The Modern American

Volume 1
Issue 2 *Fall 2005*

Article 10

2005

A Direct Approach to Reparations: Municipal Efforts to Ensure Social Justice

Samuel Emiliano Brown

A Direct Approach to Reparations: Municipal Efforts to Ensure Social Justice

Keywords
African American slavery, Reparations, Unjust enrichment

A Direct Approach to Reparations: Municipal Efforts to Ensure Social Justice

*By Samuel Emiliano Brown**

On April 12, 2005, Oakland City Council Member Larry Reid introduced a measure (the Oakland Ordinance)[1] that would require all corporations doing business with the City of Oakland to divulge information regarding past connections to African American slavery in the United States. The Chicago City Council approved a similar measure[2] in October 2002, followed by the Los Angeles City Council in June 2003. In the same manner, city governments across the nation passed resolutions calling for the federal government to apologize for the institution of slavery or to provide specific remedies to combat the lasting effects felt by the legacy of slavery.[3] The primary purpose of these municipal actions is to facilitate the accumulation of information that could buttress future claims for redress from descendants of African slaves in the United States. An important auxiliary purpose is to obtain financial contributions for college scholarships and economic development programs for the communities in which the descendants of slaves comprise the majority of the residents.

Other municipal efforts include debates in the city councils of Chicago and Detroit over proposed bills that would give African Americans a large tax credit. The rationale for this credit is that it will serve as a partial compensation for the forty acres and a mule, promised to newly freed slaves immediately after the Civil War.[4]

This article first examines the history of reparations in the United States, specifically looking at the legal system and legislative attempts at the state and local levels. Second, it will address legal and practical concerns about reparations generally. The article will then analyze the recent Oakland ordinance specifically. Finally, it will look towards the future and analyze the direction of the modern slave reparations movement and what reparations could mean for African Americans and the entire nation. This article also incorporates insight on the issue of reparations from Council Member Desley Brooks of the Oakland City Council.[5]

History of Reparations

Reparations are not a new concept. Indeed, many groups have received reparations for past wrongs. For example, Holocaust survivors, American Indians, Alaskan Natives, and Japanese Americans have received compensation for gross atrocities. Admittedly, African American slavery in the United States ended eighty years before the Holocaust ended and both existed under somewhat different circumstances. Many American Indians and Alaskan Natives can point to prior treaties and legally binding agreements which arguably makes their current claims more for fulfilling contract obligations than reparations for past wrongs. However, the basic concept of reparations, "to make whole," is the same for all. Georgetown professor Richard America noted, "Slavery produced benefits and enriched whites as a class at the expense of [b]lacks as a class…reparations is not about making up the past, but dealing with current problems."[6]

The call for African American reparations is most like the case for Japanese Americans. During World War II, the United States detained Japanese Americans in internment camps throughout the western states to allay fears of their involvement in espionage or other activities detrimental to national security. Many lost their property, jobs, and sense of security as their lives disintegrated before their eyes. In order to recompense this group for the harm caused by the federal government, Congress passed the Civil Liberties Act of 1988.[7] To avoid, or curtail, questions of government discrimination in fashioning a remedy that would serve to aid Japanese Americans as a specific racial group, the authors of the bill identified class members as "surviving detainees" and their children.[8] The text of the bill also indicates that money from the fund would go towards sponsoring research and public education activities, especially to illuminate and understand the events surrounding the evacuation goals.[9]

The Case for Reparations

African American slavery in the United States helped facilitate the beginning of the greatest accumulation of wealth in our nation's history.[10] Many examples exist of the tremendous amount of wealth attained from African American slavery-related profits, which built some of modern America's largest fortunes. Many institutions such as Exxon (formerly Standard Oil), the *Hartford Courant*, J.P. Morgan, Fleet Bank (formerly Providence Bank), and Brown University obtained their initial capital from money acquired either directly or indirectly from African American slavery in the United States.[11] In 1781, Robert Morris founded Wachovia Bank, the nation's fourth-largest, from slave trade profits.[12] As a result of information obtained through the Chicago ordinance, J. P. Morgan acknowledged that banks it had once owned had taken possession of over 1,200 slaves who were being held as collateral.[13] In response, the bank apologized and established a scholarship fund for African Americans.

Why would J.P. Morgan donate $5 million for a crime committed over a century ago? The answer may lie in a contract theory known as *unjust enrichment*:

1. The retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected.
2. A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary

must make restitution or recompense.[14]

Few could successfully argue that 400 years of forced labor and discrimination in the United States, resulting in massive amounts of wealth for some groups, and poverty and oppression for another, did not constitute unjust enrichment. American business owners and shareholders "retained the benefit" of enormous profits, and capital, with which to invest and foster more wealth. This wealth was "conferred by another," African slaves, in the form of labor under "circumstances where compensation is reasonably expected." In such situations, the law says "the beneficiary must make restitution or recompense."

Examples such as these hold little sway due to the myriad of obstacles that hinder any attempt to gain reparations through the courts. Some of the largest of these include overcoming the statute of limitations,[15] identifying the class, concerns about offsets, and the overwhelming dearth of information on actual statistics and figures for African American slavery in the United States.[16] Those with standing to make a claim for restitution, slaves themselves, were essentially shut out of the United States legal system for a century following their so-called "emancipation." African Americans did not obtain full rights as United States citizens until the 1960s. The first generation of people to grow up with full citizen rights made claims against the government for its part in African American slavery, and the lasting effects thereof.

In 1995, Jewel Cato attempted to sue the federal government for an apology and damages arising from the enslavement of and subsequent discrimination against African Americans.[17] The Ninth Circuit dismissed the case, citing sovereign immunity, jurisdictional hurdles, generalized class-based claims, and lack of standing.[18] After the Ninth Circuit, the most liberal in the nation, dismissed *Cato*, many reparations organizations and activists had to rethink their strategies. This led to efforts to involve legislatures at the state and local levels.

Reparations Legislation

Council Member Brooks discussed her feelings on the difference in attitudes towards the Maafa[19] and the Holocaust. She explained that when people speak of Africa or African Americans, there seems to be devaluation for black lives and accomplishments versus white ones, citing recent genocides in Rwanda and Sudan as examples.

Americans have a history of exhibiting a general reluctance in acknowledging and honoring contributions of Africans and African Americans. In 1968, Michigan Congressman John Conyers introduced a bill to create a federal holiday to honor Dr. Martin Luther King, Jr.[20] Many in Congress considered his idea "radical" and it took 15 years for Congress to acquiesce to its passage. In January 1989, Conyers introduced H.R. 40, "Commission to Study Reparation Proposals for African Americans Act", which many have also deemed a radical measure. Despite the criticism, Conyers has introduced the bill every year since, and plans to do so until Congress passes it into law. He chose the number forty as a symbol of the original promise of forty acres and a mule to freed slaves. H.R. 40 seeks to accomplish four major goals:

> 1) Acknowledge the fundamental injustice and inhumanity of African American slavery; 2) Establish a commission to study slavery, its subsequent racial and economic discrimination against freed slaves; 3) Discover the impact of those forces on today's living African Americans; 4) Create a commission which would then make recommendations to Congress on appropriate remedies to redress the harm inflicted on living African Americans.[21]

In 2004, the Democratic Party endorsed H.R. 40 in its platform, recognizing the importance of acknowledging and addressing the issue of reparations for African American slavery.[22] Despite these attempts, the federal government has been slow to answer the call for a full accounting of the history and impact of African American slavery in the United States. This situation has lead to renewed efforts by state and local legislatures to study and respond to the impacts felt from the lasting legacy of African American slavery.

State Efforts

In 2000, California signed into law SB 2199, the Slaveholder Insurance Policies Bill.[23] This made California the first state to require companies believed to have profited from insuring slaves to gather and report relevant history.[24] SB 2199 is now part of the California Insurance Code and outlines a request for information on records of slaveholder insurance policies and a full-disclosure requirement to the descendants of slaves.[25] To date, California has collected a list of slaveholders who held insurance policies on over 600 slaves.[26] Iowa and Illinois have passed similar bills, resulting in a partial accounting of slaveholder policies from companies and/or their predecessors, such as Aetna, AIG, and New York Life Insurance.[27]

A similar bill has been proposed in North Carolina as well, state House Bill 1006, short-titled "State Contracts/Slavery Profits." According to House Bill 1006, North Carolina would be able to terminate a contract entered into with a vendor if the vendor fails to fully and accurately complete a required affidavit regarding any past connection to African American slavery.[28] Critics of these state efforts say lawmakers have too much time on their hands. Many of the arguments against such legislation are not without merit.

Is it fair to hold modern corporations accountable for business transactions from the 18th and 19th centuries? First, records from that era are difficult to come by, making research into this area close to impossible. Second, many of these modern-day companies have only a weak connection to the parent companies that may have profited from the slave trade. Finally, some argue that slave reparations are simply unconstitutional.

Opposing Arguments and Concerns

Many Americans of all colors question the validity of reparations and have valid legal and practical concerns. The first

question many people ask is whether reparations rise to the level of a compelling state interest. In determining whether a state or federal government can consider race through legislative efforts, courts require that it be for a compelling state interest.[29]

Another concern is the fact that African American slavery was legal in the United States. How can African Americans make a claim for African American slavery-based reparations when those who committed the "crime" were not committing a crime at the time? The Constitution prohibits ex post facto laws that identify certain conduct as criminal even though it was legal at the time. Finally, how can the government fashion a remedy to redress policies and customs of racism without some form of discrimination?

Proponents of reparations note that they do not seek reparations solely from "white" people; they seek redress from an entire society whose wealth was built on free slave labor. Council Member Brooks commented, "as a local official I take pride in the fact that we can effect change and that we can focus on these issues. What would cities be like if all we did was collect taxes and write budgets?"[30] Alluding to the previous comments about the change in attitude when slave reparations is at issue, it is curious that critics are not so fervently against reparations to Native Americans for their stolen land, a series of injustices which also occurred over 150 years ago. African American slavery, like the settling of the western United States, was a state-sanctioned operation, given weight and authority through the most sacred of all American documents, the United States Constitution itself. Fortunately, for some, the Constitution has not been a bar to attaining restitution from the federal government for discriminatory policies and practices.

In assessing how to fashion a non-discriminatory remedy, many proponents point to the Civil Liberties Act of 1988. As noted above, this act does not define its beneficiaries racially, but instead defines them as "surviving detainees" and "their children." Legislators in the case for African American reparations also redefined the class of people. Rather than directing benefits of reparations to "African Americans" or "blacks," the prospective class members are identified as "descendants of slaves." This is an important distinction that, like the Civil Liberties Act, identifies group membership based on a shared experience rather than a racial characteristic. In this way, information gathered to more accurately reflect the history of African American slavery will impress upon future generations that slave reparations were meant to redress 400 years of free labor and discrimination, not simply given to one group because of their race. More importantly, it eliminates an important constitutional obstacle; the equal protection doctrine prohibits state-sanctioned discrimination based on race. By changing the characterization of the victims, programs aimed at redressing injustice to slave-descendants cannot be shot down as violating equal protection because they are based on their relation to African American slavery, not their racial background.

As for the issue of compelling interests, Council Member Brooks, although opposed to the Oakland ordinance, agrees that in the case of reparations, state and local governments might have a compelling interest upon which to base such legislation. She contends, "from a policy standpoint, the legacy of slavery continues to cost extra tax money to everyone. Remedying the lasting problems specific to African American communities would be economically beneficial and efficient for every citizen, not just African Americans."[31] Legislation that is economically beneficial for all citizens and narrowly tailored to remedy problems specific to African American communities as a result of past discrimination has a fair chance of passing the strict scrutiny standard set by the Supreme Court.[32]

With regards to the concern about compensation for a prior legal act, many proponents would note that reparations legislation does not seek to ''punish'' taxpayers by holding them accountable for the actions of long-dead slaveholders. What these laws seek to accomplish is to hold accountable corporations that transferred wealth from the free labor of slaves into their coffers, and for an official recognition that many Americans were, and still are, unjustly enriched from the legacy of African American slavery and discrimination.

In Alaska, indigenous tribes receive a percentage of the revenue from oil sales because the government acknowledged that oil companies are, and have been, profiting from the loss of lands suffered by these groups.[33] Alaskan taxpayers do not oppose these laws because they recognize that much of the wealth created by the oil industry filters down through Alaskan economies and benefits everyone. In the same vein, the wealth made from African American slavery has been a major component in building wealth in the United States. From tobacco to cotton to sugar production, free slave labor played a major part in building the wealth that would facilitate the post-Civil War industrial revolution.

Americans have benefited from the labor of slaves and from the legacy of discriminatory practices in other ways as well. After the Civil War, four million African Americans were set free with disillusions of receiving a promised forty acres and a mule. Rather than allowing them to work on the East Coast, the United States allowed hundreds of thousands of eastern and southern Europeans to immigrate to the United States to serve as laborers in the factories of the north.[34] Many argue that since their great-grandparents or grandparents arrived here after African American slavery and the Civil War, they have never benefited from African American slavery or discrimination. To the contrary, many Europeans who immigrated to the United States were able to find work because it was the general custom in the United States to deny those jobs to African Americans based on the legacy of African American slavery and discrimination.[35] While Americans often subscribe to the dominant settler ideology that we are a nation of immigrants, it is often overlooked that the majority of African Americans did not voluntarily immigrate, but were brought here against their will.

As descendants of immigrants bought homes and land, descendants of slaves were restricted from a fundamental Constitutional right, the right to own property. This continued in various

forms through the 1950's, when the federal government promoted a policy known as "red-lining" which denied affordable housing to African Americans. Whether a non-African American citizen supported this policy or not, many inevitably benefited by the increase in available housing due to discriminatory practices such as this.

The Oakland Ordinance

Reparations can come in many forms, including cash payments, land, economic development, and repatriation resources for slave descendants. Other forms of reparations for slave descendants may come through the creation of honest depictions of African American history: funds for scholarships and community development, building of historical museums and monuments, the return of stolen artifacts and art to their respective peoples and institutions, exoneration of political prisoners, and the elimination of laws and practices that maintain dual systems in the criminal justice, health, education, and the financial and economic systems.

Council Member Brooks did take issue with some of the ways reparations legislation, particularly Oakland's, would redress past grievances. She believes that the ordinance does not go far enough in specifically redressing past discrimination and explains why she abstained from the vote of the recent Oakland ordinance:

> In Oakland, the 580 freeway is like a Mason-Dixie line where one side is whites and the other side is African Americans and Hispanics. There is a large separation in Oakland between the haves and have-nots based in large part on race, how does it happen that it plays out like that? Is it coincidence? No, it represents a vestige of policies that were put in place a long time ago. The ordinance could be useful, so I didn't cast a "no" vote. But I couldn't, in good conscience, forget my past and allow (the ordinance) to be watered down by those who don't come from the same place. The fund does not address individual compensation, but is set up to benefit 'historically Black areas', like East and West Oakland. The Oakland ordinance is a farce because it will not go directly to those it is aimed at, specifically, African Americans in Oakland who have historically suffered economically at the hands of racism. The 2 areas targeted: East/West Oakland are *traditionally* African American neighborhoods, but due to the effects of gentrification, they are quickly losing their African American dominance. This means money meant to compensate descendants of slaves will go to historical black neighborhoods that are currently only about 50% black. In four to five years these neighborhoods might have very little black population but because of the way the ordinance is written, money will still go to these areas. The ordinance should direct funds recovered to black community groups and black schools, not necessarily historically black neighborhoods that won't even be black in the near future. The same goes for schools, if money goes to schools in historically black neighborhoods but all the black people are moved out and Asians and whites move in then the same thing that happened with segregation in the 1950's will happen here: the majority that doesn't need assistance will benefit more from the ordinance than those the ordinance sought to assist.
>
> Using historically black neighborhoods was a bad measuring criterion because it doesn't address the impacts of the legacy of slavery. Anyone in a particular area would benefit, not necessarily African Americans. West Oakland is the lowest income area in the city, the average income is less than $26,000 but it is the neighborhood closest to the last BART station in Oakland (prime real estate). It is now being gentrified and if money pours into those schools in the next 4-5 years from the ordinance's fund, most of it will benefit the yuppie families who move in, not the poor African American families who live there now and who need better schools.
>
> I want to do things that have real impact. I don't think anything substantive has been done here and I couldn't support that. On the issue of reparations, it is important that African Americans seek out justice but we must also 'watch what you ask for' and be sure that the remedy being fashioned will actually be to your benefit before you throw your support behind it.[36]

In light of Council Member Brooks' response, it is clear that creating sustainable legislation that properly addresses this issue will be problematic.

Conclusion

The reparations issue forces us to ask many tough questions. Should the government compensate the great-great grandchildren of slaves, whose foremothers and forefathers worked for free and were deprived of an education? If the slaves and their direct descendants were denied the right to sue for compensation, do we allow the statute of limitations to control the issue and say "tough luck" to slave descendants who now have the rights their forefathers did not have? Is it fair to require taxpayers who never owned slaves to pay for the sins of long-dead Americans? How should the government determine who is a descendant?

This initial round of reparations legislation is not aimed at producing clear-cut answers to these questions. Some lawmakers are simply asking that their government devote some resources into researching the issue. Isn't it about time the government starts accepting the equally truthful reality that the United States might not exist as we know it without the free labor and sacrifice of Africans and African Americans?

ENDNOTES

* Samuel Brown is a second-year law student at American University Washington College of Law. He received his BA from the University of Arizona. Feedback regarding the article should be directed to samebrown78@yahoo.com.

[1] OAKLAND, CA., MUN. CODE ch. 9.60 (2005); *see also* Jason B. Johnson, *Firms that profited from slavery reviewed: City of Richmond, Oakland consider early step to seeking reparations*, S. F. CHRON., Mar. 12, 2005, at B1.
[2] CHICAGO, IL., MUN. CODE § 292-585 (2002),
[3] *Id.*
[4] RAYMOND WINBUSH, SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS 166 [hereinafter WINBUSH](Amistad/HarperCollins 2003).
[5] Interview with Desley Brooks, Council Member, Oakland City Council (July 22, 2005) [hereinafter *Brooks Interview*].
[6] WINBUSH, *supra* note 4 at 18.
[7] Japanese Internment, WIKIPEDIA (2005), *at* http://en.wikipedia.org/wiki/Japanese_internment.
[8] 50 App. U.S.C.A. § 1989b (West Supp. 1994)
[9] *Id.*
[10] WINBUSH, *supra* note 4, at 84-85.
[11] *Id.*
[12] Fran Spielman, *Alderman May Punish Firm for Concealing Slavery Ties*, Chi. SUN-TIMES, June 5, 2005, *available at* http://www.chicagosuntimes.com/output/news/cst-nws-slave05.html.
[13] Associated Press, *J.P. Morgan Discloses Past Links to Slavery*, WASH. POST, Jan. 21, 2005, at E2, *available at* http://www.washingtonpost.com/wp-dyn/articles/A25284-2005Jan20.html.
[14] BLACK'S LAW DICTIONARY 1536 (7th ed. 2004).
[15] WINBUSH, *supra* note 4, at 83-84.
[16] STEPHEN KERSHNAR, JUSTICE FOR THE PAST 70 (State University of New York Press 2004).
[17] *Cato v. United States*, 70 F.3d 1103-11 (9th Cir. 1995).
[18] *Id.*
[19] MAAFA is a Kiswahili term for "Disaster" or "Terrible Occurrence", describes more than 500 years of suffering of people of African descent through Slavery, Imperialism, Colonialism, Invasions and Exploitation. The Afrocentric Experience; The MAAFA, available at http://www.swagga.com/maafa.htm.
[20] Statement from John Conyers, *Statements from April 6, 2005 briefing: The Impact of Slavery on African Americans Today* (Apr. 6, 2005), *available at* http://www.house.gov/conyers/news_reparations.htm.
[21] *Id.*
[22] Democratic Party Platform 2000, *available at* http://cwx.prenhall.com/bookbind/pubbooks/berman4/medialib/Election/dplat2000.htm.
[23] Tom Hayden Official Website: Legislation, *at* http://tomhayden.com/legislation2000.htm.
[24] *Id.*
[25] CA. INS. CODE §§ 13810-13813 (2001).
[26] Jason B. Johnson, *Californians to Get Look Back at Slavery; Reparations Advocates, Genealogists Eager to See Insurers' Lists*, S. F. CHRON., *available at* http://www.insurance.ca.gov/SEIR/NamesofSlaves.htm).
[27] Iowa Insurance Division Report on Slavery Era Insurance, *available at* http://www.iid.state.ia.us/educational_materials/slavery.asp.
[28] This proposal is working its way through the State House and, if ratified and signed by the governor, would apply to contracts entered into on or after October 1, 2005, *available at* http://www.ncleg.net/sessions/2005/bills/house/html/h1006v1.html.
[29] *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).
[30] Brooks Interview.
[31] *Id.*
[32] *Id.*
[33] Norman Chance, *Alaska Natives and the Land Claims Settlement Act of 1971*, Alaska Native Claims Settlement Act Resource Center, *available at* http://arcticcircle.uconn.edu/SEEJ/Landclaims/ancsa1.html.
[34] WINBUSH, *supra* note 4, at 177 (Recognizing that even the most impoverished immigrants were able to join trade unions and police departments, from which African Americans were excluded).
[36] *Id.*
[35] Brooks Interview.

THE MODERN AMERICAN

c/o Diversity Student Services
American University
Washington College of Law
4801 Massachusetts Avenue, NW
Suite 300
Washington, DC 20016-8181

Return Postage Guaranteed
Forwarding Service Requested

**NON-PROFIT
U.S .POSTAGE
PAID
WASHINGTON, D.C.
PERMIT NO. 1158**