

# Repairing the Past: New Efforts in the Reparations Debate in America

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## INTRODUCTION

The reparations debate, in America and globally, has gained momentum in recent years, and it will only grow in significance over time. The claim that America owes a debt for the enslavement and segregation of African Americans has had historical currency for over 150 years. Occasionally, the call for repayment of the debt for slavery has reached a fever pitch, particularly in the post-Civil War period. The demand for reparations has coincided with other civil rights strategies, reaching a national stage during the resolute leadership of Dr. Martin Luther King, Jr.<sup>1</sup> The reparations movement has experienced ebbs and flows through periods of both forceful repression and abject depression. Today, in America and worldwide, we again face one of those historically significant moments when the momentum for reparations efforts rises and arguments that seemed morally and legally unfeasible reemerge with renewed political vigor and legal vitality.

The number of reparations lawsuits and legislative initiatives at the local and state level is unprecedented. A variety of lawsuits are currently on file in various state and federal courts around the country. Focusing

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<sup>1</sup> See, e.g., Martin Luther King, Jr., *I Have a Dream*, in I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 101 (1992) [hereinafter King, *I Have a Dream*]; Martin Luther King, Jr., *A Time to Break Silence*, in I HAVE A DREAM, *supra*, at 135.

solely on reparations for African Americans,<sup>2</sup> suits are on file in Illinois,<sup>3</sup> Texas,<sup>4</sup> New York,<sup>5</sup> New Jersey,<sup>6</sup> Louisiana,<sup>7</sup> California,<sup>8</sup> and Oklahoma.<sup>9</sup> Different groups of attorneys in several jurisdictions have brought these suits asserting various theories of pleading, plaintiff classes, and bases for liability. Many of these suits are now consolidated before a court in the Northern District of Illinois.<sup>10</sup>

Legislation abounds as well. States and municipalities have passed at least four statutes addressing reparations for African Americans, most notably in Rosewood, Florida,<sup>11</sup> but also in California,<sup>12</sup> Oklahoma,<sup>13</sup> and

<sup>2</sup> There are also a variety of lawsuits filed seeking reparations for theft of the belongings of Jews during World War II. *See, e.g.*, *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (granting in part and denying in part a motion to dismiss a suit brought by Hungarian Jews arising from the Hungarian government's refusal to return their property after World War II), *reconsideration denied*, No. 01-1859-CIV, 2002 WL 31954453 (S.D. Fla. Nov. 26, 2002); *Deutsch v. Turner Corp.*, No. 00-56673, 2003 WL 751576 (9th Cir. Mar. 6, 2003) (affirming the dismissal of claims brought against Japanese and German corporations for damages suffered by plaintiffs forced to work as slave laborers during World War II).

<sup>3</sup> *See In re African American Litig.*, No. 02-CV-7764 (N.D. Ill. Jan. 17, 2003); *Porter v. Lloyds of London*, No. 02-CV-6180 (N.D. Ill. filed Aug. 29, 2002) (class action lawsuit on behalf of all African American descendants of slaves against various corporations presenting claims for conspiracy, human rights violations, conversion, unjust enrichment, and a demand for accounting).

<sup>4</sup> *See* Darryl Fears, *Slaves' Descendants Sue Firms; Filing Seeks Reparations From Profits on Free Labor*, WASH. POST, Sept. 4, 2002, at A22.

<sup>5</sup> *See Ntzebesa v. Citigroup, Inc.*, No. 2002cv04712 (S.D.N.Y. filed June 19, 2002) (class action lawsuit on behalf of victims of South African apartheid regime against various corporations alleging claims for conspiracy, human rights violations, unjust enrichment, and a demand for accounting); *Carrington v. FleetBoston Fin. Corp.*, No. 2002cv01863 (E.D.N.Y. filed Mar. 26, 2002); *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. 2002cv01862 (E.D.N.Y. filed Mar. 26, 2002) (class action lawsuit on behalf of all African American descendants of slaves against various corporations presenting claims for conspiracy, human rights violations, conversion, unjust enrichment, and a demand for accounting).

<sup>6</sup> *See Barber v. N.Y. Life Ins. Co.*, No. 02-CV-2084 (D.N.J. filed May 2, 2002) (class action lawsuit on behalf of all African American descendants of slaves against various corporations presenting claims for conspiracy, human rights violations, conversion, and unjust enrichment, and a demand for accounting).

<sup>7</sup> *See Johnson v. Aetna Life Ins. Co.*, No. 02-CV-9180 (E.D. La. filed Sept. 3, 2003) (class action lawsuit on behalf of all African American descendants of slaves against various corporations presenting claims for conspiracy, human rights violations, conversion, and unjust enrichment, and a demand for accounting).

<sup>8</sup> *See Hurdle v. FleetBoston Fin. Corp.*, No. 02-CV-4653 (N.D. Cal. filed Jan. 17, 2003) (class action lawsuit on behalf of all African American descendants of slaves against various corporations presenting claims for violations of CAL. BUS. & PROF. CODE § 17200 and a demand for accounting); *Hurdle v. FleetBoston Fin. Corp.*, No. CGC-02-0412388 (Cal. Super. Ct. filed Sept. 10, 2002) (same).

<sup>9</sup> *See Alexander v. Governor of Oklahoma*, No. 03CV133E (N.D. Okla. filed Feb. 24, 2003).

<sup>10</sup> Minute Order, *In re African American Litig.*, No. 02-CV-7764 (N.D. Ill. Jan. 17, 2003) (noting that the following cases had been transferred to the Northern District of Illinois pursuant to 28 U.S.C. § 1407 (2000): "02c6180 [*Porter*], 02c7765 [*Barber*], 02c7766 [*Farmer-Paellmann*], 02c7767 [*Carrington*], 02c9180 [*Johnson*], 02c9181 [*Bankhead*], and . . . *Timothy Hurdle v. FleetBoston Financial Corp.* [02-CV-4653]").

<sup>11</sup> FLA. STAT. ANN. § 1009.55 (West Supp. 2003); 1994 Fla. Sess. Law Serv. 94-359 (West) (repealed 2000).

<sup>12</sup> CAL. INS. CODE §§ 13810-13813 (West Supp. 2003).

<sup>13</sup> OKLA. STAT. ANN. tit. 74, §§ 8201.1-.2 (West Supp. 2003); 1997 Okla. Sess. Laws

Chicago.<sup>14</sup> Rep. John Conyers's bill, H.R. 40, demanding an investigation of slavery and recommending appropriate reparations, has been repeatedly presented to Congress.<sup>15</sup> Clearly political and legal support for a renewed examination of reparations is growing.

These legal and legislative initiatives raise complementary and, in some cases, conflicting issues. Often the litigation and legislation focus on different periods of harm to African Americans, although all of the efforts fall under the broad claim of reparations. On the one hand, the multi-district litigation consolidated in Chicago, H.R. 40, the California Slavery Era Insurance statute, and the Chicago Slavery Era Disclosure Ordinance focus upon reparations for injuries inflicted during and through the institution of slavery. In contrast, the Oklahoma and Rosewood statutes, as well as the Oklahoma litigation, address injuries inflicted during the Jim Crow era.

Public response has varied according to the audience and the nature of the reparations claims. Not surprisingly, supporters and critics fall along racial lines: African Americans overwhelmingly support the efforts, and whites overwhelmingly oppose them. These generalizations, however, miss the more subtle and nuanced responses to claims for reparations. For example, many of the reparation movement's most vocal critics seem less critical of some forms of reparations claims, such as those focusing on claims raised during the Jim Crow era and involving survivors of twentieth-century racial violence; some even support these claims.<sup>16</sup>

Jim Crow reparations present a range of distinct legal and political options that are in contrast to claims made in the lawsuits focusing on slavery claims. Many of the differences are obvious and perhaps explain the greater level of public and scholarly support for one form of reparations litigation over another. In contrast to the slavery reparations context, Jim Crow litigation usually includes a more readily identifiable set of harms, plaintiffs, and defendants. Nevertheless, it is far more difficult to morally distinguish Jim Crow from slavery reparations cases. Legal formalism tends to erect overly lofty hurdles to slavery lawsuits while attempting to narrowly cabin the consequences of the Jim Crow suits. This

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410 (repealed 2001).

<sup>14</sup> Business, Corporate and Slavery Era Insurance Ordinance, MUN. CODE OF CHI. § 2-92-585 (2002), available at <http://livepublish.municode.com/10/lpext.dll?f=templates&fn=main-hit-j.htm&2.0>. For more on the Chicago ordinance, see Sabrina L. Miller & Gary Washburn, *New Chicago Law Requires Firms To Tell Slavery Links*, CHI. TRIB. (West ed.), Oct. 3, 2002, Trib. West at 1, 2002 WL 101134937.

<sup>15</sup> Commission to Study Reparations for African Americans Act, H.R. 40, 108th Cong. (2003).

<sup>16</sup> See, e.g., David Horowitz, *Ten Reasons Why Reparations for Blacks Is a Bad Idea for Blacks—and Racist Too!*, at [http://www.adversity.net/reparations/anti\\_reparations\\_ad.htm](http://www.adversity.net/reparations/anti_reparations_ad.htm) (Mar. 12, 2001); Charles J. Ogletree & E. R. Shipp, *Point/Counterpoint, Does America Owe Us?*, ESSENCE, Feb. 2003, at 126, 127.

approach fails to accept the necessity of reparations as a first, and final, response to the horrors of slavery as well as of Jim Crow.

This Essay will attempt to explain why the asserted distinctions between various types of reparations lawsuits are overstated. The stated and perceived differences are primarily a result of the variety of legal strategies adopted by the different litigation teams in the early stages of these efforts and cannot be attributable, at this juncture, to any legal, moral, or political distinctions in the arguments for reparations in the slavery and Jim Crow contexts.

Part I outlines why there is a vital and compelling need for African American reparations. Part II briefly reviews the history of reparations, exploring both the context of reparations activism and the various critiques of the movement. Part III turns to litigation and legislative strategies, addressing some of the doctrinal and political roadblocks presented in response to these efforts. Part IV analyzes the politics of reparations, framing a principled defense of reparations as a viable legal and imperative moral response to America's historic as well as recent treatment of African slaves and their descendants.

### I. THE COMPELLING NEED FOR REPARATIONS

Reparations for African Americans are controversial and highly divisive,<sup>17</sup> not just among whites but also among African Americans. For example, since its introduction in 1989, H.R. 40, Representative John Conyers's reparations bill, has failed to generate broad support or approval each year that he has filed it in Congress. At the state and local level, the reparations movement has been dramatically different. The movement has gained public momentum in recent years, as evidenced by the growing number of legislative initiatives, and remains a compelling argument for social justice.

At its most basic level, reparations seeks something more than token acknowledgment of the centuries of suffering of African Americans at the hands of the state and federal governments, corporations, and individuals during the three centuries of chattel slavery and Jim Crow. As Randall Robinson notes in his book *The Debt: What America Owes to Blacks*, many of our greatest public monuments, including the White House, the Capitol, and the Jefferson Memorial, were built by slaves. Sadly and re-

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<sup>17</sup> See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 214–18 (2000) (blaming white ignorance about slavery); see also Harbour Fraser Hodder, *Riven by Reparations The Price of Slavery*, HARV. MAG., May/June 2003, at 12, 13; Michael Dawson, Justice and Greed: Black and White Support for Reparations, Speech for W. E. B. DuBois Institute Colloquium Series (Oct. 2, 2002) (claiming that less than five percent of the white population of America supports reparations). For a draft of a paper summarizing Dawson's research, see Michael Dawson, *Justice and Greed: Black and White Support for Reparations*, available at <http://www.ksg.harvard.edu/inequality/Seminar/Seminar.htm>. (last visited Apr. 25, 2003).

markably, the nation's Capitol offers no tribute to those who constructed our nation's most venerable monuments.<sup>18</sup> The sacrifices of the African American community for the American nation during slavery, Reconstruction, and Jim Crow are too often forgotten.

This is not a casual oversight. Randall Robinson argues persuasively that it is more insidious.<sup>19</sup> The national consciousness of the terrible history of slavery and Jim Crow has been deliberately repressed into a national subconscious as an ugly part of our national history that we choose to ignore.

The failure to acknowledge this history greatly influences the national debate about race. If we refuse to consciously confront the nation's complicity in enslaving millions of its subjects<sup>20</sup> and brutalizing millions of its citizens during Jim Crow, then we cannot engage in a conscientious discussion of race. To invoke our nation's responsibility for discrimination is not to play the "victim" card<sup>21</sup> but to demand the same treatment that other races and ethnicities receive. Accordingly, the first goal of reparations is to remember and celebrate these forgotten African Americans and insist that our nation fully acknowledge their many contributions to our country's economic and political well-being.

But reparations can—and must—go further than educating the public and erecting monuments to the nation's slave forefathers and foremothers. Reverend Dr. Martin Luther King, Jr., lamented our failure to recognize these historic contributions when he pleaded that for genuine social reconciliation to occur,<sup>22</sup> America must engage in a process of acknowledging its past and repairing the enduring injustices it has created at home. In the rush to embrace Dr. King's vision of a color-blind society, many have conveniently ignored the importance of restitution and repair at the heart of Dr. King's philosophy. What many Americans fail to remember is that, during King's historic "I Have a Dream" speech, he phrased the demand for justice in terms of reparations.<sup>23</sup> This speech required the nation to conceive of the guarantees of life, liberty, and the pursuit of happiness in the form of a check, what he called:

a promissory note in so far as [America's] citizens of color are concerned. Instead of honoring this sacred obligation, America

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<sup>18</sup> See ROBINSON, *supra* note 17, at 3–6.

<sup>19</sup> *Id.* at 5–6 (2000).

<sup>20</sup> Slaves were not citizens before the ratification of the Thirteenth Amendment. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

<sup>21</sup> John McWhorter, *Blood Money: Why I Don't Want Reparations for Slavery*, AM. ENTERPRISE, July/Aug. 2001, at 18, available at <http://www.theamericanenterprise.org/taeja01h.htm>.

<sup>22</sup> King often phrased this in terms of achieving the "beloved community." See ANTHONY E. COOK, *THE LEAST OF THESE: RACE, LAW, AND RELIGION IN AMERICAN CULTURE* 105–13 (1997).

<sup>23</sup> See King, *I Have A Dream*, *supra* note 1.

has given the Negro people a bad check; a check which has come back marked "insufficient funds." We refuse to believe that there are insufficient funds in the great vaults of opportunity in this nation. And so we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.<sup>24</sup>

The issue of race-based reparations concerns a fundamental issue of social justice as well: the responsibility that the community as a whole shoulders for the enslavement of and continuing discrimination against African Americans. The general moral obligation to eradicate racism from our society requires coordinated efforts to work toward correcting the chronic fragmentation along racial lines that exists in so much of our country today. The moral force of reparations arguments is simply to suggest that the African American community cannot shoulder the burden of redeeming American society, as Dr. King put it,<sup>25</sup> on our own.<sup>26</sup> Instead, Dr. King persuasively argues that all Americans must engage as full participants in a dialogue examining the cost of repairing our society to make it a fit place for all citizens to find their home.

A central goal of the reparations movement is to repair the damage that still afflicts the black community by targeting the most needy within that community. One of the primary tenets of the reparations debate should be focused, in my view, on repairing the harm that has been most severe and correcting the history of racial discrimination in America where it has left its most telling evidence.<sup>27</sup> The areas of harm are well documented. Race-based disparities are illustrated through racial profiling policies and practices, discriminatory insurance and lending practices, and barriers preventing equal access to housing, employment, health care, and other social goods while at the same time providing disproportionate access to this country's criminal justice and penal systems.

The issue of inclusion for all in Dr. King's vision of the "Beloved Community" has reached a critical stage. For America to move forward in unity, we must ensure all Americans enjoy the equality of opportunity that is so uniquely an American concept and, to go further, receive a fair share of our enormous wealth and considerable resources. All citizens must engage as full participants in a dialogue examining the cost of re-

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<sup>24</sup> *Id.* at 102.

<sup>25</sup> Martin Luther King, Jr., *Facing the Challenge of a New Age*, in *I HAVE A DREAM*, *supra* note 1, at 14, 22–23.

<sup>26</sup> *See, e.g.*, Charles J. Ogletree Jr., *Litigating the Legacy of Slavery*, *N.Y. TIMES*, Mar. 31, 2002, § 4, at 9.

<sup>27</sup> Professor Derrick Bell has persuasively articulated the principle of America's need to address the race problem and to not simply expect African Americans to shoulder the blame. *See* Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 524–25 (1980) (white self-interest is the only way to achieve black progress in America on issues of race).

pairing our society to make it equally accessible to everyone. Reparations is the way to start that dialogue. Its goals should be applauded by everyone who is committed to establishing a nation that will stand as a model of equal justice for all.

## II. REPARATIONS: A LONG AND NUANCED HISTORY

The African American reparations movement is commonly perceived as a recently developed political and litigation strategy resting on the shoulders of the lawsuits and legislation designed to achieve justice for Japanese American World War II internees and victims of the Holocaust. African American reparations arguments, however, began long before both these movements, growing out of a larger debate over the place of African Americans in American society as well as the proper response of both whites and African Americans to slavery, Jim Crow, and the persistence of racism from the founding of this country until the present. This Part will first give a brief overview of the history of the African American reparations movement in order to suggest that the characterization of African American reparations as both recent and derivative has important political consequences. This rhetorical and political strategy enables reparations' opponents to discount history and African Americans' constant demand for reparations, instead presenting reparations' proponents as opportunistic latecomers, attempting to get something for nothing. This Part will also briefly examine the work of reparations critics, tracing the major arguments that have been raised to counter the movement for reparations.

### A. *Brief History of Reparations Activism*

Many people believe the demand for reparations for African Americans is a movement spawned by, and derivative of, either the Holocaust reparations movement<sup>28</sup> or the battle to obtain an apology from the government and reparations for the Japanese Americans interned during World War II.<sup>29</sup> To some extent, that misperception is based on Rep. John

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<sup>28</sup> For a useful synopsis of the modern attempts to obtain reparations from corporations that profited from the Holocaust, see Michael J. Bazylar, *Nuremburg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2000) (comprehensive study of litigation against banks, insurance companies, and German corporations).

<sup>29</sup> On the Japanese American reparations movement, see LILLIAN BAKER, *THE JAPANING OF AMERICA: REDRESS & REPARATIONS DEMANDS BY JAPANESE AMERICANS* (1991); PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983); PETER IRONS, *JUSTICE DELAYED* (1989); MITCHELL T. MAKI ET AL., *ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS* (1999); *THE MASS INTERNMENT OF JAPANESE AMERICANS AND THE QUEST FOR LEGAL REDRESS* (Charles McClain ed., 1994); Eric K. Yamamoto, *Beyond Redress: Japanese Americans' Unfinished Business*, 7 ASIAN L.J. 131 (2000); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998)

Conyers's filing of H.R. 40 in 1989, the most notable reparations activity in the late twentieth century. In fact, the African American claim for reparations preceded these movements. Reparations, along with other elements of the Civil Rights movement, has a long and contentious history, and it may be more accurate to say that the Holocaust and Japanese American cases are derivative of the African American experience.

The African American demand for reparations precedes the Civil War.<sup>30</sup> While reparations activism has not been a constant feature of the civil rights struggle, it has periodically manifested itself in what Vincene Verdun calls different "waves" of activism.<sup>31</sup> The first wave "was inspired by the tension between the Union and the Confederacy and the attendant desire to restructure the South in order to enhance the Union's military advantage."<sup>32</sup> A broad, multi-racial coalition of activists sought to use reparations to complete the emancipation of slaves and to achieve compensatory justice by tying the award of property to freed slaves to disenfranchisement by former slave owners.

Verdun identifies the second wave of reparations as the attempt by African Americans to escape the South and achieve a semblance of freedom and economic parity in the North, including an effort to force "Congress to pass legislation appropriating economic relief to freedmen."<sup>33</sup> This effort and subsequent reparations initiatives contained a strong "black nationalist" element.<sup>34</sup>

The third wave broke during World War II when a white Senator from Mississippi, Theodore Bilbo, proposed to appropriate newly acquired territories for colonization by African Americans.<sup>35</sup> Black nationalists such as Marcus Garvey's United Negro Improvement Association supported this essentially segregationist effort.<sup>36</sup>

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[hereinafter Yamamoto, *Racial Reparations*]; see also Civil Liberties Act of 1988, 50 U.S.C. app. § 1989–1989d (2000) (awarding reparations to Japanese Americans and Aleut Indians); LESLIE T. HATAMIYA, *RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988* (1993) (discussing the events leading to the passage of the Act); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). The two major Japanese American reparations cases that eventually forced passage of the Act are *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), and *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984) (dismissing reparations claim on statute of limitations grounds), *aff'd*, 847 F.2d 779 (D.C. Cir. 1988).

<sup>30</sup> In 1829, David Walker "passionately protested the lack of compensation for the labor of slaves." Ewart Guinier, Book Review, 82 YALE L.J. 1719, 1721 (1973) (reviewing BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973)).

<sup>31</sup> Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 600 (1993).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 602.

<sup>34</sup> *Id.* at 603.

<sup>35</sup> *Id.*

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

Verdun identifies a fourth and final stage of reparations activism as arising during the 1960s and 1970s as an outgrowth of the Civil Rights movement.<sup>37</sup> Martin Luther King, in his famous *I Have a Dream* speech, iterated a demand for justice in terms of reparations. This speech, broadly embraced by most Americans as a result of King's strong appeal for color-blind justice, also called on the nation to conceive of the guarantees of life, liberty, and the pursuit of happiness in the form of a check for African Americans.<sup>38</sup>

At roughly the same time, the Nation of Islam demanded that the federal government set aside three states for African Americans and contended that "our former slave masters are obligated to maintain and supply our needs in this separate territory for the next 20 to 25 years—until we are able to produce and supply our own needs."<sup>39</sup> Perhaps the single most important reparations demonstration during this period was James Forman's interruption of a Sunday morning service at Riverside Church in New York City to introduce the "Black Manifesto," which demanded five hundred million dollars not from the federal government but from churches and synagogues.<sup>40</sup> While King did not endorse the Nation of Islam's brand of nationalism and demand for land, the organization's efforts represented a powerful strand in the reparations debate.

One of the most important reparations activists during this period was Queen Mother Audley Moore, who is widely celebrated as the matriarch of the twentieth-century African American reparations movement.<sup>41</sup> Born in 1898, Audley "Queen Mother" Moore was initially a follower of Marcus Garvey and subsequently a member of the Communist Party of the United States, thanks to the Communists' support of the Scottsboro Boys. In 1938, she ran as a Communist Party candidate for the New York State Assembly. By the 1950s she had left the Communist Party to found the Universal Association of Ethiopian Women, and in the 1960s she was one of the signatories of the Republic of New Africa's independence charter. Throughout the 1960s and 1970s she was a fierce advocate of reparations.<sup>42</sup>

From the late 1970s to the 1990s, reparations was the subject of a few law review articles<sup>43</sup> but received little mainstream interest. The efforts of

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<sup>37</sup> *Id.* at 603–04.

<sup>38</sup> See *supra* quotation accompanying note 24.

<sup>39</sup> The Muslim Program is reprinted in every issue of *The Final Call*. See, e.g., FINAL CALL, Sept. 7, 1990, at 39, cited in Verdun, *supra* note 31, at 604.

<sup>40</sup> Verdun, *supra* note 31, at 603–04.

<sup>41</sup> I met Queen Mother Moore when we both attended the Sixth Pan-African Conference in Dar es Salaam, Tanzania in 1973. She spurred my interest in reparations before the topic was discussed and debated in national forums.

<sup>42</sup> See African Am. Registry, *Queen Mother Witnessed Much History*, [http://www.aaregistry.com/african\\_american\\_history/1022/](http://www.aaregistry.com/african_american_history/1022/) (last visited Apr. 25, 2003).

<sup>43</sup> See, e.g., Rhonda v. Magee, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993); Matsuda, *supra* note 29; Verdun, *supra* note 31. For earlier examples, see BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973) (discussing

the National Coalition of Black Reparations Activists (N'COBRA), were pivotal in preserving the reparations movement. Without N'COBRA's continued activism, the legacy of reparations for African Americans, stretching from David Walker to Queen Mother Moore, might have disappeared.<sup>44</sup>

More recently, two events have spurred on claims for reparations for African Americans. First, the publication of Randall Robinson's book *The Debt* powerfully indicted society's failure to acknowledge slavery and reignited the reparations debate. Robinson wrote:

No race, no ethnic or religious group, has suffered so much over so long a span as blacks have, and do still, at the hands of those who benefited, with the connivance of the United States government, from slavery and the century of legalized American racial hostility that followed it.<sup>45</sup>

Robinson forcefully argued that, while the causes of African American poverty are complex, they are based in part on a history of racism and discrimination that politically, culturally, socially, and psychologically disenfranchised African Americans.<sup>46</sup> It is worth quoting a large block of Robinson's argument, since he has so often been misrepresented:

Race is and is not the problem. Certainly *racism* caused the gap we see now. The discriminatory attitudes spawned to justify slavery ultimately guaranteed that, even after emancipation, blacks would be concentrated at the bottom of American society indefinitely. . . . [However], the use of *race* by itself as a general category for comparison is a dangerously misleading decoy . . . . [African American children] fail [educationally and socially] for the same reasons that Appalachian white children fail. Grinding, disabling poverty. Unfortunately, blacks are heavily overrepresented among the ranks of America's desperately poor. Owing to race and only race, it was American slavery that created this bottom-rung disproportion.<sup>47</sup>

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German and Native American reparations as potential precedents for black reparations); Graham Hughes, *Reparations for Blacks?*, 43 N.Y.U. L. REV. 1063 (1968).

<sup>44</sup> Jonathan Tilove, *Slavery Payback Proposal Moves to Forefront; Once Far-Fetched, Idea Being Taken Seriously*, TIMES-PICAYUNE (New Orleans), Sept. 29, 2002, at 1, 2002 WL 25257694. (N'COBRA "has become the primary engine of grass-roots organizing on the issue [of reparations]"); see also NAT'L COALITION OF BLACK REPARATIONS ACTIVISTS, *BLACK REPARATIONS: AMERICAN SLAVERY AND ITS VESTIGES* 34-36, 43-47 (2d ed. 2002). See generally *SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS* (Raymond Winbush ed., 2003).

<sup>45</sup> ROBINSON, *supra* note 17, at 8.

<sup>46</sup> *Id.* at 62-63.

<sup>47</sup> *Id.* at 76-79.

A central plank of Robinson's critique is simply that African American lives and values are discounted—worth less—in America today, much as they were discounted at three-fifths value in the Constitution.<sup>48</sup> Professor Randall Kennedy has independently made this claim, noting that the Supreme Court's race rhetoric evinces remarkable solicitude for the feelings of whites and little or none for those of African Americans.<sup>49</sup> Kennedy has identified “racially selective patterns of emotional response”<sup>50</sup> in which the Supreme Court has generally “show[n] an egregious disregard for the sensibilities of black Americans . . . [even though] the Court has been careful to avoid hurting the feelings of whites.”<sup>51</sup> Kennedy found this disregard to be especially pronounced in the Court's disparate attitude to the manner in which race may be taken into account in the civil and criminal spheres. The conservative justices, including Chief Justice Rehnquist and Justices Scalia and Thomas, “have been hawks in the war against affirmative action . . . [but] strike a different note when they confront the use of race by public authorities in the administration of criminal justice.”<sup>52</sup> Kennedy states that the conservatives have been “very willing to allow public authorities to racially discriminate to pursue law enforcement aims even in the absence of an articulated compelling justification.”<sup>53</sup>

One of Robinson's major contributions stems from his use of these racially selective patterns of emotional response to explain the failure of white Americans and Europeans to acknowledge the suffering of Africans and African Americans (as well as Native Americans and other minority groups) caused by institutionalized racial discrimination.<sup>54</sup> As I suggest below, such an outlook denies the impact of slavery and Jim Crow on its victims—what might be called “slavery denial”—and minimizes the effects of that institution that persist to the present day. In *The Debt*, Robinson made the case that such denial—and the devaluation of the sensibilities of individual African Americans<sup>55</sup>—should no longer be permissible. This claim remains one of the most difficult implications of reparations for America at large.

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<sup>48</sup> *Id.* at 52.

<sup>49</sup> See Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988). For a further critique of Randall Kennedy's notion of racially selective patterns of emotional response, see Charles J. Ogletree, Jr., *Reparations, Repair, and Victims Rights*, 35 U.C. DAVIS L. REV. (forthcoming 2003).

<sup>50</sup> Kennedy, *supra* note 49, at 1417.

<sup>51</sup> *Id.* at 1417–18.

<sup>52</sup> Randall L. Kennedy, *Conservatives' Selective Use of Race in the Law*, 19 HARV. J.L. & PUB. POL'Y 719, 719 (1996).

<sup>53</sup> *Id.*

<sup>54</sup> ROBINSON, *supra* note 17, at 214–21.

<sup>55</sup> Certainly Professor Kennedy would not see this as an African American sensibility (a group sensibility), nor does Robinson necessarily suggest some “group feeling” is being hurt or discounted.

Representative John Conyers's introduction and continued support for H.R. 40 in the House of Representatives is a second major event precipitating a renewed interest in reparations.<sup>56</sup> H.R. 40 was first presented to Congress in 1989. The bill calls for the establishment of a commission to investigate the extent to which the United States government benefited from slavery and make appropriate recommendations. H.R. 40 was inspired by, and mirrors, the Civil Liberties Act of 1988,<sup>57</sup> the statute granting reparations to Japanese American victims of the government's internment policy and also Aleut Americans removed from their homes for defense purposes during World War II. H.R. 40 does not demand that money be paid but only that an investigation be conducted. Nonetheless, over the first fourteen years, the initiative has faced substantial opposition. A bipartisan Congress passed the Civil Liberties Act of 1988, yet Representative Conyers still waits to see H.R. 40 pass fourteen years after first presenting it to Congress. Indeed, dissent persists among African Americans in general<sup>58</sup> and even within the Congressional Black Caucus<sup>59</sup> about whether reparations is a viable political program. Nonetheless, Representative Conyers files the bill every year in a symbolic effort to keep the reparations demand alive at the highest level of the legislative branch.

*B. A Brief History of Criticism: Legal Arguments Against the Feasibility of Reparations Lawsuits*

In this Essay's analysis of the different types of reparations lawsuits, suits are divided by the litigation strategy and underlying legal claim. Critics, however, split reparations suits into those cases in which (a) there are no identifiable victims, or direct descendants of the victims, of a particular act or set of acts committed by a particular defendant; and (b) there exist identifiable victims, or direct descendants of the victims, of a particular act or set of acts committed by a particular defendant. Generally, this division corresponds to those lawsuits seeking redress for wrongs inflicted by involvement with slavery (where the victims will be hard to identify) and wrongs inflicted by specific acts of violence taken to ensure the establishment of a Jim Crow system of segregation (in which the particular victims may be more readily identifiable). Critics' voices are far more muted when confronted with the Jim Crow suits.

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<sup>56</sup> See Commission to Study Reparations for African Americans Act, H.R. 40, 108th Cong. (2003).

<sup>57</sup> 50 U.S.C. app. §§ 1989–1989d (2000).

<sup>58</sup> See, e.g., Lori Horvitz, *Race Adviser Says Payback Impractical*, ORLANDO SENTINEL, Apr. 28, 1998, at C1, 1998 WL 5346152 (noting that African American historian John Hope Franklin, head of the advisory board to President Clinton's Initiative on Race, objected to the payment of reparations).

<sup>59</sup> Some of the members of the Black Caucus still have not endorsed H.R. 40, 107th Cong. (2003).

### 1. *Early Legal Critiques*

The most frequently referenced critique of slavery reparations was made by Yale Law Professor Boris Bittker in the early 1970s.<sup>60</sup> In 1969, one of Bittker's African American students asked him if this country's courts would ever award damages to African Americans for the value of their labor during slavery. While he initially answered the question with a resounding no, Bittker came to see that he had probably misunderstood the question. Instead of an analysis of black-letter law, Bittker determined that the question could be reformulated in the following way: Is or should there be a right to recover for slavery or for the century of segregation that was its aftermath? Bittker thought then that the question was a weighty one, deserving of a serious and considered answer; however, his conclusion remained that the possibility of legal recompense was small or nonexistent.<sup>61</sup>

Bittker distinguished between the "recent" wrongs of the Jim Crow era and the "ancient" ones of slavery. He suggested that slavery was too far in the past.<sup>62</sup> The perpetrators of slavery are now dead; thus no legal claim could be maintained against those individuals, and it would be unfair to seek redress from their descendants. Bittker also argued that slavery claims against the government faced too many legal impediments. However, he did concede that the behavior of state and municipal officials during the Jim Crow era following slavery could subject states and municipalities to liability under the Constitution as enforced through the Civil Rights Act of 1871, commonly referred to as § 1983 of the United States Code.<sup>63</sup>

Bittker argued that official state violation of the "equal" prong of the "separate but equal" rubric of *Plessy v. Ferguson* constituted a practice of discrimination that provided a legally cognizable warrant for reparations.<sup>64</sup> Bittker admitted that, despite the passage of time "racial discrimination has not proved to be a blessing in disguise."<sup>65</sup> Unless and until it is [such a blessing], the case for compensation cannot be regarded as barred by the passage of time."<sup>66</sup> Despite his general recognition of a moral case for reparations, Bittker contended that there would have to be substantial changes made through legislation and in legal doctrine before reparations, even for the Jim Crow era discrimination, could be paid.<sup>67</sup>

Critics of Professor Bittker's work demonstrate that the distinction between Jim Crow and slavery reparations lacks any ethical basis. Professor

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<sup>60</sup> BITTKER, *supra* note 43.

<sup>61</sup> *Id.* at 27–29.

<sup>62</sup> *Id.* at 24–28.

<sup>63</sup> *Id.* at 30–35.

<sup>64</sup> *Id.* at 19–20.

<sup>65</sup> By this, Bittker meant that racial discrimination has not provided the sorts of cultural benefits that make it hard to say of other discriminated-against groups that they have suffered an unmitigated wrong.

<sup>66</sup> BITTKER, *supra* note 43, at 29.

<sup>67</sup> *Id.* at 135–37.

Derrick Bell, in a contemporaneous review of Bittker's book, argued that Bittker's Jim Crow arguments were "divorced . . . from the reality of factual situations in which serious reparations proposals would be likely to arise."<sup>68</sup> As Bell noted, "there is a tactical loss in excluding the slavery period: setting this voluntary limitation on coverage sacrifices much of the emotional component that provides the moral leverage for black reparations demands."<sup>69</sup> As we shall see, recent lawsuits and litigation have demonstrated the potential for recovering damages for slavery reparations.

In addition to doctrinal concerns regarding the possibility of reparations lawsuits, Bittker raised a second, practical concern. Even if reparations could be paid, the costs of doing so might be prohibitive. For Bittker, the cost was not only financial but societal as well. He believed that white fraudsters as well as blacks would attempt to claim the reparations due African Americans and that there would have to be some separating out and labeling of the races in a manner reminiscent of Nazi Germany or apartheid South Africa.<sup>70</sup> If reparations were not to be paid to individuals but to groups, it would create the problem of determining who would "represent" African Americans and the legitimacy of such a group.<sup>71</sup>

Professor Ewart Guinier, chairman of Harvard University's Afro-American Studies department, poured scorn on Bittker's suggestion that there would be no way to administer a reparations fund.<sup>72</sup> The problem, in Guinier's eyes, was an administrative one: how best to achieve the redistribution of wealth to those who need it most. Guinier argued that "[a]n administrative agency given adequate staff and proper statutory guidance could produce equity for individuals."<sup>73</sup> Guinier was unapologetic about the possibility of over-inclusion of African Americans in such a redistribution; rather, he was eager to celebrate over-inclusion. For Guinier, reparations were likely to help whites as well as African Americans because "the cure for difficulties in correcting institutionally-imposed inequity is more correcting of inequity. In short, legislation for reparations could be generalized to erase societal disadvantages suffered by whites as well as blacks."<sup>74</sup>

Apart from limited commentary on Bittker's work, there were few serious legal or scholarly attempts to continue to engage the issue of reparations. For many, if not most, scholars, Bittker had provided the definitive answer.

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<sup>68</sup> Derrick A. Bell, Jr., *Dissection of a Dream*, 9 HARV. C.R.-C.L. L. REV. 156, 158 (1974) (reviewing BITTKER, *supra* note 43).

<sup>69</sup> *Id.*

<sup>70</sup> BITTKER, *supra* note 43, at 99.

<sup>71</sup> *Id.* at 71-86.

<sup>72</sup> Guinier, *supra* note 30, at 1722.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1723.

2. *Recent Critiques of Reparations Lawsuits As Doctrinally Implausible*

The apparent dichotomy between slavery and non-slavery lawsuits is mirrored in the modern discourse surrounding reparations. Even some of the most vocal critics of reparations are placated, or to some extent mollified, by the Jim Crow reparations lawsuits. For example, David Horowitz, who believes that reparations are an essentially racist solution to the issue of racial disparities in American society, recognizes the legitimacy of lawsuits claiming damages for “racial outrages” such as Rosewood, Florida.<sup>75</sup> He differentiates this “outrage” from the more general outrage of slavery by noting the presence in the former situation of either direct victims of the injustice or their immediate families.<sup>76</sup> Similarly, E. R. Shipp distinguishes African Americans from Jews who received compensation from the German government or Japanese Americans who received compensation from the United States government by stating that these “groups received reparations for specific acts of injustice that they, not their ancestors suffered.”<sup>77</sup> She concurs with Horowitz that where African Americans “have such clearly defined grievances—as in losses suffered during twentieth-century atrocities in Rosewood, Florida, and in Tulsa, Oklahoma—they have the legitimate right to demand compensation.”<sup>78</sup> In essence, both Horowitz and Shipp accept as valid the precedent of making payments to identifiable victims where there is an identifiable harm.

Many of the recent academic criticisms of reparations for African Americans focus on the slavery reparations context and assume that it is impossible to frame reparations claims in traditional civil rights terms. For example, Professor Eric Yamamoto describes five general obstacles to bringing African American reparations claims under the traditional individual rights paradigm used in civil rights cases:

- a. the statute of limitations;
- b. the absence of directly harmed individuals (“all ex-slaves have been dead for at least a generation”);

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<sup>75</sup> Horowitz, *supra* note 16. The Rosewood massacre stemmed from a reported assault by an unidentified black man on Fannie Taylor, a white woman. Shortly after, Aaron Carrier, a black man, was arrested. White vigilantes attacked the Carrier house, killing or wounding the occupants. Afterward, the residents of Rosewood, an African American town, fled to the swamps to avoid the white mob, which swelled up to two to three hundred. A number of African Americans were murdered and Rosewood was burned down. No whites were ever prosecuted. See Displays for School, Inc., *Remembering Rosewood*, at <http://www.displaysforschools.com/rosewood.html>. (last visited Apr. 25, 2003).

<sup>76</sup> *Id.*

<sup>77</sup> Ogletree & Shipp, *supra* note 16, at 129.

<sup>78</sup> *Id.*; see also E. R. Shipp, *One Case for Reparations; Lawyers' Reputations Should Not Deny Justice to These Plaintiffs*, N.Y. DAILY NEWS, Mar. 16, 2003, at 43, 2003 WL 4068726.

- c. the absence of individual perpetrators (“white Americans living today have not injured African Americans and should not be required to pay for the sins of their slave master forbearers”);
- d. the lack of direct causation;
- e. the indeterminacy of compensation amounts (“it is impossible to determine who should get what and how much”).<sup>79</sup>

However, other reparations claims have been brought under this traditional, rights-based model. Most notably, the Japanese American internment reparations claims closely fit the structure of traditional civil rights suits, with only the statute of limitations posing a major obstacle.<sup>80</sup> These concerns are not trivial and raise important perspectives that require reparations advocates to craft arguments that squarely address claims within the traditional individual rights framework.

### III. ACHIEVING REPARATIONS: LITIGATION AND LEGISLATIVE APPROACHES

#### A. *Justice Through the Courts: The Current Crop of Reparations Lawsuits*

Reparations lawsuits have almost as long a history as reparations activism. The first known reparations lawsuit, *Johnson v. MacAdoo*,<sup>81</sup> was filed in 1915. The *Johnson* plaintiff, Cornelius J. Jones, sued the United States Department of the Treasury claiming that the government’s taxation of raw cotton produced by slave labor constituted an unjust enrichment from the labor of African Americans.<sup>82</sup> The D.C. Circuit Court of Appeals found against Jones, holding that the government was immune from suit on sovereign immunity grounds.<sup>83</sup>

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<sup>79</sup> Yamamoto, *Racial Reparations*, *supra* note 29, at 491.

<sup>80</sup> The internees’ claims presented the following features:

(1) their challenge addressed a specific executive order and ensuing military orders; (2) the challenge was based on then-existing constitutional norms (due process and equal protection); (3) both a congressional commission and the courts identified specific facts amounting to violations of those norms; (4) the claimants were easily identifiable as individuals (those who had been interned and were still living); (5) the government agents were identifiable (specific military and Justice and War Department Officials); (6) these agents’ wrongful acts resulted directly in the imprisonment of innocent people, causing them injury; (7) the damages, although uncertain, covered a fixed time and were limited to survivors; and (8) payment meant finality. In the end, the traditional legal rights/remedies paradigm bolstered rather than hindered the internees’ reparations claims.

*Id.* at 490.

<sup>81</sup> 45 App. D.C. 440 (1916), *aff’d*, 244 U.S. 643 (1917).

<sup>82</sup> *Id.* at 441.

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

More recent reparations lawsuits frame their cases in more sophisticated ways. Currently, there are at least three different types of lawsuits filed in the United States. First, a growing number of federal lawsuits have been consolidated in the Northern District of Illinois seeking reparations for a class of plaintiffs descended from African American slaves. These lawsuits raise at least five distinct claims: conspiracy, demand for accounting, human rights violations, conversion, and unjust enrichment.<sup>84</sup> All these cases are suits against corporations for their involvement in slavery; the plaintiffs have developed their causes of action on the basis, in part, of the Holocaust litigation model of suing corporations. These lawsuits face strong opposition from defendants arguing that plaintiffs lack standing to bring suit and that the claims are barred by the statute of limitations.

The lawsuits filed in California under California Business and Professions Code section 17200 also sue corporations.<sup>85</sup> The statute permits suit for any type of fraudulent business practice and so appears to include slavery. The statute allows the plaintiffs to avoid some of the statute of limitations and standing problems due to the vagaries of California law.<sup>86</sup>

The Oklahoma litigation,<sup>87</sup> filed by the Reparations Coordinating Committee and local counsel in Tulsa, Oklahoma, is not a slavery lawsuit but instead focuses on the violent repression African Americans suffered under Jim Crow. In contrast to the other two types of suits described above, the Jim Crow litigation provides a discrete group of plaintiffs and thus avoids standing problems. The harms are relatively recent and easy to identify. And the suit has been limited (so far) to state and municipal actors so as to focus on the government entities that advocates of reparations have traditionally argued should be held responsible for the official policies of discrimination endorsed by large segments of this nation.

The Tulsa lawsuit stems from a fairly commonplace activity beginning in Jim Crow America. On the night of Tuesday, May 31, 1921, in Tulsa, Oklahoma, a rumor spread around the African American community that there was going to be a lynching. Dick Rowland, a nineteen-year-old African American man, was accused of assaulting seventeen-year-old Sarah Page, a white woman.<sup>88</sup> The African American community of Greenwood grew anxious as the evening wore on, and eventually between fifty and seventy-five Greenwood residents went down to the jail to

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<sup>84</sup> See cases cited *supra* notes 3, 5–7 and discussed *infra* notes 145–147 and accompanying text.

<sup>85</sup> See cases cited *supra* note 8.

<sup>86</sup> See Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 23 B.C. THIRD WORLD L.J. (forthcoming 2003).

<sup>87</sup> See *Alexander v. Governor of Oklahoma*, No. 03CV133E (N.D. Okla. filed Feb. 24, 2003).

<sup>88</sup> See SCOTT ELLSWORTH, *DEATH IN A PROMISED LAND: THE TULSA RIOT OF 1921*, at 46–49 (1982).

protect Rowland and let the legal system handle the accusations. Their goal was to do something to stop the lynching.<sup>89</sup>

In the white community, rumors also flew. Someone made a speech stating that African American men were wandering around with high-powered pistols.<sup>90</sup> When a group of whites confronted the African Americans at the courthouse, a melee erupted and a gun went off. Shooting had begun in earnest.<sup>91</sup> The police department reacted to the fast-developing events by deputizing and arming hundreds of white men, many of whom were described as intoxicated and angry.<sup>92</sup> The police commandeered a local gun shop and a pawn shop, stripping them of firearms.<sup>93</sup> At about the same time, the mayor of Tulsa called in local elements of the National Guard.<sup>94</sup> According to statements of survivors of the riot, these Guardsmen and the newly deputized white citizens attempted to destroy Greenwood, the African American district of Tulsa. The rioting white mob fought a pitched battle throughout the night as a small group of African American World War I veterans attempted to defend themselves. All in all, the rioting white mob killed up to three hundred African Americans.<sup>95</sup>

At 5:00 A.M. the next morning, a whistle blew and “the invasion of Greenwood began.”<sup>96</sup> The National Guard, called in to restore order, only succeeded in worsening the situation.<sup>97</sup> At 6:30 A.M., it moved in to transport the Greenwood residents to the state fairground and McNulty Baseball Park on the outskirts of town and held them there in “protective custody.”<sup>98</sup> Then the white mob began burning the empty buildings. Over twelve hundred buildings were destroyed, and the property damage was \$16,752,600 in 1999 dollars.<sup>99</sup>

In the immediate aftermath, the white citizens of Tulsa accepted that reparations for the riot were required. For example, in the June 15, 1921, issue of the *Nation*, the Chair of Tulsa’s Emergency Committee stated that “Tulsa weeps at this unspeakable crime and will make good the damage, so far as it can be done, to the last penny.”<sup>100</sup> At about the same time,

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<sup>89</sup> *Id.* at 49–51.

<sup>90</sup> Alfred L. Brophy, *Assessing State and City Culpability: The Race and the Law*, in *TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RIOT OF 1921*, at 153, 156 (2001), available at <http://www.ok-history.mus.ok.us/trrc/freport.pdf>.

<sup>91</sup> See ELLSWORTH, *supra* note 88, at 51.

<sup>92</sup> *Id.* at 54.

<sup>93</sup> *Id.*

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

<sup>95</sup> See Maxine Horner, *Epilogue*, in *TULSA RACE RIOT*, *supra* note 90, at 177, 177. One estimate places the number of white deputies at over five hundred. ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: CONTEMPLATING CIVIL RIGHTS ACTIONS AND REPARATIONS FOR THE TULSA RACE RIOT OF 1921*, at 32 (2000), available at <http://www.law.ua.edu/directory/bio/abrophy/reparationsdft.pdf>.

<sup>96</sup> Brophy, *supra* note 90, at 157.

<sup>97</sup> BROPHY, *supra* note 95, at 41–43.

<sup>98</sup> *Id.* at 42.

<sup>99</sup> OKLA. STAT. tit. 74, § 8000.1(3) (2001).

<sup>100</sup> BROPHY, *supra* note 95, at 107 & n.85.

the mayor of Tulsa promised to compensate the victims of the riot for the losses they had suffered. He declared that a claims commission would be established to compensate the victims of the riot. Finally, the Tulsa Chamber of Commerce stated that as “quickly as possible rehabilitation will take place and reparation made . . . . Tulsa feels intensely humiliated.”<sup>101</sup> Some eighty years after the riot, the Oklahoma Commission to Investigate the Tulsa Riot of 1921, a body created by the Oklahoma state legislature to investigate and report on the riot, released a report, reiterating that “[r]eparations are the right thing to do.”<sup>102</sup>

Despite all of these statements, the African American victims of the Tulsa Race Riot have never been fully compensated for the injuries they suffered at the hands of state and municipal officers. The events in Greenwood make a powerful case for reparations. Despite ample evidence of state action in the instigation and execution of the riot—members of both the local police and the National Guard were among the rioting mob—neither the federal government, the state of Oklahoma, the city of Tulsa, nor the Tulsa police department has ever compensated the victims of the riot for the substantial loss of lives and property incurred. Furthermore, the Guardsmen and police were present as part of a state and municipal policy decision to invade Greenwood and attack its residents.<sup>103</sup>

The state and municipal action was plainly discriminatory. Greenwood was razed to the ground because its inhabitants were black. To that extent, the Tulsa riot was simply one of the infamous “nigger drives” taking place around Oklahoma in the 1910s and 1920s that were designed to force African American people from desirable towns or other pieces of land.<sup>104</sup>

The Tulsa riot marks not only a pivotal moment in America’s history of race relations but also a seminal case in African American reparations litigation. Because the state’s and municipality’s acts were so violent and so plainly discriminatory, the merits of the case are stark: the state of Oklahoma and city of Tulsa participated in a race riot that outstrips even Rosewood in its ferocity. The case presents none of the problems traditionally associated with reparations lawsuits: a number of the victims are still alive and still uncompensated; the appropriate institutional defendants are clearly identifiable; and the constitutional basis for suit is clear. As with other reparations litigation,<sup>105</sup> one legal obstacle is the statute of limitations.<sup>106</sup>

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

<sup>102</sup> Danny Goble, *Final Report of the Oklahoma Commission to Study the Tulsa Race Riot of 1921*, in *TULSA RACE RIOT*, *supra* note 90, at 1, 20.

<sup>103</sup> See First Amended Complaint ¶¶ 487–90, *Alexander v. Governor of Okla.*, No. 03CV133E (N.D. Okla. filed Feb. 28, 2003).

<sup>104</sup> See *id.* at ¶ 5 n.5. (citing *Norman Mob After Singie Smith Jazz*, *OKLA. CITY BLACK DISPATCH*, Feb. 9, 1922).

<sup>105</sup> See *Deutsch v. Turner Corp.*, No. 00-56673, 2003 WL 751576 (9th Cir. Mar. 6, 2003).

<sup>106</sup> See Anthony J. Sebok, *How a New and Potentially Successful Lawsuit Relating to a*

*B. Creating Viable Lawsuits: Addressing the Doctrinal Challenges Faced by Reparations Cases*

The obstacles identified by critics of reparations—both friendly and hostile—are real and impede both slavery and Jim Crow era lawsuits. In principle, however, there is no necessary difference between the two types of claims. The challenge for slavery litigation is not that the injury, the defendants, or the plaintiff class is somehow radically different from that of the Jim Crow lawsuits, but only that these elements are harder to identify due to the passage of time. The major difficulties are essentially the same: all these suits must identify the parties with some specificity, they must overcome the statute of limitations and (should the state or federal government be named as a party) sovereign immunity, and they must provide some form of definite remedy. In what follows, I suggest some ways to address these challenges so that the Jim Crow model can be extended into the realm of slavery litigation.

*1. Specifying the Parties*

The modern critics of reparations litigation particularly focus on cases, such as *Cato v. United States*, that fail to specify with any precision either the parties seeking relief or those from whom relief is sought. In other words, suits seeking damages on behalf of all African Americans from “the government” for injuries suffered during slavery do not fit the traditional model and are unlikely to succeed. In *Cato*, the court found that the plaintiff

proceed[ed] on a generalized, class-based grievance; she neither allege[d], nor suggest[ed] that she might claim, any conduct on the part of any specific official or as a result of any specific program that has run afoul of a constitutional or statutory right and caused her a discrete injury. Without a concrete, personal injury not abstract and that is fairly traceable to the government conduct that she challenges as unconstitutional, *Cato* lacks standing.<sup>107</sup>

Identifying defendants has not been an issue in any of the recent cases filed in federal or state court: *all* the recent reparations cases focus on suing institutions and thus pose no problem of distinguishing discrete defendants. The cases currently in multi-district litigation before the dis-

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*1921 Race Riot in Tulsa May Change the Debate over Reparations for African-Americans*, at <http://writ.news.findlaw.com/sebok/20030310.html> (Mar. 10, 2003).

<sup>107</sup> *Cato v. United States*, 70 F.3d 1103, 1109 (9th Cir. 1995); see also *Allen v. Wright*, 468 U.S. 737, 751–52 (1984).

strict court in the Northern District of Illinois all identify corporations as defendants; indeed, that has been their most significant advance over the *Cato*-style lawsuits.<sup>108</sup> The California cases against corporations avoid *Cato*'s standing problem by suing under the state private attorney general statute,<sup>109</sup> thereby making the state the plaintiff. Finally, the California lawsuits allege specific conduct—the company's business practices—as the wrong committed by defendants.<sup>110</sup>

Jim Crow era lawsuits also avoid *Cato*-like legal challenges. In the Oklahoma lawsuit, the complaint identifies several state actors: the governor of the state of Oklahoma, the city of Tulsa, the Tulsa police department, and the Tulsa chief of police.<sup>111</sup> The plaintiffs are over three hundred survivors of the race riot or their descendants,<sup>112</sup> and the harms are outlined in the body of the complaint.<sup>113</sup> This form of Jim Crow lawsuit responds to the modern critique of reparations lawsuits and conforms to the traditional litigation model.

These cases illustrate that the attempts to bifurcate the reparations cases into slavery cases and non-slavery cases is misleading. Each type of lawsuit can be framed using discrete plaintiffs and defendants and alleging discrete harms. The primary challenge for slavery reparations plaintiffs is to conceptualize litigation in narrow terms that identify discrete parties and injuries while at the same time applying that technique to a broad range of situations relying on differing legal theories of liability.

## 2. Statute of Limitations

For many commentators,<sup>114</sup> the major legal obstacle to African American reparations is the various statutes of limitations preventing recovery for injuries inflicted more than two years prior to the filing of any lawsuit.<sup>115</sup>

Courts toll the statute of limitations when there is some form of government malfeasance, and some form of misrepresentation or concealment is usually required. In *Pollard v. United States*,<sup>116</sup> the first successful Jim

<sup>108</sup> See, e.g., Complaint and Jury Trial Demand at 1, *Farmer-Paelmann v. Fleet Boston*, No. 2002cv1862 (E.D.N.Y. filed Mar. 26, 2002) (listing FleetBoston Financial Corporation, AETNA, Inc., and CSX as defendants), available at <http://news.findlaw.com/hdocs/docs/slavery/fpllmnflt032602cmp.pdf>.

<sup>109</sup> CAL. CIV. PROC. CODE § 1021.5 (West Supp. 2003).

<sup>110</sup> See First Amended Complaint at ¶ 69, *Hurdle v. FleetBoston Fin. Corp.*, No. C-02-4653 (N.D. Cal. filed Sept. 10, 2002).

<sup>111</sup> See First Amended Complaint at ¶¶ 417–20, *Alexander v. Governor of Oklahoma*, No. 03CV133E (N.D. Okla. filed Feb. 28, 2003).

<sup>112</sup> *Id.* ¶¶ 39–416.

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

<sup>114</sup> See, e.g., Alfred L. Brophy, *Some Conceptual And Legal Problems In Reparations For Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 515 (2003); Yamamoto, *Racial Reparations*, *supra* note 29, at 489.

<sup>115</sup> The time period depends upon the type of injury asserted. In tort cases, the statute of limitations period is typically two years.

<sup>116</sup> 384 F. Supp. 304 (M.D. Ala. 1974).

Crow reparations case (although it was not identified as such at the time), a group of African Americans sued the federal government. Government doctors had conducted an experiment on them as part of a syphilis study and failed to inform them that a cure had been found for the disease. Judge Frank M. Johnson of the Middle District of Alabama found that such a failure to inform constituted malfeasance sufficient to toll the statute of limitations.<sup>117</sup>

Equitable remedies tolling the statute of limitations are routinely available where filing suit is untimely due to the defendant's affirmative misconduct or because the relevant facts are unavailable to plaintiffs through no fault of their own.<sup>118</sup> Equitable estoppel "hinges on the defendant's representations or other conduct that prevents the plaintiff from suing before the statute of limitations has run,"<sup>119</sup> and is required where the defendant's affirmative misconduct undermines fairness or justice in its dealings with its citizens.<sup>120</sup>

Equitable tolling "halts the running of the limitations period so long as the plaintiff uses reasonable care and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct."<sup>121</sup>

Two recent cases have indicated that in certain circumstances, statutes of limitations must be tolled, often for extremely long periods of time. Specifically, the statute of limitations is to be tolled where there is:

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<sup>117</sup> *Id.* at 309–10.

<sup>118</sup> *See* *Young v. United States*, 122 S. Ct. 1036, 1041 (2002) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)); *see also* *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232–33 (1959) ("[N]o man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statute of limitations.").

[T]he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights. A corollary of this principle, often found in cases where wrongful concealment of facts is alleged, is that a party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense.

*Reeb v. Econ. Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir. 1975). Equitable "tolling 'focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant,' [while] estoppel 'focuses on the actions of the defendant.'" *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001) (en banc) (quoting *Naton v. Bank of Cal.*, 649 F.2d 691, 696 (9th Cir. 1981)). There is "clearly some overlap," *id.* at 1185 (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995)), between the two doctrines, and they are often conflated. *See* *McAllister v. FDIC*, 87 F.3d 762, 767 n.4 (5th Cir. 1996) ("Several courts, including the Supreme Court in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1991), have used the terms 'equitable tolling' and 'equitable estoppel' interchangeably."); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1056, at 239 (3d ed. 2002).

<sup>119</sup> 4 WRIGHT & MILLER, *supra* note 118, § 1056, at 263.

<sup>120</sup> *See* *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60–61 (1984).

<sup>121</sup> 4 WRIGHT & MILLER, *supra* note 118, § 1056, at 255.

- violent repression, followed by
- active concealment of relevant facts surrounding the history of that repression,<sup>122</sup> and an
- officially sanctioned study that uncovers the truth of that repression.<sup>123</sup>

The reasons for tolling the statute in such circumstances are reasonably clear. In general, those who attempt to engage in genocidal attacks should not be able to preclude their victims from recovery by threats of violence and active concealment.<sup>124</sup> Equitable estoppel and equitable tolling are both available to reparations plaintiffs where the defendant has acted to prevent the filing of a lawsuit, and the plaintiffs have been unable to file through no fault of their own.

Furthermore, in such circumstances, the limitations period should be equitably tolled because the purpose underlying the statute of limitations as a statute of repose is not served. The rationale behind the statute of limitations—that at some point a legal controversy must come to an end so that the defendant may have a fair opportunity to defend himself before memories fade and evidence becomes stale—is inapplicable. To the contrary, where contemporaneous evidence was buried and unavailable to the plaintiff and has only recently been rediscovered through the defendants' actions (by forming a commission to investigate the events, for example), then the defendant has reopened the underlying issues and should not be able to escape its legal responsibility for the crime identified.

In Oklahoma, for instance, the state and municipal defendants engaged in a conspiracy of silence so successful that even the district attorney of Tulsa did not know of the riot: "I was born and raised here, and I had never heard of the riot."<sup>125</sup> Oklahoma created the Commission to Study the Tulsa Race Riot of 1921 in large part precisely to discover hidden or suppressed facts surrounding the riot that could not otherwise have been discovered by plaintiffs. The report of the Commission revealed information never before made available to the public, leading the

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<sup>122</sup> See *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 135–36 (E.D.N.Y. 2000). ("[D]eceptive and unscrupulous deprivation of both assets and of information substantiating plaintiffs' . . . rights to these assets."); *Rosner v. United States*, 231 F.Supp.2d 1202, 1209 (S.D. Fla. 2002) ("[T]he Government essentially turned a deaf ear to Plaintiffs' repeated requests for information about their property."), *reconsideration denied*, No. 01-1859-CIV, 2002 WL 31954453 (S.D. Fla. Nov. 26, 2002).

<sup>123</sup> *Bodner*, 114 F. Supp. 2d at 123 (noting that a French government commission, comprised of historians, diplomats, lawyers, and magistrates, studied the circumstances of how goods were illicitly acquired and made recommendations); *Rosner*, 231 F. Supp. 2d at 1209 (It was only when the "Presidential Advisory Commission on Holocaust Assets released its report on the Gold Train" that the facts necessary to file their Complaint came to light.") (quoting the Complaint ¶ 90).

<sup>124</sup> See *Bodner*, 114 F. Supp. 2d at 136 (E.D.N.Y. 2000) ("Defendants are not entitled to benefit from whatever ignorance they have perpetuated in the plaintiffs.').

<sup>125</sup> Jonathan Z. Larsen, *Tulsa Burning*, CIVILIZATION, Feb./Mar. 1997, at 46, 46.

Commission itself to describe the report as a “tower of new knowledge” that enabled “visions never seen before.”<sup>126</sup> Specifically, the Commission conceded that its report:

[i]ncluded . . . records and papers long presumed lost, if their existence had been known at all. Some were official documents, pulled together and packed away years earlier . . . . Pages after pages laid open the city commission’s deliberations and decisions as they affected the Greenwood area. Overlooked records from the National Guard offered overlooked perspectives and illuminated them with misplaced correspondence, lost after-action reports, obscure field manuals, and self-typed accounts from men who were on duty at the riot.”<sup>127</sup>

These circumstances appear to provide a particularly compelling reason for tolling the statute of limitations and one that is by no means limited to Jim Crow lawsuits.<sup>128</sup>

Similarly, the current set of slavery reparations lawsuits on file in various jurisdictions around the country and consolidated in the Northern District of Illinois seek to toll the statute of limitations. Tolling, however, is not the only possible approach to overcoming the statute of limitations hurdle.<sup>129</sup>

Waiver, for example, provides an alternative avenue to address the statute of limitations. Both public and private institutions have waived the statute of limitations when the statute stands as the plaintiff’s only impediment to trial. The federal government’s waiver of the statute of limitations in the Japanese American litigation and its enactment of the Civil Liberties Act of 1988 to compensate the victims of the internment program is one example of this phenomenon.<sup>130</sup>

Several other recent examples of federal waiver involve African Americans.<sup>131</sup> In *Pigford v. Glickman*,<sup>132</sup> African American farmers sued the gov-

<sup>126</sup> Goble, *supra* note 102, at 8.

<sup>127</sup> *Id.* at 4.

<sup>128</sup> See Sebok, *supra* note 106.

<sup>129</sup> See, e.g., Brophy, *supra* note 114, at 506, 516–18.

<sup>130</sup> 50 U.S.C. app. §§ 1989–1989d (2000).

<sup>131</sup> The African American farmers and MetLife insurance lawsuits, discussed *infra* notes 133–138 and accompanying text, provide additional models of waivers where there is compelling evidence of significant legal harm to definable classes of African Americans and compelling moral reasons to address the matter many years after its occurrence. Both involve African Americans who have been the subjects of historical discrimination and who only discovered that discrimination after the time for filing suit in compliance with the statute of limitations has passed. These suits are not true reparations suits, however, because they both deal with events most people would consider too recent to qualify. But, plainly, they demonstrate that the behavior complained of in more “traditional” reparations suits continues even to this day, a fact recognized by the judge in *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999), *aff’d*, 206 F.3d 1212 (D.C. Cir. 2000).

<sup>132</sup> *Id.*

ernment claiming a violation of the Equal Credit Opportunity Act (“ECOA”),<sup>133</sup> which had a two-year statute of limitations. Throughout the 1980s and 1990s, federal and state officials routinely discriminated against African American farmers. When African American farmers sought government grants to start or improve farms, their requests were denied and their applications destroyed or discarded; at the same time, grants were routinely made available to whites.<sup>134</sup> Despite the two-year statute of limitations, Congress provided relief to plaintiffs in 1998 by passing legislation that tolled the statute of limitations for all those who had filed discrimination complaints with the Department of Agriculture before July 1, 1997, and had alleged discrimination at any time during the period beginning on January 1, 1981, and ending on or before December 31, 1996.<sup>135</sup> After the government agreed to settle the case, the district court in *Pigford* began its consent decree by invoking General Sherman’s “forty acres and a mule” military order.<sup>136</sup> The court clearly linked the federal government’s establishment and abandonment of the Freedmen’s Bureau to the discrimination engaged in by the Department of Agriculture.

Private defendants have also waived statute of limitations defenses due to the merits of the underlying claim. In what was described as “a warm-up match for the forthcoming battle over slavery reparations,”<sup>137</sup>

MetLife Inc., the nation’s largest life insurance company . . . announced it w[ould] set aside a quarter-of-a-billion dollars to settle a class-action lawsuit brought by former black policyholders.

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<sup>133</sup> 15 U.S.C. §§ 1691–1691f (2000).

<sup>134</sup> See *Pigford*, 185 F.R.D. at 86–89.

<sup>135</sup> See Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. No. 105-277, § 741, 112 Stat. 2681 (1999) (codified at 7 U.S.C. § 2297, Notes (2000)); see also *Pigford*, 185 F.R.D. at 89.

<sup>136</sup> *Pigford*, 185 F.R.D. at 85.

Forty acres and a mule. As the Civil War drew to a close, the United States government created the Freedmen’s Bureau to provide assistance to former slaves. The government promised to sell or lease to farmers parcels of unoccupied land and land that had been confiscated by the Union during the war, and it promised the loan of a federal government mule to plow that land. Some African Americans took advantage of these programs and either bought or leased parcels of land. During Reconstruction, however, President Andrew Johnson vetoed a bill to enlarge the powers and activities of the Freedmen’s Bureau, and he reversed many of the policies of the Bureau. Much of the promised land that had been leased to African American farmers was taken away and returned to Confederate loyalists. For most African Americans, the promise of forty acres and a mule was never kept. Despite the government’s failure to live up to its promise, African American farmers persevered. By 1910, they had acquired approximately 16 million acres of farmland. By 1920, there were 925,000 African American farms in the United States.

*Id.*

<sup>137</sup> Ward Connerly & Edward Blum, *The New Shakedown; U.S. Companies Target of Slavery Reparation Demands*, WASH. TIMES, Mar. 28, 2002, at A17, 2002 WL 2907477.

Nearly 60 years ago, MetLife sold life insurance policies to blacks that were more expensive and provided fewer benefits than policies marketed to whites.<sup>138</sup>

MetLife, in effect, waived its statute of limitations defense by settling the case. Unfortunately, in the currently pending reparations lawsuits, none of the defendants have been so reasonable in acknowledging their culpability for discriminatory practices, and all defendants have asserted statute of limitations defenses.

Even absent tolling or waiver, it is important to note that at least two types of lawsuits are not subject to the statute of limitations barriers. These include (1) suits for the return of property; and (2) suits brought under statutes, such as California Business and Professions Code section 17200,<sup>139</sup> that impose liability for fraudulent business dealings without determining that the triggering event initiates the statute of limitations. Each option presents its own problems,<sup>140</sup> but both remove the statute of limitations from the central place it occupies in much reparations litigation.

One advantage of property-based actions—for example replevin or unlawful detainer—is that they are structurally similar to takings claims that have found a certain amount of favor with courts in reparations litigation. For example, the district court in *Hohri v. United States* held that the plaintiffs were able to state a claim under the Takings Clause to recover property confiscated by federal authorities and property lost as a result of the government's exclusion of the plaintiffs from their homes and businesses.<sup>141</sup> In this vein, the court noted, "Plaintiffs' claim is in essence an inverse condemnation proceeding, in which a citizen is deprived of property by the government and then must initiate judicial action to obtain just compensation."<sup>142</sup>

Although the district court eventually dismissed Hohri's takings claims on statute of limitations grounds,<sup>143</sup> such a defense would not bar replevin and wrongful detainer claims. If title to the property is defective, it cannot be passed on.<sup>144</sup> The true owner is entitled to return of the property or to compensation for its loss. The problem in the slavery reparations context is that slaves did not own property. Free Africans were, however, sold into slavery by a number of Southern coastal states after

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<sup>138</sup> *Id.*

<sup>139</sup> CAL. BUS. & PROF. CODE § 17200 (West 1997).

<sup>140</sup> Suits for the return of slave property are problematic due to the difficulty of tracing what property slaves owned. Suits under section 17200 are limited to suits against corporations, and as such, do not address the wider issues of slavery reparations against the state or federal governments.

<sup>141</sup> *Hohri v. United States*, 586 F. Supp. 769, 782, 784 (D.D.C. 1984), *aff'd*, 847 F.2d 779 (D.C. Cir. 1988).

<sup>142</sup> *Id.* at 783.

<sup>143</sup> *Id.* at 784, 791.

<sup>144</sup> 66 AM. JUR. 2D *Replevin* § 2 (1964).

the Constitution abolished the slave trade in 1807. Certainly, the slaves had a property interest in the money illegally obtained by their sale. A slavery reparations suit could demand the return of such funds. Plaintiffs could also attempt to recover the value of the property that various states and municipalities, acting through Jim Crow legislation, appropriated from freed slaves after the Civil War.

Plaintiffs seeking reparations also pursue fraudulent business practice claims in an effort to circumvent the statute of limitations.<sup>145</sup> Taking advantage of California's private attorney general statute and the prohibition under California Business and Professions Code section 17200 of any "unlawful, unfair or fraudulent business act or practice,"<sup>146</sup> plaintiffs have sued a variety of corporations for their involvement in slavery.<sup>147</sup> This type of lawsuit has the potential to demonstrate that the practice of slavery supported, and was supported by, a diverse range of businesses both in and out of the South. Furthermore, it brings suit on behalf of the community, instead of individual plaintiffs, and thus avoids the standing issues that plague traditional slavery reparations lawsuits. Finally, the California statute applies to any unlawful business practice, not only those within a certain period of time. Hence, this type of claim avoids obstacles traditionally placed in the path of slavery reparations suits.

### 3. Sovereign Immunity

A subsidiary, but nonetheless important, issue is the sovereign immunity doctrine's preclusion of suits against states unless the state consents to suit or Congress expressly abrogates its immunity. Recently, the government has used the sovereign immunity doctrine to defend against slavery reparations claims. In *Cato v. United States*,<sup>148</sup> an African American woman brought an action for damages against the United States government alleging the kidnapping and enslavement of African Americans, as well as continuing discrimination on the part of the government.<sup>149</sup> She also sought a court acknowledgment of the injustice of slavery and Jim Crow oppression, as well as an official apology from the United States government.<sup>150</sup> The Ninth Circuit Court of Appeals failed to award the

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<sup>145</sup> See Complaint at ¶¶ 65–66, *Hurdle v. FleetBoston Fin. Corp.*, No. CGC-02-0412388 (Cal. Super. Ct. filed Sept. 10, 2002).

<sup>146</sup> CAL. BUS. & PROF. CODE § 17200 (West 1997).

<sup>147</sup> See cases cited *supra* note 8.

<sup>148</sup> 70 F.3d 1103 (9th Cir. 1995).

<sup>149</sup> *Id.* at 1106. Cato sought damages for "forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character."

*Id.*

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

relief sought, citing standing and sovereign immunity grounds for denying relief.

Unfortunately, the major civil rights statute, § 1983, does not abrogate sovereign immunity.<sup>151</sup> While states are not immune from suit, they may be sued only in the person of a state representative in his or her official capacity<sup>152</sup> and then only for non-monetary relief.<sup>153</sup> This exception is not without significance: prospective injunctive relief such as a government apology and acknowledgment of its racist practices has a place in reparations lawsuits and may be more important than monetary relief in promoting the litigation's goal of racial reconciliation.

Of course, sovereign immunity only applies to suits against the state or federal government: suits against municipalities are not covered by the doctrine. A municipality may be sued under § 1983 when its official policy or custom results in a violation of the Constitution.<sup>154</sup> As a matter of fact, the state may elect to pay for the municipality's wrongdoing; nonetheless, the doctrine of sovereign immunity does not come into play.<sup>155</sup>

Keeping the state as a party, however, has important symbolic and practical consequences. For many victims of state-sponsored discrimination, the goal is not simply to achieve payment of damages but to identify the state as the perpetrator of the wrong. Furthermore, since one of the major goals of the reparations movement is to educate the public about the wrongs and recency of state-sponsored discrimination, injunctive relief requiring the state to engage in educative efforts is a vital part of the restitution sought through such litigation.

#### 4. *Formulating Effective Remedies*

Fashioning a remedy poses a final challenge, particularly for slavery reparations lawsuits. Even where it is possible to file a lawsuit under a state's private attorney general statute,<sup>156</sup> thereby avoiding standing issues,<sup>157</sup> there is no plaintiff to pocket a remedy framed in terms of monetary dam-

<sup>151</sup> 42 U.S.C. § 1983 (2000); *see also* *Cato*, 70 F.3d at 1107.

<sup>152</sup> *See, e.g.,* *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (holding that official-capacity lawsuits are, "in all respects other than name, . . . treated as a suit against the entity").

<sup>153</sup> *See Ex parte Young*, 209 U.S. 123, 154 (1908) (holding that there is an exception to Eleventh Amendment immunity for actions seeking declaratory and injunctive relief against state officials for alleged violations of federal law).

<sup>154</sup> *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691-94 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion); *see also* *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 397, 403 (1997) ("A municipality may not be held liable under § 1983 solely because it employs a tortfeasor" and "[w]e have consistently refused to hold municipalities liable under a theory of respondeat superior:").

<sup>155</sup> *See Alden v. Maine*, 527 U.S. 706, 756 (1999).

<sup>156</sup> *See, e.g.,* CAL. CIV. PROC. CODE § 1021.5 (West Supp. 2003).

<sup>157</sup> *See Hurdle v. FleetBoston Fin. Corp.*, No. CGC-02-0412388 (Cal. Super. Ct. filed Sept. 10, 2002) (asserting California private attorney general statute).

ages. Although the doctrine of *cy pres* could be employed to ensure disbursements of such funds, an open question remains over who would be the beneficiaries of any trust fund.

The relative indeterminacy of beneficiaries is generally not a problem for Jim Crow lawsuits. In the Oklahoma litigation, the plaintiffs are individually listed, and many are still alive. However, focusing on the differences between slavery and non-slavery lawsuits in this manner ignores the potential and importance of non-monetary relief.

Money damages are certainly a principal remedy. Virtue lies in making defendants pay up; defendants may not feel their “investment” in racial reconciliation until they are hit in their pockets. However, non-monetary relief is also important.<sup>158</sup> The broader goal of reparations suits is to develop ways of crafting forward-looking initiatives for racial reconciliation. As MetLife has attempted to address the past and present by payments to actual victims and creating programs to prevent future forms of discrimination, its forward-looking approach is one model for corporate defendants to consider. A state’s acknowledgment of its complicity in a history of discrimination lasting from slavery or Jim Crow through the present day is an essential, non-monetary prerequisite to the reparations goal of racial reconciliation. Many more individuals than could be named in a Jim Crow reparations complaint would benefit from inventive, broad-ranging initiatives. Financial remedies such as the creation of business funds to aid African Americans and broad-ranging educational, housing, and health care initiatives might overcome individual remedy difficulties and assist in combating racial inequality.

### C. Legislative Approaches to Litigation Challenges

Most academic discussions of the legislative approaches to reparations have largely focused on litigation concerns, such as clearing statute of limitations and sovereign immunity hurdles to litigation. But scholars recognize the potential for legislative efforts to achieve reparations; scholars often envision sweeping reparations legislation taking the form of H.R. 40 and the Civil Liberties Act of 1988. Legislation addressing the Rosewood, Florida, and Tulsa, Oklahoma, race riots was couched in terms similar to those two statutes.<sup>159</sup> Furthermore, these statutes mirrored other legislation designed to compensate victims of twentieth-century slavery.<sup>160</sup> In particular, the California Second World War Slave Labor Victim

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<sup>158</sup> One reason why sovereign immunity is not detrimental to reparations lawsuits is precisely that the object is to obtain broad-based injunctive relief.

<sup>159</sup> FLA. STAT. ANN. § 1009.55 (West Supp. 2003); 1994 Fla. Sess. Law Serv. 94-359 (West) (repealed 2000); OKLA. STAT. ANN. tit. 74, §§ 8201.1–2 (West Supp. 2003); 1997 Okla. Sess. Laws 410 (repealed 2001).

<sup>160</sup> See California Second World War Slave Labor Victim Act, CAL. CIV. PROC. CODE § 354.6 (West Supp. 2003). *But see* *Deutsch v. Turner Corp.*, No. 00-56673, 2003 WL

Act waived the statute of limitations for suits against private corporations that used slave labor during World War II. Such a statute, if applicable to African American slavery, would enable reparations lawsuits.

Recent legislation, however, has taken a different approach and requires some accounting of corporate involvement in slavery rather than a waiver of the statute of limitations so as to permit suits against such corporations. The California Slavery Era Insurance Act<sup>161</sup> requires insurance corporations licensed in California to disclose any slavery insurance policies issued by a predecessor firm. The Act is not perfect: apart from lacking any cause of action for private enforcement, it narrowly defines the manner in which insurance corporations may have been implicated in slavery, permitting some prevarication and evasion. Nonetheless, since one of the goals of reparations is to make public the number of corporations that benefited from slavery, it is an important asset—especially in light of California Business and Professions Code section 17200. Even without the power to sue for unlawful business practices under the California statute, these “accounting” acts are vitally important in publicizing the wrongs inflicted by slavery and Jim Crow discrimination.

#### IV. A RESPONSE TO REPARATIONS CRITICS

The political attack on slavery reparations has been forcefully pursued by David Horowitz. His ten-point list is the *locus classicus* for anti-reparations arguments, condensing all the objections into an easily digestible list that he sought to have published in every campus newspaper in the country.<sup>162</sup> Most of the popular critiques of reparations reflect Horowitz’s arguments.<sup>163</sup>

The anti-reparations arguments can be grouped into three main categories. The first category of arguments asserts that the perpetrators of the injury are unidentifiable: slave owners are long dead, their descendants should not have to suffer for the wrongdoing of their ancestors, and many Americans are descended from people who immigrated after the end of slavery.<sup>164</sup> The second category of arguments makes the equitable defense of “clean hands.” According to this argument, since some Africans par-

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751576 (9th Cir. Mar. 6, 2003) (holding that the Victim Act is unconstitutional). *See also* MASS. GEN. LAWS ch. 7, §§ 22G–22M, 40F 1/2 (2000) (the “Massachusetts Burma Law”). *But see* Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *aff’d sub nom.* Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363 (2000) (holding that the Massachusetts Burma Law is unconstitutional).

<sup>161</sup> CAL. INS. CODE §§ 13810–13813 (West Supp. 2003).

<sup>162</sup> Horowitz, *supra* note 16.

<sup>163</sup> Horowitz published a book focusing on the same arguments. *See* DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* (2002). For a critique of Horowitz’s book, see Alan Dershowitz, *Bully Pulpit*, L.A. TIMES, June 2, 2002, at R13, 2002 WL 2480061 (reviewing HOROWITZ, *supra*).

<sup>164</sup> *Id.*

ticipated in the slave trade and some African Americans owned slaves, blacks are implicated in the slave trade as well.<sup>165</sup> The third category alleges overpayment: African Americans have been paid, in various forms and at various times, for the injuries inflicted by the American system of chattel slavery, and so should not continue to milk white guilt for yet more money.<sup>166</sup>

Professor Emma Coleman Jordan is also critical of reparations litigation based upon claims stemming from slavery.<sup>167</sup> Jordan has suggested that there are serious problems with litigation seeking reparations for injuries inflicted during slavery. Primarily, she suggests that there is a serious problem of “correlativity . . . the expectation that there must be a ‘nexus between two particular parties.’”<sup>168</sup> According to Jordan, the relevant nexus is “between the defendant’s liability and the plaintiff’s entitlement, as well as between the plaintiff’s entitlement and the remedy.”<sup>169</sup> Jordan points to two primary problems with correlativity. First, there is the difficulty of identifying defendants and plaintiffs.<sup>170</sup> Here, establishing a linkage between defendant and plaintiff is particularly challenging when it is difficult even to identify who those defendants and plaintiffs are.

Interestingly, this problem is not so overwhelming—at least as far as the defendants are concerned—when corporations are the object of a slavery litigation lawsuit. In that type of case, where the harm can also be clearly identified, the potential for tracing plaintiffs with the requisite nexus is high. For example, in the lawsuits currently consolidated in the Northern District of Illinois, some of the corporations facing suit are insurance companies sued for having written insurance contracts for the owners of slaves.<sup>171</sup> Having identified the defendant and the insurance contracts, it is potentially a simple matter of historical research to determine the slaves covered by those contracts and trace their descendants.

Jordan also suggests that the nexus between entitlement and remedy is obscure in slavery reparations cases. Again, that is most true when plaintiffs sue for the general harm of being enslaved: clearly a variety of specific harms may be inflicted during slavery, ranging from deprivation of liberty to physical injury or death. Certain harms may not survive the passage of time; others might. Clearly, much work remains to be done to specify which harms transfer from generation to generation (although, I

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<sup>165</sup> *Id.*

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

<sup>167</sup> See Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557 (2003).

<sup>168</sup> *Id.* at 558.

<sup>169</sup> *Id.* (quoting Hanoch Dagan, *The Fourth Pillar: The Law and Ethics of Restitution* (forthcoming 2003)).

<sup>170</sup> *Id.* at 557.

<sup>171</sup> See, e.g., *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. 2002cv01862 (E.D.N.Y. filed Mar. 26, 2002) (naming AETNA Ins. Co. as one of the defendants).

suggest, *infra*, that deprivation of property, remedied by an action in replevin, is one such harm). Nonetheless, there is no conceptual impediment to determining a range of harms that may be actionable.

Despite these concerns, Jordan does, however, support the type of reparations lawsuit that is based upon riots of the nineteenth and twentieth century, such as the Tulsa Race Riot:

My research on the legacy of lynching convinces me that the problem of lynching and race riots in the period 1865–1955 provides a promising and ultimately more satisfying fertile field for undertaking the same project as the reparations-for-slavery movement, with far fewer of the disabilities of the slavery-focused effort.<sup>172</sup>

#### *A. The Perpetrators of the Injury Are Unidentifiable*

Horowitz's first major attack on reparations focuses upon what he claims is the impossibility of identifying appropriate defendants because no "single group [is] clearly responsible for the crime of slavery."<sup>173</sup> As historian John Hope Franklin noted in an open-letter reply to Horowitz, this is an odd claim.<sup>174</sup> Most people would not dispute that Western powers, most notably Spain, Great Britain, France, and the United States, began and promulgated the slave trade. Slavery was made possible through a practice of colonization in which the European powers subjugated indigenous Africans and engaged in a policy of underdevelopment.<sup>175</sup>

In the same vein, another argument suggests that reparations is "racist" precisely because it is over-inclusive, treating "all blacks as victims and

<sup>172</sup> Jordan, *supra* note 167, at 559.

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

<sup>174</sup> See John Hope Franklin, *Letter: Horowitz's Diatribe Contains Historical Inaccuracies*, DUKE UNIV. CHRON., Mar. 29, 2001, available at [http://archives.chronicle.duke.edu/story.php?article\\_id=22351](http://archives.chronicle.duke.edu/story.php?article_id=22351).

If David Horowitz had read James D. DeBow's *The Interest in Slavery of the Southern Non-slaveholder*, he would not have blundered into the fantasy of claiming that no single group benefited from slavery. Planters did, of course. New York merchants did, of course. Even poor whites benefited from the legal advantage they enjoyed over all blacks as well as from the psychological advantage of having a group beneath them.

Meanwhile, laws enacted by states forbade the teaching of blacks any means of acquiring knowledge—including the alphabet—which is the legacy of disadvantage of educational privatization and discrimination experienced by African Americans in 2001.

*Id.*

<sup>175</sup> See, e.g., WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1982).

all whites as villains.”<sup>176</sup> It is fair to recognize an essentialist and overly accusatory strand of reparations activism—a strand that I reject—that Horowitz’s view exaggerates and parodies. What is true is that all African Americans are subject to forms of discrimination that do not apply to whites. From the inception of this nation until 1967,<sup>177</sup> the federal government sponsored a system of racial discrimination based first upon slavery and then upon Jim Crow segregation. These laws applied to every African American from every part of the nation, slave and freedman, traveling through the South, parts of the Midwest, and the District of Columbia. It was whites who passed and maintained laws denying African Americans the right to vote. The point is not that all whites were villains<sup>178</sup>—many whites voted against such laws—but that state and federal governments, acting on behalf of all citizens, upheld those laws. There should be no moral or political difficulty in holding our national institutions to account for institutionalized racism. Noted historian John Hope Franklin has responded forcefully to Horowitz’s criticism of racism, and his argument addresses why all white Americans must understand how race mattered in the distribution of goods and services in America:

Most living Americans do have a connection with slavery. They have inherited the preferential advantage, if they are white, or the loathsome disadvantage, if they are black; and those positions are virtually as alive today as they were in the 19th century. The pattern of housing, the discrimination in employment, the resistance to equal opportunity in education, the racial profiling, the inequities in the administration of justice, the low expectation of blacks in the discharge of duties assigned to them, the widespread belief that blacks have physical prowess but little intellectual capacities and the widespread opposition to affirmative

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<sup>176</sup> Jeff Jacoby, *The Hefty Bill for Slavery—and Freedom*, BOSTON GLOBE, Feb. 8, 2001, at A23 (arguing that the inability to clearly define victims and aggressors makes reparations “racist”).

<sup>177</sup> I use the year 1967 on the assumption that *Loving v. Virginia*, 388 U.S. 1 (1967), marks the end of federal de jure segregation. As late as 2000, however, the Alabama State Constitution still mandated separate schools for whites and African Americans and rendered illegal any marriage between African Americans and whites. See ALA. CONST. art. XIV, § 256 (“Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.”); ALA. CONST. art. IV, § 102 (“The Legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro.”).

<sup>178</sup> As one journalist has pointed out, on this argument, blacks with some white ancestry ought to be held partly accountable for slavery. See Jeff Jacoby, *No Reparations for Slavery*, BOSTON GLOBE, Feb. 5, 2001, at A15. Although Jacoby does not mention it, W. E. B. DuBois famously identified all African Americans as culturally or psychologically bifurcated in this way. See W. E. B. DUBOIS, *THE SOULS OF BLACK FOLK* 203 (Modern Library 1995) (1903) (arguing that reparations set an individual’s cultural heritage at war within him or her and seem to be taking self-hate and “double consciousness” a little too far).

action, as if that had not been enjoyed by whites for three centuries, all indicate that the vestiges of slavery are still with us.<sup>179</sup>

### *B. African Americans Are Implicated in the Wrongs of Slavery*

Professor John McWhorter, a linguistics professor at U.C. Berkeley, another reparations critic, offers an additional argument against reparations, contending that there is “painful clarity . . . [that] most slaves were obtained by African kings in intertribal wars, and were sold in masses to European merchants in exchange for material goods.”<sup>180</sup>

McWhorter’s argument commits a logical fallacy<sup>181</sup> and fails to adequately respect the historical record and the moral implications of black collaboration in slavery.<sup>182</sup> Slavery continued after and independently of the international slave trade. The U.S. Constitution commanded that international trade in slaves should cease in 1808,<sup>183</sup> yet slavery in America (and the domestic trade in slaves) continued for almost sixty years after that. To the extent that African Americans engaged in this domestic slave trade, generally the African American purchasers of slaves were family members purchasing their siblings, fathers and mothers, or sons and daughters out of slavery.<sup>184</sup> Such a detail is problematic for those who seek to deny or minimize the effects of slavery. While a relatively small group of African American slave owners may have acted as badly to their fellow African Americans as whites did, the moral repugnance of their actions does not undermine the case for reparations.

Reparations critics are willing to discount a history of colonial oppression, underdevelopment, and exploitation. As a moral argument, some

<sup>179</sup> Franklin, *supra* note 174.

<sup>180</sup> John McWhorter, *Against Reparations: Why African Americans Can Believe in America*, *NEW REPUBLIC*, July 23, 2001, at 32, 34 (reviewing ROBINSON, *supra* note 17).

<sup>181</sup> The fallacy is to move from a major proposition containing a limited term (some) to a conclusion containing a universal term (all).

<sup>182</sup> I doubt that reparations opponents would get far with an argument that is structurally the same but less venal: because certain Jewish people worked for the Nazis in staffing the concentration camps, or impeded efforts to resist the Polish and Nazi massacre and destruction of the Warsaw ghetto, then no Jewish people deserve reparations or commemoration. Similarly, the idea that Holocaust reparations are part of a Jewish victimology is equally repugnant.

<sup>183</sup> See U.S. CONST. art. 1, § 9, cl. 1: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” Interestingly, slaves were “persons” for the purposes of importation, but three-fifths of a person for the purposes of representation. See U.S. CONST. Art. 1, § 2, cl. 3. Professor Eric J. Miller has recently argued that the concept of underdevelopment can be applied to the condition of African Americans during slavery and Jim Crow. See Miller, *supra* note 86.

<sup>184</sup> See JAMES OAKES, *THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS* 47–48 (1998).

accounting of the African involvement in the slave trade is urgent and necessary. However, as Professor Henry Louis Gates has noted:

The export of human beings from Africa led mainly to more such exporting, and to a dramatic net economic loss to exporting nations as a whole. By contrast . . . many Western nations reaped large and lasting benefits from African slavery, while African nations did not. African regrets, profound indeed, do not have to be other than regrets, because the results of African slave trading have, in Africa, been negative, an economic curse.<sup>185</sup>

### *C. African Americans Are Overcompensated Freeloaders*

Horowitz advances additional arguments that seek to demonstrate that reparations hurts the group that it purports to help.<sup>186</sup> These arguments generally allege that reparations constitutes a type of reverse discrimination that will do more harm than good for African Americans.<sup>187</sup> Implicit in this depressing view of race relations is the stereotype of the shiftless, feckless African American, too lazy to do anything for him or herself, that has been argued to such damaging effect in disparaging everything from affirmative action to welfare mothers. These arguments may generate blistering responses but, on balance, are so misguided that they hardly deserve a serious response.

#### *1. Too Many Would Be Paid*

One of the often repeated arguments against reparations is rather straightforward: it is impossible to create a concrete list of individual grievances and harms traceable to slavery, refuting the need to provide a single mass reparations payment to all African Americans. Reparations opponents argue that such a payment would be over-inclusive, benefiting individuals who were not descended from slaves and who would be unjustly enriched, as though they did not suffer any economic consequences of slavery and discrimination.<sup>188</sup>

This issue presents one of the most interesting features of the reparations claim. By undermining the nexus between harm and beneficiary, some of the symbolism of the reparations claim may be lost, along with some of the legitimacy of the suit.<sup>189</sup> But this argument ignores that repa-

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<sup>185</sup> Henry Louis Gates, Jr., *The Future of Slavery's Past*, N.Y. TIMES, July 29, 2001, § 4, at 15.

<sup>186</sup> Horowitz, *supra* note 16.

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

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

<sup>189</sup> Derrick Bell and Ewart Guinier refute this argument. See Bell, *supra* note 68, at

rations is about repair—in particular, the repair of a community for the stigma harm occasioned by slavery. The social construction of people of African descent in America depends not simply upon the fact of personal or familial slavery. Rather, racial difference has been mediated through the stigma of slavery and Jim Crow and contained in perceptions lasting through the present time.

## 2. *All African Americans Are Already Paid*

Opponents of reparations also assert that a form of reparations has already been paid to African Americans. Horowitz states that this payment came in the form of the Civil Rights Act and the “advent of the Great Society in 1965.”<sup>190</sup> McWhorter concurs, stating that the War on Poverty and affirmative action ought to be seen as the payment sought by supporters of reparations.<sup>191</sup> McWhorter also states that in the “mid-1960s welfare programs were deliberately expanded for the ‘benefit’ of black people, in large part due to claims by progressive whites that the requirements of the new automation economy made it unfair to expect blacks to make their way up the economic ladder as other groups had.”<sup>192</sup> McWhorter believes that although such programs were not “termed ‘reparations’ in the technical sense,” they did “provide unearned cash for underclass blacks for decades.”<sup>193</sup> Some vast program of social healing and uplift is, after all, the goal of the reparations movement.

President Johnson’s 1965 commencement speech at Howard University certainly enunciated the political vision of a Great Society, but it did not even last the three years until Nixon’s election in 1968. Welfare, as we know it and have always known it, is a program designed to benefit poor families. The fact that popular culture and the media frequently put a black face on it does not alter the fact that most of the beneficiaries are white, and single, mothers, and appropriately so. Meanwhile, if the War on Poverty is measured by results, then it is a huge failure; the difference between the richest and poorest in this society grows wider each day, with African Americans disproportionately stuck at the bottom.

Reparations does not seek to replace the Great Society but to push it toward its meaningful and ambitious goals. Reparations provide a voice through which those most acutely affected by the failure of the Great Society (and those most particularly identified by President Johnson) can

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163, 164; Guinier, *supra* note 30, at 1722, 1723.

<sup>190</sup> Horowitz, *supra* note 16.

<sup>191</sup> John McWhorter, *Why I Don’t Want Reparations for Slavery*, L.A. TIMES, July 15, 2001, at M5.

<sup>192</sup> McWhorter, *supra* note 180, at 37.

<sup>193</sup> *Id.*

protest their exclusion from the benefits of American society that others take for granted.<sup>194</sup>

Another claim alleges that whites expiated the sin of slavery by fighting the Civil War. Quite apart from ignoring that Southern whites fought the Civil War to perpetuate slavery, this argument ignores President Lincoln's quite categorical statement that the Union side did *not* fight the Civil War only to abolish slavery. In a letter to James Conkling in Illinois, sent as a proxy stump speech during his second campaign for the Presidency during 1863, Lincoln wrote:

You say you will not fight to free negroes. Some of them seem willing to fight for you; but no matter. Fight you, then, exclusively to save the Union. I issued the Proclamation on purpose to aid you in saving the Union. Whenever you shall have conquered all resistance to the Union, if I shall urge you to continue fighting, it will be an apt time then for you to declare you will not fight to free negroes. I thought that in your struggle for the Union, to whatever extent the negroes should cease helping the enemy, to that extent it weakened the enemy in his resistance to you. Do you think differently? I thought that whatever negroes can be got to do, as soldiers, leaves just so much less for white soldiers to do in saving the Union. . . . If they stake their lives for us, they must be prompted by the strongest motive—even the promise of freedom. And that promise, being made, must be kept.<sup>195</sup>

According to Lincoln, then, African Americans made a pivotal contribution to a war to preserve the Union, not abolish slavery. In fact, Lincoln did not free a single slave in territory occupied by the Union when he issued the Emancipation Proclamation. Those slaves were not freed in 1861 but rather by the ratification of the Thirteenth Amendment in 1865.<sup>196</sup>

### 3. *Co-Dependent "Victims"*

Finally, reparations critics claim that reparations is yet another political strategy that seeks to "turn African-Americans into victims."<sup>197</sup> The argument, in essence, is that those within the African American commu-

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<sup>194</sup> See, e.g., Miller, *supra* note 86 (discussing reparations as addressing separation of America into two different societies based on race).

<sup>195</sup> SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE* 640 (1963) (quoting President Lincoln).

<sup>196</sup> See Abraham Lincoln, *Final Emancipation Proclamation*, in *ABRAHAM LINCOLN: GREAT SPEECHES* (John Grafton ed., 1991) (noting that the Emancipation Proclamation did nothing to free slaves in states loyal to the Union and that such slaves were freed only by the ratification of the Thirteenth Amendment in December 1865).

<sup>197</sup> Horowitz, *supra* note 16.

nity will be burdened with a “crippling sense of victim-hood” if such reparations are paid.<sup>198</sup> E. R. Shipp, for example, complains that African Americans are a people who are “desperate for excuses to explain their own failures.”<sup>199</sup> McWhorter echoes this sentiment when he states that “black America” ought to “focus on helping people to help themselves” and not wait for the handouts of others.<sup>200</sup> In denouncing Randall Robinson’s contention that “black” is essentially a shorthand for “poor,” McWhorter contends that the “reparations movement is founded in large part upon a racist stereotype” that robs African Americans of “individual initiative.”<sup>201</sup>

President Lyndon B. Johnson provided the most direct response to this line of argument. When speaking to the graduating class at Howard University on June 4, 1965, President Johnson made the case for his proposed “Great Society” revolution. Reviewing the civil rights struggle to date, President Johnson recognized that:

[F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights.<sup>202</sup>

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<sup>198</sup> *Id.*

<sup>199</sup> Ogletree & Shipp, *supra* note 16, at 127.

<sup>200</sup> McWhorter, *supra* note 191.

<sup>201</sup> McWhorter, *supra* note 180. In fact, Robinson makes clear that he does *not* regard “black” as a shorthand for “poor”: the passage quoted *supra* text accompanying note 45 expressly states that, while racial discrimination has caused disproportionate African American poverty, race and poverty are not direct correlates. *See* ROBINSON, *supra* note 17, at 77, 78.

<sup>202</sup> President Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), *available at* <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>. President Johnson continued:

We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result. For the task is to give 20 million Negroes the same chance as every other American to learn and grow, to work and share in society, to develop their abilities—physical, mental and spiritual, and to pursue their individual happiness. To this end equal opportunity is essential, but not enough, not enough. Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood you live in—by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man.

President Johnson was aware that there were many “subtle”<sup>203</sup> and “complex”<sup>204</sup> reasons for the failure of African Americans to achieve equality in America. But there were also two “broad basic reasons”<sup>205</sup> for this lack of equality: one was poverty, which affected all races; the other was “much more difficult to explain, more deeply grounded, more desperate in its force.”<sup>206</sup> The President identified:

the devastating heritage of long years of slavery; and a century of oppression, hatred, and injustice. For Negro poverty is not white poverty. Many of its causes and many of its cures are the same. But there are differences—deep, corrosive, obstinate differences—radiating painful roots into the community, and into the family, and the nature of the individual. These differences are not racial differences. They are solely and simply the consequence of ancient brutality, past injustice, and present prejudice. They are anguishing to observe. For the Negro they are a constant reminder of oppression. For the white they are a constant reminder of guilt. But they must be faced and they must be dealt with and they must be overcome, if we are ever to reach the time when the only difference between Negroes and whites is the color of their skin.<sup>207</sup>

Professor Ewart Guinier argues that, in 1965, President Johnson was making the case for reparations in terms that had existed for a century or more.<sup>208</sup> The President explicitly recognized that reparations required whites and blacks to face America’s history of oppression and take positive action in order to overcome that history. Poverty and lack of opportunity were the tangible expressions of that history, but President Johnson recognized that the different races experienced poverty differently. His laudable political effort to overcome those differences failed as his legacy was tarnished as a result of the United States involvement in the Vietnam War.

#### *D. Understanding the Goals of the Reparations Movement*

Perhaps the real locus of the objection to reparations is its perceived divisiveness. Reparations opponents appear to consider reparations a separatist demand that pits one set of Americans against another. But if reparations is nationalist, it is so only in the sense of laying claim to a place

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*Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Guinier, *supra* note 30, at 1721.

in this nation. The reparations movement demands that all of American history be fully acknowledged, accounted for, and valued.<sup>209</sup> Thus the movement must make one of its vital political and educational tasks the goal of combating the willed ignorance and ahistoricism exhibited by those who would deny the immediate and subsequent effects of slavery and Jim Crow.

John Hope Franklin argued adamantly against the modern denial of the history of slavery and Jim Crow:

as long as there are pro-slavery protagonists among us, hiding behind such absurdities as “we are all in this together” or “it hurts me as much as it hurts you” or “slavery benefited you as much as it benefited me,” we will suffer from the inability to confront the tragic legacies of slavery and deal with them in a forthright and constructive manner.<sup>210</sup>

Instead of forgetting the past and “moving on,” it is vital that we remember the past. It matters, as President Johnson suggested, that one group benefited from slavery and Jim Crow segregation and that one group was crippled by it. It also matters that President Johnson’s efforts to undo that history were subsequently undermined. To forget that—to claim that a false start on the road to social justice is adequate to remedy the systematic oppression of African Americans as a people—is shortsighted and dangerous. Denying that this nation bears a responsibility for its history of slavery is disingenuous and morally wrong. It devalues the legitimate claims of African Americans who, as President Johnson acknowledged, are harmed particularly and differently by poverty. The current generation of African Americans are the first to be able to make their way without facing the legal hurdle of segregation. The lower income bequeathed them by the practice of segregation and the continuing hurdle of discrimination should not be ignored.<sup>211</sup>

The demand for a reexamination of the historical and cultural record requires us to evaluate this nation’s tradition of fairness and equality in the manner and spirit of Supreme Court Justice Thurgood Marshall.<sup>212</sup> We should not forget that Marshall argued, as did Frederick Douglass before him, that the Constitution was drafted precisely to exclude various segments of population, including women and slaves, and that the challenge for America has been to redeem the flawed basis of its founding.<sup>213</sup> Accordingly, the Constitution we have now is not the one enacted in 1787

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<sup>209</sup> See ROBINSON, *supra* note 45, at 52; Kennedy, *supra* note 17, at 1417.

<sup>210</sup> Franklin, *supra* note 174.

<sup>211</sup> See ROBINSON, *supra* note 17, at 76, 78.

<sup>212</sup> See Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2–5 (1987).

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

but one reformed by the Civil War and the Civil Rights movement. The reparations movement demands that some accounting be made of the sacrifices that one segment of this nation required of another through state-sponsored institutional racism.

#### CONCLUSION

African American reparations are premised upon vital and viable legal, moral, and political arguments. These arguments are premised upon the complicity of state, municipal, corporate, and individual actors in perpetuating violent acts of discrimination and repression against African Americans throughout the lifetime of this country. Reparations arguments were made before emancipation and continue to be made today. The same type of discrimination discussed by David Walker in 1829 and addressed by the *MacAdoo* lawsuit in 1915 is replayed in the *Pigford* lawsuit in 1999 and the Tulsa case in 2003. American political discourse is crippled to the extent that it fails to acknowledge the constancy, continued relevance, and validity of such arguments. American political discourse is undermined to the extent that such ignorance is willful.

There are very few meaningful distinctions between the claims presented on behalf of large classes of African Americans and small groups of identifiable victims of Jim Crow discrimination. While critics of reparations tend to distinguish between slavery and non-slavery reparations, to the detriment of the former, the appropriate legal distinction is not made on the basis of the institution attacked nor on some evaluation of time elapsed. Reparations suits are most likely to be successful when the broad redress sought can be presented in narrow legal claims. Such a tactic fits both slavery and non-slavery cases.

More importantly, the underlying goals of both slavery and non-slavery lawsuits are the same. Both seek to end a tradition of denying the consequences of slavery and Jim Crow era segregation, and both seek to force the nation to engage in an informed debate about race and racism in America. Ignorance can no longer be an excuse nor a rhetorical posture.

Legislative initiatives tolling the statute of limitations are welcome and useful. Recently adopted accounting statutes, such as the Slavery Era Insurance Act in California<sup>214</sup> and the Slavery Era Disclosure Ordinance<sup>215</sup> passed by the city of Chicago, may have an even broader impact on addressing reparations in public forums. These statutes are important initiatives that mark an alternative strategy to H.R. 40's attempts to investigate and compensate for the wrongs of slavery and Jim Crow segregation.

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<sup>214</sup> CAL. INS. CODE §§ 13810–13813 (West Supp. 2003).

<sup>215</sup> Business, Corporate and Slavery Era Insurance Ordinance, MUN. CODE OF CHI. § 2-92-585 (2002), available at <http://livepublish.municode.com/10/lpext.dll?f=templates&fn=main-hit-j.htm&2.0>.

The diversification of strategies and the strength of some of the currently filed lawsuits suggest that there has never been a broader, more intellectually well-grounded moment in the reparations campaign.

We should celebrate this move away from narrow nationalism and welcome reparations as an opportunity for all Americans to participate in a debate over what a truly just and inclusive society will look like in the next millennium. The issues are clear, the venues are identified, and the time is now.