
Kevin Hopkins

John Marshall Law School

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REVIEW ESSAY

Forgive U.S. Our Debts? Righting the Wrongs of Slavery

KEVIN HOPKINS*

“We must make sure that their deaths have posthumous meaning. We must make sure that from now until the end of days all humankind stares this evil in the face . . . and only then can we be sure it will never arise again.”

President Ronald Reagan

INTRODUCTION: THE BIG PAYBACK

In recent months, claims for reparations for slavery have gained new popularity amongst black intellectuals and trial lawyers and have been given additional momentum by the publication of Randall Robinson’s controversial and thought-provoking book, The Debt: What America Owe to Blacks. In The Debt, Robinson makes a serious and persuasive case for the payment of reparations by the United States government to African-Americans for both the injustices done to their ancestors during slavery and the effect of those wrongs on the current

* Associate Professor of Law, The John Marshall Law School. I thank Vincene Verdun, Dr. James Newton, Walter Kendall, Aremona Bennett, and Susan Connor for thoughtful comments on earlier drafts of this Essay. Briana Perry (Rutgers University School of Law-Camden) provided excellent research assistance.

2. RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (2000). Robinson is a Harvard Law School graduate and the founder and president of TransAfrica, an advocacy group that has been instrumental in influencing U.S. policies toward Africa and the Caribbean, and in the dismantling of apartheid in Haiti and South Africa. Recently, black intellectuals, including Harvard law professor Charles J. Ogletree, have joined together with Robinson and others in studying legal strategies and legislative alternatives to support reparations. See Diane Cardwell, Seeking Out a Just Way to Make Amends for Slavery: The Idea of Reparations for Blacks Is Gaining in Urgency, but a Knot of Questions Remain, N.Y. Times, Aug. 7, 2000, at B7; Jeffrey Ghannam, Repairing the Past, A.B.A. J., Nov. 2000, at 38, 42. In late November 2000, lawyer Johnnie Cochran and a group of successful trial lawyers were scheduled to meet in Washington, D.C. to discuss legal strategies for bringing a class-action suit against the federal government and private companies for perpetrating and profiting from slavery. See Linda Chavez, Op-Ed, Reparations Will Make Lawyers Richer, Chi. Trib., Nov. 9, 2000, at N31; see also Making the Case for Racial Reparations: Does America Owe a Debt to the Descendants of Its Slaves?, Harpers, Nov. 2000, at 37 [hereinafter Making the Case] (discussing a recent debate among lawyers on reparations and ending with an editor’s note concerning the formation of a legal team and its intention to file a reparations lawsuit against the U.S. government for the injustices of slavery). The Reparations Assessment Group, the name of the legal team orchestrated by Professor Ogletree, will seek damages for 240 years of legalized slavery against possible defendants that could include the federal government, state governments, and corporations that have benefited from slave labor. See Chris Fusco, Suit Encourages Reparations Supporters, Chi. Sun-Times, Nov. 6, 2000, at 14.

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generation of Black Americans.\(^3\) At the core of *The Debt* are themes of racism and economic inequality.\(^4\) According to Robinson,

No race, no ethnic or religious group, has suffered so much over so long a span as blacks have, and do still, at the hands of those who benefited, with the connivance of the United States government, from slavery and the century of legalized American racial hostility that followed it.\(^5\)

He argues that America will never solve its racial differences until it acknowledges and comes to terms with the damage inflicted upon African-Americans by more than two centuries of slavery in addition to the century of government-imposed racial discrimination that followed,\(^6\) and until African-Americans come to recognize and fully appreciate their ancient history and ongoing contributions to the nation and the world.\(^7\) As a solution, Robinson concludes by asserting that a critical step toward solving America's race problems is the closing of the economic gap between blacks and whites.\(^8\) To accomplish this, he advocates the

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3. Robinson uses several of the chapters in his book as the basis for discussing the damage to African-Americans as a result of slavery. For example, in “Reclaiming Our Ancient Self,” ROBINSON, *supra* note 2, ch. 1, at 11-28, Robinson contends that the institution of slavery stripped African-Americans of all memories of their African culture and heritage and any long-held interior idea of who they were. Id. at 28. In “Taking Account of the Long-Term Psychic Damage,” id. ch. 2, at 29-58, Robinson further explores the damage to modern black self-esteem as a result of America’s failure to acknowledge African and contemporary black history, and to establish tangible reminders of black accomplishments (such as monuments and statues) in the nation’s capitol. Id. at 56. In “Race to Class to Race,” id. ch. 3, at 59-80, Robinson focuses on the socioeconomic gap between America’s races (such as high infant mortality, low income, high unemployment, substandard education, and high morbidity). In “Self Hatred,” id. ch. 4, at 81-88, Robinson discusses black self-hatred as a major impediment for the black race. In “Demanding Respect,” id. ch. 5, at 97-122, he briefly discusses the effects of the psychic injuries emanating from slavery.

4. For example, Robinson argues that racism was used to justify slavery and to protect whites from having to accept responsibility for its social consequences. He asserts that “[e]ven now its myriad viruses deploy to project one group’s history and obscure another’s, to celebrate one people and disparage another, to advance a majority and hold back a minority.” Id. at 77; *see also* id. at 59-63, 226-31 (discussing the economic inequalities resulting from slavery).

5. Id. at 8.

6. Specifically, Robinson argues:

[White America] must own up to slavery and acknowledge its debt to slavery’s contemporary victims. It must, at long last, pay that debt in massive restitutions made to America’s only involuntary members. It must help to rebuild the black esteem it destroyed, by democratizing access to a trove of histories, near and ancient, to which blacks contributed seminally and prominently. It must open wide a scholarly concourse to the African ancients to which its highly evolved culture owes much credit and gives note. It must rearrange the furniture of its national myths, monuments, lores, symbols, iconography, legends, and arts to reflect the contributions and sensibilities of all Americans. It must set afoot new values. It must purify memory. It must recast its lying face.

Id. at 107-08.

7. *See* id. at 16-17 (noting that African-Americans cannot be collectively successful without a recognition of their history).

8. *See* id. at 9 (noting that “[s]olutions must be tailored to the scope of the crime in a way that would make the victim whole” and that the psychic and economic injury to African-Americans is
payment of reparations to Black Americans in the form of a private trust.\(^9\)

In making the case for reparations, Robinson relies on history, autobiography, and anecdotes rather than statistics to support his thesis that Black Americans, like Native Americans, Japanese-Americans, and Jewish Holocaust survivors, are owed a massive debt as a result of the federal government’s involvement and complicity in slavery and the state-imposed discrimination that followed it. In developing his thesis, Robinson writes with passion and boldness as he takes on the task of educating both blacks and whites about the unspoken and forgotten truths concerning Africa’s prominence and the dominant role it once played in world history.\(^10\) Robinson makes no attempt to provide a comprehensive solution, explicitly stating at the outset that he only intends to raise the question of reparations for African-Americans, to invite debate on the topic, and to prompt America to compensate for “a long-avoided wrong.”\(^11\) Thus, his goals are straightforward and simple: (1) to create a new starting point for a discussion of a moral obligation to atone for slavery and its consequences, and (2) to gain a national commitment to close the social and economic gaps between the races resulting from approximately 350 years of American racialist policies.\(^12\)

In this Review Essay, I take on the task of evaluating the feasibility and practicality of Robinson’s proposal for providing reparations to blacks for slavery and its modern-day vestiges.\(^13\) I begin by recognizing as a given that the damage done to modern-day blacks as a consequence of the institution of American slavery continues, even several centuries after the official abolishment of slavery in the Thirteenth Amendment to the U.S. Constitution.\(^14\)}
highlighted by Robinson, much of this damage is psychological and deeply rooted, and *The Debt* provides more than sufficient facts and legal support to demonstrate this. In this respect, I agree with the central thesis of *The Debt*—that the wrongs done to African slaves during slavery, such as the physical capture and exploitation of Africans for labor, the inhumane treatment and abuse of slaves by white slaveholders, and the psychological abuses in failing to acknowledge and respect African personhood, to name only a few, were horrible and unfathomable. I too believe that, just as it has taken the country several centuries to end slavery and to begin the process of eliminating its vestiges, it will take centuries to fully repair the emotional scars imposed by it. Thus, I begin my discussion by concluding that the granting of reparations to blacks is not only morally and legally justified but also only a starting point in any genuine attempt to right the wrongs of slavery. Consequently, I make no attempt to address the argument by critics that successful modem-day recipients for reparations have typically been those persons who have experienced injuries directly resulting from government actions towards them (for example, Jewish Holocaust survivors, Japanese-Americans interned during World War II, and the African-American survivors of both the Rosewood Massacre and Tulsa Riots), rather than indirectly resulting from government actions towards their ancestors.15

Robinson, while passionately making the case for injury to African slaves and their descendants, spends very little time discussing the mechanics of such an award if the U.S. government could be persuaded to grant reparations to blacks.16 Nor does he address the crucial issue of white backlash—one that consistently surfaces in every reparations debate and one that has the power to single-handedly stop any discussion of reparations in its tracks. Robinson simply argues that a national trust fund could be set up through which reparations payments by the federal government would be used to provide for the educational and economic empowerment of blacks. Robinson also provides a

15. Robinson and other legal scholars and practitioners have provided sufficient documentation and references to verify the inhumane treatment and exploitation of Africans during slavery, the contemporary economic and psychological effects on modern-day blacks through continued and pervasive discrimination (for example, disproportional poverty and income disparities), and persuasive legal support as to why the descendants of African slaves would be legitimate claimants for reparations. See, e.g., Robinson, supra note 2, at 208 (reminding America that for “246 years and with the complicity of the United States government, hundreds of millions of black people endured unimaginable cruelties—kidnapping, sale as livestock, deaths in the millions during terror-filled sea voyages, backbreaking toil, beatings, rapes, castrations, maimings, murders”). For two excellent discussions of the legal precedent for reparations, see Roy L. Brooks, *When Sorry Isn’t Enough: The Controversy over Apologies and Reparations for Human Injustice* (1999), and Westley, supra note 9. For a good discussion of the legal practicalities and merits of a claim for black reparations, see *Making the Case, supra* note 2, at 37.

16. Robinson devotes only two chapters to a discussion of the specific details of his argument for reparations and thoughts on their implementation. See Robinson, supra note 2, chs. 9, 10, at 199-47.
few examples of programs that could be funded by the trust. Our interests and thoughts diverge on these points.

Although I believe that most White Americans today would agree that slavery was wrong, many are perplexed as to a proper remedy. As a result, the reparations theme is one that too often gets caught in a quagmire of emotion and denial, and consequently, fades away only to resurface sporadically as an intellectual thought exercise mainly to be debated by academics and city councils. Thus, I argue that a critical prerequisite to persuading the federal government to grant reparations to blacks is some thoughtful consensus on how to address the issues of white backlash, who will be entitled to compensation, and how a reparations award should be calculated. Finally, an equally challenging yet critical discussion must concern the implementation and distribution of any award of reparations.

In Part I of this Review Essay, I acknowledge and evaluate the issue of white backlash as a constant and overriding impediment to the success of any claim of reparations from the federal government. In this Part, I consider the applicability and feasibility of Professor Derrick Bell's interest-convergence theory, along with his most recent strategies for combating attacks on affirmative action as one approach for circumventing the backlash argument. In Part II, I identify several more tangible impediments to a grant of reparations for slavery and offer a few suggestions for ways to overcome them. Finally, in Part III, I discuss the actual distribution of a reparations award and a few of the inherent problems that may arise even among blacks during the implementation process. I conclude by arguing these concerns must be dealt with and tackled before any compensation award can be fully appreciated by blacks.

I. WHITE BACKLASH AND THE REPARATIONS DEBATE: THE LURKING PHANTOM

On May 17, 2000, the Chicago City Council voted overwhelmingly to adopt a resolution urging the United States Congress to initiate discussions and formal hearings on the question of granting reparations to African-Americans for the suffering and hardships endured by African slaves during and after slavery.
Although unanimously condemning the institution of slavery and the horrible human rights violations committed against Africans during that period, council members differed drastically in their opinions on what should be done to rectify the wrong. At least one council member argued that members of his district were descendants of ethnic groups that emigrated to the United States after slavery had ended and, thus, should not be required to pay for wrongs committed by others.\textsuperscript{21} African-American council members, on the other hand, argued that America owed blacks a massive economic debt both for the exploitation of slave labor used to build the United States and for the wealth that resulted and which was passed down through subsequent generations to the white community.\textsuperscript{22} After a heated and emotional debate, City of Chicago Mayor Richard Daley offered an apology to African-Americans for the wrongs done by slavery and went on record in support of the pending reparations resolution.\textsuperscript{23} In the end, Chicago became the fifth and largest city in the nation to join the growing debate over how to right the wrongs of slavery.\textsuperscript{24}

Shortly after the Chicago City Council’s resolution, I wrote a comment for Americans for slavery. See Fran Spielman, ‘Time to Start the Healing’; City Votes to Urge Congress to Make Slave Reparations, CHI. SUN-TIMES, May 18, 2000, at 3; see also Introduction of a Bill to Create a Commission to Study Reparations Proposals for African-Americans, 135 CONG. REC. E4007 (Nov. 21, 1989) (extension of remarks of Rep. Conyers). Specifically, the Conyers legislation requested the establishment of a commission to examine the institution of slavery, to study the impact of subsequent and continuing discrimination against African-Americans, and to make recommendations to Congress as to whether a remedy should be made available to the descendants of African slaves. Id. Since 1989, Representative Conyers has consistently introduced legislation urging Congress to establish a commission to study the feasibility of reparations proposals for African-Americans. The legislation, however, has never gotten out of committee. See, e.g., H.R. 40, 106th Cong. (1999); H.R. 40, 105th Cong. (1997); H.R. 891, 104th Cong. (1995); H.R. 40, 103d Cong. (1993); H.R. 1684, 102d Cong. (1991); H.R. 3745, 101st Cong. (1989).

21. See Spielman, supra note 20. For example, Alderman Brian Doherty, a Republican, cast the lone “no” vote on behalf of his constituents who were in Italy, Poland, Ireland, or Germany during the period of slavery. Alderman Doherty questioned the correctness of holding his constituents responsible for an event that occurred more than 300 years ago and one in which they played no role. Id; see also Fran Spielman, U.S. Urged to Pay for Slavery: Spirited Debate Sways City Panel, CHI. SUN-TIMES, Apr. 27, 2000, at 8 (noting that Alderman William Banks, a Democrat, refused to attend an initial hearing on the subject of reparations sponsored by the Council’s Finance and Human Relations Committees because of his disagreement with the idea of granting reparations for a crime that he did not commit).

22. See Washburn, supra note 20 (noting that two African-American Aldermen, Bernard Stone and Dorothy Tillman, argued in favor of compensation for free African labor used to build the country, the accumulated wealth handed down to the white community, and the residual effect of slavery that currently continues today).

23. See Fran Spielman, Daley Says He Backs Slavery Reparations, CHI. SUN-TIMES, May 10, 2000, at 28 (noting Mayor Daley’s position that “we have to understand all about slavery—not only as a nation, but as a world—what slavery has done to people for generations and generations”). Mayor Daley urged Congress to authorize payments and not simply talk about an issue that the nation has “closed its eyes’ to since the Civil War.” Spielman, supra note 20; see also Kevin Hopkins, Slavery Reparations Resolution Took Courage, CHI. DAILY L. BULL., June 9, 2000, at 5 (acknowledging the historic and symbolic significance of the Mayor’s apology).

24. Similar resolutions calling for hearings on reparations for slavery have been adopted by the cities of Detroit, Washington, D.C., Cleveland, and Dallas. See Politicians, Scholars Voice Support for Slavery Reparation, JET, May 15, 2000, at 4, 4, 6, 8; Spielman, supra note 20, at 8.
the *Chicago Tribune* in an attempt to prompt the Council to consider just how the U.S. government should financially repair the damage done by slavery.\textsuperscript{25} Immediately following its publication, I received a disturbing e-mail message entitled: “You forgot to credit us white folks for our downpayment [sic] on reparations.”\textsuperscript{26} I include a portion of the e-mail message to illustrate the depths of anger and backlash that often occur when discussing issues of reparations:

Don’t we get any credit for the $4 trillion spent on AFDC and federal housing? What about the earned income tax credit? What about the lost productivity cost and lost opportunity cost to qualified whites due to affirmative action? What about the cost of building a prison system to accommodate members of your race that can’t conform their conduct to the law (failure to mitigate damages from slavery) (How about reparations to white victims of black crimes?) Any credit for the 200,000 Union army troops lost in the Civil War (the only war fought to end slavery)? Your people might just owe us when you do an accurate accounting . . . . So much for Dr. King’s dream. You proved your character. Just keep jingling your change cup.\textsuperscript{27}

Other arguments against reparations that usually surface during discussions on the topic often concern issues of exploitation and victimization. For example, some nonblacks believe that Robinson and other high-profile lawyers, such as Johnnie Cochran, are the ones who will really benefit in a successful reparations lawsuit from speaking engagements, book sales, and public notoriety.\textsuperscript{28} Others argue that discussions of reparations perpetuate the characterization of black victimization—one that ultimately divides America into two categories: the oppressors and the oppressed.\textsuperscript{29} Proponents of the latter argument generally assert that in order to justify reparations for crimes committed over a century ago, both the victims and the victimizers must be identified. They point out the difficulties in identifying the victims of slavery in light of currently successful blacks—such as nationally renowned talk-show host Oprah Winfrey and professional golfer Tiger Woods—and in determining the victimizer when many whites are the descendants of immigrants who either came to America after slavery was abolished or died in the Civil War to end slavery.\textsuperscript{30} However, the advocates of these arguments fail to consider the fact that America is not a color-blind society and that racism continues to affect blacks even in the most


\textsuperscript{26} E-mail from Lloyd69 to Kevin Hopkins (May 11, 2000) (on file with author). For privacy purposes, I have withheld Lloyd’s complete e-mail address.

\textsuperscript{27} Id.

\textsuperscript{28} See Chavez, supra note 2.

\textsuperscript{29} See id.

\textsuperscript{30} See id.
basic aspects of daily activities. In addition, they also fail to acknowledge that because of skin color, whites have, for the most part, benefited directly from the economics of slave labor through the generations of wealth and opportunities that were available to and passed down from their ancestors. Finally, they fail to acknowledge that in situations in which the federal government has been instrumental or complicit in violating the civil rights of specific groups of individuals, compensation to redress those violations, for the most part, has always been charged to the nation collectively rather than to specific individual wrongdoers. For example, during past instances in which the federal government purposefully violated the constitutional and civil rights of African-American males and Japanese-Americans, compensation for those violations was paid by the revenues obtained from the taxes of every American citizen.

31. See, e.g., Paul Butler, "Walking While Black": Encounters with the Police on My Street, LEGAL TIMES, Nov. 10, 1997, at 23 (discussing the author's detainment and questioning by the District of Columbia police while walking in his neighborhood); John W. Fountain, No Fare; You’re Black. You’re Male. You Just Want a Cab. Why Is It So Cold out There?, WASH. POST, May 4, 1997, at F1 (discussing the author's experiences and frustrations in attempting to hail a cab in the District of Columbia); Valerie Lynn Gray, Shopping for Equality, BLACK ENTERPRISE, July 1998, at 60 (discussing "consumer racism" toward blacks, such as the failure of department-store sales clerks to honor legitimate credit cards of black patrons, the demand for numerous forms of identification before completing the transactions, and the false and unwarranted accusations of shoplifting made to blacks by department-store security personnel).


33. See S.E. ANDERSON, THE BLACK HOLOCAUST FOR BEGINNERS 20-21 (1995) (noting that Nicholas and Joseph Brown, the founders of Brown University, obtained their wealth through the manufacturing and selling of slave ships and in investing in the slave trade); Lizette Alvarez, Lawmakers Seek Way to Note Slaves' Role in Building Capitol, N.Y. TIMES, July 13, 2000, at A19 (noting that a majority of the labor used to erect the U.S. Capitol building was provided by slaves whose wages were appropriated by their owners); Paul Zielbauer, A Newspaper Apologizes for Slave-Era Ads, N.Y. TIMES, July 6, 2000, at B1 (noting an official apology by Aetna Inc., one of Connecticut's largest companies, for its profits from slavery by issuing insurance policies on slaves in the 1850s and the Hartford Courant's apology for having published advertisements in its paper for the sale of slaves during the eighteenth and nineteenth centuries).

34. In 1974, the U.S. government began making reparations to African-American men who had participated in an experiment begun in the 1930s by the U.S. Department of Health under the belief that they were receiving free medical care when the true purpose of the experiment was actually to study the long-term effects of untreated syphilis on black men. See Carol Kaesuk Yoon, Families Emerge as Victims of Tuskegee Syphilis Experiment, N.Y. TIMES, May 12, 1997, at A1. Currently, the federal government continues to make payments to the participants and provides lifetime medical benefits to their surviving wives and children. See Facing the Shame of Tuskegee; The Moral Stain Left by Syphilis Experiment Will Take Long to Fade, L.A. TIMES, May 18, 1997, at M4.


36. For a more recent example of federal reparations, see David Lyons, Winning for the Commandos, NAT’L L.J., Oct. 21, 1996, at A4, and Tim Weiner, Vietnam's 'Lost Commandos' Win Battle, N.Y. TIMES, June 20, 1996, at A8 (highlighting the wrongs committed by the U.S. military against approximately 300 South Vietnamese commandos during the Vietnam War who had infiltrated North Vietnam as spies at the direction of the Central Intelligence Agency and were systematically declared as dead by the Pentagon despite the fact that they were still alive and had served twenty- to thirty-year sentences in
Thus, implicit in U.S. citizenship are both the freedoms of a democracy (such as a free market system and constitutional safeguards and guarantees) and its burdens.

As evidenced by Lloyd's e-mail and noted by media commentators, white backlash is alive and well. It is a critical factor—one that must be considered when devising any claim for reparations. African-Americans, who only comprise approximately 12.7% of the nation's population, have always needed the support of White Americans in order to prevail politically. To further illustrate this truth, a digression to discuss Professor Derrick Bell's interest-convergence theory may be helpful. In his writings, Professor Bell has argued that racial equality for blacks will only occur when there is a convergence of interests between blacks and whites. Specifically, he contends that the adoption of remedies for racial discrimination, such as desegregation, may be manifestations of subconscious judicial conclusions that the remedies will advance or at least not harm the interests of middle and upper class whites. For example, in considering policies designed to facilitate black equality such as affirmative action, Professor Bell argues that despite their justifications, they are implemented for blacks only when they further the interests of whites. Thus, from a realistic viewpoint, Professor Bell warns blacks that when society's rejection of such policies threatens progress toward black equality, blacks should work toward amending or replacing those policies.

North Vietnamese prisons). On September 23, 1996, President Clinton, on behalf of the nation, signed a Defense Department spending bill authorizing a $20 million appropriation for the commandos and their surviving family members after an investigation revealed that the Pentagon had lied to their widows, mailed small death payments to their families in order to close their cases, and had placed their files under a seal of secrecy. See Weiner, supra.


38. For example, African-Americans have successfully joined with Jews during specific points in history to fight the common enemy of discrimination. See generally MURRAY FRIEDMAN, WHAT WENT WRONG?: THE CREATION & COLLAPSE OF THE BLACK-JEWISH ALLIANCE (1995); MICHAEL LERNER & CORNEL WEST, JEWS & BLACKS: LET THE HEALING BEGIN (1995) (discussing the coming together of Jews and blacks in 1909 and 1911 to create the National Association for the Advancement of Colored People and the National Urban League, and during the Civil Rights Movement of the 1950s and 1960s in order to promote education, voting rights, enforcement of the Fourteenth and Fifteenth Amendments, and to advance the economic and social conditions of blacks).


40. Id. at 523.

41. Id. In support of his theory, Bell refers to an argument made in the government's brief in Brown v. Board of Education, 347 U.S. 483 (1954), in which the government—as a successful strategy in abolishing segregation in public education—argued that discrimination against minority groups in the United States had an adverse effect upon diplomatic relations with other countries. In explaining Brown, Bell has argued that the Supreme Court's decision cannot be fully understood without a consideration of its value to those whites concerned about the immorality of racial inequality and those in policymaking positions who were capable of seeing the economic and political benefits at home and abroad in eliminating segregation. Bell, supra note 39, at 523.

42. DERRICK BELL, AFROLANTICA LEGACIES, at xii, 170 (1998).

43. See id. at xii.
In a review of Professor Bell’s most recent book, *Afrolantica Legacies*, I noted that his current strategy to encourage blacks to work toward amending or replacing civil rights policies offensive to whites, such as affirmative action, although understandable in light of a national attack on affirmative action policies, was inconsistent with his earlier positions admonishing blacks to resist oppression even if the oppression is never overcome.\(^4\) I then discussed the futility of applying Bell’s strategy in the context of Proposition 209\(^4\) and public education in California, where a majority of California residents voted in favor of amending the California Constitution to eliminate the use of affirmative action in admissions to public colleges and universities.\(^4\)

Bell’s recent strategy for combating issues of white backlash toward affirmative action policies, however, could provide the key to dealing with the backlash that often surrounds discussions of reparations. From a strategic standpoint, it would be clearly unrealistic to think that blacks, who comprise only 12.7% of the nation’s population and an even smaller percentage of the members of Congress, have sufficient power to pressure federal policymakers to enact legislation providing reparations for slavery. Implicit in Bell’s recent strategy is the recognition of this point. Although Professor Bell would warn against pushing for the enactment of reparations legislation when the majority of White Americans seem clearly against it, he would agree that a rethinking and restructuring of a reparations award in such a way that White America would also gain some significant benefit could make the claim more tolerable, and thereby enactable.\(^4\)

Although I recognize that this is a compromise, I agree with Professor Bell

\(^4\) Kevin Hopkins, *Back to Afrolantica: A Legacy of (Black) Perseverance?*, 24 N.Y.U. REV. L. & SOC. CHANGE 447, 468-72 & n.106 (1998) (citing Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 378 (1992), in which Bell reflected on a conversation he had with an elderly black woman whom he had met while working to desegregate schools in Harmony, Mississippi and noted the triumph involved in her determination to resist oppression despite her lack of economic and political power).

\(^4\) In 1996, California voters passed the California Civil Rights Initiative (Proposition 209). The initiative amended the California Constitution and provides in relevant part that “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.” CAL. CONST. art. I, § 31(a). Currently, Proposition 209 remains constitutional. See Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).

\(^4\) Hopkins, *supra* note 44, at 467-69 n.97. For example, I noted that although Bell’s solution would be unworkable in situations when the policy that furthers black equality has been rejected entirely through legislative enactments, it could work if the policies were merely rejected by the courts. In the latter instance, the legislature has constitutionally mandated authority to enact legislation to circumvent a judicial ruling, thus providing a remedy for any judicial attack on the policy. *Id.* at 469. I have gone on record in opposition to the application of Bell’s recent strategy when considering affirmative action policies. *Id.* at 470-71. I have argued that both the continued need for affirmative action and its effectiveness as a remedy for past discriminatory practices against minorities are unquestionable. In support of this, I have argued that there are few successful replacements for affirmative action-based college admissions policies and have maintained that actions designed to eliminate Proposition 209 are warranted, despite the continued affirmation of its constitutionality by the state and federal judiciaries. *Id.*

\(^4\) *See Bell, supra* note 42, at xii; Bell, *supra* note 39, at 523.
on this point. Despite the fact that individual wrongs were inflicted upon African slaves and the remnants of racism from slavery continue even today, any reparations award in response to those wrongs that is structured in the form of individual payments to blacks is destined to fail. This is evidenced by the fact that the Conyers Bill (H.R. 40), which simply mandates the creation of a commission to examine the institution of slavery and its effects on modern-day blacks, has never gotten out of committee despite the fact that it has been introduced in the U.S. House of Representatives each year for over a decade.\(^4\)

In addition, this conclusion can be reasonably deduced from a current political climate that has been overwhelmingly supportive of the revamping of the federal welfare system,\(^4\) the increased political attacks on state affirmative action measures designed to provide opportunities to blacks and other historically disenfranchised groups, and a conservative Supreme Court—one that in the past few years has refused to review lower court holdings of the unconstitutionality of state actions designed to promote gender and race equality.\(^5\)

In a capitalistic society in which whites continue to control almost all of the wealth and the political power base, it is not only reasonable but also plausible to conclude that only those claims for black reparations that will result in some direct or indirect economic benefit to whites will have even the slightest chance of moving out of a legislative committee and onto the floor for congressional hearings. Thus, I concur with Robinson and others who advocate the more utilitarian approach of awarding a group reparation administered through a trust fund.\(^6\)

II. IMPEDIMENTS TO BLACK REPARATIONS: THE BUCKS STOP HERE

Even if the federal government were inclined to grant reparations to blacks for the economic exploitation and mistreatment of their ancestors and the subsequent effects of such treatment on blacks today, no compensation would be awarded without some showing of eligibility and a more precise calculation of the debt owed. Unfortunately, Robinson fails to fully explore and provide

\(^4\) See supra note 20 (discussing the Conyers Bill). The numeral "40" in the title of the most recent bill on reparations sponsored by Representative Conyers is symbolic of the forty acres (and a mule) that freed slaves were promised but never given during the Reconstruction Period. Telephone Interview with Cynthia Martin, Staff Member for Representative John Conyers (Dec. 8, 2000).

\(^5\) See Robert Pear, Clinton Cites Welfare Gains and Defends Overhaul Plan, N.Y. TIMES, Dec. 8, 1996, §1, at 35. Recent welfare reform legislation has ended federal guarantees of monetary assistance to the nation’s poorest children. It provides states with lump sums of federal monies and the authority to run their own welfare and work programs. Id.

\(^6\) See Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir.) (rejecting the claim that California’s Proposition 209 is unconstitutional), cert. denied, 522 U.S. 963 (1997); Hopwood v. Texas, 78 F.3d 932 (5th Cir.) (holding that the University of Texas Law School’s affirmative action admissions program that granted preferences to Black and Mexican-American applicants to further diversity objectives violated the Fourteenth Amendment), cert. denied, 518 U.S. 1033 (1996).

\(^6\) See infra Part III (discussing a few of the problems in limiting the purpose of the trust solely to finance higher education).
guidance on both of these issues. In this Part, I briefly raise and discuss two of the critical roadblocks that will have to be overcome before Congress can even consider granting reparations to blacks.

A. DETERMINING ELIGIBILITY

Although it seems obvious that only the descendants of African slaves should qualify for compensation for the injustices done to their ancestors, it is highly unlikely that the federal government will issue any reparations without some concrete guidelines for determining eligibility on these grounds. Three possible approaches that could be used in determining a level of African descent sufficient to qualify for federal reparations are genealogy, blood, and genetic mapping.

1. Genealogical Research

One approach for determining the eligibility of persons entitled to receive reparations for slavery is to require all African-Americans seeking reparations to show proof of their ancestry through valid genealogical research. In fact, since the 1976 publication of Alex Haley’s Pulitzer Prize-winning novel, Roots, African-American interest in genealogy on a national level has increased dramatically. With the rise of such organizations as the National Genealogical Society, the Black Genealogy Search Group of Denver, the Institute of African-American History, and the Afro-American Historical and Genealogical Society, the tracing of family histories for many African-Americans has become more viable. In addition, the Internet has also made individualized searches for

52. See Robinson, supra note 2, at 244 (advocating the establishment of a private trust for the benefit of all African-Americans, but failing to provide a precise dollar amount for the damage owed by White America).


54. Alex Haley, Roots (1976) (discussing Haley’s account of his twelve year search for his African roots). In 1977, a twelve-hour television serialization of Roots produced by the American Broadcasting Company became one of the most closely watched television dramas in history. See Mark Goodman, Deep Roots; Journeying into His African Heritage, Author Alex Haley Forever Altered America’s Perceptions of Itself and its Past, People, Feb. 24, 1992, at 47, 47.

family histories easier and less expensive. Currently, there are several websites that provide free access to basic genealogical services for a nominal fee.

Despite the technological advances in genealogical research, however, constructing a family history is, for the most part, expensive and often fails to provide significant information about a person’s ancestry. An added impediment to determining African-American pedigree is the fact that African slaves were legally classified as chattels. As a result, they could be separated from their family members and sold to plantation owners in other parts of the same state, or in entirely different states. Moreover, because it was illegal to teach slaves how to read and write, written family records and histories for most African-Americans are nonexistent. Finally, despite the Internet’s promising potential in the tracing of family histories, many African-Americans continue to remain without access to computers or the Internet. Thus, requiring African-Americans to produce genealogical evidence would be unfair because it would result in the exclusion of a large number of Black Americans with legitimate claims.

2. The One-Drop Rule

A second approach in determining the eligibility of those persons entitled to receive reparations for slavery would be simply to apply the “one-drop rule,” a rule of hypodescent that is inherent in the American system of racial classification. Simply stated, the rule denoted that “[a]ny trace of African ancestry makes one Black,” regardless of physical appearance. Implicit in this rule was

56. See Ghannam, supra note 2, at 39 (discussing a computerized database for the Study of Afro-Louisiana History and Genealogy (1699-1860), which provides factual evidence regarding the ownership and costs of slaves in Louisiana).


58. See Tracing Your Own Roots—Advice from an Expert, U.S. NEWS & WORLD REPORT, Mar. 14, 1977, at 57 (noting that the costs for hiring a person to conduct a genealogical search may cost thousands of dollars and warning that any genealogist hired should be board certified).

59. See, e.g., U.S. CONST. art. IV, § 2, cl. 3 (recognizing slaves as chattel and requiring the delivery and return of fugitive slaves to their legal owners).


61. Katie Hafner, Ideas & Trends: A Credibility Gap in the Digital Divide, N.Y. TIMES, Mar. 5, 2000, § 4, at 4 (discussing a National Public Radio survey that noted only 38% of blacks as compared to 57% of whites under the age of 60 have Internet access from home and that in households with yearly incomes under $30,000, only 19% of blacks as compared to 34% of whites have access to the Internet from home).

62. “Hypodescent” is the term posited by anthropologists to describe America’s system of racial classification. Marvin Harris, Patterns of Race in the Americas 37, 56 (1964). It means that a subordinate classification is assigned to the offspring of a union when there is one “superordinate” and one “subordinate” parent. Id. Thus, under this classification, the child of a black parent and a white parent is considered black. Id.

the premise that not only would those persons whose black or African ancestry was visible be considered black, but also those persons with any known trace of African ancestry. In practice, the rule resulted in the classification and designation of “Negro,” “colored,” or “black” for any person who possessed even one drop of African blood.

Historically, the rule found its roots in the institution of American slavery and was established to perpetuate its vestiges. The one-drop rule was created primarily to discourage racial mixing between blacks and whites through marriage, to prevent persons of African ancestry from gaining economic power in the United States, and to ensure that all children with any degree of African ancestry, no matter how small, remained chattels. Although during the eighteenth and early nineteenth centuries, state legislatures throughout the country struggled to define the specific amount of black blood necessary to overcome a claim of whiteness, they uniformly adopted and followed the rule of hypodescent—that racial identity was to be determined by blood.

Adopting the one-drop rule in defining eligibility for black reparations is problematic. First, the test fails to accurately sift out those individuals of African ancestry who are not the descendants of the masses of Africans who were brought to the United States during slavery. Because the test fails to differentiate between the descendants of U.S. slaves and those of other nationalities with African heritage such as Haitians, Caribbean blacks, or European blacks, a literal application of the test for determining eligibility for reparations

SCOTT L. MALCOMSON, ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE 356 (2000) (noting that although the rule was designed to settle the problem of determining race, it was impossible to determine if one possessed one drop of black blood and to know whether one was a real white person or an imitation).

64. See Gotanda, supra note 63, at 24 (discussing the rule of hypodescent).

65. See RICHARD J. PAYNE, GETTING BEYOND RACE: THE CHANGING AMERICAN CULTURE 42, 61 (1998) (noting that the rule was developed to ensure the economic status of whites through the perpetuation of slavery); PAUL R. SPICKARD, MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA 374-75 (1989) (providing a summary of antimiscegenation laws in U.S. history). During the period of slavery, the law followed the civil law maxim of partus sequitur ventrem (the offspring of slaves follow the mother) in defining ownership interests in slaves. See, e.g., Harris v. Clarissa, 14 Tenn. (6 Yer.) 227, 240 (1834) (holding that the freedom of a female slave was applicable to her children); GEORGE M. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY 16-21 (2d ed. 1856) (noting that the one-drop maxim was universally recognized in slave-holding states).

66. See PAYNE, supra note 65, at 42.

67. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (discussing and upholding as a legitimate exercise of state police powers, the different approaches taken by states in defining “colored person” such as the requirements of “any admixture of black blood,” a preponderance of black blood, and .75% of black blood); People v. Dean, 14 Mich. 406, 425 (1866) (holding that persons with less than one-quarter black blood were white within the meaning of the state constitutional provision limiting the voting franchise to white males). The dissent in Dean argued that a showing of a preponderance of white blood should be adequate to sustain a status of whiteness. See id. at 435, 438 (Martin, C.J., dissenting); see also Gotanda, supra note 63, at 34-35 & nn.137-40 (referencing specific state statutes enacted during slavery to define race).

68. See Harris, supra note 32, at 1738 n.138 (discussing various court decisions of the nineteenth and early twentieth centuries defining “Negro” and “colored” by the amount of black blood).
could open the door for the submission of claims by blacks who may possess the visual characteristics of African ancestry and current U.S. citizenship, but who lack any relationship at all to those Africans brought to the United States between 1619 and the abolition of the slave trade.  Racism toward blacks in America, however, has never differentiated between the various subgroups or nationalities of blacks, but has primarily focused on the black phenotype. Consequently, even Haitians, Caribbean blacks, and others with African ancestry are subjected on a daily basis to discrimination and other modern-day remnants of slavery.

Second, the rule fails to address the more subtle issue of the eligibility for reparations of those persons whose ancestors were the products of unions between African slaves and whites, but who were light enough in skin color to “pass” as whites, thus escaping any of the negative consequences of being labeled black by society. Technically, the descendants of slaves who passed as whites would be eligible to submit claims under the one-drop rule even though most of their ancestors did not experience the dehumanizing consequences of slavery. In either case, however, persons seeking reparations for slavery would still be required to produce evidence of their lineage. Thus, all claimants would face many of the same obstacles inherent in demonstrating their ancestry as discussed in the previous section.

Notwithstanding its political incorrectness in modern society as a means of determining race, the one-drop rule is so engrained in our nation’s psyche that it remains an unofficial way of distinguishing between blacks and whites. Today, society continues to designate any individual with any indicia of black ancestry (such as skin color, physical characteristics, or blood) as African-American. This was evident in 1986 when the Louisiana Supreme Court refused to review the case of Susie Guillory Phipps—a Louisiana woman raised as a white woman—who wanted the racial classification on her birth certificate changed.

69. Between 1619 and 1860, approximately four million Africans were enslaved or held in indentured servitude in the United States. Nat’l Advisory Comm’n on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 95 (1968). In 1865, slavery was officially abolished through the Thirteenth Amendment. U.S. CONST. amend. XIII. Technically, only the descendants of slaves brought to the United States during this period would be entitled to receive reparations for American slavery.

70. See Taber’s Cyclopedic Medical Dictionary 1493 (17th ed. 1993) (defining phenotype as “[t]he physical appearance or make-up of an individual”). Physical attributes of the black phenotype include wavy and curly hair, light to dark brown skin, broad nose, full lips, and wide mouth. 16 The World Book Encyclopedia 53-54 (2000) (discussing the principal physical characteristics of the Negroid race).

71. After slavery, many persons with African ancestry who lacked the physical features and characteristics of the African phenotype often “passed” as white in order to escape the discriminatory and dehumanizing consequences of being labeled black and to gain economic power. See Payne, supra note 65, at 163; Harris, supra note 32, at 1710-12 (discussing a narrative of the author’s grandmother’s experience in “passing” as white as a result of the fairness of her skin). Those who were able to “pass” did so by disowning or abandoning their African ancestry. As a result, many whites in America have African ancestry, but are unaware of it. See Payne, supra note 65, at 163.
from black to white after she learned that she had a black ancestor. Finally, even black people with mixed ancestral heritage continue to be strong proponents of the one-drop rule. For example, as a response to the common enemy of discrimination during the Civil Rights Movement of the 1950s and 1960s, blacks from all ancestral backgrounds adopted the one-drop rule as a means of promoting racial solidarity. Today, many blacks continue to support the rule on the basis that it further perpetuates the interests of blacks in a society in which skin color, even in the black community, continues to operate as a determining factor in deciding which blacks will benefit economically and socially.

3. Genetic Mapping

A third possible way to determine eligibility for slavery reparations would be to require all persons submitting claims to undergo deoxyribonucleic acid (DNA) testing. DNA is the material located in the nucleus of an individual’s cells that stores one’s unique genetic information. Within the last few years, DNA testing has been used extensively in establishing paternity and criminal culpability. For the most part, it has been heralded as “virtually foolproof” and possibly the most persuasive proof that can be offered in paternity suits.

The use of DNA testing in determining lineage and ancestry has also been encouraging. A recent and notable instance occurred in 1999 when, after years of assertions and speculation, DNA testing provided near-conclusive proof that Thomas Jefferson, the third President of the United States, fathered children by his slave Sally Hemings. Currently, geneticists at Howard University and Massachusetts Bay Community College are working to develop DNA tests

72. Doe v. Louisiana, 479 So. 2d 369, 372 (La. Ct. App. 1985); see also Calvin Trillin, American Chronicles: Black or White, New Yorker, Apr. 14, 1986, at 62, 62 (noting that Phipps was “shocked” and “sick for three days” upon discovering that she had a black ancestor and had been designated as black).
73. See Payne, supra note 65, at 162-63.
74. See id.
75. See Kathy Russell et al., The Color Complex: The Politics of Skin Color Among African-Americans 24-28 (1992) (discussing internal discrimination within the black community based upon skin color and the various tests imposed even by blacks as requirements for admission into black churches, schools, social clubs, fraternities and sororities, and vacation resorts).
79. Jenkins, supra note 78, at 211 (noting that DNA testing often produces paternity indices well above 99.99%).
designed to assist Black Americans in determining whether their ancestors came from regions of Africa where traders purchased slaves. The new tests would allow analysts to look for sequences in the genes of Black Americans present in the current populations of the various regions in Africa and could ultimately work to restore to Black Americans their African identity, which was eliminated by slavery.

Although DNA testing would provide the most scientifically accurate information for determining the eligibility of Black Americans for slavery reparations, even it has limitations. First, many scientists have emphasized that DNA testing alone is insufficient to provide a decisive link to a homeland and that other fields of knowledge—such as history and technology—must also be considered in the process. For example, depending on the type of DNA used, the testing may only be able to explain 1/128 of a Black American’s genetic composition. Second, because DNA testing in this area is still in the early developmental stages, it will require time in order to develop the extensive data banks of people and areas of Africa necessary to provide an accurate result. Third, because of the widespread interbreeding between slave masters and slaves, it is very likely that DNA testing would point Black Americans searching for their ancestry toward their European lineage rather than to their African roots. Finally, even if sufficient data banks for DNA comparisons of blacks could be established, the potential for improper access and for use of the information by employers, insurance companies, and law enforcement agencies raises serious privacy concerns that necessitate the creation of sufficient legal safeguards for the protection of such information.

B. CALCULATING THE DEBT

Although Robinson frequently discusses the magnitude of the damage inflicted upon African slaves and the current effects of slavery upon modern-day

82. Id.
83. Id.
84. Mitochondrial DNA is usually passed down through generations unchanged. Id. It passes from mother to daughter while Y-chromosone DNA follows the male line. Id. Should a black male attempt to trace his mitochondrial DNA to the lineage of his great-great-great-great-grandmother, he might succeed, yet the woman would have only accounted for 1/128th of his genetic composition. Id.
85. Id.
86. See id.; see also Julie C. Lythcott-Haims, Note, Where Do Mixed Babies Belong? Racial Classifications in America and Its Implications for Transracial Adoption, 29 HARV. C.R.-C.L. L. REV. 531, 539 (1994) (noting that an estimated three-quarters and four-fifths of all blacks in the United States have some white ancestry).
87. See, e.g., MICH. COMP. LAWS § 37.1202(h) (2000) (prohibiting employers from requiring the submission of genetic information as a condition of employment or promotion); MO. ANN. STAT. § 375.1303.1(1) (West Supp. 2001) (prohibiting insurance companies from requiring applicants to provide genetic information or to undergo genetic testing); id. § 375.1306.1 (prohibiting employers from using genetic information or testing to distinguish between, discriminate against, or restrict rights or benefits due to employees). In 2000, Massachusetts became the first state to prohibit genetic discrimination in housing services. MASS. ANN. LAWS ch. 151B, § 4(6) (Law. Co-op. 2000).
blacks, he is careful to avoid quantifying the specific dollar amount necessary to satisfy the massive debt owed to blacks.\textsuperscript{88} Robinson simply contends that the total amount necessary to pay off the debt should be determined once an assessment is made of the actual costs for repairing the long-term social damage to blacks.\textsuperscript{89} In defending this stance, Robinson has argued that a discussion of reparations for slavery should not begin with the answer, but should begin with the invitation to engage in discussion on the topic.\textsuperscript{90} Several commentators have criticized Robinson, however, for avoiding this difficult yet critical issue.\textsuperscript{91}

I agree with Robinson's decision to refrain from offering the total costs for his reparations plan but for different reasons. First, I concur with other scholars who have concluded that an important first step in the process for calculating any such award must be a consensus among blacks on the specific legal strategy for proceeding. For example, should the claim for black reparations be legally couched as a claim for restitution or back pay, either for the unjust enrichment of whites as a result of the centuries of wealth obtained by them from the economic exploitation of slave labor, or for the denial of opportunities resulting from state-imposed segregation and discrimination? If this is the appropriate way to proceed, would payments made to blacks as restitution really effectuate the psychological healing necessary to overcome the centuries of damage inflicted by slavery? Robinson does not contend that monetary compensation alone would be sufficient to rectify the total damage done to blacks by slavery. He believes, however, that an open debate on the issue followed by a commitment by White America to closing the social and economic gaps between the races is an important step toward solving America's race problems.\textsuperscript{92}

On the other hand, should the claim be couched as a tort law claim designed to make the victims of slavery whole by attempting to compensate them for their injuries? If so, is it even possible to place an adequate dollar value on the many black lives that were lost as a result of slavery, the damage done to the black family, and more specifically, the centuries of institutionalized restraints on black liberty and freedom? The legal characterization of the claim undoubtedly will have lasting political and social consequences for blacks, and Robinson is wise not to become entangled into this debate without fully counting the costs.

From a strategic standpoint, a claim for reparations based on the tort theory of compensation for injuries continues to provide fuel for the existing arguments of black victimization and white oppression that typically surface during

\textsuperscript{88} ROBINSON, supra note 2, at 244.
\textsuperscript{89} See id.
\textsuperscript{90} See Scott Fornek, Does U.S. Owe Debt to Blacks?, CHI. SUN-TIMES, Apr. 28, 2000, at 6 (discussing Robinson's defense for failing to include a specific dollar amount for his slavery reparations proposal).
\textsuperscript{92} ROBINSON, supra note 2, at 7, 204.
debates on reparations for slavery. In addition, framing the argument in terms of compensation for injury will require that the claimants be able to demonstrate the full nature and extent of their injury, a task that may not be so easy to demonstrate. Even more detrimental to blacks, however, would be the implication that any payments agreed upon would constitute a full satisfaction of the debt and thus, blacks and whites would—for all purposes, including economic ones—be on par with one another. As discussed earlier, the likelihood for success of a claim for reparations based in tort would be slim in light of the current political climate of conservatism—one that will no doubt continue to grow during the Bush Administration. Thus, I agree that any claim, in order to be viable, must be one for restitution.

In arriving at a current pay-off figure, the federal government could use the value of slave labor as its starting point. For example, in order to create a base present value figure for the debt amount owed at the end of slavery, the government could begin by estimating the total number of African slaves brought to the United States during the period of 1619 to 1865. It could then multiply that figure by the following factors: (1) the number of hours typically worked by slaves, (2) the average number of years of expected labor, (3) the actual dollar value of slave labor, and (4) the average purchase price of slaves during that period. The government could then adjust the base amount to include periodic cost of living increases due to inflation. Finally, after determining the adjusted base dollar figure, a future value calculation of the amount could be performed in order to obtain its pay-off equivalency in present-day dollars.

93. See supra Part I (discussing white backlash).
94. See Glenn C. Loury, Op-Ed, It's Futile to Put a Price on Slavery, N.Y. TIMES, May 29, 2000, at A15 (noting that a significant flaw in advocating a tort-law model for reparations is that it would allow the nation to wash its hands of society’s inequities once the debt has been paid).
96. See supra note 69 (discussing an estimate of the number of slaves entering into the United States between 1619 and 1860). Although I have chosen the year 1865 as a fixed point to begin calculating the debt, Robinson and others have suggested that a legitimate cutoff point would be the enactment date of the Voting Rights Act of 1965, the time when the federal government began to take official steps to eliminate racial discrimination against blacks and to ensure democratic equality for blacks. See Robinson, supra note 2, at 230; Fomek, supra note 90, at 6. My formula is designed solely as a starting point to begin a dialogue on calculating the debt. I am certain, however, that other factors or formulae could be considered and used to arrive at a present value calculation for slave labor for whatever time period selected.
97. See C. STEVEN BRADFORD & GARY ADNA AMES, BASIC ACCOUNTING PRINCIPLES FOR LAWYERS 110-11 (1998); ROBERT M. CROWE, TIME & MONEY: USING TIME VALUE ANALYSIS IN FINANCIAL PLANNING 2.1-2.10 (2d ed. 1991). A basic formula for computing the future value of a sum of money is:

\[ FVSS = PVSS (1+i)^nt \]

Where:

- FVSS = the future value of a single sum
- PVSS = the present value of a single sum
- \( i \) = the compound annual interest rate, expressed as a decimal
- \( n \) = the number of years during which compounding occurs
Although in theory calculating the overall debt owed to Black Americans may seem possible and viable, even a simple formula such as the one that I have presented fails to consider such intangible factors as the loss of economic opportunities resulting from centuries of government-ratified discrimination against blacks after slavery, the perpetual psychological damage done to blacks through endless racial discrimination and its consequences, and the value of freedom. For example, Professor Robert Westley has considered the cardinal role that home ownership has played in the accumulation of wealth by the white middle class and has persuasively argued that as a result of decades of discrimination in home mortgage approval rates for blacks, the current generation of blacks will lose an estimated $82 billion dollars in home equity while the next generation of blacks will lose approximately $93 billion dollars. Needless to say, the effect of past and current discriminatory practices in mortgage lending alone continues to ensure that the broad income gap between whites and blacks that has existed throughout history remains today.

In addition, the psychological injury to Black Americans today, caused by a century or more of state-imposed discrimination and state acquiescence in private discriminatory actions against blacks, is immeasurable. In a recent commentary, Professor Glenn C. Loury effectively raised the difficulties inherent in any attempt to quantify issues affecting the black community, such as the cost of inner-city ghettos, poor education, or the stigma attached to racial inferiority. Although Professor Loury has pointed to just a few of the numerous social problems that plague the black community—ones that arguably could be tied back to the social-economic disadvantages due to slavery—he has correctly concluded that the economic and social damage done by slavery is far too complex to be fully satisfied through any cash payment. Although not as candid as Loury, Robinson has also alluded to this truth. Because Robinson is

CROWE, supra, at 2.1. In light of the fact that U.S. slavery lasted for more than two centuries and the difficulties that may arise in determining the respective yearly interest rates, an average interest rate might be used.

98. Westley, supra note 9, at 441-42. Professor Westley notes that until 1950, the Federal Housing Authority provided subsidies to white mortgage holders who were bound by restrictive covenants to exclude blacks from future ownership. Id. at 441. Consequently, this practice caused blacks to miss out on billions of dollars in home equity wealth accumulations while whites continued to benefit from discriminatory federal housing subsidies. Id.

99. Loury, supra note 94. As an example, Professor Loury raises the difficulty in proving what many have theorized, namely that a high out-of-wedlock birth rate for blacks is the result of chattel slavery. Id.

100. ROBINSON, supra note 2, at 223-24. Robinson discusses the principle behind the Luxembourg Agreement of 1952, a treaty obligation between West Germany and Israel, which provided that Israel would receive one billion dollars in reparations from the German government for state-imposed human rights violations committed against German Jews during World War II. In explaining the principle behind the Agreement, Robinson states that

[when a government kills its own people or facilitates their involuntary servitude and generalized victimization based on group membership, then that government or its successor has a moral obligation to materially compensate that group in a way that would make it whole,
mindful of the psychic healing that must occur in order to make blacks fully whole, his plan would require that a portion of the monies received for reparations be used to rebuild the self-esteem of Black Americans through the teaching of the history and culture of the black world and to create a financial basis for blacks to own the politics of their communities.\textsuperscript{101}

Finally, any attempts to place a monetary value on the loss of liberty and freedom is both offensive and demeaning to blacks. Similar to the difficulties in attempting to quantify a dollar value for the vestiges of slavery, it is impossible to fully and adequately assign a tangible value to freedom.\textsuperscript{102} The Founding Fathers believed that the concept of liberty was so significant that it was worthy of constitutional protection.\textsuperscript{103} The sentiments of the Founders with regard to the value and significance of this concept are aptly summarized in a statement made in 1775 by former U.S. statesman Patrick Henry during the period in which the thirteen colonies were deliberating the issue of secession from England. In anticipation of an inevitable war with Great Britain, Henry made the following comment in a speech given before the Virginia House of Delegates: "I know not what course others may take; but as for me, give me liberty, or give me death."\textsuperscript{104}

III. A Few Thoughts on Implementing Black Reparations

Despite the impediments to black reparations, Robinson raises a legitimate point concerning the unfairness of asking blacks to forget about the debt they are owed, when generations of White Americans have benefited, and continue to benefit, from the exploitation of their ancestors' labor and the abuses of black sovereignty that occurred during slavery. As Robinson correctly notes, recent history has revealed that slavery not only provided the labor used to construct the U.S. Capitol building, but also provided a significant basis for much of the profits and cumulative wealth of slave owners and many domestic corporations.\textsuperscript{105} As a way to level the economic playing field between blacks and

\begin{itemize}
\item while recognizing that material compensation alone can never adequately compensate the victims of great human rights crimes.
\end{itemize}

\textit{Id.} at 224.

\textsuperscript{101} \textit{Id.} at 9, 245-46.

\textsuperscript{102} Despite its offensiveness, however, I have included the average purchase price of a slave as a variable in calculating the present value for the debt owed during slavery in order to reflect the dollar value assigned to black personhood by the state governments.

\textsuperscript{103} See U.S. CONST. amend. V (noting that no person shall be deprived of life, liberty, or happiness without due process of law); U.S. CONST. amend. XIV, § 1 (noting that no state shall deprive an individual of life, liberty, or property without due process of law).

\textsuperscript{104} Speech by Patrick Henry before the Virginia House of Delegates, Richmond, Virginia (Mar. 23, 1775), quoted in \textit{John Bartlett, Familiar Quotations} 270 (1937).

\textsuperscript{105} \textit{Robinson, supra} note 2, at 3, 208-09; \textit{Alvarez, supra} note 33; Peter Slevin, \textit{In Aetna's Past: Slave Owner Policies}, \textit{WASH. POST}, Mar. 9, 2000, at A17. In recognizing that documentation of insurance coverage for slaveholders for the damage to or death of their slaves would provide first-hand evidence of the "ill-gotten profits from slavery," the California legislature recently enacted the Slavery
whites, he proposes the payment of federally funded reparations to be placed in trust for the future educational needs of black students.\textsuperscript{106}

For practical purposes, I believe that Robinson is correct in advocating group rather than individual reparations.\textsuperscript{107} However, his proposal to create a national trust fund with a primary focus of providing educational assistance to black students raises even more problems. First, Robinson spends very little time discussing the mechanics of administering the trust.\textsuperscript{108} On the one hand, it would seem suspect to have White Americans control the process for determining eligibility, reviewing claims, and making the final decisions regarding the distribution of trust monies, especially in light of the dominant role played by whites during slavery. On the other hand, it may be unreasonable to assume that the black community can rely entirely upon the race of the person as a controlling factor when determining which persons will properly and fairly administer such massive amounts of money. Although Robinson's proposal implies that the trust would be administered by a group of trustees who have been approved and appointed by blacks,\textsuperscript{109} he fails to acknowledge that the black community is not monolithic. Blacks are not immune from such internally divisive features as black-on-black crime, black racism, class, religion, sexism, and patriarchy.\textsuperscript{110} Issues of race and class continue to divide the black community and have created many difficulties for black leaders in determining the best strategies for helping blacks. Finding a group of individuals who would be both

\textsuperscript{106} See supra text accompanying note 17. Although Robinson has argued for monetary compensation, advocates of reparations have proposed a variety of compensation plans including lump-sum payments, land redistribution, a national apology from the federal government, the continuation of current affirmative action programs, a full-blown Marshall Plan that would direct federal monies into social programs, and economic development plans designed to aid blacks. See, e.g., Cardwell, supra note 2; Sabrina L. Miller, \textit{Forum Puts Reparations for Slavery into Spotlight}, Ch. Trib., Feb. 2, 2001, § 1, at 1. In addition, Professor Glenn Loury has suggested that a better model for reparations would be to follow the South African approach in establishing a Truth and Reconciliation Commission, one that was designed to create a permanent acknowledgement of the human rights violations committed during South African apartheid. See Loury, supra note 94.

\textsuperscript{107} See supra Part I (discussing my thoughts on the political feasibility of obtaining individual reparations from the federal government).

\textsuperscript{108} ROBINSON, supra note 2, at 244-46.

\textsuperscript{109} Robinson has not expressly stated this; however, it can be implied because his proposal is rooted in Professor Robert Westley's model for black reparations, which would require this. See Westley, supra note 9, at 470.

\textsuperscript{110} See, e.g., DERRICK BELL, \textit{GOSPEL CHOIRS: PSALMS OF SURVIVAL IN AN ALIEN LAND CALLED HOME} (1996) (discussing problems of sexism and patriarchy in the black community); Neil A. Lewis, \textit{Justice Thomas Suggests Critics' Views Are Racist}, N.Y. Times, July 30, 1998, at A1 (discussing accusations made by Supreme Court Justice Clarence Thomas that his black critics held racist views because they assumed that he was influenced by conservative white Justices); see also Sherri M. Owens, \textit{Henry Louis Gates, Jr.}, Orlando Sentinel, Apr. 5, 1998, at 6 (interview) (noting that the gulf between the black middle and lower classes is as wide as that between the black and white races).
acceptable to and approved by blacks, and who could lay aside any self-interest, may be more difficult than Robinson has envisioned.

Second, Robinson argues that the trust should be used mainly as a means to fund the educational needs of blacks. As an academic, I understand and appreciate Robinson’s conclusion that education can be a key to eliminating the economic divide between Black and White Americans. However, Robinson fails to specify whether the term “educational” would also include vocational skills training. Assuming that it does not and is limited only to postsecondary education at the university level, then Robinson provides little, if any, immediate help in changing the current status of the black lower class. I raise this point in light of the fact that the gap between the black middle and lower classes has continued to widen since the civil rights era. Although blacks have made significant progress in educational achievements and representations in both the electoral process and other segments of society over the past few decades, the number of low-income blacks has not significantly changed. For example, approximately 26.5% of all blacks and 36.8% of black children, as compared to only 11% of whites and 15.4% of white children, continue to live in poverty. Even if the trust is limited to more traditional educational purposes, it is likely to result in the creation of a wealthier black middle class, while widening the already existing large gap between the black middle and lower classes.

In addition, a contributing factor to the increasing economic divide between the black middle and lower classes is the emerging technological revolution that has resulted in the elimination of many unskilled jobs. Consequently, absent job training programs designed to prepare the black lower class for the high-tech computerized jobs of the twenty-first century, the black lower class will become even larger. Finally, it is unrealistic to believe that the black lower class can be ultimately eliminated solely through the promotion of education when poverty continues to cross all color lines. For purposes of fairness and to ensure that the black lower class receives some tangible benefit from the trust monies, a better approach may be to broaden the purpose of the trust to include the funding of secondary and postsecondary education at both the vocational and university skills training levels.

Third, even aside from the problems in determining the scope of the purpose

111. See supra text accompanying note 17 (discussing the specific elements of Robinson’s trust proposal).
113. Many of these gains can be attributed to the success of affirmative action programs. See Paul Butler, Affirmative Action and the Criminal Law, 68 U. COLO. L. REV. 841, 855 (1997).
115. BELL, supra note 110, at 6 (arguing that the economic distress that blacks suffer is evidence of the emerging technological revolution that has eliminated opportunities for blacks and all Americans).
116. Henry Louis Gates, director of the W.E.B. DuBois Institute for Afro-American Research at Harvard University, contends that “[u]nless we have an ethical revolution, helping people believe they can make it within the system, along with job-training programs to prepare them for the high-tech jobs of the 21st century, we’re going to have a self-perpetuating black middle class and a self-perpetuating black underclass.” Owens, supra note 110.
117. See supra note 113.
of his trust, Robinson fails to place concrete limits on the number of times that a student could submit an application for funds or the total amount that a student would be eligible to receive. Under Robinson's proposal, students may be able to submit multiple requests for funding of their educational endeavors. Thus, specific students could monopolize many of the funds to the detriment of other students. Assuming student eligibility to submit claims for reparations, it will be critical to set limits as to how much any particular student would be entitled to receive.

Fourth, Robinson's trust is designed to provide assistance to future beneficiaries—students that will be entering into grades K-12 and those who plan to attend colleges and universities after high school. Ironically, Robinson makes no attempt to provide compensation to those members of the current or previous generations of blacks who are technically more closely related by blood to slaves and who are probably more likely to have directly experienced and suffered from the discriminatory practices of Jim Crow. Under Robinson's proposal, the black lower class and members of the previous generations of blacks whose careers and accomplishments have been significantly affected or limited by racial discrimination would be sacrificed to ensure a better standard of living for later generations. This approach could result in even more division within the black community.

In light of a few of the problems surrounding Robinson's proposal, a more utilitarian and equitable approach to administering black reparations would be to create a community trust fund. The purpose of this trust would not be limited to education, but could be used for an array of programs designed to help the black community at large. This approach finds support in both Professor Westley's model and those proposed by other black scholars. For example, under a community trust model, the total amount of the reparations award could be divided and distributed to each state with black representation. As in Robinson's proposal, under a community trust approach, the funds would be held in trust and could be used to provide housing subsidies and educational scholarships for blacks. The funds could also be used to provide start-up capital for ownership of black businesses and banks, and to ensure that all blacks receive adequate health care and medical insurance coverage. Although this

118. Although Robinson's proposal does not discuss this, Professor Westley's model would allow any trust beneficiary to submit proposals to the trustees for the expenditure of the trust funds. Westley, supra note 9, at 470.
119. ROBINSON, supra note 2, at 244-45.
120. See Hopkins, supra note 25.
121. See Westley, supra note 9, at 470 (noting that Professor Westley's model is designed to benefit all Black Americans and would allow for the funding of educational and noneeducational projects designed to provide economic empowerment to blacks); Ghannam, supra note 2, at 70 (discussing Harvard law professor Charles Ogletree's argument that the primary goal behind federal reparations for slavery should be to change the quality of life for current blacks who still suffer from the centuries of government-sponsored "segregation, bigotry and lack of meaningful opportunity").
approach would face some of the same hurdles as Robinson's model, it would provide the greatest benefits to the black community in both the short and long runs, while indirectly improving the quality of life for whites and other minorities living in communities where blacks are represented.

CONCLUSION

Randall Robinson has journeyed deep into the attics of American and African histories to remind the United States of the dark realities of the institution of slavery, its contemporary vestiges, and the role that the federal government has played in its promotion. Robinson, however, is not content with simply alerting the country of its checkered past concerning race relations in America. In The Debt, he creates the foundation for a national discussion on the unthinkable: federally funded reparations to the descendants of African slaves as compensation for the human rights violations committed against their ancestors during slavery. Robinson has clearly ventured into a taboo area, especially in light of the Founding Fathers' express recognition of the significance of the inalienable human rights of "life, liberty, and the pursuit of happiness," which were inconsistently applied to African slaves, and in light of the current cloud of national conservatism that has overshadowed discussions on issues pertaining to civil rights, welfare, and affirmative action. Although the concept of reparations for slavery is not new, Robinson has succeeded in pushing the nation toward an answer to the question of how to right the wrongs of slavery. Perhaps the nation's willingness to finally acknowledge the social and moral injustices of slavery is an unforeseen fruit of President William Jefferson Clinton's Initiative on Race. The Debt has provided the context and rationale necessary to capture the attention of the public and to thrust the issue of black reparations into the eyes of the national media.

Despite the growing interest in the topic of black reparations, however, the United States continues to be divided on how to rectify the damage resulting from slavery. Monetary compensation is only one of a myriad of approaches that could be used to begin the restoration of black personhood, a direct casualty of slavery. Although Robinson and other advocates of reparations have recog-

122. Even proponents of a community trust fund model would have to tackle the issues of establishing limits on the number of claims submitted by any eligible individual and determining who would administer the trust.

123. Providing a benefit to whites and other minorities could ultimately provide an incentive for congressional support by white lawmakers.

124. The Declaration of Independence para. 2 (U.S. 1776).

125. See CNN Breaking News (CNN television broadcast, June 14, 1997) (coverage of President Clinton's commencement speech at the University of California at San Diego), available at LEXIS, News Library, Transcripts File. During this speech, former President Clinton unveiled his "Initiative on Race"—an initiative designed to promote a one-year national dialogue on race in America. Id.

126. On February 2, 2001, the City of Chicago hosted a national reparations convention to brainstorm on how the debt owed as a result of slavery should be repaid. See Miller, supra note 106. Robinson was one of several key persons invited to participate at this conference. Id.
nized many of the difficulties in attempting to quantify the social and economic costs to blacks, this impediment by itself fails to provide a sufficient basis to abandon every pursuit of monetary relief, especially when the beneficiaries of slavery continue to prosper from it.

Notwithstanding the success of middle class blacks in infiltrating the American mainstream, their fractional representation is overwhelmed by the vast numbers of blacks who continue to live below poverty or within the nation’s lowest income brackets. In light of this, one shortcoming of Robinson’s proposal is that it would fail to directly or tangibly alter the economic status of current and future members of the black lower class. Thus, in order to be appreciated fully by all blacks, a central purpose of any community or national trust fund for black reparations must be to change the quality of life for all members of the black lower class.

In any event, the issue of black reparations is one that will undoubtedly be discussed and debated for years to come. Robinson has presented an invitation to participate in what may prove to be a long negotiation process. America’s response to his invitation, however, will provide critical insight into the true status of race relations in the United States.