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Framing Redress Discourse

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“We gather here today to right a grave wrong.”

President Ronald Reagan at the signing of legislation
atoning for the internment of Japanese Americans
August 10, 1988

Introduction

My ambition here is to bring together for the first time two of the various projects on which I have given considerable attention in the last twenty-five years. The first is a construction of models for redressing past atrocities such as the Holocaust, Apartheid, the Comfort Women, and Japanese American internment. The second is a clarification and synthesis of major theories, strategies or norms about racial justice in post-civil rights America. Post-civil rights theories contextualize within the African American experience redress models that were originally constructed within a global context, primarily by what happened (or should have happened) in countries like Germany, South Africa, and Japan. The main argument broached here is that, taken together, these frameworks—redress models and post-civil rights theories—provide a coherent and meaningful way of framing our discourse on how best to redress slavery and Jim Crow (collectively referred to as “slave redress”). This article is a demonstration of that proposition. Before getting into the weeds, it may be useful to preview my thinking.

With the benefit of wonderful years (decades now) of exchanges with scholars, activists, and government officials here and abroad, I have crafted two basic approaches for redressing slavery and other past atrocities: *tort model* and *atonement model*. Backward-looking, victim-focused, and compensatory (sometimes punitive), the tort model’s primary concern is to recover damages for loss or harm suffered by the victims; in other words, recompense. Forward-looking, perpetrator-focused, and restorative, the atonement model stresses the importance of the perpetrator manifesting a true desire to make amends; in other words, redemption. The perpetrator’s redemptive act lays the foundation for forgiveness.¹

¹ The competing redress models were first published in the form of a book in Roy L. Brooks, *When Sorry Isn’t Enough: The controversy Over Apologies and Reparations for Human Injustice* (New York: NYU

Using the diversity of thought among civil rights scholars, commentators, and pundits in the decades since the death of Jim Crow as a springboard, I have endeavored to clarify the core contemporary beliefs regarding the best strategy for racial progress going forward. These post-civil rights theories are: *traditionalism* (racial neutrality); *reformism* (racial integration); *critical race theory* (social transformation—integration on steroids); and *limited separation* (black solidarity or identity).² This juxtaposition of non-nefarious (i.e. nonracist) perspectives generates a dynamic consideration of the race problem very much in the spirit of the diverse positions on civil rights taken by my classmates at Yale Law School sitting night after night around the “Black Table” almost fifty years ago.³

Whether the nation should proceed with slave redress under the tort model or atonement model intersections with the larger question of which post-civil rights norm—traditionalism, reformism, critical race theory or limited separation—generates the best strategy for maximizing racial progress going forward. The redress question, in other words, should be determined in a manner that is congruent with our collective strategy for achieving racial justice in this post-Jim Crow, post-civil rights period. We must know in which direction we are going before we begin the journey.

The intersection of these frameworks also unavoidably adds complexity to the analysis of slave redress. Traditionalism favors partial atonement; specifically redress in the form a government apology but, in deference to the racial-neutrality norm, no government reparations. Private reparations are acceptable, however. Reformism favors full atonement; specifically a “genuine” government apology and solidifying reparations. The apology is made believable by a regime of reparations which collectively effectuate racial integration across society. This entails reparations at both the group or institutional level (“rehabilitative reparations”) and individual level (“compensatory reparations”). The former might include a constitutional precommitment for racially integrated schools and colleges created through a regime of racial preferences. Compensatory reparations might entail cash reparations distributed to individuals directly as supplemental income.

Press, 1999), and subsequently refined in Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (Berkeley: University of California Press, 2004, 2019).

² The project began with the publication of my book, *Integration of Separation? A Strategy for Racial Equality* (Cambridge: Harvard University Press, 1996), and moved to the socioeconomic context in *Racial Justice in the Age of Obama* (Princeton: Princeton University Press, 2009), and to the socio-legal and socio-cultural race problems in Roy L. Brooks, *The Racial Glass Ceiling: Subordination in American Law and Culture* (New Haven: Yale University Press, 2017). Post-civil rights theories also shaped the presentation of cases in one of my casebooks, *The Law of Discrimination: Cases and Perspectives* (New Providence, NJ: LexisNexis, 2011).

³ Not limited to African Americans, the law students who sat at the Black Table in the Yale Law School cafeteria after dinner held diverse viewpoints which we all respected. In addition to myself, students who sat at the table included Lani Guiner on the left, Clarence Thomas on the right, Hillary Rodham and Bill Clinton in the middle. Sam Alito, now a Supreme Court justice, never sat at the table but sometimes sat within earshot of its discussions. His analysis of the black experience in one case in particular, *Fisher v. University of Texas (Fisher II)*, 136 S. Ct. 2198, 2216 (2016) (arguing that the university’s affirmative action program exacerbates intra-racial class conflicts between middle-class and working-class black students), indicates that he was listening to the discussions. Our discussions were in the tradition of the founding generation’s debates about republican government and the philosophers’ arguments about justice in Plato’s Republic. For a more detailed discussion about the “Black Table,” see Brooks, *Racial Justice in the Age of Obama*, p. ix.

Critical race theory also suggests full atonement. But for race critics, the apology must be solidified by reparations calculated toward social transformation (equity rather than equality). This vision of equity might include rehabilitative reparations in the form of a constitutional precommitment for racially integrated schools and colleges implemented through racial quotas to ensure diversity and inclusion, and compensatory reparations in the form of cash reparations distributed on a conditional basis for wealth accumulation. Finally, limited separation's core belief in racial identity suggests that it is not interested in pursuing an apology or atonement from the government, which has a white identity. It is only interested in compensatory justice, which is at the heart of the tort model. This might mean a redress scheme consisting of rehabilitative reparations in the form a constitutional precommitment for the legality of black schools and HBCUs that receive public funds, public funding of schools and colleges controlled by blacks, and cash payments to established black institutions that could support a range of community services and business developments. Thus, all post-civil rights theories support slave redress in one fashion or another but offer different paths to redress. This internal conflict must be reconciled before any specific plan for slave redress is presented in final form to Congress and the American people.

This paper is written in three parts. Part I briefly sets forth the reasons I believe the nation must move forward with slave redress. It gives content to President Reagan's entreaty of "right[ing] a grave wrong." Part II explains in greater detail the competing redress models and the competing post-civil rights theories. Part III intersects these frameworks, applying the post-civil rights perspectives to the slave-redress models. Part IV presents my commentary on Part III. Needless to say, this commentary is illustrative rather than comprehensive. It is but a modest attempt to frame discussion of a matter whose complexity is match only by its importance.

Part I

A Grave Wrong to Be Righted

Two persons—one white, the other black—are playing a game of poker. The game has been in progress for almost four hundred years. One player—the white one—has been cheating during much of this time, but now announces: 'From this day forward, there will be a new game with new players and no more cheating.' Hopeful but somewhat suspicious, the black player responds, 'That's great. I've been waiting to hear you say that for some four hundred years. Let me ask you, what are you going to do with all those poker chips that you have stacked up on your side of the table all these years?' 'Well,' says the white player, somewhat bewildered by the question, 'I'm going to keep them for the next generation of white players, of course.'⁴

When slavery ended in 1865, it was not replaced with a system of racial equality. Except for a brief period of Reconstruction, slavery folded into a system of separate-but-

⁴ Brooks, *Racial Justice in the Age of Obama*, p. 10.

equal, a system of racial preferences for whites that lasted until 1972 when Congress passed the Equal Employment Opportunity Act of that year. This Act, *inter alia*, made it illegal for state and local government to discriminate on the basis of race in employment.⁵

Slavery had two lasting impacts on black lives that remain with us today. If we did not have these conditions we would not have a race problem today. The first lingering effect of slavery is the race-specific rhetoric of racism the slaveholders and their supporters developed to justify the economic exploitation of blacks. Racism is still with us today. It was not invented by the white nationalist groups of today. Second, slavery produced capital deficiencies in all of black society, not just among the enslaved. Basic capital (life, liberty, and human dignity), financial capital deficiencies (income, property and investments), human capital deficiencies (formal education and skill sets), and social capital deficiencies (social esteem and the ability to get things done).⁶ “Most conservatives do not deny the fact that black Americans experience greater difficulties than whites or even other racial minorities in twenty-first century America.”⁷

Blacks brought these capital deficiencies into the Jim Crow period, and came out of that period with them; i.e., the worse schools, housing, jobs, and social esteem. While some immigrants, white or minority, came to the United States with nothing (zero), blacks were living here with minus zero. Some five decades into the post-civil rights period, blacks still have the worse schools, housing, jobs, and social esteem. In fact, the racial differentials are little changed from the end of Jim Crow in 1972 and, in some instances they have gotten worse. For example, the wage differential between college educated black and white males of similar experience is larger today than it was in 1972. And these blacks are doing everything conservatives say blacks should be doing to get ahead.⁸

⁵ 42 U. S. C. 20003 to 2000e-17 (Supp. V 1972).

⁶ See Brooks, *Atonement and Forgiveness*, pp. 42-43 (discussing the work of Glenn Loury and others). There are other ways of articulating the lasting impact of slavery; e.g., Stuart Henry and Dragan Milovanovic’s “harms of repression” and “harms of reduction.” See *ibid*.

⁷ *Ibid.* at pp. 43-44 (discussing such well-known conservatives as Shelby Steele, John McWhorter, and Armstrong Williams).

⁸ See Brooks, *Racial Justice in the Age of Obama*, p. 148, fig. 38 (1975-2003). A study using similar data (both male and female college graduates) published in 2019 reports that “young black college graduates are paid, on average, 12.2 percent less than their white counterparts.” Elise Gould, Zane Mokhiber, and Julia Wolfe, “Class of 2019,” College Edition, *Economic Policy Institute*, May 14, 2019, <https://www.epi.org/publication/class-of-2019-college-edition/> (accessed April 20, 2020). To the extent that these wage disparities are largely due to grades, that would suggest that the racial gap in the quality of K-12 education has *grown* since the end of Jim Crow. Yet grades do not tell the whole story. Two researchers report that though “a higher proportion of Asians than whites graduate from the top half of law schools, . . . [w]hite law graduates get a median annual boost to earnings that is substantially higher than minority law grads.” Debra Cassens Weiss, “A law degree provides a larger earnings boost to whites than minorities,” *Lawyer Pay*, October 2, 2017, *ABA Journal*, <http://www.abajournal.com/news/article/a-law-degree-provides-a-larger-earnings-boost-to-whites-than-minorities-res> (accessed April 20, 2020). For an analysis of racial disparities among blacks, Hispanics, Asians, and whites with respect to poverty, income, employment, housing, education, voting, incarceration,

The distance between slavery and today is even closer than the Civil War. For about 800,000 blacks, slavery ended not in 1865 but in 1941, at the beginning of World War II. This is within the lifetime of many Americans today. These African Americans were placed in involuntary servitude often for life under city or county vagrancy laws and other state and municipal laws that targeted blacks. This form of slavery ended in 1941 when the attorney general signed an order, called Circular 3591, which for the first time created federal law that enforced the Thirteenth Amendment's prohibition against involuntary servitude. The Attorney General signed the directive on December 12, 1941, just five days after the bombing of Pearl Harbor.⁹ December 12, 1941, is the official end of slavery. But for many blacks, slavery did not end until *after* World War II. Born into this system of slavery, Ben Jobe reports:

When we came off the plantation, 1945, I was around 11 years old. . . . [S]lavery ended in 1945, let me make that clear. Most people think it was 1865. Oh no, [it was] 1945, when the federal government finally put some teeth into [Circular 3591] . . . and arrested some of the slave owner.¹⁰

Involuntary servitude is but one of many conditions that created sustained or capital deficiencies in the black community. Not unlike slavery, these capital deficiencies denied black families the opportunity to accumulate wealth that could be bequeathed to future generations. Economists tell us that for the vast majority of Americans, “up to 80% of lifetime wealth accumulation results from gifts from earlier generations, ranging from the down payment on a home to a bequest by a parent.”¹¹

From the 1940s-1960s, federal state, and local governments passed housing laws that not only segregated the races, but also prevented African Americans from buying and owning homes throughout the country. For example, the Federal Housing Administration required developers like the Levitt Company to place restricted covenants in every deed which prohibited white homeowners from selling their homes to African Americans. The Fair Housing Act was passed in 1968 to put an end to this and other discriminatory laws. This legislation was not, however, a solution for the problem of housing inequality for which the government was largely responsible. All the Fair Housing Act did was to prohibit future discrimination. It did nothing to undo or compensate blacks for the decades of housing segregation they had suffered.¹²

When suburbs like Levitt Town were built in the 1940s and 1950s, houses sold for about \$8,000 a piece (the equivalent of about \$70,000 in 2020 dollars). Most African

racial profiling, marriage, and other areas during the post-civil rights period, see *Racial Justice in the Age of Obama*, pp. 125-182, figs 1-100.

⁹ See Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (New York: Anchor Books, 2008).

¹⁰ Jackie MacMullan, Rafe Bartholomew & Dan Klores, *Basketball: A Love Story* (New York: Crown Publishing Group, 2018), pp. 132-133.

¹¹ Dalton Conley, “The Cost of Slavery,” *The New York Times*, February 13, 2003, <https://www.nytimes.com/2003/02/15/opinion/the-cost-of-slavery.html> (accessed April 20, 2020).

¹² See Richard Rothstein, *The Color of Law: The Forgotten History of How Our Government Segregated America* (New York: W. W. Norton & Company, 2017).

American families could have afforded those homes. In 2020, those homes sold for roughly \$500,000 and are no longer affordable to most African American (and many other) families. More significantly, two-three generations of white families who moved into those homes benefitted from the tremendous equity appreciation in the value of those homes. In contrast, African Americans, who were forced to live in rented apartments, gain none of that family wealth. The result is that today although black income is on average 60% of white income, “43% of African Americans are homeowners, compared with 73% of whites,” and “the median white household owns 86 times the assets of the median black household.”¹³ Scholars like Richard Rothstein argue that this enormous wealth gap is almost entirely attributable to government discriminatory housing policies practiced in the mid-20th century.¹⁴

The lingering effects of these discriminatory policies and practices cannot be gainsaid. Where people live affects their lives immensely. It determines access to employment opportunities, transportation, decent health care, and, perhaps most importantly, good schools. The latter point is very important because education is “the great equalizer” in our society. It is the primary engine that drives socioeconomic mobility.

Thus, it *still means something* in our society today to be a black person. Blacks and whites are not at equal risk. Orlando Patterson reminds us that black lives are even very different from the lives of other racial minorities. He observes that “African Americans are the least assimilated racial or ethnic group, that although Asians and Latinos are disengaging their national origins from racial identity, similar to European immigrants of the past. African Americans (including multiracial blacks) are perceived as being ‘black,’ and choose to identify as ‘black.’ These identities are abetted by the fact that African Americans intermarry at a rate that is significantly lower than the rates for Asians and Latinos.”¹⁵ Thus, blacks and other racial minorities have broadly similar experiences but with strong group variations in form, intensity, and duration.

African Americans at the top of the socioeconomic ladder are not immune from the lingering effects of slavery or Jim Crow. Wealthy African Americans are not immune from the lingering effects of slavery. “Unlike Oprah Winfrey, Donald Trump has not had to deal with racism in his life. Nor has he ever had to admonish his sons, ‘it’s unlikely but possible that you could get killed today. Or any day. I’m sorry, but that’s the truth. Black maleness is a potentially fatal condition.’”¹⁶ Indeed, at one time statistics showed that “an unarmed black male is twenty times more likely to be killed by a police officer than an unarmed white male.”¹⁷ Timothy Eugene “Tim” Scott, a black republican senator from South Carolina, reports that he had been racially profiled by the policed, stopped and

¹³ Roy L. Brooks, “Op-Ed: Reparations are an opportunity to turn a corner on race relations,” April 23, 2019, *Los Angeles Times*, <https://www.latimes.com/opinion/op-ed/la-oe-brooks-reparations-20190423-story.html> (accessed May 3, 2020).

¹⁴ See Rothstein, *The Color of Law*.

¹⁵ Brooks, *The Racial Glass Ceiling*, p. 7 (sources cited therein). Other social scientists have come to a similar conclusion. See *ibid*.

¹⁶ *Ibid.* at p.8.

¹⁷ *Ibid.* at p. 6.

released, seven times in his first year serving in the Senate. He said that “the vast majority of the time, I was pulled over for driving a new car in the wrong neighborhood or something else just as trivial.”¹⁸

Even a century and a half after the end of slavery and a half century after the end of Jim Crow, African Americans continue to suffer the lingering effects of both atrocities. So much of what white Americans may have thought was finished and distant about these atrocities is in reality present and palpable. Not only the physical conditions but the enmity or distrust blacks have toward the old perpetrator—the federal government—cry out for redress.

Part II

Redress Models & Post-Civil Rights Theories

Redress Models

Since the initial introduction of HR 40 in 1989,¹⁹ scholars have fashioned two competing redress models. The first is the “settlement model,” also called the “tort model.”²⁰ It is backward-looking and victim-focused. Its redress scheme is designed to financially compensate victims for their demonstrable loss (most especially stolen labor), and, sometimes, to deliver punitive justice. The government or even a private beneficiary of slavery writes a check for X amount of dollars to settle the matter. Supporters believe that wrongs as mortal as slavery and Jim Crow should not go unpunished, and that the victims should not go without relief.²¹

Litigation is a major vehicle for effectuating the tort model.²² Yet, litigation is a nonstarter. Litigation is blocked by myriad procedural hurdles, including the statute of limitations, standing, and the lack of subject matter jurisdiction.²³ I have criticized the extant law on the ground that:

If the slave descendants’ claims are morally compelling, then they must be cognizable under U.S. law. Otherwise, the extant law stands as the ‘present embodiment’ of America’s worst atrocity and the corrupt laws

¹⁸ Ibid. at pp.6-7.

¹⁹ HR 40 was introduced by Rep. John Conyers (D-Mich.) in 1989 and reintroduced every year thereafter until 2017. See Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R.40, 115th Cong. (2017). The bill never made it out of committee. Rep. Sheila Jackson Lee (D-Texas) and Sen. Cory Booker (D-N.J.) picked up the crusade in 2019, introducing parallel legislation in the House and Senate that same year. See Commission to Study and Develop Reparation Proposals for African-Americans Act, S. 1083, 116th Cong. (2019).

²⁰ See Brooks, *Atonement and Forgiveness*, Ch. 4.

²¹ See id.

²² See id.

²³ See id. at 138.

that made it possible. This is a credibility check no less important than the Supreme Court's landmark 1954 school desegregation case of *Brown v. Board of Education*.²⁴

Notwithstanding my own argument, I consider litigation under the tort model to be deficient in that it essentially presents a legal claim, not a moral claim, in which the quotidian language of tort litigation—including the calculation of individual damages for millions of people—takes center stage. This approach, in my view, exaggerates the complexity and contentiousness of what ought to be a mutual movement toward racial reconciliation.²⁵

Critically important, there is no apology or admission of guilt by the perpetrator under the tort model whether pursued through litigation or legislation. There is no personal accountability; only a settlement. The perpetrator is thereby allowed to declare victory and go home. White neoconservative Charles Krauthammer would gladly have the government write that check as a means of closing the books on the American race problem.²⁶ In my view, this is a kind of justice on the cheap. It does less well by the victims. I am part of an international group of scholars and activists who meet to study reparations. One of the members, a South African attorney, told me that victims of apartheid who received cash reparations were poor again within a year of receiving them.

The atonement model, by contrast, is forward-looking and perpetrator-focused. It features an apology, which offers the perpetrator an opportunity to reclaim its moral character and initiate conditions that help repair its broken relationship with the victims. This model of redress imbibes a post-Holocaust vision of heightened morality, egalitarianism, identity, and restorative justice. Most importantly, the perpetrator comes to identify with the victims' humanity, which, in my, view is a necessary condition for racial healing.

Under the atonement model, redress comes in two stages. First and foremost, the perpetrator issues an apology and tenders some form of reparations to make the apology believable. Apology is an acknowledgment of guilt rather than a punishment for guilt. When the perpetrator of an atrocity apologizes, it confesses the deed, admits the deed was an injustice, repents, asks for forgiveness.²⁷ The victims then calculate the sincerity of the

²⁴ Id. at 137-38.

²⁵ For a more detailed criticism of the tort model, see id. at 138-40.

²⁶ See Charles Krauthammer, "Reparations for Black Americans," *Time*, December 31, 1990, p. 18.

²⁷ Brooks, *Atonement and Forgiveness*, p. 144. In 2009, Congress passed a concurrent resolution apologizing for slavery and Jim Crow. The resolution: "Acknowledges the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow laws. Apologizes to African-Americans on behalf of the people of the United States for the wrongs committed against them and their ancestors who suffered under slavery and Jim Crow laws. Expresses Congress's recommitment to the principle that all people are created equal and endowed with inalienable rights to life, liberty, and the pursuit of happiness, and calls on all people of the United States to work toward eliminating racial prejudices, injustices, and discrimination from our society. Declares that nothing in this resolution authorizes, supports, or serves as a settlement of any claim against the United States." S.Con.Res.26—A concurrent resolution apologizing for the enslavement and racial segregation of African Americans, 111th Congress (2009-2010). This is apology

apology by the weight of the reparations. Meager reparations undercut the sincerity of the apology. Hence, reparations give substance to the perpetrator's apology and help to repair the damage to the victim and society caused by the atrocity.

Reparations come in many forms. They can be paid at the individual level ("compensatory reparations") in the form of cash payments or nonmonetary outlays (e.g., family recognition or a scholarship) to the victims or their families. Reparations can also be paid at the group or community level ("rehabilitative reparations"). They can be in the form of cash payments to the victims' institutions (e.g., support for HBCUs) or nonmonetary measures that benefit the victims' community as a whole (e.g., new laws, expanded services, commemorations or museums).²⁸ The distinction between compensatory and rehabilitative reparations is not a hard one. It serves the purposes of reminding the public that cash payments to the victims is not the only way to redress slavery. Whether in the form of reparations, apology, or something else, redress is limited only by the imagination.

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

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

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

fails under my conceptualization of a genuine apology. In addition, the apology lacks believability as it explicitly is not solidified by a redemptive act—a reparations.

²⁸ See Brooks, *Atonement and Forgiveness*, pp. 155-156.

descendants are casualties of America's history of race relations; new immigrants of color are not. . . .

* * *

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

None of this means slave descendants will be free from all racism in postatonement America. Atonement will not obviate the need for ongoing civil rights reforms. Slave descendants will have to continue to use our civil rights laws to fight racial discrimination wherever it occurs. Atonement only means that slave descendants now have reason to begin to trust the government's commitment to racial justice.²⁹

My deployment of the atonement model in this article focuses less on the victims' civic responsibility—forgiveness—than on the perpetrator's moral responsibilities—apology and reparations. The atonement model as well as the tort model must be contextualized within the victims' community. In the context of slave redress, this means paying attention to the strategies for achieving racial justice African Americans have been pondering since the atrocities of slavery and Jim Crow ended with the death of the latter circa 1972.

Post-Civil Rights Theories

Over the years, I have clarified, synthesized, organized, and critiqued major suppositions regarding racial progress put forth by scholars and pundits since the end of the civil rights movement circa 1972. This analysis has been distilled into four major post-civil rights theories: traditionalism; reformism; critical race theory; and limited

²⁹ Ibid. at 202-206.

separation. Each of these theories stakes out a position regarding what African Americans (and by extension women, Latinx, Asians, LGBTQ, and other outsiders) should do to achieve socioeconomic, socio-legal, and socio-cultural progress in twenty-first century America. What follows is a short summary of these theories with emphasis on socioeconomic progress.³⁰

*Traditionalism*³¹

Traditionalism's basic belief is that race no longer matters in the African American quest for racial equality today. Traditionalists are not saying that racism no longer exists. They in fact acknowledge the existence of racism today but believe that such racism is not a "potent" as it was during Jim Crow. Ergo, race racism does not prevent African Americans from achieving worldly success and personal happiness in our post-civil rights society. Traditionalists also acknowledge that African Americans face socioeconomic problems today. But these problems are self-inflicted and, hence, beyond the control of government. Teenage pregnancy, black-on-black crime, lack of educational ambition, and hyper racial sensitivity, traditionalists claim, are internal, not external, behavior, not structural, problems that blacks and only blacks can resolve.

Traditionalism not only holds that race no longer matters, it also maintains that the government should not make it matter through its laws or policies. The government should be neutral as to matters of race. It should not make the mistake it made in the past by promulgating race-conscious laws or policies. Racial omission (the color-blind norm) was a sound strategy for the government and racial progress during the days of Martin Luther King, and remains sound today. Blacks and society as a whole are better off with racial omission than racial consciousness. The former norm is the only way blacks can move against white individuals and institutions given to defining blacks by their color, harboring preconceived notions of who a black person is as an individual—to wit, not the equal to a white person. The government, then, ought not to pollute the social environment by making too much fuss about race when, in fact, race should not and does not matter in America today. Race-conscious policies are racially divisive, pure and simple.

This thinking certainly provides the subtext for most of the Supreme Court's decision-making in civil rights cases that impact the socioeconomic environment. The Court simply does not want to make too much about the problem of race in our society. Chief Justice Roberts, a steadfast traditionalist, spoke to this point in one of his opinions, writing, "Simply because the school districts may seek a worthy objective does not mean they are free to discriminate on the basis of race to achieve it."³² Whether invidious or benign, "negative" or "positive," race-conscious governmental policies are discriminatory and, hence, ipso facto, "racist." They are "racist," Justice Thomas, a traditionalist but occasional limited separatist, argues because signal to society that blacks are hapless

³⁰ The theories were broached in the socioeconomic context in Brooks, *Racial Justice in the Age of Obama*, and later applied to the socio-legal and socio-cultural race contexts in Brooks, *The Racial Glass Ceiling*.

³¹ See Brooks, *Racial Justice in the Age of Obama*, Ch. 2.

³² *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 747-748 (2007) (Roberts, CJ).

victims in need of special treatment. They depict blacks as a people less than equal to whites. Blacks are akin to wards of the state, Justice Thomas asserts with no dearth of passion:

[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government’s use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are “entitled” to preferences. . . . In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.³³

Racial charity, in short, undermines racial equality.

*Reformism*³⁴

Reformism embraces a different normative stance than traditionalism. Glenn Loury, a one-time traditionalist who has become a staunch believer in reformism, argues that traditionalism’s thrust—“it’s time to move on”—is “simplistic social ethics and sophomoric social psychology.”³⁵ Though reformism acknowledges behavioral issues among the lowest socioeconomic class in black America, it posits that the race problem is less an internal problem than a structural problem. Ergo, race still matters.

Yes, Americans elected a black president, as traditionalists like to point out, reformists concede. But want traditionalists conveniently ignore, reformists instruct, is that the most powerful person in the world lacked the power to raise racial issues with a strong voice in his own administration. President Barack Obama’s cultural weakness was on full display when he was severely rebuked by the media for seeing racism in the arrest of a renowned black Harvard professor, Henry Louis Gates, by a white police officer, Sgt. James Crowley of the Cambridge, MA, Police Department. In 2013 General Mills ran a commercial showing an interracial family eating its iconic cereal, Cheerios. The commercial drew a strong racist response from the public. Reformists also point to “backstage racism,” reported by Joe Feagin and others, as evidence that race still matters. The Department of Justice report on Ferguson as well as then-FBI director James Comey acknowledged the “hard truth” that racial bias is a fact of life among police officers policing black communities. To be sure, there is black-on-black crime, as traditionalists point out, but, reformists argue, the traditionalists fail to point out that FBI statistics also

³³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

³⁴ See Brooks, *Racial Justice in the Age of Obama*, Ch. 3.

³⁵ Glenn C. Loury, *The Anatomy of Racial Inequality* (Cambridge, MA: Harvard University Press, 2004), p. 144.

show that the rate of white-on-white crime is virtually identical to the rate of black-on-black crime. Reformists accuse traditionalists of cherry-picking the evidence to fit their preordained conclusion that race no longer matters.³⁶

Though they believe race still matters, reformists are not revolutionaries. “With due humility,” Glenn Loury asserts, “I am a reformer, not an ‘abolitionist.’”³⁷ Hence, reformists, like traditionalists, embrace the race-neutrality norm (racial omission) in our post–civil rights, post–Jim Crow society. The difference lies in the fact that reformists value racial integration more than traditionalists do, and are willing to use race-conscious means to achieve it. Racial equality is most enhanced through racial integration, as the mainstream is where the best of everything is—the best schools, jobs, and so on. The difference between reformists and traditionalists, in short, lies in the relative emphasis given to the racial-omission and racial-integration norms. For traditionalists, the racial-omission norm trumps the racial-integration norm. For reformists, the racial-integration norm trumps the racial-omission norm.³⁸

³⁶ See Helene Cooper, “Obama Criticizes Arrest of Harvard Professor,” *New York Times*, July 22, 2009, http://www.nytimes.com/2009/07/23/us/politics/23gates.html?_r=0 (accessed February 16, 2020); Toby Harnden, “Barack Obama’s Support Falls Among White Voters,” *Telegraph*, August 2, 2009, <http://www.telegraph.co.uk/news/worldnews/barackobama/5961624/Barack-Obamas-support-falls-among-white-voters.html> (accessed February 16, 2020); Michael A. Fletcher and Michael D. Shear, “Obama Voices Regret to Policeman,” *Washington Post*, July 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/24/AR2009072400451.html> (accessed February 16, 2020); Krissah Thompson and Cheryl W. Thompson, “Officer Tells His Side of the Story in Arrest of Harvard Scholar,” *Washington Post*, July 24, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/23/AR2009072301073.html> (accessed February 16, 2020); Stuart Elliot, “Vitriol Online for Cheerios Ad with Interracial Family,” *New York Times*, May 31, 2013, <http://www.nytimes.com/2013/06/01/business/media/cheerios-ad-with-interracial-family-brings-out-internet-hate.html> (accessed February 16, 2020); On Leslie Houts Pica and Joe R. Feagin, *Two-Faced Racism: Whites in the Backstage and Frontstage* (New York: Routledge, 2007). The DOJ report on Ferguson is published as, “Investigation of the Ferguson Police Department” U.S. Department of Justice, March 4, 2015, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (accessed February 22, 2020). See also James B. Comey, “Hard Truths: Law Enforcement and Race,” FBI, February 12, 2015, <http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race> (accessed February 22, 2020). On the matter of black-on-black crime versus white-on-white crime, see Brooks, *Racial Justice in the Age of Obama*, pp. 32–33 (“In 2002, for example, 74.5% of violent crimes perpetrated against African Americans were committed by other African Americans. In that same year, however, 72.6% of violent crimes perpetrated against whites were committed by other whites.”). For further discussion of how race still matters, see *ibid.* at pp. 37–53.

³⁷ Loury, *The Anatomy of Racial Inequality*, p.121.

³⁸ Historically, *de facto* segregated schools on average are “inferior in terms of the quality of their teachers, the character of the curriculum, the level of competition, average test scores, and graduation rates.” Brenna Leron Hill, “A Call to Congress: Amend Education Legislation and Ensure That President Obama’s ‘Race to the Top’ Leaves No Child Behind,” *Houston Law Review* 51 (2014): 1177, 1184 (quoting Gary Orfield and Chungmei Lee, “The Civil Rights Project, Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies,” Civil Rights Project, UCLA, August 2007, <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf>). It is important note that *de facto* segregated schools are not the type of racially isolated schools that limited separation envisions. Rather, they seek schools that are adequately funded and controlled by blacks. See Brooks, *Racial Justice in the Age of Obama*, pp. 71-73. For a more detailed yet

Justice Sotomayor begins one of her dissenting opinions by referencing reformist Cornel West’s seminal work, *Race Matters*. She believes that racial preferences are the strongest implementation of the racial-integration norm. In fact, her defense of racial preferences is just as passionate as Justice Thomas’s renunciation of them, discussed a moment ago. She writes in her memoir:

I had no need to apologize that the look-wider, search-more affirmative action that Princeton and Yale practiced had opened doors for me. That was its purpose: to create the conditions whereby students from disadvantaged backgrounds could be brought to the starting line of a race many were unaware was even being run. I had been admitted to the Ivy League through a special door, and I had more ground than most to make up before I was competing with my classmates on an equal footing. But I worked relentlessly to reach that point, and distinctions such as the Pyne Prize, Phi Beta Kappa, summa cum laude, and a spot on *The Yale Law Journal* were not given out like so many pats on the back to encourage mediocre students. These were achievements as real as those of anyone around me.³⁹

Reformists see affirmative action as the gateway to integrating American institutions, which in turn is the best strategy for racial advancement in our post-civil rights society.

*Critical Race Theory*⁴⁰

Critical race theory’s central post-civil rights message is that white hegemony matters most in the struggle for racial advancement. The antidote for white privilege is social transformation. Not unlike the racial-identity norm under limited separation discussed in due course, critical race theory’s social-transformation norm is outside-of-the-box thinking about racial progress. Racial omission and racial integration are not the only (and certainly not the best) ways to pursue racial advancement post-Jim Crow.

The core message of critical race theory—white hegemony matters most—is planted in the writings of the late Harvard law professor Derrick Bell. It is a message that goes to the very structure of our society. As Richard Delgado and Jean Stefancic, two pioneering critical race theorists, assert, “critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.”⁴¹ Critical race theorists believe

older discussion, see Roy L. Brooks, *Integration or Separation? A Strategy for Racial Equality* (Cambridge, MA: Harvard University Press, 1996), pp. 214-234.

³⁹ Sonia Sotomayor, *My Beloved World* (New York: Alfred A. Knopf (2013), p. 191. Justice Sotomayor quotes Cornel West, *Race Matters* (Boston: Beacon Press, 1993), in her dissenting opinion in *Schuetz v. Coalition to Defend Affirmative Action, Integration & Immigration Rights & Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting). The 25th Anniversary of *Race Matters* was published in 2018 with a new introduction.

⁴⁰ See Brooks, *Racial Justice in the Age of Obama*, Ch. 5.

⁴¹ Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001), p. 3.

that appearances can be deceiving. Hence, reminiscent of *The Wizard of Oz*, they seek to “understand what is going on behind the curtain.”⁴² And Looking behind the curtain, critical race theorists see a post–civil rights social order that is racially corrupt, and has been from the very beginning. Look around, and what does one see?—whites on top, people of color on the bottom. Everything important in our society slants in favor of insiders who are overwhelmingly straight white males. This racialized social order means but one thing: ours is a racist society. Racism is coextensive with racial disadvantage. Our society is not organically neutral or objective when it comes to matters of race. Instead, it is “non-neutral” or “anti-objective,” all of which is socially constructive. When people think color-blind, they do not see monochrome; they see white.⁴³

Some whites, known as “critical white theorists,” acknowledge the privilege they have in the social order: “[W]hen . . . I apply for a job or hunt for an apartment, I don’t look threatening. Almost all of the people evaluating me for those things look like me--they are white. They see in me a reflection of themselves, and in a racist world that is an advantage. I smile. I am white. I am one of them. I am not dangerous. Even when I voice critical opinions, I am cut some slack. After all, I’m white.”⁴⁴ The deck is thus staked in favor of insiders.

The norms on which traditionalism (racial omission) and reformism (racial integration) operate, do nothing to unstack the deck, critical race theory maintains. What’s more, these norms not only do nothing to disassemble the constructed racial hierarchy that inheres in our society, they actually legitimize it. Racial omission and racial integration are “calculated to remedy at most the more extreme and shocking forms of racial treatment; . . . [they] can do little about the business-as-usual types of [racialized conditions] that people of color confront every day and that account for much of our subordination, poverty, and despair.”⁴⁵ Racial omission and racial integration (collectively referred to as “formal equal opportunity”) are problematic for critical race theorists because their applications are largely informed by the insider’s perspective rather than by the victim’s perspective. This slant is camouflaged by the use of lofty language like “justice,” “fairness,” and “meritocracy.” Such language endows incremental change with noble rhetoric, which mollifies outsiders. Opium for the masses.

Critical race theorists are not reformists, but they are at bottom integrationists. They want in, but on better terms than what reformists would settle for. For example, reformists generally support affirmative action but only to the extent of racial

⁴² Jerry L. Anderson, “Law School Enters the Matrix: Teaching Critical Legal Studies,” *Journal of Legal Education*, 54 (June 2004): 201, 210.

⁴³ See, e.g., Derrick Bell, *Race, Racism, And American Law*, Second Edition (Boston: Little, Brown, 1980); *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1987); *Faces at the Bottom of the Well: The Permanence of Racism* (New York: Basic Books, 1992); “Who’s Afraid of Critical Race Theory,” *University of Illinois Law Review*, (1995): 893.

⁴⁴ Robert Jensen, “White Privilege Shapes the U.S.: Affirmative Action for Whites is a Fact of Life,” *Baltimore Sun*, July 19, 1998, http://articles.baltimoresun.com/1998-07-19/news/1998200115_1_white-privilege-uneared-white-action-for-whites (accessed July 1, 2020).

⁴⁵ Richard Delgado, “Recasting the American Race Problem,” *California Law Review*, 79 (1991): 1389, 1394 (reviewing Roy L. Brooks, *Rethinking the American Race Problem* (Berkeley: University of California Press, 1992)).

preferences, not racial quotas. In addition, they justify such affirmative action on the ground that it promotes diversity. Critical race theorists believe racial preferences do not go far enough in changing the relationship between race and power in mainstream institutions, because they operate at the discretion of insiders. In addition, critical race theorists take issue with the use of the diversity rationale to support affirmative action. Derrick Bell, in an article titled “Diversity’s Distractions,” summarizes the critical race theorist’s critique of the diversity rationale:

For at least four reasons, the concept of diversity, far from a viable means of ensuring affirmative action in the admissions policies of colleges and graduate schools, is a serious distraction in the ongoing efforts to achieve racial justice: 1) Diversity enables courts and policymakers to avoid addressing directly the barriers of race and class that adversely affect so many applicants; 2) Diversity invites further litigation by offering a distinction without a real difference between those uses of race approved in college admissions programs, and those in other far more important affirmative action policies that the Court has rejected; 3) Diversity serves to give undeserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants; and 4) The tremendous attention directed at diversity programs diverts concern and resources from the serious barriers of poverty that exclude far more students from entering college than are likely to gain admission under an affirmative action program.⁴⁶

Critical race theorists, then, believe that the diversity rationale upholds affirmative action on grounds acceptable to white elites rather than on grounds beneficial to outsiders, on grounds that explicitly acknowledge the relationship between race and power in our society. The diversity rationale prevents society from dealing with the real problem outsiders face—to wit, white hegemony. It does nothing to reset white control over the social order. Justifying affirmative action as a response to white hegemony, critical race theorists believe, offers not only a nonsubordinating rationale for an otherwise useful tool if presented as racial quotas, but also provides the most truthful way to justify the deployment of that tool. They offer that we would not even be talking about affirmative action were it not for the history of racial oppression in this country. Yet insiders who support affirmative action favor the diversity rationale because it assuages their uneasy feelings about supporting a race-conscious enterprise or perhaps even feelings of white guilt.

In short, critical race theorists maintain that reformists present a tepid form of affirmative action and justify it on the basis of a rationale that expresses a white elite view of the value of affirmative action. In the process, reformists ignore historical truth.

⁴⁶ Derrick Bell, “Diversity’s Distractions,” *Columbia Law Review*, 103 (2003): 1622, 1622. The critical race theory position on affirmative action was famously stated in Charles Lawrence and Mari J. Matsuda, *We Won’t Go Back: Making the Case for Affirmative Action* (New York: Houghton Mifflin, 1997).

They do not explain why affirmative action makes sense to outsiders. “While increasing diversity enriches the academic environment and enhances the curricular aims of education, the legal and rhetorical emphasis on diversity sidesteps the more challenging social issues of race and class inequality.”⁴⁷

*Limited Separation*⁴⁸

Far less preoccupied with fighting white racism or changing white institutions than either reformists or critical race theorists, limited separatists have a clear post-civil rights orientation. The latter have a clear understanding of what matters most in moving forward with racial progress in today’s society—to wit, racial identity or solidarity. Limited separatists are imbued with a strong sense that racial self-consciousness and self-sufficiency are positive features of black identity. This type of black identity is not only psychologically healing, but also the *sine qua non* of racial advancement for African Americans. Yet blacks, limited separatists believe, suffer from a dearth of such racial identity, a paucity of racial pride and unity. Blacks are too preoccupied with gaining acceptance from whites or making their fame and fortune in white institutions. Limited separatist argue for more black pride, black heritage, black solidarity and self-reliance. *The best place to find a helping hand is at the end of your own arm.*

Given this posture, one can safely surmise that limited separatists have an unfavorable opinion of formal equal opportunity. Both the racial-omission and racial-integration norms are conceptually incompatible with limited separatists’ core message of racial solidarity, a message that is both race conscious and out of sync with racial integration. Taken together, racial omission and racial integration are at best inchoate norms and at worst dangerous norms in the context of today’s post-civil rights society.

Even during the civil rights era, many African Americans viewed the racial-omission and racial-integration norms with suspicion. While African Americans in general initially greeted the Supreme Court’s decision in *Brown* with exuberance, a fair amount of apprehension set in among many blacks, especially in the South, upon sober reflection. The fear was that formal equal opportunity might mean the closure of black institutions or the end to public funding of such institutions. The NAACP lawyers who argued *Brown* were aware of these concerns. Judges Robert Carter and Constance Baker Motely, for example, mentioned these concerns in their memoirs, but dismissed them as unfounded. These fears have, by and large, proven to be true.⁴⁹

⁴⁷ Maurice C. Daniels & Cameron Van Patterson, “(Re)considering Race in the Desegregation of Higher Education,” *Georgia Law Review*, 46 (Spring 2012): 521.

⁴⁸ See Brooks, *Racial Justice in the Age of Obama*, Ch. 4.

⁴⁹ See Robert L. Carter, *A Matter of Law: A Memoir of Struggle in the Cause of Equal Rights* (New York: New Press, 2005), 156–157, 172; Baker Motley, *Equal Justice Under the Law: An Autobiography* (New York: Farrar, Straus and Giroux, 1998), 119. Testimony before the United States Senate indicated that perhaps a majority of African American principals and teachers did lose their jobs. See Kevin D. Brown, “Review: Robert L. Carter, *A Matter of Law: A Memoir of Struggle in the Cause of Equal Rights*,” *Vermont Law Review* 31 (2007): 925, 939. See also Roy L. Brooks, *Structures of Judicial Decision Making from Legal Formalism to Critical Theory*, Second Edition (Durham, NC: Carolina Academic Press, 2005), 285n13 (sources cited therein); Alvis V. Adair, *Desegregation: The Illusion of Black Progress* (Lanham,

Reflecting the dominant social attitude, the Supreme Court places little value in maintaining or creating black institutions. For most of the post–civil rights period, the Court has, in fact, waged a sustained war against publicly funded black institutions on the ground that they make a mockery of *Brown*. For example, the Court placed Historically Black Colleges and Universities (HBCUs), which are quintessentially black institutions, under a constitutional duty to dismantle their racial identity in deference to the racial-omission norm. In *United States v. Fordice*,⁵⁰ the Supreme Court held that current policies traceable to *de jure* segregation that have a discriminatory effect “must be reformed to the extent practicable and consistent with sound educational practices.”⁵⁰ Understanding the threat that this standard—“racial identifiability” attributable to *de jure* segregation—poses to the existence of HBCUs, Justice Thomas, the lone black justice on the Court who, if nothing else, is proudly black and a limited separatist in the context of education, attempted to spin the majority’s opinion in such a way as to save HBCUs. The Court, he opined in a concurring opinion, “do[es] not foreclose the possibility that there exists ‘sound educational justification’ for maintaining historically black colleges as such.”⁵¹

Despite Justice Thomas’s attempt to spin the holding in *Fordice*, HBCUs remain under attack. Indeed, on remand in *Fordice*, the lower court mandated color-blind admission standards at HBCUs in the state of Mississippi. This ruling was made over the vehement objection of blacks who argued that the new standards would cut black enrollment in half at Mississippi’s three HBCUs. The Supreme Court denied an appeal in the case and, hence, refused to block the lower court’s ruling.⁵²

To illustrate the problematics of the racial-omission norm, limited separatists often point to Justice Harlan’s famous defense of the norm in his dissenting opinion in *Plessy v. Ferguson*. As he set about defending the ideal of a color-blind Constitution, Justice Harlan assured the nation that America’s racial hierarchy would *not* change. The very same paragraph in which he embraced the color-blind Constitution opens with Justice Harlan avowing, “The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for *all time*, if it remains true to its great heritage

MD: University Press of America, 1984); Harrell R. Rogers Jr. and Charles S. Bullock III, *Law and Social Change: Civil Rights Laws and Their Consequences* (New York: McGraw-Hill, 1972), 94–97; David G. Carter, “Second-Generation School Integration Problems for Blacks,” *Journal of Black Studies* 13 (1982): 175, 175–188; Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1987), 102, 109 (citing Brief of Amicus Curiae Nat’l. Educ. Assoc., *United States v. Georgia*, 445 F.2d 303 (5th Cir. 1971) (No. 30–338) (providing empirical data on burden borne by black teachers, administrators, and students because of school integration); James E. Blackwell, *The Black Community: Diversity and Unity*, Second Edition (New York: Harper & Row, 1985), 158–160; Harold Cruse, *Plural but Equal: A Critical Study of Blacks and Minorities and America’s Plural Society* (New York: William Morrow, 1987), 22. In addition to school closings, many of the integrated schools experienced “second generation resegregation”—i.e., segregation within these schools—with the over placement of black students in slow-learner, such as “educable mentally retarded,” classes and white students in advanced classes. See Brooks, *Rethinking the American Race Problem*, p. 77.

⁵⁰ *United States v. Fordice*, 505 U.S. 717, 729 (1992).

⁵¹ *Ibid.* at p. 748 (Thomas, J., concurring).

⁵² The Court’s decision denying certiorari in the case is reported in an article written by Peter Applebone. Peter Applebone, “Equal Entry Standards May Hurt Black Students in Mississippi,” *San Diego Union-Tribune*, April. 24, 1996, p. A10

and holds fast to the principles of constitutional liberty” (emphasis supplied).⁵³ Limited separatists ask, rhetorically, how could anyone who truly believes in racial progress embrace the racial omission norm to the exclusion of all else?

Limited separatists see implicit racism in *Brown*’s assertion that “separate is inherently unequal.”⁵⁴ Yet some have had second thoughts: In a subsequent article, Professor Brown writes:

I am one who firmly believes that what allowed Chief Justice Earl Warren to produce an opinion that all the justices of the Supreme Court could agree upon was the notion that segregation damaged only black people. Thus, I think the social science evidence was necessary because it allowed Warren to garner unanimous support for his opinion striking down segregation. As insulting to blacks as I find Warren’s opinion in *Brown* fifty years later, my deep and long reflections of twenty years as a law professor assures me that striking down segregation, even at this cost, was a tremendous bargain for black people.⁵⁵

Finally, it is important to note that limited separation is not total separation. Whites and non-blacks are not excluded under limited separation. In fact, a degree of racial integration exists in black churches and HBCUs just as sexual integration exists in single-sex colleges. Exclusion occurs only when a limited separatist institution is in jeopardy of losing its identity with the addition of another non-member of the group. Limited separation, in fact, mandates a three-prong test to determine not only the conditions under which a non-member can be excluded, but also the legitimacy of establishing limited separation in the first place. As regards African Americans, the three-prong test is: (1) a showing that establishing the institution serves a “good end,” meaning a racially compensatory or remedial purpose; (2) nonblacks must be allowed to participate in the institution; (3) unless the institution is in jeopardy of losing its identity with the addition of more blacks such that race becomes a bone fide selection qualification, or “BFSQ.”⁵⁶

Each of the post-civil rights theories is concerned with racial progress in a society that no longer discriminates against blacks on paper. Each has a strategy for proceeding based upon well-defined core beliefs: racial omission (traditionalism), racial integration (reformism), social transformation (critical race theory), and racial solidarity or identity (limited separation). The question I consider next is, how do these theories play out in the continuing debate over slave redress?

⁵³ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

⁵⁴ See, e.g., Kevin Brown, “Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?,” *Cornell Law Review* 78 (1992): 1, 4–6.

⁵⁵ Kevin Brown, “Review: Robert L. Carter, *A Matter of Law: A Memoir of Struggle in the Cause of Equal Rights*,” *Vermont Law Review* 31 (2007): 925, 948. This article was written years after Professor Brown’s original criticism of *Brown* mentioned a moment ago.

⁵⁶ See Brooks, *Racial Justice in the Age of Obama*, pp. 76-77.

Part III

Theoretical Approaches to Slave Redress

The public debate on the justification for redressing slavery assumes a binary debate between African Americans and whites. I wish to proffer that the redress question is also (and more interestingly) a contested matter within the community of black intellectuals. Traditionalists, reformists, critical race theorists and limited separatists have something important to say about slave redress. Though each group desires racial progress, each suggests different approaches to the redress question based on their core beliefs about such progress. This internal debate reminds us, once again, that well-informed and well-intended African Americans are not monolithic in their thinking.

Traditionalism posits the core belief that race no longer matters in black worldly success and personal happiness in our post-civil right society. With the eradication of government-mandated or -sanctioned racial discrimination and segregation, the descendants of the enslaved must now work on their own culture—internal values and behaviors—to achieve the type of socioeconomic success other minority groups have achieved. The government’s part in promoting racial progress post-Jim Crow is twofold: acknowledge its own past failure to support the race-neutrality norm; and remain neutral as to the races and racial matters now and in the future. Thus, the best way to promote racial reconciliation within the constraints of traditionalism is for the government to issue a public apology for slavery and Jim Crow and then deal with the lingering effects of these atrocities by remaining staunchly committed to the race-neutrality norm.

Reparations per se are ill-advised.⁵⁷ They violate the race-neutrality principle. Even assuming, *arguendo*, that slavery and Jim Crow have lingering effects, we ought not attempt to redress them with race-conscious governmental policies, the very thing that got us in trouble in the first place. Traditionalists would apply to the redress question the central message of *Brown v. Board of Education* as articulated by Chief Justice Roberts: “Before *Brown*, school children were told where they could and could not go to school based on the color of their skin. . . . The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁵⁸ In other words, two wrongs do not make a right. In addition, reparations are divisive and would not otherwise be helpful as the impediments to socioeconomic success the descendants of the enslaved face today are largely self-inflicted. Out-of-wedlock children, failure to take advantage of educational opportunities, crimes committed against neighbors, and other bad values and behaviors are internal problems and, therefore, within the control of the enslaved descendants. There is nothing government can do about that except to stay true to principle. And,

⁵⁷ The Concurrent Resolution apologizing for slavery and Jim Crow, discussed in a moment, deleted language from the reformist House Resolution that suggested Congress would issue reparations. The House Resolution, passed on July 29, 2008, stated that the House of Representatives “expresses its commitment to rectify the lingering consequences of the misdeeds committed against African Americans under slavery and Jim Crow” H. Res. 194 (110th): “Apologizing for the enslavement and racial segregation of African-Americans,” Govtrack, July 29, 2008, <https://www.govtrack.us/congress/bills/110/hres194/text> (accessed July 4, 2020).

⁵⁸ *Parents Involved*, 551 U.S. at 747-748 (Roberts, CJ).

finally, race-conscious policies of any kind ultimately hurt the intended beneficiaries. They portray all African Americans as hapless victims incapable of going toe-to-toe with whites.

Sounding a Marxist theme, what can be called “radical” traditionalism holds that focusing on race is particularly unhelpful to the black worker. The main problem facing the black worker is cyclical capitalism. Race-conscious measures, in addition, only exacerbate conflict with a natural ally of the black working class—the white working class. Take the apology and work separately on dismantling capitalism. Given the fact that racism has a major presence within the white-working-class culture, “radical” traditionalism makes a good point (it pays not to stoke the passions of these whites) or makes no sense (it is a waste of time worrying about this “basket of deplorables”).⁵⁹

In 2009, both houses of Congress joined in passes a Concurrent Resolution apologizing for slavery and Jim Crow issued. This extraordinary act of Congress, which many redress scholars thought would never happen, is faithful to the tenets of traditionalism. It is presented here in its entirety:

S. CON. RES. 26

IN THE HOUSE OF REPRESENTATIVES

June 18, 2009

Referred to the Committee on the Judiciary

CONCURRENT RESOLUTION

Apologizing for the enslavement and racial segregation of African-Americans.

Whereas during the history of the Nation, the United States has grown into a symbol of democracy and freedom around the world;

Whereas the legacy of African-Americans is interwoven with the very fabric of the democracy and freedom of the United States;

Whereas millions of Africans and their descendants were enslaved in the United States and the 13 American colonies from 1619 through 1865;

⁵⁹ “Radical” traditionalism traces back to the writings of young professors at Howard University in the 1930s. See, e. g., Sterling Denhard Spero and Abram Lincoln Harris, *The Black Worker: The Negro and the Labor Movement* (New York: Columbia University Press, 1931). On the prevalence of racism in the white working class culture, see Brooks, *The Racial Glass Ceiling*, pp. 92-93.

Whereas Africans forced into slavery were brutalized, humiliated, dehumanized, and subjected to the indignity of being stripped of their names and heritage;

Whereas many enslaved families were torn apart after family members were sold separately;

Whereas the system of slavery and the visceral racism against people of African descent upon which it depended became enmeshed in the social fabric of the United States;

Whereas slavery was not officially abolished until the ratification of the 13th amendment to the Constitution of the United States in 1865, after the end of the Civil War;

Whereas after emancipation from 246 years of slavery, African-Americans soon saw the fleeting political, social, and economic gains they made during Reconstruction eviscerated by virulent racism, lynchings, disenfranchisement, Black Codes, and racial segregation laws that imposed a rigid system of officially sanctioned racial segregation in virtually all areas of life;

Whereas the system of de jure racial segregation known as Jim Crow, which arose in certain parts of the United States after the Civil War to create separate and unequal societies for Whites and African-Americans, was a direct result of the racism against people of African descent that was engendered by slavery;

Whereas the system of Jim Crow laws officially existed until the 1960s—a century after the official end of slavery in the United States—until Congress took action to end it, but the vestiges of Jim Crow continue to this day;

Whereas African-Americans continue to suffer from the consequences of slavery and Jim Crow laws—long after both systems were formally abolished—through enormous damage and loss, both tangible and intangible, including the loss of human dignity and liberty;

Whereas the story of the enslavement and de jure segregation of African-Americans and the dehumanizing atrocities committed against them should not be purged from or minimized in the telling of the history of the United States;

Whereas those African-Americans who suffered under slavery and Jim Crow laws, and their descendants, exemplify the strength of the human character and provide a model of courage, commitment, and perseverance;

Whereas on July 8, 2003, during a trip to Goree Island, Senegal, a former slave port, President George W. Bush acknowledged the continuing legacy of slavery in life in the United States and the need to confront that legacy, when he stated that slavery was . . . one of the greatest crimes of history . . . The racial bigotry fed by slavery did not end with slavery or with segregation. And many of the issues that still trouble America have roots in the bitter experience of other times. But however long the journey, our destiny is set: liberty and justice for all.;

Whereas President Bill Clinton also acknowledged the deep-seated problems caused by the continuing legacy of racism against African-Americans that began with slavery, when he initiated a national dialogue about race;

Whereas an apology for centuries of brutal dehumanization and injustices cannot erase the past, but confession of the wrongs committed and a formal apology to African-Americans will help bind the wounds of the Nation that are rooted in slavery and can speed racial healing and reconciliation and help the people of the United States understand the past and honor the history of all people of the United States;

Whereas the legislatures of the Commonwealth of Virginia and the States of Alabama, Florida, Maryland, and North Carolina have taken the lead in adopting resolutions officially expressing appropriate remorse for slavery, and other State legislatures are considering similar resolutions; and

Whereas it is important for the people of the United States, who legally recognized slavery through the Constitution and the laws of the United States, to make a formal apology for slavery and for its successor, Jim Crow, so they can move forward and seek reconciliation, justice, and harmony for all people of the United States: Now, therefore, be it

That the sense of the Congress is the following:

(1)Apology for the enslavement and segregation of African-Americans

The Congress—

(A) acknowledges the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow laws;

(B)apologizes to African-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; and

(C) expresses its recommitment to the principle that all people are created equal and endowed with inalienable rights to life, liberty, and the pursuit of happiness, and calls on all people of the United States to work toward eliminating racial prejudices, injustices, and discrimination from our society.

(2) Disclaimer

Nothing in this resolution—

(A) authorizes or supports any claim against the United States;
or

(B) serves as a settlement of any claim against the United States.

Passed the Senate June 18, 2009.⁶⁰

It could be argued that, given the mindset of white Americans, this congressional apology is all that enslaved descendants can reasonably expect from the government. White Americans are ignorant and complacent about slavery. That is the reason whites who are not racist deny the force and effect of slavery, why they fail to see “racial slavery and its consequences as the basic reality, the grim and irrepressible theme governing both the settlement of the Western hemisphere and the emergence of a government and society in the United States that white people have regarded as ‘free.’”⁶¹ No traditionalist, David Blight makes the important argument that one needs to go back to the end of the Civil War to understand this white mindset: “White Americans North and South were able to come together in the aftermath of that sectional struggle by celebrating the bravery of white soldiers in both the Union and the Confederacy, all the while minimizing the importance of slavery and the significance of its destruction.”⁶²

The legendary David Brion Davis, Bright’s mentor at Yale, argued that white indifference about slavery is an indication that, though the North won a military victory, the South won an ideological victory in the Civil War. In other words, the South convinced the rest of the nation “that the role of slavery in American history [should] be thoroughly diminished, even somehow as a cause of the [Civil War]. . . . [T]he country gradually came to accept—or at least not challenge—the Southern version of history in the years after Reconstruction. ‘The terrible price of reconciliation and reunion was marginalizing slavery and race.’”⁶³

⁶⁰ S. Con. Res. 26 (111th): “A concurrent resolution apologizing for the enslavement and racial segregation of African Americans,” Govtrack, June 18, 2009, <https://www.govtrack.us/congress/bills/111/sconres26/text> (accessed February 3, 2020).

⁶¹ Brooks, *Atonement and Forgiveness*, pp. 148-149.

⁶² *Ibid.* at 149.

⁶³ *Ibid.* (sources cited therein).

That most whites saw slavery as an event which had little regional or national impact is not hard to understand. Ulrich Bonnell (“U.B.”) Phillips’s *American Negro Slavery* (1918) was the standard work on slavery for generations. It was written from an unapologetically racist southern perspective. “[S]outhern slavery [was portrayed] as a benign and paternalistic institution, ‘a training school’ and ‘civilizing agency’ ‘for the untutored savage.’”⁶⁴ The book appeared on course syllabi at Harvard University and other leading universities well into the 1950s. Phillips also painted Reconstruction as a failure. Like other white scholars, he ignored the works of black scholars, such as W.E.B. Du Bois’s *The Suppression of the African Slave Trade to the United States of America, 1638-1870* (1896) and *Black Reconstruction* (1935), as well as important primary sources, such as Frederick Douglass’s autobiography, *The Life and Times of Frederick Douglass* (1845; revised 1892).⁶⁵ Davis writes, “The writings of Ulrich B. Phillips on slavery and of William S. Dunning on Reconstruction were so rich in scholarly documentation and so closely tuned to the nation’s ideological needs—exemplified by popular films from *Birth of a Nation* to *Gone with the Wind*—that their influence on textbooks, fiction, journalism, and other historians would be difficult to exaggerate.”⁶⁶

By the mid-to-late 1950s, an “anti-Phillips reaction” took root among historians. Kenneth Stampp’s seminal work on slavery, *The Peculiar Institution: Slavery in the Ante-Bellum South* (1956), depicted slavery as harsh, violent, and inhumane. This book along with Stanley Elkin’s *Slavery* (1959) and Eric McKittrick’s *Andrew Johnson and Reconstruction* (1960) were the first of many attacks on Phillip’s southern perspective.

Scholarship attacking the southern perspective came out more than a half-century ago. One would think that it rendered that perspective null and void. Why, then, do white Americans today continue to possess a collective amnesia regarding slavery’s impact on current conditions in our society? Assuming that they can’t all be racist, why do they not understand slavery’s importance to the nation’s development as a world power or its debilitating impact on the descendants of the enslaved?

The answer may be that it is far easier to agree with principles than to live up to principles. As Ike Balbus asserts: “Arguments about what should be are rarely a match for the needs that negate them.”⁶⁷ Thus, “white Americans are unlikely to be moved by principled arguments in favor of reparations . . . [because] they have a deep psychological stake in resisting them.” Continuing, Balbus explains that there is in whites a “powerful unconscious resistance” to slave reparations because of “[t]he ‘depressive’ anxiety and guilt that inevitably accompany the awareness that we have harmed . . . [an innocent people].” The effort to reach whites is, therefore, “*a work of mourning whose importance is matched only by its difficulty*” [emphasis in original].⁶⁸ Balbus and other psychologists

⁶⁴ Ibid. (sources cited therein).

⁶⁵ David Blight’s exquisite biography of Frederick Douglass, *Frederick Douglass: Prophet of Freedom* (New York: Simon & Schuster, 2018), won a Pulitzer Prize for History.

⁶⁶ Brooks, *Atonement and Forgiveness*, pp. 150. One indication of the extent of the South’s ideological victory—of its gaslighting—is the fact that Frederick Douglass’s autobiography was out of print from the end of the nineteenth century to 1960. Ibid.

⁶⁷ Ibid. at 150 (sources cited therein).

⁶⁸ Ibid. at 151 (sources cited therein).

maintain that a psychoanalytic case for depressive anxiety and guilt “does not require that any given individual white has actually harmed blacks but rather only that they have . . . harbored demonizing racial [beliefs],” or in other words, “that they have thought about doing so.”⁶⁹

If this analysis is correct, then, one can see a rational basis for traditionalism’s approach to redress even if one would otherwise disagree with it. The government will not move without the support of white Americans. White Americans will have to cross a significant psychological barrier before accepting reparations. Waiting for that to happen is wasted time; so why focus so much on reparations. Take the apology and declare victory. Reformists disagree.

Reformism’s core belief is just the opposite of traditionalism’s; namely, race still matters in our post-civil right society. Nefarious—racial discrimination⁷⁰—and non-nefarious—racial subordination⁷¹—sources of racial inequality in today’s society sustain capital deficiencies (financial, human, and social) in black society wrought by slavery and Jim Crow. The death of Jim Crow ended an atrocity but it did not repair the racial damage caused by that atrocity or by the other atrocity, slavery. As a matter of morality, the primary perpetrator of these atrocities, the United States government, has an obligation to repair this racial damage. It cannot just walk away from its dirty deeds. And as a practical matter, it is only the federal government that has the power to make the repair. Thus, reformism calls for a more activist government in redressing slavery than traditionalism.

Both traditionalism and reformism suggest that racial reconciliation is the main reason for going forward with slave redress. But whereas traditionalism envisions a minimalist governmental response to past atrocities, reformism imagines a maximalist governmental role, one that goes beyond apology. Reformism would prescribe atonement—apology plus reparations—as the only way to move the country toward racial healing in any meaningful way.

The atonement apology would look very different from traditionalism’s apology. In addition to confessing the deed and admitting that the deed constituted an atrocity or grave injustice, the former would also indicate the government’s remorse by explicitly asking for forgiveness. Even if the victims are not prepared to express their forgiveness, asking for forgiveness adds to the sincerity of the apology. The importance of asking for forgiveness was eloquently expressed by Elie Wiesel’s in remarks he gave at the dedication of a Holocaust Remembrance site at the Brandenburg Gate in Berlin. He urged Parliament to:

[P]ass a resolution formally requesting, in the name of Germany, the forgiveness of the Jewish people for the crimes of Hitler. ‘Do it publicly.’ . . . “Ask the Jewish

⁶⁹ Ibid.

⁷⁰ See Brooks, *Racial Justice in the Age of Obama*.

⁷¹ See Brooks, *The Racial Glass Ceiling*.

people to forgive Germany for what the Third Reich had done in Germany's name. Do it, and the significance of this day will acquire a higher level. Do it, for we desperately want to have hope for this new century."⁷²

Unlike the traditionalist apology, the reformist apology would also follow an extensive statement clarifying the historical record. "Clarification is desperately needed regarding the historical record on American slavery. The telling of this story has been the mother's milk of white misunderstanding about the peculiar institution and white complacency about its lingering effects."⁷³ My earlier discussion of analysis offered by David Bright and David Brion Davis certainly underscore this fact.

But simply saying "I'm sorry" is not enough. Reparations are needed to solidify the apology. Reformists would seem to prefer reparations in the form of system-wide reforms responsive to capital deficiencies in black America. These reparations would target inequalities in education, employment, housing, voting, health, and policing, and would use a combination of rehabilitative and compensatory (monetary or nonmonetary) reparations in this effort. It may not be possible to completely resolve these inequalities using reparations; but a reformist would certainly want the government to try.

In education, for example, reformists would certainly want to use institutional reparations. "More than half of the nation's schoolchildren are in racially concentrated districts, where over 75 percent of students are either white or nonwhite. In addition, school districts are often segregated by income. The nexus of racial and economic segregation has intensified educational gaps between rich and poor students, and between white students and students of color."⁷⁴ Though there has been pushback based on the argument that the country has become less white, allegedly making it more difficult to integrate public schools, I believe reformists would not be deterred from acting. They would likely be motivated to act by three facts. The first is that "[t]he predominant narrative among education activists is that school segregation has gotten worse in the past several decades."⁷⁵ The second is that minority school districts annually receive \$23

⁷² Brooks, *Atonement and Forgiveness*, pp. 145-146 (citing Roger Cohen, "Wiesel Urges Germany to Ask Forgiveness," *New York Times*, January 28, 2000, p. A3).

⁷³ *Ibid.* at p. 148.

⁷⁴ Keith Meatto, "Still Separate, Still Unequal: Teaching about School Segregation and Educational Inequality," *The New York Times*, May 2, 2019, <https://www.nytimes.com/2019/05/02/learning/lesson-plans/still-separate-still-unequal-teaching-about-school-segregation-and-educational-inequality.html> (accessed February 4, 2020).

⁷⁵ Alvin Chang, "The data proves that school segregation is getting worse," *Vox*, May 5, 2018, <https://www.vox.com/2018/3/5/17080218/school-segregation-getting-worse-data> (accessed February 4, 2020). See also Gary Orfield, Jongyeon Ee, Erica Frankenberg, and Genevieve Siegel-Hawley, "Brown at 62: School Segregation by Race, Poverty and State," *Civil Rights Project/Proyecto Derechos Civiles*, May 16, 2016 (revised May 23, 2016) (accessed February 4, 2020). For the dissenting view, see, e.g., Robert VerBruggen, "The NYT Is Wrong: Schools Aren't Resegregating," *The Corner*, May 2, 2018, *National Review*, <https://www.nationalreview.com/corner/resegregation-schools-not-happening/> (accessed February 4, 2020).

billion less in K-12 funding than similarly sized white school districts.⁷⁶ Finally, “the median black household earn[s] just 59 cents for every dollar of income the median white household earn[s].”⁷⁷

Against this backdrop, reformists would at the very least call for a rehabilitative reparation in the form of a constitutional precommitment for racially integrated public schools. A constitutional amendment is necessary to prevent the Supreme Court from striking down local efforts designed to promote integrated schools. The Court could no longer strike down, as it did in *Parents Involved*, race-conscious student assignment plans voluntarily adopted by school boards to integrate *de facto* segregated schools.⁷⁸ Nor could the Court block inter-district remedies that integrate racially isolated school districts within a state as it did in *Milliken I*.⁷⁹ Most importantly, the amendment would nullify the untenable distinction between *de jure* and *de facto* segregation. That distinction makes no sense if the constitutional command as expressed in *Brown v. Board of Education* is equal educational opportunity. A constitutional precommitment for racially integrated schools would obviate the need for progressive school boards to try to act against *de facto* segregation by making the difficult claim that its schools were *de jure* segregated in the past even though they were not formally segregated by law.⁸⁰ The amendment, in short, would cut a clear bath to integrated schools.

In addition to this rehabilitative reparation, reformists would support a compensatory reparation. The latter would likely be in the form of cash payments to each descendant of the enslaved. Compensatory cash reparations are income supplements. Assume the payment is \$30,000/year/household member, and is to last one or two generations. This is all negotiable. A family of four would receive \$120,000/year/household. This money could be used to finance booster clubs that contribute extra money to public schools attended by enslaved descendants, to pay for private tutors or to pay tuition at private schools. It can also be used to make a down payment on a home in a better school district. Beyond education, the compensatory reparation could also be used for such items as investments in financial instruments or to provide seed money to start a business. Determining the precise amount of each cash payment and how they are to be financed are issues that can be address at another time.⁸¹

⁷⁶ Lauren Camera, “White Students Get More K-12 Funding Than Students of Color,” U.S. News & World Report, February 26, 2019, <https://www.usnews.com/news/education-news/articles/2019-02-26/white-students-get-more-k-12-funding-than-students-of-color-report> (accessed December 12, 2019).

⁷⁷ Valerie Wilson and Jhacova Williams, “Racial and ethnic income gaps persist amid uneven growth in household incomes,” Economics Policy Institute, Working Economics Blog, September 11, 2019, <https://www.epi.org/blog/racial-and-ethnic-income-gaps-persist-amid-uneven-growth-in-household-incomes/> (accessed December 12, 2019). These are 2018 figures, which were the same for 2017. The racial gap has actually widened since 1975. See Roy L. Brooks, *Racial Justice in the Age of Obama* 140-41 (figs. 22-25) (2009).

⁷⁸ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

⁷⁹ *Milliken v. Bradley*, 418 U.S. 717 (1974).

⁸⁰ See *Parents Involved*, 418 U.S. at 819 (Breyer, J. dissenting). Citing *Yick Wo v. Hopkins*, 118 U. S. 356, 373-374 (1886), Justice Breyer states that “our precedent has recognized that *de jure* discrimination can be present even in the absence of racially explicit laws.” *Ibid*.

⁸¹ The total amount of reparations could be equivalent to a desired increase in the percentage of the national wealth owned by blacks. “Today, Black Americans constitute approximately 13 to 14 percent of the

For now, it is sufficient to simply posit the idea of compensatory cash reparations and to consider the merits of those reparations along with reformism's rehabilitative reparations in juxtaposition with the other post-civil rights strategies. Critical race theorists certainly challenge both forms of reformist reparations.

The core post-civil rights belief of critical race theorists is clear: white hegemony matters most. Look around and what do you see: whites on top and blacks on the bottom. None of that is the natural order of things. What you are witnessing is a social order constructed by straight white men (insiders). To effectively transition from a social order that is not objective but unjustly slants in favor of insiders, reparations must pursue reconstruction rather than reform, equity rather than equality, a wholesale change in the relationship between race and power in our society. Critical race theorists would, in short, call for slave redress that reconstructs what they see as an anti-objectivist social order. They would favor social transformation, treating slave redress as nothing less than a matter of transitional justice.⁸²

This way of thinking about slave redress certainly favors the atonement model, but not in the same way as the reformists. The reformists' framing of the apology would be sufficient, but not their framing of reparations. Solidifying the apology for critical race theorists would entail reparations in the form of system-wide transformation responsive to capital deficiencies in black society. This means social transformation across the board—education, employment, housing, voting, health, and policing—involving both rehabilitative and compensatory reparations. A few examples of institutional and individual reparations follow.

In education, critical race theorists would push not simply for school integration, but for *transformative integration*; integration that would bring about structural changes in educational systems. Transformative integration might include a rehabilitative reparation in the form of a constitutional precommitment for attendance quotas at wealthy white schools. Each school would be required to maintain a ratio of black-to-white students. A constitutional amendment removes the legal constraints of anti-progressive cases like *Parents Involved* and *Milliken I*, and reaffirms the authority of district courts to issue *Swann* remedies (including ratio quotas) even in the absence of a judicial finding of

nation's population, yet possess less than 3 percent of the nation's wealth." William Darity Jr., Testimony concerning HR40, The Commission to Study and Develop Reparations Proposals for African-Americans, June 19, 2019 (116th Congress 2019-2020),

<https://sanford.duke.edu/sites/sanford.duke.edu/files/images/Dr.%20Darity%20Reparations%20Remarks%20for%20Congress.pdf> (accessed December 12, 2019). Alternatively, the reparations amount could be determined by multiplying the average racial earnings gap by the number of enslaved descendants each year the program is in existence. See Brooks, *Atonement and Forgiveness*, pp. 162-163.

⁸² Transitional justice consists of a wide range of social measure, judicial and non-judicial, designed to redress legacies or structures of human rights abuses. As regards slavery, it is what should have happened during Reconstruction. The South African government's movement from Apartheid to democratic government and racial reconciliation in the 1990s is an example of transitional justice, albeit one that has yet be fully successful. See Brooks, *When Sorry Isn't Enough*, Part 8. In my view, Ruti Teitel's *Transitional Justice* (New York: Oxford University Press, 2000) remains the best scholarship on the subject of transitional justice.

de jure segregation. Racial imbalance alone would now constitute a constitutional violation.⁸³

Critical race theorists would likely argue that racial quotas are necessary to ensure that black and white students will attend the same schools. What is at stake is too important to leave to discretion of local politicians or to the prejudices of parents, white or black. Attending school with white students will give black students equal access to quality instruction and adequate resources. In our society, green follows white. Not only government funds but private money from parent-created booster clubs and PTAs used to fund afterschool activities will also inure to the benefit of black students attending these schools.

Racial quotas are transformative in yet another way, race critics might argue. The future of a racially healthy society depends on racial mixing starting in the lower grades. Young children of both races will learn "human nature in all its phases, with all its emotions, passions and feelings, loves and hates, its hopes and fears, its impulses and sensibilities."⁸⁴ What Justice Harlan said in his lone dissent in *Plessy v. Ferguson* applies with perhaps greater force today: "The destinies of the two races, in this country, are indissolubly linked together."⁸⁵

Turning to compensatory reparations, critical race theory would seem to be more interested in wealth accumulation than in income enhancement. There is no doubt that income disparity is a serious problem—"the median black household earn[s] just 59 cents for every dollar of income the median white household earned"⁸⁶—but wealth disparity is the larger problem. "Today, Black Americans constitute approximately 13 to 14 percent of the nation's population, yet possess less than 3 percent of the nation's wealth."⁸⁷ Also,

⁸³ In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), a unanimous Supreme Court held that a district court has broad equitable powers to remedy a finding of *de jure* segregation, including ordering the use of racial quotas in the assignment of students and teachers as well as changing attendance zones. The validity of this holding is in serious doubt today given more recent decisions like *Parents Involved* and *Milliken I* plus the Court's general indisposition toward the use of race in government decision making. See, e.g., Brooks, *Atonement and Forgiveness*, pp. 174-176.

⁸⁴ *Board of Education of the City of Ottawa v. Tinnon*, 26 Kan. 1, 19 (1881).

⁸⁵ *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

⁸⁶ Valerie Wilson and Jhacova Williams, "Racial and ethnic income gaps persist amid uneven growth in household incomes," Economics Policy Institute, Working Economics Blog, September 11, 2019, <https://www.epi.org/blog/racial-and-ethnic-income-gaps-persist-amid-uneven-growth-in-household-incomes/> (accessed December 12, 2019). These are 2018 figures, which were the same for 2017. The racial gap has actually widened since 1975. See Roy L. Brooks, *Racial Justice in the Age of Obama* 140-41 (figs. 22-25) (2009).

⁸⁷ William Darity Jr., Testimony concerning HR40, The Commission to Study and Develop Reparations Proposals for African-Americans, June 19, 2019 (116th Congress 2019-2020), <https://sanford.duke.edu/sites/sanford.duke.edu/files/images/Dr.%20Darity%20Reparations%20Remarks%20for%20Congress.pdf> (accessed December 12, 2019). Professor Darity, it is worth noting, is the Samuel DuBois Cook Professor of Public Policy, African and African American Studies, and Economics and Director of the Samuel DuBois Cook Center on Social Equity, Duke University.

the median white household owns 86 times the assets of the median black household.⁸⁸ Measuring household wealth differently, “[f]or every \$100 in wealth held by a white family, a Black family has just \$10.”⁸⁹ Redressing wealth inequality (or inequity) portends more social transformation than redressing income inequality (or inequity), race critics would argue.

To create substantially more wealth within black America, compensatory reparations in the form of cash payments to individuals would have to be conditional rather than direct. For example, rather than providing yearly payments of \$120,000 of supplemental income for a family of four (\$30,000/person/year) which allows the family to do whatever it wishes with the additional disposable income (the reformist plan), critical race theorists would want to sink this money into wealth accumulation. Money would be used for limited purposes, such as property (home ownership, rent payments or rental income), investments (financial or business) or education (private grade schools, college tuition or training programs).

Looking at education specifically, race critics would likely argue for both compensatory and rehabilitative monetary reparations. Compensatory cash payments make sense because some black families will not be able to send their children to racially integrated schools. Some racially isolated schools cannot be integrated. They will remain racially isolated due to demographics. Also, no school financing restructuring, even if the Supreme Court were to reverse *San Antonio Independent School District v. Rodriguez*,⁹⁰ can equalize school funding between black and white schools. Rich parents will always be able to pour their own private money into their children’s public schools or provide additional educational services for their children. Rehabilitative cash reparations can directly help cash-deficient black schools. These reparations can pay for homework supervision after school, coding classes, and other enrichment programs. Many wealthy school districts now provide these services to their students “free of charge.”⁹¹

I suspect critical race theorists would not want the government to determine the permissibility of expenditures for cash reparations, compensatory or rehabilitative. These

⁸⁸ Brian Thompson, “The Racial Wealth Gap: Addressing America’s Most Pressing Epidemic,” *Forbes*, February 18, 2018, <https://www.forbes.com/sites/brianthompson1/2018/02/18/the-racial-wealth-gap-addressing-americas-most-pressing-epidemic/#1cdf43bf7a48> (accessed January 12, 2020).

⁸⁹ Michael W. Kraus and Jennifer Richeson, “The Wealth Gap Facing Black Americans Is Vast—and Vastly Underestimated,” *Yale Insights/Ideas from the Yale School of Management*, July 15, 2020, https://insights.som.yale.edu/insights/the-wealth-gap-facing-black-americans-is-vast-and-vastly-underestimated?utm_source=YaleToday&utm_medium=Email&utm_campaign=YT_Yale%20Today%20Alum%20no%20Parents_7-17-2020 (accessed July 20, 2020).

⁹⁰ 411 U. S. 1 (1973). Here, the Court held that education was not a fundamental interest and school financing systems based on local property taxes did not often the Equal Protection Clause.

⁹¹ Should redress funds be used for charter school vouchers? If, as the research seems to suggest, charter schools drain limited tax-payer funds from public schools, see Brian Washington, “How to prevent charter schools from draining away public school funding in your community, NATIONAL EDUCATION ASSOCIATION, May 27, 2018, <https://educationvotes.nea.org/2018/05/27/how-to-prevent-charter-schools-from-draining-away-public-school-funding-in-your-community/> (accessed June 17, 2020) “(It has been long recognized that the growth of charter schools creates costs for local school districts.)” then redress funds should not be used to support such schools. The money should, instead, be used to help turn around public schools which are the schools most black children attend.

expenditures could easily fall victim to partisan politics. Instead, redress funds could be held in trust with experienced private citizens acting as trustees. As I have stated on another occasion:

A board of commissioners, consisting of reputable citizens selected by blacks, would oversee operation of the trust fund in their respective regions of the country. Commissioners and their staff would, for example, help fund recipients make the right choices in schools and business opportunities. All payments from the trust fund would be by electronic transfer. Recipients would never really see or handle the funds.⁹²

An atonement trust fund may have some merit, even for limited separatists.

The core belief of limited separatists is that racial solidarity or identity matters most. Rather than placing all their eggs in the racial-integration basket, blacks must have the option of embracing their own identity—“things black.” Blacks should be allowed to be unapologetically black. Racial integration has not been a vehicle for racial progress on which most blacks have been able to ride. Orlando Patterson and others report that “African Americans are the least assimilated racial or ethnic group, that although Asians and Latinos are disengaging their national origins from racial identity, similar to European immigrants of the past, African Americans (including multiracial blacks) are perceived as being ‘black,’ and choose to identify as ‘black.’ These identities are abetted by the fact that African Americans intermarry at a rate that is significantly lower than the rates for Asians and Latinos.”⁹³ Blacks and other racial minorities have broadly similar experiences but with strong group variations in form, intensity, and duration.

Not unlike the other post-civil rights theorists, limited separatists would probably support slave redress on grounds of racial reconciliation. And, like the other theorists, they would view this social goal through the prism of their core belief. But limited separatists’ fundamental belief in racial identity does not appear to create the need or desire for an apology from the government, which sets it apart from the other theorists. Demanding an apology might be too much of an investment in white acceptance. Limited separatists just don’t care. For them, racial reconciliation would seem to require less a government apology than a government program of reparations targeting black institutions and black communities. This approach to redress leans less toward the atonement model than the tort model.

Focusing on education for comparative purposes, limited separatists would likely prefer rehabilitative monetary and nonmonetary reparations. The latter might take the form of a constitutional precommitment for public schools that opt for a black identity. This constitutional amendment would soften *Brown*’s ruling that, “Separate educational facilities are inherently unequal.”⁹⁴ Black institutions would be constitutional under the amendment if they pass muster under limited separation’s three-prong test discussed earlier. The strict scrutiny test would no longer be applicable. Having passed

⁹² Brooks, *Atonement and Forgiveness*, p. 161.

⁹³ Brooks, *The Racial Glass Ceiling*, p. 7 (sources cited therein).

⁹⁴ *Brown*, 347 U.S. at 495. Cf. *United States v. Fordice*, 505 U.S. 717 (1992) (higher education).

constitutional scrutiny, these institutions (public and private K-12 schools and HBCUs) would then be eligible to receive reparations (public funds) without violating the Constitution. Other requirements set by the black community would dictate the actual distribution of these funds, but the Constitution would no longer be an impediment.

Limited separatists make the point that black identity should inform a black person's understanding of what counts as a quality education. Blacks do not need to capture a white child to get a quality education. Thus, rather than making black schools "desegregative attractive" to white suburban students by updating programs and facilities or increasing teacher salaries,⁹⁵ limited separatists would want to pour these resources into black schools for the sole purpose of improving the quality of education for black students.

The fact is, scholars do not agree on the extent to which integrated schools yield educational benefits. Some have concluded that black students receive genuine educational benefits in this environment, while others have concluded that there are no demonstrable educational benefits.⁹⁶ Citing several scholars, Justice Clarence Thomas, an enthusiastic limited separatist when it comes to education—"It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior" (emphasis added)⁹⁷—makes the case that black under-achievement in racially isolated schools is a myth:

. . . . Before *Brown*, the most prominent example of an exemplary black school was Dunbar High School. . . . 'Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan.' Dunbar is by no means an isolated example. . . . Even after *Brown*, some schools with predominantly black enrollments have achieved outstanding educational results. . . . There is also evidence that black students attending historically black colleges achieve better academic results than those attending predominantly white colleges. . . .

The Seattle School Board itself must believe that racial mixing is not necessary to black achievement. Seattle operates a K-8 'African-American Academy,' which has a 'nonwhite' enrollment of 99%. . . . That school was founded in 1990 as part of the school board's effort to 'increase academic achievement.' . . . According to the school's most recent annual report, '[a]cademic excellence' is its 'primary goal.' . . . This racially imbalanced environment has reportedly produced test scores 'higher across all grade levels in reading, writing and math.' . . . [T]he

⁹⁵ The Supreme Court has struck down a court-approved "desegregative attractive" plan. See *Missouri v. Jenkins* (*Jenkins III*), 515 U.S. 70 (1995).

⁹⁶ See, *Parents Involved*, 551 U.S. at 761.

⁹⁷ *Missouri v. Jenkins* (*Jenkins III*), 515 U.S. at 114 (Thomas, J., concurring).

children in Seattle's African American Academy have shown gains when placed in a 'highly segregated environment. (Emphasis added)⁹⁸

Rehabilitative cash reparations go to black institutions. Representing African Americans collectively, these institutions operate at the heart of the black ethos. They are physical manifestations of black identity and the facilitator of black solidarity. Not only black schools (e.g., K-12 and HBCUs), but also social justice organizations (e.g., NAACP and Urban League), and businesses of all types primarily servicing black communities would be recipients of cash reparations. Schools and colleges are not the only organizations that educate African Americans. The Black News Channel, for example, endeavors to educate black audiences with stories that offer a broader perspective about their community than is currently provided by other news networks. Health issues unique to African Americans, discussions about HBCUs and federal housing policies affecting blacks, and the many positive accomplishments of African-Americans are some of the items covered by the Black News Channel in its effort to educate and entertain the black community.

I do not believe limited separatists would reject compensatory reparations in the form of conditional cash payments to individual black families or individuals similar to what critical race theorists propose; in other words, wealth accumulation rather than income supplementation. Both types of reparations could be viewed as essentially compensatory under the tort model. However, my sense is that limited separatists would place the emphasis on institutional and community reparations rather than individual reparations. Black institutions like HBCUs do the heavy lifting in terms of promoting racial solidarity and identity. They teach all of society that validating black identity is the best way to maximize racial healing in today's post-civil rights society.

Part IV

Commentary

Each post-civil rights theory—traditionalism, reformism, critical race theory, and limited separation—conforms the discourse on slave redress—the tort and atonement models—to a particular post-civil rights norm. Each theory views slave redress through its own vision as to what is needed to advance racial progress in our post-Jim Crow society. There are no dearth of considerations that add complexity to this analysis.⁹⁹

⁹⁸ See, *Parents Involved*, 551 U.S. at 761-765.

⁹⁹ Beyond such mundane questions as eligibility, see Brooks, *Atonement and Forgiveness*, p.197, and costs, see *ibid.* at pp. 162-163 (however, I no longer believe wealthy blacks should be excluded), more challenging questions of a conceptual nature include whether lingering effects of an atrocity which can be addressed through extant laws should be part of the discussion. For example, mass incarceration is a lingering effect of both slavery and Jim Crow. See, e.g., Blackmon, *Slavery by Another Name* discussed in Part I. Aspects of mass incarceration may be amenable to extant civil rights laws such as class action Section 1983 lawsuits. Typically, redress discourse is unique from a legal perspective in that atrocities, such as slavery, Jim Crow, and Apartheid, were legal under domestic law when they took place and, hence, are not amenable to extant law. In addition, they are *past* atrocities. Hence, the question concerns post-conflict justice—compensatory or restorative justice. None of the reparative schemes discussed in this article can be effectuated through extant law. All require changes in the law. I would argue, preliminarily,

Perhaps the most important is the fact that these core beliefs about racial advancement remain contested nearly a half-century after Jim Crow, the country's last atrocity committed against black Americans. Though legitimate, these norms of preference are not of equal merit in my opinion.

Traditionalism's approach to slave redress consists entirely of an apology from the perpetrator government. This strategy would back African Americans into a cul-de-sac. Reparations may not be a politically viable form of redress, as traditionalists argue, but that is not reason enough to abandon an otherwise sound social-justice measure. I believe in what I have called "practical idealism,"¹⁰⁰ meaning civil rights theory should be idealistic yet practical. In other words, it must be within the reach of morally motivated individuals and institutions. Thus, I disagree with traditionalism's underlying message, shared by other scholars, which is that civil rights theory "must not be utopian—applicable only in an ideal world—but must be politically viable given the sociohistorical circumstances of contemporary black Americans."¹⁰¹ I find this is to be a most troubling notion. Ending slavery and Jim Crow were certainly pipedreams for a long time; but that did not prevent Frederick Douglass, Thurgood Marshall, Martin Luther King, and many other civil rights advocates from demanding change. These pioneers were quite willing to complicate the lives of white Americans, even make them feel uncomfortable. They set the moral compass for society and worked like hell to move society in the right direction. That has also been the way many civil rights scholars have conducted their scholarship, challenging received traditions. This type of moral clarity and resolve is needed today if the push for racial reconciliation is to have some semblance of integrity.

The argument that reparations are a form of racial paternalism is a familiar argument. It arises in opposition to any asymmetrical civil rights measure and was certainly expressed quite often at the Black Table at Yale Law School of which I spoke in the Introduction. If such measures make blacks look like racial losers, then the problem lies with whites, not with blacks. Taking a page from limitation separation, I would argue that blacks should never forgo an opportunity based on how they are viewed by whites. Racial progress should never be held hostage to white prejudice or ignorance or inconvenience. And certainly an individual's worldly success and personal happiness should never be sequestered to the views of others.

Traditionalism does, however, raise an important point about white needs that negate principled arguments. Rather than concede defeat, however, I would argue that redress discourse should endeavor to address legitimate white concerns. For example, the concern that public attention given to the problem of white privilege disadvantages the white working-class must not be dismissed outright as racism. This claim comes up so

that mass incarceration should be included in the reparative discussion to the extent that the problem cannot be fixed by existing law. However, questions of this nature require additional reflection and, thus, are beyond the scope of this article.

¹⁰⁰ Brooks, *Racial Justice in the Age of Obama*, pp. 110-111.

¹⁰¹ Tommie Shelby, *We Who Are Dark: The Philosophical Foundations of Black Solidarity* (Cambridge: Harvard University Press, 2005), p. 250.

often in the discussion of slave redress that it behooves us to give it serious attention here. My students often make the point that progressives are too quick to dismiss the concerns of the white working class, the group that feels most threatened when attention turns to white privilege. Here are the points that need to be made as one defends slave redress.

The lives of whites living in struggling communities must be acknowledged. These communities suffer from deindustrialization and are often devastated by the opioid crisis. Those in favor of slave redress must answer this concern. It must first be pointed out that addressing the problem of white privilege is not meant to devalue the deep suffering of families in these communities. People who have worked 30 years for a company and are suddenly laid off can no longer take care of their families. These families are not privileged in a socioeconomic sense. This is a real concern that must not be ignored. But it must also be pointed out that the discussion about white privilege or institutional racism or diversity and inclusion deals with a *different* problem the solution of which does not undercut any attempt to address white-working-class concerns let alone acknowledge the legitimacy of these concerns.

White privilege speaks to the plight of the other; in other words, intergenerational disadvantage due to one's race or the color of one's skin. It is about time after time being denied a quality education, a good-paying job, a decent home, and decent medical service. In his book, *Black Man in a White Coat: A Doctor's Reflection on Race and Medicine* (2015), Dr. Damon Tweedy exposes the myriad and systemic instances of discriminatory treatment African American receive in emergency rooms and hospitals. Other African Americans have made similar observations. One first-hand account is particularly disturbing:

"A few seconds in I said, 'I can feel this.'

"The doctor said, 'No, you don't, that's just pressure.'

"No, I can feel you cutting me,' I told her.

"She didn't believe me. She kept going," says Ayana Moore, 43, a mother of two in Durham, N.C. She is a scientist with several advanced educational degrees, including a master's in science and a PhD in physiology and biophysics. She is a by-choice mom with a solid health insurance plan that covered her insemination. She could afford the fertility medications and regular doctor's appointments.

She was considered advanced maternal age and had one run-in with a pesky uterine fibroid, but overall, she had an uncomplicated pregnancy.

None of this inoculated her from the problem plaguing black women in the delivery room: Their pain is often ignored and dismissed by doctors.

"I could feel her cutting across and it got to the middle, I just started screaming," she says. One of the nurses finally yelled Stop! and in a blink Moore was out.

"I went from a room full of nurses and doctors to the room being empty except for custodians cleaning up. My mom was sitting there, and I

was like, ‘Oh, my God, what happened to the baby?’ I thought the worst,” she said. Both mom and baby recovered from the Caesarean section, but she said the birth of her son was extremely traumatic.¹⁰²

A black woman is three to four times more likely to die in childbirth because the medical staff, whether males or females, do not believe her when she says something does not feel right.¹⁰³ A black teenager is four times more likely to be arrested for the same offense committed by his white friends, and recently an unarmed black male was twenty times more likely to be killed by a police officer than an unarmed white male. Implicit bias holds back blacks but propels whites.¹⁰⁴

The white working-class does not face these problems. They suffer class subordination but not racial subordination. In contrast, the black working class suffers both class and racial subordination. White privilege means that a member of the white working-class is much more likely to escape arrest than a black member of the same class for the same crime. As a consequence, the working-class white is not placed in the position of having to post bail, which raises the possibility that he may have to serve time in jail and lose his job for not showing up for work. If a white family falls into poverty, it is less likely than a black family to be because of an arrest and failure to post bail. Working-class whites, in short, suffer disadvantage *in spite of* their race. Working-class blacks suffer disadvantage *because of* their race.

It must also be pointed out that paying attention to the problem of white privilege or institutional racism is no more identity politics than giving attention to the problems of the white working-class. The basic concern is the common good. Focusing on racial difference or class difference is necessary to arrive at the common good, which is to say the binary between unity and difference is a false binary. In a racially diverse society, the only way to achieve unity is through difference. By paying attention to the unique obstacles African Americans and the white working-class (or other groups) face in acquiring the things all Americans want—fair access to quality education, quality jobs, quality housing, quality medical care, and fair treatment in the criminal justice system—society as a whole benefits. The American Dream becomes a reality for more Americans. Singling out special obstacles groups face in achieving the American Dream serves the common good just as much as singling out the things that unite us as Americans. The

¹⁰² Sarah Hosseini, “Black women are facing a childbirth mortality crisis. These doulas are trying to help,” February 28, 2019, On Parenting, *The Washington Post*, <https://www.washingtonpost.com/lifestyle/2019/02/27/black-women-are-facing-childbirth-mortality-crisis-these-doulas-are-trying-help/> (accessed May 17, 2020).

¹⁰³ Ibid.

¹⁰⁴ These and other racial differences are discussed above in Parts I & II. For an important study that shows that implicit bias is pervasive and produces discriminatory behavior, see Anthon G. Greenwald & Linda Hamilton Krieger, “Implicit Bias: Scientific Foundations,” *California Law Review* 84 (2006): 945.

guiding principle was stated long ago: “There is no greater inequality than equal treatment of unequals.”¹⁰⁵

Not only is traditionalism’s don’t-rock-the-boat approach to slave redress tepid, so too is its idea of an apology. The government apology contemplated by traditionalism fails as an apology and, therefore, lacks credibility. It is not a genuine apology, the elements of which I enumerated earlier in my discussion of the atonement model. Although it confesses the deed and admits the deed was an injustice, there is no expression of remorse and no request for forgiveness. Even if the victims are not expected to express their forgiveness, asking for forgiveness adds to the sincerity of the perpetrator’s apology.

Traditionalism apology also lacks believability for another reason; namely, it explicitly forecloses the possibility of the government solidifying the apology with a redemptive act—to wit, a reparation. The failure to leave open the possibility of reparations of any kind means that damages visited upon enslaved descendants wrought by slavery and Jim Crow, which Congress itself acknowledges in its failed apology, will never be repaired. A halfhearted apology with no solidifying reparation offers little redress for slavery. White Americans may not be ready psychologically for more than that, as traditionalism tell us, but both the enslaved and their descendants deserve better than that if society is to achieve any semblance of racial reconciliation

In addition to the argument that reparations are political unpopular, traditionalism justifies avoiding reparations on the basis of a normative position expressed by Chief Justice Roberts’ interpretation of *Brown v. Board of Education* and by the two-wrongs-don-t-make-a-right maxim. The Chief Justice, as I mentioned earlier, reads the racial-omission norm into *Brown* based on the fact that, “Before *Brown*, school children were told where they could and could not go to school based on the color of their skin.” But it was only black children who were negatively affected by segregation laws. There is no evidence that white children struggled to attend black schools. What a cruel irony that the Chief Justice of the United States would attempt to rewrite what is arguably the Supreme Court’s most important case, certainly its most important civil rights case.

The argument that reparations collide with the anti-discrimination principle or the multiple-wrongs injunction is rather weak. There is a difference between Jim Crow discrimination and asymmetrical remedies like reparations. The former is designed to exclude and stigmatize, the latter is intended to include and validate; the former is negative, the latter is positive. Similarly, assuming, *arguendo*, that reparations constitute a “wrong,” to argue that it breaches the multiple-wrongs injunction misses the point of the command. “Two wrongs don’t make a right” presupposes the second wrong is of

¹⁰⁵ *Dennis v. United States*, 339 U.S. 162, 184 (Frankfurter, dissenting). Similarly, Plato wrote “[w]hen equality is given to unequal things, the resultant will be unequal.” Plato, “Laws,” *Plato in Twelve Volumes*, R.G. Bury, trans. (Cambridge: Harvard University Press, 1968), p. 757.

equal or greater evil than the first wrong.¹⁰⁶ The state's execution of a serial killer invokes a lesser wrong than the 50 killings for which the murderer was executed.¹⁰⁷ Gunning down Hitler in cold blood is a lesser wrong than exterminating six million Jews. Likewise, reparations that are calculated toward racial healing entail a lesser wrong (again, assuming, for the sake of argument, that a wrong has been committed) than race-conscious decisions designed to exclude, subordinate or stigmatize. Wrongs cannot be judged in a vacuum. The purpose for which the action is taken cannot be ignored when assessing an action's justice or injustice; otherwise, how could we ever explain justifiable wrongs, such as wrongs committed in self-defense?

It is less that traditionalism is unwilling to challenge white thinking about race than that it is burdened by the strictures of its core conviction that race no longer matters. But still, the failure to challenge whites robs blacks of the power that comes from simply understanding the racialized conditions under which we live. I say, again, redress theory, like all civil rights theory, should be utopian rather than political in the early stages. The proper path forward must be moral, debated, respectful of all legitimate views, and garner a consensus before the horse trading, or ox-goring, begins.

I spent a number of pages on traditionalism only because I reject almost everything it has to offer about slave redress, including the assumptions on which it operates. Not unlike a court which gives due process to the party it ultimately rules against, I felt it important to give traditionalism its due before rejecting it. I need not be so generous with reformism, critical race theory or limited separation because I accept each one in part.

Reformism and critical race theory are broadly symmetrical in their approach to slave redress. Both posit that atonement—apology plus reparations—is the best path to racial reconciliation. Each calls for an appropriate apology solidified by sufficient reparations. To that extent, I agree with both approaches. Reformism's norm of racial integration and critical racial theory's norm of social transformation dictate different reparative strategies for achieving racial reconciliation. In my view, critical race theory offers the superior approach, although I do not find anything objectionable in reformism.

Rehabilitative reparations in the form of a constitutional precommitment for racial preferences (reformism) or racial quotas (critical race theory) have similar redress benefits. Both overturn Supreme Court rulings that have allowed public schools to remain separate and unequal throughout the post-civil rights period. Most importantly, *Milliken I*'s limitation on the use of interdistrict remedies for *de facto* school segregation is gone.¹⁰⁸ Many civil rights scholars consider *Milliken I* to be the most tragic decision for

¹⁰⁶See Kenneth W. Simons, "The Logic of Equality Norms," *Boston University Law Review* 80 (2000): 693, 763. "If I am forgetful and permit one child to stay up a few minutes past her bedtime, I might permit the other child to do the same." Ibid, pp. 763-764.

¹⁰⁷ There might be other grounds for eliminating state executions; such as, racial bias and wrongful convictions.

¹⁰⁸ See *Milliken v. Bradley*, 418 U.S. 717 (1974). *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), which is the appeal of *Milliken I* on remand, is a much more progressive opinion in that it permits a district court to order a wide array of remedies, including tax increases, upon a finding of an intradistrict violation.

racial progress since *Plessy v. Ferguson*.¹⁰⁹ Also gone is the legal significance of the distinction between *de jure* and *de facto* segregation. Racial imbalance by itself would now be sufficient to establish a constitutional violation. It no longer has to be tied to traceable *de jure* segregation or intentional discrimination.¹¹⁰ As Justice Marshall said in his dissent in *Milliken II*, the distinction between *de jure* and *de facto* segregation is “superficial,” one not found in the Constitution but merely created by the justices themselves.¹¹¹

In agreeing with reformism and critical race theory, I am not suggesting that the issue regarding *de jure* and *de facto* segregation is easy to resolve. Holding a school district responsible for correcting racial imbalance caused by changing housing patterns within the school district seems unfair at some level. This is especially so when the school board implemented measures that created a unitary school system thirty years ago, and, thus, was in compliance with *Brown* at that time. But, I believe racial inequality should be viewed as a chronic condition that must be treated constantly. Society collectively must stay on its meds.

The real difference between reformism and critical race theory lies in the preference for racial preferences versus racial quotas, respectively. Racial quotas are taboo in our society and have been since at least the time of *Bakke*.¹¹² But as long as school administrators, together with other local politicians, white teachers, and white parents are predisposed to view black students as a “problem,” as long as they doubt the qualifications of these students, ways will be found to limit school integration. Simply taking account of race will not guarantee educational opportunities for black students when the ultimately decision resides in the judgment and goodwill of those who assume black students are a “problem.” More than racial preferences, racial quotas change the relationship between race and power in the context of public education. This type of attack on white hegemony is necessary for racial reconciliation. For that reason, a constitutional precommitment for racial quotas in the context of K-12 education makes the most sense to me as a rehabilitative reparation.

It also makes sense, in my view, for the government to issue compensatory cash reparations in the form of conditional payments rather than direct payments as a means of wealth accumulation. Direct cash payments to each individual victim can be justified on the ground that they allow for the exercise of agency. If blacks want to blow their reparative funds gambling in Las Vegas, that is quite alright. After all, it is their money. The legacy of slavery gives the victims the right to do whatever they want with reparative money. We do not place constraints on white control over their money. Treating slave descendants differently is a form of racism. I beg to differ.

¹⁰⁹ 163 U.S. 537 (1896).

¹¹⁰ See, e.g.,; *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

¹¹¹ See *Milliken I*, 418 U.S. at 783 (Marshall, J., dissenting). Justice Breyer argues that “noting in our equal protection law suggest that a State may right only those wrongs it committed.” *Parents Involved*, 551 U.S. at 844 (Breyer, J., dissenting).

¹¹² *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), is a landmark decision in which the Supreme Court upheld affirmative action in the form of racial preferences but not racial quotas.

Reparative funds are responsive not to an individual injury but to a collective injury. Slavery operated at the group level; it was directed toward a black identity not a black behavior. Collective wrongs call for collective remedies. It would be different if reparations had been provided by slaveholders to their former enslaved *in personam* at the end of the Civil War. Direct payment would seem more appropriate under such circumstances. But in dealing with the descendants of the enslaved, I believe conditioning cash payments on wealth accumulation is most responsive to the atrocity and a more effective path to racial reconciliation.

But I do, indeed, share the distrust of government implicit in the call for direct payments. For that reason, I favor the atonement trust fund. It is a superior alternative to government control over cash payments whether, direct or conditional. Also, conditional cash payments funneled through an atonement trust fund avoid the problem of predatory inclusion enslaved descendants can experience with direct payments. Predatory inclusion occurs when unscrupulous vendors (e.g., insurance companies or investment schemers) or greedy relatives take advantage of unsophisticated recipients of reparative income. Trustees of an atonement trust will stand in a fiduciary relationship with the beneficiaries of the trust, the descendants of the enslaved.

Limited separation maintains that racial identity is essential to racial advancement and, hence, racial reconciliation. This is especially so in primary and secondary education. For that reason, limited separatists call for a constitutional precommitment legitimizing black public schools and HBCUS as well as cash payments made directly to these and other black institutions. This position undercuts the use of integrated schools as the exclusive or preferred vehicle for public education in the country. It cuts against the racial omission norm favored by traditionalism, the racial integration norm favored by reformism, and the social transformation norm—specifically transforming white, mainstream institutions—favored by critical race theory. For limited separatists, quality education trumps integrated education.

Although, as I have indicated earlier, scholars differ on whether integrated schools generate important educational benefits, both reformists and critical race theorists suggest that racially isolated education is not quality education. In other words, quality education in a culturally diverse society, they seem to believe, must be defined, *ipso facto*, as education that takes place within a diverse or integrated student population. Students need to learn how to relate to “the other” in addition to learning the Three Rs. To be sure, both black and white students can be educated in the Three Rs in racially isolated schools; but both groups of students will emerge therefrom as educated fools. They will not be able “relate to our national life in all its facets,” they will not “know[] the wellspring—the aspirations and fears, the affections and indifferences—from which particular kinds of thought and behavior flow.”¹¹³

¹¹³ Roy L. Brooks, “What About Souter's Human Resume?” Op-ed opinion, *The New York Times*, August 1, 1990, <https://www.nytimes.com/1990/08/01/opinion/what-about-souter-s-human-resume.html> (accessed February 6, 2020).

On the other hand, there is no dearth of evidence suggesting that black children who are encouraged to explore and embrace their racial identity at school and who are taught in schools surrounded by peers and faculty members who share their racial identity grow up with better self-esteem and racial-esteem and, consequently, have better learning outcomes.¹¹⁴ This finding is replicated at the university level. Adequately funded HBCUs are widely recognized for the value they bring to African Americans and the nation as a whole. As Michael Lomax, President of the United Negro College Fund states, “HBCUs are, like our Black churches, cornerstone institutions in the Black community. Like the lives of Black men and women, our HBCUs are constantly undervalued, disparaged, under assault, and put at risk. And just as we unequivocally declare that ‘Black Lives Matter,’ so too we affirm that HBCUs’ continued existence matters.”¹¹⁵

In the end, I prefer limited separation because it gives African Americans the *choice* to attend an integrated school or a black-controlled black school well-funded through rehabilitative cash reparations. Limited separation merely wants white and black identified schools to be treated *pari passu*. The choice is an individual one; what works best for the student. But I do not believe, as limited separatist do, that an apology is unnecessary, and that cash reparations should only be rehabilitative going exclusively to black organizations. I would make cash reparations both rehabilitative and compensatory. The latter, however, would have to be in the form of conditional payments, not direct payments, to support wealth accumulation in the black community.

Conclusion

The post-civil rights theories add interesting and important perspectives to our thinking about slave redress. I have suggested some of the ways in which they might frame our understanding of the redress issue. My analysis focuses on the perpetrator’s side of the issue, not the victim’s forgiveness. The latter can be incorporated in the framework at another time. Necessarily, my discussion has been illustrative rather than

¹¹⁴ See, e.g., Sheretta T. Butler-Barnes, Seanna Leath, Amber Williams, Christy Byrd Rona Carter, and Tabbye M. Chavous, “Promoting Resilience Among African American Girls: Racial Identity as a Protective Factor,” Empirical Article, *Child Development*, November 20, 2017, <https://doi.org/10.1111/cdev.12995> (accessed February 6, 2020); “Study Shows Strong Racial Identity Improves Academic Performance of Young Black Women,” Kim Eckart, “Promoting self-esteem among African-American girls through racial, cultural connections,” *University of Washington News*, December 21, 2017, <https://www.washington.edu/news/2017/12/21/promoting-self-esteem-among-african-american-girls-through-racial-cultural-connections/> (accessed February 6, 2020). See also “Study Shows Strong Racial Identity Improves Academic Performance of Young Black Women,” Weekly Bulletin, January 2, 2018, *Journal of Blacks in Higher Education*, <https://www.jbhe.com/2018/01/study-shows-strong-racial-identity-improves-academic-peformance-of-young-black-women/> (accessed February 6, 2020).

¹¹⁵ Statement from UNCF President Dr. Michael Lomax on Murder of George Floyd and Renewed Anti-Black Violence,” UNCF, *Intrado GlobeNewswire*, June 7, 2020, <https://www.globenewswire.com/news-release/2020/06/08/2044624/0/en/STATEMENT-FROM-UNCF-PRESIDENT-DR-MICHAEL-LOMAX-ON-MURDER-OF-GEORGE-FLOYD-AND-RENEWED-ANTI-BLACK-VIOLENCE.html> (accessed June 12, 2020). See “Quote of the Week,” Weekly Bulletin, June 11, 2020, *Journal of Blacks in Higher Education*, <https://mailchi.mp/jbhe/jbhe-weekly-bulletin-for-4-20-932494?e=4b30f0a273> (accessed June 12, 2020).

comprehensive. I merely wish to stimulate discussion of a subject whose importance may be little understood and whose complexity is vastly underestimated.