IDEOLOGICAL CONFLICT, AFRICAN AMERICAN REPARATIONS, TORT CAUSATION AND THE CASE FOR SOCIAL WELFARE TRANSFORMATION

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INTRODUCTION

African American reparations raise many intriguing and vexing policy issues, providing a unique forum for reflecting conflicting conceptions of justice. This is evident in the general literature on the subject as well as the pages of this symposium. In large part, an individual’s general ideology determines how he or she will come out on the issue of African American reparations. By extension, America’s general social ethos will determine how our nation resolves this issue. While reparations arguments reflect a complex array of ideological stances, this essay will take into account three “ideal” types: Individualist, Black Nationalist, and “Social Welfareist.” These ideologies frequently conflict but at times overlap and can be held to varying degrees by the same individual.

The Individualist finds group characteristics such as race, class, and gender irrelevant in fashioning social policy. Instead, because we are all individuals, we should make our way in life based on “the content of our character.” For the Individualist, the idea of reparations only makes sense if framed as a “concrete” injustice to a particular individual by another identifiable individual or entity. The Black Nationalist believes that African Americans constitute a community and that African American reparations, therefore, represent a group

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1 See Shelby Steele, The Content of Our Character: A New Vision of Race in America 29-35 (1990) (discussing the interrelationship of individualism and “race-holding” where defining a person based on racial status rather than individual characteristics causes the individual to “see the locus of power in race rather than in himself”).
claim based on historical injustice. Similarly, the Social Welfareist also thinks in group terms but views class rather than race as the key variable. Therefore, the Social Welfareist is apt to frame an African American reparations claim as a poor people's movement. I trust that my description of these ideal types will resonate with the reader. Ultimately, the strongest case for reparations may be one that blends the Black Nationalist and Social Welfareist positions, but is informed by Individualist insights.

This essay utilizes these ideal types to work through a particularly complicated issue in the reparations thicket—causation—in order to arrive at more general conclusions regarding reparations. The focus will be on claims for group reparations, which do not easily fit within Individualist justice conceptions. These are by far the more provocative, socially significant and intellectually challenging claims. Part I will analyze African American reparations through the tort causation lens, drawing an analogy to mass toxic torts. While the immediate reaction might be that such an analysis is technical and sheds little light on the larger issue, it turns out that a good deal of the greater debate is implicated in the causation issue. Beginning the analysis with the narrower issue is beneficial because it helps sharpen the focus and provide analytical clarity. My conclusion is that traditional and even “non-traditional” causation analysis dictates that if reparations are to be granted, they should be in the form of social welfare programs delivered by the federal government. Part II will then tease out the broader policy implications of the causation analysis and social welfare reparations. Social welfare reparations raise a host of possibilities and potential hazards. Ultimately, the reparations issue cannot be grasped without understanding larger political forces.

I. THE MASS TORT ANALOGY AND THE CASE FOR AND AGAINST AFRICAN AMERICAN REPARATIONS

The vestiges of slavery, contemporary racism, and Jim Crow can be analogized to toxins that infect America. These contagions have in many ways disabled America, crippling its ability to live up to its democratic creed and humanistic ideals. The malady, however, has had its most direct impact on descendants of slaves and those who by virtue of their skin color are subject to similar ill treatment. In fact, the legacy of slavery has robbed African Americans, as a group, of sorely needed “race capital.” This represents a

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2 I am utilizing the term Black Nationalist in a narrow sense: someone who believes that the plight of African Americans should be thought of in group terms. This usage does not incorporate all of the tenets frequently associated with Black Nationalism. See JOHN T. McCARTNEY, BLACK POWER IDEOLOGIES: AN ESSAY IN AFRICAN AMERICAN POLITICAL THought 15 (1993) (classifying Black Nationalism as any movement whose purpose was the elimination of injustice toward African Americans whether via recolonization in Africa or abolition, for example).

3 See infra notes 24, 26-27 and accompanying text. Additionally, for a discussion on the commodification of race and the devaluing of African American racial capital, see e. christi
Black Nationalist position, constructing a modified tort causation framework in order to make an argument for reparations.

Assuming that vestiges of slavery may be analogized to toxins in our environment, we face familiar common law tort causation issues. In this respect, the Black Nationalist position confronts fairly standard doctrinal concerns. Causation, however, is a threshold issue in any discussion of reparations, even those that do not explicitly raise legal doctrinal concerns. Popular critics of the reparations movement, from the left and right, have raised issues regarding African American reparations, which, stripped of their rhetoric, boil down to rather technical questions of causation. These issues include questioning how we determine the beneficiaries of reparations, who bears responsibility for the slave industry, and who benefited from it. In addition, such thoughtful philosophical commentators as George Sher, Janna Thompson and Jeremy Waldron have directly raised technical issues regarding causation in reparative claims.

In his landmark article on toxic torts, Robert Rabin noted three common causation issues: identification, boundary, and source. In framing the case for

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5 See Adolph L. Reed Jr., The Case Against Reparations, THE PROGRESSIVE, Dec. 2000, at 15, 16-17 (observing that the question of compensation "opens a plethora of technical problems"); David Horowitz, Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks and Racist Too, FRONTPAGEMAG.COM, at http://www.frontpagemag.com/articles/ReadArticle.asp?ID=1153 (last accessed Sept. 22, 2004) (declaring that "[n]o evidence-based attempt has been made to prove that living individuals have been adversely affected by a slave system that was ended over 150 years ago").

6 George Sher, Ancient Wrongs and Modern Rights, 10 PHIL. & PUB. AFF. 3, 6-16 (1980) (addressing the complex issue of delimiting the temporal scope of compensation for past wrongs).

7 Janna Thompson, Historical Injustice and Reparation: Justifying Claims of Descendants, 112 ETHICS 114, 117-19 (2001) (highlighting the difficulty of using causation as a foundation for reparation claims and suggesting the victims' status as heirs as a better foundation).

8 Jeremy Waldron, Superseding Historic Justice, 103 ETHICS 4, 8-9 (1992) (arguing generally that demands for reparations to compensate for historic injustice may be superseded by demands of current and future generations resulting from changes in circumstances).

African American reparations, analogous issues emerge when one attempts to form causal connections.

Identification problems in tort causation arise when no necessary connection exists between the harm and agent alleged to have caused the harm. Rabin discussed, for example, how toxics breed disease but given the time lag between exposure and contracting these diseases, it is impossible to connect a particular injury to a toxin because frequently the harm is not unique.\textsuperscript{10} Similarly, although some injuries suffered by African Americans are unique to the slave experience, it is difficult to trace many of the misfortunes suffered by individual African Americans to slavery with the type of causal certainty required in tort. This is the Individualist position.

Black Nationalists seek to address the issue in group terms. Robert Westley has made an ingenious argument that the discrepancy in African American wealth, versus European American wealth, can be traced to the harms done as a result, and in the aftermath, of slavery.\textsuperscript{11} The problem with his analysis from a tort causation perspective is that there are background causes that may also account for wealth discrepancies. Conservatives ("Individualists"), such as Thomas Sowell, George Gilder, and more recently John McWhorter would attribute the inequalities to differing cultural values or the negative incentive effects of the welfare system.\textsuperscript{12} While some might chafe at these narratives as plausible explanations, it is obvious from even a cursory glance at the recent direction of public policy (particularly welfare reform) that such arguments have much currency in mainstream political thinking.\textsuperscript{13}

Boundary problems are raised when there is a difficulty in calculating the damages resulting from harm because its effects are felt beyond the "initial" victim. In toxic torts, Rabin identified boundary problems where \textit{in utero}

\begin{footnotesize}
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\item Id. at 29-30 (discussing the difficulty attributing a harm to a specific cause).
\item Robert Westley, \textit{Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?}, 40 B.C. L. REV. 429, 440-45 (1998) (demonstrating, for example, that racist housing policy drastically impacted the ability of African Americans as a group to accumulate wealth).
\item See GEORGE GILDER, \textit{WEALTH & POVERTY} 122-127 (1981) (defining the welfare culture as "estrang[ing] the prime mover in upward mobility," the father, and "exert[ing] a constant, seductive, erosive pressure on the marriages and work habits of the poor"); JOHN H. McWHORTER, \textit{LOSING THE RACE: SELF SABOTAGE IN BLACK AMERICA} 70-71, 83 (2000) (faulting anti-intellectualism as well as affirmative action and welfare for wealth discrepancies); THOMAS SOWELL, \textit{RACE AND ECONOMICS} 142-48 (1977) (relating economic gains with cultural values and comparing the greater gains of "future orient[ed]" immigrants like Jewish American and West Indian blacks with cultures focused on immediate returns).
\end{enumerate}
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exposure to toxins injured succeeding generations. Common law tort was designed to settle disputes in which the harm is immediate. Therefore, it is very difficult to meet the traditional causation test when boundary issues arise.

African American reparations present obvious boundary problems. We are almost five generations removed from slavery being formally dismantled. The vestiges of slavery have been manifest through the generations, and no obvious signs indicate that the harms will ever be fully alleviated. Moreover, the negative consequences are not limited to descendants of slaves but impact many of those with a darker hue whose ancestors immigrated to America after slavery was abolished.

Source problems arise due to the difficulty of identifying the agent who injured the aggrieved party. While at first blush it may seem as though the source issue is straightforward, simply a matter of tracing the record of slave ownership, it is actually very complex. Slavery, as an institution, constitutes many intricate relationships. Although the slave owner plays a major role, the institution is supported by other actors, including northern ship merchants who profited from the slave trade. Current litigation claiming reparations from financial institutions that funded the slave trade illustrates the interconnectedness of numerous economic and social forces.

The litigation also highlights a crucial fact regarding the source issue and slavery. It might be a relatively simple task to identify slave owners. However, since many plantations were family-owned sole proprietorships, there is no continually existing entity (such as a corporation) to answer for these claims. In this regard, the source problem is even more intractable than in the toxic torts context where, except for bankrupt institutions, corporate perpetrators are frequently available to litigate claims.

In sum, claims for African American reparations present a mix of vexing causation issues (identification, boundary, and source). From a philosophical perspective, such causal uncertainty raises technical difficulties in dealing with very complex counterfactuals. For example, what would the lot of any individual African American be were it not for the institution of slavery? It is difficult to say with certainty. The claim of reparations based on slavery fails to satisfy Professor Sher's "automatic effect" requirement: the current harm does not necessarily flow from the initial wrong. Thus, at a minimum, extant

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14 Rabin, supra note 9, at 29-30 (demonstrating the complexity of toxic tort claims where harms may not be temporally bounded and may reach future generations).
15 See id. at 31-33 (relating how the cumulative nature of harm in environmental torts cases obscures identification of the causal source).
16 See, e.g., Complaint and Jury Trial Demand at 6-9, Farmer-Paellmann v. FleetBoston Fin. Corp., No. 02-CV-1862 (E.D.N.Y. filed March 26, 2002) (accusing FleetBoston and other financial institutions of conspiracy, human rights violations, conversion and unjust enrichment for their predecessors' roles in slave trade).
17 See Sher, supra note 6, at 13 (using the concept of automatic effect — that which is not the result of intervening causes — to derive an inverse relationship between compensation due and the temporal distance between the current harm and the initial wrong).
tort doctrine would have to be expanded in an effort to do justice.

Of course, the conceptual foundation for tort causation and the philosophical positions Sher articulates rest on Individualist assumptions. Mari Matsuda has put forth one of the most extensive critiques of the Individualist position relating to causation, which she refers to as "liberal legalism."\(^{18}\) Observing that reparations fail to meet the Individualist causation standard, Matsuda argues that the locus of analysis should be groups as opposed to individuals.\(^{19}\) However, the problem she quickly runs up against is that group identification can be difficult and complex. For example, there are obvious class and other differences within the African American community. In order to sustain her argument for reparations, Matsuda claims that "continuing group damage engendered by past wrongs ties victim group members together."\(^{20}\) This begs, however, certain questions that an Individualist is sure to raise. Should wealthy (or even middle class) African Americans receive compensation? Do we limit reparations to those who can trace their lineage to slavery? A tort law regime provides an imperfect forum for tackling these issues.

Let us take up one of Rabin's questions: "Does it still make sense to rely on a tattered version of the traditional [tort] system?"\(^{21}\) Rabin replies to his own query by stating that it does not make sense to rely on the traditional system, and that we should at least explore alternatives.\(^{22}\) I reach the same conclusion regarding Black reparations. Moreover, given the nebulous nature of the harm stemming from American slavery and its vestiges, even the mixture of non-tort compensation schemes Rabin suggests seems to fall short.\(^{23}\) The various no-fault compensation schemes all presuppose a readily identifiable harm, such as asbestosis, which a claimant can present to an administrator. In addition, the harm's source can be traced to a pool of similarly situated actors. It is just not that simple in the case of African American reparations. The harm of racism is both too great and too amorphous to count. Regarding perpetrators, Matsuda attempts to address this issue by arguing that, although individual whites may not be responsible for slavery and its legacy, they (as members of the group)


\(^{19}\) Id. at 380 ("Victims and perpetrators belong to groups that, as a matter of history, are logically treated in the collective sense of reparations rather than the individual sense of the typical legal claim.")

\(^{20}\) Id. at 377 (pointing out that wealthy blacks and educated Japanese continue to suffer from racial stereotyping).

\(^{21}\) Rabin, supra note 9, at 42 (pointing out the high costs of relying on the traditional tort system for mass torts).

\(^{22}\) Id. at 42-44 (concluding that an alternative system is and will continue to be necessary to address mass torts).

\(^{23}\) Id. at 45 (suggesting ad hoc solutions, no fault strategies, and social insurance as alternatives to the tort system).
benefit from a regime of white privilege. Matsuda in effect makes a Nationalist (group-based) claim for reparations. Like Matsuda, reparationists almost invariably turn to group-based approaches to deal with the boundary, source, and identification problems associated with Black reparations, thus suggesting that a social remedy is the preferred policy prescription (as opposed to payments to individual claimants). It is useful to tease out the logic and policy implications.

An economic and cultural development program funded by the federal government would provide a level of group justice to victims, while eliding vexing causation problems. The logic is as follows: (1) Africans, as a group, suffered a unique harm in becoming part of America—enslavement; (2) the United States government played a crucial role in upholding the institution of slavery; (3) the United States government owes a debt to descendants of African slaves and African Americans, as a people, who are subject to the racist legacy of slavery; and (4) payment should take the form of community economic and cultural development. The balance of this section will focus on expanding these four points, while integrating the previous causation analysis.

The harm to African Americans as a group may be conceptualized as a depletion of "race capital," expanding on the group focus Professor Matsuda articulates. The idea of race capital, which has been discussed as a conceptual category, builds on the notions of economic, cultural, social and symbolic capital articulated by the French philosopher, Pierre Bourdieu. We can take the race capital of any particular ethnic group to be an amalgam of all four forms of capital set forth by Bourdieu. Westley has made a persuasive case that the vestiges of slavery have depleted the "economic" capital of Blacks. In which case, a strong argument can be made that the institution of slavery has severely decimated African Americans' race capital. I take this to be the

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24 See Matsuda, supra note 18, at 379 (observing that non-native Hawaiians necessarily benefit from Hawaiians' loss of land and sovereignty); see also Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707, 1721-37 (1993) (positing that whiteness as a racial identity developed into a form of property further entrenching white privilege).

25 The idea that America owes a "debt" to descendants of African slaves has found its most popular and recent articulation in RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (2000).

26 See, e.g., Harris, supra note 24, at 1724-36 (tracing how an intangible trait such a race can become a property right through the exercise of law); see also Kirsten Story, Equality in the American Social Space: A Theory of Race Capital (2002) (unpublished student paper, on file with author).


28 See Westley, supra note 11, at 440-45.
strong claim made by Randall Robinson and other Black Nationalists in the reparations movement.

The unique nature of the United States’ role in the depletion of race capital cannot be fully understood unless one appreciates a central fact about slavery, which Professor Keith Hylton has so aptly described: The institution of slavery cannot exist without the absence of law.29 What makes the institution of slavery unique is that the relationship between master and slave is unregulated. To the extent that the government does intervene in this relationship, it acts to protect the “property” interest of slave owners. There could not have been any legal slave ownership without government sanction — it was prior and necessary. While, a mélange of institutions were morally culpable for supporting the slave industry, the brunt of responsibility falls squarely on the United States government. In taking no action against slavery, it effectively acted for it. As such, it is not only the primary source of slavery, but of the legacy of slavery that came in its wake.

Historically, the United States government has been faced with specific choices regarding the fate of African Americans — beginning with their enslavement, but also continuing after the official abolition of slavery.30 Faced with these choices, Professor David Lyons chronicles a pattern of malign neglect: failure to live up to the promise of Reconstruction, acquiescence to the system of Jim Crow, and an all too tepid commitment to post-World War II social welfare programs (including those associated with the so-called “war on poverty”).31 From this perspective, we are dealing with a continuing wrong and its automatic effects do not seem so attenuated.

The idea that a reparations argument should not be limited to the initial wrong, slavery, but also account for the action (and inaction) of government post-abolition is hardly novel. In fact, it formed the basis for the first sustained treatment of the subject, Boris Bittker’s The Case for Black Reparations.32 As the frame of reference moves further away from slavery, however, the argument begins to look more like a standard social welfare claim as opposed to reparations.

Implementing a social welfare remedy, as that term is broadly defined, helps us address the boundary problems. Institutions established to enhance victim

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30 See David Lyons, Unfinished Business: Racial Junctures in US History and Their Legacy, in JUSTICE IN TIME: RESPONDING TO HISTORICAL INJUSTICE 284-94 ( Lukas H. Meyer ed., 2004) (arguing for reparations and tracing the U.S. government’s actions from its failure to pass anti-lynching laws through the inadequacy to this day of efforts to end housing discrimination and racial segregation).

31 See id. (observing also that many governmental programs developed in the 1960s, including Medicare and Medicaid, have faced extreme cutbacks from the 1980s through the present).

32 Boris I. Bittker, THE CASE FOR BLACK REPARATIONS 8-29 (1973) (arguing that the complicity of the United States government in perpetuating racial discrimination should be the basis for black reparations).
communities attend to the needs of not only the current generation but also others to follow, which, if history repeats itself, will suffer the same affliction. In this regard, the group form of reparations called for by advocates, such as Robinson and Westley, has merit.33 If the monies of the United States government are directed towards developing impoverished African American communities (including direct funding for public schools and basic infrastructure), supporting African American institutions (such as historically Black colleges, and cultural institutions), and creating new institutions (for example, a national museum chronicling African American history or creating a slave memorial), it would be a boon not only to present descendents of slaves, but to future generations as well.34 In addition, others harmed by the stain of racism based on skin color prejudice would also benefit.

The social form of reparations also helps address the identification problem. While it may be difficult to lay the problems of any one descendent of African slaves on the doorstep of slavery’s legacy, there is a strong case to be made that, as a people, African Americans suffer particular harms due to this unique chapter in their history, such as the loss of race capital. Under almost every significant indicator of economic and social progress African Americans lag behind others, particularly those of European descent. This is not to ignore, as Individualists would note, significant economic gains in the African American community, particularly the burgeoning middle class in post-Civil Rights America.35 Nevertheless, the continuing group inequalities persist.

II. IMPLICATIONS: SOCIAL WELFARE TRANSFORMATION?

The multitude of causation issues in making the case for African American reparations not only suggests that the case may best be pressed outside of tort, but also that the form of compensation be social as opposed to individual. Specifically, it should take the form of community economic and cultural development. The claim may be characterized as a race-based social welfare

33 See infra text accompany notes 37-38 (distinguishing social welfare programs from traditional welfare programs and noting that even critics of the transfer payment solutions remark that “social capital development” may have beneficial effects for African American communities).

34 Social welfare programs implemented as economic and cultural development projects may be distinguished from traditional welfare solutions. Even those who criticize the efficacy of transfer payment solutions tend to be less skeptical regarding “social capital development.” See Keith N. Hylton, A Framework for Reparation Claims, 24 B.C. THIRD WORLD L.J. 31, 36 (2004) (granting that social welfare litigation designed to invest in social institutions, strengthen families and develop businesses may succeed in reducing poverty rates in black communities).

35 See John McWhorter, Blood Money: Why I Don’t Want Reparations for Slavery, Am. ENTERPRISE, July-Aug. 2001, at 18, 19-20 (remarking that only one in four African Americans now live below the poverty line and stressing that current justifications for reparations detract from these important economic gains and that any reparation must be focused on engendering individual initiative at work and school).
argument. From a purely theoretical perspective, others (such as Professors Thompson and Waldron) have argued that the claim for reparations may be philosophically stronger if framed in group terms.\textsuperscript{36}

There are many questions and concerns that a proposal for social reparations raises. For example, how do we determine the institutions and programs qualified for receiving the funds? Who will be responsible for the general administration of funds? What form should the reparations take?

Leaving the specifics aside, framing the issue in terms of race capital (building on Bourdieu’s conceptual framework) suggests that we think about remedies in broad terms. At a minimum, the argument for government-assisted economic development is bolstered when viewed against the backdrop of African Americans’ history in the United States, particularly the slave legacy. The essence of the reparations claim is to ensure that America, with its penchant for historical amnesia, does not ignore its historical record.

Ironically, many African American reparations arguments, though having their genesis in a Black Nationalist ideology, migrate towards a more Social Welfareist stance by way of Individualist analysis. Robert Westley, in arguing that a trust be established to further the economic and educational position of African Americans, would have its funds distributed on the basis of needs.\textsuperscript{37} Similarly, Randall Robinson qualifies his reparations-based plans with a needs test proposing that a college fund be established to provide scholarships for African American students based on financial need.\textsuperscript{38} These policy proposals reflect a blend of the Individualist and Social Welfareist positions. They are individualistic in the sense that they recognize, given a limited reparations pool, that benefits should be distributed on an individual needs basis. The Social Welfareist position is reflected in the focus on class-based remedies. The two positions, Individualist and Social Welfareist, are interconnected.

This blend is not unique to the reparations context. The non-tort compensation schemes Rabin champions typify systems that combine tort (Individualist) principles with social welfare goals.\textsuperscript{39} The September 11 Victim Compensation Fund (“the Fund”) illustrates the most recent example of such a scheme. Regarding the Fund, Matthew Diller argues that its implementation is guided by a mix of tort and social welfare ideals, and that

\textsuperscript{36} See Thompson, supra note 7, at 115-16 (characterizing reparative claims made by members of groups as perceived to be “perfectly legitimate” and claims by individuals for injustice to ancestors as problematic); Waldron, supra note 8, at 15-26 (concluding that even strong reparation claims by aboriginal groups for historical injustice may be superceded by intervening circumstances such as changes in demographics).

\textsuperscript{37} Westley, supra note 11, at 470 (suggesting that a private trust fund granting group reparations to black communities should be distributed on the basis of need).

\textsuperscript{38} Robinson, supra note 25, at 245 (recommending that the trust provide free college education for all qualified African Americans in financial need in addition to residential K-12 schools for at risk children).

\textsuperscript{39} See supra notes 21-22 and accompanying text (discussing Rabin’s view that alternatives to the tort compensation system are required).
such mixed compensatory schemes, including mass torts, are most likely to be arrived at when dealing with unique disasters, whether natural or man-made.\textsuperscript{40} Tort has traditionally been limited to the realm of private law, while social welfare is the province of public law. Diller identifies social welfare programs as primarily concerned with meeting individuals’ needs, while tort law focuses on losses.\textsuperscript{41} The Fund administration strikes a balance based on need and loss. Its genesis raises some interesting possibilities regarding African American reparations. The Fund is capitalized by the federal government, with contributions from insurance companies and other private entities. Congress took on this responsibility almost immediately following the September 11th tragedy not out a sense of responsibility for causing the harm to victims, but for a host of other political and policy reasons, including the likely popular outrage if the Congress did nothing.\textsuperscript{42}

An argument reconceptualizing African American reparations as a federal government program follows the same logic: Notions of distributive justice and fairness dictate that the claimants not be forced to take their grievances to the courts where the Individualist creed will likely mean that substantive justice will not be rendered. Whether a political claim pressed to the federal government would have a greater chance of success, however, is debatable. Is there a sense of American obligation? Success in the political arena would be an uphill struggle. Two basic facts about the American body politic argue against sufficient sentiment favoring political reparations. First, white Americans almost unanimously reject broadly tailored African American reparations claims. In one study, researchers reported that only four percent of whites believed reparations should be paid.\textsuperscript{43} Second, if recent political history provides any indication, Americans are generally skeptical of the Social Welfareist position.\textsuperscript{44} Individualist ideology influences both of these

\textsuperscript{40} Matthew Diller, \textit{Tort and Social Welfare Principles in the Victim Compensation Fund}, 53 DEPAUL L. REV. 719, 720-26 (2003) (noting that the Fund is distinguishable from all other government compensation schemes because its goal is to provide complete compensation by “making the survivors financially whole”).

\textsuperscript{41} \textit{id.} at 727 (contrasting social welfare programs that focus on efficiency and equal treatment with the tort system’s focus on the individual at the expense of high administrative costs).


\textsuperscript{43} Alfred L. Brophy, \textit{The Cultural War Over Reparations for Slavery}, 53 DEPAUL L. REV. 1181, 1183 (2004) (citing a Harvard University and University of Chicago study showing that only four percent of whites support African American reparations, and that only thirty percent of whites support an official apology for slavery).

sentiments.
African American reparations will never succeed unless American perceptions of social welfare policies are transformed. A necessary condition for such a transformation will be rejecting the belief that individuals bear sole responsibility for their misfortunes. The reparations dialogue may help this effort. Reparationists force us to confront painful historical facts regarding the treatment of African Americans as a group: slavery, Jim Crow, state promoted housing segregation, etc. This offers a counter-narrative to the prevailing tale in America that places blame for disadvantaged socio-economic status on individuals without considering social or historical contexts. In this regard, reparations might prompt a transformation in thinking about social welfare policies generally.

Reparations may have taken hold as a concept empowering historically harmed groups. Recent reparations payments to Native Americans, Hawaiians, Japanese Americans, and Holocaust victims attest to the power of this rhetoric.45 Constructing multiple counter-narratives raises intriguing possibilities. Wendy Davis, an assistant professor of law and Dean of Students at the Appalachian School of Law, provides an interesting example by making a case for reparations to be paid to predominantly white Appalachian residents.46 Professor Davis begins with a historical narrative (going back as far as the late nineteenth century) chronicling injustices against Appalachian natives, including unjust land appropriation, inhumane labor practices, and environmental atrocities.47 She then goes on to argue that the federal government played a role in at a minimum allowing these practices to go on unfettered and that Americans as a whole benefited from the natural resource riches gathered on the backs of Appalachians.48 Professor Davis proposes a reparations program that takes the form of a federally administered social-welfare program, funded by federal tax revenues collected from coal companies.49 Specifically, reparations would take the form of local

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45 Alfred L. Brophy, Some Conceptual and Legal Problems in Reparations for Slavery, 58 N.Y.U. ANN. SURV. AM. L. 497, 499-500 (2003) (finding the renewed interest in reparations for slavery is based on the recent reparations payments to these other groups). Reparations arguments are being utilized in a host of doctrinal areas. See, e.g., Kevin Greene, Bessie Smith, Courtney Love and the Centrality of Black Cultural Production to Copyright Law: Does Intellectual Property Belong in the Debate Over African American Reparations? (unpublished manuscript, on file with the author) (offering an insightful analysis of the reparations argument in the intellectual property field).
47 Id. at 908-16.
48 Id. at 918-28 (asserting, for example, that the courts generally upheld the rights of mineral owners over those of the surface owner).
49 Id. at 958-66 (rejecting individual compensation schemes and observing that these
government grants, including funding for infrastructure, education, and other community development projects. Given the history of Appalachian peoples, is it difficult to imagine cross-racial alliances with African Americans in a call for reparations? Some have argued for re-conceptualizing the civil rights agenda along class lines, supporting a view that interracial coalitions are necessary as a legal and political matter.\textsuperscript{50}

The reparations discussion might bolster the Social Welfareist position in another way. The myth that African Americans are the principal beneficiaries of welfare has served as ammunition for conservative politicians who wish to cut back on social service programs by portraying them as “give away” programs for Blacks.\textsuperscript{51} If the historical accounting called for by reparationists is told in a compelling way, it could serve to blunt this argument. The programs are merely compensation for what is owed. Of course, such a strategy may also be fraught with peril for the Social Welfareists. Whites might take the reparationist claim as yet another form of special pleading by Blacks. This could open up terrain for conservative politicians to suggest even further cuts in social programs as the reparations issue serves as yet another “wedge” issue. Adolph Reed, in criticizing the political wisdom of pushing a race-based reparations agenda, has noted that people champion the potentially divisive issue in an economic climate where the opportunities for cross-racial alliances along class lines seem particularly ripe.\textsuperscript{52} While such warnings should give reparationists pause, historically, civil rights movements of all sorts have stirred “settled waters.”\textsuperscript{53} Additionally, a cross-racial reparations movement would have the benefit of actually facilitating alliances and casting schemes have not helped in the past).


\textsuperscript{52} Reed, \textit{ supra} note 5, at 17.

social welfare claims as being in the general interest.

Of course, a reparations argument heavily tilted toward a social welfare position may make Black Nationalists uncomfortable. To the extent that the reparations argument gets watered down to make the case for the redistributing wealth generally, the existential dimensions of reparations are undercut. Nationalist reparaitonists argue that reparations will serve as a form of spiritual healing for America.\footnote{See, e.g., David Hall, \textit{The Spirit of Reparation}, 24 B.C. THIRD WORLD L.J. 1, 3 (2004) (arguing that restitution and reparation have a spiritual origin).} If African Americans benefit from a general redistribution of wealth, based on class as opposed to race, the material benefits will not have the same redemptive meaning.

Alfred Brophy has argued for a hybrid reparations program that would combine reparations directed at the African American community to redress historic wrongs with colorblind need-based “reparations.”\footnote{Brophy, supra note 45, at 555 (“As reparations plans are formulated, it is imperative that we consider how best to repair the psychological scars, as well as close the educational and economic disparity that currently exists.”).} Such a program might strike the necessary balance between the Black Nationalist and Social Welfareist positions. Of course, to satisfy Nationalist concerns, it would have to also include an apology and funds directed at bolstering African American cultural, social, and symbolic capital, as well.

\textbf{CONCLUSION}

While the reparations discourse forces us to grapple with many abstract and technical questions, the issues underlying its discussion relate to central political concerns. Three of the most heralded speeches at the 2004 Democratic National Convention illustrate the point. Former Presidential candidate, and civil-rights activist, Reverend Al Sharpton explicitly raised the reparations issue by alluding to the promise of “forty acres and a mule.”\footnote{Reverend Al Sharpton, Speech to the Democratic National Convention (July 28, 2004) (transcript available at \url{http://www.nytimes.com/2004/07/27/politics/campaign/28TEXT-SHARPTON.html} (last accessed Sept. 26, 2004) (suggesting that since African Americans never received the “forty acres and a mule” that had been promised after the Emancipation Proclamation, they had decided to “ride this donkey as far as it would take us”).} Others did not specifically address reparations, which is generally avoided by “mainstream” politicians, but did discuss racial and equality issues that are key in discussing reparations. Senator John Edwards, the Vice Presidential nominee, continued to emphasize his theme of “two Americas,” focusing primarily on class, but connecting it to race by recounting his own experiences growing up in the Jim Crow South.\footnote{Senator John Edwards, Speech to the Democratic National Convention (July 28, 2004) (transcript available at \url{http://www.dems2004.org/site/apps/nl/content3.asp?c=lulI2LaPYG&b=131063&ct=158740} (last accessed Sept. 26, 2004)).} He accepted “enormous personal
responsibility” for addressing race and equality issues. The resolution for Senator Edwards is the possibility of “one America” not divided by race and class. Barack Obama, an African American candidate (with a mixed-race heritage) for the Illinois United States Senate seat, echoed a similar theme. Mr. Obama used the bi-racial narrative of his lineage to argue that Americans are “connected as a people” and that “[t]here’s not a black America and white America and Latino America and Asian America; there’s the United States of America.” He also included references to slave, immigrant, and working class experiences in America and how they were related.

If we take the Democratic Party as representing the Social Welfareist position, or as close to what passes as that position in the American two-party system, the way in which the speeches navigate race and class issues is noteworthy. They all, in varying degrees, integrate the two, including race conscious historical narrative, in arguing for an agenda to redistribute wealth. This may serve as the template for a transformed social welfare dialogue. It is a dialogue that seems inextricably linked to the case for and against African American reparations.

Thinking through reparations arguments and their many formations turns into a complicated affair. Theorizing implications from myriad perspectives helps. This essay, therefore, in discussing the issue through the theoretical lens of causation and competing ideological positions, will hopefully help further an understanding of the many concerns one must confront when discussing Black reparations, and the larger political possibilities they may portend.

58 Id.
59 Id.
61 Id.