A DREAM REVIVED: THE RISE OF THE BLACK REPARATIONS MOVEMENT

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It is a pleasure to provide an introduction for a conference on the black reparations movement for two reasons. First, much has been written recently about the rise of the black reparations movement and the theoretical aspects of black reparations,[1] but there has been little focus on comparative or practical considerations. This symposium issue helps to fill that gap.

Second, and even more significant, in order to fulfill its true spirit, America of the twenty-first century must uphold principles of justice and fairness. Whether one is for or against black reparations, questions of justice and fairness are central to a resolution of issues contained in the reparations debate. That is why this symposium, and others like it, are so important.

It has been said that a dream deferred will eventually just shrivel up "like a raisin in the sun."[2] But thanks to the black reparations movement, the dream of compensation and restitution for enslavement is still very much alive. Begun during the Civil War, the black reparations movement ceased to command serious attention from political leaders between the end of Reconstruction in 1876 and the rise of the modern civil rights movement during the 1960s, though several other substantial reparations movements developed

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1. *See, e.g.*, RANDALL ROBINSON, THE DEBT (2000) (offering a theoretical proposal for reparations to African Americans); Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003) (discussing the wealth of recent scholarship on reparations).

2. This statement refers to Langston Hughes's famous poem, "Harlem," which begins:

> What happens to a dream deferred?
> Does it dry up
> Like a raisin in the sun?

LANGSTON HUGHES, COLLECTED POEMS OF LANGSTON HUGHES 363 (Arnold Rampersad and David Roessel eds., Vintage Classics 1995).

during the late 1800s and early 20th century.[3] In recent years, the drive for black reparations has gained widespread support and media attention.[4]

Like an idea whose time has come, reparations, compensation or restitution to African Americans for years of enslavement, is a subject worthy of careful consideration. American slavery was sanctioned, albeit by implication, by the United States Constitution,[5] and both the federal government and many state governments, actively or passively, participated in and benefited from the institution of slavery.[6] Pursuant to such authorization, African Americans suffered unimaginable cruelty and hardship which lasted through two centuries. While monetary compensation and other forms of assistance have been provided by the United States government to other groups who have been the victims of discriminatory treatment and internment,[7] none has yet been provided to African Americans for the legacy of slavery.

The first slaves arrived in Jamestown, Virginia, in 1619.[8] They were characterized as property and afforded no personal rights. They were prohibited from education, entering contracts, or holding property. They were kidnapped, whipped, beaten, and chained, and forced to labor under harsh conditions.[9]

All slaves were freed from actual slavery by the Emancipation Proclamation issued by President Abraham Lincoln in 1863 or by the 13th Amendment to the United States Constitution passed two

3. *See* Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457 (2003) (discussing the history of post-Reconstruction reparations movements).

4. *See id.* (discussing recent support from political and popular leaders for reparations).

5. *See* U.S. CONST. art. I, § 2, cl. 3 (counting slaves as three-fifths of "free Persons" in determining the apportionment of representatives); U.S. CONST. art. I, § 9, cl. 1 (prohibiting Congressional prohibition of importation of slaves prior to 1808); U.S. CONST. art. IV, § 2, cl. 3 (requiring all states to return fugitive slaves).

6. Slavery was an integral part of the economics of most southern states. *See* A. Leon Higginbotham & F. Michael Higginbotham, "*Yearning to Breathe Free*": *Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1223–27 (1993). Some northern states where slavery had been abolished, such as Massachusetts and Rhode Island, also benefited economically from its continuance. *See* F. MICHAEL HIGGINBOTHAM, RACE LAW: CASES, COMMENTARY, AND QUESTIONS 64–66 (2001) (excerpting commentary by A. Leon Higginbotham, Jr., *The Bicentennial of the Constitution: A Racial Perspective*). Even the federal government was heavily invested in the institution of slavery. *See id.* at 114–16.

7. *See, e.g.,* Brophy, *supra* note 1 (discussing provision of reparations to Native Americans and interned Japanese Americans). R

8. A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR 20 (1978).

9. *See* ROBINSON, *supra* note 1, at 208.

years later.[10] No mandatory compensation or other form of assistance, however, was provided by either provision.

Freed slaves were subjected to widespread racial discrimination and intimidation. From lynchings, cross burnings, and night raids destroying their homes, to black codes that subjected them to convict labor farms and prisons, freed slaves experienced onerous burdens that other Americans did not. Often times, American law sanctioned such practices. At other times, laws were ignored or circumscribed. As a result, economic opportunities for African Americans were drastically limited.[11]

Reparations have been provided by the United States government, and by foreign governments and corporations, on several previous occasions. While some reparations were provided by legislative order, others were generated by court order when inadequate compensation or restitution had been provided for injuries suffered or for appropriations of labor or assets owned by those harmed.[12]

The issue of reparations has been raised since the beginning of the Civil War in 1860. Calls for reparations came from abolitionists, freed slaves, and Republican party leaders.[13] Despite these wide-

10. *See* U.S. CONST. amend. XIII; Abraham Lincoln, The Emancipation Proclamation (Jan. 1, 1863), *reprinted in* 12 Stat. 1268 (1863).

11. *See, e.g.*, Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557 (2003) (discussing the racial violence, some state-sanctioned, that pervaded post-Civil War American life and oppressed African Americans); JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 238–42 (5th ed. 1980); DERRICK BELL, RACE, RACISM, AND AMERICAN LAW § 2.13, at 58–63 (4th ed. 2000). *See generally* RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO (2d ed. 1997).

12. *See, e.g.*, Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615 (2003) (discussing recent successfully-settled litigation for restitution to victims of the Holocaust who lost property to, and worked as slave laborers for, Swiss and German entities); Brophy, *supra* note 1 (discussing recent successful domestic and foreign reparations movements). R

13. Abolitionist and author David Walker protested the lack of compensation for the labor of slaves as early as 1829. *See* BELL, *supra* note 11, at 72 n.11. Former slave Henry McNeal Turner made numerous speeches in support of reparations during the Reconstruction period. *See id.* Thaddeus Stevens, a leader of the Republican party and member of the United States House of Representatives from Pennsylvania, requested support for a reparations bill before Congress which failed in 1866. *See id.* at § 2.13, at 58–59. Charles Sumner, another leader of the Republican party and a member of the United States Senate from Massachusetts, spoke in Congress in support of a reparations bill. *See id.* at § 2.13, at 59 n.1 (quoting LERONE BENNETT, BEFORE THE MAYFLOWER 189 (1961)).

spread calls of support, reparations bills during Reconstruction were vetoed by President Andrew Johnson.[14]

The movement for reparations is not a recent phenomenon. It has its roots in the immediate post-Civil War period. Yet, as the articles contained in this issue suggest, the debate has not subsided. In fact, the debate seems just as intense today as it was when Thaddeus Stevens stood on the floor of the Senate in 1866 and unsuccessfully called for the United States government to provide "40 acres and a mule" for every freedman.[15]

Much has changed as to racial justice in America since 1866. First, state-imposed racial segregation and discrimination have been outlawed. Second, lynchings and other bias crimes have been substantially reduced and most perpetrators are now prosecuted and convicted. Moreover, some discrimination in the private sector, particularly in areas of employment and education, has been diminished. As a result, educational and employment opportunities for African Americans are greater today than ever before. Yet, even with all the changes, widespread socio-economic inequities between blacks and other Americans continue to exist. Incidents of discrimination, both public and private, blatant and subtle, continue to occur.[16] In recognition of these continuing inequities and incidents, the movement for black reparations continues its mission.

But what are reparations? What support do they find in law or in policy? How are they different from ordinary civil lawsuits and other civil rights remedies? Who awards them and who gets them? How are the Holocaust, Japanese American internment, and other instances of oppression of racial and ethnic groups similar to or different from slavery? The articles contained in this symposium issue address these questions and more.

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14. JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 233 (5th ed. 1980).

15. ROBINSON, *supra* note 1, at 204 (quoting DERRICK A. BELL, *Dissection of a Dream*, 9 HARV. C.R.-C.L. L. REV. 156 (1974) (book review)). R

16. *See* Strauder v. West Virginia, 100 U.S. 303 (1880) (declaring unconstitutional a West Virginia statute prohibiting African Americans from serving on juries); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (declaring unconstitutional state-imposed racial segregation in primary schools); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (Ginsburg, J., dissenting) (describing the continuing existence of racial discrimination in employment, housing, and government contracts); *see also* A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM 152–68 (1996) (describing Supreme Court decisions between 1930 and 1941 reducing racial discrimination in education, voting, and criminal justice system); F. MICHAEL HIGGINBOTHAM, RACE LAW: CASES, COMMENTARY, AND QUESTIONS 394–430 (2001) (describing Supreme Court decisions since 1976 permitting vast racial inequities to continue in employment, criminal justice, and voting).

In *Formulating Reparations Litigation Through the Eyes of the Movement*, Adjoa Aiyetoro discusses the challenges of obtaining reparations for Africans and African descendants of the trans-Atlantic slave trade and chattel slavery from the perspective of a member of the reparations movement. Aiyetoro's informative piece provides numerous insights on the formation and development of the black reparations movement. For example, Aiyetoro notes that in 1987, the National Coalition of Blacks for Reparations in America (N'COBRA) was formed. Its sole purpose was to obtain reparations for African descendants in the United States and to support the movements for reparations for Africans and African descendants throughout the Diaspora and Africa. She also notes that at the urging of a N'COBRA member, Congressman John Conyers introduced H.R. 40, the reparations study bill. This bill calls for the formation of a commission to study chattel slavery and whether it continues to impact African descendants in the United States today. The bill also instructs the commission to recommend the forms that reparations should take.

Aiyetoro argues that while obtaining legislative support for H.R. 40 from numerous local and state legislative bodies and social, civic and legal organizations was critical, it was also important to complement the legislative work with a litigation strategy and have Congress and others take the movement more seriously. This, she concludes, has been accomplished even though much remains to be done.

In *A History Lesson: Reparations for What?*, Emma Coleman Jordan argues that a focus on slavery as a centerpiece of a black reparations litigation strategy would be misguided due to difficulty meeting temporal requirements arising from conventional expectations of civil litigation. Instead, Jordan offers a fascinating alternative basis that would focus on lynchings and race riots from 1865-1954.

Jordan argues that lynching, like slavery, was a crime against humanity. She notes, however, that unlike slavery, lynching represented a challenge to the rule of law that was formally adapted for the newly freed slaves. According to Jordan, the Reconstruction amendments to the Constitution form the foundation for constitutional and contractarian claims to freedom. Consequently, the behavior of individual citizens and entire communities that embraced the savage practices of mutilations and torture is in direct breach of this contractarian expectation. As a result, Jordan concludes that such an alternative basis offers fewer pitfalls with virtually the same benefits.

In *Factors Impacting the Selection and Positioning of Human Rights Class Actions in the United States Courts: A Practical Overview*, Morris Ratner provides critical insights on litigation strategy for the black reparations movement. Ratner argues that plaintiffs selecting human rights cases have to be very careful. Ratner warns that one reason that the need for such selectivity exists is that defendants wield greater resources and are usually capable of securing large law firms to represent them. These firms' use of delay proceedings can be costly to the plaintiffs, not to mention the great expense of going to trial or to enforce the litigated judgment.

Ratner notes that international human rights law, rules of civil procedure, statutes, and case law provide the technical guidelines for evaluating and framing potential human rights claims for litigation in the United States. Ratner cautions, however, that counsel for the plaintiff must be aware that there are limits on personal and subject matter jurisdiction and constitutional limitations on the type of matters that can be brought in United States courts. In addition, Ratner points out that there are discretionary doctrines, such as forum non conveniens, act of state, international comity, and political questions, that often prompt United States courts to decline to exercise jurisdiction, even where it exists. Statutes and treaties also limit the ability of courts to provide justice as to particular categories of potential defendants, such as governmental entities or defendants that have negotiated waivers of liability with the United States government. Moreover, Ratner warns that courts are not willing to treat all claims on a class basis, even where the harms alleged were clearly directed at and perpetrated against large groups of persons. Ratner also points out that there are practical considerations – including the judge's prior experience and biases, the relevant political interests (such as social, political, and/or economic status of the accusers and accused), and the ability of victim's advocates to generate publicity and public sympathy – that impact a potential human rights class action's probability of success.

In *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, Anthony Sebok provides an illuminating discussion on reparations for African Americans in the context of the separation of law and equity. Sebok describes the concept of unjust enrichment in the context of law and equity arguing that the concept's basis in missing property may be misguided for a reparations lawsuit about chattel slavery rooted in the ideology of racial oppression. In discussing this misguidance, Sebok recognizes that a big advantage for choosing a claim of unjust enrichment in a repa-

rations lawsuit is the tactical advantage of a claim in equity being immune to certain affirmative defenses in law such as assumption of risk. But he also recognizes a number of disadvantages such as the problem of innocent holders of property or the problem of tracing damages that must not be overlooked. Sebok concludes by cautioning those supporters of the black reparations movement to move carefully on a claim of unjust enrichment because it is difficult to address the wrongs of racial oppression through the language of missing property.

In *Some Conceptual and Legal Problems in Reparations for Slavery*, Alfred Brophy thoughtfully discusses the constitutionality of reparations for African Americans and the appropriate types of remedies. In examining the concept, legality, and implementation of black reparations, Brophy discusses three problems with the movement. First, he identifies problems relating to the rhetoric of debt and unjust enrichment in reparations talk and associated conceptual problems with making claims on behalf of victims groups against perpetrator groups. Second, he examines issues relating to the constitutionality of reparation claims for slavery. Third, Brophy talks about the appropriate types of remedies for harms where the people most directly harmed are no longer alive. Brophy convincingly argues that the courts, unlike Congress, may not be the best forum for resolving this issue because they are limited by legal doctrine in determining what reparations will look like and who must pay. He suggests that the solution may be found in emphasizing the common interests of all Americans rather than analogies to legal doctrine that can be quite confining.

In *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, Burt Neuborne insightfully outlines the history and important role of litigation in American courts concerning the Holocaust. For example, Neuborne notes that current litigation began in 1996 and has generated over 8 billion dollars for distribution to Holocaust victims. While noting the large dollar distribution, Neuborne stresses the most important aspect of the Holocaust litigation was its challenge to patterns of exploitative behavior by private entities. He identifies four different challenges: (1) the failure of Swiss banks to return vast sums of money held for safekeeping on the eve of the Holocaust to surviving family members at the close of World War II; (2) claims that German and Austrian banks knowingly profited from playing key roles in the Nazi Aryanization program that forced non-Aryans to sell businesses and property at a fraction of market value to persons classified as Aryan; (3) the failure of German and Italian insurance companies to honor life and

property insurance policies issued to Holocaust victims; and (4) how the German industrial sector reaped huge unjust profits from the use of slave labor during World War II.

Neuborne reasons that a single thread runs through each of these four claims in that plaintiffs sought recovery of the value of the misappropriated assets as a form of equitable restitution. He cautions, however, that supporters of black reparations must keep in mind that while the Holocaust litigation was an untidy mixture of law, politics, and raw emotion, the law provided only a road map, not the fuel.

In *Rehabilitative Reparations for the Judicial Process*, Roy Brooks provides an insightful discussion concerning the precise form which the reparation should assume. Should it come in the form of monetary provisions, museums, or monuments? Should the provisions come from governments, business entities, or private individuals? Should the provisions be distributed to individuals, groups, or entities? After clearly identifying and describing the various forms reparations for African Americans might take, Brooks carefully applies a critical process to demonstrate the means by which rehabilitative reparations can be effectuated. This critical process begins by examining the various categories of reparations employed by governments. Brooks suggests that government responses to oppression such as South Africa's approach to apartheid, Germany's acknowledgment of the Holocaust, and the United States' acceptance of responsibility for the internment of Japanese Americans during World War II reflect a conceptual scheme that makes a distinction between compensatory and rehabilitative reparations. Brooks notes that compensatory reparations are directed toward the individual victim or the victim's family. He suggests that they are intended to be compensatory but only in a symbolic sense since nothing can truly return the victim to the status quo. In contrast, Brooks notes that rehabilitative reparations are directed toward the victim's community. He suggests that they are designed to benefit the victim's group by improving the conditions under which that group lives. Brooks recognizes that such reparations, compensatory or rehabilitative, can take the form of monetary or non-monetary relief such as cash payments, scholarship funds, trust funds, affirmative action, a national memorial, or a national museum. Brooks concludes that the form reparations will take will be decided, in part, by the judiciary.

Brooks argues that in deciding what form black reparations should take, judges should consider not only traditional notions of judicial reasoning but values reflected in the African American

community as well. In this way, reparations will be most beneficial to the victims it is designed to assist.

In *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations*, Christian Sundquist suggests a new way of thinking about reparations and its benefits. In thoughtfully examining the value of a new approach, Sundquist stresses the importance of remembering the past, particularly for African Americans and the legacy of slavery, racial discrimination, and economic exclusion. Sundquist argues that the value of the black reparations movement must be judged not only from a monetary compensation standpoint, but from a spiritual healing one as well. He reasons that in this way, the benefits of the black reparations movement will lie primarily in the dialogue itself rather than any negotiated monetary settlement. Sundquist notes that remembering the past has always been a difficult and painful endeavor for the black community. He indicates that such difficulty is a result of the effects of over two hundred and forty-five years of slavery, three hundred and fifty years of United States government-sponsored racial discrimination, and three hundred and eighty years of pervasive racism and economic oppression. Sundquist ingeniously argues, however, that the process of remembering this past is necessary to heal the psychic injuries caused by hundreds of years of racial oppression. He believes that the black reparations movement can be a method to engage this process of remembering. Yet, Sundquist suggests that the black reparations movement has a far greater potential than merely memory assistance.

Sundquist characterizes the black reparations movement as a monumentally transformative mechanism that can "deconstruct the myth of [American] equality." This myth, Sundquist suggests, embraces the notion that equal opportunity is a truly objective, neutral, and fair method to allocate educational, employment, and political resources to members of society, without regard to race, class, gender, or ethnicity. The black reparations movement can deconstruct this myth by demonstrating the inherent inequity in this allocation of resources. Only through such deconstruction, Sundquist believes, can African Americans truly achieve an accurate understanding of the past and, consequently, real freedom in the future.