Coram nobis

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In law, a motion for a writ of ***coram nobis*** (or *error coram nobis*, from the Latin "in our presence", usually translated in context as "the error before us") is a petition to the court in its capacity of a Court of Equity to correct a previous error "of the most fundamental character" to "achieve justice" where "no other remedy" is available. A *coram nobis* petition applies to persons who have already been convicted and have served their sentence. It may seek to remove probation requirements or restrictions, eliminate payment or obtain refund of court imposed fines, restore voting rights and gun ownership, improve employment and credit potential, remove a public stigma, and so forth, in order to restore so far as possible the erroneously convicted party to a pre-conviction state. Motions may be filed by heirs at law even after the original person is deceased.

Such motions cannot be used to address issues of law previously ruled upon by the court but only to address errors of fact that were not known at time of trial or were knowingly withheld during and after trial from judges and defendants by prosecutors, and which might have altered the verdict were they presented at the trial.

In a case from 2007 (*Neighbors v. Commonwealth*), the Supreme Court of Virginia explained in great detail the purpose of a writ of error coram nobis, quoting from a 1957 decision:

> The writ of *error coram vobis*, or *coram nobis*, is an ancient writ of the common law. It was called *coram nobis* (before us) in King's Bench because the king was supposed to preside in person in that court. It was called *coram vobis* (before you – the king's justices) in Common Pleas, where the king was not supposed to preside. The difference related only to the form appropriate to each court and the distinction disappeared in this country when the need for it ended. 49 C.J.S., Judgments, § 311, p. 561, n. 28. Mr. Minor says the proper designation here is *coram vobis*. IV Minor's Inst., 3 ed., Part I, pp. 1052-3.
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> The principal function of the writ is to afford to the court in which an action was tried an opportunity to correct its own record with reference to a vital fact not known when the judgment was rendered, and which could not have been presented by a motion for a new trial, appeal or other existing statutory proceeding. Black's Law Dict., 3 ed., p. 1861; 24 C.J.S., Criminal Law, § 1606 b., p. 145; *Ford v. Commonwealth*, 312 Ky. 718, 229 S.W.2d 470. It lies for an error of fact not apparent on the record, not attributable to the applicant's negligence, and which if known by the court would have prevented rendition of the judgment. It does not lie for newly-discovered evidence or newly-arising facts, or facts adjudicated on the trial. It is not available where advantage could have been taken of the alleged error at the trial, as where the facts complained of were known before or at the trial, or where at the trial the accused or his attorney knew of the existence of such facts but failed to present them. 24 C.J.S., Criminal Law, § 1606 at p. 148; 49 C.J.S., Judgments, § 312 c., pp. 563, 567.
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> —*Dobie v. Commonwealth*, 198 Va. 762 at 768-69, 96 S.E.2d 747 at 752 (1957).

One relatively well-known example was in regard to the Supreme Court case *Korematsu v. United States* (1944), which upheld a conviction pertaining to the World War II Japanese American internment. In 1984, a federal district court judge granted a writ of *coram nobis*, overturning the conviction. See *Korematsu v. United States*, 584 F. Supp. 1406, 1984 U.S. Dist. LEXIS 17410.

Alger Hiss, convicted in 1950 on two counts of perjury for lying under oath about having spied for the Soviet Union in the 1930s, filed for a writ of coram nobis in the 1970s, after the FBI released certain records that Hiss argued showed that he had not received a fair trial (and after Richard Nixon, a leading voice against Hiss on the HUAC committee, was disgraced by the Watergate scandal). A federal district court denied the petition, holding that the documents "raise no real question whatsoever, let alone a reasonable doubt, as to Hiss's guilt," that "[t]he trial was a fair one by any standard," and that "[t]he jury verdict rendered in 1950 was amply supported by the evidence — the most damaging aspects of which were admitted by Hiss." *In re Hiss*, 542 F.Supp. 973, 999 (S.D.N.Y. 1978), aff'd, 722 F.2d 727 (2d Cir. 1983), cert. denied, 464 U.S. 890 (1983).

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1 Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. Third World L.J. 31, 32–33 (2004) [hereinafter Hylton, *Framework*].

2 *Id.*

3 *Id.* at 33.

4 *Id.* at 33–34.

5 *See* U.S. Const. art. I, 2, cl. 3 (three-fifths clause); art. I, 8, cl. 15 (militia clause); art. I, 9, cl. 1 (non-importation clause); art. I, 9, cl. 2 (suspension of habeas corpus clause); art. IV, 2, cl. 3 (fugitive clause); art. IV, 4 (guarantee clause); art. V (prohibiting amendment of non-importation clause prior to 1808).

6 *See generally* Slavery and the Law (Paul Finkelman ed., 1996).

7 *See infra* text accompanying notes 9–15.

8 *See, e.g.*, Richard F. America, Paying the Social Debt: What White America Owes Black America 6–8, 17–19 (1993); Randall Robinson, The Debt: What America Owes to Blacks 206–07, 240–42 (2000).

9 It is essentially on this ground that the U.S. Court of Appeals for the Ninth Circuit, in *Cato v. United States*, concluded that African-American plaintiffs who sought to recover reparations from the United States for slavery lacked standing to assert the claim. *See* 70 F.3d 1103, 1111 (9th Cir. 1995).

10 *See* Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 85–90, 109–11 (1995) (discussing wealth disparities and educational differences); Stephan Thernstrom & Abigail Thernstrom, America in Black and White 263–68 (1997) (discussing criminal victimization); Dorothy A. Brown et al., *Social Security Reform: Risks, Returns, and Race*, 9 Cornell J. L. & Pub. Pol'y 633, 637 (2000) (discussing shorter life expectancies).

11 *See* Keith N. Hylton, Slavery and Tort Law 32 (Boston Univ. Sch. of Law, Working Paper No. 03–02, 2003, Soc. Science Research Network Elec. Paper Collection) [hereinafter Hylton, Slavery and Tort], *at* http://www.bu.edu/law/faculty/papers/HyltonK012803abstract.html (last visited Oct. 20, 2003).

12 *See generally* John H. McWhorter, Losing the Race: Self-Sabotage in Black America (2000) (discussing three manifestations of the "ideological sea of troubles plaguing black America": the Cult of Victimology, Separatism, and Anti-intellectualism).

13 Consider the following: In 1995 the median income of black two-parent families was 88% that of white two-parent families, but the median income of all black families was only 61% of all white families. *Id.* at 10. The disparity is attributable to the low income of many black single mothers. *Id.* McWhorter also notes that a majority of blacks (56%) live in the South, a region notorious for wages lower than the rest of the country, and that the rate of increase in median pay was faster among blacks than whites in the 1990s. *Id.* In mid-twentieth century America more than two-thirds of all black children were born into a two-parent family; by the end of the century more than two-thirds of all black children were born into a single mother family, a statistic leading one pair of researchers to conclude that this family structure is what divides poor blacks from middle-class or well-to-do blacks. Thernstrom & Thernstrom, *supra* note 10, at 237, 239–41. It is a matter of debate what caused this lamentable phenomenon; one suspect is the incentive afforded by federal welfare measures, instituted in the 1960s, for mothers to raise their children without the benefit of marriage.

14 *See* 503 U.S. 467, 494 (1992).

15 *See, e.g.*, Robert W. Tracinski, *America's "Field of the Blackbirds": How the Campaign for Reparations for Slavery Perpetuates Racism*, 3 J.L. Soc'y 145, 157 (2002) (describing estimates ranging from $1.4 trillion to $24 trillion).

16 *See* Hylton, Slavery and Tort, *supra* note 11, at 43.

17 *See* Plaintiffs' Complaint, Alexander v. Governor of Oklahoma (N.D. Okla. filed Feb. 28, 2003) (No. 03–CV–133).

18 *See* Alfred L. Brophy, Reconstructing the Dreamland: The Tulsa Riot of 1921 (2002).

19 Charles J. Ogletree, *Tulsa Reparations: The Survivors' Story*, 24 B.C. Third World L.J. 13, 18 (2004) (stating there are over 120 survivors of the riot still living).

20 F. Scott Fitzgerald, The Great Gatsby 189 (Scribner Books 1992) (1925).

21 *But see* David Lyons, *Reparations and Equal Opportunity*, 24 B.C. Third World L.J. 177 (2004) (discussing a series of race-neutral social welfare programs that could take the place of reparations specifically targetd to blacks).

22 *See* David Horowitz, Uncivil Wars: The Controversy over Reparations for Slavery 12 (2002).

23 *See* Robinson, *supra* note 8.

24 *See* America, *supra* note 8.

25 Peter H. Schuck, *Slavery Reparations: A Misguided Movement, at* http://jurist.law.pitt .edu/forum/forumnew78.php (Dec. 9, 2002). For a thorough assessment of the effects of affirmative action, see Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1 (2002).

26 My comments on this point are inspired by Jennifer Roback, *The Separation of Race and State*, 14 Harv. J.L. & Pub. Pol'y 58 (1991).

27 *See* Dennis S. Karjala, *Opposing Copyright Extension, at* http://www.law.asu.edu/Home Pages/Karjala/OpposingCopyrightExtension (last visited Oct. 20, 2003). This website is maintained by Arizona State University law professor Dennis Karjala and contains numerous links to articles and congressional testimony contending that copyright extension, particularly via the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, 112 Stat. 2827 (1998) (codified in various sections of 17 U.S.C.), favored copyright owners at the expense of consumers. *Id. See generally* Jessica Litman, Digital Copyright (2001).

28 *See* Donald L. Bartlett & James B. Steele, *Playing the Political Slots*, Time, Dec. 23, 2002, at 53; Donald L. Bartlett & James B. Steele,

Wheel of Misfortune, Time, Dec. 16, 2002, at 47, 57.
29 *See* McWhorter, *supra* note 12, at 9–10.
30 *Id.* at 10.
31 Hylton, *Framework*, *supra* note 1, at 34 tbl.1.
32 Thernstrom & Thernstrom, *supra* note 10, at 185 tbl.1.
33 *See id.*
34 *Id.* at 237.
35 *Id.* at 239–40.
36 *See generally* Lyons, *supra* note 21.
37 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989).
38 *See* 417 U.S. 484, 494–97 (1974).
39 *See* 426 U.S. 229, 245–48 (1976).
40 The constitutional validity of the Civil Liberties Act of 1988, 50 U.S.C. app. 1989b–1989b9 (2000), which provided a $20,000 payment to each person of Japanese ancestry who was deprived of liberty or property as a result of the forcible relocation and confinement of American citizens and permanent residents of Japanese ancestry during World War II, was upheld in *Jacobs v. Barr*, 959 F.2d 313, 314–15, 322 (D.C. Cir. 1992). In *Jacobs*, a pre-*Adarand* opinion, the U.S. Court of Appeals for the **D.C. Circuit** invoked *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), and applied intermediate scrutiny, but opined in dicta that the Act would survive strict scrutiny. *Jacobs*, 959 F.2d at 318. The court suggested that the Act would survive strict scrutiny because the government's purpose—to redress an act of racial discrimination that, although declared valid at the time in *Korematsu v. United States*, 323 U.S. 214 (1944), has since been widely repudiated as unjust, unconstitutional, and based on government misconduct in the courts—was compelling and the cash reparations were a narrowly tailored way to provide some restitution to the immediate and direct victims of the Japanese exclusion order. *See Jacobs*, 959 F.2d at 321.
For more on the government misconduct, which consisted of deliberate lies to the Supreme Court, see *Korematsu v. United States*, 584 F. Supp. 1406, 1417–18 (N.D. Cal. 1984); Peter Irons, Justice at War (1983).
41 *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 488–90 (1982); Flast v. Cohen, 392 U.S. 83, 85–86 (1968).
42 *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216–17 (1974); United States v. Richardson, 418 U.S. 166, 173–75 (1974).
43 959 F.2d at 313.
44 *Id.* at 314.
45 *Id.* at 315. For this proposition the Court of Appeals cited H.R. Rep. No. 278, 100th Cong., 1st Sess. 9 (1987) and stated:

> In 1983, Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, who had challenged the constitutionality of the internment, reopened their landmark federal cases through writs of error ***coram nobis***. Their wartime convictions for defying the internment policy were vacated, based on evidence that the government had misrepresented and suppressed evidence that racial prejudice, not military necessity, motivated the internment of Japanese Americans. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986), aff'd in part and rev'd in part, 828 F.2d 591 (9th Cir. 1987); Yasui v. United States, 83–151 BE (D. Or. 1984), remanded, 772 F.2d 1496 (9th Cir. 1985). None of the decisions was reversed on appeal. For an admirable review of the history of the internment policy, see Hohri v. United States, . . . 782 F.2d 227, 231–39 (D.C. Cir. 1986) (Wright, J.), vacated, 482 U.S. 64 . . . (1987).

Id.
46 *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989). The Court states:

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond . . . . [A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

Id. Left unclear in this enigmatic passage is whether the defect is a poor fit of remedy to objective ("an unyielding racial quota") or whether it is the overly broad remedial purpose ("an amorphous claim [of] past discrimination"). Justice Scalia is more direct: "The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can [not] be pursued by the illegitimate means of racial discrimination . . . ." *Id.* at 520 (Scalia, J., concurring).
47 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) ("[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction.").
48 *See, e.g.*, Lyons, *supra* note 21, at 183–185.
49 *See generally* Brophy, *supra* note 18.