

# TOWARD A JUST FUTURE: ANTICIPATING AND OVERCOMING A SUSTAINED RESISTANCE TO REPARATIONS

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## ABSTRACT

*The modern movement for reparations for Black Americans continues to unfold as unprecedented challenges stand at America's doorstep. In 2020, the United States began to stagger through a global health crisis brought on by COVID-19. The pandemic claimed more than half a million American lives, decimated the economy, and irrevocably changed life as we know it. Simultaneously, the longstanding crisis of racial inequality continued to ravage the nation. Following the deaths of George Floyd and Breonna Taylor at the hands of law enforcement, millions took to the streets to protest violence perpetrated by police against Black people. Worldwide uprisings followed unabated, as people across the globe protested the pervasive and pernicious taint of racial inequality.*

*In this essay, I consider how these challenges—the global health pandemic and the global uprising against the pandemic of racial inequality—might shape and inform efforts to secure transformational, reparative justice in the future. I do so by imagining the political, legal, and social resistance that might accompany reparations and by applying a racial justice lens to meet it. That requires taking stock of the endemic nature of racial inequality, the cyclical nature of racial progress, and the opportunities for wholesale change brought about by the pandemics of disease and racism. These considerations lead to strategy suggestions for advocates who advance the cause of reparations today: sustaining movements that raise the collective consciousness about racial injustice; supporting ongoing state and local efforts to obtain reparations; and deploying interest convergence to advance wholesale change. By building these strategies into their current efforts, advocates may overcome the anticipated resistance to reparations, ensuring that the advocacy borne of this moment produces a more just future for Black people in America.*

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“We must complain. Yes, plain, blunt complaint, ceaseless agitation, unflinching exposure of dishonesty and wrong—this is the ancient, unerring way to liberty, and we must follow it.”<sup>1</sup>

## I. INTRODUCTION

The United States found itself at a crossroads in 2020. Two profound events—the COVID-19 global health pandemic and a national uprising to advance racial justice—altered the social, political, and economic landscape in unimaginable ways. These phenomena upended life nationwide, while exposing the extent to which racial inequality plagues our country. Beyond chaos, the pandemic and the uprisings also offered hope. They did so by destabilizing the status quo and unearthing unprecedented possibilities to rebuild America anew, informed by a type of reparative justice with the potential to acknowledge, and right, the wrongs of our collective past.

Obtaining transformational reparative justice of this sort will be difficult. It is made all the more challenging by the sustained resistance that we already know

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1. W. E. B. DuBois, *The Niagara Movement*, 2 VOICE OF THE NEGRO 619, 621 (1969) (originally appeared in the September 1905 Issue).

awaits advocates, policymakers, practitioners, and communities<sup>2</sup> who pursue reparations. Of course, the cause of reparations for Black people,<sup>3</sup> and the resistance it engenders, is not new.<sup>4</sup> Throughout history we have witnessed the forms such resistance can take.<sup>5</sup> My aim in this essay is to undertake an imaginative project<sup>6</sup> that anticipates resistance in a post-reparations world in order to lay a foundation for a more just future in the present. I am most interested in exploring how we

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2. As the *N.Y.U. Review of Law & Social Change's* 50<sup>th</sup> Anniversary Colloquium made clear, advocates of all stripes—beyond the legal profession—and of all races and identities are critical to the fight to advance reparative justice. See Colloquium, *The Past, Present, and Future of Reparations*, N.Y.U. REV. L. & SOC. CHANGE (Feb. 19, 2020), <https://socialchangenyu.com/symposia/the-past-present-and-future-of-reparations-in-the-united-states/> [<https://perma.cc/DV44-27VT>]. Accordingly, the intended audience for this piece stretches beyond lawyers to all advocates engaged in the struggle to secure reparations. I therefore use the term “advocates” throughout to be as inclusive as possible. In focusing on this audience, I am mindful of the decades of advocacy to secure reparations that have come before and the ongoing attempts by those advocates to overcome resistance to reparations—topics which were central to the Colloquium. *Id.* Given the legacy of the work that has already been done, the aim of this essay is to inform the efforts of those who have recently come to view reparative justice as essential and are just beginning to pursue it.

3. My focus on reparations for Black Americans, as opposed to other groups that have suffered unspeakable harms because of their race or identity, is driven by the central theme of *N.Y.U. Review of Law & Social Change's* 50<sup>th</sup> Anniversary Colloquium, which sought “to explore a topic that lies at the heart of America’s identity, but is too often ignored by the legal world: reparations for Black Americans.” *Id.*

4. See, e.g., WILLIAM A. DARITY, JR. & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY (2020) (detailing the history of America’s Black reparations movement and the longstanding resistance to reparative justice); Adjoa Aiyetoro, *Achieving Reparations While Respecting Our Differences: A Model for Black Reparations*, 63 HOW. L.J. 329, 331–32 (2020) (describing the history of reparations, noting that “[t]he first recorded calls for reparations were made during the period of enslavement” in the 1780’s and describing the longstanding resistance to reparations by white people and Black people); ANDREA RITCHIE, DEIRDRE SMITH, JANETTA JOHNSON, JUMOKE IFETAYO, MARBRE STAHLY-BUTTS, MARIAME KABA, MONTAGUE SIMMONS, NKECHI TAIFA, RACHEL HERZING, RICHARD WALLACE, & TALIBA OBUYA, REPARATIONS NOW TOOLKIT, MOVEMENT FOR BLACK LIVES (2019), <https://m4bl.org/wp-content/uploads/2020/05/Reparations-Now-Toolkit-FINAL.pdf> [<https://perma.cc/52AD-NLAU>] (exploring the history of efforts to obtain reparations for Black people, including the resistance encountered by those seeking reparations); Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Comprehensive Implementation of and Follow-Up to the Durban Declaration and Programme of Action*, U.N. DOC. A/74/321 (Aug. 21, 2019) (detailing “obligations of [U.N.] Member States in relation to reparations for racial discrimination rooted in slavery and colonialism”); cf. A. Mechele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV. 1255, 1262–64 (2020) (describing group-based reparations to victims of the Holocaust, World War II atrocities, and the abuses of the South African apartheid regime);

5. Aiyetoro, *Achieving Reparations*, *supra* note 4, at 337–342 (describing white and Black resistance to reparations).

6. Cf. I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 2–6 (2019) (applying Afrofuturist and Critical Race Theory lenses to imagine how policy and practice in policing will change in the future in light of anticipated demographic shifts).

might leverage the opportunities presented by our current moment to obtain reparative justice in the face of the resistance that experience tells us to expect.<sup>7</sup>

I begin in Part II with a brief description of the opportunity that the events of 2020 presented to advance reparative justice. Specifically, I address how the COVID-19 pandemic, its racially disparate impact on Black people, and the racial justice uprisings raised the racial consciousness of many Americans to create conditions amenable to reparations. In Part III, I turn to the assumption that there will be a retrenchment, resistance, and countermovement<sup>8</sup> to reparations once they are implemented, and I imagine how these might manifest. I then consider what theoretical frameworks might be used to inform reparations-focused advocacy, relying on Professor Derrick Bell's views about the endemic nature of racism and his theory of interest convergence. I conclude in Part IV by applying these theoretical frameworks to the real world and giving some practical advice to advocates seeking reparative justice as we march through two interrelated pandemics: one driven by disease and one driven by racial inequality.

## II.

### 2020: A GLOBAL PANDEMIC AND A RACIAL RECKONING

Existential challenges threatened America through 2020 and into 2021. As of May 2021, the COVID-19 pandemic has claimed more than half a million

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7. The seeds of this exercise were first planted in my mind by the 2019 television show *Watchmen*, which is set in an alternate universe where the “police are . . . a force against white supremacy and must call into dispatch before drawing their weapons”—“a thought-provoking reversal of America’s off-screen reality.” Dreisen Heath & Kristi Williams, *‘Watchmen’ Was Fantasy, but the Need to Discuss Reparations is Very Real*, HUMAN RTS. WATCH (Dec. 16, 2019, 4:15 PM), <https://www.hrw.org/news/2019/12/16/watchmen-was-fantasy-need-discuss-reparations-very-real#> [<https://perma.cc/T6CY-WJ89>]. *Watchmen*’s alternate world, set in Tulsa, Oklahoma, sees the passage of the Victims of Racial Violence Act, which provides for reparations to the descendants of those victimized by racial injustice. Brady Langmann, *How ‘Redfordations’ Became a Major Political Issue in Watchmen*, ESQUIRE (Oct. 28, 2019), <https://www.esquire.com/entertainment/tv/a29592776/watchmen-redfordations-racial-injustice-act-explained/> [<https://perma.cc/XZD3-JPLZ>]. Reparations, as the show’s creator described them, are “a lifetime tax exemption for victims of, and the direct descendants of, designated areas of racial injustice throughout America’s history.” James Hibberd, *Damon Lindelof Gives His First Deep-Dive Interview for HBO’s Watchmen*, ENTERTAINMENT (Sep. 18, 2019, 10:02 AM), <https://ew.com/tv/2019/09/18/damon-lindelof-watchmen-interview/> [<https://perma.cc/9XP6-RMPV>]. What intrigued me about *Watchmen* was the fact that in this alternate universe, reparations were paid and yet, racial divisions endured, deepened, and continued to threaten Black lives. This dynamic left me wondering how America would respond to reparations if they were implemented, and how that response might inform the advocacy of those who seek reparations now.

8. “Likewise, a ‘countermovement’ is the organized collective social action in response to that movement, seeking to *preserve* the very same aspect of the existing infrastructure that the movement wishes to overturn. In short, movements advocate the disruption of social hierarchies, whereas countermovements advocate their maintenance.” Jessica L. Roberts, *To Have and to Uphold: The Common Language of Status-Preserving Countermovements*, 21 NAT’L BLACK L.J. 122, 123 (2009).

American lives,<sup>9</sup> and decimated the economy.<sup>10</sup> The American response to the virus left the United States with more reported cases and deaths than any other country in the world.<sup>11</sup> Its racially disparate impact—infecting and killing Black and Latinx people at dramatically higher rates than their white counterparts—has

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9. *COVID Data Tracker*, CTFS. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> [<https://perma.cc/9H8W-LJRV>] (last visited May 13, 2021).

10. Alex Sherman, *Five Charts that Show How Covid-19 Stopped the U.S. Economy in Its Tracks*, CNBC (Mar. 11, 2021, 8:00 AM), <https://www.cnbc.com/2021/03/11/covid-19-economic-impact-five-charts-that-tell-the-story.html> [<https://perma.cc/6PXA-W26P>]. More than 40 million people have filed claims for unemployment insurance—a quarter of all working Americans. Dori Zinn & Justin Jaffe, *Coronavirus Unemployment: Who Is Covered, How to Apply and How Much It Pays*, CNET (Oct. 9, 2020, 11:28 AM), <https://www.cnet.com/personal-finance/coronavirus-unemployment-who-is-covered-how-to-apply-and-how-much-does-it-pay/> [<https://perma.cc/Z5ZQ-L3Q8>]; Anneken Tappe, *1 in 4 American Workers Have Filed for Unemployment Benefits During the Pandemic*, CNN BUS. (May 28, 2020), <https://www.cnn.com/2020/05/28/economy/unemployment-benefits-coronavirus/index.html> [[perma.cc/2SN7-8ARX](https://perma.cc/2SN7-8ARX)].

11. German Lopez, *Everyone Failed on Covid-19*, Vox (Jan. 2, 2021), <https://www.vox.com/future-perfect/22176191/covid-19-coronavirus-pandemic-democrats-republicans-trump> [<https://perma.cc/C38U-HB2N>]; David Leonhardt, *The Unique U.S. Failure to Control the Virus*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/us/united-states-failure-coronavirus.html> [<https://perma.cc/F383-BE4Y>]; Ed Yong, *How the Pandemic Defeated America*, ATLANTIC (Aug. 4, 2020), <https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191/> [<https://perma.cc/KMU7-FN8U>] (“Despite ample warning, the U.S. squandered every possible opportunity to control the coronavirus. And despite its considerable advantages—immense resources, biomedical might, scientific expertise—it floundered.”); CORONAVIRUS DISEASE (COVID-19): SITUATION REPORT – 191, WHO (2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200729-covid-19-sitrep-191.pdf?sfvrsn=2e327e9e\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200729-covid-19-sitrep-191.pdf?sfvrsn=2e327e9e_2) [<https://perma.cc/XZ4B-YS3B>]; *Coronavirus Disease (COVID-19) Dashboard*, WHO, [https://covid19.who.int/?gclid=Cj0KCQiAlZH\\_BRCgARIsAAZHSBkMtwVKLtSROiMHXJleftQ1MHzRRpaMmPi4fcQ7Fcgd3dagCsNBZzoaAvbnEALw\\_wcB](https://covid19.who.int/?gclid=Cj0KCQiAlZH_BRCgARIsAAZHSBkMtwVKLtSROiMHXJleftQ1MHzRRpaMmPi4fcQ7Fcgd3dagCsNBZzoaAvbnEALw_wcB) [<https://perma.cc/RA98-2LRU>] (last visited Jan. 21, 2021).

underscored the lethality of race and place.<sup>12</sup> The same socio-economic factors that drive and reflect racial inequality across American society have become pre-existing conditions that increase the risk of death and disease posed by

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12. The Centers for Disease Control and Prevention (CDC) reports that hospitalization rates for non-Hispanic Black people are 2.8 times that of their non-Hispanic white counterparts. *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CDC (July 16, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> [<https://perma.cc/CZ2Q-38A9>]. Native American and Alaska Native people are hospitalized at a rate 3.5 times their white counterparts, while Latinx people are hospitalized at a rate three times that of white people. *Id.* The racial disproportionality in COVID-19 deaths is just as shocking. The CDC's data show that "Black and Latino people have been nearly twice as likely to die from the virus as white people." Richard A. Opper Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> [<https://perma.cc/6FM5-TAYW>]; *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> [<https://perma.cc/95CR-MFJH>] (last visited Dec. 29, 2020). Notably, people in prisons and jails, where racial disparity is a defining feature, have suffered a shocking number of COVID-19 infections and deaths. As of December 2020, one in five people in prison has had COVID-19. Beth Schwartzapfel, Katie Park & Andrew DeMillo, *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJ. (Dec. 18, 2020), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19> [<https://perma.cc/JRR7-BN9P>]. As of November 2020, the COVID-19 death rate in prisons was nearly twice that of the national rate, while case infection rates were nearly four times that of the national rate. KEVIN T. SCHNEPEL, COVID-19 IN U.S. STATE AND FEDERAL PRISONS: DECEMBER 2020 UPDATE 7, COUNCIL ON CRIMINAL JUSTICE (Dec. 2020), [https://cdn.ymaws.com/counciloncj.org/resource/resmgr/covid\\_commission/COVID-19\\_in\\_State\\_and\\_Federa.pdf](https://cdn.ymaws.com/counciloncj.org/resource/resmgr/covid_commission/COVID-19_in_State_and_Federa.pdf) [<https://perma.cc/8JHH-PH2J>]. At least 275,000 incarcerated people tested positive for COVID-19, and nearly 1700 people have died. Madeleine Carlisle & Josiah Bates, *With Over 275,000 Infections and 1,700 Deaths, COVID-19 Has Devastated the U.S. Prison and Jail Population*, TIME (Dec. 28, 2020, 2:52 PM), <https://time.com/5924211/coronavirus-outbreaks-prisons-jails-vaccines/> [<https://perma.cc/464B-RBPX>].

COVID-19.<sup>13</sup> Many predict, with good reason, that COVID-19 will change life as we know it forever.<sup>14</sup>

Simultaneously, the longstanding crisis of racial inequality continues to ravage the nation.<sup>15</sup> Worldwide uprisings led by the Black Lives Matter movement<sup>16</sup> were sparked by yet another lethal encounter between a Black person

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13. Sherita Hill Golden, *Coronavirus in African Americans and Other People of Color*, HOPKINS MEDICINE, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid19-racial-disparities> [<https://perma.cc/A92J-7X8N>] (last visited Dec. 29, 2020); Jazmyn T. Moore, Jessica N. Ricaldi, Charles E. Rose, Jennifer Fuld, Monica Parise, Gloria J. Kang, Anne K. Driscoll, Tina Norris, Nana Wilson, Gabriel Rainisch, Eduardo Valverde, Vladislav Beresovsky, Christine Agnew Brune, Nadia L. Oussayef, Dale A. Rose, Laura E. Adams, Sindoos Awel, Julie Villanueva, Dana Meaney-Delman, Margaret A. Honein, & CDC COVID-19 State, Tribal, Local, and Territorial Response Team, *Disparities in Incidence of COVID-19 Among Underrepresented Racial/Ethnic Groups in Counties Identified as Hotspots During June 5–18, 2020 — 22 States, February–June 2020*, 69 CDC MORBIDITY AND MORTALITY WEEKLY REPORT 1122, 1122–1126 (Aug. 21, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6933e1.htm> [<https://perma.cc/H268-K4MP>]; *Too Many Black Americans Are Dying from COVID-19*, SCI. AM. (Aug. 1, 2020), <https://www.scientificamerican.com/article/too-many-black-americans-are-dying-from-covid-19/> [<https://perma.cc/DE4T-XGSQ>].

14. *Coronavirus Will Change the World Permanently. Here's How.*, POLITICO MAG. (Mar. 19, 2020, 7:30 PM), <https://www.politico.com/news/magazine/2020/03/19/COVID-19-effect-economy-life-society-analysis-covid-135579> [<https://perma.cc/LB6P-U5J9>]; Rosanne Cash, Liz Mair, Kimberly Gudzone, Heather Sateia, Joel Kotkin & John Scalzi, *After the Pandemic*, WASH. POST (Mar. 20, 2020), <https://www.washingtonpost.com/outlook/2020/03/20/what-will-have-changed-forever-after-coronavirus-abates/> [<https://perma.cc/9E5D-WTXN>]; Charles C. Mann, *Pandemics Leave Us Forever Altered* (June 2020), <https://www.theatlantic.com/magazine/archive/2020/06/pandemics-plagues-history/610558/> [<https://perma.cc/N4D9-EP96>]; Jennifer De Pinto, Kabir Khanna, Anthony Salvanto & Fred Backus, *Most Foresee a Country Forever Changed After Coronavirus — CBS News Poll*, CBS (Apr. 23, 2020, 8:15 PM), <https://www.cbsnews.com/news/COVID-19-united-states-forever-changed-cbs-news-poll/> [<https://perma.cc/QX32-2FPH>] (indicating half of Americans think life will be permanently changed).

15. Clear racial divisions have deepened in recent years with Donald Trump's 2016 electoral campaign spewing racial hatred and his ascension to the Oval Office on a wave of racial resentments and anti-immigration invective that came to define his presidency. Amber Phillips, *'They're Rapists.'* *President Trump's Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017 1:43 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/> [<https://perma.cc/CP74-VQRQ>]; Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-Immigrant Sentiments*, 51 POL. SCI. & POLITICS 528, 531-32 (2018) (analyzing voter surveys from the 2016 U.S. presidential election and finding that "racism . . . appears to have been an important motive in voting for Trump").

16. See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 407–08 (2018) (describing the Black Lives Matter movement as part of the larger Movement for Black Lives).

and law enforcement in May 2020.<sup>17</sup> A white Minneapolis police officer, Derek Chauvin, put his knee on the neck of George Floyd, a Black man who was handcuffed and lying face down, for over nine minutes.<sup>18</sup> As Chauvin choked the life out of Mr. Floyd,<sup>19</sup> the scene served as a vignette of the precarious nature of Black life in America, especially when Black life comes into contact with the criminal legal system.<sup>20</sup> The lynching<sup>21</sup> of Mr. Floyd ignited outrage and widespread rebellions against the nation's racial caste system and the inequality that it foments.<sup>22</sup> Longstanding conflicts between law enforcement and communities of color and the racial inequity that pervades the criminal legal

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17. Jelani Cobb, *The Death of George Floyd, In Context*, NEW YORKER (May 28, 2020), <https://www.newyorker.com/news/daily-comment/the-death-of-george-floyd-in-context> [https://perma.cc/KP6Z-DLTT]. Mr. Floyd's death was not the only motivation for the uprisings. Months before Mr. Floyd was killed, Breonna Taylor, a Black woman, was killed by Louisville police executing a search warrant in her home, and Ahmaud Arbery, a Black man, was killed by white vigilantes in Georgia while he was jogging. Liane Jackson, *Ahmaud Arbery, Breonna Taylor and America's Cruel Justice Equation*, ABA JOURNAL (May 27, 2020), <https://www.abajournal.com/web/article/ahmaud-arbery-breonna-taylor-and-americas-cruel-justice-equation> [https://perma.cc/S852-JNRP]. Calls for justice in their names were among the rallying cries of the uprisings.

18. Nicholas Bogel-Burroughs, *Prosecutors say Derek Chauvin Kneled on George Floyd for 9 Minutes 29 Seconds, Longer than Initially Reported*, N.Y. TIMES (Mar. 20, 2021), <https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html> [https://perma.cc/WNH4-VBPZ].

19. Evan Hill, Ainara Tiefenthaler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (April 20, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [https://perma.cc/75UE-TPXU].

20. The comparison of the officer's knee on Mr. Floyd's neck to the stranglehold that America has on Black life was made in the eulogy delivered at his memorial service. Associated Press, *'Get Your Knee off Our Necks!': George Floyd Mourned in Minneapolis*, EURONEWS, (Apr. 6, 2020), <https://www.euronews.com/2020/06/04/get-your-knee-off-our-necks-george-floyd-mourned-in-minneapolis> [https://perma.cc/P57A-YDX2] (“‘George Floyd’s story has been the story of black folks. Because ever since 401 years ago, the reason we could never be who we wanted and dreamed to be is you kept your knee on our neck,’ the Rev. Al Sharpton said in a fierce eulogy. ‘It’s time for us to stand up in George’s name and say, ‘Get your knee off our necks!’””).

21. Mr. Floyd's death had all the hallmarks of a lynching absent the explicit racial animus: a Black person killed in broad daylight after being accused of a crime. *See generally* EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed., 2017) 35, <https://eji.org/wp-content/uploads/2020/09/lynching-in-america-3d-ed-091620.pdf> [https://perma.cc/35SF-7ZKX] (describing public spectacle lynchings as “bold, public acts that implicated the entire community and sent a clear message that African Americans were less than human”).

22. *See* Thomas J. Sugrue, *2020 Is Not 1968: To Understand Today's Protests, You Must Look Further Back*, NAT'L GEOGRAPHIC (June 11, 2020), <https://www.nationalgeographic.com/history/2020/06/2020-not-1968/> [https://perma.cc/N4P2-B4L8] (describing the global nature of protests to advance racial equality).



system galvanized the movement.<sup>23</sup> Those rebellions continued for months.<sup>24</sup> From May through June 2020, more than 4,700 demonstrations took place—close to 140 per day—in cities and towns nationwide.<sup>25</sup> Up to an estimated 26 million people participated in demonstrations from May through July 2020.<sup>26</sup> By some estimates, the summer of 2020 saw the largest mass protest movement in the nation’s history.<sup>27</sup> It marked a reckoning of sorts on race in America.<sup>28</sup>

The level of white support for this reckoning—at least as measured by involvement in the uprisings—was unprecedented. Almost half of all counties saw protests movements, and “nearly 95 percent of counties that had a protest recently are majority white, and nearly three-quarters of the counties are more than 75 percent white.”<sup>29</sup> At the height of the uprisings, roughly two-thirds of all Americans supported the Black Lives Matter movement.<sup>30</sup>

It is too soon to gauge the overall impact of 2020’s uprisings in support of Black lives. But even at this early stage, we can see the effects—from the symbolic

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23. Kim Parker, Juliana Menasce Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW (June 12, 2020), <https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/> [<https://perma.cc/6CYM-SXH4>].

24. See Ronald Brownstein, *The Rage Unifying Boomers and Gen Z*, ATLANTIC (June 18, 2020), <https://www.theatlantic.com/politics/archive/2020/06/todays-protest-movements-are-as-big-as-the-1960s/613207/> [<https://perma.cc/L8Q4-JSTB>] (noting that an estimated 25 million people have participated in protests since the death of George Floyd); Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/QL7N-BYJH>] (noting that the protests following the police killing of George Floyd are likely the largest in size in United States history).

25. Buchanan, Bui & Patel, *supra* note 24.

26. *Id.*

27. *Id.*

28. Jelani Cobb, *An American Spring of Reckoning*, NEW YORKER (June 14, 2020), <https://www.newyorker.com/magazine/2020/06/22/an-american-spring-of-reckoning> [<https://perma.cc/3RV7-Q74X>]; Ailsa Chang, Rachel Martin & Eric Marrapodi, *Summer of Racial Reckoning*, NPR (Aug. 16, 2020), <https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit> [<https://perma.cc/3NCD-UJFE>].

29. Buchanan, Bui & Patel, *supra* note 24.

30. Parker, Horowitz & Anderson, *supra* note 23. Equally impressive is the level of support from the wealthy. According to polling data, “the largest share of protesters was those earning more than \$150,000.” Buchanan, Bui & Patel, *supra* note 23.

to the tangible—worldwide.<sup>31</sup> The officers who killed George Floyd were arrested and charged.<sup>32</sup> Other officers who have engaged in lethal brutality faced increased scrutiny.<sup>33</sup> Black Lives Matter murals adorned streets across the country.<sup>34</sup> Statues

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31. See, e.g., Sophia Ankel, *30 Days that Shook America: Since the Death of George Floyd, the Black Lives Matter Movement Has Already Changed the Country*, BUS. INSIDER (June 24, 2020, 8:58 AM), <https://www.businessinsider.com/13-concrete-changes-sparked-by-george-floyd-protests-so-far-2020-6> [<https://perma.cc/66XD-KPME>] (detailing the reforms and accountability measures implemented by government at the local, state, and federal level and by businesses as a result of the 2020 protests led by the Black Lives Matter movement); Katie O'Malley, *How Black Lives Matter Protests Have Changed the World, a Month After George Floyd's Death*, ELLE (June 25, 2020), <https://www.elle.com/uk/life-and-culture/culture/a32822672/black-lives-matter-protests-achievements-statues-police-reform/> [<https://perma.cc/3M6S-Z7E7>] (documenting protest actions and responses across the United States and in fourteen other countries); Fabiola Cineas, *The Legacy of Black Lives Matter*, VOX (July 6, 2020, 8:00 AM), <https://www.vox.com/2020/7/6/21311171/black-lives-matter-legacy> [<https://perma.cc/FF9U-6H4F>] (describing the impacts of the Black Lives Matter movement in the context of a longer history of Black liberation); Jaswinder Blackwell-Pal, *The Black Lives Matter Movement in 2020: Results and Prospects*, RS21 (July 1, 2020), <https://www.rs21.org.uk/2020/07/01/the-black-lives-matter-movement-in-2020-results-and-prospects/> [<https://perma.cc/GVE9-62U2>] (discussing the British Black Lives Matter movement, its history, and resistance to it).

32. E.g., Ankel, *supra* note 31. Derek Chauvin was found “guilty on all three charges: second-degree murder, third-degree murder and second-degree manslaughter.” John Eligon, Time Arango, Shaïla Dewan and Nicholas Bogel-Burroughs, *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. TIMES (May 4, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-dchaubin-verdict.html> [<https://perma.cc/W273-PKXT>].

33. See, e.g., Scott Clement & Emily Guskin, *Most Americans Support Greater Scrutiny of Police as Discrimination Concerns Persist, Post-ABC Poll Finds*, WASH. POST (Apr. 23, 2021), <https://www.washingtonpost.com/politics/2021/04/23/poll-police-bias-floyd/> [<https://perma.cc/AU6H-GB2K>] (“Six in 10 Americans say the country should do more to hold police accountable for mistreatment of Black people, far outpacing concerns about those measures interfering with how law enforcement does its job. . . .”); Salvador Hernandez, *The Cop who Shot Dead Daunte Wright is Being Charged with Manslaughter*, BUZZFEED NEWS (Apr. 14, 2021), <https://www.buzzfeednews.com/article/salvadorhernandez/daunte-wright-cop-kim-potter-charged> [<https://perma.cc/G9AT-P3ZV>] (reporting that Brooklyn Center, Minnesota, police officer Kim Potter was charged with manslaughter within a week of her shooting Daunte Wright). Whether these steps toward accountability and scrutiny are exceptional or in fact are part of a larger trend remains to be seen. See Mark Berman, *When Police Kill People, They are Rarely Prosecuted*, WASH. POST (Apr. 4, 2021), <https://www.washingtonpost.com/nation/2021/04/04/when-police-kill-people-they-are-rarely-prosecuted-hard-convict/> [<https://perma.cc/D54L-XMHX>] (“When police are charged in fatal shootings, officers are convicted less than half of the time, often on lesser charges.”). Policing groups now blame this increased scrutiny for a surge in murder rates, asserting that “[s]ince June 2020, local leaders and activists’ increasing attacks demoralized, debilitated and, in some cases, defunded law enforcement. As police stepped back, violence surged . . . .” Stephanie Pagones, *Murder Soared as Police ‘Pulled Back’ amid 2020 Protests in Major Cities, Report Finds*, FOX NEWS (Apr. 15, 2021), <https://www.foxnews.com/us/murders-police-pulled-back-2020-protests-major-cities-report> [<https://perma.cc/TJ95-ECGR>] (quoting *Less Policing = More Murders*, LAW ENFORCEMENT LEGAL DEFENSE FUND (last visited May 21, 2021), <https://www.policedefense.org/less-policing-more-murders/>).

34. Jemima McEvoy, *Black Lives Matter Murals Color Streets Across the Country*, FORBES (June 16, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/06/16/black-lives-matter-murals-color-streets-across-the-country-photos/#4840acfc7c03> [<https://perma.cc/68HE-L7FF>].

memorializing Confederate soldiers<sup>35</sup> and historical figures who perpetrated genocides have been torn down.<sup>36</sup> Corporate America has signaled its support of Black lives<sup>37</sup> and has pledged close to \$2 billion to the movement for racial justice.<sup>38</sup> Outrage over the unacceptable nature of interpersonal racism has been renewed.<sup>39</sup> Jurisdictions have committed to cut law enforcement budgets, even going so far as to disband police departments altogether.<sup>40</sup> Calls to defund the police and abolish the criminal legal system have gained wider acceptance than ever before.<sup>41</sup> Since Mr. Floyd's murder in May 2020, "there have been about 450 pieces of policing reform proposals introduced in 31 states."<sup>42</sup> While the durability of these shifts, driven by the uprisings to advance racial justice, may be fleeting, they mark an inflection point and opportunity worthy of attention.

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35. Alisha Ebrahimji, Artemis Moshtaghian & Lauren M. Johnson, *Confederate Statues are Coming Down Following George Floyd's Death. Here's What We Know*, CNN (July 1, 2020), <https://www.cnn.com/2020/06/09/us/confederate-statues-removed-george-floyd-trnd/index.html> [<https://perma.cc/FCJ9-TRU7>].

36. Alan Taylor, *The Statues Brought Down Since the George Floyd Protests Began*, ATLANTIC (July 2, 2020), <https://www.theatlantic.com/photo/2020/07/photos-statues-removed-george-floyd-protests-began/613774/> [<https://perma.cc/B4BE-HMUG>].

37. Jessica Camille Aguirre, "People are Fed Up with This Level of Virtue Signaling": Corporate America is in a P.R. Meltdown Over the Black Lives Matter Movement, VANITY FAIR (July 22, 2020), <https://www.vanityfair.com/news/2020/07/corporate-america-in-pr-meltdown-over-black-lives-matter-movement> [<https://perma.cc/QME9-R45V>].

38. William Michael Cunningham, *Black Lives Matter: Corporate America Has Pledged \$1.678 Billion So Far*, BLACK ENTERPRISE (June 10, 2020), <https://www.blackenterprise.com/black-lives-matter-corporate-america-has-pledged-1-678-billion-so-far/> [<https://perma.cc/MC4R-3TSF>].

39. See, e.g., Braktkton Booker, *Amy Cooper, White Woman who Called Police on Black Bird-Watcher, Has Charge Dismissed*, NPR (Feb. 16, 2021), <https://www.npr.org/2021/02/16/968372253/white-woman-who-called-police-on-black-man-bird-watching-has-charges-dismissed> [<https://perma.cc/J28Z-TARZ>] (describing the video of Amy Cooper calling 911 as "one of the most widely publicized so-called 'Karen' incidents, where a white person, typically a woman, calls police to report a [B]lack or brown person engaged in mundane activities," and explaining that while the charges against Amy Cooper were dismissed after she completed court-mandated restorative justice sessions, after the video was released, Amy Cooper was fired from her job at an investment firm); Catherine Thorbecke & Benjamine Siu, *Georgetown Law Professor Terminated after Remarks about Black Students*, ABC NEWS (Mar. 12, 2021), <https://abcnews.go.com/US/georgetown-law-professor-terminated-remarks-black-students/story?id=76413267> [<https://perma.cc/4J4Z-QFBB>] ("A Georgetown Law School Professor has been terminated after comments she made about a lot of her 'lower' students being Black went viral and sparked a firestorm of backlash on social media.").

40. Ankel, *supra* note 31.

41. Sam Levin, *Movement to Defund Police Gains 'Unprecedented' Support Across US*, GUARDIAN (June 4, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/jun/04/defund-the-police-us-george-floyd-budgets> [<https://perma.cc/5KML-HG2L>].

42. Associated Press, *States Race to Pass Policing Reforms After Floyd's Death*, CNBC (Aug. 8, 2020 10:58 AM), <https://www.cnbc.com/2020/08/08/states-race-to-pass-policing-reforms-after-floyds-death.html> [<https://perma.cc/4WJ9-Y56F>].

## III.

WHY NOW IS THE TIME FOR REPARATIVE JUSTICE, AND THE RESISTANCE  
AHEAD

The possibility that a better America might emerge from this moment offers a glimmer of hope. There is more than a temporal link between the COVID-19 pandemic, its attendant health and economic crises, and the uprisings for Black lives. They are shocks to the American consciousness that reveal the brokenness of our nation. Martin Luther King, Jr. once wrote of his work and the work of the Civil Rights Movement that “[t]he purpose of our direct action program is to create a situation so crisis-packed that it will inevitably open the door to negotiation.”<sup>43</sup> In much the same way, the pandemics of COVID-19 and racial injustice present crises that create an opening for paradigmatic change. For many, the inequities they surface call into question the ordering of American society and what people should do about them.

Each phenomenon has produced an awakening. The pandemic has exposed the failings of the status quo and exposed the precarious, unstable nature of life for all people. While the racial disparities that pervade the COVID-19 pandemic and its effects ensure that Black people and other communities of color are harmed far more often and at far greater depths than many of their white counterparts, white people are experiencing job losses, evictions, sickness, death, and dramatic disruptions to their lives on an extraordinary scale. Many are realizing that their racial privilege alone cannot protect them from instability.<sup>44</sup>

Of course, instability is one of the defining features of Black life—whether because of encounters with law enforcement; a journey through the criminal legal system; or the myriad vectors of inequality in housing, employment, health, and

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43. MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 68 (Signet Classic Printing 2000) (1963).

44. While Black people in the United States have been much more severely impacted by COVID-19 than white people as a result of underlying systemic racial inequality, white people have also experienced much higher rates of job loss and housing instability than they did before the pandemic. *See, e.g., Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> [https://perma.cc/K6WL-ATDU] (last visited Jan. 1, 2021) (noting that before the pandemic, 3.4% of all adults reported food insecurity at some point in 2019, whereas during the pandemic, 6% of white adults and 16% of Black adults reported food insecurity); Jaboa Lake, *The Pandemic Has Exacerbated Housing Instability for Renters of Color*, CTR. FOR AM. PROGRESS (Oct. 30, 2020), <https://www.americanprogress.org/issues/poverty/reports/2020/10/30/492606/pandemic-exacerbated-housing-instability-renters-color/> [https://perma.cc/KV74-P29C] (describing research findings that, in April 2020, 32% of Black adults and 24% of white adults had lost jobs due to the pandemic).

education that shape the lives that Black people lead.<sup>45</sup> Some white people are beginning to see that instability. Some are coming to understand that the now crumbling status quo is not equipped to restore or secure stability, but instead will perpetuate inequality.<sup>46</sup>

At the same time, the breadth and impact of the nationwide uprisings for Black lives have raised America's consciousness around racial injustice. Many (though not all, by any means) people have been awakened to the presumption of criminality and the taint of inequality that attaches to Black people because of their race.<sup>47</sup> The pandemic, which left much of the country sheltered in place for months

45. Charlotte Edmond, *5 Charts Reveal Key Racial Inequality Gaps in the US*, WORLD ECON. FORUM (June 2, 2020), <https://www.weforum.org/agenda/2020/06/us-race-economy-education-inequality/> [<https://perma.cc/R62Y-34DP>]; Patricia Sharkey, Keeanga-Yamahtta Taylor & Yarnya Serkez, *The Gaps Between White and Black America*, in *Charts*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/interactive/2020/06/19/opinion/politics/opportunity-gaps-race-inequality.html> [<https://perma.cc/SZ63-UZ3F>]; Anthony Cubertson, *Nine Charts That Show Extent of Racial Inequality in US*, INDEPENDENT (June 4, 2020), <https://www.independent.co.uk/news/world/americas/black-lives-matter-racism-us-inequality-protests-wealth-economic-health-a9545446.html> [<https://perma.cc/SF6S-LWJD>].

46. In this way, the Black experience in America, with coronavirus and the criminal legal system, has become an indicator for the quality of the American experience for all, not just Black people. Thus, "As Lani Guinier and Gerald Torres point out, blacks are like the canaries that alerted miners to a poisonous atmosphere. Issues of race point to underlying problems in society that ultimately affect everyone, not just minorities." CARVING OUT A HUMANITY: RACE, RIGHTS, AND REDEMPTION 155 (Janet Dewart Bell & Vincent M. Southerland eds., 2020).

47. See Tyrone Beason, *'Something Is Not Right.'* *George Floyd Protests Push White Americans to Think About Their Privilege*, L.A. TIMES (June 28, 2020), <https://www.latimes.com/politics/story/2020-06-28/white-voters-racism-reckoning-george-floyd-killing> [<https://perma.cc/AD8J-GW3X>] (reporting accounts of white Americans' reckoning with the disparate experiences of Black people and increased percentages of white survey respondents who believe that "police violence . . . is either an extreme or very serious problem"). The highly visible and divergent government and police responses to anti-shutdown protests led largely by white people in the United States stood in stark contrast to the law enforcement response to protests by Black people against police violence, and served as a manifestation of this inequality. Compare Reuters, *NYPD Used Excessive Force During George Floyd Protests, City Investigation Finds*, NBC NEWS (Dec. 18, 2020), <https://www.nbcnews.com/news/us-news/nypd-used-excessive-force-during-george-floyd-protests-city-investigation-n1251688> [<https://perma.cc/S7FW-6C75>] (describing an investigation finding that New York City police used excessive force against protestors of George Floyd's killing, including chemical weapons, physical violence, and in at least one instance driving into protestors), and Alicia Robinson & Jeong Park, *Huntington Beach Police Fire Pepper Balls at Protestors Who Do Not Disperse*, OC REGISTER (May 31, 2020), <https://www.ocregister.com/2020/05/31/huntington-beach-police-declare-pier-protest-an-unlawful-assembly/> [<https://perma.cc/HR45-8CSZ>] (describing police firing pepper balls at those protesting to advance racial justice), with Wilson Wong, *Hundreds Protest Closing of Staten Island Bar that Refused COVID-19 Measures*, NBC NEWS (Dec. 3, 2020), <https://www.nbcnews.com/news/us-news/hundreds-protest-closing-staten-island-bar-refused-covid-19-measures-n1249873> [<https://perma.cc/C54R-Y9VG>] (describing an anti-shutdown protest on December 2, 2020, in New York City in which some protestors refused to wear masks and blocked traffic, and no arrests were made), and Ella Torres, *Hundreds Gather in California to Protest Stay-at-Home Orders*, ABC NEWS (Apr. 18, 2020), <https://abcnews.go.com/US/hundreds-gather-huntington-beach-california-protest-stay-home/story?id=70223389> [<https://perma.cc/WUS9-F73Q>] (describing a protest where anti-shutdown demonstrators took to the streets in Huntington Beach, California, and no arrests were made). Law enforcement treatment of protestors for racial justice was thrown into further relief by the January 6, 2021 insurrection, in which a mob of Trump

on end, focused and encouraged collective attention on the crisis of racial inequality that has always plagued America.<sup>48</sup>

Critically, many of those recently awakened to racial inequality are motivated to do something about it.<sup>49</sup> The COVID-19 pandemic and the police violence that sparked the summer of 2020's uprisings exposed the myth of an America that works for everyone equally. The fundamental problems that the pandemic and the uprisings revealed cannot be addressed by piecemeal tinkering or half-hearted reforms. Wholesale structural changes are necessary to combat the inequity that has

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loyalists attacked the United States Capitol seeking to block the certification of the presidential election results. See Nicholas Fandos & Emily Cochrane, *After Pro-Trump Mob Storms Capitol, Congress Confirms Biden's Win*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/congress-gop-subvert-election.html> [<https://perma.cc/UZZ2-9HCF>]. One estimate suggests that more than ten thousand rioters came onto Capitol grounds and more than eight hundred breached the building. See Karoun Demirjian, *Acting Capitol Police Chief: More than 10,000 Rioters Came onto Capitol Grounds and More than 800 Breached the Building*, WASH. POST (Feb. 26, 2021), <https://www.washingtonpost.com/politics/2021/02/25/joe-biden-live-updates/#link-SASQGWOOPVHTJBSYQPIR2KSASQ> [<https://perma.cc/F8SK-JJKM>]; see also Michael S. Schmidt & Luke Broadwater, *Officers' Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html> [<https://perma.cc/Q5M4-CGVP>] (“Estimates vary on the number of rioters who surrounded or entered the Capitol on Jan. 6, but a review of footage shows that at least thousands swarmed the building.”). Some Capitol Police Officers, tasked with guarding the building, appear to have aided the insurrectionists. See H.J. Mai, *Capitol Police Suspends 6 Officers, Investigates Dozens More After Capitol Riots*, NPR (Feb. 19, 2021), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/02/19/969441904/capitol-police-suspends-6-officers-investigates-dozens-more-after-capitol-riots> [<https://perma.cc/P498-2CE7>] (“Videos from the day of the attack appear to show some officers escorting rioters inside the building. In one video, USCP officers can be seen opening barricades allowing the mob to enter the Capitol complex without resistance.”). To date, six officers have been suspended with pay for their involvement, and twenty-nine officers remain under investigation. *Id.* Simply put, law enforcement, which was unprepared for the insurrection, did not view the largely white crowd as a threat. Anna North, *Police Bias Explains the Capitol Riot*, VOX (Jan. 12, 2021), <https://www.vox.com/22224765/capitol-riot-dc-police-officers> [<https://perma.cc/83XC-LVAF>].

48. Maneesh Arora, *How the Coronavirus Pandemic Helped the Floyd Protests Become the Biggest in U.S. History*, WASH. POST (Aug. 5, 2020, 7:00 AM), <https://www.washingtonpost.com/politics/2020/08/05/how-coronavirus-pandemic-helped-floyd-protests-become-biggest-us-history/> [<https://perma.cc/2M8N-VGWK>].

49. Alex Thompson, *White America is Reckoning with Racism. It Could Reshape 2020*, POLITICO (June 9, 2020, 4:30 AM), <https://www.politico.com/news/2020/06/09/white-voters-2020-biden-304804> [[perma.cc/X9NX-UVMW](https://perma.cc/X9NX-UVMW)]; Thomas Fuller, *How One of America's Whitest Cities Became the Center of the B.L.M. Protests*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/24/us/portland-oregon-protests-white-race.html> [<https://perma.cc/25GD-N7AF>].

become so acute and so damaging to so many.<sup>50</sup> The pandemic was a key “radicalizing factor because conditions that have been so dire, now combined with revolts in the street, might lead one to believe that not only is the society unraveling, but it might cause you to question what foundation it was built upon in the first place.”<sup>51</sup>

The meeting of those interests paves the way for the type of reckoning necessary to transform America. Large-scale, wholesale change—the kind of change that rarely happens—is necessary. The pandemic and the uprisings can serve as motivation to put an end to racial subordination and the racial hierarchy, redress their harms, and replace the status quo with a racially inclusive democracy.<sup>52</sup> Reparative justice is one path forward. Envisioning the challenges that might come after reparations helps to illuminate that path.

In order to embark on this thought experiment, it is helpful to consider the how and what of reparations. Legislation now pending in the United States Congress, H.R. 40, entitled the Commission to Study and Develop Reparation

50. See Ronald Brownstein, *The Rage Unifying Boomers and Gen Z*, ATLANTIC (June 18, 2020), <https://www.theatlantic.com/politics/archive/2020/06/todays-protest-movements-are-as-big-as-the-1960s/613207/> [<https://perma.cc/L8Q4-JSTB>] (“While the past decade’s social movements focus on discrete issues, all of them, as Wessel notes, are drawing on ‘the same frustration: We have an unequal society that benefits the few—the old, the white—over the many: the young, people of color. That is the crux of all these conversations.’”). Indeed, in response to the moment, the Biden Administration has sought to advance large scale structural changes through government action in service of social equality. Dan Balz, *At 100 Days, Biden Seeks to Leverage Narrow Majorities to Reverse the Reagan Era*, WASH. POST (Apr. 28, 2021), [https://www.washingtonpost.com/politics/at-100-days-biden-seeks-to-leverage-narrow-majorities-to-reverse-the-reagan-era/2021/04/28/2a7a5610-a869-11eb-bca5-048b2759a489\\_story.html](https://www.washingtonpost.com/politics/at-100-days-biden-seeks-to-leverage-narrow-majorities-to-reverse-the-reagan-era/2021/04/28/2a7a5610-a869-11eb-bca5-048b2759a489_story.html) [<https://perma.cc/M46Z-M57R>]; Annie Karni & Jim Tankersley, *Infrastructure Plan Seeks to Address Climate and Equality as Well as Roads*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/03/22/us/politics/biden-infrastructure-climate-equality.html> [<https://perma.cc/HH89-R26D>].

51. Nikole Hannah-Jones, *What Is Owed*, N.Y. TIMES MAG. (June 30, 2020), <https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html> [<https://perma.cc/DQH4-A8Q7>] (quoting Keenga-Yamahtta Taylor).

52. Such a framework is consistent with what some scholars have called a Third Reconstruction, focused on structural transformation “dedicated to the eradication of racial subordination.” Owen Fiss, *The Accumulation of Disadvantages*, 106 CALIF. L. REV. 1945, 1973 (2018). See also Paul Butler, *The System is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1474–78 (2016) (describing the Third Reconstruction as a “coordinated effort to address institutional racism and inequality” that includes “not only changes in public policy and legal doctrines, but also a broad-based social movement focused on racial justice”); Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness In Post-Slavery America*, 54 ALA. L. REV. 483, 487–501 (2003) (eschewing race consciousness in favor of a focus on “universal human dignity” to produce a Third Reconstruction that would “seek to restore to a state of dignity every man, woman, and child impacted by the dehumanizing effects of slavery, and to see that restored dignity reflected, insofar as possible, in the lives of not only the formerly oppressed but the whole society”); John A. Powell, *An Agenda for the Post Civil Rights Era* 29 U.S.F. L. REV. 889, 906–08 (1995) (endorsing a racial justice agenda that deploys “race-specific policies intended to redress the subordination of racial minorities”).

Proposals for African-Americans Act, provides a blueprint for the first steps toward reparations.<sup>53</sup> The bill would

address the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and . . . establish a commission to study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.<sup>54</sup>

Thus, once passed into law, H.R. 40 would establish a commission to study America's history of racial inequality, the effect of that history on contemporary Black life, and develop reparations proposals.<sup>55</sup>

The road to passing H.R. 40 into law is long and difficult. It took three decades for H.R. 40 to even garner a hearing.<sup>56</sup> Advocates have engaged in tremendous work to push the bill into the public's consciousness and secure its place on the legislative agenda.<sup>57</sup> In the section that follows, I will begin by imagining that their work has led to success, and that the commission created by the legislation has chosen a form of reparative justice. I further imagine that the commission's

53. Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 116th Cong. (2019). H.R. 40 has a Senate counterpart. Commission to Study and Develop Reparation Proposals for African-Americans Act, S. 1083, 116th Cong. (2019). See Rep. Sheila Jackson Lee, *H.R. 40 Is Not a Symbolic Act. It's a Path to Restorative Justice*, ACLU: NEWS & COMMENTARY (May 22, 2020), <https://www.aclu.org/news/racial-justice/h-r-40-is-not-a-symbolic-act-its-a-path-to-restorative-justice/> [<https://perma.cc/APZ8-XRB3>] (describing H.R. 40 and its designation as "intended to memorialize the promise made by Gen. William T. Sherman, in his 1865 Special Field Order No. 15, to redistribute 400,000 acres of formerly Confederate-owned coastal land in South Carolina and Florida, subdivided into 40-acre plots").

54. H.R. 40, *supra* note 53.

55. *Id.* § 2(b).

56. P.R. Lockhart, *America Is Having an Unprecedented Debate About Reparations. What Comes Next?*, VOX (Jun 20, 2019, 3:20 PM), <https://www.vox.com/identities/2019/6/20/18692949/congress-reparations-slavery-discrimination-hr-40-coates-glover> [<https://perma.cc/UB4N-6HYR>]. At that hearing, a series of witnesses testified in support of reparations, detailing their moral, economic, political, and social value to all Americans. *H.R. 40 and the Path to Restorative Justice: Hearing on H.R. 40 Before the Subcomm. on the Const., C.R., and C.L. of the H. Comm. on the Judiciary*, 116th Cong. (2019) [hereinafter *H.R. 40 Hearings*] (statements of Cory Booker; Ta-Nehisi Coates; Danny Glover; Katrina Browne; Eugene Taylor Sutton; Julianne Malveaux; Eric Miller).

57. One need look no further than the participants in the Review of Law and Social Change Colloquium as proof of this fact. See NYU School of Law, *Current Efforts to Fight for Reparations*, YOUTUBE, 6:10 (June 15, 2020), <https://www.youtube.com/watch?v=U-2x2iRUqIE> [<https://perma.cc/QUH4-898H>] (Queen Mother Mashariki Jywanza of the National Coalition of Blacks for Reparations in America describing the decades-long effort to obtain reparations for Black people and the campaign to advance H.R. 40); NYU School of Law, *Future Possibilities: Paving the Path Forward*, YOUTUBE, 20:44 (June 15, 2020), <https://www.youtube.com/watch?v=dHEQW6nnGkI> [<https://perma.cc/NA3D-YKFB>] (Jennifer Bellamy of the ACLU describing the lengthy campaign to garner support for H.R. 40).



plan for reparative justice would consist of both an acknowledgment of the harms caused by a government-supported racial caste system driven by enslavement and by de jure and de facto racial segregation, as well as financial investments addressing those harms, including individual cash payments to the descendants of the enslaved to eliminate the inequity that persists along every dimension of Black life.<sup>58</sup> With this context, it is helpful to speculate about what would come next.

*A. Racial Progress Is Cyclical and Resistance Is Constant*

The implementation of any reparations plan will trigger immediate, sustained resistance and eventual retrenchment. Ample evidence supports such a prediction.

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58. This construction is consistent with reparations comprised of “financial restitution, land redistribution, political self-determination, culturally relevant education programs, language recuperation, and the right to return (or repatriation).” Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1686 (2019); see also *Reparations*, M4BL, <https://m4bl.org/policy-platforms/reparations/> [<https://perma.cc/5PC9-R4GB>] (last visited Jan. 31, 2021). Under this formulation, “[r]eparations are a program of acknowledgement, redress, and closure for a grievous injustice.” DARITY & MULLEN, *supra* note 4, at 2. “Acknowledgment involves recognition and admission of the wrong by the perpetrators or beneficiaries of the injustice.” *Id.* Redress takes the form of “restitution,” “atonement,” or both. *Id.* at 3. Restitution involves “restoration of survivors to their condition before the injustice occurred or to a condition they might have attained had the injustice not taken place.” *Id.* Restitution would eliminate racial disparities in all facets of American life. See *id.* Atonement “occurs when perpetrators or beneficiaries meet conditions of forgiveness that are acceptable to the victims.” *Id.* “Closure involves mutual reconciliation between African Americans and the beneficiaries” of America’s racial caste system. *Id.*; see also Aiyetoro, *Achieving Reparations*, *supra* note 4, at 345–47 (outlining the creation of an endowed fund to provide grants and payments to the descendants of enslaved Africans to compensate for the injuries flowing from enslavement, including “health, education, wealth development and poverty diminution, criminal punishment, and peoplehood — investment in developing a sense of pride in self” and “the value of the forced unpaid labor of Africans”); Hannah-Jones, *What is Owed*, *supra* note 51 (positing that reparations “should include a commitment to vigorously enforcing existing civil rights prohibitions against housing, educational and employment discrimination, . . . targeted investments in government-constructed segregated black communities” and institutions and “individual cash payments to descendants of the enslaved in order to close the wealth gap”); KATHERINE FRANKE, *REPAIR: REDEEMING THE PROMISE OF ABOLITION* 15–16 (2020) (proposing property based reparations that redistributes land to Black people through community land trusts, housing cooperatives, and other mechanisms, paid for by a tax on the intergenerational transfer of wealth); DARITY & MULLINS, *supra* note 4, at 256–270 (proposing reparations comprised of, in substantial part, payments from the United States government to Black Americans to eradicate the racial wealth gap).

First, there is already a well-documented resistance to the very idea of reparations,<sup>59</sup> and indeed any effort to remedy or rectify the racial sins of our past.<sup>60</sup>

The American experience with race and racism also suggests that we should expect resistance. It teaches us that the endemic nature of racism<sup>61</sup> renders

59. The political, legal, and practical challenges are clear. *See, e.g.,* Zack Budryk, *GOP Senators Dismiss Booker Reparations Proposal*, HILL (Apr. 11, 2019, 12:36 PM), <https://thehill.com/homenews/senate/438451-gop-senators-dismiss-booker-reparations-proposal> [<https://perma.cc/6QLA-2KUX>] (detailing Republican opposition to legislative proposals on reparations); Rachel Frazin, *Top House Dem Dismisses Reparations as 2020 Candidates Endorse Idea*, HILL (Mar. 5, 2019, 7:17 PM), <https://thehill.com/homenews/house/432761-top-house-dem-dismisses-reparations-as-2020-candidates-endorse-idea-report> [<https://perma.cc/7UZ4-4RP4>] (describing opposition by Democratic leadership in the House of Representatives to reparations); Kaimipono David Wenger, “*Too Big to Remedy?*” *Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOY. L.A. L. REV. 177, 191, 197–202 (2010) (describing legal and cultural challenges to reparations); Beverly Moran, *Wealth Distribution and the Income Tax*, 53 HOW. L.J. 319, 332 n.57 (2010) (detailing several objections to reparations); David Frum, *The Impossibility of Reparations*, ATLANTIC (June 3, 2014), <https://www.theatlantic.com/business/archive/2014/06/the-impossibility-of-reparations/372041/> [<https://perma.cc/2LWU-SWW2>] (describing as a “disastrous idea” reparations in the form of race conscious cash payments to remedy past racial wrongs); Kyle Smith, *Why Reparations Wouldn’t Work*, FORBES (June 19, 2014, 9:12 AM), <https://www.forbes.com/sites/kylesmith/2014/06/19/why-reparations-wouldnt-work/#5d4fa9175394> [<https://perma.cc/V5F4-7T84>] (arguing that reparations will not work to close the racial wealth gap between Black and white Americans); Steven Greenhut, *Reparations Are More Likely to Divide the Nation than Heal It*, REASON (Apr. 5, 2019), <https://reason.com/2019/04/05/reparations-likely-to-divide-not-heal/> [<https://perma.cc/Y8JZ-AUFX>] (predicting that reparations will foster division and fail to close the racial wealth gap); Lexington, *The Idea of Reparations for Slavery Is Morally Appealing but Flawed*, ECONOMIST (June 29, 2019), <https://www.economist.com/united-states/2019/06/29/the-idea-of-reparations-for-slavery-is-morally-appealing-but-flawed> [<https://perma.cc/DW9K-3FNX>] (describing reparations as practically and politically infeasible). And while the political challenge is significant, the difficulties flowing from the Supreme Court’s Equal Protection jurisprudence are also notable. *See* Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 488, 491 (1998) (describing the challenges posed by “(1) the statute of limitations . . . ; (2) the absence of directly harmed individuals . . . (3) the absence of individual perpetrators . . . ; (4) the lack of direct causation . . . ; [and] (5) the indeterminacy of compensation amounts. . . .”); *see generally* Carlton Waterhouse, *Follow the Yellow Brick Road: Perusing the Path to Constitutionally Permissible Reparations for Slavery and Jim Crow Era Governmental Discrimination*, 62 RUTGERS L. REV. 163 (2009) (engaging in a constitutional analysis of reparations proposals).

60. The backlash against affirmative action policies, which are grounded in efforts to remedy historical discrimination, exemplifies the type of difficulty that remedial efforts face. *See* June Jennings, *The Psychology of the Affirmative-Action Backlash*, NATION (Dec. 9, 2015), <https://www.thenation.com/article/archive/the-psychology-of-the-affirmative-action-backlash/> [<https://perma.cc/Z3PW-YRZ2>] (detailing the psychology behind the rhetoric opposing affirmative action and its impact on people of color); Hua Hsu, *The Rise and Fall of Affirmative Action*, NEW YORKER (Oct. 8, 2018), <https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action> [<https://perma.cc/W367-4B83>] (explaining the history of legal efforts to end or curtail affirmative action). *See generally* Jessica Baron, *Understanding the Backlash Against Race-Based Affirmative Action*, 11 HIGHER EDUC. REV. 31 (2014) (examining the history of white backlash against affirmative action). Indeed, H.R. 40’s legislative journey is instructive. It was first introduced by Congressman John Conyers in 1989 and almost every year after that for nearly three decades. Sheryl Gay Stolberg, *At Historic Hearing, House Panel Explores Reparations*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html> [<https://perma.cc/L3DU-SHK9>]. It never garnered a legislative hearing until June 19, 2019. *Id.*

61. *See* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373–74 (1992) (“Black people will never gain full equality in this country.”).

resistance permanent and “racial progress . . . cyclical. Gains that appear secure in one period are rolled back in the next.”<sup>62</sup> Thus, advances in racial justice are followed by a retrenchment that carries with it the potential to erase much of the progress made. “Even those herculean efforts we hail as successful will produce no more than temporary ‘peaks of progress,’ short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance.”<sup>63</sup> This “‘reform/retrenchment dialectic’ . . . has constituted America’s legal and political history.”<sup>64</sup> To the extent that temporary advances are made, it is in large part due to a convergence of interests between those in power and those who are disfavored.<sup>65</sup>

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62. CARVING OUT A HUMANITY, *supra* note 46, at 150.

63. Bell, *supra* note 61, at 373–74. Professor Bell counseled that Black people “acknowledge the permanence of our subordinate status. . . [which] enables us to avoid despair, and frees us to imagine and implement racial strategies that can bring fulfillment and even triumph.” *Id.* at 374.

64. Devon Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1607–08 (2011). As Professor Carbado points out, the view that history unfolds in a straight line toward progress causes us to miss the fact that the “episodes we celebrate today as significant moments of racial reform (e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954)) were moments of national crisis, moments that contested what Lani Guinier has called the ‘tyranny of the majority,’ counter-majoritarian moments, moments preceded by mass political mobilization.” *Id.* at 1608 (quoting LANI GUINIER, *THE TYRANNY OF THE MAJORITY* (1994)); see also Kimberlé W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV L. REV. 1331, 1379–84 (1988) (describing racial subordination as a force for retrenchment against racial justice advances); Jennifer Richeson, *Americans Are Determined to Believe in Black Progress*, ATLANTIC (Sept. 2020), <https://www.theatlantic.com/magazine/archive/2020/09/the-mythology-of-racial-progress/614173/> [<https://perma.cc/62HA-DW8A>] (“When we think about the nation’s racial history, we often envision a linear path, one that, admittedly, begins in a shameful period but moves unerringly in a single direction—toward equality. . . . It is obviously true that many of the conditions of life for Black Americans have gotten better over time. Material standards have in many ways improved. Some essential civil rights have advanced, though unevenly, episodically, and usually only following great and contentious effort. But many areas never saw much progress, or what progress was made has been halted or even reversed. The mythology of racial progress often rings hollow when it comes to, for instance, racial gaps in education. Or health outcomes. Or voting rights. Or criminal justice. Or personal wealth. History is not a ratchet that turns in one direction only. Martin Luther King Jr. famously asserted that ‘the arc of the moral universe is long, but it bends toward justice.’ And maybe it will, in the end. But in our actual lifetimes we see backward steps and tragic detours.”).

65. This is the basis of Professor Bell’s theory of interest convergence—the notion that advances in equality for Black people only happen when those advances converge with the interests of white people, and that when those interests diverge, the gains made by Black people recede. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. . . . Racial 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.”); see also Carbado, *supra* note 64, at 1607–08 (“Far from reflecting national harmony in which the country as a whole agreed that racial change was in order, racial reform typically has occurred when the equality interest of people of color converges with the interest of powerful elites. . . .”).

A cursory examination of the Black freedom struggle in America is revelatory. When it comes to racial inequality, we have advanced forward as a nation, only to retreat quickly—at times in the midst of progress.<sup>66</sup> Decades of mass movements, collective action, and individual struggle, led by Black people and supported by a multi-racial coalition, have sustained attacks against the legal regimes that fostered racial subordination and control. Defiance of enslavement and Jim Crow segregation ended those institutions by law. Without question, Black lives have steadily improved over time. Yet the eras that followed the formal fall of structures of explicit racial oppression remained infected with the detritus of white supremacy,<sup>67</sup> animated by fear and trauma.<sup>68</sup> Emancipation of enslaved Black people over a century and a half ago was followed by a violent and unceasing resistance, a defense of the old status quo, and the enactment of laws to enshrine racial segregation.<sup>69</sup> *Brown v. Board of Education*,<sup>70</sup> which dealt a lethal blow to Jim Crow segregation in K-12 education, was met with “massive resistance” by segregationists.<sup>71</sup> The integration mandate was stymied by the amorphous nature of the Supreme Court’s “all deliberate speed” (emphasis on

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66. Michael A. Fletcher, *America Is Facing a Reckoning over Race, But We’ve Seen This Before*, UNDEFEATED (July 2, 2020), <https://theundefeated.com/features/america-is-facing-a-reckoning-over-race-but-weve-seen-this-before/> [<https://perma.cc/3XQT-BGT7>].

67. See, e.g., Alex M. Johnson, Jr. *What the Tea Party Movement Means for Contemporary Race Relations: A Historical and Contemporary Analysis*, 7 GEO. J. L. & MOD. CRITICAL RACE PERSP. 201, 242–43 (2015) (describing how racial progress made and experienced by Black people through the Civil Rights Era were met with attitudes and policies rooted in racism); John Simerman & Gordon Russell, *In Louisiana’s Split-Verdict Rule, White Supremacist Roots Maintain Links to Racist Past*, ADVOCATE (Apr. 7, 2018), [https://www.theadvocate.com/baton\\_rouge/news/courts/article\\_35e1664a-38ed-11e8-89d7-1ff0a664198b.html](https://www.theadvocate.com/baton_rouge/news/courts/article_35e1664a-38ed-11e8-89d7-1ff0a664198b.html) [<https://perma.cc/G9ZE-M6CZ>] (describing how Louisiana’s 1898 constitutional convention gathered with the purpose of undermining Reconstruction-era racial progress and created, inter alia, a non-unanimous jury verdict rule for felony criminal trials to dilute Black jurors’ votes as a means to maintain white supremacy).

68. Resmaa Menakem, *Notice the Rage; Notice the Silence*, ON BEING WITH KRISTA TIPPET (June 4, 2020), <https://onbeing.org/programs/resmaa-menakem-notice-the-rage-notice-the-silence/> [<https://perma.cc/DYZ2-R2H5>]; see also RESMAA MENAKEM, *MY GRANDMOTHER’S HANDS: RACIALIZED TRAUMA AND THE PATHWAY TO MENDING OUR HEARTS AND BODIES* 7–10 (2017) (describing white supremacy as a trauma response transmitted from one generation to the next).

69. See generally EQUAL JUSTICE INITIATIVE, *RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876* (2020), <https://eji.org/wp-content/uploads/2020/07/reconstruction-in-america-report.pdf> [<https://perma.cc/E3AW-CANR>]. In the most basic sense, “the course and contours of Black emancipation were charted by white people who refused to respect the humanity of enslaved people and thus locked Black people into a truly inferior second-class status once they were freed. White supremacy saturated the meaning of Black freedom every bit as much as it justified the enslavement of Black people.” FRANKE, *supra* note 58, at 6.

70. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

71. Josh Blackman, *The Irrepressible Myth of Cooper v. Aaron*, 107 GEO. L.J. 1135, 1138 (2019).

“deliberate”) timeline for desegregation.<sup>72</sup> The response to the passage of the Civil Rights Act of 1964 was a legal regime of colorblindness, which curtailed efforts to remedy racial discrimination.<sup>73</sup> These periods in American history readily fit the reform-retrenchment dialectic.<sup>74</sup> Linear racial progress is a myth.<sup>75</sup>

Throughout history, each time our nation has taken steps forward on matters of racial inequality, we have turned away from the challenge that remained: confronting the belief system—the ideology—that led to racial subordination at America’s founding.<sup>76</sup> In each of these moments of progress “the country reaches the edge of fundamental transformation and pulls back out of a fear that genuine democracy will mean white people will have to lose something—that they will have to give up their particular material and symbolic standing in the country.”<sup>77</sup> So, despite the paradigmatic shifts in the racial status quo brought on by the end of enslavement and the death of Jim Crow, the work of fully reckoning with our racial past was left unfinished. What looked like reforms presaged racially regressive policies and practices.

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72. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955). Although *Brown I* declared school segregation unconstitutional, the Court failed to explain how the principle was to be implemented nationwide until *Brown II*, in which the Court placed the onus on federal district courts to supervise the desegregation of schools “with all deliberate speed.” Blackman, *supra* note 71, at 1140–43. Segregationists deployed a campaign of massive resistance, refusing to voluntarily comply with the mandate of *Brown*. *Id.* at 1143. Southern governors, lawmakers, and executive branch officials deemed *Brown* unconstitutional, asserting that states need not desegregate schools. Lia Epper-son, *Brown’s Dream Deferred: Lessons on Democracy and Identity from Cooper v. Aaron to the “School-To-Prison Pipeline”*, 49 WAKE FOREST L. REV. 689, 692–93 (2014). The vague order in *Brown II* fostered that resistance, allowing segregationist to delay implementation of *Brown I*. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 356 (2004) (“*Brown II* . . . was hardly an order to do anything. Its indeterminacy invited judges to delay and evade, which they were inclined to do anyway.”); see also Charles J. Ogletree, Jr., *The Integration Ideal: Sobering Reflections*, 31 LITIGATION 50, 54–56 (2004) (discussing how “*Brown II* created the method and manner in which America would resist the mandate of the equality ideal”).

73. Carbado, *supra* note 64, at 1608 (“Martin Luther King, Jr.’s vision of racial cooperation and responsibility, which helped to secure the passage of the Civil Rights Act of 1964 (the reform), was re-deployed to produce a political and legal discourse that severely restricts racial remediation efforts: colorblindness.”).

74. *Id.* at 1607–08; see also EDDIE GLAUDE, BEGIN AGAIN: JAMES BALDWIN’S AMERICA AND ITS URGENT LESSONS FOR OUR OWN 164–65 (2020) (describing the Reagan era calls for law and order, demonization of welfare programs, and attacks on affirmative action, the Equal Employment Opportunity Commission and the US Commission on Civil Rights as exemplifying “white resentment and racist retrenchment”); Joseph Mello, *Reluctant Radicals: How Moderates Shape Movements for Social Change*, 41 LAW & SOC. INQUIRY 720, 722–28 (describing how countermovements to the civil rights movement drove a retrenchment).

75. Richeson, *supra* note 67.

76. See DARITY & MULLEN, *supra* note 4, at 4 (describing America’s consistent failure to confront racial inequality, evidenced by the country’s “failure to recognize the pernicious impact of white supremacy and the sustained American failure to adopt national policies that reverse” its effects).

77. GLAUDE, *supra* note 74, at 25.

Thus, while the end of state-sanctioned racial subordination was “accompanied by the demise of an explicit ideology of white supremacy,” the “white norm” remained

submerged in popular consciousness. It continue[d] in an unspoken form as a statement of the positive social norm, legitimating the continuing domination of those who do not meet it. Nor have the negative stereotypes associated with Blacks been eradicated. The rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority.<sup>78</sup>

For example, the presumption of Black criminality that arose from and perpetuated enslavement animates the modern criminal legal system and the disparate treatment of Black people in that system.<sup>79</sup> Another emerges from the stereotype that Black people are lazy, which justified enslavement and now extends to the false sense that Black people seek to live off of government assistance.<sup>80</sup> As systems changed with time, ideologies adapted to maintain an unjust racial hierarchy, retaining harmful, racialized presumptions that continue to haunt us. Racism, at its core, is dynamic. It mutates and expresses itself in varied ways. We must prepare for its ebb and flow. By anticipating the drivers and manifestations of resistance we can do so.

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78. Crenshaw, *supra* note 64, at 1379.

79. Bryan Stevenson, *Why Prisons Owe Their Cruelty to American Slavery*, N.Y. TIMES MAG.: 1619 PROJECT (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html> [perma.cc/A7HS-R7NR] (“Hundreds of years after the arrival of enslaved Africans, a presumption of danger and criminality still follows black people everywhere. New language has emerged for the noncrimes that have replaced the Black Codes: driving while black, sleeping while black, sitting in a coffee shop while black.”); William M. Carter, Jr. *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.C.L. L. REV. 17, 93 (2004) (suggesting a Thirteenth Amendment lens that accounts for the legacy of the presumption of Black criminality that arose from slavery and fosters racial profiling).

80. Joy Moses, *Moving Away from Racial Stereotypes in Poverty Policy*, CTR. FOR AM. PROGRESS 8–10 (Feb. 23, 2012), [https://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/race\\_stereotypes.pdf](https://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/race_stereotypes.pdf) [https://perma.cc/5BTH-NVNH]. These same stereotypes are also used to justify restrictions and limitations on such assistance. *Id.*

### B. Drivers of Resistance to Reparations<sup>81</sup>

Though it is not possible to delineate all of the forces behind the resistance that would unfold in a post-reparations world, three significant drivers stand out.<sup>82</sup> First, resistance may be engendered by a sense that no debt is owed to Black people for enslavement, its aftermath, or effects—a worldview rooted in everything from animus to an ahistorical understanding of America’s relationship with racial inequality.<sup>83</sup> Whether animated by ignorance or antipathy, the prevailing view might look to emancipation and subsequent civil rights legislation as sufficient counters to the legacy of American slavery. Others may feel they bear no responsibility for the past, as neither they nor their immediate ancestors enslaved people, supported Jim Crow segregation, or benefited from racial inequality.<sup>84</sup>

Second, people may resist because of the practical and logistical challenges that implementing reparations may raise. Resistance of this sort might flow from concerns about America’s ability to bear the financial costs of reparations, the

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81. Two points are worth raising. First, white supremacy is a persistent animating force of resistance. That is not to say that all drivers of resistance are rooted in explicit racial animus or implicit racial bias. Some are considerations that anyone of any identity or adhering to any ideology might raise. But those exceptions do not obscure the consistent role that an ideology of racial superiority plays to stymie reparative justice. Second, and relatedly, some of these drivers of resistance were reflected in the testimony delivered during the 2019 hearing on H.R. 40 by two Black men, providing a preview of what we might expect should the proposed legislation become law. *See H.R. 40 Hearings*, *supra* note 56 (statement of Coleman Hughes) (explaining that reparations are divisive and distracts attention from current problems in favor of a focus on the past); *H.R. 40 Hearings*, *supra* note 56 (statement of Burgess Owens) (arguing that reparations are divisive, antithetical to America’s founding ideals, unnecessary, and unfairly burden white people with a debt they do not owe).

82. Professor William Darity and scholar Kirsten Mullen helpfully catalogued the range of questions that they most often encountered when faced with resistance to reparations. *See DARTY & MULLEN*, *supra* note 4, at 239–55 (raising concerns about the divisiveness of reparations, the temporal proximity between the harm and reparations, the appropriate recipients of reparations, who is responsible for reparations, the existence of civil rights and social programs designed to address racial inequality, the way in which reparations might demean the memory of the enslaved, and reparations ignoring the plight of white people who are poor); *see also* Franke, *supra* note 58, at 130 (“Some of this resistance is motivated by the inoculating myth of white innocence[] . . . Other pushback is more related to the perfect being the enemy of the good[.]”).

83. United States Senator Mitch McConnell exemplified this form of resistance when he was asked about reparations ahead of the first legislative hearing on H.R. 40: “We tried to deal with our original sin of slavery by fighting a Civil War, by passing landmark civil rights legislation, elected an African American president.” Lucas Aulbach, *Mitch McConnell: We Paid for ‘Sin of Slavery’ by Electing Obama*, USA TODAY (June 19, 2019), <https://www.usatoday.com/story/news/politics/2019/06/19/mitch-mcconnell-reparations-slavery-compensation-not-needed-after-obama-presidency/1501650001/> [<https://perma.cc/UZ5L-NADC>].

84. Nick Sammarco, *Slavery Reparation Are an Immoral and Illogical Proposition*, SUFFOLK JOURNAL (Apr. 3, 2019), <https://thesuffolkjournal.com/28163/opinion/slavery-reparation-are-an-immoral-and-illogical-proposition/> [<https://perma.cc/B5QB-B2HU>] (“The entire discussion of reparations for “American” slavery betrays the American notions of individual responsibility and individual repayment, proposing that Americans pay restitution for crimes they had no part in. In the West, we believe that individuals, and individuals alone, should be prosecuted and punished for the crimes that they commit.”); *see also H.R. 40 Hearings*, *supra* note 56 (statement of Burgess Owens) (arguing that white people owe no debt for “the sins of those who came before”).

challenges of calculating reparations and administering a reparations program, or the seemingly unbearable emotional weight of exploring our racialized past and confronting the long shadow it casts over contemporary life.<sup>85</sup>

Finally, the social and psychological costs of reparations may foster resistance. At bottom, reparative justice requires that those who perpetuate or benefit from a harm must pay, in one form or another, for the harm done.<sup>86</sup> Such concerns may be expressed in debates over power (who gets it and who must give it up?) and privilege (what will happen to the established racial order?).<sup>87</sup>

These drivers of resistance are certain to materialize into concrete action, shaping the path forward for advocates of today.

### C. Manifestations of Resistance

There are infinite possible manifestations of the resistance to reparations. Many are unimaginable, even as resistance, retrenchment, and backlash have defined previous efforts to make America whole. But with these drivers as a backdrop and experience as a guide, some are apparent. It is safe to say that Black people would face scorn, derision, envy, and other feelings of hostility. They would be viewed as getting something that they were not owed, for a harm they had not suffered directly themselves, in a country seen as having already lived up to its commitment to treat people equally under the law—even if not in practice. Traditional and new media would portray potential recipients of reparations as undeserving, or denigrate their life choices and the ways they choose to spend the funds paid out.

These responses are easy to imagine because they are akin to what has occurred before in parallel circumstances. We have already seen such reactions in the context of public assistance—a social support far afield from reparations, but which has engendered hostility of all sorts toward its recipients.<sup>88</sup> The behavior

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85. Indeed, some who testified at the hearings on H.R. 40 argued that reparations would be more divisive than helpful. *H.R. 40 Hearings*, *supra* note 56 (statement of Burgess Owens); *H.R. 40 Hearings*, *supra* note 56 (statement of Coleman Hughes). Such “[r]egressive reactions” can also be the natural result of a reparations process that has “inflame[ed] old wounds” or revisited the conditions that turned some segment of society into victims. Yamamoto, *supra* note 59, at 494–97. None of these challenges should be taken as reasons not to pursue reparative justice. Resistance to repair—in the form of racial tension or more explicit manifestations of violence—and the fear of exacerbating racial tension has always been a part of “every effort that has been launched to end the continuing badges and indicia of slavery.” Adjoa Aiyetora, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457, 473–74 (2003).

86. Fundamentally, “[m]eaningful reparations entail change. Change means the loss of some social advantages by those more powerful. For these reasons, those charged with repairing the harms always resist.” Yamamoto, *supra* note 59, at 487.

87. *Id.* at 493.

88. See JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 117 (1994) (describing hostility directed at recipients of public assistance from conservatives and liberals alike); Catherine Powell & Camille Gear Rich, *The “Welfare Queen” Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. 19TH AMEND. SPECIAL EDITION 105, 119–20 (2020).



ranges from public campaigns that belittle recipients of public assistance and scrutinize their spending choices and lifestyles, to efforts to criminalize their behavior and level accusations of fraud.<sup>89</sup> Affirmative action programs, which also differ from reparations but seek to address a historical legacy of inequality, have likewise invoked hostility.<sup>90</sup> One can imagine reactions of this sort to reparations on a massive scale with even greater intensity.<sup>91</sup>

Passage of reparations legislation and the implementation of the commission's plan would be accompanied by political fallout. The structural hurdles and political retrenchment that defined the response to past civil rights advances foreshadows our future.<sup>92</sup> Those who voted in favor of the legislation would face pressure to enact legislation to curb or limit the duration of reparative justice or withhold funding for reparations payments and programming. Criminal convictions would be used to disqualify potential recipients. A sense that reparations had resolved America's problems with race would prevail and efforts would be undertaken to roll back or supplant civil rights protections found in other arenas. Driven by a sense of grievance and injustice, resisters would flock to the ballot box to vote supporters of reparations out of office or take to the streets to let their voices be heard. The political and legal effort to overturn the 2020 presidential election

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89. Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233 (2014) (detailing how racialized metaphors about public benefits recipients have shaped public benefits law); Nikita McMillian, *From Loving Mother to Welfare Queen to Drug Addict? LeBron v. Secretary of Florida Department of Children and Families and the Evolving Public View of the Poor as a Class of Sub-Humans with Sub-Rights*, 35 MISS. C. L. REV. 197 (2016); see also, Rae Gomes, *The Racialization of SNAP Policy*, WHY HUNGER (Feb. 14, 2020), <https://whyhunger.org/category/blog/the-racialization-of-snap-policy/> [https://perma.cc/Q6WH-63VZ]; Furaha Njoroge, *The Impact of Racism on Georgia's Safety Net*, GA. BUDGET & POL'Y INST. (Aug. 7, 2020), <https://gbpi.org/the-impact-of-racism-on-georgias-safety-net/> [https://perma.cc/CA6H-BEBG] (documenting the impact of racism and racist accusations of fraud on the decrease in accessibility of Georgia's public benefits systems).

90. The legal doctrine that shapes affirmative action has consistently been informed by white hostility to the concept of affirmative action, on and off the Court. See, e.g., William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 RUTGERS RACE & L. REV. 1, 32–35 (2015); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1766–81 (1993); see also, Vann R. Newkirk II, *The Myth of Reverse Racism: The Idea of White Victimhood Is Increasingly Central to the Debate over Affirmative Action*, ATLANTIC (Aug. 5, 2017), <https://www.theatlantic.com/education/archive/2017/08/myth-of-reverse-racism/535689/> [https://perma.cc/HM58-JCB7]; sources cited *supra* note 60.

91. For purposes of this essay, I have not focused on the legal challenges that might attend to reparations as a race conscious remedy, but they are noteworthy. See sources cited *infra* note 96.

92. See Carbado, *supra* note 64 and accompanying text.

results,<sup>93</sup> rooted in racist and demonstrably false allegations of voter fraud,<sup>94</sup> and the subsequent widespread state legislative effort to disenfranchise voters of color,<sup>95</sup> are prime examples of the type of resistance we might expect.

Lawyers would challenge potential reparations payments as unconstitutional,<sup>96</sup> or argue that one's national origin or some other dimension of their identity rendered them unqualified to receive reparations. Some people, fearing that they would be forced to give up power, property, or material wealth, would take up arms and threaten or engage in violence. We have seen the extreme lengths that people will go to maintain power or when they feel aggrieved. The post-Civil War

93. See, e.g., Barbara Sprunt, *Here Are the Republicans Who Objected to the Electoral College Count*, NPR (Jan. 7, 2021, 4:26 PM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/07/954380156/here-are-the-republicans-who-objected-to-the-electoral-college-count> [<https://perma.cc/49EN-BCZN>](describing six Republican senators and 121 Republican representatives who objected to the electoral college results); William Cummings, Joey Garrison, & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> [<https://perma.cc/Y3P6-Q5UV>] (describing the 62 lawsuits “seeking to overturn election results in states the president lost,” political objections to election results in six contested states, three recounts, and myriad claims by Trump and his surrogates that the 2020 election was stolen); Sam Levine & Lauren Gambino, *Nearly Two-Thirds of House Republicans Join Baseless Effort to Overturn Election*, GUARDIAN (Dec. 11, 2020, 5:13 PM), <https://www.theguardian.com/us-news/2020/dec/11/house-republicans-texas-election-lawsuit-supreme-court> [<https://perma.cc/5K5G-Y2WZ>] (describing a request made by 126 Republican members of the House of Representatives to the United States Supreme Court “to prevent four swing states from casting electoral votes for Joe Biden”).

94. See, e.g., Ronald Brownstein, *The ‘Urban Myth’ Behind the GOP Claims of Voter Fraud*, CNN (Dec. 15, 2020), <https://www.cnn.com/2020/12/15/politics/voter-fraud-urban-myth/index.html> [<https://perma.cc/B63Z-T3UT>] (connecting unsupported claims that Black people and other people of color engaged in voter fraud with anticipated legislative efforts to limit voting access and suppress the vote).

95. See, e.g., Jason Johnson, *Activists Saw the Attack on Black Voters in Georgia Coming*, SLATE (Apr. 2, 2021, 2:33 PM), <https://slate.com/news-and-politics/2021/04/georgia-voter-suppression-racism-black-voters-matter.html> [<https://perma.cc/3FBU-MT78>] (“If you know the history of the South, and voting behavior in the South, anytime there has been a Black advancement or Black people have showed up, we’ve seen a white backlash in some form or fashion—something punitive that normally comes up to try to prevent or marginalize our voice and our votes.”); Michael Wines, *In Statehouses, Stolen-Election Myth Fuels a G.O.P. Drive to Rewrite Rules*, N.Y. TIMES (Mar. 2, 2021), <https://www.nytimes.com/2021/02/27/us/republican-voter-suppression.html> [<https://perma.cc/D5PA-QZWX>] (describing an “avalanche of legislation” in “state legislatures nationwide” as part of the “extraordinary efforts to change the rules of voting and representation”).

96. Waterhouse, *supra* note 59, at 165; Charles Lane, *Would Reparations for Slavery be Constitutional?*, WASH. POST (Aug. 12, 2019), [https://www.washingtonpost.com/opinions/would-reparations-for-slavery-be-constitutional/2019/08/12/76677182-ba10-11e9-b3b4-2bb69e8c4e39\\_story.html](https://www.washingtonpost.com/opinions/would-reparations-for-slavery-be-constitutional/2019/08/12/76677182-ba10-11e9-b3b4-2bb69e8c4e39_story.html) [<https://perma.cc/P8EE-SH5C>].

Lost Cause mythology is one such example.<sup>97</sup> Another is the January 6, 2021 attack on the United States Capitol by an assortment of white supremacists and

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97. The Lost Cause, also known as the Lost Cause of the Confederacy, is America's most successful disinformation campaign. It was an ahistorical theory advocating the erroneous belief that all White southerners valiantly fought for the Confederacy to save true 'American' (read: White supremacist) values. It centers on the delusion that slavery, known as 'the peculiar institution,' was often benign and even welcomed by the enslaved. Rhae Lynn Barnes & Keri Leigh Merritt, *A Confederate Flag at the Capitol Summons America's Demons*, CNN (Jan. 7, 2021, 6:58 PM), <https://www.cnn.com/2021/01/07/opinions/capitol-riot-confederacy-reconstruction-birth-of-a-nation-merritt-barnes/index.html> [<https://perma.cc/8N6R-85FM>].

supporters of the lie that the 2020 presidential election was stolen.<sup>98</sup> The opposition might terrorize potential recipients of reparations with physical harm to prevent rightful, legal claims. Counter-education programs would emerge, seeking to

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98. See Sabrina Tavernise & Matthew Rosenberg, *These are the Rioters Who Stormed the Nation's Capitol*, N.Y. TIMES (May 12, 2021), <https://www.nytimes.com/2021/01/07/us/rioters-capitol.html> [<https://perma.cc/8RBM-HDVX>] (describing the insurrectionists as a mix of white supremacists, conspiracy theorists, and Trump supporters seeking to contest the results of the presidential election on the basis of false claims that the election had been stolen); Philip Bump, *How the Effort to Deny the Reality of the Jan. 6 Attack is Evolving*, WASH. POST (Feb. 23, 2021, 1:17 PM), <https://www.washingtonpost.com/politics/2021/02/23/how-effort-deny-reality-jan-6-attack-is-evolving/> [<https://perma.cc/D5MV-GE5L>] (describing the insurrection as comprised of “[a] crowd of supporters of President Donald Trump, including and bolstered by white nationalists and other far-right extremists, broke into the Capitol in an effort to disrupt the counting of electoral votes that they had been convinced by Trump were the product of rampant fraud”); Michael Biesecker, Michael Kunzelman, Gillian Flaccus, & Jim Mustian, *Who Were They? Records Reveal Trump Fans Who Stormed Capitol*, OPB (Jan. 11, 2021, 11:16 AM), <https://www.opb.org/article/2021/01/11/capitol-breach-mob-records-who-was-there/> [<https://perma.cc/7WW8-2MRW>] (describing those who attacked the Capitol as “summoned by President Donald Trump to march on Washington in support of his false claim that the November election was stolen and to stop the congressional certification of Democrat Joe Biden and the victor” and “overwhelmingly made up of longtime Trump supporters, including Republican Party officials, GOP political donors, far-right militants, white supremacists, members of the military and adherents of the QAnon myth that the government is secretly controlled by a cabal of Satan-worshipping pedophile cannibals”); see also Barnard Woods, *Trump's Mob at the Capitol Was Following an Old White Supremacist Playbook*, WASH. POST (Jan. 7, 2021, 1:56 PM), <https://www.washingtonpost.com/outlook/2021/01/07/trump-mob-capitol-red-shirts/> [<https://perma.cc/8P25-7ERJ>] (describing the parallels between the white supremacist efforts to maintain power through the violent insurrection aimed at ending Reconstruction in South Carolina and the 2021 insurrection at the Capitol). The January 6 insurrection and the movement that produced it bear instructive parallels to the Lost Cause mentality that proliferated following the Civil War. See David W. Blight, *How Trumpism May Endure*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/opinion/trump-capitol-lost-cause.html> [<https://perma.cc/P983-GL4Y>] (“If . . . the Confederate Lost Cause was born in the imagery of Lee’s . . . surrender to Ulysses Grant at Appomattox in April 1865, perhaps the Trump Lost Cause has been born in the indelible imagery of the rioters scaling and assaulting the U.S. Capitol in January 2021.”); Chuck Idelson, *Confederates in the Capitol: The Re-enactment of a Lost Cause*, COMMON DREAMS (Jan. 10, 2021), <https://www.commondreams.org/views/2021/01/10/confederates-capitol-re-enactment-lost-cause> [<https://perma.cc/V8JS-D89Z>] (comparing Confederacy’s failed attack on the Capitol in 1864 to the January 6 attack as “part of a white supremacist campaign to overthrow a democratically elected government”); Karen L. Cox, *What Trump Shares With the ‘Lost Cause’ of the Confederacy*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/opinion/trump-confederacy-lost-cause.html> [<https://perma.cc/6RLH-E9PB>] (“[I]t is difficult not to see the parallels between his [Trump’s] lost cause and the failed cause of the Confederacy in 1865.”); Zack Stanton, *How Trumpism is Becoming America’s New ‘Lost Cause’*, POLITICO (Jan. 21, 2021), <https://www.politico.com/news/magazine/2021/01/21/trump-civil-war-reconstruction-biden-lost-cause-461161> [<https://perma.cc/ERY6-JBSA>] (“A new ‘lost cause’ had stormed into the U.S. Capitol flying the flag of the original Confederate Lost Cause.”); On the Media, *Breaking the Myth*, NEW YORK PUBLIC RADIO, at 17:04 (Jan. 8, 2021), <https://www.wnystudios.org/podcasts/otm/episodes/on-the-media-breaking-the-myth> [<https://perma.cc/F4MP-32RZ>] (“The cause of voter fraud that it was an illegitimate victory is not unlike what we see former confederates saying when they talk about that they could have never won against insurmountable union forces. We start to see that same language from Trump and his followers.”).

undermine the truth about America's past, advance a narrative that labels the beneficiaries of reparations as undeserving (at best), and attack the entire exercise.<sup>99</sup>

Even imagining just a few of the ways resistance might materialize informs the task ahead. If we hope to avoid a future where reparations have been made, but they still do not salve the grave wounds that this country has inflicted on itself, we will have to focus on the unfinished work of confronting our past and atoning for it. Of course, America must provide economic redress and attend to the material conditions flowing from enslavement and segregation.<sup>100</sup> But the road to reparations must do even more. It must lead us to fully reckon with American history, boldly confront the ideology of white supremacy that drives racial subordination, and draw on concrete experiences to make reparations real. Ultimately, advocates must work to change culture.

#### IV.

#### WHAT ADVOCATES SHOULD DO ABOUT IT NOW: MAKING CHANGE IN THESE TIMES

None of this is easy—changing culture never has been. But the tracks that we lay now can carry us to a future with reparations that create a new kind of world. What follows are three suggestions that advocates—in preparation for a sustained

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99. The Trump Administration engaged in this type of resistance against education focused on racial justice, providing a sense of what is to be expected. In September 2020, the president signed an Executive Order barring the federal workforce from receiving racial justice or gender justice training. Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020); *see also* Fabiola Cineas, *Critical Race Theory, and Trump's War on It, Explained*, VOX (Sept. 24, 2020), <https://www.vox.com/2020/9/24/21451220/critical-race-theory-diversity-training-trump> [<https://perma.cc/4HSB-GCRU>]. And in November 2020, Trump created a “1776 Commission” to “produce a report for the President . . . regarding the core principles of the American founding” and to “advise executive departments and agencies . . . with regard to their efforts to ensure patriotic education.” Exec. Order No. 13958, 85 Fed. Reg. 70951 (Nov. 5, 2020). Among the justifications for the creation of the 1776 Commission was the notion that “many students are now taught in school to hate their own country, . . . [which] ignore[s] or fail[s] to properly honor and recollect the great legacy of the American national experience[, resulting in v]iewing America as an irredeemably and systemically racist country.” *Id.*

100. Closing the racial wealth gap is a critical component of any reparations plan. William Darity & Kirsten Mullen, *Black Reparations and the Racial Wealth Gap*, BROOKINGS (June 15, 2020), <https://www.brookings.edu/blog/up-front/2020/06/15/black-reparations-and-the-racial-wealth-gap/> [<https://perma.cc/JRN7-U7UR>]; Terry Gross, *A Call for Reparations: How America Might Narrow the Racial Wealth Gap*, NPR (June 24, 2020, 1:57 PM), <https://www.npr.org/2020/06/24/882773218/a-call-for-reparations-how-america-might-narrow-the-racial-wealth-gap> [<https://perma.cc/X63B-62FQ>]; Christian Weller, *We Need to Discuss the Racial Wealth Gap and Reparations*, FORBES (June 19, 2019), <https://www.forbes.com/sites/christianweller/2019/06/19/the-massive-racial-wealth-gap-and-its-connection-to-reparations/#13a431b1451b> [<https://perma.cc/TW9B-TBLZ>]. A focus on economics must be complemented by attention to the ideology of racism, otherwise, after reparations “[t]he racism remains . . . [after] the economic component of that racism has been neutralized for the black poor.” DERRICK BELL, *AND WE ARE NOT SAVED* 129 (1989).

resistance to reparations—might deploy to ensure that reparative justice in the future is transformational.<sup>101</sup>

*A. Continue to Raise Consciousness About Racial Injustice*

A movement for reparations at the national level must be driven by rigorous engagement at an individual and community level about America's history and legacy of racial inequality. This type of consciousness raising work strikes at all of the animating forces behind the resistance, especially the sense that nothing is owed to Black people. It is essential that advocates carry forward the consciousness-raising efforts undertaken during the uprisings of 2020 by continuing to foster awareness about the ways the racial status quo—and notions of racial superiority and inferiority—have shaped American society along lines that have fundamentally failed us all.<sup>102</sup> Though that type of engagement and consciousness raising often happens alongside traditional legal tools or doctrines, it is at the heart

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101. Although an exploration of social movement theory is beyond the scope of this article, it informs the work that reparative justice advocates should undertake. “Participants in social movements engage in a sustained, interactive campaign that makes sustained, collective claims for relief or redistribution in response to social marginalization, dislocation, change, or crisis.” Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1503 (2005). Fundamentally, the political mobilization that comes with social movements “disrupts the social order, . . . disturbs the law’s connection to that order, and, in time, brings about legal change, whether that change is manifested in the work of legislatures, courts, or both. Thus, social movements give nongovernmental actors an opportunity to talk back to institutions of power and to have a voice in the development of constitutional norms. Social movement contestation provides informal channels through which people can engage formal legal institutions about the direction and pace of” legal change. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946–47 (2006). It is also worth considering “the three major theoretical frameworks in social movement scholarship: (1) framing, (2) resource mobilization, and (3) political process.” Douglas Nejaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 892 (2013). Framing can be understood as the work done to create a shared understanding of the world that drives action. *Id.* Frames “identify problems, expose responsible parties, and suggest solutions.” *Id.* “Framing an issue is a way of defining, labeling, and understanding it.” Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263, 279–80 (2010). It is “central” to garnering support and shaping what kinds of change is possible. *Id.* at 280–81. Resource mobilization focuses on “the ability of movement actors to garner external resources” such as “financial and rhetorical support.” NeJaime, *Constitutional Change* at 897. Political process concerns “the external political context and governmental structure to understand how and when movements press their demands.” *Id.* at 899.

102. Aiyetora, *Formulating Reparation*, *supra* note 85, at 672. The hierarchy of power in America is expressed through a caste system, defined as “an artificial construction, a fixed and embedded ranking of human value that sets the presumed supremacy of one group against the presumed inferiority of other groups on the basis of ancestry and often immutable traits.” ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 17 (2020). Race is the “signal of rank” in the American caste system. *Id.* at 18.

of social movements.<sup>103</sup> While advocates should not abandon the law, they must complement their commitment to legal advocacy with a robust support of social movements aimed at raising our collective racial consciousness.<sup>104</sup> It is especially important to demonstrate that while America has grappled with race and racism in the past, it has done so haltingly, and that the work remains unfinished.

At a basic level, such efforts require exposing the untruths we have told ourselves about race and inequality, and re-conceptualizing racial identity outside the context of domination and subjugation.<sup>105</sup> In America “[w]e lie and cover up our sins and mute the traumas they cause. We dissociate the trauma from our national self-understanding and locate it, if at all, in the ungrateful cries of grievance and victimization among those who experienced the pain and loss.”<sup>106</sup> In other words, we too often willingly turn away from the trauma that racial inequality has produced in favor of the comfort provided by the myths about having largely

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103. There is inherent value in lawyers taking their direction from, and using their legal skills to support, social movements and the communities that lead them. Movement lawyering is one such means of doing so. Movement lawyering is defined as

*the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define.* Movement lawyering is therefore a version of cause lawyering in which the cause is defined and advanced by social movement leaders and constituents in dynamic processes of grassroots organization building and community engagement.

Scott Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1690 (2017). See also Akbar, *Radical Imagination*, *supra* note 16, at 473, 474 n.329 (2019) (collecting sources analyzing the influence of social movements on law and positing that “[s]ocial movements have always been central to the shape of American law and government, its visions and its practices. From the abolitionists to the suffragettes to those fighting for civil rights, Black Power, labor, and women’s rights, a wide range of mass movements have long shaped our polity, our governments, and our laws.”).

104. Advocates must “start by transforming cultural representations and public consciousness.” Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 229 (2016). Examples of such efforts can be found in “[t]he string of highly publicized police killings of unarmed black men and women in the last few years, and the ensuing ‘Black Lives Matter’ protests, have created the possibility of a shift in public attitudes about the fairness of the criminal justice system.” *Id.*; see also *infra* note 123 and accompanying text (detailing the Black Lives Matter movement).

105. Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (“Reconceptualizing white race consciousness means doing the hard work of developing a positive white racial identity, one neither founded on the implicit acceptance of white racial domination nor productive of distributive effects that systematically advantage whites.”).

106. GLAUDE, *supra* note 74, at 47.

overcome our racial divide.<sup>107</sup> Raising our collective consciousness is an antidote to that willful blindness.

That work must include educational efforts to increase popular understanding of America's racial caste system and its legacy of distributing burdens and benefits along racial lines.<sup>108</sup> Such efforts are already underway. The Pulitzer Center's creation of a curriculum for the New York Times Magazine's *1619 Project* is one example.<sup>109</sup> The *1619 Project* challenges readers to reframe United States history and its foundational date as the year when African people were brought to American shores and enslaved. By doing so, "[i]t aims to reframe the country's history by placing the consequences of slavery and the contributions of [B]lack Americans at the very center of our national narrative."<sup>110</sup> The initiative explores vectors of life through a racial lens, raising consciousness about America's history of racial inequality. Since August 2019, roughly 4,500 classrooms have engaged with the curriculum, while school systems in New York, Illinois, Washington D.C., Delaware, and North Carolina have "adopted the project at a broad scale."<sup>111</sup>

The Equal Justice Initiative (EJI), a nonprofit organization that "challenges poverty and racial injustice, advocates for equal treatment in the criminal justice system, and creates hope for marginalized communities" has likewise engaged in

107. These attitudes are what drive notions of colorblindness, which is part of "a particular narrative about race: the story that, although racism was an unfortunate and regrettable part of our past, it has been almost entirely extinguished in the present." John Tehranian, *Playing Cowboys and Iranians: Selective Colorblindness and The Legal Construction of White Geographies*, 86 U. COLO. L. REV. 1, 29 (2015). Those who champion colorblindness adhere to a complete ignorance of race and its relevance. Powell, *supra* note 52, at 892–94. It presumes that the world is "racially fair," and that consciousness of race in the remedial realm is pernicious. *Id.* Professor Ian Haney-López provides an extensive analysis of how such attitudes have tainted constitutional jurisprudence, leaving in their wake a constitutional framework rooted in a colorblindness ideology that "disregards the reparative motives that animate affirmative action and renders immaterial the larger context of continuing discrimination in a society otherwise struggling to get past racism." Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1876 (2012).

108. Narrative change is essential to social movements. STORIES OF CHANGE: NARRATIVE AND SOCIAL MOVEMENTS (Joseph Davis ed., 2002); RINKU SEN, STIR IT UP: LESSONS IN COMMUNITY ORGANIZING AND ADVOCACY 165–182 (2003); see also Lydia Simas, *Rooting the Movement: The Importance of Political Education/Formation*, GRASSROOTS INT'L: BLOG (June 14, 2018), <https://grassrootsonline.org/blog/rooting-the-movement-the-importance-of-political-education-formation/> [<https://perma.cc/T9P8-2CNB>]; *Why Tell Stories for Social Change?*, WORKING NARRATIVES, <https://workingnarratives.org/article/why-stories/> [<https://perma.cc/G2ZP-NWGU>] (last visited Apr. 14, 2021).

109. The 1619 Project Curriculum, PULITZER CENTER, <https://pulitzercenter.org/lesson-plan-grouping/1619-project-curriculum> [<https://perma.cc/C889-PW9W>] ("The 1619 Project, inaugurated with a special issue of The New York Times Magazine, challenges us to reframe U.S. history by marking the year when the first enslaved Africans arrived on Virginia soil as our nation's foundational date.").

110. Nikole Hannah-Jones, N.Y. TIMES MAG.: THE 1619 PROJECT, <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/2MDA-MZ8Q>] (last visited Jan. 22, 2021).

111. Jeff Barrus, *Nikole Hannah-Jones Wins Pulitzer Prize for 1619 Project*, PULITZER CENTER (May 4, 2020), <https://pulitzercenter.org/blog/nikole-hannah-jones-wins-pulitzer-prize-1619-project> [<https://perma.cc/Z3FH-TM2C>].



this type of work.<sup>112</sup> In 2018, EJI opened a National Memorial for Peace and Justice and the Legacy Museum: From Enslavement to Mass Incarceration, spaces centered on reckoning with America’s history of racial injustice and racial terrorism.<sup>113</sup> More than 750,000 people have visited these sites since they opened.<sup>114</sup> EJI’s research reports, which focused on America’s racialized history, the era of Reconstruction, and the racial terror that followed, have been made available to educators and students nationwide to “advance a fuller, more accurate understanding of the nation’s history of racial injustice.”<sup>115</sup>

This type of historical work—work that builds and shapes our “collective memory”—can also help to subvert claims of innocence that stymie efforts to repair past racial harms still felt today.<sup>116</sup> These claims of innocence rest on the sense that one is not actively engaged in discrimination and therefore bears no responsibility for the racial inequality of the past or present.<sup>117</sup> Tending to the historical narrative that displaces blame allows proponents of reparations to focus

112. *About EJI*, EQUAL JUST. INITIATIVE, <https://eji.org/about/> [<https://perma.cc/6ECR-3NA9>] (last visited Feb. 5, 2021).

113. *The Legacy Museum: From Enslavement to Mass Incarceration*, EQUAL JUST. INITIATIVE, <https://museumandmemorial.eji.org/museum> [<https://perma.cc/EN5U-GMPW>]. The Museum and Memorial are each dedicated to the type of racial reconciliation and truth telling necessary to raise racial consciousness in ways that foster reparative justice. The Museum is “an engine for education about the legacy of racial inequality and for the truth and reconciliation that leads to real solutions to contemporary problems.” *Id.* The Memorial “is constructed of over 800 corten steel monuments, one for each county in the United States where a racial terror lynching took place. The names of the lynching victims are engraved on the columns. The memorial is more than a static monument. It is EJI’s hope that the National Memorial inspires communities across the nation to enter an era of truth-telling about racial injustice and their own local histories.” *The National Memorial for Peace and Justice*, EQUAL JUST. INITIATIVE, <https://museumandmemorial.eji.org/memorial> [<https://perma.cc/6QUQ-ZZLB>] (last visited Feb. 5, 2021).

114. Mike Cason, *EJI’s Memorial to Lynching Victims to Open for After-Dark Visits*, ADVANCE LOCAL: ALA. (July 17, 2020), <https://www.al.com/news/2020/07/ejis-memorial-to-lynching-victims-to-open-for-after-dark-visits.html> [<https://perma.cc/BD3M-7GV3>].

115. *EJI’s Racial Justice Teaching Tools Now on Flipgrid Discovery Library*, EQUAL JUST. INITIATIVE (Sept. 9, 2020), <https://eji.org/news/eji-racial-justice-teaching-tools-now-on-flipgrid-discovery-library/> [<https://perma.cc/5GH3-N2W6>].

116. The difference between history and memory is that “[h]istory is behind us, memory lives on with us. The problem we have in this country when it comes to making amends for slavery is that we have relegated it to history, thereby vanquishing it from memory and its horror from any relevance to our present.” FRANKE, *supra* note 58, at 142. We address that dynamic by making the injury suffered by enslaved persons “a part of our collective memory.” *Id.*

117. Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659, 674–75 (2003) (explaining how “white innocence” and the “den[ial] [of] any responsibility for current social conditions or past discrimination” is “[p]erhaps the largest obstacle to any black reparations movement”). The same rhetoric of white “innocence” pervades arguments against affirmative action. *See, e.g.*, Cecil J. Hunt II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477 (2006); Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1039–1040 (2007).

on a “distributive justice lens,” which turns attention to the appropriate allocation of resources in the absence of racial subjugation.<sup>118</sup>

Part of that work is also making visible to all the “psychological wage of whiteness”<sup>119</sup>—the material benefits and privileges that accrue to white skin in a racial caste system that is premised on notions of white superiority.<sup>120</sup> Racial inequality is so deeply woven into America’s fabric that the advantages and disadvantages of race have become expectations, and “inequities are obscured and rendered nearly invisible.”<sup>121</sup> That dynamic makes consciousness-raising necessary. Such work may be as simple as asking people to take stock of the ways that race, and for white people, how whiteness in particular, leads to advantage in their lives.<sup>122</sup>

118. Cf. Harris, *supra* note 90, at 1784 (explaining in the context of affirmative action advocacy that “[t]he distributive justice lens . . . would refocus the question . . . on what *would have been* the proper allocation in the absence of the distortion of racial oppression,” and that “[b]y not descending into the warp of sin and innocence, doctrine and legal discourse would be redirected toward just distributions and rights rather than punishment or absolution and wrongs” (emphasis added) (citing RONALD J. FISCUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION* 13–14 (Stephen L. Wasby ed., 1992)).

119. W.E.B. Du Bois advanced the notion that whiteness carries with it value, because “notwithstanding the material deprivations that working class whites historically have experienced, they were able to draw on the psychological wages of whiteness, which they treated as a material resource against the background of presumptions of black inferiority.” Carbadó, *supra* note 64, at 1614 n.95 (2011) (citing W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARDS A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA 1860–1880*, at 700 (1965)). One way to understand the “ideology of whiteness” is as one which “subjugates Whites as well as Blacks, pushing poor and working-class Whites to identify with other Whites at the top of the economic ladder, even though their economic and political interests tend to be more aligned with Blacks.” Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 *IOWA L. REV.* 1113, 1127 (2016).

120. Such a system carries with it “the legal legitimization of expectations of power and control that enshrine the status quo as a neutral baseline, while masking the maintenance of white privilege and domination.” Harris, *supra* note 89, at 1715. Peggy McIntosh helpfully described “white privilege as an invisible package of unearned assets that I can count on cashing in each day, but about which I was ‘meant’ to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.” Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies* 2 (Wellesley Ctrs. For Women, Working Paper No. 189, 1988); see also Stephanie Wildman, *The Persistence of White Privilege*, 18 *WASH. U. J. L. & POL’Y* 245, 249–51 (2005) (briefly describing the material forces that privilege race, such as exclusionary housing and educational systems, “societal practices and thinking patterns, including language itself”).

121. Harris, *supra* note 90, at 1777.

122. Professor McIntosh modeled this behavior by undertaking what she called the “crude work” of “identifying some of the daily effects of white privilege” in her life, leading to a list of forty-six “special circumstances and conditions [she] experience[s] that [she] did not earn but that [she has] been made to feel are [hers] by birth, by citizenship, and by virtue of being a conscientious law-abiding ‘normal’ person of goodwill.” McIntosh, *supra* note 120, at 4. “Consciousness-raising about race can include self-inquiry into one’s attitudes toward race, dialogue across racial lines, and inquiry into the life experiences of people of color.” Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323, 359 (1987).

Advocates can and should engage in the type of education and consciousness-raising I have suggested by looking to the broader movement for Black lives. The coalition Movement for Black Lives (“M4BL”), comprised of a collection of Black social justice organizations, is a model.<sup>123</sup> M4BL is, at its core, a “movement to recognize the full humanity of African Americans in public life.”<sup>124</sup> The movement emerged in response to the death of Black people at the hands of law enforcement and armed vigilantes.<sup>125</sup> It is complex, as all social movements are,

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123. Though distinct from the coalition, the movement for Black Lives I am referring to is the collection of activists and advocates who have centered the dignity of Black life and continuously engaged in advocacy and non-violent protest against racialized violence by the state. That social justice movement falls under the ambit of the coalition of the same name. M4BL was formed in December of 2014, was created as a space for Black organizations across the country to debate and discuss the current political conditions, develop shared assessments of what political interventions were necessary in order to achieve key policy, cultural and political wins, convene organizational leadership in order to debate and co-create a shared movement wide strategy. *About Us*, M4BL, <https://m4bl.org/about-us/> [<https://perma.cc/FVB7-QNKE>] (last visited Feb. 5th, 2021); *see also* Akbar, *Radical Imagination*, *supra* note 16, at 407–08, 407 n.3, 421–22 (detailing the history of the Movement for Black Lives). The organization Black Lives Matter was founded in 2013 in response to the acquittal of Trayvon Martin’s murderer. Black Lives Matter Foundation, Inc. is a global organization in the US, UK, and Canada, whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes. By combating and countering acts of violence, creating space for Black imagination and innovation, and centering Black joy, we are winning immediate improvements in our lives. *See About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> [<https://perma.cc/BG9G-BXTQ>] (last visited June 5, 2021). The Black Lives Matter organization is affiliated with M4BL, signing on to M4BL’s 2016 policy platform, “Vision for Black Lives,” and working with M4BL to introduce federal legislation to “invest in public safety initiatives, particularly in Black and Brown communities, and revamp the U.S. criminal justice system.” *See* Akbar, *Radical Imagination*, *supra* note 16, at 421–22 (listing Black Lives Matter as one of the organizations that signed on to the 2016 Vision); Brianne Garrett, *Black Lives Matter Cofounder Patrisse Cullors on her Activism—and Art—Beyond Hashtags*, FORBES (Nov. 2, 2020), <https://www.forbes.com/sites/briannegarrett/2020/11/02/black-lives-matter-co-founder-patrisse-cullors-on-her-activism-and-art-beyond-hashtags/?sh=72f90b501494> [<https://perma.cc/L2BA-FWYJ>] (describing the Black Lives Matter Global Network’s support of legislation as part of its affiliation with M4BL). Char Adams, *A Movement, a Slogan, a Rallying Cry: How Black Lives Matter Changed America’s View on Race*, NBC NEWS (Dec. 29, 2020), <https://www.nbcnews.com/news/nbcblk/movement-slogan-rallying-cry-how-black-lives-matter-changed-america-n1252434> [<https://perma.cc/6UD5-L9W4>]; Vann R. Newkirk II, *The Permanence of Black Lives Matter*, ATLANTIC (Aug. 3, 2016), <http://www.theatlantic.com/politics/archive/2016/08/movement-black-lives-platform/494309> [<https://perma.cc/8YQH-6AVP>]; *see, e.g.*, Peter Eisler & Alana Wise, *‘Black Lives Matter’: A Movement That Defies Definition*, REUTERS (July 9, 2016, 12:30 AM), <http://www.reuters.com/article/us-usa-police-blacklivesmatter-idUSKCN0ZP04A> [<https://perma.cc/29DK-2CSF>] (attributing the public’s confusion about BLM to its “decentralized structure”).

124. Nicole D. Porter, *Unfinished Project of Civil Rights in the Era of Mass Incarceration and the Movement for Black Lives*, 6 WAKE FOREST J.L. & POL’Y 1, 23 (2016).

125. Butler, *supra* note 52, at 1434, 1470.

but at its core asserts the dignity and humanity of Black life.<sup>126</sup> It does so in a country whose foundational values, expressed through an ideology of white supremacy, are at odds with those ideals. Fundamentally, the movement, and the advocates behind it, are changing culture and the historical calculus that undervalues Black life.<sup>127</sup>

The end of enslavement and the victories of the Civil Rights Movement came, in part, because enough people recognized that a world that perpetuated the myths that drove enslavement and subjugation was a world that produced unacceptable injustices.<sup>128</sup> The same shift in consciousness is needed in these times, and there is plenty of work to be done.<sup>129</sup> The scope of the damage leveled by COVID-19, when taken together with the damage done by a legacy of racial injustice, provides

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126. Accordingly, “[t]he Movement for Black Lives can be rendered in different ways, since the organizers motivated by #BlackLivesMatter and related struggles for decarceration, abolition, police reform, black liberation, and economic and gender justice are engaged in countless battles in local stages across the country.” Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 356 (2016) (citation omitted). The range of motivations for the movement therefore naturally produces a variety of tactics and strategies, as well as “debate and disagreement, experimentation, trial, error, and correction.” *Id.* At its heart, “the movement is focused on shifting power into Black and other marginalized communities; shrinking the space of governance now reserved for policing, surveillance, and mass incarceration; and fundamentally transforming the relationship among state, market, and society. Akbar, *Radical Imagination*, *supra* note 16, at 408.

127. Black Lives Matter movement organizers frequently discuss raising racial consciousness as a tool to build power to end anti-Black racism. *See, e.g.*, Ajamu Amiri Dillahunt, *Making Black People Powerful: An Interview with Alicia Garza*, AAIHS (Feb. 17, 2020), <https://www.aaihs.org/making-black-people-powerful-an-interview-with-alicia-garza/> [<https://perma.cc/7WMD-DH4R>]; Ellen E. Jones, *Opal Tometi, Co-Founder of Black Lives Matter: ‘I Do This Because We Deserve to Live’*, GUARDIAN (Sept. 24, 2020), <https://www.theguardian.com/society/2020/sep/24/opal-tometi-co-founder-of-black-lives-matter-i-do-this-because-we-deserve-to-live> [<https://perma.cc/6K94-6BXE>]; Abigail Haworth, *The Global Fight for Black Lives*, MARIE CLAIRE (Nov. 23, 2020), <https://www.marieclaire.com/politics/a34515361/black-lives-matter-international/> [<https://perma.cc/XYS3-XV2C>]; Ryan Bort & Kimberly Aleah, *Year in Review: How Black Lives Matter Inspired a New Generation of Youth Activists*, ROLLING STONE (Dec. 14, 2020), <https://www.rollingstone.com/politics/politics-features/black-lives-matter-protests-new-generation-youth-activists-1099895/> [<https://perma.cc/6QV3-YRST>]; Adams, *supra* note 123.

128. *See generally* KING, JR., *supra* note 43, at 102 (“The lament became a shout and then a roar and for months, no American, white or Negro, was insulated or unaware. The stride toward freedom lengthened and accelerated into a gallop, while the whole nation looked on. White America was forced to face the ugly facts of life as the Negro thrust himself into the consciousness of the country, and dramatized his grievances on a thousand brightly lighted stages.”).

129. Since this essay has engaged with the resistance advocates can expect, it should come as no surprise that educational and consciousness raising efforts will encounter resistance as well. Sarah Schwartz, *Lawmakers Push to Ban ‘1619 Project’ from Schools*, EDUCATIONWEEK (Feb. 3, 2021), <https://www.edweek.org/teaching-learning/lawmakers-push-to-ban-1619-project-from-schools/2021/02> [<https://perma.cc/8EU2-ZSXM>]; Barbara Rodriguez, *Republican State Lawmakers Want to Punish Schools that Teach the 1616 Project*, USA TODAY (Feb. 10, 2021), <https://www.usatoday.com/story/news/education/2021/02/10/slavery-and-history-states-threaten-funding-schools-teach-1619-project/4454195001/> [<https://perma.cc/3YLU-38A5>]; Leah Asmelash, *Idaho Moves to Ban Critical Race Theory Instruction in All Public Schools, Including Universities*, CNN (May, 6, 2021, 5:45 PM), <https://www.cnn.com/2021/04/27/us/critical-race-theory-idaho-bill-trnd/index.html> [<https://perma.cc/MT3X-6FGN>].

tangible evidence of the injustice, unfairness, and palpable pain experienced by Black people. By leveraging that evidence, advocates can engage with communities to imagine the kind of world we all want to live in.<sup>130</sup>

### B. *Be Concrete in Your Work*

Raising consciousness must be complemented by concrete steps toward reparative justice. Concrete steps have two benefits. First, they provide an actionable outlet for those whose consciousness on racial inequality has been raised. Second, they serve as a model for the type of transformation that reparations would drive on a large scale. This work—though focused on enacting reparations in the present—can blunt resistance rooted in concerns that reparations are impractical, or that focusing on America’s past and atoning for racial inequality is divisive.

In taking this approach, advocates should begin by pressing for reparative justice in their own communities, focusing exclusively on the heirs to a legacy of enslavement as the barometer for what is needed to repair and heal America.<sup>131</sup> Such an approach would be revolutionary, because it would put “racialized identities . . . to service to achieve social change through democratic renewal.”<sup>132</sup> It would require treating race like “the miner’s canary”: the condition of the racially marginalized would serve as the “sign of a danger that threatens us all.”<sup>133</sup> It carries with it the type of ethos that “those who have experienced discrimination speak with a special voice to which we should listen” as we seek reparative justice.<sup>134</sup> Such thinking rests on the premise that “[t]hose who are oppressed in the present world can speak most eloquently of a better one.”<sup>135</sup>

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130. See Akbar, *Radical Imagination*, *supra* note 16, at 407 (“Most lawyers see a problem and think, ‘How can I fix this law?’” This view is too narrow: it obscures the stakes and concedes to status quo arrangements. ‘The role of the law is to protect the state,’ Hayes reasoned. ‘Lawyers must work with movements to imagine with us the kind of state we want to live in. Only from there can we work together to think about the laws we need.’”); Amanda Alexander, *How Black Women Have Built Movements and Cultivated Joy*, BOSTON GLOBE (Feb. 11, 2021), <https://www.bostonglobe.com/2021/02/11/opinion/how-black-women-have-built-movements-cultivated-joy/> [https://perma.cc/RZFF8-5WA4] (suggesting that those who seek to advance justice focus on those already engaged in movement building and “define the future worth fighting for”).

131. See Akbar, *Radical Imagination*, *supra* note 16, at 479 (“Centering the experiences of poor people of color creates disruptions and contradictions. It points to law not as a power of stability, fairness, and neutrality, but of exploitation, dispossession, and the concentration of wealth. It telegraphs the enduring and catastrophic violence that law leverages and justifies. It invests us in a more imaginative and transformative project of building and shifting power and resources, one committed to people over the status quo.”).

132. Lani Guinier & Gerald Torres, *Excerpt from the Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy*, 27 N.Y.U. REV. L. SOC. CHANGE 1, 2 (2002).

133. *Id.* at 1.

134. Matsuda, *supra* note 122, at 324.

135. *Id.* at 346.

This type of framework ensures that reparative justice reaches those whose lives have been most harmed by racial inequality. It also ensures that those who have been most harmed have a central voice in defining reparative justice.<sup>136</sup>

Advocates should also study and support nascent reparative justice efforts that are already underway or that have proven successful,<sup>137</sup> pressing for truly transformative measures whenever feasible and taking steps toward reparative justice whenever possible.<sup>138</sup> Several local efforts provide ready opportunities for exploration and support. Burlington, Vermont's City Council passed a resolution in August 2020 that established a task force to study reparations for Vermont's role in slavery and to offer a formal apology on behalf of the city for that role.<sup>139</sup> The task force's work began in October 2020 and will continue for a year to determine how to proceed.<sup>140</sup>

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136. Among the advantages of looking to the potential recipients of reparations to shape reparative justice is the fact that

[t]heir language will not be abstract, detached or inaccessible; their program will not be undefined. They will advance clear ideas about the next step to a better world. The experience of struggling against racism has taught much about struggle, about how real people can rise up, look power in the eye and turn it around.

*Id.* at 346–47. Such experiences, unbounded by the limits of one's imagination, can credibly set forth a bold vision for reparations in much the same way that the enslaved “broke free from the world as it was, because *they imagined the world as it could be.*” GLAUDE, *supra* note 74, at 210.

137. For example, after a decade of concerted campaigning by Japanese Americans, the Civil Liberties Act of 1988 established a reparations plan for Japanese people who were incarcerated in concentration camps in the US during WWII, including \$20,000 per person. *See, e.g.*, Civil Liberties Act of 1988, 50 U.S.C. § 4215 (2020); Isabella Rosario, *The Unlikely Story Behind Japanese Americans' Campaign for Reparations*, NPR (Mar. 24, 2020), <https://www.npr.org/sections/codeswitch/2020/03/24/820181127/the-unlikely-story-behind-japanese-americans-campaign-for-reparations> [<https://perma.cc/M3PM-FU4Y>].

138. While bold action of this sort may foster even more resistance, such steps are necessary to remedy systemic racial inequality, and especially important given the relatively limited window of opportunity that 2020 presented. In other words, “[t]his is the time to strike, the time to take audacious steps to address systemic racial inequality—bold, sweeping reparative action. The action must be concrete and material, rather than solely symbolic, and must address current gaps in every significant domain of social well-being: jobs, politics, education, the environment, health, housing, and of course criminal justice. A window has opened, and acting fast is essential.” Richeson, *supra* note 64.

139. Burlington, Vt., City Council Res. 7.06 (2020) (enacting the Resolution Relating to Establishing a Task Force to Study Proposal for Reparations and to Consider a City Apology for the Institution of Slavery); *see also Burlington City Council Votes Unanimously to Pass a Historical Reparations Resolution to Study Reparations for Vermont's Role in Chattel Slavery*, VTDIGGER (Aug. 11, 2020, 2:11 PM), [https://vtdigger.org/press\\_release/burlington-city-council-votes-unanimously-to-pass-a-historical-reparations-resolution-to-study-reparations-for-vermonts-role-in-chattel-slavery/](https://vtdigger.org/press_release/burlington-city-council-votes-unanimously-to-pass-a-historical-reparations-resolution-to-study-reparations-for-vermonts-role-in-chattel-slavery/) [<https://perma.cc/U9NH-BXUG>]; Sawyer Loftus, *Burlington City Council Creates Reparations Task Force; Fails to Override Veto*, VTDIGGER (Aug. 11, 2020), <https://vtdigger.org/2020/08/11/burlington-city-council-creates-reparations-task-force-fails-to-override-voting-veto/> [<https://perma.cc/Q8UC-AR2D>].

140. Burlington, Vt. Res. 7.06.

Asheville, North Carolina, approved a resolution in July 2020 to support community reparations for the city's Black residents.<sup>141</sup> The resolution details the vectors of racial inequality rooted in enslavement, segregation, incarceration, and condemns the legacy of racism in housing, education, employment, economic development, and health.<sup>142</sup> It offers an apology for perpetuating racial inequity and establishes a planning commission to make recommendations “that will make significant progress toward repairing the damage caused by public and private systemic Racism.”<sup>143</sup>

Evanston, Illinois, passed a reparations resolution in 2019,<sup>144</sup> following the City Council's adoption of “a resolution affirming the City's commitment to end structural racism and achieve racial equity.”<sup>145</sup> The City has since held community meetings to gather public input on reparations, created a city council subcommittee to begin the reparations planning process, committed to use tax revenue collected from recreational cannabis sales to support reparations, and begun to identify areas of civic life to be supported by reparations.<sup>146</sup> Following additional planning, distributions from the Reparations Fund are expected in the foreseeable future, with applications for distributions in amounts up to \$25,000 available by mid-summer 2021.<sup>147</sup>

In September 2020, California became the first state government in the country to enact legislation to study and craft reparations proposals for slavery and its

141. Asheville, N.C., City Council Res. 20–128 (2020) (enacting the Resolution Supporting Community Reparations for Black Asheville).

142. *Id.*

143. *Id.* The Asheville resolution has garnered criticism for its failure to make firm commitments beyond establishing a reparations task force and has raised concerns as merely a symbolic gesture that will fail to meet the demands made by Black grassroots organizers, such as divesting from police, returning land taken during segregation to Black communities, and “resources, funds, community space and power, the end of the structures directly causing violence.” David Forbes, *Asheville's 'Historic' Reparations Resolution Is Not What It Seems*, SCALAWAG (July 24, 2020), <https://www.scalawagmagazine.org/2020/07/asheville-nc-reparations-black-demands/> [https://perma.cc/T4AX-BQ7C].

144. Evanston, Ill., City Council Res. 126-R-19 (2019) (enacting the Resolution Establishing a City of Evanston Funding Source Devoted to Local Reparations).

145. *Reparations*, CITY OF EVANSTON, <https://www.cityofevanston.org/government/city-council/reparations> [https://perma.cc/RU9N-FJ5W] (last visited Dec. 24, 2020).

146. *Id.*

147. *Id.*; *Evanston, Illinois, Becomes First U.S. City to Pay Reparations to Black Residents*, NBC NEWS (Mar. 23, 2021, 7:11 AM), <https://www.nbcnews.com/news/us-news/evanston-illinois-becomes-first-u-s-city-pay-reparations-blacks-n1261791> [https://perma.cc/87BB-JAFU]; Mitch Dudek & Fran Spielman, *Evanston Passes First-in-Nation Reparations*, CHICAGO SUN-TIMES (Mar. 23, 2021, 8:02 AM), <https://chicago.suntimes.com/2021/3/22/22345860/evanston-passes-first-in-nation-reparations> [https://perma.cc/HDA7-WRP3] (noting that applications are expected to be available by summer 2021).

effects.<sup>148</sup> State legislators in Texas, New York,<sup>149</sup> Vermont,<sup>150</sup> and Pennsylvania<sup>151</sup> have likewise announced or “introduced legislation that would apologize for their state’s role in slavery; recognize the lasting, negative impact of slavery on current generations of African Americans; and explore monetary reparations.”<sup>152</sup>

Advocates can lend their expertise, but of even greater value, they can listen, observe, and support. Putting the theoretical into practice can reveal what is possible.<sup>153</sup> By examining the elements of local reparations movements and programs, advocates can address the concern that acknowledging and atoning for the

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148. CAL. GOV’T CODE § 8301 (2020); Taryn Luna, *California Task Force Will Consider Paying Reparations for Slavery*, L.A. TIMES (Sept. 30, 2020, 3:23 PM), <https://www.latimes.com/california/story/2020-09-30/california-task-force-reparations-slavery-gavin-newsom-shirley-weber> [<https://perma.cc/6KRL-TWN7>].

149. Assemb. B. A3080-A, 242nd Leg., Reg. Sess. (N.Y. 2019), <https://www.nysenate.gov/legislation/bills/2019/A3080> [<https://perma.cc/C8ZS-Z3TB>].

150. H.478, 2019 Leg., Reg. Sess. (Vt. 2019), <https://trackbill.com/bill/vermont-house-bill-478-an-act-relating-to-establishing-a-task-force-to-study-and-consider-a-state-apology-and-proposal-for-reparations-for-the-institution-of-slavery/1704785/>.

151. Press Release, Rep. Christopher M. Rabb, Rabb Introduces State-Based Slavery Reparations Bill on 400<sup>th</sup> Anniversary of Enslaved Africans Arriving to North America (Aug. 30, 2019), <https://www.pahouse.com/Rabb/InTheNews/NewsRelease/?id=110151> [<https://perma.cc/N9Q4-843W>].

152. Teresa Wiltz, *Talk of Reparations for Slavery Moves to State Capitols*, PEW (OCT. 3, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/03/talk-of-reparations-for-slavery-moves-to-state-capitols> [<https://perma.cc/KD63-D585>].

153. See Cullors, *supra* note 58, at 1686–87 (describing insights derived from reparative justice through abolition).



harms of enslavement will deepen racial divisions.<sup>154</sup> The multi-faceted nature of racial inequality requires a dynamic response. Reparations advocates can draw on what has worked at the local level, while dispensing with that which has proven unworkable or inadvisable. Such efforts can also help assuage concerns that the financial cost is unbearable, unquantifiable, or cannot be borne by government revenue. Local reparations programs that seek to remedy racial inequality in the criminal legal system, education, employment, and health can provide models of success for national reparations programs.

These examples tell all those willing to listen that reparations are not only possible, but that reparative justice can be transformative. The experience can help to alleviate the fears, apprehensions, and disagreements that make reparations so difficult to obtain. They can allow us—on a small scale—to reckon with our past, shift consciousness, learn lessons, and proceed with the elusive task of continuing to heal the national wounds that have long plagued America.<sup>155</sup>

### C. *Apply Interest Convergence to Press for Wholesale Change*

In Part II, I described why the COVID-19 pandemic and uprisings for racial justice presented a unique opportunity to advance reparative justice. Leveraging

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154. For example, advocates seeking guidance on what reparative justice might consist of can also learn a great deal from those efforts that have sought to atone for harms inflicted on Black people in more recent years. Between 1972 and 1991, Chicago Police Commander Jon Burge and officers under his charge tortured confessions out of more than 100 suspects, most of them Black men. Aamer Madhani, *Chicago City Council Approves Reparations for Police Torture Victims*, USA Today, <https://www.usatoday.com/story/news/2015/05/06/chicago-city-council-torture-reparations-jon-burge/70885118/> [<https://perma.cc/9W6U-5TQW>] (May 6, 2015, 5:45 PM). Burge was fired in 1993. G. Flint Taylor, *A Long and Winding Road: The Struggle for Justice in the Chicago Police Torture Cases*, 17 PUB. INT. L. REP. 178, 185 (2012). Advocacy over the next two decades resulted in a reparations ordinance that provided for payments to Burge’s victims. Chi., Ill., “Reparations for Burge Torture Victims” Ordinance (May 6, 2015), [https://www.chicago.gov/content/dam/city/depts/dol/supp\\_info/Burge-Reparations-Information-Center/ORDINANCE.pdf](https://www.chicago.gov/content/dam/city/depts/dol/supp_info/Burge-Reparations-Information-Center/ORDINANCE.pdf) [<https://perma.cc/ZC2C-74TP>]; Mitch Smith & Monica Davey, *Chicago to Pay \$5 Million to Victims of Police Abuse*, N.Y. TIMES (May 6, 2015), <https://www.nytimes.com/2015/05/07/us/chicago-to-pay-5-million-to-victims-of-police-abuse.html> [<https://perma.cc/KKY8-2VXE>]. The reparations effort also included an apology from City Council to those tortured by Burge and officers under his command. Chi., Ill., City Council Resolution SR2015-256 (2015) (resolving that the mayor and members of the City Council would “apologize to the Burge victims”). Beyond financial payments and an apology, reparations included the creation of a center to “provide psychological counseling, health care services and vocational training to the torture survivors, their family members and others affected by law enforcement torture and abuse”; free education at Chicago City Colleges for torture victims and their families; assurances that the story of the Burge torture saga would be taught in Chicago Public Schools; and the building of a public memorial in honor of the torture victims. *The Reparations Ordinance*, CHICAGO TORTURE JUSTICE MEMORIALS, <https://chicagotorture.org/reparations/ordinance/> [<https://perma.cc/XYL3-S8JM>] (last visited June 28, 2021).

155. Concrete action also helps us recognize that the path to reparations is necessarily messy, and complications abound. That is because it would be “hard, if not impossible, to fully disentangle the different dimensions of [racialized] harm from one another. Ultimately, we are obligated to deal with all of it as the massive totality that it is. But we are equally obligated to acknowledge every last wound in every last sector of our lives in which pain has been inflicted and borne.” DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 242 (2019).

the moment will require, among other things, “transforming the vision of a minority into a consensus acknowledged and embraced by the majority.”<sup>156</sup> A sizeable number of Americans—including the politically powerful—must come to understand that the relief reparations provide to Black people are in the interest of our nation.

Fundamentally, this is a restatement of Professor Derrick Bell’s interest convergence principle, which

asserts that relief from racial discrimination, when it comes, requires that policy makers perceive the relief we seek will provide a clear benefit for the nation or portions of the populace beyond African Americans. No matter how harmful, exploitative, or life threatening a racist policy or practice is, petitions for reform are *recognized and implemented only so long as they advance the nation’s interests*.<sup>157</sup>

In other words, convincing people that reparations are owed to Black people in light of America’s history of racial genocide and terror is not by itself going to be enough.<sup>158</sup> Moral arguments are compelling, but substantive progress will only be made when Americans come to understand that reparative justice has value for all.

It is of course true that “[t]he arguments that victims will have to make and perpetrators will have to accept before any reparations are awarded will raise consciousnesses about the obligation and need to correct past wrongs.”<sup>159</sup> After all, the object of “reparations is at its heart transformative. It recognizes the crimes of

156. CARVING OUT A HUMANITY, *supra* note 46, at 156.

157. *Id.* at 147; see also Bell, Brown v. Board of Education and the Interest Convergence Dilemma, *supra* note 65, at 523 (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”); BELL, AND WE ARE NOT SAVED, *supra* note 100, at 136–37 (arguing that the lack of interest convergence serves as a barrier to reparations); Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors’ Story*, 24 B.C. THIRD WORLD L.J. 13, 16 (2004) (arguing that “resistance to racial justice can be abated” by “demonstrat[ing] the convergence of interests between the advocates of reparations and the majority population”).

158. The moral case for reparations for enslavement is clear. See generally Darity, *supra* note 4; Hannah-Jones, *supra* note 51; Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/VC2L-LZNN>]. Yet despite that clear case, to date, the only people who were paid reparations following slavery were those who enslaved people. Tera W. Hunter, *When Slaveowners Got Reparations*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/opinion/when-slaveowners-got-reparations.html> [<https://perma.cc/FV47-KRZE>] (describing how the District of Columbia Emancipation Act, passed in 1862, “paid those loyal to the Union up to \$300 for every enslaved person freed” to “ease slaveowners’ pain” following emancipation); see also *The District of Columbia Emancipation Act*, NAT’L ARCHIVES, <https://www.archives.gov/exhibits/featured-documents/dc-emancipation-act> [<https://perma.cc/FA4R-7T7P>] (last updated Apr. 5, 2019).

159. Matsuda, *supra* note 122, at 397. I do not mean to suggest that a focus on interest convergence is the only means of obtaining racial justice, that advocates must only pursue paths to reparative justice that are in the interests of their opposition, or that interest convergence is without its shortcomings. See Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U.L. REV. 149, 164–65, 197 (2011) (critiquing interest-convergence and suggesting that “reformers seeking change would do better to think of the interest-convergence thesis as but one weapon in the fight for progress rather than as the entire arsenal”).

the powerful against the powerless. It condemns exploitation and adopts a vision of a more just world.”<sup>160</sup> But it is only at the point when the powerful and the masses feel reparations are appropriate and in their interest that they will come.<sup>161</sup> And if that is the case, and we want reparations to be more than a financial payoff and a half-hearted apology when they arrive, subject to widespread resistance that undermines the value of those offerings, advocates must work alongside and in support of movements to change the calculus of what is in our nation’s interests, leveraging the opportunity presented by crises—like those we are currently mired in—to do so.<sup>162</sup>

One might bolster such a focus by engaging in advocacy that highlights, for example, the net positive impact of reparative justice policies on America as a whole, even as those policies are explicitly aimed only at the descendants of the enslaved. For example, some estimate that the racial wealth gap’s “dampening effect on consumption and investment will cost the US economy between \$1 trillion and \$1.5 trillion between 2019 and 2028—4 to 6 percent of the projected GDP in 2028.”<sup>163</sup> If reparations were deployed to reduce, and ultimately eradicate the racial wealth gap that began at America’s birth,<sup>164</sup> the American economy would be improved for many.<sup>165</sup> Government efforts to redress a legacy of racial inequality would require investments in education, health, justice, housing, and other facets of life with an eye toward equality for all.<sup>166</sup> These types of net gains could produce the support needed to make reparations a reality.

The interests among advocates for reparations are converging with those of the growing portion of the population who have had their beliefs about America

160. Matsuda, *supra* note 122, at 394.

161. *See id.* at 396 (describing the political tradeoff that potential recipients of reparations might be forced to make in waiting until the powerful decide reparations are appropriate, thereby reinforcing the power imbalance that has driven injustice).

162. Professor Michelle Alexander helpfully put it, “[W]e have within our power the capacity to build a truly transformational, even revolutionary movement that helps to change the culture of this country and create—proactively create—the kind of crisis that changes the calculus for those in power about what truly is in their interests.” *CARVING OUT A HUMANITY*, *supra* note 46, at 313.

163. Nick Noel, Duwain Pinder, Shelley Stewart, & Jason Wright, *The Economic Impact of Closing the Racial Wealth Gap*, MCKINSEY (Aug. 13, 2019), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap#> [<https://perma.cc/8SHQ-NGXC>]; *see also* Irina Ivanova, *If Black Families Were as Rich as White Ones, U.S. Economy Would Be \$1.5 Trillion Bigger*, CBS NEWS (Aug. 15, 2019), <https://www.cbsnews.com/news/racial-wealth-gap-costs-economy-1-5-trillion-dollars-report-finds/> [<https://perma.cc/DVX8-GGZJ>].

164. *See* DARITY & MULLEN, *supra* note 4, at 264 (proposing reparations to “eradicate the racial wealth gap” because “today’s differential in wealth captures the cumulative effects of racism on living [B]lack descendants of American slavery” (emphasis removed)).

165. *See* Mehrsa Baradaran, *Closing the Racial Wealth Gap*, 95 N.Y.U. L. REV. ONLINE 57, 65–72 (2020) (detailing how targeted efforts to increase homeownership as a means to close the racial wealth gap can foster revitalization that will have net positive effects on education, health, public infrastructure, and employment opportunities).

166. *See id.* at 76 (“Dealing with inequality can have trickle-up effects and raise all boats.”); Ogletree, *supra* note 157, at 16–18 (“In short, legislation for reparations could be generalized to erase societal disadvantages suffered by whites as well as [B]lacks.”).

shaken by its failings and who are compelled by a need to repair our past; this convergence can be transformative. Both are motivated to remake our nation and create a new status quo. Advocates must leverage the alignment of such interests, make racial justice central in all that they do, and seek wholesale changes to American society to confront and address the nation's original sin.

## V.

### CONCLUSION

The health and racial injustice crises we face have exposed the contradiction that haunts our country: a democracy where race and identity are used to justify the inequitable structure of society.<sup>167</sup> Symbolically and tangibly, confronting this contradiction may lead us to topple the status quo, paving the way for us all to create something entirely new. Imagining the resistance to reparations allows advocates to engage in work that will bring America closer to reparative justice. By raising consciousness, taking concrete steps toward reparations now, and applying interest convergence, we may end up with a more just future, and with it, a better country than the one we currently inhabit.

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167. GLAUDE, *supra* note 74, at 6–7; WILKERSON, *supra* note 102, at 17–18.