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## Inheriting Inequality: Wealth, Race, and the Laws of Succession

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Rules of inheritance and succession are, in a way, the genetic code of a society. They guarantee that the next generation will, more or less, have the same structure as the one that preceded it.<sup>1</sup>

– Lawrence M. Friedman

Today's most serious racial injustices . . . are a legacy of past racism . . . . [T]he biggest racial problem facing the country isn't discrimination, but rather the deep inequality that has created almost two different Americas . . . .<sup>2</sup>

– Richard Thompson Ford

Since first reading the Friedman quote above,<sup>3</sup> I have carried with me an image of a legal double helix through which our society replicates itself generation after generation according to the encoded instructions of the law of succession and inheritance. Though mutations and evolution occur, essential patterns remain over time. Further, while the patterns of society emerge from law, law in turn emerges from social norms.<sup>4</sup>

In Friedman's recent book, *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law*,<sup>5</sup> he tracks specific trends in inheritance law that reflect changed social norms. He identifies shifts in law and social norms that accommodate nontraditional families and a shift from the "bloodline family" to the "family of affection and dependence,"<sup>6</sup> movement away from formal wills toward will substitutes,<sup>7</sup> and changing attitudes toward wealth and the wealthy.<sup>8</sup>

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<sup>1</sup> Lawrence M. Friedman, *The Law of Succession in Social Perspective*, in DEATH, TAXES, AND FAMILY PROPERTY: ESSAYS AND AMERICAN ASSEMBLY REPORT 9, 14 (Edward C. Halbach, Jr., ed., 1977).

<sup>2</sup> Richard Thompson Ford, *The End of Civil Rights*, BOSTON GLOBE, May 17, 2009, [http://www.boston.com/bostonglobe/ideas/articles/2009/05/17/the\\_end\\_of\\_civil\\_rights/?mo](http://www.boston.com/bostonglobe/ideas/articles/2009/05/17/the_end_of_civil_rights/?mo).

<sup>3</sup> See Friedman, *supra* note 1.

<sup>4</sup> "Laws of inheritance reflect . . . the social background and the social structure. They are the product of society. But they also perform a function for society. These laws and rules help define, maintain, and strengthen the social and economic structure." Friedman, *supra* note 1; see also Palma Joy Strand, *Law as Story: A Civic Concept of Law (with Constitutional Illustrations)*, 18 S. CAL. INTERDISC. L.J. 603, 611–15 (2009) (describing the cycle by which community experiences and stories lead to law, which in turn leads to social norms).

<sup>5</sup> LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* (2009).

<sup>6</sup> *Id.* at 11–13, 19–27.

<sup>7</sup> *Id.* at 13, 58–68, 100–10.

<sup>8</sup> *Id.* at 14, 171–78.

Friedman also notes, but does not discuss, significant demographic changes due to people living longer and the increasing importance of lifetime transfers of wealth for big-ticket items such as college costs and down payments on homes.<sup>9</sup>

Of course, the social structure that is most directly affected by the law of inheritance—which determines who receives people’s property when they die—is the distribution of property, of wealth. This Friedman does not discuss.<sup>10</sup> But his metaphor prompted me to explore the effects of inheritance law on the distribution of wealth in the United States. This Article is the result.

Following the thread of inheritance law, I started with current wealth inequality, which—after falling from its twentieth century peak in the 1920s to a low point around 1980—has increased steadily in recent decades.<sup>11</sup> Further exploration led to the particularly acute wealth disparities between Black and White<sup>12</sup> households as well as studies documenting the effect of inheritance in perpetuating those disparities. This is an issue of immediate urgency: The wave of racialized wealth owned by the parents of the baby boom generation is currently washing over the baby boomers in an enormous intergenerational transfer of wealth.<sup>13</sup> Without intervention, the

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<sup>9</sup> *Id.* at 13; see also John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988) (arguing that middle-class families now transmit wealth during the parents’ lifetime in the form of human capital rather than at death via provisions of physical capital).

<sup>10</sup> Friedman does refer to it in passing, FRIEDMAN, *supra* note 5, at 14, 135, but he does not address it in any comprehensive way. Although Friedman devotes a large portion of the book to a discussion of topics relevant especially to those with enormous wealth (dynastic and caretaker trusts and limits on perpetual trusts, charitable foundations, and estate taxes), *id.* at 111–78, he oddly does not articulate a conclusion regarding the economic structure that underlies these patterns other than to observe that institutions have formidable lobbying power, *id.* at 134, 182, and to note the public’s conversion to an anti-estate-tax view as a result of the political campaign against the “death tax,” *id.* at 176–77.

<sup>11</sup> See *infra* notes 30–31 and accompanying text.

<sup>12</sup> In this Article, the racial terminology I use, except when quoting others, is Black and White. See BEVERLY DANIEL TATUM, *WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?: AND OTHER CONVERSATIONS ABOUT RACE* 15–17 (1997). I focus on Black and White wealth here because of the amount of available data, the acute nature of the disparities, and the historical centrality of Black-White relationships in U.S. law and culture. For an overview of the wealth picture in the United States that looks to other ethnic groups as well, see MEIZHU LUI ET AL., *THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE* (2006).

<sup>13</sup> See, e.g., Melvin L. Oliver et al., “*Them That’s Got Shall Get*”: *Inheritance and Achievement in Wealth Accumulation*, in 5 *RESEARCH IN POLITICS AND SOCIETY: THE POLITICS OF WEALTH AND INEQUALITY* 69, 73 (Richard E. Ratcliff et al. eds., 1995)

wealth distribution going forward will be at least as racially skewed as it is at present. Part I of this Article describes this initial part of my journey, including a summary of the relevant provisions of our current law of succession.<sup>14</sup>

Confronting these racial wealth disparities, I considered both their effects and their source. As to their effects, current work links net worth to a host of outcomes including, perhaps most importantly, education—a key to success and upward mobility. As to their source, multiple observers trace them to the centuries-old, race-based economic system that separated White “haves” and “could-haves” from Black “have-nots” and “could-never-haves.” Slavery and de jure segregation were the most evident legal aspects of this system, but others such as the Homestead Acts of the late 1800s, the original exclusions from Social Security, and federal support for suburbanization and White-only neighborhoods after World War II were also significant. Part II discusses these dual perspectives on the disparities.<sup>15</sup>

Richard Thompson Ford has pointed to “deep inequality”<sup>16</sup> rather than overt discrimination as the most significant racial problem today. The racial wealth disparities described in Parts I and II constitute one facet of this problem. As with others, inheritance law is facially race neutral, but individual decisions under inheritance law, operating from a starting point of racially skewed wealth, perpetuate deep racial wealth inequality. Ford and others have argued for measures that focus on class rather than race per se to address the floundering of traditional civil rights law in the face of such problems. Cross-racial alliances and legal initiatives that emphasize common economic interests and, paradoxically, de-emphasize race by explicitly acknowledging it as a potent social construct offer a path toward change. Part III traces the line of analysis from deep inequality to a systemic understanding of that inequality to the cross-racial relationships and race-neutral legal initiatives that can move the system.<sup>17</sup>

I then head back to inheritance law, offering two ideas for changing how property passes from one generation to another at

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(“Between 1987 and 2011 the baby boom generation stands to inherit an estimated 6.8 trillion dollars.”).

<sup>14</sup> See *infra* notes 19–79 and accompanying text.

<sup>15</sup> See *infra* notes 80–134 and accompanying text.

<sup>16</sup> Ford, *supra* note 2.

<sup>17</sup> See *infra* notes 135–66 and accompanying text.

death. Both of these, while race-neutral proposals that would benefit all low-wealth individuals and households, would intentionally benefit Black individuals and households disproportionately due to their overrepresentation in the low-wealth ranks. Part IV highlights (1) a shift to a “windfall” tax on inheritances to change our social “story” about inheritance from one in which the decedent is entitled to dispose of “his” or “her” property to one that acknowledges the “Lady Luck” aspect of being born to a richer or poorer family; and (2) changes in intestacy law to provide clear title quickly and easily for inherited assets, especially homes in modest estates.<sup>18</sup>

Finally, in the Conclusion, I offer some thoughts on how the approach I take here, which reflects a systemic rather than an individualized understanding of racism and civil rights, meshes with other current views on the next steps in the long struggle to overcome our continuing legacy of slavery and race.

## I

### WEALTH INEQUALITIES, RACE, AND INHERITANCE

One of the groundings of our form of government is the absence of an aristocracy. In Britain, political power was passed down through inherited titles. The U.S. Constitution, in contrast, explicitly prohibited the granting of titles of nobility by the United States or any of the states individually.<sup>19</sup>

From the Founding, however, vast accumulations of wealth and the economic power that accompanies that wealth have been not only allowed, but encouraged by American capitalistic ideals. Yet, at the same time, there is a conviction in American history that concentrations of wealth—and in particular the creation of economic aristocracies by the inheritance of such wealth over generations—are at odds with our democratic project. One result of this conviction is the estate tax, which has historically been justified as a deterrent to concentrated wealth rather than in terms of revenue raising.<sup>20</sup>

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<sup>18</sup> See *infra* notes 167–255 and accompanying text.

<sup>19</sup> “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” U.S. CONST. art. I, § 9, cl. 8. “No State shall . . . grant any Title of Nobility.” *Id.* at § 10, cl. 1.

<sup>20</sup> FRIEDMAN, *supra* note 5, at 172.

Apart from the estate tax, however, little attention has been paid to the role of the law of inheritance in ensuring—or interfering with—politically acceptable levels of social mobility. The focus has been primarily on ensuring that the wealthiest citizens, the *crème de la crème*, do not found economic dynasties. What happens to the rest of us has been largely ignored. My interest is bringing Friedman’s insight into sharper focus with respect to this issue by developing a more fine-grained picture of the relationships between inheritance and the reproduction of our economic structure overall.

### A. *Wealth Inequality*

I start with the distribution of wealth overall. While many people and much of the data on economic well-being have traditionally emphasized and continue to emphasize income, “family wealth is also a source of well-being, independent of the direct income it provides.”<sup>21</sup> Income, generally earned by or assigned to individuals, is the inflow of resources over a given time and is often offset to a large degree by outflows to cover expenses. Wealth, in contrast, represents accumulated assets and often accrues to families.<sup>22</sup> Wealth provides a level of security to families to meet income fluctuations or emergency needs: “Most assets can be sold for cash or used as collateral for loans, thus providing for unanticipated consumption needs. In times of economic stress, occasioned by such crises as unemployment, sickness, or family breakup, wealth is an important cushion.”<sup>23</sup> Wealth also allows for family investment in the form of education or homeownership.

Sociologist Seymour Spilerman observes that, until recently, wealth was considered relevant only in relation to elites.<sup>24</sup> He identifies three reasons why this began to change in the 1980s: “(a) an emergent appreciation of the contributions of family wealth—even

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<sup>21</sup> EDWARD N. WOLFF, *TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT* 5 (2002).

<sup>22</sup> *Id.* at 2; see also Ron Haskins, *Wealth and Economic Mobility*, in JULIA B. ISAACS ET AL., PEW CHARITABLE TRUSTS, ECONOMIC MOBILITY PROJECT, *GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA* 47 (2008), available at [http://www.brookings.edu/reports/2008/02\\_economic\\_mobility\\_sawhill.aspx](http://www.brookings.edu/reports/2008/02_economic_mobility_sawhill.aspx).

<sup>23</sup> WOLFF, *supra* note 21, at 6.

<sup>24</sup> Seymour Spilerman, *Wealth and Stratification Processes*, 26 ANN. REV. SOC. 497, 500 (2000). Spilerman also suggests a theoretical underpinning for the historical focus on income rather than wealth: theories of stratification that focused on individual merit and skill (functionalism) or role in the system of production (Marxian). *Id.* at 498.

modest financial resources—to living standards; (b) the rapid equity buildup in the American population since World War II; and (c) the growing availability of wealth data at the level of the family or household unit.”<sup>25</sup>

As to the first reason, Spilerman notes the ability of even modest levels of wealth to “cushion” families, particularly low-income families, from economic shocks such as illness or job loss.<sup>26</sup> As to the second, he observes the general trend for the dispersion of wealth in the West over the twentieth century, with even average families often possessing home and pension equity.<sup>27</sup> Finally, as to the third reason, after an initial survey of assets was conducted in the 1960s, additional surveys have been consistently performed since the 1980s.<sup>28</sup>

Economic data and sociological analyses have in recent decades generated a more complete portrait of wealth distribution in the United States than was historically available. Several characteristics of this portrait are noteworthy. To start, wealth inequality in the United States is significantly greater than income inequality. In 2004–2005, for example, the top 20% of the income distribution received 47.7% of total income but held 84.4% of total wealth.<sup>29</sup> That same year, the bottom 20% received 4.2% of total income and held 0% of total wealth.<sup>30</sup>

In addition, wealth inequality has been increasing since the late 1970s or early 1980s. Economist Edward Wolff observes that “[a]fter the stock market crash of 1929, there ensued a gradual if somewhat erratic reduction in wealth inequality, which seems to have lasted

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<sup>25</sup> *Id.* at 500.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 501, 504–10. Even though the overall trend toward greater wealth distribution reversed in the last decades of the century, *id.* at 505–06, Spilerman’s writing in 2000 views non-elites as holding meaningful levels of assets, especially in the form of home and pension equity (as versus financial or investment assets). *Id.* at 501 (“While the average family may have accumulated only modest assets in an investment portfolio or savings account, home equity and pension equity have grown by substantial amounts.”).

<sup>28</sup> *Id.* at 501–02.

<sup>29</sup> Heather Boushey & Christian E. Weller, *What the Numbers Tell Us, in* INEQUALITY MATTERS: THE GROWING ECONOMIC DIVIDE IN AMERICA AND ITS POISONOUS CONSEQUENCES 27, 39 (James Lardner & David A. Smith eds., 2005) [hereinafter INEQUALITY MATTERS].

<sup>30</sup> *Id.* In terms of wealth distribution, 1988 data indicated that the top 1% held 11.6% of the nation’s total net worth, and the top 10% held almost half (47.3%). MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 69 tbl.4.1 (1995).

until the late 1970s. Since then, inequality of wealth holdings . . . has risen sharply.”<sup>31</sup> If Social Security and other types of pension wealth are excluded (wealth that benefits the holder but is generally extinguished at death and is thus not inheritable), wealth inequality in 1998 approached wealth inequality in the 1920s.<sup>32</sup>

Finally, wealth inequality in the United States is substantially greater than in most developed countries.<sup>33</sup> This wealth inequality echoes U.S. income inequality, which also exceeds that of other comparable countries.<sup>34</sup>

Looking even more closely at the wealth distribution portrait reveals additional details relating to the composition of household wealth. While owner-occupied housing is consistently the most important household asset,<sup>35</sup> for American households overall it accounts for only about a quarter to a third of family net worth.<sup>36</sup> But for the three middle quintiles of Americans—those who lie between the top 20% and the bottom 20% in wealth—the principal residence is between one-half and two-thirds of total net worth.<sup>37</sup> Unsurprisingly, given their overall greater wealth, the principal household residence is a significantly lower proportion of total wealth to those at the top of the wealth distribution: 7.8% for the top 1% and 28.8% for the next 19%.<sup>38</sup>

The interlocking pieces of the composition-of-assets puzzle can also be seen by noting the financial assets that comprise the majority of the wealth of those at the top of the distribution:

Another way to portray differences between middle-class households and the rich is to compute the share of total assets of different types held by each group. . . . In 1998 the richest one percent of households held half of all outstanding stock, financial securities, and trust equity, two-thirds of business equity, and 36

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<sup>31</sup> WOLFF, *supra* note 21, at 8.

<sup>32</sup> *Id.* Though these forms of non-inheritable wealth are of the utmost importance to particular individuals during their lifetimes, they are less relevant in terms of the reproduction of social structure issues of interest here.

<sup>33</sup> *See id.* at 31–36.

<sup>34</sup> *See* RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY EQUAL SOCIETIES ALMOST ALWAYS DO BETTER* 15, 19–20 (2009).

<sup>35</sup> WOLFF, *supra* note 21, at 22; Haskins, *supra* note 22, at 50 (“[A] bigger share of families own their home than any other asset . . .”).

<sup>36</sup> *See* WOLFF, *supra* note 21, at 22.

<sup>37</sup> *Id.* at 25 tbl.4-2 (For the middle three wealth quintiles, the principal residence composed 59.8% of gross assets in 1998.).

<sup>38</sup> *Id.*



percent of investment real estate. The top 10 percent of families as a group accounted for about 90 percent of stock shares, bonds, trusts, and business equity, and about three-quarters of nonhome real estate.<sup>39</sup>

What we see, then, are housing and retirement assets within the reach of most Americans. Financial assets beyond those required for daily living costs and a secure retirement, however, are heavily concentrated in those at the top, while those at the bottom of the income distribution hold essentially no wealth at all.

### *B. Racial Wealth Disparities*

The skewed distribution of wealth described in the previous section, in and of itself, has elicited acute concern in terms of its effect on the operation of our democracy. Inequality hurts both direct political participation<sup>40</sup> and the civic involvement that grounds the exercise of citizenship.<sup>41</sup> More generally, having an economic stake in one's society has been asserted to correlate to having a stake in the society overall.<sup>42</sup>

But a final aspect of the wealth distribution portrait clamors for attention: The portrait is painted in black and white. Not only is wealth inequality in general relatively high and on the rise in the United States, racial trends in wealth inequality are stark. In 1995, Melvin Oliver and Thomas Shapiro used data from the 1980s to reveal enormous disparities in racial wealth overall as well as more textured differences relevant to family economic resilience.<sup>43</sup> They showed, for example, that while the ratio of Black median *income* to White median income was 0.62 (\$15,630 to \$25,384), the ratio of Black median *net worth* to White median net worth was 0.08 (\$3700 to \$43,800).<sup>44</sup> Even more dramatic, the ratio of Black median *net*

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<sup>39</sup> *Id.* at 24–27.

<sup>40</sup> See Miles S. Rapoport & David A. Smith, *Democracy First*, in *INEQUALITY MATTERS*, *supra* note 29, at 268, 272.

<sup>41</sup> See Theda Skopcol, *America Disconnected*, in *INEQUALITY MATTERS*, *supra* note 29, at 178, 178–87.

<sup>42</sup> See, e.g., Michael Lind, *The Smallholder Society*, 1 *HARV. L. & POL'Y REV.* 143, 145–47 (2007).

<sup>43</sup> See OLIVER & SHAPIRO, *supra* note 30, at 55–56.

<sup>44</sup> *Id.* at 86 tbl.4.4.

*financial worth* to White median net financial worth was 0.00 (\$0 to \$6999).<sup>45</sup>

Probing more deeply, Oliver and Shapiro found that 65.6% of White compared to 41.6% of Black households had home equity; of those households, the median value of the asset was \$45,000 for Whites and \$31,000 for Blacks.<sup>46</sup> At the same time, for Black households, which overall hold less net financial worth than White households, home equity represented 62.5% of assets overall compared to 43.3% for White households.<sup>47</sup> Oliver and Shapiro identified “three key points at which institutional and policy discrimination often intervenes to restrict blacks’ access to housing and to inhibit the accumulation of housing wealth”:<sup>48</sup> (1) lesser access to credit, (2) higher interest rates attached to loans for buying homes, and (3) the lesser appreciation of housing values in “Black” versus “White” neighborhoods.<sup>49</sup> The last point in particular stems from historical federal practices (especially housing, tax, and transportation) that enforced residential segregation and continuing patterns of extremely high levels of racial housing separation.<sup>50</sup> Oliver and Shapiro estimated the cumulative wealth implications of these three effects of past and present housing discrimination to be substantial.<sup>51</sup>

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<sup>45</sup> *Id.*; see also Spilerman, *supra* note 24, at 508; WOLFF, *supra* note 21, at 19–21. There is, moreover, evidence indicating that the racial wealth gap has widened over the past two decades—at least in absolute terms. See THOMAS M. SHAPIRO ET AL., INSTITUTE ON ASSETS AND SOCIAL POLICY (IASP), RESEARCH AND POLICY BRIEF: THE RACIAL WEALTH GAP INCREASES FOURFOLD (2010), available at <http://iasp.brandeis.edu/pdfs/Racial-Wealth-Gap-Brief.pdf> (from \$20,000 to \$95,000 differential in median net worth exclusive of home equity, 1984–2007). Further, the recent economic downturn may well have had more severe effects on Blacks than on Whites. See, e.g., Barbara Ehrenreich & Dedrick Muhammad, Op-Ed, *The Recession’s Racial Divide*, N.Y. TIMES, Sept. 12, 2009, <http://www.nytimes.com/2009/09/13/opinion/13ehreich.html>.

<sup>46</sup> OLIVER & SHAPIRO, *supra* note 30, at 106.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 137.

<sup>49</sup> *Id.* at 137–51.

<sup>50</sup> *Id.* at 136–37.

<sup>51</sup> See *id.* at 150–51. Oliver and Shapiro found that:

Among the current generation of black homeowners, to the \$10.5 billion paid to banks in extra interest, one must add another \$58 billion in lost home equity. Finally, if black home mortgage approval rates were the same as those of similarly qualified whites, 8 percent of the blacks who are annually denied mortgages would be homeowners today. . . . [D]iscrimination in housing markets costs the current generation of blacks about \$82 billion. If these biases continue unabated, it will cost the next generation of black homeowners \$93 billion.

Ten years later, Oliver and Shapiro issued an update of their 1995 work. Using data up to 2002, they found that “the overall racial wealth gap persists at a dime on the dollar, and the dollar amount of the racial wealth gap grew.”<sup>52</sup> Surveying the overall landscape, Oliver and Shapiro identified several important developments relating to the asset gap. These include the reliance of Black families on credit card debt;<sup>53</sup> the magnified importance of home equity as it was increasingly used to cover such debt and living expenses;<sup>54</sup> the higher effects of the subprime mortgage market on Black versus White home buyers (30% versus 10%);<sup>55</sup> changes in bankruptcy law that disadvantage families, such as Black families, that have greater health problems and medical costs (the greatest cause of individual bankruptcies);<sup>56</sup> and higher incarceration rates of Black men than White men, which ensures that a significant proportion of Blacks will be handicapped in lifetime wealth accumulation.<sup>57</sup>

Wolff’s 2002 analysis reveals an additional important characteristic of the racial wealth gap: The Black-White gap in *median* wealth is greater than the gap in *mean* wealth. “This result reflects a greater inequality in wealth among blacks than whites.”<sup>58</sup> “More than one in four African-American households now have no positive wealth at all, in contrast to one in seven white households.”<sup>59</sup> These data reveal a divide between a Black middle class with net worth in the form of home equity (though depressed due to lingering effects of past discriminatory practices) but with little net financial worth and a Black poorer class with little wealth in any form whatsoever.

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*Id.*

<sup>52</sup> MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 204 (10th anniversary ed. 2006) (from \$60,980 in 1988 to \$82,663 in 2002); *see also* WOLFF, *supra* note 21, at 21. The home ownership rate for Blacks doubled from 24% to 44% between 1940 and 1980—a time when federally prescribed lending practices led to lower values for homes in non-White neighborhoods. It has, however, remained at essentially that level since, which means that Black home values and net worth continue to reflect a racially segregated market. *Id.*

<sup>53</sup> *See* OLIVER & SHAPIRO, *supra* note 52, at 214.

<sup>54</sup> *Id.* at 216.

<sup>55</sup> *See id.* at 217–19.

<sup>56</sup> *See id.* at 220–21.

<sup>57</sup> *Id.* at 225–26. On the positive side, Oliver and Shapiro note an increase in attention to the importance of wealth as an indicator of equity as well as emerging policy initiatives designed to address the issue. *See id.* at 229–68.

<sup>58</sup> WOLFF, *supra* note 21, at 21.

<sup>59</sup> *Id.* at 3.

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*C. The Role of Inheritance in Wealth Inequalities*

Awareness of the importance of household wealth as well as individual income as an indicator of economic well-being and social status has grown over the past twenty years. Along with this awareness, interest has grown regarding sources of wealth and particularly the degree to which wealth is inherited or otherwise transferred intergenerationally. Though the inheritance of wealth is one likely factor, other causes of observed trends are possible and, indeed, likely. For example, tax and economic policies set in place in the 1980s are widely assigned a role in the trend of increasing inequality over the past three decades.<sup>60</sup> My focus, however, is on the role of inheritance.

The U.S. law of succession consists of basic freedom of testation by execution of a will, along with default intestacy laws that generally designate spouses and/or children and/or descendants as primary heirs.<sup>61</sup> Under this traditional regime, a decedent's property is not transferred automatically, and initiation of a probate process is necessary for the official transfer of title.<sup>62</sup> This is still true, by and large, for intestate estates and real property not held in joint tenancy.<sup>63</sup> Privatized estate mechanisms such as life insurance, payable on death (POD) and transfer on death (TOD) accounts, and revocable or living trusts as will substitutes, however, have more recently rendered probate unnecessary in many instances<sup>64</sup>—but only where a decedent takes affirmative action to employ those substitutes. For a few wealthy decedents, taxes claim a portion of the estate for the public coffers, but historically the numbers to whom this applies are small—on the order of one percent.<sup>65</sup>

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<sup>60</sup> See, e.g., Bill Moyers, *The Fight of Our Lives*, in *INEQUALITY MATTERS*, *supra* note 29, at 3. But see WOLFF, *supra* note 21, at 34 (noting that changes in public policy alone cannot explain trends).

<sup>61</sup> See FRIEDMAN, *supra* note 5, at 18–19.

<sup>62</sup> I use the term “title” here to denote proof of ownership, which for real property normally takes the form of a formal public record. See *infra* note 206 and accompanying text.

<sup>63</sup> FRIEDMAN, *supra* note 5, at 9–10; JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 47 (8th ed. 2009).

<sup>64</sup> See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 *HARV. L. REV.* 1108 (1984) (arguing for the legitimization of the main will substitutes as “nonprobate wills” and for unifying the constructional law of wills and will substitutes).

<sup>65</sup> Friedman, *supra* note 1, at 172, 176–77 (noting that, in 1987, only 0.88% of all estates had to file a return and that, in 2002, only 1.17% of decedents had taxable estates).

Nowhere do these laws speak of the intergenerational replication of advantage or privilege. Sociologists Stephen McNamee and Robert Miller observe that:

the inheritance rules apply equally to all, regardless of privilege. But, like laws defining and protecting property, rules of inheritance differentially benefit the privileged and not the vast majority who stand to inherit little or nothing. . . . [I]nheritance systems are a major mechanism for the intergenerational transmission of privilege and, as such, constitute a central component of systems of stratification.<sup>66</sup>

Anatole France's famous axiom makes a similar point: "[T]he majestic equality of the laws . . . forbid the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal their bread."<sup>67</sup> But the operation of the laws of succession is more subtle than that of the law France describes. In his example, the law operates directly on poor and rich alike. With inheritance and wealth inequality, in contrast, the law merely creates a framework within which individual choices are made, and it is from these choices—operating from an initial wealth distribution—that the pattern of continuing wealth inequality emerges.

Individuals, that is, tend to choose to pass their wealth to succeeding generations of their own families because of strong cultural norms that lead to these decisions in people's estate plans.<sup>68</sup> When people do not exercise their right to choose, default intestacy laws make similar presumptions on their behalf. The result of these individual decisions and individualized applications of intestacy law is for the children of wealthy parents to benefit from inheritances from their parents. Children of parents with little or no wealth inherit little or nothing. Wealth travels down the generations within families, and, as Friedman suggests, the social structure reproduces itself.

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<sup>66</sup> Stephen J. McNamee & Robert K. Miller, Jr., *Estate Inheritance: A Sociological Lacuna*, 59 SOC. INQUIRY 7, 20 (1989).

<sup>67</sup> ANATOLE FRANCE, *THE RED LILY* 95 (Winifred Stephens trans., 1927) (1894).

<sup>68</sup> Not all inheritances pass to decedents' children or descendants. In fact, some evidence suggests increasing trends toward a general preference for spouses as beneficiaries than was the case traditionally, *see* FRIEDMAN, *supra* note 5, at 12, though some of this wealth is likely to reach the next generation eventually. Nevertheless, "there are strong cultural expectations in the United States for wealth to remain in the immediate family through bequests to spouses and children even though such transfers seemingly contradict the dominant ideology of meritocracy." McNamee & Miller, *supra* note 66, at 18.

Studies on the intergenerational transmission of wealth confirm this phenomenon, though quantifying its magnitude has proven challenging. After all, inheritance is not the sole source of wealth; lifetime earnings and savings as well as inter vivos intergenerational gifts can also be significant contributors. Various studies approach the issue using different methodologies and focus on wealth at different points in the life cycle, which leads to varying estimates given that older people are more likely to have received an inheritance than younger people. The range of estimates is wide—from 20% at the low end to 80% at the high end of total aggregate wealth attributable to inheritance.<sup>69</sup> Such figures reaffirm that inheritance law, while not cloning the social structure precisely, nonetheless serves as a highly predictive mold of the next generation.

Studies have also examined the effect of inheritances on wealth inequality. As to this more direct focus on the distribution of wealth, while wealthier households receive proportionately more inheritances and in greater amounts,<sup>70</sup> those inheritances account for less of the total wealth of the receiving household than of more modest households, which receive proportionately fewer and more modest inheritances.<sup>71</sup> One much-cited study suggests that inheritances overall have an equalizing effect over time.<sup>72</sup> A more recent analysis, in contrast, concludes that inheritance slightly increases wealth inequality.<sup>73</sup> A shared view is that any changes in wealth inequality will occur relatively slowly; at least in the short term, inheritance tends to replicate the current, relatively unequal distribution of wealth.

As with statistics on the general distribution of wealth, statistics on inheritance show a strong racial skew. Again, multiple methodologies lead to differing descriptions of the phenomenon. Spilerman notes that the ratio of non-White to White mean net worth declines “from .58 to .14 as one moves to the older age groups,”

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<sup>69</sup> See Robert V. Avery & Michael S. Rendall, *Lifetime Inheritances of Three Generations of Whites and Blacks*, 107 AM. J. SOC. 1300, 1305–08 (2002) (summarizing sources of wealth, methodologies, and studies).

<sup>70</sup> Edward N. Wolff, *Bequests, Saving, and Wealth Inequality: Inheritances and Wealth Inequality*, 92 AM. ECON. REV. 260 (2002).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Norma B. Coe & Anthony Webb, *Actual and Anticipated Inheritance Receipts*, (Boston Coll. Ctr. for Ret. Research, Working Paper No. 2009-32, 2009), available at [http://crr.bc.edu/working\\_papers/actual\\_and\\_anticipated\\_inheritance\\_receipts.html](http://crr.bc.edu/working_papers/actual_and_anticipated_inheritance_receipts.html).

concluding that “white families are either more successful in saving from their incomes, accumulating assets over time, or, more likely, they receive larger inheritances from parents, an assessment supported by transfer data . . . .”<sup>74</sup> More directly, Spilerman notes that “African-Americans have a lower incidence of providing [intergenerational] transfers and lesser amounts are involved when a transfer takes place.”<sup>75</sup>

Elaborating on this point, economist Robert Avery and statistician Michael Rendall show that, in 1989,

the distribution of inheritances already received is even more unequal between whites and blacks than is the distribution of current wealth. The mean 1989 present value of whites’ inheritances received is 5.46 times that of blacks’, as compared to 3.65 for current wealth. The overall white mean of \$28,177 in inheritances and substantial inter vivos transfers constitutes 20.7% of their mean current wealth . . . . The overall mean black inheritance of \$5,165 constitutes only 13.9% of their much lower mean current wealth.<sup>76</sup>

Avery and Rendall “estimate that 42.9% of whites, versus 16.7% of blacks, have received or will receive a substantial inheritance or transfer over their lifetimes.”<sup>77</sup> And, “[b]ecause mean inheritances received are greater for whites than for blacks, and the white-black ratio of mean inheritances exceeds the white-black ratio of mean current wealth, then *it follows that inheritances received will increase racial wealth disparities in both absolute and relative terms.*”<sup>78</sup>

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<sup>74</sup> Spilerman, *supra* note 24, at 508 (citations omitted). Note that Black-White savings differentials have not been documented. DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 29 (10th anniversary ed. 2010).

<sup>75</sup> Spilerman, *supra* note 24, at 515 (“An obvious reason is the smaller wealth holdings of African-American families. But it is also the case that, controlling for parental income and for income and wealth, the incidence of receipt of financial aid by African-Americans falls well below the white rate.” (citations omitted)).

<sup>76</sup> Avery & Rendall, *supra* note 69, at 1315, 1318. A contributing factor to the racial disparity is that more Whites than Blacks live in “couple-headed households, giving more whites than blacks two sources of inheritances to come into the household.” *Id.* at 1318 (Households are the subject of Avery and Rendall’s analysis.).

<sup>77</sup> *Id.* at 1319.

<sup>78</sup> *Id.* at 1318 (emphasis added). These figures, moreover, only describe inheritances already received. Forecasting prospective inheritances, Avery and Rendall find:

Whites’ mean discounted prospective inheritances are greater than blacks’ by \$27,005, in a ratio of 7.46 to 1. This is a considerably larger ratio than that for inheritances already received (5.46 to 1 . . .). . . . Thus prospective inheritances will have a greater role in increasing absolute and relative white-black wealth inequality than have inheritances already received.

Overall, Avery and Rendall sound a warning as to the detrimental effects of future inheritances on racial wealth equality:

We noted earlier that the baby boom generation effectively saw a halt in progress toward racial equalization in income, albeit at some significant advantage over their parents' generation. The larger racial difference in the parent generation's income, however, will ultimately come back to increase economic inequality of the baby boom generation. The process by which this will happen, and is indeed already happening, is through intergenerational financial transfers (inter vivos and bequests at death) from the baby boomers' parents to the baby boomers themselves. What this process implies, then, is that *even when earnings gaps are reduced, intergenerational transfers will act as a drag on the process of equalization of racial economic status. That racial earnings gaps have not narrowed since at least the beginning of the 1980s, moreover, means that the effect of inheritances may be to increase the racial gap in overall economic status, not just postpone its being narrowed.*

Inheritance, then, contributes substantially to the perpetuation of wealth inequality generally and to the perpetuation and likely even exacerbation of racial wealth disparities. The law of succession, though not overtly racial, facilitates these outcomes through both individual action (testacy) and inaction (intestacy).

## II

### RACE AND WEALTH

Richard Thompson Ford refers to a “deep inequality” that divides a heavily Black, poor America from a more prosperous multiracial America.<sup>80</sup> Wealth statistics bear out this characterization: wealth disparities among Blacks (the ratio of median net worth of the top wealth quintile to the median net worth of the bottom wealth quintile is more than 100,000 to one) are magnitudes greater than wealth disparities among Whites (only ninety-one to one).<sup>81</sup> On a similar note, the bottom 10% of White wealth-holding families in 2007 still held, on average, \$100 of net worth while the bottom 10% of Black

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*Id.* at 1331.

<sup>79</sup> *Id.* at 1334–35 (emphasis added); *see also* Oliver et al., *supra* note 13 at 91–92.

<sup>80</sup> *See supra* text accompanying note 2.

<sup>81</sup> *See* Yuval Elmelech, *Determinants of Intragroup Wealth Inequality Among Whites, Blacks, and Latinos*, in *WEALTH ACCUMULATION AND COMMUNITIES OF COLOR IN THE UNITED STATES: CURRENT ISSUES* 91, 100 tbl.3.2 (Jessica Gordon Nembhard & Ngina Chitegi eds., 2006).



families were, on average, \$3600 in debt.<sup>82</sup> Moreover, 23.4% of the bottom quintile of wealth-holding households were Black,<sup>83</sup> though Blacks compose only 12.1% of the population.<sup>84</sup>

#### A. Present (and Future) Wealth Effects

Just a few years after Oliver and Shapiro's path-breaking study, sociologist Dalton Conley offered a different perspective on racial wealth,<sup>85</sup> with a focus on the tangible results of wealth disparities and, more specifically, on the degree to which social outcomes correlated to race and/or class. Conley's data were striking.

Conley found, for example, statistically significant differences in wealth holdings between Blacks and Whites, even after controlling for individual characteristics such as level of education, age, gender, and previous income.<sup>86</sup> But he also found that, when class measures of the respondents' parents were equalized, the racial differences disappeared.<sup>87</sup> Further, *parental net worth (wealth)*—not parental education, occupational prestige, or income—was the variable that mattered, though the *type* of wealth was not predictive.<sup>88</sup> In other words, when Black and White parents had the same net worth, racial wealth disparities in the next generation did not appear. Conley concluded that

the locus of black-white wealth inequality lies in the realm of class relations rather than reflecting racial differences *per se*. Race and class mirror each other with respect to the wealth distribution; however, in the end it may be the economically disadvantaged

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<sup>82</sup> SHAPIRO ET. AL., *supra* note 45, at 2 fig.2.

<sup>83</sup> John C. Weicher, *The Rich and the Poor: Demographics of the U.S. Wealth Distribution*, FED. RES. BANK OF ST. LOUIS REV., July–Aug. 1997, at 25, 33 tbl.6, available at <http://research.stlouisfed.org/publications/review/97/07/9707jw.pdf> (referring to 1992 data; compare to 29.0% in 1989).

<sup>84</sup> Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* app. A-1 (Population Div., U.S. Census Bureau, Working Paper No. 56, 2002), available at <http://www.census.gov/population/www/documentation/twps0056/twps0056.html>.

<sup>85</sup> See CONLEY, *supra* note 74.

<sup>86</sup> *Id.* at 47.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 47–49. Conley separated out liquid assets, primary residence equity, business value, and other illiquid assets. *Id.* at 47–48.

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family backgrounds of young African Americans more than<sup>89</sup> the color of their skin that hurts their efforts to accumulate wealth.

Conley then analyzed the effects of family wealth on three measures of well-being: education, income, and premarital childbearing. As to education, Conley found strong wealth effects. When high school graduation rates are contrasted only by race, Black and White rates are statistically equivalent, but when class differences are factored out, Black students have higher net completion rates, with parental education, business value, and liquid assets having the strongest effects.<sup>90</sup> As to college graduation rates, parental education and net worth predicted completion of a bachelor's degree, with primary residence equity and liquid assets being of significance.<sup>91</sup>

Conley also found parental net worth, parental education, and primary residence equity correlated to a greater number of hours worked, though there was still a negative racial effect that did not disappear when he controlled for class.<sup>92</sup> In a more mixed set of results, parental income and parental education corresponded to higher wages while parental net worth and primary residence equity corresponded to lower wages.<sup>93</sup> The somewhat blurred picture that emerges here is one in which a background of wealth supports employment but may depress wages because it allows for offspring to choose riskier career paths.<sup>94</sup>

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<sup>89</sup> *Id.* at 49.

<sup>90</sup> *Id.* at 69–71.

<sup>91</sup> *Id.* at 72–75. With respect to education, Conley concludes, “Blacks are not disadvantaged in the educational system; rather, they are disadvantaged in the resources they bring to the system.” *Id.* at 80. More generally, the conclusion that racially disparate outcomes can be explained entirely by socioeconomic status is undermined by Conley's own data with respect to premarital childbearing and social mobility. See *infra* notes 95–96, 98–106 and accompanying text. Even as to education, other studies paint a more nuanced picture than do Conley's data alone. See, e.g., Meredith Phillips et al., *Family Background, Parenting Practices, and the Black-White Test Score Gap*, in *THE BLACK-WHITE TEST SCORE GAP* 103, 126 (Christopher Jencks & Meredith Phillips eds., 1998) (effects of characteristics of grandparents); William Julius Wilson, *Commentary*, in *THE BLACK-WHITE TEST SCORE GAP*, *supra*, at 501, 505 (effects of controlling for multiple socioeconomic factors). Conley's data do show that economic status is a crucial factor, apart from race alone, in determining social outcomes.

<sup>92</sup> CONLEY, *supra* note 74, at 100–01.

<sup>93</sup> *Id.* at 97–102. Somewhat counterintuitively, his data showed that high parent income corresponded negatively with the number of hours worked—to a greater degree than race. *Id.* at 101 fig.4.4.

<sup>94</sup> *Id.* at 104.

Finally, Conley documented a racial correlation in premarital motherhood beyond class, with Black girls significantly more likely than class-comparable White girls to fall into this group—three times as likely.<sup>95</sup> In terms of specific class and wealth variables, parental education and primary residence equity were negatively correlated with premarital childbearing.<sup>96</sup>

More recent studies have affirmed in particular Conley's findings with respect to the importance of wealth vis-à-vis the next generation's educational achievement.<sup>97</sup> Such educational achievement serves as both the basis for the educated generation's own wealth production and well-being and the grounding for the following generation's educational success. The effects of wealth thus play out directly and indirectly through families over time.

In later work, Conley looked more closely at social mobility data—both intergenerational and intragenerational. According to these data, 69% of children whose parents were in the bottom wealth quartile in 1984 remained in the lower half of the wealth distribution by 1998–2003. Conversely, more than 76% of children whose parents were in the top quartile remained in the top half—and more than half (55%) remained in the very top quartile.<sup>98</sup> Conley concludes: “[W]here you start out, either as a child or as a young adult, has a large effect on where you end up.”<sup>99</sup> Overall, after parent education, parent net worth is “the single most powerful predictor of opportunity for the next generation . . . . That is, although race, income, job status, and net worth all tend to vary hand-in-hand, careful statistical parsing shows that it is really net worth that drives opportunity for the next generation.”<sup>100</sup> Moreover, “it is much easier for individuals to *hold on* to their high wealth levels than for individuals . . . to *move into* high wealth levels.”<sup>101</sup>

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<sup>95</sup> *Id.* at 123. The order of magnitude of difference is twelve times before controlling for class. *Id.*

<sup>96</sup> *Id.* at 124–29. Conley speculates that reasons for a Black-White difference in this category, in addition to class, include cultural and religious factors and a shortage of Black men due to their lower life expectancy, disproportionate incarceration, and participation in the military. *Id.* at 116.

<sup>97</sup> See, e.g., Ron Haskins, *Education and Economic Mobility*, in *GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA*, *supra* note 22, at 91, 92.

<sup>98</sup> CONLEY, *supra* note 74, at 158–60.

<sup>99</sup> *Id.* at 160.

<sup>100</sup> *Id.* at 155.

<sup>101</sup> *Id.* at 159.

Parsing these data further, Conley finds “striking” racial disparities: “Of whites who were in the bottom wealth quartile as twenty-five to forty-five-year-olds in 1984, 44 percent remained there nineteen years later.”<sup>102</sup> In comparison, “[o]f [African Americans] who began in the bottom wealth quartile, more than two-thirds (68 percent) remained stuck there nineteen years later.”<sup>103</sup> Further,

[t]he situation appears just as grim in terms of racial inequality in downward intragenerational mobility. Of African Americans who were in the top wealth quartile as twenty-five to forty-five-year-olds in 1984, fewer than a quarter (22 percent) remained in the top quartile nineteen years later. The figure is much larger for whites, as 60 percent of whites . . . remained in the top wealth quartile nineteen years later. Moreover, whites did not fall to the lower quartiles as frequently as African Americans.<sup>104</sup>

These data tell a story that is not as sanguine as that suggested by Conley’s first results, for they strongly indicate that something other than mere socioeconomic indicators is at play. Conley suggests a couple of reasons: documented greater volatility in wealth (significant drops) for Blacks<sup>105</sup> and other factors such as racial differentials in inheritances.<sup>106</sup>

Though not conclusive on many points, Conley’s work is important for two reasons. First, it documents tangible connections between wealth and well-being.<sup>107</sup> In this regard, Conley reveals that the effects of parental wealth on children extend far beyond direct intergenerational transfers and encompass key indirect effects such as education. As a recent report on economic mobility concludes, “one of the ways family background contributes to the economic success of adult children is that relatively wealthy parents can help their children

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<sup>102</sup> *Id.* at 160.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 161.

<sup>105</sup> *Id.* at 156–59.

<sup>106</sup> *Id.* at 219 n.4. The mechanism by which inheritances would affect the ability to hold onto wealth intragenerationally are not clear. It may be that lower inheritances for Blacks provide less economic cushion in hard times or that higher “negative inheritances”—the need to provide for older family members—may undermine middle-class status. Further investigation of these dynamics is certainly warranted. *See* Oliver et al., *supra* note 13, at 84–85.

<sup>107</sup> *Cf.* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) (focusing on experienced human conditions rather than wealth generation per se); AMARTYA SEN, THE IDEA OF JUSTICE 225–27 (2009) (arguing that economic indicators are justifiable only in terms of conditions of human lives).

get a good education.”<sup>108</sup> The social mobility that is a key part of the American ethos is tied directly to parent net worth. Wealth matters.

Second, Conley’s work serves as a prism that separates, at least partially, the combined light of race-class into two separate beams: race and class. His data do not suggest a “post-racial” society.<sup>109</sup> They do suggest that, while race and class are strongly correlated, some of the negative consequences of being Black result predominantly from being poor, while others may relate primarily to the sociocultural role of Blackness. Conley’s data also highlight wealth as a key aspect of class and suggest that various types of wealth may play different roles in social success and well-being.

### B. Past Sources of Wealth Effects

Anyone who grows up in the United States is steeped in the social construction of race. We “see” race from a very early age.<sup>110</sup> Though we may be “colormute,”<sup>111</sup> we are by no means “colorblind.”<sup>112</sup>

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<sup>108</sup> Haskins, *supra* note 97, at 95. The report continues:

[I]f it were not for the nation’s education system, it might be more difficult for wealthy parents to pass along their income advantage to their children. Without a college education, only 23 percent of the adult children of parents in the top quintile themselves make it to the top quintile. This 23 percent is only a little higher than would be expected if the children of wealthy parents were equally likely to wind up in all five income quintiles. By contrast, with a college education 54 percent of the adult children of parents in the top quintile themselves make it into the top income quintile. Family background is important, but adult children from the bottom can move up if they attain a college degree, and adult children from the top risk falling if they do not attain a college degree.

*Id.* This refers to income rather than wealth, but it is consistent with Conley’s findings. See *supra* notes 85–96 and accompanying text.

<sup>109</sup> See also Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010).

<sup>110</sup> PO BRONSON & ASHLEY MERRYMAN, *NURTURESHOCK: NEW THINKING ABOUT CHILDREN* 54–55 (2009). See generally *id.* at ch. 3 (discussing why White parents do not discuss race with their children).

<sup>111</sup> See generally MICA POLLOCK, *COLORMUTE: RACE TALK DILEMMAS IN AN AMERICAN SCHOOL* (2004).

<sup>112</sup> For an introduction to unconscious or implicit biases or associations, see PROJECT IMPLICIT, <http://www.projectimplicit.net> (last visited Dec. 16, 2010) (describing the Implicit Association Test (IAT)). To take the IAT, visit *Implicit Association Test, UNDERSTANDING PREJUDICE*, <http://www.understandingprejudice.org/iat/> (last visited Dec. 16, 2010). See also Barnes et al., *supra* note 109, at 995 & n.144.

We have so internalized race as a relevant factor in our dealings with other people that we do not often step back and recall the genesis of race—the reason race as a social category was constructed in the first place. Historian Theodore Allen’s work, *The Invention of the White Race: Racial Oppression and Social Control*,<sup>113</sup> reminds us why and how race was created. Race was not the incidental or inevitable effect of different ethnic groups encountering each other and vying for supremacy. Rather, slavery and then de jure segregation were, first and foremost, *economic institutions* that served to enrich White plantation owners originally and then Whites more generally.<sup>114</sup> The social construction of race was the means to this end.<sup>115</sup> The creation of two classes of people with significantly different statuses based on their personal or ancestral origin—“race”—broke up burgeoning class solidarity that threatened to unite Euro- and African-American bond laborers against the ownership class in the late 1600s and early 1700s by attaching “Whites” of that class to the economic elite (all of whom were Euro-American) on the basis of common ancestry and carefully selected shared privileges.<sup>116</sup>

According to Allen, race accomplished this through multiple mechanisms that together served to create two classes—one to serve and enrich and the other to be served and enriched.<sup>117</sup> The general approach of racial oppression was concurrently to destroy the original social identity of the oppressed class and to exclude members of that class from access to any of the oppressing class’s avenues for creating social identity.<sup>118</sup> So members of the oppressed class were deprived

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<sup>113</sup> 1 THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE* (1994).

<sup>114</sup> Allen makes his case with a detailed and compelling analogy to the oppression of the Irish in Ireland by the British in the centuries before Black slavery in America. See, e.g., *id.* at 32–35, 46–47. Use of the Irish analogy allows analysis of racial oppression “free of the ‘White Blindspot’ that Dr. DuBois warned us about.” *Id.* at 22.

<sup>115</sup> Allen explicitly asserts that racial slavery “must be understood as a sociogenic rather than a phylogenic phenomenon.” *Id.* at 23.

<sup>116</sup> *Id.* at 16–18 (discussing EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975)); *id.* at 21 (discussing LERONE BENNETT, JR., *THE SHAPING OF BLACK AMERICA* (1975)).

<sup>117</sup> *Id.* at 32 (The hallmark of racial oppression is “reduc[ing] all members of the oppressed group to one undifferentiated social status, a status beneath that of any member of any social class within the colonizing population.” (emphasis omitted)).

<sup>118</sup> See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 38 (1982) (referring to an “overwhelming concentration on the profound natal alienation of the slave,” and the social death of the slave that emerges as a “dominant theme.”).

of political and civil rights<sup>119</sup> and denied access to literacy.<sup>120</sup> Family rights and authority were displaced—through both White male access to Black women and the absolute discretion of slave owners with respect to whether families remained united or were separated.<sup>121</sup> Finally, members of the oppressed class were, in Allen’s term, “declassed”—excluded from membership in any of the normal classes of the dominant social order—by, for example, legislation that handicapped even free Blacks from competing in the economic market by prohibiting them from hiring bond laborers other than those of African descent, who were at that time two to three times more expensive than bond laborers from Europe.<sup>122</sup>

In wealth terms, slavery created a group of people who by definition could not accumulate positive wealth—whose personal balance sheets may be understood as indicating negative net worth given their status as property and the fact that getting to zero required the investment of purchasing their own freedom. Even after abolition, restrictions on Black economic enterprise continued under de jure segregation; the lid was loosened but not removed.

Complementing this enforcement of Black economic disadvantage were measures that used public resources to create White advantage. Even as the Civil War was being fought, the Homestead Act of 1862 made “public land” in the West available to settlers—though not to Black settlers.<sup>123</sup> After the Civil War, a short-lived Southern Homestead Act opened former plantation lands for homesteading to Blacks.<sup>124</sup> Racial prejudice and access to the land by Whites resulted in large amounts of land ending up in White hands,<sup>125</sup> though “by 1900 one-quarter of Southern black farmers owned their own farms.”<sup>126</sup> The much bruted “forty acres and a mule” never came to pass.

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<sup>119</sup> *Id.* at 84–85.

<sup>120</sup> *Id.* at 84.

<sup>121</sup> *See id.* at 88–89.

<sup>122</sup> *Id.* at 83.

<sup>123</sup> *Id.* at 138–39; OLIVER & SHAPIRO, *supra* note 30, at 14.

<sup>124</sup> OLIVER & SHAPIRO, *supra* note 30, at 14.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 15; *see also* CONLEY, *supra* note 74, at 34–36. Blacks also faced “the not-so-subtle threat of lynching or other physical violence if an African-American tried to open a business, particularly if the business might compete with white-owned franchises.” CONLEY, *supra* note 74, at 35.

In the 1900s, racialized Social Security left domestic workers and farmers without old-age financial security,<sup>127</sup> benefits under the GI Bill were steered to Whites,<sup>128</sup> and postwar federal housing and transportation policy, which supported single-family housing, suburbanization, and “stable” neighborhoods—defined as those in which ““properties shall continue to be occupied by the same social and racial class””<sup>129</sup>—severely hampered Blacks in building home equity through the largest federally supported wealth acquisition program of the twentieth century.<sup>130</sup>

Oliver and Shapiro use the term “sedimentation of racial inequality”<sup>131</sup> to refer to the current disadvantage resulting from a history of slavery, various forms of state-sanctioned discrimination, and institutional racism:

What is often not acknowledged is that the accumulation of wealth for some whites is intimately tied to the poverty of wealth for most blacks. *Just as blacks have had “cumulative disadvantages,” whites have had “cumulative advantages.”* Practically, every circumstance of bias and discrimination against blacks has produced a circumstance and opportunity of positive gain for whites. When black workers were paid less than white workers, white workers gained a benefit; when black businesses were confined to the segregated black market, white businesses received the benefit of diminished competition; when FHA policies denied loans to blacks, whites were the beneficiaries of the spectacular growth of good housing and housing equity in the suburbs. The cumulative effect of such a process has been to sediment blacks at the bottom of the social hierarchy and to artificially raise the relative position of some whites in society.<sup>132</sup>

The crux of Black sedimentation (and its corollary, what we might call White skimming) is that the position of each generation has been to a significant degree dependent on the position of the preceding generation. Where one generation has wealth—to weather economic

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<sup>127</sup> CONLEY, *supra* note 74, at 36; IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 42–50 (2005).

<sup>128</sup> KATZNELSON, *supra* note 127, at 113–41.

<sup>129</sup> OLIVER & SHAPIRO, *supra* note 30, at 18 (quoting U.S. FED. HOUSING ADMIN., UNDERWRITING MANUAL ¶ 937 (1938)); *see also* CONLEY, *supra* note 74, at 36–37 (describing how Black homeowners had greater difficulty refinancing during the Great Depression because Black neighborhoods were disproportionately red-lined by the Home Owners’ Loan Corporation).

<sup>130</sup> OLIVER & SHAPIRO, *supra* note 30, at 15–18.

<sup>131</sup> *Id.* at 50.

<sup>132</sup> *Id.* at 51 (emphasis added).



reverses and health problems, to fund education, to help children with down payments on first homes, to support themselves so as not to be an economic drain on their families in later years, and finally to leave bequests outright at death—the next generation enjoys a leg up. Where such wealth is not available, the springs to give the succeeding generation an economic bounce go missing.

The concentration of Blacks at the lower end of the wealth spectrum, combined with lesser Black upward social mobility and greater Black downward social mobility, represents the current manifestation of White economic advantage and Black economic disadvantage: *Racial wealth disparities and compromised social mobility for Blacks are today's version of yesterday's segregation and the slavery of the day before.*

This economic carry-forward is intertwined with, but separate from, the sociocultural aspects of race. The low economic status of Blacks, in this view, is not simply an outcome of race but its *raison d'être*, though the social stigma of Blackness that was integral to slavery's economic function took on a life of its own that remains highly potent today.<sup>133</sup> These two aspects of race, moreover, reinforce each other: The sociocultural stigma of Blackness leads to discrimination that causes or perpetuates economic marginalization; the economic marginalization of Blacks leads to outsider status and social stigma.<sup>134</sup>

Most civil rights law focuses on the sociocultural-stigma-leading-to-economic-marginalization part of this cycle. The racial wealth disparities discussed here, in contrast, call for action that goes to the economic-marginalization-leading-to-sociocultural-stigma arc. This means, I believe, that initiatives to address racial wealth disparities should be formulated so as not to simply remedy the issue but to do so in a way that lessens the sociocultural stigma. This brings us back to colorblindness and race neutrality.

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<sup>133</sup> See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 952–58 (2006). Conley's data speak to the continuing power of sociocultural race—even when the economics of race are equalized. See *supra* text accompanying note 91.

<sup>134</sup> As Bell Hooks has observed, "In the United States, one's class standing then is always determined by racial as well as economic factors." BELL HOOKS, *WHERE WE STAND: CLASS MATTERS* 135 (2000).

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### III THE LAW OF “DEEP INEQUALITY”

Historically, legal codes overtly denied privilege and imposed penalties on the basis of racial categorizations. The sociocultural stigma and economic marginalization strands of race were tightly braided together. Over time, the explicit racial code has been largely dismantled, and we have arrived at a place where most law is “colorblind.” Such “colorblind” law, which is deemed nondiscriminatory in averred intent, is essentially immune from legal challenge, though both social stigma and tangible discriminatory effects remain to a substantial degree. The sociocultural stigma and the economic marginalization strands of race are frayed but intact; the braid has been loosened but is not undone.

#### A. *Race Neutrality: An Obvious Strategy with Nonobvious Attributes*

“Colorblindness” now serves as not simply a defense but an offense for those who seek to prevent official actions designed to ameliorate racial disparities.<sup>135</sup> Though there are both legislative and judicial holdover provisions of affirmative racial protection,<sup>136</sup> the window for such an approach is closing. Witness Justice O’Connor’s statement for the Court in *Grutter v. Bollinger*:

We take the [Michigan] Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.<sup>137</sup>

The trend is toward race neutrality as the accepted and enforceable norm for legal action.

The challenge then is how to reconcile the seeming debility of a civil rights law grounded in colorblindness with the realities of “deep inequality” such as the racial wealth disparities perpetuated by race-

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<sup>135</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). See generally Barnes et al., *supra* note 109, at 998 & n.156 (arguing that the modern incarnation of “color blindness” incorrectly assumes that society is now post-race).

<sup>136</sup> Continuation of the preclearance provisions of the Voting Rights Act and the Supreme Court decision to allow race as one factor in law school admissions decisions are examples. See e.g., *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>137</sup> *Grutter*, 539 U.S. at 343 (citations omitted).

neutral inheritance law described in this Article. In this regard, Ford proposes race-neutral measures designed to target less-well-off people overall:

To fight this entrenched racial inequality, we need to move beyond civil rights to an approach that is both more circumspect and more ambitious. We should be more circumspect in blaming racism, and hidden racists, for problems with more subtle causes. But we must be more ambitious in directly confronting the decline of inner city neighborhoods and the isolation of the urban poor. And many of the reforms needed to improve the ghettos—job creation, more effective schools, better public infrastructure—would benefit poor and working class people of all races, striking a blow against class stratification as well as racial inequality.<sup>138</sup>

In a similar vein, Lani Guinier and Gerald Torres describe a drive to increase the number of Blacks at the University of Texas, the state's flagship public university.<sup>139</sup> Advocates for inner city majority-minority schools and poorer majority-White rural schools joined together in support of a measure to ensure admittance for the top students from high schools around the state.<sup>140</sup> This race-neutral initiative, which operated to the relative disadvantage of wealthy suburban and private schools with predominantly White students that had been previously dominant in admissions,<sup>141</sup> helped to address a longstanding racial inequality.

The key to such an approach is political viability. In Critical Race Theory terms, the issue is “interest convergence,” which asserts that legal action to benefit Blacks will occur only if it benefits Whites as well.<sup>142</sup> While this can be viewed cynically, it can also be seen as reflecting greater integration of Blacks into the majoritarian U.S. democracy. After all, political minorities as a general rule have to persuade sufficient others to their cause to create a majority if they are to put their desired policies in place.

The irony here is that race-neutral initiatives, which have resulted from increasing judicial discomfort with imposing remedies for continuing racial inequities and consequent embrace of the “colorblind” approach, have pushed civil rights activists to take steps

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<sup>138</sup> Ford, *supra* note 2.

<sup>139</sup> LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 67–74 (2002).

<sup>140</sup> *Id.* at 68.

<sup>141</sup> *Id.* at 72–73.

<sup>142</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–23 (1980).

that reach toward the root of race as it was constructed centuries ago. As Blacks and Whites who are disadvantaged begin to make common cause, joint interests such as economics can be pursued. For, as Allen notes, racial slavery “was not only ruinous to the interests of the African-Americans, but was ‘disastrous’ for the propertyless ‘whites’ as well.”<sup>143</sup>

As a preliminary matter, two avenues for promoting the cross-racial healing and alliances necessary to move forward appear promising. The first begins with acknowledgement of group differences in the form of racial identities—the diametric opposite of colorblindness; when all racial groups are “seen,” the focus can shift to exposing and equalizing the power dynamic between groups to enable movement toward justice and democracy. This approach recognizes the relevance of groups as well as individuals in politics.<sup>144</sup> The second, related to the first, takes as its starting point the belief that cross-racial relationships at the individual level are a practical way to overcome barriers and to build a broader social capacity for working together.<sup>145</sup> These race-conscious, cross-racial strategies in the civic sphere are entirely consistent with race neutrality in the legal sphere.

*B. Using Race-Neutral Initiatives to Reverse the Economic and Social Consequences of Race*

If the strategy on the table is essentially to restart the cross-racial awareness of common economic interests that slavery interrupted centuries ago, the basic numbers are promising. Though substantial racial wealth disparities exist, there is another way to cut the numbers: Blacks are disproportionately lacking in wealth compared to their representation in the population overall, but the absolute number of Whites at the bottom of the wealth pyramid exceeds the actual number of Blacks because of the greater percentage of Whites in the population as a whole. Thus, Blacks represent 23.4% of the bottom quintile of the wealth distribution, which is approximately double the proportion of Blacks in the population overall; but that percentage—

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<sup>143</sup> ALLEN, *supra* note 113, at 21 (citing LERONE BENNETT, JR., *THE SHAPING OF BLACK AMERICA* 76–78 (1975)). To the extent that race continues to interfere with realization of shared interests, new legal and political approaches that help to bridge across that interference are to be welcomed.

<sup>144</sup> See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 91–95, 156–73 (1990).

<sup>145</sup> See Greenwald & Krieger, *supra* note 133, at 963–65.

and the absolute number it represents—is still less than half of the 55.9% White representation in that quintile.<sup>146</sup> *Twice as many Whites as Blacks, that is (55.9% versus 23.4%), are in the bottom wealth quintile.* This means that there is potentially a cross-racial class constituency for addressing the needs of those at the bottom of the wealth distribution.

Further, the benefits of greater economic equality may extend beyond those at the bottom of the economic heap.<sup>147</sup> An increasing body of work reveals that *income* inequality has detrimental effects not only on the least well-off members of a more unequal society but on all members of such a society. Medical epidemiologists Richard Wilkinson and Kate Pickett, at the forefront of this work, have concluded from analysis of data across nations and across U.S. states that *greater income inequality results in a host of negative social outcomes*: lower social trust,<sup>148</sup> higher rates of mental illness<sup>149</sup> and illegal drug use,<sup>150</sup> shorter life expectancies,<sup>151</sup> greater levels of obesity,<sup>152</sup> lower educational outcomes,<sup>153</sup> more pregnancies for and births to teenage girls,<sup>154</sup> more violence,<sup>155</sup> and higher rates of imprisonment.<sup>156</sup>

The degree to which effects such as those found by Wilkinson and Pickett might also result from *wealth* inequality is unclear. Just as there have been little data until recently on wealth overall, there has been very little focus on the social effects of wealth and wealth inequality in terms of the various measures of health and well-being

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<sup>146</sup> Weicher, *supra* note 83 (referencing the 1992 data). The 1989 numbers were 29.0% Black and 48.8% White. *Id.* Data on the middle and top quintiles were unavailable, but numbers for the top 1% of the wealth distribution are 91.2% White (1992) and 94.5% White (1989) compared to 0.2% Black (1992) and 0.7% Black (1989). *Id.* at 28 tbl.3.

<sup>147</sup> These benefits may extend not only to those in the bottom quintile but also to those in the bottom half. Further, there will likely continue to be a sociocultural bond between middle- and upper-class Blacks and Blacks in poverty.

<sup>148</sup> WILKINSON & PICKETT, *supra* note 34, at 52–56.

<sup>149</sup> *Id.* at 67.

<sup>150</sup> *Id.* at 71.

<sup>151</sup> *Id.* at 80 (in years).

<sup>152</sup> *Id.* at 92–93.

<sup>153</sup> *Id.* at 106 (average literacy of fifteen-year-olds).

<sup>154</sup> *Id.* at 122–23 (births and abortions per 1000 women aged fifteen–nineteen years).

<sup>155</sup> *Id.* at 135 (noting increased rates of homicide).

<sup>156</sup> *Id.* at 148 (prisoners per 100,000 population).

considered by Wilkinson and Pickett.<sup>157</sup> Moreover, wealth inequality may well operate quite differently from income inequality.<sup>158</sup> On the other hand, the evident importance of wealth in people's lives warrants the kind of attention to the potential effects of wealth inequality that has been paid to the effects of income inequality.<sup>159</sup>

A final observation made by Wilkinson and Pickett is the low degree of social mobility (correlating to high income inequality) in the United States: "In fact, far from enabling the ideology of the American Dream, the USA has the lowest mobility rate among [the] eight countries [compared]."<sup>160</sup> Here, income and wealth appear to be intertwined. Two of the indicators that Wilkinson and Pickett cite as confirming a directly measured correlation between income inequality and lower social mobility are associated with wealth: access to education and residential segregation. In this regard, Wilkinson and Pickett note both that public expenditures to equalize access to education soften the effects of income inequality and that greater income inequality leads to greater residential segregation.<sup>161</sup> As to the first factor, the converse of their point is that, in the absence of public expenditures on education, wealth differentials may exacerbate the effects of income inequality. As to the second factor, to the extent that residential segregation and associated concentrations of poverty decrease social mobility, they may again accentuate income inequality.

It has been widely noted that while higher levels of economic inequality exist in the United States than in comparable nations, U.S. citizens generally accept this. The standard explanation is that

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<sup>157</sup> *But see, e.g.*, YURI ANDRIENKO, CRIME AND WEALTH: EVIDENCE FROM INTERNATIONAL CRIME VICTIM SURVEYS 17–20 (2003), available at <http://www.cepr.org/meets/wkcn/7/756/papers/andrienko.pdf> (finding that income inequality has a significant positive correlation with property crimes, while mean income and individual wealth have U-shape form influences on crime victimization). This paper was given at the Economics and Research Consortium, Centre for Economic Policy Research (CEPR).

<sup>158</sup> The fact that it is far greater may make its effects less applicable to the population at large; and the fact that it is less directly related to consumption may attenuate its practical significance. See E-mail from Richard Wilkinson to author (June 23, 2010, 13:28 CST) (on file with author).

<sup>159</sup> Further, as noted above, *see supra* note 27 and accompanying text, while wealth inequality has risen in recent decades after falling for much of the twentieth century, a significant proportion of the population does have significant wealth (especially in the form of homes and pensions), which argues for there being effects of wealth inequality that extend to the population at large.

<sup>160</sup> WILKINSON & PICKETT, *supra* note 34, at 159.

<sup>161</sup> *Id.* at 160–63.

Americans tend to believe in social mobility, in the Horatio Alger story of those who begin life in poverty achieving success through effort and virtue. The facts, as we have seen, demonstrate that this story is much less descriptive of actual possibilities for Blacks than for Whites.<sup>162</sup> It is also less true for those at the bottom generally than for those in the middle.<sup>163</sup> Given the fact that Blacks have been historically and continue to be overrepresented at the bottom of the economic distribution, the question arises: Does widespread acceptance of high levels of economic inequality—*income and wealth*—in the United States rest, at least to a degree, on this knowledge and a sense of its “rightness”? If so, a significant part of the task ahead is to surface that subconscious equation of how the world *does look* with how it *must or should look* and to expose the ways in which the social construction of race and the negative associations with Blackness continue to affect—or infect—us.

The creation of cross-racial relationships among the economically disadvantaged and along the economic spectrum can—paradoxically—be accomplished only by explicitly confronting race and its power, though the purpose is ultimately to defuse the power of race.<sup>164</sup> Race is so essentially a part of identity in the United States that we cannot become fellow citizens across racial lines without knowing, understanding, and acknowledging each other’s experiences and our shared history. Even if colorblindness may—at least eventually—be an appropriate posture for the law, it may never be and is certainly not today an appropriate grounding for civic relationships.

The creation of cross-racial relationships has the potential, over time, to create civic alliances that join poor Black to poor White, as well as poor Black and White to the wealthier portions of our society. In those alliances lies the promise of shared stories and understandings from which can emerge new social norms, perhaps relating to the distribution of wealth, and new law that reflects those norms, perhaps relating to inheritance or to other wealth-related aspects of law, such as health care, education, asset building, and the

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<sup>162</sup> See OLIVER & SHAPIRO, *supra* note 30, at 160–69. Data are unavailable to answer the question whether Whites and Blacks have different levels of optimism on social mobility or acceptance of current levels of economic inequality—*income or wealth*.

<sup>163</sup> See Haskins, *supra* note 22, at 54 (“[T]here is ‘stickiness’ at both tails of the wealth distribution, meaning that the greatest wealth similarity between parents and offspring is at the extremes of the distribution.”).

<sup>164</sup> See, e.g., BRONSON & MERRYMAN, *supra* note 110.

revitalization of neighborhoods.<sup>165</sup> Though cross-racial relationships will be difficult given our deep social conditioning, they are nonetheless possible. Moreover, they are necessary if we are to move beyond the current “deep inequality.”

Part of the process of deconditioning ourselves is exposing the institutional racism of our current law. With inheritance law, as with many other manifestations of institutional racism, facially neutral laws can lead to non-neutral, racialized outcomes. The next step is to generate new ideas of law that actively counter the status quo—here the perpetuation of racial wealth disparities.<sup>166</sup> Such alternatives can both highlight the contingency of even long-settled law and stimulate conversation about desired alternatives. In this spirit, I offer two proposals for changing current inheritance law. The first of these addresses White advantage; the second addresses Black disadvantage.

#### IV

#### ADDRESSING RACIAL WEALTH DISPARITIES WITH RACE-NEUTRAL CHANGES TO INHERITANCE LAW

The prior Parts of this Article show that

- (1) wealth distribution in the United States is highly unequal from both historical and international perspectives;
- (2) racial wealth disparities are particularly acute;

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<sup>165</sup> On race as an underlying issue in current policy debates, see, for example, Frank Rich, *The Rage Is Not About Health Care*, N.Y. TIMES, Mar. 28, 2010, <http://www.nytimes.com/2010/03/28/opinion/28rich.html>.

<sup>166</sup> The approach I present here shares much with the critique of “post-racialism” articulated by Barnes et al., *supra* note 109. I also do not believe post-racialism describes reality. I also acknowledge continued unconscious prejudice and the inappropriateness of “colorblindness” as descriptive of reality. I also note the overwhelming evidence of continuing racial disparities in various key social and economic contexts, though I focus on wealth and homeownership primarily as it relates to wealth.

But my overall perspective on law and social change, *see* Strand, *supra* note 4, leads me to view the struggle to “un-entrench” racism in our social system, *see infra* notes 260–61 and accompanying text, as calling for adaptation and evolution of new strategies when, as at the current moment, progress has been made and the situation has been transformed but the work remains unfinished, *see* FUNDI: THE STORY OF ELLA BAKER (First Run/Icarus Films 1981) (statement by Vincent Harding). The approach I present here to address racial wealth disparities, which is redistributive in the sense it is used by Barnes et al., *see supra* note 109, at 1000–01, is intended as one contribution to what will hopefully be a rich discussion of innovative ways to continue to move forward notwithstanding lesser availability in the near term of the Equal Protection Clause as a tool for affirmative change.



(3) current inheritance law, in combination with individual choices, perpetuates wealth inequalities, including especially racial wealth disparities;

(4) a relative lack of Black wealth, part of a “deep inequality” in America today, is historically grounded and seriously compromises the well-being and social mobility of Black citizens;

(5) current civil rights law points toward race-neutral initiatives as constitutional “safe harbors;” and

(6) race neutrality can lessen the sociocultural stigma of Blackness at the same time that it addresses economic marginalization.

The two proposals below respond to these imperatives.

#### *A. Inheritance as Windfall Wealth (Addressing Advantage)*

The basic structure of our law of inheritance is often said to reflect a presumption of freedom of testation: “In one form or another, the right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times.”<sup>167</sup> Testation, of course, must be actively chosen. If the freedom is not exercised, the default provisions of intestacy law apply.<sup>168</sup>

Nor is freedom of testation absolute.<sup>169</sup> Enforced spousal share provisions generally prohibit disinheritance of spouses,<sup>170</sup> and other provisions “amend” wills in the cases of pretermitted children<sup>171</sup> and post-testation marriage and divorce.<sup>172</sup> Finally, the estate tax limits the freedom of the wealthiest testators to pass on their property.<sup>173</sup> These exceptions do not, however, challenge the essential conceptual underpinning of freedom of testation—the idea that a normal part of the “bundle” of property rights is designating who will receive one’s property when one dies.

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<sup>167</sup> *Hodel v. Irving*, 481 U.S. 704, 716 (1987); *see also* Friedman, *supra* note 1, at 12, 14.

<sup>168</sup> *See supra* note 61 and accompanying text.

<sup>169</sup> *See, e.g., Hodel*, 481 U.S. at 717 (“[W]e reaffirm the continuing vitality of the long line of cases recognizing the States’, and where appropriate, the United States’, broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause.”).

<sup>170</sup> Friedman, *supra* note 1, at 15.

<sup>171</sup> *DUKEMINIER ET AL.*, *supra* note 63, at 527–34.

<sup>172</sup> *Id.* at 305–07.

<sup>173</sup> Friedman, *supra* note 1, at 14. When I refer here to the estate tax, I include not only the federal estate tax but also inheritance taxes levied by the individual states. *See* *DUKEMINIER ET AL.*, *supra* note 63, at 933–34.

Shelly Kreiczer-Levy has proposed that inheritance law in reality is “bifocal”: in addition to the standard emphasis on the testator’s freedom of testation, socially recognized recipients (usually family) also have a “belonging” interest embodied in provisions protecting them explicitly as well as, for example, in undue influence cases that give unspoken preference to family members.<sup>174</sup> Kreiczer-Levy proposes explicit acknowledgement of “belongingness” as a value in inheritance law, along with, though perhaps not commensurate to, freedom of testation. She asserts that this value arises from a shared interest of both testator and heirs in continuity, of which property is one concrete symbol.<sup>175</sup>

Seen this way, a third value in inheritance law that has been long present but not clearly articulated becomes apparent: the public policy or social interest in the disposition of a decedent’s property. The familiar cases limiting restrictions on marriage,<sup>176</sup> the support justification for the enforced spousal share,<sup>177</sup> and the redistributive goals of the estate tax<sup>178</sup> all fall into this category. What happens to property at death, then, is *trifocal* and reflects equipoise among the decedent’s interest in autonomy, the relationships between the decedent and his or her likely heirs (Kreiczer-Levy’s “belongingness”), and the social meaning of the passage of property.<sup>179</sup>

If the likely result of allowing present inheritance practices to continue unimpeded is the perpetuation and even increase in Black-

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<sup>174</sup> Shelly Kreiczer-Levy, *The Riddle of Inheritance: Connecting Continuity and Property* 26–38 (2010) (unpublished manuscript) (on file with author).

<sup>175</sup> *Id.* at 10–26. Mary Clark’s work identifies three propensities of human nature: autonomy, bonding, and the search for meaning. MARY E. CLARK, *IN SEARCH OF HUMAN NATURE* 57–59 (2002). Autonomy and bonding are both complementary and in tension, and the bifocal interests in law identified by Kreiczer-Levy echo these propensities.

<sup>176</sup> *See e.g.*, *In re Estate of Feinberg*, 919 N.E.2d 888 (Ill. 2009); *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825 (Ohio Ct. Com. Pl. 1974).

<sup>177</sup> *See* *DUKEMINIER ET AL.*, *supra* note 63, at 476–77; *see also id.* at 469–71, 475–76 (discussing the traditional partnership rationale in community property jurisdictions and traditional support practices such as dower and curtesy in common law jurisdictions).

<sup>178</sup> *See* Friedman, *supra* note 1, at 172.

<sup>179</sup> A third propensity identified by Mary Clark, the search for meaning or the relevance of individual action to a larger whole, is at play here. CLARK, *supra* note 175, at 58. This triad of human propensities—autonomy, bonding, and overall meaning or social relevance—are all both present and legitimate here, which leads me to reject the extreme view that inheritance should simply be abolished. Such action would privilege the social interest but essentially deny the autonomy and bonding interests. My argument here is not that the social interest is the only interest but that it is important and currently underprotected in inheritance law.

White wealth disparities, there is a significant social interest in rechanneling the current intergenerational flow of wealth. Broadly taxing inheritances as windfall income can address the problem of entrenched White advantage by redirecting the flow of wealth over time. Currently, middle class wealth—which as we have seen tends to be disproportionately White—passes freely at death, enriching the next (White) generation. Taxing inheritances as income to the recipients would reach some of the wealth acquired over generations by Whites disproportionately—often with government support—and would begin to equalize rather than accentuate racial (and other) wealth disparities.<sup>180</sup>

Taxing inheritances as income would also begin to change the “story” of inheritance<sup>181</sup> from one in which the estate remains the decedent’s property to do with as he/she wishes to one in which windfall receipts by some citizens, lucky in their birth, are treated the same as citizens who are lucky in other ways, such as by winning the lottery. If law is viewed as a collective story that both arises from and shapes social norms, the absence of a tax on inheritances is part of an overall (legal *and* lay) story that people are entitled to pass their wealth unfettered. Conversely, imposing a tax on inheritances moves toward a story that people are not entitled to receive windfall income—from whatever source (including inheritance)—without paying tax.<sup>182</sup>

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<sup>180</sup> Cf. Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WISC. L. REV. 751, 783 (1996) (endorsing the continued lack of taxation on most intergenerational wealth transfers). Though Black Americans have generally been unable to pass wealth intergenerationally, with detrimental effects on Black wealth, Moran and Whitford conclude that a “Black Congress would prefer to encourage, rather than discourage, such transfers.” *Id.* If free, the continual, untaxed, intergenerational transfer of wealth will exacerbate current racial wealth disparities. As this Article concludes, curtailing that freedom is the preferable choice.

<sup>181</sup> See Strand, *supra* note 4, at 608–30 (describing law as a socially constructed collective story that emerges from and is reflected back to the community it governs).

<sup>182</sup> In my view, the best proposal—due to its specificity, practicality, and widespread applicability—was articulated two decades ago by Alicia H. Munnell, who was then with the Federal Reserve Bank in Boston, and key specifics I set forward here reflect her thinking. See Alicia H. Munnell & C. Nicole Emsberger, *Wealth Transfer Taxation: The Relative Role for Estate and Income Taxes*, NEW ENG. ECON. REV., Nov.–Dec. 1988, at 3. Note that although Munnell’s proposal emphasizes treating inheritances as income, it also includes a progressive estate surtax on the very wealthiest estates. *Id.* at 5, 10–15. For other proposals and perspectives, see Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469 (2007); Mark L. Ascher, *Curtailling Inherited Wealth*, 89 MICH. L. REV. 69 (1990); Lily L. Batchelder, *What Should Society Expect from Heirs: The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1 (2009); J.D. Trout & Shahid A. Buttar, *Resurrecting “Death Taxes”: Inheritance, Redistribution, and the*

This shift would tap into a distinct strain in public opinion that recognizes that inheritance is at odds with the widely embraced American image of equal opportunity. Surveys, for example, reveal that “a large majority of those surveyed recognize inheritance as a source of economic inequality. [In one survey, for example,] when questioned about [why people have] wealth, 64 percent responded ‘very important’ and 29 percent said ‘somewhat important’ to the item ‘money inherited from families.’”<sup>183</sup>

According to the American ideology of inequality, people deserve what they get based on their merit. But the lived experiences of individuals tell them that “it takes money to make money” (inheritance), that “what counts is not what you know but who you know” (sponsorship), and that fortune smiles on those who happen to be “at the right place at the right time” (luck).<sup>184</sup>

Americans already know that the equal background conditions that make equal opportunity real are inconsistent with the current system of inheritance.

Overall, “[t]he paradoxical nature of inheritance derives . . . from the fundamental ideological contradiction between freedom of choice at the individual level and equality of opportunity at the societal level.”<sup>185</sup> Part of what shifting to a personal income tax on windfall receipts, including inheritances, accomplishes is to begin to illuminate how *individual freedom of choice actually denies equal opportunity at a societal level—at least in our society as currently configured*.<sup>186</sup> The cognitive dissonance is already there. The proposed approach merely brings it closer to the surface.

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*Science of Happiness*, 16 J.L. & POL. 765 (2000); see also Michael Kinsley, *The Least We Can Do*, ATLANTIC, Oct. 2010, at 62, 68.

<sup>183</sup> McNamee & Miller, *supra* note 66, at 14.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 8.

<sup>186</sup> Note that there are other individual decisions that contribute to the emergence of the pattern of continued racial wealth disparities. Among them is the continued practice of “in-race” marriage: While interracial marriages have risen in recent decades, they still constitute only about 15% of all new marriages and 8% of marriages overall (2008). JEFFREY S. PASSEL, WENDY WANG & PAUL TAYLOR, PEW RESEARCH CENTER, MARRYING OUT: ONE-IN-SEVEN NEW U.S. MARRIAGES IS INTERRACIAL OR INTERETHNIC (2010), available at <http://pewsocialtrends.org/assets/pdf/755-marrying-out.pdf>. The proposals in this Article assume that interventions regarding where people’s wealth goes are more appropriate than interventions regarding whom they marry. *Id.*

Four features enhance the efficacy of the proposal I make here and ruffle complacency with the existing “story.”<sup>187</sup> First, a fixed-amount exemption should apply to all items to be taxed.<sup>188</sup> Different rationales lead to different amounts for such an exemption. One rationale would be to exempt everything below a certain level in terms of the amount of the decedent’s estate—say, the median or a percentage of the median of all estates. In combination with an owner-occupied primary residence exemption, discussed below, this would lead to a total lack of tax for most Black estates due to their low net financial worth, but it would also lead to no tax at all for the many White estates that lie below the specified level.<sup>189</sup>

Second, the long-standing practice of exempting unrealized capital gains for assets held at death should be eliminated.<sup>190</sup> This would pull into the fiscal net income that has historically not been taxed. This income, moreover, is generally held by those citizens who receive income in the form of asset appreciation rather than in the form of earned wages—citizens who tend to be on the wealthier side.

Third, the proposed income tax should distinguish owner-occupied residences from other inherited assets. In particular, owner-occupied residences that are passing to either another current occupant or to someone who will occupy the house should pass free of tax. In contrast, owner-occupied homes that are sold and the proceeds distributed are—to the receivers—just an economic asset and should be treated the same as other inherited windfall wealth.

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<sup>187</sup> The first two are included in Munnell’s proposal. See Munnell & Ernsberger, *supra* note 182, at 19–22. The others tailor it to achieve the ends identified here.

<sup>188</sup> *Id.* at 22.

<sup>189</sup> Munnell’s proposal includes two additional features that address specific practical issues resulting from treating inheritances as income. The first measure, which is to provide a combined lifetime exemption for inter vivos transfers and inheritances, ensures that the “windfall wealth” nature of both types of transfers is recognized and that they differ only in their timing. *Id.* at 21–22. (This comparability is currently recognized by the integrated gift and estate taxes.)

A second measure, which addresses an issue common in the lottery windfall context, is to provide for income averaging to spread the effects of what is generally a one-time transfer over a number of years. The recipient pays income tax but can spread the income to potentially access lower tax rates—a result of a progressive income tax system. While this diminishes the increased income tax from the proposed change, the overall tax effect will likely be revenue-positive as transfers not currently reached by the estate tax would be taxed. *Id.* at 22.

<sup>190</sup> *Id.* at 19–21.

Such an exemption recognizes that owner-occupied homes are not simply assets; they are also directly consumed by their owners.<sup>191</sup> It thus makes sense to treat them as continuing family self-support rather than as the intergenerational transfer of excess wealth. Further, and going to the issue at hand, this exemption acknowledges the disproportionate level of financial assets held by Whites, with Blacks holding more of their assets as primary residence home equity. It also acknowledges that Black as versus White families are more likely to have multiple generations living together.<sup>192</sup> In such multigenerational households, the assumption and practice is often that when the older generation dies the next generation (or generations) will continue living in the family home.

Fourth, people who inherit owner-occupied homes located in areas that were once red-lined (and perhaps also yellow-lined) and that were purchased by the decedent or a family member during that time should receive a tax credit. Oliver and Shapiro's discussion of the wealth forgone by Black families who were blocked from purchasing homes in predominantly White (green-lined and blue-lined) areas—which then appreciated in value to the extent of forming the weight of solid middle class White wealth today—makes a very specific case for the federal government acting to at least in part ameliorate the costs that are apparent today from decisions made a generation ago. Such a credit would, as with the other aspects of this proposal, benefit Blacks to a greater degree than their representation in the overall population due to their overrepresentation in these neighborhoods. It would, however, also benefit many others. For it was not only Black families who bought and owned houses in red- or yellow-lined neighborhoods; the value of the houses owned by others suffered as well.<sup>193</sup>

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<sup>191</sup> See WOLFF, *supra* note 21, at 5–6. Family-run businesses might warrant similar treatment because they also are more than simply assets, but I focus on homes due to their specific relevance to the issue here.

<sup>192</sup> PAUL TAYLOR ET AL., PEW RESEARCH CENTER, THE RETURN OF THE MULTI-GENERATIONAL FAMILY HOUSEHOLD 7 (2010), available at <http://pewsocialtrends.org/assets/pdf/752-multi-generational-families.pdf> (noting that 23% of Blacks versus 13% of Whites live in multi-generational households).

<sup>193</sup> The precise amount of such a tax credit might depend on, among other factors, when the home was purchased, the relative values of homes in different parts of that metropolitan area, and whether services such as curbs, gutters, sidewalks, transportation, shopping, and other amenities were historically and are today provided. Though these are often related to local government decisions, those decisions may track the levels of investment in neighborhoods—levels determined to a large degree by federal government actions. Further, the existence of such a tax credit could also create an incentive for

This is, of course, just an outline of a proposal with details to be worked out, but the important points are threefold. The perpetuation of Black-White wealth disparities via inheritance is not inevitable. It has occurred and will continue to occur—but only so long as our law of inheritance facilitates it. Moreover, changes in that law can address both White advantage and Black disadvantage while conforming to race neutrality in how the provisions are shaped; the current proposal applies to all who incurred financial injury regardless of race. Finally, the proposed race-neutral provisions emphasize the common economic interest of low-wealth citizens across the board and sound another note against the conflation of race and class.<sup>194</sup>

*B. Intestacy and the Problem of Evaporating Heirs' Property  
(Addressing Disadvantage)*

The prior section, like most discussions of the law of inheritance, focuses on the treatment of wealth that is identified, acknowledged, and claimed. This can be understood as a top-down view of the law of inheritance. But there is also a bottom-up view, and this view is both quite different and much less clear. This is the view that focuses on the wealth of people who are at the low end of the spectrum and how that wealth is passed to succeeding generations. The concern here is to preserve that wealth so that families who have worked their way onto the wealth ladder, even its very lowest rungs, do not slip off.

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potential owners to take actions necessary to clear title. *See infra* note 255 and accompanying text.

<sup>194</sup> The proposed income tax would begin to reverse the current racial wealth disparities because it would reach and apply higher rates to larger transfers of wealth (with greater effects on Whites) while reaching fewer and applying lower rates to smaller transfers of wealth (with lesser effects on Blacks). This phenomenon occurs because “taxation will tend to erode differences in wealth as long as the money is redistributed to the society in a more or less equal way.” MARK BUCHANAN, *NEXUS: SMALL WORLDS AND THE GROUNDBREAKING SCIENCE OF NETWORKS* 193 (2002). *Cf.* Kinsley, *supra* note 182, at 68–72 (tax similar to that proposed in this Article but to be used for infrastructure and paying off the national debt). The redistributive effects could be enhanced by pairing the proposed expanded income tax with initiatives such as providing a fiscal “nest egg” for those who might not otherwise have one. *See, e.g.*, Lora Cicconi, *How Far Do Child Savings Accounts Stray from the Tax Code?: A Comparative Perspective*, 34 OHIO N.U. L. REV. 17, 21–24 (describing Senator Bob Kerry’s “KidSave” plan and related legislative proposals); Associated Press, *Clinton Proposes \$5000 ‘Baby Bonds,’* N.Y. TIMES, Sept. 29, 2007, <http://www.nytimes.com/2007/09/29/us/politics/29bond.html> (reporting on a similar proposal made by Senator Hillary Clinton in the presidential campaign).

The ways in which the law of inheritance affects those with minimal wealth have been little noted.<sup>195</sup> Also scarce are descriptions of how people with modest wealth experience inheritance and how they interact with the current law of succession. The proposal in this section is based on the few academic studies that have been done<sup>196</sup> and on my own conversations with practitioners who represent people in this group.<sup>197</sup> Further exploration of the experiences and needs of these households is essential.

Unlike people with significant wealth, who are relatively likely to exercise the freedom of testation described above, people with fewer assets are substantially more likely to die intestate. Currently, somewhere in the neighborhood of a third of U.S. adults have a will.<sup>198</sup> Wealthier individuals are more likely to have wills,<sup>199</sup> as are older people.<sup>200</sup> And, apropos of the racial wealth disparities that are the primary subject of this Article, Whites are more likely than Blacks to have wills—32% of Whites versus 16.4% of non-Whites in one survey.<sup>201</sup> While there are several common reasons given for not executing a will (such as not wanting to confront dying or a lack of relevant knowledge), a consistent theme is people believing they

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<sup>195</sup> Compare, in this regard, the exhaustive discussions of the estate tax, trusts, and other mechanisms that affect those with significant assets.

<sup>196</sup> There are a few notable exceptions. See, e.g., Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113 (2009).

<sup>197</sup> Interview with Kate Mahern, Director, Creighton Law School Legal Clinic, in Omaha, Neb. (multiple dates); Telephone Interview with Mavis Gragg, Attorney, in Carrboro, N.C. (multiple dates); Interview with Susan Blumenthal & Tanya Harvey, Bryan Cave LLP, & Mark Herzog, DC Bar Pro Bono Project, DC Bar Probate Resource Center, in D.C. (June 25, 2010). For a description of the DC Bar Probate Resource Center, see Thai Phi Le, *The Pro Bono Effect: A Son's Battle for His Piece of the American Dream*, WASHINGTON LAWYER, June 2010, at 38. I have also benefitted from conversations with others who have shared personal or family stories.

<sup>198</sup> Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41 (2009) (noting that 68% of Americans were without wills); see also Press Release, LexisNexis, Lawyers.com Survey Reveals Drop in Estate Planning by Americans in 2009; Ailing Economy Likely Reason (Feb. 25, 2010), <http://www.lexisnexis.com/media/press-release.aspx?id=1268676534119836> (noting that 35% of Americans had wills in December 2009).

<sup>199</sup> DiRusso, *supra* note 198, at 50–51.

<sup>200</sup> *Id.* at 51–54.

<sup>201</sup> *Id.* at 42–45; see also Press Release, LexisNexis, Majority of American Adults Remain Without Wills, New Lawyers.com Survey Finds (April 3, 2007), <http://www.lexisnexis.com/media/press-release.aspx?id=1270146453917826> (noting that 32% of African American, 26% of Hispanic American, and 52% of White American adults have wills or other estate plans).



don't have enough assets (24% of respondents in 2009 and 17% in 2007).<sup>202</sup> More recently, a large number cite the economic downturn as a factor.<sup>203</sup>

There are distinctive issues that arise when individuals die intestate. These issues relate to both the substance and the process of intestacy law. Before analyzing these legal issues, however, I present a fact pattern that I believe from my conversations<sup>204</sup> not to be uncommon.

### *1. An Heirs' Property Story*

At some point in time, a married couple purchases a home. While the original owners are both alive, the husband does most of the repairs and maintenance on the house, so the cost of upkeep is not prohibitive. The husband then predeceases the wife. Legal ownership and title pass automatically to the wife as the house is, most likely, held in joint tenancy. The now-widow continues to live in the house either alone or, frequently, with a child or other family members who have already been living there or who move in to help care for her as she ages. This child or other family, of course, receive the economic and emotional benefits of living in the family home as well.

The widow/mother/grandmother dies intestate. Several children and perhaps several grandchildren, if at least one child predeceased her, are heirs by representation as tenants in common so that each heir has a fractional interest in the whole property—which leads to the designation “heirs’ property.” It also means that anyone with an ownership interest can bring a partition action, which might well result in the sale of the property and division of the proceeds.<sup>205</sup>

The value of the house (likely located in a low-value neighborhood) may not be substantial, and the house may already have been neglected somewhat as the husband aged or after he died. This in conjunction with each heir having a small interest leads to the

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<sup>202</sup> Press Release, LexisNexis, *supra* note 198; Press Release, LexisNexis, *supra* note 201.

<sup>203</sup> Press Release, LexisNexis, *supra* note 198.

<sup>204</sup> See sources cited *supra* note 197.

<sup>205</sup> See Way, *supra* note 196, at 151–56. These issues are similar to those presented by Black heirs’ properties. See, e.g., Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001) (discussing how tenancies in common contribute to Black land loss).

heirs not claiming their economic share of the home's value. Or they may regard it as the family homestead with a history worth preserving. All heirs, at least all those present, agree not to sell the home to extract its economic value, and the estate is never probated. This failure to probate can occur even if the wife has a will.

In conjunction with the decision not to sell the home, the heirs agree that the family member or members who were living in the house before the wife's death can continue to live there. He or she pays property taxes in the original owners' or owner's name. This may continue for a substantial period of time or into additional generations. By operation of intestacy law, as time passes, ownership becomes more and more fractionated until a number of people, perhaps even a dozen or more, have very small ownership interests while at the same time having experienced little connection with the home or even a complete lack of awareness that they have an interest in it.

At some point, this arrangement, with the house still *titled*<sup>206</sup> to the original owner(s) but with *legal* ownership as heirs' property spread far and wide, hits a brick wall. Often, the problem is the payment of property taxes. Perhaps the occupant cannot pay, or he or she seeks contributions from the other owners, who cannot or see no reason to invest in a property from which they receive no benefit.<sup>207</sup> Or low-cost loans are available to fix or improve the home,<sup>208</sup> or a reverse mortgage to support the occupant is indicated,<sup>209</sup> but a lack of clear title precludes eligibility. Or the area in which the home is located is being redeveloped and the developer wants to purchase the home.<sup>210</sup> Or disaster hits, and disaster relief is conditioned on proof of title.<sup>211</sup>

Depending on the economic incentives, the current occupant—usually but not always a part owner<sup>212</sup>—may or may not be able to secure the legal assistance necessary to open probate, locate all the heirs, and clear title. While conceptually straightforward, this action is often a logistical nightmare: people move away, lose touch, have and adopt children, remarry and have more children, have children

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<sup>206</sup> See *supra* note 62.

<sup>207</sup> See sources cited *supra* note 197.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Way, *supra* note 196, at 157 (discussing the problems after Hurricane Katrina).

<sup>212</sup> See sources cited *supra* note 197.

out of wedlock, go to prison, and die in faraway places without their families knowing. When the economic benefits are relatively low (saving a modest home from being lost due to property tax liens), legal assistance with estate administration is often unavailable.<sup>213</sup> These cases demand many hours, and the rewards appear minimal—though they may constitute a significant part of the overall wealth holdings of the family. When the economic benefits are high (clearing title to sell the home for a redevelopment project, for example), legal assistance may be forthcoming, but legal fees may take a substantial percentage of the proceeds from the sale.<sup>214</sup>

The final step may be eviction of or abandonment by the occupant, repossession for tax liens by the local government, and razing the property if deterioration is too far along. Blighted neighborhoods are one result.<sup>215</sup> Another is loss to the family of the wealth earned by a prior generation.<sup>216</sup>

## 2. *Destructive Effects of Intestacy Law*

This type of situation results from operation of essential aspects of the law of intestacy. First, by virtue of the *substantive* law of how ownership interests pass to descendants—by representation in one form or another<sup>217</sup>—division of ownership is given precedence over consolidation and alienability.<sup>218</sup> Second, by virtue of the *procedural* law of how title passes in the case of intestate assets, affirmative

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> Way, *supra* note 196, at 160–61.

<sup>216</sup> These issues overlap but are not the same as those raised in the context of rural property owned in tenancy in common by Blacks in the South. With those heirs' properties, the primary problem with the operation of intestacy law is that fractionated ownership and partition actions can result in a judicially ordered sale rather than actual partition, even when it is a developer who has acquired a small interest from a part owner bringing the partition action and the other owners want to keep the property. Way, *supra* note 196, at 175. The result has been a “rapid decline of African-American land ownership in the southeastern United States, in part through partition.” *Id.*; see also Mitchell, *supra* note 205; Anna Stolley Persky, *In the Cross-Heirs*, ABA J., May 2009, [http://www.abajournal.com/magazine/article/in\\_the\\_cross-heirs/](http://www.abajournal.com/magazine/article/in_the_cross-heirs/).

Way points out that, in contrast to the rural heirs' property problem, “there has been very little analysis of the prevalence and issues created by tenancy-in-common ownership amongst low-income homeowners in other settings, such as urban and semi-urban communities or areas with smaller non-agricultural homesteads.” Way, *supra* note 196, at 175–76.

<sup>217</sup> DUKEMINIER ET AL., *supra* note 63, at 87–90.

<sup>218</sup> Way, *supra* note 196, at 158–59.

action in the form of probate is generally required for the legal transfer of title.<sup>219</sup>

Heather Way discusses both of these problems comprehensively, identifying the following issues:

- (1) balancing the interests of homeowner-occupants with those of other, nonresidential heirs;<sup>220</sup>
- (2) low-income, low-wealth homeowner-occupants who want to stay in the home but cannot afford to buy out other heirs;<sup>221</sup>
- (3) the role of social interests such as “promoting the upkeep of homes, preserving familial and cultural ties to the homestead, ensuring the alienability of property, and economic efficiency”;<sup>222</sup> and
- (4) the role of factors such as
  - The length of time that an owner-occupant has lived in the home;
  - How long a property’s ownership has been fractionated;
  - The number and size of the fractionated interests;
  - Whether an heir has made any contribution to the maintenance and upkeep of the land or has any personal ties to the property; and
  - Whether an heir is unknown or cannot be located.<sup>223</sup>

Way then offers a multitude of proposals for legal reform, which she groups into seven areas. Two of these areas relate to providing legal assistance to low-wealth homeowners—before the fact in estate planning and after the fact in estate administration—to facilitate the passage of title under the current legal regime.<sup>224</sup> One area relates to reforming housing assistance programs to practice greater leniency vis-à-vis proof of title.<sup>225</sup> Though Way’s focus is on disaster relief, a more common application of this would be in the context of loans by local governments and others for property repair and maintenance.<sup>226</sup>

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<sup>219</sup> There are a few exceptions. In North Carolina, for example, “When a property owner dies intestate, the title to his real property vests immediately in his heirs.” *Wright v. Smith*, 564 S.E.2d 613 (N.C. Ct. App. 2002); *see also* N.C. GEN. STAT. § 28A-15-2(b) (2009). This procedural assist leaves unaltered the substantive issue of fractionated ownership.

<sup>220</sup> Way, *supra* note 196, at 174.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 174–75.

<sup>223</sup> *Id.* at 175.

<sup>224</sup> *Id.* at 188–89, 190–91.

<sup>225</sup> *Id.* at 189–90.

<sup>226</sup> *Id.*; *see* sources cited *supra* note 197.

The other four areas of need that Way discusses relate to legislative changes in current state intestacy laws. Way focuses most of her attention on proposals for changing the *substantive* law that governs property inherited through intestacy—with emphasis on ways to facilitate consolidation of ownership, primarily for “homesteads below a certain market value” that are not “of cultural significance;”<sup>227</sup> reform of partition laws, with disincentives for outside speculators to buy in and protections for a part owner’s investment in the property;<sup>228</sup> and collective management of property through, for example, easier or automatic creation of LLC- or land-trust-type arrangements.<sup>229</sup>

Way also presents several ideas for changing *procedural* law to ease the transfer of title to intestate heirs. These include creating an expedited process for estates in which “the only significant asset in the estate is a home of moderate value or less,”<sup>230</sup> requiring that estates be administered within a certain time of death,<sup>231</sup> or easing formalities by allowing for affidavits of heirship or even oral transfers.<sup>232</sup> Way also suggests more general process initiatives such as an overhaul of state property record-keeping systems to place a responsibility for clearing title with the state<sup>233</sup> or a “legal audit of the state’s title transfer system.”<sup>234</sup>

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<sup>227</sup> Way, *supra* note 196, at 181. Way sets forth five options for consolidation of ownership: (1) reforming statutes of limitation and creating a “long-term co-tenant-in-possession action,” (2) expanding how states define marketable title, (3) allowing homeowner-occupants to force sale of other heirs’ interests, (4) allowing courts to clear title in tax foreclosure and nuisance abatement actions, and (5) providing government assistance for purchasing co-owners’ interests. *Id.* at 179–84. Each of these has strong and weak points.

<sup>228</sup> *Id.* at 184–85.

<sup>229</sup> *Id.* at 185–88.

<sup>230</sup> *Id.* at 177.

<sup>231</sup> *Id.* at 178 (recognizing that this is only fair and feasible if processes are streamlined and support is provided to those navigating them).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 177.

When a property owner dies and no deeds or probate documents are filed in the real property records after four years or so, the government could presume that the household needs some type of assistance in formalizing the transfer of title and then institute more proactive steps to facilitate the transfer.

*Id.* at 179.

<sup>234</sup> *Id.* at 177 (“How accessible is this system to low-income homeowners? Is there a way to better streamline certain procedures? Is there a way to create more standardized legal forms? Is there a way to increase access to legal resources where needed?”).

Way's analysis and my conversations with practitioners in the field illuminate how the intertwined substantive and procedural aspects of intestacy law interfere with the smooth passage of modest value homes from one generation to the next—a transfer of wealth that is of particular importance in keeping families with some but not much net worth from losing it between generations, a category that encompasses a disproportionate number of Black families. To begin, such homes in such estates are treated the same way as any other assets in an estate. Yet the value of a home is not simply its economic value but its consumability. If it is of modest value and if there are a number of heirs so that each heir's "share" is quite small, does it make sense to split ownership? Doing so will almost certainly create a situation in which the transaction costs of probate, including most likely the sale of the home and the distribution of proceeds, make settling the estate an economically unattractive option.<sup>235</sup> Unsettled estates result in clouded title with detrimental effects.<sup>236</sup>

Intestacy law, and most of the law of inheritance, was developed for people with substantial property—people for whom the value of the property clearly exceeded the transaction costs associated with transfer to the next generation. As more and more people fall into the category of having wealth worth preserving, the traditional system (of intestacy and wills—both of which require probate) has become less and less satisfactory. The anti-probate revolution that began in the 1970s has led to substantial U.S. wealth passing by non-probate means.<sup>237</sup> The living trusts that Norman Dacey advocated<sup>238</sup> may be the face of that revolution, but POD and TOD provisions for bank and brokerage accounts, life insurance, and other private designations of beneficiaries have also grown exponentially.<sup>239</sup> The middle class has exerted political pressure, and will substitutes, by which wealth passes with much greater ease than via probate, have been endorsed—especially for those with net financial worth. Those who are stuck with probate (even new, streamlined or small-estate probate<sup>240</sup>) are

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<sup>235</sup> This may be particularly true for more strapped families with multiple demands on their resources—time, money, and energy. See sources cited *supra* note 197.

<sup>236</sup> Way, *supra* note 196, at 156.

<sup>237</sup> See Langbein, *supra* note 64, at 1108.

<sup>238</sup> NORMAN DACEY, HOW TO AVOID PROBATE 13–15 (1965).

<sup>239</sup> See generally Langbein, *supra* note 64; see also JEFFREY A. SCHOENBLUM, 2008 MULTISTATE GUIDE TO ESTATE PLANNING (2007) (describing POD and TOD laws by state).

<sup>240</sup> See DUKEMINIER ET AL., *supra* note 63, at 44.

those whose net worth is in the form of real estate, often consisting of only a modest home, and those who die intestate—people who have less wealth, who disproportionately happen to be Black.<sup>241</sup>

### 3. *The Importance of Clear Title*

Here is the point at which it becomes all too easy to assign blame. Low-wealth homeowners who get caught in this intestacy trap—those who fail to make wills or those who do not initiate probate proceedings (whether or not there is a will)—serve as one likely target. Attorneys, whose estate planning services are not readily available to low-wealth clients and who in most instances avoid undertaking estate administration for heirs' properties, provide another.<sup>242</sup>

A blame game, however, distracts attention from the fact that the intestacy trap, while harming the individuals involved, is also a *social* problem. I have already referred to some of the consequences of clouded title to homes: obstacles to low-rate loans designated for upkeep; neighborhood decline and associated problems, such as crime; and the loss of the local tax base. Moreover, the lack of secure title goes hand in hand with deficient alienability and limits economic value. Homes without clear title exist in a kind of legal purgatory; they are not held *illegally*, but they are not held precisely *legally* either.

Economist Hernando de Soto asserts that the reason capitalism has succeeded in the West is that our system of law has recognized arrangements made “on the ground,”<sup>243</sup> and responded by altering formal property law to accommodate and recognize previously informal arrangements:

The systematization of the laws that underpin modern property rights systems was possible only because authorities allowed preexisting extralegal relationships among groups on the ground sometimes to supersede official laws: “Law both grows upward out of the structures and customs of the whole society . . . and moves

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<sup>241</sup> *Id.* at 47.

<sup>242</sup> See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 198 (2000).

<sup>243</sup> *Id.* at 173.

downward from the policies and values of the rulers of society. Law helps to integrate the two.”<sup>244</sup>

In the United States, in particular, “[w]hen confronted in the past with widespread informal land holdings that lacked clear title, the country has responded by changing the law to legitimize these more informal property arrangements.”<sup>245</sup>

De Soto focuses on societies in which there is a complete disconnect between mandatory law and how things are actually done. He finds that a “common denominator [is that people] cannot pay the costs of legally obtaining property.”<sup>246</sup> The journey to legality, he concludes, must be “easy, safe, and cheap.”<sup>247</sup> To discover what will work, he advises governments not to “hir[e] lawyers in high-rise offices . . . to draft new laws [but to] go out into the streets and listen to the barking dogs.”<sup>248</sup> The goal is to discover the law. What is already happening? How are people handling things now? *What do they need to make things work?*

De Soto’s insight and questions are disturbingly applicable to the world of low-wealth homeowners.<sup>249</sup> As with other groups throughout our history who were not well served by conventional property laws, there is a benefit to the society at large in building a bridge. Way notes that in Louisiana “an estimated 15% of the homeowners who applied for federal housing assistance after Hurricane Katrina—approximately 20,000 homeowners—had clouded title, including many homeowners concentrated in the low-income neighborhoods of New Orleans Parish.”<sup>250</sup> Clouded title has concrete adverse effects on homes, neighborhoods, and communities. But it also, vis-à-vis the overarching topic of this Article, serves to both understate and diminish the value of the underlying assets to their individual owners. Homes with clouded title cannot serve as the

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<sup>244</sup> *Id.* at 174 (quoting HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 557 (1983)); *see also* Strand, *supra* note 4, at 611–15; *supra* text accompanying note 4.

<sup>245</sup> Way, *supra* note 196, at 120 (citing DE SOTO, *supra* note 242, at 107–08).

<sup>246</sup> DE SOTO, *supra* note 242, at 177.

<sup>247</sup> *Id.* at 179.

<sup>248</sup> *Id.*; *see also* Strand, *supra* note 4, at 648 (suggesting the need for a voice for those “not historically included” in the creation of the law-story).

<sup>249</sup> *See* Jane Larson, *Informality, Illegality, and Inequality*, 20 *YALE L. & POL’Y REV.* 137, 158 (2002) (“Informals are . . . disproportionately non-white, immigrant, non-English speakers, and female.”).

<sup>250</sup> Way, *supra* note 196, at 118 (actually Orleans Parish); *see also id.* at 152 (asserting extent of land held this way, especially in areas of “poverty and low education”).



basis for home equity loans to finance college educations. They cannot serve as collateral for new business ventures. They are, in de Soto's words, "dead capital."<sup>251</sup> Clouded title also keeps the owners in a shadow world in terms of the law—for estate planning purposes and more generally. It alienates and erodes respect for the law where it could embrace and build such respect.<sup>252</sup>

In response to this ill, de Soto calls for lawyers to "step out of [our] law libraries into the extralegal sector."<sup>253</sup> The necessary empirical research I referred to above can respond to this call, but it must incorporate inquiries into people's actual experiences under the current legal system, fix problems from past operation of that system, and explore how the system might operate differently in the future. From these inquiries, in which people adversely affected by current intestacy law are given voice, revisions in intestacy law could emerge.

This discussion has sketched the outline of a race-neutral proposal to reexamine intestacy law with an eye to revising it so that it facilitates the intergenerational transfer of wealth for families with modest net worth, especially when that net worth is in the form of a family home. The overarching goals are the preservation of family wealth from generation to generation and, to that end, the facilitation of the clearing of title. These goals should apply both retroactively and prospectively, though past and future may call for distinct approaches.

Specific needs, among others that would surely emerge, are (1) eliminating fractionated ownership for modest estates with a family home as the primary asset, and (2) facilitating intergenerational transfer of clear title while protecting against possible inappropriate pressure on elderly owners. As to the first, while facilitating collaborative ownership may be a top priority for rural heirs' property,<sup>254</sup> aligning ownership and occupancy are likely to be more important with other homesteads. As to the second, current privatized will substitutes provide an inherent protection against pressure on elderly owners in the form of the interest of the third-party bank, insurance company, or other institution in ensuring that the person is exercising appropriate and independent judgment in designating his or

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<sup>251</sup> DE SOTO, *supra* note 242, at 6; *see also* Way, *supra* note 196, at 156 (explaining how tenancy-in-common ownership prevents low-income families from refinancing their homes).

<sup>252</sup> DE SOTO, *supra* note 242, at 196.

<sup>253</sup> *Id.* at 187.

<sup>254</sup> *See, e.g.*, Mitchell, *supra* note 205, at 568–72.

her beneficiaries. There is no comparable safeguard for a POD- or TOD-type arrangement with real estate because of the nature of the property, which may indicate a different approach.<sup>255</sup>

As with the proposal in the prior section, these ideas for reforming intestacy law provide only a framework. Both approaches, however, rest on the conviction that the perpetuation of racial wealth disparities can be slowed and potentially reversed. Changes in our law of succession can accomplish this, and these changes—while significant—need not be radical. Inaction, however, is tantamount to acceptance of the status quo. Overall, race-neutral changes can accomplish the desired goal constitutionally and will also contribute to an awareness of the common interests of low-wealth families—both Black and White.

### CONCLUSION

I started my inquiry with a focus on the distribution of wealth generally and on whether our law of inheritance in fact serves to reproduce the social structure. I found that in the United States we have high levels of wealth inequality and over generations the rich tend to stay rich and the poor tend to stay poor. Inheritance significantly affects the “bottom line” of net worth that is arrived at over time.

I also found notable racial skew to the system. Whites disproportionately have wealth; Blacks disproportionately lack it. Moreover, our law of inheritance perpetuates and perhaps even accentuates this skew.

Inheritance and wealth are part of a continuing “deep inequality” that isolates low-wealth Blacks from mainstream America—in hyper-segregated housing,<sup>256</sup> in restricted access to education,<sup>257</sup> and in

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<sup>255</sup> The tax credit for homes in previously red- or yellow-lined neighborhoods proposed above, *see supra* note 193 and accompanying text, would provide an additional incentive for intestacy heirs to take action to clear title—but only if the mechanisms to do so are not cost-prohibitive.

<sup>256</sup> DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 74–78 (1993) (defining “hypersegregation” as a pattern of segregation across multiple distinct dimensions of geographic variation).

<sup>257</sup> GARY ORFIELD, *THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES AT UCLA, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE* (2009), available at <http://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge>.

compromised social mobility—what might be considered to be meaningful “equal opportunity.”<sup>258</sup> Inheritance and wealth may also affect even higher-wealth Blacks’ secure grasp of middle-class status.<sup>259</sup>

In response to these revelations, I set forth two proposals for reform of inheritance law to break up the cycle that perpetuates White advantage and Black disadvantage. The first proposal calls for taxing inheritances—windfall wealth—as income to those who receive them. The second focuses on revising intestacy law to preserve modest wealth between generations. The latter proposal continues a societal trend of making inheritance law more workable for those with less overall wealth.

Both of these proposals are race neutral; they would benefit many low-wealth families regardless of race, though they would be of particular importance to Black families because Black families are overrepresented in that group—in large part because of historical events and, in fact, inheritance. The race neutrality of these proposals would highlight the common economic interests of low-wealth households and take us a step further from the deep-seated race-as-class system that has prevailed for so long. Moreover, the mitigation of high levels of wealth inequality generally could benefit us all—regardless of our place in the wealth distribution—given evidence of the greater well-being of more equal societies.

I see the analysis and proposals here as consistent with much current thinking on racial reparations. Charles Ogletree, for example, has observed:

The reparations movement should not, I believe, focus on payments to individuals. The damage has been done to a group—African-American slaves and their descendants—but it has not been done equally within the group. The reparations movement must aim at undoing the damage where that damage has been most severe and where the history of race in America has left its most telling evidence. The legacy of slavery and racial discrimination in America is seen in well-documented racial disparities in access to education, health care, housing, insurance, employment and other social goods. The reparations movement must therefore focus on the poorest of the poor—it must finance social recovery for the bottom-stuck, providing an opportunity to address comprehensively

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<sup>258</sup> See *supra* notes 98–106 and accompanying text.

<sup>259</sup> See *supra* note 106.

the problems of those who have not substantially benefited from integration or affirmative action.<sup>260</sup>

Ogletree's insight goes to the fact that the continuing injury of slavery and the system of race it spawned lie today in the current configuration of our social and economic *systems*.<sup>261</sup> In this view, reparations should be designed to recalibrate the system in ways that diminish or, ideally, eliminate the relevance of race as a determinant of social status. The challenge is to formulate actions that at the same time work to reverse the concrete effects of the past race-based system *and* to dismantle the social construct of race-as-class. In this regard, race neutrality, though often perceived as a confining constitutional straitjacket, may actually offer a promising strategy for expediting movement forward.

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<sup>260</sup> Charles J. Ogletree, Jr., Op-Ed, *Litigating the Legacy of Slavery*, N.Y. TIMES, Mar. 31, 2002, <http://www.nytimes.com/2002/03/31/opinion/litigating-the-legacy-of-slavery.html>.

<sup>261</sup> See TATUM, *supra* note 12, at 7 (defining racism as a system).