RECENT DEVELOPMENTS

AIN'T I A SLAVE: SLAVERY, REPRODUCTIVE ABUSE, AND REPARATIONS

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PROLOGUE

"Brothers, I want to say something about this matter of reparations. I am for the slave's rights to be paid for the years of toil and labor done without the benefit of pay. The slavery you know is the slavery I know. It is the slavery that we women and you men shared. We slaves, men and women, shared many sorrows: the sorrow of back breaking work from sun up to sun down, the sorrow of not having a say in where we laid our heads or who could have our bodies, the sorrow of knowing our mothers, fathers, sisters and brothers were not ours at all. We know the

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heartbreak of having to say goodbye to too many babies and children torn from our arms and hearts. But brothers, I am also for a woman's rights in this matter of reparations because there are some parts of slavery that we women bore alone, or at least bore different. That slavery only a woman slave can know. Slavery for a woman meant that we plowed and reaped and husked and chopped and mowed and were forced to be what only a wife was meant to be. But we ain't been no wife to no man. To be a wife we first have to be a woman and for what we been forced to do we ain't never been seen as no woman. Women needs to be helped into carriages and lifted over ditches and they get to have the best places everywhere. Nobody ever helped the slave woman into carriages or over ditches or over mud-puddles or gives us any best place! All I ever been is a woman slave which is worst than a woman and worst than a slave. I don't think that the white man will ever see me as a woman so I turn to you brothers and ask you to look at my back with the same raised stripes as yours, and look at my eyes with the same sadness of slavery and look at my breasts low from the weight of wet nursing, which have had baby after baby torn away from each teet. Look also at my belly stretched and pulled from the thirteen children I have borne and seen almost all them sold off to slavery and when I cried out with a mother's grief none but Jesus heard me! So, brothers, when you think about reparations, I ask you, Ain't I A Slave?"[2]

2. While some of the language comes from accounts of speeches given by Sojourner Truth, a famous black abolitionist, this text here is fictional. I am imagining what Truth would have said had she interrupted a meeting on reparations instead of a meeting on women's rights. The original speech reportedly took place at a Women's Rights Convention in Akron Ohio in 1851. *See* Sojourner Truth, Speech Delivered at the Universalist Church, Akron, Ohio (May 29, 1851), *in* THE ANTISLAVERY BUGLE, June 21, 1851, *reprinted in* 4 THE BLACK ABOLITIONIST PAPERS 81-82 (C. Peter Ripley ed., 1991). Another account of Truth's speech appears in Francis D. Gage's *Reminiscences, in* 1 HISTORY OF WOMEN SUFFRAGE 115-117 (Elizabeth C. Staton et al. eds., 2d ed. 1889). Finally, Truth is also famous for baring her breast as proof of her womanness before a skeptical audience in Indiana in 1858. Many historians doubt that either account ever took place. They argue that Truth's image as well as her speeches were malleable and subject to revision based on the needs of the writer. As such, in the text above I follow in the footsteps of many when I recreate Truth for my own purposes. For a detailed, comprehensive and definitive discussion of the legend of Sojourner Truth and the discussion among historians who doubt the authenticity of these accounts, see NELL IRVIN PAINTER, SOJOURNER TRUTH: A LIFE, A SYMBOL (1996). *See also* Cheryl Harris, *Finding Sojourner's Truth: Race, Gender and the Institution of Property*, 18 CARDOZO L. REV. 309 (1996) (providing a powerful analysis of the symbolic and metaphorical use

I. INTRODUCTION

Approximately ten books, forty-one law review articles, and countless websites and manifestoes have been written on reparations for slavery in the United States. However, less than one-tenth of one percent of this literature mentions the experience of female slaves.[3] This glaring omission carries on a regrettable tradition of an insufficient analysis of the institution of slavery by legal scholars and by past political movements designed to end and protect against inevitable manifestations of slavery. Because these scholars and movements have excluded the female slave experience, significant data pertaining to the practice of exploiting the sexual vulnerability and reproductive capacity of enslaved women is sparse and difficult to assess. Consequently, African American women have yet to acquire a coherent legal doctrine with which to address the modern manifestations of female slave sexual and reproductive abuse.[4]

Additionally, the mainstream reproductive rights movement has also failed to incorporate the realities of the female slave experience into the development of their reproductive rights agenda and legal doctrine. This fact has stifled progress toward reproductive and sexual freedom, and hindered protecting against reproductive abuse, particularly for women of color. Absent a fully developed legal theory specific to women of color, it is virtually impossible to make a legal argument that they are vulnerable to or have been harmed by certain policies relating to reproduction because of their race.[5] Thus, the arduous fight in

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of Truth's legendary speech as an example of the interplay between gender, race and property exploitation).

3. Those that mention the experience of female slaves include: RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (2000) (mentioning the rape of black women as grounds for reparations); Lisa Cardyn, *Sexualized Racism/ Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675 (2002) (detailing the sexual violence during the Reconstruction and Jim Crow era and calling for increased awareness in society as a way to ameliorate racial tension).

4. *See* Pamela D. Bridgewater, *Un/Re/Discovering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11 (discussing the shortcomings of the Thirteenth and Fourteenth Amendments in providing protection against the modern manifestations of reproductive and sexual slavery); *See also* Symposium: *Bondage, Freedom and the Constitution: The New Slavery Scholarship and its Impact on Law and Legal Historiography: Part II*, 18 CARDOZO L. REV. 263 (1996).

5. Although many legal scholars address the issues affecting women of color and their interest in reproductive autonomy, it is Dorothy Roberts and her *oeuvre* that provide the most salient and comprehensive treatment of the issues. *See gener-*

the United States for inclusion of all women in the reproductive rights movement continues. But unfortunately for women of color, in large measure, the struggle has been futile.[6]

The result of the preceding dual omissions is that those interested in civil rights and freedom have not learned the lessons the history of reproductive and sexual slavery have to teach us nor have we developed strategies to protect against the reoccurrence of such experiences. In fact, historically, groups organized to achieve reproductive freedom and freedom from the consequences of enslavement, have developed in separate spheres — often in opposition to one another — as if they did not arise from the same historical context. As separate entities, the abolition movement, the civil rights movements, and the reproductive rights movement all have failed to effectively address the impact of the sexual and reproductive abuse suffered by female slaves. This failure created an untenable situation for women of color who continue to experience sexual and reproductive abuse based on racial identity.[7] Currently, African American women are extremely limited by the extent to which remedial frameworks can respond to their specific experiences of racialized reproductive oppression.

As indicated above, one corresponding consequence of particular import to this Article is seen in the fight for reparations for slavery. Since there is not widespread inclusion of the experience of slave women in the definition of slavery, there have been no formal or comprehensive efforts to include the experiences of

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ally DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY (1997) (surveying the history of coercive and abusive reproductive policies targeting women on color) [hereinafter KILLING THE BLACK BODY]; Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L. J. 935 (1996); Dorothy E. Roberts *Reconstructing the Patient: Starting with Women of Color*, *in* FEMINISM AND BIOETHICS: BEYOND REPRODUCTION 116 (Susan M. Wolf ed., Oxford Univ. Press 1996).

6. FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT (Marlene Gerber Fried ed., 1990) (essays addressing the racist aspects of the mainstream reproductive rights movement) [hereinafter REPRODUCTIVE FREEDOM].

7. *See generally* ROBERTS, KILLING THE BLACK BODY, *supra* note 5 (examining coercive reproductive policies including fetal testing, contraceptive and sterilization abuse, and the way such practices impact the lives of women of color in particular). *See also* Kristyn M. Walker, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779, (1993); Christina Lopez, *Norplant and Depo-Provera,* 20 FREEDOM SOCIALIST (Oct.-Dec. 1999) (volume 20, no 3) *available at* http://www.socialism.com/fsarticles/vol20no3/Norplant.htm (last visited Jan. 26, 2005); Eric Ludwig, *The Impact of Norplant on Minority Women* (Fall 1998) *available at* http://academic.udayton.edu/health/05bioethics/98ludwig.htm (last visited May 29, 2005).

slave women in the modern demands for reparations. Those seeking to alleviate the sequelae of slavery must do so appropriately and adequately. Therefore, it is imperative that they include both male and female experiences of slavery, and fully integrate women's issues into their analyses and strategies.

This Article will provide a model for incorporating reproductive oppression into the modern reparations for slavery movement in the United States. It provides a context and framework for overcoming the lapses in the dominant discourses on race and reproduction, by looking at the history of reproductive and sexual oppression during the slavery era. In Section II, I offer an overview of reparations starting with the history of the slavery reparations movement in the United States. I then briefly survey the domestic and international reparations movements that have most influenced the current American reparations movement. I end this section with an analysis of the current slavery reparations movement and consider the movement's articulated goals as well as the strategies undertaken to achieve those goals. In Section III, I discuss the female slave experience, paying particular attention to the ways in which slavery included, and in some respects depended on, the exploitation of female slaves' sexual and reproductive vulnerability. In Section IV, I conclude this Article in three parts. In Part A, I consider domestic and international models the slavery reparations movement could draw on to broaden its agenda to include sexual and reproductive exploitation. In Part B, I offer an example of how a reparations claim for reproductive and sexual abuse during slavery might be developed. Finally, in the Epilogue, I return to my interpretation of Sojourner Truth's question and imagine how a more inclusive and historically accurate reparations movement would respond.

II. Overview of the History of Reparations for Slavery in the United States[8]

Formal discussions regarding reparations began prior to the end of the Civil War. Policymakers charged with the duty of re-

8. In this Article, I take my cue from the reparations movement and the other writings on the topic when I fold the remedies of reparations, redress, restitution and retribution under the term reparations or use the terms interchangeably. There are, however, legal distinctions among the terms. According to Black's Law Dictionary, "reparations" is a payment for an injury; redress for a wrong done. Black's Law Dictionary 605 (7th ed. 1999) "Retribution" is something given or demanded in

pairing the nation after the internal conflict caused by the slavery question were also considering repaying or repairing ex-slaves for the experience of slavery.[9] Provisions were introduced during the House of Representatives' debates of the Freedman's Bureau in 1866, which "included a provision confirming for three years blacks' rights to lands set aside for them by General Sherman."[10] One such policymaker, Pennsylvania Congressman Thaddeus Stevens, saw the charge of the Freedmen's Bureau as including reparations as an important way to assist the newly emancipated slaves in adjusting to their new statuses in their new lives.[11] Although the Freedmen's Bureau was instituted, the reparations aspects of the agency's mission were dismissed as unworkable. Many commentators attribute this early rejection of reparations to the fear that such programs would spark violent resistance from southern whites during a time when reconciliation was a primary goal as well as a general inclination to respect the property rights of whites in the South.[12] Despite the early dismissal of the idea of reparations for slavery as official government policy, the notion that the former slaves were due some form of recompense for their stolen labor and the abuses of slavery remained strong.

The strength of the concept of reparations for slavery is evidenced by its recurrence in various points in the development of civil rights and racial equality movements. This section tracks the development of the movement for reparations from the post-Civil War era to the current movement for reparations for slav-

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payment. *Id.* In criminal law, it is punishment based on the theory that bears its name and based strictly on the fact that every crime demands payment in the form of punishment. "Redress" is defined as satisfaction for an injury or damages sustained; damages or equitable relief. *Id.* "Restitution" is the act of restoring, restoration; restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification. *Id.*

9. The debates regarding the Freedmen's Bureau Act of 1866 and its provision of reparations for the anticipated newly freed slaves began before the end of the war. *See generally* RICHARD CURRENT ET. AL., AMERICAN HISTORY: A SURVEY 441-449 (7th ed. 1987).

10. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 245-246 (New York, 1988).

11. This request formed the basis of the 1865 Freedmen's Bureau Act, which promised former slaves forty acres and a mule. *See* CURRENT, *supra* note 9, at 441-447.

12. FONER, *supra* note 10, at 246. *See also* Rhonda Magee, Note, *The Master's Tool's, From the Bottom Up: Responses to African American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 889 (1993) (discussing how and why the post Civil War reparations efforts were ultimately blocked).

ery. It begins with earlier discussions of reparations which occurred in the post-emancipation era. It then looks at the inclusion of reparations in the fight against Jim Crow and segregation, and ends with the modern strategy of reparations, using examples of successful domestic and international reparations movements to develop legal strategies, and garner political support. Finally at the end of this section, I explore the goals and strategies of the current reparations movement, including efforts to inform the public about the movement, and the legislative and litigation strategies of the movement.

A. *Early Reparations Conversations*

The fight for reparations for slavery in this country has had a long and complex history, spanning from the pre-emancipation era, through the civil rights movement of the fifties and sixties, to the present day.[13] In each of these eras, the claim for reparations has taken root alongside larger social movements and has been influenced by the political issues driving those movements.[14]

Following the Civil War, Radical Republicans proposed the legislation designed, among other things, to redistribute wealth to former slaves in the South.[15] Representative Thaddeus Stevens of Pennsylvania, a leader among Radical Republicans, be-

13. Some of the earliest calls for reparations for slavery were made during the Revolutionary Era, alongside the movement for independence of the colonies from the crown. In his effort to have slavery abolished, Thomas Paine asked, "Are we not, therefore, bound in duty to [God] and to [slaves] to repair these injuries, as far as possible. . ." Archive of Thomas Paine, *Thomas Paine: African Slavery in America*, *available at* http://www.thomaspaine.org/Archives/afri.html (last visited Jan. 26, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL) (cited in, Art A. Hall, *There is A Lot to Be Repaired Before We Get to Reparations: A Critique of the Underlying Issues of Race that Impact The Fate of African American Reparations*, 2 SCHOLAR 1 (2000)). *See also* Alfred Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L. J. at 86 (2004); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the case for Black Reparations?* 40 B.C. L. Rev. 429, 467 (1998) (discussing the role reparations play in the larger "Antiracist agenda of the Black Freedom Struggle").

14. "The demand for reparations has coincided with other civil rights strategies. . . ." Charles J. Ogletree Jr., *Repairing the Past: New Efforts in the Reparation Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 279 (2003) (citing Martin Luther King, Jr., *I Have a Dream*, in I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 101 (1992)).

15. FONER, *supra* note 10, at 235-36 (noting that the Radical Republicans sought to duplicate the capitalism of the North in the South through their legislative efforts and, furthermore, that prominent industrialists outside of Congress supported the notion of redistributing seized land to former slaves as reparations for their enslavement).

lieved that the acquisition of land was one of the most important factors in facilitating former slaves' transition to freedom.[16] As mentioned above, his initial comments on reparations were made within the context of creating the Freedmen's Bureau.[17] It is from this historical context that perhaps the most popular reparations claim arises: "forty acres and a mule."[18] However, during this time, incidents of violence against blacks continued to rise, and an attempt was made to reinstitute slavery by enacting laws referred to as the "Black Codes." These issues were thought by Radical Republicans to outweigh the importance of reparations for slavery. Thus, despite early efforts to provide tangible assets to former slaves, the matter of reparations fell out of formal public discourse for nearly a century.[19]

The era of the Black Codes became the threshold for the Jim Crow era which was marked by increased violence against and oppression of blacks. In particular, the terrorism exacted against blacks in the form of lynching effectively stifled efforts to organize around reparations and other civil rights issues. Despite the overwhelming efficiency of race terrorism during this era, the "Back to Africa Movement" led by Marcus Garvey essentially

16. Stevens proposed that the federal government take 400 million acres belonging to the wealthiest 10 percent of Southerners and redistribute them in forty-acre plots to former slaves to use as an economic base to assist in their collective advancement in society. *Id.* at 235.

17. The Freedmens Bureau's official name was Bureau of Refugees, Freedmen, and Abandoned Lands. The agency was created in 1865 to "control all subjects relating to refugees and freedmen, although its efforts regarding property redistribution were ultimately rejected by President Johnson in an effort to appease southern property owners." *See* GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 49 (Octagon Books 1970) (1955).

18. I.M. Dayton, Assistant Adjutant-General, Headquarters, Military Division of the Mississippi, in the Field, Savannah, Georgia, Special Field Order No. 15, *in* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 365-66 (Roy L. Brooks, ed., 1999). *See also* Alberto B. Lopez, *Focusing the Reparations Debate Beyond* 1865, 69 TENN. L. REV. 653 (2002) (citing CLAUDE F. OUBRE, FORTY ACRES AND A MULE: THE FREEDMEN'S BUREAU AND BLACK LAND OWNERSHIP 31, 61-71 (1978) and noting that the phrase originates from Representative Stevens' proposal for four hundred million acres redistributive plan and the mule was added later by General William Tecumseh, Sherman's Special Field Order No. 15 in which he ordered that in addition to land former slaves be given animals unfit for military use to help them cultivate the land.)

19. Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans,* 29 S.U. L. REV 25. 32-33 (2001) (surveying the ebb and flow of energy and attention regarding reparations).

sought reparations in the form of monetary damages, seeking funding which would pay for a return to Africa.[20]

The next major claim for reparations came nearly two decades after Garvey during the height of the civil rights movement. Although Dr. Martin Luther King saw a need for reparations,[21] it was James Forman, former leader of the Student Nonviolent Coordinating Committee, who made the unambiguous demand for $500 million from churches and synagogues as reparations to African-Americans.[22] This demand was made in 1969 and was considered the act that marked the culmination of the civil rights movement of the sixties. Some current proponents for reparations were also active in the civil rights movement. They argue that the civil rights movement's driving force was a fundamental plea for reparations, since the conditions in the Jim Crow South grew directly out of slavery.[23] This argument is particularly helpful in defense against the position that reparations are inappropriate because slavery happened so long ago.[24]

B. *Reformulating Reparations*

The claim for reparations for slavery during the sixties began as an independent one. However, advocates eventually viewed the civil rights movement as the dominant tool with which to repair the harms of slavery. As a result, an independent claim for reparations was subsumed by the civil rights movement. Subsequently, lack of research and ideas has led today's slavery repara-

20. The 1940s to mid-1950s mark the height of Garvey's Back to Africa Movement. Lee A. Harris, *Political Autonomy As a Form of Reparations to African Americans* 29 S.U. L. REV 25, 32-38 (2001) (discussing the relationship between Garveyism and reparations).

21. Charles Olgetree Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 Harv. C.R.-C.L. L. Rev. 279 (2003).

22. Forman made his claim during a church service at Riverside Church in New York City in 1969. *See* ARNOLD SCHUCTER, REPARATIONS: THE BLACK MANIFESTO AND ITS CHALLENGE TO WHITE AMERICA 6-7 (1970) (describing the incident). *See also* JAMES FORMAN, THE MAKING OF BLACK REVOLUTIONARIES 343-52 (2000).

23. "Segregation is the offspring of slavery." Donald Aquinas Lancaster, Jr., Comment, *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, 182 (2000) (citing Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283, 1350-52 (1996)).

24. *See generally* Brophy, *supra* note 13 (assessing the possibilities of lawsuits for Jim Crow).

tionists to seek out other domestic and international paradigms to create a viable, effective model to address the harms resulting from slavery.

1. Domestic Reparations Movements

Modern proponents of reparations have consistently looked to other successful reparations movements in the United States to establish precedence for federal and state governments paying, apologizing, and providing a remedy for wrongs of the past. Focusing only on the successful claims for reparations, proponents are well versed in the theories used and obstacles encountered on the road to attaining reparations for slavery.

Two examples of successful claims are those of American Indians[25] displaced by colonization of North America, and Japanese Americans interned during World War II.[26] Both groups used elements of traditional remedies law, specifically restitution, to argue that they were harmed, that those who harmed them benefited from their harm, and that those who benefited should not be allowed to continue enjoying the benefits. Both groups convinced the federal government to pay reparations in various forms. They sought and received money, land, public apologies, public education programs, and public tributes to the victims. When reparations for slavery proponents see successful settlements in which a vast amount of money and/or land has been awarded to claimants, optimism and momentum in their movement builds.

These two examples of successful claims for reparations appear in most current literature written about reparations for slavery. Using reparations settlements to American Indians as a model, reparations for slavery advocates have placed particular importance on the fact that the United States government made reparations payments to a group whose claims arose out of conduct predating slavery. They also found useful the claims of reparations for Japanese Americans who were wrongly interred during World War II.[27] Reparationists for slavery watched

25. 1851 marks the beginning of the United States government's efforts to grant reparations to Native American nations for the effects of colonization. These reparations came in the form of reservations designed to repair indigenous peoples for the taking of their land by Europeans. *See* CURRENT, *supra* note 9, at 484.

26. *See also* 50 U.S.C. § 1989b-4 (1994).

27. "Reparations for African-Americans are an issue whose time has come. Had not the U.S. Congress approved funds for Japanese-Americans interned during World War II, and had not the U.S. Attorney General knelt and offered her tearful

closely in 1980 when Congress established the Commission on Wartime Relocation and Internment of Civilians to review claims of unconstitutional internment of Japanese Americans during World War II.[28] Contrary to the government's claim at the time, the commission found the internments were not justified by military necessity but instead based on the government's exploitation of ignorance and fear. This conclusion led to the enactment of the Civil Liberties Act of 1988, which mandated payment of $20,000 to each survivor of the internment camps. The result of the Act was an aggregate payout of over $1 billion and an official apology to Japanese Americans collectively.[29]

There have been other successful reparations claims in the United States predating the internment of Japanese Americans. For example, many proponents note that since 1851, the United States has paid nearly $180 million in reparations to the indigenous populations of Wisconsin, South Dakota, Michigan and Florida for land divestment.[30] In addition, the Alaskan Native Land Settlement of 1971 resulted in the largest single payment of reparations thus far.[31] Under this successful claim, the indigenous people of Alaska received almost $1 billion plus 44 million acres of land. The terms of the settlement created state-chartered private corporations with the indigenous Alaskans as owners.[32]

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apology before the recipient of the first $20,000 payment, this matter might not have come so quickly to a head." 136 CONG. REC E3606-01 (daily ed. Oct. 27, 1990) (statement of Rev. Marvin A. McMickle).

28. *See* COMM. ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED, PART II: RECOMMENDATIONS 6 (Comm. Print 1983) (report denouncing the internment of Japanese Americans during World War II).

29. *See generally* Eric K. Yamamoto, *Friend, Foe or Something Else: The Social Meanings of Redress and Reparations*, 20 DENV. J. INT'L L. & POL'Y 223 (1992); Sarah L. Brew, Note, *Making Amends for History: Legislative Reparations for Japanese Americans and Other Minority Groups*, 8 LAW & INEQ. 179 (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C. L. REV. 323 (1987).

30. Native Americans began to receive land on reservations in 1851 as reparations for land taken during colonization. CURRENT, *supra* note 9, at 484.

31. Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309 (Winter 2003) (citing WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 235, 274 (Roy L. Brooks, ed., 1999)).

32. Under the "ANCSA," indigenous Alaskans were granted a reparations program based on a corporate model using stock distribution. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C.S. §§1601-1628).

An important element of the strategy for reparations for slavery is to point out the instances in which the United States government has been responsive to a claim for reparations based on its role in creating the harmful experience or in sanctioning the harmful conduct of others. Thus, proponents of reparations for slavery often highlight the fact that the government has continued to pay indigenous communities for the harms that arose from colonization.

Other, less well-known examples of reparations paid out by the United States include the 1993 formal apology offered to the indigenous peoples of Hawaii for the government's illegal overthrow of the sovereign Hawaiian nation in 1893.[33] More recently, the United States Departments of the Interior and Treasury were found to have mismanaged the assets of an Indian trust fund established in the 1830s. The federal district court awarded the plaintiffs $2.5 billion in reparations.[34]

2. International Reparations Movements

The modern reparations movement in the United States also takes cues from successful claims for reparations on the international stage.[35] Although the international claims that influence the domestic movement vary widely, they all share fundamental beliefs in the sanctity of human rights and believe that governments which engage in or are complicit in human rights violations are responsible for providing redress to those who suffered. Therefore, whether in the context of atrocities of genocide directed at European Jews, the brutal apartheid era in South Africa, or the murderous Pinochet dictatorship in Chile, basic notions of human rights have long been recognized under international law, and victims of human rights violations have been able to raise successful claims for reparations.[36]

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33. Overthrow of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1513 (1993).

34. *See* Robert L. Jackson, *Judge to Oversee Agency Effort to Compensate Indians*, SAN ANTONIO EXPRESS NEWS, Dec. 22, 1999 at 10A *See also* John Gibeaut, *Another Broken Trust*, 85 A.B.A. J. 40, 40-47 (1999).

35. "Movements to redress historical racial injustice mark the global landscape." Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 483 (1998).

36. "International law has long recognized that human rights guarantees rest, above all, on a foundation of law – in particular, on the assurance of an effective legal response when violations occur. . . . [T]he principle underlying these duties is straightforward. The only way to assure that rights are protected is to maintain effective legal safeguards against their breach. In particular, those who commit atrocious human rights crimes must be punished, and victims must be assured

Reparations claims for Jewish victims of the Holocaust during World War II are considered a hallmark of reparations movements.[37] As such, those claims have served as important models in the movement for reparations for slavery in the United States.[38] Under the reparations framework for the treatment of Jews during World War II, survivors received reparations from the German government and German corporations.[39] German companies alone paid $1.7 billion in 1952 to German Jewish victims of the Holocaust.[40] The German government also formally apologized for the Holocaust.[41] The Catholic Church followed suit recently when it apologized for its complicity in the Holocaust.[42]

Reparations also took the form of individual claims by Jewish victims and their descendants against private, non-corporate actors to reclaim stolen property.[43] Many regard the reparations movement to redress Jewish victims of the Holocaust as one of the most successful international reparations movements to date.[44] One aspect of the success of reparations for Jewish victims of the Holocaust is that there seems to be broad support for

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appropriate redress." DIANE ORENTLICHER, *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation*, *in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 425, 425-426 (Louis Henkin & John Laurence Hargrove eds., 1994).

37. Watson Branch, Comment, *Reparations for Slavery*, 3 SAN DIEGO INT'L L.J. 177 (2002) (discussing the role that reparations for Jewish Holocaust survivors play in framing modern reparations claims).

38. Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U ANN. SURV. AM. L. 615 (2003).

39. *See generally* Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich* ,39 HARV. J. ON LEGIS. 1 (2002) (providing a comprehensive analysis and discussion of German corporations' involvement in the Jewish Holocaust and the reparations paid to the victims).

40. Robinson, *supra* note 31, at 45.

41. Burt Herman, *Germany Offers Apology with Compensation Offer*, SAN ANTONIO EXPRESS NEWS, Dec. 18, 1999, at 21A.

42. Bob Keeler, *A Quarter Century of John Paul II: A Giant Among Popes/a New Style, Healing Rift with Jews Among Accomplishments*. NEWSDAY, October 12, 2003.

43. One example of recent lawsuits filed seeking reparations for theft of the belongings of Jews during World War II is Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (granting in part and denying in part a motion to dismiss a suit brought by Hungarian Jews arising from the Hungarian government's refusal to return their property after World War II).

44. The success of the movement internationally has had domestic implications in that beneficiaries of reparations for the Holocaust are not taxed on their reparations awards and are able to use the Alien Tort Claims Act to continue to sue German corporations and their American subsidiaries.

the pursuit of a remedy and no strong sentiment to rush to complete the process of repairing the damage, despite the painful history. In fact, lawsuits are still being filed against corporations that allegedly were unjustly enriched by the Jewish Holocaust.[45] The Holocaust reparations movement also created a successful framework for discourse and redress when groups or communities are harmed in furtherance of a political objective or ideology.

Other successful international reparations movements have also greatly influenced, energized, and provided models for the modern United States slavery reparations movement. For example, some Latin American countries have implemented the truth and reconciliation model, which like the Holocaust model was designed to compensate large groups of people harmed to further a political objective or ideology. The model involves creation of commissions which facilitate public discussions of the harms committed, with the idea that narratives can assist victims in the healing process. The process is open to the public, and begins with acknowledgment of the harm by both the victim and the perpetrator. Following the acknowledgment stage, stories of abuse and atrocity are recalled while communities in Latin America and around the world watch. Thus, the truth and reconciliation model also serves a broader purpose by giving those who witness the process a voice in preventing future occurrences.[46]

In 1982, Bolivia instituted one of the first such commissions to investigate disappearances of its citizens between 1967 and 1982.[47] The following year, Argentina followed suit.[48] With the end of the Pinochet dictatorship in Chile, the process of taking testimony of atrocities and reconciling them with the need for a united and peaceful future was institutionalized and gained

45. Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003) (affirming the dismissal of claims brought against Japanese and German corporations for damages suffered by plaintiffs forced to work as slave laborers during World War II). Since this ruling, Germany has, however, set up a fund to compensate victims whose labor was stolen during the Nazi era.

46. *See* Brenda V. Smith, *Battering, Forgiveness and Redemption*, 11 AM.U. J. GENDER SOC. POL'Y & L. 921, 942 (2003) (discussing the ideals of truth commissions specifically in the South African context).

47. *See* Priscilla B. Hayner, *Fifteen Truth Commissions–1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 613 (Nov. 1994). *See also* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 68-71 (A. James McAdams, ed., 1997).

48. *See* Hayner, *supra* note 47, at 597, 614.

global attention and acceptance.[49] In addition to truth and reconciliation, the Chilean government also successfully provided substantive reparations to the families of those who disappeared and were murdered during the Pinochet regime, including exemption from military service for the children of victims, health care, and in some cases, monetary compensation.[50]

Perhaps the most popular international reparations movement is the South African model. In 1995, the South African parliament established a truth and reconciliation commission to investigate human rights violations which occurred during the apartheid era between 1960 and 1994. The claims for reparations included monetary compensation, legislative acts to protect against the return of apartheid, and land redistribution.[51] In addition to writing a new constitution, which is considered a model for its breadth of protection, the new South African government set up a reparation and rehabilitation committee to recommend appropriate forms of compensation for victims of human rights violations.[52] The reparations framework proposed and adopted under the new South African regime was laudable but also proved in many instances aspirational, thus much of the reparations payments and redistribution programs failed or were never attempted.[53] This, however, does not affect the utility of looking to the intent of the law to remedy past abuses.

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49. 2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 453-545 (Neil J. Kritz, ed., 1995).

50. Gwen K. Young, *All the Truth and as Much Justice as Possible*, 9 U.C. DAVIS INT'L L. & POL'Y 209 (2003). *See also* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 697 (2003) (providing a chart of reparations domestically and internationally, including those paid to Chilean victims of the Pinochet regime).

51. The South African Promotion of National Unity and Reconciliation Act created the Truth and Reconciliation Commission charged with investigating and documenting gross human rights violations in South Africa during the apartheid era lasting roughly from 1960 to 1994. *See, e.g.*, Donald W. Shriver, Jr., *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?*, 16 J.L. & RELIGION 1, 13 (2001).

52. Hayner, *supra* note 47.

53. *See e.g.*, Penelope Andres, *Reparations for Apartheid's Victims*, 53 DePaul Law Rev. 1155 (2004) (discussing South African reparations policies and the successes and failures).

C. *Articulated Goals of the Modern Reparations Movement*

1. Claim for Reparations

The modern claim for reparations is on its face unambiguous: The institution of slavery in the United States depended on the abuse, exploitation, and the denial of rights of personhood and property of Africans brought to this country.[54] The wrong of slavery created immeasurable benefits for the United States and its economy, while exacting egregious harm on the victims of the institution. Several scholars have explored the contours of the claim for reparations, but the point remains fairly basic: "Reparations as a norm seek to redress government-sanctioned persecution and oppression of a group."[55] Additionally, although the government involvement played an important role in the institution of slavery, the modern claim for reparations includes claims against private actors who benefited from the institution.

Since slavery is the context within which the vast majority of Africans were introduced to this country, reparationists logically position their claims to redress harms experienced during slavery. The current reparations movement, however, has evolved to include the experiences of blacks in post-slavery eras as well. Specifically, as Professor Charles Olgetree argues, claims for reparations for Jim Crow should be the first step in the attempt to achieve reparations for slavery. Stating a claim would be relatively easy because surviving victims still exist, and the injury is relatively immediate.[56] Many reparationists agree with this position and point to the post-slavery conditions intended to maintain a *de facto* system of racial subjugation such as race riots, lynch mobs, abuses to the share-cropping system, race segregation, and the presence of race terrorist organization like the Ku Klux Klan. Each preceding example is a derivative of slavery and gives descendants of slaves' grounds for reparations.[57]

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54. *See, e.g.*, Posner & Vermeule, *supra* note 50, at 697 (for a discussion of the simplicity of the moral claim but difficulty of constructing concrete proposals for reparations).

55. Westley, *supra* note 13, at 473.

56. Charles Olgetree, Jr., *Tulsa Reparations: The Survivor's Story*, 24 B.C. THIRD WORLD L.J.13, 28 (2004).

57. *See* Brophy, *supra* note 13 (assessing the possibilities of lawsuits for Jim Crow). *See also* Westley, *supra* note 13, at 473 (describing the intergenerational harms of slavery that persisted after abolition including the effects of the immediate attempts to reinstate slavery-like conditions via the Black Codes, which led to the Jim Crow era).

Aside from the articulated claim for reparations, the question of remedy is important in understanding the goals of the reparations movement as well as for developing strategies for reparations. However, the common question as to what reparations proponents want is deceptively simple and increasingly difficult to answer as we learn more about slavery, its victims, its principal beneficiaries, and its legacy.[58] Most critics of reparations, as well as those fashioning legal strategies, are quick to point out that a major obstacle to reparations is proving actual damages.[59] In other words, how does one quantify the harm of slavery? Additionally, the question of remedy is especially difficult when one acknowledges that the direct victims will not receive the remedies sought. The question becomes, to whom are reparations owed?

Reparations theorists have not shied away from these questions and have offered suggestions as to how to overcome the problems presented.[60] Often considered a red herring or conversation ender, the remedy questions have led some reparationists to choose to defer constructing a remedial framework, arguing that we need first to establish that reparations are in fact due. However, this deferral approach is not shared by the majority of reparationists.

The vast majority combine the precedential value of successful domestic and international reparations claims. To fashion a claim for reparations as broad as the articulated harms of slavery, its incidents, and its vestiges, proponents have been careful to suggest a broad array of possible remedies, including: a formal apology for slavery offered to the descendants of slaves from an official governmental body;[61] monetary payments in the form of public trust funds to benefit black communal institutions (such as universities and public interest organizations), individual pay-

58. For some, the question of remedy does not present the slightest problem. "Demand it all!" advises Clarence Munford. CLARENCE MUNFORD, RACE AND REPARATIONS 207-21 (1996).

59. *See, e.g.*, David Horowitz, *This Latest Civil Rights Disaster: Ten Reasons Why Reparations for Blacks is a Bad Idea for People - and Racists Too, available at* http://dir.salon.com/news/col/horo/2000/05/30/reparations/index.html (last visited Mar. 16, 2005).(on file with the UCLA WOMEN'S LAW JOURNAL.).

60. *See, e.g.*, Brophy, *supra* note 13 (suggesting that litigators focus on Jim Crow to overcome the actual damages obstacles and examining tort law as a model for achieving reparations).

61. While there is some dissention on the utility of an apology, some scholars see an apology as inextricable component of reparations. *See, e.g.*, Art Hall, *supra* note 13, at n51.

ments, a public memorial to slaves, and financial assistance with property purchases.[62] The variety of proposals shows not only that proponents are astute about anticipated resistance to single-payment reparations models, but also that slavery left a legacy in the lives of its direct victims and remains pervasive in the lives their descendants. Additionally, the identity of the entity owing reparations has only slightly impacted the type of remedy sought. For example, in private litigation, plaintiffs have asked for damages including apologies, redistribution of property, and actual and punitive damages from corporate defendants.[63]

2. Current Reparations Strategy

While their claims, goals, and remedies for reparations present layered complexities, the strategies for achieving reparations tend to share a three-part construction, consisting of legislation, litigation, and pubic opinion campaigns. What follows is a brief description of each strategy with a focus on the obstacles as well as successes.

a. Legislation

Perhaps the most well-known legislative strategy is the bill advanced by Representative John Conyers of Michigan. Each year since 1989, Representative Conyers has introduced a bill in Congress, entitled "Commission to Study Reparation Proposals for African Americans Act."[64] The bill states that slavery "constituted an immoral and inhumane deprivation of Africans' life, liberty, African citizenship rights, and cultural heritage, and denied them the fruits of their own labor."[65] The bill also asserts that "sufficient inquiry has not been made into the effects of the institution of slavery on living African Americans and society in the United States."[66] According to the bill, a committee should be established to study reparation proposals for slavery and to

62. For the most comprehensive articulations of the remedies sought by reparationists, *see generally* Robinson, *supra* note 31; Westley, *supra* note 13.

63. There have been attempts to ascertain the amount owed to African Americans. *See, e.g.*, CHARLES W. MILLS, THE RACIAL CONTRACT 39 (1997); Charles W. Mills, *Estimated Present Value of Income Diverted During Slavery*, *in* THE WEALTH OF RACES: THE PRESENT VALUE OF BENEFITS FROM PAST INJUSTICES, 107 (Richard F. America ed., 1990) (quoting James Marketti: "An estimate for the total 'diverted income' from slavery, 1790 to 1860, compounded and translated into 1983 dollars, would yield the sum of $2.1 trillion to $4.7 trillion.").

64. H.R. 1684, 102d Cong. § 2(a)(3) (1991).

65. *Id.* § 2(a)(4).

66. *Id.* § 3(b)(7).

recommend "appropriate remedies."[67] Despite introducing the bill every year without fail, Representative Conyers has yet to see the bill make it out of committee.[68]

In addition to the Conyers' initiative on the federal level, some state legislative efforts have been more successful.[69] So far, these have addressed specific incidents, arguably growing out of slavery, but none has addressed the institution itself. For example, black residents of Rosewood, Florida, received $2 million dollars in 1995 in reparations after whites destroyed their community in response to a false allegation of sexual assault made by a white woman against a black man.[70] In 2000, an eleven-member investigatory panel recommended that the Oklahoma Legislature pay reparations to compensate for a race riot which occurred in 1921. The violent melee, referred to as the Tulsa Race Riot of 1921, resulted in scores of murders and widespread property destruction.[71] It was initiated by whites infuriated by the success of black businesses in Tulsa's Greenwood section.[72]

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67. *Id.*

68. Bills do not go to the House floor for a vote unless they can make it out of committee. Yet, support for the bill has grown over the years. Recently, Congresswoman Barbara Lee (D) of the Ninth District of California cosponsored H.R. 40, the Commission to Study Reparation Proposals for African Americans Act. *See* Barbara Lee, *Slavery Reparations: Legitimate Legislation in Congress Addressing Reparations for African Americans*, *available at* http://www.house.gov/lee/reparations.htm (last visited Apr. 16, 2003) (also containing information on reparations generally).

69. This may be due in part to The National Coalition of Blacks for Reparations in America (N'COBRA) a group organized to clearly articulate a legislative strategy, targeting local, city, and state governmental bodies to adopt resolutions acknowledging:

> 1. The Transatlantic Slave Trade was a crime against African descendants and humanity in keeping with language adopted during the 2001 World Conference Against Racism (WCAR) in Durban, South Africa.
>
> 2. The necessity of investigating and documenting the impact of this horrible era in our nation's history, on African descendents
>
> 3. The lingering vestiges of the Holocaust of Enslavement that continues to impact African descendents in particular and Americans in general.

See N'COBRA's website *at* http://www.ncobra.org/commissions.htm (last visited Jan. 26, 2005).

70. Robinson, *supra* note 31, at 225.

71. For an insider's account of the details of the Tulsa Race Riot reparations legislative strategy, see, for example, ALFRED BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION (Oxford Univ. Press 2002).

72. *Id. See also* Greg Wright, *Tulsa's Race Riot Brings Demands for Reparations*, SAN ANTONIO EXPRESS NEWS, Feb. 2, 2000, at 6A; Jim Yardley, *Panel Recom-*

Finally, several states and local governments have enacted statutes or issued proclamations addressing reparations for the descendants of African slaves in the United States. Among the largest and most notable that are still in effect[73] are in California,[74] and Chicago, Illinois.[75] In addition to these measures, California also recently granted public access to records of insurance policies that list slaves and their owners and requires companies seeking contracts with the city to disclose whether they have ever earned profits from slavery.[76]

b. Litigation

On the litigation side of the reparations movement, a number of test cases have been brought by the descendants of slaves requesting reparations for slavery and its modern-day effects. In fact, according to the co-director of the National Reparations Coordinating Committee, Professor Charles Ogletree, the number of reparations lawsuits brought by the descendants of African slaves is at an all-time high, with cases pending in Illinois, Texas, New York, New Jersey, Louisiana and California.[77] One key goal of litigation is to seek remedies from the government or

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mends Reparations in Long Ignored Tulsa Race Riot, N.Y. TIMES, Feb. 5, 2000, at 1A.

73. Florida and Oklahoma had statutes but repealed them. FLA. STAT. ANN. § 1009.55 (West Supp. 2003) 1994 Fla. Sess. Law Serv. 94-359 (West) (repealed 2000); OKLA. STAT. ANN. tit. 74, §§ 8201.1-.2 (West Supp. 2003) 1997 Okla. Sess. Laws 410 (repealed 2001).

74. CAL. INS. CODE §§ 13810-13813 (West Supp. 2003).

75. *See* Ogletree, *supra* note 14, at 281 & n.14 (referring to the Slavery Era Business/Corporate Insurance Disclosure Ordinance, MUN. CODE OF CHI. §2-92-585 (2002)).

76. Kelley B. Vlahos, *L.A. Law One More Tool for Slavery Reparations*, FOX (May 31, 2003), *available at* http://www.foxnews.com/story/0,2933,88207,00.html (last visited Feb. 14, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

77. *See* Ogletree, *supra* note 14, at 279. Of the recent cases, Ogletree cites the following class action lawsuits on behalf of descendants of African slaves against various corporations for conspiracy, human rights violations, conversion, and unjust enrichment. In re African American Litig., No. 02-CV-7764 (N.D. Ill. Jan. 17, 2003); Porter v. Lloyds of London, No. 02-CV-6180 (N.D. Ill. filed Aug. 29, 2002); Ntzebesa v. Citigroup, Inc., No. 2002cv04712 (S.D.N.Y. filed June 19, 2002); Carrington v. FleetBoston Fin. Corp., No. 2002cv01863 (E.D.N.Y. filed Mar. 26, 2002); Farmer-Paellmann v. FleetBoston Fin. Corp., No. 2002cv01862 (E.D.N.Y. filed Mar. 26, 2002); Barber v. N.Y. Life Ins. Co., No. 02-CV-2084 (D.N.J. filed May 2, 2002); Johnson v. Aetna Life Ins. Co., No. 02-CV-9180 (E.D. La. filed Sept. 3, 2003); Hurdle v. FleetBoston Fin. Corp., No. 02-CV-4653 (N.D. Cal. filed Jan. 17, 2003); Hurdle v. FleetBoston Fin. Corp., No. CGC-02-0412388 (Cal. Super. Ct. filed Sept. 10, 2002).

corporations alleged to have directly benefited from slavery,[78] as is the case in recent claims against corporate defendants, Aetna and CSX.[79]

The plaintiffs in remedies cases generally raise claims for reparations based on unjust enrichment and restitution (defined as the "[r]eturn or restoration of some specific thing to its rightful owner or status"[80]). They argue that the defendants have benefited from their participation in slavery and owe the victims of the institution compensation.[81] Thus, in order to be successful, the plaintiffs need to show that specific defendants, namely American corporate actors or the United States government, profited unjustly from slavery.[82] For example, to be successful, a plaintiff raising a claim against Aetna would need to show that the insurance company had been unjustly enriched by providing insurance to plantation owners and slave-ship builders.

Another important goal of reparations litigation, second to receiving the remedy sought, is to assess the legal parameters and obstacles of arguing claims for reparations under various legislative acts.[83] For instance in 1995 in *Cato v. United States,* reparations attorneys filed a complaint against the United States under the Federal Tort Claims Act (FTCA) on behalf of descendants of African slaves. The claim alleged that the underlying tort was a violation of the Thirteenth Amendment and asked for: (1) dam-

78. *See* Robinson, *supra* note 31 (arguing that responsible corporations should provide reparations to African Americans for past racially motivated corporate malfeasance).

79. *See Slavery and the Law: Time and Punishment: Are Reparations a New Way to Atone for the Legacy of Slavery? Or a New Way to Fleece Companies and Taxpayers?*, THE ECONOMIST (Apr. 11, 2002), *available at* http://www.uwec.edu/geography/ivogeler/w188/south/slaverylawsuit.htm (last visited Jan. 26, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL.).

80. BLACK'S LAW DICTIONARY 1315 (7th ed. 1999).

81. *See* Robinson, *supra* note 31, at 358-84 (examining the obstacles and benefits of reparations claims against corporate defendants).

82. *Id.*

83. There have been few victories on the litigation front if one counts money damages as indicia of success. Some argue that the relative failure of the litigation strategy makes the appeal for a legislative role in reparations all the more necessary. Many reparations lawyers and activists list the *Cato* case as a considerable legal hurdle, so that legislative remedies may well prove easier to attain than judicial ones. *See* Jack Hitt et al., *Making the Case for Racial Reparations: Does America Owe a Debt to the Descendants of Its Slaves?*, HARPER'S, Nov. 2000, at 37; Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677 (1999) (preferring a Congressional bill over lawsuits as the best strategy for attaining reparations).

ages resulting from the institution of slavery including subsequent racial discrimination, (2) an acknowledgment of discrimination, and (3) a formal apology.[84]

The Supreme Court affirmed the Ninth Circuit Court of Appeals' dismissal of the complaints. The Ninth Circuit held that the plaintiffs failed to prove waiver of sovereign immunity because they did not identify a legitimate constitutional or statutory violation.[85] Thus, the plaintiffs lacked subject matter jurisdiction.

The Ninth Circuit pointed out that citizens could not bring a tort claim under the FTCA by alleging a Thirteenth Amendment violation because the Thirteenth Amendment did not allow for collection of monetary damages from the federal government.[86] The court noted that had plaintiffs proven waiver of sovereign immunity, their claim still would have failed because the FTCA statute of limitations limits federal tort claims to those accruing in and after 1945.[87] Further, no grounds for a statutory violation existed because the Civil Rights Act of 1866 only protected citizens from harm perpetrated by "individual federal officials," not by the government or nation as a whole.[88] Thus, unless a concrete injury could be fairly traced to the conduct of a governmental agent, no liability could be imputed.[89] Finally, the court asserted that claims like the plaintiff's were best addressed by Congress, as was the detention of Japanese Americans in World War II, which was redressed by the enactment of the Civil Liberties Act of 1988.[90] This lawsuit was an excellent test case for reparations attorneys, in that it allowed them the opportunity to argue for reparations for slavery under various legal claims and indicated to them that legislative action could perhaps be a more effective avenue.

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84. Cato v. United States, 70 F.3d 1103, 1105 (9th Cir. 1995). Specifically, the complaint requested "$100,000,000 for forced, ancestral indoctrination into a foreign society; kidnapping [sic] 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."

85. *Id.* at 1110.

86. *Id.*

87. *Id.* at 1106.

88. *Id.* at 1110.

89. *Id.*

90. The appeals court upheld the district court's dismissal of the claims on various grounds. *Id.* at 1106.

c. Public Support Campaign

In addition to the efforts to receive reparations via legislation or litigation, the leaders of the modern reparations movement have also attempted to win public support for the cause. Recent efforts to influence public opinion and gain support have included a national conference in June 2002 and a rally in August 2002, both held in Washington, D.C. The conference was sponsored by The National Coalition for Blacks for Reparations in America (N'COBRA) and other leaders of the reparations movement.[91] The rally highlighted speakers Congressman John Conyers, and Nation of Islam leader Minister Louis Farrakhan.[92]

Efforts to sway public support have also found their way into legal academic discourse.[93] Numerous academic conferences and symposia in a variety of disciplines have been dedicated to the study of the claim for reparations. Legal reparations theorists in particular, have engaged in an ongoing discussion of the merits of reparations as well as the strategic considerations for launching a claim.[94]

However, the effort that presented the most potential for advancing the movement for reparations for slavery on all three fronts was the United Nations' Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance in September 2001, held in Durban, South Africa.[95] At this conference, American proponents of reparations for slavery found an international audience and made alliances with representatives

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91. *See generally* N'COBRA website, *available at* http://www.ncobranews.org (last visited Jan. 26, 2005). *See also* http://www.blink.org.uk/print.asp?key=233 (last visited Jan. 26, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

92. Kathleen Koch, *Slave Reparations Rally*, CNN (Aug. 17, 2002), *available at* http://www.cnn.com/2002/US/08/17/koch.otsc/index.html (last visited Jan. 26, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

93. *See generally* SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE OVER REPARATIONS (Raymond A. Winbush ed., 2003); Robinson, *supra* note 31.

94. This Article has benefited from this body of work and I have duly cited many of the leaders in the field. Here are others: Posner & Vermeule, *supra* note 50, at 689; Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts* 13 LA RAZA L.J. 387 (2002); ERIC YAMAMOTO, INTERRACIAL JUSTICE (1999); Westley, *supra* note 13, at 467 (outlining the cases for reparations and suggesting that a trust fund would be an appropriate repository of reparations monies); Lancaster, *supra* note 23 (discussing slavery, segregation, and reparations in terms of property law, constitutional law, and African-American history).

95. Michelle E. Lyons, *World Conference Against Racism: New Avenues for Slavery Reparations?* 35 VAND. J. TRANSNAT'L L. 1235 (2002) (discussing the agenda and potential the conference had in moving the reparations movement forward).

of reparations movements from around the world. Although both reparations[96] and defining slavery as a crime against humanity[97] were on the agenda, a primary yet relatively modest objective of the conference was to elicit an apology for slavery from western nations.[98] However, officials from the United States walked out of the conference, ostensibly because of criticisms of Israel's occupation of Palestine and its treatment of Palestinians.[99]

Following the walkout, momentum was extinguished almost entirely by the terrorist attacks of September 11, 2001. As a result, the conference's objective of receiving an apology has not yet been realized.[100] Nevertheless, there were successes. Many participants at the Durban conference have continued to work together and learn from each other in order to move the discussion and the possibility of reparations forward.

Moving the movement forward appears to be an important objective of each strategy undertaken, whether it is legislation, litigation, or public awareness. With this approach, success can be broadly defined to include not only reparations received and increased support, but also a more rich and informed discussion of the institution, conditions, and legacy of slavery. The following sections of this Article join the efforts to move the movement forward by suggesting inclusion of the female slave experience, which included sexual abuse and reproductive exploitation. It will show how domestic and international models for reparations for similar abuses can be used to provide an inclusive and historically accurate, and, therefore, more successful reparations for slavery movement.

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96. Paul Salopek, *UN Summit on Racism Bogs Down on Slavery*, CHI. TRIB., Sept. 8, 2001, at 1(listing debt relief and funds to help build infrastructure in the affected nations among the types of reparations sought).

97. *Id.* (noting that "the talks deadlocked when African nations pushed for language labeling the practice [of slavery] a crime against humanity, thus opening up Western governments to possible lawsuits for financial reparations").

98. For a comprehensive list of the agenda, see the Draft Declaration developed by the Preparatory Committee. Sections 114-127 discuss combating racism and reparations. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Draft Declaration, U.N. GAOR Preparatory Committee, 2d and 3d Sess., at 30-36, U.N. Doc. A/Conf.189/4 (2001).

99. Watson Branch, *Reparations for Slavery: A Dream Deferred*, 3 SAN DIEGO INT'L L.J. 177 (2002) (discussing the motivations for the walk out and the impact the September 11, 2001 attacks had on discussions of reparations); *See also* Serge Schmemann, *U.S. Walkout: Was It Repudiated or Justified by the Conference's Accord?* N.Y. TIMES, Sept. 9, 2001, § 1, at A16.

100. *Id.* at 178.

III. THE FEMALE SLAVE EXPERIENCE

Regardless of the strategy employed for obtaining reparations, proponents are, in large part, basing their claims on historical data, collected from the beginning of the institution of slavery and beyond emancipation. Yet, the lists of the conditions of slavery for which reparations are due rarely include the experience of female slaves.[101] In his persuasive, thoughtful and carefully researched book, Randall Robinson briefly mentions the experience of women under slavery.[102] He notes that women endured rape and other forms of sexual exploitation and were separated from their families.[103] Although he mentions female slaves, Robinson, like most proponents of reparations, gives short shrift to the experience of sexual reproductive exploitation of female slaves.[104] As a result, this and other accounts of slavery are incomplete, making their analyses vulnerable to critiques by black feminists of being ahistorical or suffering from male-centered myopia.[105] The following discussion examines the institution of slavery generally and the experience of female slaves with regard to their sexual vulnerability and reproductive exploitation specifically.

A. *Slavery Generally*

Slavery in the United States was in many ways unprecedented. It differed from historical slave societies in that it was based on race, was perpetual, and involved the complete domination of the lives of the slaves by their owners.[106] Not only were slave owners allowed to exploit the labor of their slaves by re-

101. *See generally* JANNA THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL INJUSTICE (2002); BORIS BITTKER, THE CASE FOR BLACK REPARATIONS (2003); Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery;* 58 N.Y.U. ANN. SURV. AM. L. 497 (2003).

102. *See* ROBINSON, *supra* note 3.

103. *Id.*

104. *Id.*

105. The relationship between advocates who engage in a male centered approach to the eradication of racism and black feminists is a tenuous one and has been known to cloud each group's ability to work together for social change. For a discussion of this relationship, particularly in the context of reproductive rights, see JENNIFER NELSON, WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT (2003).

106. Slaves were considered the property of their owners not unlike other animals, commodities or equipment. *See, e.g.*, A. LEON HIGGINBOTHAM, JR. IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 52 (1978) (citing 3 Waller Hening, STATUTES AT LARGE OF VIRGINIA 333-35 (1823)).

quiring work under the threat of physical abuse, but they also restricted freedom of movement, regulated the amount of food their slaves received, and prohibited education and communication.[107] Indeed, the slave industry in the United States was so lucrative because of the complete ownership and domination of the slaves by their owners.[108]

In many ways, the condition of slaves depended on the region where their owners lived.[109] In the Mid-Atlantic States, the workload varied because of the considerably shorter growing season.[110] Slaves in this region were not subjected to year-long toil in the fields that their southern counterparts were.[111]

In addition to the effects of geography and type of commodities produced, the institution, as well as the condition of slavery, had very complex gender dynamics. The division of labor between plantation owners and their female family members was determined in large part by traditional gender norms.[112] Few white women of the planter class worked in plantation fields,[113] and although many white women managed matters pertaining to the owner's home, slaves were responsible for the labor necessary to carry out the tasks in the house.[114]

Unlike their white counterparts, enslaved women were in many ways considered genderless in their ability to work in the

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107. HIGGINBOTHAM, *supra* note 106, at 48-49 (citing 4 Waller Hening, STATUTES AT LARGE OF VIRGINIA at 132 (describing how Virginia's laws were illustrative of the process of ever increasing deprivation of freedom slaves endured).

108. *See generally* IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA (1998) (discussing the unique need for absolute control and domination of slaves in the North American slave economy).

109. *See generally* T. LEWIS C. GRAY, HISTORY OF AGRICULTURE IN THE SOUTHERN UNITED STATES TO 1860 (1933) (discussing the varying needs for slave labor in different regions).

110. Catherine Clinton, *Caught in the Web of the Big House: Women and Slavery*, *in* BLACK WOMEN IN UNITED STATES HISTORY: FROM COLONIAL TIMES TO THE NINETEENTH CENTURY 225 (Darlene Clark Hine ed., 1990). In addition to the growing season the types of commodities produced also affected slave labor. The land in the South, which was divided into bigger parcels, led owners to produce staple crops such as tobacco in Maryland and Virginia and rice and indigo in the Carolinas and Georgia. Planting and harvesting these staple crops on such large parcels required more slaves. *See, e.g.*, GRAY, *supra* note 109, at 356-59.

111. T. SHERMAN WHITMAN, THE PRICE OF FREEDOM: SLAVERY AND MANUMISSION IN BALTIMORE AND EARLY NATIONAL MARYLAND (1997) (describing the impact weather had on slave conditions in the Mid-Atlantic region).

112. Clinton, *supra* note 110.

113. *Id.*

114. *Id.*

fields and engage in other strenuous physical labor.[115] They were expected to do much the same work as male slaves, including planting and harvesting crops, mending structures, caring for farm equipment, and looking after farm animals.[116]

Even on occasions where acknowledgment of a female slave's gender difference was unavoidable (because of pregnancy or other reproductive-related conditions), she was not given a reprieve from the demands of her slave status.[117] She was still a slave and therefore subject to the same punishments and work demands as other slaves.[118] New mothers, weakened from labor and delivery[119] were not afforded time to heal or to care for their newborns.[120] The responsibility of caring for newborn slaves often fell to a designated "wet-nurse," one slave, who was required to breast feed all the newborns while their mothers were working.[121]

B. *Rape and Reproduction*

1. Rape

Although female slaves endured intense and extreme physical labor, they were also vulnerable to a gender-specific form of slavery — sexual abuse.[122] Given their social and legal status as property, they were without means to deny their owners, or their owner's agents, sexual access to their bodies. Socially, there was no available shelter for sexually abused female slaves, nor were

115. *See* DEBORAH G. WHITE, AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH 6-7 (1990) (the most comprehensive historian's account of the life of female slaves during American slavery).

116. *Id.* at 67.

117. PEGGY C. DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 93-94 (1997).

118. One such example of the treatment women received while pregnant is presented where an overseer dug a hole in the ground before administering a lashing to a pregnant slave. After digging the hole, the overseer ordered the woman to lie down with her stomach in the hole so as not to injure the unborn child. *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419, 1420 (citing Michael P. Johnson, *Smothered Slave Infants: Were Slave Mothers at Fault?* 47 J. S. HIST. 493, 513 (1981)).

119. *Id.*

120. White, *supra* note 115, at 112-14.

121. EUGENE GENOVESE, ROLL JORDON ROLL: THE WORLD THE SLAVES MADE 507 (1974).

122. White, *supra* note 115, at 89. *See also* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT 50 (1990).

there moral sanctions against owners who sexually abused or allowed sexual abuse of their female slaves. Legally, enslaved women had no standing under civil or criminal law to accuse their owners of rape.[123]

In order to morally justify the sexual abuse of female slaves, members of the slave society adhered to a vast and complex web of mores and beliefs about the institution and its participants. They believed in the superiority of the white race and asserted that slavery enabled whites to be benevolent guardians of members of an inferior race. Unfortunately, that benevolence did not extend to protecting female slaves from sexual abuse.[124] Many members of the slave society excused the abuse by subscribing to a set of beliefs that characterized African female slaves as lascivious and immoral.[125] They viewed female slaves as female counterparts of an exaggerated image of the African male slave: enormously physically powerful, dumb, and animalistic.[126] Belief of these characteristics was fundamental in societal enablement of owners' sexual exploitation.[127] Once applied to female slave sexuality, responsibility was lifted from the sexually enticed perpetrator, and the victim was blamed for the sexual abuse carried out against her.[128]

Civil and criminal penalties could be levied against a person who raped another person's slave.[129] However, standing to pursue such actions was only granted to the slave owner, and these

123. For example, Louisiana's rape law explicitly excluded female slaves as well as free black women. *See* Judith Keller Schafer, *The Long Arm of the Law: Slave Criminals and the Supreme Court in Antebellum Louisiana*, 60 TUL. L. REV. 1247, 1256-57 (1986).

124. There was some, albeit little, protection from cruelty as slave owners were obliged to care for their slaves and could be sanctioned for neglect or egregious cases of abuse. JAMES OAKES, THE RULING RACE: A HISTORY OF AMERICAN SLAVE HOLDERS 22 (1982). *See also* GENOVESE, *supra* note 121, at 3-7.

125. *See* COLLINS, *supra* note 122 (outlining the various stereotypes about female slaves and how those stereotypes led to and developed from their slave status and sexual vulnerability). *See also* WE ARE YOUR SISTERS: BLACK WOMEN IN THE NINETEENTH CENTURY 32 (Dorothy Sterling ed., 1984, [hereinafter SISTERS].

126. COLLINS, *supra* note 122, at 50-51.

127. *Id.* at 70 (stating that white public imagination about female slaves' sexuality played an important role in their abuse). *See also* Herbert Gutman, *Marriage and Sexual Norms Among Slave Women*, *in* 2 BLACK WOMEN IN AMERICAN HISTORY: FROM COLONIAL TIMES TO THE NINETEENTH CENTURY 545, 551 (Darlene Clark Hine ed., 1990).

128. COLLINS, *supra* note 122, at 70.

129. *See, e.g.*, MELTON A. MCLAURIN, CELIA: A SLAVE (1991).

cases were rarely brought for a variety of reasons.[130] As indicated above, sexual abuse was not seen by society as conduct that would or should trigger the owner of a slave to seek legal remedy against a third person.[131] Even if a slave owner did consider rape of his "property" conduct warranting damages, unless he witnessed the assault firsthand, it was doubtful that he would rely on the account of a female slave over that of a male, free or enslaved.[132] Further, most likely, a female slave's account would not have been believed without the supporting testimony of a white person.

Thus, a female slave did not have social or legal protection from rape. Beyond the implausible option of physically defending herself, she had no way to deny her owner from abusing her body and no redress after the abuse occurred.[133] The only potential a female slave had for protection was church sanctioning, or objections from the wives of slave owners.[134] The latter was the least effective.[135]

It is worth noting that few factors, positive or negative, were associated with sexual access to slaves. In fact, before the height of the slave breeding era, prostitution in "fancy girl" markets was the only form of sexual abuse which was institutionalized and financially motivated. These markets were created to service men who were specifically desirous of sexual relationships with racially and culturally mixed women.[136] To the extent that these markets were discussed publicly, the connection to female slavery sexual abuse and reproduction was often inferred. For example, abolitionist Sarah P. Redmond declared that the nearly one million mulattoes living in the United States were the result of

130. *See generally* Jennifer Wriggins, Note, *Rape, Racism and the Law,* 6 HARV. WOMEN'S L.J. 103 (1983).

131. *Id.*

132. *Id.*

133. Even when statutes did not specifically exclude slaves there were rarely prosecutions and even convictions for raping slaves. *See* A. Leon Higginbotham Jr. & Anne F. Jacobs, *The "Law Only as An Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia,* 70 N.C. L. REV. 969, 1055-56 (1992). *See also* BARBARA WERTHEIMER, WE WERE THERE: THE STORY OF WORKING WOMEN IN AMERICA 109 (1977) (citing case holding that female slaves had no legal claim to their children).

134. Clinton, *supra* note 110.

135. The wives of slave owners were much more likely to blame their husband's "indiscretions" on the immorality and lasciviousness of the female slave. *Id.*

136. For a more detailed discussion of the Louisiana "fancy girl" markets, see Pamela D. Bridgewater, *The Female Slave Experience and the Pursuit of Reproductive Freedom* (2001) (unpublished thesis on file with the author)

rape and that the market for mulatto women was particularly vigorous as "they were to be sold as concubines for white Americans . . . not sold for plantation slaves."[137] Fancy girl markets were not widespread, existing almost exclusively in Louisiana. Prostitution of female slaves in other slave states was virtually unheard of because there was no need to buy what one already owned.

2. Reproduction

Initially, pregnancy among female slaves was more of a burden than a benefit to their owners. If a slave became pregnant, she would be physically unable to participate in heavy labor during the latter part of her gestation and immediately after birth.[138] She would give birth to an infant, who would not become a productive part of the plantation economy for at least three or four years but would consume resources in the interim.

The fact that slave owners had unfettered sexual access to their slaves' bodies and were often the fathers of these babies complicated things even further. When a slave owner impregnated his female slave, he simultaneously became the biological father and the legal owner of the child. As these incidents of rape increased, the legal status of the children became problematic for the owner-father. Thus, early on, Virginia state legislators (many were slave owners themselves) enacted status-of-the-mother laws.[139]

Under these laws, children who were created by a slave owner and his slave were owned by their fathers and barred from benefits ordinarily granted to legitimate white children, the most

137. Speech by Sarah P. Redmond, delivered at the Music Hall, Warrington, England (Jan. 24 1859), *in* WARRINGTON TIMES, Jan. 29, 1859 *reprinted in* 1 THE BLACK ABOLITIONIST PAPERS 435, 438 (C. Peter Ripley ed., 1985).

138. *See generally* White, *supra* note 115.

139. Act X11, 2 LAWS OF VIRGINIA 170 (Henig 1823) (enacted 1662). Status-of-the-mother laws were based on the legal rule of *partus sequitur ventrem* which declared a child's status, free or enslaved, based on the status of his or her mother. This doctrine was a legal anomaly in the colonies, later states, because it departed from English law which greatly influenced the private law of property, contracts and torts. Unlike the status-of-the-mother laws, which were eventually enacted in very state, English law vested status according to the father. For a more detailed discussion of Virginia's application of the law, see Karen A. Getman, Note, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste system*, 7 HARV. WOMEN'S L.J. 115, 120-22 (1984). *See also* JUNE PURCELL. GUILD, BLACK LAWS OF VIRGINIA: A SUMMARY OF THE LEGISLATIVE ACTS OF VIRGINIA CONCERNING NEGROES FROM THE EARLIEST TIMES TO THE PRESENT 52-53 (Negro Univ. Press 1969) (1936).

important benefit being inheritance.[140] As a result, sexual assault of female slaves became a wise investment strategy for cash-strapped slave owners interested in increasing the number of their slaves, even if they had to wait for the infants to become productive.[141] The mother had no legal right to her child, and the child had no legal right to any of his father's property, which was ordinarily granted via paternity.[142] Status-of-the-mother laws allowed owners to profit from sexual abuse of female slaves when the abuse resulted in healthy births of new slaves. The lack of protection against rape created a situation ripe for the valuation and exploitation of female slaves based on their reproductive capacities.[143] In short, status-of-the-mother laws legalized the rape of female slaves, and thousands of rapes were yet to come.

3. Slave Breeding

The economic benefit of the rape and impregnation of slaves was firmly established by the close of the international slave trade in 1808.[144] Federal legislation made it illegal to import slaves into the domestic market. Only those already enslaved in the United States and their potential offspring would be allowed to furnish the insatiable slave industry.[145] As noted above, in the early era of slavery, the value of female slaves was not deter-

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140. In a 19th century inheritance case, the point was aptly made by one judge in Kentucky who said, "[T]he father of a slave is unknown to our law. . ." Frazier v. Spear, 5 Ky. (2 Bibb.) 385-86 (1811).

141. Slave owners had every inducement from custom to pecuniary gain to rape female slaves. Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution* 103 YALE L. J. 791, 801 (1993).

142. *See, e.g.,* BARBARA WERTHEIMER, WE WERE THERE: THE STORY OF WORKING WOMEN IN AMERICA 109 (1977) (citing case holding that female slaves had no legal claim to their children).

143. There is evidence that the reproductive capacity of female slaves was more important to slave owners than their natural labor. A letter written by Thomas Jefferson in 1805 stated: "I consider the labor of a breeding woman as no object, and that a child raised every 2 years is of more profit than the crop of the best laboring man." Letter from Thomas Jefferson to John Jordan (Dec. 21, 1805), cited in RONALD TAKAKI, IRON CAGES, RACE AND CULTURE IN 19TH CENTURY AMERICA 44 (1990).

144. The Federal Act of 1808 significantly curtailed the importation of African slaves; however, the quantity of slaves in America "increased 500 percent in a period of sixty years following the prohibition." Gerald Norde, *From Genesis to Phoenix: The Breeding of Slaves During the Domestic Slave Era 1807-1863 and Its Consequences* 39 (unpublished Ph.D. dissertation, University of Delaware) (copy on file with the author).

145. *Id.*

mined by their ability to reproduce.[146] But, after the close of the international slave trade, the only way to legally increase the slave population was through female slave reproduction.[147] Rape suddenly became a profitable enterprise not only for cash-strapped slave owners.[148]

Several plantation owners took full advantage of the profitability of the rape and impregnation of slaves.[149] Indeed, many Mid-Atlantic slave states, already suffering from the market disadvantage of a short growing season, stopped producing traditional plantation commodities and focused solely on breeding slaves for the domestic market.[150] While female slavery still included physical labor, it now "centered on bearing, nourishing and rearing children needed for the continual replenishment of the slave labor force."[151]

The historians who describe slave breeding suggest that it was akin to animal husbandry.[152] It consisted of a concerted effort to increase the number of slave holdings by forcing female slaves to reproduce.[153] Several methods were used to facilitate increased reproduction rates.[154] Some slave owners identified

146. *Id.* at 50.

147. "Enslavement required more than that human chattel produce commodities; it also required, especially after the abolition of the international slave trade, that the slave labor force reproduce itself. . . . Few recognized this better than the slave owners themselves." Gutman, *supra* note 127, at 545. *See also* White, *supra* note 115, at 68.

148. *See, e.g.*, WALTER JOHNSON, LIFE INSIDE THE ANTEBELLUM SLAVE MARKET (1997).

149. When the status-of-the-mother laws were passed, it opened the door to a very profitable profession—slave breeding. WILSON ARMISTEAD, FIVE HUNDRED THOUSAND STROKES FOR FREEDOM (Wilson Armistead ed, Mnemosyne Pub. Co. 1969) (1853). After the close of the international slave trade the quantity of slaves born in America increased 500 percent in a period of sixty years following the legislation.

150. Norde, *supra* note 144.

151. White, *supra* note 115, at 69.

152. Norde, *supra* note 144, at 110-11 (defining animal husbandry as the management and control of a branch of agriculture where the *sin qua non* is the breeding of domestic animals). *See also* RICHARD SUTCH, THE BREEDING OF SLAVES FOR SALE AND THE WESTWARD EXPANSION OF SLAVERY 1850-1860 14 (1972).

153. "Slave breeding, strangely enough, was one of the most approved of methods for increasing agricultural capital." JOHN HOPE FRANKLIN & AFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 131 (2000).

154. "[Since] their natural increases become a source of a great profit to their owner. Whatever, therefore, tends to promote their health and render them prolific, is worthy of attention." American Cotton Planter, No. 295 *in* Norde, *supra* note 144, at 93-94.

slaves for breeding and paired them.[155] Others sold good breeders to the market.[156] Still others were personally involved in the breeding process via rape of their slaves.

Given the complexity of slavery and the owner-slave relationship, an amalgam of these methods often was used.[157] As described above, when a slave owner wanted sexual access to his female slaves for pleasure, he had it, even over the protestations of the female slave.[158] However, some slave owners chose to engage in a reward-versus-punishment system to coerce female slaves into submitting to their sexual advances and then carrying to term and delivering the conceived baby. For example, those who did submit might be rewarded with extra food, better clothing,[159] or increased standing in the slave community.[160] Those who did not submit might be punished with whippings and beatings,[161] denial of food,[162] restricted movement,[163] or sale.[164] Some owners who did not want to jeopardize the female slave's reproductive capacity might threaten to punish her family members if she did not submit to his demands.[165] Still others might promise a slave her freedom if she delivered a certain number of healthy babies.[166]

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155. Consider the testimony of another ex-slave who described his owner's practice of taking "all the fine looking boys and girls that were thirteen years old or older and putting them in a big barn. They used to strip them naked and put them in a big barn every Sunday and leave them there until Monday morning. Out of that came sixty babies." SISTERS, *supra* note 125, at 32.

156. On any given day there were hundreds of advertisements for breeder slaves throughout the south. *See* Gerald Norde for an in depth discussion of the role newspaper advertisements play in helping us to understand the practice of slave breeding and its prevalence. Norde, *supra* note 144, at 109.

157. SUTCH, *supra* note 152, at 14; Norde, *supra* note 144, at 30; SISTERS, *supra* note 125 (all describing the various methods of slave breeding).

158. Enslaved women tried to resist sexual and reproductive exploitation. *See* SISTERS, *supra* note 125, at 56-59.

159. White, *supra* note 115, at 99-100.

160. COLLINS, *supra* note 122, at 50-51, 70.

161. White, *supra* note 115, at 100-20.

162. *Id.*

163. *Id.*

164. "[Master] tried to get rid of a woman who didn't have [children]" JAMES MELLON, BULLWHIP DAYS: THE SLAVES REMEMBER 296 (Weidenfeld & Nicolson eds., 1988).

165. *See generally* HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM 1750-1925 at 80 (1976).

166. In one account of promised manumission after the birth of a woman's twelfth child, she died a month before the twelfth baby's due date. THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY (George P. Rawick ed., 1972).

The vast majority of historians agree that slave breeding was a formal practice engaged in primarily by Mid-Atlantic and southeastern plantations.[167] Some posit that slave breeding was a critical commodity on par with other slave industry commodities such as tobacco and cotton. Planters journals,[168] newspapers with numerous advertisements for breeding slaves,[169] and the number and age of slaves exported to the West support this analysis.[170]

Data suggests that slaves resisted slavery as they experienced it. Male slaves were more likely to run away or otherwise attempt escape after suffering particularly brutal physical abuse. Conversely, female slaves were less likely to attempt escape because they were bound by their connections to children or were limited by pregnancy or other physical conditions.[171] Female slaves often found that their only recourse in resisting slavery was to fashion strategies that would enable them to avoid the specific conditions in which they were exploited and abused under slavery. In response to their vulnerability to sexual abuse and reproductive exploitation, enslaved women organized and adopted sophisticated strategies[172] to limit their participation in institutionalized slave breeding.[173] Methods included using herbs and potions as abortifacients and contraceptives, other types of

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167. *See generally* IRA BERLIN, GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN-AMERICAN SLAVES (2003). *See also e.g.*, leading historian Herbert Gutman's position that "[e]nslavement required more than that human chattel produce commodities, it also required, especially after the abolition of the international slave trade, that the slave labor force reproduce itself . . . ." Few recognized this better than the slave owners themselves." Gutman, *supra* note 127, at 225. *See also* KENNETH M. STAMP, THE PECULIAR INSTITUTION, 59 (1967).

168. Planters' journals, periodicals with wide circulation, should be distinguished from planters' diaries although both yield information about the practice of breeding. In regard to planter's journals, the *American Cotton Planter,* a popular journal among slave owners gave advice on breeding techniques and contains advertisements for a slave girl who could "breed like a cat." Norde, *supra* note 144, at 98.

169. "Historical newspapers are an excellent data source for the socio-empirical investigations into the commodification of slaves. . . . These advertisements not only reveal that breeding was common, but also suggest how breeding accounted for the increase in slaves during the domestic slave era." *Id.* at 109.

170. SUTCH, *supra* note 152, at 14.

171. *See, e.g.*, LAY MY BURDEN DOWN: A FOLK HISTORY OF SLAVERY 183-200 (B.A. Botkin ed., 1945) (narratives by male slaves regarding their escape attempts).

172. The sexual vulnerability and reproductive capacities of slave women influenced the ways in which they resisted slavery. Elizabeth Fox-Genovese, *Strategies and Forms of Resistance: Focus on Slave Women in the United States*, *in* BLACK WOMEN IN AMERICAN HISTORY: FROM COLONIAL TIMES TO THE NINETEENTH CENTURY 409 (Darlene Clark Hine ed., 1990).

173. *Id.*

self-induced abortions, and infanticide. Accordingly, it appears that female slaves were not only aware of the role their reproductive capacities played in the slave industry, but also consciously and covertly resisted supplying their owners with future slaves.[174]

These resistance tactics of both female and male slaves reflected their understanding of the economic harm they could bring to their owners. Male slaves who successfully escaped or committed suicide[175] understood that in taking these actions they were undermining their owner's control and economic well-being. Female slaves understood that their efforts to resist sexual and reproductive exploitation would result in fewer slaves and have adverse economic consequences for their owners.[176] Because slaves had so little power over their lives, an enormous amount of energy was expended by female slaves to avoid contributing to the slave breeding industry. Successful interference in her owner's plan to use her as a slave breeder was equally as important a goal as escaping the sexual abuse and subsequent mental and physical burden of pregnancy.[177]

The fact that sexual and reproductive exploitation of female slaves so fully engaged the attention of many working to abolish slavery is also helpful in establishing the prevalence and importance of the practice to the slave industry.[178] Abolitionists often

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174. *See also Resistance in* SISTERS, *supra* note 125, at 56-59.

175. Suicide, by one's own hand or by placing one's self in unsurvivable situations, was another common form of male resistance to slavery. The folkloric tune, "Before I be a slave, I'll be buried in my grave" indicates the desire to die rather than live as a slave. *See* LAY MY BURDEN DOWN: A FOLK HISTORY OF SLAVERY 174 (B.A. Botkin ed., 1945). Interestingly, while men were more inclined to kill themselves in order to escape slavery than women, women were more inclined to commit infanticide in order to spare their offspring a life under slavery. *See* A. Leon Higginbotham, Jr., *Race, Sex, Education and Missouri Jurisprudence:* Shelley v. Kramer *in a Historical Perspective*, 67 WASH. U. L. Q. 673, 694-95 (1989) (discussing infanticide prosecutions). *See also* Michael P. Johnson, *Smothered Slave Infants: Were Slave Mothers at Fault? in* 2 Black Women In American History 709 (Darlene C. Hine ed., 1990).

176. "Resistance to sexual exploitation . . . had major political and economic implications. A woman who elected not to have children [by practicing] sexual abstinence, abortion or infanticide, negated through individual or group action her role in the maintenance of the slave pool." Genovese, *supra* note 172.

177. Slave owners at times tempered exertion of their power in deference to a pregnant slave usually out of fear of harming the gestating return on his investment i.e. the baby in utero. *See* Roberts, *supra* note 5, at 40 (citing Michael P. Johnson, *Smothered Slave Infants: Were Slave Mothers at Fault?*, 47 J. OF S. HIST. 409, 417 (1981)).

178. "The literature on slavery makes it abundantly clear that white men regularly abuse female slaves sexually . . . [Consequently], [s]exual abuse of female salves

attacked slavery on the grounds that it was a system that made whores out of female slaves and rapists out of slave owners.[179] For example, abolitionist Frederick Douglass frequently included references to reproductive and sexual abuse in his speeches, often invoking the story of his own grandmother and how she had been the source of her owner's wealth because she had "peopled his plantation with slaves."[180] He also published a letter pleading with his former owner to protect his sisters from rape.[181]

Similarly, abolitionist Harriet Martineau directed her admonitions against slavery toward the economic motivations and benefits to those who raped and bred their slaves[182] In the abolitionist newspaper *The Non-Slaveholder,* an abolitionist returning from the South recounted a response he received after an inquiry as to how many Southern young men had never raped a slave for purposes of reproduction and sale. "[A] cotton planter . . . answered, not more than one in ten!"[183]

Finally, Sarah P. Redmond spoke publicly about the connection between sexual abuse and reproductive exploitation when she spoke about the evils of slavery. Like many abolitionists, she saw the Southern fear of race-mixing as hypocritical, given that such mixing was an obvious byproduct of owners raping their slaves.[184] She noted that "[t]he more Anglo-Saxon blood," the more the owner-father could receive on the market for his slave-offspring.[185] This recognition of the complex relationship between rape, reproduction, skin color, and status in the context of slave breeding is particularly important when considering the in-

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was a popular theme in abolitionist propaganda." MELTON A. MCLAURIN, CELIA, A SLAVE 98 (1991).

179. The mix of sex, rape, reproduction and slavery "aroused the special ire of the northern abolitionists" who argued that slavery turned female slaves into prostitutes. GENOVESE, *supra* note 121, at 416, 460.

180. *Frederick Douglass to His Old Master*, 3 NON-SLAVEHOLDER 254, 256-57 (Samuel Rhoads & George W. Taylor eds.) (1848).

181. *Id.*

182. "Every man who resides on his plantation may have his harem, and has every inducement of custom, and pecuniary gain, to tempt him to the common practice," HARRIET MARTINEAU, 2 SOCIETY IN AMERICA 320 (AMS Press, Inc. 1966) (1837).

183. N. Thomas, *Slavery As It Is*, FREE TERRITORY SENTINEL (Indiana 1849), *reprinted in* 4 THE NON-SLAVEHOLDER 112, 115 (1849) (Samuel Rhoads et al ed., 1970).

184. *See generally* CATHERINE CLINTON, THE PLANTATION MISTRESS: WOMEN'S WORLD IN THE OLD SOUTH 1780-1835 (1982).

185. Redmond, *supra* note 137.

tergenerational benefits to the children of slave mothers and slave-owning fathers.[186]

C. *Post-Emancipation Inclusion*

1. Congressional Recognition of Sexual and Reproductive Abuse During Slavery

Interestingly, Congressional debates over the Thirteenth Amendment,[187] as well as subsequent legislation, contain more references to the experiences of female slaves than does modern reparations literature.[188] Perhaps this is because the debates were closer in time to the atrocities; or, perhaps Congress benefited from the research and work of abolitionists who focused their attention on the sexual and reproductive evils of slavery. Although no solid evidence exists as to why issues usually shielded from public discourse, such as sexual relations, abuse, and reproduction, were part of the debates, the Congressional record does reflect passionate debate about the experience of female slaves.[189]

By looking at the records of these debates, we can glean information about the extent to which sexual and reproductive

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186. Skin color was important indicia of rape during slavery. Abraham Lincoln in his famous debate against Stephen Douglas addressed the point succinctly when he stated:

> Could we have had our way, the chances of these black girls ever mixing their blood with that of white people, would have been diminished at least to the extent that it could not have been without their consent. But Judge Douglas is delighted to have them decided to be slaves . . . and thus left subject to the forced concubinage of their masters, and liable to become the mother of mulattoes in spite of themselves — thevery state of case that produces nine-tenths of all mulattoes

POLITICAL SPEECHES AND DEBATES OF ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS, 1854-1861, 50-51 (Alonzo T. Jones ed., 1895).

187. Section I of the Thirteenth Amendment abolishes slavery and Section 2 gives Congress the power to enact legislation to further the goals of the Amendment. U.S. CONST. AMEND. XIII, §§ 1-2.

188. According to a pamphlet authored by Alexander Crummel entitled *The Black Women of the South: Her Neglects and Her Needs*, sexual exploitation of black women in the south was a primary concern after emancipation (Beverly Guy-Sheftal, *Daughters of Sorrow: Historical Overview of Black Women* 1880-1920, *in* 11 BLACK WOMEN IN UNITED STATES HISTORY 1, 60 (1990) (Darlene Clark Hine ed., 1990).

189. The Congress has always prided itself in civil discourse even during the most trying of times. As such, it is interesting and telling that the only record of blood being spilt during Congressional debates was initiated in response to comments accusing a member of Congress of supporting slavery solely to retain sexual access to female slaves. THOMAS AYERS, THAT'S NOT IN MY AMERICAN HISTORY BOOK 104 (2000).

abuse were integral parts of the experience of enslaved women. For instance, Senator James Harlan of Iowa stated that the Thirteenth Amendment should abolish the legal status of slavery, as well as all incidents of slavery including "the breach of the conjugal relationship and the parental relationship by robbing the offspring of the care and attention of his parents."[190] Senator Wilson of Massachusetts also discussed slavery's impact on female slaves and slave families when he argued in favor of the amendment. In his view, the Thirteenth Amendment was meant to "obliterate the last lingering vestiges of the slave system . . . all that it was and is and everything connected with or pertaining to it . . . Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child will be protected. . ."[191]

In addition to discussing reproductive exploitation and sexual abuse in the Thirteenth Amendment debates, Congressmen addressed the issue in subsequent legislative debates. Examples are clearly seen during Reconstruction in debates over the Fourteenth Amendment, which, in part, was crafted to respond to the Southern states' attempts to negate emancipation through state legislation. Representative Shannon asked, "what divinity [is there] in tearing from the mother's arms the suckling child and selling them to different and distant owners?"[192] Representative Rainey also noted that "occasionally it was plain to be seen that there was a strong family resemblance between [the slave and free children]."[193] And, Representative Ward asserted that slavery was a system "where men who owned women and sold their offspring on the auction block for gold," adding that ending such practices via the Reconstruction Amendments would give "citizenship, suffrage and freedom" to former slaves.[194]

In addition to filling holes left by the Thirteenth Amendment and responding to Black Codes,[195] Reconstruction legislation was also designed to facilitate the transition from slavery to

190. 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 83 (Bernard Swartz ed., 1970).

191. CONG. GLOBE, 38th Cong., 1st Sess. 1319, 1321, 1324 (1864).

192. PEGGY DAVIS, *supra* note 117.

193. CONG. GLOBE, 42nd Cong., 2d Sess. 16A (1872).

194. CONG. GLOBE, 40th Cong., 2d Sess. 465 (1868).

195. For an excellent description and discussion of the Black Codes, see generally FONER, *supra* note 10.

freedom.[196] As discussed in Section II, the Freedmen's Bureau educated former slaves of their rights as free citizens, by assisting them in land redistribution issues, and with obtaining formal education, homes, and jobs.[197] A lesser known fact is that in an acknowledgment of the effects forced slave breeding had on generations of families, the Freedmen's Bureau also assisted in locating lost, stolen, or sold family members of former slaves.[198]

In later legislation, the Civil Rights Acts[199] were designed to fill the gaps left by the Reconstruction Amendments. As in the preceding enactments, debates over these acts indicate that they were intended to address the sexual and reproductive abuse of female slaves.[200] For example, in the debates over the Civil Rights Act of 1865, a discussion ensued over possible unintended effects. The Act was intended to federalize the protection of slaves, and several members of Congress cautioned that the Act was flawed because it could ultimately infringe on intimate relations such as the right to marry and to have and raise one's children. Representative Creswell pointed out that the flawed legislation would not remedy the conditions of slavery in that "[t]he slave could sustain none of those relations which give life all its charms. He could not say 'my wife, my child, or my body.'"[201] During the debates over the Civil Rights Act of 1866, Senator Jacob Howard further implicated the sexual and reproductive exploitation that occurred during slavery after he was asked to legally characterize a slave. He responded, "A slave had no rights. He had not the right to become a husband or a father in the eye of the law."[202] These continued references to sexual and reproductive abuse reveal that remedying the specific

196. Tuneen E. Chisholm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 719 (1999).

197. Freedmen's Bureau Act of 1866, ch. 200, 14 Stat. 173-177 (1866).

198. *See* Peggy C. Davis, *"So Tall Within" – The Legacy of Sojourner Truth*, 18 CARDOZO L. REV. 451, 455 (1996).

199. Civil Rights Act of 1866, ch 31 14 Stat. 27-30 (codified as amended at 42 U.S.C. §1981 (2004)).

200. *See* Roberts, *supra* note 5, at 29. *See also* Peggy Davis, *supra* note 198 (discussing the motivations and continued anti-slavery ideology of the Reconstruction Congresses as seen from the Reconstruction Amendments and subsequent legislation).

201. CONG. GLOBE, 38th Cong., 2dSess. 120 (1865).

202. CONG GLOBE, 42nd Cong., 2d Sess.16A (1872).

effects of these wrongs was of ongoing concern to members of Congress immediately before and throughout Reconstruction.[203]

Attention to these matters was not long for public discourse.[204] As the post Reconstruction era emerged, other matters, such as widespread lynching of blacks, took precedence over remedying the sexual and reproductive abuses of slavery.[205] Regrettably, despite the existence of numerous references in Congressional debates over the Reconstruction Amendments, interpretation of the doctrine has continued to develop without fully exploring the connection between slavery and reproductive exploitation. Exponentially more regrettable, however, is the failure of the popular movements seeking to eradicate and remedy the vestiges of slavery to make that connection.

2. Exclusion from Mainstream Social Justice Movements

a. Civil Rights Movement

Throughout the years, the civil rights and reproductive rights movements have not focused on the plight of female slaves. As a result, little time has been spent developing theories and strategies to protect against modern manifestations of the female slave experience.[206] To their credit, both major social movements have been integral in stewarding the United States to a place of more equality and more freedom.[207] Yet, both have fallen short in advocating for reproductive freedom for women of color.[208]

The major issues in the fight to eradicate the effects of slavery on society as a whole have focused on a fairly distinct group of issues, all of which are connected to how the male experience

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203. Both the 14th Amendment and the 15th Amendment were ratified prior to these debates..

204. By 1875, Congress had enacted what it believed to be the comprehensive set of laws necessary to ensure equal justice under the law for blacks.

205. While the lynching phenomena had sexual components, no mention was made of such matters in debates over the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871). *See* Jacquelyn Dodd Hall, *The Mind that Burns Each Body: Women, Rape and Racial Violence*, *in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 328-333 (Ann Snitnow et al, eds, 1983) (discussing the how the KKK's terror campaign included raping black women).

206. *See generally* ANGELA Y. DAVIS, WOMEN, RACE AND CLASS (1981). *See also* COLLINS, *supra* note 122.

207. The civil rights movement in the 1950s and 1960s focused on and resulted in sweeping changes to the segregated schools, housing and employment discrimination.

208. For an in depth discussion of the civil rights and reproductive rights movements and women of color, see *generally* NELSON, *supra* note 105).

of slavery impacts the male descendants of slaves. For example, although women fought for equal rights in voting, employment, and access to education, the civil rights movement did not address the ways in which these issues impacted the lives of black women differently from black men. One notable example arises from the context of employment in the domestic sphere. Many black women who worked as domestics in the homes of whites were, like their enslaved ancestors, vulnerable to sexual abuse. Although this was a well known aspect of the plight of black women domestics, it was not discussed as a major point in the civil rights agenda.

My point here is not to deny or question the importance of the civil rights movement to the lives of black women (individually and as the mothers, sisters and daughters of black men). It is to contend that the movement's failure to duly address issues unique to black women's interests in sexual and reproductive freedom was done to the detriment of black women. As such, coercive, oppressive and exploitative sexual and reproductive policies continue to go unchecked.[209]

Female slaves were affected by the same conditions as male slaves. Consequently, both male and female descendants of slaves have an interest in remedying the same long-term effects of slavery including their ability to secure quality employment, housing, and education. However, these issues have been defined by the male experience of slavery and exclude an analysis of the effects of female slaves' sexual and reproductive abuse.[210] As a result, these issues have played little or no roll in the mainstream civil rights movement.[211]

b. Women's Movement for Reproductive Rights

Issues of sexual and reproductive abuse of female slaves and their descendants have largely been left out of the mainstream

209. For a comprehensive catalogue of the harmful reproductive policies that have targeted or detrimentally impacted black women, *see* Roberts, *supra* note 5.

210. For a detailed discussion of the historiography of sexual and reproductive exploitation and the lack of attention given to that history in the civil and reproductive rights movements, *see* PAMELA D. BRIDGEWATER, REPRODUCING SLAVERY (forthcoming, South End Press 2005) (outlining the absence of reproductive rights platform in mainstream civil rights movements in the United States) (manuscript on file with the author).

211. *Id.*

reproductive rights movement as well.[212] The current reproductive rights framework was created and evolved under the Reconstruction Amendments designed to remedy the effects of the Black Codes.[213] However, the movement's agenda was and continues to be dominated by issues of concern to middle and upper-class white women.[214] The lack of a meaningful focus on race in the mainstream reproductive rights movement and its doctrine is particularly noteworthy, given that the seminal case of the reproductive rights doctrine was *Skinner v. Oklahoma.*[215] In *Skinner*, the United States Supreme Court established federal protection of reproductive matters under the Fourteenth Amendment, and clearly acknowledged the interest that historically disadvantaged racial groups have in reproduction issues.[216]

Despite *Skinner*, affects of racialized reproductive abuse have persisted and go without substantial attention in the civil rights or the reproductive rights movements.[217] With these major movements failing to sufficiently incorporate the history of sexual abuse and reproductive exploitation under slavery, it follows understandably, albeit sadly, that the major reparations movement seeking remedies for slavery also would fail to fully incorporate the plight of female slaves. Thankfully, the continued exclusion of the historiography of female slaves is not mandated by the reparations framework. Consequently, the reparations movement has an opportunity to include the experiences of female slaves in its construction of slavery and its strategies for reparations. The following discussion in this Article undertakes the central aim of this project which is to explore the viability and implications of inclusion.

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212. *Id.* at 16-17 (outlining the absence of race issues in the mainstream reproductive rights movement). *See also generally*, REPRODUCTIVE FREEDOM, *supra* note 6.

213. The reproductive rights doctrine is interpreted as flowing from the privacy protections and liberty interests provided by the Fourteenth Amendment.

214. *See* BRIDGEWATER, *supra* note 210, at 68-99 (describing the reproductive rights doctrine as ahistorical and outlining the relative lack of protection it affords women of color, descendants of slaves in particular).

215. 316 U.S. 535, 541 (1942) (ruling that a statute calling for castration of petty criminals only is unconstitutional and establishing the fundamental interests individuals and certain historically oppressed groups have in reproducing). *See infra*, note 238 and accompanying text.

216. *Id.*

217. *See, e.g.*, Roberts, supra note 5 for a the most comprehensive historiography of the reproductive experiences and particular vulnerabilities of communities of color. *See generally,* BRIDGEWATER, *supra* note 210.

IV. Including the Harms of Reproductive and Sexual Slavery in the United States' Movement for Reparations

As pointed out in the preceding section, the pattern of omitting reproductive issues from the discourse of reparations for slavery is part of a broader history of exclusion. Indeed, it is quite a reasonable analytical progression: if slavery refers to the male experience of slavery, then the request for reparations will be based on male slavery. If the claims for reparations as currently articulated are successful, they will be fashioned to remedy the male slave's slavery and the impact that form of slavery has had on the descendants of slaves. Regardless of the strategy employed to obtain reparations, proponents are in large part basing their claims on the same historical data regarding the institution of slavery and its conditions and incidents. The harms of slavery and Jim Crow, as articulated by reparations proponents, include violence, uncompensated labor, and denial of employment opportunities, education, freedom of movement, and opportunity to own property.

While the conditions central to the current claim for reparations impacted female slaves, I suggest a different approach, one which includes the female slave experience of reproductive and sexual abuse in the reparations framework. I am generally in favor of reparations as they are presently articulated; however, I offer models for the inclusion of sexual and reproductive exploitation in an effort to make more accurate the history of slavery and enhance the claim for reparations. The point is rather narrow: if reparations are to be based on slavery and the impact slavery has had on its descendants, reparations must include the conditions of female slaves, specifically, institutionalized and widespread reproductive and sexual abuse.

A. *Domestic Examples of Reparations Efforts to Address Reproductive and Sexual Abuse*

At first glance, the task of finding domestic models for reparations for reproductive and sexual slavery is daunting. No claims for reparations for slavery — much less for reproductive and sexual slavery — have been successful. The task becomes less daunting if one expands the definition of slavery to include oppressive sexual and reproduction practices engaged in to maintain a larger institutional system of repression. This expansion

positions the experience of female slaves as central to our understanding of slavery in much the same way as forced manual labor is currently positioned.

Finding models for reparations for slavery which are defined as such also becomes easier if one broadens the definition of reparations. Legislation, governmental acknowledgment, formal apology, and private and public litigation, have been used in many situations where institutionalized or government sanctioned sexual and reproductive exploitation occurred. Although these remedies may not be defined as reparations, they provide a framework for a non-compensatory scheme to remedy the injury to female slaves and to show that precedence exists, both domestically and internationally, for remedying harms of this nature.

1. White Slavery Act

The first federal legislation in the United States that dealt specifically with sexual abuse was the White Slavery Act of 1910,[218] also known as the Mann Act.[219] Although not enacted to protect former slaves from reproductive and sexual abuse, the Act, fueled by "moral panic" was ostensibly designed to reduce the sexual exploitation of white women by pimps and brothels.[220] The Mann Act made it a felony to transport knowingly any woman or girl across state lines for prostitution, debauchery, "or any immoral purpose."[221] A number of early prosecutions helped thwart plans to move women into brothels or into other situations where sexual oppression was the objective.[222]

However, some of these prosecutions helped maintain other aspects of social control. For example, the Mann Act was used against a black man who took his fiancée, a white woman, across state lines.[223] Many historians and commentators believe that

218. White Slave Traffic Act, ch. 395, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. § 2421-2424 1988).

219. Named after the Act's sponsor, Representative James R. Mann of Illinois.

220. DAVID LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 15 (1994).

221. White Slave Traffic Act, ch. 395, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. § 2421-2424 (1988).

222. LANGUM, *supra* note 220 (discussing the prosecutions under the Mann Act).

223. Boxer Jack Johnson was arrested and charged for violating the Mann Act for transporting a white woman (his fiancée who would later become his wife) across state lines. Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community* 32 AKRON L. REV. 529 (1999); Ron Flatter, *Johnson Boxed, Lived on Own Terms*, ESPN.com at http://espn.go.com/sportscentury/features/00014275.html (last visited Mar. 16, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

this aspect became the Act's primary application. Others assert that social control was the act's primary intent claiming there was never a threat to white women's morality warranting such legislation in the first place.[224]

Regardless of its application, the Mann Act is important because it shows the willingness of Congress to enact legislation in response to real or perceived sexual exploitation or sexual abuse of women. Congress recognized that sexual exploitation and sexual abuse were within its legislative purview, and as such, gave it the authority to legislate against efforts to support formal markets with sex as the primary commodity. Further, the Mann Act shows the ability of Congress to provide a remedy for women who are victims or potential victims of efforts to coerce or force them into a life of sexual slavery, i.e., prostitution.[225]

With this understanding of the Mann Act, reparations advocates can more easily make the argument that Congress has established a connection between the harms of female sexual exploitation and sexual abuse and the harms of slavery.[226] This connection could prove useful in persuading legislators to provide a remedy for historical sexual and reproductive abuse, as well as to enact protective legislation against modern attempts to exploit or manipulate sexual and reproductive capacities of historically vulnerable groups.

2. American Eugenics

The dawn of the First World War saw an upsurge in scientific justifications for society's ills. Proponents of eugenics believed that one's station in life was genetically predetermined. As such, they advocated for an increase in reproduction among those that possessed positive traits deemed important to improving society and a decrease in reproduction for those who possessed undesir-

224. FREDRICK K. GRITTNER, WHITE SLAVERY: MYTH, IDEOLOGY, AND AMERICAN LAW (1990). *See also* Barbara Holden-Smith, *Lynching, Federalism and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J. L. & FEMINISM 31 (1996); LANGUM, *supra* note 220.

225. A more cogent argument for considering prostitution within the realm of slavery is offered by Katyal, *supra* note 141.

226. *See* Holden-Smith, *supra* note 224, at 3 for discussion about the use of slavery in the Congressional debates on the Mann Act.

able traits.[227] Eugenics was accepted as scientific fact by no less than thirty-three states in the United States.[228]

Initially eugenics consisted nearly exclusively of so-called positive practices, which included criminalizing abortions and making it difficult for those deemed desirable procreators to obtain sterilization or other types of family planning.[229] But negative eugenics[230] gained widespread support and was codified to allow forced sterilization of thousands of people.[231] The practice of negative eugenics continued in full force and was expected to gain further appeal until it was connected to the Nazi party during World War II.[232] At that time, many states that practiced negative eugenics greatly limited or completely rescinded their sterilization laws.[233] Other states and institutions continued to employ negative eugenics, making efforts to distance themselves from the practices associated with the Nazi party.[234] This period of sterilization abuse has given rise to current efforts to force participating states to acknowledge, apologize for, and compensate those sterilized under eugenics policies after the laws allowing them were rescinded and, for those states that retained their laws, after the science of eugenics was debunked.

The movement to address sterilization abuse has enjoyed a great degree of success. Its efforts have led to an apology from the governors of Virginia, California, Oregon, and South Carolina.[235] The North Carolina legislature has commissioned a study of sterilization abuse, and based on their findings locates victims

227. *See, e.g.*, Paul A. Lombardo, *Three Generations of ??? Are Enough?*, 30 FLA. ST. U. L. REV. 191 (2003); Lisa Powell, Note, *Eugenics and Equality: Does the Constitution Allow Policies Designed to Discourage Reproduction Among Disfavored Groups?*, 20 YALE L. & POL'Y. REV. 481 (2002).

228. Meredith Blake, *Welfare and Coerced Contraception: Morality Implications of State Sponsored Reproductive Control*, 34 UNIV. LOUISVILLE J. OF FAM. L. 311 Spring1995/1996.

229. *Id.*

230. Negative eugenics refers to the practice of restricting or eliminating the reproductive capabilities of people with undesirable traits. *See* LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA (1976).

231. For a detailed discussion of the history of the eugenics movement see Nicole Huberfeld, *Three Generations of Welfare Mothers are Enough: A Disturbing Return to Eugenics in the Recent "Workfare" Law*, UCLA WOMEN'S L. J. 97 112 (1998).

232. Roberts, *supra* note 5, at 65-68.

233. GORDON, *supra* note 230, at 101.

234. *Id.*

235. *See generally* Dave Reynolds, *The Eugenics Apologies: How a Pair of Disability Rights Advocates Scored the First State Apology for Eugenics, and What They Have Planned Next*, RAGGED EDGE ONLINE (Nov/Dec. 2003), at http://

and determines appropriate compensation.[236] Riding this wave of success, movement leaders asked Congress to investigate the federal government's role in eugenics abuse as well as to issue a formal apology.[237]

Prior to this modern era of formal apologies for eugenics abuses, the United States Supreme Court had an opportunity to decide a case which would mark a formal end to eugenics and establish the first doctrinal recognition of the connection between reproduction and racial subordination.[238] In *Skinner v. Oklahoma*, a case intended to be an official frown upon the eugenics movement, the Supreme Court also articulated that restrictive reproductive policies affecting racial minorities were particularly egregious, given the potential to oppress an entire race.[239] The case involved Mr. Skinner, a black man, who was convicted of stealing chickens. Because it was his third conviction, he was set for castration under an enhanced penalty statute.[240] The Court found the statute unconstitutional on the grounds that it did not apply to those who committed other crimes, such as embezzlement.[241]

Despite the failure of *Skinner v. Oklahoma* to live up to its full potential,[242] the case stands for the proposition that increased scrutiny is appropriate where there is an historical experience of abuse, and continued vulnerability of descendants of slaves or other minority group would warrant such scrutiny. *Skinner v. Oklahoma,* when understood in this way, provides a powerful example of doctrinal precedence for reparations advo-

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www.raggededgemagazine.com/1103/1103ft1.html (last visited Apr. 5, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

236. Dave Reynolds, *Panel Recommends Counseling For Sterilization Survivors*, INCLUSION DAILY EXPRESS April 25, 2003, *at* http://www.inclusiondaily.com/news/institutions/nc/eugenics.htm (last visited Mar. 16, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

237. Cynthia T. Pegram, *Group Asks Bush to Issue National Eugenics Apology*, RICHMOND TIMES-DISPATCH, January 3, 2003, at B2.

238. 316 U.S. 535 (1942).

239. *Id.* at 541.

240. The Oklahoma Habitual Criminal Sterilization Act allowed for castration of offenders convicted of "felonies involving moral turpitude." *Id.* at 536.

241. *Id.* at 541-42.

242. Although *Skinner* continues to be cited for the proposition that procreation is a fundamental right deserving enhanced scrutiny, it is no longer cited for the analysis regarding the connection between racial subordination and reproductive manipulation. *See, e.g.,* Griswold v. Conn., 381 U.S. 479, 485 (1965); Eisenstadt v. Baird, 405 U.S.438, 454 (1972); Roe v. Wade 410 U.S. 113, 152 (1973); Webster v. Reproductive Health Servs., 492 U.S. 490, 547 (1989); Planned Parenthood v. Casey, 505 U.S. 833, 834 (1992).

cates. They can point to an instance where a court — indeed, the United States Supreme Court — recognized the connection between reproductive abuse and race.

3. The Indian Child Welfare Act[243]

In 1978, responding to a grassroots movement designed to combat centuries of widespread removal of Indian children from their homes to live with Anglo families in missions or in orphanages, Congress passed the Indian Child Welfare Act.[244] In so doing, Congress sought to eradicate and remedy the effects of practices that led to "an alarmingly high percentage of Indian families . . . broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and . . . an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[245] The act was precipitated by scores of people offering testimony to Congress about the abuses of removal.[246]

Some Native American families testified that they were coerced into giving their children to adoption agencies or missionaries working on behalf of prospective white parents or others who planned to exploit the children.[247] Offers of money in exchange for the fruits of female reproduction presented many Native American women with an untenable "choice," due to the dismal and poverty stricken conditions in which they lived. Under duress, some accepted compensation, but others testified that their children were stolen.[248] This Congressional testimony

243. 25 U.S.C §§ 1901 et seq.

244. *Id.*

245. *Id.* at § 1901 (4).

246. Congressional hearings began in 1974. Testimony over the course of four years focused on removal and placement of Native American children with non Indian families. Studies used in the Congressional hearings showed that between 1969 and 1974, 25-35% of all Indian children had been removed. *See, e.g., Indian Child Welfare Act of 1978, Hearings Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 95th Cong. (1978); *Indian Child Welfare Act of 1977: Hearing on S.1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong. (1977) [hereinafter1977 Hearings]; *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93rd Cong. (1974) [hereinafter 1974 Hearings].

247. *See, e.g.*, Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 (2002).

248. *See generally Tribal Child Welfare Issues at* http://www.cwla.org/advocacy/2004legagenda16.pdf. (last visited Apr. 5, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

established that the practice of whites stealing Native American children from their families and tribes was prevalent.[249] As a result, Congress enacted the Indian Child Welfare Act to provide guidelines for the removal of Native American children in need of placement outside of their homes. Thus, the Act can be understood as a Congressional effort to remedy a form of reproductive abuse — the abduction and/or selling of non-white children by whites.[250]

The conditions Congress sought to remedy with the Indian Child Welfare Act are substantially similar to those experienced by slaves. Many ex-slave testimonies reveal the widespread practice of African American children forcibly removed and given away or sold. Like many Native American women, female slaves were often given untenable choices — for instance, sustainable food or less severe physical abuse in exchange for reproducing future slaves for their owners. Further, the threat of removal constantly loomed, and owners were therefore able to use the threat of sale to coerce obedience from slaves.

Given the marked similarities between Indian child removal from their families and the plight of slaves regarding sale and the threat of sale, advocates could incorporate the Indian Child Welfare Act as a model for reparations for slavery. The Act exemplifies the government's responsiveness to the type of harm experienced by families when parental rights are forcibly severed in order to further some larger cultural subordination project. While there were no monetary damages paid in connection with the Indian Child Welfare Act, it established the possibility of remedy provided by formal recognition of the experiences, protection from future abuses, and a greater sensitivity to the vulnerability of a particular community with regard to child removal.

4. The Catholic Church Litigation and Sexual Abuse

The child sexual abuse crisis linked to the Catholic Church is the symptom of a widespread and growing problem.[251] Millions of dollars have been paid to victims and into victims' funds in

249. Peter K. Wahl, *Little Power to Help Brenda? A Defense of the Indian Child Welfare Act and Its Continued Implementation in Minnesota*, 26 WM. MITCHELL L. REV. 811, 812-820 (2000).

250. *Id.*

251. A study conducted by researchers at John Jay College of Criminal Justice in 2004 found that between 1950 and 2002, 4,392 Catholic clerics had been accused by 10,667 victims of child sexual abuse which amounts to 4% for all catholic priests during that time period. Karen J. Terry & Jennifer Tallon, *Child Abuse: A Review*

response to the claims of sexual abuse,[252] some for instances of abuse that occurred decades ago. The Catholic Church has been, and continues to be, a party to numerous private lawsuits alleging sexual abuse of children by priests or other agents of the church.[253] To date, there is neither an end in sight nor a predictable outcome of the crisis. At this point, no government entity has been implicated in enabling the abuse to go on for so long without prosecution.[254]

Two aspects of this crisis are particularly important to reparations advocates interested in including the experiences of female slaves. The first is the response of the Catholic Church. The second is the discussion concerning adjusting state statutes of limitations for private causes of actions against alleged abusers.[255] In 2002, in response to the growing anxiety over the Catholic Church's institutional role in enabling child abuse and failing to change institutional policy,[256] the United States Conference of Catholic Bishops enacted a Charter for Protection of Children and Young People.[257] Although the Vatican never approved it,

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of the Literature available at http://www.usccb.org/nrb/johnjaystudy/litreview.pdf (last visited Mar. 16, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

252. Rev. Raymond C. O'Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV. 363, 398-402 (2004) (discussing the financial costs of the sexual abuse scandal).

253. Beth Wilbourn, Note, *Suffer the Children: Catholic Church Liability for the Sexual Abuse Acts of Priests*, 15 REV. LITIG. 251 (1996).

254. The only federal suit to date is a Racketeer Influenced and Corrupt Organizations Act ("RICO") suit filed in 2002 claiming that the actions of four American dioceses and a former priest (making payments to cover up abuse, allowing abuse ignoring repeated complaints) amount to conspiracy of the type that RICO prohibits. The suit alleging violations of RICO was filed in St. Louis County Circuit Court. The suit named the Catholic dioceses of Kansas City, Kansas, West Palm Beach, Floridia, Knoxville, Tennessee, and Jefferson City, Missouri, as defendants. *See* Laura Russell, *Pursuing Criminal Liability for the Church and its Decision Makers for Their Role in Priest Sexual Abuse,* 81 WASH. U. L.Q. 885, 895-98 (2003); Nicholas R. Mancini, *Mobsters in the Monastery? Applicability of Civil RICO to the Clergy Sexual Misconduct Scandal and the Catholic Church,* 8 ROGER WILLIAMS U. L. REV. 193 (2002) (discussing the cases filed and the feasibility of the RICO actions).

255. Kearns, *Incorporating Tolling Provisions Into Sex Crimes Statutes of Limitations* 13 TEMP. POL. & CIV RTS. L. REV. 325 (2003) (arguing in favor of tolling the statute of limitations); Jodi Leibowitz, *Criminal Statutes of Limitations: An Obstacle to the Prosecution and Punishment of Child Sexual Abuse* 25 CARDOZO L. REV. 907 (2003) (same). *Cf.* Peter Smith, *The Massachusetts Discovery Rule and Its Application to Non-Perpetrators in "Repressed Memory" Child Sexual Abuse Cases*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 179 (2004) (arguing against tolling the statute of limitations for repressed memories in child sexual abuse cases).

256. Francis Temman, *U.S. Bishops Vote "Near Zero-Tolerance" on Abusive Priests*, AGENCE FRANCE-PRESSE, June 15, 2002.

257. U.S. Conference of Catholic Bishops, *Charter for the Protection of Children and Young People Revised Edition (2002), available at* http:// www.usccb.org/bish-

the Charter showed that large institutions can be responsive when grassroots movements and private litigation allege complicity or active involvement in the offending conduct.[258]

The private causes of action have led to nearly $600 million in payments via judgments or settlements.[259] They are often identified as the single most important aspect of the movement that ultimately led to the response by the Catholic Church.[260] Key to succeeding in this type of litigation is the plaintiff's ability to extend statutes of limitations mandating sexual abuse claims. Given the difficulty of overcoming the obstacles of expired statutes of limitations, and despite the justifications for having such statutes (*i.e.,* false memory and loss of evidence), victims' rights organizations have successfully persuaded some state legislatures to expand or rescind their statue of limitations in child abuse cases.[261]

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ops/charter.htm (last visited Mar. 16, 2005); U.S. Conference of Catholic Bishops, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons (2002)*, *available at* http://www.usccb.org/bishops/norms.htm (2002) (last visited Mar. 16, 2005).(all on file with the UCLA WOMEN'S LAW JOURNAL).

258. Microsoft Encarta Encyclopedia, *Roman Catholic Church*, *at* http://encarta.msn.com/encyclopedia_761573737_2/Roman_Catholic_Church.html (last visited Mar. 16, 2005).

259. *See* Angela C. Carmella, *The Protection of the Children and Young People: Catholic and Constitution Visions of Responsible Freedom*, 44 B.C.L. REV. 1031 (2003).

260. *Id.*

261. *See Spokane Diocese Settles Sex-Abuse Case for $30,000*, Seattle Post Intelligencer April 20, 2004 (describing settlement of suit where statute of limitations had expired), *available at* http://seattlepi.nwsource.com/local/169824_churchabuse21.html (last visited Mar. 16, 2005) (on file with the UCLA Women's Law Journal). Kentucky considered a bill that would do away with statute of limitation in child abuse cases. Peter Smith & Deborah Yetter, *Bill Eases Path for Child Sex-abuse Suits: Kentucky Senate Measure Would End Statutes of Limitations*, Courier-Journal, January 15, 2003, *available at* http://www.courier-journal.com/localnews/2003/01/15/ke011503s349714.htm (last visited Mar. 16, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL). Alaska, Alabama, California, Louisiana, and Kentucky have passed legislation in recent years extending or abolishing their statutes of limitations in child sex abuse cases. Sacha Pfeiffer & Kevin Cullen, *DA Seeks to Lift Time Limit on Rape Cases,* Boston Globe, June 27, 2002, at A23. In 1999, Maine was one of the first states to throw out its statute of limitations for child abuse. Kathleen Burge, *Geoghan Dismissal to be Appealed*, Boston Globe, March 21, 2005, at B1. Several States appear to be following suit. *See, e.g.*, Joe Feuerherd, *Maryland Senate Considers Bills to Aid Child Sex Abuse Victims*, National Catholic Reporter On Line, March 7, 2003, *available at* http://www.natcath.com/NCR_Online/archives/030703/030703e.htm (last visited Mar. 16, 2005) (on file with the UCLA Women's Law Journal). *See also* Toni Randolph, *Sex Abuse Victims Push for More Time to File Lawsuits*, Minnesota Public Radio, Feb. 4, 2004, *available at* http://news.minnesota.public

Legislators have been willing to adjust these statutes to allow adult victims of decades old child sexual abuse to bring claims against their alleged abusers. This willingness is encouraging to reparations advocates who are concerned about the difficulty of advancing a claim of sexual abuse that occurred years prior. The legislative action shows that, when faced with evidence of widespread abuse of sympathetic victims, legislators have the power to lessen the burden on the victims as they pursue a remedy.[262] Further, inherent in the willingness to alter statutes of limitations in the context of child sexual abuse is the recognition that there may be insurmountable factors which make bringing a claim within the statutory period unreasonable or impossible.[263]

The malleability of the statutes shows that, in instances of extreme atrocity, justice can be served only by allowing claims to go forward. Therefore, the response to abuse by the Catholic Church provides precedence for attempting to remedy reproductive and sexual oppression, even when the harm occurred well beyond the statute of limitations. This is important for reparations advocates to consider when developing responses to the concern of stale claims arising from slavery and Jim Crow. Although the passage of time is great since slavery, the Catholic Church sex abuse crisis demonstrates that some forms of harm and conduct can justify legislatures tolling statutes of limitation.

At first glance, the statute of limitations issue, coupled with the fact that no former slaves are living, seems an unworkable legal proposition for a reparations for slavery claim. However, by examining the history of sexual and reproductive abuse beyond slavery, it may be possible for reparations advocates to prevail. For example, advocates could show how slave breeding and sexual and reproductive abuse had lingering effects on African Americans during the more recent Jim Crow era. This evidence could offer more support for a claim asserting that descendants of slaves continue to be affected by the vestiges of slavery, and are owed compensation for the harm.

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radio.org/features/2004/02/02_randolpht_limitations/ (last visited Mar. 16, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

262. Christopher R. Pudelski, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-Smith World*, 98 NW. U.L. REV. 703 (2004).

263. Kearns, *supra* note 255, at 325 (discussing doctrinal and legislative attempts to amend statutes of limitations in child sex abuse cases).

B. *International Examples of Reparations Efforts to Address Reproductive and Sexual Abuse*

Looking outside the United States, there are specific remedial frameworks that lend themselves to enriching discussions of the reparations for slavery generally and that could be useful in broadening the claims for reparations to include reproductive and sexual abuses during slavery, as well as the legacy of those abuses that occurred during the Jim Crow era[264] and beyond.[265] Focusing on these models also presents an opportunity for solidarity-building in broader contexts in much the same way reparationists have historically pursued.

1. Comfort Women[266]

"Comfort women" — women used for sex by Japanese soldiers during World War II — were primarily but not exclusively Korean.[267] They were also primarily but not exclusively women.[268] Notwithstanding age, race, ethnicity, or desire, they were lured from their homes (sometimes kidnapped) and brought to camps where they were forced to provide sexual ser-

264. For Anna Julia Cooper, a black feminist during the Jim Crow era, the real sexual morality issue for African-American women is not "temptations" as much as it is the "painful, patient and silent toil of mothers to gain a fee simple title to the bodies of their daughters." BLACK WOMEN IN NINETEENTH-CENTURY AMERICAN LIFE: THEIR WORDS, THEIR THOUGHTS, THEIR FEELINGS 329 (Bert James Loewenberg & Ruth Bogin eds., 1976).

265. BRIDGEWATER, *supra* note 210, at 86-100 (discussing the continued reproductive oppression, such as forced sterilization and contraceptive abuse experienced by black women after slavery well into the modern era).

266. Comfort women or "Jugun ianfu" was a term coined by the Japanese government. Jugun means "attached" (or accompanying or following) the military. The word Ian (comfort) is adequate to convey the meaning that the soldiers who received sexual pleasure but quite contrary to express Fu (women) who are actually sex slaves of the soldiers to endure the forced prostitution and sexual subjugation with continuous rape on an everyday basis during the war. DAVID ANDREW SCHMIDT, IANFU-THE COMFORT WOMEN OF THE JAPANESE IMPERIAL ARMY OF THE PACIFIC WAR: BROKEN SILENCE, 12 (2000); Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA PAC. BASIN L.J. 263, 267 (1998).

267. Korean women comprised about eighty percent of the total comfort women. In addition to Korean women, Filipino, Chinese, Taiwanese, Indonesian, and Dutch women were forced into the Japanese rape camps. YUKI TANAKA, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II 99 (1996).

268. Sung-Eun Cho, *Korean Military Comfort Women: How the Issue Came to the Forefront*, RAFU SHIMPO, Oct. 21, 1992, at 1 (stating that some of the comfort women were not women at all but were sixth-graders at Pangsan, a primary school, when they were conscripted by Japan as prostitutes).

vices to soldiers — often up to forty times daily.[269] As a result of the rape camps, many women died.[270] Some of the survivors were able to marry, but none were able to have children. Those who became pregnant in the rape camps were forced to have abortions.[271]

The movement to force the Korean and Japanese governments to acknowledge the existence of these practices started in the 1970s.[272] Years of organizing culminated in a class action suit filed against the Japanese government in 1991 by three former victims: Hak-Soon Kim, Mi Ja Sim, and Kum Ju Hwang.[273] The suit accused the Japanese government of gross human rights violations.[274] Although largely unsuccessful, the lawsuit coincided with a reinvigorated movement for reparations for comfort women, and several other lawsuits were filed.[275]

Fueled by the increased attention to the issue,[276] a group called the Korean Council for Women Drafted into Military Sex-

269. Hwang v. Japan, 172 F. Supp. 2d 55 (D.D.C. 2001) (describing the demands of the comfort women). *See also* Tanaka, *supra* note 267 ("20,000 comfort women were required for every 700,000 Japanese soldiers, or 1 woman for every 35 soldiers").

270. Ustinia Dolgopol, *Women's Voices, Women's Pain*, 17.1 HUM. RTS. Q. 127, 130 (1995).

271. *Doctors Recall Steps to Curb VD at Brothels: Concern for Troops' Health Outweighed Suffering of "Comfort Women,"* THE JAPAN TIMES, Aug. 7, 1992, at 3.

272. As early as the 1980s, Chung-Ok Yun, a co-chair of the Korean Council conducted four field investigations by seeking surviving former comfort women in Okinawa, Hokkaido, Thailand, and Southeast Asian Islands. Alice Y. Chai, *Asian-Pacific Feminist Coalition Politics: The Chongsindae/Jugunianfu 'Comfort Women' Movement* 17 KOREAN STUD. 67 (1993).

273. Kyeyoung Park, *The Unspeakable Experiences of Korean Women Under Japanese Rule* 21 WHITTIER L. REV. 567 (2000); Eugene Moosa, *Korean "Comfort Woman" Files Damage Suit on Eve of Pearl Harbor Anniversary*, SEATTLE TIMES, Dec. 6, 1991, at C3; *The Road to Justice*, STRAITS TIMES, Aug. 30, 1993, at 3.

274. *See, e.g.,* Chunghee Sarah Soh, *Human Rights and Humanity: The Case of the "Comfort Women,"* (1998) Institute for Corean-American Studies, Inc., Lec. 98-1204-CSSb, (quoting statements from the Asian Women's Fund, which publicizes the legal and social plight of the victims of the sex camps) *available at* http://www.icasinc.org/lectures/lectures.html (last visited Mar. 26, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

275. The subsequent cases were in large part unsuccessful as well. *See generally* Christopher P. Meade, Note, *From Shanghai to Globocourt: An Analysis of the "Comfort Women's Defeat in* Hwang v. Japan, 35 Vand. J. TRANSNAT'L L. 211, 232 (2002) (discussing the claims and dispositions of the comfort women cases).

276. Also, in 1992, just short of a year after the lawsuit was filed, Professor Yoshiaki Yoshimi of Chuo University discovered and released documents from the Defense Library conclusively proving Japan's direct role in maintaining a large network of comfort houses or stations. *See* David E. Sanger, *Japan Admits It Set Up Army Brothels*, N.Y. TIMES, July 7, 1992 at A8.

ual Slavery was formed and presented to Japanese Prime Minister Toshiki with six demands: (1) that the Japanese government admit that it drafted women for use as comfort women, (2) that it offer an apology, (3) that all of the barbarous conduct be disclosed, (4) that a memorial be erected for the victims, (5) that the survivors or their families be compensated, and (6) that the facts be fully integrated into the historiography so as not to be repeated.[277] The Japanese government apologized[278] for the experience, but initially repeatedly denied that it sanctioned the rape camps. Then, in 1993, the government finally admitted deception, coercion, and official government involvement.[279] In addition to the admission, the Japanese government again apologized and offered compensation of over $1 billion to the surviving victims.[280]

The issue of the sexual abuse suffered by comfort women at the hands of the Japanese should be of particular significance to reparations advocates because the sex camp experience was similar in many ways to the female slave experience. For example, most of the women and girls in the sex camps were poor and were promised living wages in exchange for sexual services;[281] however, once enslaved in the camps, like female slaves in the United States, comfort women received no payment for the services they provided to the soldiers.[282] While lack of payment alone is not enough to establish slavery status, non-payment cou-

277. Washington Coalition for Comfort Women Issues, *Chronology of Dates and Events: Comfort Women Issues*, *available at http://www.comfort-women.org/v2/history.html* (last visited Apr. 5, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

278. Edward Neilan, *Japan Regrets Era of Forced Prostitution*, WASHINGTON TIMES, Jan. 14, 1992, LEXIS, Nexis Library (quoting Chief Cabinet Secretary Koichi Kato's statement at a news conference that Japan "cannot deny the fact that the military was involved, although at this point we are still not certain to what extent . . . .[w]e recognize [that the comfort women's] grievances . . . go beyond legal theories or contracts between the two countries").

279. Teresa Watanabe, *Japan Admits that WWII Sex Slaves Were Coerced*, L.A. TIMES, Aug. 5, 1993, at A1.

280. *See* Tong Yu, *Reparations for Former Comfort Women of World War II*, 36 HARV. INT'L L.J. 528 (1995). The offer to compensate is not without controversy in that it does not include direct compensation from the government to former comfort women. Instead, the Japanese government is calling for $10 million in donations from the private sector via donations into a private fund.

281. *See generally* Christine Wawrynek, *World War II Comfort Women: Japan's Sex Slaves or Hired Prostitutes*, 19 N.Y.L. SCH. J. HUM. RTS. 913 (2003) (describing the market aspects of the comfort stations and the lack of payment to the comfort women).

282. *Id.*

pled with the conditions of the sex camps shows the striking similarities between comfort women and female slaves. Like enslaved women, the women and girls in the sex camps could not leave on their own free will, had no control over access to their bodies, and suffered extreme physical and sexual abuse.[283] Testimony from the victims of the sex camps indicates that some comfort women were forced to have abortions, but the extent of forced reproduction remains largely unknown.[284] Female slaves endured similar abuse when their owners coerced or forced them into having multiple births for the slave economy. The fact that slave breeding resulted in more pregnancies and births rather than less does not preclude reparations advocates from pointing out the commonality inherent in the regulation of reproduction among slaves and comfort women.

A claim for slavery reparations patterned after the successes of comfort women could focus on the fact that like their Asian counterparts, women enslaved in the United States were forced to engage in sexual acts to support a larger framework of oppression. In addition to being stolen or sold away from their homes, female slaves were forced to serve their oppressors sexually as well as endure reproductive manipulation in furtherance of the objectives of their oppressors. Reparationists could also point out the government's involvement in facilitating sexual and reproductive abuse of slaves by highlighting the fact that under law, it was impossible for a slave owner to rape his slave. Further, like the comfort women forced to abort, enslaved women were unable to control their reproductive destinies and engage in mothering because the laws did not recognize the parental rights of slaves.

The absence of living witnesses is one of the looming challenges to the reparations for slavery claim, and it also limits the utility of the Korean Comfort Women as a model. This, however, is not insurmountable because there are significant references to sexual and reproductive abuse in the ex-slave testimonies gather soon after emancipation.[285] Also, while slavery is the beginning point for institutionalized sexual and reproductive abuse based on the particular vulnerabilities of a minority group, it is not the

283. *Id.*

284. JAPAN TIMES, *supra* note 271.

285. *See, e.g.* SISTERS, *supra* note 125. *See also* LAY MY BURDEN DOWN: A FOLK HISTORY OF SLAVERY (B.A. Botkin ed., 1945 (both containing ex-slave testimonies referring to sexual and/or reproduction abuse).

only point. Indeed, the practice of targeting vulnerable groups for sexual abuse and reproductive manipulation continued after slavery, during the eugenics era as well as the Jim Crow era.

2. Rape and Forced Pregnancy as a War Crime

Rape is one of the most common but least documented acts of violence committed during times of armed conflict.[286] Yet, it was not until the early twentieth century that an international response to issues of the victims of sexual and reproductive abuse during war was drafted.[287] Recognizing that rape and forced pregnancy were used in nearly every instance of armed conflict, the Fourth Geneva Convention of 1949 required that women be protected "against any attack on their honor, in particular against rape, enforced prostitution or any form of indecent assault."[288]

This protection, however, was largely symbolic. For example, it did nothing to protect the Bengali women who were victims of mass rape and forced pregnancy by Pakistani soldiers during the 1971 battle in Bangladesh.[289] The only institutional remedy the Bengali women received came after the war, when the government, seeking to curb the public's inclination to view them as 'contaminated," declared them heroines.[290] Beyond this

286. In her groundbreaking work, historian Gerda Lerner establishes the idea that militarism and sexual aggressiveness against women extends as far back as the earliest formation of expansionist or agricultural societies. In such societies, women were readily viewed as vital resources for the production of both food and children. *See generally* GERDA LERNER, THE CREATION OF PATRIARCHY (1986).

287. Jewish women in the Second World War were forcibly made pregnant so that they and their fetuses could be used for medical experiments. *See* Barbara Bedont and Katherine Hall Martinez, *Ending Impunity for Gender Crimes under the International Criminal Court*, 6 BROWN J. OF WORLD AFFAIRS 65-85 (1999) *available at* http://www.crlp.org/pub_art_icc.html (last visited Apr. 5, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

288. The Geneva Conventions governing armed conflict consists of four parts: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.T.S. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

289. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE, 82-85 (1975).

290. Since these women were expected to live a life of purdah, or strictly enforced veiled isolation, measures like these had little success if a Bengali man believed such women were contaminated. The search for a solution by desperate

local effort, there were no meaningful attempts to institutionalize protection from and prosecution for rape in armed conflict.

It was not until the last decade of the twentieth century that rape as a modality of war reentered public discourse.[291] At this point, the discussion about how to protect women from sexual and reproductive abuse during war broadened exponentially.[292] This heightened attentiveness was due in large part to the women who survived the Bosnian and Rwandan conflicts and their willingness to share the details of their experiences.[293] In fact, many cite those accounts of abuse as the primary motivation for nation states and international tribunals to prosecute rape and forced pregnancy, among other abuses, as war crimes.[294] Because these women told their stories of abuse at the hand of leaders, soldiers, and other combatants, the world began to look more closely at how these abuses further genocide.[295]

The deeper understanding of the particular vulnerability of women during war led to several important developments in-

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women led to incidents of infanticide and suicide. Abortions were also widespread, and the women who effectuated the termination of their pregnancy are numbered in the thousands. *Id.* at 82-86.

291. The Bosnian and Serbian conflicts precipitated the reemergence of interest in the plight of women during war. *See generally* Danise Aydelott, Comment, *Mass Rape During War: Prosecuting Bosnian Rapists Under International Law*, 7 EMORY INT'L L. REV. 585 (1993).

292. *Id.*

293. Human rights groups identified sexual violence during the Rwanda Genocide and its aftermath as a crucial target for human rights initiatives. *See generally* BINAIFER NOWROJEE HUMAN RIGHTS WATCH , SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996).

294. "After my arrival in the concentration camp, they . . . raped me . . . in front of all the rest of the women . . . who were yelling and defending me, but they were beaten. The [soldiers] said 'you will give birth to a Serbian child, we're doing that out of revenge' . . . [O]ut of the 24 women, 12 of us were raped many times over . . . Now I am four-and-a-half-months pregnant." Anonymous Bosnian woman cited in *A Schoolgirl's Tale of Horror and Death in a Serbian Rape*, COURIER-MAIL, Jan. 12, 1993. "'Never. I will never give birth,' Marianna, a non-Muslim Bosnian woman, speaking from Croatia and seeking an abortion after becoming pregnant as a result of being raped for 24 hours in a Serbian-controlled camp." Kevin Gerard Neill, *Duty, Honor, Rape: Sexual Assault Against Women During War*, J. OF INT'L WOMEN'S STUD., 7 (Nov. 7, 2000) *available at* http://www.bridgew.edu/SoAS/jiws/nov00/duty.htm (last visited Mar. 25, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

295. *See* Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, *in* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 197, 198 (Julie Peters & Andrea Wolper eds., 1995) (recognizing that genocidal or ethnic cleansing rape has been practiced specifically "to drive women from their homes or destroy their possibility of reproducing within and 'for' their community").

tended not only to protect women but to give victims of abuse a cause of action to go after the perpetrators.[296] For example, in 1996, the International Criminal Tribunal for former Yugoslavia issued an indictment against nine Serbian men.[297] This marked the first time that victims successfully alleged that sexual abuse was a crime against humanity under the rubric of torture and enslavement.[298] Similarly, the International Criminal Tribunal for Rwanda convicted former mayor Jean Paul Akayesu of genocide, crimes against humanity, and war crimes.[299] This case marked the first time an international court found rape to be an act of genocide when committed with the intent to destroy a particular group.[300]

Shortly after the *Akayesu* decision, the Rome Treaty of 1998, which established the International Criminal Court, stated for the first time under international law that rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, and other forms of sexual violence are considered a crime against humanity and a war crime.[301] Moreover, for the first time, international humanitarian law recognized violations of women's reproductive self-determination. It delineated forced pregnancy

296. *See, e.g.*, United Nations, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 48th Session: Preliminary Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices During Periods of Armed Conflict*, .¶ 8, U.N. Doc. E/Cn.4/Sub.2/1996/26 (1996) *at* http://www1.umn.edu/humanrts/demo/subcom96-part1.htm#1996/11.%20Systematic%20rape%20and%20sexual%20slavery%20during (last visited Mar. 25, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

297. In addition to the harm against the women, rape and forced pregnancy was also used as a method of bringing shame and destruction to Muslim families. "Eyewitness accounts mention instances where women were detained in what have been called 'rape camps' and raped repeatedly until they became pregnant. These women were released only when it was too late for an abortion, [which] forced them to bear children of mixed ethnicity, thereby acquiring the aim of ethnic pollution." *See* Neill, *supra* note 294, at 7-8.

298. Jonathan M.H. Short, Note, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, 8 MICH. J. RACE & L. 503 (2003). *See also* Gayle Kirshenbaum, *Women of the Year: Jadranka Cigelj and Nusreta Sivac*, Ms. . Jan./Feb. 1997, at 64 (discussing the unprecedented charge of rape as a weapon of war and crime against humanity).

299. Kate Nahapetian, *Selective Justice: Prosecuting Rape In the International Tribunals for the Former Yugoslavia and Rwanda,* 14 BERKELEY WOMEN'S L. J. 126 (1999).

300. *Id.*

301. *Id.* at 129. *See also* Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., Annex, at 15, U.N. Doc. S/RES/955 (1996).

and forced sterilization as among the most egregious crimes under international humanitarian law.[302]

The legislative and prosecutorial efforts in the rape-as-war-crime movement are an important aspect of reparations. To the women who were victims, the ability to tell their stories and have their abusers indicted and convicted is an extraordinary step in their healing process.[303] It also furthers the efforts to heal the group injury attempted (oftentimes achieved) by raping or forcibly impregnating a woman in order to destroy her connection and value to her community. It is possible that the public censure of the perpetrator gives the victims a better chance at regaining meaningful status in their communities.[304]

The recent successes in gaining a platform for the voices of women who are victims of sexual and reproductive abuse during armed conflict provide an excellent model for United States reparations advocates interested in including sexual and reproductive abuse during slavery and Jim Crow. For example, by showing similarities between forced pregnancy for purposes of genocide or for ethnic cleansing, and forced pregnancy to maintain the institution of slavery both socially and economically, reparation advocates can demand similar responses: namely, recognition of the harm of the conduct, and legislation to protect against its future manifestations. Much like those who bring cases that focus on rape and forced pregnancy during war, reparations advocates could demand that sexual and reproductive manipulation be recognized as a modality of slavery or involuntary servitude, and require that legislation allow for separate penalties for such conduct.

3. Australian Child Removal Policies

More than 100,000 children were taken from their families during the aboriginal child removal project.[305] Despite questions about the number of children affected, the prevalence, and the goals of the practice, most involved agree that the policy's objec-

302. United Nations, *Summary of the Judgment in Jean-Paul Akayesu Case,* ¶ 51, *available at* http://www.un.org/ictr/english/singledocs/jpa_summary.html (last visited Mar. 25, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

303. Mark A. Drumbl, *Sclerosis: Retributive Justice and the Rwandan Genocide*, 2 PUNISHMENT & SOC'Y 288 (2000).

304. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 132-33 (1998).

305. *See generally* INDIGENOUS PEOPLES, RACISM, AND THE UNITED NATIONS (Martin Nakata ed., 2001).

tive was to remove mixed-race children from their Aboriginal mothers in order to control the indigenous population.[306] The practice of forcibly removing Aboriginal children of mixed race from their mothers and raising them in training schools that would prepare them for lives as factory workers or domestic servants lasted until 1970.[307] The fathers were white construction workers or government employees who had sex with local aboriginal women and then moved on.[308]

The justifications for the government's policy of removal were threefold: (1) a half-white child must be rescued from a black society; (2) too many "white genes" would, by their presumed superiority, increase the power and ability of the aborigines to cause trouble by insisting on their rights; and, (3) by requiring the lighter-skinned children to marry each other, blackness could eventually be bred out of them.[309]

The Council for Aboriginal Reconciliation is an early example of a reparations movement that has attained remedies for government-sponsored or -supported policies of removing children from their parents which can also be understood as infringement on the parents' reproductive autonomy.[310] This remedy is designed to assist families in reuniting and thereby attempting to undo the affects of forced removal and destruction of the family unit. As early as 1990, the fully formed reparations movement issued a list of demands to the Australian government.[311]

Aboriginal groups and their allies collected more than 600 stories of the lives and experiences of families devastated by the child removal policies.[312] As a response, in large part, to the

306. *Id.*

307. *See, e.g.*, Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families* (1997) [hereinafter *Bringing Them Home*].

308. *Id.*

309. *Id.*

310. Antonio Buti, *Bridge Over Troubled Australian Waters: Reparations for Aboriginal Child Removals and British Child Migrants*, ELAW: MURDOCH UNIV. ELECTRONIC J. OF L. (Dec. 2003), *available at* http://www.murdoch.edu.au/elaw/issues/v10n4/buti104.html *(last visited Mar. 25, 2005) (on file with the* UCLA WOMEN'S LAW JOURNAL).

311. The Secretariat of the National Aboriginal and Islander Child Care ("SNAICC") resolved at its national conference in 1990 to demand a national inquiry into the removal issue. RAYMOND EVANS, FIGHTING WORDS: WRITING ABOUT RACE, 227 (University of Queensland Press, 1999) (a historiography of the government relationship with Aborigines of Australia).

312. *Id.*

popularity of the movement and the report, "Telling Our Story,"[313] the Australian government created the Australian Human Rights and Equal Opportunity Commission. It was charged with conducting an inquiry into the removal policy and exploring the effects of the removals on the Aboriginal community as well as on individuals.[314]

The Commission was also asked to consider the claim for monetary compensation for the members of the Stolen Generations, as they are known, and their families.[315] The resulting report, "Bringing Them Home,"[316] documented the inherent racial discrimination of the removal policies as well as widespread physical and sexual abuse of the children.[317] The Commission also made a number of recommendations that included acknowledgment of the truth, an apology, guarantees against reoccurrence, and rehabilitation, compensation, and restitution.[318]

Many of the churches that ran the missions and states that were involved in the removals have issued apologies for removal.[319] Prime Minister John Howard has expressed regret, although he has not issued an official apology on behalf of the Australian government.[320] In fact, the prime minister specifically refused to acknowledge or provide for damages arising out the removal policy.[321] Nevertheless, similar to Reconstruction's Freedmen's Bureau, an official reparations program has been created to assist families in locating lost loved ones, and when possible or desired, reuniting the family.[322]

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313. TELLING OUR STORY: A REPORT BY THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC) ON THE REMOVAL OF ABORIGINAL CHILDREN FROM THEIR FAMILIES IN WESTERN AUSTRALIA (1995).

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 5. *See also Bringing Them Home*, *supra* note 307, at 247-305.

319. An unofficial National Sorry Day was initiated in 1998 and has been acknowledged by most Australians every year since. Buti, *supra* note 310, at 20.

320. The speech was given in response to increased criticism of the Australian government's continued denials of responsibility. *See Transcript of the Prime Minister the Hon. John Howard MP Motion of Reconciliation*, (Aug. 26, 1999) *available at* http://www.pm.gov.au/news/speeches/1999/reconciliation2608.htm (last visited Mar. 25, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

321. *Id. See also* Buti, *supra* note 310, at 10.

322. In 1997 the Australian government outlined a plan to provide $63 million over four years to fund programs designed to address the issue "family separation and its consequences." This outline for reparations included funding for preservation of records, the recording of oral stories, family support and parenting programs, language and cultural programs, family link-up services and counseling. *Bringing*

Like the Indian Child Welfare Act, efforts to remedy the systematic removal of Aboriginal children from their families provide a useful model for reparationists — the Australian government has launched a massive effort to relocate children removed and reconstruct families. A particularly important aspect of this model is that the government has connected the removal to a larger societal harm to the indigenous peoples. This could be useful to reparationists in that it illustrates the connection between ability to parent and be free from reproductive manipulation as central to a culture's ability to survive, a point made by the United States Supreme Court in *Skinner* but one that has never been tied to a reparations framework.

4. Irish Child Sexual Abuse Survivors

After years of pressure, the Irish government decided to pay attention to the allegations of abuse suffered by children in the institutions founded by the state in 1921 and open until the late 1980s.[323] The institutions included orphanages, industrial schools, reformatory schools, hospitals, boarding and day schools, and foster care homes.[324] Although the government founded many of the institutions, the majority were administered by orders of the Catholic Church.[325] Former residents of these institutions alleged that the caretakers committed systematic sexual, physical, and emotional abuse as well as neglect.

On May 11, 1999, after finding the allegations to be true, the Taoiseach, Bernie Ahern, offered an official apology for the abuses on behalf of the government and the citizens of Ireland.[326] The government then commissioned two statutory bodies, the Commission to Inquire into Child Abuse[327] and the Residential

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Them Home - Commonwealth Initiatives, Media Release, Canberra, (Dec. 16, 1997) (statement by Senator John Herron announcing wide-ranging government initiatives in response to the "Bringing Them Home" Report by the Human Rights and Equal Opportunity Commission) *available at* http://www.atsia.gov.au/media/reports/bth.pdf (last visited Mar. 25, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL). *See also* Buti, *supra* note 310; *and Bringing Them Home, supra* note 307.

323. *Senior Lawyer to Take Over Ireland Child Abuse Inquiry*, AGENCE FRANCE PRESSE, Sept. 26, 2003, *available at* WL 71323199 [hereinafter *Senior Lawyer to Take Over*].

324. *Id.*

325. *Id.*

326. *Broken Faith: Terry Philpot Visits a Therapy Centre that Treats Roman Catholic Priests and Laymen Who Have Sexually Abused Children*, THE GUARDIAN (London), Aug. 20 2003, at Guardian Society Pages 5 [hereinafter *Broken Faith*].

327. Commission to Inquire into Child Abuse Act 2000, amended by section 32 of the Residential Redress Act of 2002, *at* http://www.irishstatutebook.ie/

Institutions Redress Board,[328] which hears claims of abuse and makes fair and reasonable financial compensation to victims.[329]

Two interesting aspects of this reparations framework are that it is a mixture of public and private accountability and redress, and that it was an overwhelming success.[330] When the Irish government asked the Catholic Church to contribute to the reparations fund,[331] it did so in recognition of the church's role in the abuse.[332] The church agreed to the request and was in full partnership with the Irish government in providing over 128 million euro[333] to survivors of sexual abuses in state- and church-run institutions. Both institutions accepted liability and thereby eased the burden on victims in their efforts to attain redress from both.[334] There were no trials with either the church or the state as defendants; instead, there were offerings of evidence of abuse and extent of damage.[335] The survivors made the showing of abuse and the board awarded compensation, under the principle that once an apology was issued by the government, it was unfair to then require each victim to prove liability.

The public-private collaboration in taking responsibility and providing a remedy for the abuses in the missions and schools has utility for reparationists who are seeking to overcome challenges to reparations based on the public-private distinction. Here, it was proven that the Irish government played a role in funding the institution as well as supplying the children, which gave rise to government accountability. It then acknowledged its

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ZZA13Y2002S32.html (last visited Mar. 16, 2005) (on file with the UCLA Women's Law Journal).

328. Residential Redress Act of 2002 *at* http://www.rirb.ie (last visited Mar. 16, 2005) (on file with the UCLA Women's Law Journal).

329. The reparations included therapy, monetary compensation and an apology. *See Broken Faith, supra* note 326.

330. *See Senior Lawyer to Take Over, supra* note 323.

331. Karl Brophy, *Church Asked to Contribute to Abuse Victims Fund*, IRISH EXAMINER Oct. 4, 2000, *available at* http://archives.tcm.ie/irishexaminer/2000/10/04/current/ipage_25.htm (last visited Mar. 16, 2005) (on file with the UCLA WOMEN'S LAW JOURNAL).

332. *A Judge Complains – An Inquiry into Child Sexual Abuse in Ireland*, THE ECONOMIST Sept. 13,2003, *available at* WL 5858402. *See also* Commission to Inquire Into Child Abuse Act 2000, *supra* note 322.

333. John Breslin, *Abuse Victims May go to Court over Funds Body*, IRISH EXAMINER, May 17, 2003 *available at* http://archives.tcm.ie/irishexaminer/2003/05/17/story901383511.asp (last visited Mar. 16, 2005) (on file with the UCLA Women's Law Journal).

334. Commission to Inquire Into Child Abuse Act 2000, *supra* note 322.

335. *Id.*

role in the abuse by admitting that it carelessly monitored and investigated claims of abuse.

Slavery reparationists can use this model to their advantage once they have proven the widespread occurrence of sexual and reproductive abuse during slavery and Jim Crow. Because of the laws on the books during slavery and Jim Crow, it will be very difficult for the United States to deny its role in the abuse. Following the Irish sexual abuse model, advocates could then argue that individual showings of liability should not be necessary. The Irish model is helpful also because it does not depend upon relative liability between private and public actors. Once the state acknowledged its involvement, the victims did not need to fully establish to what extent state or private conduct contributed to their abuse. The Irish government took responsibility for its indirect role in the abuse and requested contribution from the church, which it gave.

Another measure of a framework's success is that all demands for reparations for the victims of sexual abuse were met in their entirety. As such, it is one of the most holistic approaches to reparations for victims of systematic abuse. Survivors in this case received an official apology, accountability by private and public entities involved, an education fund and two statutorily created commissions: one to hear testimony and the other to hear claims and distribute monetary compensation to the victims. The total reparations program is estimated to be nearly $600 million.[336]

V. CONCLUSION

The following section builds on the broader historiography of the slave experience and identified models of successful reparations frameworks for reproductive and sexual abuse. In it, I offer suggestions for incorporating the female slave experience into the demand for reparations for slavery using the successful models for similar experiences. The suggestions build upon one another, beginning with inclusion in the reparations advocates' discourse and ending with a suggested demand for reparations.

336. Fionnuala Quinlan, *Church to Give 128m Euro to Compensate Sex Abuse Victims*, IRISH EXAMINER, Jan. 31, 2002, *available at* http://archives.tcm.ie/irishexaminer/2002/01/31/story22204.asp (last visited Mar. 16, 2005) (on file with the UCLA Women's Law Journal)..

A. *Inclusion*

Despite the references to the female slave experience in abolitionist literature, Congressional debates, and the work of historians on slave breeding and reproductive and sexual abuse of female slaves, the experience of female slaves remains largely invisible in many structural remedial or protective frameworks. Sadly, the current reparations movement continues this marginalization. To refrain from exacerbating the effects of omitting the female slave experience from the demands for reparations for slavery, reparations advocates must first incorporate the issue into their discourse. It must become a part of the accepted definition of slavery and its vestiges. Reparations advocates must research and become well versed in the effects of slave breeding and other forms of reproductive and sexual exploitation during slavery. In much the same way that reparations proponents commission studies and devote research resources to better understanding the institution of slavery and other forms of institutional abuse, advocates must commit to exploring the female slave experience in detail.

One approach to this would be to include those who study the female slave experience, specifically the reproductive and sexual aspects of the experience, in national conferences.[337] It should no longer be acceptable to hold gatherings to discuss slavery and reparations without dedicating time and space to considering and discussing the experiences of female slaves and including those findings in drafting a strategy for inclusion. Further, reparations proponents should engage scholars and theorists of reparations to include in their work the work of historians on slave breeding and other less formal practices of sexual abuse and reproductive exploitation. Finally, those with the power to do so should form commissions to study the experience of female slaves in order to facilitate the development of a strategy for reparations.[338]

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337. There were neither experts nor panels on the female slave experience generally or reproductive exploitation and sexual exploitation specifically on the agenda for the 15th Annual National Reparations Conference sponsored by N'COBRA in Washington, DC, June 17th-20th, 2004. *See* Kibbi Tychimbu, *Juneteenth Weekend: Focuses on Reparations*, Nat'l Black Law Students Assoc., 2004-2005, *available at* http://www.nblsa.org/programs/reparations/2004-2005/juneteenth.html (last visited Mar. 16, 2005) (on file with UCLA Women's Law Journal).

338. For example, Ruth Simmons, the president of Brown University recently commissioned a study of the University's role in slavery in order to determine whether the University should participate in reparations as a beneficiary of the insti-

Assuming members of the reparations movement view inclusion as an important objective, their commitment to incorporate the female slave experience of reproductive and sexual exploitation is necessary in developing a claim for reparations. As reparationists well know, the conditions of slavery are not easy to discuss. Descriptions of beatings, forced labor, denial of rights are hard to articulate and they are also hard to hear. The difficulty of discussing the particulars of sexual abuse and reproductive exploitation is exponentially greater. Yet, as reparationists also know, their ability to provide sound historigraphical data as to the conditions of slavery is critical to the success of the movement. As such, reparationists will certainly need to be well versed in the female slave experience, its implications and legacy, before setting strategy and appropriate remedy.

Only upon including the experiences of female slaves in the discussions within the reparations movement can one hope to progress to a point where it is possible to begin to think about how to craft a claim for reparations for the sexual and reproductive exploitation during slavery, the Jim Crow era, and beyond. The following discussion explores the possible claims for reparations once this initial inclusion has taken place within the movement.

B. *Reparations Demands*

1. Apology

As shown above, there exists sufficient evidence of the role of the state governments and the federal government, either complicity or affirmatively, in the sexual and reproductive exploitation of female slaves. Thus, an apology should top the lists of demands that advocates make to those public entities. Also, apologies appear to be an essential part of most successful reparations movements' list of demands.[339]

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tution of slavery. Brook Donald, *University Studies Slavery Ties, At Brown, an Ad in the Student Paper Sparked an Uproar. The President Wanted to Learn More*, PHILADELPHIA INQUIRER Apr. 4, 2004, *available at* 2004 WL 73848388. *See also Brown University Forms Committee to Examine Institution's Ties to Slavery*, Jet Magazine, Apr. 5, 2004, *available at* 2004 WL 63194666.

339. Apologies abound both domestically and internationally. For example, President Clinton offered an apology to survivors of the U.S. Public Health Service forty year study denying proven medical treatment to a group of African-American men with syphilis. *See Apology Now; Vigilance, Too,* PLAIN DEALER, May 26, 1997, at 8B. *See also The Tuskegee Apology*, ST. LOUIS POST DISPATCH, May 21, 1997, at 6C; Joan Beck, *Apology Can't Erase Tuskegee Horror, Experiment on Black Men*

In framing a request for an apology for sexual abuse and reproductive exploitation of female slaves, advocates should highlight status-of-the-mother laws, which relegated children born of female slaves impregnated by their owners to a life of slavery. This strategy would integrate the accountability of private actors and state actors in creating a system of sexual and reproductive oppression for female slaves. This is an important step because showing that but-for the legislation that relegated the children of female slaves to slavery regardless of the father, the wholesale exploitation of the reproductive capacities of slaves would not have been possible. Further, an apology is due for the lack of criminal or civil laws protecting female slaves from sexual abuse. By holding that female slaves lacked standing to charge their owners with rape, the legal culture adopted and perpetuated stereotypes that female slaves were lascivious and possessed unending sexual desires — a stereotype that persisted through the Jim Crow era and is alive and well today.[340]

In addition to the persistent harm of the stereotypes cultivated during slavery and Jim Crow, legislation and private conduct created a climate where sexual and reproductive abuse became an investment strategy, as well as a way to maintain the system of subordination for generations. Reparationists should therefore demand an official and public apology for the continuum of sexual and reproductive subordination made possible by the collaborative efforts of legislation and private acts.

Remains a Blot on American History, ST. LOUIS POST DISPATCH, May 20, 1997, at 7B. Other recent public apologies include: British Prime Minister Tony Blair apologized for his country's role in the Irish potato famine of 1845-1851." *See* Mark Thornton, *What Caused the Irish Potato Famine?*, MISES INST. MONTHLY, Apr. 1998, *available at* http://www.mises.org/freemarket_detail.asp?control=88. The government of Australia apologized and instituted a "Sorry Day" in response to its government's long-standing policy of stealing "Aborigine children from their parents to be raised by white families and orphanages." *See Apology Austrailia, A National Sorry Day: Acknowledgement, Unity, Commitment, at* http://www.austlii.edu.au/au/special/rsjproject/sorry/index.htm. "Japanese Prime Minister Tomiichi Murayama apologized . . . for suffering inflicted in World War II"; "East German lawmakers apologized . . . for the Holocaust," after their government had denied responsibility for decades; and, Pope John Paul II apologized for violence during the Counter-Reformation. *See* Jay Parker, *An Apology and Reparations for Slavery?*, WORLD AND I, Feb. 2000, *available at* http://www.worldandi.com/specialreport/repcon/repcon.html (all last visited Mar. 25, 2005) (all on file with UCLA WOMAN'S LAW JOURNAL).

340. For an in-depth discussion of stereotypes of black women during slavery and beyond see COLLINS, *supra* note 122, at 60-100.

2. Research

Although no additional research is needed to support a claim for an apology for slave breeding and sexual and reproductive abuse of female slaves and victims of reproductive oppression during Jim Crow, research is necessary to explore the lasting implications of the experience in order to develop appropriate protections and remedies for these abuses. Given the role of state and federal legislatures in creating and supporting the landscape necessary for the exploitation, these entities should be presented with the demand to fund further research into implications of slave breeding and its legacy. Some scholars have focused on the historiography of reproductive and sexual abuse, but relatively few begin with slavery. As a result, little is known about the lasting effects slave breeding has had on society in general and on descendants of slaves specifically. Thus, it would be appropriate for government agencies to fund this type of research as a precursor to determining the need for protective legislation and/or compensation.[341]

3. Private Accountability and the Dead Beat Dad Statute

The issue of private accountability for sexual and reproductive subordination may be the most difficult issue for advocates to develop into a request for reparations. Unlike other instances of abuse for which reparations were provided, to date, no corporate entities have been shown to have participated in slave breeding or other forms or sexual or reproductive abuse. Therefore, the only area where private litigation can be reached is when it is intersected with public accountability to create an opportunity for reparations specific to the experience of sexual and reproductive exploitation, as it did within the context of inheritance. By narrowing the pool of appropriate beneficiaries[342], state inheritance laws', along with the status of the mother laws', lack of criminal sanction for raping one's slave, forced sterilizations

341. North Carolina's response to its role in sterilization abuse provides an excellent example. The government first apologized then commissioned research to determine the extent of the abuses, locate victims and determine appropriate compensation. *See Relief for Victims of Program Approved; Easley Oks Recommendations to Help Those Who Were Sterilized*, CHARLOTTE OBSERVER, Sept. 9,2003 *available at* WL 64062464.

342. Inheritance statutes during this time era did more than prohibit distribution to slaves. Many statutes also prohibited slave owners from freeing their slaves via their wills. KENNETH STAMMP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH at 234 (1956).

under eugenics laws, and under-enforcement of rape laws during the Jim Crow era all combine support a culture of sexual and reproductive subordination for historically vulnerable groups.[343]

By amending inheritance laws to enable parties who can establish a genetic relation to a common ancestor from slavery to participate in benefits, such as memberships in foundations, being named beneficiaries of trusts and connection to name, that continue to flow to the descendants of that common ancestor, state legislatures would finally and formally acknowledge that many of the descendants of slaves are the descendants of slave owners.

A presumption in inheritance law that would allow genetic relatives to participate in any group benefits would combine private and public accountability for the generations of descendants of slaves and slave owners who were not recognized for purposes of estate distribution. Establishing a genetic connection via DNA testing would enable a claimant-descendant to participate in the estate in a way that was precluded under slavery. A statute which would include descendants of slaves would go a long way in remedying the exclusion of the children of slaves who were often also the children of slave owners from participating in the distribution of the estates of their predeceasing ancestor.

Two recent situations offer useful examples to illustrate where such a statute would be appropriate: the case of the descendants of Thomas Jefferson and his slave Sally Hemings,[344] and the case of the late Senator Strom Thurman and his biological daughter, Essie Mae Washington-Williams.[345] In the case of Jefferson/Hemings, claimant-descendants established a genetic connection that would suffice in any probate court. However, the officially recognized descendant group (the Jefferson Foundation), was allowed to decide whether the Jefferson/Hemings descendants would receive official status benefits. A dispute

343. As Adrienne Davis points out, "[i]nheritance patterns do not merely influence family relationships; they define peoples' positions in the larger community and society. The private law doctrine [of inheritance] thus contributed to the cultural ideology regarding enslaved women's sexual availability." Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 Stanford L. Rev. 221, 247 (1999).

344. SHANNON LANIER, & JANE FELDMAN, JEFFERSON'S CHILDREN: THE STORY OF ONE AMERICAN FAMILY 160 (2000); *U-Wire,* UNIVERSITY OF WISCONSIN, Feb. 12, 2004 *at* WL 69337394.

345. Nikitta Foston, *Strom Thurmond's Black Family,* EBONY March 01,2004 *available at* 2004 WL 63567877; Dan Rather, *Strom Thurmond's Daughter Reveals* Past, CBS EVENING NEWS December 16, 2003 *available at* 2003 WL 5212998.

amongst the members of the Jefferson Foundation resulted in the organization placing limitations on the Jefferson/Hemings descendants[346] By enabling this unusual exertion of power by already "formally" recognized descendants, the state (via probate court)[347] continues to sanction the harm rooted in the history of reproductive and sexual exploitation.

The case of Washington-Williams, concerns the sexual relationship between a black domestic worker (Washington-Williams' mother) and her white male boss (Strom Thurmond) during the Jim Crow era. After Thurmond's death, Washington-Williams acknowledged that she was his biological daughter and sought admission to United Daughters of the Confederacy (UDC).[348] She desired membership so she could learn more about her heritage, given that she and her mother are the descendants of slaves and, had their lineage "broken by the course of events."[349] To date, Ms. Washington-Williams has not experienced any resistance to her petition to the organization.[350] Still, an amendment to the probate law of South Carolina, once a major slave-breeding state, precluding organizations such as the UDC from requiring more than proof of lineage, would empower descendants who have not been traditionally recognized and allowed to enjoy the rightful benefits of their ancestry.

The idea behind such a statute would be to incorporate the private conduct and public role in creating the experience of reproductive and sexual subordination for female slaves and for perpetuating the legacy of that experience. The statute would highlight how, even today, some Americans continue to enjoy the benefits that were created by the reproductive and sexual abuse of female slaves, and how some have been drastically harmed by its legacy. As such, the statute could determine the extent that reparations could appropriately address those benefits and harms.

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346. Brigitte Dusseau, *Descendants of Jefferson Slave to Hold Reunion*, AGENCE FRANCE-PRESSE, May 15, 2003, *at* WL 2803289.

347. Interestingly, Virginia was also the first state to enact a status of the mother law. *See* JOHN HOPE FRANKLIN AND ALFRED MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 65 (2000).

348. The Organization is for descendants of confederate soldiers. Thurmond was a member of the United Sons of the Confederacy. Shaila K Dewan & Ariel Hart, *Thurmond's Daughter Seeks to Join Confederacy Group*, N.Y. TIMES, July 2, 2004.

349. *Id.*

350. *Id.*

EPILOGUE: AN INCLUSIVE REPARATIONS MOVEMENT IS SUCCESSFUL BY DEFINITION

This Article has highlighted the movement's failure, to date, to incorporate the experiences of female slaves in discourse, individual lawsuits and discussions with state and federal entities. This failure is a continuation of the failings of previous social justice movements to give the experience of female slaves a central role in the movement. With the reparations movement, this historical failure can be remedied, thus transforming the movement into one that is successful in ways that none of its predecessors have been. Further, the movement should adopt this objective because reparations advocates are best positioned to assist the country to face its slave history, reconcile with and remedy, where possible, the wrongs of that history, and move forward.

Despite the omission of the female slave experience, the fight for reparations in the United States is laudable. It has pulled together many leading scholars, academics and activists in a common enterprise. It also has sparked a national, and international at times, discourse on how societies view and possibly remedy past wrongs. The movement has had a few successes that have proved important in keeping the fight alive and proponents engaged. It has also had many setbacks, but it continues to move forward with an eye on attaining redress for the wrong of slavery. The promise of reparations is that the country will face its history and move forward. Yet, the promise of reparations can not be fully achieved if the story of slavery is incomplete. Reparations advocates must take the time to include the experiences of female slaves in their demands for reparations because not doing so will impede our ability to hear and understand the experiences of female slaves. It will also continue the vulnerability to reproductive policies that target or disparately impact black women.

Once the movement has encompassed the experiences of female slaves, success will be measured not by whether reparations are given but by the fact that a more inclusive story was told and an awareness and appreciation of the experiences female slaves will result. It will help women today who are faced with oppressive reproductive policies or sexual abuse to understand that their reproductive lives are a part of a historical continuum beginning with slavery. To be included in the discourse will bring women historians and activists to the table to focus on the experience of female slaves. It will spark conversations of the nature of slavery that is more nuanced than chains and shackles. We will

come to understand more fully the relationship between slavery, Jim Crow, eugenics and the restrictive reproductive policies of today.

These are all a part of the promise of the reparations, and if accomplished, inclusion will be a great deal more than has ever been done and will ensure that the reparations movement realizes its promise.