HEALING RACISM'S WOUNDS: ON RACIAL RECKONING & OBAMA'S "A PROMISED LAND"

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ABSTRACT

Legal controversies surrounding race and racism have persisted in America from its inception, but not without intervention. Supreme Court decisions in Dred Scott, Plessy and Brown trace the Court's jurisprudential evolution while, legislatively, the passage of the post-civil rights Amendments, and, more recently, The Civil Rights Act of 1964, demonstrate Congresses' intent to address racial equality, among other disparities. However, while some legal scholars and policy advocates suggest these measures are adequate, others point to their insufficiency or potential for overreach. Currently, amidst rising civil and political unrest, there is both a renewed interest in racial justice and increasing racial animus. This racial divide is perhaps most attributable to different conceptions of liberalism and legal redress which are captured, historically, by the words of the same civil rights leader, Dr. Martin Luther King, Jr., and both penned in 1963. Dr. King famously made mention, seemingly affirming race-neutral individualism, of a "dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." (I Have a Dream, 1963) Yet he also wrote, depicting a vision of race-specific communitarianism, that "a price can be placed on unpaid wages. The ancient common law has always provided a remedy for the appropriation of the labor of one human being by another. This law should be made to apply for American Negroes." (Why We Can't Wait, 1963) As a consequence of such, seemingly, disparate statements

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from a seminal and symbolic Civil Rights leader, different conceptions of the legacy of the Civil Rights Movement have emerged.

Catapulted into the American conversation on race by virtue of his pursuit and ascent to the presidency in 2008, Barack Obama, owing to personal biography and political philosophy, undeniably embodies King's 'content of their character' dream. This article, which in part provides a review of President Obama's reflections on race from his book, A Promised Land, also seeks to provide a historical context for examining the evolution of American thinking on racism and legal remedies. Juxtaposing the events of Andrew Johnson's Amnesty Proclamation with Barack Obama's first presidential campaign and inauguration, I explore some of the legal implications that emerge from competing visions of the Civil Rights Movement legacy, including, dichotomous understandings of racial remediation.

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INTRODUCTION

In 1865, having concluded the Civil War, America embarked upon a new chapter in the democratic experiment fraught with different, but not less difficult challenges than those which characterized the former era of chattel slavery. Of great import, during this period of American history now known as Reconstruction, was the question of what would become of the nation's former enslaved people? Notwithstanding Abraham Lincoln's Emancipation Proclamation in 1863, it was not until the end of the war in 1865 that thousands of formerly disenfranchised enslaved people—now propertyless citizens—were thrust upon the nation. And the nation had no conception or plan for what their economic and political inclusion in American society would be. Unfortunately, despite decades of forced servitude resulting in free labor, the nation failed to provide an economic foundation, not to mention recompense, for most of these newly freed African Americans. Observing this tragic set of circumstances in 1880, Fredrick Douglass lamented, "could the nation have been induced to listen . . . some of the evils which we now suffer would have been averted."[1]

One hundred and twenty-eight years after Frederick Douglass' critique regarding the treatment of recently emancipated Black people, America elected its first Black president—Barack H. Obama—and many wondered, if only fleetingly, whether that 'old dragon,' racism, was dead. Certainly, for most Americans, President Obama's inauguration was at least symbolic of a significant step in the right direction concerning race relations. Moreover, for many Black Americans, including this author, it represented the removal of another "racist stain"—an imputed ideological connection between Blackness and subjugation, referred to in Antebellum America as "a badge of slavery"—and the hope that this nation might fulfill its promise of equality for all.[2] Few would have imagined during President

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1. Rick Beard, *A Promise Betrayed: Reconstruction Policies Prevented Freedmen from Realizing the American Dream*, HISTORYNET (June 2017), https://www.historynet.com/a-promise-betrayed.htm [https://perma.cc/YH7N-FJFT] (describing William Tecumseh Sherman's issuance of Special Field Orders No. 15 as a solution to the "Negro Problem"—large numbers of Black camp followers); *see also* MICHAEL FELLMAN, CITIZEN SHERMAN: A LIFE OF WILLIAM TECUMSEH SHERMAN 169 (1995) (describing Sherman's view of "forty acres" as a short term military tool rather than a long term vehicle for reparations as Sherman "wanted to smite his enemies in every possible way, and land confiscation would grievously injure the moral and material fortunes of his enemies, demonstrating their powerlessness before the conqueror, and humiliating them publicly").

2. Jennifer M. McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 575 (2012) (explaining the relatively common use of the phrase "badge of

Obama's inauguration in 2008 that our nation would again be so divided along racial lines. As I write today, we are still contending with the aftermath of Summer 2020 racial justice protests, an attempted insurrection, two impeachments, electoral questions, and looming uncertainty regarding the stability and efficacy of America's two-party political structure. Despite the proclamation and hope by many that America had entered a post-racial society with the election of President Obama, the tensions of racialized capitalism—a unique formulation of free market economics founded upon the exploitation of Africans and Native Americans—have persisted.

In his latest book, *A Promised Land*, President Obama acknowledges as much, noting the ongoing struggle between the nation's ideals, what he calls "the possibility of America," and America's troubling tendency towards "conquest and subjugation, a racial caste system and rapacious capitalism."[3] However, he stops short of abdicating the "idea of America" or denouncing it as pure mythology. Rather, grounded in pragmatism, President Obama conveys that, as president, "by appealing to what Lincoln called the better angels of our nature I stood a greater chance of leading us in the direction of the America we've been promised."[4] Indeed, most will agree that President Obama's uncanny ability to identify and articulate common interests, and elicit common goodwill, perhaps more than all his other gifts, is what translated his presidential candidacy from mere possibility to reality.[5] Notably, one of President Obama's early models in politics, Harold Washington—Chicago's first Black mayor—convinced President Obama that "a political campaign based on racial redress, no matter how reasonable, generated fear and backlash and ultimately placed limits on progress."[6] Instead, what President Obama sought was a "politics that

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slavery" both prior to and after 1883 as a rhetorical and political term connoting skin color as the presumptive mark or sign of enslaved status).

3. BARACK OBAMA, A PROMISED LAND, at xv (2020) [hereinafter "OBAMA"] (describing President Obama's view of the American "experiment").

4. *Id.* at xvi; *see generally* DORIS KEARNS GOODWIN, TEAM OF RIVALS (2005) (identifying central elements of Abraham Lincoln's political genius, including his ability to form friendships with former opponents and repair injured feelings).

5. *See generally* DAVID J. GARROW, RISING STAR: THE MAKING OF BARACK OBAMA (2017) (describing the personal characteristics and environmental conditions that shaped Obama's eclectic appeal and leadership style).

6. OBAMA, *supra* note 3, at 17 (describing how Harold Washington's charismatic leadership planted a seed within President Obama to run for political office and simultaneously, provided him a cautionary tale regarding political campaigning and governance).

bridged America's racial, ethnic, and religious divides," as well as the many strands of his own life.[7]

This paper examines how President Obama's vision of racial progress aligns with presumptions underlying resurging calls for racial reparations—assessing this comparison in light of the legacy of the Civil Rights Movement. Presidential politics at two historical inflection points—the emancipation of America's enslaved Black people and the election of America's first Black president—provide the context for this exploration. First, in the aftermath of Abraham Lincoln's death, I trace the history of Andrew Johnson's "Amnesty Proclamation" during Reconstruction. Next, I follow President Obama's 2008 campaign, as primarily articulated in Part Two of *A Promised Land*. Utilizing these narratives and other critical texts, I explore two interrelated legal questions: 1) What do legal norms of race-neutrality and individualism imply about the nature of racial progress?; and 2) How does interest convergence impact efforts to provide redress for group harm?

I. Amnesty Proclamation

Near the conclusion of the Civil War, in Savannah, Georgia, the heart of the deep south, General William T. Sherman and other Union leaders met to discuss the fate of a multitude of newly freed Black people.[8] Green-Meldrim House, now a Gothic Revival Mansion, then a classic two-story plantation home, was chosen by Sherman and Secretary of War, Edwin Stanton, as the site to consult with a group of the newly emancipated. Reverend Garrison Frazier—an eloquent man and imposing figure at well over six feet tall—was selected to represent the freedmen.[9] This conversation, like others between Union officials and formerly enslaved Black people, undoubtedly covered a myriad of topics: from

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7. *Id.* at 41 (identifying President Obama's mixed heritage—including his white grandparents, white mother, Kenyan father, and Michelle Obama's Black parents).

8. *See generally* WILLIAM TECUMSEH SHERMAN, MEMOIRS OF GENERAL W.T. SHERMAN (2000) (describing Sherman's thoughts and impressions regarding his wartime and post-wartime commands and decisions).

9. Sarah McCammon, *The Story Behind '40 Acres and a Mule'*, NPR (Jan. 12, 2015), https://www.npr.org/sections/codeswitch/2015/01/12/376781165/th
e-story-behind-40-acres-and-a-mule [https://perma.cc/S98Z-AY7M] (describing the meetings between General William T. Sherman and local Black leaders as captured in Sherman's memoirs); *see generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–77 (2011) (providing a coherent, comprehensive modern account of Reconstruction which traces the centrality of the Black experience, the remodeling of Southern society as a whole, and the evolution of racial attitudes and patterns of race relations).

economic self-sufficiency and governance to the more immediate practical concerns of food, clothing, and shelter.[10] Sherman's memoir records portions of his dialogue with Rev. Frazier. Responding to Sherman's question regarding how the newly freed Black people would want to live in former Confederate states, "whether scattered among the whites," or in colonies by themselves, Rev. Frazier suggested a preference to "live by ourselves, for there is prejudice in the South that will take years to get over."[11] Rev. Frazier's concern was more than conjecture. As one southerner observed during this time period, the "feeling against any ownership of land [in the South] by negroes is so strong that the [white] man who should sell small tracts to them would be in actual personal danger."[12]

Four days after his conversation with Rev. Frazier, General Sherman issued Special Field Order 15, which later became known as "40 acres and a mule," indicating that: "each family shall have a plot of not more than forty acres of tillable ground."[13] Although "mules" were not an explicit part of this order, the fact that many land recipients received leftover Army mules contributed to the more well-known colloquialism.[14] Practically speaking, Sherman's signing of Special Field Order No. 15 authorized the setting aside of 400,000 acres of confiscated Confederate land for freed people, but the "possessory titles" issued were provisional—granting the right to use but not to own the land—ultimately subject to approval by the president.[15] Notably, after the assassination of Abraham Lincoln, his successor, Andrew Johnson—a southerner—began issuing presidential

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10. *See* Foner, *supra* note 9.

11. Sherman, *supra* note 8, at 605 (describing Sherman's discussion with Rev. Frazier, leader of the freedmen).

12. Beard, *supra* note 1 (identifying the tension that was created by President Johnson's order to return confiscated land in a manner that the mutually agreeable to both the original owners and the freed people who had claimed it under Sherman's Special Field Order No. 15).

13. McCammon, *supra* note 9 (describing the substantive content of Special Field Order No. 15, subject to several bureaucratic strictures).

14. *See* Foner, *supra* note 9, at 71 (estimating that 40,000 formerly enslaved people received grants of land, and each was eligible to receive a lent mule, although it is not known exactly how many accepted mules); *see also* Henry Louis Gates, Jr., *The Truth Behind '40 Acres and a Mule'*, PBS (Jan. 13, 2013), https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/the-truth-behind-40-acres-and-a-mule/ [https://perma.cc/JVW6-FZZK].

15. Beard, *supra* note 1 (describing Brigadier General Rufus Saxton's task of assigning each family 40 acres of land by furnishing a "possessory title").

pardons to southern whites and Confederates.[16] These pardons, which enabled southerners to reclaim their formerly confiscated land if they paid their taxes, renounced the confederacy, and swore allegiance to the Union, effectively repealed Sherman's Special Field Order 15—amounting to a proverbial "bait and switch" from the freedman's perspective. [17] Consequently, thousands of formerly enslaved people were effectively consigned to forced migration or sharecropping and, thereby, a cycle of indebtedness and impoverished conditions.[18]

Naturally, Johnson's Amnesty Proclamation exerted significant influence in the lives of formerly enslaved Black people and their descendants.[19] However, curiously, the legislative, political, and economic relationship between "40 acres and a mule" and the Amnesty proclamation has not been widely discussed, and as a consequence, is not broadly understood.[20] Rather, an incomplete narrative touting the government's betrayal of a "promise" that granted "40 acres and a mule" to newly freed Black people has risen to the level of historical fact.[21] Certainly, it is quite possible that part of the attraction to this incomplete depiction is the sense, at least amongst liberal thinkers and many within the Black community,

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16. *See id.* (identifying the provisional nature of Special Field Order No. 15 and describing how the Reconstruction betrayal drove many impoverished Blacks from Southern to Northern cities).

17. *See* DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 472 (2018) (describing Andrew Johnson as a white supremacist who accepted the end of slavery but was recalcitrant regarding the notion of Black civil and political rights); *see also* David W. Blight, *What America Owes Frederick Douglass*, N.Y. TIMES (Nov. 5, 2018), https://www.nytimes.com/2018/11/05/opinion/what-america-owes-frederick-douglass.html (on file with the *Columbia Human Rights Law Review*).

18. *See* Foner, *supra* note 9, at 35–36 (explaining that the Amnesty Proclamation's full pardon and restoration of rights to Southern whites, along with newly established reconstruction governments, led to the adoption of measures to maintain the status of "[B]lacks consistent with their present condition as a laboring, landless and homeless class").

19. *See* Beard, *supra* note 1 (explaining that few decisions have had a more long-lasting and deleterious impact on American society than the Johnson administration's decision to force the freedmen off confiscated lands).

20. *See* Gates, *supra* note 14 (explaining that most Americans have not heard that the idea of "40 acres and a mule" was generated by Black leaders themselves or that the actual promise was even then only "temporarily" realized for 40,000, roughly 1%, of the nation's approximate 3.9 million formerly enslaved persons).

21. *See id.* (describing how Americans have been taught an incomplete story about "40 acres and a mule" through schooling, Black history lessons, and or by popular awareness of Spike Lee's film company name, which leads to the inaccurate conclusions that the promise of "40 acres and a mule" originated with Sherman alone and that the promise was made to all formerly enslaved persons).

that such a commitment was warranted.[22] Some progressive white senators during Reconstruction, including Thaddeus Stevens and Charles Sumner, advocated for as much.[23] But, in fact, no such executive or congressional Federal commitment to support Sherman's Field Order No. 15 ever occurred, and thus it does not appear the case that the United States federal government—as a collective decision-making body—ever intended to compensate formerly enslaved Black people.[24]

Not surprisingly then, but ironically, ubiquitous public discussion after the Civil War centered around compensating former slave owners—a political stratagem that was deemed necessary by government officials seeking to 'bind the nation's wounds and preserve the Union.'[25] But what of the wounds of formerly enslaved Black people—were they not also part of the nation?[26] At the conclusion of the war, the Union was in possession of over 800,000 acres of land confiscated from the Confederacy, but ultimately, as a result of Johnson's Amnesty Proclamation, within a year of the war's end, the Freedmen Bureau—the government entity created in part to manage land redistribution—had returned more that 400,000 acres back to Southern white landowners. By the middle of 1867, "all but 75,000 acres were in the hands of their original owners."[27]

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22. *See* William Darity, Jr., & A. Kristen Miller, *How Reparations for American Descendants of Slavery Could Narrow the Racial Wealth Divide*, NBC NEWS (June 20, 2019), https://www.nbcnews.com/think/opinion/how-reparations-american-descendants-slavery-could-narrow-racial-wealth-divide-ncna1019691 [https://perma.cc/3269-XU9U] (describing how activist and lawmakers gathered for a House Judiciary subcommittee hearing on the topic of reparations).

23. *See* Beard, *supra* note 1 (describing Frederick Douglass' chastisement of the American public for not listening to the suggestions of Thaddeus Stevens and Charles Sumner).

24. *In re* African-American Slave Descendants Litigation, 471 F.3d 754, 759 (7th Cir. 2006). The Seventh Circuit, ironic in light of the history of Special Field Order No. 15, found that slave descendants lacked standing to bring derivative injury claims and state statutes of limitations precluded relief on claims brought as representatives of enslaved peoples' estates.

25. *See* Beard, *supra* note 1 (describing the Johnson administration's determination to restore antebellum patterns of land ownership).

26. Dred Scott v. Sanford, 60 U.S. 393, 407 (1857) (finding that Blacks were "so far inferior that they had no rights which the white man was bound to respect"). *See* Robert Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, WIS. L. REV. 219, 290 (1986) (noting that indigenous people and Blacks, deemed "heathens" and "infidels" were "legally presumed to lack the rational capacity necessary to assume equal status or exercise of equal rights under the European's medievally-derived legal world-view").

27. *See* Beard, *supra* note 1 (finding that Special Field Order No. 15 was rendered impotent by the Johnson administration's decision to return confiscated land to white Southerners and Confederates).

Historically, American political and, more so, presidential decision-making has always been fraught with such compromises—at times sacrificing "Black humanity on the altars of political and economic necessity" to promote pragmatism and expediency.[28] It was this priority for pragmatism, in fact, that Abraham Lincoln grappled with as he weighed options regarding Emancipation and the preservation of the Union, concluding: "If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it."[29] Ironically, one hundred and fifty years later, another senator from Illinois would once again contend with the tensions between "racial progress" and political compromise as president—however, this time, in part because of his own "mixed-race" status.

II. Yes We Can

President Obama realized early in his inaugural presidential bid that "a president wasn't a lawyer or accountant or a pilot, hired to carry out some narrow, specialized task. Mobilizing public opinion, shaping working coalitions—that was the job."[30] He also recognized that, for better or worse, "people were moved by emotion, not facts."[31] The identification and articulation of common interests, appealing to what Abraham Lincoln called our "better angels," was his objective—and likely Obama's only path to victory.

Activists and intellectuals supporting President Obama's candidacy "in pure symbolic terms" expected him to take what he deemed to be "uncompromising positions on everything from affirmative action to reparations and [was] continually on alert for any hints that [he] might be spending too much time and energy courting middle-of-the-road, less

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28. *See* Anthony Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959, 991 (2000) (providing an ideological justification, political, economic, and legal framework for reparations within the context of Dr. Martin Luther King, Jr.'s egalitarian tradition).

29. Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862) (on file with the Library of Congress), https://www.loc.gov/item/mal4233400/ [https://perma.cc/Y4GN-TZWF]; *see also* Goodwin, *supra* note 4 (describing Abraham Lincoln's commitment, above all, to popular government and the constitution, amidst the countervailing political pressures he faced during the Civil War).

30. OBAMA, *supra* note 3, at 89 (describing President Obama's debrief with campaign manager, David Axelrod, after his first debate, where President Obama came to the realization that the goal of a political debate was for the candidate to communicate their values and priorities, and not necessarily to answer the moderators' questions in a direct manner).

31. *Id*.

progressive White folks."[32] His advisors worried, not without historical merit, that too much focus on issues considered specific to Black people would trigger suspicion and backlash from the broader electorate.[33] President Obama's goal was to become neither a supplicant for liberal benefactors, unable to make decisions independent of these constituents, nor a "permanent protestor" waiting for "White America to expiate its guilt," for he believed that both approaches were born of despair.[34] To transcend this old logic, he would have to win. To accomplish this objective, President Obama knew that he would need to "use language that spoke to all Americans and propose policies that touched everyone . . . [embracing] White people as allies rather than impediments to change, and to couch the African American struggle in terms of a broader struggle for a fair, just, and generous society."[35]

President Obama acknowledged the tightrope he was walking, bound as he was to "specific communities of flesh and blood, filled with men and women who had their own imperatives and their own personal histories."[36] No one, perhaps, in President Obama's personal sphere of influence, exhibited such contradictory impulses to the extent of Reverend Jeremiah Wright—his pastor from Chicago. Rev. Wright's comments, reported in a *Rolling Stone* article, that America believes in "White supremacy and Black inferiority and believe[s] it more than we believe in God"—created a significant controversy at the inception of President Obama's candidacy.[37] In fact, Rev. Wright had been scheduled to lead a prayer in front of an assembled crowd—where President Obama was to announce his candidacy—before the article was published a day earlier, forcing a change in plans from the public invocation to a private one.[38]

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32. *Id*. at 117 (listing the concerns of the Black community in regard to President Obama's campaign).

33. *Id*. at 118 (describing how campaign advisors Axelrod, David Plouffe, and Robert Gibbs warned President Obama that "too much focus on civil rights, police misconduct, or other issues considered specific to Black people risked triggering suspicion, if not a backlash, from the broader electorate").

34. *Id*. (analyzing the viability of a Black presidential candidate seeking political legitimacy, beyond merely symbolic terms).

35. *Id*.

36. *Id*. at 119 (reflecting on President Obama's political request that the Black community exercise optimism and strategic patience).

37. *Id*. at 120 (describing what President Obama viewed as Rev. Wright's racially charged rhetoric, juxtaposed against his genuine commitment to President Obama and others in the Chicago community).

38. *Id*. at 121 (describing President Obama's phone call to Rev. Wright asking him to offer a private prayer before his speech and skip the public invocation).

Not unexpectedly, this chain of events triggered a significant reaction within the white and Black community, with a menagerie of Black voices arguing that President Obama "wasn't ready," or "was too radical, or too mainstream, or not quite Black enough."[39] Encouragement came from Dr. Otis Moss, a vanguard of the Civil Rights Movement, and close friend and associate of both Dr. King and Rev. Wright, who shared with President Obama that "every generation is limited by what it knows."[40] It was Dr. Moss' biblical analogy that Dr. King and others, like Dr. Moss, were part of the Moses generation, destined to lead the people to the promise land but not enter it, while President Obama and others like him were part of the Joshua generation, "responsible for the next leg of the journey," that convinced President Obama that what he was "trying to do was worth it, that it wasn't just an exercise in vanity or ambition but rather a part of an unbroken chain of progress."[41] In fact, in President Obama's view, electoral politics is where the energy of the Civil Rights Movement had migrated.[42] Buttressed by the support of Dr. Moss and others, he preserved the common-struggle approach, and ten months later, President Obama walked into an auditorium in Columbia, South Carolina, where a multi-ethnic—mostly college aged—crowd was chanting: "Race doesn't matter! Race doesn't matter!"[43]

But "race" did matter.[44] Shortly after the rally in Columbia, and more than a year after the initial Rev. Wright coverage in *Rolling Stone*, *ABC News* compiled a series of short clips, running on *Good Morning America*, in which Rev. Wright—in a vivid display of Black radicalism—called America the "USA of KKK" and intoned, "Not God bless America. God damn America."[45] Such rhetoric from many Black pulpits was not uncommon, in some ways a reflection of "the periodic need to let loose, to release pent-up anger from a lifetime of struggle in the face of chronic racism, reason and

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39. *Id*. at 122.

40. *Id*. (identifying the generational limitations of social movements).

41. *Id*.

42. *Id*. at 18 (describing President Obama's perspective of electoral politics and the legacy of the Civil Rights movement).

43. *Id*. at 128 (reflecting on the atmosphere generated by white and Black college students after his primary victory in South Carolina).

44. *Id.*; s*ee also* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 35 (2019) (explaining that race is a power construct of collected or merged difference that lives socially); L. LUCA CAVALLI-SFORZA, PAOLO MENOZZI, & ALBERTO PIAZZA, THE HISTORY AND GEOGRAPHY OF HUMAN GENES 16-19 (1994) (explaining that there is no scientific basis for race. There is far more genetic variation within a people group, or race, than there is between one people group and another. "Race" cannot be biologically defined due to genetic variation among human individuals and populations).

45. OBAMA*, supra* note 3, at 140.

logic be damned."[46] Understanding the political risks, President Obama decided he needed to make a speech on race to staunch the political bleeding.[47] Airing on all the major networks, he described how many complexities in the American family have resulted from America's racial legacy. Performing an oratorical balancing act, President Obama explained how some Black folks and historically Black institutions "might still harbor bitterness toward—and feel betrayed by—a country they loved" but also how "White Americans might resist, or even resent, claims of injustice from Blacks—unhappy with any presumption that all Whites were racists, or that their own fears and day-to-day struggles were less valid."[48]

Ultimately, President Obama sought to communicate that "unless we could recognize one another's reality . . . we would never solve the problems that America faced."[49] Sharing a story from his youth that involved his white grandmother and a Black panhandler who had 'frightened' her, apparently, by virtue of nothing other than the panhandler's race, President Obama analogized his own mixed heritage with that of America.[50] His goal, it seemed, was to convey the idea that both realities, white and Black—with all their contradictions, fears, unreconciled pain, and shame—were part of a shared "American identity" possessed by both Black and white folk. The speech worked—if only temporarily. Several weeks later, when Rev. Wright announced at the *National Press Club* that America was "racist at its core" and President Obama had denounced Rev. Wright's previous comments because "that's what politicians do to get elected," President Obama was forced to make a clean break from Rev. Wright.[51] With a brief statement unequivocally denouncing Rev. Wright's comments and separating himself from the provocative pastor, President Obama effectively closed the door on the "Wright controversy," leaving for

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46. *Id*. at 120 (identifying President Obama's assessment of persisting racial frustration within the Black community, periodically expressed in the Black church).

47. *Id*. at 141 (describing President Obama's conviction that the only way to deal with controversy created by Rev. Wright's comments was to place them in context).

48. *Id*. at 142 (providing an ideological context for President Obama's understanding of racial tension in America).

49. *Id*.

50. *Id*. (explaining how President Obama processed his grandmother "Toot" expressing fear about a panhandler because he was Black).

51. *Id*. at 146–47 (describing President Obama's growing alienation from Rev. Wright and, ultimately, his decision to sever the relationship due to growing political pressures).

another day the issue of America's deeply conflicted view on race and racial progress exposed by "Wright's commentary."[52]

III. The Beloved Community: Race Neutrality & Individualism

During his lifetime, Dr. Martin Luther King, Jr. offered the concept of the "Beloved Community" as a model for racial reconciliation, and since that time, scholars and theologians have provided competing interpretations regarding what characteristics and conditions such a community would require. Professor Anthony Cook, in his exploration of reparations for Black Americans, explains the tension between a conception of the "Beloved Community" as a race-neutral "liberal commitment to a color-blind society," versus a "Beloved Community" asserting the need for "public atonement that entails a process of confession and restitution-based repentance."[53] Cook's view is that policies born of race-neutrality which attempt racial reconciliation, like President Obama's, superficially treat the wounds of racism, "wounds that continue to fester beneath the surface of color-blind laws, policies, and interactions."[54] Cook believes these policies aim to remediate racial disparities without exclusively targeting benefits to members of the "historically injured" racial group.[55]

However, the importance of the "Beloved Community" extends beyond redress. Just as much, it is about the symbolic legacy of the Civil Rights Movement. More specifically, it is a question of which Dr. King America envisions—either President Obama's liberal, race-neutral individualistic, judged by the "content of your character" Dr. King, or Professor Cook's radical, race-specific communitarian, "a price can be placed on unpaid wages" Dr. King. Part of this answer rises and falls on the manner in which we choose to interpret Dr. Moss' insight, spoken to President Obama in the aftermath of the first Rev. Wright incident, that

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52. *See id*. at 147 (explaining how President Obama's statement did not allay voter's concerns but did convince reporters that he had nothing further to say on the matter).

53. Cook, *supra* note 28, at 963 (describing a model of race-specific affirmative action compensating Black people for the unpaid wages of slavery consistent with Dr. King's understanding of a Beloved Community). *See* Darity, *supra* note 22 (discussing House bill H.R. 40, a proposal that would establish a congressional commission to study and develop reparations proposals).

54. *Id.*; *see also* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1166 (1978) (explaining that color-blind theory presumes a neutral relational history between Blacks and whites).

55. *Id.*

"every generation is limited by what it knows."[56] For President Obama, the "limitation" of the King generation was encapsulated by desperate attempts for racial redress in the form of politically divisive appeals to reparations and other extreme positions.[57] In the view of Professor Cook, Cornel West, and others, the "limitation" refers to this present generations inability to see beyond the dominant culture's sanitized depiction of Dr. King—a characterization that strips Dr. King's ideology of its egalitarian, and perhaps radical, transformative qualities.[58]

These distinct interpretations of the "limitation" emerge from differing rights-based liberal commitments to policies of racial redress, either race-neutral or race-specific, which are respectively associated with notions of "individualism" and "communitarianism."[59] Legal scholar Duncan Kennedy has observed that the individualism pervading American law is based on self-reliance, which means "an insistence on defining and achieving objectives without help from others (i.e., without being dependent on them or asking sacrifices of them.)"[60] Notably, this conception of individualism as "autonomous self," providing the basis for classical liberal theory, assumes little responsibility for the past, requiring only that "individuals do not presently engage in discrimination based on the

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56. *See* OBAMA, *supra* note 3, at 122.

57. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305–10 (1978) (rejecting societal discrimination as a sufficient justification for reserving medical school positions for minority applicants, and thus harming "innocent" whites, a view President Obama seemingly aligns with).

58. *See* Cook, *supra* note 28, at 961 (explaining how the emasculation of the image of Dr. King by the rehearsal of the "I Have a Dream" speech, robs that image of its disruptive potential and revolutionary implications); *see also* MARTIN LUTHER KING, JR., THE RADICAL KING xiv (Cornel West ed., 1985) (describing West's view that President Obama's advisers were not part of the Dr. King legacy and that Obama ultimately betrayed what the radical Dr. King stands for); Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1768 (1993) (describing how the assertion that "race is color and color doesn't matter" is an essential norm of colorblindness which denies the historical context of white domination and Black subordination).

59. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–49 (2007) (rejecting the school district's diversity plan, noting that the Fourteenth Amendment requires the government to be colorblind with regard to race, regardless of the objective); Gratz v. Bollinger 539 U.S. 244, 270 (2003) (equating "invidious" and "benign" racial classifications and denying the use of racial preferences because there is no distinction in how racial categories are used—whether to support racism or contest it in legal analysis).

60. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713 (1976) (describing individualism and the tension that arises when considering remedial measures under this philosophical-political theory).

irrationality of race and that they be personally liable for past discrimination committed *by them* against an identifiable victim."[61]

In contrast, reform liberal theory asserts "that the present effects of the past are undesirable and not in the genuine self-interest of the present generation to tolerate."[62] The distinction, Cook observes, is centered on the role of the state and how far back the state's power extends in correcting "certain 'free market' failures or social inequalities due to 'irrational' or 'immoral' decision-making based on race, among other things."[63] In the classical liberal view, the "rights" that the Constitution ensures are "individual" rights and may not be encroached upon no matter how noble the cause. However, ironically, persisting notions of Black inferiority—cognitive, cultural, or otherwise—consistently pointed to as rationales for Black underachievement—are group-based. Cook notes that "Blacks are made to be individuals when they seek group redress but are made members of a group when the dominant culture wishes to disparage and subordinate them."[64]

Suggesting a way forward, Professor Cook points to the need for a discourse that "nurtures an understanding of individuality that recognizes our connection to and responsibility for the past—a discourse that balances individualism with the need to appreciate and reckon with the role of historically constructed group identities."[65] Such an understanding, in Cook's view, would provide an ideological 'space' for reparations. However, Critical Legal Studies scholars question whether pursuing legal rights such as the "right to reparations" is a futile effort.[66] They note that "floor entitlements can be turned into ceilings (you've got your rights, but that's all you'll get). Formal rights without practical enforceable content are easily

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61. Cook, *supra* note 28, at 966 (emphasis added) (analyzing the limitations of individualism in assuming responsibility for past societal and communal injustices).

62. *Id*.

63. *Id*. at 967.

64. *Id*. *See generally* RICHARD J. HERNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994) (Hernstein and Murray, identifying a statistical bias observed between Blacks and whites on norm-based standardized tests, appear agnostic about the source of this performance gap).

65. Cook, *supra* note 28, at 965.

66. *See, e.g.*, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 375–76 (1982–83) (suggesting "the long-term effects of a legal strategy based primarily on the acquisition of legal rights tends to weaken the power of popular movements because such a strategy allows the State to define the terms of the struggle. By granting new legal rights that seem to vindicate the claims of the individuals and groups asserting them, the State can succeed over time in co-opting the movements' more radical demands while 'relegitimizing' the status quo through the artful manipulation of legal doctrine").

substituted for real benefits."[67] Additionally, "the powerful can always assert counter rights ([such as] vested property rights, differential treatment according to 'merit,' and the right to associate with one's own kind) to the rights of the disadvantaged. 'Rights' conflict—and the conflict cannot be resolved by appeal to rights."[68] Conceived in this way, rights discourse may impede genuine democracy and justice—the suggestion being that an articulation of needs would be a more effective strategy to advance the interests of marginalized groups.

In support of reparations and other remedial measures, Critical Race scholars point out that the critique of rights, inclusive of the right to reparations, neglects the historical potential of rights in the real lives of Blacks, women, and others who have not always been conferred rights. Patricia Williams, Professor of Law at Columbia Law School and Critical Race theorist, observes that "Blacks have been describing their needs for generations . . . [amidst] a long history of legislation *against* the self-described needs of Black people."[69] As such, the suggestion of pursuing rights as "meritless" lacks force where Blacks have been excluded even from the humanity of rights-based discourse.[70]

As an alternative to a liberal, rights-based, individualism, Cook suggests "communitarianism," which acknowledges and nurtures cultural and historical group identities, and fosters the understanding "that intra-group as well as inter-group dynamics can become repressive and deny

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67. Robert Gordon, *Some Critical Theories of Law and Their Critics*, *in* THE POLITICS OF LAW 657 (David Kairys ed., 3d ed., 1998).

68. *Id.*; *see also* W. Burlette Carter, *True Reparations*, 68 GEO. WASH. L. REV. 1021, 1026–32 (2000) (suggesting "[t]hat the [American] culture has only words for claims or injuries [of Black people] that a free white person might also possess or endure is not accidental—the limitation in language is a product of the oppression itself").

69. Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 412 (1987) (describing the historical failure of needs-based rhetoric from rhetoric and advocacy, as a political activity, to advance the interest of Black people); *see also* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 12 GERMAN L.J. 247, 269–70 (2011) (explaining "the fundamental problem [of Critical Legal Studies] is that, although Critics criticize law because it functions to legitimate existing institutional arrangements, it is precisely this legitimating function that has made law receptive to certain demands in this area . . . [t]he possibility for ideological change is created through the very process of legitimation, which is triggered by crisis. Powerless people can sometimes trigger such a crisis by challenging an institution internally, that is, by using its own logic against it").

70. *See id*. at 416 (describing the humanizing nature of rights for the historically disempowered).

individuals the human dignity and respect to which they are entitled."[71] Jennifer Nash, Professor of Gender, Sexuality, and Feminist Studies at Duke University, aligns communitarianism with a love-politics that emphasizes "mutual vulnerability" and "witnessing." The goal being to transform "love from the personal . . . into a theory of justice."[72] Nash's conception of mutual vulnerability, mirroring Dr. King's notion of the "inescapable network of mutuality," is that "my survival and thriving depend on yours. If our survivals are mutually dependent, we are, then, mutually vulnerable, as *our thriving requires coexistence*."[73] It is from this perspective that non-violent resistance as a social change strategy emerged, embracing the possibility and probability of injury, and more broadly, of being 'undone,' as a mechanism for awakening the humanity of others.[74] For Cook, "mutuality" also means that "groups must construct and maintain their group identities with a special consideration for how those identities impact the least of these among the group, that is, the most vulnerable and disempowered elements of that particular group."[75] This is particularly complicated for Black folks, because of the complexities inherent in the intersections of race, gender, and class.

Practically speaking, Patricia Williams argues that Blacks and other marginalized groups must advocate for an expansion of rights.[76] This means extending "rights" beyond an expectation of individual civil rights, to an expectation of collective human rights. In essence, transitioning social and legal discourse beyond direct instances of "injury in fact" based on civil status, to also account for collateral aggregates of "systemic injury," predicated on human status. This is not a foreign concept to American jurisprudence, but, as described in Part IV, has heretofore been applied only in narrow circumstances.

According to Williams, "for [B]lacks the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather, the goal is to find a political

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71. Cook, *supra* note 28, at 974 (assessing the impact of group-based injury on individual autonomy).

72. JENNIFER C. NASH, BLACK FEMINISM REIMAGINED: AFTER INTERSECTIONALITY 115–16 (2019) (describing the use of love—the desire to benefit others, even at the expense of self—as a practical theory of social transformation).

73. *Id.* at 116 (emphasis added).

74. *See generally* MARTIN LUTHER KING, JR., THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. (Clayborne Carson ed., 1998) (explaining the use of non-violence to promote social change by advocating for massive non-cooperation with an evil system).

75. Cook, *supra* note 28, at 976.

76. *See* Williams, *supra* note 69, at 432 (suggesting that "the task is to expand private property rights into a conception of civil rights, into the right to expect civility from others").

mechanism that can confront the denial of need [for human recognition]."[77] Williams suggests that policy makers and legal scholars imagine a legal project where "[t]he task . . . is not to discard rights, but to see through or past them so that they reflect . . . the [human] right to expect civility from others."[78] This legal project, which includes interrogating social norms, policies, and practices, is premised upon Dr. King's recognition of the equal "dignity and worth of all human personality."[79] Notably, such an approach to rights requires a nuanced understanding and commitment to liberal notions of autonomy, and in America, necessitates revisiting a long history of jurisprudence which has, in most instances, privileged individualism over communitarianism.[80]

IV. Johnson V. M'intosh: Interest Convergence & Redress

President Obama, in his introduction of *A Promised Land*, observes that America has always been haunted by a constant push pull between our better angels and our worst impulses. He references *Johnson v. M'Intosh*, the landmark land acquisition dispute calling into question the possessory interests of the United States versus the Illinois and Piankeshaw nations.[81] In writing the decision for that case, Chief Justice Marshall opines that "conquest gives a title which the Courts of the conqueror cannot deny," and while "the conquered shall not be wantonly oppressed . . . their condition shall *remain eligible as is compatible with the objects of the conquest*."[82] His

77. *Id*. at 413 (analyzing the utility of rights for Black people and exploring means to address the persistent denial of Black needs).

78. *Id*. at 432.

79. *See* King, *supra* note 74, at 189 (describing personalistic philosophy, which is the theory that the clue to the meaning of ultimate reality is found in personality).

80. *See* Washington v. Davis 426 U.S. 229, 240 (1976) (holding that a law's disparate impact on different races cannot by itself establish an equal protection violation, there must be evidence of an individuals or institution's discriminatory purpose, revealing racial animus); *see also* King, *supra* note 74 (noting that advancing such a project . . . exceeds legal evidentiary standards and protocols but might be advanced by other means, such as during the Civil Rights movement, television cameras capturing brutal beatings by police and young people mauled by dogs played a crucial role in in shifting public opinion; today, people may capture "bad behavior" and injustice by cell phone videos).

81. OBAMA, *supra* note 3, at xv (describing the case as an early expression of a persisting American "crisis rooted in a fundamental contest between two opposing visions of what America is and what it should be").

82. Johnson v. M'Intosh, 21 U.S. 543, 588–89 (1823) (emphasis added). The Supreme Court analyzed the power of Native Americans to give, and of private individuals to receive, a title, which could be sustained in the courts of the United States. The Court denied this right to Native Americans, indicating that "discovery" granted title

use of the phrase, "shall remain eligible as is compatible with the objects of the conquest," deserves special attention when considering remedies for racial discrimination. John Marshall, the nation's first Chief Justice—charged with protecting the fledgling Constitution—with this remark drew a jurisprudential "line in the sand." Specifically, Marshall delineates between the rights of the conqueror and the conquered and determines the need for compatibility if any rights of the conquered are to be acknowledged at all. Modernly, it is for this reason that some scholars have expressed concern regarding the feasibility of utilizing legal strategy (which relies on the constitutional jurisprudence) to advance racial justice and to support redress for racial discrimination.[83]

Alan David Freeman, for example, observes that the conception of available legal remedies to "racial discrimination" is shaped by whether the notion is approached from a victim perspective or perpetrator perspective. From the perspective of the victim, "racial discrimination describes those *conditions* of actual social existence as a member of a perpetual underclass . . . [including] both the objective conditions of life—lack of jobs, lack of money, lack of housing—and the consciousness associated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual." [84] In contrast, "[t]he perpetrator perspective sees racial discrimination not as conditions, but as *actions*, or series of actions, inflicted on the victim by the perpetrator."[85]

Significantly, American jurisprudence, from its constitutional inception, has consistently affirmed that the starting point of its prototypical legal subject is white, male, and landowner or wealthy, which simply means that when the interests of others come in conflict with those of white males (in particular, wealthy white males) the law acts, by its substance and interpretation, to preserve the interest of individuals from this group as a status quo.[86] Legal scholar Derrick Bell describes this phenomenon, which Chief Justice John Marshall deemed "compatibility," as

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to the government by whose subjects, or by whose authority, it was made such that "conquest gives a title which the courts of the conqueror cannot deny."

83. *Id.*

84. Freeman, *supra* note 54, at 1052–53 (emphasis added) (describing the tradition of American jurisprudence that privileges the perpetrator perspective as a legal means of redress).

85. *Id.* at 1053.

86. *See* Harris *supra* note 58, at 1726 (describing James Madison's view of whiteness, male status, and property ownership—extended to land, goods, and revenue—as the essential elements for determining legal status and rights in the late 1700s, and tracing the persistence of "whiteness as property" in American jurisprudence).

"interest-convergence," noting that a powerful majority only yields to the demands of a minority group to the extent that the minority groups' interests are aligned with that of the dominant group.[87] Hence, as a legal concept, "antidiscrimination law" has been operationalized from a perpetrator's perspective such that the legal standard prioritizes how the race-dependent decisions of potential perpetrators are carried out, while remaining relatively indifferent to the condition of victims. Under this current formulation, a violation of antidiscrimination law requires that a perpetrator must both intend to cause and actually cause disparate outcomes on the basis of race. Thereby, group harm that results from systemic and historical marginalization—specifically, those conditions of oppressed peoples not in the interest of the powerful to remediate—is obscured from view and, on these grounds, is immune from remedial treatment under the law.[88]

One has to wonder whether President Obama's appeal to "common interests" was something different from "compatibility" and "interest-convergence," or whether it was the same concept by another name. Certainly, for President Obama, this mode of operation represented the pragmatic approach, as there are many issues where both whites and Blacks, especially amongst the poor and working class, can and do benefit. Perhaps this explains President Obama's ardent commitment to universal healthcare, also known as Obamacare.[89] However, as much as Blacks and whites are alike in their humanity, there are some differences in their social experiences—specifically among them, experiences regarding race and racism. The core challenge for policy makers and politicians like President Obama is how to address the social consequences of racism without

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87. *See* Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma* 93 HARV. L. REV. 518, 523 (1980) (analyzing how the convergence of racial interests between whites and Blacks, more so than an altruistic interest in justice, advanced the policy objective of school desegregation advocated for in *Brown*).

88. Milliken v. Bradley, 418 U.S. 717, 744–45 (1974) (noting that a victim must be able to demonstrate how the actions of the alleged victimizer, about whose 'discrimination' they are complaining, show an 'intent' to discriminate); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977); Washington v. Davis, 426 U.S. 229, 239–42 (1976) (emphasizing that both an act and an intent are necessary to effect intentional discrimination).

89. OBAMA, *supra* note 3, at 118 (describing President Obama's recognition that he needed to "propose policies that touched everyone . . . to couch the African American struggle in terms of a broader struggle for a fair, just, and generous society" and emphasize universal programs where "benefits were often less directly targeted to those most in need"); OBAMACARE, https://www.obamacareusa.org/obama care-plans.html [https://perma.cc/7TCQ-D5JC] (last visited Sept. 1 2021) (describing five-tiered plans that are based on economic need and health status, not race).

injuring "innocent" individuals.[90] This is the crux of the perpetrator perspective when faced with the victim perspective, and vice versa.

Undergirding the perpetrator perspective, colorblind theory, which presupposes a world where the actions of individuals take place and can be accounted for "argues that because society has conquered racism and people of color and white people have full equality, social policies should not take account of race."[91] Many people, laymen and political pundits alike, argue that this is what must precipitate Dr. King's vision of a world where his children "would not be judged by the color of their skin but by the content of their character."[92] However, this view ignores Dr. King's vision that "a price can be placed on unpaid wages" because it does not account for the persisting impact of the nation's de jure discrimination, nor the de facto sanctioning of oppressive practices under the presupposition of rule of law.[93] Practically speaking, politicians, especially presidents, must be committed to preserving the rule of law. As a Black American president, President Obama is perhaps the greatest symbolic realization of Dr. King's Dream for "judgement by the content of one's character." But President Obama, unlike prior presidents, was faced with the duality of enforcing a rule of law that has consistently been interpreted in ways that disadvantage Black people—"his" people—and discount their experiences of racism.

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90. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276–82 (1986) (exemplifying the tension between proposed remedial measures addressing group disparities and individual rights). Here, a negotiated agreement between the school board and Union seeking to protect the jobs of more recently hired Black teachers, in the event of layoff, was challenged by white teachers who lost their jobs. The white teachers who lost their jobs asserted that their seniority was a vested right—a property right—of which they were unjustly being deprived of on account of their race. The Court agreed.

91. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 77 (2019) (describing the evolution of slavery, as a form of racialized capitalism, within the current prison industrial complex and discussing the utility of an expansive approach to constitutional interpretation which seeks to challenge the evidentiary requirement of "discriminatory intent," under certain circumstances, where there has been a showing of despaired racialized outcomes); *see also* Antonin Scalia, *The Disease as Cure: 'In Order to Get Beyond Racism, We Must First Take Account of Race*', 1979 WASH. U. L.Q. 147, 153–54 (1979) (noting that "[affirmative action] is based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need . . . " and thus is racist).

92. Dr. Martin Luther King Jr, "I Have a Dream" Address at the Lincoln Memorial in Washington, D.C. (Aug. 28, 1963).

93. *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2248–51 (2019) (indicating that criminal procedure and punishment in the United States still function to maintain forms of racial subordination that originated in the institution of slavery and overturning Flower's conviction, finding that the prosecutor, Evans, had violated Flower's Fourteenth Amendment rights using peremptory challenges to strike forty-one of forty-two prospective Black jurors).

Professor Robin West, feminist legal theorist and Professor of Law and Philosophy at Georgetown University Law Center, captures the American commitment to the rule of law as first, affirming the public will over the private will and second, affirming the value of representative democracy.[94] The question for President Obama, in a society committed to individualism but fractured by disparate experiences and understandings of race and racism, became "which public" and "whose representation?" Especially because "different but binding norms within the legal system may each warrant conflicting outcomes [concerning rule of law]."[95] Put another way, fairness to one group or individual is often perceived as injustice to others. To wit, "Stand Your Ground" laws, often advocated for by Second Amendment advocates, are equally objectionable to many within the Black community.[96]

So then how does the rule of law get determined? Legal scholars observe that the rule of law in America is determined by the dominant group, such that a legal proposition is determinate when there is agreement, by force or consent, that "the rules in play compel a single conclusion."[97] For example, government officials forcefully imposed both segregation and desegregation on American citizens because the desired outcomes were thought to be "right." Both historically and contemporarily, there is broad consensual agreement amongst American citizens that a crime such as felony murder is deserving of severe punishment.[98]

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94. *See* ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 17 (2003) (suggesting that the rule of law "affirms the value of 'public will' over 'private will'" and "the value of representative democracy").

95. Jules L. Coleman & Brian Leiter, *Determinacy*, *Objectivity, and Authority*, 142 U. PA. L. REV. 549, 578 (1993).

96. *See generally* Cynthia V. Ward. *Three Questions About "Stand Your Ground" Laws*, 95 NOTRE DAME L. REV. 119 (2020) (comparing the self-defense doctrine to Stand Your Ground laws and examining legal questions about what constitutes justice in cases that give rise to claims of self-defense).

97. Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 346 (1996) (explaining how laws become indeterminate in a social context where a powerful counterargument is set forth and broadly accepted, contradicting a heretofore well settled legal proposition).

98. Paul Finkelman, *Supreme Injustice: Slavery in the Nation's Highest Court* 1–13 (2018) (exploring the jurisprudence of the three most important justices on the antebellum Supreme Court—Chief Justice John Marshall, Associate Justice Story, and Chief Justice Roger Brooke Taney—including, each justice's proslavery position, the reasoning behind his opposition to Black freedom, and the incentives created by circumstances in his private life); *see also* Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983) (explaining that in a broader society, "punishment in some cases is a practical necessity for any system in which threats of punishment are to be

Conversely, legal propositions become "indeterminate [or ambiguous] when some socially significant group finds it useful to raise legal claims that theretofore seemed frivolous; [under such circumstances] their arguments will become first professionally respectable and then reasonably powerful as their social or political power increases."[99] Some recent examples include challenges to longstanding police practices surrounding the use of "Stop and Frisk," "No Knock Warrants," "Chokeholds," and "Bodycams."[100] Indeterminacy creates the opportunity for political decision makers and lawyers to make changes in policy, and for citizens to advocate for more inclusive laws or to enforce existing rights. Hence the power of the Civil Rights movement, led by Dr. King and others, and now, perhaps Black Lives Matter.[101]

However, there is disagreement regarding how such socially significant groups and movements are best conceived and maintained. Abolitionist scholars, in the tradition of Frederick Douglass and those promoting a liberal conception of Dr. King, argue that the Constitution may be interpreted expansively, utilizing concepts of liberalism and individualism to incorporate and advance the interest of groups that the framers did not originally intend to protect.[102] Historically, this approach has garnered important rights, but with limitations. Others, like Professor Cook and the scholars promoting a radical conception of Dr. King, contend that there must be a fundamental paradigm shift in legal thinking, involving a substantive overhaul of constitutional interpretation, moving from

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taken seriously," and the sources of American criminal law have a common law beginning which has evolved to include state and federal legislative criminal statutes).

99. Tushnet, *supra* note 97, at 345; *see, e.g.*, Conor M. Reardon, *Cell Phones, Police Recording, and the Intersection of the First and Fourth Amendment*, 63 Duke L. Rev. 735, 740–43 (2013) (describing cell phone video evidence of police violence as a new form of government monitoring and analyzing the tension between the First Amendment right to post the recording on the Internet for public examination and the Fourth Amendment).

100. Megan Quattlebaum & Tom Tyler, *Beyond the Law: An Agenda for Policing Reform*, 100 B.U. L. REV. 1017 (2020); *see also* George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

101. In response to public outrage over cell phone and body camera footage showing George Floyd's heinous killing at the hands of Minneapolis police officers, two comprehensive bills were introduced by the House and Senate: The George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020) and the Just and Unifying Solutions to Invigorate Communities Everywhere (JUSTICE) Act, S. 3985, 16th Cong. (2020).

102. *See* Roberts, *supra* note 91, at 8 (suggesting an alternative reading of the Constitution and demonstrated incremental achievements as reasons to engage in abolition constitutionalism); *see also* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1820–22 (2006) (explaining how antislavery activists not only chose to fight on constitutional ground, but, in the process, also crafted an alternative reading of the Constitution that proved highly influential for a period of time).

individualism to communitarianism in order to achieve racial redress.[103] Still, scholars, including some abolitionists, have argued that authentic racial reconciliation and reparations would require a total rejection of the Constitution.[104]

Professor Dorothy Roberts, race, gender, and legal scholar at the University of Pennsylvania, explores the tension between a total rejection of the Constitution versus a more expansive interpretation of the Constitution as a means for addressing systemic racism in her critique of the prison industrial complex.[105] Roberts meticulously traces the rise of the prison industrial complex from slavery, noting the connection of overseers and slave patrols supported by slave codes and Black codes to modern-day policing, comparing slavery and sharecropping to convict leasing, and lynching to the death penalty.[106] Extrapolating from Fredrick Douglass' Reconstruction lament, she asserts that the prison industrial complex arises from the failure to incorporate "freed African Americans into the social order . . . [such that the law as applied to Blacks] is not primarily designed to protect people from crime, but rather to address human needs and social problems *with punitive measures*."[107]

Distinctively, scholars advancing an approach of "expanded interpretation" do so from a forward-looking (not remedial) posture and advocates arguing for total rejection of the Constitution assert an ideological position which, as a practical matter, has proved politically untenable in terms of results.[108] As such, reparations are outside the scope

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103. *See generally* Cook, *supra* note 28 (discussing how the individualist discourse of classical Liberalism has declared any analysis of group power dynamic out of bounds); s*ee also* Crenshaw, *supra* note 69; Neil Gotanda, *A Critique of "Our Constitution Is Colorblind*," 44 STAN. L. REV. 1 (1991).

104. *See, e.g.,* MARY FRANCES BERRY, BLACK RESISTANCE/WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA 4 (Penguin Press 1994) (arguing that the system of slavery constituted an "integral part" of American constitutional law.

105. Roberts, *supra* note 91, at 58; *see also* Allegra M. McLeod, *Envisioning Abolition Democracy, in Developments in the Law – Prison Abolition*, 132 Harv. L. Rev. 1613, 1617 (2019) (describing how abolitionist movements are working to dismantle a wide range of systems, institutions and practices, inclusive of criminal punishment).

106. *Id.* at 27–31; *see also* Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (explaining that the doctrine of "separate but equal" and the legalization of racial segregation is a perpetuation of slavery's caste system).

107. Roberts, *supra* note 91, at 44 (emphasis added) (analyzing how racialized capitalism is operationalized in the prison industrial complex through post incarceration command and control mechanisms which have led to mass incarceration and high rates of recidivism).

108. *See id.* at 19, 108 (explaining that prison abolitionists "look forward to imagine a society without carceral punishment" and describing the anti-abolitionist petition brought to the United Nations by the Civil Rights Congress in 1951 that charged

of these legal frameworks. However, communitarianism, which postulates a "Social Awakening" couched in "Social Atonement," might provide a viable legal construct to support a call for reparations under the rubric of racial reckoning.[109] For Dr. King, the notion of Social Atonement, restoring the fraternity and solidarity of humanity, was based upon a recognition that sins such as racism were both personal and social, which "alienated individuals from one another and blinded them to their common humanity and mutual dependency."[110] To accomplish this, Cook suggests that "America needs its own Truth and Reconciliation Commission, similar to the South African model in which the stories of victims of oppression and the beneficiaries of oppression can be heard."[111] However, as President Obama noted, there is a disconnect between whites and Blacks on the subject of race which would make it difficult to achieve broad consensus towards such a project.[112] This communicative gap, at least in part, emerges from the curation of racist ideas (overt or implicit; subconscious or conscious) in our nation's storytelling institutions—inclusive of schools, colleges and universities, and media outlets—such that content and images, or the lack thereof, become instructive.[113] It is notable that the "baseline for everyday conversations about race in America is very different for whites than it is for Blacks . . . [for whites] it is exceedingly difficult for one to *confess* when one does not acknowledge that there has been—and continues to be—*transgression*."[114]

Cook suggests that "a movement for Black reparations must be part of a broader movement for social justice," just like Dr. King was in the

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the U.S. government with racism and genocide, noting that this petition, grounded in international human rights law rather than the Constitution, still did not enact substantive change for Black Americans).

109. Cook, *supra* note 28, at 981 (describing a "Social Awakening" as societal movement towards a "Beloved Community," which adheres to a "common humanity and mutual dependency" and entails "the confession of social fears and repentance for the many social deceptions designed to compensate for those fears").

110. *Id.*

111. *Id*. at 984.

112. OBAMA, *supra* note 3, at 142.

113. *See generally* CARTER G. WOODSON, THE MIS-EDUCATION OF THE NEGRO 6 (1933) (suggesting that "no systematic effort toward change has been possible, for, taught the same economics, history, philosophy, literature and religion which have established the present code of morals, the Negro's mind has been brought under the control of his oppressor"); *see also* IBRAM X. KENDI, STAMPED: A DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 22 (2016) (investigating the creation, dissemination, and perpetuation of racist narratives through storytelling).

114. Carter, *supra* note 68, at 1026 (emphasis added) (describing how individual actions and injury tends to inform white's perception of racism while Black's typically view racism as social, institutional, and transgenerational).

process of planning a transracial and transcultural Poor People's Campaign.[115] One approach might be to couch Black reparations within a larger vision for a binary economy, which would seek to distribute capital ownership more broadly to the working poor and middle class.[116] This is possible, but not probable, until and unless there is major paradigm shift in the American conception of individualism—from the "autonomous self" to "an intergenerational self, as well as a communal self, [conceptualized as] a byproduct of past histories and future possibilities pushing their way into the defining present moment."[117] It is only the intergenerational and communal self—as a legal and social entity—that can recognize the inherent contradiction in the receipt of a "present benefit" which results from a "past deficit," unjustly imposed upon the ancestors of some, to confer a future reward upon the heirs of others. Currently, legal precedents are receiving increasing attention that might support the rise of a socially significant movement with the efficacy to, perhaps, spark a national change of heart and mind regarding Black reparations.[118]

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115. Cook, *supra* note 28, at 997; *see* King, *supra* note 74 (explaining Dr. King's belief that racism, economic exploitation, and militarism were inextricably connected, which he called the "big three," and indicated that "the movement" must evolve because it was not possible to successfully ameliorate any of these issues in isolation; rather, they must be addressed concurrently).

116. ROBERT ASHFORD & RODNEY SHAKESPEARE, BINARY ECONOMICS: THE NEW PARADIGM 11 (1999) (noting that "[i]n the unfree market, although everyone is theoretically free to acquire productive capital, effective freedom to acquire it is unnecessarily denied to the many and enjoyed by only a few"*)*; *see, e.g.*, Fernando Alfonso III, *Class-Action Lawsuit Filed Against Robinhood Following Outrage over GameStop Stock Restriction,* CNN (Jan. 29, 2021), https://www.cnn.com/2021/01/28/investing/lawsuit-robinhood-gamestop-wallstreetbets/index.html [https://perma.cc/CM28-ESFK] (describing lawsuit claims against Robinhood that the stock-trading app's decision deprived retail investors of potential gains "for the benefit of people and financial institutions who were not Robinhood's customers").

117. Cook, *supra* note 28, at 1012 (describing the preference of American jurisprudence in limiting race remedial measures to action that can be traced to autonomous individuals and living victims as opposed to institutional harm, which might exhibit compounding intergenerational impacts); *see also* Obadele v. United States, 52 Fed. Cl. 432, 441–44 (2002) (discussing the complexity involved in deciding who has the best moral claims between the "innocent" and the "victim").

118. *See, e.g.*, Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 834–35 (2006) (presenting a series of legislative "reparations" throughout American history and using that historical evidence to suggest several factors for a legislature to consider in designing reparations for historical injustice); *see also* Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–29 (2000) (providing nearly one billion dollars to native Alaskan tribes to compensate them for land); Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3005 (2000) (requiring organizations receiving federal funding to return property once held by native tribes*)*. *Compare* African National Congress, Constitutional Comm., ANC Draft Bill of Rights, Preliminary Revised Version I.I,

Legal historian Professor Burlette Carter distinguishes between what she sees as the valuable proposition in "debating reparations" from "adopting an economic reparations strategy."[119] In fact, there are noted distinctions in legal precedents regarding other groups that have received economic reparations from the American government, as well as challenges with the applicability of international law.[120] But that is not the seat of Carter's objection. While acknowledging the profitability of utilizing reparations as a means of fostering an understanding of racism's impact on Black people, she suggests that the emotional and economic costs of political "horse-trading"—surrendering Black claims considered non-compensable, minimizing Black injury to economic considerations, and the impracticability in tracing Black injuries—make reparations a non-viable theory of recovery.[121] In Carter's view, the primary hinderance to Black reparations is not legal theory. Rather, she points to a persisting racist ideology which has led to the narrow application of legal theories of

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Art. 14, at 14 (Center for Development Studies, Univ. of the Western Cape, South Africa, May 1992) ("To deal with the grossly skewed property relations produced by apartheid under which whites, who number less than 13% of the population, own 87% of the land and 95% of productive capital, a new democratic government could pursue a number of alternatives ranging from completely precluding public intervention in the existing patterns of ownership to authorizing total nationalization . . . [or] a third option—permitting intervention through taking property in the public interest and providing compensation to the owner, but defining compensation to include affirmative action principles"), *with* Darity, *supra* note 22 ("[B]lack Americans hold less than three percent of the nation's wealth, despite constituting twelve to thirteen percent of the nation's population.").

119. *See* Carter, *supra* note 68, at 1023–28 (explaining that the reparations debate can serve the useful purpose of educating whites about the lives of Blacks and about how those lives differ from white lives).

120. *See, e.g.*, Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W.L. REV. 1, 1539 (discussing four generations of reparations theory the transformation of legal consciousness on what is right and just at a given time); Civil Liberties Act of 1988, Pub. L. 100–383, 100th Cong. (1988) (providing restitution to individuals of Japanese ancestry who were interned during World War II or their children); Tamar Lewin, *Calls for Slavery Restitution Getting Louder*, N.Y. TIMES (June 4, 2001), https://www.nytimes.com/2001/06/04/us/calls-for-slavery-restitution-getting-louder.html (on file with the *Columbia Human Rights Law Review*) (noting that Stewart Eizenstat, senior official of the Clinton administration, negotiated settlements under which the Holocaust survivors would receive eight billion dollars from the European governments, but he viewed those cases as different from African-American claims, because Holocaust reparations are going to surviving victims, while slavery reparations would go to descendants generations removed).

121. Carter, *supra* note 68, at 1027–32 (explaining that any minority group that devotes itself to educating a majority risks ignoring its own need to forge a positive agenda).

recovery—with regard to descendants of formerly enslaved persons—that could otherwise provide a vehicle for Black reparations.[122] As an alternative, she suggests that what is needed is the ideological divestiture of unjust enrichment from Black subjugation, noting that "absent measures to reduce the value of whiteness as property, the post-reparations [B]lack dollar will still buy only a fraction of what the post-reparations white dollar will buy. The white dollar will still be spent in white neighborhoods, not in Black ones. And, [B]lack life will still be worth less than white life. The problems that lie at the heart of economic downturns in Black communities will remain."[123] She suggests that true reparations must repair communities and is established through the "efforts of attorneys, legal scholars, politicians, activists, or even doctors, architects and stockbrokers, who make crossing racial divides and remedying racial injustice even a small part of their work."[124] This perspective is largely persuasive, considering legal precedents where there have been efforts to address or remediate racial discrimination, and the history of institutional responses to social pressures and court orders.[125]

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122. *Id.*

123. *Id.* at 1033; *see also* Harris *supra* note 58, 1736–37 (identifying "whiteness as property" as a right to exclude, historically rooted in white supremacy and economic hegemony over Black and Native American peoples and presently legitimated by racist ideologies—curated in social institutions—which maintain the interests of a narrowly defined ruling elite, mainly, white male power brokers). The transgenerational economic and social advantages and opportunities emanating from historic "white status" are not necessarily individually indictable, as they are unrequested, but such privilege is socially inculcated and systemically conferred. Psychologically, as James Baldwin observed, even the poorest white person, affected by the disease of racism, feels that at least they have been spared "Blackness." ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 40 (1992).

124. *Id*. at 1034 (describing how the collective presence of Blacks committed to racial justice in various professions works to foster racial understanding and promotes reconciliation).

125. *See, e.g.*, Elizabeth Latt, *Vanderbilt to Remove 'Confederate' Inscription From Residence Hall*, VAND. UNIV. NEWS (Aug. 15, 2016), https://news.vanderbilt.edu/2016/08/15/vanderbilt-will-remove-confederate-inscription-from-residence-hall/ [https://perma.cc/2SPW-Z6RB] (describing university forfeiture of donation from Daughters of the Confederacy to rename building); Tenn. Div. of the United Daughters of the Confederacy v. Vand. Univ., 174 S.W.3d 98, 120 (Tenn. Ct. App. 2005) (where the United Daughters of the Confederacy sought and won enforcement of a 1930s contract, which provided $100,000 for the dormitory in exchange for naming rights and other benefits, though the concurrence argued that the building name honored the men who died, rather than the purpose of the Civil War, and the focus on individual actors—rather than the focus on the war's purpose—was part of the compromise reached between North and South that led to reconciliation in the years after the war).

In 2000, Professor Carter forecasts, almost prophetically, the emergence of the Black Lives Matter movement, noting that "the continued insistence on whiteness as property will necessarily require the establishment of Blackness as property."[126] However, more poignantly, she observes that America will not "have [racial] reconciliation—or Dr. King's beloved community—until rights in racial property have been both acknowledged by all and surrendered by all."[127]

CONCLUSION

So then, what might it take to "rehabilitate humanity" in America, a nation where competing impulses, as aptly described by President Obama in *A Promised Land*, have often caused us to "bite and devour" one another surrounding the issue of race?[128] Ultimately, the question that presents itself in this essay is whether reparations, economic or otherwise, have the capacity or tendency to move us closer or further away from this desired end. Interestingly, Professor Carter in her explanation of why she personally does not support economic reparations for Black Americans, analogizes the pursuit as "spitting into the wind,"[129] and, while I understand the point she is trying to make, this analogy is imperfect.

To start, spitting is a pejorative act, not a justifiable one. In fact, in many states, spitting on a person under certain circumstances is considered a felony.[130] Moreover, approaching the analogy from a point-taken perspective—namely, that attempts to secure economic reparations for Black folks will ultimately end up backfiring on them, so they are not worth pursuing—leaves the casual reader with the wrong impression. This is because the way the explanation of why a particular thing will not work—or think it will not work—is just as important, if not more so, than the "fact" it actually may not work. In a real sense, the explanation determines how people conceive of the viable options that will work. Put another way, it must be asked whether economic reparations—despite the difficulties associated with their calculation and implementation—are a necessary, albeit insufficient condition, in pursuit of racial redress. To this end, while the more expansive definition of "true reparations" offered by Carter—which focuses primarily on the need for self-empowerment within the

126. Carter, *supra* note 68, at 1034.

127. *Id.* (suggesting that the racial recognition implied by communitarianism ultimately requires a property interest in humanity, rather than whiteness or Blackness).

128. *See* OBAMA, *supra* note 3, at 140–47.

129. *Id*. at 1034 (identifying the pursuit of economic reparations as a futile effort).

130. *See e.g.*, State v. Roberts, No. 98CA21, 1999 WL 152128, at *1 (Ohio Ct. App. Mar. 11, 1999).

Black community and her analysis of the way in which "whiteness as property" contributes to racial disparities is certainly appreciated, I am not as convinced as she is that economic reparations, whether as tort compensation or restitution, should not be part of the social formulation—a "cocktail of remedial drugs"—necessary to address the underlying condition of systemic racism in America.[131]

President Obama's own notion of American rehabilitation on the issue of race is by and large, progressive—calling for "a mixture of optimism and strategic patience."[132] However, it is difficult to tell exactly what he means from his assertion that reparations are "born of despair."[133] Namely, in what ways are reparations born of despair? Are they "born of despair" because they represent a non-workable legal or economic strategy for remediating racial inequity, or because they represent a non-viable political strategy for maintaining American democracy—threatening to topple, so to speak, the "house of cards?"[134] My suspicion is that he is referencing the latter. This is no indictment, as it represents the political posture almost by definition that presidential leadership necessitates. Admittedly, some have construed President Obama's trust in the "better angels" of white people and his willingness to grant moral equivalence to the sufferings of white and Black people as a leadership weakness, considering America's history of slavery and persisting racism.[135]

While hope is not a weakness—it is, rightly conceived, a prerequisite for rehabilitation—hope without real progress can become a recurring nightmare. As such, equally important to an accurate assessment

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131. *See* Brophy, *supra* note 118, at 834–35 (indicating that reparations ought to include symbolic gestures, linked to forward-looking action—such as truth commissions, apologies, and civil rights legislation—and backward looking action like monetary transfers).

132. OBAMA, *supra* note 3, at 119.

133. *Id.* at 118 (describing President Obama's pragmatic assessment regarding efforts to secure reparations for African Americans and conceding at the outset of his book that he is not sure if the American experiment, dogged by its worst impulses, can succeed, but he is emphatic, in his characteristic style, that he is not yet ready to give up on the "idea of America").

134. *Id.* at 119 ("house of cards" is suggested by the delicate balance between President Obama's adherence to the "idea" or "promise of America," and his commitment to a progressive political ideology "requiring a mixture of optimism and strategic patience" from "Black folks").

135. *See, e.g.*, *Obama: In Pursuit of a More Perfect Union* (HBO television broadcast Aug. 3, 2021) (highlighting Ta-Nehisi Coates' concern that, during his presidency, President Obama had turned a blind eye to the endemic nature of American racism and Cornel West's frustration that President Obama's appeal to "common human experiences" overlooked a deep-seated pain amongst Black folk rooted in a history of despaired treatment).

of President Obama's political navigation and the Civil Rights Movement's legacy, is the question of whether race relations have actually progressed in the last sixty years, and whether, by "progressed," we are referring to increased opportunity or decreased disparity. Prior to the events of the last eight years, with an increase in racially charged political rhetoric and the highly publicized killings of unarmed Black men and women (more recently George Floyd and Brianna Taylor), most people—specifically white and Black folks—would have answered without a second thought, "yes" to both questions. Now the answer to the first interpretation of the question, increased opportunity, is still reasonably "yes," but the answer to the second interpretation, decreased disparity, is less certain, which begs the question of whether we are in a process of "rehabilitation" or "recidivism." Statistically, a growing economic disparity among Blacks and whites, highly correlated with wealth indices, has been occurring for some time.[136] While increased opportunity is measured by individual achievements, decreased disparity is measured by reference to group norms. This discrepancy in measures of progress, at least from a communitarian perspective, is a matter of national concern.

And what of the "American identity?" It is difficult to imagine a rehabilitated American humanity that does not impact American identity—specifically, what we believe America is and what it means to be an American. Professor Cook argues that "individuals and groups have an affirmative duty to construct an understanding of themselves that does not negate other individuals and groups, but rather, nurtures common understanding, that is, a genuine awareness of spiritual oneness and human interdependency."[137] However, racism works to blind human beings to the invidious nature of materialism and poverty. Indeed, racism was used to justify the enslavement of Black people, but racism's purpose was economic exploitation—namely, to enrich, via forced human enslavement, certain American institutions and individuals who have subsequently transferred these "unjust" gains intergenerationally via endowments and inherited wealth.[138]

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136. ROBIN DIANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 60 (2018) (noting that the people who have managed to concentrate more wealth into fewer hands than ever before in human history are the white elite); *see generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014) (observing that the United States has seen a sharp and unparalleled increase in the percentage of income going to the top 1% while the median income has lost ground relative to other nations).

137. Cook, *supra* note 28, at 976 (describing how individualism and doctrines of autonomy, enacted from a scarcity mindset, can undermine notions of community and the "common good").

138. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954) (outlawing segregation because "separate educational facilities are inherently unequal"). Some

Presently, while Congress' designation of Juneteenth as a national holiday is incredibly significant, it falls short of apology, and thus continues to beg the question: what should we understand from the fact that there has never been a formal congressional apology for slavery?[139] Is it unreasonable to interpret from this historical and modern fact that systems within the United States—not made by the current generation but inherited by them—have convinced a large portion of our citizenry that the enslavement of Black people was in the best interest of its African transplants, and therefore there is no need for redress, and there should be no complaints? One can only speculate. While Professor Cook points out an underlying denial of America's true history—"a severe case of social psychosis" requiring "social atonement,"—President Obama urges "a mixture of optimism and strategic patience," envisioning a racial progress made possible by our collective commitment to common interests, exemplified by the viability of a Black president. [140]

Dr. King's genius was "to foster a unique vision of American community, one based on love and fraternity"—utilizing the construct of the Beloved Community to foster "inward spiritual renewal and outward social reconstruction."[141] President Obama's genius was the invocation, articulation, and communication of common interest across racial lines, providing an audacious hope of what America might yet become. Both Dr.

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scholars have criticized the *Brown* decision for not explicitly stating that the inequality was the result of a governmental purpose to oppress Black people for the benefit of white people, pointing to the rise of color-blind legislation and policies under the aegis of race-neutrality. *See*, *e.g.*, Harris, *supra* note 58, 1750–54.

139. Juneteenth National Independence Day Act, S. 475, 117th Cong. § 2 (2021); *see also* Mark Medish & Daniel Lucich, *Congress Must Officially Apologize for Slavery Before America Can Think About Reparations*, NBC NEWS (Aug. 30, 2019), https://www.nbcnews.com/think/opinion/congress-must-officially-apologize-slavery-america-can-think-about-reparations-ncna1047561 [https://perma.cc/5RJP-FE23] (discussing the individual and communal need to confess past transgressions to avoid the moral hazard of shirking accountability); BEVERLY ENGEL, THE POWER OF APOLOGY: HEALING STEPS TO TRANSFORM ALL YOUR RELATIONSHIPS 12–13 (2001) (explaining that the "Power of Apology" lies in the demonstration of respect and empathy for the wronged person, and even if it cannot undo harmful past actions, it can disarm the other of their anger, prevent further misunderstandings, and, when done sincerely, undo the negative effects of those actions).

140. OBAMA, *supra* note 3, at 119.

141. Cook, *supra* note 28, at 979–80 (explaining Dr. King's belief that social and economic revival is preceded by spiritual renewal); *see also* Michelle Alexander, *America, This Is Your Chance,* N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/06/08/opinion/george-floyd-protests-race.html (on file with the *Columbia Human Rights Law Review*) (observing, in the aftermath of George Floyd's death, the need for our nation to embrace a politics of deep solidarity and collective liberation rooted in love).

King and President Obama inform us that racial redress can be enacted differently across various spheres of influence: spiritual, legal, and political, to name a few. And each is necessary—all to the exclusion of none—for the exorcism of racism in America. The next genius, I would suggest, must be communal, institutional, and organizational—not individual—and it must evoke the transformational. Namely, this genius must be comprised of a collective social, political, and legal ideological commitment to exonerate the conscience[142] of our amalgamated American identity from the stain of racial injustice by every means available— through arts and entertainment, business and economics, faith communities, research and development, direct media, social media, law, and institutions of education and government.[143] It must involve, within these spheres, not only ensuring that such environments are free from racial animus and seeking remediation, where needed, for prior racial injustices but also revisiting racialized storytelling norms. In other words, recasting our collective vision for an American identity that accounts for the racial realities of each of its citizens, without privileging one over another. This, I would argue, is the legacy of the Civil Rights Movement, one in which both the radical Dr. King and the liberal Dr. King have a place in humanity's rehabilitation.

142. MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 28 (1968) (discussing the primary role of Civil Rights Movement as enlisting "consciences" to awaken the "conscience" of the nation).

143. *See* Robert G. Bratcher, *The Meaning of Kosmos,"World", In the New Testament*, 31 THE BIBLE TRANSLATOR 430, 430 (1980) (explaining "kosmos" as a Greek word referring to the "order" or "arrangement" of God's universe); *see also* Bishop La Fayette Scales, Address at Rhema Christian Center for Servant Leaders Changing Our World (Jan. 17, 2016) (defining spheres of influence as multidimensional man-made systems, or sectors of society, existing within the "kosmos", including arts and entertainment, business, congregation and community service, direct media, education, family and government).