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## Book Review: The Case for Reparations (1973)

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## BOOK REVIEWS

**The Case for Black Reparations.** By Boris I. Bittker,<sup>1</sup> New York: Random House, 1973. Pp. vii, 191.

*Reviewed by Ira B. Shepard<sup>2</sup>*

Professor Bittker calls this book "an inquest"; on first reaction, it seems more like the exhumation of an issue which was stillborn and buried with the 1960's. After all, was not the 1969 demand for five hundred million dollars for black reparations from "the white Christian churches and Jewish synagogues which are part and parcel of the system of capitalism"<sup>3</sup> made by James Forman during worship services in New York's Riverside Church merely the unreal culmination of a decade of social unreality?

Even the contemporaneous reaction to the demand was offhandedly automatic, aside from the expected imputations of masochistic "white liberal" mea culpability to supporters of the demand. The *New York Times* gave it sententious dismissal with, "there is neither wealth nor wisdom enough in the world to compensate in money for all the wrongs in history,"<sup>4</sup> and Bayard Rustin reacted with, "[i]f my grandfather picked cotton for 50 years, then he may deserve some money, but he's dead and nobody owes me anything."<sup>5</sup> The most forthright Northern reaction was one of outrage for disruption of Riverside's worship service; the Jewish Defense League mobilized to insure that worship services in synagogues would be spared similar outrages.

The Southern reaction, in addition to outrage, was similarly predictable: Why reparations solely for blacks? The Southern states and Southern whites have suffered discrimination from the North; moreover, is not the North even more insidiously bigoted than the South? ("At least in the South . . ."<sup>6</sup>).

However, the issue of black reparations is worth raising and this book is worth reading because the above-quoted reactions are, in the end, not completely satisfactory. This is so, whether the reaction be Southern, Northern or black. Most objective observers—even in the South—would conclude that America's past treatment of its black inhabitants has been outrageous at best. The injuries resulting from those past outrages have left present-day

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<sup>3</sup> *Black Manifesto*, quoted in B. BITTKER, *THE CASE FOR BLACK REPARATIONS* 167.

<sup>4</sup> *New York Times*, Sept. 9, 1969, quoted in B. BITTKER, *supra* note 3, at 5.

<sup>5</sup> *New York Times*, May 9, 1969, quoted in B. BITTKER, *supra* note 3, at 142 n.10.

<sup>6</sup> This phrase, which has come up in scores of conversations during the two years this reviewer has lived in the South, can prompt only revulsion. There can be no justification—either moral or practical—for the white South's treatment of blacks.

blacks in a position of substantial disadvantage in relation to the remainder of the population—and this disadvantage is more substantial than that of any other large identifiable group. To say that this disadvantage will be justly remedied in the near future merely by a firm resolve to do right is unrealistic. Furthermore, such action, even if it were taken, cannot right past wrongs.

Professor Bittker's book assumes that the appropriate prospective remedies will be made and goes on to deal with the question: "[I]s there or should there be a right to recover for slavery or for the century of segregation that was its aftermath?"<sup>7</sup> That question, particularly the question of whether there should be a right to recover for more recent injustices, surely merits consideration because the present disadvantage of blacks is the legacy of slavery and that century of segregation. This disadvantage, moreover, is continuing and pervasive; even if the century of segregation ended today, its effects would still be with us.

Our remedies for racial discrimination have been mainly prospective, without much regard for redress of past wrongs. We posit an ideal of color-blindness and pledge to look to that in the future, with retrospective redress regarded as hopelessly sentimental. In practice, the results have been unsatisfactory. Those Southern demagogues—who, in the aftermath of *Brown v. Board of Education*,<sup>8</sup> told their constituencies that their children would not have to go to school with black children—were right. Few white children in segregated public schools in 1954 ever had to bother with attendance at an integrated public school; no redress was made to the black victims of delayed integration. This delay in school integration was paralleled in other areas in society with similar lack of redress. Thus, a premium was put upon delay in compliance with *Brown*, and the foot-draggers achieved apparently costless victories year after year. However, those victories had a price. They were damaging to the silent majority of decent people, white and black, who had to live in a demagogically-created, quasi-totalitarian South infected by the thought control necessary to achieve those "victories."

This book seeks to place the argument for black reparations in a worldly context. To date, the demands for reparation have largely come from wearers of dashikis; this book offers an analogous legal model which would allow these demands to be supported by wearers of three-button suits as well.<sup>9</sup> In suggesting the theoretical orthodoxy of black reparations, Professor Bittker asks whether the three-buttoned representatives of vested rights would find it radical to suggest the remedy of an action under 42 U.S.C. section 1983 to a client who had been damaged by state officials acting

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<sup>7</sup> B. BITTKER, *supra* note 3, at 4.

<sup>8</sup> 347 U.S. 483 (1954).

<sup>9</sup> B. BITTKER, *supra* note 3, at 34.

unconstitutionally. (A parallel model is the recent case of *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*,<sup>10</sup> which allowed a cause of action for deprivation of constitutional rights against federal officials.) There is nothing unusual about such actions; and, it is even more orthodox to seek recovery from a governmental unit than from public officials personally. Professor Bittker concludes that there is room to argue effectively that there might be doctrines sufficiently similar to present law to allow such recovery from governments. These models are created primarily to provide "a statutory springboard from which we would plunge into deeper waters if the spirit moves us."<sup>11</sup> They also make it possible to reduce the "emotional temperature" which discussion of black reparations seems to raise. What Professor Bittker seeks to show is that "[f]ar from being a bizarre, outrageous, and unprecedented proposal, [black reparations] turns out to be a concept that invites, and is susceptible to, ordinary legal analysis."<sup>12</sup>

Having established his model, Professor Bittker then turns to the problems of identifying the beneficiaries. This raises the questions of whether compensation is to go to groups or to individuals, and of how the beneficiaries are to be identified. He sees in these questions what he terms a second American Dilemma. If benefits are to go to groups, as the original Forman demand contemplated, there is the problem either of identifying existing groups or of creating new ones. Thus, the paying entity must decide who the recipients will be (or must select those persons who will decide on the recipients). This decision tends to make the objects of the choice the nominees, and hence the tools, of the paying entity. On the other hand, if payments are to go to individuals, Professor Bittker sees problems of race-identification—evoking the spectre of a Nuremberg-like system—in determining which individuals are to receive such payments. These problems would exist unless an easily delineated subgroup of blacks is to receive payments (e.g., those blacks who attended segregated schools). Professor Bittker feels that if Southern blacks are included, it would be unfair to exclude Northern blacks merely because they were not included in a system of legal segregation; these Northern blacks did, after all, live in the nationwide fallout of the Southern Jim Crow system.

However, as Professor Bittker points out, this problem was solved on the practical level by the Federal Republic of Germany (West Germany) in its program of payments to victims of the Nazi genocide: Payments went to survivors and to relatives of the dead, as well as to Jewish relief agencies and the State of Israel (which had borne the costs of resettling many refugees from Germany). Under this model, the horns of this dilemma are sufficiently blunted to make viable the possibilities both of group and of individual

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<sup>10</sup> 403 U.S. 388 (1971).

<sup>11</sup> B. BITTKER, *supra* note 3, at 68.

<sup>12</sup> *Id.*

recoveries. Group recipients can be determined by general consensus. America has never before had any significant problems in identifying the black members of its population; the possibility of marginal error should not impede an otherwise satisfactory system of black reparations; and the problem could be solved by framing the issue not in terms of whether a potential recipient is actually black, but in terms of whether the recipient was ever so regarded for purposes of past discriminatory practices, whether these were Northern or Southern. The mobility of our society makes location of past discriminatory practices largely irrelevant; both victims and bigots have moved about in such numbers as to make this problem national in scope.

Professor Bittker then raises the question of the constitutionality of a program of black reparations. He notes that the ideal of a color-blind constitution in the *Plessy v. Ferguson*<sup>13</sup> dissent has been replaced by the Supreme Court's acceptance of racial classifications for remedial purposes in its *Charlotte-Mecklenburg* decisions relating to school desegregation.<sup>14</sup> Upon this basis, he is able to resolve his doubts as to the constitutionality of a black reparations program. Again, I feel that the doubts are overemphasized. In today's climate, despite the crocodilian lachrymosity of whites temporarily inconvenienced, reverse discrimination has to be constitutionally trivial in comparison to the lingering residue of discrimination against blacks.

The final question is the wisdom of a program of black reparations. Members of groups excluded from the program would see in it another burden added to a nation which has taken care of all sorts of worthy and unworthy recipients of charity in the past. A program of black reparations may be divisive; however, it would be morally strengthening in the long run. Reparations would serve as a recognition of the past injustices America has done to its black inhabitants. America's ability to admit these injustices in this manner would be a morally positive step. For the recipients, there would be problems of pride in the acceptance of reparations. Nevertheless, the need admittedly exists; the setting pride aside would also be a significant moral step for the recipients of reparations. And, at bottom, pride has nothing to do with this; few corporations are so deterred from accepting the benefits of a tax loophole or a government subsidy.

The costs, in the light of our quarter-trillion dollar annual national budget and our trillion dollar gross national product, are not significant. The Forman demand was for one-half billion dollars, which "total comes to 15 dollars per [black person]."<sup>15</sup> This amount is slight in comparison with the

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<sup>13</sup> 163 U.S. 537, 552, 559 (1896).

<sup>14</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

<sup>15</sup> *Black Manifesto*, quoted in B. BITTKER, *supra* note 3, at 168.

economic advantage directly and indirectly derived by whites from America's treatment of blacks or in comparison with the waste arising from America's failure to make the most economically rational use of its black people. It would be possible to go far beyond token amounts of reparations without causing significant dislocation to our economy. For example, payments in the amount of the gap between black and white per capita income (about \$1,500 in 1969) would have an annual cost of about \$4 billion dollars.<sup>16</sup> Even this amount is affordable in relation to our society's product—or even in relation to its waste. Great cost has rarely deterred the American people from any venture they really wanted to undertake. (For example, we utilize automobiles for transportation despite the enormous cost in lives and dollars.) However, if the cost of black reparations is too great, it is an argument only for reducing the amount of reparations; to say that the injury is too great to recompense would be a strange argument for not awarding reparations at all. The significance of reparations is that they would be paid in cash—the ultimate American Band-Aid.

Why are blacks particularly deserving of reparations? Other groups might also have claims. For example, white Southerners have lagged economically and socially behind the rest of the country. Should not their needs be also met? This argument is inadequate because the comparison is inapt. A misleading impression to the contrary may have been given by a practice of the *New York Times* and other Northern news media in the early 1960's of quoting the utterances of bigoted Southern whites in ungrammatical forms of speech, while making quotes from blacks emerge in the purest Oxfordian English. This practice was sadly misleading in portraying blacks as having talents they had never been given the educational and social opportunities to develop. Whatever satisfaction critics of the Northern press can take from actuality, the fact is that the condition of the black in America has always been—and will foreseeably be—worse than that of almost everyone else.

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<sup>16</sup> B. BITTKER, *supra* note 3, at 131.