



REPARATIONS PRO&CON

ALFRED L. BROPHY

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Alfred L. Brophy

OXFORD
UNIVERSITY PRESS

2006

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Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

www.oup.com

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Library of Congress Cataloging-in-Publication Data
Brophy, Alfred L.

Reparations : pro & con / Alfred L. Brophy.
p. cm.

Includes bibliographical references and index.

ISBN-13 978-0-19-530408-4

ISBN 0-19-530408-X

1. African Americans—Reparations. 2. African Americans—Legal status, laws, etc.
3. Compensation (Law)—United States. 4. Reparations for historical injustices.
5. Restorative justice. I. Title.

KF4757.B66 2006

342.7308'7308996073—dc22 2005037620

9 8 7 6 5 4 3 2 1

Printed in the United States of America
on acid-free paper

For my friends, most especially Dedi

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ACKNOWLEDGMENTS

I HAVE been the beneficiary of a wonderful set of friends and colleagues. At the University of Alabama, William S. Brewbaker III and Utz Lars McKnight have generously offered their time (and opposing views) to help make sure that I treat positions with at least some rough justice. In addition, Arthur G. LeFrancois, Daniel M. Filler, Bryan Fair, Suzette Malveaux, Carol N. Brown, Kenneth Rosen, and Norman Stein have spent much time questioning my arguments. My dean, Kenneth Randall, has provided funding and a supportive atmosphere. My other friends on the University of Alabama campus, Damon Freeman, Greg Dorr, Pat Bauch, Lisa Lindquist Dorr, Joshua Rothman, and George Williamson, have helped as well.

The larger world of reparationists has been supportive as well. Randall Kennedy, Eric Miller, Charles J. Ogletree, and Kenneth W. Mack have all spent time improving my ideas. Professors Ogletree and Miller—the leaders of the movement for reparations litigation—have given me the pleasure of working with them on the Tulsa riot lawsuit, along with Agnieszka Fryzman, Scott Ellsworth, Kimberly Ellis, and Michele Roberts. My other friends from the reparations world, including Roy Brooks, Alfreda Robinson, Mark Gibney, Angela Kupenda, Rhonda McGee Andrews, Michele Goodwin, Anthony Farley, Maria Grahm Farley, Kevin Hopkins, Keith Hylton, David Lyons, Calvin Massey, Catherine Manegold, Albert Mosley, Kaimipono Wenger, Robert Westley, and Eric Yamamoto, have taught me much. Members of the Brown University Steering Committee on Slavery and Justice, particularly its chair, James Campbell, and Michael Vorenberg, James Patterson, Seth Rockman, and Neta Crawford, are doing much to advance the academic study of these issues, and I have incorporated many of their ideas here. I have also learned much from friends whose primary area of work is outside reparations, including John Dzienkowski, John C. P. Goldberg, Ronald Krotzynski, Mark Brandon, Ellen Pearson, Sarah Nelson Roth, Stephen Siegel, Aviam Soifer, and Valorie Vojdik.

Many students at Alabama, Boston College, and Vanderbilt have taught me about reparations, including Janel Apuna, Elizabeth Tyler Bates, Becca Brinkley, Chad Bryan, Rebecca Schwartz, and Amy Leigh Wilson. As usual, my friends have supported this project. I am especially indebted to Felix Escamilla, Eva Gasser, Bryn Dinges, Mary Sarah Bilder, Daniel Hulsebosch, Barbara Thompson, Sanford Katz, Mark Brodin, Sara Patterson, Deana Pollard, and Scott England.

I have also benefited from audiences at the University of Alabama, Boston College Law School, Brown University, DePaul University, the University of Florida, the University of Kentucky and the Lexington Network, the University of Nevada at Las Vegas, New York University, Pendel Hill, Smith College, Swarthmore College, Thomas Jefferson School of Law, Vanderbilt University Law School, and Wayne State University.

Once again, as with my previous book, *Reconstructing the Dreamland: The Tulsa Riot of 1921—Race, Reparations, Reconciliation*, my editor, Dedi Felman (this time with help from Stephen Holtje and six anonymous readers), has mightily improved the manuscript. She first suggested the idea of a primer on reparations and has guided this book. Everything good in here, from the structure to the arguments, comes from Dedi. The digressions are my contribution.

CONTENTS

Introduction xi

Part I. Understanding Reparations: Reparations Definitions, Goals, History, and Theory

1. Reparations Definitions 3
2. Black (and Other) Reparations in History 19

Part II. Reparations Ascendant: The Recent Renaissance of Reparations Debate and Refined Reparations Theory

3. The Modern Black Reparations Movement:
Why Now, Why, and What? 55
4. Against Reparations 75

Part III. Implementing Reparations: Reparations Practice

5. Evaluating Reparations Lawsuits 97
6. Legislative Reparations 141

Part IV. Possibilities for the Future

7. Reparations Future, Realistic Reparations,
and Models of Reparations 167

Appendices. Documents Related to Reparations

APPENDIX 1: Special Field Orders, No. 15 (1865)	183
APPENDIX 2: A Bill (H.R. 29) Relative to Damages Done to Loyal Men, and for Other Purposes [Confiscation] (1867)	187
APPENDIX 3: Slavery Study Bill, H.R. 40, 106th Congress, 1st Session (1999)	191
APPENDIX 4: California Slavery Era Insurance Registry (2000)	199
APPENDIX 5: Chicago Slavery Era Insurance Disclosure Ordinance 2-92-585 (2003)	201
APPENDIX 6: President Bush Speaks at Goree Island in Senegal (2003)	203
APPENDIX 7: 108th Congress, 2d Session, Senate Joint Resolution 37 (2004)	207
APPENDIX 8: United States Senate Apology for Failure to Pass Anti-Lynching Legislation, 109th Congress, 1st Session	211

Notes	213
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For Further Reading	277
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Index	281
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INTRODUCTION

FACED WITH differences between blacks and whites in wealth, poverty rates, educational achievement, and health care, scholars and activists in post-Civil Rights America have increasingly turned to “reparations talk.” Indeed, reparations talk has grown exponentially. People are talking about whether there is a need to redress the years of unpaid labor and slavery from 1620, when the first African slaves were brought to the Virginia colony, until 1865, when slavery ended, and the decades of “Jim Crow” segregation that followed.

There has also been action. There have been apologies for slavery from the Southern Baptist Convention, the Presbyterian General Assembly, the *Hartford Courant*, JPMorgan Chase, and Wachovia, and an apology from the U.S. Senate for failing to pass antilynching legislation in the 1920s. Lawsuits have been filed, including one in 2003 by Charles Ogletree and Johnnie Cochran for victims of the Tulsa race riot of 1921 (dismissed in 2004). Bills have been introduced in Congress every term since 1989. There has been a law passed by the state of California to require insurance companies to disclose policies written on slaves’ lives. In Chicago, Detroit, and Los Angeles, ordinances require companies doing business with those cities to disclose their connections to slavery. There are frequent references to reparations in political debates from the state to the national level and on radio and television talk shows, as well as editorials in the nation’s newspapers and, of course, fervent debate on college campuses, where faculty, administration, or students at schools like Brown, Sewanee, Vanderbilt, Yale, and the Universities of Alabama, Mississippi, North Carolina, South Carolina, and Virginia are investigating their connections to slavery and the institution’s defenders.

The two sides, reparations advocates and their opponents, however, rarely talk to one another. They exist in two parallel worlds and talk about different issues. Reparations advocates focus mostly on the harm of slavery and Jim Crow (the period between the end of the Civil War

and the modern Civil Rights era of the 1950s, which witnessed limited voting, educational, and employment opportunities). They often refer to how harms that began in those times continue to limit the opportunities of blacks today and how those eras have left blacks with only a fraction of the wealth of whites. They speak in terms of the debt owed by white America and of the continuing benefits of “white privilege.”

Reparations skeptics acknowledge the tragedy and injustice, as they must, of slavery and Jim Crow. President George W. Bush, for example, in his trip to Africa in 2003 called slavery one of the greatest crimes of history.¹ (His speech is reprinted in appendix 6.) However, reparations skeptics focus on the economic and educational opportunities that blacks have in the United States, as well as their achievements. They point out that discrimination is illegal and has been for decades, that trillions of dollars have been spent on social welfare programs, and that many of the problems with black educational and economic achievement seem to stem from single-parent families, rather than from the legacy of now decades-old crimes. And even with the discrimination in the United States, they ask, would blacks prefer that their ancestors had remained in Africa?

This book is an attempt to take seriously the arguments on both sides of the debate. There is a huge volume of literature on reparations. Dozens of journalists, politicians, and social activists, along with professors of philosophy, literature, history, sociology, and law, have written across a range of reparations issues. Serious reparations talk has engaged (and enraged) the nation for the past fifteen years and at other points in American history, too. The bibliography calls attention to some of the literature and the key contours in the debate, but in a subject that is moving so quickly and that encompasses such breadth and quality of writing, it is impossible to capture all the contours. This book will survey the major arguments, but first and most important, I want to make readers think about this important subject and to raise issues for further research. While it is not possible to reach definitive conclusions about these issues, it is possible to identify the key arguments on either side and to suggest some of the ways that we can focus the debate and evaluate the utility of reparations. I hope this book will provide a vehicle for moving the discussion of reparations to a new level.

The first chapter sets the stage for the discussion of the black reparations movement. Chapter 1 defines reparations and surveys the forms

they take, such as truth commissions, apologies, community-building programs, and payments to individuals. It then turns to a basic definition of reparations: legislative and court action designed to address historic injustices. Reparations are programs that seek both to repair past damage and to build something that will help bring about racial justice and equality. They are about both “corrective justice” (correcting past harm) and “distributive justice” (redistributing wealth in the present). The movement is also divided between those emphasizing backward-looking remedies, designed to compensate for decades of slavery and Jim Crow, and those who emphasize forward-looking action, which focuses on building something better for the future, independent of evidence of specific harm.

Chapter 2 turns to the history of reparations in the United States. It looks to the programs of reparations that have been discussed (and sometimes granted), with particular emphasis on what has happened since World War II. This second chapter traces one of the longest-running battles for reparations: the efforts for reparations for slaves and their descendants since the Civil War. A brief window opened at the end of the Civil War in 1865, when there was serious discussion about providing land to help newly freed slaves get an economic start. But those grand promises of assistance went unfulfilled during the period of Reconstruction. Instead, Southern legislatures established “black codes,” which restricted movement of the newly freed slaves and subjected them to arrest if they were unemployed. The Jim Crow system of segregation grew up about the same time. That system mandated segregation in housing, employment, education, and public accommodations. Frequently, the strict lines of segregation were enforced through violence. At bottom, the Jim Crow system dramatically limited the opportunities for educational and economic advancement. The legacy of Jim Crow suggests some of the reasons that we are talking about reparations now. Although slavery ended more than 140 years ago, there was not a clean break from the era of slavery. Reparations talk is often about repairing Jim Crow as much as about repairing slavery.

Once we locate the movement for slavery and Jim Crow reparations in its historical context, we can then begin to examine the relationship of the black reparations in America movement to other reparations movements. When we begin to look at American history, we see that the U.S. Congress, as well as state legislatures, has been granting reparations

throughout American history. Decades before the American Revolution, for instance, families of those wrongfully executed during the Salem witchcraft scare received payments from the Massachusetts legislature. Similarly, victims of mob violence in the nineteenth century frequently had the right to sue the local government for failure to protect them from violence. One of the most surprising reparations programs is that provided by Congress in 1862 for slaves freed in the District of Columbia. Slaveholders who were loyal to the Union received compensation when their slaves were freed.²

In the twentieth century, there have been Congressional truth commissions and, recently, many apologies. Moreover, legislatures have frequently taken action to expose and repair past damage—such as the 1946 federal legislation to compensate Native tribes for their land claims and Florida's 1994 act to provide compensation to victims of the 1923 Rosewood Massacre in Florida. One of the most significant acts of slave reparations so far has been California's legislation that requires insurance companies doing business in the state to disclose the names of the slaves whom they insured, along with the names of the slave owners who purchased the policies. That registry, which is available on the Internet, provides stark testimony to the connections between our nation's slave past and the present.³ Lawsuits have also resulted in reparations, such as the \$9 million settlement that victims of syphilis experiments in Alabama received in 1976.

The next section of the book turns to the current debate and to possibilities for the future. Here we see the opposing arguments, the clash between reparations proponents and skeptics. Chapter 3 asks, Why are we talking about reparations now? Did the compensation received by the Japanese Americans interned during World War II through the Civil Liberties Act of 1988 lead to the dramatic growth in reparations talk? Why has it so captured the imagination of blacks and so few others? Why do two-thirds of blacks believe that reparations should be paid, while only 5% of whites support them? One clear factor is the continuing concern among blacks about the lack of progress in the post-Civil Rights era United States. The optimism of the Civil Rights movement of the 1950s and 1960s following such monuments as *Brown v. Board of Education*, the Civil Rights Acts of 1957 and 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, the social welfare programs of the Great Society of the mid-1960s, and the affirmative ac-

tion programs of the late 1960s and 1970s has not been fulfilled, at least in the minds of many blacks. As Congress and the U.S. Supreme Court cut back on affirmative action programs in the 1980s, many academics and community activists looked around for another language to use in talking about inequality. They sought a language of entitlement, of a debt owed the black community. They began to talk of reparations.

The third chapter also provides a roadmap for understanding “what reparationists want”—how they view the movement as fitting into the post–Civil Rights agenda. One problem with understanding the movement is that it is going in several different directions at once. Some moderate members of the movement see it as a way of correcting a historical injustice, which will ultimately move us toward an integrated America. Others are not interested in the goal of integration in itself. They see reparations as a way of obtaining justice and fairness, which they believe is not possible through integration. Some are not interested in integration; the most extreme reparations proponents advocate a separate state for blacks. For them, the reparations movement is about separation.

The chapter also explores the other factors leading to current reparations talk. The decline of affirmative action theories underlying reparations, such as the black power movement, critical race theory, and multiculturalism, opened the door for replacement. As activists were looking around and realizing that the Civil Rights movement had not brought economic equality, they saw other groups receiving limited reparations: Japanese Americans interned during World War II received compensation in 1988 from the U.S. Congress; some victims of the Holocaust received compensation as well; and Native Americans periodically received reparations, such as the 1971 Alaska Native Claims Settlement Act, which transferred billions of dollars of land to tribes to settle claims to Alaskan land. We are having this debate in 2006, rather than in 1876, 1906, or 1956, because many strands of thought came together: the search for new ideas in the aftermath of the Civil Rights movement; the international movement for reparations and apologies, such as the South African Truth and Reconciliation Commission; and the movement for reparations to other groups in the United States, such as to Native Americans and to survivors of the Nazi Holocaust and Eastern European communism.

Recently, opponents of reparations, or “reparations skeptics,” have

begun to take reparations arguments seriously and to question the moral and legal basis for reparations. Chapter 4 takes up their arguments. The arguments can be put into several broad categories:

1. That there have already been adequate reparations paid through the Civil War and social welfare programs, like the Great Society
2. That taxpayers should not have to pay, because they are innocent; that is, they have no culpability for the actions of past legislators and private individuals, and they have no benefit from the legacy of slavery and Jim Crow
3. That compensation is impracticable or politically unworkable
4. That reparations are divisive and focus attention of the black community in the wrong places
5. That slavery is, on balance, a benefit to the descendants of the enslaved

Reparations talk, with its focus on America's history and its effects on the present, is really one part of a much larger debate over race and equality in contemporary America. The arguments, pro and con, are another front on what we call the "culture wars." Where people stand in the culture wars is determined in part by such questions as: Do we view America as a land of opportunity or oppression? Is it a place where blacks are disadvantaged by a legacy of slavery or by their own culture? Who should bear the responsibility for correcting those past injustices? Should we even try to correct them? That debate frames the arguments advanced against reparations.

Turning from this debate, we then look at "reparations in practice," or ways to achieve those goals. Chapter 5 discusses the possibilities of reparations through lawsuits—what lawsuits require in terms of proof, the hurdles faced in court, and the types of relief they might provide. In short, lawsuits are poorly designed to provide the relief sought by reparations because they demand plaintiffs who can show they have been harmed unjustly by a defendant within the relatively recent past (known as the statute of limitations). Until now, lawsuits have been remarkably ineffective. In 1996, in the case of *Cato v. United States*, the U.S. Court of Appeals (the court just below the U.S. Supreme Court) dismissed a suit brought by slave descendants against the federal gov-

ernment. It rested its decision on a series of rationales, including an inadequate demonstration that the United States had taken any action that hurt the plaintiffs and that the plaintiffs had taken too long to file their claims (they were barred by the statute of limitations). Other suits have also foundered because of the statute of limitations and the failure to connect plaintiffs to harm caused by defendants. Still, plaintiffs continue to come forward.

Chapter 5 also explores some ways that plaintiffs might meet the burdens of a lawsuit. There may be some limited lawsuits that will be successful, such as suits for return of specific property taken from slaves, against universities that received donations from slaveholders who made fortunes off slave labor, for the possessors of art made by slaves that survives to the present, and for access to graves of ancestors who were held in slavery. There may also be lawsuits for specific Jim Crow crimes, such as the riots that terrorized black communities in the aftermath of World War I, for the thousands of lynchings presided over by government officials, and for segregated libraries. In some slavery era cases, there is specific, identifiable property that can be traced to slaves; in some Jim Crow cases, a few individuals who are still alive may be able to demonstrate specific harm that they suffered. They may be able to overcome statute of limitation defenses by showing that they did not have access to the courts, one well-known basis for overriding the statute of limitations.

Yet, the number of successful lawsuits is likely to be small and to offer only tiny relief compared with the huge harms of slavery and Jim Crow crimes. For the great crimes for which reparations are sought, relief would have to come through legislative action. So we turn in chapter 6 to legislative proposals. We examine what a legislature might do in terms of apologies and legislative action and what they are permitted to do under the Constitution. Because any legislature faced with reparations claims faces very difficult questions about collective guilt and moral issues along the lines of who should pay for past crimes and who is entitled to relief, there will be difficult issues of who should pay and who should benefit. There are also related questions about how much should be paid and how much evidence of harm beneficiaries must show.

The seventh chapter then turns to a series of discrete guidelines for “realistic reparations.” It explores a series of increasingly controversial

proposals, beginning with the (relatively) uncontroversial, such as public truth commissions, apologies, and statutes that impose duties on private corporations to disclose their complicity in slavery and Jim Crow. Then it moves to the more controversial, such as statutes that provide retroactive liability for businesses' and governments' complicity in long-ago racial crimes, to payments for community-based programs of reparations, and to payments to specific individuals. The proposals move from areas where most people can agree to areas where many will disagree. This way, readers can see what the entire field of opportunities looks like. The models are designed to provide grounding for the abstract discussions earlier in the book, to offer a sense of what reparations might look like, and to push forward discussion of what—if anything—we want to do. And chapter 7 concludes with some questions about reparations, which may be helpful to keep in mind as you read this book. Those questions include how much have the legacies of slavery and Jim Crow contributed to the gap between African American and white wealth? How much did the federal and state governments participate in slavery and Jim Crow? How much have those governments—and American society in general—provided benefits to victims of slavery and Jim Crow?

This discussion of reparations is gathering force. Each side will need to have a greater understanding and appreciation of the merits of the others' arguments. The scholarship both supporting and opposing reparations will set the agenda for future legislative action. Once there is a dialogue, we can more clearly see what, if anything, ought to be done.

PART I

Understanding Reparations

Reparations Definitions, Goals, History, and Theory

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1

Reparations Definitions

IN 1989, U.S. Representative John Conyers of Michigan introduced a bill, H.R. 40, to study slavery and understand its effects, both benefits it has conferred on American society and harms it has caused subsequent generations. Since then, discussion of reparations has grown explosively. Debate about reparations is now heard on college campuses, on the editorial pages of newspapers, even in political campaigns.¹

Reparations talk has advanced from the circles of Black Power, where the idea floated in the late 1960s and early 1970s, though the time was not then ripe. In the 1980s, law professors again took up discussion of reparations for slavery and other racial crimes and identified the problems with lawsuits. That scholarship built on such prominent precedents as the Civil Liberties Act of 1988, which provided compensation to Japanese Americans interned during World War II, and Florida's payment to victims of the 1923 Rosewood Massacre. It contemplated what reparations might look like and how they might lead to interracial justice.² It also sought to identify new places, like the Tulsa race riot of 1921, where there should be reparations.³ Yet, much of that scholarship was critical of the existing system, critical of American law's seeming inability to provide a language for thinking about reparations.

As other nations begin to discuss how they can repair past damage and obtain closure, the concept of reparations has gained momentum throughout the world.⁴ As Nontombi Tutu has said, "The honest discussion of reparations has come of age in the United States and the world. Maybe I should say that the world has come of age for the discussion of reparations."⁵ Even as discussion has grown and as repara-

tions lawsuits have been filed, courts have been remarkably unreceptive to claims. In 1995, the U.S. Court of Appeals dismissed a reparations lawsuit brought against the U.S. government by descendants of slaves.⁶ In January 2004, another set of cases filed against companies that profited from slavery was dismissed.⁷ In February 2003, a serious claim was filed for reparations for victims of the 1921 Tulsa race riot; it was dismissed in March 2004.⁸ The future of the movement will be determined in large part by how successfully reparations proponents can make a compelling moral argument for reparations and promote political support for the concept.

But reparations advocates have a very, very long way to go. It is a gross understatement to say that many people are unconvinced by the idea of reparations. Reparations payments, even apologies, are incredibly controversial and unpopular. When the *Mobile Register* polled Alabama citizens in the summer of 2002, it found that the question of reparations was the most racially divisive issue it had ever studied. The differences between whites and blacks outstripped even the gap seen by the paper during the Civil Rights struggle over integration. During the Civil Rights era, many moderate whites supported integration. That is not the case with reparations for slavery. As table 1.1 shows, whites overwhelmingly oppose reparations payments, and a majority of blacks support them. The contrast is stark. Only 5% of white Alabamians support reparations for slavery from the federal government, but 67% of black Alabamians support them. And perhaps that 5% is an

TABLE 1.1
Percentage of Alabamians Favoring Apologies and Payments

	Blacks	Whites
Government should apologize for slavery	73	24
Corporations that benefited should apologize	76	31
Corporations that benefited from slavery should establish scholarship funds for descendants of slaves	87	34
Corporations that benefited from slavery should pay descendants of slaves	69	15
Federal government should pay reparations	67	5

Source: Sam Hodges, *Slavery Payments a Divisive Question*, *Mobile Register*, June 23, 2002.

overestimate, for the poll may have had problems. Some whites became so enraged at the mere suggestion of reparations that they could not complete the poll.⁹

Lest one think that Alabama is out of step with attitudes elsewhere in the United States, that racial gap is fairly constant. According to a study by Harvard University and University of Chicago researchers reported in the spring of 2003 and listed in table 1.2, only 4% of whites support reparations payments. The bare poll numbers—revealing as they are—do not begin to capture the anger that many expressed at the mere suggestion of reparations. The antireparations Web site “We won’t pay” expresses the feelings of many, apparently:

No matter what pressure is brought up [*sic*] us, no matter what laws are passed, no matter what verdicts are handed down, no matter what consequences there are to following our conscience, and no matter what it is that we have to do to fulfill our pledge, we give our pledge that we will give in no further. Paying reparations in the year 2003 for an act that ended in 1865 is wrong, and we will not participate; and that is all there is to it.¹⁰

The opposition to even apologies, which are free from financial obligation, suggests that something very important is at stake—how we view ourselves and our place in the world. Reparations and apologies, in

TABLE 1.2
Attitudes of Blacks and Whites toward Apologies
and Payments from the Federal Government

<i>The Federal Government Should</i>	<i>Blacks</i>	<i>Whites</i>
Apologize for internment of Japanese Americans during World War II	75%	43%
Pay compensation to those interned	59%	26%
Apologize for slavery	79%	30%
Pay compensation for slavery	67%	4%

See Harbour Fraser Hodder, *The Price of Slavery*, Harvard Magazine, May–June 2003, available at <http://www.harvard-magazine.com/on-line/050319.html>; Michael C. Dawson & Rovana Popoff, *Reparations: Justice and Greed in Black and White*, 1 DuBois Review 47, 62 (2004).

short, are about what is known as the culture wars, a conflict between liberals and conservatives over how they view cultural issues as diverse as abortion, religion's role in public life, affirmative action, and U.S. culpability for racism.¹¹ Reparations touch on those issues, for reparations relate to how we view U.S. history. Is the United States a place of opportunity or oppression?

Reparations also relate to how we view the legacy of slavery and what we should do about it now. Is there continuing culpability? Do we need to do something to repair past harms? Do ideas of personal culpability free current taxpayers from liability? Have slaves' descendants received adequate compensation in the form of U.S. citizenship or in the grand opportunities available in this country? These are issues we take up, though by no means answer, in subsequent chapters. Reparations and apologies are about issues of racial justice and redistribution of wealth. Thus, they touch central issues of the American soul, of guilt for past sins, and contemporary issues in race.

There is something more at stake with reparations, though; there is more opposition to reparations than to most issues in the culture wars. In many issues of the culture wars, such as abortion, gay marriage, and what should be taught in elementary and secondary school history classes, there is some basic parity. With reparations, judging by public opinion, there is no parity. Reparations are simply viewed with disdain by the vast majority of Americans. Why is this? Perhaps it is because of a conflict that appears so frequently when race enters political discussion, because of fear of issues of group identity and group liability. So frequently, group members see themselves as being asked to pay more than their fair share. Other group members think they are receiving less than they deserve. Those sentiments are heightened when one deals with racial group identity.

Some of the opposition to apologies comes from the sense that they will lead to extraordinary liability and that there will be more humiliation attached to apologies and reparations payments. So far, reparations skeptics have won the hearts and minds of American voters, and it appears as though that dominance will continue. Yet, the idea of reparations is powerful in the black community. Alan Keyes, running on the Republican ticket for a seat in the U.S. Senate from Illinois, proposed reparations, perhaps as a way of appealing to black voters.¹² And so, as reparations begins appearing even in Republican platforms, let

us turn to the definition of reparations, to gain a sense of what the debate is about.

Defining Reparations

When proponents ask for reparations, what do they have in mind? When opponents speak against them, what do they think they are opposing? The meanings vary, but at base each reparations program has the goal of building something better for the future by correcting for past injustice. Often that correction of the past includes a redistribution of wealth in the present.

Reparations proponents envision grand programs that will achieve racial justice and perhaps racial harmony. They often talk in vague terms about these programs, running from apologies and truth commissions, to community-building programs, and in rare instances individual payments. There has been little systematic effort to define reparations, however. And yet we need some kind of definition to give us a common language for talking about what reparations are, who ought to provide them and who will receive them, and what we might expect them to accomplish.

Often, reparations programs look backward. That is, they focus on measuring past harm and correcting for it. Thus, truth commissions, apologies, and individual payments are frequently aimed at correcting for some well-defined, identifiable past harm. Other programs are forward-looking. Community-building programs, designed to promote the welfare of an entire community through such actions as funding for schools, frequently make little effort to measure past harm; recognizing that a harm occurred in the past, they are more concerned with trying to design a program to improve the lives of victims into the future.¹³

Reparations proponents' discussions of backward-looking and forward-looking programs are similar to what is called "corrective justice," which refers to acknowledging and repairing past harm, and to "distributive justice," which refers to distributing property in a fair manner.¹⁴ In essence, corrective justice seeks to put people back in the position they would have been in, absent slavery or other racial crime. That involves answering a complex question: what position would a given person be in without slavery? Is the appropriate comparison the

standard of living for people on the west coast of Africa or in the United States? These issues are addressed in much more detail in chapter 5, which discusses various ways to measure harm due to slavery. Distributive justice is not concerned with measuring past harm; it is concerned with achieving a fair and appropriate distribution of property right now. Hence, it examines not the harm slavery imposed but what is fair today and going forward into the future. Nonetheless, deciding on a fair distribution involves questions of past harm. Often, corrective justice and distributive justice lead to similar calculations of the amount owed.

Thus, reparations proponents' discussion of backward-looking and forward-looking programs is closely related to well-established legal concepts. Backward-looking relief seeks to assess the exact harm of the past and compensate for it. Proponents of forward-looking relief, in contrast, recognize that past harm is having some continuing effect on the present, but they make little effort to assess the exact value of those past harms. In place of an exact calculation of past harm, they seek some compensation that attempts to improve lives into the future. The Civil Liberties Act of 1988 is an example of that kind of forward-looking relief, for it provided a flat payment of \$20,000 to every Japanese American person interned during World War II who was still alive in 1986. The flat payment was not linked in any way to evidence of past harm. Forward-looking relief seems to be the dominant form among reparations proponents, for it provides flexibility in choosing the type and size of remedy. Many also believe that it offers the best way of tailoring a program that is suited to the nature of the harm.

Backward-looking programs seek to tie relief to specific findings of past harm. As the Civil Liberties Act of 1988 demonstrates, backward-looking programs are rigid (and thus problematic) because they provide compensation regardless of need and limit compensation to those who can prove their connections to specific past harm. Every reparations program is likely to look both backward and forward in certain ways. They will be backward-looking because they are justified on the basis of past harm and forward-looking because they are designed to enable a better future. Flexible, forward-looking programs can provide compensation for past injuries and still allow payments based on need, so that the amount of compensation is not necessarily closely tied to harm. To take an example from contemporary political debate, backward-looking pro-

grams are like our current Social Security program. Benefits depend in large part upon the amount of money paid in the past. Programs that would add means testing to Social Security and, thus, tie benefits to need are more similar to forward-looking reparations programs.

We might think of reparations, then, as *programs that are justified on the basis of past harm and that are also designed to assess and correct that harm and/or improve the lives of victims into the future*. That is a broad definition, indeed, but it also recognizes the diverse programs that are part of addressing past injustices.¹⁵

Further Defining the Reparations Movement through Its Goals

The reparations movement has defined itself largely through aspirational goals rather than specific definitions of what it sees as reparations. A movement that is still in its early stages and that is still formulating its strategies can identify its goals more easily than it can make plans. In social movements, goals often come first, followed by specific plans. There are several key goals of the black reparations movement: identification of past injustice and bringing those injustices to the public's attention so that they can be addressed, compensation and redress of those injustices to bring about racial justice, and reconciliation.

Harvard Law School Professor Charles Ogletree, a leader of the Reparations Coordinating Committee, a group of lawyers and social scientists whose goal is to coordinate reparations lawsuits and political activism, has recently emphasized four features of reparations:

1. A focus on the past to account for the present
2. A focus on the present, to reveal the continuing existence of race-based discrimination
3. An accounting of the past harms or injuries that have not been compensated
4. A challenge to society to devise ways to respond as a whole to the uncompensated harms identified in the past¹⁶

Ogletree sees “acceptance, acknowledgment, and accounting” as central elements of reparations.¹⁷ Phrased another way, reparations in-

clude truth commissions that document the history of racial crimes and the current liability for those crimes, apologies that acknowledge liability, and payments to settle those accounts. Professor Ogletree concludes with an appeal to the consciences of his readers with a grand theme of empowering the powerless: “I envision an America where we focus not on our own personal, selfish needs, but on the needs of the voiceless, faceless, powerless, and dispossessed members of the African-American community. We must continue the fight for justice and equality by imagining a world that cares for those who would be left behind. It is a dream that we must make . . . a reality for everyone.”¹⁸

Tulane University Law School Professor Robert Westley, a leading reparations theorist, defines reparations through its goals:

Reparations include compensations such as return of sovereignty or political authority, group entitlements, and money or property transfers, or some combination of these, due to the wrongdoing of the grantor. It is obvious, then, that the form reparations will take depends on, among other things, the particular demands of the victimized group and the nature of the wrong committed.¹⁹

Like many others, Westley urges a focus on community-building programs, not payments to individuals, but he suggests that the very poorest may deserve direct payments. The goals of reparations proponents are broad and varied; they include money, political autonomy, and power. Those goals are to be achieved through a variety of means, what one might call the modes of reparations.

Modes of Reparations

A final part of defining reparations comes with identifying the kinds of programs that are part of redress. That is, what kinds of programs are part of redressing past injustices? The types of reparations are varied. Many begin by talking about modest programs, such as truth commissions, which study the scope of the problem, then move to discussions of apologies. From there, they move to more concrete programs, such as civil rights laws, community-building programs, and payments to

individuals. Much reparations scholarship assumes that reparations include truth commissions, apologies, community development programs, individual entitlement programs, and cash payments. Both proponents and skeptics have included such diverse efforts as the emancipation of slaves through the American Civil War, the Great Society's welfare payments, the many apologies given by Congress and other government officials for past injustice, truth commissions, affirmative action programs in education and employment,²⁰ community empowerment zones, and payments to Japanese Americans interned during World War II. Professor John McWhorter of the University of California–Berkeley, a prominent reparations skeptic, claimed the Great Society as reparations:

[F]or almost forty years America has been granting blacks what any outside observer would rightly call reparations. . . . For surely one result of that new climate of the 1960s—of the official recognition that America owed its black citizens some sort of restitution—was a huge and historic expansion of welfare.²¹

Some define reparations narrowly, as including only payments. They see truth commissions and apologies as adjuncts to reparations plans, which lay the groundwork for payments of some sort. But if we define reparations as programs designed to repair past injury, reparations do not *necessarily* have to include payments. Some injuries may be best repaired by study of the past injustice and by apology. Indeed, a sincere apology may be more valuable and meaningful to some victims than money. Even if, as is often the case, an apology is insufficient to repair all past harm, it can be part of a meaningful program of repair and reconciliation. So this section includes apologies and truth commissions as part of its catalog of modes of reparations.²²

Apologies and Truth Commissions

Some of the more moderate proponents of reparations see truth commissions and apologies as critical first steps toward a plan of monetary reparations; they also see them as integral parts of a plan of recon-

ciliation. The most prominent proposal for a truth commission for slavery is Congressman John Conyers's Bill H.R. 40 (appendix 3). That bill is primarily about studying the history of slavery. Truth commissions are central to many sophisticated blueprints for reparations. Similarly, University of Hawaii Law School Professor Eric Yamamoto's book *Interracial Justice* focuses on reconciliation. Yamamoto sees reconciliation as a multistep project. First, there should be truth commissions and apology; then payments can solidify that contrition. Following that, there should be forgiveness. Yamamoto sees several phases of the process of interracial justice, running from recognition, to responsibility, to reconstruction, and, finally, to reparation.²³

Others propose truth commissions to address discrete events in the Jim Crow past, such as the Tulsa, Oklahoma, race riot of 1921; the Rosewood, Florida, massacre of 1923; and the thousands of wrongful prosecutions and lynchings and dozens of riots that took place throughout the country in the period from Reconstruction through the Civil Rights era.²⁴ Professor Sherrilyn A. Ifill has suggested that local communities ought to establish truth commissions to investigate local complicity in such crimes as lynchings. She makes a compelling case for the centrality of lynchings to American society in the early part of the twentieth century. Given that centrality, it makes sense that we do something to investigate them. Lynching truth commissions may teach us about the range of racial crimes that were sponsored or permitted by the government. Moreover, lynchings provide concrete examples of how the Jim Crow system left blacks without legal protection and how, in fact, that system often used law to oppress them.

Certainly, truth commissions will uncover ugly chapters of American history. But once that has happened, will they do anything else?²⁵ What good does it do to bring up that ugly past? How will that help repair the past?

The new knowledge that the truth commissions will produce will, one suspects, have several consequences. First, it will give a new sense of power to those whose version of history is vindicated. The power of historical stories is strong—they give listeners a sense of place and importance—and stories about the community will lead to a renewed sense of power and pride. The value of new and accurate accounts of past racial crimes appears to be great.

One can gauge the power of truth commissions, as well as apologies,