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Adrienne D. Davis

*American University Washington College of Law*

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## The Case for United States Reparations to African Americans

by Adrienne D. Davis\*

*"Rep.a.ra.tions: Payment of a debt owed; the act of repairing a wrong or injury; to atone for wrongdoings; to make amends; to make one whole again; the payment of damages; to repair a nation; compensation in money, land, or materials for damages."*

—National Coalition of Blacks for Reparations in America

The political and juridical viability of reparations for descendants of enslaved black people is emerging as a highly contested concept in U.S. debates about justice and law. For decades, reparations have been an essential part of the international discourses of war and human rights. Even the United States has paid some reparations awards to Native nations. Today, Korean women seek reparations from the Japanese government as recompense for what amounted to sexual enslavement during World War II. And in addition to on-going suits against the German state, Holocaust survivors seek damages awards from corporations who enslaved them, banks who appropriated their funds, and insurance companies that refused to pay the life insurance claims of those murdered. Among the political mainstream in the United States, there is support for all of these reparations efforts. From newspaper op-eds to legislation, Americans have expressed their outrage about these immoral practices. California State Senator Tom Hayden wrote a law giving the state jurisdiction over claims stemming from World War II slave labor issues and extending the statute of limitations for filing such claims until 2010. Also, California, the sixth largest economy in the world, bars insurance companies who refused to pay or work to settle claims from doing business in the state. Within U.S. legal culture the language of economic rights and justice is persuasive and remedies seem natural.

Yet the U.S. government has refused to consider the need for domestic reparations to be paid for the labor and sexual slavery enforced in the United States for over two centuries. In contrast to Hayden's legislation, U.S. Representative John Conyers's bill H.R. 40, Commission to Study Reparation Proposals for African Americans Act, introduced in 1993 to study the economic effects of slavery on black Americans has not made it out of the House of Representatives Subcommittee on Civil and Constitutional Rights. At its initial vote, the bill received 28 cosponsors out of 435 members in the House of Representatives. Only ten of those co-sponsors were not black. Even as the United States demands other nations make moral and economic recompense for their actions, it declines to consider even the possibility of repairing its own history.

Since 1995, I have been involved in the black reparations effort, now well over a century old. I am a member of the three-year-old Reparations Litigation Committee convened by the National Coalition of Blacks for Reparations in America. The chair of that committee, Adjoa Aiyetoro, and I have co-taught courses on litigating reparations at the Washington College of Law (WCL), and supervised students in independent research efforts. To the best of my knowledge, WCL is the only law

school in the United States to offer such a course. What has emerged from our work is the conclusion that reparations for black Americans are warranted, justifiable, feasible, and fair.

### The Case for Reparations

But what are reparations? What support do they find in law? How are they different from ordinary civil lawsuits and other civil rights remedies? Who awards them and who gets them? The framework of reparations is the duty to repair injury imposed on another. Unlike tort law, which addresses individual injury, in their conceptualization, reparations suits frame harm as group-based, even when the plaintiffs are individuals. Unlike criminal law, the harm is explicitly conceived of as against the group, not the state. Therefore, unlike criminal cases, the decision for bringing and shaping reparations lawsuits should lie with the victims, not with state. In this sense, these suits should be organized at the grassroots level and should be designed to recompense the harm as understood by communities, not decided by lawyers.

Another distinction is that the explicit function of reparations would be national atonement for the moral wrong and financial injuries of enslavement to black Americans. The primacy of atonement and morality differentiates such suits from ordinary civil suits that do not rest on these principles.

Finally, such suits emphasize the economic damage of enslavement to black Americans as serious and in need of national recognition and compensation. In this sense, they depart from other civil rights remedies that address post-slavery racial harms or rest on political or criminal remedies.

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Affirmative action, for instance, was a remedy to combat existing racism against blacks and the on-going effects of post-slavery racial apartheid. It did not compensate black people for slave labor, nor did it seek to. The point of reparations is not to "make blacks equal" or to ensure racial opportunities, like affirmative action. These are necessary and important goals, but other causes of action and frameworks of analysis address them better. Instead, the theory of domestic reparations is to identify and atone for economic injuries and harms that blacks as a group suffered under enslavement.

We have identified two distinct, but related judicial legal principles that justify and support reparations for black Americans: the equitable remedy of restitution for unjust enrichment and the Thirteenth Amendment prohibition against badges and incidents of slavery. I will sketch the contours of the latter, as the former is not innovative in its inherent conception, although it is in its application.

Those who know American history are typically familiar with the political assaults and human rights depredations that enslaved people suffered. Enslaved people and many free blacks could not vote, serve on juries, or testify against whites in a court of law. In addition, the state authorized slaveholders to inflict with impunity horrific violence, including beatings that scarred and maimed, as well as rapes and other sexual coercion. In some instances, what would be criminal homicide if committed against a white went unpunished when done against an enslaved black.



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Literacy was denied in most states, and the slave-holding states, employed a variety of mechanisms of varying brutality to suppress cultural as well as political self-determination. These denials of bodily autonomy, citizenship, and dignity were the most visible deprivations.

But American enslavement also suppressed what I have called economic personality. Enslavement denied blacks the economic fruits of their 200 years of backbreaking labor. They could not make and enforce contracts. Property rights of use, ownership, or management did not follow from their market participation in the labor force, but were systematically denied by the state. The slave-holding states did not confer legal status on black families; through inheritance, the family is one of the primary institutions of wealth transfer, but black slaves were excluded from inter-generational wealth transfer, one of the centerpieces of Anglo-American culture. From the public sphere of market work to the intimate sphere of the family, black economic relationships were systematically and often brutally suppressed. For the first 250 years of American economic history, the law excluded blacks from the market in a society in which market participation was emerging as vital to personal, political, and social well being.

Furthermore, political and economic personality are closely intertwined. For blacks as for many other groups, the denial of full citizenship rights, such as voting and jury service, was also accompanied by circumscribed market rights: property, contract, inheritance, and labor. Denial of economic rights marked lesser citizenship, as did refusal at the ballot box. Reparations seek to remedy the suppression of over two centuries of black economic personality.

### The Case Theory

Our primary theory of the case rests on the Thirteenth Amendment of the U.S. Constitution, the first in the trilogy of post-Civil War (1865-1870) amendments. Its better known sisters are the Fourteenth and Fifteenth Amendments; each of these spawned a compelling and contested twentieth century jurisprudence, on equal protection of law and voting rights respectively. The Thirteenth Amendment, passed in 1865, prohibits slavery and involuntary servitude. It has two sections: "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation." The amendment was followed the next year by the Civil Rights Act of 1866, which overruled the U.S. Supreme Court's denial of black citizenship in *Dred Scott v. Sandford* in 1857. Significantly, the Civil Rights Act also authorized basic economic rights of property and contract in addition to access to courts. Each of the three amendments represented some effort to grant meaningful citizenship to blacks and to prevent Southern states from re-enslaving the race in new forms. But they have generated quite different jurisprudences. Although the Fourteenth Amendment is the best known, it is the Thirteenth Amendment that would best support a reparations cause of action.

All three amendments were fairly buried in the racial retrenchment following the Reconstruction Period after the Civil War. Despite congressional intent to ensure meaningful black citizenship, it was not until the mid-twentieth century that the U.S. Supreme Court began that effort in earnest. During the years in which Chief Justice Warren presided over the Supreme

Court (1953-1969), the Fourteenth Amendment emerged as the original engine for combating racial supremacy. The Fourteenth Amendment provides for equal protection to all people before the law. The possibility of a fully racially liberatory interpretation was almost immediately limited, however, as the Court concluded that state action and discriminatory intent were required to trigger Fourteenth Amendment violations. Under this interpretation, the Fourteenth Amendment did not reach purely "private" acts—a jurisprudential category invented to contrast with the doctrine of state action—and mere racial inequity or racially biased acts did not constitute violations of the Fourteenth Amendment if invidious intent could not be proven. In its post-Warren incarnations, the U.S. Supreme Court interpreted the Fourteenth Amendment to be a guarantee of color-blindness rather than racial equality. Under this conceptualization, white Americans as much as black Americans suffer the harms of race, although blacks were enslaved and systemically denied all meaningful rights, while whites held them in bondage.

The Thirteenth Amendment has promise both as a cause of action for reparations and as an intervention into the jurisprudence of color-blindness. The critical twentieth century case law that gave anti-discrimination content to the Thirteenth Amendment was *Jones v. Alfred H. Mayer, Co.*, decided in 1968. In that case, the U.S. Supreme Court resurrected the validity of the 1866 Civil Rights Act and the Thirteenth Amendment to conclude that a private actor's refusal to sell property to blacks violated federal civil rights law. The *Jones* decision focused on Section 2 of the amendment, noting that it specifically gave Congress power to end what the Court named the badges and vestiges of slavery. As legal scholar Douglas Colbert summarizes it in a *Harvard Civil Rights-Civil Liberties Law Review* article, the Court refused to limit its interpretation of the amendment to eliminating only the formal "auction block," while allowing black slavery to continue unimpeded in new forms.

Although the *Jones* decision focused on Section 2 of the Amendment, many legal scholars and judges have urged a restoration of the meaning of the first section, which is arguably the more significant one. Not only can Congress pass legislation

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to eliminate enslavement under Section 2, there is a state imperative to actively eliminate enslavement and its badges and incidents, as required in Section 1 of the amendment. Constitutional theorists have argued about the applicability of this theory in contexts ranging from labor, to forced prostitution, to children's rights, to abortion. Despite these creative and promising scholarly treatments, the Thirteenth Amendment remains an under-litigated doctrine and its ban on slavery an under-theorized concept in the struggle for racial justice.

### A Jurisprudence of the Thirteenth Amendment

Developing Section 1 of the Thirteenth Amendment is potentially valuable to a reparations movement for several reasons. The theory of reparations is economic recompense from public and private actors for the on-going effects of black enslavement. Starting with the last point, unlike the Fourteenth Amendment, the Thirteenth offers a direct framework to

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connect contemporary economic depredations to blacks to the economic violence of slavery. This is important because people working at the grass-roots elements of the campaign conceptualize reparations as repairing slavery. Casting reparations as less than this, a remedy for an abstracted racism for instance, would most likely lose political support from the black community, and sympathetic non-blacks. A crucial part of what reparations remedies repair is the psychic damage done by state-inflicted or sanctioned injuries. This implicates the essential core of the U.S. legal system: wrongs done for which injury can be shown warrant recompense absent a compelling reason justifying the harm. Reparations are more than an economic payment; they are a deeply philosophical recognition of the humanity and worth of one wronged. A cause of action for reparations

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that does not explicitly incorporate slavery will almost certainly fail as a political and moral, as well as, a legal matter. And because it exists as an anti-slavery imperative, the Thirteenth Amendment does not exclude considerations of the on-going racial effects of enslavement. Slavery explicitly was a racial institution. In every state but Delaware, blacks were presumed at law to be slaves; proving one was legally white constituted a defense to slavery. The badges and incidents of slavery the Thirteenth Amendment opposes will overwhelmingly manifest in racial forms. The amendment does not prohibit, and even invites, analyses of racial harm.

The Thirteenth Amendment also diverges from the Fourteenth Amendment in the intent requirement. Unlike the latter, the Thirteenth Amendment has not been interpreted to require state action and intent to discriminate. Because its emphasis is on eliminating slavery and its relics, its jurisprudence recognizes that actors, private and public, can often unwittingly permit and perpetuate the customs and norms of slavery. Finally, the legislative history of the Thirteenth Amendment shows it was meant to protect economic rights as well as political rights. Douglas Colbert shows how the legislative debates explicitly were about, not just the end of servitude, but the extent of affirmative black rights. He concludes: "By linking present racial discrimination to this nation's history of slavery and apartheid, a Thirteenth Amendment analysis uniquely addresses existing racial and economic injustice as modern relics and badges of slavery." It thereby offers the perfect theory for awarding black reparations.

In summary, the Thirteenth Amendment did not end slavery with the understanding that racial economic castes would replace formal black slavery. To prevent this, the amendment calls for policies and state efforts to end the economic manifestations of black slavery, whether perpetuated by the state or a private individual, with or without invidious intent. The goal of the Thirteenth Amendment is to end the badges and incidents of slavery, not to engender color-blindness.

#### Preparation for Litigation

Certain legal procedural obstacles are to be anticipated, such as statute of limitations, laches, standing, and sovereign

immunity. Some can be avoided with expert technical lawyering. Others will require more substantive strategies. But rather than being viewed as diversions, surmounting some of those barriers may enhance the political and judicial viability of the suit. For instance, the statute of limitations on bringing suit may appear daunting. Reparations are based on a harm stemming from slavery; the statute has run on practically every cause of action we have conceived. However, under the doctrine of continuing violation of rights, a statute of limitations may be tolled. Reparations lawyers must therefore identify deprivations of black economic personality under slavery that continued post-slavery, into this century.

While there are several potential causes of action, one of the primary ones involves denial of federal benefits. Not only were enslaved blacks unable to enforce property rights, but much of the massive homestead distributions of land in the American West during the 19th century excluded blacks, either directly or de facto. In addition, black veterans returning from World War II found patterns of earlier wars repeated when they received lesser benefits than did their white compatriots. In programs initiated for returning soldiers in the Servicemen's Readjustment Act of 1944, commonly known as "the G.I. Bill," mortgage and school tuition benefits extended to black soldiers were devalued due to state endorsed and enforced segregation. There were far fewer places they could attend school or purchase housing. The schools they were able to attend and houses they were able to buy were less valuable because they were black institutions and neighborhoods, respectively, in an economy that valued whiteness. Finally, in the mid-twentieth century, the federal government took several steps to subsidize the

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construction of suburbs as racially segregated spaces, which simultaneously devalued black property in urban areas. Independent, private banks followed these federal guidelines, and blacks found themselves doubly squeezed into emerging ghettos and out of suburbs being invented as white. Like the homestead acts, the G.I. bills for soldiers and the federal housing programs were moments of massive government subsidization that supported an emerging middle class. Blacks were excluded from this process and denied economic personality in ways that reflected the badges of slavery.

Another obstacle may be resolved by distinguishing legislative and judicial reparations awards. Standing is frequently raised as a procedural obstacle to judicial reparations; unlike comfort women and internment victims, American slaves and their direct heirs are no longer alive. Moreover, part of the invidiousness of slavery is that the system ripped apart black families, denying them the possibility of keeping records and genealogies. The fact that few blacks can trace their ancestry to specific enslaved persons is part of the injury of enslavement. One could approach this obstacle in two ways. One could utilize equitable principles to argue that one who actively destroys



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clear where diamonds were originally mined, not just where they were exported from before reaching Belgium.

The United Nations has attempted to address this issue in Angola, where the rebel group *Uniao Nacional Para a Independencia Total de Angola* (UNITA) uses diamond revenues to fund the ongoing civil war. The Angolan conflict has killed over 300,000 people since the country returned to civil war in 1992. The UN Security Council passed Resolutions 1173 and 1176, which prohibit the direct or indirect export of Angolan diamonds unless accompanied by a Certificate of Origin (CO) issued by the Angolan Government of Unity and National Reconciliation. The illegal diamond trade continues, however, because of inadequate controls at all levels of the diamond trade, including the HRD's failure to verify COs and neighboring countries' ineffective verification of sources of origin. On March 10, 2000, the UN issued the *Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA* about how UNITA evades the sanctions and continues to smuggle diamonds. The report recommended that mechanisms be developed for identifying within the diamond market those diamonds without a customs declaration, and that those individuals dealing in undeclared rough diamonds be subject to criminal penalties.

Under pressure from NGOs, national governments, and the United Nations, De Beers vowed in October 1999 not to buy diamonds from Angola and to review its buying operations in West African countries. In February 2000, De Beers agreed to buy only government-certified diamonds and guaranteed that the all uncut gems sold through its Central Selling Organization did not originate in rebel-held territories. A company spokesman verified that De Beers instructed its buyers in Antwerp not to buy informal-sector diamonds coming out of Africa.

### U.S. Efforts

In the United States, two members of the U.S. House of Representatives, Representatives Tony Hall (D-Ohio) and Frank Wolf (R-Virginia), called on U.S. Ambassador to the United Nations Richard Holbrooke to expand the sanctions on black market diamonds from Angola to include black market

diamonds from Sierra Leone. The Congressmen urged the United Nations to put sanctions on the UN Security Council's agenda and to pass a resolution modeled after UN Resolution 864, which prohibits the purchase of diamonds from Angola's UNITA rebels. "By capturing the diamond-mining region, rebels there transformed themselves from a rag-tag bunch of 400 to a well-equipped gang of 25,000. Diamonds allowed them to buy the weapons they need to oust the country's democratically elected government—and turned the people living in diamond-rich areas into targets for attack," Representative Hall said.

Additionally, on November 1, 1999, Representative Hall introduced a bill entitled Consumer Access to a Responsible Accounting of Trade (CARAT) Act of 2000. The legislation recognizes that U.S. consumers purchase 65 percent of the world's gem-quality diamonds and calls for the disclosure of where diamonds are mined. Given the United States' purchasing power in the diamond market, U.S. compliance with diamond regulations would set an important precedent for other countries to follow.

### Conclusion

Critics of COs argue that the plan is too cumbersome to be implemented. The benefits of having COs, however, far outweigh the concerns about practicality. Sierra Leone has endured nine years of civil war and serious human rights abuses. Currently, the nation is struggling to maintain a fragile peace accord. The RUF continues to inflict human rights abuses while it profits from the diamond trade. De Beers has taken important steps to close its offices in nations where it suspects diamond smuggling occurs. Requiring COs is one more means to prevent human rights abusers from profiting from the sale of diamonds on the world market. 🌐

*\*Sheryl Dickey is a J.D. candidate at the Washington College of Law and a publication editor for the Human Rights Brief.*

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records cannot then invoke that absence to recuse its own legal liability. Another approach is to craft a series of causes of action, stemming from different continuing violations, similar to the strategy for statute of limitations. Because these actions will have to conform to the statute of limitations and the harms extend into this century, blacks today should be more able to identify and prove legal relationships with those affected. In the case of World War II veterans, many will still be alive today.

### Conclusion

Putting racism into economic language is important. A significant effect of racism is its dissociation of blacks from markets and economics. Part of the reason so many Americans are skeptical of awarding reparations is the absence of a compelling discourse of black economic personality and desert of wealth. Reparations are recognition of the severe economic harm inflicted on blacks. Developing a reparations cause of action will yield several positive results. In defining the contours of a Thirteenth Amendment-based racial jurisprudence, it will turn the nation's atten-

tion toward what black slavery entailed, connect current acts, including private ones, to customs, norms, and history stemming from slavery and segregation, and comprehend slavery's ongoing economic effects. When confronted with this history, then perhaps we can come to a national consensus on what the anti-slavery imperative of the Thirteenth Amendment means. 🌐

For additional information, see the National Coalition of Blacks for Reparations in American website at [www.ncobra.com](http://www.ncobra.com).

*\*Adrienne D. Davis is a Professor of Law and Co-Director of the Gender, Work & Family Project at American University Washington College of Law. Copyright 2000, Human Rights Brief and Adrienne D. Davis.*

