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GIVE THEM THEIR DUE: AN AFRICAN-AMERICAN REPARATIONS PROGRAM BASED ON THE NATIVE AMERICAN FEDERAL AID MODEL

Mishael A. Danielson

Alexis Pimentel

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I. A FEASIBLE SUGGESTION FOR A FEASIBLE GOAL: AN INTRODUCTION

Numerous scholarly publications discuss the controversial topic of reparations for descendants of slaves in America. The works expound on possible justifications, moral implications, societal effects, and consequential feasibility of implementing a reparations program. The leading justification focuses on descendents' right to compensation for the unpaid labor of their ancestors. The lack of compensation for labor prevented slaves from bequeathing equity to their offspring. The inability to inherit indirectly impacts the current socioeconomic condition of African-Americans today.

The United States government currently sanctions a reparations model for Native Americans, arguably a racial group similarly situated with African-Americans.[1] The government could easily structure an African-American reparations program to duplicate this model with minor modifications. Native Americans have received federal aid as a form of reparations from the government through Congressional legislation for over a hundred years. Similar legislation, as opposed to attempts at legal remedies obtained through federal and state courts, may be the best way for recognizing and addressing the grievous wrongs committed against African-American slaves and their descendants.

II. A BRIEF HISTORY OF SLAVERY IN AMERICA

The story of slavery in America is not unknown, but it is often trivialized. Legalized slavery existed in America until the end of the Civil War.[2] Though prohibited by law, inhumane treatment of slaves, such as

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* Mishael A. Danielson is a J.D. candidate, Hofstra University School of Law, 2004; B.A., City College of New York. I wish to thank God, my family, especially my parents Daniel and Devorah, Azalea Z. Lemoine, and all of my friends and supporters. A special thanks goes to my good friend and co-author, Alex Pimentel, a gentleman of great wisdom and intelligence. Alexis Pimentel is a J.D. candidate, Hofstra University School of Law, Class of 2004; B.A., John Jay College of Criminal Justice. I wish to thank God, my family, all of my friends and supporters, and especially my good friend and co-author, Mishael A. Danielson; none of this would have been possible without you.

1 *See generally* 25 U.S.C. §§ 1–4307 (2003).

2 *Slavery*, *in* MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA (2004), *at* http://encarta.msn.com/encyclopedia_761556943/Slavery.html (last visited Mar. 5, 2004).

branding, mutilation, chaining, and outright murder, often occurred in the eighteenth century.[3]

III. SLAVERY'S ADVANCEMENT OF THE AMERICAN ECONOMY

Slaves began working on the plantation as young as five years old.[4] During their early years, slave children performed basic tasks like carrying water or walked alongside their parents in the fields to learn the tasks of a field hand.[5] In the preteen years, slaves became responsible for a certain fraction of the production quota of an adult field hand and by age eighteen, slaves were considered "prime" field hands.[6] Even elderly and disabled slaves were required to work.[7] Elderly women cooked for the other slaves and cared for the young, while old men performed somewhat less strenuous tasks, such as cleaning horse stables.[8] Disabled slaves often worked as weavers, making clothes for the healthier slaves in the field.[9]

Not only did slaves have to perform such arduous work for their masters, but slaves also had to work for other individuals.[10] Many masters hired their slaves out to others seeking temporary help.[11] Such slave hiring was most common in the upper South, but occurred in every slave state.[12] Masters sometimes hired slaves for short periods of time, but it was customary to hire slaves for a period of one year, typically from January to the Christmas holiday.[13] Written contracts between the slave's owner and the hirer usually specified the duration of the hire, the kind of work the slave would perform, and the hirer's obligation to the slave while renting him.[14] Hired slaves performed various functions, from agricultural work such as raising sugar cane and picking cotton, to non-agricultural tasks including domestic service, factory work, and railroad building.[15]

Even the United States government used the labor of slaves, hiring slave labor to build some of the most famous buildings in Washington, D.C.,[16] including the Capitol building, which was built by one hundred slaves

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3 *Id.*

4 KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 57 (Knopf 1956).

5 *Id.*

6 *Id.* at 57–58.

7 *Id.* at 58.

8 *Id.*

9 *Id.*

10 *Id.* at 67.

11 *Id.*

12 *Id.* at 67–68.

13 *Id.* at 68.

14 *Id.*

15 *Id.* at 69–72.

16 RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 3 (2000).

leased from their masters at five dollars per slave per month.[17] These slaves mined rock, set stones, mixed mortar, and cut timber for the construction of the Capitol.[18] Slaves also cleared the forestlands that would eventually be the locations for the Capitol and the White House.[19] During the Civil War, Union soldiers brought slaves that left their plantations to Washington, D.C., to help build the Capitol.[20]

A small number of slaves were allowed to "hire their own time," thereby enabling slaves to work for themselves.[21] These bondsmen agreed to pay their masters a stipulated sum of money, and whatever they were able to make beyond that amount was theirs to keep.[22] The overwhelming majority of these slaves were skilled laborers.[23] This practice was illegal under most southern slave codes, but many masters still allowed their slaves to go out and make a living for themselves in this way.[24] Along with receiving an agreed-upon sum for allowing his slave to work for himself, this arrangement also benefited the master in that he did not have the responsibility of feeding and clothing his slave during this time.[25]

IV. SLAVE CODES: THE LAW OF SLAVE LABOR

States permitting slavery used the law to justify the oppression of slaves. These laws reduced Africans to the status of "chattel."

A. State Labor Laws Governing Slave Wages and Slave Labor Agreements

Every slave state had a "slave code," that is, a group of laws regulating slaves in nearly every aspect of their existence within the state.[26] Slave codes firmly established the property rights of slave owners over slaves, seeking to suppress possible slave rebellion.[27] The slave codes of the various states were generally the same.[28] Those of the deep South were

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17 *Id.*

18 *Id.* at 4.

19 *Id.* at 3.

20 *Id.* at 4.

21 STAMPP, *supra* note 4, at 72.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* at 206.

27 *Id.*

28 *Id.* ("The similarities were due, in part, to the fact that new states patterned their codes after that of the old . . . . But the similarities were also due to the fact that slavery, wherever it existed, made necessary certain kinds of regulatory laws.").

usually harsher than those of the upper South.[29] These laws generally prevented slaves from receiving payment for their work.

Most southern states passed laws prohibiting slaves from receiving money, from owning real or personal property, and from independently entering into labor contracts.[30] Many states prohibited slaves from entering into any contracts,[31] even marriage contracts,[32] though some states allowed a slave to enter into a contractual agreement with the consent of his master.[33]

B. State Laws Governing a Slave's Ability to Sue His Master for Unpaid Wages

Slaves had no legal recourse to pursue wages for the labor that they performed for their owners. The slave codes of virtually all slave states prevented slaves from suing their owners for unpaid wages.[34] Slave codes also prohibited slaves from being parties to suits of any type against their masters, no matter how serious the injury suffered, economic or otherwise.[35] A slave was the chattel of his master, like an ox or a horse; slave masters therefore perceived the idea of a slave receiving a forum in which to sue his master to be as outrageous as the idea of a horse accusing his master in court for alleged wrongdoings.[36]

A slave could not be a party in any civil suit,[37] except for those in which a former slave claimed to be free.[38] But in instances in which a freed slave wished to assert her freedom, thus challenging the claim of a white person, the courts refused to recognize a right to do so.[39] Even if a slave could bring a claim against his master,[40] a law prohibiting slaves from acting as witnesses against any white person in court effectively cut off all avenues of legal recourse.[41] Slaves could generally only testify on behalf of the

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[29] *Id.*

[30] *See* WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND IN PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTE, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 89–104 (Negro University Press 1968) (1853).

[31] *Id.* at 91.

[32] *Id.*

[33] *See, e.g.*, Hall v. Mullin, 5 H. & J. 190 (Md. 1821).

[34] GOODELL, *supra* note 30, at 239–44.

[35] *Id.* at 239–40.

[36] *Id.* at 239.

[37] *Id.* at 240.

[38] *Id.* at 295.

[39] Berard v. Berard, 9 La. 156, 156 (1836) (holding that a freed slave could not contest the title of a white person claiming to own her in court, even if the white person was not previously her master).

[40] Slaves would seek quantum meruit wages for work performed, or to complain about unsafe working conditions or inhumane treatment. GOODELL, *supra* note 30, at 300.

[41] *Id.*

commonwealth, or in civil cases between free black parties.[42] The rule made labor laws establishing minimum standards for working conditions of slaves essentially ineffective. These labor laws usually required witnesses, but because slaves could not testify against their masters, and white people seldom testified on behalf of slaves, a slave could not force a master's compliance of labor laws.[43] Even in cases of "murder, dismemberment, or mutilation" of a slave, without the testimony of a white person, "the difficulty of establishing the facts [was] so great, that white men [were], in a manner, put beyond the reach of the law."[44]

C. Federal Slave Law

The Constitution sanctioned the use of slave labor before the Civil War. Article I, section 9, which gave the federal government the right to tax "the Migration or Importation of such Persons as any of the States . . . shall think proper to admit,"[45] implicitly permitted slave labor and illustrated the government's willingness to profit from such labor.[46] Article IV, section 2, clause 3 of the Constitution solidified the exclusive property rights of the slave owner in his slaves and their labor:

> [n]o person held to service or labor in one state, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[47]

This clause, which stated that labor of a "person held to service" is "due" to his master, illustrated the federal government's recognition of an exclusive right of slave labor in the slave owner, paramount even over the laws of the free states.[48]

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[42] *Id.*

[43] *Id.* at 131. Because slaves could not testify against their white slave masters regarding alleged labor abuses, the laws purporting to provide slaves with protection against such abuses required a white witness to levy charges of abuse against a slave master. *See id.* at 135–40. However, slaveholders would not prosecute fellow slaveholders and poor non-slaveholding whites would not accuse slave masters of improper treatment of their slaves for fear of offending the slave owners. *See id.*

[44] *Id.* at 302.

[45] U.S. CONST. art. I, § 9.

[46] Donald Aquinas Lancaster, Jr., *The Alchemy and Legacy of the United States of America's Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African-American Reparations*, 43 HOW. L.J. 171, 180 (2000).

[47] U.S. CONST. art. IV, § 2, cl. 3.

[48] *Id.* at 171, 181.

V. PAST AND PRESENT ECONOMIC AND SOCIAL CONSEQUENCES OF AMERICAN SLAVE LABOR LAWS: SOME EXAMPLES

The past and present effects of slavery on the lives of African-Americans are well documented. From economic disadvantages to social harms, scholars have written much detailing the pervasive and egregious consequences of slavery. These works detail the suffering of the slave before, during, and immediately after the Civil War, and document the current vestiges of the slave labor system on their descendents today.

A. Educational Opportunities Available to African-Americans

Access to education is one of the most important factors in determining the likelihood of a person's economic and social success.[49] During slavery, slaves were denied education to ensure that they would remain a permanent underclass.[50] At the turn of the twentieth century, African-Americans generally had less than half of the education level of their Anglo-Americans counterparts.[51] Lack of educational opportunity for slaves and their descendents continued well into the twentieth century through the implementation of government programs affording whites opportunities while denying African-Americans.[52] Court decisions such as *Plessy v. Ferguson*[53] also prevented blacks from utilizing educational resources.

The denial of education for slaves and their descendents during and immediately after slavery helped to create much of the current inequalities in educational performance between African-Americans and Anglo-Americans, and, consequently, the inequality in social and economic opportunities between African-Americans and other groups.[54] For example, the percentage of African-Americans completing four or more years of college is consistently lower[55] than that of white Americans.[56] Statistics indicate that

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[49] Lucila Rosas, *Is Post Secondary Education a Fundamental Right?: Applying* Serrano v. Priest *to Leticia "A"*, 16 CHICANO-LATINO L. REV. 69, 83 (1995) (citing Serrano v. Priest, 18 Cal. 3d 728, 763 (1976)).

[50] Lancaster, Jr., *supra* note 46, at 185.

[51] *Id.* at 186–87.

[52] *See generally* A'Lelia Robinson Henry, *Perpetuating Inequality:* Plessy v. Ferguson *and the Dilemma of Black Access to Public Higher Education*, 27 J.L. & EDUC. 47 (1998).

[53] Plessy v. Ferguson, 163 U.S. 537 (1896).

[54] Lancaster, Jr., *supra* note 46, at 191–92.

[55] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 399, tbl. 622 (1997). In 1970, 8.3% of African-Americans completed four years of college, while 14.8% of white Americans completed four years of college during the same period. This trend continued in the following years, with 11% and 15.5% of African-Americans completing four years of college in 1980 and 1990, respectively, while 22.9% and 27.1% of Anglo-Americans finished four years of college during 1980 and 1990, respectively.

[56] Lancaster, Jr., *supra* note 46, at 191.

educational disparity continued through the 1990s.[57] The lack of African-American advancement today has been directly linked to the lack of educational opportunity for slaves and their descendents.[58]

B. African-American Real Property Ownership

Ownership of real property is often the primary source of wealth for American families today. Among African-Americans, however, there is a low rate of real property ownership.[59] This is due to the effects of slavery and the laws governing slavery. From 1619 until the end of the Civil War, most African-Americans were not allowed to own any property[60] because they themselves were considered property,[61] and neither slave states[62] nor the federal government[63] recognized African-Americans as citizens, whether as slaves or as free men. Hence, state and federal governments used lack of citizenship as a primary justification for denying African-Americans the right to own real property.[64]

The inability of African-Americans to purchase real property immediately after slavery reflects the paucity of economic means because slaves were not remunerated for their labor. Modern government initiatives have not helped most African-Americans obtain ownership of real property. For example, the Federal Housing Authority, a federal agency formed to ensure that low- to middle-income Americans could own their own homes, permitted covenants that discriminated on the basis of race.[65] Additionally, the Supreme Court's decision in *Plessy v. Ferguson*, crystallizing the "separate-but-equal" doctrine, sanctioned housing discrimination.[66]

A large gap exists between the levels of real property ownership among African-Americans and white Americans. The Bureau of the Census reports that in 1990, 67.5% of white Americans owned their homes versus only 42.4% of African-Americans.[67] This trend continued into the late 1990s; in 1996, 69% of white Americans owned their homes while only

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[57] *Id.*

[58] *See generally* Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1892 (1996) (generalizing that the past and present effects of discrimination have negatively affected the academic performance of black children).

[59] Lancaster, Jr., *supra* note 46, at 196.

[60] GOODELL, *supra* note 30, at 89–92.

[61] *See* Phyliss Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER L.J. 45, 47 (1998) (noting that until emancipation, the overwhelming majority of African-Americans were enslaved and treated as property).

[62] Lancaster, Jr., *supra* note 46, at 193.

[63] *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1857).

[64] Lancaster, Jr., *supra* note 46, at 193.

[65] Craig-Taylor, *supra* note 61, at 63.

[66] Lancaster, Jr., *supra* note 46, at 194.

[67] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 49 (1997).

43.9% of African-Americans owned their homes, accounting for 87.9% and 12.2% of all homeowners, respectively.[68] The inability of African-Americans to own property, either as slaves or later as free men, hindered their ability to obtain real property during the settlement of the American territories. This initial obstacle contributed to the inability of African-Americans to acquire wealth and thus helped entrench African-Americans into the lower levels of the American economy.

C. Other Effects of Slavery

The enslavement of Africans created many other social, economic, cultural, mental, emotional, and physiological problems for slaves and their descendents. Enslavement put African-Americans at a distinct disadvantage in society, both during and after slavery.[69]

VI. PAST REPARATIONS MOVEMENTS

America has struggled for centuries with how best to deal with the problem of slavery and its aftereffects. Many people, both white and black, have proposed various methods of repaying slaves for their labor.[70] To date, there have been five major African-American reparations movements: 1) the Civil War Reconstruction era; 2) the turn of the twentieth century; 3) the Marcus Garvey movement; 4) the civil rights movement of the late 1960s and early 1970s; and 5) the post-Civil Liberties Act era, beginning in 1989.[71]

A. The Reconstruction Era

The first widespread movement for African-American reparations began during the Reconstruction era.[72] This early attempt focused on

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[68] *Id.*

[69] *See, e.g.*, ROBINSON, *supra* note 16; Lancaster, Jr., *supra* note 46; Watson Branch, Comment, *Reparations for Slavery: A Dream Deferred*, 3 SAN DIEGO INT'L L.J. 177 (2002); Joe R. Feagin et al., *The Many Costs of Discrimination: The Case of Middle-Class African Americans*, 34 IND. L. REV. 1313 (2001); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993).

[70] 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, 883 (1993).

[71] Verdun, *supra* note 69, at 600; *cf.* Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 511 (1998).

[72] Verdun, *supra* note 69, at 600.

punishing the South to cripple the Confederacy.[73] The Freedman's Bureau Act of 1865, passed after the Civil War, was Congress's first attempt at reparations for slaves.[74] Effective for only one year, the Act assisted persons of African descent by allowing them to lease and buy designated land.[75]

In 1866, Congress amended the Act by creating the Freedmen's Bureau Bill. This bill, which expired in 1870, gave the Freedmen's Bureau the power to provide education to former slaves through legislation.[76] Since then, the government has had no direct involvement with the African-American reparations movement, though some argue that government-sponsored affirmative action programs qualify as reparations.[77]

B. The Turn of the Twentieth Century

The second reparations movement took place at the turn of the twentieth century when African-Americans began voicing displeasure concerning their living conditions in the South.[78] Supportive white Americans also sought reparations during this period. For example, Walter R. Vaughan, a white businessman, started the first ex-slave pension and bounty organization.[79] In 1894, Callie D. House and Reverend Isaiah H. Dickerson, also of European descent, established the National Ex-Slave and Mutual Relief Bounty Pension Association, an organization that actively promoted reparations to ex-slaves.[80] The efforts of organizations such as these often met great resistance and were largely unsuccessful.

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[73] *See* Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 685 (discussing the Confiscation Act of 1861 and how it was directed at taking land from Confederate rebels).

[74] Act of Mar. 3, 1865, ch. 90, 13 Stat. 507.

[75] Chisolm, *supra* note 73, at 685.

[76] *Id.*

[77] *See id.* Affirmative action programs have come under "strict scrutiny" and appear to be facing a demise. *See id.* (claiming that proposition 209 from California and a series of "copy cat legislation" may ultimately result in the demise of affirmative action); *but see* Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (requiring that the government have a compelling interest when it gives preferences based on race).

[78] *See* Verdun, *supra* note 69, at 600–01 (stating that African-Americans migrated from the South to escape poverty and racism).

[79] *Id.* Mr. Vaughan stated, "The Government should pension these ex-slaves . . . [who] formerly had good homes, were well fed, were provided with the best medical attention in sickness, and since their freedom, just the reverse has been their position." *Id.* at 602 n.12 (citation omitted) (quoting Mary F. Berry, *Reparations for Freedmen, 1890–1916: Fraudulent Practices or Justice Deferred?*, 57 J. NEGRO HIST. 219, 220 (1972)).

[80] Verdun, *supra* note 69, at 602–03.

C. The Marcus Garvey Era

Marcus Garvey, a Jamaican immigrant who founded the Universal Negro Improvement Association[81] (UNIA) in 1914, organized over four million African-Americans in a movement seeking reparations from the American government.[82] Garvey's message emphasized economic, political, and cultural self-sufficiency and self-preservation for African-Americans.[83] He helped establish several African-American businesses and publications throughout the country, and through his efforts, hundreds of African-Americans left the U.S. and resettled in Liberia.[84]

During World War II, Senator Theodore Bilbo of Mississippi proposed the Bureau of Colonization bill, which provided for re-colonization of acquired territories by African-Americans.[85] Members of UNIA provided 2.5 million signatures in support of Senator Bilbo's proposition from "American Negroes pleading and begging for a physical separation of the races."[86] Garvey's indictment for mail fraud and subsequent deportation thwarted the efforts of the UNIA.[87]

D. The Civil Rights Era

The civil rights movement sparked a renewed interest in reparations[88] that reached its peak when James Forman introduced the "Black Manifesto."[89] The Black Manifesto demanded $500,000,000 from white Christian churches and Jewish synagogues, though it made no demands of the government.[90] Simultaneously, Elijah Muhammad and the Nation of Islam published *The Muslim Program*, which demanded land and financial

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[81] The UNIA was an organization dedicated to the social and economic improvement of the descendants of African slaves throughout the world. AFRICANA, GARVEY, MARCUS MOSIAH, *at* http://www.africana.com/research/encarta/tt_608.asp (last visited Mar. 5, 2004)

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] AFRICANA, *supra* note 81.

[88] Verdun, *supra* note 69, at 603.

[89] *Id.* at 603–04.

[90] *Id.* & n.18 ("Use of the $500 million demanded . . . included: 1) $200 million for the purchases of land for cooperative farms; 2) $80 million for the establishment of black publishing companies and television networks; 3) $170 million for the establishment of a skills training center, a research center, and a black college in the South; 4) $30 million for the establishment of a welfare rights organization and a labor defense fund; and 5) funds for the establishment of an international trade association to facilitate cooperative businesses between the United States and Africa.").

assistance for up to twenty-five years, until African-Americans could supply their own needs.[91] The federal government ignored these proposals.

E. The Post-Civil Liberties Act Era

The Civil Liberties Act of 1988 revitalized the movement for African-American reparations.[92] Once interned Japanese-Americans received reparations for wrongs they suffered during World War II, descendants of slaves throughout America felt even more justified in their pursuit for compensation. Grassroots organizations such as the National Coalition of Blacks for Reparations lead the push to encourage the federal government to address this issue.[93] Additionally, U.S. Representative John Conyers of Michigan and Massachusetts State Senator William Owens have introduced reparations legislation in Congress.[94] The current version of their proposal, known as the "Conyers Bill," seeks to establish a commission to study the institution of slavery and to make recommendations to Congress for adequate remedies to the descendents of slaves.[95] The success of these current efforts has yet to be determined.

VII. ARE AFRICAN-AMERICANS DESERVING?: LEGAL AND MORAL ARGUMENTS FOR AND AGAINST REPARATIONS

A. Arguments in Favor of African-American Reparations

Some legal scholars suggest that the government should directly address the issue of reparations for slaves because America profited from slave labor for over two centuries, so America should compensate slaves for their labor.[96] Slaves were deprived of fair wages for almost three hundred years and their descendents were therefore deprived of economic inheritance.[97] The slave masters, ergo their descendents through inheritance, benefited from the withheld wages that rightfully belonged to their slaves.[98]

The law of trusts provides a method of remedy for unpaid wages. Though no actual trust was established, courts could impose a constructive

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91 *Id.*

92 *Id.* at 605–06.

93 *Id.*

94 *Id.* at 606.

95 H.R. 40, 108th Cong. (1st Sess. 2003).

96 *See* ROBINSON, *supra* note 16, at 6 (alluding to the fact that the federal government used slave labor to build and construct several federal buildings).

97 Verdun, *supra* note 69, at 608.

98 *Id.*

trust at equity.[99] Courts could consider the unpaid wages to be the corpus of the constructive trust, the descendents of slave masters to be the trustees, and the descendents of slaves to be the beneficiaries.[100] Courts could trace the proceeds of the constructive trust through various transactions, such as testamentary transfers and sales, into the hands of descendents of slave masters.[101] In keeping with the law of constructive trusts, the intention of the slave master is irrelevant; courts could impose a constructive trust in order to prevent unjust enrichment and force restitution.[102] Under the law of trusts, descendents of slaves would also have standing to claim any profits derived from the use of the corpus by the trustees.[103]

After the Civil War, General Sherman, with the permission of the War Department, granted the head of each family of former slaves forty acres of land and animals too weak for military service.[104] President Andrew Johnson later revoked these grants and returned the land to the previous white owners.[105] The U.S. government accepted the notion of slavery and actually profited from it. At least three provisions of the Constitution recognized and condoned slavery. The Constitution only recognized slaves as three-fifths of a whole person.[106] Article IV, section 3 prevented slaves from acquiring their freedom through escaping from a slave state to a free state.[107] Not only did Article I, section 9 bar the dissolution of the slave trade until 1808, but it also placed a tax on slavery and created revenue for the

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[99] 5 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 462 (4th ed. 1989) ("Judge Cardozo has . . . said: 'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.' This would seem to be a . . . nearly complete description of a constructive trust.").

[100] Verdun, *supra* note 69, at 608 n.31.

[101] *Id.*

[102] *Id.*

[103] *Id.* Mari Matsuda concludes that a similar claim can be brought and maintained under restitution law. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 380 (1987). She claims that African-Americans, among other groups, have been relegated to take some of the most difficult dangerous and uncompensated work and contends that "[o]ne cannot be detached from privilege while enjoying the benefit's of this country's high standard of living." *Id.* "To the extent that beneficiaries retain a privileged status at the expense of another disadvantage [African-Americans], they are unjustly enriched." *Id.* at 380 n.231.

[104] Verdun, *supra* note 69, at 608 n.31.

[105] *Id.*

[106] U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all [slaves].").

[107] U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to [Slave] Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

government through the importation of slaves.[108] During the antebellum years, the Supreme Court upheld the laws that permitted slavery, deciding major cases concerning the slave trade[109] and the treatment of escaped slaves.[110] Furthermore, as discussed above, the government used slave labor to build and construct several federal buildings,[111] paying slave owners or masters for the slave labor.

America's use of slave labor is a major reason that America has emerged as the preeminent industrial power of the modern era.[112] One scholar is convinced that

> [the United States'] present day wealth, rather than a result of how economic activity was organized or of access to natural resources, is more attributable to the fact that at a crucial point in the development of the industrial United States, large amounts of free labor were deployed, from which surplus was extracted and filtered through various exchange mechanism[s] to nearly every budding industrial enterprise in the nation.[113]

For the majority of the 1800s, labor was the major source of production in America.[114] The scarcity of labor during America's infancy slowed economic growth during that period.[115] Slave labor relieved this scarcity and made it possible for the development of American industry, which helped spur America's unprecedented economic growth.[116]

The government, while giving reparations to selected racial and ethnic groups that it has wronged,[117] has refused to engage in meaningful dialogue about reparations for slaves and their descendants.[118] Additionally, individual states have enacted statutes that allow other ethnic and racial

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[108] U.S. CONST. art. 1, § 9, cl. 1 ("The Migration or Importation of [slaves] as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each [slave].").

[109] *See, e.g.*, The Antelope, 23 U.S. (10 Wheat.) 66 (1825) (recognizing the right of foreigners to engage in the slave trade if allowed by their country).

[110] *See* Priggs v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (upholding the Federal fugitive slave Act of 1793).

[111] *See* ROBINSON, *supra* note 16, at 6.

[112] Verdun, *supra* note 69, at 631–32 n.99.

[113] Jim Marketti, *Black Equity in the Slave Industry*, 2 REV. BLACK POL. ECON. 43, 43–44 (1972).

[114] Verdun, *supra* note 69, at 631–32 n.99.

[115] *Id.*

[116] *Id.*

[117] *See* Irma J. Ozer, *Reparations for African-Americans*, 41 HOW. L.J. 479, 480–81 (1998) (chronicling the reparations of Native Americans, Japanese, and Italians by the American government).

[118] *See, e.g.*, Cato v. United States, 70 F.3d 1103, 1105 (9th Cir. 1995) (dismissing a reparations claim against the United States).

groups to use state courts to sue for reparations from international entities.[119] Because the federal government and various states have shown a great willingness to acknowledge their own wrongs and help various victims pursue justice, these same governments should also be willing to engage in meaningful discussion concerning reparations and should allow African-Americans to use the courts to pursue justice.

B. Arguments Against African-American Reparations

Opponents of reparations argue that reparations for African-Americans would be an ineffective way of remedying the past wrongs of slavery. Reparations opponents often base their arguments on one or more of five concepts:

> (1) no one should receive reparations for something that happened so long ago; (2) if society "gives" reparations to blacks, when will they stop, where is the cut off line?; (3) blacks today were not enslaved and should not receive reparations; (4) today's opponents did not enslave anyone and should not have to pay for the sins of their slave-master forebears; and (5) blacks must become self-reliant and stop waiting for relief from external sources.[120]

Many opponents of African-American reparations assert that existing law is sufficient to remedy the past wrongs of slavery.[121] Those who adopt this stance point to existing civil rights laws that purport to grant equal opportunity to African-Americans.[122] With such opportunities available to African-Americans, they argue, there is no need for some other form of reparations.[123]

In addition, opponents of reparations argue that racial reparations plans for African-Americans would be both over-inclusive and under-inclusive. Critics argue that middle- and upper-class African-Americans

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[119] *See* Diane R. Foos, *Righting Past Wrongs or Interfering in International Relations? World War II-Era Slave Labor Victims Receive State Legal Standing After Fifty Years*, 31 MCGEORGE L. REV. 221, 226 n.39 (2000) (referring to CAL. CIV. PROC. CODE §§ 339–340 (West Supp. 2000) as "lacking an exception to the statute of limitations for World War II-era slave labor victim cases"). *But see id.* (finding that that CAL. CIV. PROC. CODE § 345.5(c) "extend[s] the statute of limitations . . . for Holocaust victims or their heirs or beneficiaries, who have claims arising out of insurance policies purchased in Europe during World War II").

[120] Jeremy Levitt, Article, *Black African Reparations: Making a Claim for Enslavement and Systematic de Jure Segregation and Racial Discrimination Under American and International Law*, 25 S.U. L. REV. 1, 4–5 (1997).

[121] Yamamoto, *supra* note 71, at 487–88.

[122] *Id.*

[123] *Id.*

would benefit from such programs, though they are not economically disadvantaged.[124] Likewise, they argue that reparations for African-Americans will not address the problems faced by other economically disadvantaged groups.[125]

VIII. THE CIVIL LIBERTIES ACT: AN EXAMPLE OF AMERICA'S WILLINGNESS TO RECOGNIZE WRONGS COMMITTED AGAINST OTHER RACIAL GROUPS

A recent example of America's willingness to recognize its role in causing harm to an ethnic or racial group is the apology and grant of financial reparations to Japanese-Americans who the government incarcerated in internment camps during World War II. The Civil Liberties Act of 1988[126] provided Japanese-Americans with a formal apology from the federal government, acknowledging the wrongful evacuation, relocation, and internment of American citizens and permanent resident aliens of Japanese ancestry. Additionally, the federal government made reparations payments of $20,000 to each individual of Japanese ancestry subjected to the internment.[127] The purpose of the Act was to

> (1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II; (2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens; (3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event; (4) make restitution to those individuals of Japanese ancestry who were interned; (5) make restitution to Aleut residents of the Pribil Islands and the Aleutian Islands west of Unimak Island, in settlement of United States obligations in equity and at law, for—(A) injustices suffered and unreasonable hardships endured while those Aleut residents were under United States control during World War II; (B) personal property taken or destroyed by United States forces during World War II; (C) community property, including community church property, taken or destroyed by United States forces during World War II; and (D) traditional village lands on Attu Island not rehabilitated after World War II for Aleut occupation or other productive use; (6) discourage the

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124 *Id.* at 498–99.
125 *Id.* at 499.
126 50 app. U.S.C. §§ 1989–1989d (2003).
127 *Id.*

> occurrence of similar injustices and violations of civil liberties in the future; and (7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.[128]

The Act created the Office of Redress Administration, a federal agency responsible for identifying individuals eligible for relief in connection with the wrongs suffered by Japanese-Americans during World War II.[129] For eligibility, the Civil Liberties Act required a claimant to show that she was 1) of Japanese Ancestry; 2) living on the date of the Act's enactment, August 10, 1988; 3) alive during the evacuation, relocation, and internment period, between December 7, 1941, and June 30, 1946; and 4) confined, held in custody, relocated, or otherwise deprived of liberty and property because of the confinement, relocation, or internment simply because of his Japanese ancestry.[130] The Act contained a specific waiver of sovereign immunity, authorizing the United States Court of Federal Claims to review claims under the Act and award payments as justified by law.[131] To facilitate the payment of reparations, the Act created the U.S. Civil Liberties Public Education Fund within the U.S. Treasury.[132] The fund was to terminate on August 10, 1998, ten years after the enactment of the Act, or whenever the money ran out, whichever occurred first.[133]

The Civil Liberties Act of 1988 survived constitutional attack. In *Jacobs v. Barr*,[134] an American of German ancestry challenged the Act on the ground that the Act violated the Equal Protection Clause of the Fourteenth Amendment.[135] The plaintiff had been interned during World War II but was considered ineligible to receive any reparations under this statute because, according to Congress's findings of fact, individuals of German ancestry were not subjected to the same "mass exclusion or detention" as those of Japanese ancestry.[136] The Court of Appeals for the D.C. Circuit upheld the Act, applying the strictest level of constitutional scrutiny because the law discriminated on the basis of race or nationality.[137] The court noted that there was no proof showing that the federal government's internment policy

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128 50 app. U.S.C. § 1989 (2003).
129 Obadele v. United States, 52 Fed. Cl. 432, 433 (2002).
130 28 CFR § 74.3 (2003).
131 50 app. U.S.C. § 1989b-4(h)(1) (2003). *See, e.g.*, Murakami v. United States, 46 Fed. Cl. 653 (2000).
132 50 app. U.S.C. § 1989b-3(a) (2003).
133 § 1989b-3(d).
134 Jacobs v. Barr, 959 F.2d 313 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 831 (1992).
135 *Id.* at 314.
136 *Id.* at 315.
137 *Id.* at 318, 322.

extended to German-Americans simply because of their race[138] and that the historical evidence and testimony during congressional hearings clearly supported Congress's finding that Japanese-Americans were the victims of racial prejudice during the internment period.[139] Therefore, the court concluded, Congress had a sufficient reason to compensate people of Japanese descent for the "shameful example of national discrimination" experienced.[140]

In providing an apology and financial award to interned Japanese-Americans, America made a necessary and honorable attempt to rectify the suffering that Japanese-Americans suffered at the hand of the federal government. If the federal government could recognize and repair the harm that it caused in this isolated instance, surely it should be able to acknowledge the obvious harm that it and its citizens caused slaves and their descendants for the hundreds of years that Africans were forced to labor for the benefit of America and its people.

IX. THE CONYERS BILL: ONE LEGISLATIVE ATTEMPT AT CREATING AN AFRICAN-AMERICAN REPARATIONS PLAN

John Conyers has been one of the only politicians in recent history to create a compensation plan to remedy the effects of slavery.[141] The stated purpose of the Conyers Bill,[142] as submitted to the Judiciary Committee on January 3, 2001, was

> [t]o acknowledge the fundamental injustice, cruelty, brutality, and inhumanity, of slavery in the United States and in the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequently de jure and de facto racial and economic discrimination, against African-Americans and the impact of those forces on living African-Americans, to make

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[138] Germans were detained in small numbers and only after individual hearings on their loyalty to America. Detainees of Japanese ancestry were kept in large numbers without the benefit of individualized hearings. *Id.* at 313.

[139] *Id.* at 319–21.

[140] *Id.* at 321–22.

[141] Interestingly, the proposed legislation for reparations is closely modeled after the congressional grant of reparations of former Japanese-Americans reparations. Magee, *supra* note 70, at 878.

[142] The Conyers Bill has never made it past the House Judicial Subcommittee. Some members in the subcommittee have argued that throwing money at old wounds would do little to heal them. Representative F. James Sensenbrenner, a Wisconsin Republican stated, "There's no more detestable institution than slavery . . . [but] I don't think trying to monetarize that history lesson is going to provide a useful purpose." *Id.* at 879 (citation omitted). However, California Democrat and Subcommittee Chairman Don Edwards stated that "[P]andora's box should be opened . . . . Something needs to be done to wake up America [to the fact] that something is wrong in our race relations." *Id.* (citation omitted).

> recommendations to the Congress on appropriate remedies and for other purposes.[143]

The Bill states the following conclusions regarding the institution of slavery: (1) approximately 4,000,000 Africans and their descendants were enslaved in the U.S. from 1619 until 1865; (2) the U.S. government sanctioned the institution of slavery; (3) African-Americans were deprived of their liberty, cultural heritage, and citizenship and denied the fruits of their labor; and (4) sufficient inquiry has not been made concerning the effects of the institution of slavery on descendents of slaves.[144] The Conyers Bill sought to establish a commission to recommend to Congress appropriate ways to educate the American public of the effects of slavery on slaves and their descendants.[145] Chief among the commission's concerns would be to determine whether descendants of slaves are entitled to any reparations.[146]

The Conyers Bill reaches many of the same factual conclusions that supporters of reparations have made, yet some reparations activists have criticized the bill.[147] These critics contend that the time for further studies on the lingering effects of slavery is over.[148] The plight of the African-American, they argue, has been studied long enough and the effects of slavery are obvious.[149]

Nevertheless, many reparations proponents believe that it is best to seek reparations from the legislature. The legislature has plenary power to address the issue and can exercise such power under the General Welfare Clause or the Commerce Clause, augmented by the power under section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause.[150] Conversely, courts can only deal with parties before them, and even in a class action suit, a court is able to address the concerns of only parties similarly

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[143] H.R. 40, 108th Cong. (1st Sess. 2003).

[144] H.R. 40 § 2(a).

[145] H.R. 40 §§ 4–5. *See, e.g.*, H.R. 40 § 4(a)(1) ("The Commission shall be composed of 7 members, who shall be appointed, within 90 days after the date of enactment of this Act, as follows: (A) Three members shall be appointed by the President. (B) Three members shall be appointed by the Speaker of the House of Representatives. (C) One member Shall be appointed by the President pro tempore of the Senate."); H.R. 40 § 5(a) ("The Commission may . . . hold such hearings and sit and act as such times and at such places in the United States, and request the attendance of testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents, as the Commission considers appropriate. The Commission may request the Attorney General to invoke aid of an appropriate United States district court to require, by subpoena or otherwise, such attendance, testimony, or production.").

[146] H.R. 40 §§ 4–5.

[147] Ozer, *supra* note 117, at 487.

[148] *Id.*

[149] "Reparation activists, who have criticized the Conyers Bill, felt that African-Americans had been studied long enough, that the injury was obvious, and that the time had come for compensation." *Id.*

[150] *Id.*

situated to those before the court.[151] Therefore, courts do not have the ability to devise a societal solution or the power to enforce them.[152]

X. HOW MUCH?: CAN A MONETARY VALUE BE PLACED ON THE EFFECTS OF SLAVERY ON AFRICAN-AMERICANS?

Placing a monetary value on the effects of slavery on African-Americans is a difficult, if not impossible, task.[153] The numerous social and economic problems currently facing the African-American community are too complex and widespread for a simple lump-sum cash payment alone to satisfy them.[154] Any effort to quantify the consequences of centuries of insufficient economic resources, lack of basic educational opportunities, and discrimination in society has many inherent difficulties.[155] Some African-Americans might consider an effort to place a monetary value on the loss of freedom and liberty suffered during slavery offensive.[156] Others worry that a cash payment for damages suffered under a tort theory of liability might allow the government to wash its hands of the social and economic problems of the African-American community after tendering the payment.[157]

XI. POLICIES AND GOALS OF NATIVE AMERICAN REPARATIONS: HOW AMERICA'S APPROACH TO AFRICAN-AMERICAN REPARATIONS CAN MIRROR FEDERAL NATIVE AMERICAN POLICY

Native Americans have suffered enduring social marginalization, economic poverty, and virtual extinction at the direct hands of the U.S. government. Admirably, the federal government officially admitted to its culpability by instituting various policies and initiatives in an attempt to correct wrongs. The African-American experience has been remarkably similar to the Native American experience. Both groups experienced officially sanctioned discrimination, violence, and exploitation. As America recognized its fault in the dealings with Native Americans by implementing

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[151] *Id.*

[152] "From the Japanese and Jewish experience it is clear that the courts are an inappropriate body before which to submit a claim for reparations. Moreover, even though reparations were paid to Japanese Americans on the basis of a group criterion, each eligible claimant received an individual payment." Robert Westley, *Many Billions Gone: Is It Time to Reconsider The Case For Black Reparations?*, 40 B.C.L. REV. 429, 467 (1998).

[153] *See, e.g.*, Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531 (2001).

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] Glenn C. Loury, Op-Ed, *It's Futile to Put a Price on Slavery*, N.Y. TIMES, May 29, 2000, at A15.

policies and programs to redress injuries suffered by the Native Americans, America should also recognize its fault in the treatment of slaves and their descendents by implementing corrective measures in a similar fashion.

Though the federal government has not officially used the term "reparations" to describe policies and programs instituted on behalf of Native Americans, the authors submit that these policies are reparations nonetheless. As discussed below, the government adopted these policies to correct some of the injustices that Native Americans suffered and repair what it has nearly destroyed. Consequently, when discussing Native American federal aid, this article uses the words "aid" and "reparations" interchangeably.

A. Federal Indian Reparations Policies and Goals

America has recognized a fiduciary duty towards Native American tribes pursuant to various treaty obligations and a network of statutes that impose certain specific responsibilities on the government.[158] American courts and congressional acts characterize the relationship between the government and Native Americans as a people "dependent" on and "sometimes exploited" by the American government as a trust relationship.[159] Through law, the government assumes "obligations of the highest responsibility" towards Indians.[160]

Many opinions differ as to the catalyst that drove the federal government to address the injustices suffered by Native Americans. One author opines that the various laws concerning Native Americans

> emanate a kind of morality profoundly rare in our jurisprudence. It is far more complicated than a sense of guilt or obligation, emotions frequently associated with Indian policy. Somehow, these old negotiations—typically conducted in but a few days on hot, dry plains between midlevel federal bureaucrats and seemingly ragtag Indian leaders—are tremendously evocative. Real promises were made on those plains, and the Senate of the United States approved them, making them real laws. My sense is that most judges cannot shake that. Their training, experience, and, finally, their humanity—all of the things that blend into the rule of law—brought them up short when it came to signing opinions that would have obliterated those promises.[161]

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[158] Cato v. United States, 70 F.3d 1103, 1108 (9th Cir. 1995). *See, e.g.*, United States v. Mitchell, 463 U.S. 206 (1983); United States v. Mason, 412 U.S. 391 (1973); Seminole Nation v. United States, 316 U.S. 286 (1942).

[159] *Seminole Nation*, 316 U.S. at 296.

[160] *Id.* at 296–97.

[161] CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 121–22 (Yale Univ. Press 1987).

Other authors suggest that the government, in promising justice for Native Americans whose lands it illegally expropriated, desired to avoid appearing hypocritical while prosecuting Nazis at Nuremburg for war crimes against European Jews during World War II.[162]

B. Possible Policies and Goals for African-American Reparations

Just as America implores the world community to recognize human rights abuses by ostracizing, punishing and even invading sovereign states that refuse to meet America's standards regarding human rights, America should consider its own history on these issues and assume the "highest responsibility" in ensuring that those who were denied these same rights are justly compensated. Otherwise, just as some authors theorize, America may appear as a hypocrite in the international community. "Morality" and "humanity" require at least this much.

The goal and general policy for African-American reparations should be to ensure that African-Americans are compensated for the slave labor of their ancestors and, more importantly, to establish the African-American as a complete equal to his white American counterpart. To accomplish this goal, an African-American reparations plan should focus on various social and economic concerns, including but not limited to the following: 1) financial independence of African-American individuals and communities; 2) sufficient educational opportunities; 3) familial stability; 3) land and property ownership; 4) political and social equality and inclusion; and 5) psychological healing. For an effective reparations plan, the government must first officially acknowledge and apologize for the harm it caused and for the harm it allowed its citizens and agencies to cause through the slavery of African-Americans.

XII. A REPARATIONS PLAN FOR AFRICAN-AMERICANS BASED ON THE NATIVE AMERICAN FEDERAL AID MODEL

This section proposes two methods for the distribution of African-American reparations: economic initiatives and educational opportunities.

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[162] *See, e.g.*, Ward Churchill & Glenn T. Morris, *Key Indian Laws and Cases*, *in* THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE (RACE AND RESISTANCE) 15 (M. Annette Jaimes ed., 1992); Lindsay Glauner, *The Need for Accountability and Reparation: 1830–1976 The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 936 (2002).

A. Economic Reparations Programs Based on the Native American Federal Aid Model

Looking to the Native American reparations model, Congress can fashion a feasible and effective economic plan for African-Americans that would help African-Americans gain widespread financial security through self-renewing business initiatives and educational opportunities.

1. Low-Interest Loan Program

One possible approach to African-American economic reparations could be a low-interest loan program for the descendents of slaves based on the federal government's current loan system for American Indians. In an effort to assist Indians in establishing a standard of living comparable to average American communities by using Indian resources, both human and physical, Congress created the Indian Revolving Loan Fund (IRLF),[163] which provides capital to Indian communities on a reimbursable basis.[164] The money for IRLF comes in part from settlement for livestock debts as well as previously created revolving funds[165] and $50,000,000 appropriated by Congress.[166] Qualifying Indians may receive a grant "for any purpose which will promote the economic development of (a) the individual Indian borrower, including loans for educational purposes, and (b) the Indian organization and its members including loans by such organizations to other organizations and investments in other organizations."[167]

The office of the Secretary of the Interior will grant such loans only when there is a reasonable prospect of repayment and the individual or organization is unable to procure financing on reasonable terms elsewhere.[168] The loans can last for a term of up to thirty years and charge an interest comparable to the market yield on municipal bonds.[169] The borrower may defer the interest on loans for educational purposes while the borrower is in school or in the military.[170] The Secretary of the Interior has the power to cancel or adjust the amount of any loan made from this fund and the authority to modify the terms of any agreement made to secure repayment of the loan.[171] Title to any land purchased with money from the revolving loan

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163 25 U.S.C. § 1461 (2003).
164 25 U.S.C. § 1451 (2003).
165 *Id.*
166 25 U.S.C. § 1468 (2003).
167 25 U.S.C. § 1462 (2003).
168 25 U.S.C. § 1463 (2003).
169 25 U.S.C. § 1464 (2003).
170 *Id.*
171 25 U.S.C. § 1465 (2003).

fund may be taken in trust in certain circumstances at the discretion of the Secretary of the Interior, but title to any personal property bought using such borrowed funds will lie in the purchaser.[172]

The IRLF would serve as an excellent template for a comparable loan program for African-Americans. This program's goal, to "promote the economic development" of Native Americans, is identical to the suggested goals of any African-American reparations program. Using loan standards similar to those required by IRLF would help ensure that only the people most deserving of a low interest rate; that is, the poorest descendents of slaves who could not receive financing on their own would receive a loan under this program. Money from a revolving fund similar to the IRLF could start small businesses throughout African-American communities, create jobs for the unemployed, generate tax revenue for the federal and state governments, or create scholastic opportunities, opening the door to employment opportunities routinely denied to African-Americans due to lack of education. Such a loan program, if provided with sufficient funds to reach as many of those who need such assistance as possible, would serve as the economic boost that many African-Americans need to end the cycle of social and economic destitution. The IRLF provides Congress with a suitable blueprint to build such a program.

2. Loan Guarantees for Private Loans

Congress also created the Indian Loan and Guaranty and Insurance Fund (ILGIF), which authorizes the Secretary of the Interior to guarantee up to 90% of the unpaid principal and interest of any loan made by a private lending institution to any Indian individual or organization.[173] This guarantee is subject to a premium charged to the borrower to cover expenses and probable losses[174] and the term of the loan may not exceed thirty years.[175] Congress agreed to insure up to $500,000,000 of loans under this program.[176]

The Secretary reviews loan applications and issues a certificate of guarantee to the lender if the Secretary finds a reasonable prospect of repayment.[177] The Secretary will not guarantee loans to individuals exceeding $500,000 and will guarantee loans to Indian organizations exceeding $250,000 only if the Secretary pre-approves the loans.[178] If an

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[172] 25 U.S.C. § 1466 (2003).

[173] 25 U.S.C. § 1481 (2003). *But see* 25 U.S.C. § 1487 (2003) (limiting the type of financial institutions whose loans may be guaranteed under these provisions).

[174] 25 U.S.C. § 1482 (2003).

[175] 25 U.S.C. § 1490 (2003).

[176] 25 U.S.C. § 1497 (2003).

[177] 25 U.S.C. § 1484 (2003).

[178] *Id.*

Indian individual defaults on a loan insured by ILGIF, the lender submits a claim directly to the Secretary of the Interior and the Secretary reimburses the lender only if the lender has made reasonable efforts to collect the debt.[179] Once the guaranteed loan is repaid in whole or in part, the borrower enjoys protection from any further claims made by the private lender, though the Secretary may take further collection action within his discretion against the borrower.[180] As with loans drawn from the IRLF, the Secretary of the Interior may take title in trust to land purchased with money from the ILGIF in certain circumstances, but anyone who uses borrowed funds from private institutions to buy personal property holds title to such property.[181]

African-Americans face the same difficulties as Native Americans when attempting to secure favorable loans from private lending institutions, primarily because of economic status and lack of equity. By guaranteeing private loans made to African-Americans under a plan similar to ILGIF, the federal government would help millions of the neediest of its citizens have access to funds that would not otherwise be available.

3. Grants to Establish Economic Initiatives

The Department of the Interior has also established the Indian Business Development Program (IBDP), which provides non-reimbursable grants to Indian individuals and Indian tribes "to establish and expand profit-making Indian-owned economic enterprises."[182] These grants are limited to $100,000 per individual and $250,000 per tribe.[183] Grants are available only to applicants who are unable to obtain sufficient financing from other sources[184] and who have at least 60% of the funds necessary for the economic enterprise.[185] Since 1986, Congress has appropriated up to $10,000,000 per year for these grants.[186]

Before the making of a loan under the IRLF, the guarantee of a loan under the ILGIF, or the making of a grant from the IBDP, the Secretary of the Interior must be satisfied that the loan or grant money is competently managed according to the needs of the economic enterprise.[187] The Secretary has the right to consult with federal agencies such as the Small Business Administration and to contract with private organizations to provide services

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179 25 U.S.C. § 1492 (2003).
180 *Id.*
181 25 U.S.C. § 1495 (2003).
182 25 U.S.C. § 1521 (2003).
183 25 U.S.C. § 1522(a) (2003).
184 25 U.S.C. § 1522(b) (2003).
185 25 U.S.C. § 1522(c) (2003).
186 25 U.S.C. § 1523 (2003).
187 25 U.S.C. § 1541 (2003).

and assistance that ensures the proper management of the borrowed or granted funds.[188]

As with IRLF and ILGIF, the IBDP is a suitable paradigm for an African-American business grant program. Congress could create an agency to administer and monitor loan and grant disbursements just as the Secretary of the Interior presides over these Native American programs. Economic solutions based on the above models would likely enjoy great success in repaying slaves and their descendents for many years of hard labor.

B. Educational Reparations Programs Based on the Native American Model

This country places great emphasis on individual achievement through education. The Supreme Court noted that education is paramount in providing individuals with the basic tools necessary to be a contributing member of society.[189] Slaves, however, were denied education in an effort to keep them downtrodden.[190] Not until *Brown v. Board of Education* were African-Americans allowed to receive an "equal" education.[191]

Congress has found that the number of Native American students qualifying for post-secondary education is increasing and far outpaces the available general federal funding specifically provided for Native American colleges or universities.[192] Congress therefore created higher educational need-based grants for individual Native American students.[193] It could create similar need-based educational grants for African-Americans.[194]

XIII. FACING THE DIFFICULT TRUTH: ADDRESSING THE REPARATIONS ISSUE TO PROMOTE HEALING FOR ALL AMERICANS

Though most reparations claims seek judicial remedies, congressional legislation is the preferable avenue for achieving African-American reparations. The legislature has plenary power to address this issue. Because Congress has already addressed reparations for Native

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188 25 U.S.C. § 1542 (2003).

189 Plyler v. Doe, 457 U.S. 202, 221 (1982) (stating, "[As] . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence" (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972))).

190 Lancaster, Jr., *supra* note 46, at 185.

191 *See* Brown v. Bd. of Educ., 347 U.S 483 (1954) (overruling the separate but equal doctrine).

192 25 U.S.C. § 3302 (2003).

193 25 U.S.C. § 3305(b)(1) (2003).

194 Basing eligibility on financial need addresses some of the concerns that reparations are over-inclusive because middle-class African-Americans who have the means to pay for postsecondary education do not receive benefits.

Americans and Japanese-Americans, it should now address African-American reparations.

The challenges facing African-Americans today are not rooted solely in their slave history; thus, the government cannot remedy their condition with one large monetary payment. The Native American federal aid model illustrates the fact that the government must take many different approaches to address such widespread social and economic ills. A system of African-American reparations such as the one created for Native Americans would provide the greatest long-term benefits for descendents of slaves. The system could provide economic support, educational opportunities, and other benefits enabling African-American self-reliance. Implementation of a reparations program would also help the country as a whole heal from the wounds that slavery and segregation created in our society. Programs like the ones suggested above would add legitimacy to America's supposed position as a world leader on the issue of human rights and democracy.

The government must have the courage to face issues of reparations for African-Americans to reach an equitable outcome. Everyone agrees that slavery was wrong. There is also ample evidence that African-Americans are still suffering from the effects of slavery. Yet remedies alleviating the effects of slavery have been few and far between. The Conyers Bill has never made it past the Judiciary Committee. The courts have unsympathetically struck down legal reparations claims on mere technicalities, often without showing genuine willingness to consider the merits of these claims.[195] All branches of American government have hesitated to confront this issue. Instead of recognizing the reality of our country's history and present social condition, our political representatives continue to deny the past and ignore the future. The government and, more importantly, the citizens of this nation must realize that America's well-being is inextricably connected to the wellbeing of the African-American. "[U]ntil mainstream America perceives self-interest in [reparations], the political movements for reparations will have little resonance."[196]

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[195] *See, e.g.*, Cato v. United States, 70 F.3d 1103 (9th Cir. 1995) (holding in part that lower court properly dismissed pro se in forma pauperis complaint because it neither identified a violated constitutional or statutory right nor asserted any ground for federal subject matter jurisdiction or waiver of sovereign immunity); Obadele v. United States, 52 Fed. Cl. 432, 443–44 (2002) (holding that the Civil Liberties Act did not violate equal protection or due process rights of African-American claimants denied redress under the Act because the race-based limitation to Japanese-Americans was narrowly tailored to meet a compelling government interest).

[196] Yamamoto, *supra* note 71, at 714.