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*43 How. L.J. 171***LENGTH:** 20877 words**COMMENT:** The Alchemy and Legacy of the United States of America's Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations**NAME:** Donald Aquinas Lancaster, Jr.\*

**BIO:** \* Donald A. Lancaster, Jr., MPA, graduated from California Western School of Law in December of 1999, with a Juris Doctor degree. He has since accepted a position at Preovolos, Ward and Kiser in San Diego, California, and will begin his legal career in both civil litigation and corporate law. The following is a list of people who, through love, academic advice or professional guidance, contributed to this work on African American reparations. Foremost, Donald A. Lancaster, Jr. would like to thank God from whom all blessings flow. Additionally, Mr. Lancaster credits the four most important women in his life, Sharon McKinley, Debra McKinley, Deborah McKinley, and Ann Harris for instilling in him the importance of pride and heritage, both of which gave birth to this labor of love. He also would like to thank Professor Matthew Ritter, California Western School of Law; Regina Lockett, Howard University School of Law; and Shlyn Bruton, San Diego State University for their critique and thoughtful input. Finally, Randa Trapp and the brothers of Phi Beta Sigma Fraternity, Inc. deserve praise for their continued support and guidance with respect to all of Mr. Lancaster's personal and professional endeavors.

**SUMMARY:**

... In reaching back over 100 years, a series of questions must be answered: How did slavery and segregation affect each generation's quality of life with respect to education, property ownership, and employment? Did slavery and segregation impede their ability to fulfill the American Dream? How did slavery and segregation affect subsequent generations of Lancasters? Finally, considering slavery and segregation, what legacy could these individuals leave their issue? ... The federal government's efforts to deny African Americans access to education, property ownership, and employment through slavery and segregation, indicates that the United States intended African Americans to be subordinate in every respect to Anglo Americans, supporting an ideology of Anglo American superiority in all aspects of American life. ... Therefore, whereas restitution would be the ideal remedy in asserting a reparations claim for education and employment discrimination, a damages remedy would be more beneficial to African Americans when addressing discrimination in property ownership. ... Defining the slave, Nigger, Negro, colored, Afro-American, black, and African American is important because these are the people who were victims of slavery and segregation, and their descendants are entitled to reparations. ... In measuring the effects of slavery and compulsory segregation with respect to education, property ownership, and employment, the effects of the federal government's sanction of inequality has and continues to have a lasting effect on generations of African Americans. ...

**TEXT:**

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## INTRODUCTION

In the early to mid-1800s in Randolph County, Alabama, a brother and sister are slaves. Ruben, date of birth unknown, and Maryann, born in 1850, are the ancestors to generations of the Lancaster clan. n1 Ruben, with wife Lydia, would sire one child, Henry Lancaster, on the eve of emancipation. Henry would beget 19 children with his wife Charlotte Holliday-Lancaster. Of those 19 children, Guy Lancaster and his wife Carrie would give birth to seven children, one of whom was

Elbert Lancaster, Sr., in 1925. n2 On March 26, 1950, Donald Aquinas Lancaster, Sr. was born to Elbert and Martha Jane McCurdy-Lancaster. n3 On July 12, 1971, Donald Aquinas Lancaster, Jr. was born to Sharon Marie McKinley and Donald Aquinas Lancaster, Sr. n4

In reaching back over 100 years, a series of questions must be answered: How did slavery and segregation affect each generation's quality of life with respect to education, property ownership, and employment? Did slavery and segregation impede their ability to fulfill the American Dream? How did slavery and segregation affect subsequent generations of Lancasters? Finally, considering slavery and segregation, what legacy could these individuals leave their issue?

[\*172] It is said that the first three generations of Lancaster men did not attend school, but instead worked in the fields as sharecroppers. Although a sharecropper, Elbert obtained an eleventh grade education, and his son would finish high school. From Henry down, each Lancaster owned real estate. Exactly how the sons of slaves acquired property has long died with each patriarch. In terms of employment, the majority of Lancasters were farmers. Donald Sr. escaped a life of sharecropping with the family's move to California. n5

The vestiges of slavery and compulsory discrimination in the United States had a profound effect on the Lancasters' education, ability to own property, and ability to obtain gainful employment. While other factors also contributed to each generation's quality of life, it would be difficult to contest the effect that being an African American in the United States had on five generations of a family from the 1850s to 1971. This paper questions slavery and segregation in America with respect to their impact on African Americans today. America's legacy of slavery and segregation will be explored through an identification of Americans entitled to reparations, the manner in which the federal government sanctioned slavery and segregation, and the theories under which a reparations claim could be asserted. After establishing the legitimacy of reparations due to African Americans, this paper will answer the legacy question with a demand for reparations to all African American families.

Part I of this article will determine the class of American citizens entitled to reparations for America's sanction of slavery and compulsory segregation through an analysis of common law presumptions, physical descriptions, statutory law, and parental classification. Part II examines property law in the United States Constitution, and the Dred Scott and Plessy v. Ferguson decisions to ascertain the federal government's sanctioning of slavery and segregation. Through an analysis of the common law and Supreme Court decisions, the federal government's ratification of slavery and segregation will be conclusively established to advance a theory of liability.

Part III examines the operation of the Plessy factor—the right in being white—in three key areas that contribute to achieving success in America, primarily education, property ownership, and employment, through the chronology of slavery and segregation. In observing

[\*173] the operation of "the right-in-being-white" in public policy, the sanctioning of the theory of slavery and segregation bears out, while demonstrating centuries of deprivation. Education, property ownership, and employment are three areas of American life that will be used to analyze the Plessy factor's ability to provide preferential treatment to Anglo Americans, while simultaneously socially, economically and politically ostracizing African Americans.

Part IV will turn to the issue of legal theories under which an African American could assert a reparations claim against the United States. International law, constitutional law, and federal tort theory will be utilized as a springboard to assert theories of federal liability with the appropriate remedies entitled to African Americans. Finally, Part V will address the form reparations should take with respect to compensating African Americans for slavery and compulsory discrimination.

#### PART I.

#### THE SLAVE, NIGGER, NEGRO, COLORED, AFRO-AMERICAN, BLACK, AND AFRICAN AMERICAN: DEFINING THE CLASS OF AMERICAN CITIZENS ENTITLED TO REPARATIONS

Law and culture operated together to define the slave and the class of Americans subjected to slavery. n6 Legal presumptions, physical descriptions, statutory definitions, and parental lineage all shaped n7 the law used to ostracize individuals of African descent. n8 These presumptions, physical descriptions, statutory definitions, and parental lineage classification systems established during slavery, are the same factors that operated during segregation and well into the modern era. n9 Each aspect of the law used against the slave and the African American will be examined to understand the class of people subjected to American genocide. In defining the class of individuals legally enslaved and discriminated against, their progeny will be ascertained, answering the oft-posed query: How will beneficiaries of an African American reparations paradigm be determined?

[\*174] Since the inception of slavery in North America in 1619, the majority of those subjected to chattel slavery for over two centuries in the United States were people of African descent. n10 The common law presumption that classified an individual as a slave was based solely on an individual's ethnic origin. From 1619 to 1865, courts routinely held that people of African descent were prima facie slaves. n11 Justice John Louis Taylor of North Carolina was one of the first judges to apply the slave presumption in *Gobu v. Gobu*. n12 The rationale used to validate the presumption rested on the purpose for bringing Africans to the United States, which was to be slaves. Any African or person of African descent was presumptively a slave in so far as their purpose in American society was limited to being bondsmen. n13 The common law approach established and applied by American courts merely set the stage for additional factors used to classify people of African descent as slaves.

The physical attributes that described a member of the "Negro" race included, but were not limited to the following: being of African descent, having a "black complexion, having crisped or woolly hair texture, compressed cranium size and a flat nose." n14 Individuals with some or all of these features were considered "Negroes," and therefore, slaves. n15 Although courts placed great weight on physical factors, other classification systems were employed to ascertain whether an individual was a member of the Negro race. State statutory law supplemented common law and physical descriptions by codifying the definition of a "Negro" and "mulatto." n16 An 1849 provision of the Virginia Code declared that "every person who has one-fourth part or

[\*175] more of Negro blood shall be deemed a mulatto, and the word 'Negro' in any other section of this, or any future statute, shall be construed to mean mulatto as well as 'Negro.'" Although most state legislatures refrained from statutorily defining Negroes and slaves, their efforts to define offspring of mixed parentage occurred and operated to expand the law to persons of mixed heritage. n17

Mulattos were typically defined as individuals of African and European heritage or African and American Indian heritage, and therefore a member of the Negro race. n18 Thus, the statutory definition of mulatto expanded the slave presumption to an even broader class of individuals. n19 Parental lineage classifications ensured that individuals of African descent were and remained slaves. The parental lineage presumption, adopted in 1662 by American courts, n20 employed the legal maxim of *partus sequitur ventrem*, which means, "all children borne in this country shall be held in bond or free only according to the condition of the mother." n21 Courts and culture employed this maxim as a result of the vast number of children born of miscegenous relationships. n22 This rule effectively classified the majority of issue borne of miscegenation relationships as slaves; however, it was not all encompassing. The exception to the parental lineage presumption applied by courts was the Latin maxim of *quia partus sequitur ventrem*, which meant, "if the mother is free, the child shall be free, not withstanding the bondage of the father." n23 This maxim operated solely to protect children of Anglo American women. n24

Early American society was reluctant to separate an Anglo American woman from her child, even though a relationship between an Anglo American woman and an African man was legally and culturally condemned. n25 Thus, the offspring of an Anglo American woman and an African man would not be considered a slave; that individual was considered an indentured servant, and held in bondage

[\*176] until thirty-one years of age. n26 Collectively, common law presumptions, physical descriptions, statutory law, and parental lineage supported the conclusion that if an individual had one-fourth, one-eighth, or as little as a "Drop of Black Blood," then that person was considered a Negro, and therefore, a slave. n27

These presumptions are still evident in modern society. n28 The Slave, Nigger, Negro, Colored, Afro American, black and African American are all classifications premised on either an individual's skin complexion or African ancestry. n29 The significance of race in common law and statutory law classification systems is highlighted by the fact that these were the people enslaved, and their descendants were the class of Americans legally discriminated against pursuant to American law. n30 The overreaching significance of the class of people subjected to slavery and segregation is that it provides a foundation for determining the modern class of people entitled to reparations. The analysis that emerges is that if an individual would have been classified as a Slave, Nigger, Negro, Colored, Afro American, black or African American, and that individual would have been enslaved or subjected to compulsory discrimination, that individual is entitled to reparations under an African American reparations paradigm. This approach will enable reparations proponents to determine the modern descendants of slaves who were compelled to submit to compulsory discrimination, and differentiates those who falsely would attempt to benefit from a holocaust.

Upon successfully establishing a class entitled to reparations, an African American reparations claim asserted against the United States must also consider the federal government's liability for slavery

[\*177] and segregation. To properly address the question of federal liability, the following section will analyze property law and property rights established pursuant to the Constitution. Crafting sanctioning theories will lay a foundation that will bridge the gap between America's blessing of slavery and segregation, the federal government's role – through act or omission – in divesting African Americans of opportunity based on race, and the resulting harm experienced by modern-day African Americans.

## PART II.

### STATE PROPERTY LAW, THE UNITED STATES CONSTITUTION AND THE DRED SCOTT AND PLESSY V. FERGUSON DECISIONS: AMERICA'S SANCTION OF SLAVERY AND COMPULSORY DISCRIMINATION

#### A. Origins of the Characterization of Africans as Property

The idea that slaves were recognized as property rather than as human beings originated from the purpose and manner in which they were acquired. n31 The Dutch and English acquired Africans for the sole purpose of slave labor in the New World. n32 They purchased African people from slave traders, victorious kings, and privateers. n33 Although the original acquisition of enslaved Africans was through kidnapping, transcontinental slave traders reasoned that once Africans were purchased for consideration, their legal status consisted of being a commodity in international commerce. n34 Europeans, therefore refrained from recognizing slaves as having any claim to freedom or legally recognized personal status. n35

In the American colonies, slave transactions applied the commodity model used by European slave traders. Akin to other commodities, slaves were appraised, sold, secured for debts owed, and probated like all characteristics of property. n36 English law in the colonies detained slaves in the common law action of "trover," an action for detaining chattel. Application of this action is additional evidence that from America's infancy, Africans were merely property.



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#### B. Role of State Property Law, Intestate and Testate Succession

Slave-holding states in the Union classified slaves as either personal property or real property. n37 The majority of slave-holding jurisdictions recognized slaves as chattel property. n38 In a minority of jurisdictions where slaves were recognized as real property, exceptions in the law permitted a classification of slaves as chattel property in limited circumstances, thereby reaching the same conclusion as majority jurisdictions. n39 The commodity model applied during the beginnings of slavery gave birth to the classification of slaves as property in individual states. The extent of state property law in classifying slaves as property is most clear through the auspices of intestate and testate succession pursuant to law in slave-holding states.

Intestate succession of personal property in most slave-holding jurisdictions followed the English Statute of Distribution of 1670. n40 This statute distributed slave property by allocating one-third to the widow and the remainder to the children, and, if there were no children, one-half to the widow and one-half to the next of kin to be divided in equal shares. n41 In some instances, the unique characteristics of a given slave made them difficult to convey and, in such cases, county courts were authorized to appraise, sell, or preserve slaves in-kind to improve the beneficiary's estate. n42 With testate succession, the prevailing view in slave-holding states was that personal property could be devised to whomever the testator saw fit. n43 Thus, while the majority of states classified slaves as chattel property, a slave could be conveyed freely according to the testator's intent.

The implications that emerge from state probate laws regarding intestate and testate succession suggest that slaves were routinely held as property and as long as the slave was alive, he was held indefinitely. The "remainder" used in property law ensured that subsequent generations

[\*179] would also be held as property. The rule in the majority of jurisdictions for slaves' issue was that the slaves' children belonged to the one entitled to the remainder. Only Delaware and Maryland recognized a life tenant's rights in a slave's issue over the rights of the person entitled to the remainder. n44 Because a slaveowner could devise a slave to one beneficiary and the slave's children to other beneficiaries, slaveowners had complete control over slaves. n45 After a succession of rules with regard to the question of increase, the common law rule applied in the majority of jurisdictions held that the owner of the mother owned all the issue. n46 With this method to resolve the question of increase, all subsequent generations of slaves were also slaves, and therefore property.

The characterization of slaves as property has two major implications. First, it establishes a common classification system that was supported by the common law of slave-holding states, which characterized slaves as the private property of slaveowners in the beginning of the international slave trade and during the zenith of the American slave trade. Second, in recognizing the individual property rights of slaveowners as the common thread woven between the states that legalized slavery, it follows that any subsequent ratification of individual property rights of slaveowners by the United States Constitution amounted to a federal sanction of slavery. The ratification of slaves as property is found implicitly and expressly in the United States Constitution. n47

#### C. The Constitution's Sanction of Slavery Through Slaveowners' Property Rights

When distilling the issue of slavery through the United States Constitution and Supreme Court decisions, the common element strained from both forms of federally created law is the recognition of slaves as personal property. n48 Article I, Section 9 is the first constitutional provision that implies that the federal government recognized slaves as property. This provision is important in two respects. First,

[\*180] it suggests that federal law retained authority over slavery, thus preempting state law. Second, Article I, Section 9 suggests that the federal government actually derived a monetary benefit from the institution of slavery through a taxation of property. In relevant part, Article I, Section 9 states: "The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by Congress prior to the year one thousand eight hundred and eight...." n49 This constitutional provision permitted Congress to prohibit the interstate and international transportation of slaves.

The "migration and importation" language suggests that enslaved Africans were held as property. "Migration" pertained to the movement of slaves through the contiguous states. "Importation" pertained to the exchange of slaves as commodities for consideration over international borders, suggesting the property character of slaves. The effect of the clause was to retain the power to constrict the interstate slave trade and abolish the international slave trade at the federal government's will. At the formation of the Union, the Founders actually retained the authority to go beyond limiting slavery after a certain date when they could have abolished it pursuant to constitutional law. By not abolishing slavery, the federal government permitted slavery in the United States by relinquishing authority to the slave-holding states that continued to enslave Africans because of their economic dependence on slavery.

Article I, Section 9 permitted the federal government to obtain a monetary benefit from slave property suggesting that slave property and its uses were legal endeavors sanctioned by constitutional law. n50 Article I, Section 9 states "a tax or duty may be imposed on such importation not exceeding ten dollars for each person," n51 which referenced slaves. The plain language meaning of this clause indicates that, although constitutionally limited, the federal government derived a monetary benefit from slave property. The logical conclusion reached from this provision is that the government retained the authority to tax slave property and recognized slaves as a legal form of property.

The next relevant component to a property analysis is determining who held the right to slave property. Article IV, Section 2, Clause

[\*181] 2, emerges as a central component because it recognized the individual property rights of a slaveowner in a slave, indicating a constitutional protection of slave property. Furthermore, it implicitly sanctioned the product that flowed from slave property, namely, slave labor. Article IV, Section 2, Clause 2 states:

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such services or labor, but shall be delivered up on claim of the party to whom such services or labor may be due. n52

This provision permitted a slaveowner to lay claim to slaves by virtue of their characterization as property. n53 Article IV, Section 2, Clause 2 was important in two respects. First, the clause recognized a state-created property right in a slave because it required that slaves be returned to their master. n54 Second, it placed the law of slave-holding states above the law of free states, which would have afforded slaves their freedom. n55 Where a battle of state law ensued over a fugitive slave, the Constitution settled the matter by recognizing the state-created property right of the slaveowner over the law of the state prohibiting slavery.

The language in Article IV, Section 2, Clause 2 states that a slave shall be returned to "whom such services or labor may be due." This language implies that the Constitution recognized that the product of slave property belonged to the owner of that property. Thus, pursuant to constitutional law, slaves were compelled to be subservient to their masters unless they were released from their burden by manumission, escaped to jurisdictions beyond the government's reach, or death. This constitutional analysis is effective at recognizing the federal government's implicit authority over the issue of slavery, and that it sanctioned slavery through a constitutionally granted property right.

Although the Constitution conclusively recognized a property right in a slave, the Dred Scott decision further bolstered the contention that the federal government sanctioned slavery. One manner in which the Supreme Court sanctioned slavery was by denying slaves

[\*182] legal redress through the court system and ensuring that slaves could not contest their enslavement. n56 In denying slaves access to federal tribunals, the Supreme Court relegated enslaved Africans to a perpetual state of bondage. Slaveowners had unquestioned authority over the person of another human being.

The Dred Scott decision moved beyond denying slaves a right to challenge their state-created status on the federal level. n57 First, the Supreme Court relied on Article I, Section 9 and Article IV, Section 2, Clause 2, to legitimize the recognition of slaves as property. n58 The Court stated, through the first provision, that the framers "directly sanctioned" slave property. With respect to the second provision, the Supreme Court held that it established law to "uphold" the right of a master in a slave. n59 The right protected by the second provision was a property right of a slaveowner in his slave property. The Court recognized and sanctioned the state-created property right of slaveowners.

The Dred Scott decision went a final step by not only sanctioning slaves as a valid form of property, but by actually protecting that property pursuant to the Fifth Amendment of the Constitution, which prohibits the federal government from depriving a person of their property without due process of law. n60 The Court reasoned that slave property was similar to any other form of property and was entitled to the same constitutional protection as all other forms of property. n61 The Court affirmed a property right that could only be denied through constitutional amendment.

#### D. Segregation and the Emergence of the Plessy Factor

Segregation is the offspring of slavery. n62 Although segregation cannot be placed on the same level as slavery, it was but one step above it in that it relegated African Americans to a state of second-class citizenship. n63 When viewed narrowly as independent state policies, segregation does not suggest any federal policy. However, when viewed through the Plessy v. Ferguson decision, segregation and the

[\*183] effects that flowed from it indicates the federal government's responsibility for the discriminatory treatment by private and public sector entities experienced by African Americans.

The origins of legalized segregation are based on two competing schools of thought. Some scholars and historians argue that segregation evolved immediately after the Civil War in response to the need of lower-class whites to feel superior to recently emancipated freedmen. n64 To differentiate between recently freed African Americans and lower-class Anglo Americans, compulsory discrimination, also known as segregation, was instituted to maintain an Anglo American belief of superiority. Revisionists argue that segregation was customary prior to emancipation and simply became codified when African Americans were emancipated to maintain the cultural status quo. n65

The "Black Codes," enacted immediately following the Civil War, were the first legislative acts that relegated recently freed African Americans to a system of inferiority reminiscent of slavery. n66 Compulsory discrimination prevailed in every aspect of life, including restaurants, inns, places of entertainment, public transit, and educational systems. n67 The implementation of this tactic at the municipal level was simply a precursor to a full-scale codification of segregation on the state level. n68 In 1881, Tennessee passed the first segregation law in the South. n69 It directly addressed the issue of public accommodations, requiring the separation of African Americans and Anglo Americans. African Americans who purchased first-class accommodations on the railway were forced to ride in smoking cars, often with belligerent, intoxicated, and smoking men. By 1900, every former Confederate

[\*184] state had similar laws. n70 While the Black Codes and many segregation laws were municipal and state-level actions, the Court's decision in *Plessy v. Ferguson* demonstrated that the federal government supported segregation as a legitimate federally sanctioned public policy.

In *Plessy v. Ferguson*, the majority held that segregation was legal as long as equal accommodations were provided. n71 The separate-but-equal doctrine was not problematic if the races were separated and every public accommodation was equally afforded. Although the Supreme Court held that separate-but-equal was legal, the *Plessy* factor decided the case. The *Plessy* factor materializes in the Supreme Court's response to the plaintiff's argument that the reputation of belonging to the dominant race, the white race, was a property right. n72 The *Plessy* factor was not a threat, in its germane form, to the rights of African Americans, provided that comparable rights were afforded to African Americans. However, in the municipal, state, and federal governments' adoption of public policy rooted in the *Plessy* factor, each entity allowed unfettered access to Anglo American opportunity. This amounted to preferential treatment for non-African Americans and denied opportunity to African Americans. Insofar as the *Plessy* factor was key to accessing opportunity and preferential treatment, the Supreme Court's approval of a right-in-being-white afforded opportunity to some of the citizens of the United States - Anglo Americans - and denied it to others - African Americans - simply based on their race.

The common thread that weaves slavery and segregation together is the right-in-being-white, or the *Plessy* factor. The gravity of the *Plessy* factor can only be fully appreciated by analyzing it through the chronology of slavery and segregation, while observing its operation in public law and policy.

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PART III.

OPERATION OF THE PLESSY FACTOR IN EDUCATION, PROPERTY OWNERSHIP, AND EMPLOYMENT

A. The Education of Enslaved African Americans During Slavery and Segregation

Education continues to be a cornerstone to accessing the American dream and is thought to be the critical factor in an individual's success. n73 The educational process during slavery was not designed to empower but rather was designed purposefully to make and maintain slaves as a subservient class to Anglo Americans. The indoctrination of ignorance within slaves was the first form of education. n74 During slavery, every slave-holding state, with the exception of Kentucky, prohibited anyone, including masters, from teaching slaves how to read and write. n75 Slave-holding states also made a concerted effort to deny slaves access to books, pamphlets, newspapers, and any form of academic literature. n76 The purpose of spurring ignorance in African slaves was to repress the slaves' innate sense of freedom and self-preservation. n77 The planter class and the ruling class in slave-holding states reasoned that if a slave had the ability to read and write, then that individual could read literature adverse to the institution of slavery and would share that knowledge with others slaves, resulting in the destruction of the planter class's way of life. n78

The second prong of the slave's educational process consisted of a mixture of slave laws and social etiquette designed to "miseducate" slaves. n79 Slave laws reinforced ignorance of an individual's human right to self-defense and economic advancement. Such laws included a prohibition against slaves striking Anglo Americans, n80 trading without a permit, possession of weapons, ownership of property, and contracting



[\*186] for services. n81 Through slave laws, the interaction of slaves with the outside world was eliminated or, at a minimum, was controlled, and ensured deference to both slave masters and all Anglo Americans. n82

Indoctrination through social etiquette played an important role in the miseducation process. Avoiding direct eye contact, bowing, and curtsying were all forms of social interaction demanded by Anglo Americans to create the subordination of the slave. n83 Combined with the legal denial of formal educational opportunities, the indoctrination of inferiority in slaves was instrumental in maintaining Anglo American superiority and internalized the attitudes, values, skills, and sensibilities of the perfect slave. n84

The effects of educational deprivation during slavery were evident in the freedmen population immediately following slavery. An analysis of the educational levels of freedmen immediately following their 1865 emancipation reveals that African Americans started at the bottom rung of the educational ladder. n85 According to census data gathered from 1866 to 1870, Anglo Americans were an average of 4.3 grade levels above African Americans. n86 African American males completed an average of 21.2 months of school between ages 5 and 20, and African American females completed an average of 24.2 months of education. Their Anglo American male counterparts completed an average of 49.3 months of school, while Anglo American females completed an average of 50.1 months of school. n87 By 1910, nearly 90.6% of all blacks attending school were enrolled in the South. n88 African Americans in the United States, at the beginning of the 20th century, were poorly educated with less than half the educational level of

[\*187] Anglo Americans. The early, inadequate educational level of African Americans was evident at the grammar school level, where African American schools had inferior books, supplies, and inadequate funding. n89 Coupled with low adult literacy within the African American community, the denial of education during slavery and inferior education after slavery ensured that African Americans remained educationally inferior to Anglo Americans. n90

African Americans did not have the requisite educational foundation or infrastructure to excel to the level of Anglo Americans due to the Plessy factor's emergence. Educational disenfranchisement continued and intensified due to the implementation of federal government programs that afforded additional opportunity to Anglo Americans while denying that same opportunity to African Americans solely based on race. n91

#### B. The Land Grant Movement and its Role in the Educational Deprivation of Modern-Day African Americans

Prior to the Land Grant Movement, higher education was exclusively reserved for the wealthy and privileged class. n92 By the turn of the century, greater access to higher education was afforded to the Anglo American working class in the areas of agriculture, industry, and science through the Land Grant Movement. n93 The Land Grant Movement provided early generations of lower-class Anglo Americans with an opportunity to obtain a higher education, whereas similarly situated African Americans were all but excluded from taking advantage of that opportunity. African Americans' inability to take advantage of this opportunity was not the result of the lack of cognitive ability or the lack of ambition, but rather the result of not being white.

A series of congressional enactments provided funding for public institutions of higher education throughout the United States. The 1862 Morrill Act, n94 the first of these enactments, provided funding to states for colleges in order to facilitate greater access to higher education

[\*188] through public funding. n95 Although credited as a significant factor in educating the American citizenry, when viewed through African American eyes, the Morrill Act contributed to generations of African Americans being denied access to higher education, which stifled their ascension in societal and economic status.

At the beginning of the Land Grant Movement, n96 Congress made a distinction between its citizens on the basis of race, ratifying the separate-but-equal doctrine six years prior to the Plessy decision. n97 The language of the Act stated that "the establishment and maintenance of such colleges, separately, for white and colored students shall be held to be in compliance with provisions of this act if the funds be equitably divided." n98 In adopting the separate-but-equal doctrine, n99 Congress rejected the opportunity to encourage equal treatment of its African American citizens with regard to public higher education in favor of compulsory segregation. n100 The adoption of the separate-but-equal doctrine was not problematic in itself; rather, it was the actual implementation of the policy that implies the reason for the current educational disparities that exist between African Americans and Anglo Americans.

The four cornerstones of the Land Grant Movement were residential instruction, humane extension services, military instruction, and scientific study. n101 Each component played an important role in individual and class growth as well as in the development of American society. The residential instruction component was designed to encourage academic study in science, engineering, and technology. n102 This component was of particular importance because it provided Americans, who otherwise would not have had access to this level of education, with training to raise their educational and socio-economic levels. All things being equal, African Americans should have had the same opportunity for advancement; however, the funding was not equally afforded to African Americans as it was to Anglo Americans. n103

[\*189] Although the language of the Act required equal funding, the Secretary of Interior's allocation formula was based on the percentage of African American and Anglo American students in each state's publicly funded higher education system, rather than a dollar for dollar allocation per institution pursuant to the statute. n104 African Americans constituted 23% of the population in states that maintained Land-Grant colleges for African Americans, but black institutions received only 6% of the total allocation afforded to Land Grant institutions. n105 The average funding for white institutions was \$234 per student in comparison to \$138 per student at black institutions. n106 Preparing African Americans for professional careers started from a position of inequity and inadequate resources. The ramifications of inequality in funding are that African Americans did not have access to similar instruction at the same level as Anglo Americans, and thus, generations of African Americans did not have an opportunity to receive a quality education related to science, engineering, and technology.

Inadequate military instruction had an equally important effect on African American educational disenfranchisement and the lack of leadership opportunities in the United States military. The Reserve Officer Training Corps (ROTC) program significantly contributed to the development of the military leadership infrastructure and by 1920 had trained over 16,000 Anglo American students as military officers through. n107 Military training programs at African American institutions were limited to drill teams and marching units by the War Department, until 1940. n108 As the American military infrastructure increased in size and importance within the world community, African Americans were again denied access to educational opportunities that would have transferred into military and civilian life. n109

A third component of the Land Grant Movement, Cooperative Extension Services, was an integral part of the economic, social, and industrial advancement of the nation specifically geared toward assisting

[\*190] the development of rural America. The Smith–Lever Act of 1914 n110 marked the beginning of federal efforts to fund extension services, and by 1937, \$13 million in funding was received annually by state institutions to enhance extension services. n111 Inequity in this component rested in the federal government's relinquishing of authority to state governments, as specifically required by the Act. The language of the Act stated that appropriations for extension services must "be administered by such college or colleges as the legislature of the State may direct." n112 In relinquishing authority to the states, the federal government knew, or should have known, that the funding would not be apportioned equally. The federal government's knowledge demonstrates its role in the provision of unequal and inadequate academic resources and extension services to the African American community.

The fourth component, similar to the previous three, was inherently unequal, and as a result of this inequality, black colleges and African Americans did not have a similar opportunity to ascend to the sciences. The Hatch Act of 1887 n113 provided an annual grant of \$15,000 to institutions of higher learning. n114 As was the case with the other three components of the Land Grant Movement, states continually denied black institutions of higher learning access to these funds and, as of 1930, only West Virginia had awarded a black institution funding for research at the meager sum of \$1,800 annually. n115 The denial of research funding combined with the segregation in institutions of higher learning prevented African Americans from attaining success in academia.

Education viewed through the context of the Land Grant Movement illuminates the federal government's role in the current educational disparities between African Americans and Anglo Americans. By expanding opportunity to Anglo Americans and denying opportunity and providing unequal funding to black institutions, the federal government played a crucial role in sanctioning state discriminatory practices. The government purposefully relegated generations of African Americans to educational ignorance, while providing federal

[\*191] funding from all American taxpayers for the all but exclusive use of the Anglo American population.

C. The Current Educational Position of African Americans: The Effects of the Land Grant Movement

According to the U.S. Bureau of Labor Statistics, the percentage of African Americans attending four or more years of college is consistently lower than Anglo Americans. In 1970, 14.8% of Anglo Americans obtained four or more years of a college education, whereas African Americans only obtained 8.3%. In 1980, 22.9% of Anglo Americans obtained four or more years of college, in contrast to a mere 11.0% of African Americans. In 1990, 27.1% of Anglo Americans obtained four or more years of college, while only 15.5% of African Americans obtained the same level of education. n116

Recent statistics reveal that between 1992 and 1996, the number of college graduates in the African American community is significantly lower than in the Anglo American community. Table 1 illustrates that, between 1992 and 1996, Anglo Americans had close to double the number of college graduates as compared to African Americans.

Table 1. Disparities Between African American and Anglo American College Graduates. n117

[mg f:'[data.h.how.43-2]how20101.eps',w28.,d8.10] [cp8,9]Source: U.S. Bureau of Labor Statistics, unpublished data. The disparity in percentages of college graduates suggests that educational attainment after the federal government's effort to end compulsory segregation has resulted in minor advancements toward

[\*192] closing the educational gap between African Americans and Anglo Americans. The lack of educational advancement for African Americans can be directly attributed to the lack of parental educational attainment. n118 In addition, the lack of educational opportunity is a significant factor in African Americans' earning potential, societal standing, and their ability to provide a higher education for their descendants. When the first generation of African Americans born at the end of legal segregation (in 1954) came of age at the beginning of the 1970s, families of college-age African Americans likely did not have the resources to send their children to universities.

D. African American Property Ownership: The Federal Government's Effort to Limit Property Ownership of African Americans Through the Homestead Movement and the Federal Housing Authority

Property ownership is one of three factors used to measure African Americans' inability to reach the social and economic levels of Anglo Americans. While education provides the skills and professional development to access the economic bounty of American life, property ownership is the foundation for economic advancement in the United States. "Power always follows property." n119 John Jay's eloquent proclamation is a quintessential principle of American life. As the second confluent force used to assert a reparations claim, property ownership has been a significant factor in African Americans' inability to ascend in American society during slavery and since emancipation. Property ownership must be evaluated in the context of the Plessy factor with respect to slavery, segregation, and federal government policies that required discrimination. The federal government's liability for the lack of property ownership stems from delegating authority to states that knowingly discriminated based on race and the implementation of federal policy that encouraged segregation in property ownership.

[\*193]

#### E. Property Ownership of Enslaved Africans and Their Descendants During Slavery

From 1619 to 1865, most African Americans were enslaved and were themselves considered property. n120 Slaves were not eligible to own any property. Slave-holding states' refusal to recognize slaves as citizens, the federal government's denial to grant immigrant status to freedmen, and the Dred Scott decision, which held that slaves were not citizens, played an important role in denying property ownership rights to slaves. n121 Although 3% of the African American population was free, freedmen were denied citizenship, and did not have the right to own property. n122

Segregation is also an important period to consider in evaluating the property ownership of African Americans. Critics of African American reparations argue that, since emancipation, slave descendants have had ample opportunity to acquire property; therefore, the reparations claims asserted by modern-day African Americans are invalid. The Homestead Acts and the FHA directives are two policies that squarely fit within the paradigm designed to demonstrate the federal government's sanction of discrimination, which has resulted in inequity in property ownership during the modern period.

#### F. Discrimination in Property Ownership

The Homesteading period is important because it enabled a significant number of citizens to obtain property. n123 Citizenship presented the first barrier to African Americans participating in the Homestead Acts because some states denied citizenship to African Americans. n124 In 1790, Congress excluded African Americans from a class of persons who could be naturalized, n125 and most were not eligible to participate in the Homestead Movement. Although homesteading was not completely closed to African Americans, only 11% of African Americans owned property. n126

A lack of capital was an important factor behind why African Americans did not obtain property. They had no economic base due



[\*194] to their previous classification as slaves and it was nearly impossible for African Americans to take advantage of the minimal opportunities afforded them by the Homestead Acts. n127 Although citizenship may not have been a barrier in all instances, start-up costs were another impediment. A third barrier was the lack of productive land. The Homestead Act of 1866 reserved 47 million acres of public lands in Alabama, Mississippi, Louisiana, Arkansas, and Florida for homesteading. Although African Americans were allowed to homestead these public lands, the land was considered worthless. n128 The majority of "productive property" allotted by the Homestead Acts was distributed before the Civil War. Therefore, the majority of African Americans were prohibited from participating in the Homestead Movement. n129

#### G. Compulsory Segregation and the FHA

The Homestead Movement illuminates the federal government's role in curtailing African American property ownership while Anglo American property ownership was encouraged and afforded. Discrimination in property ownership emerged as an important factor during the early part of the 20th Century. The separate-but-equal doctrine articulated in Plessy made housing discrimination sanctioned by law. n130 Although the Supreme Court ratified segregation, inequity in property ownership materialized in the FHA. The FHA was the primary federal agency charged with ensuring that adequate housing would be accessible to all Americans. During a period when the FHA was instrumental in providing Americans with an opportunity to obtain single family homes, the FHA strongly supported the use of racially restrictive covenants and provided federal funding for their introduction and proliferation. n131 The implication of the FHA's active effort to segregate and deny African Americans an opportunity to obtain property of choice is that, on a whole, African Americans were effectively excluded from obtaining productive property.

The quintessential difference during the years of continued divestment of property ownership opportunities of African Americans and Anglo Americans is the Plessy factor. As a result of Anglo Americans'

[\*195] property right-in-being-white, as a class, they had unfettered access to acquire productive property during the Homestead Movement and during the federal government's effort to encourage property ownership through the FHA.

#### H. The Consequences of Slavery and Segregation in Property Ownership: Interpretations of the Federal Government's Policies

The connection between the federal government's support of discriminatory practices and the present condition of African Americans is directly related to the fact that inheritance is still the central underpinning of wealth in the United States. n132 Therefore, because African Americans have been denied an opportunity to participate in the property ownership movements by federal government policies, the United States is largely responsible for the ramifications that result from depressed African American economic strength insofar as property ownership conveys one's economic viability. Understanding the chronology of discrimination in property ownership and its implications can only be done by reviewing data to ascertain the current effects of a history of compulsory discrimination in property ownership.

According to the United States Bureau of Census Data, a vast gap still remains between African American and Anglo American property ownership. In 1990, 67.5% of the Anglo American population owned their homes in comparison to 42.4% of African Americans. By 1996, the gap widened with 69% of Anglo Americans owning their homes, contrasted to 43.9% of African Americans. At first glance, the rate of home ownership appears to be inconsequential; but when analyzed in relation to the total population of Anglo and African Americans, it is astounding. n133 Based on 1990 statistics, Anglo Americans represented 88.4% of homeowners, while African Americans accounted for only 11.5% of the homeowners in America. Similarly, 1995 statistics revealed that Anglo Americans made up 88.7% of homeowners, contrasted with a home ownership rate of 12.2% in the African American population. Statistics released in 1996

[\*196] show that Anglo Americans represented 87.9% of all homeowners, in comparison to a dismal 12.04% of African Americans. n134

The evidence suggests that the federal government's support of slavery and state laws that prohibited property ownership of slaves, coupled with compulsory segregation in homesteading and the FHA subsidizing discrimination, significantly contributed to hindering African Americans' ability to obtain property at a rate similar to that of Anglo Americans during major periods of land divestment by the United States. Moreover, the low rate of property ownership that currently exists directly correlates to ancestors of modern-day African Americans not having an opportunity to leave a legacy of wealth through inheritance because the majority of African Americans simply did not have the opportunity to acquire the property to devise to their descendants. To establish a reparations claim, property ownership within the African American community is crucial. Although the economic ramifications cannot be measured with any degree of certainty, the connection between the federal government's policies and the African American rate of property ownership is certainly a factor that has led to African American disenfranchisement.

#### PART IV.

#### THE FOUNDATION OF EMPLOYMENT DISCRIMINATION

A. Slavery, Segregation, and Employment Discrimination: Understanding the Effects of the National Labor Relations Act, n135 the Davis-Bacon Act, n136 and the National Apprentice Act n137

The federal government's role in supporting employment discrimination has also contributed to African Americans' disproportional lag behind Anglo Americans. At the close of the Civil War, sharecropping replaced slavery. n138 According to 1910 statistics, African Americans composed 74.7% of the agricultural industry, 6.6% of the manufacturing industry, and 13.1% of the domestic and personal services industries. n139 In all respects, 1890 data revealed a continued

[\*197] exclusion of African Americans from high-income, high-status trades. n140 African Americans were relegated to employment in agriculture and did not have the opportunity to obtain skilled training. With the advent of unions and collective bargaining agreements, the federal government made a concerted effort with private entities to discriminate against African Americans. The National Labor Relations Act, the Davis-Bacon Act, and the National Apprenticeship Act are three federal enactments that encouraged discrimination. Understanding the practical effects of these measures with respect to African American employment illuminates the federal government's role in sanctioning discriminatory practices in employment.

The National Labor Relations Act, a "race neutral" legislative measure passed in 1935, permitted employees to organize and negotiate collective bargaining agreements. n141 With its passage, the National Labor Relations Act vested in union members a property right in employment positions sanctioned by law. n142 Through the collective bargaining agreement, unions had the power to ensure a system of economic redistribution in American society. n143 All things being equal, the legislation itself created tremendous opportunity for Americans to economically advance through employment. Marketplace discrimination has been defined as "differences among similarly qualified workers in wages, employment and occupational position that can be traced" directly to unions, and is recognized as a major factor in limiting African American opportunity to obtain gainful employment. n144

Electricians, plumbers, bridge and structural ironworkers, granite cutters and flint glass workers had tacit agreements barring African American membership. n145 Although some industries controlled by union labor did not expressly exclude African Americans, de facto discrimination continued to occur in many industries. n146 By failing to insert an anti-discrimination clause in the language of the National Labor Relations Act, which could have limited discrimination in unions, the federal government effectively sanctioned unions' discriminatory

[\*198] practices. n147 This legislation set the stage for subsequent enactments that also limited African American participation in employment.

The Davis-Bacon Act required contractors and subcontractors engaged in public works of the United States to comply with the state laws relating to hours of labor and wages of employees on state public works. n148 Prior to this enactment, African Americans had an opportunity to enter the skilled labor force at lower wages. However, the passage of the Davis-Bacon Act equalized pay and closed off people of color from the skilled crafts. n149 Unfortunately, the vestiges of the Davis-Bacon Act were extended to fifty-seven other federally assisted projects and artificially raised wages. n150 Considering the vast expansion of the Davis-Bacon Act to other federal projects and the rise in income level among those permitted to participate in the federally subsidized efforts, African Americans were excluded from participating in a major portion of the employment sector and were also denied an opportunity to gain the necessary skills to be gainfully employed.

The National Apprenticeship Act of 1937 authorized the Secretary of Labor to bring together employers and laborers to create apprenticeship programs. n151 The American Federation of Labor (AFL) seized control of these programs and established rules that granted preference to the offspring of union members. Therefore, the AFL was allowed to exclude African Americans in apprenticeship programs, which was the primary way employees entered the skilled professions. n152 Apprenticeships extended beyond the trades and trained people in fields such as occupational and physical therapy or library science. n153 These programs trained over 200,000 people by 1950. n154 By 1962, these apprenticeship programs had received approximately \$4 million in funding annually. n155 Federal funding for these programs

[\*199] paid for job instructors, instructional supplies, and program consultation. n156

Similar to other legislative policies that encouraged discrimination, the National Apprentice Act was significant in denying employment opportunities to African Americans while ensuring continued access to the majority of Anglo Americans. While Anglo Americans enjoyed access to a system of redistribution, African Americans were relegated to the lower strata of the employment sector. n157 Current statistics regarding levels of employment, percentage of people living below poverty, and annual income per household suggest that a vast disparity between African Americans and Anglo Americans exists. Of the total African American and Anglo American civilian populations, African Americans constitute 6.8% of the individuals employed, whereas Anglo Americans constitute 55.8% of the workforce. n158

In 1996, African Americans represented 29.3% of those in poverty, while Anglo Americans composed 11.2% of the population in the same condition. n159 The historic employment rates of African Americans, combined with the federal government's role in supporting discrimination in employment, have resulted in African Americans being employed at a lesser rate than Anglo Americans and having less earning. In 1994, the median income for African Americans was \$21,027, contrasted with that of Anglo Americans at \$34,028. n160 A year later, the median income for African Americans was \$22,393, while Anglo Americans' median income was \$35,766. n161

Education, property ownership, and employment discrimination are not presented as all-inclusive factors attributing to the federal government's role in divesting African Americans of an opportunity for a quality life. The policies discussed above are key factors that implicate the federal government's liability. Each factor is a foundation upon which to build a reparations claim. In recognizing the sanctioning of slavery and segregation, and the harm that flowed from that sanctioning, it is equally important to present legal theories under which an African American reparations cause of action can be brought.

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PART V.

INTERNATIONAL LAW, CONSTITUTIONAL LAW, AND FEDERAL TORT LAW: THE APPROPRIATE LEGAL THEORIES TO ASSERT AN AFRICAN AMERICAN REPARATIONS CLAIM

A. International Law and an African American Reparations Paradigm

The greatest barrier that will emerge in an African American reparations claim is the federal government itself. In realizing that the federal government could simply render a reparations claim moot, it is imperative that a reparations claim be asserted in one of the following approaches: (1) take control out of the federal government's purview; (2) assert a claim as a violation of the United States Constitution; or (3) measure the federal government's liability based on state tort law by utilizing a federal statute designed to hold the federal government accountable for its actions.

Second, the applicable legal theory should have the effect of expanding current law to protect future classes of people from pervasive discrimination perpetrated by their government. Asserting a cause of action based on international law and the United States Constitution will have the effect of expanding the law in such a manner. This expansion is desirable because it subjects the United States of America and other sovereigns to an international tribunal in addition to breathing life into a dormant constitutional amendment that protects people on American soil. All three legal theories should be pursued in the interest of "Justice." African Americans have yet to receive any form of substantive justice for slavery and segregation. The very entity that substantially contributed to a people's genocide claims immunity and continues to deny these citizens justice.

B. Asserting an African American Reparations Claim Under International Law

A reparations claim pursued under international law serves two important purposes. First, it removes the issue from the federal government's jurisdiction and expands international law to the extent that world powers will be held accountable for abuses of their citizenry. Article 6 of the Nuremberg Charter states the following:

Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any

[\*201] civilian population, before or during war, or persecution on political, racial or religious grounds in execution or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated. n162

The analysis of an African American reparations claim seizes upon the language within the measure that states "enslavement" and "or persecution on... racial... grounds" as the basis for the foundation of a cause of action. The sole factor used to enslave Africans and oppress African Americans, which resulted in African American genocide, is their race. In utilizing both phrases within Article 6, African Americans could contend that because the United States sanctioned slavery through constitutional law and legal decisions, combined with its active role in oppression of a people, its acts and omissions constitute crimes against humanity.

Korean women have asserted a similar claim premised on international law that has a factual basis with a striking likeness to that of the African Americans. The women, who filed suit against the Japanese government, argued that the atrocities committed against the Korean women, by being forced into slavery and prostitution, constituted crimes against humanity. n163 Over 6 million Koreans were enslaved and forced into labor in Korea, Japan, Manchuria, Sakhalin, and the South Sea Islands, n164 and were forced to labor in Japanese factories, mines, and to serve in the Japanese military. n165 From 1932 to 1945, the Japanese government enslaved Korean women for the sole purpose of prostitution. n166 The ethnic Korean's existence in Japan and territories within its domain mirrors the African Americans' existence in the United States because they were both selected based on their race and taken from their native land as slaves. Furthermore, Koreans still experience a significant amount of discrimination. A large portion of the Korean population lives in ghettos, has a higher rate of unemployment, and is prohibited from holding certain jobs. n167 Additionally, Koreans are discriminated against in the educational system in that



[\*202] they are denied access to the most prestigious Japanese universities. n168 The majority of the estimated 700,000 Koreans in Japan are second, third, fourth, and fifth generation residents. n169 The factual basis of the African American and Korean existence and oppression in the United States and Japan are similar. African Americans would use the same analysis as Koreans in Japan to assert a claim under international law.

The United States' sovereignty and traditional application of the law are defenses the federal government might employ against an African American reparations claim in an international tribunal. American sovereignty could be easily dispensed by arguing that the United States subscribes to a rule of law as one of its foundational tenets, and therefore it must submit to judgment before a world tribunal just as any other sovereign nation that signed a treaty and is a member of the United Nations. n170 As for the traditional application of the law, the United States would probably argue that the Nuremberg Tribunal has been limited in its application to periods of war. n171 Thus, to effectively use international law to assert a claim against the United States, an extension of international law, or a more flexible interpretation of the law, is required. n172 Although war may be a precursor to utilizing Article 6, an international tribunal should also have authority to adjudicate claims of citizens of a country against their country of origin insofar as relief from an oppressor is unlikely.

### C. A Reparations Theory Under the United States Constitution

An African American reparations claim could also be based on a violation of the Fifth and Thirteenth Amendments of the United States Constitution. To establish a violation of the Fifth Amendment, an African American reparations claim must first establish that prior to the Fourteenth Amendment, the United States Constitution also applied to slaves and their descendants. After establishing that enslaved Africans and their issue were entitled to constitutional protection, the Fifth Amendment need only be applied to illuminate the federal government's violation of constitutional law.

The preamble of the Constitution states:

[\*203]

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. n173

American culture uniformly acquiesced in the belief that the United States Constitution did not apply to enslaved Africans or their issue. n174 However, a closer look at the Constitution's language and its intent suggests that enslaved Africans and their issue were included in the terms "people" and "persons." Thus, the Constitution applied to slaves and subsequent generations. Article I, Section 2 describes "those bound to service" as "three-fifths of a person... excluding Indians not taxed..." n175 From this language, it is evident that enslaved Africans, from the adoption of the Constitution, were persons under the United States Constitution and thus, the "Liberty" interest afforded to "persons" in the Preamble was the "Liberty" interest afforded, likewise, to enslaved Africans.

James Madison bolstered this opinion in the Federalist No. 54. Madison stated:

In being protected on the other hand in his life & in his limbs, against the violence of all others, even the master of his labor and his liberty; and in being punishable himself for all violence committed against others; the slave is not less evidently regarded by the law as a member of society; not as a part of the irrational creation; as a moral person not as a mere article of property. n176

Slaves were considered persons under the meaning of the Constitution and, therefore, entitled to the same protections afforded by the Constitution. Unlike the limitations placed on the Indian rights in the Constitution, n177 the federal Constitution placed no limitations on slaves or their issue. Enslaved Africans and their issue were persons under the meaning of the Constitution and were entitled to protection of their liberty. The Fifth Amendment prohibited the federal government from denying any "person" of their "liberty." n178 When the federal government sanctioned slavery through state property law, the federal government violated the Constitution.

[\*204] Critics may argue that this proposed reading of the Constitution is too narrow. However, viewing the Constitution as a contract between the people and their government, n179 proponents of reparations can rely on the Doctrine of Ambiguity. n180 Under that doctrine, the word "persons" in constitutional language should be construed as applicable to enslaved Africans and their issue from the inception of the document to the abolition of slavery in 1865. The constitutional breach established by the plain language reading of the document and its guarantee of liberty is circumscribed to the period from 1787 to 1865. From 1866 to 1954, a different constitutional analysis must be employed to reach the federal government's liability in the disenfranchisement of African American citizens.

With the exception of emancipating the slaves, the Thirteenth Amendment has been largely a dormant constitutional amendment. However, a reparations claim can be crafted to utilize the Thirteenth Amendment. Section 1 of the Thirteenth Amendment 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." n181

In addition, Section 2 states that "Congress shall have power to enforce this article by appropriate legislation." n182 A reparations claim would seize upon the "involuntary servitude" phrase within this amendment. The appropriate test to measure whether a constitutional violation occurred would be based on the "function of race" standard set forth in *City of Memphis v. Greene*, n183 which holds that the Thirteenth Amendment is applicable when a person or government infringes upon an individual's or a people's rights because of their race. n184

[\*205] Proponents of a reparations claim would contend that because the United States sanctioned compulsory segregation through the law and denied African Americans access to education, property ownership, and employment because of their race, African Americans were relegated to a state of "involuntary servitude" in violation of the Thirteenth Amendment. By breathing life into the Thirteenth Amendment and establishing a basis to apply the law, a reparations claim would have a solid foundation to assert a constitutional claim against the United States.

#### D. A Reparations Claim Under the Federal Tort Claims Act

The third legal theory under which an African American reparations claim could be asserted is the Federal Torts Claims Act (FTCA). This law would be employed for two important reasons. First, it ensures that United States citizens have a legal venue to assert a claim against the federal government. Second, the federal government's acts would be measured under state law, which would favor a reparations claim. The FTCA is codified in 28 U.S.C.A. 2671-2680. The applicable section, Section 2674 states:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. The plaintiff must submit the claim to the government agency involved and suit is not permitted until the agency has refused payment or has delayed by state tort law. The case is tried only in federal court. Neither party can have a jury trial; the judge sits as trier of fact. n185

The dignitary tort that could be utilized as the basis for an African American claim for reparations under the FTCA is Intentional Infliction of Emotional Distress (IIED). The Second Restatement of Torts states that to prove IIED one must show that: (1) the actor's conduct was extreme and outrageous; (2) the harm intended (or risked by the actor's recklessness) was severe; and (3) the actual resulting emotional harm was also severe. n186 Traditionally, at common law, IIED was employed as a parasitic tort and not recognized. However, with an increasing

[\*206] focus on the emotional well-being of the individual, society began to recognize IIED as an individual tort. n187

In applying the common law standard of IIED to an African American claim for reparations, it is evident that such a claim would be based on tort law. n188 Proponents of African American reparations may argue that America's conduct toward African Americans constitutes extreme conduct that sanctioned the enslavement of a race. After emancipating the African Americans, the government made a concerted effort to deprive African Americans of opportunities in education, property ownership, and employment, and all liberties included with being a citizen in the United States. In addition, the proponents must contend that the sanction of slavery and discrimination was outrageous because the government knew, or should have known, that the result of this genocide would be that African Americans subjected to such policies, and their subsequent generations, would lack educational, economic, social, and political opportunity. The federal government's efforts to deny African Americans access to education, property ownership, and employment through slavery and segregation, indicates that the United States intended African Americans to be subordinate in every respect to Anglo Americans, supporting an ideology of Anglo American superiority in all aspects of American life.

As a result of slavery and segregation, African Americans experienced hopelessness because of their total exclusion from every aspect of American opportunity, a feeling of being second-class citizens, and less opportunity when measured by social, political, and economic indicators. Thus, in the final analysis, the emotional harm is a conscious or subconscious belief of inferiority bred by the Anglo American culture and indoctrinated in generations of African Americans. Therefore, IIED is an appropriate claim to assert a reparations cause of action against the United States of America. The fact that the statute is designed to address wrongs of the government makes it especially appealing.

Each of the three theories is burdened by the doctrine of governmental immunity, which bars constitutional tort claims under the Federal Tort Claims Act. n189 Although governmental immunity may be

[\*207] raised as a bar, it is not applicable based on any of the three theories presented to assert an African American reparations claim. With respect to an international claim, the United States would be subjected to an international tribunal. Although a sovereign and able to decline to accept amendments to any treaty, the federal government would be subjecting itself to acknowledging its hypocrisy before the world. The constitutional claim would also survive a sovereign immunity claim because it is a constitutional violation. Unlike the plaintiffs in *Cato* who requested monetary damages under the FTCA, n190 the claim asserted under constitutional violations does not attempt to recover a monetary award. In addition, unlike the claim in *Cato* and like cases that premise their reparations claim on a constitutional tort, n191 the FTCA claim asserted would be premised on IIED, a tort recoverable under state law.

Another potential barrier to an African American reparations claim would be the Doctrine of Laches. n192 Opponents often contend that affording modern-day African Americans reparations based on slavery and segregation simply renders reparations too tenuous. In response to a laches defense, African Americans must rely on the common law limit to laches, which limits a laches defense when used to defeat the public interest. n193 Proponents must contend that a denial of an African American reparations claim works to the detriment of the public interest because the defense leaves people without the protections of their government or without relief under the laws that are designed to protect and provide recourse. Thus, through the federal government's executive, legislative, and judicial branches, the federal government is continually perpetrating genocide against African Americans by continuing to deny African Americans reparations.

Lack of standing may also be raised as a bar to an African American reparations claim. A series of cases have been filed in which the United States district courts have held that the plaintiffs in African American reparations claims lacked standing insofar as the complaints alleged that the wrongs complained of were sanctioned by the Constitution and laws of the United States, and did not raise a federal question. n194

[\*208] Standing exists because the United States Constitution applies to all Americans. Asserting a reparations claim based on international law, constitutional law or the FTCA are all approaches that should be pursued by African Americans. In addition to providing a sufficient basis to assert a reparations claim against the United States, these legal theories provide an ideal foundation on which the remedies to African Americans can be crafted.

#### E. Examining the Appropriate Legal Remedies and Suggested Forms of Reparations to African Americans

Restitution and damages are two legal remedial theories that are perfectly aligned with the form of reparations that should be advanced. Restitution is the primary legal remedy that should be utilized in an African American reparations cause of action. A restitutionary goal is to prevent the unjust enrichment of the defendant. Restitution is measured by the defendant's gains, not by the plaintiff's losses. n195

The specific type of restitution that should be applied is "in specie" restitution. In specie or "in kind" restitution, rather than a monetary award, permits recovery of a specific thing. n196 The second type of remedy that is applicable in an African American reparations cause of action is damages. Damages seek to compensate the victim for loss. n197

#### F. Form of Reparations for Educational Disenfranchisement

Restitution is the appropriate legal remedy under which reparations for educational discrimination should be pursued. The divestment of educational opportunity and its measurable effects is difficult to ascertain. However, in measuring the remedy based on the defendant's gains, and not the plaintiff's loss, this remedy becomes a more inviting theory on which reparations can be crafted.

First, the federal government would be required to improve the existing academic infrastructure of Historically Black Colleges and Universities (HBCU). Each HBCU should be afforded resources to improve its academic curriculum, ROTC programs, extension services, and scientific research. The second form of educational remedy that

[\*209] should be implemented is an educational scholarship fund, solely for African Americans. Although this remedy appears narrowly tailored for a specific racial group at first glance, it is the offspring of a similar educational fund remedy established to satisfy a reparations claim asserted by Japanese Americans. n198 Reparations afforded to Japanese Americans for internment are often distinguished from similar African American remedies because reparations are usually limited to the actual victims. n199 With respect to education, Congress established an educational fund intended to "address an injustice suffered by an entire ethnic group," thus expanding reparations to ensure that they can be used to remedy past, current, and future effects of discrimination. n200 Using the Japanese paradigm, African Americans must contend that the only way to completely address the educational disparities and "injustices" suffered by African Americans would be to provide African Americans with unfettered access to public institutions of higher learning, provided individuals meet the institution's minimum qualifications for admission.

The fundamental challenge that may be asserted against a restitution claim is that, even if it is conceded that the federal government's acts and omissions resulted in the harm alleged, a restitution remedy is inappropriate because there is no evidence that the federal government was unjustly enriched. To overcome this challenge, proponents must equate the federal government to Anglo Americans. In arguing that the federal government and Anglo Americans were one and the same at the time the government sanctioned slavery and segregation, the plaintiff must contend that the Constitution, laws, and public policies favored Anglo Americans at African Americans' expense. Since Anglo Americans controlled the federal government, the two were arguably one and the same. Under this analysis, it could be proven that the federal government was unjustly enriched and restitution is an appropriate remedy for education.



[\*210]

#### G. Employment Discrimination and a Restitution Remedy

A restitution remedy could also be applied in the case of African American reparations for employment discrimination. The specific institutional remedy that should be afforded to African Americans is a federal program that focuses on practical training for traditional and emerging industries in public and private sectors. Moreover, similar to preferences afforded to veterans for their services to their country, African Americans should receive additional consideration, provided that they meet the minimum qualifications for the position. The major barrier with regard to this form of reparations would be the preferential treatment afforded to African Americans. In fact, courts have attempted to limit employment reparations to the "actual victim." For example, in *Firefighters Local 1784 v. Stotts*,<sup>n201</sup> the Court suggested that hiring any person, other than the actual victim, as a remedy for discrimination, would violate the 1964 Civil Rights Act.<sup>n202</sup> The "actual victim" analysis is problematic because it fails to address the harm to the class experiencing discrimination. In cases of long-standing exclusion of a victim group, an employer would be required to prove an equitable environment.<sup>n203</sup> Under this model, the discrimination against the class would be considered and a restitution remedy would be applicable to address the discrimination against the class. To effectively address the class discrimination, a paradigm should be adopted that shifts the burden from the individual proving discrimination to the employer that created the discriminatory environment. Although the federal government may raise the same lack of unjust enrichment argument, the analysis employed to defeat that challenge would be equally applicable in the instance of an employment reparations claim.

#### H. Discrimination in Property Ownership and Damages Remedy

Property ownership bears a distinct difference from education and employment because an increase in property ownership can be immediately actualized with an aggressive reparations model. Therefore, whereas restitution would be the ideal remedy in asserting a reparations claim for education and employment discrimination, a

[\*211] damages remedy would be more beneficial to African Americans when addressing discrimination in property ownership.

First, reparations for discrimination should be afforded in the form of a tax credit. African Americans should be permitted to create a 50-year trust account to invest, in any manner, all income taxes that would have been paid to the federal government. n204 The rationale is that during the 246 years of slavery, and 60 years of legal segregation, African Americans were all but prohibited from fully participating in the real estate market. Thus, African Americans would have a significant period of time to obtain enough capital to acquire productive property. n205 Second, property acquired by African Americans should not be taxed for three successive generations. This policy would be an ideal method of encouraging inheritance within the African American family structure. Finally, similar to home loan guarantees afforded to veterans, African Americans should be entitled to home loan benefits to provide additional assistance to those that may not have the necessary resources to obtain capital or credit for a home loan.

These suggested forms of reparations are not exclusive, nor do these paradigms fit neatly into a box. Just as there were costs to generations of African Americans that were raped of potential, stripped of opportunity, and stifled with oppression, there will be costs in affording reparations to African Americans. America's systematic effort to commit genocide tolled African Americans' reparations claim, and until it is addressed, reparations will continue to be due to successive generations that continue to feel the effects of slavery and segregation.

### CONCLUSION

Defining the slave, Nigger, Negro, colored, Afro-American, black, and African American is important because these are the people who were victims of slavery and segregation, and their descendants are entitled to reparations. The theories advanced in this article may quiet those critics' voices that place slavery in a state or individual enterprise. Through the United States Constitution and American common law, it has been established that the federal government authorized slavery through sanctioning slave-holding states' property laws. In measuring the effects of slavery and compulsory segregation

[\*212] with respect to education, property ownership, and employment, the effects of the federal government's sanction of inequality has and continues to have a lasting effect on generations of African Americans.

The law under which a reparations claim should be brought is crucial to assert an African American reparations claim. International law, the Constitution, and the Federal Tort Claims Act provide grounds to assert an African American reparations claim. The disparities in education, employment, and property ownership fostered by the federal government could be addressed through these and other types of solutions to address the United States of America's genocide on Africans and African Americans.

Coming to grips with injustice is difficult for all. As American culture and law move toward a resurgence of racist ideology implemented in law, and notions of preferential treatment for the historically disenfranchised, African Americans must utilize every resource to correct past wrongs and prevent future injustices. A demand for African American reparations must be advocated for until each and every Lancaster, and each and every other African American family receives reparations for 306 years of slavery and segregation.

#### FOOTNOTES:

n1. The Lancaster Family History, 1992 Colorado Lancaster Family Reunion.

n2. Id.

n3. Interview with Donald Aquinas Lancaster, Sr., father of Donald Aquinas Lancaster, Jr., in San Diego, Cal. (Dec. 28, 1998).

n4. Id.

n5. Interview with Elbert Lancaster, Jr., uncle of Donald Aquinas Lancaster, Jr., in San Diego, Cal. (Dec. 28, 1998).

n6. David A. J. Richards, Public Reason and Abolitionist Dissent, *69 Chi.-Kent L. Rev.* 787, 803 (1993).

n7. William Javier Nelson, Racial Definition: Background for Divergence, *47 Atlanta University Review of Race and Culture* 318, 318-19 (1986).

n8. Id. at 318.

n9. Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* 21 (1996).

n10. Id.

n11. *Id.* at 25.

n12. *1 N.C. 188 (1802)* (arguing that a presumption of slavery existed because "the Negroes originally brought to this country were slaves").

n13. *Morris*, *supra* note 9, at 22.

n14. *Id.*

n15. J. Clay Smith, Jr., In *Freedom's Birthplace: The Making of George Lewis Ruffin, The First Black Law Graduate of Harvard University*, 39 *How. L.J.* 201, 235 (1995) ("The most specific provision of the slave code that tied mulattos to slaves as equals was the statutory provision relating to a judge's charge to any slave, Negro or mulatto, as a witness on any trial, which provided in part, that whenever it shall be necessary to examine any slave, mulatto, as a witness on any trial... it shall be the duty of the court or justice sitting on such trial, before such witness shall be examined, to charge him to declare the truth, in the manner following, to wit: You are brought hither as a witness, and, by the direction of the law, I am to tell you, before you give your evidence, that you must tell the truth, the whole truth and nothing but the truth; and that, if it be found hereafter that you tell a lie, and give false testimony in this matter, you must for so doing, have both your ears nailed to the pillory and cut off, and receive thirty-nine lashes on your bare back, well laid on, at the common whipping-post.").

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n21. *Morris*, *supra* note 9, at 24.

n22. *Id.* at 43.

n23. *Id.* at 45.

n24. *Id.* at 24.

n25. Brian Gallagher, A Brief History of Institutionalized Child Abuse, *17 B.C. Third World L.J.* 1, 15 (1997).

n26. Ariela J. Gross, Litigating Whiteness: Trial of Racial Determination in the Nineteenth-Century South, *108 Yale L.J.* 109, 178 (1998).

n27. A. Leon Higginbotham, The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority, *17 Cardozo L. Rev.* 1695, 1708 (1996).

n28. Anthonia Steele, The Myth of a Color-Blind Nation: An Affirmation of Professor Derrick Bell's Insight into the Permanence of Racism in Society, *22 Cap. U. L. Rev.* 589, 596 (1993).

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n30. Lysander Spooner, The Unconstitutionality of Slavery, *28 Pac. L.J.* 1015, 1105 (1997).

n31. Jonathan A. Bush, Free to Enslave: The Foundation of Colonial American Slave Law, *5 Yale J.L. & Human.* 417, 442-43 (1993).

n32. *Id.* at 443.

n33. *Id.*

n34. *Id.*

n35. *Id.* at 424.

n36. William M. Wiecek, The Origins of the Law of Slavery in British North America, *17 Cardozo L. Rev. 1711, 1725 (1996)*.

n37. Bush, *supra* note 31, at 427.

n38. *Id.*

n39. *Id.*

n40. Martin L. Fried, The Uniform Probate Code: Intestate Succession and Related Matters, *55 Alb. L. Rev. 927 (1992)*.

n41. Morris, *supra* note 9, at 82.

n42. *Id.*

n43. Thomas D. Russell, A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property, *18 Cardozo L. Rev. 473, 505 (1996)* (explaining that holding a life estate in slaves meant that the holder could manage the slaves during his or her lifetime, but when the holder of the life estate died, the remainder of the life estate would pass to the person whom the testator had specified to receive the remainder, also known as the remainderperson).

n44. Morris, *supra* note 9, at 90.

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n48. See generally, Andrew Kull, Freedom: Personal Liberty and Private Law: The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves, *70 Chi.-Kent L. Rev. 493 (1994)*.

n49. U.S. Const. art. I, 9, cl. 1.

n50. Barbara Holden-Smith, Lords of Lash, Loom, and Law: Justice Story, Slavery, and Priggs v. Pennsylvania, 78 *Cornell L. Rev.* 1086, 1096 (1993).

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n52. U.S. Const. art. IV, 2, cl. 2, repealed by U.S. Const. amend. XIII, 1.

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n54. Robert J. Kaczorowski, Fidelity Through History and To It: An Impossible Dream?, 65 *Fordham L. Rev.* 1663, 1674-75 (1997).

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n68. Samuel Issacharoff, *Contractual Liberties in Discriminatory Markets*, 70 *Tex. L. Rev.* 1219, 1231 (1992) ("Jim Crow... was not born and bred among 'rednecks' in the country. First and foremost he was a city slicker."). The Jim Crow laws transformed the postwar agricultural South:

The Jim Crow laws applied to all Negroes – not merely to the rowdy, or drunken, or surly, or ignorant ones. The new laws did not countenance the old conservative tendency to distinguish between classes of the race, to encourage the 'better' element, and to draw it into a white alliance... The Jim Crow laws put the authority of the state or city in the voice of the streetcar conductor, the railway brakeman, the bus driver, the theater usher, and also into the voice of the hoodlum of the public parks and playgrounds. They gave free rein and the majesty of the law to mass aggressions that might otherwise have been curbed, blunted, or deflected." (footnotes omitted).

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n70. Singer, *supra* note 62, at 1388.

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n73. Lucila Rosas, *Is Post Secondary Education a Fundamental Right?: Applying Serrano v. Priest to Leticia "A,"* 16 *Chicano-Latino L. Rev.* 69, 83 (1995) ("Education is the lifeline between the individual and society, and is a major factor in assessing a person's chances for economic and social success.").



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n75. Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 *Geo. Wash. L. Rev.* 587, 624 (1993).

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n88. *Id.* at 196.

n89. *Id.* at 194-95.

n90. *Id.*

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n94. Ch. 130, 4, 12 Stat. 503, 504 (1862).

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n108. *Id.* at 51-52.

n109. *Id.* at 53.

n110. Ch. 79, 38 Stat. 372 (1914).

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n112. *Id.*

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n118. Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 *Tex. L. Rev.* 1847, 1892 (1996).

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n149. *Id.* at 289.

n150. Smith, *supra* note 141, at 161.

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n152. *Id.*

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n154. *Id.* at 162 (There was a drastic increase in government subsidies for job training. The number of programs increased from 17,300 on January 1, 1941, to 40,571 on January 1, 1945, to 131,217 on January 1, 1947, and to 230,832 at the beginning of 1950).

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n170. Matthew Lippman, The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later, *15 Ariz. J. Int'l & Comp. L.* 415, 430 (1998).

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