

# FORMULATING REPARATIONS LITIGATION THROUGH THE EYES OF THE MOVEMENT

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## INTRODUCTION

Discussions are now being held throughout the world in academic, community and governmental organizations concerning reparations as a remedy for the enslavement of African peoples in the Americas and the continuing vestiges of chattel slavery. It has taken on a level of seriousness which surprises many, largely because the concept of reparations for Africans and African descendants has been devalued and dismissed in the power and influence spheres of the United States and the world. The National Coalition of Blacks for Reparations in America (N'COBRA) has been organizing to obtain reparations for African descendants in the United States since 1987, when it had its first organizing meeting in Washington, D.C. N'COBRA has joined its efforts with other organizations to mount a national and international campaign to obtain reparations for Africans and African descendants for the Trans Atlantic Slave Trade and chattel slavery, and the continuing vestiges of the Trans Atlantic Slave Trade and chattel slavery. Litigation strategies are being developed by a number of groups including the N'COBRA, the Reparations Coordinating Committee (RCC) and Corporate Restitution Team (CRT).<sup>1</sup>

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1. Adjoa A. Aiyetoro, *Why I'm a Reparations Activist*, ESSENCE, Feb. 2002, at 172. N'COBRA developed a Litigation Committee in 1997 composed of lawyers, social scientists and reparations activists for the purpose of developing reparations litigation. In 2000, Charles Ogletree and Randall Robinson formed the Reparations Coordinating Committee (RCC) that includes lawyers and social scientists. The RCC, working in cooperation with N'COBRA, is also developing reparations litigation. The Corporate Restitution Team is a name Deadria Farmer-Paellman uses in identifying the group that filed several reparations lawsuits against corporations in 2002 discussed *infra*.

I.  
HISTORY OF THE DEMAND FOR REPARATIONS

The demand for reparations for the enslavement of African peoples in the United States is a long-standing one. During enslavement, people such as David Walker, in his 1830 "Appeal"<sup>2</sup> addressed "to the Coloured Citizens of the World, but In Particular, and Very Expressly, to Those of the United States of America," spoke to the need for emancipation and reparations.<sup>3</sup> Of course, it was not until the end of enslavement of African peoples in the United States that the time was ripe for making reparations and the onus was placed on the government to do so.

A. *Forty Acres and a Mule*

The demand for reparations has been popularized as a demand for "Forty Acres and a Mule" based on the view that this promise had been made to recently freed Africans and was not kept. A review of the documents that purportedly granted forty acres and a mule to freed enslaved Africans reveals that the promise fell short of granting land to all recently freed Africans as a form of reparations.<sup>4</sup> General Sherman's Special Field Order No. 15 and the first Freedmen's Bureau Act provided up to forty acres of land, but no mule, to freed enslaved Africans.<sup>5</sup> This land was provided with certain restrictions and, in the case of the Freedmen's Bureau

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2. DAVID WALKER, *DAVID WALKER'S APPEAL* (Black Classic Press 1993) (1830).

3. *See id.* at 90 (stating that Americans "have to raise us from the condition of brutes to that of respectable men, and to make a national acknowledgement to us for the wrongs they have inflicted on us").

4. *See* COMM'N FOR POSITIVE EDUC., *THE FORTY ACRES DOCUMENTS: WHAT DID THE UNITED STATES REALLY PROMISE THE PEOPLE FREED FROM SLAVERY?* (1994) [hereinafter *THE FORTY ACRES DOCUMENTS*]. This book reprints General Sherman's Special Field Order No. 15, dated January 16, 1865; the Freedmen's Bureau Act passed by Congress on March 3, 1865; the Bill to Amend the Freedmen's Bureau Act passed by Congress on December 4, 1865 and vetoed by President Andrew Johnson on February 19, 1866; and the Freedmen's Bureau Act passed by Congress on July 16, 1866 over President Johnson's veto.

5. William T. Sherman, Special Field Order No. 15 (Jan. 16, 1865), *reprinted in* *THE FORTY ACRES DOCUMENTS*, *supra* note 4, at 54. On September 16, 1863, President Lincoln instructed the tax commissioners for South Carolina to sell not more than twenty acres of land obtained in tax sales during the Civil War to "heads of families of the African race." An Act to Continue in Force and to Amend "An Act to Establish a Bureau for the Relief of Freedmen and Refugees" (Second Freedmen's Bureau Act), ch. 200, 14 Stat. 173 (1866) *reprinted in* *THE FORTY ACRES DOCUMENTS*, *supra* note 4, at 99. However, the "40 acres and a mule" promise derives from the documents identified in footnote four. *See* *THE FORTY ACRES DOCUMENTS*, *supra* note 4, at 22.

Act, for a price. Field Order No. 15 only applied to abandoned land in South Carolina, and this order as well as the Freedmen's Bureau Acts based the decision of who would be eligible for the land on a judgment by a government official as to the character of the freed man or woman.<sup>6</sup>

General Sherman issued Field Order No. 15 during the Civil War, granting up to forty acres of land in "[t]he islands from Charleston south, the abandoned rice-fields along the rivers for thirty miles back from the sea, and the country bordering the Saint John's River, Fla., . . . ." <sup>7</sup> Parcels of these lands were granted to three respectable negroes, heads of families . . . to enable them to establish a peaceable agricultural settlement. The three parties named will subdivide the land . . . among themselves and such others as may choose to settle near them, so that each family shall have a plot of not more than forty acres of tillable ground . . . .<sup>8</sup>

Subsequent to the issuance of Field Order No. 15, the Congress of the United States passed, and President Lincoln signed, the first Freedmen's Bureau Act.<sup>9</sup> This Act gave the War Department the authority to make certain provisions and land available to "refugees and freedmen" in "rebel states, or from any district of country within the territory embraced by the operations of the army."<sup>10</sup> Specifically, "destitute and suffering refugees and freedmen and their wives and children" could be provided with "provisions, clothing, and fuel . . . for [their] immediate and *temporary* shelter . . . ."<sup>11</sup> The Act also gave the War Department officials the authority

to set apart, for the use of loyal refugees and freedmen, such tracts of land within the insurrectionary states as shall have been abandoned, or to which the United States shall have acquired title by confiscation or sale, . . . and to every male citizen, whether refugee or freedmen, . . . there shall be assigned not more than forty acres of such land . . . .<sup>12</sup>

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6. See generally *id.* (stressing traits of loyalty and respectability to receive plots).

7. Special Field Order No. 15, reprinted in THE FORTY ACRES DOCUMENTS, *supra* note 4, at 52.

8. *Id.* at 53–54.

9. An Act to Establish a Bureau for the Relief of Freedmen and Refugees (Freedmen's Bureau Act), ch. 90, 13 Stat. 507 (1865), reprinted in THE FORTY ACRES DOCUMENTS, *supra* note 4, at 60.

10. *Id.*

11. *Id.* at 61 (emphasis added).

12. *Id.* at 62–63 (emphasis added).

However, this land was not a gift in recognition of the forced free labor that had been extracted from the refugees and freed men and women and the inhumane treatment to which they and their ancestors had been subjected. Rather, the loyal refugees and freedmen chosen to receive this land were *required* to pay annual rent not “*exceeding six per centum upon the value of such land, as it was appraised by the state authorities,*” and they *were* allowed to purchase the land “*at the end of said [three year] term or at any time during said term . . . upon paying therefore the value of the land as ascertained and fixed for the purpose of determining the annual rent . . .*”<sup>13</sup>

The first Freedmen’s Bureau Act was to expire one year after the end of the Civil War.<sup>14</sup> The 39th Congress passed an amendment to that Act on February 6, 1866.<sup>15</sup> However, President Johnson vetoed the amendment on February 19, 1866.<sup>16</sup> The Congress then passed a second amendment to the Freedmen’s Bureau Act on July 16, 1866—over President Johnson’s veto—that extended the authority for the Freedmen’s Bureau for two years after the passage of the Act and gave authority to the Bureau to care for “loyal refugees and freedmen . . . to aid them in making the freedom conferred . . . available to them and beneficial to the republic.”<sup>17</sup> This bill once again gave the Bureau authority to issue provisions to “desertite and suffering” refugees and freedmen.<sup>18</sup> However, it prohibited the Bureau from issuing provisions to a refugee or freed man “who is able to find employment, and could, by proper industry or exertion, avoid such destitution, suffering and dependence.”<sup>19</sup>

The promise of land held out by General Sherman’s Field Order was further diminished. The amended Act conferred title to twenty acre plots obtained in tax sales during the Civil War and sold pursuant to President Lincoln’s instructions issued September 16, 1863, to “heads of families of the African race.”<sup>20</sup> It provided that land obtained pursuant to these tax sales and not previously sold should be “disposed of in parcels of *twenty acres, at one dollar and fifty cents per acre, to such persons and to such only as have acquired and are now occupying lands under and agreeably to the provisions of General Sher-*

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13. *Id.* at 63 (emphasis added).

14. PAUL SKEELS PIERCE, *THE FREEDMAN’S BUREAU* 55 (1971).

15. *Id.* at 61.

16. *Id.*

17. Second Freedmen’s Bureau Act, *reprinted in* THE FORTY ACRES DOCUMENTS, *supra* note 4, at 96.

18. *Id.* at 98–99.

19. *Id.*

20. *Id.* at 99.

*man's special field order . . .*"<sup>21</sup> If any land was left, the Act allowed "persons as had acquired lands agreeable to the said order of General Sherman, *but who have been dispossessed by the restoration of the same to the former owners*" to purchase twenty acre plots for one dollar and fifty cents per acre.<sup>22</sup> Finally, the amended Act took back forty acres of land granted to "respectable negroes, male heads of households" pursuant to Field Order No. 15.<sup>23</sup> It required those who had claims to land pursuant to General Sherman's Field Order to present those claims, and if the claims were held valid they were given a "warrant upon the direct tax commissioner for South Carolina for twenty acres of land" for which they would obtain a six-year lease that could be converted to a sale upon the payment of one dollar and fifty cents per acre.<sup>24</sup>

The diminution of General Sherman's Field Order 15 No. from forty to twenty acres and the imposition of a fee for the land was the first of many betrayals that African descendants would experience as they navigated the road to freedom and equality. There was no recognition in the Freedmen's Bureau Acts passed subsequent to the Field Order that the recently emancipated Africans should be given any material benefits whatsoever as recognition of the fact that they and their ancestors had been subjected to systematic, inhumane treatment because of their racial identity and were denied the human right to control their lives and the lives of their families.

### B. *Ex-Slave Mutual Relief, Bounty and Pension Association*

In the early 1890s, the Ex-Slave Mutual Relief, Bounty and Pension Association was formed under the leadership of Rev. Isaiah Dickerson and Callie House.<sup>25</sup> The primary purpose of this organization was to obtain support for the "ex-slaves" and their descendants.<sup>26</sup> The Association leaders garnered support from approximately 600,000 "ex-slaves" and their descendants in their efforts to lobby Congress for the passage of legislation, such as Senate

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21. *Id.* at 100–01 (emphasis added).

22. *Id.* (emphasis added).

23. *Id.* at 102.

24. *Id.*

25. LINDA ALLEN EUSTACE & IMARI A. OBADELE, EIGHT WOMEN LEADERS OF THE REPARATIONS MOVEMENT 6–8 (2000); *see also* Mary F. Beity, *Reparations for Freedmen, 1890-1916: Fraudulent Practices or Justice Deferred?*, 57 THE J. OF NEGRO HIST. 219 (1972).

26. EUSTACE & OBADELE, *supra* note 25, at 8–9.

Bill 4718.<sup>27</sup> Although the association organized effectively throughout the South and in states such as Oklahoma, Kansas, Indiana, Ohio and New York, it was unable to convince the United States Congress to pass legislation to provide a pension for “ex-slaves” or, if deceased, their descendants.<sup>28</sup> This lack of success was due in large part to the efforts of the United States government to destabilize the Association by charging and convicting Ms. House, Rev. Dickerson and other leaders with mail fraud, for having used the mail to distribute one of its flyers.<sup>29</sup> These charges resulted from a ten-year postal investigation that could not uncover any substantive federal violations, strongly suggesting that the purpose of the investigation was to destroy the organization’s efforts.<sup>30</sup> The charges foreshadowed the mail fraud charges brought against Marcus Garvey,<sup>31</sup> revealing a strategy of the United States government to avoid addressing the demand for reparations by attempting to disparage the reputations of the leaders of the demand.

The “Back to Africa” movement, as the major initiative of the United Negro Improvement Association (UNIA) formed by Marcus Garvey was popularly named, is more widely known than the work of the Ex-Slave Mutual Relief, Bounty and Pension Association. Although many people had not identified it as a “reparations movement,” the formation of the United Negro Improvement Association (UNIA) was a critical point in the effort to obtain reparations. It galvanized more African descendants than the Ex-Slave Mutual, Relief and Pension Association, perhaps in large part because it spoke to getting away from a government that had oppressed so brutally and had then refused to implement reparative remedies—to make peace with the past. The fraudulence of the charges against Marcus Garvey has been unearthed and House Resolution 216, introduced by Congressman Rangel on August 1, 1997, but not passed, recognizes that his conviction and deportation had been politically motivated.<sup>32</sup>

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27. S. 4718, 55th Cong. (1898); Deadria Farmer-Paellman, *Black Exodus: The Ex-Slave Pension Movement Reader*, in *SHOULD AMERICA PAY: SLAVERY AND THE RAGING DEBATE OVER REPARATIONS* 22, 27 (Raymond A. Winbush, Ph.D., ed., 2003).

28. EUSTACE & OBADELE *supra* note 25, at 8.

29. EUSTACE & OBADELE, *supra* note 25, at 9; *see also* BABA HANNIBAL AFRIK, N’COBRA, *HANDBOOK FOR REPARATIONS NOW!* (1999).

30. *See* EUSTACE & OBADELE, *supra* note 25, at 9 (commenting on white supremacist values that led officials to “attempt to defeat any significant self-help efforts among Black people”); *see also* BERRY, *supra* note 25.

31. *See generally* JOHN HENRIK CLARKE & AMY JACQUES GARVEY, *MARCUS GARVEY AND THE VISION OF AFRICA* (1974).

32. *See* H.R. Res. 216, 105th Cong. (1997).

After the Marcus Garvey-led movement was destabilized, the call for reparations did not die. Queen Mother Audley Moore and Dara Abubakari formed the Reparations Committee of Descendants of United States Slaves, Inc., in the early 1960s.<sup>33</sup> The Nation of Islam, the Republic of New Africa, the New Afrikan Peoples Organization and the African People's Socialist Party kept the demand alive by placing reparations in their programs of action starting in the 1960s and '70s along with other largely nationalist organizations.<sup>34</sup>

With the formation of N'COBRA in 1987, the reparations movement took on new life. N'COBRA was formed as a broad-based organization with the sole purpose of obtaining reparations for African descendants in the United States and supporting the movements for reparations for Africans and African descendants throughout the Diaspora and Africa.<sup>35</sup> At the urging of N'COBRA member Ray Jenkins (known as "Reparations Ray"), Congressman John Conyers introduced a Reparations Study Bill, H.R. 3745, in 1989.<sup>36</sup> He has reintroduced the bill every new Congress and in the past four Congresses it has been given the bill number of H.R. 40.<sup>37</sup> This bill provides for the formation of a commission to study chattel slavery and whether and how it continues to impact African descendants in the United States today.<sup>38</sup> The bill also calls for the commission to recommend the form that reparations should take if it indeed finds there to be continuing injuries to African descendants.<sup>39</sup>

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33. EUSTACE & OBADELE, *supra* note 25, at 23.

34. Adjoa A. Aiyetoro, *The National Coalition of Blacks for Reparations in America: Its Creation and Contribution to the Reparations Movement*, in *SHOULD AMERICA PAY: SLAVERY AND THE RAGING DEBATE OVER REPARATIONS* 209, 210 (Raymond A. Winbush, Ph.D., ed., 2003).

35. *Id.* at 213.

36. *See id.* at 217; Commission to Study Reparations Proposals for African Americans Act, H.R. 3745, 101st Cong. (1989).

37. Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 108th Cong. (2003); Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 107th Cong. (2001); Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 106th Cong. (1999); Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 105th Cong. (1997).

38. *See, e.g.*, H.R. 3745, § 2(b)(1)–(3), 101st Cong. (1989).

39. *Id.* at § 2(b)(5).

## II. DEVELOPING LEGAL STRATEGIES TO ADVANCE THE DEMAND FOR REPARATIONS

Unless a variety of strategies to obtain reparations are investigated and implemented, as appropriate, the demand for reparations remains a rhetorical one. Following in the footsteps of the Ex-Slave Mutual Relief, Bounty and Pension Association, advocates for reparations have lobbied for and supported the passage of H.R. 40, obtaining support from local and state legislative bodies and social, civic and legal organizations.<sup>40</sup> Although obtaining legislative support is critical, it became clear in the 1990s that a litigation strategy was needed to complement the legislative work, and have the Congress and others take the movement more seriously.<sup>41</sup> In order to have a litigation strategy that speaks with integrity to the demands for reparations, there is a need to redefine terms associated with the procedural and substantive hurdles faced.

### A. *Definitions Critical to Sustaining Litigation Created Through Focus on the Movement*

In order for people who have been shut out of the system to obtain meaningful remedies for violations of their human rights, redefinition of some ordinary and some uncommon terms must be accepted by the legal system. In a challenging and thought-provoking article, Mari Matsuda suggests that the Critical Legal Studies movement should develop approaches to human rights issues gen-

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40. N'COBRA has been instrumental in obtaining support for H.R. 40 from a number of state and municipal legislative bodies, including those in Washington, D.C., Detroit, Michigan, Louisiana, Compton, California and Chicago, Illinois, and organizations such as the National Bar Association and Delta Sigma Theta Sorority. See Aiyetoro, *supra* note 34, at 222. The support for H.R. 40 continues to expand and includes spiritual organizations such as the Episcopal Church and the Society of Friends and political parties such as the New Jersey Green Party. See Ronald Roach, *Moving, Toward Reparations: The Resurgence of the Reparations Movement is Taking Shape with Black Leaders, Intellectuals*, BLACK ISSUES IN HIGHER EDUCATION, Nov. 8, 2001, at 20 (describing N'COBRA and other activists' efforts in rallying support behind the bill, including their success in lobbying the Los Angeles and Chicago city councils); *Reparations Now*, GREENGRAM, March, 2000 (stating the Green Party of New Jersey's support for reparations and encouraging passage of H.R. 40); *Resolutions*, PAC. CHURCH NEWS Oct.-Nov., 2001, at 7 (stating the San Francisco Area Episcopal Church's support for H.R. 40); *World Conference Against Racism—What Can Quakers Do Now?*, THE NEW ENGLAND FRIEND, Winter, 2000, at 5 (urging readers to ask congressional representatives to support the bill).

41. The litigation strategy, like the legislative strategy, follows in the footsteps of Callie House, who, once released from prison, funded a lawsuit seeking reparations. EUSTACE & OBADELE, *supra* note 25, at 9 (citing Berry, *supra* note 25, at 227).



erally and to reparations particularly in a “looking to the bottom” approach.<sup>42</sup> Ms. Matsuda aptly describes the source of the demand for reparations when she says “[r]eparations is a legal concept generated from the bottom. It arises not from abstraction but from experience.”<sup>43</sup> By “bottom,” Matsuda refers to those individuals who are alleging the violation of rights rather than those who have traditionally defined the scope of legal relief—judges, the state bar associations and other groups ensconced in the halls of power in the United States.<sup>44</sup> “Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist . . . in the task of fathoming the phenomenology of law and defining the elements of justice.”<sup>45</sup>

Rather than simply a tool for critical legal studies scholars to broach issues of human rights, this methodology must be utilized by those who are developing reparations litigation. The definitions of victim and injuries discussed in any number of fora must comport with the experiences of those who are raising the demand for reparations. Such an approach requires, necessarily, a willingness to “think outside the box” of the legal system in which we have been trained. It also requires persuading a judge and jury that the manner in which the reparations advocates define the demand is judicially cognizable, that it states a claim for which relief can be granted.

In validating dismissal of the plaintiffs’ claim for reparations from the United States government in *Cato v. United States*,<sup>46</sup> the Ninth Circuit Court of Appeals went to some lengths to articulate the procedural standards that plaintiffs must meet. In the final analysis, the court held that the claim for reparations was a political and not a legal claim. The court appears to have reached this decision because it was looking at the claims through the eyes of the traditional legal system, and not through the eyes of the plaintiffs, as Matsuda suggests.<sup>47</sup>

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42. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

43. *Id.* at 362.

44. *Id.* at 324.

45. *Id.*

46. 70 F.3d 1103 (9th Cir. 1995).

47. By denying the plaintiffs an opportunity to amend the complaint to address the legal analysis presented by the court, the Ninth Circuit could not see beyond its traditional view of the legal claims, most particularly on the issues of standing and justiciability. *See id.* at 1106. The Court dismissed even the request for non-monetary relief because it viewed the plaintiffs as non-injured parties and

Utilizing Matsuda's thesis, the lawyer and non-lawyer members of N'COBRA's Litigation Committee and the Reparations Coordinating Committee are crafting litigation that clearly defines, from the perspective of the movement, the justiciability of their claims.<sup>48</sup> The procedural hurdles of standing, statute of limitations and sovereign immunity must be successfully addressed if we are to sustain an action; yet the historical and present day experiences of Africans and African descendants in the United States must inform our approach to overcoming these hurdles.

### B. Standing

In order for a plaintiff to avoid dismissal of a lawsuit, he or she must have standing to bring the action. Standing means that the defendant violated a legal right of the plaintiff and that the plaintiff consequently suffered a concrete injury—frequently called an “injury in fact.”<sup>49</sup> In the one reported reparations case, *Cato*, the Ninth Circuit ruled that plaintiffs had not shown a particularized, concrete injury to themselves from actions that violated a constitutional or statutory right.<sup>50</sup> The problem of showing a particularized, concrete injury frequently arises in legal analyses about reparations for the Trans Atlantic Slave Trade and chattel slavery. Many view some aspects of the status of African descendants in the United States as a continuing injury of chattel slavery.<sup>51</sup> Yet, in order to proceed with some anticipation of success, this injury must be particularized and lodged in named plaintiffs representing a class of African descendants. Many argue that this is difficult, if not impossible, given the historical facts. The United States was legally barred from engaging in the forced importation of Africans from Africa

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indicated that “the legislature, rather than the judiciary, is the appropriate forum for this relief.” *Id.* at 1109, 1111.

48. See Charles Ogletree, *The Case for Reparations*, USA WEEKEND, Aug. 18, 2002, [http://www.usaweekend.com/02\\_issues/020818/020818reparations.html](http://www.usaweekend.com/02_issues/020818/020818reparations.html).

49. *Allen v. Wright*, 468 U.S. 737 (1984).

50. *Cato*, 70 F.3d at 1109–10.

51. See generally A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM* (1996) (discussing the precepts of inferiority created in slavery and continuing to today); *id.* at xxv (indicating that the book addresses “contemporary incidents of the last decade that will illustrate the continuum up to today of the precept of inferiority that began in an era of slavery centuries ago”); see also W. MICHAEL BYRD & LINDA A. CLAYTON, *1 AN AMERICAN HEALTH DILEMMA: A MEDICAL HISTORY OF AFRICAN AMERICANS AND THE PROBLEM OF RACE, BEGINNINGS TO 1900* (2000); W. MICHAEL BYRD & LINDA A. CLAYTON, *AN AMERICAN HEALTH DILEMMA VOLUME TWO: RACE, MEDICINE AND HEALTH CARE IN THE UNITED STATES 1900–2000* (2002) (discussing the continuing health issues of African Americans in relation to slavery and ongoing discrimination).

after 1808.<sup>52</sup> Chattel slavery was legally ended for all enslaved Africans after the passage of the 13th Amendment to the Constitution in 1865.<sup>53</sup> The question is then, how can an individual be injured in the legal sense by institutions and practices abolished over a hundred years ago?

Thirteenth Amendment jurisprudence provides one answer to that question. African descendants may seek relief under the 13th Amendment when the United States government fails to eliminate the badges and indicia of slavery.<sup>54</sup> Thirteenth Amendment jurisprudence and the legislation that was passed pursuant to the 13th Amendment are the starting points for identifying the particularized badges and indicia of slavery that Congress identified, and also for determining if and by whom these rights are being violated and, finally, who has consequently suffered a concrete and particularized injury. This approach may, by legal necessity, narrow the plaintiffs to a class smaller than all African descendants in the United States. However, successfully raising the issue for some subgroup of African descendants is in fact a win for all African descendants, since it will legitimize the claim that reparations are owed for injuries that continue to be sustained by African descendants, the origins of which can be traced to slavery. The focus of reparations litigation, therefore, is to obtain a court order for reparative remedies to as broadly defined a class of African descendants as possible, pursuant to Federal Rule of Civil Procedure 23.<sup>55</sup>

The jurisprudence of the 13th Amendment, having been revitalized in *Jones v. Alfred H. Mayer Co.*,<sup>56</sup> provides one legal route for a successful legal claim for reparations. For example, in identifying the vestiges of slavery, the Court in *Jones* relied on legislation that was passed pursuant to the 13th Amendment, the Civil Rights Act of 1866, finding that the defendant had denied plaintiffs the right to

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52. Act of March 2, 1807, ch. 22, 2 Stat. 426 (prohibiting importation of slaves into the United States).

53. U.S. CONST., amend XIII, § 1.

54. *See, e.g.*, Civil Rights Cases, 109 U.S. 3, 20 (1883). Although refusing to extend the 13th Amendment to public accommodations, the Court embraced the view that the 13th Amendment extended to badges and indicia of slavery as identified by the Civil Rights Act of 1866. *Id.*; Civil Rights Act, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1994)).

55. FED. R. CIV. P. 23(a) (stating that classes must satisfy requirements of: 1) size rendering joinder impracticable, 2) common questions of law or fact, 3) typicality of claims and defenses and 4) ability of representatives to protect the interest of the class).

56. 392 U.S. 409 (1968).

purchase property that was protected by this Act.<sup>57</sup> Surviving portions of the Civil Rights Act of 1866 seem also to identify dual punishment systems, one for Africans and African descendants and one for whites, as a badge and indicia of slavery, requiring that African peoples “shall be subject to like punishment, pains, [and] penalties.”<sup>58</sup> The Act thereby ended in theory the badges and indicia of slavery in the punishment system.

In examining whether the criminal punishment system can be one domain in which we seek reparations, we look to the history of the dual punishment system that existed during slavery.<sup>59</sup> The work of a number of organizations, including the Sentencing Project and the NAACP Legal Defense Fund, supports the view that this dual system continues today.<sup>60</sup> Thus, African descendants subjected to punishments that are proven to be harsher than those given to white persons in similar circumstances would have standing to challenge them as badges and indicia of slavery as a continuation of this dual punishment system that was created in slavery.<sup>61</sup>

Unjust enrichment is another legal theory that may serve as the basis of a reparations claim. Persons who are direct descendants of those whose labor and ideas were stolen may have a claim for unjust enrichment. Their families were denied the right to the benefits of their labor and creative ideas while others were, and continue to be,

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57. *Id.* at 422, 437–38.

58. Civil Rights Act, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1994)).

59. *See, e.g.*, A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978); CHARSHÉE C. L. MCINTYRE, CRIMINALIZING A RACE: FREE BLACKS DURING SLAVERY (1993).

60. The Sentencing Project has released a number of reports that describe the disparate representation of African descendants in the criminal punishment system. *See, e.g.*, MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (1995); MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM (1990). These disproportionate results were also observed in *McCleskey v. Kemp*, 481 U.S. 279 (1987), a case litigated by the NAACP Legal Defense Fund. The Supreme Court denied relief under the 14th Amendment while holding valid a study by Professor Baldus and others that concluded that defendants charged with killing a white person were 4.3 times more likely to receive the death penalty and that Black defendants were 1.1 times more likely to receive a death sentence than other defendants. *Id.*

61. For a discussion of the dual punishment system during slavery for enslaved and “free” Africans, see generally A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978) and CHARSHÉE C. L. MCINTYRE, CRIMINALIZING A RACE: FREE BLACKS DURING SLAVERY (1993).

enriched by this appropriation.<sup>62</sup> In defining injury through the eyes of those who are making the claim, African descendants who disproportionately live in poverty yet whose ancestors provided the base for the creation of modern-day industry, are injured in fact when corporations who exploited the system of chattel slavery thereby amassed many millions of dollars.<sup>63</sup>

### C. Statute of Limitations

The second obstacle to reparations claims is the statute of limitations. In the case of reparations for African descendants, the analysis suggested for overcoming the standing obstacle is helpful in overcoming this obstacle. If an African descendant plaintiff alleges an injury in fact that is occurring to him or her today because of a continuing badge and indicia of slavery, the statute of limitations poses little problem. Indeed, the Court in *Cato* recognized the “continuing violations doctrine” as a viable means to overcome a statute of limitations problem if the defendant is responsible for the continuing violation and can be sued for this violation.<sup>64</sup>

Another possibility for addressing the statute of limitations is to establish that the Trans Atlantic Slave Trade and chattel slavery were crimes against humanity and that there are continuing injuries from these crimes. There is no statute of limitations for such

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62. Lawsuits were filed in several United States District Courts in 2002 alleging unjust enrichment of a number of corporations due to economic benefits received as a result of involvement in chattel slavery. See *Barber v. New York Life Ins. Co.*, C.A. No. 2:02-2084 (D.N.J.); *Farmer-Paellman v. FleetBoston Fin. Corp.*, C.A. No. 1:02-1862 (E.D.N.Y.); *Carrington v. FleetBoston Fin. Corp.* C.A. No. 1:02-1863 (E.D.N.Y.); *Madison v. FleetBoston Fin. Corp.*, C.A. No. 1:02-1864 (E.D.N.Y.). These cases were recently transferred to the Northern District of Illinois pursuant to an order issued by the Multidistrict Litigation Panel. In re African-American Slave Descendants Litigation, No. MDL1491, 2002 WL 31432900, 2002 U.S. Dist. LEXIS 20890 (Judicial Panel on Multidistrict Litig. Oct. 25, 2002). Another lawsuit was filed in California state court, alleging violations of California’s Unfair Competition Act, CAL. BUS. AND PROF. CODE § 17200 (West 2002). The case was subsequently removed to the federal district court. *Hurdle v. FleetBoston Fin. Corp.*, Civil No. C-02-4653 (N.D. Cal. Sept. 25, 2002).

63. This is a valuable area for research since there are probably innumerable instances of enslaved Africans creating something for which the “master” assumed ownership. During a conference on reparations at the University of North Carolina Law School in February 2002, “Race, Gender, Class, and Ethnicity,” an attorney in the audience shared information about Vicks Vapo Rub. An enslaved African woman in North Carolina purportedly created the formula for Vicks and the economic benefits have purportedly inured to the family of the “master” not to the family of the enslaved African woman.

64. *Cato v. United States*, 70 F.3d 1103, 1108–09 (1995).

crimes under international law.<sup>65</sup> Of course, the United States has not admitted that these were crimes against humanity, and the international community has been quite unclear on this matter. The World Conference Against Racism's Declaration and Program of Action, accepted by the United Nations General Assembly in January 2002, were not signed by the United States.<sup>66</sup> In the Declaration adopted by the conference, the international community regarded the Trans Atlantic Slave Trade as a specific occurrence in history for condemnation:

We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the Transatlantic Slave Trade and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences.<sup>67</sup>

Countries throughout the western world preceded the United States in ending this institution, suggesting that the international community knew that chattel slavery was an inhumane institution.<sup>68</sup> Litigators speaking through the voices of those who seek reparations, as with injury in fact, must present their claims in a manner that enables the courts to recognize the fundamental unfairness of using a time bar to prevent fair and just adjudication of crimes

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65. See *United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. Res. 2391(xxii), Annex 23, U.N. GAOR, Supp. No. 18, at 40, U.N. Doc. A/7218 (1968) (establishing that no statute of limitations exists for crimes against humanity under international law).

66. Cf. Rachel L. Swarns, *After the Race Conference: Relief, and Doubt over Whether it Will Matter*, N.Y. TIMES, Sept. 20, 2001, at 10 (describing the United States exiting the conference early, before the declaration was signed).

67. *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, at 11–12, U.N. Doc. A/CONF.189/12 (2001).

68. See Historical Survey: The International Slave Trade, The Encyclopedia Britannica Online, at <http://search.eb.com/eb/article?en=117527> (last visited Nov. 22, 2002) (discussing the end of slavery in Britain in 1807, followed by Spain in 1820, Chile in 1823 and Mexico in 1829); *Slavery*, The Columbia Encyclopedia (6th ed. 2001), at <http://www.bartleby.com/65/sl/slavery.html> (describing the abolition of slavery in the British colonies in 1833).

against humanity for which there are continuing injuries that are ripe for redress. Indeed, as Frederick Douglass expressed in his famous Fourth of July speech, prior to the end of chattel slavery in the United States, chattel slavery is a crime against God and man.<sup>69</sup>

#### D. *Sovereign Immunity*

The third obstacle that must be overcome is that of sovereign immunity. Many African descendants identify the United States (and its predecessor colonies) as playing a significant role in the Trans Atlantic Slave Trade, chattel slavery and the continuing badges and indicia of slavery to which they are subjected.<sup>70</sup> However, as demonstrated by *Cato*, it is difficult to articulate a reparative claim against the United States as an entity.<sup>71</sup> The United States has waived sovereign immunity in lawsuits seeking non-monetary relief,<sup>72</sup> but the voices of the Reparations Movement must agree to seek non-monetary relief for the litigation to be reflective of them. Although this movement has strongly urged that “reparations is more than a check,” through the voice of N’COBRA, it does include a check.

Seeking monetary reparations from federal government agencies may also be difficult based on the *Cato* Court’s refusal to extend the *Bivens* rationale for damages against individual employees to federal agencies.<sup>73</sup> The problem may be less difficult if an action is against a state agency since 42 U.S.C. § 1983 has allowed for lawsuits against state agencies for violations of constitutional rights.<sup>74</sup> Again, however, this would require a restatement by African descendants articulating their reparations claims—changing the focus from the federal government to state actions.

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69. See Frederick Douglass, *The Meaning of July Fourth for the Negro*, Speech at Rochester, N.Y. (July 5, 1852), reprinted in 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE 1850–1860*, at 181–204 (Phillip S. Foner ed., 1950).

70. See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 203–04, 206–08, 230–31 (2000); cf. Joe R. Feagin & Eileen O’Brien, *The Long-Overdue Reparations for African Americans*, in *WHEN SORRY ISN’T ENOUGH* 417 (Roy L. Brooks ed., 1999) (attributing responsibility to the federal government, in part, for the build up of white American wealth and lack of accumulation of wealth by African Americans); *Racial Discrimination and Related Intolerance*, in *HUMAN RIGHTS WATCH, WORLD REPORT 2002* (calling on “governments to make reparations to counter the most severe continuing effects of slavery, segregation . . .”), <http://www.hrw.org/wr2k2/racism.html> (last visited Jan. 13, 2003).

71. *Cato*, 70 F.3d at 1110–11.

72. See Administrative Procedure Act (APA), 5 U.S.C. § 702 (2000).

73. *Id.* at 1110 (citing *FDIC v. Meyer*, 510 U.S. 471 (1994)).

74. See BORIS I. BITTKER, *A CASE FOR BLACK REPARATIONS* (1973).

The work of reparations litigators, therefore, becomes two-fold: locating a specific waiver of sovereign immunity that meets the demands and concerns of the Reparations Movement and articulating the claims for reparative remedies in a manner that satisfies both the Reparations Movement and the demands of the legal system.

### III. THE NEED FOR CAREFUL ASSESSMENT

The Reparations Movement is fueled by the energies of those who refuse to accept an injury without a remedy. As has been suggested above, the question is one of policy and legal right. The difficulty becomes articulating the legal right in a manner that compels judicial action.

N'COBRA's Litigation Committee is moving deliberately to develop litigation that will meet the legal standard while clearly expressing the injury to African descendants as articulated by them. N'COBRA wants to avoid what I term "feel good" litigation. "Feel good" litigation speaks movingly to the injuries suffered by Africans and African descendants in the Trans Atlantic Slave Trade, chattel slavery, and the continuing badges and indicia of chattel slavery, and yet does not survive in a court of law because the drafters had not addressed the procedural hurdles discussed above. Thus, the N'COBRA and other litigation efforts have a daunting challenge—to articulate claims for relief that will result in a reparative remedy for violations of human rights that began in 1619 and continue to this day.

Although the challenge before us is great, our foreparents faced even greater challenges in ending chattel slavery and surviving despite the continuing badges and incidents of slavery. This daunting challenge requires that committed and well-prepared advocates identify by thorough and exhaustive legal and historical research the mechanisms for allowing the voice of African descendants to be heard, their legally sustainable injury to be recognized, and a reparative remedy to be ordered and implemented. The granting of meaningful reparative remedies will at last end the ongoing denial of the debt owed African peoples not only for their forced uncompensated labor during chattel slavery, but for the centuries of violations of their human right to be treated with dignity and equality. It will end over 100 years of living with the broken promises of General Sherman's Special Field Order No. 15, the 13th Amendment and the other Reconstruction Amendments. This type of intensive litigation development work is therefore not only necessary to avoid dismissal, or worse yet, sanctions. It is neces-



sary to give voice to the cries of the ancestors, the agony of those who are struggling now against the badge of inferiority that was stamped on African peoples in 1619,<sup>75</sup> and continues to this day, and the promise of those yet unborn African descendants.

#### IV. REPARATIONS AS HEALING

There are those who say that seeking reparations is divisive and will exacerbate racial tensions. This has been the warning for every effort that has been launched to end the continuing badges and indicia of slavery. Those who drove the Civil Rights Movement of the 1960s were told to wait. Our ancestors in slavery were told to wait. It took them 250 years to obtain freedom from the chains of chattel slavery. Others look at the backlash of the affirmative action era, where programs designed to narrow the gap created by slavery and continuing racial discrimination in the United States have been held to violate the 14th Amendment's Equal Protection Clause, part of the trilogy of amendments passed to remedy the crimes of slavery.<sup>76</sup>

Should we forego what we know to be a just cause to obtain an acknowledgment of the crime that was perpetrated against us as African peoples and that has continuing consequences today because white people may get mad? Racial tension in the United States today is palpable in many communities across the country. What does making it worse really mean for African descendants: that they should accept the badge of inferiority that was placed on their ancestors in order to sustain a brutal, dehumanizing and demeaning system that also created and maintained the myth of white supremacy? Does it mean that we have to accept that the police will target African-descended people because they have internalized a view that African peoples are more criminal by nature? Does it mean that we will have to accept that the only remedy is from individual actions based on the 14th Amendment and that we can never obtain a recognition that we have been harmed as a group because of our group identity? Failing to seek reparations because racial tensions may get worse is like refusing treatment for an otherwise

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75. The first African slaves arrived in North America in 1619, traveling on a Dutch ship to the Virginia colony. *Study Guide: Slavery*, THE ENCYCLOPEDIA BRITANICA GUIDE TO BLACK HISTORY, [http://search.eb.com/blackhistory/study/index\\_eb.htm](http://search.eb.com/blackhistory/study/index_eb.htm) (last visited Nov. 22, 2002).

76. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978); *see also* U.S. Const. amend. XIV, § 1.

terminal disease because it may hurt. We must have the courage to speak truth to power and to wrestle with the legislative and judicial systems to obtain reparations. The acknowledgment of the wrong and the reparative package may not satisfy everyone and it may anger some. However, if the judicial and legislative systems fairly address the claim for reparations and make real the promise of the 13th Amendment, we will have a practical and visible application of the principle of justice.

The reparative package must address all areas of the continuing vestiges of slavery. The passage of H.R. 40 will enable the commission created thereby to do so in a comprehensive way. Litigation would likely allow only for specific, clearly articulated vestiges to be addressed and therefore would be less comprehensive. Some of the remedies that could be obtained through injunctive relief under the 13th Amendment include requiring that federal and state governments end punishment schemes that routinely treat African descendants more harshly and requiring the end to practices of racial profiling. Other reparative remedies that must flow from litigation, legislation, or both include: mandating the development of health care modalities, including research, that fairly and compassionately address the health needs of African descendants; development of education funds to allow African descendants to go as far as their ability and interest will take them; providing funds for the development of educational materials that describe and analyze the Trans Atlantic Slave Trade, chattel slavery and the continuing badges and indicia of slavery from the perspective of African descendants; creation of community development funds that support the expansion of viable, resourceful African descendant communities; and, creating mechanisms that close the wealth gap between African descendants and white people that has its birth in the Trans Atlantic Slave Trade and chattel slavery.

### CONCLUSION

Litigation is a viable tool for obtaining reparations for African descendants if the legal claim is clearly identified and various procedural hurdles can be successfully mounted. Three procedural hurdles that must be addressed at the initial stages of litigation—standing, statute of limitations and sovereign immunity—can be met using the experiences of African descendants. Honoring the experiences and voices of those who seek reparations is imperative if the ultimate remedy is to heal the wounds of centuries of disdainful, brutal and inhumane treatment that the international community acknowledges as a crime against humanity.