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# Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations

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## COMMENT

### **Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations**

Eric L. Ray\*

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#### I. INTRODUCTION

From 1929 to 1944, the United States government, with the cooperation of state and local governments, engaged in a system of mass deportations targeting Latino immigrants, primarily those of Mexican descent, marking another dark and forgotten event in American history known as the Mexican Repatriation.

Scholars have estimated that between 500,000 and 2 million Mexicans, mostly U.S. citizens or legal residents, were either forcefully deported or forcefully persuaded to leave the United States for Mexico.<sup>1</sup> The policy, authorized by President Herbert Hoover, was instituted as a means to free up jobs for Americans suffering financially during the Great Depression. Hoover's policy of mass deportations was also fueled by a nationwide anti-immigrant hysteria.

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1. Ben Fox, *California Bills Seek to Address '30s Repatriation: U.S. Sent Thousands to Mexico to Free Up Jobs In Depression*, ARIZ. DAILY STAR, Sept. 12, 2004, available at <http://www.azstarnet.com/dailystar/relatedarticles/38521.php>.

Lacking concrete or convincing substance were the three facetious claims often used to justify or at least to rationalize banishing the Mexicans: Jobs would be created for 'real Americans'; cutting the welfare rolls would save taxpayers money; and 'those people' would be better off in Mexico with their 'own kind.'<sup>2</sup>

On September 24, 2004, California Governor Arnold Schwarzenegger vetoed California Senate Bills (S.B.) 37 and 427, effectively ending any state cause of action for Mexican-Americans seeking financial reparations from the state of California for the injustices they sustained.<sup>3</sup> The two bills, proposed by California State Senator Joseph Dunn, a Democrat from Garden Grove, were approved by the California Legislature before Governor Schwarzenegger vetoed them.<sup>4</sup>

Given the fact that the statute of limitations to file tort claims had closed, S.B. 37 would have opened a two-year window for victims to sue local California governments for damages, including loss of property, due to the illegal deportations.<sup>5</sup> In his veto message to members of the California Legislature, Governor Schwarzenegger stated, "While I am very sympathetic towards victims who were involuntarily sent back to Mexico . . . , these individuals were able to pursue legal action within a fixed period of time."<sup>6</sup>

S.B. 427 would have set up a privately funded, sixteen-member commission, known as the "Commission on the 1930s 'Repatriation' Program," to look into the involvement of local and state governments in deportation efforts such as immigration raids and coercive tactics.<sup>7</sup> S.B. 427 would have required the commission to gather facts and conduct a study regarding the unconstitutional

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2. FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930s* 216 (1995).

3. Michele Morgante, *Governor's Vetoes Rile Hispanic Activists*, ASSOCIATED PRESS, Oct. 1, 2004, available at [http://www.bakersfield.com/state\\_wire/story/4974152p-5037222c.html](http://www.bakersfield.com/state_wire/story/4974152p-5037222c.html).

4. Edward Sifuentes, *Bills Would Address 'Wrongful Deportations' in 1930s*, North County Times, Sept. 8, 2004, available at [http://www.nctimes.com/articles/2004/09/08/news/top\\_stories/23\\_16\\_149\\_7\\_04.prt](http://www.nctimes.com/articles/2004/09/08/news/top_stories/23_16_149_7_04.prt).

5. An Act to Add Section 354.9 to the Code of Civil Procedure, Relating to Civil Actions, and Declaring the Urgency Thereof, to Take Effect Immediately, S.B. 37, 2003-2004 Leg. Sess. (Cal. 2004), available at [http://vote-smart.org/official\\_xveto\\_detail.php?can\\_id=MCA83868&bill\\_no=SB%2037&entry\\_id=](http://vote-smart.org/official_xveto_detail.php?can_id=MCA83868&bill_no=SB%2037&entry_id=).

6. Governor Arnold Schwarzenegger, Veto Message to the Members of the California State Senate (Sept. 24, 2004), available at [http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb\\_0001-0050/sb\\_37\\_vt\\_20040924.html](http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sb_37_vt_20040924.html).

7. Harrison Sheppard, *Senator Proposes Study on Forced Repatriation*, L.A.

deportations of U.S. citizens, permanent residents or legal residents of Mexican descent.<sup>8</sup>

In his S.B. 427 veto message to members of the California Legislature, Governor Schwarzenegger stated, "[t]he establishment of a new commission is not necessary. The Legislature and the Administration can create commissions to advise them without the need for legislation."<sup>9</sup>

Governor Schwarzenegger's decision to veto both bills echoed a similar stance by former California Governor Gray Davis, who feared that an investigative commission and the prospect of financial awards would cost California millions of dollars in legal fees and reparation payments, which the state could not afford.<sup>10</sup>

Prior to seeking legislative redress, victims of the California Mexican Repatriation efforts filed a class action lawsuit in Los Angeles Superior Court seeking damages from the State of California, Los Angeles City, County and the Chamber of Commerce for their roles in the unconstitutional program. However, the case was dismissed because the statute of limitations had passed.<sup>11</sup>

Incidentally, lawyers for those seeking reparations did not go after the federal government because the federal government, under President Franklin Delano Roosevelt, had stopped the federally-endorsed deportations in 1932.<sup>12</sup> Though the federal government ended its public participation in the deportation program, local and state authorities continued the anti-Mexican deportation policies.<sup>13</sup>

The question that this paper seeks to address is whether a cause of action exists for filing a claim against the federal government. At a minimum, the legal and legislative efforts in California may be used as a starting point for generating public support

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DAILY NEWS, Aug. 14, 2004, available at [http://www.amren.com/mtnews/archives/2004/08/senator\\_propose.php](http://www.amren.com/mtnews/archives/2004/08/senator_propose.php).

8. An Act to Add and Repeal Chapter 3.2 (Commencing with Section 8253) of Division 1 of Title 2 of the Government Code, Relating to Mexican Repatriation, S.B. 427, 2003-2004 Leg. Sess. (Cal. 2004).

9. Governor Arnold Schwarzenegger, Veto Message to the Members of the California State Senate (Sept. 24, 2004), available at [http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb\\_0401-0450/sb\\_427\\_vt\\_20040929.html](http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0401-0450/sb_427_vt_20040929.html).

10. Joe Rodriguez, *Deported - In a Boxcar*, SAN JOSE MERCURY NEWS, Oct. 5, 2004, available at [http://www.mercurynews.com/mld/mercurynews/news/columnists/joe\\_rodriguez/9839233.htm](http://www.mercurynews.com/mld/mercurynews/news/columnists/joe_rodriguez/9839233.htm).

11. *Id.*

12. Steven Wall, *2 Bills Address Forced Exiles*, SAN BERNADINO SUN, Aug. 26, 2004, available at <http://www.sbsun.com/Stories/0,1413,208~12588~2871700,00.html>.

13. *Id.*

similar to that garnered for Japanese-Americans interned during World War II, which resulted in an official apology and reparations despite repeated rejections for a legal remedy.

To vindicate the interests of Mexican-Americans seeking reparations represents a difficult legal battle. A federal cause of action will either be dismissed (as evidenced by the slave reparations litigation), or it could follow the precedent set by Japanese-Americans and victims of the Holocaust, including the recent case of Hungarian Holocaust survivors who successfully won a settlement in the "Gold Train" litigation.

Allowing reparations for Mexican Repatriation may open the door for unlimited lawsuits by people seeking redress for wrongs committed in the distant past. Critics of reparations claim that people need to let go of the past. The alternative point of view, however, relies on the United States' commitment to upholding justice and correcting its past mistakes.

## II. THE VICTIMS OF MEXICAN REPATRIATION

In the 1910s and 1920s, "Mexicans were recruited to come as cheap labor for various industries . . . ."<sup>14</sup> "Especially effective in attracting Mexican workers to the United States was the presence of American economic interests in Mexico."<sup>15</sup> Mexican immigrants became invaluable participants in industries such as railroad construction, mining, steel, ranching and farming. The "key factor for American agriculturalists and industrialists was the Mexicans' willingness to work for low wages."<sup>16</sup> Despite American interest in Mexican labor, and regardless of their reputation as "hardworking" and "law-abiding" people, they were always considered second class citizens.<sup>17</sup> It was this sentiment that made Mexicans and their American-born children easy targets as scapegoats during the Great Depression.

Senator Dunn's research prior to introducing his bills to the California Legislature revealed that "[l]ocal, state and national officials were bombarded with demands 'to curtail the employment of Mexicans' and that they 'be removed from the relief rolls and shipped back to Mexico.'"<sup>18</sup> The Great Depression sparked a

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14. Sifuentes, *supra* note 4.

15. *Id.*

16. BALDERAMA & RODRÍGUEZ, *supra* note 2, at 19.

17. *Id.*

18. *Commission on the 1930s Repatriation Program: Hearing on S.B. 427 Before the S. Comm. on Governmental Organization*, 2003-2004 Sess. 4 (Cal. 2004).

nationwide anti-immigrant environment that the federal government could not ignore. In response, the federal government initiated the first raids in 1931, abducting persons of Mexican descent from public places without regard to citizenship or legal status as many of those abducted were American citizens.<sup>19</sup> Soon after the federal government's involvement became public knowledge, local government institutions, such as the Los Angeles County Board of Supervisors, followed suit on its own repatriation campaign, transporting tens of thousands of people of Mexican descent and their American-born children.<sup>20</sup> States such as Michigan, Texas and Colorado eventually followed the California deportation model.<sup>21</sup> Although the deportations were technically considered voluntary, official local government reports found to the contrary.

Senator Dunn's research has uncovered that as many as 50,000 victims of Mexican Repatriation are still alive.<sup>22</sup> The challenge of determining a more precise figure is the fact that many of the deported never returned to the United States, and those who did are scattered throughout the United States.<sup>23</sup> There are, however, many survivor stories: "[Ignacio] Pina was only six years old when U.S. immigration officers showed up at his Montana home, jailed his family for a week, then put them on a train to Mexico."<sup>24</sup> "Latinos or those looking like Latinos were rounded up, put on flatbed trucks and driven to the border. Others were coerced into leaving on their own and lost their homes and property, government documents show."<sup>25</sup>

The most common cause for deportation was being in the country illegally. However, it is estimated that as many as 60% of those deported were either legal residents or had been born in the United States, thus making them citizens.<sup>26</sup> Once a person was rounded up, they had the option of seeking a deportation proceeding (which very few knew was an option), which were ridden with violations of basic human rights; or they could "voluntarily return to their own country."<sup>27</sup>

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19. Morgante, *supra* note 3.

20. BALDERAMA & RODRÍGUEZ, *supra* note 2, at 55-60.

21. *Id.*

22. Telephone Interview with Legislative Staffer Norma Cobb, Office of State Senator Joseph Dunn, in Garden Grove, Cal. (Feb. 2, 2005).

23. Fox, *supra* note 1.

24. Rodríguez, *supra* note 10.

25. Wall, *supra* note 12.

26. BALDERAMA & RODRÍGUEZ, *supra* note 2, at 216.

27. *Id.* at 50-51.

### III. THE UNITED STATES GOVERNMENT'S INVOLVEMENT IN MEXICAN REPATRIATION

Deportation proceedings represented the United States government's most egregious participation in the Mexican Repatriation program. As the deportation system was structured during the early 1930s, immigration officers working for the Immigration and Naturalization Service (INS) exercised almost total control of the process, including the deportation proceedings.<sup>28</sup> Raids and arrests were conducted without warrants and Latinos were not allowed to see anyone.<sup>29</sup> "Without the opportunity to post bail, deportees languished in jail until the next deportation train was formed . . . . With the advent of the depression and abetted by the hue and cry to 'get rid of the Mexicans,' the situation grew worse as the Immigration Service swung into action."<sup>30</sup>

In its 1932 report, the government's own Wickersham Commission stated, "[t]he apprehension and examination of supposed aliens are often characterized by methods [which are] unconstitutional, tyrannic and oppressive."<sup>31</sup>

There is evidence within the INS's own statistics that the Service specifically targeted Mexican barrios and colonias.<sup>32</sup> "During the period from 1930 to 1939, Mexicans constituted 46.3 percent of all the people deported from the United States. Yet, Mexicans comprised less than 1 percent of the total U.S. population."<sup>33</sup> "Since the Immigration Service was housed within the Department of Labor, it might be surmised that the Service had a vested interest in getting rid of as many Mexicans as possible."<sup>34</sup> In a telegram to the U.S. Government Coordinator of Unemployment Relief, the spokesman for Los Angeles Citizens Committee for Coordination of Unemployment relief stated, "[f]our hundred thousand deportable aliens U.S. Estimate 5 percent in this district [sic]. We can pick them all up through police and sheriff channels. Local U.S. Department of Immigration personnel not sufficient to handle [sic]. You advise please as to method of getting rid [sic]. We need their jobs for needy citizens."<sup>35</sup>

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28. *Id.*

29. *Id.*

30. *Id.* at 52.

31. *Id.* at 52-53 (citing John Perry Clark, *Aliens in the Deportation Dragnet*, 36 CURRENT HISTORY 27, 29 (April 1932)).

32. *Id.*

33. *Id.* at 53.

34. *Id.*

35. *Id.*

The federal policy of freeing up jobs taken by Mexican workers was making its presence felt in local communities nationwide. The most celebrated raid initiated by the federal government, known as La Placita, set the tone of fear in Mexican communities throughout the country. On February 26, 1931, under the supervision of the director of the Immigration Service, Walter E. Carr, immigration agents from all over California gathered in Los Angeles to discuss a massive effort aimed at scaring immigrants into returning to Mexico.<sup>36</sup> "The Placita site was chosen for its maximum psychological impact in the INS's war of nerves against the Mexican community."<sup>37</sup> Uniformed agents swept through a crowded park on a sunny day and began lining Mexicans up. Those without proper documentation were detained.

Raids like the one at La Placita represented the culmination of Secretary of Labor William N. Doak's efforts to transform the Immigration Service . . . . Upon assuming office, Secretary Doak instigated a personal vendetta to get rid of the Mexicans. His motivation was purely political, for he was acting under President Hoover's orders to create a diversion to counteract organized labor's hostile attitude toward his administration.<sup>38</sup>

In the first nine months of 1931, Secretary Doak's efforts resulted in more people being deported than entering the United States.<sup>39</sup> "In a manner characteristic of the Immigration Service, Doak denied all allegations of illegal procedures, abuses, and misconduct by his agents. All protests fell on deaf ears as the Immigration Service pandered to the public weal."<sup>40</sup>

"Much to the dismay and chagrin of the Immigration Service, aliens who could prove they had resided in the United States continually for the past five years could not be summarily or arbitrarily deported. Such individuals could be deported only for cause."<sup>41</sup>

Aside from the fact that many of the raids and deportations were unconstitutional, Secretary Doak and his agents were granted the authority to protect the country from illegal immigrants.<sup>42</sup> Subsequently, Secretary Doak concluded that 400,000 illegal immigrants were eligible to be deported immediately – a

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36. *Id.* at 57.

37. *Id.* at 57.

38. *Id.* at 58.

39. *Id.* at 59.

40. *Id.* at 60.

41. *Id.* at 60-61.

42. *Id.* at 58.



staggering and unsupported number aimed at pleasing organized labor.<sup>43</sup> The problem with this argument, however, is that although many of the immigrants may have been illegal, many of their offspring were born in the United States and were thus entitled to the full panoply of constitutional rights afforded to all American citizens. While these children were entitled to stay, the possibility of remaining in the United States as young children while their parents were deported to Mexico presented an unrealistic scenario. "Younger children who had no choice but to accompany their parents suffered wholesale violations of their citizenship rights. This accounts for the fact that approximately 60 percent of those summarily expelled were children who had been born in the United States and were legally American citizens."<sup>44</sup>

#### IV. A FEDERAL CAUSE OF ACTION FOR REPARATIONS: DEFEATING THE STATUTE OF LIMITATIONS

Individuals seeking reparations against the United States government face the difficult jurisdictional hurdle of defeating the statute of limitations. There are, however, ways around this obstacle. To defeat the statute of limitations, plaintiffs seeking a cause of action against the federal government would need their time-barred claim equitably tolled, which would require proof that material, factual predicates to the plaintiff's cause of action against the defendant, the United States government, were inherently unknowable or concealed by the United States.<sup>45</sup>

Victims of Mexican Repatriation would have the difficult task of proving that information relating to the federal government's involvement in the deportation of untold numbers of Mexican Americans, permanent residents or resident aliens, was hidden from them or unknowable for the past sixty years. There are, however, several arguments demonstrating that logistical obstacles and inadequate resources may have prevented a plaintiffs' class from filing a timely suit against the United States government.

In the absence of proof of concealment of material facts by the

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43. *Id.* at 58-59.

44. *Id.* at 216.

45. Memorandum from the Office of the Chief Economist, U.S. Dep't. of Agric., *Agricultural Labor Affairs in Support of United States' Motion to Dismiss the Bracero Savings Cases* (Aug. 14, 2002), available at <http://www.usda.gov/oce/oce/labor-affairs/braceromemo.htm>.

United States government, the plaintiff's claims are time-barred under 28 U.S.C. § 2401(a), which states, "[e]xcept as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."<sup>46</sup> Further, this provision "applies to all civil actions whether legal, equitable or mixed."<sup>47</sup>

In a typical claim against the federal government, the six-year statute of limitations "is not simply a waivable defense; it deprives the district court of jurisdiction to entertain the action."<sup>48</sup> "The 6-year statute of limitations on actions against the United States is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity

.....<sup>49</sup>

It is undisputed that the victims of Mexican Repatriation failed to bring their claims within the requisite six years of accrual. A cause of action accrues "when 'all events which fix the government's alleged liability have occurred and plaintiff was or should have been aware of their existence.'"<sup>50</sup> The plaintiffs in the Mexican Repatriation case will have to rely on the fact that they were not aware of the existence of liability in order for the statute of limitations to toll. These plaintiffs could not have known of a deliberate plan by the United States government to rid the nation of Mexicans as part of a tactic aimed at satisfying the majority of Americans who looked to the federal government to address the Depression in some way. Further, "a plaintiff does not need to possess actual knowledge of all the relevant facts in order for the cause of action to accrue."<sup>51</sup>

The statute of limitations is a doctrine inherent to our system of justice. The plight of plaintiffs similar to the victims of Mexican Repatriation, such as African Americans suing for slavery reparations, face a major challenge in defeating the doctrine because of the precedent it might set. Critics believe that the United States government should not have to pay reparations for acts that took place in the distant past:

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46. 28 U.S.C. § 2401(a) (2000).

47. *Nesovic v. United States*, 71 F.3d 776, 778 (9th Cir. 1995).

48. *Id.* at 777-78.

49. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988).

50. *Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000) (citing *Hopland*, 855 F.2d at 1577).

51. *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995).

Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.<sup>52</sup>

Based on this theoretical interpretation of the statute of limitations, any effort to compensate Mexican Americans must take place now - before the primary evidentiary sources, the victims themselves, disappear.

In trying to prove the federal government's involvement in Mexican Repatriation, another evidentiary concern is the fact that the United States "administers hundreds of programs at any given time, and, as a matter of course, disposes of its records pursuant to pre-determined retentions schedules."<sup>53</sup> In the instant case, locating concrete evidence of the United States' involvement in deporting Mexicans-Americans is a very challenging task given how long ago the actions took place.

A plaintiff cannot rely on conclusory allegations of law and unwarranted inferences to defeat a Fed. R. Civ. P. 12(b)(6) motion to dismiss which is most likely what lawyers for the federal government will do.<sup>54</sup> To withstand a violation of the statute of limitations, the plaintiffs must establish that there are grounds for equitable tolling or they must prove there are newly discovered facts that were inherently unknowable or concealed by the United States.<sup>55</sup>

Equitable tolling in this case could be based on the fact that many of the victims of Mexican Repatriation were settled back in Mexico by the time the statute of limitations had expired. There would have been no way for them to file a claim against the United States. Further, communication during that time period, particularly communication between repatriates and lawyers in

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52. *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

53. Memorandum from the Office of the Chief Economist, *supra* note 45, at 21.

54. *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996).

55. Memorandum from the Office of the Chief Economist, *supra* note 45, at 21.

the United States, would have been unfathomable. Many of those repatriates were forced to settle in rural areas where it would have been nearly impossible to make phone calls or send letters to lawyers in the United States. Also, at that time, it would have been economically impracticable for a repatriate to pursue litigation against state or federal authorities. The Great Depression placed a financial burden on Americans, and particularly burdened Mexican-Americans, who were forced to leave the United States.

The victims of Mexican Repatriation with the best legal case - the children who were in fact American citizens - were too young at the time to pursue litigation, and their parents most likely lacked resources to act on their behalf.

For many victims of Mexican Repatriation, the concept of a legal battle against the federal and state governments was largely unknown until media attention over the last ten years brought the issue into the open. Similar public outcry and media attention led to the United States' efforts during the 1980s to apologize and make reparations to Japanese-Americans who were forced to live in internment camps during World War II.<sup>56</sup>

The plaintiffs in the instant case must also establish that the government was an active participant in the deportations and that they covered up their involvement. "[T]he statute of limitations can be tolled where the government fraudulently or deliberately conceals material facts relevant to a plaintiff's claim so that the plaintiff was unaware of their existence and could not have discovered the basis of his claim."<sup>57</sup> Ignorance of rights that should be known is not enough. Fraudulent concealment will be very difficult to prove because it requires concrete evidence, such as documents that may have been destroyed, or knowledgeable witnesses who may be dead or unwilling to implicate themselves or the government in an embarrassing political scandal.

Additionally,

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was

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56. Sheppard, *supra* note 7.

57. Hopland Bank of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988).

presented.<sup>58</sup>

After speaking with the author of *Decade of Betrayal*, Professor Francisco Balderrama, this author learned that *Decade of Betrayal* will be re-released with additional evidence gathered from new testimonials from survivors. The updated book will detail how INS agents in Detroit were aboard many of the trains that traveled to Mexico.<sup>59</sup> These agents often forced train passengers to remain on the trains, though many tried to get off.<sup>60</sup> The INS agents went so far as to round up passengers who got off the trains.<sup>61</sup> The involvement of federal employees in the deportations and repatriation movement certainly helps any cause of action against the government.

## V. COMPARATIVE ANALYSIS WITH REPARATIONS FOR JAPANESE INTERNMENT, THE GOLD TRAIN & SLAVERY

### A. *Victims of Japanese Internment*

On February 19, 1942, President Franklin D. Roosevelt signed Executive Order (E.O.) 9066,<sup>62</sup> which commenced the round-up of 120,000 Americans of Japanese descent and placed them in one of ten internment camps in Arizona, Arkansas, California, Colorado, Idaho, Utah and Wyoming.<sup>63</sup> Responding to anti-Japanese sentiment throughout the United States following the Japanese attack of Pearl Harbor on December 7, 1941, Roosevelt approved the incarceration of approximately 80,000 Japanese-American citizens into what were called "relocation centers."<sup>64</sup> Living conditions in the camps were substandard, lacking proper plumbing, cooking facilities or heat.<sup>65</sup> Food was rationed out in overcrowded mess halls.<sup>66</sup> In what President Roosevelt himself called "concentration camps," many died because of inadequate medical care and many others were killed by military guards

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58. 28 U.S.C. § 2401(b) (2000).

59. Telephone Interview with Francisco Balderrama, Professor, Cal. State Fullerton, in Fullerton, Cal. (Feb. 8, 2004).

60. *Id.*

61. *Id.*

62. 7 Fed.Reg. 1407 (Feb. 19, 1942).

63. Ricco Villanueva Siasoco & Shmuel Ross, *Japanese Relocation Centers*, INFOPLEASE DAILY ALMANAC, Feb. 5, 2005, <http://www.infoplease.com/spot/internment1.html>.

64. *Id.*

65. *Id.*

66. *Id.*

posted for allegedly resisting orders.<sup>67</sup> Although the United States government allowed internees to leave the camps if they enlisted in the U.S. Army, only 1,200 internees elected to do so.<sup>68</sup>

The first challenge to Japanese internment came during World War II, when the Supreme Court ruled in favor of the United States government in the cases of *Hirabayashi v. United States*<sup>69</sup> and *Korematsu v. United States*.<sup>70</sup> In both cases, the plaintiffs argued their Fifth Amendment rights were violated because of their Japanese ancestry.<sup>71</sup> In 1944, President Roosevelt rescinded E.O. 9066, and by the end of 1945 the last internment camp was closed.<sup>72</sup>

On August 10, 1988, spurred by public outcry and efforts by leaders of the Japanese-American community, Congress passed the Civil Liberties Act of 1988<sup>73</sup> (also known as the Japanese-American Redress Bill). The legislation awarded payments of \$20,000 to the 80,000 survivors of Japanese internment.<sup>74</sup> Further, the bill also formally apologized to the victims of Japanese internment stating, "[t]he Congress recognizes that, as described in the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II."<sup>75</sup>

The legal path towards ultimately receiving a Congressional apology and reparations from the United States government was fraught with numerous obstacles. The first lawsuits had to contend with the fact that E.O. 9066 essentially "permitted the military to circumvent the constitutional safeguards of American citizens in the name of national defense."<sup>76</sup> The Order was "justified as a 'military necessity' to protect against domestic espionage and sabotage."<sup>77</sup>

In 1943, when Gordon Kiyoshi Hirabayashi refused to obey

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67. Satsuki Ina, *Children of the Camps: Internment History*, PUBLIC BROADCASTING SERVICE, 1999, <http://www.pbs.org/childofcamp/history> (last visited Nov. 11, 2005).

68. *Id.*

69. 320 U.S. 81 (1943).

70. 323 U.S. 214 (1944).

71. Siasoco & Ross, *supra* note 63.

72. *Id.*

73. 50 U.S.C. app. § 1989-1989d (2000).

74. *Id.*

75. Ina, *supra* note 67.

76. Ina, *supra* note 67.

77. *Id.*

orders to report to an internment camp, he was sentenced to ninety days at a work camp. The United States Supreme Court upheld the convictions. Hirabayashi, an American citizen born in Seattle, contended that E.O. 9066 was an unconstitutional delegation of Congressional power. The Supreme Court held that E.O. 9066 was a proper exercise of the power to wage war conferred on the Congress and President, as Commander in Chief of the armed forces, by Articles I and II of the Constitution.<sup>78</sup> More importantly, however, the Supreme Court stated that although the Constitution recognizes equal protection for all American citizens under the Fourteenth Amendment, including those of Japanese ancestry, "danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas."<sup>79</sup>

After retiring from teaching, Hirabayashi sought to have his convictions overturned, and in 1987, a federal appeals court panel unanimously overturned his convictions on the grounds that they were racially discriminatory.<sup>80</sup> The event that triggered Hirabayashi's lawsuit happened in 1982 when a researcher discovered the last remaining unaltered copy of the original report prepared by General John L. Dewitt, who issued the curfew and exclusion orders for Japanese-Americans following E.O. 9066.<sup>81</sup> The report intended to explain the basis for the military orders which imposed curfews on Japanese-Americans and eventually forced them into camps. Ultimately, General Dewitt's report revealed that the decision to impose restrictions on Japanese-Americans was based primarily on racial prejudice.<sup>82</sup> Following the original publication of the report, the War Department revised the report in several material respects and "tried to destroy all copies of the original report when the revised portion was prepared."<sup>83</sup> Thus, after uncovering the original DeWitt report, Japanese-American plaintiffs had concrete proof of fraudulent concealment.

The government asserted in *Hirabayashi* that the district court should have dismissed Hirabayashi's claim on the ground of laches, arguing, "the material upon which the petitioner relies had

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78. *Hirabayashi v. United States*, 320 U.S. 81, 92 (1943).

79. *Id.* at 100.

80. Gordon Kiyoshi Hirabayashi – Biography, INFOPLEASE BIOGRAPHY, <http://www.infoplease.com/ipa/A0880738.html> (last visited Nov. 11, 2005).

81. *Hirabayashi v. United States*, 828 F.2d 591, 598 (9th Cir. 1987).

82. *Id.* at 595.

83. *Id.*

been a matter of public record for decades, or, alternatively, that petitioner by due diligence should have found the material earlier.”<sup>84</sup> The Court, however, overturned Hirabayashi’s convictions based on the fact that the contents of the original report were not discovered until nearly forty years after he was first convicted.<sup>85</sup>

Hirabayashi’s case is a powerful reminder of how proper funding and unlimited access to research can turn a moot case into a valid claim. Opponents of Mexican Repatriation cite limited evidence to implicate the federal government in a plan to deport Mexicans. Had Hirabayashi solely relied on the revised versions of General DeWitt’s report, the statute of limitations surely would have passed, and the government’s claim of laches would have had greater force. “The discovery of these materials recently caused the District of Columbia Circuit to hold that the government’s fraudulent concealment tolled the statute of limitations in cases brought by Japanese Americans for civil damages arising out of their internment.”<sup>86</sup> The district court judge in the *Hirabayashi* case went on to say that “the petitioner cannot be faulted for not finding and relying upon [the only surviving copy of the initial version of the report] long before he brought this action in early 1983.”<sup>87</sup> “Professional historians had failed to discover it as well, and the difficulty for a lay person to locate the initial version was documented in the record by testimony concerning its discovery.”<sup>88</sup>

The victims of Japanese-American internment were fortunate that a diligent researcher uncovered a major piece of evidence that dramatically supported their claim. However, proper research and resources allow such discoveries to be made. Governor Schwarzenegger’s decision to veto a bill that would have created a commission to investigate Mexican Repatriation creates a major obstacle for victims of Mexican Repatriation to assert such a claim. It is possible that such documents do not exist or that they have been destroyed, but the purpose of an investigative commission would be to find them. The absence of a true smoking gun with regard to the federal government’s involvement in the mass deportations of Mexicans Americans will most likely be the greatest hindrance to successful litigation.

The testimonials of those who experienced, first-hand, the

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84. *Id.* at 605.

85. *Id.*

86. *Id.*

87. *Hirabayashi v. United States*, 627 F. Supp. 1445, 1455 (W.D. Wash. 1986).

88. *Hirabayashi*, 828 F.2d at 605.



government's involvement in Mexican Repatriation are the most valuable pieces of evidence to date, and certainly provide the best opportunity for educating the majority of Americans who know nothing about what took place. They represent the real smoking gun.

The second legal challenge to come out of Japanese internment was *Korematsu v. United States*.<sup>89</sup> The U.S. Supreme Court upheld the conviction of Fred Toyosaburo Korematsu, who was found guilty of remaining in a portion of a military area from which persons of Japanese ancestry had been ordered excluded.<sup>90</sup> The Supreme Court stated

We uphold the exclusion order as of the time it was made and when the petitioner violated it . . . . In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens . . . . But hardships are a part of war, and war is an aggregation of hardships.<sup>91</sup>

Relying on *Hirabayashi*, the Court upheld Korematsu's convictions and defeated any constitutional arguments alleging that President Roosevelt's Order was beyond his delegated authority to act during war.<sup>92</sup>

Like *Hirabayashi*, Fred Korematsu's convictions were overturned in 1983. Collectively, the *Hirabayashi* and *Korematsu* cases, which came to be known as the *coram nobis* cases, helped spark the redress movement that would result in reparations and a Congressional apology.<sup>93</sup> The publicity generated from these landmark rulings was invaluable in ultimately fueling the mission to remind all Americans of the haunting acts our government can undertake. Mexican Repatriation could use a similar publicity boost.

### *B. The Gold Train Reparations*

The most recent success in the movement to repay victims of government-sponsored human and constitutional rights violations is the Holocaust victim plaintiffs involved in the Gold Train litigation. During World War II, the pro-Nazi Hungarian government forced all Jews to turn over their gold, silver, gems, and other per-

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89. 323 U.S. 214 (1944).

90. *Id.*

91. *Id.* at 219.

92. *Id.*

93. Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 935 (2004).

sonal valuables to the authorities.<sup>94</sup> The Hungarian government then loaded the goods onto a train.<sup>95</sup> However, before it reached Germany, the United States Army intercepted the "Gold Train" and ultimately moved the train to a military storage facility in Salzburg, Austria.<sup>96</sup> The U.S. Army then declared that it was impossible to identify the individual owners of each piece of property, so it systematically sold, distributed and requisitioned the property by selling it through the Army Exchange Service.<sup>97</sup> The plaintiffs claimed their belongings were clearly identifiable as they were placed in containers with their names and addresses on them.<sup>98</sup>

In 2001, the plaintiffs brought suit against the United States government claiming that the Army's actions violated the Fifth Amendment as a "public taking without just compensation."<sup>99</sup> It was not until 1999, when the Presidential Advisory Commission on Holocaust Assets released its Report on the Gold Train, that many of the facts in the case came to light, thus making a lawsuit more plausible.<sup>100</sup>

In response to the plaintiffs' lawsuit, the United States government asserted a sovereign immunity defense, claiming that the United States government cannot be sued in its own courts unless Congress explicitly authorizes such suit.<sup>101</sup> Although Congress can waive its sovereign immunity, the statute of limitations is generally strictly enforced.<sup>102</sup> Pursuant to 28 U.S.C. § 2401(a), "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."<sup>103</sup> The United States government argued that because the Hungarian Jews knew by at least 1947 that the U.S. Army had possession of the Gold Train, the limitations period expired no later than 1953.<sup>104</sup>

The court in the Gold Train case recognized the plaintiffs' right to equitably toll the statute of limitations. "The equitable tolling doctrine allows plaintiffs to sue after the expiration of the

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94. *Rosner v. United States*, 231 F. Supp. 2d 1202, 1204 (S.D. Fla. 2002).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Rosner v. United States*, 2002 WL 31954452 at 1 (S.D. Fla. 2002).

100. *Rosner*, 231 F. Supp. at 1205.

101. *Id.* at 1206.

102. *See Soriano v. United States*, 352 U.S. 270, 273 (1957).

103. 28 U.S.C. § 2401(a) (2000).

104. *Rosner*, 231 F. Supp. 2d at 1206.

applicable statute of limitations, provided they have been prevented from doing so due to inequitable circumstances.”<sup>105</sup> Relying on *Bodner*,<sup>106</sup> the plaintiffs contended that the statute of limitations should be equitably tolled given the government’s misrepresentations that the property was not identifiable and the government’s efforts to withhold vital information necessary to assist the plaintiffs in filing a claim.<sup>107</sup> “Alternatively, Plaintiffs maintain[ed] that the brutal reality of the Holocaust, and the resulting extraordinary circumstances that Plaintiffs were forced to endure, merit[ed] application of equitable tolling in this case.”<sup>108</sup> “[E]quitable tolling is applied when necessary to prevent an injustice.”<sup>109</sup>

The court in *Rosner* held that because the plaintiffs had been prevented access to vital information necessary to pursue their claim, the principles of equitable tolling should apply to extend the statute of limitations. “In addition, the Court note[d] that, for the majority of Plaintiffs, the years following World War II were particularly difficult. This, combined with the fact that the Government cannot benefit from its own alleged misconduct, tip[ped] the balance in favor of tolling the limitations period.”<sup>110</sup>

By the rationale of the *Rosner* court, the emotional distress that accompanied the mass deportations and inhumane treatment of Mexican-American citizens should also serve as grounds for the equitable tolling of the statute of limitations. In addition to the humiliation of round-ups, the deprivation of constitutional rights and the loss of jobs and property, they were also forced to return to a country which they left because of a lack of hope and opportunity for a better future.

The plaintiffs in *Rosner* also alleged that, in violation of the Fifth Amendment Takings Clause,<sup>111</sup> the United States government took their property for public purposes without justly compensating them.<sup>112</sup> The United States government asserted that because the plaintiffs were not U.S citizens at the time their property was taken (many of the 30,000 plaintiffs have migrated to the

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105. *Id.* at 1208.

106. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 135 (E.D.N.Y. 2000).

107. *Rosner*, 231 F. Supp. 2d at 1208.

108. *Id.* at 1209.

109. *Id.* at 1208.

110. *Id.* at 1209.

111. U.S. CONST. amend. V.

112. *Rosner*, 231 F. Supp. 2d. at 1212.

United States since)<sup>113</sup> and did not have a substantial connection to the United States, they could not bring a Takings Clause claim.<sup>114</sup> On this claim, the court ruled in favor of the government, given that the property at issue was located outside the United States. More importantly, however, the court relied on *Verdugo-Urquidez*, which stated “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”<sup>115</sup> The court further asserted that “[t]o hold otherwise would be to invite constitutional claims against the United States government from all over the world, and hence, start a path down a very slippery slope.”<sup>116</sup>

Again, by the rationale of the *Rosner* court, the plaintiffs in an action against the United States government will not face the same constitutional hurdle experienced by the plaintiffs in the Gold Train case. The majority of the victims of Mexican Repatriation were either American citizens or permanent residents entitled to full constitutional protections. The land taken by state and federal authorities was in the United States, thus the substantial connection requirement as relied upon by the *Rosner* court is inapplicable. The plaintiffs have a strong Fifth Amendment Takings Clause claim against the United States government if they can clearly identify that the property taken belonged to them, and that it was confiscated without just compensation. Property deeds would be the most beneficial evidentiary tool if it can be proven that they owned a plot of land and it was either forcefully taken or purchased for an inequitable amount by the government.

One example of the government taking land without just compensation is seen in the case of Ruben Jimenez, now seventy-nine years old. Mr. Jimenez was seven years old when “his parents were persuaded by a man from the U.S. government to exchange their nice home in East Los Angeles for 21 acres of what they thought was developed property in Mexicali.”<sup>117</sup> Jimenez’s father was told that, because of the Great Depression and racism, he would most likely lose his job, and should therefore accept the government’s deal.<sup>118</sup> Meanwhile, the Mexican land they were prom-

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113. Jay Weaver, *U.S., Holocaust Survivors Agree to ‘Gold Train’ Settlement*, MIAMI HERALD ONLINE, Dec. 20 2004, available at <http://news.phaseiii.org/article3888.html>.

114. *Rosner*, 231 F. Supp. 2d at 1212-14.

115. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

116. *Rosner*, 231 F. Supp. 2d at 1214.

117. Sheppard, *supra* note 7.

118. *Id.*

ised had no running water or electricity.<sup>119</sup> The United States government subsequently sold the Jimenez family's home in Los Angeles for \$10.<sup>120</sup> There are countless accounts of similar testimonials.

The plaintiffs in the Gold Train case further asserted a Little Tucker Act claim which was dismissed by the court on the grounds that a claim based on international law does not fall within the terms of the Tucker Act,<sup>121</sup> therefore the Little Tucker Act is inapplicable as well.<sup>122</sup> The Little Tucker Act claim, however, is a powerful tool for victims of Mexican Repatriation who will not be subjected to the constraints of international law. As stated earlier, the United States government is immune from suit unless it consents to be sued.<sup>123</sup> "Through passage of the Little Tucker Act, 28 U.S.C. § 1346(a)(2), Congress has waived sovereign immunity for non-tort claims against the United States . . . ."<sup>124</sup> Given that the plaintiffs in a federal Mexican Repatriation case would be suing for a return of property, among other things, rather than a tort violation, the suit would not necessarily be restricted by sovereign immunity. The Tucker Act permits non-tort claims against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . ."<sup>125</sup> While the Tucker Act grants jurisdiction to the United States Court of Federal Claims requiring that the claims be in excess of \$10,000, the Little Tucker Act established concurrent jurisdiction between the Court of Federal Claims and the district courts for Tucker Act claims less than \$10,000.<sup>126</sup> Most likely, the Mexican Repatriation plaintiffs in a federal cause of action against the United States government would be seeking less than \$10,000; thus, the Little Tucker Act would apply.

There may also be a cause of action for breach of an implied-in-fact contract for bailment. The inappropriate compensation approved through regulations established by the executive department might well fit within the parameters of the Little Tucker

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119. *Id.*

120. *Id.*

121. 28 U.S.C. § 1491 (1996).

122. *Rosner v. United States*, 231 F. Supp. 2d 1202, 1211 (S.D. Fla. 2002).

123. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980).

124. *Rosner*, 231 F. Supp. 2d at 1210.

125. 28 U.S.C. § 1346(a)(2) (1996).

126. *Id.*

Act. As evidenced by what happened with the Jimenez family, the government clearly breached their obligation to provide comparable property in Mexico. Further, examples such as the sale of the Jimenez home in Los Angeles for \$10 are clearly a violation of the Takings Clause.

During pre-trial litigation of the case, the two sides in the Gold Train case reached an agreement to settle.<sup>127</sup> It is estimated that the 30,000 plaintiffs could receive up to \$10,000 each – a \$300 million settlement.<sup>128</sup> The stolen gold, artwork, jewelry and furniture valued at approximately \$200 million back in the 1940s, is now estimated to be worth more than \$2 billion.<sup>129</sup> Furthermore, the German government, German businesses, and former pro-Nazi governments throughout Europe have paid Holocaust survivors over \$8 billion in reparations for bank accounts and personal property seized during the Holocaust.<sup>130</sup>

### C. *Reparations to African-Americans for Slavery*

The issue of paying reparations to the descendants of slaves has been debated since the Civil War. Since then, the issue has been raised by ex-slaves seeking reparation at the beginning of the 20th Century, and by civil rights leaders in the 1960s. Possible targets in slave reparations litigation include insurance companies who once issued policies on slaves for their masters, corporations with slavery in “in their past” and those who may have illegally seized property from African Americans during the 17th, 18th and 19th centuries.<sup>131</sup> Another argument for slave reparations includes awarding damages to African Americans for the value of their labor during slavery.<sup>132</sup>

The major hurdles to such lawsuits are the statute of limitations and the argument that the effects of slavery are not felt now, 139 years after the violations occurred. Further, properly identifying victims or descendants of victims is a very difficult task.

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127. Weaver, *supra* note 113.

128. *Id.*

129. Press Release, Hagens Berman Law Firm, Holocaust Survivors Gain Ground in Suit Against U.S. Government: District Court Rejects Government's Claims of Immunity (Sept. 4 2002), available at <http://hagens-berman.com> (follow “Press Room” hyperlink).

130. James Cox, *Reparations Gain Legal, Academic Interest*, USA TODAY, Mar. 24, 2002, available at <http://www.usatoday.com/money/general/2002/03/25/reparations-sidebar.htm>.

131. *Id.*

132. Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 291 (2003).

There are currently suits on file in Illinois, Texas, New York, New Jersey, Louisiana, California and Oklahoma.<sup>133</sup> Furthermore, at least four states have passed statutes addressing reparations for African-Americans in the form of investigating committees and recommendations.<sup>134</sup> The most notable piece of legislation to be presented to Congress was United States Rep. John Conyer's bill, H.R. 40, which "demand[ed] an investigation of slavery and recommend[ed] appropriate reparations."<sup>135</sup> It has yet to be adopted.

One critic of reparations for slavery, E.R. Shipp, distinguished African-Americans from Jewish Holocaust survivors and Japanese-Americans who received reparations stating that "these 'groups received reparations for specific acts of injustice that they, not their ancestors, suffered.'"<sup>136</sup> Thus far, suits against the United States government for slave reparations have been unsuccessful on sovereign immunity grounds.<sup>137</sup> Suits against corporations for slave reparations have been modeled after the successful Holocaust survivor suits against pro-Nazi European corporations.

Lawsuits for slave reparations face many of the same obstacles victims of Mexican Repatriation will face, including: (1) identifying specific conduct by the parties; (2) the statute of limitations; and (3) defenses of sovereign immunity. Mexican-Americans may seek suits against the various corporations throughout the United States who endorsed the anti-Mexican fervor in the form of layoffs and wage decreases.

Regarding the statute of limitations, one successful Jim Crow-era reparations case allowed for equitable tolling where government doctors conducted a syphilis experiment on African-Americans without informing the subjects that a cure had been found.<sup>138</sup> "Equitable remedies tolling the statute of limitations are routinely available where filing suit is untimely due to the defendant's affirmative misconduct or because the relevant facts are unavailable to plaintiffs through no fault of their own."<sup>139</sup>

As studies into reparations for slavery have revealed, statutes of limitations have been tolled even over extremely long periods of

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133. *Id.* at 280.

134. *Id.*

135. *Id.* at 280-81.

136. *Id.* at 293 (quoting Charles J. Ogletree & E.R. Shipp, *Point/Counterpoint, Does America Owe Us?*, ESSENCE, Feb. 2003, at 126, 129).

137. See *Johnson v. MacAdoo*, 45 App. D.C. 440 (D.C. 1916).

138. See *Pollard v. United States*, 384 F. Supp. 304 (M.D. Ala. 1974).

139. Ogletree, *supra* note 132, at 300 (citing *Young v. United States*, 535 U.S. 43, 51-52 (2002)).

time. Victims of Mexican Repatriation will have to rely on equitable tolling to have any chance at sustaining a defense against statute of limitations. "The statute of limitations is to be tolled where there is: violent repression, followed by active concealment of relevant facts surrounding the history of that repression, and an officially sanctioned study that uncovers the truth of that repression."<sup>140</sup> Though there should be no fear of violent repression for plaintiffs seeking access to information, active concealment, however, is a reality for victims of crimes that took place decades ago.

[W]here contemporaneous evidence was buried and unavailable to the plaintiff and has only recently been rediscovered through the defendant's actions (by forming a commission to investigate the events, for example), then the defendant has reopened the underlying issues and should not be able to escape its legal responsibility for the crime identified.<sup>141</sup>

Governor Schwarzenegger's veto of the bill that would have created a privately funded commission to investigate Mexican Repatriation thwarts a true government-backed effort to investigate the local and state governments' involvement in the deportations. There have also been attempts by U.S. Representative Hilda Solis to introduce a bill that would investigate the Depression-era deportations and to determine if reparations would be appropriate.<sup>142</sup> However, the effort has been unsuccessful.<sup>143</sup>

Another avenue for addressing the statute of limitations problem is waiver. As a gesture of upholding the interests of justice, private and public institutions have waived the statute of limitations "when the statute stands as the only impediment to trial."<sup>144</sup> Following *Pigford v. Glickman*,<sup>145</sup> Congress passed legislation that tolled the two year statute of limitations for African-American farmers who brought a discrimination claim against the Department of Agriculture for its violation of the Equal Credit Opportunity Act.

Regardless of government waiver of the statute of limitations or equitable tolling, suits for the return of property are not subject

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140. *Id.* at 300-01.

141. *Id.* at 301.

142. Fox, *supra* note 1.

143. *Id.*

144. *Id.* at 302.

145. 206 F.3d 1212 (D.C. Cir. 2000).



to statute of limitations barriers. "One advantage of property-based actions — for example replevin or unlawful detainer — is that they are structurally similar to takings claims that have found a certain amount of favor with courts in reparations litigation."<sup>146</sup>

In *Hohri v. United States*,<sup>147</sup> the court allowed the plaintiffs to state a claim under the Fifth Amendment Takings Clause "to recover property confiscated by federal authorities and property lost as a result of the government's exclusion of the plaintiffs from their homes and businesses."<sup>148</sup> The *Hohri* court eventually dismissed the claim based on a violation of the statute of limitations because the court determined that the property was taken by the government in a moment of "imminent peril" and thus did not constitute a viable constitutional takings claim.<sup>149</sup> The court further said that the constitutional rights asserted by the plaintiffs in *Hohri* did not fall within any category of property recognized for takings purposes. This defense, however, would not apply to replevin or unlawful detainer cases because if title is not proper, it cannot be passed on. "The true owner is entitled to return of the property or to compensation for its loss."<sup>150</sup> While this argument may be tough to get around in the context of slavery reparations claims because slaves did not own land, victims of Mexican Repatriation may have a more realistic claim given that they did in fact have land or were removed from it without proper compensation.

Thus far in the slave reparations cases, the government has been successful in asserting sovereign immunity as a defense. Unless the government consents to suit, sovereign immunity applies. In *Cato v. United States*, an African American woman sued the government seeking damages on claims of kidnapping and enslavement, as well as continuing government discrimination.<sup>151</sup> The major civil rights statute, 42 U.S.C. § 1983, which might be another legal tool utilized by victims of Mexican Repatriation, does not abrogate sovereign immunity. Based on the § 1983 statute, neither states nor the federal government are immune from suit, but they must be sued "only in the person of a state [or government] representative in his or her official capacity and then

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146. Ogletree, *supra* note 132, at 304.

147. 586 F. Supp. 769 (D.D.C. 1984).

148. Ogletree, *supra* note 132, at 304.

149. *Hohri*, 586 F. Supp. at 784.

150. Ogletree, *supra* note 132, at 304 (citing 66 AM. JUR. 2D *Replevin* § 2 (1964)).

151. 70 F.3d 1103 (9th Cir. 1995).

only for non-monetary relief.”<sup>152</sup> Finding a representative of the government to consent to suit will be inapplicable to a discrimination claim in both the slavery and Mexican Repatriation contexts. However, non-monetary relief, such as an official apology, may be just as important as financial damages to the aging plaintiffs.

## VI. CONCLUSION

One of the great ironies of Mexican Repatriation was that many Mexicans were recruited to work in the United States when the industrial revolution hit full swing in the United States. When the Depression ravaged the United States, a Mexican workforce was no longer needed and those who originally sought their cheap labor abandoned them. Furthermore, Mexican labor became an integral part of the development of the United States as a financial power. They came to the United States to find a better life and to provide their children with a more promising future. Those American-born children who were denied their constitutional equal protection rights are still alive and deserve recognition.

“[S]ince one of the goals of the reparation movement is to educate the public about the wrongs and recency of state-sponsored discrimination, injunctive relief requiring the state to engage in educative efforts is a vital part of the restitution sought through such litigation.”<sup>153</sup>

After speaking with representatives from Senator Dunn’s office, this author learned that the Senator plans on consolidating the previous bills, which have been vetoed. Senator Dunn believes a consolidated bill will be more successful now by linking the two-year limitations period to a privately funded commission. The commission would report to the legislature and appropriate a dollar amount for reparations if appropriate. Further, the new bill would include an apology from the California government and would fund a memorial plaque in East Los Angeles.<sup>154</sup> The most important apology, however, should come from the federal government which opened the door for state governments to engage in anti-Mexican tactics.

The survivors of Mexican Repatriation will tell you they are too old to enjoy any financial reparations they might receive. They simply want an apology as a means to teach future genera-

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152. Ogletree, *supra* note 132, at 306.

153. *Id.*

154. Telephone Interview with Legislative Staffer Norma Cobb, *supra* note 22.

tions about what the United States government did in the hope of protecting against similar practices in the future. Our government owes them at least that much.