The Unintended Consequences of Promising Black Americans Reparations

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In this article, I offer the opposing view (con-side) against reparations for American slavery, as if in a forensic debate before a moot court: I presume the American public will judge the merits of my opposing arguments. I oppose reparations for slavery based on: 1) the legal standard of culpability, 2) the "clean-hands doctrine," 3) Black people who were themselves slave owners, and 4) fairness in the administration justice. While anyone else is welcome to argue the pro-side, I argue the con-side of the following proposition: America owes Black Americans reparations because of its history of plantation slavery, which has privileged White Americans economically over Black Americans. I provide a plethora of evidence that reparations and justice are incompatible in the application of American justice. Moreover, any law requiring reparations for slavery could create an unintended liability for far too many Black Americans whose ancestry extends far beyond Sub-Saharan Africa.

Keywords: black slave owners, reparations, culpability, justice, law, proposition, injury, debate

DEBATING A PROPOSITION

To avoid spuriousness in my argument, it makes more sense for me to get right onto the topic. I will abide by long established procedures for arguing against a proposal, when debated as a proposition. Reparations for America slavery is a controversial topic, to say the least. There are two sides of a debate, detailed explicitly in *Fundamentals and Forms of Speech* by Weaver and Ness (1957): a classic Twentieth century speech textbook.

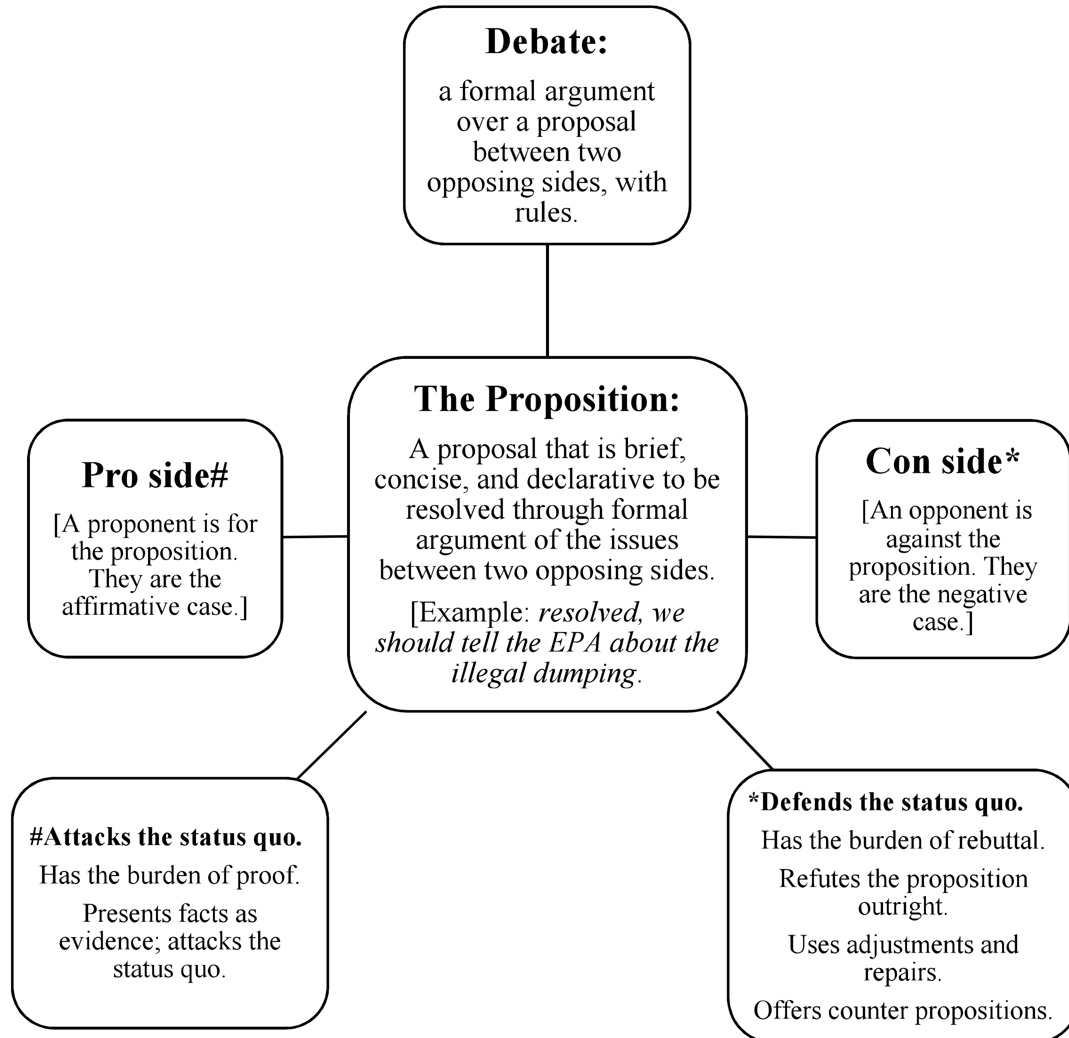
The proponents, *pro-side* of the argument are those who advocate for the stated proposition, they have the *affirmative case*. Why is the change they propose better than what exist currently? The affirmative case has the burden of proof, which obligates proponents for the proposition to prove their claims by attacking the status quo (Weaver & Ness, 1957).

On the other hand, the *con-side* of the argument (the *negative case*) has the burden of rebuttal, which obligates the opponents of the proposition to defend the status quo fiercely. Opponents demonstrate flaws in the evidence provided by the proponents of the proposition. The con-side must seek to discredit every piece of evidence in support of the proposition and must not allow any single piece of evidence to remain unchallenged (Weaver & Ness, 1957).

Debate is rooted in the philosophy of science, where proving a general negative assumption is not required, i.e. criminal courts operate on the general negative assumption that all persons accused of a crime are innocent until proven guilty; however, when accusers (state prosecutors) show sufficient evidence of guilt, this proof to the contrary of a general accepted belief (innocent until proven guilty) is more than enough to alter the accepted belief—presumption of innocence. Showing proof of guilt for a

single instance is sufficient for a verdict of guilty. For example, a charge of murder once proved is sufficient to show the accused is in fact guilty; furthermore, the most parsimonious standard of proof means that it is not necessary to prove the impossible task that a person is factually innocent at all times in his or her life. Proving murder is strong enough to demonstrate the proposition of guilt for the single time, thus, win the debate. Figure 1 shows responsibilities of the proponents and opponents in a forensic debate.

FIGURE 1
THE RESPONSIBILITIES OF PROPONENTS AND OPPONENTS IN FORMAL DEBATE



It is much more parsimonious to assume people innocent than to presume them guilty. The impossible task of showing all humans, past and present, to be innocent at all aspects of their lives is impossible, thus, the negative case need not be proved; it should be assumed. “Innocent until proven guilty” is the status quo, the negative case. The charge of murder is the proposition, the affirmative case. In fact, it is the job of the pro-side to offer proof as exact as any scientific hypothesis, with a confidence interval of at least 95%, or getting a correct verdict 19 out of 20 times. In other words, if the pro-side has any chance to win the debate it must prove their arguments with scientific precision. Carroll Quigley (1979) in *The Evolution of Civilization* argues the nature of proof the following way:

...these rules about scientific hypotheses are not derived from any sense of economy or of esthetics, but rather arise from the nature of demonstration of proof. The familiar judicial rule that a man is to be assumed innocent until he has been proved guilty is based on the same fundamental principles as these rules about scientific hypotheses, and, like these, rests ultimately on the nature of proof. We must assume that a man is innocent (not guilty) until we have proof of his guilt because it is always simpler to assume that things are not so than to assume that they are, and also because no man can prove the negative "not guilty" except by the impossible procedure of producing proof of innocence during every moment of his past life. (If he omits a moment, the charge of guilt could then be focused on the period for which proof of innocence is unobtainable (pp. 37-38).

The affirmative case for reparations for American slavery bears the burden of proof as to why the proposition is warranted. The opponents of the proposition are against the proposition and they bear the burden of rebuttal. The con-side are the negative case, in that they protect the status quo, and need not prove the proposition. It is their job to defend against the evidence presented as proof by the pro-side. Opponents can refute the proposition outright, offer counter propositions (a better theory), or adjust and repair the proposition being affirmed by the pro-side. It is the con-side's job to counter the evidence by opposition and hold the pro-side to the highest standard of proof that is required of the proponents to win the debate (Weaver & Ness, 1957).

The Current Debate Proposition

The proponent (pro-side) argues in favor of the following proposition: *resolved, America owes Black Americans reparations because of its history of plantation slavery which has privileged White Americans economically over Black Americans.* [My use of Black American, rather than African American, is used to put White Americans and Black Americans on equal footing in the debate.]

The opponent (con-side) refutes the aforementioned proposition, countering: *America does not owe Black Americans reparations because of its history of plantation slavery which has not privileged White Americans economically over Black Americans.*

ARGUMENTS AGAINST REPARATIONS FOR AMERICAN SLAVERY

The demand for reparations has been seen in the mainstream media recently, with nearly all the democrat presidential hopefuls, on April 5, 2019 at the National Action Network meeting, vowing to Mr. Al Sharpton that if one of them is elected US president they would sign reparations into law. The grievances they embrace come from a sporadically argued, yet, troubling past, of which many Americans are ashamed. Motion picture portrayals of White people's role in slavery in American history, including the original TV miniseries Roots (1977), based on the book by Alex Haley, provokes such guilt in some White Americans that they vow to make right an historical wrong. Young people online are using *23andme* to verify their sub-Saharan African ancestry, but much to their shock and chagrin. Nia Hope on January 6, 2019 found out in her live DNA reveal that her European ancestry, through her mother's mitochondrial bloodline, was 40% White: her reaction, unscripted and genuine, says more about the sentiment of the resurgence in reparations arguments than a book of words could say (Hope, 2019). The #1 comment Hope received with 603 "thumbs up" votes reads "when you find out you owe reparations." The second highest reads "D.N.A. = definitely not African" with 428 thumbs up votes. Slavery is most definitely the crux of the legal and moral claims for reparations for slavery, especially against the United Stated of America (Davidson, 2012; Jordan, Mount, & Parker, 2018; Shepherd, 2018). Modern White Americans are undoubtedly held responsible for the evil deeds of their White ancestors. Not one of the aforementioned articles claims slavery to be anything other than evil.

For more than 40 years now, reparations has been fostered by mostly Black media sources, in favor of it for legislative reasons, not moral or legal, and covered sporadically by White media sources loosely in favor of it when that source is placating to Black audiences. Critical race theory has apparently embraced the concept of reparations as restitution for American slavery, and remains steadfast in the pursuit (Frith & Scott, 2018; Olmsted, 1998). The demand is for $500 million from one author (Lechtrek, 2012; Mastin, Campo, & Frazer, 2005). Another author couches the claim in post-reconstruction era politics to a modern "superfund" argument; most certainly as restitution and reconciliation rooted in the perceived historical wrong doing of Western cultures on non-Western peoples (Franklin, 2012; Franklin, 2013). A Google Scholar search revealed *The Journal of African American History* published 21 articles with the word "reparation" in the title of the article. None of the articles' abstracts were against the proposition, all in favor. The articles appear to be competing with each other as to which idea of reparations is more feasible. The articles in general proliferate the idea of the construct, but do not apparently challenge it. However, not all Black Americans buy into the media depictions of fairness and justice.

Shelby Steele in a March 5, 2017 Wall Street Journal article, "The Exhaustion of American Liberalism," called "white guilt" nothing more than "mock politics based on the pretense of moral authority." Steele (2018) followed up with the sobering fact that black protests are losing its power because more White Americans are starting to judge black people by a universal fair standard. Despite the popularity in race politics feeding the appetite for reparations, arguments for reparations are not easily defended when the nuanced evidence of American slave history is thoroughly considered. What role did Black Americans play in proliferating slavery? Did Black Americans have "clean hands" in enslaving other Black people?

Did Black Americans Own Slaves?

It is not clear as to how the dispensation [See the Appendix for a Glossary of terms section of this paper for definitions of legal terms.] for blacks and restitution from whites for slavery reparations can be fairly adjudicated by any system of justice when black people owned slaves, possibly in the tens of thousands (Koger, 1985; Rogers, 1995). Historical documents prove that a large number of slaves who purchased their own freedom eventually ended up purchasing thousands of slaves, along with huge partials of land on which their slaves worked (Johnson & Roark, 1984). Contrary to common beliefs, Black American slave owners were not all purchasing slaves solely for benevolent reasons (Gates, 2017).

The economic benefits of slavery was apparently not predicated purely on race because former slaves were permitted to amass fortunes from their innovative ideas (in one case being a barber and real estate owner) then purchasing and selling slaves (Koger, 1985; Rogers, 1995). The 1830 census count shows evidence that 4% of "Free-Colored" owned slaves, and 19% of free Whites owned slaves, as Carter G. Woodson examined this decade in particular (Gates, 2017). And, "Free Negroes" were purchasing white slaves until 1670 when Virginia passed a law prohibiting the practice: "Hening's Statutes, Act V, 1670, 'No Negro or Indian, though baptized and enjoying their own freedom shall be capable of any purchase of (white) Christians…'" (Rogers, 1961, p. 61). Direct evidence Blacks did own Whites in America.

People calling for reparations are disconnected from any history where White Americans were slaves, to a more romanticized modern portrayal of black slaves with white masters. There were hundreds of white slaves who perished long before black slaves were brought to America. Rogers (1995) claims that the "first slaves held in the United States were not black, but white" and "White people were sold in the United States up to 1826, fifty years after the signing of the Declaration of Independence" (Rogers, 1995, para 64). Free-Negroes were buying white slaves in Virginia in 1670, approximately "50 years after they had arrived in chains" (Rogers, 1995, para 66). Rogers found further evidence that in Louisiana "Free Negroes" purchased white slaves in such numbers that laws prohibiting the act were passed in 1818.

Many states never had a single slave: Evidence can be found in the 1870 census taken after the Civil War had ended in 1865. In fact, of the 10 US territories, 8 territories had no slaves living in them at all from 1790 to 1870. Several of the states during the period of 1790 to 1870 never had a single slave living within those borders. In 1830, there were 319,599 Free-Colored, of which 3,776 Free-Colored owned 12,907 slaves (Gates, 2017, p. 60). This is 4% of the Free-Colored population in 1830 that owned at least

one slave [12,907/319,599 * 100 = 4.04%]. From this data, we can calculate the percent of free whites who owned slaves because the 1830 census shows the population count of whites in 1830. There were 18.94% of free-whites who owned slaves [2,009,043 (tot. slaves) – 12,907 (slaves owned by free-colored) / 10,537,378 (white pop.) * 100 = 18.94%]. Perhaps a much better way to present the data is to argue that 95.96% of Free-Colored did not own a single slave in 1830, and 81.06% of free-whites never owned a single slave in 1830. These numbers are taken directly from the Census of the United States (1870), "Table 1: Population of the United States (by State and Territories) in the Aggregate, and as White, Colored, Free Colored, Slave, Chinese, and Indian, at Each Census."

Census evidence is contrary to the claim which accuses all whites of having "white privilege" based on the color of their skin because it proves that 81% of whites had no dealings in slavery in 1830, a year singled out by Carter G. Woodson. Moreover, Gates (2017) reported that according to Woodson, 58% of black slave owners owned more than one slave likely for economic reasons, and 42% owned just one slave "likely for benevolent reasons." The failure to show evidence that free blacks who owned just one slave transferred title to the one slave they owned appears to negate the assertion of benevolence. The evidence of the magnitude of black slave owners is much worse when considering eight decades, sequentially.

The count in South Carolina of black slave owners, from 1790 to 1860, is well into the thousands. Koger (1985) shows for the period 1790 to 1860, there were 1,738 black slave owners (reported in his Table 2.1) in South Carolina who owned 8,997 slaves (reported in his Table 2.2). When I extrapolate from South Carolina to the 27 of 37 states that participated in slavery (and the 2 of 10 US territories) for the period 1790 to 1860, this means it is possible that tens of thousands of slaves were owned by black slave owners nationwide. It is plausible that black slave owners owned well over 200,000 slaves, extrapolating from Koger's numbers. There is no reason to believe that the 4.04% of black slave owners dropped off precipitously from 1830; moreover, if black slave owners continued to own 4.04% of the 3.9 million slave population reported in the 1860 census, they would have owned 157,560 slaves. Adams (2016) seems to be suggesting that the number of black slave owners is underestimated given that many of the slave states had huge populations of "Free-Negro" slaveholders:

> *Accordingly, the existence of this affluent slaveholding caste of free blacks directly challenges modern society's predispositions of the belief in strictly defined roles for whites and blacks in the Antebellum South. Though the vast majority of African-Americans in the United States were slaves, their status does not diminish the facts existing in Antebellum black communities; namely that within the United States there was a third caste made up of several thousand black slave owners, who commanded a large number of slaves, and fully embraced the peculiar institution* (p. 25).

It should be noted that Koger (1985) and Gates (2017) show source documents and name directly black slave owners of this affluent Black slaveholder caste.

More telling was that former black slaves purchased their own freedom then eventually become slave owners themselves. One such black slave owner was John Carruthers Stanly of North Carolina who owned three plantations with 163 slaves, and he hired three white overseers to manage his slaves (Gates, 2017, p. 62). It is a spurious declaration that Carter G. Woodson assigned benevolent reasons for blacks who owned just one slave, but he denied by omission benevolent reasons to the vast majority of whites in 1830 who never owned a single slave. Moreover, there is a tremendous amount of difficulty in reparations as compensation for slavery.

IS POLITICAL REVENGE JUSTICE?

There is little doubt that the views on White Americans paying reparations to Black Americans for the past sins of White slaveholders weighs heavy on the conscious mind, as a burden or a blessing, depending on which side you're on. Julian Kunnie says Justice is never too late: arguing that global

impoverishment is largely due to the greed of Western Imperialism, "led by the United States and facilitated by the military, political, and economic actions of the North Atlantic Treaty Organization" (Kunnie, 2018, p. 44). Nevertheless, there is skepticism that the promise of reparations is a valid proposition. Possibly the most succinct illumination of the fervor for systematic justice and the rule of law comes from Emil Brunner (1945) "Justice and the Social Order" where the author argues:

> *It lies in the nature of law to fix, to settle. In many languages the notion of law is connected with that of settlement. Insofar as man is regarded in his legal aspect, he is regarded as one who is settled, as one who is the object of a decision. Further, law of necessity generalizes, it embraces, in one rule a multiplicity of cases. Every law is a scheme. There can be no such thing as a law which discriminates in favor of the individual, which is entirely fitted to the individual, which would admit as valid the uniqueness of the individual, for that would invalidate the very conception of law. Hence it is precisely justice which can never "do justice" to the single human being as a unique individuality (pp. 21-22).*

The goal of justice is that justice must be blind to bias, as it is never to favor the individual. Justice must encompass all individuals without prejudice, and settle matters equitably.

Proving harm in the reparations debate is a tremendous task because the burden is on the advocates for reparations to prove that only White Americans alive today are somehow the direct beneficiaries of slave owners from 1670 to 1865. Proponents must prove white people alive today are legally culpable for their ancestors' wrongful deeds. Further, advocates for reparations must prove why the descendants of the thousands of black slave owners are not equally culpable for compensating the posterity of the white slaves they owned.

Hypothetical Example of American Justice

I can show by hypothetical example, similar to what has occurred in real life instances, a point of justice in a United States criminal matter.

Imagine a young couple whose luck is low. They decide to rob a dollar store in a rural town for some quick cash with a low police presence. The young man invites three of his male friends to help with the caper. The day of the heist, one of the young men shoots and kills a store clerk. The young woman's involvement is as the getaway driver. The four young men storm out of the store the day of the robbery with some cash, load into the car and two miles down the road, all five of the bandits are caught and arrested. The trials occur and all five are found guilty of murder, including the female getaway driver. In US justice, all five receive a guilty verdict of murder after their trials, even though only one has pulled the trigger. Is this justice? If so, why?

Why is it justice that when an innocent person is murdered in the commission of a crime that all the criminals involved are convicted of murder, irrespective of the degree of their actual involvement, or the punishment they receive?

Is Compensation for Slavery Practicable?

Systemic justice precludes favoritism. Justice itself appears to thwart the proposition of reparations that favors one race at the expense of another race. Adjudging guilt by the culpability of genealogy, a charge of guilt by connection to the past merely by the color of skin is reprehensible to justice. Emily Sherwin (2004, p. 1444) who takes "no position on the overall moral or legal viability of a claim to reparations for slavery" summarizes the problems she sees when unjust enrichment is not considered, but merely demonstrating the difficulty of proving harm regarding reparations as compensation claims in the following passage:

> *Slavery reparation claims, when asserted as claims for compensation, face a variety of difficulties that have been well described by others. Looking only at the initial harm to slaves, there are problems in determining an appropriate baseline from which to measure the effects of enslavement. If the initial injury can somehow be defined, the passage of time and the countless human acts and choices that have intervened lead to daunting problems in tracing the injury to current generations of Black Americans and separating the harm of enslavement from the effects of more recent public and private acts. The problem of linking past harm to present claimants is not only a problem of proof, but also one of logic because few if any current claimants would exist in a counterfactual world in which slavery did not occur. Further, time has eliminated all or nearly all defendants who participated in the wrongdoing* (pp. 1444-1445).

Reparations to Black Americans for a presumed connection to slavery favors the individual by fitting like a suit to one individual justice while stripping the suit away from the other individual with naked injustice. Justice cannot seem like revenge. A system of justice cannot be tailored to an individual by a poorly connected ancestral grievance without such a ruling invalidating equity and fairness in the application of laws. This is why the cousins, brothers, sisters, fathers, and mothers of villains like Frank and Jesse James, and the Younger brothers, all robbers and thieves, are never punished for the crimes of their guilty blood relatives. It is seen, however, in tyrannical cultures that entire families are punished for the deeds of one relative; sometimes entire families in barbaric cultures can face hard labor camps for the wrong doings of their ancestors. There is no presumption of innocence in such cultures. In the United States retaliatory justice is (or should be) vehemently rejected.

CLOSING ARGUMENTS AGAINST REPARATIONS

In summary, America should not pay Black Americans reparations for slavery because its history of plantation slavery has not been proved to have privileged White Americans economically over Black Americans.

The evidence supporting the proposition is spurious at best, and it seems to pivot on revenge at worst. Certainly there is an element of legal process in both civil and criminal law. There lacks standing because no person alive today can demonstrate that they were a slave or owned a slave in the period of dispute, 1670 to 1865, when slavery as an economic institution was ended after the American Civil war. There is the matter of unjust enrichment that was eloquently elucidated by attorney Emily Sherwin in her article "Reparations and Unjust Enrichment." Not only is there the problem of statutes of limitation for claims, but, these claims are compacted by who can prove standing in an appropriate court of jurisdiction. Then there is the problem of culpability and clean hands.

Rogers referred to "Free-Negroes" who own whites in 1670 all the way up to 1826. He also shown historic evidence that Louisiana and Virginia needed to pass laws to stop the practice of Free-Negroes purchasing white slaves. Gates (2017) confirms that 3,776 free-colored owned 12,907 slaves in the census year 1830, which was 4% of the free colored population. The fact that a very significant number of free blacks owned slaves, both white and black, negates the ability to claim clean hands. When considering the period of slavery from 1790 to 1860, the count in Southern slave states of black slave owners is well into the tens of thousands (Johnson & Roark, 1984; Koger, 1985).

Moreover, the vast majority of people living in the era of slavery never owned a single slave. Eight of 10 US territories had no slaves. And, several of the States never had a single slave in their borders. Five years after slavery ended in American in 1870, the US Census counted, 3.9 million slaves, among 31,000,000 people living in the USA. There is now approximately 327,000,000 people living in the USA, or 10.5 times more people.

How can so many people who never had involvement with slavery be accountable for slavery which happened before they were born? Punishing people for crimes for which they are innocent is cruel. The reparations discontent appears to be political revenge rather than justice. In the highly unlikely event that

reparations are required by law, the Black American descendants of black slave owners might be mandated to pay reparations to the descendants of the tens of thousands of slaves they owned.

It appears compensation for slavery, when injury is predicated on skin color (group membership) alone, is not achievable. Furthermore, culpability for slavery purely based on the assumption that all White Americans are privileged (unjustly enriched) is presumed. People arguing for reparations assume that Black American people had no significant role in proliferating slavery: the evidence shows the contrary is true. Furthermore, establishing rightful parties, jurisdiction, statutes of limitation, and legal standing are serious limitations when complainants strive to establish an unbroken chain leading back to their injuries from slavery, a period from 1670 to 1865.

Black Americans with mitochondrial DNA of 40% or more European ancestry might owe reparations too. In this case, the one-drop rule would not be good enough to count as being Black. More than a few people in the country who consider themselves Black or African American would find that they are linked by DNA to an ancestry of slavery. The good news is with this vein of logic, nearly no American would be required to pay, considering the tremendous amount of race-mixing (miscegenation), migration and immigration that has occurred in the USA since 1670. The fact that Black Americans have the lowest median household income of any other race group means that we can't afford to pay reparations if required by law to do so.

For all the aforementioned reasons, reparations and justice are incompatible in the application of the American system of jurisprudence.

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APPENDIX

Culpability: "Sufficiently responsible for criminal acts or negligence to be at fault and liable for the conduct." Retrieved from, https://www.law.cornell.edu/wex/culpable

Clean Hands Doctrine: "The principle that someone who violates equitable norms cannot then seek equitable relief or claim a defense based in the law of equity. A party who has violated an equitable principle, such as good faith, is described as having 'unclean hands.'" Retrieved from, https://www.law.cornell.edu/wex/clean-hands_doctrine

Dispensation: "Legal leaning of dispensation is an exemption from a law, duty or penalty. It is the permission to do something forbidden by law. Dispensation can also be the relaxation of law for the benefit or advantage of an individual." Retrieved from, https://definitions.uslegal.com/d/dispensation/

Fallacy: Error in reasoning and logic that can invalidate an argument.

Remuneration: "Includes income in the form of a commodity, service, or privilege if, before the performance of the service for which it is payment, the parties have agreed upon the value of such commodity, service, or privilege, and that such part of the amount agreed upon to be paid may be paid in the form of such commodity, service, or privilege." Retrieved from, https://www.law.cornell.edu/cfr/text/20/322.2

Restitution: "In civil cases: A remedy associated with unjust enrichment in which the amount of recovery is typically based on the defendant's gain rather than the plaintiff's loss. In criminal cases: Full or partial compensation for loss paid by a criminal to a victim that is ordered as part of a criminal sentence or as a condition of probation." Retrieved from, https://www.law.cornell.edu/wex/restitution

Unjust Enrichment: "Unjust enrichment occurs when Party A confers a benefit upon Party B without Party A receiving the proper restitution required by law. This typically occurs in a contractual agreement when Party A fulfills his/her part of the agreement and Party B does not fulfill his/her part of the agreement." Retrieved from, https://www.law.cornell.edu/wex/unjust_enrichment