

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

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## Introduction

Governments that set out to provide their citizens with reparations for human rights violations on a national scale express their understanding of the seriousness of those violations<sup>1</sup> and attempt to achieve not only moral but also political and economic gains.<sup>2</sup> Distributing reparations in pecuniary rather than non-pecuniary 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, not only because of the inherent scarcity of money,<sup>4</sup> but also because 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 for reparations, a planner would want, in principle, 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 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 of 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 con-

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1. 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).

2. See generally GREGORY I. MASSING, *CIVICS IN PRACTICE: PRINCIPLES OF GOVERNMENT AND ECONOMICS* 565 (2d ed. 2009) (explaining the pursuit of political and economic improvement by governments).

3. De Greiff, *supra* note 1, at 11 (equating reparations with payments). In speaking of reparations as “pecuniary,” we refer to transfer payments that governments make to individuals. We intend to exclude investments in infrastructure, such as expanded schools or health clinics, even if governments choose to describe these expenditures as reparations.

4. Scarcity is not the only difficulty that pecuniary reparations face. For an overview of issues that extend past the scope of this article, see Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 *HASTINGS INT'L & COMP. L. REV.* 157 (2004).

5. On enhancing self-help of disadvantaged persons through government welfare spending, see *ISSUES FOR DEBATE IN SOCIAL POLICY: SELECTIONS FROM CQ*, at 162–63 (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 pure 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.”).

6. 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 Arm-

cerns in a strategic perspective.

“Microfinance,” the term one of us coined in 1990,<sup>7</sup> resembles the more frequently used “microcredit,”<sup>8</sup> which itself 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 as part of a deliberate strategy to enhance their economic well-being, contribute to microenterprise development, and alleviate poverty. Microfinance is the wider of the two concepts. Whereas “microcredit” refers to small loans extended to borrowers who in the past had been rejected as unbankable—that is, unworthy of credit and other services—“microfinance” consists of all financial services that reach this once-marginalized group, “includ[ing] savings, insurance, and money transfers.”<sup>10</sup>

All microcredit is microfinance, in other words, but not all microfinance is microcredit. Because a pecuniary reparations scheme presumably seeks to create redress for injury rather than to impose a new burden on victims, a reparations payment made in the form of microfinance follows the logic of redress in eschewing the imposition of debt and preferring an outright pecuniary transfer instead. Pressing microcredit on recipients and using this debt to generate income for those who furnish capital does not give—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>

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strong, *Reparations and Microfinance Schemes*, in *THE HANDBOOK OF REPARATIONS*, 677 (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* (Univ. of Cologne Dev. Research Ctr., 2003) [hereinafter Seibel, *Reparations Shareholders*], available at <http://www.uni-koeln.de/ew-fak/aef/08-2005/2003-6 ICTJ Microfinance.pdf>.

7. See Hans Dieter Seibel, *Does History Matter? The Old and New World of Microfinance in Europe and Asia 1* at n.1 (Univ. of Cologne Dev. Research Ctr., 2003), available at <http://www.uni-koeln.de/ew-fak/aef/10-2005/2005-10 The Old and the New World in Europe and Asia.pdf>.

8. “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), [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, at 21.

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

10. Consultative Group to Assist the Poor, *Microfinance Gateway*, <http://www.microfinancegateway.org/p/site/m/template.rc/1.26.12263/> (last visited Sept. 17, 2010).

11. De Greiff, *supra* note 1, at 12–13 (describing the prevalence of one-off pecuniary schemes).

Building on earlier work,<sup>12</sup> we argue 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 and deposits in microfinance institutions*. Part I introduces the proposal. We claim that of all the ways to design a reparations scheme, only a plan like this one—combining transfer payments to individuals with the development of sustainable financial institutions—preserves the virtues of pecuniary reparations while also fulfilling the political and macroeconomic needs that often accompany a national crisis.<sup>13</sup>

Hewing to the Symposium theme of gender-based justice and violence,<sup>14</sup> we place female participants in reparations programs at the center of this Article. When we speak 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 women 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>15</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 stakeholders and decision-makers throughout the Article.

In Part II, we survey the requirements of international law that impose on nation-states an obligation to redress certain human rights violations. Such redress, in our view, must take material and tangible forms.<sup>16</sup> Because modern international law explicitly equates women's rights with human rights,<sup>17</sup> our emphasis on women also comports with the human rights mandates of international law, and we integrate female recipients

12. See *supra* note 6 and accompanying text.

13. At the outset we acknowledge that our strategy faces perils. Foremost, the approach is untested: to date “[t]here is some experience with microfinance in postconflict 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. For planners willing to forge a new path, choosing the right level of legal controls for the microfinance institutions we would enlist is a fundamental challenge. Like bank and corporation regulation generally, regulation of reparations-funded microfinance institutions can flounder 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). Cf. Anita Bernstein, *The 2x2 Matrix of Tort Reform's Distributions*, 60 DE PAUL L. REV. (forthcoming 2011) (manuscript on file with author) (juxtaposing security against freedom in the context of reforming tort law). Literatures critical of microcredit raise additional concerns. See *infra* notes 83-89 and accompanying text. In response, we make preliminary recommendations about safeguards that government planners might consider.

14. Sara Lulo, *2010 Symposium Issue Introduction*, 44 CORNELL INT'L L.J. 1 (2011).

15. 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*].

16. See *supra* note 6 and accompanying text. For a thoughtful disagreement with our stance, see generally Roht-Arriaza, *supra* note 4.

17. See *infra* Part II.B.

into a larger scheme. Building on an argument by Lisa Magarrell,<sup>18</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.

Because investment in microfinance moves national economic development forward in several ways, a gender-aware reparations scheme making use of microfinance would offer macroeconomic benefits to a nation that extend beyond the gains to individuals and to gender justice that the scheme might achieve. We discuss two such benefits in Part III below. We focus on what a government already committed to reparations, but uncertain of which program design to choose, would want to know.

## I. The Strategy

If, as Flaubert was reputed to have written, *le bon Dieu est dans le detail*,<sup>19</sup> then microfinance-based reparations schemes will succeed or fail based on their particulars. Decision-makers choosing among alternative modes of reparations would want to know the structure of a microfinance-based plan, as well as how a base in gender justice and international law can inform rebuilding after a national crisis. Although sociocultural variation makes it impossible for us to state a set of optimal practices that would pertain to every national setting,<sup>20</sup> this Part offers guidance to planners about the microfinance institutions in which distributees of reparations would receive shares.

### A. Engaging Microfinance Institutions to Effect Reparations

#### 1. Terminology

As noted in the Introduction, we use *microfinance* to describe financial services designed to meet the needs and circumstances of low-income clients. The word includes savings, insurance, and money transfers.<sup>21</sup> As for *microfinance institutions*, these entities vary. What we have in mind resembles the communal and member-owned local financial entities that already

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18. See 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. See 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*].

19. THE YALE BOOK OF QUOTATIONS 275 (Fred R. Shapiro, ed., 2006).

20. Some of the breadth of what we are discussing can be conveyed at the Reparations page of the International Center for Transitional Justice website. Its variety emerges in books of country-studies, reports, fact sheets, international conferences, and aid by the Center to numerous countries. See Reparations - International Center for Transitional Justice, <http://www.ictj.org/en/tj/782.html> (last visited Sept. 17, 2010).

21. See *supra* note 10 and accompanying text.

exist. Governments would enlist these geographically scattered institutions into the process of distributing reparations to individuals.

We classify microfinance institutions hierarchically as *formal*, *semiformal*, or *informal*, depending on how closely national banking and corporate laws govern and supervise the institution in question.<sup>22</sup> Entities in which recipients can hold their reparations that governments pay might fall into any of these three tiers. The semiformal category, where governments recognize the entity but do not supervise its activities, probably offers the most opportunity and flexibility for a reparations program, except in countries with effective microfinance and microbanking laws and networks of well-functioning institutions that have experience complying with this legal regime.

## 2. *The Plan in Brief: Transfer Payments to, and Shares in, Microfinance Institutions*

Governments that implement the reparations proposal described in this Article would enlist microfinance institutions to provide for shareholder ownership and distribute reparations payments to individuals in the form of both monetary transfers and shares in these microfinance institutions. Although national governments might find it necessary or politically desirable to create new institutions to carry out a reparations plan, they would gain benefits from working with entities already functioning on the ground, including credit NGOs or stable local microfinance institutions. Partnering with these existing institutions would bring to the plan experience with savings and loans, credibility inside the targeted communities, and connections to a wider network of funds.

A central feature of the microfinance institution that we envision as a participant in a reparations plan is that its holdings would go beyond the deposits and shares that governments pay out. Instead, capital paid by the national government as reparations would join returns earned from microfinance services that the institution would provide in the targeted community at large. We make this recommendation with the historical record of indigenous self-help groups and savings-and-credit associations in mind. Such institutions often flourish, and at least do business, almost everywhere in the world.<sup>23</sup> Entities like these—which in this Article we regard as instruments, rather than romantic saviors of the poor—dominate the economies in which millions of people now make their living. Microfinance institutions would integrate reparations transfer payments into the network of savings and credit that sustains a nation in transition.

When making reparations payments, a national government would use two modes of distribution. First, it would give out shares that allot

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22. The taxonomy is Seibel's. See Bernstein, *Pecuniary Reparations*, *supra* note 6, at 22–23. We discuss the tiers in more detail below, when describing how microfinance institutions grow to reach new sources of capital. See *infra* Part I.A.3.

23. See generally FINANCIAL PROMISE FOR THE POOR: HOW GROUPS BUILD MICROSAVINGS (Kim Wilson et al. eds., 2010) (providing examples of indigenous self-help groups from around the world).

each recipient an equity stake in the microfinance institution that would include a say in management, likely in the form of voting rights.<sup>24</sup> Second, the government would deposit cash payments directly into accounts at that institution in the name of each recipient shareholder.

The prescriptive delineation of our plan stops here. In particular, we refrain deliberately from trying to state rules or “best practices” about how a 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.

We predict enhancements to the post-crisis economy that would become measureable relatively quickly after the creation of transfers and ownership. Funded by government-provided shares as well as nongovernmental capital,<sup>25</sup> each microfinance institution can make loans designed to enhance local economic development. Recipients of reparations transfers who seek access to larger amounts of capital could apply for a loan at the institution in which they hold shares. Other individuals would also borrow and repay money in pursuit of entrepreneurial projects. Any loan can fail, of course; we make no predictions about rates of return. Satisfactory performance of the institution, however, would attract more capital, and this growth would in turn generate 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 both debatable and debated, governments that pursue microfinance-based reparations have a useful quantitative measuring device at hand: they can monitor the performance of each microfinance institution by noting standard financial performance indicators before and after the transfer of their payments. Stagnation or dissipation of capital would indicate failure. Increases in the total capital held by the institution, the number of transactions, the size of loans that borrowers take and repay, and the rates of participation not tied to government-paid transfers are among the measurements that will support a judgment of success.<sup>26</sup> These increases would show that what originated as redress, compensation, rehabilitation, and reintegration went on to become a source of development for the national economy as well.

### 3. *Upgrading and 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 both economic devel-

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24. We have in mind one share per recipient, but circumstances may call for other arrangements.

25. See *supra* note 23 and accompanying text; see also *infra* Part III.B.

26. Microfinance-based reparations could succeed at the fiscal level and fail by other criteria. See *infra* notes 88–89 and accompanying text (noting findings of adverse effects on women attributed to Grameen microcredit). Standard financial performance metrics, however, have at least the virtue of clarity to commend them.

opment and reparations.<sup>27</sup> Planners can work with these institutions. Because economic development fosters socially progressive development as well,<sup>28</sup> strengthening these smaller and less formal business affiliations would comport with the overall reparative project.

We have spoken of microfinance institutions as occupying three tiers. Formal institutions are (or closely 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>29</sup> Officially unknown to the government, they respond to demand from poor people and provide a variety of services, their main products being the gathering of small deposits and the making of small loans.<sup>30</sup> Prominent among informal institutions are rotating and non-rotating savings and credit groups or associations, which are usually governed by traditional law.<sup>31</sup> In the middle is the semiformal tier. Semiformal microfinance institutions are usually 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>32</sup>

In the developing world, informal institutions have grown alongside the formal and semiformal sectors, both of which are often of limited reach, and diversified to provide financial services to a varied clientele.<sup>33</sup> The development literature has long extolled this informal tier for its flexibility, responsiveness, low transaction costs, inclusiveness of women, and ability to build collateral from nontraditional sources like community participation.<sup>34</sup> Although we share in this appreciation, we nevertheless recommend the *upgrading* of informal institutions to semiformal or formal levels as an aim for microfinance-based reparations.<sup>35</sup> Regulation and

27. Seibel with Armstrong, *supra* note 6, at 692.

28. See ALLIANCE FOR FINANCIAL INCLUSION, POLICY NOTE: FORMALIZING MICROSAVINGS: A TIERED APPROACH TO REGULATING INTERMEDIATION 2 (2010), available at <http://www.microfinancegateway.org/gm/document-1.9.43671/Formalizing%20microsavings.pdf> [hereinafter *Formalizing Microsavings*].

29. For an alternative approach to classification, see Mark Schreiner, *Informal Finance and the Design of Microfinance*, 11 DEV. IN PRAC. 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).

30. BRIGIT HELMS, ACCESS FOR ALL: BUILDING INCLUSIVE FINANCIAL SYSTEMS 35–38 (2006). To a lesser extent, these services include emergency and funeral assistance.

31. 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.

32. Seibel with Armstrong, *supra* note 6, at 689–90.

33. See, e.g., MICHAEL T. MARX, GEWOHNHEITSRECHT ALS ENTWICKLUNGSPOTENTIAL: SELBSTHILFEORGANISATIONEN IN NIGERIA (1990) [Customary Law as Development Potential: Self-Help Organizations in Nigeria] (explaining the history and development of several types of informal indigenous savings and credit institutions in Nigeria).

34. See Schreiner, *supra* note 29, at 638 (reviewing the literature).

35. Elsewhere Seibel describes in greater detail the ways in which 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



supervision, though initially costly to the informal entity, enhance prospects for sustainability and growth.<sup>36</sup> Increased formality alleviates the categorical detriments of informal microfinance institutions, which include constraints on loan amounts (because 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>37</sup>

A “policy note” published by the Alliance for Financial Inclusion in 2010 pays similar attention to institutional tiers that we note in this Article.<sup>38</sup> This document, entitled *Formalizing Microsavings*, urges national governments to create a special license to cover microfinance institutions that offer savings accounts, separate from the one that commercial banks currently use.<sup>39</sup> The new license so proposed would provide shareholder-depositors with more security than they now receive. As a further recommendation, *Formalizing Microsavings* encourages greater stringency for the special license with respect to some activities and risks, and greater leniency with respect to others.<sup>40</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 offers an instrument 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 should subject informal microfinance institutions to at least some of the regulatory demands of higher tiers.

Upgrading allows microfinance institutions to grow; however, without connections to larger sources of capital, this growth has a natural limit. One way to overcome that limit is demonstrated by India’s successes in *linkage banking*.<sup>41</sup> This practice, based on pilot experience in Indonesia, connects informal rural institutions with the formal banking sector.<sup>42</sup>

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AND FORMAL FINANCIAL INSTITUTIONS (1987); Hans Dieter Seibel, *Upgrading, Downgrading, Linking, Innovating: Microfinance Development Strategies—A Systems Perspective* (Univ. of Cologne Working Paper No. 1997-6, 1997), available at [http://www.uni-koeln.de/ew-fak/aef/PDFold%28revised%29/1997\\_6.pdf](http://www.uni-koeln.de/ew-fak/aef/PDFold%28revised%29/1997_6.pdf); Hans Dieter Seibel, *Saving for Development: A Linkage Model for Informal and Formal Financial Markets*, 4 Q.J. INT’L AGRIC. 390 (1985).

36. Seibel with Armstrong, *supra* note 6, at 693. See generally HANS DIETER SEIBEL, FINANCIAL SYSTEMS DEVELOPMENT AND MICROFINANCE: VIABLE INSTITUTIONS, APPROPRIATE STRATEGIES AND SUSTAINABLE FINANCIAL SERVICES FOR THE MICROECONOMY (1996).

37. Schreiner, *supra* note 29, at 638–39.

38. *Formalizing Microsavings*, *supra* note 28.

39. *Id.* at 5.

40. 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).

41. Seibel, *Reparations Shareholders*, *supra* note 6, at 20. See also 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) (analyzing linkage banking data from India).

42. Seibel, *Reparations Shareholders*, *supra* note 6, at 19.

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 in India promote and assist informal “self-help groups” of up to twenty members, with groups beyond that size required to register under Indian association law.<sup>43</sup>

As of March 2009, linkage banking, the predominant mode of microfinance in India, encompassed 6.12 million self-help groups holding bank deposits and 4.22 million self-help groups with bank loans outstanding. The non-performance ratio for loans from banks to self-help groups was 2.9%, and 80% of the self-help groups were comprised entirely of women, leading to an overall female membership of approximately 90%. These self-help groups covered over 86 million poor households.<sup>44</sup>

Linkage banking has delivered credit to the rural poor in India, integrated self-help groups into national financial markets, and enabled commercial banks to reach out beneficially to microentrepreneurs.<sup>45</sup> A 2009 study of NABARD operations published by the Reserve Bank of India, the central bank, reported positive results notwithstanding the word “critique” in its title.<sup>46</sup> Flaws (including significant regional disparities) persist, but Reserve Bank researchers ascribed disappointments of linkage banking to insufficient investment rather than any deficiency in linkage banking as such.<sup>47</sup> Furthermore, an increasing number of self-help groups have organized in federations at the village, district, and higher levels.<sup>48</sup> Federations help them leverage their strength.<sup>49</sup>

The Indian version of linkage banking balances savings and credit, and suggests a blueprint for reparations programs that would emphasize safe savings while also providing 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: “[w]ith some modifications, the [linkage banking] approach could also be

43. See generally National Bank for Agriculture and Rural Development (NABARD), <http://www.nabard.org/introduction.asp> (last visited Sept. 17, 2010).

44. See NABARD, BASIC FIGURES ON SHG BANKING IN INDIA, 2008-09i-xvi (2008), available at [http://www.nabard.org/pdf/Status of Microfinance in India 2008 09\\_131109.pdf](http://www.nabard.org/pdf/Status%20of%20Microfinance%20in%20India%202008%2009_131109.pdf). For an external analysis of the NABARD linkage banking record, see Karduck & Seibel, *supra* note 41.

45. Seibel with Armstrong, *supra* note 6, at 680, 693.

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

47. *Id.* at 136-38.

48. See C.S. Reddy et al., SHG Federations in India 12-17 (2007), available at <http://www.apmas.org/pdf/SHGfinalbook.pdf>.

49. Pertinent to the gender thesis of this Article and this Symposium, one donor and bank-funded study reported that when village women join self-help group “clusters and federations, [they] 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>.

jumpstarted by, or otherwise incorporate, reparations payments.”<sup>50</sup>

#### 4. *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 a microfinance-based reparations program. Although we make specific recommendations when we can, working at a more general plane has its own 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, in our opinion, negotiable and flexible.

Foremost, the regulation of a microfinance institution that receives and holds transfer payments need not be heavy. Both “semiformal” institutions—which are registered with national governments but not regulated as banks or financial companies—and “informal” institutions could 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 if only informal institutions are available, governments should consider enlisting them and encourage the formation of new 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 in a reparations distribution is controls on interest rates for the loans the entity makes. The literature on microcredit supports this deregulatory inclination,<sup>51</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 emphasized that we share—should accommodate rather than try to supersede the gender-segregation within a given country and culture. We stress that it is only either integration or segregation, 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>52</sup> we believe that as long as the women who participate have some sphere of power in controlling money,<sup>53</sup> planners should not compel microfinance institutions to impose gender integration

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50. Seibel, *Reparations Shareholders*, *supra* note 6, at 19. See also Hans Dieter Seibel, *Linking Informal and Formal Institutions in Africa and Asia*, in *MICROENTERPRISES IN DEVELOPING COUNTRIES* 97, 118 (Jacob Levitsky ed., 1989).

51. 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 29, at 638 (reporting this barrier to sustainable microfinance).

52. See Martin L. Levy, “*Separate But Equal is Inherently Unequal*”, 28 *T. MARSHALL L. REV.* 121, 121 (2003).

53. Eleanor Roosevelt, writing in 1953 about the United Nations Draft Convention on the Rights of Women, described the goal we have in mind:

on the operations of the entity, but instead leave this decision to local participants.<sup>54</sup>

In general, once the government writes or conveys basic 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—rules restricting hasty withdrawal and preventing deposit money from serving as collateral for a loan for the benefit of someone other than the recipient shareholder are among the restrictions that might arise—but controls on the use of reparations payments should come from stakeholders and not from the national government that disburses reparations.<sup>55</sup> We recommend that controls emerge from multiple sources: existing national laws regulating banks and other corporations, the board and management of the institution, and shareholders themselves, acting as owner-recipients of the reparations payments in question.

## B. Extending the Microfinance Record

Having acknowledged that paying reparations through microfinance is an untested idea,<sup>56</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 base our endorsement of microfinance in part on our own field research and in part in a review of the literature; we seek the most conservative projection of benefits to the implementing nation. For this purpose we explore differences between microcredit-as-debt on one hand and microfinance-as-outright-transfer on the other.

### 1. *The Uses of Microfinance*

When writing about microfinance, commentators often begin with the truism that it is “no panacea,”<sup>57</sup> and then proceed to divide into skeptical

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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*, 28 DEP'T ST. BULL. 29, 29 (1953).

54. For a detailed example of how gender segregation can coexist with gains in wealth for women, see Hans Dieter Seibel, *Village Banks in Vientiane Capital, LAO PDR: Roadmap Scenarios for a Sustainable Future* (Feb. 18, 2010), available at [http://mikrofinanzwiki.de/sites/default/files/Village\\_Banks\\_in\\_Vientiane\\_Capital\\_LAO\\_PDR.pdf](http://mikrofinanzwiki.de/sites/default/files/Village_Banks_in_Vientiane_Capital_LAO_PDR.pdf) (describing microfinance in Laos).

55. Cf. *Formalizing Microsavings*, *supra* note 28, at 4 (observing that “innovation is driven first by unregulated microcredit organizations. Over time, these organizations develop into a promising service sector. . . .”).

56. See *supra* note 13.

57. Bernstein, *Pecuniary Reparations*, *supra* note 6, at 26 n.77 (citing writings that use this phrase).

and enthusiastic camps.<sup>58</sup> We put ourselves in the cautious wing of the enthusiastic camp. Postponing for now the macroeconomic question of whether microfinance builds national wealth, which we will address later,<sup>59</sup> we note three improvements to individuals' circumstances that planners can reasonably expect to produce when they install a microfinance-based reparations scheme.

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 would protect the savings that these payments can generate.<sup>60</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>61</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>62</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>63</sup>

Second, a strengthened or newly created financial institution makes credit available to borrowers who may have been written off as unbankable.<sup>64</sup> Despite publicity surrounding microfinance as a worldwide phenomenon, researchers agree that large numbers of people remain out of its reach.<sup>65</sup> Microcredit experts have contended that the supply of money for loans—comprised of savings and equity and including retained earnings,

58. For a summary of negative commentary on microcredit, see Mac Margolis, *Lining Up the Loan Angels*, NEWSWEEK (Apr. 9, 2007), <http://www.newsweek.com/2007/04/08/lining-up-the-loan-angels.html>. For a comprehensive critique, see generally MILFORD BATEMAN, *WHY DOESN'T MICROFINANCE WORK? THE DESTRUCTIVE RISE OF LOCAL NEOLIBERALISM* (2010).

59. See *infra* Part III.A.2.

60. Seibel with Armstrong, *supra* note 6, at 678.

61. See Jennifer L. Schenker, *Mobile Money for the Unbanked*, INFORMILO (Dec. 7, 2009), <http://www.informilo.com/20091207/mobile-money-unbanked-212> (noting that an estimated 2.5 billion adults in the world lack access to banks).

62. See, e.g., STUART RUTHERFORD, *THE POOR AND THEIR MONEY* 1, 19-20 (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 SAFESAVE, <http://www.safesave.org/products.html>. See also *Formalizing Microsavings*, *supra* note 28, at 1 (noting that “[i]n virtually every country in the world, the existing supply of savings services falls short of the demand from low income populations.”).

63. See generally DARYL COLLINS ET AL., *PORTFOLIOS OF THE POOR* 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.”).

64. Seibel with Armstrong, *supra* note 6, at 678.

65. See *Formalizing Microsavings*, *supra* note 28, at 1; M.G. Olujide, *Assessment of Micro-Credit Supply by Country Women Association of Nigeria (COWAN) to Rural Women in Ondo State, Nigeria*, 4 *WORLD J. AGRIC. SCI.* 79, 83 (2008) (making the same observation in a particular national context).

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>66</sup> This claim about an inadequate supply indicates a need for flexibility that can be at least partially filled by microfinance institutions. The microfinance-based mode of reparations gathers financial resources together but does not command that it go to loans; instead, it is flexible and responsive to demand on the ground. Reparations recipients act as both depositors and shareholders empowered to disburse loan money to applicants.

Third, a plan that invites the recipients of reparations into the governance of a local financial institution mobilizes their capacity for self-help and self-management, providing them with a material base of power on which they can build.<sup>67</sup> Again, recall the context of a ravaged nation. Self-help is the backbone of any wartime and postwar economy; recipients will have been looking out for themselves 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>68</sup> Autonomy and commercial participation become more available to recipients, starting 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

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66. See, e.g., Mark Hannam, *Life, Liberty, and Access to Credit* (Jun. 25, 2010), <http://oecdinsights.org/2010/06/25/life-liberty-and-access-to-credit> (arguing that access to credit is a human right); Muhammad 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 24-26, 1999), <http://www.microcreditsummit.org/papers/donorpaper.pdf> (identifying structural impediments to the delivery of loan capital to poor borrowers) [hereinafter Yunus, *Donor Funds*].

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

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* 6 (Int'l Food Pol. Res. Inst., Nigeria Strategy Support Program Background Paper No. Nssp 003, 2009) (emphasis in original), available at <http://www.ifpri.org/sites/default/files/publications/nssp03.pdf>. But see Thomas Dichter, *A Second Look at Microfinance 5-6* (Cato Inst. Center for Global Liberty & Prosperity Dev. Pol'y Briefing Paper No. 1, 2007), available at <http://www.cato.org/pubs/dbp/dbp1.pdf> (arguing that the poor use savings instead of loans to start businesses, and that stable credit is a product of business growth, not a cause thereof).

67. Seibel with Armstrong, *supra* note 6, at 678; cf. Rubio-Marín, *Transitional Societies*, *supra* note 15, at 109-10 (noting that because women often start out deprived, they prefer "reintegration and rehabilitation" over "restitution" within reparations schemes).

68. Rubio-Marín, *Transitional Societies*, *supra* note 15, at 113.

microfinance institutions that may have ties to larger entities, it links recipients to local centers of power. These new networks can provide a counterweight to a national government that has been at best weak or ineffective in the recent past.<sup>69</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.

Our roster of expected benefits based on past experiences with microcredit is conservative, as befits a proposal that contains risk. It does not indulge in the wishful thinking that implementing a microfinance-based reparations plan will create national wealth on a substantial scale. We do believe that making reparations through microfinance generates wealth, stability, and sustainability at a local level,<sup>70</sup> but we disregard these hypothetical gains for present purposes. If the plan is implemented correctly, it would expand access to savings accounts, increase the supply of credit, and provide an opportunity for vulnerable people to gain some power.

## 2. *Heeding the Lessons of Microcredit*

Having outlined the upside of our proposal in conservative terms, we turn now to its possible downsides. 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 can generate.<sup>71</sup> Our proposal can be viewed as only one step away from microcredit, because 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 subsequently 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 currently practiced, however, and extend its record in a constructive new direction.

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69. Seibel with Armstrong, *supra* note 6, at 678–79; Bernstein, *Tort Theory*, *supra* note 18, at 309–10.

70. *See infra* Part III.A.

71. One such downside is the burdensome nature of debt. *See* Margolis, *supra* note 58 (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, *Reflection in a Distant Mirror: Why the West Has Misperceived the Grameen Bank’s Vision 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 an increase of verbal aggression and domestic violence by male relatives in connection with their coercion of women to take out microcredit loans, for the repayment of which the women, as nominal borrowers, remain solely liable). *See also* Bernstein, *Tort Theory*, *supra* note 18, 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.”).

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 they have suffered, the problem of pressure by relatives to make an application lessens; receiving such payments as a government-sponsored transfer requires little or no entrepreneurial application. Second, prerogatives for individuals-cum-shareholders of microfinance institutions reduce the documented drawbacks of microcredit. Whereas taking out a loan obliges a borrower to pay back the principal along with interest—and, in the context of at least one famed microbank, comes with non-pecuniary tasks and pressures<sup>72</sup>—our proposal imposes no new obligations on a recipient. As a shareholder and depositor, the reparations recipient need not borrow money nor involve herself in any loan decisions.

Moreover, because it expands its base to include shareholder-recipients who, unlike the plucky borrowers of microcredit lore, have not manifested any entrepreneurial inclination before they participate, the reparations plan we advocate adds a stabilizing constituency to the microfinance institution. New shareholders are likely to favor safety over higher-yielding risk. These new owners will enlarge the demand for—and from there, the supply of—sober financial services, such as life and funeral insurance.

### C. Safeguards Against Gender-Related Abuses

Microfinance has long enjoyed a reputation for elevating the position of women.<sup>73</sup> In our prior work we have, to a degree, shared this enthusiasm.<sup>74</sup> Focused here on strategies for implementation, we urge governments to heed concerns related to gender equality that will arise as part of any microfinance-based reparations scheme. Awareness is the most fundamental prescription we can make, but we also have a few specifics about how to assuage foreseeable detriments to women.

A report issued by the Swiss Agency for Development and Cooperation identifies four classes of constraints that operate to cut women off from the gains of economic development and thus may harm the prospects of a microfinance-based reparations plan.<sup>75</sup> First, legal barriers, such as laws requiring the consent of a male relative to engage in a business trans-

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72. See *Methodology*, GRAMEEN BANK, [http://www.grameen-info.org/index.php?option=com\\_content&task=blogsection&id=6&Itemid=169](http://www.grameen-info.org/index.php?option=com_content&task=blogsection&id=6&Itemid=169) (last visited Sept. 17, 2010) (describing the Sixteen Decisions that Grameen Bank members must pledge when accepting loans).

73. See Bernstein, *Pecuniary Reparations*, *supra* note 6, at 4-5, 31; see also sources cited *infra* note 81 and accompanying text.

74. Bernstein, *Pecuniary Reparations*, *supra* note 6, at 37-43 (concluding that the record of microfinance, despite several disappointments, suggests that microfinance enhances the status of women); Seibel, *Reparations Shareholders*, *supra* note 6, at 18 (reporting gains experienced by women from microfinance in Syria).

75. SWISS AGENCY FOR DEV. & 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*].



action, impede women in several countries. Second, sociocultural conditions present in some countries restrict women to the household or otherwise discourage their participation in business. The third and related category of women-specific constraints, family obligations, typically increases domestic workloads for women and thereby limits their mobility. Finally, women suffer from inferior access to institutional supports, including job training and occupational or professional networks to expand their economic opportunities.

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 society at large. Making reference to fieldwork she did in South Asia, Linda Mayoux brings pertinent issues to the fore. Women may be participating in microenterprise out of a “desperate” need for income, Mayoux writes, rather than making a free, “conscious choice” to do so.<sup>76</sup> Contrary to economic theory, women also do not always benefit when their income rises. Their male relatives are likely to cooperate with their entrepreneurial activities only when those efforts bring money under male control and where the activity does not “require any change in women’s unpaid domestic or productive work.”<sup>77</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>78</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 entrepreneurs “are as likely as men to manipulate gender inequalities and gender stereotypes.”<sup>79</sup>

Commentary by the founder of the Grameen Bank informs this analysis. Muhammad Yunus won fame for his choice to lend money to women rather than men.<sup>80</sup> Rhetoric of female empowerment continues to accompany discussions of microfinance policy.<sup>81</sup> As one observer has argued,<sup>82</sup>

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76. LINDA MAYOUX, U.N. RES. INST. FOR SOC. DEV., FROM VICIOUS TO VIRTUOUS CIRCLES? GENDER AND MICRO-ENTERPRISE DEVELOPMENT 26 (1995), available at [http://www.unrisd.org/unrisd/website/document.nsf/d2a23ad2d50cb2a280256eb300385855/5901781754e7c91580256b67005b6af7/\\$FILE/opb3.pdf](http://www.unrisd.org/unrisd/website/document.nsf/d2a23ad2d50cb2a280256eb300385855/5901781754e7c91580256b67005b6af7/$FILE/opb3.pdf).

77. *Id.*

78. *Id.* at 27.

79. *Id.*

80. Dyal-Chand, *supra* note 71, at 220.

81. See MUHAMMAD YUNUS, BANKER TO THE POOR: MICRO-LENDING AND THE BATTLE AGAINST WORLD POVERTY 71 (1999) (remarking that Grameen was intentionally “gender-biased” towards women due to the existence of a banking system that was “created for men.”). See also 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 necessary” to resist gender-based injustice); Charlotte E. Lott, *Why Women Matter: The Story of Microcredit*, 27 J.L. & COM. 219, 230 (2009) (stating that “[m]icrocredit with women as the principal borrowers is a powerful tool in the reduction of poverty and the transformation of society.”); Katherine Spengler, Note, *Expansion of*

however, the Grameen model rests on a perception of women as instruments.<sup>83</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.

One detailed review undertaken by Aminur Rahman in the 1990s attributed the Grameen Bank's high repayment rate in significant part to domineering behavior by male employees over female borrowers.<sup>84</sup> Rahman interviewed several bank workers who described these women as "shy," "submissive," and "immobile," whereas male borrowers, to these informants, were "arrogant" and belligerent when faced with collection or monitoring efforts from the bank.<sup>85</sup> Because women remain geographically "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 honor. They know that a default would bring disgrace to their relatives to a degree that male defaulting would not.<sup>86</sup>

Another concern about gender in microcredit is "fronting," a practice whereby men pressure women to take out female-only loans subject to the men's use and control. Researchers confirm that worries about male relatives' appropriating monies set aside for women have a foundation in real experience.<sup>87</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 personally obliged to repay.<sup>88</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>89</sup>

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*Third World Women's Empowerment: The Emergence of Sustainable Development and the Evolution of International Economic Strategy*, 12 *COLO. J. INT'L ENVTL. L. & POL'Y* 303, 334-39 (2001) (arguing that making microcredit more available to women may help increase sustainable agricultural practices).

82. Dyal-Chand, *supra* note 71, at 262.

83. See, e.g., YUNUS, *supra* note 81, at 72 (noting that "money entering a household through a woman brings more benefits to the family as a whole.").

84. AMINUR RAHMAN, *WOMEN AND MICROCREDIT IN RURAL BANGLADESH* 73-74 (1999).

85. *Id.*; see also STUART RUTHERFORD, *THE PLEDGE: ASA, PEASANT POLITICS, AND MICROFINANCE IN THE DEVELOPMENT OF BANGLADESH* 135 (2009) (reporting the use of shaming tactics in repayment collection by the Association for Social Advancement, a large Bangladeshi organization similar to Grameen).

86. Dyal-Chand, *supra* note 71, at 263.

87. 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 84, at 109-15 (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).

88. Anne Marie Goetz & Rina Sen Gupta, *Who Takes the Credit? Gender, Power, and Control Over Loan Use in Rural Credit Programs in Bangladesh*, 24 *WORLD DEV.* 45, 49 (1996).

89. Mayoux, *supra* note 76, at 38.

These findings contain some nuance, however. For example, men who control a loan nominally assigned to women often contribute to repaying it.<sup>90</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>91</sup> In other words, comparing two couples that both live with a loan that the man controls indicates that the wife is better off in the couple that has a Grameen loan in the name of the wife than in the couple with a loan that a husband obtained on his own. 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>92</sup> Microcredit is associated with other non-pecuniary welfare gains, notably the use of contraceptives and women's control of their fertility.<sup>93</sup> Researchers also tentatively link microcredit to enhanced education for girls and women.<sup>94</sup>

The mixed record of microcredit becomes stronger and more encouraging with reference to microfinance-based reparations. Two contrasts are important here: first, microfinance-based reparations offers shares (*i.e.* equity) in microfinance institutions, as opposed to other types of pecuniary reparations;<sup>95</sup> second, microfinance-based reparations offers microfinance in the form of ownership instead of as microcredit.<sup>96</sup> The methodology of "asking the woman question"<sup>97</sup> supports a conclusion that although a microfinance-based reparations plan contains gender perils, it is better for female recipients than its rivals in the pecuniary category. Similarly, a savings account that contains money and represents an equity stake in a financial institution gives a woman more power than she would receive from a loan.<sup>98</sup>

90. *Id.* at 39-40.

91. *Id.*

92. Zern-shun Adam Chen, Note, *Securitizing Microcredit: The Implications of Securitization for Microcredit Institutions' Human Rights Missions*, 39 COLUM. HUM. RTS. L. REV. 757, 766 (2008) (citing sources).

93. Lott, *supra* note 81, at 227.

94. BEATRIZ ARMENDARIZ & JONATHAN MORDACH, *THE ECONOMICS OF MICROFINANCE* 181 (2005).

95. See *infra* notes 120-124 and accompanying text.

96. 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. ON POVERTY L. & POL'Y 205 (2005) (recommending that some humanitarian aid that international funders distribute following national conflict take the form of microcredit).

97. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990) (stating that "[f]eminists 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.") (internal citations omitted).

98. See Bernstein, *Pecuniary Reparations*, *supra* note 6, at 44-45 (arguing that "[s]hares 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.").

Gender-awareness in the microfinance-reparations scheme will increase the odds of benefiting female recipients. If a government chooses to make payments to existing microfinance institutions, then it ought to look for ones with experience in allotting decision-making power to women as stakeholders and located in places that are geographically accessible to women.<sup>99</sup> Governments that decide to launch new microfinance institutions for this purpose should work with what one study called “gender-sensitive and trained personnel,”<sup>100</sup> Female recipients should receive their equity shares and savings accounts with their own names on them.<sup>101</sup> The pecuniary goal we pursue with these suggestions is to increase the amount of money about which women make spending decisions. The welfare effects of such a shift of wealth are positive.<sup>102</sup>

## II. 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 disputed 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 make reparations.<sup>103</sup> Because we are examining reparations as a technique already in use,<sup>104</sup> however, 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. Acknowledging that international law recognizes payments to individuals among the many modes of reparation available to states following national crises, critics of pecuniary reparations have expressed doubt that this form achieves real repair.<sup>105</sup> Our argument in this section—that among the ways to distribute pecuniary reparations, microfinance fits best with the reparative mandate of interna-

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99. See *Gender Approach*, *supra* note 75, at 16 (citing a program in Mozambique that achieved a significant increase in women’s participation by moving to marketplaces near women’s worksites). See also Christen & Mas, *supra* note 51, at 278 (noting that “[e]very 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 places where they live and work.”).

100. *Gender Approach*, *supra* note 75, at 14.

101. See Bernstein, *Pecuniary Reparations*, *supra* note 6, at 45 (discussing benefits to women of self-owned reparations shares).

102. See *infra* Part III.A.

103. 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. See Roht-Arriaza, *supra* note 4, at 163–64 (internal citations omitted).

104. See generally THE HANDBOOK OF REPARATIONS (Pablo de Greiff ed., 2006) (documenting twentieth-century experiences with reparations).

105. See Bernstein, *Pecuniary Reparations*, *supra* note 6, at 10–11 (reviewing sources).

tional law—may be of particular interest to readers inclined to oppose the pecuniary mode. The need to recognize gender in reparative schemes, discussed below in the second section, is much less controversial.

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

International law sources for the mandate of reparations are manifold. Treaties that recognize an obligation to make, and an entitlement to receive, reparations include the American Convention on Human Rights of 1969;<sup>106</sup> the International Covenant on Civil and Political Rights of 1976;<sup>107</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination of 1969.<sup>108</sup> The United Nations has issued proclamations on the necessity of reparations, notably in its foundational Universal Declaration of Human Rights of 1948.<sup>109</sup> These sources emphasize the uncontroversial nature of the obligation. One resolution approved by the General Assembly in 2006, for example, described its call for reparations plans—which it suggested should include “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”<sup>110</sup>—as a restatement of “existing” law, rather than the enactment of new entitlements.<sup>111</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. According to de Greiff, *restitution* refers to restoration and reinstatement for victims; *compensation* refers to the steps taken to make up for 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; finally, *guarantees of non-recurrence* recognize the need for future change, including the need for “institutional reform.”<sup>112</sup>

Our focus on microfinance emphasizes the pecuniary elements of this recitation. We have argued elsewhere that reparations schemes that trans-

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106. Organization of American States, American Convention on Human Rights, arts. 63, 68, Nov. 12, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

107. International Covenant on Civil and Political Rights, art. 2(3)(a)-(c), Mar. 23, 1976, 999 U.N.T.S. 171.

108. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969)

109. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/Res/217A (III) (Dec. 10, 1948).

110. G.A. Res. 60/147, ¶ 18, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

111. *Id.*, Preamble.

112. Pablo de Greiff, *Justice and Reparations*, in THE HANDBOOK OF REPARATIONS 451, 452 (Pablo de Greiff ed., 2006) [hereinafter de Greiff, *Justice*].

fer wealth can achieve non-pecuniary gains for nations and societies.<sup>113</sup> We will expand on these points below. Here we find an imperative to make payments to individuals in de Greiff's warning about the dangers of "blood money," on one hand, and "cheap talk," on the other.<sup>114</sup> "Blood money" expresses in metaphor what a payor does out when it expends cash while refusing to acknowledge the crisis that made such a 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>115</sup> We recognize the denunciation of "blood money," and take as given that a reparations plan crafted pursuant to this Article's recommendations would also include non-pecuniary recognition.<sup>116</sup>

More central to this Article is the danger of "cheap talk" quasi-reparations, a public display that condemns the troubled past or makes vague promises about the bright future but withholds restitution, compensation, and reintegration from individuals. We have argued elsewhere at some length that payments to individuals, apart from development-minded spending to enhance a national economy, impart to reparations programs a genuine recognition of past wrongs done to individuals.<sup>117</sup> Other observers of particular initiatives have shared in this judgment, commenting on the necessity (along with the insufficiency) 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>118</sup>

113. See sources cited *supra* note 6.

114. De Greiff, *Justice*, *supra* note 112, at 461.

115. 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).

116. Examples of non-pecuniary gains would include an apology, a truth commission, or a public memorial. Such non-pecuniary 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*].

117. Seibel with Armstrong, *supra* note 6, at 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, *Pecuniary Reparations*, *supra* note 6, at 11 (arguing that payments to individuals establish "ledgers" that "affirm an ideal of governmental responsibility.").

118. See, e.g., Brandon Hamber, *Narrowing the Macro and Micro: A Psychological Perspective on Reparation in Societies in Transition*, in THE HANDBOOK OF REPARATIONS 560, 567 (Pablo de Greiff ed., 2006) (noting that "[t]here 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-Marin, *Gender and Collective Reparations in the Aftermath of Conflict and Political Repression*, in THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 381, 396-99 (Ruth Rubio-Marin ed., 2009) (describing different modes of pecuniary investment that a government could use in order to create recognition of harms to women as a group); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 517-18 (1998)

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<sup>119</sup>—by distinguishing shares in microfinance institutions, which constitute ownership, 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>120</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>121</sup>

One-off payments can be particularly dangerous and unavailing to women. Post-conflict economic crises can cut women off from whatever access to banks they may have had, make their possession of cash riskier, and worsen poverty in the nation, which in turn can increase the likelihood that male relatives or partners of these recipients would take the monies paid to women for their own use. Furthermore, certain national laws and customs do not recognize full rights of women to hold traditional forms of property like land or livestock,<sup>122</sup> making it harder for women to turn their cash into something they want to own and are able to 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 society at large—is likely to be short-lived and far from sustainable.<sup>123</sup> A one-off direct payment will have little effect on reintegration or rehabilitation.<sup>124</sup> It does not invite a recipient into governance, democratic deliberation, or civic life.

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(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) (internal citations omitted).

119. See, e.g., Yamamoto, *supra* note 118, at 520–21 (noting, for example, that “monetary compensation . . . is not, alone, deemed sufficiently reparatory by most Hawaiians.”).

120. See Schenker, *supra* note 61.

121. Roht-Arriaza, *Book Review*, *supra* note 116, at 237.

122. See, e.g., Jamie Crook, Comment, *Promoting Peace and Security in Rwanda Through Fair and Equitable Land Rights*, 94 CAL. L. REV. 1487, 1505 (2006) (describing laws and customs whose effects persist in sub-Saharan Africa). See also 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) (stating that women’s rights are framed as “family protection” or otherwise broad non-discrimination terms that do not expressly protect the property and economic rights of women, and that the African Union “fails to support or adequately fund its women’s rights initiatives.”). Laws and customs that impede travel have a similar effect on the ability of women to achieve gains from reparations payments.

123. Seibel, *Reparations Shareholders*, *supra* note 6, at 1.

124. See Rubio-Marin, *Transitional Societies*, *supra* note 15, 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 very different goals: 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, with each person experiencing trauma in a unique way. On the other hand, victims also suffered as members of groups or social aggregates.<sup>125</sup>

A focus on individual justice must strain to include the communal, tribal, familial, and national elements of the suffering being recognized. The alternative, a focus on collective justice, contains these recognitions but lacks particular attention to the unique human being who experienced a human rights violation. 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 will not 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>126</sup>

The remedial difficulty of honoring both individual and collective harm becomes explicit when the planning nation tries to state exactly what it is trying to repair. In her analysis of reparations in Peru, published soon after that nation's plan was announced in 2003, Lisa Magarrell broached what she called "the question of consequences vs. violations as a starting point."<sup>127</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>128</sup> Focusing on violations raised problems of its own. Magarrell noted that the "most politically attractive" features in the reparations scheme are "those that look like development programs, and that—either coincidentally or purposefully—thus lose some of their reparative force."<sup>129</sup>

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125. See, e.g., 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 in the United States).

126. This response arose in Peru. See Magarrell, *supra* note 18, at 93–94.

127. *Id.* at 91.

128. *Id.* at 93–95.

129. *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 portion of the funds needed to execute its reparations plan. INTERNAL DISPLACEMENT MONITORING CENTRE, PERU: REPARATIONS BEGIN BUT IDPs EXCLUDED 6 (2009), available at <http://>



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 by at least 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. Each expenditure necessarily precludes another when resources are finite, making it impossible to deploy all feasible methods of repair at once. 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 affect 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>130</sup> Consistent with these experiences, we agree that national governments undertaking reparations must install a centralized administrative scheme rather than limit redress to independent individual initiative. In relatively wealthy countries, claimants may have access not only to these centralized administrative schemes but also to courts that use tort principles of responsibility and redress to evaluate the harm that claimants suffered as individuals. When national governments pay out reparations to social aggregates, however, they cannot apply tort reasoning to form individually tailored remedies.<sup>131</sup>

Carrying out the mandates of international law would aggregate categories of injuries and claimants and attempt, within this aggregation, to treat like cases alike.<sup>132</sup> At the same time, a reparations program that sets

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[/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).

130. Roht-Arriaza, *supra* note 4, at 165–77 (reviewing reparations debates in Argentina and describing a successful tort claim, brought by Daniel Tarnopolsky, as well as a centralized governmental reparation scheme).

131. Malamud-Goti & Grosman, *supra* note 115, at 551 (arguing that ideally the nation undertaking reparations should provide both administrative compensation and access to courts that apply tort principles).

132. The tension between consequences and violations means that the principle of "like cases alike" will necessarily invite debate over which classification outweighs the

out to repair human rights violations ought to provide for the initiative and freedom of individuals. This measure of individual justice offers 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>133</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.

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

Gender awareness makes the desired outcomes of a reparations plan—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 international law,<sup>134</sup> whether nations need to take extra steps to ensure women's access to pecuniary modes of redress,<sup>135</sup> and whether women are entitled to recompense for “indirect” or “secondary” harms relating to harms that their partners or children suffered.<sup>136</sup> In other words, we do not join discussions over what types of affronts constitute actionable violations; we assume instead 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 United Nations Security Council over the past decade have declared the necessity of including women as participants when nations rebuild after conflict. Superseded

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other. This problem, however, is present in any approach that mixes law and justice. On the presence of the principle of “like cases alike” in world law, see Olav A. Haazen, *Precedent in the World Court*, 38 HARV. INT'L L.J. 587, 599 (1997) (book review) (arguing that this principle is part of international law). See also 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 principle is Aristotelian in origin).

133. See generally Roht-Arriaza, *Book Review*, *supra* note 116, at 238 (arguing that “[g]overnments 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 18, at 97.

134. Rubio-Marín, *Transitional Societies*, *supra* note 15, at 83–84 (summarizing points of disagreement).

135. *Id.* at 106.

136. *Id.* at 91–93.

ing an older conception of women as victims and vulnerable subgroups, these instruments put women at the center of repair work, making women subjects, and not just the passive objects of the actions of 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>137</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>138</sup> Successor resolutions by the Security Council built on the ambition of Resolution 1325 by adding measures to ensure accountability,<sup>139</sup> calls for “redress” for harms to women’s human rights,<sup>140</sup> and reminders to heed the socio-economic claims and needs of women in post-conflict programs.<sup>141</sup> Calls for gender quotas and parity in international assemblies remind participants of what women contribute as leaders and decision-makers.<sup>142</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>143</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>144</sup> Its elaborate “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross 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>145</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 “as a war crime, a

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137. For information on the Fourth World Conference on Women, see generally Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT’L L. 759 (2007). On the relation of Resolution 1325 to that Conference, see Dianne Otto, *Power and Danger: Feminist Engagement with International Law through the UN Security Council*, 32 AUSTL. FEMINIST L. J. 97, 100 (2010).

138. Otto, *supra* note 137, at 101, 104.

139. S.C. Res. 1820, ¶ 7, U.N. Doc. S/RES/1820 (June 19, 2008).

140. S.C. Res. 1888, ¶ 6, U.N. Doc. S/RES/1888 (Sept. 30, 2009). This resolution was drafted by the United States. See Dulcie Leimbach, *A New U.N. Resolution Zeroes In on Rape as a Weapon*, UNITED NATIONS ASSOCIATION WORLD BULLETIN (Oct. 7, 2009), <http://www.unausa.org/worldbulletin/clinton/women>.

141. S.C. Res. 1889, Preamble, U.N. Doc. S/RES/1889 (Oct. 5, 2009).

142. See, e.g., Rosenblum, *supra* note 137, at 799-800 (discussing examples from France and Brazil of actions taken to encourage female representation in politics).

143. See G.A. Res. 58/142, U.N. Doc. A/RES/58/142 (Feb. 10, 2004).

144. U.N. Secretary-General, *In-depth Study on All Forms of Violence Against Women*, ¶¶ 6-10, U.N. Doc. A/61/122/Add. 1 (July 6, 2006).

145. G.A. Res. 60/147, ¶¶ 20-25, U.N. Doc A/RES/60/147 (Mar. 21, 2006).

crime against humanity, and an act of genocide,”<sup>146</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>147</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>148</sup>

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 that continues 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 that agenda. Women who manage their property demonstrate that the power to save, spend, and invest assets belongs to all human beings, regardless of gender.

### III. Macroeconomic Gains in Post-Conflict Nation-Building

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 in general,” and “has a disproportionately positive impact on the income of the poor. . . .”<sup>149</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>150</sup> Around the world, female borrowers have leveraged small loans to build a degree of prosperity.<sup>151</sup> Shifting from microcredit to the outright-transfers version of microfinance that this Article recommends would make good use of the wealth-creating tendencies of microcredit, while greatly reducing the drawbacks that expansive debt installs.

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146. 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).

147. 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. 1297, 1309-13 (2008).

148. *Id.* at 1309.

149. *Formalizing Microsavings*, *supra* note 28, at 2.

150. See generally M. Shahe Emran, A.K.M. Mahbub Morshed & Joseph E. Stiglitz, *Microfinance and Missing Markets* (Mar. 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1001309](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001309) (explaining the extraordinary success of microcredit with reference to its repair of flawed labor markets that exclude participation by women).

151. Isobel Coleman, *The Better Half: Helping Women Help the World*, 89 FOREIGN AFF. 126, 128 (2010) (noting that “[t]oday, 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.”).

Furthermore, microfinance offers a conduit to attract funding for reparations from a class of under-tapped potential benefactors: entrepreneur-funders who live outside the nation.<sup>152</sup> Monies that these individuals donate to or invest in a reparations program would, *ceteris paribus*, increase its salutary effects.<sup>153</sup> To be sure, wealthy persons who earned their fortunes through commercial innovation and risk-taking might also admire other proposals that compete for their attention—not only one-off cash transfers, but also investments in national infrastructure, such as the funding of hospitals or schools, which some observers believe can be a form of reparation.<sup>154</sup> Only a microfinance program like the one we propose in this Article, however, would extend to these donors the so-called sincerest flattery of emulating them.<sup>155</sup> Because taking an entrepreneurial approach to reparations identifies a nation as committed to market-oriented economic growth as well as non-pecuniary healing for its citizens, this 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 widening a transnational base of support in the aggregate.

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, transfers of shares and deposits in financial institutions (in contrast to two alternatives: investments in national development, such as the construction of clinics or schools, or loans that borrowers must agree to repay) and, second, attention to the inclusion and participation of female recipients. As we detail in the first section below, 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 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 transferring control over money to women enhances the

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

153. See generally Yunus, *Donor Funds*, *supra* note 66.

154. See *supra* note 3 (noting the possibility that governments will describe their spending on infrastructure as reparations). An example of a funder that supports both microfinance and non-microfinance projects is the Gates Foundation, which invests in health care and preventative medicine. See *Programs & Partnerships*, <http://www.gatesfoundation.org/programs/Pages/overview.aspx>, THE BILL & MELINDA GATES FOUNDATION (last visited Oct. 22, 2010). See also *infra* note 197 and accompanying text.

155. See CHARLES CALEB COLTON, *LACON: OR, MANY THINGS IN FEW WORDS; ADDRESSED TO THOSE WHO THINK* 113 (1837).

welfare of children, the nation's next generation.<sup>156</sup> In hungry countries, children gain more of the calories they need to live when women gain more money vis-à-vis men.<sup>157</sup> As a general rule, low-income men spend at least part of their income on their own pleasure, as consumers, whereas low-income women tend to contribute their entire income to their households.<sup>158</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, these workers concluded that women nourished their families more reliably than men.<sup>159</sup>

As mentioned above, researchers who study microcredit have found that access to microfinance increases the use of contraceptives and is linked to gains in female literacy.<sup>160</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>161</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>162</sup> American policymakers who regard the advancement of women as desirable in itself—independent of whether children do better, based on the benefits of full citizenship for women—have taken advantage of crises to encourage gender-progressive social investments.<sup>163</sup> Directing transfer payments to the control of women yields gains to the repairing national government.<sup>164</sup>

156. See Bernstein, *Pecuniary Reparations*, *supra* note 6, at 48–50.

157. *Id.* (reporting studies in Kenya, Jamaica, and Brazil).

158. See Lott, *supra* note 81, at 226–27 (reviewing studies).

159. *Women-Only Food Sites Open in Haiti*, (Jan. 31, 2010), <http://www.cbc.ca/world/story/2010/01/31/haiti-women-food.html>.

160. See Lott, *supra* note 81, at 227–28.

161. Sarita Gupta, *Microfinance in Africa: Harnessing the Potential of a Continent*, 9 MICROFINANCE INSIGHTS 12, 14 (2008).

162. Bernstein, *Pecuniary Reparations*, *supra* note 6, at 49 (internal citations omitted).

163. 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 A35. 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), <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 11th terrorist attacks, 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 firefighter tests and obtained donations of space for women to practice. A record number of women became firefighters. Dana Goldstein, *Pink-Collar Blues*, THE AM. PROSPECT, June 2009, at 19, 21.

164. See generally Beth Goldblatt, *Evaluating the Gender Content of Reparations: Lessons from South Africa*, in WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR

## 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.” “Development from below. . . serves to advance democracy and human rights,”<sup>165</sup> the announcement added. The Nobel Committee was expressing what had become close to a conventional wisdom: “millions for millions.”<sup>166</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>167</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>168</sup> Our review of the evidence as it has been presented in the CGAP report and elsewhere finds that microcredit has generated wealth and welfare gains for poor people around the world. The effect is more modest than some microcredit-enthusiasts have claimed but it exists.<sup>169</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. The drawbacks of being indebted may be present for borrower-clients of microfinance institutions, but transfers to recipients-owners of such institutions do not burden these individuals with risks associated with debt and thus largely escape the detrimental effects of microcredit.

We extend our skepticism to anecdotes, and recommend parsimony and caution in generalizing about what a microfinance intervention can do. As Esther Duflo, a recipient of several honors for pioneering work on the development of vulnerable economies,<sup>170</sup> has demonstrated through

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HUMAN RIGHTS VIOLATIONS 48 (Ruth Rubio-Marín ed. 2006). For a particular example of directing money to women, see *id.* at 73-74 (reporting that South Africa implementers of reparations give to women funds intended for children “in the belief that this money would actually reach the family, because men sometimes misuse it and often are not the actual custodians of the children.”).

165. 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).

166. See generally Connie Bruck, *Millions for Millions*, THE NEW YORKER, Oct. 30, 2006, at 62.

167. See *supra* notes 66, 71 and accompanying text.

168. RICHARD ROSENBERG, CONSULTATIVE GROUP TO ASSIST THE POOR, FOCUS NOTE NO. 59, DOES MICROCREDIT REALLY HELP POOR PEOPLE?, available at <http://www.cgap.org/gm/document-1.9.41443/FN59.pdf>.

169. The basic lesson is that while microcredit can have beneficial effects, borrowers who fail to repay their loans do not share them. See generally BATEMAN, *supra* note 58.

170. Among other honors Duflo has been awarded a MacArthur “genius” grant and the Clark Medal, which often presages Nobel recognition for economists. See Press

her Poverty Action Lab at the Massachusetts Institute of Technology, rival approaches toward increasing wealth and welfare can and should be tested through the same kind of randomized studies that regulators demand to prove the efficacy of new pharmaceuticals.<sup>171</sup> This technique provides valuable evidence about the value of interventions.<sup>172</sup> Scarcity always necessitates prudence in government spending to increase welfare, and the fraught political context of post-conflict reparations makes such prudence even more important.

Following decades of anecdotal information about the supposed power of microcredit—plucky women receive tiny loans, open small businesses, 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 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>173</sup> Another randomized and controlled trial that pertains more closely to the reparations proposal of this Article was published by the MIT Poverty Action Lab in 2009. In that study, researchers assembled one hundred and four slums in Hyderabad and opened a microfinance bank in half of them, based on a random selection. A year and a half later, they found modest effects: the introduction of microfinance institutions had no impact on health, education, or women's outcomes, but did lead to increases in new business and in the profitability of existing businesses.<sup>174</sup>

In 2009, researchers at the World Bank reported on an extraordinary data set that arose in Mexico;<sup>175</sup> though not a controlled study, this event

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Release, Peter Dizikes, Esther Duflo Wins Clark Medal (Apr. 23, 2010), available at <http://web.mit.edu/newsoffice/2010/duflo-clark-0423.html>.

171. *Id.*

172. As a founding editor of the *American Economics Journal: Applied Economics*, Duflo has helped to facilitate research reporting empirical measurements and analysis of interventions to increase social welfare. See Esther Duflo, <http://www.povertyactionlab.org/duflo> (last visited Oct. 22, 2010). For a sample of findings published in that journal, compare Benjamin A. Olken, *Do Television and Radio Destroy Social Capital? Evidence from Indonesian Villages*, 1 AM. ECON. J. APPLIED ECON. 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*, 3 AM. ECON. J. APPLIED ECON. 91 (2011) (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).

173. Dean Karlan & Jonathan Zinman, *Expanding Credit Access: Using Randomized Supply Decisions to Estimate the Impacts*, 23 REV. FIN. STUD. 433 (2010).

174. Abhijit Banerjee et al., *The Miracle of Microfinance? Evidence from a Randomized Evaluation* 12–14 (The Institute for Financial Management and Research, Centre for Micro Finance Working Paper Series No. 31, 2009), available at [http://ifmr.ac.in/cmfp/publications/wp/2009/31\\_Banerjee\\_Miracle\\_of\\_Microfinance.pdf](http://ifmr.ac.in/cmfp/publications/wp/2009/31_Banerjee_Miracle_of_Microfinance.pdf).

175. Miriam Bruhn & Inessa Love, *The Economic Impact of Banking the Unbanked: Evidence from Mexico* (The World Bank, Policy Research Working Paper No. 4981, 2009), available at <http://ideas.repec.org/p/wbk/wbrwps/4981.html>.



presented many of the virtues of this device. A large retailer of consumer goods called Grupo Elektra received a charter that 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 815 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>176</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 researchers to compare macroeconomic indicators in municipalities with Banco Azteca branches to municipalities that lacked access to microcredit. The World Bank found gains in the municipalities with branches, noting that the opening of a Banco Azteca branch led to an increase of 7.6% in the number of informal business owners, an increase of 1.4% in total employment, and an increase in average income of about 7%.<sup>177</sup>

These effects resulted from 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 or quasi-controlled settings like the Banco Azteca experience. Our premise is that the three gains from our plan for microfinance-based reparations—a safe place for savings for people who have previously lacked it, an expansion of the money available for loans, and increased opportunities for nation-building via social solidarity<sup>178</sup>—add up to more than what a commercial bank can render, because commercial banks might not offer self-help to individuals and the repair that emerges from the networks they build.<sup>179</sup>

## B. External Donor-Investor Participation

Writing about reparations from a United States domestic perspective, the economist and legal scholar Saul Levmore proposed a reparations

176. *Id.* at 2.

177. *Id.* at 3.

178. *See supra* Part I.A.

179. 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 (internal citations omitted). On the relationship between microfinance institutions and the development of self-help networks, see *supra* notes 66–71 and accompanying text.

scheme for African Americans modeled in part on philanthropy. He described his idea as follows:

The plan is to ask for donors. 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>180</sup>

Under the Levmore plan, taxpayers would 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*, relates to our recommendations about reparations through microfinance. Recognition of the private sector can augment a national reparations program in a post-conflict setting. We do not explicitly "ask for donors," but instead suggest a mode that welcomes and facilitates participation from benefactors outside the national government. The diaspora already excels at remittances.<sup>181</sup> 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>182</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>183</sup> Pecuniary reparations plans legislated in poorer countries have gone on to fail for lack of funds.<sup>184</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 least occasionally accompany the reach toward external financing because "foreign actors [may have] supported the military regimes or participated directly in the internal conflicts of societies in transition."<sup>185</sup>

Summing up the problem of financing reparations, the development economist Alexander Segovia concludes that foreign support for national

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180. Saul Levmore, *Privatizing Reparations*, 84 B.U. L. REV. 1291, 1302-03 (2004).

181. See, e.g., Sergio Díaz-Briquets, *Remittances to Cuba: An Update*, 18 CUBA IN TRANSITION 154 available at <http://lanic.utexas.edu/project/asce/pdfs/volume18/pdfs/diaz-briquets.pdf> (describing remittances of the Cuban diaspora).

182. 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 152, at 659. We extend these precedents by moving beyond national governments and international aid organizations to individuals and the resources they control.

183. Roht-Arriaza, *Book Review*, *supra* note 115, at 234-35.

184. Segovia, *supra* note 152, 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 (internal citations omitted).

185. Segovia, *supra* note 152, at 659.

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>186</sup> Planners of reparations schemes must also “find new mechanisms of cooperation that enable the community to finance reparations, at least in part.”<sup>187</sup> As examples of these “new mechanisms,” Segovia notes that foreign governments might forgive debt or aid in confiscating and repatriating stolen assets.<sup>188</sup>

The pursuit of “new mechanisms” to fund reparations goes further when extended beyond foreign national governments and into the international financial community, which has manifested its commitment to microfinance.<sup>189</sup> To date, “foreign contributions for financing reparations have been fairly modest, and in most cases disappointing.”<sup>190</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. With its large number of wealthy individual citizens and a strong tradition of private philanthropy, the United States offers a concentration of potential donors that could be tapped while the consensus about the importance of transnational imperatives builds.<sup>191</sup> Reparations planners raising funds should consider the manifested inclinations of this population.

Prominent American entrepreneur-benefactors have found microfinance an attractive medium for charitable giving. George Soros started the Economic and Business Development Program to help “emerging economies . . . achieve prosperity and sustainability through microfinance” and other initiatives.<sup>192</sup> The founder of eBay and his wife donated \$100 million to their alma mater, Tufts University, in 2005 to launch the Omidyar-Tufts Microfinance Fund.<sup>193</sup> Several years before winning the Nobel Prize

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186. *Id.*

187. *Id.* at 671.

188. *Id.*

189. 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/> (last visited Oct. 22, 2010). 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> (last visited Oct. 22, 2010).

190. Segovia, *supra* note 152, at 659.

191. See, e.g., Stephanie Strom, *Billionaires' Pledge to Give Away Half Gains Follows*, N.Y. TIMES, Aug. 5, 2010, at A15. On the American tradition of private philanthropy, see generally AMERICAN PHILANTHROPY (Daniel J. Boorstin, ed., 2d ed. 1988).

192. Greer J. McPhaden, *Billionaire Philanthropy: Seasoned Capitalists Helping Entrepreneurs*, GLOBAL ENVISION (Mar. 10, 2003), <http://www.globalenvision.org/library/12/122> [hereinafter *Billionaire Philanthropy*].

193. See TUFTS UNIV., <http://www.tufts.edu/microfinancefund/> (last visited Oct. 22, 2010). Among “American entrepreneur-donors” we include Pierre Omidyar, who is not universally regarded as American. See Salar Golestanian, *The Richest Iranian in the World*, BRITISH-IRANIAN BUS. NEWS (last visited Oct. 22, 2010), <http://www1.bibauk.com/Topics/Technology/Internet/tabid/172/Default.aspx>. He has lived in the United States

in 2006, the Grameen Foundation received a two-million dollar gift from the wireless-communication tycoon Craig McCaw.<sup>194</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>195</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>196</sup> Another funder, billionaire Bill Gates, has expressed keen support for microfinance.<sup>197</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 planners would pursue in microfinance-based reparations.<sup>198</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, in their bestseller on development, praised microfinance as a uniquely potent social instrument: "Capitalism, it turns out, can achieve what charity and good intentions sometimes cannot."<sup>199</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>200</sup>

Groups of individuals with some money to spare—necessarily a larger group than the mega-rich benefactors mentioned above—have manifested

since the age of six, however, and made his fortune in northern California. See Jim McClellan, *Going, Going, Strong*, THE GUARDIAN, Oct. 28, 1999, at 14.

194. Billionaire Philanthropy, *supra* note 192.

195. *Id.*

196. Press Release, Michael & Susan Dell Foundation, Microfinance: Services the Poor Can Bank on (May 2, 2006), available at [http://www.msdf.org/Newsroom/Press\\_Releases/06-05-02/Microfinance\\_Services\\_the\\_Poor\\_Can\\_Bank\\_On.aspx](http://www.msdf.org/Newsroom/Press_Releases/06-05-02/Microfinance_Services_the_Poor_Can_Bank_On.aspx).

197. See Michael Warmington, *Gates Foundation Names Robert Peck Christen of the Boulder Institute of Microfinance as Head of Microfinance Team*, (Apr. 13, 2007), MICRO-CAPITAL MONITOR, <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 Gates 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 might adapt "their products or expertise to help the poorest." Bill Gates, Remarks at Government Leaders Forum Americas 2008 (Apr. 4, 2008) (transcript available at <http://www.microsoft.com/presspass/exec/billg/speeches/2008/04-04GLFAmericas.msp>). Gates made an analogy: for "food companies, it's about micronutrients," but "[f]or the banks, it's about microfinance for the poor." *Id.* Finally, Gates added another reason that businesses should focus on "the poorest": talented younger workers prefer employers who are "pioneering" to ease poverty. *Id.*

198. For darker commentary of this point, describing enthusiasm for microfinance as ideology about bootstrapping, see Dyal-Chand, *supra* note 71, at 231–32; see also BATEMAN, *supra* note 58, at 160–64 (describing enthusiasm for microfinance as a pernicious byproduct of neo-liberalism).

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

200. ADAM SMITH, *THE WEALTH OF NATIONS* 13 (Everyman ed. 1910) (1776).

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>201</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>202</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 money could help underwrite national microfinance-reparations programs. For individuals who seek to steer their funds in a direction that is both remunerative and socially progressive, the category of socially conscious investing finds a desirable midpoint between self-enrichment and philanthropy that planners could harness to strengthen the financing of their reparations programs. Demand for this opportunity is strong in the United States. In 2008, a popular magazine noted that many Americans were "chasing returns in bare-foot banking" and offered its readers pointers on how to combine the "the do-good feel" with strong scores on "scale, efficiency, portfolio risk and profitability."<sup>203</sup> The reparations proposal of this Article, which encourages governments to work with existing microfinance institutions when they can, fits well with this mixture of motives. Our version of reparations also seeks profit along with 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>204</sup> Wealthy foreigners have long had access to private-placement funds that make equity investments in microfinance institutions.<sup>205</sup> The existence of these funds manifests a market for microfinance investment vehicles that is likely to grow when reparations planners 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 welcoming new stakeholders.

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201. The website Brent's Place, subtitled Information for a Better Life, has recommended these organizations to donors. See BRENT'S PLACE, <http://brentsplace.info/charities.shtml#microloans> (last visited Oct. 22, 2010). The German nonprofit Welthungerhilfe has a similar mission. See WELTHUNGERHILFE, <http://www.welthungerhilfe.de/about-us.html> (last visited Oct. 22, 2010).

202. See SUSAN R. JONES, LEGAL GUIDE TO MICROENTERPRISE DEVELOPMENT 65-66 (2004) (paraphrasing Maimonides).

203. Matthew Swibel, *Microfinance Fever*, FORBES, Jan. 7, 2008, at 50, 50-52.

204. See generally Chen, *supra* note 92, at 793 (describing securitization as an instrument for microcredit institutions "to further their human rights missions").

205. See Swibel, *supra* note 203, at 757 (mentioning that Microplace.com, an eBay initiative launched in October 2007, as an investment vehicle, offers shares "as little as \$100," whereas larger entities like MicroVest, which raises money through private placements, demands minimum investments of \$100,000 or more).

## 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 might choose to address through reparations—represent social capital for reconstruction. Around the world, poor women have participated actively in microfinance as a form of 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 look to 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. The distribution that we recommend can both establish a relatively safe place for savings and strengthen such places that already exist. 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 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 institutions make.<sup>206</sup>

We have focused on financial institutions that we characterize as semi-formal 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>207</sup> every nation-state has some experience with ownership and amalgamation of capital that a reparations scheme can leverage.

Our laying out a strategy 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 assumed throughout that 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>208</sup> Because sociocultural contexts influence the

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206. See LINDA MAYOUX & MARIA HARTL, INT'L FUND FOR AGRIC. DEV., GENDER AND RURAL MICROFINANCE: REACHING AND EMPOWERING WOMEN 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).

207. See COLLINS ET AL., *supra* note 63, at 1 (noting the book title *Portfolios of the Poor*).

208. 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 consistently with, not at

ways in which a reparations program can advance these goals, however, we have eschewed recommending any particular set of “best practices.” We have also made every effort to keep our predictions of gains conservative.

Experience has shown that networks of the institutions we describe can be successfully built within two or three years.<sup>209</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>210</sup> there is no alternative to institution-building and participation in ownership, particularly by women.

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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 75 and accompanying text (noting four categories of impediments to women’s participation in commercial markets); *supra* Part II.B (reviewing gender justice in international law). Another pertinent data point about women’s economic disadvantage comes from the United Nations 1995 estimate that the economic value of unpaid work performed each year is \$16 trillion dollars, with \$11 trillion of that work, or more than two-thirds of it, performed by women. *See* RAJ PATEL, *THE VALUE OF NOTHING: HOW TO RESHAPE MARKET SOCIETY AND REDEFINE DEMOCRACY* 68 (2009).

209. 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.

210. *Cf. supra* Part II.A. (describing the danger of “cheap talk” in reparations).

