

WHEN RIGHTEOUSNESS FAILS: THE NEW INCENTIVE FOR
REPARATIONS FOR SLAVERY AND ITS CONTINUING AFTERMATH IN
THE UNITED STATES

BY TUNEEN E. CHISOLM*

Abstract. Starting from the well-established premise that reparations for African Americans are justified and required to provide redress for race-based social and systemic ills, this Article examines the United States' compliance with the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), not only as evidence of the continuing harms and their causal connection to slavery and Jim Crowism but also as a guide to the wide-scope approach to reparations for Black Americans required for transition to a true democracy guaranteeing full citizenship rights to all, consistent with the United States' own Bill of Rights, the United Nations Declaration of Human Rights, and Articles 2, 3, and 5 of ICERD. This Article argues that, consistent with Article 4 of ICERD, effective reparations must include the stripping away of all badges and incidents of slavery, including those still embedded in the Constitution and White supremacist ideology, in a manner akin to the post-World War II denazification efforts in Germany. This Article also explores the question of what will cause the United States to grant reparations, and to that end it revisits the moral economy incentive for reparations through the lens of interest convergence theory. The Article concludes that, consistent with interest convergence theory, the United States' own current interest in preserving its place as a leader in the international arena may be a viable substitute for the missing international ally whose absence, to date, has rendered moot the moral economy incentive for such reparations.

* Associate Professor of Law at Campbell University School of Law; J.D. University of Pennsylvania Law School; Sc.B. Brown University. With special appreciation, I acknowledge Campbell University Faculty Development for its financial support of my research. For their thoughtful critique of this article as a work-in-progress, I also thank commenting participants at the 2018 Conference of Global Perspectives: Regimes of Redress and Reparations, Transitional Justice, and the Rule of Law at Tulane Law School, and my commenters from the Lutie Lytle Writing Workshop. Finally, with immeasurable gratitude, I thank the staff of the *University of Pennsylvania Journal of Law and Social Change* for their invaluable resourcefulness and editorial contributions. The copyright in the Article is held by the author.

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INTRODUCTION

Reparations to descendants of enslaved Africans in the United States of America are long overdue. For support of that assertion, this Article primarily rests on the repeated findings of the United Nations' Committee on the Elimination of Racial Discrimination relating to the nation's progress toward eliminating all forms of racial discrimination, the United Nations' Working Group of Experts on People of African Descent findings on the condition of people of African descent within the nation, and, more generally, the vast, ever-expanding body of literature and legal scholarship detailing the connection of continuing systemic oppression of descendants of enslaved Africans to slavery and post-slavery historical injustices.¹ The only legitimate questions about reparations for descendants of enslaved Africans in America are how such reparations should be framed and implemented, and who or what will succeed in causing the United States to grant them. This Article explores both questions, using a framework that references Jewish Holocaust reparations as a benchmark throughout, notwithstanding certain acknowledged distinctions, because the success of that movement in large degree makes it a logical and helpful comparator.

Few publicly question the merit of past and continuing reparations for victims of the systemic persecution of European Jews by Germany's Nazi regime and its collaborators across German-occupied Europe, over the course of approximately thirteen years. Yet, many, if not most, challenge the merit of reparations for the victims of the Trans-Atlantic Slave Trade and the related enslavement of generations of Africans, and the subsequent and continuing post-slavery persecution and oppression of their descendants, all over the course of centuries.

An estimated 6 million European Jewish men, women, and children were murdered² by Nazis who believed that Germans were racially superior to Jews, Blacks, and other groups. That 6 million does not include the numbers of Jews who were otherwise persecuted, caused to die of starvation or disease, forced to flee, and/or deprived of their property solely based on their Jewish identity.³

¹ The body of literature detailing *why* reparations are justified for descendants of enslaved Africans in America includes too many books, journal articles, essays, and other publications to list here individually, but review of a sampling is certain to lead discovery of numerous other sources. *See, e.g.*, CHARLES P. HENRY, LONG OVERDUE: THE POLITICS OF RACIAL REPARATIONS (2007); ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (2004); RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES BLACKS (2000); Ayesha Bell Hardaway, *The Breach of the Common Law Trust Relationship Between the United States and African Americans: A Substantive Right to Reparations*, 39 N.Y.U. REV. L. & SOC. CHANGE 525, 526-527 (2015); Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations*, 3 COLUM. J. RACE & L. 147 (2013); David C. Gray, *A No-Excuse Approach to Transitional Justice Reparations as Tools of Extraordinary Justice*, 87 WASH. U L. REV. 1043 (2010); Tuneen Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677 (1999); Rhonda V. Magee, Note, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream, and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993).

² The use of "murder" here is an intentional adherence to the Biblical distinction between killing, meaning to put to death, and murder (unjustified killing), which is prohibited by the Ten Commandments.

³ *See* Caroline Dostal, et al., *Between Individual Justice and Mass Claims Proceedings: Property Restitution for Victims of Nazi Persecution in Post-Reunification Germany*, 15 GERMAN L.J. 1035, 1040-1042 (2014) (discussing Nazi persecution of Jews from 1933 to 1945, by virtue of "approximately 430 laws, regulations, directives, and decrees introduced over time, which extended to all parts of Jewish life, including the deprivation of all Jewish private property," as well as exclusion from work in leading business

An estimated 12.5 million captured African men, women, and children were transported to the Americas for eventual enslavement in the course of the Trans-Atlantic Slave Trade between 1517 and 1867.⁴ An estimated 2 million African men, women, and children were murdered in the course of holding Africans captive and forcing them into the vessels that carried captives over the Atlantic Ocean, away from their homeland and families.⁵ An estimated 1.8 million African men, women, and children who were forced on to those vessels “did not survive the horrors of the Middle Passage.”⁶ An estimated 300,000⁷ of the African men, women, and children who did survive the Middle Passage were delivered, enslaved, and forcibly bred and raped to produce progeny for the enslavers’ benefit in what became the United States. From that number, an estimated 4 million Africans and African descendants were held in bondage⁸ and the count is unknown for the number of enslaved Africans and descendants who were murdered in the course of nearly 250 years of slavery in what became the United States. Also unknown is the count of Black men, women, and children murdered, otherwise persecuted, caused to die of starvation or disease, forced to flee, and/or deprived of their property solely based on their Black identity post-slavery and continuing up to present day.

As legal, moral, social, and political philosopher Professor J. Angelo Corlett aptly stated:

“[If] the Nazi oppression of Jews warrants reparations from Germany (which, of course, it does), then racist oppression of Natives and African Americans warrants reparations from the U.S. government.”⁹

Certainly, the United States understands the importance of reparations and knows how to hold others accountable for granting them. The United States passed laws on restitution of property for the Jews within its occupied zone following World War II,¹⁰ and also championed early denazification efforts during the early part of the occupation.¹¹ The United States facilitated reparations for Jewish

positions and ownership of retail and mail-order businesses, for example.)

⁴ ANA LUCIA ARAUJO, REPARATIONS FOR SLAVERY AND THE SLAVE TRADE: A TRANSNATIONAL AND COMPARATIVE HISTORY 1 (2017).

⁵ *Id.*

⁶ *Id.*

⁷ HUGH THOMAS, THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE 1440-1870 804 (1997). *See also* *Trans-Atlantic Slave Trade – Estimates*, VOYAGES: THE TRANS-ATLANTIC SLAVE TRADE DATABASE, <https://www.slavevoyages.org/assessment/estimates> [<https://perma.cc/4329-B98S>] (last visited Apr. 20, 2020).

⁸ Avidit Acharya, Matthew Blackwell, & Maya Sen, *The Political Legacy of American Slavery*, 78 J. OF POLITICS 621, 624 (2016) <https://scholar.harvard.edu/files/msen/files/slavery.pdf> [<https://perma.cc/7EVG-YEKS>]

⁹ J. ANGELO CORLETT, RACE, RACISM, & REPARATIONS 3 (2003). Among other oppressive and genocidal acts against them by White settlers, Native Americans were also enslaved. *U.S. v. Beebe*, 807 F. Supp. 2d 1045, 1053-1054 (D. N.M. 2011) (citations omitted). The United States has also failed to fully remedy the harms against Native Americans, although some steps toward reparations have been made. *See, e.g.*, William Bradford, “*With a Very Great Blame On Our Hearts*”: *Reparations, Reconciliation, and An American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, *passim* (2003).

¹⁰ NANA SAGI, GERMAN REPARATIONS: A HISTORY OF THE NEGOTIATIONS 38 (1986); *see also* PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES, FINAL REPORT ch. 5 (Dec. 2000), <https://govinfo.library.unt.edu/pcha/PlunderRestitution.html/html/StaffChapter5.html> [<https://perma.cc/P3ER-D53K>].

¹¹ *See infra*, Part III(B)(1).

Holocaust victims, and also passed legislation—the Lipinski Resolution—demanding Japan’s grant of monetary compensation and issuance of apology for its wrongful acts toward so-called “comfort women” during World War II.¹² As recently as 2014, the United States played a direct role in securing reparation payments from France for certain Holocaust deportation victims, their spouses, and heirs, after civil lawsuits in U.S. federal courts against the French railroad company that transported individuals to Nazi concentration camps were unsuccessful.¹³ The United States also knows how to grant reparations, as it granted reparations for its own World War II internment of Japanese Americans and Aleuts, albeit decades after the actual internments.¹⁴

Yet, in 2001, when discussion of demands for reparations from nations that participated in the Trans-Atlantic Slave Trade was proposed as an agenda item for the inaugural World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (the “WCAR”), the United States shamelessly took a hard stance on the global stage, at first refusing to participate at all, and ultimately withdrawing the U.S. delegation from the conference prior to its conclusion.¹⁵

Despite its support, facilitation, and subsequent granting of the above-enumerated World War II reparations, the United States has been unwilling to self-impose reparations to descendants of enslaved Africans in America. The H.R. 40 bill, to establish a Commission to Study and Develop Reparation Proposals for African Americans was modeled after the Civil Liberties Act which ultimately led to the grant of reparations to interned Japanese-Americans and their descendants.¹⁶ Yet, the bill languished in the Senate for nearly thirty years after its introduction in 1993, before the most recent version, introduced in the House in January 2019, finally reached subcommittee hearing in June 2019.¹⁷

Based on the facts, we can conclude that the United States’ failure to grant reparations to African Americans for the mass atrocity of slavery, Jim Crowism, and the persisting aftermath of those racial caste regimes has been a conscious choice. What accounts for this decision?

While reparations to Jewish Holocaust victims have primarily consisted of monetary payments and restitution of stolen property, the scope of reparations as a remedy is significantly broader than that. Indeed, the remedy is multi-faceted with the aim of addressing both the cause and impact of gross historical injustices and mass atrocities, particularly where there have been government-sanctioned violations of internationally-recognized fundamental human rights.¹⁸ When

¹² ROY L. BROOKS, *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN RIGHTS* 149 (1999).

¹³ See, e.g., Kristina Daugirdas & Julian Davis Mortenson, *United States and France Sign Agreement to Compensate Holocaust Victims*, 110 AM. J. INT’L 117, 117-120 (2016) (discussing the December 2014 agreement, which was negotiated after lawsuits in the U.S. federal courts failed, and after repeated introduction of legislation that would have granted U.S. courts jurisdiction to hear claims for relief).

¹⁴ Civil Liberties Act of 1988, 50 U.S.C. §§ 4201-4239 (2018).

¹⁵ See Michelle E. Lyons, *World Conference Against Racism: New Avenues for Slavery Reparations?*, 35 VAND. J. TRANSNAT’L L. 1235, 1238 (2002) (discussing the U.S. threat to pull out completely if the agenda was not adjusted).

¹⁶ Civil Liberties Act of 1988, 50 U.S.C. §§ 4201-4239 (2018).

¹⁷ See *Commission to Study and Develop Reparation Proposals for African-Americans Act*, H.R.40, 116th Cong. (2019), CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/40> [<https://perma.cc/5KTE-6TRZ>] (last visited Apr. 20, 2020).

¹⁸ See Roy L. Brooks, *Getting Reparations for Slavery Right – Response to Posner and Vermule*, 80 NOTRE DAME L. REV 251,

viewed as transitional justice, reparations consider and accomplish what a “successor regime committed to democracy, human rights, and the rule of law can and should do to achieve justice for human rights abuses perpetrated by and under an abusive forebear[er].”¹⁹ Such must be the focus of reparations for slavery and its aftermath in a country such as the United States, which has historically declared itself the model of democracy.

Thus, for the United States, admitting that reparations for slavery and post-slavery systemic injustices are due would be to admit a critical failure of a nation whose very birth purportedly was premised on evading oppression.²⁰ Because an effective grant of reparations should be transformative of the institutions and relationships giving rise to the underlying injustices,²¹ the granting of meaningful reparations to descendants of enslaved Africans in America must include an overhaul of institutions plagued with systemic racism and would thus necessarily threaten the racial and political power imbalance to which this nation has grown accustomed. It is likely for these reasons that the United States has proven itself unwilling to self-impose reparations to remedy its historical and continuing injustices against Black America. Further, in contrast to the moral economy incentive that was present in connection with reparations for the Jewish Holocaust, the absence of a third-party nation with the political and/or economic power to compel the United States to grant reparations has thwarted the success of movements for reparations for descendants of enslaved Africans to date.²²

Meanwhile, events over the last decade and, in particular, since the 2016 presidential election, have confirmed continuing patterns of systemic oppression, racial disparities, and discrimination, as well as a genocidal approach to treatment of Black Americans by various government and private actors for the world to see. Based on a fact-finding visit to and study of the United States, in 2016 the United Nations’ Working Group of Experts on Peoples of Africa Descent—established at the inaugural WCAR and charged by the United Nations General Assembly with monitoring the human rights situation of people of African descent worldwide—issued a report calling on the United States to finally pass the long-stagnant H.R. 40 bill to establish a Commission to Study of Reparation Proposals for African Americans.²³ Significantly, the Working Group also called for reparations, urging the United States to seriously consider “applying analogous elements contained in the Caribbean Community’s Ten-Point Action Plan on Reparations, which includes a formal apology, health initiatives, educational opportunities, an African knowledge programme, psychological rehabilitation, technology transfer and financial support, and debt cancellation.”²⁴

255 (2004).

¹⁹ Cf. Gray, *supra* note 1, at 1047.

²⁰ See JILL VICKERS & ANNETTE ISAAC, *THE POLITICS OF RACE: CANADA, THE UNITED STATES, AND AUSTRALIA* 4 (2d ed. 2012) (“In the thirteen America colonies, British settlers—often refugees from religious oppression—rebelled against colonial rule and established a new nation, which they mythologized as a beacon of liberty for the world.”); see also Natsu Taylor Saito, *Redressing Foundational Wrongs*, 51 U. TOL. L. REV. 13, 16 (2019) (exploring the question of what justice looks like for peoples subordinated by design in settler colonial states).

²¹ See Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 518 (1998).

²² See *infra*, Part IV(A).

²³ Working Group of Experts on People of African Descent on its Mission to the United States of America, ¶ 94, U.N. Doc. A/HRC/33/61/Add.2 (Aug. 18, 2016).

²⁴ *Id.*

The current state of our nation reveals the United States as a hypocritical and dysfunctional “democracy,”²⁵ if the nation can rightly be called a democracy at all. It divests the nation of its historic claim to moral high ground, undercutting the validity of the United States’ democracy mantra. It also threatens to diminish the power of the United States to maintain alliances for purposes of promoting or coercing democracy extraterritorially. These broader potential consequences now at stake have given rise to new incentives for the United States to grant the reparations necessary to address the slavery-related harms that, until very recently, the United States has preferred to forget—if not outright deny.²⁶

The remainder of this Article proceeds in four parts, prior to concluding. Part I sets the stage with a brief discussion of the general scope of reparations as a remedy applicable in the case of mass atrocities and historical injustices, accompanied by illustrations of what the remedy has meant in the context of reparations for Jewish Holocaust victims. Part I also discusses the prerequisites for entitlement to reparations, as set forth in the literature based upon successful claims. With regard to the question of how reparations for slavery and its aftermath should be framed and implemented, Part II begins by examining the definitions of democracy and argues that, consistent with the ideals set forth in the United States’ own Bill of Rights, the United Nations Declaration of Human Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), a *substantive democracy* is the preferred goal. Part II then explores how the United States has failed to live up to its claimed status as moral leader of the free world and the epitome of democracy, using relevant United Nations treaties as the framework for analysis, but primarily focusing on assessments of the United States’ progress toward complying with its obligations under the Covenant for the Elimination of All Forms of Racial Discrimination. Part II also illustrates the race-based gap in the United States’ commitment to democracy, human rights, and the rule of law within its own borders, and it includes an overview of the 2016 call for reparations by the Working Group of Experts on People of African Descent.

Further illustrating the continuing harm, while also broadly addressing the question of how reparations for slavery and its aftermath should be framed, Part III discusses why democracy in the United States was a fallacy at its inception, in light of the intentional incorporation of social structures and government systems meant to preserve and perpetuate slavery and the racial caste system upon which it was built. It argues for elimination of such vestiges of slavery. Focusing specifically on the United States’ failure and unwillingness to fully comply with Article 4 of ICERD, Part III identifies White supremacist ideology as the core of the United States’ systemic ills, arguing that reparations for slavery and its continuing aftermath must directly address White supremacist mentality to transition the United States to a functioning, substantive democracy.²⁷

Finally, with regard to the question of who or what will succeed in causing the U.S. government to finally grant reparations for slavery and its aftermath, this Article explores the moral economy incentive for reparations through the lens of interest convergence theory, a theory first

²⁵ See *infra*, Part II.

²⁶ See *infra*, Part IV.

²⁷ See Adjoa A. Aiyetoro, *Why Reparations to African Descendants in the United States are Essential to Democracy*, 14 J. GENDER RACE & JUST. 633, 637-638 (2011) (furthering Erwin Chemerinsky’s argument that majority rule “is not a proper definition of American democracy,” whether “descriptively or normatively,” and arguing that we should strive for substantive democracy, “which seeks to assure stability and equal treatment among members of society”).

articulated by the late Professor Derrick Bell as an explanation for the landmark *Brown v. Board of Education* decision.²⁸ This Article concludes that the nation's own interest in restoring and preserving its global image, status, and leverage as a world leader provides a formidable alternative to the missing external or international ally that, under the moral economy incentive theory, would otherwise compel the United States to be accountable for its expansive history of slavery and related continuing injustices against descendants of enslaved Africans.

I. REPARATIONS AND THE EXAMPLE OF THE JEWISH HOLOCAUST

A. Scope of Reparations as a Remedy

The remedy of reparations is multidimensional, expansive, and much more than some nominal or even significant amount of money. The nature of reparative interventions is necessary to provide redress for groups harmed by government-sanctioned, gross historical injustices, that rise to the level of mass atrocities and/or genocide.²⁹ In his book, *The Guilt of Nations: Restitution and Negotiating Historical Injustices*, Elazar Barkan uses the term “restitution” instead of reparations to capture what he deemed “the entire spectrum of attempts to rectify historical injustices.”³⁰ According to Barkan, that spectrum includes: “form[s] of material recompense for that which cannot be returned, such as human life, a flourishing culture and economy, and identity;” “return of the specific actual belongings that were confiscated, seized, or stolen, such as land, art, ancestral remains, and the like;” and “admission of wrongdoing, a recognition of its effects, and, in some cases, an acceptance of responsibility for those effects and an obligation to its victims.”³¹ Barkan defines these three groupings as reparations, restitution, and apology, respectively.³²

The first two of Barkan's definitions, however, are somewhat inaccurate from a legal perspective. What he defines as reparations is more akin to compensatory damages in the context of legal remedies, where money is given either as a direct, dollar-for-dollar remedy or as an approximate and substitutionary remedy—albeit a sometimes inadequate one—for harm that cannot be quantified precisely. For example, under the U.S. Military Government Law No. 59 on the Restitution of Identifiable Property—issued in November 1947 when the United States took over executive and legislative powers in the post-World War II U.S. occupied zone—compensation was payable if restitution of the specific property was not available, (i.e., “if confiscated or alienated property could

²⁸ See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

²⁹ Gray, *supra* note 1, at 1051 (“Reparations encompasses a variety of potential responses to mass atrocities.”).

³⁰ ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* xix (2000). Barkan is a Professor of International and Public Affairs at Columbia University, as well as founding Director of the Institute for Historical Justice and Reconciliation (IHJR) in The Hague. See *Elazar Barkan*, COLUMBIA SCHOOL OF INTERNATIONAL AND PUBLIC AFFAIRS <https://sipa.columbia.edu/faculty-research/faculty-directory/elazar-barkan> [<https://perma.cc/NK6E-9PKK>] (last visited Apr. 22, 2020).

³¹ BARKAN, *supra* note 30, at xiii-xix.

³² *Id.*; see also CORLETT, *supra* note 9, at 149-151 (defining reparations to include compensation, restitution, acknowledgement, and apology); Gray, *supra* note 1, at 1054-1055 (noting reparations to include a range of forms from financial compensation to “more ethereal” forms including “apologies, memorials . . .”).

not be returned,” due to destruction, transformation, or otherwise.)³³ Similarly, the German Federal Restitution Law adopted by the West German government in July 1957—as a vehicle for implementation of the Allied restitution legislation—required payment of full compensation on the basis of replacement value for property that was destroyed or which otherwise could not be returned.³⁴ However, Germany also adopted legislation which, in its final form, required payment of not only property replacement value, but also for “damages relating to life, health, liberty, . . . [and] vocational and economic pursuits,” which is the substitutionary form of damages.³⁵ Individual compensation was paid, and “[c]ollective reparations were channeled to the nascent State of Israel.”³⁶ The unification of the Federal Republic of Germany with East Germany in 1990 prompted the adoption of subsequent laws during that decade for both compensation and restitution.³⁷

Restitution as a legal remedy can include the return of specific actual belongings, but it is not strictly limited therein as Barkan suggests.³⁸ Jewish Holocaust victims have benefitted from restitution where artworks and other personal property (as well as real property) confiscated by the Nazi regime or forcibly forfeited have been recovered from successor owners, based on the victim’s ability (or that of their heirs) to establish the victim’s prior rightful ownership.³⁹ Holocaust victims have also sought restitution from banks alleged to have “knowingly provided Nazi Germany with [currency] in return for goods produced by Jewish slave labor.”⁴⁰

The purpose of restitution, however, is not just to restore to victims what is rightfully theirs but also to deter wrongful conduct by depriving the perpetrator of the fruits of such conduct. Consequently, restitution focuses on disgorgement of ill-gotten gains held by the perpetrator, even where that disgorgement results in overcompensating the victim.

The apology and acknowledgement aspect of reparations, while symbolic and likely ineffective standing alone, is powerful when combined with corrective actions that convert the apology into an act of atonement. Barkan’s definition is similar to that of Roy L. Brooks, who proposed a model that includes: confessing the deed, admitting the deed constitutes an atrocity, repenting, and asking for forgiveness.⁴¹ Germany coupled its apology for the Holocaust with tens of billions of dollars in reparations—plus restitution.⁴² Atonement is powerful because it sets an agreed standard for what is acceptable moving forward, which in turn provides the benchmark for

³³ Dostal, *supra* note 3, at 1042-43.

³⁴ *Id.* at 1045.

³⁵ *Id.* at 1046 (discussing Germany’s Federal Supplementary Law for Compensating Victims of Socialist Persecution, which, after several amendments, became the 1965 Final Federal Compensation Law).

³⁶ Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT’L & COMP. L. REV. 157, 170 (2004).

³⁷ Dostal, *supra* note 3, at 1048.

³⁸ According to Barkan, “[r]estitution strictly refers to the return of the specific actual belongings that were seized, confiscated, or stolen.” BARKAN, *supra* note 30, at xix.

³⁹ Ariel Colonomos & Andrea Armstrong, *German Reparations to the Jews After World War II: A Turning Point in the History of Reparations*, in THE HANDBOOK OF REPARATIONS 390, 391, 413 (Pablo de Greiff ed., 2006).

⁴⁰ Michael J. Bazzyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 3 U. RICH. L. REV. 1, 38 (2000) (discussing, *inter alia*, slave labor claims).

⁴¹ Roy L. Brooks, *Toward a Perpetrator-Focused Model of Slave Redress*, 6 AFR.-AM. L. & POL’Y REP 49, 67 (2004).

⁴² Colonomos & Armstrong, *supra* note 39, at 391, 399.

accountability. Absent atonement, true reconciliation is likely impossible.⁴³

When President Bill Clinton apologized for the Trans-Atlantic Slave Trade during a visit to Africa in 1998, he did not apologize for the government-institutionalized White supremacist mentality that led to the grossly inhumane conditions of slavery and the post-slavery oppression of Black Americans.⁴⁴ In fact, President Clinton's apology was not directed to descendants of enslaved Africans in America at all.

Some twenty-one years later, in 2009, when the U.S. Congress finally enacted legislation to issue an apology to African Americans for slavery and Jim Crowism and their oppressive legacy (the "Apology"), it was done with little to no fanfare or widespread promotion, and with the express caveat that the Apology could not serve to support claims for compensation or restitution.⁴⁵

Congress finally officially acknowledged, in a series of "whereases" in the 2009 Apology, that Jim Crowism "was a direct result of the racism against people of African descent that was engendered by slavery," that "the vestiges of Jim Crow continue to this day," and that "African-Americans continue to suffer from the consequences of slavery and Jim Crow laws . . . through enormous damage and loss, both tangible and intangible, including the loss of human dignity and liberty."⁴⁶ Congress also acknowledged that "after emancipation from 246 years of slavery, African-Americans soon saw the fleeting political, social, and economic gains they made during Reconstruction eviscerated by virulent racism, lynching, disenfranchisement, Black Codes, and racial segregation laws that imposed a rigid system of officially sanctioned racial segregation in virtually all areas of life."⁴⁷ Further, it acknowledged that "the story of the enslavement and de jure segregation of African-Americans and the dehumanizing atrocities committed against them should not be purged from or minimized in the telling of the history of the United States."⁴⁸

But after these truths, the context for the Apology turned to what is, at best, folly with respect to the anticipated impact of an apology without reparations. That is, though Congress expressly declared the importance of making a formal apology so that we can "move forward and seek reconciliation, justice, and harmony for all people of the United States," it then immediately disclaimed any connection between the apology and attendant acknowledgments on the one hand, and any claim or settlement against the United States on the other hand.⁴⁹

⁴³ For example, having also been "founded" by colonists who instituted slavery and post-slavery laws and who also institutionalized segregation designed to disenfranchise the non-White population, South Africa's post-apartheid government established the Truth and Reconciliation Commission ("TRC") to encourage full disclosure to South African citizens of the full extent of the atrocities committed during apartheid. See Benjamin Zinkel, *Apartheid and Jim Crow; Drawing Lessons from South Africa's Truth and Reconciliation*, 2019 J. DISP. RESOL. 229, 229 (2019). The TRC was said to have had a cleansing effect. As Germany had paired its apology with reparations, South Africa paired the TRC with paid reparations to Apartheid victims. Gray, *supra* note 1, at 1052.

⁴⁴ Chisolm, *supra* note 1, at 704.

⁴⁵ S. Con. Res. 26 (2009).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*; see also Gray, *supra* note 1, at 1083 (suggesting that the inclusion of the disclaimer was a necessity for passage of the 2009 resolution).

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The text of the Apology itself, prior to the disclaimer, reads as follows:

(1) APOLOGY FOR THE ENSLAVEMENT AND SEGREGATION OF AFRICAN-AMERICANS.—The Congress—

(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.⁵⁰

In spite of the express commitment to extend the ideal of inalienable fundamental rights to all U.S. citizens, and not just to White citizens as was originally envisioned by the founders, Congress put forward no apparent strategy or plan to accomplish anything concrete in this vein. The explicit disclaimer instantly diminished the Apology's effectiveness as a tool of reparations.

As Barkan ultimately suggests, the spectrum of redress required to rectify historical injustices necessarily includes a combination of compensation, restitution, apology, and acknowledgement⁵¹; but these measures are just the beginning. Effective remediation for the harms suffered by a people whose oppression and marginalization have been the norm in this nation requires actions akin to both declaratory relief (e.g., renouncement of oppressive policies and declarations of just policies) and coercive, restorative, and prophylactic injunctions which assist implementation of the other parts of the remedy. As used in this Article, the term “reparations” refers to this more expansive combination of responses.

B. Entitlement, with Jewish Holocaust Claims as the Comparator

As several reparations scholars have observed, most claims for reparations do not succeed.⁵² Because Jewish Holocaust victims succeeded in obtaining reparations against Germany, Austria, France, and various private banks and institutions, Holocaust reparations claims have served as the benchmark for other groups seeking reparations.⁵³ In theory, based upon studies of what has and has

⁵⁰ S. Con. Res. 26 (emphasis added).

⁵¹ BARKAN, *supra* note 30 at xix (“I refer to *restitution* more comprehensively to include the entire spectrum of attempts to rectify historical injustices. *Restitution* refers to the integrated picture that this mosaic creates and is thus not only a legal category but also a cultural concept.”).

⁵² See, e.g., Gray, *supra* note 1, at 1043; Roht-Arriaza, *supra* note 37, at 158.

⁵³ HENRY, *supra* note 1, at 19-20; Colonomos & Armstrong, *supra* note 40, at 411.

not worked, a meritorious claim for securing reparations requires: (1) the commission of a human injustice that is well-documented, (2) victims who are identifiable as a distinct group, (3) continued harm suffered by members of the group, and (4) causal connection between the harm and the past injustice(s).⁵⁴

In the case of the claim for reparations for descendants of enslaved Africans in the United States, most would agree that the United States' participation in the Trans-Atlantic Slave Trade, slavery, and Jim Crowism are well-documented human injustices. The latter three components of a meritorious claim, however, are often called into question.

Identity of the victims as a distinct group must be based on the reality that, by design, persons who are perceived to be "Black" in the United States experience racism, oppression, and systemic discrimination as "Black people," regardless of their actual ethnicity or national origin,⁵⁵ or even their socioeconomic status.⁵⁶ For that reason, challenges to reparations lack merit when the arguments are based on some "Blacks" having achieved education or wealth, or some "Blacks" not being descendants of Africans who were enslaved in the United States. While technically it may be so that only descendants of Africans who were enslaved in the United States should be entitled to monetary compensation to the extent the compensation is tied to wages due for unpaid labor, there are significant bases for monetary compensation as a substitutionary remedy for the harms suffered simply by virtue of being "Black" in America. Although "Black America" is not necessarily synonymous with "African Americans" or "Blacks in America," those terms are used deliberately within this work to underscore the point that when we discuss and consider the reparations due from the United States—and who is entitled to what and why—we must operate on the basis of reality.

The reality is the social construction of race has been used throughout the history of the United States as a tool of oppression. This approach has been a common practice of White settler states, in the United States and elsewhere, which have "maintained at least two different legal and governance regimes—one for White citizens, the other for non-Whites," via use of racist ideas to legitimize that dichotomy:⁵⁷

Settler governments established political regimes that to varying degrees were based on racialism. Racialism is an ideology with three main pillars: first, that the human species is composed of separate entities called races; second, that race determines the abilities of human groups (races) and that such abilities are inherited along with physical features, such as skin colour; and third, that it is legitimate for one 'race' to rule over another because the dominant race always has superior abilities. Each of these pillars has been discredited scientifically, but together, at the time, they formed the ideological foundations of each state, and they explain how the supplanting societies dispossessed the original owners of their

⁵⁴ HENRY, *supra* note 1, at 66 (citing Mari Matsuda's elaboration of Roy L. Brooks' theory of redress).

⁵⁵ See, e.g., Taylor et al., *Prevalence and Correlates of Everyday Discrimination Among Black Caribbeans in the United States: the Impact of Nativity and Country of Origin*, 24 ETHNICITY & HEALTH 463, 463 (2017).

⁵⁶ See, e.g., Brakkton Booker, *Money May Not Shield Prosperous Blacks From Bigotry, Survey Says*, NPR MORNING EDITION (Oct. 24, 2017), <https://www.npr.org/2017/10/24/559690951/money-may-not-shield-prosperous-blacks-from-bigotry-survey-says> [<https://perma.cc/PJ6Y-HQ65>].

⁵⁷ VICKERS ET AL., *supra* note 20, at 6.

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territories. As a consequence, racist ideas have been embedded in the institutions and practices of government and continue to influence politics in significant ways.⁵⁸

It is therefore appropriate that the same social construct of race be employed as expansively in determining who should receive reparations to provide redress for the oppression it has caused.

The following Part addresses the continuing harm and causal connection components of the meritorious reparations claim by examining the United States' failure to rectify continuing effects of slavery and Jim Crowism in the context of compliance with relevant United Nations treaties aimed at ensuring equal rights to full citizenship and at eliminating racism and discrimination.

II. FAILED RIGHTEOUSNESS

righteousness (noun): the state of being righteous

righteous (adjective): acting in accord with divine or moral law; free from guilt or sin; morally right or justifiable⁵⁹

The very first “whereas” in the series of “whereases” providing context for Congress’ 2009 Apology personifies the righteous esteem in which the United States has long bathed itself: “Whereas during the history of the Nation, the United States has grown into a symbol of democracy and freedom around the world.”⁶⁰ By that reference to “democracy”, the United States presumably means the ideals of freedom and equality reflected in the U.S. Constitution. But the hypocritical duality of the United States’ approach to advancing democracy outside and within its own borders confirms a failed righteousness.

A. Democracy Defined

The concept of democracy does not lend itself to singular definition. It has been deemed an “essentially contested concept” . . . because the very definition carries a different social, oral, or political agenda.”⁶¹ The literature reflects “common understandings of democracy to include the concepts of majority rule, representative democracy [i.e., where the majority elects their representative, who may then vote without regard for the views and objectives of the constituency] and constitutional democracy.”⁶²

Constitutional scholar Erwin Chemerinsky has argued that majority rule is a not a proper definition of American democracy, “[n]either descriptively nor normatively.”⁶³ We are not a majority

⁵⁸ *Id.* at 4-5.

⁵⁹ *Righteousness*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/righteousness> [<https://perma.cc/3288-JY4D>] (last visited Nov. 22, 2020).

⁶⁰ S. Con. Res. 26, 111th Cong. (2009).

⁶¹ Aiyetoro, *supra* note 27, at 636 (internal quotations omitted).

⁶² *Id.* at 637.

⁶³ Erwin Chemerinsky, *A Grand Theory of Constitutional Law?*, 1001 MICH. L. REV. 1249, 1256 (2002).

rule democracy, as the Constitution does not provide for involvement of the majority of the population in government decision-making.⁶⁴ The founding history also reflects an express distrust and rejection of majority rule, as illustrated by the three-fifths compromise, restriction of representation to White male property owners, and use of the electoral college. Chemerinsky argues that a majority rule democracy is normatively undesirable because such a model would allow for action inconsistent with the Constitution, so long as the majority was in favor, whereas “a democracy that focuses on both the processes of government and the substantive values that the Constitution protects” is normatively desirable.⁶⁵ On that basis, Chemerinsky argues we should understand the United States as a constitutional democracy committed to protection of fundamental rights, equality, and separation of powers, “where the choices of the majority and their elected officials are allowed only so long as they are consistent with the Constitution.”⁶⁶ This definition of democracy is consistent with, for example, the U.S. Supreme Court decision in *Brown v. Board of Education*, which overturned segregation in public schools on Fourteenth Amendment grounds, despite majority support for continued segregation.

Professor Adjoa Aiyetoro argues, and this author agrees, that the preferred form of democracy is a substantive democracy, which extends Chemerinsky’s definition to require correction of oppression and its consequences, and thus enables true inclusion and equal protection.⁶⁷ She writes:

In a situation where oppression is present, there exists a higher ranking of the oppressor population due to forced non-competitiveness. The voices of oppressed groups, or those languishing under the vestiges of oppression, are not heeded. The group is less in quantity and perceived by the majority to be less in quality, thus allowing the majority to ignore the group’s needs. It is also more capable of being unduly influenced by members of the oppressor group. Therefore, the underlying principle of substantive democracy is the requirement that the inequalities born of societal barriers be addressed. Addressing the inequalities born of oppression places the groups (the past oppressed and oppressor) on an equal footing such that the voices can be heard and one not dominate the other because of the oppression.⁶⁸

Substantive democracy is a democracy in which all citizens enjoy the civil, political, and social components of citizenship. Civil citizenship “refers to an individual’s security in the basic constitutional rights and liberties,” those being: “the right to secure one’s self and property; freedom of speech, religion, assembly, and association; and both substantive and procedural equality before the law.”⁶⁹ Political citizenship “is essentially democratic enfranchisement—participation in the

⁶⁴ *Id.*

⁶⁵ *Id.* at 1257.

⁶⁶ *Id.*

⁶⁷ Aiyetoro, *supra* note 27, at 634.

⁶⁸ *Id.* at 643.

⁶⁹ Chisolm, *supra* note 1, at 700 (quoting Talcott Parsons, *Full Citizenship for the Negro American?: A Sociological Problem*, 94 DAEDALUS 1009, 1017 (1965)).

governmental process through the right to a formal voice in the selection of leadership and the right to attempt to influence policy.⁷⁰ Social citizenship “concerns welfare and general well-being, or those resources and capacities required to secure the opportunity to express and implement the [civil and political] rights derived from . . . societal values”; it “includes health, education, and welfare, and ‘presumptively forbids the organized society to treat an individual . . . as a member of an inferior or dependent caste or as a nonparticipant.’”⁷¹

Full and equal citizenship, and the benefits thereof, historically were not and are still not fully available to *all* citizens in the United States. That reality relates back to the fact that from 1790 to 1870, “being a ‘white person’” was a prerequisite to naturalization and citizenship in the United States.⁷² In 1870, the naturalization process was opened to persons of African descent.⁷³ The United States was later forced to reconsider its naturalization law and policies during World War II, which had excluded Asian nationals, so as not to be in the company of the Nazi regime, which limited its recognition of citizens solely to members of the Aryan race.⁷⁴

Although “race categories in the first U.S. census were ‘free,’ ‘slave,’ and ‘Indian,’ [t]hese categories were quickly polarized into ‘White’ and ‘Black’ (still-later ‘non-White’). All subsequent race categories were based on this polarization, which created a race hierarchy into which new immigrants were fit.”⁷⁵ Phrases like “White privilege” and the recently coined colloquial phrase “living while Black”⁷⁶ reflect, rather simply, the normalized dichotomic existence dictated by apparent racial identity.

B. Hypocritical Duality

The United States has a long history of using its military force and economic power in the name of advocating for human rights in the international arena and of imposing democracy as the superior form of government upon nondemocratic nations. President Woodrow Wilson aimed to “make the world safe for democracy” by fighting in World War I.⁷⁷ After World War II, when the Allied occupiers implemented a “program of denazification” seeking to eliminate “Nazi influence in every aspect of society” in West Germany, the United States actively sought to instill concepts of

⁷⁰ *Id.*

⁷¹ *Id.* (quoting Talcott Parsons, *Full Citizenship for the Negro American?: A Sociological Problem*, 94 DAEDALUS 1009, 1017-1018 (1965); Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5 (1977)).

⁷² See IAN R. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 1 (1996); see also *Scott v. Sandford*, 60 U.S. 393, 425-426 (1857).

⁷³ 16 Stat. 254, 256 (1870).

⁷⁴ Lopez, *supra* note 72, at 44 (recounting that during World War II, the United States “was open to charges of hypocrisy for banning from naturalization the nationals of many of its Asian Allies”).

⁷⁵ VICKERS & ISAAC, *supra* note 20, at 10.

⁷⁶ “Living while Black” is derived from the phrase “driving while Black,” which served as a shorthand for the prevalence of Black drivers being pulled over by police for no apparent reason other than their perceived Black identity. For a survey and discussion of racially motivated and weaponized police reporting, see Chan T. McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335 (2019).

⁷⁷ James Meernik, *United States Military Intervention and the Promotion of Democracy*, 33 J. PEACE RES. 391, 391 (1996).

democracy as part of the overhaul of the education and political systems, as well as the overall culture.⁷⁸ The United States has intervened or invaded to facilitate, restore, maintain, and/or defend democracy in South Korea, Syria, Lebanon, Taiwan, South Vietnam, Honduras, Grenada, Nicaragua, Panama, Kuwait, and many other target territories between 1950 and 1990 alone.⁷⁹ The list is long.

Meanwhile, within its borders, U.S. citizens still live with an ingrained racial caste system which, for non-Whites, actively thwarts true access to the basic rights and liberties derived from the societal values reflected in the Bill of Rights and the Fifth and Fourteenth Amendments to the Constitution. This hypocrisy is exemplified by the United States' role in developing the United Nations Declaration of Human Rights in contrast to its compliance with the same, and in particular, the International Convention on the Elimination of All Forms of Racial Discrimination.

1. Jewish Holocaust as the Impetus for the United Nations' Universal Declaration of Human Rights, While Jim Crowism in the United States Continued

The United Nations was chartered in close temporal proximity to the end of World War II with the purposes of maintaining international peace and security and of developing a cooperative spirit amongst member nations, "based on respect for the principle of equal rights and self-determination of peoples."⁸⁰ The Charter established initial principal organs, which included a General Assembly⁸¹ and an International Court of Justice.⁸² The General Assembly subsequently proclaimed the Universal Declaration of Human Rights (the "Declaration") as the common standard of achievement for all nations.

The Declaration essentially recognizes the freedom, autonomy, equal dignity, and equal rights of human beings. It sets forth rights to life, liberty, security of person and property, education, work and rest, an adequate standard of living, participation in government, and recognition as a person, as well as freedoms to which everyone is entitled, irrespective of "race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status."⁸³ The Declaration prohibits slavery or servitude, torture, cruel, inhuman or degrading treatment or punishment, and it eschews discrimination.⁸⁴

⁷⁸ See GILES MACDONOGH, *AFTER THE REICH: THE BRUTAL HISTORY OF THE ALLIED OCCUPATION* 344 (2007) (discussing political and cultural life in the American occupied zone of post-war Germany, and describing the use of questionnaires aimed at quantifying National Socialism to enable exclusion of former Nazis from public life and office); Helen Beckert, *The Effects of Denazification on Education in West Germany* 8 (Apr. 18, 2016), (unpublished B.A. thesis, Murray State University Honors College) (available at <http://digitalcommons.murraystate.edu/scholarsweek/2016/GermanHistory/4> [<https://perma.cc/3RLJ-JGW7>]). In fact, in addition to ordering "a very strict program of denazification extending to both public life and business," Joint Chiefs of Staff directive 1067—as well as the Potsdam Conference Agreement, presumably as a result of U.S. influence—stated that "a basic purpose in Germany was '[t]o prepare for the eventual reconstruction of German political life on a democratic basis.'" HAROLD ZINK, *UNITED STATES IN GERMANY, 1944-1955* 94, 326 (1957).

⁷⁹ Meernik, *supra* note 77, at 391, 395.

⁸⁰ U.N. Charter art. 1, ¶¶ 1-2.

⁸¹ *Id.* at arts. 7, 9.

⁸² *Id.* at arts. 7, 92.

⁸³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1-2, *passim* (Dec. 10, 1948).

⁸⁴ *Id.* at arts. 4-5, 7.

The United States was a founding member nation of the United Nations, despite the fact that Jim Crow laws were in full force and effect within this nation at the time, and would remain so for another twenty years. In other words, while the United States was at the table professing the virtues of establishing universal agreement on basic human and citizenship rights in the international arena, within its own borders it was actively engaged in, among other things, race-based segregation, discrimination, and suppression of voting rights, and it was derelict in restraining and punishing White terrorism against Black citizens.

Since its chartering, the United Nations has adopted numerous treaties and conventions that complement the Declaration, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”).⁸⁵

2. Ideal Implications of Ratifying the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

ICERD was adopted for signature and ratification in December 1965, with an effective date of January 4, 1969.⁸⁶ It is a widely-accepted treaty, with more than 135 state parties.⁸⁷ It requires state parties to report one year after accession and then biennially, or whenever requested, on the legislative, judicial, and administrative, and other measures undertaken to give effect to ICERD.⁸⁸

The convention established the Committee on the Elimination of Racial Discrimination (“CERD”)—a committee of eighteen elected experts from among the state parties serving in their individual capacities—to monitor each party’s implementation of ICERD. CERD does that by issuing its conclusions and recommendations to the United Nations General Assembly after considering the party’s self-report and other submitted materials.⁸⁹ However, CERD has no teeth for enforcement; there are no consequences for failure to progress in implementing ICERD beyond public disclosure.⁹⁰

Article 1 of ICERD defines racial discrimination broadly to include “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which

⁸⁵ High Comm’r on Human Rights, *U.N. Fact Sheet No. 30: The United Nations Human Rights Treaty System* 5-8 (2012), <https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf> [<https://perma.cc/DA8T-KCUM>]. Together the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) are referred to as the “International Bill of Rights.” The United States became a signatory to ICCPR and ICESCR in 1977; it ratified ICCPR in 1992, but has not ratified ICESCR. *See Human Rights & The U.S.*, The Advocates for Human Rights, https://www.theadvocatesforhumanrights.org/human_rights_and_the_united_states [<https://perma.cc/W3SR-W8GS>] (last visited Nov. 1, 2020).

⁸⁶ G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965) [hereinafter ICERD].

⁸⁷ *See* 140 Cong. Rec. S7634-02 (June 24, 1994) (statement of the presiding officer).

⁸⁸ ICERD, *supra* note 86, at art. 9.

⁸⁹ ICERD, *supra* note 86, at arts. 8-9.

⁹⁰ *Cf.* Gray, *supra* note 1, at 1090 (“While the period since the 1948 signing of the Universal Declaration of Human Rights has marked a new era in internationalism and the progressive advancement of an international system of human rights norms and transnational agencies charged with reviewing and encouraging respect for these norms, there is no organization with sovereign reach and authority sufficient to guarantee the prosecution and punishment of all human rights violations.”).

has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”⁹¹ Excluded from the definition of racial discrimination are special measures and policies specifically designed to remedy and protect against deficiencies in equal enjoyment or exercise of human rights and fundamental freedoms for racial or ethnic groups and individuals, so long as those measures do not result in separate rights for separate groups, and so long as they do not continue after the objectives have been achieved.⁹² In other words, Article 1 recognizes the legitimacy of affirmative action and other race- or ethnicity-based measures aimed at advancing historically affected and disadvantaged groups.

Articles 2 and 3 of ICERD obligate all parties, with respect to their jurisdictions, to condemn and to undertake, without delay, to prevent, prohibit, and eradicate racial discrimination in all its forms, including racial segregation and apartheid, whether such condemnable conduct is by national or local governments, public authorities and institutions, or any person, group, or organization.⁹³ ICERD calls for the parties to “review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”⁹⁴ It also calls for concrete measures and remedies to ensure the adequate development and protection of certain racial groups to guarantee the “full and equal enjoyment of human rights and fundamental freedoms” thereafter specified in Article 5.⁹⁵ Article 7 of ICERD obligates parties to adopt effective measures in the areas of education, culture, and information, to promote understanding and tolerance.⁹⁶

Notably relevant to Aryanism, the enemy mentality during World War II, and to the continued indulgence of White supremacist mentality and related organizations in the United States and elsewhere, Article 4 obligates parties to condemn all propaganda and all organizations that are based on ideas or theories of racial or ethnic superiority, or which attempt to justify or promote racial hatred and discrimination in any form, and to “adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.”⁹⁷ To that end, Article 4 requires that a state party:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another

⁹¹ ICERD, *supra* note 86, at art. 1(1).

⁹² *Id.* at art. 1(4) (“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms, shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”).

⁹³ *Id.* at arts. 2-4.

⁹⁴ *Id.* at art. 2(1)(c).

⁹⁵ *Id.* at arts. 2(2), 5, 6.

⁹⁶ *Id.* at art. 7.

⁹⁷ *Id.* at art. 4.

colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.⁹⁸

3. United States Ratification of ICERD

The United States became a signatory to ICERD in September 1966, but did not agree to be bound until ratification and accession nearly thirty years later in July of 1994.⁹⁹ The United States' ratification was subject to a federalist understanding¹⁰⁰ and the declaration that "the provisions of ICERD are not self-executing,"¹⁰¹ meaning that the convention alone does not give rise to private rights of action enforceable in U.S. courts.

Ratification was further limited by three reservations. First, the United States rejected any obligation to restrict rights, particularly under Article 4 (prohibition of race-based superiority propaganda and incitement to discrimination and related violence) and Article 7 (promotion of understanding and tolerance), to the extent such action would restrict individual freedom of speech, expression and association protected by the Constitution and laws of the United States.¹⁰² Second, the United States rejected any obligation to enact legislation or take other measures under Articles 2, 3, and 5 with respect to private conduct, to the extent ICERD calls for a broader regulation of private conduct not otherwise mandated by the Constitution and laws of the United States.¹⁰³ Third, the United States required its consent in each case, before any dispute regarding interpretation or

⁹⁸ *Id.*

⁹⁹ See 140 Cong. Rec. S7634-02 (June 24, 1994) (daily ed. June 24, 1994) (statement of the presiding officer). The United States' 1966 signing of the Convention occurred during Lyndon B. Johnson's administration. Apparently, it was not submitted to the Senate by Presidents Johnson, Nixon, or Ford. According to the legislative history, President Jimmy Carter's administration transmitted it to the Senate in February 1978, but, reportedly, "domestic and international events at the end of 1979 prevented the [The Foreign Relations Committee] from moving to a vote on it." *Id.* (statement of Dr. Pell). "Neither the Reagan nor the Bush administrations supported ratification of the convention," but "the Clinton administration . . . support[ed] ratification of the convention with a limited number of conditions: three reservations, one understanding, and one declaration," which were "similar to the conditions proposed by the Carter administration" in many respects. *Id.*

¹⁰⁰ *Id.* ("That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.").

¹⁰¹ *Id.*

¹⁰² 140 Cong. Rec. S7634-02 (June 24, 1994)

¹⁰³ *Id.*

application of ICERD to which it is a party may be submitted to the jurisdiction of the International Court of Justice.¹⁰⁴

The United States' use of such declarations, understandings, and reservations in ratifying ICERD and other major international human rights treaties is intended to narrow the scope of its obligations; accordingly, the practice has been criticized by U.N. bodies and other U.N. members.¹⁰⁵ The declarations, understandings, and reservations have hindered meaningful compliance with ICERD.

4. Progress, and Lack Thereof, Toward Elimination of Racial Discrimination

To date, the United States has submitted self-reports to CERD in the years 2000, 2007, and 2013, resulting in three sets of Concluding Observations from CERD regarding the United States' progress toward implementing ICERD.¹⁰⁶ The self-reports are extensive, as they set forth explanations of existing domestic laws and anecdotal illustrations of continuing racial discrimination and related remedial action, if any.¹⁰⁷ Thus, this Part provides an overview of U.S. compliance with ICERD, though it covers only those aspects deemed most pertinent to this Article rather an exhaustive analysis.

In all its self-reports, the United States has acknowledged that racial discrimination continues. It has also acknowledged the connection between present-day racial discrimination and the history of racial oppression in the United States. For example, in the initial self-report, first on the list of the "principal causative factors" of continuing discrimination was "[t]he persistence of attitudes, policies and practices reflecting a legacy of segregation, ignorance, stereotyping, discrimination and disparities in opportunity and achievement."¹⁰⁸

Yet, consistent with its rejection of any obligation to enact legislation or take other measures under ICERD Articles 2, 3, and 5, the United States has relied heavily on the mere existence of anti-discrimination laws and U.S. constitutional amendments, without due regard for the reality as to

¹⁰⁴ *Id.*

¹⁰⁵ See Martha F. Davis, *The Upside of the Downside: Local Human Rights and the Federalism Clauses*, 62 ST. LOUIS U. L.J. 921, 921-922 (2018) (noting that the United States asserted the "so-called federalism understanding" in connection with its ratification of the International Covenant on Civil and Political Rights, the Convention Against Torture, and CERD).

¹⁰⁶ Having acceded to ICERD in 1994, self-reports from the United States on its legislative, judicial, and administrative, and other measures undertaken to give effect to ICERD were due in 1995, 1997, 1999, 2001, 2003, 2005, 2007, 2009, 2011, 2013, 2015, and 2017. See S. EXEC. DOC. NO. 103-29, at 5 (1994). The first report, filed in October 2000, covered the initial, second and third reporting periods. The second report, filed in October 2007, covered the fourth, fifth, and sixth reporting periods. The third and most recent report, filed October 2013, covered the seventh, eighth and ninth reporting periods. See Comm. on the Elimination of Racial Discrimination, Reports, Submitted by States Parties under Art. 9 of the Convention: Seventh to Ninth Periodic Reports of the United States of America, at ¶ 5, U.N. Doc. C/USA/7-9 (June 13, 2013).

¹⁰⁷ See, e.g., Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of United States of America, U.N. Doc. C/USA/CO/7-9 (Aug. 29, 2014).

¹⁰⁸ Comm. on the Elimination of Racial Discrimination, Reps. Submitted by States Parties Under Art. 9 of the Convention: Third Periodic Reports of the United States of America, Addendum, ¶ 71(a), U.N. Doc C/351/Add.1 (Oct. 10, 2000).

whether, how, and to what success and breadth such laws are enforced.¹⁰⁹ For example, the initial self-report includes the following statements:

... U.S. laws, policies and government institutions are fully consistent with the provisions of the Convention accepted by the United States. Racial discrimination by public authorities is prohibited throughout the United States, and the principle of non-discrimination is central to governmental policy throughout the country. The legal system provides strong protections against and remedies for discrimination on the basis of race, colour, ethnicity or national origin by both public and private actors. These laws and policies have the genuine support of the overwhelming majority of the people of the United States, who share a common commitment to the values of justice, equality, and respect for the individual.¹¹⁰

... Federal law prohibits discrimination in the areas of education, employment, public accommodation, transportation, voting, and housing and mortgage credit access, as well as in the military and in programmes receiving federal financial assistance. The Federal Government has established a wide-ranging set of enforcement procedures to administer these laws, with the U.S. Department of Justice exercising a major coordination and leadership role on most critical enforcement issues. State and local governments have complementary legislation and enforcement mechanisms to further these goals.¹¹¹

Thus, from the outset, a basic concern of CERD has been the “[a]bsence of specific legislation implementing the provisions of the Convention [ICERD] in domestic laws.”¹¹² In addition, CERD has repeatedly noted that the definition of discrimination in U.S. domestic laws and judicial implementation is not always consistent with the broader proscription against discrimination in Article 1, paragraph 1 of ICERD, in that state and federal laws that do require discriminatory intent do not address *de facto* discrimination and disparate impact.¹¹³

Notably, reliance on the U.S. legal system as the vehicle for enforcement of domestic anti-discrimination laws ignores the inherent temporal and financial barriers to relief for private citizens that would bring suit.¹¹⁴ It also ignores the fact that, even where authorized to do so, the Department

¹⁰⁹ See, e.g., Comm. on the Elimination of Racial Discrimination, Reps. Submitted by States Parties Under Art. 9 of the Convention: Periodic Reports of the United States of America, Addendum, ¶¶ 58-80, U.N. Doc. C/USA/6 (Apr. 24, 2007).

¹¹⁰ Comm. on the Elimination of Racial Discrimination, Reps. Submitted by States Parties Under Art. 9 of the Convention: Third Periodic Reports of the United States of America, Addendum, ¶ 6, U.N. Doc C/351/Add.1 (Oct. 10, 2000).

¹¹¹ Comm. on the Elimination of Racial Discrimination, Reps. Submitted by States Parties Under Art. 9 of the Convention: Periodic Reports of the United States of America, Addendum, ¶ 55, U.N. Doc. C/USA/6 (Apr. 24, 2007).

¹¹² See Comm. on the Elimination of Racial Discrimination, Report on the Work of Its Fifty-Eight and Fifty-Ninth Session, ¶ 390, U.N. Doc A/56/18 (Oct. 1, 2001).

¹¹³ See *id.* at para. 93; Comm. on the Elimination of Racial Discrimination on its Eighty-Fifth Session Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, ¶ 5, U.N. Doc. C/USA/CO/7-9 (Sept. 25, 2014).

¹¹⁴ Related to this point, CERD expressed concern about “the disproportionate impact that the lack of a generally

of Justice may often fail to pursue enforcement for various reasons, including, but not limited to, its exercise of prosecutorial discretion and a lack of resources.¹¹⁵ In fact, the United States has attributed continuing discrimination—whether overt, subtle, or elusive—to, among other things, “[i]nadequate enforcement of existing anti-discrimination laws due to under-funding of federal and state civil rights agencies” and “delays in investigation, compliance review, [and] technical assistance and enforcement” caused by these resource limitations.¹¹⁶

CERD has also expressed concern with the lack of progress toward addressing unjustifiably disparate impacts of practices and legislation that may not be discriminatory *in purpose* but which are discriminatory *in effect*.¹¹⁷ These concerns include, but are not limited to: (i) incidents of police violence and police brutality and deaths caused by excessive force, found to particularly affect minority groups and foreigners;¹¹⁸ (ii) the disparate impact existing felon disenfranchisement laws have on a large number of persons belonging to racial, ethnic and national minorities, particularly African American persons, who are disproportionately represented at every stage of the criminal justice system;¹¹⁹ (iii) “persistent and significant racial disparities with regard to the imposition of the death penalty, particularly those associated with the race of the victim, as evidenced by a number of

recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities (art. 5 (a)).” Comm. on the Elimination of Racial Discrimination on its Seventy-Second Session, Consideration of Reports. Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations, ¶ 22, U.N. Doc. C/USA/CO/6 (May 8, 2008).

¹¹⁵ See, e.g., OFFICE OF THE INSPECTOR GENERAL, DEPT. OF JUSTICE, AUDIT OF THE DEPARTMENT OF JUSTICE’S EFFORTS TO ADDRESS PATTERNS OR PRACTICES OF POLICE MISCONDUCT AND PROVIDE TECHNICAL ASSISTANCE ON ACCOUNTABILITY REFORM TO POLICE DEPARTMENTS, (2018) (noting that the Department of Justice at times would fail to further investigate a matter of police misconduct due to lack of resources or change in priorities).

¹¹⁶ Comm. on the Elimination of Racial Discrimination, Reports Submitted by States Parties Under Art. 9 of the Convention: Third Periodic Reports of the United States of America, Addendum, ¶¶ 71(a)- (b), U.N. Doc C/351/Add.1 (Oct. 10, 2000).

¹¹⁷ Comm. on the Elimination of Racial Discrimination on its Eighty-Fifth Session Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, ¶ 5, U.N. Doc. C/USA/CO/7-9 (Sept. 25, 2014); Comm. on the Elimination of Racial Discrimination on its Seventy-Second Session, Consideration of Reports Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations, ¶ 10, U.N. Doc. C/USA/CO/6 (May 8, 2008); Comm. on the Elimination of Racial Discrimination, Reports on the Work of Its Fifty-Eight and Fifty-Ninth Session, ¶ 393, U.N. Doc A/56/18 (Oct. 1, 2001).

¹¹⁸ Comm. on the Elimination of Racial Discrimination, Report on the Work of Its Fifty-Eight and Fifty-Ninth Session, ¶ 394, U.N. Doc A/56/18 (Oct. 1, 2001). A nationwide epidemic of murders of African Americans by police officers has highlighted a widespread practice and disparate impact of police brutality affecting African Americans and exposed a pattern of seeming indifference by government prosecutors, grand juries, and judicial officers alike. Due in large part to the ease with which any citizen can broadcast photographs, videotape, and news of current events through social media platforms, hard evidence of continuing systemic oppression and a genocidal approach to treating African Americans by various actors within the United States’ governance has been on display for the world to see.

¹¹⁹ Comm. on the Elimination of Racial Discrimination on its Seventy-Second Session, Consideration of Reports Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations, ¶ 27, U.N. Doc. C/USA/CO/6 (May 8, 2008); Comm. on the Elimination of Racial Discrimination, Report on the Work of Its Fifty-Eight and Fifty-Ninth Session, ¶ 395, U.N. Doc A/56/18 (Oct. 1, 2001).

studies, including a recent study released in October 2007 by the American Bar Association”;¹²⁰ (iv) “stark racial disparities in the administration and functioning of the criminal justice system” at various stages of criminal proceedings, including disproportionate imposition of life sentences without parole and disproportionate impact of persistent inadequacies in criminal defense programs for indigent defendants belonging to racial, ethnic, and national minorities;¹²¹ (v) “discriminatory mortgage-lending practices and the foreclosure crisis which disproportionately affected, and continues to affect, racial and ethnic minorities”;¹²² and (vi) “persistent disparities in the enjoyment of, in particular, the right to adequate housing, equal opportunities for education and employment, and access to public and private health care.”¹²³

CERD repeatedly has expressed concerns regarding the dismantling of affirmative action programs in the United States,¹²⁴ as well as the “persistence of *de facto* racial segregation in public schools.”¹²⁵ Whereas CERD “emphasizes that the adoption of special measures by State parties when

¹²⁰ Comm. on the Elimination of Racial Discrimination on its Seventy-Second Session, Consideration of Reports Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations, ¶ 23, U.N. Doc. C/USA/CO/6 (May 8, 2008); *see also* Comm. on the Elimination of Racial Discrimination, Report on the Work of Its Fifty-Eight and Fifty-Ninth Session, ¶ 396, U.N. Doc A/56/18 (Oct. 1 2001)(noting the “disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty, particularly in states like Alabama, Florida, Georgia, Louisiana, Mississippi and Texas”).

¹²¹ Comm. on the Elimination of Racial Discrimination on its Eighty-Fifth Session Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, ¶¶ 20-21, U.N. Doc. C/USA/CO/7-9 (Sept. 25, 2014); Comm. on the Elimination of Racial Discrimination on its Seventy-Second Session, Consideration of Reports Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations, ¶¶ 20-22, U.N. Doc. C/USA/CO/6 (May 8, 2008).

¹²² Comm. on the Elimination of Racial Discrimination on its Eighty-Fifth Session Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, ¶ 13, U.N. Doc. C/USA/CO/7-9 (Sept. 25, 2014).

¹²³ Comm. on the Elimination of Racial Discrimination, Report on the Work of Its Fifty-Eight and Fifty-Ninth Session, ¶ 398, U.N. Doc A/56/18 (Oct. 1, 2001).

¹²⁴ *See* Comm. on the Elimination of Racial Discrimination on its Eighty-Fifth Session Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, ¶ 7, U.N. Doc. C/USA/CO/7-9 (Sept. 25, 2014) (“Taking note of the Supreme Court decision of April 2014 in *Schuette v. Coalition to Defend Affirmative Action* and the measures adopted by several states against the use of affirmative action in school admissions, the Committee expresses concern at the increasing restrictions, based on race or ethnic origin, on the use of special measures as a tool to eliminate persistent disparities in the enjoyment of human rights and fundamental freedoms (art. 2 (2)).”); Comm. on the Elimination of Racial Discrimination on its Seventy-Second Session, Consideration of Reports Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations, ¶ 15, U.N. Doc. C/USA/CO/6 (May 8, 2008) (expressing concern that “recent case law of the U.S. Supreme Court and the use of voter referenda to prohibit states from adopting race-based affirmative action measures have further limited the permissible use of special measures as a tool to eliminate persistent disparities in the enjoyment of human rights and fundamental freedoms”).

¹²⁵ Comm. on the Elimination of Racial Discrimination on its Seventy-Second Session, Consideration of Reports Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations, ¶ 17, U.N. Doc. C/USA/CO/6 (May 8, 2008) (“In this regard, the Committee notes with particular concern that the recent U.S. Supreme Court decisions in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) and *Meredith v. Jefferson County Board of Education* (2007) have rolled back the progress made since the U.S. Supreme Court’s landmark decision in *Brown v. Board of Education* (1954), and limited the ability of public school districts to address *de facto* segregation by prohibiting the use of race-conscious

the circumstances so warrant, such as in the case of persistent disparities, is an obligation stemming from article 2, paragraph 2,” the United States has taken the position that ICERD permits, but does not require, parties to adopt affirmative action measures to ensure the adequate development and protection of certain racial, ethnic, or national groups.¹²⁶

Finally, the United States’ “far-reaching reservations, understandings, and declarations” have been a consistent concern of CERD, particularly as they affect and restrict compliance with Article 4.¹²⁷ The United States takes the position that its ability “to give effect to [the Article 4] requirements is circumscribed by constitutional protections of individual freedom of speech, expression and association.”¹²⁸ Thus, the United States rejects the Article 4(b) requirements to declare illegal and prohibit organizations which promote and incite racial discrimination, to prohibit their propaganda activities, and to make participation in such organizations and activities an offence punishable by law.¹²⁹

While there are federal and state hate crime statutes that criminalize hate-motivated violence and incitement to such violence, and that provide for discretionary enhancement of sentencing upon conviction, actual enforcement of these statutes suffers from the same strains on resources and limitations of prosecutorial and/or judicial discretion that burden effective enforcement of other domestic anti-discrimination laws.

In 2007, the United States reported the following, as to Article 4:

The American people reject all theories of the superiority of one race or group of persons of one color or ethnic origin, as well as theories that attempt to justify or promote racial hatred and discrimination. It is government policy to condemn such theories, and none is espoused at any level of government.¹³⁰

The first assertion—that the American people, *as a whole*, reject all theories of racial superiority—is contradicted by the actual instances and manifestations of White supremacist mentality relayed elsewhere in the U.S. self-reports,¹³¹ as well as by more recent events of raced-based domestic

measures as a tool to promote integration (arts. (2), 3 and 5 (e) (v)).”

¹²⁶ Comm. on the Elimination of Racial Discrimination, Rep. on the Work of Its Fifty-Eight and Fifty-Ninth Session, ¶ 399, U.N. Doc A/56/18 (Oct. 1 2001).

¹²⁷ *Id.* at ¶ 391; *see, e.g.*, Comm. on the Elimination of Racial Discrimination on its Seventy-Second Session, Consideration of Reps. Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations, ¶ 18, U.N. Doc. C/USA/CO/6 (May 8, 2008); Comm. on the Elimination of Racial Discrimination on its Eighty-Fifth Session Concluding Observations on the Combined Seventh to Ninth Periodic Reps. of the UNITED STATES OF AMERICA, ¶ 9, U.N. Doc. C/USA/CO/7-9 (Sept. 25, 2014).

¹²⁸ Comm. on the Elimination of Racial Discrimination, Reps. Submitted by States Parties Under Art. 9 of the Convention: Third Periodic Reps. of the UNITED STATES OF AMERICA, Addendum, ¶ 286, U.N. Doc C/351/Add.1, (Oct. 10, 2000).

¹²⁹ *Id.* at ¶¶ 285-291.

¹³⁰ Comm. on the Elimination of Racial Discrimination, Reps. Submitted by States Parties Under Art. 9 of the Convention: Sixth Periodic Rep. of the United States, ¶ 136, U.N. Doc CERD/C/USA/6 (24 October 2007).

¹³¹ *See, e.g., id.* at ¶ 145 (“[A] white supremacist and his organization were charged under the Pennsylvania Ethnic Intimidation Law with terroristic threats, harassment, and harassment by communication in connection with” material on a

terrorism.

While the second assertion may or may not have been true in 2007, it is certainly not true as of the 2016 presidential election and thereafter. As mentioned above, there have been candidates for government across levels—from municipal to state to federal judicial, legislative and executive office—who have openly embraced racist views and encouraged discrimination¹³² and, some, even violence.¹³³ There have been multiple cases of members of law enforcement, who are sworn to protect and serve, having demonstrable affiliations with White supremacist groups.¹³⁴ Moreover, the United States has made little or no concerted effort to clear from public office persons known to hold racist views and White supremacist mentality.

By its third set of Concluding Observations, issued in 2014, CERD had found that the United States has failed to satisfactorily address various areas of racial discrimination, including racist hate crimes, disparate impact of environmental pollution, housing discrimination, racial disparities in education, racial profiling, and the disproportionate arrest and imprisonment of African Americans.¹³⁵ CERD also found “obstacles faced by individuals belonging to racial and ethnic minorities and indigenous peoples to effectively exercise their right to vote, due, inter alia, to restrictive voter identification laws, district gerrymandering and state-level felon disenfranchisement laws.”¹³⁶ Each of these areas of racism has been identified as a vestige of slavery and basis for reparations throughout the literature.

website, including “threats against two specific local and state civil rights enforcement employees”).

¹³² See, e.g., Jackie Smith, *Keep City White ‘as Much as Possible,’ Council Candidate Says, Stunning Forum in Michigan*, USA TODAY (Aug. 23, 2019), <https://www.usatoday.com/story/news/nation/2019/08/23/marysville-michigan-city-council-candidate-jean-cramer-stuns-racist-comment/2094779001/> [<https://perma.cc/94SG-27H2>] (reporting on how candidate at a city council election forum “doubled down” on her racist comments when answering questions about diversity); Michael D’Antonio, *Is Donald Trump A Racist? Here’s What the Record Shows*, FORTUNE (June 7, 2016), <https://fortune.com/2016/06/07/donald-trump-racism-quotes/> [<https://perma.cc/G788-PQDP>]; *Race in Our Politics: A Catalog of Campaign Materials*, CAMPAIGN LEGAL CTR. (Apr. 5, 2020), <https://campaignlegal.org/race-our-politics-catalog-campaign-materials> [<https://perma.cc/BW9W-UTNT>] (documenting campaign materials from candidates, political action committees, and other political actors that make racist appeals to voters). Notably, in one instance a Holocaust denier ran unopposed in the 2018 Republican primary for Illinois’ Third Congressional District and won, although the Republican party reported denounced this candidate as a Nazi. Liam Stack, *Denounced by His Party as a Nazi, Arthur Jones Wins Illinois G.O.P. Congressional Primary*, NEW YORK TIMES (March 20, 2018), <https://www.nytimes.com/2018/03/20/us/politics/arthur-jones-illinois.html> [<https://perma.cc/BJ4G-J8QV>].

¹³³ David Leonhardt, *It Isn’t Complicated: Trump Encourages Violence*, N.Y. TIMES (Mar. 17, 2019), <https://www.nytimes.com/2019/03/17/opinion/trump-violence.html> [<https://perma.cc/R2YV-JGJ4>].

¹³⁴ Maddy Crowell & Sylvia Varnham O’Regan, *Extremist Cops: How US Law Enforcement is Failing to Police Itself*, THE GUARDIAN (December 13, 2019), <https://www.theguardian.com/us-news/2019/dec/13/how-us-law-enforcement-is-failing-to-police-itself> [<https://perma.cc/S5KE-DPB6>].

¹³⁵ See Comm. on the Elimination of Racial Discrimination on its Eighty-Fifth Session Concluding Observations on the Combined Seventh to Ninth Periodic Reps. of the UNITED STATES OF AMERICA, ¶ 9, U.N. Doc. C/USA/CO/7-9 (Sept. 25, 2014).

¹³⁶ *Id.* at 11 (noting in particular “the Supreme Court decision in *Shelby County v. Holder*, which struck down section 4(b) of the Voting Rights Act and rendered section 5 inoperable, thus invalidating the procedural safeguards to prevent the implementation of voting regulations that may have discriminatory effect”).

C. Call for Reparations from the Working Group of Experts on People of African Descent 2016

Separate from CERD, the Working Group of Experts on People of African Descent is charged to study the problems of racial discrimination faced by people of African descent throughout the African diaspora, which entails gathering relevant information from the respective governments, non-governmental organizations, and other relevant sources, in addition to meeting with the particular governments.¹³⁷ The Working Group is then responsible for proposing measures to ensure full access to justice, to eliminate racial discrimination and improve human rights conditions, and to address the issues concerning the well-being of Africans and people of African descent.¹³⁸

For the period of July 2015 to June 2016, the Working Group reported deep concern with the “escalation of racism, racial discrimination, Afrophobia, racist hate speech, xenophobia and related intolerance targeting peoples of African descent in many parts of the world.”¹³⁹ Specific to the United States, the Working Group reported that “*a systemic ideology of racism ensuring the domination of one group over another continues to impact negatively on the civil, political, economic, social and cultural rights of African Americans today.*”¹⁴⁰

Echoing many of the concerns articulated by CERD, the Working Group recommended, among other things, the establishment of a national commission on human rights and greater efforts to address police brutality.¹⁴¹ It also called on Congress to pass H.R. 40, the Commission to Study Reparations Proposals for African-Americans Act, which should include “a formal apology, health initiatives, educational opportunities, an African knowledge programme, psychological rehabilitation, technology transfer and financial support, and debt cancellation.”¹⁴² It is unclear whether this 2016 call for reparations played a significant role in either the decision to hold a committee hearing on H.R. 40 in June 2019.

III. TOWARD A FUNCTIONING SUBSTANTIVE DEMOCRACY

If the United States is to deliver on the fundamental rights and equal protections promised in its Constitution (as amended) and reiterated in the Universal Declaration and related treaties to which the United States has acceded, then we must aim to be a substantive democracy. We can only achieve that aim by granting reparations to address the harms that have been flowing, for centuries, from the systemic oppression entrenched in the U.S. culture and American social relations.

¹³⁷ The Working Group was established in 2002, by the United Nations Commission on Human Rights Resolution 2002/68; subsequently, that mandate was renewed by the Commission and the Human Rights Council in parallel resolutions. See *Working Group of Experts on People of African Descent*, INTERNATIONAL JUSTICE RESOURCE CENTER, <https://ijrcenter.org/un-special-procedures/working-group-of-experts-on-people-of-african-descent/> [https://perma.cc/J7BE-ZUYX] (last visited Nov. 1, 2020); U.N. Comm’n on Human Rights Res. 2002/68 (Apr. 18, 2001).

¹³⁸ Human Rights Council Res. 36/23, U.N. Doc. A/HRC/RES/36/23 (October 9, 2017).

¹³⁹ Report of the Working Group of Experts on People of African Descent on its Seventy-first Session, U.N. Doc. A/71/297 (Aug. 5, 2016).

¹⁴⁰ Working Group of Experts on People of African Descent on its Mission to the United States of America, ¶ 9, U.N. Doc. A/HRC/33/61/Add.2 (Aug. 18, 2016) (emphasis added).

¹⁴¹ *Id.* at ¶¶ 88, 98-99.

¹⁴² *Id.* at ¶ 94.

Importantly, meaningful reparations must address the heart of the systemic ills that plague us, that being White supremacist mentality or the notion that non-White persons are somehow inferior to and, thus, entitled to lesser rights than White persons. To that end, this Part begins with a brief but forthright overview of how the concept of White supremacy was (and still is) reflected in the fabric of the nation, before then focusing on the argument for stricter adherence to Article 4 of ICERD as a means of moving toward the scope of reparations required to redress slavery and its continuing aftermath.

A. Confronting Fallacy with Truth Regarding Vestiges of Slavery

Generally, many of those raised in the United States (the Author included) are taught that our country is a great democracy and our president, leader of the free world. We are taught that our democracy is the superior form of government: one person, one vote; every vote counts, majority rules. We believe that, because we are not educated about gerrymandering or systemic voter suppression or the original purpose of the electoral college and its actual impact on the notion of a “majority-rules” democracy.

We learn about President Abraham Lincoln’s Gettysburg Address and we accept the premise that this nation was founded as “a new nation, conceived in liberty and dedicated to the proposition that ‘all men are created equal,’” and that “government of the people, by the people, for the people, shall not perish from the earth.”¹⁴³ We learn that the Declaration of Independence includes, as a “self-evident” truth, “that all men are created equal, that they are endowed by their creator with certain inalienable rights, [and] that among these are life, liberty and the pursuit of happiness.”¹⁴⁴ We learn the preamble to the U.S. Constitution and are able to recite it verbatim:¹⁴⁵

We the people [], in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.¹⁴⁶

We are generally *not* taught, however, that the founders intentionally wrote the U.S. Constitution as a proslavery document, in that: (i) it expressly protected the import of persons to be enslaved and prohibited amendment of the Constitution to interfere with slave trade prior to 1808; (ii) it expressly guaranteed enslavers the right to recapture escaped enslaved persons, without regard for geographic boundaries, and also guaranteed federal protection against “domestic violence” then understood to mean rebellions against slavery; and (iii) it incentivized slavery, while discounting the humanity of the enslaved, by basing the number of seats in the House of Representatives to which a

¹⁴³ Abraham Lincoln, 16th President of the United States, Gettysburg Address (November 19, 1863).

¹⁴⁴ THE DECLARATION OF INDEPENDENCE (U.S. 1776).

¹⁴⁵ Thanks in part to the catchy tune put to it by Schoolhouse Rock, many children learn the Preamble almost verbatim. Appearing at the very beginning of the actual Preamble, but omitted in the Schoolhouse Rock lyrics, are the words “of the United States.” See Lynn Ahrens, Schoolhouse Rock: Preamble (ABC television broadcast Nov. 1, 1975), <https://www.schoolhouserock.tv/Preamble.html> [<https://perma.cc/FWC9-UD5U>].

¹⁴⁶ U.S. CONSTITUTION, pmb1.

state was entitled on the number of free persons plus “three fifths of all other persons” (i.e., the enslaved), as a so-called compromise between the southern and northern states.¹⁴⁷

We do learn, in passing, that slavery “happened,” but its malevolent extremity is cloaked, and we are taught that there were abolitionists and fearless rebels like Harriet Tubman who were against slavery, and then there was the Civil War and the “slaves” were freed. The reference in the Constitution to three fifths of a person and its connection to slavery is either ignored completely or dismissed with assured reliance on the Thirteenth and Fourteenth Amendments.¹⁴⁸

We learn about the Civil Rights Movement, or, more particularly, we learn about Dr. Martin Luther King, Jr. and his nonviolent approach to protests to end segregation; and, maybe, we also learn about how the Supreme Court required integration of public schools in *Brown v. Board of Education*. And we come to believe that “we the people” and “government of the people, by the people, for the people” really does include everyone. We want to believe that. We embrace and hold fast to the notion that our country is committed to the premise that “all men are created equal.”

Even as we may individually supplement our knowledge with shockingly horrific details about what the enslavement of Africans and their descendants in the United States actually looked like, and about the intentional undoing of Reconstruction Era reparations¹⁴⁹ toward transition and progress after emancipation of the enslaved Africans and their descendants, and about Jim Crowism and the full extent of the struggle for civil rights through the 1960s, and even as we experience what still reeks of racism and oppression and discrimination, the lens through which we view it is distorted by the fact that the U.S. government has a history of actively advocating for human rights and democracy in the international arena.¹⁵⁰ That is so because we are conditioned to believe that fighting for democracy and human rights is what we—the United States of America—do. But, we, some of the people, come to realize that the United States does *not* have a comparable history of actively ensuring human rights and true democracy at home. That truth is demonstrated by the failure of the United States to remedy the legacy of slavery and the continuing systemic marginalization, oppression, and genocide of Black people in America.

The fire of hope for the realization of the democracy and “more perfect union” our years of learning had promised was kindled by the 2008 election of President Barack Obama, the nation’s first

¹⁴⁷ Juan F. Perea, *Echoes of Slavery II: How Slavery’s Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1083-1085 (2018) (discussing Article I, Section 9, Articles IV and V, and the Fugitive Slave Clause as evidence that the Constitution was intentionally written to protect and incentivize slavery).

¹⁴⁸ See U.S. CONST., art. I, § 2, cl. 3, amended by U.S. CONST., amend. XIV, (referencing “free Persons” including indentured servants, but “excluding Indians,” and otherwise including “three fifths of all other Persons” for purposes of determining a state’s population to calculate the state’s number of representatives for the House of Representatives); U.S. CONST., amend. XIII (abolishing slavery, “except as punishment for a crime whereof the party shall have been duly convicted”); U.S. CONST. amend. XIV, § 2 (amending the calculation in Article I, § 2 to, inter alia, remove the “three fifths of all other Persons” component and replace the reference to “free Persons” with “whole number of persons in each state”).

¹⁴⁹ See Chisolm, *supra* note 1, at 685-686 (discussing the “Confiscation Act, of August 1861, the 1862 Confiscation Act, General Sherman’s field order, and the 1865 Freedmen’s Bureau Act and their respective repeals); see also U.S. v. Harris, 106 U.S. 629, 644 (1883) (striking down Section 5519 of the Revised Statutes of the United States, which criminalized certain acts of conspiracy reflecting the practice of White supremacists).

¹⁵⁰ Chisolm, *supra* note 1, at 707.

African American—the biracial son of a White American woman and a Black African man¹⁵¹—to hold the presidency. Yet, for anyone paying attention it became graphically clear that the United States had *not* in fact reached “post-racial society” status where race-based discrimination and oppression and the attendant need for reparations were no more. After President Obama took office in 2009, the glaring truth about just what the United States of America as a country was *not* was punctuated by *increased* overt racial prejudice, discrimination, and violence against Black Americans across socioeconomic levels.¹⁵²

And to the extent there was still a flicker of hope left that the United States would live up to its longstanding, self-proclaimed righteousness after President Obama’s re-election in 2012, that flicker was splashed to embers by events leading up to and following the 2016 presidential election. The forty-fifth president of the United States lost the direct popular vote by 2.8 million votes, and yet was “elected” president by a vestige of slavery—the Electoral College—meant to protect slavery and the manifestation of White supremacist mentality via the Three-fifths Compromise,¹⁵³ despite the revisionist justification of the Electoral College as a means of preventing unqualified but popularly elected candidates from taking office. While the 2016 electoral college election of a president who had

¹⁵¹ The terms “Black” and “White” are social constructs that prioritize skin coloring as an identifier, while ignoring ethnicity, national origin, and true genealogy. The term “White people” lumps together all persons perceived to belong to the segment of the population which is not “black” or “brown” or otherwise identifiable as “persons of color,” without regard for whether such persons are Nordic or Canadian or European or American (meaning of the United States) or even African by birth or family heritage, and without regard for the persons’ genetic heritage. Similarly, the term “Black people” lumps together all persons perceived to belong to the segment of the population which is not “white” or “brown” or otherwise identifiable as “persons of color,” without regard for whether such persons are African or Caribbean or Brazilian or Dutch or Australian or American by birth or family heritage, and without regard for the persons’ genetic makeup. This type of lumping together also ignores cultural distinctions, religious identity, gender identity, and socioeconomic status, all of which influence who we are as people. It strips us of true identity in favor of a set of stereotyped characteristics. The social construct of race was intentional. Professor W.E.B. Du Bois, an American scholar, sociologist, and early opponent of race, wrote of its aim on one occasion in 1909, explaining how false theory of race was used to legitimize the oppression. *See generally*, W.E.B. Du Bois, *Evolution of the Race Problem* in PROCEEDINGS OF THE NATIONAL NEGRO CONFERENCE 142-158 (New York: s.n., 1909). Continued employment of the race construct has perpetuated a social dynamic where racial identity affiliation often overrides lower socioeconomic status affiliation, religious affiliation, and gender affiliation with the consequence of thwarting alliances that would harness political power across racial divides. Although transition away from the false Black/White dichotomy is a must, none of this is to say that the use of race as an identifier should cease immediately for *all* purposes. Certainly, its use should not cease prior to effectual redress of the harms this social construct has created, so that all affected “Blacks” may be identified.

¹⁵² Associated Press, *AP Poll: U.S. Majority Have Prejudice Against Blacks*, USA TODAY (Oct. 27, 2012), <https://www.usatoday.com/story/news/politics/2012/10/27/poll-black-prejudice-america/1662067> [https://perma.cc/WB D8-DKL8]; *see also* Stacy Hawkins, *Diversity, Democracy & Pluralism: Confronting the Reality of Our Inequality*, 66 MERCER L. REV. 577, 614 (2015) (“Notwithstanding claims that President Obama’s election ushered in-if not reinforced-a “post-racial” America, politics remain as racially polarized today as they ever have been.”) (footnote omitted).

¹⁵³ Perea, *supra* note 147, at 1087; *see also* Akhil Reed Amar, *The Troubling Reason the Electoral College Exists*, TIME (Nov. 10, 2016), <http://time.com/4558510/electoral-college-history-slavery/> [https://perma.cc/K93L-8ALQ]. The Electoral College was “one of a series of compromises that the founders accepted in order to accommodate the interests of the slave states.” VICKERS & ISAAC, *supra* note 20, at 143. Each enslaved person “was counted as three-fifths of a citizen in determining the number of House Representatives districts, a number duplicated when the numbers of Electoral College delegates were calculated.” *Id.* “Four out of five presidents over the first three decades were Virginal enslavers.” *Id.*

lost the popular vote was not a first in U.S. history,¹⁵⁴ it has certainly had substantial historic impacts in other respects.

The forty-fifth president not only failed to condemn racism, religious bigotry, misogyny, xenophobia, and related group-specific violence, but, in many cases, he actively and openly encouraged and even embraced the same.¹⁵⁵ Other candidates for various offices on federal, state, and local levels have followed suit with no apparent concern for negative repercussions to their election prospects.¹⁵⁶ Democracy is failing when, with neither shame nor fear of political consequence, candidates seeking seats of executive, legislative, and judicial power ride the wave of incivility and align themselves with hate groups who might foist them into office.

The resulting climate of overt actions by emboldened hate groups, increasing incivility, and widening societal divisions we are experiencing is moving the United States backward in giant steps.¹⁵⁷ The facade that hid the existence of White supremacist mentality as an acceptable mentality for mainstream society and government actors in the United States has been dropped.

There is obvious cause for concern because racism translates into harmful policy and real life-and-death consequences for those who are racially oppressed.¹⁵⁸ The same is true of the targeted campaigns to dismantle laws and policies enacted during President Obama's administration, where

¹⁵⁴ See Akhil Reed Amar, *The Inaugural Abraham Lincoln Lecture on Constitutional Law: Electoral College Reform, Lincoln-Style*, NW. U. L. REV. 63, 69-72 (2017) (explaining that Lincoln, who lost the popular vote, had a particularly noteworthy electoral victory, considering that the Electoral College's initial purpose was to bolster the influence of slave states).

¹⁵⁵ See, e.g., Michael D'Antonio, *Is Donald Trump A Racist? Here's What the Record Shows*, FORTUNE (June 7, 2016) <https://fortune.com/2016/06/07/donald-trump-racism-quotes/> [<https://perma.cc/KFV3-HV2J>] (reporting on the congruency between presidential candidate Trump's statements, deemed to be racist or fan flames of hatred, and his track record, over decades, of embracing racist views and discriminatory acts).

¹⁵⁶ See, e.g., Jackie Smith, *Keep City White 'As Much As Possible,' Council Candidate Says, Stunning Forum in Michigan*, USA TODAY (Aug. 23, 2019), <https://www.usatoday.com/story/news/nation/2019/08/23/marysville-michigan-city-council-candidate-jean-cramer-stuns-racist-comment/2094779001/> [<https://perma.cc/94SG-27H2>] (reporting on how candidate at a city council election forum "doubled down" on her racist comments when answering questions about diversity); Liam Stack, *Denounced by His Party as a Nazi, Arthur Jones Wins Illinois G.O.P. Congressional Primary*, N. Y. TIMES (March 20, 2018), <https://www.nytimes.com/2018/03/20/us/politics/arthur-jones-illinois.html> [<https://perma.cc/T7HW-HZN5>]; *Race in Our Politics: A Catalog of Campaign Materials*, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/race-our-politics-catalog-campaign-materials> [<https://perma.cc/JXE4-3H84>] (last visited Apr. 18, 2020).

¹⁵⁷ See, e.g., Oliver Holmes, *Antisemitic Incidents In U.S. Soar to Highest Level in Two Decades*, THE GUARDIAN (U.S. edition, Feb. 27, 2018), <https://www.theguardian.com/society/2018/feb/27/antisemitism-us-rises-anti-defamation-league?fbclid=IwAR281XhZTF-0zyegGuyiDL5AfVd7lv5VFVeSPfaAR0VZjZyT9gHOU2b3dB4> [<https://perma.cc/EGR6-2RB3>]; Vanessa Williamson and Isabella Gelfand, *Trump and Racism: What do the Data Say?* BROOKINGS (Aug. 14, 2019), <https://www.brookings.edu/blog/fixgov/2019/08/14/trump-and-racism-what-do-the-data-say/> [<https://perma.cc/Q8RS-9Q9T>]; Griffin Sims Edwards & Stephen Rushin, *The Effect of President Trump's Election on Hate Crimes*, SSRN, (Jan. 14, 2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652 [<https://perma.cc/THZ5-AWDR>]/

¹⁵⁸ Associated Press, *supra* note 152 ("Negative racial attitudes can manifest in policy" that has real consequences for "the way people are treated by the police, the way kids are treated by teachers, the way home seekers are treated by landlords and real estate agents") (quoting Alan Jenkins, an assistant solicitor general during the Clinton administration); see also William M. Wiecek, et al., *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095, 1101-1111 (2014) (discussing, from a sociological perspective, how structural or systemic racism results "from social policies produced by political decisions").

those laws and policies aimed to increase access to education, employment, economic opportunities, and healthcare. Bent on negating the legacy of the first African American President, a partisan Congress and the forty-fifth president's administration intentionally "worked to roll back dozens of health, environment, labor, and financial rules put in place by [President Obama],"¹⁵⁹ some of which marked significant progress toward addressing discrimination based on race, ethnicity, or minority status¹⁶⁰ and indeed, were claimed as such in the U.S. government's self-reports to CERD.¹⁶¹

The heart of the problem is that White supremacist ideology and the racial caste system it spawned survived the Civil War and the abolition of slavery, and both remain entrenched in the culture, economy, and political structure of the United States. That result is not surprising, given the intentional racialization of U.S. governance, which began with denying the humanity of Africans and Native Americans, ultimately manifesting in structures/institutions—e.g., legislatures, laws, courts, police, and the civil service—and practices/relationships—e.g., habits of deference and subordination—"through which states establish, maintain, and change official systems of racial domination."¹⁶² As the historian Edward Countryman has described, "[i]n the mid-nineteenth century the code phrase 'states rights' meant the legitimacy of slavery itself," and since the "mid-twentieth century, it [has] mean[t] the legitimacy of White supremacy."¹⁶³

To eradicate such deeply rooted systemic ills and actually effect transition after nearly 250 years of slavery, decades more of Black Code oppression and Jim Crowism, and scores of years of systemic racism, oppression, and discrimination, would require a sweeping intervention akin to the denazification of Germany imposed by Allied occupiers after World War II.

B. Addressing White Supremacist Mentality as the Core of Systemic Ills

Our nation's history with regard to persistent abuse and disenfranchisement of non-Whites proves the United States cannot transition toward a substantive democracy without addressing the core of its systemic ills. In other words, the United States must dismantle and reimagine the institutions, systemic structures, and practices that were put in place to protect and perpetuate slavery and White dominance. This means, for example, eliminating all restraints on and discounting of the

¹⁵⁹ Jenna Johnson, Juliet Eilperin, & Ed O'Keefe, *Trump Is Finding It Easier to Tear Down Old Policies Than to Build His Own*, WASH. POST (June 4, 2017) https://www.washingtonpost.com/politics/trump-is-finding-it-easier-to-tear-down-old-policies-than-to-build-his-own/2017/06/04/3d0bedb2-47c5-11e7-a196-a1bb629f64cb_story.html [https://perma.cc/XU98-PWV5].

¹⁶⁰ Juliet Eilperin & Daria Cameron, *How Trump is Rolling Back Obama's Legacy*, WASH. POST (Mar. 24, 2017, updated Jan 20, 2018), <https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/> [https://perma.cc/X63K-UU55].

¹⁶¹ See, e.g., Comm. on the Elimination of Racial Discrimination, Reps. Submitted by States Parties Under Art. 9 of the Convention: Seventh to Ninth Periodic Reports of the United States of America, U.N. Doc CERD/C/USE/7-9 (Oct. 3, 2013).

¹⁶² VICKERS & ISAAC, *supra* note 20, at 52-53.

¹⁶³ Edward Countryman, *Moral Economy, Political Economy, and the American Bourgeois Revolution*, in *THE MORAL ECONOMY AND POPULAR PROTEST: CROWDS, CONFLICTS, AND AUTHORITY* 159 (Adrian Randall & Andrew Charlesworth eds., 2000).

right to vote (including the electoral college¹⁶⁴), and revamping or reimagining our justice system, our law enforcement system, and our healthcare system. Again, the task is tremendous because it requires the ferreting out and uprooting of manifestations of White supremacist mentality upon which the United States was built. And yet, the intentional and targeted eradication, by the United States, of such supremacist notions in government and private services impacting basic societal needs is not without precedent.

1. Lessons from Denazification Efforts

Notably, the United States' denazification efforts in Germany were controversial from the start.¹⁶⁵ Yet according to former Chief Historian of the Office of the United States High Commissioner of Germany, Harold Zink, "it was generally agreed that the [National Socialist] party must be liquidated and its leaders dealt with"; thus, "provision was made for the complete liquidation of the National Socialist party, the confiscation of its property and funds, and the seizure of its records."¹⁶⁶ Those charged with the responsibility for a denazification plan set out to purge German society of former Nazis, particularly with respect to anyone in a governmental role or even in a public service role.¹⁶⁷ Policy in the American occupation zone was not only to exclude members of any Nazi Party-affiliated institution from work, but also to remove those who failed to show sufficient zeal for denazification.¹⁶⁸ To that end, all drafts of JCS 1067—the directive to the American Commander relating to occupation—addressed denazification.

The JCS 1067 draft, made public in October 1945, "provid[ed] that a proclamation should be issued dissolving the National Socialist party and all of its associated, affiliated, and supervised organizations and prohibiting their reconstitution, that laws devised by the Nazi regime to further their own purposes should be abrogated, that National Socialist property should be confiscated and Nazi records taken over, [and] then stipulated as follows:"¹⁶⁹

All members of the Nazi party who have been more than nominal participants in its activities, all active supporters of Nazism or militarism and all other persons

¹⁶⁴ As of March 2019, twelve states and the District of Columbia had joined the National Popular Vote Interstates Compact, by signing into law a measure that would commit their electoral votes to the presidential candidate who wins the national popular vote, however the law only becomes effective after it is enacted by states possessing the minimum number (270) of the electoral votes required to elect a president. See Michael Brice-Saddler and Deanna Paul, *Colorado Signs on to Popular-Vote Effort Ahead of 2020 Presidential Election*, THE WASHINGTON POST (Mar. 16, 2019), <https://www.washingtonpost.com/politics/2019/03/16/another-state-signs-popular-vote-bill-that-could-decide-presidential-election/> [https://perma.cc/ZQ79-277V].

¹⁶⁵ Denazification efforts by the United States and other Allies in West Germany were criticized and later undone. See, e.g., NORBERT FREI, *ADENAUER'S GERMANY AND THE NAZI PAST: THE POLITICS OF AMNESTY AND INTEGRATION* xii-xiii, 27-39 (2002).

¹⁶⁶ ZINK, *supra* note 78, at 151-152.

¹⁶⁷ For example, doctors who had belonged to Nazi organizations "were banned from practice." MACDONOGH, *supra* note 78, at 345.

¹⁶⁸ *Id.* at 348.

¹⁶⁹ *Id.* at 156.

hostile to Allied purposes will be removed and excluded from public office and from positions of importance in quasi-public and private enterprises such as (1) civic, economic, and labor organizations, (2) corporations and other organizations in which the German government or subdivisions have a major financial interest, (3) industry, commerce, agriculture, and finance, (4) education, and (5) the press, publishing houses, and other agencies disseminating news and propaganda. Persons are to be treated as more than nominal participants in Party activities and as active supporters of Nazism or militarism when they have (1) held office or otherwise been active at any level from local to national in the party and its subordinate organizations, or in organizations which further militaristic doctrines, (2) authorized or participated affirmatively in any Nazi crimes, racial persecutions or discriminations, (3) been avowed believers in Nazism or racial and militaristic creeds, or (4) voluntarily given substantial moral or material support or political assistance of any kind to the Nazi Party or Nazi officials and leaders. No such persons shall be retained in any of the categories of employment listed above because of administrative necessity, convenience or expediency.¹⁷⁰

Of note is the directive's broad expanse, reaching beyond government offices based on the understanding that the specified private actors and corporations were capable of continuing Nazi activities and practices that could defeat the rebirth of Germany as a country without Nazi influences.

Under Hitler's regime, the police had been "thoroughly nazified" and centralized, and the "American military government regarded both denazification and decentralization as requisites of a reorganized German police force."¹⁷¹ By comparison, while the police forces in the United States are decentralized, their very genesis is found in slavery and, like the Nazi police, rooted in racial oppression and White supremacist mentality, given that the antecedent of the modern American police was the Slave Patrol.¹⁷²

The American military government believed that "jurists operating German courts could not be trusted after twelve years of National Socialism,"¹⁷³ given that "most of the judges of the courts [and prosecutors and other officials] under Hitler had been associated with the National Socialist party."¹⁷⁴ With regard to reconstruction of the German courts during its early occupation, American military took over and prioritized the administration of justice for criminal matters and postponed consideration of civil matters until proper staffing could be accomplished using the denazification process to vet and identify qualified jurists who were not compromised.¹⁷⁵ Within its occupied zone,

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 304.

¹⁷² Slave Patrols functioned to help maintain an oppressive societal order, aiding enslavers in the recapture of escaped enslaved Africans. See Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, EASTERN KENTUCKY UNIVERSITY ONLINE: POLICE STUDIES (Jan. 7, 2014), <https://plsonline.eku.edu/insidelook/brief-history-slavery-and-origins-american-policing> [<https://perma.cc/X7EA-M4AW>].

¹⁷³ Andrew Szenajda, *Restoring Administrations of Justice in Early Practice: American-Occupied German 1945-1949*, 6 AMSTERDAM L. FORUM 35, 39 (2014).

¹⁷⁴ ZINK, *supra* note 78, at 309.

¹⁷⁵ See *id.* at 378.

the U.S. military “claimed the power to dismiss any German judge or prosecuting attorney, to disbar a lawyer or notary from practice, and to supervise proceedings of and to review, modify, or commute the decisions of German Courts.”¹⁷⁶ A similar review, modification, or commutation of prosecutions, convictions, and sentencing could be applied to address the disparate mass incarceration of Black criminal defendants in the United States, but such would require committed resources. At least theoretically, racial discrimination and bias is already a basis for removal of judges and disbarment of attorneys in most U.S. jurisdictions under ethics codes for attorneys and judges adopted by states and the federal judiciary.¹⁷⁷ However, there has not been a concerted effort to use the process to effect removal of biased attorneys and judges. Moreover, our highest court is not subject to any ethical check or balance at all, and therefore Supreme Court justices are free to rule on cases notwithstanding apparent or even certain biases they may hold.¹⁷⁸

While scholars have discussed and may disagree on the efficacy of the denazification “to remove tainted individuals from positions of power,” Professor Andrew Szenajda concludes that “the post-war administration of justice ultimately inherited by the Federal Republic of Germany was safeguarded by the application and enforcement of legislation.”¹⁷⁹ Regarding the reconstruction of German law, Zink wrote:

The task of American military government in eliminating this Nazi influence was one of the most weighty of the occupation. It was assumed to begin with that this task would be handled in large measure by the Allied Control Authority, but the difficulties . . . actually made it necessary for the United States to do a great amount of work alone. The general policy of suspending Nazi laws was of course not self executing; law books had to be scrutinized, the acceptable had to be sifted from the bad, and old laws or new provisions had to be substituted for the sections thrown out. Thus the job was both negative and positive in character: negative in eliminating the vicious legal dictates of the Nazis, and positive in drafting and promulgating as Allied Control Authority, Allied High Commission, and the American military government laws, ordinances, regulations, directives, and so forth. Much of this work was performed by German legal experts employed by OMGUS and HICOG. Some of it, for example the revision of the Administrative Code, was turned over to groups of German legal and juridical authorities who had been carefully screened for the purpose.¹⁸⁰

The effort was labor-intensive, involving consideration of some 11,682 pieces of German legislation

¹⁷⁶ *Id.* at 40.

¹⁷⁷ See MODEL CODE OF JUDICIAL CONDUCT R. 2.3 (2020); Lorelei Laird, *Discrimination and Harassment Will Be Legal Ethics Violations Under ABA Model Rule*, AM. B. ASS'N JOURNAL (Aug. 8, 2016), https://www.abajournal.com/news/article/house_of_delegates_strongly_agrees_to_rule_making_discrimination_and_harass [https://perma.cc/N6BP-T637].

¹⁷⁸ Martha Neil, *Can Congress Impose Ethics Rules on the U.S. Supreme Court?*, AM. B. ASS'N JOURNAL (Aug. 5, 2013), https://www.abajournal.com/news/article/is_proposed_bill_to_impose_ethics_rules_on_us_supreme_court_constitutional [https://perma.cc/6RCR-A6EB].

¹⁷⁹ Szenajda, *supra* note 173, at 38.

¹⁸⁰ ZINK, *supra* note 78, at 306.

over the course of eighteen months.¹⁸¹

Denazification efforts with respect to education gained priority in 1947. Contrary to some other Allied zones of occupation, elementary and secondary schools in the American occupied zone remained closed in the early stages of Allied occupation. According to Zink, “over 80 percent of the German school staff had been Nazified to the extent of belonging to the National Socialist Teachers’ League and [] many were active members of the party itself.”¹⁸² Thus, out of necessity, the American education authorities retained half of the teaching staff, and set up emergency training facilities to supply additional teachers.¹⁸³ Because “the textbooks and teaching materials were virtually 100 per cent National Socialist in character,” efforts were made to revise pre-Nazi German textbooks obtained from a U.S. university library to eliminate the objectionable parts, because they also contained overt themes of extreme nationalism.¹⁸⁴

For various reasons, implementation of the denazification directive was far from perfect, particularly with respect to private actors. The logistics of identifying and categorizing people who were not direct participants in the Nazi regime were both inexact—ultimately relying on self-reporting via millions of questionnaires—and administratively difficult to manage.¹⁸⁵

While there was no general agreement amongst the Allies about the “right way” to denazify Germany, there was agreement that it was necessary. Commitment to denazification was strong in the American occupied zone, while apparently lax in the British occupied zone, where, for instance, pro-Nazi graffiti was observed that was not seen elsewhere.¹⁸⁶

2. In Favor of Compliance with ICERD Article 4

CERD has urged the United States to consider withdrawing or narrowing the scope of its reservations to Article 4 of the Convention, as “the prohibition of all ideas based on racial superiority or hatred is compatible with the right to freedom of opinion and expression, given that the exercise of this right carries special duties and responsibilities, including the obligation not to disseminate racist ideas.”¹⁸⁷ The United States has maintained that it “protect[s] freedom of expression because the cost of stripping away individual rights is far greater than the cost of tolerating hateful words” and because of “grave concerns about how empowering government to ban offensive speech could easily be misused to undermine democratic principles.”¹⁸⁸

¹⁸¹ *Id.* at 308.

¹⁸² *Id.* at 197.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 198.

¹⁸⁵ *See id.* at 156-160; *see also* MACDONOGH, *supra* note 78, at 349 (discussing the thirteen million “Fragebogen of questionnaires” directed to “those with dubious pasts” and Germans seeking employment).

¹⁸⁶ *See* MACDONOGH, *supra* note 78, at 349.

¹⁸⁷ Comm. on the Elimination of Racial Discrimination on its Eighty-Fifth Session Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, ¶ 9, U.N. Doc. C/USA/CO/7-9 (Sept. 25, 2014); Comm. on the Elimination of Racial Discrimination on its Seventy-Second Session, Consideration of Reports, Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations, ¶ 18, U.N. Doc. C/USA/CO/6 (May 8, 2008).

¹⁸⁸ Comm. on the Elimination of Racial Discrimination, Reports. Submitted by States Parties under Art. 9 of the

This weighing of free speech as an individual right at the expense of others' individual rights to be secure in his or her person and to be free from violence and oppression based on identity was certainly no barrier to the United States' implementation of denazification efforts in its occupied zones of Germany after World War II. Nor was it a barrier to Congress passing Reconstruction Era legislation aimed at the Ku Klux Klan, which created criminal liability for two or more private persons who "conspire[d] or [went] in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws . . ." ¹⁸⁹ That legislation survived for two decades before the Supreme Court struck it down as unconstitutional in 1883, finding that Congress did not have authority to enact it under the Thirteenth Amendment or any other provision of the Constitution.¹⁹⁰ However, 135 years later the Supreme Court expressly recognized racially motivated violence as a badge of slavery that Congress is empowered to eliminate under the Thirteenth Amendment.¹⁹¹ Indeed, federal circuits faced with the issue have upheld the constitutionality of federal hate crime statutes, based upon that very premise.¹⁹²

Accordingly, freedom of speech and the right to associate under the First Amendment should not now be posed as a barrier against directly addressing discrimination and systemic oppression that flow from the White supremacist mentality of government and private actors alike, where both manifest the badges and incidents of slavery.

A June 2015 massacre of nine Black Christians by a self-proclaimed "White supremacist" shined an international spotlight on the enduring nature of racism in the United States, provoking widespread criticism toward the nation.¹⁹³ The murdered congregants and church pastor had welcomed the soon-to-be-murderer into the historic Black church's prayer meeting and Bible study.¹⁹⁴ The terrorist sat through nearly an hour of the service, before acting on his true intent, claiming that "blacks were taking over the world," as he began his shooting rampage.¹⁹⁵

In the wake of the massacre, the state of South Carolina continued to fly the Confederate battle flag over the state capitol, despite the flag being a historical symbol of pro-slavery¹⁹⁶ and a known continuing symbol of White supremacist ideology. Even after a bold African American young woman climbed the South Carolina Capital building's flag pole to remove the battle flag herself, the

Convention: Seventh to Ninth Periodic Reports of the United States of America, ¶ 50, U.N. Doc. C/USA/7-9 (June 13, 2013).

¹⁸⁹ United States v. Harris, 106 U.S. 629, 629 (1883).

¹⁹⁰ *Id.*

¹⁹¹ Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).

¹⁹² See, e.g., United States v. Beebe, 807 F. Supp. 2d 1045, 1053 (D.N.M. 2011) (citing additional cases).

¹⁹³ See, e.g., Christopher Bodeen, *World Shocked at Enduring Racism, Gun Violence in US*, ASSOCIATED PRESS (June 19, 2015), <https://apnews.com/759309b070f14ed99ad3c8effddb2915> [<https://perma.cc/3SX2-A473>] (quoting Chairman of the Philippine Alliance of Human Rights Advocates, Max de Mesa, as saying "Some of the (old) structures and some of the attitudes remain and they were even nurtured, at least that is being shown now").

¹⁹⁴ *An Act of 'Pure, Pure Evil': Charleston Mourns a Massacre*, AL JAZEERA AMERICA (June 18, 2015), <http://america.aljazeera.com/articles/2015/6/18/police-arrest-white-suspect-for-attack-on-historic-black-church.html> [<https://perma.cc/U5DX-SM66>].

¹⁹⁵ Bodeen, *supra* note 193.

¹⁹⁶ See *id.*

state put it back up pending a vote by the legislature as to whether it should be removed.¹⁹⁷ Legislation was enacted days later and the flag was finally taken down, after having been first raised in 1961.¹⁹⁸ It should be self-evident that the battle flag of the Confederacy, which lost the Civil War, should not be flown over government properties or otherwise be included in government-sanctioned displays of patriotism. It should be reason enough for rejection of the Confederate flag, monuments to Confederate leaders, and other such symbolism, that a governmental sanction of these symbols suggests an official embrace of White supremacist ideology and it all represents. Yet, movement on the issue has been slow. Scholars addressing the issue have come down on both sides, with some arguing for maintaining the status quo, and others for First Amendment rights to give way to the prioritization of social justice and transformative justice.¹⁹⁹ Meanwhile, calls for removing Confederate flags and various monuments in tribute to confederate army offices have resulted in backlash from White supremacist groups, such as the Ku Klux Klan and neo-Nazis. During 2015 and 2016, there was a growing trend to hold intentionally violent rallies by such groups, some of which actually did end in violence.²⁰⁰

Reportedly, the “movement against Confederate symbolism encompasses a mix of business logic[, including] an association with backward thinking [which] prevents states [from] competing for economic talent.”²⁰¹ In other words, the possibility of negative economic impact is what carries the most weight. This illustration of an ulterior motive having little to do with moral rectitude or substantive democratic values reveals the “what’s in it for me” mentality that the late Professor Derrick Bell first articulated as the “interest convergence” principle.

IV. CRUCIALITY OF INTEREST CONVERGENCE

Beyond the harms suffered by a group subject to any particular “-ism,” three broader causes for concern flow from the current state of the nation. The first is the juxtaposition of the United States’ unbridled problem with hate crimes and domestic terrorism, and its stance on the “war on terrorism”; the former affects the United States’ credibility and the latter impacts its alliances. The second is that as a direct result of the outcome of the 2016 presidential election, the global image of

¹⁹⁷ Linsey Davis, *Woman Who Removed Confederate Flag at SC Statehouse: ‘Enough Is Enough’*, ABC NEWS (July 2, 2015), <https://abcnews.go.com/US/woman-removed-confederate-flag-sc-statehouse/story?id=32176372> [https://perma.cc/6HB4-R6VG].

¹⁹⁸ Letitia Stein, *Confederate Flag Removed From South Carolina Capitol Grounds*, HUFFINGTON POST (July 10, 2015), https://www.huffpost.com/entry/confederate-flag-removal_n_7769300 [https://perma.cc/MP8H-2DSQ].

¹⁹⁹ Compare Chris Demaske, *Social Justice, Recognition Theory and the First Amendment: A New Approach to Hate Speech Restriction*, 24 COMM. L. & POL’Y 347, 348-349 (2019), and Leonard M. Nichoff, *Policing Hate Speech and Extremism: A Taxonomy of Arguments in Opposition*, 52 U. MICH. J. L. REFORM 859 (2019), with Luca Lixinski, *Confederate Monuments and International Law*, 35 WIS. INT’L L.J. 549 (2018); cf. E. Perot Bissell, Comment: *Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law*, 128 YALE L.J. 1130 (2019).

²⁰⁰ See JoAnne Sweeny, *Incitement in the Era of Trump and Charlottesville*, 47 CAP. U.L. REV. 585, 603-604 (2019).

²⁰¹ Jonathan Chait, *The Confederate-Flag Backlash and the New American Patriotism*, N.Y. MAG. (June 24, 2015) <https://nymag.com/intelligencer/2015/06/confederate-backlash-and-the-new-patriotism.html> [https://perma.cc/Q7W2-9C5Z].

the United States suffered, and global confidence in its leadership waned.²⁰² The third is that the stability of whatever version of democracy we do have was threatened, as timeless hallmarks of democracy—such as freedom of the press and the right to question and criticize government,²⁰³ separation of powers,²⁰⁴ and transparency of adjudicative process²⁰⁵—were blatantly trampled. The question now is whether these broader concerns are sufficiently tangible to push the United States to confront and resolve the heart of the problem.

A. *The Missing Moral Economy Incentive for Reparations*

Successful movements for reparations have enjoyed integral third-party support, resulting in a moral economy incentive for the grantor to take action. Post-World War II grants of reparations to Jewish Holocaust victims are the most familiar illustrations of the remedy.²⁰⁶ Less well known are the United States' legislative grants of reparations to Americans of Japanese descent who were interned during World War II and to the Aleuts, via the Civil Liberties Act of 1988, as well as Japan's subsequent grant of reparations to “comfort women” of the World War II era.²⁰⁷ While the groups' claims for reparations were each meritorious in their own right, their successes were in part attributable to the fact that there was at least one third-party power exerting political or economic pressure on the grantor.

In a moral economy, an “empowered global market supports restitution as moral atonement for ‘wrongs of one people against another.’”²⁰⁸ For example, “the United States often uses foreign aid as a means by which to [punish and reward] nations for their human rights abuses and democratic practices”; such measures might include “economic assistance and economic sanctions, [and] the

²⁰² Richard Wire, et al., *U.S. Image Suffers as Publics Around World Question Trump's Leadership*, PEW RESEARCH CENTER (June 26, 2017), <http://www.pewglobal.org/2017/06/26/u-s-image-suffers-as-publics-around-world-question-trumps-leadership/> [https://perma.cc/4E3L-YNN1]; Dominic Tierney, *What Does It Mean That Trump Is “Leader of the Free World”?: The Puzzling Resilience of a Cold War Concept*, THE ATLANTIC (Jan. 24, 2017), <http://www.theatlantic.com/international/archive/2017/01/https://perma.cc/6PET-HALY>.

²⁰³ See, e.g., Sam Husseini, *Meet the Reporter Dragged from Trump-Putin Press Conference for Trying to Ask about Nuclear Treaty*, DEMOCRACY NOW! (July 17, 2018), https://www.democracynow.org/2018/7/17/it_wasn't_a_protest_sam_hussei [https://perma.cc/NU9W-VK48].

²⁰⁴ See, e.g., David Love, *An Impeachment Trial Without Witnesses or Evidence is Very American*, CNN (Feb. 4, 2020), <https://www.cnn.com/2020/02/04/opinions/impeachment-no-witness-no-evidence-american-history-love/index.html> [https://perma.cc/5F98-N9A3] (noting the rarity of an impeachment trial without evidence, while also noting the “haunting familiarity of a sham trial in the Jim Crow South” in comparing such an impeachment trial to a “trial that has already been decided before it[s] beginning”); Peter L. Strauss, *Eroding Checks on Presidential Authority - Norms, the Civil Service, and the Courts*, 94 CHI.-KENT L. REV. 581, 590 (2019).

²⁰⁵ See, e.g., Nicholas Fandos, *Republicans Block Subpoenas for New Evidence as Impeachment Trial Begins*, N.Y. TIMES (Jan. 21, 2020), <https://www.nytimes.com/2020/01/21/us/politics/senate-impeachment-republicans-democrats.html> [https://perma.cc/7X7Y-UTM4].

²⁰⁶ Chisolm, *supra* note 1, at 707.

²⁰⁷ *Id.* at 707, 713-714.

²⁰⁸ *Id.* at 707 (quoting Elazar Barkan, *Payback Time: Restitution and the Moral Economy of Nations*, TIKKUN (Sept.-Oct. 1996), at 52).

funding of freedom fighters and propaganda.”²⁰⁹ But unlike the Jewish Holocaust reparation recipients, who had the political influence of Israel and the World War II Allies working in their favor,²¹⁰ or the interned Japanese Americans and their descendants, who had the economic influence of Japan and its international trade potential working in their favor,²¹¹ Black America has no international ally with economic and/or political clout sufficient to press the United States to account for its actions. To the contrary, many of the international powers with such clout were complicit in the horrors of the Trans-Atlantic Slave Trade. The missing ally has rendered moot the moral economy incentive for reparations for Black America, at least insofar as one might look to an external or international player to fill that role.

Consequently, interest convergence is critical with regard to answering the question of who or what will compel the U.S. government to grant meaningful reparations to its descendants of enslaved Africans and move the nation toward compliance with Article 4 of ICERD.

B. Interest Convergence Theory Applied

When the U.S. Supreme Court ordered an end to state-sanctioned segregation in public schools in *Brown v. Board of Education*,²¹² the right of Black schoolchildren to an equal education took precedence over the right of association (or the right not to associate) of White school children.²¹³ In his comment on the case following a twenty-fifth anniversary commemoration of *Brown*, Professor Bell offered the following principle of “interest convergence” as “the positivistic expression of the neutral statement of general applicability” that could justify or explain the decision:²¹⁴

The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.²¹⁵

²⁰⁹ Meernik, *supra* note 77, at 393.

²¹⁰ See, e.g., Zahava Moerdler, *Restituting Justice: Applying the Holocaust Restitution Process to Subsequent Genocides and Human Rights Violations*, 40 *FORDHAM INT'L L.J.* 131, 139-140 (2016) (explaining that “[r]estitution programs in the 1950s and 1960s predominantly relied on international diplomacy,” such as Austria’s payment of restitution to the Austrian Jewish community, which was a main factor in improved relations between Israel and Austria).

²¹¹ See, e.g., Magee, *supra* note 1, at 909 (applying Professor Bell’s interest convergence theory to conclude that “the political context which favored trade relations between Japan and the United States provided the essential ‘major crisis, or tragic circumstance that conveyed the necessity or at least the clear advantage of adopting a reparations scheme’ for the United States’ ill-treatment of Japanese Americans during World War II).

²¹² *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

²¹³ See Bell, *supra* note 28, at 522 (“Professor Charles Black, therefore, correctly viewed racial equality as the neutral principle which underlay the *Brown* opinion.”) (citing Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 428-429 (1960)).

²¹⁴ *Id.* at 523 (considering Professor Herbert Wechsler’s critique of the decision).

²¹⁵ *Id.*

Bell went on to explain that “the availability of fourteenth amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites,” but rather,

[r]acial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. Racial justice — or its appearance — may, from time to time, be counted among the interests deemed important by the courts and by society’s policymakers.²¹⁶

Noting that Black citizens had been challenging segregation policies for a century prior to the *Brown* decision, and interrogating not only *Brown* but subsequent decisions diluting its enforcement (such as requiring intentional discrimination and proof of actual harm), Bell argued that the departure from the prior so-called separate-but-equal standard came about in 1954 because of the political and economic value of the decision to White policymakers and government actors for whom the morality of racial equality alone was insufficient reason for desegregation.²¹⁷

“[W]hat mattered significantly to the United States . . . on the eve of [*Brown*]” was, according to Bell, “that its moral authority and international standing to wage the Cold War in the interest of national security were being undermined by the failure to rectify civil rights violations at home.”²¹⁸ Indeed, the NAACP and the federal government had strategically trumpeted the boost to the United States’ credibility in its struggle against world communism and promotion of democracy as the superior form of government.²¹⁹ A second consideration was “offer[ing] much needed reassurance to American Blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home,” which Bell tied to a need to quell civil unrest.²²⁰ A third consideration was that “segregation was viewed as a barrier to further industrialization in the South.”²²¹

A human rights petition titled “We Charge Genocide” filed with the United Nations in 1951 by the Civil Rights Congress—an African American organization—also cast a global spotlight on the duplicitous and hypocritical nature of the United States’ external and internal quests for democracy.²²² Under the glare of global media, state-sponsored systemic oppression of African Americans raised the hard question of whether American democracy inhibited, rather than promoted, freedom and equality: “International critics of America’s global attempt to spread democracy, [including the Soviet Union and China], seized on the United States’ own civil rights and human rights record.”²²³

²¹⁶ *Id.*

²¹⁷ *Id.* at 524.

²¹⁸ Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War of Terror*, 101 MICH. L. REV. 1269, 1311 (2003).

²¹⁹ Bell, *supra* note 28, at 524.

²²⁰ *Id.* at 524-525.

²²¹ *Id.*

²²² Yamamoto, *supra* note 218, at 1330.

²²³ Yamamoto, *supra* note 218, at 1329-1330 (citing Mary L. Dudziak, COLD WAR CIVIL RIGHTS: RACE AND THE

Arguably, CERD's Concluding Observations, the separate findings of the Working Group of Experts on Peoples of African Descent and their call for reparations, and the persistent media reports of ongoing, present-day racial terrorism and rampant police murders of Black men, women, and children have served a similar role in shining that same global spotlight.

Professor Mary Dudziak's research into the international underpinnings of *Brown* provides strong support for Bell's theory:

Over the next several years American officials responsible for international affairs mounted a campaign to clean up America's tarnished image abroad, targeting among others the Supreme Court. As [] Dudziak's extensive historical research reveals, the government's position in *Brown* was not driven primarily by a commitment to equality or fairness but by Cold War imperatives. Professor Richard Delgado aptly summarizes that research: "[d]ocument after document and [press] release after release inexorably converge on the same point--the United States needed to do something large-scale, public and spectacular to reverse its declining fortunes on the world stage." And the Supreme Court responded. In 1954, the Court unanimously decided *Brown*, overruling Plessy's separate-but-equal doctrine and outlawing overt state-sponsored segregation.²²⁴

Similar concerns are seemingly afoot today, as the United States' global image has been in a state of decline over the past ten years²²⁵ partially for reasons relating to the apparent undoing of progress toward racial equality within the United States. Beyond the 2009 Apology and the June 2019 hearing on H.R. 40 (after literally decades of the bill sitting stagnant), some evidence of political awareness of this image decline and its relation to racial oppression includes the fact that reparations for slavery and its aftermath were a topic of national conversation amongst several Democratic presidential candidates.²²⁶ Further evidence is the nearly unanimous passage of H.R. 35, the Emmett Till Antilynching Act, by the U.S. House of Representatives in February 2020, and the unanimous passage of the Justice for Victims of Lynching Bill in 2019, where both bills acknowledge lynching as a badge of slavery used to control and oppress the enslaved and free Africans and their descendants in America.²²⁷

Moreover, there is a documented growing concern and attendant governmental realization that the domestic terrorism threat posed by White supremacists extends well beyond historically targeted non-White citizens, resulting in not only domestic violence but also economic harm to the

IMAGE OF AMERICAN DEMOCRACY 37-45 (2000)).

²²⁴ *Id.* at 1331 (reviewing Professor Dudziak's research) (footnotes omitted).

²²⁵ Julie Ray, *World's Approval of U.S. Leadership Drops to New Low*, GALLUP (Jan. 18, 2018) <https://news.gallup.com/poll/225761/world-approval-leadership-drops-new-low.aspx> [<https://perma.cc/ZS94-L3AF>].

²²⁶ Khorri Atkinson, *Reparations: Where the 2020 Democratic Candidates Stand*, AXIOS (Apr. 13, 2019), <https://www.axios.com/reparations-2020-presidential-candidates-02cce9ac-082e-4777-955b-33c8196e64c0.html> [<https://perma.cc/M3VG-UG2G>].

²²⁷ See Claire Foran, *House Passes Bill to Make Lynching a Federal Crime in Historic Vote*, CNN (Feb. 26, 2020), <https://www.cnn.com/2020/02/26/politics/house-vote-antilynching-legislation-federal-crime/index.html> [<https://perma.cc/Q4QE-8KYG>].

United States. The Director of the Federal Bureau of Investigation stated in testimony before the House Homeland Security Committee:

[Domestic violent extremists] pose a steady and evolving threat of violence and economic harm to the United States....The top threat we face from domestic violent extremists stems from those we identify as racially/ethnically motivated violent extremists (RMVE). RMVEs were the primary source of ideologically motivated lethal incidents and violence in 2018 and 2019 and have been considered the most lethal of all domestic extremists since 2001.²²⁸

Similarly, in a threat assessment released in October 2020, the acting Secretary for the U.S. Department of Homeland Security reported that “racially and ethnically motivated violent extremists—specifically white supremacist extremists []—will remain the most persistent and lethal threat in the Homeland.”²²⁹

A most vibrant illustration of the expansiveness of that domestic threat posed by White supremacist mentality in the United States is the January 6, 2021 armed attack on the U.S. Capitol by a mob intent on disrupting the ceremonial certification of the election of a new President and Vice President at the behest of the forty-fifth president, who refused to accept the election results. Various world leaders called the riotous siege an attack on democracy.²³⁰ But beyond the United States’ image impairment issues were the deaths of five people, including one law enforcement officer, the palatable threat to the lives of the various legislators and the then Vice President, who was presiding over the certification, and the visual of a coordinated attack on the peaceful transition of power that is so critical to a true democracy.²³¹ Of the more than 430 individuals charged, “the defendants are predominately white and male” and fourteen percent of the mob members charged “had possible ties to the military or law enforcement.”²³² While a significant number of the defendants charged were found to be connected to extremist groups, reportedly the large majority had no such connections to established extremist groups, leading researchers to “raise concerns about how extremist ideologies have moved increasingly into the mainstream.”²³³ But, arguably, there is no mystery in that; those defendants are the DVEs and RMVEs the FBI has flagged as posing the most “persistent and lethal” threat.

²²⁸ Christopher Wray, “Worldwide Threats to the Homeland,” Statement before House Homeland Security Committee, 116th Cong., 2nd sess., September 17, 2020, <https://www.fbi.gov/news/testimony/worldwide-threats-to-the-homeland-091720> [<https://perma.cc/GU89-SW9N>].

²²⁹ Chad Wolf, *Homeland Threat Assessment*, U.S. DEP’T OF HOMELAND SEC. 18 (Oct. 2020), https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf [<https://perma.cc/E4MK-TMCD>].

²³⁰ *US Capitol Riots: World Leaders React to 'Horrible' Scenes in Washington*, BBC NEWS (Jan. 7, 2021), <https://www.bbc.com/news/world-us-canada-55568613> [<https://perma.cc/AM9W-GEJT>].

²³¹ *The Capitol Siege: The Arrested and Their Stories*, NPR (Feb. 9, 2021, updated May 14, 2021), <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories> [<https://perma.cc/XC8C-ZBFY>].

²³² *Id.*

²³³ *Id.*

WHEN RIGHTEOUSNESS FAILS

Self-interest—confiscation of rebel property to gain leverage during the Civil War—was the driving force behind General Sherman’s field order.²³⁴ Self-interest—ensuring that the freeing of formerly enslaved Africans and their descendants would benefit the Republic and not cause social burden or compromise safety—was the driving force behind the modified Freedmen’s Bureau Act of 1866.²³⁵ Self-interest—reclamation and preservation of the United States’ image and position as a world leader and epitome of democracy, and preservation of democratic process for peaceful transition of power—may just be strong enough at this point in time to move the needle.

CONCLUSION

To date, neither moral obligation nor general public criticism has been enough to motivate the United States to legislate even a study of the threshold issues or how the nation might effectively provide reparations to descendants of enslaved Africans. What has been missing from the repeated calls for reparations from the United States is a political or economic power to support the call and compel compliance, due in part to the complicity of most countries that might be such a power. Because the United States is not so righteous after all, reparations for slavery and its ongoing aftermath must serve a purpose beyond addressing the harms to a people comprising only about fourteen percent of the total population, whose disenfranchisement is the historic norm for this country. Thus, the alternative to the missing moral economy incentive is a contemporaneous, parallel ulterior motive for the United States to grant reparations—a significant benefit to the United States itself that would result from the grant.

Simply put, to correct course from its current trajectory, the United States must rid itself of all vestiges of slavery and eliminate its tolerance for the White supremacist mentality that has been allowed to infect and influence all levels of government and private institutions essential to the democratic functions upon which the United States purports to base itself. That is, the United States must implement comprehensive reparations for its enslavement of Africans and their descendants, and for its subsequent role—up to the present day—in enabling and tolerating the systemic oppression, discrimination, and domestic terrorism against descendants of enslaved Africans in America. Without such comprehensive reparations, this nation is doomed to repeat the cyclic pattern of progress/regress it has been engaged in since the Reconstruction era; it is doomed to fall miserably short of the democracy our Constitution calls us to be.

Having been once again introduced in the House Judiciary Committee just two days prior to the Capitol Siege in January 2021, H.R. 40—Commission to Study and Develop Reparation Proposals for African Americans Act—finally made it out of committee in April 2021, with a 25-17 majority vote.²³⁶ The question now is whether it will successfully emerge from the House and Senate and move us to correct course and make the reparative interventions required to save ourselves as nation?

In his inaugural address at the United States Capitol, a mere two weeks after the Capitol Siege, President Joseph Biden acknowledged the fragility of democracy and issued a call for racial

²³⁴ Chisolm, *supra* note 1, at 685.

²³⁵ *See id.* at 686.

²³⁶ *See Commission to Study and Develop Reparation Proposals for African-Americans Act*, H.R.40, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/40> [<https://perma.cc/WJC2-MZ9T>].

justice that could be construed as a commitment to the systemic overhaul that reparations require; among other things, he said:

A cry for racial justice some 400 years in the making moves us. The dream of justice for all will be deferred no longer.

A cry for survival comes from the planet itself. A cry that can't be any more desperate or any more clear.

And now, a rise in political extremism, white supremacy, domestic terrorism that we must confront and we will defeat.

To overcome these challenges – to restore the soul and to secure the future of America – requires more than words.

It requires that most elusive of things in a democracy:

Unity.

Unity.

In another January in Washington, on New Year's Day 1863, Abraham Lincoln signed the Emancipation Proclamation.

When he put pen to paper, the President said, "If my name ever goes down into history it will be for this act and my whole soul is in it."

My whole soul is in it.

Today, on this January day, my whole soul is in this:

Bringing America together.

Uniting our people.

And uniting our nation.

I ask every American to join me in this cause.

Uniting to fight the common foes we face:

Anger, resentment, hatred.

Extremism, lawlessness, violence.

Disease, joblessness, hopelessness.

With unity we can do great things. Important things.

We can right wrongs.

....

We can deliver racial justice.

We can make America, once again, the leading force for good in the world.

....

I know speaking of unity can sound to some like a foolish fantasy.

I know the forces that divide us are deep and they are real.

But I also know they are not new.

Our history has been a constant struggle between the American ideal that we are all created equal and the harsh, ugly reality that racism, nativism, fear, and demonization have long torn us apart.

WHEN RIGHTEOUSNESS FAILS

The battle is perennial.
Victory is never assured.
Through the Civil War, the Great Depression, World War, 9/11, through struggle,
sacrifice, and setbacks, our “better angels” have always prevailed.
In each of these moments, enough of us came together to carry all of us forward.
And, we can do so now.²³⁷

May God bless and help the United States of America to do so, lest we fail and fall.

²³⁷ Joseph R. Biden, Jr., *Inaugural Address*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr/> [https://perma.cc/ZZ2S-37H9].