

Reparations for Slavery: A Dream Deferred*

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What happens to a dream deferred?
Does it dry up
like a raisin in the sun?
.....
Or does it explode?

Langston Hughes
*Harlem*¹

When the year began, the prediction was that 2001 was going to be the “Year of Reparations.” Both internationally and in the United States, the consensus held that the time had finally come for governments around the world to face up to racism and apologize for the harm brought about by slavery and its aftermath—harm in the past, to those long dead, and in the present, to those who, because of the color of their skin, still suffer from racism. Governments were expected to make amends for that harm

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1. Langston Hughes, *Harlem*, in *AN ANTHOLOGY OF MODERN AMERICAN POETRY* 523 (Cary Nelson ed., 2000).

through restitution and compensation, whether individual or collective. This willingness to address the evils of slavery and racism was accompanied in the United States and throughout the industrialized world by a strong economy that meant funds would be available to redress the injuries.

The details needed to be worked out, but there was a general feeling that reparations for slavery, segregation, and discrimination were just and fair and should be pursued by those with the resources and the power to effect them. The precipitating event, intended to get the programs started on an international level, was the United Nations World Conference Against Racism, Intolerance, and Xenophobia (WCAR), scheduled for Durban, South Africa at the end of August. In that former land of apartheid, itself transformed by its Truth and Reconciliation Commission², the leaders of the world's nations were to come together and lay out a plan that individual nations could implement in appropriate ways to correct the evils of racism.³

It did not happen. Disputes over resolutions identifying Israel as a racist state caused irreparable division among the nations and led the United States to withdraw its delegation.⁴ The division undermined the plans for a unified closing statement against racism. Tragically, two days after the Conference, on September 11, 2001, terrorists flew suicide missions into the World Trade Center and the Pentagon, taking thousands of innocent lives. As the country's resources, both physical and financial, were suddenly, and for the foreseeable future, focused on the destruction of an enemy outside the country, the hope for a program of reparations for citizens in America was lost.

Although the dream of reparations has been deferred, the day will come when America once again will be called upon to confront its heritage of slavery, segregation, and discrimination, to apologize for past

2. The Commission, formed by the South African Government's Promotion of National Unity and Reconciliation Act, was charged with "investigating and documenting gross human rights violations within or outside South Africa in the period 1960-94." Volume One, Chapter Two, Final Report of the Truth and Reconciliation Commission Presented to President Nelson Mandela on 29 October 1998, *available at* <http://www.polity.org.za/govdocs/commissions/1998/trc>.

3. For examples of the concerns of the international community that would be addressed in Durban, see the Draft Declaration developed by the Preparatory Committee during its three sessions in Geneva in the six months preceding the conference, especially sections 114-127 on remedies and sections 128-142 on strategies for combating racism. *World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Draft Declaration*, U.N. GAOR Preparatory Committee 2d & 3d Sess., at 30-36, U.N. Doc. A/CONF.189/4 (2001).

4. For a discussion of why Secretary of State Powell recalled the U.S. delegation, see Jane Perlez, *How Powell Decided to Shun Conference*, N.Y. TIMES, Sept 5, 2001, at A8.

wrongs, and to make amends for them. In the interim, America would do well to examine the rationale for reparations and to develop a plan that can be justified and implemented when a better day dawns.

I. MODELS FOR REPARATIONS FOR SLAVERY

WCAR failed despite the fact that some reparations programs have been successfully carried out since the end of World War II and could serve as models for new efforts. Foremost is the German government's provision of material compensation and restitution to Jewish victims of the Holocaust. In 1951, in a speech to his country's parliament, the leader of West Germany, Konrad Adenauer declared:

Unspeakable crimes have been committed in the name of the German people, calling for moral and material indemnity, both with regard to the individual harm done to Jews and to the Jewish property for which no legitimate, individual claimants still exist. . . . The Federal Government are prepared, jointly with representatives of Jewry and the State of Israel . . . to bring about a solution of the material indemnity problem, thus easing the way to the spiritual settlement of infinite suffering.⁵

A month later the Conference on Jewish Material Claims Against Germany (Claims Conference) was formed to indemnify individual Jewish victims of Nazi persecution for injuries, to restore property confiscated or destroyed by the Nazis, and to fund the rehabilitation of Jewish communities. This led to the passage of the original West German Federal Indemnification Law in 1952 (*Bundessentschädigungsgesetz*, or BEG), which provided compensation to Holocaust survivors. The Claims Conference has paid out over DM 100 billion in the last half century, and, although the BEG has expired, the Conference continues to work to support organizations that provide essential services to needy, elderly victims of Nazi persecution.⁶ In addition, in 1990, the Conference, with active support from the United States government, convinced the German government to provide further compensation for Holocaust victims under Article 2 of the Implementation

5. Claims Conference: Conference on Jewish Material Claims Against Germany (presenting Chancellor Adenauer's speech and other information about the history of reparations in Germany), at <http://www.claimscom.org/about.asp> (last accessed Sept. 7, 2001) (on file with author).

6. Claims Conference, *supra* note 5, at <http://www.claimscom.org/germany/BEG.asp>.

Agreement to the German Unification Treaty.⁷ Besides working with the Claims Conference, the German government also signed an agreement with the State of Israel under which it provided goods and services to Israel, which had been formed just three years earlier.⁸ Taken together, these programs of reparations have done much to heal the hurt done in the name of Germany by the Nazi government.

Another well known call for reparations, this one having to do with America's other principal enemy during World War II, Japan, has not been as successful. It is widely felt that Japan should pay reparations to the women its government forced to become sexual slaves, or "comfort women," for the Japanese military during the war. In his informative examination of the plight of the comfort women, George Hicks outlines the failures of the Japanese government to address the harm done to those foreigners, mostly Korean, who suffered under the "officially-organized system of rape by the Imperial Japanese Forces."⁹ There has never been, Hicks says, an official apology from the Japanese Diet. The 1990 letters from the Emperor and the Prime Minister are considered expressions of personal rather than official government remorse, in no way countermanding "the Diet's long-standing position that postwar treaties, including the 1965 Basic Treaty with South Korea, released Japan from all World War II claims."¹⁰ Japan's methods for paying compensation to the comfort women take forms that avoid the acknowledgement of responsibility on the part of the government.

The Asian Women's Fund, established by private groups in 1995 with the "support" of the government, is designed to "extend atonement and support to those who suffered as wartime 'comfort women.'"¹¹ The Fund distributes donated funds to women who apply and qualify, sending each of them 2 million yen along with a letter from the Prime Minister extending his "most sincere apologies and remorse to all the women who underwent immeasurable and painful experiences and suffered incalculable physical and psychological wounds as comfort

7. Article 2 of the Implementation Agreement to the German Unification Treaty of October 3, 1990, *quoted in* Claims Conference, *supra* note 5, at <http://www.claimscom.org/article2/history.asp>. *Accord* United States Department of Justice Foreign Claims Settlement Commission, *German Compensation for National Socialist Crimes, in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 61-67 (Roy Brooks ed., 1999) [hereinafter SORRY] (presenting a history of United States involvement in the German indemnification efforts).

8. *German Compensation for National Socialist Crimes, supra* note 7, at 62.

9. GEORGE HICKS, *THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 11 (1994).

10. George Hicks, *The Comfort Women Redress Movement*, in SORRY, *supra* note 7, at 123-24.

11. See Activities of the Asian Women's Fund, at http://www.awf.or.jp/01_e.html (last accessed January 29, 2002).

women.”¹² Many women refuse to accept these private funds, believing that the government itself should be paying for the reparations: they want, Hicks says, “atonement money,” not “consolation money.”¹³ That some Americans find the Japanese approach unsatisfactory can be gathered from a Resolution introduced by Rep. William Lipinski (D-Ill.) in 1997, which called for a “clear and unambiguous apology” from the Japanese government along with reparations of at least \$40,000 to each woman for her “extreme pain and suffering.”¹⁴

These examples of efforts, some more successful than others, to come to terms with the evils perpetrated upon innocent people by governments serve as a backdrop for the more ambitious project pursued by many at the World Conference Against Racism: to draft and adopt a statement condemning slavery and its legacy. Many speakers, according to the United Nations High Commission on Human Rights, “pointed out that the precedent for compensation had been set in a number of instances, including by Germany after the First World War, to the Japanese Americans interned during the Second World War and to the victims of the Nazi Holocaust.”¹⁵ Unfortunately, the issue of slavery

served to expose—and harden—differences in thinking between the West and descendants of African slaves. Where the white community approached the matter from the perspective of contemporary concerns—its members wanted to avoid being sued—Africans expressed an almost ancestral responsibility to exact an apology from the descendants of former slave masters.¹⁶

At the end of the Conference, the American delegation was conspicuously absent. Harvard law professor Charles Ogletree said, “It is lamentable we are not a part of this. If the world’s nations can agree on issues like racism and the Middle East, then the US should have played a role in those discussions.”¹⁷ The remaining 160 nations in the end were able to compromise and agree on a text for the U.N. Declaration, with certain

12. *Id.* The Japanese government also funds a program paying each surviving Filipina comfort woman 1.2 million yen but excluding Korean and Taiwanese women. See Hicks, *supra* note 11, at 124.

13. See Hicks, *supra* note 11, at 124.

14. H. R. Con. Res. 126, 105th Cong. (1997), reprinted in SORRY, *supra* note 7, at 149-50.

15. *Call to Eradicate Discrimination and Intolerance Marks Conclusion of World Conference Against Racism* (Sept. 8, 2001), at <http://www.un.org/WCAR/pr.htm>.

16. Michael Slackman, *Divisive U.N. Race Talks End in Accord*, L.A. TIMES, Sept. 9, 2001, at 1.

17. Elizabeth Neuffer, *UN Conference Agrees in a Plan to Fight Racism*, BOSTON GLOBE, Sept. 9, 2001, at A1.

sections speaking specifically to slavery:

We acknowledge that slavery and the slave trade, including the trans-Atlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of victims, and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so.¹⁸

“Abhorrent barbarism” and “crimes against humanity” became facts of everyday life in the United States two days after the Conference closed when terrorists attacked New York and Washington. And while the reordering of public priorities following the attacks means that reparations for black Americans will not be forthcoming for years, what must not be deferred is an analysis of the history of slavery and its aftermath in America and the creation of a reasoned program for reparations that can be executed when the country is ready.

II. SLAVERY IN AMERICA

The long, dark shadow of slavery has cast its pall over America since the first Africans were brought in chains to this land in 1619. Slavery so warped the minds of white and black Americans and so distorted the institutions forming the supporting structure of American society that the nation has been unable to escape its debilitating influence even a century and a half after the “peculiar institution” was outlawed. “The story of the Negro in America,” as James Baldwin said 50 years ago, “is the story of America.” The “Negro” is “that shadow which lies athwart our national life,”¹⁹ and not as a threat or a curse but as a constant reminder of the injustice and inequality that belie the American Dream and the promise of the nation’s foundational ideals—ideals that were enunciated by white men of European extraction who thought of the African slaves not as human beings but as chattel. The Founding Fathers apparently had no problem putting blacks in a category where they were diminished to three-fifth of their personhood²⁰ and where the proposition that “all men are created equal” did not apply.²¹

As the United States enters the 21st Century, the time is ripe to lift that pall and transform the country into a land that fulfills the promises of its founding documents on behalf of not just the privileged classes but all

18. Associated Press, *Racism Conference Slavery Text* (Sept. 8, 2001), at <http://www.washingtonpost.com>.

19. James Baldwin, *Many Thousands Gone*, in *NOTES OF A NATIVE SON* 24 (Beacon Press 1984).

20. See U.S. CONST. art. I, cl. 2.

21. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

Americans. This can be done only if America comes to terms with the overt and covert racism that flows through its institutions and the hearts and minds of its people. And once the reality of racism is faced, the country must take affirmative steps to correct the wrongs that racism breeds. The solution calls for radical measures that strike at the root of the problem, namely, a monumental program of reparations that in the next thirty to forty years will go far to eliminate the injustices and inequalities that presently infect the land. The justification for such a program is the debt owed to African Americans for harm done by slavery, segregation, and discrimination; the effect of such a program will be a better America, not only *directly* for blacks and other minorities but also *indirectly* for all Americans. Reparations can serve as the principal antidote to the poison of racism that sullies America today.

The truth of these assertions must be tested through an examination of (1) the factual historical record that justifies reparations, (2) the present reality of racism in America today that makes reparations necessary, and (3) the appropriateness of reparations as the solution to the problem of race in America.

III. THE HISTORICAL RECORD

Slavery and post-Emancipation segregation and discrimination have severely harmed African Americans, and those harms cry out for redress. On top of the personal injuries suffered, harms have been done to blacks as a group. As Robert Westley has pointed out, this leads to a two-fold claim: first, for the value of uncompensated labor during the period of slavery and, second, for the violations of the civil rights of African Americans since the end of slavery.²²

One is tempted to say that there is no need at this late date to recount the horrors of slavery itself; however, the subject is addressed so little within the curricula of American schools that people in this country continue to grow up ignorant of the physical and mental suffering visited upon blacks. A sense of the reality that many school curricula ignore can be gained from Frederick Douglass's descriptions of a slave overseer:

His savage barbarity was equaled only by the consummate coolness with which he committed the grossest and most savage deeds upon the slaves under his

22. Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparation?*, 40 B.C. L. REV. 429, 465-66 (1998).

charge. Mr. Gore once undertook to whip one of Colonel Lloyd's slaves, by the name of Demby. He had given Demby but few stripes, when, to get rid of the scourging, he ran and plunged himself into a creek, and stood there at the depth of his shoulders, refusing to come out. Mr. Gore told him that he would give him three calls, and that, if he did not come out at the third call, he would shoot him. The first call was given. Demby made no response, but stood his ground. The second and third calls were given with the same result. Mr. Gore then, without consultation or deliberation with any one, not even giving Demby an additional call, raised his musket to his face, taking deadly aim at his standing victim, and in an instant poor Demby was no more. His mangled body sank out of sight, and blood and brains marked the water where he had stood. . . . [Gore's] horrid crime was not even submitted to judicial investigation. It was committed in the presence of slaves, and they of course could neither institute a suit, nor testify against him; and thus the guilty perpetrator of one of the bloodiest and most foul murders goes unwhipped of justice, and uncensored by the community in which he lives.²³

Such a denial of justice is no surprise to anyone who has read Judge Higginbotham's chronicle of the treatment of blacks under the slave codes of Colonial America where a mere fine would be imposed on any person who would "willfully cut the Tongue put out the Eye Castrate or Cruelly Scald burn or deprive any Slave of any Limb or Member."²⁴

Slavery was, and remains, as Randall Robinson described it, "an American holocaust," lasting ten times as long and killing twenty times as many people as the Nazi Holocaust. "It eviscerated whole cultures: languages, religions, mores, customs. It plundered. It raped. It commodified human beings."²⁵ And looking back to the beginnings of the American republic, on the eve of the Civil War, the Supreme Court found that members of the "negro African race" were regarded as "beings of an inferior order," having "no rights which the white man was bound to respect."²⁶ The words of the Declaration of Independence, said the Court,

would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted.²⁷

23. *Narrative of the Life of Frederick Douglass, an American Slave, Written by Himself*, in THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 1932, 1948-49 (Nina Baym, et al. eds., 1994).

24. A. Leon Higginbotham, Jr., *The Legal Status of African Americans during the Colonial Period*, in SORRY, *supra* note 7, at 317, 320. Accord Roy L. Brooks, in SORRY, *supra* note 7, at 327-32.

25. Commentary, *Perspective on Slavery: African Americans Are Owed for Years of Bottomness*, L.A. TIMES, Feb. 6, 2000, at M5.

26. *Dred Scott*, 60 U.S. at 406-07.

27. *Id.* at 410.

Blacks, the Court said, are not included, "and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."²⁸ It would take "a great civil war" to achieve the status of "citizen" for African Americans.

Ironically, neither that Civil War, nor the constitutional amendments and the federal civil rights statutes that came soon after, resulted in blacks being admitted to full citizenship and to an equal place in American society. Freedom alone is insufficient as a means to equality, even equality of opportunity. As Randall Robinson has pointed out, "No nation can enslave a race of people for hundreds of years, set them free bedraggled and penniless, pit them, without assistance in a hostile environment, against privileged victimizers, and then reasonably expect the gap between the heirs of the two groups to narrow."²⁹ After the war, every area of the lives of African Americans was affected negatively by private and state-sponsored segregation and discrimination. In his tracing of the "strange career of Jim Crow," C. Vann Woodward outlines the forces that determined "the Negro's 'place'" in the South, "disfranchised" and "relegated to the lower rungs of the economic ladder," without hope for equality.³⁰

Even when the post-Civil War U.S. Congress attempted to develop a program designed to help the freedmen towards equality, the racist attitudes pervasive in Washington as well as throughout the South frustrated the good intentions of the legislation. Professor Westley has described in clear detail the purposes and effects of specific provisions favoring the emancipated slaves, including the constitutional amendments, the civil rights acts, the Freedmen Bureau Acts, and the Southern Homestead Act.³¹ Rhonda V. Magee examines the abortive Reconstruction era congressional proposals to redistribute wealth to blacks in the form of land grants and the legacy of that lack of success.³² This failure of the federal government, according to Manning Marable,

to recognize the necessity for massive land redistribution, along the lines of what blacks themselves called "forty acres and a mule," would be the principal reason

28. *Id.* at 404.

29. RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 74 (2000).

30. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 7 (1957).

31. Westley, *supra* note 22, at 30-40.

32. Rhonda V. Magee, Note, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 885-97 (1993).

for the failure of the First Reconstruction. . . . Racial equality could not occur in political and social relations when economic power was held in relatively few hands.³³

Donald Aquinas Lancaster Jr., applying what he calls the “Plessy Factor” (after the decision in *Plessy v. Ferguson*) to the areas of education, property ownership, and employment, discovers that “a right-in-being-white” operated to the great advantage of Anglo Americans, affording them opportunities denied to African Americans.³⁴

The principal result of this program of economic subordination has been large disparities between blacks and whites in the ownership of capital, disparities that have been transmitted intergenerationally since the Civil War. David H. Swinton concludes, “[t]hese capital disparities would prevent attainment of racial equality even if current discrimination ended and blacks and whites had identical tastes and preferences. It would, therefore, be necessary to repair historic damage to the black capital stock in order to ensure attainment of equality.”³⁵

The gap in the ownership of the nation’s wealth derives from what Robert S. Browne called, “the debt owed to Blacks for the centuries of unpaid slave labor which built so much of the early American economy, and from the discriminatory wage and employment patterns to which Blacks were subjected after emancipation.”³⁶ Those centuries of unpaid labor, figured either as income lost to blacks or as income gains to whites, have been calculated by scholars as reaching billions and even trillions of dollars.³⁷ And the discriminatory wage and employment

33. *Id.* at 891.

34. Donald Aquinas Lancaster, Jr., Comment, *The Alchemy and Legacy of the United States of America’s Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations*, 43 *How. L. J.* 171, 184 (2000). Lancaster first argues that educational disenfranchisement left blacks without the solid educational foundation to compete with white Americans. *Id.* at 185-92. The inequitable implementation of the Land Grant Movement by the federal government resulted in white institutions receiving most of the funding and relegated African Americans to second class status in higher education. *Id.* Second, in the area property ownership, African Americans’ status did not improve a great deal even after the end of slavery. *Id.* at 192-96. They did not benefit very much from the Homestead Acts, being limited by a lack of capital and the paucity of productive land still available after the Civil War. *Id.* Thus succeeding generations of African Americans received little in the way of inheritance, which is a major way of passing on wealth and achieving economic advancement. *Id.* Third, the federal government, through the National Labor Relations Act, the Davis-Bacon Act, and the National Apprenticeship Act, supported discrimination and denied employment opportunities to African Americans while granting them to whites. *Id.* at 196-99.

35. *Racial Inequality and Reparations*, in *THE WEALTH OF RACES* 157 (Richard F. America, ed., 1990) [hereinafter *WEALTH*].

36. Robert S. Browne, *Wealth Distribution and Its Impact on Minorities*, in *WEALTH*, *supra* note 35, at 3.

37. See Roger L. Ransom & Richard Satch, *Who Pays for Slavery?* in *WEALTH*,

patterns have resulted in financial advantages for whites and disadvantages for blacks that have been transferred across generations. This is evident not only in levels of personal inheritance but also in terms of business enterprises where discrimination is "likely to result in racial cost disparities which can persist long after the discrimination has ceased."³⁸

In looking back over the hundred years of Jim Crow segregation that followed Emancipation, Boris Bittker based his reasoned case for black reparations on "the theory that statutes, ordinances, and other official actions have been the predominant source of the racial discrimination that has blighted our public and private life."³⁹ It was a time of second-class citizenship for African Americans, as Roy Brooks points out, in which they "lived in a world of fear—beatings, maimings, murder, and constant racial indignities—as well as limited opportunity."⁴⁰ Nearly 400 years after the first African slaves were brought to America, millions of blacks, says Randall Robinson, "remain economically and socially disabled by the long, cruel promise of American slavery and the century of government-embraced racial discrimination that followed it."⁴¹

IV. THE PRESENT SITUATION

Why is it that African Americans are still disabled almost a half century after the landmark case of *Brown v. Board of Education* overturned the pernicious separate-but-equal doctrine and nearly four decades after the passage of the Civil Rights and the Voting Rights acts of the 1960s and passage of the series of affirmative action measures that followed them? The answer is contained in a single word: *racism*.

In their book *White Racism*, Joe R. Feagin and Hernán Vera define their subject as the "socially organized set of attitudes, ideas, and practices that deny African Americans and other people of color the

supra note 35, at 31-54; James Marketti, *Estimated Present Value of Income Diverted during Slavery*, in *WEALTH*, *supra* note 35, at 108-23; Robert S. Browne, *Achieving Parity Through Reparations*, in *WEALTH*, *supra* note 35, at 202; see also GEORGE SCHEDLER, *RACIST SYMBOLS AND REPARATIONS: PHILOSOPHICAL REFLECTIONS OF VESTIGES OF THE AMERICAN CIVIL WAR* 103-14 (1998) (discussing a measure of restitution).

38. Martin J. Katz, Note, *The Economics of Discrimination: The Three Fallacies of Croson*, 100 *YALE L.J.* 1033, 1043 (1991).

39. BORIS T. BITTKER, *THE CASE FOR BLACK REPARATIONS* 26 (1973).

40. See Roy L. Brooks, *Redress for Racism*, in *SORRY*, *supra* note 7, at 395.

41. Randall Robinson, *TransAfrica Forum: The Case for Black Reparations-Transcript*, at <http://www.transafricaforum.org/reports/print/reparations-print.shtml> (last visited June 28, 2000).

dignity, opportunities, freedoms, and rewards that this nation offers white Americans.”⁴² This reality creates precisely the dilemma enunciated by Gunnar Myrdal when he described the conflict in America between the commitment to the ideal of liberty and justice and the treatment of blacks, who are condemned at birth to membership in a disfavored caste.⁴³ Little has changed in this regard since Myrdal made his study, as can be seen in Alexander Aleinikoff’s acute observations on this point less than a decade ago:

A strong case, I believe, could be made for a proximate relationship between slavery and current racial conditions. But there is another linkage as well. . . . [T]he American system of slavery . . . was justified in terms of the subhumanness of blacks. As George Frederickson has explained, “[e]xplicit racism, a public ideology based on the doctrinaire conception of the black man as a natural underling, developed . . . directly out of the need to defend slavery against nineteenth-century humanitarianism.”

Over the past 150 years, the terms and explanations have shifted, primarily from a biological to a cultural basis for black inferiority. But the message of inferiority has not been extirpated.⁴⁴

It was this truth that Justice Douglas spoke of in his concurrence to *Jones v. Mayer* when he said that the institution of slavery “produced the notion that the white man was of superior character, intelligence, and morality.” And, he added, “[s]ome badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men.” Justice Douglas saw in the cases before the Court “a spectacle of slavery unwilling to die.”⁴⁵

If racism were only in the hearts and minds of white Americans, the solution might lie in terms of personal conversion, purging the negative notions regarding blacks. But racism is endemic in the political and social institutions of this country, where, as Rhonda Magee says, “‘the system’ of American law and politics merely consists of the aggregate actions of racially hyperconscious individual participants,” creating a “so-called institutionalized racism, or rather, institutionalized white supremacy.”⁴⁶ Jerome Culp declares, “race is only skin deep,” a mere social construct, while “white supremacy runs to the bone” in the “structure of the law and the legal academy,” and, one might add, in the

42. JOE R. FEAGIN & HERNAN L. VERA, *WHITE RACISM: THE BASICS* 7 (1995).

43. GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 4 (1964).

44. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1120 (1991).

45. *Jones v. Meyer*, 392 U.S. 409, 445 (1968). For two incisive examinations of the reality of racism in America, see ANDREW HACKER, *TWO NATIONS, BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1995); JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* (2000).

46. Magee, *supra* note 32, at 910.

total structure of American society.⁴⁷

Of course, most Americans still refuse to acknowledge the existence of racism. In the summer of 2000, *The New York Times* ran a six-week series on race in America in which the paper invited "whites and blacks to express their feelings about race in an uninhibited way."⁴⁸ The *Times*'s editorial comment extolled today's "shared activities" and "social interaction" of black and white Americans.⁴⁹ But sharing activities is no indication that perceptions or values are shared, and social interaction can be almost entirely superficial with no real communication. Over 150 years ago blacks and whites shared the activity of raising cotton, and that certainly did not lead to understanding or sympathy. The interactions were more blatantly racist then, but the underlying attitudes still persist.

As a part of its project, the *Times* conducted a nationwide poll on race relations and came to the conclusion that "a majority of Americans maintain that race relations in the United States are generally good" even though blacks and whites have divergent perceptions on many racial issues and live lives that rarely intersect each other.⁵⁰ Major differences appeared in how black and white Americans see the world. For example, when asked, "[t]hese days, do you think the media talk too much about issues of race, too little, or about the right amount?," fifty-four percent of whites but only twenty-eight percent of blacks responded "too much."⁵¹ And when asked how important they thought improving race relations is to the future of the United States, sixty-six percent of blacks thought it one of the most important issues but only twenty-six percent of whites agreed.⁵²

The inescapable reality of black socioeconomic disadvantage is outlined in convincing detail by Professor Westley as a part of his examination of the case for black reparation.⁵³ He examines the writings of scholars such as Manning Marable, Thomas F. Pettigrew, Melvin L. Oliver, Thomas M. Shapiro, and Andrew Hacker in order to document how "structures of white supremacy have asserted hegemony over

47. Jerome Culp, *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1638-39 (1999).

48. *Progress and Pain on Race*, N.Y. TIMES, July 16, 2000, at 14.

49. *Id.*

50. Kevin Sack & Janet Elder, *Poll Finds Optimistic Outlook but Enduring Racial Divisions*, N.Y. TIMES, July 11, 2000, A1, A23.

51. *Id.*

52. *Id.*

53. Westley, *supra* note 22, at 438-49.

numerous aspects of social, political and personal life in the United States.”⁵⁴ Clearly, blacks suffer economic injury because of racism and discrimination in education, employment, and housing, but they also suffer assaults on their dignity as human beings that, as Professor Brooks has pointed out, are inevitable for people of color in an integrated society:

Dignity harms are ubiquitous and permanent because they result from racialized ways of feeling, thinking, and behaving toward African Americans (and other minorities) that emanate from the American culture at large. They are macrosystemic. Furthermore, they are reinforced by schools, families, friends, TV, movies, and the media.⁵⁵

Nowhere is the subordination of blacks more evident than in the administration of the criminal justice system in the United States. The abuses of white supremacy affect blacks directly when they are subjected to discrimination by legislators who frame the criminal laws and by the police, prosecutors, judges, and prison personnel who carry them out. But blacks also suffer long-term effects from being victimized by a racist legal system: loss of freedom, foreclosure of economic opportunities, disenfranchisement. Nearly a third of young black men are either imprisoned today or under the control of a correctional system, and young black women represent the fastest growing segment of the prison population.⁵⁶ Minorities represent over fifty percent of the prison population, with blacks being incarcerated at seven times the rate of whites.⁵⁷ African American men are disenfranchised at a rate seven times the national average, now numbering about 1.4 million or thirteen percent of black males. At current rates of incarceration, thirty percent of the next generation of black men can expect to be disenfranchised at some point in their lifetime, and in states that disenfranchise ex-offenders, as many as forty percent of the black men may permanently lose their right to vote.⁵⁸

In a report to the United Nations Commission on Human Rights on the role of race in the U.S. criminal justice system, Charles Ogletree laid out in detail how, at every stage in the criminal justice system, from pre-arrest suspicion to death penalty sentencing, institutionalized racial bias

54. *Id.* at 448.

55. ROY BROOKS, *INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY* 109 (1996).

56. Angela Y. Davis, *From the Convict Lease System to the Super-Max Prison*, in *STATES OF CONFINEMENT: POLICING, DETENTION AND PRISONS* 61 (James Joy ed., 2000) [hereinafter *STATES OF CONFINEMENT*].

57. David T. Goldberg, *Surplus Value: The Political Economy of Prisons and Policing*, in *STATES OF CONFINEMENT*, *supra* note 56, at 213.

58. JAMIE FELLNER, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* (1998), available at <http://www.sentencingproject.org/Pubs/hrwfv.html> (last visited Jan. 22, 2002).

continues “to operate to deny people of color equal protection under the law.”⁵⁹ It may be that the treatment of blacks in the criminal justice system is the most glaring example of white racism, but the subordination of blacks in all areas of their lives suggests that African Americans’ putative progress toward socioeconomic equality and full civil rights is essentially a chimera. The two main engines of that supposed progress—integration and affirmative action—have not done their office.

Despite *Brown v. Board of Education* and the civil rights legislation of the following four decades, millions of African Americans, as Professor Brooks says, “are still not receiving adequate education and emotional support in our public schools, are still not living in safe and decent neighborhoods, are still not working to their full economic and emotional potential, and are still not able to protect their social and economic interests through the political process.”⁶⁰ This is a stinging indictment of the traditional liberal program for solving the problem of race in America: personal racial bias is too strong, as are structural and institutional racism.⁶¹

In his inclusive examination of the topic, Professor Westley declared, “[a]ffirmative action for Black Americans as a form of remediation for perpetuation of past injustice is almost dead.”⁶² The Supreme Court cases from *Bakke*⁶³ in 1978, to *Adarand*⁶⁴ in 1995, indicate a hostility on the part of a majority of the Court towards affirmative action as a way of

59. *The Role of Race in the U.S. Criminal Justice System and the Opportunities for International Responses*, written report by Charles Ogletree presented at the NGO Forum on slavery and reparations sponsored by the International Human Rights Law Group at the 56th Session of the U.N. Commission on Human Rights, April 5, 2000, in Geneva, Switzerland (on file with author).

60. BROOKS, *supra* note 55, at 104.

61. *Id.* at 107.

62. Westley, *supra* note 22, at 429 (surveying the scholarship, the statutes, and the case law). See also Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 7 VA. L. REV. 753 (1985) (arguing that the legislative history of the 14th Amendment is dispositive of the legal dispute over constitutional standards applicable to affirmative action); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986) (considering the objections to affirmative action and the role of covert motivations in reactions against affirmative action). Cf. RONALD J. FISCUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION* (1992) (viewing affirmative action programs, even those with quotas, as the only way to advance race-related claims of distributive justice); Magee, *supra* note 32, at 897-900 (examining modern antidiscrimination law).

63. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

64. Adarand Contractors, Inc. v. Peña, 515 U.S. 200 (1995).

dealing with racial discrimination.⁶⁵ This “judicial crippling” of affirmative action, according to Vincene Verdun,

coupled with an increasingly intolerant population, which has forgotten that racism ever existed and denies its prevalence today, and now blames the African-American community for failing to assimilate like other ethnic groups, are making it abundantly clear that reparations for the injustices of slavery and systematic discrimination will not be found in affirmative action.⁶⁶

Instead of affirmative action, the present Court is committed to a policy of colorblindness that rejects race-consciousness. The essence of this policy can be found in Justice Scalia’s concurrence to *City of Richmond v. J.A. Croson*:

The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin.⁶⁷

Although this policy appears egalitarian and antidiscriminatory on its face, it is effectively subordinating and racist. As Alexander Aleinikoff argues, “a legal norm of colorblindness will not end race-consciousness; rather, it will simply make the unfortunate aspects and consequences of race-consciousness less accessible and thus less alterable.”⁶⁸ It is his position that race-consciousness can help transform America, not by integration but by reorienting the relationship between the dominant white culture and the subordinate black culture, thereby preserving the racial and cultural integrity of the black community.⁶⁹ At best, this allegiance to colorblindness is based on a desire to overcome racism by treating all alike; at worst, it results, both personally and institutionally, in the preservation of the status quo where the white power structure dominates all others.

Also challenging the traditional integrationist view is Gary Peller, who, in a provocative and insightful article, applies black nationalist assumptions about culture and identity to the American racial scene.⁷⁰

65. See Westley, *supra* note 22, at 469-70. Professor Westley also finds the non-monetary compensation of affirmative action to be “unacceptable” for many reasons, including that it helps relatively few blacks while perpetuating discrimination against all blacks and that it is not uniform and systematic. *Id.*

66. Vincent Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 666 (1993).

67. *City of Richmond v. J.A. Croson*, 488 U.S. 469, 520 (1989).

68. Aleinikoff, *supra* note 44, at 1078.

69. *Id.* at 1082.

70. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990).

He finds that integration

has had some success in improving the lives of specific people and in transforming the climate of overt racial domination that pervaded American society thirty years ago. But it has been pursued to the exclusion of a commitment to the vitality of the black community as a whole and to the economic and cultural health of black neighborhoods, schools, economic enterprises, and individuals.⁷¹

Peller quotes Robert S. Browne's understanding that the price of complete integration would be too high: "the total absorption and disappearance of the race—a sort of painless genocide."⁷² From the point of view of the dominant white culture, this "genocide" by assimilation would be seen instead as a form of euthanasia, but the term could be specifically applied to the acts of white Americans and their governments in the treatment of blacks during both slavery and its aftermath.⁷³ Still, integration has had its appeal, as de Tocqueville noted in 1835:

The Negro makes a thousand fruitless efforts to insinuate himself into a society that repulses him; he adapts himself to his oppressors' tastes, adopting their opinions and hoping by imitation to join their community. From birth he has been told that his race is naturally inferior to the white man and almost believing that, he holds himself in contempt. He sees a trace of slavery in his every feature, and if he could he would gladly repudiate himself entirely.⁷⁴

Integration and assimilation will indeed solve the race problem, but in a manner that diminishes black culture. The sort of enlightened universalism that sees all people as being essentially alike requires an absorption of African Americans into the white culture. Professor Culp questions the

71. *Id.* at 845.

72. *Id.* at 783.

73. See *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). The Convention defines "genocide" as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such: (a) Killing members of the group; (b) Causing serious bodily harm or mental harm to members of the group; (c) deliberately inflicting on the group conditions intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

Id. This provision is codified in the United States Code. 18 U.S.C. §§ 1091-1093 (2000). Under this definition the treatment of blacks in America, during slavery and after, can be seen as genocide, a crime that Contracting Parties have agreed to prevent and punish.

74. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 294 (J.P. Mayer and Max Lerner, eds., 1966).

necessity of assimilation as a cure for racism.⁷⁵ A decolonized black community must have the power to choose whether or not to assimilate, and the denial of that freedom is “the real totalitarianism that is involved in race relations in America.”⁷⁶ An integrationist philosophy entails the abolition of the African American community and with it the African American culture. Following the lead of Harold Cruse and Stokely Carmichael, Professor Peller criticizes the integrationists for ignoring “the possibility of understanding racial justice in terms of the transfer of resources and power to the black community *as an entity*,” thus providing material means for improving the socioeconomic and cultural life of black neighborhoods, which would have their own “cultural identity, life patterns, and institutions.”⁷⁷ It is worth repeating Peller’s concluding assessment of how the sad state of American race relations could have been prevented:

One gets the sense that if, at any number of points in American history, a nationalist program of race reform had been adopted, African Americans in virtually every urban center would not be concentrated into disintegrating housing, would not be sending their children to underfunded and overcrowded schools to learn a nationally-prescribed curriculum, would not be sending them to play in parks and on streets alongside drug dealers and gang warriors, and would not be working at the bottom of the economic hierarchy (if they are lucky enough to have a job at all). If community-to-community reparations had been made (as promised), if there had actually been a massive transfer of economic resources from the white to the black community in the 1940s, then the kind of black economic cooperatives and black-run schools, newspapers and cultural institutions advocated by Du Bois would likely exist today as foundations for healthy African American neighborhoods. Or, if a similar program had been adopted in the 1960s, one can imagine that black neighborhoods would be by and large healthy, cosmopolitan parts of the urban scene rather than ghettos of hopelessness and frustration.⁷⁸

Because integrationist policies and affirmative action based on civil rights statutes have failed to solve the problems of racial discrimination and subordination of blacks, it is time to undertake a new program of race reform—namely *reparations*.

V. THE CASE FOR BLACK REPARATIONS REDUX

In his remarks on the occasion of his nomination as Secretary of State in the cabinet of President-elect George W. Bush, General Colin Powell said that he was glad that the newspaper reports about the occasion would say that he would be the first African American to hold the

75. Culp, *supra* note 47, at 1651.

76. *Id.* at 1652.

77. Peller, *supra* note 70, at 797 (emphasis added).

78. *Id.* at 846.

position because it would, he hoped, "give inspiration to young African-Americans coming along . . . that no matter where you began in this society[,] with hard work and with dedication and with the opportunities that are presented by this society, there are no limitations on you."⁷⁹ If this statement were true, there would be little need for reparations, but as Dr. Browne pointed out thirty years ago, "[b]lack Americans have no bootstraps to pull ourselves up by."⁸⁰ After declaring that the "illusions of power, such as another black in the federal administration's cabinet, are insufficient," Dr. Browne went on to say, "[w]e start with so few economic resources that our tactics must be to utilize cleverly what strength we have . . . to extract some economic resources from those who do have them."⁸¹ And some of those who "do have them" are the churches and synagogues of America, the specific targets of the demands for reparations presented in *The Black Manifesto* by James Forman on Sunday, May 4, 1969, when he interrupted the service at the Riverside Church in New York City.⁸² That was the opening salvo in the modern battle to persuade white America to compensate African Americans for 350 years of suffering under slavery, segregation, and discrimination.

The Black Manifesto demanded \$500 million from the churches and synagogues, prescribed the ways in which it should be spent, including a land bank and organizations that would deal with communications, welfare, labor, business, and education, and laid out a program for gaining support for the demands.⁸³ The response of the church's preaching minister, Dr. Earnest Campbell, was measured and sympathetic in a radio address a week later. To the outcries of "shame" at Forman's behavior, Dr. Campbell said, "[t]he shame centers in the fact that within the population of this most prosperous nation there are people who feel, rightly or wrongly, that they have to use such tactics to draw attention to their grievances."⁸⁴ He went on to define "reparations" as the "making

79. Colin Powell, *Remarks at Announcement of Powell's Nomination as Secretary of State*, N.Y. TIMES, Dec. 17, 2000, at 37.

80. Browne, *Toward Making "Black Power" Real Power*, in BLACK MANIFESTO: RELIGION, RACISM, AND REPARATIONS 77 (Robert S. Lecky and H. Elliott Wright eds., 1969).

81. *Id.*

82. Robert S. Lecky & H. Elliott Wright, *Reparations Now? An Introduction*, in BLACK MANIFESTO: RELIGION, RACISM, AND REPARATIONS, *supra* note 80, at 3.

83. James Forman, *The Black Manifesto*, in BLACK MANIFESTO: RELIGION, RACISM, AND REPARATIONS, *supra* note 80, at 114-26.

84. Ernest Campbell, *What Shall Our Response Be? Riverside Speaks First*, in

of amends for wrong or injury done,” and condemned the “demeaning and heinous mistreatment” of blacks at the hands of whites during and after slavery, declaring it “just and reasonable that amends be made by many institutions in society.”⁸⁵

Reparations can also be defined in a more legal sense, as Elazar Barkan does when he says the term refers to “some form of material recompense for that which cannot be returned, such as human life, a flourishing culture and economy, and identity.”⁸⁶ For Barkan it is still a moral argument: although the past cannot be undone, “the effect of this historical injustice constitutes a continuing violation. Therefore, the descendants of slaves are themselves victims.”⁸⁷ More broadly, reparations, as Professor Matsuda so clearly explains, are not “equivalent to a standard legal judgment. It is the formal acknowledgement of historical wrong, the recognition of continuing injury, and the commitment to redress, looking always to victims for guidance.”⁸⁸ Within this context, the purpose of reparations may be seen as three-fold. In his article, “[t]he Economic Basis for Reparations to Black America,” Dr. Browne summarizes the objectives: first, to punish white Americans for their ancestors’ brutal enslavement of African Americans; second, to compensate the African American community for the unpaid labor of their slave ancestors; third, to provide African Americans with their fair share of the national wealth and income that would have been theirs had they had the same opportunities and advantages that white Americans experienced over the last 375 years.⁸⁹

Reparations, then, become the answer to the problem of race and racism in America, and the question is how best to implement them. A failure to redress the injuries caused by slavery and its aftermath is, as Professor Matsuda says, “an injury often more serious than the acts themselves, because it signifies the political non-personhood of victims.”⁹⁰ Reparations declare to the victims of racism that they exist as persons and that they are entitled to compensation for real deprivations: “This nation and its laws acknowledge you.”⁹¹ The achievement of recognition is one of the most important benefits of reparations,

BLACK MANIFESTO: RELIGION, RACISM, AND REPARATIONS, *supra* note 80, at 128.

85. *Id.* at 130-31.

86. ELAZAR BARKAN, *THE GUILT OF NATIONS* xix (2000).

87. *Id.* at 284.

88. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 397 (1987).

89. FEAGIN & VERA, *supra* note 42, at 187, quoting Robert S. Browne, *The Economic Basis for Reparations to Black America*, in *REVIEW OF BLACK POLITICAL ECONOMY* 21, 99 (Jan. 1993).

90. Matsuda, *supra* note 88, at 390.

91. *Id.*

harbinger the socioeconomic benefits that will accrue when a program of reparations is instituted. Recognition is linked, Charles Taylor says, with identity,

where this latter term designates something like a person's understanding of who they are, of their fundamental defining characteristics as a human being. The thesis is that our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.⁹²

This lack of true recognition and the resulting injury to identity have been the fate of African Americans as individuals and as a group, leaving them subjugated to the image of inferiority imposed upon them by the dominant white hegemony. The granting of reparation could work to overturn this debilitating situation and free blacks from the prison of misrecognition, first, by the acknowledgement of their identities as persons worthy of receiving restitution and, second, by the positive effects on the socioeconomic conditions of blacks from an executed program of reparations, raising them to a position of parity within the general community. Once reparations are paid, says Professor Westley,

[b]lack will be able to function within American society on a footing of absolute equality. Their chance for public happiness, as opposed to private happiness, will be the same as that of any white citizen who currently takes this concept for granted because the public so utterly "belongs" to him, so utterly affirms his value, his humanity, his dignity and his presence.⁹³

What, then, ought to be the specific nature of a program of reparations for African Americans for the harms suffered under slavery, segregation, and discrimination? The best place to look for guidance, as Professor Matsuda suggests, is to the victims themselves, and the TransAfrica Forum's "Restatement of the Black Manifesto" is an excellent starting point.⁹⁴ This updating of the 1969 Black Manifesto begins with a "Statement of Facts," opening with a list of ten points that underpin the need for

92. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25 (Amy Gutmann, ed., 1994).

93. Westley, *supra* note 22, at 476.

94. *Restatement of the Black Manifesto*, Reports, TransAfrica Forum, at http://www.transafricaforum.org/reports/roundtable011100_manifesto.shtml (last visited Jan. 29, 2002).

reparations today.⁹⁵ They fall into two groups: the first five focus on the failure of the U.S. government to acknowledge its role in the mistreatment of African Americans or to compensate them, either by statute or in the courts, for their original and continuing subordination; the second five assert the appropriateness of reparations by a government that has abrogated the rights of its minorities, citing as precedent recent state and federal payments of reparations to injured groups for provable injuries they have suffered.⁹⁶ On this basis, the new Manifesto states its position: It is time for the government—not for private individuals—to create a forum in which it can pay the debt and heal the wounds caused by slavery, segregation, and discrimination in order to redress the continuing harm not only of uncompensated labor but also of the poverty and deprivations that have persisted from generation to generation.⁹⁷ This Manifesto concludes with a call for Congressional hearings to establish the basis for reparations and to determine the amount.⁹⁸

A bill to achieve precisely such hearings is presently before the U.S. House of Representative. On January 3, 2001, Rep. John Conyers (D-Mich.) once again introduced a bill that he had been proposing for more than a decade.⁹⁹ Appropriately numbered HR 40, it is called the “Commission to Study Reparation Proposals for African-Americans Act,” and its intent is

To acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequently de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.¹⁰⁰

The commission would examine, first, the institution of slavery and the extent to which state and federal governments supported it constitutionally and statutorily; second, economic, social, and political discrimination

95. *Id.*

96. *Id.* The Manifesto lists the United States government’s payment of reparations to Japanese Americans for unjust internment during World War II and its actions in support of reparations for Jewish survivors of the Holocaust, and it cites the individual states’ reparations to those African Americans within their jurisdictions who suffered specific harm resulting from a combination of white violence and official inaction in response to that violence. *Id.*

97. *Id.*

98. *Id.*

99. See Major Issues—Reparations: The Commission to Study Reparations Proposals for African Americans Act, at www.house.gov/conyers/news_reparations.htm (last visited March 27, 2002).

100. Commission to Study Reparation Proposals for African-Americans, H.R. 40, 107th Cong. (2001), available at <http://thomas.loc.gov/> (last visited Jan 29, 2002).

against freed slaves and their descendants; and, third, the continuing negative effect of slavery and discrimination on living African-Americans and on U.S. society generally, all to the end of recommending appropriate remedies.¹⁰¹ The bill was referred to the House Committee on the Judiciary, where, as one might expect, it languishes. Even a decade after it was first introduced, the bill has been able to attract only 30 cosponsors in the 107th Congress out of the 435 members of the House.¹⁰²

Still, the future of reparations for blacks may not be totally bleak. Recent examples of reparations to groups who have suffered historical injury, such as Japanese Americans or Jewish survivors of the Holocaust, could set a precedent for African Americans. At the end of his discussion of compensation for Japanese Americans and European Jews as "victimized groups," Professor Westley quotes David Ben Gurion's response to the *Wiedergutmachung* that, for the first time in history of the oppressed European Jews, "a persecutor and despoiler has been obliged to return part of his spoils and has even undertaken to make collective reparations as partial compensation for the material losses."¹⁰³ Professor Westley adds,

[t]he principle, then, was that when a State or government has through its official organs—its laws and customs—despoiled and victimized and murdered a group of its own inhabitants and citizens on the basis of group membership, that State or its successor in interest has an unquestionable moral obligation to compensate that group materially on the same basis.¹⁰⁴

After a detailed comparison of reparations to internees of Japanese descent and African Americans, Professor Verdun concludes that granting reparations to Japanese Americans without granting them to African Americans "sends to the latter yet another message declaring that they are on the bottom of society's ladder, and this exclusion confirms their sense of futility in the quest for justice in the United States."¹⁰⁵

Perhaps even more important for the eventual success of reparations in the United States may be the existence of federal budget surpluses in the coming years after the threat of terrorism subsides. Because blacks usually absorb the brunt of economic hard times, the prospects for any

101. H.R. 40 § 2(b).

102. Congress. Org, Congressional Legislation, Commission to Study Reparations Proposals for African-Americans Act, Bill # H.R.40, at www.congress.org/congressorg/issues/bills/?billnum=H.R.40&congress=107 (last visited March 27, 2002).

103. Westley, *supra* note 22, at 455-56.

104. *Id.*

105. Verdun, *supra* note 66, at 646-59.

social program that might serve them in particular are very problematic when such a program would have to compete with projects favored by the dominant white culture in the competition for scarce funds. Still, two major questions must be addressed. One, should the effort to achieve reparations be made through the courts or through the legislature? And two, should the awards be made to individual African Americans in the form of monetary grants, or should they be made to African Americans as a group in the form of support for the black community?

Many proponents of reparations believe that the courts should be the battlefield,¹⁰⁶ but it is precisely in the area of litigation that the opponents to reparations, no matter what their motives, are able to marshal their strongest arguments. Professor Matsuda lists four standard doctrinal objections to reparations: 1) factual objections and excuses or justifications for illegal acts; 2) difficult identification of perpetrator and victim groups; 3) lack of sufficient connection between past wrong and present claim; 4) difficulty of calculation of damages.¹⁰⁷ Derrick Bell, in his generally sympathetic review of Professor Bittker's *The Case for Black Reparations*, says,

[w]hether based on [42 U.S.C.] section 1983 or directly on constitutional amendments, reparations litigation, if attempted on a broad scale, faces an avalanche of procedural problems, including determining proper parties, fashioning an appropriate class action, and effecting meaningful discovery, all of which are likely to increase in complexity as the case proceeds.¹⁰⁸

106. See Charles J. Ogletree, Jr., *Litigating the Legacy of Slavery*, N.Y. TIMES, March 31, 2002, at (discussing group of lawyers that filed a federal class-action lawsuit in New York on behalf of all African-American descendants of slaves. The lawsuit seeks compensation from a number of defendants for profits earned through slave labor and the slave trade); James Cox, *Special Report: Activists Challenge Corporations that They Say are Tied to Slavery*, USA Today, Feb. 21, 2002, at A1 (analyzing the efforts of the Reparations Coordinating Committee, led by Charles Ogletree and Randall Robinson and including Johnnie Cochran, Dennis Sweet, Cornel West, Richard America, and Manning Marable, to hold legally responsible companies that profited from slavery and ultimately to convince Congress to award reparations to African Americans); Paul Braverman, *Slavery Strategy: Inside the Reparations Suit*, THE AMERICAN LAWYER, July 2001, at 22 (noting that the group headed by Randall Robinson and Charles Ogletree plans to file suits in 2002); Breant Staples, *Editorial Observer: How Slavery Fueled Business in the North*, N.Y. TIMES, July 24, 2000, at A18 (noting that Deadria C. Farmer-Paellman is pursuing litigation against corporations that benefited from slavery). See also Robin Finn, *Public Lives: Pressing the Cause of the Forgotten Slaves*, N.Y. TIMES, Aug. 8, 2000, at B2 (discussing Deadria C. Farmer-Paellman's plans to sue corporations that benefited from slavery, including Aetna which sold slave insurance to slave holders, and Fleet Boston which helped finance slave purchases).

107. Matsuda, *supra* note 88, at 373-74. When she returns to this subject in 1997, Professor Matsuda adds the point that legal critics also object to reparations because they are divisive politically. CHARLES R. LAWRENCE & MARI MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 235-36 (1997).

108. Derrick Bell, *Dissection of a Dream*, 9 HARV. C.R.-C.L. REV. 156, 159 (1974) (reviewing BITTKER, *supra* note 39); see also Tureen E. Chisolm, Comment, *Sweep*

In an effort to answer the objections, Professor Matsuda develops a theory of liberal legalism that includes reparations. She argues for the expansion of the standard legal claim so that the plaintiffs would be members of the victim group and the defendants would be descendants of the perpetrators and current beneficiaries of past injustices.¹⁰⁹ She seeks to overcome the traditional legal bars of time, proximate cause, and laches by linking them to the limiting perspective of the victims.¹¹⁰ And she finds sufficient precedent for the awarding of damages that cannot be determined with scientific precision.¹¹¹

Given the penchant of judges to stick to more traditional or conventional applications of the law, the prospects for successful reparations are slim. This is evident from the histories of two unsuccessful cases: *Hohri v. United States*¹¹² and *Cato v. United States*.¹¹³ In *Hohri*, victims of the Japanese internment during WWII and descendants of some of the deceased victims brought a class action suit for compensation based on various theories of liability, including constitutional violations, tort, breach of contract and fiduciary duties.¹¹⁴ Despite the failure of the suit, Rhonda Magee sees the courts as the “most promising starting point” for successful reparations because the total exhaustion of legal options for reparations can bolster the victims’ claims for legislative action.¹¹⁵ In *Cato*, the plaintiffs’ complaint against the government “for damages due to the enslavement of African Americans and subsequent discrimination against them, for an acknowledgement of discrimination, and for an apology” was dismissed by the district court.¹¹⁶ The 9th Circuit affirmed, quoting Judge Armstrong:

Discrimination and bigotry of any type is [*sic*] intolerable, and the enslavement of Africans by this Country is inexcusable. This Court, however, is unable to identify any legally cognizable basis upon which plaintiff’s claims may proceed against the United States. While plaintiff may be justified in seeking redress for

Around Your Own Front Door: Examining the Argument for Legislative African American Reparations, 147 U. PA. L. REV. 677, 708-12 (1999); SCHEDLER, *supra* note 37, at 107-14; and Lancaster, *supra* note 34, at 205-08.

109. Matsuda, *supra* note 88, at 374-80.

110. *Id.* at 380-85.

111. *Id.* at 385-88.

112. *Hohri v. United States*, 586 F. Supp. 769 (D. D.C. 1984), *aff’d in part and rev’d in part*, 782 F.2d 304 (D.C. Cir. 1986) *vacated by*, 482 U.S. 64 (1987).

113. *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).

114. Magee, *supra* note 32, at 904-06 (outlining the progress of *Hohri* through the courts).

115. *Id.* at 905-06.

116. 70 F.3d at 1105.

past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief. The legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances.¹¹⁷

Considering this predilection on the part of judges to defer to the legislature as the proper forum for the redress of grievances based on slavery, segregation, and discrimination, perhaps the proponents of reparations ought to concentrate their efforts on Congress. But even then, reparations measures would not escape the scrutiny of the courts, which would decide on their constitutionality. Professor Bittker made a strong argument for the constitutionality of reparations,¹¹⁸ an argument that has been updated by Professor Brooks in light of the current Supreme Court's decisions in the area of affirmative action.¹¹⁹ By applying the "non-subordinating principle" rather than a "colorblind principle," Professor Brooks can justify the constitutionality of laws that seek to correct the injustices of the continuing effects of slavery and discrimination through a benign race-consciousness.¹²⁰ After tracing the history of Supreme Court opinions, from *Bakke*¹²¹ decided in 1978, to *Adarand*¹²² decided in 1995, that deal with constitutional challenges to racial preferences and that display a movement toward the strict scrutiny test for governmental actions based on race, Professor Brooks concludes that "*Adarand* would seem to sound the death knell for black reparations, unless they can be tendered as compensation for the government's racial discrimination against blacks."¹²³

But, asks Professor Brooks, will the blacks who benefit from reparations legislation be seen by the Supreme Court as the actual victims of governmental misconduct, and thus be deserving of compensation under tests the Court will most likely apply?¹²⁴ From the myopic viewpoint of those who oppose black reparations, such as Stephan Thernstrom, the answer is definitely no: "Most Americans today are not the descendants of anyone who lived in the United States in the period in which slavery existed."¹²⁵ Professor Matsuda tries to deal with this problem, as

117. *Id.*

118. BITTKER, *supra* note 39, at 105-27.

119. Boris I. Bittker & Roy L. Brooks, *The Constitutionality of Black Reparations*, in SORRY, *supra* note 7, at 374-89.

120. *Id.* at 379.

121. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

122. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

123. Bittker & Brooks, *supra* note 119, at 381-83. See Verdun, *supra* note 66, at 621-25 (the Court is leaning towards requiring a tighter connection between the recipient of benefits and the acts of the discriminator under affirmative action plans).

124. Bittker & Brooks, *supra* note 119, at 384.

125. Stephan Thernstrom, *Paying for Past Sins: the Debate Over Slavery Reparations* (June 16, 2000), at <http://www.abcnews.go.com/sections/us/TakingSides/takingsides8.html> (visited June 20, 2000).

discussed above, by broadening the definition of the class of victims of slavery and its aftermath to include present day African Americans.¹²⁶ Professor Brooks deals with this problem by proposing two bases of legal support for reparations for nonvictims.¹²⁷ The first is constitutional, growing out of the Supreme Court's affirmative action cases, which allow present-day remedies for past discrimination.¹²⁸ When the discrimination precedes by many years the enactment of the remedy, the beneficiary need not be the same person as the victim.¹²⁹ The second is statutory, developing in a manner comparable to 706(g) of Title VII of the 1964 Civil Rights Act, which gives the courts wide discretion in fashioning equitable relief upon a finding of unlawful discrimination.¹³⁰ Taking this statute as a model, Professor Brooks says, "Congress could pass legislation designed to atone for past discrimination rather than to compensate actual victims."¹³¹ But in the end, he says, judicial resolution of legal problems surrounding black reparations "might well turn on public policy considerations, as is usually the case."¹³²

Also turning on public policy considerations is the question of the best method for distributing reparations. The purpose of reparations is to compensate African Americans so that they can assume the place in American society that they would have reached had it not been for their unjust treatment during the periods of slavery, segregation, and discrimination. Based on all the historical facts discussed above, there is no doubt that blacks are entitled to compensation.¹³³ The question, then, is how to compensate them in a way that will best accomplish the public policy purpose of socioeconomic and political parity.¹³⁴

Dr. Browne suggests four possible methods for payment of reparations:

1. A per capita cash payment to each African American on a designated date, based on a pro rata share of the finally agreed on reparations debt.
2. Investment of the reparations payments in income-producing assets, with the income allocated annually on a per capita basis.

126. See *supra* note 111 and accompanying text.

127. Bittker & Brooks, *supra* note 119, at 384.

128. *Id.* at 384-85.

129. *Id.* at 385.

130. *Id.*

131. *Id.*

132. Bittker & Brooks, *supra* note 119, at 384-85.

133. See *supra* text accompanying notes 22-77.

134. See BITTKER, *supra* note 39, at chs. 8 & 9.

3. Use of the payment to fund massive government-sponsored programs to raise educational and skill levels, provide housing, and generally improve overall economic status.
4. A collective payment to the "community" to create conditions necessary for "takeoff" in the Rostovian sense.¹³⁵

Distributing individual reparations by presenting each African American a certain sum of money, as the first two of Dr. Browne's methods do, raises major problems beyond the mere question of exactly how much money should be given. For one thing, how would the recipients be chosen? Who would qualify as an "African American"? Even if the reparations program avoided the whole question of privity by not requiring that a beneficiary be someone who had suffered injury or be the descendant of such a person and even if the awards were intended for blacks as a group, there would still be the problem of determining who was black. Professor Bittker raises this as a problem in his book,¹³⁶ but in his review of it, Professor Bell finds the fears about false claims not borne out by experience: whites have shown little interest in declaring themselves to be black in order to benefit from affirmative action programs.¹³⁷

Dr. Browne's methods 3 and 4 offer a better solution. Making cash grants to individuals would temporarily improve their standard of living, but it would do little to solve the large, long-term problems that plague many blacks today.¹³⁸ However, large transfers of money to the black communities would enable them to make major improvements in the areas of education, housing, employment, business, finance, police and fire protection, health maintenance, and general infrastructure. Over a period of years, such improvements would make a real and long-lasting change in the lives of African Americans, moving them toward a position of social equality.

The kinds of programs that are needed are self-evident to anyone who takes the time to examine honestly the lives of African Americans in this country, and scholars, many of whom are cited throughout this paper, have made promising and practical proposals for what can be done if money were to become available.¹³⁹ But no matter what the program, it

135. Browne, *Achieving Parity through Reparations*, in WEALTH, *supra* note 35, at 204-05. "Rostovian" refers to W.W. Rostow's theory of the stages of economic growth.

136. BITTKER, *supra* note 39, at 98-100.

137. Bell, *supra* note 108, at 163.

138. See Darrell L. Pugh, *Collective Reparations*, in SORRY, *supra* note 7, at 372-73 (revising Bittker's argument for individual and collective payments of reparations).

139. See, e.g., Forman, *supra* note 83; *Restatement of the Black Manifesto*, *supra* note 94; Chapter XVII of the Kerner Report, in REPORT OF THE NATIONAL COMMISSION ON CIVIL DISORDERS (1968). See also Alienikoff, *supra* note 44, at 4 & *passim* (proposing race-conscious programs for juries, media licensing, staffing of social service

must be African Americans themselves who design and implement it. House Judiciary Committee hearings on Congressman Conyers' HR 40, if the Republican leadership ever allows them, will provide African Americans with the opportunity to testify about the history and present reality of racism in this country and will create a factual record as a basis for governmental programs to help black communities.¹⁴⁰ The hearings will bring to the forefront those organizations and individuals who can be instrumental in implementing those programs. The voices of African Americans must be heard and attended to. One important voice is that of Randall Robinson:

There is much new fessing-up that white society must be induced to do here for the common good. First, it must own up to slavery and acknowledge its debt to slavery's contemporary victims. It must, at long last, pay that debt in massive restitutions made to America's only involuntary members. . . . It must open wide a scholarly concourse to the African ancients to which its highly evolved culture owes much credit and gives none. It must rearrange the furniture of its national myths, monuments, lores, symbols, iconography, legends, and arts to reflect the contributions and sensibilities of all Americans. It must set afoot new values. It must purify memory. It must recast its lying face.¹⁴¹

It is a matter of *vision*. Whites must first *see* blacks, see them as fellow human beings and not treat them as if they were, in Ralph Ellison's term, "invisible." Then, whites must see blacks as *equals*. For Professor Alienikoff, this *revisioning* has two parts: "First, whites must see blacks in positions of power, authority, and responsibility . . . Second, whites must begin to recognize and credit self-definition by

agencies, voting, education, housing, police, and even the literary canon); WEALTH, *supra* note 35, at xvii (previewing his book's focus on "systematic remedy in the form of targeted redistributive investment in housing, education, small business, and capital development"); Brooks, *supra* note 55, at 189-286 (proposing a program of "limited separation"—cultural and economic integration within African-American society—and black self-help that provides an alternative path to dignity and empowerment); Chisolm, *supra* note 108, at 722-26 (discussing in particular housing and education); Westley, *supra* note 22, at 470 (establishing a private trust fund for the educational and economic empowerment of blacks).

140. While the programs will be directed toward blacks, whites will not be excluded if they live within the areas designated for attention. For example, a program to improve the schools in a predominantly African-American urban area would not exclude whites or other minorities who also lived there. The program would be designed and controlled by blacks, but all students would benefit from better teachers and staff, improved facilities, modernized equipment, adequate supplies, and a broader and more inclusive curriculum.

141. ROBINSON, *supra* note 29, at 107-08.

subordinated groups.”¹⁴² It is the purpose of reparations to allow blacks to achieve these positions. It will take time not only to institute changes but also for the changes to have an effect on the perceptions that whites have of blacks and that blacks have of themselves. African-American children are the ones who will most benefit from reparations, but it will probably take two generations for the black community to benefit as the children move up through improved schools where they will receive a first-class education, live in adequate housing in decent neighborhoods, eat healthful foods, get excellent medical care, and be protected by highly professional and sympathetic fire and police forces. When these children grow and mature and enter the wider world of the American society, they will do so not as deprived or injured or oppressed or subordinated adults but as equals to anyone. The old stereotypes will be destroyed by the very numbers and abilities and accomplishments of these new generations of African Americans. Those seen today by the white society as being “exceptions”—the African Americans who have gained positions of honor and success in the white American culture—will become the “rule.” Racial equality will be a massive and undeniable reality.

As Gwendolyn Brooks wrote:¹⁴³

The White Troops Had Their Orders But the Negroes Looked Like Men

They had supposed their formula was fixed.
They had obeyed instructions to devise
A type of cold, a type of hooded gaze.
But when the Negroes came they were perplexed.
These Negroes looked like men. Besides, it taxed
Time and the temper to remember those
Congenital inequities that cause
Disfavor of the darkness. Such as boxed
Their feelings properly, complete to tags—
A box for dark men and a box for Other—
Would often find the contents had been scrambled.
Or even switched. Who really gave two figs?
Neither the earth nor heaven ever trembled.
And there was nothing startling in the weather.

WATSON BRANCH

142. Alienikoff, *supra* note 44, at 1109.

143. Gwendolyn Brooks, *The White Troops Had Their Orders but the Negroes Look Like Men*, 2 THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 2521-22 (Nina Baym, et al. eds., 1994).