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Reparations Talk in College

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In the spring of 2001, David Horowitz opened another front on the culture wars. He became the focus of much public attention due to a controversial advertisement that he placed in college newspapers around the country, entitled “Ten Reasons Why Reparations for Slavery are a Bad Idea and Racist, Too.” Having incited the controversy, he now attempts to portray himself as the victim of discrimination by campus radicals in his book *Uncivil Wars: The Controversy over Reparations for Slavery.* The majority of the book explores the controversy that ensued over the publication of Horowitz' advertisement at the University of California, Berkeley, the University of Wisconsin, and Brown University. As such, it is of relatively limited interest to people concerned solely about the larger issue of reparations for slavery, although a final section turns to the issue of reparations. Horowitz' book, like much of the writing on reparations for slavery—by both supporters and detractors—suffers from hyperbole, distortion of evidence, and what is perhaps best described as egomaniacal paranoia. Given the attention that *Uncivil Wars* has drawn in the popular media, it is advisable to examine Horowitz' distortions. We are now beginning to take reparations talk seriously; the subject is gaining substantial attention in academic and political forums, and it is time to take seriously the arguments both for and against reparations and to explore whether university campuses are dominated by intolerant radicals, as the book suggests.

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1. DAVID HOROWITZ, UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY (Encounter Books 2002).
"THE ADVERTISEMENT" AND THE FUROR

*Uncivil Wars* details the history of David Horowitz' advertisement "Ten Reasons Why Reparations for Slavery is a Bad Idea."² The advertisement, placed in February of 2001, was Horowitz' attempt to incite discussion of reparations. The *Los Angeles Times* summarized the advertisement in this way:

The gist of the ten points in Horowitz ad was that the Civil War is long over, African Americans are prospering today, and the families of most of today's Americans bear no responsibility for slavery or the Jim Crow laws that followed anyway. Why, he asked, should a struggling recent immigrant have to pay for injustices that happened in another time?³

He sent the advertisement to two college newspapers, the University of Chicago's *Maroon* and the California State University at Northridge's *Sun Dial*. The *Maroon* printed it; the *Sun Dial* did not. Thus began Horowitz' crusade to buy his way into college newspapers.⁴ In total, Horowitz sent the advertisement to seventy-seven newspapers, but only twenty-eight agreed to print it.⁵ Horowitz seemed to put the newspapers into a no-win situation unless they agreed with him completely. When newspapers rejected his advertisement—often following a long-standing policy of refusing to allow the purchase of space for what are essentially editorials—he labeled them censors. When they ran the ad and then re-

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⁴. For a complete list of the school newspapers that Horowitz sent the ad to, see http://frontpagemag.com/horowitznotepad/2001/colleges.htm. Those that refused to publish are marked with an asterisk.


Perhaps not surprisingly, many schools refused to accept that advertisement as well. I suppose that indicates that there are some neutral principles in operation, such as college newspapers do not generally allow people to buy their way onto the editorial page, though some may also see that as evidence of a conspiracy to silence both left and right wing speech.

responded to it, as the *Daily Princetonian* did, he labeled them as people who simply caved in to pressure from radicals. He contrasts the reaction on campuses to his ad with the reaction to an article that had run a few months earlier on Salon.com. The article, which made largely the same points, drew much comment, but no calls for censorship, thus suggesting that campuses are dominated by intolerant radicals who oppose (and become enraged by) discussion of ideas that are commonplace on the internet.

Horowitz focuses on the reactions from three campuses—the University of California, Berkeley, the University of Wisconsin and Brown University—to illustrate what he believes is a pervasive ethic of censorship by radical left-wing academics of ideas of which they disapprove. However, much of Horowitz' first one-hundred pages are devoted to attacks on college campuses throughout this country. Further focusing his discussion, he specifically targets three groups: college administrators, students, and faculty. He does so by devoting one chapter to an attack on each of those groups.

He begins the story at Berkeley, where their newspaper, the *Daily Californian*, ran his advertisement. Horowitz' complaint seems to be that the *Daily Californian* printed an apology after African American college students protested in the paper's offices that they were offended by the advertisement. Horowitz was then invited to speak on the campus. After completing his speech members of the audience were then allowed to express their opinions. How that gets turned into a crisis of free speech is a little puzzling.

Horowitz' belief is that the liberal Berkeley campus—which provided him a podium and published his advertisement—is hostile to him. Horowitz blames the college administrators for not doing more (beyond providing police officers to ensure his safety) to maintain decorum, which (by his own account) broke down only after an older man in the audience began to make a speech in response. Against charges that he published

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10. HOROWITZ, supra note 1, at 21.

11. HOROWITZ, supra note 1, at 40–41. One wonders what more Horowitz wanted? How are the college administrators to blame for that speaker's attempt to use the
the advertisements simply to gain attention, Horowitz combats this notion by observing that:

[d]uring the controversy, one of my sons asked another member of the family, ‘Why would dad want to do this? Why would he want to be called a racist?’ Indeed, why would anyone want to put his son in the position where he would have to ask such a question?\textsuperscript{12}

Horowitz' next stop is the University of Wisconsin at Madison, whose newspaper, the Badger Herald, like the Daily Californian, ran his advertisement. The primary difference between these campuses' reactions is that when students at Wisconsin complained, the newspaper did not apologize. That refusal drew praise from journalists around the country.\textsuperscript{13} However, Horowitz complains later that following his advertisement's publication, a large group of faculty and staff took out their own adver-

microphone to say his piece? Are they any more responsible for that man than they are for Horowitz advertisement.

12. \textsc{Horowitz, supra} note 1, at 3–4. The response to my call for the University of Alabama faculty senate to apologize for the University's ownership of slaves, the faculty's "discipline" (whipping) of them, and the faculty's advocacy of proslavery thought is other evidence people on every side of the apologies and reparations debate receive angry letters and sometimes threats. See Jay Reeves, \textit{University of Alabama Apologizes for Slavery}, \textit{Cmnt. Trib.}, Apr. 21, 2004, at 21.

The reaction to my calls for an apology mirrored those to Horowitz. To take just a few examples, one person linked me in strange and extended ways to terrorists. Letter to the Editor, \textit{Brophy's Motives Traced to Harvard}, TUSCALOOSA NEWS, Apr. 28, 2004:

The source of the University of Alabama Professor Alfred Brophy's anti-Southern cultural bigotry is not at all hard to trace. It is apparent if you consider the fact that his Ph.D. was awarded by those neo-Puritan monoculturists at Harvard University. . . . Brophy should be ashamed for promoting such hair-brained, hateful, prejudicial and divisive schemes as apologies for slavery. He should be especially so now when American soldiers are dying every day to protect us from fanatics who have exactly the same philosophy as the so-called "secret six." These were the six prominent Yankees who financed and supported that original American fanatic and terrorist named John Brown. By the way, at least four of those six were Harvard alumni. If Brophy or any other neo-Puritan wants apologies for past injustices let them start by apologizing for the policies and philosophies promulgated by Harvard that led directly to an unnecessary fratricidal war that killed 620,000 Americans and kept most Southerners (of all races) in an impoverished and subjugated condition for three generations.


13. \textsc{Horowitz, supra} note 1, at 45–46.
tisement, voicing their opinions about the lack of civility in the pages of the Badger Herald. Horowitz then quotes a member of the Badger Herald editorial board, who stated that civility is not the job of the university. This time, however, he does so to indicate his approval. Can it be that he believes his inconsistency goes unnoticed? Does he believe that his letter to the Berkeley administration, which begged for them to ensure that he be treated civilly, has been forgotten? Civility is what Horowitz tells us universities should be teaching, at least until they try to heed his advice, and then it is robust, searching, aggressive journalism that he suddenly values. The only constant appears to be that Horowitz will criticize universities almost no matter what they do.

And so we arrive on the east coast in chapter four, at Brown University. Once again the student newspaper, the Brown Daily Herald, printed the advertisement. Given the chapter’s title, “The Professors (Brown),” one assumes that the faculty should be the primary targets of Horowitz’ criticisms. In actuality, the protests were led by students and supported by faculty. However, to maintain the parallel structure of his argument—that administrators, students, and faculty are all acting to suppress discussion—Horowitz needed to now highlight the faculty in this chapter. Students at Brown organized protests, demanded space in the Brown Daily Herald to respond to Horowitz, and asked that the ad revenue be given to them as reparations. A few students went so far as to take 4,000 copies of the newspaper from ten distribution locations around campus. In the aftermath, student protestors received hate email and phone calls, as, apparently, did Brown Daily Herald editors.

The atmosphere of open discussion on Brown’s campus continued to deteriorate. An attempt by Brown President Sheila Blumstein to foster a discussion between the Herald and the protesters floundered. Some faculty publicly supported the Herald, but more voiced opposition to it. The faculty called on the administration, which was already investigating the newspaper thefts, to also investigate the hateful e-mails that student protestors were receiving. Horowitz concludes the chapter by noting that he was invited by the Brown College Republicans to speak, then uninvited when there was concern that his visit might stir an obviously bitter campus even more.

It seems quizzical that Horowitz should worry about being censored, or his reputation being tarnished, since evidence points to the

14. Id. at 50–51.
15. Id. at 51–52.
16. Id. at 31.
17. Id. at 52–53.
19. HOROWITZ, supra note 1, at 63–67.
contrary. Horowitz has gained substantial name recognition through the advertisements, and has been invited to campuses all over the country to speak.  

A few days after the Brown speech was canceled, he debated Dorothy Benton-Lewis, head of the National Coalition of Reparations for Blacks (N’COBRA) at MIT, and again later that semester at Princeton. The MIT debate drew acclaim, and was even broadcast on CSPAN.”

One wonders, given all the attention, what Horowitz is so worried about.

When the Duke University Chronicle ran his advertisement a few weeks after the MIT debate, it sparked student protests. The University’s president met with the students, and nevertheless steadfastly backed the right of the Chronicle to run the ad. Even by Horowitz’ own standards, speech is being protected.

Distinguished historian John Hope Franklin, Emeritus Professor of History at Duke, responded to the advertisement with a letter to the Chronicle. Franklin made several crucial points. First, he noted that certain Whites, like Southern planters and New York merchants, received a disproportionate benefit, in the form of profits, from slavery. Furthermore, the profitability also conferred benefits on those who did not own slaves, since the institution contributed to the wealth of American society as a whole. At the same time that there were advantages for Whites, slavery placed enormous burdens on Blacks. Those burdens were numerous, and included restriction on education, the destruction of families and the objectification of human beings. Many of these hardships came as a result of laws mandating such treatment, but in other instances, the laws merely permitted them.

20. See David Horowitz, I Am Not a Racial Provocateur, SALON, Mar. 13, 2001, available at http://dir.salon.com/news/feature/2001/03/13/horowitz/index.html?pn=1 (“I plead guilty to enjoying the attention the ad is getting and the consternation of those editors at campus dailies who have tried to stifle free speech. Who wouldn’t be?”)


23. See State v. Mann, 13 S.E. 2d 247, 248 (1829). Justice Thomas Ruffin of the North Carolina Supreme Court provided a brutally honest assessment of slavery in 1829 in this infamous case:

[T]he end is the profit of the master, his security and public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits.... [S]uch services can only be expected
Horowitz notes some minor arguments against Franklin. Notably, he maintains that slaves had more rights than Franklin's letter suggests. Although Horowitz purports to know a great deal about history it is surprising how much of it he ignores. It is not clear whether he does this deliberately or negligently. It may simply be that he actually believes the information he disseminates. It is difficult to tell.

For example, one of his key propositions is that Christian Whites were responsible for ending slavery and that as a result, African Americans owe a debt to the Founding generation that made the termination of slavery possible. Is Horowitz serious? African Americans owe a debt to the Founders, who set in a motion a system that ultimately ended slavery? What Founders is he referring to? There certainly were some people in the Founding era who were staunchly antislavery, and many of them were devout Christians (notably Quakers and Unitarians), but there were many more Christians who supported slavery than those who opposed the institution. In addition, what he fails to acknowledge is that slavery is an institution imposed on African Americans by Whites. How does Horowitz propose that a debt is owed to the same people who put the slave system in place?

from one who has no will of his own; who surrenders his will in implicit obedience to that of another.


24. Horowitz gives only short treatment to Franklin's para-phrase of Chief Justice Taney's statement in Scott v. Sandford, 60 U.S. 393 (1857) that slaves have no rights the White man are bound to respect. Horowitz points out that masters were prohibited from killing their slaves, for instance. See Horowitz, supra note 1, at 81–82. What is astonishing about Horowitz is the lengths he goes to make the system of slavery in the United States seem somewhat palatable. Without getting into the intricacies of the harshness of the slave code, one might point out that Horowitz' defense of slavery indicts his neutrality. Do not be deceived; this is someone who thinks slavery was not so bad and is willing to overlook the role of many of America's ancestors for their role in the oppression of millions of their fellow citizens.

25. Horowitz quotes at length from one of the leading historians of slavery, Robert Fogel. Fogel first came to prominence in the early 1970s for a controversial book, Time on the Cross, whose main (and hotly disputed premise) was that slaves were, by and large, treated well. Robert William Fogel & Stanley L. Engerman, Time on the Cross: The Economics of American Negro Slavery (Little, Brown and Company, 1974); See also Herbert G. Gutman, Slavery and the Numbers Game: A Critique of Time on the Cross (University of Illinois Press, 1975).

26. See, e.g., David Brion Davis, Free at Last: The Enduring Legacy of the South's Civil War Victory, N.Y. Times, Aug. 26, 2001, at 1 (summarizing evidence of federal government's complicity in slavery). Much recent historical writing has explored the connections of the
Throughout the book, there exist similarly inaccurate historical accounts. At one point he credits America as the first place where Whites freed their slaves, when in actuality the United States was one of the last places where slaves where freed. The freeing of slaves in the United States happened decades after emancipation in Great Britain and the British West Indies. Moreover, among the Western countries with a large slave population, only Brazil terminated slavery after the United States.

Yet, no matter who is to blame for introducing slavery to British North America, a key but frequently ignored issue is how African Americans are, and have been treated, once they come to the United States. Surely Horowitz does not think that it is permissible to treat certain immigrants (or their descendants) differently, so long as they are treated better than they were, or would be, in their homeland (or their ancestors' homeland)? In application, and by example, the equal protection principle suggests that it is improper for people to have labor stolen from them in the United States, even if the same injustice would have occurred in their homeland.

Founders and the succeeding generations to the continuance of slavery. See, e.g., Don E. Fehrenbacher, The Slaveholding Republic: An Account of the United States Government's Relations to Slavery (Ward M. McAfee ed., Oxford University Press, 2001). Here, as so often in life, the personalities and motives are complex. I think it is equally improper to give credit to the Founding generation for putting in place a Constitution, which ultimately—through war—resulted in the termination of slavery, as it is to portray founders like Thomas Jefferson as hypocrites beyond redemption. Both positions reflect an incomplete understanding of the context in which the Founders acted—and the clashing values that their actions represented.

There is much to consider in the Constitution's role in creating a government that (after much transformation) was able to end slavery. Such questions are typically asked in a context more closely related to the Civil War, however. Historians debate, for instance, whether the Compromise of 1850, which included the Fugitive Slave Act, was an evil compromise with slaveholders or a device that held the Union together long enough so that the Union could survive Civil War and end slavery? See, e.g., Alfred L. Brophy, Considering Transylvania University's Connections to Slavery (2005) (unpublished manuscript). As Professor David Potter explained,

[Even as for antislavery, it is difficult to see that the Compromise ultimately served the purpose of the antislavery idealists less well than it served those who cared primarily for peace and union, though it is easy to see why antislavery men found the medicine more distasteful. If, as Lincoln believed, the cause of freedom was linked with the cause of Union, a policy which dealt recklessly with the destiny of the Union could hardly have promoted the cause of freedom.

27. Horowitz, supra note 1, at 74.
Perhaps by some perverted argument, Horowitz might suggest that some African nations whose citizens were taken into slavery owe a debt to Europeans for abolishing slavery. I think this is an enormously difficult argument to sustain, especially given the centuries of European-imposed colonialism in Africa. Furthermore, it was the Europeans who provided economic incentives for the wars that facilitated the capture of slaves. Still, this argument—as I have reformulated it—makes more sense than Horowitz’. His argument is that the person whose ancestors were kidnapped and then forced to work for free owes a debt to the descendants of people who first kidnapped and stole that labor. That debt arises because the North ended slavery through the Civil War. The act of freeing people from slavery ended the crime; it does not incur, it seems to me, a separate debt.  

Once the “Ten Reasons” advertisement proved so successful in promoting his message, Horowitz then reworked two of the most controversial points into a separate advertisement, called “The Debt.” The title derives—one supposes—from the title of Randall Robinson’s important book, The Debt: What America Owes to Blacks.  

“The Debt” highlighted two key elements of Horowitz argument. First, that African Americans have a substantially higher standard of living than Africans. Second, that the emphasis on reparations is based on a hatred of America, and that instead of criticizing the United States for its legacy of slavery, African Americans should celebrate the “bounty that is a direct result of the heritage that is under assault.” Those two elements get to the crux of Horowitz’ argument against reparations. Much of the rest of the book addresses, and elaborates on, those points. Reparations, as Horowitz observes, is part of a culture war. How should America’s past
be viewed, as a place of oppression or opportunity? That is a crucial issue, for our understanding of the past is central to our understanding of the future.

THE CULTURAL WAR OVER REPARATIONS FOR SLAVERY

Let me attempt to clarify Horowitz’ reasons for opposing slavery reparations, while also briefly evaluating his arguments. First, Horowitz says slavery was, taking everything into consideration, a benefit to the descendants of the slaves. There is support for this argument, including from some of the leading African American thinkers of the twentieth century. Horowitz, like many other opponents of reparations, frequently points out that African Americans have a substantially higher income and standard of living than the average resident of Benin, for instance. But why should one make the comparison between African Americans and Africans? That comparison ignores the Equal Protection clause of the 14th Amendment of the Constitution of the United States, which requires that American citizens be treated equally without regard to race, or country of origin. The potential difference in treatment between countries should have little relevance when one is being mistreated in the United States.

But there are even greater problems that Horowitz’ argument ignores. For one, he has failed to take account of the suffering imposed on slaves and their descendants by the slave system.

The difference over how to view slavery's legacy is central to the reparations debate. Some, like Horowitz, think African Americans now


34. See, e.g., Booker T. Washington, Up From Slavery (Corner House Publishers, 1978):

[W]e went into slavery pagans; we came out Christians. We went into slavery pieces of property; we came out American citizens. We went into slavery with chains clanking about our wrists; we came out with the American ballot in our hands... We must acknowledge that, notwithstanding the cruelty and moral wrong of slavery, we are in a stronger and more hopeful position, materially, intellectually, morally, and religiously, than is true of an equal number of black people in any other portion of the globe


35. Horowitz, supra note 1, at 129.
have opportunities for advancement and do not need (and maybe do not deserve) the additional benefits that would accrue from reparations. Reparations advocates ask for better treatment; they pay less attention than do reparations opponents to the perceived benefits of United States citizenship.

The debate over reparations taps into views of American society: should more be done to help others move up the economic ladder, or is the bounty that American society provides to all of its citizens sufficient? This is part of the cultural war that takes place within the History profession, where such competing visions are even illustrated in titles to books like *A People's History of the United States* and *A Patriot's History of the United States*.

When we talk about reparations, we enter into a debate over the United States' conception over what our country represents, stemming from the seemingly incompatible perceptions of our nation's history. Brown University's Steering Committee on Slavery and Justice presents one model of how to approach those diverse perceptions and how to reconcile them. The Brown Committee is looking into the University's complex past, which contains slave-traders and those who opposed slavery. Despite the fervent talk about Brown's connections to slavery, we are finding out that Brown University's complex history included much that was positive. For example, Brown University's president during much of the antebellum period, Francis Wayland, was an important anti-slavery advocate. Wayland and other anti-slavery advocates at Brown did worked

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If not for the dedication of Americans of all ethnicities and colors to a society based on the principle that all men are created equal, blacks in America would not enjoy the highest standard of living of blacks anywhere in the world, and indeed one of the highest standards of living of any people in the world. They would not enjoy the greatest freedoms and the most thoroughly protected individual rights anywhere. Where is the gratitude of black America and its leaders for those gifts?

37. See Jennifer D. Jordan, Ruth Simmons—Brown's 18th President Is a Woman with a Mission, *Providence J.*., May 29, 2005, at A-01 (noting that President Ruth Simmons' appointment of the Slavery and Justice Committee "reflects a profound belief in the capacity of universities to provide intellectual and moral leadership in our society.") (quoting James T. Campbell); See also Gregory Smith, Memorials Debated as Means to End, *Providence J.*, March 21, 2005, at C-01. For more on the Slavery and Justice Committee, see generally Brown University: The University Steering Committee on Slavery and Justice, available at http://www.brown.edu/Research/Slavery_Justice/ (last visited Nov. 06, 2005).

38. See Frances Fitzgerald, *Peculiar Institutions: Brown University Looks at the Slave Traders in its Past*, *New Yorker* 68 (Sept. 12, 2005); Alfred L. Brophy, *Considering Universities' Moral Culpability in Slavery* (paper presented at Brown University to the Slavery and Justice
harder against slavery than many other institutions. However, there still remains the harsh aftermath of the effects and legacy of slavery. The principles of the Declaration of Independence and the Constitution, which Ralph Ellison called the "Great Constitutional Dream Book" on the eve of the Brown decision, are dreams yet to be realized. As President George W. Bush said during a visit to Goree Island, Senegal, in July 2003:

My nation's journey toward justice has not been easy and it is not over. The racial bigotry fed by slavery did not end with slavery or with segregation. And many of the issues that still trouble America have roots in the bitter experience of other times. But however long the journey, our destination is set: liberty and justice for all.

And so, while Horowitz is quick to criticize knee-jerk radicals, we find that colleges and universities largely have civil and thoughtful debates. The dispute over the "reality" of American history, and the debt we owe to our ancestors for their legacy, is a modern parallel of the dispute that Ralph Waldo Emerson wrote about in his essay, "The Conservative," in which he contrasted the views of conservatives and reformers on attitudes towards the past and whether we should accept the distribution of power given us by the past or try to change it.

People will clash on questions such as these, of whether African Americans are owed something to compensate for past inequality or not, based on their ideology. What discussions about reparations as a specific type of compensation can contribute to the dialogue is a greater understanding about the opportunities available for advancement, and whether they have yet to be realized. Horowitz focus on the question of whether slavery is on balance a benefit or a detriment to African Americans is re-

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41. Ralph Waldo Emerson, The Conservative, in Emerson's Works 279, 293 (1883): It is trivial and merely superstitious to say that nothing is given you, no outfit, no exhibition; for in this institution of credit, which is as universal as honesty and promise in the human countenance, always some neighbor stands ready to be bread and land and tools and stock to the young adventurer. And if in any one respect they have come short, see what ample retribution of good they have made. They have lost no time and spared no expense to collect libraries, museums, galleries, colleges, palaces, hospitals, observatories, cities.
lated to a common theme in reparations talk: the idea that African Americans are owed a debt for their centuries of un-compensated and under-compensated labor.\footnote{See, e.g., Robinson, supra note 30; Richard F. America, Paying the Social Debt: What White America Owes Black America (Praeger Books 1993) (assessing the amount of money saved by systematic undercompensation of African Americans).}

There are some legitimate conceptual problems with the notion of debt as a measure of reparations for slavery, and Horowitz highlights some of them. This conception of debt-as-payment stems from the unjust enrichment doctrine,\footnote{Unjust enrichment is a cause of action that allows recovery of benefits that have been conferred and are still retained by another. It typically requires a showing that the person seeking compensation provided services in a way that a reasonable person would expect compensation and that the further retention of the benefit would be unjust. See Elaine Shoben, Remedies: Cases and Problems 806 (2002) (listing requirements of unjust enrichment). The calculation of "unjust" would, in the case of reparations for slavery, involve consideration of the length of time since the benefit was conferred, the ways that the benefit had decreased over time, and the innocence of the current holder of the benefit. Professor Emily Sherwin has recently argued that unjust enrichment is inappropriate in the slavery because it focuses in a punitive way on the benefit to the defendant rather than the harm to the plaintiff. See Emily Sherwin, Unjust Enrichment and Reparations, 84 B.U. L. Rev. 1443 (2004). It is likely in most instances that the harm to the plaintiff's family during slavery outstrips the value of whatever is retained by defendants (and thus the remedy would not be punitive) and the unjust enrichment remedy (even when it provides for a remedy in excess of the damage suffered by plaintiff) is limited to the value of the benefit conferred on the defendant. Thus, there is an important limiting principle on the punitive nature of any unjust enrichment recovery.} which requires that people, or corporations, must disgorge money that in equity belongs to someone else.\footnote{See, e.g., Andrew Kull, Restitution in Favor of Former Slaves, 84 B.U. L. Rev. 1277 (2004); Anthony Sebok, Two Concepts of Justice in Restitution for Slavery, 84 B.U. L. Rev. 1405 (2004). There are many ways to classify the reparations claims. For a thoughtful, but as yet under-utilized, formulation based on inheritance, see Joseph Jenkins, Inheritance Law as Constellation in Lieu of Redress: A Detour Through Exceptional Terrain, 24 Cardozo L. Rev. 1043 (2003).} It requires little abstraction to conclude that money that was unjustly earned from slave labor ought in fairness to be now paid to the slaves whose labor was stolen. And the money cannot be paid, at any rate, to the slaves whose labor was stolen. It can only be paid to their descendants. During the era of slavery, courts routinely recognized that the property rights slave owners had in the labor of their slaves lay at the center of the institution. And, while judges denied slaves an ownership interest in their own labor, they recognized when an owner's interest was interfered with, and they then provided a remedy.

In one remarkable Alabama opinion, an owner who rented his slave to another asserted an unjust enrichment claim against the renter when he used the slave for services beyond the contract.\footnote{Moseley v. Wilkinson, 24 Ala. 411 (1854); see also Fail & Miles v. McArthur, 31 Ala. 26 (1857).} This opinion confirms
that it makes conceptual sense to talk in terms of unjust enrichment, if we can show that enrichment has been retained. While some might criticize such reasoning because it perpetuates the person-as-property idea, the unjust enrichment analogy provides at least a modest measure of what is owed.

Yet, even if one can overcome the significant problems and the statutes of limitations, there remain significant problems of computing the debt, and of figuring whether the enrichment has already been disgorged. Debt is inherently intermingled with quasi-contract principles. The primary focus in this quasi-contract analysis is on how much benefit has been conferred to, and is still retained by, the people who are disgorging the benefits. On the benefit side of the equation is the slave labor, and the economic expansion it fueled. Much of that debt may have been paid by the Civil War; by Northern expenditures and by the destruction of Southern wealth. Horowitz sees this as straight cancellation of the debt. However, I think the issue is substantially more complex than Horowitz makes it out. It is not apparent why the Northern costs of the war should be considered as a payment on the debt. Moreover, the war fueled further economic development in the North. How should those benefits from the war then be accounted for? Do they increase the debt owed to slaves, because without slavery there would have been no war and hence no stimulus to the economy? Perhaps. And what does one make of the arguments that there have been forms of reparations, such as the Great Society, New Deal, and more recently affirmative action? Has compensation equal to that taken already been paid?

Finally, there is a distasteful argument, which must be addressed. If we are talking about unjust enrichment—as opposed to a moral obligation to repair damage—there is the question whether, when one offsets the benefits, African Americans are better off because of the institution of slavery. That is a morally extremely difficult question and one on which reasonable minds can, no doubt, differ. But it will be central to further

46. The problem is that it is difficult to determine whether there has been any unjust retention of benefits. And even if there has been a retention of benefits, there may have to be an off-set for the benefits conferred. Compare Restatement (Second) Torts § 920, comments 1–6 with Restatement (Second) Contracts §§ 347, 349 (listing conditions for offsetting the benefits).

47. Anthony Sebok has provided perhaps the strongest case against unjust enrichment as dehumanizing remedy. See Anthony Sebok, Reparations, Unjust Enrichment, And The Importance Of Knowing The Difference Between The Two, 58 N.Y.U. ANN. SURV. AM. LAW 651, 657 (2003).

discussions of unjust enrichment and reparations. So there is, obviously, much to talk about in regard to Horowitz first point that slavery was, on balance, a benefit to the descendants of slavery.

To understand the amount owed as reparations, one may need to look beyond the notion of debt, or at the least there must be more precise calculation to determining the values on each side of the equation. Unjust enrichment theory is an important, and often overlooked, basis for asserting a claim. However, it carries with it substantial limiting principles. And in situations like slavery, where tracing the wealth created by the institution presents an almost insuperable task, it may make sense to adopt other analogies.

Perhaps the better way of thinking about reparations is as another case of the government’s obligation to assist in repairing the lives of people who have been harmed. Or, one might think of this situation as analogous to a tort case. Tort law is an area of the law where there is no need to trace benefits conferred and retained and then offset them against benefits received. Horowitz has little to say about this argument—that the government should repair the damage that was done and still affects people today, other than to say life is good enough right now.

A second major point for Horowitz is that it is anti-American to criticize the United States for its legacy of slavery and Jim Crow. Such criticisms, in Horowitz' opinion, are divisive, lead to separatist ideas, and are ultimately self-defeating. The argument that criticism of the government, and its allowance of inhumane behavior, is somehow un-American goes to the heart of the cultural war that Horowitz is engaged in. It is part of the struggle over how to view America’s past, and it also has important consequences for the rhetoric of reform. If we perceive our history as a positive one, in which those who strived succeeded and in which merit

49. See, e.g., Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States (1992) (detailing the growth of the welfare state and the idea that government has obligation an to protect and assist its citizens).

50. For further development of these themes, see Alfred L. Brophy, Reparations Talk: The Tort Law Analogy in Reparations for Slavery, 23 B.C. Third World L.J. 81 (2004).

51. In Horowitz' characteristically emotionally charged language, the issue is part of a concerted and political effort of academics to discredit America:

Since the 1960s the "tenured radicals" have waged a ferocious assault on America's conception of itself as a beacon of freedom. A nation of immigrants becomes a nation of victims. The reparations idea is a product of this historical revisionism. It has been designed by its advocates to refute America's self-image as a nation dedicated to equality of all and, in Abraham Lincoln's words, "the last best hope of mankind." It is because Lincoln and Jefferson are the indispensable shapers of this American idea, in fact, that they are also principal targets of the reparations left.

Horowitz, supra note 1, at 105–06 (footnotes omitted).
was rewarded, then there should be little need to repair any past injustice. If, instead, our national narrative is about legacies of conquest and exploitation, then there may be a need for at least dialogue about redistribution of wealth. This, then, is the heart of the cultural war, and the reason, I suspect, why people became enraged at the mere suggestion of reparations.  

It merits mentioning that a dialogue concerned with prohibiting discussion of the past is, at bottom, a call to passively accept the current distribution of power and wealth. And while it may be correct that a focus on the past is distracting to those who should be focused on the future, calls to not talk about the past still deserve scrutiny because they prevent an inquiry into the justice of the current asymmetrical distribution of wealth.

The Civil War is central to Horowitz’ argument as well. The North deserves enormous credit for making the sacrifices that ended slavery. But should that wipe the slate clean? “Hundreds of thousands of whites died in these struggles. It is the denial of this reality that is the heart of the dispute.” But is there really a denial of the Civil War among reparations advocates? I think the most important denial in this debate comes from opponents of reparations, who ignore the post-Civil War failure to repair the legacy of slavery.

When the Civil War ended and the optimistic promises of help evaporated, the newly freed slaves were left without the means to make an independent life for themselves. Instead of land, they were forced to live by new black codes and required to sign long-term contracts to work for former slave owners. Indeed, though we often hear talk about the Union army promising forty acres to the heads of newly freed families, one of the army’s most prominent assignments in the years after slavery was to restore slaveholding families to property confiscated from them during the war and then given to slaves. The criticism of the past can, of course, become so debilitating that the people making the criticisms become paralyzed and incapable of improving their condition. That is a danger, but Horowitz is engaged in the opposite problem. He has become so enraged by reparations talk that he is unable to see the legacy of racism. Moreover, he fails to acknowledge the part of the debate that complains about the legacy of Jim Crow.

52. See, e.g., Sam Hodges, Slavery Payments a Divisive Issue, Mobile Register, June 23, 2002, at A1 (reporting on difficulty of accurately measuring Alabamians’ attitudes towards reparations, because some opponents became so enraged at the mere suggestion of reparations that they could not complete the poll); Jeff Amy, Professor Wants UA Apology for Slavery, Mobile Register, Mar. 16, 2004, at A1.

53. Horowitz, supra note 1, at 82.

54. See, e.g., Eric Foner, Reconstruction: America’s Unfinished Revolution 159–60 (Harper & Row, 1988) (discussing eviction of freedmen from land and return of land to former slaveholders from whom it had been confiscated).
Horowitz’ third claim is that there is a tenuous connection between the institution of slavery and current American society. In several instances Horowitz questions whether there is a tenable connection between Americans today and those individuals subjected to the slavery regime. His first reason is that “there is no single group clearly responsible for the crime of slavery.” Here Horowitz emphasizes that 3,000 Black people owned slaves before the Civil War. His third reason is that “Only a tiny minority of white Americans ever owned slaves, and others gave their lives to free them.” His fourth reason is that “America today is a multi-ethnic nation and most Americans have no connection (direct or indirect) to slavery.” Here he observes that many Americans’ ancestors did not even arrive in the United States until after the Civil War ended.

With each of those arguments, Horowitz has misunderstood the nature of reparations claims; they are made against the government for its culpability in slavery and Jim Crow. Horowitz’ attempt to fragment the crimes of slavery into discrete elements is part of his attempt to think about reparations on a personal rather than an institutional basis. The denouncing of reparations because of a lack of supposed individual responsibility fails to address a central premise of the concept of reparations: that slavery and Jim Crow were imposed and supported by the state and federal governments and that it is their responsibility to repair the damage. Horowitz’ argument is akin to suggesting that the Mobil corporation’s shareholders did not individually make decisions that led to a judgment against it for water pollution. The lack of individual culpability has little to do with the case for reparations. Culpability does not attach to individuals here—it attaches to the government. And even though there may be no wealth retained, there is a very real harm continuing. And if it is continuing, then there may be continuing moral obligation on the part of the federal government to act to correct that harm.

55. See Horowitz, supra note 1, at 12.
56. Id. at 13.
57. See Town of Cyril v. Mobil Oil Co., 11 F.3d 996 (10th Cir. 1996).

Proponents of slavery reparations argue that the wrong done to blacks did not end with slavery, but has continued to this day... If these arguments are correct, calculating reparations is not a matter of determining, say, the difference between the market wage and the actual wage paid to slaves, but must include some assessment of the harm incurred by blacks, and the benefits (if any) obtained by whites, since the Civil War.

59. In fact, some of the most thoughtful of the reparations skeptics, like Professor John McWhorter, accept that there is some obligation and then say that the federal government is discharging those obligations. The debate then shifts from the extreme position of Horowitz to a more modest one: is there sufficient reparative action? See John
A fourth point is that "the historical precedents used to justify the reparations claims do not apply, and the claim itself is based on race, not injury." Horowitz paints history with a broad and inaccurate brush. He states that "the historical precedents generally invoked to justify the reparations claim are payments to Jewish survivors of the Holocaust, Japanese-Americans and African American victims of racial experiments in Tuskegee, or racial outrages in Rosewood and Oklahoma City." I think Horowitz is referring to Tulsa instead of Oklahoma City. But why does Horowitz think the historical precedents of reparations to Native Americans, such as the Indian Claims Commission, the Alaska Claims Settlement Act, and the compensation to Japanese Americans in the Civil Liberties Act of 1988 are inapposite? Because "in each case the recipients of reparations were the direct victims of the injustice or their immediate families." Here again Horowitz misunderstands the nature of reparations claims. Reparations claims are made on behalf of people who are themselves victims of the institutions of slavery and Jim Crow. The leading works discussing slavery reparations, such as Charles Ogletree’s book All Deliberate Speed, Randall Robinson’s The Debt, and Robert Westley’s article “Many Billions Gone,” all urge that reparations be made towards the goal of building institutions, rather than payments to individuals.

The people who should receive reparations are victims themselves, considering that their lack of resources is a direct effect of slavery. Perhaps Horowitz means that cases where reparations have been paid are not good precedent, because in those cases the people compensated were the people who were most directly affected. The Civil Liberties Act of 1988 provided compensation to Japanese Americans who were interned
Reparations Talk in College during World War II and then survived until 1986. Descendants could collect only if the person who was interned lived until 1986. That requirement of survival provided an important limiting principle, which made it economically feasible to provide compensation. However, other acts addressed claims of those who were generations removed from the first people who suffered deprivation. Those claims occur most frequently with Native Americans. The 1971 Alaska Claims Settlement Act provided compensation to people who were descended from those who had first suffered the deprivation.

There are two final, closely related points: there have already been adequate reparations made—mostly in the form of welfare payments—to repair the damage of slavery; and that African Americans are doing well now and further reparations are not necessary. Those points ought to be treated together, since they both require an assessment of what the government has done to repair the damage of slavery, and how successful those efforts have been. While African Americans were promised forty acres after the Civil War, in addition to the promise of support of other government programs, the sad truth is that until the New Deal era, the federal and state government made little effort to make it possible for African Americans to climb the ladder of economic and educational success. So when one considers what the federal government has done in terms of reparations for slavery, one must look at the relatively recent history of the Great Society and afterwards. Indeed, looking at the Civil Rights Act of 1964 and the Voting Rights Act of 1965 we are assured at least that there would be limited overt discrimination.

The welfare system is the most controversial aspect of the Great Society, in part because there was a concomitant rise in single-parent households. As Horowitz points out, the poverty rate among single-parent-households is several times greater than for two-parent-households. He attributes—as do many opponents of reparations—the gap between the poverty rate among African Americans and Whites to the “broken family structure of the Black community, which dates from the 1960s.” He questions the connection between slavery and family structure and asserts that “no proponent of reparations has made any attempt to

66. Horowitz, supra note 1, at 124.
67. Among the many books that catalog the treatment of African Americans by the federal and state governments during Reconstruction and Jim Crow, one might begin with Leon F. Litwack, Trouble in Mind: Black Southerners in the Age of Jim Crow (Alfred A. Knopf, Inc. 1998).
69. Horowitz, supra note 1, at 127.
The effects of welfare payments are complex, to say the least. But if, as Horowitz asserts, the welfare system is responsible for the family structure, why would we not charge that as part of the legacy that must be repaired? To use an analogy to tort law, where can we say that the chain of causation has ended?

There is an even more important gap in Horowitz’ analysis: there is no demonstration that even if we were able to magically convert single-parent families in poverty to two-families, that they would emerge from poverty. Put another way, the mere fact that two-parent African American families have income approaching that of two-parent, non-Hispanic White families, does not mean that family structure is what accounts for the gap in African American and White poverty rates. Correlation is not causation, although Horowitz does not seem to understand that. As he said in an interview, “A crusade for marriage would do more to improve the lot of inner-city Blacks than any reparations.”

But at bottom of the controversy over apologies and reparations are questions about how we view history and its role in debates about public policy. Horowitz makes history irrelevant. Phrased in the most positive way, he wants us to focus on the future, rather than the past. Phrased somewhat more skeptically, he wants us to ignore the reasons that contribute to the current inequitable distribution of wealth and educational achievement. The value of discussion of apologies and reparations, if they are held in a respectful fashion, is that they allow for discussion of those complex issues. We can assess how past racial crimes contribute to the present inequities. To have the discussion is important for reparations advocates; for by simply talking about these issues we are permitted to begin to make the case, and given the current stage of the reparations movement, discussion is even more critical. Much talk must precede action. Yet Horowitz, through his attack on the academy, limits that opportunity for debate. His book is an angry denunciation of people with whom he disagrees. And it is entirely possible that his advertisements make reasoned discourse less likely.

Reasonable minds differ on whether newspapers ought to be more selective to whom they sell their editorial space. It strikes me as inappropriate to criticize papers like the Harvard Crimson and Columbia Spectator because they flatly refused to print the advertisements. Similarly, it seems wrong to criticize newspapers that responded with editorials opposing

70. Id.
Horowitz. Is it not their prerogative to oppose what they disagree with? Horowitz does have a reasonable complaint, however. The response on campuses was in some places inappropriate if one treasures, as we Americans do, free speech. Once speakers appear on a college campus, common decency mandates that they be permitted reasonable opportunity to present their views. And there have been some regrettable instances of censorship and lack of civility on all sides of the debate.72

The sometimes extreme responses of reparations proponents highlight a problem, which is harmful to those of us in favor of reparations. Much wisdom may come from exploration of the multiple connections of slavery and Jim Crow to the present day. Growing evidence suggests that the equal protection principle developed in part because of the African American press’ constant reminders of the unequal treatment that Blacks received from state governments. That “constant inconsistency”, once demonstrated, fueled the development of the notion that everyone should be treated equally.73 Similarly, the antislavery movement, which created a fundamental change in American law and culture, did so in large part by bringing an understanding of the inhumanity of slavery to the entire country. The turn to narrative scholarship illustrates a contemporary analog to the antislavery movement, which convinces people through persuasion.

72. Obviously, stealing newspapers, as happened at Brown, is troubling. So are emails, like the one that was sent by a Brown student, that (at least to my reading) seek to intimidate the recipient. See Horowitz, supra note 1, at 66.

73. Mark Tushnet has made perhaps the fullest demonstration of this principle. See Mark Tushnet, The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. DuBois, and Charles Hamilton Houston, 74 J. Am. Hist. 884–903 (1987). And recently Kenneth Mack has explored the contributions of the African American bar to the Civil Rights movement. See Kenneth W. Mack, Rethinking Civil Rights Lawyering and Politics in the Era Before Brown, 115 Yale L.J. 256 (2005). Yet, there is more insight to be gained here. Through the pages of the Black press like the The Crisis, African American intellectuals emphasized unequal treatment. See, e.g., W.E. Burghardt DuBois, Violations of Property Rights, 2 Crisis 28–32 (1911); The Waco Horror, 3 Crisis 1–8 (1916); The Massacre of East St. Louis, 14 Crisis 219–38 (1917). Often The Crisis reported on court cases. See, e.g., Segregation, 8 Crisis 69–70 (1914) (celebrating North Carolina decision striking segregation ordinance). Then, those ideas of unequal treatment migrated into formal constitutional law. For example, Michael J. Klarman views the slow development of equal protection jurisprudence with great skepticism—and as essentially meaningless in the Jim Crow period. See Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 61–97 (Oxford University Press, 2004). And we must, of course, view with skepticism the progress during the White Court. See Randall Kennedy, Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt, 86 Colum. L. Rev. 1622 (1986) (cautioning against too optimistic read of White Court). The principles propounded in the Black press became important, however. It was, of course, the equal protection clause that was at the center of Brown v. Board of Education, 344 U.S. 1 (1952). And perhaps soon we will recognize more fully the multiple and hidden connections between the Black press, which saw the possibilities in law, even as they were abandoned by it, and the destruction of the Jim Crow legal system. See Alfred L. Brophy, Reading the Great Constitutional Dream Book: African American Ideas of Equality in the Progressive Era, (paper delivered at Washington and Lee University, September 2004).
But the nature of the debate—particularly by reparations advocates—has taken such a strident turn in recent years that the majority culture may oppose all discussion of reparations. As students at Berkeley, for instance, issue non-negotiable demands, the students decrease significantly their ability to achieve reconciliation. This is, quite simply, poor politics. By analogy, voters are not often convinced of the truth of arguments by fear and intimidation. Such politics of intimidation are almost calculated to lose support. If—as is certainly the case with reparations for slavery—there is going to be a request for reparations from a legislature, it will need popular support. That support can come in two ways: either as a program that people support because they believe that it is correct to support it, even though it may go against their self-interest; or as part of a political trade: so much support for reparations in return for so much support of another program. The case for reparations is in its early stages and will likely gain support only if it can be shown to be beneficial for many more than just Blacks, or if it is part of political trade.

David Horowitz’ Uncivil Wars latches onto some extreme behavior by an unrepresentative group of college students and other campus radicals and uses them as straw figures in his argument against reparations. It presents a distorted view of free speech on college campuses, but even more importantly, the book presents a strange attack on the issue of reparations for slavery. Horowitz frames the issues of reparations to make them appear as claims of individuals against other individuals. He portrays reparations advocates as people who focus on unfortunate, long-past parts of American history.

There are, of course, serious issues to be discussed regarding the morality and efficacy of reparations for people whose ancestors were slaves and for those who suffered under the discriminatory system of Jim Crow that persisted well into the twentieth century. Those issues include the basis for asserting claims, who would pay and what is the morality of asking for payments, which claims have the best claim on the public fisc, what would reparations look like, and whether reparations claims are so

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74. Take two examples; first the University of Alabama student newspaper refused a pro-choice advertisement. No one believes that is a form of censorship. It is merely a refusal to allow people to buy their way into editorials. See, e.g., David Mazel, Right-Wing Colleges Reject “God is Abortionist” Ad, (Sept. 2005), available at http://dir.salon.com/news/feature/2001/04/27/censorship/index.html?sid=1026730.

Second, when the Auburn Plainsman printed an editorial opposing an apology for slavery, it garnered substantial praise; there was no detectable hint from anyone on campus that the newspaper should not have published the editorial. See Michael J. Thompson, Apologizing For Past Sins a Big Mistake, AUBURN PLAINSMAN (April 2004), available at http://www.theplainsman.com/vnews/display.v/ART/2004/04/26/408d7edd17a0b.
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divisive that they should be abandoned. Horowitz addresses few of those serious issues.

What is perhaps most surprising in this whole affair is that Horowitz stirred such controversy. There are serious arguments against reparations, obviously, although Horowitz may distract us from serious discussion more than he points us towards it.\(^7\) I hope that our society has a serious discussion of the appropriate response to centuries of government-sponsored and government-permitted racial crimes in this country, and that we seriously engage the arguments in favor or and against reparations. When that happens, there ought to be little place for David Horowitz' inflammatory advertisements.

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