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TULSA REPARATIONS: THE SURVIVORS' STORY

CHARLES J. OGLETREE, JR.*

Abstract: This Article explores the ability of reparations litigation to transform the American debate about race by promoting “interest convergence” between reparations advocates and the majority population. As Professor Derrick Bell has argued, only when the interests of the majority converge with those of the minority will the minority achieve its goals. Reparations lawsuits—especially those framed as traditional civil rights claims, as in the ongoing litigation seeking reparations for the 1921 Tulsa Race Riot—can begin to promote the convergence of interests between reparationists and the reluctant majority population by forcing the majority population to confront past and present injustices against African Americans. The Article concludes that litigative reparations are a promising first step toward insuring justice for those who were sacrificed during slavery and Jim Crow oppression.

INTRODUCTION

Reparations advocacy has dominated the news as of late. While many dismissed reparationists in the past as members of a narrow and ideologically driven fringe movement, reparations today is discussed and debated in the *New York Times*, the *Wall Street Journal*, many news programs, and even in popular culture.¹ The comedian Chris Rock has introduced it as part of his routine, and the recent controversial and commercially successful comedy, *Barbershop*, included a lengthy

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¹ See Dalton Conley, Op-Ed, *The Cost of Slavery*, N.Y. TIMES, Feb. 15, 2003, at A1 (proposing a net-worth-based solution for reparations and generating several subsequent letters to the editor); Allen Guelzo, *Reason in Disrepair*, WALL ST. J., Nov. 22, 2002, available at 2002 WL-WSJ 103126916 (criticizing a conference at Columbia University on reparations and the law); Gary L. Schell, Letter to the Editor, *Slain Union Soldiers Paid 'Blood Costs' for Slavery*, WALL ST. J., Dec. 3, 2002, available at 2002 WL-WSJ 103127610 (responding to *Reason in Disrepair* by suggesting the lives sacrificed by Union Soldiers during the Civil War are ignored by reparations advocates); sources cited *infra* note 2.

dialogue about the movement.² Nevertheless, despite the growing interest in reparations by supporters and opponents, it would be a mistake to view reparations advocacy as a popularity contest. Reparations advocates are deeply committed to the goal of reparations for descendants of African slaves, and do not believe that popular acceptance of the effort can or should drive the movement.

Indeed, reparationists do not seek the endorsement of the majority of the American population or even the majority of the African-American population for what we do. We do not seek your vote, your support, or even your encouragement when engaging in this type of advocacy because the motivations that sustain us come not from public accolades but from empathy with our clients—those who survived the violence of slavery and segregation and those who did not. One of the fundamental goals of reparations for African Americans is to insure that those who were sacrificed are not forgotten in our rush to move beyond the painful lessons of our past.³

But reparations is more than an exercise in education and remembrance. Reparations advocates ultimately seek the redistribution of resources from one group to another. To that extent, reparations is another manifestation of the progressive agenda articulated by President Lyndon B. Johnson and his vision of addressing the needs of the “Great Society.”⁴ Reparations is, in other words, yet another expression of the demand for political, social, and economic equality that, since the failure of the Civil Rights movement in the 1970s, has been stifled and suppressed in this country.

Reparations is controversial and distinctive, however, because race is one of the criteria justifying the redistribution: those who are to pay should do so because they injured a racially identifiable group of people. In fact, the link between race and injury is closer than this; those who inflicted the injury did so using race as perhaps one of

² *ABC News 20/20: America's IOU* (ABC television broadcast, Mar. 23, 2001) (including clips of Chris Rock asking strangers on the streets of New York for their opinions on reparations for slavery as part of his show); *BARBERSHOP* (MGM Pictures 2002).

³ See Charles J. Ogletree, Jr., *Reparations for the Children of Slaves: Litigating the Issues*, 33 U. MEM. L. REV. 245, 245–47 (2003) (discussing motivation for reparations as representation of those who worked and died as a result of slavery).

⁴ I have made the connection between President Johnson and reparations in Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 317–18 (2003) [hereinafter Ogletree, *Repairing the Past*].

many justifications.⁵ Demanding payment from whites on the basis of their government's or their ancestors' racism results in a relatively predictable and forceful denial of liability for restitution to the victims of those injuries.

This overwhelmingly negative response poses a problem for reparations advocates: While legal battles may be fought and won without widespread social approval of the litigation's goals, the type of social change pursued through reparations advocacy would seem to require sacrifices from, and perhaps the approval of, that segment of the population most adamantly opposed to reparations. Whether or not one believes that the current allocation of resources depends upon the illegitimate exploitation of African Americans,⁶ those who have the resources will lose some of them should they be redistributed along the lines suggested by reparations advocates.

The problem faced by reparations advocates is a familiar one for civil rights advocates, and has been described under the rubric of "interest convergence" by Professor Derrick Bell.⁷ As Bell argues, only when the interests of the majority converge with those of the minority will the minority achieve its goals. Only:

[w]hen whites perceive that it will be profitable or at least cost-free to serve, hire, admit, or otherwise deal with blacks on a nondiscriminatory basis, they do so. When they fear—accurately or not—that there may be a loss, inconvenience, or upset to themselves or other whites, discriminatory conduct usually follows.⁸

In an earlier article on reparations, Bell suggested that the type of interest convergence necessary to support reparations was a long way off.⁹

⁵ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (recognizing "mixed motive" discrimination); see also *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003) (clarifying the evidentiary standard to be applied in mixed motive cases).

⁶ And so any redistribution of resources along the lines suggested by reparations advocates is justified, and the continuing failure to redistribute is wrongful.

⁷ See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 20, 22 (Kimberlé Crenshaw et al. eds., 1995) [hereinafter Bell, *Interest Convergence*].

⁸ DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 7 (1992) [hereinafter BELL, *FACES AT THE BOTTOM OF THE WELL*].

⁹ See Derrick A. Bell, Jr., *Dissection of a Dream*, 9 HARV. C.R.-C.L. L. REV. 156, 157 (1974) (reviewing BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973)).

A recent study confirms that this is still the case.¹⁰ What are the prospects for changing these attitudes, and how can it be done?

This symposium is one sign of hope. It is wonderful to witness the diverse range of scholars who are here to comment on the reparations movement, if the ad hoc and fragmented set of groups pursuing reparations can be called a movement. But movement there is—through the courts¹¹ and in the legislatures of various states¹² and cities¹³ around the country. The momentous nature of much of the currently filed litigation renders all the more urgent scholarly contributions to the development of reparations doctrine and policy. This forum is timely in that it comes on the heels of an important effort to address reparations in the court system, most recently seen in a lawsuit seeking reparations, *Alexander v. Governor of Oklahoma*,¹⁴ filed in the Northern District of Oklahoma. So it is particularly enjoyable to participate in this symposium having just filed that suit, and to receive predominantly positive feedback from the participants on its merits.

My goal in this Article is to suggest that reparations litigation can provide a means of transforming the debate about race in such a manner that the majority resistance to racial justice can be abated. One way in which to do so is to demonstrate the convergence of interests between the advocates of reparations and the majority population. As Professor Ewart Guinier recognized in another early reparations article, reparations is likely to help whites as well as African Americans because “the cure for difficulties in correcting institutionally-imposed inequity is more correcting of inequity. In short, legislation for reparations could be generalized to erase societal disadvantages suffered by whites as well

¹⁰ See Harbour Fraser Hodder, *Riven by Reparations: The Price of Slavery*, HARV. MAG., May/June 2003, at 12, 13.

¹¹ See, e.g., Plaintiff's Complaint and Jury Trial Demand, *Farmer-Paellmann v. FleetBoston Fin. Corp.* (E.D.N.Y. filed Mar. 26, 2002) (No. 02-CV-1862).

¹² See, e.g., Slavery Era Insurance Policies Act, CAL. INS. CODE §§ 13810–13813 (West Supp. 2003); Act of May 4, 1994, 1994 Fla. Sess. Law Serv. ch. 94–359 (West) (relating to Rosewood, Florida) (codified in part at FLA. STAT. ch. 1004.60, 1009.55 (2003)); 1921 Tulsa Race Riot Reconciliation Act of 2001, Okla. Sess. Law Serv. ch. 315 (West) (codified at OKLA. STAT. ANN. tit. 74, § 8000.1(3) (2002)).

¹³ See, e.g., John M. Broder, *The Business of Slavery & Penitence*, N.Y. TIMES, May 25, 2003, § 4, at 4 (discussing Los Angeles City Council's unanimous approval of “an ordinance . . . that would require any company wishing to do business with Los Angeles to investigate and disclose any profits derived from the American slave trade”); Sabrina L. Miller & Gary Washburn, *New Chicago Law Requires Firms to Tell Slavery Links*, CHI. TRIB., Oct. 3, 2002, § 2, at 1 (discussing Chicago Ordinance).

¹⁴ Plaintiffs' First Amended Complaint, *Alexander v. Governor of Oklahoma* (N.D. Okla. filed Feb. 28, 2003) (No. 03-CV-133).

as blacks.”¹⁵ In this way, reparations litigation can provide the kind of interest convergence that is necessary to overcome the challenges facing reparations advocates.

I. THE REPARATIONS EFFORT IN GREENWOOD, OKLAHOMA

On the night of May 31 through June 1, 1921, a mob of white rioters, including individuals deputized by the Chief of Police of the city of Tulsa and properly activated members of the Oklahoma State National Guard, descended upon Greenwood, the African-American district of Tulsa popularly known as the “black Wall Street.”¹⁶ Within twelve hours, over eight thousand African Americans had been forced to flee their homes.¹⁷ Some kept running, relocating in different towns within Oklahoma.¹⁸ Otis Clark, who was eighteen at the time, fled all the way to California, refusing to return until well into his nineties.

After the mob had done its work, as many as 300 African Americans had been murdered and over 1,200 residences had been burned to the ground in a forty acre stretch of land.¹⁹ The Riot caused more than \$20 million (in today’s dollars) worth of property damage.²⁰ Those who stayed were rounded up and herded into detention camps, later to spend the winter like refugees in tents provided by the Red Cross.²¹ Fifteen days after the Riot, Judge Loyal J. Martin, chair of the Emergency Committee appointed to restore order after the Riot, acknowledged that:

Tulsa can only redeem herself from the country-wide shame and humiliation into which she is today plunged by complete restitution and rehabilitation of the black belt. The rest

¹⁵ Ewart Guinier, Book Review, 82 YALE L.J. 1719, 1723 (1973) (reviewing BORIS I. BITTKER, *supra* note 9).

¹⁶ See Plaintiffs’ First Amended Complaint ¶¶ 2, 17, *Alexander* (No. 03–CV–133); Don Ross, *Prologue to TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921*, at ix, xi (2001) [hereinafter TULSA RACE RIOT], available at <http://www.ok-history.mus.ok.us/trrc/freport.htm> (last visited Nov. 12, 2003).

¹⁷ See Alfred L. Brophy, *Reconstructing the Dreamland: Contemplating Civil Rights Actions and Reparations for the Tulsa Race Riot of 1921*, at 3 (2000) (preliminary draft of report to Tulsa Race Riot Commission) [hereinafter Brophy, Preliminary Report] (unpublished, available online at http://www.law.ua.edu/staff/bio/abrophy/abrophy_links.html (last visited Nov. 12, 2003)).

¹⁸ Plaintiffs’ First Amended Complaint ¶¶ 5, 9, *Alexander* (No. 03–CV–133).

¹⁹ OKLA. STAT. ANN. tit. 74, § 8000.1(3) (2002); John Hope Franklin & Scott Ellsworth, *History Knows No Fences: An Overview*, in TULSA RACE RIOT, *supra* note 16, at 21, 22–23.

²⁰ See OKLA. STAT. ANN. tit. 74, § 8000.1(3).

²¹ Scott Ellsworth, *The Tulsa Race Riot*, in TULSA RACE RIOT, *supra* note 16, at 37, 88.

of the United States must know that the real citizenship of Tulsa . . . will make good the damage, so far as it can be done, to the last penny.²²

Eighty years later, the commission created by the state to determine the causes of the Riot and to assess culpability agreed that “[r]eparations are the right thing to do.”²³ Yet, as of today, neither the state of Oklahoma nor the city of Tulsa has paid one cent to any of the victims or their descendants.

There are over 120 survivors of the riots still living; for example, Otis Clark, who recently celebrated his one-hundredth birthday, is still alive and seeking justice.²⁴ These survivors have come together as a group, along with the descendants of those who did not live long enough to see justice done and to have their experiences acknowledged and addressed directly by the municipal, state, and federal government. I am the lead attorney on the Oklahoma lawsuit, and two other contributors to this symposium are participating in the litigation.²⁵

The Oklahoma lawsuit is a model of the transformative process of interest convergence between the advocates of reparations and the majority population.²⁶ The suit is based upon the model of compensatory damages that Professor Keith Hylton endorses in this sympo-

²² *Tulsa*, 112 NATION 833, 839 (1921), quoted in ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921, at 107 (2002) [hereinafter BROPHY, RECONSTRUCTING THE DREAMLAND].

²³ TULSA RACE RIOT, *supra* note 16, at 20.

²⁴ See Plaintiffs’ First Amended Complaint ¶¶ 66, 557, *Alexander* (No. 03–CV–133).

²⁵ Professor Alfred L. Brophy, who wrote the seminal book on the Riot and its legal consequences, has been indefatigable in his efforts to ensure that the plaintiffs had their day in court. It is no understatement to say that this lawsuit could not have been filed without that fantastic resource. See generally BROPHY, RECONSTRUCTING THE DREAMLAND, *supra* note 22. Professor Brophy also served on the Oklahoma Commission to Study the Race Riot of 1921, and contributed a chapter to its report. See Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law*, in TULSA RACE RIOT, *supra* note 16, at 163, 163–83. He also wrote a more trenchant and as yet unpublished argument for reparations for the riot victims. See generally Brophy, Preliminary Report, *supra* note 17. Professor Eric J. Miller, Michele A. Roberts, Adjoa A. Aiyetoro, Suzette M. Malveaux, Johnnie Cochran, Denis C. Sweet III, and several local Oklahoma attorneys, including Leslie Mansfield and James O. Goodwin, are among the individuals who assisted me in drafting the complaint in *Alexander*, which is the suit brought on behalf of survivors of the Tulsa Race Riot of 1921 and descendants of the victims of that riot, suing the Governor of the state of Oklahoma, the city of Tulsa, the Chief of Police of the city of Tulsa, and the Tulsa Police Department for damages and injunctive relief under the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1983, and 1985, and for supplemental state-law claims. See Plaintiffs’ First Amended Complaint ¶¶ 38, 489, 518–64, *Alexander* (No. 03–CV–133).

²⁶ See BELL, FACES AT THE BOTTOM OF THE WELL, *supra* note 8, at 7; Guinier, *supra* note 15, at 1719, 1723.

sium,²⁷ and it is intended to serve as a paradigm by creating concrete cases with actual living victims and by identifying the fact of racial repression as a present and continuing injustice.

Professor Hylton's assessment of the validity of the social welfare model of reparations litigation deserves serious analysis.²⁸ While the discussion of interest convergence may suggest that such cases have been filed prematurely, the "deliberate speed" of racial reform in this country, at least since the second opinion in *Brown v. Board of Education*,²⁹ has been a disappointment to many of those seeking racial justice.³⁰ We have hardly begun the task of changing the racial climate in America in the thirty-five years since the end of de jure segregation. We are approaching the 140th anniversary of the end of the Civil War and the passing of the Thirteenth Amendment, yet attitudes to race remain mired in animosity and distrust. If we have learned one thing, it is that this is not a problem that money alone can solve. It involves, as well, the consideration of new directions in our national project of racial reconciliation and a new beginning in the task of founding a new and fairer America.

II. INTEREST CONVERGENCE AND THE ERADICATION OF RACISM

Professor Bell's discussion of interest convergence can be understood against the background of two different theories of racism in America. A moderately pessimistic theory has been propounded by Professor Roy Brooks, who suggests that it is "naïve[] [to] expect[] that whites will act more nobly than African Americans or any other group would act under similar circumstances" by looking beyond their self-interests when confronted with a demand to redistribute social benefits.³¹ Professor Brooks's theory contends that, although integration has been a failure, that failure is limited and may be overcome by a strategy of limited separation.³² The theory contends that integration has failed and continues to fail many African Americans,³³ and that the

²⁷ See Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L.J. 31, 32-33 (2004).

²⁸ See *id.*

²⁹ 349 U.S. 294 (1955) ("*Brown II*").

³⁰ See *id.* at 301. The first of the *Brown* opinions outlawed racial discrimination in public education. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 1495 (1954) ("*Brown I*").

³¹ ROY L. BROOKS, *INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY* 190 (1996).

³² See *id.* at 104, 189-213.

³³ See *id.* at 190.

white community lacks a generalized will to overcome race-based social and economic disparities.³⁴ Nonetheless, Professor Brooks clearly believes that racism can be overcome by strategies based on African-American self-help.³⁵

Professor Bell's more pessimistic analysis suggests that racism is not merely an accidental by-product of American society or culture that can be undone by a sustained effort to eradicate it. Rather, Bell sees racism as endemic—a definitive, structural feature of liberal democracy in America.³⁶ Far from a problematic but essentially transient social or psychological condition, racism is a permanent feature of American society, necessary for its stability and for the well-being of the majority of its citizens.³⁷ Thus, according to Bell: "Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance."³⁸

These two theories address the issue of redistributive racial goals (whether expressly or implicitly) from the perspective of interest convergence. Brooks's discussion assumes that whites will not act against their interest, and so African-American self-help ought to be a major part of any strategy seeking to overcome racism. Bell's thesis is distinguishable from Brooks. Interest-convergence, he argues, explains how African Americans are able to achieve political gains despite the essentially racist nature of American society. Political and social power is retained by the white majority—in fact, true power is retained by a white *minority* that has power and wishes to conserve it, and the rest of white society is empowered only relative to African Americans.³⁹ Thus, while not only African Americans, but a large portion of white society, are

³⁴ See *id.* at 105. Brooks's analysis replicates that of Professor Bell in his early article on interest convergence. See Bell, *Interest Convergence*, *supra* note 7, at 23–24.

³⁵ See BROOKS, *supra* note 31, at 256, 263–69, 284–85.

³⁶ See BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 8, at 10. Bell considers the relationship between racism and liberal democracy to be "symbio[ti]c," such that "liberal democracy and racism in the United States are historically, even inherently, reinforcing; American society as we know it exists only because of its foundation in racially based slavery, and it thrives only because racial discrimination continues." *Id.* (quoting JENNIFER HOCHSCHILD, *THE NEW AMERICAN DILEMMA* 5 (1984)).

³⁷ See *id.* at 3–10. As evidence of the permanence of racism, Bell points to the "unstated understanding by the mass of whites that they will accept large disparities in economic opportunity in respect to other whites as long as they have a priority over blacks and other people of color for access to the few opportunities available." *Id.* at 10.

³⁸ *Id.* at 12.

³⁹ See BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 8, at 8–9.

denied effective political, social, or economic power, the relative position of African Americans to the rest of society serves to mask the disenfranchisement of the majority of whites.⁴⁰ Interest-convergence suggests that, against this consolidation of power in an elite, redistributive gains are only possible when the interests of the elite and the rest coincide.

Accordingly, interest convergence works as a safety-valve, to permit short-term gains for African Americans when doing so furthers the short- or long-term goals of the white elite. As a side effect, it has the important consequence of convincing the minority population (or others that lack power) that social change is possible, rather than ephemeral, and that participation in the social and political system will provide redistributive benefits. This is an important check on widespread disaffection that may end in revolution.

Reparations, understood in this light, can only be politically successful to the extent that it can be presented as providing short- or long-term benefits for the empowered portion of the population. To the extent that reparations is predominantly, or only, a “black thing,” it has little chance of succeeding. Thus, even with large-scale social backing, there can be no reparations unless those in power can see their interests converging with those who demand reparations.

The potential of the reparations movement to persuade a white power elite that some form of social action is required may not be as fanciful as some have imagined. As respected historian Eric Foner noted recently, the major problem with affirmative action is not the manner in which it is administered, but its separation from the other programs introduced along with it in the 1960s.⁴¹ Public education continues to fail African Americans in significantly greater numbers than whites,⁴² and it is this failure that ensures the continuing relevance of affirmative action as a stop-gap measure to help the unfortunate succeed.

As Bell notes, however, the move to integrated education—and indeed the whole Civil Rights revolution of the 1960s—can be re-

⁴⁰ See *id.* at 7.

⁴¹ See Eric Foner, *Diversity over Justice*, NATION, July 14, 2003, at 4, 4.

⁴² See, e.g., Neil J. Smelser et al., *Introduction to 1 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES* 1, 12–13 (Neil J. Smelser et al. eds., 2001) (stating that research suggests that stereotypes lead teachers to expect less of black students than non-Hispanic whites, and this expectation leads to lower performance on test scores); James P. Smith, *Race and Ethnicity in the Labor Market: Trends over the Short and Long Term*, in 2 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 52, 56 (Neil J. Smelser et al. eds., 2001) (stating that on average, blacks complete fewer years of education than whites).

garded as an effort by white America to head off the real possibility of race-based mass civil disobedience.⁴³ Since the end of slavery, whites have resisted the challenge of integration and have found more or less sophisticated ways by which to resist the efforts of African Americans to participate on equal terms in American society.⁴⁴ As in the 1960s, the frustrations of second-class citizenship have led to the inevitable resurgence of black nationalism, as best demonstrated in the now broadly accepted, although controversial, momentum for reparations. With the failure of a race-neutral liberalism to provide a populist political alternative, reparations is, for many African Americans, the only remaining option to seek the sort of redistribution of resources promised under the "Great Society." White failure to embrace the modest civil rights or integration programs envisaged during the 1970s and into the 1980s has allowed the black underclass to grasp the issue of reparations. As the situation currently stands, it looks like they will not let go until they receive justice.

III. SLAVERY REPARATIONS AND REDISTRIBUTION

Reparations is an attempt to obtain restitution for the wrongs inflicted through slavery and segregation and persisting through the current landscape of racial discrimination in America. At bottom, it is premised upon a principle of compensation: those who have inflicted an injury must compensate those who have suffered the injury in an amount appropriate to the wrong inflicted. As is well recognized, the problem with slavery reparations is that all of the victims are dead, as are the individuals who participated in and perpetrated slavery and its related institutions. Nevertheless, some of those institutions survive, among them a range of corporations, other private institutions such as universities and colleges, and state and federal governments.

There are a number of obvious and well-detailed hurdles to seeking reparations through litigation.⁴⁵ Two principal barriers are the lack of living plaintiffs and the various statutes of limitations. These impediments militate against the traditional forms of recovery of tort law and quasi-contract. Furthermore, quite apart from the issue of "deep pockets," there are important symbolic factors at stake when

⁴³ See Bell, *Interest Convergence*, *supra* note 7, at 23–24.

⁴⁴ See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 85–86 (2000).

⁴⁵ See generally Hylton, *supra* note 27, at 36–38 (discussing hurdles such as identifying the victims and defendants, causation, and statutes of limitation); Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 157, 161–65 (2004) (discussing hurdles related to the passage of time).

selecting defendants in reparations cases. Where the state has condoned the wrong in the very document constituting it as a polity⁴⁶ the state is rightly regarded as the principal target for suit.⁴⁷ Thus, plaintiffs have resorted to a variety of constructive legal arguments in reparations claims.

The controlling slavery reparations case is *Cato v. United States*, in which an African-American woman brought an action for damages against the United States government, alleging the kidnapping, enslavement, and transshipment of her ancestors, as well as continuing discrimination on the part of the government.⁴⁸ She also sought a court acknowledgment of the injustice of slavery and Jim Crow oppression, as well as an official apology from the United States government.⁴⁹ The court dismissed the case, citing the government's failure to consent to suit under the Tucker Act, and the failure of the Thirteenth Amendment to provide a remedy under the Administrative Procedures Act.⁵⁰

More recently, the Court of Federal Claims in *Obadele v. United States* dismissed a slavery reparations claim filed under the Civil Liberties Act, which provides for payments to Japanese-American internees detained during World War II.⁵¹ Plaintiffs argued that the Act rested upon an unconstitutional racial classification, and sought payment to descendants of slaves under the Act.⁵² The court upheld the Act's constitutionality while at the same time commenting that "the Plaintiffs have made a powerful case for redress as representatives of a racial group other than Americans of Japanese ancestry."⁵³ Clearly, *Cato* and *Obadele* present major obstacles for plaintiffs seeking reparations against the federal government.

The currently filed slavery litigation lawsuits are grappling with these precedents.⁵⁴ The distinctive feature of several of these suits is their

⁴⁶ See, e.g., U.S. CONST. art. I, § 2, cl. 3 (three-fifths clause); U.S. CONST. art. IV, § 2, cl. 3 (fugitive clause).

⁴⁷ See ROBINSON, *supra* note 44, at 204–08.

⁴⁸ 70 F.3d 1103, 1106, 1111 (9th Cir. 1995).

⁴⁹ *Id.*

⁵⁰ *Id.* at 1111; see Administrative Procedures Act, 5 U.S.C. § 702 (2000); Tucker Act, 28 U.S.C. § 1491, 1505 (2000).

⁵¹ Civil Liberties Act of 1988, 50 U.S.C. app. §§ 1989–1989d (2000); *Obadele v. United States*, 52 Fed. Cl. 432, 444 (2002).

⁵² *Obadele*, 52 Fed. Cl. at 436.

⁵³ *Id.* at 442.

⁵⁴ See Plaintiffs' First Amended Complaint, *Alexander* (No. 03–CV–133); Plaintiff's Complaint and Jury Trial Demand, *Farmer-Paellmann* (No. 02–CV–1862); First Amended Complaint,

choice of defendants: corporations that participated in slavery in a variety of capacities. The issue is whether such suits present a sufficient basis for the courts to grant relief, or whether they will suffer the fate of *Cato* and *Obadele*. In his contribution to this symposium, Professor Hylton suggests that, in casting around for a basis for suit, the slavery litigation suits have adopted a theory of litigation and of relief that inherently compromises their chance of success.⁵⁵ These suits, he argues, “aim[] for a significant redistribution of wealth,” adopting “social welfare” as their underlying policy or goal.⁵⁶ These policy considerations are reflected not only in the relief sought and in the class of plaintiffs, but in the claims articulated: conspiracy; demand for accounting; human rights violations; conversion; and unjust enrichment.⁵⁷

And yet, while the problems faced by such lawsuits are well known and are the subject of many differences of opinion, there is merit in the various strategies employed by the wide variety of efforts to secure reparations.⁵⁸ In terms of interest convergence, however, many people will view these commendable efforts as too far removed from present injustices to have much of an impact on the national consciousness. Arguably, no one in the white majority, and certainly not anyone in the power elite identified by Bell, feels the immediacy of slavery. Furthermore, the question of the appropriate response toward the bitter history of slavery is a fraught one, even within the African-American community. Notably, there has been fairly widespread disagreement over not only the appropriate manner in which to memorialize slavery, but also over whether such a memorial should exist at all.⁵⁹ Those who object to a slavery museum claim that such a memorial is either too painful or too stigmatizing for African Americans even today.⁶⁰

Hurdle v. FleetBoston Fin. Corp. (Cal. Super. Ct. filed Sept. 10, 2002) (No. CGC-02-412388); see also Ogletree, *Repairing the Past*, *supra* note 4, at 298-308 (commenting on these suits).

⁵⁵ Hylton, *supra* note 27, at 33-34.

⁵⁶ *Id.* at 33.

⁵⁷ See, e.g., Plaintiff's Complaint and Jury Trial Demand ¶¶ 50-70, *Farmer-Paellmann* (No. 02-CV-1862).

⁵⁸ See Ogletree, *Repairing the Past*, *supra* note 4, at 281.

⁵⁹ See, e.g., Jim Auchmutey, *Slave Museums Confront a Painful Past*, ATLANTA JOURNAL-CONST., Mar. 9, 2003 (describing “the sensitive nature” of the topic of memorializing slavery), available at 2003 WL 13244321; Jacqueline Trescott, *Capitol Site Favored for Black History Museum; Presidential Panel's Report Envisions 2011 Completion*, WASH. POST, Apr. 3, 2003, (discussing “the long and often fractious history of deciding whether a museum dedicated to the African American story should be built on the [National] Mall [in Washington, D.C.]”), available at 2003 WL 17425494.

⁶⁰ See Auchmutey, *supra* note 59.

Such problems are magnified when the harms inflicted during slavery are used as a justification for redistributions of wealth and power, as efforts to secure legislative reparations indicate. The type of study that could make the case for that justification has been continually resisted at the federal level. In particular, Representative John Conyers' bill, H.R. 40, entitled "Commission to Study Reparation Proposals for African Americans Act," has been defeated every year since its introduction in 1989.⁶¹ Given this general resistance to reparations, the challenge to look to the past to solve problems related to race remains, and must not be ignored. For interest convergence to succeed, we must make a serious effort to confront past, and not simply present, injustices.

Certainly, were the federal government to sponsor such a study, even if no payment would be included in the report's recommendations, it would provide an indication that the government wishes to take seriously the issue of reparations. The idea that the state should make an effort to investigate and acknowledges its responsibility has resulted in two major reparations successes: the Civil Liberties Act of 1988,⁶² by which payments were made to World War II Japanese-American internees; and the Rosewood Act,⁶³ under which the state of Florida made payments to the survivors and descendants of the Rosewood Massacre of 1923. Thus, there is a good chance that a federal commission would provide a legal basis for suit to recover payments should a commission so recommend. That is certainly the basis for suit in two recent holocaust reparations suits, and it is the case we are currently making in Oklahoma.⁶⁴

Nonetheless, while a federal commission would provide a necessary legal basis for reparations lawsuits, it is not clear that the sort of commission proposed under H.R. 40 can overcome the failure of in-

⁶¹ See, e.g., Commission to Study Reparation Proposals for African Americans Act, H.R. 40, 108th Cong. (2003); H.R. 3745, 101st Cong. (1989); see also Ogletree, *Repairing the Past*, *supra* note 4, at 281, 290 (discussing Representative Conyers' introduction of this bill each year for the last fourteen years).

⁶² Civil Liberties Act of 1988, 50 U.S.C. app. §§ 1989-1989b-9 (2000).

⁶³ Act of May 4, 1994, 1994 Fla. Sess. Law Serv. ch. 94-359 (West) (relating to Rosewood, Florida) (codified in part at FLA. STAT. ch. 1004.60, 1009.55 (2003)).

⁶⁴ See *Rosner v. United States*, 231 F. Supp. 2d 1202, 1205 (S.D. Fla. 2002) (discussing Plaintiff's assertion that it was only after the Presidential Advisory Commission on Holocaust Assets released its report that they had the necessary facts for their complaint); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 123-24 (E.D.N.Y. 2000) (discussing commissions created by the French government to draft proposals for redress of Holocaust-era injuries); Plaintiffs' First Amended Complaint ¶ 22, *Alexander* (No. 03-CV-133).

terest convergence. Even after the Riot Commission's report,⁶⁵ the current reparations litigation in Oklahoma has been presented as a white-against-black struggle,⁶⁶ with many white citizens opposed to reparations for the survivors of the Tulsa Race Riot. Private donations to reparations funds have dried up and local citizens have resented the intrusion by "national" lawyers in their local issues.⁶⁷

IV. JIM CROW LITIGATION AS A FIRST STEP

Compared to political activism, reparations advocacy through litigation may have greater potential to create interest convergence. As Professor Hylton and others have noted, the chances of successful litigation are greatly increased where the reparations claim can be framed as a traditional civil rights issue, allowing the courts to concentrate on statute of limitations problems rather than on creative theories of litigation.⁶⁸ Two recent holocaust litigation cases suggest that, in circumstances similar to those presented in the Oklahoma litigation, there are, at the very least, grounds for tolling the statute of limitations.⁶⁹ Given that the Oklahoma litigation does not seek to rely on a novel theory of injury, the statute of limitations issue is essentially the only bar to recovery.⁷⁰

The point of reparations advocacy through litigation, as opposed to reparations political activism, is to create convergence by changing the stakes of the debate. That is certainly what happened during the litigation leading up to the decision in *Brown v. Board of Education*,⁷¹ and litigation success—indeed, perseverance—also changed the stakes in the Japanese-American internment debate. Once the Ninth Circuit Court of Appeals found that the federal government had made a material misrepresentation about the military exigency of its curfew and ex-

⁶⁵ TULSA RACE RIOT, *supra* note 16.

⁶⁶ See Editorial, *Double Jeopardy: Suit Cites Statute of No Limitations*, DAILY OKLAHOMAN, Feb. 28, 2003 (re-characterizing the 1921 Riot as a "racial war" that left both blacks and whites dead, and referring to reparationists as "professional race-baiters"), available at 2003 WL 13945084.

⁶⁷ See, Arnold Hamilton, '21 Tulsa Riot Case Polarizes: Some See Suit Emerging as Bellwether for Black Reparations Movement, DALLAS MORNING NEWS, June 23, 2003, at 1A.

⁶⁸ See Hylton, *supra* note 27, at 36–38; Anthony J. Sebok, *How a New and Potentially Successful Lawsuit Relating to a 1921 Race Riot in Tulsa May Change the Debate over Reparations for African-Americans*, Mar. 10, 2003, ¶¶ 1–4, at <http://writ.news.findlaw.com/sebok/20030310.html>.

⁶⁹ See *Rosner*, 231 F. Supp. 2d at 1204 (tolling statute of limitations for 58 years); *Bodner*, 114 F. Supp. 2d at 121, 134–36 (tolling statute of limitations for over 50 years).

⁷⁰ See Sebok, *supra* note 68, ¶¶ 22–27.

⁷¹ 347 U.S. 483 (1954); see also Bell, *Interest Convergence*, *supra* note 7, at 20–24 (suggesting the Court's opinion in *Brown* can best be understood by looking at its value to whites).

clusion policies of 1942, which it then hid for almost forty years, the statute of limitations was tolled and a suit was allowed to proceed in the mid-1980s.⁷² It was that outcome that prompted the reparations payments under the Civil Liberties Act.

The history of *Brown* demonstrates that incremental successes won on a divergent but related legal theory can result in convergence on the underlying goal of an initially unpopular legal strategy. *Brown* also demonstrates that such a strategy need not appeal to the majority of whites, but only those who have the power to change things. In other words, Bell is perhaps unduly pessimistic to suggest that:

The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites [T]he Fourteenth Amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle- and upper-class whites.⁷³

Thus, at the state level, the convergence of interests in the Oklahoma lawsuit may, in the short term, be limited to persuading the state to make changes to the Oklahoma educational system rather than paying out large sums of money. Nonetheless, such short-term convergence may bear long-term fruit. A well-structured educational package offers an opportunity to teach about the manner in which interests converge, providing a stepping stone to re-orient the public's perception about what people's interests are and where they converge.

The benefit of Jim Crow reparations litigation is not simply the relative simplicity, as compared to slavery reparations suits, of stating a claim. The relative immediacy of the injury, symbolized by the presence of living survivors such as Otis Clark, underlines the recency of such acts of discrimination and violent repression, demonstrating the persistent breadth and depth of racism in this country. Racism is broad in the sense that the virulent attacks on African Americans (and other minorities) have not been limited to a particular location. Many of us consider racial repression as a southern phenomenon, forgetting that all our towns, including New York, Boston, Chicago, Detroit, Omaha, Dallas, Los Angeles, and San Francisco, were segregated on the basis of race. All of these towns have suffered race riots.

⁷² See *Hirabashi v. United States*, 828 F.2d 591 (9th Cir. 1987). But see *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984) (dismissing reparations claim on statute of limitations grounds).

⁷³ Bell, *Interest Convergence*, *supra* note 7, at 22.

Most of these riots were perpetuated by white mobs attempting to subjugate the black citizenry.⁷⁴ In addition, all of these riots happened during this century. People who were there and who suffered are still alive. Some people who inflicted the suffering may still be alive.⁷⁵

Racism is deep because of the extreme measures we take to deny its existence. The shame that frequently—and rightly—accompanies the identification of an individual as a racist does not always result from a disavowal of the underlying beliefs but from a recognition of the social sanctions that follow from such an identification. It is the attitude of white peers to the tag “racist” that is regarded as problematic, not the failure properly to acknowledge the humanity of African Americans (or other minorities). As Bell notes, these attitudes have not disappeared, but resurface in white efforts to avoid integration.⁷⁶

Jim Crow reparations litigation forces the prevalence of segregationist practices upon the American public in all of its recency, its breadth, and its depth. It demands that the institutions that adopted these segregationist policies pay for them directly to identifiable victims or their children. If the reparations movement, at least in its Jim Crow aspect, has one benefit, it will be in giving the lie to the suggestion of *Adarand Constructors, Inc. v. Peña*⁷⁷ and *City of Richmond v. J.A. Croson Co.*⁷⁸ that discrimination is a thing of the past, and in tracing the identifiable legal and social effects of slavery and segregation in current society.⁷⁹ Furthermore, by providing a federal forum for real

⁷⁴ See Claudia Kolker, *A Painful Present as Historians Confront a Nation's Bloody Past*, L.A. TIMES, Feb. 22, 2000, available at 2000 WL 2213090; Nicholas Von Hoffman, *U.S. History, U.S. Riots: A Thread of Mob Violence, Civil Unrest*, L.A. TIMES, May 15, 1992, available at 1992 WL 2914207.

⁷⁵ Graphic evidence of this history of violence, often sponsored by states and municipalities, has been collected in photographs in *WITHOUT SANCTUARY* (James Allen ed., 2000), a memorial to the victims of lynching throughout the nation. Many of the photos can be viewed online at the Without Sanctuary Musarium, <http://www.musarium.com/withoutsanctuary/main.html> (last visited Nov. 12, 2003). These trophy pictures were circulated as souvenirs of the lynchings they depict. A similar photograph, entitled “Running the Negro out of Tulsa” is depicted in Professor Brophy’s excellent book, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921*, *supra* note 22, and in the Greenwood Cultural Center’s Riot Museum in Tulsa, Oklahoma. The Greenwood Center also maintains an online museum of the Tulsa Race Riot at <http://www.greenwoodculturalcenter.com/> (last visited Nov. 12, 2003).

⁷⁶ Bell, *Interest Convergence*, *supra* note 7, at 20–24.

⁷⁷ 515 U.S. 200 (1995).

⁷⁸ 488 U.S. 469 (1989).

⁷⁹ See Spencer Overton, *Racial Disparities and the Political Function of Property*, 49 UCLA L. REV. 1553, 1558–59, 1568–70 (2002). Professor Overton states that mandatory segregation policies in education, employment, housing, and business increased the inequality in the control of resources between white Americans and black Americans. *Id.* at 1558–59.

people to share their experiences in a way that forces the larger public to recognize their humanity, Jim Crow reparations litigation undermines the denial surrounding anti-African-American racism. Empathy, which sustains us as reparations advocates, is, on this view, one step towards manifesting interest convergence.⁸⁰

CONCLUSION

Several signs of interest in Jim Crow reparations, if not in convergence, are forthcoming. The recent academic endorsement of Jim Crow lawsuits is an indication of changing attitudes on the topic in the twenty-first century.⁸¹ This is especially so as the academy is just the type of elite audience that has generally proved resistant to reparations except in limited circumstances. A judicial endorsement of Jim Crow litigation would be even more gratifying, particularly for the victims and descendants of the Tulsa Race Riot. A legal victory, even if only on the statute of limitations issue, has obvious value as precedent for other cases that could be filed around the country.

Nevertheless, as I have argued elsewhere, the rejection of slavery reparations is a little too convenient.⁸² It permits us to forget that many of the founding fathers were slave-holders and racists who, over the objections of their colleagues, ensured that the Constitution reflected the views of slave-holders and not those of abolitionists.⁸³ Nowadays, Americans prefer to consider the Civil War as fought by the foes of slavery rather than by anti-secessionists, many of whom were pro-slavery (or at least ambivalent about its suppression), and ignore the fact that the Emancipation Proclamation preserved slavery in those states loyal to the North. Perhaps most concerning, the rejection of slavery reparations allows us to forget or deny that slavery imposed a holocaust that resulted in the extermination of millions of Africans through transshipment alone—individuals who were tossed overboard as ballast or spoiled cargo as needs required.

Furthermore, he asserts that wealth disparities that stem from past segregation reduce the ability of significant numbers of people of color to participate in democracy by making campaign contributions, purchasing airtime and billboards, and retaining lobbying assistance. *Id.* at 1568–70.

⁸⁰ On empathy or “intimacy” as a goal of the reparations movement, see Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45, 78–79 (2004).

⁸¹ See, e.g., Sebok, *supra* note 68.

⁸² See Ogletree, *Repairing the Past*, *supra* note 4, at 308–19.

⁸³ See Derrick Bell, *Brown v. Board Of Education: Forty-Five Years After The Fact*, 26 OHIO N.U. L. REV. 171, 175 (2000).

Thus, while Jim Crow lawsuits are a good beginning, reparations lawsuits must not stop at compensation alone. Some more general form of redistributive justice should be contemplated. Professor Hylton is opposed to this type of redistributive lawsuit, arguing that throwing money at the problem has not worked thus far.⁸⁴ Nonetheless, Hylton's case against wealth-redistribution, while interesting, is unproven because it fails to take into account a variety of factors that might impede wealth distribution as a cure for the ills inflicted by racism and segregation. Wealth-redistribution is an important goal for reparations, although (in the manner discussed by Hylton) that may be some way down the road.

In addition to wealth redistribution, the major goal of reparations litigation, one that is generally underemphasized, is knowledge redistribution. Knowledge redistribution engenders the empathy that may foster interest convergence; it also publicizes the voices of the alienated African Americans willing to endorse the likes of such outsiders as Al Sharpton in his run for President of the United States. These outsider voices must not only be represented but also addressed for the sake of whites as well as African Americans. The turn to nationalism and separationism under a politics of confrontation⁸⁵ promises to create a racial powder keg of disenfranchised African Americans who have little to lose by engaging in desperate acts of protest. Yet the reparations movement has a long way to go before it persuades white elites that the sort of redistribution contemplated is a good thing. For the sake of all American citizens, let us hope we succeed sooner rather than later.

⁸⁴ See Hylton, *supra* note 27, at 34–36.

⁸⁵ See Miller, *supra* note 80, at 48–56.