

Reparations to African-Americans: The Only Remedy for the U.S. Government's Failure to Enforce the Thirteenth, Fourteenth, and Fifteenth Amendments

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I. INTRODUCTION

This article takes a hard look at U.S. history: the political, the social, and the legal landscape after the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. The author wholeheartedly believes that the Reparations dialogue must continue. Many, including well-educated Americans, are solidly divided on this important issue and have taken the position that Reparations should be buried because American slaves are buried. In spite of the difficulties, we must study and question the societal norms that led to major changes in the United States and forge ahead to find a solution to the issues that adversely affect a major portion of America's citizenry. Reparations have been used internationally as well as domestically and are not novel theories.

The U.S. has not realized the great society that so many projected was possible for this nation. Like the Truth and Reconciliation Commission in South Africa¹ after Apartheid, the U.S. must come to grips with its failures and shortcomings as they relate to a major sector of its population. Therefore, this article first examines the Thirteenth Amendment, its purposes, and failures.² Next, the Fourteenth Amendment's purposes and failures are analyzed.³ Third, the Fifteenth Amendment is analyzed.⁴ Finally, the article concludes⁵ that

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¹ Promotion of National Unity and Reconciliation Act (1995) *available at* <http://www.doj.gov.za/trc/legal/act9534.htm> (implemented to investigate gross violations of human rights that were committed during Apartheid. Afforded victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparations to, and the rehabilitation and the restoration of human and civil dignity of victims).

² U.S. CONST. amend. XIII; *see infra* notes 11–43.

³ U.S. CONST. amend. XIV; *see infra* notes 44–122.

⁴ U.S. CONST. amend. XV; *see infra* notes 123–68.

Reparations is the only remedy for the federal government's egregious breach of the protections that are guaranteed by the Amendments.

African slaves were subjected to extreme conditions, as well as continued acts of violence⁶ long after they were freed and in spite of major legal advances. Today, "when African Americans [descendants of the African slaves] say the word 'reparations,' you'd think they had suggested something completely outrageous."⁷ To the chagrin of many, "the concept is legitimate."⁸ Fifty billion dollars in restitution was paid by Germany to the Jews after WWII, and Japanese Americans received twenty thousand dollars from the U.S. government as a result of their confinement in camps during WWII.⁹ The request for "reparations aren't some extralegal remedy that belongs to the past, but a process that is the usual means to resolve harms done by a nation against a people."¹⁰ The penumbras of the post slavery Amendments and the Government's failure to enforce the Amendments support such a process.

II. THE THIRTEENTH AMENDMENT'S PROMISES AND FAILURES

Two years before the ratification of the Thirteenth Amendment, African slaves in many parts of the U.S. had learned about The Emancipation Proclamation,¹¹ which freed slaves in designated parts of

⁵ See *infra* Part V and notes 169–88 (concluding that reparations for African Americans the only remedy).

⁶ Jeffrey Ghannam, *Repairing the Past: Demands are Growing for Reparations for the Descendants of African Slaves in America. How the Issue is Resolved May be Key to this Country's Continuing Search for Racial Harmony*, 86 A.B.A. J. 38, 43 (2000).

⁷ MARIANNE WILLIAMSON, *THE HEALING OF AMERICA* 203 (1997) ("Many middle-class white people, especially those of us from the suburbs, like to think that we got to where we are today by virtue of our merit – hardwork, intelligence, pluck, and maybe a little luck. And while we may be sympathetic to the plight of others, we close down when we hear the words.").

⁸ *Id.*

⁹ *Id.*

¹⁰ Ghannam, *supra* note 6, at 43 (using the Holocaust settlements as proof of the legal foundation for such a petition. Though this article does not advocate "slave reparations," per se, an incredible body of evidence exists as to the business aspects of slavery in many states – Alabama, Delaware, Florida, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, and Virginia.). See Henry J. Reske, *Following Slavery's Legal Trail: History Professor Finds Untold Stories in the Records of Southern Courthouses*, 80 A.B.A. J. 38 (1994) (citing to Professor Loren Schwinger and his work on slave-related matters in the courts during the late seventeen hundreds to mid eighteen hundreds, which could probably assist in putting a value on the losses).

¹¹ President Abraham Lincoln, *The Emancipation Proclamation* (Jan. 1, 1863), in *THE BOOK OF GREAT AMERICAN DOCUMENTS* 66 (Vincent Wilson, Jr. ed., 1988) (most

the United States. “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”¹² Congress had the power to enforce this article by appropriate legislation.¹³ “Emancipation, while it may have ended slavery – did not bring freedom¹⁴ to the African [slaves]. It was after slavery that you get some of the most barbaric, uncivilized manifestations of hate and of the sense of white superiority.”¹⁵ This unfortunately continues in modern times. As recently as December 2003, the FBI investigated a situation where threatening letters were sent to prominent black men in sports and other prominent careers.¹⁶ These letters included threats of being shot, castrated, or set on fire if Black men refused to stop having relationships with Whites.¹⁷

After freedom, Blacks were brutally segregated and relegated to hard times and conditions.¹⁸ Due to many changes in America, “Black rights became vulnerable to compromise and sacrifice. By the late 1800’s Whites began to insist on formal racial segregation, which had long been practiced in fact; segregation was given official status to show whites that they were indeed superior to blacks.”¹⁹ The Black Codes²⁰ were a constant reminder to Blacks that “freedom was not as they had anticipated.”²¹ The Codes were used to inhibit freedom by dictating all aspects of the ex-slaves’ lives, from work hours and duties to behavior,²²

states were in rebellion against the U.S.: Arkansas, Texas, Louisiana – except St. Bernard, Plaquemines, Jefferson, St John, St. Charles, St James, Ascension, Assumption, Terre Bonne, Lafourche, St. Mary, St. Martin, and Orleans, including the city of New Orleans – Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia – except the forty-eight counties designated as West Virginia).

¹² U.S. CONST. amend. XIII.

¹³ *Id.* at § 2.

¹⁴ Derrick Bell, *Revocable Rights and a People’s Faith: Plessy’s Past in Our Future*, 1 RUTGERS RACE & L. REV. 347 (1999).

¹⁵ *America’s ‘Own Holocaust’*, NEWSWEEK, Dec. 7–8, 1997, at 61 (quoting John Hope Franklin, a historian who finds the vestiges of slavery alive).

¹⁶ Jason Cole & Armando Salguero, *Letter to Taylor Part of Probe*, THE MIAMI HERALD ONLINE, Dec. 5, 2003, <http://www.miami.com/mld/miamiherald/sports/football/7418139.htm> (discussing the probe because of the threatening nature of the letter; many of the individuals are married to White women).

¹⁷ *Id.*

¹⁸ Bell, *supra* note 14, at 348.

¹⁹ *Id.* See generally C. Vann Woodward, *THE STRANGE CAREER OF JIM CROW* (1966).

²⁰ Jessica McElrath, *The Black Codes of 1865*, <http://afroamhistory.about.com/library/weekly/aa121900a.htm> (last visited Mar. 20, 2006).

²¹ *Id.*

²² *Id.*

especially when Blacks had to deal with Whites or when they were in the presence of Whites. Blacks were often arrested when they solicited services from restaurants that were open to the general public.²³ States usually had statutes that made it a misdemeanor to refuse to leave the premises of establishments when requested by the owner to do so.²⁴ These statutes were used to protect Whites from the inferior Blacks. In *Georgia v. Rachel*,²⁵ the defendants argued that “their arrests were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and attitudes”²⁶ These were common types of prosecutions that were unfolding throughout the country.²⁷ Blacks were barred from towns after certain hours and could not reside in certain towns and cities.²⁸ Under Jim Crow, many “Black males were expected to tip their hats in the presence of whites, even if they were walking on the opposite side of the street.”²⁹ The Codes were implemented in the late nineteenth century and, unfortunately, lasted until the 1960s.³⁰ Neither Blacks nor Whites could easily disregard this ‘Code Mentality’; thus, the ‘Code Mentality’ had a profound effect well beyond the 1960s because people who had lived under that system refused to relinquish what they had come to know as the ‘norm.’ “[L]egalized segregation could not achieve its purpose without imposing inequality,”³¹ and grave inequity. “The purposeful creation and maintenance of inequality”³² was

²³ *Georgia v. Rachel*, 384 U.S. 780, 783 (1966) (allowing removal to Federal Court because defendants would be denied or cannot enforce federal civil rights in state court).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 785, citing *Hamm v. City of Rock Hill*, 379 U.S. 306, 311 (1964) (holding that the recently passed Civil Rights Act of 1964, 78 Stat. 241, precluded state trespass prosecutions for Blacks’ peaceful attempts to be served on an equal basis in establishments covered by the Act, even though the prosecutions were instituted prior to the Act’s passage).

²⁸ *Id.*

²⁹ MERLINE PITRE, IN *STRUGGLE AGAINST JIM CROW 5* (Texas A&M University Press, 1999) (discussing Lulu B. White, a Black female activist, and the NAACP’s strategies to combat Jim Crow in Texas).

³⁰ Jessica McElrath, *Creation of the Jim Crow South: Segregation in the South*, <http://afroamhistory.about.com/library/weekly/aa010201a.htm> (last visited Mar. 20, 2006).

³¹ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1752 (1993) (discussing the interrelatedness of racial identity and property, and how whiteness has evolved into a form of property).

³² *Id.*

sanctioned and upheld by the U.S. government to the detriment of the freed African slaves. The judicial branch of the U.S. Government put its stamp of approval on separate but equal when it made it the law of the land.³³ The Court, in *Plessy v. Ferguson*,³⁴ put its stamp of approval on the “superiority” of Whites. After the *Plessy* decision, Whites had a “legal right” to a separate lifestyle. Though many services and amenities were financially supported by the federal government, it nevertheless decided to enforce white rights at the freed African slaves’ expense.³⁵ “De jure segregation in the South constituted one of the material benefits of racial exclusion and subjugation which functioned to stifle class tensions among whites.”³⁶ This government sanctioned exclusion highlights the government’s failure to treat its new citizens equally by providing protection only to the majority Whites.

Early in American society and especially after the abolition of slavery, “white privilege” became an expectation. Whiteness became the quintessential property of personhood.³⁷ The societal sentiment of the day, which was legally supported by the Codes, elevated “whiteness” to an “object” over which continued control was expected³⁸ and, in reality, obtained. Whites were expected to use this privilege, and they did – it was accepted as a right because they were “White” and that had value, which brought benefits. The “law recognized, either implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledge[d] and reinforce[d] a property interest in whiteness that reproduces Black subordination.”³⁹ With this type of support for White supremacy and domination, the freed African slaves’ path was severely jeopardized.

³³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³⁴ *Id.*

³⁵ Harris, *supra* note 31 at 1750 (the article actually states, “[W]hite supremacy . . . is maintained through the institutional protection of relative benefits for whites at the expense of Blacks.”)

³⁶ CHERYL I. HARRIS, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism in CONSTITUTIONAL LAW STORIES* 181, 197 (Michael C. Dorf, ed., 2004) (discussing historical implications of *Plessy*’s impact on racial separation in transportation, reconstruction, and the country’s racial positions before, during, and after *Plessy*).

³⁷ Harris, *supra* note 31, at 1730 (citing Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–61 (1982)).

³⁸ *Id.*

³⁹ *Id.* at 1731.

As a result of the passage of the Thirteenth Amendment, additional legislation⁴⁰ was passed. Unfortunately, progress was further hampered because the judicial system failed in the art of genuine interpretation, which is to uncover the rule the lawmaker intended to establish.⁴¹ Notwithstanding positive laws, slow progress was recorded for ex-slaves after their emancipation. Additional amendments⁴² were adopted, but bias continued in the courts immediately after Emancipation and that bias still exists today. Thus, “it takes legislative [and judicial] support and public concern to bring about changes,”⁴³ not only in the judicial system but also throughout the fabric of America. In spite of setbacks, ex-slaves remained optimistic that they would soon be accepted by White society, and they continued to work toward that end.

III. THE FOURTEENTH AMENDMENT’S PROMISES AND FAILURES

In 1865, African slaves were finally made citizens of the U.S. They could finally drop the ‘slave label’ and accept themselves as American African citizens or African Americans citizens.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.⁴⁴

⁴⁰ See Civil Rights Act, ch. 31, 14 Stat. 27 (1866) (created to protect ex-slaves from Black Codes); Freedmen’s Bureau Act (1865), available at <http://www.history.umd.edu/Freedmen/fbact.htm> (established “[a] bureau of refugees, freedmen, and abandoned lands, to which shall be committed . . . the supervision and management of all abandoned lands, and the control of all subjects relating to refugees and freedmen from rebel states, or from any district of country within the territory embraced in the operations of the army . . .”). See also W.E. Burghardt Du Bois, *The Freedmen’s Bureau*, 87 ATLANTIC MONTHLY 354 (1901), available at <http://eserver.org/history/freedmens-bureau.txt> (discussing the problems of the twentieth century, the proponents’ argument that the Freedmen’s Bureau was absolutely essential to the successful implementation of the Thirteenth Amendment as well as the opponents’ position).

⁴¹ Roscoe Pound, *Spurious Interpretation*, VII-6 COLUM. L. REV. 379, 381 (1907).

⁴² See *infra* Parts III and IV.

⁴³ *Id.*

⁴⁴ U.S. CONST. amend. XIV.

Congress had the “power to enforce, by appropriate legislation, the provisions of this article.”⁴⁵ The Fourteenth Amendment and subsequent legislation were intended to impose a new political and economic view⁴⁶ on a country that had, prior to the Amendment, conducted itself without much restraint. During the early periods after the Thirteenth and Fourteenth Amendments were passed, courts offered little assistance; thus, oppression and violations of civil rights continued.⁴⁷ These results were not part of the Amendments’ vision of the new order. This “spurious interpretation”⁴⁸ and disregard for the Amendments’ purposes continued up to, through, and beyond the passage of the Fifteenth Amendment.⁴⁹ As a result, the law was brought into disrepute, the Court was placed under extreme political pressure, and the personal element was highly visible in the judiciary.⁵⁰

The courts’ refusal to uphold the intent of the legislation reinforced the African Americans’ view that courts make and unmake the law at will. Many courts buckled under pressure and “adjusted[ed] constitutional provisions to the exigencies of [the] current policy.”⁵¹ Public sentiment that was not always favorable to the African American was, nonetheless, often interspersed into final decisions. White supremacy and “white privilege serve[d] several functions...it provide[d] white people with ‘perks’ that [they did] not earn and that [African Americans did] not enjoy”⁵² and still do not enjoy to date. “Whiteness as property has carried and produced a heavy legacy.... It has warped efforts to remediate racial exploitation.”⁵³

This “legacy” also affected the new African American citizens’ hope that expanded educational opportunities would be available now that they were citizens. In spite of roadblocks that were set up to thwart educational opportunities, the Court determined that mandating equality

⁴⁵ *Id.* at § 5.

⁴⁶ Roscoe Pound, *Spurious Interpretation*, VII-6? COLUM. L. REV. 379, 384 (1907) (discussing how the failure of a particular body to perform presses other bodies into service to do its work – politic failure of one organ to do its work or to do it well puts pressure on other bodies to fill in the gaps).

⁴⁷ See MERLINE PITRE, IN STRUGGLE AGAINST JIM CROW 5 (Texas A&M University Press, 1999).

⁴⁸ Pound, *supra* note 46.

⁴⁹ See *infra* Part IV (discussing the Fifteenth Amendment’s history and impact).

⁵⁰ Pound, *supra* note 46, at 384.

⁵¹ *Id.* at 385.

⁵² Jennifer R. Holliday, *A Personal Roadmap*, in 4 THE WHITENESS PAPERS—WHITE ANTIRACIST ACTIVISM 1 (Nov. 2000).

⁵³ Harris, *supra* note 31.

of education could rectify past denials.⁵⁴ The Supreme Court affirmed the constitutionality of such programs in higher education⁵⁵ in *Regents of the University of California v. Bakke*.⁵⁶ In upholding the University's position, the Court specifically stated "that race can be used to remedy disadvantages cast on minorities by past racial prejudices."⁵⁷ Since 1980, the demise of affirmative action became more evident as decisions to enforce the equal protection clause came under attack.⁵⁸ Many middle-class Whites summarily reject all types of affirmative action programs for African Americans while selectively forgetting the reality that they did not get where they are today based on the virtues⁵⁹ of "[m]erit-hard work, intelligence, pluck, and maybe a little luck. And while we [whites] may be sympathetic to the plight of others, we close down when we hear the words 'affirmative action' or 'racial preferences.'" We worked hard, we made it on our own, the thinking goes, why don't they? After all, the Civil Rights Act was enacted almost 40 years ago."⁶⁰ This view led to an all-out attack against affirmative action.

⁵⁴ *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (the Court held that the petitioner's equal protection right, under the Fourteenth Amendment, was contravened because he was denied the right to receive a legal education. The black petitioner must be admitted to the University of Texas Law School, a White school that had excluded blacks).

⁵⁵ Ruth Bader Ginsburg and Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 1 RUTGERS RACE & L. REV. 197 (1999) (discussing affirmative action in the international human rights context).

⁵⁶ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (upholding the use of race as a factor in admissions, to remedy past injustices in education).

⁵⁷ *Id.* at 325.

⁵⁸ Ginsburg, *supra* note 55, at 209 (discussing the Supreme Court's divisive decision to uphold race-based affirmative action, which reserved 10% of federal funds that were spent on local public works to minority-controlled businesses).

⁵⁹ Vernelia R. Randall, *For Whites Only – A Long History of Affirmative Action*, 2003, available at <http://academic.udayton.edu/race/04needs/affirm22.htm> (discussing the institutional history of white racial preference, the Wagner Act of 1935, the Social Security Act of 1935, the Indian Removal Act of 1830, and the Naturalization Act of 1790, which all benefited Whites). See Todd Ackerman, *End 'Legacy' Program, A&M Urged*, HOUS. CHRON., Jan. 8, 2004, at 21A (discussing minorities' attack on the Texas A&M University's policy that allows points toward admissions if an applicant's parents, brother, sister, or grandparents attended the University – Opponents argue that blacks were not allowed to attend the University until 1963, which precludes many minorities from taking advantage of the program).

⁶⁰ Randall, *supra* note 59 (discussing the long institutional "white history" of racial preferences in this Country).

As a result, projections are made that affirmative action programs may not be upheld if a compelling interest is not shown.⁶¹ For example, a Texas law school's attempt to "remedy past discrimination (through affirmative action) in the Texas school system and to increase the diversity of the law school"⁶² was assaulted because it exemplified affirmative action. Specifically, in *Hopwood v. Texas*,⁶³ white plaintiffs argued that the University of Texas Law School's admissions policy was using an impermissible quota system.⁶⁴ This decision came in spite of the knowledge that the American Bar Association's "academic standards create a system that without affirmative action, would have allowed only 22 percent of the 8,375 blacks who applied to law school to be accepted at even the least selective school. The remaining 6,554 blacks would not have qualified for admission at any school."⁶⁵ "The underrepresentation in the legal profession oppresses blacks in pervasive, insidious ways."⁶⁶ The Court agreed that race was being used impermissibly.⁶⁷ Fortunately, a positive change in African Americans' struggle to obtain equality in education came with the U.S. Supreme Court's decision in *Grutter v. Bollinger*,⁶⁸ where it held that "The Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or § 1981."⁶⁹ As a result, the Court definitively clarified the rule concerning the use of race, which was not uniform in the circuit courts. Race can be used to

⁶¹ Ginsburg, *supra* note 55, at 210 (discussing the attack on affirmative action programs and comparing recent cases on the issue: *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

⁶² Susan Strum and Lani Guinier, *The Future of Affirmative Action: Reclaiming The Innovative Ideal*, 84-4 CAL. L. REV. 961 (1996).

⁶³ *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

⁶⁴ *Id.* at 938. Plaintiffs also argued that any past discrimination against blacks occurred so long ago, it has no present effects. *Id.* at 952-4.

⁶⁵ George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 121 (2003) (discussing the ABA's racist accrediting history and its impact on the number of African Americans in the legal profession).

⁶⁶ *Id.* at 103.

⁶⁷ *Hopwood*, *supra* note 63, at 937.

⁶⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003) (determining whether the University of Michigan Law School's denial of admissions to a white Michigan resident with high indicators was a violation of the Fourteenth Amendment and whether race can be used as a factors in admissions).

⁶⁹ *Id.* at 2328.

correct past harms as well as to provide educational benefits to minorities.

Affirmative action helps alleviate segregation in higher education. In public elementary and high schools around the nation, segregation continues to be a major issue. Sub-standard public schools contribute to ill preparedness for those students who want to attend institutions of higher learning. “Minority students in high poverty areas are not getting a quality education.”⁷⁰ Thus, a strong argument has been waged that merit should not be equated with performance on standardized tests⁷¹ because they are unreliable in determining who will succeed in college.⁷² Likewise, they not only prevent capable students from attending college but they also fail to accurately predict persons who will perform well in future jobs.⁷³ One study has shown that Blacks’ social disadvantages are reflected in low SAT scores and high school grades but do not hinder their success if they are admitted to good schools.⁷⁴ The graduates, more often than not, take active roles in society and become important leaders both within the Black community and in society at large.⁷⁵ Usually, the affirmative action argument normalizes and legitimizes procedures for selection that are not fair or functional.⁷⁶ This is done in spite of the education that Blacks receive or fail to receive in the public school systems. Blacks and other ethnic minorities are expected to compete with students who are afforded educational opportunities that were envisioned for the freed slaves, but which have not been realized to date.⁷⁷ “Every passing day denies these

⁷⁰ Michael Dobbs, *Segregation in Schools at Levels Last Seen in 1969*, HOUS. CHRON., Jan. 19, 2004, at 3A (discussing the extreme cases of segregation: most segregated are New York and Illinois for Blacks and New York and California for Latino students) (quoting John Jackson, education director of the NAACP).

⁷¹ Strum and Guinier, *supra* note 62, at 969.

⁷² *Id.*

⁷³ *Id.* at 969.

⁷⁴ Shepherd, *supra* note 65, at 129.

⁷⁵ *Id.* (discussing how Blacks become the “backbones” of their community and form the middle class).

⁷⁶ Strum & Guinier, *supra* note 62, at 997 (discussing how scrutiny of the selection standards rarely makes it into the judicial opinions concerning affirmative action).

⁷⁷ *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996) (finding that extreme ethnic and racial isolation in the public schools, which deprived the children of their right to right to substantially equal education). *See also* Robert A. Frahm, *Sheff vs. O’Neill Law Settled*, HARTFORD COURANT, Jan. 22, 2003, at 1 (discussing goals and timetables for school desegregation brought about after 14 years in this school desegregation case, when the two sides recently reached an agreement to settle the structuring of the desegregation mandate.)

children their constitutional right to a substantially equal educational opportunity”⁷⁸ and perpetuates the imbalance in education and economic advancement.

A recent study has shown a deeper problem in the education system that creates a labeling bias⁷⁹ which usually only affects African Americans. For example, Black boys living in wealthier communities with a majority White student body are found to be at a greater risk of having schools label them as mentally retarded and, as a result, Black boys are often sent to special education classes.⁸⁰ After being placed in special education, African American children are far less likely to be part of the regular classes than similarly situated White children.⁸¹ These decisions have long-term effects that affect the employability and economic potential of Black males.

The assault on affirmative action is analogous to the government’s passing laws that have the pretext of providing opportunity, yet in actuality fail to protect the pretextual opportunities. Studies have shown that “Actual performance often correlates best with on-the-job training.”⁸² The people who do well usually learn on the job; the ones who are given the opportunity to learn on the job usually do well.⁸³ Opportunity is so often what has been denied to descendants of ex-slaves. If Black students are labeled as mentally retarded, they are denied opportunities on several levels. “Assessment through opportunity to perform works better than testing for performance.”⁸⁴ Blacks have been excluded and marginalized⁸⁵ in the workplace and in schools. This marginalization is insidious and affects all aspects of life; it prevents Blacks from becoming integral links in society, especially economically. African Americans do not enjoy equal opportunity in the U.S., which is undeniably reflected in the unemployment rate. The

⁷⁸ Frahm, *supra* note 77 (discussing the proposed agreement open new integrated magnet schools, more support for after-school and summer-exchange programs for city and suburban students, etc.).

⁷⁹ Jay Mathews, *Study Finds Racial Bias in Special Ed*, WASH. POST, Mar. 3, 2001 at A01 (discussing a joint study conducted by Virginia Commonwealth University and East Tennessee State University that shows that black kids, especially in wealthier schools, are faced with administrators who have the tendency to use “systematic bias that allowed a substantial number of black students to be labeled, inappropriately, mentally retarded”).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Strum & Guinier, *supra* note 62, at 1003–4.

⁸³ *Id.* at 1004 (discussing how experts learn their expertise).

⁸⁴ *Id.* at 1007.

⁸⁵ *Id.* at 1027.

jobless rate for African Americans in 1998 for 20-24 year-olds was 16.8%. Although down from 24.5 percent in 1981,⁸⁶ the prospects for employment are grim for African Americans. Even though the jobless rate has gone down, that means little to Travon Netherly, a student at L.A. Southwest College. Recently, says Travon, four of his brothers applied for a job at an Orange County amusement park. Despite the help-wanted ad in the window, all were turned away. My brothers were willing to take anything, even wear one of those Snoopy costumes, says Netherly, who bitterly adds, it don't take skills to be Snoopy.⁸⁷

This type of blatant rejection of young African Americans sends a clear signal that the time has come to bury the property interest in "whiteness"⁸⁸ because it profoundly affects Blacks. Affirmative action is a "must tool" in that task.⁸⁹ Affirmative action is consistent with equality and is essential to ridding America of the legacy of oppression⁹⁰ against African Americans⁹¹ and the elimination of "whiteness as property." The U.S. government played a major role in discriminating against African Americans. Not only did the Government neglect issues that affected African Americans, it also inconsistently enforced the laws in favor of private citizens who developed elaborate plans to prevent Blacks from exercising their rights.⁹² For example, the Department of Agriculture agreed to compensate Black farmers for discrimination that the Department inflicted on them.⁹³ The settlement was a result of a lawsuit that alleged that the government used more restrictive terms for loans to Black farmers than to White farmers with similar credit histories.⁹⁴ This treatment impacted the farmers' economic situation. As a result of this discrimination, to which the government admits, the percentage of Black farmers has dropped to 1%. In the 1920's, however,

⁸⁶ Ellis Cose, *The Good News About Black America*, NEWSWEEK, June 7, 1999, at 38.

⁸⁷ *Id.*

⁸⁸ Harris, *supra* note 31, at 1791.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *United States v. Price*, 383 U.S. 787 (1966) (This appeal was taken after the lower courts dismissed part of a Sheriff's indictment where he was allegedly guilty of violating three black men's civil rights. The Sheriff of Neshoba County, Mississippi, allegedly released the men from jail during the dark of night as part of a conspiracy with local whites to 'punish' the men. All three men were killed).

⁹² *Georgia v. Rachel*, 384 U.S. 780 (1966) (allowing removal to Federal Court because defendants would be denied or could not enforce their federal civil rights in state court).

⁹³ Michael A. Fletcher, *For Black Farmers, A Hollow Victory*, WASH. POST NAT'L WEEKLY ED., Jan. 18, 1999, at 29 (discussing the settlement as well as the stress and pain that was inflicted on the farmers during the arduous ordeal).

⁹⁴ *Id.*

14% of the nation's farmers were Black. In spite of the settlement and its admitted discriminatory behavior, the Government is allowing its past to repeat itself as a result of the Agriculture Secretary's refusal to terminate high officials who allowed the discrimination against Black farmers to take place⁹⁵ in the first place. Such decisions fuel antagonism and send signals to the nation's employers and private citizens that it may be worth taking a chance on discrimination. If the Government can do it, so can others. This complacency "is going to cost taxpayers hundreds of millions of dollars. It seems that somebody should be held accountable."⁹⁶ This failure to fully accept responsibility and dismantle the problem from its roots is analogous to what the U.S. Government is doing in its failure to address the Reparations issue in a meaningful way.

Blacks are discriminated against by both the federal and state governments,⁹⁷ the educational system, and employers, especially in the legal arena⁹⁸ which continues to exclude blacks *en masse*. Blacks are so underrepresented in the legal system today that Black lawyers are sometimes mistaken for defendants and restrained by bailiffs when they attempt to approach the bench.⁹⁹ This is degrading to the Black lawyer and his, oftentimes, Black clients as well because it highlights the ill-treatment that highly educated, professional Blacks are also subjected to. When Black clients witness this, they have little confidence in the judges. Moreover, Blacks usually receive unequal sentences to similarly situated Whites, and bail is also granted inequitably.¹⁰⁰ Judges are also part of the racism that is so overtly reflected in the courtroom: judges oftentimes "overrule juries' imposition of life sentences in favor of death sentences for Blacks who kill Whites and credit White witnesses while discrediting similar Black witnesses."¹⁰¹ In 1996, the ABA's Commission on Opportunities for Minorities in the Profession stated that minorities are "experiencing legal setbacks that remind them of

⁹⁵ *Id.* (quoting John W. Boyd, Jr., President of the National Black Farmers Association).

⁹⁶ *Id.*

⁹⁷ See Shepherd, *supra* note 65, at 108-109 (many states prohibited blacks from attending state run law schools).

⁹⁸ *Id.* at 109 (The American Bar Association, the legal education's accrediting body, excluded blacks from attending law school until 1943. Moreover, "[o]nly in 1964 could the Association of American Law Schools [another legal accrediting body] certify that none of its member schools denied admission to blacks on grounds of race.").

⁹⁹ Clay Hathorn, *Funding Equal Justice*, ABA J., Aug. 1992, at 38.

¹⁰⁰ See Shepherd, *supra* note 65, at 145.

¹⁰¹ *Id.* (citing Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C.L. Rev. 95, 96, 101 n.26 (1997)).

Plessy.”¹⁰² “The Supreme Court of 1996 seems very similar to the court of *Plessy v. Ferguson*.”¹⁰³ For about thirty years, statutory protection was afforded to African Americans.¹⁰⁴ “After 40 years of constitutional rulings . . . in the courts, we now see a sense of fatigue.”¹⁰⁵ Currently, the Supreme Court is ignoring the vestiges of widespread racism in society.¹⁰⁶ As a result, a trend toward re-segregation is developing.¹⁰⁷ “The Country is witnessing resegregation without ever having achieved the goal of a completely desegregated society.”¹⁰⁸ Schools across the nation are being resegregated.¹⁰⁹ “The resegregation trend picked up momentum as a result of a 1991 Supreme Court decision that authorized a return to neighborhood schools instead of busing, even if such a step would lead to segregation.”¹¹⁰ This segregation or “resegregation” extends to all areas of the society: social, employment, education, and especially the legal system, which is the last of the citadels.¹¹¹

Perceptions of bias, especially in the legal system, are not viewed the same by Black and White Americans; a major divide exists. As late as 1999, many African Americans, especially African American lawyers, continue to believe that racial bias currently exists in the judicial system.¹¹² Fifty-two percent of the Black lawyers, as opposed to six-and-one-half percent of the White lawyers believe very much that bias exists.¹¹³ Additionally, “[t]wo-thirds of the black lawyers, about 92 %,

¹⁰² Steven Keeva, *A Bumpy Road to Equality*, ABA J., Oct. 1996, at 32.

¹⁰³ *Id.* (quoting Johnnie Cochran as stating, “If you go to the Supreme Court now, you’re told that race can never be used to benefit anyone. It can only be used to punish.”).

¹⁰⁴ *Id.* (quoting Barbara Arnswine, Executive Director, Lawyers Committee for Civil Rights Under Law).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting Federal Judge Nathaniel Jones and University of Texas Law School Professor Michael Tigar).

¹⁰⁸ *Id.* (quoting Professor Tigar).

¹⁰⁹ Michael Dobbs, *Segregation in Schools at Levels Last Seen in 1969*, HOUS. CHRON., Jan. 19, 2004, at 3A available at 2004 WL 57801634 (discussing the Harvard Civil Rights Project’s recent study which indicates that “we are losing many of the gains of desegregation” that occurred during the Civil Rights era).

¹¹⁰ *Id.* (quoting Harvard University Professor Gary Orfield)

¹¹¹ George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103 (2003) (highlighting that blacks are less represented in the law than in almost any other profession: only 4 percent of lawyers are black, compared to 13 % of the population).

¹¹² Terry Carter, *Divided Justice*, ABA J., Feb. 1999, at 42 (discussing perceived wrongs and denials of rights in the system, which “has a white spin” on justice).

¹¹³ *Id.*

said that, compared to other segments of society, the justice system has the same amount of racial bias or more. Nearly half the White lawyers believe there is less.”¹¹⁴ The Association of American Law Schools (AALS) Equal Justice Project¹¹⁵ (EJP) highlights the importance of law schools working with the equal justice community in order to provide needed services to minorities, especially Blacks. The public interest and grassroots organizations provide a range of services to the poor and working class,¹¹⁶ many of whom are African Americans with limited resources and education. Programs like the Law School Consortium Project, the famed Innocence Project, which provides services to people that claim unjust convictions, the Equal Justice Centers at the University of California at Berkeley, Santa Clara Law School, and the University of Seattle have also created centers to help with equal justice activities in their schools and communities¹¹⁷ to provide services and support for African Americans who have been denied adequate legal representation based on economic and other factors. These programs indicate that major problems persist in America, and that they are inextricably tied to race. They are not only based on economic inequality but also based on inequality in the justice system and lack of representation therein. Many African Americans are profiled based on race.¹¹⁸ Skin color has been a major issue in recent police shootings and other profiling related cases.¹¹⁹ African American arrests resulting from profiling cases are usually drug related.¹²⁰ Black and White drug arrests are comparable; nonetheless, Blacks are more often jailed than their White counterparts for the same offense.¹²¹

Massive changes have taken place since 1868, when citizenship brought hope of a better day and better treatment. This hope was fueled by the prospect of perhaps being able to vote now that citizenship had been bestowed on “ex-slaves.”

¹¹⁴ *Id.*

¹¹⁵ EQUAL JUSTICE PROJECT REPORT (Ass’n of Am. Law Sch.) Mar. 2002, at 1 [hereinafter EJP] (discussing the equal justice work, which includes services, that is being done in law schools across the United States).

¹¹⁶ *Id.* at 25

¹¹⁷ *Id.* at 26–28.

¹¹⁸ ARYEH NEIER, TAKING LIBERTIES: FOUR DECADES IN THE STRUGGLE FOR RIGHTS 368 (Public Affairs 2003).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (discussing racial profiling cases that resulted in fatality to Blacks in New York City, such as those of Amadou Diallo and Patrick Dorismond, as well as the “driving while black” (DWB) nomenclature that has developed since racial profiling of African Americans has been so prevalent in recent years).

IV. THE FIFTEENTH AMENDMENT'S PROMISES AND FAILURES

“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”¹²² Congress has the “power to enforce this article by appropriate legislation.”¹²³ There is a basic connection among work, education, and citizenship [which] suggests that the screening process for employment and education has become the modern-day equivalent of eighteenth and nineteenth-century screening processes for voting. In the colonial period and the first decades of independence, the franchise was generally restricted by race and gender to landed white males.... In the last nineteenth century, voting was also conditioned on the capacity to pay and the ability to read.¹²⁴ Voting was not as easy as the “new citizen” thought it would be. For many years voter qualifications were tied to their ability to pay a poll tax,¹²⁵ which was based on one’s ability to find employment – a most difficult task for the ex-slave. African Americans struggled to pay because they realized, and believed, that voting was worth it.

In order to obtain finances to pay poll taxes, Blacks would often try to separate themselves from White society. Nonetheless, they were often met with serious racial violence. In 1921, one of the worst cases of racial violence was manifested when approximately 10,000 Whites invaded a prosperous Black neighborhood and killed 40 Blacks and destroyed 35 blocks of business and family homes.¹²⁶ Unfortunately, Blacks were reminded that in spite of amassing financial wherewithal that would allow them to participate in the system, Whites could easily amass a myriad of roadblocks.¹²⁷

¹²² U.S. CONST. amend. XV, § 1.

¹²³ U.S. CONST. amend. XV, § 2.

¹²⁴ Strum and Guinier, *supra* note 62, at 1032.

¹²⁵ *Id.* at 1032–33.

¹²⁶ Ross E. Milloy, *Oklahoma Looks at 1921 Race Riot*, HOUS. CHRON., Mar. 1, 2001, at 4A (discussing the Oklahoma Commission to Study the Tulsa Race Riots’ report and recommendation concerning this tragic event).

¹²⁷ See MERLINE PITRE, *supra* note 29, at 19 (1999) (discussing the “white man’s primary” in Texas that prevented Blacks from voting even if they became literate, acquired property, and paid poll taxes). The U.S. Judicial system offered little help to combat problems in the voting area. The Court upheld the Court of Appeals for the First Judicial District of Texas determination that “white primaries” were legitimate; the Supreme Court rationalized that the case was moot because the election had already taken place. *Id.* at 20. *Contra, Id.* at 35 (citing *United States v. Classic*, 313 U.S. 299 (1941), reversing its prior decisions on primary elections, and held that “primary

Finally, it was concluded that wealth was not germane to people's abilities to participate intelligently in the election process,¹²⁸ thus, wealth-based credentials, especially ones with extreme race consequences, should not forge access to work and education¹²⁹ but which they often do in American society.

Blacks continued to struggle for their civil liberties. By 1963, "the movement for racial equality was in full flower."¹³⁰ African Americans' zeal and contributions to getting others to vote came under direct attack. Voter-fraud investigations were initiated against Black voter advocates in increased numbers.¹³¹ For instance, after African Americans began to win a number of offices in the Black Belt counties, local Whites complained of voter fraud and the federal government subsequently initiated a voter-fraud investigation against two local voting-rights activists.¹³² The two were convicted but the case was later overruled with the assistance of the NAACP Legal Defense Fund.¹³³ In 1985, the federal government also launched an investigation against Albert Turner, his wife, Evelyn, and Spencer Houge Jr., or the "The Marion Three," all of whom were civil rights activists. The Government accused them of fraud in the absentee ballots and forgery of signatures. This suit ended in an acquittal for all three.¹³⁴ Similar cases have also been pursued in Alabama,¹³⁵ and many Blacks believe that the cases have had a profound impact on the Black vote in Alabama, which has caused a major reduction in voter turnout,¹³⁶ and which benefits White Alabamans.

Perhaps even more egregious and appalling was when Republican North Carolina Senator Jesse Helms, trailing a black opponent in 1990, mailed out postcards to 125,000 black voters

election had become so much a part of the electoral process that they no longer could be considered merely private activities.").

¹²⁸ Strum and Guinier, *supra* note 62, at 1033 (quoting *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966)).

¹²⁹ *Id.*

¹³⁰ ARYEH NEIER, *supra* note 118, at 3 (chronicling the civil rights movement that included Black Americans as well as their allies in their struggle to obtain rights that they had not enjoyed prior to the 1960s).

¹³¹ Ron Nixon, *Turning Back The Clock on Voting Rights*, THE NATION, Nov. 15, 1999, at 12 (discussing widespread voter-fraud investigations against blacks across the nations, especially in the Black Belt counties of Alabama).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 12, 14.

¹³⁵ *Id.*

¹³⁶ *Id.* at 16.

implicitly threatening them with jail if they went to the polls. Helms's campaign settled a complaint with the Justice Department in 1992, but not before he had won another term.¹³⁷ Many activists believe that the U.S. government should put a stop to abusive prosecution in the voter area. They argue, "the rights that blacks have fought hard for may be in fundamental danger."¹³⁸

The U.S. government *must* protect the African American vote. "Voter-fraud investigations and other attempts to intimidate black voters [is] a stunning reversal of the goals of voting rights, aided by a willing Justice Department."¹³⁹ Unfortunately, racial conflict, as a result of legal inroads and civil rights activity, continues to have a great impact in the South.¹⁴⁰ Getting the vote was nice, but attitudinal vestiges continue not only in the ballot box but also in the White South's proud use of questionable symbols that remind Blacks, especially southern Blacks, of the old south – such as the display of the Confederate flag.¹⁴¹ Major discrimination in all areas continues to persist. The laws that were passed to protect African Americans were not vigorously enforced in the early years, and many people continue to circumvent these laws because punishment is often inconsequential.¹⁴² To date, "civil rights laws, even more than others, are radically flouted and underenforced."¹⁴³

Unfortunately, even after the passage of the Amendments, African Americans were deprived of life, liberty, education, and family ties,¹⁴⁴ and vestiges of these deprivations are still pervasive. As a result of such demoralizing denials, a few Blacks tried to establish themselves in American society by adopting the "whiteness as property" ideal. The so-called Black elite adopted the "white nice features" – i.e., sharp

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* (quoting J.L. Chestnut, Activist, stating that "in this climate, not only are we going to lose cases, but we're going to lose all the things that we have gained over the past thirty years").

¹⁴⁰ Hastings Wyman, *Speaking of Religion...*, WASH. POST NAT'L WEEKLY ED., Aug. 28, 2000, at 22 (discussing the increase in tolerance in voting patterns in the South for Jews and Catholics on the one hand but on the other hand the almost static and rare pattern for a black candidate to win the vote in a white constituency).

¹⁴¹ *Id.*

¹⁴² See Nixon, *supra* note 131.

¹⁴³ Richard Delgado, 1998 Hugo L. Black Lecture: *Ten Arguments Against Affirmative Action—How Valid?*, ALA. L.R. 148 (1998) (quoting a 1987 University of Chicago study that showed that 70% of the employers in that city acknowledged that they made employment decisions and distinctions based on race and ethnicity).

¹⁴⁴ *Interracial Group of Lawmakers Urges U.S. Apologize For Slavery*, HOUS. CHRON., June 20, 2000, at 5A.

features – thin noses, thin lips, sharp jaws, and hazel, green, or blue eyes as standards for entry to Black “membership-by-invitation-only” social clubs.¹⁴⁵ These Black elites only accepted “those who passed the ‘brown paper bag and ruler test’ – skin no darker than a paper bag, hair as straight as a ruler.”¹⁴⁶ In other words, like “whiteness,” Black elite success was “a color thing and a class thing. And for generations of black people, color and class have been inexorably tied together”¹⁴⁷ because the elite African Americans, like the White American majority, began to see what color could offer. As a result, America placed value on color, mostly “white”¹⁴⁸ and in order to realize benefits, the African American elite bought into the “white” as property and set up its own system, which mirrored the White view.

In spite of the progress that a small Black elite may have accomplished, the masses of Blacks who have not been afforded opportunities are indicia that the basic principle of equality are still being denied to African Americans as a people.

Buying into “color,” especially “white,” was vividly displayed by Sally Hemings’ heirs and other Blacks who unquestionably accepted the Sally Hemings-Thomas Jefferson story on its face, and Whites who unequivocally rejected it until DNA gave the final answer.¹⁴⁹ Being part White translated into something tangible in the White world, and later in the Black elites’ world. Who can really say why the Black side of the family so insisted that the story was true? The “whiteness as property” concept probably has major bearing on the why. “Perhaps a more historically responsible way to make a similar if slight different case is to suggest that advancing technology has at least allowed us to open a window into the covert and concealed [and often denied] interracial intimacies that have always been there but that many white Americans have preferred to deny.”¹⁵⁰

¹⁴⁵ Lawrence Otis Graham, *Living in a Class Apart*, U.S. NEWS & WORLD REP., February 15, 1999 at 49 (these early clubs, e.g., Jack and Jill and Links, included the children of black elite graduates from Spellman College or Fisk University. Some families had two or three generations of relatives who owned insurance companies, restaurants, banks, newspapers, funeral homes, etc.).

¹⁴⁶ *Id.* at 48.

¹⁴⁷ *Id.*

¹⁴⁸ See Harris, *supra* note 31 (discussing how “whiteness” has involved into a property).

¹⁴⁹ Barbra Murray and Brian Duffy, *Did The Author of The Declaration of Independence Take a Slave For His Mistress? DNA Tests Say Yes*, U.S. NEWS & WORLD REP., Nov. 9, 1998, at 59.

¹⁵⁰ Joseph J. Ellis, *When a Saint Becomes a Sinner*, U.S. NEWS & WORLD REP., Nov., 9, 1998 at 67 (“‘Tom and Sally,’ America’s most enduring soap opera, has reached its finale”).

Americans' denial of racial injustice persists for inexplicable reasons. The recent revelation about Strom Thurmond's Black daughter,¹⁵¹ which is similar to the Sally Hemings's story, illustrates that Blacks as well as Whites had to know about the daughter, but for inexplicable reasons decided not to divulge credible evidence. Essie Mae Washington-Williams also acknowledged in her statement to the press that "there are many stories like Sally Hemings' and mine."¹⁵² Ms. Washington-Williams was born in South Carolina in 1925; her mother was a maid to the Thurmond family.¹⁵³ She admitted that she wanted to end "all the speculation and questions,"¹⁵⁴ the same types of questions that were raised in the Hemings story. The truth about the Senator's daughter and the questions raised were kept secret for more than seven decades.¹⁵⁵ This revelation has ignited many dormant feelings for many African Americans. Some remembered that if a Black man looked at a White woman in those days, the Black man would have been severely harassed or hanged.¹⁵⁶ This story brings many of the hard issues to the surface. Americans, both Black and White, made hard decisions during a very tumultuous time in American history; some of the decisions were detrimental to the African American, but not all were. Some Blacks reaped benefits from their ability to use "whiteness."

The Thirteenth, Fourteenth, and Fifteenth Amendments did not bestow exactly what the "new citizen" had envisioned, but at least they were starts. These Amendments inspired and allowed them to work zealously to correct past injustices. African Americans are demanding¹⁵⁷

¹⁵¹ *Late Senator's Daughter Says Weight Has Lifted*, HOUS. CHRON., Dec. 18, 2003, at A2, available at <http://www.HoustonChronicle.com> (discussing the late Senator Strom Thurmond's relationship with a Black maid that resulted in a bi-racial daughter – Essie Washington-Williams).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (discussing how Senator Thurmond sent warm letters and money to his daughter and the fact that he was known for his segregationist views). See Marilyn W. Thompson, *The Senator's Progeny*, WASHINGTON POST NAT'L WEEKLY ED., Dec. 22, 2003, at A2 (discussing Essie M. Washington's revelation that she is late Senator Strom Thurmond's illegitimate daughter and the contact that she had with the Senator during his lifetime).

¹⁵⁶ Erika Hayasaki, *Thurmond Story Stirs Emotions*, Dec. 15, 2003, <http://new.blackvoices.com/news/bv-newsthurmond121503,0,1483057.story?coll=bv-news-black-headlines> (discussing African Americans' reaction to the Thurmond revelation).

¹⁵⁷ John Conyers, Jr., *Major Issues – Reparations, The Commission to Study Reparations for African American Act*, Jan. 16, 2004, available at http://www.house.gov/conyers/news_reparations.htm (discussing the need for a

and uniting to pressure the U.S. Government to give its African American citizens, who are obviously deeply affected by the vestiges of post-slavery atrocities, the opportunity to at least air their grievances and receive an apology, as well as ultimately receive Reparations that would allow closure and reconciliation. Representative John Conyers introduced bill H.R. 40 in 1989, which urged Congress to establish a Commission to study the issues.¹⁵⁸ One germane argument is that the judges allowed Holocaust victims to pursue restitution in a U.S. court.¹⁵⁹ Even though the case was settled prior to litigation,¹⁶⁰ opportunity was afforded to the litigants to have their day in court. The Reparations Assessment Group¹⁶¹ has launched an aggressive effort, though most lawsuits and legislation dating back to the mid-1800s have not been successful, to get American Blacks compensated for more than 244 years of slavery.¹⁶² Most would agree that the Holocaust victims should have had access to the legal systems. Nonetheless, the U.S. should evaluate its approach to its other citizens, the African Americans, and concerns about Reparations. In recent years, victims of atrocities, many of whom are not American, have filed more than 100 lawsuits in U.S. courts in an attempt to obtain accountability for offenses against human dignity and rights.¹⁶³ These suits are indicia that the world has started to recognize such atrocities as legitimate legal issues and also that victims should have recourse, yet some U.S. judges have refused to adopt this position. For example, the United Nations World Conference Against Racism recently “declared slavery a crime against humanity.”¹⁶⁴ The U.S. needs to embrace this position as well.

national discussion about reparations as well as the areas that must be addressed: fundamental injustices and inhumanity of slavery; proposes a commission to study slavery; suggests determining an appropriate remedy to redress the harm....)

¹⁵⁸ *Id.*

¹⁵⁹ Francine Parnes, *Fighting On.*, ABA J., Mar. 2002, at 21 (citing *In re Holocaust Victim Assets Litigation*, 105 F.Supp. 2d 139 (E.D.N.Y. 2000)).

¹⁶⁰ *Id.*

¹⁶¹ Paul Shepard, *Lawyer Group Investigates Slavery Reparations*, SUNDAY ADVOC., Nov. 5, 2000, at 2A (discussing the groups goals to obtain not only monetary compensation but also a “change in America,” Charles J. Ogletree).

¹⁶² *Id.*

¹⁶³ *Id.* (quoting Michael Hausfeld, a partner at Cohen, Milstein, Hausfeld & Toll in Washington D.C.).

¹⁶⁴ Kristen Mack, *Houstonians Join Rally Cry For Reparations in D.C.*, HOUS. CHRON., Aug. 18, 2002, at 24A (discussing modern day disparities that continue to affect African Americans, quoting Donna Lamb, Caucasians United For Reparations and Emancipation: “It’s very clear to us, as white Americans, that our people have committed a horrible crime against people of black ancestry.”).

No nation can enslave a race of people for hundreds of years, set them free bedraggled and penniless, put them, without assistance in a hostile environment, against privileged victimizers, and then reasonably expect the gap between the heirs of the two groups to narrow. Lines, begun parallel and left alone, can never touch.¹⁶⁵

Reparations suits are being filed in U.S. courts, but the Supreme Court has not allowed them to proceed to trial.¹⁶⁶

Reparations supporters are not looking to place a check in the hands of every African American, but they “envision reparations being used to fund education, improve health care, create cultural facilities and buy and expand businesses in the [B]lack community. At the very least they hope the government will issue a formal apology for the institution of slavery.”¹⁶⁷

V. CONCLUSION

Black organizations have been created to assist African Americans in realizing their dream to enjoy their rights as freed citizens, including the right to vote, the right to obtain justice, and ultimately, the right to achieve equality of opportunity.¹⁶⁸ “Slavery’s aftermath...deserve[s] to be met with the same sense of public penance that the nation eventually applied to its wartime failures in having

¹⁶⁵ RANDALL ROBINSON, *THE DEBT* 74 (2000) (discussing inequalities in the society, their impact on Blacks as a result of overt racism, and the need for America to acknowledge slavery, pay restitution, and rectify history).

¹⁶⁶ Rosanna Ruiz, *Professor Presses Reparations*, HOUS. CHRON., May 8, 2002, at 32A (discussing the U.S. Court of Federal Claims’ dismissal of the reparations lawsuit filed in Washington, D.C. by Imari A. Obadele and two other board members of the National Coalition of Blacks For Reparations of America); Majorie Caldwell, *Slavery Reparations-Plowing the 41st Acre*, Vol. 6-9 UNIVERSITY FACULTY VOICE, May 2002, at 1, 4 (discussing three lawsuits that were filed in a Federal District Court in Brooklyn, New York, on March 26, 2002 naming Aetna Inc., CSZ, and Fleet Bank as defendants. Deadria Farmer-Paellman was the named plaintiff; she asserts that her ancestors were former slaves. Her case demands, inter alia, an accounting, a request for reparations based on unjust enrichment, as well as allegations of human rights violations. Farmer-Paellman’s suit has also been dismissed.)

¹⁶⁷ Mack, *supra* note 164.

¹⁶⁸ *19th Century Timeline*, <http://www.nps.gov/boad/timeli~1.htm> (discussing W.E.B. Dubois and his reasons for establishing the National Association for the Advancement of Colored People in 1912).

imprisoned Japanese-Americans and in ignoring evidence of the Holocaust in Germany.”¹⁶⁹ Unfortunately, “white” skin continues to open doors in the U.S. for Whites because dominance has been conferred on them.¹⁷⁰ Whites continue to enjoy unearned skin privileges because

1. [They] can take a job with an affirmative action employer without having coworkers on the job suspect that [they] got it because of race.
2. [They] can choose public accommodation without fearing that people of [their] race cannot get in or will be mistreated in the places [they] have chosen.
3. Whether [they] issue checks, credit cards, or cash, [they] can count on [it that their] skin color will not work against the appearance of financial reliability.¹⁷¹

Obliviousness about White advantage and Black disadvantage is kept strongly indoctrinated in the U.S. in order to maintain the meritocracy myth.¹⁷² They are constantly being challenged¹⁷³ because they are used as a pretext for not opening doors of opportunity to African Americans. Like South Africa,¹⁷⁴ America needs to unite the country and courageously accept the undeniable truth that cruel acts were committed against its former slaves, later its ex-slave citizens, and now the children and grandchildren of these ex-slave citizens. African Americans, the descendants of ex-slaves, may not have direct recollection of the specific cruelties, but they have faced severe limitations as a result of years of de facto practices and de jure laws that affected their liberties and unfortunately persisted for many, many years.

“The United States government is a continuous, living body that must be held accountable for all its previous actions and make amends

¹⁶⁹ Francis X. Clines, *Cardinal Confronts a 'Spiritual Malady'*, HOUS. CHRON., Jan. 14, 2001, at 21A (quoting Charles G. Tildon).

¹⁷⁰ Peggy McIntosh, *White Privilege: Unpacking The Invisible Knapsack*, PEACE AND FREEDOM, July/August 1989, at 10, 12.

¹⁷¹ *Id.* at 11.

¹⁷² *Id.* at 12.

¹⁷³ Strum & Guinier, *supra* note 62.

¹⁷⁴ *South Africa Truth Commission Ends Painful Hearings*, (July 31, 1998), <http://www.cnn.com/WORLD/africa/9807/31/safrica.truth.commission/> (discussing the wrenching testimony about crimes and human rights abuses committed during the apartheid era).

for past mistakes.”¹⁷⁵ After the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the U.S. allowed its [White] citizens to continue to exploit and destroy a people; as a result, “it owes them”¹⁷⁶ because the effects of this exploitation continue. As late as 1995, a UN report estimated that American Whites would lead the world in well-being if they were a separate nation, but African Americans would rank 27th worldwide. It is interesting to note that the report’s measures were based on life expectancy, educational achievement, and income.¹⁷⁷

“Full equality still is a distant prospect in the United States.”¹⁷⁸ Nonetheless, some have decided to assist in the move toward equality. In 2000, Chicago became the fifth city to endorse national hearings on reparations,¹⁷⁹ and in 2001, the California Legislative Assembly joined the list making California the forerunner of all the states.¹⁸⁰ California’s Resolution urges “Congress to apologize to Black Americans for the “fundamental injustice, cruelty, brutality and inhumanity of slavery.”¹⁸¹

The reparations cry is definitely gathering momentum. “America will continue to be haunted by slavery [and its aftermath] until the government makes amends”¹⁸² and addresses the issue because “the truth is quite crucial to the process of reconciliation.”¹⁸³ This process would

¹⁷⁵ Mikhailina Karina, *Randall Robinson Advocates Reparations For Slavery*, http://veracity.univpubs.american.edu/weekly_site/weeklypast/030700/story_4.html. (quoting Randall Robinson).

¹⁷⁶ *Id.*

¹⁷⁷ Ruth Bader Ginsburg and Deborah Jones Merritt, *supra* note 55, at 198.

¹⁷⁸ *Id.* at 198 (citing United Nations Development Programme, Human Development Report 1995, at 22)

¹⁷⁹ Jeffrey Ghannam, *Repairing The Past*, A.B.A. J., Nov. 2000, at 39 (discussing research that has uncovered data that shows who owned slaves and how much they cost, and a means of calculating fortunes that were made by slaveowners).

¹⁸⁰ *State of California Calls For National Action on Slavery Reparations*, JET, July 30, 2001, at 21 (discussing the California Assembly’s resolution that urged Congress to study the reparations issue, joining Chicago, Detroit, Dallas, and Cleveland).

¹⁸¹ *Id.* (discussing California’s call for a national monument and memorial as a reminder about the institution of slavery). See Bill Murphy, *Jackson Calls For Disclosure on Slave Insurance*, HOUS. CHRON., May 8, 2002, at 32A (discussing California’s mandate to insurance companies to turn over documents that show whether the insurer profited from slave-related insurance; Jackson is calling for other states to follow California and pass legislation mandating the same).

¹⁸² *Interracial Group of Lawmakers Urges U.S. Apologize For Slavery*, HOUS. CHRON., June 20, 2000, at 5A (discussing Representative Tony Hall’s proposal for Congress to not only apologize for slavery but also to set up a commission to look at slavery’s continuing impact in America’s society).

¹⁸³ *South African Truth Commission Ends Painful Hearings*, (July 31, 1998), <http://www.cnn.com/WORLD/afuca.9807/31/safrica.truth.commission/>.

allow the U.S. to “shut the door on that past.”¹⁸⁴ This may be a past that we may not want to remember, but remember we must. An apology must come. The nation must send a message to its citizens that will lead to racial harmony. “The debate over slavery reparations should be viewed as a means toward improving race relations.”¹⁸⁵ We must resist allowing the public to turn the issue into “a shouting match about paychecks and forty acres.”¹⁸⁶ “America will continue to be haunted by slavery until the government makes amends beginning with a formal apology.”¹⁸⁷

¹⁸⁴ *Id.* (quoting Archbishop Desmond Tutu).

¹⁸⁵ *Moseley-Braun: Reparations Debate as Salve For Racial Wounds*, (Jan 16, 2004), <http://new.blackvoice.com/news/bv-moselybraun030227.story> (discussing Democratic Presidential Hopeful Carol Moseley-Braun’s comments concerning “modern solutions” to the nation’s racial issues).

¹⁸⁶ *Id.*

¹⁸⁷ *Interracial Group of Lawmakers Urges U.S. Apologize For Slavery*, *supra* note 182, at 5A (discussing an apology resolution that was offered to Congress by Representative Tony Hall, a white Democrat).