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Ain't No Peace Until We Get A Piece: Exploring the Justiciability and Potential Mechanisms of Reparations for American Blacks Through United States Law, Specific Modes of International Law, and the Covenant for the Elimination of All Forms of Racial Discrimination

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By
*Dekera Greene**

I. The Prologue [1]

In the beginning was the word
And the word was Death
And the word was nigger
And the word was death to all niggers
And the word was death to all life
And the word was death to all
peace be still . . .

In the name of peace
They waged the wars
ain't they got no shame

In the name of peace
Lot's wife is now a product of the Morton company
nah they ain't got no shame . . .

Cause they killed the Carthaginians
in the great appian way
And they killed the Moors
"to civilize a nation"
And they just killed the earth
And blew out the sun in the name of a god
Whose genesis was white
And war wooed god
And america was born
Where war became peace
And genocide patriotism
And honor is a happy slave
cause all god's chillun need rhythm
And glory hallelujah why can't peace
be still

The great emancipator was a bigot
ain't they got no shame
And making the world safe for democracy
Were twenty million slaves
nah they ain't got no shame . . .

The rumblings of this peace must be stilled
be stilled be still

ahh Black people
ain't we got no pride?[2]

* * *

As Germany and other interests that profited *owed* reparations to Jews following the holocaust of Nazi persecution, America and other interests that profited *owe* reparations to blacks following the holocaust of African slavery which has carried forward from slavery's inception for 350-odd years to the end of U.S. government-embraced racial discrimination.[3]

* * *

The civil-rights struggle involves the black man taking his case to the white man's court. But when he fights it at the human-rights level, it is a different situation. It opens the door to take Uncle Sam to the world court. The black man doesn't have to go to court to be free. Uncle Sam should be taken to court and made to tell why the black man is not free in a so-called free society. Uncle Sam should be taken to the United Nations and charged with violating the UN charter of human rights. You can forget civil rights. . . . It is absolutely impossible to do it in Uncle Sam's courts—whether it is the Supreme Court or any other kind of court that comes under Uncle Sam's jurisdiction. The only alternative that the black man has in America today is to take it out of Senator Dirksen's and Senator Eastland's and President Johnson's jurisdiction and take it downtown on the East River and place it before that body of men who represent international law, and let them know that the human rights of black people are being violated in a country that professes to be the moral leader of the free world.[4]

* * *

The imagination of the academic philosopher cannot recreate the experience of life on the bottom . . . The technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so. When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge . . . reparations is a legal concept generated

from the bottom. It arises not out of abstraction, but from experience.[5]

* * *

I am an invisible man . . . I am invisible, understand, simply because people refuse to see me . . . When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.[6]

II. Introduction

Kugichagulia – Self-determination: To define ourselves, name ourselves, create for ourselves and speak for ourselves.[7]

The oppression of people of color,[8] particularly Black people,[9] and the economic growth of America has historically been in direct proportion. The success, then, of American capitalism and imperialism has rested in the marginalization of Black people through chattel slavery, *de jure* and *de facto* segregation, and racial discrimination.[10] These institutional and structural hindrances[11] result in several challenges, including: low rates of home, land, and resource ownership; overrepresentation in jails and prisons; underrepresentation in areas of educational attainment; significantly larger proportions of unemployed and underemployed persons and low rates of business ownership; the lack of access to healthcare and high rates of disease contraction[12]; and single parenthood, orphanage, and the destruction and disconnection of the Black family. The perpetuation of such marginalizing and interweaving systems wrought ills on a people, ultimately dispossessing and disenfranchising the whole. Reparations, then, while owed as repair for previous harms and their resulting ills, are key to remedying the current condition and instrumental in closing the gap of disparity.[13] While damages cannot account for all losses, and it is impossible to restore the aggrieved wholly, it is backwards to maintain a structure that profits the beneficiaries of a maliciously designed system, while simultaneously discounting the real harms of the injured parties—American Blacks. Those who disagree engage in the malicious cycle that continues to marginalize Black people.

This indignation demonstrates ignorance of history, economics, and sociology, and manifests the damage of American imperialism and the perversion of its design. Even the language that typifies this dynamic is inverted to further confuse and detract from this perpetually marginalizing structure. Such behavior maintains a system where the ugly become beautiful, the oppressed become the oppressors, and the powerful become the powerless. As rapper Nas describes it: "Anytime we mention our history, existence or condition, they calling it reverse racism."[14] Brother Malcolm[15] contended the same:

> So I don't believe in violence—that's why I want to stop it. And you can't stop it with love, not love of those things down there. No! So, we only mean vigorous action in self-defense, and that vigorous action we feel we're justified in initiating by any means necessary. Now, for saying something like that, the press calls us racist and people who are "violent in reverse."

Kara Walker, *Camptown Ladies*, May 1, 2006.

> This is where they psycho you. They make you think that if you try to stop the Klan from lynching you, you're practicing violence in reverse. Pick up on this, I hear a lot of you parrot what the man says. You say, "I don't want to be a Ku Klux Klan in reverse." Well, if a criminal comes around your house with his gun, brother, just because he's got a gun and he's robbing your house, and he's a robber, it doesn't make you a robber because you grab your gun and run him out. No, the man is using some tricky logic on you. I say it is time for black people to put together the type of action, the unity, that is necessary to pull the sheet off of them so they won't be frightening black people any longer. That's all. And when we say this, the press calls us "racist in reverse." "Don't struggle except within the ground rules that the people you're struggling against have laid down." Why this is insane, but it shows how they can do it. With skillful manipulating of the press they're able to make the victim look like the criminal and the criminal look like the victim.[16]

Rapper and activist Immortal Technique simply encapsulates the idea of deconstructing the language and systems of the oppressor through revolutionary empowerment—a sentiment present in the philosophies articulated above: "My revolution is borne out of love for my people, not hatred for others."[17] It is understandable that a pervasive backward sentiment continues to inform and foment a malicious infrastructure in both law and society, unfortunately to the detriment of an already historically-maligned people. This paper, then, explores the usage of international law and American law under the auspices of international law to access reparations and facilitate the carving out of self-determination for Black people. This presents a unique irony where the law is applied as an inversion of its design since it has historically protected others' rights while marginalizing Black people.

III. An Historical Overview of the Framework of Dispossession of American Blacks and the Need for Reparations

To tell the truth, the proof of success lies in a whole social structure being changed from the bottom up. The extraordinary importance of this change is that it is willed, called for, demanded. The need for this change exists in its crude state, impetuous and compelling, in the consciousness and in the lives of men and women who are colonized. But the possibility of this change is equally experienced in the form of a terrifying future in the consciousness of another "species" of men and women: the colonizers.[18]

The Transatlantic Slave trade,[19] the beginning of Maafa, the African Holocaust, lasted from the 15th century to the 19th century, and brought enslaved Africans to America shortly after the settlement of Jamestown, Virginia in 1607.[20] The Thirteenth Amendment to the U.S. Constitution ended the practice of slavery in 1865 after the Civil War,[21] though the marginalization of Black people persisted long after. Through a series of *de jure* and *de facto* mechanisms of racial segregation—manifested in Southern Black Codes and Jim Crow laws,[22] the practice of racial discrimination continued throughout the country. These laws marginalized Blacks, dispossessing them of civil and political rights in fair trials[23], enfranchisement[24] and equality of education, and use of public and private facilities.[25] The discriminatory mechanisms also denied American Blacks economic, social, and cultural rights, affecting their access to employment, housing and property ownership, healthcare, the expression of their culture and heritage, and their right to life, generally.[26] Many of these inequities continue, and their unequal effects are easily linked to the enslavement and ownership of Africans.

These practices, resulting in the detachment of American Blacks as right-bearers, stakeholders, and full participants in a purportedly democratic society, illustrated that access to citizenship and entitlement to rights required something more than Black people possessed. This is evident because they were still not guaranteed the full promise of these rights after the passage of legislation and adoption of court rulings. Collectively, American Blacks continued to face structural impediments, not often overcome by individual successes (though they are celebrated), because of the traditional lack of value ascribed to the people. This development of a Black underclass ultimately disconnects Blacks from society.[27] *Whiteness*,[28] then, as a social construct provided subjectively positive value, democratic participation, and general acceptance in the society, particularly applied in connection with citizenship. This privilege is compounded by centuries of imperialism and concomitant devaluation of communities of color, specifically the Black community.

Since America's political and economic traditions are based on a system of private property and capitalism, borne of thinkers like John Locke, democratic participation is premised on property ownership.[29] Property is a natural right derived through labor, with ownership contingent upon "useful" development and value of the land.[30] This natural right[31] precedes governmental sovereignty, based on a social contract in which the people consent to being governed. As such, the government is subject to the will and volition of the people[32]—presupposing the people's right to revolution.[33] This ultimately connects fundamental rights (including the right to revolt or hold government accountable),[34] democratic participation (governmental access and engagement),[35] and value (societal contribution and intrinsic worthiness),[36] to ownership of private property. The benefactors of this oppressive structure designed it for their own success (and continued success for their progeny) by directly exploiting[37] and dispossessing enslaved Africans of private property ownership and depriving them of control over their own labor. The government sanctioned this system, and White society perpetuated it. It deprived enslaved Africans of property ownership (inhered value in *this* society)[40] and subjected them to the expropriation of their work.[41] The direct result of this systemic marginalization influenced the place Black people stand in today—deprivation of access to democracy, citizenship, and participation in governmental functions,[42] and the intrinsic value[43] manifested in subjective conceptions of cognizable societal contributions and "earned" wealth.

Extending the elimination of American Blacks' democratic participation for almost four centuries,[44] these economic, political, white supremacist, and governmental systems fundamentally led to the incapacitation of Black self-determination in this country. The harm done is three-fold: (1) American Blacks were denied value[45] and worth, which in a zero-sum framework of capitalism protects whiteness and privilege[46] as a core value (this dictated Black inability to engage in the development and execution of the democratic and political processes that have sustained this society and government); (2) they were deprived of the capacity to acquire capital and resources to sustain a living for themselves and their descendants,[47] and (3) they were deprived of this right so long that there have not been sufficient gains to overwhelm the ills designed to marginalize them.

IV. An Overview of the Fight for Reparations for American Blacks

Mr. Backlash, Backlash who do you think I am. You raise my taxes and freeze my wages, send my son to Vietnam. You give me second-class houses, second-class schools; do you think that all colored people are just second-class fools. Mr. Backlash, I'm gonna leave you with the blues, yes I am. When I try to find a job, to earn a little cash. All you got offer is your mean old white backlash, but the world is big, big and bright and round. And it's full of other folks like me who are black, yellow, beige, and brown. Mr. Backlash, I'm gonna leave you with the blues, yes I am. When Langston Hughes died, when he died he told me many months before, he said Nina keep on working till they open up the door. And one of these days when you made it and the doors are open wide, make sure you tell 'em exactly where its at so they'll have no place to hide. So Mr. Backlash, Mr. Backlash, Hear me now, someone in here, yeah somehow, someway. I'm gonna leave you with the blues.[48]

The fight for Black reparations began in the 16th century in pre-colonial African rebellions, demanding reparations for the enslaved Africans traded throughout the New World.[49] The struggle was documented in other periods including: (1) pre- and post-Reconstruction, (2) the beginning of the 20th century, (3) the Marcus Garvey Back to Africa Movement, (4) the Civil Rights Movement of the 1960s and 1970s, and (5) today, as the post-Civil Liberties Act era, beginning in 1989.[50] These periods

brought about increasingly polarized attitudes, particularly during the pre- and post-Reconstruction periods and the Civil Rights Movement of the 1960s and 1970s.[51] The existence of affirmative action changed only the dialogue of reparations, and did not avert the goals of those seeking repair for the damage caused by the racially-perverse and oppressive systems under American governance, which diminished the collective capacity of American Blacks for self-determination.

The pre- and post-Reconstruction reparations movements can be characterized in consonant terms with the movement of abolitionism. Not all abolitionists favored reparations for enslaved Africans in the pre-Reconstruction period, or freedmen in the post-Reconstruction period. The central arguments for reparations generated mostly from this group (though surely the marginalized persons themselves were ardent supporters of reparations, an idea typically lost in the historical characterization, as Levitt points out).[52] In the pre-Reconstruction period, Special Field Order No. 15 issued by General William Tecumseh Sherman, on January 16, 1865, provided that 485,000 acres of white-owned land would be taken and redistributed to more than 18,000 newly freed Black families. This granted them possessory titles to the land and settled them respectively, on 40-acre plots and the loan of a federal government mule to work the land.[53] General Sherman did not have congressional authority but acted lawfully under his power through the Freedman Act.[54] In 1865, after the assassination of President Lincoln, President Andrew Johnson revoked the orders and pardoned many white Southerners for their treasonous secession.[55] The order became popularized[56] in American history, by proponents of reparations as the promise of 40-acres and a mule for Black families.[57]

White people became more vocal supporters of reparations for the enslaved African,[58] as when Congressman Thaddeus Stevens demanded land be redistributed to provide remedy to American Blacks for the ills of slavery, and to combat one of the central problems of the South: "a landed gentry and a landless proletariat."[59] In 1861, Stevens introduced a bill to Congress authorizing the President to seize Confederate lands to redistribute to the formerly enslaved Africans.[60] In 1865, President Johnson, reversed this legislative victory for enslaved Africans and restored lands to their white antebellum owners.[61] The reparations movement came to a halt in the 1880s as a result of his stifling.[62] Johnson's actions single-handedly undermined the beginning of the cause for Black reparations at a crucial point in time, circumventing a true Reconstruction.

The reparations movement at the beginning of the 20th century persisted in various capacities. Industrialization of Northern cities and the birth of Black ghettos encouraged the growth of the movement in cities. The cause for Black reparations in rural and agrarian areas grew due to land reform during Reconstruction, sharecropping, and partition, voluntary, and tax sale of heirs' property—all contributors to Black rural land loss (all from the design of (White) business interests—protected and facilitated by the American legal system).[63] This played a significant role in the increasing marginalization of American Blacks.[64] Reparations in this period were borne not just from past injustices, but from contemporary wrongs, including malicious government and complicit white-owned industry action against the interests of American Blacks.

The reparations movement was simultaneously championed and eclipsed by the Marcus Garvey Movement. Marcus Garvey called for pan-Africanism of Black people and the formation of a Black homeland.[65] This was the major focus of his Universal Negro Improvement Association ("UNIA").[66] Garvey also favored reparations for the exploitation of Black labor and saw this as critical to generating funding for the creation a Black homeland.[67] But, the movement lost footing when Garvey was indicted for mail fraud and deported to Jamaica[68] (with much speculation that his indictment was a political tactic by the White power structure to defray Black economic and social mobility). One of the Founders of UNIA, Queen Mother Audly Moore, continued championing the cause for reparations, and is commonly recognized as the mother of reparations.[69] She sought redress and reparations of American Blacks through the American democratic structure.[70] Others focused on the attainment of civil and political rights, and this cause expanded in the subsequent period.

The Civil Rights Movement of the 1960s and 1970s, like the turn of the century movement, included reparations for ills perpetuated against American Blacks under the marginalizing governmental structure, as part of the focus on economic development.[71] Dr. Martin Luther King, Jr. wrote:

> No amount of gold could provide an adequate compensation for the exploitation and humiliation of the Negro in America down through the centuries . . . . Yet a price can be placed on unpaid wages. The ancient common law has always provided a remedy for the appropriation of the labor of one human being by another. This law should be made to apply for American Negroes. The payment should be in the form of a massive program by the government of special, compensatory measures, which could be regarded as a settlement in accordance with the accepted practice of common law.[72]

Though their mechanisms and means of attaining Black self-determination were different, both Dr. King and Malcolm X agreed. Brother Malcolm contended:

> If you are the son of a man who had a wealthy estate and you inherit your father's estate, you have to pay off the debts that your father incurred before he died. The only reason that the present generation of white Americans are in a position of economic strength . . . is because their fathers worked our fathers for over 400 years with no pay . . . . We were sold from plantation to plantation like you sell a horse, or a cow, or a chicken, or a bushel of wheat . . . . All that money . . . is what gives the present generation of American whites the ability to walk around the earth with their chest out . . . like they have some kind of economic ingenuity. Your father isn't here to pay. My father isn't here to collect. But I'm here to collect and you're here to pay.[73]

The Black Manifesto, penned at the National Black Economic Development Conference[74] in 1969 demanded, "Fifteen dollars per nigger," or "$500 million from White Christian churches and Jewish synagogues."[75] James Forman, once leader

of the Student Nonviolent Coordinating Committee ("SNCC"), contended that this amount be assessed against the groups for their participation in the exploitation of the American Negro who was, "kept in bondage and political servitude and forced to work as slaves by the military machinery and the Christian church working hand in hand."[76] It is notable that, with the deaths of civil rights leaders like Medgar Evers (1963), El Hajj Malik El-Shabazz (1965), and Dr. Martin Luther King Jr. (1968), among others, there was a strong collective support of reparations for American Blacks within the Black community[77] (with some exceptions), but also by white individuals and groups. This is reminiscent of the Reconstruction period where White abolitionists supported Black reparations, probably because of the polarizing nature of the social climate.

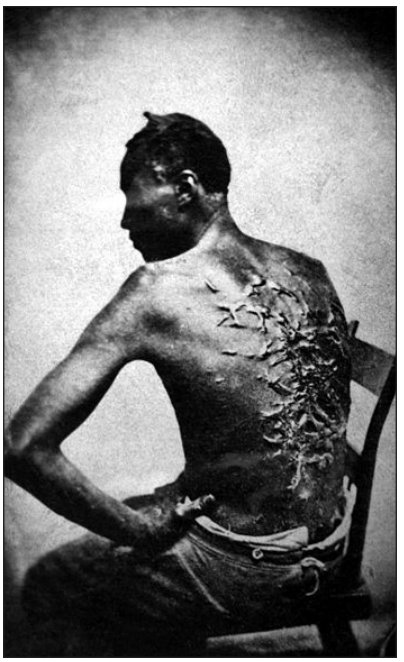

Photo credit unknown, Peter, an enslaved Black man, whipped by his overseer, taken April 12, 1863.

In the post-Civil Liberties Act era, there was renewed vigor in the reparations movement, after the passage of an act formally apologizing and providing reparations to Japanese- Americans interned during World War II.[78] Though the marginalization of Japanese-Americans was egregious, it did not arise to the level nor continue for the length of chattel slavery of enslaved Africans and the continued marginalization of their descendants in America.[79] Reparations activists felt that these reparations were a victory for marginalized groups, generally, but in some respect, represented continued contempt for American Blacks, by acknowledging concrete harms exacted against one group for a period of several years and refusing the acknowledge the harm done to another—concrete and enduring—for centuries.[80] Though the Civil Liberties Act of 1988 did nothing substantive for the goals of black reparations, it still increased fervor for the cause.

In 1989, Representative John Conyers and in the early 1990s Massachusetts State Senator William Owens introduced reparations legislation,[81] that failed to garner enough support. Conyers' proposed legislation required the U.S. government to (1) acknowledge the fundamental inhumanity and injustice of slavery, (2) establish a commission to study the effects of economic and racial discrimination against formerly enslaved Africans, (3) study the impact that these institutional disparities have had, and (4) allow the Commission to make recommendations to Congress for the redress of harm. Conyers has introduced HR 40 every year since.[82] In the 21st century, many city councils have passed resolutions to urge Congress to consider reparations for slavery, in support of Conyers' bill.[83] Other coalitions have organized to develop strategies on how best to pursue efforts for reparations.[84] There have been many unsuccessful claims for reparations for American Blacks in U.S. courts.[85] The cases in the following section had some measure of success or present a unique opportunity to gain some ground in this struggle for reparations, to counteract the pernicious system of marginalization that plagued American Blacks, and this country, for centuries.

VI. Claims for Reparations Through the United States Legal Structure

The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submission on the other. Our children see this, and learn to imitate it; for man is an imitative animal . . . For in a warm climate, no man will labour for himself who can make another labour for him. This is so true, that of the proprietors of slaves a very small proportion indeed are ever seen to labour. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just; that his justice cannot sleep forever: that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation, is among possible events: that it may become probable by supernatural interference![86]

In examining the U.S. legal structure and consideration of reparations, two things must be considered: (1) will it actually work and (2) who will reap the benefits.[87] The commitment (or lack thereof) to racial justice in the U.S. places those seeking repair from racial discrimination in a peculiar predicament. Judging from the past, reparations through the U.S. legal structure would prove useless since it has been U.S. law that has oppressed American Blacks.[88] This does not mean that reparations will never be won, just that other avenues may need to be explored. Some contend that the difficulty in assessing whom reparations should benefit overcomes the need to provide them, but this does not justify the beneficiaries of these marginalizing institutional systems, keeping the ill-gotten wealth themselves.[89] In working towards a world without privilege, repair must be given to those so severely damaged.

Identifying plaintiffs for claims has not been as difficult as opponents have depicted. The class of claims that have been dismissed throughout the years have identified individuals or classes of people harmed by *de jure* and *de facto* discrimination and racial segregation. For those who contend American constitutional and contractual issues of privity, standing, and nexus preclude damages outside of these structures, some suggest examining the reparations issue in a broader perspective. Critical legal scholar Mari Matsuda suggests the structure below, similar to a class action suit:[90]

The standard legal claim resembles:	A claim in reparations looks like this:
Plaintiff A (individual victim) v. Defendant B (perpetrator of recent wrong-doing)	Plaintiff Class A (victim group members) v. Defendant Class B (perpetrator descendants and current beneficiaries of past injustice)

This is because according to Matsuda:

> Several components of the standard legal claim are not apart of the second illustration. First, the horizontal intragroup connections are absent. Not all members of the group are similarly situated. Some are rich, some poor. Some feel betrayed, others do not. Some are easily identified as group members, others have weak claims to membership.

A. Individual Claims for Reparations from American Blacks, Statutory Claims, and Legislative Provisions for Reparations

But you did everything you could to be ill-informed by developing the art of forgetting.[91]

Civil suits for damages have been marginally more successful than claims for reparations from the ills of slavery. What is unique about the following claims is that they seek reparations for ills not from slavery, but practices that deprived them of resources already acquired, with the exception of the Ohio case. These can be examined, then, as claims for restitution, which are not very far-removed from claims of reparations, as they are more akin to suits alleging race-based wrongdoing through exploitation, deprivation, or marginalization, which are a kind of Black reparations. *Kennedy* presents a unique parameter with which to examine the future of reparations because it was a tort-based claim based solely on deprivation and access to a fundamental resource. The cases are included because it is beneficial to examine attempts at restitution through the law for race-based wrongs exacted against American Blacks, as many civil rights cases were based on negative rights—government and industry restraint from discrimination and segregation—and positive rights to the extent of provision of education, not recompense for such wrongs.

a. *Pigford v. Glickman*: [91] Reparations for Black Farmers

This case was a class-action lawsuit of Black farmers from fifteen states against the U.S. Department of Agriculture ("USDA").[93] It resulted in a settlement of $2.25 billion awarded to the plaintiffs for the denial of federal benefits,[94] discriminatory USDA lending practices, and ultimately lost land for Black farmers.[95] The consent decree in the class-action suit was thought "fair, adequate and reasonable" by Judge Paul L. Friedman, since it provided discharge of farmers' outstanding USDA debt, injunctive relief, and the receipt (for some) of $50,000 cash payments (less $12,500 in taxes to the IRS).[96] The Judge acknowledged, however, that the case would "not undo all that has been done,"[97] since the 401 claimants named in the case[98] only wanted their land back.[99]

There are more than 66,000 Black farmers today who were excluded when they missed notifications of the lawsuit in 1999.[100] In February of 2005, some of them met with the Chairman of the House Judiciary Committee on civil rights hearings, hoping to urge Congress to develop a legislative solution to the discriminatory practices.[101] This case represents some recognition of wrongdoing and move towards recompense through the U.S. legal structure. It has, however, failed to fundamentally address the needs of the petitioners, evidenced by the value of land in America[102] in comparison with $37,500 allotments, especially when a good tractor costs at least that much.

b. *Kennedy, et al. v. City of Zanesville, et al.*: [103] Every Drop Counts

Sixty-seven of the Black residents of the predominantly Black neighborhoods of Coal Run and Langan Lane, Ohio won a $10.9 million lawsuit[104] against the local government for intentionally denying them public water service for almost fifty years,[105] though they lived within one mile of public water lines.[106] White residents on the same street were extended the public water service, and one of the Muskingum County Commissioners informed the Black residents that they would not get water "until President Bush drops spiral bombs in the holler."[107] This deprivation fundamentally speaks to the marginalization of American Blacks.

c. Rosewood, Florida: Recompense?

In 1923, a race riot occurred in Rosewood, Florida after a White woman falsely claimed to have been raped by a Black man.[108] A mob of Whites took to the streets and destroyed an all-Black neighborhood, burning houses to the ground and killing six Black residents.[109] In 1994, the state of Florida passed the Rosewood Compensation Act paying each of the nine survivors of the tragedy $150,000, and establishing a college fund.[110] The Rosewood community, however, was never rebuilt, and twenty-five to thirty families lost their homes to the violence.[111] Here there was a failure to account for the economic value of all losses. Again, we see that while debts must be assessed for egregious acts, monetary compensation does not account for making persons whole again.

d. *Alexander, et al. v. Oklahoma, et al.*: [112] Black Wall Street

In Tulsa, in 1921, a race riot was sparked on a similar basis as that in Rosewood, Florida.[113] A White woman alleged to have been raped by a Black man (the veracity of the claim was contested, but at this time the only proof of falsity was his word against hers), and again a white mob took to the streets.[114] Three hundred people were killed and a good deal of the Greenwood District, recognized as Black Wall Street, because of the prominence of its businesses and the accumulation of Black wealth,[115] was destroyed.[116] This included over 600 businesses, churches, restaurants, movie theaters, libraries, schools, private airplanes, a hospital, bank, and other public goods.[117] The estimated property damage was $1.5 million (in early 20th century dollars), not accounting for the loss of life and livelihood, and the cost of the marginalization of Black people.[118]

A 2001 report by the state of Oklahoma assessed that $12 million in damages should be awarded, but the state governor decried the ability of the state to pay for "past mass crime[s] committed by its officials on the state's behalf."[119] The Oklahoma state legislature responded by passing the 1921 Tulsa Oklahoma Race Riot Reconciliation Act, awarding more than 300 college

scholarships to the descendants of Greenwood residents.[120] A lawsuit was filed by five of the elderly survivors with the assistance of Professor Charles Ogletree (Harvard law professor, former director of the Public Defender Service for the District of Columbia) and the late Johnnie Cochran (represented OJ Simpson in his double-homicide case).[121] The plaintiffs were more interested in securing resources in education and healthcare than financial capital,[122] but their suit was thrown out. The courts cited the exhaustion of the statute of limitations,[123] and the Supreme Court refused to grant certiorari. Professor Ogletree appealed to Congress to extend the statute of limitations for the case,[124] though there has not been a response to date.

Statutory and legislative provisions for reparations have not gained winning ground, though they seem like viable sources. None have been wholly successful as damages in individual suits have at times proven. Damages have been grossly less than what they should be. Statutory claims through citizen-suit provisions have been less than marginally successful, but the most promising options seem to be: (1) The Federal Tort Claims Act ("FTCA"), 28 USC § 1346(b)(1); (2) The Civil Rights Act of 1866, 42 U.S.C. § 1981; or (3) The Civil Rights Act of 1979, 28 U.S.C. § 1983.[125] They each still require the constitutional meeting of standing and jumping through the other hurdles as required by American jurisprudence.[126] Still, the main problem with these statutes is in their application.

The FTCA, commonly used for toxic torts claims, cannot overcome the retroactivity that only allows its use for harms occurring after January 1, 1945.[127] Though marginalization of American blacks occurred after 1945, this presents a serious impediment to obtaining the amounts owed by the beneficiaries of Black marginalization, including the American government since the 16th century. The Civil Rights Act of 1866 seems more promising as it was designed to protect the rights of newly enslaved Africans and their progeny.[128] It is however, unlikely, that this statute would prove helpful as the ensuing 142 years since its adoption have been filled with the failure of the government (and at times government facilitation in marginalization) to protect the rights of Black people from racial discrimination and *de jure* and *de facto* segregation.

The Civil Rights Act of 1979, commonly known as § 1983,[129] has not been helpful for Black people, particularly in the criminal context. We consistently see the abuse of state actors, particularly state police and prosecutorial misconduct towards Black people in the civil, but particularly in the criminal context. The recent Oscar Grant, Jena Six, Sean Bell, and Genarlow Wilson controversies and in a larger context, the failure of the government to protect Blacks of the lower 9th Ward of New Orleans in the aftermath of the Hurricane Katrina tragedy, demonstrate the abuse of state power against Blacks. In short, it is not likely that § 1983 would be a viable source of reparations for American Blacks.

The legislative capacity for reparations could be viable if enough political capital is established. The historical actions of this country and its responses to racial justice seem problematic if seeking a result through this avenue; though it is more likely to generate a result than a court ruling awarding Black reparations for the harms of slavery. While we wait for the outcome of *Alexander*, to see if a Congressional extension of the statute of limitations is provided, we can look to the past successes within the political arena. As assessed with Representative Conyers' efforts, legislation too is a disappointing avenue of redress.

VII. Examination of Reparations Through Specific Modes of International Law

While the U.S. is a state party to the International Covenant on Civil and Political Rights ("ICCPR"),[130] and can be held accountable for violations under the auspices of its provisions (particularly as a nation that adopted and agreed to respect human rights),[131] the Covenant requires the exhaustion of all state and administrative remedies.[132] As outlined above, citizen-suit provisions under specific statutes and civil suits for damages can be wholly denied or granted in part. When suits are partially won, this creates a greater challenge for remedies under the Covenant, as the state has provided some sort of relief to the claimants.

Similar to the ICCPR state-party membership, the U.S. is required to observe *jus cogens* peremptory norms under the Universal Declaration of Human Rights ("UDHR").[133] In this case, the U.S. has continuously violated this provision by its systemic and systematic discrimination against American Blacks. Again, these claims must first be exhausted in federal courts,[134] but this is problematic because the U.S. debates the binding nature of the UDHR.

VIII. Examination of Reparations Through the Covenant for the Elimination of All Forms of Racial Discrimination ("CERD")

The U.S. became a state party to the Covenant for the Elimination of All Forms of Racial Discrimination (CERD) in 1994.[135] The International Convention on the Elimination of All Forms of Racial Discrimination required all states parties member to the Covenant to refrain from marginalization and the denial of rights (negative rights) and to provide guarantees and protection (positive rights) for everyone (not just citizens) in its territories and under its jurisdiction.[136] States parties must also condemn propaganda against specific racial and ethnic groups,[137] provide particular economic, social, and cultural, and civil and political rights,[138] incorporate "immediate and effective measures in the field of teaching, education, culture, and information" with the intent of combating prejudice and promoting cultural understanding,[139] and provide remedies through its courts, legislation, and institutions,[140] among other very progressive measures.[141] While CERD provides the opportunity for state parties to denounce their membership in writing (effective one year after the date of receipt by the UN Secretary-General)[142] and does not provide for military force, the phenomenon of globalization places an incredible amount of pressure on states, particularly Western states (specifically those who denounce other nations for their human rights violations) to preserve some semblance of equality for their own legitimacy and transparency in the global socio-political marketplace.

CERD also has the force of requiring states parties to submit reports to the Committee every two years.[143] They accept reports from groups and individuals claiming to be victims of actions by states parties,[144] though petitioners must have

Kara Walker, My Complement, My Enemy, My Oppressor, My Love, *Darkytown Rebellion*, October 11, 2007–February 3, 2008.

exhausted all domestic remedies before seeking redress through CERD (this is not so if domestic proceedings have been unnecessarily long).[145] The Committee also views reports of non-profit organizations and others citing issues prevalent in the state party with respect to CERD to give them a more full picture of happenings there. States parties must also undergo review by the Committee for the Elimination of All Forms of Racial Discrimination comprised of eighteen committee members of "good moral standing."[146] Committee members are those serving of their own accord and not nationals to the particular state party under review. The Committee submits recommendations and the state party must submit written explanations or statements of clarification citing how they have complied with the recommendations by providing remedies for violations or explaining how they will.[147]

CERD, then, as a mechanism requiring some accountability and transparency from its states parties, provides a more hopeful measure for American Blacks to seek recourse through reparations, particularly with an international audience. As a party to CERD the U.S. is subject to Committee Evaluations and reports after the submission of their reports[148] and since reports are designed to monitor the success of states in eliminating racial discrimination within its jurisdiction, they provide powerful evidence of an entire nation's noncompliance with the Covenant, their racial inequities, generally, and recourse for wronged parties. The Committee of CERD has found multiple violations for the two reports the American government has submitted since enacting the international provision (it should have been eight reports by 2009 since the U.S.'s membership in 1994, though the U.S. submitted its fourth, fifth, and sixth report in a single document). It seems likely that the problems found by the Committee will be helpful in developing the contentions for which American Blacks seek redress. The Committee commented on the disproportionate amount of Blacks and Latinos incarcerated in America's jails and prisons, as well as police brutality, particularly applied to minorities.[149]

The Committee also highlighted the severe disparity in access and retention of education and employment (particularly because affirmative action has been under attack), in addition to discriminatory housing and lending practices, racial profiling, zero tolerance and three strikes measures that disparately impact minorities (Blacks and Latinos in particular), voter discrimination and disenfranchisement, violence against migrants and minority women, abuse of non-citizens during detention, racial bias in capital punishment, failure to enforce federal ameliorative statutes, inferior provision of healthcare/medical services disparately impacting minorities and women, diminished protection of workers' rights, and insufficient provision of civil remedies, among many other problematic and systemic violations of CERD.[150] In its most recent 2007 report to the CERD Committee, the U.S. mentions Hurricane Katrina in relation to equitable housing stating that, "concern has been expressed about the disparate effects of Hurricane Katrina on housing for minority residents of New Orleans," asserting that, commentators found that Katrina was a result of "poverty (i.e. the inability to evacuate) rather than racial discrimination *per se*."[151] As if the two could be separated into clean boxes whereby those victimized by government and other designers and beneficiaries of the oppressive systems and structures, get to choose how they are discriminated against—either by race or class. More often than not in this country, the latter is informed by the former, and they are inextricably bound to one another. In this respect, reparations provide an interesting dimension to examine this privileged denial of blame, fault, or benefit against the marginalization of Black people, people of color, poor people, and particularly poor people of color. In this respect, CERD has been useful in requiring some kind of response for the blatant and disparate treatment of American Blacks.

The most attractive prospect of CERD's vitality in the cause for reparations is the Committee's indictment of the U.S. on its interpretation of no violation for actions that have not been proven to be intentionally discriminatory despite their impact.[152]

This particular aspect seems encouraging because the standard for proving intentional discrimination domestically, essentially requires the demonstration of malintent almost through the certainty of physical documentation, because the domestic impact standard is so limited. It does not account for the subjective and normative sociological orientations of humans injected into their laws and their interpretation of them. The truth is that this critical part of examining harms against groups based on the impact of racial prejudice (instead of the victimized demonstrating the intent of the victimizer) is unlikely to become inhered in the American system of jurisprudence. This is particularly because of the state of race relations in this country, and the status of Black people today.

Among other ills plaguing the Black community, in 2004, 25% of Black people were living below the poverty line,[153] since 2007, 40.9% of America's prisons and jails were populated with Black bodies with Blacks incarcerated at rates 5.6 times that of Whites,[154] and recent Supreme Court cases affirmed limitations on voluntary integration,[155] a severe detriment to Black education when taken in conjunction with the reality of no fundamental right to education or second look given to educational funding as a means of *de facto* segregation.[156] To boot, the latter is exacerbated by laws like No Child Left Behind, which absolve government of responsibility to provide critical educational funding, good teachers, and adequate school buildings, among other critical entities, to facilitate the learning and engagement process of Black children. The effect of connecting such a dire reality (with empirical illustration) to systemic harms caused by chattel slavery and harms perpetuated by this society, is too hard a pill to swallow for the beneficiaries of this system. As such, while CERD is seemingly an attractive legal prospect for remedying harms, it serves more as a public, international indictment of the U.S.'s refusal to eliminate forms of racial discrimination, and the country's continued commitment to racial injustice.

The problematic application of CERD is again, the requirement that domestic remedies be exhausted,[157] which places the precarious nature of the condition of a people back into the domestic courts that have not time and again failed them. One hope is that in the increasingly global politicization of nations, more care will be given to the perception of domestic policy abroad. Though the past eight years have been even more difficult generally, hope for grassroots leadership at this juncture to play a critical role in remedying past wrongs and current marginalization, seems more feasible. It is understood that movements come from the bottom up—not just with presidencies or Congressional majorities and the same is true for the success of securing reparations for the marginalization of American Blacks. For whether the battle for reparations is won or not, the penultimate goal of carving out the self-determination of Black people will provide the peace and begin the healing the community so desperately needs.

IX. Epilogue

I want my people to be free, to be free, to be free, want black people to be free, to be free, to be free. . . . That's all that matters to me, that's all that matters to me.

Endnotes

* Dekera Greene is a native of St. Stephen, SC, graduate of Clemson University, in Clemson, SC, and a 2nd year law student at the Washington College of Law at American University. I would like to thank my mother, Que Glover, and my grandmother Alphair Ferguson, for showing me what it means to love and teaching me profound lessons about the strength and beauty of my blackness, particularly my black womanhood in the face of the harried history of our people; thus developing the place from which this article begins. Many thanks to my comrades, Shaunté Preer, Seema Sadanandan, and Sarah Ihn for their eternal support, infinite wisdom, and valuable kinship. Thanks for the many mind-stretching discussions that have occupied the space of our friendship—challenging me to evolve to another level of reflection, always proving that iron sharpens iron.

[1] The following pieces illustrate the paradigm through which I write about the topic, and they hopefully place the subject in an operable and understandable framework for analysis.

[2] Nikki Giovanni, *The Great Pax Whitie* (1968), *in* The Collected Poetry of Nikki Giovanni 54-56 (2003).

[3] Randall Robinson, the Debt: What America Owes to Blacks 18 (2000).

[4] Malcolm X, *Chapter 4 The Black Revolution, Speech April 8, 1964*, *in* Malcolm X Speaks: Selected Speeches and Statements 53-54 (1990).

[5] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 325, 362 (1987).

[6] Ralph Ellison, Invisible Man 1 (1952).

[7] One of the seven principles of Kwanza, or seven principles of Blackness.

[8] There exists a vast body of literature on the oppression of indigenous peoples, non-Black people of color, and European immigrants generally in the U.S., and while this is acknowledged, my focus is solely on the marginalization and oppression of the descendants of enslaved Africans in America in this paper.

[9] I will refer to those traded in the Transatlantic system of free labor as enslaved Africans, not slaves: slavery was their condition, and defined and typified their treatment but did not constitute their existence. I posit that their resounding strength and the resilience of their progeny are a testament to this. I will refer to the descendants of enslaved Africans in the U.S. as Black people or American Blacks throughout this paper. It is my fundamental belief that "African-Americans" is yet another distinction crafted by the majority to characterize a people they have historically marginalized and misunderstood. Black inheres at the core of our identity because it connects us to other members of the African Diaspora, and largely characterizes our familiar yet distinct conditions. Nikki Giovanni encapsulates my sentiment best, "For me the noun is Black; American is the Adjective." Nikki Giovanni, Racism 101 at 54 (1994).

[10] *See generally* Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964); Brown vs. Bd. of Educ., 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537 (1896); Scott v. Sanford, 60 U.S. 393 (1857) (demonstrating the history of *de jure* and *de facto* segregation and racial discrimination in the U.S.).

[11] While some would argue, that institutional impediments are only part of the problem (a large part), and that there should also be a focus on building the esteem of Black people to address community needs, I will not address that discussion here, though I agree. I will say that the two are not mutually-exclusive, and I believe that we must combat institutional harms by tearing down structural strongholds and also building up the love, connectedness, unity, compassion, and trust of our community in order to carve out self-determination. The paper is limited to discussion of governmental wrongs. Though I recognize the finite nature of reparations—that they will not repair all of the damage caused to both enslaved Africans and their descendants in America, they certainly provide a sound beginning to attaining *kujichagulia*.

[12] Though it will not be explored fully in this work, there is an argument to be made that the instruments of gentrification and ghettoization of urban communities promote population density (by respectively pushing urban Blacks

into outlying areas and warehousing them within other areas) and increase the likelihood of the passage of communicable diseases. It is to be said that personal responsibility in the form of diet, and exercise, in addition to either employer or state responsibility for facilitating access to regular health check-ups, play a pivotal role in general disease prevention. Prophylactic protection, education, and awareness play a critical role as it relates to the contraction of HIV/AIDS specifically, in America, so personal responsibility is most definitely a factor in preventing the HIV/AIDS epidemic. However, education is not the only factor in disease contraction and passage, generally, as population density has historically been linked to communicable disease transference, even and including HIV/AIDS.

[13] Some argue that reparations ought not be 'given' to Black people, but my discussion is premised on the fact that reparations are owed not rewarded. Beyond the historical contextualization that follows, I try not to engage in providing "reasoning" for reparations, but attempt to demonstrate how marginalization affected other aspects of life and why reparations are the beginning of an equitable remedy for American Blacks. There exists a heated and polarized debate, centrally focused on two sides: black and white (not surprisingly). Detractors argue that reparations should not be paid to American Blacks principally because (1) slavery is over and American Blacks should improve their own condition (2) not all White people owned enslaved Africans and the descendants of those who did they should not be subjected to paying the debts of their ancestors, and (3) Black reparations establish a slippery slope of wrongs to be corrected with no tenable end in sight. I will not debate or provide responses to these contentions specifically, though it could be said the larger nature of the paper speaks to them. They are easily negated by understanding that (1) reparations are assessed as repayment for a debt owed not a charity won, (2) beneficiaries of the design of this American system currently profit from the construct of their ancestors, and (3) specific models of past reparations paid to other groups marginalized by the American government demonstrate that such assessments, can in fact be made if government is willing to admit obvious wrongs. I find such assertions lacking in insight, history, and understanding of the structural effects of enslavement on the condition of American Blacks, and posit that reparations are more to repair harm done, though they can be used to improve a condition; these are separate distinctions. Though this ignorance is troublesome to me, my goal here is not to "educate" or "enlighten" those who don't understand. I only aim to provide my own prescription to black self-determination in America to the scholarship of proponents of reparations, so that the analysis focuses on international mechanisms of grappling with remedies to counteract the plight of my people in the existing global economy.

[14] NAS, *N.I.*.*.E.R. (The Slave and the Master)*, *on* NAS (Island Def Jam Music Group 2008).

[15] Malcolm X will intermittently be referred to as Brother Malcolm or El Hajj Malik El-Shabazz, the name he used towards the end of his life after his journey to Mecca. I use Malcolm X because that is the familiar historical recognition of him, while El Hajj Malik El-Shabazz is his formal name and Brother Malcolm describes my personal affinity for our Black shining prince.

[16] Malcolm X, Speech (Feb. 13, 1965), *in* MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 164-65 (George Breitman ed.,1990).

[17] IMMORTAL TECHNIQUE, *The Poverty of Philosophy*, *on* REVOLUTIONARY VOL. 1 (Viper Records 2005) (2001).

[18] FRANTZ FANON, *Concerning Violence*, *in* THE WRETCHED OF THE EARTH 36 (2004).

[19] "The word "Maafa" (also know as the African Holocaust) is derived from a (Kiswahili) word meaning disaster, terrible occurrence or great tragedy. The term today collectively refers to the 500 hundred years of suffering of people of African heritage through Slavery, Imperialism, Colonialism, Oppression, Invasions and Exploitation." http://www.africanholocaust.net/html_ah/holocaustspecial.htm. Maafa is an indictment on the benefactors of Black marginalization—it immortalizes the intentional degradation of Black people.

[20] JOHN READER, AFRICA: A BIOGRAPHY OF THE CONTINENT 377-390 (1999). Consequently, Virginia was the first of the 50 states to apologize for the enslavement of Black people in America with the passage of House Joint Resolution 728 in 2007, on the 400th anniversary of the settlement of Jamestown. http://leg1.state.va.us/cgi-bin/legp504.exe?071+ful+HJ728H2. Maryland, North Carolina, and Alabama issued apologies through resolutions in the same year either through their respective legislatures. http://www.foxnews.com/story/0,2933,276724,00.html. These are the only four states to formally apologize for the dehumanization of American Blacks through chattel slavery.

[21] U.S. CONST. amend. XIII, § 1.

[22] Ronald L. F. Davis, *From Terror to Triumph: Historical Overview*, *available at* http://www.jimcrowhistory.org/resources/pdf/From_Terror_to_Triumph.pdf.

[23] This was crucial particularly in state courts where Black people (including civil rights activists, typically) consistently faced due process rights violations. They faced all-white juries, had little access to legal counsel, and had no guarantee of a fair trial under the Sixth Amendment of the U.S. Constitution, in addition to obviously not having equal protection under the laws.

[24] *See* Veterans of the Civil Rights Movement, *Civil Rights Bill Passes in the House*, http://www.crmvet.org/tim/ timhis64.htm#1964cra64h; Daniel Levitas, Ira Glasser, et. al., *The Case for Extending and Amending the Voting Rights Act – Voting Rights Litigation 1982–2006: A Report of the Voting Rights Project of the American Civil Liberties Union* (2006); Hazel Trice Edney, *Rally Planned for Re-authorizing Voting Rights Act*, BIRMINGHAM TIMES, Aug. 2, 2005 at 1 (Though Blacks were granted the right to vote in 1870 with the passage of the 15th Amendment to the U.S. Constitution, the National Voting Rights Act of 1965 was passed to outlaw race-based discriminatory practices designed to foster disenfranchisement. Title I of the Civil Rights Act of 1964 outlawed the unequal application of voter registration requirements based on race, as another measure of protection for Black voters. This protection is recognized as not holistic because the provision did not eliminate violence against those who attempted to vote, did not prevent gerrymandering and annexation of districts, did not combat police and state suppression of Black voters, did not address voter intimidation of non-state actors, roll-purging, and literacy tests designed to exclude Black Southern voters, and did not guard against economic retaliation exacted by Whites angry with Black voters. Many of these problems persist today).

[25] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (granting Blacks access to public facilities like schools, movies, private movie theaters, restaurants, and hotels, etc.).

[26] Though mechanisms like the Title VII of the 1964 Civil Rights Act protect against discrimination in employment (outlawing race as a discriminatory factor in granting employment and promotion) and the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, guards against discrimination in housing (outlawing race as a mechanism for not selling or renting), there are no provisions to provide access to either of these "protections" or any other of the above-mentioned. Though the creation of federal government entities monitor the implementation of the law, respectively the U.S. Department of Housing and Urban Development (HUD) and the Equal Employment Opportunity Commission (EEOC), in their existence, discriminatory practices still persist, and there is no available mechanism for access to these entities.

[27] Jeremy Levitt, *Black African Reparations: Making A Claim for Enslavement and Systematic De Jure Segregation and Racial Discrimination Under International Law*, 25 S.U. L. REV. 7 (1997).

[28] Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack* (1988)*, in* CLASSROOM CONVERSATIONS: A COLLECTION OF CLASSICS FOR PARENTS AND TEACHERS 169, 169-177 (Alexandra Miletta and Maureen Miletta, ed., 2008) (contending that the disadvantages of people of color, particularly those historically marginalized, are inverse to the overprivileges of Whites, because racism goes beyond individual acts, and is incorporated into entire systems that purport to be objective, but confer privileges to those with white-skin, regardless of other factors contributing to their lives. In addition, Whites are taught not to recognize or notice this. She asserts that this privilege cannot be easily quantified, though she lists fifty examples of benefits of the privilege, and refers to them as "an invisible package of unearned assets that I can count on cashing in each day, but about which I was 'meant' to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks.").

The oblivion inhered in the knapsack of White privilege provides the opportunity to freely disparage and disregard anything outside of the dominant culture, as the privilege is elusive and easy to ignore for its recipients. McIntosh further posits that whiteness protects from backlash, alienation, hostility, and distress and allows the projection of those things onto people of color.

Whiteness enables a certain level of comfort for its beneficiaries to the direct disadvantage of others, while creating a society that ignores this privilege and provides the added benefit of touting a meritocracy when no such system, in fact exists. Some of the privileges provided by whiteness like: not having to educate your children on systemic racism for their own daily protection; knowing that if a cop pulled you over or the IRS audits you, you were not singled out because of your race; possessing the ability to avoid spending time with people whom you were trained to mistrust or mistrust your kind or you; having the ability to purchase or rent a house in an area which you can afford to live should you need to move; possessing the ability to do well in a challenging situation without being called a credit to one's race; the certainty that asking to speak to a person in charge (anywhere) that the person will be of your race; the ability to find academic courses and institutions which give attention only to people of your race; and the ability to feel welcomed and "normal" in the usual walks of life, public, institutional, and social; among other facts not listed here, or in the fifty tenets by McIntosh, are benefits of whiteness. Such systems are active and embedded, and must be deconstructed and examined to assess whether the privilege encompasses a facet of life that should be enjoyed by all, or is simply an unearned power that has no place in society. McIntosh recommends consciousness and raising levels of saliency and awareness to begin this process of reversal or the unpacking of the white privilege knapsack).

[29] While I find the writings of this particular sophist offensive, (based on imperialist attitudes about resources, people, and value) and could foray into a discussion of the underlying accepted natural law and economic principles on which he bases his theories of property to deconstruct this premise, I use this to demonstrate that even if the philosophical underpinnings of the creation of this society are accepted, the dispossession of American Blacks that follows is still counter in theory to this proto-capitalistic law/labor/land principle. JOHN LOCKE, *Of Property*, *in* SECOND TREATISE OF CIVIL GOVERNMENT, § 45 (1690).

[30] *Id.* §§ 32-35, 38, 39, 40.

[31] *Id.*

[32] *Id.* § 42.

[33] JOHN LOCKE, *Of the Ends of Political Society and Government*, *in* SECOND TREATISE OF CIVIL GOVERNMENT, § 123 (1690); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (providing "[t]hat whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.").

[34] JOHN LOCKE, *Of Civil and Political Society*, *in* SECOND TREATISE OF CIVIL GOVERNMENT, § 90 (1690).

[35] *Id.* § 123.

[36] LOCKE, *supra* note 33, § 45.

[37] JOHN LOCKE, *Of Slavery*, *in* SECOND TREATISE OF CIVIL GOVERNMENT, §§ 22-23 (1690) (asserting that man's state of nature is to be free, thereby presenting himself as an opponent of slavery). Still, he describes a paradigm of a state of war (akin to American slavery) and drudgery (likened to the bondage of the Israelites in Egypt), but contends that the duration of both, at best are *ephemeral*, while acknowledging their existence. It seems odd to describe the condition of a people as short in duration when systems are designed to continually oppress them, and ironic when his theories were central in legitimating this oppression. Locke's other theories connecting property, government, and political participation, too, create the inescapable condition of chattel slavery at worst and involuntary servitude and feudalism at best.

[38] U.S. CONST. art. I, § 2 (stating that originally, the Constitution demonstrated that slaves could not have ownership or possession even in themselves, because they were not whole persons. This clause details the tax apportionment and elected representation in the House of Representatives to the exclusion of "three-fifths of all other persons," a legacy of the compromise between Northern and Southern States at the Philadelphia Convention in 1787 in developing the Constitution, to count enslaved Africans and their Black progeny as three-fifths of persons for purposes of maintaining a Southern relevance in national politics, but discounting the status of Blacks as whole persons in order to sustain slavery. This clause was rendered moot after the passage of the 13th Amendment); *see* ANGELA DAVIS, *The Legacy of Slavery: Standards for a New Womanhood*, *in* WOMEN, RACE, & CLASS 5 (1981) (Enslaved men and women were viewed as profitable labor-units, not human beings in the American chattel race-based slave system).

[39] *See* U.S. CONST. art. I, § 2. (sanctioning slavery); *see* McIntosh, *supra* note 28, at 171-172 (demonstrating that slavemasters were not the only profiteers of the race-based economic system because other whites benefited from the subjugation of the enslaved Africans monetarily and sociologically, and still do in some capacity or other through their white-skinned privilege).

[40] LOCKE, *supra* note 29, §§ 32-35, 38, 39, 40.

[41] The expropriation and undervaluation of Black labor specifically refers to the use of Blacks in chattel slavery for the development and sustaining of industry, agriculture, and the economic system, without or with little monetary compensation, aside from the "provision" of despicable housing and clothing, and oftentimes the inedible remains of the food of their White contemporaries. Further, the Black intellectual and creative capacities were co-opted for the benefit of white society, in the same respect as the theft of their physical labor.

[42] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[43] LOCKE, *supra* note 29, §§ 32-35, 38, 39, 40.

[44] Though 1776 marked the beginning of what we now recognize as the U.S. Government, the former colonies were not fault-free where these practices were instituted overnight under the newly confederated states. They carried their treatment of Blacks and valuation of the people-group from their colonial settlements in the New World over into the newly formed American government, so that when there is discussion of marginalization of the American Blacks, we must account for the years preceding the formal organization of the nascent American government. For purposes of considering reparations, the colonies themselves profited from the free labor of Blacks as well, and instituted the practice of disconnecting Blacks from participation in society-building and sustaining institutions.

[45] *See* LOCKE, *supra* note 29, §§ 32-35, 38, 39, 40 (demonstrating that value is contrived).

[46] McIntosh, *supra* note 28, at 171-172.

[47] U.S. CONST. art. I, § 2. Before the 13th Amendment, referring to enslaved Africans and their inclusion in determining apportionment for state representation in the Congress: Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, *three fifths of all other Persons* [emphasis added]. No right to enslaved African ownership (particularly no right to self-possession) or citizenship; Scott v. Sandford, 60 U.S. 393, 393-394 (1857) Stating:

> A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a "citizen" within the meaning of the Constitution of the United States. When the Constitution was adopted, they were not regarded in any of the States as members of the community, which constituted the State, and were not numbered among its "people or citizens." Consequently, the special rights and immunities guarantied to citizens do not apply to them [. . .] The only two clauses in the Constitution which point to this race treat them as persons whom it was morally lawfully to deal in as articles of property and to hold as slaves. Since the adoption of the Constitution of the United States no State can by any subsequent law make a foreigner or any other description of persons citizens of the United States, nor entitle them to the rights and privileges secured to citizens by that instrument. A State, by its laws passed since the adoption of the Constitution, may put a foreigner or any other description of persons upon a footing with its own citizens as to all the rights and privileges enjoyed by them within its dominion and by its laws. But that will not make him a citizen of the United States, nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another State. The change in public opinion and feeling in relation to the African race which has taken place since the adoption of the Constitution cannot

change its construction and meaning, and it must be construed and administered now according to its true meaning and intention when it was formed and adopted.

[48] NINA SIMONE, *Backlash Blues* (2005 Remix), *on* FOREVER YOUNG, GIFTED, AND BLACK: SONGS OF FREEDOM AND SPIRIT (RCA 2006).

[49] Levitt, *supra* note 27, at 7. Levitt argues, citing to Paiewonsky, *Eyewitness Accounts of Slavery in the Danish West Indies* (1989), that the oral traditions in West Africa indicate that Kings demanded the return of their brothers and sisters, reparations for the murders and rapes committed against their peoples, and damages for the breach of international trade agreements. Both free and enslaved Africans sought payment for the services of enslaved Africans, and petitioned for their release. While some may be doubtful of this prospect, I do not find it so unbelievable that Black people in this entire scheme of stolen, commodifed, and exploited bodies, lasting for centuries, sought recompense for the expropriation of their own labor, and the labor of their relatives. It is paternalistic to say that since it was not recorded in Western history, this phenomenon did not exist.

[50] *Id.* at 6 (explaining that the Civil Liberties Act of 1988 was a formal apology to Japanese Americans interned throughout World War II, which provided reparations from the American government of over $1.6 billion).

[51] *Id.*

[52] *Id.*

[53] Levitt, *supra* note 27, at 10; Freedmen and Southern Society Project, *Sherman's Special Field Orders, No. 15*, http://www.history.umd.edu/Freedmen/sfo15.htm.

[54] Levitt, *supra* note 27, at 10.

[55] *Sherman's Special Field Orders, No. 15*, *supra* note 53.

[56] The demand for reparations was popularized by the descendants of enslaved Africans and Black people in America, through writings, art, music, media, film, and culture. Writer/director Spike Lee (*Do the Right Thing, Malcolm X, Jungle Fever, She's Gotta Have It*) named his production company 40 Acres and a Mule Filmworks.

[57] Pigford v. Glickman, 185 F.R.D. 82, 85 (D.D.C. 1999).

[58] Levitt, *supra* note 27, at 7.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U.L. REV. 505, 506, 513-519 (2001).

[64] *Id.* at 506.

[65] Marcus Garvey, Speech at Carnegie Hall: Aims and Objectives of UNIA (Feb. 23, 1923).

[66] *Id.*

[67] *Id.*

[68] Levitt, *supra* note 27, at 12.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] DR. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT, 137-138 (1964).

[73] MALCOLM X, *Speech at a Meeting in Paris*, *in* MALCOLM X: BY ANY MEANS NECESSARY, November 23, 1964, at 123 (1970).

[74] *See A Black Manifesto*, TIME MAGAZINE, May 16, 1969 (stating that the National Black Economic Development Conference was sponsored by the Interreligious Foundation for Community Organization (IFCO) as an "effort by a liberal interfaith group to draw black ideas for the economic betterment of urban ghettos. . . [designed to] bring black leaders together for discussions and action on the economic aspects of Black Power.").

[75] *Id.*

[76] *Id.*

[77] Levitt, *supra* note 27, at 12 (The Southern Christian Leadership Conference, Nation of Islam, NAACP, among countless other black churches, organizations, and voluntary associations supported reparations for American Blacks in this period).

[78] *Id.* at 13.

[79] I agree with Marx that a trick of the enemy is to divide and conquer, and I in no way attempt to disparage the ills suffered by Japanese Americans in this time, I simply draw the contrast to demonstrate the contempt of American society for American Blacks who endured more than 360 years of *de jure* and *de facto* segregation and racial discrimination. It is estimated that between 15 million to 100 million African people were murdered during enslavement, not including the rape and labor exploitation of Black people in this period. Levitt, *supra* note 27, at 13. Nor does it address the commodification of Black bodies in the periods after slavery. DAVIS, *supra* note 33, at 7. Here the breeder strong-buck Black male slave typology is manifested in American professional athletics, namely the NBA and the NFL, and the commodification of Black female bodies are continuously oversexualized as pop-culture vixens in the entertainment industry. Today's video vixen is yesterday's mystical Negress who conjured spells on her master to seduce him: to justify their dominant-perspective of the rape of enslaved Black women by their White masters or overseers.

[80] Levitt, *supra* note 27, at 13.

[81] *Id.*

[82] John Conyers Jr., *Reparations*, *available at* http://www.johnconyers.com/issues/reparations.

[83] *Id.*; Jet, *Chi. City Council Votes to Urge Congress to Consider Reparations*, JET, June 5, 2000.

[84] Dora Muhammad, *Ndaba: 'A Great Sitting Down,'* THE FINAL CALL, August 9, 2003 (including groups such as: National Coalition of Blacks for Reparations in America (N'COBRA), the Universal Negro Improvement Association (UNIA), the New Afrikan People's Organization (NAPO), the Republic of New Afrika (RNA), the Restitution Study Group, the National Association for the Advancement of Colored People (NAACP), the New Black Panther Party, and countless churches, activists, academics, lawyers, community members, and other distinguished individuals); *see also* Matsuda, *supra* note 10, at 327 (There also exists a voice in support of American Black reparations within Critical Legal Studies (CLS), and within the Critical Race Theory philosophy. Critical Legal Studies (CLS) is the legal academic movement based on the deconstruction of law and power, emphasizing a focus on the subaltern. It reveals a structure, de-constructs it, and de-legitimizes the foundations on which they are based. CLS is premised on the idea "that legal ideals are manipulable and that law serves to legitimate existing maldistributions of wealth and power.").

[85] Levitt, *supra* note 27, at 13.

[86] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 162-63 (William Peden ed., 1982) (1782).

[87] A third consideration—where the money will come from is not explored but directly suggested throughout the paper by holding the American government and capitalistic business interests responsible for facilitating the exploitation and marginalization of Blacks. Reparations or restitution for such harms can be assessed against government, corporate, and private entities that profited and continue to benefit from Black marginalization. An excellent representation of this continued marginalization, though not discussed in this paper would be the government, construction companies, and corporate entities that utilize and profit from the prison industrial complex—the new slaveocracy through the undervaluation and exploitation of prison labor (institutionalized marginalization of Black people—both young and old, particularly Black men since Black people account for almost 41% of the jail and prison population).

[88] *See* Thurgood Marshall, Bicentennial Speech – Remarks at the Annual Seminar of the Patent and Trademark Law Association (May 6, 1987) (acknowledging that the life of Black people in America has been dictated by the law: "What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law.")

[89] McIntosh, *supra* note 28, at 174-175.

[90] Matsuda, *supra* note 5, at 364-375.

[91] Unknown.

[92] Pigford v. Glickman, 185 F.R.D. 82, 85 (D.D.C. 1999).

[93] *See* Mitchell, *supra* note 63, at 506 (stating that the fifteen states were AL, AR, CA, FL, GA, IL, KS, MO, MS, NC, OK, SC, TN, TX, and VA).

[94] *Id.*

[95] Daniel Peete, *African American Farmers and Civil Rights (Pigford v. Glickman)*, 78 J. OF S. HIST. 1, 1-2 (2007).

[96] *Id.*

[97] *Id.* at 2.

[98] *See generally Pigford*, 185 F.R.D. 82 (discussing a class action lawsuit in which former slaves tried to recover land).

[99] Mitchell, *supra* note 63, at 506.

[100] Tadlock Cowan & Jody Feder, *The Pigford Case: USDA Settlement of a Discrimination Suit by Black Farmers*, CONGRESSIONAL RESEARCH SERVICE, RS20430, 5 (2008).

[101] *Id.*

[102] *Supra* notes 19-46.

[103] *See generally* Kennedy v. City of Zanesville, 505 F. Supp. 2d 456 (S.D. Ohio 2007) (demonstrating the disparity between black and white citizens of Langan Lane, Ohio).

[104] Claire Suddath, *Making Water a Matter of Race*, TIME MAGAZINE, July 14, 2008.

[105] Relman & Dane, PLLC, *Our Cases: Selected Current Cases*, http://www.relmanlaw.com/cases.html.

[106] *See id.* (forcing Black residents to collect rainwater, haul water from the City, and store water in cisterns, endangering their own consumption because of the storage mechanism).

[107] *Id.*

[108] Thomas Dye, *The Rosewood Massacre: History and the Making of Public Policy,* 19 PUB. HIST. 29-34 (1997).

[109] *Id.* at 31-32.

[110] Raymond A. Winbush, ed., *Should America Pay? Slavery and the Raging Debate on Reparations* at 69 (2003).

[111] *Id.*

[112] 382 F.3d 1206 (10th Cir. 2004)

[113] *Id.*

[114] *Id.*

[115] Darren Briscoe, *A Day of Reckoning*, NEWSWEEK, March 10, 2005.

[116] Tim Madigan, *The Burning: Massacre, Destruction, and the Tulsa Race Riot of 1921*, at 4, 131-32, 144, 159 (2001).

[117] *Id.* at 164.

[118] *Id.* at 249.

[119] Winbush, *supra* note 110, at 369.

[120] *Id.*

[121] Alexander v. Oklahoma, 382 F.3d 1206, 1212 (10th Cir. 2004).

[122] Darren Briscoe, *A Day of Reckoning*, NEWSWEEK, March 10, 2005.

[123] *Alexander*, 382 F.3d at 1206, 1219.

[124] Jim Myers, *Race Riot Bill Gets House Hearing*, TULSA WORLD, April 25, 2007.

[125] Levitt, *supra* note 27, at 31. I again, reproduce the structure Levitt cited in this respect because these three statutory provisions have been, and seem like the most viable constructs with which to pursue reparations.

[126] *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007) (demonstrating the difficulty of enforcing statutes and litigating statutory claims).

[127] The Federal Tort Claims Act, 42 USC § 1346(b)(1) (2000).

[128] The Civil Rights Act of 1866, 42 U.S.C. § 1981 (2000).

[129] The Civil Rights Act of 1979, 42 U.S.C. § 1983 (2000).

[130] G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

[131] RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 701 n.4 (1987).

[132] *Id.* § 701(4).

[133] G.A. Res. 217, U.N. GOAR Doc. A/810 at 71 (1948). Jus cogens, includes prohibitions on slavery, torture, genocide, maritime piracy, and wars of aggression. Per the Vienna Convention, no treaties can derogate *jus cogens*.

[134] RESTATEMENT § 701(4).

[135] G.A. Res. 2106 (XX), at 47; U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966).

[136] G.A. Res.2106 (XX), at 47, U.N. GOAR 20th Sess., 1046th plen. mtg., U.N. Doc A/3, A/2 (Dec. 21, 1965). Providing:

> Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

[137] *Id.* at A/4.

[138] *Id.* at A/5.

[139] *Id.* at A/7.

[140] *Id.* at A/6.

[141] *Id.* at A/14 at 6.

[142] *Id.* at A/21.

[143] *Id.* at A/9.

[144] *Id.* at A/14.

[145] *Id.* at 7(a).

[146] *Id.* at A/8.

[147] *Id.* at A/14.

[148] *Id.* at A/9.

[149] Office of the High Commissioner for Human Rights, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶¶ 380-407, U.N. Doc. A/56/18 (July 30–Aug. 17 2001).

[150] RACE AND ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE (2007), http://www.aclu.org/pdfs /humanrights/cerd_full_report.pdf

[151] *Id*. at 38.

[152] Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations on the Committee on the Elimination of Racial Discrimination, at 2. The Committee responds to the US report by recommending:

> The Committee recommends that the State party review the definition of racial discrimination used in the federal and state legislation and in court practice, so as to ensure, in light of the definition of racial discrimination provided for in article 1, paragraph 1, of the Convention,—that it prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.

[153] *Id*. at 14.

[154] MARC MAUER AND RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3 (2007), http://sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf.

[155] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 U.S. 2738 (2007).

[156] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[157] G.A. Res.2106, GAOR UN Doc A/14 at 7, Dec. 21, 1965; Restatement (Third) Foreign Relations Law, Volume 2 § 703, Comment d, Reporters Notes 6 & 7.

[158] MOS DEF, *Umi Says*, *on* BLACK ON BOTH SIDES (Rawkus Ent. 1999).