

Restorative Justice

An Ethical Argument for Reparations

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Abstract

The idea of making reparations to the African-American community is a controversial one. Reparations often refer exclusively to repairing harms suffered by Black Americans during slavery, but I argue that the Black Community should receive reparations for harms that continued through the Jim Crow era, as well as those that endure to this day. Reparations are not meant to be a punishment for European-Americans, as is so often claimed by those who oppose them. Rather, they are intended to work toward justice through the rehabilitation of the Black Community, which has suffered through slavery, virtual apartheid, subjugation, and disenfranchisement over the course of their presence in the United States. It is ethically incumbent upon us, as we claim to be a society that promotes justice and equality, to attempt to restore justice where it has been compromised. Indeed, we have made historical attempts at restorative justice. As a nation, we made reparations for victims of Japanese Internment Camps and the Rosewood Massacre in Florida. The idea of making reparations goes back to Hammurabi's Code and Sumerian Law; it has been an enduring theme in common law and ethical codes. Reparations positively impact Black Americans in two major ways: through acknowledging that they have been made victims of horrible crimes, and through compensating them for the harms that have resulted from those crimes.

“Whoever is content with the world, and who profits from its lack of justice, does not want to change it.”

—Friedrich Durrenmat

Let me begin by explaining that I am fully aware my position makes me a radical. It is unpopular, it

is taboo, and by many people in the United States today, its realization is feared. It will not soon be part of a keynote speech at a popular, mainstream conference; nor will it be the goal of a club or organization at your average college or university. It is an incredibly divisive issue. I do not write this essay under any delusion that the topic at hand is polite dinner conversation, or that there is any kind of consensus among the American people regarding whether or not this course of action should be carried out. I write it because it is so often that the most important ethical issues go unmentioned, precisely because they are difficult. I write this because it is an ethical issue that was difficult for me, and one that I now find so compelling that I feel it is ethically incumbent upon me to argue in favor of it.

“The decision to repair what has been broken is not an admission of guilt.”

I am referring to the issue of reparations for African-Americans: not only for slavery, but for the decades of government facilitated injustice and Jim Crow segregation that followed it. It is true that many people alive today had nothing to do with the terrible crimes committed against the African-American community. However, after years of struggling with this issue, I have come to my own ethical conclusion: the decision to repair what has been broken is not an admission of guilt. The relationship between African-Americans and European-Americans has been marred by centuries of atrocities for which I am not culpable. Still, I now argue that all of us, as members of one society, are *ethically responsible* for rehabilitating that which needs restoration. I believe that, after decades of enslavement, virtual apartheid, disenfranchisement, and subjugation, the African-American community is in need of restoration, for the good of both

European-Americans and African-Americans. In order to be ethically consistent, we as a nation must pursue justice for all peoples. Our Constitution, creed, and consciousness require it. This includes justice for African-Americans, upon whom our country has inflicted unspeakable harms and to whom we are greatly indebted.

Reparations are, of course, a means of repairing that which has been damaged. They are a way of accomplishing restorative justice. The crux of restorative justice is the idea that when a wrong is committed, there exists an ethical duty to right the wrong. The perpetrator, the victim, and their community must work together to right the wrong through “repair, reconciliation, and reassurance.” Restorative justice considers not only the initial crime, but also the long term impacts of the wrongdoing. Restorative justice is a particularly good aspiration for the situation at hand, as it satisfies both substantive and procedural justice; that is, it satisfies both moral and legal standards of fairness. The satisfaction of both of these is very important when dealing with reparations for African-Americans, because their treatment shows that the law itself does not always deal justly or ethically.

Indeed, the United States Constitution itself condoned slavery in Article I, Section IX, where it promised the buying and selling of slaves would be permitted at least until 1808, and that the taxation on these persons would not be heavy. Worse still, perhaps, are the Black Codes, also known as Jim Crow laws, which were designed specifically to disenfranchise and intimidate Black freedmen while still satisfying procedural justice. Procedural justice, therefore, although it satisfies the law, cannot be depended upon to ensure the fair treatment of all peoples. Indeed, those who seek to satisfy procedural justice alone may well end up compromising substantive justice. Take, for example, those who worked in the Underground Railroad as aids to runaway slaves: their actions served substantive justice, but if they had focused only on procedural justice, they would have returned their slaves to their owners, compromising their ethics for legality.

This makes it necessary to move beyond mere procedural justice to the more universal, ethics-focused substantive justice. Insofar as restorative justice satisfies both, it provides a good basis for determining how we should work on repairing the harm that has been done to the African-American community.

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Of course, restorative justice is not a new idea. It has been employed since the time of Sumerian law and Hammurabi’s code, based upon the idea that attempting to repair harms is a better means of serving justice than is attempting to punish. A victim of theft, for example, is more positively impacted by receiving restitution from the perpetrator than they would be if the offender paid for a crime to the state. The United States itself has a strong history of practicing restorative justice, with examples ranging from systematic applications with First Peoples and victims of Japanese Internment Camps during World War II (who received monetary compensation from the government) to individual applications with personal law suits regarding civil matters. Although opponents of reparations argue that statutes of limitations prevent payment of reparations for African-Americans, U.S. courts have waived them when dealing with such cases as Florida’s Rosewood Massacre, granting \$7,000,00 to the victims and their descendants, in order that restorative justice be served. Indeed, President George Bush himself, in 2003, called slavery “one of the greatest crimes in history,” and declared that its legacy continues: that it “did not end with slavery or segregation,” and that we need to “confront that legacy.”¹ This statement was so influential that the House of Representatives cited it in their own *Apology for Slavery*, which also states outright that the negative impacts of slavery

¹ *Apology for Slavery*” *Poverty and Race* 17.5 (2008). Proquest. Web. 30 Nov. 2012.

and the Jim Crow south continue today. The intention declared for the *Apology* was not to “erase the past” but to take “the first step in the process of racial reconciliation.”² Reconciliation, of course, is an essential element of restorative justice, and the House’s *Apology* even goes on to express their desire to “rectify” the problems that exist today as symptoms of past crimes, and adds that it “seeks justice for all citizens.”³

These political positions are consistent with the direction in which the international community is moving. The General Assembly of the United Nations aspires to a more thorough implementation of restorative justice, as is seen in *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. This document is of particular importance here: it recognizes the right of victims to benefit from reparations. In its preamble, it discusses the importance of rehabilitation and compensation for those who have been victims of Gross Violations of International Human Rights Law, which include slavery and systematic discriminatory laws like the Black Codes. Since opponents of reparations so frequently argue that because the statute of limitations is expired, the court has no power to grant reparations, it is noteworthy that, in Article Four, it states statutes of limitations should not apply to cases in which international law is violated, because of the egregious nature of collective human rights violations. The *Basic Principles and Guidelines* also provide criteria, in Article Five, for who qualifies as a victim of a gross violation of international human rights law:

“...victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute

gross violations of international human rights law, or serious violations of international humanitarian law.”⁴

Certainly, all of these harms have been caused by centuries of systematic discrimination against the African-American people. The *Universal Declaration of Human Rights* categorizes enslavement of a people, in its fourth article, as a serious violation of international humanitarian law. The *Charter of the Nuremberg Tribunal* established both slavery and legalized racial discrimination as crimes against humanity on an international scale regardless of domestic legality. Both the *Rome Statute of the International Criminal Court* and the U.N. *Declaration on the Elimination of All Forms of Racial Discrimination* establish segregation as a crime against humanity.

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It is safe, then, to assert that slavery and the systematic discrimination that followed it were egregious violations of human rights, that both domestic law and international law that we as a nation are a party to support this argument, and that restorative justice is an appropriate means of remedying such situations. There is not much disagreement about this. Surprisingly, though, when reparations, the natural ethical and logical conclusion of the aforementioned ideas, are brought up, the people dissent. If the purpose of justice is to give each his due, then certainly justice is best served by giving the African-American community *their* due. It seems, then, that so many Americans decide to break from their ethical code when it comes to taking ethical action, not when it comes to making

² Ibid.

³ Ibid.

⁴ “Basic Principles and Guidelines on the Right to a Remedy and Reparation.” *Office of the High Commissioner for Human Rights / OHCHR Welcome page*. N.p., n.d. Web. 30 Nov. 2011. <http://www.ohchr.org/EN/Pages/WelcomePage.aspx?id/29764460/ns/business-sports_biz/t/how-nfl-became-americas-game>

theoretical ethical determinations. The vast majority seems to think slavery and Black Codes were terrible tragedies; still, a large number draw the line at trying to repair the damage.

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I could fill pages and pages with horrifying examples of ways in which African-Americans have been mistreated and abused in the United States. I could write dozens of tear jerking tales of how they have been disenfranchised. I could tell sob stories about how they need a helping hand. All of these actions would miss the point, however, which is not to victimize the African-American community with an ill-thought out cash payment and a half-hearted apology, but, rather, to focus on rehabilitating the African-American community, on reconciling the African-Americans and European-Americans, and on restoring a relationship of an egalitarian nature to those two ethnicities which God created equal. The goals of restorative justice are not to guilt, shame, or punish the offender. Instead, the goal is to work with the community to acknowledge a wrongful act and try to repair its damage. It is true that the slaveholders of the nineteenth century are no longer alive to pay for their actions; I am not suggesting that anyone be punished for ancient wrongs. I only say that the ethical choice is always, has always been, and will always be the choice that serves justice. This, in the case of African-Americans, will require effort on the part of all European-Americans, but it will also benefit them in the same way it will benefit African-Americans. Certainly, as a democratic people who stand for freedom, equality, and fairness, we should recognize that the enfranchisement and protection of all peoples is vital to our societal progress.

When we repair harm through restorative justice, we fulfill the code of ethics we already claim to espouse. When the House of Representatives voted unanimously to apologize for slavery and the Black Codes that followed it in July of 2008,

the nation officially recognized the fact that the United States did harm to the African-American community on a massive scale. So, do we cry over the spilt milk? Or, do we attempt to clean it up? The ethical choice is clear. If we really believe the things we say domestically and internationally, we must act in accordance with these ethical codes we have outlined. This action is not always easy, but action that works towards justice is ethical and imperative.

If we are honest with ourselves, we are aware of the tremendous harm that slavery and the Black Codes caused. We know that the African-American community has been subjected to centuries of either non-existent or inadequate education. We know that Jim Crow’s vagrancy and property ownership laws in the Southern United States prevented accumulation of wealth among African-Americans and established financial dependence between them and the European-Americans for whom they were forced to work or sharecrop. These are stories we have heard before. We have established holidays and memorials to quell our national guilt. We have signed documents of international law to prevent such an atrocity from occurring again. We have altered our domestic law to remove the legal stains made by the Jim Crow South. We have done these things, perhaps, as penance—but penance is not the ethical imperative. Restorative justice is. If we truly believe these things were wrong, we should try to fix them—not try to pretend their harms no longer exist by declaring ourselves colorblind, a melting pot, or diverse. The solution to the problem cannot be found in simply ceasing to commit crimes against African-Americans, nor can it be found in saying those crimes were wrong. These things are good, but they cannot be the whole story. Until we rehabilitate the African-American community, justice will not have been served.

So, how then do reparations rehabilitate the African-American community? The answer is twofold: through acknowledgment and compensation. Cash compensation is undesirable today, as it has the danger of causing further victimization; this is why Dr. Martin Luther King, Jr., said the compensation for the damage to the African-American community should come in the form of a “Bill of Rights for the Disadvantaged” that would establish programs

for advancement, much like the GI Bill did. Of course, as Dr. King points out, this is much lower in cost than paying hundreds of years of wages (with accrued interest) for slave labor that occurred in the United States. Although they did so in a forced way, African-Americans contributed to the growth of American society through their unpaid labor. Their ancestors should be compensated for their labor contributions and the harms they suffered, in the same way the descendants of someone who died a wrongful death can legally demand compensation for the harms suffered by the victim, their relative. African-American slaves were owed a debt that was never paid. This debt is still owed to their heirs—they have a right to their ancestors' entitlements. It is not convenient, but it is ethical.

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We do not like to think that companies like AIG, J.P. Morgan Chase, or Aetna made their initial profits on the backs of slaves. Neither do we want to know that Harvard, Princeton, Yale, and University of Virginia may have gained some measure of affluence from the enslavement of the African-American Race. However, the undesirability of this information does not negate its truth or the obligations that accompany it. They are our ethical responsibility. Brown University agrees—they started a committee to determine what reparations should be made for their historical links with the slave trade.⁵ The fact is that a great many European-Americans and their companies made money off of slavery, and this money was in effect stolen via the kidnapped and unpaid African-Americans bought and sold during the Transatlantic Slave Trade. The fact that this money was stolen long ago does not make it any less a crime. Time has not made the thievery of yesterday any more ethical. We can tell

by the very fact that these things disturb us that they are wrong, and we must remedy the wrongs instead of ignoring them. The emphasis should be on rehabilitation and not cash payments, but if there were to be cash payments, estimates in damages range to \$777 trillion by groups like The African World Reparations and Reparation Truth Commission. Although these numbers may be accurate estimates, we must focus on what is most ethical, what is most beneficial, and what will best reconcile European-Americans and African-Americans: programs that will rehabilitate the African-American community instead of victimizing them through cash payments, which will only put a band aid on a gunshot wound. The rehabilitation of African-Americans will improve the lot of all Americans; it will improve our society and fulfill the ethical aspirations that we ourselves claim.

To rehabilitate African-Americans, we must compensate them for their contributions and suffering, but also, we must acknowledge their contributions and suffering. We must acknowledge that not only were African-Americans enslaved, but after they were “freed,” they were left illiterate with no money, no land, no home—they were set up for failure. We must recognize that for close to one hundred years after the slaves were freed, laws existed to prevent them from accumulating wealth or assets, such as regulations blocking them from obtaining mortgages. Acknowledging the problems that exist and recognizing their roots in slavery and its aftermath will prevent Americans from making judgments that have prevailed in the past, such as saying negative things (like living only for the present or not pursuing higher education) are “part of Black culture” when they really are part of a “slave culture” that European-Americans—not African-Americans—created. The proper programs, designed to enfranchise, educate, and rehabilitate, will provide both acknowledgment and compensation, thus achieving restorative justice through reparations.

Undeniably, the decisions regarding how reparations should be paid out will be difficult

⁵ Foster, Andrea L., and Alyson Klein. “Brown U. To Explore Slavery, Reparations.” *The Chronicle of Higher Education* 50.29 (2004): A.30. Proquest. Web. 30 Nov. 2012.

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ones. There are numerous schools of thought on the subject and cogent arguments exist for most of them. These, however, are pragmatic issues—ones that almost cannot be thought of until the ethical issue of slavery reparations has been addressed. Acknowledgment, I believe, shares a great deal of weight with compensation when it comes to restorative justice. By agreeing that reparations are necessary, we legitimize the battles that generations of African-Americans have fought in hopes of finding justice. It is senseless to say that because we do not know the best way to provide reparations, we should not provide them at all. Unfortunately, this is the sort of talk that has prevailed. Those arguments given against reparations are almost always those of a practical nature. Rarely do we hear that the African-American community has been treated justly, or

that their past suffering and toiling do not merit compensation; instead, we hear about technicalities or practical problems that might arise. These issues cannot be ignored, but we must give precedence to the ethical over the convenient. As the people that set out to form a more perfect union, to establish justice, to ensure domestic tranquility, we must see that prioritizing the practical over the ethical is to lose who we are. Restorative justice is not only about rehabilitating the victim, it is also about repairing the relationship between victim and offender and providing the chance for the offender and victim to redefine themselves. We need not be oppressor and oppressed, nor criminal and victim. Through making reparations, we have the opportunity to be, instead, restorers of justice who live up to the ethical code we have claimed for so long.

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