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# REPARATIONS AND EQUAL OPPORTUNITY

DAVID LYONS\*

**Abstract:** This paper offers a sympathetic interpretation of reparations claims made on behalf of African Americans and suggests how they could properly be honored. It reviews the federal government's role in supporting racial subordination and its continuing failure to address the inequitable consequences, which public policy now largely ignores. It sketches a national rectification project, comprising a comprehensive set of public programs that would attack the persisting legacy of slavery and Jim Crow. The programs can be justified by the government's duty to insure equal opportunity for our society's children and, most urgently, by corrective justice, because the inequities are attributable to the government's own policies.

## INTRODUCTION

Reparations claims by African Americans frequently refer back to chattel slavery. That leads some to object that reparations could not be justified, as no one alive today can be held responsible for those wrongs. As slavery was abolished nearly a century and a half ago, those who might be expected to pay reparations were not even born until decades after slavery ended.

While focusing on the moral foundations of reparations claims, this paper will suggest an approach to meeting some of the skeptics' principal concerns. Two of the central points are: first, that relevant claims can be grounded on current social conditions and; secondly, that they do not assume our complicity in the wrongs of slavery, only our civic responsibility as members of this political community.

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\* Professor of Law & Law Alumni Scholar; Professor of Philosophy, Boston University. This paper derives from the author's contribution to the Boston College Law School symposium on reparations sponsored by the *Boston College Third World Law Journal*, March 14, 2003. The author has subsequently completed a longer version of this Article, *CORRECTIVE JUSTICE, EQUAL OPPORTUNITY, AND THE LEGACY OF SLAVERY AND JIM CROW* (Boston Univ. Sch. of Law, Working Paper No. 03-15, 2003, Public Law & Legal Theory, at <http://www.bu.edu/law/faculty/papers> (last visited Oct. 24, 2003)).

## I. THE GROUNDS OF CURRENT CLAIMS

It is understandable that many discussions of reparations refer back to chattel slavery. The slave system was a central part of the American economy and a major source of wealth for two centuries; America's distinctive racial hierarchy has its origins in the development of that system; and after abolition the former slaves received no compensation for their lifetimes of deprivation and exploitation.

It is true that reparations are now being claimed for the complicity of current corporations in slavery.<sup>1</sup> But reparations claims do not require us to go back 138 years. We need not go back in time at all, as I'll now explain.

The American practice of racial subordination did not end with slavery but evolved into the system known as Jim Crow.<sup>2</sup> That system received a veneer of legal legitimacy from new state constitutions and legislation around the turn of the century. But every American knew—or was in a position to know—that Jim Crow was built upon the illegal disfranchisement of African Americans as well as fraud, harassment, coercion, and brutal violence; and that it became possible because of an unwillingness in all three branches of the federal government to enforce clear constitutional obligations and legislative mandates that had been established after the Civil War.

Some reactions to desegregation decisions such as *Brown v. Board of Education* might suggest that objections to Jim Crow turned mainly on debatable interpretations of the federal Constitution; but one must remember that the subjugation of African Americans required thousands of lynchings; that many lynchings were done publicly with advance notice; that lynching is, at bottom, murder; and that, in the context, the law against murder was largely ignored by public officials.<sup>3</sup>

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<sup>1</sup> See, e.g., Plaintiff's Complaint and Jury Trial Demand, *Farmer-Paellman v. FleetBoston Fin. Corp.* (E.D.N.Y. filed Mar. 26, 2002) (No. 02-CV-1862) (naming FleetBoston, Aetna, CSX, and 100 unnamed corporations as defendants). Other lawsuits stem from specific incidents within living memory. See, e.g., Plaintiffs' First Amended Complaint, *Alexander v. Governor of Oklahoma* (N.D. Okla. filed Feb. 28, 2003) (No. 03-CV-133) (addressing the 1921 riot that devastated the Greenwood section of Tulsa).

<sup>2</sup> See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 6-7 (commemorative ed. 2002). Under Jim Crow, public facilities and accommodations for African Americans were either separate and unequal or not available at all. See *id.* at 24-25. Economic and social discrimination was pervasive. See *id.* at 7 *passim*. Numerous means, including some that were plainly unlawful, were employed to exclude African Americans from the political process. See *id.* at 83-86. Thus, "racial subordination (or subjugation)" is more descriptive of the system than "racial segregation."

<sup>3</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). See generally PHILIP DRAY, *AT THE*

In 1947, the President's Committee on Civil Rights began systematically to document Jim Crow's dimensions and its further consequences. The Committee found that African Americans had not only been suffering grave moral wrongs for many decades but were systematically subjected to gross violations of their ordinary legal, as well as their constitutional, rights.<sup>4</sup>

The illegality of racial discrimination and political disfranchisement was not confronted squarely in our political system until relatively recently. Federal courts began to rule against Jim Crow as the Civil Rights movement developed against the background of Cold War competition between the United States and the Soviet Union.<sup>5</sup> By the mid-1960s, Congress felt obliged to enact significant civil rights laws.<sup>6</sup> This "Second Reconstruction" committed the nation once again to racial equality. State-sponsored racial subordination was officially terminated and the doctrine of white superiority was for the first time officially denounced. Overtly racist practices and explicitly racist political appeals would no longer be condoned. Like the first Reconstruction, however, the second Reconstruction provided no compensation for the victims of racial subjugation.<sup>7</sup> Nor did it include measures to undo the entrenched disadvantages resulting from three centuries of a racial caste system.

Following slavery, adequate corrective measures would have included land reform, which was needed to break the planters' oligarchic control and secure the former slaves' rights. But Congress rejected the idea.<sup>8</sup> Following Jim Crow, adequate corrective measures would have included crash programs to improve housing, medical, educational, and employment conditions for African Americans and a concerted attack on residential segregation. Improvements have been made in many areas. But no set of programs was adopted that could

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HANDS OF PERSONS UNKNOWN (2002) (providing detailed accounts of specific incidents of lynching and discussing the social and political context in which they occurred); ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950*, at 3-21 tbl. 1 & 2 (1980) (recounting the history of lynching, including data on lynchings by state and race and data on lynchings by year and race).

<sup>4</sup> See PRESIDENT'S COMM. ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS* 20-30, 35-40 (1947).

<sup>5</sup> Starting, of course, with *Brown*, 347 U.S. 483 (1954).

<sup>6</sup> Most notably the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000-2000h (2000)), and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

<sup>7</sup> Many of whom are alive today.

<sup>8</sup> See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 235-36, 245-46 (1988).

reasonably have been expected to permit citizens of all colors to enter adulthood with genuine equal opportunity. And most of the programs that were adopted have since been ended or reduced.<sup>9</sup>

The result is a legacy of disadvantage that persists because of a national failure to address the full consequences of slavery and Jim Crow. Those consequences are current conditions, not faint shadows of the distant past.<sup>10</sup> If the inequitable legacy had been undone, it is unlikely we would still hear broad-based claims of reparations based on conditions that originate in chattel slavery.

## II. WHO SHOULD PAY, AND FOR WHAT?

When the colonies were first established, the British common law, which the colonists brought with them, lacked any law of slavery.<sup>11</sup> The

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<sup>9</sup> See MANNING MARABLE, *RACE, REFORM, AND REBELLION* 152, 206–13 (2d ed. 1991); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 230–31 (1993); Robin D. G. Kelley, *Into the Fire: 1970 to the Present*, in *TO MAKE OUR WORLD ANEW: A HISTORY OF AFRICAN AMERICANS* 543, 599 (Robin D. G. Kelley & Earl Lewis eds., 2000). For example, the real benefits of Medicare and Medicaid have been reduced. MARABLE, *supra*, at 207. Federal subsidies for low income families to rent private housing (Section 8) have decreased. See *id.* at 209–10; MASSEY & DENTON, *supra*, at 230–31. The Comprehensive Employment and Training Act programs have ended. MASSEY & DENTON, *supra*, at 230. Eligibility for food stamps has been restricted. DEBORAH HARRIS & PATRICIA BAKER, *MASS. LAW REFORM INST., FOOD STAMP ADVOCACY GUIDE 1* (1999). Under-use of food stamps by those who remained eligible after welfare reform has been caused in part by “[c]onfusion and misinformation on the part of eligibility workers, or their withholding of information.” Linda Burnham, *Welfare Reform, Family Hardship, and Women of Color*, in *LOST GROUND: WELFARE REFORM, POVERTY AND BEYOND* 43, 48 (Randy Albelda & Ann Withorn eds., 2002). Aid to Families with Dependent Children has been eliminated; its replacement, Temporary Assistance to Needy Families, sets lifetime limits on receipt of aid, requires more work from mothers of young children, and denies four-year college study as a means to improved employment. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections and titles of the U.S.C.); see Kelley, *supra*, at 599. Despite such work requirements, the government has made woefully inadequate provision for child day care. See Kelley, *supra*, at 599.

<sup>10</sup> For example, in 1994, the unemployment rates for whites and blacks were 5.4% and 12.0% respectively. Harry J. Holzer, *Racial Differences in Labor Market Outcomes Among Men*, in 2 *AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES* 98, 100 (Neil J. Smelser et al. eds., 2001) [hereinafter *AMERICA BECOMING II*]. The median net worth of whites and blacks was \$52,944 and \$6,127 respectively, and the median net financial assets were \$7,400 and \$100 respectively. Melvin L. Oliver & Thomas M. Shapiro, *Wealth and Racial Stratification*, in *AMERICA BECOMING II*, *supra*, at 222, 228. As of 1996, life expectancy was 76.8 years for whites and 70.2 years for blacks. Raynard S. Kington & Herbert W. Nickens, *Racial and Ethnic Differences in Health: Recent Trends, Current Patterns, Future Directions*, in *AMERICA BECOMING II*, *supra*, at 253, 259.

<sup>11</sup> David Lyons, *Unfinished Business: Racial Junctures in US History and Their Legacy*, in *JUSTICE IN TIME: RESPONDING TO HISTORICAL INJUSTICE* (L.H. Meyer ed., forthcoming Jan. 2004) (manuscript at 7, on file with author). For a more detailed account of relevant

legal framework for chattel slavery was constructed by colonial legislation.<sup>12</sup> After Bacon's Rebellion, slavery was given a racist character.<sup>13</sup> The colonial elite, which understandably felt threatened by the uprising of black and white servants acting together, decided that their security and privilege required them to divide and weaken the multi-racial servant class. Slavery was then restricted to people of color, and became a condition into which white servants were assured they could not fall.<sup>14</sup>

A century later, slavery was incorporated into the new federal system by constitutional provisions. Slave states were given extra representation and therefore extra influence in the federal government, and all states acquired a constitutional obligation to return escaped slaves.<sup>15</sup> Until the Civil War, public policy supported the slave system.

After slavery was abolished, the federal government took important legislative<sup>16</sup> and constitutional<sup>17</sup> steps to aid the former slaves and guarantee them equal rights. But the federal government soon gave up those onerous tasks, broke its solemn constitutional promises, and knowingly allowed a new system of racial subjugation to be brutally established.<sup>18</sup>

In fact, federal policies promoted racial segregation. Consider housing. In the 1930s, federal agencies embraced the practice of "red-lining," which disqualifies applicants in African-American and "transitional" neighborhoods from home purchase and home improvement

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developments from the seventeenth through the twentieth centuries, see *id.*, the penultimate version of which can be found at <http://www.bu.edu/law/faculty/papers> (last visited Oct. 24, 2003).

<sup>12</sup> See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 19-60 (1978); see also 2 THE STATUTES AT LARGE: A COLLECTION OF ALL THE LAWS OF VIRGINIA 170, 260, 270, 283, 490-93 (William Waller Hening ed., 1823).

<sup>13</sup> See generally PAUL FINKELMAN, THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK (1986) (discussing colonial legislation recognizing slavery and the racial assumptions therein); WILCOMB E. WASHBURN, THE GOVERNOR AND THE REBEL (1957) (describing the background and aftermath of Bacon's Rebellion).

<sup>14</sup> See, e.g., EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM 327-37 (1975).

<sup>15</sup> U.S. CONST. art. I, § 2, cl. 3 (three-fifths clause); U.S. CONST. art. IV, § 2, cl. 3 (fugitive clause).

<sup>16</sup> See, e.g., Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507; Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Supplementary Freedman's Bureau Act of 1866, ch. 200, 14 Stat. 173; Reconstruction Act of 1867, ch. 152, 14 Stat. 428; Enforcement Acts of 1870, ch. 114, 16 Stat. 140; Act of July 16, 1870, ch. 254, § 7, 16 Stat. 254, 255-256 (amending naturalization laws to provide that persons of African nativity and descent may become citizens); Enforcement Act of 1872, ch. 415, 17 Stat. 347; Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

<sup>17</sup> U.S. CONST. amend. XIV (ratified in 1868); U.S. CONST. amend. XV (ratified in 1870); see also U.S. CONST. amend. XIII (ratified in 1865) (aiding former slaves by prohibiting slavery, thus outlawing the re-enslavement of former slaves).

<sup>18</sup> See FONER, *supra* note 8, at 582-612.

loans. That policy was subsequently followed by private lenders. The practice severely restricted home acquisition and repair in African-American neighborhoods. This, in turn, substantially limited wealth accumulation for African Americans, which largely accounts for the substantial wealth gap between African-American and European-American families. Federal agencies also supported the segregation policies of local public housing agencies, and other federal policies promoted the development of permanent black urban ghettos and lily-white suburbs.<sup>19</sup>

During the 1950s and 1960s, under extraordinary foreign and domestic pressures, the federal government denounced race discrimination and took important steps to ameliorate poverty and guarantee equal rights. However, once again, it soon gave up those onerous tasks. It allowed the entrenched disadvantages of African Americans to remain unchallenged by law or public policy. Federal fair housing legislation, for example, at first lacked significant enforcement provisions.<sup>20</sup> When enforcement authority was later added, enforcement was not part of federal policy.<sup>21</sup>

In sum, federal policy supported slavery before the Civil War. After the Civil War, the federal government pledged to support racial equality, but after a brief time period it violated or failed to enforce relevant federal law. After Jim Crow was denounced, the federal government failed to rectify the inequitable legacy of its own prior policies.

The federal government has thus been complicit in the systematic, grievous wrongs done to African Americans. Slavery and Jim Crow were in large part public, not private wrongs. And their legacy is a matter of public concern because its persistence reflects current policy. The federal government is the single most important currently existing party that can truly be held accountable. In view of that history and the entrenched nature, the wide scope, and the great magnitude of the persisting inequities, the federal government is a fitting target of moral demands for corrective justice.

While it is often assumed that reparations claims seek cash transfers from European Americans to African Americans, the argument I have been sketching does not lead in that direction. I do not mean to rule out individual claims, but my argument concerns the role of federal policy in the wrongful creation of a black-white gap in life pros-

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<sup>19</sup> See MASSEY & DENTON, *supra* note 9, at 51–59, 227–28.

<sup>20</sup> See Fair Housing Act of 1968, Pub. L. No. 90–284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3631 (2000)).

<sup>21</sup> See Fair Housing Amendments Act of 1988, Pub. L. No. 100–430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601–3631 (2000)); MASSEY & DENTON, *supra* note 9, at 209–12.

pects, a gap that federal policy first made possible and has since failed to address. The argument indicates the morally imperative need for a corrective national project to eliminate that gap.

The relevant inequities have two aspects—material deprivation and social derogation. An adequate rectification project would address both.

On the material side, I suggest a rectification program that concentrates on closing the life prospects gap for children. The point is to minimize skepticism about reparations by employing a political principle that is both minimally controversial and clearly violated by the legacy of slavery and Jim Crow.

African-American children are born into a system for which they cannot plausibly be held responsible, one that disproportionately affords many of them substantially inferior life expectancy, medical care, nutrition, education, career possibilities, job options, housing, and the like.<sup>22</sup> As these disadvantages stem largely from the legacy of slavery and Jim Crow, and as a decent government is committed to providing genuine equal opportunity for all of its children, public policy should place a high priority on eliminating those gaps, on refining the necessary programs so as to maximize their effectiveness, and on maintaining them until their jobs are done.

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<sup>22</sup> See, e.g., Rebecca M. Blank, *An Overview of Trends in Social and Economic Well-Being, by Race*, in 1 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 21, 25–27 (Neil J. Smelser et al. eds., 2001) [hereinafter AMERICA BECOMING I] (reporting a widening gap between black children and white children in access to computers and completion of college degrees); Cecilia A. Conrad, *Racial Trends in Labor Market Access and Wages: Women*, in AMERICA BECOMING II, *supra* note 10, at 124, 124–51 (discussing racial differences in opportunity and access to occupations for women); Holzer, *supra* note 10, at 98–123 (discussing racial differences among men in wages, employment, and labor-force participation); Renée R. Jenkins, *The Health of Minority Children in the Year 2000: The Role of Government Programs in Improving the Health Status of America's Children*, in AMERICA BECOMING II, *supra* note 10, at 351–70 (discussing racial disparities in health status of children); Kingston & Nickens, *supra* note 10, at 259 (stating that in 1996 life expectancy was 70.2 years for blacks and 76.8 years for whites), 281 (noting racial differences in access to health care as a result of differences in health insurance coverage); Oliver & Shapiro, *supra* note 10, at 240–43 (finding discrimination in areas relating to home ownership); James P. Smith, *Race and Ethnicity in the Labor Market: Trends over the Short and Long Term*, in AMERICA BECOMING II, *supra* note 10, at 52, 56 (stating that on average, blacks complete fewer years of education than whites); David R. Williams, *Racial Variations in Adult Health Status: Patterns, Paradoxes, and Prospects*, in AMERICA BECOMING II, *supra* note 10, at 371, 371–410 (discussing racial differences in health status and the possible causes); see also Albert M. Camarillo & Frank Bonilla, *Hispanics in a Multicultural Society: A New American Dilemma?*, in AMERICA BECOMING I, *supra*, at 103, 113 tbl. 4-4, showing family income and poverty by race); Gary D. Sandefur et al., *An Overview of Racial and Ethnic Demographic Trends*, in AMERICA BECOMING I, *supra*, at 40, 82–83 tbl. 3-10 (life expectancy), 86–87 tbl. 3-11 (death rates), 88–89 tbl. 3-12 (infant mortality).



A national project that aims to provide equal opportunity for children might seem to neglect a large number of potential claimants. But children's life prospects cannot be improved without aiding their parents and communities. Children require decent housing, a safe and healthy environment, and good community services. They require ample time with parents, which means that parents require good child-care services, transportation, wages, and benefits. The various intensive human services that require expansion and enrichment in order to secure equal opportunity for children would provide worthwhile jobs for many adults. And so on.

The preceding sketch should suggest the scope and magnitude of the programs that would be required for a child-centered rectification project. The costs would be considerable—but well within the capabilities of an America that pools rather than wastes its resources.

Such a rectification project neither assumes nor implies that we should generally regard current European Americans as responsible for the legacies of slavery and Jim Crow and thus as owing reparations to African Americans.<sup>23</sup> Nevertheless, members of the political community may legitimately be called upon to support such a project. This follows from any reasonable conception of civic responsibility. Our strongest civic obligations require us to support just public policies, especially programs that are required to rectify inequities resulting from the community's past policies.

Partly for these reasons, and because the project called for here is required to rectify *existing* inequities, it might not be regarded as a "reparations" program. But it is none the less required by corrective justice.

So much for the material component of the rectification project. The social component is more complex. Political subordination and racist derogation have been central features of America's racial caste system. The wrongs have included not only political exclusion but also systematic insults, humiliations, terror, murder, and rape.

It is essential that these aspects of racial subordination be addressed vigorously. Experience reveals that a rectification program requires a firm commitment, for which a profound attitude change is itself required. Apologies are not enough.

It is important to recognize that racism need not involve hateful acts. Racism is exemplified more frequently in discounting the interests of those with whom one does not identify—in not giving their in-

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<sup>23</sup> Nor does it assume or imply that current European Americans owe restitution for unjust enrichment.

terests equal consideration (or any consideration at all). It may be found, for example, not merely in lynchings but in the prolonged, widespread failure to regard the practice of lynching as important enough to address. Such attitudes are poisonous ingredients of the persisting legacy of slavery and Jim Crow.

#### EPILOGUE

In one respect, the rectification project I have described may be regarded as utopian. That is not because the constituent programs would be aimed at satisfying some pure ideal of social justice. On the contrary: they are required to make up the enormous shortfall between current conditions and a fair set of starting conditions for competitive social processes, which precludes equality of opportunity, when that shortfall flows from grievous wrongs. Given current political realities, however, such a proposal is *practically* utopian: I cannot imagine today's Congress or federal administration entertaining such a project. What is the point of discussing it, then?

First, we need a benchmark—an idea of what corrective justice demands, even when we cannot expect to achieve it. We need it because, while proponents of rectification now have limited political leverage, one can never tell when propitious circumstances will arise.

I alluded earlier to circumstances that permitted the post-World War II civil rights movement to achieve as much as it did. They included recent participation in a war against a racist regime, the development of the United Nations and of the Universal Declaration of Human Rights, the rise of newly independent states with populations of color, Cold War competition for influence among them, and the growth of widely disseminated pictorial news through film and video.

Given the disastrous current direction of U.S. foreign and domestic policy, we might find, before long, that political circumstances will once again be radically altered. New conditions may offer possibilities for instituting effective elements of the programs I have described.

That expectation should help to sustain our efforts in that direction. Meanwhile, we should recall what Sam Adams said: "It does not require a majority to prevail, but rather an irate, tireless minority keen to set brushfires in people's minds."<sup>24</sup>

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<sup>24</sup> As recalled by Aaron McGruder, *The Boondocks*, CHI. TRIB., May 25, 2003, § 9.

