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DAVID LYONS

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## **CORRECTIVE JUSTICE, EQUAL OPPORTUNITY, AND THE LEGACY OF SLAVERY AND JIM CROW**

*David Lyons*<sup>1</sup>

Chattel slavery was a brutally cruel, repressive, and exploitative system.<sup>2</sup> If compensation can be required for wrongs done, as we normally assume, then slave-holders owed ex-slaves compensation for the terrible wrongs of enslavement as well as for the disadvantages or other injuries that resulted from those wrongs.

But slavery ended 138 years ago, and we also assume that guilt is not inheritable. No person alive today can be held responsible for the wrongs of slavery. Furthermore, those who might be called upon to pay reparations were not even born until decades after slavery was abolished. For some, that makes current reparations claims based on slavery preposterous.<sup>3</sup> Such a reaction is understandable -- but it misses a big part of the point of many reparations claims.

We need not go back 138 years. Racial subordination in the U.S. did not end with the abolition of slavery. After the post-Civil War period known as Reconstruction, racial hierarchy was preserved in the system called Jim Crow. Racial subjugation was then maintained, contrary to law. I am not referring merely to Jim Crow's unconstitutional aspects, which the Supreme Court belatedly acknowledged. I mean that the system depended on violence, coercion, fraud, and terror, which were tolerated by public officials when they did not engage in such practices themselves. Slavery and Jim Crow imposed massive material deprivation, required sustenance from contemptuous racist ideology, and – most importantly for present purposes – left a legacy of entrenched systems of disadvantage and indignity.

This paper explores connections between that history and general calls for reparations.<sup>4</sup>

It establishes the factual basis of a crucial subclass of those claims and suggests how they could properly be honored, in substance and in spirit. Its aim is to defend a substantial demand for corrective justice by appealing not to a potentially controversial theory of reparations but to a political principle that already plays a basic role in American political thinking.

The paper does not consider litigation strategies, such as those currently in play,<sup>5</sup> that press more limited claims and seek narrower remedies than I believe are required.<sup>6</sup> Partly because of the differences between the proposals to which my argument leads and the specific objectives of such court cases, I characterize the type of rectification proposed here not as reparations but as *corrective justice*.

Reparations claims are usually thought of as addressing *past* wrongs. This paper takes into account the government's past wrongs in sustaining slavery and promoting Jim Crow as part of an "interconnected history of wrongs,"<sup>7</sup> which include the government's *continuing* failure to address the inequitable legacy of slavery and Jim Crow.

As the term is sometimes used, "corrective justice" means restoring a condition that existed prior to the wrong (restoring the *status quo ante*). That approach is not appropriate here. For a relatively brief time, the initial wrongs might have been rectified by freeing, compensating, and returning to their various homelands Africans who had been seized and enslaved.<sup>8</sup> That time has long since passed. Those Africans who were forcibly brought here and their descendants became founding members of American society. Corrective justice now requires addressing the legitimate claims of African *Americans*.

To clarify the main argument of this paper, it will be useful to examine some reparations reasoning. Section I considers the moral bases and limitations of reparations claims. The

problems involved in validating such claims do not affect the corrective justice argument that I develop.

Section II offers an historical overview of the federal government's role in promoting and sustaining racial subjugation and its failure to address the inequities that remain. It is a mistake to think of these inequities as the result of private action, to be rectified accordingly. For two full centuries, government at all levels was the center of a Racial Subjugation Project, which created deep-rooted inequalities that public policy now largely ignores.

Section III sketches a comprehensive program of corrective justice to address the entrenched legacy of slavery and Jim Crow. It imagines a National Rectification Project that would be centered on public programs that are morally required on two grounds: first, by the government's responsibility to insure *equal opportunity* for all of our society's children,<sup>9</sup> and secondly by *corrective justice* because it is incumbent on the government to correct inequitable conditions that are attributable to its own policies.

Although such a rectification project looks politically infeasible today, we have at least two reasons for imagining it. In the first place, we need a benchmark, an understanding of what corrective justice truly requires, so that we can identify intermediate objectives that are, for now, more feasible. In the second place, circumstances change, and objectives that seem unreachable today may become practical tomorrow. The civil rights bills of the mid-1960s<sup>10</sup> lacked any chance of realization until shortly before they were enacted; changed circumstances made what had been impossible achievable. We cannot predict the future, and our corrective justice efforts cannot reasonably wait for propitious circumstances. We must try to create conditions that are conducive to morally imperative changes and be prepared to take advantage of opportunities for

change as they arise.

### **I. Compensation, Restitution, and Corrective Justice.**

My concern here is with moral, not legal, issues. Although some of the terms I shall use are employed more technically in law, I use them here in a moral sense, on the working assumption that morality requires not only compensation but also restitution for unjust enrichment.

Reparations claims are based, directly or indirectly, on the wrongful treatment of some persons by others and, in many cases, appear to call for compensation by the responsible parties. A *compensation* claim made today based solely on the wrongs of chattel slavery faces special problems. A valid claim concerns existing parties, but the persons involved in slavery have long been dead. We cannot now require a slaveholder of the 17<sup>th</sup>, 18<sup>th</sup>, or 19<sup>th</sup> century to compensate his former slaves, nor could they now be compensated. If a reparations claim today stems only from slavery, it must identify living people with *derivative* claims based on wrongs that were visited upon *other* persons long ago. It must also suggest a principled basis for determining the magnitude of those claims.

I'll call those persons with valid claims (original or derivative) *claimants*. One who can justifiably be held to account today (perhaps for reasons other than complicity in the original wrong) I'll call an *accountable party*. My use of these terms will not be limited to the compensation context but will extend to the broader reaches of corrective justice. Let's now consider some modes of reasoning about reparations.

*The moral debt model.* When slavery was abolished, reparations were owed, but the ex-slaves received no compensation for the injuries they had suffered. On the moral debt model, they had valid moral claims against their former masters, whose estates included unpaid moral debts to their former slaves. These correlative claims and debts have been passed down to heirs, from one generation to the next, up to the present day.

This assumes that some reasonable basis for estimating the original debts can be found, as well as for translating them into current dollars and dividing them among current descendants. Such moral reasoning seems, however, to track notions of legal liability too closely. I am not confident that valid moral claims to compensation can be inherited. I am much less confident that moral debts can be transmitted to one's heirs, for that suggests the notion that the moral guilt of ancestors can be transmitted to their descendants.<sup>11</sup>

This approach to reparations claims looks too narrowly at U.S. history. As I shall explain in Section II, chattel slavery was followed by another brutally cruel, repressive, and exploitative system, which was established and enforced by law, public policy, and terror for many years.<sup>12</sup> That system, known as Jim Crow, was not officially dismantled until the latter half of the 20th century, which means that many African Americans alive today lived under Jim Crow. Moreover, 300 years of racial subjugation left deeply entrenched racial inequities that remain to be addressed. Reparations claims can therefore be based directly on Jim Crow and its legacy. There is no need to bridge an historical gap between wrongs done in the distant past and current claimants. The wrongs are both recent and continuing.

Who are the accountable parties alive today? If we dismiss the idea that moral debts can be inherited, then accountable individuals include those who either actively supported Jim Crow

or resisted reform. They might also include those who failed to work as hard against Jim Crow and its legacy as morality required, given the knowledge they had, or should have had, of its visibly aggressive discrimination.

The latter suggestion involves controversial moral judgments. For present purposes, however, that is not the principal shortcoming of the moral debt model. In focusing on accountable individuals, the model neglects the institutional nature of racial subjugation in the U.S. To be sure, individuals made the relevant decisions, enacted the relevant laws, framed and implemented the relevant policies; but those decisions, laws, and policies were made, enacted, adopted, and implemented on behalf of the political community by persons acting in an official capacity. Racial subordination in the U.S. was a *system* and not simply a matter of private decisions. And, in a case like this, merely honoring the valid claims of some individuals against others, as the moral debt model contemplates, would not solve the problems that keep reparations claims alive.

*The material disadvantage model.* Many theorists assume that a reparations claim based on a wrong of the distant past is determined by a counterfactual test. We must estimate how much worse off a potential claimant is than she would have been if the wrong had not been done.<sup>13</sup>

The counterfactual test generates problems for reparations claims based on slavery alone. When much time has passed and the current state of affairs has to a significant extent been shaped by decisions that were made by relevant parties in the intervening generations, the counterfactual question may have no clear answer.

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

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

A rebuttal has already been suggested. Chattel slavery was followed by Jim Crow, which left a legacy of deeply entrenched racial inequities. Many African Americans alive today suffer

substantial disadvantages relative to European Americans: income and wealth gaps, more limited job opportunities, inferior housing, inferior education, inferior public services, and inferior medical care – substantially worse life prospects generally.<sup>14</sup> The material disadvantage model claims that these deficits constitute the relevant legacy of slavery and Jim Crow. Current claims can therefore be based on the measurable life prospects gap between blacks and whites *today*. A counterfactual test across several generations is not needed to determine the material disadvantages that flow from slavery and Jim Crow.

The material disadvantage model, however, does not help us identify the currently accountable parties. Discussions of reparations claims sometimes suggest that all European Americans may properly be held accountable, by invoking a notion of unjust enrichment.

*The unjust enrichment model.* If I have profited from someone else's wrongdoing – if, in other words, I have been enriched by another's injustice – I may owe restitution to the party who was wronged, even though I was not complicit in the wrong. If slavery and Jim Crow benefitted some who were not responsible for those systems, those who were wronged may have a valid claim for restitution against those third parties. Some reparations claims employ this reasoning.<sup>15</sup>

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

hierarchy.

Here's how the unjust enrichment argument might go. Many slave-holders extracted profits from slave labor and others profited indirectly. The children of prosperous slave-holders derived benefits from the income, wealth, social standing, and political power that their families built upon slave labor. Others profited from supplying goods, including slaves, for the plantations or from marketing or processing the products of slave labor. Commerce based on the slave economy created jobs for non-slave labor and raised the welfare level of European American workers and their families. Those advantages have been sustained through succeeding generations and have been inherited by current European Americans.

The argument can be extended and strengthened by including Jim Crow. Employers have profited by paying African Americans lower wages, providing fewer benefits, and employing them as strikebreakers. Residents of white neighborhoods have benefitted from increased services which have been paid for not by higher taxes but by the diversion of resources from black communities. European Americans enjoy the advantages of being classified as white in the racial hierarchy that since the 17th century has been central to our economic, political, and social relations. As compared with blacks, whites enjoy better educational and job opportunities, higher wages, better benefits, superior housing, superior medical care, and better public services – in short, substantially better life prospects.<sup>16</sup>

The preceding argument may be thought to show that European Americans have been unjustly enriched and thus owe restitution to African Americans for benefits that stem from slavery and Jim Crow. It is important that this argument, as it stands, neither assumes nor implies that those who owe restitution are morally responsible for the relevant inequities. It does

not cast blame on those it would hold accountable.

I believe that reparations claims have been misunderstood as seeking compensation only from wrongdoers when, in fact, some have sought restitution for unjust enrichment. When it is held that Jane owes restitution because she has benefitted from slavery and Jim Crow, it is irrelevant that Jane was not complicit in those systems.

The unjust enrichment argument is plausible, but also problematic. From the fact that, as a result of slavery and Jim Crow, whites are significantly better off than blacks, it does not follow that all whites have benefitted from those systems.

Consider, for example, the position of poor Southern whites under slavery. As its defenders noted,<sup>17</sup> the system assured poor whites a position above slaves and, at least in social terms, above the condition of free blacks. But the reason why it is plausible to suppose that ex-slaves had a valid claim for reparations is that slaves fared *very* badly. Even those who were relatively well-treated were denied freedom, wages for their labor, respect, independence, participation in the governance of their communities, and reasonable redress of grievances. And free blacks, by and large, were not much better off during slavery. Conditions for African Americans were generally so bad that poor whites could have been better off while still faring badly themselves.

We cannot assume that poor whites fared better under slavery and Jim Crow than they *would* have fared in a *non-racialized* economy. In the first place, the profits derived from slavery were distributed unevenly. In the second place, the racial barriers that were crucial to chattel slavery and Jim Crow divided laboring people, lessening their leverage in the labor market and their political leverage, while enhancing the power of planters and employers.

Because slave labor was unpaid, free black labor was discounted, and blacks, who were excluded for so long from trade unions, were available to serve as strikebreakers, the conditions of white workers may have suffered accordingly.

While we can safely assume that some whites reaped considerable benefits from slavery and Jim Crow, we cannot reasonably infer that those systems served all European Americans well. That would require factual, or rather counterfactual, support. We therefore cannot assume that all European Americans owe restitution for advantages derived from the institutionalization of white supremacy.<sup>18</sup>

It may be suggested that whites owe restitution simply for living under a system in which they have enjoyed relative advantages due to systematic discrimination against blacks. The notion that whites generally owe restitution could be reinforced by the compensatory justice argument that those who supported Jim Crow or who failed to work as hard against it and its legacy as morality required are complicit in the racial hierarchy.

The principal problem with these suggestions, for present purposes, has already been stated. In focusing on accountable individuals, the approaches mentioned neglect the institutional nature of racial subjugation in the U.S. Honoring the claims of one class of individuals against another will not solve the problems that insure the persistence of reparations claims.

*The systemic injustice model.* Reparations claims would probably not be made today if the wrongs of slavery had been rectified. It is true that, following the abolition of slavery and during the period called Reconstruction, the U.S. took important steps toward repairing the

injustices of slavery. But reconstruction was not achieved. It was abandoned, under circumstances that enabled another system of racial subjugation to be established – the system called Jim Crow. More importantly, although some programs that were proposed for Reconstruction might have laid the groundwork for adequate reform, the programs actually adopted were not radical enough to enable reconstruction to succeed.<sup>19</sup>

The same applies to the 20<sup>th</sup> century. Reparations claims would probably not be made today if the wrongs of Jim Crow had been rectified. Nearly a century after the first Reconstruction was abandoned, a second was inaugurated and the U.S. took steps toward redressing the injustices of Jim Crow. Like the first Reconstruction, however, the second withered under a backlash. More importantly, the programs actually adopted during the 20th century were not radical enough to eliminate the entrenched racial hierarchy. The U.S. has made some significant reforms, but the legacy of slavery and Jim Crow remains, with systemic disadvantages for African Americans. In Section III, I'll outline an approach that takes into account the systemic nature of that legacy.

*The institution model.* A valid reparations claim requires some currently existing party that can today be held accountable for past wrongs. As guilt is not inheritable, this condition may seem impossible to satisfy. That inference is mistaken. Institutions, such as corporations and political organizations, can be held accountable, and they are capable of existing for many generations. If, for example, the U.S. long ago illicitly took land from a Native American nation that continues to exist today, then the U.S. presumably owes that land or suitable compensation to that Native American nation. The point about continuing federal accountability is applicable

to the present case.

For nearly the whole of its first century, the federal government zealously supported slavery. After abolition, the federal Constitution was significantly amended and Congress enacted important civil rights legislation. The federal government acquired constitutional and legislative commitments to secure basic rights for African Americans. But it defaulted on those commitments. It allowed the freedmen to be subordinated again, in another brutally enforced system of racial subordination. When, in recent years, the federal government confronted Jim Crow, it outlawed overt discrimination, but it did not secure reparations for the wrongs suffered by those who survived Jim Crow and it failed to address the deeply entrenched legacy of the racial hierarchy.

In Section II, I will amplify this history and show why the federal government can be held morally accountable not only for slavery but for tolerating Jim Crow and its legacy.

## **II. The Role of the Federal Government.<sup>20</sup>**

As current litigation implies, there are at least two kinds of potentially accountable parties: people and institutions. At least one recent lawsuit harking back to slavery has named private, for-profit corporations as defendants.<sup>21</sup> One reason for doing so is to bridge the historical gap between slavery and the present: corporations and other institutions can exist for generations, and some existing corporations have a history of profitable involvement in slavery. Their legal accountability may be problematic, however, if the relevant history concerns a series of related but non-identical corporate entities. More importantly, for present purposes, the

honoring of such claims may not facilitate a dismantling of the entrenched racial hierarchy.

Some public institutions have existed continuously since the founding of the U.S. The federal government is the prime example, and it is centrally relevant here. In this section I will review the federal government's crucial support of chattel slavery and Jim Crow and its failure to address their iniquitous legacy adequately, which make it one of the accountable parties,<sup>22</sup> perhaps the principal party.

One might question the idea of regarding the federal government as an accountable party, distinct from members of the political community. Unlike a person, the government is an "artificial" (rather than a "natural") entity, which can act only when things are done by real people – only, for example, when people make, interpret, or apply laws. A skeptic might infer that people can be held accountable but governments cannot. Furthermore, the federal government has since renounced racial subordination and has acted against it. A skeptic might infer that today's government cannot be held accountable for its conduct 50, 100, or 200 years ago.

These considerations are unpersuasive. First, although a government can act only when things are done by people, when people do those things, it is *the government* that acts. Second, governments are routinely regarded as accountable for their actions, and they have often assumed accountability for their prior acts, and have paid reparations, even after significant changes have been made in their character, personnel, laws, and policies.<sup>23</sup> Third, civic responsibilities are defined relative to one's government. It is commonly held, for example, that a citizen has an obligation to comply with her community's laws; it is likewise plausible to hold that the obligation to combat injustice has special force when the wrong is done by one's own

government. I shall accordingly assume, as we normally do, that a government can retain a morally relevant identity for a substantial period of time, that its acts and practices are subject to moral appraisal, and that it can be held accountable accordingly.

In this section I will argue that the federal government is significantly accountable for its support of slavery, its acceptance of Jim Crow, and its failure to address their legacy adequately. The facts may be summarized as follows. (1) The protections for slavery that were provided by the Constitution went beyond what was required for a constitutional settlement. The result was a central government that not only tolerated but supported chattel slavery. (2) When the U.S. formally abolished slavery, the federal government failed to secure reparations for the former slaves, it abandoned Reconstruction, and it rejected reforms that were needed to end the racial caste system. Instead the federal government permitted the systematic violation of blacks' constitutional rights, the reestablishment of a racial hierarchy under Jim Crow, and its enforcement by murder, fraud, and other illicit means. (3) When the U.S. formally abolished Jim Crow, it declined to implement fully many of the reforms it officially endorsed, such as fair housing legislation. It failed to dismantle the racial caste system it had helped to sustain, despite urgent advice from an official body that reforms were essential to prevent the development of "two societies, one white, one black -- separate and unequal."<sup>24</sup>

*The 17<sup>th</sup> century.* A slightly fuller summary of the story is best begun in 17th century Virginia, which led in the development of chattel slavery. This reveals how the system of racial subjugation that would be accepted by the fledgling U.S. was not imposed by England but was created by privileged colonists for their own security and profit.

From 1619 on, Africans came to Virginia involuntarily. But for several decades their legal status was ambiguous. They did not become chattels consigned to lifetime, inheritable slavery, for there was no such status in the law that the colonists brought with them from England.

Distinctions between African and European servants were initially unclear. We know that some Africans, unlike European servants, served for life, but also that some were indentured for a limited term of years. We also know that they could use the courts to confirm that they had served out their indentures and to secure compensation for being kept as servants beyond their terms.<sup>25</sup> We know that African and European servants lived and worked together, under similar conditions, and that they ran away together. We know that some Africans were able to become independent farmers, that free communities of color developed, and that there was intermarriage between Africans and Europeans.<sup>26</sup>

Those conditions were not to last. Four decades after the first arrival of African servants, the Virginia legislature began to create a body of slave law. In 1662, for example, it declared that a child would inherit the condition of its mother, so that a child who was borne by a slave would be born a slave.<sup>27</sup> That enactment departed from the common law. It in effect sanctioned rape as a means of increasing the valuable slave population and released slave owners from responsibility for more than the minimal costs of raising some of their offspring.

Many of the Africans who arrived in 17<sup>th</sup> century Virginia had previously had contact with Europeans, and many had been baptized. In 1667, the legislature declared that baptism was no bar to enslavement.<sup>28</sup> That enactment departed from the traditional rule that only non-Christians could be enslaved.

Many slaves and servants rebelled against the harsh conditions of servitude in Virginia. In 1668, the legislature declared that the killing of a slave who was being disciplined was not murder,<sup>29</sup> thus subjecting slaves to maximum control by their owners.

In 1676, poor blacks and whites joined together in Bacon's Rebellion.<sup>30</sup> They chased the colonial government from Jamestown, which they burned to the ground. In the wake of that most threatening rebellion, by a coalition of laboring people against the colonial elite, the Virginia legislature formally distinguished slaves from servants, making color a condition of lifelong, inheritable slavery.<sup>31</sup> The colonial elite sanctioned a racial hierarchy, presumably hoping to drive a politically debilitating wedge between white and black labor. When, in 1691, the legislature permitted the killing of runaway slaves, restricted the manumission of slaves, and banned interracial marriage and procreation, it further developed the racial caste system.<sup>32</sup>

*The 18th century.* Fashioned by the colonial elite for its security and profit, that racial hierarchy was embraced by the U.S. at its founding.

The traditional story of the constitutional framing is that, in order to achieve a settlement that would secure a viable union of the newly freed states under a capable central government, it was necessary for the North to compromise its anti-slavery principles. From what we know of the constitutional convention, however, there's little evidence of compromise over slavery and much evidence of Northern support for the slave system.

The traditional story is right on one important point. It assumes that in 1787 the anti-slavery movement was perceived as a threat by Southern states. The movement was in fact significant. Anti-slavery arguments had been circulating in the colonies since 1700, and they

had spread increasingly as the European Enlightenment influenced colonial thinking. During the War for Independence, European allies of the rebels had pointedly noted the inconsistency between the colonials' human rights rhetoric and their maintenance of chattel slavery. By the time of the constitutional convention, three Northern states had abolished slavery, three had enacted gradual emancipation statutes, and three others were about to follow, as would three of the states that were soon to be carved out of the Northwest Territory.<sup>33</sup>

The anti-slavery movement was significant in the Upper South (especially Virginia and Maryland). The traditional story assumes that all of the Southern states were determined to continue slavery and that they possessed sufficient leverage to wrest concessions for it. At the time of the convention, however, many in the Upper South embraced anti-slavery sentiments. During the founding period, instead of profitably selling their excess slaves to planters in the Lower South (Georgia and the Carolinas), where there was a slave shortage, a number of Chesapeake planters freed them, including anti-slavery sentiments in the manumission documents. The misgivings about slavery among Chesapeake planters helps to explain why delegates from the Lower South worried that slavery was threatened, and why they wanted it to be protected.<sup>34</sup>

The traditional story assumes that the anti-slavery movement was adequately represented by Northern delegates to the constitutional convention. In fact, those delegates seem largely to have represented commercial interests, and they exerted no significant pressure against slavery. Critics of slavery at the convention, such as Gouverneur Morris of Pennsylvania and George Mason of Virginia, were vastly outnumbered. Delegates from New England almost always voted with the Lower South when it sought protections for slavery. When Connecticut's

Ellsworth declined to consider the merits of slavery, he commented that “what enriches a part enriches the whole.”<sup>35</sup> Slavery was profitable to commercial interests.

The Lower South was not in a position to wrest concessions through hard bargaining. Georgia and South Carolina wanted a central government to be strong enough to aid them against powerful Native American nations. Georgia wanted help against Spanish Florida on its southern border. Furthermore, the Northern and Upper South states – which included the most populous, prosperous, and economically diversified of the former colonies – could have constructed a viable union without the Lower South.<sup>36</sup>

But the convention agreed on a constitution that supported slavery. The limited powers that it proposed for the federal government did not include an authority to regulate slavery. But more than the omission of such direct authority was needed to insulate slavery from federal interference, and it was secured. The importation of slaves had been suspended during the war, while many slaves escaped. The Lower South wanted the external slave trade protected, and it was worried about the Upper South’s position. The demand for tobacco had not kept up with its expanded cultivation, and Virginia and Maryland had a surplus of slaves. Planters in the Upper South were in a position to profit greatly, at the Lower South’s expense, from an *internal* slave trade, especially if the new Constitution protected slavery but banned the *external* trade. The Northern states wanted the new federal government to regulate external commerce. If it was given that authority, it could restrict the external trade in slaves, so merely omitting regulation of the external slave trade from the list of federal powers would not protect it.

Instead, the delegates agreed to an unchangeable twenty-year protection of the slave trade and agreed to a ban on the taxation of exports, which protected the slave states’ cash crops.

There is no evidence that those provisions were regarded by Northern delegates as concessions to slavery, and they served the Northern commercial interests that were well-represented in the convention.<sup>37</sup>

Other provisions that favored slavery did not result from slavery-related bargaining between North and South – provisions such as the three-fifths clause and the fugitive slave clause.

Representation in the House of Representatives was to be based on population. Slaves could not vote, but the proposed constitution would include three-fifths of a state's slave population in calculating its representation. The slave states had not insisted on the provision, which had neither precedent nor clear rationale; but the North nevertheless agreed to the proposal without any quid pro quo. The result was to enhance the power of the slave states at the federal level -- directly in Congress and the Electoral College, and indirectly in selecting the president and the federal judiciary.<sup>38</sup>

The fugitive slave clause committed all of the states to returning escaped slaves. It was the basis for the fugitive slave acts of 1793 and 1850. The provision was not proposed until the end of the convention, and it was subjected to neither bargaining nor significant debate.<sup>39</sup>

If Northern delegates had represented the anti-slavery movement of the time, the Lower South might well have agreed to much less, perhaps a constitution that tolerated but did not support slavery. We can even imagine a union embarked on a national anti-slavery project. There was support for such a program at the time, and the new nation had resources that would have enabled compensated abolition. Instead, the federal government became committed in law and policy to supporting slavery.<sup>40</sup>

*The 19<sup>th</sup> century.* The next crucial set of federal decisions concerning slavery and its legacy were made at the end of the Civil War.

High points of the post-war period include ratification of the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> constitutional amendments, beginning with the abolition of slavery; wide-ranging civil rights legislation, especially in 1866, 1870, and 1875; development of the Freedman's Bureau; limited but effective federal action against organized reactionary violence; and significant African American participation in the political process, including election to public office at all levels.<sup>41</sup>

These measures went well beyond what had been contemplated by President Abraham Lincoln. His 1863 Proclamation of Amnesty and Reconstruction offered to restore all rights, except property rights in slaves, to those former Confederates who swore future loyalty and accepted the abolition of slavery. It offered ex-slaves only the prospect of laboring for the reestablished planters.<sup>42</sup>

Lincoln's successor, Andrew Johnson, embraced white supremacy. With Johnson's blessing, new state governments established Black Codes, which resembled the former slave codes. Freedmen were coerced into labor contracts and forced back onto plantations. Widespread violence enforced the system.<sup>43</sup>

Dismayed by Johnson's policies, Congress overrode his veto of the 1866 Civil Rights Act, mandating legal equality for blacks, freedom in economic relations, and universal male suffrage. By overriding another veto by Johnson, Congress kept alive the Freedmen's Bureau, which had been providing emergency relief to Southern whites as well as blacks and would now go on to help enforce the new legal rights and to establish new institutions, such as public schools.<sup>44</sup>

Responding to violence against blacks and to insure more democratic state governments, in 1867 Congress created military districts in the South and laid down criteria for new state constitutions, including universal male suffrage and acceptance of the 14<sup>th</sup> Amendment. The Civil Rights Act of 1875 mandated equal access to public accommodations.

But the commitment to Reconstruction soon faded. A crisis following disputed results in Southern states of the 1876 presidential election was ended by the 1877 Hayes-Tilden agreement. In exchange for having decisive electoral votes assigned to the Republican candidate, Federal troops were withdrawn from Southern capitals and federal supervision of Southern elections was ended.<sup>45</sup>

The subsequent federal withdrawal from Reconstruction efforts was significant, as were Supreme Court decisions that undermined both the civil rights acts and the 14<sup>th</sup> amendment.<sup>46</sup> But even more crucial decisions concerning Reconstruction had long since been made.

An effective Reconstruction would have insured for African Americans full political rights, equal treatment under equal laws, uncoerced labor, and freedom from discrimination in the public sphere – none of which was secured. How might they have been achieved?

In the South, wealth and political power were concentrated in the planter class. So long as planters retained so much of the land and blacks were forced to work it for them, the planters would maintain economic and political dominance. A Reconstruction program with a reasonable hope of insuring blacks and poor whites the opportunity to effectively exercise their rights would have had to end planter control of the South. That required land reform – the confiscation of large land holdings, with some distribution of land to the freedmen.

Freedmen recognized that their labor had paid for the land, had cleared it, had built upon

it, and had earned cash for the crops they had raised upon it. They recognized their own just claim to compensation and that the means of compensation were available – the very land they had worked as slaves. They agitated for a modest land allotment, and their proposals for land reform were supported by some poor Southern whites, by some agents of the Freeman’s Bureau, and by some political leaders who endorsed large-scale land reform.<sup>47</sup>

Land could have been made available. A great deal of land was already owned by the federal government. Much Southern acreage was abandoned during the War, much was seized for nonpayment of taxes, and a vast amount was potentially subject to confiscation. In 1862 Congress had provided for confiscation of Confederates’ lands (although in 1865 it declined to make the arrangements permanent).<sup>48</sup>

During and immediately following the war, large plantations were placed in the hands of ex-slaves. But most of the land that seemed to have been transferred to them was soon auctioned off or returned to its former owners. In violation of federal law, President Johnson ordered that all land be returned. Blacks appealed, to no avail. When they tried to retain the land, the U.S. Army removed them by force.<sup>49</sup>

The single most important decision, however, was made just after the war. In 1865 Thaddeus Stevens proposed a comprehensive program that would have involved seizing 400 million acres that were owned by the wealthiest 10 percent of Southern landowners. Forty acres would have been allocated to each adult ex-slave and the remaining 90 percent of the acreage to be seized would have been sold in lots of up to 500 acres. The proceeds would have provided pensions for Civil War veterans, compensation to loyal unionists for property losses in the war, and retirement of the national debt. This program would have made possible a genuine

reconstruction of the South. It would have helped diffuse wealth and political power by breaking the planters' oligarchic control. But Stevens' proposal was rejected by Congress in 1866.<sup>50</sup>

It is unclear how many white policy makers considered the possibility that those who had been enslaved had a right to compensation for it. Many believed they should serve their previous masters for wages. Some argued that it would hurt the freedmen to be given land and that they must learn to work and save for it. Some argued that federal aid, even emergency relief, would create dependency upon the government. President Johnson condemned governmental aid to ex-slaves as discrimination against whites. Land reform was opposed by Northern investors, and it was not endorsed by most congressional Republicans. Most white policy makers wanted to restore the money machine of Southern agriculture and profitable related enterprises in the North and South.<sup>51</sup>

The first Reconstruction was thus aborted. Over the next generation, through force, fraud, terror, and various legal devices, blacks were driven from political participation. Neglecting its responsibilities under the amended Constitution, the federal government declined to intervene. Most freedmen became sharecroppers on land that had been restored to its original owners. To secure racial subordination, lynchings became increasingly frequent (up to three a week during the 1890s).<sup>52</sup> No longer valuable private property, blacks could be killed publicly with impunity. White supremacy was thus violently re-established, and, during the most intense period of lynching, Jim Crow was sanctified by *Plessy v. Ferguson* in 1896. Anti-lynching legislation, frequently proposed, never survived in Congress.<sup>53</sup>

The U.S. had officially committed itself to civil and political rights for blacks, but it failed to enforce those rights. It made a binding promise that it did not keep. African Americans

were betrayed, and a brutal white supremacist regime was allowed to replace chattel slavery.

*The 20<sup>th</sup> century.* The Jim Crow system survived into the second half of the 20th century. Following World War Two, however, several developments converged that facilitated change. Black veterans returned to civilian life determined to realize the nation's democratic promises. Wartime propaganda against racism had generated more enlightened attitudes among many whites. The newly founded United Nations embraced a Universal Declaration of Human Rights. Colonial liberation movements gave rise to independent nations whose populations of color were appalled at Jim Crow in America, which film and video made visible. Cold War competition between the U.S. and the U.S.S.R. led American policy-makers to deplore unfavorable images of our domestic arrangements, especially the brutal suppression of peaceful civil rights demonstrations. In this confluence of circumstances, challenges to Jim Crow began to achieve success, despite lethal violence (indeed, sometimes because of lethal violence – when it took the lives of white civil rights workers).<sup>54</sup>

With the *Brown v. Board of Education* desegregation decision of 1954, the federal judiciary seriously began to contemplate vigorous enforcement of blacks' constitutional rights. By the mid-1960s, Congress felt obliged to enact significant civil rights legislation, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the Equal Employment Act of 1972.

The movement for black equality sparked a series of grass-roots campaigns for the civil rights of other groups that had been subjected to systematic discrimination. During the same period, increasing recognition of the relations between economic and political inequality gave

rise to demands for governmental action to address deep, widespread poverty in the U.S. The resulting “War on Poverty” included a number of important programs, funded all or partly by the federal government, such as food stamps, Medicare (for the elderly and disabled), Medicaid (for poor children and some adults), Supplemental Security Income (serving needy aged, disabled, and blind), the Comprehensive Employment and Training Act (or CETA, subsidizing low wage jobs in non-profit and public settings), and Head Start (preschool program for disadvantaged children); and existing programs were expanded, such as Aid to Families with Dependent Children (AFDC, or “welfare”). Because of African Americans’ disproportionate share of economic disadvantages (well documented by the 1947 Report of the President’s Committee on Civil Rights), such programs are of special relevance here.

The Second Reconstruction, like the first, secured important changes in public policy. The nation committed itself, once again, to equal rights; this time, however, racist ideology was officially rejected. Openly racist appeals became unacceptable for mainstream political candidates, and explicitly racist comments were banished from public policy statements. Anti-discrimination laws were enacted and their enforcement was sustained by the courts. Opportunities became available for blacks in politics, education, skilled trades, and the professions. Overt discrimination and anti-black violence were reduced.<sup>55</sup> And, unlike the first Reconstruction, such changes have come to seem irreversible.

There are less gratifying parallels. Criticism of government aid to blacks resembled that of the 19th century, to the point of regarding it as discrimination against whites. Federal commitment to uncompleted reconstruction programs faded. By the early 1980s, government policy had reduced interventions on behalf of blacks and government assistance was decreased.<sup>56</sup>

The chief similarity between the First and Second Reconstructions, however, is their failure to eliminate the deep-rooted disadvantages of African Americans that flowed from past public policy.

After the First Reconstruction, freedmen with minimal resources were driven into peonage or menial jobs while nutritional, educational, and medical programs were ended. For generations thereafter, the vast majority of African Americans entered working lives without a decent share of the nation's resources and with significantly lower life prospects than their white counterparts.

After Jim Crow, anti-black discrimination was lessened and opportunities for blacks were increased. But nutritional, educational, medical, employment, and housing programs that were developed in the 1960s faced cutbacks, which were severe by the 1980s and are worse today. The real benefits of Medicare and Medicaid have been reduced. New construction of affordable public housing has virtually ceased. Federal subsidies for low income families to rent private housing have decreased. CETA programs have ended. Eligibility for food stamps has been restricted. AFDC has been terminated; its replacement, Temporary Assistance to Needy Families, sets lifetime limits on receipt of aid, requires more work from mothers of young children, and denies four-year college study as a means to improved employment. Despite increased work requirements, the government has failed to provide for adequate child day care.<sup>57</sup>

Most important, the War on Poverty and the Second Reconstruction have failed to address the deep, systemic character of Jim Crow's legacy. After 300 years of slavery and Jim Crow, African Americans entered the Second Reconstruction with life prospects substantially lower than that of their white counterparts.<sup>58</sup> Since then, conditions have in some respects

improved, but a substantial income gap continues and the wealth gap is greater than ever and continues to expand. At every income level, blacks' net worth (mainly housing equity) is a fraction of whites'. At most income levels, blacks' financial resources – funds available in case of lay-offs, serious illness, and other emergencies – are substantially less: *zero or negative*. This is not merely a matter of relative disadvantage: 25% of white households lack such financial resources, but 61% of black households are in that potentially disastrous predicament.<sup>59</sup>

The political origins, persistence, and significance of the wealth gap merit closer attention. As equity in private housing constitutes the main component of wealth for most U.S. families,<sup>60</sup> public policies affecting the acquisition and appreciation of housing will be central to our review.

Prior to the Second Reconstruction, employment discrimination was not merely tolerated but engaged in by government at all levels. Such discrimination generated a black-white income gap, which affected African Americans' relative and absolute ability to purchase homes. Other government policies have greatly promoted home acquisition by whites while inhibiting it for African Americans. Many of the same policies promoted residential segregation.

The black urban ghetto, primarily a 20<sup>th</sup> century phenomenon, was occasioned by the migration of blacks to urban areas and periodic housing shortages and resulted from exclusionary actions by white home owners, real estate agents and associations, mortgage and insurance providers, and policies of both local officials and federal agencies. Begun with violence, the exclusionary means extended to racially restrictive covenants, white boycotts of real estate agents who served blacks, "racial steering" (realtors' systematic diversion of black clients from white communities), "redlining" (which identifies black neighborhoods, within

which home purchase and home improvement loans are denied or interest rates are inflated), “block-busting” (whereby blacks are brought into a neighborhood, leading intolerant whites to leave, more blacks are brought in, leading less intolerant whites to leave, and so on, while blacks must accept segregated housing at inflated rents and prices).<sup>61</sup>

Redlining was embraced by federal agencies, such as the Home Owners Loan Corporation, the Federal Housing Administration, and the Veterans Administration. Federally supported “slum clearance” programs intensified ghetto conditions. Many public housing projects, typically high-density, were located within or adjacent to existing ghettos. As the projects accommodated fewer ghetto dwellers than slum clearance displaced, more pressure was placed upon housing in the ghetto. Public housing authorities employed segregation policies which further promoted black isolation. When they were ordered by federal courts to reform, funding for public housing was halted. Congress enacted a Fair Housing Act in 1968, but only after it was stripped of enforcement provisions. When such provisions were added by the Fair Housing Amendment Act of 1988, the federal government declined to enforce them vigorously.<sup>62</sup>

Block-busting and “white flight” can occur only when some communities are maintained as white domains. Federal and local governments funded and constructed new highways to serve white suburbs. When overt housing discrimination was prohibited, realtors developed covert measures to divert black renters and home buyers from white communities. Such discriminatory practices can be identified but, because of law and federal policy, private, non-profit organizations have had the burden of doing so. Their “audits” of such practices have been effective, but were substantially reduced with the end of CETA, which had supported a variety of community-based anti-poverty jobs.<sup>63</sup>

By 1940, the isolation of blacks within segregated urban communities was greater than had ever been experienced by any other ethnic group in America. Following World War Two, as white suburbs expanded and African Americans of all income levels were excluded from white domains, urban black ghettos increased in size and density, giving rise to a degree of uniquely concentrated isolation that sociologists have dubbed “hyper-segregation.” Only African Americans among minority groups in the U.S. have for a sustained period of time been the majority within a discrete urban ghetto. Of African Americans alone has it been true that the majority of the group in a given metropolitan area reside within a discrete urban ghetto. For no other ethnic group have affluent members been largely unable to escape racially segregated housing.<sup>64</sup>

Hyper-segregation persists partly because of the continuing exclusion of blacks from white communities, partly because federal fair housing legislation has not significantly been enforced, and partly because public policies can adversely affect an established black ghetto without hurting a significant number of whites. Providing inferior public services for the ghetto can seem politically prudent to politicians who rely primarily on the votes of whites, whose communities reap some relative benefits. Poorly endowed public schools are familiar features of the ghetto, along with inadequate public transportation.

Poverty in the U.S. is most concentrated in the black urban ghetto. Social contacts with whites are minimized by the isolation of the ghetto, as are job opportunities and access to business networking.<sup>65</sup>

Most importantly, residential segregation promotes the black-white wealth gap. Public policies such as redlining have reduced the opportunity for blacks to acquire, maintain, and

improve homes. African Americans who could afford the higher interest rates they were charged on housing loans have paid more than whites for homes of similar value, which has reduced their available financial resources. In periods of economic hardship, such as the 1930s and 1970s, “demand density” dropped dramatically in the ghetto, commercial outlets and services withdrew, buildings fell into disrepair and were abandoned, and crime and disorder increased. These conditions caused housing values to appreciate at a lower rate in black than in white communities, adversely affecting blacks’ net worth and their ability to borrow in order to invest in educational and business opportunities.<sup>66</sup>

The effects are transgenerational and profound. “Nearly three-quarters of all black children, 1.8 times the rate for whites, grow up in households possessing no financial assets. Nine in ten black children come of age in households that lack sufficient financial reserves to endure three months” without income, even at the poverty line, “about four times the rate for whites.”<sup>67</sup> The life prospects of children depends more on parents’ wealth than on their income. “Asset poverty is passed on from one generation to the next, no matter how much occupational attainment or mobility blacks achieve.”<sup>68</sup> As a result of the wealth gap, there is, between generations, both more downward mobility and less upward mobility for blacks than for whites.<sup>69</sup>

The policies that have promoted hyper-segregation have thus intensified the legacy of slavery and Jim Crow, and the results are not being challenged by public policies.<sup>70</sup>

The foregoing review includes an incomplete but relevant description of the federal government’s role relative to African Americans. The government’s policies supported both slavery and Jim Crow. Since 1865, it has for extended periods violated or failed to enforce its

own Constitution and legislative enactments. In accepting violations of its own basic law, the federal government allowed the racial caste system to be reconfigured so that it could survive the abolition of slavery. It thereby enabled the entrenchment of inequities for African Americans in a new system – Jim Crow. It tolerated gross misconduct by officials, frequent public lynchings, rape, harassment, terror, and coercion -- in other words, widespread, grievous violations of African Americans' most fundamental rights. Given the opportunity, it has more than once declined to undertake measures necessary to substantially rectify the long-standing inequities. Of course, this pattern does not fully describe public policy; but it has dominated public policy since the U.S. was established.

The federal government has thus been party to and partly responsible for the wrongs done to African Americans. It has knowingly tolerated systematic violations of federal, state, and local law by officials at all levels. It is the single most important currently existing party that can truly be held accountable to those who have suffered the wrongs of racial subjugation. The federal government is, furthermore, an appropriate recipient of moral demands for corrective justice because of the nature, scope, and magnitude of the inequities that remain to be addressed.

### **III. What Is To Be Done?**

In Section I we noted that morally valid reparations claims must identify both current claimants and currently accountable parties. In Section II we reviewed the federal government's role in supporting slavery and Jim Crow and its failing to dismantle their inequitable legacies. That review enables us to identify the federal government as a party – perhaps the principal party

-- that can be held morally accountable today.

Section II also implies that, for present purposes, the validation of current claims does not require that we bridge an historical gap to wrongs done in the distant past. Although the wrongs to be rectified have their origins in chattel slavery, the system of racial subjugation that began in slavery was continued under Jim Crow until the recent past, and those wrongs have not been fully undone. On the one hand, reparations were not secured for the victims of chattel slavery or Jim Crow after those systems were abolished. On the other hand, the legacy of slavery and Jim Crow persists today.

I shall not focus here on reparations for wrongs that occurred only in the past, but shall consider instead the problem of appropriately addressing deeply entrenched, persisting inequities that have resulted from systemic racial stratification. I do not mean to criticize or discourage other approaches to rectification, such as litigation that might successfully trace current claims back to the wrongs of slavery and Jim Crow, nor to suggest that the moral reasoning supporting such litigation or other proposals is unsound. Those are open questions. If presented in their full contexts for public discussion, such cases can also have educational value.<sup>71</sup>

I take a different approach because the inequities persist and cannot adequately be addressed by anything less than a comprehensive set of public programs. I wish furthermore to show how such rectification can be required by modest considerations of political morality and thus that much of the point of many reparations proposals can be defended unproblematically.

It is unlikely that reparations claims would be advanced today if the persisting inequities that are the legacies of slavery and Jim Crow had been adequately addressed. But reparations claims typically concern past, not persisting, wrongs. As the legacy of slavery and Jim Crow is a

continuing wrong, I suggest that we consider what's needed in the broader terms of *corrective justice*.

For two centuries, the maintenance of racial subjugation was in effect an American national project – even though it was, for half of that time, inconsistent with our basic law and solemn public commitments. A *Racial Subjugation Project* was implemented by public policy at all levels. Corrective justice calls for a *National Rectification Project* to extinguish the relevant inequities.

We are not in a position to conclude that all African Americans are individual holders of valid reparations claims, to estimate the magnitude of such claims, or to identify accountable individuals. For present purposes, none of that is necessary. The current argument rests on the fact that a morally indefensible black-white gap in life prospects stems from slavery and Jim Crow. What's called for is a corrective project to eliminate that gap.

The particular version of this approach that I shall endorse is motivated by several complementary considerations.

First, *my proposals are based on the requirements of a fair set of social processes*, not some preconception of just distributive outcomes. Americans value fair competition with rewards for good performance. Fair competition requires a substantially equal set of opportunities and resources at the start. The competition to which I refer begins no later than birth.

Second, an implication of the factual picture I have presented is that *many African American children grow up with systemically assured disadvantages that are the legacy of slavery and Jim Crow*. They embark on life without a fair share of the nation's resources and

with significantly worse life prospects than their more affluent and less stigmatized peers. They receive inadequate food, medical care, housing, education, and job opportunities. Housing conditions expose them to lead and air-borne pollutants, vermin and infestation. They have less time with parents who, because of low wages and inadequate benefits, must work longer hours to secure a subsistence income for their families.

Third, *young children are not responsible for the conditions they inherit*. As the relevant conditions constitute the material aspect of the deeply entrenched legacy of slavery and Jim Crow, it is also implausible to suppose that their parents are responsible for the life prospects gap or can generally be expected to overcome those disadvantages.<sup>72</sup>

Fourth, the 1996 repeal of Aid to Families with Dependent Children was motivated in part by the notion that many recipients of welfare are responsible to a substantial extent for their unenviable circumstances and have taken unfair advantage of government “handouts.” I believe it is demonstrable that such concerns are unfounded and that they have been promoted for political purposes.<sup>73</sup> Regardless, the approach I propose avoids this issue by focusing on the needs of children.

Fifth, given its overall regulatory responsibilities, it seems reasonable to assume that *the federal government has a primary obligation to insure equal opportunity* – to insure that social arrangements provide a fair share of favorable life prospects for each child. No morally defensible system of social organization would fail in that responsibility. Given the historical background that was reviewed above, it also seems undeniable that *the government is morally bound to eliminate unfair inequalities in opportunity that it has wrongfully promoted*.

Sixth, for much of U.S. history, many groups have been subjected to prolonged systems

of discrimination, and as a result *many additional children inherit a legacy of unequal opportunity*. I do not want to suggest that all forms of unwarranted discrimination are equal, or that slavery and Jim Crow can properly be understood simply as systems of discrimination. To underscore this, I shall indicate the examples I have principally in mind:

- (1) For more than two centuries, Native Americans in U.S. territory have been subjected to massive thefts of land and other goods, displacement, fraud, and genocide, for which the federal government is primarily responsible;<sup>74</sup>
- (2) For nearly two centuries, Mexican Americans have been subjected to massive losses of land by illicit means, for which the federal government is primarily responsible;<sup>75</sup>
- (3) The U.S. provides entry to massive numbers of immigrants and guest workers, especially from Asia and Latin America, who have been systematically exploited and maltreated by under-regulated employers.

In each such case, vast numbers of individuals suffer the legacy of past inequities and continuing discriminatory practices.

In addition to these clear examples (there may be others), U.S. history includes a long list of immigrant groups from Asia and Europe that have been subjected to systematic discrimination for varying numbers of decades or generations. Not all groups still experience systematic discrimination. But some members of such groups may continue to suffer disadvantages that flow from past inequities. It is important to address injustice evenhandedly – to promote public policies that address the most pressing needs first, especially needs stemming from past or present wrongs. The programs I shall suggest would address the most basic needs of all children, in order to insure equal opportunity.

*The material component.* How can poor children's life prospects be improved? We can begin to sketch aspects of a comprehensive program under familiar categories, such as health, nutrition, housing, family life, education, and community conditions.

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

Many poor children live in overcrowded housing; many are homeless. We have massive need for affordable, well-maintained family housing, in well-tended neighborhoods, free of infestations, lead, and other poisons. I offer no formula for their provision, only the judgment that inadequate housing is intolerable in the land of plenty.

Children must have adequate individual attention in their public schools. Class sizes must be reasonably manageable by the teaching staffs. Educational programs and facilities must provide children with adequate exposure to cultural and technical developments of the society at large so that they are not disadvantaged, relative to others in the same stage of life, as potential employees or as potential continuing students.

Children must have adequate time with their parents. This means that their parents must have jobs such that working only one shift enables the families to live in reasonable comfort. Furthermore, parents should have a range of choices that include the opportunity to care for their

young children at home, especially those with special needs. When work or other responsibilities call parents away from the home, the children must have adequately staffed day care. Parents must have available to them adequate transportation to and from their workplaces, medical facilities, shopping, etc.

As the previous points imply, poor children's life prospects cannot be improved significantly without aiding their parents and their larger communities. Housing and schools must be built and maintained. Wages and benefits must be improved for parents. Public transportation must be expanded. We must increase greatly the numbers of teachers and other human service workers and must value their work in accordance with the inestimable value of their primary responsibility – our children – and we must compensate and attract them accordingly.<sup>76</sup>

Most importantly, an adequate rectification project must address the black-white wealth gap. Equal opportunity requires more than prohibitions against discrimination. It is generally denied children in families that lack financial resources. A two-pronged approach is needed. First, economic security programs are required to cushion the effects of lay-offs, illnesses, and to provide job training and educational opportunities, at minimal cost to families. Second, families must be enabled to acquire homes and other assets so that their children, by and large, can begin their working lives on reasonably equal terms with all of their peers. Public policies have prevented fair access to wealth formation by African Americans and morality now requires public policies that will rectify that wrong.<sup>77</sup> Such policies would redistribute some of the most highly concentrated wealth in our society.<sup>78</sup>

To insure that basic needs are met and, in some contexts, to minimize the possibility of

arbitrary allocation and stigmatization, many of the benefits and services mentioned may best be provided without fee; this would probably include not only education but also school lunches, child care, public transportation, and health care. Such programs would be friendly to the environment and would minimize administrative costs while freeing up labor for an expanded realm of labor-intensive human services.

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

A minimally decent concern for children, to provide equal opportunity for each, requires a public investment in the generations that will follow us -- a public investment in policies and programs that are vastly more ambitious than any our society currently contemplates, except when it mobilizes for war. Our capacity to wage war on other humans reveals an untapped capability to wage war on want.<sup>79</sup>

My argument neither assumes nor implies that we may generally regard European Americans as responsible for the legacies of slavery and Jim Crow. Although some Americans resist rectification programs and some still favor racist policies, most do not. But one need not be morally accountable for current inequities in order to be called on to help undo past and current wrongs. Political responsibility is not reducible to compliance with law. Its central core is a commitment to social justice, including, most urgently, corrective justice. It calls on us to protest and sometimes to frustrate the operation of unjust laws and public policies. The National Rectification Project I have outlined is in those respects less demanding. Insofar as morally

mandated reforms involve charges to the public purse, political responsibility calls on citizens to contribute their fair shares of the costs.<sup>80</sup>

*The moral component.* The approach I have sketched would address a good deal of the unfinished business of grievous injustice that we face. However, it does not take account of a fundamental aspect of rectification that is often neglected in discussions of reparations. Compensation and restitution directly address injuries that are regarded as commensurable in material or economic terms. But the wrongs suffered by African Americans under slavery and Jim Crow have by no means been limited to material losses. White supremacist ideology and racist derogation have been central features of racial subjugation in the U.S. While the wrongs have included very severe material deprivations, they have also encompassed systematic insults, indignities, and humiliations; political exclusion and social subordination; and harassment, terror, murder, rape, and public lynchings. For want of a better term, I call this the moral aspect of the relevant wrongs.

Our discussion so far has considered past practices not as wrongs to be addressed directly but rather as sources of continuing wrongs that still require rectification. If we continue with that orientation, the question that we face is what else, besides material conditions, is needed to provide our society's children with equal opportunity.

We might cautiously characterize the moral aspect of the legacy of slavery and Jim Crow as persisting white racism. Although racism is associated with overt hostility, violence, and brutality, those are not essential manifestations of racist attitudes. Since the beginning of British colonial settlements in North America, public policy has typically been formed while ignoring or

substantially discounting the interests of African Americans (and the interests of other peoples of color) relative to the interests of those who at a given time are regarded as white.

Consider, for example, the attitude manifested in non-disparaging judicial terms by Lemuel Shaw, highly respected Chief Justice of the Supreme Judicial Court of Massachusetts. In 1851, Shaw rejected a habeas corpus petition seeking the release of Thomas Sims,<sup>81</sup> who was being held as an escaped slave under the Fugitive Slave Act of 1850.<sup>82</sup> Shaw cited conventional support for his decision, such as the U.S. Supreme Court's 1842 holding in *Prigg v. Pennsylvania*, which upheld the Fugitive Slave Act of 1793.<sup>83</sup>

It is noteworthy that in doing so, however, Shaw ignored obvious differences between the two enactments. Unlike the brief 1793 Act, the much more detailed 1850 Act explicitly required summary hearings to determine whether someone who was being held as an alleged fugitive slave should be turned over to a slaveholder; it barred testimony by or on behalf of the alleged fugitive; and it gave hearing officers a financial incentive to decide in favor of slaveholder claimants. One would be hard put to find a more blatant violation of constitutional due process in a legislative enactment.

More noteworthy, for present purposes, is that Shaw added to his legal opinion a judicially gratuitous appendix in which he sought to justify the inclusion of the fugitive slave clause in the Constitution.<sup>84</sup> Shaw argued that the welfare of the several states was served by the clause, because it prevented conflict between slave and non-slave states. Shaw's determination of the welfare of the states reveals not the slightest suggestion that he took into account the interests of African Americans, especially of slaves. Shaw claimed, for example, that failing to provide for the return of escaped slaves would have led to warfare between North and South.

His reasoning did not require him to take into account the well-known fact that thousands of slaves managed to escape during the War for Independence, which presumably served the distinct long-term interests of that substantial segment of the population.<sup>85</sup>

Such moral blindness is a common feature of prevailing political dispositions. Consider the nationwide toleration of lynching – a phenomenon that was frequently reported, about which there were national protest campaigns from the 19th century on. For decades, Congress was reminded annually by bills seeking a federal anti-lynching statute, which it always rejected.<sup>86</sup> Given the stakes – thousands of human lives taken in brutally cruel and excruciatingly painful ways – a relatively uninformed person who got wind of the practice could be reasonably expected to investigate further. A failure to do so, when it was understood that blacks were the typical victims, is culpable ignorance.

The moral attitudes thus manifested – which were encouraged by the 17th century creation of a racial caste system, sustained by the 18th century embrace of that system, and renewed by the 19th century endorsement of Jim Crow – suggest the idea that was given expression by Roger Taney, Chief Justice of the U.S. Supreme Court, that African Americans “had no rights which the white man was bound to respect.”<sup>87</sup> These attitudes are poisonous ingredients of the persisting legacy of slavery and Jim Crow.

It would seem, then, that an essential element of the required rectification is an informed acknowledgment of the moral as well as material aspects of the wrongs of slavery and Jim Crow and an effective undertaking to combat racism.

It is, moreover, practically imperative that the moral aspect of racial subordination in the U.S. be addressed directly. The persistence of racism helps to account for the lack of political

will to implement a genuine reconstruction.<sup>88</sup> On the one hand, we know from experience that government will not design an adequate corrective program or sustain even an inadequate program without a firm commitment. On the other hand, a profound attitude change is required for such a commitment.

Given a realistic assessment of its political prospects, the National Rectification Project I have described might reasonably be regarded as utopian. That is because it requires not only adequate legislation and funding but an effective commitment by public officials and political leaders to carry it through. We know from experience as well as current policy that such political will is lacking.

I have no formula for creating the necessary commitment, but I can name three relevant factors. One factor is an unrelenting campaign for corrective justice at every level of political organization. A second factor is a national program within schools, other public institutions, and the media to educate our population in the relevant aspects of U.S. history and the phenomenon of moral blindness.<sup>30</sup>

A third factor, over which we lack direct control, is propitious circumstances. The civil rights movement would have been far less successful had it not been for the then-recent national mobilization against a racist regime, the development of the United Nations, the emergence of newly independent states with populations of color, Cold War competition for influence with such states, and the widespread dissemination of pictorial news through film and television. Given the disastrous current direction of U.S. foreign and domestic policy, we might find before long that political circumstances will be radically altered. New conditions may offer new opportunities for rectifying the massive legacy of injustice in our society.

## NOTES

1. This paper has benefitted from contributions by other participants in the October 2002 Bowling Green Conference on The Moral Legacy of Slavery and the March 2003 Boston College Law School Reparations Symposium. I am grateful for comments on earlier drafts by Alon Harel and Sandra Lyons and from colloquium participants at UCLA, Boston College, and Boston University; and for research assistance by Kathleen O'Malley and John B. Koss.

2. Only slavery in the U.S. will be referred to here.

3. This point is suggested by John McWhorter, "Against Reparations," in *Should America Pay?*, ed. R.A. Winbush (New York: HarperCollins, 2003), p. 191.

4. The reparations literature is substantial and expanding. For an overview of the reparations movement, its history, and current legal strategies, see "Does America Owe a Debt to the Descendants of Slaves?," reprinted from *Harper's Magazine* for November 2000 in Winbush, *Should America Pay?*, pp. 79-108. James Foreman's 1969 "Manifesto" is reprinted and the legal issues it raises are discussed in Boris I. Bittker, *The Case for Black Reparations* (N.Y.: Vintage Books, 1973). A recent collection of important philosophical studies is *Injustice and Rectification*, ed. R.C. Roberts (N.Y.: Peter Lang, 2002). An important new monograph is Janna Thompson, *Taking Responsibility for the Past* (Cambridge, U.K.: Polity Press, 2002).

5. See, e.g., *Complaint & Jury Demand, Farmer-Paellman v. FleetBoston Financial Corporation*

(E.D.N.Y. 2002) (No. CV 02-1862), seeking redress from FleetBoston, Aetna, CSX, and 100 unnamed corporations for their involvement in slavery, and First Amended Complaint, Alexander v. Governor of the State of Oklahoma (N.D. Okla. 2003) (No. 03CV133 E/C), stemming from the 1921 pogrom that devastated the Greenwood section of Tulsa.

6.As, I believe, the persons who are pressing those claims would agree.

7.Thompson, *Taking Responsibility for the Past*, p. 81. Thompson defends reparations with a short-term argument for inheritance rights (pp. 107-122) and a long-term argument citing “harms to family lines” (pp. 131-140). The present paper complements Thompson’s (innovative but more controversial) theory by explaining (a) governmental accountability, (b) the legacy of slavery and Jim Crow, (c) the requirements of a National Rectification Project, and (d) its basis in an innocuous principle of political morality.

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

9.It is a further question whether our government has a responsibility to insure equal opportunity for children throughout the world.

10.Those that became the 1964 Civil Rights Act and the 1965 Voting Rights Act.

11. This does not rule out *legal* claims by descendants of slaves against descendants of slave holders, but means only that they could not be based on inherited *moral* debts. Such claims might alternatively be based on unjust enrichment, which I discuss below.

12. Relevant Jim Crow laws, such as those restricting African Americans' voting rights, violated the federal Constitution, and relevant Jim Crow policies involved public officials in systematic violations of ordinary laws, such as those against murder, rape, and assault.

13. One problem with the test, as it is usually presented, is that it considers only the material effects of injustice and neglects what I'll call its moral aspect. I'll return to this in Section III.

14. I'll discuss this systematically in Section II. Meanwhile, we may note that in 1994, for example, the median income for blacks was 3/5 that of whites while their unemployment rate was more than twice that of whites. Even more significant, as I'll explain, is the *wealth gap*. In 1994, blacks' median net worth was 1/4 that of whites and their median net financial assets (roughly, their available resources) was 1/7 that of whites. As of 1996, blacks' life expectancy was 6.6 years less than whites'. See *America Becoming: Racial Trends and Their Consequences*, ed. N.J. Smelser, et al., 2 vols. (Washington, D.C.: National Academy Press, 2001), Vol. 2, pp. 100, 228, 258. For the persistence of these aspects of the legacy, compare data from the late Jim Crow period, in *To Secure These Rights: Report of the President's Committee on Civil Rights* (Washington: U.S. Government Printing Office, 1947).

15. See, e.g., Bernard Boxill, "The Morality of Reparation," *Social Theory and Practice* 2 (1972):

113-123 (reprinted in Roberts, *Injustice and Rectification*, pp. 124-130).

16. Some or all of these advantages are sometimes referred to as “white skin privilege.”

17. See, e.g., J.D.B. DeBow in *Slavery Defended*, ed. E.L. McKittrick (Englewood Cliffs, N.J.: Prentice-Hall, 1963), pp. 169-77.

18. This rebuttal ignores the non-material aspects of racial subjugation – the egregious indignities, humiliations, etc., to which blacks, but not whites, have been subjected.

19. I’ll substantiate the foregoing claims as well as those that follow in Section II.

20. For a more detailed account, see my “Unfinished Business: Racial Junctures in US History and Their Legacy,” forthcoming in *Historical Justice*, ed. L.H. Meyer (Baden-Baden: Nomos Verlag, 2003).

21. *Farmer-Paellman v. FleetBoston Financial Corporation*.

22. Jon M. Van Dyke reports that a “Reparations Coordinating Committee ... has been focusing its efforts on bringing claims against the federal and state governments, but will also be targeting private corporations and universities that have benefitted from slavery.” See Winbush, *Should America Pay?*, p. 373, n. 92.

23. Thus (to cite only the most relevant examples) the U.S. government has regarded itself as

accountable for the Tuskegee syphilis experiment and the World War Two internment of Japanese Americans and has paid reparations accordingly. For other examples, see Winbush, *Should America Pay?*, p. xii.

24. *The Kerner Report: The 1968 Report of the National Advisory Commission on Civil Disorders* (N.Y.: Pantheon, 1988), p. 1.

25. See, e.g., Re Edward Mazingo (1672) and Moore v. Light (1673) in *The Law of Freedom and Bondage*, ed. P. Finkelman, (N.Y.: Oceana Publications, 1986), p. 13.

26. See, e.g., Ira Berlin, *Many Thousands Gone* (Cambridge, Mass.: Harvard Univ. Press, 1998), pp. 29-46, A. Leon Higginbotham, *In the Matter of Color* (N.Y.: Oxford Univ. Press, 1978), pp. 26-30, and Robin Blackburn, *The Making of New World Slavery* (N.Y.: Verso, 1998), pp. 228, 240, 266.

27. Act XII, in *The [Virginia] Statutes at Large*, ed. W.W. Hening (Richmond: S. Pleasants, 1809-23), vol. 2, p.170.

28. Act III, in Hening, *The Statutes at Large*, vol. 2, p. 260.

29. Act I, in Hening, *The Statutes at Large*, vol. 2, p. 270.

30. Berlin, *Many Thousands Gone*, p. 45; Edmund S. Morgan, *American Slavery American Freedom* (N.Y.: Norton, 1995), p. 327; Wilcomb E. Washburn, *The Governor and the Rebel*

(N.Y.: Norton, 1972), p. 80.

31. Act I (1682), in Hening, *The Statutes at Large*, vol. 2, pp. 490-93.

32. Act XVI, in Finkelman, *The Law of Freedom and Bondage*, p. 18.

33. Gary B. Nash, *Red, White, and Black*, 4<sup>th</sup> edn. (Upper Saddle River, N.J.: Prentice-Hall, 1999), pp. 7-20; Leon F. Litwack, *North of Slavery* (Chicago: Univ. of Chicago Press, 1961), pp. 7-9.

34. On the convention, see Paul Finkelman, "Making a Covenant with Death," in *Slavery and the Founders*, 2<sup>nd</sup> edn. (Armonk, N.Y.: M.E. Sharpe, 2001) and "The Founders and Slavery," *Yale Journal of Law and the Humanities* 13 (2001): 413-449, and Gary B. Nash, *Race and Revolution* (Madison: Madison House, 1990), pp. 37-42.

35. Quoted in Finkelman, "The Founders and Slavery," p. 434.

36. Finkelman, "The Founders and Slavery," pp. 415-16, 425-45; Nash, *Race and Revolution*, pp. 28-29.

37. Finkelman, "Making a Covenant with Death," pp. 22-34, and "The Founders and Slavery," pp. 433-41.

38. Finkelman, "Making a Covenant with Death," pp. 10-20, 22-25, and "The Founders and

Slavery,” pp. 427-30.

39.Finkelman, “Making a Covenant with Death,” pp. 30-32, and “The Founders and Slavery,” pp. 438-39.

40.Finkelman, “The Founders and Slavery,” pp. 425-45; Nash, *Race and Revolution*, pp. 36-37, 42-47.

41.John Hope Franklin & Alfred A. Moss, Jr., *From Slavery to Freedom*, 7<sup>th</sup> edn. (N.Y.: McGraw-Hill, 1994), pp. 227-31, 237-44.

42.Eric Foner, *Reconstruction* (N.Y.: McGraw-Hill, 1988), p. 35f; *Documents of American Constitutional and Legal History* 2<sup>nd</sup> edn., ed. M.I. Urofsky & P. Finkelman (N.Y.: Oxford Univ. Press, 2002), pp. 442-43.

43.Foner, *Reconstruction*, pp. 119-23, 198, 209.

44.Foner, *Reconstruction*, pp. 68-70, 143-53, 157-70, 243-51.

45.Foner, *Reconstruction*, pp. 575-601; John Hope Franklin, *Reconstruction After the Civil War*, 2<sup>nd</sup> edn. (Chicago: Univ. Of Chicago Press, 1994), pp. 168-69, 174-75.

46.Most notably, The Slaughter-House Cases (1873) and The Civil Rights Cases (1883).

- 47.Foner, *Reconstruction*, pp. 68-69, 105, 160-64, 302, 309-10, 329, 374-75.
- 48.Foner, *Reconstruction*, pp. 51, 68.
- 49.Foner, *Reconstruction*, pp. 51-3, 58-59, 69-70, 78-79, 158-64.
- 50.Foner, *Reconstruction*, pp. 234-35, 246.
- 51.Foner, *Reconstruction*, pp. 105, 235-37, 247-48, 308-11, 376-77.
- 52.Philip Dray, *At the Hands of Persons Unknown* (N.Y.: Random House, 2002); Robert L. Zangrando, *The NAACP Crusade Against Lynching* (Philadelphia: Temple Univ. Press, 1980).
- 53.C. Vann Woodward, *The Strange Career of Jim Crow*, 3<sup>rd</sup> edn. (N.Y.: Oxford Univ. Press, 1974), pp. 82-93; *To Secure These Rights*, pp. 35-40.
- 54.Vincent Harding, et al., “We Changed the World,” in *To Make Our World Anew*, ed. R.D.G. Kelley & E. Lewis, eds. (N.Y.: Oxford Univ. Press, 2000), pp. 452-54, 513-14; Manning Marable, *Race, Reform, and Rebellion*, 2<sup>nd</sup> edn. (Jackson: Univ. Press of Mississippi, 1991), pp. 86-87; Woodward, pp. 130-34.
- 55.Marable, *Race, Reform, and Rebellion*, pp.149-50.
- 56.Marable, *Race, Reform, and Rebellion*, pp. 152, 206-13, 221. The War on Poverty was not won but abandoned. It never came close to ending widespread, deep poverty in the U.S. The responsibility for resuming that “war” lies with the society as a whole.

57. Harding, in Kelley & Lewis, *To Make Our World Anew*, p. 599; Douglas S. Massey & Nancy A. Denton, *American Apartheid* (Cambridge, MA: Harvard Univ. Press 2001), p. 231.

58. Marable, *Race, Reform, and Rebellion*, pp. 227-30.

59. Melvin L. Oliver and Thomas M. Shapiro, *Black Wealth/White Wealth* (New York: Routledge, 1997), p. 87 and chap. 5. The authors distinguish *net worth*, the “value of all assets less debts,” from *net financial assets*, which “excludes equity accrued in a home or vehicle” and includes resources that are more likely to be used “to finance a college education for [one’s] children, start a business, make other investments, support political candidates, or pay lobbyists to protect [one’s] special interests” (pp. 58-59). The statistics on which they mainly rely come from the Census Bureau’s 1984-1989 Survey of Income and Program Participation (pp. 55-58).

60. Oliver and Shapiro, *Black Wealth/White Wealth*, p. 64. I was alerted to the importance of the wealth gap by Robert Fullinwider’s presentation to the Bowling Green conference on reparations, “Slavery, Reparations, and Moral Clarity.”

61. Massey & Denton, *American Apartheid*, pp. 26-49, 51-52, 55-57, 74-78, 84-88.

62. Massey & Denton, *American Apartheid*, pp. 51-59, 227, 230-34.

63. Massey & Denton, *American Apartheid*, pp. 229-30.

64. The only exception to these generalizations are Puerto Ricans with African ancestry, who have been comparably segregated.

65. Massey & Denton, *American Apartheid*, pp. 153-60.

66. Oliver and Shapiro, pp. 16-23, 37-45, 137-150.

67. Oliver and Shapiro, *Black Wealth/White Wealth*, p. 90.

68. Oliver and Shapiro, *Black Wealth/White Wealth*, pp. 152-170. The quotation is from p. 170.

69. Oliver and Shapiro, *Black Wealth/White Wealth*, p. 158.

70. "Our research indicates that racial residential segregation is the principal structural feature of American society responsible for the perpetuation of urban poverty and represents a primary cause of racial inequality in the United States." Massey & Denton, *American Apartheid*, p. viii.

71. They might also secure compensation that could not otherwise be secured.

72. "Studies find either that the savings rate of blacks exceeds that of whites or that black and white rates are identical. Like our analysis, these findings are inconsistent with the conspicuous-consumption thesis" that "lavish spending on cars, clothes, and cultural entertainment" accounts "for blacks' lack of financial assets." "Never married, separated, divorced, and widowed whites all command substantially greater incomes and assets than similarly situated blacks.... These asset findings pose a clear challenge to the contention that the predicament of female-headed households is primarily a factor of gender." "[W]e have found that significant racial resource

stratification occurs regardless of family status, gender, or labor force participation..” Oliver and Shapiro, *Black Wealth/White Wealth*, pp.107-108, 123-124.

73.For example, one of the myths surrounding welfare is that it provided attractive continuing support for successive generations of women and children (usually represented as black).

Longitudinal data showed, on the contrary, “that 70 percent of women who receive AFDC leave the rolls within two years, either to work or to marry, and that only 7 percent stay for more than eight years,” and that “most of the returnees only used welfare as a short-term economic back-up during a crisis. A small number did need assistance for longer than eight years, but these tended to be single mothers of young children who were school drop-outs with little work experience, or women who were too ill or disabled to work at all.” In other words, AFDC functioned as a safety net. Mimi Abramovitz, *Under Attack, Fighting Back: Women and Welfare in the United States* (N.Y.: Monthly Review Press, 1996), pp. 30-31.

74.This process began, of course, nearly two centuries earlier, before the U.S. was established. See, e.g., Vine Deloria, Jr., & Clifford Lytle, *American Indians, American Justice* (Austin: Univ. of Texas Press, 1991); Francis Jennings, *The Invasion of America* (N.Y.: Norton, 1976); Gary B. Nash, *Red, White, and Black* 4<sup>th</sup> edn. (Upper Saddle River, N.J.: Prentice-Hall, 2002).

75.See, e.g., Rodolfo Acuña, *Occupied America*, 3<sup>rd</sup> edn. (N.Y.: HarperCollins, 1988); Malcolm Ebricht, *Land Grants and Lawsuits in Northern New Mexico* (Albuquerque, N.M.: University of New Mexico Press, 1994).

76. The alternative is to assume that impoverished and low income parents are generally responsible for the conditions I have described and for the community to remove most poor children from their parents' care and raise them independently. If we were even willing to contemplate these ideas and study them seriously, I think we would find that the provision of truly adequate substitute arrangements would be enormously expensive. (There is of course a third possibility, which is to tolerate current conditions, including the higher infant mortality rate for poor children, but this is presumably precluded by the principle I have enunciated.)

77. Oliver and Shapiro offer suggestions, *Black Wealth/White Wealth*, pp. 177-188, ranging from tax reforms to the creation of asset accounts.

78. Much as would have been effected under Thaddeus Stevens' proposals, which Congress rejected at the end of the Civil War, thus insuring that the racial hierarchy would not be upset.

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

80. It must be acknowledged, however, that any even-handed set of reforms that would

effectively address the black-white wealth gap can be expected to result, over time, in a substantial redistribution of wealth. That is basically because wealth is highly concentrated in our society, and increasingly so.

81. Thomas Sims's Case, 61 Mass. 285 (1851).

82.9 Stat. 462.

83.1 Stat. 302.

84.61 Mass. 311-319. The Supreme Court regarded the fugitive slave clause as authorizing fugitive slave enactments by Congress, although they did not fall within Congress's explicitly enumerated powers. But neither Sims's nor any other case required a court to justify the founders' decision to include the fugitive slave clause in the original Constitution.

85. It is worth noting that in *Roberts v. Boston*, 59 Mass. 198 (1849), Shaw anticipated the U.S. Supreme Court's "separate but equal" holding in *Plessy v. Ferguson* (1896).

86. See, e.g., B. Holden-Smith, "Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era," *Yale Journal of Law and Feminism* 31 (1996): 31-78.

87. In *Dred Scott v. Sandford*, 60 U.S. 393, 401 (1857). Although the strategy of Taney's opinion enabled him to avoid explicitly endorsing that position, he tacitly embraced it.

88. It is not, I believe, the total explanation. We are regressively under-taxed. Those who principally hold the levers of political power take every opportunity to minimize taxes for those who can most afford them and to reduce public programs accordingly.