

# Forty Acres and a Mule in the 21st Century\*

William Darity, Jr., *Duke University*

In general, a program of reparations is intended to achieve three objectives: acknowledgment of a grievous injustice, redress for the injustice, and closure of the grievances held by the group subjected to the injustice. Three types of injustices motivate a program of reparations for black Americans: slavery, the nearly century-long Jim Crow regime following Reconstruction, and ongoing discrimination. Inauguration of a reparations program on behalf of black Americans preferably will be undertaken via legislative action at the federal level, rather than by judicial fiat. Logistical issues addressed in the article include determination of the magnitude of the reparations bill and the criteria to be used to identify those eligible to receive reparations. The present day value of 40 acres and a mule can provide the foundation for the calculation of the magnitude of reparations owed to black Americans.

Three objectives can be ascribed to a program of reparations: acknowledgment, redress, and closure. Acknowledgment refers to the public recognition of a grievous injustice committed by the institution or group that bears responsibility for it. This includes a formal apology. No such apology ever has been made by an official entity of the U.S. federal government either for slavery or for the Jim Crow practices that followed slavery within the nation's borders. In contrast, Benin—once Dahomey—an African nation with a population of less than 5 million people has made an apology to African Americans for their ancestors' participation in the sale of other Africans into slavery. The apology was delivered in 2003 by Benin's ambassador, Cyrille Ogcien (Associated Press, 2003). A more encouraging sign in the United States is the series of apologies for slavery and legal segregation issued by state legislatures, including those in Alabama, Florida, New Jersey, North Carolina, and Virginia.

\*Address correspondence to William Darity, Jr., Arts and Sciences Professor of Public Policy Studies, African and African American Studies, and Economics, Duke University (wd2@duke.edu). Earlier versions of this article were presented at the South Africa-United States Civil Society Forum held December 9–11, 2003 at Duke University and the Distinguished Invited Lecture at the Southwestern Social Science Association Conference in Corpus Christi, Texas on March 18, 2004.

Redress refers to compensatory actions taken to mitigate, to the extent possible, the long-term consequences of the grievous injustice. With respect to reparations due African Americans, this would involve the design and implementation of a program that would eliminate historically generated racial disparities in the United States caused by slavery, legal segregation, and ongoing discrimination.

Closure refers to a settling of accounts, a healing process brought to fruition. Concretely, again with respect to reparations due African Americans, it would mean that in the aftermath of an effective reparations program, no further claims for race-based initiatives on behalf of blacks for the wrongs of slavery, Jim Crow, and past discrimination would be forthcoming.

Ironically, recent interest in the idea of reparations for African Americans was sparked by a notorious advertisement attacking reparations placed by David Horowitz in numerous campus newspapers on behalf of his Center for the Study of Popular Culture in February 2002. Thus far, there is no official support or lobbying on behalf of reparations for African Americans from major, credible civil rights organizations in the United States, including the NAACP and the National Urban League. The organization that has stood most solidly as an advocacy group for reparations is the National Coalition on Black Reparations (N<sup>o</sup>COBRA), which is neither as well known nor as widely visible as the NAACP and the National Urban League. N<sup>o</sup>COBRA also conceives of itself as functioning philosophically outside of a narrow “civil rights” discourse and instead as operating as part of a wider “human rights” discourse. While civil rights discourse emphasizes equalizing access, human rights discourse emphasizes retributive or restorative justice.

Pursuit of reparations for African Americans in the United States primarily has been followed through the judicial route. Charles Ogletree, N<sup>o</sup>COBRA, Daedria Farmer-Paellmann, and Jerry Leaphart all have developed court cases seeking reparations. Farmer-Paellmann, in particular, has brought suit against corporations that profited from slavery. Her efforts have further galvanized media attention and interest in reparations, but the legal obstacles she has faced are substantial. No reparations case brought to the U.S. judiciary on behalf of African Americans has been litigated successfully.

For example, in 1995, in the case of *Cato v. United States*, a \$100 million reparations case brought against the federal government “was dismissed . . . [by a] sympathetic U.S. Appeals Court in San Francisco . . . after saying it could not find a legal basis for it” (Cox, 2002). The appeals court said reparations activists should seek redress from the U.S. Congress. In early 2004, another case brought against private corporate entities Lehman Brothers, R. J. Reynolds Tobacco, and Aetna was dismissed by U.S. District Judge Charles Norgle in Chicago. Because the case was dismissed “without prejudice . . . slave descendants seeking reparations from U.S. companies are allowed to file an amended complaint.” In his decision, the judge indicated that a matter of this type “has been historically and constitutionally com-

mitted to the legislative and executive branches of government” (Associated Press, 2004).

A more recent case has been brought by lawyer Edward Fagan and a group of plaintiffs, including Queen Mother Dolores Barclay (so named in honor of pioneering reparations activist Queen Mother Audley Moore) as well as Daedria Farmer-Pullman herself. The plaintiffs have named Lloyd’s of London in the suit. Plaintiffs intend to demonstrate on the basis of DNA evidence that they are direct descendants of persons enslaved and transported on ships insured by Lloyd’s. Apparently not particularly worried about the outcome of the case at the time, a Lloyd’s spokesman observed arrogantly, “previous claims regarding slavery involving Lloyd’s have been dismissed without prejudice” (BBC News, 2004).

Three major limitations are associated with reliance on litigation to attain reparations for African Americans. First, slavery was state sanctioned from the beginning of the republic, so corporations can respond that they were not behaving illegally. Their behavior certainly was immoral. Indeed, the immorality of slavery was recognized by some of the nation’s founders. An initial draft of the Declaration of Independence attacked the King of England for his involvement in the slave trade, but that passage was deleted because of the resistance of delegates from the southern colonies (Combs, 2002:ch. 4). Ultimately, the state must be the object of attention, but any lawsuit against governmental entities must overcome the difficult legal barrier of sovereign immunity.

Second, Farmer-Paellmann’s specific approach does not address the rationale for reparations arising out of the postslavery practices of Jim Crow (or apartheid in the United States) that lasted for close to a century nor for ongoing discriminatory practices in America’s postapartheid era. There are living victims and palpable, measurable adverse effects on current generations of African Americans from the operation of racism in the United States since the end of slavery (see, e.g., Darity, Dietrich, and Guilkey, 2001). The case for reparations based on the wrongs of Jim Crow establishes strong parallels with the terms and content of the Civil Liberties Act of 1988, the federal legislation that enabled reparations for Japanese Americans who had been subjected to incarceration during World War II.

Consider the litany of wrongs visited upon African Americans under the formal regime of apartheid in the United States. These wrongs include educational deficits imposed on blacks through the mechanism of a dual system of schooling. These deficits were not corrected nor remedied by school desegregation. In addition, African Americans were subjected to loss of life via the lynching tree and loss of property via land seizures by night-riding white terrorists (Darity and Frank, 2003:326–27). Raymond Winbush (Barclay, 2001:3) even has proposed a connection between lynchings and land loss, speculating that the lynching trail across America also was a trail of stolen property. Jim Crowism reached its apex as an engine for destruction of black wealth with the literal annihilation of prosperous black

communities, including Danville, Virginia in 1883, Wilmington, North Carolina in 1898, Atlanta, Georgia in 1906, Tulsa, Oklahoma in 1921, and throughout Florida in the 1910s and 1920s (see Dailey, 2000; Umfleet, 2005; Mixon, 2005; Brophy, 2002; Ortiz, 2005).

Thomas Mitchell (2001), in a comprehensive study on black land loss, demonstrates that fraudulent and semi-fraudulent legal means were used to appropriate black-owned land during the Jim Crow period and beyond. Mitchell highlights the use of partition sales as the major method used to de-cumulate black-owned property. Compounding the harms of the Jim Crow period was the fact the black Americans in the U.S. South were taxpaying citizens while being prohibited from exercising the vote. Indeed, from the Reconstruction era a white terror movement emerged specifically with the intent of eliminating black political participation (Trelease, 1971); this was the explicit intent of white violence in Danville, Wilmington, Atlanta, and Florida. The Jim Crow era also established the framework for discriminatory treatment of blacks in the criminal justice system and in employment, practices that continue to the present. Thus, the omission of the wrongs of the postslavery period in the United States is a serious limitation of Farmer-Pullman's approach.

The third weakness arises because judicial success without broad popular support can result in the castration of any program for change. Witness the long-term consequences of the *Brown v. Board* decision adopted by the courts without broad, popular sentiment in favor of integration of schools. Judicially-based reparations without dense political support in the U.S. population is unlikely to be an effective reparations program.

Ultimately, legislative action will be needed to produce a reparations program on behalf of African Americans. The difficulty here is the depth of opposition to such a program. In 2002, a *USA Today* article reported that only one-third of white Americans are receptive to apologies and scholarships being offered to African Americans as atonement for slavery, and only 11 percent favored cash payments for the descendants of slaves (Cox, 2002). In a more comprehensive national survey conducted in 2000, Michael Dawson and Roxanna Popoff (2004) report that respondents were first asked whether they favored an apology to Asian Americans for internment. Respondents were not told that such an apology already had been made, subject to the terms of the Civil Liberties Act of 1988. Seventy-five percent of African-American respondents said "yes" while the remaining 25 percent said "no." But only 43 percent of white respondents said "yes," while the remaining 57 percent said "no."

Then respondents were asked whether Asian Americans should receive monetary compensation for being subjected to internment. Again, respondents were not told that payments of \$20,000 apiece had been made to former internees under the terms of the Civil Liberties Act of 1988. A majority of African Americans, 59 percent, responded in the affirmative, with the remainder dissenting. However, only 26 percent of white Amer-

icans endorsed monetary compensation for internees, with the remaining three-quarters disagreeing.

Respondents next were asked whether an apology should be made to African-American descendants of slaves. Among African Americans themselves, 79 percent said “yes” and 21 percent said “no.” However, among whites, the percentage favoring an apology to African Americans was much lower than the percentage favoring an apology to Japanese Americans. Only 30 percent of white respondents approved of such an apology. Even more dramatic was the racial divide when respondents were asked whether monetary compensation should be paid to African-American descendants of slaves. Sixty-seven percent of African Americans said “yes,” with the remainder saying “no.” But among whites, a mere 4 percent said “yes,” with the remaining 96 percent saying “no.”

Since political support from white Americans would be essential for enabling legislation to be passed to establish a reparations program for African Americans—or merely to get Rep. John Conyers long-stalled bill to establish a commission to study reparations for African Americans out of committee—these numbers indicate that the task of building a national movement of black reparations is daunting. Still, the legislative route seems to be the most likely route to produce a comprehensive and effective reparations program. So the serious and hard task is one of persuading the U.S. public of the validity of reparations for African Americans.

Reparations authentically is a foregone promise to the ex-slaves and their descendants. The phrase “forty acres and a mule” somehow has been cloaked in the mists of African-American folklore, but it is a phrase that has a clear foundation in the facts of the conditions of the expected compensation to be delivered to the newly freed slaves at the close of the Civil War. “Forty acres and a mule” is no mere mythological claim on the part of African Americans.

On January 16, 1865, after completing his march to the Georgia coast, General Sherman issued Special Field Orders No. 15 that established the provision “of not more than (40) forty acres of tillable ground” designated “for the settlement of the negroes now made free by the acts of war and the proclamation of the President of the United States.” The territory to be settled under Sherman’s orders included “[t]he islands from Charleston, south of the abandoned rice fields along the rivers for thirty miles back from the sea, and the country bordering the St. Johns River” (Sherman, 2003:325–27).

More expansively, the Freedman’s Bureau Act of March 3, 1865, pursuant to the Southern land confiscation acts of 1861, 1862, 1863, and 1864, had an explicit racial land redistribution provision. Again, “not more than 40 acres” of land was to be provided to refugee or freedman male citizens at three years’ annual rent not exceeding 6 percent of the value of the land based on appraisal of the state tax authorities in 1860. At the end of the three years, the occupants could purchase the land and receive title. Similar

provisions were included in the postwar Southern Homestead Act of 1866; freedmen were to receive land in the southern states at a price of \$5 for 80 acres. Neither of these Acts were implemented on behalf of the ex-slaves with any degree of vigor given the fierce opposition of President Andrew Johnson. By the end of 1865, Johnson also had ordered the removal of former slaves from the coastal lands they had settled under the conditions of Sherman's Special Field Orders No. 15. The lands ultimately were restored to the former slave owners (see Friedman, 1996; McPherson, 1964; Shabazz, 1994).

Had such a racial land reform taken place in the United States during the late 1860s, it is easy to envision that the vast current differences in wealth between blacks and nonblacks would not exist. Although the black-white per-capita income ratio is in the upper 50 percent range, the highest estimates of the racial wealth ratio run in the 15–25 percent range (Chiteji, 1999). Since the major sources of wealth for most persons today are inheritance and in vivo transfers (Darity and Nicholson, 2005), a past history of wealth deprivation has dramatic intergenerational effects.

Indeed, had the promise of 40 acres been fulfilled, one can readily imagine a completely different U.S. history unfolding over the course of the subsequent century, a history in which race did not intertwine with dense inequalities. "Forty acres and a mule," with the mule as a metaphorical stand-in for additional farm implements and supplies as a startup, was conceived as a grant to each family of ex-slaves, typically construed as a family of four. Implicitly, then, 10 acres would have gone to each ex-slave, for a total land allocation of 40 to 45 million acres. Remarkably, as Mitchell documents, blacks somehow managed to accumulate 15 million acres of land by dint of their own initiative during the postemancipation years, but the cumulative effects of land taking have reduced that total to about 1 million acres of black-owned land today.

The insight of economists can be of use in calculating the magnitude of the bill for reparations. Ransom and Sutch (1990) used a concept of slave exploitation to arrive at one estimate. They treated slave exploitation as the part of labor's product not returned in food, shelter, or other consumption items—in short, the profits of the slave system. Ransom and Sutch calculated that the profits of the slave system for the interval 1806 to 1860 compounded to 1983 came to \$3.4 billion. The present value of that sum compounded to the present at an annual interest rate of 5 percent is approximately \$9.12 billion.

Larry Neal (1990) derived an estimate based on the gap between the wage an enslaved African would have received had he or she been a free laborer and what was spent on slave maintenance by slave-owners between 1620 and 1840. Neal arrived at an estimate of \$1.4 trillion by 1983. Again, compounding to the present at 5 percent interest yields a total of close to \$4 trillion by the end of 2004.

James Marketti (1990) utilized a concept of income diverted from enslaved Africans during the course of slavery in the United States to arrive at a

figure of \$2.1 trillion by 1983. The present value of his estimate after compounding annually at 5 percent is about \$6 trillion.

None of these approaches incorporate the harms of slavery, the inherently coercive nature of the system, the denial of the ability to accumulate property or acquire education, or the denial of control over one's family life. If anything, all three of these calculations can be viewed as underestimates.

However, the unfulfilled promise of 40 acres per family also provides a means to gauge the magnitude of reparations owed to the descendants of those enslaved. A conservative estimate of the price of land in the United States in 1865 would be \$10 per acre (Mittal and Powell, 2000). An allocation of 40 acres to a family of four would imply 10 acres per person, hence a value of \$100 per ex-slave in 1865. If we also take as a conservative estimate the total number of ex-slaves who had attained emancipation at the close of the Civil War as 4 million persons, 40 million acres of land valued at \$400 million should have been distributed to the ex-slaves in 1865. The present value of that sum of money compounded from 1865 at 6 percent (5 percent for interest earned and 1 percent as an inflation adjustment) would amount to more than \$1.3 trillion. If there are approximately 30 million descendants of enslaved Africans in the United States today, the estimate based on 40 acres yields an allocation of slightly more than \$400,000 per recipient.

I also envision a "portfolio" of reparations, rather than the fund for reparations being utilized in a single way. A total of \$1–6 trillion could partly take the form of a direct payout to eligible recipients. The payout need not take place in one lump sum but could be allocated over time. For example, German government payments to victims of the Nazi holocaust often have taken the form of \$100 monthly checks. Reparations also could take the form of "establishment of a trust fund to which eligible blacks could apply for grants for various asset-building projects, including homeownership, additional education, or start-up funds for self-employment," or even vouchers for the purchase of financial assets (Darity and Frank, 2003:327–28).

These preceding sums are estimates of the per-person missing compensation for slavery. They are separate from any calculation that might be undertaken for the costs of the succeeding near century-long practice of state sanctioned segregation under the Jim Crow regime. Those costs are substantial, including the aforementioned loss of personally accumulated land seized by white terrorists, the denial of quality education, the exclusion from better paying employment, the loss of life due to lynching practices, and the constraints of spatial segregation (see Darity and Frank, 2003:326–27).

Chachere and Udinsky (1990) sought to estimate the gains to whites from labor market discrimination just during the period 1929–1969 and found that the benefit came to \$1.6 trillion by the mid-1980s. Their estimate was premised on the assumption that at least 40 percent of racial income inequality is attributable to discrimination. Numerous observers have charged that social transfer programs—although they have not been racially tar-

geted—already constitute reparations. David Swinton (1990) sought to net out the costs of transfer programs from the Chachere-Udinsky total. Swinton found that a residual of at least \$500 billion would remain even if all social transfer programs were deducted from the \$1.6 trillion figure for the same interval.

Eligibility for reparations should have two criteria. First, individuals would have to establish that they are indeed descendants of persons formerly enslaved in the United States. Second, individuals would have to establish that at least 10 years prior to the adoption of a reparations program they self-identified as “black,” “African American,” “Negro,” or “colored.” This would preclude persons who have lived as white, thereby benefiting from white privilege, suddenly claiming a black identity to access reparations (Darity and Frank, 2003:327).

Reparations for African Americans are long, long overdue—more than a century overdue. The political prospects for payment still seem distant, but such a payment is both just and necessary as a mechanism to close the persistent racial gaps that exist in the United States. Now the U.S. public has to be convinced of the correctness of this cause and support the appropriate action—action that will reverse Andrew Johnson’s abrogation of the promise of “forty acres and a mule.”

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