9-1-2021

Reparations for Slavery: A Productive Strategy?

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CHAPTER 1

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Introduction

Slavery negates individual autonomy and equality—both in the abstract and in substance—when a person or institution holds another human being as chattel or property.[1] Slavery is a system in which society, or a fraction thereof, applies the rules of commerce, the market, and property to human beings. It is a legal regime in which people and institutions can buy and sell human beings. In this sense, the term "slave" itself is a misnomer because it implies a certain normalcy of the condition. It shifts responsibility for slavery from the trader—the trafficker—in human beings, or the owner of the enslaved person, to the enslaved. This is an important distinction because it argues that a human being cannot be a slave per se. The fact of enslavement does not turn one into a slave. This central but fine distinction to some—in the academy and in public discourse—lies at the heart of the question of whether human beings can normatively become chattel or property.

Scholars and commentators in public discourse in the United States often use the term "slave" when referring to enslaved Africans or African Americans before the Emancipation Proclamation and the passage of the Thirteenth Amendment.[2] The argument here is that the law can rob people of their freedom through enslavement, but it cannot vacate their inherent and innate dignity as humans.

A person cannot be a slave as such. As an empirical matter, a person can be enslaved, but that does not vacate or nullify their inherent human dignity

as a normative question. To argue otherwise is to ratify an immorality and a normative impossibility. Even those born into slavery are not intrinsically slaves but enslaved human beings. This argument sits at the core of the justification for reparations for slavery. Enslavement of human beings is a wrong that transcends all known morality. It cannot be justified as a matter of history, law, morality, or culture. That is why absolutist demands for reparations for slavery should be unarguable.

Reparations for slavery fall within a large genre of claims for compensatory and social justice for historical injustices.[3] There are several famous cases in recent history of reparations for historical injustices. The first is that of persons of Japanese heritage, most of them Japanese Americans, who the United States interned during World War II on false claims of disloyalty, espionage, and sabotage on behalf of the Japanese government.[4] The other is the compensation to Jewish victims of the Nazi-perpetrated Holocaust.[5] A third, which is more recent and involves colonial abuses, is the British compensation for atrocities against the Mau Mau freedom fighters in Kenya (see Chapter 7, by Elkins, in this volume).[6] In 2013, the British government expressed regret for the actions of its colonial administration in Kenya and agreed to pay £19.9 (US$30.8) million as compensation to 5,228 Kenyan claimants as "full and final settlement" for the court action.[7] British foreign secretary William Hague told the House of Commons that "We [British] understand the pain and grief felt by those who were involved in the events of emergency in Kenya. The British government recognizes that Kenyans were subjected to torture and other forms of ill-treatment at the hands of the colonial administration."[8] Hague added that: "The British Government sincerely regrets that these abuses took place and that they marred Kenya's progress to independence. Torture and ill-treatment are abhorrent violations of human dignity which we unreservedly condemn."[9]

The language employed by Hague appeared calculated to avoid legal liability. While he does not deny the commission of torture and other atrocities, he nevertheless only "sincerely regrets" those abominations but does not "sincerely apologize" for them. The British government appeared to have been concerned that an "apology"—as opposed to an expression of "regret"—could be an admission of legal liability actionable in a court of law. It is unclear as a matter of legal interpretation whether a court of law would find such a distinction in a legal opinion. Even so, Hague vowed that the Kenyan

settlement did not set a precedent and that the British government would defend claims from other British colonies.

It is notable that the British government only settled the Mau Mau claims in a suit that the Kenya Human Rights Commission and the Mau Mau War Veterans Association brought in the United Kingdom. A British court rejected the government's arguments that the statute of limitations barred the claims and that there would be "irredeemable difficulties" in obtaining evidence and availing witnesses.[10] The court also dismissed the British government's attempt to shift the burden for any compensation to the government of Kenya by arguing that any responsibility for colonial atrocities had passed to the government of independent Kenya in 1963.[11] At a public ceremony on September 12, 2015, at Uhuru Park in Nairobi, the British high commissioner, Christian Turner, spoke at the unveiling of the British-funded monument to the Mau Mau and other freedom fighters.[12] The Kenyan case represents the first time that a colonial power has compensated victims of colonial atrocities. More cases against other colonial powers are sure to follow. In January 2017, the Herero and Nama peoples of Namibia sued Germany through a court in New York over the 1904 genocide.[13]

There are other important reparations programs in history—some going as far back as 1872, when France paid Germany reparations after the Franco-Prussian War.[14] However, the more recent cases of reparations for historical injustices include U.S. payments of monies to Native Americans and reparations for Japanese internment.[15] Elsewhere, there were reparations in the form of property restitution after the Cold War to individuals from whom Soviet bloc states in Eastern and Central Europe took property.[16] Beyond these cases, there have been heated and complex debates about whom should be compensated—or seek reparations—for historical injustices, and why, how, and in what form.[17] This is particularly the case where positive law is lacking, or difficult to establish. But one thing seems to be clear: there is a political economy to a successful claim for compensation or reparations. Claimant groups with social capital, economic clout, and backing from powerful actors and states have met with more success. Victims of the Nazi-perpetrated Holocaust had powerful allies in Israel and the United States. Since 2017, the Me Too movement (#MeToo)—an international uprising against sexual harassment and assault—is the latest demonstration of the power of the confluence of social capital and political awakening to create accountability beyond the strictures of positive law.[18] This is why accountability for past injustices need not be negated by statutes of limitation or the absence of clear positive law.

This chapter interrogates the politics, claims, and strategies for reparations for slavery for Africans, African Americans, and the larger African Diaspora. With the hindsight benefit of both the strategic successes and shortcomings that other groups deployed for reparations, the chapter explores the approaches that advocates of reparations for persons of African descent have adopted. It examines legal, political, and moral strategies as entry points for reparations. It looks at why some groups have succeeded in their quest for reparations and not others. The chapter explores legal fictions used to punt, deny, and belittle claims for reparations for persons of African descent, as well as the deficit of political will in Africa, the West, and the Arab world to come to terms with the staggering cost of the enslavement of Africans and their descendants. Finally, the chapter closes by making a case for multipronged strategies and approaches employing all levers of advocacy to seek reparations for people of African descent.

The Quandary of Historical Injustices

There can be little doubt that the idea of justice is historically contextual in the sense that as a civilizational value it is contingent on time and place. Whether a particular norm of justice is transcendent is a question of debate.[19] Is a particular norm of justice applicable only nationally, or does it have international, or universal, purchase beyond its geographic place of origin? At what point does a narrow culturally tailored social norm become universal? Particular societies at specific historical moments construct social, moral, and legal norms. Should such a limitation matter in a question of accountability at a future date for historical injustices? How should society today address harms that did not carry social, moral, and legal liability at the time they were committed? The historical text suggests a shifting standard of accountability for past abuses and justices. Global hegemons can make new rules and apply them retroactively, even if such ex post facto rules violate longstanding legal precedents or norms. In the legal realm, the Allied powers' legal responses to the vanquished Axis powers after World War II provide a most telling example of the creation of new norms and their retroactive application.

The 1945–46 trial at Nuremberg of major war criminals—predominantly Nazi Party leaders and military officials—not only launched the modern human rights movement but fashioned laws out of new cloth. The charter that

the victors of World War II—the United States, Britain, France, and the USSR—annexed to the London Agreement established the International Military Tribunal at Nuremberg to try war criminals.[20] Among the innovations of the charter were the expansion of crimes and sanctions applicable to offenders for actions that did not constitute crimes at the time of their commission.[21] For example, crimes against peace, or *jus ad bellum*, as opposed to war crimes, or *jus in bello*, were an innovation. The concept of crimes against humanity was another innovation.[22] So was the application of individual criminal responsibility for a number of international crimes. There have been divergent views on these stark developments at the dawn of modern international criminal law. Some jurists, most notably U.S. Supreme Court chief justice Harlan Fiske Stone, were scathing in their disagreement with these innovations. Stone called the Nuremberg trial "an attempt to justify the application of the power of the victor over the vanquished" by dressing it "with a false façade of legality." He called the trial a "high-grade lynching party" and a "sanctimonious fraud."[23]

The Nuremberg trials demonstrate that the international community—as represented by the hegemonic powers of the day—can rewrite existing rules to reach backward and punish a wrong. Nuremberg was easy to accept because of the gravity of the Holocaust and the atrocities of the Axis powers (although the Allied powers exempted their own grave brutalities such as the massive bombing of cities with high civilian casualties and the nuclear destruction of Hiroshima and Nagasaki). The trial's defects and contradictions are more palatable because of its launch of the human rights movement. One can see why the Holocaust pushed the Allied powers to bend legal precedents. For one, it was an opportunity for the Anglo-Saxon tradition of the rule of law to demonstrate its superiority over Nazi barbarities at the dawn of a new international legal and political order under the leadership of the United States. For another, the punished atrocities had taken place in the heart of Europe against the Jews (and although less acknowledged and repaired, against other groups too, including the Romani people, see Chapter 14 by Ian Hancock), an influential, though long-persecuted community that had been the target of many pogroms. It is highly doubtful, as history bears out, that the West would have marshaled a similar response for atrocities against Africans. Unlike Jews, Africans did not have influential organizations such as the World Zionist Organization, or its internationally dominant leader Chaim Weizmann, who served as the first president of Israel. Weizmann convinced the United States to recognize the newly created state of Israel.[24]

Nuremberg did something else that is helpful to those seeking reparations for people of African descent. It gave unarguable status to war crimes, crimes against humanity, and crimes against peace as the most abominable universal offenses known to man.[25] Genocide made it on this ignominious list soon thereafter.[26] The existence of positive law ex ante is not necessary for accountability for these heinous crimes and other historical abuses. As the Nuremberg trial clearly showed, global powers can will accountability ex post facto for gross abuses even where no extant law prohibited such actions. Nuremberg is a great example of a constitutional moment in which society realizes that certain abuses, though not criminalized, are so inimical to morality and decency that leaving them unpunished sets an untenable precedent. In such a situation, dispensing with the general prohibition against retroactive laws is the more plausible option. The most exceptional circumstances may dictate an expedient waiver of this particular legal formality—or an aversion to retroactivity—as was the case in Nuremberg. Actions that shock the human conscience, such as slavery, should follow suit.

There is a further question of statutes of limitations. Does the passage of time bar what can reasonably be sanctioned? In common and civil law, there are statutes of limitation or statutes of prescription to ensure the fair and effective administration of justice. Traditionally, statutes of limitation served three purposes: to ensure that a claimant or plaintiff with a valid cause of action would pursue it with diligence; to ensure that evidence did not get lost, or the defendant was still alive; and finally, to ensure that a long-dormant claim does not deny a defendant justice.[27] In most jurisdictions, however, the statute of limitations is inapplicable to the most heinous crimes, such as murder. The 1970 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity disallows limitations on war crimes, genocide, and crimes against humanity, including gross offenses related to apartheid.[28] The 1998 Rome Statute of the International Criminal Court—ratified by 127 states—provides that genocide, crimes against humanity, and war crimes "shall not be subject to any statute of limitations."[29] This is a legal recognition that accountability for heinous crimes cannot be excused in spite of the passage of time, however long.

In the more recent past, there is growing recognition that particular historical injustices—colonialism, apartheid, and slavery—were so egregious that they cry out for justice. The United Nations repeatedly and annually condemned apartheid—which formally lasted in South Africa from 1948 to 1990—as a crime against humanity; and, in 1966, it declared apartheid a

crime against humanity.[30] In 1984, the UN Security Council affirmed apartheid a crime against humanity.[31] Previously, in 1973, the UN had adopted the Convention on the Suppression and Punishment of the Crime of Apartheid.[32] It is notable that only four countries—the United States, United Kingdom, Portugal, and South Africa—voted against this convention, while ninety-one countries voted in favor.[33] The Apartheid Convention declared that apartheid is a crime against humanity and further provided that "inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination" are international crimes.[34] The use of the term "international crimes" is significant because it elevates them over mere, or common, crimes and gives all states and relevant international tribunals the permission to prosecute them.

Unlike the case of apartheid, there is no similar international consensus on the legal status of colonialism and slavery. There is little doubt that colonial powers committed barbaric acts that amount to crimes against humanity. However, there has been a reluctance to declare colonialism itself a crime against humanity. In 2001, the Declaration of the World Conference against Racism (WCAR) in Durban, South Africa, employed clever rhetoric to defuse tension on the question of whether colonialism and slavery were crimes against humanity for which reparations must be due. The declaration's language on colonialism is woefully inadequate. It condemned colonialism as morally outrageous in the strongest terms but fell short of calling it a crime against humanity for which descendants or successors of the colonizers should pay reparations.[35] The declaration was a little stronger on slavery. It explicitly termed slavery and the slave trade crimes against humanity. It acknowledged, in part, "We recognize that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their barbarism, but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, *and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade*" (emphasis added).[36]

The failure of the declaration to recognize slavery, the slave trade, and colonialism as crimes against humanity, with explicit repercussions for the former colonizers and the states that engaged in slavery and the slave trade, disappointed many observers. Kenya's Amina Mohamed, the spokesperson for the Africa group, lamented the lack of an explicit apology for slavery and the absence of any commitment for reparations. She called the declaration

"terribly imperfect" but said it "provides a basis to build on."[37] Nkosazana Dlamini Zuma, then South Africa's foreign minister, said, "Something historic happened here." She added, "We have agreed that the depredation of the systems of slavery and colonialism had a degrading and debilitating impact on those who are black, broadly defined."[38] The United States, which had sent low-level representatives to the conference, and Israel, withdrew from the conference, citing objections to the draft of the declaration.[39]

At least one important Western leader—France's Emmanuel Macron—has called colonialism a crime against humanity. He said French actions in the 132-year colonization of Algeria involved "crimes and acts of barbarism" that would today be termed "crimes against humanity."[40] The question then remains: Where does the international community go from here?

The Legitimation of Reparations for Slavery

In the last several decades, the idea of reparations for slavery has gained momentum even though it remains out of the political mainstream. A succession of events has raised the profile of the reparations debate. The reparations movement, if it can be called that, spans the entire globe, wherever people of African descent are domiciled. In the United States, several antecedent events have inched the debate forward. Not since Reconstruction—when the United States attempted to appropriate and confiscate land in the American South and give African Americans who had been freed from slavery "forty acres and a mule"—have there been more calls for reparations.[41] In the face of southern states' fierce opposition, President Andrew Johnson rescinded "forty acres and a mule."[42] He ordered the eviction of Africans Americans and the return of the land to those who had enslaved them. Thus, the United States has not made reparations for slavery.

Even so, several entities have paid reparations and issued apologies for a number of related historical injustices and brutalities. In 1995, the Florida legislature approved reparations for the victims and descendants of the 1923 Rosewood Massacre.[43] In a frenzy of racist violence, whites descended on Rosewood, where they murdered blacks, and pillaged, ransacked, and destroyed the town. Survivors and victims received sums ranging from $375 to $150,000.[44] In 1997, the United States paid monetary compensation and gave an apology to African American victims of the Tuskegee syphilis experiments.[45] The reparations for the internment of Japanese Americans and the

apology—without reparations—for the illegal overthrow of the sovereign Hawaiian Nation in 1893 and the subsequent mismanagement of the Hawaiian trust lands, have boosted claims for reparations for the enslavement of African Americans.[46] A 1946 settlement for claims by Native American tribes for lands taken forcibly or by deception is a powerful precedent for African Americans.[47] So, too, is the 1971 payment by the United States of $1 billion and the return of 40 million acres as reparations to Native Alaskans.[48] Nevertheless, Public Law 103-150, or the so-called Apology Resolution, explicitly rejected claims for slavery reparations by providing in the disclaimer: "Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States."[49]

The United States is not the only jurisdiction where claims for reparations have found both traction and resistance. Africa, the Caribbean, and Europe have been a major part of the debate to legitimize claims for reparations for slavery. In Africa, there have long been demands for reparations for both the transatlantic slave trade and the Arab slave trade.[50] In the so-called Indian Ocean slave trade, Arabs captured millions of Africans and sold them into slavery in the Middle East and European colonies in Asia.[51] Historians and scholars estimate that up to eighty thousand Africans, whom Arabs had captured in East and Central Africa, died each year even before reaching the slave markets in Zanzibar.[52] Ali A. Mazrui, one of Africa's pre-eminent global intellectuals, captured well the impact of the Arab slave trade in black Africa.[53] However, it is the transatlantic slave trade, not the Indian Ocean one, that has received more attention from scholars and policy makers. Claims for reparations against Arab countries have either been muted or nonexistent. The prominence of the Africa Diaspora in the political, academic, civic, and economic spheres in the West has led to a more heightened public discourse of historical injustices, including slavery. Conversely, the concomitant invisibility of the African Diaspora in the milieu of the Middle East and Asia has suppressed any public clamor for reparations. In 2010, Muammar Gaddafi became the first and only Arab leader to apologize for the Arab enslavement of Black Africans. He said, "I regret the behavior of the Arabs. . . . They brought African children to North Africa, they made them slaves, they sold them like animals, and they took them as slaves and traded them in a shameful way."[54]

In Africa, there has been the occasional robust debate on reparations for slavery. In 1992, Chief Mashood Abiola, the late Nigerian billionaire politician, prevailed on the Organization of African Unity (OAU) to establish the

Group of Eminent Persons for Reparations.[55] The group committed the OAU to press for reparations for slavery. In 1999, the African World Reparations and Repatriation Truth Commission issued the Accra Declaration, in which it called for the West to pay US$777 trillion in reparations for slavery to Africa within five years.[56] However, these claims have not received any traction or advanced beyond the rhetorical stage. In 2001, the World Conference against Racism in South Africa recognized the enslavement of Africans as a historical evil but fell short of calling for reparations for fear that this would tear the conference apart. Abdoulaye Wade, then president of Senegal, was a lone oppositional voice breaking the consensus of the African group at WCAR in its call for reparations.[57] Predictably, Western states—many of them culprits of the transatlantic slave trade—were opposed to reparations at the WCAR.[58] In the Caribbean, there have been spirited, state-led, regional claims for reparations for slavery against the West. It is significant that Caribbean states themselves are pushing for reparations at the risk of alienating powerful Western states. Jamaica, Guyana, and Antigua and Barbuda are among the Caribbean states to press for reparations. In 2014, fourteen Caribbean states vowed to sue European states if negotiations failed to produce a settlement for reparations.[59] Most significantly, the Caribbean Community (CARICOM)—the official regional body for Caribbean nations and dependencies—formed the Caribbean Reparations Commission in 2013.[60] The commission's "Ten Point Action Plan" calls for a full apology and reparations from the West in a number of social, economic, and cultural sectors.[61]

There have been movements for reparations for slavery in two of the most important Western states: the United States and the United Kingdom. These two states were major players in slavery and the slave trade in Africans. It is worth noting that the two countries have large African diasporic populations and, together, have to play important roles in the reparation movement's success. In both the United States and the United Kingdom, advocates for reparations have employed a number of strategies, including lawsuits, legislative and other political actions, and public advocacy. While the reparations movement has witnessed ebbs and flows in the United States, it has not gained widespread acceptance among the populance, nor the elite classes. Former president Barack Obama opposed the calls for reparations for slavery.[62] As president, he instead advocated for incremental and remedial investments in health, education, and other social sectors for African Americans.[63] In fact, he opposed reparations as a candidate for U.S. president.[64] Obama persisted in his opposition in spite of strong cases made by leading African American

scholars, especially Ta-Nehisi Coates.[65] One thing is clear—the clamor for reparations for slavery in the United States will not go away in spite of divisions on the issue among African Americans and outright rejection by many white Americans. Significantly, the United Nations Working Group on People of African Descent termed slavery a crime against humanity and recommended reparations for slavery by the United States.[66] The UN Working Group was unequivocal in its comprehensive list of recommendations for reparations for slavery and related historical injustices visited by the United States on African Americans.[67] As advocates' strategies amply demonstrate, reparations for the redress of slavery will not go away and cannot be forgotten, or swept under the rug.[68]

Legal Strategies

One of the enduring paradoxes of the law is its proclivity to render injustice instead of justice. Much as the rule of law is one of the most important issues that stand between the tyranny of the state and the citizen, it is a double-edged sword. It was not for nothing that Charles Dickens in *Oliver Twist* popularized the English expression the "law is an ass—an idiot."[69] The law's rigidity as well as paradoxically its malleability can cut both ways. That is why the law's application does not always result in a just or fair outcome. The tradition of legal positivism—the most enduring judicial philosophy—clads the law with a veil that often hides and protects the interests of the wealthy and powerful in society. Can the law excavate and reduce deeply embedded social and economic inequities, or is it a handmaiden for hegemonic interests? Can the law stand at the intersection of the powerful and the powerless and become an effective lever for the latter? In other words, can the law and legal discourse—especially in a democracy—be tools for transformative liberation? What is the law's liberatory potential? What role can the courts play as agents of deep social change?

The law's career as a tool of liberation is at worst disappointing, and at best mixed. The one poignant example in recent history is Nelson Mandela's attempt, in postapartheid South Africa, to uproot the previous regime's crimes largely by resorting to legal discourses. That experiment has been disappointing, as the lot of Black South Africans—the country's overwhelming majority—has stubbornly refused to improve.[70] South Africa's new constitutional rights framework, while uplifting and a cause célèbre

around the world, seemed to freeze the hierarchies of apartheid in place and thus preserve the apartheid status quo. As law scholar Ibrahim Gassama observes:

> Disenchantment echoes the critique of the rights discourse's double-edged quality: rights can be deployed to protect the powerful and the status quo just as easily as they can be wielded to advance the interests of the weak and the excluded. The power of this observation should be increasingly apparent to rights activists in South Africa. It is not altogether surprising that even as the attainment of political participation rights by blacks in South Africa is celebrated, rights-rhetoric is being successfully deployed to protect the economic status quo—the private property rights—of the white minority in the country.[71]

Karl Klare, the legal academic, underscores this point, stating "rights discourse does not and probably cannot provide us with the criteria for deciding between conflicting claims of right."[72] Critiques of the use of law to transform society abound, and most leading scholars agree on the law's limitations to do substantive justice.[73] The poor and the marginalized can use the rights idiom to improve their plight at the margins—and even to capture state power as happened in South Africa—but there is ample evidence to suggest that those victories are partial, at best. Economic power does not always follow political power, as the history of postcolonial states demonstrates.[74] This reality tempers enthusiasm for the use of rights language and legal forums to vindicate socially and economically difficult problems. We must resort to other discourses for a fuller agenda of liberation. That is why the use of the law as a pathway to reparations for slavery—whether in the United States or elsewhere—is fraught with difficulty. By its nature, the law is a conservative tool when deployed in the struggle for social change, and courts are naturally cautious and skeptical of the property claims of the poor and marginalized, especially where such claims have the potential to upset legal precedent and reorder society.

The limitations imposed by rights language and the courts have not deterred advocates of reparations for slavery. Advocates have filed a number of lawsuits in the United States and Europe in pursuit of reparations. Caribbean states have threatened a lawsuit for reparations at the International Court of Justice at The Hague.[75] In 2004, a number of African Americans brought a

class action lawsuit in Britain against Lloyds of London, the corporate insurance marketplace, claiming that it was culpable for genocide for insuring and financing slave ships.[76] The courts dismissed the case and rejected all appeals.[77] While there have been several actual and threatened lawsuits in other jurisdictions, the most sustained use of the courts for reparations for slavery has been in the United States. This partly reflects African Americans' progressive and persistent efforts and the perception that vindication and redress for slavery are possible within the American legal system. At various points in history, U.S. courts have made landmark rulings in the struggle for racial equality. In spite of many horrendous decisions, such as *Plessy v. Ferguson* (1896), several rulings of the U.S. Supreme Court, among them *Brown v. Board of Education* (1954) and *Grutter v. Bollinger* (2003),[78] buoy the narrative that U.S. courts can be one of the many useful sites in the struggle for racial justice. However, in spite of their reputed openness and accessibility, American courts have not looked at claims for reparations for slavery with favor.

Opponents of claims for reparations in general—and within the courts in particular—raise a number of objections. Since *Korematsu v. United States*, the 1944 case challenging the constitutionality of the executive order on the internment of Japanese Americans,[79] the courts have been an unreliable forum for the adjudication of race-based claims. In *Korematsu*, the court denied any legal claim for compensation. However, in the 1980s, the courts breathed new life into the reparations movement through *Korematsu* and *Hirabayashi* v *United States* in a writ of *coram nobis*.[80] A review of the original cases showed that the government had destroyed and suppressed key evidence that would have altered the outcome. Although the original Supreme Court *Korematsu* ruling has never been explicitly overturned, these latter cases established the validity of the legal claims for reparations and gave advocates more material for battle. This, together with the *Report of the Congressional Commission on Wartime Relocation and Internment of Civilians: Personal Justice Denied*, made possible the realization of reparations for Japanese Americans.[81] In other words, establishing a clear legal claim within the strictures of law, with living victims, and using the political process through a congressional commission was instrumental to the successful claims of Japanese Americans. The African American reparations movement no doubt looked to the Japanese American cases as precedent.

Framing reparations claims in legal jargon is fraught with peril. Opponents of reparations for African Americans for slavery try to use the law to

defeat the claims. One argument is that civil rights and affirmative laws are sufficient to address social and racial inequities and provide African Americans equal opportunities to change their fortunes. Legal scholar Eric Yamamoto has captured well the narrow legal objections that opponents of reparations use: "They [opponents of reparations] argue the criminal law defense of lack of bad intent on the part of the wrongdoers; they assert the procedural bar of standing by claimants (the difficulty of identifying specific perpetrators and victims); they cite the lack of legal causation (specific acts causing specific injuries); and they cite the impossibility of calculating damages (or compensation)."[82]

Implicitly jettisoning white American responsibility for the enslavement of African Americans, these narrow traditional legal objections are supposed to be a complete bar to reparations. They reject collective responsibility by a demographic that has benefitted from the legacy of slavery.[83] No one captures these objections better than Eric A. Posner and Adrian Vermuele.[84] They reject collective moral taint and guilt for the evil of slavery.[85] They make these arguments in the face of overwhelming evidence that African Americans continue to suffer from the legacy of slavery, and that remedial measures such as affirmative action have failed to redress the institution's wrongs.[86] These common law paradigms and arguments are ill-suited to respond to deep historical social and economic injustices and inequities.[87] Others argue that reparations conceived as tangible racial restitution are simply an impossibility—because of the lack of specificity of the claims and claimants and the absence of political legitimacy.[88] The courts—like the scholars who object to legal redress for reparations—have been unyielding in their myopic application of the law and understanding of claims for reparations for slavery.

The few cases in U.S. courts have come up empty. In 2002, descendants of enslaved blacks filed several lawsuits in the United States. The lawsuits sought reparations from various U.S. corporations. The plaintiffs argued that the corporations (financial, textile, tobacco, insurance, and railroad) had either directly, or indirectly through their predecessors, enriched themselves unjustly through slavery and the transatlantic slave trade.[89] The courts consolidated the suits into one action. The district court dismissed the suit on the grounds that it raised a "political question" that the judiciary could not adjudicate, that the claimants lacked standing, and that the statute of limitations barred the claims.[90] In 2006, the U.S. Court of Appeals for the Seventh Circuit affirmed the lower court's ruling but reversed the

dismissal of the plaintiffs' fraud claims; that is, whether the companies defrauded the plaintiffs by failing to disclose their collaboration with slavery.[91] The court dismissed the balance of the claims. In 2007, the U.S. Supreme Court ended the lawsuit when it declined to hear the case on appeal. Advocates have not mounted other major legal challenges for reparations in U.S. courts.

Apologies and Political Strategies

While courts have proven to be an unproductive forum for pressing reparations claims, the political arena seems to hold some limited promise. Advocates for reparations have been able to extract "apologies" or "expressions of regret" from some European countries and the United States. France recognized slavery as a crime against humanity in 2001 and has established the Slavery Remembrance Foundation.[92] In 2007, UK prime minister Tony Blair issued an official statement of apology for slavery.[93] In 2008, the U.S. House of Representatives passed a resolution apologizing for slavery and discriminatory laws.[94] The Senate followed suit in 2009.[95] However, these resolutions make no mention of reparations for slavery. In fact, both congressional resolutions explicitly reject in a disclaimer any authorization, support, or the idea of a settlement for reparations for slavery against the United States. It is empty rhetoric. The U.S. Congress has only considered one major bill on reparations for slavery. Rep. John Conyers introduced the "Commission to Study Reparation Proposals for African Americans Act" each year from 1989 until he retired in 2017.[96] The bill sought to establish a commission to study the impact of slavery and recommend reparations. His departure from Congress may put an end to further initiatives for reparations through legislation.

Conclusion

The West and the Arab world's enslavement and trade in Africans is one of the most egregious historical acts of inhumanity. People of African descent—in Africa and the African Diaspora—continue to suffer from the legacy of slavery and the associated abomination of colonialism. It is heartening that these two gross chapters of human history are being recognized, albeit slowly,

for the brutalities they were. The abolition of chattel slavery, although pockets of it remain in the modern world, was a great advance. So is recognizing slavery as a crime against humanity and offering an apology for it. However, recognition of the evil and an apology are not enough. The world must address the legacy of slavery and colonialism directly. It will not suffice to employ cynical legalese to blunt the issue. Admittedly, it is a complicated and politically explosive question. Several things are clear: neither avoiding the issue nor putting up rhetorical roadblocks to reparations will work; the argument that slavery and the slave trade were legal when they took place will not hold water.

Advocates for reparations need to use all the available tools for advocacy. They need to bring their claims in multiple forums in several jurisdictions. They need to employ many strategies, including those that are legal, political, and educational.[97] They need a social movement drawn from all the continents where large numbers of people of African descent live. They need a unity of purpose. It is imperative that they agitate and organize in every facet of national and global life. The Kenyan Mau Mau case, in which the British provided restitution for their colonial atrocities, is a great study in coordination, persistence, and advocacy in the courts of law and the courts of public opinion. It was a tribute to the organizational abilities of Kenyan civil society and the mobilization of shame and public rage over the atrocities against the Mau Mau. The Kenyan case utilized academics to great effect. The works of leading scholars—in particular, Elkins's path-breaking *Imperial Reckoning*—were key to the advocacy by lawyers and civil society groups. More coordinated collaboration among advocacy groups, lawyers, and academics is necessary if the reparations movement is to gain wider acceptance. The settlement of the Mau Mau case and Britain's "expression of regret" set an important precedent. Reparations for slavery are a much more difficult challenge. However, the states against whom the claims are being made are the wealthiest and the most prosperous in the world. There is no defensible reason they cannot address this blight of history.