

2007

## Reparations: A Remedies Law Perspective

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### Recommended Citation

Hutchinson, Darren L. "Reparations: A Remedies Law Perspective." *American University Law Review* 56, no. 6 (August 2007): 1402-1406.

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## CONFERENCE

### REPARATIONS IN THE INTER-AMERICAN SYSTEM: A COMPARATIVE APPROACH

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human rights violation. The UN text is thus a useful base for developing the law in the future, with the aim of ensuring reparations for all victims of human rights violations.

*E. Darren Hutchinson*<sup>59</sup>

It is hard to go last, especially when there have been many good presentations. I find myself in a difficult situation talking about the United States' domestic law on reparations. As the other panelists have demonstrated, international human rights law on this issue is complicated, even where formal structures permit claims of redress. In the United States domestic law context, however, no coherent, organized, sustained body of legislation deals with reparations as such. Instead, the reparations movement in the United States has consisted of individuals, discrete groups of individuals, or social movements making claims before state and federal lawmakers and courts for remediation of collective harms that they or their ancestors have experienced. Accordingly, in the United States context, we see appeals to common law, statutory law, and constitutional law as a basis for group remediation, and typically, these claims reach back into periods of history, rather than focusing on contemporary acts of injustice.

The lack of a precise definition of "reparations" also complicates the situation in the United States. International law, however, offers some interesting insight on this issue. Furthermore, general trends have emerged in jurisprudence and scholarship on this issue. From this research and international analogues, reparations are commonly viewed as judicial or legislative remedies for sustained past or present injustice towards a particular group. The essence of reparations is remediation for collective harms.

One final point complicates the United States' situation (and this subject did not receive much attention from the other panelists): how far into the past should state actors reach to remedy injustice? Culturally, in the United States' system, discussion of reparations typically centers around issues pertaining to slavery and Native American land claims. Although I generously support remediation of prior and ongoing injustice, reparations claims raise difficult matters including: (1) defining the class of "injured" people; (2) explaining why this present-day class is in fact injured when the actions upon

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which remediation is based took place in the past; and (3) considering whether some forms of remediation—for example, land redistribution—present fairness questions when implemented today. Although I agree with reparations advocates that compelling arguments justify the provision of reparations, these questions still form a legitimate part of the debate.

In this talk, I will provide a general overview of reparations discourse in the United States and offer some suggestions concerning how advocates of reparations might frame their claims. First, I will identify some of the policies that one might consider when advocating reparations in the U.S. context. As a remedies professor, I will invoke remedies law (judicial remedies doctrine) as an analogy for this discussion. Remedies law provides a helpful framework for thinking about reparations in the legislative context, and this subject matter necessarily shapes claims for reparations made in a judicial setting.

Second, I will examine some of the political and legal barriers to reparations in the United States. Reparations for racial injustice, in particular, are hindered by a common perception among many whites who see the United States as having attained equal opportunity and who view current racial inequality as a product of the lack of initiative among persons of color. Many whites also embrace remediation so long as they do not feel that they are potentially impacted by policies to remedy racial oppression.

Finally, I will discuss my personal preference for structural legislative remedies, as opposed to discrete, compensatory, and judicial remedies for past injustices. I hope to demonstrate that in terms of providing redress, structural reforms offer the best hope for broader improvement in the social and economic status of oppressed people in the United States.

1. *What are “reparations”? A remedies law analogy*

Proponents of reparations have framed their claims for redress around a variety of forms of relief, but their claims often include monetary compensation. Remedies law, or the body of doctrines and statutory rules the courts apply when supplying relief to litigants, provides a helpful structure for thinking about the range of possible instruments that might serve to redress prior, collective injustice. Remedies law identifies several categories of redress for litigants. Damages compensate for harm. Restitution removes the ill-gotten gains from the defendant and returns them to the plaintiff. Structural remedies seek to reform important social institutions to

bring them into compliance with legal norms. Also, ordinary injunctions prohibit future harms or rectify prior injustice. These different baskets of remedies can serve as a prism for thinking about reparations either as a legislative or as a judicial tool.

The historical and contemporary debates surrounding remedies in the United States demonstrate the relevance of the remedies analogy. For example, Japanese-Americans who were interned during World War II received monetary compensation for their injuries. Restitution has been a form of relief sought by individuals in reparations cases, as in litigation seeking disgorgement of profits of companies that benefited from slavery. And as early as Reconstruction, some former slaves demanded land and subsistence from plantation owners as a way of restoring the unjust gains of coerced labor and oppression. Also, during the Civil War and continuing into the earlier parts of Reconstruction, Congress created the Freedmen's Bureau, which distributed (with varying degrees of success and intensity) food, education, health care, legal services, and other important benefits to the freed slaves. Finally, in terms of injunctions, the post-Civil War era produced a body of constitutional provisions and statutory enactments designed to prevent future harms and rectify prior injustice.

## 2. *Political and legal barriers to reparations*

An important part of the debate over reparations in the U.S. context centers upon political and legal constraints. One element of contention concerns remediation of historical wrongs. Opponents to reparations argue that the injustices addressed by contemporary reparations movements, particularly for slavery and Jim Crow laws, took place in the remote past. Accordingly, they often view remediation as an unfair "punishment" of innocent individuals and an undeserved benefit to potential recipients of redress.

Additionally, the U.S. electorate tends to disfavor economic redistribution generally. Because reparations advocates simultaneously demand redistribution and seek to rectify prior wrongs, their claims receive very little public support, as opinion data persistently confirm.

One thing that I find interesting in this debate is the failure of the opponents of reparations to treat remedies for gross human rights or civil rights deprivations as a public good, rather than as a series of private transactions that benefit or burden individuals. If we view rectifying prior and current injustice as a public good (that improves human capital or that fortifies our national commitment to justice,

etc.), then reparations can lose their individuated character. Seen in this light, reparations also become compelling for contemporary society, despite the passage of time between the wrongdoing and the remediation. If historical wrongs burden society today, then one could make a compelling argument to support contemporary redress.

### 3. *Structural/legislative relief*

In the little time that remains, I will discuss why I prefer legislative reparations over a litigation strategy. A litigation model provides very little hope for success in this area. First, in terms of the Supreme Court, public opinion serves as a powerful constraint upon Court rulings. Furthermore, the Court has defined rights and equality as protecting individuals rather than groups. Accordingly, groups face a difficult time pressing claims of injustice or convincing the Court that they require judicial solicitude. Moreover, equal protection doctrine requires that plaintiffs prove that governmental defendants acted intentionally to create harm. While many foreign jurisdictions, including international human rights structures, define inequality around intent or effects, federal court doctrine in the United States tends to dismiss evidence of disparate effects, which makes many conditions of extreme inequality (unequal distribution of educational resources, disparities in the administration of criminal justice, etc.) beyond judicial invalidation.

In addition to these doctrinal and institutional constraints, the litigation model also fails because it distorts the impact of broad abuses of human and civil rights. Litigation attempts to provide a particularized remedy to a discrete plaintiff or class of plaintiff for identifiable, contemporary activity. While this model might help to rectify some instances of injustice, on many levels it obfuscates the injurious nature of oppression, which creates pervasive and dispersed harms rather than discrete and particularized injuries. Litigation suggests that reparations implicate private harms and individualized wrongdoing, which simply reinforces the negative perception of reparations as a burden upon or unearned handout to individuals rather than as a benefit to society.

Legislation can better respond to the dispersed nature of the harms associated with oppression and provide the deep structural reform necessary to rectify social injustice and to invest in human capital. Along these lines, Alfred Brophy, who writes extensively on reparations in the U.S. context, has proposed a community “social welfare” model for framing reparations discussions, which deemphasizes litigation. Instead, he focuses on seeking legislation

that creates institutions that deliver resources to individuals who, due to past or current injustices, cannot adequately navigate and access these resources in the absence of governmental assistance. Due to the time constraints of today's panel, I am unable to elaborate on the content of Brophy's proposal or of similar writings, but this approach more accurately captures the structural nature of subordination, emphasizes the importance of sustained legislative treatment of prior and ongoing injustice, and demonstrates the limitations of private litigation strategies.

### III. LAWYERING FOR REPARATIONS: INTER-AMERICAN PERSPECTIVE

#### A. *Agustina Del Campo*<sup>60</sup>

My presentation today will address a slightly different issue than what other panelists have been addressing this morning. The analysis of reparations in the inter-American human rights system has mostly been focused on the Inter-American Court of Human Rights, rather than the Inter-American Commission on Human Rights. In fact, the Commission's recommendations are hardly ever addressed in research studies dealing with reparations for international human rights violations.

My presentation will be divided in two parts. First, I will briefly summarize the general competence of the Commission and its practice in affording remedies and reparations for victims under the American Declaration of the Rights and Duties of Man;<sup>61</sup> then I will discuss challenges to the litigation of *Lorenzo Enrique Copello Castillo v. Cuba*,<sup>62</sup> a case that we brought with *Washington College of Law's* ("WCL") Impact Litigation Project before the Commission in 2003 and was decided in November 2006.

Going to the first part of my presentation, the Commission is one of the two supervisory organs of the inter-American system for the protection of human rights. It was created in 1959 and was incorporated into the Charter of the OAS as one of its main organs in 1960. With the adoption of the American Convention on Human

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61. Organization of American States, American Declaration of the Rights and Duties of Man, art. XVIII, 1948, O.A.S. Off. Rec., OEA/Ser.L./V./II.23, doc. 21 rev. 6.

62. *Copello Castillo v. Cuba*, Case 12.477, Inter-Am. C.H.R., Report No. 68/06, OEA/Ser.L./V./II.127, doc. 4 rev. 1 (2006), available at <http://www.cidh.org/annualrep/2006eng/CUBA.12477eng.htm>.