reputable citizens selected by blacks, would oversee operation of the trust fund in their respective regions of the country. Commissioners and their staff would, for example, help fund recipients make the right choices in schools and business opportunities. All payments from the trust fund would be by electronic transfer. Recipients would never really see or handle the funds.³⁵

Conditional payments through an atonement trust fund avoid the problem of predatory inclusion enslaved descendants can experience with direct payments. Predatory inclusion is where unscrupulous vendors (e.g., insurance companies or investment schemers) or greedy relatives take advantage of unsophisticated recipients of reparative income. Trustees of an atonement trust will have a fiduciary relationship with the beneficiaries of the trust, the descendants of the enslaved.

In short, rehabilitative reparations, cash or in-kind, are designed to nurture the group's self-empowerment and community-building; in other words, close the racial wealth gap. Cash payments would include the strategic deployment of funds into public schools located in black communities along the lines previously discussed,³⁶ as well as

34. Should reparative funds be used for charter school vouchers? An important study by the UCLA Civil Rights Project found that “[s]egregation for blacks is the highest in the Northeast.” PRESS RELEASE, UCLA CIVIL RIGHTS PROJECT (CRP), UCLA REPORT FINDS CHANGING U.S. DEMOGRAPHICS TRANSFORM SCHOOL SEGREGATION LANDSCAPE 60 YEARS AFTER BROWN V BOARD OF EDUCATION (May 15, 2014), <https://civilrightsproject.ucla.edu/news/press-releases/2014-press-releases/ucla-report-finds-changing-u.s.-demographics-transform-school-segregation-landscape-60-years-after-brown-v-board-of-education> (last visited Dec. 17, 2019). If, as the research seems to suggest, charter schools drain limited tax-payer funds from public schools, reparative funds should not be used to support such schools. The money should, instead, be used to help turn around public schools which are the schools most black children attend. See Brian Washington, *How to prevent charter schools from draining away public school funding in your community*, NATIONAL EDUCATION ASSOCIATION (May 27, 2018), <https://educationvotes.nea.org/2018/05/27/how-to-prevent-charter-schools-from-draining-away-public-school-funding-in-your-community/> (last visited Dec. 17, 2019) (“It has been long recognized that the growth of charter schools creates costs for local school districts.”).

35. BROOKS, *supra* note 9, at 161.

36. See *supra* text accompanying note 34.

Racial Reconciliation Through Black Reparations

college scholarships and venture capital for black business established in black communities. In-kind payments would include state or local museums to educate the public, not just the descendants of the enslaved, about the history of racial oppression in our society and its lingering effects, and investments in hospitals and grocery stores that sell healthy food. Establishing relationships between community schools and large or small businesses throughout the region also fall within the scope of rehabilitative reparations. Rehabilitative reparations are limited only by the imagination.³⁷

Forgiveness is the second step under the atonement model. This is the victims' side of the equation. The process begins with the perpetrator's atonement. Once an appropriate apology and sufficient reparations are provided by the government, the question of forgiveness arrives on each victim's desk like a subpoena; it necessitates a response. Forgiveness is not, however, immediately forthcoming. Instead, it evolves over time as the perpetrator and victims negotiate and adjust the reparations. As I have stated on another occasion:

With the government's genuine apology for slavery and Jim Crow, with the construction of the museum of slavery, and with the creation of the atonement trust fund, slave descendants will have good reason to embrace America as a country that is worthy of their respect—a country that does not ignore its discriminatory past or the consequences that flow therefrom. Atonement should convince disaffected blacks that it is time to change their behaviors and attitudes toward America. After atonement, it will be difficult to justify the racial chip so many slave descendants wear on their shoulder, in some instances as a badge of honor. . . .

It would, however, be Pollyannaish to expect disaffected slave descendants to adopt, at least initially, the star-spangled view of America that is held by so many immigrants of color, such as the Somali refugee working as a police officer in an inner-city neighborhood who gushes: 'I go to work every day, put my life on the line—and it is a pleasure to do that, . . . because this country I owe a lot. I owe my life and my family's life. So the most precious thing I can offer to this country is not money, not time, but my life. That is my intent—to . . . be a good citizen. There is no place like the United States, when it comes to immigrants.' . . . Slave descendants are casualties of America's history of race relations; new immigrants of color are not. . . .

37. See BROOKS, *supra* note 9, at 156-163.

* * *

. . . T]he government's apology and reparations will give slave descendants a much greater investment in America than they now have. With a genuine sense of belonging to the American family, slave descendants should begin to see themselves not as limited by skin color as they once were, and even less limited by [their own] racial anger preatonement. The atonement trust fund will give them the financial and human capital needed to overcome many of the lingering effects of slavery and Jim Crow, including low-performing public schools and meager family resources to sustain a college education. If the trust fund does its job, slave descendants should have no felt need to soothe their despair in drugs and street crime or attempt to wield these pernicious elements as misguided forms of protests. In a postatonement America, slave descendants should feel secure enough in their investment as citizens to overlook everyday sources of racial friction—such as the sales clerk's dirty look or the carload of whites who yell racial slurs as they speed by. There should also be more of a willingness to submit to industrial discipline fully—playing by the rules of the workplace—as the primary reason to hold back—silent protest against a racially unjust America—will have faded.

None of this means slave descendants will be free from all racism in postatonement America. Atonement will not obviate the need for on-going civil rights reforms. Slave descendants will have to continue to use our civil rights laws to fight racial discrimination wherever it occurs. Atonement only means that slave descendants now have reason to begin to trust the government's commitment to racial justice.

* * *

[And], atonement—the government's demonstrated commitment to racial justice—will give slave descendants.³⁸

My hope is that atonement—apology and reparations—will give the descendants of the enslaved the external means and, subsequently, the internal resolve to overcome the lingering effects of our country's worst atrocity. I also hope that atonement and forgiveness will help the descendants of the enslaved to overcome that instinctive sense of hopelessness that can result from living under slavery's long shadow. This is a tall order, I know. But it is, in my view, the essence of racial reconciliation.

38. *Id.* at 202-06.

CONCLUSION

Reparative discourse deals with a rather specific type of wrongdoing—past atrocities that are the product of official state policy. The United States government has promulgated many such policies, including not only slavery and Jim Crow, but also the internment of Japanese Americans and the cultural genocide of American Indians.³⁹ Like all atrocities, these American atrocities necessarily involve collective rather than individual suffering. Each is an “exceptional act[] of human degradation.”⁴⁰ Reparative discourse focuses on *past* atrocities, meaning the events that gave rise to the mass suffering have ended. Because an atrocity is typically legal under domestic law or international law when it occurred—slavery was both⁴¹—the resolution of the redress issue is less a matter of legality than one of politics or morality. I believe the moral approach offered by the atonement model is better than the tort model’s legalistic approach. The former points us more clearly in the direction of what for me is the purpose of the entire redress enterprise—racial reconciliation.⁴²

39. See generally *WHEN SORRY ISN’T ENOUGH*, *supra* note 1.

40. BROOKS, *supra* note 9, at 142.

41. See *id.* at 22-25 (U.S. law) & 105-106 (international law).

42. I have not attempted to answer in this his article all the questions surrounding redress for slavery. For example, I have not attempted to determine the cost of rehabilitative reparations; i.e., what the total amount of reparations should be. This figure could be determined by a desired increase in the percentage of the national wealth owned by blacks, currently at 3 percent, see *supra* text accompanying note 30; or by multiplying the average racial earnings gap by the number of enslaved descendants each year the program is in existence, see *id.* at 162-63.

Republican, Rebellious Reparations

ERIC J. MILLER*

INTRODUCTION

Reparations is, at its core, a form of resistance to oppression. Resistance to oppression takes many forms: one of them is the activity of calling out wrongdoing.¹ Reparations is the activity of calling out one particular form of wrongdoing: the transgenerational subordination of some group²—in the case I am interested in, African Americans who are the victims of various forms of race-based subordination.

Reparations seeks redress for extraordinary historical acts of racial injustice that have a continuing impact upon the lives of African Americans today.³ Emblematic injustices include the institution of slavery and the various massacres of African Americans that swept the country, from the end of Reconstruction⁴ to the beginning of World War II. Perhaps currently the most famous of these massacres is the Tulsa Race Massacre of 1921 which destroyed the African American Greenwood district of Tulsa, Oklahoma.⁵ Since 2001, a raft of books, both fictional and non-fictional, have been published describing the Massacre.⁶ HBO's television series *The Watchmen*⁷ re-

* Professor and Leo J. O'Brien Fellow, LMU Loyola Law School.

1. See, MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS 187 (2009).

2. KATHERINE FRANKE, REPAIR: REDEEMING THE PROMISE OF ABOLITION (2019). Franke uses the term "intergenerational."

3. See, ROY L. BROOKS, ATONEMENT AND FORGIVENESS 174 (2004).

4. See, *United States v. Cruikshank*, 92 U.S. 542 (1876) (refusing to apply federal law to prosecute the victims of the Colfax Massacre of 1870).

5. See, ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION 88 (2002) (noting the Massacre destroyed thirty-five city blocks and 1,000 homes).

6. See, RANDY KREHBIEL & KARLOS K. HILL, TULSA 1921: REPORTING A MASSACRE (2019); ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION (2002); JAMES S. HIRSCH, RIOT AND REMEMBRANCE: THE TULSA RACE WAR AND ITS LEGACY (2003); TIM MADIGAN, THE BURNING: MASSACRE, DESTRUCTION, AND THE TULSA RACE RIOT OF 1921 (2001).

7. *Watchmen* (HBO, Oct. 20-Dec. 15, 2019).

cently included the Massacre as the central animating event of the series. The Tulsa Race Massacre inflicted transgenerational harm on its victims and their descendants and continues to do so.

The physical and political act of destroying a community like Greenwood is characteristic of American subordination of African Americans.⁸ The silencing of the victims and their descendants,⁹ and the “epistemic injustice”¹⁰ imposed by that silencing, is a core form of the American practice of political, social, and cultural oppression of African Americans. For many people, responding to the Massacre seems to difficult, disruptive, and expensive an undertaking to contemplate, and too far in the past to make a difference for contemporary social issues.¹¹ There is no place for reparations, critics suggest, because they are too massive, too marginal, too disruptive, and too late.¹²

Reparations resists oppression by refusing to “know its place.” The act of standing up to an oppressor—the victims pitting themselves against an oppressor by calling out wrongdoing¹³—is perhaps the definitive feature of reparations. Calling out wrongdoing is a rebellious and republican activity. Reparations is rebellious because of *who* asserts political power: the direct victims of oppression the powerless, the marginalized, and subordinated.¹⁴ These outsiders’ voices are often silenced by “respectable” political activity.¹⁵ This rebelliousness, and in particular its demand for empowerment and respect from the victims of subordination is also a core feature of the political the-

8. See, Ta-Nehesi, *The Case for Reparations*, THE ATLANTIC (June 2014).

9. See, Tulsa Race Riot, 74 OKLA. ST. ANN. §8000.1.4-5 (2014) (discussing “conspiracy of silence”).

10. See, MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING (2007).

11. See, Kimberly Jackson, *Mayor Says Reparations Would Divide the City, Focuses on Development*, KTUL.COM (Feb. 20, 2020); see also Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 95 (2005) (discussing the appellate opinion in the Tulsa lawsuit finding the issues too complex and the injury too long ago to remedy).

12. See, ALFRED L. BROPHY, REPARATIONS: PRO & CON 75-96 (2006).

13. See MICHELE M. DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS (2009) (discussing respect and resistance as calling out wrongdoing).

14. Adjoa A. Aiyetoro & Adrienne D. Davis, *Historic And Modern Social Movements For Reparations: The National Coalition Of Blacks For Reparations In America (N’COBRA) And Its Antecedents*, 16 TEXAS WESLYAN L. REV. 687, 723 (2010); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 362 (1987).

15. GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE 26-29 (1992) (describing ways in which the “regnant” idea of lawyering excludes forms of knowledge that does not sit easily within traditional understandings of legal expertise).

ory of civic republicanism.¹⁶ Civic republicanism insists that a person's standing in the community is a feature of her power to resist domination.¹⁷ Reparations, as standing up to oppression, is the act of rejecting race-based domination or subordination. Taken together, the rebellious, republican reparations is a "bottom-up" a victim-theoretic view that insists on civic empowerment as a feature of political equality.¹⁸

As we approach the centennial of the Tulsa Race Massacre, and the City of Tulsa engages in a variety of projects to commemorate that event,¹⁹ it is perhaps worth reflecting on almost a quarter-century of activity around reparations for the Massacre victims and descendants. In particular, given the current Mayor's recent refusal to apologize or discuss reparations,²⁰ we might consider the different routes towards reparations pursued by different groups among Tulsa's African American community. These strategies included a legislative push to create a commission to investigate the Massacre;²¹ the Commission's suggestion that the State and City apologize and pay reparations; and the subsequent litigation, brought on behalf of a group of survivors and their descendants, demanding reparations for the victims of the Massacre.

How does this rebellious, resistant strategy apply to these different strategies as part of a reparations movement? Legislation, litigation, and even apologies are not a necessary nor a sufficient feature of reparations. Nonetheless, focusing on the process of passing legislation, obtaining an apology, and engaging in litigation reveals reparations' rebelliousness through the manner in which it treats what I shall call the intrinsic and extrinsic goals of various moral and legal processes. Reparations need not accept mechanisms such as an apol-

16. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 71 (1997); see also QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998).

17. See, Pettit, *supra* note 16 at 85. Pettit suggests that "non-domination is the one and only yardstick by which to judge the social and political constitution of a community."

18. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. Rev. 323, 362 (1987).

19. See, Michael Scherer, *Mike Bloomberg, at Site of 1921 Tulsa Racial Massacre, Announces Plans to Aid African Americans*, THE WASH. POST (Jan. 19, 2020); Jackson, *supra* note 11.

20. Jackson, *supra* note 11.

21. See, 2001 OKLA. SESS. LAW SERV. CH. 315 (H.B. 1178) (WEST) (1921 Tulsa Race Riot Reconciliation Act of 2001).

ogy or litigation on their own terms, but instead treat apologies as moments of resistance and empowerment.²²

The role of litigation for reparations movements has been insightfully discussed by Adjoa Aiyetoro and Adrienne Davis, and so I shall instead focus on the role of apologies for reparations movements, as part of a process of seeking equal moral, political, and social standing for African Americans in the American community.²³ The intrinsic goal of an apology is expressing genuine remorse and contrition for some act of wrongdoing,²⁴ usually one's own.²⁵ Judged from the perspective of the activity or reparations, the intrinsic goal of an apology—expressing genuine contrition for wrongdoing—was only one out of a number of reasons for (in the Tulsa Massacre example) petitioning the State of Oklahoma to launch an investigation into the massacre. Instead, reparations proponents might choose to treat the apology process in an instrumental way, as one route through which to engage in further, rebellious action.

As a form of *reparations* activism, the goal of seeking an apology must be to empower the Massacre survivors and their descendants to stand up to the City of Tulsa and the State of Oklahoma. The apology process is a means of acting in a victim-centering way²⁶ to demand respect from the municipal and state wrongdoers for all that the victims and their descendants had suffered both during the Massacre and as a consequence of it. For the apology process to be successful as a form of reparations, it would have to empower the victims, rather than

22. See, Adjoa A. Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N'COBRA) and Its Antecedents*, 16 TEX. WESLEYAN L. REV. 687, 691 (2010).

23. The most prominent advocate for apologies as a necessary aspect of reparations is Professor Roy L. Brooks. See, BROOKS, ATONEMENT AND FORGIVENESS (2004); Roy L. Brooks, *Making the Case for Atonement in Post-Racial America*, 14 J. GENDER RACE & JUST 665 (2011); Roy L. Brooks, *Toward a Perpetrator-Focused Model of Slave Redress*, 6 AFR.-AM. L. & POL'Y REP. 49 (2004).

24. See, BROOKS, ATONEMENT AND FORGIVENESS note 23 (discussing that Brooks calls this "atonement").

25. For example, in House Bill 1178, the State of Oklahoma apologized for its role in perpetrating the Massacre. It is not clear that the apology was genuine; in part, the Reparations Coordinating Committee filed its lawsuit because the City of Tulsa and State of Oklahoma failed in significant ways to act upon its apology.

26. See, KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* 224-25 (2017) (discussing the importance and controversy surrounding this aspect of victimhood). The notion of victimhood is a contested one in the context of reparations (as elsewhere). See, Charles J. Ogletree, *Repairing the Past: New Efforts in the Reparations Debate*, 38 HARV. C.R.-C.L.L. REV. 279, 316 (2003) (discussing John McWhorter's claim that reparations robs African Americans of "individual initiative"). This victim-centered approach is the opposite of a "perpetrator-focused" approach. See, Brooks, *Perpetrator-Focused Model*, *supra* note 23 at 66.

the City of Tulsa and the State of Oklahoma, by giving the survivors and their descendants a measure of control over the process of redress.

The 125 living survivors of the Massacre who joined the lawsuit filed on their behalf in 2003 by the Reparations Coordinating Committee did not seem to feel particularly empowered by the State of Oklahoma's grudging apology.²⁷ Certainly, the political process creating a commission²⁸ to study the massacre, and the report of that commission, forwarded the cause of reparations by providing a new and comprehensive historical account of the massacre and making available many new documents and uncovering much new information. The ensuing apology, however, rang hollow without the City or the State fully committing itself to meaningful reparations.

Providing access to the courtroom, to try to enforce the commission's reparations recommendations, was another important way to empower the victims to assert their standing against the City and State. The lawsuit enabled the survivors and descendants to demand recognition as *legitimate* victims,²⁹ individuals who had been affirmatively denied legal redress in 1921 and who deserved the law's solicitude, as well as placing them on an equal footing with the City and State that had oppressed them for over 80 years. Even if the plaintiffs lost the case—if they failed to succeed under the intrinsic goals of litigation—they could succeed *instrumentally*, as part of a reparations strategy to the extent that the City, State, and the courts treated the case as non-frivolous, as well as by using the complaint and the courts as a forum to tell and publicize the injuries inflicted upon them.

In what follows, I shall explore the manner in which the Tulsa Massacre process exemplifies the role of apology as a strategic opportunity to engage in rebellious resistance. In Section 1, I give a brief history of, first, the Tulsa Massacre itself, and then the nature of the apology as part of a broader reparations package recommended by the commission. In Section 2, I flesh out the notions of rebellious lawyering and republican resistance as aspects of reparations movements. In this section, I shall contrast the bottom-up aspects of rebel-

27. 74 OKL. ST. ANN. §8000.1.6 (“freely acknowledge its moral responsibility on behalf of the state of Oklahoma and its citizens that no race of citizens in Oklahoma has the right or power to subordinate another race today or ever again.”).

28. The Tulsa Commission to Study the Riot of 1921.

29. See, Aiyetoro & Davis, *supra* note 14 at 723 (discussing the role of litigation in legitimizing claims to reparations).

lious lawyering and republican resistance with more top-down approaches to lawyering and political redress. Finally, in Section 3, I use the concepts of rebellion and resistance to demonstrate that litigation and apology are useful, if at all, as a means of empowering those on the bottom to engage in the activity of demanding respect for themselves. I shall conclude by suggesting some reasons to think that both litigation and apology are easily coopted by top-down demands for respectability, demands that often undermine the core activity of resisting and rebelling characteristic of reparations.

TULSA RACE MASSACRE AND LITIGATION

The Tulsa Race Massacre has become a focal point for discussion of reparations. Less obviously, the various responses to reparations for the Massacre, which included grassroots, legislative, and litigative action, enacted in miniature some of the concerns raised by the reparations movement more generally. I shall focus on the legislative acknowledgment of the Massacre, and response of an overwhelming number of the then-living survivors to that acknowledgment. Rather than accepting the apology and attempts at atonement, the survivors filed a lawsuit. To understand why the apology was insufficient, and why the lawsuit was necessary, we must step outside the false binary of apology or litigation to recognize that both are justified, if at all, in service of the larger goals of reparations: transformative justice that empowers the victims of intergenerational wrongs.³⁰

History of the Tulsa Race Massacre

A brief history of the massacre will help explain the significance of the Tulsa Massacre legislation, apology, and litigation. By the late 1910s, African Americans had created a mostly self-governing community in the Greenwood District of Tulsa, Oklahoma. Thanks to their efforts, Greenwood had become, a thriving African American residential and business district in the City of Tulsa, popularly known as the “Black Wall Street.”³¹

In the decade preceding the Massacre, the State of Oklahoma encouraged and empowered white supremacy.³² Twenty-three African

30. For a concrete proposal for transformative justice, see, Deleso A. Alford, *HeLa Cells and Unjust Enrichment in the Human Body*, 21 ANNALS HEALTH L. 223, 233–35 (2012).

31. *Id.*

32. ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND, THE TULSA RIOT OF 1921: RACE, RECONCILIATION, AND REPARATION 9-10 (2002).

Americans were lynched in Oklahoma between 1911 and 1921.³³ The Tulsa Massacre was simply the most extreme expression of this mob mentality. On the evening of May 31, 1921, the police arrested Dick Rowland, an African American man, who had been falsely accused of attempting to assault a white woman.³⁴ A mob of drunk white Tulsans assembled outside the Tulsa jail intending to lynch him. Some African American men, including World War I veterans, came to the jail to prevent the lynching. A scuffle between the two groups ensued, shots were fired and “all hell broke loose.”³⁵ The Mayor, acting under color of law, called out local units of the State National Guard and, with the assistance of the police chief of Tulsa, deputized and armed some of the white citizens of Tulsa, many of whom were part of the drunken mob.

Hundreds of white citizens, aided by the State National Guard and the City of Tulsa Police Force, burned down 35 city blocks in the Greenwood district of Tulsa.³⁶ The Oklahoma State Legislature, adopting the findings of the Riot Commission, acknowledged that:

The staggering cost of the Tulsa Race Riot included the deaths of an estimated 100 to 300 persons, the vast majority of whom were African Americans, the destruction of 1,256 homes, virtually every school, church and business, and a library and hospital in the Greenwood area, and the loss of personal property caused by rampant looting by white rioters. The Tulsa Race Riot Commission estimates that the property costs in the Greenwood district was approximately \$2 million in 1921 dollars or \$16,752,600 in 1999 dollars. Nevertheless, there were no convictions for any of the violent acts against African Americans or any insurance payments to African American property owners who lost their homes or personal property as a result of the Tulsa Race Riot.³⁷

Overnight, the state-sponsored mob of white rioters, assisted by the Tulsa Police Department and the Oklahoma State National Guard, shot, stabbed, burned, and looted five thousand African Americans out of their homes. Three thousand terrorized people fled the city. The rest were rounded up and held against their will in camps staffed by the National Guard. The City of Tulsa chamber of

33. See 74 OKL. ST. ANN. §8000.1.1 (West 2002).

34. Brophy, *supra* note 32.

35. Alfred Brophy, *Assessing State and City Culpability: The Riot and the Law*, in, 153, 156 (2001).

36. Brophy, *supra* note 32.

37. 74 OKL. ST. ANN. §8000.1.3.

commerce, along with the National Guard and the Mayor devised a scheme to tag and release the captive African American civilians, but only if a white employer “vouched” for them.³⁸ The Red Cross mobilized to provide tents for the thousands who remained.³⁹ After the Massacre, the City of Tulsa refused to provide economic compensation or to rebuild Greenwood.

The State and City labored to suppress public discussion of the Massacre. The State of Oklahoma omitted the Massacre from official accounts of Oklahoma history. No Oklahoma school textbook recorded the Massacre.⁴⁰

This “conspiracy of silence” served the dominant interests of the state during that period which found the riot a “public relations nightmare” that was “best to be forgotten, something to be *swept well beneath history’s carpet*” for a community which attempted to attract new businesses and settlers⁴¹ (emphasis added).

The State campaign of race-based oppression inflicted intense psychological trauma on the victims. Even after eighty years, “[m]any of the [survivors] still believe[d] that the state and municipal government will punish them for discussing openly what happened during the Riot.”⁴²

Apologies

In the 1990s, State Representative Don Ross advocated for the formation of a Commission to study the Tulsa Massacre as a means of raising awareness of the Massacre, and moving discussion towards reparations for the survivors and their descendants, including providing an apology. In 1996, on the 75th Anniversary of the Massacre (and one year before the State legislature agreed to form a Commission),

38. SCOTT ELLSWORTH, *DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921*, 72 (1985) (“In addition to the internment camps, black Tulsans faced other restrictions. While on the streets, they were required to wear or carry a green card with the words ‘Police Protection’ printed on one side, and various other data recorded on the other, including the person’s name, address, and employer. It has been reported that ‘any black found on the street without a green card properly filled out was arrested and sent back to the detention camp.’ Black Tulsans had to carry these cards, which had been paid for by the City Commission and the Chamber of Commerce, until July 7.”).

39. Brophy, *supra* note 32.

40. John Hope Franklin & Scott Ellsworth, *History Knows No Fences* published with Commission Report, 21, 26 (2001).

41. *Id.* at §8000.1.4.

42. Complaint, *Alexander v. Governor of the State of Oklahoma*, No. 03-C-133-E, 2004 U.S. Dist. Lexis 5131, (N.D. Okl., Feb. 4, 2003).

Republican, Rebellious Reparations

Governor Frank Keating apologized to the family of J.B. Stradford,⁴³ a hotelier wrongfully indicted by a grand jury.⁴⁴ In the same year, the Mayor of the City of Tulsa, Susan Savage, also “apologized [for the Massacre] . . . saying that ‘the whole community regretted the incident.’”⁴⁵

These apologies did not diminish Representative Ross’ efforts to constitute a Commission. In 1997, the State of Oklahoma commissioned a study to determine liability for the Massacre and make recommendations for restitution for the Massacre’s victims.⁴⁶ The decision to form a commission was controversial and regarded as divisive. For example, “Bob Blackburn, deputy executive director of the Oklahoma Historical Society. . . said to consider if reparations would ‘help the healing process, provide any positive step. It might. Or would it create greater problems?’”⁴⁷

The resulting body, The Oklahoma Commission to Study the Tulsa Race Riot of 1921, published a report which contained a series of essays detailing the nature of the Massacre and recommending various forms of redress, including an apology and that reparations be paid to the survivors and descendants. These findings were endorsed by the Oklahoma State Legislature.⁴⁸

The Commission’s research produced much previously unavailable material. When the state refused to make good on those recommendations, the Reparations Coordinating Committee filed a lawsuit, *Alexander v. Governor of Oklahoma*, on behalf of 125 then-living survivors of the massacre, in an attempt to force the City of Tulsa and the State of Oklahoma to follow through on the Commission’s recommendations to compensate the still-living victims and the other massacre victims’ descendants.

In her Epilogue to the Riot Commission’s Report, Oklahoma State Senator Maxine Horner announced that “[w]hat is owed this community 80 years later is a repairing—education and economic in-

43. Rik Espinosa, *Apology Alone Just “Hot Air,”* TULSA WORLD (June 22, 1997), https://www.tulsaworld.com/archive/apology-alone-just-hot-air/article_815de27a-fb8b-5795-9150-a91789698bfb.html.

44. Amy Latham, *Righting a Wrong, 75 Years Later,* TULSA WORLD (Oct. 19, 1996) (“[a] white grand jury later charged Stradford and other black men with inciting a riot, and he fled Tulsa to Chicago to avoid prosecution.”).

45. Espinosa, *supra* note 43.

46. OKLA. STAT. ANN., §8000.1.5.

47. Jean Pagel, *Can Victims Be Repaid,* TULSA WORLD (April 12, 1998), https://www.tulsaworld.com/archive/can-victims-be-repaid/article_39bad884-db8b-5251-bc11-6eb5e8a5ce39.html.

48. *See* OKLA. STAT. ANN., §8000.1.

centives and something more than symbolic gestures or an official report as an apology extended to the survivors.”⁴⁹ She seems to have thought that the State should apologize, but that an apology without action would not be enough. Accordingly, the political activity taken to create The Oklahoma Commission to Study the Tulsa Race Riot of 1921, the work of the Commission, and the legislation endorsed by the Commission and enacted by the State of Oklahoma are part of the work of reparations, but not all of it.

In 2001, the State of Oklahoma enacted Oklahoma Statute title 74 § 8000.1.6, which included the following statement, which is worth quoting at length:

The 48th Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 concurs with the conclusion of The 1921 Tulsa Race Riot Commission that the reason for responding in the manner provided by this act is not primarily based on the present strictly legal culpability of the State of Oklahoma or its citizens. Instead, this response recognizes that there were moral responsibilities at the time of the riot which were ignored and has been ignored ever since rather than confront the realities of an Oklahoma history of race relations that allowed one race to “put down” another race. Therefore, it is the intention of the Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 to freely acknowledge its moral responsibility on behalf of the state of Oklahoma and its citizens that no race of citizens in Oklahoma has the right or power to subordinate another race today or ever again.⁵⁰

The Legislature appears to have tried to thread the needle between, on the one hand, apologizing and taking *moral* responsibility for the Massacre, and on the other hand, accepting legal liability. Furthermore, the State of Oklahoma, through its legislature, repeatedly asserted that its goal was racial reconciliation. The Oklahoma State legislature expressly styled the Act creating the commission the “1921 Tulsa Race Riot Reconciliation Act Of 2001,”⁵¹ and repeatedly emphasized that the purpose of the study, and the institutions created in response to the study’s recommendations, were for the purpose of ra-

49. Maxine Horner, *Maxine Horner (Epilogue)*, NORTH TULSA, <https://www.northtulsa.org/index.php/images-of-1921/maxine-horner-epilogue>.

50. OKLA. STAT. ANN., §8000.1.6.

51. *Id.* §8000.1 (codifying bill no. 1178 and making legislative findings); *id.* §8201 (discussing the Race Riot Greenwood Memorial); *id.* §8205 (certifying survivors of the Riot); *id.* §§8221-8226 (discussing the Greenwood Area Redevelopment Authority); and OKLA. STAT. ANN., §§2621-2626 (establishing the Tulsa Reconciliation Education and Scholarship Program).

cial reconciliation. In addition, the Legislature, on behalf of the State and citizens of Oklahoma, recognizes and “freely acknowledge[s] its *moral* responsibility” for the Massacre and for the racial subordination that ensued.

The Legislature did not, however, stop at a verbal acknowledgment of its moral responsibility for the Massacre. Whilst Governor Keating continued to deny that the state was involved in the Massacre—a claim belied by the National Guard After Action Reports—nonetheless, the State proposed some measures to address its failure to protect and restore the Greenwood community during and after the Massacre; to address the “conspiracy of silence” perpetrated by the State in the wake of the Massacre; and to promote racial reconciliation in the City of Tulsa. The 1921 Tulsa Race Riot Reconciliation Act of 2001 created both the Greenwood Area Redevelopment Authority (“GARA”) and the Tulsa Reconciliation Education and Scholarship Program (“TRESP”).⁵²

GARA is a State agency with a twenty-member Board of Trustees,⁵³ and was supposed to provide political and social redress to the current residents of the Greenwood District by returning business to recreate the Black Wall Street in Greenwood. Among its functions are “to promote the investment, reinvestment, development and revitalization of qualified metropolitan areas.”⁵⁴ TRESP is “a scholarship fund available to students affected by the riot.”⁵⁵ The educational remedy was primarily directed at indigent students. The fund applies to any “applicant [who] resides in a census block area within the Tulsa School District where thirty percent (30%) or more of the residents are at or below the poverty level established by the United States Bureau of the Census.”⁵⁶ Individuals related to Riot victims must still demonstrate that they are indigent to qualify. In fact, TRESP simply permits (it does not require)⁵⁷ the administrators of the State’s indigent scholarship fund to:

consider as a factor, when determining the order of preference of applicants, whether an applicant is a direct lineal descendant of a

52. OKLA. STAT. ANN., §§8221-26 (2001); *id.* §§2621-26.

53. *Id.* §8223.

54. *Id.* (In addition, the statute includes source of funding, provides for expenditures from the Fund, authorizes the Authority to hire an Executive Director and staff.)

55. Tulsa Race Riot: A Report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921, ii (Feb. 28, 2001) <https://www.okhistory.org/research/forms/freport.pdf/>.

56. OKLA. STAT. ANN. tit. 74, §2623(B)(3) (2001).

57. *See id.* §2623.

person who resided in the Greenwood Area in the City of Tulsa between April 30, 1921, and June 1, 1921.⁵⁸

Finally, the legislature created 1921 Tulsa Race Riot Memorial of Reconciliation Design Committee (The Greenwood Reconciliation Memorial Committee) to generate a memorial to the Massacre. In May 2001, then-Oklahoma Governor Keating signed into law a bill directing \$750,000 to a memorial of the riot to purchase of 2.9 acres of land on North Elgin Avenue for a Tulsa Race Riot memorial museum.⁵⁹ The amount was subsequently reduced by budget cuts.⁶⁰ As of 2004, state legislation authorized up to \$5 million for a riot memorial, but little to none of the money appears to have been spent.⁶¹ “The state legislature established committees for a memorial museum, as well as a scholarship and a community development fund for North Tulsa But little money was appropriated to maintain those entities.”⁶²

Each of these initiatives was broadly designed to bring a measure of healing in the wake of the Commission’s report. Nonetheless, none of these entities directly benefitted the Massacre survivors, at least 150 of whom were still living in 2001, nor were the survivors or their representatives’ participants in the decision-making process of either body.

The Survivors Underwhelmed

Despite the legislative initiative creating the Commission, and the State legislature’s moral, though not legally binding, apology, and setting up agencies designed to provide social, economic, and educational relief to the descendants of the Massacre survivors, the survivors and their families remained underwhelmed by the State’s response. Some survivors and descendants, along with supporters, formed Tulsa Reparations Coalition, a group seeking reparations for the Massacre, and

58. *Id.* §2623(C).

59. (Tulsa World 2/21/03).

60. AP, 5/21/02.

61. Sulzberger, *infra* note 66 (“[c]ivic leaders built monuments to acknowledge the riot, including a new Reconciliation Park, but in the wake of failed legislative and legal attempts, no payments were ever delivered for what was lost.”).

62. Liz Farmer, *A Racial Reawakening: Tulsa is Struggling to Make Amends for a Massacre it Ignored for Nearly a Century*, GOVERNING (Nov. 2018), <https://www.governing.com/topics/public-justice-safety/gov-tulsa-black-wall-street.html>.

included at least one Commissioner, Eddie Faye Gates, among its membership.⁶³

The Coalition expressed its dissatisfaction with the State's apology and the City's lack of response to the Commission's report.⁶⁴ Coalition President, Mark Stodghill, articulated that discontent during a 2002 press conference: "The state is interested in giving money only to a memorial. The city is silent."⁶⁵ Don Ross, the State Representative who was instrumental in creating the Riot Commission "explained, there is 'no money in apologies.'"⁶⁶

As part of their fight for reparations, the Coalition, along with other survivors and descendants considered litigation as the next step. The year after the Commission published its report, and the State accepted moral responsibility, Charles J. Ogletree Jr., a professor at Harvard Law School, visited the University of Tulsa School of Law to deliver their annual Buck Colbert Franklin Memorial Civil Rights Lecture.⁶⁷ Professor Ogletree was the co-chair, along with Adjoa Aiyetoro, of the Reparations Coordinating Committee, a recently-created organization formed to engage in reparations litigation. Ogletree had been working, along with other members of the Committee, to develop a reparations litigation strategy.⁶⁸ At the lecture, Mark Stodghill and another Tulsa Reparations Coalition member, Mrs. Eddie Faye Gates,⁶⁹ met Professor Ogletree and introduced him to a group of survivors, who asked him to consider representing them.⁷⁰ He accepted, and put together a team of lawyers to draft a complaint.⁷¹

63. See Adrian Brune, *Tulsa's Shame: Race Riot Victims Still Wait for Promised Reparations*, THE NATION (Feb. 28, 2002), <https://www.thenation.com/article/archive/tulsas-shame/>.

64. *Id.*

65. *Id.*; Randy Krehbiel, *Suit Filed For Riot Survivors*, TULSA WORLD (Feb. 25, 2003), <https://www.tulsaworld.com>.

66. A. G. Sulzberger, *As Survivors Dwindle, Tulsa Confronts Its Past*, THE NEW YORK TIMES (Jun. 19, 2011), <https://www.nytimes.com/2011/06/20/us/20tulsa.html>.

67. Charles J. . WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 57 (Charles J. Ogletree Jr. & Austin Sarat, eds., 2009).

68. See Charles J. Ogletree, Jr., *From Brown to Tulsa: Defining Our Own Future*, 47 HOW. L.J. 499, 572 (2004) ("[i] had asked Eric J. Miller, a former student of mine, and at that time the Charles Hamilton Houston Fellow at Harvard Law School, to prepare a memorandum outlining potential strategies for reparations litigation.").

69. *Id.* at 571.

70. *Id.* at 571–72.

71. *Id.* at 573 ("[e]ric Miller, now a professor at [LMU Loyola Law School], was one of my research fellows during the commencement of the litigation, and before that, a Charles Hamilton Houston Fellow at Harvard Law School. He was instrumental in drafting the complaint, as was Suzette Malveaux, now a professor at [University of Colorado Law School]"); see also Alfred Brophy, *Charles Ogletree and Tulsa Riot Victims*, 22 HARV. BLACK LETTER L.J., 145, 146 (2006)

The Lawsuit

Ordinarily, a civil rights law suit alleges a violation of the Equal Protection or Due Process Clauses of the Fourteenth Amendment. The plaintiff then brings suit under Title 42, Section 1983 of the United States Code; which provides a means for holding state actors liable for constitutional torts. Such a lawsuit requires that there be some living victim harmed by an identifiable perpetrator who directly caused the harm, and that compensation be available in a determinate amount. In addition, the statute of limitations in Oklahoma provided two years in which to file suit.

Typically, reparations claims lack these factors. In suing on behalf of formerly enslaved people, for example, all formerly enslaved persons have been dead for at least a generation; no Americans living today have directly injured African Americans by enslaving them; descendants of slaves cannot often show harms directly attributable to contemporary individuals; and it is difficult to determine who should get what and how much.⁷² However, the Tulsa litigation fit well in traditional civil rights complaint, thanks to the Commission Report.

From the outset of the litigation, it was clear that the process of litigating was as important to the survivors as the result. Shortly after Ogletree's Buck Franklin lecture, he returned with a group of Committee lawyers, including Johnnie Cochran, Jr., at that time probably the most famous lawyer in the United States, to visit the survivors and descendants. The fact that they were to be represented by Cochran clearly made a major impact on the assembled group of Massacre survivors, who ranged in age from about 82 to 102 years of age.

The survivors outlook should not, perhaps, surprise us. Professor Ogletree had written, about a decade before the Tulsa litigation, how his approach to legal representation was driven by empathy, by putting the client first in a quite specific way. Even when representing criminal defendants, Ogletree:

("[t]he complaint, largely the brainchild of Ogletree and Eric Miller, was an important product of critical race studies."). The other major contributors to the complaint, along with Miller and Malveaux, were historian Scott Ellsworth. See Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13, 18 n.25 (2004) ([e]lsewhere Ogletree identified "Eric J. Miller, Michele A. Roberts, Adjoa A. Aiyetoro, Suzette M. Malveaux, Johnnie Cochran, Denis C. Sweet III, and several local Oklahoma attorneys, including Leslie Mansfield and James O. Goodwin [as] . . . the individuals who assisted me in drafting the complaint.").

72. See Eric J. Miller, *Representing the Race: Standing to Sue in Reparations Lawsuits*, 20 HARV. BLACK LETTER L.J. 91 (2004).

Republican, Rebellious Reparations

viewed [each defendant] as a victim as well. However, my sense of his victimization differed from traditional justifications for criminal defense practice in that it was not based on generalizations about criminals or pity for him. Instead, my empathy was based on my ability to relate to him as a person and to develop a friendship with him.⁷³

On this view of client representation, the lawyer-client relationship creates a dynamic independent of the outcome of the case. For Ogletree, the lawyer is not a friend within the confines of the law;⁷⁴ instead, the lawyer is a true friend, with a relationship independent of and outlasting the case itself, whatever the result of that case may be.⁷⁵ That law-independent relationship has its own value, one that puts the client-as-victim at the center of the story, and provides reasons to sustain the client during and after the litigation.

In a slightly different, but nonetheless related way, Adjoa Aiyetoro and Adrienne Davis have elsewhere detailed the ways in which “[b]ringing litigation can be a way of mobilizing, sustaining, or publicizing a larger extra-legal and social battle, inflicting costs on an opponent, or achieving some needed delay in the resolution of an issue.”⁷⁶ The litigation becomes a means of creating, amplifying, and sustaining relationships around reparations. Indeed, with specific reference to the Tulsa Massacre litigation, Aiyetoro and Davis claim that members of the Reparations Coordinating Committee “viewed legislation and litigation as not just end goals, but also instrumentally . . . taking reparations to the courts and the legislative branches also sustained members’ interests, as well as brought in new activists and supporters.”⁷⁷ From Ogletree’s perspective, it created new and deepened existing friendships and relations around seeking the sort of transformative justice reparations entails.

Unfortunately, the litigation was ultimately unsuccessful. The district⁷⁸ and appellate⁷⁹ courts were ultimately unpersuaded that the victims could not have filed suit earlier, and so refused to toll the statute of limitations. Sadly, the families remain uncompensated, Green-

73. Charles J Ogletree Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1271 (1993). (footnote omitted).

74. *Id.* at 1272–73.

75. *Id.* at 1273.

76. Aiyetoro & Davis, *supra* note 22 at 722.

77. *Id.* at 762.

78. *Alexander v. Oklahoma*, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *34 (N.D. Okla. Mar. 19, 2004).

79. *Alexander v. Oklahoma*, 382 F.3d 1206, 1211 (10th Cir. 2004).

wood remains unreconstructed and underdeveloped, and Tula remains a racially segregated city.

RESISTANCE AND REBELLION

Reparations is the activity of resistance organized around a demand for transformational change as the response to intergenerational wrongs. The core activity characteristic of reparations is making a *demand*.⁸⁰ Demanding is a particular sort of speech act: it necessarily, if implicitly, asserts that the person demanding has the status or authority—in this case, the social, political, or moral status—to ask for the thing demanded. The implicit assertion of status or authority made through the activity of demanding captures the core features of reparations as resistance: that reparations requires calling out the wrong of intergenerational subordination; that reparations requires the subordinated person or group to be empowered; that the way subordinated persons or groups are empowered is by recognizing and responding to their status as social, political, and moral equals; and that the appropriate response called for from the dominant group must be transformative, if it is to afford the reparations-demander the right sort of social, political, and moral equality given the nature of the wrong.

Resisting authority plays a central role in civic republican political theory. Indeed, because of their shared emphasis on resistance, reparations appears to be a form of civic republicanism: the reparationist demand for empowerment tracks the republican goal of resisting authoritarian domination. But reparations is more than an activity of resistance; it is also a victim-centered activity, one that seeks to transform social relations by empowering individuals who are subordinated—that is, at the margins or on the bottom of society—to stand up for themselves and take control of developing a more just and inclusive future. This bottom-up, victim-centering feature of reparations fits with rebellious politics, asserting the right of self-determination rather than a politics of accommodation or reconciliation.⁸¹

80. ROBIN D. G. KELLEY, *A DAY OF RECKONING: THE BLACK RADICAL IMAGINATION*, 114 (describing reparations as a “demand for . . . social justice, reconciliation, reconstructing the internal life of black America, and eliminating institutional racism.”); Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45, 46 (2004) (observing that “arguments for reparations for African Americans are characterized by two related features: confrontation and demand.”).

81. See Aiyetoro & Davis, *supra* note 22 at 721 (“a classic tension in the struggle for racial justice: seeking respectability and uplift versus self-determination and revolutionary politics.”).

Centering Victims

Clarifying the concept of reparations can help solve some of the legal and policy issues facing lawyers, legislators, and social activists. Without a clear understanding of the nature of and justifications for reparations, we will struggle to evaluate the political proposals for reparations advanced by, for example, the various political candidates, legislators, and lawyers who claim reparations as their goal.

Some recent advances in the philosophy of oppression and victimhood provide the starting point for reconceptualizing reparations as resistance. The core insight is that victims occupy a special social role⁸² because they have a special moral and political standing. A victim's standing is characterized by subordination. According to Philosopher Kate Manne:

the paradigm case of being a victim involves being morally wronged at the hands of another agent—and being injured, humiliated, or otherwise wounded because of it. One is typically lowered relative to one's previous moral-cum-social position. And one is typically put down relative to the agent who made one his victim in an act of moral wrongdoing.⁸³

The correct moral response to victimhood is thus to restore the standing of the victim as a moral and political equal.

The victim's subordinate status places her in a special relationship with both the wrong done to her and the wrongdoer. That relationship is captured by another recent advance in moral and political philosophy: that victimhood, as a morally and politically significant social role,⁸⁴ comes with associated rights, duties, and powers,⁸⁵ as well as normative standards governing appropriate conduct, and which bystanders use to judge the performance of individuals in their roles.⁸⁶

82. See, MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS 187 (2009).

83. KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY 223–24 (2018).

84. See, CHRISTINE KORSGAARD, THE SOURCES OF NORMATIVITY (1996); LESLIE GREEN, LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE 323–342 (Kimberly K. Ferzan & S. J. Morse eds. 2016); see also John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575–98 (1998).

85. MANNE, *supra* note 84 at 223; HELGA VARDEN, SEX, LOVE, AND GENDER: A KANTIAN THEORY (forthcoming 2020); CAROL HAY, KANTIANISM, LIBERALISM, AND FEMINISM: RESISTING OPPRESSION viii (2013); MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS 184 (2009); Ashwini Vasanthakumar, *Epistemic Privilege and Victims' Duties to Resist Their Oppression*, 35 J. APPLIED PHIL. 466, 467 (2016); Pamela Hieronymi, *Articulating an Uncompromising Forgiveness*, 62 PHIL. & PHENOMENOLOGICAL RES. 529, 530 (2001).

86. See Gardner, *supra* note 84 at 575–98.

Two of these normative standards are worth highlighting because of their relation to reparations and resistance. The first standard stems from the victim's special relationship to wrongdoing. All of us have a moral duty to oppose wrongdoing. Our reasons to oppose wrongdoing often become stronger or weaker given our proximity to the wrong and our ability to hold the wrongdoer accountable.⁸⁷ Victims, however, have special role-based reasons to call out the wrongdoer that do not apply to the rest of us.⁸⁸ As the person wronged and placed in a subordinate moral and political position, victims have a special, autonomy-based reason to have control over restoring their status as a moral equal.

Self-respect requires expression. One form of expression is having the power to control the remedy for wrongdoing, including by excluding others for making that determination on behalf of the victim. The autonomy-based reason for resisting takes hierarchical priority over bystanders' reasons for stepping in to right the wrong, or at least, doing so without consulting the wishes of the victim. If bystanders butt-in and act on behalf of the victim, they remove one way in which the victim can take control of her situation and restore her equal moral and political standing as an autonomous member of the community. We might think of this as a special right to resist: as a special normative standing that the victim has to participate in accounting for her wrongs that takes priority over the standing or interests of others to hold the wrongdoer accountable.⁸⁹

Second, resistance can only function as a way of restoring autonomy and social standing if victims have the *power* to call out wrongdoing and oppression. Remediating wrongdoing, on its own, is not enough, because some third party may direct remediation in ways that leaves the victim out of the story.⁹⁰ Victims of oppression, however, are often characterized by a lack of social power, and so they are wronged again if the remedy or redress for oppression itself marginal-

87. Vasanthakumar, *supra* note 85 at 471 (explaining that proximity may be epistemic, based on our understanding of wrongdoing); *see also* Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 *RATIO JURIS* 164, 165 (2016) (describing legal duties imposed on society).

88. *See*, DEMPSEY, *supra* note 85 at 4; Vasanthakumar, *supra* note 85 at 476; HAY, *supra* note 86 at 100.

89. DEMPSEY, *supra* note 85 at 193.

90. *See*, Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323, 362 (1987); *see generally* Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976).

izes, overlooks, or coerces victims through the process of holding wrongdoers accountable or devising remedies for wrongdoing.⁹¹ Restoring autonomy, and moral and political standing, requires the victim to take her place at the center of her own story,⁹² by demanding the power to determine their own remedy. The demand for empowerment is both moral and political: it is a claim about who gets to determine the manner in which redress is provided. The answer is *the victim*, so long as the redress is itself justified.

Victims thus have a role-based claim to exercise the moral and political power to resist, both for themselves and on behalf of themselves. When bystanders decide how to act “on behalf of the victim” without allowing the victim autonomy to control that process, they doubly wrong the victim. They undermine her autonomy by taking away her right to direct or control the accountability process, and they disempower her as a moral agent, replicating the subordination imposed by the wrongdoer.

Resistance

Resistance is a revolutionary act: the act of standing up, of raising oneself from a servile position, of refusing to accept one’s place in the world, to challenge the power, domination, and authoritarianism of American society. The *act* of standing up and challenging power has important expressive and constitutive value: standing up enables victims to identify themselves as a person, someone who is worthy of respect, equal treatment, and protection by the state. Demanding reparations is one of the ways in which the victims of transgenerational racial oppression assert their political identity as a morally and legally valuable person, by standing on equal footing with the state.

This idea of standing—of standing up for oneself by standing on equal footing—has important political and not merely moral resonances. For example, the civic republican idea of this non-dominative or anti-subordinating version of equal standing is “the ability to look each other in the eye,”⁹³ To face each other as equals, not to cower as subordinate.⁹⁴

91. Dempsey, *supra* note 85 at 187.

92. MANNE, *supra* note 83 at 20.

93. PETTIT, *supra* note 16 at 5.

94. *Id.* at 71. See also Quentin Skinner, *Liberty Before Liberalism* 72 (2012) (contrasting republican virtue of “upright” character with vice of “cringing” servility).

Jeremy Waldron has pointed out that there is a rebellious equivalent of republican non-domination:⁹⁵ the right to an “upright gait” as constitutive of political power.

The claim to the upright gait [i]s within all rebellions; otherwise there would not be uprisings. The very word uprising means that one makes one’s way out of one’s horizontal, dejected, or kneeling position into an upright one.⁹⁶

This further feature of political, moral, and social standing as standing up constitutes the victims’ political and moral dignity and self-respect. Resistance empowers victims by enabling them to occupy a space at the center of the story. In standing up and standing out, victims assert their “upright character.”

For race-based systems of subordination or oppression, such an assertion is itself a challenge. Too much of the history of people of color in this country is one of servility, of not making eye contact, of kneeling and submitting, of avoiding and crossing streets, of embodying deference as a form of second-class citizenship.⁹⁷ Civic republicans have long emphasized this feature of domination or subordination renders as a secondary effect of oppression. Classical republicans fear that a public fearful of arbitrary retaliation from the powerful will tend to engage in “self-censorship”⁹⁸ and start to “behave in appeasing and ingratiating ways.”⁹⁹ Standing up to the oppressor is the way that the oppressed recover their self-respect and assert themselves as political equals. Participating in a process of demanding standing to challenge oppression is thus an important feature of reparations’ goal of enacting anti-subordination in the world.

Republicanism and rebelliousness coalesce over the intrinsic value of confrontation “in virtue of aimed for, but not necessarily achieved, consequences.”¹⁰⁰ The value of engaging in action (trying) even if not guaranteed of success (so long as success is at least possi-

95. JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* 21 (Martin Jay & R. Jay Wallace eds., 1st ed. 2012).

96. Jan Robert Bloch & Caspers Rubin, *How Can We Understand the Bends in the Upright Gait?*, 45 *NEW GER. CRITIQUE* 9, 9 (1988).

97. See, STEPHEN A. BERREY, *The Jim Crow Routine: Everyday Performances of Race, Civil Rights, and Segregation in Mississippi* 19 (2015); PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 70–74 (2d ed. 2002).

98. Quentin Skinner, *Freedom as the Absence of Arbitrary Power* in *REPUBLICANISM AND POLITICAL THEORY* 93 (Cécile Laborde and John Maynor, eds., 2008).

99. *Id.*

100. MICHELLE MADDEN DEMPSEY, *PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS* 161 (2009).

ble)¹⁰¹ is neatly expressed by Derrick Bell's idea that "the struggle for freedom is, at bottom, a manifestation of our humanity that survives and grows stronger through resistance to oppression, even if that oppression is never overcome."¹⁰²

Bell was cynical that racism could be overcome fully in America, but he did believe that "temporary 'peaks of progress'" were possible.¹⁰³ Nonetheless, the value of trying is both an instrumental good—for if we do not try, how can we hope to succeed?—and constitutive of character. Bell quotes Mrs. Biona MacDonald, a civil rights activist from Harmony, Mississippi, who told him, "[i] am an old woman. I lives to harass white folks."¹⁰⁴

Bell recognized the value of Ms. MacDonald's struggle:

[S]he recognized that—powerless as she was—she had and intended to use courage and determination as weapons 'to harass white folks.' Her fight, in itself, gave her strength and empowerment in a society that relentlessly attempted to wear her down."¹⁰⁵

In his book, *Faces at the Bottom of the Well*, Bell links Ms. MacDonald's struggle to the Reverend Martin Luther King's struggle. King, Bell notes, once wrote of "the sense of affirmation generated by the challenge of embracing struggle and surmounting obstacles."¹⁰⁶ The important value of "commitment to courageous struggle whatever the circumstances or the odds"¹⁰⁷ is an important value engaged with by victims whenever they challenge the wrongdoers who seek to victimize them.

Rebellion

The act of giving power to the powerless by facilitating acts of resistance is at the core of rebellious lawyering. Rebellious lawyering resists framing the value of law and litigation in terms internal to the discipline, and instead honors the ways in which litigants use the law as one among many methods of engaging in social organization and social activism.¹⁰⁸ Instead of having their identity, expertise, and aims

101. *Id.* at 162.

102. Derrick Bell, *Racial Realism*, 24 *CONN. L. REV.* 363, 378 (1992).

103. *Id.* at 373.

104. *Id.* at 378.

105. *Id.* at 379.

106. DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* xiii (2018).

107. *Id.*

108. LÓPEZ, *supra* note 15 at 11–82.

shaped in narrow legalistic terms by lawyers claiming superior skills and knowledge, rebellious lawyering centers the victim-clients to control and shape the role that the law plays in their life. Rebellious lawyering recognizes that the relationship between victim-activists and their agents, including lawyers, is constituted by power, not devoid of it. These relationships importantly shape their identity as political, morally, and socially powerful, self-respecting agents.

The rebellious lawyering approach to empowering clients, developed most thoroughly by Gerald López, finds a resonance in another work of Derrick Bell's, his *Serving Two Masters* article.¹⁰⁹ Bell articulates a rebellious lawyering perspective when he argues that “[l]itigation can and should serve lawyer and client as a community-organizing tool, an educational forum, a means of obtaining data, a method of exercising political leverage, and a rallying point for public support.”¹¹⁰ Aiyetoro and Davis articulate the same point in embracing social movements that reject the politics of respectability and instrumentally leverage the legal system for their own extra-legal ends.¹¹¹ Charles Ogletree's notion of empathy and friendship is another version of this rebellious orientation.

The process of litigation, legislation, and apology in the movement for reparations for the Tulsa Massacre of 1921 should be understood from this rebellious perspective. Rather than granting the intrinsic value of apology as a form of atonement, reparationists should treat apologies instrumentally, as a process through which to mobilize and empower victims to center their experiences and stand up to authority.

APOLOGY AS PROCESS

The social activism that encouraged the State of Oklahoma to create the Commission to study the Tulsa massacre was the same activism encouraging the State to apologize and make reparations. It was the same activism that encourages the Reparations Coordinating Committee to engage in litigation. The groups agitating for reparations in Tulsa, Oklahoma shared overlapping members, and a common goal of holding the State and City to account, including by receiving

109. See Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

110. *Id.* at 513.

111. Aiyetoro & Davis, *supra* note 14, at 690–91.

some payment on behalf of the survivors to compensate for what they had lost during the Massacre and to take care of them in their old age.

For the survivors, an apology may have been important, but it was neither a necessary nor a sufficient condition of their movement for reparations. Furthermore, focusing on an apology, in the absence of the victims' other demands, risked empowering the wrongdoers—the State of Oklahoma and the City of Tulsa—by providing them with the ability to determine whether to give or withhold the apology. Apologies tend to be perpetrator-focused.¹¹² They put the wrongdoer at center of the story, not the victim. Where the wrongdoer is already more powerful than the victim, the wrongdoer gets to determine whether or not to apologize. In Oklahoma, the City never officially apologized to all the then-living survivors and their descendants for the Massacre; as we have seen, the State of Oklahoma controlled the manner of its apology, limiting its acceptance of responsibility to avoid legal liability so as to further control the manner of reparations and reconciliation.

The perpetrator perspective disempowers victims. For example, the victim may wish to reconstitute herself as a “survivor” and may want to marginalize the wrongdoer’s significance by “getting on with her life.” She may not wish to reconcile, and so maintain a relationship with her oppressor, but to move on and live a life independent of, and not defined by, her victimization. Even individuals who may seek to break with their oppressors may nonetheless wish to call out the oppressor for their wrongdoing. That, in fact, is the core feature of resistant, rebellious, republican reparations.

Perpetrator Model of Reparations

The resistant, rebellious, republican model of reparations stands in conflict with Professor Roy Brooks’ celebrated perpetrator model of reparations as apology and redress.¹¹³ Brooks argues that the continuing harms of slavery and segregation still impact the current African American community in a variety of ways.¹¹⁴ These harms justify reparations, or as Brooks prefers to call it, redress for the current vic-

112. See, Brooks, *Perpetrator-Focused Model*, *supra* note 23, at 50; Roy L. Brooks, *Getting Reparations for Slavery Right - Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 273–76 (2004).

113. See, BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 3, at 143–68. *Perpetrator-Focused Model*, *supra* note 23, at 50.

114. See, BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 3, at 36–72

tims of the harms of enslavement.¹¹⁵ Reparations—as–redress come in two forms: first, compensatory (victim-oriented, backwards looking) redress; and second, rehabilitative (community-oriented, forwards looking) redress.¹¹⁶ Brooks associates compensatory reparations with a confrontational “tort” model of reparations,¹¹⁷ whereas rehabilitative reparations are associated with a more self-critical (or better yet, self-reproachful¹¹⁸) model of reparations as atonement and restitution.¹¹⁹ Self-critical reparations properly acknowledge and respect (give meaning to) the suffering of enslaved people.¹²⁰

Critiquing the Perpetrator Model

Under Brooks’ model, so long as the wrongdoer offers an apology with restitution as consideration, then the victim has a duty to accept the apology and extend forgiveness. Everyone gets a further benefit, which is racial reconciliation.

But the moral exchange is not uncoerced or equal. Instead, as Brooks envisages it, the moral exchange takes the form of a coercively unilateral contract, one that the victim must accept upon performance of the apology plus redress.¹²¹ This sort of exchange empowers the apologizer in a very specific way: so long as the apologizer fulfills the conditions of a formal apology, she has the ability to change the normative status of the victim (the victim is under an obligation to forgive). This is the very definition of a normative power.¹²²

It might help to think about the supposed duty to forgive in the context of recent studies of both apologies and of victimization.¹²³ Apologies are not simple acts, even when some form of material redress is offered as atonement. Self-reproach and reparation, whilst essential to apology, and even reconciliation itself, do not always empower the victim. On the contrary, when we consider for example

115. See, Brooks, *Perpetrator-Focused Model*, *supra* note 23, at 49.

116. See ATONEMENT AND FORGIVENESS, *supra* note 3, at 156.

117. *Perpetrator-Focused Model*, *supra* note 23, at 49.

118. Paul Davis, *On Apologies*, 19 J. APPLIED PHIL. 169, 170–71 (2002).

119. Brooks, *Perpetrator-Focused Model*, *supra* note 23, at 50, 68.

120. *Id.* at 50.

121. On exchange models of morality, see, Eric J. Miller, “Sympathetic Exchange,” *Adam Smith, and Punishment*, 9 RATIO JURIS 182 (1996).

122. On normative powers, see, H. L. A. Hart, *Bentham on Legal Powers*, 81 YALE L.J. 799 (1972); Neil MacCormick & Joseph Raz, *Voluntary Obligations and Normative Powers*, 46 PROC. ARISTOTELIAN SOC’Y SUPP. VOL. 59 (1972).

123. See, NICK SMITH, *JUSTICE THROUGH APOLOGIES: REMORSE, REFORM, AND PUNISHMENT* (2014).

the case of victims of sexual violence and domestic abuse, a cycle of self-reproach, redress, and reconciliation may be followed by a cycle of rebuke, coercion, and violence.¹²⁴ On this view, apology and reconciliation is not opposed to oppression. Rather that cycle is one of the forms that oppression takes. Focusing on the perpetrator perspective emphasizes the first part of the cycle and stops at reconciliation. It stops short, however, of asking what happens after reconciliation, in part because it stops short of empowering the victim by placing her at the center of our solicitude and concern. Worse, it affirmatively disempowers the victim, by imposing a duty to reconcile upon her, where reconciliation may in fact be a way-stage along the process to her further oppression.

Furthermore, Brooks characterizes the moral exchange process of apology and atonement in opposition to the political and legal activity of confronting oppression by demanding redress. In effect, he seeks to privatize and civilize the process of ending racial oppression. The point of his project is to persuade the oppressor of the wrong of oppression, or at least, that apologizing for the wrong of oppression can be less agonizing for the perpetrator than victim-centered models suggest.¹²⁵ The political and legal realms, Brooks seems to believe, are inherently antagonistic and partisan, whereas the moral realm is sympathetic and neutral. The realms of politics and law are contestatory where the moral realm is conciliatory. Keeping reparations-as-exchange in the moral realm removes the political, contestatory aspects and emphasizes the reasonable, collaborative aspects of racial reform.

Morality is not, however, quite so neat and tidy. First of all, the notion of self-respect often requires individuals to stand up for themselves in ways that challenge those who would disrespect them. To fail to challenge is sometimes to disrespect oneself. In failing to challenge—in forgiving and moving on—the victim may (reasonably or not) fail to live up to the “uncompromising” standards of victimization and forgiveness.¹²⁶ Reconciliation is not an end in itself. Properly understood, reconciliation is appropriate only if it adequately empowers both parties. Requiring the victim of oppression—whether racial or sexual oppression—to reconcile with their oppressor undermines the sort of autonomy necessary to promote self-respect. Rather than im-

124. *See, id.* at 1–16 (discussing restorative justice).

125. BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 3, at 49–143–68.

126. *See* Hieronymi, *supra* note 85, at 530.

posing a duty to forgive on a victim of oppression, morality imposes reasons for outsiders to butt out, and empowers the victim to determine how she is to proceed—as reconciled with her oppressor, or as survivor independent of the oppressor, making her way in the world.¹²⁷ An offer of apology and redress should not take the power to determine how the wrongdoing affects the victim’s life away from the victim.¹²⁸

Furthermore, morality is not so easily separated from the political and legal realm. Indeed, politics and the law ought to be assessed in the light of our moral reasons, not independent of them.¹²⁹ The hard line Brooks draws between private moral reasons for action and public political and legal ones is illusory. We can see this if we consider an analog to the “tort” model, which we might call the “criminal” model of reparations. The line between criminal law and tort law is famously thin: the prohibited acts and even the sanctions look remarkably similar.¹³⁰ What distinguishes criminal law from tort law is the *public* nature of the criminal law.¹³¹ Furthermore, criminal law shares the features that Brooks finds most objectionable in tort law: “It operates upon a certain set of premises [including]. . . punishment or even white guilt,”¹³² that (so Brooks believes) “like all litigation, is too contentious, too confrontational to provide the kind of racial reconciliation and accord that is needed for future race relations.”¹³³

Some of these similarities to criminal law are, however, important for our understanding of the way reparationists engage with intergenerational wrongdoing. A claim made through reparations’ demands is not simply that some oppressor has done a prohibited act and owes compensation to the victim. After all, wrongdoers might harm another without fault; in that case, no blame would attach to her. She might breach her duty not to interfere with or damage another’s property, as in the famous case of *Vincent v. Lake Erie Trans-*

127. In the terms of racial oppression, the choices are whether we are to force integration or recognize that independence is a legitimate alternative.

128. See Hieronymi, *supra* note 85, at 530.

129. See, Joseph Raz, *Incorporation by Law*, 10 *Legal Theory* 1 (2004).

130. See, Henry M Hart Jr., *The Aims of the Criminal Law*, 23 *LAW AND CONTEMPORARY PROBLEMS* 401–441 (1958) (noting the similarity of criminal and tort law).

131. *Id.* at 404 (describing the additional aspect of “community condemnation” that attaches to the criminal law sanction). See generally Anthony Duff, *Punishment, Communication, and Community* 58 (2001) (describing the criminal law as condemning public wrongs).

132. BROOKS, *ATONEMENT AND FORGIVENESS*, *supra* note 3 at 98.

133. *Id.*

portation Co.,¹³⁴ but do so to save the lives of the passengers on her boat.¹³⁵

In the sorts of cases reparationists care about, however, the wrongdoer is very much to blame. Their blameworthiness consists in acting for reasons that they know or should know are unjustified: for racist reasons, or reasons that perpetuate racial subordination. These acts of intergenerational harm should promote *remorse*.¹³⁶ A truly remorseful person would “give themselves a hard time for their wrongs, a hard time which they hold themselves to deserve on the model of punishment.”¹³⁷ It is not enough that the individuals who perpetrate intergenerational wrongs simply *regret* their acts of oppression. They must regret their wrongdoing in the right way, and do something about it. The temptation of wrongdoers who act for morally despicable reasons is to undersell the force of the reasons for acting properly. And it is this “rational underresponsiveness [that] also militates against his experiencing, without intervention, the apt measure of regret.”¹³⁸ In the context of criminal law, the standard intervention is punishment.¹³⁹

Reparationists sometimes seek to punish the perpetrators of intergenerational discrimination.¹⁴⁰ Where the criminal- and tort- law models overlap, however, is in seeking to hold the wrongdoer accountable by directly confronting the wrongdoer with their wrongdoing and challenging them to justify their actions. And whether the reparationist seeks a private or public accounting, one that is punitive, redressive, or restorative is up to the reparationist as victim of that wrongdoing. That is what it means to put the victim first.

Finally, Brooks might want to contrast what Jurgen Habermas calls “the unforced force of reason”¹⁴¹ with the coercive force of law.¹⁴² Certainly, wrongdoing provides reasons to apologize. A self-critical, rational person should recognize that, having wronged an-

134. 124 NW 221 (1910).

135. Derek Parfit’s discusses the concept of “blameless wrongdoing” in DEREK PARFIT, REASONS AND PERSONS 31-35 (1987).

136. John Gardner, *Wrongs and Faults*, in APPRAISING STRICT LIABILITY 51, 76 (Andrew Simester ed., 2005).

137. *Id.*

138. *Id.* at 75.

139. *Id.* at 76.

140. BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 3 at 98.

141. JURGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES 341 (1998).

142. It is not clear that law is intrinsically coercive. See, Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 *RATIO JURIS* 164 (2016).

other, there is reason to apologize and make it up to the victim. However, even self-critical and rational people recognize that apologies make us personally and professionally vulnerable: they empower the victim and bystanders to evaluate whether our apology is genuine, and whether our act of atonement is sufficient. They highlight the relationship between wrongdoer and victim, one that is primarily structured by the wrongdoer's act of wrongdoing. And, in properly accounting for the wrong done, may implicate others in the act of wrongdoing.

In the case of slavery, Jim Crow, and racial oppression, imagining apologies as coming from a non-political, that is, non-contestatory place, seems fanciful. To take two major international examples that Brooks holds out as reparations, German redress for the Holocaust and the South African truth and reconciliation process, in both events, the persons apologizing had suffered major political setbacks and were seeking to reestablish their position in society. Their decision to apologize was not independent of their power in the world—of their political and legal standing—it expressed their power in the world. These wrongdoers were not motivated by an altruistic desire to reconfigure the moral world to make themselves and their victims whole: they were at least *also* motivated by a self-interested desire to be reconciled with the political world from which they were marginalized. Reconciliation by the wrongdoer granted reentry into the political realm. And part of the negotiation was: on whose terms? How much (or how little) would the oppressors have to give up in order to escape their pariah status. And how much input would the victims of oppression have over that process.

Reparations, as I have defined it, is the activity of resistance organized around a demand for transformational change as the response to intergenerational wrongs. The ability to demand *effectively* depends upon having the power to enforce the demand. The case of African American reparations is distinctive from Holocaust reparations precisely because the international community had the power to demand reparations from a Germany dependent upon international support to ensure its national integrity during its postwar rebuilding process and the Cold War. African Americans lack similar leverage.

What we need is a victim-empowering account, rather than a perpetrator empowering one. Resistant, rebellious, reparations provide that model. Brooks is certainly correct that a tort model focused on litigation has severe limitations. However, we should not overesti-

Republican, Rebellious Reparations

mate the importance of the intrinsic goals of the various processes through which victims demand reparations. That, as Brooks powerfully argues, includes accepting the values of tort law and the litigation process when making demands. Nonetheless, reparations movements often use the processes of *both* litigation *and* apology, *extrinsically*: to organize, mobilize, give voice to, and empower victims. To put victims at the center of the story. For groups who are oppressed and silenced, being at the center of the story is a form of victory in itself.

CONCLUSION

The concept of reparations, let alone the propriety of awarding reparations, is highly contested. However, if reparations are to function as a form of transgenerational transformative justice, we need to emphasize the role of victims as participants setting the terms of redress and reconciliation. That role must honor victims even if they reject reconciliation in favor of survival as independent, autonomous individuals.

African American Reparations: A Rough Sketch of the Road to Educational and Economic Restoration

CARLTON WATERHOUSE

In America and throughout modern societies, institutions provide the context in which generations pass on values and resources to future generations. Institutions also represent the means by which prominent African American leaders struggled against the oppression of slavery and segregation and passed on their resources to future generations. Properly developed and focused economic and educational institutions should play a central role in restoring and renewing black communities mired in the muck of historic and ongoing racism-white supremacy. In a formal sense, African American communities live in the shadow of American slavery and segregation. For well over three quarters of four centuries, African American educational attainment and wealth accumulation contradicted the dictates of explicitly racist laws, policies, and practices. Racial slavery and segregation represented public-private partnerships designed to create and maintain black racial subordination and white racial dominance. These formal legal systems and the practices they protected locked in racial inequality throughout their long lifespans. Of equal importance, however, the repercussions of these systems continue to shape American life experience today. For African Americans, that reflects a legacy of racial exclusion and discrimination in housing, education, employment, political life, and so much more. The consequences of that legacy remain with the surviving victims, their children, and their communities. To date, America has never endeavored to right these wrongs by redressing the historic and contemporary harms they caused. This article proposes the creation of two distinct trusts to do so. It envisions the

development of reparative programs within existing institutions and financing the creation of new institutions as institutional reparations.¹

Principally, this article contends that the construction, renewal, restoration, and expansion of black economic and educational institutions represent essential components of African American reparations. In two parts, it focuses on education and economics as critical pathways to redress for American slavery and segregation.

In sketching only modest proposals, the article points out a small number of examples to illustrate the critical role that institutional based redress should play in African Americans reparations. Ultimately, a complete map of the roads to reparations requires that African Americans trained in the specific areas along with other members of the African American community work collaboratively to develop its intricacies and avenues for restoring and renewing African American communities. Nonetheless, this article presents exemplary proposals for remedying community harms and identifies critical pathways to reparations.

[V]ictims must define the remedies, and the obligation of reparations must continue until all vestiges of past injustice are dead and buried. Reparations is not, then, equivalent to a standard legal judgment. It is the formal acknowledgment of historical wrong, the recognition of continuing injury, and the commitment to redress, looking always to victims for guidance.²

—Mari Matsuda

Following the wisdom of Professor Matsuda above, this article provides a map to reparations based on the experiences of African Americans and the insights gained from Native peoples, LatinX, Asian Americans, and other groups marginalized by the American project. It explicitly “looks to the needs of the bottom” to center the experiences of African Americans in mapping a route to reparations.³ Rather than the political or social mechanism to obtain redress from the judicial or legislative branches of government, this article focuses attention on the delivery of reparations.⁴

1. See Carlton Waterhouse, *The Full Price of Freedom* (doctoral dissertation) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674478 for a comprehensive exploration of institutional based reparations.

2. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L.L. REV. 323, 397 (1987).

3. *Id.*

4. Of course, the journey to secure reparations is yet ongoing and of critical import. That journey is focused largely on the justification or warrant for reparations and has been extensively examined over more than two decades since Professor Robert Westley’s seminal article, *Many*

Envision reparations for African Americans as an isolated island with no existing bridges or roadways to reach it. For the masses of African Americans to experience redress we have to build large bridges that are easily reached and crossed. Overly complex and demanding routes to reparations leave too many people behind. Affirmative action plans were not created as reparations and fall far short of correcting the wrongs of slavery and segregation or remedying their harms. They can, however, help make an important point.

African Descendants of Slavery (“ADOS”) advocates contend that reparations must “exclude black immigrant populations that voluntarily migrated to America.”⁵ The point is controversial and has been rejected in many circles that question the group’s credibility.⁶ Without addressing the contention directly, we can still gain insight into the best boundaries to follow along the road to reparations. One credible contention that ADOS adherents raise is that lineal descendants of enslaved Africans in the United States represent the bottom of America’s racial hierarchy.⁷ Affirmative action programs that developed in response to the Civil Rights Movement’s challenge to racism and white supremacy, ostensibly sought to reorient the racially exclusionary practices of white institutions. Early affirmative action programs guided businesses and government offices to promote equal opportunities for positions.⁸ However, many of the opportunities were only available to the most competitive and best advantaged African Americans.⁹ Elite university admissions, today, provide a prime example as a majority of black students on many campuses will originate from one or more well-heeled immigrant parents.¹⁰ Those who

Billions Gone: Is It Time to Reconsider the Case for Black Reparations?, 19 B.C. Third World L.J. 429 (1998), and Randall Robinson’s groundbreaking book *The Debt: What America Owes to Blacks* (2001).

5. ADOS, *The Roadmap to Reparations*, <https://ados101.com/roadmap-to-reparations>.

6. See Samara Lynn, *Controversial group ADOS divides black Americans in fight for economic equality*, ABC NEWS (Mar. 9, 2020), <https://abcnews.go.com/US/controversial-group-ados-divides-black-americans-fight-economic/story?id=66832680>.

7. *Id.*

8. See Office of Federal Contract Compliance Programs (OFCCP) *History of Executive Order 11246*, <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history>. However, many institutions only use(d) these programs for symbolic gestures to signal opportunity and racial equality where non-exists.

9. See Ronald Roach, *Class Based Affirmative Action*, June 19, 2003, *Diverse Issues in Higher Education* at <https://diverseeducation.com/article/3029/>.

10. Lani Guinier, *Our Preference for the Privileged*, BOSTON.COM, July 9, 2004, http://archive.boston.com/news/globe/editorial_opinion/oped/articles/2004/07/09/our_preference_for_the_privileged?pg=full, (Blacks are not alone in this phenomenon. The children of Asian, Latin X, and black immigrants routinely achieve greater socioeconomic success than their counterparts of native born parentage); See *Black Immigrants and Black Natives Attending Selective*

can best compete under current programs are those who are the best educated, wealthiest, and most advantaged. In other words, as programs look(ed) to the top instead of the bottom the most disadvantaged fell further behind. Because structural and individual racism was and still is the norm, these beneficiaries certainly needed all the help they could get. Unfortunately, the opportunities that were and are created leave too many people behind.

As the foregoing shows, viable paths to repair harms caused by the continuing legacy of slavery and segregation require easy access ramps that allow people at all levels to cross. So, what routes enable the least advantaged African Americans to get the benefits of redress? Those most related to their daily lives, experiences, and wellbeing like education and economics.¹¹ It is upon these two avenues that the remainder of this article will focus in two parts. Part II engages the educational pathways to redress, and part III examines the economic road to reparations.

PART II EDUCATION

“Without education there is no hope for our people, and without hope our future is lost.”¹²

— Charles Hamilton Houston

The legacy of educational discrimination continues with us today. More than sixty years after the Supreme Court’s decision in *Brown v. the Board of Education*, the majority of African American students attend schools that remain separate and unequally resourced.¹³ In the wake of *Brown*, education promised a common and readily accessible on-ramp to racial equality. Instead, it became another casualty of ongoing racism-white supremacy—a continued reflection of locked in inequality. The first bridge from America today to reparations for African Americans is education. It is fundamental to individual and

Colleges and Universities in the United States, AMERICAN JOURNAL OF EDUCATION, Vol. 113, No. 2 (February 2007), pp. 243-271 at 245. https://www-jstor-org.proxyhu.wrlc.org/stable/pdf/10.1086/510167.pdf?ab_segments=0%252Fbasic_SYC-5144%252Ftest&refreqid=excelsior%3A77049cd223ddc86c52dc320b4bd1ebaa.

11. In addition to these important thoroughfares, politics, health, environment, and cultural/familial avenues to redress must also be constructed. Although space does not allow consideration of these in this article, they remain essential pathways to redress.

12. RICKY L. JONES, WHAT’S WRONG WITH OBAMAMANIA?: BLACK AMERICA, BLACK LEADERSHIP, AND THE DEATH OF POLITICAL IMAGINATION 25 (2008).

13. See Vincent J. Roscigno, *Family/School Inequality and African-American/Hispanic Achievement*, SOCIAL PROBLEMS, Vol. 47, No. 2 (May, 2000), pp. 266-290 at 268-269, https://www-jstor-org.proxyhu.wrlc.org/stable/pdf/3097201.pdf?ab_segments=0%252Fbasic_SYC-5144%252Ftest&refreqid=excelsior%3Ae1b80d09f1f06998132230981e8e9abc.

community prosperity. Almost all African American children interact with the educational system in some way and state governments provide it as a public resource. At the primary, secondary, and tertiary level education is a critical route for remedying the intergenerational harms of slave and segregation.

Compared with the legal significance of *Brown v. the Board of Education*, its educational significance is almost negligible. The Brown decision and its progeny failed in two key respects: It has provided neither integration nor equal educational resources for the vast majority of black children.¹⁴ The fault lies less with the decision, however, than with whiteness as an identity construct itself and the degree of commitment white parents and others had and still have to protect it.¹⁵

What does an educational bridge to redress look like then in a society still loyal to white racial dominance? An article on that subject alone could not do justice to the question. In this part, accordingly, I can only describe key components of an educational route to redress. Universal and easy access, high quality and superior resources, and flexible forms top the list. Looking to the bottom reveals a range of educational challenges facing African Americans. At all grade levels, African Americans face disproportionate discipline.¹⁶ In achievement, African American graduation rates have meaningfully improved over the last two decades.¹⁷ At 6.5%, however, the high school drop-out rate remains too high.¹⁸ African American college attendance has also increased but the completion rates is only at 40% after six years.¹⁹ When we look more closely at these numbers we also discover that black boys have substantially lower high school graduation rates, college enrollment rates, and university graduation rates

14. See Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision*, 2004 U. ILL. L. REV. 1099 (2004).

15. *Id.* 1117-1124; See also EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 120-141 (5th ed. 2017).

16. See F. Chris Curran *Estimating the Effect of State Zero Tolerance Laws on Exclusionary Discipline, Racial Discipline Gaps, and Student Behavior*, *Educational Evaluation and Policy Analysis*, Vol. 38, No. 4 (December 2016), pp. 647- 668 at 647.

17. *Status Dropout Rates*, THE NATIONAL CENTER FOR EDUCATION AND STATISTICS, 2019, https://nces.ed.gov/programs/coe/pdf/coe_coj.pdf at page 2.

18. *Id.*

19. *Status and Trends in the Education of Racial and Ethnic Groups*, THE NATIONAL CENTER FOR EDUCATION AND STATISTICS, Feb. 2019, https://nces.ed.gov/programs/raceindicators/indicator_red.asp.

than black girls and women.²⁰ Despite some progress, the road to educational prosperity for African Americans still requires substantial improvements. Meaningful redress means reversing these present inequalities.

To do so, multiple approaches are needed that address the diverse challenges and experiences that African American children face. Flexible forms means that black children in suburbs, rural areas, and inner cities should all be served by the approach. While parental and community involvement, strong leadership, prepared and committed teachers, and a comprehensive curriculum are essential to make schools serving black children successful, they are not sufficient to provide redress.

An educational trust fund would provide grants for the development of public charter schools, independent schools, traditional public schools, and mixed educational models using online and brick and mortar arrangements. The trust would also provide support for trade and skills-based schools along with the preceding academic models. Black parents and communities would design and decide the best way to approach educational needs for black children. The trust, in turn, would provide communities with options based on successful models of each approach and the particular makeup of the community. Parents and guardians invested in sending their children to predominantly white schools and those otherwise without access to the foregoing options would primarily benefit after graduation with two exceptions: (1) parents and guardians homeschooling children should gain access to large databases of online lectures and educational resources and (2) all children would receive payment codes or an equivalent for educational testing preparation for the SAT the ACT and other examinations. The demands and requirements for all of the potential approaches would share two common requirements essential for success—a demonstrated commitment to high quality education and abundant resources for the students.

An educational bridge to reparations would necessarily extend to curriculum choices and subject matter. Cultural, health, and financial

20. See, *Status Dropout Rates*, THE NATIONAL CENTER FOR EDUCATION AND STATISTICS, 2019 <https://nces.ed.gov/fastfacts/display.asp?id=16>; *College Enrollment Rates*, THE CONDITION OF EDUCATION 2019, https://nces.ed.gov/programs/coe/pdf/coe_cpb.pdf, (Figure 3 at page 3); *Graduation Rates for Selected Cohorts, 2009–14*; *Outcome Measures for Cohort Year 2009–10*; *Student Financial Aid, Academic Year 2016–17*; and *Admissions in Postsecondary Institutions, Fall 2017*, THE NATIONAL CENTER FOR EDUCATION STATISTICS, Dec. 2018, <https://nces.ed.gov/pubs2018/2018151.pdf>, (Table 1 at page 7).

education that nurtures critical life skills within a racist society will be essential to success. While parents, guardians, and communities should make curriculum, program, and school design choices, a commitment to reparations, individual and collective flourishing, and fostering positive and healthy racial identity within students should ground all approaches.

At the post-secondary level, the bridge to educational repair will require substantial development. The approach should mirror the characteristics provided above—high quality and superior resources, universal and easy access, and flexible forms. Funding should also reflect a commitment to reparations, individual and collective flourishing, and fostering positive and healthy racial identity within students.

To accomplish this, this article offers two approaches. The first is straightforward: provide scholarships and grants to African American students in exchange for a commitment to serving underserved African American communities in education, healthcare, law, business and other areas of need for a minimum number of years. The second would be to strengthen HBCUs. HBCUs can play a critical role in producing graduates committed to developing black enterprises that provide job and career opportunities within black communities.

Slavery precipitated a wedge in the relationship of American blacks with the affairs of Africa, the Caribbean, and broader African diaspora.²¹ As an added charge for HBCUs, some funding should be used to establish meaningful relationships with universities in Nigeria, South Africa, Kenya, Ghana, the University of the West Indies, and elsewhere. Grants should establish requirements for meaningful collaboration on research, joint projects, technology transfers, student exchanges, and visiting professorships where feasible. These along with other criteria articulated above and developed by an educational trust fund board of trustees will help institutionalize practices that will strengthen the educational bridge to reparations.

PART III ECONOMICS

“At the bottom of education, at the bottom of politics, even at the bottom of religion itself there must be for our race, as for all races an economic foundation.”²²

21. Andrea Hunter, Teaching the Classics in Family Studies: E. Franklin Frazier’s “The Negro Family in the United States” *Family Relations* Vol. 55, No. 1 (Jan., 2006), pp. 80-92, at 82-83.

22. WILLIAM H. DAVIS, NATIONAL NEGRO BUSINESS LEAGUE ANNUAL REPORT 74 (1915), https://play.google.com/books/reader?id=ASA_KUKACKMC&hl=en&pg=GBS.PA3.

—Booker T. Washington

Like the educational route to redress, explored above, the economic path begins by looking to the bottom. Wealth disparity in America tells a powerful story of racial exclusion, racial exploitation, and white racial cartels stifling black competition.²³ Slavery reflected vast economic disparity and access to property in America. However, the greatest disparities in wealth for African Americans grow out of America's Jim Crow era.²⁴ During these times, white public private partnerships provided multitudinous opportunities for employment and ownership on a whites-only basis.²⁵ While similar acts of racial discrimination in employment and ownership continue today, they help maintain disparities created a century beforehand.²⁶ The economic road to reparations faces the challenge of constructing a bridge over a chasm of economic inequalities carved over tens of generations.

This article adopts an institutional approach to building that road. Individual approaches are certainly viable. Through tax credits, one time or periodic payments, cash awards could provide substantial vehicles to attain individual redress. They suffer, however, from significant temporal limitations. After more than twenty generations without redress, a remedy should last at least as long and may need to for full success. Moreover, reparations dispersed in a check or a series of checks falls short of constructing a common structure to reach reparations. This shortcoming does not rule out the need for some cash disbursement for those with the greatest need and, in fact, supports financial support that supplements existing public assistance. Need-based criteria, like that established in German reparations programs to Holocaust victims, would be required to protect the neediest.²⁷ Additionally, individual payments to pay off student loan debt for African Americans committing to minimal terms of service within underserved African American communities would constitute a criti-

23. See generally, DARIA ROITHMAYR, *REPRODUCING RACISM* (2014).

24. Brentin Mock, *White Americans' Hold on Wealth Is Old, Deep, and Nearly Unshakable*, CITYLAB, Sept. 3, 2019, <https://www.citylab.com/equity/2019/09/racial-wealth-gap-history-slavery-black-white-family-income/597100/>; see also, *Nine Charts about Wealth Inequality in America*, Oct. 5, 2017, <https://apps.urban.org/features/wealth-inequality-charts/> (for an examination of more recent wealth disparities).

25. See Generally, IRA KATZ NELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* (2005); PHILLIP F. RUBIO, *A HISTORY OF AFFIRMATIVE ACTION 1619-2000* (2001); DARIA ROITHMAYR, *REPRODUCING RACISM* (2014); RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017).

26. See, DARIA ROITHMAYR, *REPRODUCING RACISM* pp. 108-135 (2014).

27. *Article 2 Fund: Eligibility Guidelines*, CLAIMS CONFERENCE.ORG, 2020, <http://www.claimscon.org/what-we-do/compensation/background/article2/eligibility/>.

cal component of the route to economic redress. Lack of generational wealth has led to many African Americans seeking student loans at some of the highest rates.²⁸ Many were subject to predatory college lending at for-profit schools.²⁹ Universal and easy access to redress would place these individuals on the route to economic redress. Outside of these individual awards, institutional approaches would otherwise focus on efforts that provide collective and community benefits.

To be effective, this route to redress has to enable black institutions to, day to day, work within the existing market system, and to provide assets, capital, skills, products, services, and opportunities for black communities. In *Our Black Year*, Maggie Anderson and her family chronicled the difficulty they had in finding black businesses in Chicago to supply the family's needs.³⁰ In assessing black business, E. Franklin Frazier's book, *Black Bourgeoise*, examined the primary reasons why African American businesses were unable to overcome the economic challenges facing African American communities in the early to mid-twentieth century. Many of his findings endure and play out in the challenges faced by the Andersons and others seeking to "buy black." Blacks still own a very small percentage of the businesses that provide food, clothing, residential construction, and multi-family property ownership.³¹ The purchase of food, clothing, and other goods is done almost exclusively through businesses owned by whites and others as a result.

Looking to the bottom, we see that African American wealth and African American access to business loans lag behind most other groups in the society.³² These statistics are clearly related. The black middle class lacks the capital needed to develop the large-scale business enterprises created by their white counterparts.³³ Statistics show

28. Annie Nova, *The student debt crisis has hit black students especially hard. Here's how*, CNBC.COM, July 27, 2019, <https://www.cnbc.com/2019/07/27/how-the-student-debt-crisis-has-hit-black-students-especially-hard.html>.

29. *Gainful Employment: A Civil Rights Perspective*, <http://civilrightsdocs.info/pdf/reports/Gainful-Employment-WhitePaper.pdf> at 3-6.

30. Maggie Anderson, *Our Black Year* (2013).

31. 4 Despite the low rate of homeownership few black businesses are involved in residential property management or ownership.

32. Tiffany Howard, *The State of Black Entrepreneurship in America*, CENTER FOR POLICY ANALYSIS AND RESEARCH, April, 2019, <https://www.cbefinc.org/wp-content/uploads/2019/05/CPAR-Report-Black-Entrepreneurship-in-America.pdf> at 11-16.

33. Gene Marks, *African American businesses grew 400% – but they still need investment*, THE GUARDIAN, Feb. 17, 2019, <https://www.theguardian.com/business/2019/feb/17/african-american-small-business-growth-investment>.

that African Americans wealth is dwarfed by that of whites—the median black family’s wealth is a mere 2% of the median white family’s wealth.³⁴ Accordingly, the majority of African Americans lack the capital resources and intergenerational wealth used in developing large scale business operations. It should be no surprise then that the vast majority of African Americans depend upon white businesses for their material substance.³⁵

Racial discrimination historically and today limits opportunities for African Americans to gain significant management and ownership experience. Accordingly, this article proposes the establishment and funding of a nonprofit organization devoted exclusively to providing business expertise and consulting to black businesses receiving loans from these newly established financial institutions. Participation in a business training and development program would be one of the conditions for receiving a loan. Other conditions relating business activity to the communities they serve would be developed by the trust board responsible for administering the program. Today if each African American owned business hired one African American employee, employment rate for African Americans would double and exceed that of whites.³⁶

Racial pride alone is inadequate to establish support for black businesses.³⁷ Consumers buy based on a range of factors including quality, convenience, and cost.³⁸ Calls for racial pride as the sole basis for supporting black businesses lack the force needed to compel black consumers who in all other respects, act according to market logic in their spending practices. Therefore, to foster black patronage, black businesses will have to compete with other businesses on the following market terms: quality, convenience, and cost.

To construct an institutional bridge to economic redress, this article proposes an economic reparations trust fund. The proposal envisions the systematic development of black businesses in discrete

34. *Wealth Inequality in the United States*, INEQUALITY.ORG, <https://inequality.org/facts/wealth-inequality/#racial-wealth-divide>

35. See generally, Maggie Anderson, *Our Black Year* (2013).

36. *Black Owned Businesses Statistics*, BLACK DEMOGRAPHICS, THE AFRICAN AMERICAN POPULATION, 2020, <https://blackdemographics.com/economics/black-owned-businesses/> (Blacks own roughly 2.6 million businesses. If each hired one African American, that would drastically lower African American unemployment).

37. Due to the influence of these market forces, racial pride alone is inadequate to establish support for black businesses.

38. See generally Lindholm, *supra* note 129 (for consideration of the relationship between consumer purchasing and product availability).

sectors of the economy, nurturing and funding black entrepreneurship, and the acquisition of controlling interests in select enterprises and companies. The economic fund would set up offices in strategic locations targeted for business development. Capital finance, small business loans, management support, and supply chain development are key components of successful business infrastructure. Strategically supporting black businesses through these mechanisms would enable an economic trust fund to bridge the gap for many talented business women and men. To ensure that businesses reinvest in African American communities, the fund should prioritize support for business ventures that employ, enrich, or otherwise build wealth for members of African American communities.³⁹ Creating a few wealthy individuals is a dead end on the road to reparations. Projects supported by the economic trust should in turn be those that build economic institutions invested in African American well-being and the communities in which they live.

Like the educational fund, it is essential that the economic fund provide an easy on ramp for African Americans to reach economic redress. Programs, in turn, will need to look to the bottom by providing training, financial resources, and other supports that enable the least provisioned but no less committed business women and men to succeed. Along with a bias toward creating more opportunities directly or indirectly for those most disadvantaged, the economic fund should shore up the middle by helping to stabilize small and medium sized businesses and the challenges they typically face in the market. Black professional firms across sectors provide critical legal, medical, and other services for black communities. An economic fund would provide a great service to African American communities by supporting the growth and development of these firms and their ability to serve their clientele. In many ways, the fund serves the function that mentors, relatives, and friends play routinely for the wealthy of our society. As an angel investor and business support institution it will work to remediate the centuries of discrimination and exclusion African Americans faced in the fiscal, professional, and commercial markets.

39. See generally, Carlton Waterhouse and Andre Smith, *No Reparations without Taxation*, PITTSBURGH TAX REVIEW, Vol. 7, Issue 2 (Spring 2010), pp. 159-210 for an exploration of the tax consequences and mechanisms of an economic trust fund for African American reparations.

Obtaining meaningful reparations represents a serious and worthwhile endeavor for African Americans.⁴⁰ After four centuries of racism-white supremacy, a collective yearning for true equality remains muted by ongoing discrimination. Structural racism and individual efforts make substantive equality just beyond the horizon for most African Americans. A route to meaningful redress for the masses of African Americans is sorely needed and long overdue. Beyond discussions of why reparations are warranted that dominate the discussion, this article explores two critical pathways to reach meaningful redress. The approach looks to the bottom as the starting point to ensure that African Americans have easy access to enjoy the restoration and remediation that redress can provide. The chief contribution of the article is the rough description of the educational and economic structures that lead to transformative redress for the masses of African Americans. These pathways provide necessary steps to redress yet they are not sufficient to remedy the generational harms of slavery and segregation. Additional pathways detailing political, health, environmental, cultural, and familial roads remain under construction and in need of future development.

40. Rhoda E. Howard-Hassmann, *Why reparations to African-Americans are necessary – how to start now*, THE CONVERSATION.COM, July, 15, 2019. <http://theconversation.com/why-reparations-to-african-americans-are-necessary-how-to-start-now-119581>.

NOTE

Land of the Free? An Examination of the Constitutionality of Forced Labor in U.S. Immigrant Detention Centers

JAMILA S. CAMBRIDGE¹

“Not everything that is faced can be changed, but nothing can be changed until it is faced.”²

ABSTRACT

In 2017, Immigration Customs and Enforcement (“ICE”) detained over 40,000 migrants—an unprecedented number of detentions in the United States.³ In these detention centers, many migrants are subjected to a practice known as the “deprivation scheme,” where they must work grueling hours for as little as one dollar a day to afford necessities such as toilet paper, toothpaste, food, and other sanitary products.⁴ If they refuse, they are often punished with solitary

1. Student note, Howard University School of Law. I would like to thank my faculty advisor, Dean Mariela Olivares, who supported this Note from its inception. Finally, I would like to thank my parents, Cheryl Baskerville and Vaughn Cambridge, whose immigration story ignited my passion for immigration reform.

2. James Baldwin, *As Much Truth As One Can Bear; To Speak Out About the World As It Is, Says James Baldwin, Is the Writer's Job As Much of the Truth As One Can Bear*, N.Y. TIMES (Jan. 14, 1962), <https://www.nytimes.com/1962/01/14/archives/as-much-truth-as-one-can-bear-to-speak-out-about-the-world-as-it-is.html>.

3. The terms “migrant” and “immigrant” are used interchangeably in this Note to describe an individual who has left their home country in pursuit of living in the United States; U.S. IMMIGR. CUSTOMS AND ENF'T, *Fiscal Year 2017 ICE Enforcement and Removal Operations Report* (2017), available at <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf>; Spencer Ackerman, *ICE is Imprisoning A Record 44,000 People*, DAILY BEAST (Nov. 11, 2018), <https://www.thedailybeast.com/ice-is-imprisoning-a-record-44000-people> (“ICE recently reported to Congress that, as of October 20, its average daily population in detention had reached 44,631 people.”).

4. Catherine E. Shoichet, *Lawsuit Alleges 'Forced Labor' in Immigrant Detention*, CNN (Apr. 17, 2018), <https://www.cnn.com/2018/04/17/us/immigrant-detention-forced-labor-lawsuit/in->

confinement.⁵ Although Congress outlawed chattel slavery and involuntary servitude in 1865, courts in various circuits have held that forced labor can be constitutional under the “civic duty” exception in the Thirteenth Amendment of the U.S. Constitution. This Note argues that the deprivation scheme deployed by U.S. immigrant detention centers violates the Thirteenth Amendment because by withholding essential supplies from detainees, detention centers have established a coercive practice that forces migrants to perform prison labor to survive. This Note provides a historical examination of how courts have addressed forced labor in migrant detention centers and explains how immigrant detention deprivation schemes violate the Thirteenth Amendment’s prohibition against involuntary servitude. Additionally, by exploiting refugees and asylum seekers awaiting their day in court, private prisons undermine public policy rationales centered on protecting oppressed persons seeking relief. To resolve this, the Supreme Court should find that deprivation schemes violate the Thirteenth Amendment, and Congress should raise migrant pay to the national minimum wage. Finally, this Note proposes that alternative programs should replace long-term immigrant detention.

INTRODUCTION

Deep in the rural backroads of southwest Georgia, Shoaib Ahmed, a twenty-four-year-old migrant from Bangladesh, completed his tenth day in solitary confinement.⁶ Isolated from other detainees for twenty-three hours each day and refused daily showers, Shoaib recalled his harrowing experience, noting, “I [thought] the segregation [would] kill me.”⁷ Shoaib’s crime? He encouraged his fellow detainees to stop working for sub-par wages.⁸ Shoaib was one of 1,700 men held at the Stewart Detention Center, an immigration detention facil-

dex.html (“Detainees at the Stewart Detention Center in south Georgia generally make between \$1 and \$4 a day for tasks such as preparing food, mopping floors and doing laundry, according to the lawsuit, which describes the practice as a ‘deprivation scheme’ and alleges it’s a violation of human trafficking laws. Detainees who work double shifts can earn up to \$8 a day. Part of the scheme, according to the lawsuit: Depriving detainees of basic necessities like food, toothpaste, soap and toilet paper, so they have to work to pay for those items from the detention center’s commissary.”).

5. *Id.*

6. Azadeh Shahshahani, *Why Are For-Profit U.S. Prisons Subjecting Detainees to Forced Lab.*, *THE GUARDIAN* (May 17, 2018), <https://www.theguardian.com/commentisfree/2018/may/17/us-private-prisons-forced-labour-detainees-modern-slavery>.

7. *Id.*

8. *Id.*

ity.⁹ Following his detention, Shoaib filed a lawsuit against CoreCivic, one of the largest private prison corporations in the United States.¹⁰ CoreCivic also runs several migrant detention centers.¹¹ Migrant detention is the practice of holding persons suspected of unauthorized entry, visa violations or those subject to deportation in government-owned or government-contracted facilities until immigration authorities can determine if the individual violated any immigration policy.¹² If it is determined that a law was violated or the individual cannot satisfy the requirements to lawfully reside in the United States, the individual faces deportation.¹³

In the lawsuit, Shoaib and other migrants alleged that CoreCivic violated human trafficking laws by creating a “deprivation scheme,” which forced them to work for as little as one dollar a day to purchase basic necessities such as toilet paper, toothpaste, and phone cards to call family members.¹⁴ These necessities came at an exorbitant cost as they could only purchase the items from the detention center’s commissary.¹⁵ In addition to being deprived of basic necessities, the facility provided Shoaib and the other detainees with inadequate food portions, which forced them to purchase food from the commissary to supplement for the lack of available, nutritious food.¹⁶ If the detainees objected or refused to work, they were threatened by officers with solitary confinement or stripped of their basic rights like access to daily showers, food, and/or hygiene products.¹⁷

By implementing these nefarious practices in detention centers nationwide, CoreCivic along with other detention centers net hun-

9. *Id.*

10. Renae Merle & Tracy Jan, *Wall Street Pulled It's Financing. Stocks Have Plummeted. But Private Prisons Still Thrive*, WASH. POST (Oct. 3, 2019), <https://www.washingtonpost.com/business/2019/10/03/wall-street-pulled-its-financing-stocks-have-plummeted-private-prisons-still-thrive/> (“[CoreCivic] is one of the nation’s largest private prison operators and also runs immigration detention centers for Immigration and Customs Enforcement.”).

11. *Id.*; see also Christie Thompson, *Welcome to Stewart Detention Center, The Black Hole of America's Immigration System*, VICE (Dec. 12, 2016), https://www.vice.com/en_us/article/yypv59j/welcome-to-stewart-detention-center-the-black-hole-of-the-immigration-system.

12. Int’l Det. Coal., *What Is Immigrant Detention?* INT’L DET. COAL., available at <https://idcoalition.org/about/what-is-detention/> (“Refugees, asylum-seekers and migrants are often subjected to arbitrary or unlawful detention and may be detained for months or years in overcrowded and unhygienic conditions falling below international standards.”).

13. Sarah Wise & George Petras, *The Process of Deportation*, USA TODAY (June 25, 2018), <https://www.usatoday.com/pages/interactives/graphics/deportation-explainer/>.

14. *Barrientos v. Corecivic, Inc.*, 332 F. Supp. 3d 1305, 1308 (M.D. Ga. 2018).

15. *Id.*

16. *Id.*

17. *Id.*

dreds of millions of dollars on the backs of migrants,¹⁸ many of whom are seeking asylum from their home countries.¹⁹ Along with massive profits, detention centers also have the political backing of several Republican leaders,²⁰ including former Attorney General Jeff Sessions.²¹ These leaders assert that private detention centers will yield long-term benefits because the “voluntary” labor program saves the government the cost of paying a detainee the national or state minimum wage.²² Further, these supporters assert the labor program will improve migrants’ morale.²³ Indeed, many Republican lawmakers believe forced prison labor is good for migrants’ well-being.²⁴

Moreover, these GOP leaders and the Trump Administration have a significant interest in ensuring the success of detention centers. President Trump and several GOP leaders received significant campaign contributions from GEO Group, one of the largest privately-run detention centers in the United States.²⁵ Specifically, GEO Group

18. Michael Sainato, *Private Prison Industry Lobbying, Profits Soar Under Trump Admin.*, OBSERVER (Oct. 27, 2017), <https://observer.com/2017/10/geo-group-private-prison-industry-profits-soar-under-trump/>.

19. Chico Harlan, *Inside the Administration’s \$1 Billion Deal to Detain Central American Asylum Seekers*, WASH. POST (Aug. 14, 2016), https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html?utm_term=.a6eb55f284f4; Many refugees seek asylum to escape persecution based on their race, religion, nationality and or membership in a particular social group. Many also seek asylum to escape war or violence in their home countries. In FY 2016, 994 individuals arrived in the U.S. as refugees, a 22% increase from 2015. Christina Nuñez et al., *Why People Migrate: 11 Surprising Reasons*. GLOBAL CITIZEN (Dec. 4, 2014), <https://www.globalcitizen.org/en/content/why-people-migrate-11-surprising-reasons/>; see also Brittany Blizzard & Jeanne Batalova, *Refugees and Asylees in the U.S.*, MIGRATION POL’Y INST. (June 13, 2019), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states>.

20. A letter was sent to Attorney General Jeff Sessions requesting for Sessions to support Geo Group as they litigated claims from detainees alleging that the voluntary labor program violated numerous human trafficking laws. The letter was signed by Steve King (R-Iowa), Lamar Smith (R-Tex.), Mike D. Rogers (R-Ala.), Paul A. Gosar (R-Ariz.), Matt Gaetz (R-Fla.), Andy Biggs (R-Ariz.), Louie Gohmert (R-Tex.), Dana Rohrabacher (R-Calif.), Paul Cook (R-Calif.), Scott W. Taylor (R-Va.), Earl L. “Buddy” Carter (R-Ga.), John Ratcliffe (R-Tex.), Jody Hice (R-Ga.), Duncan D. Hunter (R-Calif.), Bob Gibbs (R-Ohio), Brian Babin (R-Tex.), John Rutherford (R-Fla.) and Barry Loudermilk (R-Ga.); Tracy Jan, *These GOP Lawmakers Say It’s Okay for Imprisoned Immigrants to Work for \$1 a Day*, WASH. POST (Mar. 16, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/03/16/republican-congressmen-defend-1-a-day-wage-for-immigrant-detainees-who-work-in-private-prisons/?noredirect=on&utm_term=.07e8eae5f39d.

21. *Id.*; Shahshahani, *supra* note 6.

22. Betsy Swan, *Republicans Say Forced Labor Is Good for Detained Immigrants in Letter Defending Private Prisons*, DAILY BEAST (Mar. 15, 2018), <https://www.thedailybeast.com/republicans-say-forced-labor-is-good-for-detained-immigrants-in-letter-defending-private-prison?ref=scroll>.

23. *Id.*

24. *Id.*

25. Jan, *supra* note 20. (“The Trump administration awarded its first private prison contract to GEO, which last fall hosted a conference at Trump’s Doral golf resort. The company had also

contributed nearly half a million dollars to the inauguration and election of President Trump; \$17,500 in campaign contributions to several of their GOP supporters; and \$1.7 million in lobbying efforts to encourage for-profit, privately-run immigrant detention.²⁶

The Democratic Party, however, is not blameless in the expansion of for-profit immigrant detention. Long-term migrant detention and incarceration significantly expanded during the Clinton Administration as a response to the 1993 World Trade Center attack.²⁷ At the end of President Clinton's tenure, the budget for immigration enforcement increased five-fold.²⁸ During the Obama Administration, the United States was spending more on immigration enforcement than all federal agencies combined.²⁹ Consequently, the Trump Administration was able to expand immigrant detention due to government contracts created under the Obama Administration.³⁰

Proponents of these forced prison labor programs assert that the programs are voluntary because the detainees are being paid, and therefore, the migrants have no legal recourse.³¹ Court decisions also support the initiatives, suggesting that much of the labor the migrants perform, such as cleaning, cooking and upkeep of the facilities, are "housekeeping duties" that fall within the "civic duty" exception of

donated \$250,000 toward Trump's inaugural festivities, on top of the \$225,000 a company subsidiary donated to a super PAC to elect Trump. In the 2016 and 2018 election cycles, GEO has contributed a total of \$17,500 to the campaigns of five of the lawmakers who signed the letter: Gaetz, Cook, Taylor, Ratcliffe and Rutherford. The company spent \$1.7 million in 2017, a more than 70 percent increase from 2016, lobbying on issues that included the deportation of federal prisoners and alternatives to detention within ICE.").

26. *Id.*

27. Carly Goodman, *Angry That ICE is Ripping Families Apart? Don't Just Blame Trump. Blame Clinton, Bush and Obama Too*, WASH. POST (June 11, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/06/11/angry-that-ice-is-ripping-families-apart-dont-just-blame-trump-blame-clinton-bush-and-obama-too/> ("Rather than releasing the [asylum seekers] while they awaited asylum hearings, the Clinton administration decided to detain most of them in jails and prisons, to demonstrate its attention to the increasingly fraught immigration policy debate. Immigration detention was not widespread at the time—in 1994, there was room for fewer than 7,000 people per day in immigrant detention centers nationwide.").

28. *Id.* ("Between 1990 and 2002, the budget of the Immigration and Naturalization Service (INS, previously the agency in charge of immigration services and enforcement) increased fivefold.").

29. *Id.* ("By 2013, the United States was spending more on immigration enforcement than on FBI, Secret Service, the Drug Enforcement Administration and all other federal criminal law enforcement agencies combined, and holding more people in immigration.").

30. Towards the end of his administration, President Obama took steps to close some private detention centers; however, President Trump was able easily to reinstate them after his election. John Burnett, *Big Money As Private Jails Boom*, NPR (Nov. 21, 2017), <https://www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom>.

31. Shahshahani, *supra* note 6.

the Thirteenth Amendment.³² However, circuits are split on this issue, which has resulted in conflicting case law.³³ Given the lack of Supreme Court precedent, the constitutionality of forced migrant labor is a matter being decided by the state courts.

Moreover, supporters further assert that the labor programs actually benefit detainees as they “reduce the negative impact of confinement through decreased idleness, improved morale, and [lead to] fewer disciplinary incidents.”³⁴ However, these proponents fail to acknowledge the lasting effects of the consequences that follow these mandatory work programs.³⁵ Detainees can suffer from significant psychological, physical side effects from solitary confinement such as panic attacks, depression, and suicide.³⁶

This Note examines whether the deprivation schemes in migrant detention centers are a violation of the protections against involuntary servitude guaranteed by the Thirteenth Amendment of the U.S. Constitution. This Note analyzes immigrant detention center deprivation schemes and how these practices violate the Thirteenth Amendment’s prohibition against involuntary servitude. Part I provides a historical overview of the Thirteenth Amendment and how courts have held that forced labor in U.S. detention centers is impermissible and that detained migrants are entitled to the protections guaranteed by the Thirteenth Amendment. Part II examines the history of detention

32. Brianne Power, *When Is Forced Labor Consistent with the General Basic System of Free Labor? An Analysis of Historical Judge-Made Exceptions to the Thirteenth Amendment*, ON LABOR (Apr. 26, 2018), <https://onlabor.org/when-is-forced-labor-consistent-with-the-general-basic-system-of-free-labor-an-analysis-of-historical-judge-made-exceptions-to-the-thirteenth-amendment/>.

33. *Id.* (“Similarly, the Fifth Circuit and the Supreme Court of Indiana have extended the ‘civic duty exception’ to housekeeping tasks in public institutions. Also citing *Butler*, the Supreme Court of Indiana held in *Bay v. Sonnenburg* and here that requiring patients at a mental health facility to perform housekeeping tasks “fit squarely within this ‘civic duty’ exception.” Later, in *Channer v. Hall*, the Fifth Circuit held that requiring a civil detainee to work in the detention center’s Food Services Department fell within the Amendment’s exception. The Second Circuit appears to disagree in *McGarry v. Pallito*.””).

34. Shahshahani, *supra* note 6.

35. See Jason Breslow, *What Does Solitary Confinement Do to Your Mind?* FRONTLINE (Apr. 22, 2014), <https://www.pbs.org/wgbh/frontline/article/what-does-solitary-confinement-do-to-your-mind/>. (“Stuart Grassian, a board-certified psychiatrist and a former faculty member at Harvard Medical School, has interviewed hundreds of prisoners in solitary confinement. In one study, he found that roughly a third of solitary inmates were ‘actively psychotic and/or acutely suicidal.’ Grassian has since concluded that solitary can cause a specific psychiatric syndrome, characterized by hallucinations; panic attacks; overt paranoia; diminished impulse control; hypersensitivity to external stimuli; and difficulties with thinking, concentration and memory. Some inmates lose the ability to maintain a state of alertness, while others develop crippling obsessions.”).

36. *Id.*

center voluntary work programs and how the current pay rate for migrant labor is utilized to systemically exploit detained immigrants. Part III discusses why these deprivation schemes violate the Thirteenth Amendment. Finally, this Note provides two solutions: (1) fair wages for detained immigrants, such as the national minimum wage and (2) the ultimate end of incarceration of undocumented immigrants awaiting their immigration hearings.

THIS IS AMERICA: THE EVOLUTION OF FORCED MIGRANT LABOR

While the controversial policies of the Trump Administration have ushered in an era of amplified scrutiny toward immigration reform, the forced labor of undocumented migrants is nothing new in the United States. Although the Thirteenth Amendment outlawed chattel slavery and involuntary servitude in 1865, the Supreme Court did not address the constitutionality of forced migrant labor until 1896 in the landmark case *Wong Wing v. United States*.³⁷ Here, the Court determined that an illegal entry or unauthorized stay in the United States is not a criminal offense; thus, a detained immigrant cannot be subjected to forced prison labor unless the individual is convicted of a crime.³⁸

Wong Wing, however, is silent on the constitutionality of forced labor in immigrant detention centers. This lack of precedent has allowed many lower courts to use the “civic duty” exception of the Thirteenth Amendment to justify forced labor in immigrant detention centers.³⁹ The lack of consistency among circuits places judicial relief for many detained migrants in a precarious position if they must litigate their claims in an unfavorable circuit.

Part I begins with a discussion on the history of the Thirteenth Amendment’s enactment and how the Amendment’s protections extend to all forms of slavery. Next, this section provides an analysis of how the *Wong Wing* decision failed to categorize forced labor as a form of slavery, which allowed some lower courts to permit forced labor in detention centers under the “civic duty” exception. Finally, Part I concludes by addressing how the civic duty exception still vio-

37. See generally *Wong Wing v. United States*, 163 U.S. 228 (1896).

38. *Id.* at 241.

39. Power, *supra* note 32.

lates the Thirteenth Amendment because it is used for a pecuniary purpose.

The History and Purpose of the Thirteenth Amendment

In 1863, in response to the secession of the Southern states, President Abraham Lincoln issued the Emancipation Proclamation, which declared that, “all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free.”⁴⁰ Although President Lincoln is often incorrectly credited for freeing all people enslaved during the Civil War, the wording of his declaration was clear and intentional: only slaves that lived in confederate states were granted freedom.⁴¹

Lincoln’s strategy was a means to destabilize the rebellious South, while rewarding the Union States on the condition that they remain loyal to the Union.⁴² Thus, many doubted the Emancipation Proclamation would last after the Civil War ended and the southern states rejoined the Union.⁴³ However, at the end of the War, Congress passed the Thirteenth Amendment, and the States ratified the Amendment on December 18, 1865.⁴⁴ According to Senator Trumbull—one of the Amendment’s sponsors—Congress enacted the Amendment as a means to “take the question [of emancipation] entirely away from the politics of the country.”⁴⁵ Trumbull’s words framed chattel slavery—and other forms of forced labor—as a human rights issue that transcended political affiliations.

The Thirteenth Amendment provides that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly *convicted*, shall exist within the United States, or any place subject to their jurisdiction.”⁴⁶ Although Congress’ intent when writing the Amendment was to end the enslavement of Afro-descendants, the Supreme Court noted in the *Slaughter-House Cases* that the Amendment extended to all forms of slavery:

40. Emancipation Proclamation, 12 Stat. 1268 (1863).

41. *Id.*

42. James C. Welling, *The Emancipation Proclamation*, 130 N. AMER. REV. 163 (1880); see also J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 371–404 (rev. ed. 1951).

43. Ronald G. Shafer, *Lincoln Moved to End Slavery on New Year’s Day 1863. It Went on for Three More Years*, WASH. POST (Jan. 1, 2019), https://www.washingtonpost.com/history/2019/01/01/lincoln-declared-an-end-slavery-new-years-day-it-went-two-more-years/?noredirect=on&utm_term=.9f7725b925a4.

44. BERNARD SCHWARTZ, *Statutory History of the United States: Civil Rights* 25-96 (1970).

45. CONG. GLOBE, 38th Cong., 1st Sess. 1489 (1864).

46. U.S. CONST. amend. XIII, §1 (emphasis added).

“[i]f Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.”⁴⁷ Thus, the Court forecasted the ability of the lower courts to end systemic forms of enslavement—particularly for those who are disenfranchised—through the Amendment.

The Supreme Court’s Interpretation of the Thirteenth Amendment and Migrant Labor

While the Thirteenth Amendment ended chattel slavery and involuntary servitude in the United States, the Supreme Court first addressed the constitutionality of forcing detained migrants to perform prison labor in 1896.⁴⁸ In *Wong Wing v. United States*, the defendant, a Chinese immigrant, was ordered to be removed from the U.S. under the Chinese Exclusion Act.⁴⁹ Wong was brought before the commissioner of the Circuit Court in Michigan.⁵⁰ The commissioner held that Wong would be detained for six days, required to perform labor in the detention center, and then he would be removed from the United States.⁵¹ Wong appealed the decision, arguing that he was unlawfully detained.⁵² The Court held that while the United States may forbid aliens or classes of aliens from crossing the U.S. border, Congress could not subject detained immigrants to forced labor without a conviction subsequent a trial.⁵³ *Wong Wing* explained that an immigrant can be deported for reasons besides criminal violations; thus, a *detained* immigrant cannot be subject to forced labor.⁵⁴

Indeed, the Court’s decision in *Wong Wing* protected detained migrants from forced prison labor. However, the Court failed to categorize forced labor in detention centers as a Thirteenth Amendment violation.⁵⁵ Consequently, the Supreme Court’s silence on forced labor in detention centers has allowed lower courts to create a “civic duty” exception within the Thirteenth Amendment, establishing that detention centers are “entitled” to detainee labor.⁵⁶ Thus, courts

47. *Slaughter-House Cases*, 83 U.S. 36, 72 (1872).

48. *Wong Wing*, 163 U.S. at 235.

49. *Id.* at 239.

50. *Id.* at 240.

51. *Id.*

52. *Id.*

53. *Id.* at 237.

54. *Id.* (emphasis added).

55. *Id.* at 238.

56. Power, *supra* note 32.

across many circuits are divided on whether detained migrants can successfully bring Thirteenth Amendment civil lawsuits.⁵⁷

The “Civic Duty” Exception of the Thirteenth Amendment Allows Detention Centers to Force Immigrant Detainees to Work

While the Thirteenth Amendment prohibits involuntary servitude, there is a “civic duty” exception.⁵⁸ This exception explains that services an individual owes the government such as jury duty, military service, etc., fall within a civic duty exception, which is not prohibited under the Thirteenth Amendment.⁵⁹ Under this exception, the Court has decided that the state and federal government can compel individuals, under threat of criminal sanctions, to perform these duties.⁶⁰ Some lower courts have expanded the civic duty exception to include “housekeeping duties” as a service the government is owed when an individual is detained or incarcerated.⁶¹ Housekeeping duties have been defined as the cleaning of facilities and laundry or maintaining the upkeep of the detention center.⁶² Although the phrase “housekeeping duties” is not in the wording of the Thirteenth Amendment nor in any Supreme Court opinion, some lower courts have used housekeeping duties as a carve-out to the civic duty exception, legalizing forced migrant labor.⁶³

Although *Wong Wing* established a precedent that protected migrants without criminal convictions from involuntary servitude, some lower courts have circumvented the *Wong Wing* precedent by ruling that detainees cannot bring Thirteenth Amendment claims because their work should be categorized as housekeeping duties, thereby preventing migrants from prevailing in claims that forced labor in immigrant detention centers is a form of involuntary servitude.⁶⁴

57. Leora Smith, *The Use of Forced Labor in Private Immigration Detention Centers*, ON LABOR (Oct. 29, 2018), <https://onlabor.org/the-use-of-forced-labor-in-private-immigration-detention-centers/>.

58. Power, *supra* note 32.

59. *Butler v. Perry*, 240 U.S. 328, 333 (1916).

60. *United States v. Kozminski*, 487 U.S. 931, 943–44 (1988).

61. *Butler*, 240 U.S. at 333.

62. Alexandria Gutierrez, *Sufferings Peculiarly Their Own: The Thirteenth Amendment, In Defense of Incarcerated Women’s Reproductive Rights*, 15 BERKELEY J. AFR.-AM. L. & POL’Y 117, 160 (2013) (“Courts have found that inmates can be required to do general housekeeping duties, such as cleaning their cells and assisting with the upkeep of the facility.”).

63. Smith, *supra* note 57.

64. *See Bayh v. Sonnenburg*, 573 N.E.2d 398, 410 (Ind. 1991); *Channer v. Hall*, 112 F.3d 214, 219 (5th Cir. 1997).

For instance, in *Channer v. Hall*, a migrant detainee sued, alleging a Thirteenth Amendment violation because he was forced to work in the detention center's kitchen.⁶⁵ The Fifth Circuit held the detention center did not violate the Thirteenth Amendment because even though Channer was threatened with solitary confinement for refusing to work, he received *some* compensation for his work.⁶⁶ Thus, Channer failed to demonstrate that his form of compulsory labor was "akin to African slavery."⁶⁷ Disturbingly, the court's rationale is based on an erroneous assertion: that enslaved people of African origin were not forced to perform various housekeeping tasks such as cooking, cleaning, and repairs that solely contributed to the upkeep of the slave masters' homes. Additionally, the court relied on precedent from the Second Circuit, which held that certain housekeeping duties fall within the "civic duty" exception under the Thirteenth Amendment.⁶⁸ Thus, Channer could not obtain relief because the federal government was "entitled" to his labor.⁶⁹ Specifically, the court held that it was reasonable for the prison to expect Channer to perform "housekeeping chores" such as fixing meals, cleaning the building, and scrubbing dishes because such labor was part of Channer's "civic duty" as a detainee.⁷⁰

The *Channer* decision introduced the disturbing notion that migrants are not entitled to relief under the Thirteenth Amendment because forced labor is not as harsh as the labor imposed by African slavery. Furthermore, proponents for the "voluntary" work program asserted that the migrants were "[i]mpart[ed] [with] skills and habits that would ease the process of reintegrating into free society."⁷¹ These supporters asserted that forced labor programs helped detainees better acclimate to the U.S. workforce, yet they failed to openly acknowledge the detrimental effects these programs have on the physical, psychological and emotional health of detained immigrants. Fortunately, some courts have recognized how the tactics employed by private detention centers have violated the rights of detained migrants

65. *Channer*, 112 F.3d at 217.

66. *Id.* at 218 (emphasis added).

67. *Id.*

68. *Id.* at 219.

69. *Id.* (Specifically, the court stated, "we hold that the federal government is entitled to require a communal contribution by an INS detainee in the form of housekeeping tasks, and that Channer's kitchen service, for which he was paid, did not violate the Thirteenth Amendment's prohibition of involuntary servitude.")

70. *Id.*

71. *See* McGarry v. Pallito, 687 F.3d 505, 512 (2d Cir. 2002).

and have ruled in favor of detained migrants.⁷² Specifically, the following section discusses how the housekeeping duties exception is violated when forced labor is used for a pecuniary purpose.

The Housekeeping Duties Exception Violates The Thirteenth Amendment When Forced Labor is Used for A Pecuniary Purpose

The Second Circuit has recognized the unconstitutionality of forced labor programs and has ruled in favor of detainees when the detention center used the detainees' labor to reduce institutional costs.⁷³ In *McGarry v. Pallito*, Finbar McGarry sued the Chittenden Regional Correction Facility in Vermont, where he was detained regarding a domestic violence dispute.⁷⁴ He was awaiting a bail hearing and, therefore, was not convicted of any criminal charges.⁷⁵ McGarry alleged that prison officers required him to work in the prison laundry room despite his continuous objections.⁷⁶ He claimed that when he refused to work, officers threatened him with "the hole" (solitary confinement) for twenty hours a day.⁷⁷ Additionally, the officers told McGarry that if he continued to defy them, he would receive an Inmate Disciplinary Report, which would affect McGarry's eligibility for release.⁷⁸

While working in the prison laundry room, McGarry was subjected to hot, unsanitary conditions.⁷⁹ The bathroom near the laundry room was bolted shut, impeding his ability to use the restroom during his fourteen-hour shifts.⁸⁰ He was required to handle inmates' soiled clothing but was never given gloves or hand soap.⁸¹ Consequently, McGarry was diagnosed with a staph infection in his neck that "manifested itself as a series of reoccurring lesions."⁸²

72. See generally *Novoa v. Geo Grp., Inc.*, No. EDCV 17-2514 JGB (SHKx), 2018 U.S. Dist. LEXIS 117129 (C.D. Cal. June 21, 2018); see generally *Figgs v. GEO Grp., Inc.*, No. 1:18-cv-00089-TWP-MPB, 2019 U.S. Dist. LEXIS 53991 (S.D. Ind. Mar. 29, 2019).

73. See McGarry, 687 F.3d at 514.

74. *Id.* at 508–09.

75. *Id.*

76. *Id.*

77. *Id.* at 509.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

In his lawsuit against the correctional facility, McGarry alleged that the forced prison labor he endured during his detention violated his rights under the Thirteenth Amendment.⁸³ The prison defended its actions, arguing that compelled prison labor was legal and that state officers had a “legitimate interest in reforming its inmates.”⁸⁴ Moreover, the prison asserted that McGarry had no claim for relief because he failed to show how the forced labor he endured was akin to African slavery.⁸⁵

The Second Circuit ruled for McGarry and reversed the district court.⁸⁶ The court was unpersuaded by the prison’s arguments, holding that previous jurisprudence clearly stated that prison guards are only able to impose forced labor to rehabilitate *convicted* inmates, not detainees awaiting their hearing.⁸⁷ Thus, it was not “objectively reasonable” for officers to conclude that detainees should be forced to perform prison labor.⁸⁸ In response to the prison’s assertion that McGarry’s claim should fail because the forced labor he endured was not similar to African slavery, the court poignantly refuted the prisons rationale, stating, “it would be grotesque to read involuntary servitude as not covering a situation where an employee was physically restrained by guards or where servitude was created by a credible threat of imprisonment.”⁸⁹ Finally, the court held that an institution violates the Thirteenth Amendment when it forces inmates to perform chores that are not personally related but rather are to offset institutional costs.⁹⁰ Thus, McGarry had an actionable claim because he was forced to clean laundry for multiple inmates in the facility, a task not reasonably construed as personally related housekeeping chores.⁹¹

Although McGarry was not held in an immigrant detention center, his case is still largely relevant in the context of immigration detention, namely because he was not convicted of a crime and thus could not be subject to forced labor. Further, the civic duty exception of the Thirteenth Amendment did not apply to his detention because the work McGarry was subjected to extended outside of maintaining

83. *Id.* at 511.

84. *Id.* at 512.

85. *Id.* at 510.

86. *Id.* at 514.

87. *Id.* at 513 (emphasis added).

88. *Id.*

89. *Id.* at 511.

90. *Id.* at 514.

91. *Id.*

his living quarters, and he was forced to work to offset the institutional costs of the correction facility. Consequently, the *McGarry* decision augments immigrant detainees' Thirteenth Amendment claims because the court narrowly defined housekeeping chores and established a higher burden that prisons must satisfy to justify subjecting detainees to forced labor.

First, *McGarry* established that rehabilitation is an insufficient justification for forcing migrants to perform prison labor if they have not been convicted of a crime.⁹² Consequently, the Second Circuit's decision refutes the argument that forced labor is necessary to help migrants adjust to working in the United States because "rehabilitative" efforts cannot be used as justification for subjecting detainees with no convictions to forced labor. Second, the Second Circuit refuted the argument that detainees must demonstrate how forced labor is akin to African slavery.⁹³ The assertion that prison labor bears no similarity to slavery is also weakened, given that many enslaved people were forced to perform housekeeping tasks such as cleaning, laundry and upkeep of the slave master's property. Consequently, *McGarry* lowered the burden that a detainee's claim must meet, as it is unlikely that U.S. prison conditions will mirror the horror and brutality that was African slavery. Moreover, that standard should not impair a detainee's claim as the Thirteenth Amendment does not explicitly use the enslavement of Afro-descendants as the measuring stick to define involuntary servitude.

Finally, the court in *McGarry* narrowly construed prison labor by categorizing "housekeeping chores" as those that are personally related to the detainee.⁹⁴ Detention centers can no longer broadly categorize housekeeping chores to force migrants to work for little to no pay. Thus, prisons are prohibited from forcing detainees to perform prison labor to offset prison costs.⁹⁵ This bolsters detainees' claims because many detainees in the voluntary work programs are required to maintain, clean and repair the facilities in areas where they do not reside.⁹⁶ Moreover, it is established that detention centers maintain

92. *Id.* at 513.

93. *Id.* at 511.

94. *Id.* at 514.

95. *Id.*

96. Yara Kunichoff, "Voluntary" Work Program Run in Private Detention Centers Pays Detained Immigrants \$1 a Day, TRUTHOUT (July 27, 2012), <https://truthout.org/articles/voluntary-work-program-run-in-private-detention-centers-pays-detained-immigrants-1-a-day/>; see also Victoria Law, *Investigation: Corporations are Profiting from Immigrant Detainees' Labor. Some say*

these work programs to lower the prison costs by reducing the need for prison custodial staff.⁹⁷ Therefore, detained immigrants may be able to obtain judicial relief by showing that they were required to work for these reasons. Although *McGarry* is only precedent in the Second Circuit—and other circuits have not similarly ruled—detained migrants can look to the decision for guidance on successfully bringing their claims.

HISTORY OF MIGRANT PAY AND THE VOLUNTARY WORK PROGRAM

In addition to arguing that detention centers are entitled to migrant labor under the civic duty exception, supporters of forced migrant labor assert that detainees do not have an actionable Thirteenth Amendment claim because they are paid for their work.⁹⁸ Despite generating billions of dollars through federal contracts to detain immigrants,⁹⁹ privately-run detention centers avoid paying migrants the federal minimum wage by claiming the \$1-a-day pay rate was set by Congress in the Appropriations Act of 1978.¹⁰⁰ Although detention center officials claim that they must adhere to the detention policies established by ICE, many detention centers fail to follow the ICE employment standards; consequently, many migrants have been compensated in candy and chips, not been paid at all, or have died due to harsh working conditions.¹⁰¹

Thus, the history of the migrant pay rate and detention center voluntary work programs reflect a system that was crafted to capitalize off of migrant labor without having to adequately compensate detainees. Because detainees are not adequately compensated, they are

it's Slavery, IN THESE TIMES (last visited May 2, 2019), http://inthesetimes.com/features/ice_immigrant_detention_centers_forced_prison_labor_investigation.html.

97. Discussed *infra* Part I.

98. Jan, *supra* note 20.

99. Farida Jhabvala Romero, *ICE Signs New For-Profit Detention Contracts Days Before California's Ban Begins*, KQED (Dec. 19, 2019), <https://www.kqed.org/news/11792302/ice-poised-to-sign-new-for-profit-detention-contracts-before-californias-ban-begins> (“The ICE contracts total \$6.5 billion and extend for as long as 15 years, much longer than typical immigration detention agreements.”).

100. Madison Pauly, *How a Private Prison Company Used Detained Immigrants for Free Labor*, MOTHER JONES (Apr. 3, 2017), <https://www.motherjones.com/politics/2017/04/geo-forced-labor-lawsuit/> (When nine detainees from the Denver Contract Detention Facility filed grievances against GEO for inadequate pay, GEO’s assistant manager stated that ICE, not GEO, sets the pay rate.).

101. Anita Sinha, *Slavery by Another Name: “Voluntary” Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J.C.R. & C.L. 1, 30 (2015).

coerced into working to afford necessities. Part II examines the history of the \$1 dollar-a-day rate and how the Voluntary Work Program in detention centers has been used to exploit detained immigrants.

History of the Pay Rate for Detained Migrant Labor

Conflicting legislation and case law surrounding compensation for undocumented migrant labor first appeared in the enactment of the 1986 Immigration Reform Control Act (“IRCA”), which made it unlawful for unauthorized migrants to work.¹⁰² However, when the Immigration and Nationality Service¹⁰³ (“INS”), interpreted the IRCA, it determined that the Act did not apply to detained migrants.¹⁰⁴ In a legal opinion, the INS General Counsel reasoned that the relationship between detainee workers and INS or private detention centers should not be construed as an employee/employer relationship because the purpose of voluntary labor programs was to provide detainees the opportunity to “participate in an institutional work program and . . . [w]ork performed is for the purpose of rehabilitation and institutional maintenance, not compensation.”¹⁰⁵

Disturbingly, the INS also stated that there are instances when detainees would be forced to work, directly contradicting *Wong Wing*, which prohibited forced labor of migrants with no criminal convictions.¹⁰⁶ However, the House Judiciary Committee circumvented this inherent contradiction by asserting that the detainee work programs were voluntary, thereby distinguishing it from a forced labor law.¹⁰⁷ Specifically, the House Judiciary Committee established that there were instances when detainees would be forced to work, despite calling the work program “voluntary.”¹⁰⁸ Further, because unauthorized

102. 8 U.S.C. § 1101 (“Amends the Immigration and Nationality Act to make it unlawful for a person or other entity to: (1) hire (including through subcontractors), recruit, or refer for a fee for U.S. employment any alien knowing that such person is unauthorized to work, or any person without verifying his or her work status; or (2) continue to employ an alien knowing of such person’s unauthorized work status.”).

103. The INS, now known as the U.S. Citizenship and Immigration Services (“USCIS”), is a federal agency that oversees lawful immigration to the United States. Adrienne Lerner, *INS United States Immigration And Naturalization Service*, ENCYCLOPEDIA (Dec. 23, 2019), <https://www.encyclopedia.com/social-sciences-and-law/political-science-and-government/us-government/united-states-immigration-and-naturalization-service>. This Note refers to the agency as INS, as opposed to USCIS, to reflect the accurate name of the agency at the time the IRCA was interpreted.

104. Sinha, *supra* note 101, at 30.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

migrants were not classified as employees, detention centers were not required to pay the detainees minimum wage for their services.¹⁰⁹ The Immigration and Nationality Act delegated the ability to modify detainee pay to Congress, which must be made through an appropriations act.¹¹⁰

Congress first set the pay in 1950 to one dollar a day and last addressed migrant pay in the Appropriations Act of 1978, where Congress kept the 1950 pay rate.¹¹¹ The pay for migrant labor has remained unchanged. Today, if the 1950 pay rate was adjusted for inflation it would be equivalent to approximately \$10.89 a day,¹¹² which is still significantly below the hourly national minimum wage.¹¹³ Further, even under that adjustment, a detainee who works one day still would not earn enough to purchase a tube of toothpaste from some detention center commissaries.¹¹⁴ This disparity is not just isolated to one or two detention centers; it is occurring in facilities across the country.¹¹⁵

For example, a can of commissary tuna at a detention facility in Adelano, California costs \$3.25, quadruple the price at a Target store in the surrounding neighborhood.¹¹⁶ A miniature deodorant stick,

109. *Id.*

110. 8 U.S.C. § 1555(d).

111. Congress last set the rate in 1978. Department of Justice Appropriation Act, 1978, Pub.L. No. 95-86, 91 Stat. 426 (1978) (setting “rate not in excess of \$1 per day”).

112. *Calculate the Value of \$1.00 in 1950*, DOLLAR TIMES, <https://www.dollartimes.com/inflation/inflation.php?amount=1&year=1950> (last visited May 2, 2019).

113. The hourly national minimum wage is \$7.25 per hour. WageIndicator Found., *Minimum Wage - Federal*, PAY WIZARD, <https://paywizard.org/salary/minimum-wage> (last visited May 2, 2019).

114. Paul Blest, *Welcome to Immigration Jail, Where Toothpaste Costs \$11*, SPLINTER (Jan. 18, 2019), <https://splinternews.com/welcome-to-immigration-jail-where-toothpaste-costs-11-1831882681> (“Detainees are charged \$11.02 for a 4oz tube of Sensodyne toothpaste.”).

115. See Michelle Conlin & Kristina Cooke, *\$11 Toothpaste: Immigrants Pay Big for Basics at Private Ice Lock-Ups*, REUTERS (Jan. 18, 2019), <https://www.reuters.com/article/us-usa-immigration-detention/11-toothpaste-immigrants-pay-big-for-basics-at-private-ice-lock-ups-idUSKCN1PC0DJ>; see also Aris Folley, *Detained Immigrants Paid \$1 a Day, With Toothpaste Costing \$11*, THE HILL (Jan. 18, 2019), <https://thehill.com/blogs/blog-briefing-room/news/426008-immigrant-that-was-paid-1-a-day-salary-at-detention-facility>; Katherine Hignett, *ICE Detainees Who Earn \$1 A Day Can't Afford \$11 Toothpaste On Sale At Private Detention Center*, NEWSWEEK (Jan. 18, 2019), <https://www.newsweek.com/ice-detention-center-immigration-adelanto-stewart-1297597> (“A commissary price sheet from another private detention facility—the Stewart Detention Center in Lumpkin, Georgia, as seen by Reuters—listed a tube of Sensodyne toothpaste for \$11.02 and Dove soap for \$2.44 . . . “Honduran asylum seeker Douglas Cruz, 25, said he took a \$1-a-day job at the Adelanto Detention Facility in California to supplement meager meals provided by the center. But his salary wasn’t high enough to buy commissary items like tuna (a can costs \$3.25) or deodorant (\$4.35 for a small stick).”).

116. Conlin, *supra* note 115.

priced at \$3.35, costs a detainee more than three days' wages.¹¹⁷ A bar of Dove soap costs detainees \$2.44, despite being available for just over a dollar at the local Target.¹¹⁸ Detention centers also profit from fees charged detainees for adding money to their commissary.¹¹⁹ Vioney Gutierrez, a former detainee at GEO Group's Adelanto facility, said ten percent of the money her family spent to fund her commissary account was consumed by fees, stating, "When my daughter put in [forty dollars], I got [thirty-six dollars]."¹²⁰ The lack of adequate pay for detainees further demonstrates how detention center work programs systematically force migrants to work to afford essential supplies for their survival. The grossly undervalued pay rate, coupled with the detainee voluntary work program created a government-sanctioned system that capitalizes off detained migrants, awaiting their day in court. The following section outlines the origin of voluntary work programs and the dangers migrants are exposed to while in custody.

History and Implications of Voluntary Work Programs

ICE refers to the implementation and systematic facilitation of detainee labor across detention centers as the "Voluntary Work Program."¹²¹ For-profit, private detention centers contract with ICE and contribute to the majority of paid migrant labor under the Voluntary Work Program.¹²² Many of these centers are also run by the same companies that operate private prisons.¹²³ Thus, by entering into government contracts with ICE, overcharging for commissary items, and charging fees for depositing money into commissary accounts, private prisons have systemically profited off of migrant detention. Further, this system endangers the lives of many detained migrants as the facilities are often poorly managed, resulting in horrific working conditions for detainees.¹²⁴

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. INS, *Voluntary Work Program*, INS DETENTION STANDARD: VOLUNTARY WORK PROGRAM (2000), available at <http://www.ice.gov/doclib/dro/detention-standards/pdf/work.pdf>.

122. Sinha, *supra* note 104, at 32.

123. Dymond Green & Tala Hadavi, *Why Big Banks Could Be Killing Private Prisons*, CNBC (Jan. 2, 2020), <https://www.cnbc.com/2020/01/02/why-private-prisons-geo-group-and-corecivic-are-struggling-under-trump.html> (CoreCivic and The GEO Group are two of the largest companies that manage private prisons and private detention centers.).

124. Sinha, *supra* note 104, at 33–35.

In 2000, ICE created detention standards that contained an overview of how voluntary work programs should be facilitated.¹²⁵ According to those standards, detainees could not be required to work, except to perform “personal housekeeping.”¹²⁶ Additionally, detainees were not allowed to work more than eight-hour days and could not work more than forty hours a week.¹²⁷ Detention centers are not legally required to provide detainees with basic health and safety protections, but the detention standards specified that these services would be provided to those who chose to work under the program.¹²⁸

Despite these protections, many detainees reported that detention center officers did not strictly follow the ICE standards.¹²⁹ Migrants were often forced to work hours that significantly exceed the eight-hour maximum.¹³⁰ They were also tasked with life-threatening assignments outside the scope of personal housekeeping such as performing electrical work without adequate safety tools and equipment.¹³¹

In 2007, Cesar Gonzales, a detainee at a Los Angeles detention center died after his jackhammer struck an electrical cable, sending 10,000 electrical volts through his body.¹³² He was tasked with digging holes around the facility’s perimeter to expand the property’s landscape.¹³³ Representatives of the detention center—in an attempt to

125. INS, *supra* note 121. These standards outline the requirements ranging from work hours to responsibilities of detainees. need a more descriptive short cite. Made add something about the requirements for workers here compared to the equivalent for OSHA?

126. *Id.*

127. *Id.*

128. Sinha, *supra* note 104, at 32.

129. *Id.* at 34–35. (“Some detainees describe being paid in junk food in lieu of the dollar-a-day wage. Karina Tamayo from the Northwest Detention Center received a chocolate bar and chips for cleaning other cells and folding blankets for incoming detainees. . . . In other reported cases, detainee labor is an alternative to punishment or harsher treatment. For Marian Martins, a detainee held in Alabama’s Etowah County Detention Center, ‘work had been her only ticket out of lockdown, where she was placed when she arrived without ever being told why.’ . . . another Stewart detainee reported that he ‘was threatened with segregation if he refused to work less than eight hours a day,’ and alleged that this was ‘not atypical.’”).

130. *Id.*

131. Jacqueline Stevens, *When Migrants Are Treated Like Slaves*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/opinion/migrants-detention-forced-labor.html>. (“Workers in immigration custody have suffered injuries and even died. In 2007, Cesar Gonzalez was killed in a facility in Los Angeles County when his jackhammer hit an electrical cable, sending 10,000 volts of direct current through his body. He was on a crew digging holes for posts to extend the camp’s perimeter.”).

132. *Id.*

133. *Id.*

avoid culpability—asserted that Gonzales was not an employee, and therefore had no form of redress under state occupational laws.¹³⁴

However, the California Division of Occupational Safety and Health determined that Gonzales was in fact an employee and that his detention facility violated several state laws on occupational safety and health.¹³⁵ While California recognized that detainees deserve protections from harsh or unsafe working conditions, the federal government has yet to extend those same protections to detained immigrants.¹³⁶ However, the pending lawsuit, *Barrientos v. CoreCivic*, may give detained migrants an actionable Thirteenth Amendment claim, as the complaint alleges that CoreCivic used “deprivation schemes” that were so coercive that many detainees were forced to work to survive.¹³⁷

THE MIGRANT DETENTION DEPRIVATION SCHEME IS UNCONSTITUTIONAL

The deprivation schemes executed in migrant detention centers violate the Thirteenth Amendment’s prohibition against forced servitude because detainees are subjected to coercive practices such as solitary confinement and deprivation of adequate food, which force detainees to work to survive.¹³⁸ Part III provides a deeper analysis of the *Barrientos v. CoreCivic* and explains why deprivation schemes violate the Thirteenth Amendment.

The federal government’s failure to enforce ICE employment standards adequately has allowed detention centers to continue to capitalize off immigrant detainee labor.¹³⁹ For many detained immigrants that decide not to work, they face the risk of being punished with solitary confinement.¹⁴⁰ In addition to solitary confinement, detention centers use other coercive tactics—such as depriving detainees of essential supplies such as adequate food, cleaning supplies, toiletries and phone cards to call family members or their attorneys—to force detainees to work to be able to purchase the supplies from the

134. *Id.*

135. *Id.*

136. Stevens, *supra* note 131.

137. Complaint at 1, *Barrientos v. CoreCivic, Inc.*, 332 F. Supp. 3d 1305 (M.D. Ga. Aug. 17, 2018) 4:18-CV-70 (CDL), *aff’d*, No. 18-15081, 2020 WL 964358 (11th Cir. Feb. 28, 2020).

138. Stevens, *supra* note 131.

139. Compl. at 7, *Barrientos*, 332 F. Supp. 3d at 1305.

140. *Barrientos*, 332 F. Supp. 3d at 1308.

commissary.¹⁴¹ In *Barrientos v. CoreCivic*, plaintiffs refer to this as a “deprivation scheme” and claim that several detention centers owned by CoreCivic commit human trafficking violations through use of force to compel migrant labor.¹⁴² While the allegations in the lawsuit focus on violations under the Trafficking Victims Protection Act of 2000,¹⁴³ the plaintiffs also have standing to assert that their Thirteenth Amendment rights were violated when they were forced to work as “‘modern-day slave[s].’”¹⁴⁴

Factual Background

Barrientos v. CoreCivic is a class action suit brought by Wilhen Barrientos, Margarito Velazquez Galicia and Shoaib Ahmed—individuals who were all detained at the Stewart Detention Facility in Lumpkin, Georgia.¹⁴⁵ The Complaint outlines the methods the detention facility used including, but not limited to: threats of solitary confinement and criminal prosecution, deprivation of safety and privacy in the migrants’ personal spaces, deprivation of sanitary products and deprivation of contact of loved ones.¹⁴⁶ Further, the housing in the facility was “deplorable.”¹⁴⁷ Many of the showers only had cold water, and detainees were held in an open, overcrowded, dormitory with no privacy.¹⁴⁸ The dormitory was only equipped with one bathroom that had several toilets and showers with no temperature control.¹⁴⁹

The dormitory was commonly referred to as the “Chicken Coop” because of its overcrowding and unsanitary living conditions.¹⁵⁰ CoreCivic detention centers did not provide detainees with sufficient amounts of hygiene products like soap, toothpaste or toilet paper.¹⁵¹ Further, detainees could not call their attorneys or family without

141. Compl. at 1, *Barrientos*, 332 F. Supp. 3d 1305.

142. *Barrientos*, 322 F. Supp. 3d. at 1305.; Christopher Zoukis, *Class-Action Suit Against CoreCivic ICE Detention Center Allowed to Proceed*, PRISON LEGAL NEWS (Jan. 8, 2019), <https://www.prisonlegalnews.org/news/2019/jan/8/class-action-suit-against-corecivic-ice-detention-center-allowed-proceed/>.

143. Zoukis, *supra* note 142.

144. Sinha, *supra* note 101 at 3, 36.

145. *Barrientos v. CoreCivic, Inc.*, 332 F. Supp. 3d 1305, 1308 (M.D. Ga 2018), *aff’d*, No. 18-15081, 2020 WL 964358 (11th Cir. Feb. 28, 2020);

146. Complaint at 1, *Barrientos*, 332 F. Supp. 3d 1305.

147. *Barrientos*, 332 F. Supp. 3d at 1308.

148. *Id.*

149. *Id.*

150. Betsy Woodruff, *Private Prison Company Made Detainees Work for Toilet Paper*, DAILY BEAST (Apr. 17, 2018, 11:29 AM), <https://www.thedailybeast.com/private-prison-company-made-detainees-work-for-toilet-paper-lawsuit-alleges>.

151. *Id.*

purchasing an expensive calling card from the detention center commissary.¹⁵²

If detainees participated in CoreCivic’s “voluntary work program”, they were spared from some of the facility’s harsher conditions.¹⁵³ For example, work program participants did not live in the Chicken Coop; they were assigned to a more humane living quarter with only one roommate, a shared common area, and temperature-controlled showers.¹⁵⁴ However, if participants refused to work, they could be assigned back to the Chicken Coop, placed in solitary confinement, have their access to the commissary revoked or were threatened by detention center employees with criminal charges—an action that could subject a detainee to deportation.¹⁵⁵

Crucially, migrants were only paid one to four dollars a day for their work.¹⁵⁶ Officers often threatened detainees to work more than eight hours or for more than five days a week.¹⁵⁷ Under no circumstances were detainees paid minimum wage for their work.¹⁵⁸ Further, the lawsuit revealed the millions of dollars CoreCivic generated from the exploitation of migrant labor.¹⁵⁹ Thus, as long-term migrant detention steadily increased, CoreCivic received a windfall of profit off the backs of migrants who were awaiting their day in court.¹⁶⁰

Moreover, many detainees were subjected to prison-like conditions in the center such as punitive and long-term solitary confinement, inadequate medical care, sexual and physical assault, lack of access to legal counsel, and other harsh conditions of confinement¹⁶¹;

152. *Id.*

153. *Barrientos*, 322 F. Supp. 3d. at 1308.

154. *Id.*

155. *Id.*

156. Shoichet, *supra* note 4.

157. Derek Gilna, *Federal Class-Action Accuses CoreCivic of Exploiting Immigrant Detainee Labor*, PRISON LEGAL NEWS (Aug. 8, 2018), <https://www.prisonlegalnews.org/news/2018/aug/8/federal-class-action-accuses-corecivic-exploiting-immigrant-detainee-labor/>.

158. Nick Schwellenback, *Ex-Ice Official Paid to Defend \$1-a-Day Wages for Immigrants*, DAILY BEAST (Dec. 17, 2018, 5:03 AM), <https://www.thedailybeast.com/ex-ice-official-paid-to-defend-dollar1-a-day-wages-for-immigrants> (“Critics of the program, which was authorized by an immigration law dating back to 1950, say paying immigrant detainees below the minimum wage is unlawful, because most have not been convicted of or pleaded guilty to any crime and thus there is no valid legal basis for excluding them from minimum wage law.”).

159. Gilna, *supra* note 157 (“CoreCivic is placing profits above people by forcing detained immigrants to perform manual labor for next to nothing, saving millions of dollars that would otherwise provide jobs and stimulate the local economy. CoreCivic is padding its pockets by violating anti-trafficking laws.”).

160. *Id.*

161. Silva Viñas, *Immigrant Detainees Say They Were Sexually Abused in CBP Custody*, NPR (Mar. 24, 2019, 8:13 AM), <https://www.npr.org/2019/03/24/706295417/immigrant-detainees->

all without a right to a speedy trial, a jury, a government-appointed lawyer, or a duly-entered conviction. After enduring these sub-standard living conditions, many detainees then faced deportation, making migrant detention an effective method to curtail immigration.

Unconstitutionality of Deprivation Scheme

Immigrant detention deprivation schemes violate the Thirteenth Amendment's prohibition against involuntary servitude because the practice is inherently coercive. While a plain reading of the Thirteenth Amendment explicitly states that established slavery and involuntary servitude is unconstitutional¹⁶², the inadequate compensation of migrants is arguably a more elusive version of involuntary servitude. Because most detainees receive paltry wages that are used for necessities like food and toiletries¹⁶³—items they need for survival and that they cannot obtain elsewhere—their work is not truly voluntary.

Further, the courts have long established that other systemic forms of slavery that mirror forced labor practices in immigrant detention such as Mexican peonage and Chinese labor violate the Thirteenth Amendment. In *Thirteenth*, a documentary about the racial disparity of mass incarceration in U.S. prisons, criminal justice reform advocate Glenn E. Martin, stated: “When I think of systems of oppression historically in this country, they’re durable. They tend to reinvent themselves right under your nose.”¹⁶⁴ Consequently, while many believe the Thirteenth Amendment ended forced labor in this country, the lack of stronger legal protections for detained migrants has allowed involuntary servitude to expand and flourish in the form of deprivation schemes. These schemes are a mere replication of oppressive systems ingrained in the history of the United States. To ignore these systems and the impact they have had in the marginalization of the most vulnerable populations is to ignore the exploitation of fundamental human rights.

say-they-were-sexually-abused-in-cbp-custody; Lisa Riordan Seville et al., *22 Immigrants died in ICE Detention Centers During the Past 2 Years*, NBC NEWS (Jan. 6, 2019), <https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781>; Ian Urbina & Catherine Rentz, *Immigrant Detainees and the Right to Counsel*, N.Y. TIMES (Mar. 30, 2013), <https://www.nytimes.com/2013/03/31/sunday-review/immigrant-detainees-and-the-right-to-counsel.html>.

162. Discussed *infra* Part I.

163. Discussed *infra* Part II.

164. THIRTEENTH (Netflix 2016).

SOLUTIONS TO RESOLVE FORCED LABOR IN MIGRANT DETENTION CENTERS

Deprivation schemes are an inhumane practice that forever alters the lives of countless immigrants. Despite the shortfalls of jurisprudence and legislation to protect migrants, there is still an opportunity to rectify the flaws within the immigration system. Part IV discusses two solutions that can remedy forced migrant labor in detention centers. First, Congress should increase migrant pay to the national minimum wage. Second, for-profit immigrant detention centers should be abolished.

Congress Should Increase Migrant Pay to the National Minimum Wage

Congress has failed to update migrant pay since 1978.¹⁶⁵ As a result, migrants are compensated significantly below the national minimum wage.¹⁶⁶ Because detainees are underpaid for their work, for-profit detention centers exploit migrant labor to maximize their profits and to avoid paying full-time staff to maintain detention facilities. Thus, detainees are exposed to dangerous and harsh working conditions with little recourse.¹⁶⁷ Congress should increase migrant pay to reflect the national minimum wage because migrants deserve to be adequately compensated for their labor.

End of For-Profit Migrant Detention

In addition to increasing the pay rate for detained migrants, Congress should end migrant incarceration. Not only is long-term detention a costly means to ensure immigrants attend their court hearings, migrant detention is inhumane and unnecessary.¹⁶⁸ Non-profit agencies such as Justice for Immigrants and the American Civil Liberties Union (“ACLU”) have conducted independent research to examine

165. Discussed *infra* Part II; *supra* note 110; *see also* Appropriation Act, 1978, Pub.L. No. 95-86, 91 Stat. 426 (1978).

166. Discussed *infra* Part II; *supra* note 112.

167. Stevens, *supra* note 130; discussed *infra* Part II.

168. Jaden Urbi, *This is How Much It Costs to Detain an Immigrant in the U.S.*, CNBC (June 20, 2019), <https://www.cnbc.com/2018/06/20/cost-us-immigrant-detention-trump-zero-tolerance-tents-cages.html> (According to ICE’s 2018 budget, it costs on average \$133.99 a day to house one adult in immigrant detention. However, other immigration groups estimate the cost to be around \$200 a day).

the success rates of alternatives to long-term immigrant detention.¹⁶⁹ A report released by the ACLU revealed that case management support programs that provide services such as case management and referrals to legal and social services have improved court appearance rates and compliance with final court outcomes without damaging the physical and mental health of immigrants.¹⁷⁰ Further, the report asserts that over 90% of the individuals that participated in the case study made their court appearances.¹⁷¹

Additionally, Justice for Immigrants examined the efficiency of current alternatives to detention (“ATD”) used by ICE.¹⁷² These programs were not community-based and did not use a case management centered approach.¹⁷³ However, the programs resulted in immigrants’ high compliance rates with court hearings and immigration appointments.¹⁷⁴ The report revealed that of the immigrants placed on an ATD, 95% appeared for their final hearings.¹⁷⁵ Further, a significant number of family detainees were compliant with multiple hearings and appointments.¹⁷⁶ Over 85% of families who were released from ICE detention from 2001 to 2016 appeared to all of their court hearings.¹⁷⁷ Thus, data reflects that long-term detention is unnecessary to effectuate compliance with immigration hearings and appointments.

CONCLUSION

Immigrant detention center deprivation schemes violate the Thirteenth Amendment’s prohibition against involuntary servitude and impose lasting damage on immigrant detainees mental and physical well-being. Despite this, for-profit detention centers continue to generate billions of dollars of revenue through exploiting immigrants.

169. *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/sites/default/files/field_document/aclu_atd_fact_sheet_final_v.2.pdf (last visited 2019); *The Real Alternatives To Detention*, JUSTICE FOR IMMIGRANTS, <https://justiceforimmigrants.org/wp-content/uploads/2019/06/The-Real-Alternatives-to-Detention-June-2019-FINAL-v.2.pdf> (last visited 2019).

170. *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up*, AM. CIVIL LIBERTIES UNION (last visited 2019), https://www.aclu.org/sites/default/files/field_document/aclu_atd_fact_sheet_final_v.2.pdf;

171. *Id.*

172. *The Real Alternatives To Detention*, JUSTICE FOR IMMIGRANTS, <https://justiceforimmigrants.org/wp-content/uploads/2019/06/The-Real-Alternatives-to-Detention-June-2019-FINAL-v.2.pdf>. (last visited 2019).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

However, as immigration reform remains a topic of debate, there is a significant opportunity to transform and remediate many of the injustices imposed against immigrants. As this Note concludes, there are alternatives to long-term immigrant detention that can effectively achieve compliance with immigration laws. Moreover, Congress can effectuate many of the necessary changes to immigrant detention such as adjusting migrant pay and passing legislation to end long-term immigrant detention. Thus, ample opportunities remain for sweeping changes to be made that will protect immigrants and curtail oppressive detention tactics.

NOTE

A Classroom as an Opportunity to Learn, Not an Obligation to Fill a Seat: Accommodating Hidden Disabilities in Marginalized Communities

KAMALI HOUSTON

“I . . . am unsatisfied with the hope of an ultimate ‘political’ solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that ‘may affect their hearts and minds in a way unlikely to ever be undone.’”

— Justice Marshall, dissenting in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 441 U.S. 1 (1973).

Aaron was diagnosed with ADHD and anxiety at age nine.¹ By eleven, Aaron’s parents took their doctor’s advice and put him on anxiety medication. Before his medication, Aaron could not brush his teeth without becoming hysterical. Aaron had constantly isolated himself and hated going to school—he hated how other students were able to sit through class without getting in trouble and how his teachers treated him in contrast. Aaron found solace in books and always had a book, or three, in his hands. Aaron has never had a class with more than twenty students. Aaron went to the most prestigious private school in his city. Aaron’s parents were professionals. Aaron felt emotions strongly—his behavior caused significant family concern. Aaron had a classmate who committed suicide in elementary school.

Aaron has two parents with medical degrees. They are significantly aware of mental health. Aaron’s parents could hire someone to take him to doctor appointments or could take time off from their

1. The story of Aaron is that of a private individual whose name has been changed for the purpose of this introduction.

schedule to make sure Aaron's medical needs were met. Aaron's parents also were able to privately meet with his teachers to ensure his accommodation. When Aaron's parents' insistence on his accommodation failed, they would tell the school that they would transfer Aaron to a different school that would accommodate him, unless the school found a way to meet his needs. The risk of losing tuition proved an actionable threat.

Aaron's medicine resolved most of his family's concerns. Aaron was covered by his family's health insurance. But what if Aaron didn't have a doctor who was able to evaluate his mental health? What if Aaron's parents did not have the resources or wherewithal to look into his mental health? What if Aaron didn't go to the most prestigious private school, where his parents could talk to his teachers about accommodating him in class?

The government cannot prevent any person from *receiving* an education because the Constitution protects students' right to an education generally.² Since *Brown v. Board of Education*, government-offered education programs must be equally available to all state-citizens. However, Constitutional protection does not extend to guarantee the quality of education students receive. Instead, the Supreme Court has declared that varying qualities of education across socio-economic school districts do not support an Equal Protection claim.³

Using the Constitutional right to education has proven an unsuccessful claim for fixing educational disparities,⁴ so the question begs: how can the law protect students who are unable to keep pace with their class due to cognitive factors, such as mental health? In particular, what remedies are there for children who do not have the same capacity to perform in class as their peers, due to hidden disabilities such as depression, anxiety, Attention Deficit Hyperactivity Disorder, and learning or conduct disorders? Hidden disabilities are those that do not manifest themselves physically, and many of these mental diagnoses require medicine that is difficult to access due to restrictions on

2. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

3. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973).

4. The Constitution may not be the most effective means to bring change in educational settings. Today, many disparities that are legally accounted for have not been actually improved. For example, affirmative action is now unconstitutional, but schools still have disproportionate racial representation. *See* Lena Groeger et al., *Miseducation: Is There Racial Inequity at Your School?*, PROPUBLICA (Oct. 16, 2018), <https://projects.propublica.org/miseducation>.

the substance and the cost of doctor visits.⁵ Moreover, many medications are prohibitively expensive without insurance,⁶ making medical help less fruitful for people without substantial socio-economic resources.⁷ Furthermore, many families are unfamiliar with the symptoms of hidden disabilities—most families that identify and diagnose hidden disabilities come from the middle class.⁸

At the end of the Civil Rights Movement, people began to advocate for equality for persons with disabilities. As a result, the Rehabilitation Act of 1973 was passed, extending civil rights protections to students who, like Aaron, have “hidden disabilities” including learning disabilities. Section 504 of the Rehabilitation Act requires schools that receive federal funding to locate and identify handicapped students and ensures equal opportunities for those students.⁹ Additionally, in 1975 an early version of the Individuals with Disabilities in Education Act (“IDEA”) was passed,¹⁰ in an effort to specifically protect people like Aaron within the education system. The IDEA first sought to protect children “who were excluded entirely from the education system and [those] with disabilities who had only limited access ‘to the education system and were therefore denied an appropriate education.’”¹¹ Years later, the Americans with Disabilities Act of

5. See Deanna R. Willis, et al., *A Proactive Approach to Controlled Substance Refills*, 17:6 FAM. PRAC. MGMT. 22 (2010), available at <https://www.aafp.org/fpm/2010/1100/p22.html>.

6. Shahin Soltani, *Hidden Cost of Disability: What Policy Makers Usually Forget*, 23 J. RES. MED. SCI. 15 (2018). The lack of health care for many people of low socioeconomic status causes certain people with hidden disabilities to go without diagnoses. Lack of standardized identification models for hidden disabilities, lack of access to doctors, gender, race, socioeconomic status, and prejudicial biases about certain groups of students causes disproportionate rates in the identification of students with learning disorders. Dara Shiffer et al., *Disproportionality and Learning Disabilities: Parsing Apart Race, Socioeconomic Status, and Language*, 44(3) J. LEARNING DISABILITIES 246, 247–49 (2011).

7. *Id.*

8. SUBINI A. ANNAMMA ET AL., DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION 11 (David J. Connor et al., 2016) (<https://books.google.com/books?hl=en&lrid=lce9CWAAQBAJ&oi=fnd&pg=pp1&ots=GQjdnPkmB&sig=BLg9QrrrjCQxrOPkziEpVTiYAW8#v=onepage&q&f=true>).

9. Office for Civil Rights, *Free Appropriate Public Education for Students With Disabilities: Requirements Under Section 504 of The Rehabilitation Act of 1973*, U.S. DEP’T OF EDUC. (Aug. 2010), <https://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html>.

10. Special Educ. & Rehabilitative Servs., *Twenty-Five Years of Progress in Educating Children with Disabilities Through the IDEA*, U.S. DEP’T OF EDUC. (Jul. 19, 2007), <https://www2.ed.gov/policy/speced/leg/idea/history.html>.

11. Office of Special Educ. Programs, *History of the IDEA*, U.S. DEP’T OF EDUC. (2000), <https://www2.ed.gov/policy/speced/leg/idea/history.pdf>. Since its original enactment, the IDEA has undergone many amendments and now has more protections for people with disabilities transitioning to life outside of the education system. *Id.* Further, the IDEA has added the Individual Education Program, which requires tailored plans for individual students, so that their particular disability is addressed appropriately. *Id.*

1990 was passed, extending protections for persons with disabilities in any public accommodation, and further developing protections for people with learning disabilities.¹² Despite Congress's concerted effort to protect the rights of people with disabilities, problems identifying and accommodating struggling children remain.

The correlation between marginalized communities and disparities accessing mental health resources deepens the education divide for students with undiagnosed hidden mental disabilities. Students of color and of low socio-economic status should hold schools accountable for failing to provide adequate mental health resources that would allow them to properly participate in the classroom.¹³ Lawyers must step up to provide the tools necessary to combat these injustices by working around the Supreme Court's ruling that education is not a fundamental right.¹⁴

Accordingly, when a school is unable to identify and accommodate students with learning disabilities, lawyers should help students to seek relief under Section 504 of the Rehabilitation Act of 1973 for their school's inability to effectively fulfill the obligation to provide a free appropriate public education. Although Section 504 of the Rehabilitation Act of 1973 better protects students than the Equal Protection Clause, neither has proven successful legal tools for defeating socio-economic disparities in education. Thus, lawyers should use students' lawsuits to bring light to the need for legislation that actually protects students with hidden disabilities from low socio-economic backgrounds.

Part I discusses the empirical evidence supporting the close link between education, socio-economic status, race, and un-diagnosed children with mental health disabilities. The section also discusses the current state of the Americans with Disabilities Act's impact on education for students with disabilities. Part II discusses courts' treatment of claims under the Rehabilitation Act in comparison to how courts address Equal Protection in education claims. Part III proposes changes to the legal treatment of learning disabilities. The first change is amended legislation and a new approach to the Americans

12. See UNITED STATES DEP'T OF JUSTICE, *The Americans with Disabilities Act 30th Anniversary: Furthering the Promise* (Feb. 26, 2020), <https://www.justice.gov/opa/blog/americans-disabilities-act-30th-anniversary-furthering-promise-0>.

13. Lawyers have an ethical duty to use their legal knowledge for the better. See David Fagelson, *Rights and Duties: The Ethical Obligation to Serve the Poor*, 17 L. & INEQUALITY: J. OF THEORY & PRACTICE 171, 191–92 (1999).

14. See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

with Disabilities Acts (“ADA”), applying ADA standards to students’ rights to equal protection of the laws and the recognized right to equal education. Second, this part proposes that Congress use its “power of the purse” to require all states to adopt mental health programing, and that students influence Congress to do so by bringing lawsuits against school districts under Section 504 of the Rehabilitation Act on behalf of individual students with disabilities. Such lawsuits would increase Congress’s awareness of the need for legislative reform as well as the need for a new law that mandates action to remedy the effects of hidden disabilities on students of low socio-economic status.

PUBLIC EDUCATION—STUDENTS FALLEN AND FORGOTTEN

In 2016, the House Committee on the Judiciary published a statement noting that “research has shown that some of the most vexing issues affecting children and their access to educational excellence and opportunity today are inextricably linked to race and poverty.”¹⁵ Race and poverty play a significant role in the development of intellectual and cognitive disabilities.¹⁶ In fact, the House Committee’s report notes that research “shows a clear link between schools’ socioeconomic (or income) composition and student academic outcomes.”¹⁷ In a middle-class white family, parents will often intervene and seek evaluation for a child who is unfocused and frequently the subject of student discipline.¹⁸ However, the National Institute of Mental Health has found that mental health struggles are more prevalent in lower socio-economic environments.¹⁹ Certain mental health disorders like post-traumatic stress disorder (“PTSD”) are triggered by a person’s environment, including exposure to trauma in one’s community.²⁰ There is a direct correlation between exposure to trauma and socio-economic status; children exposed to trauma are at an increased risk to develop “toxic stress response” and consequently

15. UNITED STATES GOV’T ACCOUNTABILITY OFFICE (Apr. 21, 2016), K–12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION 1, 1.

16. *Id.* (Explaining that lack of nutrition and health care result in higher risk for intellectual and cognitive disabilities in babies of women of color).

17. *Id.* at 8.

18. *Id.*

19. NAT’L INST. OF MENTAL HEALTH, MENTAL HEALTH: CULTURE, RACE, AND ETHNICITY: A SUPPLEMENT TO MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL [CHAPTER 3] (2001) (available at <https://www.ncbi.nlm.nih.gov/books/NBK44249/>).

20. *Id.*

develop PTSD.²¹ Inner city children who grow up exposed to violent crimes are at higher risk for developing PTSD than other Americans and on par for developing PTSD with a soldier returning from war.²² As a result, mental health has a significant impact in the classroom for minority children of low socio-economic status.

Students with mental health disorders may be unable to go to classes or to focus in class, causing them to struggle with finding the support they need to complete degrees, and may withdraw from classes, even if accommodations are provided.²³ It is important to ensure that students are given the greatest opportunity for success.

Students with hidden disabilities that are not able to learn effectively in school experienced difficulties throughout their lifetime because their adolescent shortcomings in education reduce their ability to seek higher education and thus threaten employment opportunities in adulthood because modern employment opportunities frequently require advanced education or training.²⁴ However, students who are diagnosed are able to get access to effective medication that allows them to reap the benefits of their education.²⁵ Due to the demands of modern life, diagnoses are becoming more common in affluent communities²⁶ as parents seek medical attention to ensure their children succeed whenever behavior indicates that their child may have a learning disability. Unfortunately, this is not the norm for people of low socio-economic status with psychological or learning-based disa-

21. Bekh Bradley-Davino, PhD & Lesia Ruglass, PhD, *Trauma and Posttraumatic Stress Disorder in Economically Disadvantaged Populations*, AMERICAN PSYCHOLOGICAL ASS'N, <https://www.apatraumadivision.org/files/58.pdf>.

22. See Lois Beckett, *Living in a Violent Neighborhood is as Likely to Give You PTSD as Going to War*, MOTHER JONES (Feb. 4, 2014), <https://www.motherjones.com/politics/2014/02/ptsd-among-wounded-americans-in-violent-neighborhoods/>; Sam P.K. Collins, *The Hidden Trauma Plaguing American Kids*, THINK PROGRESS (Dec. 12, 2014), <https://thinkprogress.org/the-hidden-trauma-plaguing-american-kids-cdd47a93c1cb/>.

23. Sharlene A. Kiuvara & Dixie S. Huefner, *Students With Psychiatric Disabilities in Higher Education Settings: The Americans With Disabilities Act and Beyond*, 19:2 JOURNAL OF DISABILITY POLICY STUDIES 103, 105 (2008).

24. See Joe Magliano PhD, *Invisible Disabilities*, PSYCHOLOGY TODAY (Jun. 26, 2013), <https://www.psychologytoday.com/us/blog/the-wide-wide-world-psychology/201306/invisible-disabilities>. (explaining that many challenges persist in accompaniment with hidden or invisible disabilities). American students have optimized opportunities with postsecondary education—it “is one of the most important investments a student can make, and is the surest path to the middle class in our country.” U.S. DEPT. OF EDUCATION, *Fact Sheet: A College Degree: Surest Pathway to Expanded Opportunity, Success for American Students* (Sept. 16, 2016), <https://www.ed.gov/news/press-releases/fact-sheet-college-degree-surest-pathway-expanded-opportunity-success-american-students>.

25. *Id.*

26. *Id.*

bilities.²⁷ Lack of access to medical resources and social stigma create barriers for self-reporting of mental illnesses, and result in less diagnoses.²⁸ Disproportionality in diagnoses is often more persistent for students of color with learning disabilities.²⁹

For minorities, culture and social contexts create misunderstandings about mental health and the available mental health services.³⁰ People of color are often misdiagnosed during diagnostic screenings, for various reasons including cultural cues and language barriers.³¹ Due to the problematic diagnoses for children of color, these children can be labeled with learning disabilities more frequently than white students and remain at higher risk of unnecessary placement in segregated classrooms.³²

Learning disabilities have become increasingly destigmatized, until the disability intersects with lower socio-economic status and minority status.³³ The process of labeling students with learning disabilities has become inseparable from historical context of racism, privilege, and classism in our educational system.³⁴ Students of color experience different realities from their white peers that are diagnosed with the same learning disability.³⁵ Differences include the access to education, the choices in services provided, higher education opportunities, and quality of life.³⁶ Race and class further plays a significant role in who is identified and placed in the special education category of learning disabilities.³⁷ In 2005, Congress's Annual Report on the IDEA found that black students with disabilities were more likely to be educated "outside of the regular classroom"—meaning

27. See Annamma et al, *supra* note 8, at 10.

28. See *id.*; Kiuvara & Huefner, *supra* note 23, at 105. Minorities often attach more stigma to learning disabilities. *Id.*; see also Dara Shiffer et al., *Disproportionality and Learning Disabilities: Parsing Apart Race, Socioeconomic Status, and Language*, 44(3) J. LEARNING DISABILITIES 246, 247–49 (2011).

29. Blanchett, *supra* note 21, at 377.

30. National Institute of Mental Health: Culture, Race, and Ethnicity: A Supplement to Mental Health: A report of the Surgeon General [CHAPTER 2] (2001) (available at <https://www.ncbi.nlm.nih.gov/books/NBK44249/>).

31. S.E. Smith, *The Hidden Epidemic of Undiagnosed Disabilities Among Students of Color*, ALTERNET (July 2012), https://www.alternet.org/2012/07/the_hidden_epidemic_of_undiagnosed_disabilities_among_students_of_color/.

32. Wanda J. Blanchett, *Telling it Like It Is: The Role of Race, Class, & Culture in the Perpetuation of Learning Disability as a Privileged Category for the White Middle Class*, 30 Disability Studies Quarterly (2010), <http://dsq-sds.org/article/view/1233/1280>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

the time spent outside of class compared to inside—for over sixty percent of the day.³⁸ In the 2017 report, statistics showed that black students were about 20% less likely to be reported as having a learning disability, than their white peers³⁹—the report did not speculate reasons for these differences. Thus, it is critical to understand how the civil rights law, ADA, protects and accommodates students of low socio-economic status and minority races or colors.

CIVIL RIGHTS PUSH FOR EDUCATION EQUALITY

Sixty-four years after *Brown v. Board*, racial inequality pervades America's education system.⁴⁰ The national achievement gap between black students and white students is prevalent—especially in the “Deep South.”⁴¹ Research from the Brookings Institute found that black students attend schools with the lowest comprehension test results—the average black student attends a school with test results in the 37th percentile, contrary to the average white student who attends a school in the 60th percentile.⁴² The National Assessment of Educational Progress’ (“NAEP”) national report card shows that African American students test far below their white counterparts, averaging twenty-five points below in reading and math tests.⁴³ However, racial disproportionality is even more pervasive for students of color with undiagnosed disabilities, with students of color making up 70% of the disciplined students and often those with disabilities go through the

38. *Id.*; U.S. DEP'T OF EDUC. 1, 43 (2005), *27th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, <https://www2.ed.gov/about/reports/annual/osep/2005/parts-b-c/27th-vol-1.pdf>.

39. *See* U.S. DEP'T OF EDUC. (2017), *39th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, <https://www2.ed.gov/about/reports/annual/osep/2017/parts-b-c/39th-arc-for-idea.pdf>.

40. *See* Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, NY TIMES (June 9, 2016) <https://www.nytimes.com/2016/06/12/magazine/choosing-a-school-for-my-daughter-in-a-segregated-city.html>.

41. Lena V. Groeger et al., *Miseducation: Is There Racial Inequality at Your School?*, PROPUBLICS (Oct. 16, 2018), <https://projects.propublica.org/miseducation> (describing the difficulty in sending children to public schools in a modern America where districting causes gross disparities in quality of education).

42. Edward Rodrigue & Richard V. Reeves, *Five Bleak Facts on Black Opportunity*, BROOKINGS (Jan. 2015), <https://www.brookings.edu/blog/social-mobility-memos/2015/01/15/five-bleak-facts-on-black-opportunity/>. The Brookings Institute is a nonprofit public policy organization.

43. *See* THE NATION'S REPORT CARD, *District Student Group Scores And Score Gaps*, https://www.nationsreportcard.gov/reading_2017/districts/gaps/?grade=4 (last visited Mar. 14, 2020); *see also* THE NATION'S REPORT CARD, https://www.nationsreportcard.gov/math_2017/districts/gaps/?grade=4 (last visited Mar. 14, 2020).

school system unaccommodated.⁴⁴ *Brown v. Board of Education* has laid the framework for challenging the constitutionality of providing students with a lesser quality education, and has opened the door to challenges against public schools that exclude children with disabilities from the classroom.⁴⁵ The Supreme Court initially limited the definition of people with disabilities under the ADA to require a showing of a “substantial limitation.”⁴⁶ To show a substantial limitation, the person must demonstrate that their alleged disability impacted a variety of tasks central to daily life.⁴⁷ A substantial limitation is significantly difficult to prove for hidden disabilities, as such disabilities are not readily apparent.⁴⁸

Brown laid the foundation. *PARC v. Commonwealth of Pennsylvania*⁴⁹ and *Mills v. District of Columbia*⁵⁰ extended guarantees of special education services to all children and youth with disabilities.⁵¹ In *Alexander v. Choate*, the Supreme Court required a showing of intentional discrimination to establish a violation of Section 504 when plaintiffs mounted an attack on an across-the-board state government resource allocation decision concerning a public welfare program.⁵² Students with hidden disabilities have additional hurdles in showing intent. In fact, students with disabilities were often treated as second-class citizens until the mid-1970s.⁵³ As students with disabilities are now protected under the Equal Protection Clause, issues may seem more manageable, but yet students with disabilities still have the odds stacked against them.⁵⁴ For example, students with hidden disabilities

44. S.E. Smith, *The Hidden Epidemic of Undiagnosed Disabilities Among Students of Color*, ALTERNET (July 2012), https://www.alternet.org/story/156119/the_hidden_epidemic_of_undiagnosed_disabilities_among_students_of_color.

45. See generally *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

46. See generally *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998).

47. *Toyota Motor Mfg., KY, v. Williams*, 122 S. Ct. 681, 693 (2002).

48. OCR, *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973*, U.S. DEP'T OF EDUC. (1995), <https://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html>.

49. See *P.A.R.C. v. Commonwealth of Pennsylvania*, 334 F.Supp. 1257 (E.D. Pa. 1972) (holding that a “mentally retarded” child is entitled to special education services).

50. See *Mills v. Board of Education, DC*, 348 F. Supp. 866 (D.D.C. 1972) (extending the premise of *P.A.R.C.* to all children with disabilities).

51. Wanda J. Blanchett, *A Retrospective Examination of Urban Education From Brown to the Resegregation of African Americans in Special Education—It Is Time to “Go for Broke”*, 44 URBAN EDUCATION 370, 374 (July 2009).

52. Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1418 (2015).

53. CATHERINE KIM, ET AL., THE SCHOOL-TO-PRISON PIPELINE 53 (2010).

54. See generally *id.* at 51–77 (2010).

who remain undiagnosed are not able to seek accommodation with their school system.

LEGISLATIVE PROTECTIONS FOR STUDENTS WITH DISABILITIES

Hidden disabilities are addressed by a number of federal laws and initiatives, including the Rehabilitation Act, Americans with Disabilities Act, Individuals with Disabilities Education Act, Free and Appropriate Public Education, and Individual Education Plan. Most federal laws, including the Rehabilitation Act, were implemented in the 1970s, at the tail end of the Civil Rights Movement, during a national movement for the equal treatment of those with disabilities.⁵⁵ After substantial education equality litigation, federal law was amended constantly until the laws were shaped into their present form. Accordingly, there is extensive case law discussing the ADA and IDEA—the IDEA even established litigation as a key remedy available to students who are not properly accommodated.⁵⁶ However, class action claims tend to focus on general inequality claims rather than suing under § 504 or the IDEA.⁵⁷

A class action should prove fruitful because of the numbers of students experiencing similar problems. In students of color, students with learning disabilities make up over forty percent of the students categorized with a disability.⁵⁸ 46.4% of all students qualified for Individuals with Disabilities Act (“IDEA”) accommodation due to a learning disability in 2004.⁵⁹ One-in-seven children are affected by developmental disabilities.⁶⁰

55. Perri Meldon, *Disability History: The Disability Rights Movement*, NAT'L PARKS SERV. (Dec. 13, 2019), <https://www.nps.gov/articles/disabilityhistoryrightsmovement.htm>.

56. Nicholas Gumas, *Socio Economic and Racial Disparities in Public Special Education: Alleviating Decades of Unequal Enforcement of the Individuals with Disabilities Education Act in New York City*, 8 COLUM. J. RACE & L. 398, 401–02 (2018).

57. See Class Action Complaint at 119–21, B et al. v. Snyder, 329 F.Supp.3d 344 (E.D. Mich. 2018) (No.: 16-CV-13292).

58. Wanda J. Blanchett, “Telling it Like It Is: The Role of Race, Class, & Culture in the Perpetuation of Learning Disability as a Privileged Category for the White Middle Class”, 30 DISABILITY STUDIES QUARTERLY (2010), <http://dsq-sds.org/article/view/1233/1280>.

59. *Id.*

60. Nancy Shute, *CDC: Developmental Disabilities Affect 1 in 7 U.S. Kids*, NPR (May 23, 2011), <https://www.npr.org/sections/health-shots/2011/05/23/136582348/cdc-developmental-disabilities-affect-1-in-7-u-s-kids>; see Benjamin Zablotsky, *PhD et al., Estimated Prevalence of Children with Diagnosed Developmental Disabilities in the United States, 2014–16* (Nov. 2017), <https://www.cdc.gov/nchs/products/databriefs/db291.htm>; see also Kiuahara & Huefner, *supra* note 23, at 104 (explaining one in four Americans are diagnosed with psychiatric disabilities each year).

Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 mandates that “no otherwise qualified handicapped individual in the United States shall solely on the basis of his handicap, be excluded from the participation, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”⁶¹ A person with a disability under Section 504 is someone who has a “physical or mental impairment which substantially limits one or more major life activities.”⁶² Accordingly, any program, including a school, that receives federal assistance cannot discriminate against a person with some sort of handicap.⁶³ The U.S. Department of Education is responsible for enforcing Section 504 and creating relevant regulations.⁶⁴ The Department requires that students with disabilities and without disabilities be placed in “the same setting, to the maximum extent appropriate to the education needs of the students with disabilities.”⁶⁵ Evaluation and placement procedures must “ensure children are not misclassified, unnecessarily labeled as having a disability, or incorrectly placed.”⁶⁶

Americans with Disabilities Act

The Americans with Disabilities Act protects those with disabilities from discrimination in places of public accommodation, among other things.⁶⁷ Congress broadened the Act in 2009 to ensure the scope of the ADA reached students with disabilities and to ensure its protections in classrooms, enacting Congress’ idealized higher bar for education provided to students with disabilities.⁶⁸ The ADA ensures

61. Kitty Cone, *Short History of the 504 Sit in*, DISABILITIES RIGHTS IN EDUCATION FUND (2017), <https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/>.

62. Office for Civil Rights, *Free Appropriate Public Education for Students With Disabilities: Requirements Under Section 504 of The Rehabilitation Act of 1973*, U.S. DEP’T OF EDUC. (Aug. 2010), <https://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html>.

63. The Rehabilitation Act was adopted at the tail end of the civil rights movement. According to the bill supporter Sen. Hubert Humphry, the Act was intended to “firmly establish the right of disabled Americans to dignity and self-respect as equal and contributing members of society and to end the virtual isolation of millions of children and adults.” Cone, *supra* note 61. The Department of Health Education Welfare was put in charge of all initial regulations relating to the Act. *Id.*

64. Office for Civil Rights, *supra* note 62.

65. *Id.*

66. *Id.*

67. Civil Rights Division, *Americans with Disabilities Act*, U.S. DEP’T OF JUSTICE (Aug. 1990), <https://www2.ed.gov/about/offices/list/ocr/docs/hq9805.html>.

68. Nat’l Educ. Ass’n, *Fact Sheet: Section 504, the ADA, and the IDEA*, <http://www.nea.org/tools/30527.htm> (last visited Mar. 2020).

that students receive accommodations in testing and programming so that students with hidden disabilities have increased education accessibility.⁶⁹

Individuals with Disabilities Act

In 1975, Congress passed the first version of the Individuals with Disabilities Education Act (“IDEA”), called the Education for All Handicapped Children Act. The Act was adopted in order to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”⁷⁰ The IDEA puts the onus on states receiving federal funding to devise and implement a plan to provide free and appropriated education to all students with disabilities.⁷¹ A child qualifies for a Free Appropriate Public Education (“FAPE”) under IDEA when the child has a statutorily recognized disability, including learning and emotional disabilities.⁷² When a student seeks a FAPE remedy, they must seek grievances under IDEA rather than § 504.⁷³ In order to bring a lawsuit that involves an IDEA claim, students and their families must first exhaust all administrative remedies.⁷⁴ This includes mediation, informal negotiations, and due process notice and hearings.⁷⁵

Claims Under Federal Law

In order to forgo the “exhaustion requirement” of FAPE claims, the essentials of the claim must be mostly separate from FAPE.⁷⁶ Under Section 504, a student may bring suit against their school for

69. *Id.*

70. Nicholas Gumas, *Socio Economic and Racial Disparities in Public Special Education: Alleviating Decades of Unequal Enforcement of the Individuals with Disabilities Education Act in New York City*, 8 COLUM. J. RACE & L. 398, 404 (2018).

71. *Id.* at 405.

72. *Id.* at 404.

73. *Fry v. Napoleon Cmty Sch.*, 137 S. Ct. 743, 756 (2017).

74. *Id.* at 748, 750; 20 U.S.C. § 1415(l) (2018). The IDEA states: “[n]othing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], Title V of the Rehabilitation Act [including § 504], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [IDEA’s administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].”

75. *Fry*, 137 S. Ct. at 749; 20 U.S.C. § 1415 (2018).

76. *Fry*, 137 S. Ct. at 755–756.

discrimination on the basis of their hidden disability based on the school's failure to make "reasonable modifications" to their policies, practices, or procedures.⁷⁷ To determine whether the § 504 claim is sufficiently independent from any IDEA claims, the Supreme Court must determine whether: (1) "the plaintiff has brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school"; and (2) "an adult at the school. . .has pressed essentially the same grievance."⁷⁸ A student cannot bring a Section 504 claim when their parents are dissatisfied with their progress under the IEP implemented because the claim is centered around the classroom setting and thus not independent of the IDEA claim.⁷⁹ A student's claim fails when he seeks to show that his teacher discriminated against him based on his having ADHD if the teacher asked him to undergo shock therapy as a method of discipline and the student *willingly* complies.⁸⁰ In addition to lack of knowledge regarding the ability of Section 504 accommodation claims, case law demonstrates that it is difficult to bring a claim against a school for failure to make reasonable accommodations. Accordingly, the key question becomes how are children with hidden disabilities of low socio-economic status families protected and accommodated by Section 504 if their school does not identify the student's disability?

A Free Appropriate Public Education

A free appropriate public education ("FAPE") is required under both Section 504 and the IDEA.⁸¹ A free education means that programs receiving federal funds cannot charge students with disabilities except for fees that are equally imposed on non-disabled persons.⁸² FAPE requires that all persons with disabilities are provided an education which is designed to meet the individual education needs of the

77. See *Alexander v. Choate*, 469 U.S. 287, 299–300 (1985).

78. *C.G. by and through Keith G. v. Waller Indep. Sch. Dist.*, 697 F. App'x 816, 820 (5th Cir. 2017).

79. *Id.* at 821.

80. See *Cochran through Shields v. Columbus City Sch.*, No. 17-4110, 2018 WL 4922973 at *4 (6th Cir. 2018).

81. 20 U.S.C. § 1412(a)(1)(A) (2018); see also § 1401(3)(A)(i) (listing covered disabilities). Office for Civil Rights, *Free Appropriate Public Education for Students With Disabilities: Requirements Under Section 504 of The Rehabilitation Act of 1973*, U.S. Dep't of Education (Aug. 2010), <https://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html> ("The requirements for FAPE under *IDEA* are more detailed than those under Section 504").

82. Office for Civil Rights, *Free Appropriate Public Education for Students With Disabilities: Requirements Under Section 504 of The Rehabilitation Act of 1973*, U.S. DEP'T OF EDUCATION (Aug. 2010), <https://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html>.

student, allow maximum integration into classes with non-disabled students, evaluate and place students, and establish due process procedures so parents and guardians may receive notice, challenge, and review their child's placement and records.⁸³ The range of an appropriate education is broad, including "education in regular classes, education in regular classes with the use of related aids and services, or special education and related services in separate classrooms for all portions of the school day."⁸⁴ The scope of a child's individual FAPE rights is often determined by his or her Individualized Education Program ("IEP").⁸⁵ An IEP is a written plan detailing the services a child requires and explaining what his or her public school will have to do in order to meet those needs.⁸⁶

Failure to comply with FAPE is often a result of misclassification and inappropriate placement.⁸⁷ However, the Department of Education has implemented Child Find requirements that mandate the procedures for deciding who needs disability related accommodations including tests that are "validated for the specific purpose for which they are used for[;]" "tailored to assess specific areas of education need and are not designed merely to provide a single general intelligence quotient;" and "selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the *test results accurately reflect the student's aptitude or achievement level.*"⁸⁸ Evaluation and placement procedures are meant to safeguard children from erroneous disability labels or placements.⁸⁹ These assessments do not ignore the student's social and cultural background—tests must also consider the student's adaptive behavior, meaning the "effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group."⁹⁰

83. *Id.*

84. *Id.*

85. *Id.*

86. Nicholas Gumas, *supra* note 56, at 405.

87. Office of Civil Rights, *supra* note 62.

88. Andrew M.I. Lee, *Child Find: What It Is and How It Works*, UNDERSTOOD, <https://www.understood.org/en/school-learning/your-childs-rights/basics-about-childs-rights/child-find-what-it-is-and-how-it-works> (last visited Mar. 2020); 34 C.F.R. 300.111(c); *see also* Office of Civil Rights, *supra* note 36. Tests are not okay that simply reflect the "student's impaired sensory, manual or speaking skills (except where those skills are the factors that the test purports to measure)."

89. *See* Office of Civil Rights, *supra* note 62.

90. *Id.* "All significant factors related to the learning process must be considered. These sources and factors include, for example, aptitude and achievement tests, teacher recommenda-

Individualized Education Programs

The Individuals with Disabilities in Education Act (“IDEA”) requires the implementation of Individualized Education Programs (“IEP”), an education customization plan required for students participating in special education programs that receive IDEA funding.⁹¹ If a student is able to receive an IEP, the plan documents the child’s current level of academic achievement and specifies goals for the child to make progress in their classes.⁹² The IEP plan also lists the special services the student will receive so that she may accomplish the goals.⁹³ Making the plan includes an IEP team, comprised of people like a case manager, one of the student’s teachers, a district representative, a teacher specialist, and the student’s parent or guardian.⁹⁴ The IEP does not need to result in an educational benefit for the child as long as the IEP was “reasonably calculated to provide such a benefit at the time it was created.”⁹⁵ Furthermore, children with hidden disabilities frequently do not qualify for IDEA support due to the more stringent requirements of the “substantial limitation” for demonstrating a disability.⁹⁶

Public actors do not have a duty to review the substance of each child’s IEP on their own initiative.⁹⁷ Parents are responsible for much

tions, physical condition, social and cultural background, and adaptive behavior. ‘Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.’” Additionally, periodic reevaluation is required. The IDEA requires reevaluation at three-year intervals. *Id.*

91. *Id.*

92. Understood Team & Kelli Johnson, *At a Glance: Anatomy of an IEP*, UNDERSTOOD, <https://www.understood.org/en/school-learning/special-services/ieps/at-a-glance-anatomy-of-an-iep> (last visited Mar., 2020).

93. *Id.*

94. *Id.*

95. “As part of the development of the IEP, the creators of this document must describe the level of services to be provided, and establish objective criteria for evaluation of the child’s progress. These goals and objectives must be reasonable, realistic, and attainable.” 99 AM. JUR. PROOF OF FACTS 3d 237. “A material failure to implement an IEP constitutes a violation of IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Id.*

96. Eileen Bailey & Susan Yellin, *Dear ADDitude: Why Has My Child’s IEP Been Denied?*, ADDITUDE (last updated Jan. 26, 2017), <https://www.additudemag.com/dear-additude-why-has-my-childs-iep-been-denied/>. Explaining that ADHD falls into the classification of “Other Health Impaired” persons and typically only learning disabilities or severe ADHD qualifies under IDEA. Whereas § 504 only requires a disability (physical or mental impairment that “substantially limits one or more major life activities”). Thus, ADHD that limits a child’s learning ability qualifies for accommodations or services under § 504.

97. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1422 (Aug. 2011).

of their children's needs, including their special education needs.⁹⁸ The Supreme Court has determined that the IDEA allows parents to collect attorney's fees, but does not entitle families to reimbursements for costs of experts used in litigation.⁹⁹ Further, a parent may receive reimbursement for a non-public placement even if their child did not previously receive special education services in a public school.¹⁰⁰

STATE DUTY TO PROTECT EQUAL EDUCATION

Despite States' duty to ensure state-provided education is equally available for all students, states may individually elect how education is provided.¹⁰¹ The Supreme Court has held that Equal Protection applies to the quality of school that the government chooses to provide,¹⁰² but has not required states to take any sort of affirmative actions regarding education. Florida, for example,¹⁰³ does not ensure that students are meeting federal standards for reading proficiency.¹⁰⁴ In Florida, students' passage rate for state reading exams is 71 percent but federal exams passage rate is 30 percent.¹⁰⁵ These exams are annual assessments in which students take standardized tests to ensure that they are on par for their education level expected in their grade. The federal exams were developed in response to President George W. Bush's "No Child Left Behind Act," infamous for its inability to accurately diagnose the problems in American schools.¹⁰⁶ Nonethe-

98. Interview with Leslie Finley.

99. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006).

100. *Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230, 246-47 (2009).

101. See CLASS ACTION COMPLAINT at 44-45, *B et al. v. Snyder*, 320 F.Supp.3d 344 (E.D. Mich. 2018) No. 16-CV-13292, 2016 WL 4775474. (explaining that Michigan's constitution dictates how the State provides public education).

102. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). As States have assumed this duty through their own practices in developing ways to accommodate students, State governments must fulfill this obligation by accommodating for *all* students. See e.g., *Fisher v. Univ. of Texas at Austin*, 578 U.S. 297, 328 (2016); *United States v. Virginia*, 518 U.S. 515, 540 (1996).

103. State and Federal law mandates testing requirements for students. The National Assessment of Educational Progress (NAEP) tests reading and math across the country. States can choose how to implement their own testing, per their police power. See Lisa Larson, *Federal and State Testing Requirements for K-12 Public School Students*, MINNESOTA HOUSE OF REP. (Nov. 2002), <https://www.leg.state.mn.us/docs/pre2003/other/020564.pdf>.

104. Kihara & Huefner, *supra* note 23, at 105.

105. Michael Winerip, *Are Schools Passing or Failing? Now There's a Third Choice . . . Both*, NY TIMES (Nov. 2, 2005), <https://www.nytimes.com/2005/11/02/nyregion/are-schools-passing-or-failing-now-theres-a-third-choice-both.html?mtrref=www.google.com>.

106. The failure of the No Child Left Behind Act highlighted the need for federal involvement in education in order to fully realize equal protection in schools. Lily Eskelsen Garcia & Otha Thornton, *'No Child Left Behind' has Failed*, WASH. POST (Feb. 13, 2015), https://www.washingtonpost.com/opinions/no-child-has-failed/2015/02/13/8d619026-b2f8-11e4-827f-93f454140e2b_story.html?utm_term=.c79b0cd8bb22.

less, methods to test students should not allow gross discrepancies, but rather testing should remain a method of accountability and insurance that their school system is providing an accurate education for students.¹⁰⁷ Florida should look for the cause behind the reading proficiency exam discrepancies, as often the problem is the method of teaching.¹⁰⁸

Few educators acknowledge that students of color who are labeled as disabled have some of the most significant issues and challenges facing students in urban settings, a disproportionate percentage of whom are poor, African American, and Hispanic.¹⁰⁹ For example, New York State has implicitly acknowledged the correlation between the classroom and mental health disorders.¹¹⁰ In 2011, New York's Senate considered a bill to inform parents of existing services that identify and provide services for students with disabilities.¹¹¹ The bill's purpose statement explains that parents are not often aware of their right to refer their child to receive mental health evaluations.¹¹² The bill acknowledges that information about the availability of existing services is not readily available to parents.¹¹³ However, this bill has not passed the New York Assembly, but remains in the Senate Committee on Education today.¹¹⁴

New York's bill proposal is important because it provides a way to address the needs of students with mental disabilities that have not successfully been met.¹¹⁵ States that provide education should ensure

107. Valerie Strauss, *How testing practices have to change in U.S. public schools*, WASH. POST (Jan. 6, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/06/how-testing-practices-have-to-change-in-u-s-public-schools/?utm_term=.c933c4408982 (highlighting alternatives to the status quo of standardized testing). States are currently in the best position to help students as “[t]he federal government does not serve as a national school board.” With tax payer money going towards education, States should be accountable to ensure schools get the adequate resources necessary in order to optimize schooling. Motoko Rich, *Holding States and Schools Accountable*, NY TIMES (Feb. 9, 2013), <https://www.nytimes.com/2013/02/10/education/debate-over-federal-role-in-public-school-policy.html>.

108. See Natalie Wexler, *Why American Students Haven't Gotten Better at Reading in 20 Years*, THE ATLANTIC (Apr. 13, 2018), <https://www.theatlantic.com/education/archive/2018/04/american-students-reading/557915/>.

109. Wanda J. Blanchett, *A Retrospective Examination of Urban Education: From Brown to the Resegregation of African Americans in Special Education—It Is Time to “Go for Broke,”* 44 URBAN EDUC. 370, 371 (2009).

110. S. 7225A, 2011-2012 Leg. Sess. (N.Y. 2012).

111. *Id.*

112. *Id.*

113. *Id.*

114. *See id.*

115. Sharlene A. Kiuvara & Dixie S. Huefner, *Students With Psychiatric Disabilities in Higher Education Settings: The Americans With Disabilities Act and Beyond*, 19:2 J. OF DISABILITY POL'Y STUDIES 103, 104 (2008).

that students have equal access to disability resources because the ADA requires that students are not treated differently due to a disability.¹¹⁶ States should not leave student accommodation up to the chance that parents will recognize disability signs and know how to find a solution for their child. Many parents of low socio-economic status have overwhelming work schedules to balance and often do not have the luxury of attending frequent meetings with teachers or addressing every issue that may arise with their child at school.¹¹⁷ Teachers are in a unique position to identify a student's potential disability and often have access to the appropriate resources to help the child.¹¹⁸ States should not deregulate education in hopes that community consciousness will fix problems that marginalized groups confront.¹¹⁹ If children who struggle with difficulties related to low socioeconomic status cannot rely on their schools to identify and address any educational problems, hidden disabilities will continue to go unnoticed.¹²⁰

Ultimately, politics determine much of how student's needs are or are not met.¹²¹ The funds distributed by the IDEA give the states autonomy in disbursement and allocation of funds.¹²² In New York,

116. "Public elementary and secondary schools must employ procedural safeguards regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services." Office of Civil Rights, *Protecting Students with Disabilities*, U.S. DEPT. OF EDUCATION (Sept. 25, 2018), <https://www2.ed.gov/about/offices/list/ocr/504faq.html>.

117. Michael S. Elia, *Parenting Practices of Lower Socioeconomic Status Parents of High Achieving Students*, WALDEN DISSERTATIONS AND DOCTORAL STUDIES 53–54 (2015), <https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=1576&context=dissertations>. This article walks through the challenges that many low socioeconomic parents face and the impact of their presence or absence on their children.

118. See PROJECT IDEAL, *Understanding and Addressing the Needs of Students in the Classroom*, available at <http://www.projectidealonline.org/v/student-needs/>.

119. Tomiko Brown-Nagin, *Toward A Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 760 (2000) (arguing for deregulated education and explaining that such deregulation would not be contrary to civil rights because communities would be responsible for ensuring that equality was met in charter-like schools). Brown-Nagin's article takes a very optimistic approach to community responsibility. I do not think this approach is realistic—communities may not have the tools to self-identify what issues they need to resolve. This note discusses how people in marginalized communities do not have the resources to identify and address hidden disabilities. If Brown-Nagin's approach was adopted, these communities would continue to fall short in identifying students with mental disorders.

120. See Elia, *supra* note 117, at 54 (explaining that parents of low socioeconomic status are less able to provide the attention and structure their children need).

121. Gumas, *supra* note 56, at 426.

122. See OFFICE OF PERFORMANCE EVALUATIONS, *EVALUATION REPORT: DISTRIBUTION OF STATE FUNDS FOR K-12 PUBLIC EDUCATION*, IDAHO LEGISLATURE 14 (Dec. 2016), available at <https://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r1607.pdf>.

the approach to IDEA relief changes based on who holds the mayor's position—Mayor DeBlasio claims for tuition reimbursement were resolved in favor of settlement whereas Mayor Bloomberg preferred claims go to litigation.¹²³ A child's quality of accommodation could theoretically improve by attending a private school under their IEP because the school would have smaller classrooms and more resources, but if parents cannot afford to take the risk of having to litigate for tuition reimbursement then the cost-risk analysis serves as a serious deterrent.¹²⁴ States have serious power over how parents ensure their children are accommodated. With great power comes great responsibility—some states try to fulfill that obligation by implementing additional initiatives like Maryland's Common Core State Standards.¹²⁵

In order to accommodate for the legislative shortcomings, we must look at the legislation in an objective manner and assess the terms, goals, and underlying assumptions of the ADA and IDEA.¹²⁶ We must ask why 34 percent of children in juvenile detention facilities were once identified as eligible for special education under the IDEA.¹²⁷

LEGAL REMEDIES FOR STUDENTS WITH DISABILITIES

In light of the complex legal world for students with disabilities, it becomes even more challenging for students and families to determine the best methodology to enforce their rights. The class action setting is ideal for institutional change, yet class actions are not the typical device used for students with learning disabilities because students' needs typically require a case-specific solution.¹²⁸ Class actions are not a feasible means when students have such individualized claims and have tailored accommodations under their IEP. Furthermore,

123. Gumas, *supra* note 56, at 402. Notably, Congress amended the IDEA to favor cooperation between schools and parents through methods like mediation. *Id.* at 407–08.

124. However, parents seeking tuition reimbursement can seek attorney's fees under the 1986 Amendments. Pub. L. No. 99–372. Furthermore, students have a codified right to tuition reimbursement. 20 U.S.C. § 1412(a)(10)(C)(ii) (2018); § 1415(f)(1)(b) (2018).

125. *Common Core State Standards Initiative*, <http://www.corestandards.org/> (last visited March 13, 2020).

126. Martin K. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective And Proposal for Change*, 27 UNIV. OF MICH. J. OF L. REFORM 339, 341 (1994).

127. CATHERINE KIM, ET AL., *THE SCHOOL-TO-PRISON PIPELINE* 51 (2010).

128. Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, DUKE LAW, <https://www.law.duke.edu/groupplit/papers/classactionalexander.pdf> (last accessed Feb. 17, 2019).

modern claims for education disparities are difficult to prove and often unsuccessful.¹²⁹

LITIGATION OPTIONS

Disabilities in education litigation are not appealing to attorneys as the “problem” cannot go away—the potential for major settlements is slim to none for attorneys.¹³⁰ Time and financial demands also make litigation inaccessible to many parents.¹³¹ Parents of low socio-economic backgrounds often do not have the time to take to find a lawyer.¹³² If they are able to find a lawyer, they often cannot afford legal fees.¹³³ Furthermore, attorney-advocates often come into communities and end up treating families’ lives like a legal playground.¹³⁴ Families grow weary of lawyers coming into their neighborhoods, promising money and relief, asserting themselves without truly being invested in their family’s needs.¹³⁵ Nonetheless, litigation would prove helpful when schools are not doing their jobs. Litigation would allow students to hold schools more accountable and ensure that school boards require schools to identify students with disabilities and provide individualized education programs for those students. Litigation is not helpful when it aggregates the process—legal advocacy can be necessary or abusive.¹³⁶

129. In *B et al.*, the plaintiffs alleged that the Michigan School district violated the Fourteenth Amendment by allowing facilities that violate the health code and created dangerous conditions at schools. *B et al. v. Snyder*, No. 16-cv-13292, CLASS ACTION COMPL. at 44–45 (explaining that Michigan’s constitution dictates how the State provides public education). These claims focused on the physical facilities, amenities, and resources available to students, but not the actual classroom accommodations. *Id.* The plaintiffs claimed that the Detroit public schools denied their constitutional right to literacy, but the judge dismissed the case. Lorelei Laird, *Judge dismisses lawsuit alleging constitutional right to literacy; plaintiffs vow to appeal*, ABA J. (July 3, 2018), http://www.abajournal.com/news/article/judge_dismisses_lawsuit_alleging_constitutional_right_to_literacy_plaintiff. How can students who attends schools that “are so underfunded and mismanaged by the state [] that [the school’s] condition denies students a right of access to literacy” seek relief when the Supreme Court has declined to rule that education is a fundamental right? *Id.* (explaining that the judge agreed “that literacy is vitally important to public life and that the conditions in Detroit public schools are ‘devastating,’ but ultimately found that “the Due Process Clause of the 14th Amendment ‘does not require a state to provide access to minimally adequate education’”).

130. See Lorelei Laird, *Judge dismisses lawsuit alleging constitutional right to literacy; plaintiffs vow to appeal*, ABA J. (July 3, 2018), http://www.abajournal.com/news/article/judge_dismisses_lawsuit_itutional_right_to_.

131. Gumas, *supra* note 56, at 426.

132. See Erin Phillips, *When Parents Aren’t Enough: External Advocacy in Special Education*, 117 YALE L. J. 1802, 1823–32 (2008).

133. *Id.*

134. *Id.*

135. Interview with Leslie Finley, *supra* note 98.

136. *Id.*

It is difficult for children to prove that the Child Find requirements were not adequately met by their school board and often strength in numbers is necessary.¹³⁷ *Jamie S. v. Milwaukee Public Schools*, came out of a long timeline of legal advocacy.¹³⁸ The suit was a class action complaint in which the plaintiffs focused on the failure to make a timely evaluation referral for the children, and adequately review all the data necessary to determine the child's needs as well as a pattern of wrongfully extending mandated time lines and using suspensions during the pre-referral process.¹³⁹ The case ultimately was settled with the court's approval. The settlement required implementation of terms for assessment, making timely referrals, and other comprehensive remedies.¹⁴⁰ But this does not negate the fact that 6 percent of Black children found eligible for the IDEA, in Wisconsin in 2005, were suspended for more than ten days while .67 percent of their white peers received similar suspensions.¹⁴¹ The needs of children with disabilities should not be addressed disparately based on their race or class. With such statistics, we cannot continue to allow the education to fail minority students.

ADMINISTRATIVE REMEDIES

Instead of litigating, students with learning disabilities who are not accommodated seek administrative remedies through the procedural safeguards set forth in Section 504 and FAPE—administrative remedies must be exhausted before filing a lawsuit, and legal fees are often beyond the means of students insufficiently accommodated.¹⁴² Furthermore, a child's diagnosis determines their available resources. Mental health has a very emotional component—parents may be unwilling to get a diagnosis for their child. Children may be unwilling to be “labeled” and parents may feel the same. Children who remain undiagnosed do not pursue FAPE and thus do not receive IEP accommodation. Care depends on how the professionals are trained and “poor children with mental health conditions may also receive less ef-

137. KIM ET AL., *supra* note 53, at 72.

138. *Id.* at 70.

139. *Id.*

140. *Id.* at 71.

141. *Id.* at 72.

142. Gumas, *supra* note 56 at 402.

fective treatment than other children, and thus be at ‘double jeopardy’ for ill effects.”¹⁴³

Implementation of the ADA and the IDEA is where work is needed.¹⁴⁴ Implementation matters as “[t]hose with early onset psychiatric problems were less likely to have graduated from high school or attended college.”¹⁴⁵ Children with behavioral problems at a young age are less likely to be employed as young adults. Furthermore, students with learning disabilities are vulnerable to getting pushed out of school and into the juvenile justice system.¹⁴⁶ Students with learning disabilities are infamously difficult for teachers to handle in a classroom full of many other children. Parents may even enable their child’s poor behavior by ignoring the cause of the behavior, making it more difficult for teachers to adequately help these students. Teachers need to learn how to incentivize good behavior rather than penalize students.¹⁴⁷

Federal Law Hurdles to Disability Accommodations

Students with hidden disabilities cannot always prove their case as easily as students with visible disabilities. Solutions to problems for students with disabilities include realizing FAPE by providing procedural protections for those students. For example, the IDEA has an explicit statutory exception that limits challenges to short-term suspensions, but Section 504 allow such suspensions—the status quo could allow a student with disabilities to be suspended for an act that was clearly a manifestation of their disability.¹⁴⁸

In order to adequately protect children, the ADA and IDEA (1) should have less political influence, and (2) implementation should be streamlined.¹⁴⁹ The ADA and IDEA are only as powerful as their implementation and implementation depends, in large part, on funding.¹⁵⁰ Funding depends in large part on politics. Remembering that

143. THE PROBLEMS OF DISADVANTAGED YOUTH: AN ECONOMIC PERSPECTIVE 117 (Jonathon Gruber ed., 2009).

144. Interview with Leslie Finley, *supra* note 98.

145. *Id.* at 6.

146. KIM ET AL., *supra* note 53, at 51.

147. Interview with Leslie Finley, *supra* note 98. Mrs. Finley discussed the Positive Behavior Intervention System as a method to help active students in class.

148. See KIM ET AL., *supra* note 53, at 60.

149. See Martin Kotler, *The Individuals with Disabilities Education Act: A Parent’s Perspective and Proposal for Change*, 27 U. MICH. J. L. REFORM 331, 338 (1994) (introducing how the IDEA is an example of liberal legalism, accomplishing political goals through the law).

150. Interview with Leslie Finley, *supra* note 98.

education is not a right and States have police power, funding is distributed to States who have ultimate autonomy in allocation.¹⁵¹

In reality, if the Child Find requirements were implemented as intended, we would not have students with hidden disabilities because their disabilities and mental health would be diagnosed and accommodated. To get to this reality, our legislatures must put children over politics and come up with effective solutions to use Congress's "power of the purse" as a means to implement streamlined policies. Not only would such policies target the actual procedural mechanisms to accommodate students, but also those policies would necessarily look at student discipline and seek to ensure that students are not disproportionately impacted by their disabilities or mental health.¹⁵²

Underfunding ties the hands of the staff to do their work in helping students—the demands do not match the funding provided.¹⁵³ Without adequate funding, children suspected of having additional disabilities cannot afford further evaluations, services are watered down so students do not receive the support they need, IEPs cannot be fully implemented, among countless other issues.¹⁵⁴ Funding of public schools allows for a full realization of the ADA and the IDEA because public schools are bound by these federal requirements. Currently, state and local policy makers have full authority to determine how schools are funded and the amount of money certain programming receives.

Legislative control over funding has resulted in bipartisanship shifting the prioritization of student accommodations. The Federal Commission on School Safety's ("Commission") December 2018 Report ("Report") made 100 recommendations, focusing heavily on mental health, urging significant cutbacks and proposing to eliminate

151. See Office of Special Educ. and Rehab. Serv., *Special Education—Grants to States*, U.S. DEP'T OF EDUC. (last modified May 5, 2016), <https://www2.ed.gov/programs/osepgrts/funding.html>. The locality determines how the budget fulfills demands—there are even schools that are not funded. See also Interview with Leslie Finley, *supra* note 98.

152. Gumas, *supra* note 56, at 446.

153. Interview with Leslie Finley, *supra* note 98; see generally NAT'L. COUNCIL ON DISABILITY, *BROKEN PROMISES: THE UNDERFUNDING OF IDEA 33–38* (Feb. 7, 2018), https://ncd.gov/sites/default/files/NCD_BrokenPromises_508.pdf.

154. See NAT'L. COUNCIL ON DISABILITY, *BROKEN PROMISES: THE UNDERFUNDING OF IDEA 36* (Feb. 7, 2018), https://ncd.gov/sites/default/files/NCD_BrokenPromises_508.pdf. Notably, this is a problem that Wanda Blanchett has called out countless times, yet continues to pervade our education system. See Wanda J. Blanchett, "Telling it Like It Is: The Role of Race, Class, & Culture in the Perpetuation of Learning Disability as a Privileged Category for the White Middle Class", 30 *DISABILITY STUDIES QUARTERLY* (2010), <https://dsqds.org/article/view/1233/1280>.

a \$1.1 billion federal grant that schools use for school safety and mental health.¹⁵⁵ However, the Commission's guise of protecting students attempted to hide the reality that the Commission "spen[t] seven months and untold tax dollars on rediscovering well-known school safety strategies."¹⁵⁶

Political Hurdles to Accommodations

School vouchers have become the subject of heightened debate as some feel that vouchers will allow for disabled students' needs to be best accommodated. Vouchers arise out of a "school choice movement" in which advocates like Betsy DeVos believe that providing students with vouchers to attend private schools. Such advocates highlight the shortcomings of public education and often argue that the public-school system will take too much time for students to benefit from the "quality education" they need early on in life.¹⁵⁷ Applied to students with disabilities, this ideology believes that private schools will be able to provide appropriate services early on whereas public schools are considered insufficiently resourced to meet the student's needs and are "scattered, fragmented, and poorly coordinated."¹⁵⁸

Implementation of IDEA and FAPE becomes tedious when politics cause repetition of prior research and solutions. The inability to work across party lines makes the consensus irrelevant. Rather than make productive recommendations, the Commission merely researched current policies and practices, recommending that schools implement the "School Responder Model" a less developed version of FAPE procedures.¹⁵⁹ The Report also addressed psychotropic medication for Treatment of Troubled Youth, recommending that federal agencies should increase the number of physicians that diagnose students and provide appropriate medicine to those students.¹⁶⁰ Commission member, Alex Azar, made his money in pharmaceuticals and

155. Cutbacks include urging school districts to find new and creative ways to fund therapists. FED. COMM'N ON SCH. SAFETY, FINAL REPORT, 2 (2018), <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>.

156. Nat'l Ass'n of Secondary Sch. Principals, *NASSP Statement on Final Report of Federal Commission on School Safety*, NASSP (Dec. 18, 2018), <https://www.nassp.org/2018/12/18/nassp-statement-on-final-report-of-federal-commission-on-school-safety/>.

157. Some in the school choice movement may have an ideological opposition to public education, and to the restrictions on the inclusion of religion in public school curriculums. Gumas, *supra* note 56, at 433-34.

158. *Id.* at 434.

159. FED. COMM'N ON SCH. SAFETY, *supra* note 155, at 44.

160. *Id.* at 82.

was allowed to take part in the chapter recommending 47 different drugs that can be used for children with various “behavioral health conditions.”¹⁶¹ Although medicine may help students, many of the medications are recommended for children seven-years-old and up.¹⁶² Medicine as a solution does not actually help children, but instead covers up the child’s natural behavior. Instead, parents and teachers should work with children to find ways to meet the needs of children who learn differently. Providing individualized education allows children to learn without simply masking their different learning method—drugging children ages seven to ten should not be considered a reasonable approach or a primary solution.

Politics determine how implementation becomes a reality, and like many bipartisan power struggles that forget that politicians serve all Americans, the children of constituents are the losers. In 2018, Education Secretary Betsy DeVos took a strict anti-Obama approach to strike down guidelines on civil rights and student discipline.¹⁶³ DeVos implemented policies to arm school safety officers in an effort to reduce mass shootings and the everyday risk to youth of gun violence, including gun violence at the hands of police.¹⁶⁴ The guidelines that were struck down were implemented in an effort to mitigate racist discipline in schools that contribute to the “school-to-prison pipeline.”¹⁶⁵ In rescinding the guidelines, DeVos “has long said she dislikes this type of guidance because it is perceived as a directive to school districts without the deliberative process required for a formal regulation.”¹⁶⁶ However, she does not mention the intention of the former education secretaries, Arne Duncan and John King, who “put this guidance in place to start a conversation about [] harmful practices [such as history of antisocial or violent behavior] and encourage advocates and policymakers to look more deeply into why these dis-

161. *Id.* at 81.

162. *Id.*

163. Anya Kamentez, *DeVos to Rescind Obama-Era Guidance On School Discipline*, NPR (Dec. 18, 2018), <https://www.npr.org/2018/12/18/675556455/devos-to-rescind-obama-era-guidance-on-school-discipline>.

164. *Id.*

165. Rebecca Klein, *Trump Administration Scraps Guidelines That Protects Students From Racist Discipline*, HUFF POST (Dec. 22, 2018), https://www.huffpost.com/entry/devos-school-discipline-guidance_n_5c1e4cbfe4b08aaf7a894098.

166. Laura Meckler, *Betsy DeVos Panel Rejects Obama-era Effort to Reduce Discrimination in School Discipline*, WASH. POST (Dec. 10, 2018), https://www.washingtonpost.com/local/education/betsy-devos-school-safety-panel-takes-aim-at-obamas-discipline-guidance/2018/12/10/7e515700-f6b6-11e8-8c9a-860ce2a8148f_story.html?utm_term=.5edc1afb4673.

parities exist and to intervene when necessary.”¹⁶⁷ The shift towards increasing security in schools and encouraging “extreme-risk protection orders”¹⁶⁸ represented the start of DeVos’s changes.¹⁶⁹ Nonetheless, it is not a secret that “students of color suffer harsher discipline for lesser offenses than their white peers and that racial bias is a driver of discipline disparities.”¹⁷⁰ Rather than focus on the needs of marginalized students, DeVos seeks to pour money into private education; seeking to raise scholarships for schools like those she attended herself.¹⁷¹ DeVos even stated that she has never been to at-risk schools, despite being a Michigan native—a state riddled with public schools struggling to have acceptable facilities, much less quality education programs.¹⁷² DeVos’s private education proposals are not completely without merit, as parents who seek tuition reimbursements under IDEA are often rejected; however, without ever looking at the conditions of such problem-ridden schools, DeVos’s proposals seem ill-suited.

167. Lauren Camera, *White House: Scrap Obama-Era School Discipline Guidance*, U.S. NEWS (Dec. 18, 2018), <https://www.usnews.com/news/education-news/articles/2018-12-18/white-house-scrap-obama-era-school-discipline-guidance>.

168. Such orders would allow law enforcement to take away weapons from individuals that are deemed dangerous to himself or others and prevent those individuals from temporarily purchasing a weapon. *Id.* Though such policies may seem reasonable, this ignores the reality that school shootings are not usually the result of violent students but are caused by people outside of the school. *Id.* Calling for additional fencing and stronger glass windows do not solve the problem of people who violently target innocent students but instead make students feel locked in school—the exact problem the Obama-era guidelines sought to repair.

169. Furthermore, the Commission is not representative of all Americans but instead are four well-to-do Caucasian government and policy specialists: Alex Azar, Betsy DeVos, Kristen Neilsen, and Matthew Whitaker. U.S. DEPT. OF EDUC., *Fed. Comm’n on Sch. Safety*, <https://www.ed.gov/school-safety/?src=feature>. In fact, nearly all of the pictures in the Report depict Caucasian officials. U.S. DEPT. OF EDUC., FED. COMM’N ON SCH. SAFETY, *Integrating Mental Health, Primary Care, Family Services, and Court-Ordered Treatment* 37 (2018), <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>. Notably, Betsy DeVos is known a billionaire and Alex Azar is known a millionaire. See Emily Stewart, *Betsy DeVos is still struggling to explain cuts to Special Olympics Funding*, VOX (Mar. 28, 2019), <https://www.vox.com/policy-and-politics/2019/3/28/18285360/betsy-devos-special-olympics-shriver-pocan>; Nathaniel Weizel, *HHS Nominee Azar Made Millions Working for Drugmaker Lilly*, THE HILL (Nov. 20, 2017), <https://thehill.com/policy/healthcare/361264-hhs-nominee-azar-made-millions-working-for-drugmaker>.

170. Lauren Camera, *Federal Report Confirms Discipline Disparities*, U.S. NEWS (April 4, 2018), <https://www.usnews.com/news/education-news/articles/2018-04-04/federal-report-confirms-discipline-disparities-for-black-students-boys-and-students-with-disabilities>.

171. Laura Meckler, *DeVos Defends Billions in Education-spending Cuts to Skeptical House Democrats*, WASH. POST (Mar. 26, 2019), https://www.washingtonpost.com/local/education/devos-defends-billions-in-education-spending-cuts-to-skeptical-house-democrats/2019/03/26/9a0c7a38-4ff3-11e9-88a1-ed346f0ec94f_story.html?utm_term=.0c754e4e092f.

172. The View, *Betsy DeVos Struggles in Interview on Education*, YOUTUBE (Mar. 12, 2018), <https://www.youtube.com/watch?v=YBMc3EqGikg>; see also *B v. Snyder*, 329 F. Supp. 3d 344, 348 (E.D. Mich. 2018).

Accommodating Hidden Disabilities

Despite projecting an idealized perception of private schools, sending disabled students to private schools through voucher programs is not an effective solution. Private schools are not subject to the IDEA and thus have no legal standards to accommodate the student. In fact, studies and scholars have found that voucher programs are not a sustainable or effective choice for students but create an “existential threat” as “schools that accept vouchers. . .often do not have a unionized faculty.”¹⁷³ Approaching school accommodations by promoting private schools does not actually ensure that students are accommodated, even if private schools have smaller student-to-teacher ratios. Instead, promoting voucher programs can cause more problems for students by forcing parents to pay out of hand for private school if the voucher is delayed, leading students simply becoming ignored, or causing students to have to travel great lengths to attend the private school. Furthermore, voucher programs strip money from public schools that need resources to effectively implement the ADA and the IDEA. The voucher programs require the government to pay the private school tuition for students to attend when that money could pay.

Rather than rush to blame the system, like enthusiasts such as Betsy DeVos, positive solutions need to look at how to hold schools and parents accountable. Student self-advocacy could actually protect children. In order to ensure that students receive the care they need, we should give students a platform to express their needs. Yes, in some utopian world we could require schools to hand out vouchers for all students with special education needs to go to private or chartered schools. But in reality, there are vast numbers of students with such needs and causing taxpayers to support private education would cause great negative repercussions.¹⁷⁴ Heavy bipartisanship makes it difficult for students to have a say in their rights and needs, and instead cause tax driven policies to be implemented in a way that continues to disproportionately impact marginalized students. People in positions of power like DeVos, ought to be held accountable for the hypocrisy of implementing policies such as cutting funding for Special Olympics while seeking funding for private school scholarships; particularly as private schools have the capacity to implement their own fundraising

173. Nicholas Gumas, *Socio Economic and Racial Disparities in Public Special Education: Alleviating Decades of Unequal Enforcement of the Individuals with Disabilities Education Act in New York City*, 8 Colum. J. Race & L. 398, 434-35 (2018).

174. *Id.* at 434-36.

efforts, just as DeVos stated about the Special Olympics when she defended her funding cuts.¹⁷⁵

The shift in policies and approaches to students with mental health issues under the Commission highlights the reality that minor students are vulnerable to the political system. More curiously, bipartisan representatives purport to agree on the substance of the evil – that children with mental health concerns face a lack of access to treatment necessary to support their needs.¹⁷⁶ Additionally it seems undisputed that “[s]chools can play an important role in curating healthy environments that seek to prevent and mitigate the onset of health and mental conditions.”¹⁷⁷

SOLUTIONS FOR ACCOMMODATING STUDENTS WITH HIDDEN DISABILITIES

When parents’ efforts to get accommodations for their children are unfruitful, lawyers may play a role in protecting the child. However, lawyers may not be helpful when they confuse families or seek monetary gain from the child’s disability.¹⁷⁸ In order for litigation efforts and lawyers to be effective, we may need to publicly fund special education attorneys.¹⁷⁹ These attorneys need to have “Skin in the Game” and relate to their clients and have passion for students with hidden disabilities and little access to resources.¹⁸⁰ Such publicly funded attorneys would allow for students to have legal advocates that are motivated by their desire to effect change rather than ulterior motives. Creating a public defender styled entity for education claims would provide a legal outlet for families of low-socio-economic backgrounds and allow for litigation to become a more viable option. Further, this kind of entity could become a catalyst for legal reform in the available remedies for students with disabilities. There is substantial need for such an entity because the implementation of the IDEA and ADA has yet to be fully recognized but there is not adequate legal representation advocating for these children. If the State or Federal government was unwilling or unable to fund such an entity, then ef-

175. *See generally* Meckler, *supra* note 171.

176. *See* U.S. DEPT. OF EDUC., FED. COMM’N ON SCH. SAFETY, *supra* note 169.

177. *Id.* at 37.

178. Interview with Leslie Finley, *supra* note 98.

179. Gumas, *supra* note 56, at 440.

180. Skin in the game is a concept where the person who is advocating for certain change or solutions has personally experienced the issue that they wish to solve. NASSIM NICHOLAS TALEB, *SKIN IN THE GAME* 11 (2017).

forts within the law profession can be made to push pro bono work in disabilities education representation.¹⁸¹ The American Bar Association could easily implement efforts to urge the private sector to take up such cases, providing for more legal representation. With adequate legal representation, policy makers may begin to take the needs of students with disabilities seriously and put the students' needs before the policy-makers' agendas.

Another solution that parents and students can implement now and until bipartisanship less significantly impacts IDEA protections includes self-advocacy. However, the IDEA conflicts with parent control over their children's educational experience. This conflict limits parental choice by (1) limiting the resources and thus restricting the range of programming options available to choose from; and (2) deferring to educators in decision making based on a belief that educators "have superior knowledge regarding programming."¹⁸²

Before turning to litigation, students should know and understand the extent of their legal rights. Recently, an Alabama District Court found that the school board did not violate their child-find duty.¹⁸³ The court found that the pre-referral interventions, in which teachers and administrators monitor the child prior to an IEP referral, used to help the child with attention problems allowed the student to meet expectations.¹⁸⁴ Nonetheless, the child found that the Board should have referred him for an IEP evaluation immediately because his asthma medication caused hyperactivity.¹⁸⁵ Eventually he was diagnosed with Attention Deficit Hyperactivity Disorder and was found eligible for special education services.¹⁸⁶ The parents or child did not know that the care received passed IDEA muster. Their lawyers likely told them they had a good case. Such outcomes do not help children receive the care they need. This case demonstrates the lack of clarity in availability of legal relief and the need for alternatives to litigation. The restrictions on parental empowerment actually contradict the original history of the IDEA.

181. Erin Phillips, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 *YALE L.J.* 1802, 1848 (2008).

182. Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective*, 27 *U. MICH. J. L. REFORM* 331, 361 (1994).

183. D.J.D. by & through Driver v. Madison City Bd. of Educ., No. 17-cv-00096, 2018 WL 4283058, at *1 (N.D. Ala. Sept. 7, 2018).

184. *Id.* at *2.

185. *Id.*

186. *Id.*

The IDEA originally believed that parental involvement was the first mode to correct earlier errors in decisions affecting a child, as parents are often able to serve as the most effective advocate for their children.¹⁸⁷ However, the IDEA's original policy principle of parental participation has become a significant point of opposition by policy members impacting special education.¹⁸⁸ IEPs were intended to bring parents in as central advocates for their child's unique needs, but soon educators began to resent parental involvement and IEP conferences "have become 'highly formal, noninteractive, and replete with educational jargon.'" ¹⁸⁹ Parents have become pushed out for many reasons, including the institutional barriers to implementing IEP or FAPE programs as well as an unwillingness to change the bureaucratic method of routinizing procedures.¹⁹⁰

Taking parents' voices away ultimately hurts the children and their ability to determine what their needs are. Students that are subject to the bureaucracy are not likely to fare particularly well as the system does not care about the individual student, but rather is concerned with the bigger picture. Parents were initially deemed by policymakers as significant safeguards for the wellbeing of their children:

The value of individualized planning depends on including an effective advocate for the child in the planning process and enforcing the child's plan. Policymakers recognized the potentially adversary relationship between the school and the child[,] so they empowered parents to act in the child's interest. Parents would represent the child in the IEP meeting. An impartial hearing would resolve disagreements between school officials and the parents. Parents could request an independent education evaluation. The parent's advocate role follows traditional conceptions of parental authority, and policymakers presumed that parents would be effective advocates.¹⁹¹

Parents working with educators can result in positive solutions for children, but the status-quo is not such a harmonious relationship.¹⁹²

187. Kotler, *supra note* 126, at 362.

188. *Id.* at 363.

189. *Id.* at 363-64 (quoting William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, LAW & CONTEMP. PROBS. (1985)).

190. *Id.* at 364-65.

191. Jack Tweedie, *The Politics of Legalization in Special Education Reform*, in SPECIAL EDUCATION POLICIES: THEIR HISTORY, IMPLEMENTATION AND FINANCE 48, 61 (Jay G. Chambers & William T. Hartman eds., 1983).

192. Educator resentment of parental participation in the process of selecting and implementing educational programming for disabled children is well documented. For example, nu-

In order to best accommodate the needs of the students, cooperative interactions between educators and parents will have to become honest and transparent. Currently, “educators frequently attempt to manipulate parents into accepting programs formulated in the parent’s absence.”¹⁹³ Such resistance and manipulation is due to institutional barriers of implementing ADA and IDEA measures and the unwillingness of bureaucracy to change even when best practices require change.¹⁹⁴ Education reform must include efforts to challenge the educators’ judgment and give power to families to seek the best interest for their child’s needs.

In the alternative to focusing on self-advocacy, parents, policy makers, and advocates can push the Department of Education for reforms. The guidelines by the Commission and other similar bodies need not exist. Just like any agency, the Commission is able to survey the responses after a note and comment period and implement policies they believe are appropriate. The Commission has autonomy to determine how to assess the issues it faces and how to derive solutions. However, in light of the members of the current Commission and DeVos’s efforts to cut \$7 billion in education funding, we should take a closer look at the necessity of the guidelines. As Congress has enacted the IDEA and has the direct authority to amend the act, the guidelines do little more than provide research results and conclusions from a handful of selected persons. Furthermore, it is not clear that schools actually implement the suggestions from the guidelines, as many policies that have been in place at local schools are slow to change.

CONCLUSION

There is a book called *Skin in the Game* which discusses the need for people to have a direct connection to the community they are working in for the person to accurately address the needs of that community.¹⁹⁵ The thesis of the book is that skin in the game is necessary in order to ensure fairness and to understanding the world.¹⁹⁶ Educa-

merous studies of Individualized Education Program (IEP) conferences report that the conferences do not function as envisioned by the drafters of the Act.

Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent’s Perspective and Proposal for Change*, 27 U. MICH. J.L. REFORM 331, 363 (1994).

193. *Id.* at 364.

194. *Id.* at 366–67.

195. See TALEB, *supra* note 180.

196. See generally *id.*

tors and policy makers effecting education must have skin in the game in order to better represent marginalized communities. However, as discussed above, the Federal Commission on School Safety's ("Commission") was a homogeneity of white, well-to-do government and policy specialist. Commissions such as this do not help all students because there is no representation of the views regarding issues on school safety from actual educators, persons of color, people who have experienced poverty, and presumably persons with disabilities or working with disabilities. The people who serve on the Commission do not relate to the backgrounds of the students that need representation. Instead, these Commission members carry privilege of their personal experiences, and are often not thinking of the low-socioeconomic status brown boy or girl with a learning disability when making Commission decisions about how to enforce FAPE and IEPs.

When the government organizes official entities to protect the nation's schools, the government should have a duty to ensure that the chosen representatives reflect the voices of the *Nation* not merely an insular community of white Americans. Accordingly, the government should have an affirmative duty to ensure that all education policy members have skin in the game for their particular community and that all voices of the Nation are represented when making decisions that affect the education of children.