

SOME THOUGHTS ON THE LAW AND POLITICS OF REPARATIONS FOR SLAVERY

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Abstract: This Article examines several legal and political issues raised by reparations for slavery and offers a skeptical appraisal of both the wisdom of reparations and their potential for success. There are a number of legal obstacles to courtroom-based reparations, including the difficulty of proving duty, causation, and damages; technical barriers such as limitations statutes and laches; and constitutional problems such as standing and courts' strict scrutiny of racial classifications. In the political realm, the difficulty of identifying those who should pay and those who should receive reparations, and the impact of a successful reparations scheme on race relations in America, should counsel against the wisdom of reparations for slavery.

When grappling with providing reparations for slavery, two distinct categories of issues emerge: legal and political. While the division between law and politics is murky at the margins, the distinctly legal issues involved in slavery reparations focus on the doctrinal possibilities of obtaining damages for slavery, and the policy wisdom of altering legal doctrine, if necessary, to afford such a remedy. Part I of this Article will discuss the legal limitations of seeking reparations for slavery, recognizing that a felt sense of injustice, by itself, is not a sufficient foundation for restitution under private law. Part II will discuss the political problems inherent in slavery reparations, problems that raise broad questions of whether and how we should use the political system to provide either a massive redistribution of wealth to those claiming entitlement to reparations for slavery, or some other socio-political scheme to redress the present effects of slavery. Part II of this Article will argue that approaching reparations from a political perspective would ultimately prove more problematic than cathartic. Finally, at the very intersection of law and politics lies the constitutional question of whether, or to what extent, such redistribution is permissible. Part III of this Article will address why it is unlikely that

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reparations for slavery will overcome the strict scrutiny of racial classifications. This Article concludes that reparations for slavery face numerous, and likely insurmountable, legal and political hurdles.

I. PRIVATE LAW

Professor Hylton divides tort claims for slavery reparations into those seeking a conventional form of justice and those seeking to redistribute wealth to improve overall social welfare.¹ Under the justice approach, specific victims must identify the particular individuals or entities that harmed them, the precise acts that led to their injury, and the sum necessary to compensate their injuries.² The social welfare approach, however, “aims for a significant redistribution of wealth,” rather than achieving “justice in any discrete case.”³ According to Professor Hylton, the social welfare approach “shares much in common with the . . . tobacco litigation[, which] led to a large-scale redistribution [of wealth] from cigarette manufacturers and their customers to other groups in society [in order to] compensate society for some of the ‘externalities’ imposed by the cigarette industry.”⁴ As Professor Hylton acknowledges, there are significant differences between the social welfare approach and the conventional justice approach. This Article will examine the social welfare method first, and then briefly discuss the conventional justice method.

A. Social Welfare

The social welfare approach to slavery reparations seeks to invoke the tort system to accomplish massive wealth redistribution. Although the tobacco litigation achieved this goal (albeit to a lesser degree than that sought by reparations advocates), there are vast differences between the two cases. The social welfare approach to slavery reparations faces some daunting hurdles. First, slavery, although unjust, was legal. Second, an accounting of the effects of slavery, while informative, will not serve any real legal purpose. Third, the passage of time raises problematic questions of duty, causation, and damages.

¹ Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L.J. 31, 32–33 (2004) [hereinafter Hylton, *Framework*].

² *Id.*

³ *Id.* at 33.

⁴ *Id.* at 33–34.

1. The Legality of Slavery

The formal legality of American slavery poses a substantial obstacle to a tort claim for slavery reparations. Although slavery was a unique institution, in that the state largely permitted slaveholders to wield absolute power over slaves, this seeming absence of law did not make slavery a completely lawless practice. There were at least seven provisions of the 1787 Constitution that recognized slavery as a part of the legal order of the states.⁵ However stirring Jefferson's statement of human equality may be, it is familiar history that the drafters of our constitution wove slavery into our fundamental law from the beginnings of our republic. Slavery was more than simply legal; it was a recognized, fundamentally constitutional fact. Sobering and disquieting though that may be, it remains fact. It bears repeating that there was no formal absence of law governing the relationship between slave and master. While it is true that most of the law concerning slaves cemented the subjugation of slave to master, and that laws whose aim was to inhibit the excessive abuse of slaves were largely ineffective, laws existed purporting to govern the relationship between master and slave.⁶ As unsatisfying and unjust as these laws were, there was no legal void.

Even if one could persuasively argue that the master-slave relationship was a legal void, that would not vitiate its formal legality as a defense to a contemporary tort claim. Consider a rough modern analogue, recognizing that there can be no true analogy to the horror of slavery. Until fairly recently, family relationships were also largely exempt from legal inspection; the state ceded its vast power to parents so that they could define the "law" governing their relationships with their children. Even in the heyday of "Father Knows Best," law was not totally absent from the family. Would it be proper to conclude that, because law was largely absent from the family, an emotionally cold and distant parent (but one who did not intentionally inflict emotional distress upon his children) could not assert the lawfulness of his parental disinterest as a defense to a tort claim made by his child?

⁵ See U.S. CONST. art. I, § 2, cl. 3 (three-fifths clause); art. I, § 8, cl. 15 (militia clause); art. I, § 9, cl. 1 (non-importation clause); art. I, § 9, cl. 2 (suspension of habeas corpus clause); art. IV, § 2, cl. 3 (fugitive clause); art. IV, § 4 (guarantee clause); art. V (prohibiting amendment of non-importation clause prior to 1808).

⁶ See generally *SLAVERY AND THE LAW* (Paul Finkelman ed., 1996).

2. Accounting for Slavery

There is a vast moral chasm between slavery and an emotionally cold parent, and it is ultimately upon moral grounds that one must consider slavery reparations. While the political system is the better vehicle for sorting out moral claims of entitlement, we must at least evaluate the moral claims of the social welfare model in light of the existing architecture of tort law. The most attractive (albeit possibly ineffective) way in which to articulate those moral claims in tort doctrine is through the seldom-used remedy of an accounting. An accounting—an honest and complete accounting of the profits whipped from the backs of black Americans held in slavery—is the “truth” part of an American version of the South African exercise in “truth and reconciliation.”

Entitlement to an accounting depends upon proving the existence of a tort, and the problems of duty and causation may prove to be as insuperable here as they are with respect to tort claims seeking damages.⁷ In more prosaic tort settings, one might wonder whether there is any point to an accounting in the absence of any available damages remedy. Such an accounting would merely be a recitation of lawful gains for which no one is entitled to compensation. For the moment, however, let us ignore the real-world elephant of tort liability and simply examine the accounting remedy in isolation. When we acknowledge that a nominally lawful past practice was morally abominable and bereft of law in practice, even if there are no legally cognizable present victims or villains, the accounting remedy becomes far more relevant as a practical way to compute, in utilitarian terms, the cost of this morally repugnant past practice.

The principal value of an accounting for slavery lies not so much in the legal realm but in the social and political world. An accounting, even if limited to the benefits obtained by specific defendants in a tort action, would serve only to focus public attention on the extent of the wealth amassed by whites from the labor of black slaves.⁸ This, in itself, might have value. The number of Americans who truly understand this point is astonishingly low. Some years ago, at a convention of the American Society of Legal History held in Charleston, South Carolina, I took a tour of old Charleston in the company of my fellow academicians and a few outsiders. As we swept through fabulous man-

⁷ See *infra* text accompanying notes 9–15.

⁸ See, e.g., RICHARD F. AMERICA, *PAYING THE SOCIAL DEBT: WHAT WHITE AMERICA OWES BLACK AMERICA* 6–8, 17–19 (1993); RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 206–07, 240–42 (2000).

sion after fabulous mansion, one of our company (I hope not an academician) inquired innocently of our tour guide, a blue-blooded Charlestonian, "Where did the money come from to build these places?" Before our guide could answer, Professor Paul Finkelman, who was standing next to me, blurted out, "From the backs of slaves!" He was absolutely correct, but I still wonder how our tour guide would have replied. Would she have said rice or indigo, leaving unspoken *who* worked those fields? Or would she have recognized and identified slavery as the brutally efficient form of wealth generation that it was in the plantation economy of the old South? An accounting, via the tort system, would definitively answer that question, and answer it in the form of *legal judgment*, not merely in the form of an economist's opinion, or an idealist's *cri de coeur*.

Therein lie some additional problems. Why is it that a legal judgment of an accounting would have greater societal impact than similar pronouncements in the movies, on a PBS documentary, on the op-ed pages of the *New York Times*, or out of the mouth of a presidential candidate? A legal judgment would be the end-result of a process that inevitably narrows focus, whether through application of the rules of evidence or by other aspects of legal process. Might such a judgment, especially because it would be utterly empty of force, be simply Shakespearean sound and fury, signifying nothing?

3. Passage of Time Problems

An even greater hurdle than the legal validity of slavery at the time it existed is the passage of time problem. This manifests itself in the form of insuperable proof problems with respect to duty, causation, and damages, to say nothing of the more technical issues of limitations statutes and laches. Two types of tort claims might be brought to recover damages for slavery, but each claim is initially dependent on overcoming the hurdle of slavery's legal validity during its existence. The first such claim would seek damages for the wrongful restraint suffered by slaves; the second would seek restitution based on unjust enrichment.

a. *Damages for Wrongful Constraint*

The problems with the first claim are duty, causation, and proof of damages. Duty raises the question of whether a contemporary defendant owed and breached a duty to the contemporary plaintiff. Consider two types of defendants, the individual descendant of wealthy white slaveholders and the corporate enterprise, still existing,

that derived profits from slavery in its corporate past. Let us assume (probably unrealistically) that the blue-blooded Charleston tour guide is the product of an absolutely pure genetic chain that, once followed back to before 1865, consists exclusively of white slaveholding South Carolinians who lived in those Charleston mansions. Let us further assume that our tour guide lives today in one of those mansions, an inheritance that has passed continuously through her family, resting for the moment in her. She would now be enjoying the fruit of a tree planted and watered by the sweat wrung from the brow of the ancestor of her neighbor, a fellow citizen of Charleston (let us imagine him to be a Colonel in the United States Marine Corps). What duty to the Colonel does the tour guide owe that she has breached? No doubt her ancestor breached many duties owed by law and morality to the ancestor of the Colonel, but what principle of law imputes those foul breaches to his fourth or fifth generation descendant? The principle of corruption of blood is foreign to our institutions; do we really wish to revive it, even if it were constitutionally permissible to do so?

Now consider duty in the context of the corporate defendant. Corporations, as fictional and immortal persons, are surely liable for their breaches of duty that occurred prior to the end of slavery. This leaves open the question of who can claim recovery for those breaches of a corporation's duty. Imagine a corporate trafficker in humans during the nineteenth century that is still in existence. Surely that corporation owed and breached a duty to the slave (assuming that slavery's nominal legality is no defense); but did that corporation, by its long-ago actions, violate a duty owed to a contemporary descendant of the slave? If so, may I also recover from a hypothetical corporation that breached its contract with my ancestor by holding him in indentured servitude for a year longer than stipulated? What duty does the corporation owe me, as distinct from my ancestor? To put the question into yet another context, may the descendant of a Titanic sinking victim recover from the corporate successor to the White Star Line?

Another problematic consideration is causation, which invokes the question of whether the injury presently complained of was a foreseeable product of the defendant's conduct. It makes no difference to this issue whether the defendant is the Charleston tour guide or the corporate slave trader. In either case, assuming you have concluded that it is appropriate to attribute to the tour guide the sins of her ancestors, it is necessary to wrestle with the issue of whether that past conduct has

caused injury to a contemporary plaintiff.⁹ Satisfaction of this causal link may occur through several measures. Compared to whites, blacks in America remain poorer, facing shorter life expectancies, are less educated, and face a greater likelihood of criminal victimization, among other ills.¹⁰ While these facts may constitute circumstantial evidence of causation, another attempt to establish a causal link is the claim that slavery embedded in American society the "resilient virus" of racism, which tends "to replicate itself in successive generations."¹¹ If one starts from these propositions, the proximate cause claim becomes an assertion that slavery caused racism and that racism is responsible for the disadvantaged position of black Americans. Neither assertion is incontestable; racism can and does exist where slavery never did, and racism is surely just one among a number of contributors to this deplorable state of affairs. One need not subscribe to Professor McWhorter's view of the ills of black America¹² to recognize that white racism is not the sole and exclusive cause of the social ills that beset black Americans. It is a plausible thesis that the well-meant culture of the welfare state has been a significant contributor to the disadvantages that beset many black Americans today.¹³

⁹ It is essentially on this ground that the U.S. Court of Appeals for the Ninth Circuit, in *Cato v. United States*, concluded that African-American plaintiffs who sought to recover reparations from the United States for slavery lacked standing to assert the claim. See 70 F.3d 1103, 1111 (9th Cir. 1995).

¹⁰ See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 85–90, 109–11 (1995) (discussing wealth disparities and educational differences); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE* 263–68 (1997) (discussing criminal victimization); Dorothy A. Brown et al., *Social Security Reform: Risks, Returns, and Race*, 9 CORNELL J. L. & PUB. POL'Y 633, 637 (2000) (discussing shorter life expectancies).

¹¹ See KEITH N. HYLTON, *SLAVERY AND TORT LAW* 32 (Boston Univ. Sch. of Law, Working Paper No. 03–02, 2003, Soc. Science Research Network Elec. Paper Collection) [hereinafter HYLTON, *SLAVERY AND TORT*], at <http://www.bu.edu/law/faculty/papers/HyltonK012803abstract.html> (last visited Oct. 20, 2003).

¹² See generally JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* (2000) (discussing three manifestations of the "ideological sea of troubles plaguing black America": the Cult of Victimology, Separatism, and Anti-intellectualism).

¹³ Consider the following: In 1995 the median income of black two-parent families was 88% that of white two-parent families, but the median income of all black families was only 61% of all white families. *Id.* at 10. The disparity is attributable to the low income of many black single mothers. *Id.* McWhorter also notes that a majority of blacks (56%) live in the South, a region notorious for wages lower than the rest of the country, and that the rate of increase in median pay was faster among blacks than whites in the 1990s. *Id.* In mid-twentieth century America more than two-thirds of all black children were born into a two-parent family; by the end of the century more than two-thirds of all black children were born into a single mother family, a statistic leading one pair of researchers to conclude that this family structure is what divides poor blacks from middle-class or well-to-do blacks. THERNSTROM &

Whatever the general social causation that may be at work, it is a much harder proposition to defend the causal linkage between the present injuries of any particular plaintiff (or even the class of all present descendants of American slaves) and the past specific tort of wrongful constraint attributed to today's defendants. Consider an analogous problem. In the unitary school desegregation cases, such as *Freeman v. Pitts*, the Supreme Court exhibited a willingness to sever the causal link between past unconstitutional de jure racial discrimination and the de facto racial disparity that exists in the present pupil composition of schools formally governed by de jure racial discrimination.¹⁴ If *that* causal link is so easy to sever, what is the likelihood that courts dealing with a tort claim for slavery reparations will find slavery to be a proximate cause of today's racial disparities in wealth?

Finally, even if duty and causation do not pose insurmountable hurdles, one must wonder about the speculative nature of the damages. It is a familiar principle to litigators that claims for lost profits will fail unless there is specific proof of the opportunities in hand lost as a result of someone's tortious conduct. That principle is applicable here. Calculation of the economic loss suffered by any given present-day descendant of an American slave attributable to the wrongful confinement of slaves is so speculative as to be an exercise in imagination. Perhaps that is why reparationists' estimates of the total such loss are so wildly disparate.¹⁵ We have no way of determining the precise cost of the labor value or of the emotional costs extracted from slaves. Even more difficult is knowing how much of that sum would have been passed on to the next generation, and how much of that value would survive transmission through four or five succeeding generations. It is safe to generalize that blacks in America would be better off economically today if the full value of slave labor and the emotional costs of slavery had been distributed to newly emancipated slaves in 1865, but it is impossible to know how much better off today's black Americans would be, if at all. It is even more speculative to try pinning a number on the loss suffered by any given contemporary indi-

TERNSTROM, *supra* note 10, at 237, 239–41. It is a matter of debate what caused this lamentable phenomenon; one suspect is the incentive afforded by federal welfare measures, instituted in the 1960s, for mothers to raise their children without the benefit of marriage.

¹⁴ See 503 U.S. 467, 494 (1992).

¹⁵ See, e.g., Robert W. Tracinski, *America's "Field of the Blackbirds": How the Campaign for Reparations for Slavery Perpetuates Racism*, 3 J.L. Soc'y 145, 157 (2002) (describing estimates ranging from \$1.4 trillion to \$24 trillion).

vidual descendant of American slavery. In short, this loss, like the business plaintiff's claim for lost profits, is not legally cognizable.

b. *Restitution for Unjust Enrichment*

The second claim, restitution, fares little better. Indeed, if restitution is merely a tort remedy there is nothing to add to my earlier comments on duty and causation. If restitution is, in this context, a separate cause of action, there remain two major obstacles to its application to a claim for reparations.

First, as discussed in connection with the claim for wrongful confinement, the present value of the profits derived from slavery by any given contemporary defendant is virtually impossible to calculate. It can only be guesswork. Few corporate defendants will have records adequate to prove such profits, and no individual will have such records. For example, how would you establish the present value of the profits derived from slavery by any given white descendant of Thomas Jefferson?

Second, even if one is able to surmount the obstacle of adequate proof of the amount of these speculative profits, there remains the task of establishing that restitution from a contemporary proxy for an ante-bellum profiteer from slavery will actually further restitution's objectives—detering “market bypassing and unambiguously-socially-undesirable conduct”¹⁶ and ensuring public peace by discouraging extra-legal retaliation. No doubt, such an award would deter any present-day person from engaging in slavery, but that is not a real problem in twenty-first century America. It is far more plausible to argue that restitution ensures public peace by assuaging the hurt and anger felt by many black Americans. Nevertheless, a felt sense of injustice, by itself, is not a sufficient foundation for restitution. The classic case for restitution in tort, as a separate cause of action, is to punish a bad actor (and deter him from further misconduct) by delivering his ill-gotten gains to his victim. With reparations there are only proxies for long-dead bad actors, there will be no deterrence, and wholly speculative gains will be delivered to people who are, at worst, proxies for long-dead victims and, at best, people who suffer in varying degrees from the remote vestiges of slavery.

I am not contending that racism is dead (it surely is not; racism is a far harder disease to extirpate than smallpox). Neither am I arguing

¹⁶ See HYLTON, *SLAVERY AND TORT*, *supra* note 11, at 43.

that there is no connection between slavery and racism (of course there is). I am contending only that the nexus between slavery and the present forces that produce the sense of injustice felt by black Americans today is too attenuated to merit a judicial award of damages based on restitution. Like the causation element of standing in constitutional law, the injury must be "fairly traceable" to slavery through a chain that contains no links of independent causation. In short, tort lawsuits for reparations will win publicity but little if any damages.

B. *Conventional Justice*

The exception to this assessment is the category of reparations suits that seeks conventional justice. A prototypical such case is the suit filed by Professor Ogletree, among others, seeking damages for the Tulsa race riot.¹⁷ First, as Professor Brophy has painstakingly documented in his book on the Tulsa riot, *Reconstructing the Dreamland*,¹⁸ there is no doubt whatever that the riot was an act of official violence, patently illegal at the time it was committed. Second, the governmental entities that committed those unlawful acts exist today. Third, there are presently existing people who were the direct and immediate victims of this official violence.¹⁹

These facts combine to distinguish claims for damages attributable to the Tulsa riot from claims for damages attributable to slavery. Unlike Tulsa, claims for damages due to slavery seek recovery for acts lawful at the time committed, often asserted against entities that did not commit those acts, and by people who were not themselves the injured party. These are not formalities; these differences reflect the fact that our legal culture is one of individual rights and responsibilities. Indeed, a fundamental organizing principle of our legal system is that rights and responsibilities are individual matters. Some sneer at the supposed fiction of the individual rights-bearer, and many advocates of reparations enthusiastically embrace the notion of collective rights and collective liability, but they have the burden of proving why it is that we should displace our fundamental notions of individual rights and responsibilities with a collectivist version of rights and responsibilities.

¹⁷ See Plaintiffs' Complaint, *Alexander v. Governor of Oklahoma* (N.D. Okla. filed Feb. 28, 2003) (No. 03-CV-133).

¹⁸ See ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921* (2002).

¹⁹ Charles J. Ogletree, *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13, 18 (2004) (stating there are over 120 survivors of the riot still living).

The collectivist notion of rights and obligations is curiously atavistic, rooted in the same impulse that created the theological fiction of original sin. Human freedom means having the freedom to make choices and to accept the consequences that result from those choices. The quintessentially American version of this idea is that you should be free to shape yourself.

Individuality does not come without risk. Consider why it is that American literature teachers still assign the only good novel Scott Fitzgerald ever wrote, in which Jay Gatsby sprang from his own Platonic conception of himself and turned out to be dark, troubled, and criminally tragic. Fitzgerald concluded that "we beat on, boats against the current, borne back ceaselessly into the past."²⁰ Here, brilliantly captured in metaphor, is the essential dilemma of the reparations debate: We beat on in our individual cockleshells, armed with our rights and responsible for our own actions alone, but we beat against the current of our past racial injustice and are borne back ceaselessly into that past. If we are to best that current, we must confront it, then tame it, in order to glide with tranquility to some happy land beyond. Reconciling ourselves with the past so that we may valiantly face the future is the domain of politics, not law.

II. POLITICS

Tort law will probably not provide redress to those who seek reparations for slavery, but the political realm may prove to be a more adequate forum. What is the strength of the case for using the political system to effect a massive redistribution of wealth from white Americans to black Americans? This redistribution might take the form of direct cash transfers or indirect transfers in the form of social welfare benefits or subsidies that are distinctly race-based.²¹ For the sake of simplicity, I will lump these together as monetary reparations. There are a host of problems with monetary reparations, but most can be grouped into one of two broad categories: pragmatic problems and consequential problems. Because this topic is so vast and my space and time are so limited, I content myself with the academician's primary job—asking questions.

²⁰ F. SCOTT FITZGERALD, *THE GREAT GATSBY* 189 (Scribner Books 1992) (1925).

²¹ But see David Lyons, *Reparations and Equal Opportunity*, 24 B.C. THIRD WORLD L.J. 177 (2004) (discussing a series of race-neutral social welfare programs that could take the place of reparations specifically targeted to blacks).

A. *Pragmatic Problems*

Who should benefit from reparations? Should all blacks benefit, including immigrants not descended from slaves? Should this class of beneficiaries also include descendents of Native-American slaves? What sort of proof would one need to establish eligibility if only the descendants of slaves are eligible for reparations? If all blacks are eligible, what determines who is black? It would be ironic if in implementing a race-based form of reparations it would be necessary to employ a rule of law defining race; such legal definitions would emulate the legal regimes of the Jim Crow South and Nazi Germany.

Should benefits be equal among all recipients? Should Oprah Winfrey, Johnnie Cochran, Richard Parsons, or Denzel Washington, to name just a few spectacularly successful black Americans, receive the same amount as a minister, a postal clerk, an army sergeant, a manual laborer, or an unemployed single mother?

Should causation have any role to play? Should beneficiaries be required to prove some causal link between slavery and their individual current condition? Should there be any relevance to the fact that the economic condition of most American blacks is far better than that of African blacks?²²

Who should pay? Should funds come from all non-blacks, including Latinos, Asians, Indians, and those whose ancestors immigrated to America after the end of slavery? Should funds come only from white Americans, or, perhaps, only the descendants of slave owners? If so, how do we determine the identity of these people? What degree of genetic connection would be enough to hold a person liable? Consider again the morality and wisdom of using law to identify the requisite degree of genetic taint in order to establish stigma and liability. Into what category should we place a person who is descended from both Thomas Jefferson and Sally Hemings? Into what category should we place a person who has one grandparent of Chinese ancestry, another of Irish ancestry, a third who is indigenous to the Peruvian highlands, and the fourth who was a Russian immigrant? Should it matter if the Irish ancestor was a slaveholder? What if the Irish slaveholder came to America as an indentured servant? These are not fanciful questions; they deserve serious answers if any reparations scheme is to blossom.

²² See DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* 12 (2002).

B. Consequential Problems

The single largest consequential problem with reparations stems directly from taking seriously the arguments of such reparations advocates as Professor Richard America and Randall Robinson. Reparations are intended to pay *The Debt: What America Owes to Blacks*, to quote the title of Robinson's book on the subject.²³ Similarly, Professor America titles his book, *Paying the Social Debt: What White America Owes Black America*.²⁴ This raises the following practical conundrum: If non-black America pays "The Debt" by cash or other transfers of present wealth, what is the justification for the continued use of race-based affirmative action? One such justification is that cash reparations, like damages, pay for past wrongs and racial preferences act as injunctive relief to prevent future wrongs. This is a plausible justification, but it is both politically impracticable and laden with extraordinary potential for racial division and animosity. Affirmative action in the wake of a broad reparations scheme would be politically impracticable because non-black America is unlikely to accept the premise that it must pay twice for a single wrong. It will inflame racial divisions if cash reparations are made on the premise that they extinguish "The Debt," but non-black America learns afterwards that it was only a down payment, with a continued obligation to provide race-based preferences. One need not be clairvoyant to predict that a great tsunami of anger and racial division will ensue. Advocates of reparations need to confront the political consequences of success.

The second consequential problem is embedded in the first problem. If thirty years of race-based affirmative action has produced many benefits, it has also generated widespread unpopularity, and that unpopularity is not limited to those who receive no benefits from affirmative action. Whatever the scope and value of its benefits, affirmative action has, to quote Professor Schuck, "created new barriers to inter-racial reconciliation and heightened the salience and divisiveness of race—precisely the opposite of the advocates' originally [sic] goals."²⁵ If that has been the effect of affirmative action, what will be the effect of a massive race-based wealth redistribution effected through political coercion? Consider also the consequences to the po-

²³ See ROBINSON, *supra* note 8.

²⁴ See AMERICA, *supra* note 8.

²⁵ Peter H. Schuck, *Slavery Reparations: A Misguided Movement*, at <http://jurist.law.pitt.edu/forum/forumnew78.php> (Dec. 9, 2002). For a thorough assessment of the effects of affirmative action, see Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1 (2002).

litical process of adopting any governmental system of race- or ethnic-based wealth transfers.²⁶ Once such a system is established, or even once the idea is established that overtly race-based wealth transfers are possible and legitimate, people will organize along racial lines to obtain the transfers.

There is nothing unique to race about this phenomenon, which economists call rent seeking. Economists also note that narrowly concentrated interest groups are more effective in the social competition for rents than larger and more diffuse groups, which explains why the media moguls prevail over the interests of individual consumers when it comes to the manufacture of copyright law.²⁷ Thus, once governments start making race-based transfer payments, there are strong incentives to establish an identity within the benefited racial classification. We can observe this phenomenon at work in the tribal identities of enrolled tribes that operate lucrative casinos under the Indian Gaming Regulatory Act. Presently enrolled tribal members have an incentive to exclude un-enrolled people who have a plausible connection to the tribe, and those outsiders clamor to become part of the tribe.²⁸ Race-based wealth transfers raise the very real specter of governments creating incentives for honing an exquisite sense of racial consciousness and encouraging elaborate and divisive mechanisms for determining racial identities. One must wonder whether that is the vision of pluralism and diversity to which we aspire. One must also wonder whether, given our past errors, we wish to continue postponing separation of race and state.

The third consequential problem of reparations is that they would divert attention from other possible approaches to the various social pathologies that afflict our nation. So far, we have been doing something right with regard to race, regardless of the distance that we may yet have to travel. Since 1940, the median income of black males

²⁶ My comments on this point are inspired by Jennifer Roback, *The Separation of Race and State*, 14 HARV. J.L. & PUB. POL'Y 58 (1991).

²⁷ See Dennis S. Karjala, *Opposing Copyright Extension*, at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension> (last visited Oct. 20, 2003). This website is maintained by Arizona State University law professor Dennis Karjala and contains numerous links to articles and congressional testimony contending that copyright extension, particularly via the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in various sections of 17 U.S.C.), favored copyright owners at the expense of consumers. *Id.* See generally JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

²⁸ See Donald L. Bartlett & James B. Steele, *Playing the Political Slots*, TIME, Dec. 23, 2002, at 53; Donald L. Bartlett & James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002, at 47, 57.

has risen from 41% of that of white males to 67%; the median income of black females has risen from 36% of that of white females to 87%.²⁹ In 1995, the median income of black two-parent families was 88% of the median income of white two-parent families, and even that disparity is partially explained by the fact that 56% of those black families lived in the South, the region with the lowest wages in America.³⁰ The percentage of black households living below the government's "poverty line" has declined from 48% in 1959 to 22% in 1999.³¹ Since 1940 the proportion of black males holding middle-class occupations has risen over six times; the proportion of black females holding such jobs has risen over nine times.³² It is true that these numbers hardly suggest equality—only 32% of black males and 60% of black females held "middle-class" jobs as of 1990.³³ Poverty is still a fixture of too much of black America—some 22% of black Americans live in poverty. Reasonable people may differ as to the causes of the disparity. Reparations advocates say that this is the legacy of slavery. Perhaps they are right, but there is room for various interpretations. Stephen and Abigail Thernstrom, in their book *America in Black and White*, conclude that "it is family structure that largely divides the haves from the have-nots in the black community. The population in poverty is made up overwhelmingly of single mothers."³⁴

Slavery can hardly be the cause of the increase of single mother households in the black community. In mid-twentieth century America, more than two-thirds of black children were born into two parent families; at the end of the century more than two-thirds of black children were born into single-mother families.³⁵ This is not the forum to debate why this happened, but it is not credible to assert that this twentieth century single-mother phenomenon is the immediate (or even the plausibly remote) result of slavery. It is a contemporary failure. Pouring the monetary salve of reparations into this social wound will help somewhat, but is it the best cure?

If debate about reparations is to be serious, there must be consideration of alternative approaches to the structural problem of inequalities of wealth. This is not the forum in which to propose or ex-

²⁹ See McWHORTER, *supra* note 12, at 9–10.

³⁰ *Id.* at 10.

³¹ Hylton, *Framework*, *supra* note 1, at 34 tbl.1.

³² THERNSTROM & THERNSTROM, *supra* note 10, at 185 tbl.1.

³³ *See id.*

³⁴ *Id.* at 237.

³⁵ *Id.* at 239–40.

amine such alternatives in detail, but one can readily imagine a range of expensive social welfare initiatives that could be delivered on a race-neutral basis while still producing a meaningful impact on the problem of structural wealth inequality.³⁶

III. CONSTITUTIONAL PROBLEMS

The constitutional problems associated with reparations depend on the nature of the reparations. Given the limited time and space at my disposal, these comments are mere cursory observations.

Racial classifications, whether malignant or benign, are presumed to violate the Equal Protection guarantee, and may only be upheld if the government can prove that the classification is necessary (or narrowly tailored) to accomplish a compelling government objective.³⁷ Race-based reparations are thus subject to strict scrutiny. While strict scrutiny of race-based reparations might not prove fatal, a racially neutral reparations scheme would be presumptively valid and subject only to minimal scrutiny. This would virtually assure its validity, but how can reparations for slavery be racially neutral?

If the beneficiaries of reparations are limited to those who are descended from slaves, it is possible that the relevant classification would not be race-based. Such a classification would be similar to the Supreme Court's classification, in *Geduldig v. Aiello*, of pregnant people and non-pregnant people as not based on sex.³⁸ Nevertheless, a similar reparations scheme is unlikely to work, if only because of the difficulty of proving that one is descended from slaves. Self-serving declarations based on oral history will not do. Ultimately, some form of presumption would be necessary, and that presumption would inevitably be race-based.

Even if reparations were not based on race, reparations would be susceptible to an attack that they were motivated by race. Thus, under the principle of *Washington v. Davis*, reparations would be subject to strict scrutiny unless the government could prove that it would have enacted its reparations program for non-racial reasons, a rebuttal that would be extremely difficult to prove.³⁹ Because monetary reparations

³⁶ See generally Lyons, *supra* note 21.

³⁷ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989).

³⁸ See 417 U.S. 484, 494-97 (1974).

³⁹ See 426 U.S. 229, 245-48 (1976).

are likely to require a racial classification, however, strict scrutiny will apply to any Equal Protection challenge of the program.⁴⁰

The first problem for those who might wish to challenge such reparations, however, is standing. The key problem is establishing personal injury in fact. So-called "taxpayer" standing may not suffice. After *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, the scope of taxpayer standing has been, in effect, restricted to the precise facts of *Flast v. Cohen*—governmental expenditures that allegedly violate the Establishment Clause.⁴¹ Yet *Valley Forge* did not overrule *Flast*, and it may be possible for a federal taxpayer to claim successfully that his taxpayer status enables him to challenge governmental expenditures that are openly race-based as a violation of Equal Protection. If taxpayer status is insufficient to confer standing, however, it is difficult to conceive of a likely plaintiff with standing. The fact that a government expenditure based on race alone is a presumptive violation of Equal Protection does not enable any American to assert its invalidity, for such a plaintiff's claim is a mere generalized grievance, one shared by everyone and without particularized injury in fact.⁴² Consider the injury that supported standing of the plaintiff in *Jacobs v. Barr*;⁴³ in which the plaintiff challenged the constitutional validity of reparation payments to victims of the World War II Japanese internment camps. "Arthur Jacobs, an American citizen who says he was detained with his German father in 1945, argues [that because] the Act compensates in-

⁴⁰ The constitutional validity of the Civil Liberties Act of 1988, 50 U.S.C. app. §§ 1989b-1989b9 (2000), which provided a \$20,000 payment to each person of Japanese ancestry who was deprived of liberty or property as a result of the forcible relocation and confinement of American citizens and permanent residents of Japanese ancestry during World War II, was upheld in *Jacobs v. Barr*, 959 F.2d 313, 314-15, 322 (D.C. Cir. 1992). In *Jacobs*, a pre-*Adarand* opinion, the U.S. Court of Appeals for the D.C. Circuit invoked *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), and applied intermediate scrutiny, but opined in dicta that the Act would survive strict scrutiny. *Jacobs*, 959 F.2d at 318. The court suggested that the Act would survive strict scrutiny because the government's purpose—to redress an act of racial discrimination that, although declared valid at the time in *Korematsu v. United States*, 323 U.S. 214 (1944), has since been widely repudiated as unjust, unconstitutional, and based on government misconduct in the courts—was compelling and the cash reparations were a narrowly tailored way to provide some restitution to the immediate and direct victims of the Japanese exclusion order. See *Jacobs*, 959 F.2d at 321.

For more on the government misconduct, which consisted of deliberate lies to the Supreme Court, see *Korematsu v. United States*, 584 F. Supp. 1406, 1417-18 (N.D. Cal. 1984); PETER IRONS, *JUSTICE AT WAR* (1983).

⁴¹ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 488-90 (1982); *Flast v. Cohen*, 392 U.S. 83, 85-86 (1968).

⁴² See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-17 (1974); *United States v. Richardson*, 418 U.S. 166, 173-75 (1974).

⁴³ 959 F.2d at 313.

terns of Japanese and Aleutian, but not German, descent . . . it denies him the equal protection of the laws."⁴⁴ By this principle, reparations for slavery limited to Americans of African ancestry might be challenged by someone whose ancestors were American Indians held in slavery, or perhaps even by someone whose ancestor was an Englishman bound to indentured servitude.

On the merits, the government would contend that its compelling purpose is remedial: to provide some measure of restitution for the moral abomination of slavery and to assuage its present effects. There are several problems with this purpose. First, although morally obnoxious, slavery was not a constitutional wrong. In *Jacobs*, the U.S. Court of Appeals for the D.C. Circuit dealt with this contention in connection with reparations to Japanese-American internees by noting that a congressional commission

found unambiguously that Executive Order No. 9066 [authorizing the internments] and the military orders affecting Japanese Americans were the products of prejudice and demagoguery, rather than military necessity Congress noted that the premises relied on in Supreme Court decisions upholding the internment have been repudiated by scholars, by former government officials, and more recently, by courts.⁴⁵

The second problem with the government's stated purpose of assuaging the present effects of slavery is that the objective becomes one of seeking to remedy broad societal effects of unconstitutional racism, a purpose that the Court has hinted may be insufficiently compelling to

⁴⁴ *Id.* at 314.

⁴⁵ *Id.* at 315. For this proposition the Court of Appeals cited H.R. Rep. No. 278, 100th Cong., 1st Sess. 9 (1987) and stated:

In 1983, Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, who had challenged the constitutionality of the internment, reopened their landmark federal cases through writs of error *coram nobis*. Their wartime convictions for defying the internment policy were vacated, based on evidence that the government had misrepresented and suppressed evidence that racial prejudice, not military necessity, motivated the internment of Japanese Americans. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986), *aff'd in part and rev'd in part*, 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 83-151 BE (D. Or. 1984), *remanded*, 772 F.2d 1496 (9th Cir. 1985). None of the decisions was reversed on appeal. For an admirable review of the history of the internment policy, see *Hohri v. United States*, . . . 782 F.2d 227, 231-39 (D.C. Cir. 1986) (Wright, J.), *vacated*, 482 U.S. 64 . . . (1987).

surmount strict scrutiny.⁴⁶ As Justice Scalia has put it more colorfully, "under our Constitution there can be no such thing as either a creditor or a debtor race."⁴⁷

Even if the Court accepted that atoning for the costs of societal racism is a compelling objective, there remains the problem of proving that reparations are narrowly tailored to accomplishing its stated objective. A host of non-racially based initiatives would perhaps be better suited to addressing the differential wealth effects that reparations advocates attribute to slavery and racism.⁴⁸ Without proof of the inability of such programs to accomplish the objective of remedying the present effects of race-based slavery, a race-based reparations program would almost surely founder on the rock of narrow tailoring.

The funding device for reparations may present additional problems. If a special tax were levied only on the descendants of slaveholders, it would be susceptible to attack as a bill of attainder. If specific property were seized as the fruits of slave labor, such seizures would be susceptible to attack as an uncompensated taking. Moreover, because of the extreme difficulty of proving who is descended from slaveholders, some sort of racial presumption would likely be necessary to administer such a special tax. If that were the case, strict scrutiny would apply and the mirror image of the problems just discussed would emerge. If, however, reparations were funded by all Americans out of general revenues, there would be no peculiar constitutional

⁴⁶ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989). The Court states:

While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond [A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

Id. Left unclear in this enigmatic passage is whether the defect is a poor fit of remedy to objective ("an unyielding racial quota") or whether it is the overly broad remedial purpose ("an amorphous claim [of] past discrimination"). Justice Scalia is more direct: "The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can [not] be pursued by the illegitimate means of racial discrimination . . ." *Id.* at 520 (Scalia, J., concurring).

⁴⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) ("[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction.").

⁴⁸ See, e.g., Lyons, *supra* note 21, at 183–185.

difficulties with funding, although the Equal Protection problems with the expenditures would remain.

This is no more than a brief glance at the constitutional difficulties of a reparations program. Under existing doctrine, an explicitly race-based program of reparations is quite possibly unconstitutional. This is not to say that the existing doctrine is incapable of change; it may well be the case that a reparations program could be the occasion for change. Such change, however, seems unlikely with the current Court.

CONCLUSION

I am a skeptic about the practical prospects of reparations. Reparations to people who have suffered personal injury by tortfeasors, as is sought in the case of the Tula race riot, should succeed, though there are substantial obstacles to such claims in the form of limitations statutes and sovereign immunity.⁴⁹ Reparations for the generalized and diffuse injuries that are attributable, in some measure, to two-and-a-half centuries of slavery and another hundred years of racial apartheid, are even less probable. Advocates for such reparations seem much like Dorothy and her companions, facing a very arduous struggle with many huge obstacles, and with no assurance that once they have made it onto the yellow brick road and entered the fabled City of Oz, they will find that there is anything of value behind the green curtain. Yet I have always been a pessimist, and have long subscribed to the *faux* Biblical proverb: "Blessed is he that expecteth nothing, for he shall not be disappointed."

⁴⁹ See generally BROPHY, *supra* note 18.