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Reparations as Redistribution

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REPARATIONS AS REDISTRIBUTION

KYLE D. LOGUE*

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INTRODUCTION

The most controversial, and most intriguing, remedy sought by proponents of slavery reparations involves massive redistribution of wealth from whites to blacks within the United States. This is not to say that reparations proponents have focused only on racial redistribution. Some have called for an 'official apology from the U.S. government.'¹ Others seek the creation of a foundation

* Professor of Law, University of Michigan Law School. I wish to thank the participants at the Boston University School of Law Symposium on the Jurisprudence of Slavery Reparations as well as my colleagues at the University of Michigan for comments on earlier versions of this Article. Financial support for this project was provided by the University of Michigan Law School's Cook Fund for summer research.

¹ 143 CONG. REC. H3890-3891 (daily ed. June 18, 1997) (statement of Rep. Tony P. Hall

or institute, funded by U.S. tax dollars, to be devoted to furthering the interests of African Americans, including the funding of K-12 educational programs for black children and the funding of general civil rights advocacy to counteract the lingering effects of racism in American society.² In a relatively new twist, some state governments have passed laws requiring companies to disclose the extent to which they or their predecessor companies were involved in or benefited from the practice of slavery;³ and some local governments – notably, Chicago, Los Angeles, and Detroit – have adopted ordinances requiring companies seeking to do business with the city’s government to disclose any profits they received from slavery.⁴ A similar slavery “accounting” was also one of the remedies sought in the recent lawsuits brought by slavery descendants against corporations alleged to have historical ties to slavery.⁵ Nevertheless, at the core of most slavery reparations proposals are calls for either cash or in-kind transfers from whites to blacks. Such redistributive programs will be the focus of this Article.

Broad-based racial redistribution would, according to proponents, provide a measure of compensation to the present generation and perhaps to future generations of African Americans for the harms caused by slavery, including the many years of unpaid slave labor.⁶ Furthermore, a white-to-black redistributive transfer would reduce the colossal inequality of resources between whites and blacks in America.⁷ Given the historic scope of the

of Ohio urging support for a House Concurrent Resolution, H.R. Con. Res. 96, 105th Cong. (1997), containing formal congressional apology for slavery).

² RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 244-46 (2000) (suggesting the establishment of an educational trust fund and federal funding of civil rights litigation).

³ See, e.g., SLAVERY ERA INS. REGISTRY, CAL. DEP’T OF INS., *REPORT TO THE CALIFORNIA LEGISLATURE* (2002), at <http://www.insurance.ca.gov/SEIR/SlaveInsuranceReporttoLeg.htm> (last accessed Sept. 28, 2004) (describing recent California legislation empowering California insurance regulators to require insurers doing business in California to disclose any slavery related insurance policies and describing regulations carrying out that mission).

⁴ Joyce Howard Price, *Detroit Joins Two Cities on Slave Disclosures*, WASH. TIMES, July 1, 2004, at A1, available at 2004 WL 64160149 (observing that companies with ties to slavery would not be barred from government contracts).

⁵ *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004) (seeking an accounting of profits from slave labor to determine the proper amount on which to impose a constructive trust).

⁶ Joe R. Feagin & Eileen O’Brien, *The Long-Overdue Reparations for African Americans: Necessary for Societal Survival?*, in *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 417, 418 (Roy L. Brooks ed., 1999) [hereinafter *WHEN SORRY ISN’T ENOUGH*] (stating that white wealth has largely came about from stealing labor from blacks and land from native Americans). Consistent with the approach taken by the U.S. Census, I use the terms “black” and “African American” interchangeably.

⁷ The average white household has, by one estimate, ten times the wealth of the average black household. For greater discussion of this and other inequalities, see *infra* notes 91-

injustice slavery represents, the potential size of a fully “reparative” transfer could be astronomical. Although most slavery reparations proponents decline to suggest specific dollar estimates of the appropriate transfer, some are willing to venture a guess. One researcher, for example, focusing on a stolen-labor measure of harm and using 1790-1860 slave prices as proxies for the value of unpaid slave labor, calculated a sum of between \$448 billion and \$995 billion,⁸ which in 2003 dollars would be approximately between \$2 trillion and \$4 trillion.⁹ By comparison, the entire U.S. government budget in 2004 is projected to be just over \$2 trillion. More recently, taking a different approach to assessing the social harm associated with slavery, sociologist Dalton Conley suggested that if all of the present wealth gap between African Americans and whites were attributed to the institution of slavery and related injustices, a one-time transfer of 13 percent of existing white wealth would be necessary to eliminate the black-white wealth disparity entirely.¹⁰ Alternatively, Conley suggested that a better approach might be to determine what fraction of existing household wealth is attributable to inheritance from prior generations, and to use that number to determine the extent to which current levels of black household wealth lag behind those of whites because of slavery. Following that approach, Conley arrived at a more modest one-time tax of 3.7 percent of white household wealth to be distributed among African Americans.¹¹

Only the most radical reparations supporters would regard such a massive wealth transfer as desirable, and few people – perhaps none – would regard it as politically plausible. Putting aside the discussion as to amount, the idea itself of a transfer of resources from whites to blacks is intriguing. What would such a transfer even look like? Perhaps the most obvious and most controversial possibility would be a program of direct cash transfers to African American taxpayers funded by federal tax revenues or, as suggested above, by some special tax on whites. Indeed such a system is what many slavery reparations proponents seem to have in mind. That type of racially

111 and accompanying text.

⁸ Robert S. Browne, *The Economic Case for Reparations to Black America*, 62 AM. ECON. REV. 39, 42 (1972) (discussing work conducted by Jim Marketti, a University of Wisconsin graduate student, to determine “unpaid black equity”).

⁹ Dalton Conley, *Calculating Slavery Reparations: Theory, Numbers, and Implications*, in *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* 117, 119 (John Torpey ed., 2003) (observing that Marketti’s estimates matched the sum demanded by a prominent black separatist movement, the Republic of New Africa)).

¹⁰ *Id.* at 122 (stating that a 13 percent transfer would be sufficient due to the African American population being approximately 17 percent the size of the white population).

¹¹ *Id.* at 122-23. To arrive at this 3.7 percent figure, Conley assumed that there were six (22-year) generations from the time of slavery to the present. Additionally, Conley relied on the assumption, developed by prominent economists Laurence Kotlikoff and Lawrence Summers, that 80 percent of household wealth is attributable to inheritance. *Id.* (citing Laurence J. Kotlikoff & Lawrence H. Summers, *The Role of Intergenerational Transfers in Aggregate Capital Accumulation*, 89 J. POL. ECON. 706 (1981)).

redistributive cash transfer, however, is not the only possibility. Once we broaden the notion of what counts as a program of redistribution, it becomes clear that we already engage in some degree of racial (white-to-black) redistribution, some of which is controversial and some of which, apparently, is not. Thus, for example, affirmative-action programs can be seen as a prominent real-world example of an explicitly race-based in-kind transfer from whites (and Asian Americans) to blacks (and some other racial and ethnic groups, such as Native Americans). Moreover, even transfers that are not explicitly race-based can be understood as a form of redistribution by race. For example, because blacks are overrepresented in most inner-city metropolitan areas, any federal or state spending programs that primarily benefit the inner city, but that are funded by general tax revenues would have a racially redistributive effect. Even certain types of anti-discrimination law can be seen as having a racially redistributive component, insofar as it such laws result in racial cross-subsidization of blacks by whites. An example of this would be laws against racial discrimination in insurance underwriting. The point here is that broad-based racial redistribution, from all or almost all whites to all or almost all blacks, can take many forms.¹² One of the lessons of this Article will be that all of these various program-design issues must be taken into account by those calling for slavery reparations in the form of white-to-black redistribution.

My main argument is straightforward. First, I contend that some level of redistribution from whites to blacks – whether paid in-cash or in-kind, whether explicitly race-based or only implicitly so, and whether labeled reparations or something else – can be defended on fairly intuitive and straightforward distributive justice grounds. The idea is that, according to every empirical study of the issue, African Americans are on average significantly less well off than whites. Moreover, the inequality extends to almost every conceivable measure of well-being – income, wealth, education, employment, health, housing, even life expectancy. Given this fact, and given especially this country's history of slavery and segregation, it is not difficult to argue that the government ought to spend some resources to reduce that inequality. Although the conclusion is not especially new, the distributive justice angle has been largely overlooked in discussion of slavery reparations. Second, I argue that any program to effect racial redistribution or reduce racial inequality – again, whether labeled reparations or not – should be informed by the basic lessons of public finance economics, a field that has long been devoted to the problem of designing real-world distributional programs. Drawing on that literature, I point out that the concept of race has three qualities that make it a surprisingly useful tool, at least in theory, for implementing an egalitarian vision of

¹² For a discussion of making reparations through federal welfare programs directed at increasing African American racial capital, see James R. Hackney, Jr., *Ideological Conflict, African American Reparations, Tort Causation and the Case for Social Welfare Transformation*, 84 B.U. L. REV. 1193, 1201-06 (2004).

distributive justice: (a) race is one of the best predictors of, or proxies for, overall social and economic well-being; (b) unlike redistribution with respect to other proxies for well-being, such as redistribution with respect to income or wealth, redistribution on the basis of race will not cause labor-market distortions, because race is relatively immutable; and (c) race is relatively observable. For all of these reasons, redistribution on the basis of race, at least in theory, has the properties of a distributively just lump-sum transfer program. Third, although I do not here endorse any particular racially redistributive program, I point out the costs and benefits of several alternative forms that programs of racial redistribution might, and in some cases already do, take. Included in that discussion are direct cash transfers from whites to blacks (perhaps administered through the federal tax system), which would probably be unconstitutional but which provides an interesting point of comparison. I also discuss a range of in-kind redistributive programs, from race-based affirmative-action programs to federal funding of urban housing and educational programs to certain types of anti-discrimination law, all of which may be constitutional, depending on their particular design details. One point of emphasis in the Article is that, although redistributing explicitly on the basis of race may have certain advantages, such as the absence of labor distortions that accompany income or wealth redistribution and the increased precision of the redistributive transfers, there are disadvantages that have to be considered as well, such as the difficulty of defining and policing racial categories for the purpose of administering a redistributive program. In addition, it may ultimately be that there are other proxies for well-being besides race (such as geography) that can be used to produce a distributively-just lump sum transfer, but those systems will inevitably have drawbacks as well.

Before launching into my primary argument regarding the use of race in redistributive programs, I should point out that my focus on reparations as redistribution is a departure from the general thrust of the slavery reparations literature. Instead, most reparations scholars and activists view reparations as an issue of corrective justice, of rectifying a historic wrong.¹³ That vision of reparations, insofar as it builds on the notion of corrective justice that is employed in the private law context, is derived from an analogy to tort law, which says that if person A wrongfully harms person B, A must pay compensation to B. That view of slavery reparations has considerable appeal. Much, probably most, of the inequality between blacks and whites today, which I describe in some detail below, is doubtless attributable directly or indirectly to the historical injustices of slavery, Jim Crow, and subsequent discrimination. And it is certainly understandable that reparations proponents would seek to link racial redistribution directly with those past injustices. To ignore that link would itself be an injustice, as well as perhaps a tactical

¹³ See Eric J. Miller, *Healing the Wounds of Slavery: Can Present Legal Remedies Cure Past Wrongs?*, 24 B.C. THIRD WORLD L.J. 45, 47 n.5 (2004) (discussing the corrective justice rationale for reparations).

political (and perhaps legal) error. Nevertheless, because of the amount of time that has elapsed since the end of slavery and the difficulty of assigning blame today for what happened hundreds of years ago, a program of slavery reparations that involved large-scale redistributive transfers from whites to blacks would not fit neatly within the conceptual category of corrective justice. Again, I am not arguing for ignoring the past. To the contrary, as will become clear, my distributive justice argument has an important historical component. Rather, my primary argument is that whether and how society ought to structure a slavery reparations program depends on what such a program is expected to achieve. The goal of slavery reparations – whether it is to achieve distributive justice by reducing the substantial inequalities between whites and blacks, or to achieve corrective justice, which requires identifying specific wrongdoers and assigning them blame for the harms caused by slavery – will have important implications for the design of the program.

The Article proceeds as follows. Part I describes the private-law roots of corrective justice and explains how the move from paradigmatic private-law setting (the simple tort or contract case) to group-based harm saps the intuitive strength of the corrective justice rationale. Building on this conclusion, Part I then points out some of the conceptual and practical difficulties with applying the corrective justice rationale to slavery reparations that take the form of broad-based transfers from whites to blacks. Next, Part II argues that some level of white-to-black racial redistribution can be justified on the basis of a modest (and fairly conservative) version of egalitarian distributive justice, although I make no claim as to the appropriate amount. Part III emphasizes the lump-sum (and therefore relatively efficient) nature of racial redistribution, discusses some of the alternative forms that racial redistribution might take, and highlights some of the costs and benefits of those alternatives. The final section in Part III also responds to some of the most obvious objections to the idea of racial redistribution of any kind. As I conclude there, it may well be that the expressive or political problems associated with racial redistribution – such as the hostility that might be created among non-black citizens who would be required to pay the cost of the program and the expressive harms experienced by blacks who regard the program as demeaning – would outweigh the social benefits of such a program. That is an issue, I argue, for voters to decide. Indeed, insofar as government programs that implicitly engage in racial redistribution already exist, the voters have already decided. The question is whether more, or less, should be done. Part IV then concludes.

I. SLAVERY REPARATIONS AS CORRECTIVE JUSTICE

As suggested in the introduction, the dominant way of speaking about slavery reparations is in terms of corrective justice, of repairing past wrongs. Scholars arguing for slavery reparations have long embraced the corrective justice approach.¹⁴ Likewise, plaintiffs seeking tort-like or restitutionary

¹⁴ See, e.g., Adjoa A. Aiyetoro, *The Development of the Movement for Reparations for*

damages in the recent federal lawsuit seeking slavery reparations have invoked the corrective justice principle and the idea of righting past wrongs.¹⁵ The dominance of the corrective justice framework is not surprising. There is a good case to be made that African Americans living today, even after all this time, continue to suffer disadvantages due to slavery and its aftermath.¹⁶ Moreover, previous reparations programs, such as the program of German reparations paid to Holocaust survivors and the payments from the U.S. government to the victims of the Japanese American internment camps, have been defended on corrective-justice grounds. In those cases the analogy to the slavery case has been difficult to resist.¹⁷ Some commentators have gone so far as to assert that the concept of reparations itself, as a definitional matter, entails the “backward-looking grounds of corrective justice.”¹⁸ All of this being said, and despite the obvious appeal of corrective justice to reparations generally, I want to emphasize the limitations of the corrective-justice approach when applied to slavery reparations in particular, at least those reparations proposals that involve broad-based racial redistribution from all white taxpayers to all black taxpayers. My claim is that the corrective-justice intuition grows steadily weaker as we move away from paradigmatic private-law setting. Further, I argue that the corrective justice rationale, when applied to slavery reparations in particular, loses much of its normative punch, and some version of distributive justice becomes the more compelling rationale for racially redistributive transfers.

African Descendants, 3 J.L. Soc’y 133, 133-34 (2002) (stating “[t]he demand for reparations . . . is a demand for acknowledgment and repair of the vestiges of slavery”); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 685 (2004) (pointing out society’s obligation to make amends for its participation in wrongful discrimination); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 284 (2003) (“One of the primary tenets of the reparations debate should be focused, in my view, on repairing the harm that has been most severe and correcting the history of racial discrimination in America where it has left its most telling evidence”).

¹⁵ See Complaint and Jury Trial Demand, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. 02-CV-1862 (E.D.N.Y. filed March 26, 2002) (outlining wrongs committed against slaves and seeking restitution and disgorgement of profits from slavery).

¹⁶ I define the aftermath of slavery to include at least the 100 years of legal segregation that followed the Civil War Amendments to the U.S. Constitution.

¹⁷ Additionally, it may be helpful to consider analogizing reparations to products liability or toxic torts. See *infra* text accompanying notes 45-51 (discussing corrective and distributive justice in the context of product liability cases and toxic torts).

¹⁸ Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691 (2003) (defining the term “reparations”); see also JANNA THOMPSON, *TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL INJUSTICE* 103 (2002) (“It is a principle basic to reparative, as well as retributive, justice that obligations and entitlements associated with wrongdoing belong only to those who have done or suffered the wrong.”).

A. *Corrective Justice vs. Distributive Justice: The Conceptual Distinction*

Corrective justice has been defined as the principle that wrongfully caused harms ought to be repaired.¹⁹ Thus, when A wrongfully harms B or B's property, tort law requires A to provide some form of compensation. This outcome is consistent with and justified by the standard account of corrective justice, or so the argument goes.²⁰ The least controversial application of the corrective justice idea would be rectifying intentionally caused harms. If A intentionally injures B, no one would deny the strength of B's claim to recovery.²¹ Most scholars, however, would also extend the concept of corrective justice to encompass negligently caused harms as well. Some even go so far as to argue that corrective justice supports strict liability with respect to certain classes of accidents, for example, in situations involving inherently risky activities.²² Tort law is not the only legal area to which corrective justice principles can be applied. There are corrective justice elements in property law, contract law, and the law of unjust enrichment (sometimes called restitution law).²³ Thus, if A steals property from B (or breaches a contract with B), A has incurred an obligation to make B whole.²⁴ In sum, corrective justice describes and explains the core ideas of not only tort law but much of private law generally.

¹⁹ Jules L. Coleman, *The Practice of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53 (David G. Owen ed., 1995) ("[C]orrective justice is the principle that those who are responsible for the wrongful losses of others have a duty to repair them, and that the core of tort law embodies this conception of corrective justice."); see also Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) ("Currently there are two major camps of tort scholars. One understands tort liability as an instrument aimed largely at the goal of deterrence, commonly explained within the framework of economics. The other looks at tort law as a way of achieving corrective justice between the parties."). Aristotle is credited with originating corrective justice and distributive justice as conceptual categories. See ARISTOTLE, NICOMACHEAN ETHICS 120-23 (Martin Ostwald trans., Bobbs-Merrill Co. 1962).

²⁰ See Coleman, *supra* note 19, at 53.

²¹ Most would also agree that this obligation exists irrespective of the effect of such a rule on incentives or risk bearing or other instrumental concerns.

²² See e.g., Ronald R. Rattton, *Corrective Justice and the D.C. Assault Weapon Liability Act*, 19 J. LEGIS. 287, 305-06 (1993) (using corrective justice to justify strict liability for manufacturers, dealers, and importers of assault weapons).

²³ See generally Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES L. 1, (2000) (discussing corrective justice in the context of property and contract law and arguing that restitution should be gain-based, in that it should focus on why a particular plaintiff should gain as opposed to why a particular defendant should disgorge wrongfully acquired property).

²⁴ Breaking a contractual promise can also be seen as wrongfully causing a harm. See Edward Lorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1409 (1982) (discussing the use of specific performance and cost of completion damages to enforce the view that willfully breaking a contractual promise is wrong).

It should come as no surprise, however, that corrective justice, like any normative or descriptive legal theory, has certain shortcomings. The primary shortcoming of corrective justice as an account of tort law, or of private law more generally, is its failure to specify an independent conception of “wrongfulness.”²⁵ This is a serious deficiency of the theory, as even its proponents seem to understand.²⁶ If we do not know what counts as a wrongful act, how can we know whether compensation should be paid? By contrast, consider the leading alternative theory (some would say the dominant theory) of private law: the economic approach. Although the economic theory of, for example, tort law has its own shortcomings (such as sometimes implausible assumptions about the rationality of individual actors in certain settings), it does provide reasonably well specified explanations or predictions of the circumstances in which liability ought to attach and why. Under the economic approach, the basic idea is that society should adopt the rule that creates the optimal – cost-minimizing – accident-prevention incentives among both potential injurers and potential victims.²⁷ Thus, if the corrective justice theorist defined “wrongful” as “inefficient,” the two theories would be coextensive, or virtually so, a fact that is distressing to corrective justice theorists.²⁸ This overlap, however, should come as no surprise really, because both theories were developed as efforts to describe, or to provide coherent accounts of, the same set of existing common law doctrines. Moreover, the pursuit of efficiency is a compelling normative vision of what private law ought to be about, even if the efficiency explanation is implausible as a descriptive matter in certain settings. All of this is not to say, however, that the two theories – corrective justice and efficiency – cannot and do not diverge at times. Given that the economic approach is dependent on the incentive effects of law and the corrective justice approach is not, it is certainly possible to imagine circumstances in which corrective justice would call for compensation but economic analysis would not. Indeed, as we shall see below, certain reparations settings will provide an interesting example of just this sort of divergence.

²⁵ See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 93-94 (“[C]orrective justice is incomplete in that one must look elsewhere for a substantive theory of what counts as wrongful injury, a point that most scholars state explicitly or acknowledge implicitly.”) (citations omitted).

²⁶ See *id.* at 93-97 (acknowledging that the lack of a substantive notion of wrongfulness obscures the criteria which should be used to determine if a rule promotes fairness in a certain case).

²⁷ See Jeffrey Evans Stake, *Status and Incentive Aspects of Judicial Decisions*, 79 GEO. L.J. 1447, 1463-65 (1991) (observing that economic treatment of common law issues focuses on incentives rather than status to determine the new “price” of certain types of individual behavior).

²⁸ See, e.g., Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 431 (“One problem with imposing corrective injustices in order to annul greater wrongful losses is that it threatens to turn corrective justice into a form of efficiency.”).

A key aspect of the philosophical literature on corrective justice is the effort to distinguish corrective justice from distributive justice. This distinction will prove to be important for the slavery reparations question, although I will argue that the distinction is less about philosophy and more about function. Corrective justice as a philosophical idea is, again, about restoring the status quo, requiring A to compensate B for some wrong that was done by the former to the latter. By contrast, distributive justice is about the fairness of the overall distribution of scarce societal benefits and burdens within a society and typically calls for reducing certain types of societal inequality.²⁹ What is interesting is that both corrective and distributive justice can be understood as applying irrespective of, or oblivious to, the other. On this view, corrective justice requires that the wrongdoer compensate the victim regardless of whether the initial allocation of resources as between the wrongdoer and victim – the status quo that corrective justice seeks to restore – was just. Likewise, distributive justice, which imposes obligations on all members within a community to share societal resources and burdens fairly, seems, according to the prevailing philosophical view, to be blind to any special obligations that have been created by wrongs committed by one individual against another individual.³⁰

To make this distinction clear (perhaps painfully so), consider a stylized example. Imagine a society composed entirely of four individuals (A, B, C, and D), each of whom has exactly \$1000. Assume further that this initial allocation of wealth is considered fair or distributively just; in other words, the principle of distributive justice in this society is strict equality of wealth. Now suppose that A steals \$1000 from B, leaving B with nothing, A with \$2000, and C and D with \$1000 each. On these facts, both corrective and distributive justice would call for A to return the stolen \$1000 to B. Such a transfer would not only redress the wrongfully caused harm, it would also achieve what is by assumption the distributively-just outcome. Distributive justice and corrective justice diverge, however, when there is an unequal or otherwise distributively unjust initial allocation of resources. To see this point, imagine now that A starts with \$0, and B, C, and D start with \$1333.33 each. Thus, society's \$4000 of wealth in this example is unevenly, and therefore under my assumptions unjustly, distributed. If we assume now that A steals \$200 from B, so that after the theft A has \$200, B has \$1133.33, and C and D have \$1333.33 each, the interesting question is whether corrective justice *still* requires A to return the stolen money to B, even though doing so would reestablish the initial unjust allocation of resources.

The answer seems to be yes. Most contemporary legal philosophers seem to believe that corrective justice requires restoring the status quo regardless of the effect on the overall distribution of resources.³¹ The reason, the argument

²⁹ For a more precise definition of "distributive justice, see *infra* Part II.A.

³⁰ See *infra* Part II.A.

³¹ See, e.g., Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive*

goes, is that corrective justice is the obligation that attaches to particular individuals with respect to a given transaction or interaction and thus is distinct from distributive justice.³² Distributive justice, again, is indifferent to these sorts of personal, transactional obligations.³³ With distributive justice, the responsibility to correct the inequality in society rests with everyone in the society. Consider now how this dichotomous distinction between corrective and distributive justice would apply to my example. Assuming again, for simplicity, that distributive justice calls for strict equality of wealth and that B, C, and D have equal initial allocations of wealth (\$1333.33), and that A's initial allocation is \$0, distributive justice (as defined here) would require B, C, and D to pay \$333.33 to A, and this obligation would exist irrespective of any obligation that B, C, or D might have with respect to A (or A to them) under corrective justice.³⁴

In sum, corrective justice is about private obligations between individuals, and distributive justice is about how scarce resources, opportunities, as well as burdens should be allocated within a society among all of its members.

B. *Corrective Justice vs. Distributive Justice: The Functional Distinction*

Not only have philosophers taken pains to draw the distinction between corrective justice and distributive justice, they locate the two notions of justice in separate and distinct areas of the law. That is, legal philosophers talk about corrective justice as being primarily the role of private law – the domain of torts, contracts, and property; whereas distributive justice is assumed to be

Justice, 77 IOWA L. REV. 515, 515-16 (1992). Benson noted that:

Over the centuries, writers have proposed different conceptions of corrective and distributive justice. Thus, Aristotle and Thomas Aquinas understood them in one way, Hobbes and Grotius in another, and Kant and Hegel in still another. And the same is true of contemporary legal and political theory. Despite such differences, however, corrective justice has usually been thought of as comprising those principles that directly govern private transactions between individuals. In developed legal systems, these principles are generally embodied in the law of contract, torts, and unjust enrichment. By contrast, the concept of distributive justice has been viewed as including those principles that ought to regulate the fair distribution of common burdens and benefits among individuals or groups of individuals. A system of income taxation is an example of a scheme coming under distributive justice.

Id.

³² See *id.* at 538.

³³ See *id.*

³⁴ Note that in the example in which A has stolen \$200, leaving B with \$1133.33, the corrective justice and distributive justice goals might be coordinated so that A would be allowed to keep the \$200, and B's redistributive obligation would be reduced to \$133.33. That is, the theoretical separation of corrective justice and distributive justice does not necessarily require that A actually handover a check for \$200 (or the actual \$200 that was stolen), and then B write another check for \$333.33. The point is that the two obligations are separate and distinct. The reason for this distinction is not so much theoretical as practical.

relegated to the redistributive arm of the government, specifically, the tax-and-transfer system.³⁵ It is interesting, and in my view not coincidental, that a similar division of labor has been suggested by legal economists. That is, legal economists also argue that the primary functions of private law and tax law are distinct from each other. However, instead of drawing a distinction between corrective justice and distributive justice, which are philosophical terms, legal economists distinguish between the efficiency and redistributive functions of law. Thus, the conventional wisdom among economic analysts of law is that "legal rules," by which they typically mean private law rules, should be designed exclusively to achieve efficiency and that any redistribution that society chooses to do should be accomplished exclusively through the tax-and-transfer system.³⁶ In other words, the private-law legal system helps to maximize the size of the pie, and the tax-and-transfer system is the means for slicing the pie fairly.³⁷

Again, both philosophers and legal economists seem to be persuaded by this division of functions, but it is the legal economists who provide a comprehensive defense of it, in an argument based on comparative advantage. Legal rules, the arguments goes, are especially well suited for promoting efficiency, because legal rules can, if properly designed, create optimal (welfare-maximizing) incentives on the part of private actors.³⁸ The efficiency accounts of tort, contract, and property rules are by now well known, and there is no need to rehearse them here.³⁹ But the next step in the argument is key: Legal rules are *poorly* suited to achieve society's redistributive aims, at least insofar as the redistributive goal is shifting resources from the rich to the poor. A number of justifications are given for this conclusion. The strongest arguments are what might be called the "haphazardness" argument and the

³⁵ See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 274-80 (1971) (conceptualizing government as four branches, each concerned with preserving social and economic conditions); see also Benson, *supra* note 31, at 515-16.

³⁶ See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 124-27 (2d ed. 1989) (stating that the goal of redistribution may cause socially inefficient legal rules to be accepted); Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994) ("[R]edistribution through legal rules offers no advantage over redistribution through the income tax system and typically is less efficient."). As will become clear, however, this distinction between private law and tax or distributional law becomes blurred in certain settings, making the analysis much more complicated.

³⁷ Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance* 56 TAX L. REV. 157, 158 (2003) (baldly asserting that the majority of legal economists likely hold the view that the tax system should be the exclusive policy tool for redistributing income).

³⁸ See Stake, *supra* note 27, at 1463-65.

³⁹ For an introduction to the issue of whether common law rules are directed toward justice or efficiency, see *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

“contracting around” argument. The haphazardness argument is that legal rules in general provide both an insufficiently comprehensive and an insufficiently precise system of distributive justice.⁴⁰ They are insufficiently comprehensive in the sense that only a small percentage of individuals in society come into direct contact with the legal system; whereas, a much larger percentage of individuals within society can be brought within the scope of the tax system.⁴¹ And redistributive legal rules can be insufficiently precise insofar as courts are not set up to measure relative well-being – such as relative income or wealth – as between plaintiffs and defendants; whereas, that is precisely what the taxing authority is set up to do.⁴² The lesson of the contracting-around argument is this: In legal settings that involve contractual relationships between plaintiffs and defendants (what might be called “vertical contractual relationships”), it will be almost impossible to redistribute from a class of defendants (say, “rich” product manufacturers) to a class of plaintiffs (say, “poor” product consumers), because future parties to such contractual relationships (i.e., future manufacturers and consumers) will simply contract around any such effort at redistribution.⁴³ Thus, in the case of a products liability rule designed to redistribute wealth from product manufacturers to product consumers, the rule would not necessarily work, as manufacturers would pass some of the cost of the redistributive rule back to the consumers themselves through increased prices. Moreover, if some of the cost is borne by corporate shareholders, there is no reason to believe that shareholders as a class are better or less well off on average than product consumers – especially in today’s era of widely owned stock mutual funds.

That legal philosophers seem to endorse a similar division of functions between legal rules and tax rules should come as no revelation. I have already noted the potentially derivative (and certainly overlapping) relationship between corrective justice and efficiency explanations of private law rules. Thus, insofar as corrective justice is another term for efficient deterrence, it only makes sense that both theories would suggest a similar role for the legal and tax systems. As already noted, however, corrective justice and efficiency are not necessarily co-extensive. Nevertheless, the functional distinction between private law and tax law seems to make sense even in the non-overlapping situations – such as situations in which corrective justice, but not deterrence, would call for a remedy. For example, if A intentionally takes B’s property, and there is no plausible argument that the legal rule in this setting will have an appreciable incentive (or efficiency) effect on future “A’s”, not only would corrective justice still call for A to compensate B but that corrective justice function would most likely best be achieved through the

⁴⁰ Logue & Avraham, *supra* note 37, at 177-88 (summarizing and critiquing the contracting-around and haphazardness arguments).

⁴¹ *See id.* at 185-88.

⁴² *See id.* at 182-85.

⁴³ *See id.* at 177-82.

implementation of a legal rule, which would involve a court and maybe a jury and all the other aspects of due process, such that a full factual hearing on the question of A's and B's rights to the property in question can be addressed. The tax system, by contrast, would not provide a suitable system of redress for such wrongs.⁴⁴ Where the issue becomes trickier for both the philosophers and the economists, and where the division of functions becomes less clear, is when the boundaries between private law and redistributive or tax law become blurred, which is precisely what has happened in the slavery reparations debate.

C. *Corrective Justice vs. Distributive Justice: From Simple Torts, to Toxic Torts, to Reparations*

Before we discuss reparations, however, let us consider the intermediate cases of products liability law and toxic torts, the analysis of which can provide useful insights into not only whether a program of slavery reparations makes sense, but, if so, how it ought to be designed. Recall the primary distinction between corrective and distributive justice: Corrective justice, at its core, is about private obligations between individuals created by one party's wrongfully harming another and is generally considered the domain of private law. Distributive justice, by contrast, is about the broader social obligations that members of a society have to one another – with an emphasis on reducing arbitrary inequality, and is considered the domain of the tax-and-transfer system.⁴⁵ As we shall see, however, reparations programs do not fit neatly into

⁴⁴ Interestingly, this distinction between the relevant domains of private law and redistributive law can be traced at least as far back as the Old Testament. According to Mosaic Law, corrective justice was embodied in the talion principle – eye for eye, tooth for tooth. *Exodus* 21:24 (New Revised Standard Version). Those given the responsibility of administering corrective justice were admonished not to ignore considerations of distributive justice. *Exodus* 23:3 (New Revised Standard Version) (“[N]or shall you be partial to the poor in a lawsuit.”). There was also a separate system of distributive justice, whereby wealthy Jews were commanded to lend without interest to the poor. *Deuteronomy* 15:7-9 (New Revised Standard Version) (“If there is among you anyone in need . . . do not be hard-hearted or tight-fisted toward your needy neighbor . . . rather open your hand, willingly lending enough to meet the need, whatever it may be.”); *Exodus* 22:25 (New Revised Standard Version) (“If you lend money to my people, to the poor among you, you shall not deal with them as a creditor; you shall not exact interest from them”). Moreover, property owners were expected to abide by the Sabbatical year, which meant every seventh year leaving their land fallow for the use of the poor. *Exodus* 23:10-11 (New Revised Standard Version) (“For six years you shall sow your land and gather its yield; but the seventh year you shall let it rest and lie fallow, so that the poor of your people may eat; and what they leave the wild animals may eat.”). In sum, some functional division between corrective and distributive justice and the systems that implement them seems to have existed for thousands of years. (I am grateful to Bill Miller for pointing out these particular passages from the Bible and their relevance to my argument.)

⁴⁵ I provide a fuller definition of distributive justice later in the Article. See *infra* Part

these categories and, depending on the design and the purpose of the particular program, might be considered either more about corrective justice or more about distributive justice or somewhere in between.

However, let us first consider an intermediate type of program, one that is one step beyond the individual tort case (involving Person A and Person B) and one step closer to the reparations context: namely, a typical products liability lawsuit. Remember that under a corrective justice rationale, when Person A takes Person B's property, our intuition tells us that the law ought to compel B to return the property or pay damages, irrespective of whether such a rule provides a deterrent benefit to future A's. Now, to focus the analysis on the corrective justice intuition (and to minimize the work being done by the deterrence idea), assume that products liability law has no deterrent effect whatsoever on corporate decision making – that corporate management, for example, wrongly and irrationally regard the probability of tort liability as being zero no matter what the law actually is.⁴⁶ Assume also that adopting a rule of enterprise liability would result in the costs of product-related injuries being shifted from the injured consumers (and their first-party health insurers) to a combination of: (a) the customers of the corporation (through product price increases); (b) the corporation's liability insurers (through risk-shifting policies); (c) the shareholders of the manufacturing corporation (as not all of the liability would be shifted to consumers through price-increases or to insurers through liability coverage); and (d) the company's employees, including their management whose compensation and employment status would be affected by liability outcomes. Now the question is whether in such an example there is a normative (and, by assumption, non-deterrence) argument for holding the manufacturer liable and thus shifting the costs of the product injuries from the victims to the corporation. If so, the next question is whether that argument is one of corrective or distributive justice – and, of course, whether the distinction matters.

In my view, there is a normative argument, or at least a generally shared intuition, that supports compelling the corporation to pay damages in this hypothetical, though this intuition is significantly weakened by the assumed absence of any deterrence benefit from such a rule. The justification for corporate liability in this example is somewhat more attenuated than the case involving individuals A and B above, since a corporation is not *really* a separate person, even though the law treats it as one. Instead, as the assumptions above suggest, the corporation is merely a contractual stand-in for various stakeholders, such as stockholders, employees, managers, even insurers, most of whom, at least in the case of large public corporations, do not participate directly in product design, manufacturing, or marketing decisions.

II.A.

⁴⁶ Although this is an especially difficult assumption for me, being a believer in the deterrent value of products liability law, it is not implausible and it helps to make the point that corrective justice can be independent of efficiency.

Nevertheless, whether the brunt of corporate liability falls on shareholders or managers or liability insurers, there is something intuitive about the idea that the corporation and its stakeholders ought collectively to bear the burden of the harms that the corporation's product wrongfully causes. And that intuition applies, I think, irrespective of whether those stakeholders are rich or poor, which is why it seems fair to characterize this intuition as one of corrective justice rather than distributive justice.

But the reason it makes sense to call this hypothetical an example of corrective justice is purely functional, in the following sense: The question of the relative income or wealth of the corporation's shareholders as compared with their customers is an issue best handled through the tax-and-transfer system, given that the tax-and-transfer system is relatively comprehensive (transfers can be made from all of the rich to all of the poor) and because that system avoids the contracting-around problem described above. Thus, it generally makes sense *as a functional matter*, in the design of products liability law (and tort law more generally), to ignore the relative income or wealth of the parties involved. And that is why products liability law (as with tort law generally) is best understood as a system of corrective justice – or, under more realistic assumptions, a system of deterrence and corrective justice. If that were not the case, if we thought that using a product liability rule could be a relatively efficient way of redistributing from, say, rich product manufacturers to poor product consumers,⁴⁷ then the normative intuition favoring liability in this example might fairly be called one of distributive justice.

Now consider a more extreme case, one that is yet another step closer to the reparations context and that blurs further the distinction between corrective and distributive justice – the example of a toxic tort, which raises not only issues of group-based wrongs but also issues of the passage of time. Although there is no single universally accepted definition of what constitutes a toxic tort, most of the paradigmatic toxic tort cases have the following characteristics: (a) a corporate defendant (or class of defendants) that manufactures a product with certain toxic or harmful qualities; (b) numerous individuals who claim to have been exposed to the defendant's product and who claim to have suffered some injury or illness as a result; and (c) a long (multi-year) latency period between the victims' exposure to the product and the physical manifestation of their harm.⁴⁸ To isolate the corrective justice intuition, let us continue to assume that tort law has no deterrence value. In toxic tort cases, even under these assumptions, the corrective justice argument for imposing corporate liability could be quite strong. This would be true, for example, in a situation in which: (a) the causal link between the defendant's product and the victims' injuries is

⁴⁷ And, again, the conventional wisdom among legal economists now is that this argument is fallacious. See Logue & Avraham, *supra* note 37, at 158.

⁴⁸ See, e.g., *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003) (involving a claim by six former railway employees against their employer railroad company involving fear of contracting cancer due to exposure to asbestos).

clear; and (b) it can be proven the defendant knew or should have known of the risk of injury at the time of the exposure. If there is a failure of proof, however, with respect to any of these elements, the corrective justice case for liability can fail as well. And the more time that passes between the exposure to the product and the manifestation of the injury, the more difficult it becomes to make the requisite demonstrations of proof.

Perhaps the best way to understand the effect of time on tort liability – and this is especially relevant to the slavery reparations question – is the fact that tort law generally does not allow intergenerational claims for liability. In other words, tort law simply does not impute a “duty” that extends to subsequent generations, at least not to individuals who have not at least been conceived at the time of the incident that gave rise to the harm. Thus, there are cases in which individuals have been allowed to recover for harm caused to them while they were in their mother’s womb – harm caused, for example, by some drug that their mothers took while pregnant with them.⁴⁹ And even a few jurisdictions have allowed claims where the injury to the baby was the result of harm to the mother’s body that occurred before the baby was conceived.⁵⁰ But such cases are exceedingly rare, and, moreover, courts have never gone the next step to allow an individual (or a class of individuals) to recover for damages that have incurred as a result of harm caused to their grandparents – and certainly not to their great grandparents. The argument that courts give when they deny liability in these cases is simply that the concept of foreseeability does not extend generally beyond human beings who have been born, or at least conceived, at the time of the tortious act.⁵¹

The extension of corrective justice from individual wrongs to corporate wrongdoing can be pushed yet further to include wrongs committed by one country against another, or by a country against a particular group of people. This is the step that brings us to reparations. It is also a step, however, that further attenuates the corrective-justice intuition at least as a functional matter, or so I argue.⁵² In addition, the corrective justice rationale is further weakened

⁴⁹ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 367-68 (5th ed. 1984).

⁵⁰ *Id.* at 369 n.26; see also Julie A. Greenberg, *Reconceptualizing Preconception Torts*, 64 TENN. L. REV. 315, 320-27 (1997) (describing cases that have allowed recovery for preconception torts).

⁵¹ A classic case is *Grover v. Eli Lilly & Co.*, 591 N.E.2d 696 (Ohio 1992), which involved a diethylstilbestrol (“DES”) claim brought on behalf of a child who had allegedly sustained injuries as a result of damage to his mother’s reproductive system, which damage had happened to the mother when she was in the womb of *her* mother – the plaintiff’s grandmother. In a split decision, the court held for the defendant, invoking *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928), and arguing that the harm was not foreseeable. The majority concluded that “[w]hen a pharmaceutical company prescribes drugs to a woman, the company, under ordinary circumstances, does not have a duty to her daughter’s infant who will be conceived twenty-eight years later.” *Id.* at 762.

⁵² Moreover, if we reintroduce the deterrence or efficiency component of private law, it

as the time-element becomes larger, that is, as time passes between the initial injury and the eventual claim for repair. As a descriptive matter, there have been a number of reparations regimes established in the past that were justified on corrective justice grounds. The two examples that are most often cited, at least in the slavery reparations literature, are: (a) the payments made by the West German government (starting in the 1950s and continuing for decades) to Israel and to various Jewish charitable organizations for the benefit of Holocaust survivors; and (b) the U.S. government's 1988 payments to the Japanese Americans who had been held in internment camps during World War II. In both cases a plausible corrective justice story can be told for some type of reparations payments. Whether a pure distributive justice story can be told, however, seems less likely.

In both the Holocaust survivor and Japanese American reparations programs, for example, the payer governments, or individuals acting under the auspices of those governments, had perpetrated injustices against – wrongfully harmed – a group of identifiable individuals, and, critically, the reparations payments went to those victims – not to their heirs or descendants. In the German case, the payees were the actual victims of the Holocaust, including former forced laborers, concentration-camp internees, and individuals deprived of rights or property under the Nazi regime.⁵³ Likewise, in the Japanese American case, the payees were the particular individuals who had been required to sell their belongings, leave their homes, and move to what amounted to concentration camps.⁵⁴ In neither case, therefore, were payments generally made to heirs or descendants of the original victims – only to the victims themselves.⁵⁵ Hence, the analogy to corporate tort liability or to a

is even clearer that slavery reparations are best understood as an example of pure redistribution. That is, no one can claim that requiring the payment of slavery reparations today would have any sort of deterrent effect. It is not even clear who would conceivably be the target of such a deterrence message.

⁵³ U.S. Dep't of State, *German Compensation for National Socialist Crimes* (March 6, 1996), at <http://www.ushmm.org/assets/frg.htm> (last accessed Sept. 28, 2004). Under the German reparations program, much of the money was paid to an organization called the "Jewish Claims Conference," an association of Jewish charitable organizations that was given the task of paying out the funds to holocaust survivors. *Id.* Eligibility for funds is limited to actual victims of the holocaust, including former forced laborers and concentration camp internees, as well as individuals deprived of rights or property under the Nazis. See generally Claims Conference, *The Conference on Jewish Material Claims Against Germany*, at www.claimscon.org (last accessed Sept. 28, 2004) (providing the official web site of the Jewish Claims Conference).

⁵⁴ Sandra Taylor, *The Internment of Americans of Japanese Ancestry*, in *WHEN SORRY ISN'T ENOUGH*, *supra* note 6, at 165-68 (describing the experience of the Japanese American internees).

⁵⁵ In the case of the Japanese American reparations, payments of \$20,000 were made only to the then-living actual victims of the internment camps, of which there were approximately 60,000. See Roger Daniels, *Redress Achieved, 1983-1990*, in *WHEN SORRY*

toxic tort situation is straightforward, although neither reparations program involved the court system.⁵⁶ What is also interesting is that neither reparations program seemed to turn on a claim that the putative beneficiaries were poorer on average than those who were funding the programs. That is, the programs were not primarily justified, if at all, on distributive justice grounds. Although it seems likely that West German taxpayers, who funded the original Holocaust-survivor reparations program, were on average richer than the average recipient of reparations payments in the years following the war, that may not have been the case and, in any event, a needs-based assessment apparently was not a requirement of the transfers. In other words, if it had been the case that the designated beneficiaries, as a class, were on average at the same or higher level of income and wealth as those paying into the system, it seems unlikely that the program would have therefore been stopped. Corrective justice would still have required some reparative transfer from the Germans to the Jews. And a similar conclusion could perhaps be drawn about the internment-reparations program as well.

What does all of this have to do with slavery reparations? The question is whether the same sort of corrective justice story, which applies in some tort contexts and which seems to have applied in some previous reparations contexts, would also apply to a program of slavery reparations. I now turn to that question.

D. *Slavery Reparations as Corrective Justice: The Problem of the Passage of Time*

Although there is obvious rhetorical force in grounding a slavery reparations program in the idea of corrective justice, there are also serious drawbacks to that approach, all of which have been noted previously by numerous commentators and which I only summarize here.⁵⁷ An initial obvious

ISN'T ENOUGH, *supra* note 6, at 189.

⁵⁶ In more recent years, lawsuits have been used to recover additional reparations-like recoveries for some victims of injustice that occurred during the reign of the Third Reich. See generally Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2000) (discussing the recent holocaust-related suits in considerable detail).

⁵⁷ See generally THOMPSON, *supra* note 18 (focusing on intergenerational duties owed between social groups); Alfred L. Brophy, *Some Conceptual and Legal Problems in Slavery Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003) (discussing technical difficulties involved in creating a reparations system); Gregory Kane, *Why the Reparations Movement Should Fail*, 3 MARGINS 189 (2003); Posner & Vermeule, *supra* note 18; Jeremy Waldron, *Superceding Historic Injustice*, 103 ETHICS 4 (1992) (discussing how the passage of time may cause reparations, and the concomitant social upheaval which they may produce, to be superceded by other social needs). The best collection of responses that I have encountered to these objections to slavery reparations is found in Kim Forde-Mazrui's excellent article on the subject. See Forde-Mazrui, *supra* note 14 (providing a comprehensive articulation of the corrective justice case for slavery reparations and a defense against the leading

argument is that assigning blame for American slavery to any currently living person is problematic, maybe impossible. The actual human perpetrators of slavery have been dead for over a hundred years. Thus, if culpability were to be ascribed to anyone still in existence, it would have to be to an institution, and a long-lived one at that, such as a corporation or a government entity. For example, slavery reparations proponents sometimes argue for assigning some of the responsibility for slavery to the U.S. government, since slavery was, prior to the Civil War and the adoption of the Thirteenth Amendment, entirely consistent with U.S. law.

This argument for U.S.-funded reparations, however, is famously flawed. For one thing, it fails to account for the U.S. government's role in ending slavery and the enormous price paid – in terms of resources and lives – to bring the institution of slavery to an end. In the case of the Holocaust-survivor reparations program, by contrast, although the German government voluntarily began making payments in the 1950s, a force outside of the German government – namely, the Allies – had to intervene to end the holocaust. Thus, the price the German government paid in terms of lives and resources prior to the end of the war was incurred in an effort to *continue* rather than to *end* the injustice. Moreover, so much time has passed since the Civil War and so many changes have taken place, it is difficult to conceive of the current U.S. government as being the same as the pre-Civil-War version of the same government. Although it is not a *decisive* argument that none of the participants in the current federal government (and no currently living taxpayers for that matter) are in any sense to blame for slavery,⁵⁸ it is still relevant. Whenever a country is asked to pay reparations out of current tax dollars for a harm caused many years in the past, even if payments are made only to living victims, there is some degree of slippage between the payees and the wrongdoers. In this respect, of course, there is a significant difference between the slavery case and the other cases in which reparations payments have been allowed: much more water has flowed under the bridge in the slavery case than in any of other reparations case in which payments were actually made; thus, there has been a greater change in the constituency of the alleged wrongdoing country in this case. Indeed, there has been complete turnover many times over.

Another problem with holding the U.S. government responsible for slavery is that, if corrective justice is truly the aim, the U.S. government and by extension the U.S. taxpayers are the wrong targets. A slavery reparations program designed to achieve corrective justice should be much more narrowly tailored. For example, imagine a regime of special taxes to be imposed on the

critiques). Ultimately, as this article suggests, I have not been persuaded by the corrective justice justification for slavery reparations.

⁵⁸ After all, such an argument did not stop Congress from compensating the Japanese American internees even though all of the members of Congress and the citizens from that period were either dead or very old.

descendants of slave owners and slave traders. Alternatively, if such a tax were considered impractical, because of the difficulty of identifying who is descended from slave owners, perhaps a special tax on families whose ancestors lived in the south during the slavery period would be close enough. Or, to make things even simpler (albeit less accurate), a special tax could be imposed on whites living in the south today, or maybe on the state governments that were members of the Confederacy and their current taxpayers. All of these alternative proposals would at least represent an attempt to assign blame roughly to those individuals – or, more accurately, to the descendants of those individuals – who were responsible for, or directly benefited from, the slave trade. It is true that northern states (and the nation as a whole) profited financially from the institution of slavery.⁵⁹ However, if the object of corrective justice is to assign relative blame, and if we are going to take the whole notion of ancestry seriously, it is difficult to see how descendants of slave owners or of the southern aristocracy should not be expected to endure an extra measure of pain. Thus, the alternatives mentioned sound a lot more like corrective justice than does a program of taxing all whites to pay all blacks.

What is interesting is that none of these ideas – neither a special tax on southerners nor one on descendants of slave owners, nor one on southern states – has been seriously proposed by any recent advocate of slavery reparations.⁶⁰ That fact can perhaps best be explained in terms of politics. To argue that the costs of slavery reparations should be borne entirely or primarily by a discrete, identifiable group – one probably capable of effective political action – would doom the proposal from the start. But the whole idea of slavery reparations seems a political non-starter, and yet it has received considerable attention of late. Thus, it seems unlikely that political constraints are what have stopped people from even suggesting a special tax be imposed on the descendants of slave owners or on southern states. A more likely explanation, and one that supports a primary thesis of this Article, is that slavery reparations proponents really want something other than to assign specific blame for the particular injustices associated with slavery. They want to reduce overall racial inequality.⁶¹

A second category of objections to slavery reparations *qua* corrective justice involves the payee side. Recall that in both the Japanese American and the Holocaust-survivor cases, the intended beneficiaries were living victims of the actual injustice. Such a statement could not be made about slavery reparations, or even about Jim Crow reparations (unless the benefits were limited to a very

⁵⁹ See Derrick Bell, *The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 5 n.2 (1985).

⁶⁰ One exception to this statement would be the proposal by one radical reparations group that five southern states be given to blacks for the purpose of forming a separate black nation. See Conley, *supra* note 9, at 119.

⁶¹ See *infra* Part II (discussing more fully the goal of reducing racial and social inequality).

small fraction of the living African American population). The difficulty is that, when we move beyond the generation that was actually injured by the wrongdoers to later generations who were allegedly harmed, and only indirectly so, we encounter certain conceptual problems, such as the issue that some slavery descendants might not have been born but for the institution of slavery.

More importantly, we encounter certain problems of proof. For example, an important initial question would be whether reparations claimants would be required to show that they are worse off than they would have been had slavery never occurred. Would they have to show that, absent slavery, they would have been born citizens of some African country and therefore would have been better off? Or would they have to show, alternatively, that they would still have been born U.S. citizens, because their ancestors would have emigrated here as free people, and they would have been better off for that reason? Whatever the method of calculating damages, the computations – and the proof of the underlying facts – would be extremely difficult. Indeed, this problem is precisely why the payments in the Holocaust-survivor and Japanese American reparations programs were limited to the actual victims of those injustices.⁶² Moreover, these same concerns explain why tort law – our paradigmatic example of corrective justice – generally does not acknowledge intergenerational injuries.⁶³ Thus, under a corrective justice approach, payments must be limited to descendants of slaves, leading to the impossible task of determining who is a slavery descendant, what to do with individuals of mixed-raced ancestry, and how to handle the situation in which a claimant's family tree includes both slaves and slave owners.⁶⁴

Given all of these obstacles to achieving true corrective justice through slavery reparations, how are we to understand and evaluate the recent slavery reparations lawsuits and their attempts to assign blame to (and seek damages from) particular corporations that have historical ties to the institution of slavery? Such lawsuits, which are both a product of and a cause of the recent resurgence of interest in slavery reparations generally, seem to be fashioned on the products liability, class action, toxic-tort analogy discussed above. The interesting question is whether such reparations suits can possibly achieve anything that resembles corrective justice. Or, alternatively, if some form of distributive justice is the goal, can such redistributive lawsuits avoid the problems that typically undermine redistributive legal rules? I will discuss the second question in Part II below.

⁶² See Posner & Vermeule, *supra* note 18, at 691-92 (observing differences between reparations for Japanese-American internees and Holocaust-survivors as opposed to reparations for African Americans).

⁶³ See *supra* text accompanying notes 49-51.

⁶⁴ There is, of course, an analogous problem of dealing with individuals of mixed-race ancestry in a program of racial redistribution that is justified on distributive justice rather than corrective justice grounds. See *infra* Part II.

As to the first question, the problem is not so much that lawsuits are the wrong way to go about achieving corrective justice (generally they are a good way to achieve corrective justice); the problem is that, for the reasons already mentioned having to do with the passage of time, achieving corrective justice in the case of slavery at this late date just is not plausible. One can, in theory, imagine some exceptional cases. For example, if a particular individual hypothetically could prove that his ancestor was forced to provide slave labor to a particular corporation, which corporation still exists today, a case for recovery based on corrective justice could be made, ignoring statutes of limitations for the moment. But in the real world, problems of proof – and the practical inability to link payer, payee, wrongdoing, and harm – make such a hypothetical fanciful in the extreme.⁶⁵ Moreover, and this is the most important point, even if we decide that making a particular group of corporations pay something for their historic involvement in slavery (and we thus waive the statute of limitations in this case), and we decide to make those funds available to individuals who can somehow prove that one or more of their ancestors were slaves, the resulting reparations program would not much resemble the sort of broad-based redistributive transfers from whites to blacks that most reparations proponents have called for and that would respond to the broad-based racial inequality that seems to be a major motivating factor underlying the reparations movement.

E. Summary

In sum, although corrective justice provides a powerful and intuitive rationale for reparative recovery in certain private law settings, there are limits to the applicability of the corrective-justice idea, and those limits are reached in the slavery reparations setting. For the reasons summarized above, corrective justice does not provide a persuasive justification for broad-based redistributive transfers from white taxpayers to black taxpayers. Moreover, if we take seriously the corrective justice idea and apply it straightforwardly to the slavery-reparations question, and assuming we could overcome the problems of proof discussed above, we would likely arrive at a program that would be fairly narrow in scope and that would not respond to the issue that seems to be at the heart of many slavery reparations proposals: the problem of racial inequality.

II. SLAVERY REPARATIONS AS DISTRIBUTIVE JUSTICE

In the complaint filed in the federal class-action slavery reparations lawsuit, *In re African-Americans Slave Descendants Litigation*,⁶⁶ the plaintiffs included the following grim statistics:

⁶⁵ And this conclusion is entirely consistent with toxic tort jurisprudence, and tort law generally, which, as far as I know, has never allowed any claim this “old” to be successfully brought.

⁶⁶ 304 F. Supp. 2d 1027 (N.D. Ill. 2004).

[A] 1998 census report shows that 26 percent of African American people in the United States live in poverty compared to 8 percent of whites. It also showed that 14.7 percent of African Americans have four-year college degrees, compared with 25 percent of whites. The same year, African American infant-mortality rates were more than twice as high as those among whites. Federal figures also show that a Black person born in 1996 can expect to live, on average, 6.6 fewer years than a white person born the same year.

African-Americans are more likely to go to jail, to be there longer, and if their crime is eligible, to receive the death penalty. They lag behind whites according to every social yardstick: literacy, life expectancy, income and education. They are more likely to be murdered and less likely to have a father at home.⁶⁷

These data only begin to tell the story of the persistent and substantial inequality between blacks and whites in the United States. In this Part, I argue that there is a fairly intuitive and basic normative argument that such inequalities ought to be reduced. And just as various normative arguments for rectifying wrongful harms have been grouped under the label corrective justice, the idea of reducing societal inequality of one form or another – including racial inequality – has traditionally been called distributive justice. This Part explains what I mean by the term distributive justice, it discusses how racial inequality fits within that understanding, and it suggests briefly how redistributive policy might (and to some extent already does) usefully respond to the problem of racial inequality.

A. *Defining Distributive Justice*

As mentioned in the previous Part, distributive justice is, in the most general terms, the idea that scarce societal benefits and burdens ought to be distributed fairly across the members of society. Put that way, of course, everyone is in favor of distributive justice. Disagreements arise over what is a “fair” distribution of society’s resources. For some people, any allocation of resources produced by voluntary exchange within a market economy would be considered distributively just.⁶⁸ Under such a libertarian vision of society, there is no persuasive justification for government-compelled redistributive transfers from the rich to the poor. Thus, a libertarian, for example, would oppose a progressive income tax system as well as many other aspects of the U.S. social safety net, such as the various forms of social insurance. Indeed, the only legitimate purpose of taxation for libertarians is to finance a minimal government whose only function would be to enforce property rights and

⁶⁷ See Complaint and Jury Trial Demand, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, *supra* note 15, at ¶ 18-19.

⁶⁸ This is one plausible interpretation of Nozick’s position, for example. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 224-27 (1974).

generally keep the peace – and perhaps to provide other classic public goods. That sort of libertarian vision, however, is not what most political philosophers have in mind when they speak of distributive justice. At least since the publication of John Rawls's influential book *A Theory of Justice* in 1971, the dominant approach among distributive justice theorists has been to pursue one version or another of egalitarianism.⁶⁹ Thus, when I use the term distributive justice, I will mean egalitarian distributive justice. Although there are many different conceptions of egalitarianism, I will not try to review them all here; rather, I will discuss only a few of the key elements common to most of the theories.

Egalitarian distributive justice describes a collection of normative theories that are deployed to justify not only reducing societal inequality but using the state's coercive power to do so – through taxes and transfers, for example.⁷⁰ Egalitarians, however, do not object to all inequality and thus do not regard all inequality as grounds for government intervention. To the contrary, under most theories of distributive justice, some inequality is desirable, some is inevitable, and some is just trivial. The point of mainstream egalitarian distributive justice, rather, is merely to shift the burden of proof. For egalitarians, in other words, it is inequality rather than redistribution that requires a justification; and if a particular inequality cannot be justified, a presumptive conclusion is that the state's power to tax and transfer resources will be used to reduce or eliminate it.

One of the most famous formulations of egalitarian distributive justice is Rawls's "difference principle," which holds that inequality with respect to "primary social goods" – a category that includes income and wealth, opportunities and powers, rights and liberties, but that excludes natural talent and health, for example⁷¹ – is permissible only to the extent that it enhances the well-being of the least well off in society. Any inequality of primary social goods that does not satisfy this difference principle should be, in Rawls's view, eliminated through government redistributive policy. Inequalities with respect to natural goods, however, are not legitimate targets of redistributive policy, according to Rawls. Probably most egalitarian theorists, and certainly most U.S. voters, would regard the difference principle as too extreme, as giving too much weight to the welfare of the least well off. Moreover, the dominant view among egalitarian philosophers today is that "natural" inequalities, those

⁶⁹ See generally RAWLS, *supra* note 35.

⁷⁰ See generally RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 65-92 (2000) (discussing the idea of a tax system aimed at determining what proportion of an individual's income is attributable to differential talents as opposed to differential ambitions).

⁷¹ RAWLS, *supra* note 35, at 54. Rawls, thus, does not see inequality with respect to natural ability or health – which are types of "natural primary natural" in his terminology – as legitimate targets for government redistribution. *Id.* Rawls has been criticized for making this distinction by subsequent egalitarian philosophers, including the luck egalitarians described in the text immediately below.

resulting in some sense from nature (such as differences in natural talent and in health), should also be considered potentially legitimate targets for redistributive policy.⁷² Indeed, this is the view of what some consider the dominant version of egalitarian distributive justice among egalitarian theorists today, so-called “luck egalitarianism” or “equality of fortune.” Luck egalitarianism holds that inequality of either social primary goods or natural goods (to use Rawls’s terminology) is desirable if, but only if, such inequality is the product of informed, voluntary choices.⁷³ Thus, inequality that is *not* the product of informed, voluntary choices – or, in Ronald Dworkin’s terms, inequality that is the product of pure “brute luck”⁷⁴ – is considered arbitrary, underserved, and hence a valid target for redistributive policy.

The intuitive appeal of this luck/choice distinction is captured in the following quote from philosopher Will Kymlicka:

It is unjust if people are disadvantaged by inequalities in their circumstances, but it is equally unjust for me to demand that someone else pay for the costs of my choices. In more technical language, a distributive scheme should be “endowment-insensitive” and “ambition-sensitive.” People’s fate should depend on their ambitions (in the broad sense of goals and projects about life), but should not depend on their natural and social endowments (the circumstances in which they pursue their ambitions.)⁷⁵

Under luck egalitarianism, then, if one person acquires a fortune solely by dint of her ambition, hard work, and wise business decisions, she should be allowed to keep it. You eat what you kill, as the saying goes. By the same token, if another individual knowingly chooses a path of poverty – opting, for example, to quit her high-paying job to become a homeless surfer – that person should not receive redistributive transfers. You made your own bed, now you lie in it, would be the analogous saying. Thus, under luck egalitarianism, the inequality of resources between a diligent worker and an indolent surfer would be not only permissible but desirable, given the differences in their choices. When there are differences in ambition and willingness to work, there ought to be differences in well-being. Luck egalitarianism, however, would support the use of state power to require or encourage a redistributive transfer for any inequality attributable to the accidents of birth, or to any circumstance that is beyond human control. This is what is meant by “endowment-insensitive”: A person’s lot in life should not depend on – should be *insensitive to* – her endowment or inheritance. A version of this intuition has long served to justify the existence in the U.S. and in other countries of a steeply progressive

⁷² See DWORKIN, *supra* note 70, at 91-92.

⁷³ See RAWLS, *supra* note 35, at 60-65.

⁷⁴ See DWORKIN, *supra* note 70, at 73-78.

⁷⁵ WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 75 (1990) (quoting Ronald Dworkin, *What is Equality? Part II: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 311 (1981).

inheritance tax, as taxes on inheritance can be seen as an effort to tax pure luck or endowment-based transfers.

Luck egalitarianism has obvious intuitive appeal. While it calls for eliminating arbitrary inequalities, such as those created and perpetuated by inheritance, it also incorporates the concepts of free will and personal responsibility that many philosophers, and most people, find attractive. Luck egalitarianism, however, also is vulnerable to a number of criticisms. First, and perhaps most obvious, there is the libertarian critique mentioned above. For a libertarian, any egalitarian theory of distributive justice is unacceptable, as societal inequality – whether the result of pure luck or pure choice – is part of the natural order of things. Thus, for a libertarian, slavery reparations can be justified in terms of corrective justice or not at all.⁷⁶

Second, there is a determinist critique of luck egalitarianism, or, more accurately, a determinist critique of the luck-choice distinction. Causal determinism holds that all human actions are the product of prior causes and that therefore no particular human action can be attributed to an individual's free choice.⁷⁷ According to such a view, even ambition, good judgment, and industriousness, as well as their opposites, are the result of prior causes, a combination of genetic inheritance and environmental stimuli. If the determinist position is taken to its most extreme conclusion, the distinction between luck and choice disappears entirely. But so does the idea of free will and personal responsibility, and few theorists, and fewer people generally seem prepared to accept that position. Moreover, even if one is sympathetic to causal determinism, at least as applied to questions of distributive justice, and thus is unwilling to "blame" poverty on the poor, it would *not* necessarily

⁷⁶ Nozick, for example, explicitly addresses the idea of rectifying past wrongs, but he is unclear with respect to how far back the principle should reach and how specifically it should be applied. NOZICK, *supra* note 68, at 230-31. It is possible to offer a corrective-justice type argument in favor of some forms of slavery reparations, but such an approach, if taken seriously, would seem to suggest a program significantly narrower than a regime of broad-based redistribution from all whites to all blacks. *See supra* Part I.

⁷⁷ Causal determinism is the thesis that all laws of nature are deterministic laws, in the sense that they are compatible with only one future. *See generally* AGENCY AND RESPONSIBILITY: ESSAYS ON THE METAPHYSICS OF FREEDOM (Laura Waddell Ekstrom ed., 2000); John Martin Fischer & Mark Ravizza, *Introduction to PERSPECTIVES ON MORAL RESPONSIBILITY* 8-9 (John Martin Fischer & Mark Ravizza eds., 1993). Incompatibilists believe that causal determinism and free will are logically inconsistent. Hard determinists are incompatibilists who believe that determinism is true and therefore free will is not possible. *See, e.g.,* PETER VAN INWAGEN, AN ESSAY ON FREE WILL 19-22 (1983) (arguing that determinism is incompatible with free will). It is this sort of hard determinist critique of luck egalitarianism that I am responding to in the text. By contrast, compatibilists, or those who believe that determinism and free will are potentially consistent, should have no problem with the luck/choice distinction drawn by luck egalitarians. And of course, incompatibilists who are not determinists – or who believe that determinism is just false – should also be open to the luck-choice distinction.

imply that one would be opposed to the idea of egalitarian distributive justice. To the contrary, if all inequality is the result of arbitrary circumstances beyond human control, the case for some type of redistributive program becomes even stronger. However, because I suspect that most voters and taxpayers, and a fair percentage of political theorists (and conservative critics of slavery reparations), regard the luck-choice distinction as normatively meaningful and important, I will continue to use it in the analysis that follows.

B. *Luck Egalitarianism in the Real World*

A related but more practical critique of luck egalitarianism derives from the fact that every important example of inequality in the real world will likely be the result of a combination of luck and choice. Many rich people, for example, amass their fortunes through a combination of hard work, smart choices, and pure good luck, and many poor people are poor because of a combination of bad luck and bad choices. That fact presents a problem for any real-world redistributive policy that seeks to make the luck-choice distinction. What, then, is a luck-egalitarian redistributive policymaker to do? The answer is either to do nothing (abandon any effort to reduce inequality) or to do something (attempt to reduce inequality) knowing that there will be some degree of inaccuracy and imperfection in the process – that some who deserve to receive transfers will not receive them or will receive less than they deserve, and some who ought to pay high taxes will get off easy, and so on. Given the choices that have been made in this country, the do-nothing option seems out of the question. That is to say, the U.S. government does in fact engage in a fair amount of redistribution, although only in an imperfect and imprecise way, and U.S. voters and taxpayers generally seem to approve.

Consider the example of the U.S. federal tax-and-transfer system, which overall has a significant redistributive or “progressive” element. A progressive tax system is one in which average tax rates rise as income rises,⁷⁸ and average federal tax rates in the U.S. are uniformly progressive and have been so for many years.⁷⁹ Thus, for example, the lowest-quintile earners in 2001 paid 5.4 percent and the highest-quintile earners paid 26.8 percent of their income in

⁷⁸ HARVEY S. ROSEN, PUBLIC FINANCE 256 (6th ed. 2002) (defining a progressive taxation regime).

⁷⁹ CONGRESSIONAL BUDGET OFFICE, EFFECTIVE FEDERAL TAX RATES: 1979-2001, at tbl.1A (2004), available at www.cbo.gov/Pubs.cfm (last accessed Sept. 8, 2004). The top 1 percent in 2001, the very highest earning individuals, paid 33 percent. *Id.* (listing effective federal tax rates for the top one percent of earners). Studies of effective tax rates by the U.S. Treasury Department use a different definition of income than those conducted by the CBO and therefore tend to show a slightly smaller degree of progressivity. *See generally* JOEL SLEMMOD & JON BAKIJA, TAXING OURSELVES: A CITIZEN’S GUIDE TO THE GREAT DEBATE OVER TAX REFORM 71-72 (2d ed. 2000) (discussing differences in the CBO’s and the Treasury Department’s assumptions assessing the incidence of federal taxes).

federal taxes.⁸⁰ Moreover, there is good reason to believe that the expenditure side of the federal budget also is at least moderately progressive, thereby increasing the overall progressivity – or redistributive nature – of the federal tax-and-transfer system.⁸¹ Of the total expenditures by the federal government, a sizeable percentage goes to so-called entitlements or mandatory (nondiscretionary) spending programs, and those programs tend to be weighted heavily in favor of lower-income individuals.⁸²

For example, Social Security benefits, which constitute the single largest item of nondiscretionary federal spending,⁸³ are structured explicitly to be progressive, although the story is complicated by the fact that some of the redistribution is from husbands to wives (or, more generally, from workers to non-working spouses of workers). Medicare payments also exhibit a significant redistributive component, as does Medicaid.⁸⁴ If federal spending programs, overall, tend to be even mildly progressive, combined with the undisputed (albeit modest) progressivity of the federal tax system, then it would be hard to deny that the federal tax-and-transfer regime overall is indeed substantially progressive – or redistributive from the better off to the less well off – although much inequality obviously remains.

The other real-world response to the problem of mixed luck-choice inequality is to design the redistributive program in a way that makes distinctions between the effects of luck and the effects of choice. This approach too can be seen in some parts of the U.S. income tax system. To take one example, under the Internal Revenue Code, an individual taxpayer in arriving at taxable income is entitled to deduct extraordinary uninsured medical expenses;⁸⁵ however, the medical expense deduction is denied for

⁸⁰ See CONGRESSIONAL BUDGET OFFICE, *supra* note 79, at tbl.1A (listing effective federal tax rates by income quintile). Moreover, average federal tax rates have been consistently progressive throughout the 1980s and 90s, despite numerous changes in the tax laws during that period. The smallest degree of progressivity, or redistribution within the federal tax system, existed during the Reagan years, when the effective rate for the top 1 percent dropped to a low of 25.5 percent (in 1986) and the rate for the bottom quintile rose to a high of 10.2 percent (in 1984). *Id.*

⁸¹ Gene Steuerle, *The Progressivity of Taxes and Expenditures*, 75 TAX NOTES 835, 835-36 (1997) (noting that in all modern industrial economies, the combined tax and expenditure structure is inevitably progressive).

⁸² See *id.*

⁸³ See CONGRESSIONAL BUDGET OFFICE, THE LONG-TERM BUDGET OUTLOOK 1-2, 19 (2003), available at <http://www.cbo.gov/Pubs.cfm> (last accessed Sept. 14, 2004) (observing that social security is the federal government's largest income-redistribution program and noting that in 2003, government spending on social security composed 4.2% of GDP, while government spending on Medicare composed 3.9%).

⁸⁴ DANIEL SHAVIRO, WHO SHOULD PAY FOR MEDICARE? 33-39 (2004) (discussing the distributional effects of the current Medicare regime).

⁸⁵ I.R.C. § 213(a) (2000) (allowing for the deduction of uninsured medical expenses during a taxable year, so long as said expenses exceed 7.5 of adjusted gross income).

medical procedures that are merely cosmetic, defined as “any procedure which is directed at improving the patient’s appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.”⁸⁶ The theory obviously is that such cosmetic expenses are purely matters of consumption choice and not of necessity. As support for this conclusion, note that cosmetic surgery, as defined by the Code, does not include any surgery or procedure “necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease.”⁸⁷ Thus, surgery to repair a birth defect or to undo the effects of an accident is deductible, but surgery merely to improve one’s appearance is not.

Along the same lines, a taxpayer can deduct the cost of unexpected and uninsured damage to her home if that damage exceeds a certain threshold amount, but the deduction is disallowed if the damage was caused intentionally or even recklessly by the taxpayer.⁸⁸ And the reasoning is the same: If a taxpayer intentionally or recklessly destroys her house, her reduction in well-being is primarily a matter of personal choice rather than happenstance; thus, the tax system allows her to deduct such losses in calculating her taxable income. Despite these and other examples of the tax system’s attempt to fine-tune the measure of relative well-being and to draw some luck-choice distinctions, much inaccuracy remains. Such inaccuracy, again, is one of the reasons that partial equalization is the only plausible aim of any real-world redistributive program.

C. *Luck Egalitarianism and Racial Inequality*

To recap, luck egalitarianism provides an intuitive rationale for establishing government programs designed to eliminate pure luck-based inequality. However, because most inequality in the world is the result of a combination of luck and choice, all real-world redistributive programs should – and in fact do – attempt only partial equalization. Therefore, under real-world redistributive programs, inequality is reduced but not eliminated. Moreover, real-world redistribution inevitably involves some degree of imprecision or inaccuracy. That is the nature of the beast. How does all of this apply to slavery reparations? Again, given the nature of the remedies sought by most reparations proponents, the primary motivating factor underlying the slavery reparations movement seems to be substantial and persistent inequality between blacks and whites. As the quote from the slavery reparations suit suggests, blacks as a group lag behind whites in every meaningful measure of social and economic well-being: income, wealth, housing, education, employment, health, life expectancy, and even subjective assessments of

⁸⁶ *Id.* § 213(d)(9)(B) (defining cosmetic surgery).

⁸⁷ *Id.* § 213(d)(9)(A).

⁸⁸ *See id.* § 165 (describing deductible losses).

individual happiness.⁸⁹ Consider some of the most recent evidence of these inequalities.

With respect to income, the median household income for blacks in 2002 was approximately \$29,000; the median income for whites was around \$47,000.⁹⁰ This means that blacks in that year earned approximately \$0.62 for every \$1.00 whites earned, a ratio that has remained unchanged for many years.⁹¹ In addition, according to the most recent U.S. Census report, roughly twenty-four percent of blacks, but only eight percent of whites, fell below the poverty line.⁹² This disparity was even greater with respect to children: whereas around nine percent of white children lived in poverty in 2002, around thirty-two percent of black children did.⁹³ Perhaps the most important indicator of inequality between blacks and whites is the difference in household wealth.⁹⁴ According to a study that used 1994 data, the median net worth of black households was around \$9,771; whereas the median net worth for white households was roughly \$72,000. This means that the average white household had *more than six times as much wealth* as the average black

⁸⁹ See *supra* note 67 and accompanying text; see also THE COUNCIL OF ECONOMIC ADVISERS (FOR THE PRESIDENT'S INITIATIVE ON RACE), CHANGING AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING BY RACE AND HISPANIC ORIGIN 2 (1998) [hereinafter CHANGING AMERICA] (noting that race is a statistical predictor of well-being in American society and observing racial disadvantages Blacks, Hispanics, and American Indians suffer vis-à-vis Whites and Asians in terms of health, education, and economic status). This report compiles data from a number of sources, including, but not limited to, data from the 1990 Census and more recent Census surveys.

⁹⁰ U.S. CENSUS BUREAU, MONEY INCOME IN THE UNITED STATES: 2002, at 3 tbl.1 (2003), <http://www.census.gov/prod/2003pubs/p60-221.pdf> (last accessed Sept. 7, 2004).

⁹¹ U.S. CENSUS BUREAU, MONEY INCOME IN THE UNITED STATES: 2001, at 5 fig.1 (2002), <http://www.census.gov/prod/2002pubs/p60-218.pdf> (last accessed Sept. 7, 2004). The disparity in the mean household incomes is just as stark: Whites (\$60,116); Blacks (\$40,011). U.S. CENSUS BUREAU, MONEY INCOME IN THE UNITED STATES: 2002, *supra* note 90, at 17-19 tbl.A-1 (listing mean household income for whites and blacks in 2002). The size of the income gap between blacks and whites has remained fairly stable since at least 1967. U.S. CENSUS BUREAU, MONEY INCOME IN THE UNITED STATES: 2001, *supra*, at 5 fig.1 (2002).

⁹² U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 2002, at 2 tbl.1 (2003), <http://www.census.gov/prod/2003pubs/p60-222.pdf> (last accessed Sept. 7, 2004) (presenting 2002 data and listing the percentage of Americans living below the poverty line by race). The official measure of poverty is based on various income thresholds for households of various sizes and types. Thus, for example, a household of four, with two adults and two children, would be considered below the poverty threshold if the total household money income (before taxes and excluding capital gains and noncash benefits) fell below \$18,244 in 2002. *Id.* at 4.

⁹³ *Id.* at 29-30 tbl.A-2 (listing poverty status by age and race).

⁹⁴ "Net worth" is defined here to include the excess of value of all assets, including owner-occupied housing and financial assets, over total household liabilities.

household.⁹⁵ According to a different study, which used 1999 data, the racial wealth gap was even larger: with the median white household having \$81,000 in net worth and the median black household having \$8,000: a *ten-to-one wealth differential*.⁹⁶

The substantial and persistent inequalities between blacks and whites are not limited to income and wealth. Disparities can be found with respect to virtually every important measure of well-being. With respect to housing, for example, a much higher percentage of blacks than whites have high housing-cost burdens,⁹⁷ live in housing units with serious or moderate physical problems,⁹⁸ live in crowded circumstances,⁹⁹ and report problems in their neighborhood ranging from crime to litter to poor public services.¹⁰⁰

With respect to education, black children drop out of high school at a much greater rate than do white children: seventeen percent compared to eleven percent.¹⁰¹ Fewer blacks have a high school degree or its equivalent than do

⁹⁵ DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 26-27, app. tbl.A2.1 (1999). In addition, whereas almost ten percent of white households had a negative net worth (liabilities in excess of assets), over thirty percent of black households do. *Id.* For the lowest income groups (annual incomes below \$15,001), twenty-three percent of white families were in the red compared with fifty percent of blacks. *Id.* Although some of the racial wealth gap is attributable to differences in homeownership rates – fewer than fifty percent of black families own their own home compared with more than seventy percent of whites. CHANGING AMERICA, *supra* note 89, at 62. However, home ownership rates do not explain the entire wealth gap. To the contrary, the disparity in financial assets (which are assets other than home equity or other consumer durables) is ever greater. Thus, excluding home-equity from consideration, the median wealth for white households in 1994 was \$29,000, compared to \$2,000 for blacks – a ratio of almost fifteen to one. CONLEY, *supra*, at app. tbl.A2.2.

⁹⁶ THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 47 (2004) (observing that according to 1999 data, black families possess ten cents for every dollar of wealth held by white families).

⁹⁷ CHANGING AMERICA, *supra* note 89, at 63 (charting the percentage of households, by race, with high housing-cost burdens). High housing-cost burdens are defined as paying thirty percent or more of household income on housing.

⁹⁸ *Id.* at 64 (“Severe physical problems include lack of indoor plumbing, inadequate heating, electrical problems, and other serious upkeep problems. Moderate physical problems include problems with heating or plumbing or the lack of a kitchen sink, refrigerator, or stove burners.”).

⁹⁹ *Id.* at 65 (defining a house as crowded if it has more than one person per room. Rooms used for living space are counted, including bedrooms, living rooms, and kitchens, but bathrooms are excluded.).

¹⁰⁰ *Id.* at 66 (comparing reported neighborhood problems by race).

¹⁰¹ POSTSECONDARY EDUCATION OPPORTUNITY, DROPOUT RATES BY RACE/ETHNICITY AND GENDER 1974 TO 2002, at <http://www.postsecondary.org/archives/Reports/Spreadsheets/EntranceRate.htm> (last accessed Sept. 8, 2004) (presenting 2002 data regarding high school dropout rates by sex and race).

whites: eighty-seven percent compared to ninety-three percent.¹⁰² Fewer blacks have at least four years of college: fourteen percent compared to thirty-three percent of whites.¹⁰³ The employment picture is not much better. The black unemployment rate is twice that of whites, a ratio that has persisted for more than twenty years.¹⁰⁴ A black worker on average receives \$0.74 of wages for every \$1.00 a white worker receives for a given hour of labor;¹⁰⁵ and, not unrelated, a relatively low percentage of blacks are found in the higher-skilled and higher-status professions such as law and medicine.¹⁰⁶

Some of the worst racial inequalities are in the health area. Infant mortality among black babies is more than double that of white babies.¹⁰⁷ Blacks fare far worse than whites in terms of the number of years with a “chronically impair[ing]” health condition.¹⁰⁸ Moreover, with respect to two of the biggest killer diseases – heart disease and cancer – blacks are substantially worse off than whites, with black men at eighty-five percent greater risk of heart disease and seventy percent greater risk of cancer than white men, while black women suffer a one hundred fifty percent greater risk of heart disease and thirty-four percent greater risk of cancer than white women.¹⁰⁹ One of the most striking statistics is that blacks face almost nine times the risk of death by homicide that whites face.¹¹⁰ Given the various disparities in risk of death, both from disease and crime, it comes as no surprise that the overall life expectancy at birth of an African American is roughly seven years shorter than that of a white person.¹¹¹

¹⁰² CHANGING AMERICA, *supra* note 89, at 21 (using 1998 data to compare high school completion rates for 25-29 year old whites and blacks with at least a four year college degree).

¹⁰³ *Id.* at 22 (comparing white and black unemployment rates between 1954 and 1997 and stating that the black unemployment rate has been twice that of whites for more than twenty years).

¹⁰⁴ *Id.* at 26. In 2003, the unemployment rate for whites hovered around five percent, whereas the rate for blacks was between ten and eleven percent. U.S. BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, *at* <http://www.bls.gov/webapps/legacy/cpsatab2.htm> (last accessed Sept. 8, 2004).

¹⁰⁵ CHANGING AMERICA, *supra* note 89, at 30 (using 1997 data to chart black wages as a percentage of white wages).

¹⁰⁶ *Id.* at 32 (graphing the professions of employed persons by race and gender).

¹⁰⁷ *Id.* at 43 (comparing infant mortality rates by race from 1983 to 1995).

¹⁰⁸ Mark D. Hayward et al., *The Significance of Socioeconomic Status in Explaining the Racial Gap in Chronic Health Conditions*, 65 AM. SOC. REV. 910, 911 (reviewing recent empirical research on the racial health gap and stating the importance of understanding the relationship between race and incidence of chronic illness).

¹⁰⁹ CHANGING AMERICA, *supra* note 89, at 48 (comparing death rates caused by heart disease and cancer by sex and race for persons aged forty-five to sixty-five).

¹¹⁰ *Id.* at 47, 53 (charting death rates by cause and race for persons aged fifteen to thirty-four in 1994 and 1995 and showing victims of homicide, by race, from 1950 to 1995).

¹¹¹ *Id.* at 44 (comparing life expectancy at birth among black men and women and white

Given this strong correlation between racial status and relative well-being, the egalitarian argument for a substantial program of redistribution along racial lines – in particular, from whites to blacks – is obvious and, in a sense, uncontroversial. Whites are significantly better off on average than blacks in almost every way. Moreover, the types of inequalities that exist between blacks and whites in the U.S. – differences in wealth, income, education, employment, health, housing, and personal safety – are inequalities that lie at the core of virtually every theory of egalitarian distributive justice. In other words, if egalitarian distributive justice is about anything, it is about reducing precisely these sorts of inequalities. As such, there is a *prima facie* egalitarian case for some level of redistribution. Given the discussion of the luck-choice distinction above, however, the next obvious question is whether any or all of these inequalities can properly be attributed to differences in voluntary, informed choices.

If whites on average have higher incomes, more wealth, better educations, and better health only because they work harder, study more, and take better care of themselves, then racial redistribution would make little sense, at least not on luck-egalitarian grounds. Thus, the question arises as to how much of the racial gap in well-being is due to luck and how much is due to choice? I do not pretend to be able to answer this question. Still, it seems almost beyond debate that much of the inequality that currently exists between blacks and whites is attributable in some way to a version of bad brute luck. A full defense of this assertion is beyond the scope of this article, but here are a few tentative thoughts. First, much of the inequality between blacks and whites involves children. Black children, for example, are more likely to die as infants, more likely to be born into poverty, more likely to be uninsured, more likely to be abused or neglected, and more likely to drop out of school than white children, to name just a few of the inequalities.¹¹² Obviously, black children are not to blame for these problems, and to the extent blacks suffer as adults because of such inequalities experienced as children, they too cannot be considered fully responsible for the result.

Second, it is unclear how systematic inequality between blacks and whites generally *could* be attributed to voluntary, informed choices. That is, even if we might attribute a particular individual's bad situation (e.g., poor education or low-wage job or bad neighborhood) largely to his own bad choices, what sort of story would explain why an entire race of people would tend to make voluntary and informed choices that leave them, on average, lagging behind their white counterparts? If some combination of slavery, Jim Crow, and

men and women).

¹¹² CHILDREN'S DEFENSE FUND, 40 YEARS OF PROGRESS AND PERIL: RACIAL INEQUALITIES SINCE THE CIVIL RIGHTS ACT OF 1964, at http://www.childrensdefense.org/data/40_years_of_progress_and_peril.pdf (last accessed Sept. 8, 2004) (comparing statistics related to white and black demographics, education, mortality, and poverty in 1964 and 2003).

current discrimination is not the explanation, then what is? It is not clear what other explanations are available that do not also suggest bad brute luck. There is the discredited (and, by definition, racist) genetic-inferiority story that not even conservatives make any longer. And there is the culture-of-poverty story, which is more fashionable today and which says that black culture is either inherently inferior or, in the alternative, was badly damaged by the ill-conceived liberal welfare policies of the Great Society. What is interesting is that even those two explanations – inferior genes or inferior (or damaged) culture – whether you find them plausible or repulsive, are stories of bad brute luck and not of individual moral failure. Therefore, if those were the explanations, they would in fact support, not undermine, the argument for redistributive transfers.

Finally, consider a different approach to understanding racial inequality, one that is based on a slight variation on the intergenerational-wealth-transfer argument suggested by Dalton Conley and which I mentioned in the introduction.¹¹³ As it turns out, there is considerable evidence that wealth strongly correlates with a number of the other important dimensions of well-being. For example, studies show that, if we control for differences in wealth between individuals and households of different races, many other well-being gaps between the races diminish.¹¹⁴ Thus, it seems that the huge disparities in household wealth between blacks and whites – as much as a ten to one disparity – may have a lot to do with, and may actually cause, the large differences in other measures of well-being between whites and blacks. But that conclusion begs the next question: What is the cause of the wealth gap? Is the problem that blacks simply do not save as much of their current income, and thus do not accumulate as much wealth during their lifetimes, as whites do? If so, the wealth gap, and the well-being gap more generally, might be considered primarily an issue of personal responsibility.

The available evidence, however, seems to suggest otherwise. In a recent book, for example, sociologist Thomas Shapiro, using the most comprehensive data-set yet applied to this question and using the latest economic theories in how wealth is accumulated, concluded that much of the net-worth gap between blacks and whites is almost certainly the result of multiple generations of inheritance.¹¹⁵ To summarize this last argument: (a) the black-white wealth

¹¹³ See *supra* notes 9-11 and accompanying text.

¹¹⁴ See CONLEY, *supra* note 95, at 61 (citing a study observing that living amongst a greater proportion of neighbors with incomes over \$30,000 positively affects a five-year-old's cognitive development and reduces the risk of dropping out of high school among adolescents); David Williams & Chiquita Collins, *US Socioeconomic and Racial Differences in Health: Patterns and Explanations*, 21 ANN. REV. SOC. 349, 363-65 (1995) (observing that adjusting racial disparities in health, violent deaths, and illegal drug use by socioeconomic status substantially reduces those disparities).

¹¹⁵ SHAPIRO, *supra* note 96, at 60-84. Inheritance here is defined broadly to include not only gifts of cash and property at death but also inter-vivos gifts from parents to their children in the form of college tuition or help with home down payments and the like.

gap is probably attributable mostly to differences in patterns of inheritance between black families and white families over the generations, a quintessential example of luck-based inequality; (b) that wealth gap explains much of the overall inequality between blacks and whites (given the importance of wealth on various other measures of well-being); therefore, (c) the overall black-white well-being gap is also largely an example of endowment-based, or luck-based, inequality. Note also that this argument does not take into account the possibility that some of the existing racial well-being gap may be the result of continuing racial discrimination against blacks, also an example of bad brute luck. That is, of the portion of the well-being gap not attributable to differences in inheritance, some fraction of that is probably attributable to ongoing discrimination.

For all of these reasons, it seems fair to assume that much of the differences in social and economic well-being between blacks and whites are attributable to luck or endowment, and not to individual choice or ambition, and is thus a legitimate target of redistributive policy. Even for those luck egalitarians who believe that racial inequality is a product of both luck and choice, the lesson to draw from other examples of real world redistribution – such as the income tax – is to engage in partial rather than complete equalization, but not to abandon the project of distributive justice entirely. Moreover, for egalitarians who are skeptical of the luck-choice distinction anyway, and certainly for Rawlsians (whose primary concern is inequality with respect to social primary goods), the extent of racial inequality that still exists in the United States has to be one of the most pressing domestic concerns of our time.

III. REDISTRIBUTING BY RACE

That persistent racial inequality is a distributive justice concern is not a surprising claim. Neither is the suggestion that there should be some measure of redistribution to reduce the race gap. Arguments based on theories of egalitarian distributive justice have long been used to justify various race-based preferences, such as affirmative-action programs in college and university admissions, as well as federal spending programs that are not explicitly targeted at blacks but that disproportionately benefit them, such as Head Start.¹¹⁶ Even the civil rights legislation of the 1960s could be defended on egalitarian grounds.¹¹⁷ What I want to emphasize in this Part is that race has certain properties that make it a particularly useful redistributive tool,

¹¹⁶ See, e.g., Colin S. Diver and Jane Maslow Cohen, *Genophobia: What is Wrong with Genetic Discrimination?*, 149 U. PA. L. REV. 1439, 1471 (2001) (discussing egalitarian distributive justice ethos in connection with genetic discrimination and emphasizing the fact that egalitarianism has been used to justify a range of policy responses, from prohibitions on discrimination to affirmative action).

¹¹⁷ See Michael W. Combs and Gwendolyn M. Combs, *Revisiting Brown v. Board of Education: A Cultural, Historical-Legal, and Political Perspective*, 47 HOW. L.J. 627, 651 (referring to the Civil Rights Act of 1964 as the triumph of egalitarianism).

properties that have been ignored in the slavery reparations debate (perhaps because the discussion has focused on the corrective justice perspective) and that have been lost in the larger debate over racial equality. As will be discussed more fully below, race also has some obvious properties that counsel against its use, or at least its explicit use, as a redistributive proxy. The properties that make race a surprisingly useful redistributive tool are as follows:

- (a) race correlates with well-being (the evidence for which I summarized above);
- (b) race is relatively immutable (at least for those whose physical characteristics make it difficult to “pass” as being of another race); and
- (c) race is relatively observable (although this is less true than one might initially think).

In the remainder of this Part, although I do not argue for a particular type or amount of racial redistribution, I do discuss some of the design issues that should be taken into account in designing a regime of racial redistribution. But first it is necessary to take a brief detour into how redistributive policy works in practice.

A. *Redistribution in the Real World: Searching for Reliable, Observable, Non-distorting Proxies*

Any real-world redistributive program must find some way, other than direct observation, to measure differences in relative well-being in order to determine how to allocate public burdens and benefits. This is because, of course, well-being is not directly observable. For good or ill, human beings do not come equipped with digital well-being meters embedded in their foreheads. For that reason, all real-world redistributive programs operate on the basis of outward indicia or proxies that are believed to correlate with well-being and that are relatively observable. Income, for example, is a proxy for well-being that is commonly used in redistributive programs, because it is both correlated with well-being and observable. That income correlates with well-being is obvious: the more money a person has, the broader will be her array of life choices with respect to food, clothing, shelter, education, healthcare, and so on.¹¹⁸

Moreover, although a person's income is doubtless a blend of luck and choice, inheritance and hard work, it is possible to draw some luck-choice distinctions within the definition of income.¹¹⁹ There is also an obvious sense

¹¹⁸ Although money may not be able to buy true happiness, studies have shown income to be positively correlated with higher subjective assessments of well-being. See, e.g., Ed Diener & Shigehiro Oishi, *Money and Happiness: Income and Subjective Well-Being Across Nations*, in *CULTURE AND SUBJECTIVE WELL-BEING* 208 (Ed Diener & Eunkook M. Suh eds., 2000) (concluding that wealth within nations correlates with subjective well-being).

¹¹⁹ For example, see *supra* notes 86-87 and accompanying text discussing the tax code's treatment of cosmetic surgery.

in which income is observable. Each line on the Form 1040 corresponds to something that can be observed in the world – salaries, wages, dividends, interest, capital gains, and so on. Moreover, the observability of these items is greatly enhanced in the U.S. and in other developed economies systems of information returns under which entities, such as corporate employers and financial institutions, are required to report salary, dividends, interest, and the like directly to the taxing authority. In sum, income is a reasonably good proxy for well-being, and one that is relatively capable of being observed or measured.

All of this is not to say, however, that income is perfect on either dimension – correlation with well-being or observability. As already noted, although the tax laws attempt to define income to correlate precisely with individual well-being, and even sometimes draw distinctions along luck-choice lines, much inaccuracy and imprecision in the definition and measurement of income remain. Some of this inaccuracy and imprecision is intended by Congress. For example, Congress sometimes, for reasons of social policy, adopts tax expenditure provisions that create exclusions for certain types of receipts that undeniably improve well-being.¹²⁰ And some of the inaccuracy and imprecision is unavoidable, precisely because income is not costlessly observable. For example, although there is a surprisingly high degree of tax compliance, there is still much noncompliance, even in the U.S. Rich taxpayers, with the help of well-paid tax advisors, are often able to shelter income through complex and sometimes illegal or borderline legal transactions. Self-employed individuals, too, have their own ways of appearing poor to the tax collector, especially if their business is conducted primarily in cash. The point of all this is not that the income tax is a failed system. For the most part, it works reasonably well. Rather, the point is that even the best redistributive regime will have some degree of inaccuracy and imprecision.

Another problem with income as a proxy for well-being is that income is not immutable, but is a positive function of work effort. Thus, taxing income distorts individuals' decisions regarding whether and how much to work. More precisely, to use the jargon of public finance economics, introducing an income tax changes the relative price between work and leisure, causing a "substitution effect," which means that individuals, when faced with an income tax, choose to work less and enjoy leisure more than they would in the absence of such a tax. This work-leisure distortion reduces overall social welfare.¹²¹ Thus, there is an inherent tension: The more redistributive policymakers try to make the redistributive program, that is, the more evenly they try to slice the

¹²⁰ An example of this is the exclusion for certain employee benefits, the largest of which is employer-provided health insurance, benefits that clearly increase individual employees' well-being but that are allowed to go unreported as income. See I.R.C. § 106(A) (exempting employer-provided health coverage from an employee's gross income).

¹²¹ See ROSEN, *supra* note 78, at 36 (discussing the substitution effect of taxation).

social pie, the more distorting the system becomes – i.e. the more the pie shrinks in size.

This tension – the efficiency-fairness tradeoff – is impossible for a tax-and-transfer regime to avoid entirely. On the one hand, when policymakers try to make the system more progressive or more distributively just, they end up sacrificing efficiency. That is what happens, for example, when marginal tax rates are increased on the highest levels of income, or when special deductions are phased out as income rises. On the other hand, when policymakers try to improve the efficiency of a tax, it is often at the expense of distributive justice. The paradigmatic example of the efficient but distributively unjust tax is the head tax, a type of lump-sum tax that imposes the same tax liability on every individual in the society. Such a tax is perfectly efficient, in the sense that it produces no substitution effect (after all, there is no way to avoid the tax other than to leave the country), but it is obviously unjust, as the poorest person in society pays the same tax as the richest person. This injustice, in fact, is why we use an income tax rather than a head tax, because the income tax, for all its flaws, at least allows us to allocate tax burdens roughly on the basis of relative well-being.

In sum, real-world redistributive programs must find reliable proxies for well-being that are relatively observable. Such redistributive regimes typically have a serious problem with distorting work incentives, because most good proxies for well-being are functions of work effort; therefore, it is generally understood that tradeoffs or compromises must be made between distributive justice concerns and efficiency concerns. These are practical facts about redistributive programs that must be taken into account, and alternative systems of redistribution must be compared with one another in terms of how well they deal with these issues.

B. Race as a Redistributive Proxy: The African American Tax Credit (and other design alternatives)

Now let us return to the three properties of race that make it a potentially useful redistributive tool: correlation, observability, and immutability. First, race correlates strongly with overall well-being.¹²² In study after study, and in decades of Census surveys, differences in race correlate remarkably well with differences in every conceivable measure of human well-being, for adults and especially for children. This fact alone is sufficient to justify including race, along with income and wealth, in the policymaker's redistributive toolbox and thus is sufficient to justify some degree of racial redistribution.¹²³

Second, race is relatively observable. Researchers frequently ask people to designate their race on Census surveys and other forms, and the answers are generally considered reliable indicators of race. Individuals know what their

¹²² See *supra* Part II.C.

¹²³ Whether it justifies more than the current level of racial redistribution is another question to which I return briefly later in this Part.

race is, and they generally answer truthfully when asked about it. Moreover, according to social science research on the question of defining race, it turns out that external observers also are able to identify someone else's race with a high degree of accuracy, at least in cases in which that "someone else" is, by their own self-designations, either black or white – and not, for example, of mixed race.¹²⁴

Third, redistributive transfers made purely on the basis of race would not distort work incentives, because race, unlike income or wealth, is immutable, or at least relatively so, and therefore – unlike income or wealth – is not a function of how many hours a person works or in what job. Thus, racial redistribution has the quality of a distributively just lump-sum, that is, efficient, transfer. The transfer could even be means-tested – for example, made available only to blacks below a certain income threshold – without losing its lump-sum quality, so long as the racial transfer was in fact set up, and could credibly be characterized as, a one-shot deal. If, however, the program were designed to provide recurring transfers to African Americans on an annual basis (for example, through a special African American tax deduction or refundable credit, along the lines of the earned income tax credit), such transfers could also be means-tested based on annual income. But that sort of annual means-testing, by making the payments a function of individual taxpayer's annual income, would reintroduce the work-leisure distortion. Of course, that tradeoff between fairness and efficiency might well be appropriate and certainly is nothing new in the design of a tax system.¹²⁵

Assuming we have decided that some degree of racial redistribution makes sense, the big questions then become: (a) how much redistribution is

¹²⁴ Recent research on the question of defining race through self-identification versus external observation suggests (unsurprisingly) that there are sometimes discrepancies between self-reported and observed race; and in the case of Asian and Latino individuals, for example, the discrepancy between the race they designate for themselves and the ones that external observers designate can be substantial, with as much as fifty and sixty percent of the observers getting it "wrong." DAVID R. HARRIS, IN THE EYE OF THE BEHOLDER: OBSERVED RACE AND OBSERVER CHARACTERISTICS 10 tbl.4a (Population Studies Ctr. at the Univ. of Michigan, Research Report No. 02-522, 2002), available at <http://www.psc.isr.umich.edu/pubs/papers/rr02-522.pdf> (last accessed Sept. 8, 2004). Moreover, with respect to self-reported *mixed-race* individuals, if we assume again that self-identification is the best indicator, almost none of the external observers got it right. What is interesting for present purposes, however, is that with respect to those individuals who self-report as black or white alone (and not as belonging to a mixed-race category), the "accuracy" of the external observers – or the correlation between their observations and the subjects' self-reported designation – was extremely high, usually above ninety percent. *Id.*

¹²⁵ For example, the federal income tax system phases out certain deductions and credits as income rises in order to limit the benefit of those deductions and credits to individuals below a given threshold of income. See, e.g., I.R.C. § 22(d) (reducing by one half the tax credit an elderly or disabled person is eligible for based on income in excess of the threshold level). Such phases increase the distortive effect of the system in just the same way that an increase in marginal tax rates does.

appropriate; and (b) how exactly such a regime should be designed. As to the first question, again, I will not even hazard a guess. As to the second question, a full answer is beyond the scope of this Article, but I will suggest a few policy-design issues that should be taken into account. For starters, putting to one side all political, symbolic, and expressive concerns, there is a comparative-advantage argument for doing racial redistribution through the tax-and-transfer system, perhaps through the federal income tax system, rather than through the legal system, such as through lawsuits brought by African Americans against various corporations. The argument at this point should be fairly obvious: If the goal is to achieve racial distributive justice, rather than corrective justice, then a class-action slavery-reparations lawsuit is clearly not the best approach.

Using the legal system would present huge problems of inaccuracy and imprecision. For example, in defining the plaintiff class or the beneficiaries of the transfers, it would be impossible as a practical matter to include all African Americans. The court system simply is not set up to handle that sort of massive redistributive program. The federal tax system, by contrast, with its large administrative apparatus, *is* designed to handle this sort of large-scale redistribution. And the tax-and-transfer approach, in contrast with the legal approach, could be more comprehensive on the payer side as well; that is, not only could transfers be made to all blacks, but the tax burden could be imposed on all whites or all taxpayers. Furthermore, because the federal income tax system already is gathering information about individuals' income, it would be relatively simple to means-test a race-based transfer administered through that system. For example, an African American tax deduction or credit could easily be phased out as income rises above certain thresholds, just as is currently done with the earned income tax credit,¹²⁶ the personal exemption deduction,¹²⁷ the special deduction for the blind,¹²⁸ and the special credits for the elderly,¹²⁹ and those who are retired on disability.¹³⁰ By contrast, it is not clear how means-testing a judicial remedy would work, and, in any event, there is no reason to expect that judges or the court system would be as good at that sort of calculation as the Treasury Department, the IRS, and the tax system are.

There are some obvious disadvantages, of course, to using the federal tax system to implement cash-based racial redistribution. For one thing, it could be argued that race is not so observable after all, or perhaps that it is not immutable. That is to say, if an African American tax credit were adopted, how can we be sure that individuals who self-identify as black on their tax

¹²⁶ I.R.C. § 32 (2000) (allowing for the earned income tax credit).

¹²⁷ *Id.* § 151 (allowing deductions for personal exemptions).

¹²⁸ *Id.* § 63(f)(2) (allowing deductions for both blind individuals and their spouses).

¹²⁹ *Id.* §§ 22, 63(f) (allowing deductions for individuals over 65 years old but reducing the credit for the elderly as adjusted gross income exceeds certain levels).

¹³⁰ *Id.* § 22 (reducing the credit, however, as the taxpayer's Adjusted Gross Income exceeds certain threshold levels).

returns are not lying in order to get the credit? Although it might be reasonable to assume that people will answer truthfully about their race in a survey for social scientific research, such an assumption is more dangerous when money is at stake. Moreover, the problem increases as the comprehensiveness of the program increases: the more people that apply for the African American tax credit, the harder it becomes for the taxing authority to monitor the veracity of each application, and the more tempting it becomes for whites to apply as well.

This problem is made worse by the fact that race does not have a universally agreed upon definition; thus, it is not clear what standard would be used to determine whether a taxpayer was answering truthfully or not. According to the modern view of race, the concept of race is socially constructed, albeit one that depends importantly on certain unchangeable and observable physical characteristics, such as skin color, facial features, hair texture, and the like.¹³¹ Thus, there is inevitably a subjective component to defining race, which makes the observability of race more difficult than, say, blindness or old age, both of which are characteristics that can make one eligible for a tax deduction or credit, but both of which are relatively objectively defined and relatively easily verified.¹³²

Perhaps one way to answer the question of observability is to consider examples of existing race-based redistributive programs that rely on individual applicants to self-designate their race. The most obvious example would be

¹³¹ The following extended quotation from a recent study on race captures the current thinking on what the social category "race" means:

In virtually all human societies, people take note of and assign significance to the physical characteristics of others, such as skin color, hair texture, and distinctive features. Race becomes socially significant when members of a society routinely divide people into groups based on the possession of these characteristics. These characteristics become socially significant when members of a society routinely use them to establish racial categories into which people are classified on the basis of their own or their ancestors' physical characteristics and when, in turn, these categorizations elicit differing social perceptions, attitudes, and behaviors toward each group.

PANEL ON METHODS FOR ASSESSING DISCRIMINATION, NAT'L RESEARCH COUNCIL, MEASURING RACIAL DISCRIMINATION 26 (Rebecca M. Blank et al. eds., 2004) (discussing the social construction of race); see also Neil J. Smelser et al., *Introduction* to 1 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 1, 2-3 (Neil J. Smelser et al. eds., 2001) (discussing how race, although a social construction, is still "real" and has real consequences).

¹³² Age is defined, obviously, with reference to the taxpayer's date of birth and can be verified by a birth certificate. Blindness is defined in the Code either as "total blindness" (presumably, the complete inability to see) or "partial blindness," which means that the taxpayer cannot see better than 20/200 in her better eye with glasses or contact lenses, or has a field of vision of not more than 20 degrees. I.R.C. § 63(f)(4) (2000). The Treasury Regulations governing the blindness deduction call for a doctor's verification of partial blindness. Treas. Reg. § 1.151-1(d) (2004). It is interesting to note that if the taxpayer claims to be totally blind, she need only attach a document stating as much. However, if she claims to be partially blind, she must get a reference from a qualified doctor. *Id.*

affirmative action programs, such as the ones many colleges and universities use in making admissions and financial aid decisions. How do those institutions deal with the problem of defining race? The answer is, again, self-identification. Applicants for admission and for financial aid are asked to report their race. The interesting question is what the admissions and financial aid offices do to police the accuracy of these racial self-designations. And the answer seems to be, for the most part, nothing. At the University of Michigan, for example, in both the Law School and undergraduate admissions offices, they do not attempt, and as far as I can determine have never attempted, in any systematic way to determine the extent to which applicants misidentify their race on their application materials.¹³³ This is not to say that, if someone in the admissions office happened to discover that an individual applicant blatantly lied about his race on his college or law school application, nothing would be done about it. It is conceivable that disciplinary proceedings might be brought, and the student might be subject to some sanction, perhaps including expulsion from the program. But at Michigan at least, there is no systematic *ex post* policing or auditing of individual applicants' racial self-designations. I am not aware of any other university or college that handles this issue any differently, and, as best I can tell, there is no research on the issue.

Despite this lack of systematic enforcement or monitoring, it is my perception (and the perception of the few colleagues I polled on the question) that there is *not* a widespread problem of rampant lying about one's race on law school or undergraduate applications, although, obviously, given the lack of hard data on the question, that intuition could just be wishful thinking. Still, there are reasons we might expect there to be relatively little cheating with respect to racial self-identification in the affirmative-action context. For example, the temptation to misreport one's race is probably relatively low in part because the precise amount of the subsidy – the degree of advantage in admissions – associated with minority status is: (a) relatively small; (b) difficult to compute; and (c), except in the case of programs that become the subject of litigation,¹³⁴ kept confidential. Moreover, perhaps most applicants wrongly assume that some sort of systematic check will be done by the university to assure the accuracy of their racial self-designations, or that they might be found out in some way, and the magnitude of the potential punishment might make the gamble not worth the risk. In any event, even if there is relatively little cheating in the affirmative-action context, it would likely be a different matter in the case of a sizeable, easily quantifiable, and highly publicized racial cash-subsidy program.

¹³³ For the Supreme Court's recent discussion of the University of Michigan's affirmative action programs, see *Grutter v. Bollinger*, 539 U.S. 306, 312 (2003) (upholding the University of Michigan Law School's affirmative action program), and *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003) (striking down the University of Michigan's undergraduate affirmative action program).

¹³⁴ See generally *Gratz*, 539 U.S. at 244; *Grutter*, 539 U.S. at 309 (addressing the use of racial preferences in university admissions).

In theory, there are steps that might be taken to deal with this potential problem in the context of an African American tax credit (or any other form of direct cash transfer to African Americans). If we follow the tax analogy to its logical (and admittedly farfetched) conclusion, we might imagine policymakers setting up an enforcement apparatus that would be similar to what is currently done with income tax returns. The process would begin with individual taxpayer self-reporting his race on his tax return. But that would not be the end of it. We might imagine also that employers would be asked to file a special information return for each employee that would identify the racial classification of the individual in question, based on the employer's objective assessment. The IRS could then match these information returns up with the employee tax returns, as they do now with W-2 forms; and discrepancies between the tax returns and the information returns would "raise a red flag," suggesting grounds for an audit.

In such an audit, the IRS agent would simply make his own assessment of whether the person is black or not. As always, the self-employed would present special problems. Given the findings that objective external observers tend to be able to identify who is black and who is white (or who self-identifies as black or white),¹³⁵ the decisions of auditors on this question could be considered presumptively valid; and it would then be the taxpayer's job to prove she is in fact black to be eligible for the credit. Appeals could then be taken to a panel of experts (or maybe a panel of lay people) whose job would be simply to give their objective assessments of an audited individual's race. If the panel says an individual taxpayer is not black, then, for tax purposes, that would be that, and the taxpayer would lose the credit and have to pay the relevant penalty and so on. Presumably, the existence of this whole reporting, audit, appeal, and punishment process would deter most cheating.

Such "racial audits" are almost certainly never going to happen in this country. They are a political and perhaps a constitutional impossibility. But they are an interesting thought experiment, if only because they illustrate one of the most serious difficulties with a problem of explicit race-based cash transfers. This is not to say, however, that direct cash transfers would have no advantages. The analysis above demonstrates otherwise.

A cash transfer, especially if administered through the federal tax laws, would have the benefits of not only being distributively just, but also being flexible (i.e., it could be set at any amount), comprehensive and precise (i.e., it could be targeted either to all African American taxpayers or to all low-income African Americans or to whichever subset of African Americans was deemed appropriate); and the transfers could be progressively administered through the income tax. On the negative side, such a program may run afoul of the Supreme Court's current interpretation of the equal protection clause, given

¹³⁵ See HARRIS, *supra* note 124, at 10 tbl.4a (listing the results of a study where participants were shown photographs of different racial and mixed-racial individuals and asked to identify the race of the pictured person).

that the Court has struck down government programs designed to respond generally to "societal discrimination" and has upheld only government programs that respond to identified discrimination within the government's jurisdiction.¹³⁶ But how the Court would handle a broad-based cash transfer to blacks out of general tax dollars enacted at the federal level is still not clear.

Eric Posner and Adrian Vermeule argue in their recent article on slavery reparations that such a program may stand a chance of surviving strict scrutiny, given that the Court has not yet struck down a piece of federal legislation of this sort, and given that the structure of the program under consideration avoids the primary concerns that underlie the equal-protection process-based analysis.¹³⁷ That is to say, given how much public attention would be focused on the adoption of an explicitly race-based transfer program, Posner and Vermeule conclude that "courts should have confidence that any nationally enacted reparations scheme represents a product of successful public deliberation, or at least of a well functioning pluralist market in legislation, rather than a socially suspect interest group transfer."¹³⁸ Thus, although an African American tax credit is probably politically implausible (in fact, precisely because it is), it might be constitutional.¹³⁹ This argument, of course, ignores expressive-harm concerns, and some will argue that the expressive harm associated with such a program of cash transfers would be prohibitive.¹⁴⁰ Before turning to that question, however, consider the advantages and disadvantages of several non-cash, or in-kind, alternatives to an explicit race-

¹³⁶ See Posner & Vermeule, *supra* note 18, at 718 (discussing the Supreme Court's distinction between identified and societal discrimination).

¹³⁷ *Id.* at 715-21 (discussing why cash transfers to blacks levied through the federal income tax system might survive current Supreme Court equal protection analysis and comparing race-based reparations schemes to current Supreme Court jurisprudence regarding affirmative action). Posner and Vermeule here rely on David Strauss's theory of the purpose underlying distinction the Court has drawn among government programs designed to remedy specific acts of discrimination and those designed to remedy societal discrimination generally. See David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 27-31 (arguing that the Supreme Court's jurisprudence in this area can best be understood as attempting to prevent interest groups from securing legislation or regulations that enrich them at the expense of the public good).

¹³⁸ Posner & Vermeule, *supra* note 18, at 719 (concluding that courts need to be confident that a nationally enacted reparations scheme is the product of successful public deliberation or a functioning pluralist market in legislation, rather than a socially suspect interest group transfer).

¹³⁹ Note, however, that Posner and Vermeule were discussing a broad-based cash transfer program to African Americans that was "justified as recompense for slavery and its continuing effects." *Id.* at 715. And my justification for the program has had a different emphasis – one that relies on principles of *distributive* rather than *corrective* justice. However, it is certainly consistent with, and indeed a part of, my argument that the inequalities between blacks and whites today generally are attributable to the effects of slavery, segregation, and discrimination.

¹⁴⁰ I consider that question in *infra* Part III.D.

based cash transfer program of the sort described above.

C. *Alternatives to Direct Cash Transfers*

One approach to racial redistribution that avoids the problem of having to adopt procedures for verifying the race of the beneficiaries – and an approach that may respond to expressive-harm and constitutional concerns (although not necessarily) – would be to target a group in which blacks happen to be disproportionately represented: in other words, facially race-neutral tax or expenditure programs that have disparate beneficial impact on African Americans. An obvious example of this would be simply to redistribute on the basis of income or wealth. Because blacks are disproportionately represented among those with low incomes, and whites among those with high incomes, increasing the progressivity of the federal income tax system would have the effect of redistributing from whites to blacks – without having to rely on individuals' self-identification of their race. This could be done, for example, by raising marginal tax rates on the highest-earning individuals or increasing the ceiling on (and the amount of) the earned income tax credit; there would obviously be no constitutional obstacle. There are, however, some apparent downsides to increased income-tax progressivity. For one thing, ignoring race and focusing exclusively on income would continue the existing imprecision in the current redistributive program in the sense that middle- and high-income blacks, in some ways, are on average less well off than their white counterparts with equal income. Again, that is the whole point of redistributing on the basis of race as well as income. Second, increasing marginal tax rates would increase the distortion of work incentives inherent in any income-based redistributive program.

Perhaps a better approach from an efficiency perspective would be a one-time lump-sum wealth transfer from the rich to the poor, irrespective of race. Given the enormous disparity in wealth between blacks and whites, such a transfer would obviously disproportionately benefit African Americans. Moreover, if we believe the studies showing that, when household wealth is held equal, most of the differences in well-being between blacks and whites disappear, then a significant reduction in household wealth disparity would put a dent in the racial well-being gap.¹⁴¹ The costs of a program of general wealth redistribution are well known. Some argue that wealth is not as observable as income, because of valuation problems.¹⁴² Also, if the government cannot promise credibly that the wealth transfer would be a one-shot deal, the effect on work incentives could be devastating.

In addition, with respect to both ideas – the wealth transfer and the increase in income tax rates – there would be problems of compliance of the sort

¹⁴¹ See *supra* note 114 and accompanying text.

¹⁴² See, e.g., Yariv Brauner, *A Good Old Habit, or Just an Old One? Preferential Tax Treatment for Reorganizations*, 2004 BYU L. REV. 1, 9 (noting that some forms of wealth are difficult to value given traditional market volatility).

discussed above, as individuals would have an increased incentive to understate their wealth and income.¹⁴³ My point here is not to suggest that income or wealth redistribution is bad. To the contrary, there is a case to be made for redistributing to reduce income and wealth inequality irrespective of racial issues, precisely because income and wealth correlate with well-being and are relatively observable. Again, that is presumably one of the reasons that we currently have a progressive income tax (and a social insurance program). The question here is whether to supplement income or wealth redistribution with some measure of racial redistribution as well, and that is the issue I have been addressing.

Another facially race-neutral alternative to explicit racial redistribution would be federal spending on projects in geographical areas where African Americans are over-represented. Racially segregated housing patterns remain a reality *within* cities, where blacks and whites tend to live in relatively homogeneous enclaves,¹⁴⁴ as well as *among* cities, as some cities have more blacks, or a higher percentage of blacks, than do others.¹⁴⁵ Likewise, blacks are disproportionately represented within city centers (the so-called inner cities), whereas whites predominate in suburban and rural areas.¹⁴⁶ Thus, government spending programs – on education, housing, jobs, or healthcare – in predominantly black neighborhoods or predominantly black cities or in the inner-city generally, which are funded by broad-based tax revenues, would tend to have a racially redistributive effect.

Moreover, such indirect racial redistribution would have the same lump-sum quality as the direct racial cash transfers, as geography-based transfers are also not a function of work effort. In addition, geography-based transfers may reduce the problem of individual misrepresentation of race. When individuals fill out the census surveys, the data which would be used in making geography-based transfers, there is relatively little incentive for them to falsify their race. In a sense, geography-based transfers would exploit a sort of

¹⁴³ An obvious alternative to using cash transfers from rich to poor (or from high-income to low-income) would be to make the transfers in-kind: that is, to increase federal spending programs that benefit poor and low income households. Whether cash transfer or in-kind transfers are better is an issue that has received considerable attention in the public finance literature, and I will largely ignore it here, except insofar as I discuss anti-discrimination law as a form of in-kind transfer.

¹⁴⁴ See Victor A. Bolden, *Where Does New York City Go From Here: Chaos or Community?*, 23 Fordham Urb. L.J. 1031, 1041 (referring to the “hypersegregat[ion]” of sixteen large American cities).

¹⁴⁵ See JOHN ICELAND ET AL., U.S. CENSUS BUREAU, RACIAL AND ETHNIC SEGREGATION IN THE UNITED STATES: 1980-2000, at 17 (2001), available at http://www.census.gov/hhes/www/housing/ressseg/pdf/paa_paper.pdf (last accessed Sept. 8, 2004); JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION: 2000, at 7 (2001).

¹⁴⁶ JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002, at 2 fig.2 (2003), available at <http://www.census.gov/prod/2003pubs/p20-541.pdf> (last accessed Sept. 8, 2004).

collective action problem: although it would be in the collective interest of the respondents to falsify their race (and increase the chances of their region getting a transfer or the size of their transfer), there would be little individual incentive to do so, as the benefit to each person would be trivial.¹⁴⁷ There might also be an increased incentive for whites to move into areas that were receiving geography-based subsidies, and this could be seen as a type of distortion; however, this could also be seen as a side benefit of the regime: increased residential integration.

The disadvantages of the geography-as-proxy-for-race approach are not difficult to identify, however. Geographically targeted subsidies can never be as precise or as comprehensive as direct transfers based on individual tax returns can be. Predominantly black areas will almost always have *some* white residents, and likewise there are some blacks in predominantly white areas. Moreover, some of the poorest and generally least well off areas of the country are in rural settings, where blacks tend to be underrepresented.¹⁴⁸ And although means-testing geographically targeted transfers would be possible, it would not be easy – certainly not as easy as means-testing direct cash transfers administered through the tax system. Furthermore, if it were possible to make the targeting of geographic transfers very precise (so as to resemble the fine-tuning possible in a tax system), presumably whatever constitutional, political, and expressive objections that can be raised against the cash transfers would apply to the geographic transfers as well.

Another alternative to direct cash transfers from whites to blacks has received relatively little attention as a system of redistribution, although that is clearly what it is. This is the collection of laws forbidding statistical discrimination against African Americans in various contexts. By “statistical discrimination” I mean discrimination that is based neither on racial animus nor on erroneous stereotypes. Rather, statistical discrimination, as I use the term, means discrimination that is based on accurate assessments of the statistical characteristics of African Americans as a group. Statistical racial discrimination occurs when, for example, insurance companies charged black policy holders higher premiums than they charge white policy holders, because blacks in fact present on average statistically higher insurance costs. Or if banks charged blacks higher interest rates for loans, all else equal, because in fact blacks presented a higher default risk, that too would be statistical discrimination.

Such discrimination, it turns out, is generally forbidden by law.¹⁴⁹ In the

¹⁴⁷ Of course, state or local government officials might have an incentive to overcome this collective action problem to increase federal dollars spent in their area, but presumably that sort of organized fraud would be minimal.

¹⁴⁸ See Debra Lyn Bassett, *The Politics of the Rural Vote*, 35 ARIZ. ST. L.J. 743, 755-57 (2003) (observing that of the 250 poorest counties in America, 244 are rural).

¹⁴⁹ Of course, antidiscrimination laws do not focus solely only on statistical discrimination; rather, they generally forbid all discrimination on the basis of race in certain

case of insurance, it is generally state insurance laws that prohibit insurers from explicitly using race in the process of insurance underwriting.¹⁵⁰ Thus, with respect to all types of insurance (life, health, auto, and homeowners), insurance companies may not take race explicitly into account when deciding whether to provide a given individual insurance coverage, how much coverage to provide, or how much to charge for that coverage. Federal law forbids lending institutions from taking race into account even if race in fact correlates with higher lending costs, although the source of law is primarily federal statutes rather than state law.¹⁵¹ And again, the prohibitions on the use of race here apply even though blacks may present higher costs to the insurer or the lender than do whites on average. What is interesting about the prohibition against statistical discrimination in particular, however, is that it can be justified as a form of real-world redistribution – as a system of transfers from the better off to the less well off.¹⁵² Although it can be argued that anti-discrimination law is not the best system of redistribution – neither the most efficient nor the most comprehensive or the most precise – it has some advantages.

My point can be illustrated through an example involving insurance, although the analysis would apply to loan markets and other contexts as well. Imagine there is an insurance pool in which there are one hundred total policy holders, eighty-eight of whom are white and twelve of whom are black; and assume that they are all purchasing essentially the same policy from the same insurer. Imagine also that the insurance fully covers the risk in question, such that an insured, having bought insurance, will be indifferent as to whether the

setting (such as in the formation of contracts or the sale or purchase of property), and sometimes statistical discrimination gets included in that prohibition. *See* 42 U.S.C. §§ 1981-83 (2000).

¹⁵⁰ This legal prohibition can take a number of forms. Many states statutorily and explicitly forbid the explicit use of race in insurance underwriting. Other states prohibit unfair trade practice or unfair discrimination generally, which are then interpreted by courts to include discrimination on the basis of race. *See, e.g.*, ALA. CODE § 27-12-11 (1986 & Supp. 2003) (banning racial discrimination in the sale of insurance); CAL. INS. CODE § 10140 (West 1993 & Supp. 2004) (banning racial discrimination in the sale of insurance).

¹⁵¹ *See, e.g.*, Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2000). Federal Reserve Board Regulation B implements this act and prohibits discrimination in all credit markets. *See* Regulation B (Equal Credit Opportunity), 12 C.F.R. § 202 (2004).

¹⁵² Laws forbidding animus-based and error-based discrimination also produce a form of redistribution, of course. However, the prohibition of those types of discrimination can also be justified on grounds other than distributive justice. For example, rules against animus-based discrimination might best be explained on corrective justice grounds, and rules against error-based discrimination on standard consumer protection grounds. What is interesting about the prohibition on statistical discrimination is that it is less easy to square with either of these theories. Corrective justice does not apply, because the party doing the discriminating is not the cause of the statistical differences in costs represented by blacks as a group; and consumer protection does not apply, because we are assuming that the statistical association is accurate.

loss occurs or not.¹⁵³ Assume finally that the per-insured actuarially fair insurance premium under this policy would be \$1.00 for whites and \$1.30 for blacks. The reason for this difference in actuarial expected costs, we will assume, is that blacks on average, holding all other characteristics equal, represent a thirty percent higher risk than do whites for the insurance coverage in question. Maybe this is because blacks have a higher incidence of certain deadly diseases or tend to live in more dangerous neighborhoods or have a greater incidence of poverty or, for whatever reason, have a shorter life expectancy – all of which could be relevant statistically for one or another type of insurance. Thus, in the absence of a legal prohibition, the insurer in a competitive market would likely separate this group into two insurance pools, charging blacks \$1.30 per person and whites \$1.00 for the same coverage; and this result would be considered “actuarially fair,” to use the insurance industry jargon, as the insurance premium each person pays would represent his or her expected insurance costs – based on the best available statistical measures.

Now consider what happens when the insurer is forbidden from using race in determining insurance premiums. Because the total expected cost of the pool is \$103.60,¹⁵⁴ the insurance premium charged to each of the one hundred policy holders would be \$1.036. The result is a full equalization of circumstances with respect to the particular risk being insured under the policy in question. Why so? Notice that all of the policy holders are paying the same premium (\$1.036 per person), and all of them are, by assumption, fully insured and therefore indifferent to the risk being insured against. In effect, what has happened is that the insurance company has taken the extra \$3.60 of expected insurance costs associated with the twelve black members of the pool and, instead of leaving that cost to be borne by the blacks as a group (as discriminatory, but actuarially fair insurance would do), it has distributed that cost evenly over the entire pool, blacks and whites alike. This outcome, in effect, treats the extra thirty cents per person in expected insurance costs of the black members of the insurance pool as a burden that society should bear, not one that blacks as a group should bear.¹⁵⁵

This sort of redistributive regime, like all the other redistributive options discussed above, has advantages and disadvantages. First, on the plus side, if we imagine that the extra insurance costs are attributable to bad brute luck on the part of the black policy holders (either as a result of the legacy of slavery or ongoing discrimination or whatever), such a redistributive transfer makes some

¹⁵³ This is obviously an unrealistic assumption, but it simplifies the analysis and relaxing it does not change the direction of the result.

¹⁵⁴ $(1.00 \times 88) + (1.30 \times 12) = 103.6$

¹⁵⁵ Note also that this example could be generalized to social insurance as well. That is, whenever the government provides insurance coverage for some risk and that risk tends to correlate with race, so long as the funding mechanism for the social insurance in question does not attempt to allocate the costs among groups on an actuarial basis, there will be racial cross-subsidization.

sense in terms of luck-based egalitarianism. The transfer is, in effect, explicitly race-based and therefore has the lump-sum qualities that have already been described with respect to racial transfers generally.

Second, the anti-discrimination approach avoids the need for a government regulator to calculate the amount of the transfer each year. Note that the transfer in the example above is equivalent to a tax-and-transfer alternative under which the government pays thirty cents to each of the twelve black policy holders and then funds it with a special tax of 3.6 cents on all one hundred policy holders. The question, though, is how the government would determine the amount of the transfer or the tax. It could rely on the insurance industry or its own research to provide the relevant actuarial data. But we might be skeptical of the government's comparative advantage in this regard.

By contrast, with the anti-discrimination approach, we are relying on competition among insurers (facing the constraint of anti-discrimination law) to produce the right result. Moreover, under this approach, the transfer and tax would automatically adjust as cost differentials between blacks and whites changed over time. Thus, there is no need for "racial audits," as there is no need to for this redistributive system to identify who is black and who is white. Simply forbidding the use of race – enforcing a norm of color blindness – automatically produces the desired level of cross-subsidization.¹⁵⁶ All of these properties, it should be noted, apply to social insurance as well, so long as the social insurance regime in question: (a) provides benefits on a color-blind basis; and (b) is funded on a color-blind basis as well. Thus, for example, Medicare and Medicaid, insofar as they provide equal benefits to whites and blacks, and insofar as blacks have higher medical costs, can be understood as having a racially redistributive component.

The disadvantages of anti-discrimination law as redistributive system are well known. The rule against racial statistical discrimination in insurance underwriting produces racial redistribution with a substantially narrower, or less comprehensive, scope than could be accomplished through the tax system. The transfers are limited to the parties within a given insurance pool – a group of policy holders who are being lumped together by a particular insurer for the purpose of calculating prices. So long as we are not talking about a single-payer insurance system, but rather an insurance system – as in the U.S. – in which insurance is provided by hundreds of different insurance companies, there are in effect thousands of different insurance pools. Thus, the race-based redistribution that is produced from the rule against racial discrimination would doubtless be somewhat uneven as compared with explicit race-based redistribution through a national tax-and-transfer system, where redistribution can be from *all* white taxpayers to *all* black taxpayers within the country. This

¹⁵⁶ Of course, if the insurance in question does not fully cover the loss being insured against, as will almost always be the case given the prevalence of deductibles and co-payment features, the non-discrimination rule will result in transfers that are not fully equalizing with respect to the risk in question.

critique, however, can be overstated. As insurance and lending pools increase in size, and to the extent they tend to rely on the same data in doing their underwriting, the practical difference between redistribution via insurance cross-subsidization and redistribution via the tax-and-transfer system diminishes.

A more serious critique of redistribution via anti-discrimination law is akin to a critique of redistribution via affirmative-action: the benefits of the transfer tend *not* to go to the African Americans who are the worst off, but rather go to the individuals who are on the margin between getting the benefit without the subsidy. Thus, just as affirmative-action in higher education almost by definition helps those African American applicants who are on the cusp of getting into and affording an elite college or university, cross-subsidization in insurance and lending markets will tend to help those African Americans who are on the margin between buying and not buying insurance. The worst off blacks, the ones who are truly "uninsurable" or who cannot possibly get a loan and are thus not even in the market, will not benefit from the non-discrimination rule. For those people, only direct cash subsidies or in-kind subsidies can help. Moreover, the individuals who are funding the cross-subsidization of insurance and loans for blacks under a non-discrimination approach are not only the white policy holders or borrowers who are forced to pay the higher, cross-subsidizing prices, but also the relatively less well off whites who, under the non-discrimination rule, are priced out of the market.¹⁵⁷

D. *Summary, Objections, and Qualifications*

The main point of this Part, and perhaps the most important point in the article, is that if some form of racial redistribution is a good idea (because race correlates with substantial differences in well-being and is relatively observable and immutable), then there are many other program-design issues that need to be taken into account. I have only touched on some of those issues here. Using the tax system to implement a cash transfer would be the most precise (for example, the easiest to means-test) and the most comprehensive approach, but would give rise to the problem of identifying which taxpayer is of which race – and may run afoul of the Constitution. Various implicit in-kind alternatives – such as redistributing on the basis of geography and subsidizing, for example, inner-city neighborhoods, businesses, and schools – would be less precise (for example, less easy to means-test) and less comprehensive, but would also suffer less from the problem of needing to rely on racial self-designation, a problem that seems not to have disabled affirmative-action programs but that would likely be much more acute in a

¹⁵⁷ This is a well known critique of prohibitions against statistical discrimination. See, e.g., Martin J. Katz, *Insurance and the Limits of Rational Discrimination*, 8 YALE L. & POL'Y REV. 436, 450 (1990) (analyzing the effects of banning statistical discrimination and recommending a subsidy for minorities rather than an outright ban on statistical discrimination).

nation-wide program of cash transfers. Anti-discrimination law, in particular, the prohibition on statistical racial discrimination, provides an example of an existing racially redistributive regime that seems to be relatively uncontroversial, is obviously constitutional, and that has some technical advantages (such as not requiring the government to engage in racial audits). However, anti-discrimination law will be neither as precise nor as comprehensive as direct cash transfers and can have distributively unjust consequences as well.

Imagining objections to the whole idea of redistribution by race is not difficult. There is the libertarian critique, of course, which would apply to any program of redistribution. But even if for those who support, or who are at least willing to tolerate, some types of redistribution – such as redistribution to reduce income inequality – there are obvious objections to racial redistribution *per se*. For example, many will object to racially redistributive programs that are justified on luck-egalitarian grounds rather corrective-justice grounds, because such a justification is demeaning or condescending to blacks. The argument would be that blacks do not need charity; rather, they need compensation for the harm that has been caused to them.

From the other direction, many will object to the idea of racial redistribution simply because they believe that the greater average level of well-being of whites as a group is mostly the product of differences in choices that have been made, and continue to be made, by whites and blacks. Alternatively, there will be some who hold the view that the mere existence of brute-luck-based inequality, if that is what it is, does not provide an appropriate basis for coercive government transfers.¹⁵⁸ These are all legitimate criticisms of the position set forth in this Article, and I do not have good responses, at least none better than the ones already provided. I would, however, reiterate my position that, if we are going to engage in broad-based racially redistributive transfers, some version of egalitarian distributive justice (even if one rejects the luck/choice distinction) provides a better theoretical framework than does the corrective-justice story. As for the complaint that the racial inequalities are not luck-based, or not the legitimate target of redistributive policy, I would refer back to my previous arguments.¹⁵⁹ But my ultimate response is this: All of these issues will ultimately be decided through the political process, and because the question would necessarily receive a lot of public attention, there is a tautological (but, I think, meaningful) sense in which, if the costs (including the expressive or symbolic costs) of racial redistribution exceed the benefits, then it will not happen.

It is interesting to note that the expressive or symbolic objections to racial redistribution seem to diminish when the transfers are indirect (by geography, for example, rather than explicitly by race) or when they are structured as automatic cross-subsidization within insurance pools or lending markets. Why

¹⁵⁸ One need not, of course, be a libertarian to oppose government redistribution.

¹⁵⁹ See *supra* Part III.C.

this is so is difficult to say. Perhaps voters do not understand that these sorts of programs implicitly involve racial redistribution. If so, then one function of this Article would be to point that fact out, which might mean creating controversy where none existed before, which may or may not be a good thing. Perhaps, however, people just view implicit transfers differently, as an empirical and even normative matter. That is, maybe people fully understand the racially redistributive component, for example, in the anti-discrimination principle in insurance law (and in the funding mechanisms for social insurance as well), but they regard this as an acceptable form of redistribution – more so than, say, an African American tax credit, which would tend to place too much public emphasis on the well-being gap between whites and blacks. Again, all of these issues could be a part of the public debate over whether to have racial redistribution, how much, and in what form.

Another objection to racial redistribution generally is that it would seem to apply to groups other than blacks. Native Americans may be the least well off group in American society, even less well off along many dimensions than African Americans; and this is according to the same studies that reveal the black-white well-being gap on which much of my analysis is based.¹⁶⁰ Would not all the same arguments support redistributive programs that benefit Native Americans? That is certainly possible. The logical conclusion of my argument may well apply to Native Americans, and perhaps to Hispanic Americans, who also lag behind whites on average in many areas, although I have focused on the black-white well-being gap. My point is that, so long as the racial or ethnic category (a) is correlated with differences in well-being, (b) is observable, and (c) is relatively immutable, it has the properties necessary to make it a potentially useful, although possibly politically explosive, redistributive proxy.

This conclusion obviously highlights the difference between the corrective justice approach – which needs to have the link between present harm and past wrongful act – and the distributive justice approach – which needs only the observation of brute luck inequality. A related complaint would be that, as individuals from different races inter-marry and have children, the statistical differences among the races will presumably diminish over time, and hence the potential value of race as a redistributive proxy will diminish as well. When the Census data are taken in future years, in other words, a smaller percentage of people will self-designate as all-white or all-black, and the racial categories that are used to do the various well-being studies will begin to merge and break down. That is certainly possible, perhaps even likely. And if that happens, if the current racial categories lose their predictive power with respect to different measures of well-being, that would be all the better. Of course, if that happens, the need for the racial transfers, again, whether in-kind or in-cash, would also diminish. Therefore, one worry is that racially redistributive programs, once enacted, will be difficult to eliminate or reduce over time.

¹⁶⁰ See generally *CHANGING AMERICA*, *supra* note 89, at 35 (“According to the 1990 census, the median family income of American Indians . . . was lower than that of blacks”).

That is a serious concern.

One response might be to plan periodic reassessments based on future Census research into the relative well-being of blacks and whites and other racial and ethnic groups, and as the well-being gaps diminish – and race becomes less predictive of relative well-being – the programs would be reduced. Again, this might be politically difficult, and this is another reason to prefer anti-discrimination law as a form of racial redistribution. That is, although there are serious disadvantages to the redistribution through prohibitions against statistical discrimination, anti-discrimination law does have the advantage of automatically adjusting to changes in the relative costs associated with being black or white. Thus, if blacks and whites draw closer together, for example, in terms of relative health costs, the cross-subsidy caused by the prohibition on racial discrimination in insurance underwriting would automatically diminish as well.

Finally, perhaps the strongest counter-argument to my case for some level of racial redistribution is this: If there are so many different measures of well-being with respect to which blacks (and maybe Native Americans and Hispanics) lag behind whites, then, instead of relying on a system of racial classification, with all of the historical, political, and constitutional baggage it entails, why not instead seek to achieve greater equality with respect to each of those measures of well-being. In other words, if there is inequality with respect to housing opportunities we should have housing subsidies for the poor (or those having trouble getting good housing); if there is inequality with respect to health care, we should have health-care or health-insurance subsidies for the poor and uninsured (or maybe a nationalized system of healthcare); if there is educational inequality, we should subsidize education, especially for the poor; and if the problem is poverty generally, we should just redistribute to reduce poverty, either with direct cash transfers or with subsidies to certain types of job-creating industries or in some other way. With this argument I have no real disagreement. Indeed, this alternative is probably what I would recommend. It may well be that the most efficient, precise, comprehensive, administrable, and symbolically acceptable approach to dealing with these issues is to have separate redistributive programs for each dimension of well-being. The advantage of using race as a proxy for all of these things, recall, was that it provides a relatively inexpensive (in one sense) way of getting at all of these dimensions of well-being in one cash or in-kind transfer and in a relatively non-distorting way.

CONCLUSION

This Article has taken seriously the idea of slavery reparations as a redistributive program, and substantial white-to-black redistribution seems to be what many advocates of slavery reparations, at the core of their arguments, are proposing. The Article, therefore, is both a normative paper, in that it offers a defense of a modest version of racial redistribution, and a policy-design paper, in that it explores the implementation issues that would

inevitably arise if we were to pursue various modes of racial redistribution. Ultimately whether the sorts of programs I have been discussing, in-kind or in-cash, would be considered radical or conventional is a question of magnitude. A \$50 federal tax deduction limited only to African Americans would be trivial, although perhaps unconstitutional; whereas a massive increase in federal spending on inner-city schools funded by either an increase in the top federal income tax rates or by a new federal wealth tax would clearly be constitutional, but radical indeed. Precisely how much redistribution by race there should be, what forms such redistribution should take, and whether the amount of racial redistribution that we are already doing both implicitly (through targeted spending programs and prohibitions against statistical discrimination) and explicitly (through affirmative-action programs) is enough are the difficult questions, and I do not answer them here. I do suggest, however, some of the general types of programs that should be considered and the criteria for evaluating them. More importantly, I suggest that *these* are the key questions that should be the focus of attention in the slavery reparations debate.