

# RACIAL REPARATIONS: JAPANESE AMERICAN REDRESS AND AFRICAN AMERICAN CLAIMS

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## I. INTRODUCTION

In 1991 the United States Office of Redress Administration presented the first \$20,000 reparations check to the oldest Hawai'i survivor of the Japanese American internment camps. I attended the stately ceremony. The mood, while serious, was decidedly upbeat. Tears of relief mixed with sighs of joy. Freed at last.

Amidst the celebration I reflected on the Japanese American redress process and wondered about its impacts over time. The process had been arduous, with twists and turns. Many Japanese Americans contributed,<sup>1</sup> and their communities overwhelmingly considered reparations a great victory, as did I.

Other racial groups lent support, often in the form of political endorsements. Support also came as ringing oratory—for instance, the moving speech on the floor of the House of Representatives by African American Congressperson Ron Dellums.<sup>2</sup> Yet some of the support seemed begrudging. One African American scholar observed,

[t]he apology [to Japanese Americans] was so appropriate and the payment so justified . . . that the source of my ambivalent reaction was at first difficult to identify. After some introspection, I guiltily discovered that my sentiments were related to a very dark, brooding feeling that I had fought long

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<sup>1</sup> See Takeshi Nakayma, *Historic Chapter Closes*, *RAFU SHIMPO*, Aug. 10, 1998, 1, 3. Contributors to Japanese American redress included the Japanese American Citizens League (JACL), the National Coalition for Japanese American Redress, numerous elected officials and grassroots organizers.

<sup>2</sup> See 133 CONG. REC. H7555, H7576-77 (daily ed. Sept. 17, 1987) (statement of Rep. Dellums), 135 CONG. REC. H7597, H7626-27 (daily ed. Aug. 4, 1988) (statement of Rep. Dellums). In support of an amendment to the Related Agencies Appropriations Act of 1990 concerning the Civil Liberties Act of 1988, Dellums recalled:

and hard to conquer—inferiority. A feeling that took first root in the soil of “Why them and not me.”<sup>3</sup>

This confession led me to ask about what political role Japanese Americans might play in future struggles for racial justice in America. That question then led to my essay in 1992 about the social meanings of Japanese American redress.<sup>4</sup> The essay started with the recognition that Japanese American beneficiaries of reparations benefited personally, sometimes profoundly. The trauma of racial incarceration, without charges or trial, and the lingering self-doubt over two generations left scars on the soul. The government’s apology and bestowal of symbolic reparations fostered long overdue healing for many. As I observed then, redress was:

cathartic for internees. A measure of dignity was restored. Former internees could finally talk about the internment. Feelings long repressed, surfaced. One woman, now in her sixties, stated that she always felt the internment was wrong, but that, after being told by the military, the President and the Supreme Court that it was a necessity, she had come seriously to doubt herself. Redress and reparations and the recent successful court challenges, she said, had now freed her soul.<sup>5</sup>

But, I wondered, what were the long-term societal effects of reparations—the social legacy of Japanese American redress beyond personal benefits? Would societal attitudes toward Asian Americans and other racial minorities change? Would institutions, especially those that curtailed civil liberties in the name of national security, be restruc-

I participated in the debate that gave rise to the authorizing legislation. For some of us in this Chamber, that was a very painful debate for me, a very emotional debate. Hopefully, for all of us it was a debate full of principle[,] integrity and compassion. . . .

Mr. Speaker, I urge support of the amendment before us. This is a matter of high principle, and those of us who recall the debate on the floor remember there were tears in the House Chamber, and there was conflict, agony, and pain in this Chamber.

135 CONG. REC. H7595–02, H7626–27 (daily ed. Oct. 26, 1989) (statement of Rep. Dellums).

<sup>3</sup>Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 647 (1993).

<sup>4</sup>See generally Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT’L L. & POL’Y 223 (1992) [hereinafter *Social Meanings of Redress*]. See also Sarah L. Brew, Note, *Making Amends for History: Legislative Reparations for Japanese Americans and Other Minority Groups*, 8 LAW & INEQ. J. 179 (1989); Tyron J. Sheppard & Richard Nevins, *Constitutional Equality/Reparations At Last*, 22 U. WEST L.A. L. REV. 105 (1991).

<sup>5</sup>Yamamoto, *Social Meanings of Redress*, *supra* note 4, at 227.

tured? Would Japanese American reparations serve as a catalyst for redress for others?

I identified and critiqued two emerging and seemingly contradictory views of reparations for Japanese Americans and then offered a third. The first view was that redress demonstrates that America does the right thing, that the Constitution works (if belatedly) and that the United States is far along on its march to racial justice for all. I criticized that view as unrealistically bright.

The criticism is not that reparations are insignificant for recipients; the criticism is that they can lead to an "adjustment of individual attitudes" towards the historical injustice of the internment without giving current "consideration to the fundamental realities of power." The "danger lies in the possibility of enabling people to 'feel good' about each other" for the moment, "while leaving undisturbed the attendant social realities" creating the underlying conflict.<sup>6</sup>

The second view was that "reparations legislation has the potential of becoming a civil rights law that at best delivers far less than it promises and that at worst creates illusions of progress, functioning as a hegemonic device to preserve the status quo."<sup>7</sup> I criticized that view as overly dark.

As part of this critique, and drawing upon critical race theory insights, I offered a third view.

[R]eparations legislation and court rulings in cases such as [the] *Korematsu* [*coram nobis* case] do not . . . inevitably lead to a restructuring of governmental institutions, a changing of societal attitudes or a transformation of social relationships, and the dangers of illusory progress and co-optation are real. At the same time, reparations claims, and the rights discourse they engender in attempts to harness the power of the state, can and should be appreciated as intensely powerful and calculated political acts that challenge racial assumptions underlying past and present social arrangements. They bear potential for contributing to institutional and attitudinal restructuring . . . .<sup>8</sup>

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<sup>6</sup> *Id.* at 231-32 (citations omitted) (quoting Edmonds, *Beyond Prejudice Reduction*, MCS CONCILIATION Q., Spring 1991, at 15).

<sup>7</sup> *Id.* at 229.

<sup>8</sup> *Id.* at 233. The *Korematsu coram nobis* litigation in 1983-84 reopened the United States Supreme Court's decision in the original *Korematsu* case in 1944 which upheld the constitution-

In light of this third view, I posited that the social meaning of Japanese American redress was yet to be determined. I suggested that the key to the legacy of redress was how Japanese Americans acted when faced with continuing racial subordination of African Americans, Native Americans, Native Hawaiians, Latinas/os and Asian Americans. Would we draw upon the lessons of the reparations movement and work to end all forms of societal oppression, or would we close up shop because we got ours?

Six years have passed. During that time, the United States, indeed the world, has gone apology crazy. Japanese American redress has stimulated a spate of race apologies. Some apologies appear to reflect heartfelt recognition of historical and current injustice and are backed by reparations. Other apologies appear empty, as strategic maneuvers to release pent-up social pressure.<sup>9</sup>

Amidst this phenomenon African Americans have renewed their call for reparations for the legally sanctioned harms of slavery and Jim Crow oppression. These renewed claims have gained momentum, perhaps more so than at any time since Reconstruction—when Congress and the President sought to confiscate Southern land and provide freed slaves with forty acres and a mule.<sup>10</sup> The Florida legislature recently approved reparations for survivors and descendants of the 1923 Rosewood massacre.<sup>11</sup> The African American victims of the Tuskegee syphilis experiment received reparations and a presidential apology in 1997.<sup>12</sup> One reparations lawsuit was filed on the West Coast and a reparations class action is contemplated on the East Coast.<sup>13</sup> Representative John Conyers' resolution calling for a Congressional Reparations Study

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ality of the internment. *Korematsu v. U.S.*, 584 F. Supp. 1406 (N.D.Cal. 1984). Based on recently discovered World War II documents showing the absence of military necessity for the internment and the Justice Department's wilful misrepresentations to the Court, the federal district court found a manifest injustice and set aside Fred Korematsu's conviction for refusing to abide by the military's exclusion orders. *See id.* at 1417.

<sup>9</sup> *See* Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47 (1997) [hereinafter *Race Apologies*].

<sup>10</sup> *See* Salim Muwakkil, *Does America Owe Blacks Reparations?*, IN THESE TIMES, June 30, 1997 (describing mounting community activism in support of reparations). *See also* Verdun, *supra* note 3, at 600 (describing five African American reparations movements since the Civil War).

<sup>11</sup> In 1995, each of the nine African American survivors of the mayhem as a result of a white woman's false rape charge was awarded \$150,000 in reparations; the descendants of Rosewood residents received between \$375 and \$22,535 for loss of property. *See* Lori Robinson, *Righting a Wrong Among Black Americans: The Debate is Escalating over Whether an Apology for Slavery is Enough*, SEATTLE POST-INTELLIGENCER, June 29, 1997, available in 1997 WL 3200157.

<sup>12</sup> *See Apologize but Don't Forget*, AUSTIN AMERICAN-STATESMAN, May 16, 1997, available in 1997 WL 2823680.

<sup>13</sup> *See infra* note 116 (describing the 1995 California case, *Cato v. United States*, 70 F.3d 1103, 1110 (9th Cir. 1995)).

Commission, reintroduced every year since 1989, has garnered endorsements from an impressive array of political organizations.<sup>14</sup>

And in every African American reparations publication, in every legal argument, in almost every discussion, the topic of Japanese American redress surfaces.<sup>15</sup> Sometimes as legal precedent. Sometimes as moral compass. Sometimes as political guide. In similar fashion, Native Hawaiian reparations claims against the United States for the illegal overthrow of the sovereign Hawaiian nation in 1893, and against the State of Hawai'i for mismanagement of Hawaiian trust lands,<sup>16</sup> also cite reparations for Japanese Americans.

In light of recent reparations history and contemporary claims, the diverging views of Japanese American redress and the February 1999 closure of the Office of Redress Administration,<sup>17</sup> the time is ripe

<sup>14</sup> See Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 105th Cong. (1997). Groups supporting this bill include the NAACP, the Southern Christian Leadership Conference, the city councils of Cleveland, Detroit, and Inglewood and the Council of Independent Black Institutions. See Robinson, *supra* note 11.

<sup>15</sup> See DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* 51 (2d ed. 1980); Verdun, *supra* note 3.

<sup>16</sup> Current Hawaiian claims for reparations are divided into both court and legislative claims against both the federal and state governments. Examples of court claims against the state government include: Office of Hawaiian Affairs v. State of Hawaii, Civ. No. 94-0205-01, *appeal docketed*, No. 20281 (1998) (the Office of Hawaiian Affairs, created by the Hawai'i Constitution to represent Native Hawaiians, has asserted claims to back payment of one-fifth of ceded land trust revenues, over \$1 billion; the case is on appeal to the Supreme Court of Hawai'i); Ka'ai'ai v. Drake, Civ. No. 92-3742-10 (1st Cir. 1992) (after successful lobbying, the 1995 legislature committed \$90 million a year for 20 years, \$600 million total, to the Homelands Trust); Kealoha v. Hee, Civ. No. 94-0118-01 (1st Cir. 1994) (plaintiffs sought to enjoin negotiations, settlement, and the execution of release by trustees of Office of Hawaiian Affairs "concerning claims against the United States for the overthrow of the Hawaiian government in 1893, and the redress of breaches of the ceded lands trust committed by the United States and the State of Hawai'i").

Examples of legislative reparations proposals include: The Aboriginal Lands of Hawaiian Ancestry, Inc. Association ("ALOHA") (during the 1970s ALOHA called attention to the United States involvement in the overthrow of the Hawaiian government; their efforts resulted in the introduction of a series of reparations bills into Congress, bringing attention to Native Hawaiian claims on a federal and state level); The Native Hawaiian Autonomy Act, H.B. 98-0270-1, 19th Leg., 1st Spec. Sess. (Haw. 1997) (the bill proposed the creation of Native Hawaiian Trust Corporation to assume the assets, liabilities and responsibilities currently held by the state as trustees for Native Hawaiians; in the face of stiff Hawaiian political opposition, the legislation died); The Native Hawaiian Plebiscite, 1996 Haw. Sess. Laws 140 (to acknowledge and recognize the unique status the Native Hawaiian people bear to the State of Hawaii and to the United States and to hold an election allowing Native Hawaiians to decide whether to set up a constitutional convention establishing an indigenous sovereign government); Senator Daniel Akaka's commitment to introducing legislation in Congress. See Pete Pichaske, HONOLULU STAR BULLETIN, July 14, 1998 (describing Akaka's proposed advisory committee of tribal leaders and indigenous peoples to address Native Hawaiian self-determination rights). See generally NATIVE HAWAIIAN RIGHTS HANDBOOK (Melody Kapilialoha MacKenzie ed., 1991).

<sup>17</sup> The ORA ended its service on February 5, 1999. See Civil Liberties Act of 1988, 50 U.S.C. app. § 1989(b-3).

to revisit the legacy of Japanese American redress. As part of that inquiry, it is also time to assess what Japanese American redress means to racial reparations movements for others.

In this essay I examine aspects of Japanese American reparations history and the current reparations debates and offer the beginnings of a conceptual framework for inquiring into, critiquing and guiding ongoing reparations efforts in the United States. The framework I offer operates from a specific vantage point: groups seeking reparations. The framework, however, does not address "how to get reparations" so much as "how to think about the reparations process with all its potential and risk." Its utility lies in helping groups frame concepts, craft language and determine strategy in deciding whether to embark on a reparations journey and what to anticipate along the way.<sup>18</sup>

More specifically, Section II of this essay surveys the terrain of recent race apologies and reparations and asks about the extent of Japanese American support for other groups currently seeking redress for historical injustice. Section III asks what lessons, bright and dark, might be drawn from the political and legal processes of Japanese American redress. It begins with the assumption that reparations usually have salutary impact upon recipients and that in certain situations reparations can be transformative for groups struggling against oppression. The section then focuses on the underside of that assumption, a darker side often only minimally explored during legislative lobbying, court suits, community demonstrations and media presentations—a darker side often overlooked amid the hot rhetoric justifying reparations.

That underside is comprised of the risks of reparations efforts—the hidden dangers of entrenched victim status, image distortion, mainstream backlash, interminority friction and status quo enhancement. Drawing from experiences of Japanese American redress and the current African American and Native Hawaiian reparations move-

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<sup>18</sup>In discussing Japanese American redress and African American and, to a lesser extent, indigenous Hawaiian reparations claims, I am not passing judgment about the comparative value or priority of racial group reparations claims. Nor is my decision in this essay to not address in depth reparations claims of other groups (such as various Native American tribes; see *infra* note 22) meant to diminish the importance of those claims. In saying this, I am not suggesting that all group reparations claims are the same. Groups have experienced oppression differently, and every serious discussion of reparations should acknowledge the uniqueness and moral strength of African American claims (due to slavery and Jim Crow apartheid) and indigenous peoples' claims (due to physical and cultural genocide). See generally Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 *ASIAN PAC. AM. L.J.* 33 (1995) [hereinafter *Rethinking Alliances*] (describing how groups are "differentially racialized," giving rise to differing group identities, living conditions and claims).

ments, and for the sake of simplicity, I cast this underside, the risks, in three ways. The first is the distorted legal framing of reparations claims; the second, the dilemma of reparations process; and the third, the ideology of reparations.

Section IV assesses pending African American reparations claims in light of these concerns. Finally, in the context of future claims, Section V offers an expanded view of reparations not as compensation, but as "repair"—the restoration of broken relationships through justice.

## II. JAPANESE AMERICAN AND OTHER REDRESS MOVEMENTS

Movements to redress historical racial injustice mark the global landscape. These movements are part of the Japanese American redress legacy.<sup>19</sup> Internationally, the Canadian government recently apologized to and promised substantial reparations for Canada's indigenous peoples for destruction of their culture and way of life; the British offered reparations to New Zealand's Maori for British-initiated 19th century bloody race wars; French President, Jacques Chirac, recognized French complicity in the deportation of 76,000 Jews to death camps; the Catholic Church apologized for its assimilationist policy in Australia that contributed to the Aborigines' spiritual and cultural destruction. Still unresolved are the claims of the Korean "comfort women" forced into prostitution by the Japanese government.<sup>20</sup>

Nationally, President Clinton apologized to indigenous Hawaiians for the illegal U.S.-aided overthrow of the sovereign nation and the near decimation of Hawaiian life that followed; the Methodist Church apologized to Native Americans in Wyoming for the 1865 post-treaty slaughter at the hands of the U.S. cavalry led by a Methodist minister; the Florida legislature awarded reparations to survivors of mayhem at Rosewood; and the federal government offered reparations to the African American victims of the Tuskegee syphilis experiment and agreed to apologize to and provide limited reparations for Japanese Latin Americans kidnapped from Latin American countries and placed in U.S. internment camps as hostages during WWII.<sup>21</sup> Claims that are

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<sup>19</sup>The following are brief descriptions of recent national and international apologies and reparations catalogued in greater detail in Yamamoto, *Race Apologies*, *supra* note 9, at 68 app.

<sup>20</sup> See *Japanese Court Rules in Favor of "Comfort Women"* (visited Apr. 27, 1998) <<http://www.cnn.com/WORLD/asiapcf/9804/27/japan.comfort>>.

<sup>21</sup> See Caroline Aoyagi, *Bittersweet Victory for Japanese Latin Americans: After 57 Years, Former Internees to Receive Apology and \$5,000 Redress Payment from United States*, *PACIFIC CITIZEN*, June 19-July 2, 1998, at 1.

still pending include: Native Hawaiian claims for land and money reparations from the U.S. and the State of Hawai'i, Native American reparations claims for treaty violations by the U.S.<sup>22</sup> and African American slavery-based reparations claims.<sup>23</sup>

The political movements supporting these reparations claims have been bolstered by the reality of Japanese American redress. Yet the larger questions asked six years ago remain. First, in what ways have Japanese Americans, as an exercise of group agency, engaged in these recent and ongoing reparations efforts of others? Have the Japanese Americans—community and legal organizations, media, politicians, educators—lent organizational help and political and legal muscle to the movements of others?<sup>24</sup> Or, have they sat back and said, "you're on your own?"<sup>25</sup> Second, to what extent have Japanese Americans engaged with other Asian American groups<sup>26</sup> and other communities of color

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<sup>22</sup>The United States government has attempted to redress its past transgressions against Native Americans through reparations. Examples of past reparations for appropriation of land and other resources include: \$81 million to the Klamaths of Oregon; \$105 million to the Sioux of South Dakota; \$12.3 million to the Seminoles of Florida; \$31 million to the Chippewas of Wisconsin; and \$32 million to the Ottowas of Michigan. See Malik Russell, *The African Holocaust, Reparations and the Apology*, MICHIGAN CITIZEN, Nov. 8, 1997, available in 1997 WL 11677255; see also Mike Nemeth, *Forgotten Tribes Search for Place in History: Kih-I-Allus Dwindles; Samish 'Here to Stay'*, SEATTLE TIMES, Jan. 5, 1998, available in 1998 WL 3132581. The struggle for reparations still continues. Present-day Native American claims for reparations include: the Hopi's and Lenape's claims against museums pursuant to the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3006 (1994) (any federally funded institution, including museums, that has remains or artifacts from federally recognized tribes has the obligation to report the objects to the specific tribes), Kristen Kromer, *Denver Museum Returning 164 Artifacts to Hopi Tribe*, DENVER POST, May 23, 1998, available in 1998 WL 6111706; the Lenape's claim for land and reparations from the city of Wildwood, New Jersey, Thomas J. Fitzgerald, *Indian Tribe Wants Wildwood Back: Legal Battle over Casino Site Widens*, THE RECORD (NJ), Mar. 21, 1998, available in 1998 WL 5799684; the Sioux Nation's claim to 1.3 million acres of federally unoccupied lands, Susan Lope, *Indian Giver: The Illusion of Effective Legal Redress for Native American Land Claims*, 23 SW. U. L. REV. 331, 358, (1994); and their Black Hills claim, see *id.* at 346; various claims for hunting and fishing rights and sovereignty by the Cheyenne River Sioux, the Crow tribes and the Confederated Tribes and Bands of the Yakima Indian Nation, John S. Harbison, *The Broken Promise Land: An Essay on Native American Tribal Sovereignty Over Reservation Resources*, 14 STAN. ENVTL. L.J. 347 (1995).

<sup>23</sup> See *infra* notes 104–13 and accompanying text.

<sup>24</sup> One example of organizational help is the Hawai'i Chapter of the Japanese American Citizens League's endorsement of the Hawaiian sovereignty movement and its educational sessions on Hawaiian history and the various forms of indigenous sovereignty. Interview with Alan Murakami, President of the Hawai'i Chapter of the Japanese American Citizens League, in Honolulu, Hawai'i (Mar. 23, 1997). Of course, one important factor of engagement is the extent to which other groups have asked Japanese Americans to participate.

<sup>25</sup> See Sachii Seko, *Remembering Walter Weglyn*, PACIFIC CITIZEN, June 19–July 2, 1998, at 7 ("For most of us, interest in redress faded soon after President Reagan signed the 1988 Civil Liberties Act, a common attitude being, 'I've got mine.'").

<sup>26</sup> More recent Asian American immigrant groups, including Vietnamese, Laotians, Hmong,



on racial justice issues beyond reparations, such as anti-immigrant legislation, the ending of affirmative action, the curtailment of welfare, job discrimination, English-only proposals and hate violence?<sup>27</sup>

Of course, Japanese American activists have supported others in their political struggles and have worked hard to forge multiracial alliances.<sup>28</sup> Some reparations beneficiaries have pooled reparations money to aid others struggling socially and economically.<sup>29</sup>

Nevertheless, the question persists: Why do some activists in current reparations movements perceive that, as a whole, Japanese Americans benefitting from redress have offered relatively little financial aid and political and spiritual support to others in their justice struggles?<sup>30</sup> Is this perception completely false? Or partially true? If it is false, why does the perception exist? If true in some part, what are the explanations, and what is the Japanese American response?

These questions engender complicated inquiries that encompass, but also extend well beyond, present-day Japanese American political activities. They entail detailed inquiry into past and present intergroup

Koreans, Filipinos and Cambodians, face poverty, discrimination and violence. See Jeff Chang, *Housing Divided, Tragic Failures and Hopeful Successes in Public and Non-Profit Housing Struggles to Integrate the Poor* (describing violence against Vietnamese families in San Francisco public housing project and tense interracial relations) (unpublished manuscript, on file with author).

<sup>27</sup> See generally Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 *IND. L.J.* 1111 (1998).

<sup>28</sup> Recent multiracial collaborations involving Japanese Americans include: Challenging the Anti-Immigrant Backlash (educating lawyers in a grassroots campaign to defeat Proposition 187); the Japanese American Citizens League with Native Americans (commemorating the achievements of Native Americans); Asian American Studies/Latino Workers collaboration (organizing a Latino union at the New Otani Hotel in Los Angeles); Asian Pacific Islanders Against Proposition 187 (uniting 60 organizations to oppose the immigration law); the MultiCultural Collaborative (working on affirmative action and school reform in Watts); APALC of Southern California (providing Los Angeles Asian Pacific American community with multilingual legal services and civil rights advocacy); Asian Pacific American Dispute Resolution Center (mediating services for conflicts within Asian Pacific American communities and interracial conflicts); "A.K.A. Don Bonus" (1995) (a film of a first generation working-class Cambodian family by filmmaker Spencer Nakasako and Cambodian student Sokly "Don Bonus" Ny); the Encampment for Citizenship (a non-profit youth service organization bringing together young people of various cultural and class backgrounds to promote the ideals of equality, social justice and democracy). See also Dean Takehara, *Nihkei in the Civil Rights Movement*, *LOS ANGELES JAPANESE DAILY NEWS*, Wednesday, Feb. 3, 1997, No. 26,897 (discussing the bicultural efforts of Japanese and African Americans opposing discrimination in the 1950s and '60s including Yuri Kochiyama's political work with Malcolm X).

<sup>29</sup> For example, fifteen families from Kahuku, Oahu, in Hawai'i gave \$20,000 from their reparations awards to the rural high school in their low-income area, the population of which is predominantly Hawaiian, Samoan and Tongan American. See Tino Ramirez, *Past Laid to Rest with School Gift*, *HONOLULU STAR BULLETIN*, June 30, 1998, at A1.

<sup>30</sup> See Yamamoto, *Social Meanings of Redress*, *supra* note 4, at 237, 241.

relations. In brief, this inquiry may require digging into whether other groups opposed the Japanese American internment at the time and later supported Japanese American redress. For example, preliminary research reveals an apparent lack of opposition by the National Association for the Advancement of Colored People ("NAACP") to the internment at the time. Although black journalists voiced dissent, neither the NAACP nor any other African American organization submitted an amicus brief when the *Korematsu* internment cases were before the Supreme Court.<sup>31</sup> Did this apparent historical lack of public opposition to the violation of the civil liberties of Japanese Americans, when the NAACP was beginning to forge its civil rights strategy, create an African American interest in later assisting in Japanese Americans' struggles for redress? Consider the strong support for Japanese American redress in the 1980s by black congressional leaders.<sup>32</sup>

The inquiry into intergroup relations may also require digging into and beyond the pervasive effects of white supremacy, into the extent to which Japanese Americans (and Asian Americans) have been complicit in the subordination of African American communities over the last fifty years. In present-day America, depending on the circumstances, racial groups can be simultaneously disempowered and empowered, oppressed and complicit in oppression, liberating and subordinating.<sup>33</sup> Do Asian Americans, themselves subject to continuing discrimination and negative stereotyping,<sup>34</sup> have an obligation to aid in the healing of African American communities culturally, spiritually and economically?

These questions about Japanese American engagement with the justice struggles of other racial groups, which I raise rather than seek to answer in this essay, speak to a larger issue: Is Japanese American reparations solely about redress for Japanese Americans? Or is it also about racial justice for all?

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<sup>31</sup> See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1780 (1989) ("Significantly, neither the NAACP nor any other predominantly black organization submitted an amicus curiae brief to the Supreme Court in *Korematsu v. United States* or the other cases challenging the government's internment policy."). *Id.* See *Korematsu v. United States*, 323 U.S. 214 (1944). See also RICHARD DELGADO, *THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* 171 n.25 (1996). To place this apparent inaction in context, the Japanese American Citizens League initially decided not to oppose the internment (although it later submitted an amicus brief when the *Hirabayashi* case was argued in 1943). In addition, the national office of the American Civil Liberties Union refused to publicly oppose the internment. See PETER IRONS, *JUSTICE AT WAR* 105-18 (1983).

<sup>32</sup> See *supra* note 2.

<sup>33</sup> See generally Yamamoto, *Rethinking Alliances*, *supra* note 18.

<sup>34</sup> See ANGELO N. ANCHETA, *RACE RIGHTS AND THE ASIAN AMERICAN EXPERIENCE* 7-10 (1998)

As I did six years ago, I suggest that the response to these questions, and the mature legacy of Japanese American redress, is yet in the making.

### III. THE POTENTIAL UNDERSIDE OF REPARATIONS PROCESS

With this in mind, I turn to reparations process: What larger lessons might communities of color in the United States draw from Japanese American redress? Most addressing this question talk about how the government rectified a serious violation of constitutional liberties and how a diverse racial community banded together to achieve reparations legislation.<sup>35</sup> These are important salutary lessons. Indeed, I start with the premise that reparations can be beneficial and at times transformative for recipients.

This essay, however, takes a different tack. It focuses on the underside of reparations process—a darker side requiring careful strategic attention by those seeking reparations and requiring forthright acknowledgement by those who have achieved them. To simplify, I identify three aspects of this underside: the distorted legal framing of reparations claims, the dilemma of reparations process and the ideology of reparations. My thesis is not that this underside diminishes the significance of achieving reparations or forecloses future redress efforts. Rather, I suggest that the risks caution careful strategic framing of debate and action and anticipatory grappling with a reparations movement's both bright and darker potential.

#### A. *Legal Framing of Reparations Claims*

The first aspect of the underside of reparations process is the distorted legal framing of reparations claims. Reparations that repair are costly.<sup>36</sup> Meaningful reparations entail change. Change means the loss of some social advantages by those more powerful. For these reasons, those charged with repairing the harms always resist.

Opponents employ legalisms in two ways to aid their resistance. First, they cite the sufficiency of existing laws. Since existing civil rights

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("the United States Commission on Civil Rights concluded that anti-Asian activity in the form of violence, harassment, intimidation, and vandalism has been reported across the nation.") *Id.* at 7.

<sup>35</sup> See, e.g., JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter Irons, ed. 1989).

<sup>36</sup> See *infra* Section V (describing the reframing of reparations from compensation to "repair"—that is, the repairing of tears in the structural and psychological fabric of a society resulting from the social and economic subordination of some of its members).

laws already afford individuals equal opportunity, the argument goes, there is no need for additional reparations legislation to rectify social inequalities.<sup>37</sup> Second, those resisting reparations raise objections shaped by narrow legal concerns. They argue the criminal law defense of lack of bad intent on the part of wrongdoers; they assert the procedural bar of lack of standing by claimants (the difficulty of identifying specific perpetrators and victims); they cite the lack of legal causation (specific acts causing specific injuries); and they cite the impossibility of accurately calculating damages (or compensation).<sup>38</sup>

These concerns seem compelling to lawyers and judges because they resonate with the common law paradigm of a lawsuit—where an individual wrongfully harmed by the specific actions of another in the recent past is entitled to recover damages to compensate for actual personal losses. The typical situation is the pedestrian hit by a speeding car. As Mari Matsuda observes, however, that paradigm works poorly where, over time, members of a group act to preserve that group's system of dominance and privilege by denigrating other groups and excluding other groups' members from housing, businesses, jobs and political and social opportunities; that is, situations of systemic racial oppression.<sup>39</sup>

Yet, despite the misfit, the common law paradigm for reparations persists. African Americans seeking reparations for slavery have tended to frame their arguments according to traditional remedies law—that reparations are a form of both payment for individual losses (just compensation) and divestiture of ill-gotten gain (preventing unjust enrichment).<sup>40</sup> This resort to traditional legal remedies makes some sense at first glance. Compensation and unjust enrichment are well-recognized remedial principles, and they generally appear to fit the circumstances of African American slavery-based claims.

In practical legal application, however, those traditional principles erect inordinately high barriers. For instance, as Vincene Verdun observes, by casting reparations as a “claim for compensation based on

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<sup>37</sup> See Rhonda V. Magee, Note, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 906–07 (1993).

<sup>38</sup> Mari Matsuda has thoughtfully refuted the narrow common law paradigm-based objections to reparations. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 373–88 (1987) [hereinafter *Looking to the Bottom*]; CHARLES R. LAWRENCE, III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 242 (1997).

<sup>39</sup> See Matsuda, *Looking to the Bottom*, *supra* note 38, at 376.

<sup>40</sup> See Verdun, *supra* note 3, at 621.

slavery," present-day African Americans are required to prove "that all African Americans were injured by slavery and that all white Americans caused the injury or benefitted from the spoils of slave labor."<sup>41</sup> The courts legally, and mainstream America politically, have been unwilling to accept this group victim/group perpetrator proposition. They continue to look instead for individual wrongdoers who inflict harm on identifiable individuals, resulting in quantifiable damages. This search, framed by the common law paradigm, undermines historical group-based claims for the wrongs of slavery and Jim Crow segregation.<sup>42</sup>

Without a marked shift away from the individual rights/remedies paradigm, reparations claims face formidable obstacles—unless the circumstances, particulars and timing of the claims allow for recasting those claims in traditional legal garb. For example, the Japanese American redress movement stalled in the late 1970s in part because former internee claims lacked a traditional legal basis. Despite hindsight recognition of historical injustice, government decisionmakers opposed to reparations cited the Supreme Court's 1944 constitutional validation of the internment in *Korematsu*.<sup>43</sup> The government argued there was no legal claim and that, therefore, compensation could not be awarded.<sup>44</sup> Indeed, the *Hohri*<sup>45</sup> class action case, filed in the early 1980s on behalf of internees seeking monetary compensation for internment losses, also ran aground on the shoals of legal procedure—the statute of limitations.

The redress movement regained its political momentum in the mid-1980s in part from the judiciary's rulings in the *Korematsu*<sup>46</sup> and *Hirabayashi*<sup>47</sup> *coram nobis* cases. Those cases reopened the original

<sup>41</sup> *Id.* at 630.

<sup>42</sup> See *infra* Section IV for a detailed discussion.

<sup>43</sup> *Korematsu v. United States*, 323 U.S. 214 (1944). See also James Kilpatrick, quoted by Senator Thurmond in the Civil Liberties Act debates:

As the Supreme Court noted in the case of *Korematsu v. United States*, most of the internees were loyal Americans. But some were not. More than 5,000 of them refused to swear allegiance to the United States and to renounce allegiance to the emperor. Several thousand evacuees requested repatriation to Japan. It is all very well to say today that these citizens should have received fair hearings, but in the spring of 1942 we were involved in a desperate war for national survival. Due process had to yield to the exigencies of the day.

134 CONG. REC. S4396-402 (daily ed. Apr. 20, 1988) (statement of Senator Thurmond quoting James Kilpatrick).

<sup>44</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>45</sup> *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part, rev'd in part*, 782 F.2d 227 (1986), *vacated*, 482 U.S. 64 (1987), *on remand*, 847 F.2d 779 (1988), *cert. denied*, 488 U.S. 925 (1988).

<sup>46</sup> See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

<sup>47</sup> See *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

World War II internment decisions by the Supreme Court on the basis of declassified government documents. The federal courts found that during the war the Justice and War Departments had destroyed and suppressed key evidence and lied to the Supreme Court about the military necessity for the internment. These "factual findings" in specific cases, coupled with a congressional commission's similar conclusions,<sup>48</sup> provided the missing traditional legal cornerstone to the foundation for Japanese American reparations claims.

Ultimately, Japanese Americans succeeded on their reparations claims not because they transcended the individual rights paradigm, but because they were able to fit their claims tightly within it. Consider these facets of the internees' claim: (1) their challenge addressed a specific executive order and ensuing military orders; (2) the challenge was based on then-existing constitutional norms (due process and equal protection); (3) both a congressional commission and the courts identified specific facts amounting to violations of those norms; (4) the claimants were easily identifiable as individuals (those who had been interned and were still living); (5) the government agents were identifiable (specific military and Justice and War Department Officials); (6) these agents' wrongful acts resulted directly in the imprisonment of innocent people, causing them injury; (7) the damages, although uncertain, covered a fixed time and were limited to survivors; and (8) payment meant finality. In the end, the traditional legal rights/remedies paradigm bolstered rather than hindered the internees' reparations claims.

For similar reasons, reparations awarded to African Americans emerged from narrow legal claims of families and survivors of the 1923 Rosewood Massacre.<sup>49</sup> In 1995, the State of Florida paid each of the nine survivors \$150,000 and each of the 145 descendants of residents between \$375 and \$22,535.<sup>50</sup> Framed in terms of property damage, the Rosewood claims fit within the traditional individual rights paradigm. The government perpetrators and victims were identifiable, direct causation was established, damages were certain and limited, and payment meant finality.

By contrast, and as developed further in Section IV, African American groups seeking broad redress for slavery and Jim Crow segregation

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<sup>48</sup> See generally REPORT OF CONGRESSIONAL COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 47-92 (1982) [hereinafter *CWRIC Report*].

<sup>49</sup> See generally MICHAEL D'ORSO, LIKE JUDGMENT DAY: THE RUIN AND REDEMPTION OF A TOWN CALLED ROSEWOOD (1996) (describing the Rosewood Massacre and reparations efforts).

<sup>50</sup> See Robinson, L., *supra* note 11.

have encountered considerable difficulty in casting their reparations claims in terms of individual rights and remedies. Legally framed claims for lost wages, liberty and property meet the slew of standard legal objections identified earlier. Opponents of African American reparations point to: (1) the statute of limitations ("this all happened over one hundred years ago"); (2) the absence of directly harmed individuals ("all ex-slaves have been dead for at least a generation"); (3) the absence of individual perpetrators ("white Americans living today have not injured African Americans and should not be required to pay for the sins of their slave master forbearers"); (4) the lack of direct causation ("slavery did not cause the present ills of African American communities"); (5) the indeterminacy of compensation amounts ("it is impossible to determine who should get what and how much").<sup>51</sup>

The strength of these legal objections impelled Boris Bittker in his highly publicized book, *The Case for Black Reparations*, to purposely omit slavery as the basis for African American reparations.<sup>52</sup> His argument, which fashioned reparations as a civil rights claim under a Reconstruction era statute (known as Section 1983), conceded insurmountable legal obstacles to reparations for the harms of slavery. Rather than challenging the appropriateness of framing black reparations claims as narrow legal civil rights claims, Bittker abandoned slavery as the principal justification for reparations. He instead stressed compensation for present-day societal discrimination. This argument identified harmed individuals—living blacks experiencing discrimination. It identified perpetrators—Americans who operated government and private institutions that supported discrimination in housing, education and jobs. It linked present harm to contemporary acts whose historical roots lay in legalized Jim Crow segregation. And the argument cast damages in terms of lost wages, property and economic opportunities. Bittker framed his argument in this limited fashion to characterize black reparations claims as recognized by law.<sup>53</sup>

Even this narrow legal framing, however, foundered in at least two significant respects. First, the framing was still not narrow enough. Issues such as governmental immunity and proof of racist intent of government actors appeared to block current damage claims.<sup>54</sup> Second, and more significant, this framing reflected "a tactical loss [by]

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<sup>51</sup> Verdun, *supra* note 3, at 607.

<sup>52</sup> See generally BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973).

<sup>53</sup> See *id.*

<sup>54</sup> See generally Derrick A. Bell, Jr., *Dissection of a Dream*, 9 HARV. C.R.-C.L. L. REV. 156, 159-60 (1974) [hereinafter *Dissection of a Dream*] (reviewing BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973)).

excluding the slavery period: setting this voluntary limitation on coverage sacrifices much of the emotional component that provides the moral leverage for black reparations demands."<sup>55</sup>

Opponents of Native Hawaiian reparations cite similar legal objections. They contend that "[i]f there were now a legal right to reparations the Hawaiians could have sued the U.S. government and won years ago . . . . [T]here is now no legal remedy for the alleged moral wrong."<sup>56</sup> These opponents thus deem reparations claims unavailing because they perceive no legal wrong.<sup>57</sup>

Legal arguments against African American and Native Hawaiian reparations often appear compelling when reparations claims are cast narrowly within the traditional individual rights and remedies paradigm. Indeed, for this reason, reparations critics continue to frame reparations claims primarily in narrow legal terms. This does not mean that African American and Native Hawaiian claims lack merit as justice claims. It means that the narrow legal framing of those sweeping reparations claims, based largely on a vast array of historical events, carries heavy baggage.

That baggage does not counsel abandonment of legal claims and court battles. Rather, it counsels a dual strategy. One strategic path focuses on bite-sized legal claims, with limited numbers of claimants, well-defined in time and place. This would resemble situations like Rosewood and Tuskegee and, to some extent, the internment, which were framed in terms of individual rights and remedies. The second, and simultaneous, strategic path recognizes the distortions of narrow legal framing. It therefore reconceptualizes law and litigation broadly as key components of larger political strategies. This alternative path means treating law and court process—regardless of formal legal outcome—as generators of “cultural performances” and as vehicles for providing outsiders an institutional public forum. The strategy also entails communicating counter-narratives to dominant stories about the racial order and attracting media attention to help organize racial

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<sup>55</sup> *Id.* at 158.

<sup>56</sup> Patrick W. Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, 17 HAWAII B.J. 107, 107–08 (1982).

<sup>57</sup> By contrast, many Native Hawaiians seek redress for the U.S.-aided illegal overthrow of the Hawaiian Nation in 1893, which resulted in a loss of sovereignty and land. Because the Provisional Government, which replaced the Queen, actively sought and eventually secured a treaty annexing Hawai'i to the United States, proponents seeking redress contend that the United States and the State of Hawai'i perpetrated the harm upon all Native Hawaiians. See generally NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 16.



communities politically in support of more sweeping reparations claims.<sup>58</sup>

As described in the concluding section, when law and court process are recast in this fashion and when reparations claims are reframed within the law-based paradigm and beyond it in terms of moral, ethical and political dimensions of "repair," reparations can address both the improvement of present-day living conditions of a historically oppressed group and the healing of breaches in the larger social polity. Under these circumstances, reparations claims can appear not only justifiable but essential to the racial health of both communities of color and the nation. This alternative framework for reparations has yet to gain a foundational hold in the rhetoric and strategy of reparations movements. Narrow legal framing of reparations claims continues to dominate, allowing opponents to hide their underlying social and political objections.

What are the opponent's objections? Money. Critics are wondering where reparations resources will come from, and if reparations sufficient to "do justice" will disrupt the economy. Power. They are calculating how reparations can be shaped and conveyed in ways that will advance the interests of mainstream America. Privilege. Critics question whether reparations will alter the existing racial order.<sup>59</sup>

These objections by dominant interests suggest a need for concern about reparations' likely impacts. Will the benefits to recipients have lasting, or only temporary, effect? Will the reparations process reopen or exacerbate old wounds, inflaming rather than healing? Will there be social and political backlash against reparations beneficiaries and political leaders, not only by disgruntled dominant group members but also by marginalized groups who have not received reparations?

Collectively, these questions raise serious concerns worthy of careful consideration in every situation where reparations claims are contemplated. In most instances, no clear answers will be forthcoming. Although there is no simple way to cut through the morass of questions and concerns, I suggest merging them into two additional conceptual categories to facilitate practical exploration by those engaged in reparations movements. Those categories are the dilemma of reparations and the ideology of reparations.

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<sup>58</sup> See generally Eric K. Yamamoto, Moses Haia & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994) [hereinafter *Cultural Performance*] (describing courts in handling indigenous peoples' claims as potential sites and generators of "cultural performances"); DELGADO, *supra* note 31 (describing this approach generally as "legal instrumentalism").

<sup>59</sup> See generally Matsuda, *Looking to the Bottom*, *supra* note 38.

### B. *Dilemma of Reparations*

The dilemma of reparations is the second aspect of the darker side of reparations.<sup>60</sup> Reparations, if thoughtfully conceived, offered and administered, can be transformative. They can help change material conditions of group life and send political messages about societal commitment to principles of equality. When reparations stimulate change, however, they also generate resistance. Proponents suffer backlash. Thus, when reparations claims are treated seriously, they tend to recreate victimhood by inflaming old wounds and triggering regressive reactions.<sup>61</sup> This is the dilemma of reparations.

Seeing these dual possibilities in all redress movements, Joe Singer describes the potential for further victimization in two contemporary situations. He recounts Jews' highly publicized demands in 1997 that Swiss banks account for and restore Jewish money and gold held by the banks for Nazis during World War II.<sup>62</sup> Bank acknowledgment and restitution treats Jews as worthy human beings with rights, including the right to own property. Restitution counters the anti-Semitic myth of Jews misappropriating the property of others. Jewish "victimhood is acknowledged, but Jews are not treated as mere victims, but as agents calling the Swiss banks to account . . . ."<sup>63</sup>

One problem, however, is that Jewish demands for monetary restitution resurrect for some the harsh historical stereotypes of Jews "as money-grubbing, as having both accumulated secret bank accounts in the past and as caring now about nothing more than money . . . ."<sup>64</sup> Another, and broader, problem is that additional Jewish reparations claims may spark resentment among other groups whose reparations claims have gone unmet (such as Hungarian gypsies who were exterminated by Nazis in Auschwitz and elsewhere).<sup>65</sup>

Singer also describes reparations demands for African Americans.<sup>66</sup> Some understand those demands as a call for redress of past injustice; others understand the demands as a "refusal to grow up."<sup>67</sup>

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<sup>60</sup> See generally Joseph William Singer, *Reparation* (1997) (unpublished manuscript, on file with author).

<sup>61</sup> See *id.* at 3-4.

<sup>62</sup> See *id.* at 3. See also Lance Morrow, *The Justice of the Calculator*, TIME, Feb. 24, 1997, at 45.

<sup>63</sup> Singer; *supra* note 60, at 3.

<sup>64</sup> *Id.* at 3. See also Johanna Mcgeary et al., *Echoes of the Holocaust: The Effort to Recover Jewish Assets Deposited in Swiss Banks Before and During the War has Grown into a Bitter Crusade that Dredges Up the Horrors of the Past*, TIME, Feb. 24, 1997, at 36.

<sup>65</sup> See, e.g., Alex Bundy, *Gypsies Demand Compensation for Suffering During Holocaust*, HONOLULU ADVERTISER, Aug. 4, 1997, at A10.

<sup>66</sup> See Singer; *supra* note 60, at 4.

<sup>67</sup> *Id.*

The result, evident in the volatile affirmative action debates, is that "calls to repair the current effects of past injustice are met with derisory denials that continuing injustice exists and that the problems of African Americans are now purely of their own making."<sup>68</sup> As Singer observes about mixed healing potential in both situations, the "very thing that restoration is intended to combat may be the result of the demand for restoration."<sup>69</sup>

There are other examples of the reparations dilemma. In 1970 James Forman interrupted Sunday services at the Riverside church in New York to demand 500 million dollars from America's churches and synagogues for the oppression of blacks.<sup>70</sup> He demanded the "beginning of the reparations due us as people who have been exploited and degraded, brutalized, killed and persecuted."<sup>71</sup> The backlash against Forman and his "Black Manifesto" was swift and strong. Many were appalled at the idea. Others, who agreed in concept, criticized Forman's tactics. Among this latter group were African American churches that acknowledged continuing racism against blacks and pledged money for church programs to uplift blacks, while stipulating that none of the money could go to Forman or his supporters.<sup>72</sup> Forman, who issued the challenge to repair the degradation, felt exploited and persecuted.

The dilemma of reparations process, the dual realities, also played out in the United Church of Christ, Hawai'i Conference redress process. The Hawai'i Conference of the United Church of Christ proposed and eventually approved a plan to apologize to Native Hawaiians for its predecessor's participation in the overthrow of the Hawaiian Nation in 1893 and to offer monetary reparations. The arduous process took several years.<sup>73</sup>

Serious discussion of reparations within the Hawai'i Conference raised a host of serious fears.<sup>74</sup> Amid fractious debate at the 1993 Conference's annual meeting, some delegates called for a halt to the process to stop the bleeding.<sup>75</sup> Both missionary descendants and Hawaiian church members expressed fears about tearing apart the Con-

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 3.

<sup>70</sup> See JAMES FORMAN, *THE MAKING OF BLACK REVOLUTIONARIES* 543-50 (1972).

<sup>71</sup> James Forman, *Black Manifesto Delivered to the White Christian Churches and the Jewish Synagogues in the United States of America and All Other Racist Institutions* (Apr. 26, 1969), reprinted in BITTKER, *supra* note 52, app. A at 168.

<sup>72</sup> See ARNOLD SCHUCHTER, *REPARATIONS: THE BLACK MANIFESTO AND ITS CHALLENGE TO WHITE AMERICA* 7-13 (1970); Forman, *supra* note 71, at 548.

<sup>73</sup> See Yamamoto, *Rethinking Alliances*, *supra* note 18, at 39, 74.

<sup>74</sup> See generally ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999).

<sup>75</sup> See *id.*

ference by reopening (and not healing) one hundred year-old wounds. Others hinted at possibilities for renewed betrayal—where the Conference would regain Hawaiian churches' trust, revisit the pain and then, due to internal backlash, disappoint once again. Still others worried about reinforcing negative stereotypes of Hawaiians still unable to lift themselves up.

In addition to illuminating the angst of the reparations process—a fear of replicating the very injuries reparations are designed to heal—the dilemma of reparations also partially explains the disappointed expectations of some Hawaiian community leaders. Those leaders criticized Conference redress priorities that directed reparations primarily to Hawaiian Churches and not community organizations. The leaders asked, in effect, why them and not us, why so much for the churches and so little for the rest.<sup>76</sup>

The dilemma also played out—but in a different way—after Japanese American redress. Since past governmental sin had been absolved, Asian Americans were once again permissible targets for the government and mainstream America.<sup>77</sup> The President and Congress criticized Japanese competition in the auto industry and extensive Japanese real estate purchases in the United States.<sup>78</sup> Asian immigrants became a target of popular initiatives like California's Proposition 187 and federal welfare reforms. They were blamed for America's depressed economy, inadequate public education and other social ills.<sup>79</sup> The recent congressional investigation into campaign finance tarred with the taint of "yellow peril" not only Asian nationals and immigrants, but also all American citizens of Asian ancestry.<sup>80</sup> Some believe that although the redress process educated many about the historical injustice, reparations, combined with a feeling that "now the system works," also let the government off the hook so that it no longer needed to vigorously oppose racism against Asian Americans.

The transformative potential of reparations is therefore linked, ironically, to dissatisfaction and risk. Reparations for some does not necessarily presage reparations for deserving others. Reparations for one group may stretch the resources or political capital of the giver, precluding immediate reparations (or enough reparations) for oth-

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<sup>76</sup> See *id.*

<sup>77</sup> See Yamamoto, *Social Meanings of Redress*, *supra* note 4, at 236.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See, e.g., Maria Puente & Richard Price, *Asian-Americans Fight Scandal-Linked Bias*, USA TODAY, Oct. 13, 1997, at A3.

ers.<sup>81</sup> The very dynamic of reparations process, even where salutary for recipients, can generate backlash and disappointment.

### C. Ideology of Reparations

The third aspect of the underside of reparations process is the ideology of reparations. Reparations ideology is illuminated by Derrick Bell's interest-convergence thesis.<sup>82</sup> Bell's thesis suggests that dominant groups only recognize "rights" of minorities when the recognition of those rights benefits the dominant group's larger interests. That is, a government will rarely simply do the right thing; rather, it is likely to confer reparations only at a time and in a manner that furthers the interests of those in political power.<sup>83</sup>

Rhonda Magee employs the interest-convergence thesis to explain why African Americans have not received reparations for slavery. She observes that, "[s]elf-interested whites who must make the ultimate decision on whether or not to transfer property (land or currency) to African-Americans have no incentive to make such self-defeating decisions."<sup>84</sup> Magee discusses how after the Civil War and during Reconstruction, Congress decided to seize land from the wealthiest Southerners and distribute forty acres to each adult former slave.<sup>85</sup> Support for the redistribution came from those who believed "the establishment of an African-American economic base was critical to the dissolution of the economic legacy of slavery."<sup>86</sup> After two years of lobbying, Congress created the Freedman's Bureau to distribute "captured and abandoned land."<sup>87</sup> In January 1865, possessory title to

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<sup>81</sup> In July 1998, just before President Clinton's visit to China, the U.S. agreed to apologize and bestow limited monetary reparations (\$5,000) to Japanese Latin Americans ("JLAs") kidnapped from Latin American countries by the U.S. and placed in U.S. internment camps during World War II. Previously, the government had refused to award reparations to the JLAs under the Civil Liberties Act of 1988 on grounds that they were not U.S. citizens and had been in the U.S. illegally. The settlement of the JLAs' class action lawsuit and the government's apology and limited reparations brought mixed reactions. Some hailed the settlement as a "major victory for JLAs." John Tateishi, *A Major Victory for JLAs*, PACIFIC CITIZEN, June 19-July 2, 1998, at 3. Others called it a "bittersweet victory." Aoyagi, *supra* note 21: "Many would argue that JLAs in fact endured much more suffering than what [U.S. Japanese Americans] went through," said the attorney for the JLAs, Robin Toma. "That's why I think many people feel that it's a bitter pill to swallow to take so much less than what the [U.S. Japanese Americans] received." *Id.*

<sup>82</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) [hereinafter *Interest-Convergence Dilemma*].

<sup>83</sup> See Yamamoto, *Social Meanings of Redress*, *supra* note 4, at 230.

<sup>84</sup> Magee, *supra* note 37, at 908.

<sup>85</sup> See *id.* at 886-88.

<sup>86</sup> *Id.* at 887.

<sup>87</sup> *Id.* at 888.

485,000 acres was awarded to 40,000 former slaves who immediately began to settle and work the land.<sup>88</sup> Later that same year, however, in the face of rising Southern states' opposition to Reconstruction, President Andrew Johnson rescinded the land reparations program, ordered the black settlers to leave the occupied land and returned the land to former Southern slave owners.<sup>89</sup> Land reparations threatened the nation's newfound peace. Therefore, the President scrapped the program, assuring peace among the states, but at incalculable long-term cost to former slaves.<sup>90</sup>

The Alaska Native Claims Settlement Act of 1971 can also be viewed through the lens of interest-convergence. The United States agreed to pay one billion dollars and to return forty-four million acres of land to Native Alaskans as reparations for the wrongful seizure of lands.<sup>91</sup> However, the primary impetus for reparations was the need to clear land title for development of the Alaska oil pipeline. The United States deemed the pipeline essential not only to its economic health but also to national security. The Middle Eastern oil cartel controlled oil supplies to the United States and was threatening to strangle the American economy.<sup>92</sup>

Broadly conceived, the interest-convergence thesis underscores reparations ideology in these instances. While no one ideology controls all situations, underlying systems of beliefs and values which serve particular interests tend to shape whether, when and how reparations will be awarded. At least two related strands of reparations ideology are significant to our discussion. One involves the tension between race and class; the other, the characterization of group "worthiness."

A race/class tension is manifested ideologically in the reparations debate when opponents of reparations play the "class card" to defeat racial reparations. How is this argument structured?<sup>93</sup> These critics argue that racial group reparations are overinclusive. Middle class blacks, for example, will benefit to some extent even though they are not economically disadvantaged. The critics conclude, therefore, that

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<sup>88</sup> See *id.* at 888-89.

<sup>89</sup> See *id.* at 889.

<sup>90</sup> See *id.* at 888-89.

<sup>91</sup> See Robinson, L., *supra* note 11. See also Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 (1998).

<sup>92</sup> See John F. Walsh, *Settling the Alaska Native Claims Settlement Act*, 38 STAN. L. REV. 227, 229 (1985) (citing R. ARNOLD, ALASKA NATIVE LAND CLAIMS 93-144 (1976)).

<sup>93</sup> These ideas are developed and critiqued by Robert Westley in another article in this symposium issue. See generally, Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, in this issue, at 429.

racial reparations make bad policy. Many of these critics of race-based reparations, however, do not actually support economically tailored reparations for historically oppressed groups. Instead, they use class concerns to mask hostility for reparations of any kind.

Similarly, opponents of racial reparations employ class to argue underinclusiveness—that other economically disadvantaged groups will be left out of a race-based reparations program. Here again, the failure of these critics to support more expansive reparations for those other groups belies their ideological use of class rhetoric.<sup>94</sup>

The second ideological strand is the characterization of group worthiness. In an earlier article in this symposium, Chris Iijima traced the Congressional debates preceding Japanese American redress. Politicians, lobbyists and media largely shaped crucial reparations arguments around the cooperativeness of the internees, the heroism of the 442nd Regimental Combat Team and the “good citizenship” of Japanese Americans during and after the internment.<sup>95</sup> Mike Masaoka’s words, for example, were uplifted in the debates. Masaoka, the Executive Secretary and spokesperson of the Japanese American Citizens League during the war, had urged acquiescence to the government’s internment orders as an act of patriotism.

I am proud that I am an American citizen of Japanese ancestry, for my very background makes me appreciate more fully the wonderful advantages of this Nation. I believe in her institutions, ideals and traditions; I glory in her heritage . . . .

Although some individuals may discriminate against me I shall never become bitter or lose faith, for I know such persons are not representative of the majority of the American people . . . .

Because I believe in America, and I trust she believes in me, and because I have received innumerable benefits from her I pledge myself to do honor to her at all times and in all places, to support her Constitution, to obey her laws, to respect her Flag, to defend her against all enemies, foreign or domestic, to actively assume my duties and obligations as a citizen, cheerfully and without any reservations whatsoever,

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<sup>94</sup> Those who make class-based arguments to *limit* the scope of racial reparations to those with financial need, and who are serious about supporting reparations in this fashion, raise arguments deserving careful consideration.

<sup>95</sup> See generally Chris Iijima, *Reparations and the “Model Minority” Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, in this issue, at 385.

on the hope that I may become a better American in a greater America.<sup>96</sup>

With this and other testimonials as a backdrop, Congress, at least in part, appeared to award redress for "deserving superpatriots." It thereby refined the image of a model minority—those who are loyal to and willing to sacrifice for the United States.<sup>97</sup> Congressman Robert Matsui, a key player in Japanese American redress, reinforced this point at a recent gathering of redress activists:

There could be no question about our patriotism after people like Rudy [Tokigawa of the 442nd Regimental Combat Team], who was locked up in camp, went to war for the U.S. I don't think redress would have passed without the 442nd, without those who gave up their lives and gave themselves for the war effort while their families were interned.<sup>98</sup>

The superpatriot/model minority vision was bolstered by Congressmen Shumway (Japanese Americans are "some of the most respectable, hard working, loyal Americans that we have in this country"), Brown (Japanese Americans are some of Colorado's "finest citizens . . . some of our most honest, hardworking, and productive human beings"), and Lehman (the bill for reparations will show "the respect we all have for the contributions that Japanese Americans have made to our society").<sup>99</sup>

Most interesting, according to Iijima's research, the Congressional reparations debates avoided reference to Japanese American draft resisters—those who refused to fight while their families were wrongfully imprisoned.<sup>100</sup> The debates also failed to address the riots and work and hunger strikes during which interned Japanese Americans voiced discontent with internment conditions.<sup>101</sup> Throughout the internment, considerable disagreement existed within Japanese American communities over cooperation with and support for the government—disagreements later ignored by the narrow framing of redress discourse around Japanese American patriotism and sacrifice.<sup>102</sup>

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<sup>96</sup> *Id.* at 399–400 n.42 (quoting 134 CONG. REC. H6308–09 (daily ed. Aug. 4, 1988)).

<sup>97</sup> *See id.* at 395.

<sup>98</sup> Takeshi Nakayama, *Rare Victory of Spirit Over Numbers*, *RAFU SHIMPO*, Sept. 16, 1997, at A1.

<sup>99</sup> Iijima, *supra* note 95, at 393 n.25.

<sup>100</sup> *See id.* at 393.

<sup>101</sup> *See id.* at 402–03.

<sup>102</sup> *See id.* at 401–02.



Framing reparations worthiness in terms of the superpatriot/model minority served several interests. Certainly, and pragmatically, it aided Japanese American internees—they received long-overdue reparations. That framing also appears to have served the government's practical and policy interests. Practically, it enabled the government to award reparations to a relatively small number of "highly deserving" Japanese Americans without opening the floodgates to reparations for other racial groups. In terms of policy, it enabled the United States unblushingly to tout democracy and human rights in its hard push against Communism in the Soviet Union and Central Europe.

I supported Japanese American redress. Reparations were a well-deserved and appropriate response to a horrendous violation of constitutional liberties and to human suffering. Yet, difficult questions about ideology bear asking. In the broadest sense, were reparations a monetary buy-off of protest, an assuaging of white American guilt without changes in mainstream attitudes and the restructuring of institutions? Were reparations a transactional exchange along the lines of: "we'll admit you into the club for now if you don't challenge our exclusion of others?" In my view, Japanese American redress will not likely be seen by the mainstream and by other communities of color as a buy-off, or an exclusive transactional exchange. But that danger exists unless Japanese Americans now and tomorrow press for racial, immigrant, gender, class and sexual orientation justice in the United States.

The "danger lies in the possibility of enabling people to 'feel good' about each other" for the moment, "while leaving undisturbed the attendant social realities" creating the underlying conflict. . . . [R]edress and reparations could in the long term "unwittingly be seduced into becoming one more means of social control that attempts to neutralize the need to strive for justice."<sup>103</sup>

Inquiry into reparations ideology reveals this potential hidden danger of reparations; that leaving undisturbed the social structural sources of racial grievance may neutralize "the need to strive for justice."

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<sup>103</sup>Yamamoto, *Social Meanings of Redress*, *supra* note 4, at 232 (quoting Edmonds, *Beyond Prejudice Reduction*, MCS CONCILIATION Q., Spring 1991, at 15).

#### IV. AFRICAN AMERICAN REPARATIONS CLAIMS

As developed more fully in the concluding section, I support reparations for African Americans for a variety of reasons, including the need to heal the continuing wounds of many African American communities and to help repair the larger racial breach in the American polity. Others, including Robert Westley in this symposium, have made compelling arguments for reparations based on the economic and psychological harms of slavery, of Jim Crow violence and legalized segregation and of continuing institutional discrimination.<sup>104</sup> With this in mind, and drawing upon emergent lessons of Japanese American redress, this section grapples with strategic obstacles to current African American reparations claims.

##### A. *Legal Framing*

Most claims for African American reparations are framed by civil rights law. The claims articulated by the National Coalition of Blacks for Reparations in America (N'COBRA) are one example. Although N'COBRA has several spokespersons at any given time, its main positions can be fairly characterized. N'COBRA cloaks its claims for African American reparations in legal cloth. It grounds those claims primarily in the Thirteenth and Fourteenth Amendments and civil rights statutes and, secondarily, in international law guarantees of equality and self-determination.<sup>105</sup> N'COBRA's strategy is to seek legislative or judicial recognition of an existing legal entitlement to reparations.<sup>106</sup>

##### 1. Thirteenth Amendment

N'COBRA maintains there is no need to seek a Congressional amendment to the Thirteenth Amendment to authorize reparations. All that is necessary is enabling legislation to "put the already existing

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<sup>104</sup> See generally RICHARD F. AMERICA, *PAYING THE SOCIAL DEBT: WHAT WHITE AMERICA OWES BLACK AMERICA* (1993); BELL, *RACE, RACISM AND AMERICAN LAW*, *supra* note 15; BITTKER, *supra* note 52; BLACK MANIFESTO: RELIGION, RACISM, AND REPARATIONS (Robert S. Lecky & Elliot Wright eds., 1969); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* (6th ed. 1988); Magee, *supra* note 37; Thomas E. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 *RUTGERS L. REV.* 673 (1985); Verdun, *supra* note 3; Westley, *supra* note 93.

<sup>105</sup> See Nketchi Taifa, *Reparations and Self-Determination, in REPARATIONS YES!: THE LEGAL AND POLITICAL REASONS WHY NEW AFRIKANS—BLACK PEOPLE IN NORTH AMERICA—SHOULD BE PAID NOW FOR THE ENSLAVEMENT OF OUR ANCESTORS* 1, 9-10 (Chokwe Lumumba ed., 1989) [hereinafter Taifa, *Reparations and Self-Determination, in REPARATIONS YES!*].

<sup>106</sup> See *id.* at 10.

13th Amendment into effect."<sup>107</sup> For this reason, in 1987 N'COBRA members drafted procedural legislation recognizing an existing African American entitlement to reparations and creating the process for "New Afrikan" sovereignty.<sup>108</sup> Because the United States "has never accorded ultimate political justice" to slaves and the descendants of slaves, the draft legislation required that the federal government hold a plebiscite for African Americans.<sup>109</sup> Among other things, blacks could vote to create a New Afrikan nation within the United States<sup>110</sup> that would be supported by U.S. reparations payments of three billion dollars annually.<sup>111</sup>

The proposed implementing legislation faced immediate political and legal obstacles. Politically, its unveiling revealed strong disagreement among the American populace about black reparations. The legislation also severely underestimated the logistical and financial difficulties of a nationwide plebiscite involving African slave descendants. Finally, the proposal overestimated African American desire to consider seriously some form of independent black government.<sup>112</sup>

Equally important, N'COBRA's narrow legal framing of an African American entitlement to reparations under the Thirteenth Amendment was easily undermined. As interpreted by the courts, the Thirteenth Amendment forbids slavery. It does not, however, embody an entitlement to reparations.<sup>113</sup> Congress now could elect to confer reparations under the Amendment if it characterized past and current living conditions for many African Americans as "badges of slavery." Procedural legislation to implement a pre-existing entitlement appears unavailing.

<sup>107</sup> *Id.*

<sup>108</sup> Entitled an "Act to Stimulate Economic Growth in the United States and Compensate, in part, for the Grievous Wrongs of Slavery and the Unjust Enrichment Which Accrued to the United States Therefrom," the proposed legislation was submitted to Congress by Professor Imari Abubakari Obadele and Attorney Chokwe Lumumba. See REPARATIONS YES! 67-76 (Chokwe Lumumba ed., 1989).

<sup>109</sup> *Id.* at 67.

<sup>110</sup> *Id.* at 71-74. N'COBRA's approach requires all African Americans ("Afrikans") to decide whether to accept the U.S. government's offer of citizenship. Afrikans must decide either to (1) accept U.S. citizenship; (2) return to a country in Africa; (3) emigrate to a country outside Africa; or (4) create a New Afrikan nation-state in America. See *id.* at 73-74.

<sup>111</sup> See *id.* at 70, 72-73.

<sup>112</sup> See Frederick D. Robinson, *Internal Change Needed, Reparations Not the Answer for African Americans*, ATLANTA J., January 29, 1997, available in 1997 WL 3951781. The African American author calls the demand for the creation of an independent black state in the Deep South, and requests for funding for "back-to-Africa" missions, "silly demands [which] make a mockery of the issue." *Id.*

<sup>113</sup> See, e.g., *Cato v. United States*, 70 F.3d 1103, 1110 (9th Cir. 1995); *Hohri v. United States*, 586 F. Supp. 769, 782, *aff'd*, 847 F.2d 779 (D.C. Cir. 1988).

## 2. Civil Rights and Torts Claims Act

In the summer of 1997, N'COBRA announced a contemplated class action reparations lawsuit on behalf of all descendants of formerly enslaved Africans in America against the federal and state governments. A litigation committee comprised of lawyers, scholars, social scientists and community activists is researching possible legal claims and assessing political strategies. Traditional civil rights and tort claims, along with novel claims such as claims under the Fair Housing Act, are under consideration.<sup>114</sup>

The problems of a civil rights/tort claims litigation approach to reparations are revealed in the Ninth Circuit's ruling in *Cato v. United States*.<sup>115</sup> *Cato* consolidated two *pro se* lawsuits. Jewel, Joyce, Howard and Edward Cato and Leerma Patterson, Charles Patterson, and Bobbie Trice Johnson filed "nearly identical complaints . . . against the United States for damages due to the enslavement of African Americans and subsequent discrimination against them, for an acknowledgment of discrimination, and for an apology."<sup>116</sup> Specifically, the complaint sought compensation of:

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<sup>114</sup> See Interview with Adrienne Davis, Professor of Law, Litigation Committee member, in Miami, Fla. (May 9, 1998).

<sup>115</sup> 70 F.3d 1103. See generally Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952). *Himiya v. United States* is relevant to *Cato*. See No. 94 C 4065, 1994 WL 376850 (N.D. Ill., July 15, 1994). Himiya sued the United States for "aiding, abetting and condoning the institution of slavery" and alleged that the "institution of slavery caused African Americans to lose their language, religion, culture and history." *Id.* at \*1. Himiya sought "twenty million dollars in punitive damages, 150 acres of tax-exempt land of his choice, free health care coverage for the remainder of his life, costs necessary to trace his personal genealogy, and costs necessary to legally change his name." *Id.* The district court dismissed Himiya's claims, finding them barred by the doctrine of sovereign immunity. In addition, the court dismissed his claim under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (negligence or wrongful act of an employee of government), because he did not "and cannot allege any wrongful act or omission of any employee of the government while acting within the scope of his office." *Id.* As in *Cato*, the court concluded with a hint of regret:

Although it is extremely regrettable that this country's history, as well as the history of many other countries, includes a significant history of slavery, the plaintiff does not have proper standing under the law to recover damages for this reprehensible time period. Instead, the citizens of the United States, acting through their congressional representatives, have determined that the remedy has been provided by the 13th, 14th and 15th Amendments to the United States Constitution, as well as our federal civil rights statutes.

*Id.* at \*2.

<sup>116</sup> *Cato*, 70 F.3d at 1105. *Cato* is a consolidation of two nearly identical complaints filed *in forma pauperis*. The district court dismissed the complaints in both cases, with prejudice, as groundless prior to service pursuant to 28 U.S.C. § 1915(d), but left open the opportunity to refile the action as a paid complaint. *Id.* at 1105 n.2.

\$100,000,000 for forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character.<sup>117</sup>

The complaint also requested that the "court order an acknowledgment of the injustice of slavery in the United States and in the [thirteen] American colonies between 1619 and 1865, as well as of the existence of discrimination against freed slaves and their descendants from the end of the Civil War to the present."<sup>118</sup> Finally, and related to the acknowledgment, the complaint asked for a formal apology from the United States.<sup>119</sup>

Plaintiffs' initial complaint thus described, in general terms, the horrors of slavery and current black/white disparities in employment, education and housing. The district court dismissed the complaint for failure to state a legal claim. On appeal, the plaintiffs' attorneys endeavored to recast the reparations claims in narrow civil rights and tort law terms. Even that constricted framing, however, fell short. Threshold procedural obstacles, including standing, subject matter jurisdiction, and the statute of limitations, blocked plaintiffs' reparations claims at every turn.

In affirming dismissal of the complaint, the Ninth Circuit Court of Appeals first noted that the district court described the suit as "patterned after the reparations authorized by Congress for individuals of Japanese ancestry who were forced into internment camps during WWII."<sup>120</sup> The court then expressed empathy for the suffering slavery inflicted upon African Americans. It nevertheless agreed with the following statement of the district court, finding that there was no legally cognizable claim:

Discrimination and bigotry of any type is intolerable, and the enslavement of Africans by this Country is inexcusable. This Court, however, is unable to identify any legally cognizable basis upon which plaintiff's claims may proceed against the United States. While plaintiff may be justified in seeking

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<sup>117</sup> *Id.* at 1106.

<sup>118</sup> *Id.*

<sup>119</sup> *See id.*

<sup>120</sup> *Id.*

redress for past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief.<sup>121</sup>

The Ninth Circuit therefore concurred with the district court's conclusion that "the legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances."<sup>122</sup>

More specifically, the court held that it lacked subject matter jurisdiction over Federal Torts Claims Act claims because the Act only applies to claims against the United States accruing after January 1, 1945 and to claims brought within two years of accrual.<sup>123</sup> The court concluded that the Act did not provide a waiver of the United States' sovereign immunity from slavery-related damage claims accruing in the 1800s.<sup>124</sup> The court also implied that even if the Act did operate as a waiver of governmental immunity, the statute of limitations would have undermined African American damage claims based on the harms of slavery and legalized segregation.<sup>125</sup>

Moreover, the court rejected the possibility of amending the plaintiffs' complaint in order to assert a civil rights statutory claim and a Thirteenth Amendment reparations claim.<sup>126</sup> The court adopted the district court's reasoning that section 1981(a) of the 1866 Civil Rights Act<sup>127</sup> (pertaining to contractual relationships) does not waive the federal government's immunity from slavery-based claims.<sup>128</sup> The court also recognized that the Thirteenth Amendment does not authorize individual damage claims against the government.<sup>129</sup> In addition, the

<sup>121</sup> *Cato*, 70 F.3d at 1105.

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* at 1107.

<sup>124</sup> *Id.*

<sup>125</sup> *See id.* at 1108.

<sup>126</sup> *See id.* at 1109. The Supreme Court has ruled that the Enabling Clause of the Thirteenth Amendment clothed "Congress with the power to pass all laws necessary and proper for abolishing all badges and incidents of SLAVERY in the United States." *Cato* at 1109 n.7 (quoting *Jones v. Mayer Co.*, 392 U.S. 409, 439 (1968)).

<sup>127</sup> The statute reads:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1998).

<sup>128</sup> *See Cato*, 70 F.3d at 1106.

<sup>129</sup> *See id.* at 1110. Citing *Holm*, 586 F. Supp. at 782, the court concluded that the Thirteenth Amendment itself does not provide grounds to sue for damages (i.e., it does not in and of itself waive sovereign immunity), nor is it self-enforcing as to anything beyond the actual act of slavery. In particular, the court held that the Amendment does not provide a right to damages on grounds

court observed that even a claim solely for non-monetary relief (apology and acknowledgement) would not cure the complaint's deficiencies because (1) such a claim would be based on a "generalized, class-based grievance" and would not implicate the conduct of any specific official or program that caused a discrete injury, and (2) the individual plaintiffs would lack "standing to litigate claims based on the stigmatizing injury to all African Americans caused by racial discrimination."<sup>130</sup>

Boris Bittker's thoughtful pro-reparations arguments also cast reparations claims narrowly as Section 1983 civil rights claims.<sup>131</sup> In light of a bevy of technical legal problems, however, Bittker limited the claims to those arising from post-slavery discrimination against African Americans. Bittker turned his focus away from the slavery era—a period for which no living person is directly responsible—because civil rights slavery reparations claims against state and local officials create insurmountable legal hurdles that "stultif[y] the discussion."<sup>132</sup> He argued that post-Civil War wrongs against blacks were sufficient to support present-day reparations claims.<sup>133</sup>

Derrick Bell criticized Bittker for succumbing to narrow civil rights legalisms.<sup>134</sup> First, by framing reparations as civil rights claims, African Americans still faced the legal obstacle of U.S. sovereign immunity. Second, by purposefully excluding claims for the entire period of slavery "there is a tactical loss[;] . . . setting this voluntary limitation on coverage sacrifices much of the emotional component that provides the moral leverage for black reparations demands."<sup>135</sup> The narrow legal

of Congress' failure to act. See DONALD E. LIVELY, PHOEBE A. HADDON, DOROTHY E. ROBERTS, RUSSELL L. WEAVER, *CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES* 444-45 (1996).

<sup>130</sup> *Cato*, 70 F.3d at 1109-10.

<sup>131</sup> U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute . . . of any state or Territory, subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

<sup>132</sup> BITTKER, *supra* note 52, at 9.

<sup>133</sup> See Bell, *Dissection of a Dream*, *supra* note 54, at 158. See also BITTKER, *supra* note 52, at 9-10.

<sup>134</sup> See Bell, *Dissection of a Dream*, *supra* note 54, at 158.

<sup>135</sup> *Id.* In a footnote, Bell commented that Bittker might have explored the Thirteenth and Fourteenth Amendments as alternatives to 42 U.S.C. section 1983 as a jurisdictional basis for a federal reparations suit. *Id.* at 159 n.14. Bell also commented on the anticipated challenges to the use of the Thirteenth and Fourteenth Amendments and concluded that "[w]hether based on section 1983 or directly on constitutional amendments, reparations litigation, if attempted on a broad scale, faces an avalanche of procedural problems, including determining proper parties,

framing robbed the reparations claims of the heart<sup>o</sup> of African American suffering—the continuing effects of slavery. For Bell, Bittker's "exploratory surgery" of African American reparations "predictably exposes some serious legal and political difficulties while giving little attention to the pressures, moral and political, that, when applied by those whose faith in a cause exceeded their belief in the law, have spawned other legally [legislatively] acceptable reparations programs in this country and elsewhere."<sup>136</sup>

Legal obstacles, such as the statute of limitations, justiciability and causation, precluded Cato's actual claims and undermined N'CO-BRA's draft legislation as well as Bittker's post-slavery civil rights arguments. The traditional common law paradigm of a legal claim, an individual wrongfully harmed by the specific actions of another in the recent past to recover demonstrable personal losses, did more than subvert legal claims for African American reparations. The traditional paradigm's limitations also deprived the claims of their historical force and obscured their significance for a racially divided America.

### 3. International Human Rights Law

International human rights law is also a potential, albeit problematic, source of legal claims. In 1998, the Inter-American Commission of Human Rights determined that the United States violated international law through one of its court's racially discriminatory treatment of William Andrews, an African American man convicted of murder in 1974 and executed in 1992.<sup>137</sup> The Commission's decision centered on a Utah court's conviction and death penalty sentencing of Andrews despite ample evidence of a jury member's overt racial bias.<sup>138</sup> The

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fashioning an appropriate class action, and effecting meaningful discovery, all of which are likely to increase in complexity as the case proceeds." *Id.*

<sup>136</sup> *Id.* at 157-58 (citing Bittker's detailed discussion of the Indian Claims Commission and Germany's Federal Compensation Law, under which West Germany paid reparations to Nazi victims).

<sup>137</sup> In *Andrews v. United States*, Report No. 57/96, Case No. 11.139, OEA/ser/L.V.II.98, doc. 7 rev. (1998), William Andrews was convicted in Utah state court for the torture slayings of three people during an armed robbery, despite questions regarding the extent of his involvement in the killings. In 1973, Andrews, Pierre D. Selby and Keith Roberts robbed a stereo shop. Andrews and Roberts were outside the shop when Selby forced five people to drink drain cleaner, assaulted and shot them. *See id.*

<sup>138</sup> *Id.* at 44. The Commission considered evidence that while jurors were sitting at lunch in a local restaurant during the guilt phase of Andrews' trial, one of the jurors had handed the court bailiff a drawing on a napkin depicting a stick figure hanging from a gallows with the words, "Hang the Niggers." The trial court made no effort to investigate the origins of the note, or who on the jury had seen it. The court merely admonished the jury to "ignore communications from



Commission's 1998 report on the case recommended that "[t]he United States . . . provide adequate compensation to Mr. William Andrews' next of kin for . . . violations" of Andrews' right to life and equality under law, his rights to an impartial hearing and his right to protection from cruel, infamous, or unusual punishment, pursuant to Articles I, II and XXVI of the American Declaration of the Rights and Duties of Man.<sup>139</sup>

International human rights law is significant because of its articulation of global norms of governmental behavior. It is problematic because of the difficulty, if not impossibility, of enforcement of those norms in state and federal courts in the United States. The United States is a member of the Organization of American States, which operates the Commission, and is bound by the American Declaration of the Rights and Duties of Man. Despite the Commission's findings in *Andrews*,<sup>140</sup> the U.S. refused to comply with the Commission's recommendations, maintaining that "Mr. Andrews received an impartial trial free of racial bias. . . . [The U.S.] cannot agree with the Commission's findings, or carry out its recommendations."<sup>141</sup> Without significant political intervention, the U.S.'s refusal to formally recognize the international law decision ended the case. Neither the state nor federal courts have jurisdiction to enforce the Commission's decision.

My aim in identifying the obstacles to reparations claims raised by narrow legal framing is not to discourage the assertion of legal claims for reparations or the identification of legal bases for reparations. These tasks are necessary because reparations are bestowed through some formal instrument, and law (whether legislation, court pronouncement, executive order or international protocol) provides a recognizable vehicle. The tasks are also important because law and legal process, independent of formal outcome, can serve as generators of "cultural performances." They can provide an institutional public forum for calling powerful government and private actors to account. They can offer opportunity to develop and communicate counter-nar-

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foolish people." *Id.* at 5. Moreover, the Commission found that Andrews was "tried by an all white jury some of whom were members of the Mormon Church and adhered to its teachings that black people were inferior beings." *Id.* at 44-45.

<sup>139</sup> See *id.* at 49.

<sup>140</sup> The Commission found that the United States violated Andrews' right to life, right to equality at law, rights to an impartial hearing and not to receive cruel, infamous, or unusual punishment pursuant to Articles I, II and XXVI, respectively, of the American Declaration of Rights and Duties of Man. *Id.*

<sup>141</sup> *Id.* at 50.

ratives to prevailing stories about minority communities. And they can help focus community education and political organizing efforts.<sup>142</sup>

My point is that claims of legal entitlement are integral to a reparations movement; they should not, however, be the primary emphasis of a reparations strategy. Legal claims and arguments need to be carefully framed and employed in light of their limitations in order to further the movement's larger political goals. Thus, although the international commission's decision in *Andrews* may be unenforceable in the U.S., if aptly framed and publicized, it may serve the reparations movement's larger political goal of recasting domestic civil rights claims as international human rights claims.<sup>143</sup> The concluding section of this article sets forth an alternative look at strategic framing.

### B. *Dilemma of Reparations*

Earlier I introduced the dilemma of reparations as part of the darker side of the transformative potential of reparations. When reparations are taken seriously they tend to recreate victimhood by inflaming old wounds and triggering regressive reaction. In a recent study, Jewish recipients of German reparations for Holocaust horrors attest

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<sup>142</sup> See generally Yamamoto, *Cultural Performance*, *supra* note 58. This political/cultural approach to law and legal process also serves as a foundation for environmental justice theory. See generally Luke Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOCY L.Q.* 619 (1992).

<sup>143</sup> Haunani-Kay Trask asserts that the United States has deprived Native Hawaiians of their nation and land and denied the Hawaiians' right to self-determination as a people, including control over aboriginal lands and natural resources. HAUNANI-KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I* (1993). These deprivations, she asserts, are violations of Articles 15, 17, 20, and 21 of the Universal Declaration of Human Rights, Article 1 of the International Covenant on Civil and Political Rights, Article 1 of the International Covenant on Economic, Social and Cultural Rights, and Article 20 of the American Convention on Human Rights. *Id.* at 34-36.

One example of the use of international law in domestic litigation is *Kealoha v. Hee*, Civil No. 94-0118-01 (1st Cir. Haw., amended complaint filed Feb. 2, 1994). The plaintiffs sought to enjoin negotiations, settlement, and the execution of release by trustees of the Office of Hawaiian Affairs "concerning claims against the United States for the overthrow of the Hawaiian government in 1893, and the redress of breaches of the ceded lands trust committed by the United States and the State of Hawaii." *Id.* at 2. One of the claims asserted was that "it would violate the right to self-determination under international law (to do otherwise)." Count V of the Amended Complaint specifically addressed the alleged "Violation of International Law." It located Native Hawaiians' rights of self-determination in, among other things: the International Covenant of Civil Political Rights, Articles I, II, and XXVII, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (ratified by United States on Sept. 8, 1992); the Draft Declaration on the Rights of Indigenous People, dated August 21, 1993, prepared by the Working Group on Indigenous Populations and submitted to the United Nations Sub-Commission on Human Rights; the Universal Declaration of Human Rights; and general principles of international law. See Amended Complaint, at 20-26.

Some African American reparations claims asserted under international law are based on

to these problems.<sup>144</sup> In the current movement for African American reparations, the potential victimization and backlash are apparent.

N'COBRA adopted a confrontational approach at its inception in 1987.<sup>145</sup> With its support for a New Afrikan nationalism, N'COBRA recalls a kind of 1960s black nationalism<sup>146</sup> then feared by many in the American mainstream. Some find N'COBRA's approach now bracing, a wake-up call. Others twist lingering fears of black nationalism into a particular kind of backlash; for example, the "[t]alk of healing and reparations to African-Americans has provided the [Klu Klux] Klan with a recruitment tool in a time of decline."<sup>147</sup>

Democratic Representatives John Conyers of Michigan and Tony Hall of Ohio have taken a kinder and gentler political and moral approach to African American reparations. Each year since 1989 Conyers has introduced legislation proposing an African American reparations study commission patterned after the study commission that uncovered facts essential to Japanese American reparations.<sup>148</sup> The proposed commission, however, has received little congressional or presidential support.<sup>149</sup> In June 1997, Hall introduced a highly controversial resolution calling for a simple United States apology to African Americans for slavery.<sup>150</sup>

The N'COBRA and Conyers calls for African American reparations and the Hall apology resolution generated three types of negative reaction. First, much of the swift public opposition to Hall's proposed resolution was steeped in hate and denial.<sup>151</sup> The calls reopened old

slavery and are "presented in the context of the United States' having denied [African Americans] the exercise of [their] right to self-determination." Imari Abubakari Obadele, *Reparations, Yes! A Suggestion Toward the Framework of a Reparations Demand and a Set of Legal Underpinnings, in REPARATIONS YES!*, *supra* note 108, at 51.

<sup>144</sup> See generally CHRISTIAN PROSS, *PAYING FOR THE PAST: THE STRUGGLE OVER REPARATIONS FOR SURVIVING VICTIMS OF THE NAZI TERROR* (1998) (describing ways in which Jewish survivors of Nazi atrocities felt re-victimized by the reparations process).

<sup>145</sup> See H. Khalif Khalifah, *Reparations: A War Issue*, ENCOBRA: N'COBRA NEWSLETTER, Summer 1995, at 22 ("[r]eparations should always be presented as a militant, strong, uncompromising issue").

<sup>146</sup> See Diego Bunuel, *Black Power Day Provides Motivation; Rally Focuses on Efforts to Bring About Changes*, SUN SENTINEL, (Ft. Lauderdale, FL), July 26, 1998, at 3B, available in 1998 WL 12824356.

<sup>147</sup> Wes Smith, *Weakened KKK Looks to Recruits*, LAS VEGAS REV.-J., July 20, 1997, available in 1997 WL 4549302.

<sup>148</sup> See Sonya Ross, *Clinton Considers Apology for Slavery*, GREENSBORO NEWS & REC., June 17, 1997, at 1, available in 1997 WL 4588826.

<sup>149</sup> See *id.*

<sup>150</sup> See Caitlin Rother, *Should an Apology for Slavery be Made? African-Americans Have Mixed Opinions*, SAN DIEGO UNION-TRIB., Aug. 12, 1997, available in 1997 WL 3148674.

<sup>151</sup> The backlash to Hall included hundreds of letters and phone messages, most condemning his resolution, often with harsh racial language.

wounds. Second, for some, the calls for an apology and reparations reinscribed victim status.

I don't believe that we are so scarred by our history that we are incapable of finding creative ways to advance. Indeed, it is our endless preoccupation with governmental redress that partly robs us of the energy to find solutions to our problems. It enslaves us. As long as we sit around waiting on others to do for us what we should be doing for ourselves, nothing will ever get done.<sup>152</sup>

In addition, for some, the calls for reparations also painted blacks as pandering and overreaching. "Why should average tax-paying Asian Americans or Hispanic Americans or even European Americans (whose forebears [sic] owned no slaves) be asked to pay reparations to all black Americans, including the most wealthy?"<sup>153</sup> Some

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One man wrote that the government should apologize to him for stripping his great-grandfather of his 435 slaves. Some said African Americans should be thankful that slave traders rescued their ancestors from Africa. Others argued that their ancestors are immigrants who had no connection to slavery or that, beginning with the 350,000 Union soldiers who perished in the Civil War, the nation has done more than enough to atone for slavery.

Michael A. Fletcher, *For Americans, Nothing is Simple About Making Apology for Slavery; Congressman's Suggestion Draws Fire from All Sides*, WASH. POST, Aug. 5, 1997, available in 1997 WL 12879800. Political scientist Andrew Hacker observes that Hall's proposed apology for slavery: raises all sorts of emotions[.] Many white people don't want to hear any more obligations that have not been fulfilled. People say, "[w]e have done everything we have to do. We have affirmative action. We supported civil rights. Don't call us anymore." I sense a lot of that feeling out there.

*Id.*

<sup>152</sup>Robinson, F., *supra* note 112. According to Edgar Hunt, a N'COBRA member, "Native Americans, the Eskimos and Japanese got reparations for what the American government did to them, why can't we?"

Barbara Cooper, a Tennessee state representative, expressed similar sentiments regarding the issue of reparations: "There have been reparations for other groups to help keep them afloat. We (blacks) are just as much a part of this country as anyone else, so there is no reason that blacks should not receive reparations, also." Chandra M. Hayslett, *Clinton Panel on Black Reparations Sought*, COMM. APPEAL (Memphis, Tenn.), June 28, 1997, at 1, available in 1997 WL 11959623.

<sup>153</sup>Joseph Perkins, *Reparations for Blacks are the Wrong Answer*, LAS VEGAS REV.-J., Feb. 19, 1997, at 2, available in 1997 WL 4537651. Perkins argues that:

[T]he reparationists make their strongest case when they argue that the 30 percent of black Americans who remain mired in poverty may be suffering the residual effects of slavery 120 years later. Fair enough. But helping these 9 million or so black Americans—whom Harvard social scientist William Julius Wilson termed the "truly disadvantaged"—is best accomplished not by cutting \$400,000 reparation checks to these poor black families (which, no doubt, would be squandered like lottery checks), but by completely dismantling the \$250-billion-a-year government—

blacks reacted by saying that reparations claims unnecessarily mis-cast blacks as continuing targets of government mistreatment when blacks in the past have benefitted from Urban Renewal, Model Cities, Community Block Grants, Urban Development Action Grants, Enterprise Zones, Empowerment Zones and affirmative action.<sup>154</sup>

The third type of negative reaction came from the other direction. It addressed the perceived inadequacy<sup>155</sup> of Conyers' study commission approach—that this approach did not go far enough because it initially asked only for a study, and that even if individual monetary payments resulted, those payments would be mere tokens. “[R]eparations [need to] come in a lump sum that would be funneled into the educational system, social programs or loans for first time home buyers.”<sup>156</sup>

Joe Singer asked, “[w]ill reparation[s] right a wrong” or “will it create further victimization of the oppressed group” thus exacerbating the wound?<sup>157</sup> Some will answer affirmatively to the first question, some affirmatively to the second, and some will say yes to both. The dilemma of reparations, revealed here, argues not for retreat by reparations proponents in light of ambiguous support and likely backlash, but for tactical anticipation.

### C. Ideology of Reparations

I introduced Derrick Bell's broadly conceived interest-convergence thesis in Section III C of this article. According to Bell, African Americans will only receive reparations for slavery when reparations serve white Americans' larger political or economic interests. Bell believes that ordinarily “[s]elf-interested whites who must make the ultimate decision on whether or not to transfer property (land or

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controlled welfare plantation, on which far too many poor black families are reliant.

In its place should be an empowerment system, which encourages and rewards legitimate child birth, family cohesion, education, work and entrepreneurship. These are the keys to upward mobility in America, as the thriving, successful black middle and upper-middle classes have proven.

*Id.*

<sup>154</sup> See Robinson, F., *supra* note 112.

<sup>155</sup> Tony Hall's proposed apology also received some negative reaction stemming from its perceived inadequacy. See Fletcher, *supra* note 151.

<sup>156</sup> Rother, *supra* note 150, at 4. In response to the Hall apology resolution, Reverend Jesse Jackson commented: “[i]t is like you drive over somebody with a car, leave the body mangled, then you decide to come back later to apologize with no commitment to help them get on their feet. There is something empty in that. It is just more race entertainment.” Fletcher, *supra* note 151.

<sup>157</sup> Singer, *supra* note 60, at 3.

currency) to African-Americans have no incentive to make such self-defeating decisions.<sup>158</sup> The interest-convergence thesis does not mean that African Americans must subordinate their interests to those of white Americans. Rather, it means that blacks must devise a reparations strategy that primarily serves African American interests while furthering, or appearing to further in some important way, mainstream interests. Those interests, as traditionally described, include the United States' international and domestic reputation on human rights issues, peace in American cities and bolstering the American economy.<sup>159</sup>

From this vantage point, until mainstream America perceives self-interest in N'COBRA's position or the Conyers/Hall legislation, the political movements for reparations will have little resonance.<sup>160</sup> As one commentator observes:

[w]e could organize 'til the cows came home and make a unified, resounding demand for reparations, and I just don't think that in this climate it would be taken seriously. . . . This is not a black question. This is a white question. The question ought to be: "What will bring whites to apologize for the sin and the crime of slavery and to make the just recompense for it?"<sup>161</sup>

Tellingly, Representative Conyers did not expect to find support for an apology to African Americans in the current Republican-majority Congress.<sup>162</sup>

In America's volatile racial climate, supporters of African American reparations have yet to frame a compelling interest-convergence.

<sup>158</sup> Magee, *supra* note 37, at 908.

<sup>159</sup> See Yamamoto, *Social Meanings of Redress*, *supra* note 4, at 231; Bell, *Interest-Convergence Dilemma*, *supra* note 82, at 524; Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 *STAN. L. REV.* 61, 113-14 (1988).

<sup>160</sup> The Reverend Jesse Jackson has attempted to lay an interest-convergence foundation for African American reparations. In one instance, he commented that an apology by President Clinton to African Americans would not be enough, and that the United States would also have to pay reparations. Reverend Jackson then

praised an effort by President Clinton, who is preparing for a trade mission to southern Africa. He noted that the United States is seeking better trade relations with southern Africa, an effort he considered unprecedented. "The U.S. has interests in southern Africa, and southern Africa has an interest in shoring up its trade relations with America. So this is not a gift but an investment in Africa," Mr. Jackson said, comparing the effort to the Marshall Plan for Europe after World War II.

Harold McNeil, *Baptist Gathering Hears Jackson Call for Return to Activism*, *BUFF. NEWS*, Aug. 7, 1997, at 2, available in 1997 WL 6453116.

<sup>161</sup> Robinson, L., *supra* note 11.

<sup>162</sup> See *id.*

Proponents of a confrontational black nationalism in the 1960s coalesced with anti-war and social justice activists and spurred mainstream accommodation in the form of affirmative action and government entitlements. N'COBRA's black nationalism takes the position that the reparations movement is a "war" and should always be presented as "militant, strong, [and] uncompromising."<sup>163</sup> This aggressive approach to reparations in post-civil rights era America, however, has played out quietly for the most part. N'COBRA has not attracted the kind of kinetic community and media attention once garnered by James Forman, Malcolm X and the Black Panthers. The 1960s black nationalism in the streets and schools created a sense of urgency in mainstream America; its 1990s version is comparatively unobtrusive.

Nor has the Conyers study commission approach appealed to the now politically conservative American mainstream. This approach adopts the blueprint for Japanese American redress. In 1988, based on a congressional commission's recommendations and in light of the court rulings in the *coram nobis* cases, the United States paid \$20,000 to each Japanese American internee survivor, totaling over \$1.6 billion dollars.<sup>164</sup> The payments, although substantial, were a small blip on the radar of the American economy. By contrast, similar reparations for African Americans would impact the economy: 20 million descendants of Africans enslaved in the United States between 1619 and 1865, multiplied by \$20,000, would total 400 billion dollars in reparations. Opponents of African American redress are likely to cite these figures in playing the class card. Tapping into public concerns about expenditure of taxpayer dollars, they will argue both the overinclusiveness and underinclusiveness of racial reparations; overinclusive in that some not economically disadvantaged will benefit, underinclusive because other needy groups will be left out.

Also, in contrast with Japanese American redress, African American interests in reparations are not as easily squared with mainstream America's current interests. First, when Japanese Americans received reparations the United States was fighting to win the Cold War and needed to be perceived as liberators. Although the United States recently has sought to expand its political influence into China, the Middle East and central Europe,<sup>165</sup> an American interest internation-

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<sup>163</sup> Kalifah, *supra* note 145, at 22.

<sup>164</sup> See Robinson, L., *supra* note 11. See also Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time For a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

<sup>165</sup> See George Melloan, *China's Balance of Power Politics in Asia*, WALL ST. J., Jan. 20, 1997, at A15, available in 1997 WL 2406221 (linking President Clinton's visit to China with U.S. political

ally in African American "liberation" through reparations has not been clearly articulated. There also has been no development of a cogent vision of far-reaching domestic benefits for the American polity.

Second, politicians from both parties, lobbyists and media shaped the debate on reparations for Japanese Americans so that Congress ultimately bestowed reparations upon a "worthy" racial minority—the "superpatriotic" even in the wake of oppression, the "model minority" that pulled itself up by the bootstraps.<sup>166</sup> Chris Iijima characterized this reparations narrative as a celebration of "blind obedience" to injustice.<sup>167</sup> This narrative, he suggests, sent a pointed ideological message to those subject to racial and other forms of aggression in America—be "patriotic," do not complain, succeed on your own and you may be rewarded later. Or, conversely, if your group's "character" marks it as "unworthy," do not come to Congress seeking reparations.<sup>168</sup>

Thus, although the moral justification for Japanese American redress applies many times over to African American claims, the economics and rhetorical strategies of 1980s Japanese American redress do not translate readily into African American reparations in a conservative political environment. How African American reparations proponents handle superpatriot/model minority narrative and its linkage to the social justification for reparations may be key, particularly in light of the Republican Party's casting of African Americans in recent years as undeserving of "special" government benefits.<sup>169</sup> Will the rise in overt white racism, the abolition of affirmative action, glass ceiling discrimi-

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influence on China's potential for manufacturing high value weapons such as submarines and nuclear weapons); Marianne Means, *Scandal Backfire: Don't Conclude Clinton is in China's Pocket*, DAYTON DAILY NEWS, Mar. 22, 1997, at 15A, available in 1997 WL 3931950 (noting that with President Clinton's visit to China "[p]owerful economic interests are at stake . . . , represented by companies with vast political influence whose overseas trade translates into jobs for thousands of voters"); Edith M. Lederer, *Group Says U.S. Shows Poor Leadership*, ASSOCIATED PRESS, Apr. 23, 1998, available in 1998 WL 6654746 (describing U.S. attempts to gain political influence in the Middle East and other world trouble spots by acting as peace maker and displaying leadership); Jaime Suchlicki, *Foreword*, J. OF INTERAMERICAN STUDIES & WORLD AFF., Mar. 22, 1997, at 1, available in 1997 WL 10714609 (criticizing U.S. preoccupation with China, Central Europe, and the Middle East in attempts to obtain economic and political influence).

<sup>166</sup> See generally Iijima, *supra* note 95.

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

<sup>169</sup> An article describes *Decades of Distortion: The Right's 30-Year Assault on Welfare*, a report by Northeastern Law Professor Lucy A. Williams, as "document[ing] the ability of political conservatives to define welfare recipients as undeserving African American . . . women." Republican politicians and their intellectual allies often made direct connections between African Americans, welfare and street crime, deteriorating neighborhoods, declining property values [and] affirmative action." As a result, "the political right promoted a misleading image of welfare as an entitlement for 'lazy' Black wom[en]." *Decades of Distortion: The Right's 30-Year Assault on Welfare*, N.Y. BEACON, Dec. 11, 1997, available in 1997 WL 11708068.



nation, the high black male incarceration rate and the cutbacks in social programs and public assistance generate enough black anger and mainstream anxiety to create a national interest in black reparations? Will the "resegregation of America"—President Clinton's words—detract from America's capacity to police global democracy and thereby create impetus for black reparations? Will Japanese American redress beneficiaries disavow the singular superpatriot/model minority narrative of reparations worthiness and publicly support African American justice claims? The ideology of reparations poses these questions to Japanese Americans, African Americans, other groups seeking redress and the American polity as a whole.

In sum, at the turn of the millennium, how might the African American reparations movement navigate its way through obstacles generated by the narrow legal framing of reparations claims, the reparations dilemma and the ideology of reparations? How might it translate the moral power of its claims into politically viable action? There is, of course, no single, encompassing answer. No magic words.

What I offer in the concluding section are not specific arguments for African American reparations. Rather, I offer an altered conception of reparations to assist in the formulation of those arguments as part of a larger political strategy of "repair."

## V. REPARATIONS AS REPAIR

Notwithstanding legal and political objections and the dilemma and ideology of reparations, reparations have been offered and accepted in recent years.<sup>170</sup> The socio-psychological benefits of apologies and reparations are often significant for recipients.<sup>171</sup> As previously mentioned, one woman said the Japanese American redress process had "freed her soul."<sup>172</sup> Other beneficiaries responded with a collective sigh of relief. Ben Takeshita, for instance, expressed the sentiments of

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<sup>170</sup> See Yamamoto, *Race Apologies*, *supra* note 9, at 47-48.

<sup>171</sup> According to clinical psychologist Susan Heitler, "[a]n apology is a much more complex and powerful phenomenon than most people realize[.]" Fletcher, *supra* note 151. Additionally, psychologist Susan T. Fisk observes,

An apology for slavery would say it may not have been me, but it was my people or my government that did this and we now see that it was really a crime and sin. It is potentially healing. It shares responsibility for ending racism and it acknowledges that slavery has some relevance to today.

*Id.* See also Sharon Cohen, *Americans to be Compensated for Horrors of Holocaust: Survivors Say Reparations Won't End Nightmares*, SAN DIEGO UNION-TRIB., Apr. 6, 1997, available in 1997 WL 3126022 (for concentration camp survivor, "[r]eceiving reparations . . . would be a psychological boost").

<sup>172</sup> Yamamoto, *Social Meanings of Redress*, *supra* note 4, at 227.

many when he said that although monetary payments "could not begin to compensate . . . for his . . . lost freedom, property, livelihood, or the stigma of disloyalty," the reparations demonstrated the sincerity of the government's apology.<sup>173</sup>

In light of both the dangers and the transformative potential of reparations, I offer two insights into specific reparations efforts, insights drawn from Japanese American redress that bear on the shape of African American reparations claims and strategy. One is normative: reparations by government or groups should be aimed at a restructuring of the institutions and relationships that gave rise to the underlying justice grievance. Otherwise, as a philosophical and practical matter, reparations cannot be effective in addressing root problems of misuse of power, particularly in the maintenance of oppressive systemic structures, or integrated symbolically into a group's (or government's) moral foundation for responding to intergroup conflicts or for urging others to restructure oppressive relationships. This means that monetary reparations are important, but not simply as individual compensation. Money is important to facilitate the process of personal and community "repair" discussed below.

A second insight is descriptive: restructuring those institutions and changing societal attitudes will not flow naturally and inevitably from reparations itself. Dominant interests, whether governmental or private, will cast reparations in ways that tend to perpetuate existing power structures and relationships. Indeed, traditionally framed, American interests in racial reparations, including international credibility and domestic peace, tend to reinforce the social status quo.

Those seeking reparations need to draw on the moral force of their claims (and not frame it legally out of existence) while simultaneously radically recasting reparations in a way that both materially benefits those harmed and generally furthers some larger interests of mainstream America. Moreover, those benefiting from reparations in the past need to draw upon the material benefits of reparations and the political insights and commitments derived from their particular reparations process and join with others to push for bureaucratic, legal and attitudinal restructuring—to push for material change. And their efforts must extend beyond their own reparations to securing reparations for others.

These insights point toward a reframing of the prevailing reparations paradigm—a new framing embracing the notion of reparations

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<sup>173</sup>NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 107 (1991).

as "repair." Indeed, reparation, in singular, means repair. It encompasses both acts of repairing damage to the material conditions of racial group life—distributing money to those in need and transferring land ownership to those dispossessed, building schools, churches, community centers and medical clinics, creating tax incentives and loan programs for businesses owned by inner city residents—and acts of restoring injured human psyches—enabling those harmed to live with, but not in, history. Reparations, as collective actions, foster the mending of tears in the social fabric, the repairing of breaches in the polity.

For example, slavery, Jim Crow apartheid and mainstream resistance to integration inflicted horrendous harms upon African American individuals and their communities, harms now exacerbated by the increasing resegregation of America.<sup>174</sup> Reparations directly improving the material conditions of life for African Americans and their communities are especially appropriate. In addition, the racial harm to African Americans also wounded the American polity. It grated on America's sense of morality (do we really believe in freedom, equality and justice?), destabilized the American psyche (are we really oppressors?), generated personal discomfort and fear in daily interactions (will there be retribution?), and continues to do so. As Harlon Dalton observes, "perpetuating racial hierarchy in a society that professes to be egalitarian is destructive of the spirit as well as of the body politic."<sup>175</sup> Reparations for African Americans, conceived as repair, can help mend this larger tear in the social fabric for the benefit of both blacks and mainstream America.

So viewed, reparations are potentially transformative. Reparations can avoid "the traps of individualism, neutrality and indeterminacy that plague many mainstream concepts of rights or legal principles."<sup>176</sup> Reparations are grounded in group, rather than individual, rights and responsibilities and provide tangible benefits to those wronged by those in power. As Mari Matsuda observes, properly cast, reparations target substantive barriers to liberty and equality.<sup>177</sup> In addition, coupled with acknowledgment and apology, reparations are potentially transformative because of what they symbolize for both bestower and

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<sup>174</sup> See generally ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992).

<sup>175</sup> HARLON L. DALTON, *RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES* 4 (1995).

<sup>176</sup> Matsuda, *Looking to the Bottom*, *supra* note 38, at 393-94.

<sup>177</sup> See *id.* at 391. See also Magee, *supra* note 37, at 913 ("[r]eparations would be powerful symbols of white group responsibility for the continued degradation of African-American life and

beneficiary: reparations "condemn exploitation and adopt a vision of a more just world."<sup>178</sup>

For these reasons, some argue that reparations—in the sense of repair rather than compensation—are essential to mending racial breaches in the American polity. Manning Marable contends that the post-Civil War Reconstruction eventually failed because the federal government refused to support broad land grant reparations to African Americans.<sup>179</sup> Without large-scale land redistribution (forty acres and a mule), the emancipation, the Fourteenth Amendment and civil rights statutes failed to uplift blacks socially and economically. Marable observes that because economic power was held by whites, equality in political and social relations was an illusion.<sup>180</sup>

As Marable implies, without change in the material conditions of racial group life, reparations are fraught with regressive potential. Without attitudinal and social structural transformation of a sort meaningful to recipients, reparations may be illusory, more damaging than healing. No repair. Cheap grace.

Native Hawaiians voice these concerns in their drive for reparations. Hawaiians are seeking reparations from the United States and the State of Hawai'i in the form of money, homelands and Hawaiian self-governance.<sup>181</sup> Repairing cultural wounds, restoring a land base and altering governance structures are perceived by increasing numbers of Hawaiians as essential to functioning relationships among in-

culture"). Failure to engender such a transformation, Carl Rowan warns, may contribute to a race war:

[T]he reason there is a danger of this black underclass engaging in a race war is that they have no meaningful stake in the America that most whites and privileged minorities know. People with a real stake in something of value are loath to piss on it, let alone destroy it. But the mass of blacks can't get close enough to the American dream just to piss on it.

CARL T. ROWAN, *THE COMING RACE WAR IN AMERICA: A WAKE-UP CALL* 290 (1996). Rowan, an award-winning journalist, sees deteriorating living conditions for many African Americans and white provocation, such as the rise in hatemongering, the death of affirmative action, the decline of government in providing for the social welfare, the criminalization of black youths and the abandonment of inner city public schools, as a potentially combustible mix. *See id.*

<sup>178</sup> Matsuda, *Looking to the Bottom*, *supra* note 38, at 394.

<sup>179</sup> *See generally* MANNING MARABLE, *RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990* (2d ed. 1991).

<sup>180</sup> *See id.* at 6.

<sup>181</sup> A few legal claims for Hawaiian reparations have achieved some success. These claims were resolvable in part because they were based on specific provisions in Hawai'i's Constitution that recognize the state's trust relationship with Hawaiians. *See Ka'ai'ai*, Civil No. 92-3742-10 (1st Cir. Haw., Oct. 1992) (after successful lobbying by the core group, the 1995 legislature committed \$30 million a year for 20 years, \$600 million total, to the Homelands Trust); *Office of Hawaiian Affairs v. State of Hawai'i*, Civ. No. 94-0205-01, *appeal docketed*, No. 20281 (1998). *See also* HAW. CONST. art. 16, § 7; HAW. CONST. art. 12, § 4; HAW. CONST. art. 12, § 7.

digenous Hawaiians, the federal and state governments and their non-Hawaiian citizens. Thus, while monetary compensation may be an appropriate form of reparations in some instances, it is not, alone, deemed sufficiently reparatory by most Hawaiians. For some, monetary payment alone would not bring material change; it would likely generate only illusions of progress and "throwing money at old wounds would do little to heal them."<sup>182</sup>

Symbolic compensation without accompanying efforts to repair damaged conditions of racial group life is likely to be labeled "insincere." For instance, despite modest monetary restitution, the Japanese government's refusal to acknowledge responsibility for World War II crimes or take active measures to rehabilitate surviving victims has generated charges of insincerity and foot-dragging. For many, the Japanese government's refusal to express regret undermines the possibility of forgiveness and prospects for healing.<sup>183</sup> By contrast, Germany's efforts to heal the wounds of Jewish Holocaust survivors extend beyond monetary reparations. The German government has also undertaken disclosure of war archives, passed legislation barring race hatred, overhauled Holocaust educational materials and commemorated war victims.<sup>184</sup>

Reparations, as repair, therefore aim for more than a temporary monetary salve for those hurting. Reparations are a vehicle, along with an apology, for groups in conflict to rebuild their relationships through attitudinal changes and institutional restructuring.<sup>185</sup> In terms of changed attitudes, making apologies a part of a group's public history—as the Southern Baptists did through their formal apology to African Americans<sup>186</sup>—is one means of reparation. Committing to end derogatory stereotyping of racial "others" is another. In terms of dismantling disabling social structures or supporting empowering ones, reparations might mean, as in South Africa, the government's new

<sup>182</sup> Magee, *supra* note 37, at 879 (citing subcommittee members' comment on Conyers' reparations study bill, Commission to Study Reparation Proposals for African Americans Act, H.R. 1684, 102 Cong., (1991)).

<sup>183</sup> See, e.g., Tong Yu, Comment, *Reparations for Former Comfort Women of World War II*, 36 HARV. INT'L L.J. 528, 539 (1995).

<sup>184</sup> See *id.* at 538 (citing "Forgive Us": East Germany Faces the Truth, Apologizes for the Holocaust—A Profound First Act, NEWSDAY, Apr. 15, 1990, at 3).

<sup>185</sup> See John Stevens Keali'iwahamana Hoag, The Moral, Historical and Theoretical Framework for Restitution and Reparations for Native Hawaiians 19 (Apr. 28, 1995) (unpublished manuscript, on file with author). Elazar Barkan observes that injured groups often seek to achieve a more moderate goal than full retroactive justice, such as lessening conflict or improving their economic condition. See Elazar Barkan, *Payback Time: Restitution and the Moral Economy of Nations*, 11 TIKKUN, Sept. 19, 1996, at 52.

<sup>186</sup> See Vincent F.A. Golphin, *Southern Baptists Apologize for Past Racism*, SYRACUSE HERALD-J., July 1, 1995, at A10.

struggling but active Reconstruction and Development Programme aimed at redistributing land, changing education, health and housing policies and establishing public and private affirmative action programs.<sup>187</sup>

This repair paradigm of reparations redirects attention away from individual rights (recognized by law) and legal remedies (monetary compensation). It focuses instead on (1) historical wrongs committed by one group, (2) which harmed, and continue to harm, both the material living conditions and psychological outlook of another group, (3) which, in turn, has damaged present-day relations between the groups, and (4) which ultimately has damaged the larger community, resulting in divisiveness, distrust, social disease—a breach in the polity.<sup>188</sup> Within this framework, reparations by the polity and for the polity are justified on moral and political grounds—healing social wounds by bringing back into the community those wrongly excluded.<sup>189</sup>

How Japanese Americans respond to African American reparations claims in the new millennium, and whether Japanese Americans

<sup>187</sup> See generally John W. DeGruchy, *The Dialectic of Reconciliation: Church and the Transition to Democracy in South Africa*, in *THE RECONCILIATION OF PEOPLES: CHALLENGE TO THE CHURCHES* 16 (Gregory Baum & Harold Wells eds., 1997).

<sup>188</sup> See generally Yamamoto, *Race Apologies*, *supra* note 9. Mari Matsuda has proposed a legal group-based, victim-conscious reparations model that generally embraces these ideas. The model expands the narrow definition of a legal relationship to include victim groups, perpetrator descendants and current beneficiaries. See Matsuda, *Looking to the Bottom*, *supra* note 38, at 375. Group damage brought about by past wrongs provides a horizontal connection within victim groups. See *id.* at 377. Group members think of themselves as a group because they are treated as a group. For them, group experiences with racism and discrimination are "raw, close and real." *Id.* at 379. A horizontal connection likewise exists within the perpetrator group because dominant groups have benefited and continue to benefit from past wrongs, even if members of this group deny any personal involvement. See *id.*

The expanded paradigm also departs from the classical legal notions of time-bar and proximate cause. See Matsuda, *Looking to the Bottom*, *supra* note 38, at 381. Reparation itself is necessary because a nation takes such a long period of time to recognize historical wrongs against a victim group. Reparations claims are instead based upon *ongoing* stigma, discrimination and harm. See *id.* at 381–82. A victim perspective offers an alternative time-bar. Under the expanded paradigm, "[t]he outer limit should be the ability to identify a victim class that continues to suffer a stigmatized position enhanced or promoted by the wrongful act in question." *Id.* at 385. And where the continuing effects of the wrongs are acute, the passage of time should not be a waiver of the wrong. See LAWRENCE & MATSUDA, *supra* note 38, at 240.

Matsuda suggests that victim group members should also participate in the identification of those entitled to relief and the nature and disbursement of the reparation awards. See Matsuda, *Looking to the Bottom*, *supra* note 38, at 387. Consultation of victims respects their self-determination and personhood. See *id.* Under this expanded group-based legal paradigm, groups, both victims and perpetrators, are thus treated collectively rather than individually. See *id.* at 380.

<sup>189</sup> See generally JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 6 (1985).

participate in the repair of other groups' wounds and the mending of tears in society's fabric, may well determine the legacy of Japanese American redress.

