

REPARATIONS FOR RACIAL WEALTH DISPARITIES AS REMEDY FOR SOCIAL CONTRACT BREACH

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I

INTRODUCTION

Acute crises such as the COVID-19 pandemic and the 2008 financial meltdown exposed and exacerbated chronic racial wealth disparities. Those disparities accumulated over time as government and private actions—often involving contracts—systemically benefitted White Americans and institutions at the expense of African-Americans.¹ This Article focuses on a private law mechanism—loan contracts—as one important contributor to systemic racial wealth disparities, labels particular lending contracts and related government action as breaches of the social contract, and proposes a restitution-based form of reparations as a remedy for that breach.²

A few facts illustrate how contracts helped lenders and government breach the social contract. New Deal housing and lending institutions' redlining policies ensured that White borrowers got better loan terms than African-Americans, which in turn built lily-White suburbs where homes appreciated alongside valuable amenities such as good public schools, parks, and libraries.³ City dwellers, in contrast, were stuck with high interest loans for overpriced homes in

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1. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, June 2014, at 58–59, 65–66. The costs of crisis are unevenly allocated regarding other identity categories such as gender. See, e.g., Amanda Taub, *Pandemic Will “Take Our Women 10 Years Back” in the Workplace*, N.Y. TIMES (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/world/covid-women-childcare-equality.html> [<https://perma.cc/T57P-N2AP>] (explaining how the pandemic has placed even more pressures on working mothers and threatens recent improvements in workplace gender equality).

2. This Article builds on other scholars' view of racial wealth disparities as breaches of the social contract. See, e.g., MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 281 (2017) (“Full justice demands a recognition of the historic breach of the social contract between America’s constitutional democracy and Black Americans. And contract breach requires a remedy.”).

3. *Id.* at 101–05.

majority-Black neighborhoods with fewer amenities.⁴ Decades later, predatory lenders in the 1990s and early 2000s targeted African-Americans for subprime loans that had higher interest rates and harsh prepayment terms.⁵ Fully a third of African-Americans saddled with subprime loans could have qualified for conventional loans, and African-American borrowers as a group were four times more likely than similarly-situated Whites to have subprime loans that charged as much as 30% higher interest than conventional loans.⁶ Those loan terms harmed African-American families, causing 10% of high income African-Americans to lose their homes during the 2008 financial crisis, compared to just 4.6% of Whites.⁷ Those losses in turn caused huge hits to Black household wealth from the 2008 financial crisis—a whopping 53%—compared to only 16% for White households.⁸ Over and over, these contracts and policies funneled thousands more dollars to White families than to Black families, money that has enabled Whites to spend more on their children’s education, the whole family’s health, starting a business, and other life-enriching investments.

That racial allocation of resources breaches the social contract that political theory teaches provides a foundation for law. The idea is that law came into being via a mythical contract in which everyone agreed to be bound by law in exchange for the law’s benefits (i.e., private property, police, education, common roads, etc.). John Rawls theorized an equally mythical pre-political “original position” in which people behind a “veil of ignorance” do not know their race, sex, level of wealth, or other social and physical characteristics, a blindness that should allow us to imagine an ideal society in which legal and social rules would not give priority to any one group at the others’ expense.⁹ But philosopher Charles Mill points out that Rawlsian theory conveniently ignores past distributions of wealth and power to White men, and away from White women and people of color.¹⁰ For law to come into line with its foundational assumption of equal treatment, it must acknowledge breaches of that social contract and award remedies to those harmed by the breach.

A rich literature on reparations documents their necessity and proposes both theoretical and doctrinal frameworks for actual payments—monetary and nonmonetary—to victims of racial inequities. Consistent with the immense amount of debt and the public nature of the social contract, those proposals have

4. *Id.* at 112.

5. JANIS SARRA & CHERYL WADE, PREDATORY LENDING AND THE DESTRUCTION OF THE AFRICAN-AMERICAN DREAM 70 (2020).

6. *Id.* at 70–71.

7. *Id.* Latinx borrowers, it is worth noting, fared even worse, with 15% home loss due to foreclosure during the crisis.

8. WILLIAM A. DARITY, JR. & A. KIRSTIN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 32 (2020).

9. JOHN RAWLS, A THEORY OF JUSTICE 11–12 (1971).

10. CHARLES MILLS, THE RACIAL CONTRACT 7, 10, 64 (1997). UNIV. OF MICH., 2020 *Tanner Lecture on Human Values - Theorizing Racial Justice - Charles W. Mills*, YOUTUBE (Feb. 17, 2020), <https://www.youtube.com/watch?v=78wzAfQu9Mw> [<https://perma.cc/ATN5-VNJ5>].

largely focused on public law.¹¹ This Article adds a private law framework to the conversation. Space constraints make it a pilot project that sketches a justification and remedial framework, which I plan to develop further in a longer article.

While many factors contribute to systemic racism and income inequality, debt is a logical starting point for reparations. First, race disparities in many kinds of debt—medical, housing, payday, student—account for a good part of the great wealth disparities between Black and White Americans. Second, the theory of reparations presupposes a debt—financial, symbolic, political, ethical—owed by an unjustly enriched dominating group or entity to those who suffered and continue to suffer in that zero-sum game.¹² Finally, law has long furthered White acquisition of wealth via debt contracts that systemically harm African-Americans.¹³

This Article advances an argument for reparations in four steps. Part II briefly describes the outrageous racial disparities in the impact of COVID-19, as well as broader wealth disparities. Part III briefly describes the long and varied history of debt-based government policies and contracts that caused those disparities. Part IV situates these government actions and contracts as breaches of the social contract. Finally, Part V lists some recent examples of reparative measures then explores the feasibility of a restitution-based remedy for that breach in the

11. See, e.g., A. Mechele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV. 1255 (2020) (arguing that the models courts and special masters use in compensation programs for victims in complex disputes should be adapted to a reparations system); Roy L. Brooks, *Racial Reconciliation Through Black Reparations*, 63 HOWARD L.J. 349 (2020) (explaining and defending a model for black reparations); Kindaka Jamal Sanders, *Reassembling Osiris: Rule 23, The Black Farmers Case, and Reparations*, 118 PENN. ST. L. REV. 339, 366 (2013) (examining the Black Farmers case, a series of claims of racial discrimination by African-American farmers against the federal government, and how it may qualify as a slavery reparations case); Kaimipono David Wenger, “*Too Big to Remedy?*”: *Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOYOLA L.A. L. REV. 177 (2010) (arguing that reparative action is needed in the case of slavery, but the goals of restitution can be advanced through non-tort or otherwise non-traditional approaches); Eric K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1 (2007) (suggesting a reparations framework of social healing through practical justice); Kevin Outterson, *Tragedy and Remedy: Reparations for Disparities in Black Health*, 9 DEPAUL J. HEALTH CARE L. 735 (2005) (arguing that black health disparities provide a firmer foundation for reparations that are less susceptible to arguments regarding remoteness); Pamela D. Bridgewater, *Ain’t I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN’S L.J. 89 (2005) (providing a model for incorporating reproductive oppression into the reparations for slavery movement); Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81 (2004) (examining the viability of obtaining reparations through tort and unjust enrichment claims); James R. Hackney, Jr., *Ideological Conflict, African American Reparations, Tort Causation, and the Case for Social Welfare Transformation*, 84 B.U. L. REV. 1193 (2004) (focusing on claims for group reparations through the tort causation lens); Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209 (2004) (evaluating the claim for slavery reparations from a torts perspective); Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319 (2004) (arguing for race-based redistribution informed by public finance economics).

12. RUSSELL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 206–07 (2001).

13. See, e.g., Julie A. Nice, *Welfare Servitude*, 1 GEO. L.J. ON FIGHTING POVERTY 340 (1994) (examining whether mandatory work for welfare violates the Thirteenth Amendment’s prohibition of involuntary servitude); Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015) (positing that the post-Civil War judicial system entrapped blacks in a cycle of coerced labor, which parallels today’s criminal justice system).

medical debt context. Because the debt owed to African-Americans is so large and so longstanding, this private law remedy, of course, would be just one tool among many to right the wrongs that created wealth disparities.

II

HEALTH & WEALTH DISPARITIES

The COVID-19 pandemic continues as this Article goes to press, preventing any conclusive tally of its financial tolls, let alone those based on race and class. But health disparities provide a starting point to illustrate the class- and race-based consequences of the crisis.

COVID-19 chopped nearly three years off of African-American and Hispanic Americans' life expectancy, about three times the one year that COVID-19 shaved off of White Americans' life expectancy.¹⁴ Along the same lines, African-American and Hispanic people were hospitalized nearly three times as often as Whites, and COVID-19 was fatal for twice as many of them as for Whites.¹⁵ That racial disparity is due to lower income frontline workers in slaughterhouses, grocery stores, hospitals, and public transportation underwriting the safety of higher income people who could afford the luxury of quarantine. Those frontline workers, who were disproportionately Black and Brown, increased their risk of COVID-19 while processing food, stocking shelves, delivering necessities, staffing hospitals, and transporting other workers. White collar workers who moved our work from the office to the kitchen table, and largely kept our incomes courtesy to online platforms such as Zoom, have been and continue to be immeasurably enriched by those risks and services.

Relative levels of safety correlated with race-based allocations of wealth. Public policy professor William Darity and writer Kirsten Mullen assert that wealth—which includes income as well as assets such as home equity—*“is the best single indicator of the cumulative impact of White racism over time.”*¹⁶ Appalling data points explain the now-familiar 2016 Survey of Consumer Finances tenfold gap between median net worth of Black households (\$17,600) and White households (\$171,000) and show how the wealth gap transcends patterns

14. Julie Bosman, Sophie Kasakove & Daniel Victor, *Virus Widens a Racial Gap in Longevity*, N.Y. TIMES, July 22, 2021, at A1, A14; Matiangai Sirleaf, *Disposable Lives: COVID-19, Vaccines, and the Uprising*, 121 COLUM. L. REV. F. 71, 75–76 (2021) (noting mortality rates for Black Americans approximately 1.5 times more than for Whites).

15. CENTERS FOR DISEASE CONTROL, *Risk for COVID 19 Infection, Hospitalization and Death by Race/Ethnicity*, Feb. 1, 2022, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> [<https://perma.cc/7UAD-2NG5>]. The worst disparity is between hospitalization for COVID-19 between American Indians/Alaska Natives and WhiteWhites: with those people of color suffering hospitalization more than three times as often as WhiteWhites.

16. DARITY & MULLEN, *supra* note 8, at 31. *See also* ROBINSON, *supra* note 12, at 204 (arguing that the economic gap between black and White Americans has been perpetuated by law and public behavior); DOROTHY BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS AND HOW WE CAN FIX IT* 15–28, 220 (2021) (examining how tax policies have historically excluded black families from benefits given to White families).

regarding marriage, parenthood, educational attainment, employment, age, and other supposed vehicles to wealth accumulation.¹⁷ For example:

- Married Black parents have half the wealth (\$16,000) of single White parents (\$35,000);¹⁸
- Black women with no children have a comparable median net worth as single White women with children;¹⁹
- Single Black female senior citizens with bachelors' degrees have a median net worth of \$11,000, compared to \$384,000 for their White counterparts;²⁰
- Black families with college degrees have, on average, \$300,000 less wealth than their White counterparts;²¹
- Blacks working full-time have lower net worth than unemployed Whites;²² and
- Black female college graduates in their twenties have a median net worth of *negative* \$11,000, compared to *positive* \$3,400 for their White counterparts.²³

Worse still—if that is possible—the gap is accelerating.²⁴ Only systemic bias against African-Americans could produce the race-based income gap (60%) and the threefold higher rates of poverty for Blacks than Whites, both of which have held steady for at least fifty years.²⁵

III

GOVERNMENT AND PRIVATE ACTIONS CAUSED THE DISPARITIES

Government and private actions since the country's founding—often facilitated by contracts—caused these disparities. The losses and ill-gotten gains start with slavery, which enriched White America by allocating to enslavers the value of work done by those they enslaved. At the same time, White-controlled insurance, transport, manufacturing, and other—often Northern—concerns further profited through the slave trade. After the Civil War, the federal

17. Lisa J. Dettling et al., *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, FED. RESRV. (Sept. 27, 2017), <https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm> [<https://perma.cc/35JX-U6XP>]; ROBINSON, *supra* note 12, at 204. Another scholar reports an even higher disparity of White families having thirteen times more wealth than Black families. BARADARAN, *supra* note 2, at 249.

18. DARITY & MULLEN, *supra* note 8, at 33.

19. *Id.*

20. *Id.*

21. BARADARAN, *supra* note 2, at 249. Along the same lines, Black household heads with college degrees have \$10,000 less wealth than White household heads who dropped out of high school. DARITY & MULLEN, *supra* note 8, at 33.

22. DARITY & MULLEN, *supra* note 8, at 33.

23. *Id.*

24. BARADARAN, *supra* note 2, at 249.

25. DARITY & MULLEN, *supra* note 8, at 38, 44.

government could have begun to disgorge enslavers of their ill-gotten gains by transferring the storied forty acres and a mule to newly freed people. This would have provided them with the resources needed to establish lives as people instead of property. Instead, the Southern Homestead Act of 1866 gave freed people a virtually useless six-month option to purchase land at reasonably low rates without competition from White southerners and northern investors, an illusory remedy for centuries of stolen labor and degradation since that theft prevented them from having funds to purchase the land.²⁶ Consequently, about 28,000 Whites acquired land under the Homestead Act, which is six or seven times the 4,000 to 5,500 African Americans whom the Act was supposedly intended to benefit.²⁷

That may seem long ago and far away until you consider the many generations benefitted or harmed along racial lines by that White supremacist giveaway. The benefit went to 46 million people by 2000, nearly a quarter of the U.S. population.²⁸ Passing of that wealth from generation to generation greatly contributes to the 10:1 racial wealth gap, since between 26 and 50% of an adult's wealth is acquired via gifts and inheritance.²⁹ For every White family with land to pass along to the next generation, an African-American family—and its descendants—were prevented from accumulating or passing along interests in land that could underwrite education, health care, business operations, and other supports for family and community life.

In short, the end of slavery did not deliver reparations for enslaved people who worked “long, hard, killing days, years, centuries,” and were paid “only in the coin of pain.”³⁰ Instead those unjustly enriched enslavers and other Whites enjoyed special rights to asset accumulation. More galling yet, in 1862 enslavers in the District of Columbia received “reparations” in the form of \$300 per freed person, courtesy of the 1862 Compensated Emancipation Act.³¹

Sometimes the theft was accomplished via mob violence. For example, White supremacist mobs stole Black assets and life chances in murderous assaults on Black business districts such as the Greenwood neighborhood of Tulsa, Oklahoma in 1921 and Rosewood, Florida in 1923.³² Police either colluded with the mobs or refused to protect African-Americans, and virtually no one was punished for the hundreds murdered or run off their land. Further, the losses continued to rack up over time. For example, Tulsa treated the victims as if they had brought the losses on themselves, and prevented them from reestablishing their homes, schools, churches, and businesses by routinely refusing permission to rebuild. On the private side, insurance companies largely refused to pay

26. ROBINSON, *supra* note 12, at 205; DARITY & MULLEN, *supra* note 8, at 37.

27. DARITY & MULLEN, *supra* note 8, at 37.

28. *Id.*

29. *Id.* at 36.

30. ROBINSON, *supra* note 12, at 207, 6.

31. Abolition of Slavery Act (District of Columbia), ch. 54, §§ 2–3, 12 Stat. 376–77 (1862).

32. Caleb Gayle, *The Damage Done*, N.Y. TIMES MAG., May 30, 2021, at 20–42.

African-American claims arising out of the destruction of thirty-five square blocks of residences and businesses, but did compensate a White shop owner for guns stolen from his store.³³ As with the post-Civil War allocations of land to Whites, Tulsa's African-American population continues to suffer losses due to the riots. A Harvard economist estimates that even a century later, Black Tulsans' income is reduced on average by 7.3%.³⁴

Enter the New Deal, widely known and taught as the safety net that made possible twentieth century American prosperity. This huge government giveaway was implicitly stamped "for Whites only" even though by the 1930s African-Americans had been paying taxes and serving in the military as citizens for a solid fifty years, and otherwise contributing to the wealth and welfare of the Republic for centuries.

Take the G.I. Bill's subsidies of education, a great building block of the American middle class. That program colluded with Jim Crow to systemically shunt money toward Whites and away from Blacks. While the program was facially neutral, African-Americans could not access segregated institutions, administrators often steered Black GIs to vocational programs instead of college, and historically Black colleges could not afford to enroll all the Black veterans.³⁵ Consequently, while the G.I. Bill paid for college educations for nearly eight million servicemen and women, only one-fifth of the 100,000 African-Americans who had applied for educational grants through the G.I. Bill were enrolled in college by 1946.³⁶ Thus, government's largesse in funding higher education and its social and intellectual capital overwhelmingly went to Whites.³⁷

In the housing context, the Federal Housing Act guaranteed home loans only if lenders required racially restrictive covenants, even years after the U.S. Supreme Court ruled that state enforcement of "Whites only" property restrictions violated the Constitution. The red lines that lenders and the Federal Housing Administration drew on maps to designate African-American neighborhoods devalued those homes, which made credit to purchase them more expensive. Even wealthy neighborhoods peopled by African-American professionals, such as those surrounding Morehouse and Spelman College campuses, were redlined. This prevented those educated and high-income Blacks from accumulating wealth and passing it onto their children and grandchildren at comparable rates with their White counterparts.³⁸

Prior to urban renewal policies in the 1970s, Black homeowners were

33. Caleb Gayle, *The Damage Done*, N.Y. TIMES MAG., May 30, 2021, at 22–43; DARITY & MULLEN, *supra* note 8, at 16–17; Coates, *supra* note 1, at 64.

34. *Id.* at 24.

35. DARITY & MULLEN, *supra* note 8, at 247–48; Hilary Herbold, *Never a Level Playing Field for Blacks and the GI Bill*, 6 J. BLACKS IN HIGHER EDUC. 104, 107 (1994).

36. Hilary Herbold, *Never a Level Playing Field for Blacks and the GI Bill*, 6 J. BLACKS IN HIGHER EDUC. 104, 107 (1994).

37. DARITY & MULLEN, *supra* note 8, at 247.

38. Mehrsa Baradaran, *Jim Crow Credit*, 9 U.C. IRVINE L. REV. 887, 890 (2019); *see also* Shelley v. Kraemer, 334 U.S. 1, 20–23 (1948) (refusing to enforce a racially restrictive covenant).

relegated to sources of credit left over from the bad old days before the Great Depression. Without federally guaranteed mortgages, African-Americans too often could only purchase shoddier homes through installment contracts with high interest rates. In contrast to protections enjoyed by White borrowers, these installment contracts merely gave borrowers an option to purchase the home, which they could forfeit for missing a single payment.³⁹ That difference in loan terms, in turn, prevented the accumulation of equity that could fund other life projects, such as a child's education or a business, as well as community amenities, such as public schools, libraries, and retail districts. In short, the New Deal was really the same old great deal for White Americans, quite literally paid for by African-Americans.

Unfortunately, the Civil Rights movement failed to close the income gap widened by each of these giveaways to White Americans. The Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Equal Credit Opportunity Act of 1974 (ECOA) banned discrimination, but did nothing to provide credit, let alone restitution, to African Americans for earlier government giveaways that lavished capital on White borrowers.⁴⁰ Instead, the ECOA treated information as a substitute for cash, facilitating financial advice for Black borrowers and Black-owned banks.

Racial credit disparities trickled down to credit arrangements for purchasing durable goods. While White borrowers in lily-White suburban houses purchased with federal subsidies got used to doing laundry at home with washing machines they purchased with low-interest loans from retailers and finance companies, Black borrowers paid more and got less in the much more expensive rent-to-own market. The plausibly unconscionable terms of those installment contracts are familiar to anyone who has taught or taken a 1L Contracts class, thanks to the canonical case *Williams v. Walker-Thomas*.⁴¹ Consumer protection laws have since stepped in with a regulatory fix that bans blanket security interests in consumer goods,⁴² but other predations in the form of payday loans and check cashing centers emerged as new forms of the same old injustice.⁴³ Because poor African-American communities are banking deserts, African Americans are more likely to obtain payday loans at interest rates of 300%—or even up to 2000%—in staggering comparison to the 10% interest rate on home equity loans.⁴⁴

39. For a detailed description of one man's negotiation of these punishing contracts and their cost to African American communities in Chicago, see Coates, *supra* note 1. Even after the FHA stopped redlining and the federal government supported low-income home ownership, too often African-American homebuyers' financing featured unfavorable terms such as higher interest rates that banks imposed on urban properties. KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 3–5 (2019).

40. Baradaran, *supra* note 38, at 904.

41. 350 F.2d 445 (D.C. Cir. 1965) (finding that unconscionability can bar contract enforcement).

42. U.C.C. § 9-204 (AM. L. INST. & UNIF. L. COMM'N 1977); FTC Credit Practice Rule, 16 C.F.R. § 444.1 & .2 (2021).

43. MEHRSA BARADARAN, HOW THE OTHER HALF BANKS 260–61 (2015).

44. Baradaran, *supra* note 38, at 910–11.

America's debt to African-Americans is way overdue. As a 106-year-old survivor of the Tulsa Massacre asserted in 2021, "[a]ll we're asking for in Tulsa and Black communities across the U.S. is repair, respect and restitution."⁴⁵ Social contract theory provides a theoretical foundation to justify long-overdue restitution for the damage that contract law has caused.

IV

RACIALLY BIASED ACTIONS AND CONTRACTS BREACH THE SOCIAL CONTRACT

The legitimacy of law itself rests on the political theory of the social contract. Social contract theory aims to reconcile individual freedom with state power by imagining a primordial exchange in which our distant ancestors swapped the freedom enjoyed in a mythical state of nature for the so-called "civil freedom" of civilized society. In this view, state power does not overcome individual freedom, because the individuals chose, in their self-interest, to abdicate some freedoms to the state for their own good and the community's greater good.⁴⁶

By extension, government in this view is for everyone and by everyone. Critical theorists have questioned that presumption of equal treatment by pointing out deep racial and sex-based biases embedded in the social contract. That distortion in turn warps legal doctrine, which reflects the underlying logic of the primordial contract.⁴⁷ While theorists such as Carole Pateman say that we must go "beyond contract" if we are finally to have a "free social order,"⁴⁸ philosopher Charles Mills would modify or reform the social contract to make it live up to its liberal promise of equal treatment of all. A central element of Mills' salvage operation would be a backward-looking program of reparations and other anti-racist reforms.⁴⁹

According to Mills, social contract theory distorts Western political theory by systemically obfuscating "the ugly realities of group power and domination."⁵⁰ Mills reasons that theorists implicitly presuppose that White men were the only contracting parties, and that they divvied up power over other human beings, specifically women and people of color. They then wrapped the deal in a pretty package of ostensible race and gender neutrality to justify White supremacy as a political system.⁵¹ He calls the resulting compact the "Racial Contract" to show

45. Gayle, *supra* note 33, at 44.

46. Christopher Bertram, *Jean Jacques Rousseau*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2020), <https://plato.stanford.edu/entries/rousseau/> [<https://perma.cc/YCC3-S8XV>].

47. According to political theorist Carole Pateman, "[w]omen are not party to the original contract through which men transform their natural freedom into the security of civil freedom. Women are the subject of contract." CAROLE PATEMAN, *THE SEXUAL CONTRACT* 6 (1988). In this view women disappear from the stage on which individuals play out civic, public life and are instead shunted over to the private sphere in which status rather than contract predominates. *Id.* at 11.

48. *Id.* at 2, 150.

49. MILLS, *THE RACIAL CONTRACT* *supra* note 10, at 4, 118–32.

50. *Id.* at 3.

51. *Id.*

how White supremacy and racial hierarchy are baked into its very foundation. Once we see that the social contract was made by Whites for Whites—instead of an idealized “we the people” that recognizes everyone’s full humanity—Mills contends that “we can correct for it in constructing the ideal ‘contract.’”⁵²

Mills optimistically asserts that social contract theory can look forward toward an anti-discriminatory future, and also look back on the systemic steals that created the wealth disparities that exist today.⁵³ He explains:

[W]e should start with the reality of *exclusion and inegalitarianism* as the norm, and a ‘contract’ that theoretically registers that fact: a ‘contract of breach,’ in the sense that the very foundation of the contract is the breach of universalism and respect for all . . . The normative task of contract theory, . . . [is] to replace the domination contract . . . with a contract that repairs and corrects for that breach, thereby achieving racial justice.⁵⁴

That project of repair would start with a recognition of zero-sum games of group advantage facilitated by purportedly neutral policies and contracts.

As detailed above, Whites are routinely and unjustly enriched at the expense of Black Americans through “opportunity hoarding” historically and today.⁵⁵ That causal link between Black failure and White success, Mills points out, has yielded compound benefits and detriments across generations via “inherited advantages that come from systemic and intergenerational racial exploitation.”⁵⁶ Those unjust gains of racial domination show up in eye-popping data of wealth disparities, including Mills’ report that when the focus is on liquid assets, such as mutual funds, the disparity skyrockets to a 100-to-one advantage that Whites lord over Blacks.⁵⁷

In Mills’ view, liberal color-blindness and gender-blindness is “simple blindness.”⁵⁸ By revealing traditional social contract analysis as a “White male fairyland,” complete with “wishing-makes-it-so idealizing,” Mill creates a roadmap to overcome this “willed obliviousness”⁵⁹ and extend genuine equality of opportunity to all.

This Article picks up where Mills’ philosophical analysis leaves off by proposing a contractual remedy for that “opportunity hoarding” that causally links “Black failure and White success.”⁶⁰ Because courts award money damages to remedy breaches of contract, recognition of the racial contract framework would justify restitution-based redistribution of wealth to Black Americans to realize “genuine formal equality of opportunity for the racially subordinated.”⁶¹

52. *Id.* at 7.

53. CAROLE PATEMAN & CHARLES MILLS, *CONTRACT AND DOMINATION* 7 (2007).

54. *Id.* at 108 (emphasis in original).

55. *Id.* at 126.

56. *Id.* at 129.

57. *Id.* at 127.

58. *Id.* at 175.

59. *Id.* at 199.

60. *Id.* at 126.

61. *Id.* at 131.

V

REPARATIONS AS REMEDY FOR BREACH OF SOCIAL CONTRACT

Reparations require a multistep process. This Part describes that framework, details some recent examples of reparative measures, and concludes by exploring how restitution may provide a reparative remedy in debt collection actions.

A. Reparative Steps: Acknowledgment, Remorse & Redress

Many people narrowly construe the concept of reparations as cash payments to victims of past wrongs, but experts recognize multiple steps to the process and various forms of compensation. Ta-Nehisi Coates, the most prominent voice for reparations due to his blockbuster 2014 *Atlantic* article *The Case for Reparations*, defines reparations as “full acceptance of our collective biography [as a country founded on White supremacy] and its consequences.”⁶² In a *New Yorker* interview five years later, he articulates four steps:

1. Government acknowledgment of the harm caused;
2. A commission linking reparations to specific acts and “figure out how we pay it back”;
3. Payment of the reparations; and
4. Education to teach people about the injuries sustained and redress.⁶³

Other leading voices for reparations urge a final step of “closure” in which both hoarders and those injured by hoarding transcend their differences “to create a new and transformed” country.⁶⁴

America at last may be ready to seriously acknowledge and perhaps even begin to pay its debt to African-Americans. In the last two decades public support for reparations has greatly increased, with a 2019 survey reporting 29% of Americans support them, up from 14% in 2002.⁶⁵

B. Recent Reparative Measures

Governments and private organizations have answered the call for reparation in a variety of forms, which include one or more of the steps of acknowledgment, redress, and education. These examples represent a tiny sliver of the many and varied harms that deserve acknowledgment and redress. Most interventions involve public law, though private entities are also stepping forward.⁶⁶

62. Coates, *supra* note 1, at 54, 70.

63. Ta-Nehisi Coates *Revisits “The Case for Reparations,”* THE NEW YORKER (June 10, 2019) <https://www.newyorker.com/news/the-new-yorker-interview/ta-nehisi-coates-revisits-the-case-for-reparations> [<https://perma.cc/E7F5-D442>] (transcribed conversation between Coates and David Remnick).

64. According to William Darity and Kirsten Mullen, “closure” entails a process in which “[w]hites and Blacks would come to terms over the past, confront the present, and unite to create a new and transformed United States of America.” DARITY & MULLEN, *supra* note 8, at 2–3.

65. Dickerson, *supra* note 11, at 1260 (showing 74% support among Blacks, 44% among Hispanic respondents, and a woefully low 15% from Whites).

66. Excluded from the list are reparative gestures by White individuals who atone for the ill-gotten

After Nazi Germany slaughtered six million Jews in World War II, West Germany officially apologized, made small payments to individuals—including as restitution for property the Nazis stole from Jews—and paid Israel more than three billion Deutsche marks (the equivalent of about seven billion dollars in 2014 dollars). That cash influx helped the then-fledgling state of Israel, home to half the world’s Jews, establish a solid economy over the next twelve years. The Bank of Israel attributed fifteen percent of their GDP growth during that time to the reparations payments.⁶⁷

Sometimes the very size and seriousness of the injury prevents meaningful redress beyond acknowledgment and apology.⁶⁸ As with American discussions of reparations for racial injustices, few Germans—only thirty percent—originally supported the payments. Nearly half of Germans objected on the grounds that only Germans who “really committed something” should have to pay. In the United States, that type of opposition has also hampered reparations.

Another World War II version of reparations involves recognition of the injustice, apology, payments, and education arising out of the America’s internment of Japanese-Americans from 1942 to 1945. In 1976 President Ford repealed Executive Order 9066 that authorized the incarceration of over 110,000 Japanese-Americans in internment camps. Later, Congress enacted the 1988 Civil Liberties Act, which mandated a presidential apology, \$20,000 reparations payments to surviving internees, and established a public education fund.⁶⁹

Although public law forms of reparation for race discrimination face constitutional barriers, a handful of recent (2020–2021) reparative programs shows how the federal government, states, and municipalities have begun to counter historic, systemic thefts and conversion of African-Americans’ wealth.

At the federal level, the House of Representatives is advancing House Resolution (H.R.) 40, a bill to establish the Commission to Study and Develop Reparation Proposals for African Americans that Rep. John Conyers introduced at the start of every Congress since 1989.⁷⁰ One concrete form of federal

gains of White supremacy. *See, e.g.*, BROWN, *supra* note 16, 214–15 (suggesting that White people acknowledge their advantages, particularly generational ones); Kim Severson, *Farmer’s Family Owned Slaves. How to Atone?*, N.Y. TIMES, July 5, 2021, at A1, A15 (describing a White southern farmer’s efforts to repair some harms caused by her slave-owning ancestors); Zoe Barry, *The Rich Kids Who Wanted to Tear Down Capitalism*, N.Y. TIMES (Nov. 27, 2020), <https://www.nytimes.com/2020/11/27/style/trust-fund-activism-resouce-generation.html> [<https://perma.cc/5GXH-7XKL>] (discussing wealthy Millennials’ intent to share their inheritances to narrow the wealth gap).

67. Coates, *supra* note 1, at 70–71; Dickerson, *supra* note 11, at 1262–63.

68. One instance of reparations—arising out of the 1864 Sand Creek Massacre—involved only recognition of the event and an apology. In 1998, the Sand Creek Massacre National Historic Study Site Act officially acknowledged the slaughter of a peaceful Cheyenne village by 700 U.S. soldiers. ROBINSON, *supra* note 12, at 224.

69. ERIC YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 6 (2d ed. 2013).

70. DARITY & MULLEN, *supra* note 8, at 15; Nicholas Fandos, *House Panel Advances Bill to Study Reparations in Historic Vote*, N.Y. TIMES (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/us/politics/reparations-slavery-house.html> [<https://perma.cc/8P44-P85Z>].

reparations is the Department of Agriculture's commitment of four billion dollars to help Black and Hispanic farmers and ranchers pay off loans granted or guaranteed by the Department, as reparation for decades of systemic race discrimination in the form of lower approval rates, inferior loan terms and servicing, and systemic refusal to acknowledge the discrimination.⁷¹

States and cities have likewise stepped up. California created a commission to document racial injustices from slavery onward and develop proposals for reparation, and also has agreed to pay seven and a half million dollars in reparations to victims of involuntary sterilization between 1909 and 1979.⁷² Four Virginia public colleges and universities have committed to study their ties to enslaved people who worked on their grounds or otherwise enriched the universities, and to establish scholarships or economic development programs to benefit those people's descendants.⁷³ In the housing context, Evanston, Illinois has established a Restorative Housing Program to provide grants of up to \$25,000 for home repairs, mortgage assistance, or down payments toward a new home to residents who were victims of redlining between 1919 and 1969 as well as their descendants.⁷⁴

While public measures may be ideal, private law should also play a role in reparations. For example, a high profile case from the 1990s, *In re African-American Slave Descendants Litigation*, involved descendants of enslaved Americans who sought recovery for unjust enrichment from eighteen companies or their predecessors that enslaved Africans, financed the slave trade through vehicles such as insurance, or otherwise profited from slavery between 1810 and 1980.⁷⁵ The court acknowledged the fact of unjust enrichment, but nevertheless dismissed the case on the grounds of lack of standing, the statute of limitations, law's inability to remedy "generalized grievances," and the greater institutional

71. Part of the \$1.9 trillion economic relief package Congress passed in 2021, Section 1005 set aside funds for "socially disadvantaged farmers"—defined as Black, American Indian/Alaskan Native, Hispanic, Asian and Pacific Islander. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005, 135 Stat. 4, 12 (2021). A federal court in Florida temporarily stayed payments due to a White farmer's claim of race discrimination against him, and at least twelve other lawsuits across the country have come to the same conclusion. *Wynn v. Vilsack*, F.Supp.3d, No. 3:21-cv-514-MMH-JRK, 2021 WL 2580678 (M.D. Fla. June 23, 2021); Michael Levenson, *Judge Blocks \$4 Billion U.S. Debt Relief Program for Minority Farmers*, N.Y. TIMES (June 23, 2021), <https://www.nytimes.com/2021/06/23/us/politics/biden-debt-relief-black-farmers.html?searchResultPosition=1> [<https://perma.cc/8TE7-SUVU>]; Alan Rappeport, *Black Farmers Fear Foreclosure as Debt Relief Remains Frozen*, N.Y. TIMES (Feb. 21, 2022).

72. Taryn Luna, *California Task Force to Study Paying Reparations for Slavery*, L.A. TIMES (Sept. 30, 2020), <https://www.latimes.com/california/story/2020-09-30/california-task-force-reparations-slavery-gavin-newsom-shirley-weber> [<https://perma.cc/TPD8-Y3JR>]; Amanda Morris, *'You Just Feel Like Nothing:' California to Pay Sterilization Victims*, N.Y. TIMES (July 11, 2021), <https://www.nytimes.com/2021/07/11/us/california-reparations-eugenics.html?searchResultPosition=1> [<https://perma.cc/X7HB-MAZN>].

73. The Enslaved Ancestors College Access Scholarship and Memorial Program, VA. CODE ANN. § 23.1-615.1 (2021).

74. Julie Bosman, *Chicago Suburb Moves to Shape Reparations for its Black Residents*, N.Y. TIMES, Mar. 23, 2021, at A21; *Evanston Local Reparations*, CITY OF EVANSTON, <https://www.cityofevanston.org/government/city-council/reparations> [<https://perma.cc/A8W4-U6K3>].

75. 304 F.Supp.2d 1027, 1038–43 (N.D. Ill. 2004).

competence of legislatures to address the issues.⁷⁶

Other private efforts have been more successful. Since around 2010, a number of private organizations have begun to make reparations, sometimes nudged along by aspirational calls. For example, venture capitalist Robert Smith urged the biggest corporations to invest two percent of their income in Black-owned banks and businesses.⁷⁷ Others are pushed to do the right thing by public law, such as the Equal Credit Opportunity Act and other anti-discrimination laws.

For example in 2021, the Jesuits established a \$15,000,000 trust to fund organizations engaged in reconciliation activities, scholarships for descendants of people whom the Jesuits had enslaved, and to a lesser extent emergency needs of those descendants.⁷⁸ Likewise, in 2019, Georgetown University announced a program of preferential admissions and \$400,000 a year in scholarships to descendants of 272 enslaved people whom the Jesuits sold for \$3,300,000 in today's dollars to save the university.⁷⁹

On the business side, in 2020, Netflix committed to bank up to two percent of its holdings—as much as \$100 million—in Black banks and businesses, inspired by Mehrsa Baradaran's book *The Color of Money*.⁸⁰ But litigation has more reliably induced businesses to disgorge their ill-gotten gains. For example, in 2009, John Hancock Insurance Co. paid \$24.4 million to settle a lawsuit arising out of the insurance company issuing substandard policies from the 1940s to the 1960s to African-Americans. The \$15 million remaining, after payouts to members of the class who could be found, has gone to remedy racial injustices by, for example, providing payments to Black homeowners to complete repairs after natural disasters.⁸¹ Along the same lines, in 2011, Bank of America and Wells Fargo paid \$355 million and \$175 million respectively for steering African-American borrowers toward risky subprime mortgages with less favorable terms than enjoyed by many or most White borrowers, even when the Black borrowers would have qualified for conventional loans. Wells Fargo loan officers referred to Black customers as “mud people” and to their subprime products as “ghetto loans,” and cultivated Black church leaders to get to congregants.⁸²

76. *Id.* at 1049, 1051–52, 1060.

77. Michael Gee, *It's Time for U.S. Business Leaders to Talk About Reparations*, HARV. B. REV., July 24, 2020, <https://hbr.org/2020/07/its-time-for-u-s-business-leaders-to-talk-about-reparations> [<https://perma.cc/FPX6-N3TV>].

78. Rachel L. Swarns, *Jesuits Vow to Raise \$100 Million to Atone for Role in Slavery*, N.Y. TIMES, Mar. 16, 2021, at A15.

79. Rachel L. Swarns, *272 Slaves Were Sold to Save Georgetown: What Does It Owe Their Descendants?*, N.Y. TIMES (Apr. 16, 2016), <https://www.nytimes.com/2016/04/17/us/georgetown-university-search-for-slave-descendants.html> [<https://perma.cc/BA4Q-5SDS>]. Two years later, unfortunately, the administration was just establishing a grant application process and had yet to make any payments. Susan Svrluga, *Georgetown University Students Renew Push for Reparations*, WASH. POST, Dec. 10, 2021, at B1–B2.

80. Gee, *supra* note 77.

81. Theresa Vargas, *Reparations Boost Local Program for Black Teens*, WASH. POST, July 1, 2021, at B1, B3.

82. Coates, *supra* note 1, at 71.

That last example—predatory lending practices of huge banks that contributed to the financial collapse of 2008—shows both the good that law can do and its limits. While the bank settlements funded a number of consumer-protection projects,⁸³ the homeowners themselves were left holding the bag. As Ta-Nehisi Coates concludes in his article *The Case for Reparations*: “[b]ut the damage had been done. In 2009, half of the properties in Baltimore whose owners had been granted loans by Wells Fargo between 2005 and 2008 were vacant; 71% of these properties were in predominantly Black neighborhoods.”⁸⁴ Since contracts caused much of this damage, contract law can and should provide a remedy.

For some years after the 2008 financial crisis, courts adjusted contract remedies among large commercial actors to prevent inequitable losses as they sorted out legal liability for the complex residential mortgage-backed securities.⁸⁵ That “crisis construction” arguably played a key role in preventing national economic collapse and protected the artificial persons that have the biggest investments in asset securitization. Yet contract law has not done enough to provide restitution to the flesh and blood African-Americans and others whose wealth was so drastically depleted by those institutional players and legal policies.

It is time—past time—for contract law and contracts scholars to do better.⁸⁶ In Mills’ words, we must “replace the dominance contract” and compensate those harmed by its breach of the social contract, “thereby achieving racial justice.”⁸⁷

C. Restitution as an Off-Contract Remedy for Lenders’ Breach of the Social Contract

Earlier work in reparations has proposed a range of ways to pay that debt, including a private trust administered by people elected by the descendants of enslaved Americans,⁸⁸ and changes in the tax code to (1) collect and publicize tax data by race as it does now for gender and age; (2) return to the progressive income tax with no exclusions, a single deduction for a living allowance, and no reduced or preferential rates; and (3) a tax credit to redress the historical, legal

83. See, e.g., Press Release, U.S. Dep’t of Justice, Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading Up to and During the Financial Crisis (Aug. 21, 2014), <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading> [<https://perma.cc/QWVG9-MLV3>] (discussing that part of Bank of America’s settlement will provide relief to Americans harmed by the financial crisis).

84. Coates, *supra* note 1, at 71.

85. Emily Strauss, *Crisis Construction in Contract Boilerplate*, 82 LAW & CONTEMP. PROBS., 164–65 (2019).

86. See, e.g., Pamela Foohey, Dalié Jiménez & Christopher K. Odet, *The Debt Collection Pandemic*, 11 CALIF. L. REV. ONLINE 222, 225–26 (May 2020), <https://www.californialawreview.org/debt-collection-pandemic/> [<https://perma.cc/7MG6-KTCD>] (noting that state law did more than the federal government could and should have done to halt debt collection during the pandemic).

87. PATEMAN & MILLS, *supra* note 53, at 108.

88. Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?* 40 B.C. L. REV. 429, 470–71 (1998).

systemic racism that has created the racial wealth gap.⁸⁹ Consistent with this Article's focus on debt, banking law expert Mehrsa Baradaran proposes several forms of reparations:

- “Follow the red lines” where poor African American communities were denied the stability and wealth accumulation enjoyed by their White suburban counterparts, and implement reforms to facilitate home ownership;
- “Greenline” to lower interest rates by, for example, guarantying mortgages;
- “Shared equity mortgages” or “SEMs” that allow private investors such as a nonprofit or bank to jointly make mortgage payments and accrue a proportion of home equity alongside the homeowner;
- Vouchers for home purchases, akin to Section 8 vouchers, in which governments subsidize payments for rental housing; and
- Direct loans from government entities, such as the FHA, to, as Baradaran says, “fix the problem the FHA itself created.”⁹⁰

While most of these proposals involve public law, this Article mines common law and equity principles as vehicles for reparations, using medical debt as a test case.

Restitutionary recovery in debt contracts is worth exploring as a mechanism for disgorging lenders of unjust enrichment. While this doctrinal application requires some creative interpretation of existing legal doctrines and principles, the pressing crisis of racial wealth disparities justifies revisiting old approaches and developing new ones.⁹¹ Consumer debt transactions present an apt test case, not least because this focus echoes an existing movement to reform and even abolish race and income-discriminatory debt.⁹²

Restitution aims to disgorge bad actors of ill-gotten gains and can justify relief even if a formal promise is lacking. Consistent with its equitable pedigree, it provides a flexible basis for recovery. A claimant seeking restitutionary relief must establish three elements: (1) A confers a non-gratuitous benefit on B; (2) B

89. BROWN, *supra* note 16, at 202. Because of constitutional barriers to assigning the tax credit on the basis of race, Brown proposes that it be based on median income. Fully 83% of African Americans have household wealth below the median of about \$100,000, so that would accomplish part of the reparative goal. *Id.* at 203, 210, 217.

90. Baradaran, *supra* note 38, at 946–48.

91. Traditional views of contract doctrine value freedom of contract over all other norms, and accordingly ignore power disparities based on income, race, gender and other characteristics. Anthony R. Chase, *Race, Culture, and Contract Law: From the Cotton Field to the Courtroom*, 28 CONN. L. REV. 1, 10–11 (1995). However, many scholars see contract doctrine as reflecting and reinforcing normative claims for or against social change. See, e.g., Jonathan C. Lipson, *Promising Justice: Contract as Social Responsibility*, 2019 WIS. L. REV. 1109, 1113 (2019).

92. See, e.g., THE DEBT COLLECTIVE, <https://debtcollective.org/> (fighting to cancel student, medical, probation, and credit card debt); Astra Taylor, Opinion, *Abolish Debt!*, N.Y. TIMES, July 4, 2021, at SR5 (calling for President Biden to cancel student debt, medical debt, and accumulated unpaid rent); Angela Glover Blackwell & Michael McAfee, Opinion, *Banks Should Face History and Cancel Black Debt Now*, N.Y. TIMES, July 5, 2020, at 10–11 (discussing ways in which the financial industry could serve as a starting point for helping to close the “Black-White wage gap”).

realizes some value from the benefit; and (3) it would be inequitable for B to retain that benefit without paying A for the value.⁹³ Even if B receives the benefit passively, a claimant can disgorge B of that gain if it would be unconscionable for B to retain the benefit.⁹⁴ While inadequacy of the expectation measure of damages is not required for restitutionary recovery, that inadequacy strengthens the case for restitution.⁹⁵

Installment land contracts present a nodal case of circumstances that justify restitutionary relief.⁹⁶ Not coincidentally, that is the form of debt that many African-Americans were stuck with because federal and lender redlining practices fenced them out of more debtor-friendly federally-guaranteed home loans. The case of *DeLeon v. Adrete* is illustrative. Purchasers made installment payments that amounted to 70% of the purchase price on a tract of land, funds that the seller retained despite selling the land to a third party.⁹⁷ The Texas court concluded that, consistent with principles of flexibility that accompany equitable remedies, “a vendor must pay restitution if the equities so require,”⁹⁸ and that restitution was appropriate if the amount that the buyer paid is greater than any loss that the buyer’s breach imposed on the seller.⁹⁹ Otherwise, the court reasoned, the land seller would be unjustly enriched by taking the buyer’s payments and also reselling the land to a third party.¹⁰⁰

Granted, two difficulties come to mind when considering how to translate losses in racially-warped lending contracts to a particular dollar value: (1) relief requires tying a particular debt contract to the breach of the social contract (“the two-contract problem”); and (2) calculating the dollar value of unjust enrichment.

First, the two-contract problem. A restitutionary remedy requires lenders’ participation in breaches of the social contract by government and other private actors. Lenders doubtless would resist limits on debt collection based on a link between their debt contracts with particular borrowers and the larger, cultural social contract. The social contract is a heuristic and origin story, hardly a detailed written agreement with a preamble identifying the parties and terms that could be discerned and enforced. Absent those words on the page, critics are bound to contend that the social contract is simply not the kind of agreement that contract law enforces. Lenders could assert, for example, that they never manifested assent to the terms of the social contract, and that its terms lack reasonable

93. 88 AM. JUR. 2D *Restitution and Implied Contracts* § 9 (2021); 3 RESTATEMENT (SECOND) OF CONTRACTS ch. 16, topic 4, intro. note (AM. L. INST. 1981). The doctrine goes by many names, including quasi-contract, implied-in-law contract, quantum meruit, and unjust enrichment. E. ALLAN FARNSWORTH, CONTRACTS §§ 2.19, 2.20 (4th ed. 2004).

94. 88 AM. JUR. 2D *Restitution and Implied Contracts* § 9 (2021).

95. *Id.* Restitutionary relief may also take the form of constructive trust or equitable lien. *Id.*

96. RESTATEMENT (SECOND) OF CONTRACTS § 371 cmt. a (AM. L. INST. 1981).

97. *De Leon v. Aldrete*, 398 S.W.2d 160, 164 (Tex. Civ. App. 1965).

98. *Id.* at 162.

99. *Id.*

100. *Id.* at 164.

certainty.¹⁰¹ Even if the social contract included legally binding promises, lenders could assert that contract law adjusts losses based on causation and reasonable certainty. Lenders could argue that estimates of how much a given loan contract violated the equality principles of the social contract are inherently speculative. They would have good reason to resist by any means necessary, since the debt due to African Americans, measured by the size of the race-based wealth gap, is between fifteen and twenty trillion dollars.¹⁰²

Restitution's role of filling in gaps left by contract law goes a good way toward answering this objection. Restitution allows a performing party to recover even if there is not a "promise" as defined in contract doctrine.¹⁰³ And the flexibility of restitution-based recovery permits a court to attribute some but not all of the lender's return on a racially-biased loan agreement to the lender's violation of the larger social contract.

The second major objection relates to the amount of the debt. Calculating damages in the installment land sale context is much easier than in a lending contract in which interest rates and other loan terms are warped by White supremacy. But while difficulties in measuring a benefit can prevent recovery in restitution,¹⁰⁴ that barrier need not preclude recovery. Restitution doctrine calculates the monetary measure of unjust enrichment as either the net gain enjoyed by the enriched person, or the cost avoided. In any particular debtor-creditor relationship, that amount could be the difference between the price of credit enjoyed by White borrowers and by Black borrowers. If that racial distinction runs afoul of other legal principles, income and wealth could provide a proxy given the racial wealth gap.¹⁰⁵

1. Medical Debt as a Test Case

To see how a restitution claim might work, consider medical debt, a context closely related to the COVID-19 crisis and its unequal racial impact. Many patients' obligations to medical providers may fall into the general pattern of credit arrangements in which creditors—and White debtors—enjoy ill-gotten gains of White supremacy. Accordingly, advocates and courts could consider restitutionary setoffs to reduce or wipe out race- or class-tainted medical debt.

According to the U.S. Census Bureau 2021 data, households with a Black householder had more medical debt (28%) than households with a White householder (17%).¹⁰⁶ Not surprisingly, health insurance helps reduce medical

101. See RESTATEMENT (SECOND) OF CONTRACTS §§ 1, 24, 33, 50 (AM. L. INST. 1981).

102. ROBINSON, *supra* note 12, at 264–65.

103. RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT intro. note (AM. L. INST. 2011).

104. *Id.*

105. Dorothy Brown proposes tax reforms based on both race and on income and wealth. BROWN, *supra* note 16, at 220.

106. Neil Bennett et al., *Who Had Medical Debt in the U.S.?*, U.S. CENSUS BUREAU (Apr. 7, 2021), <https://www.census.gov/library/stories/2021/04/who-had-medical-debt-in-united-states.html> [<https://perma.cc/YH7Y-PUT5>]; see also BROWN, *supra* note 16, at 163 (citing 2017 Urban Institute

debt, so that households in which not everyone is fully insured have roughly double the medical debt of households of fully insured people (31% vs. 16%).¹⁰⁷ Moreover, Black Americans are less likely than their White counterparts to have jobs that provide high-quality health insurance and the tax benefit of paying premiums with pre-tax dollars.¹⁰⁸

Thanks to recent regulations requiring transparency in medical billing and collection practices, more is known about how hospitals and other health care providers actively contribute to race and income disparities.¹⁰⁹ It is also known that the immense complexity and variety in insurance—including social insurance such as Medicare and Medicaid—and medical services makes it difficult if not impossible to speak in generalities.¹¹⁰ But a simple set of possible—and perhaps likely—factual circumstances illustrates how medical debt could be grounded on race and class bias and thus justify restitutionary relief.¹¹¹

Say an African-American woman has an operation in a hospital. The hospital may charge her differently—and collect medical debt differently—depending on her insurance situation. For example, medical providers often provide bulk rates to insurers, a benefit from which uninsured patients are fenced out as are patients with low-quality insurance. If the insurer reimburses the hospital for less than the amount that the hospital charged for the procedure, hospitals and other providers often write off the difference as a loss. In contrast, sometimes hospitals pursue uninsured or underinsured patients for unpaid bills, despite the fact that they have more difficulty paying the high medical bills than their well-insured counterparts.

That type of collection process could unjustly enrich creditors at the expense of lower income patients. For example, a hospital may try to collect the debt itself or sell it to a collection agency, a process that can result in wage garnishment, liens on the patients' property, and low credit scores on credit reports. According

report that 31% of Black Americans have past-due medical bills, compared to 23% of White Americans).

107. BROWN, *supra* note 16, at 163.

108. *Id.* at 135.

109. Dep't Health & Human Services, 45 C.F.R. Pt. 180 Subchapter E Final Rule (2020); Melanie Evans, Anna Wilde Matthews & Tom McGinty, *Hospitals Often Charge Uninsured People the Highest Prices, New Data Show*, WALL ST. J. (July 26, 2021), https://www.wsj.com/articles/hospitals-often-charge-uninsured-people-the-highest-prices-new-data-show-11625584448?mod=hplead_pos5 [<https://perma.cc/FP2U-9XA7>]; see also Lisa Kinney Helvin, *Caring for the Uninsured: Are Not-for-Profit Hospitals Doing Their Share?*, 8 YALE J. HEALTH POL'Y & ETHICS 421, 426–27 (2008) (discussing how the hospital tax exemption shifted focus to determining whether hospitals are providing sufficient amounts of free and discounted care to their communities).

110. See, e.g., Sarah Kliff, *How to Look Up Prices at Your Hospital, If They Exist*, N.Y. TIMES, Aug. 22, 2021 (describing pricing differences based on type of insurance and cryptic information provided by hospitals).

111. Another private solution is a charity called “RIP Medical Debt,” which buys medical debt and forgives it. Melanie Evans & Anna Wilde Matthews, *Medical Debt Charity to Buy, Wipe Out \$278 Million of Patients' Hospital Bills*, WALL ST. J. (June 16, 2021), <https://www.wsj.com/articles/medical-debt-charity-to-buy-wipe-out-278-million-of-patients-hospital-bills-11623762001> [<https://perma.cc/5LQ4-GZTM>]; RIP MEDICAL DEBT, <https://ripmedicaldebt.org/>. The charitable nature of that endeavor, however helpful to debtors, fails to acknowledge the unjust process by which the bills accumulated and are collected.

to a 2014 Consumer Financial Protection Bureau report, fully half of overdue debt on credit reports is medical debt.¹¹² Paradoxically, debtors may be better off if medical providers sell the debt to debt-buyers that pay pennies on the dollar then try to simply collect more than they paid for the debt. But too often the transfer to debt collectors introduces errors to the billing, causing collectors to hound debtors even after the debts have been paid or discharged in bankruptcy.¹¹³

To return to the hypothetical African-American hospital patient: say that she was not insured, and that the hospital billed her \$10,000 for the operation, while a well-insured patient would only “pay” \$8,000 via insurance reimbursements to the provider. If the hospital’s well-insured patients are more likely to be White and its uninsured patient more likely to be Black, that set of facts could justify the uninsured patient or debtor in asserting a \$2,000 offset to the medical debt. This would disgorge the hospital of the unjust enrichment that resulted from having patients with the fewest resources subsidize patients with more resources.

2. Analogy from Uniform Commercial Code (UCC) Article 9 Rebuttable Presumption Rule

Private law already provides a restitutionary type of offset that protects debtors in secured transactions governed by UCC Article 9. The doctrine known as the rebuttable presumption rule provides a model for how a restitutionary remedy could provide relief for debtors harmed by debt contracts that have been warped by race and income disparities.

UCC Article 9’s rebuttable presumption rule disgorges creditors of gains from failing to comply with debtor-protective rules. Recall that Article 9 enforces contracts in which secured creditors take a security interest in the debtor’s personal property as collateral to secure repayment of a loan. If the debtor defaults on the loan obligation, the secured lender enjoys the extraordinary remedies of self-help repossession and selling the collateral to satisfy the debt.¹¹⁴ To access those rights, secured lenders must comply with specific debtor-protective provisions, including the creditor’s duty not to breach the peace in repossessing the collateral and its duty to sell the collateral in a “commercially reasonable” manner. Commercial reasonableness, in turn, requires that the creditor notify the debtor of when and how it is going to sell the collateral.

If the debtor still owes the creditor money after the sale, then the creditor can sue the debtor to collect the deficiency. But a creditor’s ability to collect the full amount of the deficiency depends on its compliance with commercial reasonableness and other Article 9 requirements. The rebuttable presumption

112. Olga Khazan, *What Happens When You Don’t Pay a Hospital Bill*, THE ATLANTIC (Aug. 28, 2019), <https://www.theatlantic.com/health/archive/2019/08/medical-bill-debt-collection/596914/> [https://perma.cc/V75E-GHGY].

113. Peter A. Holland, *Defending Junk-Debt-Buyer Lawsuits*, CLEARINGHOUSE REV., May-June 2012, at 12, 14–16.

114. U.C.C. §§ 9-203; 9-601; 9-609; 9-610 (AM. L. INST. & UNIF. L. COMM’N 1977).

rule of UCC Section 9-626 polices that compliance by requiring creditors to prove that they complied with Article 9's debtor-friendly protections.

Here is how it works: say that the creditor loaned the debtor \$10,000 and took a security interest in a car. Upon debtor's default, the creditor seized and sold the car for \$5,000, but failed to meet its Article 9 duty to notify the debtor of the time and place of the sale. When the creditor sues the debtor to collect the \$5,000 still due, the debtor can reduce or wipe out the rest of the debt by asserting the rebuttable presumption rule of UCC Section 9-626.¹¹⁵

Analysis under the rebuttable presumption rule proceeds in four steps.

1. The debtor raises issue of creditor's noncompliance with Article 9;
2. The creditor must prove that it did comply with Article 9;
3. If the creditor cannot satisfy that burden, then a compliant Article 9 disposition is rebuttably presumed to generate enough money to satisfy the full debt (i.e., wipe out the deficiency); and
4. The creditor can rebut the presumption of no deficiency by showing that even a compliant disposition of the collateral still would have left a deficiency.

In the example of the creditor that failed to notify the debtor of the date it planned to sell the collateral, the creditor cannot prove that it complied with Article 9. So Article 9 presumes that a compliant sale would have generated \$10,000 and paid off the debt. Only if the creditor can prove—by a preponderance of the evidence—that a compliant sale would still have left a deficiency can the creditor collect that deficiency.

Now imagine how a similar logic could operate in the medical debt context. The data discussed above suggest that uninsured or underinsured patients are more likely to be African-American than White, and also that medical providers may well charge uninsured or underinsured patients higher prices than insured patients and pursue more harsh collection practices against them.

If all that were true, and the provider (or its agent in the case of a collection agency) sued the uninsured or underinsured African-American patient to collect the bill, a statute, common law, or equitable rule could dictate the following process:

1. The debtor raises the issue of discriminatory billing;
2. The creditor carries the burden of proof to show equality in credit terms regardless of race, income, insurance status, etc., and perhaps compliance with any reporting requirements with regard to its billing practices;
3. If the creditor cannot prove fair lending practices, the doctrine presumes that fair lending practices would have enabled the debtor to pay in full, and thus wipe out any remaining debt; and
4. The creditor can rebut the presumption by showing that fair credit practices would still have left part or all of the medical debt, and the

115. U.C.C. § 9-626 (AM. L. INST. & UNIF. L. COMM'N 1977).

debtor would have to pay that amount.

This typical race or income-based restitutionary remedy could provide debtors with leverage to negotiate settlements as well as financial relief if debts are reduced or wiped out. In addition, it would give creditors incentives to bill equitably and comply with any required disclosures of race and income-based disparities in their billing practices.

Medical debt provides just one example. Future work could explore how restitutionary offsets or defenses could work in other debt contexts, such as residential mortgages, payday lending, and school loans. While these private law remedies require legal representation and sophistication to exercise, a perfect solution should not hold hostage the good that restitutionary remedy could do. Moreover, given the expressive function of law, the very existence of the relief and its operation may pave the way to broader changes by openly recognizing the race- and income-based harms created and exacerbated by White supremacist contracting practices in the law more generally.

VI

CONCLUSION

Reparations are due to African-Americans for the immense, systemic gains that White people and institutions have retained at Black Americans' expense. Contracts played a crucial role in the accumulation of those ill-gotten gains, often in conjunction with government action such as New Deal programs that made housing and education credit much cheaper for White Americans than for Black Americans. Those contracts and actions breached the social contract upon which law is purportedly based by violating the foundational principal of equal treatment for all. Instead, African-Americans funded New Deal programs with their tax dollars, yet did not share equally in the life-enhancing benefits of those government giveaways.

While existing reparations proposals often advance public law solutions, contract law's culpability in unjustly enriching White Americans and institutions makes contract-based relief a particularly apt vehicle for reparations, especially in the context of debt. This Article has explored a private law remedy in the form of restitutionary relief for the contracts and other actions that breached the social contract and thus contributed to the racial wealth gap. While this framework requires creative understanding of the social contract as linked to other kinds of contract, the equitable flexibility of restitution makes it less of a reach than it may first seem. Indeed, other contract-based doctrines such as UCC Article 9's rebuttable presumption rule already recognize an offset to disgorge lenders of gains unjustly generated by evading debtor-protective statutory provisions.

Admittedly, the social contract's liberal promise of equal treatment for all falls short of the precision required to enforce promises in ordinary contracts, and measuring the losses poses difficulties. But once we recognize how ordinary contracts—including debt contracts—have created, sustained, and even exacerbated the racial wealth gap and attendant gaps in life chances, both

scholars and doctrine must look for remedies. To fail to make those reparations is to give up on the very idea that law is made by everyone and for everyone, and to concede that formal equality is mere pretense to cover up a massive giveaway to the haves at the expense of the have-nots. The loss of that liberal ideal would impoverish us all.