

## REPARATIONS: POLITICALLY INCONCEIVABLE\*

Jack Greenberg\*\*

Compensation sought or paid for wrongs inflicted on large numbers of members of racial, religious, ethnic, or national groups is often called reparations. Usually, it has been paid, or sought, from entities that did the harm or that in some sense are the representatives of the harm doer. Sometimes the wrongdoer might be a corporation or perhaps an individual. Where the victims have been smaller in number, the compensation is more likely to be called “just compensation” or “damages.”

The list of actual and proposed reparations is long, to some extent depending on how the term is defined. After World War I, Germany paid reparations to the Allied powers. In recent times, Germany has paid reparations to Holocaust survivors or their families and to the state of Israel. The United States has paid reparations to Japanese-Americans who were placed in relocation centers during World War II. Koreans have sought reparations from Japan for forcing Korean women into prostitution as “comfort women” during that war. Some American Indian tribes have claimed what some have called reparations for land taken in violation of claimed treaty rights. Those claims also could be classified as conventional claims for compensation for real property taken in violation of law, although of a scale vastly larger than those customarily

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\* The following is a transcription from a lecture delivered by Professor Jack Greenberg at *Taking Reparations Seriously*, a scholarly conference held at the Thomas Jefferson School of Law on March 17 and 18, 2006.

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encountered.

No one can deny the moral position: African-Americans, as a group, have a compelling claim on the United States. The history need not be rehearsed further than mentioning the main points: they were dragged here in chains; kept in slavery until emancipation; confined by segregation until 1954 and, in many ways, beyond that time; and victimized by discrimination during all this time and to a considerable extent today. Less well recognized is how blacks were excluded de facto from the wealth generating New Deal and post World War II legislation. The National Labor Relations Act and the minimum wage laws did not include agricultural labor, which is where most blacks were employed following the war. They could not get favorable home mortgages, because the F.H.A. and V.A., which insured those mortgages, would not insure blacks who wanted to live in white neighborhoods. There was no post-war housing boom in black neighborhoods comparable to the massive Levittowns that were built for whites. The G.I. bill provided virtually free higher education, but in the South, blacks could not attend white colleges or universities. The black schools were rarely as good and did not have a great deal of space.

African-Americans have asserted claims for reparations from the United States, some states, corporations, and Yale University. Still, I think, the most prominent claim was that of the Black Manifesto, read by James Forman in 1969 in Riverside Church. He addressed “the White Christian Churches and the Jewish Synagogues in the United States of America and All Other Racist Institutions,” calling upon the churches and synagogues to pay \$500 million as a beginning of reparations “due us as people who have been exploited and degraded, brutalized, killed and persecuted.” The dramatic means of presentation and the boldness of the claims shocked the nation, evoking a range of responses, from denial to admission of moral failure, but no reparations.

Starting in 1989, Congressman John Conyers has biennially introduced the Commission to Study Reparations Proposals for African Americans Act.<sup>1</sup> But after years of effort it has not been enacted. Randall Robinson, who gained national renown as

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<sup>1</sup> Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 109th Cong. (2005).

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head of TransAfrica, an organization that was in the vanguard of opposition to South African apartheid, has led a movement for reparations. He has written an influential book on the subject, "The Debt." Professor Charles Ogletree and others have mounted lawsuits seeking reparations, none of which succeeded. Some have been generalized; others have focused on particular events, like the Tulsa race riot. One, *Alexander v. Oklahoma*, recently was denied review by the United States Supreme Court.<sup>2</sup> Other proponents have forcefully presented African-American reparations claims in articles, speeches, petitions, and lawsuits.

One might rehearse the various theories on which relief has been denied. These include sovereign immunity, statute of limitations, constitutional and prudential standing, political question, and variants of all of the above as well as others. While these have been grounds for rejecting litigation efforts, their underlying rationales appear to underlie the failure of legislative attempts.

To me the objections reduce to several: the amount of money involved to pay adequate compensation is staggering. No political party could be expected to take the lead in view of such cost and certain opposition. After all, affirmative action remains a contentious issue. In public opinion polls, referenda, and votes on various aspects of it, it has almost always lost. It usually has been rejected by the courts and when approved, as recently in the University of Michigan case, only by a single vote and for limited circumstances. While reparations would be different, they would have much in common with affirmative action: compensation for a subordinated racial group at the expense of others. There is little point in rehearsing the merits. The opponents are not without reasons, but it comes down not to who is right, but who pays and who receives. Politically, it is hardly likely to happen.

While the courts are governed by rules of law, not by political advantage, we would be here operating in a sphere in which the rules of law are at best not favorable to the claimants or at least unclear. In that territory, where courts have to make up the rules, the ambient political atmosphere always plays an

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<sup>2</sup> *Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir. 2004), *cert. denied*, 127 S.Ct. 360 (2006).

important role. It is not incidental that *Brown v. Board of Education* was decided after African-Americans played a decisive role in Truman's election, black migration from South to North changed the political map of the United States, the cold war pressured the United States to remove the stain of segregation from its escutcheon, colonialism became a national and international issue, and so forth. No such imperatives are at work now.

Moreover, some of the obstacles are indeed formidable. When Boris Bittker published his pioneering legal analysis of reparations in 1973, he concluded that African-Americans indeed had valid legal claims. But they foundered on the issues of who would be entitled to reparations. He foresaw the need for an official code of racial classification to decide who would be entitled to such payments. At that time he could not have foreseen that 30% of the blacks in New York City, 28% in Boston, and 25% in Montgomery County, Maryland are foreign born. Many of those who were born in the United States may be the children of foreign born parents, some of whom lived in different parts of the country and some of whom are products of intermarriage in earlier generations. It all could be sorted out, but surely not smoothly and probably often with conflict and rancor.

That does not mean that the United States should turn its back on what it has wrought over its shameful racial history. One might call the remedy reparations or not, but restorative social programs are called for. Some may be called affirmative action, others may be called educational equalization, and still others could have different names. Perhaps even reparations, but not as the term has been understood heretofore. Those programs, however, will have to be fought out on the political turf of give and take, with interest groups of all sorts contending with one another. The reparations movement has made a useful contribution in elevating the issues to a level of visibility.