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> Reparations are more than an exercise in education, remembrance, and apology. Reparations demand the political, social, and economic power and equality for African Americans that has been stifled and suppressed in America since its inception.[1]

Mr. Chairman, Members of the Committee:

I am honored by the Committee's invitation to testify at this very important hearing on HR40 and the Path to Restorative Justice. Whilst reparations has recently received some well-deserved attention in the Democratic Presidential primary campaign, reparations has been a feature of American political debate since Thomas Jefferson proposed declaring enslaved persons "a free and independent people" with rights to land.[2] Reparations is a longstanding and legitimate legal and political demand.

I. WHAT IS REPARATIONS ?

Reparations is the institutional social, political, legal, economic, and cultural rebuilding, restoration, and empowerment of African American communities and individuals to remedy race-targeted dignity wrongs perpetrated during and through slavery, segregation, and beyond,.

The history of America, from the earliest colonies to the present, is a history of discrimination by governmental and private institutions and individuals on African Americans to negate their humanity, dignity, and power. Reparations has two aspects, one backwards-looking, one forwards-looking.[3] First, reparations demands that we acknowledge and redress the specific social, political, cultural, and economic wrongdoing perpetrated by federal, state, and municipal governments designed to reduce African Americans to subservience and servitude.[4] Second, reparations calls for the creation of programs and institutions capable of remedying a specific and pernicious type of historical wrongdoing, which is the race-targeted disempowerment and subordination of African Americans.[5]

Often African Americans reparations envisages this empowerment as "payments to those who are descended from slaves and those discriminated against during the Jim Crow era."[6] However, whilst economic compensation is an essential part of reparations, the larger goal is

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[1] Charles J. Ogletree, Jr., Speech delivered at Boston College (Mar. 14, 2003).

[2] Bernard R. Boxill, *Black Reparations*, STAN. ENCYCLOPEDIA PHIL. 1, 1-2 (2016) Retrieved June 10, 2019, from https://plato.stanford.edu/archives/sum2016/entries/black-reparations/ (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 138 (1954) [1785]). Kaimipono Wenger has charted a history of reparations arguments over the past 150 years. *See* Kaimipono David Wenger, *From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution*, 25 J. CIV. RIGHTS & ECON. DEVELOPMENT, *25*(4), 697, 698-704 (2011). And Professor Alfred Brophy has plotted the more recent discussion of reparations into different "generations" that variously legitimized reparations as a valid moral and political goal, and then refined it as a legal claim, before broadening reparations to focus on substantive political, social, economic, and cultural "repair." *See* ALFRED L. BROPHY, REPARATIONS PRO & CON 62-74 (2006); Alfred L. Brophy, *ReparationsTalk: Reparationsfor Slavery andthe Tort Law Analogy,* 24 B.C. THIRD WORLD L.J. 81, 82 (2004).

[3] Thom Brooks, *A Two-Tiered Reparations Theory: A Reply to Wenar*, 39 J. SOC. PHIL. 666 (2008).

[4] Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45 (2004).

[5] *Id.*

[6] Alfred L. Brophy, *What Should Inheritance Law Be? Reparations and Intergenerational Wealth Transfers,* 20 L. & LITERATURE 197, 207 (2008).

remedying the specific social, political, cultural, and economic efforts to entrench race-based discrimination and domination throughout American social, cultural, economic, and political institutions of governance.[7]

Reparations for African Americans recognizes that concrete, historical events structure the disparate, race-targeted treatment of African Americans in contemporary American society. These events are the identifiable, discriminatory acts of individuals and institutions. The backwards-looking aspect of reparations exposes the manner in which the structural features of modern discrimination were generated by identifiable institutions and individuals. Reparations charts the ways in which national, state, and local communities have consolidated their civic identities in response to acts of racial violence or discrimination both during and after the era of slavery.[8] Reparations then holds these institutions and individuals accountable for the present-day structural and race-targeted harms traceable to the se past wrongs.

Reparations' forward-looking program entails the creation and financing of institutions capable of undoing the wrong.[9] This forward-looking aspect requires addressing the continuing impact of institutional discrimination and domination in contemporary America, both to hold institutions accountable for past race-targeted wrongs and responsible for current and future race-targeted remediation.

The task is a complex one, because the range of institutions and the forms of discrimination are complex. Different types of injury derive from the different discriminatory activities of disparate national, local, and private entities. Each distinctive injury requires a properly tailored form of reparations to undo the harm inflicted by each discrete form of structural and individual discrimination.

Nonetheless, the task is an essential one for any society that claims to be a democracy of equal citizens under law. As reparations activist, attorney, and academic Adjoa Aiyetoro argues,

> democracy requires the correction of oppression or consequences of oppression - substantive democracy. Most of the world would agree that the United States is a democracy. Indeed many tout the United States as being the most advanced democracy. Yet, significant portions of its citizens are living under conditions or vestiges of oppression...Reparations have been advanced as a way to address the continuing inequities that flow from the history of slavery and the Jim Crow Era's de jure discrimination. Slavery and Jim Crow [government

[7] Boxill, *Black Reparations* at 9.

[8] The backwards-looking aspect is often emphasized in proposals to memorialize the dignity wrongs of slavery as an essential aspect of reparations. *See, e.g.,* Carlton Waterhouse, *Total Recall: Restoring the Public Memory of Enslaved African-Americans and the American System of Slavery Through Rectificatory Justice and Reparations*, 14, J. GENDER, RACE & JUSTICE 1 (2011).

[9] *See, e.g.,* Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?,* 19 B.C. THIRD WORLD L.J. 429, 468-76 (1998) (discussing reparations proposals); ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (2004); Kevin Judd, *Empowering Up: Reversing the Economic Legacy of Racial Segregation*, 2 HOWARD HUMAN & CIVIL RIGHTS L. REV. 17 (2018) (detailing the use of Economic, Education, and Political Trust Funds as mechanisms to provide institutional based reparations based on my research).

> created and supported] were the major occurrences of oppression and exploitation of African peoples in the United States that led to the current state of inequality. The demand for reparations to bridge this inequality is not new nor has it been relingushed. ... reparations must be given in order to [obtain] the equality promised in the evolving understanding of a true democracy.[10]

II. REPARATIONS FOR RACE-TARGETED "DIGNITY WRONGS"

State-sponsored, race-targeted oppression inflicts specific and distinctive injuries on persons and groups. Racial oppression is an attack on African Americans' shared humanity and their ability to function as self-governing individuals or communities. The goal of racial oppression is to put the oppressed group in their place, literally and figuratively, by denying the social, political, and cultural access to institutions an opportunities granted by the dominant group.

The core harm justifying reparations is what Bernadette Atuahene calls a "dignity taking,"[11] and what I shall call a *dignity wrong*. Dignity wrongs are distinctive because they are inflicted through (1) race-targeted institutional action (2) destructive of the group's social, economic, political, and cultural standing or its power to engage in self-governance.[12] The core case of dignity wrong is a government attack on specific groups intended to produce their systematic subordination and exclusion on the basis of race. Governmental action also includes inaction, by withdrawing protections as thereby exposing vulnerable groups to race-targeted discrimination and attack.

Some of the core expressions of race-targeted and state-inflicted dignity wrongs include the destruction of social, political, economic, legal, and cultural institutions.[13] Without access to lasting institutions of this sort, African Americans have been and continue to be denied equal standing and power in the American polity.

The race-targeted and institution-destroying dignity wrongs inflicted by state, federal, and municipal governments are significantly different from economic injustice.[14] Economic injustice is primarily a distributive failure that may be remedied by re-allocating the financial

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[10] Adjoa A. Aiyetoro, *Why Reparations to African Descendants in the United States Are Essential to Democracy*, 14 J. GENDER, RACE & JUSTICE, 633, 634-636 (2011).

[11] BERNADETTE ATUAHENE, WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM 31-32 (2014).

[12] Atuahene describes dignity wrongs as both (1) "the failure to recognize an individual or group's humanness," *Id.* at 31; and (2) "the restriction of an individual or group's autonomy based on the failure to recognize and respect their full capacity to reason." *Id.* at 32. I differ from Atuahene in considering dignity wrongs, not as a form of *misrecognition*, but as a form of discipline and production. The state puts African Americans in their place by adopting policies to restrict opportunities, punish non-conformity, and so create a subordinate class of individuals.

[13] *See, e.g.,* Erik K. Yamamoto, et al. *American Reparations Theory and Practice at the Crossroads* 44 CAL. W.L. REV. 7 (2007) (arguing that reparations activism "continues because the economic and psychological wounds of slavery and segregation persist in the form of well-documented discrimination in housing and employment, denial of access to adult health care, high infant mortality, and negative cultural stereotyping.")

[14] Matthew Evans and David Wilkins helpfully distinguish the different backwards-looking and forwards-looking aspects of reparations claims. Matthew Evans & David Wilkins, *Transformative Justice, Reparations and Transatlantic Slavery*, 28 SOC. & LEGAL STUD. 137 (2018).

burdens that different socio-economic groups face when accessing social goods such as work, healthcare, and housing. Economic justice proposes a colorblind or *race-insensitive* response that will benefit everyone, irrespective of the wrong done to them (or, indeed, whether there was a wrong done to them). Whilst economic justice is often designed to benefit everyone, it cannot benefit everyone equally. Such proposals ignore the specific and racially distinctive nature of the dignity wrongs inflicted through slavery and segregation upon African Americans, and the race targeted nature of remedying those wrongs. Lacking the resources to take advantage of economic windfalls, the victims of dignity harms will remain disadvantaged in relative terms.

Dignity wrongs are not so easily solved because they are both more specific and more disparate than economic harms. Race-targeted dignity wrongs often occur piecemeal, localized across different geographic and cultural communities. To account for the injuries inflicted by dignity wrongs, it is essential to detail both *what happened* and *who did it*. A core feature of reparations for dignity wrongs requires identifying the specific ways in which African Americans have been injured and traumatized, often requiring a form of corrective justice to redress the specific damage done.

Reparations serves the vital purpose of uncovering race-based power structures in our society, and in our institutions. The sort of investigation required for reparations often reveals that what we take for granted as a "normal" feature of our institutions and our relation to them is in fact structured by an exercise of force that excluded and disempowered African Americans, or permitted others to do so. These exclusionary and disempowering acts continue to structure many federal, state, local, and private institutions. Their current institutional posture normalizes racial domination through repose A posture of repose allows past, coerced, race-targeted domination to continue unchallenged. Reparations operates to both demonstrate institutions' historical involvement in subjugating African Americans, and to demand some form of restructuring of the institution or of society to end the present and continuing discrimination and disempowerment inflicted by the institution.

III. HR40 Is An Essential First Step to Achieve Reparations for Race-Targeted Dignity Wrongs

Reparations advocates have pursued a variety of tactics to obtain justice for the victims of race-targeted dignity wrongs.[15] At bottom, however, many of these efforts founder for lack of the information necessary to link past wrongs to identifiable individuals and institutions, or to provide the proper context to establish the nature and scope of the harm done. We might know the vague contours of some terrible act of state-sponsored discrimination but lack the details to flesh out the true picture. HR40 is essential to provide that sort of information.

Consider, for example, a state commission organized along the lines proposed by HR40. In 1997, the State of Oklahoma enacted a statute creating a commission to study and propose reparations for the more than one-hundred-and-twenty-five still living survivors of the Tulsa, Oklahoma Race Massacre of 1921. The Commission's Report provided the basis for

[15] Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 Harv. C.R.-C.L. L. Rev. 279 (2003).

subsequent litigation to enforce the Commission's recommendations by the Reparations Coordinating Committee, a group of lawyers led by Harvard Professor Charles J. Ogletree, Jr. and Adjoa Aiyetoro, the chief legal consultant to the National Coalition of Blacks for Reparations in America (N'COBRA).[16] That litigation would have been impossible without the creation of the Oklahoma Commission to Study the Tulsa Race Riot of 1921. The Commission was charged with:

> "undertak[ing] a study to develop a historical record of the 1921 Tulsa Race Riot including the identification of [any] person[ ] who:
> 1. was an actual resident of the Greenwood area or community of the City of Tulsa on or about May 31, 1921, or June 1, 1921; or
> 2. sustained an identifiable loss to their person, personal relations, real property, personal property or other loss as a result of . . . the 1921 Tulsa Race Riot."[17]

The Commission was also instructed to "produce a written report of its findings and recommendations [for the Oklahoma legislature] . . . contain[ing] specific recommendations regarding whether or not reparations can or should be made and the appropriate methods to achieve the recommendations made in the final report."

In essence, the Tulsa Riot Commission mirrors the commission contemplated by HR40, but directed to investigate only one incident of institutional, state- and municipal-instigated, race-targeted dignity wrong.

On February 28, 2001, the Commission published *Tulsa Race Riot: A Report of the Oklahoma Commission to Study the Tulsa Race Riot of 1921* ("Commission Report"). The Commission Report was essential to uncovering hitherto hidden and suppressed facts relevant to political and legal action to obtain reparations for the massacre survivors. The Commission Report, and the subsequent research it inspired, revealed that the circumstances precipitating the massacre reflected a pervasive atmosphere of race-targeted wrongdoing both pursued through and facilitated by the justice system in Oklahoma.

A. A History of the Tulsa Massacre

A brief history of the massacre will help explain the significance of the Commission and its Report. From 1910-1920, segments of the white population of Oklahoma, facilitated by the State, engaged in a program of racial violence.[18] The law enforcement system and the courts engaged in a systematic, institutionalized, race-targeted attack on the political and social standing of African Americans. These African Americans were the self-governing residents

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[16] The Committee was founded by Charles J. Ogletree, Jr., the Jesse Climenko Professor of Law at Harvard Law School, along with Randall Robins, author of *The Debt*. The Committee members included Adjoa A. Aiyetoro, Professor of Law at the University of Arkansas, Little Rock, School of Law; Johnnie L. Cochran, Jr.; Michele A. Roberts, Executive Director of the National Basketball Players Association; Suzette M. Malveaux, Provost Professor of Civil Rights Law and Director of The Byron R. White Center, at the University of Colorado School of Law, Dennis C. Sweet, III, and Alfred Brophy, the D. Paul Jones Chairholder in Law at the University of Alabama Law School, along with many others.

[17] 74 Okl. St. Ann. §8201.

[18] ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND, THE TUSLA RIOT OF 1921: RACE, RECONCILIATION, AND REPARATION (2002).

of the Greenwood District of Tulsa, Oklahoma, a thriving African American residential and business district in the City of Tulsa, popularly known as the "Black Wall Street."[19]

Some of these Tulsans were African American "doughboys": veterans of military service during the First World War, who had returned from France expecting a "new reconstruction."[20] Instead, they were confronted by repeated acts of racial violence. For example, the Oklahoma State Legislature found that 23 African Americans were lynched in Oklahoma between 1911 and 1921.[21] Eight months before the massacre, a mob removed an African American man from an Oklahoma jail and lynched him. Professor Alfred Brophy, one of the Tulsa Riot Commissioners, concluded in his book about the massacre, *Reconstructing the Dreamland, The Tusla Riot of 1921: Race, Reconciliation, and Reparation*:

> Not only did police and prosecutors fail to protect blacks, but when cases reached the courts, judges failed to apply the law equally to blacks and whites. Judges failed to convict whites who attacked blacks, issued harsher sentences to blacks than whites, and sometimes interpreted statutes to allow continued unequal treatment in schools and in voting.

The Tulsa Massacre, which began on May 31, 1921, and lasted through the night and on into June 1, 1921, was precipitated by the rumor of just such a lynching.

On the evening of May 31, 1921, a drunken white mob assembled outside the Tulsa jail They were preparing to lynch Dick Rowland, an African American man falsely accused of attempting to assault a white woman.[22] Some African American men, including World War I veterans, came to the jail to prevent the lynching. A scuffle between the twro groups ensued, shots were fired and "all hell broke loose."[23] The Mayor, acting under color of law, called out local units of the State National Guard and, with the assistance of the police chief of Tulsa, deputized and armed some of the white citizens of Tulsa, many of whom were part of the drunken mob.

Hundreds of white citizens, aided by the State National Guard and the City of Tulsa Police Force, burned down 35 city blocks in the Greenwood district of Tulsa.[24] The Oklahoma State Legislature, adopting the findings of the Riot Commission, acknowledged that:

> The staggering cost of the Tulsa Race Riot included the deaths of an estimated 100 to 300 persons, the vast majority of whom were African-Americans, the destruction of 1,256 homes, virtually every school, church and business, and a library and hospital in the Greenwood area, and the loss of personal property caused by rampant looting by white rioters. The Tulsa Race Riot Commission estimates that the property costs in the Greenwood district was approximately $2 million in 1921 dollars or $16,752,600 in 1999 dollars. Nevertheless, there were no convictions for any of the violent acts against African-Americans or any insurance

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[19] *Id.*
[20] *Id.*
[21] *See* 74 Okl. St. Ann. §8000.1.1 (West 2002).
[22] BROPHY, RECONSTRUCTING THE DREAMLAND.
[23] Alfred Brophy, *Assessing State and City Culpability: The Riot and the Law*, published with COMMISSION REPORT, 153, 156 (2001).
[24] BROPHY, RECONSTRUCTING THE DREAMLAND.

> payments to African-American property owners who lost their homes or personal property as a result of the Tulsa Race Riot.[25]

Overnight, five thousand African Americans became homeless. Three thousand terrorized people fled the city. The rest were rounded up and held against their will in camps staffed by the National Guard. They could only be released if a white employer "vouched" for them. The Red Cross mobilized to provide tents for the thousands who remained.[26]

The State and City's institutionalized dignity wrongs did not end with the massacre. In the aftermath of the massacre, the City of Tulsa promptly enforced unlawful, race-targeted zoning restrictions to prevent the reconstruction Greenwood,[27] and refused to provide economic compensation or to help the victims, many of whom remained housed in tents through the fall and into the winter of 1921.

Equally traumatic, the State and City worked hard to suppress talk of the massacre and the survivors' attempts to seek legal redress. Efforts to seek relief from the court system were unsuccessful and futile. A grand jury called to determine the causes of the Massacre issued indictments against a large number of African Americans, but no whites. "[T]he grand jury believed that the social order had collapsed and that the blacks had staged an uprising." Many of the African Americans indicted were prominent members of the Greenwood Community. Fearing institutionalized, race-targeted reprisal from the State and City, they fled town.[28]

While some African Americans filed lawsuits at the time, over 100 of them were dismissed before even receiving a hearing.[29] Legal redress was stymied by Oklahoma common law doctrine which unconstitutionally limited municipal liability.[30] The law made it difficult, if not impossible, for massacre victims to sustain a claim against the City of Tulsa absent ratification by the City Council that sought to punish African Americans for the massacre.[31]

The City of Tulsa and the State of Oklahoma moved quickly to suppress news of the massacre. All mention of it was excised from official accounts of Oklahoma history. After the massacre, African Americans were not allowed to speak of their experiences,[32] and were not believed when they did. A core dignity wrong inflicted by the State and City was to inflict intense psychological trauma by undermining the remaining Greenwood residents' sense of security, "to place them in a subservient condition, and to enforce a racial caste system that privileged whites and disadvantaged and demeaned African Americans."[33] Even eighty years later, many of our clients, who were survivors of the massacre, were reluctant to

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[25] 74 Okl. St. Ann. §8000.1.3 (emphasis added).
[26] BROPHY, RECONSTRUCTING THE DREAMLAND.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 95-97.
[30] *See* Alfred L. Brophy, *The Tulsa Race Riot in the Oklahoma Supreme Court*, 54 OKLA. L. REV. 67 (2001).
[31] *See* Wallace v. City of Norman, 60 Pacific 108 (Okla. Terr. 1900).
[32] See John Hope Franklin and Scott Ellsworth, *History Knows No Fences: An Overview*, published with the COMMISSION REPORT 21, 26-28 (2001) (discussing suppression of discussion of Riot). *See also* Brent Staples, *Unearthing a Riot*, NY TIMES, December 19, 1999, Section 6 at 64 (same).
[33] Complaint, *Alexander v. Governor of the State of Oklahoma*, 03CV133, Complaint dated February 4, 2003 (N.D. Okl., 2003)

talk about their experience. "Many of them still believe[d] that the state and municipal government will punish them for discussing openly what happened during the Riot."[34]

According the Commission Report, "The 1921 riot is, at once, a representative historical example and a unique historical event. It has many parallels in the pattern of past events, but it has no equal for its violence and its completeness."[35]

In 1997, in an effort to end the "conspiracy of silence" imposed by the State and City in the aftermath of the massacre,[36] the State of Oklahoma commissioned a study to determine liability for the Massacre and make recommendations for restitution for the Massacre's victims. The resulting body, The Oklahoma Commission to Study the Tulsa Race Riot of 1921, made detailed findings revealing the causes and racially discriminatory consequences of the massacre, which were then endorsed by the Oklahoma State Legislature.[37] The Commission determined that:

> The root causes of the Tulsa Race Riot reside deep in the history of race relations in Oklahoma and Tulsa which included the enactment of Jim Crow laws, acts of racial violence…against African-Americans in Oklahoma, and other actions that had the effect of "putting African-Americans in Oklahoma in their place" and to prove to African-Americans that the forces supportive of segregation possessed the power to "push down, push out, and push under' African-Americans in Oklahoma."[38]

According to the legislature:

> Perhaps the most repugnant fact regarding the history of the 1921 Tulsa Race Riot is that it was virtually forgotten, with the notable exception of those who witnessed it on both sides, for seventy-five (75) years. This "conspiracy of silence" served the dominant interests of the state during that period which found the riot a "public relations nightmare" that was "best to be forgotten, something to be *swept well beneath history's carpet*" for a community which attempted to attract new businesses and settlers.[39]

The details of the massacre only became public in 2003, after the HR40-style Commission published its report on the massacre. The Commission found that, to this day, Oklahoma, and in particular, Tulsa, remains racially divided. The Commission's painstaking search through the historical record led to the discovery of much previously unavailable material, and proposed that reparations be paid to the survivors and descendants. When the state refused to make good on those recommendations, the Reparations Coordinating Committee filed a lawsuit, *Alexander v. Governor of Oklahoma*, on behalf of 125 then-living survivors of the massacre, in an attempt to force the City of Tulsa and the State of Oklahoma to follow through on the Commission's recommendations to compensate the still-living victims and the other massacre victims' descendants.

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[34] *Id.*
[35] COMMISSION REPORT at 19.
[36] 74 Okl. St. Ann. §8000.1.5.
[37] *See id.* at. §8000.1.
[38] *Id.* at §8000.1.1.
[39] *Id.* at §8000.1.4 (emphasis added).

B. The Litigation Strategy

Ordinarily, a civil rights law suit alleges a violation of the Equal Protection or Due Process Clauses of the Fourteenth Amendment. The plaintiff then brings suit under Title 42, Section 1983 of the United States Code which provides a means for holding state actors liable for constitutional torts. Such a lawsuit requires that there be some living victim harmed by an identifiable perpetrator who directly caused the harm, and that compensation be available in a determinate amount. In addition, the statute of limitations in Oklahoma provided two years in which to file suit.

Typically, reparations claims lack these factors. In suing on behalf of formerly enslaved people, for example, all formerly enslaved persons have been dead for at least a generation; no Americans living today has directly injured African Americans by enslaving them; descendants of slaves cannot often cannot show harms directly attributable to contemporary individuals; and it is difficult to determine who should get what and how much.[40] However, the Tulsa litigation fit well a traditional civil rights complaint, thanks to the Commission Report.

Unfortunately, the litigation was ultimately unsuccessful. The district[41] and appellate[42] courts were ultimately unpersuaded by that the victims could not have filed suit earlier, and so refused to toll the statute of limitations. Sadly, the families remain uncompensated, Greenwood remains unreconstructed and underdeveloped, and Tula remains a racially segregated city.

C. The Importance of the Commission Report

The Tulsa massacre experience explains the vital importance of HR40. Without the Commission Report, filing suit would have been impossible. The plaintiffs would have lacked the core components of a traditional civil rights complaint.[43] The Tulsa litigation was exceptional because of the existence of a comprehensive record, identifying specific victims, made possible by a commission to study and report the massacre. The report discovered new information and identified the amount of damage done to the victims by the perpetrators. The Commission Report assessed damages in the range of $2 million in 1921 dollars,[44] which the State acknowledged was $16,752,600 in 1999 dollars.[45] Commissioner Eddie Faye Gates managed to trace many of the survivors and their descendants. Each of

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[40] See Eric J. Miller, *Representing the Race: Standing to Sue in Reparations Lawsuits*, 20 HARV. BLACKLETTER L.J. 91 (2004)

[41] Alexander v. Oklahoma, Order filed March 19, 2004 (N.D. Okl. 2004).

[42] Alexander v. Oklahoma, 382 F.3d 1206 (10th Cir. 2004).

[43] For the importance of the traditional civil law framing for reparations litigation, *see* Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*. 40 BOSTON COLLEGE L. REV. 477 (1998). Alfred Brophy has called attempts to bring reparations lawsuits within this framework the "third generation" of reparations activism. *See* ALFRED L. BROPHY, REPARATIONS PRO & CON 62-74 (2006); Alfred L. Brophy, *ReparationsTalk: Reparationsfor Slavery andthe Tort Law Analogy,* 24 B.C. THIRD WORLD L.J. 81, 82 (2004). *See also* Erik K. Yamamoto, et al. *American Reparations Theory and Practice at the Crossroads* 44 CAL. W.L. REV. 7 (2007).

[44] Commission Report at 149.

[45] 74 Okl. St. Ann. §8000.1.3 (emphasis added).

these factors distinguished the *Alexander* case from other reparations lawsuits not based upon a detailed, official historical record.

Action to remedy dignity wrongs requires detailed, accurate historical information exposing what happened. The Tulsa Commission was able to provide a robust, accurate, detailed , report because its board membership included historical experts on the massacre, activists able to track down massacre survivors, and legal experts able to interpret the nature of the City's and State's wrongdoing. HR40 §4 contemplates just this sort of board, requiring selected members to be qualified for service by virtue of their "education, training, activism or experience, particularly in the field of African-American studies and reparatory justice."

Without detailed information regarding the Tulsa massacre, the Reparations Coordinating Committee would have been unable to file a lawsuit. The Commission simply had more and better resources than a small litigation team could amass, and the litigation ream relied heavily on the report, as well as the documents it had uncovered and placed in the public domain for everyone to access.

It is much harder, but not impossible to discover this amount of detailed information about the practices of federal, state, municipal, and even private institutions in supporting the peculiar institution of slavery. For the most part, however, the problem is not the lack of information, but—as HR40 recognizes—accessing the materials and compiling the information in a single database. There are a variety of precedents for this sort of work, albeit on a much smaller scale. The Tulsa Commission is one of them.

Several local ordinances, for example, have required businesses to disclose their contacts with slavery as a condition of doing business with a municipality. Two of these are the Slavery Era Insurance Act in California[46] and the Slavery Era Disclosure Ordinance.[47] Some such regulation might be used by the Federal Government to require private institutions to search through their records and make appropriate disclosures as a cost of doing business with the government.

HR40 is also essential because financial compensation for the dignity wrongs of race-targeted discrimination is not enough. Reparations aims to empower African Americans socially, economically, politically and culturally. The goal is to create African American institutions capable of providing effective organization and leadership aimed at reconstructing the institutions destroyed by governmental action. This sort of political organization requires training, funding, and other forms of support.

Litigation is always, in reparations terms, a limited remedy.[48] Litigation is an insufficient vehicle for generating new community structures to replace those destroyed by systematic

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[46] Cal. Ins. Code §§ 13810-13813 (West Supp. 2019).

[47] *Business, Corporate and Slavery Era Insurance Ordinance*, MUN. CODE OF CHI. § 2-92-585 (2002). For a detailed discussion, see, e.g., Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003).

[48] At the very least, community action is necessary to obtain the sort of empowerment contemplated by reparations. *See, e.g.* Adjoa A. Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N'cobra) and its Antecedents*, 16 TEX. WESLYAN L. REV.

institutional action emblematic of dignity wrongs. A lawsuit can require the state to pay monetary damages to the victims. In addition, if necessary a lawsuit could enjoin the state from adopting any policy that would continue to harm the victims. These remedies are, however, only a part of redress contemplated by reparations, which demands action to identify and redress the dignity wrong perpetrated upon the victims.

In the Tulsa massacre, the dignity wrong was massive, race-targeted violence that razed a whole community, including its residential and business districts, and social institutions including schools, a library, and a hospital. The City and State inflicted catastrophic mental and emotional trauma upon a generation of African American Tulsans, The City and State prevented the residents of Greenwood from rebuilding their town, and reduced them to a dependent state. And to cover its tracks, the City and State erased the massacre from the official history of the state, and suppressed reporting of the massacre, so that subsequent generations did not know about the massacre or did not believe that it had happened.

The damage wrought by the Tulsa race massacre extended beyond the victims and their descendants. It impacted every African American who lived in Tulsa, and indeed, in the State of Oklahoma. The City and State communicated a clear message about African Americans subordinate status. The State and City destroyed the social, political, legal, economic, and cultural institutions and infrastructure created by African Americans in the Greenwood district of Tulsa. The City and State then prevented their reconstruction. Reparations in Greenwood would thus take the form of investing in local institutions, run by African Americans, employing African Americans, serving African Americans, because it was these African American community institutions and infrastructure that was targeted for destruction.

During the Tulsa litigation, the Reparations Coordinating Committee discovered various groups and grassroots organizations who were attempting to provide this sort of organization and leadership on behalf of the African American community, but who lacked the resources to make the massive social change required to remedy the dignity wrongs inflicted by the Tulsa massacre.

Members of the Reparations Coordinating did participate in dialog with organizations formed in the wake of the Commission's Report. Many of these activists wanted real reparations: investment in providing meaningful employment, ownership, and educational opportunities for the residents of Greenwood to enable them to rebuild the district and restore the community. However, the Reparations Coordinating Committee could offer only very limited help because it lacked a political organization to match its litigation organization. Furthermore, as a non-profit organization, the Reparations Coordinating Committee simply lacked the financial resources to devote to this sort of political activity. It was clear that a simple financial payment to the survivors might take care of our clients' health needs in their old age (the Reparations Coordinating Committee's youngest client was 80 years old). However, such a payment would do little to restore the social and political power of the community destroyed in the massacre.

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687 (2010); Kaimipono David Wenger, *From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution,* J. CIV. RIGHTS & ECONOMIC DEVELOPMENT 697 (2011).

IV. FEDERAL GOVERNMENTAL RACE-TARGETED DISCRIMINATION

From its inception, the United States sought to create and maintain a system of race-targeted domination. The creation of the federal government itself, through a Constitution that replaced the loose alliance of states envisaged by the Articles of Confederation, embraced a commitment to the subjugation of African Americans. "The structure and content of the original Constitution was based largely on the effort to preserve a racial caste system—slavery—while at the same time affording political and economic rights to whites."[49]

My focus in this section is necessarily on a few illustrative events to demonstrate the federal government's active participation in dignity wrongs. A more comprehensive account for the HR40 Commission to undertake.

A commonplace feature of constitutional history is that in the antebellum period, the Constitution delegated most policy-making regarding slavery to the states. The federal government's main involvement, on this view, was to designate which states were to be slave states and which to be free. Though that intervention was significant enough to lead to a civil war, nonetheless it underestimates the day-to-day activities of the federal government in supporting slavery.

Though the dominant feature of federal government during the antebellum period was its relatively small size, that government nonetheless provided direct support to slavery in a variety of ways. Historian Leon Litwack cataloged just a few of these federal initiatives:

> Reflecting the popular conception of the United States as a white man's country, early Congressional legislation excluded Negroes from certain federal rights and privileges and sanctioned a number of territorial and state restrictions. In 1790, Congress limited naturalization to white aliens; in 1792, it organized the militia and restricted enrollment to able-bodied white male citizens; in 1810, it excluded Negroes from carrying the United States mails; in 1820, it authorized the citizens of Washington, D.C., to elect "white" city officials and to adopt a code governing free Negroes and slaves. Moreover, it repeatedly approved the admission of states whose constitutions severely restricted the legal rights of free Negroes.[50]

Furthermore, the role of the federal military in supporting the institution of slavery is often overlooked. The federal government used slave labor in military building projects; provided military assistance in the recapture of escaped enslaved people; and authorized military deployments that facilitated the development of westward expanding slave states.[51]

For example, the federal buildings housing the government in the District of Columbia were built using slave labor, and slaves worked in construction on military bases and naval yards. As Southern States developed Slave Patrols to capture escaped enslaved people,[52] so the

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[49] MICHELLE ALEXANDER, THE NEW JIM CROW 25 (2012).
[50] LEON F. LITWACK. NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES (1961)
[51] *See, e.g.,* DAVID F. ERICSON, SLAVERY IN THE AMERICAN REPUBLIC: DEVELOPING THE FEDERAL GOVERNMENT, 1791-1861 (2011).
[52] RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960s (2016).

federal government used the military to assist in their capture and return.[53] Finally, both conflict over returning escaped enslaved persons, as well over land to accommodate the expansion of slave states, embroiled the military in wars with Native Americans and European nations and their colonies on the United States' western and southern borders.[54]

After the Civil War, the states ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. These Amendments were designed to empower formerly enslaved African Americans socially and politically. The Amendments outlawed slavery, guaranteed citizenship, and purported to promote equality, provide legal protections, and protect the right to vote. To bolster these Amendments, Congress passed a series of statutes designed to permit individuals to hold the states accountable for constitutional violations. However, with the end of Reconstruction, the Constitution's protects existed in name only, as far as the rights of African Americans were concerned.

For example, Southern states at the end of the Civil War sought to re-establish slavery by other means. Since the 13th Amendment had prohibited slavery "except as a punishment for crime whereof the party shall have been duly convicted,"[55] some Southern states sought to use incarceration as a substitute for slavery. State vagrancy laws, used to persecute free slaves during the antebellum period, were now used to incarcerate African American workers or force them to remain tied to labor-intensive, poorly paid agricultural jobs.[56]

In the State of Alabama, convict leasing began in 1846 and lasted until July 1, 1928. "Convlict leasing generated about 6 percent of the state's total revenue in these years."[57] One of the beneficiaries was Tennessee Coal, Iron & Rail, already in business during the Confederate years. It was taken over by U.S. Steel in 1907. Possibly the greatest impetus to the continuance of convict labor in Alabama was to depress the union movement.[58]

All told, at least 40,000 state prisoners were leased to private enterprises, mostly between 1900 and 1922; in addition, 51 of Alabama's 67 counties leased their prisoners. During those twenty years the State of Alabama received $17 million in leases (about $250 million in today's dollars). Companies saved labor costs, and they even got additional income by spending less on food and lodging than what the state paid them.

Death rates among leased convicts were approximately ten times the death rates of prisoners in non-lease states. In 1873, for example, twenty-five percent of all black leased convicts died. There is what locals call a "U.S. Steel cemetery" in a deserted portion of Birmingham that may contain the bodies of African Americans who died during the convict lease system.

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[53] ERICSON, SLAVERY IN THE AMERICAN REPUBLIC AT 80-107.
[54] *Id.*
[55] U.S. Const. Amend XII.
[56] RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 115-117 (2016)
[57] DAVID OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 80 (1996).
[58] *See* MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 (1996).

While the practice of convict leasing was nominally legal under the 13th Amendment, which permits involuntary servitude if one is "duly convicted" of a crime, many of the leased African Americans were not so convicted, and the public records reflect that fact. Many African Americans were not even charged before being leased. The State of Alabama appears to have engaged in widespread dignity wrongs illegal even under the laws that existed as they participated in this form of "slavery by another name."[59]

Even the New Deal, a period often associated with broad-based social and economic justice, brought with it broad policies of race-based segregation and domination. Boris Bittker observed in his pathbreaking book, *The Case for Black Reparations*:

> the discriminatory policies of federal agencies administering residential and business loans and guarantees, public housing projects, agricultural extension services, farm-price supports, and other economic and social programs…have only gradually been subjected to the constitutional standard of equality that in theory has always been applicable.[60]

Every aspect of the federal government has been touched by racial discrimination. The federal government perpetrated massive, race-targeted, dignity wrongdoing upon African Americans through access to housing, education, health care, property law, agricultural policy, military policy, and criminal justice, to name just a few.

Segregationist federal programs did not operate in isolation from state programs and state law. Whilst segregation takes many forms, the most basic separates African Americans physically and geographically from whites, through separate residential and work districts, and separate facilities in shared work or residential spaces. Federal law played a major role in creating these separate districts and facilities.

For example, the GI Bill is famous for creating a generation of opportunity for white servicemen returning to the United States from war service. The Bill funded both residential and educational opportunities, providing financing to purchase a house and go to college. The Bill effectively created post-war suburbia, which the federal government facilitated by building roads and communications networks to enable the flight from city to the suburbs.

This movement of whites to the suburbs is often presented as the private choices of white city-dwellers fleeing increasingly African American cities. Whatever the truth in that image, the federal government was not a passive onlooker, but active driver of white flight. Under the GI bill, the Department of Veterans Affairs "denied African Americans the mortgage subsidies to which they were entitled,"[61] so that demobilized African Americans could not afford the suburban homes available to white veterans.

Even if they could, various New Deal programs, such as the Public Works Administration

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[59] DOUGLAS BLACKMON,. SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II (2008).
[60] BORIS BITTKER. THE CASE FOR BLACK REPARATIONS (1973).
[61] RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 167 (2017).

Made actively segregated the areas available for housing. The New Deal policies of the Roosevelt administration are often praised as a form of economic justice, lifting up all the people of America out of the Great Depression. Certainly, African Americans benefited from the federal programs. Nonetheless, the programs were administered as a racial caste system to ensure that African Americans remained relatively disadvantaged as compared to whites. Even the New Deal imposed identifiable race-targeted dignity wrongs upon African Americans, the effects of which persist to this day.

The federal government's official policy maintained segregation in providing affordable housing during the 1930s and 1940s. Unofficially, however, the federal government increased both segregation and African American housing density. For example, the government would effect a taking of housing occupied by African Americans, remake the now-cleared neighborhood for whites, and requiring pre-existing African American neighborhoods to absorb the displaced black homeowners.[62]

> A result of the government program, therefore, was the increased population density that turned the African American neighborhoods into slums.[63]

Other government agencies were also in on this act. For example, in the 1930s the Fair Housing Administration developed amortized mortgages. These mortgages, offered at a low rate of interest, included not only the interest on the loan, but principal as well, so that by the end of the loan period, the mortgagee would own the house. The Federal Housing Administration, however, created the "redlining" of neighborhood: a policy that officially favored granting loans to whites seeking to purchase a home in the suburbs, and denied loans to African Americans constrained to buy in the cities. Another 1930s creation, the Homeowners Loan Corporation, created to rescue defaulting homeowners, awarded amortized mortgages to whites that were denied to African Americans.[64]

> Because the FHA's appraisal standards included a whites-only requirement, racial segregation now became an official requirement of the federal mortgage insurance program.[65]

The federal government also engaged in the race-targeted immiseration of rural African American landowners. The federal practice of discriminatorily denying credit to African American farmers was described by the district court in a decision in the case of *Pigford v. Glickman*.[66] The court explained that longstanding historical discrimination by the United States Department of Agriculture ensured that federally funded credit and benefit programs available for *all* farmers were specifically withheld from African American ones.[67] Whilst the statute was race neutral, the local committees that awarded funding were white dominated. For decades, local white commissioners denied credit and benefits to African American farmers. The district court acknowledged that this federal action:

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[62] *Id.* at 21-22.
[63] *Id.* at 22.
[64] *Id.* at 64-65.
[65] *Id.*
[66] 185 F.R.D. 82 (D.D.C. 1999).
[67] *Id.* at 87.

> has had a devastating impact on African American farmers. According to the Census of Agriculture, the number of African American farmers has declined from 925,000 in 1920 to approximately 18,000 in 1992. The farms of many African American farmers were foreclosed upon, and they were forced out of farming. Those who managed to stay in farming often were subject to humiliation and degradation at the hands of the county commissioners and were forced to stand by powerless, as white farmers received preferential treatment.[68]

Federal action was urgently needed, in part to remedy the race-targeted discriminatory acts of local whites. In addition to the race-targeted violence and intimidation experienced by many African American farmers, white Southerners also engaged in a form of financial terrorism designed to force rural African Americans to sell their land.

Following the end of reconstruction and the introduction of Jim Crow, white land owners in the South engaged in a variety of schemes designed to dispossess black landowners of their property. One of the most common is to force partition sales of land held in common. Whenever one of the tenants in common sold her interest in the land, a predatory speculator could buy that interest, then sue to have the property partitioned. Where the property belonged to African Americans, courts often ignored the preferred remedy of partitioning the land, electing instead to force a partition sale of the whole property, often to a white purchaser. Although each tenant would receive a share of the profits, the original African American tenants often did not want to sell, but to stay on the land.[69]

The effect has been to immiserate black farmers on the basis of their race (a dignity wrong). Many of these farmers moved from rural areas to urban centers, where they were funneled into overcrowded segregated neighborhoods. In this way, the UDSA and its predecessor organizations contributed to the creation of the inner-city African American ghetto. Our currently segregated urban, suburban, and rural landscape is thus not—as the Supreme Court sometimes assumes—the unmediated associational choice of white and African Americans: it was a planned decision thrust upon them by the federal government, aiding and abetting state and local governments.

The creation of white suburbia and urban overcrowding had a major impact upon housing, education, and crime. Federal policy, along with state and local housing regulation, created

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[68] *Id.* at 87-88.

[69] *See, e.g.,* Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss*, 2005 WIS L .REV. 557 (2005); Thomas W. Mitchell, *From Reconstruction to Deconstruction, Undermining Black Ownership through Partition Sales of Tenancies in Common*, 95 NorthWestern U L. Rev 505 (2001). *See also* Spencer D. Wood & Jess Gilbert, *Returning African-American Farmers to the Land: Recent Trends and a Policy Rationale*, REV. BLACK POL. ECON., Spring 2000; Robert Zabawa, *The Black Farmer and Land in South-Central Alabama: Strategies to Preserve a Scarce Resource*, 19 HUM. ECOLOGY 61 (1991). Professor Thomas Mitchell, the national expert on this form of land theft, argues that lack of data serves (1) to normalize the erroneous belief that race-targeted theft of African American land is ancient history, and (2) to undermine efforts to stabilize (let alone undo) the dignity wrong of race-targeted land expropriation. However, the legal and political regimes facilitating land theft are still in operation. To combat this sort of land theft, Professor Mitchell served as the Reporter, principal drafter, of the Uniform Partition of Heirs Property Act (UPHPA), a uniform act that addresses partition sales of African-American-owned tenancy-in-common property and is designed to protect African American property valued at several billion dollars. However, whilst the act may prevent future predation of African American land, it cannot restore land already stolen. Accordingly, HR40 is urgently needed to help reveal the historical practice of land expropriation.

suburban tracts of "single-family homes physically separated from one another by expanses of yard and often fences, in a setting ideally removed from traffic, commercial life, and workplaces."[70]

At the same time, federal, state, and municipal policies, as well as demographic movement from the South, produced increasingly overcrowded racially dense cities. Federal housing policy contributed to the "hypersegregation"[71] of certain neighborhoods in large metropolitan cities: areas in which the African American population is tightly packed into minority neighborhoods clustered together near the center of a city without contact with whites, who reside far away from the black neighborhoods. The effect of federal, state, and local policies:

> was often to concentrate the poor and minority families in areas quite far removed from the city and lacking in basic amenities such as shops, jobs and good public transport.[72]

Combined with other federal policies, the government helped create what Harvard philosopher Tommie Shelby has called the moral abomination of the African American ghetto: a space in which federal, state, and municipal governments have forfeited their legitimacy thanks to their failed social policies.[73]

The segregation in housing was matched by a federal policy of maintaining or promoting segregation in education. The Veterans Administration and the Federal Housing Administration pursued similar policies with regard to education. Whilst the FHA promoted the continued segregation of school children, the VA directed white veterans to four-year colleges and African American veterans to trade schools.[74]

These federally-sponsored educational disadvantages had a knock-on effect on employment, which was also already the subject of discriminatory federal policies. For example, the Veterans Administration routinely engaged in "arbitrary, discriminatory, and indifferent treatment of blacks."[75] In the Southern States, the United States Employment Service, which operated as a job placement service for unemployed veterans, coerced overqualified African American servicemen into low-paying, unskilled jobs under penalty of losing their unemployment benefits.[76]

> A 1947 survey conducted by scholar Howard Johnson found that "of 1,700 veterans employed in the Veteran's Administration in one southern

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[70] Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration since 1950*, 2010 U. CHI. L. FORUM 141, 148 (2010).
[71] *See, e.g.,* Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373 (1989); ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT (2012).
[72] DAVID GARLAND, THE CULTURE OF CONTROL 84 (2001).
[73] *See Tommie Shelby, Dark Ghettos: Injustice, Dissent, and Reform* (2016).
[74] *Id.* at 22.
[75] Hilary Herbold, *Never a Level Playing Field: Blacks and the GI Bill*, 6 J. BLACKS IN HIGHER ED. 104, 105 (1994-1995).
[76] David H. Onkst, *"First a Negro... Incidentally a Veteran": Black World War Two Veterans and the G. I. Bill of Rights in the Deep South, 1944-1948*, 31 J. SOC. HIST. 517, 520-23 (1998).

> state, only seven are Negroes," despite the fact that blacks comprised a third of all southern veterans at the time.[77]

The federal government's residential policy also had an effect on perceptions of criminality. White suburbanites experienced the "declining importance of local loyalties and face-to-face interaction settings; and the increased privatization of individual and family life."[78] This privatization, however, was also experienced as isolation and relative vulnerability to outsiders, also known as "stranger danger."[79] In these racially homogenous suburbs, the quintessential stranger was an African American one. The political creation of the white suburb produced a fear of the black "other" that justified harsh crime policies leading, through a variety of routes, to our current system of mass incarceration.[80]

V. REPARATIONS AND RESTORATIVE ACTION

HR40 proposes recommending remedies for the dignity wrongs justifying reparations. I shall conclude by suggesting some of the obstacles to reparatins litigation. There are few legal options for pursuing reparations, absent some action by Congress to toll the statute of limitations.

A. Litigation

The controlling slavery reparations case is *Cato v. United States*.[81] An African American sued the United States government for the enslavement of her ancestors and for continuing discrimination on the basis of race.[82] She sought money damages and an official apology from the United States government.[83]

Because Cato did not specify the legal basis of her lawsuit, the district and appellate courts attempted to determine whether there was *any* theory of liability under which she could amend her complaint and thereby avoid dismissal of her case.[84] The court identified two possible grounds under which to bring a reparations lawsuit:

(1) The Tucker Act, 28 U.S.C. § 1491, by which the federal government consents to suit for money damages in cases not sounding in tort. *See United States v. Mitchell*, 463 U.S. 206, 214 (1983);

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[77] Herbold, *Never a Level Playing Field* at 105.
[78] DAVID GARLAND, THE CULTURE OF CONTROL 85 (2001).
[79] Simon, *Consuming Obsessions* at 149.
[80] *See, e.g.,* Garland, Culture of Control. *See also* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1874 (2000) (suggesting suburbanites ability to externalize consequences of criminal punishment onto urbanites tends to rachet up the level of punishment).
[81] 70 F.3d 1103 (9th Cir. 1995).
[82] *Id.* at 1106.
[83] *Id.*
[84] The *Cato* court considered a relatively comprehensive range of rationales for a reparations suit, including: the Federal Tort Claims Act; the Indian trade and Intercourse Act, 25 U.S.C. § 177; the Thirteenth Amendment; and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 402 U.S. 388 (1971). However, the court was positively unable to identify any legal basis under which a reparations claim could be brought. *Cato*, 70 F.3d at 1105, 1111.

(2) The Administrative Procedures Act, 5 U.S.C. § 702, under which the government may be liable for non-monetary relief.

The *Cato* court held that the "continuing violations" doctrine, whereby a suit is permissible so long as the violation from which it results continued through the time limit of the applicable statute of limitations, may apply to permit such a suit.[85] The court held, however, that there was no right to sue the government for the acts complained of, and so the question of whether the action was time-barred was immaterial to the resolution of the case.[86]

However, neither statute straightforwardly permits relief. To succeed under the Tucker Act, a plaintiff must sue in the Federal Circuit, and demonstrate that substantive law provides a basis for damages, such that "the source of substantive law 'can fairly be interpreted as *mandating* compensation by the Federal Government for the damages sustained.'"[87]

However, both *Cato* and *Hohri v. United States*,[88] raise substantial barriers to bringing suit. Both cases preclude suit under the Thirteenth Amendment, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[89] and under the Federal Tort Claims Act.[90] *Cato* also held that analogies with Native American law were inapposite. In addition, "there is no cognizable avenue for litigating a complaint about the judgment calls of legislators in their legislative capacity,"[91] and such claims may present a non-justiciable political question. Most damagingly, the *Cato* court saw its task as that if identifying any theory of liability under which Cato could amend her complaint and thereby avoid dismissal of her case. Yet the court was positively unable to identify any legal basis under which a reparations claim could be brought.[92]

Of course, simply because the court could not recast Cato's claims in a manner that would avoid a motion to dismiss does not indicate that there is no way to do so. What is required for this type of lawsuit is an identifiable government official whose discriminatory act amounts (perhaps due to deliberate indifference) to the denial of constitutionally protected rights to a discrete set of individuals.

However, for such a suit to succeed, some act must be found whose effects can be said to be continuing to the present day. *Hohri* provides a particularly interesting comparison. The court held that "[o]nly one of the constitutional provisions on which plaintiffs rely can fairly

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[85] The *Cato* court primarily addressed sovereign immunity; it did not consider the statute of limitations dispositive. *See id.* at 1107.
[86] Cato, 70 F.3d at at 1109.
[87] *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984) *aff'd* 847 F.2d 779 (Fed. Cir. 1988) (emphasis added).
[88] 586 F. Supp. 769 (D.D.C. 1984) *aff'd* 847 F.2d 779 (Fed. Cir. 1988) (dismissing Japanese American Internment victims reparations claims on statute of limitations grounds).
[89]402 U.S. 388 (1971. *See Cato*, 70 F.3d at 1110 (Thirteenth Amendment, *Bivens*); *Hohri*, 587 F. Supp. at 782 (*Bivens*).
[90] Tort claims brought under the Federal Tort Claims Act (FTCA) are unlikely to succeed because of statute of limitations issues. *See Cato v,. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995); *Hohri*, 587 F. Supp. at 793.
[91] *Cato*, 70 F.3d at 1110.
[92] *Id.* at 1105, 1111.

be interpreted to mandate compensation: the Fifth Amendment "takings" clause."[93] The *Hohri* plaintiffs alleged that three types of property were "taken:"

(1) property confiscated by federal authorities;
(2) property lost as a result of the government's exclusion of plaintiffs from homes and businesses;
(3) "vested constitutional rights" lost as a result of evacuation and internment.

Although the constitutional rights "taking" does not fit under a Takings Clause analysis,[94] the court held that the *Hohri* plaintiffs were able to state a claim under the Takings Clause on their other theories.[95] However, both the takings and the contract claims were barred under 28 U.S.C. § 2401(a), which imposes a six-year statute of limitations on such actions.[96] While, in dissent, Judge Baldwin of the Court of Appeals believed that the plaintiffs should be permitted to equitably toll the running of the statute of limitations on the grounds that the federal government fraudulently concealed information relating to the military necessity for relocating and interning Japanese Americans during World War II,[97] that argument is not available to most reparations claims.

More likely to succeed is the sort of lawsuit represented by *Pollard v. United States*,[98] a case brought by the survivors of the infamous Tuskegee Syphilis Study. The study was conducted by government physicians, who purported to treat the study subjects, all of whom were African American men. Instead, the doctors provided placebos in order to engage in a longitudinal study of the effects of syphilis. That plaintiffs sought damages under a theory of wrongful neglect. Because the physicians had concealed the non-treatment from the subjects, the court tolled the statute of limitations. However, there is usuall no evidence of willful misinformation by the government in any reparations lawsuit, and so the statute of limitations remains a significant obstacle.

B. Legislation

There are a variety of legislative solutions that would permit some form of reparations litigation.

(1) passage of H.R. 40, or some variant thereof, requiring Congress to create a commission to determine whether reparations are owed to the descendants of slaves, and determining how to apportion the money;
(2) passage of an act, similar to section 354.6 of the California Code of Civil Procedure, extending or waiving the time in which a reparations suit may be brought;
(3) passage of a series of acts, similar to Chapter 94-359 passed by the Florida State Legislature (the Rosewood Reparations Act), which would require that individual communities or companies compensated the victims of discrete acts of racial

[93] *Hohri*, 586 F. Supp. at 782.
[94] *Hohri*, 587 F. Supp at 783.
[95] *Id.* at 784.
[96] *Id.* at 784, 791-91.
[97] *Hohri*, 847 F.2d at 708 (Baldwin, Circuit J., dissenting).
[98] 384 F. Supp. 304 (M.D. Ala. 1974).

> harassment or violence or their descendants for the acts perpetrated by those communities or companies.

Of these, the best option, is passage of H.R. 40. H.R. 40 mirrors PL 100-383, 50 U.S.C. app. 1989, which granted reparations to Japanese American victims of the government's internment policy (in other words, resolving the issues litigated in *Hohri*), and also Aleut Americans who were forced, for military reasons, to vacate their islands during World War II. The Act permitted the federal government to appropriate 1,250,000,000 to create a trust fund out of which reparations to each eligible individual of $20,000 was to be paid. H.R. 40 does not go so far as to require such payments, but rather requires a commission to examine the "role which the Federal and State governments of the United States supported the institution of slavery in constitutional and statutory provisions,"[99], to "recommend appropriate remedies,"[100] and to determine "[h]ow, in consideration of the Commission's findings, any…forms of compensation to the descendants of African slaves is warranted."[101]

C. Extension or Waiver of Statutes of Limitations Filing Periods

Because statutes of limitations are more a "legislative grace" than a "fundamental right," they are subject to a "large degree of legislative control."[102] Accordingly, the statute of limitations preventing suits against the government, or against other entities that profited from slavery or Jim Crow segregation may be extended or waived by appropriate legislation.[103] An example of such legislation already exists: Cal. Code Civ. Proc. § 354.6(b) provides that:

> Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War slave forced victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.

The section was enacted to permit the victims of slave or forced labor who worked in Nazi concentration camps to bring suit against German corporations who employed slave laborers during the Second World War. Germany has created a variety of Slave Labor Reparations funds under various international treaties which permitted a suit for reparations to be filed, at the latest, on November 7, 1999.[104] However, such treaties were subject to a ten year statutes of limitations. Id. at 463. In order to permit slave or forced labor victims or their heirs to bring suit, the California legislature extended the filing deadline until

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[99] HR40 § 3(b)(2).
[100] HR40 § 3(b)(7).
[101] HR40 § 3(b)(7)(C).
[102] *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).
[103] *See, e.g.,* Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68 (2005).
[104] *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 448 - 456 (D.N.J.,1999). In addition, the *Iwanowa* court found that Iwanowa's forced labor claims raised nonjusticiable political questions, in part because foreign policy issues are to be determined by t"he political departments of the government--the executive branch and the legislative branch. . . . [W]ar reparations fall within the domain of the political branches and are not subject to judicial review." *Iwanowa*, 67 F.Supp.2d at 485.

December 31, 2010. Cal. Code Civ. Proc. § 354.6(c).[105] Subsequently, however, the section was determined to be unconstitutional, because it usurped Congress's power to regulate foreign affairs.[106] The district court failed to comment upon the legality of the statute of limitations provision,[107] and so it would appear that such an extension of a statute of limitations would pass constitutional muster.

C. Targeted Legislation

There are a variety of specific acts of discrimination that may be amenable to a legislative solution, as exemplified by the response of the Florida legislature to the treatment of the descendants of the Rosewood massacre. In passing Chapter 94-359, the State of Florida acknowledged "local government officials were on notice of the serious racial conflict in Rosewood . . . and had sufficient time and opportunity to act to prevent the tragedy, and nonetheless failed to act to prevent the tragedy." The legislature further acknowledged that victims who were living in Rosewood at the time of the racist attacks upon them "each suffered compensable damages of at least $150,000," and appropriated $500,000 to compensate "African-American families of Rosewood, Florida, who demonstrate real property and personal property damages sustained as a result of the destruction of Rosewood."

A noteworthy features of the successful state-sponsored reparations legislation, whether tolling the statue of limitations or directly compensating the survivors or descendants of racial violence, is that the remedy is targeted to an identifiable wrong. Targeted remediation requires historical research to identify particular agents and acts of discrimination, and the relevant group of potential claimants. That historical inquiry makes possible legislation framed in a manner much closer to a traditional individual rights claims. These forms of reparative legislation are therefore much more closely related to the Japanese American internee claims and legislation. Likewise, H.R. 40, though having a much greater scale, is similarly structured to traditional civil rights remediation. This sort of legislative initiative provides an opportunity to provide justice to restore and empower communities based on the wrong done and the harm they continue to suffer. Along the way, HR40 enables us to educate the public in diverse ways about the continuing effects of chattel slavery and Jim

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[105] "Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010." Cal. Code Civ. Proc. § 354.6(c).

[106] *See In re: World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001).

[107] The court held that the section 354.6 "(1) . . . demonstrate[s] a purpose to influence foreign affairs directly, (2) the statute targets particular countries, (3) the statute does not regulate an area that Congress has expressly delegated to states to regulate, (4) the statute establishes a judicial forum for negative commentary about the Japanese government and Japanese companies, (5) the Japanese government asserts that litigation of these claims could complicated and impede diplomatic relationships of the countries involved, and (6) the United States, through the State Department, contends that section 354.6 impermissibly intrudes upon the foreign affairs power of the federal government." *Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1173. *But see Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739 (9th Cir. 2001) (permitting suit under Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807, as only indirectly impacting foreign affairs). The district court also dismissed claims brought by United States nationals against the Japanese government in a separate opinion, entered on September 21, 2000, holding that their claims were barred by a treaty between the United States and Japan waiving reparations. *In re: World War II Era Japanese Forced Labor Litigation*,114 F. Supp. 2d 939, 945 (N.D. Cal. 2000).

Crow laws, as well as drawing analogies to legislation that has already passed in the various states.

VI. CONCLUSION

The federal government has been slow to acknowledge the multiple ways it has actively participated in, and passively facilitated, race-targeted dignity harms that have a continuing effect on African American communities throughout this nation. Many other institutions have taken a leadership role in addressing the wrongs of slavery and segregation, and seeking to provide some form of restorative justice. It is time that Congress joined the various states, municipalities, universities and private organizations investigating the invidious legacy of the slave trade so as to promote a frank and open-minded discussion of the impact of slavery on race in America.