Memorandum

To: Washington University colleagues

From: Anita Bernstein

Date: September 7, 2006

Subject: “Micro-Principles for Reparations”

I hope that my giving you a rough draft will be all right. Input at an earlier stage of my writing tends to help me more than reactions to a high-gloss finished paper. As you see, the draft is particularly rough in its Part IV (pp. 26-31), and I have not yet written an introduction or conclusion. (If your time is short and you want to read just a little, I suggest the first two pages.)

The paper is scheduled to become a chapter in a book called Engendering Reparations, published under the auspices of the International Center for Transitional Justice, and I await commentary not only from you but its editor, Ruth Rubio Marín. You can find description and context on the Center’s website, http://www.ictj.org/en/news/press/release/913.html. I joined the ICTJ cohort last May when Ruth, whom I did not know, sent me an e-mail message saying that the book would benefit from my feminist torts-and-damages perspective. The ICTJ hopes to influence a host of reparations programs now being planned around the world.

Although I write occasionally in international and comparative law, the “white paper” had been terra incognita for me until this invitation. Disclosing my inexperience to Ruth and nominating better-credentialed writers in the feminist torts-and-damages category did not keep me from the ICTJ team. It’s been an honor to join work that might affect people’s lives.

I look forward to seeing you next week.
Part I: The Necessity of Maintaining Focus on Women in All National Reparations Programs that Seek to Redress Wrongfully Inflicted Injury

Like other contributions to *Engendering Reparations*, this chapter claims that reparations programs designed to address wide-scale national misfortune should not purport only to endow an undifferentiated citizenry: They must consider gender. Without attention to gender distributive justice will fail, or, to put the point less abstractly, women citizens will not receive a right measure of reparation. This Part of the chapter considers the question of measuring the rightness of reparation measures. Indebted to Pablo de Greiff’s panoramic “Justice and Reparations,”¹ it works with the part of de Greiff’s analysis that looks at the rendering of payments and other material transfers to *individuals*, leaving aside for this purpose two significant constituents of transitional justice: non-material reparations, such as apologies, and reparations that pursue a collective goal, such as economic development.

The heading that declares a “necessity of maintaining focus on women in all national reparations programs that seek to redress wrongfully inflicted injury” raises the question, Necessity in what sense? The outline of this necessity comes from a helpful, if perhaps crude, dichotomy of “fairness versus welfare.”² Fairness and welfare, not “versus” each other but as two complementary pursuits, can inform reparations policy.

Readers should envisage, for this purpose, a government of a strife-torn nation that has committed itself to disbursing monetary reparations to many of its citizens as part of its transition to democracy and a stable civil society. This national government has rejected contentions that the endeavor of reparation is futile, or that money cannot effect meaningful reparation, or that payments to

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individuals waste money in light of a superior alternative, collective payments. It has proceeded to plan its disbursements to individual citizen-recipients.

The reparations plan of this national government must pay heed to women because of three imperatives. Fairness, which can be understood also as corrective justice, suggests that inattention to women will result in women’s receiving an unjustly small share of this measure. Welfare, the second imperative and another term with near-synonyms (“efficiency,” “wealth maximization”), refers to effects and consequences that societies experience. In this perspective individuals are constituents of larger wholes. Welfare too demands attention to women as recipients, not for their own individual gain qua women but for gains to the collective. The third imperative that supports particular attention to women, international law, unites fairness and welfare concerns in a positive-law mandate.

A. Fairness

Though at one level a quintessential exercise in public law and policy, a reparations scheme also necessarily regards recipients as individual persons. It sees, or should see, distributees “as irreplaceable and unsubstitutable human beings.” Unsubstitutable individuals as claimants evoke corrective justice, expounded in the Book V of the Nicomachean Ethics. In this “earliest elucidation of private law” Aristotle posits a division between voluntary transactions, which correspond in juridical terms to contracts, and involuntary, or tortlike, transactions. Both voluntary and involuntary transactions can give rise to private-law claims based on assertions of wrongdoing. Rectification of the two types of wrong is arithmetical: To repair a subtraction, one adds, and to repair an addition, one subtracts. For a wrongful injury priced at $X, corrective justice requires the rendering of $X to the victim.

The symmetry of corrective justice may appear too tidy for the painful work of national-scale reparations schemes, but its promise for this volume extends beyond the easy private-law instances like undoing the seizure of a chattel that was not impaired in the seizure (by compelling a thief to returning an intact

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3 See infra *** (discussing these debates over reparations fundamentals).
4 Caveat about synonyms.
5 De Greiff at 460.
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stolen good). Tort theorists agree that corrective justice is, or can be, present in remedies other than disgorgement: that is, where the wrongdoer did not gain in a direct and material sense by the infliction of harm. Tony Honoré and other theorists in the corrective-justice tradition speak of “outcome-responsibility.” If an individual possesses agency, then it becomes accurate to say that choices direct his voluntary actions, and the consequences of these actions register on his own “moral ledger.” From there, the relation between wrongdoer and victim emerges as correlative, as Ernest Weinrib instructs: “Corrective justice construes the doing and the suffering of harm as the active and the passive aspects that together comprise a single unit of juridical significance.”

The rendering of pecuniary reparations from governments, rather than individuals, to citizens complicates this corrective-justice imperative only slightly. One commentator, for example, has claimed that corrective-justice liability cannot be applied to a government as wrongdoer because government, not being “a morally autonomous person with rights,” cannot participate in the reciprocity that Aristotle posits. This reading does not follow from the text of the *Nicomachean Ethics*, however, and an extensive literature has related corrective justice to the imposing of responsibility on governments to effect remedies.

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9 Weinrib, supra note *, at 417.
10 Richard B. Stewart, Liability for Natural Resource Injury: Beyond Tort, in Analyzing Superfund: Economics, Science and Law 219, 230-31 (Richard L. Revesz & Richard B. Stewart eds., 1995). In the reparations context, see also W. Michael Riesman, Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas, in State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights 68 (Albert Randelzhofer & Christian Tomuschat eds., 1999) (noting that when the state is identified as responsible, “it is often innocent people who, in effect, pay the compensation for the human rights violations that have been effected by others”).
in the curricula of public schools).

12 See generally Ruth Rubio-Marín, this volume MS pp 19-21. As Rubio-Marín explains, assertions of these claims against the state for its acts and omissions contribute not only to redress but to building the state’s new commitments; they are constitutive. Id. at 9. I return to this point below (in the Welfare section).


14 Rubio-Marín at 2-3.
addressed in reparations programs absent reference to a study like the one in this volume.

1. Obstructions to Fairness in Politics and Law

One fundamental source of undercounting is the underrepresentation of women in governing institutions throughout the world. Identified as a source of political illegitimacy by John Stuart Mill in the mid-nineteenth century, this condition persists. Because reparations schemes in transitional democracies necessarily involve legislatures and bureaus like ministries, any shortfall in the proportion of women inside these institutions translates approximately into a shortfall of power for women in the design and implementation of these programs.

The shortfall has been documented in the developing world: Men hold more than 90% of all seats of parliaments in all developing regions except east Asia, and “in no developing region do women hold more than 8 percent of ministerial positions.” Any governing institution where women are scarce “may fail to recognize or comprehend issues of great importance to women in society; this in turn brings up broader questions of accountability, responsiveness, and alienation.” Several countries have installed quotas for women in governing institutions, after concluding that formal equality—a universal franchise and technical eligibility of women to stand for office—is not enough to ensure equal representation in fact. These quotas are controversial: even assuming that they are legitimate and function effectively, they have not been widely implemented.

Women suffer disadvantage beyond their absence in governing institutions: reparations payments allotted equally to women in theory often become unequally allotted in practice because of local laws or norms that disadvantage them in property ownership, inheritance, and control of family

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16 The Inter-Parliamentary Union tabulates the proportion of women serving in the world’s legislatures. For data as of June 2006, see http://www.ipu.org/wmn-e/classif.htm. These fractions are less than half in every country, ranging from 49% in Rwanda to zero percent in Bahrain.
18 Reynolds, supra note *, at 549.
wealth.\footnote{The feminist essayist Katha Pollitt provides a crisp summary: “Worldwide, women do most of the farming but own only 2 percent of the land. In many areas where tribal rules govern inheritance, they cannot own or inherit land and are thrown off it should their husband die.” Katha Pollitt, Virginity or Death 84 (2006).} This point will receive more attention below under the “welfare” rubric. For “fairness” purposes, we may note the existence of unfair national laws that result in maldistribution of assets.\footnote{To note them is not necessarily to lapse into despair. Concern with fairness in reparations does not overcome or repeal these background conditions, and so from the start planners must anticipate some degree of unfairness in the ultimate distribution of reparations. Fairness is a relative and aspirational good rather than an absolute: reparations programs should strive to be as fair as they can under conditions of unfairness.}

2. Unseen and Undercompensated Injuries

This volume documents Ruth Rubio-Marín’s “double marginalization” with reference to injuries that women experience at deeper levels, and to a more devastating degree, than what law-based categories identify. Writing about the Inter-American Court of Human Rights, for example, Cecilia Medina mentions disappeared persons. International human rights law recognizes that this harm happens to both men and women, and contains no overt diminution of women’s interests; but as Medina reports, almost all the cases that have reached this court made reference to the disappearances of men, as reported to the state by female relatives.\footnote{Medina mentions the psychological stress that confronts women as they decide whether to protest; the likelihood that they are treated with more contempt and dismissal than male complainants would receive; and the risks of retaliation that they and their dependants may face.} Two possibilities of gender-unfairness thus emerge: first, disappeared men may be more valued by their relatives than disappeared women because of biases that privilege men, and, second, women seem to be absorbing an enlarged share of the burdens that accompany reporting disappearances.\footnote{Margaret Walker warns that background conditions of oppression and even violence, such as genital cutting or marital rape and beatings at the hands of a husband, constitute an order, however bad and troubling: they do not prepare a woman for explosions of new violence that upend the stability of the older kind. Thus it becomes a mistake, even if consistent with tort measurement, to calculate}
women’s injuries by trying to identify the difference between their baseline and incremental harm.\textsuperscript{24}

To these well-established points, one might add the remark that injury to women’s reproductive anatomy—the lost capacity to bear children, forced childbearing, compelled abortion or the violent termination of pregnancy, trauma to women’s genitals—is poorly remedied all over the world, even in national legal systems that pay relatively large sums as tort damages.\textsuperscript{25} For example, the toxic drug DES, taken by pregnant women for decades, caused reproductive-organ anomalies in fetuses that often went on to cause infertility when the fetus grew to become adult women: among other ills: during the litigation that followed, American lawyers and judges had great difficulty grasping the cost of this harm, and one energetic lawyer built her career in the 1970s by insisting on more than nominal recompense for her clients.\textsuperscript{26} The barriers to understanding and remedying this type of traumatic injury remain formidable around the world.

The law of civil redress generally does a poor job of relating its conceptions of injury to what women victims experience. In this volume Cecilia Medina comments on disappearance as a harm to female relatives who seek redress for harm—a harm that civil justice sees as having happened to “primary” or “direct” victims. Women so injured are demoted to the level of bystanders.\textsuperscript{27} Ruth Rubio-Marín notes the acceptance of claims for unlawful detention and confinement—harmsthat tend to happen to men—along with the unacceptance of forced homelessness as a civil wrong: Displacement from land without cause is unlawful, but in order to have a remedy one must be a possessor, and many women do not enjoy possession of their homes.

\textsuperscript{24} On the common law torts rule, see Restatement (Third) of Torts: Apportionment of Liability § 26 (2000).
\textsuperscript{26} AB Interviews with Sybil Shainwald, ca. 2002.
\textsuperscript{27} “Because of the normalcy of certain forms of violence in women’s ordinary lives, even in times of official peace, and because of self-sacrifice as an essential component of femaleness and motherhood in patriarchal cultures, women in post-conflict and post-authoritarian regimes have been known to be more active in relation to violations committed against their immediate family members (husbands, brothers, children) than those committed against themselves.” Rubio-Marín.
Reparations programs cannot escape ranking human rights violations in hierarchies. It would be absurd, to say nothing of contrary to international law, not to distinguish between serious and trivial violations. At the same time, the ways in which these hierarchies discount and shortchange the lives of women deserve attention. For example, writes Rubio-Marín, one hallmark of a serious human rights violation is “the irrereplaceable nature” of what the victim loses.\textsuperscript{28} The extinguishing of human life is wrong because it cannot be reversed. Yet if the permanent loss of a fundamentally necessary good is what matters, then forced sterilization ought to be high in the hierarchy.\textsuperscript{29} The mismeasurement of human injury violates the Aristotelian requirement that like cases be treated alike or, per one restatement of the tenet, that “if people are treated differently, there has to be a (legitimate) reason for the difference in treatment.”\textsuperscript{30}

B. Welfare

Whereas fairness/corrective justice looks backward, to redress past injury, welfare analysis of policy looks forward, striving to increase wealth in the aggregate. In the context of personal injury, this approach looks for incentives. It sees legal systems as forcing injury-inflic tors to pay for the costs of their injuries they commit because they want actors to internalize the costs of their harm-causing activities.\textsuperscript{31} Welfare analysis recognizes that human activity produces wealth as well as loss, and seeks to foster optimal--rather than unbounded--investment s in safety; and so it requires those who inflict injury to pay for not having taken only cost-justified measures, rather than every possible measure, to avoid injury.\textsuperscript{32}

Welfare analysis of injury law may appear to deviate slightly from the mandate of this chapter because, first, it is usually used to study accidental harm, not the intentional or reckless injuries that reparations programs address; and second, in principle welfare analysis does not pursue the compensation of victims.

\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{31} Steven Shavell, Economic Analysis of Accident Law (1987).
\textsuperscript{32} If a precaution would have cost more money than it would have saved, the inflictor should not have to pay for the resultant loss. This possibility lies outside the scope of this volume.
but rather the imposition of monetary sanctions. As long as the injurer pays—and as long as potential injurers as a group have to take into account their obligations to pay should they injure someone—it matters not to welfare analysis whether any injured person collects anything. These deviations do not limit the value of the exercise, however. Nothing in welfare analysis precludes applying it to intentionally or recklessly inflicted harms, and efficiency-minded scholars have recognized that because fines and other public sanctions are typically under-used and too cheap, empowering the victim as recipient can help to ensure that wrongdoers pay at the optimal level.

Numerous variations can complicate their assessment of a reparations program, but in general the awarding of monetary reparations to individual victims will make sense to welfare analysts. Even though reparations planners may feel confident that the nation has turned a corner and thus traumas to citizens will not recur, a project of reparation does not supersede the quest of deterrence through incentives. Even though many individual wrongdoers would now be out of power (or, better yet, dead), awarding money to victims from the government deemed responsible teaches prospective wrongdoers about this particular punch contained in the new rule of law.

Welfare analysis can go beyond the incentives facing prospective wrongdoers, however, and pay heed the distributive effects of a reparations policy. In this view, valuing the interests and experiences of women citizen-recipients becomes a good idea if it would make societies better off, a bad one if it would make societies worse off. Because this extra attention to women would

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33 Indeed one prominent practitioner, Richard Posner, used to apply it to rape. Richard A. Posner, Sex and Reason [citation].

34 Writings on this point from the law and economics camp include Jennifer H. Arlen, Compensation Systems and Efficient Deterrence, 52 Md. L. Rev. 1093, 1114 (1993) (emphasizing that civil actions may be likely more likely than criminal actions to be prosecuted); Ronen Perry & Yehuda Adar, Wrongful Abortion: A Wrong in Search of a Remedy, 5 Yale J. Health Pol’y & Ethics 507, 585 (2005) (arguing that “wrongful abortion” warrants more deterrence than either tort or criminal liability can deliver, and proposing that courts make available “an extra-compensatory civil fine” to be divided between plaintiffs and the state). See generally Richard Craswell, Instrumental Theories of Compensation: A Survey, 40 San Diego L. Rev. 1135 (2003) (arguing that whether requiring the payment of compensation accords with the goal of efficiency is a complex question whose answer depends on variables). Another prominent economic analyst argues that mandating compensation to victims is more necessary in the case of intentional torts as compared with “ordinary” or accidental torts, so as to eliminate inefficient expenditures in self-protection that victims make. William M. Landes, Optimal Sanctions for Antitrust Violations, 50 U. Chi. L. Rev. 652, 673 (1983).
have the effect of putting more money in women’s hands, \(^{35}\) the question becomes whether societies are better off or worse off when, other things being equal, women have the power to spend more money. \(^{36}\) Evidence suggests strongly that societies become better off.

The gain to welfare is not the transfer of money from men to women—if men and women are equal, a premise of this volume, \(^{37}\) then neither gender has a superior claim to wealth vis-à-vis the other—but instead enhancements to the quality of life of children. Welfare analysis aggregates people into groups, and so it becomes acceptable to generalize about what “men” and “women” do, individual exceptions notwithstanding. Around the world men devote more money to pleasures for themselves—cigarettes, alcoholic beverages, leisure activities like sports, sexual conquests—than do women. Both male and female adults are likely to have children, but they provide for their children unequally: money in the hands of a woman is more likely to buy “goods that benefit children and enhance their capacities.”\(^{38}\)

Ann Crittenden has surveyed the globe. In Kenya, she writes, the more income controlled by women in sugarcane farmer households, the greater the household caloric intake. In Jamaica, female-headed households spend more on food and less on alcohol. Data from the Ivory Coast suggest that doubling the proportion of income controlled by women would cause a 26 percent reduction in amounts spent on alcohol and a 14 percent reduction in money spent on cigarettes. “In Brazil, $1 in the hands of a Brazilian woman has the same effect

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\(^{35}\) I will review other papers to see whether they say anything pertinent. Maybe Nick T.

\(^{36}\) Other welfare effects relating to reparations for women, though beyond the scope of this paper, warrant brief note here. Researchers have estimated that violence against women cost the national economy of Nicaragua 1.6 percent of its GDP ($29.5 million) in 1999, and 2 percent of the GDP of Chile ($1.56 billion) in 1996. Andrew R. Morrison & María Beatriz Orlando, Social and Economic Costs of Domestic Violence: Chile and Nicaragua, in Too Close to Home: Domestic Violence in Latin America 51 (Andrew R. Morrison & María Loreto Biehl 1999). To the extent that reparations payments promote stability through civic engagement, see Rubio-Marin chapter, and thereby diminish violence against women, national economies can look forward to becoming more prosperous. Another example is the correlation between GNP and the enrollment of girls at school. Taking Action: Achieving Gender Equality and Empowering Women, UN Millennium Project Task Force Report on Education and Gender Equality 47 (2005).

\(^{37}\) Cite Rubio-Marin

\(^{38}\) Ann Crittenden, The Price of Motherhood 120 (2001). Crittenden adds that “[s]tudies conducted on five continents have found that children are distinctly better off” when their mothers have more money to spend.
on child survival as $18 in the hands of a man.”

In richer countries, where calorie counts are a less reliable proxy for well-being, one finds other indicators: for example, affluent divorced fathers in the United States are less likely than their (somewhat less) affluent ex-wives to cooperate with paying for their children’s college education. Around the world female legislators introduce and promote more child-friendly government expenditures, suggesting a secondary welfare effect: the more women can avail themselves of education and other sources of access to civic life, the better off children will be.

Some criticisms of the Crittenden thesis may be noted briefly. Crittenden writes that men in governments, especially American governments, dislike making transfer payments to mothers because they believe—correctly, it turns out—that money helps women abandon their unsatisfactory relationships with men. It may thus be prudent to anticipate on our welfare ledger an increase in divorce and the severance of informal unions (although it appears equally likely that the receipt of reparations payments would enhance peace and stability in a household). Children are probably still better off. Another possible criticism: perhaps mothers and female legislators overspend on children while fathers and male legislators make an optimal investment in them. Searches through the literature have found no writing that has made this claim. Finally, nations could use excise taxes to pursue the same welfare gains that redistribution in favor of women would achieve: “sin” taxation of liquor, cigarettes, motorcycles, brothels

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39 Id. at 120-22.
40 Id. at 122.
41 Matthew M. Davis & Amy P. Upston, State Legislator Gender and Other Characteristics Associated With Sponsorship of Child Health Bills, 4 Ambulatory Pediatrics 295 (2004) (reporting study of American state legislatures); Crittenden at 126 (noting the same pattern in Scandinavia). The voting rights activist Carrie Chapman Catt, working for suffrage in the U.S., looked at several other countries where women had the vote—including Australia, New Zealand, Norway, and Finland—to conclude that “wherever women, the traditional housekeepers of the world, have been given a voice in the government, public housekeeping has been materially improved by an increased attention to questions of pure food, pure water supply, sanitation, housing, public health and morals, child welfare and education...” Carrie Chapman Catt, Do You Know? (1915), available at http://douglassarchives.org/catt_a07.htm.
42 Crittenden, p. 126 (arguing that poor children are best off when no man has familial input on how money is spent).
43 This is not to say that every possible proposal to spend public money on children does and should escape critical scrutiny. Certainly government budgets are controversial in every nation, and social welfare has to compete with contrary directions that a public fisc could take. In that sense, it is possible to read endorsements of lower taxes or military spending as critiques of the priorities that women favor.
and so on could, in theory, generate enough revenue for governments to enhance child welfare through public programs. Such an agenda would burden a transitional democracy trying to repair its recent failure to uphold the human rights of its citizens, however.\textsuperscript{44} Better, probably, to pursue welfare by putting money into the hands of mothers.

The welfare criterion suggests prospective gains beyond rectification of wrongs. To the extent that reparation payments function as economic development interventions as distinguished from the transfer of money into the hands of women—a function noted only in passing in this volume\textsuperscript{45}—they offer promise. Exerts on economic intervention have for more than a decade recognized that development-related expenditures that benefit women yield payoffs to societies:\textsuperscript{46} “This claim has now achieved ‘motherhood’ status, in virtue of the accumulating evidence confirming what has long been available at an intuitive level, which is that “investing in women,” especially in the areas of health and education, is likely to generate payoffs or “positive externalities” for the well-being of children, the household, and the economy as a whole.”\textsuperscript{47}

C. The Reparations Context: International Law

International law unites the “fairness” and “welfare” themes. Under its mandate, national governments hold two pertinent obligations: to provide reparation following serious human rights violations,\textsuperscript{48} and to take measures against sex discrimination. So seen, the entitlement of women to be treated fairly in reparations programs becomes a human right, or “fairness.” Institutions like the World Bank have stated that enforcing this human right enhances economic development, or “welfare.”\textsuperscript{49} The imprimatur of international law adds a positive-law imperative: Not only should each national reparations program pay heed to women, it must.

\textsuperscript{44}Rubio-Marín p. 19 (noting breach of the state’s duty to protect).
\textsuperscript{45}De Greiff, supra note *, warns of conflating reparations and development aid.
\textsuperscript{48}This statement, not controversial at a general level, postpones the particular question of whether reparations programs must include payments to individuals. See infra Part III.
\textsuperscript{49}World Bank, Engendering Development, passim. See also Rittich, at 580 (noting similar stances in the Beijing Platform).
Entitlements to reparations that individuals hold under international law are summarized in an Australian government paper that explores “the van Boven principles,” submitted to the United Nations in 1996. After Theo van Boven submitted his report, the United Nations went on to adopt another document called “UN Basic Principles and Guidelines for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” prepared by law professor M. Cherif Bassiouni, that built on the van Boven principles. These documents identify an obligation that all parties to human rights treaties hold: “to repair the damage caused, awarding the victims means of rehabilitation, and where applicable, compensation or economic indemnification.” A 2004 report by another law professor, Diane Orentlicher, studied “impunity” for the U.N. Secretary General. It provides “Best Practices to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity,” a document offered to influence the content of reparations programs.

The obligations that van Boven, Bassiouni, and Orentlicher have identified reflect existing international law standards, rather than create extensions. Numerous human rights documents—which include the Universal Declaration of Human Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment; the Convention on the Rights of the Child; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the American Convention on Human Rights; and the African Charter on Human and Peoples’ Rights—declare a right to redress for violations. The Inter-American Court of Human Rights, relying on the American Convention on Human Rights and other

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51 Id.
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sources, has issued several judgments that ordered the payment of monetary compensation to victims, as have other tribunals.

In one of its major treaties, the Convention to Eliminate All Forms of Discrimination Against Women (the “Women’s Convention”), international law proscribes discrimination against women, defining this term as “any distinction, restriction or exclusion made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women ... of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” In 1995 the United Nations added to international law gained the Beijing Declaration and Platform for Action, a conference document summarizing plans to end or ameliorate instances of sex discrimination around the world. Although it may not bind national governments, the Beijing Platform has won expressions of support, even from the notoriously treaty-shy United States. Other agreements supplement the Women’s Convention by bringing into international law more geographical or topical versions of this concern. By recognizing effects as well as purposes—the intent to disadvantage women is not necessary to establish a violation—and through its broad understanding of how women might suffer harm, the Women’s Convention emphasizes that reparations programs must be scrutinized for how they treat women. Other human rights treaties that declare political and civil

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53 Id. (summarizing Aloeboetoe v. Suriname). See also El Amparo Case, 1996 (against Venezuela) and Urbina case, 2004 (against Honduras).


55 CEDAW art. 1.


57 Id. at 239 (reporting that after the United Nations Fourth Annual Conference on Women adopted the Platform, the Clinton administration immediately announced that the United States was committed to numerous measures of implementation).

58 E.g. the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women [cite]
rights require governments to exercise a similar vigilance against unfairness to women in national policies on the basis of sex.\textsuperscript{59}

Part II: \textbf{The Necessity of Rendering Compensation to Women by Wealth Transfer}

Referring again to the \textit{Nicomachean Ethics}, this Part moves from corrective justice, discussed in the last Part under “fairness,” toward distributive justice, which received only passing mention there. Pecuniary reparations transfer material goods under conditions of scarcity. Those who devise reparations schemes must be able to state why their redistribution is just—that is to say why the pattern of ownership, or who holds what, comes out better after the transfer than before.

A. The Inadequacy of Nonpecuniary Measures

Several writers have singled out monetary compensation as problematic among the possible means of reparation.\textsuperscript{60} Money is indeed never enough to repair serious violations of human rights. Here one may explore Pablo de Greiff’s insight that neither truth-telling nor financial recompense alone can constitute full reparation\textsuperscript{61} by focusing on the necessity-of-money side of this balance, relatively neglected in current discussion. Truth commissions, apologies, forward-looking rhetoric, newly elected democratic governments committed to change, and other nonpecuniary measures are crucial to the rebuilding of societies in transition: but ideally, or so I shall argue, money should also go into victims’

\textsuperscript{59} International Covenant on Civil and Political Rights (actually ratified by the US!) art. 2(1) (each state party “undertakes to respect and to ensure to all individuals” the human rights covered in the Covenant, including the right to be free from discrimination on the basis of sex)

\textsuperscript{60} Women are prominent among the money-skeptics. Roman David & Susanne Choi Yuk-Ping, Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic, 27 Human Rights Q. 392, 403 (2005) (noting that some mothers of disappeared sons in Argentina refused financial compensation on the ground that it would reduce their quest for “truth and justice”); Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence 103 (1998) (arguing that “reparations fall short of repairing victims or social relationships after violence” and questioning “whether the most obvious need of victims is for compensation”); id. at 110 (“Social and religious meanings rather than economic values lie at the heart of reparations”).

\textsuperscript{61} De Greiff argues that without truth-telling, reparations payments can look to victims like “blood money,” and without payments, truth-telling can look like “cheap talk.” De Greiff at 461.
pockets. 62 “Collective payments and programs,” 63 though undoubtedly salubrious, do not discharge this obligation. 64 Among persons who have experienced human rights violations, women have an exceptionally strong claim to monetary recompense.

The added weight that gender brings to the case for money to individuals may be necessary in light of a somber suggestion that in “poor or developing nations it may be wrong to subject the entire populace to the effects of such a budgetary strain.” 65 Reluctance to burden the citizens of poor countries with reparation duties was once included in written international law: The International Law Commission Draft Articles on Responsibility of States for Intentionally Wrongful Acts (“Draft Articles”) used to contain a clause stating that “in no case shall reparation result in depriving the population of a State of its own means of subsistence.” 66 Another writer adds that any individual citizen of “a wrongdoing state is frequently as innocent as the citizen of a foreign country, and has little chance to influence decisions made at the national level.” 67 Especially in countries where life expectancies are short and the rise of a reparations-paying bureaucracy long, citizens may end up paying through taxation for the redress of wrongs perpetrated before they were born. 68

Compelling an “innocent” citizenry to pay for the historical wrongs of its nation’s history becomes fairer when one considers the claim that women have to receive money from governments. Again fairness, welfare, and international

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62 I elaborate below on what falls within the general category of money.


64 Seibel and Armstrong express some sympathy for the typical preference of governments for collective rather than individual payments. They note that collective programs allow governments “to spend less per individual, while still providing reparations to the majority of victims” and “to label existing infrastructure and development funds as reparations funds, thereby enacting a reparations program with little additional expense.” Id.


66 Quoted in Tomuschat p. 180. This phrase was later removed.

67 Id.

68 See id. (“generations of human beings come and go.”). Those who object to proposals for monetary reparations in response to slavery in the United States, where millions of citizens descend only from ancestors who immigrated into the country after the emancipation of enslaved persons in 1863, often make a similar protest. See generally Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 4 (1992) (reporting a widespread belief among Caucasian-Americans that they are not responsible for whatever effects of nineteenth-century slavery remain in the United States, and so should not have to pay for them).
law bear on this reparations problem. To return to the first two: If women have been unfairly deprived of money because of state action, then they have a moral claim to receive payment from their government; furthermore, redistributing money to them not only remedies this unfairness but enhances national welfare. The erstwhile tenet that “in no case shall reparation result in depriving the population of a State of its own means of subsistence,” assuming it has survived after its erasure from the Draft Articles, should therefore inhibit only those redistributions of money to women that are plainly unavailing from the start, because a straightforward transfer of wealth to women would in almost all cases enhance, rather than jeopardize, a nation’s means of subsistence.

The fairness claim rests on the probability that women have not enjoyed the control over money that they should have enjoyed. Laws and norms have taken money out of their hands, as if women were moral children and money something too dangerous for them to hold. A generation ago, the United Nations made an famed announcement on point: Women do two-thirds of the world’s work (as measured in hours), earn one-tenth of the world’s income, and own less than one hundredth of the world’s property.\(^69\) Although the U.N. has not updated this notorious statistic about the world, its more recent local studies find that big disparities remain. For example, its Millennium Task Force reported in 2005 that women produce 80 percent of the food in Africa and the Caribbean,\(^70\) and that women in Zambia devote an extraordinary 800 hours a year to gathering food and firewood.\(^71\)

Ownership of land--a time-honored means for individuals to accrete economic strength--is less available to women than men, particularly in the developing sector. The World Bank reports that many national laws still place women under the guardianship of husbands and recognize “no independent right to manage property.”\(^72\) Several African countries deny married women the right to own land,\(^73\) and take land ownership from women who become widowed or divorced.\(^74\) Studies of cultivated-land ownership in Asia and Latin America as well

\(^{70}\) Taking Action, supra at p. 77.
\(^{71}\) Id. at 7.
\(^{72}\) World Bank at 37.
\(^{73}\) Id.
\(^{74}\) Id. at 51. See also Pollitt, supra note *,

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as Africa show that women hold smaller parcels, inferior land, and less farming equipment than what men possess.\textsuperscript{75}

These conditions--more toil, less income, and much less property for women--persist, and appear more benevolent than they are, with the help of ideology. Patriarchy posits a male provider who heads his household and meets the needs of the women and children inside. It further claims that the women inside are better off than they would be under conditions of gender parity.\textsuperscript{76} The male-headed household protects women from their various infirmities regarding money and property: Women, it has been said around the world, are too naive to manage money, too swayed by emotion to retain it, too busy with child-making and -minding to have time for it, too small-minded to leverage it, or too pure to want any. Unequal educational opportunity for girls and young women, a dire pattern in much of the world, is both symptom and cause of these beliefs.

Though hard to measure, not equally present in all societies, and probably on the wane, concepts like these need attention within all reparations programs because, at least in their quasi-benevolent form, they deviate sharply from the stark contrasts that pervade reparations. Dichotomies like violence versus peace; the old bellicose nation-state now superseded by its contrite successor; chaos versus order; violating human rights then and honoring human rights now; tyranny versus democracy, and the like are more dramatic than patriarchal

\textsuperscript{75} Id. at 51-52. See also id. at 120-21 (reporting that much land reform of the 1990s in Latin American and Africa has failed to alleviate these conditions).

\textsuperscript{76} One expression of this ideology argues that it benefits women:

\begin{quote}
“The women of every society save our own have understood that the male's nature is such that he must be given a special position in the family if he is to peacefully take his place in it..... Women have realized that men will not even attempt to suppress [their socially disruptive] tendencies if they are offered no distinctive and respected position in the family, a position that can act as counterpoise to both the limits marriage sets on male behavior and the centrality that the woman's unique physiological and psychological bond to the infant automatically gives her.

“In response to the refusal to grant them their traditional role men will tend to either a) disrupt the family as they attain through aggression that which they were once granted, or b) channel their energies into sexual conquest outside the family. Women will find that they are raising their children either on a battlefield or alone, wondering why loudmouthed Rambo's have replaced strong, silent defenders of justice and protectors of women.”
\end{quote}

traditions versus attempts to defy these traditions, both of which have been credited for making individuals content, and societies peaceful. As contributors to this volume emphasize, the task of crafting reparations that give women citizens what they should have may call for reexamination of proclivities and beliefs. Inherent in reparations is a search for absolutes and extremes: inequality regarding access to money nevertheless also belongs in reparations-analysis, even when the conditions that caused it are subtler.

B. What Does It Mean to Compensate Through the Transfer of Wealth?

Reparations planners who have decided to pay monetary compensation to victims should consider the purposes of transfer payments made (at least in part) as compensation for injury. Following the lead of Ruth Rubio-Marín and Margaret Walker in this volume, who urge attention to the content of human rights violations, I argue here for commensurate concern with what financial reparation seeks to accomplish. Like Rubio-Marín and Walker, I believe that such scrutiny, though not overtly about gender, will shed light on “the woman question” of this volume.

1. Enhancing Security

Wrongfully inflicted injury is a breach of security whose consequences extend into a victim’s future. In this reparations context, one might think of violence followed by post-traumatic stress disorder and related anxieties; but it would be a mistake to delimit injury so parsimoniously. Every wrong amenable to legal redress, not just trauma, protrudes forward in time. Some of the protrusion into the future may be juridical rather than inherent in the wrong itself—that is, kept alive by the preparation of testimony, the stoking of narration in public venues (such as truth commissions), or the tendency of adjudication to look backward—but victims feel its effects all the same. Inflictors of violence know, or should know, that what they commit will undermine a victim’s security even after they stop acting.

77 Compare Steven Goldberg n. 73 with Carrie Chapman Catt n. 38. Maybe add a feminist writer who like Catt associates anti-patriarchal measures with women’s happiness and gains to societies, and a ‘neutral’ who supports feminism but deems it disruptive.

78 Walker, Medina, Rubio-Marín

79 Rubio-Marín at 15-16 (advocating attention to reasons and rationales behind human rights as a way to pursue gender equity); Walker at 16 (noting that what appears to be one trauma can expand into a multiplicity of injuries).
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Other types of injury that reparations might address also do not need an acute episode to undermine the security of victims. A mother who inferred after some weeks of absence that her son had been disappeared, for instance, cannot identify the exact moment that her injury occurred, but has suffered a breach of her security. The cruel havoc that all national reparations programs confront necessarily threatened even businesslike conceptions of security, such as the ‘rational’ worries about investment that permeated the economies of Argentina and Chile. Moreover, every reparations program presumes that the breach of security is still alive, unsettled, voracious—a blight on the future and the present as well as the national past.

Applied to ordinary civil justice in developed legal systems, where prosperous and well-represented defendants litigate by making arguments and shuffling paper, and where those “persons” who seek redress need not be human beings, such rhetoric may sound a bit overheated. But pecuniary redress for injury has common themes everywhere. Even in the driest precincts, a quest for monetary compensation in court for noncontractual wrongs necessarily complains about a violation of security, while the resistance that a defendant mounts is a plea to keep the tranquility of the status quo, casting the plaintiff as disruptor. Private-law adjudication sets out in binary fashion to determine who is the troublemaker, the putative wrongdoer or the complainant, and then, if the plaintiff wins, to fashion a remedy to restore equanimity and civil peace. Part of the work of remembrance is to give the victim more security in the future. Money damages paradigmatically do this job: Collect your award and put it in the bank, sleep better.

2. Enhancing Freedom

Perpetrators of wrongdoing found obliged under law to pay victims for remembrance—who may be nation-states or business entities as well as individuals--

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80 The United States, which clings eccentrically to juries in personal injury cases, is a partial exception. Yet even in the U.S. only a tiny fraction of claims for injury filed in court reach juries. [cite Galanter on the vanishing trial]


82 “Best” under constrained conditions, of course. American tort plaintiffs, for instance, often want medical monitoring following the exposure to toxic substances, but almost never receive it. The focus of law (as contrasted to “equity”) on monetary damages forecloses creative remedies. See also Stephen G. Gilles, The Judgment-Proof Society, 63 Wash. & Lee L. Rev. 603 (2006) (noting the difficulty of collecting judgments).
overindulged in their own freedom, hurting other people along the way. Their freedom to swing their fist, or to not care about the foreseeable consequences of their inattention, or recklessly to neglect the basic safety of their citizenry, should have ended at the other person’s nose but did not. “Our autonomy is limited,” writes torts scholar and philosopher Jules Coleman, “only insofar as we are not free to cross the borders that define the protective moral spheres of our neighbors. Boundary crossings are violations, and should harm ensue, compensation is owed.” Whether taking a trivial form, like an automobile collision that bends fenders, or a deep one, like a massacre, each wrongfully inflicted injury calls out for repair of the negation it inflicted on its victim. Too much prerogative--insufficiently checked and inhibited--has violated the rights of a human being.

Pecuniary recompense for wrongdoing reminds the recipient that freedom exists not only for the class of assailants but for her or him too. And so after legal proceedings have concluded the recipient will ordinarily enjoy more choice than before. If a monetary transfer succeeds in enhancing security for victims, as was just broached, then that increase in security will foster a sense of power over their environment. Receiving money adds another layer of freedom to this minimum where the best revenge, so to speak, is not revenge on perpetrators nor withdrawal from civil society but a superior exercise of one’s human prerogatives: doing what one wants in a way that, unlike the actions of the wrongdoer, violate the rights of no one else. Again, money makes for an effective instrument. Tortfeasors found liable in the legal systems of developed nations don’t turn over a new appliance or a fancier wheelchair: to you if you are their victim: they cut you a check, and you spend your ‘reparations’ as you like. Other measures of compensation that reparations programs might use can foster choice, and thus freedom, as well.

3. Anticipating Foreseeable Obstacles to Delivery and Receipt of the Transferred Wealth

Although Western personal injury proceedings seldom pause over this point because it has come to seem natural rather than designed, legal systems that furnish victims with monetary compensation try to guard against conditions that obstruct the conveyance of money from payors to recipients. The lawyer who steals from his clients is a stock figure of worldwide opprobrium, for example, and American legal ethics as enforced by regional authorities, a regulatory system

that in practice condones almost every kind of lawyer misconduct, hammers attorneys who take money out of client trust accounts. Safeguards used in legal systems around the world, including liens, collateral, escrow accounts, bank regulation, and appeal bonds, provide assurances to people who hold entitlements to money.

4. **Summary, Noting Women**

These characteristics of financial compensation to victims within civil justice—enhancing the security and freedom of victim-recipients, and making the rendering of payment meaningful by protecting the transfer from accidental loss and theft—are integral to the task of heeding women in national reparations programs. Such money-minded points may tend to get short shrift from reparations planners. Focusing on macro-concepts like the nation-state, transition to democracy, and human rights can make the bean-counting of individual compensation, especially its mechanisms, look petty. Whether individual compensation payments are indeed petty lies outside the scope of this chapter, whose starting point is a reparations program under development to include them; we have moved quickly through the debate over whether money matters in reparations. Assuming that a program will include compensation to individuals, remembering the touchstones of this compensation bolsters its effectiveness.

Security, freedom, and the mechanical protections of transfers come together in the problem of reparations payments set aside for women that nevertheless move into male control when paid. As the activist Sara Hlupekile Longwe warns, every program that purports to empower women through development aid is vulnerable to resistance from patriarchal traditions, ubiquitous in developed and underdeveloped nations alike, which will often make “gender-oriented policies ... evaporate.” To illustrate, Longwe describes a program to fund family-planning clinics in the fictitious southern African nation of Sundia, and asks her readers to suppose that a “visiting gender consultant” has just told foreign funders that people who manage the clinics in Sundia have been refusing to dispense contraceptives unless the women “bring a letter of permission from their husbands,” thereby keeping birth control away from most married women.

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84 See supra note *.
and all single women.\textsuperscript{86} Although Longwe’s hypothetical stipulates that this practice violates official written policies of empowering women and overcoming discriminatory practices, the ways that funders and funded alike can maintain the status quo are nearly infinite. Longwe suggests that patriarchy-rooted resisters can blame local cultural norms, or blame the government of Sundia, or declare suddenly a policy of nonintervention and deference with respect to internal national affairs, or appoint a committee ostensibly to look into the problem but actually to cover it up, or ignore what the consultant has reported, or refer the matter to a separate “women’s sector,” among other strategies.\textsuperscript{87} The counterpart of this hypothetical that “engendering reparations” might face is rhetorical attention to women and gender equality followed by the diversion of resources, pecuniary and nonpecuniary alike, away from women citizens. In the pecuniary subcategory of the obstacles problem, men take the money appropriated for women.

Layers of complication challenge the delivery of security- and freedom-enhancing increments. Some women recipients might, in particular, wish to share or relinquish the tangible reparations they receive—and believe they enjoy more freedom or more security as a consequence. A wife may know that her husband had his eye on a bicycle or a truck, from which purchase she would also gain some slight benefit. If he had been idle and depressed, she might believe he would feel heartened by the boost of money in his pocket. At home a man could have been impinging on his family’s security by making threats (to leave, to become violent, to take up dangerous work for the sake of earning income) that a handout from his woman would ameliorate. If these examples sound drearily anti-male, amiable men will serve almost as well. A good fellow may too have suffered in the old days and been treating his woman kindly during hard times; might our recipient not want to share her new money with him? A recipient of reparations money might feel indebted to her man, for good reason: many women have received shelter and other boons from male partners. Or take children. At least some, if not most, women who receive reparations money would without hesitation try to spend it on the next generation. Notwithstanding Pablo de Greiff’s warning that “the responsibilities of a program of reparation are not the same as that of a development or social investment plan,”\textsuperscript{88} mothers would certainly assign part of reparations funds earmarked for them to education, health care, and food for their young.

\textsuperscript{86} Id. at 154.
\textsuperscript{87} Id. at 153-55.
\textsuperscript{88} De Greiff at 470-71.
Overriding such choices by women, or making them difficult to effect, could undermine the security- and freedom-enhancing ambitions of compensation. The large feminist literature on choice and agency cautions against accusing women of ‘false consciousness’ for manifesting decisions that appear self-negating, but offers little guidance on how to make reparations money stick to the women who receive it. Here thinking about security and freedom becomes helpful after the fact, as a way to understand what might otherwise look like the squandering of payments. The point of the endeavor had been to enhance the security and freedom of recipients. Recipients’ diverting their money to men and children might have been consistent with this goal.

That said, however, it would be a facile error to condone any and every distribution of reparations payments as always (with the help of tautology) enhancing the security and freedom of their female recipients. Here the third point becomes pertinent: Reparations programs owe to recipients not only the rendering of a designated payment but the safeguards that protect it from intentional or careless disappearance. Like commercial creditors, investors, and mortgagees, women recipients of reparations are entitled to enjoy what the rule of law can provide to safeguard their property. Accordingly, the design of a program must anticipate foreseeable obstacles to delivery and receipt of the transfer of wealth; when recipients are women, one key obstacle worthy of attention is the belief that women ought not have the power to spend money on their own, or for themselves. One can envision women who simply do not feel entitled to make spending decisions that enrich themselves directly until they know that their families’ needs have been satisfied first.

A reparations planner probably cannot thwart such an inclination, but each payment should have a chance to get to each individual woman first, rather than to her men or dependent children. It should have her name on it. Instruments in lieu of cash should include protections against theft and loss. General announcements to public audiences about reparations payments should state plainly that recipients include individual women (or men), and are not paid only to households, families, or communities. Any item conveyed to a woman as reparations that has to be registered with a title office should formally bear the woman’s name only. Program designers should work with regional banks or finance-minded NGOs to give recipients a safe place to store their payments.

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89 Cite
These specifics might provoke the objection that recognizing women as individuals with competence in worldly realms, and who hold personal identities separate from household and tribe, offends the cultural norms of a particular country, and thus that a portion of this reparations scheme would be unsustainable in that venue. This objection should be seen either as mere vapor that rises from Longwe’s “patriarchal cooking pot” and rejected—or else taken seriously and heeded: Perhaps there are places where cultural predilection and commercial backwardness intersect to destroy basic safeguards that would otherwise protect property transferred to women. Where the claim of absent safeguards is credible, program designers should reconsider their plan of paying recompense to individuals. A society that cannot foster women’s holding property in their own name—that treats women only as the means, never the end, of a national reparative program—is one whose reparations scheme ought to be confined to nonpecuniary measures. Insisting on naming women as payees would in such a setting promote strife; cash changing hands under the contrary approach, one that defers to patriarchy rather than resists it, would reach the wrong people and go to waste.

Part IV: The Lure of Adding Micro-Principles to Reparations

We proceed now from ends to means. Having considered the ‘why’ and the ‘what’ of reparations programs that strive to keep women in mind, we move here to techniques, or: How? As an analytic starting point, compensation for harm permits the juxtaposition of two types of transfer payments that have drawn attention and are likely to expand in the near term. Like reparations, small-sum transfers of money as development policy have generated high expectations. The two concepts may be able to nourish each other in the context of providing recompense to individuals for harm they suffered.

A preliminary note on terminology. “Micro-principles,” coined here as a variation on “microcredit” and “microfinance,” will endeavor below to build on these older and more familiar neologisms. Lacking a canonical definition of the terms, I use the 2005 Year of Microcredit announcement declaring microcredit to be a subset of microfinance, the wider category. Proponents of microfinance
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make expansive claims about the power of small sums of money as a force in economic development. The applause that these claims enjoy in the developed world is a success in itself, and potentially a boon to reparations programs. Before we consider how microfinance might yield “micro-principles” of interest to those who plan reparations, a short review of this success is in order.

[Schematic outlining follows:]

A. A Poverty Reduction Scheme of Unequaled Popularity

Although moneylenders and low-capital financing of enterprise have existed since antiquity, popular commentary sites the birth of microfinance as self-conscious development policy in Bangladesh in the 1970s, with Muhammad Yunus credited as a founding father.91 Yunus, who earned a Ph.D. in economics from Vanderbilt University before returning to his homeland and there starting his Grameen (“Rural”) Bank to make small no-collateral loans, has been nominated formally for a Nobel Prize, a notion endorsed by Bill Clinton, an admirer since the mid-1980s: while serving as governor of Arkansas, Clinton asked Yunus how to deploy microcredit in his small and underdeveloped U.S. state.92 Over the last two decades, microcredit and microfinance have grown even more acclaimed.

What is the difference between microfinance and microcredit?
Microcredit is a small amount of money loaned to a client by a bank or other institution. Microfinance refers to loans, savings, insurance, transfer services, microcredit loans and other financial products targeted at low-income clients. Microcredit has been changing the lives of people and revitalizing communities worldwide since the beginning of time.


91 See Hype and Hope: The Worrisome State of the Microcredit Movement, Public Agenda, Jan. 2006 (available on Lexis) (calling Dr. Yunus the “grandfather of the microcredit movement”); Technology Quarterly, Economist, Sept. 18, 2004 (available on Lexis) (crediting Dr. Yunus with “the development of microcredit”). Seibel objects to what he calls the ahistorical refusal to acknowledge thousands of years’ experience with microfinance around the world. See (chiding “many in the microfinance community who associate microfinance with credit NGOs and believed that microfinance was invented in Bangladesh some thirty years ago”). Seibel, supra note 84, at 1.

92 Microcredit is Revolution for Poor, Times-Union, Apr. 4, 2004, at A7.
1. Endorsements by World Leaders

The Clinton-esque admiration for microfinance as a development strategy extends beyond the former president: Hillary Clinton and the William J. Clinton Foundation have support microfinance strongly, with gestures as well as words.  

American legislation identified microcredit as a measure to address women under conditions of transitional justice with the Women and Children in Conflict Protection Act, introduced in the United States Senate in 2003. Focused on acute humanitarian needs, this bill also addresses longer-term problems of sustainability, and includes provisions for microcredit as a source of enhanced economic security for women as household providers.

2. Banks Like It Too

Banks in Bangladesh and Indonesia found to their surprise that they were making more money with microcredit than conventional loans to big businesses. Default rates are very low and debtors also opened savings accounts (more on that below, Part V.B.1). Today every large multinational bank has gone into the business to some extent. Banks expect to do more in the future as technological innovation lowers the cost of administering small accounts.

3. Media Acclaim

*The Economist* is a big cheerleader, and other business/macroeconomics magazines praise it too. From a skeptical story by the leading critic, Thomas Dichter:

“The hope has bred hype. Pro-microcredit editorials abound. World-class papers like the New York Times, The Wall Street Journal and Le Monde write about it, and scores of books have been published, including The Miracles of Barefoot Capitalism; Pathways Out of Poverty; Hands Around the Globe; Back Alley Banking; Defying the Odds; Give Us Credit; The Price of a Dream.”

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94 S. 1001, 108th Cong.

95 Id., Title III, § 306(b).
I have never seen a negative story in the popular press. Have had to do several Internet searches to find journalism on the other side.

4. Dissent: A Summary

Criticism is aimed mostly at microcredit rather than microfinance, which is a more slippery target:

a. Since when is adding to Third World debt a terrific new idea?

b. Only a minority of people have the entrepreneurial temperament, but microcredit presumes that everyone has a good idea for a new business, is willing to do the work, and will be lucky.

c. Microcredit is poverty reduction on the cheap. Governments relinquish their obligations to provide for the poor.

d. Meager economic activity that has received microcredit—Dichter gives as examples a woman in Malawi who breaks rocks and sells them to a road developer and a woman in Guinea who sells dried chili peppers—is a struggle to keep alive in an environment that no rational business would consider a source of new profits. These poor women would have engaged in the same activities without microcredit, but now they are overinvested in wretched settings, and have the burden of more debt.

Dichter’s book, DESPITE GOOD INTENTIONS: WHY DEVELOPMENT ASSISTANCE IN THE THIRD WORLD HAS FAILED (2003), is a powerful attack on international development efforts of all kinds, including microcredit. The wider-ranging “microfinance” gets around some (but not all) of the dangers Dichter ascribes to “microcredit,” although I do think lending might play a role in reparations.

B. Potential Gains to Reparations Programs That Attach Themselves to the Success of Microfinance

I don’t want to embrace microcredit or microfinance any more than necessary. Certainly I cannot become a Dichter-like expert on whether the programs work. Instead, this section takes microfinance as a fact of life in nations that are in transition—nothing
suggests that it will lose rather than gain popularity in the future—to suggest that reparations programs, which are often ill-funded and chaotic, can benefit from association with this prosperous sibling.

1. Access to Existing Local Institutions and Nongovernmental Organizations

Given all the hype and boosterism surrounding microfinance and microcredit, it may be unwise to trust what journalists and stakeholders say about the reach of these programs, but even if the anecdotes and estimates are unreliable, policymakers know that many institutions have pertinent experience. Some of these institutions operate in countries that now have, or are planning, newly installed reparations programs. Others are just one or two degrees or separation away from these operations on the ground. The NGO community in general can contribute to microfinance programming. Reports and documents abound.

[Develop with specifics.]

*Must acknowledge disappointing experience with microcredit as reparations in Rwanda and Sierra Leone.*

2. Appeal to Investors as Donors and Donors as Investors

Most national reparations programs are funded at least in part by national governments, but fundraising has enlarged the pie that recipients share. Including microfinance in reparations could lure donor support. Part of the lure is temperamental: investors and donors tend to recoil from giving “just a handout,” and might feel inspired by a capitalist or neoliberal model of philanthropy. Another part of the lure is *homo economicus* at work: one supporter of microcredit, the chief operating officer of Monsanto, has accounted for his enthusiasm by observing that microcredit can create new customers for his company.  

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96 Credit NGOs can turn into microfinance institutions. See generally Hans Dieter Seibel with Andrea Armstrong, Reparations and Microfinance Schemes, in The Handbook of Reparations 676, 696-97 n. 24 (giving examples from Sierra Leone, the Philippines, and Uganda).


98 Cite from Internet.
3. **Hedging Reparative Bets on the Government**

The existence of a reparations program bespeaks past failure by a national government.\(^99\) When reparations planners consider the uses of payments to individuals as a source of strength for civil society in its transition to stable democracy, they should bear in mind the virtue of governmental weakness as well as strength. The fledgling headed-for-democracy government needs encouragement and other boosts, but it also needs competitors. Microfinance institutions, which may be “the only civil society institutions that survive the breakdown of society,”\(^100\) amount in the aggregate to “decentralized economic authority,” and their development “creates alternative nongovernmental sources of power and is a potential impediment to future abuses by the central government.”\(^101\)

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Part V: **Notes on the Implementation of Micro-Principles for Reparations, with Women in Mind**

A. **What Are Micro-Principles for Reparations?**

The phrase “micro-principles” serves here as shorthand for the careful, selective borrowing of microfinance precepts and techniques in the construction of reparations programs. United under the “micro” here are not only loans (or microcredit) but other sorts of financial instruments offered to the poor. Microfinance for this purpose requires entrepreneurship and risk-taking: A simple transfer payment attached to no contingency would not fall within the category.

The limiting phrase “careful, selective” warrants repetition. Just as “a development program is not a program of reparations,”\(^102\) the numerous schemes that can fall loosely under a microfinance rubric do not amount to a reparations

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\(^99\) See supra note  (*) (noting that the government was guilty either of overt wrongdoing as a principal, or gross omissions while nongovernmental actors were committing overt wrongs).

\(^100\) Seibel & Armstrong, supra note  (*), at 677.

\(^101\) Id. The authors elaborate that microfinance institutions as economic actors replace development banks, which had been heavily (and ineptly) controlled by national governments. Aspects of their decentralization include, or Seibel and Armstrong say should include, competition among financial entities; the closing of distressed institutions rather than propping-up by donors; incentives for timely repayment; and the freeing of interest rates from government diktat. Id. at 681-85.

\(^102\) De Greiff p. 470.
program either, and so these two disparate concepts—reparations and microfinance—should be brought together only with the utmost caution. In particular, microfinance is not sufficient to discharge a reparations obligation. Loans, credits, and exhortions to the poor to cultivate their inner entrepreneur are not the same as the transfer of wealth. Identified victims of serious human rights violations hold no responsibility for earning and paying their own reparations. Although markets can sometimes render to citizens what their governments owe them,\(^\text{103}\) reparations planners should not assign market activity to recipients for this function.

Once it is identified as patently insufficient to do the whole work of reparations payments, microfinance can make a contribution to the endeavor, aided by reference to the themes of security and freedom.\(^\text{104}\) If the point of civil recompense for injury is to increase the security and freedom of the injured individual\(^\text{105}\)—to honor the security and freedom she lost, by a measure that enhances these goods—then micro-principles add value to reparations when they augment the security and freedom that transfer payments can bring. They can do so effectively as a fraction of the reparations payment. My suggestion is that each reparations payment to individuals contain both a fixed sum representing an entitlement (cash or a close equivalent) and, on top of this entitlement, another transfer that invites the exercise of choice by the recipient.

Recommendations about what form the second modality should take lie beyond the scope of this chapter: The microfinance business revises its priorities continually based on new experiences, data, and opportunities, suggesting that any research into the alternatives would face built-in obsolescence. A couple of illustrations may be helpful, nevertheless. They do not exhaust the category.

*Vouchers*, particularly to cover education, a perennial favorite of reformers in the United States, may have application as a remedial device in other countries. American writers have proposed various types of vouchers to cure a variety of

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\(^{103}\) See, e.g., Bonnie Miller Rubin, Firms Lean on Deadbeats—Then on Moms, Chi. Trib., Sept. 27, 2002, at News, p. 1 (noting the growth of “bounty hunters” to pursue child support arrears); Aaron Bernstein, Too Much Corporate Power?, Bus. Week, Sept. 11, 2000, at 144 (describing the Channel One Network program that gives “money, supplies, and programming” to schools in exchange for being allowed “to beam ads to students” in classrooms).

\(^{104}\) See generally Seibel & Armstrong at 678 (emphasizing that microfinance institutions offer “a secure place for the safe-keeping and accumulation of reparations payments and savings” and also “mobilize the self-help capacity of victims as shareholder-owners and users”).

\(^{105}\) See supra
ills: the reparations proposals in the U.S. focus on nineteenth-century slavery and its continuing consequences for citizens of African descent. “Vouchers for education” have attracted particular attention.  

In those nations of the developing world where parents have to pay school fees, education vouchers as a reparations measure might make acute sense. Many national governments would prefer to finance primary education through public spending but have not done so, for shifting reasons. In the 1980s, developing countries faced international-finance constraints that required them to balance their domestic budgets and pay interest on debt as a condition of receiving new foreign investment. A generation later, although the World Bank has reversed its old stance and now holds that governments, not parents, should pay for primary education, national budgets remain tight, and according to a 2001 survey of 79 countries by the Bank, “only Algeria and Uruguay do not have fees of any type.” Vouchers dispensed to individuals go beyond shouldering a load that properly belongs to governments and enabling misplaced budgetary priorities to persist. Education vouchers could be given to a wide class of recipients, not just parents or people young enough to go to school, if they were made amenable to exchange for a range of goods. Tradeability of course would expand the risk that education vouchers would morph into liquor and cigarettes; reparations planners would have to balance that danger against the advantages of a more option-laden transfer, keeping open the possibility of education vouchers that could not be traded for anything but school fees.

Insurance. Researchers have found strong demand for insurance in the developing world, particularly against drought, harm to livestock, and funeral or

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109 Price of School Fees, supra note 99.
burial expenses. Reparations planners should consider facilitating the formation of new cooperatives to make this option available where it is not offered, and promoting connections to existing enterprises willing to offer insurance to recipients. The voucher method could be used to give recipients choices among insurance for different contingencies.

For a final example, borrowed from recent writing on reparations, programs could offer recipients a choice of shares in local microfinance institutions. Under such a scheme, national governments would link reparations payments to a community-based bank established as part of the program, and recipients could “choose whether to buy shares or open accounts in the newly created microfinance institution.” The choice between shares (an entrepreneurial path) or accounts (the nonentrepreneurial one) takes us to our next point: the effort to attain security and freedom for women who receive reparations payments.

B. Improving the Transfer of Wealth to Women Recipients: Micro-Principles Toward Security and Freedom

1. Security

 Everywhere in the world, the presence of banks and similar financial institutions eases the safe delivery of transfer payments to recipients. Peace, in turn, strengthens banks and financial institutions. The reparations context suggests strain on these conditions. Because reparations arise after severe harm to a nation, those who plan programs must anticipate threats to safety in the disbursement of payments. Conflict-torn regions have notoriously been littered with armaments like guns and grenades; and demobilized soldiers who know how

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110 Stefan Dercon, a professor of development economics at Oxford, explores the issue in several contexts. See, e.g., Stefan Dercon, Risk, Insurance, and Poverty: A Review, in Insurance Against Poverty 4 (Stefan Dercon, ed. 2005) (arguing that poor people are “least able to cope with risk and shocks, and therefore would benefit most from protection”); Stefan Dercon et al., Group-Based Funeral Insurance in Ethiopia and Tanzania 4-5 (2004), available at http://www.bepress.com/cgi/viewcontent.cgi?article=1227&context=csae (finding funeral associations a useful model for “other developmental activities”).

to use these weapons are often present as well. In response to this problem, an entity called the Microfinance Best Practices Project has issued a report offering practical advice to prevent the armed robberies that threaten microfinance institutions and their human constituencies.

Although such pointers are not “failsafe,” a local microfinance institution might nevertheless be the safest place for a woman to store the money she receives, and microfinance has great potential to increase security for even those women who do not participate in a local microfinance institution. When this microfinance institution is the only banklike entity within ready reach, and can offer a modicum of security to persons who hold accounts and shares, the money a woman deposits there will generally be safer from loss than money she keeps at home, vulnerable to anyone who can overpower her there. In the alternative scenario, when a local microfinance institution exists near a commercial bank, this institution can offer women recipients benefits that the nearby commercial bank may not be able to give them: for example, a woman might be too small an account-holder to have access to a commercial account, but participating in a microfinance institution could convey to her this additional security when microfinance institutions band together, offering low-tech shelter to members in dealings with the nearby commercial bank. A group of women might travel together while carrying money, receive checks rather than cash from the commercial bank, or host representatives of the commercial bank who come to meetings bearing cash. Engaging “micro-principles for reparations” can thus strengthen what these institutions have to offer recipients--particularly women, and particularly with respect to security.

2. Freedom

While it may be true that most persons lack an entrepreneurial temperament and thus do not crave all the loans and other risk-tinged financial instruments they do not have, systemic inequities ensure that the number of

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113 Id.
114 Id. at 5.
115 Id. at 4-5.
would-be entrepreneurs with limited access to credit will exceed the number of people who can receive the credit they need to implement their business plans. Recipients of reparations are individuals whose human rights were violated. “Credit is a human right” may be a silly slogan, but both fairness- and welfare-based accounts of reparations support efforts to level this playing field and give recipients a chance to invest in their own human capital.

According to studies of gender in microcredit, women have traditionally had, and today still have, less access to credit than men. Presumably this condition has eased since about the mid-1990s, when microcredit became thought of as a “panacea for women,” in one critic’s phrase. It seems fair to suppose that credit and other sources of finance have been less available to women and so more freedom for those women who desire to pursue entrepreneurial activity could result from easing this blockage.

[Another paragraph to develop this theme]

The strand of microfinance that aggregates women into groups can offer psychological as well as pecuniary gains that enhance the cause of fairness. Independent, novel sources of income aimed at women come with new ideas and “social support ... [that] should make women more assertive of their rights.”

[Brief development.]

3. Anticipating Foreseeable Obstacles to Delivery and Receipt of the Transferred Wealth

Just as legal systems safeguard the payments that individuals receive pursuant to their law-based claims, reparations delivered to women pursuant

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119 See supra.
to a “micro-principles,” or choice-instilling, approach have to anticipate the ways these reparations might fail. Failure, for these purposes, would be manifest in a lessening of security and freedom rather than an increase. Two pertinent dangers are well documented: first, that men rather than women will seize the benefit given as reparation to women; and, second, that choice for women recipients will prove illusory. The problems are large; the attention they can receive here is slight in relation to their importance.

The danger of male control. The experience of Bangladeshi microcredit leader Grameen Bank, whose vast majority of borrowers are women aggregated into groups of five that borrow (and become eligible for future loans) collectively, includes a list of successes. One admirer in the American legal academy reports that Grameen members help out in fellow members’ business enterprises; communal norms that include risk-taking and profit-seeking for women have gained strength; and women have formed “an institutional base” for “pursuing their social and political interests,” including interventions against domestic violence and more widespread acceptance of birth control.\(^{120}\) Diverging from this celebratory account, another paper about the Bangladesh experience with microcredit identifies husbands as hijackers who control a significant portion of Grameen loans made to women and leave their wives saddled with the obligation to repay it.\(^{121}\) Another critic of the Grameen Bank depicts it as a conservative institution that encourages women to borrow to build traditionally female-dominated, low-return enterprises, and does not foster any real gains in women’s power.\(^{122}\) Away from the Bangladesh context, another researcher has suggested that in the informal sector, where contracts and the rule of law are seldom invoked, women working with micro-capital are often dependent on male family members to serve as enforcers.\(^{123}\)

Aggregation into groups can provide a safeguard against the vulnerability of individual women who pursue microfinance-funded enterprise in developing regions. [expound]

\(^{120}\) Daryl Levinson, Collective Sanctions, 56 Stan. L. Rev.345 (2003).


\(^{122}\) Gina Neff, Microcredit, Microresults, Left Business Observer, Oct. 1996.

\(^{123}\) Scully, supra note * (citing Peter Gibbons, Structural Adjustment and the Working Poor in Zimbabwe (1995)).
Misplaced choice. The Organization for Economic Co-operation and Development has identified worrisome side-consequences of encouraging poor women to become entrepreneurs: For example, a microcredit loan does not of itself lighten existing household labors, and so women recipients find themselves working a second (or third) shift to earn income, take care of their families, and repay their debt. When the fledgling business succeeds enough to become demanding, teenage or preteen daughters look like untapped resources who can help with the work if they are withdrawn from school.124

[The response to this point is to be more skeptical of microcredit than of “micro-principles”-choice-installing modes still play a vital role in reparations.]

Conclusion

[Return to the themes of fairness and welfare, security and freedom.]

These larger themes are more important than microfinance or even “micro-principles.” The conscientious reparations planner should not make a fetish of techniques at the expense of the broad and vital ideals that they aim to achieve. Yet the techniques matter: Reparations can benefit from well-formed partnerships with other successes. A transition to democracy will gain strength from recognizing recipients of reparations as potential entrepreneurs and risk-takers—not just victims, claimants, or wounded citizens. It should seize this recognition.

124 OECD, supra note *. But see [add]