



EDWARD L. BARRETT, JR. LECTURE ON CONSTITUTIONAL LAW

The Current Reparations Debate

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I. REPARATIONS, REPAIR, AND VICTIMS' RIGHTS

Reparations for African Americans strike at the heart of America's relationship with race. By requiring compensation for a host of evils

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inflicted upon African Americans, reparations demand that America, particularly white America, acknowledge the terrible history of racism upon which this country was founded.¹ Racism was enshrined in federal law until 1967 (when anti-miscegenation statutes were finally declared illegal)² and in some state constitutions until as recently as 2000.³ My goal is to examine how this history of discrimination has led to black oppression in this country.

One of the many criticisms of reparations is that it defines the harm suffered by African Americans as "group" harm. Critics claim that the group currently seeking reparations is over inclusive in two different ways. First, because none of the current members of the group were alive during slavery, slavery reparations punish modern white Americans, who did not inflict the injury (slavery) upon the group (slaves). Additionally, many white Americans are not descended from the people who inflicted the harm (slave owners). Thus, none of the perpetrators and few, if any, of their descendants are still around.

Second, critics argue that reparations compensate those who were not victimized by slavery or descended from slaves.⁴ Furthermore, reparations compensate those whose ancestors may have been part of the problem, i.e. individuals descended from white and black parents, or from the incredibly small group of free blacks who may have owned slaves. David Horowitz argues that African Americans should reject reparations partly because during slavery there were free black men who may have been slave owners.⁵ John McWhorter, an associate professor of

¹ These evils include slavery, Jim Crow laws, and a variety of more or less subtle forms of racism practiced today.

² *Loving v. Virginia* 388 U.S. 1 (1967). The Warren Court deliberately avoided tackling anti-miscegenation statutes until near the end of the "rights revolution," in large part because of the backlash it feared striking down such statutes would cause. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

³ As late as 2000, however, the Alabama State Constitution still mandated separate schools for whites and African Americans, and rendered illegal any marriage between African Americans and whites. See ALA. CONST. art. XIV, § 256 ("Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race."); ALA. CONST. art. IV, § 102 ("The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro."); see also *United States v. Brittain*, 319 F. Supp. 1058 (N.D. Ala. 1970) (declaring anti-miscegenation portions of state constitution and statutes unconstitutional and unenforceable).

⁴ Therefore, critics of reparations argue that there is no connection to any victim, present or past.

⁵ David Horowitz, *Ten Reasons Why Reparations for Blacks Is a Bad Idea for Blacks — and Racist, Too!*, at http://www.adversity.net/reparations/anti_reparations_ad.htm (posted Mar. 12, 2001).

linguistics at Stanford University, is a staunch opponent of reparations. He concurs with Horowitz and contends that it is painfully clear "that . . . most slaves . . . were obtained by African kings in intertribal wars, and were sold in masses to European merchants in exchange for material goods."⁶ This contention furthers the argument that no one group can be blamed for slavery and that some African Americans benefited from the slave trade.

Thus, by focusing on the group nature of the harm, critics claim, African Americans are adopting a more or less essentialist position in which African Americans assert they have been victimized by whites.⁷ To embrace this "victim" status, so the argument goes, is to ignore those African Americans who have not been treated in a racist manner or who have "made it" in American society. In Professor McWhorter's terms, African American "victimologist thought ignores the facts of contemporary black success and progress, because they do not square with the 'blame game.'"⁸ The "special treatment" demanded by African Americans from whites is thus completely unjustified. McWhorter argues that "reparations cannot logically rely on a depiction of black Americans as a race still reeling from the brutal experience of slavery and its after-effects."⁹ McWhorter rejects the notion of group harm and suggests that if there is any positive change to come from the African-American community it is to come from "individual initiative."¹⁰

Conservatives reject the group focus as an attempt to "turn African Americans into victims."¹¹ Horowitz, for example, believes that those within the African-American community will be burdened with a "crippling sense of victim-hood" if reparations are paid.¹² McWhorter concurs that "black America" ought to "focus on helping people to help themselves" and not wait for the handouts of others.¹³ Opponents fear that African Americans will not be able to do for themselves because

⁶ John McWhorter, *Why African Americans Can Believe in America*, THE NEW REPUBLIC, Jul. 23, 2001, at 32.

⁷ McWhorter denounced Randall Robinson's contention that "black" is essentially a shorthand for "poor" and states that the "reparations movement is founded in large part upon [such] a racist stereotype." *Id.*

⁸ John McWhorter, *Blood Money; Analysis of Slavery Reparations*, THE AM. ENTERPRISE, July 1, 2001, at 18.

⁹ John McWhorter, *Why I Don't Want Reparations for Slavery*, LOS ANGELES TIMES, Jul. 15, 2001, at 5.

¹⁰ *Id.*

¹¹ Horowitz, *supra* note 5.

¹² *Id.*

¹³ McWhorter, *supra* note 8, at 18.

they will be too caught up in this damaging self-perception as victims. Typically, this sort of conservative criticism claims that African Americans seek to achieve power through a series of self-serving arguments based upon the long-remedied ills of slavery or segregation:

We need someone else to solve our problems.

We need someone else to accept responsibility for our problems.

Their proposed remedy is quite straightforward:

We need to move on.

We need to stop being victims.

These criticisms of reparations are neither new nor original: they are closely linked to other complaints about African-American demands for justice and depend upon stereotyped views of African-American culture. Particularly, they cast the reparations movement as promulgating the self-serving argument that because of historical discrimination, blacks should be the "special favorite of the laws."¹⁴ This argument extends back before the Civil War, but received its canonical form with the crippling of the Thirteenth, Fourteenth, and Fifteenth Amendments in the wake of the Civil War. In this view, African Americans are all too keen to cast themselves in the role of victims. The particular question I wish to focus on is: what happens when African Americans *are* victims of racism? Should reparations be paid then? Is America able to contemplate that kind of social reconciliation?

Opponents of reparations have relied on invective and misinformation.¹⁵ This is by no means an unusual response to the mention of slavery and Jim Crow reparations. Even Horowitz, however, assumes that certain types of reparations-style lawsuits are permissible. He lists Rosewood as one, and as another the "racial outrage [] in . . . Oklahoma City." However, victims of race-based violence are not celebrated in American lore; rather, they are mostly forgotten. Horowitz provides a case in point here: there was no riot in Oklahoma City — the riot was in Tulsa, Oklahoma.¹⁶ The victims' families and communities

¹⁴ The Civil Rights Cases, 109 U.S. 3, 25 (1883).

¹⁵ See, e.g., the text of the advertisement he attempted to publish in campus newspapers. Horowitz, *supra* note 5.

¹⁶ Horowitz clearly means to cite the Tulsa Riot of 1921.

are told to “get over it,”¹⁷ even by the citizens of the towns still traumatized by their history of racial and ethnic violence as well as by black and white critics of reparations around the country.

The attack on reparations as a group harm is made possible because reparations is an amorphous concept. Many people all too quickly assume that it involves a simple payment from all whites to all blacks based on this country’s history of slavery. While there may be some validity to this sort of reparations claim, it is not a claim that I pursue.¹⁸ I certainly do not advocate such a shotgun approach as a legal strategy, a legislative agenda, or as a matter of racial justice. Reparations, even slavery reparations, are much more targeted than that. It is clear that many states and many more private corporations profited from their involvement in slavery and the slave trade. Northern companies did not use slave labor to staff their factories, but they engaged with and supported Southern plantations that did. Part of the difficult task for reparations advocates is to acknowledge that there are different types of reparations and to clarify what sort of reparations they wish to pursue.

II. DEFINING REPARATIONS

There are four features of reparations that I wish to emphasize: 1) a focus on the past to account for the present; 2) a focus on the present, to reveal the continuing existence of race-based discrimination; 3) an accounting of past harms or injuries that have not been compensated; and 4) a challenge to society to devise ways to respond *as a whole* to the uncompensated harms identified in point “3”.¹⁹ These features comport with Dr. Martin Luther King’s vision of the civil rights movement as founded on loving redemption.²⁰ Nevertheless, while Dr. King believed it was the peculiar position of African Americans to redeem America through the civil rights struggle, subsequent events have demonstrated African American struggle on its own is not enough. In Dr. King’s terms, it is not enough that African Americans lovingly redeem America. Only when America can love African Americans — that is,

¹⁷ Horowitz *supra* note 5.

¹⁸ Charles J. Ogletree Jr., *Litigating the Legacy of Slavery*, N.Y. TIMES, Mar. 31, 2002, at 11.

¹⁹ Whether a particular municipality or state, or the nation itself, depends upon the type of harm claimed.

²⁰ And not accidentally so. See Rev. Martin Luther King, Jr., Letter from a Birmingham Jail, in I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 83 (1992). Dr. King was a proponent of Reparations. See Rev. Martin Luther King, Jr., I Have A Dream, in I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 101 (1992).

unconditionally accept us as fellow humans, citizens, and equals in the American community — shall we be able to move forward as a nation.²¹

If we regard the goals of reparations as acceptance, acknowledgment, and accounting, then an essential element of the process of reparations is recognizing that the present is not an accident or fortuity. We did not get where we are by chance alone. Acknowledgment requires recognizing that, for many, success is founded upon inequality. This strain of reparations thought runs counter to the protestant ethic of capitalism founded upon the particularly American myth of individual achievement.²² Many Americans believe they have wealth or property because they deserve it, not because they inherited it or because they received it by profiting unfairly off another. For these Americans, the fact that they have wealth is a sign that it is deserved. The reparations movement, on the other hand, asks us to look deeper, to account and assume responsibility for the centuries of inequality that has advantaged some and disadvantaged others.

A further feature of the current state of race politics is the dishonesty that surrounds the debate on race. If some proponents of reparations are prone to exaggeration or essentialism, then those who criticize reparations are guilty of equally serious argumentative flaws. For decades these individuals have been quite literally rewriting America's past by removing black suffering from it. For example, the Tulsa Race Riot of 1921 appears nowhere in Oklahoma state history books. It took the creation of the Oklahoma Commission to Study the Riot of 1921 to uncover facts that had been suppressed by the citizens and government of that state.²³ The Oklahoma Legislature stated that the Commission's report breaks the "conspiracy of silence" that has existed for over a half century.²⁴ Prior to the report, according to the Oklahoma Legislature, the riot was "something to be swept well beneath history's carpet."²⁵

²¹ I discuss the resonance of reparations with Dr. Martin Luther King's philosophy at greater length in Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, HARV. C.R.-C.L. L. REV. (forthcoming 2003) (on file with author).

²² MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Stephen Kalberg ed. & trans., 2001)

²³ See OKLA. STAT. ANN. tit. 74, § 8000.1 (West 2002) (recording Oklahoma Legislature's findings, based on 1921 Tulsa Race Riot Commission report, "regarding . . . riot's place in the history of race relations in Oklahoma").

²⁴ *Id.*

²⁵ *Id.* § 8000.1(4). Until recently, the riot has been the most important least known event in the state's entire history. Even the most resourceful of scholars stumbled as they neared it for it was dimly lit by evidence and the evidentiary record faded more with every passing year.

The current racial discourse takes place as if America as a polity had heard and fully responded to Dr. Martin Luther King's call for racial redemption. Instead, many of the white perpetrators of crimes against African Americans during the civil rights period are still at large, and few of their victims have been compensated. Many Americans fail to acknowledge racial disparities. The fact that they treat race issues as something that African Americans and other minorities should "just get over" speaks volumes about what "America United" actually means.²⁶ The amnesia that nurtures such an attitude results not from absent-mindedness or forgetfulness but, as the Oklahoma experience demonstrates, from engendering and then actively suppressing a history of violence and suffering.

One way in which this suppression has been accomplished in the last thirty years has been the reconstitution of African Americans from being victims of white hatred and prejudice to criminal victimizers of middle-class whites. This may be a manifestation of what Professor Randall Kennedy has identified as "racially selective patterns of emotional response."²⁷ Kennedy has noted that the United States Supreme Court has generally "show[n] an egregious disregard for the sensibilities of black Americans" and "has been careful to avoid hurting the feelings of whites."²⁸ This disregard has been especially pronounced in the Court's differing attitude to the manner in which race may be taken into account in the civil and criminal spheres. Conservative justices, "including Chief Justice Rehnquist and Associate Justices Scalia and Thomas, have been hawks in the war against affirmative action," yet "strike a different note when they confront the use of race by public authorities in the administration of criminal justice." According to Kennedy, "conservatives have been very willing to allow public authorities to discriminate racially to pursue law enforcement aims even in the absence of an articulated compelling justification."²⁹

²⁶ Since the September 11, 2003 terrorist attacks in New York and Washington, D.C., there has been much discussion of coming together as a nation, an "America United." However, there has been no discussion of what such a union would entail. The suggestion that Reparations interrogates the basis of this union has been discussed at a recent reparations symposium. See Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 23 B.C. THIRD WORLD L.J. (forthcoming 2003).

²⁷ Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1417 (1988)

²⁸ *Id.* at 1417-18.

²⁹ Randall L. Kennedy, *Conservatives' Selective Use of Race in the Law*, 19 HARV. J.L. & PUB. POL'Y 719, 719 (1996).

III. THE RACE-SKEWED NOTION OF VICTIMHOOD

There is, then, a certain irony to the charge of "victimology." To the extent that it is a critique of an essentialist strain in civil rights discourse that imputes harm to African Americans as a group, it may have some bite.³⁰ But where African Americans remain the uncompensated victims of criminal violence, victimology not only turns reality on its head, but also buys into what might be called the aesthetics of criminal justice.

First, victims of crime deserve to be compensated. As Attorney General Janet Reno stated during her address to a victims' rights conference on August 12, 1996:

I draw most of my strength from victims, for they represent America to me: people who will not be put down, people who will not be defeated, people who will rise again and again for what is right You are my heroes and heroines. You are but little lower than angels.³¹

Professor David Garland of NYU Law School echoes this sentiment: "the centre of contemporary penal discourse is . . . the individual victim and his or her feelings."³² A central tenet of the modern penal revolution is the payment of restitution to victims for the crimes committed against them. Victims' groups use "closure" to justify the involvement of the relatives and descendants of the deceased in criminal cases many years after the crime was committed. In fact, one of the remarkable things about the victims-of-crime movement has been its extension of the definition of victim from the person attacked, robbed, or murdered, to that person's family, descendants, and community as well.

It is clear that the surviving victims of the Tulsa Race Riot of 1921 have not had the closure so earnestly demanded by other victims. Time is not the obstacle here. While other victims may wait decades for a criminal on death row to be executed, few conservatives deny their right to closure at the end of the waiting period. Now, I am far from endorsing the death penalty, and am not a particular fan of the "closure" argument.³³ So rather than accept this view wholeheartedly I would

³⁰ Although some might counter that the psychic harm done to African Americans as a group by slavery and Jim Crow continues to victimize all African Americans.

³¹ Bruce Shapiro, *Victims & Vengeance: Why the Victim's Rights Amendment is a Bad Idea*, THE NATION, Feb. 10, 1997, at 11.

³² DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 144 (2001).

³³ There may never be closure when someone we love dies. Coming to accept that is part of the grieving process and may have nothing to do with the manner of their death.

suggest that conservatives be estopped from using the “get over it” argument when the victims of racial discrimination are tangible and identifiable. Citizens of the United States who have suffered harm have a right to seek justice.

Second, Attorney General Reno’s comments make clear that the demand for reparations — or restitution — is precisely the end of victimhood. It represents the moment at which we assert our independence, personal integrity, and humanity. By asserting our right to reparations, we assert the right to be respected as individuals and as equals, and treated accordingly. We assert the right to receive the compensation due to anyone who has suffered a deprivation, whether through crime or other wrongdoing. So what differentiates the claims of reparations advocates from the claims for restitution advanced by victims’ rights advocates?

I think, as a criminal lawyer, that a cursory examination of the political culture that emerged since the late 1970s is helpful. In the 1950s and 1960s, blacks’ demands for equal treatment under law and social equality were regarded as justified and meritorious. However, as formerly poor and under-educated populations began integrating into mainstream society, the liberal consensus that had previously dominated the political landscape began to break down. Politicians, whose power was limited by the institutional nature of the New Deal regulatory state, saw that their ability to directly effectuate social change was now limited.

But one area they could make an immediate impact on was penal policy. As Professor Jonathan Simon of the University of Miami Law School suggests, the “severity revolution” ushered in during the 1980s used crime as a codeword to target poor and predominantly minority populations. At the same time, this pressure group used victims’ rights as a means of representing the supposedly threatened white community.³⁴ In modern jargon, the undeserving poor — “welfare kings and queens” — suffer from victimology. Nice middle class folks have victims’ rights. This is represented aesthetically by, on the one hand, television commercials of Willie Horton used to scare white voters during the 1988 presidential campaign, and on the other hand by the presence of white victims’ rights advocates on political platforms.

Certainly, some essentialist arguments about race and social justice mistakenly assume that all descendents of slaves are oppressed or

³⁴ See Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217, 220, 238-47 (2001).

deserve some kind of special treatment. I agree that there may be individuals who have made it just fine through the stigma of slavery. Part of the purpose of the reparations movement is to open up a discussion of economic justice that takes race into account, and poses questions of responsibility and accountability that are hard for both blacks and whites. Reparations also ask us to account for our behavior towards all communities of color and to explore the moral consequences of our interactions with them.

IV. A HISTORY OF VIOLENCE

The victims of Jim Crow segregation include those who were tortured and killed to enforce the segregationist's code of racial deference. Among those victims were as many as 300 residents of the Greenwood District of Tulsa, Oklahoma. Many may believe that the terrible events they witnessed on September 11, 2001 were the first time citizens of the mainland United States were subjected to aerial attack. Others may point to the Japanese attack on Pearl Harbor. But the first aerial bombardment of American citizens on home soil probably happened in 1921, when private aircraft were used to raze the Greenwood district of Tulsa, Oklahoma to dust.³⁵ In an attack presaging the use of napalm in Vietnam forty-five years later, the airplanes dropped turpentine or incendiary bombs on the buildings to help them burn.³⁶ In that attack, Americans bombed fellow Americans in a "state of the art" act of calculated ethnic cleansing reminiscent of Bosnia or Rwanda.³⁷

The events in Tulsa were unusual only in their scope, but not in their animus or method. In the Jim Crow South, African Americans who violated the etiquette of segregation were routinely subjected to violence at the hands of the white citizenry. On many occasions this violence was facilitated by the action or inaction of the state. Sometimes that violence took the form of riots. In many riots, the goal was not necessarily to drive out a segment of the population, but to subjugate them. For example, the Tulsa Race Riot, which occurred only sixty years after the end of *de jure* slavery in 1865, was part of a much larger culture of discrimination against African Americans. Many of the riot victims

³⁵ Richard S. Warner, *Airplanes and the Riot*, TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, 103, 104 (2001), available at <http://www.ok-history.mus.ok.us/trrc/freport.htm>.

³⁶ *Id.* at 105.

³⁷ *See id.* at 103-08.

themselves had been slaves.³⁸

Many whites explained the riot as a response to the increasingly assertive attitudes of African Americans, who sought social equality following their service in World War I. Some whites linked the Tulsa Race Riot to demands for equal treatment by people only recently removed from slavery. One white man wrote in the aftermath of the riot that

[w]hite adventurers trapped him in his native jungle only a few years ago; shipped him in chains to serve the white man in other lands; a stroke of political fortune makes him free and 'equal' to the white man in our country, and he has the consummate gall and impudence to want a place at the council board of the white man's civilization.³⁹

Shortly after the riot, a white Tulsa paper editorialized about the consequences of slavery: "If those who invaded the shores of the Dark Continent for the purpose of securing slaves for the southern plantations of America could have foreseen the consequence of their acts it is certain the black man would never have been introduced to the United States."⁴⁰ Only after African Americans had been reduced to the status of "helpless refugees" could they be re-accepted as members of a separate, subservient community.⁴¹

These types of riots, and the more discrete acts of lynching, were widespread in the Jim Crow South. There were riots in Wilmington, North Carolina in 1898, Springfield, Missouri in 1906, Helena, Arkansas in 1919, Elaine, Arkansas in 1919, and Sherman, Texas in 1930.⁴² Of particular importance were the Chicago Riots of 1919, the last and bloodiest of the "Red Summer" riots following the end of the First World War. Chicago's white city government stood idly by during the riot, waiting until the fourth day of rioting before deploying the state militia to restore order. In the end, the violence claimed the lives of thirty-eight Chicagoans: twenty-three blacks, fifteen whites. Additionally, over 500 were injured. Hundreds of families lost everything when their homes were torched by rioters. Engendering these riots was an atmosphere of

³⁸ First Amended Complaint at ¶ 19, *see* Alexander v. Governor of Okla., No. 03cv00133 (N.D. Okla. filed Feb. 28, 2003).

³⁹ *Id.* at ¶ 21.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See* Claudia Kolker, *A Painful Present as Historians Confront a Nation's Bloody Past*, L.A. TIMES, Feb. 22 2000, at 5.

lawlessness that condoned over 3000 lynchings throughout this country during Jim Crow. Frighteningly, lynchings still occur, as was demonstrated by the murder of James Byrd, Jr. in Jasper, Texas, in 1998.

The growth of riots out of a pervasive atmosphere of discrimination and violence is now being documented. For example, the Oklahoma Commission to Study the Riot of 1921, a body created by the Oklahoma state legislature, linked the riot to racial violence throughout Oklahoma. The Commission's findings determined that

[t]he root causes of the Tulsa Race Riot reside deep in the history of race relations in Oklahoma and Tulsa which included the enactment of Jim Crow laws, acts of racial violence (not the least of which was the 23 lynchings of African-Americans versus only one white from 1911) against African-Americans in Oklahoma, and other actions that had the effect of "putting African-Americans in Oklahoma in their place" and to prove to African-Americans that the forces supportive of segregation possessed the power to "push down, push out, and push under" African-Americans in Oklahoma.⁴³

The Tulsa Race Riot, however, was not only an attempt to subjugate a newly assertive African-American population emboldened by wealth and service during World War I. The riot was also, in part, a manifestation of what at that time was the common practice known as "nigger drives". The purpose of this practice was to remove African Americans from cities and claim their property for white people. After African Americans were driven out, cities established informal "sun down" laws. They placed notices in prominent places notifying African Americans that they could not remain in the city after dark. For example, in the early 1920s the signs in Norman, Oklahoma, read, "Nigger, don't let the sun go down on you in this town."⁴⁴

V. ACCOUNTING FOR THE VICTIMS

One major task facing reparations advocates is accounting for the suffering inflicted on the victims of these riots. A first step is the open and public acknowledgment of the harm inflicted. For example, Oklahoma passed a statute recognizing its culpability in the Tulsa Race Riot of 1921.⁴⁵

⁴³ OKLA. STAT. ANN. tit. 74, § 8000.1(1) (West 2002).

⁴⁴ *Norman Mob After Singie Smith Jazz*, OKLA. CITY BLACK DISPATCH (Feb. 9, 1922).

⁴⁵ The text of the statute stated the following:

The documentation assembled by The 1921 Tulsa Race Riot Commission

Unfortunately, acknowledgment only goes so far. Taking responsibility for one's acts, especially in the criminal context, often involves some kind of affirmative act to the detriment of the criminal.⁴⁶ Oklahoma has made no effort to pay restitution to the victims of the Tulsa Race Riot of 1921. The state has established an educational fund⁴⁷ and a business development group.⁴⁸ However, neither of these is adequately funded and neither represents the citizens of Greenwood,

provides strong evidence that some local municipal and county officials failed to take actions to calm or contain the situation once violence erupted and, in some cases, became participants in the subsequent violence which took place on May 31 and June 1, 1921, and even deputized and armed many whites who were part of a mob that killed, looted, and burned down the Greenwood area.

The staggering cost of the Tulsa Race Riot included the deaths of an estimated 100 to 300 persons, the vast majority of whom were African-Americans, the destruction of 1,256 homes, virtually every school, church and business, and a library and hospital in the Greenwood area, and the loss of personal property caused by rampant looting by white rioters. The Tulsa Race Riot Commission estimates that the property costs in the Greenwood district were approximately \$2 million in 1921 dollars or \$16,752,600 in 1999 dollars. Nevertheless, there were no convictions for any of the violent acts against African-Americans or any insurance payments to African-American property owners who lost their homes or personal property as a result of the Tulsa Race Riot. Moreover, local officials attempted to block the rebuilding of the Greenwood community by amending the Tulsa building code to require the use of fire-proof material in rebuilding the area thereby making the costs prohibitively expensive.

The 48th Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 concurs with the conclusion of The 1921 Tulsa Race Riot Commission [T]his response recognizes that there were moral responsibilities at the time of the riot which were ignored and have been ignored ever since rather than confront the realities of an Oklahoma history of race relations that allowed one race to 'put down' another race. Therefore, it is the intention of the Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 to freely acknowledge its moral responsibility on behalf of the state of Oklahoma and its citizens that no race of citizens in Oklahoma has the right or power to subordinate another race today or ever again.

§ 8000.1 (2)-(4), (6).

⁴⁶ This often includes accepting a proposed plea bargain and paying some form of restitution.

⁴⁷ The Tulsa Reconciliation Education and Scholarship Program ("TRESP") established by OKLA. STAT. ANN. tit. 70, § 2621 (West 2002) has never been properly funded. At the very least, plaintiffs seek to require the State to adequately fund the TRESP, as required by §§ 2620-27.

⁴⁸ The Greenwood Area Development Authority ("GADA") was created by the State of Oklahoma to administer the redevelopment of Greenwood, as recommended by the Commission. Tit. 74, §§ 8221-26.

where the riot took place. No Greenwood resident is required to be present on the board of either fund. Most importantly, there has been no effort to lift the "conspiracy of silence" surrounding the riot.⁴⁹ There has been no effort to educate the citizens of Oklahoma of the terrible history of racial violence that preceded and superceded the riot. Only by educating present generations of Oklahomans of their state's violent segregationist past can we address the current baleful state of race relations in Oklahoma.

VI. REPAIR AND REPARATIONS

A recent newspaper article compared reparations lawyers to divorce attorneys and said what society really needed were marriage counselors: people who would fix the relationship before it went awry.⁵⁰ I agree that some form of social action that is not driven by the bottom line would be great. In fact, none of the attorneys or academics working for the Reparations Coordinating Committee is charging a fee. We are volunteers, not the grasping divorce lawyers depicted by the article.

More generally, I agree that it would be wonderful if people of all colors would altruistically come together and say, "Let's get this done, let's sort this out, and let truth and reconciliation be our motto and our goal." But this has *never* been the model of racial justice. In the sixties, people had to die for a racial justice that was given grudgingly, if at all. And when we tried to integrate schools in the seventies, busing prompted riots in cities all over the country. If apologetic legislation was sufficient compensation for victims of racial violence, then we would accept it. However, the Oklahoma example makes clear that there is

⁴⁹ See Tit. 74, § 8000.1(5) (West 2002).

⁵⁰ The article said:

Think of the difference between divorce lawyers and marriage counselors. The former are reparationists, guided mostly by financial bottom lines — how much of the marital assets can be grabbed for their client. The latter are healers: What arrangements, commitments and concessions are necessary to make the marriage work?

For a lot of people, not all of them black by any means, America isn't working very well. Sometimes it's their own fault, and sometimes—particularly in the case of children—it isn't. Can't we agree that it is in our own interest to improve their outlook, their preparation, their life chances—spending whatever it takes in money and human effort?

William Raspberry, Editorial, *Why Wait for Reparations?*, AUGUSTA CHRON., Aug. 25, 2002, at A5.

little legislative will to fully compensate black victims of race riots even when the legislature acknowledges its moral responsibility.

Currently, there are a multiplicity of lawsuits on file in New York, New Jersey, California, Louisiana, Illinois, and Texas, seeking reparations. The federal litigation predominantly seeks reparations against institutions that owned, used, or insured slaves. The theory common to most of those lawsuits, which have been filed by Ed Fagan, a holocaust reparations lawyer, and Daedria Farmer-Paellman, a law graduate and slavery historian, is that these institutions violated domestic and international law by conspiring to deprive slaves and their descendants of their property. A similar lawsuit seeking reparations was recently dismissed by the Federal Claims Court.⁵¹ In addition, there are two lawsuits pending at the state and federal level in California, alleging that those corporations that engaged in slavery violated the ethical prerequisites necessary to do business under California law.⁵² The California law has the additional advantage of avoiding many of the statute of limitations problems of the federal litigation.

In Illinois, the Chicago City Council, thanks to the efforts of Alderman Dorothy Tillman, has just passed the Slavery Era Disclosure Ordinance, requiring all businesses vying for city contracts to search their records and disclose whether they profited from slavery.⁵³ This legislation is modeled after the California Slavery Era Insurance Act, which has been instrumental in exposing the involvement of a number of corporations that supported slavery.⁵⁴ The Chicago ordinance, which is the first such ordinance enacted by a municipality, actually goes further than the California legislation. The California Insurance Act requires disclosure but imposes no penalties for non-disclosure and contemplates no consequences once the corporations disclose their involvement with slavery. The Chicago Disclosure Ordinance prohibits the city from doing business with those corporations that refuse to make full disclosure of their past involvement with slavery while not a panacea, it is certainly a start. With increasing numbers of people looking to file reparations lawsuits, and more companies required to divulge their links with slavery, the pace of litigation, legislation, and activism is picking up, not slowing down. The reparations movement is gaining momentum.

⁵¹ *Obadele v. United States*, 52 Fed. Cl. 432 (2002).

⁵² See CAL. BUS. & PROF. CODE § 17200 (West 2003).

⁵³ See Sabrina L. Miller & Gary Washburn, *New Chicago Law Requires Firms to Tell Slavery Links*, CHI. TRIB., Oct. 3, 2002, (Trib. West), at 1.

⁵⁴ See CAL. INS. CODE §§ 13810-13 (West 2003).

VII. FAILURE OF DIALOGUE

A myriad of misunderstandings already pervade the relationship between black and white America, and minority and majority America. Too often, the claim of the dispossessed is not that America does not see the problem but that it will not acknowledge the problem. The public will not hear the problem in terms that do justice to the black point of view. We are not in community with those who do not share the import of our words. This is not to say that this is “a black thing.” But it is to say that the dismal state of race relations is something whites, as well as other races are responsible for, and accountable to. Ignorance is not an excuse, because racial harmony and understanding does not just happen, but takes hard work. We want our experience and our history to be taken seriously and recognized for what it is. The demand that we “just get over it,” that we “stop thinking like victims” and accept the great strides this country has made are especially inapposite when other groups claim the right to be made whole for the violence done them as a group — as a race.⁵⁵

And just when did things become so good that we ceased to be victimized? In 1865, with emancipation? In 1871, when the first civil rights act was enacted? In 1954, when *Brown v. Board of Education* supposedly ended school desegregation? What about the busing crises of the 1970s; the white flight of the 1980s and 1990s? Were we made whole in 1964 with the Civil Rights Act or 1965 with the Voting Rights Act? In 1967 with *Loving v. Virginia*, which outlawed anti-miscegenation statutes, effectively ending *de jure* segregation? Or *Bakke v. Regents of the University of California's* endorsement of affirmative action in 1972? Or finally, with the reparations paid to black farmers by the government in 1999, to recompense them for the Government's decades-old discriminatory loans policy? If we can't seem to get over it, it is because “it” is still going on.

Not only is “it” still pervasive, many of the people who suffered during Jim Crow are still alive, and they have never been compensated for the harm they suffered. The survivors of the Tulsa Race Riot are one graphic example. There are 125 survivors of the Tulsa Race Riot named in the first amended complaint filed in the Northern District of Oklahoma on February 28, 2003. There are 251 descendants listed in the complaint. These individuals lost family members and property and

⁵⁵ See, e.g., Michael J. Bazylar, *Nuremburg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2000) (comprehensive study of litigation against banks, insurance companies, and German corporations).

suffered personal injury.

In other words, while slavery had its horrors — both psychological and physical — the degradation of African Americans did not end with slavery. Throughout the country, after the Civil War, the Ku Klux Klan organized a violent, repressive resistance aimed at stealing land, property, and humanity from African Americans. Even without the Klan, black life and livelihood were precarious. Nowhere is this truer than in Tulsa, Oklahoma, where the facts of the Tulsa Race Riot of 1921 are finally coming to light. If we cannot “get over it,” it is because incidents like Tulsa have shaped our country, and we have been denied justice and recompense for that suffering.

Put more simply, one kind of reparations does not seek payment for the psychic harm done to modern-day African Americans as a result of having been descended from slaves. I do not wish to comment upon whether that is an adequate moral or legal basis for seeking compensation. Instead, it is important to look at the actual people and actual communities that suffered racist repression and to gain some kind of restitution for their suffering. Even more important, we must hold accountable those institutions that not only did nothing, but also profited from this baleful history of discrimination. These institutions still exist today. And finally, we need to establish just why it is that we are willing to pay reparations to other minority groups, but that African American reparations seem such an incredible idea.⁵⁶

To return to the Tulsa Race Riot, the African-American community in Greenwood was completely destroyed. Before the riot, the black dollar would circulate thirty-five times before leaving the community; after the riot, just once.⁵⁷ Thus, the destruction was not simply physical or

⁵⁶ See, e.g., The Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app § 1989 (1988)) (awarding Reparations to Japanese Americans and Aleut Indians); see also LESLIE T. HATAMIYA, *RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988* (1993) (discussing events leading to passage of Act). The two major Japanese American Reparations cases that eventually forced passage of the Act are *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) and *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984) (dismissing reparations claim on statute of limitations grounds) *aff'd* 847 F.2d 779 (Fed. Cir. 1988).

⁵⁷ This continued circulation of the dollar in the community means that money is continually spent on goods and services within the geographic community, allowing each community business to prosper, rather than having those same dollars go to outside merchants to purchase the same goods. When consumers go to outside merchants, the community's competitors, rather than the community, become the beneficiary of the community's precious resources. The grocer sells food; the barber cuts hair; the dentist fills cavities; the restaurant provides meals. The community as a whole benefits when each citizen is both a producer of goods or services, and a consumer.

emotional, but economic as well. The loss to the black community resulted in a direct infusion of wealth into the white community from black dollars that otherwise would have gone to black businesses. This effect led to the underdevelopment of the black community during Jim Crow.⁵⁸

A dialogue is especially important in light of the feedback already generated simply by talking about reparations. I receive a lot of mail from those who believe either that African Americans do not deserve reparations, or that white Americans of this generation are not responsible for the acts of their ancestors. Ignorance of history, and of the pervasiveness of slavery and the Jim Crow system in American life in the last four hundred years, makes it easy to dismiss the reparations argument as unjustified and unreasonable.

Patricia Williams, in her book *The Rooster's Egg*, did a remarkable job demonstrating that many men feel that, contrary to all evidence, *they* are victimized by the few programs to help minorities. Indeed, one of the letters prompted by my appearance on CNN was sent by a man identifying himself as "a white victim of affirmative action since its inception." Who is playing the race card here? In this case, because affirmative action applies predominantly to college education, it is unlikely, unless the gentleman was particularly precocious, that he was a victim of affirmative action all his life. At any rate, he implicitly endorsed Horowitz's argument that blacks who see themselves as victims and want something for nothing are the ones who demand reparations. In his own words, "Blacks in America are quick to play the slavery chit . . . complaining of inequity [in the hope that] a free handout will come along." He also suggested that Minister Louis Farrakhan was associated with the Reparations Coordinating Committee, a claim that is not true, but often made.⁵⁹

The author of another email stated that "[m]y family has not even lived in this country long enough to have had anything whatsoever to do with slavery"⁶⁰ and that to insist on reparations victimizes similarly placed whites. He suggested that it was "truly a shame that I willingly guarantee the rights that you egregiously treat with such disregard. I hope that someday the pain you enjoy visiting on the innocent comes back to haunt you." Well, to use an analogy of Cornel West's, while

⁵⁸ See, e.g. WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1981). The connection between colonial underdevelopment and African American underdevelopment is made by Eric J. Miller. See Miller, *supra* note 26.

⁵⁹ Email from Daniel Kearney (on file with author).

⁶⁰ Email from thunderpig@msn.com (on file with author).

black folks were sitting at the back of the bus; generations of white immigrants got to go straight to the front.

But perhaps my favorite was the letter stating that blacks should compensate the Southern whites dispossessed by means of the Freedmen's Bureau. This correspondent had a shaky grasp of history. The land the Bureau gave to blacks was taken back and redistributed to whites at the end of Reconstruction. In fact, the only reparations for slavery that the government ever paid were to Southern whites to compensate them for the loss of their slaves.

Let me be quite clear about these sorts of arguments. I do not seek to pursue a legal strategy that holds individuals legally accountable for their acts during slavery. Nor do I seek to bring lawsuits against individual descendants of slave owners for the acts of their ancestors. That is a legal matter. But let me be clear about one other thing: as a matter of moral accountability, if you have profited from the increased social prestige engendered by slavery, *de jure* segregation, or *de facto* discrimination, then you ought to recognize that fact. You need not have been a slave owner to benefit from the profits of slavery. You need not have been a proponent of segregation to benefit from sharecropping. And you need not have discriminated to benefit from the last-hired, first-fired treatment of African Americans.

Nevertheless, I believe that suing a corporation is much different than suing a person. Legally, corporations are immortal; they do not die except by their own hand. So a company that is around in 2002 can be the same company that was around in 1602. And where that company owes its present profitability to its slave trading, that company should acknowledge that fact and make some form of restitution. Now, this principle of corporate responsibility is neither new, nor controversial. Holocaust victims have successfully sued corporations to recover the property stolen from them during the Second World War. In fact, in a recent case, Judge Sietz of the Southern District of Florida applied many of the slavery reparations arguments when he refused to dismiss a holocaust litigation suit.⁶¹ California has passed legislation making it possible for individuals used as slave labor during the Second World War to sue Japanese and German corporations for reparations. Massachusetts, among others, has passed a law making it illegal for any corporation doing business in the commonwealth to contract with Myanmar (formerly Burma), because of that country's use of slave labor.

⁶¹ See *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002).

By comparison, the slavery and Jim Crow reparations legislation that has been passed is insubstantial. The 1994 legislation that Florida passed to compensate the victims of the Rosewood Massacre properly compensated those victims.⁶² Meanwhile, California has waived statute of limitations deadlines for the victims of Second World War slavery, yet has not done so for the victims of African American slavery or repressive violence. Nevertheless, that the statute passed, compelling insurance companies to divulge their involvement with slavery, is welcome. The California statute serves as a model for others around the country. Municipalities are now passing resolutions modeled after the statute but with more teeth. For example, the Chicago Ordinance is directly modeled after the California legislation.

VIII. TYPES OF LAWSUIT AVAILABLE

The root of the word reparations is "repair," and without question, damage has been done. Of course, African slaves and their descendants are not the only group to suffer in our nation. Native Americans, Irish, Italians, and Mexicans — almost every minority has been singled out, wronged, or discriminated against. The fundamental difference in the case of African Americans is that it was legislated and enforced, not just a matter of custom. Equally important is that slavery in America, which existed for nearly 250 years, was followed by an era of legalized discrimination and continuing practices that perpetuate black subordination. The legacy of slavery is seen today in well documented racial disparities in access to education, health care, housing, employment, and insurance. It is also seen in the form of racial profiling, the high rate of single-parent homes, and the disproportionate number of black inmates.

That the claim for reparations depends upon the distinct harm done to the slaves' descendants does not mean that I believe only these individuals will benefit. Indeed, while every African American has both a legally and morally compelling entitlement to reparations as the logical descendants of those slaves who suffered mightily to build this country, I think that accepting individual payments, as a prudential matter, may not be the ideal course to pursue. The question arises as to why would

⁶² In 1923, the citizens of the African-American town of Rosewood, Florida, were attacked after an unidentified African American man was accused of assaulting a white woman. The town was destroyed, and a number of African Americans killed. See MICHAEL D'ORSO, *LIKE JUDGMENT DAY: THE RUIN AND REDEMPTION OF A TOWN CALLED ROSEWOOD* (1996).

anyone entitled to benefits voluntarily choose not to receive them? My answer is: because it may be the morally correct sacrifice to make. There are many in the African-American community who would be entitled to reparations (I include myself and others who have managed a degree of success despite the challenges posed by racial barriers to progress) but would choose to forego that right for what I believe to be the greater good of the African-American community. Accordingly, I would urge some sacrifice by those who have succeeded in America and suggest that the reparations resources be pooled, monitored, and distributed to address specific community needs and to empower specific community members.

Therefore, individual payments to every African American in the country would not be the primary result that is sought through a progressive vision of reparations. Instead, I believe that the focus should be on establishing a trust fund to administer money received through claims and an independent commission to distribute those funds to the poorest members of the black community. The damage has been done to a group, African American slaves and their descendants, but it has not been done equally within the group. The reparations movement must aim at undoing the damage where it has been most severe. The legacy of slavery and racial discrimination in America is seen in well documented racial disparities in educational access, health care, housing, insurance, employment, and other social goods. If the reparations movement succeeds in financing social recovery for the bottom-stuck, it enables individuals of all races to participate in a movement away from poverty and towards an acceptable standard of living. If we succeed in developing a Reparations Trust Fund for the poorest of the poor, and it is employed to address hunger, poor quality health care, housing, education and employment, and succeeds in lifting the bottom-stuck, we will be solving problems for America, and not simply black America. When we improve the quality of life for the poorest of the poor, it improves the quality of our entire nation.

Before America can unite, as many currently believe it must, we need to establish a community based on equality and accountability for all, by all, regardless of ancestry. Until we can say, as a country, "We must never forget," and mean the events of June 1, 1921, as well as the events of September 11, 2001, we will never truly be whole.

I envision an America where we focus not on our own personal, selfish needs, but on the needs of the voiceless, faceless, powerless, and dispossessed members of the African-American community. We must continue the fight for justice and equality by imagining a world that

cares for those who would be left behind. It is a dream that we must make, in the words of Langston Hughes, a reality for everyone:

There is a dream in the land
With its back against the wall
By muddled names and strange
Sometimes the dream is called.
There are those who claim
This dream is theirs alone —
A sin for which, we know,
They must atone.
Unless shared in common
Like sunlight and like air,
The dream will die for lack
Of substance anywhere.
The dream knows no frontier or tongue,
The dream no class or race.
The dream can not be kept secure
In any one looked place.
This dream today embattled,
With its back against the wall —
To save the dream for one
It must be saved for All —
Our dream of freedom!