

Statement of

Eric J. Miller

Assistant Professor

Saint Louis University School of Law

Before the

House Judiciary Committee

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

December 18, 2007

Mr. Chairman, Members of the Committee:

I am honored by the Committee's request that I testify at this very important hearing on the Legacy of the Trans-Atlantic Slave Trade. Chairman Conyer's efforts to raise awareness of this issue, and to promote the study of this issue through H.R. 40, are rightly celebrated. Thanks in large part to his efforts, state legislatures in Virginia, North Carolina, Maryland, and Alabama, have engaged in an investigation of, and apology for their sponsorship of the Slave Trade. These important developments have stimulated a national discussion of the role of slavery in American history and pose the difficult question of how to acknowledge and account for it in America's present. That discussion is one that H.R. 40 seeks to sponsor, and one that this legislature should support.

Despite being almost a century-and-a-half removed from slavery, and fifty years from *de jure* segregation, we are not very good at talking about race in America. In part, that is because we, as a public, are not very knowledgeable about that history. Even relatively recent incidents from the Jim Crow era have been deliberately hidden or forgotten.¹ Yet there are still living the survivors of the race riots that swept the South and Midwest designed to rid or coerce them into submission whole communities of African Americans.² Their voices are still discounted or outright silenced.

One reason our civic discussion of race and racism is so stunted is that finding the means to talk about the history and legacy of slavery and segregation for America has hardly begun. It cannot properly start until we have some shared understanding of the still-hidden aspects of slavery and segregation upon which our community is based.

Public institutions are at the forefront of recent initiatives to promote an informed and inclusive discussion of race and history in America. State legislatures, like those in Rosewood, Florida, Tulsa, Oklahoma, and Greenwood, North Carolina, have convened

¹ See, e.g., OKLA. COMM'N TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT (Comm. Print 2001); OKLA. STAT. ANN. tit. 74, § 8000.1 (West 2002) (making legislative findings that Oklahoma state officials engaged in "conspiracy of silence" to cover up Tulsa Race Riot of 1921).

² See, e.g. JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 90-115 (2005) (describing manner in which private and municipal actors forced African Americans out of various municipalities).

commissions to investigate and report upon community-sponsored killings of African Americans.³ These innovative inquiries, explicitly modeled on the Civil Liberties Act of 1988⁴ and H.R. 40,⁵ have sought to publicize and provide redress or closure for the citizens or descendants of state-sponsored racial violence. Various universities have sponsored studies to determine their own involvement with slavery and educate a state and national audience about their shared responsibilities.⁶ That research has led some of these institutions, including the University of Alabama, the University of North Carolina, and the Episcopal Church have actually apologized for their ties to slavery.⁷

Many of these initiatives have been formulated around or influenced by the concept of “reparations.”⁸ Too often, however, reparations for African Americans are characterized by a posture of confrontation pitting the descendants of African American slaves against majority of whites who claimed to have received no benefit from slavery. The confrontational model of reparations tends to focus on the establishing and seeking financial redress for some duty owed by whites to blacks for the wrong of slavery. Such theories are generally premised upon addressing the rights and duties implicated in reparations claims through the standard, bilateral model of individual or group rights, in which the rights of one individual or group are pitted against another. On this model, whosoever has the stronger right — to compensation or to be let alone — in a given instance, wins.⁹

³ See, e.g., OKLA. STAT. ANN. tit. 74, § 8201 (West 2002) (creating commission to study events of Tulsa Race Riot of 1921).

⁴ CIVIL LIBERTIES ACT OF 1988, 50 U.S.C. app. §§ 1989-1989b-9 (2000).

⁵ Commission to Study Reparations for African Americans Act, H.R. 40, 108th Cong. (2003). Compare e.g., 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)).

⁶ See, e.g., SLAVERY AND JUSTICE: REPORT OF THE BROWN STEERING COMMITTEE ON SLAVERY AND JUSTICE (2006).

⁷ Wendy Koch, *Va. 1st State to Express “Regret” Over Slavery*, USA TODAY, Feb. 25, 2007.

⁸ See, e.g., Charles J. Ogletree, Jr., *Chapter 17 Addressing The Racial Divide: Reparations*, 20 HARV. BLACKLETTER L.J. 115 (2004).

⁹ Discussions of moral or legal conflict can be phrased in terms of “balancing.”

T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 962 (1987); see also Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 596 (1988) (identifying three steps to any balancing test: “announcing the factors to be balanced, weighing those factors, and announcing the victor”).

Part of the problem presented by the confrontational reparations claim is that it is over-inclusive and so fails to provide a satisfactory theory of compensation. The familiar argument is that it identifies too many white people as owing a duty to repay and too many African Americans as having suffered the harm.¹⁰ But whites also play the confrontation card, arguing they have no such duty to their fellow citizens either because there is something about African Americans — usually their culture — that is peculiarly to blame for the ills besetting that community; or because the duty to compensate which once may have existed has been exhausted, perhaps simply due to the passage of time, or perhaps because African Americans who adopt a “victim” status have already received all the benefits due them.¹¹

Neither of these versions accurately states the issues. The confrontational model is too narrow to capture both the harm inflicted and the strategies necessary to remedy that harm. On both sides of the debate, confrontation takes for granted that reparations proponents seek financial redress for wrongs inflicted in the past on the basis of some more-or-less moral theory of entitlement to redress. Yet the current discussion of what reparations is, and what types of reparations are appropriate, does and must depend upon a broader notion of the harm inflicted and must reflect the particular wrongs that need to be “repaired.” What the various state and university sponsored public commissions have demonstrated is that the harm inflicted and the benefits accrued are not singular but plural, affecting a range of communities at different times and in different ways.

Reparations is much more than, and on occasion unconcerned with, monetary restitution. When not phrased in purely monetary terms, reparations offers an opportunity to explore our shared history to determine our mutual investment in each other. It seeks to trace and account for past behavior, and resists specifying in advance what sorts of restitution are appropriate, and from whom. At bottom, reparations seeks to develop a more accurate understanding of the story of race in America. It adopts an open-minded approach to the

¹⁰ See, e.g., David Horowitz, *Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks - and Racist, Too!* ¶¶ 3-4 (Mar. 12, 2001) (controversial anti-reparations advertisement), at http://www.adversity.net/reparations/anti_reparations_ad.htm.

¹¹ See, e.g., John McWhorter, *Blood Money: Analysis Of Slavery Reparations*, AM. ENTERPRISE, July 1, 2001, at 18 (discussing reparations as example of African American “victimology”).

American past as well as the American present, while questioning which accounts of that past and present are open to challenge and reconfiguration.

Put this way, reparations encompasses three distinct stages: acknowledgment; accounting; and redemption. The first stage, acknowledgment, requires us to recognize that a harm or harms have occurred. The second stage, accounting, requires us to investigate and identify the nature of the harm, the wrongdoers and the people harmed. The third stage, redemption, requires us to disseminate the information discovered through research, and encourage, where appropriate, any wrongdoers to apologize to the people harmed for the harms done or make whole the people harmed. Given the lapse of time since slavery and segregation, such making whole may take many forms. It may stop at education or apology, or may require more direct restitution (where, for example, there are living survivors of Jim-Crow era state-sponsored violence).

The simple fact is that reparations is now in the mainstream of American discourse about race. Most Americans have accepted the first stage: acknowledgment. That is, it is now uncontroversial that slavery and segregation were wrong. What is disturbing is a subsequent history that has sought to minimize, hide, and silence broad-ranging studies of the history of slavery and segregation, and publication of the results.¹² States are taking the initiative in the second stage, accounting for the history of slavery and segregation in America. And some states, along with some of our corporations and internationally renowned centers of education are even proceeding to the redemption stage.

This mainstream version of reparations is best characterized as a conversation in which we can chart our investment in a variety of geographic, social, and political communities, and in which we can publicly accept or decline responsibility for past, present, and future. It rejects discussion of race in America as a zero-sum game, where there is only one right answer or way of doing things, discovering and taking responsibility is a dynamic process of creating and recreating the basis of our society.

¹² OKLA. STAT. ANN. tit. 74, § 8000.1 (West 2002) (discussing state-sponsored attempts to cover up the Tulsa Race Riot of 1921).

This conversational model of reparations invites a process questioning the basis of our shared community. Reparations is thus part of a dynamic process in which one seeks to determine how we got where we are, and what the consequences of that should be. The claims made through reparations are useful, in part, by ruling out certain arguments from the get-go as having the weight others wish to put on them. Thus, if reparations succeeds in tracing the underdevelopment of African Americans by whites, certain notions of desert and failure, responsibility and innocence, are ruled out of the debate on race, discrimination, and their consequences for American society. Here, the question becomes one of community: whether we can find a common set of valuations that enable us to understand the present significance of our acts, given our shared and divided past.

Reparations argues that we need to account for the ways in which the federal, state, and local governments that have profited off or promoted slavery and segregation. In part, it seeks to chart the ways in which national, state, and local communities have consolidated their civic identities in response to acts of racial violence both during and after the era of slavery. At a minimum, it seeks to explore the effects that slavery and segregation played in establishing the relative social inequality of African Americans as compared to other racial or ethnic groups. Reparations as a moral argument makes it impossible for citizens to ignore the contribution of slavery and of de jure segregation to the current character of our society.

The stakes of the reparations discussion are high. To fail to acknowledge and account for America's history is to ignore and reject the past and continuing experiences of a huge segment of the population. It is to perpetuate the treatment of African Americans as somehow less worthy or interesting than other citizens.

Conclusion

Justice Kennedy recently suggested that “an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can

assign to the other all responsibility for persisting injustices.”¹³ It is all the more pressing, then, to engage with an open mind in the process of accounting and reckoning to make more concrete and less amorphous the source of and solution for such injuries. Investigating slavery and segregation is not an impediment to a discussion of race and justice in America, but its necessary first step.

¹³ *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2795 (2007).