

2021

3/5ths to 1/10th, How to Make Black America Whole: Exploring Congressional Act H.R. 40 – Commission to Study and Develop Reparation Proposals for African-Americans Act, 54 UIC J. Marshall L. Rev. 531 (2021)

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3/5THS TO 1/10TH, HOW TO MAKE BLACK AMERICA WHOLE: EXPLORING CONGRESSIONAL ACT H.R.40 – COMMISSION TO STUDY AND DEVELOP REPARATION PROPOSALS FOR AFRICAN-AMERICANS ACT

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I. INTRODUCTION

In 1619, a ship arrived in what was then known as “the New World”¹ and is now the shores of Virginia, carrying a distinct

* Christopher Burton, Juris Doctor, UIC John Marshall Law School 2020. My intention is for this comment to open minds, create new conversations, and push the United States closer to adequality atoning for its history of racial injustice. While we did not create America’s racial problem, we have inherited it, and it is up to us to fix it.

1. See *Colonial America (1492-1763)*, LIBRARY OF CONGRESS, www.americaslibrary.gov/jb/colonial/jb_colonial_subj.html [perma.cc/ZR6H-FND2] (last visited Mar. 29, 2021) (explaining that the “new world” is a term given to the Americas due to the fact that it was an unexplored region at the time). During the years of 1492-1769 European nations came to the Americas to increase their wealth and broaden their influence over world affairs. *Id.*

cargo.² The cargo held the potential to build generational wealth for its owners, but, more than that, the cargo carried the key to America's economic success. The cargo in question was approximately twenty human bodies—twenty human lives.³ Each life stolen from their African villages and forced onto a Portuguese slave ship.⁴ This cargo began the establishment of one of America's greatest economic advantages—slavery.⁵

By 1860, those twenty enslaved Africans had become the first of nearly four million American Slaves, valued at \$3.5 billion;⁶ making the enslaved the “largest single financial asset in the entire U.S. economy, worth more than all manufacturing and railroads combined.”⁷ In the Antebellum South, Black bodies were articles of commerce.⁸ This idea was demonstrated by the framers of the Constitution, who legally classified the enslaved as three-fifths of a person.⁹ Enslaved Black Americans were generating mass amounts of wealth for a country that considered them less than a whole person;¹⁰ the enslaved out-produced themselves

2. E.R. Shipp, *1619: 400 Years Ago, A Ship Arrived in Virginia, Bearing Human Cargo*, USA TODAY (Feb. 8, 2019), www.usatoday.com/story/news/investigations/2019/02/08/1619-african-arrival-virginia/2740468002 [perma.cc/FY5K-X59P].

3. *Id.*

4. *African Americans at Jamestown*, NAT'L PARK SERV., www.nps.gov/jame/learn/historyculture/african-americans-at-jamestown.htm [perma.cc/DF6E-CEN2] (last visited Mar. 14, 2021). English settler John Rolfe recounted the first documented arrival of Africans to the colony of Virginia:

About the latter end of August, a Dutch man of Warr of the burden of a 160 tunes arrived at Point-Comfort, the Comandors name Capt Jope, his Pilott for the West Indies one Mr Marmaduke an Englishman. . . . He brought not any thing but 20. and odd Negroes, w[hich] the Governo[r] and Cape Merchant bought for victuall[s].

Id.

5. Ta-Nehisi Coates, *Slavery Made America*, ATLANTIC (June 24, 2014), www.theatlantic.com/business/archive/2014/06/slavery-made-america/373288/ [perma.cc/Y7AL-4VSE] [hereinafter Coates I].

6. *Id.*

7. *Id.*

8. *Id.*

9. U.S. CONST. art. 1, § 2, cl. 3, *amended by* U.S. CONST. amend. XII.

10. *The “Three-Fifths Compromise”, A Story*, AAREG, aaregistry.org/story/the-three-fifths-compromise/ [perma.cc/EMU7-QKJZ] (last visited Mar. 29, 2021).

The issue of how to count slaves split the delegates into two groups. The northerners regarded slaves as property who should receive no representation. Southerners demanded that Blacks be counted with whites. The compromise clearly reflected the strength of the pro-slavery forces at the convention. The “Three-fifths Compromise” allowed a state to count three fifths of each Black person in determining political representation in the House. It was an early

season after season—cultivating tobacco, sugar cane, and cotton.¹¹ The cotton grown and picked by the enslaved was America’s most valuable export.¹² At this time, the South was the “economic engine” of the United States, “producing 75 percent of the world’s cotton,” fueled by forced labor.¹³

By 1860, the Mississippi Valley housed more millionaires per capita than anywhere else in the United States.¹⁴ This wealth was built on the backs of Blacks.¹⁵ Here, slave bodies were seen as “assets, credit, debt, currency — forms of capital and wealth.”¹⁶ America was well underway to becoming an economic powerhouse, creating an economy that could rival the wealthiest nations in the world.¹⁷ Enslaved people, Black Americans, human bodies now turned to fuel for the American Machine. This wealth and America’s state-sponsored slavery went hand in hand; the two were, and still are, inextricably tied to the other.¹⁸

American effort to avoid the intersectionality of race, class, nationality and wealth for political control.

Id.

11. See 1619: *The Economy That Slavery Built*, N.Y. TIMES MAG. (Aug. 30, 2019), www.nytimes.com/2019/08/30/podcasts/1619-slavery-cotton-capitalism.html?showTranscript=1 [perma.cc/FFT6-YMWK] (reporting that “[a]t the eve of the Civil War, the average enslaved worker picked 400 percent as much cotton as her counterpart did 60 years earlier”). “It’s an incredible amount of productivity. The system is really pulling as much as it can out of its enslaved workforce.” *Id.*

12. See e.g., Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You have to Start on the Plantation*, N.Y. TIMES MAG. (Aug. 14, 2019), www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html [perma.cc/ZMJ5-MLR3] (explaining that enslavement guaranteed that America would be the biggest cotton producer in the world.).

What made the cotton economy boom in the United States, and not in all the other far-flung parts of the world with climates and soil suitable to the crop, was our nation’s unflinching willingness to use violence on nonwhite people and to exert its will on seemingly endless supplies of land and labor. Given the choice between modernity and barbarism, prosperity and poverty, lawfulness and cruelty, democracy and totalitarianism, America chose all of the above.

Id.

13. Greg Timmons, *How Slavery Became the Economic Engine of the South*, HISTORY (Mar. 6, 2018), www.history.com/news/slavery-profitable-southern-economy [perma.cc/N9LE-L495].

14. Desmond, *supra* note 12.

15. MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 10 (2019).

16. *Id.*

17. ANGUS MADDISON, CONTOURS OF THE WORLD ECONOMY, 1-2030 AD at 103-05 (2007).

18. See, e.g., Edward E. Baptist, *Without Slavery, Would The U.S. Be The*

Since the abolishment of slavery, there have been vagrancy laws,¹⁹ convict leasing,²⁰ Jim Crow laws,²¹ redlining,²² and a host

Leading Economic Power?, NHPR, www.nhpr.org/post/without-slavery-would-us-be-leading-economic-power#stream/0 [perma.cc/NE5E-7R96] (explaining that slavery was “integral to establishing the United States as a world economic power” and that “[s]lavery continues to have an impact on America in the most basic economic sense”).

19. See *Black Codes*, HISTORY (June 1, 2020), www.history.com/topics/black-history/black-codes [perma.cc/QPS5-H4YP] (explaining the restrictive laws that were put in place after emancipation to continue to criminalize being Black)

Black codes were restrictive laws designed to limit the freedom of African Americans and ensure their availability as a cheap labor force after slavery was abolished during the Civil War....Some states limited the type of property that Black people could own, while virtually all the former Confederate states passed strict vagrancy and labor contract laws, as well as so-called “anti-enticement” measures designed to punish anyone who offered higher wages to a Black laborer already under contract.

Id.

20. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 31 (2010).

[C]onvict leasing, in which prisoners were contracted out as laborers to the highest private bidder. Douglas Blackmon, in *Slavery by Another Name*, describes how tens of thousands of African Americans were arbitrarily arrested during this period, many of them hit with court cost and fines, which had to be worked off in order to secure their release. With no means to pay off their “debts,” prisoners were sold as forced laborers to lumber camps, brickyards, railroads, farms, plantations, and dozens of corporations throughout the South. Death rates were shockingly high, for the private contractors had no interest in the health and well-being of their laborers, unlike the earlier slave-owners who needed their slaves, at a minimum, to be healthy enough to survive hard labor. Laborers were subject to almost continual lashing by long horse whips, and those who collapsed due to injuries or exhaustion were often left to die.

Id.

21. *RACE LAWS*, *BOUVIER LAW DICTIONARY* (desk ed. 2012).

Jim Crow laws were the statutes, municipal ordinances, and case decisions that created and enforced de jure segregation and reinforced de facto segregation of Americans based on the construction of race, which persisted from the end of Reconstruction to the end of the Civil Rights Movement. Jim Crow laws were prominent in southern states, but there was no lack of similar laws in northern and western states, as well as federal laws. Jim Crow laws were constitutional under the federal constitutional doctrines of state sovereign immunity and of separate but equal treatment, complying with the notion of equal protection of the laws enshrined in *Plessy v. Ferguson*, 163 U.S. 537 (1896), although their dismantling commenced as early as World War I, with such cases as *Buchanan v. Warley* 245 U.S. 60 (1917), outlawing

of other political and government-sponsored crusades to suppress Black Americans both socially and economically.²³

Enslavement reigned for 250 years on these shores. When it ended, this country could have extended its hallowed principles — life, liberty, and the pursuit of happiness — to all, regardless of color. But America had other principles in mind. And so for a century after the Civil War, [B]lack people were subjected to a relentless campaign of terror[.]²⁴

This “relentless campaign of terror” has led to vast intergenerational economic disparities among White and Black Americans, disparities that still find a home in American society today.²⁵ America has yet to fully address these disparities and attempt to make Black America whole. In order to rectify this injustice, America must give reparations.

Black Americans have historically leaned on the judicial system to address the issues of economic disenfranchisement brought about by state-sponsored social and financial bondage

the legal segregation of housing. The end of Jim Crow came with the rejection of the Plessy doctrine in *Brown v. Board of Education*, 347 U.S. 483 (1954) and the passage of the federal civil rights and voting rights acts in the 1960s.

Id.

22. See Tracy Jan, *Redlining Was Banned 50 Years Ago. It's Still Hurting Minorities Today*, WASH. POST (Mar. 28, 2018), www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/ [perma.cc/XQ9J-JC8G] (reporting on the discriminatory practices by the Federal Housing Administration).

The Federal Housing Administration institutionalized the system of discriminatory lending in government-backed mortgages, reflecting local race-based criteria in their underwriting practices and reinforcing residential segregation in American cities . . . 50 years after that law passed, the lingering effects of redlining are clear, with the pattern of economic and racial residential segregation still evident in many U.S. cities...

Id.

23. See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (reasoning that: “[t]hey had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.”).

24. Olivia Paschal and Madeline Carlisle, *Read Ta-Nehisi Coates's Testimony on Reparations*, ATLANTIC (June 19, 2019), www.theatlantic.com/politics/archive/2019/06/ta-nehisi-coates-testimony-house-reparations-hr-40/592042 [perma.cc/4URB-TX9N] [hereafter Coates II].

25. *Id.*

laws.²⁶ Time-and-time again the court system has concluded that the legislature, not the judiciary, is better suited to handle these claims:

Discrimination and bigotry of any type is intolerable, and the enslavement of Africans by this Country is inexcusable. This Court, however, is unable to identify any legally cognizable basis upon which plaintiff's claims may proceed against the United States. While plaintiff may be justified in seeking redress for past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief. The legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances.²⁷

Giving deference to the Court's view on reparations, this Comment will argue that the United States Congress should enact Congressional Act H.R.40, Commission to Study and Develop Reparation Proposals for African-Americans Act.²⁸ In making that argument, Part II of this Comment will start with an overview of H.R. 40. Next, it will explore the history of economic disparities among Black and White Americans. Part II will then conclude with examples of how reparations have been successful throughout the history of the United States. Part III of this Comment will explore the substance of the proposals in H.R. 40. It will then contrast American's opposing views on H.R. 40. Finally, Part IV proposes that Congress enact H.R. 40 and allocate community-based reparations targeting Black Americans. This will both atone for America's history of racial injustice and address the vast economic disparities among White and Black Americans.

II. BACKGROUND

A. *What Is H.R. 40?*

H.R. 40 is a bill that aims to study slavery and discrimination of Black Americans from 1619 to present day.²⁹ The bill looks to understand the effects of state-sponsored discrimination — the benefits it has conferred on societal

26. *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721 (N.D. Ill. 2005); *Tatum v. United States*, 630 F. App'x 638 (7th Cir. 2016); *Mims v. United States Fed. Gov't*, No. 19-cv-320-jdp, 2019 U.S. Dist. LEXIS 122845 (W.D. Wis. July 23, 2019). (These cases found that descendants of the enslaved lacked standing to assert the legal rights of their ancestors; and that any decision made by the court on reparations would be considered a political question.)

27. *Cato v. United States*, 70 F.3d 1103, 1105 (9th Cir. 1995).

28. Commission to Study and Develop Reparation Proposals for African-Americans Act, 116 H.R. 40, 116th Cong. (2019).

29. *Id.*

institutions and the harm that has entailed for subsequent generations.³⁰ Former Democratic United States Representative John Conyers of Michigan introduced H.R. 40 in every Congressional term beginning in 1989 and continuing until he resigned in 2017.³¹ Since Representative Conyers's resignation, Texas Democratic Representative Sheila Jackson Lee has taken the baton, sponsoring the current version of H.R. 40 in the 117th Congress.³² Representative Lee sees H.R. 40 as "a crucial piece of legislation because it goes beyond exploring the economic implications of slavery and segregation. It is a holistic bill in the sense that it seeks to establish a commission to also examine the moral and social implications of slavery."³³

H.R. 40 is four-fold.³⁴ The current bill aims to:

- (1) address the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865;
- (2) to establish a Commission to study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent de jure and de facto racial, and economic discrimination against Black Americans;
- (3) the impact of these forces on living Black Americans; and
- (4) to make recommendations to the Congress on appropriate remedies, and for other purposes.³⁵

H.R. 40 is not a bill that asks for monetary compensation or the establishment of entitlement programs for the decedents of the enslaved.³⁶ Rather, the purpose of the bill is to acknowledge the injustices done to Black Americans during legal enslavement and

30. *Id.*

31. ALFRED L. BROPHY, REPARATIONS PRO & CON 143 (2006) [hereinafter BROPHY I].

32. Breeanna Hare & Doug Criss, *Six Questions About Slavery Reparations, Answered*, CNN (Apr. 15, 2019), www.cnn.com/2019/04/14/politics/slavery-reparations-explainer-trnd/index.html [perma.cc/2CW7-8MRJ].

33. Press Release, Sheila Jackson Lee, Congresswoman, House of Representatives, Congresswoman Sheila Jackson Lee Introduces Legislation for a Commission to Consider Reparations Proposals for Africans Americans (Jan. 9, 2019), jacksonlee.house.gov/media-center/press-releases/congresswoman-sheila-jackson-lee-introduces-legislation-for-a-commission [perma.cc/9YPB-EDG9].

34. 116 H.R. 40 (2019).

35. *Id.*

36. See Maija Sikora, *Explained: H.R. 40 and The Possibility of Reparations*, RACQUET PRESS (July 23, 2019), theracquet.org/6476/news/explained-h-r-40-and-the-possibility-of-reparations/ [perma.cc/D5FE-LQ42] (explaining that "[t]he end goal of H.R. 40 is not the disbursement of cash, checks or any other kind of direct deposit").

the periods of state-sponsored terror that followed.³⁷ After the Commission has studied these issues, the Commission is then charged with making a recommendation to Congress on any reparations they find are needed to atone for Americas past injustices.³⁸

The bill requests that the Commission be made up of 13 members.³⁹

Three members [are to] be appointed by the President, three members [] appointed by the Speaker of the House of Representatives, one member appointed by the President pro tempore of the Senate, [and] six members [to be] selected from the major civil society and reparations organizations that have historically championed the cause of reparatory justice.⁴⁰

The Act calls for all members of the Commission to be people “who are especially qualified to serve on the Commission by virtue of their education, training, activism or experience, particularly in the field of African-American studies and reparatory justice.”⁴¹

B. Historic Economic Disparities Among Black and White Americans

There is a saying: “when White America catches a cold, Black America catches pneumonia.”⁴² This adage illustrates the omnipresent economic gap that exists between Black and White Americans.⁴³ Following Emancipation, Black Americans owned

37. *Id.*

38. *Id.*

39. 116 H.R. 40 (2019).

40. *Id.*

41. *Id.*

42. Sam Fulwood III, *When White Folks Catch a Cold, Black Folks Get Pneumonia*, CTR. FOR AMERICAN PROGRESS (Jan. 28, 2015), www.americanprogress.org/issues/race/news/2015/01/28/105551/when-whites-folks-catch-a-cold-black-folks-get-pneumonia/ [perma.cc/QRQ7-4ZE9] (explaining that “[i]oosely translated, this clichéd quip means a downturn in the economy might pose hardships for some white Americans, but it’s deadly for those [B]lack Americans who are already mired at the bottom of economic ladder”).

43. Anita Rao & Frank Stasio, *Will America Ever Close Its Racial Wealth Gap*, WUNC (Feb. 23, 2018), www.wunc.org/post/will-america-ever-close-its-racial-wealth-gap [perma.cc/B5GH-7HDQ].

In 1865 when slaves are emancipated . . . Freedmen and freed [B]lacks have about 0.5 percent of the nation's wealth at the time . . . Today that number has barely budged. It is about 1-2 percent. So, any efforts at wealth accumulation for the [B]lack community have been an utter failure . . . There's another economic story that once you have a racial wealth gap that is that wide, it continues to self-perpetuate without actually continuing input ... Wealth creates more wealth unto itself.

about 0.5 percent of America's wealth.⁴⁴ This low percentage of wealth was because the enslaved could not legally own property, nor were they paid for their labor.⁴⁵ It is astonishing that "150 years later, [the initial post-slavery percent of wealth at .5 percent] has barely budged—Blacks still own only about 1 percent of the wealth in the United States."⁴⁶ In 2019, the average White family was worth about \$171,000, whereas the average wealth of a Black family was worth \$17,600.⁴⁷ White Americans, on average, are worth *ten times* as much as Black Americans.⁴⁸

This wealth inequality among Black and White Americans can be attributed to the historic racially motivated policies and practices of the United States Government.⁴⁹ Nina Banks, a professor of economics at Bucknell University, explains, "[t]he racial wealth gap is a reflection of long-term policies and practices by both the public and private sectors that have systematically disadvantaged [B]lack, Latinx and Native communities in favor of [W]hite Americans."⁵⁰

1. *The New Deal and Jim Crow*

The New Deal was the United States Government's response to the Great Depression.⁵¹ It was a series of economic programs enacted by President Franklin D. Roosevelt that focused on relief for the poor, the recovery of the U.S. economy, and a reform of the

And the lack of wealth, also, has this vicious cycle downwards. You don't actually need banks to be racist . . . Even a race-neutral credit score or race-neutral applications will continue to self-perpetuate that racial wealth gap, because without wealth you have poor credit. You have more debt. You have lower ladders out of poverty.

Id.

44. BARADARAN, *supra* note 15, at 9.

45. *Id.*

46. *Id.*

47. Irina Ivanova, *If Black Families were as Rich as White Ones, U.S. Economy Would be \$1.5 Trillion Bigger*, CBS (Aug. 15, 2019), www.cbsnews.com/news/racial-wealth-gap-costs-economy-1-5-trillion-dollars-report-finds/ [perma.cc/L5FE-BNW9].

48. *Id.*

49. See e.g., Trymaine Lee, *A Vast Wealth Gap, Driven By Segregation, Redlining, Evictions And Exclusion, Separates Black And White America*, NY TIMES MAG. (Aug. 14, 2019), www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html [perma.cc/N5YM-A7A4] (reporting that "[t]oday's racial wealth gap is perhaps the most glaring legacy of American slavery and the violent economic dispossession that followed").

50. Ivanova, *supra* note 47.

51. Leon Keyserling, *The New Deal and Its Current Significance In Re National Economic and Social Policy*, 59 WASH. L. REV. 795, 797 (1984).

U.S. financial system.⁵² The New Deal established the Homeowners Loan Corporation (“HOLC”) to give Americans the opportunity to be homeowners.⁵³ The HOLC purchased properties and existing home mortgages from banks to allow people to pay their home loans back to the government at lower interest rates.⁵⁴ The New Deal also created the Social Security Act (“SSA”), which provided financial assistance to elderly and handicapped Americans.⁵⁵ Along with those programs, the New Deal created the National Youth Administration, the Federal Emergency Relief Administration, the Civil Works Administration, the Works Progress Administration, and a host of other social programs that put millions of White Americans immediately back to work and helped them create wealth.⁵⁶ This was not the case for Black Americans.⁵⁷ While White America was beginning to catch its breath and start to see benefits from these social programs, Jim Crow’s death grip had begun to tighten on the throat of Black

52. CAROL BERKIN, *MAKING AMERICA, VOLUME 2: A HISTORY OF THE UNITED STATES SINCE 1865* at 629-632 (1995).

53. Peter M. Carrozzo, *A New Deal For The American Mortgage: The Home Owners’ Loan Corporation, The National Housing Act And The Birth Of The National Mortgage Market*, 17 U. MIAMI BUS. L. REV. 1, 8 (2008).

The HOLC would issue its own bonds to local lenders in exchange for delinquent mortgages in their portfolios. These bonds were tax exempt (no federal, state or local tax), paid a maximum interest rate of 4 percent (guaranteed by the federal government), and held a maximum eighteen-year maturity. Loans could be made on one to four family dwellings for 80 percent of the appraised value of the property or less.

Id.

54. *Id.*

55. *Policy Basics: Top Ten Facts About Social Security*, CTR. ON BUDGET & POLICY PRIORITIES (Aug. 13, 2020), www.cbpp.org/research/social-security/top-ten-facts-about-social-security [perma.cc/6RVL-JZME].

56. Steve Fiorillo, *What Were the New Deal Programs and What did They Do?*, STREET (Feb. 11, 2019), www.thestreet.com/politics/new-deal-programs-14861940 [perma.cc/7CEF-FFPY]; Kimberly Amadeo, *New Deal Summary, Programs, Policies, and Its Success*, BALANCE (July 31, 2020), www.thebalance.com/fdr-and-the-new-deal-programs-timeline-did-it-work-3305598 [perma.cc/NW3X-GQAD].

57. Richard Lyon, *The New Deal: Designed for Jim Crow*, HUFFINGTON POST (Sept. 10, 2012), www.huffpost.com/entry/the-new-deal-and-jim-crow_b_1868672 [perma.cc/QS49-QELX].

The Roosevelt administration could not pass legislation without the votes of the southern delegations. In the tradition of the Solid South they acted as a unified bloc. As a price for their votes they demanded and got modifications to social and economic programs that cut racial minorities out of the picture.

Id.

America.⁵⁸ Southern oligarchs meticulously implemented Jim Crow restrictions to deny Blacks from voting, receiving housing and social security benefits and major pieces of New Deal legislation “were deliberately structured in ways to make them racially exclusionary in practice.”⁵⁹

The HOLC used an appraisal system to determine what neighborhoods would receive the loan relief.⁶⁰ “HOLC developed a rating system to evaluate the risks associated with loans made to specific urban neighborhoods, systematically including in the procedures an evaluation of the racial integration or potential racial integration of the community.”⁶¹ This system created “four color-coded categories of quality.”⁶² The HOLC then used this system to draw maps that classified areas heavily populated by Black Americans as “hazardous,” creating a system where Black Americans were not able to qualify for HOLC’s relief.⁶³

This was yet another barrier to wealth building for Black Americans. “Since housing equity makes up about two-thirds of median household wealth, excluding [B]lack Americans from establishing equity during a time of unprecedented rises in home values locked in and exacerbated wealth disparities.”⁶⁴ The HOLC ensured White Americans could become homeowners by offering them lower interest rates on their loans and increasing the

58. *Id.*

59. *Id.*

60. Charles L. Nier III, *Perpetuation Of Segregation: Toward A New Historical and Legal Interpretation Of Redlining Under The Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 621 (1999).

61. *Id.* at 622.

62. *Id.*

An explanation of the HOLC rating system:

The rating system established four color-coded categories of quality. The first category (A) was coded green and the areas were described as “new, homogenous, and ‘in demand as residential locations in good times and bad times.’” Homogeneous was defined as “American business and professional men.” The second category (B) was coded blue and consisted of areas that had “reached their peak,” but were “still desirable” and could be expected to remain stable. The third category (C) was coded yellow with the neighborhoods described as “definitely declining.” The fourth category (D) was coded red and the “neighborhoods were defined as areas “in which the things taking place in C areas have already happened.”

Id.

63. *Id.*

64. Calvin Schermerhorn, *Why the Racial Wealth Gap Persists, More Than 150 Years After Emancipation*, WASH. POST (June 19, 2019), www.washingtonpost.com/outlook/2019/06/19/why-racial-wealth-gap-persists-more-than-years-after-emancipation/ [perma.cc/6EA4-X4CX].

lifespan of their loans by *three-hundred percent*.⁶⁵ Thomas J. Sugrue, a historian at the University of Pennsylvania, argues that “[w]ithout federal intervention in the housing market, massive suburbanization would have been impossible . . . In 1930, only 30 percent of Americans owned their own homes; by 1960, more than 60 percent were home owners. Home ownership became an emblem of American citizenship.”⁶⁶

The Social Security Act was considered a “safety net” for Americans.⁶⁷ The goal of the SSA “was to create a dedicated tax that would fund pension benefits for all workers.”⁶⁸ Farm workers and domestics, jobs predominately held by Blacks, were excluded from eligibility under the SSA.⁶⁹ Sixty-five percent of Black Americans were deemed ineligible to reap the social benefits given to poor and unemployed White Americans.⁷⁰ At this time, the South was still primarily an agrarian society, whose economy was largely dependent on severely underpaid Black labor.⁷¹ Maintaining this cheap labor benefited White landowners, who, as the decision makers of the time, ensured Blacks would not receive Social Security benefits.⁷² The National Association for Colored People referred to America’s new “safety net” as “a sieve with holes just big enough for the majority of Negroes to fall through.”⁷³ The SSA had been “shaped to racist contours” much like most of the New Deal legislation, ensuring that Black Americans would never be able to fully recover in ways White Americans would.⁷⁴

65. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ [perma.cc/N988-GB9L] [hereinafter Coates III].

66. *Id.*

It was the Home Owners’ Loan Corporation, not a private trade association, that pioneered the practice of redlining, selectively granting loans and insisting that any property it insured be covered by a restrictive covenant—a clause in the deed forbidding the sale of the property to anyone other than [W]hites. Millions of dollars flowed from tax coffers into segregated [W]hite neighborhoods.

Id.

67. Theodore P. Seto & Sande L. Buhai, *Tax And Disability: Ability To Pay And The Taxation Of Difference*, 154 U. PA. L. REV. 1053, 1071 (2006).

68. Lyon, *supra* note 57.

69. Coates III, *supra* note 65.

70. *Id.*

71. Lyon, *supra* note 57.

72. *See id.* (reporting that “the southern oligarchs saw this as a threat to their supply of cheap colored labor. They demanded that agricultural and domestic workers be excluded from the program.”).

73. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 48 (2005).

74. *Id.*

2. *The Racist Execution of the G.I. Bill*

The Servicemen's Readjustment Act of 1944, better known as the G.I. bill, has been called “one of the finest two or three [laws] congress has passed since our constitution has took effect.”⁷⁵ The G.I. Bill replaced the traditional veterans’ bonus with benefits: “[H]ousing, business, or farm loans guaranteed by the government; tuition and a stipend at the school of a veteran’s choice or fees to cover the cost of on-the-job training; unemployment compensation; and no-cost health care for veterans who were injured because of service.”⁷⁶ Often referred to as the “*magic carpet to the middle class*,” the G.I. Bill converted millions of working-class Americans to members of the middle class.⁷⁷ Although Black veterans had fought in the same war and amassed the same battle wounds as White veterans, Black veterans were not offered a ride on the “magic carpet.”⁷⁸

Although the G.I. Bill was “carefully race-neutral on its face,” the bill required the federal benefits be administered locally, ensuring that the prevailing prejudices in state government controlled the administration of the benefits.⁷⁹ “Written under Southern auspices, the law was deliberately designed to accommodate Jim Crow.”⁸⁰ This was engineered anocracy. While White veterans were attending colleges and starting their professional lives, Black veterans were denied entry to those same colleges and universities.⁸¹ Ninety-five percent of Black veterans looking to use their education benefits were relegated to about 100 “Colleges for Negroes” in the South.⁸² In 1947, about 20,000 Black veterans were denied entry to those “Colleges for Negroes”, fifty-five percent of applicants were turned away due to lack of space.⁸³ Using the G.I. Bill the federal government “subsidized White colleges and universities that adhered to racist admissions policies that denied admission to Black students,” while simultaneously ensuring that Black veterans would rarely — if ever — have

75. KATHLEEN J. FRYDL, *THE G.I. BILL* 1 (2009).

76. *Id.* at 1-2.

77. Juan F. Perea, *Doctrines Of Delusion: How The History Of The G.I. Bill And Other Inconvenient Truths Undermine The Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 585 (2014) (emphasis added).

78. *Id.*

79. *Id.* at 593. “Though the legislation was race-neutral in its language, pervasive race discrimination against [B]lack in higher education meant that [B]lack were largely denied equal access to their federal education benefits. With few exceptions, most colleges and universities in the country admitted only token numbers of [B]lack students.” *Id.*

80. KATZNELSON, *supra* note 73, at 114.

81. *Id.* at 594.

82. *Id.*

83. *Id.* at 595.

access to the education benefits they were entitled to.⁸⁴ The Bill inflamed income inequalities between Whites and Blacks.⁸⁵ Most Black veterans had to settle for low wage jobs due to the state-sponsored blackballing of education and training opportunities, while White veteran's incomes increased considerably as they became almost exclusively college-educated.⁸⁶

Title III of the Bill provided loans to veterans for the "Purchase or Construction of Homes, Farms, and Business Property."⁸⁷ This benefit provided federal government guarantees of up to fifty percent of loans made by private banks and lending institutions.⁸⁸ Because the administration of the Bill was left in the hands of local government, this "left [B]lack veterans to tangle with [W]hite officials at their local Veterans Administration as well as with the same banks that had, for years, refused to grant mortgages to [B]lacks."⁸⁹ The housing benefit was virtually useless to Black veterans.⁹⁰ Although the loans were insured by the federal government, banks still refused to offer home loans to Blacks.⁹¹ "Of the 3,229 GI Bill-guaranteed home, business and farm loans made in 1947 in Mississippi, for example, only two went to Black veterans."⁹² Between 1945 and 1954, the United States added thirteen million new homes to its "housing stock," not surprising, forty percent of those homes were paid for by VA mortgages.⁹³ While White veterans were given the opportunity for economic security through homeownership, Black Americans were once again locked out of America's "[W]hite only" prosperity pool.⁹⁴

84. *Id.*

85. Nick Kotz, *When Affirmative Action Was White: Uncivil Rights*, N.Y. TIMES (Aug. 28, 2005), www.nytimes.com/2005/08/28/books/review/when-affirmative-action-was-white-uncivil-rights.html [perma.cc/XEB5-2L2A]. "The statistics on disparate treatment are staggering. By October 1946, 6,500 former soldiers had been placed in nonfarm jobs by the employment service in Mississippi; 86 percent of the skilled and semiskilled jobs were filled by [W]hites, 92 percent of the unskilled ones by [B]lacks." *Id.*

86. KATZNELSON, *supra* note 73, at 134.

87. *What Does the Government Offer You?*, AMERICAN HIST. ASS'N, [www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-36-does-it-pay-to-borrow-\(1945\)/what-does-the-government-offer-you](http://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-36-does-it-pay-to-borrow-(1945)/what-does-the-government-offer-you) [perma.cc/6QAG-QTVS] (last visited Mar. 29, 2021).

88. *Id.*

89. Coates III, *supra* note 65.

90. *Id.*

91. *Id.*

92. CHESTER HARTMAN, AMERICA'S GROWING INEQUALITY: THE IMPACT OF POVERTY AND RACE 46 (2014).

93. KATZNELSON, *supra* note 73, at 116.

94. See e.g., Terry Gross, *A 'Forgotten History' Of How The U.S. Government Segregated America*, NPR (May 3, 2017), www.npr.org/transcripts/526655831 [perma.cc/F3AT-KGQR] (explaining that federal housing policies were designed with racial intent to segregate).

C. History of Past Proposed Reparation Acts in the United States.

Reparation legislation has historically been implemented by domestic and foreign governments to repair for past injustice.⁹⁵ The idea of reparations for racial groups in America is certainly not a new concept.⁹⁶ While H.R. 40 has not yet passed thirty years after its introduction to Congress, there is precedent for a reparations act.⁹⁷ As recent as 2021, the city of Evanston, Illinois has become the first city in the United States to make reparations to its Black residents that include housing grants to address the city's past housing discrimination.⁹⁸ The Chicago suburb plans to give \$25,000 to eligible Black households for home repairs or down payments on property purchases.⁹⁹ In 2002, resolutions passed in Chicago requiring companies doing business with the city to disclose their connections to slavery.¹⁰⁰ Native Americans received reparations from the United States Congress in the form of returned property in 1992 after the passing of The Native Graves Repatriation Act.¹⁰¹ The Act required "the return of human remains to tribes from institutions that receive federal funding,"

The federal policies mostly began during the New Deal. It was a state-sponsored system of segregation. The things you've just mentioned - private prejudice and real estate steering and bank redlining and income differences - all certainly played a role. But without federal policy designed explicitly with racial explicit intent to segregate every metropolitan area in this country, those private factors would not have been able to successfully segregate their communities.

Id.

95. See BROPHY I, *supra* note 31, at 7 (explaining that "often, reparations programs look backward. That is, they focus on measuring past harms and correcting for it. Thus, truth commissions, apologies, and individual payments are frequently aimed at correcting for some well-defined, identifiable past harm.")

96. *Id.*

97. *Id.*

98. Char Adams, *Evanston Is The First U.S. City To Issue Slavery Reparations. Experts Say It's A Noble Start*, NBC (Mar. 26, 2021), www.nbcnews.com/news/nbcblk/evanston-s-reparations-plan-noble-start-complicated-process-experts-say-n1262096 [perma.cc/5R9Q-7XK7].

99. *Id.*

100. Sabrina L. Miller, Gary Washburn, *New Chicago Law Requires Firms to Tell Slavery Links*, CHI. TRIB. (Oct. 3, 2002), www.chicagotribune.com/news/ct-xpm-2002-10-03-0210030033-story.html [perma.cc/V2W3-XMCC].

101. Native American Grave Protection And Repatriation Act, 136 Cong. Rec H 10985 (1990).

in return for continued funding.¹⁰²

In 1988, the U.S. Congress provided reparations to Japanese Americans interned during World War II in the form of monetary compensation.¹⁰³ The largest single payout of reparations in U.S. history came in 1971 in the Alaska Claims Settlement Act of 1971.¹⁰⁴ The reparations paid to the Japanese and Alaskan people are most similar to those proposed in this Comment and will be further explained.

1. *Reparations to Japanese Americans Interned During World War II*

One of the most-known reparations cases in U.S. history is the Civil Liberties Act of 1988.¹⁰⁵ This Act provided restitution for World War II internment of Japanese Americans and Aleuts.¹⁰⁶ During World War II, President Roosevelt, through Executive Order, forced “the relocation of Japanese Americans from the West Coast.”¹⁰⁷ Individuals of Japanese ancestry were excluded from military zones and forced into detention centers.¹⁰⁸ The Order stated: “[T]he successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities[.]”¹⁰⁹ The Order and the subsequent internment of Japanese Americans were both upheld by the United States Supreme Court.¹¹⁰ After the war, Japanese Americans filed lawsuits to recover for damages for the internment.¹¹¹ The lawsuits were dismissed and Japanese Americans looked to Congress for redress.¹¹²

After two years of consideration, Congress enacted a bill

102. BROPHY I, *supra* note 31, at 42.

103. *Id.* at 43.

104. *Id.* at 42.

105. Civil Liberties Act Of 1988; Aleutian And Pribilof Islands Restitution Act, 1988 Enacted H.R. 442, 100 Enacted H.R. 442, 102 Stat. 903.

106. *Id.*

107. BROPHY I, *supra* note 31, at 43.

108. Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining The Argument For Legislative African American Reparations*, 147 U. PA. L. REV. 677, 714 (Jan. 1999).

109. Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943).

110. *Korematsu v. United States*, 323 U.S. 214 (1944).

111. *See Hohri v. United States*, 586 F. Supp. 769 (D.C. 1984) (explaining that the Court granted the Government's motion to dismiss the Japanese-Americans' complaint for lack of subject matter jurisdiction).

112. Bilal Qureshi, *From Wrong To Right: A U.S. Apology For Japanese Internment*, NPR (Aug. 9, 2013), www.npr.org/sections/codeswitch/2013/08/09/210138278/japanese-internment-redress [perma.cc/NFR2-KXXY].

signed by President Ronald Reagan that authorized the payment of \$1.6 billion.¹¹³

[T]he Act provided for: (1) compensation in the amount of \$20,000 to individuals of Japanese ancestry who were interned, and living on the date of the enactment of the Act (or to their living heirs); and (2) a public education fund to facilitate public awareness of the internment and prevent a recurrence.¹¹⁴

Approximately 1.2 million people were interned but only about 82,219 received compensation.¹¹⁵

2. *Alaska Claims Settlement Act of 1971*

The Alaska Claims Settlement Act of 1971 is the “largest single payout of reparations in U.S. history.”¹¹⁶ Signed into law by President Richard Nixon, the Act “provided Alaskan tribes with nearly \$1 billion” dollars and “the return of 44 million acres of land.”¹¹⁷ This payout was “[m]otivated in large part by politics: Alaska Natives had a plausible claim to land that was crucial to the completion of the Alaska pipeline.”¹¹⁸ Congress provided land and money to the Alaskan tribes in exchange for their claims to the other land.¹¹⁹

The United States Congress has historically used reparations to repair past mistakes. President Lyndon B. Johnson famously said, “[y]ou do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.”¹²⁰ This notion of fairness and compensation for past harms has been extended to multiple racial groups in the U.S. — it is time the idea is extended to Black Americans.

III. ANALYSIS

Drafters of H.R. 40 have yet to determine what form of reparations should be implemented if the Commission were to recommend a compensation remedy.¹²¹ This Section will analyze

113 BROPY I, *supra* note 31, at 43.

114. Chisolm, *supra* note 108, at 714-715.

115. BROPY I, *supra* note 31, at 44.

116. *Id.* at 42.

117. *Id.*

118. *Id.*

119. *Id.*

120. President Lyndon B. Johnson, To Fulfill These Rights, Speech at Howard University Commencement (June 4, 1965).

121. Chisolm, *supra* note 108, at 720.

four types of reparations in the context of H.R. 40. After determining what form of reparation is applicable to address America's history of racial injustice, the next question is who receives the redress? This Section will consider who the appropriate beneficiaries of reparations are. Finally, this Section will analyze the contrasting views Americans have on Black American reparations.

A. *Types of Reparations*

The “four main types of reparations that legislatures could grant [are]: truth commissions, apologies, community-based reparations, and payments to individuals.”¹²² Individual payments can come in the form of affirmative action plans or direct cash payments.¹²³ Proponents of reparations generally support a combination of all four forms of reparations.¹²⁴ There has been little to no serious discussion of cash payments to individuals as reparations for enslavement.¹²⁵

1. *Truth Commissions*

Truth commissions are “officially sanctioned non-judicial bod[ies] organized for a limited time.”¹²⁶ Commissions are tasked with discovering and revealing past wrongdoings by the government or non-state actors.¹²⁷ They are usually set up to “examin[e] serious human rights violations.¹²⁸ The goal of truth commissions is two-fold: (1) to seek truth and (2) to provide reconciliation.¹²⁹ Moderate Reparationists in the U.S. have advocated for truth commissions to explore limited parts of Jim Crow and enslavement, including the Tulsa Race Riot of 1921,¹³⁰

122. BROPHY I, *supra* note 31, at 176.

123. *Id.*

124. *Id.*

125. *Id.*

126. Matiangai V.S. Sirleaf, *The Truth About Truth Commissions: Why They Do Not Function Optimally in Post-Conflict Societies*, 35 CARDOZO L. REV. 2263, 2265 (2014).

127. *Id.*

128. *Id.*

129. David Marchese, *What Can America Learn From South Africa About National Healing?*, NY TIMES (Dec. 11, 2020), www.nytimes.com/interactive/2020/12/14/magazine/pumla-gobodo-madikizela-interview.html [perma.cc/AU67-PYVH].

130. Scott Ellsworth, *The Tulsa Race Massacre*, OK. HIS. SOC'Y, www.okhistory.org/publications/enc/entry.php?entry=TU013 [perma.cc/7NY6-GV24] (last visited Mar. 29, 2021). The state of Oklahoma provides a vivid account of the racial violence:

the Rosewood Massacre of 1923,¹³¹ and the thousands of lynchings that took place in the U.S. “from Reconstruction through the Civil Rights Era.”¹³²

Commissions have been used globally since the 1980s by countries looking to come to terms with their past.¹³³ For example,

Believed to be the single worst incident of racial violence in American history, the bloody 1921 outbreak in Tulsa has continued to haunt Oklahomans. During the course of eighteen terrible hours on May 31 and June 1, 1921, more than one thousand homes and businesses were destroyed, while credible estimates of deaths range from fifty to three hundred. By the time the violence ended, the city had been placed under martial law, thousands of Tulsans were being held under armed guard, and the state's second-largest African American community had been burned to the ground.

One of a number of similar episodes nationwide, the outbreak occurred during an era of acute racial tensions, characterized by the birth and rapid growth of the so-called second Ku Klux Klan and by the determined efforts of African Americans to resist attacks upon their communities, particularly in the matter of lynching. Such trends were mirrored both statewide and in Tulsa.

Id.

131. Carmelita Pickett, *Rosewood Riot of 1923*, ENCYCLOPEDIA BRITANNICA, www.britannica.com/topic/Rosewood-riot-of-1923 [perma.cc/6FDZ-QFPZ] (last visited May 26, 2021). A recount of the Rosewood Riot:

On January 4, 1923, sparked by the claim that a [Black] man had attacked a [W]hite woman, dozens of armed [W]hites descended on Rosewood, terrorizing the community, shooting several residents, and burning buildings. Fearing for their lives, some Rosewood residents hid in the nearby swamps while others sought refuge in the home of John Wright, a local [W]hite businessman. Most Rosewood residents refused to fight the vigilantes, fearing the repercussions that were sure to follow, but Sylvester Carrier took up arms against the mob.

Carrier was killed in a shootout, but not before killing two [W]hites, and word of that act quickly spread to surrounding communities. Hundreds of [W]hites joined the mob already in Rosewood, and acts of systematic violence against [Blacks] continued until January 7. By the time the mob had dispersed, the town had been almost totally destroyed, with businesses, churches, and homes in ruins or burned to the ground. Surviving residents fled, with many settling in nearby Gainesville or moving to cities in the North. Although a grand jury was convened in February 1923, it found insufficient evidence to prosecute, and no one was charged with the crimes committed against the residents of Rosewood.

Id.

132. Alfred L. Brophy, *The Cultural War Over Reparations For Slavery*, 53 DEPAUL L. REV. 1181, 1185 (2004) [hereinafter Brophy II].

133. See ONUR BAKINER, TRUTH COMMISSIONS: MEMORY, POWER, AND LEGITIMACY 2 (2016) (explaining that “human rights violators in Argentina

Canada's Indian Residential Schools Truth and Reconciliation Commission (2008-2015).¹³⁴ This was a Commission to investigate the human rights abuses in the Canadian Indian residential school system.¹³⁵ After the end of the civil war in Sierra Leone (1999), the African country established the Sierra Leone Truth and Reconciliation Commission to hold the country's leaders accountable for the atrocities brought on by the war and to ensure a safe future for the Sierra Leone people.¹³⁶ In the U.S., the first

and Rwanda, Guatemala and Serbia, face domestic or international courts; legislatures all around the world recognize genocides and impose punitive measures against denial; governments apologize for past abuses to rectify historical injustice; and victims receive material and symbolic reparations in many countries").

134. Eric K. Yamamoto et al., *Bridging the Chasm: Reconciliation's Needed Implementation Fourth Step*, 15 SEATTLE J. SOC. JUST. 109, 123-124 (2016). A description of the Indian Residential Schools Truth and Reconciliation Commission:

In the teeth of class action lawsuits and mounting political agitation, the Canadian government and churches embarked on a far more extensive program of reconciliation with Canada's stolen generations. From the late 1800s, in the name of educational assimilation, Canada's government forcibly removed aboriginal children from families and placed them in native residential schools that banned their mother tongue and inflicted rampant physical and sexual abuse.

In 2015, the Canadian government formalized its reconciliation commitment. Its initiative encompassed apologies, monetary payments, and creation of a healing foundation. And, after the official publication of the Truth and Reconciliation report, newly elected Prime Minister Justin Trudeau promised to seek a formal apology from the Catholic Church for its pivotal role in operating and benefitting from the grossly abusive schools.

Id.

135. *Id.*

136. Penelope Andrews, *Justice, Reconciliation, and the Masculinist Way: What Role for Women in Truth and Reconciliation Commissions?*, 60 N.Y.L. SCH. L. REV. 199, 213-214 (2015).

The Sierra Leone Truth and Reconciliation Commission, on the other hand, took a more purposive approach regarding women. The civil war in Sierra Leone was one of the most devastating in Africa, resulting in the displacement of more than a million civilians. During the war, between 215,000 and 257,000 women and girls were subjected to sexual violence. The war is known for the mass amputations of women, children, and infants' limbs and the forceful recruitment of civilians, including women and children, as a fighting force.

Though the Truth and Reconciliation Act, which established the Sierra Leone Truth Commission, did not specifically mention women, women were instrumental in getting the warring parties to the negotiating table. The enabling act required that gender be a consideration in the selection of Commissioners and in the appointment of committees.

truth commission was the Greensboro Truth and Reconciliation Commission (2004-2006).¹³⁷ This Commission was created to investigate the deadly events that took place in Greensboro, North Carolina, where about twenty-five years earlier KKK members, with the explicit authorization of the local police department, shot and killed five protestors and wounded ten others.¹³⁸ The members received no punishment for the acts.¹³⁹ This Commission was also charged with making “recommendations for community healing.”¹⁴⁰ A truth commission is the first form of reparations proposed by H.R. 40.¹⁴¹

2. *Apologies*

Apologies and truth commissions go hand-in-hand.¹⁴² Once the problem is admitted by way of a truth commission, then comes a formal apology. Professor Ray Brooks argues, “when a government commits an atrocity against an innocent people, it has, at the very least, a moral obligation to apologize and to make that apology believable by doing something tangible called a ‘reparation.’”¹⁴³

An apology can be a “conversation starter” — a way to begin to address the pervasive U.S. history of racial discrimination.¹⁴⁴ It

Id.

137. Margaret (Peggy) Maisel, *Have Truth And Reconciliation Commissions Helped Remediate Human Rights Violations Against Women? A Feminist Analysis Of The Past And Formula For The Future*, 20 CARDOZO J. INT'L & COMP. L. 143, 174-175 (2011).

The first Truth and Reconciliation Commission in the United States was established in Greensboro, North Carolina in 2004 to examine the "context, causes, sequence and consequences" and to make recommendations for community healing concerning the tragic events that took place there almost twenty-five years earlier. On November 3, 1979, at the beginning of a march against the Ku Klux Klan in the City's Morningside Homes, a predominantly African-American public housing community, five Communist Worker's Party demonstrators were shot and killed and ten others wounded. The shooting was captured on videotape but there were no convictions after two criminal trials in front of all-[W]hite juries.

Id.

138. *Id.*

139. *Id.*

140. *Id.*

141. 116 H.R. 40.

142. ROY L. BROOKS, *ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS* ix (2004).

143. *Id.*

144. Kaimipono David Wenger, *Apology Lite: Truths, Doubts, and Reconciliations in the Senate's Guarded Apology for Slavery*, 42 CONN. L. REV.

can also function as a “stepping stone” in the long journey of racial atonement and can move the reparations conversation further along.¹⁴⁵ Apologies have played a role in atonement for many cases of mass harm.¹⁴⁶ For example, President Clinton apologized to the Hawaiian Native Americans, President Ford to the Japanese interned during WWII, and Chancellor Adenauer to the Holocaust victims.¹⁴⁷ In 1977 the Lipinski resolution sought an apology for all the “comfort women”, Korean, Chinese, Malaysian, Dutch, who suffered at the hands of Japanese soldiers.¹⁴⁸ These all serve as models for H.R. 40 and slavery reparations.

On July 29, 2008, the House of Representatives issued a formal apology for slavery.¹⁴⁹ This was followed by an apology in the Senate nearly a year later.¹⁵⁰ In the apology, Congress both acknowledged and apologized for the following:

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

(B) apologizes to African-Americans on behalf of the people of the United States, for the wrongs committed against them and their ancestors who suffered under slavery and Jim Crow laws; and

(C) expresses its recommitment to the principle that all people are created equal and endowed with inalienable rights to life, liberty, and the pursuit of happiness, and calls on all people of the United States to work toward eliminating racial prejudices, injustices, and discrimination from our society.¹⁵¹

The Senate’s apology included a disclaimer, stating that “nothing in this resolution – (A) authorizes or supports any claim against the United States; or (B) serves as a settlement of any claim against the United States.”¹⁵² This disclaimer diluted the apology. The apology became an “I’m sorry, but.”¹⁵³ Legally, the

CONTEMPLATIONS 1, 4 (2009).

145. *Id.*

146. Krishna K. Tummala, Politics of Preference: India, United States, and South Africa 135 (2015).

147. *Id.*

148. *Id.*

149. Wenger, *supra* note 144, at 1.

150. *Id.*

151. S. Con. Res. 26, 111th Cong. (2009).

152. *Id.*

153. See William Douglas, *Congress’ apology for slavery just proves it’s hard to say sorry*, MCCLATCHY NEWSPAPERS (July 2, 2009), www.mcclatchydc.com/news/politics-government/article24544429.html

(reporting that “[t]he word ‘reparations’ doesn’t appear in the Senate’s slavery apology resolution. Senate aides, however, said the disclaimer was added to satisfy senators who worried that the resolution could open the door to claims against the nation. The resolution wouldn’t have passed without the disclaimer, the aides say.”).

disclaimer was used to state that the apology could not be used as grounds for monetary compensation.¹⁵⁴ Symbolically, “[t]he disclaimer is a preemptive, symbolic rejection of compensation, and alters the symbolic content of the apology in significant ways.”¹⁵⁵ Other beneficiaries of official apologies were not subjected to a disclaimer.¹⁵⁶ Blacks, being in the unique position they are in America — having their ancestors brought into this country in chains, sold and bought like property, subsequently subjected to lynching for insignificant reasons and later Jim Crow — once again received the short end of the stick.¹⁵⁷ Apologies can be a form of restorative justice, which “is not focused on punishment or on the redistribution of wealth, rather, restorative justice seeks” to heal and create a space for reconciliation.¹⁵⁸ Through H.R. 40, Congress has a chance to make good on its 2008 apology and move towards reconciliation with Black Americans.

3. *Community-based Reparations*

Community-based reparations are the most popular form of reparations among advocates for Black American reparations.¹⁵⁹ This form of reparations would provide assistance to communities affected by slavery and America’s legacy of racism.¹⁶⁰ Community based reparations would look pretty similar to past society based programs like the New Deal.¹⁶¹ These programs would “foster educational, occupational, and health care opportunities” in

154. Wenger, *supra* note 144.

155. *Id.* at 8.

156. *Id.*

157. TUMMALA, *supra* note 146.

158. Wenger, *supra* note 144, at 3-4.

159. Alfred L. Brophy, *Reparations: Reparations Models*, 22 WINDSOR Y.B. ACCESS JUST. 71, 80-81 (2003) [hereinafter Brophy III]. Reparationist Alfred Brophy discusses the popularity of community-based reparations:

Such programs are probably the most *popular* areas for *reparations* advocates. For instance, Robert Westley speaks of a trust fund for community development. Or, as Professor Charles Ogletree has recently phrased it:

“My goal is to use the money in the same manner as the government does for veteran's benefits. This money should be available in a trust at a community level for those who have suffered the most. We will not solve these problems just by giving individuals a check. We can only solve these problems if *reparations* money, and substantial aspects of it, are used at the local level to address issues of health care, education, and housing.”

Id. (emphasis added).

160. *Id.*

161. *Id.*

communities that have been historically robbed of access to these opportunities.¹⁶²

One proposed program for community-based reparations is a first-time homebuyer program.¹⁶³ With this program, “[t]he government could offer subsidized home mortgages similar to those that built the [W]hite middle class after World War II” — this time targeting those excluded by banks and predatory lenders.¹⁶⁴ This program would also benefit Black Americans who have been historically barred access to property and opportunities to create wealth through property ownership.¹⁶⁵ This program could look similar to the housing program in Evanston, Illinois; there the city has pledged to spend \$10 million to aid its Black residents in home buying and repair.¹⁶⁶

Community based reparations can come in the form of health care. Writer and lecturer, Jason Silverstein argues in *Vice* that being Black in America is a “health risk.”¹⁶⁷ Silverstein goes on to say that, “[p]ublic policies [in the U.S.] have made generations of [B]lack people sick . . .”¹⁶⁸ He proposes a community-based reparation in the form of healthcare to Blacks that have been “systematically overexposed to health risks while also being deprived of healthcare.”¹⁶⁹ A healthcare-specific reparation would address the seventy percent gap in early,

162. *Id.*

163. Chuck Collins, *This is What Reparations Could Actually Look Like in America*, QUARTZ (June 23, 2017), www.qz.com/1012692/this-is-what-reparations-could-actually-look-like-in-america [perma.cc/88S9-VCHE].

164. *Id.*

165. *Id.*

166. Adams, *supra* note 98. Funding for Evanston’s reparations come from donations and revenue from the city’s sales tax on recreational marijuana. *Id.*

167. See Jason Silverstein, *Being Black in America Is a Health Risk. It’s Time for Reparations*, *Vice* (June 19, 2019), www.vice.com/en_us/article/5973yq/the-healthcare-case-for-reparations-hr40 [perma.cc/VEA2-5UQP] (explaining the health risk that America’s racism has posed to Black Americans).

Not only do these environments lead to Black communities facing higher rates of health problems, but at every step of the healthcare-seeking process, Black people run into man-made barriers: There are often fewer choices of providers in their communities, transportation barriers to seeing those providers, and higher costs to get the care needed. Even if people can clear those hurdles, there’s a risk of not receiving the same quality treatment as [W]hite patients for the same conditions, too often with deadly consequences.

Id.

168. *Id.*

169. *Id.*

treatable, deaths between Whites and Blacks.¹⁷⁰ This program aims to offer medical benefits to the Black community as a whole and seeks to correct America's health disparity among Blacks and Whites.¹⁷¹

In *Atonement and Forgiveness: A New Model of Black Reparitions*, Roy Brooks proposes a model of what community-based reparations may look like.¹⁷² Brooks suggests establishing a trust fund to administer payments to individuals to pay for education and funding businesses.¹⁷³ He recommends that the value of the trust fund be computed by multiplying the average difference in income of Black and White Americans by the number of Black Americans.¹⁷⁴ Black communities could tap into this trust to establish scholarships for Blacks to attend colleges or use the money to start a new business.¹⁷⁵

Community-based reparations can vary, seeking to address many disparities placed on Blacks from America's inveterate racist history. But they all seek to narrow the gap between White and Black economic achievement and educational opportunity.¹⁷⁶ Community-based reparations permit "institution building,"¹⁷⁷ carrying the idea that the "magnitude of the harm determines the amount of relief."¹⁷⁸ If passed, H.R. 40 can use these models of community-based reparations to target expenditures to those who are most in need.¹⁷⁹

4. *Payment to Individuals*

Direct payments to Black Americans are the most controversial form of reparations because it raises the questions of fairness and culpability.¹⁸⁰ These payments are also the least

170. *Id.*

171. *Id.*

172. BROOKS, *supra* note 142, at 159-63.

173. *Id.*

174. *Id.*

175. *Id.*

176. BROPHY I, *supra* note 31, at 148.

177. *Id.*

178. *Id.* at 174.

179. *Id.*

180. *See, e.g.,* Brophy III, *supra* note 159 (explaining the controversy behind the idea of reparations.)

They are controversial, one supposes, because they deal so directly with redistributing wealth -- and there is both serious question whether the people who receive the payments are entitled to them by virtue of harm they have suffered and whether the people making those payments are sufficiently culpable that they are liable for those payments or that they have received a benefit that they are now disgorging.

popular form of reparations amongst serious advocates for Black-American reparations.¹⁸¹ With the distribution of direct payments come the obvious inquiries of who gets the payments and how much should be given to address the harms.¹⁸² Since it is difficult to find Reparationists that seriously encourage direct payments to individuals, it is also difficult to determine how much an individual should receive.¹⁸³ Estimations argue that the United States benefited from about 222,505,049 hours of forced labor between 1619 to the abolition of slavery in 1865.¹⁸⁴ Valued at the U.S. minimum wage in 2017, with a modest rate of interest, this work would be worth \$97 *trillion* today.¹⁸⁵

While direct payments are unpopular amongst the majority of Reparationists, some advocates argue that direct payments are the only way to atone for America's past.¹⁸⁶ Advocates of direct payments have pushed for plans that include a \$500,000 distribution to the decedents of enslaved people, the estimated present value of the property taken during slavery.¹⁸⁷ Others argue for a program that transfers the wealth of White families to Black families.¹⁸⁸ In practice, this would be the U.S. government

Id.

181. *Id.* at 81.

182. *Id.*

183. *Id.*

184. JASON HICKEL, *THE DIVIDE: GLOBAL INEQUALITY FROM CONQUEST TO FREE MARKETS* 210 (2017).

185. *Id.*

186. See William Darity Jr. & Kristen Mullen, *Write Black Americans a Check Already*, IN THESE TIMES, (May 15, 2019), [inthesetimes.com/article/21863/reparations-Black-americans-check-wealth-gap-baby-bonds](https://www.inthesetimes.com/article/21863/reparations-Black-americans-check-wealth-gap-baby-bonds) [perma.cc/2LH6-3BGP] (arguing that “[u]ltimately, a sound program of reparations for [B]lack Americans must include a substantial direct payment to each eligible recipient. (At least some of this payment, too, should take the form of illiquid assets that can build long-term wealth.) The nation must ‘cut the checks.’”).

187. BROPHY I, *supra* note 31, at 175.

188. Dalton Conley, *The Cost of Slavery*, NY TIMES (Feb. 15, 2003), www.nytimes.com/2003/02/15/opinion/the-cost-of-slavery.html

[perma.cc/YYG7-YEBT]. The New York Times lays out the economic disparity between Black and White Americans:

The typical [W]hite family enjoys a net worth that is more than eight times that of its [B]lack counterpart, according to the economist Edward Wolff. Even at equivalent income levels, gaps remain large. Among families earning less than \$15,000 a year, the median African-American family has a net worth of zero, while the corresponding [W]hite family has \$10,000 in equity. The typical [W]hite family earning \$40,000 annually has a nest egg of around \$80,000. Its [B]lack counterpart has about half that amount.

This equity inequity is partly the result of the head start [W]hites enjoy in accumulating and passing on assets. Some economists estimate that

paying out about \$35,000 to Black households in effort to reduce the wealth gap between the races.¹⁸⁹

B. Who Are The Appropriate Beneficiaries Of Reparations?

Whatever form of reparations Congress decides to put in practice to address the harm of enslavement and subsequent Jim Crow laws, the next step is to decide who receives the redress. There are three classes of people who could be beneficiaries of reparations: descendants of the enslaved, Blacks who were alive during Jim Crow, and all Black Americans.¹⁹⁰

Traditional American enslavement officially ended in 1863 with the ratification of the Thirteenth Amendment.¹⁹¹ Although the “original wounded” are no longer alive, enslavement has left its brutal scars on millions of indirect victims throughout history.¹⁹² Analyzing the enslavement of Blacks through an unjust enrichment framework, H.R. 40 can provide a measure of unjust enrichment — “the value of property created by [enslaved people] and unjustly retained.”¹⁹³ This framework provides the basis for descendants of the enslaved receiving compensation.¹⁹⁴ William Darity, a leading academic authority on American racial inequality, suggests that potential beneficiaries would have to “prove they descended from a person enslaved in the United States.”¹⁹⁵ Darity also proposes that the decedents “show that they have identified as [B]lack in public documents for at least 10

up to 80 percent of lifetime wealth accumulation results from gifts from earlier generations, ranging from the down payment on a home to a bequest by a parent. If the government used such net-worth inequality as a basis, and then factored in measures like population size, it could address reparations by transferring about 13 percent of [W]hite household wealth to [B]lacks. A two-adult [B]lack family would receive an average reparation of about \$35,000.

Id.

189. *Id.*

190. Theodore Kalambokidis, *The Case for Voluntary Reparations*, FEE (July 7, 2019), fee.org/articles/the-case-for-voluntary-reparations/ [perma.cc/DEM2-K8ZJ].

191. U.S. CONST. amend. XIII, § 1.

192. Saul Levmore, *The Jurisprudence Of Slavery Reparations: Privatizing Reparations*, 84 B.U.L. REV. 1291, 1304 (2004).

193. BROPHY I, *supra* note 31, at 150.

194. *Id.*

195. Wesley Lowery, *Which Black Americans Should Get Reparations?*, WASH. POST (Sept. 18, 2019), www.washingtonpost.com/national/which-americans-should-get-reparations/2019/09/18/271cf744-cab1-11e9-a4f3-c081a126de70_story.html [perma.cc/34NP-WFKW].

years.”¹⁹⁶ Enlisting these two requirements would limit the number of beneficiaries and ensure the reparation would go to the intended target.¹⁹⁷

Blacks who were alive during Jim Crow should benefit from reparations.¹⁹⁸ This group resembles beneficiaries of the Japanese Interment bill.¹⁹⁹ Like the victims still alive after WWII, here, the victims of Jim Crow are living.²⁰⁰ Using a tort model, Congress can measure the amount of harm placed on Blacks during Jim Crow and its subsets to compensate living victims.²⁰¹

Finally, many advocates of reparations argue that all Black Americans should benefit from reparations.²⁰² Adopting the view that slavery is a continuing tort, all Black Americans are considered to be victims.²⁰³

Like slavery, other human rights crimes have resulted in the loss of millions of lives. But only slavery, with its sadistic patience, asphyxiated memory, and smothered cultures, has hulled empty a whole race of people with inter-generational efficiency. Every artifact of the victims’ past cultures, every custom, every ritual, every god, every language, every trace element of a people’s whole hereditary identity, wrenched from them and ground into a sharp choking dust. It is a human rights crime without parallel in the modern world. For it produces victims *ad infinitum*, long after the active state of the crime has ended.²⁰⁴

Critics of reparations inevitably question whether Blacks who have achieved overwhelming economic success should fall under the category of beneficiary. This query misses the point all together and highlights anecdotal cases of Black success, while removing the conversation from history.²⁰⁵ Reparations are meant

196. *Id.*

197. *Id.*

198. See Joe Feagin, *A Legal and Moral Basis for Reparations*, TIME (May 28, 2014), time.com/132034/a-legal-and-moral-basis-for-reparations/ [perma.cc/HM7B-44Q6] (writing that another beneficiary group of reparations would include Blacks who were alive during Jim Crow and can actually name who did much of that discrimination and unjust impoverishing.)

199. *Id.*

200. Roy L. Brooks, *Reparations are An Opportunity to Turn a Corner On Race Relations*, L.A. TIMES (Apr. 23, 2019), www.latimes.com/opinion/op-ed/la-oe-brooks-reparations-20190423-story.html [perma.cc/X4YA-3ETW].

201. *Id.*

202. BROPHY I, *supra* note 31, at 153.

203. *Id.*

204. RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 216 (2001).

205. Brooks, *supra* note 200. Reparationist Roy Brooks explains the atonement model:

The atonement model, by contrast, is forward-looking and perpetrator-focused. It pursues restorative justice. In other words, the goal is for

to *atone*, not to *enrich*.²⁰⁶ This atonement is not always monetary and can come in the form of an apology or community investment.²⁰⁷

C. *Contrasting American's Opposing Views On H.R. 40*

Although the idea of reparations is as old as the country itself, it still is a polarizing issue among Americans.²⁰⁸ The deep divide amongst advocates and critics of reparations almost always align with racial and political identities.²⁰⁹ The Mobile Register polled Alabama citizens on the issue of reparations and it found that “the question of reparations was the most racially divisive issue since it began polling.”²¹⁰ The Alabama poll showed that “only five-percent of [W]hite Alabamians support reparations” for enslavement from the federal government, while “sixty-seven percent of [B]lack Alabamians” supported reparations.²¹¹ “The differences between [W]hites and [B]lacks outstripped even the gap seen during the civil rights struggle over integration.”²¹² Many

the perpetrator to reclaim its moral character by initiating conditions that help repair its broken relationship with the victims. Restorative justice imbibes a post-Holocaust vision of redress whereby the perpetrator comes to recognize and identify with the victims' humanity.

Under the atonement model, redress comes in two stages. First and foremost, the perpetrator issues an apology and tenders some form of reparations; the victims then calculate the sincerity of the apology by the weight of the reparations. Hence, more than the victims' loss — for no reparation can fully compensate the victims of an atrocity — reparations give substance to the perpetrator's apology.

Id.

206. *Id.*

207. *Id.*

208. Scottie Andrew, *Nearly 75% Of African Americans Support Reparations For Slavery. Only 15% Of White Americans Do, A Poll Says*, CNN (Oct. 28, 2019), www.cnn.com/2019/10/28/us/reparations-poll-trnd/index.html [perma.cc/5ZZU-HCYU] (reporting on the disparity of thought regarding reparations among Black and White Americans).

Overall, about 29% of the people questioned support reparations, or payment to African Americans whose family members were slaves, according to the poll conducted in September of nearly 1,300 [B]lack, [W]hite and Hispanic Americans. Reparations have been adopted as a talking point among Democratic presidential hopefuls. But there's little consensus among average Americans.

Id.

209. *Id.*

210. Brophy II, *supra* note 132, at 1182-1183.

211. *Id.*

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Whites became so angry at the suggestion of reparations that they could not finish the survey.²¹³ This dichotomy of opinion is not unique to Alabama or the South. This trend is present throughout the United States.²¹⁴

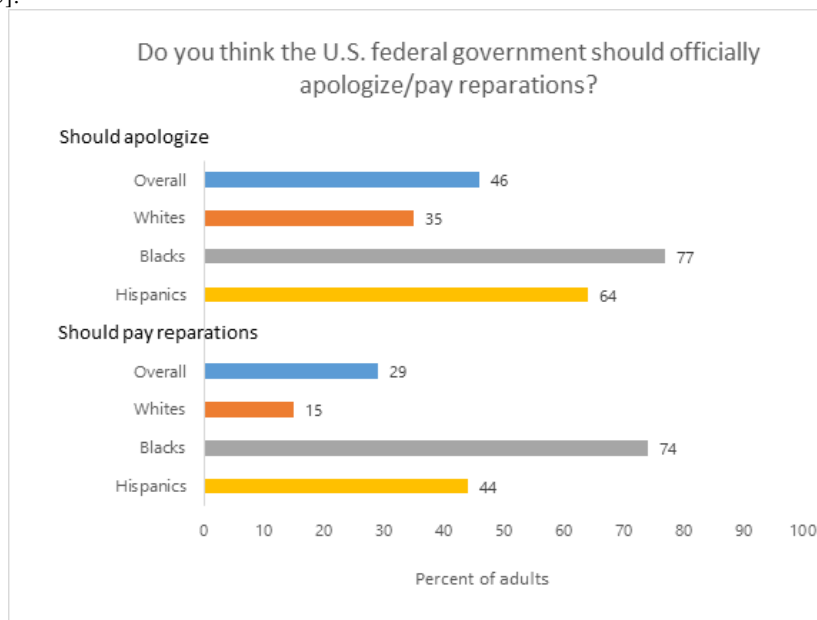
A national poll conducted by the AP-NORC Center for Public Affairs Research showed that nearly seventy-five percent of Blacks agreed the federal government should pay reparations and, just fifteen percent of Whites polled supported reparations.²¹⁵ Critics argue that there is a culpability problem with reparations regarding individual or community payments.²¹⁶ Many detractors of reparations believe that Whites currently living are not responsible for past harms.²¹⁷ They argue that the decedents of the enslaved are not beneficiaries of past injustice, and therefore not

212. *Id.*

213. *Id.*

214. *Id.*

215. Corey Williams & Noreen Nasir, *AP-NORC Poll: Most Americans Oppose Reparations For Slavery*, AP (Oct. 25, 2019), apnews.com/article/76de76e9870b45d38390cc40e25e8f03 [perma.cc/KC9U-ARPU].



Source: AP-NORC poll conducted September 20-23, 2019, with 1,286 adults.

216. Ariela Gross, *When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283, 302 (2008).

217. *Id.*

deserving of reparations.²¹⁸

The gulf between the opinions of advocates and critics of reparations is just as vast among political ideologies.²¹⁹ While many Democratic lawmakers have pushed for some form of legislation to begin the conversation on reparations, Republican members of Congress have consistently voted against past versions of H.R. 40.²²⁰ Senate Majority Leader, Republican, Mitch McConnell raised an argument that most critics of reparations advance, “[w]e’re always a work in progress in this country but no one currently alive was responsible for that.”²²¹ In response, Reparationists and writer, Ta-Nehisi Coates in his address to Congress stated:

This rebuttal proffers a strange theory of governance: that American accounts are somehow bound by the lifetime of its generations. But well into this century, the United States was *still paying out pensions* to the heirs of Civil War soldiers. We honor treaties that date back some 200 years, despite no one being alive who signed those treaties. Many of us would love to be taxed for the things we are solely and individually responsible for. But we are American citizens, and thus bound to a collective enterprise that extends beyond our individual and personal reach.²²²

Reparations may be polarizing because conversations about reparations touch every segment of American society.²²³ The idea behind reparations requires all Americans to recount the times that they have sat back and silently benefited from racism.²²⁴ Reparations require a level of accountability that the U.S. Government and many Americans still refuse to take on. It forces every American to see themselves, not through the rosy glasses of history, but through the unconsented terror that Black Americans have been subjected to, not just 150 years ago, but today. Reparations require law firms and corporate organizations to look at their leadership and explain why there are few, if any, people of color in those positions.²²⁵ Reparations require a city like Chicago

218. *Id.*

219. *Lawmakers Weigh Slavery Reparations: “Why not, and why not now?”*, L.A. TIMES (June 19, 2019), www.latimes.com/politics/la-na-pol-reparations-slavery-house-hearing-20190619-story.html [perma.cc/BE5F-VZHV].

220. *Id.*

221. Mariam Khan, *Senate Majority Leader Mitch McConnell Says Slavery Reparations Are Not A ‘Good Idea’*, ABC (June 18, 2019), abcnews.go.com/Politics/senate-majority-leader-mitch-mcconnell-slavery-reparations-good/story?id=63792117 [perma.cc/R7XG-7RQK].

222. Coates II, *supra* note 24.

223. Coates I, *supra* note 5.

224. *Id.*

225. See e.g., Noam Scheiber & John Eligon, *Elite Law Firm’s All-White Partner Class Stirs Debate on Diversity*, NY TIMES (Jan. 27, 2019), www.nytimes.com/2019/01/27/us/paul-weiss-partner-diversity-law-firm.html

to look at its racial makeup and explain why its neighborhoods are still just as segregated as they were in the 1970s.²²⁶ Reparations require White Americans to admit that they historically have had a leg up on Black Americans.²²⁷ Reparations create a dilemma of inheritance.²²⁸

IV. PROPOSAL

For nearly three decades, H.R. 40 legislation has been introduced to Congress seeking to establish a Commission to study and create reparation proposals.²²⁹ And for nearly three decades, little to no progress has been made to develop the Commission H.R. 40 is advocating for.²³⁰ As the political climate currently stands, H.R. 40 has a low chance of passing Congress's partisan chambers.²³¹ However, if the United States truly wants to make amends for its history of brutality and theft, it must begin with the passing of H.R. 40. In the words of Ta-Nehisi Coates:

A crime that implicates the entire American people deserves its hearing in the legislative body that represents them. John Conyers's HR 40 is the vehicle for that hearing. No one can know what would come out of such a debate. Perhaps no number can fully capture the multi-century plunder of black people in America. Perhaps the number is so large that it can't be imagined, let alone calculated and dispensed. But I believe that wrestling publicly with these questions matters as much as — if not more than — the specific answers that might be produced. An America that asks what it owes its most vulnerable citizens is improved and humane. An America that looks away is ignoring not just the sins of the past but the sins of the present and the certain sins of the future. More important than any

[perma.cc/444A-T7FF] (reporting that, "Diversity remains an unfulfilled promise in a variety of elite industries, including tech and finance as well as at big media companies like The New York Times").

226. Steve Bogira, *Separate, Unequal, and Ignored*, CHICAGO READER (Feb. 10, 2011), www.chicagoreader.com/chicago/chicago-politics-segregation-african-american-black-white-hispanic-latino-population-census-community/Content?oid=3221712 [perma.cc/2XKX-EC3T].

227. See David Frum, *The Impossibility of Reparations*, ATLANTIC (June 3, 2014), www.theatlantic.com/business/archive/2014/06/the-impossibility-of-reparations/372041/ [perma.cc/KQY2-2RNY] (explaining that "[a]ffirmative action ranks among the least popular thing that U.S. governments do"). "When surveyed, white Americans crushingly reject race preferences, Hispanic Americans object by a margin of 2 to 1, and black Americans are almost evenly divided, with only the slightest plurality in favor." *Id.*

228. Coates I, *supra* note 5.

229. Rep. Sheila Jackson Lee, *H.R. 40 Is Not a Symbolic Act. It's a Path to Restorative Justice*, ACLUNC (June 17, 2019), www.aclunc.org/blog/hr-40-not-symbolic-act-it-s-path-restorative-justice [perma.cc/E3CY-HV65].

230. *Id.*

231. H.R. 40 Commission to Study and Develop Reparation Proposals for African-Americans Act, 116 Bill Tracking S. 1083.

single check cut to any African American, the payment of reparations would represent America's maturation out of the childhood myth of its innocence into a wisdom worthy of its founders.²³²

To reach this "maturation," this Comment will propose that Congress do two things. First, Congress should enact H.R. 40 and establish a Commission to study and develop reparation proposals. Next, Congress should allocate community-based reparations to the Black community. These proposals are *not* one of many solutions to America's race problem, but instead are *the* solutions. The only way to atone for a legacy of robbery is to pay back what was stolen.

A. Congress Should Enact H.R. 40

H.R. 40 is not asking Congress to give reparations, but to establish a Commission to study whether reparations should be given to Black Americans.²³³ The purpose of this bill is *not* to offer cash payments to Black Americans but to create progress.²³⁴ Progress for Black Americans has never come through moral appeal. Progress has historically required structural change. It took a civil war to end American Slavery.²³⁵ It required massive amounts of resistance and the loss of countless lives to dismantle Jim Crow.²³⁶ Similarly, the healing of race relations in the U.S. requires Congress to begin to take account of what it, as a historical body, has done to deepen racial divides. This healing cannot occur through "race-neutral means."²³⁷ This healing can only occur through Congress starting a "national reckoning" by passing H.R. 40, because Reparations are about respect and reconciliation.²³⁸

232. Coates III, *supra* note 65.

233. H.R. 40 Commission to Study and Develop Reparation Proposals for African-Americans Act, 116 S. 1083.

234. *Id.*

235. *Slavery: Cause and Catalyst of the Civil War*, U.S. DEP'T OF INTERIOR NAT'L PARK SERV., www.nps.gov/shil/learn/historyculture/upload/slavery-brochure.pdf [perma.cc/EJ3N-FZDL](last visited Mar. 29, 2021) (explaining that "[a] number of issues ignited the Civil War: states' rights, the role of the federal government, the preservation of the Union, the economy; but all were inextricably bound to the institution of slavery").

236. *Jim Crow Laws and Racial Segregation*, VCU LIBRARIES SOC. WELFARE HISTORY PROJECT, socialwelfare.library.vcu.edu/eras/civil-war-reconstruction/jim-crow-laws-andracial-segregation/ [perma.cc/K2GR-FYR5] (last visited Mar. 29, 2021).

237. Lee, *supra* note 229.

238. *Id.*

B. Allocate Community-Based Reparations

Once Congress enacts H.R. 40 it needs to use the findings from the Commission's studies to enact legislation that gives community-based reparations. The biggest impact America's legacy of racism has had on the Black community is a lack of opportunity to create wealth.²³⁹ This is evident from the nation's wealth gap.²⁴⁰ White families have nearly ten times the net worth of Black families.²⁴¹ This economic inequality places Blacks and Whites in two different countries and must be addressed.

Community-based reparations can come in many forms and primarily seek to redress harms done to entire communities. This Comment proposes that Congress enact community-based reparations in the form of housing loans, educational grants, and job training programs. Government investment in each of these areas will not only give Blacks access they have been historically denied, but will aid in closing the racial wealth gap. Currently, 70 percent of White families own homes, compared to 40 percent of Black families.²⁴²

With the establishment of government-sponsored housing loans, Blacks will be more likely to be homeowners.²⁴³ This “boosts construction,” “strengthen[s] local communities”, and reduces the psychological stress often placed on people forced to live in poverty.²⁴⁴ The establishment of educational grants and job training programs would reduce the amount of debt Blacks take on, allowing them to contribute to faster economic growth.²⁴⁵ This would also lead to a more educated society and add to America's workforce.²⁴⁶

While community-based reparations will directly contribute to all Americans, it is important for Congress and the country not to lose sight on the goal of reparations—to atone.

239. Tracy Jan, *White Families Have Nearly 10 Times The Net Worth Of Black Families. And The Gap Is Growing*, WASH. POST (Sept. 28, 2017), www.washingtonpost.com/news/wonk/wp/2017/09/28/black-and-hispanic-families-are-making-more-money-but-they-still-lag-far-behind-whites/ [perma.cc/PP3W-GGA7].

240. *Id.*

241. *Id.*

242. BARADARAN, *supra* note 15, at 254.

243. Christian Weller, *Doing Well By Doing Good: The Economic Case For Closing The Racial Wealth Gap*, FORBES (Sept. 20, 2019), www.forbes.com/sites/christianweller/2019/09/20/doing-well-by-doing-good-the-economic-case-for-closing-the-racial-wealth-gap/#465bfd9019f7 [perma.cc/DSA4-AAHD].

244. *Id.*

245. *Id.*

246. *Id.*

This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result. . . . To this end equal opportunity is essential but not enough, not enough.²⁴⁷

Reparations are Black American's request to be seen, they are an acknowledgment that this country has historically failed its Black people and they provide an opportunity for this country to make things right. H.R. 40 gives Congress that opportunity—it just has to take it.

When enslavement ended, President Lincoln passed the Freedmen's Bureau Act.²⁴⁸ This law aimed to aid the nearly four million former enslaved people with food, housing, education, and employment.²⁴⁹ Most importantly, this law promised a massive land redistribution.²⁵⁰ The freed blacks were promised that each family would receive forty acres of land and a mule.²⁵¹ This promise could have altered the course of America's race relations but regrettably was never realized.²⁵² It is time for Congress to

247. President Lyndon B. Johnson, Commencement Address at Howard University, June 4, 1965 (reprinted in IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* 175 (2005)).

248. Henry Louis Gates, Jr., *The Truth Behind '40 Acres and a Mule'*, PBS, www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/the-truth-behind-40-acres-and-a-mule/ [perma.cc/2HFX-PTX5] (last visited Apr. 13, 2021).

249. *Id.*

250. *Id.* Professor Henry Gates explains the history behind the Freedman's Act:

Today, we commonly use the phrase "40 acres and a mule," but few of us have read the Order itself. Three of its parts are relevant here. Section one bears repeating in full: "The islands from Charleston, south, the abandoned rice fields along the rivers for thirty miles back from the sea, and the country bordering the St. Johns river, Florida, are reserved and set apart for the settlement of the negroes [sic] now made free by the acts of war and the proclamation of the President of the United States." Section two specifies that these new communities, moreover, would be governed entirely by black people themselves[.] Finally, section three specifies the allocation of land: ". . . each family shall have a plot of not more than (40) acres of tillable ground [.]"

Id.

251. *Id.*

252. *Id.* Professor Henry Gates explains why the act never came to fruition:

And what happened to this astonishingly visionary program, which would have fundamentally altered the course of American race relations? Andrew Johnson, Lincoln's successor and a sympathizer with the South, overturned the Order in the fall of 1865, and, as Barton Myers sadly concludes, "returned the land along the South Carolina,

make good on their promise and to atone for its history of theft and robbery. The only way to do that is through a transfer.

There needs to be a transfer for the 250 years of enslavement — where Blacks were forced to transfer their labor and bodies for the economic success of the United States. Enslavement was more than cotton picking; it was infrastructure building — a harnessing of Black intelligence to build everything from the cast iron buildings of the South, to the historic landmarks in the nation’s capital. There needs to be a transfer for the 100 years Blacks were forced to live under the ugly system of Jim Crow, where they paid into a system that they were brilliantly kept out of. Black taxes helped to build this country, public universities, pools, libraries, and transportation systems. All of which they were forbidden to utilize. There needs to be a transfer for the government-sponsored resistance Blacks were met with when they attempted to move into better communities and local governments sought to contain them to America’s ghettos. There needs to be a transfer for the present-day heirs of historical racism illustrated by the racial wealth gap and the fact that Black women die in childbirth at four times the rate of White women.²⁵³ There needs to be a transfer for the U.S. system of mass incarceration. In this system, “the largest prison population . . . of which the descendants of the enslaved make up the largest share.”²⁵⁴ Congress can make that transfer.

V. CONCLUSION

H.R. 40 is aptly named after America’s original broken promise to its Black citizens of 40 acres and a mule. It is time for Congress to not only make good on that promise but to atone for America’s history of racial injustice. America has gone from legally classifying its Black population as 3/5ths of a person, to now systematically ensuring the decedents of those fractions can only access 1/10th of this nation’s wealth. Congress must enact H.R.40 and pass community-based reparation legislation in order to make Black America whole.

Georgia and Florida coasts to the planters who had originally owned it” — to the very people who had declared war on the United States of America.

Id.

253. Coates II, *supra* note 24.

254. *Id.*