

# Designing Slavery Reparations: Lessons from Complex Litigation

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## Introduction

Ten years ago, the U.S. Senate and House of Representatives enacted resolutions that apologized to Black Americans “on behalf of the people of the United States[] for the wrongs committed against them and their ancestors who suffered under slavery and Jim Crow laws.”<sup>1</sup> Despite acknowledging “the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow,” neither Congress nor anyone (or anything) else has ever given enslaved Africans any type of monetary reparations for their unpaid labor. Likewise, no person or business has returned the unjust benefits or profits they earned from slavery or Jim Crow laws and practices.

Slavery reparation discussions typically stall once opponents declare that it is both absurd and impracticable to imagine that the United States would ever agree to pay reparations.<sup>2</sup> But given swift reversals of public opinion on controversial social issues like same-sex marriage and transgender rights and the almost breakneck speed that the names of slaveholders and Confederate leaders have been stripped from streets, schools, and buildings, reparations may be on a short path from theory to reality. Moreover, the inexorably changing racial demographics in this country<sup>3</sup> will soon force political leaders to seriously engage in slavery-reparations discussions in ways they have thus far managed to avoid.<sup>4</sup>

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1. S. Con. Res. 26, 111th Cong. (2009).

2. Reparations include a range of relief, including apologies, commissions, legislation, and cash payments to groups or individuals. Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 814 (2006).

3. The United States is rapidly becoming primarily nonwhite. From 2000 to 2018, over 100 individual counties' demographics shifted from primarily white to primarily nonwhite, as compared to only two such counties doing the opposite. Jens Manual Krogstad, *Reflecting a Demographic Shift, 109 U.S. Counties Have Become Majority Nonwhite Since 2000*, PEW RESEARCH CTR. (Aug. 21, 2019), <https://www.pewresearch.org/fact-tank/2019/08/21/u-s-counties-majority-nonwhite/> [<https://perma.cc/7UEJ-8HPG>].

4. See Daniel A. Farber, *Backward-Looking Laws and Equal Protection: The Case of Black Reparations*, 74 FORDHAM L. REV. 2271, 2290 (2006) (noting the glimmer of hope that may exist for public support “for some kind of reparations program, at least enough so that consideration of the issue is not completely without practical significance”); Saul Levmore, *Privatizing Reparations*, 84 B.U. L. REV. 1291, 1292–93 (2004) (questioning whether reparations awards will materialize since they are only “favored by a minority of voters” although “in intense fashion”).

This Essay starts by briefly reviewing the current slavery reparations debate, and then describes reparations programs that have compensated victims for atrocities committed during World War II and the brutal South African apartheid regime.<sup>5</sup> This Essay then explains how courts and special masters have structured both individual and group compensation programs for victims in complex disputes (including 9-11, toxic torts, and data breaches) and concludes by arguing that the models courts and special masters use in complex disputes should be adapted to design an efficient, transparent, and comprehensive reparations payment system.

While this Essay suggests ways to structure individual reparations payments, the main goal of this Essay is to propose group-based reparations that redress ongoing and persistent problems (like the racial wealth gap and racial health disparities) that can be traced back to slavery or the Jim Crow era.

## I. The Demand for Reparations

### A. *Early Claims*

In 1619, the first ship carrying enslaved Africans arrived in Virginia. From then until slavery was abolished in 1865, the United States and its colonies enslaved over four million Blacks.<sup>6</sup> Formerly enslaved people and their descendants have consistently demanded monetary and nonmonetary reparations,<sup>7</sup> and Union General William T. Sherman even promised to pay formerly enslaved Blacks reparations at the end of the war when he issued Special Field Order No. 15 (the “Order”). This Order, which required the redistribution of approximately 400,000 acres of land (in forty-acre blocks) to recently freed Blacks,<sup>8</sup> was never implemented because President

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5. Thomas Craemer, *Estimating Slavery Reparations: Present Value Comparisons of Historical Multigenerational Reparations Policies*, 96 SOC. SCI. Q. 639, 639 (2015) (“Public opinion research on slavery reparations suggests that support for slavery [reparations] crucially depends on *who* is to receive reparations, from *whom*, in what *modality*, and for what *reason*.”). Because this Essay focuses on the design of a reparations payment system, it does not advance any particular legal theory that supports slavery-reparations claims nor does it theorize whether nonlegal philosophical or moral justifications support reparations.

6. Khushbu Shah & Juweek Adolphe, *400 Years Since Slavery: A Timeline of American History*, GUARDIAN (Aug. 16, 2019), <https://www.theguardian.com/news/2019/aug/15/400-years-since-slavery-timeline> [<https://perma.cc/3GTE-68KJ>].

7. See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/598H-SQUL>] (discussing reparations paid by Massachusetts to a child kidnapped in what is now Ghana and sold into slavery).

8. See Roy L. Brooks, *Getting Reparations for Slavery Right: A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 260–67 (2004) (summarizing the history of slavery in the U.S. from before the Civil War until World War II).

Lincoln's successor (Andrew Johnson) reversed the Order and, instead, required that any confiscated land be returned to former slave-holding owners.<sup>9</sup>

### B. *The Current Reparations Debate*

1. *Generally.*—For the last several decades, Black plaintiffs have demanded reparations payments from a range of people and entities (including the United States, the descendants of slave holders, and businesses) that unjustly profited from slavery. Except in rare exceptions,<sup>10</sup> reparations opponents agree with the congressional acknowledgement that Africans were brutalized, humiliated, and dehumanized by slavery. Likewise, few opponents dispute that post-Civil War de jure racial segregation, i.e., the Jim Crow regime, was “engendered by slavery” and designed to “create separate and unequal societies” for whites and Blacks.<sup>11</sup>

While they recognize the brutality of slavery, reparations opponents argue that group-based relief (like the Emancipation Proclamation, the Civil War, post-Civil War legislation, and the short-lived Freedmen's Bureau) were slavery reparations.<sup>12</sup> They further contend that 1960s civil rights

9. While enslaved Blacks never received reparations for their unpaid labor, the federal government made payments to some *slaveholders* in the District of Columbia who were Union loyalists because they were deprived of the unpaid labor of “their” now-freed Blacks. See Tera W. Hunter, *When Slaveowners Got Reparations*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/opinion/when-slaveowners-got-reparations.html> [<https://perma.cc/FTU7-S96L>] (“An overwhelming majority of white people believed that slaveowners, not enslaved African-Americans, deserved recompense for the benevolence of manumission.”). England and France also paid reparations to slaveholders. *Id.* And one British university maintains a reparations database that chronicles the “merchants, firms and financial institutions receiving slave compensation, and their use of slave-derived wealth in investments in Britain.” *Legacies of British Slave-ownership*, UCL DEP'T OF HISTORY, <https://www.ucl.ac.uk/lbs/legacies/> [<https://perma.cc/H3M9-MCU4>].

10. Some reparations opponents actually question whether slavery was bad since slaveholders fed and housed enslaved Blacks and the alternative (to being enslaved) for the Africans may have been worse. See Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283, 287–92 (2008) (describing conservative, revisionist accounts of slavery); Michael A. Lawrence, *Racial Justice Demands Truth & Reconciliation*, 80 U. PITT. L. REV. 69, 93–94 (2018) (same); see also Coates, *supra* note 7 (discussing a newspaper article that argues that formerly enslaved Blacks were owed nothing because they were “taught Christian civilization” and taught how “to speak the noble English language instead of some African gibberish”).

11. H.R. Res. 194, 110th Cong. (2008).

12. Historians note that post-Civil War “reparations” were not meant to redress slavery and, instead, were enacted to respond to the informal “black codes” Southern states imposed *after* the Civil War to allow whites to continue to control and exploit freed-men by preventing them from buying land and forcing them to continue working on plantations for low wages. See, e.g., CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* 15–20 (2016) (discussing congressional response to the Black Codes, including the creation of the Freedmen's Bureau and the passage of post-Civil War legislation); Lawrence, *supra* note 10, at 84–86 (same).

legislation, affirmative-action plans, the removal of the names of slavery supporters and Confederate leaders from streets and buildings, and the renaming of streets or facilities for Black historical figures should also be viewed as reparations.<sup>13</sup> Opponents worry that awarding slavery reparations will somehow stigmatize “innocent”<sup>14</sup> whites whose ancestors did not live in the United States before the Civil War or whose ancestors actively opposed slavery, and they question why only U.S. entities (but not Africans who sold fellow Africans to white slave traders) should be forced to pay reparations.<sup>15</sup>

The overall undercurrent in reparations debates appears to be the assumption that Black Americans who are demanding reparations are simply unwilling to admit that they are to blame for their current social or financial circumstances and that those circumstances are unrelated to the enslavement of their ancestors.<sup>16</sup> In addition, Blacks who demand money from people or organizations who were not directly involved with slavery are often deemed morally unworthy just as some morally blameless victims (including those who received 9-11 compensation payments) have been viewed as greedy and undeserving for demanding, then accepting, compensation from entities that did not directly injure them.<sup>17</sup>

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13. Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1189 (2004) (“[U]nless someone comes up with a convincing explanation of why all the positives since 1954 should be disregarded, the claims for reparations will stall on the obvious ground that many political steps have already been taken in that direction.”); see also Brophy, *supra* note 2, at 825–26 (describing arguments that reparations already have been paid); Thomas Craemer, *International Reparations for Slavery and the Slave Trade*, 49 J. BLACK STUD. 694, 705 (2018) (reviewing proposed and enacted international reparations measures).

14. For example, critics question why lower income descendants of poor whites should pay reparations since their ancestors received no financial benefits from slavery. See Epstein, *supra* note 13, at 1188 (suggesting that the descendants of Civil War soldiers who died in the war “could think that they have paid reparations in blood and do not wish to go further”); David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1384 (2004) (“[W]hile we can safely assume that some whites reaped considerable benefits from slavery and Jim Crow, we cannot reasonably infer that those systems served all European-Americans well. We therefore cannot assume that all European-Americans owe restitution for advantages derived from the institutionalization of white supremacy.”). *But cf.* Brooks, *supra* note 8, at 280 (“Whiteness in the main is an asset in this country, not a liability. Those who have it benefit from it, both in terms of the psychology of slavery and the socioeconomics of slavery. Racial fault lines laid down during slavery continue to give whites racial advantages.”).

15. See Kaimipono David Wenger, “*Too Big to Remedy?*” *Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOY. L.A. L. REV. 177, 214–15 (2010) (arguing that reparations payments should not be avoided simply because of the multiracial complexity of the slave trade).

16. See David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043, 1075 (2010) (discussing how reparations programs are “vulnerable to arguments that any potential beneficiary’s contemporary material conditions are the consequence of mistakes and failures of his or her forebears”).

17. See Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 291 (2003) (observing that morally innocent victims are deemed deserving of compensation but become morally stained once they accept compensation and

2. *The Judicial Landscape*.—The claims raised in reparations lawsuits are generally based in tort or on theories of unjust enrichment.<sup>18</sup> Specifically, plaintiffs maintain that slaveholders (and derivatively their descendants) and others (including the tobacco and cotton industries as well as banks and insurance companies) who profited from the unpaid labor of enslaved Blacks should be forced to pay for those benefits. Defendants generally respond to these demands by arguing that plaintiffs lack standing to file the claims, that the claims are barred by the statute of limitations or (in the case of the United States) by sovereign immunity, and that damage calculations are wildly speculative.<sup>19</sup>

*In re African-American Slave Descendants Litigation*<sup>20</sup> is representative of the types of claims and defenses raised in most slavery-reparations lawsuits. The plaintiffs in that case sought monetary and injunctive relief on behalf of the descendants of formerly enslaved Africans and all currently living formerly enslaved Blacks. The lawsuit named as defendants eighteen companies whose predecessors either financed the slave trade, insured slave owners, enslaved Africans, or otherwise unjustly earned profits from slavery.

The court's opinion concedes that slavery was immoral and that inexpensive slave labor increased the production and profitability of the defendants' businesses from 1780 to 1810. Nonetheless, the court (like others) dismissed the lawsuit for lack of standing and found that the plaintiffs failed to prove they suffered injuries sufficient to satisfy Article III's case-or-controversy requirement.<sup>21</sup> The court specifically held that the claims were barred by the statute of limitations<sup>22</sup> and argued that the claims were "generalized" grievances rather than personal disputes.<sup>23</sup> Finally, the court

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become the "recipients of public funds, a category that is, in the American context, one of degradation and suspicion").

18. See Andrew Kull, *Restitution in Favor of Former Slaves*, 84 B.U. L. REV. 1277, 1278–80 (2004) (characterizing the forms of nineteenth-century restitution claims, such as assault and battery, false imprisonment, claims in *indebitatus assumpsit*, and claims in equity); Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443, 1454 (2004) (arguing that reparations claims should be made as claims for compensation, as opposed to claims of unjust enrichment).

19. See ALFRED L. BROPHY, *REPARATIONS: PRO & CON* 20 (2006) (chronicling slave reparations cases); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 433–35 (1998) (same).

20. 304 F. Supp. 2d 1027 (N.D. Ill. 2004).

21. *Id.* at 1051–52.

22. The court totally disregarded the social and economic realities Blacks faced during Reconstruction and blithely asserted that the plaintiffs were barred from relief because their enslaved ancestors failed to sue for reparations but "knew of their injury at the time that it occurred[,] . . . knew, or should have known that they were wrongfully being forced to work without compensation, and [knew] that somebody was making a profit from their labor." *Id.* at 1074.

23. *Id.* at 1049.

opined that it lacked the authority “to say that more could have been done in the past” and that such a determination must be made by the Legislative Branch.<sup>24</sup>

3. *The Political Landscape: Congress.*—Although Congress has apologized for slavery, it has never voted on a reparations bill (H.R. 40) that former Representative John Conyers introduced in every congressional session from 1989 until his retirement.<sup>25</sup> H.R. 40 does not mandate individual cash payments or group-based relief. Instead, it requires Congress to establish a bipartisan commission to study slavery and the impact it and Jim Crow laws have had on freed Blacks and their descendants. The bill also requires an examination of how federal and state governments supported slavery.<sup>26</sup>

Many political leaders oppose H.R. 40 and other reparations proposals, particularly if they include cash payments, for a temporal reason: slavery is over.<sup>27</sup> They also argue that giving money to Blacks who were never enslaved or penalizing whites who never owned slaves is unjust, *particularly* if “undeserving” Blacks (like Oprah), immigrants, or Blacks who cannot prove they are the descendants of slaves are eligible for payments.<sup>28</sup>

4. *The Political Landscape: The Court of Public Opinion.*—Reparation payments are not popular in public-opinion polls. A 1997 ABC poll found that 77% of respondents felt the U.S. should *not* pay reparations<sup>29</sup> and, 15 years later, a 2002 Gallup survey showed even less overall support for reparations (81% opposed). Whites overall oppose cash payments, and, until

24. *Id.* at 1060.

25. Sheryl Gay Stolberg, *At Historic Hearing, House Panel Explores Reparations*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html> [<https://perma.cc/MNB9-4UY8>]. After Conyers retired, Rep. Shelia Jackson-Lee reintroduced the bill and a subcommittee of the U.S. House of Representatives Judiciary Committee held a hearing on reparations in 2019. *Id.*

26. Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R.J. Res. 40, § 3, 116th Cong. (2019).

27. For example, Senator Lindsey Graham, the chair of the Senate Judiciary Committee, believes reparations are inappropriate because “it’s too remote in time” and “too divisive.” Igor Bobic, *Republicans Pan Democratic Proposal to Study Reparations*, HUFFPOST (Apr. 11, 2019, 11:57 AM), [https://www.huffpost.com/entry/reparations-slaves-2020\\_n\\_5caf5587e4b09a1eabf8d7dc?d3d](https://www.huffpost.com/entry/reparations-slaves-2020_n_5caf5587e4b09a1eabf8d7dc?d3d) [<https://perma.cc/6AKS-J9AU>].

28. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 720–23 (2003). An activist group, the American Descendants of Slavery (ADOS), also argues that Blacks whose ancestors voluntarily came to this country should not receive reparations or benefit from affirmative action policies. *Black Agenda*, AM. DESCENDANTS OF SLAVERY, <https://ados101.com/black-agenda> [<https://perma.cc/7S8K-8N37>]. ADOS likewise believes governmental agencies and businesses who receive governmental support should be required to provide hiring and employment data about the number of descendants of slaves, not simply the “minorities,” they employ. *Id.*

29. Melissa R. Michelson, *The Black Reparations Movement: Public Opinion and Congressional Policy Making*, J. BLACK STUDS., 574, 578 (2002).

recently, even support for reparations among Blacks was almost evenly split.<sup>30</sup> While a recent 2019 AP-NORC Center for Public Affairs Research poll found slightly more overall support (approximately 29%) for cash reparation payments, support among Blacks soared (to 74%). Despite strong support by Blacks, less than half (44%) of Latinos in this country favor reparations and reparations are supported by only 15% of whites.<sup>31</sup>

5. *Voluntary Efforts.*—While most whites do not support paying slavery reparations and the federal government and private businesses have taken aggressive defensive positions in reparations lawsuits, some private groups and nonprofit institutions have been less hostile to the concept of slavery reparations. For example, Georgetown University undergraduate students recently voted to impose a mandatory fee to fund an account for the descendants of Blacks who had been enslaved at Georgetown.<sup>32</sup> Similarly, religious colleges and organizations have allocated funds to provide financial support for former students or worshipers who experienced discrimination at their institutions, have awarded scholarships to help the descendants of enslaved Blacks attend their institutions, or have funded slavery-reparations projects.<sup>33</sup> Finally, over fifty universities have joined the Universities Studying Slavery consortium to create research collaborations that address “both historical and contemporary issues dealing with race and inequality in higher education and in university communities as well as the complicated legacies of slavery in modern American society.”<sup>34</sup>

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30. Mohamed Younis, *As Redress for Slavery, Americans Oppose Cash Reparations*, GALLUP (July 29, 2019), <https://news.gallup.com/poll/261722/redress-slavery-americans-oppose-cash-reparations.aspx> [<https://perma.cc/CHN4-XH6Q>].

31. *The Legacy of Slavery*, ASSOCIATED PRESS-NORC CTR. FOR PUB. AFFAIRS RESEARCH, <http://www.apnorc.org/projects/Pages/The-Legacy-of-Slavery.aspx> [<https://perma.cc/B9EQ-4K4S>].

32. Martin Pengelly, *Georgetown Students Vote to Pay Reparations for Slaves Sold by University*, GUARDIAN (Apr. 15, 2019), <https://www.theguardian.com/world/2019/apr/15/georgetown-students-reparations-vote-slaves-sold-by-university> [<https://perma.cc/76BN-6Q7P>].

33. For examples, see Episcopal Diocese of Texas, *Texas Diocese Announces \$13 Million Commitment to Fund Racial Justice Projects*, EPISCOPAL NEWS SERV. (Feb. 12, 2020), <https://www.episcopalnewsservice.org/pressreleases/texas-diocese-announces-13-million-commitment-to-fund-racial-justice-projects/> [<https://perma.cc/CVD2-FWYD>]; Ed Shanahan, *\$27 Million for Reparations Over Slave Ties Pledged by Seminary*, N.Y. TIMES (Oct. 21, 2019), <https://www.nytimes.com/2019/10/21/nyregion/princeton-seminary-slavery-reparations.html> [<https://perma.cc/KS4U-S7HC>]; and Rachel L. Swarns, *The Seminary Flourished on Slave Labor. Now It's Planning to Pay Reparations.*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/12/us/virginia-seminary-reparations.html> [<https://perma.cc/UB2N-ZTRN>]. As the writer Ta-Nehisi Coates has noted, religious leaders have offered reparations to their formerly enslaved Blacks since the 1700s. Coates, *supra* note 7.

34. *Universities Studying Slavery (USS)—The Birth of a Movement*, PRESIDENT’S COMM’N ON SLAVERY AND THE UNIV., <https://slavery.virginia.edu/universities-studying-slavery-uss-the-birth-of-a-movement/> [<https://perma.cc/Z8L4-95ZM>].

## II. Non-Slave Reparations Programs

To explain why the United States is long overdue for a reckoning for its role in supporting slavery and the racist Jim Crow regime, slavery-reparations supporters often point to other programs that gave victims reparations for atrocities or indignities conducted (or condoned) by a government.<sup>35</sup> These programs include ones that made reparations to victims of the Holocaust or other World War II abuses and the South African reconciliation process.<sup>36</sup>

### A. *World War II: Germany*

Because genocide was not illegal until the conclusion of the Nuremberg trials in 1946, West Germany had no legal duty to acknowledge that it engaged in misconduct by helping cause the deaths of approximately 6,000,000 Jews. Nonetheless, the country apologized for participating in the extermination of Jews and other Holocaust victims and regarded it as its duty to make good “the wrong done to the Jews in their name by a criminal regime.”<sup>37</sup> Although most Holocaust victims received modest compensation, those payments were coupled with an apology and other reconciliation projects that were designed to signal Germany’s remorse for Nazi atrocities.<sup>38</sup>

Despite mild public support for reparations payments (originally, only 30% of Germans supported reparations), West Germany made a series of payments—some as high as \$7 billion (in 2014 U.S. dollars). Germany awarded reparations to both individual victims who were forced into slave labor and to the nation of Israel<sup>39</sup> for the costs it incurred to resettle displaced Germans.<sup>40</sup> Germany also agreed to pay restitution for property stolen from

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35. For a comprehensive list of reparations programs or proposals in this country, see Brophy, *supra* note 2, at 820–22 tbl.2.

36. See Brooks, *supra* note 8, at 254, 271 (“Providing reparations is merely one way in which the perpetrator of an atrocity can provide redress. It is not the only way.”).

37. Michael Brecher, *Images, Process and Feedback in Foreign Policy: Israel’s Decisions on German Reparations*, 67 AM. POL. SCI. REV. 73, 86 (1973). While Germany has also apologized for its role in the deaths of people from what is now Namibia, it disputes that it is liable for their deaths and has refused to make reparations payments. Allan D. Cooper, *Reparations for the Herero Genocide: Defining the Limits of International Litigation*, 106 AFR. AFF. 113, 117 (2007).

38. France has also admitted responsibility for delivering Jews to the Nazis and issued a 3,000 page report that described the “various types of spoliations suffered by Jews in France between 1940 and 1944.” *Freund v. Republic of France*, 592 F. Supp. 2d 540, 547 (S.D.N.Y. 2008). Similarly, Japan paid reparations to women and girls who were forced into sexual enslavement and prostitution during World War II. Japan’s then-Chief Cabinet Secretary also issued a formal apology for the role Japan played in their abduction, recruitment, and treatment. *He Nam You v. Japan*, 150 F. Supp. 3d 1140, 1147 (N.D. Cal. 2015); see also Morris A. Ratner, *The Settlement of Nazi-era Litigation Through the Executive and Judicial Branches*, 20 BERKELEY J. INT’L L. 212, 224–30 (2002) (discussing resolution of claims brought by victims of Nazi persecution against European entities).

39. Coates, *supra* note 7.

40. Craemer, *supra* note 13, at 695–96.



Jews and it endowed a foundation (of over \$7.4 billion in 2019 U.S. dollars) using profits German companies earned as a result of unpaid slave labor.<sup>41</sup>

*B. World War II: United States*

The United States agreed to provide compensation for holding approximately 125,000 people of Japanese descent,<sup>42</sup> including some American citizens, in concentration camps during World War II. The internments, authorized by an executive order that President Franklin Delano Roosevelt signed, were based on unfounded suspicions that the internees might conspire against the United States. Congress commissioned a study to examine the internment and consider potential compensation to the victims and ultimately passed the Civil Liberties Act of 1988. This Act required the U.S. to provide monetary payments (lost wages and property losses) as well as nonmonetary individual (an apology and presidential pardon) and group (educational programs and a monument) reparations.<sup>43</sup> Approximately 80,000 survivors ultimately received individual payments of \$20,000 (in 1990) for a total of approximately \$1.6 billion.<sup>44</sup>

*C. Native Americans*

Partially because Hitler invoked the way Native Americans were treated in the United States to justify his invasion of Czechoslovakia and Poland, the United States created the Indian Claims Commission (ICC) and tasked it with addressing a wide range of grievances that tribes and individual members had against the United States and its citizens.<sup>45</sup> Though partially designed to encourage Native Americans to “assimilate fully into the dominant culture,” the ICC reparations program ultimately helped resolve claims involving a range of infractions, including the taking of Native American land and treaty violations.<sup>46</sup>

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41. *Id.* at 696.

42. Frank H. Wu, *FDR New Deal Legacy Intact, but Internment of Japanese-Americans Lives in Infamy Too*, U.S. NEWS & WORLD REP. (Feb. 19, 2009), <https://www.usnews.com/opinion/articles/2009/02/19/fdr-new-deal-legacy-intact-but-internment-of-japanese-americans-lives-in-infamy-too> [<https://perma.cc/AJE7-RN6Y>].

43. Brooks, *supra* note 8, at 271–72.

44. Matt Ford, *The Case for Migrant Reparations*, NEW REPUBLIC (Aug. 1, 2018), <https://newrepublic.com/article/150348/case-migrant-reparations> [<https://perma.cc/4KQZ-C954>]. The United States also paid reparations of \$12,000 each to approximately 450 living Alaskan Aleuts who also were deported to camps during World War II. 1988: *U.S. Pays Restitution; Apologizes to Unangan (Aleut) for WWII Internment*, NAT'L LIBRARY OF MED.: NATIVE VOICES, <https://www.nlm.nih.gov/nativevoices/timeline/635.html> [<https://perma.cc/9NG9-EC7M>].

45. Nell Jessup Newton, *Compensation, Reparations & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 468 (1994).

46. The complexity of the claims dispute resolution process, the limitation of liability caps placed on claims, and the aggressive defensive posture of the United States caused some to view

#### D. *South African Reconciliation*

After its brutal apartheid regime ended, South Africa created a Truth and Reconciliation Commission (TRC) to foster national unity and reconciliation. While victims ultimately received individual payments, the TRC was not created to administer monetary reparations, and, as a result, it predominately provided nonmonetary reparations. For example, black South Africans were allowed to question white apartheid leaders—something that had never occurred in South Africa’s history. In addition, whites were forced to listen to black South Africans describe the brutalities of the apartheid regime, and the TRC gave white ex-leaders the opportunity to admit their involvement in apartheid-related abuses.<sup>47</sup>

### III. Complex Litigation: Remedies and Reparations Models

While judges, some members of Congress, and the majority of white Americans may oppose slavery reparations, it is a red herring to suggest that it is impossible to design a slave-reparations system. The “impossibility” argument is disingenuous because courts, special masters, and lawyers routinely evaluate and resolve claims in complex disputes involving multiple parties who are injured by an often indeterminate number of wrongdoers. If this country shows the political will to award reparations and all parties are willing to focus less on precise line drawing and more on broad standardized criteria, the United States could design and administer a reparations system that awards both individual and group relief quickly, efficiently, and transparently.

#### A. *Toxic Torts and Environmental Pollution*

For several decades, Vietnam veterans sued the manufacturers who supplied Agent Orange (a herbicide) to the United States Armed Forces. During the Vietnam War, military aircraft sprayed Agent Orange to destroy the foliage enemy forces used to conceal themselves from U.S. troops. The veterans alleged that the manufacturers negligently delivered a toxic substance (dioxin) in Agent Orange when they delivered the herbicide to the United States.<sup>48</sup> As part of a class action lawsuit, the judge (Weinstein) assigned to the litigation was required to oversee a fund (the Agent Orange Settlement Fund) that distributed approximately \$330 million to veterans and their families.<sup>49</sup>

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the ICC process as a failure even though some tribes received payments they then distributed to their members. *Id.* at 469.

47. Sisonke Msimang, *All Is Not Forgiven: South Africa and the Scars of Apartheid*, FOREIGN AFF., Jan.–Feb. 2018, at 30–31.

48. *In re “Agent Orange” Prod. Liab. Litig.*, 304 F. Supp. 2d 404, 415 (E.D.N.Y. 2004).

49. *Id.* at 418.

In discussing which victims would be compensated for injuries caused by exposure to Agent Orange, Judge Weinstein observed that structuring compensation was complicated because the case involved a large group of claimants and an indeterminate number of potential defendants in a world that lacked “the archetypical smoking gun.”<sup>50</sup> Recognizing the impossibility of precise line drawing, Weinstein drew arguably arbitrary lines then determined liability and damages using his “common sense and experience with the real universe” after making “the best estimates of probability . . . using the help of experts such as statisticians.”<sup>51</sup>

Weinstein’s approach is not aberrational as courts also have drawn arbitrary lines in environmental cases involving economic harm. For example, the plaintiffs in *Pruitt v. Allied Chem. Corp.*<sup>52</sup> sued a chemical company that polluted open waters and killed marine life. The plaintiffs claimed as damages lost profits from their inability to sell seafood to others. Because claimants consisted of a wide range of groups that included commercial fishermen, inland restaurants, and tackle shops, the trial judge was forced to draw lines to determine which plaintiffs suffered indirect (and noncompensable) harm and which suffered direct (compensable) harm. The *Pruitt* court conceded that it struggled to “find a principled basis for its decision” because the wrongdoer’s harms “were borne most directly by the wildlife of the Chesapeake Bay” and admitted that it found “itself with a perceived need to limit liability, without any articulable reason for excluding any particular set of plaintiffs.”<sup>53</sup>

Although the court understood that any liability limitation might require drawing an arbitrary line, it understood that declaring that it was impossible to award relief to *any* claimant would be an unjust windfall for the defendant.<sup>54</sup> The *Pruitt* court ultimately drew a line at the shoreline, holding that the plaintiffs whose businesses operated primarily on the water (commercial fishermen, boat, tackle and bait shop owners, and marina owners) could recover damages while businesses who operated primarily on land (wholesalers, retailers, distributors and processors, restaurateurs) could not.<sup>55</sup>

#### B. 9-11

Immediately after the 9-11 terrorist attacks, Congress passed the Air Transportation Safety and System Stabilization Act (the “Act”). The Act

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50. *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 838 (E.D.N.Y. 1984).

51. *Id.*

52. 523 F. Supp. 975 (E.D. Va. 1981).

53. *Id.* at 976–80.

54. *Id.* at 980.

55. *Id.*

primarily was designed to ensure the long-term financial security of the airline-transportation industry, New York City, and entities with a property interest in the World Trade Center (WTC). The Act protected these entities by essentially limiting the liability they faced because of their actions/inactions involving the attacks. The Act also created the September 11th Victim Compensation Fund of 2001 (VCF), which was designed to globally resolve the claims of people (or heirs) harmed by, during, or immediately after the terrorist attacks.

Congress recognized the precedent it set by creating a compensation fund that provided cash compensation for some (but not all) injured people for wrongful acts committed by entities other than the federal government. The 9-11 claims resolution process was a rare and extraordinary moment in this nation's history because it combined political action (the Act), judicial action (limits of liability), and administrative proceedings (the VCF claims process) to create a dispute-resolution process that required the United States to provide quick, certain, and efficient compensation for people harmed by a terrorist attack.<sup>56</sup>

The U.S. Attorney General appointed Special Master Kenneth R. Feinberg (who received no compensation for his work)<sup>57</sup> to administer the VCF and gave him wide discretion to design virtually all aspects of the compensation program, including which claimants would be compensated and how damages would be measured.<sup>58</sup> Congress selected Feinberg because he had previously administered billions of dollars to victims and survivors of

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56. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001). The VCF was financed by the airline industry and federal appropriations. Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences With the 9/11 Victim Compensation Fund*, 42 L. & SOC'Y REV. 645, 649-51 (2008).

57. While Feinberg was not compensated, his firm received \$404,000 for "cost" reimbursement, KENNETH R. FEINBERG, WHAT IS LIFE WORTH?, Appendix, p. 204, and PricewaterhouseCoopers (the firm selected to administer claims processing and payment procedures) received \$77 million. Hadfield, *supra* note 56, at 650-51.

58. Feinberg narrowly defined "claimant" to essentially include only (1) people killed or physically harmed on the airplanes or in the World Trade Center, the Pentagon, or Shanksville, Pennsylvania, and (2) rescue workers in the NYC disaster area. U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 19 (2004), available at <https://securitypolicy.syr.edu/wp-content/uploads/2012/09/Special-Masters-Final-Report.pdf> [<https://perma.cc/28U2-PLF3>]. People who lost their jobs because of the attacks or who were emotionally traumatized by 9-11 were not compensated through the VCF. Moreover, over the objection of the survivors of some highly compensated victims, Feinberg reduced what he viewed as abnormally high claims to ensure "that fifteen percent of the eligible claimants did not receive eighty-five percent of the taxpayers' money." Kenneth R. Feinberg, *Speech: Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation*, 19 WASH. U. J. L. & POL'Y 21, 23 (2005).

many of America's most prominent disasters, mass torts, and national tragedies.<sup>59</sup>

Feinberg understood that he was tasked to design a simple, nonadversarial, and transparent process that widely advertised eligibility requirements, explained how claims would be valued, and encouraged as many victims as possible to forego litigation.<sup>60</sup> Feinberg could quickly process claims<sup>61</sup> largely because of the wide discretion Congress gave him to define the parameters of compensation (who could receive and in what amount).<sup>62</sup> Feinberg could also move quickly because he knew Congress did not intend to fully compensate everyone who may have been harmed by the attack.<sup>63</sup> Finally, Feinberg could create an efficient and largely nonadversarial claims resolution process because claimants were not required to prove (and he could not consider) which entity was legally liable for the harm.

While Feinberg believed he designed a transparent process that globally and equitably resolved as many claims as possible,<sup>64</sup> some victims bitterly criticized him for the design choices he made. For example, victims with injuries that excluded them from being deemed a "claimant" criticized the lines Feinberg drew to determine which victims affected by the 9-11 attacks

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59. Feinberg administered the Hokie Spirit Memorial Fund (created to compensate victims at the Virginia Tech mass shooting), the Aurora Victim Compensation Fund (created to compensate victims at a mass shooting in a movie theater in Aurora, Colorado), and he briefly administered the \$20 billion Gulf Spill Independent Claims Fund (created after the Deepwater Horizon oil spill). He also participated in claims compensation programs involving the Sandy Hook school shooting and the Boston marathon bombing. Ashish Joshi, *An Interview with Kenneth R. Feinberg*, 44 LITIG., Spring 2018, at 49.

60. Feinberg concluded that the "recipe for success" for the VCF was massive outreach efforts to families (including foreign claimants and undocumented workers) and making himself available to give families the opportunity to be heard. Feinberg, *supra* note 58, at 27; *see also* U.S. DEP'T OF JUSTICE, *supra* note 58, at 14–15 (highlighting several different outreach vehicles used to publicize the VCF).

61. The VCF was required to review claims within 120 days and give claimants tax-free compensation within twenty days after the completion of the review, though the process often was delayed. Victims of Terrorism Tax Relief Act, Pub. L. No. 107–134, § 111, 115 Stat. 2427, 2432 (2002) (exempting relief payments from tax); U.S. DEP'T OF JUSTICE, *supra* note 58, at 4 (laying out the timeframe).

62. In Feinberg's view, Congress granted him wide discretion because they did "not know what [they were] getting into" and wanted to "[m]ake sure that [the VCF] work[ed]." Feinberg, *supra* note 58, at 23.

63. For example, the Act prohibited Feinberg from awarding punitive damages, even if that remedy was allowed by applicable substantive law. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107–42, § 405(5), 115 Stat. 230, 239 (2001).

64. Feinberg sought to "make very generous payments" and let families "know that there are no tricks, and that there is nothing hidden here." Feinberg, *supra* note 58, at 27; *see also* U.S. DEP'T OF JUSTICE, *supra* note 58, at 14 (stating that it was essential for eligible claimants to become familiarized with the benefits of the program). Feinberg's approach was similar to the one Judge Weinstein used in the Agent Orange litigation, which is not surprising as Feinberg administered the initial Agent Orange compensation fund. Joshi, *supra* note 59, at 49.

would receive compensation from the VCF.<sup>65</sup> In addition, victims questioned his decision to pay uniform pain-and-suffering damages, as opposed to calculating damages on an individualized basis.<sup>66</sup> Claimants also complained that Feinberg's settlement and negotiation tactics deprived them of their "day in court" and prevented them from punishing the wrongdoers face-to-face.<sup>67</sup> Despite these criticisms, Feinberg ultimately approved and paid over 5,500 claims and awarded over \$7 billion.<sup>68</sup> Almost all (approximately 97%) victims received compensation through the Act's claims-resolution process.<sup>69</sup>

### C. *Data Breach*

Equifax collects and compiles financial information about consumers, then includes that information in credit reports it supplies to authorized financial institutions and businesses. In September of 2017, Equifax announced a data breach that exposed the personal information (including names, Social Security numbers, birth dates, addresses, driver's license numbers, and credit card numbers) of 147 million people.<sup>70</sup> After individuals,

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65. Congress subsequently passed the James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, § 3301, 124 Stat. 3623, 3625 (2011), to provide compensation for additional first responders and people who lived near Ground Zero and were excluded by Feinberg's narrow definition of "claimant." Likewise, Congress later created the WTC Health Program to provide medical monitoring and additional medical treatment for first responders and others who were harmed by 9-11 but were not entitled to receive compensation from the VCF. *World Trade Center Health Program*, BENEFITS.GOV, <https://www.benefits.gov/benefit/6181> [<https://perma.cc/L7QW-7VXX>].

66. Feinberg, *supra* note 58, at 23. Feinberg stated that he was "not Solomon—everybody eligible will get \$250,000 for the death of the victim and \$100,000 for each surviving spouse and dependent." *Id.*

67. Feinberg convinced victims to file claims by the two-year deadline by emphasizing the lack of legal fees, the relative lack of delays, and an efficient process with few uncertainties once the claimant was deemed to have a valid claim. *See* U.S. DEP'T OF JUSTICE, *supra* note 58, at 10–11 (detailing the elements of the VCF which made it preferable to litigation). Because only one claim could be made for each person killed or injured in the attack, Feinberg often used mediation to determine whether the appropriate claimant should be a current (or former) spouse (or fiancé or same-sex partner), sibling, or child (or grandchild). *See id.* at 7 (explaining the Special Master's need for a methodology for granting awards). Some victims felt they had no choice but to waive their right to sue because they did not have insurance coverage or savings to pay for medical expenses or to make up for the loss of income from a spouse, parent, or child. Victims also stated they felt pressured to accept compensation from the VCF because the Act's limitation-of-liability caps discouraged private lawyers from representing them. Hadfield, *supra* note 56, at 663–69.

68. U.S. DEP'T OF JUSTICE, *supra* note 58, at 1.

69. Hadfield, *supra* note 56, at 665. The average payout was about \$2 million with paid-death claims that ranged from \$500,000 to \$7.1 million and personal injury claims that ranged from \$500 to approximately \$8.7 million. Feinberg, *supra* note 58, at 22. The average award in cases settled in litigation, however, was approximately double the average VCF payment. Benjamin Weiser, *Value of Suing Over 9/11 Deaths Is Still Unsettled*, N.Y. TIMES (Mar. 12, 2009), <https://www.nytimes.com/2009/03/13/nyregion/13lawsuits.html> [<https://perma.cc/CH56-MD9B>].

70. *Equifax Data Breach Settlement*, FED. TRADE COMM'N. (Jan. 2020), <https://www.ftc.gov/enforcement/cases-proceedings/refunds/equifax-data-breach-settlement> [<https://perma.cc/Y36T-FZAJ>].

states, municipalities, credit unions, and federal agencies filed suit, Equifax reached a global settlement that includes up to \$425 million to remedy the harm of the data breach.<sup>71</sup>

The Equifax settlement involved both monetary and nonmonetary compensation. Specifically, all affected persons could choose to receive free credit monitoring (for at least four years) or an individual cash payment (up to \$125).<sup>72</sup> People who could prove identity theft or fraud could also be compensated for (1) up to 20 hours (at the rate of \$25/hour) for the time they spent redressing the misuse of their personal information, and (2) any out-of-pocket losses (including paying for credit-monitoring products) the data breach caused.<sup>73</sup>

#### IV. Crafting Slavery Reparations

The approaches courts, special masters, and class action lawyers have used to construct compensation models in complex disputes refute claims that it is impossible to construct a slavery-reparations system that includes both a compensatory function (for individuals or on a group-wide basis) and a rehabilitative function (that could include group nonmonetary compensation).<sup>74</sup> Although most whites opposed a cost-free national apology for slavery,<sup>75</sup> the U.S. Senate's slavery apology calls "on all people of the United States to work toward eliminating racial prejudices, injustices, and discrimination from our society."<sup>76</sup>

Slave reparations would be unprecedented in this country, but the compensation 9-11 victims received was also unprecedented. Those payments—like reparations—were justified because, as Feinberg (the VCF special master) observed, 9-11 was unlike any other recent national tragedy including the 1993 World Trade Center and 1995 Oklahoma City bombings.

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71. *Id.*

72. *FTC Encourages Consumers to Opt for Free Credit Monitoring, as Part of Equifax Settlement*, FED. TRADE COMM'N. (July 31, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-encourages-consumers-opt-free-credit-monitoring-part-equifax> [<https://perma.cc/S7SB-QLWK>]. Class members who chose the cash compensation will likely receive less than \$125 because Equifax significantly underestimated the cost for this option. *Id.* The FTC webpage values the free credit monitoring offer at "hundreds of dollars a year" and advises that "the free credit monitoring is worth a lot more" than the \$125 cash payout. Robert Schoshinski, *Equifax Data Breach: Pick Free Credit Monitoring*, FED. TRADE COMM'N.: CONSUMER INFO. BLOG (July 31, 2019), <https://www.consumer.ftc.gov/blog/2019/07/equifax-data-breach-pick-free-credit-monitoring> [<https://perma.cc/95M5-BDYH>].

73. EQUIFAX DATA BREACH SETTLEMENT, <https://www.equifaxbreachsettlement.com/> [<https://perma.cc/3XWX-3RTN>].

74. Brooks, *supra* note 8, at 270.

75. Ironically, the same poll shows that the percentage of Latinos (64%) that *support* a slavery apology is the same as the percentage of whites who oppose an apology. Blacks have the highest support for an apology at 77%. *The Legacy of Slavery*, *supra* note 31.

76. S. Con. Res. 26, 111th Cong. (2009).

Feinberg even compared 9-11 to the Civil War, and argued that 9-11 was a unique event that required a unique response that was justified “not by examining the status of the victim but by looking at the nation’s response, the collective will of the people.”<sup>77</sup> The same is true for rehabilitative and compensatory slavery reparations. As the court observed in *In re Slave Descendants*, the United States had the “dubious distinction” of leading the new world in its use of slave labor.<sup>78</sup> That ignominious honor, like the nation’s collective horror on 9-11, supports the unique response of slavery reparations.

Like white South Africans, the descendants of slave holders or the companies that profited from the slave trade could help heal racial wounds by acknowledging that their ancestors (or predecessors-in-interest) caused Blacks to suffer “enormous damage and loss, both tangible and intangible, including . . . the frustration of careers and professional lives, and the long-term loss of income and opportunity.”<sup>79</sup> Similarly, additional apologies could acknowledge (as the House of Representatives did) that Blacks “continue to suffer from the complex interplay between slavery and Jim Crow.”<sup>80</sup> While these apologies might help social healing and reconciliation and reduce current racial resentments and tensions, apologies alone cannot meaningfully redress the harms slavery and Jim Crow continue to impose on Black Americans.

To redress the harmful legacies of slavery and Jim Crow laws, current or future apologies must be part of a broader reparations compensation program. Modeling slavery reparations using the methods special masters and courts have used to resolve complex disputes can (1) remedy the negative lingering effects of slavery and Jim Crow, (2) avoid blaming (innocent) whites for sins they did not commit, and (3) avoid the appearance that the remedy is an affirmative action “handout” to (unworthy) Blacks who cannot prove actual harm.<sup>81</sup>

The remainder of this Essay proposes a reparations format that responds to two ongoing problems that can be traced to slavery and Jim Crow: racial health disparities and the racial wealth-disparity gap. To give claimants some input into the form of reparations that would best help them, this Essay also

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77. Feinberg, *supra* note 58, at 28–29.

78. *In re African-American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1034–35 (N.D. Ill. 2004).

79. H.R. Res. 194, 110th Cong. (2008).

80. For example, the 2008 House resolution states that “it is important for this country, which legally recognized slavery through its Constitution and its laws, to make a formal apology for slavery and for its successor, Jim Crow, so that it can move forward and seek reconciliation, justice, and harmony for all of its citizens.” *Id.*

81. See Alfred L. Brophy, *The Culture War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1201–10 (2004) (recounting how opponents of reparations argue that reparations divide people along racial lines).



suggests ways to let claimants accept either modest individual monetary payments or potentially more generous nonmonetary reparations.

A. *Targeted Group-Based Compensation*

1. *Racial Health Disparities*

a. *Generally.*—Blacks have always been more likely to develop stress-related medical conditions and illnesses associated with unhealthy lifestyles, like hypertension, obesity, diabetes, and kidney failure.<sup>82</sup> In addition, Blacks have shorter overall life expectancies than whites and are nearly twice as likely to die from heart disease, stroke, and diabetes.<sup>83</sup> Furthermore, Black male mortality rates are higher than mortality rates for women of all races and all males except Native Americans.<sup>84</sup> Despite overall reductions in death rates over the last century, these health disparities prevented Blacks from achieving the life expectancy that whites had *in 1950* until 1990.<sup>85</sup>

Like overall mortality rates, maternal mortality rates have precipitously declined (by over 90%) over the last century. But, Black women are still three times as likely to die from preventable pregnancy-related causes as white women.<sup>86</sup> In fact, maternal-mortality rates for Black women exceed rates for white women regardless of income or education level as highlighted by the fact that tennis superstar Serena Williams almost died during childbirth.<sup>87</sup>

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82. Likewise, Black males are less likely to receive medical diagnoses for these chronic (but treatable) conditions. For studies supporting this assertion for a variety of such conditions, see Keon L. Gilbert et al., *Visible and Invisible Trends in Black Men's Health: Pitfalls and Promises for Addressing Racial, Ethnic, and Gender Inequities in Health*, 37 ANN. REV. PUB. HEALTH 295, 299 (2016) and David R. Williams, *Miles to Go Before We Sleep: Racial Inequities in Health*, 53 J. HEALTH & SOC. BEHAV. 279, 280 (2012).

83. Williams, *supra* note 82, at 280.

84. Gilbert et al., *supra* note 82, at 296.

85. Williams, *supra* note 82, at 282.

86. *Pregnancy-Related Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 7, 2019), <https://www.cdc.gov/vitalsigns/maternal-deaths/> [<https://perma.cc/YYZ2-ED75>].

87. See generally Nina Martin et al., *Nothing Protects Black Women from Dying in Pregnancy and Childbirth*, PROPUBLICA (Dec. 7, 2017, 8:00 AM), <https://www.propublica.org/article/nothing-protects-black-women-from-dying-in-pregnancy-and-childbirth> [<https://perma.cc/SJ4V-2CC7>] (detailing how neither education nor income protects Black mothers in pregnancy and childbirth). Because of her death scare, Serena Williams joined an investment group that provided funding for a maternal and infant health-tech company that focuses on ways to end the maternal mortality crisis among Black women. Megan Hernbroth, *This CEO Got \$3 Million from Investors Including Serena Williams' VC Firm to Fix a Problem with Women's Health that Even the Star Tennis Player Has Struggled With*, BUS. INSIDER (July 15, 2019, 7:00 AM), <https://www.businessinsider.com/serena-williams-maternal-health-startup-mahmee-seed-round-2019-7> [<https://perma.cc/2326-EQEL>]; see also Maya Salam, *For Serena Williams, Childbirth Was a Harrowing Ordeal. She's Not Alone.*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/sports/tennis/serena-williams-baby-vogue.html> [<https://perma.cc/HEY6-NFMT>].

Moreover, infant-mortality rates for babies born from Black female *college* graduates are higher than rates for white mothers who did not complete high school.<sup>88</sup>

As is true with Black adults, Black children also have worse health outcomes than white children. One reason they are generally sicker than white children is because they are at a greater risk of being exposed to mold, asbestos, or lead; even a relatively slight exposure to lead can cause or exacerbate asthma. Even though asthma is manageable if families “receive asthma education, understand medications, live in healthy housing, and have a system of coordinated care in place,” Black children continue to suffer from this respiratory disease at rates that are disproportionately high.<sup>89</sup>

Black children have greater exposures to mold, asbestos, and lead because they are more likely to live in older, dilapidated housing and to live in racially and economically segregated neighborhoods that have poor air quality.<sup>90</sup> In addition, recent reports have found that Black families now increasingly live in economically and racially stratified neighborhoods that are often physically hotter (in temperature) than higher income and predominately white neighborhoods.<sup>91</sup>

In addition to being hotter, having worse air quality and other environmental hazards, racially and economically stratified neighborhoods generally have fewer healthy food options and residents in those neighborhoods generally experience “higher levels of acute and chronic

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(discussing both Williams’s near-death experience and overall maternal mortality rates for Black women).

88. Williams, *supra* note 82, at 283; *see also* Vijaya Hogan et al., *Dimensionality and R4P: A Health Equity Framework for Research Planning and Evaluation in African American Populations*, 22 *MATERNAL & CHILD HEALTH J.* 147, 148 (2018) (comparing health outcomes for Black and white mothers). Similar disparities may be observed in the infant-mortality context. In the late ’80s, infant-mortality rates for children of Black mothers with over thirteen years of schooling were higher than infant-mortality rates for children of white mothers with fewer than eight years of schooling. Gopal K. Singh & Stella M. Yu, *Infant Mortality in the United States: Trends, Differentials, and Projections, 1950 through 2010*, 85 *AM. J. PUB. HEALTH*, 957, 960 (1995).

89. Elizabeth R. Woods et al., *Community Asthma Initiative to Improve Health Outcomes and Reduce Disparities Among Children with Asthma*, 65 *MORBIDITY & MORTALITY WKLY. REP.* 11S, 12S (Supp. No. 1 2016), [https://www.cdc.gov/mmwr/volumes/65/su/su6501a4.htm?s\\_cid=su6501a4\\_w](https://www.cdc.gov/mmwr/volumes/65/su/su6501a4.htm?s_cid=su6501a4_w) [<https://perma.cc/SVY6-7UZR>].

90. *Id.*

91. *See* Jeremy S. Hoffman, Vivek Shandas & Nicholas Pendleton, *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, *CLIMATE*, Jan. 13, 2020, at 1, 11, <https://www.mdpi.com/2225-1154/8/1/12/htm> [<https://perma.cc/5ZKR-3JC7>] (finding that formerly redlined neighborhoods were approximately seven degrees Celsius hotter than nonredlined neighborhoods).

stressors.”<sup>92</sup> Moreover, as discussed in more detail below, living in economically stratified neighborhoods also restricts residents’ economic opportunities, which exacerbates racial income and wealth disparities that have existed since slavery.

*b. Documenting Racial Health Disparities: Racial Score Cards.*—Public policy experts consistently conclude that “historical and contemporary racial discrimination created and perpetuates . . . racial inequality in health status.”<sup>93</sup> But, health studies have not conclusively determined whether lifestyle choices, heredity, or environmental factors are the primary drivers of racial health and mortality disparities. Given the paucity of data and research on racial health disparities *particularly* now that data show that COVID-19 disproportionately affects Blacks,<sup>94</sup> one relatively inexpensive group-based slavery reparation would be to require federal and state agencies to provide better record-keeping of known racial health disparities, particularly if the disparities can be traced back to racist practices during slavery or Jim Crow.

For example, the web page for the Centers for Disease Control and Prevention, Office of Minority Health & Health Equity (OMHHE) states that this office issues an annual report on health disparities. Unfortunately, the OMHHE does not consistently issue this report even though doing so could help document the overall causes for higher Black mortality rates (and why Blacks appear to be dying from COVID-19 at disproportionately higher rates). Likewise, the OMHHE does not consistently maintain or regularly update its website. Mandating that this federal entity comply with its duty to issue an annual report and requiring the CDC to keep this website current would give researchers easier access to racial health disparities studies and trends.<sup>95</sup>

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92. Williams, *supra* note 82, at 284.

93. *Id.* at 283. For example, medical research consistently shows that mortality rates for Blacks were higher until civil rights laws in the 1960s banned racially segregated hospitals, and life expectancy for Blacks increased when income gaps narrowed because of antidiscrimination laws in the 1960s. See JANELLE JONES, JOHN SCHMITT & VALERIE WILSON, *ECON. POLICY INST.*, 50 YEARS AFTER THE KERNER COMMISSION, 5 (2018), <https://www.epi.org/files/pdf/142084.pdf> [<https://perma.cc/X2RC-KCVY>] (“African Americans’ life expectancy at birth has also increased substantially (up 11.5 years) between 1968 and today . . .”).

94. John Eligon et al., *Black Americans Face Alarming Rates of Coronavirus Infection in Some States*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/coronavirus-race.html> [<https://perma.cc/2VYC-KR3C>].

95. Navigating this webpage is challenging, which makes it almost impossible to find the annual health disparity reports (the last of which appears to have been issued in 2016). *Strategies for Reducing Health Disparities — Selected CDC-Sponsored Interventions, United States, 2016*, 65 MORBIDITY & MORTALITY WKLY. REP. (Supp. No. 1 2016), <https://www.cdc.gov/mmwr/volumes/65/su/pdfs/su6501.pdf> [<https://perma.cc/WB28-2G6E>].

*c. Equitably Funding Gun Violence Research.*—In addition to better recordkeeping, group-based slavery reparations should also increase funding for scientists, physicians, or academics (of all races) whose research focuses on racial health disparities like deaths by gun violence. For example, death by homicide disproportionately affects Blacks and is the leading cause of death for Black males fifteen to twenty-four and twenty-five to thirty-four years old.<sup>96</sup> In fact, their disproportionately higher homicide rates appear to be a primary reason mortality rates for young Black men far exceed rates for young white men.<sup>97</sup> While not all deaths by homicide are by firearms, gun violence is clustered in nonwhite and lower-income neighborhoods, and the Black death-by-gun homicide rate is more than 10 times higher than the rate for whites. Black men, though only about approximately 7% of the U.S. population, make up 52% of all gun-homicide victims.<sup>98</sup>

Scant research examines why gun violence disproportionately affects young Black males, why gun violence is more prevalent in certain neighborhoods, or whether existing gun policies and regulations (concerning, for example, gun storage and interventions to prevent suicides using firearms) are effective. The main reason there is a dearth of research on gun violence is because the federal government, at the behest of the National Rifle Association (NRA), had essentially defunded this type of research. That is, although the federal government recently appropriated \$25 million for gun-violence research,<sup>99</sup> funding for gun-violence research virtually disappeared after a 1993 CDC-funded study found that keeping a gun in the home increased the risk of homicide by a family member or intimate acquaintance.<sup>100</sup>

After the study's release and favorable publicity, the NRA lobbied Congress to end funding for gun-violence research. Until 2019, these lobbying efforts succeeded and the CDC denied funding requests for any

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96. *Leading Causes of Death—Males—Non-Hispanic Black—United States, 2016*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthequity/lcod/men/2016/nonhispanic-black/index.htm> [<https://perma.cc/86VJ-YPD3>].

97. See Gilbert et al., *supra* note 82, at 297 (“[T]he only race by gender group for which homicide is a top-five cause of death is for black males between the ages of 15 and 44.”).

98. *Gun Violence Statistics*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/facts/gun-violence-statistics/> [<https://perma.cc/96L5-DAR7>].

99. Erin Schumaker, *Congress Agrees on Historic Deal to Fund \$25 Million in Gun Violence Research*, ABC NEWS (Dec. 16, 2019, 4:28 PM), <https://abcnews.go.com/Health/congress-approves-unprecedented-25-million-gun-violence-research/story?id=67762555> [<https://perma.cc/LSA6-KJEC>].

100. See Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084, 1090 (1993) (“[O]ur results suggest that [guns] actually pose a substantial threat to members of the household. People who keep guns in their homes appear to be at greater risk of homicide in the home than people who do not.”).

research that “may be used to advocate or promote gun control.”<sup>101</sup> The National Institutes of Health (NIH) had similar funding restrictions, though it was more willing to fund limited research projects.<sup>102</sup> Although private organizations like the Giffords Law Center to Prevent Gun Violence continued to conduct gun research and cities, states, universities, and private philanthropic organizations increased funding for gun-violence research when Congress eliminated federal funding, gun-violence research *still* is not funded at levels comparable to funding for other leading causes of death, like car accidents or poisoning.<sup>103</sup>

Group-based slavery reparations can help close this research gap by providing additional funding for research on deaths by firearms. Although young Black men would be the intended beneficiaries of this research, the research could also help explain the soaring rates of death by suicide (many of which include firearms) for Black children<sup>104</sup> and for middle-age whites who lack college degrees.<sup>105</sup> In addition to funding increases for gun-violence research, to increase the awareness of the magnitude and consequences of racial health inequalities, states and the federal government should increase overall research funding, particularly NIH funding, for scholars who study health disparities.

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101. See, e.g., Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009–244 (“[N]one of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control.”).

102. Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 218, 125 Stat. 1085 (“None of the funds made available in this title may be used, in whole or in part, to advocate or promote gun control.”).

103. For example, the NIH devoted \$3 billion toward HIV/AIDS research and \$5.9 billion on brain disorders in 2018. Rita Rubin, *Tale of 2 Agencies: CDC Avoids Gun Violence Research But NIH Funds It*, JAMA NETWORK (Apr. 26, 2016), <https://jamanetwork.com/journals/jama/fullarticle/2513131> [<https://perma.cc/D95F-WSGQ>]; William Wan, *Congressional Deal Could Fund Gun Violence Research for 1st Time Since 1990s*, WASH. POST (Dec. 16, 2019), <https://www.washingtonpost.com/health/2019/12/16/congressional-deal-could-fund-gun-violence-research-first-time-since-s/> [<https://perma.cc/A9FD-4CDN>]; see also Margot Sanger-Katz, *Gun Research Is Suddenly Hot: Concern About Mass Shootings Has Lifted Spending on Studies and Attracted a New Generation of Researchers*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/upshot/gun-research-is-suddenly-hot.html> [<https://perma.cc/LE9M-7EN6>]. A JAMA study concluded that gun violence research has less funding relative to funding for other leading causes of death. David E. Stark & Nigam H. Shah, *Funding and Publication of Research on Gun Violence and Other Leading Causes of Death*, JAMA NETWORK (Jan. 3, 2017), <https://jamanetwork.com/journals/jama/fullarticle/2595514> [<https://perma.cc/NX8F-W4NE>].

104. Blacks under the age of thirteen are twice as likely to die by suicide relative to white youth and the death by suicide rate among Black youth is increasing faster than any other racial or ethnic group. BONNIE WATSON COLEMAN, CONG. BLACK CAUCUS EMERGENCY TASKFORCE ON BLACK YOUTH SUICIDE & MENTAL HEALTH, RING THE ALARM: THE CRISIS OF BLACK YOUTH SUICIDE IN AMERICA, 2 (2019), [https://watsoncoleman.house.gov/uploadedfiles/full\\_taskforce\\_report.pdf](https://watsoncoleman.house.gov/uploadedfiles/full_taskforce_report.pdf) [<https://perma.cc/6RQA-2DLP>].

105. Anne Case & Angus Deaton, *Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st Century*, 112 PROC. NAT’L ACAD. SCI., 15078, 15078 (2015), <https://www.pnas.org/content/112/49/15078> [<https://perma.cc/QV4D-5YLD>].

Just as increases in gun-violence research might help explain why middle-age whites are dying at increasingly higher rates from death by suicide, enhanced overall funding for racial disparities research could benefit researchers of all races. Increased NIH funding for research on racial health disparities would also, however, help career advancement for Black professors and help close funding shortages found at many Historically Black Colleges or Universities (HBCUs).

*d. Prioritizing Funding for HBCU Grant Proposals.*—A recent study funded by the NIH reveals that scientists who submit proposals to study race-specific topics (like ways to reduce asthma in minority children, or why Blacks typically do not receive the most current heart-disease treatments) are *significantly less likely* to receive NIH funding than applicants who submit proposals for race-neutral topics to study cells or molecules.<sup>106</sup> Because Blacks are already underrepresented in science fields and they consistently struggle to secure funding to conduct research they need to advance their academic careers,<sup>107</sup> researchers at HBCUs should receive priority for this additional funding.<sup>108</sup>

A reparations program that increases funding to HBCUs would also be appropriate because it would reward those educational institutions for the role they played in educating formerly enslaved Blacks. Most HBCUs were created in the aftermath of the Civil War by the Freedmen's Bureau and, for decades, HBCUs were the only entities that would provide a college education to Blacks.<sup>109</sup> Since their creation, HBCUs have been integral in combatting the residual effects of slavery and Jim Crow laws, and they have educated 80% of this country's black judges and approximately half of all Black doctors and teachers.<sup>110</sup> Unfortunately, HBCUs are chronically underfunded, many have closed since the 1950s, and many are struggling to survive.

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106. Travis A. Hoppe et al., *Topic Choice Contributes to the Lower Rate of NIH Awards to African-American/Black Scientists*, SCI. ADVANCES, Oct. 9, 2019, at 2, <https://advances.sciencemag.org/content/5/10/eaaw7238> [<https://perma.cc/Y627-UK6L>].

107. Francie Diep, *Are Black Scientists Being Punished for What They Want to Study?*, THE CHRON. OF HIGHER EDUC. (Oct. 17, 2019), <https://www-chronicle-com.ezproxy.lib.utexas.edu/article/Are-Black-Scientists-Being/247367> [<https://perma.cc/T5NG-X44N>].

108. See generally Posner & Vermeule, *supra* note 28, at 716–21 (discussing potential constitutional challenges to race-specific reparations remedies and how those challenges can be overcome).

109. Samara Freemark, *The History of HBCUs in America*, AM. RADIOWORKS (Aug. 20, 2015), <http://www.americanradioworks.org/segments/hbcu-history/> [<https://perma.cc/7K3A-ZRMS>].

110. Delece Smith-Barrow, *H.B.C.U.s' Sink-or-Swim Moment*, N.Y. TIMES (Oct. 21, 2019), <https://www.nytimes.com/2019/10/21/opinion/hbcu-college.html> [<https://perma.cc/K2YJ-9S49>].

HBCUs struggle financially for a number of reasons. First, they generally have smaller and poorer alumni fundraising bases and, compared to predominately white institutions (PWIs), HBCUs receive comparatively small (and now shrinking) shares of federal, state, and local appropriations. Although HBCUs are the schools that educated and supported formerly enslaved Blacks, most of their financial struggles started once the Supreme Court deemed “separate but equal” education to be unconstitutional in 1954. That is, as more middle- and higher-income Black students chose to attend PWIs, HBCUs were left to educate a disproportionate number of lower-income students who receive federal Pell grants and need significant financial support while they attend college. Most HBCUs are tuition-dependent, but cannot easily raise tuition or fees because so many of their students are poor. Then, after they graduate, many of their students often lack the financial capacity to make substantial alumni donations.<sup>111</sup>

Prioritizing the applications for additional NIH funding submitted by scholars who are employed by HBCUs (as they were defined in the Higher Education Act of 1965)<sup>112</sup> would reward these institutions for their willingness to educate formerly enslaved Blacks and their descendants after slavery and during the Jim Crow era. While funding requests from scholars of all races at HBCUs should receive priority, giving HBCUs additional funding will inevitably help advance the careers of Black scientists because over 95% of Black tenured faculty in this country teach at HBCUs.<sup>113</sup> Thus, in addition to compensating HBCUs for their role in educating formerly enslaved Blacks and their descendants, this reparation should also help increase the number of Black college and university professors.<sup>114</sup>

*e. Translating Race-Based Research Into Action.*—While increasing funding for research involving racial health disparities would be a critical part of a slavery reparations program, research alone is not enough. A 2017 CDC report stressed that the only way to improve the health of the Black

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111. *Id.*

112. The Act defines HBCU as “any . . . college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans.” 20 U.S.C. § 1061(2) (2018) (emphasis added).

113. Valerie Strauss, *It’s 2015. Where Are All the Black College Faculty?*, WASH. POST (Nov. 12, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/11/12/its-2015-where-are-all-the-black-college-faculty/> [<https://perma.cc/VHQ6-Y99J>].

114. Valerie Strauss, *The Academy Awards Isn’t Alone with Its Color Problem. Look at Higher Education.*, WASH. POST (Jan. 29, 2016), <https://www.washingtonpost.com/news/answer-sheet/wp/2016/01/29/the-academy-awards-isnt-alone-with-its-color-problem-look-at-higher-education/> [<https://perma.cc/QVE4-SXWT>].

population is to “translate research results into effective universal and targeted interventions across the life span.”<sup>115</sup>

The CDC identified a number of reasons Blacks have poor health outcomes, including low health literacy, inadequate health insurance coverage, overwhelmed clinics, and too few culturally or linguistically competent providers. To ensure that race-based research helps improve Black lives, reparations should also include additional funding and staffing for health clinics in lower-income neighborhoods to give residents additional access to enhanced screening for early diagnoses of high blood pressure, diabetes, and childhood diseases like asthma.

## 2. *Economic Inequality Gaps*

Demands for reparations have intensified largely because of the persistent and widening racial wealth gap. Blacks have disproportionately high poverty and unemployment rates, lower overall lifetime income, and roughly one-tenth of the wealth of whites.<sup>116</sup> The racial wealth gap persists regardless of educational attainment levels, marital status, age, or household income.<sup>117</sup>

Because all but the richest American families hold most of their household wealth in housing, there is a racial homeownership gap for middle- and lower-income families. Slavery reparations could help close this gap by focusing on ways to redress the ongoing effects of racist housing laws and policies that made it virtually impossible for Blacks to buy homes or build wealth during slavery or the Jim Crow era. In addition, a slavery reparations program could respond to racist post-World War II federal housing and lending policies (including municipal zoning laws, redlining, racial deed covenants, and segregated public housing) that made it harder for Blacks to

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115. Timothy J. Cunningham et al., *Vital Signs: Racial Disparities in Age-Specific Mortality Among Blacks or African Americans—United States, 1999–2015*, 66 MORBIDITY & MORTALITY WKLY. REP. 444, 447 (2017), <https://www.cdc.gov/mmwr/volumes/66/wr/pdfs/mm6617e1.pdf> [<https://perma.cc/9W2R-JBJS>].

116. Angela Hanks, Danyelle Solomon & Christian E. Weller, *Systematic Inequality: How America’s Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS (Feb. 21, 2018), <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/> [<https://perma.cc/RT2S-339P>].

117. *Id.* Savings rates are higher for workers whose employers offer their employees a retirement plan, in part because federal tax regulations let workers save more (up to \$26,000 annually) in employer-provided retirement plans compared to what they could invest annually in an IRA (no more than \$7,000). Ashlea Ebeling, *IRS Announces Higher 2020 Retirement Plan Contribution Limits for 401(k)s and More*, FORBES (Nov. 6, 2019), <https://www.forbes.com/sites/ashleaebeling/2019/11/06/irs-announces-higher-2020-retirement-plan-contribution-limits-for-401ks-and-more/#2797482e33bb> [<https://perma.cc/E8ER-DZXY>]. This places Blacks at a savings disadvantage since they are less likely to work for an employer who offers a retirement savings plan. Hanks, Solomon & Weller, *supra* note 116.



buy high-appreciating homes in high-opportunity suburban neighborhoods using low-cost federally subsidized loans.<sup>118</sup>

This country's prior housing policies depressed Black homeownership rates and, in addition, persistent and ongoing discrimination in mortgage and housing markets<sup>119</sup> continue to cause Blacks to live in racially and economically segregated neighborhoods where home values are lower than comparable homes in predominately white neighborhoods.<sup>120</sup> Although, it is a political nonstarter to propose that the U.S. give every Black the 40 acres Sherman promised after the Civil War. Nonetheless, group reparations could focus on remedying current housing policies that make it harder for Blacks to find affordable housing (to buy or to rent).

For example, a slavery reparations program could provide financial incentives for cities to enact inclusionary zoning laws that force builders to construct (or owners to provide) affordable multi-family housing in high opportunity neighborhoods. Halting the trend of "exclusionary zoning" would help close the racial wealth gap and would also make it easier for low- or middle-income families of all races to find affordable housing. Another way to make housing more affordable for lower- and middle-income families of all races would be to increase funding for antigentrification research so cities could avoid displacing lower-income residents when they agree to let developers build newer and more expensive housing.

### B. *Individual Cash Reparations*

The easiest way to match the remedy (reparations) to the harm (slavery and Jim Crow's racist brutality) would be to provide group/institutional relief. Group relief would be quicker and administratively easier because it would not require victims to trace their individual harms to a particular wrongdoer. Another benefit of group/institutional relief is that it would provide ongoing benefits, rather than a one-time (preclusive) transfer, and

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118. MECHELE DICKERSON, HOMEOWNERSHIP AND AMERICA'S FINANCIAL UNDERCLASS: FLAWED PREMISES, BROKEN PROMISES, NEW PRESCRIPTIONS 146–54, 187–90 (2014); *see also* Trymaine Lee, *A Vast Wealth Gap, Driven by Segregation, Redlining, Evictions and Exclusion, Separates Black and White America*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html?mtrref=t.co&gwh=7919999E5CA8823CECA7A7D3EC51A407&gwt=pay&assetType=REGIWALL> [<https://perma.cc/33LJ-YLW6>] ("Today's racial wealth gap is perhaps the most glaring legacy of American slavery and the violent economic dispossession that followed.")

119. *See generally* Robert Bartlett et al., *Consumer-Lending Discrimination in the Fintech Era* (Nat. Bureau of Econ. Research, Working Paper No. 25943, June 2019), <http://www.nber.org/papers/w25943> [<https://perma.cc/K8X7-MV6L>] (examining the extent of racial/ethnic discrimination in the loan approval process).

120. *Quarterly Homeownership Rates by Race and Ethnicity of Householder for the United States: 1994–2019*, U.S. CENSUS BUREAU, <https://www.census.gov/housing/hvs/data/charts/fig08.pdf> [<https://perma.cc/6L32-ZVT9>].

this would signal that the country's long-term national commitment to reducing or eliminating racial disparities.<sup>121</sup>

Group-based reparations would also be more politically palatable and feasible because the potential number of individual slavery reparations claims (potentially 40 million) would vastly exceed the actual number of 9-11 claims (5,500) and payments to individuals would no doubt vastly exceed the amount the VCF distributed (\$7 billion) to claimants.<sup>122</sup> But, even if a cash-compensation program is over or underinclusive<sup>123</sup> or includes nominal or merely symbolic payments, awarding individual reparations would tangibly signal the willingness of the country or private actors to acknowledgement of the harm slavery and Jim Crow has inflicted on Black descendants of slaves (BDOS).<sup>124</sup>

Despite any potential challenges of providing individual slavery reparations, the compensation structures found in complex disputes can be used to design a slavery reparations system that includes at least a component of individual relief. The Equifax settlement that combined a choice between a one-time payment or longer term credit monitoring offers an approach that combines a backwards-looking (but minimal) cash payment with broader forward-looking rehabilitative reparations.<sup>125</sup>

For example, applying the Equifax structure, a slavery reparations program could allow claimants who live in neighborhoods with unhealthy or high-cost healthy food options to choose between receiving a nominal but symbolic cash payment or a "prescription" for fresh fruits and vegetables. Claimants who elected to receive the prescription would then have the

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121. Posner & Vermeule, *supra* note 28, at 723, 732 (suggesting that some Blacks might view reparations as stigmatizing or worry that a reparations payment would forever absolve the government or white Americans of any responsibility to redress racially discriminatory practices).

122. A recent estimate that calculates the total hours all enslaved Blacks worked between 1776 until 1865 and multiplies that number by average wage prices during that period (with a compound interest rate of 3% annually) places the slavery reparations debt at \$5.9 trillion and \$14.2 trillion. Craemer, *supra* note 5, at 653. There currently are more than 40 million Blacks in this country. *Annual Estimates of the Resident Population by Sex, Single Year of Age, Race, and Hispanic Origin for the United States: April 1, 2010 to July 1, 2018*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk#> [<https://perma.cc/A45F-7TBK>].

123. The special master of a slavery reparations fund should be given broad authority, like Feinberg had over the VCF, to decide how to define "claimant," whether to means test claims (and exclude high-income Blacks like Oprah) or whether to exclude Blacks whose ancestors did not live in the United States during slavery or Jim Crow.

124. See ROY L. BROOKS, *ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS*, ix (2004) ("When a government commits an atrocity against an innocent people, it has, at the very least, a moral obligation to apologize and to make that apology believable by doing something tangible called a 'reparation.'").

125. See David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043, 1096 (2010) (discussing how "reparations programs are driven by past atrocities" but "must cast an eye to the future as part of a broader effort to sow the ground for future peace and stability").

opportunity to develop a healthier lifestyle that, ultimately, would help lower their blood pressure and reduce their risk of heart disease, diabetes, and stroke.<sup>126</sup> A slavery reparations programs that allowed for individual choice could also potentially close the racial retirement income gap by, for example, allowing claimants to choose to receive a one-time increase to their social security accounts to acknowledge the role the government historical role in creating a social insurance system that initially excluded (whether intentional or not) most Black workers.<sup>127</sup>

### C. Funding Reparations

Like the 9-11 VCF, slavery reparations should be jointly funded. States and the federal government should primarily fund reparation payments given their direct involvement with slavery and Jim Crow.<sup>128</sup> But the heirs of slave holders or businesses who profited from the slave trade,<sup>129</sup> as well as public and private universities that benefitted from slavery or Jim Crow laws, should be encouraged to voluntarily contribute to a national slavery-reparations fund (rather than create their own smaller, local reparations funds).<sup>130</sup>

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126. Some states have created programs that allow doctors or pharmacists to write these prescriptions for residents of lower-income households. For an in-depth analysis of some of these programs, see generally Etienne J. Phipps et al., *The Use of Financial Incentives to Increase Fresh Fruit and Vegetable Purchases in Lower-Income Households: Results of a Pilot Study*, 24 J. HEALTH CARE FOR POOR & UNDERSERVED 864 (2013).

127. When the Social Security Act (SSA) was enacted in 1935, domestic and agricultural workers (who were mostly Black) were excluded from coverage. See generally Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SECURITY BULL., no. 4, 2010, at 50 (“[N]either agricultural laborers nor domestic servants—a pool of workers that included at least 60 percent of the nation’s black population—were covered by old-age insurance.”).

128. For a brief period during the 1840s and 1850s, the federal government actually owned and sold enslaved Blacks when financially distressed slave holders sought to erase their debts and the bankruptcy laws at that time deemed the government to be the owner of debtors’ property. See generally Rafael I. Pardo, *Bankrupted Slaves*, 71 VAND. L. REV. 1071 (2018) (recounting how the Bankruptcy Act of 1841 and the domestic slave trade collided to create the bankruptcy slave trade).

129. Recently, after learning that their ancestors used forced labor in their factories during World War II and financially supported Hitler’s paramilitary SS force, the family that controls the company that owns Krispy Kreme, Panera Bread, Peet’s Coffee, and Einstein’s Bagels agreed to donate \$5.5 million to an organization that compensates Holocaust survivors. Jordan Valinsky, *Krispy Kreme Owners Donate \$5 Million to Holocaust Survivors over Family’s Nazi Past*, CNN (Dec. 12, 2019, 10:28 AM), <https://www.cnn.com/2019/12/12/business/krispy-kreme-family-nazi-donation-trnd/index.html> [<https://perma.cc/AVG4-SGFP>].

130. Other potential funding sources for group-based reparations could include (1) higher corporate taxes for companies that benefitted from the slave trade, (2) fines or penalties against businesses who discriminate in the future against Blacks in housing markets, (3) fines against banks that engage in redlining or otherwise fail to invest in predominately Black neighborhoods, as revealed by the Home Mortgage Disclosure Act, or (4) higher taxes for hand gun sales.

### Conclusion

Neither individual nor group-based cash payments will put Blacks in the position they would have occupied had their ancestors not been brutalized by slavery or the Jim Crow regime. Still, the protestation that it is impossible to design a slavery-reparations system is a red herring. Courts and special masters routinely process claims and administer payments in complex disputes. Although slavery reparations, like the 9-11 VCF, should be viewed as an aberration and not the wave of the future, the time has come for political leaders to close this odious chapter of our history and provide reparations to redress the harms of slavery and Jim Crow.