

Reparations, Microfinance, Gender:  
A Plan, with Strategies for Implementation

Anita Bernstein\* and Hans Dieter Seibel\*\*

Governments that set out to provide their citizens with reparations for human rights violations on a national scale express their understanding of serious wrongdoing.<sup>1</sup> They attempt, we may infer, to achieve not only moral but also political and economic gains.<sup>2</sup> Distributing reparations in a pecuniary rather than a nonpecuniary form—the choice manifested in most of the reparations programs commenced in recent decades<sup>3</sup>—is a challenge for any nation emerging from a humanitarian crisis, and not only because of the inherent scarcity of money:<sup>4</sup> Expenditures of any kind in a budget, not just reparations, can pursue only limited goals.

Priorities about how much and where to spend money always face competition within governments, and reparations plans are not exempted from having to compete. When considering whether to appropriate funds to reparations, a planner would in principle want to enhance the well-being of recipients in a lasting way, preferably building their capacity for self-help,<sup>5</sup> because reparations programs in post-conflict settings are part of a larger effort to strengthen and rebuild. Unrest and threats to public order

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\* Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. Thanks to Tyler Korff for research assistance and to Diane Fahey and Arthur Pinto for helpful suggestions.

\*\* Professor Emeritus of Sociology, University of Cologne, Germany; Senior Fellow, Development Research Center (ZEF), University of Bonn, Germany; former Rural Finance Advisor, International Fund for Agricultural Development, United Nations. Thanks to Pablo de Greiff for alerting me to the relevance of microfinance in reparations schemes.

<sup>1</sup> See Pablo de Greiff, *Introduction: Repairing the Past: Compensation for Victims of Human Rights Violations*, in *THE HANDBOOK OF REPARATIONS* 1, 11 (Pablo de Greiff ed., 2006) (equating reparations with payments).

<sup>2</sup> See *CIVICS IN PRACTICE: PRINCIPLES OF GOVERNMENT AND ECONOMICS* (2d ed. 2009) (explaining the pursuit of political and economic improvement by governments).

<sup>3</sup> De Greiff, *supra* note 1, at 11.

<sup>4</sup> See *infra* note 42. Scarcity is not the only difficulty that pecuniary reparations face. For an overview of reparations issues outside the scope of this article, see Naomi Roht-Arriaza, *Reparation Decisions and Dilemmas*, 27 *HASTINGS INT'L & COMP. L. REV.* 157 (2004).

<sup>5</sup> On enhancing self-help of disadvantaged persons through government welfare spending, see *ISSUES FOR DEBATE IN SOCIAL POLICY: SELECTIONS FROM CQ*, at 163 (2010) (claiming that the War on Poverty failed in this goal for the American poor); *SELF HELP IN HEALTH AND SOCIAL WELFARE: ENGLAND AND WEST GERMANY* (Stephen Humble & Judith Unell eds., 1989). Here it may be necessary to say that we assume a degree of sincerity or good faith, rather than unrelieved rent-seeking, on the part of officials. See generally Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 *HARV. J. L. & PUB. POL'Y* 203, 217 (2000) (concluding that the large literature on public choice notwithstanding, “governmental action continues to be justified with reference to the public good rather than the mechanical summing of individual preference”).

typically accompany any plan to distribute money for the benefit of victims. A reparations plan gains political support when it can join larger plans to enhance the nation's prosperity and stability.

In this Article, mindful of divergent goals and mandates in different countries—and the finitude of any pecuniary path—we recommend microfinance as a mode of delivery for reparations. We have advocated for this goal in separate writings.<sup>6</sup> Here we combine our arguments and concerns in a strategic perspective.

“Microfinance,” the term one of us coined in 1990,<sup>7</sup> resembles the more frequently spoken and printed “microcredit,”<sup>8</sup> a word that gained fame in 2006 when the Norwegian Nobel Committee awarded its annual peace prize to the Grameen Bank and its founder, the economist Muhammad Yunus.<sup>9</sup> Both terms refer to the extension of financial services in small amounts to a low-income clientele, often in a deliberate strategy to enhance national economic growth or the reach of commercial banks. Microfinance is the wider of the two concepts. Whereas “microcredit” refers to small loans extended to borrowers who in the past had been neglected or rejected as unbankable—that is, unworthy of credit and other transactions that require approval from funders—“microfinance” includes all financial

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<sup>6</sup> See Anita Bernstein, *Pecuniary Reparations Following National Crisis: A Convergence of Tort Theory, Microfinance, and Gender Equality*, 31 U. PA. J. INT'L L. 1 (2009) [hereinafter Bernstein, *Pecuniary Reparations*]; Hans Dieter Seibel with Andrea Armstrong, *Reparations and Microfinance Schemes*, in THE HANDBOOK OF REPARATIONS, 676 (Pablo de Greiff ed. 2006); Hans Dieter Seibel, *From Recipients of Reparation Payments to Shareholders of Microfinance Institutions: A Study of the Possible Relations Between Reparations for Victims of Human Rights Abuses and Microfinance 2* (2003) (paper presented at The Rockefeller Foundation Bellagio Study and Conference Center "Villa Serbelloni") [hereinafter Seibel, *Reparations Shareholders*], available at <http://www.uni-koeln.de/ew-fak/aef/08-2005/2003-6%20ICTJ%20Microfinance.pdf>.

<sup>7</sup> Hans Dieter Seibel, *Old and New Worlds of Microfinance in Europe and Asia*, in SOUTHEAST ASIA'S CREDIT REVOLUTION: FROM MONEYLENDERS TO MICROFINANCE 40 (Aditya Goenka & David Henley eds., 2009). See also <http://www.uni-koeln.de/ew-fak/aef/10-2005/2005-10%20The%20Old%20and%20the%20New%20World%20in%20Europe%20and%20Asia.pdf> (offering an earlier version of this chapter).

<sup>8</sup> “Microfinance” is gaining ground, however. For example, in 2007 Forbes magazine undertook for the first time to rank the world's top microfinance institutions. Matthew Swibel, *The 50 Top Microfinance Institutions*, FORBES, Dec. 20, 2007 (available at [http://www.forbes.com/2007/12/20/microfinance-philanthropy-credit-biz-cz\\_ms\\_1220microfinance\\_table.html](http://www.forbes.com/2007/12/20/microfinance-philanthropy-credit-biz-cz_ms_1220microfinance_table.html)). On the discursive rivalry between these two words, see Bernstein, *Pecuniary Reparations*, *supra* note 6.

<sup>9</sup> See Press Release, Norwegian Nobel Committee, The Nobel Peace Prize for 2006 (Oct. 13, 2006), available at [http://nobelprize.org/nobel\\_prizes/peace/laureates/2006/press.html](http://nobelprize.org/nobel_prizes/peace/laureates/2006/press.html) (claiming that any effort to alleviate poverty would have to include microcredit).

services that this once-marginalized clientele can reach, “includ[ing] savings, insurance, and money transfers.”<sup>10</sup>

All microcredit is microfinance, in other words, but not all microfinance is microcredit: and because pecuniary reparations presumably seek to create redress for injury rather impose a new burden on victims, a reparations payment made in the form of microfinance follows the logic of redress when it eschews imposing debt and takes the form of an outright transfer. Pressing microcredit on recipients and using these persons to generate income for those who furnish capital does not give them—or at least does not emphasize—compensation or restitution, two central constituents of pecuniary reparations. The other pecuniary alternative that we reject here is the one-off cash payment, a prevalent mode of distribution in reparations schemes of the last two decades.<sup>11</sup> Instead we argue, again building on earlier work,<sup>12</sup> that governments seeking to distribute pecuniary reparations in recognition of serious harms resulting from human rights violations during national conflict should choose to transfer *shares in microfinance institutions*.

A brief overview of our terms: We follow the working definition of “microfinance” just noted.<sup>13</sup> As for “microfinance institutions,” they vary. What we have in mind resembles communal savings accounts; these geographically scattered entities would implement a national reparations plan. Newly formed microfinance institutions could carry out this function, but a government that works with existing entities like credit NGOs or stable local microfinance institutions will gain additional advantages.<sup>14</sup> We classify microfinance institutions hierarchically as either formal, semiformal, or informal, with the adjective referring to how closely these institutions are governed by national banking and corporate laws.<sup>15</sup> Entities in which recipients can hold their reparations that governments pay might fall into any of the three tiers. The semiformal category, where governments

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<sup>10</sup> Microfinance Gateway page, <http://www.microfinancegateway.org/p/site/m/template.rc/1.26.12263/>

<sup>11</sup> De Greiff, *supra* note 1, at 12-13.

<sup>12</sup> See *supra* note 6 and accompanying text.

<sup>13</sup> See *supra* note 10 and accompanying text.

<sup>14</sup> See *supra* Part II.

<sup>15</sup> The taxonomy is Seibel's. See Bernstein, *Pecuniary Reparations*, *supra* note 6, at 23-24. We discuss the tiers in more detail *infra* in Part II.B.

recognize the entity but do not supervise its activities, probably offers the most opportunity and flexibility for a reparations program.

We propose that governments undertaking reparations incorporate new microfinance institutions, or reincorporate old ones, to provide for shareholder ownership. The government would make reparations payments in two forms. First, it would distribute shares that allot each recipient an equity stake and a role in the management of the organization, likely in the form of voting rights.<sup>16</sup> Second, the government would deposit cash payments directly into the microfinance institution in the name of recipient shareholders. We write no rules or “best practices” about how the reparations-transfer might be withdrawn from the microfinance institution by its recipient or used as collateral for a loan; we leave that question to individual recipients, local and national regulators, and the institution itself. Funded by government-provided shares and perhaps with other community-originated capital as well,<sup>17</sup> the microfinance institution can make loans designed to enhance local economic development. Shareholder-recipients who seek capital would be able to apply for loans from their institution. Satisfactory performance makes it likely that the institution will attract more capital, which in turn generates a larger volume of funds for recipient-owners to spend on their income generating activities.

Although the success or failure of any reparations program will always be debated, governments have a useful quantitative measuring device: they can monitor the performance of each microfinance institution relatively simply by noting indicators before and after the transfer of their payments. Stagnation or dissipation of capital would indicate failure. Increases in variables—the total capital held by the institution, the number of transactions, the size of loans that borrowers take and repay, and rates of external participation—are among the measurements that will support a judgment of success.<sup>18</sup> These increases show that what originated as redress, compensation, rehabilitation, and reintegration went on to become a source of economic development for the country as well.

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<sup>16</sup> We have in mind one share per recipient, but circumstances may call for other arrangements.

<sup>17</sup> See *infra* Part III.

<sup>18</sup> Microfinance based reparations could succeed at the fiscal level and fail by other criteria. See *infra* note 130-37 and accompanying text (reporting findings of adverse effects on women attributed to Grameen microcredit). This metric does, however, have the virtue of clarity.

Before celebrating, however, let us be the first to acknowledge that the plan we advocate faces perils and complications.<sup>19</sup> Choosing the right level of legal controls for the microfinance institution is a central challenge. Like bank and corporation regulation generally, regulation of reparations-funded microfinance institutions can founder on the shoals of both too much shareholder safety (which reduces profit) and too much managerial prerogative (which leads to not enough safety for shareholders).<sup>20</sup> Literatures critical of microcredit raise additional concerns. In response, we make preliminary recommendations about safeguards that government planners can consider.

Hewing to the Symposium theme of “gender-based justice and violence,”<sup>21</sup> we situate female participants in reparations programs at the center of this Article; when we think about a recipient of pecuniary reparations, we have a woman in mind. Misconceptions about male soldiers who suffer and die to protect women-and-children civilians notwithstanding, national conflict frequently imposes an extra measure of suffering on women. Even those of them who are spared gender-based violence (such as rape and sexual slavery) often experience more severe iterations of the harms that affect the whole population.<sup>22</sup> Our enthusiasm for shares in microfinance institutions rests in part on the dangers that alternative modes of pecuniary reparation pose for the women who receive them. Accordingly, women are present as decisionmakers in each of the three parts of the Article.

We begin in Part I by surveying the requirements of international law, which provides an imperative: Nation-states have an obligation under international law to redress certain human rights violations; this redress, in our view, must take material and tangible forms.<sup>23</sup> Because modern international law explicitly equates women’s rights with

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<sup>19</sup> Foremost, the approach is untested: to date, “there is some experience with microfinance in post conflict situations, but none with the use of reparations in building [microfinance institutions] as instruments in a political or economic transition.” Seibel with Armstrong, *supra* note 6, at 679.

<sup>20</sup> Cf. Anita Bernstein, *The 2x2 Matrix of Tort Reform’s Distributions*, 60 DE PAUL L. REV. – (2010) (juxtaposing security against freedom in the context of reforming tort law).

<sup>21</sup> Cite symposium introduction.

<sup>22</sup> Ruth Rubio-Marín, *The Gender of Reparations in Transitional Societies*, in THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 63, 63 (Ruth Rubio-Marín ed., 2009) [hereinafter Rubio-Marín, *Transitional Societies*].

<sup>23</sup> See *supra* note 6 and accompanying text. For a thoughtful disagreement with our stance, see Roht-Arriaza, *supra* note 4.

human rights,<sup>24</sup> our emphasis on women also comports with a mandate of international law. We integrate female recipients into a larger scheme. Building on work by Lisa Magarrell,<sup>25</sup> we contend that although it is impossible for any reparations plan to achieve *restitutio ad integrum*—a return to the past, the unscarred day before each victim suffered a serious violation of her human rights—the microfinance scheme proposed here would go further than any feasible alternative toward the reparation that international law demands, because it reaches the most effective balance between competing poles.

Decisionmakers choosing among alternative modes of reparation would want to know how a base in gender justice and international law can inform the development of a microfinance-based plan. Aspiring to reach these readers, the balance of the Article (Parts II and III) proceeds with attention to implementation. If, as Flaubert was reputed to have written, *le bon Dieu est dans le detail*, then microfinance-based reparations schemes will succeed or fail based on their particulars. Planners who devise reparations must make choices among alternatives. Although sociocultural variation makes it impossible for us to state a set of optimal practices, Part II offers guidance for planners with reference to the microfinance institutions in which distributees of reparations would receive shares.

Gender-aware reparations through microfinance would offer macroeconomic benefits to a nation that extend beyond the gains to individuals and to gender justice that the scheme might achieve. Investment in microfinance moves national economic development forward in several ways. We discuss two main benefits in Part III, the section of the Article that focuses on what a government already committed to reparations, but uncertain of which program design to choose, would want to know.

Foremost, a wide-scale distribution of financial resources in the form of shares in microfinance institutions can enlarge a nation's economy. Financial development has reparative effects of its own: it reduces income inequality and "has a disproportionately

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<sup>24</sup> See *infra* Part I.B.

<sup>25</sup> Lisa Magarrell, *Reparations for Massive or Widespread Human Rights Violations: Sorting Out Claims for Reparations and the Struggle for Social Justice*, 22 WINDSOR Y.B. ACCESS JUST. 85 (2003) (making reference to reparations in Peru). We also build on Bernstein's work. Anita Bernstein, *Tort Theory, Microfinance, and Gender Equality Convergent in Pecuniary Reparations*, in *THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS* 291, 294-95 (Ruth Rubio-Marín ed., 2009) [hereinafter Bernstein, *Tort Theory*].

positive impact on the income of the poor.”<sup>26</sup> Women as distributees are central to this advantage: researchers have documented the wealth and welfare effects of putting money in the hands of women.<sup>27</sup> Around the world, female borrowers have leveraged small loans to build a degree of prosperity.<sup>28</sup> Shifting from microcredit to the outright-transfers version of microfinance that this Article recommends would put to good use the wealth-creating tendencies of microcredit, while greatly reducing the drawbacks that expansive debt installs.

Second, microfinance offers a conduit to attract funding for reparations from a class of under-tapped potential benefactors: entrepreneur-funders who live outside the nation. Monies that these individuals donate to or invest in the program would, *ceteris paribus*, increase its salutary effects.<sup>29</sup> We speculate that a microfinance-based plan would appeal to a cohort that has been under-tapped as a source of financing reparations.<sup>30</sup> To be sure, wealthy persons who earned their fortunes through commercial innovation and risk-taking might also favor other proposals that compete for their attention—not only one-off cash transfers, but also investments in the national infrastructure like the funding of hospitals or schools, which some observers believe can be a form of reparation.<sup>31</sup> Only a microfinance program like the one we propose in this Article extends to these donors the so-called

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<sup>26</sup> Policy Note, Alliance for Financial Inclusion, *Formalizing Microsavings: A Tiered Approach to Regulating Intermediation* 4 (2010), available at <http://microfinanceafrica.net/resources/formalizing-microsavings-a-tiered-approach-to-regulating-intermediation> [hereinafter *Formalizing Microsavings*]. See also *id.* at 3 (“In virtually every country in the world, the existing supply of savings services fall short of the demand for low income populations.”).

<sup>27</sup> M. Shahe Emran, A.K.M. Mahbub Morshed & Joseph E. Stiglitz, *Microfinance and Missing Markets* (Mar. 2007) (available on SSRN.com) (explaining the extraordinary success of microcredit with reference to its repair of flawed labor markets that exclude participation by women).

<sup>28</sup> Isobel Coleman, *The Better Half: Helping Women Help the World*, 89 FOREIGN AFF. 126, 128 (2010) (“Today, most microfinance organizations also explicitly focus on women – not only because women are statistically more likely to be poor than men but also because women tend to use any marginal increases in their incomes to invest in their families’ nutrition, health, and education.”).

<sup>29</sup> See Mohammad Yunus, *How Donor Funds Could Better Reach and Support Grassroots Microcredit Programs Working Towards the Microcredit Summit’s Goal and Core Themes 6-8* (June 1999) available at <http://www.microcreditsummit.org/papers/donorpaper.pdf> (identifying structural impediments to the delivery of loan capital to poor borrowers).

<sup>30</sup> For an overview of the funding difficulty, see Alexander Segovia, *Financing Reparations Programs*, in THE HANDBOOK OF REPARATIONS 650 (Pablo de Greiff ed., 2006).

<sup>31</sup> For example, the Gates foundation invests in health care and preventative medicine. See also *infra* note 190 and accompanying text (discussing Gates’s endorsement of microfinance as well).

sincerest flattery of emulating them, however.<sup>32</sup> Because taking an entrepreneurial approach to reparations identifies a nation as committed to market-oriented economic growth as well as nonpecuniary healing for its citizens, the strategy would welcome foreign for-profit investors along with philanthropists to its circle of funders. Less wealthy individuals could participate as both donors and investors, contributing less money per capita but in the aggregate widening a transnational base of support.

#### I. THE MANDATE OF INTERNATIONAL LAW

As we review in this Part what international law demands with respect to reparations, we emphasize points of consensus rather than the more controversial interpretations of this remedial device. We intend no derogation of the varied arguments that scholars and activists have made in favor of expanding national obligations to repair.<sup>33</sup> Because we are examining reparations as a technology already in use,<sup>34</sup> rather than a right and obligation that could be extended to new categories of recipients, we focus on the uncontroversial requirements of international law.

The position occupying the first section below—that reparations ought to be paid in a pecuniary form to victims of serious human rights violations—is widely but not universally shared. Critics of pecuniary reparations, who acknowledge that international law recognizes payments to individuals among the many modes of reparation that states can undertake following national crisis, have expressed doubt that this form achieves real repair.<sup>35</sup> Our argument in this section—that among the ways to distribute pecuniary reparations, microfinance fits best with the reparative mandate of international law—may be of particular interest to readers inclined to oppose the pecuniary mode. The need to recognize gender in reparative schemes, which we discuss below in the second section, is much less controversial.

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<sup>32</sup> See CHARLES CALEB COTTON, *LACON: OR, MANY THINGS IN FEW WORDS, ADDRESSED TO THOSE WHO THINK 127* (1822) (referring to imitation as “the sincerest of flattery”).

<sup>33</sup> For example, some writers have contended that violations need not be “serious” or “gross” to warrant a remedy in international law; others advocate widening responsibility to include more remote forms of state action like third-party interference in the governance of another country. Roht-Arriaza, *supra* note 4, at 163-64 (citations omitted).

<sup>34</sup> See *THE HANDBOOK OF REPARATIONS* (Pablo de Greiff ed., 2006) (documenting twentieth-century experiences with reparations).

<sup>35</sup> See Bernstein, *Pecuniary Reparations, supra* note 6, at 10-11 (reviewing sources).

### A. Pecuniary Reparations as a Technology of International Law

International law sources for the mandate of reparations are manifold. Treaties that recognize an obligation and entitlement to reparations include the American Convention on Human Rights, entered into force in 1978; the International Covenant on Civil and Political Rights of 1976; and the International Convention on the Elimination of All Forms of Racial Discrimination of 1969.<sup>36</sup> The United Nations has issued proclamations on the necessity of reparations, notably in its foundational Universal Declaration of Human Rights of 1948.<sup>37</sup> These sources emphasize the uncontroversial nature of obligation. One resolution approved by the General Assembly in 2006, for example, described its call for reparations plans—commended to include “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”<sup>38</sup>—as a restatement of “existing” law, rather than the enactment of new entitlements.<sup>39</sup>

1. *The pecuniary aspect.* Applied to human rights violations, the term “reparations” contains a multitude of expressions and forms. Pablo de Greiff, editor of the leading reference work on this subject, has expanded on terms from the General Assembly resolution just noted. In this context *restitution* refers to restorations and reinstatements for victims; *compensation* refers to mental harm and perhaps “moral injury;” *rehabilitation* covers the rendering of medical and psychological care; *satisfaction* is an especially broad concept that includes such measures as apologies, verifications of facts, full disclosure of the truth, and administrative or judicial sanctions against perpetrators; *guarantees of nonrecurrence* recognize the future as well as the past.<sup>40</sup>

Our focus in this Article on microfinance emphasizes the pecuniary elements of this recitation. Elsewhere we have argued that reparations schemes that transfer wealth can achieve nonpecuniary gains for nations and societies.<sup>41</sup> We will expand on these points presently. Here we find an imperative to make payments to individuals in de Greiff’s

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<sup>36</sup> *Id.* at 7.

<sup>37</sup> Universal Declaration of Human Rights, G.A. Res. 217A, art. 8, P 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>38</sup> G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

<sup>39</sup> *Id.*

<sup>40</sup> Pablo de Greiff, *Justice and Reparations*, in THE HANDBOOK OF REPARATIONS 451, 452 (Pablo de Greiff ed., 2006) (emphasis in original)[hereinafter de Greiff, *Justice*].

<sup>41</sup> See sources cited *supra* note 6.

warning about the dangers of “blood money,” on one hand, and “cheap talk,” on the other.<sup>42</sup> “Blood money” in reparations expresses in metaphor what a payor gives when it doles out cash while refusing to acknowledge the crisis that made its payment morally necessary. When made by a reparations program, such a transfer not only limits the potential effects of repair but also suggests that the state wishes to buy passivity or silence in response to the grievances of citizens.<sup>43</sup> We recognize the denunciation of “blood money,” and take as given that a reparations plan crafted pursuant to this Article’s stance would also include nonpecuniary recognition.<sup>44</sup>

More central to this Article is the danger of “cheap talk” quasi-reparations, a public display that condemns the bad past or makes vague promises about the bright future but withholds restitution, compensation, and reintegration from individuals. Separately we have argued at length that payments to individuals, separate from development-minded spending to enhance a national economy, give to reparations programs a genuine and necessary recognition of past wrongs done to individuals.<sup>45</sup> Other observers of particular initiatives have shared in this judgment, commenting on the necessity (along with the insufficiency, of course) of paying money in some form to individuals whenever governments seek to declare convincingly that they repudiate the human rights violations of the past.<sup>46</sup>

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<sup>42</sup> De Greiff, *supra* note 40, at 461.

<sup>43</sup> See Jaime E. Malamud-Goti & Lucas S. Grosman, *Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies*, in THE HANDBOOK OF REPARATIONS 539, 555-56 (Pablo de Greiff ed., 2006) (reporting this perception in Argentina when President Carlos Menem announced an administrative reparations program shortly after announcing a pardon to human rights violators).

<sup>44</sup> E.g. an apology, a truth commission, public memorials. This form of nonpecuniary recognition has become customary in reparations programs. See Naomi Roht-Arriaza, Book Review, 56 AM. J. COMP. L. 233, 233 (2008) (noting that more than thirty truth commissions have been formed following national conflicts) [hereinafter Roht-Arriaza, Book Review].

<sup>45</sup> Seibel with Armstrong, *supra* note 6, p. 686 (warning of “development policies that masquerade as reparations programs” and noting that “governments will significantly harm the political and social aims of reparations if they substitute the provision of clean water for reparations programs”); Bernstein, *supra* note 6, at p. 297 (arguing that payments to individuals establish “ledgers” that “affirm an ideal of governmental responsibility”).

<sup>46</sup> Brandon Hammer, *Narrowing the Macro and Micro: A Psychological Perspective on Reparation in Societies in Transition*, in THE HANDBOOK OF REPARATIONS 560, 567 (noting that there is “research to show that many victims (of criminal violence) want reparations in the form of a sincere apology from their offender, as well as compensation from them for damages...”); Ruth Rubio-Marín, *Gender and Collective Reparations in the Aftermath of Conflict and Political Repression*, in THE GENDER OF REPARATIONS 381, 396-99 (Ruth Rubio-Marín ed., 2009) (gathering illustrations of pecuniary investments that a government could make in recognition of harms to women as a collective); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and*

Advocating reparations in the form of microfinance, we continue our response to pecuniary-skeptics—writers who have noted the shortcomings of money as a medium of repair—by distinguishing shares, which constitute ownership, in microfinance institutions from the cash payments that these critics have in mind when they fault pecuniary schemes. We share many of the familiar misgivings about one-off transfers as a mode of reparation. Safety is a major difficulty. With an estimated 2.5 billion adults around the world lacking access to banks,<sup>47</sup> many persons have no secure place to store a disbursement from their government. In the past, solitary cash payments distributed as reparations have generally been too small to change the life conditions of recipients yet big enough to provoke resentments, strife, and money-grabbing by friends and relatives.<sup>48</sup>

One-off payments can be particularly dangerous and unavailing to women. Post-conflict economic crisis can cut women off from whatever access to banks they may have had, make their possession of cash more dangerous, and worsen poverty in the nation, which in turn could increase the likelihood that male relatives or partners of these recipients would arrogate for their own use the monies paid to women. Certain national laws and customs do not recognize full rights of women to hold traditional forms of property like land or livestock,<sup>49</sup> making it harder for women to turn their cash into something they want and can control. Gender aside, even if recipients can hold onto their one-off payments long enough to spend them on things they like and value, their benefits to individuals—not to mention the larger society—is likely to be short-lived and far from sustainable.<sup>50</sup> A one-off direct payment will have little effect on reintegration or rehabilitation.<sup>51</sup> It does not invite a recipient into governance, deliberation, or civic life.

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*African American Claims*, 40 B.C. L. REV. 477, 517-18 (1998) (reporting that although Japanese-American recipients of pecuniary reparations did not experience these payments as compensation for their “lost freedom, property, livelihood, or the stigma of disloyalty,” they believed that the appropriation of money showed that the U.S. government sincerely sought repair).

<sup>47</sup> Jennifer L. Schenker, *Mobile Money for the Unbanked*, INFORMILO, Dec. 7, 2009, available at <http://www.informilo.com/20091207/mobile-money-unbanked-212>

<sup>48</sup> Roht-Arriaza, Book Review, *supra* note 44, at 237.

<sup>49</sup> See Jamie Crook, Comment, *Promoting Peace and Security in Rwanda Through Fair and Equitable Land Rights*, 94 CALIF. L. REV. 1487, 1505 (2006) (describing laws and customs whose effects persist); Rachel Rebouché, Note, *Labor, Land, and Women’s Rights in Africa: Challenges for the New Protocol on the Rights of Women*, 19 HARV. HUM. RTS. J. 235, 236-37 (2004). Laws and customs that impede women’s travel have a similar effect on their ability to gain from pecuniary reparations.

<sup>50</sup> Seibel, *Reparations Shareholders*, *supra* note 6, at 1.

<sup>51</sup> See Rubio-Marín, *Transitional Societies*, *supra* note 22, at 109-13 (emphasizing these goals).

2. *Individual and collective justice.* At a policy level, one central difficulty for reparations following a national crisis is the tension between two polar ends: individual justice and collective justice. On one hand, victims who have experienced serious human rights violations in a time of national crisis were hurt as individuals, each person experiencing her or his own trauma in a unique way. On the other hand, victims also suffered as members of groups or social aggregates.<sup>52</sup>

A focus on individual justice must strain to include the communal, tribal, familial, and national elements of the suffering that is recognized. The alternative, a focus on collective justice, contains these recognitions but lacks particular attention to the unique human being who experienced a violation of human rights. Plans that distribute money or social supports to individuals based on specific past acts of official wrongdoing rather than on citizens' needs or macroeconomic national policy sow dissension when politicians have to choose between dishonoring the wrong ("You, citizen, may not receive any reparation for the violation of your human rights because there won't be enough hospitals, or schools, or housing to go around if we pay you") and dishonoring claims for subsistence ("You, citizen, may not have access to the hospital, or school, or housing you need because we had to spend our money on reparations to note wrongdoing that injured a different citizen").<sup>53</sup>

The remedial difficulty of honoring both individual and collective harm becomes explicit when the planning nation tries to state what exactly it is trying to repair. In her analysis of reparations in Peru, published soon after the plan was announced in 2003, Lisa Magarrell broached what she called "the question of consequences vs. violations as a starting point."<sup>54</sup> This dichotomy overlaps with the more familiar contrast between individual and collective justice but adds a tension of its own. Magarrell, who worked with the Peruvian Truth and Reconciliation Commission to devise a reparations scheme, reports that the Commission shifted away from consequences, which in a poor country proved too hard to separate from wider social problems.<sup>55</sup> Focusing on violations raised problems of its own: Magarrell noted that the "most politically attractive" features in the reparations

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<sup>52</sup> Max du Plessis, *Reparations and International Law: How Are Reparations to Be Determined (Past Wrong or Current Effects), Against Whom, and What Form Should They Take?*, 22 WINDSOR Y.B. ACCESS JUST. 41, 54 (2003) (reviewing the dilemma with reference to slavery reparations).

<sup>53</sup> This response arose in Peru. Magarrell, *supra* note 25, at 93-94.

<sup>54</sup> Magarrell, *supra* note 25, at 91.

<sup>55</sup> *Id.* at 93-95.

scheme are “those that look like development programs, and that—either coincidentally or purposefully—thus lose some of their reparative force.”<sup>56</sup>

It becomes tempting at this point to throw up one’s hands and abandon pecuniary reparations as incoherent and impossible. Like the gap between individual and collective justice, the gap between wrongdoing and consequences indicates that at least by one of these measurements, pecuniary reparations will always price the injury wrong and fail to attain full repair. Responses to human rights violations distributed in a form that does not include payouts to individuals conveniently escape the individual-collective problem in a way that our pecuniary mode of reparations cannot achieve. A truth commission, for example, can have a plenary agenda to uncover and account for wrongs at many levels. Pablo de Greiff’s “cheap talk,” being cheap, can usually be lavished on yet another individual or group at little marginal cost. Pecuniary reparations, however—whether made in the form of one-off payments, investments in national development, the microfinance approach that we advocate here, or any other mode—all operate under the precept of scarcity. Every expenditure precludes another expenditure; one mechanism for attaining repair cannot coexist with all others. Instead of despairing, however, we find in this discussion an outline of what a pecuniary reparations plan ought to provide.

We start by repeating the warning about cheap talk. Words alone do not effect repair. Next, we note individual and collective justice as pursued by historically recent reparations plans.

Nations typically do not pay out reparations money pursuant to both individual complaints in their courts and a centralized administrative scheme. Most countries that have implemented pecuniary reparations have favored standardized payments. This choice emphasizes collective rather than individual justice.<sup>57</sup> Consistent with these experiences, we agree that national governments undertaking reparations must install a

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<sup>56</sup> *Id.* at 97. Magarrell’s observation was prescient: as of 2009, five years after the publication of her paper, the Peruvian government had appropriated only a small proportion of the funds needed to effect its reparations plan. Internal Displacement Monitoring Centre, Peru: Reparations Begun But IDPS Excluded, Jan. 8, 2009, at 6 (available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/EA59E9CD1071F245C125753800520C76/\\$file/Peru\\_Overview\\_Jan09.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/EA59E9CD1071F245C125753800520C76/$file/Peru_Overview_Jan09.pdf)).

<sup>57</sup> Roht-Arriaza, *supra* note 4, at 165-77 (reviewing reparations debates in Argentina and describing a successful tort claim, brought by Daniel Tarnopolosky, as well as a government scheme).

centralized administrative scheme rather than limit redress to individual initiative. In relatively wealthy countries, a claimant may have access not only to these administrative plans but to courts that use tort principles of responsibility and redress to evaluate what happened to them as individuals. When national governments pay out reparations to social aggregates, however, they cannot apply tort reasoning to form individually tailored remedies.<sup>58</sup>

Carrying out the mandate of international law would aggregate categories of injuries and claimants, setting out to treat these like cases alike.<sup>59</sup> At the same time a reparations program that sets out to repair human rights violations ought to provide for the initiative and freedom of individuals. This measure of individual justice offers potential gains to welfare, because when a government program can be described credibly as not just reparations but national economic development, it becomes easier for politicians to enact, finance, and defend.<sup>60</sup>

Pecuniary transfers that are less liquid than cash, and less familiar to recipients than the chattels that one-off payments can buy, add a collective-justice element to an individual's transfer payment. A pecuniary reparations scheme whose payments are relatively illiquid prevents recipients from consuming their payments as quickly as they might wish, but offers benefits that outweigh this deficiency. At the individual level, illiquidity enhances the security of the conveyance and thus the likelihood that each recipient will be able to enjoy it; at the collective level, recipients pool and leverage their payments in ways relatively likely to increase wealth and improve social conditions.

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<sup>58</sup> Malamud-Goti & Grosman, *supra* note 43, at 551 (arguing that ideally the nation undertaking reparations should provide both administrative compensation and access to courts that apply tort principles).

<sup>59</sup> The tension between consequences and violations, see *supra* notes 48-49 and accompanying text, means that "like cases alike" will necessarily invite debate over which classification outweighs the other. This problem, however, is present in any approach that mixes law and justice. On the presence of "like cases alike" in world law, see Olav A. Haazen, Book Review, 38 HARV. INT'L L.J. 587, 599 (1997) (arguing, in a review of *Precedent in the World Court*, authored by a judge of the International Court of Justice, that this principle is part of international law); Frederick Schauer, *Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy*, 3 PERSP. ON PSYCHOL. SCI. 454, 458 (2008) (arguing that the precept derives from Aristotle).

<sup>60</sup> See generally Roht-Arriaza, Book Review, *supra* note 44, at 238 ("Governments tend to like the idea of collective reparations because they are easier to fold into more general development programs and because they allow the government to downplay the political significance of reparations."); Magarrell, *supra* note 25, at 97.

B. Integrating Gender Justice into Reparative Schemes: The Mandate, Continued

Gender awareness makes these desired outcomes—gains for both individuals and collectives—more likely to ensue. In these observations about gender, we continue our focus on the non-controversial precepts of international law and thus pass over numerous debates in the reparations literature, including whether sex discrimination violates customary international law,<sup>61</sup> whether nations need to take extra steps to ensure women's access to pecuniary modes of redress,<sup>62</sup> and whether women are entitled to recompense for "indirect" or "secondary" harms relating to harms that their partners or children suffered.<sup>63</sup> In other words, we do not join discussions over what types of affronts constitute actionable violations; we assume that reparations planners have resolved the definitional task of which injuries to cover.

That national reparations plans must recognize the experiences and the human agency of female citizen-recipients has, at least at the level of principle, no opposition. Resolutions adopted by the Security Council of the United Nations over the last decade have declared the necessity of including women as participants when nations rebuild after conflict. Superseding an older conception of women as victims and vulnerable subgroups, these instruments put women at the center of repair work: women are subjects, not just the objects or recipients of actions by others.

The first (and most innovative) of the series, Security Council Resolution 1325, continued an agenda of gender mainstreaming that had started at the fourth World Conference on Women in Beijing.<sup>64</sup> Resolution 1325 insisted on the inclusion of women in peace-brokering even when women are not direct parties to the conflict. Translated into a hundred languages, this document made its way successfully into other applications, including petitions by women for expenditures and national implementation legislation.<sup>65</sup> Successor resolutions by the Security Council built on the ambition of Resolution 1325 by

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<sup>61</sup> Rubio-Marín, *Transitional Societies*, *supra* note 22, at 83-84 (summarizing points of disagreement).

<sup>62</sup> *Id.* at 106.

<sup>63</sup> *Id.* at 91-93.

<sup>64</sup> Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT'L L. 759, 788 (2007); Dianne Otto, *Power and Danger: Feminist Engagement with International Law Through the UN Security Council* 5 (n.d.) available at [ssrn.com](http://ssrn.com).

<sup>65</sup> Otto, *supra* note 64, at 7, 12.

adding measures to ensure accountability,<sup>66</sup> calls for “redress” for harms to women’s human rights,<sup>67</sup> and reminders to heed the socio-economic claims and needs of women in post-conflict programs.<sup>68</sup> Calls for gender quotas and parity in international assemblies remind participants of what women contribute as leaders and decisionmakers.<sup>69</sup>

During the last decade, the General Assembly of the United Nations joined in this endorsement of women as subjects and participants in post-conflict repair.<sup>70</sup> In 2003, for the first time, it mandated the preparation of an in-depth study of violence against women and the identification of best practices to address prevention and repair.<sup>71</sup> Its elaborate “Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Human Rights Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” adopted in 2005, included a non-discrimination clause and several references to the harms that women experience in wide-scale violations of international human rights.<sup>72</sup>

The agenda of mainstreaming women’s claims and experiences moves forward when international law connects them to universal principles. When the International Criminal Court recognized rape in 1997 “as a war crime, a crime against humanity, and an act of genocide,”<sup>73</sup> it widened classifications that in the past had implicitly barred women. Similarly, women leaders were central to the formation of the International Criminal Tribunal for the Former Yugoslavia, making a deep imprint there: for example, women in leadership positions noticed early on how few women had testified at other tribunals, and took steps to recruit female witnesses.<sup>74</sup> These women spoke effectively not only about rape, a subject on which they were expected to testify, but a range of experiences and encounters.<sup>75</sup>

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<sup>66</sup> SC Res 1820, Jun. 19, 2008.

<sup>67</sup> SC Res 1888, Sept. 30, 2009 [6]. This resolution was sponsored by the United States.

<sup>68</sup> SC Res 1889, Oct. 5, 2009.

<sup>69</sup> Rosenblum, *supra* note 64, at 800.

<sup>70</sup> GA Res 58/142 (2004).

<sup>71</sup> <http://www.un.org/womenwatch/daw/vaw/violenceagainstwomestudydoc.pdf> p. 10.

<sup>72</sup> G.A. Res. 60/147, U.N. Doc A/RES/60/147 (Mar. 21, 2006).

<sup>73</sup> Beth Van Schaack, *Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson*, 17 AM. U. J. GENDER SOC. POL’Y & L. 361, 370 (2009).

<sup>74</sup> Julie Mertus, *When the Fighting Stops: When Adding Women Matters: Women’s Participation in the International Criminal Tribunal for the Former Yugoslavia*, 38 SETON HALL L. REV. 1309-13 (2008).

<sup>75</sup> *Id.* at 1309.

If international law has progressed by, *inter alia*, demonstrating the ways in which women and men are not different from each other, then policymakers heeding the mandate of international law ought to extend the mainstreaming mandate initiated in Beijing at the World Conference and continuing through international law instruments and institutions. A reparations scheme that establishes women as stakeholders—and also transfers money for them to own and control—advances the agenda. Women who manage their property demonstrate that the power to save, spend, and invest assets belongs to all human beings regardless of gender.

## II. MICROFINANCE-BASED REPARATIONS: APPLICATIONS

Having acknowledged that paying reparations through microfinance is an untested idea,<sup>76</sup> we endeavor to be cautious in this summary of how and why a nation deciding among alternative reparations plans should choose the path we recommend. We start below by reviewing the microfinance literature at a general level, seeking the most conservative projection of benefits to the implementing nation. We conclude that our proposal offers three distinct gains. Next we consider regulation of the microfinance institutions that participate in the national program; we recommend a light hand. In the third section, we consider harms to women that critics have ascribed to microcredit. Even though the microfinance we advocate is not microcredit, this literature pertains to our survey of applications, and has influenced our recommendations about program design.

### A. Extending the Microfinance Record

When writing about microfinance, commentators often begin with the truism that it is “no panacea,”<sup>77</sup> and then proceed to divide into skeptical and enthusiastic camps.<sup>78</sup> We put ourselves in a cautious wing of the enthusiastic sector. Postponing for now the macroeconomic question of whether microfinance builds national wealth,<sup>79</sup> we note three improvements to individuals’ circumstances that planners can reasonably expect to occasion when they install a microfinance-based reparations scheme.

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<sup>76</sup> See *supra* note 18 and accompanying text.

<sup>77</sup> Bernstein, *Pecuniary Reparations*, *supra* note 6, at 26 n.77 (citing instances).

<sup>78</sup> For a summary of negative commentary on microcredit, see Mac Margolis, *Lining Up the Loan Angels*, NEWSWEEK, Apr. 9, 2007; for a comprehensive critique, see MILFORD BATEMAN, *WHY DOESN'T MICROFINANCE WORK? THE DESTRUCTIVE RISE OF LOCAL NEOLIBERALISM* (2010).

<sup>79</sup> See *infra* Part III A.2.

First, the creation or strengthening of local financial institutions would offer a secure place for victims of human rights violations to store their reparations payments and the savings that these payments can generate.<sup>80</sup> The large majority of reparations-recipients are poor people, and at present many of the world's poor lack access to such an institution, even the humblest kind.<sup>81</sup> Studies of the savings and other financial practices of poor persons around the developing world report that the poor want a safe place to keep their savings much more than they want loans.<sup>82</sup> Expanding this kind of outreach to people who are cut off from bank accounts benefits not only the enterprise-minded, who are probably a minority in every geographical region or set of reparations recipients, but also ordinary people suffering from present insecurity on top of the serious human rights violations in their recent past.<sup>83</sup>

Second, a strengthened or newly created financial institution makes credit available to borrowers who may have been written off as unbankable.<sup>84</sup> Despite publicity surrounding microfinance as a worldwide phenomenon, researchers agree that large numbers of people remain out of its reach.<sup>85</sup> Experts on microcredit have contended that the supply of money for loans—comprised of savings and equity and including retained earnings, donor and investor funds, and domestic commercial bank credit accessible to microfinance institutions, self-help groups, and individuals—is too low and ought to be expanded.<sup>86</sup> This claim about an inadequate supply commends flexibility in response. The

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<sup>80</sup> Seibel with Armstrong, *supra* note 6, at 678.

<sup>81</sup> See *supra* note 47.

<sup>82</sup> STUART RUTHERFORD WITH SUKHWINDER ARORA, *THE POOR AND THEIR MONEY* 1 (2d ed. 2009). In response to this deficiency, Rutherford founded a micro-savings institution called Safe Save. Employees of Safe Save, all women, make daily visits to depositors, collecting sums (as small as 1.5 cents a day) and recording these savings in hand-held computers. See [www.safesave.org](http://www.safesave.org).

<sup>83</sup> See generally DARYL COLLINS ET AL., *PORTFOLIOS OF THE POOR: HOW THE WORLD'S POOR LIVE ON \$2 A DAY* 3 (2009) (noting that "poor households are frustrated by the poor quality—above all the low reliability—of the instruments that they use to manage their meager incomes").

<sup>84</sup> Seibel with Armstrong, *supra* note 6, at 678.

<sup>85</sup> *Formalizing Microsavings*, *supra* note 26, at 1; M.J. Olujide, *Assessment of Micro-Credit Supply by Country Women Association of Nigeria (COWAN) to Rural Women in Ondo State, Nigeria*, 4 *WORLD J. AGRICULTURAL SCIENCES* 79, 83 (2008) (making the same observation in a particular national context).

<sup>86</sup> See, e.g., Mark Hannam, *Life, Liberty, and Access to Credit*, Jun. 25, 2010, available at <http://oecdinsights.org/2010/06/25/life-liberty-and-access-to-credit> (making a human rights argument); Yunus, *Donor Funds*, *supra* note 27, at 6-8.

The problem runs deeper for women who want to borrow money:

microfinance-based mode of reparations gathers financial resources together but does not command that it go to loans; our direction responds to demand on the ground, with reparations-recipients acting as shareholders empowered to disburse money, and as depositors.

Third, a plan that invites the recipients of reparations into the governance of a local financial institution mobilizes their capacity for self-help, providing them with a material base of power on which they can build.<sup>87</sup> Again, recall the context of a ravaged nation. Self-help is the backbone of any wartime and postwar economy; recipients will have already been engaged in it when their payments arrive. Microfinance-based reparations in this sense align with other stability-enhancing measures considered and used by reparations planners, including education and skills training.<sup>88</sup> Autonomy and commercial participation become more available to recipients, beginning when peers in the community communicate about income-generating activities and other coping strategies.

Measures that strengthen self-help extend beyond meeting the short-term financial needs of recipients and their families. Because the reparations scheme shifts money from the central government toward diverse microfinance institutions that may have ties to larger entities, it links recipients to local centers of power. This network provides counterweight to a national government that has been at best weak, if not malevolent, in the recent past.<sup>89</sup> Self-help in this sense reaches to the future, offering to recipients a brighter prognosis for the economic investments they may choose to make.

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*Why it is difficult for women to borrow from banks?* Rural women in particular find it difficult to borrow from banks because most do not have bank accounts, they have no collateral to present to the bank, and many women do not know the procedures for accessing bank loans. As they explained, while men inherit land and other property which they can use as collateral, women do not inherit property. They also said that women need their husband's consent to borrow money from the bank.

Christiana E.E. Okojie et al., *Institutional Environment and Access to Microfinance by Self-Employed Women in the Rural Areas of Edo State, Nigeria*, INT'L FOOD POLICY RES. INST., Sept. 2009, available at <http://www.ifpri.org/sites/default/files/publications/nsspbp03.pdf>.

But see Thomas Dichter, *A Second Look at Microfinance*, CATO INST., Feb. 15, 2007, available at <http://www.cato.org/pubs/dbp/dbp1.pdf> (arguing that the poor seldom need or use loan capital to build businesses).

<sup>87</sup> Seibel with Armstrong, *supra* note 6, at 678; cf. Rubio Marín, *Transitional Societies*, *supra* note 22, at 109-110 (noting that because women often start out deprived, they prefer "reintegration and rehabilitation" over "restitution" within reparations schemes).

<sup>88</sup> *Id.* at 113.

<sup>89</sup> Seibel with Armstrong, *supra* note 6, at 679; Bernstein, *Tort Theory*, *supra* note 25, at 309-10.

Our roster of expected benefits based on past experiences with microcredit is conservative, as befits a proposal that contains risk. It does not indulge wishful thinking that implementing the plan will create national wealth on a substantial scale. We do happen to believe that making reparations through microfinance generates wealth, stability, and sustainability at a local level,<sup>90</sup> but we eliminate these hypothetical gains in the present discussion. If the plan is implemented, it will expand access to savings accounts, increase the supply of credit, and provide an opportunity for vulnerable people to gain some power.

Having outlined an upside in conservative terms, we turn now to the downside. The version of microfinance that we advocate in this Article—outright transfers rather than loans—eliminates many but not all of the detriments and burdens that microcredit has wrought.<sup>91</sup> Our proposal can be viewed as only one step away from microcredit: The microfinance institutions that we wish to see launched or expanded as part of a reparations program operate first by absorbing share capital and accepting deposits, but then by lending money. To the extent that debt harms the poor (or at least some of them, the imprudent or unfortunate), we are advocating more harm.

Several distinctions separate our proposal from microcredit as practiced, however, and extend the microfinance record in a constructive new direction. First, the transfer we describe honors a claim for repair of a human rights violation. Because governments disburse payments to classes of individuals based on criteria related to the harms these people suffered, the problem of pressure by relatives to make an application lessens; receiving this money requires little or no entrepreneurial application. Prerogatives for

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<sup>90</sup> See *infra* Part III.A.

<sup>91</sup> Debt has a burdensome aspect. See Margolis, *supra* note 78 (quoting Judge Richard Posner: “The idea of borrowing one’s way out of poverty is passing strange.”). Even if individuals can indeed borrow their way out of poverty, loans generate pressures on these individuals to repay debt that add their own dangers. See Rashmi Dyal-Chand, *Reflections in a Distant Mirror: Why the West Has Misperceived the Grameen Bank’s Version of Microcredit*, 41 STAN. J. INT’L L. 217, 253-64 (2005) (describing aggressive tactics to compel repayment to the Grameen Bank, as imposed by both bank employees and members of the borrowing “solidarity circle” that has responsibility to repay the loan). Microcredit programs that target female borrowers created gender-based detriments in Bangladesh. See *id.* at 264 (reporting that male relatives coerce women to take out loans for which only women, the nominal borrowers, are liable); *id.* (reporting increased verbal aggression and domestic violence by male relatives against female micro-borrowers, although the evidence is mixed). See also Bernstein, *Tort Theory*, *supra* note 25, at 321 (speculating that a woman struggling to repay a microloan “might feel compelled to draft her children into her struggling business; under this pressure, a daughter would probably look more valuable to her mother as a housekeeper and child-minder than a student continuing her education.”).

individuals as shareholders of microfinance institutions also reduce the documented potential drawbacks of microcredit. Whereas taking out a loan obliges a borrower to pay back the principal along with interest—and in the context of famed banks like Grameen adds nonpecuniary tasks and pressures—our proposal imposes no new obligations on a recipient. As a shareholder and depositor she need not borrow money nor involve herself in any loan decisions.

## B. Designing Microfinance Institutions to Implement Reparations

### 1. *Upgrading; Linking to Larger Financial Institutions*

Crises that cause institutions of a nation to collapse usually leave standing indigenous entities that can form a base for economic development as well as reparations.<sup>92</sup> Planners can work with these institutions. Because economic development fosters socially progressive development as well,<sup>93</sup> strengthening smaller and less formal business affiliations comports with the reparative project.

We have spoken of microfinance institutions as occupying three tiers. Formal institutions are or resemble the banks, insurance companies, and other financial services providers familiar to the affluent West. These entities register as corporations and financial institutions under the law and are regulated and supervised by a central bank or bank superintendency. Informal institutions, at the other end of the spectrum, operate away from regulation and state scrutiny.<sup>94</sup> Officially unknown to the government, they respond to demand from poor people and provide variety, their main products the gathering of small deposits along with small loans and, to a lesser extent, emergency and funeral assistance.<sup>95</sup> Prominent among informal institutions are rotating and non-rotating savings and credit groups or associations, which are usually governed by traditional law.<sup>96</sup> In the middle is the semiformal tier. Semiformal microfinance institutions are usually

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<sup>92</sup> Seibel with Armstrong, *supra* note 6, at 692.

<sup>93</sup> See *supra* note 23 and accompanying text.

<sup>94</sup> For an alternative approach to classification, see Mark Schreiner, *Informal Finance and the Design of Microfinance*, 11 DEV. IN PRACTICE 637 (2000) (using “microfinance” to refer to what we call the “formal” level, and “informal finance” for what we call the informal tier of microfinance).

<sup>95</sup> BRIGID HELMS, ACCESS FOR ALL: BUILDING INCLUSIVE FINANCIAL SYSTEMS 35-38 (2006).

<sup>96</sup> Private moneylenders also fall in the informal tier. Because in this Article we focus on self-help, however, we exclude them from our version of the category.

registered with some government agency but not subject to financial regulation and supervision. Nongovernmental credit organizations, also known as “credit NGOs,” dominate the semiformal category.<sup>97</sup>

In the developing world, informal institutions have grown and diversified to provide more financial services to a varied clientele, side by side with the formal and semiformal sectors.<sup>98</sup> Conventional wisdom in the development literature has long extolled the informal tier for its flexibility, responsiveness, low transaction costs, inclusiveness to women, and the ability to build collateral from non-traditional sources like community participation.<sup>99</sup> Although we share this appreciation, we nevertheless recommend the *upgrading* of informal institutions to semiformal or formal levels as an aim for microfinance-based reparations.<sup>100</sup> Regulation and supervision, though costly to the entity, enhance its prospects for sustainability and growth.<sup>101</sup> Increased formality alleviates the categorical detriments of informal microfinance institutions, which include constraints on loan amounts (debts must be small and short-term), an absence of deposit insurance, and, for borrowers and depositors, limited recourse to legal systems to enforce contracts.<sup>102</sup>

In a “policy note” called *Formalizing Microsavings*,<sup>103</sup> published in 2010 the Alliance for Financial Inclusion continued this attention to institutional tiers. *Formalizing Microsavings* urges national governments to create a special license to cover those microfinance institutions that offer savings accounts, different from the one that commercial banks now use.<sup>104</sup> This proposed new license provides shareholder depositors

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<sup>97</sup> Seibel with Armstrong, *supra* note 6, at 690.

<sup>98</sup> MICHAEL T. MARX, GEWOHNHEITSRECHT ALS ENTWICKLUNGSPOTENTIAL: SELBSTHILFEORGANISATIONEN IN NIGERIA (1990) (“Customary Law as Development Potential: Self-Help Organizations in Nigeria”).

<sup>99</sup> Schreiner, *supra* note 94, at 638.

<sup>100</sup> Elsewhere Seibel has provided more descriptive detail about how informal financial institutions grow into more formal regulation. See HANS DIETER SEIBEL & MICHAEL T. MARX, DUAL FINANCIAL MARKETS IN AFRICA: CASE STUDIES OF LINKAGES BETWEEN INFORMAL AND FORMAL FINANCIAL INSTITUTIONS (1987); Hans Dieter Seibel, Upgrading, Downgrading, Linking, Innovating: Microfinance Development Strategies—A Systems Perspective, Economics and Sociology Occasional Paper No. 2371, Rural Finance Program, Dept. of Agricultural Economics, The Ohio State University (June 1997) (available at [http://www.uni-koeln.de/ew-fak/aef/working\\_papers.htm](http://www.uni-koeln.de/ew-fak/aef/working_papers.htm)); Hans Dieter Seibel, *Saving for Development: A Linkage Model for Informal and Formal Financial Markets*, 4 QUARTERLY J. INT’L AGRICULTURE 290 (1985).

<sup>101</sup> Seibel with Armstrong, *supra* note 6, at 693; HANS DIETER SEIBEL, FINANCIAL SYSTEMS DEVELOPMENT AND MICROFINANCE: VIABLE INSTITUTIONS, APPROPRIATE STRATEGIES AND SUSTAINABLE FINANCIAL SERVICES FOR THE MICROECONOMY (1996).

<sup>102</sup> Schreiner, *supra* note 94, at 638-39.

<sup>103</sup> *Formalizing Microsavings*, *supra* note 26.

<sup>104</sup> *Id.* at 5.

with more security than they now receive. *Formalizing Microsavings* encourages greater stringency for the special license with respect to some activities and risks, greater leniency with respect to others.<sup>105</sup>

Without commenting on the particulars of what *Formalizing Microsavings* recommends, some of which contain more detail than we are prepared to defend, we note that its proposed special license presents a source of upgrading. Informal microfinance institutions have many virtues but have won acclaim much more for debt than savings, and safe savings is the most important priority for pecuniary reparations. With an eye toward more security for shareholder-recipients, governments could allow informal microfinance institutions to the regulatory demands of higher tiers.

Upgrading allows microfinance institutions to grow: but without connections to larger sources of capital, this growth has a cap. One source of growth is demonstrated by experience in India, a country that now leads the world in *linkage banking*.<sup>106</sup> This practice, based on pilot experience in Indonesia, connects informal rural institutions with the formal banking sector.<sup>107</sup> Coordinated by the National Bank for Agriculture and Rural Development (NABARD) and backed by the central bank, Self-Help Promoting Institutions, which include NGOs, government agencies, and banks, promote and assist informal “self-help groups” of up to twenty members (above which the groups would have to register under Indian cooperative or association law).<sup>108</sup>

As of March 31, 2009, linkage banking, the predominant model of microfinance in India, has included 6.12 million self-help groups holding bank deposits and 4.22 million self-help groups with bank loans outstanding; the non-performing loan ratio was 2.9%. Eighty percent of the self-help groups are comprised entirely of women; about 90% of the membership of all these groups is female. The total outreach of self-help groups stands at 92 million members, covering a population of over half a billion poor people.<sup>109</sup> It delivers

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<sup>105</sup> Compare *id.* at 7 (noting lower capital requirements for specialized institutions) with *id.* at 8 (noting limits on risk exposure and prohibitions on certain high risk activities).

<sup>106</sup> Seibel, *Reparations Shareholders*, *supra* note 6, at 21-22; Stefan Karduck & Hans Dieter Seibel, *Transaction Costs of Self-Help Groups: A Study of NABARD's SHG Banking Programme in India*, in FINANCIAL GROWTH IN INDIA AND CHINA 196 (Dhandapani Alagiri ed., 2006).

<sup>107</sup> Seibel, *Reparations Shareholders*, *supra* note 6, at 22.

<sup>108</sup> See <http://www.nabard.org/introduction.asp>.

<sup>109</sup> These data come from NABARD. See Basic Figures on SHG Banking in India, 2008-09 (available at

credit to the rural poor in India, integrates self-help groups into national financial markets, and enables commercial banks to reach out to microentrepreneurs.<sup>110</sup> A 2009 study of NABARD operations by the Reserve Bank of India, the central bank, contained the word “critique” in its title but reported positive results:<sup>111</sup> Flaws remain—including significant regional disparities—but Reserve Bank researchers ascribed disappointments of linkage banking to insufficient investment rather than any deficiency in linkage banking as policy.<sup>112</sup> Increasing numbers of self-help groups have organized in federations at the village, district, and higher levels;<sup>113</sup> these federations help leverage their strength.<sup>114</sup>

The Indian version of linkage banking balances savings and credit, suggesting a blueprint for reparations program that would emphasize safe savings but also provide additional capital for new loans. Governments choosing microfinance institutions to receive and hold reparations transfer payments ought to borrow linkage practices (from India and elsewhere) that are suited to the needs of geographically dispersed recipients: “with some modifications, the approach could also be jumpstarted by, or otherwise incorporate, reparations payments.”<sup>115</sup>

## 2. Shareholders and Governance: Options for the Reparations Plan

Our phrase “options for the reparations plan” expresses our intent to withhold answers to certain recurring questions about how to set up the microfinance-based reparations program. The proposal in this Article, offered literally to the world, cannot be tailored to every nation that considers pecuniary reparations;<sup>116</sup> it needs to be adjusted

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[http://www.nabard.org/pdf/Status%20of%20Microfinance%20in%20India%202008-09\\_131109.pdf](http://www.nabard.org/pdf/Status%20of%20Microfinance%20in%20India%202008-09_131109.pdf)). For an external analysis of the NABARD linkage banking record, see Karduck & Seibel, *supra* note 106.

<sup>110</sup> Seibel with Armstrong, *supra* note \*, at 693.

<sup>111</sup> Pankaj Kumar & Ramesh Golait, *Bank Penetration and SHG-Bank Linkage Program: A Critique*, 29 RESERVE BANK OF INDIA OCCASIONAL PAPERS 119 (2009).

<sup>112</sup> *Id.* at 136-38.

<sup>113</sup> C.S. Reddy et al., *SHG Federations in India* (2007) (available at <http://www.apmas.org/pdf/SHGfinalbook.pdf>).

<sup>114</sup> Pertinent to the gender thesis of this Article and this Symposium, one donor- and bank-funded study reported that when they join self-help group “clusters and federations, village women can gain experience of relevant processes (regular meetings, taking decisions, allocating money). They also become more ‘visible’ in the village...” EDA Rural Systems, *Self Help Groups in India: A Study of the Lights and Shades 5* (2006), available at <http://www.edarural.com/documents/SHG-Study/Executive-Summary.pdf>.

<sup>115</sup> Seibel, *Reparations Shareholders*, *supra* note 6, at 22; Hans Dieter Seibel, *Linking Informal and Formal Institutions in Africa and Asia*, in *MICROENTERPRISES IN DEVELOPING COUNTRIES* 97 (Jacob Levitsky ed., 1989).

<sup>116</sup> Some of the breadth of what we are discussing can be conveyed at the Reparations page of the International Center for Transitional Justice website, which lists books of country-studies, reports, fact sheets,

during the course of implementation in each country. Although we make specific recommendations when we can, working at a general plane has virtues. By insisting that planners take local conditions into account, our approach to reparations design ameliorates the perception of a top-down external imposition. Here we mention a few terms of microfinance-based reparations that are negotiable and flexible, in our opinion.

Foremost, the regulation of the microfinance institution that receives and holds transfer payments need not be heavy. Our categories of “semiformal” institutions (which are registered with national governments but not regulated as banks or financial companies) and “informal” ones could both participate in programs that distribute reparations from national governments. Semiformal institutions offer better oversight than informal ones and are in that sense more suited to the task, but when only informal institutions are available, governments should consider enlisting them, encouraging links to the formal tier. Nongovernmental organizations can aid planners in identifying and scrutinizing local entities.

Governments ought to emphasize sustainability for institutions that take part in the reparations scheme, even at the expense of other goals. For example, regardless of how formal the participating institution may be, one level of regulation that should be omitted is additional controls on interest rates for the loans the entity makes. The literature on microcredit supports this deregulatory inclination,<sup>117</sup> and philanthropic motives following national crisis should not impede this enhancement to sustainable development. For another example, concerns about gender progress—which we have indicated we share—should accommodate rather than try to supersede the gender segregation within a given country and culture. We emphasize that it is only either integration or segregation, but not subordination, of women that planners ought to tolerate. Although “separate but equal” may be as challenging in the context of microfinance as it is in United States race relations,<sup>118</sup> as long as women who participate have some sphere of power in controlling

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international conferences, and aid by the Center to numerous countries. See <http://www.ictj.org/en/tj/782.html>.

<sup>117</sup> See, e.g., Bob Christen & Ignacio Mas, *It's Time to Address the Microsavings Challenge, Scalably*, 20 ENTERPRISE DEV. & MICROFINANCE 274, 276 (2009) (noting with regret that many national banking laws around the world cap interest rates); Schreiner, *supra* note 94, (reporting this barrier to sustainable microfinance).

<sup>118</sup> See Martin L. Levy, “*Separate But Equal*” is Inherently Unequal, 28 THURGOOD MARSHALL L. REV. 121, 121 (2003).

money,<sup>119</sup> we recommend that planners not compel microfinance institutions to impose gender separation or integration on the operations of the entity, but instead leave this decision to local participants.<sup>120</sup>

In general, once the government writes or conveys rules to enhance the safety of funds that shareholder-owners wish to keep undisturbed in a savings account, it ought to curb its impulse to regulate. Planners will probably be tempted to attach conditions to the sum it deposits in the name of each recipient—restrictions on hasty withdrawal, or rules that this money cannot serve as collateral for a loan that benefits someone other than the recipient shareholder, are among the notions that might arise<sup>121</sup>—but controls, if any, on the use of reparations payments should come from stakeholders outside the national government that disburses reparations. We recommend that most controls emerge from multiple sources: existing bank and corporation regulation within national law, board and management of the institution, and the shareholders themselves acting as recipients of reparations who go on to become owners.

### C. Safeguards Against Gender-Related Abuses

Microfinance has long enjoyed a reputation for elevating the position of women.<sup>122</sup> To a degree, we have shared in this enthusiasm.<sup>123</sup> Here, focused on strategies for implementation, we note some difficulties and concerns with respect to gender equality as

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<sup>119</sup> Eleanor Roosevelt, writing in 1953 on the United Nations Draft Convention on the Rights of Women described the goal we have in mind:

Even in countries where for many years women have voted and been eligible for public office, there are still too few women serving in positions of real leadership. I am not talking now in terms of paper parliaments and honorary appointments. Neither am I talking about any such artificial balance as would be implied in a 50-50, or a 40-60 division of public offices. What I am talking about is whether women are sharing in the direction of the policy making in their countries...

Eleanor Roosevelt, *U.N. Deliberations on Draft Convention on the Political Rights of Women*, DEPARTMENT OF STATE BULLETIN, Jan. 5, 1953, available at <http://www.udhr.org/history/124.htm>. We too are talking about women sharing in the direction of policymaking.

<sup>120</sup> See Hans Dieter Seibel, *Village Banks in Vientiane Capital, Lao PDR: Roadmap Scenarios for a Sustainable Future* (2010) (available at <http://www.sparkassenstiftung.de/home.html?&L=1>).

<sup>121</sup> *Accord, Formalizing Microsavings*, *supra* note 26, at 4 (observing that “innovation is driven first by unregulated microcredit organizations. Over time, these organizations develop into a promising service sector...”).

<sup>122</sup> See Bernstein, *Pecuniary Reparations*, *supra* note 6, at 4-5, 31 (citing sources); see also *infra* note 121.

<sup>123</sup> Bernstein, *Pecuniary Reparations*, *supra* note 6, at 37-43 (concluding that although the record includes several disappointments, it suggests that microfinance enhances the status of women); Seibel, *Reparations Shareholders*, *supra* note 6, at 21 (reporting gains to women from microfinance in Syria).

part of a microfinance-based reparations scheme, and some thoughts on how to abate these detriments.

One report published by the government of Switzerland has identified four classes of constraints that cut women off from the gains of economic development. First, legal barriers, such as laws requiring the consent of a male relative to engage in a business transaction, impede women in several countries. Second, sociocultural conditions restrict women to the household or otherwise discourage their participation in business. Third (and related to the second category), family obligations typically increase women's workload and limit their mobility. Finally, women suffer from lesser access to institutional supports: training, information networks, and centers of decisionmaking.<sup>124</sup>

Our premise that a microfinance-based reparations plan would serve the goal of gender equality is mindful of the gap between transferring money to individual women and enhancing the status of women in a society. Making reference to fieldwork she did in south Asia, Linda Mayoux has raised pertinent questions and concerns. Women may be participating in microenterprise, Mayoux writes, out of a "desperate" need for income rather than a conscious choice.<sup>125</sup> Contrary to a tenet of microeconomics, women do not necessarily benefit when their income rises. Their male relatives are likely to cooperate with their entrepreneurial activities (only) when these efforts bring money under male control "and where this does not require any change in women's unpaid domestic or productive work."<sup>126</sup> Gains from the activity thus "may merely substitute for male expenditure on family needs, freeing more male income for their own personal luxury expenditure."<sup>127</sup> Moreover, because of gender segregation in labor markets, female entrepreneurs typically compete with other women. And although they have a better record than their male counterparts on sexual harassment and sexual exploitation, female

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<sup>124</sup> Swiss Agency for Development and Cooperation, *The Gender Approach in Small Enterprise Development 3* (1999) (available at <http://www.intercooperation.ch/sed/download/issuepapers/issue1-eng.pdf>) [hereinafter *Gender Approach*].

<sup>125</sup> Linda Mayoux, *From Vicious to Virtuous Circles? Gender and Micro-Enterprise Development*, United Nations Development Programme, May 1995, at 26 (available at [http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=5901781754E7C91580256B67005B6AF7&parentdoctype=paper&netitpath=80256B3C005BCCF9/\(httpAuxPages\)/5901781754E7C91580256B67005B6AF7/\\$file/opb3.pdf](http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=5901781754E7C91580256B67005B6AF7&parentdoctype=paper&netitpath=80256B3C005BCCF9/(httpAuxPages)/5901781754E7C91580256B67005B6AF7/$file/opb3.pdf)).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 27.

entrepreneurs “are as likely as men to manipulate gender inequalities and gender stereotypes.”<sup>128</sup>

Commentary by the founder of the Grameen Bank about the gender of his micro-borrowers informs this analysis. Mohammad Yunus won fame for his choice to lend money to women rather than men. Rhetoric of female empowerment continues to accompany this policy, from Yunus himself and from admirers of the Grameen enterprise.<sup>129</sup> As one observer has argued,<sup>130</sup> however, the Grameen understanding rests on a perception of women as instruments.<sup>131</sup> Lending to women-as-instruments originates in a belief that women direct their borrowed money to good ends.

From here, it becomes easy for microlenders to regard power for women as irrelevant or even counterproductive rather than a desirable goal in itself. Again Grameen is instructive. One detailed review undertaken in the 1990s attributed the bank’s high repayment rate to domineering behavior by male employees over female borrowers.<sup>132</sup> Interviewing Grameen bank workers, the anthropologist Aminur Rahman quoted several who described these women as “shy,” “submissive,” and “immobile,” whereas male borrowers, in the view of these informants, were “arrogant,” argumentative, and belligerent when faced with collection or monitoring efforts from the bank.<sup>133</sup> Because women remain indeed “immobile” compared to men in Bangladesh, they are less able to move away after defaulting on a loan, and also carry the extra burden of maintaining family

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<sup>128</sup> *Id.*

<sup>129</sup> MUHAMMAD YUNUS, *BANKER TO THE POOR: MICRO-LENDING AND THE BATTLE AGAINST WORLD POVERTY* 71 (1999) (remarking that Grameen pioneered within a banking system that had been “created for men”); Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 *GEO. L.J.* 179, 243 n.325 (1995) (contending that Grameen advanced “the emancipation, status, and economic independence of women”); Daryl J. Levinson, *Collective Sanctions*, 56 *STAN. L. REV.* 345, 398 (2003) (claiming that the experience of Grameen borrowing “has created the cohesion” to resist gender injustice); Charlotte E. Lott, *Why Women Matter: The Story of Microcredit*, 27 *J.L. & COM.* 219, 230 (2009) (“Microcredit with women as the principal borrowers is a powerful tool in the reduction of poverty and the transformation of society”); Katherine Spengler, Note and Comment, *Expansion of Third World Women's Empowerment: The Emergence of Sustainable Development and the Evolution of International Economic Strategy*, 12 *COLO. J. INT'L ENV'T'L L. & POL'Y* 303, 334-39 (2001) (arguing that making microcredit more available to women increases sustainable agricultural practices).

<sup>130</sup> Dyal-Chand, *supra* note 91, at 262.

<sup>131</sup> Women, wrote Yunus in his book about his bank, are “better fighters” than men in “the fight against poverty and hunger.” YUNUS, *supra* note 129, at 40-41. See also *id.* at 72 (“Money entering a household through a woman brings more benefits to the family as a whole.”).

<sup>132</sup> AMINUR RAHMAN, *WOMEN AND MICROCREDIT IN RURAL BANGLADESH* 73-74 (1999).

<sup>133</sup> *Id.*; see also STUART RUTHERFORD, *THE PLEDGE: ASA, PEASANT POLITICS, AND MICROFINANCE IN THE DEVELOPMENT OF BANGLADESH* 135 (2009) (reporting similar practices by another large Bangladeshi bank).

honor; they know that a default would bring disgrace to their relatives to a degree that male defaulting would not.<sup>134</sup>

Another concern about gender in microcredit is “fronting,” where men pressure women to take out female-restricted loans for the use and control of these men. Researchers confirm that worries about male relatives’ appropriating monies set aside for women have a foundation in real experience.<sup>135</sup> One much-cited study of Grameen found that 63% of the borrowers (all women) had no direct control over what to do with the loan proceeds which, of course, these women were obliged to repay.<sup>136</sup> Scholars of microfinance find the “fronting” problem especially acute when loan sizes are relatively large or available to support industries where men participate as entrepreneurs.<sup>137</sup>

These findings contain some nuance, however. Men who control a loan nominally assigned to women often contribute to repaying it.<sup>138</sup> Aminur Rahman, the anthropologist critical of Grameen, found positive welfare effects for women holding Grameen loans that they did not control once he compared them to wives of men who had borrowed money from other lenders.<sup>139</sup> Other researchers have found that taking out a micro-loan makes a woman more likely to participate in financial decisions with her husband and to become more assertive in household negotiations.<sup>140</sup> Microcredit is associated with other nonpecuniary welfare gains, notably the use of contraceptives and women’s control of their fertility.<sup>141</sup> More tentatively, researchers link microcredit to enhanced education for girls and women.<sup>142</sup>

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<sup>134</sup> Dyal-Chand, *supra* note 91, at 263.

<sup>135</sup> HELEN TODD, *WOMEN AT THE CENTER: GRAMEEN BANK BORROWERS AFTER ONE DECADE 81-83* (1996) (concluding that about a quarter of Grameen borrowers have become disempowered rather than empowered by microloans because men gained control over the money); RAHMAN, *supra* note 121, at 109-115 (concluding that many women have been made worse off by access to Grameen loans because Grameen regards only the female borrowers as responsible for repayment, a condition that increases male pressure on female relatives to take out these loans for male use).

<sup>136</sup> Anne Marie Goetz & Rina Sen Gupta, *Who Takes the Credit? Gender, Power and Control Over Loan Use in Rural Credit Program in Bangladesh*, 24 *WORLD DEV.* 45, 47 (1996).

<sup>137</sup> Mayoux, *supra* note 125, at 38.

<sup>138</sup> *Id.* at 39-40.

<sup>139</sup> *Id.*

<sup>140</sup> Zern-Chun Adam Chen, *Securitizing Microcredit: The Implications of Securitization for Microcredit Institutions’ Human Rights Missions*, 39 *COLUM. HUMAN RTS. L. REV.* 757, 766 (2008) (citing sources).

<sup>141</sup> Mayoux, *supra* note 117, at 38.

<sup>142</sup> BEATRIZ ARMENDARÍZ & JONATHAN MORDACH, *THE ECONOMICS OF MICROFINANCE* 181 (2005).

The mixed record of microcredit becomes stronger and more positive in support of microfinance-based reparations because of the contrast that it invites to two alternatives: first, shares (*i.e.* equity) in microfinance institutions versus other types of pecuniary reparations<sup>143</sup> and, second, microfinance in the form of ownership versus microfinance as microcredit.<sup>144</sup> “Asking the woman question” as methodology<sup>145</sup> supports the conclusion that although a microfinance-based reparations plan contains gender perils, it is better for female recipients than other modes of pecuniary reparations; similarly, a savings account that contains money, along with an equity state in a financial institution, gives a woman more power than she would receive from a loan.<sup>146</sup>

Gender-awareness in the microfinance-reparations scheme, it is safe to predict, will increase the odds of benefiting female recipients. If a government chooses to make payments to an existing microfinance institution, then it ought to look for ones with experience in allotting decisionmaking power to women as stakeholders, and located in places accessible to women.<sup>147</sup> Governments that decide to launch new microfinance institutions for this purpose should work with what one study has called “gender-sensitive and trained personnel.”<sup>148</sup> Female recipients should receive their equity shares and savings accounts with their own names on them.<sup>149</sup> The pecuniary goal we pursue with these

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<sup>143</sup> For this contrast, we compare our proposal to other types of pecuniary reparations only; we endorse the view that other government-funded investments in the welfare of its citizens, such as schools and medical clinics, are desirable but do not amount to reparations. For more detail on this argument, see *supra* note 43 and accompanying text; see also de Greiff, *Justice*, *supra* note 40, at 451.

<sup>144</sup> Cf. Lisa Avery, *Microcredit Extension in the Wake of Conflict: Rebuilding the Lives and Livelihoods of Women and Children Affected by War*, 12 GEO. J. POVERTY L. & POL’Y 205 (2005) (recommending that some humanitarian aid that international funders distribute following national conflict take the form of microcredit).

<sup>145</sup> “Feminists across many disciplines regularly ask a question—a set of questions, really—known as ‘the woman question,’ which is designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective.” Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).

<sup>146</sup> Bernstein, *Pecuniary Reparations*, *supra* note 6, at 44-45 (“Shares in an institution achieve [gender-progressive results] better than any other rendering of money. These shares have women’s names on them. They implicitly contain protection against theft and loss. They state plainly that recipients include individual women (or men), and are not paid only to households, families, or communities.”).

<sup>147</sup> See Gender Approach, *supra* note 124, at 16 (giving as an example a program in Mozambique that achieved a significant increase in women’s participation by moving to marketplaces near women’s worksites); Christen & Mas, *supra* note 117, at 278 (“Every time a poor person earns money there is a savings opportunity. But it can only be exploited if people are able to deposit (and withdraw) money near the place where they live and work.”).

<sup>148</sup> Gender Approach, *supra* note 124, t 14.

<sup>149</sup> Bernstein, *Pecuniary Reparations*, *supra* note 6, at 45.

suggestions is to increase the amount of money about which women make spending decisions. The welfare effects of this transfer are positive.<sup>150</sup>

### III. MACROECONOMIC GAINS IN POST-CONFLICT NATION-BUILDING

The microfinance-reparations strategy recommended in this Article offers promise to the development of vulnerable post-conflict national economies. Recall the two central aspects of our proposal: first, attention to the inclusion and participation of female recipients, and, second, transfers of shares and deposits in financial institutions, rather than investments in national development or loans that borrowers must agree to repay. As we detail below in the first section, putting money in the hands of women has salubrious effects on the economy of a nation; the version of microfinance that we advocate avoids the major perils of expanding debt for poor people. The second section explores the appeal of microfinance as a source of obtaining support at the foreign-individual level for a national reparations scheme.

#### A. National Economic Development

1. *Gendered returns on investment.* Demographers, development economists, and other social scientists have reported that when women gain more control over money, this transfer enhances the welfare of children, the nation's next generation.<sup>151</sup> In hungry countries, children gain more of the calories they need to live when women gain more money vis-à-vis men.<sup>152</sup> As a general rule, low-income men spend at least part of their income on their own pleasure, as consumers; low-income women contribute their income to their households.<sup>153</sup> This generalization was tested in 2010 when a deadly earthquake struck Haiti: relief workers distributing United Nations World Food Program coupons chose to give the coupons only to women after they witnessed men pushing to the head of food lineups; consistent with what more formal research has found, the workers concluded that women recipients nourished their families more reliably than men.<sup>154</sup> As was

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<sup>150</sup> See *supra* note 129; see also *infra* Part III.A.

<sup>151</sup> Bernstein, *Pecuniary Reparations*, *supra* note 6, at 48-50. See generally Lott, *supra* note 129, at 226-27 (summarizing unanimous findings).

<sup>152</sup> Bernstein, *Pecuniary Reparations*, *supra* note 6, at 48-50 (reporting studies in Kenya, Jamaica, and Brazil).

<sup>153</sup> Lott, *supra* note 129, at 226-27 (reviewing studies).

<sup>154</sup> Women-Only Food Sites Open in Haiti, CBS News, Jan. 31, 2010, available at <http://www.cbc.ca/world/story/2010/01/31/haiti-women-food.html>.

mentioned, researchers who study microcredit have found that access to it increases the use of contraceptives and is linked to gains in female literacy.<sup>155</sup> More generally and to the same point, a study reporting on microfinance in Africa reported that “women reinvest in their communities at greater rates than men—at 89 cents on the dollar versus 60 cents, respectively.”<sup>156</sup>

Similar evidence about the social value of shifting power to women emerges from the record in affluent nation-states, where civic power in the hands of women generates socially useful results, both in tranquil times and when turmoil strikes. Female legislators in the United States and Europe are more likely than their male counterparts to introduce child-friendly expenditure bills.<sup>157</sup> American policymakers who regard the advancement of women as desirable in itself—independent of whether children do better, because full citizenship for a subordinated population is good—have taken advantage of crises to make gender-progressive social investments.<sup>158</sup> Directing transfer payments to the control of women yields gains to the repairing national government.<sup>159</sup>

2. *Returns from microfinance.* In its announcement of the Nobel Peace Prize in 2006, the Norwegian Nobel Committee asserted that microcredit is a way for large groups of people to “break out of poverty.” Moreover, it continued, “[d]evelopment from below

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<sup>155</sup> See *supra* note 141 and accompanying text.

<sup>156</sup> Sarita Gupta, *Microfinance in Africa: Harnessing the Potential of a Continent*, Women’s World Banking, Nov. 1, 2008, available at [http://www.swwb.org/files/microfinance\\_insights\\_sarita\\_gupta\\_november\\_1\\_2008.pdf](http://www.swwb.org/files/microfinance_insights_sarita_gupta_november_1_2008.pdf).

<sup>157</sup> Bernstein, *Pecuniary Reparations*, *supra* note 6, at 49 (citations omitted).

<sup>158</sup> For example, when the American government was planning a stimulus aimed at easing a severe recession, one editorial urged that this money be directed toward increasing and enhancing women’s employment. Linda Hirshman, *Where Are the New Jobs for Women?*, N.Y. TIMES, Dec. 9, 2008, at 35. In a follow-up essay the author reported that after the publication of her editorial “the [stimulus] package improved for women,” although she did not take the credit. Linda Hirshman, *Are Women’s Blogs Afraid of Math?*, SLATE, May 26, 2009, available at <http://www.doublex.com/section/work/introducing-princess-column-linda-hirshman>. Another example: In New York, when 343 fire department workers lost their lives in the September 11 terrorist attack, the feminist law reform group Legal Momentum found “an opportunity to reform an ‘infamously’ sexist city agency.” They worked to gather women to take the firefighters’ tests and obtained donations of space for women to practice. A record number of women were able to become firefighters. Dana Goldstein, *Pink-Collar Blues*, THE AMERICAN PROSPECT, Jun. 2009, available at [http://www.prospect.org/csnc/blogs/tapped\\_archive?month=03&year=2009&base\\_name=how\\_the\\_stimulus\\_sells\\_women\\_s](http://www.prospect.org/csnc/blogs/tapped_archive?month=03&year=2009&base_name=how_the_stimulus_sells_women_s).

<sup>159</sup> See generally Beth Goldblatt, *Evaluating the Gender Contents of Reparations: Lessons from South Africa*, in WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS 73 (Ruth Rubio-Marín ed. 2006) (reporting that South Africa implementers of reparations give women rather than men the funds for children).

also serves to advance democracy and human rights.”<sup>160</sup> The Nobel Committee was expressing what had become close to a conventional wisdom: “millions for millions.”<sup>161</sup>

To listeners with a skeptical cast of mind, bold claims like this one tend to invite resistance: *Really? Is that so?* Even before the Nobel trumpet sounded, many writers had doubted that the route to prosperity for poor people is to borrow money (typically at a high interest rate).<sup>162</sup> In recognition of this cautionary literature, we proceed with care as we identify returns from microfinance.

A recent report published by Consultative Group to Assist the Poor (CGAP), the policy and research group housed at the World Bank, gathers the record under the rubric of a blunt question: “Does Microcredit Really Help Poor People?”<sup>163</sup> Our review of the evidence as it has been presented in the CGAP report and elsewhere finds that microcredit has generated gains to wealth and welfare by making many poor people around the world somewhat better off. The effect is more modest than some microcredit-enthusiasts have claimed but it exists.<sup>164</sup> We next explore the distinction between microcredit as loans and *microfinance* as we propose it here: transfer payments in the form of shares in financial institutions. Because transfers to recipients do not burden these individuals with risks associated with debt (although the drawbacks of being indebted may be present for borrower-clients of the financial institution), the detrimental effects of microcredit in large part recede from this use of microfinance.

We extend our skepticism to anecdotes, and desire parsimony and caution in generalizing about what a microfinance intervention can do. As Esther Duflo, recipient of several honors for pioneering work on the development of vulnerable economies,<sup>165</sup> has demonstrated through her “poverty action lab” at the Massachusetts Institute of Technology, rival approaches toward increasing wealth and welfare can, and should, be

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<sup>160</sup> See Press Release, Norwegian Nobel Committee, The Nobel Peace Prize for 2006 (Oct. 13, 2006), available at <http://nobelprize.org/nobel/prizes/peace/laureates/2006/press.html>.

<sup>161</sup> Connie Bruck, *Millions for Millions*, THE NEW YORKER, Oct. 30, 2006, at 62.

<sup>162</sup> See *supra* note 78 and accompanying text.

<sup>163</sup> Richard Rosenberg, *Does Microcredit Really Help Poor People?*, Jan. 2010, available at <http://www.cgap.org/gm/document-1.9.41443/FN59.pdf>.

<sup>164</sup> In the aggregate: borrowers who fail to repay their loans do not enjoy this welfare gain. See BATEMAN, *supra* note 78.

<sup>165</sup> Among other honors Duflo has been awarded the Clark Medal, which often presages Nobel recognition for economists, and a MacArthur “genius” grant. See Peter Dizikes, *Esther Duflo Wins Clark Medal*, MIT NEWS, Apr. 23, 2010, available at <http://web.mit.edu/newsoffice/2010/duflo-clark-0423.html>.

tested through the randomized studies that regulators demand to show the efficacy of new pharmaceuticals.<sup>166</sup> This technique provides the best evidence about the value of interventions.<sup>167</sup> Scarcity always necessitates prudence in government spending to increase welfare; the fraught political context of post-conflict reparations makes this care even more imperative.

Following decades of anecdotal evidence about the supposed power of microcredit—plucky women receive tiny loans, then open small businesses; the women attain prosperity and enhance their villages—researchers have tried to measure the effects of both microcredit in particular and microfinance in general through randomized controlled trials. Dean Karlan and Jonathan Zinman, for example, studied microcredit in South Africa and the Philippines by randomly prompting loan officers to approve half the loan applications from a population that would normally be turned down, and then examining these borrowers to see how they fared after they received their loan offers.<sup>168</sup> One randomized controlled study that pertains more closely to the reparations proposal of this Article was published by the MIT Poverty Action Lab in 2009. Researchers assembled 104 slums in Hyderabad and opened a microfinance bank in (a randomly selected) half of this number. A year and a half later, they found modest effects—“no impact on health, education, or women’s outcomes,” but an increase in new businesses and in the profitability of existing businesses.<sup>169</sup>

In 2009, the World Bank reported on an extraordinary data set that arose in Mexico;<sup>170</sup> though not a controlled study, this event presented many of the virtues of this device. A large retailer of consumer goods called Grupo Elektra received a charter that

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<sup>166</sup> *Id.*

<sup>167</sup> Duflo helped to found a new journal focused on reporting measurements of interventions to increase welfare. For a sample of findings published in it, compare Benjamin A. Olken, *Do Television and Radio Destroy Social Capital? Evidence from Indonesian Villages*, 1 AM. ECON. J.: APPLIED ECONOMICS 1 (2009) (concluding that increased television and radio signal reception relates inversely to social trust) with Emily Oster & Rebecca Thornton, *Menstruation, Sanitary Products and School Attendance: Evidence from a Randomized Evaluation*, forthcoming, AM. ECON. J.: APPLIED ECONOMICS – (2010) (available at <http://faculty.chicagobooth.edu/emily.oster/papers/menseduc.pdf>) (reporting that, contrary to anecdotes, menstruation has only a tiny effect on girls’ attendance at school in poor countries and that distributing sanitary products has no effect on attendance).

<sup>168</sup> See Rosenberg, *supra* note 163, Annex.

<sup>169</sup> *Id.* at 8.

<sup>170</sup> Miriam Bruhn & Inessa Love, *The Economic Impact of Banking the Unbanked: Evidence from Mexico*, THE WORLD BANK, DEVELOPMENT RESEARCH GROUP, June 2009, available at [ssrn.com](http://ssrn.com).

enabled it to go into the banking business. Grupo Elektra decided to house a subsidiary bank in all of its stores. In October 2002 it launched eight hundred and fifteen branches of its new Banco Azteca, setting a world record for the most bank branches opened at once. Banco Azteca featured “low documentation requirements,” “motorcycle-riding loan officers that come to the borrower’s house,” and modestly sized loans, making it comparable to existing microfinance institutions.<sup>171</sup> Data gathered by the Mexican federal government in its National Employment Survey—on employment levels and income received from labor in both formal and informal markets—enabled the researcher-authors to compare macroeconomic indicators in municipalities that had Banco Azteca branches with the same data in those that lacked access to this source of microcredit. The World Bank found gains. The opening of a Banco Azteca branch led to an increase of 7.6 percent in the number of informal business owners; total employment went up by 1.4 percent, and average income increased by about 7 percent.<sup>172</sup>

These results came into effect by the extension of *microcredit*, of course, rather than the version of microfinance we advocate. Paying reparations as shares in financial institutions, the proposal of this Article, promises to do more than what researchers have reported about microcredit as provided in controlled trials or quasi-controlled settings like the Banco Azteca experience. Our premise is that the three gains from our plan for microfinance-based reparations—safe savings for people who have lacked this form of shelter; expansion of the money available for loans; and expanded opportunity for nation-building via social solidarity<sup>173</sup>—add up to more than what a commercial bank can render, because commercial banks do not offer self-help to individuals and the repair that emerges from the networks they build.<sup>174</sup>

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<sup>171</sup> *Id.* at 2.

<sup>172</sup> *Id.*, Abstract.

<sup>173</sup> See *supra* Part II.A.

<sup>174</sup> “For reparations purposes, the curative effect of expanded credit reaches fundamentally into a victim’s well-being. The word ‘victim,’ the source of her entitlement to become a shareholder, loses its hold as this citizen moves to bankability. Shakespeare notwithstanding, any person who may both ‘a borrower ... [and] a lender be’ is more autonomous, more likely to enjoy both self-respect and the respect of others, than a person shut out of both roles. As they become investors, reconstructors, and rebuilders of the social tissue, these shareholders gain in relative social status, and by their work and risk-taking they earn this gain.”

Bernstein, *Pecuniary Reparations*, *supra* note 6, at 27-28 (citations omitted). On the formation of networks, see *supra* notes 113-14 and accompanying text.

## B. External Donor-Investor Participation

Writing about reparations from a United States domestic perspective, the economist and legal scholar Saul Levmore proposed a reparations scheme for African Americans that he modeled in part on philanthropy: “The plan is to ask for donors,” he wrote. “It is to suggest to donors that, as with so many other things undertaken in this country, individual and corporate volunteers can, in the aggregate, accomplish important objectives that might fail or be done less effectively if entirely public in nature.”<sup>175</sup> Taxpayers would under the Levmore plan decide whether, and how much, to contribute to two reparations schemes whose provisions would be laid out by Congress.

Levmore’s article, pertinently titled *Privatizing Reparations*, pertains to our recommendations about reparations through microfinance. Recognition of the private sector can augment a national reparations program post-conflict. We do not exactly “ask for donors,” but suggest a mode that welcomes and facilitates participation from benefactors outside the national government. The diaspora already excels at remittances. It might well respond positively to a call to contribute to reparations paid in the form of microfinance shares and deposit accounts of beneficiaries.<sup>176</sup>

Historical experiences with pecuniary reparations underscore the importance of attracting external funding. The best-known pecuniary reparations schemes following national crises originated in wealthier countries that could pay the bill: Germany after World War II and, much lower on the gross domestic product hierarchy but still relatively prosperous, Argentina and Chile.<sup>177</sup> Pecuniary reparations plans legislated in poorer countries have gone on to fail for lack of funds.<sup>178</sup> Financial need is not the only reason for a country to seek reparations money from outside its borders. A claim of justice will at

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<sup>175</sup> Saul Levmore, *Privatizing Reparations*, 84 B.U. L. REV. 1291, 1302-03 (2004).

<sup>176</sup> The Truth Commission of El Salvador proposed a reparations scheme to be financed mostly by foreign sources, and “most truth commissions have in their recommendations called on the international community to help finance reparations.” Segovia, *supra* note 30, at 659. We extend these precedents by moving beyond national governments and international aid organizations to individuals and the resources they control.

<sup>177</sup> Roht-Arriaza, Book Review, *supra* note 44, at 234.

<sup>178</sup> Segovia, *supra* note 30, at 665 (observing that reparations plans lacked sufficient funds to carry out the recommendations of truth commissions in El Salvador, Guatemala, Haiti, Malawi, and South Africa). The budget for reparations in Haiti, too much for the country to pay, had been only about \$3,500,000. Bernstein, *Pecuniary Reparations*, *supra* note 6, at 15 (citation omitted).

least sometimes accompany the reach toward external financing: “foreign actors [may have] supported the military regimes or participated directly in the internal conflicts of societies in transition.”<sup>179</sup>

Summing up the problem of financing reparations, the development economist Alexander Segovia concludes that foreign support for national reparations programs—like pecuniary reparations generally—is usually necessary but not sufficient. Foreign-originated monies “should be considered a complement to national resources, but never as substitutes.”<sup>180</sup> Planners of reparations schemes must also “find new mechanisms of cooperation that enable the community to finance reparations, at least in part.”<sup>181</sup> As examples of these “new mechanisms,” Segovia mentions actions that foreign governments could take to help pay for a reparations scheme: debt forgiveness, perhaps, or confiscating and repatriating stolen assets.<sup>182</sup>

The pursuit of “new mechanisms” to fund reparations goes further when extended beyond foreign national governments into the international financial community, which has manifested its commitment to microfinance.<sup>183</sup> To date, “foreign contributions for financing reparations have been fairly modest, and in most cases disappointing.”<sup>184</sup> The private sector lies mostly untapped.

Among the alternative modes of financing a reparations plan, the microfinance apparatus is likely to attract more support from foreign donors than traditional modes of pecuniary reparation have attained. Prominent American entrepreneur-donors have found microfinance an attractive medium for their philanthropy. George Soros started the Economic and Business Development Program to help “emerging economies ... achieve prosperity and sustainability through microfinance” and other initiatives.<sup>185</sup> The founder

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<sup>179</sup> Segovia, *supra* note 30, at 659.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 671.

<sup>182</sup> *Id.*

<sup>183</sup> For example, development agencies and private foundations founded CGAP, the Consultative Group to Assist the Poor, housed at the World Bank to focus on microfinance. See <http://www.cgap.org/p/site/c/aboutus/>. A newsletter available in full only to paying subscribers, the MicroCapital Monitor, has been commenting on worldwide microfinance capital markets since 2005. See <http://www.microcapital.org/microcapital-monitor/>.

<sup>184</sup> Segovia, *supra* note 30, at 659.

<sup>185</sup> Billionaire Philanthropy: Seasoned Capitalists Helping Entrepreneurs (2003), available at <http://www.globalenvision.org/library/12/122> (hereinafter Billionaire Philanthropy)

of eBay and his wife donated \$100 million to their alma mater, Tufts University, in 2005 to launch the Omidyar-Tufts Microfinance Fund.<sup>186</sup> Several years before winning the Nobel Prize in 2006, the Grameen Foundation received a \$2 million gift from the wireless-communication tycoon Craig McGaw.<sup>187</sup> Ted Turner's pledge of a billion dollars to the United Nations Foundation included funding for entrepreneurship, including the African Rural Energy Development Initiative, which has focused on new businesses that develop sustainable energy.<sup>188</sup> The Michael and Susan Dell Foundation, financed by a personal-computer fortune, has focused on providing startup capital to entrepreneurs in what it calls "six urban slums" in India.<sup>189</sup> Another funder, billionaire Bill Gates, has expressed keen support for microfinance.<sup>190</sup>

Individuals like these who have amassed wealth while implementing their own plans have experienced the connection among personal ambition, economic clout, and social improvement that programmers would pursue in microfinance-based reparations.<sup>191</sup> Prospective donors to reparations programs who have made money in commerce and industry thus would likely agree with journalists Nicholas Kristof and Sheryl WuDunn, who praised microfinance as a uniquely potent social instrument: "Capitalism, it turns out, can

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<sup>186</sup> See <http://www.tufts.edu/microfinancefund/>. Among "American entrepreneur-donors" we include Pierre Omidyar, who is not universally regarded as American, see Salar Golestanian, *The Richest Iranian in the World*, available at <http://www1.bibauk.com/Topics/Technology/Internet/tabid/172/Default.aspx>, because he has lived in the United States since the age of six and made his fortune in northern California. Jim McClellan, *Going, Going Strong*, *THE GUARDIAN*, Oct. 28, 1999, at 14.

<sup>187</sup> Billionaire Philanthropy, *supra* note 185.

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

<sup>189</sup> [http://www.msdf.org/Newsroom/Press\\_Releases/06-05](http://www.msdf.org/Newsroom/Press_Releases/06-05)

-02/Microfinance\_Services\_the\_Poor\_Can\_Bank\_On.aspx

<sup>190</sup> See Gates Foundation Names Robert Peck Christen of the Boulder Institute of Microfinance as Head of Microfinance Team, Apr. 13, 2007, available at

<http://www.microcapitalmonitor.com/cblog/index.php?/archives/756-Gates-Foundation-Names-Robert-Peck-Christen-of-the-Boulder-Institute-of-Microfinance-as-Head-of-Microfinance-Team.html#extended>

(reporting on microfinance in the foundation's Financial Services for the Poor initiative). At the end of a 2008 speech, Gates took a question about microfinance from the CEO of the multinational World Data Ventures. In response, Gates articulated his view that all businesses should pursue "creative capitalism," which entails identifying how these businesses could adapt "their products or expertise to help the poorest." Remarks by Bill Gates, Government Leaders Forum Americas 2008, Apr. 4, 2008 (transcript available at <http://www.microsoft.com/presspass/exec/billg/speeches/2008/04-04GLFAmericas.mspx>). Gates gave an example: for "food companies, it's about micronutrients." *Id.* "For the banks, it's about microfinance for the poor." *Id.* Gates added another reason for businesses focus on "the poorest": talented younger workers prefer employers who are "pioneering" to ease poverty. *Id.*

<sup>191</sup> For darker commentary of this point, describing enthusiasm for microfinance as ideology about bootstrapping, see Dyal-Chand, *supra* note 91, at 231-32; see also BATEMAN, *supra* note 78 (describing enthusiasm for microfinance as a pernicious byproduct of neoliberalism).

achieve what charity and good intentions sometimes cannot,” they wrote in their bestseller about development.<sup>192</sup> Uplift without abasement evokes Adam Smith’s reminder that “[n]obody but a beggar” would choose “to depend chiefly upon the benevolence of his fellow-citizens.”<sup>193</sup>

Groups of individuals with some money to spare—necessarily a larger group than the mega-rich benefactors mentioned above—have manifested support of Adam Smith’s generalization about what all people want by revealing enthusiasm for microfinance as an engine of progress. Charities like Kiva, ACCION International, The Hunger Project (which sponsors an African Woman Food Farmer Initiative), Opportunity International, Trickle Up, and Women for Women International set out to channel donations into microloan capital.<sup>194</sup> These organizations pursue a famed tenet of Maimonides, the Jewish medieval scholar, that charity reaches its greatest height when it enables a recipient to become self-sufficient.<sup>195</sup> Prosperous but not conspicuously rich donors have found in microfinance their own version of what has inspired charity from billionaires.

Charity is not the only way that foreign donors could help underwrite national microfinance-reparations programs. For individuals who seek to invest money in a direction that is both remunerative and socially progressive, the category of socially conscious investing finds a midpoint between self-enrichment and philanthropy that planners could harness to strengthen the financing of their reparations programs. Demand for this opportunity exists in the United States: In 2008, a popular magazine noted that many Americans were “chasing returns in barefoot banking.” It continued by offering advice: “Here’s what you should know before you follow.”<sup>196</sup> Pointers in the story addressed readers interested in combining “the do-good feel” with strong scores on “scale, efficiency, portfolio risk and profitability.”<sup>197</sup> The reparations proposal of this Article,

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<sup>192</sup> NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE* 187 (2009).

<sup>193</sup> ADAM SMITH, *THE WEALTH OF NATIONS* 13 (Everyman ed. 1910) (1776).

<sup>194</sup> The website Brent’s Place, subtitled Information for a Better Life, has recommended these organizations to donors. See <http://brentsplace.info/charities.shtml#microloans>. The German nonprofit Welthungerhilfe has a similar mission. See <http://www.welthungerhilfe.de/about-us.html>.

<sup>195</sup> SUSAN R. JONES, *LEGAL GUIDE TO MICROENTERPRISE DEVELOPMENT* 65-66 (2004) (paraphrasing Maimonides).

<sup>196</sup> Matthew Swibel, *Microfinance Fever*, *FORBES*, Jan. 7, 2008, available at <http://www.forbes.com/forbes/2008/0107/050.html>.

<sup>197</sup> *Id.*

which encourages governments to work with existing microfinance institutions when they can, adapts well to this mixture of motives: Our version of reparations also seeks profit as well as social progress.

Consistent with the design we propose, then, a nation announcing its plan for reparations through microfinance might link its program to foreign mutual funds that would buy shares of reparations-holding microfinance institutions throughout the country.<sup>198</sup> Wealthy foreigners have long had access to private-placement funds that make equity investments in microfinance institutions;<sup>199</sup> the existence of these funds manifests a market for microfinance investment vehicles that is likely to grow when reparations planners put link these vehicles to a quasi-charitable purpose. Securitization of the institutions' loans could invite smaller investors into the reparations plan, broadening its base of support and interest to welcome new stakeholders.

#### CONCLUSION

Self-help groups and indigenous informal savings and credit associations in many countries provide models for institutions that can administer and distribute reparations payments. These kinds of microfinance entities—which are frequently the only civil society institutions that survive the breakdowns that a government may address through reparations—represent the social capital for reconstruction. Around the world, poor women have participated actively in microfinance as self-help; this participation has had mostly positive effects for them and the societies in which they live.

In this Article, we have recommended that national governments work with these existing institutions, along with more formal entities like credit NGOs when they are available, to distribute the sums they appropriate for post-crisis reparation. This distribution establishes or strengthens a relatively safe place for savings. It also assigns to recipients an equity stake in financial institutions that they can help govern to generate income. Experience indicates that a microfinance-based reparations scheme need not

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<sup>198</sup> See generally Chen, *supra* note 140 (describing securitization as an instrument “for microcredit institutions’ human rights missions”).

<sup>199</sup> See Swibel, *supra* note 196 (mentioning Microplace.com, an eBay initiative launched in October 2007, as an investment vehicle offering shares “as little as \$100,” whereas larger entities like MicroVest, which raises money by private placements, demands minimum investments of \$100,000 or more).

pursue a gender agenda overtly to have feminist effects after implementation: Establishing or strengthening financial institutions that offer ownership, safe savings, and communal participation through self-help necessarily makes poor women better off, as long as female participants have a voice in the decisions that the institution makes.<sup>200</sup>

We have focused on financial institutions that we characterize as semiformal and informal because such entities exist in almost every country, making our plan universally feasible. Some nations that install reparations plans may lack institutions that can incorporate reparations payments and need to build them from the ground. This building can happen anywhere. Just as every adult person holds some property,<sup>201</sup> every nation-state has some experience with ownership and amalgamations of capital that a reparations scheme can leverage.

Our laying out a descriptive plan for reparations has called for both a statement of our starting points, so that implementing nations know where the plan is coming from, and restraint in the formation of these premises, to accommodate variation at the national and local level. We have worked with an assumption about the goals of this program: Any reparations project undertaken by a national government following a humanitarian crisis ought to advance social healing, economic development, and the position of women, who in the aggregate are unjustly disadvantaged.<sup>202</sup> Because sociocultural contexts influence the ways in which a reparations program can advance these goals, however, we have eschewed the writing of “best practices” and made every effort to keep our predictions of gains conservative.

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<sup>200</sup> See Linda Mayoux with Maria Hartl, *Gender and Rural Microfinance: Reaching and Empowering Women*, International Fund for Agricultural Development 57-66 (2009) (available at [http://www.ifad.org/gender/pub/gender\\_finance.pdf](http://www.ifad.org/gender/pub/gender_finance.pdf)) (offering checklists for a “gender audit” to evaluate what a microfinance program does for women).

<sup>201</sup> See *supra* note 83 (noting the book title *Portfolios of the Poor*).

<sup>202</sup> See *generally* TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS (Pablo de Greiff & Roger Duthie eds., 2009) (arguing that the repair of human rights violations following national conflict ought to be pursued as consistent with, not at the expense of, economic development). On the subordination of women in the reparations context, see Bernstein, *Pecuniary Reparations*, *supra* note 6, at 39-41 (summarizing data about economic disadvantage in the developing world); see also *supra* note 124 and accompanying text (noting four categories of impediments to women’s participation in commercial markets); *supra* Part I. B (reviewing gender justice in international law).

Experience has shown that networks of the institutions we describe can be successfully built within two or three years.<sup>203</sup> Stability in terms of self-management, self-financing and legal regularity not only for the microfinance institutions but also for their network may take another three to five years. For reparations planners who seek sustainable impact,<sup>204</sup> there is no alternative to institution-building and participation in ownership, particularly by women.

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<sup>203</sup> For the generalizations in this paragraph about “experience,” we rely on Seibel’s three-plus decades of familiarity with the development of microfinance institutions in Africa, south and southeast Asia, and the Middle East.

<sup>204</sup> *Cf. supra* note 42 (referring to the danger of “cheap talk” in reparations).