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## Michael Perry and Disproportionate Racial Impact

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# Michael Perry and Disproportionate Racial Impact

LARRY ALEXANDER\*

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I am delighted to be contributing to this festschrift honoring Michael Perry. He and I go back a long way. He may not remember how far back, but I do. In 1980, when Michael was a faculty member at Ohio State's law school, he organized a symposium on John Ely's recent *Democracy and Distrust*, and he invited me to contribute to it, which I did. (The contributions were published in the 1981 volume of the *Ohio State Law Journal*.) I am not sure Michael knew me then, or why he invited me, but we have known each other and had both an intellectual and personal relationship ever since. Indeed, even as I was writing this, I was looking forward to receiving Michael's contribution to a symposium I had organized and, COVID willing, to seeing him in person at that symposium. (Unfortunately, family matters prevented him from coming.)

I am assuming that most of the contributors to this festschrift will focus their remarks on Michael's human rights literature. After all, international human rights, and how they should bear on constitutional adjudications in

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the United States, has been Michael's preoccupation for many years and the subject of his many books. And surely it is a topic, or set of topics, that merits the attention I expect it to receive in this festschrift. Nonetheless, human rights and how they relate to the U.S. Constitution will not be my focus. I intend to look at Michael's early work, and in particular, his work on equal protection. I think some of what Michael wrote on this topic was misguided. But I focus on it, not to find a bone to pick somewhere in Michael's impressive body of work, but because his error in that early work has an analogue in today's political discourse, which makes that error of many years past of contemporary importance.

## I. THE DISPARATE IMPACT THEORY OF RACIAL DISCRIMINATION

This section's title is the title of Michael's article that will be the principal focus of my remarks.<sup>1</sup> Although Michael also wrote several other articles on equal protection theory in the same time period,<sup>2</sup> including one in which he takes issue with what I had written on the topic,<sup>3</sup> it's his disparate racial impact (DRI) theory that interests me, largely because of claims made today that echo his.

Michael's principal disagreement with the Supreme Court's equal protection jurisprudence is the Court's decision in *Washington v. Davis*.<sup>4</sup> In that case, two black men brought suit under the equal protection prong of the Fifth Amendment's due process clause.<sup>5</sup> They had failed Test 21, a written examination used by the District of Columbia police department to select its recruits, and thus had been denied positions in the District's police force. They based their constitutional argument on the fact that a greater proportion (57%) of blacks failed Test 21 than the proportion (13%) of whites who failed.

The court of appeals had reversed the district court's judgment for the District, ruling that the use of Test 21 was unconstitutional due to a failure to demonstrate its job relatedness.<sup>6</sup> But the Supreme Court reversed the court of appeals, holding that disproportionate impact is not sufficient to make out an equal protection violation, and that a claimant must show that

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1. Michael J. Perry, *Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

2. Michael J. Perry, *The Principle of Equal Protection*, 32 HASTINGS L.J. 1133 (1981); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979); Michael J. Perry, *Constitutional Fairness: Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383 (1977).

3. See Perry, *The Principles of Equal Protection*, *supra* note 2, at 1136-37 n.10.

4. 426 U.S. 229 (1976).

5. See *Bolling v. Sharpe*, 347 U. S. 497 (1954) (holding that de jure school segregation in the District of Columbia violated the principle of equal treatment inherent in due process).

6. *Davis v. Washington*, 512 F.2d 956 (D.C. Cir. 1975).

a discriminatory purpose was behind the government's choice of the criterion that produces that impact.<sup>7</sup> The court of appeals had applied the test for a Title VII violation,<sup>8</sup> but that test was not the test applicable to equal protection claims, or so said the Court.

Perhaps the important reason the majority was dissuaded from adopting the *Griggs* Title VII DRI test for equal protection jurisprudence lies in this paragraph of Justice White's opinion for the majority:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.<sup>9</sup>

It is important to point out that had the Court adopted the *Griggs* DRI test as the standard for equal protection, the consequences would extend far beyond those that worried the majority in the paragraph just quoted. First, it is important to remember that the equal protection clause protects all "persons." In other words, it protects members of all races, not just blacks. So a statute that does not have a disproportionate impact on blacks might have a disproportionate impact on whites, or on Asians. And if one adds to DRI disproportionate sexual impact, or disproportionate citizen–status impact, it would be difficult to imagine how any statute would not be subject to the demand that it be shown to serve a compelling interest. In the Title VII employment cases, the demand is that the employment criterion producing the disproportionate impact serve a "business necessity" to avoid running afoul of Title VII. But if under the equal protection clause DRI were applied to all laws, the government would, by analogy, have to demonstrate "tax necessity," "regulatory necessity," and so on. And given the point made above, that all races are protected under the equal protection clause, the government would be forced to demonstrate the necessity and compellingness of each of its laws, given that no law will have a perfectly proportionate impact on all races (and also on both sexes, or on aliens and citizens).

Of course, the problem would be mitigated if DRI required that the impact in question be "grossly" disproportionate. The problem then would

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7. 426 U.S. at 239–45.

8. That test was first announced by the Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

9. 426 U.S. at 248 (footnote omitted).

become when is disproportionate impact “grossly” disproportionate. Any line defining grossly disproportionate impact will be arbitrary.

And that is the case because the harm of disproportionate impact is not obvious. Is proportional representation of “races” an intrinsic good, one that should be pursued by the government unless the costs of doing so are compelling? Is disproportional representation of races an intrinsic bad? The notion that races rather than the individuals who comprise them should be the loci of moral concern seems morally obtuse—more in line with regimes such as Nazi Germany than with the liberal ethos to which most Americans adhere.

It thus seems hard not to agree with the Court’s rejection of the DRI test for equal protection. Disproportionate racial effect, at least when that effect is not itself the purpose behind the law, seems to be an unjustifiable basis for deeming laws constitutionally infirm.

Of course, one might respond that law-makers’ purposes are a strange reason to invalidate laws the effects of which are benign. After all, constitutional adjudication is not primarily about judging law-makers. It’s about judging their products. And when the law-maker is a multimember body, such as a legislature, a body that lacks a mind and thus purposes and beliefs, the ontology of legislative purpose itself becomes elusive. A DRI constitutional standard at least avoids that Gordian Knot.

Still, Michael’s quarrel with the Court’s rejection of DRI as the equivalent of a racial classification and thus subject to the compelling interest requirement is not based on skepticism about law-makers’ purposes—their relevance, or their ontology. Nor does he quarrel with the Court’s worries over the broad array of laws that DRI would subject to strict scrutiny. Here’s what he says defending the Court’s aversion in *Washington v. Davis* to employing DRI as a presumptive equal protection violation:

The equal protection clause serves principally as a brake on the lamentable tendency of the majority race willfully to oppose or exploit racial minorities, and in this regard it prohibits, absent compelling justification, the use of race as a criterion of selection. Traditionally, however, it has not been thought wrong—unfortunate, perhaps, but not wrong—that an individual or group is incidentally burdened by a law serving the public good. Incidental burdens have been thought the fair price everyone, black as well as white, must pay, at some time or other, for the societal advantages of laws. After all, virtually every piece of legislation is burdensome to somebody. Accordingly, with respect to racial discrimination, equal protection doctrine has been focused almost exclusively on *willful* oppression or exploitation of minorities by the majority. This focus is especially understandable in light of what historically has been the society’s severest moral affliction, racial animus.<sup>10</sup>

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10. Perry, *supra* note 1, at 556 (footnote omitted; emphasis in original).

Despite this concession to the Court's reasons for rejecting DRI as a presumptive equal protection violation, Michael thinks those reasons are insufficient, at least in certain contexts. He argues that when the incidental burdens disadvantage persons as a consequence of prior governmental action that was unconstitutional or immoral, the disadvantage suffered can no longer be considered ethically neutral. Accordingly, he argues that because the disadvantage is, as he puts it, "the fruit of prior government misdeeds," the government should bear a heavier burden of justification.<sup>11</sup>

Michael argues that governmental actions that disproportionately disadvantage blacks do so because blacks are disproportionately poor and poorly educated. They have not only been discriminated against in education, but Michael asserts that slavery and discrimination have caused familial and social disintegration, which in turn have impeded motivation and cognitive development. Add to this the fact that most blacks live in deprived racially isolated environments, and the result is that any law having the effect of burdening the poor or the poorly educated, or of reinforcing racial isolation, will have the effect of disproportionately disadvantaging blacks.<sup>12</sup>

Despite this, Michael does not argue that DRI should require the government to show that its law serves a compelling interest, the standard that applies to the use of race as a criterion of selection, or that applies when a law is enacted *because of* rather than *despite* its DRI. "The standard of review—the burden of justification—contemplated by DRI theory is more rigorous than that required by the rational relationship test but less rigorous than that required by the strict scrutiny test."<sup>13</sup> Michael's preferred DRI test would weigh the degree of disproportion, the interest disadvantaged, the government's objective behind the law, and the fit between the law and its objective (and whether there are less disproportionate alternatives).<sup>14</sup> Obviously, there are a number of soft, vague variables in Michael's test, such as the degree of disproportion, the degree of fit, the importance of the unburdened interest, and the importance of the government's objective.<sup>15</sup>

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11. *Id.* at 557.

12. *Id.*

13. *Id.* at 559.

14. *Id.* at 560.

15. Michael is rather sanguine about the court's ability to operate with such matters of degree. *Id.* at n.103. Like the man who's asked if he believes in baptism by immersion, and who replies, "Believe in it? Heck, I've seen it done!," Michael relies on the fact that when courts have to decide under such vague standards, they manage to do so. Of course, it is fair to ask whether those decisions are justifiable; and the fact they are decisions does not answer that question.

Judges will surely disagree much more about these variables than they will over the rather cut and dried matter of whether the government used race as a criterion of selection, or even over whether the ostensibly nonracial law was enacted for a racial purpose.

Michael is surely correct about the disadvantages blacks have suffered at the hands of government. Slavery, Jim Crow, and discrimination are facts about the past. And they undoubtedly have left indelible traces in the black community today—although, as I shall discuss below, their effects on the *individuals* who make up today’s black community is a more complicated matter.

Is Michael’s DRI test a form of affirmative action, a mild form of reparations for past unjust treatment? He denies that it is.<sup>16</sup> He points out his DRI test does not call for allocating scarce resources to blacks. And poor whites will benefit from the absence of laws disadvantaging poor blacks. They will not benefit from preferential treatment of blacks under affirmative action.

Michael sees his DRI theory’s principal application in three contexts: employment decisions (as in *Washington v. Davis*); land use policy; and decisions affecting the racial make up of public schools.<sup>17</sup> With respect to employment, DRI theory requires that hiring practices be job-related.<sup>18</sup> With respect to land use policy, DRI theory requires removal of barriers to low-income housing.<sup>19</sup> And with respect to student assignment, DRI theory requires that racially unbalanced schools be avoided where practicable.<sup>20</sup> As Michael envisions the application of DRI theory, it is both flexible and contextually limited.<sup>21</sup>

## II. ASSESSING THE MERITS OF MICHAEL’S DRI THEORY

As just stated, Michael’s DRI theory has the virtues of being flexible and contextually limited. And DRI does not trigger the highly demanding compelling interest test. All in all, it looks to be a rather mild corrective to what Michael considers the error of *Washington v. Davis*.

On the other hand, as I have pointed out, the criteria in the test Michael’s DRI theory triggers are vague, and the outcomes they will produce in litigation would likely be unpredictable and controversial. That is surely a strike against Michael’s theory and in favor of the Supreme Court’s

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16. *Id.* at 561.

17. *Id.* at 562.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 563. Michael says that his DRI theory would not apply to jury selection or to legislative districting. *Id.* at 566–71.

more bright line test that triggers strict scrutiny only when race is the criterion of selection or when a racial purpose lies behind a facially race-neutral law.

I believe, however, that Michael's DRI theory has a more basic problem: It treats blacks as a monolith. It does not distinguish between blacks who descended from American slaves, and blacks who emigrated from the West Indies or from Africa. It does not distinguish between blacks who face economic and educational handicaps and blacks who do not. And among blacks who do face such handicaps, it does not distinguish among blacks whose difficulties stem from past mistreatment and blacks whose difficulties stem from their own choices and behaviors. With respect to the latter, it seems to assume that such choices and behaviors have been caused by past injustices. And finally, it depends on a definition of race, and of blacks in particular, that it does not give us. Because humans are one interbreeding species, any definition of races will be arbitrary, and mating across such arbitrary lines will create the need for new arbitrary lines.

Perhaps the weakest part of Michael's case for DRI theory is his account of the etiology of the handicaps he attributes to blacks. In defending the use of DRI theory in the context of public employment, and calling into question employment requirements that put a premium on educational achievement, he says the following:

Blacks are disproportionately represented among those whose educational achievement is weak, and this condition is part of the legacy of slavery and racial oppression. Not only have blacks been discriminated against in education, but the impact of slavery and discrimination on the family and social structures of many blacks has seriously impaired the motivation and ability of many black children to succeed in the classroom. Because there is a disproportionate impact, a history of discrimination, and a causal connection between them, the DRI standard of review should apply.<sup>22</sup>

Let us examine that passage closely. First, it goes without saying that job tests for public employment should be job related. The public suffers if that is not the case.

Second, suppose the government uses a test that is not job related, but the races of applicants who fail it are proportional to the numbers of the applicants of those races in the applicant pool. Suppose, for example, that

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22. *Id.* at 572.



fifty percent of the applicant pool is black and fifty percent is white.<sup>23</sup> And suppose that fifty percent of the applicants who fail this non-job-related test are black and fifty percent are white. The DRI test is therefore not triggered. But unlike the whites who failed, the blacks who failed may have been handicapped in the way Michael asserts black have been. So for blacks who must deal with a non-job-related employment test despite their educational handicaps, they can only get relief from such a test if they fail it in a greater proportion than do whites.

Third, Michael's causal claims are shaky. For example, after centuries of slavery followed by years of racially discriminatory laws, the black family in the early 1960s was relatively intact. Black marriage rates were about the same as those of whites.<sup>24</sup> The dissolution of the black family really begins in the mid-1960s with enactment of the so-called War on Poverty.<sup>25</sup> It is less a product of past injustice and more the unintended consequence of societal good intentions. Moreover, parallel trends have occurred among whites and Hispanics. It is well documented that family dissolution correlates with poor educational outcomes.<sup>26</sup> And poor educational outcomes are also correlated with a lack of emphasis on education by parents and by a disdain for educational achievement among peers. Putting aside the politically incorrect possibility that heredity might also play a role, poor educational achievement's connection to the past evils of slavery and Jim Crow is questionable at best and most likely untrue.

So, given that non-job-related tests for public employment are a bad thing, they only fail constitutionally under Michael's DRI theory if blacks fail them disproportionately, even if they would have passed them disproportionately in the absence of their putative handicaps. Moreover, those handicaps, if they exist, are most likely not the result of slavery and Jim Crow. Nor are those handicaps unique to blacks.

There are similar weaknesses in the application of DRI theory to school assignments and to low-income housing sitings. In school districts, however,

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23. Of course, depending on how one defines the races, there could be many more races than just these two in the applicant pool. I've simplified here for the sake of a point that will also apply if we increase the number of races in the applicant pool.

24. The marriage rate among blacks in the early 1960s was 61%. See Dawne Mouzon, *Why Has Marriage Declined Among Black Americans?*, SCHOLARS STRATEGY NETWORK (Oct. 26, 2013), <https://scholars.org/brief/why-has-marriage-declined-among-black-americans> [<https://perma.cc/Z4DK-D6JM>].

25. From 1965 on the number of out-of-wedlock births has increased dramatically, especially, but not exclusively, among blacks. See, e.g., Walter E. Williams, *The True Black Tragedy: Illegitimacy Rate of Nearly 75%*, CNS NEWS (May 19, 2015, 6:50 AM), [www.cnsnews.com/commentary/walter-e-williams/true-black-tragedy/](http://www.cnsnews.com/commentary/walter-e-williams/true-black-tragedy/) [<https://perma.cc/VJT5-7669>].

26. See e.g., Daniel Potter, *Psychosocial Well-Being and the Relationship between Divorce and Children's Academic Achievement*, 72 J. MARRIAGE & FAMILY 933 (2010).

rare, where blacks are relatively affluent and whites are poor, and most blacks go to one school and most whites go to another school, DRI theory would demand that those student assignments be invalidated and, if possible, blacks and whites be assigned to schools in numbers proportionate to their percentage in the district.<sup>27</sup> It is hard to see, however, why the “racial isolation” of the relatively affluent blacks is bad for them, or that the blacks would benefit from having a proportionate number of whites in their schools.

Moreover, even if we drop the stipulation that the blacks are more affluent than the whites, is it true that “racial isolation” is uniquely harmful to blacks? We don’t consider the racial isolation of whites or of Asians to be harmful to them educationally. And there are plenty of examples of racially isolated black schools whose students performed at a high level.<sup>28</sup>

Michael’s third area in which he foresees his DRI theory will be important is that of land use policy. Exclusionary zoning, fencing out low-income housing from more affluent neighborhoods, will leave poor blacks geographically isolated, which in turn will make it more difficult for them economically and educationally.<sup>29</sup> Again, however, DRI theory is a rather clumsy tool for achieving racial integration of neighborhoods. It is important to remember that although the percentage of whites who are poor is lower than the percentage of blacks who are poor, in absolute numbers there are more poor whites than poor blacks. Because of that, exclusionary land use policies are quite likely to have a proportionate impact on blacks and whites in many locales. Economic isolation rather than racial isolation will be the result of these policies. Blacks will benefit from DRI theory only if their low-income population is significantly greater than the low-income population of whites in their localities.

Michael’s DRI theory of equal protection violations, therefore, is subject to a number of objections. The judicial test that DRI triggers is vague and manipulable. It assumes a monolithic picture of blacks in America. Its causal assumptions are questionable. And it aids its intended beneficiaries only in situations in which whites are aided less but not in situations in which whites are aided equally or more. For these reasons, I believe the

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27. Michael views such racial imbalance in the schools as having a disproportionate (negative) impact on blacks. Perry, *supra* note 1, at 575.

28. Consider, for example, the achievements of the students at all-black Dunbar High School in Washington, D.C., at a time when the District’s schools were racially segregated by law. See [dunbarhsdc.org](http://dunbarhsdc.org).

29. Perry, *supra* note 1, at 580–85.

Court in *Washington v. Davis* was right to reject DRI as a presumptive equal protection violation.

### III. DISPROPORTIONATE RACIAL IMPACT AND TWENTY-FIRST CENTURY RACIAL POLITICS

My interest in Michael's 1977 article on DRI lies, as I said at the outset, on its relevance to contemporary racial politics. One hears a lot these days about so-called "systemic racism." That term is usually not defined, nor are the "systems" that it refers to identified.

One such "system" is that of apprehending, trying, and punishing those who murder, rape, rob, burglarize, and batter. It is difficult to see how that "system" is in any way "racist." One may, of course, object to particular criminal laws, including some that have a disproportionate impact on blacks.<sup>30</sup> But that would be a retail objection, not a wholesale objection to the "system" of criminal justice.

Another "system" is that of the market economy, a system based on the freedom to sell and acquire goods, labor, and capital. There is nothing "racist" about such a system, for no race would benefit from its absence.

I could go on with this list of "systems," but I doubt if any of them can be fairly termed as "racist." What I believe lies at the heart of the claim of "systemic racism" is not an indictment of this or that "system" but is rather the claim that unless blacks are proportionately represented in all sectors of American life, we can presume racism is the cause.<sup>31</sup>

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30. A number of criminal laws, including, for example, the various laws against acts of violence, have a disproportionate impact on blacks. But that is because blacks violate those laws disproportionately.

31. See IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* (2019). The idea that there is systemic racism has been forcefully rebutted by such black intellectuals as John McWhorter of Columbia University and Shelby Steele of Stanford's Hoover Institution. See, e.g., JOHN MCWHORTER, *WOKE RACISM* (2021); SHELBY STEELE, *SHAME: HOW AMERICA'S PAST SINS HAVE POLARIZED OUR COUNTRY* (2015); SHELBY STEELE, *WHITE GUILT: HOW BLACKS AND WHITES TOGETHER DESTROYED THE PROMISE OF THE CIVIL RIGHTS ERA* (2006).

The claim of systemic racism is also related to the attack on western civilization, the cultural legacy dating from the Greeks and Romans. Because almost all the contributors to the major accomplishments of western civilization were white, the "system" represented by those accomplishments—the science, technology, medicine, literature, art, music, and the moral and political ideals of liberty and human equality—must be rejected and replaced. That view is, of course, not only ridiculous and self-defeating—the very ideals that freed the slaves, eliminated Jim Crow and animated the civil rights movement were the products of western civilization—but is also profoundly racist.

The cries of systemic racism, although completely meritless, are, I believe, when made by whites, usually either cheap or ignorant virtue signaling attempts or else completely disingenuous panderings to those bullying "Twitter mobs" that can only denounce but never debate. And when made by blacks, those who make them are almost always privileged,

The problem with this claim is that it is manifestly false. There are many causes for why races, however defined, are not proportionately represented in all domains. Asians, for example, are “overrepresented” in science, medicine, and technology. This may be due to native intelligence, cultural preferences, educational diligence, or some combination of factors. The same things may explain the disproportionate number of Jews in the professions, or the disproportionate number of blacks in professional sports. There is nothing racist in the selection processes in any of these fields of endeavor.

I expect a rebuttal from those claiming systemic racism to go as follows: Had there not been slavery and Jim Crow, blacks would have been proportionately represented in all fields, and not well represented only in a few, such as athletics. Slavery and Jim Crow bred the pathologies that afflict blacks and lower their performances in all areas other than athletics and a few others. In that sense, the absence of across-the-board proportional racial representation is “racist” in that it reflects the legacy of slavery and Jim Crow.

There is no question that the dissolution of the black family, which has resulted in poor educational performance, poverty, and an increase in criminality, has made it impossible for blacks to achieve parity with groups in the upper echelons of the economy. As I pointed out earlier, however, there is reason to doubt that slavery and Jim Crow caused the current pathology of family dissolution.<sup>32</sup> Nor is it clear what the remedy should be. Government cannot magically put dissolved black families back together, or instill love of education and an aversion to criminality in black children. Nor should we just overlook deficiencies in qualifications for positions. No patient wants an underqualified doctor; no client wants an underqualified lawyer; no bridge builder wants an underqualified engineer; and so on.

Recognizing this problem, many have called instead for paying reparations to current blacks based on the premise that slavery and Jim Crow have injured them and that no other remedy for the harms caused today by these past injustices is feasible. But the prospect of paying current blacks as reparations for these past injustices has not only doubtful political prospects. As a conceptual matter, it is thoroughly flawed.

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elite blacks who view portraying themselves as victims as a way to gain more power, wealth, and influence.

32. See *supra* notes 24–26 and accompanying text.

The basic model for reparations is A wrongfully harms B, so A must compensate B and restore B to where B would have been had the wrong not been committed. So if Al recklessly crashes his car into Bob's car and damages it, Al should have to pay what it costs to restore Bob's car to the condition it was in before the accident. There are some tricky issues whenever we must ask counterfactuals, such as what would the condition of Bob's car be had Al not crashed into it. Would another car have wrecked Bob's if Al's hadn't done so? But we deal the best we can with answering these counterfactuals in ordinary cases in which A wrongfully harms B.

If this is our basic model of reparations, then we should ask, first with respect to slavery, who are the As and Bs today? After all, both the slaveholders—the As—and their slaves—the Bs—are long dead. So the As and Bs today must be those who stand in the shoes of the slaveholders and slaves and inherit their obligations and rights.

So who, then, are the As today who owe reparations for slavery? Do they include the millions of whites who emigrated to the U.S. in the last 150 years? The descendants of whites who opposed slavery? The descendants of blacks who owned slaves (there were some who did)?<sup>33</sup> The descendants of Native Americans who owned slaves (ditto)?<sup>34</sup> The descendants of those who fought and often died to end slavery?

The assumption seems to be that the U.S. government is the A for purposes of reparations for slavery. But the U.S. government did not itself legalize slavery, which was a matter left to the states. It is true that the U.S. Constitution did not outlaw slavery. Had it attempted to do so, however, there would have been no United States, as the states that endorsed slavery would not have joined the union. And it was the U.S. government, in the Civil War, that finally put an end to slavery, and at great cost in blood and treasure.

But let us put aside the problem of the As and assume the U.S. government, and thus all taxpayers (black and white), will pay the reparations. The question then is, who are the recipients of these payments, the Bs? Do they include blacks who have emigrated to the U.S. from Africa and the West Indies? Blacks whose ancestors owned slaves, which include not only black slaveholders, but also white slaveholders with black descendants? Wealthy blacks?

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33. 3776 blacks owned 12,907 slaves. *See* [www.africanamerica.org/topics/did-black-people-own-slaves/](http://www.africanamerica.org/topics/did-black-people-own-slaves/) [<https://perma.cc/H2KD-V8SF>].

34. In 1860, the Cherokees owned 2511 slaves; the Choctaws owned 2349; the Creek owned 1532; and the Chickasaws owned 975. *See* [www.intellectualltakeout.org/native-americans-who-owned-slaves/](http://www.intellectualltakeout.org/native-americans-who-owned-slaves/) [<https://perma.cc/2GKU-H9NR>].

There are more basic problems on the B side of the model. Had there been no slavery, the ancestors of today's U.S. blacks would have remained in Africa, most often as the slaves of other African tribes. And even more basically, in the absence of slavery, today's individual blacks would not exist. That is, although blacks might exist in the U.S., the ones who actually exist here would not exist at all. For each of us is the product of a particular sperm and egg. Change the circumstances of conception ever so slightly, and a different individual is created. And slavery caused more than slight changes in the circumstances of conception that would have existed in its absence. Each of us in reality owes our very existence to past horrendous events, and that is as true of today's blacks as it is of the rest of us. So, none today can say, but for slavery, I would have been better off. People might be better off today had there been no slavery, but none of us, blacks included, would be.<sup>35</sup>

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35. See, e.g., KASPER LIPPERT-RASMUSSEN, MAKING SENSE OF AFFIRMATIVE ACTION 32–36 (2020); Saul Smilansky, *The Moral Evaluation of Past Tragedies: A New Puzzle*, 17 J. MORAL PHIL. 188 (2020); *Morally, Should We Prefer Never to Have Existed?*, 91 AUSTRALASIAN J. PHIL. 655 (2013); Christopher W. Morris, *Existential Limits to the Rectification of Past Wrongs*, 21 AMERICAN PHILOSOPHICAL Q. 175 (1984); Michael Levin, *Reverse Discrimination, Shackled Runners, and Personal Identity*, 37 PHILOSOPHICAL STUDIES 139 (1980). Philosopher David Boonin understands the problem but believes there is a way around it. DAVID BOONIN, SHOULD RACE MATTER? UNUSUAL ANSWERS TO THE USUAL QUESTIONS 109-11 (2011). Boonin's "solution" to the nonidentity problem, as it is known, is premised on the residual effects of slavery on present day blacks. But because present day blacks, like the rest of us, owe their existence to slavery and other great wrongs, Boonin's "solution" doesn't succeed. See, e.g., Larry Alexander and Maimon Schwarzschild, *Race Matters*, 29 CONST. COMM. 31, 52–53 (2013). Other philosophers have attempted to finesse the nonidentity problem that dogs reparations for slavery by focusing on parents' obligations to provide a minimum level of welfare for their children. See, e.g., Andrew I. Cohen, *Compensating for Historic Injustices: Completing the Boxill and Sher Argument*, 37 PHIL. & PUB. AFF. 81 (2009). See also Bernard R. Boxill, *A Lockean Argument for Black Reparations*, 7 J. ETHICS 63 (2003); George Sher, *Transgenerational Compensation*, 33 PHIL. & PUB. AFF. 181 (2005). But this approach does not get one to reparations for present day blacks, none of whom have lacked the minimum level of welfare parents owe children, especially given the safety net of the welfare state. And still other philosophers have tried to circumvent the nonidentity obstacle to reparations by focusing on inheritance rights. But even if slaves had received compensation for the wrong of their enslavement, it is quite uncertain how much of that would have been passed down through the generations to their descendants. See, e.g., Stephen Kershner, *The Inheritance-Based Claim to Reparations*, 8 LEGAL THEORY 243 (2002). And some argue that Blacks receive many billions of dollars annually through the redistribution of income. See, e.g., MICHAEL LEVIN, WHY RACE MATTERS 259 (1997).

So, the premise on which reparation for slavery is modeled is flawed. Reparations to victims' descendants make sense only if those descendants existed at the time the wrong was committed, such as the reparations paid by Germany after World War II.

The case for reparations for Jim Crow laws is somewhat easier. The federal government was itself guilty of enacting such laws.<sup>36</sup> And there are still a few blacks alive today who were born during the Jim Crow era. But most blacks today were born after Jim Crow laws were overturned by the Supreme Court, so the nonidentity problem renders their claims to have been harmed by Jim Crow laws, like their claims to have been harmed by slavery, untenable.

And more important, reparations are definitely not a cure for problems faced by blacks today. In general, blacks as a group are doing better than ever before, not only materially, but also in terms of positions of influence.<sup>37</sup> And for those who are not doing well, the cause is not the effects of slavery or Jim Crow.<sup>38</sup> Nor is the cause racial bigotry, which, though some undoubtedly exists, is not a significant obstacle in blacks' lives. Nor is it the vague culprit of "systemic racism."<sup>39</sup>

Neither racial bigotry nor non-bigoted discrimination is the cause of black poverty to the extent it exists. (If it were, African and West Indian blacks would not be doing as well as they are, or emigrating to the U.S. in great numbers.) Although racial bigotry and discrimination could be problems

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36. For example, it racially segregated the schools in the District of Columbia, a federal enclave. *See, e.g., supra* note 5.

37. There are today many black millionaires, a number of black CEOs, and quite a few mayors, police chiefs, judges, state legislators, members of Congress, and the current Vice President, as well as a past two-term President.

38. That statement needs to be qualified. Shelby Steele argues that slavery and Jim Crow gave rise to cultural norms among blacks that were appropriate for a condition of servitude and dependency but not for the condition (and burden) of freedom and personal responsibility. The ills of the black underclass, according to Steele, largely stem from the inability to cope with freedom and the responsibility for what one achieves that comes with freedom. *See, e.g.,* Tunku Varadarajan, *Interview with Shelby Steele*, WALL ST. J., Feb. 12, 2021.

39. There is no doubt some residual racial discrimination that persists even as racial bigotry itself has been banished to the margins of society. This non-bigoted discrimination reflects the higher incidence of criminality and other unwanted behaviors among blacks. The result is that when one knows only that a person is black and perhaps male, one will predict that person is more likely to engage in unwanted behavior than non-black persons. This is the so-called "crime tax" that law-abiding blacks pay. It no doubt makes life somewhat more difficult for them in a variety of ways, as it has for other groups in the past. And this kind of discrimination is difficult to eliminate precisely because it's rational. (That is why it is similarly rational to be more concerned about one's safety and one's possessions in some neighborhoods but not others.) The good news, however, is that it is demonstrably not a major obstacle much less an insurmountable one for avoiding poverty or even achieving great success.

for blacks today, the reality, thankfully, is that they are not. As Steele acknowledges, blacks today are far more likely to encounter preferential treatment and celebration than bigotry and discrimination.<sup>40</sup>

The real impediment to the advancement of poor blacks—and everyone knows this, regardless of whether they admit it—is the cultural factors that have produced family disintegration, which in turn portends poor educational achievement, crime, and poverty. And this problem will only be worsened by reparations, which sends the message that the predicament of poor blacks is others' fault, that blacks are victims, and that they have no control over their fate. That is precisely the wrong message to send, a message that denies blacks' agency. Reparations will not atone for chattel slavery but will instead foster the insidious psychological slavery of victimhood.<sup>41</sup>

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Michael Perry has had a long and very distinguished career, one more than worthy of this celebratory symposium. I suspect his major intellectual legacy will be his writings on international human rights and their role in U.S. constitutional law and Supreme Court decision making. Although I have some disagreements with what Michael has written on these topics, my focus in this article has been elsewhere, on things Michael wrote many years ago about race and equal protection. What he wrote then resonates with demands one hears today for racially proportionate policy outcomes. Although Michael's arguments were much more measured and limited than those today to which I am referring, if his arguments should be rejected, then today's more extreme demands surely must be. We will continue to live in exceedingly fraught times unless we return to focusing on how individuals are faring rather than the groups to which they are arbitrarily said to belong.

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40. See Varadarajan, *supra* note 38.

41. See Scott B. Kaufman, *Unravelling the Mindset of Victimhood*, SCIENTIFIC AMERICAN (June 29, 2020).



