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# On Arraigning Ancestors: A Critique of Historical Contrition

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## ON ARRAIGNING ANCESTORS: A CRITIQUE OF HISTORICAL CONTRITION\*

DAVID LOWENTHAL\*\*

*Recent years have brought a sea change in stances toward the past. Instead of looking back with pride, we increasingly recollect with remorse. Rather than stressing achievements and victories, we dwell on disasters and defeats. No longer history's winners but history's losers occupy center stage. And we apologize profusely for ancestral misdeeds. Commemorative practice, museum exhibits, reparations' concessions, textbooks, and teaching variously stress history as a saga of victimhood. American grief over slavery harks back to Founding Fathers' laments that the accursed institution was foisted on them by imperial Britain. But modern victimhood largely originated in post-war Holocaust awareness and reparation. Among myriad painful legacies—slavery, genocide, religious vendettas, imperialism, racism—now under critical scrutiny, this surge of contrition bears closely on current assessments of Thomas Ruffin's famed State v. Mann decision.*

*Rendering historical justice faces many practical impediments—the lapse of time makes it hard to tell who might owe what to whom, or even to disentangle descendants of victims from those of victimizers. Moreover, damning past evils has several damaging consequences. It subverts historical truth by empowering traumatic memory; it conflates moral outrage with legal justice; it vindicates and exacerbates ancient feuds. Above all, those who condemn past crimes seem unaware that slavery and other social inequities were accepted norms from classical times to the nineteenth century. Hence they arraign their precursors in the context of their own superior moral standards. Judgments of Ruffin are particularly prone to such errors, because his salient*

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\*\* Professor emeritus of geography, University College London. I am grateful to Sally Greene for enlisting me in the Thomas Ruffin reappraisal, to Cariadne Margaret Mackenzie Hooson for an incisive and empathetic critique, to John Henry Merriman and John T. Noonan, Jr., for legal nous and encouragement, to Mary Alice Lowenthal for editorial steadfastness, and to my primary editor Tracy Stewart for her patience and fortitude in dealing with last-minute additions and alterations, and for goading me to delve into Bluebook rules, holy writ for most law journals but unholy horror for the laity. Apologies to readers misled or mystified by Bluebook-mandated journal title abbreviations, book publisher lacunae, and other perverse diktats imposed on me.

*influence and subsequent fame seem to exemplify slavery's evils. However, as a slaveholder faced with the manifold contradictions of the "domestic" institution—slaves as family who could never talk back, let alone fight back—Ruffin was typical of his time and place.*

*Although present persons ought not be blamed for long-past injuries, collective culpability seems appropriate for ancient wounds such as slavery that have enduring costs. Just as states and courts abide by previous statutes and treaties, corporate entities—nations, banks, universities—should rectify injustices committed in their corporate name, even if long ago. Apart from amends to descendants of those wronged, public contrition can help heal societies torn by unrequited wounds. Now a mantra of tribal restitution and truth and reconciliation movements worldwide, such repentance however remains the exception in dealings between nation-states. I conclude by discussing what to do with existing memorials to past causes and heroes, like slavery and Ruffin, whose reputation time has tarnished. With examples from ancient Athens to modern Richmond, Virginia, I review the efficacy of expunging, of altering, and of adding to texts and monuments now erroneous or outdated.*

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## INTRODUCTION

Just a century ago, a Futurist manifesto assailed the past as an incubus stifling present enterprise. Futurists consigned the relics of antiquity—ancient monuments, museum collections, ancestral veneration—to the flames.<sup>1</sup> The past had been especially crippling in Italy, the home of Filippo Marinetti and his Futurist cohorts. The legacy of ancient Rome, medieval Venice, and Renaissance Florence left modern Italy with an enduring inferiority complex that national unification had signally failed to overcome. Only through dynamic technology could Italians break free from paralytic worship of their ancestors' daunting achievements.<sup>2</sup> In the wake of Futurism came Modernism, similarly dedicated to all that was new, eager to shed the shackles of the burdensome past. European and American architects and artists flaunted their contempt for tradition by jettisoning plaster casts of Classical and Renaissance structures and by eliminating history from their students' training. Emulation was passé, innovation was all.<sup>3</sup>

Today the past is again under assault. But the cause and the context are utterly different. Unlike Futurists and Modernists, we do not reprobate the past's material and aesthetic achievements; quite to the contrary, we cherish them as indispensable heritage. Instead, we condemn precursors' wicked misdeeds and immoral institutions. Our racist, sexist, elitist forebears are anathematized as cruel and avaricious hierarchs, and hypocrites to boot. For that apostle of liberty Patrick Henry, who confessedly kept slaves owing to the "general inconvenience of living here without them,"<sup>4</sup> there seems no excuse.

Or else past heroes who fall short of contemporary morality are refashioned to reflect current pieties. The plantation homes of the

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1. FILIPPO TOMMASO MARINETTI, *The Founding and Manifesto of Futurism* (1909), reprinted in MARINETTI: SELECTED WRITINGS 39, 41–43 (R.W. Flint ed., R.W. Flint & Arthur A. Coppotelli trans., 1972).

2. ROSA TRILLO CLOUGH, LOOKING BACK AT FUTURISM 21–29 (1942); SYLVIA MARTIN, FUTURISM 6–9 (Uta Grosenick ed., 2005); David Lowenthal, *Mediterranean Heritage: Ancient Marvel, Modern Millstone*, 14 NATIONS AND NATIONALISM 369, 378–79 (2008).

3. DAVID LOWENTHAL, THE PAST IS A FOREIGN COUNTRY 379–81 (1985).

4. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 22 (2d ed., Transaction Publishers 1996) (1944) (quoting Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773)).

nation's Founding Fathers—Washington's Mount Vernon, Jefferson's Monticello, Monroe's Ash Lawn—are presented as models of social propriety, suggesting that slavery was benignly paternalistic. Visitors are told that these presidents were reluctant owners, morally opposed to the institution. Washington's vows to buy no more slaves and to manumit those he held are stressed; his later slave purchases and his failure to free them are shrouded in silence.<sup>5</sup> American history textbooks portray slavery without anger, for there is no one to be angry at. "Somehow we ended up with four million slaves in America but no owners!"<sup>6</sup>

Critics decry such cover-ups. "If we are interested in history more than enshrinement," grumbles a historian, "the apologies offered for slavery at these sites . . . suggest a shallow faith in the greatness of these men."<sup>7</sup> But these sites *are* patriotic shrines. It is their custodians' function to regret slavery yet salvage their owners' reputations, like the Alabaman who assured Jonathan Raban that her Civil War ancestor "did not *believe* in slavery. He had a *very* few, only about sixteen or twenty, something like that."<sup>8</sup> Portraying forebears as reluctant accessories mitigates what is now, but was not then, unconscionable.

We lack the appreciation of temporal distance that let antebellum abolitionist Wendell Phillips say, of America's Founding Fathers, "I love these men; I hate their work. I respect their memory; I reject their deeds. I trust their hearts; I distrust their heads."<sup>9</sup> Few today would join Harriet Beecher Stowe in praising North Carolina Judge Thomas Ruffin's self-reproach that the law compelled him to exonerate a hirer's brutality toward a slave; his harsh verdict in *State v. Mann* was inherent in "the curse of slavery," for "the duty of the magistrate" must prevail over "the feelings of the man."<sup>10</sup> Ruffin's

5. DAVID LOWENTHAL, *THE HERITAGE CRUSADE AND THE SPOILS OF HISTORY* 135–54 (Cambridge Univ. Press 1998) (1996); James Oliver Horton & Spencer R. Crew, *Afro-Americans and Museums: Towards a Policy of Inclusion*, in *HISTORY MUSEUMS IN THE UNITED STATES: A CRITICAL ASSESSMENT* 215, 230–31 (Warren Leon & Roy Rosenzweig eds., 1989); *National Symbols: Presidential Homes*, *HIST. NEWS*, Jan.–Feb. 1990, at 8–17.

6. JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG* 138 (1995).

7. Mark Bograd, *Apologies Excepted: Facing Up to Slavery at Historic House Museums*, *HIST. NEWS*, Jan.–Feb. 1992, at 20–21.

8. JONATHAN RABAN, *HUNTING MISTER HEARTBREAK* 186 (Edward Burlingame Books 1991) (1990).

9. Dwight L. Dumond, *The Controversy over Slavery*, in *PATHS OF AMERICAN THOUGHT* 86, 90 (Arthur M. Schlesinger, Jr. & Morton White eds., 1963) (quoting Wendell Phillips, Speech at Franklin Hall (May 12, 1848)).

10. *State v. Mann*, 13 N.C. (2 Dev.) 263, 264, 266 (1829). Ruffin wrote the *State v. Mann* decision in 1830. Commission from Governor John Owens as Judge of the Supreme

words left Stowe “feeling at once deep respect for the man and horror for the system.”<sup>11</sup>

Stowe’s distinction between “the man” and “the system” now goes unrecognized; blindness to past complexity mires us in cognitive dissonance. We lack the indulgent lenience that led a 1927 educator to commend past heroes’ “deeper virtues [by] mercifully forgetting those weaknesses . . . which seem irrelevant to their fame.”<sup>12</sup> Instead, Americans now venerate their Constitution as a sacred timeless compact never to be altered, yet simultaneously censure the Founding Fathers who wrote it as Dead White Male slave owners.<sup>13</sup> Similarly, in newly penitential Australia, “the White nation appears not to want to understand its [pioneer settler] forebears,” writes anthropologist Gillian Cowlshaw. “Easier far to . . . disinherit them, than to try to unravel the uncomfortable fact that it was mostly reasonable and humane men and women who took part in the processes and policies that we now see as repugnant.”<sup>14</sup>

This essay explores the bearing of the current surge of contrition on the Thomas Ruffin case, in the light of similar efforts to come to terms with abhorred legacies, notably that of slavery. I first show the wide range of apologies for the past in commemorative practice, museum exhibits, reparation agreements, and history written and taught as a saga of victimhood. American grief over slavery harks back to Founding Fathers’ laments that the accursed institution was foisted on them by imperial Britain. But modern victimhood largely originated in postwar Holocaust awareness and reparations.

In addition to practical impediments to historical justice—it is hard to tell who might owe what to whom, or even to disentangle descendants of victims from those of victimizers—damning past evils has several negative consequences. It subverts historical truth by empowering traumatic memory; it conflates moral outrage with legal

Court (Jan. 9, 1830), in 2 THE PAPERS OF THOMAS RUFFIN 3 (J.G. de Roulhac Hamilton ed., 1918) (appointing Ruffin to the Supreme Court of North Carolina).

11. HARRIET BEECHER STOWE, A KEY TO UNCLE TOM’S CABIN 78–79 (Kennikat Press 1968) (1853). Ruffin’s bleak acknowledgement of slavery’s necessary evils were, with good reason, grist to Stowe’s abolitionist mill.

12. MICHAEL KAMMEN, MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE 497 (1991) (quoting John Erskine).

13. ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES xxxi (2000); FRANÇOIS FURSTENBERG, IN THE NAME OF THE FATHER: WASHINGTON’S LEGACY, SLAVERY, AND THE MAKING OF A NATION 230 (2006); MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 3, 316 (1986).

14. Gillian K. Cowlshaw, *Cultures of Complaint: An Ethnography of Rural Racial Rivalry*, 42 J. SOC. 429, 442 (2006).

justice; it vindicates and exacerbates ancient vendettas. Above all, I argue, those who condemn past crimes seem unaware that slavery, like other social inequities, was an accepted norm from classical times to the nineteenth century. Misapplying hindsight, they judge past people by their own superior moral standards. Judgments of Ruffin are particularly prone to such errors, because his salient influence and subsequent fame exemplify the evils of slavery. However, as a slaveholder faced with the manifold contradictions of the “domestic” institution—slaves as family who could never talk back, let alone fight back—Ruffin seems typical of his time and place.

Although present persons should bear no blame for injuries inflicted by previous people, there may be collective culpability for ancient wounds like slavery that have enduring costs. Just as states and courts make amends for past injustices, durable corporate entities feel accountable for long-ago wrongs done in their corporate name. Apart from amends to descendants of those wronged, public contrition can help heal societies torn by unrequited harms. Now a mantra of tribal restitution and truth and reconciliation movements worldwide, such repentance remains the exception in dealings between nation-states. I conclude by discussing what to do with existing memorials to those, like Ruffin, once honored but now defamed. With examples from ancient Athens to modern Richmond, Virginia, I review the efficacy of expunging, of altering, and of adding to texts and monuments now adjudged erroneous or outdated.

## I. THE NEW AGE OF APOLOGY

### A. *History Seen as Tragedy*

In reappraising their history, Westerners nowadays dwell less on past triumphs than on traumatic defeats, trumpeting not sagas of progress but litanies of infamy and suffering. Fixation on historical wounds is not new; ancient peoples likewise mourned past crimes and miseries. Not the Second Temple’s erection but its destruction is memorialized at Jerusalem’s Wailing Wall. From Hector to Joan of Arc, Masada to the Mount of Olives, Sedan to the Somme, sacrifice sacralizes loss. Bunker Hill, Gallipoli, and Pearl Harbor reinforced losers’ bonds more than any subsequent victory. “Where national memories are concerned,” Ernest Renan consoled fellow-countrymen for France’s surrender to Prussia in 1870, “griefs are of more value than triumphs, for they impose duties, and require a common

effort.”<sup>15</sup> In line with Renan’s dictum, Prime Minister Eric Williams termed his 1962 *History of the People of Trinidad and Tobago* “a manifesto of a subjugated people.”<sup>16</sup> But previous memorialists more often proudly celebrated a glorious past; today we seldom do. “The past which haunts us is not a golden age,” observes a historian of twentieth-century France, “but rather an iron age, one of fire and blood.”<sup>17</sup> Ancient injury and injustice still obsess the Poles and the Irish long after they regained national sovereignty.

Most victims point to particular oppressors. Poles, for centuries stripped of autonomy, scarred by dismemberment, and plundered of cherished heritage, indict everyone. “For as long as we can remember,” they say, our “neighbors have always had only one idea: to attack us.”<sup>18</sup> The poet Adam Mickiewicz personified Poland as “the Christ among nations,” crucified for others’ sins.<sup>19</sup> Harking back to a lost ancient Fatherland, Poles keep a calendar of grievous reminders. Polish National Day celebrates not the modern state but the stillborn, quixotic eighteenth-century constitution.<sup>20</sup>

Rivaling Poles as victims, the Irish cite but a single malefactor—perfidious Albion. Centuries of bards have keened a saga of “agony the most vivid, the most prolonged, of any recorded on the blotted page of human suffering.” A. M. Sullivan’s canonical *Story of Ireland* (1867) showed it “like no other country in the world . . . in cruelties of oppression endured.”<sup>21</sup> Dublin’s Easter 1916 Rising became a Yeatsian tragedy to vindicate the past, reducing revolutionaries to vengeful revivalists, the 1922 constitution more sepulchral lament than triumphal

15. Ernest Renan, *What Is a Nation?* (1882), reprinted in *BECOMING NATIONAL: A READER* 41–55 (Geoff Eley & Roger Grigor Suny eds., 1996).

16. ERIC WILLIAMS, *HISTORY OF THE PEOPLE OF TRINIDAD AND TOBAGO*, at ix–x (Frederick A. Praeger 1964) (1962).

17. HENRY ROUSSO, *THE HAUNTING PAST: HISTORY, MEMORY, AND JUSTICE IN CONTEMPORARY FRANCE* 17 (Ralph Schoolcraft trans., Univ. of Penn. Press 2002) (1998).

18. HANS MAGNUS ENZENSBERGER, *EUROPE, EUROPE: FORAYS INTO A CONTINENT* 190, 228 (Martin Chalmers trans., Pantheon 1989) (1987).

19. ROBERT BIDELEUX & IAN JEFFRIES, *A HISTORY OF EASTERN EUROPE: CRISIS AND CHANGE* 298 (2d ed. 2007) (1998) (discussing Mickiewicz’s *Books of the Polish Nation and of the Polish Pilgrims* (1932)).

20. Norman Davies, *Poland’s Dreams of Past Glory*, *HIST. TODAY*, Nov. 1982, at 23–30; Ladis K. D. Kristof, *The Image and the Vision of the Fatherland: The Case of Poland in Comparative Perspective*, in *GEOGRAPHY AND NATIONAL IDENTITY* 221–32 (David Hooson ed., 1994).

21. ROY FOSTER, *THE STORY OF IRELAND: AN INAUGURAL LECTURE DELIVERED BEFORE THE UNIVERSITY OF OXFORD ON 1 DEC. 1994*, at 11 (1995) (quoting A. M. Sullivan).



portent.<sup>22</sup> The Irish Free State continued to MOPE, in Fintan O'Toole's apt acronym for the "Most Oppressed People Ever."<sup>23</sup>

Atrocities are invoked not only to forge internal unity but also to enlist external sympathy. "Serbia, the nearly slaughtered nation," is poet Matija Bećković's slogan for the Belgrade monument encasing the bones of Serbs fallen in myriad battles, intended to show the world the savagery Serbia has suffered.<sup>24</sup> Museums in both the Turkish and Greek parts of Nicosia show sagas of persecution, the latter's Hall of Heroes depicting Greek Cypriots burnt to death, slaughtered by Turks, hanged by the British, and killed in torture chambers.<sup>25</sup> Saddled with a global legacy of genocidal grief, Israelis complain of life "being kept . . . as a museum for Jewish suffering," yet see the Holocaust integral to Israeli identity, the slain six million reinforcing images of beleaguered Jews as perennial victims.<sup>26</sup>

American history as celebrated today is likewise less a saga of glory than of infamy. Of the History Channel's 2006 "10 Days that Unexpectedly Changed America" more than half were tragic (the Pequot massacre, Shays's Rebellion, Antietam, the Homestead strike, McKinley's assassination, the 1964 Civil Rights murders).<sup>27</sup> Historical guilt over slave and female subjugation dominated the 2008 Democratic primary race between Barack Obama and Hillary Clinton. "People will have to choose which of America's sins are greater, and which stain will have to be removed first," commented a columnist. "Is misogyny worse than racism, or is racism worse than misogyny?"<sup>28</sup> No wonder "the politics of regret" is called the signature of our times.<sup>29</sup>

Regret was manifest among those gathered at Chapel Hill in 2007 to reassess the reputation of Thomas Ruffin, the author of *State v. Mann*, the Supreme Court of North Carolina judgment both vilified and lauded by Harriet Beecher Stowe. Speakers came not to

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22. Declan Kiberd, *The War Against the Past*, in *THE USES OF THE PAST: ESSAYS ON IRISH CULTURE* 24, 24–54 (Audrey S. Eyster & Robert F. Garratt eds., 1988).

23. John Banville, *In the Puddles of the Past*, N.Y. REV. BOOKS, May 9, 2002, at 38–40.

24. Svetlana Slapsak, Op-Ed., *Bestial War*, N.Y. TIMES, May 25, 1993, at A23.

25. Yiannis Papadakis, *The National Struggle Museums of a Divided City*, 17 *ETHNIC AND RACIAL STUD.* 400, 400–19 (1994).

26. Yitzhak Laor, *Unfaithful to Wagner*, LONDON REV. BOOKS, Apr. 22, 1993, at 4.

27. Raul Burriel, *Television Review: 10 Days That Unexpectedly Changed America*, *THE TRADES*, Apr. 9, 2006, <http://www.the-trades.com/article.php?id=4210>.

28. Maureen Dowd, *Duel of Historical Guilt*, N.Y. TIMES, Mar. 5, 2008, at A23.

29. Jeffrey K. Olick & Brenda Coughlin, *The Politics of Regret: Analytical Frames*, in *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* 37, 56 (John Torpey ed., 2003).

commend the past but by and large to censure it. It was “no occasion for celebration; rather it is a time for reflection and contemplation, a time for sorrowful truths to be spoken, a time for contrition,” as was likewise said of long pervasive tribal mistreatment, at a Bureau of Indian Affairs’ anniversary in 2000.<sup>30</sup> In arraigning our ancestors, we both disown their views and at the same time assume responsibility for them. We deplore their misdeeds, express remorse, strive to make amends for damage done.

Yesteryear’s Futurists and Modernists rejected past splendors with self-confident hubris; today’s apologists disavow past squalor with remorseful anxiety. Cynics term this “contrition chic,” “a bargain-basement way to gain publicity, sympathy, and even absolution [that] now extends to entire nations.”<sup>31</sup> National repentance is like purging guilt by confession. Errant forebears serve as surrogates for our former selves; “people eager to be praised as the salt of the earth are apologizing for the low-lifers they used to be.”<sup>32</sup> Apology sinks into self-service.

When forgiveness becomes the public rallying cry, played out on daytime television soap operas, encouraged by civic and religious leaders, and praised far and wide for its power to heal, its slide into confusion and vulgarity is almost inevitable. It becomes identified with “closure,” it is sentimentalized and transformed into therapy,<sup>33</sup>

charges philosopher Charles Griswold.

“Apologizing for something you didn’t do to people to whom you didn’t do it (in fact, to people to whom it wasn’t done)” is now a growth industry, a self-righteous bow to history that enhances corporate images.<sup>34</sup> Over the past decade, apologies have become a major weapon in the arsenal of image restoration in business, politics,

30. Rebecca Tsosie, *The BIA’s Apology to Native Americans: An Essay on Collective Memory and Collective Conscience*, in *TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION* 185, 186 (Elazar Barkan & Alexander Karn eds., 2006) [hereinafter *TAKING WRONGS SERIOUSLY*] (quoting Kevin Gover, Assistant Sec’y for Indian Affairs, Dep’t of the Interior, Remarks at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs (Sept. 8, 2000)).

31. Jean Bethke Elshtain, *Politics and Forgiveness*, in *BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT* 45, 45 (Nigel Biggar ed., 2003).

32. Russell Baker, *No Time for the Future*, *N.Y. TIMES*, Oct. 7, 1997, at A27.

33. CHARLES L. GRISWOLD, *FORGIVENESS: A PHILOSOPHICAL EXPLORATION* 182 (2007).

34. WALTER BENN MICHAELS, *THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY* 122 (2006).

and religion.<sup>35</sup> “I repent, we repent [is] currently the most common verb in the French language,” grumbled a diplomat-scholar at the deluge of Vichy apologies in the wake of Prime Minister Jacques Chirac’s official contrition: “The churches, the doctors, and the police parade and contrive. We are now waiting for the postmen, the train conductors, and the truck drivers to join the great self-flagellating movement . . . . Me, too, I ask for forgiveness. Forgiveness for not wanting to repent.”<sup>36</sup>

History was traditionally written by the victors; nowadays it is rewritten by the victims. Formerly voiceless minorities reclaim the past via collective memory and oral records. They find roots in resurrected or reinvented traditions, aided by mainstream scholars and activists eager to serve subaltern causes.<sup>37</sup> Thus repentant white Australians condemned their own forebears and “expressed a pious and overwhelming sympathy for Aborigines.” Deeming all whites beneficiaries of Aboriginal dispossession, “Black Armband . . . history” follows the “impulse to wallow in the enormity of it all, to reel under the blows of Indigenous accusers . . . and to plead comprehensively guilty.”<sup>38</sup>

Sites that highlight victim history are today’s Calvary and Compostela.<sup>39</sup> Launched in 2002, an International Coalition of Historic Site Museums of Conscience embraces locales of slavery and

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35. For a discussion of this trend, see generally WILLIAM L. BENOIT, ACCOUNTS, EXCUSES, AND APOLOGIES: A THEORY OF IMAGE RESTORATION STRATEGIES (1995); JOSEPH R. BLANEY & WILLIAM L. BENOIT, THE CLINTON SCANDALS AND THE POLITICS OF IMAGE RESTORATION (2001); KEITH MICHAEL HEARIT, CRISIS MANAGEMENT BY APOLOGY: CORPORATE RESPONSE TO ALLEGATIONS OF WRONGDOING (2006); James Kauffman, *When Sorry Is Not Enough: Archbishop Cardinal Bernard Law’s Image Restoration Strategies in the Statement on Sexual Abuse of Minors by Clergy*, 34 PUB. REL. REV. 258, 258–62 (2008).

36. Julie Fette, *The Apology Moment: Vichy Memories in 1990s France*, in TAKING WRONGS SERIOUSLY, *supra* note 30, at 259, 274 (quoting Philippe Moreau Defarges in 112 DÉBAT 133–34 (2000)).

37. See ROUSSO, *supra* note 17, at 13–15.

38. Gillian K. Cowlshaw, *On “Getting It Wrong”: Collateral Damage in the History Wars*, 37 AUSTRAL. HIST. STUD. 181, 197, 199, 201 (2006). “Black Armband” history is the term coined by Geoffrey Blainey, by way of contrast with celebratory “Three Cheers” history. Geoffrey Blainey, *Drawing Up a Balance Sheet of Our History*, QUADRANT, July–Aug. 1993, at 10–15.

39. “The commemoration and museumification of genocides, slavery, and other atrocities increasingly occupy the national public sphere.” ALYSON M. COLE, THE CULT OF TRUE VICTIMHOOD: FROM THE WAR ON WELFARE TO THE WAR ON TERROR 2 (2007). See generally PLACES OF PAIN AND SHAME: DEALING WITH “DIFFICULT HERITAGE” (William Logan & Kier Reeves eds., 2009) (covering museums and memorials from around the globe, including the United States, Northern Ireland, Poland, South Africa, China, Japan, Taiwan, Cambodia, Indonesia, Timor, and Australia).

mass slaughter, the Irish Famine, the Holocaust, the Gulag, tenement slums, prisons, and workhouses.<sup>40</sup> Along with empathetic contrition toward past crimes, such sites convey cautionary lessons for the future.<sup>41</sup> Popular history's very horror is exemplary. For its 2004 show "Barbarians"—fearsome Vikings, eerie Huns, terrifying Goths "Get ready for 1,000 years of unreal human behavior. . . . [T]he world's most feared raiders and plunderers. . . . 'Barbarians' is a story of people . . . whose dominance was gained by the use of terror. Their calling card was annihilation. And what you will realize when you watch 'Barbarians' is that in 2004 the weapons may have changed, but the calling card remains the same."<sup>42</sup>

In former times, by contrast, historic infamy was exhibited for sadistic glee, not for cautionary or conscience's sake. Blatantly commercial Victorian displays of past iniquity—Mme. Tussaud's, Newgate gallows, torture implements at the Tower of London—evoked shivers of horror rather than shudders of contrition.<sup>43</sup> Scenes of Jack the Ripper, Salem witchcraft, Fall River's Lizzie Borden, the Kennedy assassination site attest the timeless allure of the gruesome. Time-Life Books invited Americans to bring "the full horror of battle straight into your living room; relive the horrors of Gettysburg in the comfort of your own home."<sup>44</sup> Offering "History written in blood!—the full horror of medieval Britain" as family entertainment, the London Dungeon in 1981 proposed Black Plaques at sites of executions, torture, squalor, and the plague pits and prisons of the past to boost "London's second largest money-earner."<sup>45</sup>

"Can we really learn anything from history," mused a critic, "when its most sobering lessons are defanged and turned into vacation amusements?" Slavery and genocide "routinely depicted as . . . feel-good experiences" made observers "morally obtuse to their shame."<sup>46</sup>

40. See Ruth J. Abram, *Kitchen Conversations: Democracy in Action at the Lower East Side Tenement Museum*, PUB. HISTORIAN, Winter 2007, at 59, 65; Liz Ševčenko & Maggie Russell-Ciardi, *Foreword to Sites of Conscience: Opening Historic Sites for Civic Dialogue*, PUB. HISTORIAN, Winter 2008, at 9–15.

41. JOHN LENNON & MALCOLM FOLEY, DARK TOURISM: THE ATTRACTION OF DEATH AND DISASTER 7–11 (Continuum 2000) (2000)

42. N.Y. TIMES, Jan. 19, 2004, at A7. The "Barbarians" advertisements reveal at one fell swoop how The History Channel trebly misinforms viewers that history is unbelievable, horrific, and exemplary.

43. BILLIE MELMAN, THE CULTURE OF HISTORY: ENGLISH USES OF THE PAST 1800–1953, at 45–56, 93–97, 144–45 (2006).

44. VOICES OF THE CIVIL WAR: GETTYSBURG—THE ECHOES OF COURAGE AND CANNONS (Time-Life 1997).

45. LOWENTHAL, *supra* note 5, at 100.

46. Gary Krist, Op-Ed., *Tragedyland*, N.Y. TIMES, Nov. 27, 1993, at 19.

Yet victims' heirs often put up with it. To fund its Amsterdam museum the Anne Frank Foundation markets pens and diaries with her name, balking only at T-shirts.<sup>47</sup> "As a Romanian, I am sorry that Romania's main symbol in the West is Dracula," said Dan Matei when Francis Ford Coppola's 1992 vampire film *Dracula* hit the box office; "as the minister of tourism, I have to take advantage of this."<sup>48</sup>

### B. *Victimhood and Its Benefits*

Those historically wronged—ex-colonial peoples, minorities, tribal indigenes—seek reparation for loss of autonomy and agency, repatriation of property purloined or pillaged, compensation for past injuries. These claims carry increasing moral weight.<sup>49</sup> Sacred writ in U.N. and UNESCO protocols, restitution diktats become de rigueur in archaeological and museum codes of ethics.<sup>50</sup> (Even airport security uses restitution lingo; a Gatwick sign points check-in travelers to the "shoe repatriation area."<sup>51</sup>) The rise of restorative justice in criminal proceedings, holding offenders accountable for the emotional and material losses of those violated, enhances victim agency.<sup>52</sup> Previously marginalized in legal policy, the victim now occupies center stage. "The new political imperative is that victims must be protected, their voices heard, their anger expressed, their fears addressed."<sup>53</sup>

Lamentations for the slaughter of innocents go back many millennia, but widespread public contrition is a recent phenomenon. Pope John Paul II's manifold millennial apologies for past faults of the Church were papally unprecedented; "in none of the Jubilees celebrated till now," noted the 1999 "purification of memory" report, "has there been . . . an awareness in conscience of any faults in the

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47. Robert L. Kroon, *Court Fight Disputes Legacy of Anne Frank*, INT'L HERALD TRIB., Feb. 15, 1996, <http://www.iht.com/articles/1996/02/15/frank.t.php>.

48. Sean Hillen, *Hollywood Dracula Pierces Romanian Hearts*, TIMES (London), Feb. 1, 1993, at 19 (quoting Dan Matei).

49. Elazar Barkan & Alexander Karn, *Group Apology as an Ethical Imperative*, in TAKING WRONGS SERIOUSLY, *supra* note 30, at 3, 3–30.

50. David Lowenthal, *Why Sanctions Seldom Work: Reflections on Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 391, 404–11 (2005); United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, art. 12, 13, 31, U.N. Doc. A/61/L.67 (Sept. 13, 2007).

51. Lesley Totty, *Lost Property*, TIMES (London), Aug. 4, 2007, at 16.

52. Marilyn Peterson Armour & Mark S. Umbreit, *The Paradox of Forgiveness in Restorative Justice*, in HANDBOOK OF FORGIVENESS 491, 491 (Everett L. Worthington, Jr. ed., 2005).

53. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 11 (2001).

Church's past, nor of the need to ask God's pardon."<sup>54</sup> Dismissing an Anglican apology to Darwin, a Vatican spokesman felt the Church "should abandon the idea of issuing apologies as if history was a court eternally in session."<sup>55</sup> Apologies and regrets for slavery issued by North Carolina, Alabama, Virginia, Maryland, New Jersey, and Florida in 2007 and 2008 were undreamed of a mere generation ago. Save for a low-key Westminster Abbey ceremony, the 1907 centenary of the abolition of the slave trade went virtually unremarked in Britain;<sup>56</sup> the 2007 bicentenary saturated the media, museums, and public events; there were commemorative stamps and coins, penitential processions in yokes and chains.<sup>57</sup> A descendant of slave trader Sir John Hawkins, his T-shirt inscribed "So Sorry" and "Pardon," knelt in chains before 25,000 Gambians in Banjul, asking forgiveness for his forebear's crimes.<sup>58</sup>

Slavery is by no means the only ancestral iniquity nowadays deplored. Britain's prime minister apologized for the Irish Famine, the pope for the Inquisition. Australia declared a "National Sorry Day" for past mistreatment of Aborigines, and Canada has followed suit on behalf of its tribal peoples.<sup>59</sup> Shrivens of guilt after voting for reparations for Japanese American internment, the U.S. Congress

54. INTERNATIONAL THEOLOGICAL COMMISSION, *MEMORY AND RECONCILIATION* 11 (2000). Most of John Paul II's admissions of wrongs and requests for forgiveness were made not to victims or their descendants (especially non-Catholics), however, but to God, and hence seem more like confessions of sin than reparative apologies. See Michael R. Marrus, *Papal Apologies of Pope John Paul II*, in *THE AGE OF APOLOGY: FACING UP TO THE PAST* 259, 265–66 (Mark Gibney et al. eds., 2008) [hereinafter *AGE OF APOLOGY*].

55. Philip Pulella, *Evolution Fine, but No Apology to Darwin: Vatican*, REUTERS, Sept. 16, 2008, <http://www.reuters.com/article/scienceNews/idUSLG62672220080916?pageNumber=1&virtualBrandChannel=0> (quoting Archbishop Gianfranco Ravasi). Pressed to stop saying sorry, the papacy demurred at apologizing to the Knights Templar for suppressing and dissolving the order between 1307 and 1312, but did absolve it from charges of heresy. Ruth Gledhill, *Descendants of "Holy Grail" Knights Demand an Apology from the Pope*, TIMES (London), Oct. 16, 2007, at 32.

56. Cora Kaplan, *Commemorative History Without Guarantees*, 64 HIST. WORKSHOP J. 389, 389–97 (2007) (reviewing JOHN OLDFIELD, *CHORDS OF FREEDOM: COMMEMORATION, RITUAL AND BRITISH TRANSATLANTIC SLAVERY* (2007) and ELIZABETH KOWALSKI WALLACE, *THE BRITISH SLAVE TRADE AND PUBLIC MEMORY* (2006)).

57. Adam Hochschild, *English Abolition: The Movie*, N.Y. REV. BOOKS, June 14, 2007, at 73–75.

58. Alan Hamilton, *Slaver's Descendant Begs Forgiveness*, TIMES (London), June 22, 2006, at 9.

59. See Gorman Beauchamp, *Apologies All Around: Today's Tendency to Make Amends for the Crimes of History Raises the Question: Where Do We Stop?*, AM. SCHOLAR, Autumn 2007, at 83, 84; Australian Government Culture and Recreation Portal, *Sorry Day and the Stolen Generations*, <http://cultureandrecreation.gov.au/articles/indigenous/sorry> (last visited Feb. 26, 2009).

urged Japan to apologize to wartime “comfort women.”<sup>60</sup> A Fijian apology for eating the Reverend Thomas Baker in 1867 came with symbolic amends: the cannibal’s descendants slaughtered and cooked a cow for the missionary’s offspring.<sup>61</sup> The International Center for Transitional Justice’s thousand-page *Handbook of Reparations* is by no means a comprehensive catalogue of current efforts to rectify the injustices of the immediate past century.<sup>62</sup> As for the more remote past, one wag suggests apologies are due from “every human being who ever lived” to the unjustly maligned Neanderthal Man for his extinction 28,000 years ago.<sup>63</sup> Remorse is bestowed on places as well as peoples: John Paul II apologized to the Greek Orthodox Church for the sacking of Constantinople in the Fourth Crusade.<sup>64</sup> John Betjeman’s daughter said sorry to Slough, a byword for English urban blight, for the poet’s 1937 ditty, “Come, friendly bombs, and fall on Slough / It isn’t fit for humans now.”<sup>65</sup> Town councilors claimed to be mollified when told that Betjeman hadn’t really meant it.<sup>66</sup> The past in general has become “a matter of atonement,” concludes Ian Buruma. Thus, “public confessions, official apologies, and ritual reflections on their sinful nature [are required] not only of the generation of sinners, but also of the children and grandchildren who inherited the mark of Cain.”<sup>67</sup>

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60. *U.S. House Urges Japan to Apologize for WWII Sex Abuses*, INT’L HERALD TRIB., July 30, 2007, <http://www.iht.com/articles/2007/07/30/news/vote.php>.

61. Beauchamp, *supra* note 59, at 84. The Fiji apology is a rare exception to the cultural masochism virtually exclusive to the West, save for Benin’s apology for the precolonial Abomey Kingdom’s role in the slave trade. John B. Hatch, *Beyond Apologia: Racial Reconciliation and Apologies for Slavery*, 70 W. J. COMM. 186, 195–97 (2006); Michael Radu, *History and Political Games*, FOREIGN POL’Y RES. INST.: E-NOTES, Nov. 2008, <http://www.fpri.org/enotes/200811.radu.historypoliticalgames.html>.

62. THE HANDBOOK OF REPARATIONS: THE INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE 1 (Pablo de Greiff ed., 2006) [hereinafter HANDBOOK OF REPARATIONS].

63. Giles Coren, *Three Grunts for Those Neanderthal Geniuses*, TIMES (London), Aug. 30, 2008, at 16.

64. James Boyne, *Better Late Than Never! Pope Apologizes for Sacking Constantinople in 1204*, OPEDNEWS.COM, July 3, 2004, [http://www.opednews.com/boyne\\_070304\\_pope.htm](http://www.opednews.com/boyne_070304_pope.htm).

65. JOHN BETJEMAN, *Slough* (1937), reprinted in COLLECTED POEMS 20, 20–21 (Farrar, Straus, and Giroux 2006) (1958).

66. *Despond of Slough Lifts after Betjeman Apology*, TIMES (London), Sept. 16, 2006, at 18; see Sarah Lyall, *A Town Trying Not to Live Up to Its Name*, N.Y. TIMES, Mar. 21, 2008, at A4.

67. Ian Buruma, *War Guilt, and the Difference Between Germany and Japan*, N.Y. TIMES, Dec. 29, 1998, at A19.

So politically potent is victimhood that nations, minorities, sects, and individuals compete to be ranked as most maltreated.<sup>68</sup> “There is only one nation of victims,” an Israeli journalist contends. “If somebody else wants to claim this crown of thorns for himself, we will bash his head in.”<sup>69</sup> Other claimants to that crown, besides those named above, include the United States,<sup>70</sup> Germany,<sup>71</sup> Northern Ireland,<sup>72</sup> and Colombia.<sup>73</sup> A recent study finds Britain a “nation of victims,” because seventy-three percent of all Britons—the disabled, women, ethnic minorities, homosexuals—are officially oppressed, some (black lesbians, for example) trebly disadvantaged.<sup>74</sup> The Gujjars, Rajasthan’s traditionally pastoralist group, have asked to be classified as more “backward” to receive job benefits reserved for India’s deprived Scheduled Tribes.<sup>75</sup> When Swiss banks were censured for sequestering gold purloined from Jews and compelled to make restitution, a political leader termed Switzerland a “victim of trends in world history.”<sup>76</sup> Recalling partisan resistance that led to a German retaliatory massacre in 1944 Rome, young Italians see this massacre as a series of isolated acts where the deceased were hapless victims, not contestants in a bitter, divisive struggle.<sup>77</sup> At California history textbook hearings in 1987, group after group demanded that the

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68. Jean-Michel Chaumont, *Du culte des héros à la concurrence des victimes*, CRIMINOLOGIE, Spring 2000, at 167, 178–79; JOHN TORPEY, MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS 160 (2006).

69. Uri Avnery, *Mourning Becomes Israel: The Role of Victimhood in the Jewish Psyche*, WASH. REP. ON MIDDLE E. AFF., Apr. 2004, at 16–17.

70. CHARLES J. SYKES, A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER *passim* (1992); Renana Brooks, *A Nation of Victims*, NATION, June 30, 2003, at 20–22.

71. A NATION OF VICTIMS? REPRESENTATIONS OF GERMAN WARTIME SUFFERING FROM 1945 TO THE PRESENT *passim* (Helmut Schmitz ed., 2007) [hereinafter A NATION OF VICTIMS?].

72. Brian Lennon, *A Nation of Victims? Northern Ireland’s Two Minorities*, COMMONWEAL, Mar. 14, 1997, at 12–14.

73. Clifford Krauss, *War in Colombia Creates a Nation of Victims*, N.Y. TIMES, Sept. 10, 2000, at A1.

74. Anthony Browne, *I’m Oppressed, You’re Oppressed, We Are All Oppressed: The Victim Culture*, TIMES (London), Oct. 9, 2006, at 17 (citing DAVID G. GREEN, WE’RE (NEARLY) ALL VICTIMS NOW (2006)).

75. Somini Sengupta, *Indian Officials to Rule How “Backward” Group Is*, N.Y. TIMES, June 5, 2007, at A10.

76. Regula Ludi, *What Is So Special About Switzerland?*, in THE POLITICS OF MEMORY IN POSTWAR EUROPE 210, 238 (Richard Ned Lebow et al. eds., 2006) (quoting Walter Hofer, 1997) [hereinafter POLITICS OF MEMORY].

77. ALESSANDRO PORTELLI, THE ORDER HAS BEEN CARRIED OUT: HISTORY, MEMORY, AND MEANING OF A NAZI MASSACRE IN ROME 299–300 (Palgrave MacMillan 2003) (1999).



curriculum show “its forebears had suffered more than anyone else in history.”<sup>78</sup>

Victimhood not only vindicates and exonerates; it also enhances identities. I have a grievance, therefore I am. Only “our sense of trauma, and thus our status as victims,” adds Buruma, “makes us feel authentic.” Like historic-site museums, school history increasingly focuses on “history as it is felt, especially by its victims.” This encourages empathy but hampers critical thinking. “For feelings can only be expressed, not discussed,” leading either to “mute acceptance of whatever people wish to say about themselves, or in violent confrontations. . . . You cannot argue with feelings.”<sup>79</sup>

### C. *Blameless Americans Burdened by Slavery*

Americans seem particularly prone to lurch from rude self-praise to unseemly self-pity. Charges of “lynching” at Clarence Thomas’s 1991 Senate confirmation hearing turned his clash with Anita Hill into “a contest to see who was the most convincing victim . . . probably the highest status a public figure can aspire to in America.”<sup>80</sup> The National Alliance, America’s foremost “White Pride” organization, contends that guilt-mongering liberal academics suppress the fact that far more whites than blacks have been enslaved, hence *whites* have suffered most.<sup>81</sup>

That white Americans risked enslavement was, indeed, a recurrent plaint of colonials who craved independence. Britain aimed to “fix the shackles of Slavery upon us,” wrote George Washington, and to “reduce us to the most abject state of Slavery.” The imminent conflict would determine “whether Americans are to be, Freemen, or Slaves.” Their own slaves provided a potent analogy; to “submit to every Imposition . . . will make us as tame, & abject Slaves, as the Blacks we Rule over.”<sup>82</sup> Those (like Washington’s own slaves) who did not resist tyranny deserved their servile lot.<sup>83</sup>

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78. Diane Ravitch, *History and the Perils of Pride*, PERSPECTIVES ON HIST., Mar. 1991, at 12, 13.

79. Ian Buruma, *The Joys and Perils of Victimhood*, N.Y. REV. BOOKS, Apr. 8, 1999, at 8–9.

80. PAUL NATHANSON & KATHERINE K. YOUNG, LEGALIZING MISANDRY: FROM PUBLIC SHAME TO SYSTEMIC DISCRIMINATION AGAINST MEN 38 (2006) (quoting journalist Joe Klein).

81. James T. Campbell, *Slavery and Justice*, PUB. HISTORIAN, Spring 2007, at 19–20.

82. FURSTENBERG, *supra* note 13, at 193–94 (quoting letters from George Washington to Bryan Fairfax, July 20, 1774 & Aug. 24, 1774).

83. *Id.* at 194. Abolitionists and escaped slaves felt likewise. As a free black abolitionist put it, “The man who would not fight . . . to be delivered from the most

When slaves did rebel, as they did in the St. Domingue insurrection that put blacks in power in Haiti after 1791, American slaveholders trembled for their own future. And they blamed Britain for saddling them with a barbarous and perilous legacy. "I am not the man who enslaved them," declared Henry Laurens of South Carolina, presiding at the Continental Congress, "they are indebted to Englishmen for that favor." The infernal slave trade, held George Mason, "originated in the avarice of British merchants, [who] constantly checked the attempts of Virginia to put a stop to it." This fiction long persisted. "England forced upon us the importation of slaves from Africa," held Philadelphia statesman Richard Rush in 1850. "We strove to prevent it while colonies, but could not." In any case, it would be wrong "to censure the present generation for the existence of slavery; our forefathers sow[ed] the seeds of an evil, which . . . hath descended upon their posterity," reasoned Virginia jurist St. George Tucker.<sup>84</sup> "This invented past conveniently absolved the living of any responsibility for the institution," concludes historian François Furstenberg. "Slavery was a legacy of a barbarous past; it was the dead, not the living, who were to blame."<sup>85</sup>

But it was the living who would be blamed for failing to end slavery, felt American slave owners in the wake of St. Domingue's slave revolt. Thomas Jefferson feared that conflict between white "despots" and black "enemies" would end only with the "extermination of one race" or the other. "If something is not done,

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wretched, abject and servile slavery . . . ought to be kept with all of his children or family, in slavery." DAVID WALKER, WALKER'S APPEAL, IN FOUR ARTICLES, TOGETHER WITH A PREAMBLE, TO THE COLORED CITIZENS OF THE WORLD 15 (2d ed., David Walker 1830) (1829). Had runaway slaves not tried to escape, asserted escaped slave Frederick Douglass in 1845, "we had as well fold our arms, sit down, and acknowledge ourselves fit only to be slaves." FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS 98 (Filiquarian 2007) (1845). It is a stunning irony that freedom from Britain actually put white Americans into slavery. With the 1783 Peace of Paris, the United States lost the protection of Britain's treaties with the Barbary States, and over the next decade more than seven hundred American sailors were captured and held as slaves in North Africa. See FREDERICK C. LEINER, THE END OF BARBARY TERROR: AMERICA'S 1815 WAR AGAINST THE PIRATES OF NORTH AFRICA 1-4 (2006).

84. FURSTENBERG, *supra* note 13, at 86-89 (quoting Henry Laurens, George Mason, Richard Rush, and St. George Tucker).

85. *Id.* at 89-90. Jefferson similarly accused George III of oppressing colonial whites by enslaving and sending Africans to America. THOMAS JEFFERSON, "original Rough draught" of the Declaration of Independence, in 1 THE PAPERS OF THOMAS JEFFERSON 426 (Julian P. Boyd ed., 1953). Slaves were a burden "our ancestors have entail'd on us," Thomas Ruffin's father wrote him, when young Ruffin was a student at Princeton. Sally Hadden, *Judging Slavery: Thomas Ruffin and State v. Mann*, in LOCAL MATTERS: RACE, CRIME, AND JUSTICE IN THE NINETEENTH-CENTURY SOUTH 1, 2 (Christopher Waldrep & Donald G. Nieman eds., 2001).

& soon done, we shall be the murderers of our own children," he wrote to St. George Tucker, who concurred: "Will not our posterity curse the days of their nativity with all the anguish of Job? Will they not execrate the memory of those ancestors who . . . have, like their first parents, entailed a curse on all future generations?"<sup>86</sup> Southerners regretted the past. But they deplored it as a practical error, not a moral evil. And they reproached their precursors for the predicament of their heirs, not out of contrition for their slaves.

Northerners, too, were less concerned (when at all) about slavery's immorality than its inexpedience. They envisaged freedom only much later, after their own demise and at no cost to slave owners. State acts from 1780 (Pennsylvania) to 1804 (New Jersey) emancipated *future* slave offspring after some years of labor. "Only a property not yet on earth was to be freed, and only on some distant day"; before that day most New York owners had sold their slaves down south.<sup>87</sup> After the War of 1812, the U.S. Congress compensated slave owners for the loss of slaves who had been freed by British troops. Like American lawmakers, British parliamentarians viewed slaves as both property *and* persons, but their property status was paramount.<sup>88</sup> British West Indian slaves freed in 1834 were not compensated for having been deprived of liberty; rather, slave owners were compensated for being deprived of property.<sup>89</sup> Lincoln's Emancipation Proclamation made no mention of compensating slaves; "the loudest talk at the time was of compensation to Northern

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86. FURSTENBERG, *supra* note 13, at 79–80 (quoting ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA 105 (1796)); Letter from Thomas Jefferson to St. George Tucker (Aug. 28, 1797), in 29 THE PAPERS OF THOMAS JEFFERSON 519 (Barbara B. Oberg ed., 2003).

87. WILLIAM W. FREEHLING, THE REINTEGRATION OF AMERICAN HISTORY: SLAVERY AND THE CIVIL WAR 17–18 (1994). Slavery in Connecticut lingered on from the state's emancipation act of 1784 until 1848. In the wake of the 1831 Nat Turner revolt, Thomas Jefferson Randolph (Jefferson's grandson) proposed future emancipation, coupled with forced removal, leaving planters plenty of time to sell slaves to the Deep South, while sparing Virginia the cost of deporting freed blacks to Africa; his proposal was only narrowly defeated. *Id.* at 189–90.

88. James Madison in *The Federalist* No. 54 (Feb. 12, 1788) summarized the dual roles: on the one hand, the slave is compelled to labor not for himself but for his master; he is vendible from one to another; he is "subject at all times to be restrained in his liberty and chastised in his body, by the capricious will of another, . . . degraded from the human rank, and classed with . . . animals [as legal property]." On the other hand, the slave is regarded by the law as a "moral person" and "a member of . . . society," protected in life and limb against the violence of others and punishable himself for violence against others. THE FEDERALIST NO. 54 (James Madison).

89. See DAVID LOWENTHAL, WEST INDIAN SOCIETIES 51–52 (1972).

slaveholders,” as Congress did in 1862 for owners of more than three thousand slaves in the District of Columbia.<sup>90</sup>

#### D. *Holocaust and Other Sources of Modern Victimhood*

Why now? Why is the world, especially the developed West, so swamped in collective remorse? The reasons are multiple. Some stem from the failure of roseate postwar hopes. The collapse of pledges to end poverty, famine, disease, and injustice eroded faith in technological and economic panaceas.<sup>91</sup> As the optimism of the Enlightenment has come to seem a cruel illusion, visions of a better tomorrow give way to righting past wrongs.<sup>92</sup> But above all, what ushered in what Wole Soyinka called “a *fin de millénaire* fever of atonement” was dawning awareness of Holocaust horrors and ensuing amends to its survivors and descendants.<sup>93</sup> Coming to terms with the past became a major preoccupation first in postwar Germany. Chancellor Konrad Adenauer saw *Wiedergutmachung*, “making good again,” as not only a necessary act of atonement but also essential to rehabilitate Germany in the global community.

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90. DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 312–13 (2006). Lincoln did, however, condemn “all the wealth piled by the bondsman’s two hundred and fifty years of unrequited toil.” ABRAHAM LINCOLN, *Second Inaugural Address*, reprinted in 8 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 332, 333 (Roy P. Basler ed., 1953). Border states that remained in the Union rejected Lincoln’s offer of federal compensation to free their slaves. As late as February 1865, Lincoln hoped to persuade the South to end the Civil War by compensating Confederate slave owners. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877*, at 6, 74 (Perennial 2002) (1988). Dutch emancipation in the Netherlands Antilles and Surinam was delayed until 1863 by prolonged haggling over slave-owner compensation. See Peter Baehr, *Colonialism, Slavery, and the Slave Trade: A Dutch Perspective*, in *AGE OF APOLOGY*, supra note 54, at 229, 235–36. Failure to compensate Brazil’s slaveholders for freeing slaves in the 1880s led to riot and revolution. See DAVID BARANOV, *THE ABOLITION OF SLAVERY IN BRAZIL: THE “LIBERATION” OF AFRICANS THROUGH THE EMANCIPATION OF CAPITAL* 161 (2000).

91. David Lowenthal, *Beyond Repair: Apologies for the Past Replace Our Hopes for the Future*, *TIMES LITERARY SUPP.* (London), Nov. 24, 2006, at 3; see also PIERRE NORA, *The Era of Commemoration*, in 3 *REALMS OF MEMORY: THE CONSTRUCTION OF THE FRENCH PAST III: SYMBOLS* 609, 634–35 (Lawrence D. Krizman ed., Arthur Goldhammer trans. 1998).

92. TORPEY, supra note 68, at 36, 160.

93. WOLE SOYINKA, *THE BURDEN OF MEMORY, THE MUSE OF FORGIVENESS* 90 (1999). The current decade’s outpouring of Holocaust-related books and films seems to the critic A.O. Scott “to defy quantification.” He ascribes this obsessive, perhaps morbid, preoccupation in part to the Holocaust’s recession from living memory, in part to our “tragic foreknowledge” that “the sheer scale of the atrocity” precludes ever putting that memory to rest. A.O. Scott, *Why So Many Holocaust Films Now, and Who Benefits?*, *INT’L HERALD TRIB.*, Nov. 22, 2008, at 1.

Hence the most substantial reparations ever implemented were paid to the State of Israel and to individual Jewish sufferers.<sup>94</sup>

The Holocaust example fueled reparations campaigns the world over. Claimants in South Africa, Namibia, Argentina, Brazil, and Chile, Australian Aborigines, Native Americans, Japanese Americans, and African Americans all deployed the same rationales and rhetoric, the same legal instruments and expertise, often the same lawyers and publicists, as victimized Jews.<sup>95</sup> And just as global Holocaust attention helped to revitalize Jewish group identity, so have memories of the Armenian genocide sustained adherence to national identity among Armenians abroad, and the Nanking massacre has sustained group identity among overseas Chinese.<sup>96</sup>

## II. DRAWBACKS TO DAMNING THE PAST

### A. *Practical Impediments to Recompensing Past Injuries*

The sheer magnitude of loss often defies restitution. “Which victims—which memories—should have priority?” asks Tony Judt of the torrent of bitter charges following the fall of communism. “Who deserve[s] the attention of posterity: obscure Slovak or Hungarian peasants thrown off their property, or the Communist apparatchiks who ejected them but who themselves fell victim a few years later?”<sup>97</sup> Historical wrongs rectified more in rhetoric than in practice leave claimants aggrieved by expectations denied. To be sure, some claims are largely rhetorical. For example, when Afro-Caribbean member of Parliament Bernie Grant harangued the House of Commons to return Britain’s crown jewels to Africa, he specified neither which jewels nor to which country they should go.<sup>98</sup> Similarly, although it is the Greek national mantra that the Elgin Marbles purloined from the

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94. See Ariel Colonomos & Andrea Armstrong, *German Reparations to the Jews After World War II: A Turning Point in the History of Reparations*, in HANDBOOK OF REPARATIONS, *supra* note 62, at 390, 393, 408; BARKAN, *supra* note 13, at 8–15. The term “Wiedergutmachung” comes from Karl Jaspers’s *The Question of German Guilt*. KARL JASPERS, DIE SCHULDFRAGE: EIN BEITRAG ZUR DEUTSCHEN FRAGE *passim* (1946).

95. The recent slavery reparations upsurge partly replaces affirmative action, increasingly a dead letter. ALFRED L. BROPHY, REPARATIONS PRO & CON 55–62 (2006).

96. TORPEY, *supra* note 68, at 161. The “shared consciousness of past suffering . . . often is deployed to stimulate group self-understanding and political involvement” among descendants (actual or putative) of those injured. *Id.* at 21.

97. Tony Judt, *From the House of the Dead: On Modern European Memory*, N.Y. REV. BOOKS, Oct. 6, 2005, at 13.

98. *Return of Cultural Objects*, 237 PARL. DEB., H.C. (6th ser.) (1994) 740 (remarks by Mr. Grant); Russell Chamberlin, *Culture or Plunder?*, HIST. TODAY, May 2002, at 38.

Parthenon should be returned home from the British Museum,<sup>99</sup> some Greeks say, in confidence, that it suits Greece better to go on claiming them—to remain civilization’s iconic victim—than to get them back.<sup>100</sup>

Restitution for recent injuries spawns perplexing and often divisive issues. Should amends be personal or collective or both? Should compensation be allocated in line with injury or need or faith or ancestry? Reparations normally issue from nation-states; should firms and individuals also pay? German and Swiss banks, French railways, global art and antiquities dealers were all complicit in Holocaust crimes. Can compensation for lost land or houses, money or mementos, be weighed against claims to repatriate human remains or against redress for slaughter, torture, incarceration? What possible recompense can succor children of Argentinean “disappeareds,” told in their teens that their “parents” are in fact their parents’ murderers? Reconciliation in such a case seems ludicrous, truth a horrendous added injustice.<sup>101</sup>

Just claims for recent wrongs often collapse because the need for healing social wounds trumps justice for the wronged.<sup>102</sup> As in ancient Athens, so in modern South Africa, Truth and Reconciliation amnesty for past crimes deprived apartheid victims of legal recourse against confessed persecutors.<sup>103</sup> “The price of conjuring peace out of conflict is that justice is *not* done”; as exemplified in Ulster’s armistice and political settlement, “most crimes go unpunished. . . . [T]hose who have suffered most—the families of the dead—will not see the killers of their loved ones brought to justice.”<sup>104</sup>

Reparations for ancient wrongs frequently founder on the futility of determining who owes what to whom. “Trying to go back and rewrite history, righting all its wrongs, is a feckless endeavor,”

99. ELEANA YALOURI, *THE ACROPOLIS: GLOBAL FAME, LOCAL CLAIM* 67 (2001).

100. *Id.* at 71; YANNIS HAMILAKIS, *THE NATION AND ITS RUINS: ANTIQUITY, ARCHAEOLOGY, AND THE NATIONAL IMAGINATION IN GREECE* 243–44 (2007); Lowenthal, *supra* note 2, at 379–80.

101. Lowenthal, *supra* note 91; Thomas Catan, *The Orphan Files*, *TIMES* (London), Nov. 28, 2007, *Times2*, at 4; Roger Cohen, *Lost Children, Lost Truths*, *N.Y. TIMES*, Jan. 13, 2008, at 14.

102. See DOROTHY C. SHEA, *THE SOUTH AFRICAN TRUTH COMMISSION: THE POLITICS OF RECONCILIATION* 12–15 (2000).

103. Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, in *HANDBOOK OF REPARATIONS*, *supra* note 62, at 176, 184–87. For a general discussion of the politics of amnesty, see SHEA, *supra* note 102, at 26–32, 58–59, 73–74.

104. Michael Goldfarb, *Peace Is Not About Justice*, *INT’L HERALD TRIB.*, Dec. 8, 2007, at 6.

concludes Garry Wills.<sup>105</sup> Distance in time derails efforts to hold the past to account; “as the past recedes, historical wrongs become increasingly difficult to repair.”<sup>106</sup> “Given the vastness of historical injustice, and given the ramification of every event over time,” reasons a philosopher, “most or all current individuals have been . . . harmed by numerous ancient wrongs.”<sup>107</sup> The Old Testament, to be sure, burdened great-grandchildren with forebears’ sins; but patriarchal descent then went unquestioned. Today most fourth-generation victimizers may well be fourth-generation victims; for example, most mixed-race African Americans stem from great-grandmothers who were slaves and great-grandfathers who were slaveholders or other whites. Since a high proportion of all African Americans have ancestors who were slave owners as well as slaves, contrition becomes a baffling affair.<sup>108</sup>

Claims for ancient wrongs also come to grief when what seems rightly due is beyond all reach. A 1995 estimate that Brazil owed 60 million slave descendants \$100,000 each totaled six trillion dollars, twelve times Brazil’s gross national product.<sup>109</sup> A 1998 call to pay every American slave descendant \$200,000, the current value of the 40 acres and a mule promised in 1865, would bankrupt the federal government.<sup>110</sup> Such payments are manifestly impossible. Yet fearful Brown University alumni, in the wake of a faculty report deploring that college’s slave-trade beginnings, felt it necessary to stipulate that

105. Gary Wills, *We Are All Romans Now*, N.Y. REV. BOOKS, May 31, 2007, at 12–14.

106. P.E. DIGESER, *POLITICAL FORGIVENESS* 53 (2001).

107. George Sher, *Ancient Wrongs and Modern Rights*, 10 PHIL. & PUB. AFF. 3, 3–17 (1981).

108. It is noteworthy that “the vast majority of Blacks in America are . . . of mixed race heritage.” Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1523 n.161 (2000) (citing one estimate that between three-fourths and four-fifths have some white ancestry); see Lawrence Wright, *One Drop of Blood*, NEW YORKER, July 25, 1994, at 46, 48. Most of these white ancestors would have been slave owners, overseers, or hirers with absolute power over their property. When so many descendants of victims are also descendants of wrongdoers, reparations become pointless. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 740 (2003) (“[A]fter a few generations of mixing, the problem of identifying beneficiaries will become intractable.”). “Would the government ever dare ask an African-American official to apologize for slavery?” wondered a scornful skeptic in the wake of the apology by Kevin Gover, a Pawnee tribal member, for past mistreatment of Indians by the Bureau of Indian Affairs. Barbara L. Tavern, *BIA’s Apology to Native Americans*, in *TAKING WRONGS SERIOUSLY*, *supra* note 30, at 90.

109. BARKAN, *supra* note 13, at 285.

110. *Id.* at 288–89; see Tyler Cowen, *How Far Back Should We Go? Why Restitution Should Be Small*, in *RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY* 17–32 (Jon Elster ed., 2006).

their gifts not be used for reparations.<sup>111</sup> And British Prime Minister Tony Blair's slave-trade regrets fell short of a full apology because Whitehall legal advisors warned it might rouse claims for unaffordable reparations.<sup>112</sup>

### B. *Aggrandizing Vengeance*

Today's pervasive culture of apology contains "benefits as well as serious risks [but] the former are as routinely proclaimed as the latter are overlooked," warns Griswold.<sup>113</sup> Paying heed to victim testimonies adds previously unheard voices and new insights to history. It prompts critiques of once customary credos that now seem loathsome or ludicrous. And in re-evaluating erstwhile heroes and villains, we realize the transient frailty of our own certitudes. Alerted to shifting moral codes, we learn to spot disjunctions between dictums and deeds. As a result, we feel obliged to amend memories, revise histories, and revamp memorials.

But immersion in victimhood also subverts historical understanding.<sup>114</sup> Personal accounts of monstrous evils make their bearers "messengers from another world," as is said of Holocaust survivors "who alone can communicate the incommunicable," salvaging histories otherwise lost.<sup>115</sup> Yet prevalent uses of such accounts—"practicing a 'therapy of memory' to counter the 'pathology of history'"<sup>116</sup>—are apt to smother history in memory: they aim less to tell the truth about what happened than to reveal how victims felt about it.<sup>117</sup> Sufferers' recollections become sacred

111. Frances FitzGerald, *Peculiar Institutions*, NEW YORKER, Sept. 12, 2005, at 77; see also BROPHY, *supra* note 95, at 146–47 (discussing the impact of the Brown University study). For the full report, see generally SLAVERY AND JUSTICE: REPORT OF THE BROWN UNIVERSITY STEERING COMMITTEE ON SLAVERY AND JUSTICE (2006), available at [http://www.brown.edu/Research/Slavery\\_Justice/report.html](http://www.brown.edu/Research/Slavery_Justice/report.html) [hereinafter report of the BROWN UNIVERSITY STEERING COMMITTEE ON SLAVERY AND JUSTICE].

112. David Smith, *Blair: Britain's Sorrow for Shame of Slave Trade*, OBSERVER (London), Nov. 26, 2006, at 1.

113. GRISWOLD, *supra* note 33, at xxiii. For a discussion of the risks associated with apologies, see Robert I. Rotberg, *Apology, Truth Commissions, and Intrastate Conflict*, in TAKING WRONGS SERIOUSLY, *supra* note 30, at 33–49.

114. Dipesh Chakrabarty, *History and the Politics of Recognition*, in MANIFESTOS FOR HISTORY 77, 77–87 (Keith Jenkins et al. eds., 2007); Dominick LaCapra, *Resisting Apocalypse and Rethinking History*, in MANIFESTOS FOR HISTORY, *supra*, at 173.

115. CHRISTOPHER R. BROWNING, COLLECTED MEMORIES: HOLOCAUST HISTORY AND POSTWAR TESTIMONY 38–39 (2003).

116. DANIEL ARASSE, ANSELM KIEFER 93 (2001).

117. Hayden White, *Afterword: Manifesto Time*, in MANIFESTOS FOR HISTORY, *supra* note 114, at 230. A huge evil "impossible to remember as it truly was . . . is inherently vulnerable to being remembered as it wasn't." Judt, *supra* note 97, at 16.



relics, venerated not as historical documentation but as tragic testimony.<sup>118</sup> Thus reified, they valorize victimized groups as timeless hallowed entities whose collective self-images must be affirmed by all. “The current group of living descendants of the victims of injustice . . . is entitled to have its own understanding of its past validated by society,” contends a philosopher; social justice demands “an understanding of its history that supports a sense of its own worth and a dignified sense of its collective identity.”<sup>119</sup> In short, the cure for inherited self-loathing is to wield the past as a moral cudgel, berating others for their forebears’ sins and requiring them to endorse your own feel-bad version of history.<sup>120</sup>

It is now de rigueur to condemn past atrocities, saying “never again” to forestall their recurrence. But dwelling on past evils may in fact impede efforts to overcome present injustice, substituting for rather than spurring preventive action. “To hold the present everlastingly guilty for the past represents a distraction from the present, in which new crimes are being committed that could be prevented.”<sup>121</sup> Post-utopian skepticism about “new blueprints for a heaven on earth,” suggests John Torpey, leads us to fix our proxy “gaze firmly on the horrors and injustices of the past.” In consequence, reparation demands for past genocide are “more effective than the mechanism[s] designed to stop genocide in the present.”<sup>122</sup>

Current obsession with historical injustice moreover conflates legal justice with moral outrage, jumbling what can with what cannot be repaired. Mired in distress for pasts beyond redemption, we abnegate the future. The duty to remember Auschwitz becomes a moral axiom, imposing permanent consciousness of the crime and an unattainable injunction to redress it. Thus France’s 1990s trials for Nazi complicity posed an insoluble paradox.

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118. ALAN MEGILL, *HISTORICAL KNOWLEDGE, HISTORICAL ERROR: A CONTEMPORARY GUIDE TO PRACTICE* 19–21, 30 (2007).

119. JEFFREY BLUSTEIN, *THE MORAL DEMANDS OF MEMORY* 164 (2008) (internal quotation marks omitted). See generally François Bedariva, *The Historian’s Craft, Historicity, and Ethics*, in *HISTORIANS AND SOCIAL VALUES* 69, 69–76 (Joep Leerssen & Ann Rigney eds., 2000) (discussing the bottomless pit of cultural relativism).

120. Judt, *supra* note 97, at 16. Advocates of the historically mistreated are apt to term themselves similarly mistreated by oppressors, a strategy termed “therapeutic alienation.” JOHN MCWHORTER, *WINNING THE RACE: BEYOND THE CRISIS IN BLACK AMERICA* 6 (2005).

121. William Pfaff, *The Danger of Seeing the Past Through Today’s Prism*, *INT’L HERALD TRIB.*, June 6, 1998, at 6.

122. TORPEY, *supra* note 68, at 36.

One makes a legitimate call for reparation, all the while proclaiming that the crime is irreparable. . . . Calling for moral, symbolic, material, or judicial reparation after the heat of the moment implies that . . . once paid, the debt should be settled, so that one can henceforth speak of forgetting, forgiving, or simply turning the page. [Yet this] seems unacceptable and probably impossible.<sup>123</sup>

Ancient grievances pronounced incurable have dire effects. That “so many minorities have come to define themselves above all as historical victims,” most notoriously in the Balkans, Buruma finds alarming.<sup>124</sup> For “when a culture, ethnic, religious, or national community bases its communal identity almost entirely on the sentimental solidarity of remembered victimhood,” historical myopia induces endless vendetta.<sup>125</sup> Traumatic memories of ancient injustice are deployed to evade, condone, or inflame ongoing reprisals.<sup>126</sup> Relentlessly dwelling on inherited grievances idealizes perpetual victimhood.

“Chosen traumas”—Jews for the fall of the Maccabees, Greeks for that of Constantinople, Czechs for their 1620 subjugation by the Habsburgs at Bilá Hora, Scots for the 1745 massacre at Culloden, Serbs for the Ottoman slaughter of 1389 at Kosovo—become indelible icons of collective identity. To live mainly “for the sake of retaining the memory of the dead,” as Armenians are said to do, is to submit to being “governed from mass graves,” in Avishai Margalit’s phrase.<sup>127</sup> Seeking in vain for some Armenian “who does not live in a dark room and weep about the past,” Michael Arlen on a visit to his ancestral homeland heard only the perpetual refrain, “We were murdered. We were innocent. We were slaughtered.”<sup>128</sup> “The past continues to torment because it is *not* past,” sums up Michael Ignatieff, “yesterday and today [a]re the same,” a toxic “agglutinated mass of fantasies, distortions, myths, and lies. . . . [Historical] crimes . . . remain locked in the eternal present, crying out for blood.”<sup>129</sup>

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123. ROUSSO, *supra* note 17, at 21–23.

124. Ian Buruma, *The Joy and Perils of Victimhood*, N.Y. REV. BOOKS, Apr. 8, 1999, at 4.

125. *Id.*

126. BARKAN, *supra* note 13, at xvii, xxxiv.

127. AVISHAI MARGALIT, *THE ETHICS OF MEMORY* viii–ix (2002).

128. MICHAEL J. ARLEN, *PASSAGE TO ARARAT* 24, 126 (Penguin Books 1982) (1975) (internal quotation marks omitted).

129. MICHAEL IGNATIEFF, *THE WARRIOR’S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE* 186 (1997).

Slobodan Milošević's blood-red monument at Kosovo Polje in 1989 "was built not to complete the Serbians' 600-year-old mourning, but to reopen it," concludes a psychiatrist; "not to allow thoughts of forgiveness, but to stimulate revenge against current enemies."<sup>130</sup>

Tribal advocates likewise take refuge in enduring victimhood. Thus Aboriginal claimants to ancestral artifacts reject proofs showing some were freely given or sold, on the ground that "any transfer of goods between settlers and indigenous people in the nineteenth century *had* to be exploitative [for] indigenous people were always powerless in the face of the white intruder." Tagging tribal ancestors in toto as "people without autonomy or agency" is morally compelling and politically efficacious, but it comes at the cost of saddling descendants with a historically dubious legacy of hapless impotence that undermines traditional self-respect.<sup>131</sup> Complicit in such demoralizing are *mea-culpa* prone white Australians. Our "nation's discursive sympathy . . . threatens to reduce one's being to the status of abject victimhood," warns Cowlshaw. "When the past is made a parable of injustice and cruelty, living memories and inherited stories are flattened and homogenised."<sup>132</sup> Hence Aboriginal elders in Bourke, New South Wales, deplore efforts to make wholesale moral capital out of past oppression, whereas young militants decry elders' pride in memories of service today deemed "comprehensively humiliating," in line with the current credo that "the only valid human relationships are those based on an affirmation of equality."<sup>133</sup>

### C. *Hindsight Hubris and Inherited Guilt*

To censure past misdeeds gives rise to baseless and unseemly self-congratulation. Combining "moral superiority towards her forebears . . . with a modicum of self-flagellation," as was said of Germaine Greer's admonitory *Whitefella Jump Up* (2004), we preen ourselves on being better than our precursors.<sup>134</sup> "Sorry, folks, for the brutality of our morally inferior ancestors. If it had been us in charge, with our enlightened new-age sensitivity, instead of those immoral old-

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130. Vamik D. Volkan, *What Some Monuments Tell Us About Mourning and Forgiveness*, in *TAKING WRONGS SERIOUSLY*, *supra* note 30, at 115, 129. For Kosovo Polje, see VAMIK D. VOLKAN, *BLOODLINES: FROM ETHNIC PRIDE TO ETHNIC TERRORISM* 57–68 (1997).

131. Elizabeth Willis, *The Law, Politics and "Historical Wounds": The Dja Dja Warrung Bark Etchings Case in Australia*, 15 *INT'L J. CULTURAL PROP.* 49, 57–58 (2008).

132. Cowlshaw, *supra* note 38, at 188, 192.

133. *Id.* at 189–90.

134. Cowlshaw, *supra* note 14, at 433.

timers, it would never have happened.”<sup>135</sup> Nineteenth-century faith in progress promoted this smug fallacy: “our posterity will be wiser than we,” Thomas Babington Macaulay cautioned fellow Victorians confident of ever-advancing improvement. But it “would be a gross injustice for our grandchildren to talk of us with contempt, merely because they may have surpassed us.” He likened those who “boast of indisputable superiority to all the greatest men of past ages” to a boy on his father’s shoulders, crowing “How much taller I am than Papa!”<sup>136</sup>

Hindsight, warned Macaulay, encouraged unjustified hubris.

As we would have our descendants judge us, so we ought to judge our fathers . . . To form a correct estimate of their merits, we ought to place ourselves in their situation, to put out of our minds, for a time, all that knowledge which they could not have, and which we could not help having.”<sup>137</sup>

But to put hindsight knowledge wholly out of mind is impossible. Hence the historian A. F. Pollard despaired that we could ever “really be fair to men of the past, knowing what they could not know . . . with our minds prepossessed by a knowledge of the result.”<sup>138</sup>

Made wise by hindsight, we are tempted to fault our forebears for myopia. It is strange “how little our [eighteenth-century] ancestors had the power of putting two things together, and perceiving either the discord or the harmony thus produced,” the Victorian novelist Elizabeth Gaskell ironically remarked.

Is it because we are farther off from those times, and have, consequently, a greater range of vision? Will our descendants have a wonder about us, such as we have about the inconsistency of our forefathers, or a surprise about our blindness[?] . . . Such discrepancies ran through good men’s lives in those days. It is well for us that we live at the present time, when everybody is logical and consistent.<sup>139</sup>

Hindsight hubris is less excusable today, for few nowadays share Macaulay’s faith in progress. Tony Blair is a Panglossian exception. In regretting the slave trade, the then prime minister went on to

135. Russell Baker, *Sorry About That*, N.Y. TIMES, July 1, 1997, at A21.

136. THOMAS BABINGTON MACAULAY, *Sir James Mackintosh* (1835), reprinted in 2 CRITICAL AND HISTORICAL ESSAYS CONTRIBUTED TO THE EDINBURGH REVIEW 67, 70 (F.C. Montague ed., 1903).

137. *Id.* at 68.

138. A.F. Pollard, *Historical Criticism*, 5 HISTORY 21, 29 (1920).

139. ELIZABETH GASKELL, *SYLVIA’S LOVERS* 58–59 (Dent 1964) (1863).

rejoice at “the different and better times we live in today.”<sup>140</sup> (This in our age of atrocity in Rwanda, Bosnia, Iraq, Darfur, not to mention continuing enslavement, especially of women and children!<sup>141</sup>)

Shifting morality, as Wendell Phillips noted, leaves our hearts at odds with our heads.<sup>142</sup> And present feeling often refuses to recognize past reality. “We are all convinced that enslaving human beings is bad. How shall we characterize the once universal teaching that you acquire a slave baby lawfully by owning the baby’s mother?” “Can anyone today contemplate the slave trader and slaveholder without a shudder of disgust?” asks the jurist John Noonan. “Can anyone empathize with the bigot putting a torch to the stake where the condemned heretic will be incinerated? Abstractly, we may concede that the slave-owner and the persecutor thought that they acted justly. In our bones we experience repugnance and even righteous rage.”<sup>143</sup>

Some think it their duty to arraign the deceased. But “elementary justice demands that he who is to be judged should have a hearing: the dead are powerless to defend themselves,” continues Noonan. “It may make a historian swell with pride to . . . set down Thomas More as a persecutor or Abraham Lincoln” as a racist. “No figure of the past will meet the standards of the present.”<sup>144</sup> Should we condemn Augustine and Aquinas for defending slavery and religious persecution? Adjudge Washington, Jefferson, and Madison evil because they owned slaves? Rebuke Supreme Court icons Brandeis, Holmes, and Hughes for upholding racial segregation in the schools in 1926? For “if each generation is free to measure its predecessors morally, using the criteria now accepted, no one will escape condemnation.”<sup>145</sup> Moreover, arrogating the right to censure our ancestors, as Matthew Parris rephrases Macaulay, puts us at the like mercy of our descendants: “the future has no right to rehear past judgments in the light of altered morality. To deny our ancestors

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140. Smith, *supra* note 112.

141. An estimated twenty-seven million live in slavery, perhaps more than at any time in history. Alan Riding, *The Abolition of Slavery Is Still an Unfinished Story*, INT’L HERALD TRIB., Feb. 15, 2007, at 2.

142. Dumond, *supra* note 9, at 90 (quoting Wendell Phillips, Speech at Franklin Hall (May 12, 1848)).

143. JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING 197, 201 (2005).

144. *Id.* at 200.

145. *Id.*

autonomy in the judgments they reached is to cede our own moral authority to our successors."<sup>146</sup>

Thomas Paine's *The Rights of Man* famously advocated washing today's hands of ancestral deeds and misdeeds. "Those who have quitted the world, and those who are not arrived yet in it, are as remote from each other as the utmost stretch of mortal imagination can conceive: what possible obligation then can exist between them?"<sup>147</sup> Seen in this light, present contrition for ancient crimes is sheer hypocrisy, and self-flagellation moral imposture. Parris finds "neither sacrifice, repentance nor courage in 'apologising' on other people's behalf."<sup>148</sup> British deserters in the Great War were recently granted posthumous pardons, on the ground that military tribunals in those benighted days knew nothing about post-traumatic stress. Many held this an outrage. "Should Oscar Wilde be posthumously pardoned because we now think the laws under which he was convicted were unjust?" Should we retrospectively exonerate all those charged in centuries past with attempted suicide, witchcraft, or Catholicism?<sup>149</sup> To try to repair all past wrongs is folly. "Contrition and congratulation are both strictly non-transferable. Hereditary guilt makes no more sense than hereditary honours."<sup>150</sup>

Similar qualms, during the recent spate of apologies for slavery, led some American legislators to query their states' contrition. "[A]pologies need to come from feelings that I've done wrong," said Georgia Senate majority leader Tommie Williams; "I just don't feel like I did something wrong."<sup>151</sup> House speaker Glenn Richardson protested all his colleagues' innocence. "I'm not sure what we ought to be apologizing for. . . . Nobody here was in office" during slavery.<sup>152</sup> Georgia legislators may well have feared a surge of anachronistic reproach like that voiced during the 1992 Columbus quincentenary. A San Diego State University history instructor then

146. Matthew Parris, *A Clever Trick: Say Sorry, Condemn the Past and Look Good, with No Cost*, TIMES (London), Aug. 26, 2006, at 21.

147. THOMAS PAINE, *The Rights of Man* (1791), reprinted in POLITICAL WRITINGS 57, 64 (Bruce Kuklick ed., rev. student ed. 2000).

148. Parris, *supra* note 146, at 21.

149. *Id.*; see Michael Evans, *Psychiatrist Says Pardons for "Cowards" Ease Our Pain*, TIMES (London), Sept. 2, 2006, at 20; Fran Yeoman & Marcus Leroux, *War Pardon Will Clear Rogues and Innocents*, TIMES (London), Sept. 9, 2006, at 16.

150. Peter Manning, Letter to the Editor, *Slavery, Abolition and Apologies*, GUARDIAN (London), Mar. 24, 2007, at 37.

151. Greg Bluestein, *Black Lawmakers Urge Georgia to Apologize for Slavery*, INT'L HERALD TRIB., Mar. 8, 2007, <http://www.iht.com/articles/ap/2007/03/08/america/NA-GEN-US-Slavery-Apology.php>.

152. *Id.*

held a visiting Spanish naval officer, a descendant of Christopher Columbus, personally responsible for his ancestor's rape of the New World.<sup>153</sup>

"We like being outraged by the bad things somebody else's people did to ours," writes Walter Benn Michaels, "and we like thinking that justice requires they make up—or at least apologize—for them."<sup>154</sup> As victimization gains clout, descendants fear being held answerable for ancestral acts and opinions now deemed wicked. Defensive New Jersey Assemblyman Richard A. Merkt thus balked at his state's apology for slavery: "not one—of the 215,000 people that I represent . . . is culpable in any way in the sin of slavery. Nor for that matter, my colleagues, are any of the living individuals in any of your home districts."<sup>155</sup>

#### D. *Anachronistic Egalitarianism*

Censuring the past reflects current ignorance of past reality. People seem unaware that preceding generations judged things by different standards. "[T]he inability or unwillingness of people in public affairs to consider the events of another period in the context of the beliefs and prejudices of that time" strikes the political pundit William Pfaff as a fundamental and growing problem in international relations.<sup>156</sup> A decade ago I noted that it was "ever more common to hold figures from the past accountable for not thinking and acting as right-minded people do today."<sup>157</sup> Ancestor-bashing continues unabated. But it is one thing to deplore what is now perceived as past injustice; it is quite another to blame its perpetrators for not living up to today's code of ethics. Following John Paul II's profuse contrition for previous Church misdeeds, many Catholic scholars found "something repellent, as well as profoundly unhistorical, about

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153. GARY B. NASH, CHARLOTTE CRABTREE & ROSS E. DUNN, *HISTORY ON TRIAL: CULTURE WARS AND THE TEACHING OF THE PAST* 123 (1997).

154. MICHAELS, *supra* note 34, at 18. In general, inherited guilt cuts less ice than inherited pride—the avowal, attributed to the Portuguese, that "we were a great people, therefore we are a great people." Katina T. Lillios, *Nationalism and Copper Age Research in Portugal During the Salazar Regime (1932–1974)*, in *NATIONALISM, POLITICS AND THE PRACTICE OF ARCHAEOLOGY* 57, 57 (Philip L. Kohl & Clare Fawcett eds., 1995). Or the claim of the King of Jordan that, as the direct descendant of Mohammed, he knew better than terrorists how to interpret the Koran. Rami K. Khouri, *Is America to Blame?*, *INT'L HERALD TRIB.*, Nov. 15, 2005, at 7.

155. Jeremy W. Peters, *A Slavery Apology, but Debate Continues*, *N.Y. TIMES*, Jan. 13, 2008, § 14 (N.J.), at 2.

156. Pfaff, *supra* note 121.

157. LOWENTHAL, *supra* note 5, at xii.

judging the past by the standards and prejudices of another age.”<sup>158</sup> A Catholic scholar asks readers to envisage a bi-millennial “heavenly choir . . . made up of former slaves . . . and of slaveholders such as Popes Gregory the Great, Pius V, Pius VII,” countless saints, Dominican and Jesuit missionaries, and Augustinian and Carmelite nuns. “What pope could retroactively disqualify from this assembly those who had owned human beings?”<sup>159</sup>

Egalitarian-minded folk today find it incredible that slavery, genocide, and gross inequality, far from being aberrations of some uniquely evil epoch, are habitual human practices, sanctioned by moral philosophers from Aristotle to Machiavelli, James Harrington, and Montesquieu.<sup>160</sup> (Much less can they credit that even today “most of the globe’s inhabitants simply do not believe in human equality” and regard “such a belief [a]s a Western eccentricity.”<sup>161</sup>) Young Americans, charges Allan Bloom, are unable even to imagine “any substantial argument in favor of aristocracy or monarchy, [those] inexplicable follies of the past.”<sup>162</sup> Some of historian Daniel Gordon’s Stanford University students felt aggrieved even to be asked to discuss “the values of these antiquated beings.”<sup>163</sup> Similarly unaware that people viewed things differently five hundred years ago, European fifteen-year-old students “argue only from their modern viewpoint of individualism, secularism and autonomy.” As they are “neither willing nor able to accept pre-modern reality and morality, even in theory,” they rely solely on human-rights philosophy “for an era before the invention of human rights.”<sup>164</sup> Thomas Ruffin’s hierarchical assumption that “it is impossible for society to subsist without some persons being in the service of others”<sup>165</sup> would strike today’s young as almost as regressive as his defense of slavery.

158. Paul Johnson, *When Is God Going to Apologise for Raining Fire and Brimstone on Sodom?*, SPECTATOR, Nov. 8, 1997, at 28; see Avery Dulles, *Should the Church Repent?*, 88 FIRST THINGS: J. RELIGION, CULTURE, & PUB. LIFE, Dec. 1998, at 36.

159. NOONAN, *supra* note 143, at 200.

160. JOYCE APPLEBY, *A RESTLESS PAST: HISTORY AND THE AMERICAN PUBLIC* 74 (2005); see LOUIS DUMONT, *HOMO HIERARCHICUS: THE CASTE SYSTEM AND ITS IMPLICATIONS* 19 (Mark Sainsbury et al. trans., Univ. of Chicago Press rev. ed., 1980) (1966).

161. Richard Rorty, *On Ethnocentrism: A Reply to Clifford Geertz*, 25 MICH. Q. REV. 525, 531 (1986).

162. ALLAN D. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 90 (1987).

163. Daniel Gordon, *Teaching Western History at Stanford*, in *LEARNING HISTORY IN AMERICA* 44, 52 (Lloyd Kramer et al. eds., 1994).

164. Andreas Körber, *Can Our Pupils Fit into the Shoes of Someone Else?*, in *THE STATE OF HISTORY EDUCATION IN EUROPE: CHALLENGES AND IMPLICATIONS OF THE “YOUTH AND HISTORY” SURVEY* 123, 136 (Joke van der Leeuw-Roord ed., 1998).

165. Parham v. Blackwelder, 30 N.C. (8 Ired.) 446, 447 (1848).



The young are not today's only innocents astounded to learn of wicked ancestral ways. Of the transatlantic slave trade, British Prime Minister Blair found it "hard to believe that what would now be a crime against humanity was legal at the time."<sup>166</sup> Yet until recently, in fact, most observers denounced not slave but free labor, at the mercenary mercy of avaricious employers.<sup>167</sup> Even in the northern states at the late eighteenth-century peak of anti-slavery sentiment, "few . . . doubted the propriety and rectitude of slavery."<sup>168</sup> In the antebellum American South, hardly any voices were heard opposing slavery. To be sure, few slaves would have defended it. But their opinions did not count, any more than did those of Indians, women, children, or, indeed, property-less white men.

In passing judgment today on Thomas Ruffin, James Wynn reminded us, we must take into account the temper of the times in which he lived.<sup>169</sup> Eric Muller argues that so doing risks exonerating him under the misapprehension that he shared a then widely agreed *Zeitgeist*.<sup>170</sup> That past times were no less conflicted, no less multifaceted than our own is, indeed, hard to realize. Because the past is *over*, its consequences largely evident, it appears clarified and seamless, unlike the messy incoherent present. The temper of the time is reduced to a single mood, the prevailing order the only order, the *Zeitgeist* a monolith. Iconic past figures get recast for consistency; heroes and villains become cardboard angels or demons. The faults of the one and the virtues of the other are forgotten, the changing and often self-contradictory views that saddled them, no less than us, are erased.<sup>171</sup>

Erased, too, are past genres now found obnoxious. Inscribed on the plinth of George Grey Barnard's 1918 Abraham Lincoln statue in Manchester, England, is Lincoln's famed 1863 letter thanking cotton factory workers for downing tools in support of the Union during the

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166. Smith, *supra* note 112, at 1.

167. Two to three centuries ago, "the overwhelming majority of civilized people thought free labor alarming." ELIZABETH FOX-GENOVESE & EUGENE D. GENOVESE, *THE MIND OF THE MASTER CLASS: HISTORY AND FAITH IN THE SOUTHERN SLAVEHOLDERS' WORLDVIEW* 2-3 (2005).

168. FREEHLING, *supra* note 87, at 29 (quoting John Jay, president of the Continental Congress and future Supreme Court Chief Justice, Letter to the English Anti-Slavery Society (1788), in 3 *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 340, 342 (Henry P. Johnston ed., New York, J.P. Putnam's Sons 1892)).

169. James A. Wynn, Jr., *State v. Mann: Judicial Choice or Judicial Duty?*, 87 N.C. L. REV. 991, 991-92 (2009).

170. Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757, 773-74 (2009).

171. LOWENTHAL, *supra* note 3, at 191, 218-19, 234-35.

Civil War. Renovation in 1986 revealed an altered text: Lincoln's "workingmen" had become "working people," his "men" "men and women" (given widespread child labor, "children" surely should have been added). Modern Manchester worthies had felt Lincoln's "sexist" language unbearably discordant with the Great Emancipator's renown as an apostle of freedom.<sup>172</sup> In similar spirit, Frederick MacMonnies's 1922 *Civic Virtue* triumphant over the Siren of Temptation was banished in 1941 from New York's City Hall Park to the boondocks (next to Queens Borough Hall), because viewers ignorant or disdainful of mythology took offense at a male trampling two females supposed to represent vice. "Where would the fine arts be," the aggrieved sculptor had asked, "if an allegory were always to be taken literally? . . . If we harness our art so that it can be understood by babes is there any hope for us?"<sup>173</sup>

Any display of past pride in domination distresses today's egalitarians. An eighteenth-century portrait of founder Elihu Yale with a servant kneeling at his feet was removed from Yale University's corporate boardroom not just because viewers mistook the Indian servitor for an African slave, but because they shrank from bygone elites' penchant for being painted with menials, slave or free. Explained a Yale art historian, "depictions of servants and slaves in portraits of their employers and owners can be shocking to modern audiences."<sup>174</sup> Yet today's sanitizers of the past live with inequalities of income and opportunity more rampant than for over a century, the hyper-rich waited on by an invisible phalanx of underlings. Our formidable forebears openly flaunted their superior status; we hide our unseemly privileges even from ourselves.

African slavery transmitted a legacy of human bondage now reprobated by every right-minded person, yet then almost universally thought desirable, even necessary. And slavery ended with consequences equally reprobated today: impoverished freedmen dependent on former masters, societies wracked by racial exclusion

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172. LOWENTHAL, *supra* note 5, at 150; Public Monument and Sculpture Association National Recording Project, <http://pmsa.cch.kcl.ac.uk/MR/MR-MCR09.htm> (last visited Feb. 26, 2009).

173. MICHELE H. BOGART, PUBLIC SCULPTURE AND THE CIVIC IDEAL IN NEW YORK CITY, 1890–1930, at 266–68 (1989); New York City Dept. of Parks & Recreation, *Civic Virtue*, Feb. 1, 2002 [http://www.nycgovparks.org/sub\\_your\\_park/historical\\_signs/hs\\_historical\\_sign.php?id=13093](http://www.nycgovparks.org/sub_your_park/historical_signs/hs_historical_sign.php?id=13093) (quoting Frederick MacMonnies). In the late 1980s, Queens Borough President Claire Shulman tried to get rid of *Civic Virtue*, since it portrayed women as evil and treacherous, but failed. Joyce Purnick, *Women Seen, or Just Used*, *Through Art*, N.Y. TIMES, Oct. 14, 1996, at B1.

174. Tyler Hill, *Univ. to Retire "Racist" Portrait*, YALE DAILY NEWS, Feb. 7, 2007, at 1.

and segregation. Yet these conditions, too, were viewed by many until recently as just, even necessary. Few American whites, north or south, thought blacks potential equals. In 1867, Charles Sumner urged the Senate to help freedmen play a full role in society by bringing the Southern caste system to an end. Edgar Cowan of Pennsylvania, a staunch abolitionist, objected: “Who would black boots and curry the horses, who would do all the menial offices of the world?”<sup>175</sup> Racial inequality long survived under the myth of “separate but equal.” And up to the 1980s zoning ordinances throughout the United States mandated racial apartheid as “natural,”<sup>176</sup> while many state laws prohibited racial intermarriage as “unnatural.”<sup>177</sup>

The Emancipation Proclamation by no means showed Lincoln a racial egalitarian, let alone against segregation. The Negro “is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual endowment,” he declared in the 1858 debate with Stephen Douglas.<sup>178</sup> And when Lincoln sought a colony in Central America for freed slaves “capable of thinking as White men,” he like most whites presumed both their general inferiority and unassimilability in white America.<sup>179</sup> The right to petition Congress for abolition was long led and finally won by former president John Quincy Adams. But Adams was more concerned to protect free speech than to free slaves. And he was an uncompromising foe of integration as against nature, more appalled by racial amalgamation than rapist slaveholders who used and sold their own progeny, not to mention slave owners who were themselves black or of mixed race.<sup>180</sup>

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175. BROPHY, *supra* note 95, at 27 (quoting Edward Cowan). That “the mental inferiority of the negro . . . is a fact” was authoritatively stated as late as 1911. Thomas Athol Joyce, *Negro*, in 19 ENCYCLOPÆDIA BRITANNICA 344, 344 (11th ed. 1911).

176. Jerome S. Bruner, *Past and Present as Narrative Constructions*, in NARRATION, IDENTITY AND HISTORICAL CONSCIOUSNESS 23, 36 (Jürgen Straub ed., 2005).

177. Not until 1967 did the Supreme Court ban sixteen states’ anti-miscegenation laws. *Loving v. Virginia*, 388 U.S. 1 (1967). Only in 2000 did Alabama repeal its ban against interracial marriage. Somini Sengupta, *Marry at Will*, N.Y. TIMES, Nov. 12, 2000, at D2.

178. Abraham Lincoln, First Debate with Stephen A. Douglas at Ottawa, Illinois (Aug. 21, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 1, 16 (Roy P. Basler ed., 1953).

179. Abraham Lincoln, Address on Colonization to a Deputation of Negroes (Aug. 14, 1862), in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 370, 373 (Roy P. Basler ed., 1953).

180. Adams took as *Othello*’s “great moral lesson . . . that black and white blood cannot be intermingled . . . without a gross outrage upon the law of Nature.” John Quincy Adams, *Misconceptions of Shakspeare* [sic] *upon the Stage*, NEW ENG. MAG., Dec. 1835, at 435, 438; see also John Q. Adams, *The Character of Desdemona*, AM. MONTHLY MAG., Mar. 1836, at 209, 209–17 (claiming that the offense committed by Desdemona was

What, indeed, have modern egalitarians to say of black slave owners?<sup>181</sup>

Lincoln's and Adams's racism is unbelievable, even unendurable, to many brought up to revere their memory.<sup>182</sup> But historical honesty requires showing the slavery past not as some now wish it had been, but as it actually was, in the conflicting confusion of what then seemed conventional wisdom, with all its "diversity of opinion and practice, and the possibility of meaningful, and morally consequential, choice."<sup>183</sup>

### III. SLAVE CIRCUMSTANCES IN A COMPARATIVE CONTEXT

To understand New World slavery and its aftermath in all their "diversity of opinion and practice," let me contrast Ruffin's plantation South with the British West Indies, in particular with one island where local conditions induced bizarrely different moral judgments. Exclusive to slavery in the American South was the mystique of benevolent paternalism. So, too, was its apparent converse, slave-breeding for profit, common and lauded throughout the Upper South.<sup>184</sup> "In the states of Maryland, Virginia, North Carolina, Kentucky, Tennessee and Missouri," a slaveholder told Frederick Law Olmsted, "as much attention is paid to the breeding and growth of negroes as to that of horses and mules."<sup>185</sup> "No man is

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marrying a Moor). White men had put much white blood into black veins, admitted Senator Theodore Bilbo of Mississippi in 1947, but since mixed-race offspring were defined as black, this hardly mattered; what did matter was that white women had kept the *white* race pure. Bilbo "would rather see his race and his civilization blotted out with the atomic bomb than . . . destroyed in the maelstrom of miscegenation." THEODORE G. BILBO, TAKE YOUR CHOICE: SEPARATION OR MONGRELIZATION v-viii, 224 (Hist. Rev. Press, photo. reprint 1980) (1947).

181. Most black slave owners were of mixed race, some of them the acknowledged heirs of whites. Others had to buy their own spouses and children, whom they were legally unable to manumit, to prevent their being sold away. But several black slave owners held scores or hundreds of slaves. LARRY KOGER, BLACK SLAVEOWNERS: FREE BLACK SLAVE MASTERS IN SOUTH CAROLINA, 1790-1860, at 1-3 (1985); LOREN SCHWENINGER, BLACK PROPERTY OWNERS IN THE SOUTH 1790-1915, at 104-12 (1997).

182. See Samuel S. Wineburg, *The Psychological Study of Historical Consciousness, in* NARRATION, IDENTITY AND HISTORICAL CONSCIOUSNESS, *supra* note 176, at 204-07.

183. Muller, *supra* note 170, at 761; TRUDY GOVIER, TAKING WRONGS SERIOUSLY: ACKNOWLEDGMENT, RECONCILIATION, AND THE POLITICS OF SUSTAINABLE PEACE 81-82 (2006) ("It is a mistake—though a common one—to think that people at a given time all agreed on the practices of their day").

184. STEVEN DEYLE, CARRY ME BACK: THE DOMESTIC SLAVE TRADE IN AMERICAN LIFE 29, 46-49 (2005); WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET 94, 144 (1999).

185. FREDERICK LAW OL MSTED, A JOURNEY IN THE SEABOARD SLAVE STATES, WITH REMARKS ON THEIR ECONOMY 55 n.\* (New York, Dix & Edwards 1856) (internal

so inhuman as to breed and raise slaves . . . as a western drover does with his herds of cattle,” averred Thomas Ruffin’s Virginia cousin Edmund Ruffin, but he admitted that “the general result is the same. [Slaveholders] have every inducement and facility to increase their numbers, without any opposing check, either prudential, moral, or physical.”<sup>186</sup> On Caribbean plantations, by contrast, endemic disease and harsh conditions meant high infant mortality. Slave owners, seldom locally resident, found it cheaper to work their slaves to death and import fresh hands from Africa than to persuade or coerce them to bear and rear children. Few West Indian planters viewed themselves as benevolent paternalists.<sup>187</sup>

A. “*Slave Breeding*” in Barbuda, Myth and Reality

The Leeward island of Barbuda, too arid for plantation agriculture, was long notorious as the sole attested Caribbean slave-breeding locale. Barbuda is still a byword for this singularly odious practice. In the 1970s, however, archival papers found by me and a colleague revealed that Barbudan slave breeding was a myth. It had arisen out of efforts by the island’s lessees, the Codrington family, to increase compensation due them upon emancipation. They contended that slave life on Barbuda was so benign and natural increase so great that they could, *had they wished*, have turned it into a “nursery for Negroes” to work their sugar estates in neighboring Antigua. Later observers misread this as though it had been done.<sup>188</sup>

Barbuda was, in truth, almost unique in Caribbean slave fertility from the 1780s on. By contrast with early 19th century Jamaica, where a quarter to a half of all babies died shortly after birth,

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quotation marks omitted); see also MARIE JENKINS SCHWARTZ, *BIRTHING A SLAVE: MOTHERHOOD AND MEDICINE IN THE ANTEBELLUM SOUTH* 22–24 (2006) (documenting slaves’ hatred of “stockmen” assigned as studs and being lashed for failing to consummate a pairing).

186. CARL N. DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES*, 63–64 (Univ. of Wisconsin Press rev. ed., 1986) (1971) (quoting Edmund Ruffin).

187. LOWENTHAL, *supra* note 89, at 42–43.

188. David Lowenthal & Colin G. Clarke, *Slave-Breeding in Barbuda: The Past of a Negro Myth*, 292 *ANNALS N.Y. ACAD. SCI., COMP. PERSPECTIVES ON SLAVERY IN NEW WORLD PLANTATION SOCIETIES* 510, 529 (1977). The Codrington Papers, then on loan at the Gloucestershire County Record Office, were subsequently sold at auction. Donated to the National Archives of Antigua and Barbuda after 1984, they are on file in Antigua, with a microfilm copy at the British Library. Andrew Sluyter, *The Role of Black Barbudans in the Establishment of Open-Range Cattle Herding in the Colonial Caribbean and South Carolina*, *J. HIST. GEOGRAPHY* (forthcoming 2009, uncorrected proof) (manuscript at 13 n.17) (on file with the North Carolina Law Review).

Barbuda did not lose one in twenty.<sup>189</sup> Hence, as in the Upper South, Barbuda had far more slaves than work could be found for. But unlike Southern planters who profited by selling to the Deep South, Bethell Codrington was prohibited from exporting Barbudans. Nor did he succeed in employing many on his Antigua estates: they either resisted being sent or proved infamous troublemakers once there.<sup>190</sup> Barbuda's birth excess was a mounting drain on their owner's purse.

Intentions aside, Bethell Codrington's self-praise for his Barbudan slaves' well-being was almost identical to Thomas Ruffin's for those of North Carolina two decades later. As proof of their well-being, and hence their masters' benevolence, Ruffin cited the "increase in the numbers of our slave population beyond the ratio of natural increase" anywhere else.<sup>191</sup> Such increase was widely viewed as evidence of unique Southern benignity; elsewhere in plantation America slave deaths long exceeded births.<sup>192</sup> Ruffin's 1855 statement is not necessarily at odds with *State v. Mann*, when he anticipated amelioration less from absolute decline in slave numbers than from the increasing ratio of whites to blacks. What most alarmed Ruffin, again in common with both Southern and British West Indian planters, was the risk of insurrection (and prevalence of abuse) where slaves heavily outnumbered whites.<sup>193</sup>

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189. Lowenthal & Clarke, *supra* note 188, at 518. Other exceptions were Great Exuma in the Bahamas and Union Island in the Grenadines. For Great Exuma, see Michael Craton, *Hobbesian or Panglossian? The Two Extremes of Slave Conditions in the British Caribbean, 1782–1834*, 35 WM. & MARY Q. 324, 324–25 (1978). For Union Island, see CHARLES SHEPARD, AN HISTORICAL ACCOUNT OF THE ISLAND OF SAINT VINCENT 215 (Frank Cass & Co., photo. reprint 1971) (1831).

190. Lowenthal & Clarke, *supra* note 188, at 523.

191. Thomas Ruffin, Address Delivered Before the State Agricultural Society of North Carolina (Oct. 18, 1855), in 4 THE PAPERS OF THOMAS RUFFIN 323, 332 (J.G. de Roulhac Hamilton ed., 1920).

192. JAMES WALVIN, BLACK IVORY: SLAVERY IN THE BRITISH EMPIRE 127 (Blackwell 2d ed. 2001) (1992); see PHILIP D. CURTIN, MIGRATION AND MORTALITY IN AFRICA AND THE ATLANTIC WORLD, 1700–1900 *passim* (2001).

193. See, e.g., *Redmond v. Coffin*, 17 N.C. (2 Dev.) 437, 441 (1833) (opposing a trust leaving slaves to Quakers so that they might be freed). In *Redmond v. Coffin*, Ruffin wrote that "a stern necessity arising out of the safety of the commonwealth forbids [manumission as] dangerous and unlawful." *Id.*; see also *State v. Mann*, 13 N.C. (2 Dev.) 263, 268 (1829) ("The same causes . . . will continue to operate with increased action, until the disparity in numbers between the whites and blacks, shall have rendered the latter in no degree dangerous to the former"). For Southern fears generally, see SCOT FRENCH, THE REBELLIOUS SLAVE: NAT TURNER IN AMERICAN HISTORY (2004); The History Channel Discussion Forums, Slave Insurrections, <http://boards.historychannel.com/topic/civil-war/slave-insurrections/520006690> (last visited Feb. 27, 2009).

Yet Barbuda, where no more than two or three whites lived among four or five hundred slaves, aroused no similar fears. Although Codrington warned the Colonial Office that little Barbuda might become “another St. Domingo” because nothing could “prevent their taking possession of the Island should they be so inclined,” in reality he had no such qualms.<sup>194</sup> Barbudans were dependent on imports of staple foods and clothing in return for their labor—fishing and lobstering, rounding up feral livestock, producing firewood and charcoal, salvaging wrecked vessels off the island’s reefs.<sup>195</sup> But in most respects they felt virtually free decades before emancipation. “They acknowledge no Master, and believe the Island belongs to themselves,” complained Codrington’s manager in 1829.<sup>196</sup> In effect, the owner was forced to do his slaves’ bidding, his agents less feared as bullies than welcomed as provisioners. “There are but two white men with myself on the Island,” wrote another manager in 1824, “and I frequently leave my Wife & Daughters there without a fastening to the House.”<sup>197</sup>

Our essay exploding the slave-breeding myth was serialized in the monthly *Barbuda Voice*, issued by the island’s Bronx diaspora.<sup>198</sup> Barbudans nonetheless continue to trumpet their slave-breeding descent, not as an indignity but as a source of unique pride. Selective breeding, they bragged, had made Barbudans taller, stronger, and more handsome and intelligent than other West Indians.<sup>199</sup> They echoed Codrington’s self-serving claim that Barbudans were “much advanced in intelligence and social culture beyond the other negro inhabitants of the Charibbees, and are indeed . . . a superior class, and a finer Body of People than are to be found in any other Island.”<sup>200</sup> Rather than a shameful heritage gladly shed, the stud-farm past

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194. Lowenthal & Clarke, *supra* note 188, at 525.

195. *Id.* at 512.

196. *Id.* at 524.

197. *Id.* at 515.

198. *BARBUDA VOICE*, Feb. to June–July 1979 (on file with author).

199. LOWENTHAL, *supra* note 5, at 134. In the aftermath of National Socialism’s racial atrocities, human eugenic breeding is now viewed with deep repugnance. It is easy to forget that as recently as the 1940s it was all the rage, an ethically and juridically approved way not only to rid society of the criminally feeble-minded—the famous Supreme Court case *Buck v. Bell*, 274 U.S. 200 (1927) decision noted that “three generations of imbeciles are enough”—but also to create superior humans. Harvey Ernest Jordan, *Eugenics: The Rearing of the Human Thoroughbred*, 11 CLEV. MED. J. 875, 886–88 (1912). Americans careful about their pigs’ and chickens’ pedigrees were chastised for leaving their children’s ancestry to blind chance. DOROTHY NELKIN & M. SUSAN LINDEE, *THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON* 21–37 (1995).

200. Lowenthal & Clarke, *supra* note 188, at 525 (quoting draft letter from C. Bethell Codrington to colonial secretary E.G. Stanley (June 1, 1834)).

remains a triumphal founding fable—trotted out to explain to credulous reporters why Princess Diana, on a 1995 visit, felt at home in Barbuda “surrounded by beautiful people.”<sup>201</sup> This mythic eugenicist ancestry still serves to buttress the Barbudan community’s equally unique communal ownership and management of land and resources.<sup>202</sup> They deploy their slave “history” to the benefit of the present by *praising* rather than censuring their slave past.

That Ruffin would have been appalled by Barbudans’ slave-breeding mystique is clear from his expressed hope that slave numbers would decline to the point when they would cease to outnumber whites. Slave fertility was fine, but only as long as the increase could be exported to the Deep South: “the benevolences towards each other, seated in the hearts of those who have been born and bred together [will continue to] mitigat[e] the rigors of servitude . . . until the disparity in numbers between the whites and blacks shall have rendered the latter in no degree dangerous to the former.”<sup>203</sup> A virtually all-black community like Barbuda would have been unthinkable for Ruffin, as for most white Americans.

#### B. *Ruffin’s South: Paternalist Fantasy, Slave-Trading Fact*

In Ruffin’s South, slaves were not the only human chattels: as in many pre-modern societies, wives were the property of husbands, children the property of fathers, perfectly entitled to sell them or to hire out their labor. Ownership determined men’s elite identity: “‘I am what I own,’ whether cattle or coin, concubines or Canalettos, has been the guiding principle . . . throughout the ages.”<sup>204</sup> In the patriarchal South a man’s repute rested on his treatment of his dependents. Yet their physical punishment was a legally sanctioned guiding practice. “If violence could be used by a man to control his slaves, it could also be used to control others that ‘belonged’ to him—

201. LOWENTHAL, *supra* note 5, at 134.

202. See David Lowenthal & Colin Clarke, *The Triumph of the Commons: Barbuda Belongs to All Barbudans Together*, in *CARIBBEAN LAND AND DEVELOPMENT REVISITED* 147, 147 (Jean Besson & Janet Momsen eds., 2007).

203. *State v. Mann*, 13 N.C. (2 Dev.) 263, 267–68 (1829).

204. John Windsor, *Identity Parades*, in *CULTURES OF COLLECTING* 49, 62 (John Elsner & Roger Cardinal eds., 1994). Johann Gottfried von Herder, in his *Ideen zur Philosophie der Geschichte der Menschheit* (1784–1791), declared “Everyone loves his country, his manners, his language, his wife, his children . . . because they are absolutely his own.” MAURIZIO VIROLI, *FOR LOVE OF COUNTRY: AN ESSAY ON PATRIOTISM AND NATIONALISM* 122 (1995).



like women and children,” note scholars of the antebellum South.<sup>205</sup> “Inferiors of any age or sex, class or color, needed patriarchal direction, lest children revolt from parents, wives leave husbands, lower classes assault upper classes, and especially lest patriarchal republics degenerate into depraved mobocracies.”<sup>206</sup> Southern courts termed wives, children, slaves, and unskilled white workmen “domestic dependents . . . of their husband/father/master/employer.”<sup>207</sup> Statutes and case law specify beating as appropriate correction for a slave, a child, or a wife. A Tennessee decision of 1842 likened the right to physically “correct” a slave to kindred relations with apprentices, pupils, children, and prisoners.<sup>208</sup> “If slaves were family members,” comments a historian, one implication was that family members were slaves.<sup>209</sup>

Unlike other family members, however, slaves were *permanent* dependents. Because “their state of pupilage *never ceases*; they are *always* with us; they are *always* members of our families; they are *always* subject to our authority and control,” explained Thomas Ruffin’s neighbor, Episcopal rector George W. Freeman, “and more to the point, though ever so far advanced in years, they are, from the very nature of their condition, *always children*; they are but children *in intellect*, children *in wisdom*, children *in understanding and judgment!*”<sup>210</sup> Hence owners who cast adrift infirm and elderly slaves—or worse, dumped the ill and dying for a profit on places like Dr. Stillman’s Charleston “Medical Infirmary”<sup>211</sup>—were as widely reprobated as the “deep execrations of the community upon the barbarian” whom Ruffin termed “guilty of excessive and brutal cruelty to his unprotected slave.”<sup>212</sup>

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205. RICHARD E. NISBETT & DOV COHEN, *CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH* 59 (1996).

206. FREEHLING, *supra* note 87, at 192.

207. Dylan C. Penningroth, *The Claims of Slaves and Ex-Slaves to Family and Property: A Transatlantic Comparison*, 112 *AM. HIST. REV.* 1039, 1050 (2007).

208. NISBETT & COHEN, *supra* note 205, at 59 (regarding *Jacob v. State*, 22 *Tenn.* 493 (1842)).

209. Michael P. Johnson, *Planters and Patriarchy: Charleston, 1800–1860*, 46 *J. S. HIST.* 45, 71 (1980).

210. GEORGE W. FREEMAN, *THE RIGHTS AND DUTIES OF SLAVEHOLDERS: TWO DISCOURSES, DELIVERED ON SUNDAY, NOVEMBER 27, 1836, IN CHRIST CHURCH, RALEIGH, NORTH CAROLINA* 32 (Raleigh, J. Gales & Son 1836). I am indebted to N. Brooks Graebner and Sally Greene for this source.

211. DEYLE, *supra* note 184, at 159. Many a slave suffered medical experiments that seem harbingers of Auschwitz’s Dr. Josef Mengele. See JOHNSON, *supra* note 184, at 102–03.

212. *State v. Mann*, 13 *N.C. (2 Dev.)* 263, 267–68 (1829).

But limits of excessive cruelty were not the same for a slave as for a child. Here lay a crucial distinction glossed over by Rector Freeman. That slavery was *not* the same as childhood or pupilage lay at the heart of Ruffin's reasoning in *State v. Mann*. For the "principles which restrain the authority of the parent over the child, the tutor over the pupil, the master over the apprentice . . . the end in view is the happiness of the youth, born to equal rights" once an adult.<sup>213</sup> But the adult slave, "doomed in his own person and his posterity . . . to toil that another may reap the fruits," had no such rights.<sup>214</sup> With slavery the end purpose of restraint was not the slave's happiness but "the profit of the master, his security and the public safety."<sup>215</sup> Total subordination was "essential to the value of the slaves as property, to the security of the master, and the public tranquility."<sup>216</sup>

In all these respects Ruffin's spectrum of views and actions was typical of most Southern slaveholders. To be sure, his legal decisions condoned, and his own behavior embraced, some of slavery's most reprehensible features. His *State v. Mann* decision, James Wynn notes, was a matter not of judicial duty but of judicial choice.<sup>217</sup> His profession of anguish, Eric Muller suggests, seems hypocritical.<sup>218</sup> His episodic brutality toward his own slaves belied his famed lament for the harsh judgment of *State v. Mann*. But in most respects he differed from few slave owners of his day, compelled to maintain the fiction that their stern but caring paternalism benefited all concerned, including supposedly consenting slaves.<sup>219</sup>

Terming their slaves "family," devout slaveholders like Ruffin persuaded themselves that their idealized "domestic institution" was the usual happy state of affairs. In serving "*humane and enlightened masters, [being] secured . . . of the necessaries and most of the comforts of life, and . . . partakers of the blessings of the Gospel of Salvation,*" as Freeman put it, American slaves were fortunate beneficiaries of God's merciful providence.<sup>220</sup> Ruffin echoed Rector Freeman: "The comfort, cheerfulness, and happiness of the slave . . . should be, and generally is, the study of the master; and every Christian master

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213. *Id.* at 265.

214. *Id.* at 266.

215. *Id.*

216. *Id.* at 268.

217. Wynn, *supra* note 169, at 996–98.

218. Muller, *supra* note 170, at 771–74.

219. FREEHLING, *supra* note 87, at 35–39.

220. FREEMAN, *supra* note 210, at 19.

rejoices over the soul of his slave saved, as of a brother."<sup>221</sup> Ruffin shared the evangelical confidence that Christian progress, demographic change, and owner self-interest would in time bring milder treatment of slaves.<sup>222</sup> However, he never went so far as the South Carolina Golden-Rule Presbyterian who urged masters to "treat our slaves as we should feel that we had a right to be treated if we were slaves ourselves."<sup>223</sup>

Southern slavery could hardly live up to its patriarchal idealization. Intrinsic to it were the ills Ruffin and others professed to abhor. Although many of his standing deplored slave trading and forced separation of slave families, they utterly depended on a labor economy reliant on both, in which they were willy-nilly complicit. The domestic slave trade uprooted more than a million African Americans from their families in the Old South.<sup>224</sup> The interregional trade was an unavoidable everyday presence, with long overland coffles and prominent slave depots in all major cities. But "the real glue that held the southern slave system together was the far more prevalent local trade," Steven Deyle has shown. "The overwhelming majority of enslaved people . . . were sold locally, by one owner to another or . . . as a way to settle debts or estates."<sup>225</sup> The sale of slaves was the lifeblood of slavery; virtually every owner was at some point a trader in slaves. Many expressed chagrin at separating slave families. But in selling a nine-year-old away from his mother and siblings, Ruffin behaved like the great majority of slaveholders, for the breakup of conjugal and family bonds in slave sales was not the rare exception but the crushing rule.<sup>226</sup>

The stereotypical slave trader, on whom all these sales and family ruptures were blamed, that "handful of bad apples—greedy,

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221. WILLIAM E. WIETHOFF, *A PECULIAR HUMANISM: THE JUDICIAL ADVOCACY OF SLAVERY IN HIGH COURTS OF THE OLD SOUTH, 1820–1850*, at 89 (1996) (quoting Ruffin, *supra* note 191, at 333).

222. *State v. Mann*, 13 N.C. (2 Dev.) 263, 268 (1829); FOX-GENOVESE & GENOVESE, *supra* note 167, at 670.

223. J. H. THORNWELL, *THE RIGHTS AND DUTIES OF MASTERS: A SERMON PREACHED AT THE DEDICATION OF A CHURCH, ERECTED IN CHARLESTON, S.C., FOR THE BENEFIT AND INSTRUCTION OF THE COLOURED POPULATION* iii, 43 (Charleston, Walker & James 1850). Abraham Lincoln sharpened the Golden Rule: "[I]f any should be slaves it should be . . . those who desire it for others. Whenever [I] hear any one, arguing for slavery I feel a strong impulse to see it tried on him personally." Abraham Lincoln, *Speech to One Hundred Fortieth Indiana Regiment* (Mar. 17, 1865), in 8 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 360, 361 (Roy P. Basler ed., 1953) (second alteration in original) (internal citation omitted).

224. DEYLE, *supra* note 184, at 3–4.

225. *Id.* at 144.

226. Muller, *supra* note 170, at 797.

uncouth men who stood outside the paternalistic ideal [and] bore full responsibility for all of the evils that the slave trade produced," was a convenient scapegoat for most slave owners.<sup>227</sup> Ruffin was in this respect no blameworthy exception. The humane paternalistic planter who parted with his slaves and separated slave families only rarely and under duress is a myth.<sup>228</sup> So is the belief that respectable slave owners despised and shunned "[t]he miserly Negro Trader" as a lowbred monster, the "coarse ill-bred person . . . with a cross-looking phiz, a whiskey-tinctured nose, cold hard-looking eyes, a dirty tobacco-stained mouth, and shabby dress," limned in an 1860 proslavery tract.<sup>229</sup> In fact, major slave traders from the highest circles of southern society (Thomas Gadsden, Louis De Saussure, John Springs III) were respected by all.<sup>230</sup> Those whom elites like Ruffin scorned were shunned not as slave traders but as lower class.

The slave owner, noted a Scottish traveler in 1857, "has the 'noble inconsistency' to condemn his institution in the person of the agent who is essential to its existence."<sup>231</sup> Ruffin in common with "[m]ost southern slave owners had little trouble reconciling this apparent contradiction."<sup>232</sup> They avowed paternalist benevolence, financial need, and concern for public safety all in the same breath. "Talk not then about kind and christian masters," wrote one escaped slave. "They are not masters of the system. The system is master of them; and the slaves are their vassals."<sup>233</sup>

To condemn Ruffin for what seemed iniquitous *even to Ruffin himself* may seem reasonable. But it criminalizes inconsistencies characteristic of his place and time. Ruffin expressed conflicting views of slave mentality. In *Redding v. Long* (1858) he termed slaves "responsible human beings, . . . know[ing] right from wrong, and . . .

227. DEYLE, *supra* note 184, at 238.

228. Typical of this fantasy was Henry Clay's 1850 Senate speech in defense of the internal slave trade: an owner "takes care of his slaves; he fosters them, and treats them often with the tenderness of his own children. They multiply on his hands; he can not find employment for them, and he is ultimately, but most reluctantly and painfully, compelled to part with some of them because of the increase of numbers and the want of occupation." DEYLE, *supra* note 184, at 213. On slaveholders' efforts to distinguish "slavery" from "the market," and thus absolve themselves from all blame, see JOHNSON, *supra* note 184, at 25–30.

229. D. R. HUNDLEY, *SOCIAL RELATIONS IN OUR SOUTHERN STATES* 140 (New York, B. Price 1860).

230. DEYLE, *supra* note 184, at 122.

231. JAMES STIRLING, *LETTERS FROM THE SLAVE STATES* 293 (London, John W. Parker & Son 1857).

232. DEYLE, *supra* note 184, at 10.

233. JAMES W.C. PENNINGTON, *THE FUGITIVE BLACKSMITH; OR, EVENTS IN THE HISTORY OF JAMES W. C. PENNINGTON* vii (London, Charles Gilpin 2d ed.1849).

the difference between bondage and freedom.”<sup>234</sup> In *State v. Cæsar* (1849) he wrote that abuse that would drive “a white man to madness, will not have the like effect, if done . . . to a slave.”<sup>235</sup> Such cognitive dissonance reflected Ruffin’s need, in Alfred L. Brophy’s gloss, “to make what he wished . . . a reality.”<sup>236</sup> But such inconsistency was (and remains) legion. Ruffin’s caning of Archibald Murphey’s slave Bridget, which he had no legal right to do, was no more inconsistent than Murphey’s reaction: having beseeched Ruffin to sell him Bridget for “good nursing in my sufferings,”<sup>237</sup> Murphey subsequently reassures him that “flogging Bridget ha[d] given [him] no offense.”<sup>238</sup>

Ruffin’s views and acts strike some today as especially odious not, I think, because Ruffin was unusually reprehensible, but rather because of his contemporary influence and subsequent renown. The rhetorical force of his judicial opinions was patently at odds with his private behavior; his actual and frequent callousness was contrary to his long-lasting acclaim, in the wake of Harriet Beecher Stowe’s praise of his “honesty” in legitimating cruelties he professed to lament. But Ruffin was certainly no Simon Legree, no sadist with a lust for power.<sup>239</sup> He was, by and large, one of Cowlshaw’s “mostly reasonable and humane men and women who took part in the processes and policies that we now see as repugnant” and for which we feel we owe amends to victims’ descendants.<sup>240</sup>

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234. *Redding v. Long*, 57 N.C. (4 Jones Eq.) 216, 218–19 (1858).

235. *State v. Cæsar*, 31 N.C. (9 Ired.) 391, 423 (1849).

236. Alfred L. Brophy, *Thomas Ruffin: Of Moral Philosophy and Monuments*, 87 N.C. L. REV. 799, 816 (2009).

237. Letter from Archibald D. Murphey to Thomas Ruffin (Jan. 13, 1830), in 1 THE PAPERS OF THOMAS RUFFIN, 537, 538 (J.G. de Roulhac Hamilton ed., 1918).

238. Letter from Archibald D. Murphey to Thomas Ruffin (Dec. 21, 1831), in Thomas Ruffin Papers (on file with the Southern Historical Collection, Wilson Library, The University of North Carolina at Chapel Hill).

239. David Bromwich, *The Fever Dream of Mrs. Stowe*, N.Y. REV. BOOKS, Oct. 25, 2007, at 51–53 (reviewing HARRIET BEECHER STOWE, THE ANNOTATED UNCLE TOM’S CABIN (Henry Louis Gates, Jr. & Hollis Robbins eds., 2007)); see also Laura H. Korobkin, *Appropriating Law in Harriet Beecher Stowe’s Dred*, 62 NINETEENTH-CENTURY LITERATURE 380, 380–406 (2007) (showing that Ruffin became famed largely through abolitionists’ citations of *State v. Mann*).

240. Cowlshaw, *supra* note 14, at 442.

## IV. JUSTIFYING REPARATIVE JUSTICE

A. *The Endurance of Ancient Injuries*

Old wounds still fester. Inherited pain persists. Endemic racism and accrued inequities disadvantage slave descendants to this day. Ancient injuries wound the pride, shrink the purse, cripple the power, and constrain the will even of remote putative heirs, who “too easily accept the story that they and their kind were always good for nothing,” and so blame themselves for their subordination.<sup>241</sup>

“Genealogical trees do not flourish among slaves,” noted escaped slave Frederick Douglass; a “*father*, is literally abolished in slave law and slave practice.”<sup>242</sup> Nonetheless “grief is passed on genetically,” as a Lakota/Dakota woman says of the legacy of trauma, shame, fear, and anger handed down to Native Americans. “I have been carrying a weight around that I’ve inherited. . . . It has been paralyzing to us as a group.”<sup>243</sup> When an Australian Aboriginal half-caste child was stolen from the tribal family and forbidden any mention of or contact with it, the “entire community lost, often permanently, its chance to perpetuate itself in that child,” acknowledged a subsequent official report. This had been “a primary objective of forcible removals . . . amount[ing] to genocide.”<sup>244</sup> Scarred by “post-traumatic slave syndrome,” some are said to be “still haunted by memories of that enslavement.”<sup>245</sup> And that Britain fears reparations claims suggests “there must be an element of truth in the

241. Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 6 (1992). In the U.S. South (as in Africa), “masters stood to benefit by stripping slaves of any kin ties.” Penningroth, *supra* note 207, at 1052. Uncertainty about ancestry still shadows slave descendants and helps explain their compelling need for roots. As salable property, slaves were deprived of parental or filial support. “Not only was the slave denied all claims on, and obligations to, his parents and living blood relations, but . . . all such claims and obligations on his more remote ancestors and on his descendants.” ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 5 (1982).

242. FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 34–35 (New York & Auburn, Miller, Orton & Co. 1857).

243. Tsosie, *supra* note 30, at 203.

244. GOVIER, *supra* note 183, at 81–82; HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM’N, *BRINGING THEM HOME: REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES* 190 (1997) (Austl.); see Danielle Celermajer, *The Apology in Australia: Re-Covenanting the National Imaginary*, in *TAKING WRONGS SERIOUSLY*, *supra* note 30, at 153, 158.

245. Brian Logan, *Heart of Blackness*, TIMES (London), Oct. 29, 2007, Times2, at 12 (quoting playwright Kwame Kwei-Armah); see JOY DEGRUY LEARY, *POST TRAUMATIC SLAVE SYNDROME: AMERICA’S LEGACY OF ENDURING INJURY AND HEALING* 13–14 (2005).

claim.”<sup>246</sup> These laments exemplify what Robert Pogue Harrison says of forebears in general. “We inherit their obsessions; assume their burdens; carry on their causes; . . . and often we die trying to vindicate their humiliations.”<sup>247</sup>

Ancient injustice not only continues to afflict distant descendants, but “the original harm or wrong may become a core part of the identity [of] the victim or transgressor.”<sup>248</sup> Victims internalize their moral inferiority in aggressors’ eyes, while violators hold on to “a distorted sense of their own moral superiority.”<sup>249</sup> And as a philosopher puts it, such mindsets “are passed down to children almost with their mothers’ milk [and] can cascade down the generations to an alarming extent.”<sup>250</sup> And such identities harden into “moral fortress[es].” Dialogue degenerates into fruitless recrimination, “escalating . . . accusation and counter-accusation, exaggeration and denial,” as Eva Hoffman says of Polish–Jewish relations. She thinks historical honesty the only cure. Just as “the majority culture . . . [must] admit its history of dominance or injustice,” so the minority must relinquish “powerlessness as proof of moral superiority,” and cease “to hold the majority moral hostage in perpetuity.”<sup>251</sup>

### B. *Collective Responsibility for Past Wrongs*

“In Adam’s fall, / We sinnèd all.”<sup>252</sup> But if living individuals are not answerable for ancestral sins, who is? Given the moral gulf between past and present viewpoints, what is the argument for burdening heirs with forebears’ decisions? The case can be and indeed is made by considering the two as members of the same collective entity. Legal statutes routinely invoke past precedent, presuming us beholden to ancestral deeds and bound to honor ancestral commitments. Court judgments refer to “we” in a broad sense, embracing the enduring juridical institution, not just today’s

246. Logan, *supra* note 245, at 12 (quoting playwright Kwame Kwei-Armah); see Posner & Vermeule, *supra* note 108, at 730 (noting that apologies seeming to admit justiciable wrongdoing may lead to legal liability).

247. ROBERT POGUE HARRISON, *THE DOMINION OF THE DEAD* x (2003).

248. DIGESER, *supra* note 106, at 53.

249. Kok-Chor Tan, *Colonialism, Reparations, and Global Justice*, in *REPARATIONS: INTERDISCIPLINARY INQUIRIES* 280, 287–88 (Jon Miller & Rahul Kumar eds, 2007).

250. Leif Wenar, *Reparations for the Future*, 37 *J. SOC. PHIL.* 396, 404 (2006).

251. EVA HOFFMAN, *SHTETL: THE LIFE AND DEATH OF A SMALL TOWN AND THE WORLD OF POLISH JEWS* 14–16 (1997).

252. BENJAMIN HARRIS, *THE NEW ENGLAND PRIMER* 12 (Albany, Whiting, Backus & Whiting 1805) (1690).

judges. So doing, notes Stanley Fish, “acknowledge[s] that they are part of an ongoing enterprise, and as such are responsible for its history, . . . charged with the duty of carrying on a project that precedes them and will survive them.”<sup>253</sup>

As with past promises, so with past injustices. “We are all guilty,” declared Russian President Boris Yeltsin, apologizing on behalf of the Soviet state for the massacre of the Romanov family eighty years back.<sup>254</sup> When President Bill Clinton said, in 1998, “European Americans received the fruits of the slave trade, and we were wrong in that,” the words *we* and *wrong* linked today’s Americans to long-dead precursors.<sup>255</sup> In apologizing to the African American community and pledging \$5 million to aid black students, J.P. Morgan Chase accepted culpability for predecessor banks that had financed the slave trade and held slaves as collateral on loans.<sup>256</sup>

The Bureau of Indian Affairs (BIA) had long done manifold harm to the tribes in its care, acknowledged contrite BIA spokesman Kevin Gover in 2000. Although “BIA employees of today did not commit these wrongs,” he continued, they must “acknowledge that the institution [they] serve did, . . . [and] accept . . . this legacy of racism and inhumanity. And . . . also the responsibility of putting things right.”<sup>257</sup> Over objections that the University of Alabama before the Civil War was not representative of the university today, academics accepted that “the current Faculty Senate . . . link[ed] to the body of the University faculty past, present, and future.” Although not responsible for the criminal “thoughts and actions of those long deceased,” they felt compelled to apologize to descendants of slaves forced to construct campus buildings. The institution was essentially the “same,” hence accountable.<sup>258</sup>

Enduring trans-generational responsibility was famously advocated by Thomas Paine’s arch-antagonist, Edmund Burke. Burke condemned the wholesale erasures of the French Revolution as a misguided attempt to expunge the entire French legacy. Because “unmindful of what they have received from their ancestors, or of what is due to their posterity,” they risk breaking “the whole chain

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253. Stanley Fish, *But I Didn't Do It!*, N.Y. TIMES, Mar. 21, 2007, at A21; see MARGALIT, *supra* note 127, at 96.

254. Boris N. Yeltsin, Address at the Burial Ceremony for Czar Nicholas II (July 17, 1998), in N.Y. TIMES, July 18, 1998, at A4.

255. BROPHY, *supra* note 95, at 13.

256. *Id.* at 144.

257. Tsosie, *supra* note 30, at 193.

258. GRISWOLD, *supra* note 33, at 148–49, 148 n.12 (quoting the University of Alabama Senate Minutes on Apr. 20, 2004).



and continuity of the commonwealth . . . No one generation could link with the other. Men would become little better than the flies of a summer.”<sup>259</sup> He held obeisance to lasting tradition socially indispensable.

[Society] is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.<sup>260</sup>

Long assailed as a reactionary defense of bygone hierarchical tyranny, Burke’s rationale is now increasingly invoked to uphold lasting accountability. For the sake of peace and comity, state treaties bind future generations. Similarly, injuries done in the name of states should be expiated by subsequent state agents.<sup>261</sup> It may be objected that “keeping an agreement made by our predecessors forces us to bear burdens that we had no say in incurring.”<sup>262</sup> And repairing historical injustices, paying for wrongs we ourselves did not commit, smacks of biblical injunctions that visit the sins of forebears on great-grandchildren, of inherited moral pollution staining a community over generations.<sup>263</sup>

Yet citizens who feel entitled to benefits from state or corporate precursors are by the same token bound to honor their promises and make amends for their wrongs. “Recent immigrants or descendants of the guiltless may not . . . feel guilt or shame,” argues a political

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259. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 81 (Frank M. Turner ed., Yale Univ. Press 2003) (1790).

260. *Id.* at 82.

261. Burke demurred at holding the present responsible for rectifying past injustice because he saw how readily would-be reformers invented or inflated historical crimes for evil purposes. They “think they are waging war with [past] intolerance, pride, and cruelty, whilst, under colour of abhorring the ill principles of antiquated parties, they are authorizing and feeding the same odious vices in different factions, and perhaps in worse.” *Id.* at 120. “It is not very just to chastise men for the offenses of their natural ancestors: but to take the fiction of ancestry in a corporate succession, as a ground for punishing men who have no relation to guilty acts . . . is [deeply unjust]. Corporate bodies are immortal for the good of their members, but not for their punishment.” *Id.* at 118. Burke’s distinction seems fundamentally untenable, but his general concern for intergenerational responsibility is now widely cited by theorists of retrospective moral assessment. See Christopher Kutz, *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 PHIL. & PUB. AFF. 277, 310 (2004).

262. JANNA THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL INJUSTICE 25 (2002).

263. W. JAMES BOOTH, COMMUNITIES OF MEMORY: ON WITNESS, IDENTITY AND JUSTICE 17 (2006).

philosopher, but they are nonetheless responsible as citizens, whether by birth and tacit consent or by positive choice, for trying to set things right. Ancestry is not at issue. “Blood lines are as irrelevant to historical obligations of citizens as they are to other duties of citizenship.”<sup>264</sup>

### C. *Therapeutic Restitution in Theory and Practice*

The desire to “make good again,” as Germany under Adenauer sought to do,<sup>265</sup> echoes a primal urge: we innately long to make whole what has been smashed. Young children believe in restorative powers that can rejoin things broken and bring the dead back to life. To restore something or someone to wholeness or health is considered not only achievable, but obligatory. The child in us feels responsible for causing the injury and must make amends to relieve the guilt.<sup>266</sup>

Among adults, the urge to make amends often extends to injuries done by others. Some, like slave trader John Hawkins’s descendant noted above, take on ancestral guilt as individuals. Others assume collective responsibility for unjust acts committed in the name of a continuing corporate entity. “A responsible government,” reasons another philosopher, “wants to clean up a mess not of its own making, . . . [to] try to repair the injuries of its predecessor.”<sup>267</sup> “Collective *guilt* across generations may be a morally dangerous idea,” concedes a theologian, but “collective *responsibility* across generations [is]

264. Such obligations presume viable continuity with a state or other institution; “only . . . associations capable of making and keeping transgenerational commitments”—nations, corporations, churches—can be held responsible for past misdeeds. THOMPSON, *supra* note 262, at 36–37. “The Greek government [owes no] reparations to descendants of Athenian helots,” even if these could be identified, because “[t]he Athenian state no longer exists . . . [and] the modern Greek state has [not] inherited its responsibilities.” *Id.* at 40. The U.S. Congress’s 1993 apology for overthrowing the Hawaiian kingdom a century earlier was made to native Hawaiians as surrogates of a violated nation. Contrary to Thompson, however, some would expand collectively responsible communities from corporate institutions to include families. See BLUSTEIN, *supra* note 119, at 145–69. Posner & Vermeule discuss how far corporate groups of perpetrators and victims are considered persons for moral purposes; stances range from hard ethical individualism (no group responsibility) to soft ethical individualism (group responsibility is circumstantial; the group matters because individuals derive value from it) to ethical collectivism (groups are blameworthy in the same sense as individuals). Posner & Vermeule, *supra* note 108, at 707.

265. See *supra* note 94 and accompanying text.

266. Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition*, in HANDBOOK OF REPARATIONS, *supra* note 62, at 560, 562–63.

267. DIGESER, *supra* note 106, at 166.

morally necessary ... We remember evil ... to build a new community with the descendants of the evildoers.”<sup>268</sup>

Indeed, it is an article of contemporary faith that “a society will not be able to successfully pass into the future until it somehow deals with its demons from the past.”<sup>269</sup> The Archbishop of Canterbury urged that Britain’s role in slavery be acknowledged and healed, lest it continue to imprison spiritually.<sup>270</sup> He echoed German President Richard von Weizsäcker’s 1985 warning to the Bundestag that anyone who “does not wish to remember inhumanity becomes susceptible to the dangers of new infection.”<sup>271</sup> “If we don’t deal with our past adequately,” Archbishop Desmond Tutu counseled fellow South Africans, “it will return to haunt us.”<sup>272</sup> These minatory cautions derive from axiomatic precepts about personal trauma: Freud famously taught that repressing the past came at huge psychological cost.<sup>273</sup> The collective costs of repression are arguably no less onerous. “When nations, like individuals, try to rewrite the past in such a way as to ignore its impact,” writes an authority on Korea, “they are likely to become sick, and their affirmations to become obsessions.”<sup>274</sup> Hence the widespread consensus on the need to confront traumatic histories.<sup>275</sup>

Yet for all the pious talk such confrontation remains exceptional. The historical hair shirt on the German landscape, if not on the

268. Donald W. Shriver, Jr., *Is There Forgiveness in Politics? Germany, Vietnam, and America*, in *EXPLORING FORGIVENESS* 131, 141 (Robert D. Enright & Joanna North eds., 1998) (emphasis added).

269. Rhoda E. Howard-Hassmann & Mark Gibney, *Introduction: Apologies and the West*, in *AGE OF APOLOGY*, *supra* note 54, at 1, 1.

270. See Rowan Williams, *Slavery Debate Heats Up as Blair Considers Apology*, *VOICE* (London), Dec. 3, 2006, at 6.

271. Shriver, *supra* note 268, at 142.

272. Archbishop Desmond Tutu, *Without Forgiveness There Is No Future*, in *EXPLORING FORGIVENESS*, *supra* note 268, at xiv.

273. SUSAN RUBIN SULEIMAN, *CRISES OF MEMORY AND THE SECOND WORLD WAR 222–25* (2006). We can try to forget an oppressive past by destroying evidence of it, or else by defanging and neutralizing it; “there is forgetting as spitting out, as rendering utterly alien ... and ... forgetting as digesting, incorporating.” John Forrester, “*Mille e tre*”: *Freud and Collecting*, in *CULTURES OF COLLECTING*, *supra* note 204, at 224, 245.

274. PAUL M. EDWARDS, *TO ACKNOWLEDGE A WAR: THE KOREAN WAR IN AMERICAN MEMORY* 18 (2000).

275. See REPORT OF THE BROWN UNIVERSITY STEERING COMMITTEE ON SLAVERY AND JUSTICE, *supra* note 111, at 5. “Nations, like individuals, need to face up to ... traumatic past events before they can put them aside and move on to normal life.” TINA ROSENBERG, *THE HAUNTED LAND: FACING EUROPE’S GHOSTS AFTER COMMUNISM* xviii (1995). Like Michael Ignatieff, however, Rosenberg realizes that states often deal with past injustice not to break free of it but to justify its recurrence. *Id.* at xxiv; see IGNATIEFF, *supra* note 129, at 186.

German psyche, more than two generations after the Holocaust, is virtually unique. “Most countries celebrate the best in their pasts. Germany unrelentingly promotes its worst,” a journalist notes of Berlin’s mania for reminders of Nazi infamy.<sup>276</sup> “Where in the world has one ever seen a nation that erects memorials to immortalize its own shame?” exclaimed Israel’s former ambassador there. “Only the Germans had the bravery and the humility.”<sup>277</sup> Or, perhaps more realistically, the urge to be shed of awful memories by memorializing on a monumental scale. For “the more monuments there are, the more the past becomes invisible,” suggests Andreas Huyssen; “redemption, thus, through forgetting, . . . *Entsorgung*, the public disposal of radiating historical waste.”<sup>278</sup>

Indeed, nations rarely face up to discreditable pasts. Hiroshima and Nagasaki enabled the Japanese to feel more victimized than victimizers.<sup>279</sup> Never called on to make restitution and long exempt from war crimes trials, Austrians denied Holocaust complicity until the Waldheim Affair of 1985, and still fancy themselves primarily *victims* of Nazism.<sup>280</sup> The Spanish 1936–1939 civil war remained undiscussed by common consent until a “law of historical memory” was enacted in 2007.<sup>281</sup> But this largely toothless act was widely seen as an unspoken pact to go on letting the past alone, as one legislator

276. Nicholas Kulish, *75 Years After Hitler's Ascent, A Germany That Won't Forget*, N.Y. TIMES, Jan. 29, 2008, at A1.

277. *Id.* (quoting Avi Primor). France’s first commemoration of a state crime, on July 16, 1995, was for the 1942 round-up of 13,000 French Jews deported to the death camps. ROUSSO, *supra* note 17, at 23 & n.11.

278. Andreas Huyssen, *Monumental Seduction*, in ACTS OF MEMORY: CULTURAL RECALL IN THE PRESENT 191, 193 (Mieke Bal et al. eds., 1999).

279. Elizabeth S. Dahl, *Is Japan Facing Its Past? The Case of Japan and Its Neighbors*, in AGE OF APOLOGY, *supra* note 54, at 241–55. Philip A. Seaton disputes the orthodox view of Japanese amnesia and denial. PHILIP A. SEATON, JAPAN’S CONTESTED WAR MEMORIES: THE “MEMORY RIFTS” IN HISTORICAL CONSCIOUSNESS OF WORLD WAR II 1–5 (2007).

280. See ERIC R. KANDEL, IN SEARCH OF MEMORY: THE EMERGENCE OF A NEW SCIENCE OF THE MIND 405–06 (2006); ÖSTERREICHS UMGANG MIT DEM NATIONALSOZIALISMUS: DIE FOLGEN FÜR DIE NATURWISSENSCHAFTLICHE UND HUMANISTISCHE LEHRE *passim* (Friedrich Stadler ed., 2004); Heidemarie Uhl, *From Victim Myth to Co-Responsibility Thesis: Nazi Rule, World War II, and the Holocaust in Austrian Memory*, in POLITICS OF MEMORY, *supra* note 76, at 40, 40–72. Ex-Secretary-General of the United Nations Kurt Waldheim, while campaigning for the Austrian presidency in 1985, was shown to have concealed his Wehrmacht complicity in the Second World War.

281. GILES TREMLETT, GHOSTS OF SPAIN: TRAVELS THROUGH A COUNTRY’S HIDDEN PAST 78–79 (2006); Michael Kimmelman, *In Spain, a Monumental Silence*, N.Y. TIMES, Jan. 13, 2008, § 2 (Arts & Leisure), at 1.

put it, “forgetting by everyone for everyone.”<sup>282</sup> Poles, in their own view Europe’s most victimized people, accept no accountability for either the Nazi or Communist past. Layer on layer of decimations, “deportations, imprisonments . . . [have] made almost everyone in Poland a loser or complicit in someone else’s loss.”<sup>283</sup> Few Russians feel, let alone own up to, complicity in Gulag atrocities. “We need to do a great deal to ensure [the Soviet Great Terror] is never forgotten,” declared Russian President Vladimir Putin recently.<sup>284</sup> But this seemed less a lament for the dread past than an ominous portent of a repressive future. “[I]n other countries,” he added dismissively, “even worse things happened.”<sup>285</sup> “We have never used nuclear weapons against civilians . . . or dropped more bombs on a tiny country than were dropped during the entire Second World War, as . . . in Vietnam.”<sup>286</sup> To most Russians, Stalin’s triumphs more than compensate for his brutality.<sup>287</sup> Balkan failures to come to terms with the past stem not from a deficit but a surfeit of memory, obsessive preoccupation with ancient wrongs and enmities.<sup>288</sup> Given that so many nations repress the past “with psychological impunity,” it would seem that “collective memories can be changed without a return of the repressed.”<sup>289</sup>

282. Bess Twiston Davies, *Sacred Law of Historical Memory*, *TIMES* (London), Nov. 23, 2007, at 84.

283. Judt, *supra* note 97, at 13; see Andrzej Paczkowski, *Nazism and Communism in Polish Experience and Memory*, in *STALINISM AND NAZISM: HISTORY AND MEMORY COMPARED* 242, 242–61 (Lucy B. Golsan et al. trans., Henry Rousso ed., Univ. of Neb. Press 2004) (1999).

284. Sophia Kishkovsky, *Putin Visits Memorial to Victims of Stalin*, *INT’L HERALD TRIB.*, Oct. 31, 2007, at 3; see also STÉPHANE COURTOIS ET AL., *THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION* 24 (Jonathan Murphey & Mark Kramer trans., Harvard Univ. Press 1999) (1997) (noting that Prime Minister Nikita Khrushchev’s proposal for a monument to Josef Stalin’s victims was dismissed at the twenty-second Communist Party of the Soviet Union Congress in 1961).

285. Tony Halpin, *Textbooks Rewrite History to Fit Putin’s Vision*, *TIMES* (London), July 30, 2007, at 31.

286. Clifford J. Levy, *Purging History of Stalin’s Terror; A New Attitude Toward Past Puts Focus on Russian Glory*, *INT’L HERALD TRIB.*, Nov. 27, 2008, at 1.

287. Andrew E. Kramer, *New Russian History: Yes, People Died, But . . .*, *INT’L HERALD TRIB.*, Aug. 16, 2007, at 2; see also Svetlana Osadchuk, *Russian Teachers’ Manual Labels Stalin “Rational,”* *INT’L HERALD TRIB.*, Sept. 1, 2008, <http://www.iht.com/articles/2008/09/01/europe/stalin.php>.

288. See MEGILL, *supra* note 118, at 23–24.

289. Claudio Fogu and Wulf Kansteiner, *The Politics of Memory and the Poetics of History*, in *POLITICS OF MEMORY*, *supra* note 76, at 284, 289. Expressions of national contrition also risk causing a domestic backlash, fueling enmity rather than aiding reconciliation. JENNIFER LIND, *SORRY STATES: APOLOGIES IN INTERNATIONAL POLITICS passim* (2008).

Burke's compact between the dead, the living, and the unborn works well only where citizens have long felt at home with their institutions. Just as collective apology requires collective agency, collective agency requires "corporate identity over time and a network of duties assumed and rights conferred,"<sup>290</sup> the "ongoing enterprise" specified by Stanley Fish.<sup>291</sup> Political apology can be crucial for civic reconciliation. But its actual realization by any community is as difficult as it is rare. Yet only in such a community can we hope, in an editorialist's phrase, that "[l]eaders who learn the art of apology on the nursery slopes of apologising for the mistakes of others may graduate to . . . saying sorry for their own errors and meaning it."<sup>292</sup> Or better yet, as one leader urged, "inspire our citizens to live their lives so that our children and grandchildren have nothing to apologize for."<sup>293</sup>

For historical contrition to be truly useful also requires a modicum of consensual faith in the prospect of moral progress, in Macaulay's sense of the term. Absent such hope, apology is "reduced to a political stratagem," or, concludes Griswold bleakly, "assuming that wrong-doing was as pervasive in human life as we know it to be, . . . justifications of revenge for never-to-be-forgotten insults and injuries."<sup>294</sup>

#### V. COMMEMORATIVE STRATEGIES FOR DEFAMED REPUTE

Reputations of the famed are constantly revised as their subjects die, pass beyond living memory, and are reappraised, sometimes more, often less favorably, by posterity's ever-changing criteria.<sup>295</sup> Beyond retrospective contrition, what should be done with memoirs of and memorials to such men as Thomas Ruffin, once revered but now reproached by changed morals or new insights? History reveals manifold modes, some reviewed in this issue by Sanford Levinson<sup>296</sup>

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290. Roger Scruton, *Sorry!*, TIMES LITERARY SUPP. (London), Dec. 14, 2007, at 5; see BOOTH, *supra* note 263, at 23.

291. See Fish, *supra* note 253 and accompanying text.

292. *In Praise of . . . Saying Sorry*, GUARDIAN (London), Nov. 27, 2006, at 32.

293. *Georgia Governor Skeptical on Slavery Apology*, Mar. 20, 2007, <http://www.msnbc.msn.com/id/17689341/> (quoting Governor Sonny Perdue).

294. GRISWOLD, *supra* note 33, at 192.

295. KENNETH H. CRAIK, REPUTATION: A NETWORK INTERPRETATION 177-92 (2009).

296. Sanford Levinson, *Thomas Ruffin and the Politics of Public Honor: Political Change and the "Creative Destruction" of Public Space*, 87 N.C. L. REV. 673, 676-77 (2009).

and by Alfred Brophy,<sup>297</sup> of coping with newly embarrassing or repugnant legacies.

In reassessing such legacies, we should bear in mind the vital distinction between remembering and celebratory commemorating. During the French Revolution, church and seigneurial archives hated as reminders of unjust privilege, *servitude et fanatisme*, were nonetheless largely spared the autos-da-fé wreaked against monuments; whereas statues and symbolic buildings were torched as icons of oppression, written sources were rededicated as icons of national memory.<sup>298</sup> Similarly, when the 1871 Communards tore down the Vendôme column, topped by a statue of Napoleon, they spared Louis-August Thiers's Napoleonic historical writings.<sup>299</sup> It was essential to have the history of the Vietnam War, but a memorial would wrongly hallow it, argued a veteran: "Let's not perpetuate the memory of such dishonorable events by erecting monuments to them."<sup>300</sup> Animal rightists damned a proposed Leicestershire museum of British hunting as glorifying "part of our heritage we ought to eradicate altogether." They did not mean to delete hunting from *history*; its evils had to be chronicled. But to *museumize* hunting implied endorsing it.<sup>301</sup>

Confusion between chronicling and celebrating provoked the Smithsonian 1994–1995 quarrel over the aborted *Enola Gay* exhibition, "The Last Act: The Atomic Bomb and the End of World War II." The conflict went deeper than disputed versions of why the bomb was dropped (to shorten the war, to save American lives, to preclude Soviet involvement). Some wanted to celebrate the defeat of Japan, others to dispel feel-good national myths by showing history in all its agonizing complexity.<sup>302</sup> Pressured by veterans' groups and threatened by Congress, the Smithsonian felt forced to cancel what some saw as hindsight wallowing in a bath of American guilt. In trying "to couple a historical treatment of the use of atomic weapons with the 50th anniversary commemoration of the end of the war," said Smithsonian secretary I. Michael Heyman, they had failed to foresee "the intense

297. Brophy, *supra* note 236, at 800–01.

298. Krzysztof Pomian, *Les archives: du Trésor des chartes au Caran*, in PIERRE NORA, *LES LIEUX DE MÉMOIRE*, III: LES FRANCE, 3: DE L'ARCHIVE À L'EMBLÈME 181, 181–90 (1992).

299. MATT K. MATSUDA, *THE MEMORY OF THE MODERN* 20–21, 77 (1996).

300. Robert Wagner-Pacifici & Barry Schwartz, *The Vietnam Veterans Memorial*, 97 AM. J. SOC. 376, 388 n.7 (1991).

301. LOWENTHAL, *supra* note 5, at 160.

302. Edward T. Linenthal, *Can Museums Achieve a Balance Between Memory and History?*, CHRON. HIGHER EDUC., Feb. 10, 1995, § B2, at 1–2.

feelings such analysis would evoke” among museum-going veterans who “were not looking for analysis” anyway, but for admiration.<sup>303</sup> “I don’t want sixteen-year-olds walking out of there thinking badly of the U.S.,” declared a Massachusetts congressman. Representative Sam Johnson, a Smithsonian Regent, was more explicit: “We’ve got to get patriotism back into the Smithsonian. We want the Smithsonian to reflect real America and not something that a historian dreamed up.”<sup>304</sup> Historians meddle with commemoration at their peril.

#### A. *Oblivion*

The most sweeping and irreversible remedial action is oblivion: expunging all reference to the man or matter in question and enjoining forgetting. Two opposite aims animate injunctions to forget: on the one hand to doom a sinner to oblivion, to “blot out his name” (Deuteronomy 29:20); on the other to blot out the sin, “forgive their iniquity and . . . remember their sins no more” (Jeremiah 31:34).<sup>305</sup> In nations as in families, forgetting is a common prelude to forgiving: amnesia facilitates amnesty. To foster a needed myth of uninterrupted ancestral freedom, and to antiquate Solon’s laws into an original unassailable constitution, Athens decreed an amnesty when the city regained democracy in 403 BC. Athenian citizens were forbidden to discuss their recent sufferings or to seek revenge against traitors who had aided the now-exiled oligarchs.<sup>306</sup> Recall was forbidden precisely because the recent past was remembered all too well; it was disowned and put out of mind because too painful to come to terms with.<sup>307</sup>

The ancient Athenian example proved serviceable in seventeenth- and eighteenth-century Europe, when internecine religious and other conflicts imperiled social stability and national exchequers. To promote reconciliation, former foes were enjoined to forget past injuries. The 1598 Edict of Nantes required the memory of previous quarrels to “be

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303. Martin Harwit, AN EXHIBIT DENIED: LOBBYING THE HISTORY OF *ENOLA GAY* 396 (1996) (quoting I. Michael Heyman, press release, Jan. 30, 1995).

304. Edward T. Linenthal, *Struggling with History and Memory*, 82 J. AM. HIST. 1094, 1100 (1995) (quoting Representatives Peter I. Blute and Sam Johnson).

305. See MARGALIT, *supra* note 127, at 188–90.

306. See NICOLE LORAUX, *THE DIVIDED CITY: ON MEMORY AND FORGETTING IN ANCIENT ATHENS* 40–41 (Corrine Pache & Jeff Fort trans., Zone Books 2002) (1997); ANDREW WOLPERT, *REMEMBERING DEFEAT: CIVIL WAR AND CIVIC MEMORY IN ANCIENT ATHENS* 29–30 (2002).

307. See WOLPERT, *supra* note 306, at 118. Forgetting is involuntary; we can choose to disregard but not to forget an evil or an injury. MARGALIT, *supra* note 127, at 201–03.



extinguished and put to rest.”<sup>308</sup> Ending the Thirty Years’ War, the Treaty of Westphalia (1648) imposed a duty of “perpetual oblivion and amnesty” on all parties.<sup>309</sup> Mindful of the English Revolution’s festering sores, the philosopher Thomas Hobbes pronounced forgetting the basis of a just state, terming amnesia the cornerstone of the social contract. Offenses should be pardoned, not punished; evils forgotten, not avenged. Remedial oblivion became a vital tool of seventeenth-century English statecraft: to heal Civil War wounds, antagonists were adjured to forget past animus; “the oblivion of injuries [was] an Act in every way as noble as revenge.”<sup>310</sup> General pardons, expressly termed Acts of Oblivion, in 1660 absolved men who had borne arms against Charles II and in 1690 those who had opposed William III. Suppressing memory of grievances spared England from being crippled by inherited resentments.<sup>311</sup>

French revolutionaries decreed oblivion an accessory to freedom; *écrasez l’infâme* exhorted reformers to expunge all traces of the base past.<sup>312</sup> After the Terror of 1794 citizens were told to “forget the misfortunes inseparable from a great revolution.”<sup>313</sup> Similarly, *union et oubli* became Louis XVIII’s motto at his restoration in 1814.<sup>314</sup> Amnesia was essential to the national heritage, taught Ernest Renan in 1882. “Every French citizen has to have forgotten the massacre of St.

308. BERNARD COTTRET, 1598 L’ÉDIT DE NANTES: POUR EN FINIR AVEC DES GUERRES DE RELIGION 363 (1997); PAUL RICOEUR, MEMORY, HISTORY, FORGETTING 454–55 (Kathleen Blamey & David Pellauer eds., 2004); TZVETAN TODOROV, HOPE AND MEMORY: LESSONS FROM THE TWENTIETH CENTURY 169 (David Bellos trans., Princeton Univ. Press 2003) (2000).

309. HARALD WEINRICH, LETHE: THE ART AND CRITIQUE OF FORGETTING 171–72 (Steven Randall trans., Cornell Univ. Press 2004) (1997). See generally JÖRG FISCH, KRIEG UND FRIEDEN IM FRIEDENSVERTRAG: EINE UNIVERSALGESCHICHTLICHE STUDIE ÜBER GRUNDLAGEN UND FORMELEMENTE DES FRIEDENSSCHLUSSES (1979) (showing that, in seventeenth- and eighteenth-century Europe, it became common for peace treaties to include a comprehensive order to forget all culpable acts committed during the previous conflict).

310. GEORGES DE SCUDÉRY, CURIA POLITIAE: OR, THE APOLOGIES OF SEVERALL PRINCES: JUSTIFYING TO THE WORLD THEIR MOST EMINENT ACTIONS 98 (London, H. Moseley 1654).

311. See SHELDON S. WOLIN, THE PRESENCE OF THE PAST: ESSAYS ON THE STATE AND THE CONSTITUTION 142 (1989) (citing Thomas Hobbes); David Lowenthal, *Memory and Oblivion*, 12 MUSEUM MGMT. & CURATORSHIP 171, 175 (1993).

312. SUZANNE CITRON, LE MYTHE NATIONAL: L’HISTOIRE DE FRANCE EN QUESTION 183 (2d ed., Éditions Ouvrières 1989) (1971).

313. ROBERT GILDEA, THE PAST IN FRENCH HISTORY 32 (1994) (quoting Bertrand Barère de Vieuzac, Rapport du Comité de Salut Public, An II [1794]).

314. Anne M. Wagner, *Outrages: Sculpture and Kingship in France After 1789*, in THE CONSUMPTION OF CULTURE, 1600–1800: IMAGE, OBJECT, TEXT 294, 306 (Anne Bermingham & John Brewer eds., 1995). See generally Louis Joinet, *L’Amnistie: Le droit à la mémoire entre pardon et oubli*, 49 COMMUNICATIONS 213 (1989).

Bartholomew, the massacres in the 13th century Midi”: only by consigning such crimes to oblivion could France ensure undivided loyalty to *la patrie une et indivisible*.<sup>315</sup> A century later the ruptures of Vichy France, in turn, had to be forgotten. “Are we going to keep open the bleeding wounds of our national discords forever?” chided President Georges Pompidou, while pardoning Paul Touvier in 1971 for murdering Jews in 1944; it was time “to forget these times when the French didn’t like each other.”<sup>316</sup>

Selective amnesia also promoted Anglo-French amity. England’s consent to let Napoleon’s corpse be taken from St. Helena for reburial in Paris would “wipe out all traces of a sorrowful past,” envisaged a French worthy. “The time has come when the two nations should remember only their glory.”<sup>317</sup> Fort Louisbourg, Canada, had been “consecrated by the blood of your forefathers, the English, and my forefathers, the French,” Canadian Prime Minister Wilfrid Laurier remarked in 1900, urging that “the memory of these conflicts of the last century be forever forgotten.”<sup>318</sup>

Extolled by countless spokesmen, oblivion was central to the American Dream from the start. Colonists expunged from memory the evils of the Old World to realize the blessings of the New. Immigrant offspring eagerly shed European traditions to embrace American novelty. “We had to try to obliterate centuries’ worth of memory,” as an Italian American put it, “in just two or three generations.”<sup>319</sup> President George H. W. Bush invoked the statute of limitations against the festering wounds of the Vietnam War; Americans must forget it, for “no great nation can long afford to be sundered by a memory.”<sup>320</sup> Lauding the decision to shred East Germany’s Stasi files, Margalit bids states to “make decisions and establish institutions that foster forgetting as much as remembering.”<sup>321</sup>

Yet modern statecraft overwhelmingly authorizes the opposite: perpetual remembering. The horrors of the First World War made

315. See Renan, *supra* note 15, at 45 (“[T]he essence of a nation is that all individuals have many things in common, and also that they have forgotten many things.”).

316. Ronald Koven, *National Memory: The Duty to Remember, the Need to Forget*, SOCIETY (New Brunswick), Sept.–Oct. 1995, at 52, 55 (quoting Pompidou).

317. IDA TARBELL, *A LIFE OF NAPOLEON BONAPARTE, WITH A SKETCH OF JOSEPHINE, EMPRESS OF THE FRENCH* 296 (McClure, Phillips & Co. 1901) (1894) (quoting Interior Minister Charles, Comte de Remusat (May 12 1840)).

318. B.A. Balcom, A.J.B. Johnston & William A. O’Shea, *1995—A Year of Commemoration*, HERITAGE NOTES, Feb. 1994, <http://fortress.uccb.ns.ca/search/1995Commemoration.html> (quoting Sir Wilfrid Laurier, August 1900).

319. LOWENTHAL, *supra* note 5, at 157.

320. President George H. W. Bush, Inaugural Address (Jan. 20, 1989).

321. MARGALIT, *supra* note 127, at 13.

prescribed amnesia impossible as well as unethical.<sup>322</sup> And the Nuremberg war crimes trials expressly excluded “crimes against humanity” from any amnesty or statute of limitations. Ratified by the Bundestag, the ban on forgetting the Holocaust is binding on Germany.<sup>323</sup>

Given the never-ending collective guilt implied in this ban, it is small wonder that German media long portrayed the Holocaust as “a crime without perpetrators and bystanders.”<sup>324</sup> Adenauer’s Bundestag restitution speech distanced German people from the extermination camps, making nobody responsible.<sup>325</sup> The Holocaust is undeniable in German law, omnipresent in the urban scene, dutifully taught at school. But it persists only as *public* history; in family converse the Holocaust does not exist. “While public memory is dominated by images of Nazi crimes,” in one summary of German culture since 1990, “private and family memory predominantly communicate experiences of suffering, hardship and heroism.”<sup>326</sup> Grandparents’ own memories of Nazi participation are repudiated by their offspring’s invented trans-generational anti-Nazi families, as Harald Welzer has documented in recording family converse.

The children’s and grandchildren’s generation enlightened the grandfather on his own past. This enlightenment resembles an absolution; that the eyewitness is denied is part of the ‘memory culture’ of the past two decades, . . . a restoration of the widespread handed-down belief that Nazis and Germans were two different groups of people.

Welzer concludes that “what children learn subjectively about the past is utterly different from the historical knowledge experts impart; a knowledge of history can even be responsible for thinking it is no longer necessary to deal with the past.”<sup>327</sup>

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322. SULEIMAN, *supra* note 273, at 218.

323. WEINRICH, *supra* note 309, at 172–73.

324. WULF KANSTEINER, IN PURSUIT OF GERMAN MEMORY: HISTORY, TELEVISION AND POLITICS AFTER AUSCHWITZ 122 (2006).

325. BARKAN, *supra* note 13, at 13.

326. Helmut Schmitz, *Introduction: The Return of Wartime Suffering in Contemporary German Memory, Culture, Literature and Film*, in A NATION OF VICTIMS?, *supra* note 71, at 1, 4.

327. Harald Welzer, *The Collateral Damage of Enlightenment: How Grandchildren Understand the History of National Socialist Crimes and Their Grandfathers’ Past*, in VICTIMS AND PERPETRATORS: (RE)PRESENTING THE PAST IN POST-UNIFICATION CULTURE 285, 285–95 (Laurel Cohen-Pfister and Dagmar Wienroeder-Skinner eds, 2006). See generally HARALD WELZER, “OPA WAR KEIN NAZI”: NATIONALSOZIALISMUS UND HOLOCAUST IM FAMILIENGEDACHTNIS (2002) (showing how history is formed and transmitted through conversations among the generations and how Germans interpret the

The past celebrated in material form, however, is quite a different matter. Imposing and often highly durable, monuments to past events and persons are visually unavoidable. And revision or reinterpretation of the commemorative scene, littered with memorials to now discredited or forgotten champions and causes, often seems to lag light years behind updated revisions of texts.

Consider the archetypal American Civil War battlefield, Gettysburg National Military Park. It contains more than 1,400 monuments, memorials, tablets, and markers, most of them put up by veterans' groups between the 1870s and the 1920s. In line with the North-South reconciliation that the nation then sought, most dwell on the soldiers' bravery, courage, and valor, none on *why* they were fighting. "A few commemorate the preservation of the Union. Not one commemorates the ending of slavery," or even mentions slavery.<sup>328</sup> Erected as late as 1963, South Carolina's Gettysburg memorial declared that "dedicated South Carolinians stood . . . for their heritage and convictions. Abiding faith in the sacredness of states rights provided their creed here."<sup>329</sup> That inscription was not just about the past. The historical fable it intoned was again invoked, a century after the Civil War, against federal intrusion into states' rights, so as to maintain racial segregation.

Not until 1998, a generation after the Civil Rights Act of 1964, did the National Park Service even begin to address the meanings of Gettysburg embodied in Lincoln's famed Address there. Even then, it failed to recognize the causes and consequences of the Civil War long revealed by historians, much less the vision of emancipation. Gallery space in the park's new museum will feature key phrases from the Gettysburg Address.<sup>330</sup> But the park's monuments and markers will continue to tell the veterans' old story, as little more than a reminder of the endeavor and cost of warfare.<sup>331</sup> Radical revision is not a feasible option.

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roles of parents and grandparents in the Third Reich). According to Rudy Koshar, on the other hand, Germans see their parents and grandparents as unregenerate perpetrators of Nazi evil. RUDY KOSHAR, *FROM MONUMENTS TO TRACES: ARTIFACTS OF GERMAN MEMORY, 1870-1990*, at 297 (2000).

328. John Latschar, *Coming to Terms with the Civil War at Gettysburg National Military Park*, CRM: J. HERITAGE STEWARDSHIP, Summer 2007, at 6.

329. JAMES W. LOEWEN, *LIES ACROSS AMERICA: WHAT OUR HISTORIC SITES GET WRONG 371-77* (1999); see JIM WEEKS, *GETTYSBURG: MEMORY, MARKET, AND AN AMERICAN SHRINE passim* (2003).

330. Latschar, *supra* note 328, at 12, 15.

331. John Latschar, personal communication with author (May 30, 2008) (on file with the author).

### B. Obliteration

Demolition is the most common strategy for dealing with a despised legacy. As with inconvenient memories, out of sight, out of mind. Iconoclasts down the ages expunge detested reminders. Fearing idolatrous reinfection, Reformation Protestants aimed to wipe out every Catholic icon, to make “utterly extinct and destroy all shrines,” in a 1547 Tudor injunction, “so that there remain no memory of the same.”<sup>332</sup> The missionary founder of Berea College, Kentucky, Dr. John Fee, so loathed slavery that he literally knifed out every Scriptural reference to servitude. Fee’s mutilated Bible, on display in Berea’s library, attests his faith that evil can be undone by being literally unwritten.<sup>333</sup>

But Fee’s excisions also vividly remind us that the Old Testament is suffused with passages condoning and even lauding slavery, while the New Testament offers Paul’s admonition that slaves obey their masters “with fear and trembling” (Ephesians 6:5). Abolitionist arguments that the King James translation referred to servants rather than slaves, that Jesus and Paul had planted a secret seed of liberty, or that Scripture was less authoritative than conscience, were easily confuted by slave owners armed with biblical scholarship.<sup>334</sup> Berea’s Fee might have been comforted by the Southern Baptists’ unprecedented recantation, at the Georgia Dome, Atlanta, in July 1995. Apologizing for the particular inhumanity of American slavery, the Baptists expressed remorse for their forebears’ failure to grasp the inerrant biblical “family values” message of Galatians 3:28: “there is neither bond nor free, . . . for ye are all one in Christ Jesus.”<sup>335</sup>

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332. MARGARET ASTON, ENGLAND’S ICONOCLASTS: LAWS AGAINST IMAGES 256 (1988); see *supra*, at 2, 10; ANN KIBBEY, THE INTERPRETATION OF MATERIAL SHAPES IN PURITANISM 47–50 (1986).

333. I saw Fee’s Bible in the Berea library in 1988. JOHN G. FEE, THE AUTOBIOGRAPHY OF JOHN G. FEE (Chicago, Nat’l Christian Assoc. 1891).

334. J. ALBERT HARRILL, SLAVES IN THE NEW TESTAMENT: LITERARY, SOCIAL, AND MORAL DIMENSIONS 165–92 (2006). Especially absurd seemed the antislavery argument that Paul’s despised “menstealers,” 1 *Timothy* 1:10, were slave owners; those who stole slaves were slave *traders* or, even worse, Northern violators of the Fugitive Slave Act who helped slaves flee their masters. HARRILL, *supra*, at 188; Molly Oshatz, *The Problem of Moral Progress: The Slavery Debates and the Development of Liberal Protestantism in the United States*, 5 MOD. INTEL. HIST. 225, 230–38 (2008) (discussing abolitionists’ strained efforts to dismiss biblical sanctions of slavery).

335. HARRILL, *supra* note 334, at 193–94.

### C. Concealment, Erasure, Revision

Hiding rather than uprooting offensive reminders allows for possible future rehabilitation. Visual camouflage is a safe way to deal with reminders that are hard to bear, yet risky to jettison. Having laid waste the island of Rhodes and killed its leaders, Queen Artemisia of Halicarnassus “put up in the city a trophy of her victory,” including a bronze statue of herself, recounted Vitruvius. Yet when the Rhodians regained power, the hated statue stayed put: “laboring under the religious scruple which makes it a sin to remove trophies once they are dedicated, [they instead] constructed a building to surround the place, and thus . . . covered it so that nobody could see it.”<sup>336</sup>

Modern Germans, like ancient Rhodians, keep and construct physical reminders of the Nazi past and then render them unseen. Counter-monument (*Gegendenkmale*) memorial shafts sink slowly into the ground until no trace of them is visible, shut out of sight but not out of mind. Other monuments serve as “all-purpose receptacles of guilt,” their meaning changing every couple of years.<sup>337</sup> “Antiquarian masochism” is rife—saving atrocious relics as historical documents, clinging to aesthetically repellent reminders of what was morally offensive and politically repugnant.<sup>338</sup> What has become obnoxious can be consigned to public display: a Museum of Broken Relationships in Berlin exhibits mementos cast off by forsaken lovers—wedding dresses, underwear, a coffee machine, a prosthetic limb that “lasted longer than their love, as it was ‘made of better material’ ”—to purge memories of discarded partners.<sup>339</sup>

Greeks and Romans outraged by their rulers improved upon the Rhodian strategy. Those who betrayed Athenian or Roman communal welfare were executed or banished, their houses destroyed. But steles and inscriptions marked the demolished sites to ensure that they would *not* be forgotten, but remembered as traitors in perpetuity.<sup>340</sup> Such dishonor was felt worse than the oblivion of total erasure. When Roman imperial tyrants were overthrown their statues were less often expunged or stored out of sight than transformed, new heads replacing

336. VITRUVIUS, *DE ARCHITECTURA*, Bk II Ch. 8 & Bk VI (1st century BC).

337. JANE KRAMER, *THE POLITICS OF MEMORY: LOOKING FOR GERMANY IN THE NEW GERMANY* 290 (1996).

338. Perry Anderson, *The German Question*, LONDON REV. BOOKS, Jan. 7, 1999, at 14.

339. Bojan Pancevski, *Your Broken CDs and Torn Suits Are in the Museum*, TIMES (London), Oct. 30, 2007, Times2, at 2; see also Rebecca Cathcart, *Unloading the Leftovers of Past Loves*, N.Y. TIMES, Apr. 23, 2008, at A15 (getting rid of the flotsam and jetsam of relationships past is served by ExBoyfriendJewelry.com).

340. HARRIET I. FLOWER, *THE ART OF FORGETTING: DISGRACE & OBLIVION IN ROMAN POLITICAL CULTURE* 22 (2006).

old or with features gouged out. Dishonored Caligula's portraits were recut as his uncle Claudius, his successor, or turned into his great-grandfather Augustus. Reworked likenesses knowingly retained traces of the original; Nero is recognizable in the cannibalized statue of Domitian, and Domitian in that of Nerva. Unfinished at Nero's suicide in AD 68, the bronze Colossus of the sun-god Sol/Helios commissioned for the Domus Aurea on the Velia, with Nero's facial features, was erected with those of Titus instead. Moved near the Coliseum by Hadrian, altered to an image of Hercules with the features of Commodus, moved again after that emperor's downfall, the Colossus was dedicated in the early fourth century to Maxentius' deified son Romulus. But it also continued all along to be linked with Nero.<sup>341</sup>

Roman friezes, arches, and inscriptions were partly erased or overwritten, the newly infamous not consigned to oblivion but remembered by defamation.<sup>342</sup> The practice of altering inscriptions was as old as writing on stone itself, an erasure less a negation than an exaggerated form of writing.<sup>343</sup> Septimius Severus' kin were erased from the Arch of the Argentarii, but "the resulting blank passages in the reliefs speak volumes. All three obliterated individuals are tellingly present through their conspicuous absences."<sup>344</sup> Following Commodus' assassination in AD 192, images of those disgraced were mostly disfigured, their statues vandalized to tarnish their memory. Marbles, bronzes, paintings, coins were attacked as if they were living beings capable of feeling pain: eyes gouged out, noses and mouths and ears cut off to disable the image from seeing, speaking, hearing.<sup>345</sup> Such *damnatio memoriae* worked "to *dishonor* memory, not to destroy it," etching recall into stone as eternal punishment.<sup>346</sup> The prevalence of disfigured relics showed that "Roman viewers were visually sensitive not only to what was now before their eyes . . . but also to what was once there."<sup>347</sup>

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341. ERIC R. VARNER, MUTILATION AND TRANSFORMATION: *DAMNATIO MEMORIAE* AND ROMAN IMPERIAL PORTRAITURE 4, 9, 66 (2004).

342. PETER J. HOLLIDAY, THE ORIGINS OF ROMAN HISTORICAL COMMEMORATION IN THE VISUAL ARTS 203–21 (2002); Jaś Elsner, *Iconoclasm and the Preservation of Memory*, in MONUMENTS AND MEMORY, MADE AND UNMADE 209, 209–219 (Robert S. Nelson & Margaret Olin eds., 2003).

343. FLOWER, *supra* note 340, at 26, 56; CHARLES W. HEDRICK, JR., HISTORY AND SILENCE: PURGE AND REHABILITATION OF MEMORY IN LATE ANTIQUITY 246 (2000).

344. VARNER, *supra* note 341, at 198.

345. *Id.* at 3, 23–24, 154–55.

346. HEDRICK, *supra* note 343, at xii.

347. Elsner, *supra* note 342, at 216.

#### D. *Superimposition and Addition*

However outdated, many statues and plaques to past heroes and heroics can neither be removed nor hidden. Familiar monuments and markers are often too cherished to tamper with, regardless of their subjects' changed reputations. The interpretive program at Gettysburg is currently undergoing major revision. But to remove or alter its outmoded monuments would be unthinkable. What then should be done? One strategy is to redress the past by, so to speak, *redressing* its visible reminders. Another is to reshape viewers' perceptions by adding new monuments adjacent to the old ones, retaining but updating their messages.<sup>348</sup>

Emendation by overlay is the mode of revision adopted for South Africa House, that country's diplomatic headquarters in Trafalgar Square, London. Boer ideology suffuses Cecil Rhodes's friend Herbert Baker's 1935 building; homage to imperial conquest and African bondage pervades reception rooms and corridors. But post-apartheid plans to scrap this now offensive fabric were stymied by English Heritage: the building was a Grade II\* consecrated architectural treasure. Nothing could be removed. After all, "apartheid was a part of that history," agreed High Commissioner Cheryl Carolus; "We can't wish it away or deny it."<sup>349</sup> But new chapters could be added to the old history. Transparent layered portals bridge the country's successive pasts. Jan Juta's mural detailing the benefits of paternalistic Boer slavery is overlain by Sue Williamson's grid, reproducing ledger pages of Simon van der Stel's slave profit-and-loss account and details of slave punishments. Rather than erasing the past, the friezes lend it accrued meaning.<sup>350</sup>

Similar examples abound. At the Royal Museum for Central Africa near Brussels, Arsène Matton's white priest towering over a semi-naked black, once called "Belgium brings civilization to the Congo,"<sup>351</sup> is now re-described as a relic of "the colonial idea of

348. Kirk Savage, *The Politics of Memory: Black Emancipation and the Civil War Monument*, in *COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY* 127, 143 (John R. Gillis ed., 1994).

349. Mark Rowe, *Apartheid Murals Must Stay, South Africa House Is Told*, *INDEPENDENT* (London), May 28, 2000, at <http://www.independent.co.uk/news/uk/this-britain/apartheid-murals-must-stay-south-africa-house-is-told-718094.html>.

350. ANNIE E. COOMBES, *HISTORY AFTER APARTHEID: VISUAL CULTURE AND PUBLIC MEMORY IN A DEMOCRATIC SOUTH AFRICA* 291–95 (2003).

351. Alan Riding, *Belgium Confronts Its Heart of Darkness*, *N.Y. TIMES*, Sept. 21, 2002, at B9.



Africa.”<sup>352</sup> In East Berlin, a 1981 memorial to anti-Nazi martyrs erected in homage to eternal Soviet friendship was overlain in 1990 by a transparency and again in 2001 by a Plexiglas plaque, each with revisionist wording.<sup>353</sup>

Proximity to later memorials helps make old memorials anachronistic. The U.S. Army in 1863 slaughtered 300 Shoshone men, women, and children at Bear River, southern Idaho. Commemorative plaques of 1932 and 1953 “tell a story of marauding Indians getting what they deserved” for “depredations against Cache Valley’s ‘peaceful inhabitants.’”<sup>354</sup> But changing views, the extermination no longer a triumph but a disaster, got the Idaho and National Park Service plaques revised in 1990 from “Battle” to “Massacre.” Army re-enactors presented tribal Shoshones with brass buttons clipped from their uniforms “out of respect and honor to the Shoshone people and for what happened in the past.” On land overlooking the site deeded to the Shoshones in 2003, tribal descendants give their own account of the massacre. “Different monuments tell different, almost contradictory stories but . . . all of the stories stand side by side on the same site, . . . recounting the same event . . . through different lenses.”<sup>355</sup>

Rather than demolish Pretoria’s Voortrekker Monument, a famed memorial to Boer victory over Zulus, African National Congress leaders let the symbol of Afrikaner triumphalism stand “to mark the past, to learn from it and to integrate it into a new democratic South Africa.” On an adjacent hill in Isivivane (Freedom) Memorial Park, a new monument was erected “to commemorate the struggle against apartheid.”<sup>356</sup> In the United States, a 1996 monument to black tennis champion Arthur Ashe transformed Monument Avenue in Richmond, Virginia, from a bastion of white supremacy to a site of interracial healing. Today “one sees the familiar procession of Confederate heroes

352. Royal Museum for Central Africa, Permanent Exhibition, <http://www.africamuseum.be/museum/permanent/museum/permanent/permrotonde> (last visited Feb. 24, 2009).

353. JENNIFER A. JORDAN, *STRUCTURES OF MEMORY: UNDERSTANDING URBAN CHANGE IN BERLIN AND BEYOND* 73–74 (2006).

354. John Barnes, *The Struggle to Control the Past: Commemoration, Memory, and the Bear River Massacre of 1863*, *PUB. HISTORIAN*, Feb. 2008, at 81, 83–84. The 70-year delay in expressing gratitude to the soldiers reflected the need to forget intense 1860s hostility between local Mormon settlers, a “community of traitors, murderers, fanatics, and whores” (according to Col. Patrick Connor, 1862), and the army, which “manifested the most filthy and disgusting code of Civilization” (Peter Maugham to Brigham Young). *Id.* at 88.

355. *Id.* at 83, 100, 102.

356. Louis Bickford, *Monuments and Memory*, *INT’L HERALD TRIB.*, Nov. 20, 2007, at 8.

culminate, unexpectedly, in a monument to exactly what the Confederacy feared . . . : an educated, articulate, powerful African American citizenry.”<sup>357</sup> The statue’s inscription exhorts viewers to “lay aside every weight, and the sin which so easily ensnares us, and . . . run with endurance the race that is set before us” (Hebrews 12:1).

Memorials to Thomas Ruffin might host like treatment. As ongoing scholarship and altered ethos shine new light on his behavior and opinions, changing perceptions could be merged with those of earlier celebrants. Informative notes and salient documentary excerpts next to his statues, portraits, and historic sites would let viewers trace Ruffin’s changing repute from his own time to the present.

### CONCLUSION

Undoubtedly “it is among the first duties of a historian to point out the faults of the eminent men of former generations,” held Macaulay. He thought “none . . . so necessary to expose, as the errors of persons who have a just title to the gratitude and admiration of posterity. In politics, as in religion, there are devotees who show their reverence for a departed saint by converting his tomb into a sanctuary for crime.” Consequently, “[v]ile abuses cluster thick . . . round every venerable name. . . . But the proper course is to abate the nuisance without defacing the shrine . . . of the illustrious dead.”<sup>358</sup> Hobbes and Renan to the contrary, oblivion is seldom the best option, besides being patently ineffective; from ancient Athens on, efforts to ban memory have only reinforced it. Obliteration precludes understanding, let alone coming to terms with a legacy.<sup>359</sup> One of historians’ prime duties is to be “professional remembrancers of what their fellow citizens wish to forget.”<sup>360</sup> It is wiser to rectify than to erase or hide a traumatic or troubling past, not least because, if history tells us nothing else, it is that every generation will surely need to amend that past again.

Yet in adding our fleeting voices to those of the past, we should be wary not only of condemning but of eternalizing ancestral evils. “In wishing to perpetuate the memory of pain,” as Chateaubriand

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357. KIRK SAVAGE, *STANDING SOLDIERS, KNEELING SLAVES: RACE, WAR, AND MONUMENT IN NINETEENTH-CENTURY AMERICA* 211–12 (1997).

358. MACAULAY, *supra* note 136, at 71.

359. Chloe S. Burke & Christopher J. Castaneda, *The Public and Private History of Eugenics: An Introduction*, *PUB. HISTORIAN*, Summer 2007, at 15 (discussing the removal of visible markers of eugenicist Charles M. Goethe from the campus of California State University at Sacramento).

360. ERIC HOBSBAWM, *AGE OF EXTREMES: THE SHORT TWENTIETH CENTURY, 1914–1991*, at 103 (1994).

warned of Bourbon statuary highlighting French Revolutionary horrors, "one often perpetuates its cause."<sup>361</sup> In a past too prominently present, lasting reminders of ancient injuries preclude consolation and provoke interminable discord.

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361. Wagner, *supra* note 314, at 306 (quoting François-René de Chateaubriand).