

REPARATIONS THEORY AND PRACTICE THEN AND NOW: MAU MAU REDRESS LITIGATION AND THE BRITISH HIGH COURT

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I. INTRODUCTION

Claims to reparations for historic injustice mark the modern global landscape. Starting in the late 1980s, with the United States' redress for 120,000 wrongly incarcerated American citizens and Japanese ancestry during World War II, reparations advocates advanced claims on behalf of African Americans, Native Americans, Native Hawaiians and Holocaust survivors in the United States; in support of colonized (and/or enslaved) people in Canada, Australia, New Zealand, Kenya, Britain and the Caribbean islands; in response to formerly repressive regimes in South Africa, Peru, Colombia, Chile, Argentina, the Philippines, Korea, Brazil, Nepal and Cambodia; in reaction to internal genocide in Sierra Leone, the Congo and Rwanda; in challenge to specific wartime atrocities related to Japan and Kosovo; and more. Those claims awakened public consciousness about the horrors of historic injustice and the need for present-day redress. They also generated controversy and legal and political backlash. Now, often integrated into reconciliation or social healing initiatives, claims to reparations are both significant and problematic.¹

Professor Mari Matsuda's seminal article *Looking to the Bottom*² transformed legal scholarship on justice. By claiming the subordination experiences of those at the bottom of societal hierarchies as legitimate jurisprudential starting points, she refashioned the way scholars think and write about justice.³ And in doing so, she and others laid the foundation for the emergence of Critical Race Theory and for

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¹ See ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 323-33 (2d ed. 2013).

² Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) [hereinafter Matsuda, *Looking to the Bottom*].

³ See, e.g., Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988).

grappling with the ways that race shaped and continues to shape many dimensions of American life and law.⁴ For this reason, *Looking to the Bottom* has been rightly regarded as path-forging.

What has received less attention is the way that Matsuda, in the same article, triggered an explosion of legal scholarship on reparations for historic injustice.⁵ By theorizing about the limits of traditional legal analysis—reparations as individual legal claims against identified perpetrators—and about the contrasting support for reparations provided by critical legal analysis—reparations as group-based claims to repair group-based damage⁶—she opened a new way of assessing and justifying reparations claims. She also identified thorny problems to strategically avoid in conceptualizing and pursuing reparations.⁷

This work and the evolving scholarship that followed over the next several years contributed to a burgeoning reparations practice, with on-the-ground claims in courts and legislatures throughout the country (and later throughout the world).⁸ Those reparations claims in turn faced potent conservative backlash—some of it thoughtful, much of it vituperative.⁹ This political backlash and skepticism by mainstream judges necessitated a retooling of reparations theory and practice and renewed attention to many of Matsuda's foundational insights.¹⁰ Although always controversial—whether denominated reparations, redress, or reconciliation—claims for reparations to heal the persistent wounds of historic injustice mark the political and legal landscape in the United States and in countries throughout the world transitioning to democracy.¹¹

In this setting we cast bright and, in some respects, new light on Matsuda's foundational theories on reparations. Section II summarizes her critique of limited traditional legal views and then describes her expansive, yet grounded approach, to reparations as a "critical legalism" and her illumination of theory through the then-pending Japanese American internment redress and Native Hawaiian redress initiatives.¹² As part of this description, we pay close attention to her anticipation of obstacles to reparations, many of which later played out on judicial and legislative battlefields. Section III depicts four evolving past-to-present generations of reparations theory and practice, with Matsuda's *Looking to the Bottom* article as the first generation's starting point.¹³ Finally, Section IV identifies the present-day relevance of Matsuda's original insights and their impact

⁴ See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995).

⁵ See *infra* Section II.

⁶ For a full discussion see *infra* Section II.

⁷ Matsuda, *Looking to the Bottom*, *supra* note 2, at 374-88.

⁸ See *infra* Section III.

⁹ See Matsuda, *Looking to the Bottom*, *supra* note 1, at 374-88.

¹⁰ *Id.*

¹¹ *Id.*

¹² See *infra* Section II.

¹³ See *infra* Section III.

on reparations theory and practice “at the cross-roads,”¹⁴ particularly as fourth generation reparations theory evolves with a multidisciplinary emphasis on social healing through justice.¹⁵ We do this through a concise look at startling 2011 and 2012 reparations rulings by the High Court of England and Wales (“British High Court”). Those rulings recognize the viability of the Mau Mau people’s group-based reparations claim against the British government for atrocities in Kenya during colonial rule and, in important respects, approach reparations as a “critical legalism.”¹⁶

II. LOOKING TO THE BOTTOM: CRITICAL LEGALISM AND A THEORY OF REPARATIONS

For Mari Matsuda, reparations is “a legal concept generated from the bottom.”¹⁷ It is “the formal acknowledgment of historical wrong, the recognition of continuing injury, and the commitment to redress, looking always to victims for guidance.”¹⁸ This early conception of reparations as group-based claims for continuing group-based damage—informed by those on the bottom—unlocked a new way of assessing and justifying reparations claims.¹⁹

Then-emerging Japanese American and Native Hawaiian reparations claims provided the factual basis for her theory of reparations.²⁰ Japanese Americans in the 1980s launched a redress movement for their internment during World War II, and Native Hawaiians sought reparations for the overthrow of the Hawaiian government and loss of land.²¹ For Matsuda, Japanese American and Native Hawaiian group consciousness and experience, along with critical theory insights, informed an expanded reparations theory generated by looking to the bottom.

¹⁴ See Eric K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 31 (2007) [hereinafter Yamamoto et al., *Crossroads*].

¹⁵ See *infra* Section IV.

¹⁶ See *id.*

¹⁷ Matsuda, *Looking to the Bottom*, *supra* note 2, at 362. Matsuda describes “the bottom” as “those who have seen and felt the falsity of the liberal promise” and who occupy the lower rungs of the social and economic ladder. *Id.* at 324.

¹⁸ *Id.* at 397. See Watson Branch, Comment, *Reparations for Slavery: A Dream Deferred*, 3 SAN DIEGO INT’L L.J. 177, 196 (2002); see also Robert J. Taylor, *The Value of Critical Legal Studies in the Legal Education System*, 6 THE CRIT: A CRIT. LEGAL STUD. J. 24, 37-38 (2012).

¹⁹ ALFRED L. BROPHY, REPARATIONS PRO & CON 278 (2006) [hereinafter BROPHY, PRO & CON] (referring to Mari Matsuda’s *Looking to the Bottom* as “the fountainhead of academic writing on reparations”). See also Rebecca Sharpless, *More Than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347, 385 (2012) (characterizing Mari Matsuda’s *Looking to the Bottom* as “highly influential”); Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 279 n. 1 (2006) [hereinafter Wenger, *Causation*] (referring to Mari Matsuda’s *Looking to the Bottom* as one of the “major reparations pieces in recent years”).

²⁰ Matsuda, *Looking to the Bottom*, *supra* note 2, at 373.

²¹ Restitution for World War II Internment of Japanese-Americans and Aleuts (Civil Liberties Act of 1988), 50 U.S.C. app. § 1989 (1988) (Japanese Americans received redress in the form of an apology, monetary reparations and a public education fund). Native Hawaiians received an apology, but redress has stalled. See Ashley Obrey, *Broken Promise? A Brief Update on the U.S. Role in Native Hawaiian Reconciliation Since the 1993 Apology*, HE’E (2007), <http://www2.hawaii.edu/~nhlawctr/article3-6.htm>.

A. Limits of Traditional Legal Analysis

To open the “doctrinal door” for reparations claims, Matsuda initially described the liberal legal conception of reparations²²—a narrow concept requiring proof of wrongful action by an individual perpetrator that causes specific harm to an individual victim. More specifically, she described three standard legal doctrinal objections to reparations: (1) the “difficult identification of perpetrator and victim groups”; (2) the “lack of sufficient connection between past wrong and present claim”; and (3) the “difficulty of calculation of damages”²³—and offered critical responses to each.

First, for Matsuda, reparations claims make new connections between victims and perpetrators, thus challenging the law’s affinity for specific identification of wrongdoers and victims (concepts of privity, standing, and nexus). In her transformational view of reparations, described more fully below, victim group members are connected by the “continuing group damage engendered by past wrongs.”²⁴ For example, Native Hawaiians are persistently at the bottom of every socio-economic demographic indicator, and Japanese Americans, though successful overall by standard indicators, faced pervasive racism and continue to encounter a glass ceiling.²⁵ While not all group members are similarly situated (some are rich or poor, assimilated or non-assimilated), “the experience of discrimination against the group is real,” and thus, “the connections inevitably exist.”²⁶

Perpetrator group members are also linked because they “continue to benefit from the wrongs of the past and the presumptions of inferiority imposed upon victims.”²⁷ While dominant perpetrator group members may deny personal involvement or racism, they cannot escape their “privileged status.”²⁸ For example,

²² Matsuda, *Looking to the Bottom*, *supra* note 2, at 373-88. See Maxine Burkett, *Reconciliation and Nonrepetition: A New Paradigm for African-American Reparations*, 86 OR. L. REV. 99, 117 n.59 (2007) (citing Matsuda to note that as currently articulated, African-American reparations could “buy[] off protest, assuage[] white guilt, and throw[] responsibility for continued racism upon the victims”); see also Dartanyon Burrow, *The Debate Over the Current Reparations Movement*, 2 THE CRIT. A CRITICAL STUD. J. 99, 118 n. 123 (2009) (writing that in *Looking to the Bottom*, Mari Matsuda suggested “that the traditional doctrinal objections to reparations, such as difficulty of calculating damages, causation, time-bar, and sufficiency of identifying parties, can be overcome by a liberal and expanded application of legal theories, which is furthered by examining and acknowledging past and present inequity”).

²³ Matsuda, *Looking to the Bottom*, *supra* note 2, at 373-74. See Branch, *supra* note 18, at 200 (recounting Matsuda’s standard doctrinal objections to reparations); see also Mary L. Clark, *Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial*, 94 KY. L.J. 487, 530 n. 156 (2005-06) (citing Matsuda’s list of standard doctrinal objections as part of an “articulation of the most significant objections to reparations”); Wenger, *Causation*, *supra* note 19, at 292 n.54.

²⁴ Matsuda, *Looking to the Bottom*, *supra* note 2, at 377.

²⁵ *Id.* at 377-79.

²⁶ *Id.* at 376.

²⁷ *Id.* at 379. See Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 503-04 (2003) [hereinafter Brophy, *Problems*] (addressing the problem of causation as it relates to present discrimination and past wrongs).

²⁸ Matsuda, *Looking to the Bottom*, *supra* note 2, at 379. See Verna L. Williams, *Reading, Writing, and Reparations: Systemic Reform of Public Schools as a Matter of Justice*, 11 MICH. J. RACE & L. 419, 429 (2006) (highlighting Matsuda’s observations about group liability and the connections between victims and perpetrators); see also James R. Hackney, Jr., *Ideological Conflict, African American Reparations, Tort Causation*

nearly all non-Native Hawaiian residents of Hawai'i benefit from the loss of Native Hawaiian land and sovereignty through their use of former native lands and access to services derived from revenue from those lands. Thus, "[u]nder [Matsuda's] reparations doctrine, the working class whites whose ancestors never harbored any prejudice or ill-will toward the victim group are taxed equally with the perpetrators' direct descendants for the sins of the past."²⁹ This is sensible, Matsuda argues, because the privilege gained from the persistent inferiority of those on the bottom is a collective benefit to the dominant perpetrator group members. From this view, "victims and perpetrators belong to groups that, as a matter of history, are logically treated in the collective sense of reparations rather than the individual sense of the typical legal claim."³⁰

Second, Matsuda also challenged the law's penchant for a close linkage between the alleged act and the present claim (e.g., statute of limitations, proximate cause, and laches).³¹ She contended that reparations claims are always timely because they are based on continuing economic harm and discrimination.³² Traditional exceptions to these doctrines, such as disability and fraud, also apply. For example, the victim groups' injuries—the "deprivation of land, resources, educational opportunity, person-hood, and political recognition—are disabilities that have precluded successful presentation of the claim at an earlier time."³³ Likewise, fraud and misrepresentation have delayed the presentation of claims.³⁴

Reparations claims justify an expanded proximate causal connection. While the vertical gap of time in reparations claims is problematic, "[e]ven mainstream jurists, however, recognize that the proximate cause question is essentially political."³⁵ In cases of intentional torts, for example, judges often reach "across wide[] gulfs of time and space to connect act and injury."³⁶ For Matsuda, "[a]n act of racism against a powerless victim is a classic case justifying imposition of a proximate causal connection."³⁷ Indeed, a reasonable person would effortlessly "predict the harm that would befall Hawaiians from the loss of their nation and land, or the harm that would befall Japanese-Americans taken abruptly from their

and the Case for Social Welfare Transformation, 84 B.U. L. REV. 1193, 1198-99 (2004).

²⁹ Matsuda, *Looking to the Bottom*, *supra* note 2, at 375.

³⁰ *Id.* at 380. See Ryan Fortson, *Correcting the Harms of Slavery: Collective Liability, The Limited Prospects of Success for a Class Action Suit for Slavery Reparations, and the Reconceptualization of White Racial Identity*, 6 AFR.-AM. L. & POL'Y REP. 71, 121-22 (2004)

³¹ Matsuda, *Looking to the Bottom*, *supra* note 2 at 374-88. See Brophy, *Problems*, *supra* note 27, at 505; Kaimipono David Wenger, *From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution*, 25 J. C.R. & ECON. DEV. 697, 703 (2011) [hereinafter Wenger, *Radical to Practical*]; Kaimipono David Wenger, *Too Big to Remedy? Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOY. L.A. L. REV. 177, 197 (2010).

³² See Burkett, *supra* note 22, at 123 n.80 (noting Mari Matsuda's point that these continuing harms keep the "wounds [] fresh," making "the action timely"); see also Katrina Miriam Wyman, *Is There Moral Justification for Redressing Historical Injustices?*, 61 VAND. L. REV. 127, 195 (2008).

³³ Matsuda, *Looking to the Bottom*, *supra* note 2, at 382.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 382-83.

³⁷ *Id.* at 383.

homes to the desert relocation centers.”³⁸

Thus, for Matsuda, an expanded liberal legal conception of reparations serves classical democratic values of fairness, participation, and personhood. Viewed in this way, reparations “begins to address the substantive barriers to liberty” by “rais[ing] the standard of living of victim groups, promoting their survival and participation.”³⁹ But the rhetoric of this expanded liberal legal view can “bite back.”⁴⁰ Critical legal scholars and lawyers caution against “neutral principles and liberal-legalisms” used to privilege those on top.⁴¹ For Matsuda, reparations is not neutral—it is “tilted toward the bottom.”⁴² As such, she retooled reparations as a “critical legalism,” offering a pathbreaking way to assess and justify reparations claims.⁴³

B. Reparations as Critical Legalism

Matsuda described a theory of reparations that considers “both a victim’s consciousness and the insights of critical legal theorists.”⁴⁴ Critical inquiry “reveals the flexibility of legal doctrine and invites new consciousness of what law can be.”⁴⁵ Looking to victim groups’ experiences “suggests versions of liberalism, legal consciousness and legal doctrine that possess critical power.”⁴⁶ She concluded that reparations—“the idea of acknowledgment of and payment for past injustice to victims of racism”—is a critical legalism.⁴⁷

For Matsuda, a critical legalism is “a legal concept that has transformative power and that avoids the traps of individualism, neutrality and indeterminacy that plague many mainstream concepts of rights or legal principles.”⁴⁸ Reparations as a critical legalism “avoids standard liberal pitfalls” for three reasons. First, unlike concepts of free speech or due process that are rights extending to all members of the polity, reparations “is a concept directed at remedying wrongs committed against the powerless.”⁴⁹ Second, reparations avoids the ideological traps of liberal legal or “traditional rights thinking” just described because it supports group rather than individual rights. Third, “reparations is at its heart

³⁸ *Id.*

³⁹ *Id.* at 391.

⁴⁰ *Id.* at 392.

⁴¹ *Id.* at 393.

⁴² *Id.*

⁴³ *Id.* at 362; see Williams, *supra* note 28, at 429; see also Irma Jacqueline Ozer, *Reparations for African Americans*, 41 HOW. L.J. 479, 492-93 (1998) (referencing Mari Matsuda and reparations as a critical legalism); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1617-18 (2000) (responding “to Mari Matsuda’s work on critical legal studies and reparations” with an “assessment of the discourse of treaty rights”).

⁴⁴ Matsuda, *Looking to the Bottom*, *supra* note 2, at 397. See Wenger, *Radical to Practical*, *supra* note 31, at 703 n. 49.

⁴⁵ Matsuda, *Looking to the Bottom*, *supra* note 2, at 388.

⁴⁶ *Id.* at 398.

⁴⁷ *Id.*

⁴⁸ *Id.* at 393-94. See also *id.* at 328-30 (for discussions of neutrality and indeterminacy).

⁴⁹ *Id.*

transformative. It recognizes the crimes of the powerful against the powerless. It condemns exploitation and adopts a vision of a more just world.”⁵⁰ It “has the aspirational, affirming, idealistic attraction of rights rhetoric, without the weak backbone.”⁵¹

She cautioned, however, that this “progressive tilt” of reparations can “mask lurking dangers.”⁵² For example, reparations could “promote[] the idea that everyone has a price, that every wound is salved by cash, that success merely means more money.”⁵³ For Matsuda, commodification of victimhood is a serious concern; yet the shortage of remedial resources in racial communities militates against the risk of commodification. The monetary award is symbolic: it cannot compensate for losses of sovereignty or freedom. Nevertheless, “[r]esistance to commodification is important. If reparations are viewed as an equivalent exchange for past wrongs, continuing claims are terminated.”⁵⁴

Relatedly, some victim group members reject reparations “because of the political reality that any reparations award will come only when those in power decide it is appropriate.”⁵⁵ From this view, reparations portray the United States as “benign and contrite”—a “lawgiver and patron.”⁵⁶ As such, “[r]eparations buys off protest, assuages white guilt, and throws responsibility for continued racism upon the victims.”⁵⁷ To avoid this, Matsuda contends, “victims must define the remedies, and the obligation of reparations must continue until all vestiges of past injustice are dead and buried.”⁵⁸ In this sense, reparations is forward-looking and “is not ... equivalent to a standard legal judgment. It is the formal acknowledgment of historical wrong, the recognition of continuing injury, and the commitment to [present and future] redress, looking always to victims for guidance.”⁵⁹

Finally, Matsuda warned of the effect that reparations awarded to one group may have on other uncompensated groups. She contended: “[r]eparations will result in a new form of disadvantage only if they are made outside of a broader consciousness that always looks to the needs of the bottom.”⁶⁰ Each reparations award should instead be viewed as a collective “step forward in the long journey toward substantive equality.”⁶¹ For example, Native Hawaiians should view awards already made to Native Americans “not as a chunk taken out of a limited fund,

⁵⁰ *Id.* at 394.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 394-95.

⁵⁴ *Id.* at 395. See Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659, 678 (2003) (quoting Matsuda, *Looking to the Bottom*, *supra* note 2, at 395-96).

⁵⁵ Matsuda, *Looking to the Bottom*, *supra* note 2, at 396.

⁵⁶ *Id.* at 396-97. See Burkett, *supra* note 22, at 155 n. 201.

⁵⁷ Matsuda, *Looking to the Bottom*, *supra* note 2, at 397.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

leaving less for Hawaiians, but as a symbol of the possibility of reparations for Hawaiians as well.”⁶²

Not only was Matsuda’s theorizing about reparations integral to the development of Critical Race Theory,⁶³ but it also laid the foundation for evolving generations of contemporary reparations theory and practice, discussed in the next section.

III. FOUR GENERATIONS OF EVOLVING REPARATIONS THEORY AND PRACTICE

Near the turn of the millennium, Alfred L. Brophy observed that modern reparations theory could be broadly characterized by several overlapping modern generations of legal scholarship. The “generations” are not sequential time periods or distinct categories of scholarship; rather they depict intersecting strategies and movements that have paved the way for reparations claims.

A. First Generation: Possibility for Reparations

Beginning in the mid-1980s, in terms of modern reparations activity, the first generation theorized that reparations for slavery and other racial crimes were possible.⁶⁴ To open space for envisioning reparations, the scholars “critic[ized] the existing [legal] system . . . and its seeming inability to provide a language for thinking about reparations.”⁶⁵

As described in Section II, Matsuda initiated this discourse in 1987, eschewing the traditional liberal legal view of reparations as an ordinary, if problematic, legal remedy for redressing individual claims. She proposed group-based remedies for historic injustices. She argued for reparations that repair the wounds of injustice persisting over years because of “continuing stigma and economic harm.”⁶⁶ For that reason she contemplated forward-looking remedies aimed at repairing the material and psychological damage to those subordinated and to society itself to

⁶² *Id.*

⁶³ See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *SUPRA* NOTE 3; CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and A Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

⁶⁴ See BROPHY, *PRO & CON*, *supra* note 19; Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81 (2004) [hereinafter Brophy, *Reparations Talk*]; see generally RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 205 (2000) (describing the foundation for contemporary African American reparations claims).

⁶⁵ Brophy, *Reparations Talk*, *supra* note 64, at 82 (describing the three overlapping generations Brophy identified and adding a fourth, this essay draws substantially from updates and refines material from Yamamoto et al., *Crossroads*, *supra* note 14).

⁶⁶ Matsuda, *Looking to the Bottom*, *supra* note 2, at 381.

“mov[e] us away from repression toward community.”⁶⁷

In Matsuda’s view, then-pending reparations claims of Native Hawaiians for loss of sovereignty and Japanese Americans for internment during World War II were better understood not as individual claims for compensation, but as compelling demands to redress the full range of harms from group-based historic injustice.⁶⁸ That theorizing laid the foundation for other scholars, particularly Professors Vincene Verdun and Rhonda Magee, who extended Matsuda’s general vision of redress and called for reparations for African American slavery and Jim Crow segregation.⁶⁹

B. Second Generation: Legislative Reparations

With the then-new Civil Liberties Act of 1988⁷⁰ and Japanese American internment redress as a backdrop, a second generation of reparations theory emerged with an emphasis on the legislative arena. According to Brophy, the second generation “contemplated what reparations might provide and how they might lead to . . . justice” in the practical world of politics and social movements.⁷¹ Brophy cited Robert Wesley’s and Eric Yamamoto’s writings strategically linking narrowly-framed Japanese American redress to far broader African American reparations claims.⁷² Brophy’s own scholarship, *Reconstructing the Dreamland*,⁷³ drew in part upon the dynamics of internment redress – investigative commission, litigation and legislative action⁷⁴ – in calling for reparations for African American survivors of the 1921 “Tulsa Race Riots” that killed many people and destroyed a thriving African American town.⁷⁵

Similarly, other American⁷⁶ scholars and advocates in the 1990s sought to link

⁶⁷ *Id.* at 397.

⁶⁸ See generally *id.*

⁶⁹ Rhonda V. Magee, *The Master’s Tools, From the Bottom Up: Responses To African-American Reparations Theory in Mainstream and Outsider Remedies*, 79 VA. L. REV. 863 (1993) (extending Matsuda’s group-based theory to African American reparations claims); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993) (making the first contemporary case for legal claims to African American reparations).

⁷⁰ Restitution for the World War II Internment of Japanese-Americans and Aleuts (Civil Liberties Act of 1988), 50 U.S.C. app. § 1989 (2000).

⁷¹ Brophy, *Reparations Talk*, *supra* note 64, at 82.

⁷² See generally Robert Wesley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. THIRD WORLD L.J. 429 (1998); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998) [hereinafter Yamamoto, *Racial Reparations*] (describing how internment redress fit the specific perpetrator and specific surviving victim legal paradigm).

⁷³ ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921* 109 (2002) (hereinafter BROPHY, *RECONSTRUCTING*).

⁷⁴ Eric K. Yamamoto & Ashley Kaiyo Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 20 (2009) [hereinafter Yamamoto & Obrey, *Reframing Redress*] (describing multiple facets of internment redress).

⁷⁵ See Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors’ Story*, 24 B.C. THIRD WORLD L.J. 13, 17 (2004).

⁷⁶ We use the term “American” to refer to the United States and its people, although we acknowledge that this term can refer to anyone from the Americas and can foster the misconception that the United States is

litigation and political organizing to achieve comprehensive legislative reparations for other historically oppressed groups — in particular, African Americans, Native Americans, Native Hawaiians, and Puerto Ricans.⁷⁷ Those legislative reparations claims encompassed apologies, individual payments, return of assets or land, memorials, and public education.⁷⁸ And reparations advocacy spread internationally,⁷⁹ highlighted by the urgent and final reparations programs recommended by South Africa's Truth and Reconciliation Commission to redress decades of white apartheid rule.⁸⁰ Slave descendants in African and Caribbean countries also sought redress for the long-standing damage of the European transatlantic slave trade.⁸¹ The 2001 United Nations World Conference on Racism in Durban, South Africa, ignited a Pan-African reparations movement.⁸² With the support of activists from over 168 countries, the conference issued a call for reparations to repair the persisting harms of centuries of government-sanctioned racism.⁸³ With 3,000 American activists and supporters in attendance, the U.S. movement merged with the Pan-African movement into a broad call for slavery redress.⁸⁴

Back in the United States, however, as anticipated by Matsuda, the African American reparations movement calling for monetary compensation faced increasingly strident opposition.⁸⁵ In addition to the opposition to legislative

the only "America." See Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices,"* 40 HARV. C.R.-C.L. L. REV. 71, 75 n.16 (2005) (avoiding the term "American" unmodified because it overlooks the rest of the Americas, and using "North American" as an alternative although it conflates the U.S. and Canada); Berta E. Hernández-Truyol, *Sex and Globalization,* 11 HARV. LATINO L. REV. 173, 174 n. 8 (2008) (using the term "Estado Unidenses" (persons from the United States) rather than "American").

⁷⁷ See generally Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts,* 13 BERKELEY LA RAZA L.J. 387 (2002); Ediberto Román, *Reparations and the Colonial Dilemma: The Insurmountable and Yet Transformative Benefits,* 13 LA RAZA L. J. 369 (2002); Eric K. Yamamoto, Susan K. Serrano & Michelle Natividad Rodriguez, *American Racial Justice on Trial - Again: African American Reparations, Human Rights, and the War on Terror,* 101 MICH. L. REV. 1269 (2003) (discussing African American and Native Hawaiian claims) [hereinafter Yamamoto et al., *Racial Justice on Trial*].

⁷⁸ YAMAMOTO ET AL., *supra* note 1, at 333.

⁷⁹ See generally THE HANDBOOK OF REPARATIONS (Pablo de Greiff ed., 2006) (describing reparations initiatives throughout the world, including the Japanese American internment redress in the United States); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 93 (1998).

⁸⁰ See generally DESMOND M. TUTU, NO FUTURE WITHOUT FORGIVENESS (1999); Eric K. Yamamoto & Susan K. Serrano, *Healing Racial Wounds? The Final Report of South Africa's Truth and Reconciliation Commission,* in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 492 (Roy L. Brooks ed., 1999).

⁸¹ See Jonathan Petre, *Blair's Deep Sorrow for Slavery Is Not Enough,* DAILY TELEGRAPH (Nov. 28, 2006, 12:01 AM), <http://www.telegraph.co.uk/news/main.jhtml?xml=/news2006/11/28/nslave28.xml> (describing the Pan African Reparation Coalition Victory).

⁸² See Yamamoto et al., *Racial Justice on Trial,* *supra* note 77, at 1311-14 (describing World Conference proceedings and call for reparations).

⁸³ *Id.*

⁸⁴ Naomi Klein, *Minority Death Match: Jews, Blacks, and the "Post-Racial" Presidency,* HARPERS MAG., Sept. 2009, at 53, 57-60.

⁸⁵ See also Brophy, *Reparations Talk* *supra* note 64, at 135-36; *infra* notes 95 and 96 and accompanying text. See, e.g., BROPHY, RECONSTRUCTING, *supra* note 73, at 117 (noting opposition arguments, including payments by those not actively responsible, benefits by those not harmed and increased societal

reparations, 9/11 dramatically altered America's justice priorities. The 2001 attacks shifted U.S. political consciousness to the "war on terror." Repositioning America as the victim of hostile aggression, the serious advance on "reparations was blasted off the political map."⁸⁶ Most major political initiatives withered.

C. Third Generation: Litigation

Scholars and advocates shifted from the political to the legal, from legislatures to courts, remaking reparations theory and practice into a third generation marked by demands for reparations as legal claims in the courts. Randall Robinson's controversial book, *The Debt*, urged the United States to pay reparations as "restitution to blacks for the damage done."⁸⁷ His book encouraged African Americans to seek court-mandated remedies. Scholars and litigators worked to craft reparations within a formal narrow legal framework as legal claims largely for compensation.⁸⁸ While reciting a poignant history of exploitation and suffering, proponents sought recovery according to traditional tort and contract legal doctrines.⁸⁹ But, as Matsuda and others earlier predicted, courts dismissed these traditionally framed lawsuits on ordinary procedural grounds, such as lack of individual standing and statutes of limitations.⁹⁰

The third generation's reparations suits also illuminated the "underside of reparations process"⁹¹ – three socio-legal risks that Matsuda and other second generation scholars predicted would likely be integral to a reparations claiming process.

Those scholars characterized the first risk as "the distorted legal framing of reparations claims."⁹² As revealed by the dismissal of the *Farmer-Paellmann* class action suit,⁹³ if reparations lawsuits are narrowly framed as traditional individual

divisiveness).

⁸⁶ Klein, *supra* note 84, at 53, 60.

⁸⁷ ROBINSON, *supra* note 64, at 9.

⁸⁸ See, e.g., *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 760 (7th Cir. 2006) (*Farmer-Paellman* class action).

⁸⁹ See generally Third Amended Complaint for Violation of Consumers Legal Remedies Act, Cal. Civil Code Section 1750 et seq. & Unlawful Competition Law, Cal. Bus. & Professions Code Section 17200 et seq., *Farmer-Paellman v. Brown & Williamson Tobacco Corp.*, 552 U.S. 941 (2007) (denying writ of certiorari) (No. 03 Civ. 2644), 2007 WL 5272849 (*Farmer-Paellman* class action).

⁹⁰ Brophy, *supra* note 64, at 103 (noting two specific barriers rendered problematic the reparations-as-legal compensation approach. First, a traditional tort and contract law requires harm to individual plaintiffs caused by identifiable defendants. This presents a sizable challenge for African American reparations claimants because attributing wrongdoing to "particular individuals, businesses, or entities is difficult." Second, legal claimants must overcome traditional threshold procedural barriers, including standing and statutes of limitations. These barriers enabled judges to dismiss nearly all African American reparations claims). See *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 760 (7th Cir. 2006); Katrina Miriam Wyman, *supra* note 30, at 158-59 (2008) (questioning whether monetary compensation can "restore" victims of historical injustice when injuries are incommensurable)

⁹¹ See Yamamoto, *Racial Reparations*, *supra* note 72, at 487-501.

⁹² *Id.* at 487.

⁹³ *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754, 754 (7th Cir. 2006) (dismissing class action against slavery-industry companies for plaintiffs' lack of standing and on statute of limitations grounds).

legal claims, judges are likely to reject reparations suits at the procedural threshold, generating a distorted public perception that reparations legal claims lack substantive merit.

Scholars characterized the second emergent risk as the “dilemma of reparations.”⁹⁴ By “inflaming old wounds and triggering regressive reactions,” reparations claims might engender backlash and entrench victim status.⁹⁵

The third emergent risk related to Matsuda’s concern about the possible commodification of group-based injustice – the “ideology of reparations.”⁹⁶ Because reparations claims often separate the “haves” from the “have nots,” the reparations claims process itself might exacerbate race and class tensions by characterizing some groups as more “worthy” of redress than others.⁹⁷

Indeed, legal claims for compensation triggered harsh opposition from segments of the media and the mainstream public as well as legal scholars.⁹⁸ Many objected to paying for wrongs they had not committed and opposed providing blanket monetary compensation for all African Americans – including those from non-slave countries and those who have achieved great wealth, like Oprah Winfrey.⁹⁹ Others asserted that the 1960s and 1970s Great Society programs had more than compensated for past injustices and that reparations litigation enshrined “victimhood.”¹⁰⁰

D. Fourth Generation: Reconciliation

In light of the limitations of the third generation litigation strategy, reparations proponents revitalized and retooled the repair paradigm of the first and second generations, but this time incorporated social and political initiatives aimed mainly at broad forms of reconciliation rather than litigation for monetary

⁹⁴ Yamamoto, *Racial Reparations*, *supra* note 72, at 494-97.

⁹⁵ *Id.* at 494.

⁹⁶ *Id.* at 497-501.

⁹⁷ *Id.* at 516. Scholars maintained that the “underside” called not for abandonment of reparations, but for “careful strategic framing of debate and action” about reparations to minimize potential harms. Eric K. Yamamoto, *What’s Next? Japanese American Redress and African American Reparations*, in *REDDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES: ON REPARATIONS FOR SLAVERY, JIM CROW, AND THEIR LEGACIES* 411, 415 (Michael T. Martin & Marilyn Yaquinto eds., 2007); see also Matsuda, *Looking to the Bottom*, *supra* note 2, at 392-97.

⁹⁸ For instance, Professors Eric A. Posner and Adrian Vermeule proffered a restrictive method for evaluating African American reparations claims. Taxpayers, they argued, “cannot be blamed for slavery or be said, in any normal sense, to have benefitted from slavery” nor should proponents “assign blame” to the U.S. government because it is the “institution that destroyed slavery at great cost.” Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 *COLUM. L. REV.* 689, 738 (2003). See also Alfred L. Brophy, *Reconsidering Reparations*, 81 *IND. L.J.* 811, 813-814 (2006) (appearing to Professor Brophy that by narrowly defining bona fide reparations, all reparations claims were framed as meritless by Posner and Vermeule).

⁹⁹ PETER FLAHERTY & JOHN CARLISLE, NAT’L LEGAL & POLICY CTR., *THE CASE AGAINST SLAVE REPARATIONS* (2004), available at <http://nlpc.org/sites/default/files/Reparationsbook.pdf> (describing reparations claims as a shakedown of the American people).

¹⁰⁰ Shelby Steele, *Reparations Enshrine Victimhood, Dishonoring Our Ancestors*, *NEWSWEEK*, Aug. 27, 2001, at 23.

compensation.¹⁰¹ The evolving fourth generation's redress discourse now explicitly embraces reconciliation, or even more broadly, social healing. Reconciliation entails the healing of peoples' wounds and the mending of tears in the societal fabric to foster productive, peaceable relations.¹⁰² This vision of repair has emerged worldwide.¹⁰³ Many established democracies undertaking reconciliation initiatives emphasize the "individual and societal benefits of story-telling, apologies, symbolic payments and public education."¹⁰⁴

Returning in part to the internment redress model, this current fourth generation of reparations theory coalesced around recognizing and accepting responsibility for historic injustice, repairing present-day harms linked to past group-based injustice, and restoring or building productive group relationships.¹⁰⁵

Within the fourth generation's renewed repair, rather than mainly compensatory, paradigm, like Matsuda fifteen years earlier, scholars emphasized forward-looking reparatory initiatives.¹⁰⁶ While backward-looking initiatives seek to "correct" past injustice by compensating victims for particularized harms, forward-looking initiatives recognize continuing harms and emphasize improving lives into the future.¹⁰⁷ Three types of proposals emerged from reparations proponents. First are "social transformation" programs and multicultural "bottom up" government initiatives to relieve poverty and eliminate barriers of discrimination.¹⁰⁸ Second are community/institution building programs to rebuild communities through government investments that improve the educational and economic opportunities.¹⁰⁹ Third are "individual support based programs," including government trust funds that help finance individuals' "college tuition, health care coverage, and business."¹¹⁰

These kinds of reparative measures — now an integral part of larger reconciliation initiatives — mark the contemporary global political landscape.

¹⁰¹ See Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45 (2004); Wenger, *Radical to Practical*, *supra* note 31; Yamamoto et al., *Crossroads*, *supra* note 14, at 31.

¹⁰² See *infra* notes 119-25 and accompanying text.

¹⁰³ See THE HANDBOOK OF REPARATIONS, *supra* note 79.

¹⁰⁴ Yamamoto & Obrey, *Reframing Redress*, *supra* note 74, at 20.

¹⁰⁵ Lorraine K. Bannai, *Introduction: The 25th Anniversary of the United States v. Hirabayashi Coram Nobis Case: Its Meaning Then and Its Relevance Now*, 11 SEATTLE J. SOC. JUST. 1 (2012) (describing the present relevance of the internment cases and redress); Yamamoto et al., *Crossroads*, *supra* note 14, at 31.

¹⁰⁶ BROPHY, PRO & CON, *supra* note 19, at 9; Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 307 (2003).

¹⁰⁷ BROPHY, PRO & CON, *supra* note 19, at 9 (citing the Civil Liberties Act of 1988 as one model for redress, Professor Brophy envisions reparations as "programs that are justified on the basis of past harm and that are also designed to . . . correct that harm and/or improve the lives of victims into the future").

¹⁰⁸ See *id.*; see also Burkett, *supra* note 22.

¹⁰⁹ Eric K. Yamamoto & Brian Macintosh, *Redress and the Salience of Economic Justice*, F. ON PUB. POL'Y, 1, 4 (2010), <http://forumonpublicpolicy.com/vol2010.no4/archive.vol2010.no4/yamamoto.pdf>.

¹¹⁰ ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 143 (2004); Burkett, *supra* note 22, at 101-02; Carlton Waterhouse, *Follow the Yellow Brick Road: Penusing the Path to Constitutionally Permissible Reparations for Slavery and Jim Crow Era Governmental Discrimination*, 62 RUTGERS L. REV. 163, 198 (2009).

With roots in the fifteen-year truth and reconciliation process designed to rebuild South Africa after the fall of apartheid,¹¹¹ they range from Colombia's,¹¹² Peru's¹¹³ and Kenya's¹¹⁴ structured, government-supported initiatives, to the United States' and State of Hawai'i's halting commitments to reconciliation with Native Hawaiians over land and self-governance,¹¹⁵ to the efforts of the residents of the South Korean Island of Jeju to engage the South Korean government and the United States in healing the persisting wounds of the Jeju April 3rd Grand Massacre inflicted partially during United States' peacetime occupation of South Korea.¹¹⁶

By the end of the 2010s, however, many reconciliation initiatives faced grave practical obstacles.¹¹⁷ In Canada, for instance, some indigenous Canadians expressed frustration at the delayed implementation of reconciliation measures and at the government's partially empty promises.¹¹⁸ In Timor-Leste, political instability severely slowed the legislatively-mandated, gender-sensitive reconciliation process.¹¹⁹ And in New Zealand, the potency of the Waitangi Tribunal's land

¹¹¹ See DESMOND M. TUTU, *NO FUTURE WITHOUT FORGIVENESS* (1999); Penelope E. Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?*, 53 *DEPAUL L. REV.* 1155, 1171-72 (2004); Eric K. Yamamoto, *Race Apologies*, 1 *J. GENDER RACE & JUST.* 47, 49-52 (1997). In 1993 South Africa legislatively mandated a widely recognized reconciliation project aimed at healing historic wounds and rebuilding the nation. South Africa established a Truth and Reconciliation Commission (TRC) to investigate gross violations of human rights, consider amnesty for those who confess to political crimes and recommend both monetary and nonmonetary reparations for victims. The South Africa TRC progress is now viewed by many as a mixed bag – with the successes of victim storytelling and the unearthing of truths about the deep injustices of white apartheid and the failures of economic justice for the mass of black South Africans.

¹¹² See Sibylla Brodzinsky, *Colombia to Compensate Victims of Armed Conflict: Historic Law to Financially Redress Up to Four Million Victims of Decades-Long Internal Conflict Including Those of the State*, *THE GUARDIAN* (May 31, 2011, 6:45AM), <http://www.bbc.co.uk/news/world-latin-america-15718695> (describing 2011 Colombia legislation as a part of a broad reconciliation initiative that combines acknowledgment, punishment, and restitution to redress the damage of state-sponsored violence against its citizens).

¹¹³ See Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 *AM. U. INT'L L. REV.* 51, 159 (2007).

¹¹⁴ See Ron Slye, *Truth, Justice, and Reconciliation*, *SEATTLE UNIV. SCH. OF LAW NEWS & FEATURES* (Winter 2012-13), <http://www.law.seattleu.edu/x12893.xml> (describing Kenya's structured government-supported Truth and Reconciliation process).

¹¹⁵ See Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1513 (1993); Derek H. Kauanoe & Breann S. Nu'uhiwa, *We Are Who We Thought We Were: Congress' Authority to Recognize a Native Hawaiian Polity United by Common Descent*, 13 *ASIAN-PAC. L. & POL'Y J.* 117 (2012); D. Kapua Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 *MARQ. L. REV.* 127 (2012).

¹¹⁶ See Tae-Ung Baik, *Social Healing Through Justice: Jeju 4.3 Case*, 2 *WORLD ENV. & ISL. STUD.* 59 (2012); Eric K. Yamamoto, Sara Lee & Yea Jin Lee, *The United States' Role in the Korea Jeju April 3rd Tragedy and Its Responsibility for Social Healing Through Justice*, 2 *WORLD ENV. & ISL. STUD.* 49 (2012).

¹¹⁷ See generally *THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES* (Will Kymlicka & Bashir Bashir eds., 2008) [hereinafter *THE POLITICS OF RECONCILIATION*].

¹¹⁸ See *INDIAN RESIDENTIAL SCHOOLS TRUTH & RECONCILIATION COMMISSION, TRUTH HEALING RECONCILIATION* (2008), available at <http://www.trc-cvr.ca/pdfs/20080818eng/pdf> (describing a commission that seeks to guide Canadian natives "in a process of truth, healing and reconciliation that will lead to renewed relations" with the Canadian government).

¹¹⁹ See Yamamoto et al. *Crossroads*, *supra* note 14, at 6 n.20.

determinations in favor of the Maori people was undermined by the government's politically-based delays.¹²⁰ Similar practical obstacles plagued reconciliation initiatives across the globe, in countries like Nepal, Sierra Leone, Chile, Sri Lanka, and Bosnia.¹²¹

Reconciliation's limitations may well lie in its illusive meaning and shifting political underpinnings. The language of reconciliation alone offers no firm guidance to even well-meaning policymakers and also allows ill-intentioned politicians to disguise continuing power abuses behind a peaceable façade. Matsuda earlier cautioned about this danger in assessing the ways that reparations might be distorted both by conventional legal analysis and by political opposition.¹²² The idea of reconciliation, while powerful, did not itself provide a detailed, grounded analytical framework to guide and assess real-life reparatory initiatives.

E. Beyond the Fourth Generation: Social Healing

Faced with these challenges in theory, on the ground reparations initiatives are facing a bumpy, though still passable, road towards justice. Fourth generation theorists are continuing to recast the repair approach to historic injustice, searching for new language within a conceptually sound and practically workable framework. Part of that effort today is the resurfacing of Matsuda's fundamental insights from *Looking to the Bottom*.

To address the repair paradigm's salutary aspects and uncertainties, redress scholars and advocates are endeavoring to discern analytically and practically when social healing efforts are truly productive for individuals and society and when they are not.¹²³ The aim is to capture concepts, expressed in a "common language," that serve both as a "strategic guide" for new or on-going initiatives and as a "tool

¹²⁰ See generally Joe Williams, *Truth, Reconciliation and the Class of Cultures in the Waitangi Tribunal*, AUSTL. & N.Z. L. & HIST. E.J. (2005) (describing politically-induced delays in process of government approval of tribunal awards).

¹²¹ See, e.g., Chowa Choo, *Serbs Sorry for Srebrenica Massacre*, THE EPOCH TIMES, Apr. 2, 2010, <http://www.theepochtimes.com/n2/content/view/32607/> (noting that for social healing, Serbian recognition of its crimes against Bosnians during the Bosnia-Herzegovina wars is "key for reconciliation in the Balkan region"); Lansana Fofana, *Sierra Leone: No Easy Road to Reconciliation*, INTER PRESS SERVICE NEWS AGENCY, Mar. 25, 2010, <http://www.ipsnews.net/africa/nota.asp?idnews=50794>; *Japan to Assist Sri Lanka Police in Reconciliation Efforts*, COLOMBO PAGE (Mar. 29, 2010, 11:45 AM), http://www.colombopage.com/archive_10/Mar1269843343CH.html (discussing the "ethnic differences that are hindering reconciliation"); Mac Margolis, *The Art of Darkness: In Latin America, Honoring Victims of the Dirty Wars Can Be a Political Act*, NEWSWEEK (Apr. 1, 2010, 8:00PM), <http://www.newsweek.com/id/235684>.

¹²² See Matsuda, *Looking to the Bottom*, *supra* note 2, at 393-97.

¹²³ See Pablo de Greiff, *Justice and Reparations*, in THE HANDBOOK OF REPARATIONS, *supra* note 79, at 455 (identifying specific reparatory goals of "recognition, civic trust, and social solidarity"); SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 133 (2007) (urging scholars and advocates to assess reconciliation efforts in light of their capacity to create a new community that can hear and acknowledge the stories of both victims and perpetrators, of beneficiaries and bystanders).

of assessment” for actions already taken.¹²⁴

As anticipated by Matsuda’s infusion of conceptual notes beyond law’s normal register – she called it “traneing,” after Coltrane’s jazz riffs¹²⁵ – multidisciplinary scholarship on reconciliation offers insights into the kind of justice that heals group-based wounds. For instance, Will Kymlicka and Bashir Bashir, the editors of *The Politics of Reconciliation*, explore the “real-world intermingling” of reconciliation efforts and identity politics.¹²⁶ Scholars who engage social science, most notably in *The Social Psychology of Intergroup Reconciliation*, analyze social group healing in light of the social psychological processes.¹²⁷ Drawing from Christian theology, Roy Brooks suggests that the “key to racial reconciliation” is atonement and forgiveness.¹²⁸ Rebecca Tsosie infuses indigenous peoples’ cultural practices and values to “engage the spirit of racial healing.”¹²⁹ Eric Yamamoto and Brian Macintosh draw upon the economic capability theories of Amartya Sen and Martha Nussbaum to highlight the “salience of economic justice” to redress initiatives.¹³⁰

Yamamoto coalesces these and other approaches and offers a multidisciplinary four-dimensional framework to guide and assess reparatory initiatives.¹³¹ This

¹²⁴ See Yamamoto et al., *Crossroads*, *supra* note 14, at 38 (describing the search for “common language,” a “strategic guide” and “a tool of assessment”); see also Eric K. Yamamoto & Sara D. Ayabe, *Courts in the “Age of Reconciliation”*: *Office of Hawaiian Affairs v. HCDCH*, 33 U. HAW. L. REV. 503 (2011).

¹²⁵ Matsuda, *Looking to the Bottom*, *supra* note 2, at 388.

¹²⁶ THE POLITICS OF RECONCILIATION, *supra* note 117, at 7 (describing the interaction of academic theorizing with on-the-ground reparations movements).

¹²⁷ THE SOCIAL PSYCHOLOGY OF INTERGROUP RECONCILIATION (Arie Nadler et al. eds., 2008) (addressing varying processes of social group healing from the harms of mass trauma).

¹²⁸ BROOKS, *supra* note 110, at 43.

¹²⁹ Rebecca Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21, 22 (2005) (concerning Native Hawaiians and the continuing harms of colonization, assessing “what it means to ‘heal’ injustice [that] is embedded in society at the level of both structure and consciousness”).

¹³⁰ Eric K. Yamamoto & Brian Macintosh, *Redress and the Salience of Economic Justice*, F. ON PUB. POL’Y, (2010), <http://forumonpublicpolicy.com/vol2010.no4/archive.vol2010.no4/yamamoto.pdf> (employing Sen and Nussbaum’s capacity-building theories as foundation for economic justice as an integral component of redress and assessing impact on reconciliation of governmental failure to build economic capacity for those injured by historic injustice). See Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61, 62 (Martha C. Nussbaum & Jonathon Glover eds., 1996); AMARTYA SEN, DEVELOPMENT AS FREEDOM 6 (1999). See generally EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS (2005).

¹³¹ Drawing insights from social psychology, prophetic theology, political theory, law, economics and indigenous healing practices, *Social Healing Through Justice* emerges from four commonalities among these diverse disciplines. The first commonality is recognition that “all are members of the polity, and injury to one harms the entire community, and therefore healing the injured is the responsibility of all.” The second is that genuine healing requires mutual engagement and simultaneous repair on both the individual and collective level. Participation “must be widespread, and all must see a benefit.” The third is that for redress to be meaningful, communities must see “material change” in socio-economic conditions. The fourth distills the other commonalities into the analytical framework for guiding and assessing reparatory initiatives on the ground, the “Four Rs” of *Social Healing Through Justice* (recognition, responsibility, reconstruction, and reparation). Yamamoto & Obrey, *Reframing Redress*, *supra* note 74, at 32-33. See also ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (1st. ed. 2000) (economics and psychology); BROOKS, *supra* note 110 (Christianity); DONALD W. SHRIVER,

framework emphasizes a kind of justice that aims to heal psychological wounds and repair the material damage of historical injustice. Rather than a one-time payment of often symbolic monetary compensation as the main goal, a framework of *social healing through justice* focuses “on ways to ‘repair’ the deep harms to society (divisions, guilt, shame, lack of moral standing) by healing the continuing [economic and psychological] wounds of [people suffering group-based] injustice.”¹³²

The heart of this kind of social healing by *doing justice* is illuminated in part by emerging international human rights norms of reparative justice.¹³³ In 2005, the United Nations Human Rights Commission approved the “Basic Principles . . . [on] Reparations for Victims of Gross Violations of Human Rights Law.”¹³⁴ Those principles specify forward-looking forms of reparatory justice for group-based human rights violations, including restitution of land and personal property, compensation for specific losses, rehabilitation of shattered communities, and institutional reforms to guarantee non-repetition of abuses.¹³⁵

Although most international human rights remain unenforceable in courts of law, as aspirational norms, they now “affect how both policy makers and ordinary citizens think about the state’s interest” in reparations for past or continuing government-sponsored injustice.¹³⁶ Thus, human rights norms affect notions of social healing by “influencing modes of thought . . . [and becoming] a constitutive part of culture, shaping and determining social relations and providing ‘a distinctive manner of imagining’ what is morally right and just.”¹³⁷

For these reasons, governments and advocacy groups throughout the world are “increasingly embracing reparations for historic harms inflicted by governments

JR., AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS 9 (1995); NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION (1991).

¹³² Yamamoto & Obrey, *Reframing Redress*, *supra* note 74, at 30. See also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (drawing from Professor Derrick Bell’s interest-convergence thesis that dominant groups tend to recognize rights of vulnerable groups only when doing so benefits their larger interests for *Social Justice Through Healing*).

¹³³ See Sproat, *supra* note 115.

¹³⁴ BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW, C.H.R. Res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (Apr. 19, 2005). See generally Universal Declaration of Human Rights, G.A. Res. 271 A (III), at 71, U.N. GAOR, 3rd Sess., art. 4, U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), at 52, 21 U.N. GAOR Supp. No. 16, art. 2(3), U.N. Doc. A/6316 (Mar. 23, 1976); American Declaration of Rights and Duties of Man, O.A.S. Res. XXX, Ninth International Conference of American States (May 2, 1948); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46/Annex (Dec. 10, 1984); Torture Victim Protection Act of 1991, art. II, § 2, 28 U.S.C. § 1350 (2007);

¹³⁵ See Dinah Shelton, *The United Nations Principles and Guidelines on Reparations: Context and Contents*, in *OUT OF ASHES: REPARATIONS FOR VICTIMS OF GROSS AND SYSTEMATIC VIOLATIONS OF HUMAN RIGHTS* 11 (Koen De Feyter et al. eds., 2005).

¹³⁶ Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1280 (2006). See also Thomas Antkowiak, *Remedy Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 357 (2008).

¹³⁷ See Yamamoto et al. *Crossroads*, *supra* note 14, at 57 (quoting Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1281 (2006)).

and businesses as a lynchpin for legitimizing present-day democratic governance.”¹³⁸ More than ever, both established and transitioning democracies perceive a larger self-interest in acknowledging responsibility for historic group-based injustices and repairing persisting damage.¹³⁹

As the fourth generation of reparations scholarship and practice continues to evolve, and as reconciliation initiatives (incorporating reparations components) populate the global landscape, international human rights norms increasingly influence the tenor of social healing. Thus, Matsuda’s earlier creative insights into expansive forward-looking remedies presaged a broadly intertwined domestic law and human rights approach to reparative justice.¹⁴⁰

This evolving approach to reparations as a critical legalism emerged recently from an unexpected source – the British High Court in London.

IV. HISTORIC 2011-2012 BRITISH HIGH COURT RULINGS ON MAU MAU REPARATIONS CLAIMS: A CASE STUDY OF REPARATIONS AS CRITICAL LEGALISM

In 2011 and 2012, Britain’s High Court placed its imprimatur on the Mau Mau reparations lawsuit for British Government-related atrocities in colonial Kenya decades ago.¹⁴¹ By contrast, United States courts terminated reparations suits by World War II Japanese American internees,¹⁴² African Americans for slavery-related harms,¹⁴³ and African American victims of the 1921 Tulsa Race

¹³⁸ See *id.* at 64; Adjoa A. Aiyetoro, *Why Reparations to African American Descendants in the United States Are Essential to Democracy*, 14 J. GENDER RACE & JUST. 633 (2011).

¹³⁹ See Yamamoto et al., *Crossroads*, *supra* note 14, at 72-73.

¹⁴⁰ See Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT’L L. 279 (2011). With this broader human rights vision, justice-oriented reparations supporters now acknowledge that until recently reparations advocacy itself at times replicated a particular kind of injustice. It reflected a gender bias, discounting unique systemic harms to women). See also Colleen Duggan & Adila Abusharaf, *Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice*, in THE HANDBOOK OF REPARATIONS, *supra* note 79, at 623 (calling for gender-sensitive redress); Eric K. Yamamoto & Michele Park Sonen, *Redress Bias?*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 244 (Justin D. Levinson & Robert J. Smith eds., 2012) (identifying gender and race-gender biases in past redress initiatives and employing implicit bias theories as explanations). Professor Matsuda’s contributions to feminist legal theory about women’s autonomy over their bodies, although not directly addressing gender-sensitive reparations, helped pry open this new door to reparatory justice. See generally MARI J. MATSUDA, *WHERE IS YOUR BODY?: AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* (1996).

¹⁴¹ *Mutua v. Foreign & Commonwealth Office*, [2012] EWHC (QB) 2678 (Eng.); *Mutua v. Ndiku Mutua and Others v. Foreign and Commonwealth Office*, [2011] EWHC (QB) 1913 [14] (Eng.).

¹⁴² See *Hohri v. United States*, 782 F.2d 227 (D.C. Cir. 1986) (dismissing in part a class action damage suit by former internees on statute of limitations grounds). See generally ERIC K. YAMAMOTO, MARGARET CHON, CAROL IZUMI, JERRY KANG & FRANK WU, *RACE RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2d ed. 2013) (describing the “internment” cases and redress).

¹⁴³ *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754, 756 (7th Cir. 2006) (dismissing class action against slavery-industry companies for plaintiffs’ lack of standing and on statute of limitations grounds); *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995) (dismissing slavery reparations claims at outset of litigation).

Riot mayhem¹⁴⁴ for failure to plead *bona fide* legal claims or because the statute of limitations expired. The High Court in *Mutua, et al. v. Foreign and Commonwealth Office*¹⁴⁵ might have similarly ended the Mau Mau's controversial claim at the threshold, well before further information discovery and certainly before an embarrassing public trial. But it chose to do the opposite.

In startling rulings for what is usually deemed to be a non-adventurous tribunal, the High Court denied the defendant Government's motion to dismiss.¹⁴⁶ It determined that the Mau Mau claimants marshaled enough preliminary evidence of group-based torture and abuse linked to the British Government to state a *bona fide* legal claim under English common law, and more generally according to international human rights norms, to overcome the statute of limitations time-bar.¹⁴⁷ Their claim will now proceed to a formal public trial.

The High Court embarked on a juridical road less traveled. It acknowledged the colonial setting, group-based harms, and forward-looking human rights norms of reparatory justice. With an apparent eye on social healing in addition to compensation, it at least implicitly embraced reparations as a *critical legalism*, as something far more than a "standard legal judgment."¹⁴⁸ Indeed, Matsuda's scholarship on reparations elucidates a coherent framework by which to analyze the High Court's decisions.

As summarized below, although cast in formal legal language, the High Court's rulings were anything but a "standard legal judgment."¹⁴⁹ And regardless of ultimate formal outcome, by altering public perceptions, the rulings may well have significantly advanced prospects for long-delayed justice for the Mau Mau.

A. Background of the Case

As part of a multi-dimensional reparatory justice campaign,¹⁵⁰ five elderly Kenyans – Paulo Muoka Nzili, Wambugu Wa Nyingi, Ndiku Mutwiwa Mutua, Susan Ngondi, and Jane Muthoni Mara – filed a reparation lawsuit against the British government in the British High Court in London for torture during the Mau Mau rebellion in Kenya in the 1950s.¹⁵¹ Filed in 2009, the suit held a mirror up to the British Government's brutal colonial past¹⁵² and asked England and its

¹⁴⁴ *Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir. 2004) (dismissing class action on statute of limitations grounds).

¹⁴⁵ [2012] EWHC (QB) 2678 (Eng.).

¹⁴⁶ *Mutua v. Foreign & Commonwealth Office*, [2011] EWHC (QB) 1913, [159] (Eng.).

¹⁴⁷ *Mutua v. Foreign & Commonwealth Office*, [2012] EWHC (QB) 2678, [158] (Eng.).

¹⁴⁸ See Matsuda, *Looking to the Bottom*, *supra* note 2, at 397-99.

¹⁴⁹ See *id.*

¹⁵⁰ *Support the Mau Mau Reparations Campaign*, PAMBAZUKA NEWS, Mar. 5, 2009, <http://www.pambazuka.org/en/category/features/54582>.

¹⁵¹ *Mutua v. Foreign and Commonwealth Office*, [2012] EWHC (QB) 2678, [8] (Eng.).

¹⁵² Carina Ray, *The Empire's Ghost Returns*, NEW AFRICAN 18 (Aug.-Sept. 2009), available at http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:bsc&rft_dat=xri:bsc:ft:iibp:00373880; see also *Mutua v. Foreign & Commonwealth Office*, [2011] EWHC (QB) 1913, [156] (Eng.); Nation Reporter, *Mau Mau to Sue UK for Compensation*, DAILY NATION (May 10, 2009,

populace to acknowledge gross human rights abuses and heal the persisting wounds of systemic torture.¹⁵³

The Mau Mau rebellion began as an indigenous (primarily Kikuyu) anti-colonial movement for Kenyan independence from 60 years of British colonial rule and for recovery of native lands.¹⁵⁴ Displacing Kenya's indigenous peoples, British settlers capitalized on Kenya's vast arable lands.¹⁵⁵ The Mau Mau movement emerged from broiling dissatisfaction with land losses, social inequality, and deteriorating indigenous culture and work and housing opportunities. Kenyan independence fighters and a multitude of supporters backed the freedom movement – one of many in Africa at the time.¹⁵⁶

The British government moved quickly to suppress the rebellion. It declared a state of emergency and endorsed mass detention, which often began with village burnings.¹⁵⁷ Security forces ordered families, including many indigenous Kikuyu, into makeshift camps¹⁵⁸ where guards whipped workers,¹⁵⁹ beat and castrated males, and tortured and raped women into sexual submission.¹⁶⁰ The rebellion and the British government's reaction tore communities apart.¹⁶¹

The British government outlawed any mention of the atrocities and branded the Mau Mau as terrorists instead of freedom fighters.¹⁶² The long-standing ban prevented the Mau Mau from fully telling their story and engaging in organized

5:32 PM), <http://www.nation.co.ke/News/-/1056/595996/-/u67str/-/index.html>; Kharunya Paramaguru, *Justice for the Mau Mau: Court Case in the U.K. Sheds Light on Grim Colonial Past*, TIME WORLD (Oct. 10, 2012), <http://world.time.com/2012/10/10/justice-for-the-mau-mau-court-case-in-the-u-k-sheds-light-on-grim-colonial-past>.

¹⁵³ *Mutua v. Foreign & Commonwealth Office*, [2011] EWHC (QB) 1913, [8], [9], [13], [27] (Eng.).

¹⁵⁴ *Id.* at [41], [42].

¹⁵⁵ DAVID CAVALERI, *THE LAW OF WAR: CAN 20TH-CENTURY STANDARDS APPLY TO THE GLOBAL WAR ON TERRORISM?* 57 (2005), available at http://www.au.af.mil/au/awc/awcgate/army/csi_cavaleri_law.pdf (noting that historically, the Kikuyu were one of over thirty indigenous Kenyan groups that comprised a third of the Kenyan population and occupied "the most fertile land in the Kenyan highlands" that came under the ownership of less than 30,000 Europeans).

¹⁵⁶ *Id.* at 58.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 65.

¹⁵⁹ CAROLINE ELKINS, *IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA* 247 (1st ed. 2005).

¹⁶⁰ Simon Rutho, one of the few male survivors of the Nyeri District's Gatung'ang'a village, recounts the sexual violence:

There was a headman . . . from Kiamariga[, . .] a very cruel man. Whenever that headman desired a woman, and she refused him, he would take a beer bottle, then order an *askari* [soldier] to hold one of the woman's legs, and another to hold the other, wide apart. Then he would insert the bottle into the woman's private parts and punch it up to the stomach. Many women died after having been treated that way.

Id. at 245.

¹⁶¹ DAVID ANDERSON, *HISTORIES OF THE HANGED: THE DIRTY WAR IN KENYA AND THE END OF EMPIRE* 4 (1st ed. 2005) (stating that the British Government enforced a deliberate policy to divide African communities. "Loyalists" Kenyans supported the government and opposed the Mau Mau).

¹⁶² *Lift Mau Mau Ban Plea*, THE INDEPENDENT ON SUNDAY, Aug. 13, 2000, at 4; Hugh Macleod, *Kenya Scraps Law Against Mau Mau Rebels*, THE INDEP., Sept. 1, 2003, at 10.

reparative justice activity.¹⁶³ Their characterization as terrorists legally shielded the British government from reparation claims because under the Geneva Convention, governments were not liable for the harsh treatment of prisoners engaged in terrorism.¹⁶⁴ Post-independence Kenyan leadership maintained the ban on speech related to the Mau Mau rebellion and buried the memory of the Mau Mau ostensibly to promote national unity.¹⁶⁵ Then-President Jomo Kenyatta assured European settler-farmers of their safety by cementing Kikuyu subordination,¹⁶⁶ characterizing Mau Mau as “a disease which had been eradicated, and must never be remembered again.”¹⁶⁷ Later Kenyan leadership also suppressed the memory of Mau Mau in history books and independence celebrations.¹⁶⁸

However, in 2002, Kenyans employed “ballot power” to uproot corrupt leadership and elect Mwai Kibaki, a Gikuyu from the Mau Mau heartland of Nyeri.¹⁶⁹ Kibaki, praised as “the people’s choice,”¹⁷⁰ quickly and boldly removed the 56-year-old ban on the Mau Mau.¹⁷¹ This facilitated open discussions about the atrocities and the creation of the Mau Mau War Veterans’ Association.¹⁷² The Veterans’ Association, with government support, demanded an accurate written history of the rebellion before aging elders passed on.

B. Reparative Justice Movement

At the same time, the Republic of Kenya created a Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission to determine the necessity of a formal truth commission investigation.¹⁷³ The Kenyan government desired to be perceived as a human rights adherent and thereby enhance its legitimacy as an emerging democracy.¹⁷⁴ The Task Force listened to

¹⁶³ *Mutua v. Foreign & Commonwealth Office*, [2012] EWHC (QB) 2678, [33] (Eng.) (“Any act that could be considered to be ‘organising or taking part in any activity for or on behalf of’ a proscribed organisation such as Mau Mau was punishable with up to 14 years imprisonment, a substantial fine or both”).

¹⁶⁴ Macleod, *supra* note 161.

¹⁶⁵ Lotte Hughes, “*Truth Be Told*”: *Some Problems with Historical Revisionism in Kenya*, 70 AFR. STUD. 182, 187 (2011); Ray, *supra* note 152, at 18.

¹⁶⁶ James Ogude, *The Truth of the Nation & The Changing Image of Mau Mau in Kenya Literature*, in *THE MAU MAU & NATIONHOOD: ARMS, AUTHORITY & NARRATION* 270 (E.S. Atieno Odhiambo & John Lonsdale eds., 2003); Hughes, *supra* note 167, at 187 (stating that President Jomo Kenyatta sought to “cement Kikuyu sub-nationalism” and reassure protections of European farmers).

¹⁶⁷ Hughes, *supra* note 165, at 185; Andrew Novak, *Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya*, 45 SUFFOLK U. L. REV. 285, 328-29 (2012).

¹⁶⁸ Ogude, *supra* note 166, at 270.

¹⁶⁹ Hughes, *supra* note 165, at 185; Ray, *supra* note 152, at 18; Daniel Teng’o, *Kenyan Press Cheers Kibaki*, WORLDPRESS.ORG, (Jan. 22, 2003), http://www.worldpress.org/print_article.cfm?article_id=1022.

¹⁷⁰ Hughes, *supra* note 165, at 185.

¹⁷¹ *Mutua v. Foreign & Commonwealth Office*, [2012] EWHC (QB) 2678, [33] (Eng.) (Mau Mau ban removed in 2002/3).

¹⁷² Paramaguru, *supra* note 152.

¹⁷³ Makau Mutua, *Republic of Kenya Report of the Task Force on the Establishment of A Truth, Justice and Reconciliation Commission*, 10 BUFF. HUM. RTS. L. REV. 15, 15 (2004).

¹⁷⁴ *Id.*

first-hand accounts of the suffering of Kenyans during the colonial era.¹⁷⁵ However, it recommended that a formal Truth Commission focus only on the post-colonial period of 1963-2002.¹⁷⁶

The Mau Mau Veterans' Association rejected the Task Force's recommendation for a sharply limited inquiry. It appealed to the Kenya Human Rights Commission and a United Kingdom law firm and formed a Mau Mau reparations legal team.¹⁷⁷ Based on historians' investigations,¹⁷⁸ the Human Rights Commission in 2006 launched a Mau Mau Reparations Campaign in Kenya and Britain.¹⁷⁹ The campaign set forth clear objectives: educate the local and global communities about the group-based atrocities against the Mau Mau and the need for redress; energize an incipient redress movement and achieve reparations for the Mau Mau torture survivors; trigger the British government's acceptance of responsibility; and engender social healing for the future by "[i]mplant[ing] the tools for comprehensive transitional justice in Kenya."¹⁸⁰ The British Government refused to engage.¹⁸¹

C. *Mutua, et al. v. Foreign and Commonwealth Office*

So in 2009, the Mau Mau claimants sued the British government.¹⁸² In *Mutua v. Foreign and Commonwealth Office*, they asserted tort claims for damages under English law for assault, battery, and negligence.¹⁸³ They maintained that the British government authorized and jointly designed the system of torture against them and also negligently failed to prevent the torture, beatings, and rape by Kenyan governmental actors.¹⁸⁴ In light of those transgressions, the Mau Mau claimants asserted a right to meaningful redress emanating from both domestic common law and international law.¹⁸⁵

¹⁷⁵ *Id.* at 18.

¹⁷⁶ *Id.* at 46-47 (noting that extending the Truth Commission investigation to include colonial human rights violations "would be an impossibly expensive, laboriously prohibitive, and practically unmanageable exercise"). The Truth, Justice and Reconciliation Commission of Kenya adopted the Task Force's recommendation and only "investigate[d] the gross human rights violations and other historical injustices in Kenya between 12 December 1963 and 28 February 2008," excluding the Mau Mau atrocities. *About TJRC, THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION OF KENYA*, http://www.tjrkenya.org/index.php?option=com_content&view=article&id=93&Itemid=118 (last visited Mar. 14, 2013).

¹⁷⁷ Corydon Ireland, *Justice for Kenya's Mau Mau*, HARV. GAZETTE, Sept. 1, 2011, <http://news.harvard.edu/gazette/story/2011/09/justice-for-kenya%e2%80%99s-mau-mau/>; see also Leigh Brownhill, *Mau Mau Demand Reparations from Britain for Colonial Crimes*, 20 CAPITALISM NATURE SOCIALISM 102 (2009); Leigh Day Launches Mau Mau Claim, LEIGH DAY (May 11, 2009), <http://www.leighday.co.uk/News/2009/May-2009/Leigh-Day-launches-Mau-Mau-claim>.

¹⁷⁸ See Paramaguru, *supra* note 152; Ray, *supra* note 152, at 18.

¹⁷⁹ Brownhill, *supra* note 177.

¹⁸⁰ *Support the Mau Mau Reparations Campaign*, *supra* note 150.

¹⁸¹ *Id.*

¹⁸² Leigh Day Launches Mau Mau Claim, *supra* note 177.

¹⁸³ [2011] EWHC (QB) 1913, [1] (Eng.).

¹⁸⁴ *Mutua v. Foreign & Commonwealth Office*, [2012] EWHC (QB) 2678, [35] (Eng.).

¹⁸⁵ The High Court noted that the claimants' submission cited human rights principles that require a

1. British Government's Threshold Motion to Dismiss

The defendant, Britain's Foreign and Commonwealth Office ("FCO") representing the British Government, moved to dismiss the reparations claim.¹⁸⁶ The motion to dismiss (or in the alternative for summary judgment) under British law is a threshold motion decided early in the case to determine whether enough evidence exists to allow the litigation to proceed through the discovery stage and to trial.¹⁸⁷ Especially when a case involves events that occurred many years earlier and particularly when the Government is a targeted defendant facing a controversial charge, courts are inclined to grant the motion and end the case well before it exposes the Government at trial to both liability and embarrassment.¹⁸⁸

An early dismissal of *Mutua* not only would have ended the case, it would have publicly signaled government absolution – the Mau Mau's reparations claim so lacked merit that it was not substantial enough to get to trial. Indeed, in moving to dismiss at the threshold, the British Government asserted exactly that: it denied legal responsibility for torture that may have been committed by the Colonial Government in Kenya (which ceased to exist since 1963) and further denied that the British Government was in any way directly involved in torture.¹⁸⁹

The Mau Mau claimants traveled 4,000 miles to oppose the Government's motion to dismiss in the High Court in London. Plaintiffs *Mutua* and *Nzili* presented evidence that British perpetrators castrated them and that British detention officials manacled *Nyingi* for two years and beat him unconscious.¹⁹⁰ They also attested to horrific sexual violence.¹⁹¹ The Mau Mau claimants additionally presented academic historians' "sizable documentary base" detailing grave abuses and the colonial system of authority and control.¹⁹² The claimants asserted that common law and public international law principles passed liabilities of the old Colonial Government to the British Government upon independence.¹⁹³ Moreover, the Mau Mau litigants asserted that the British Government should be held directly liable because its Army and Colonial Office instigated and procured a system of horrific abuse in violation of broadly accepted international law precepts.¹⁹⁴ Documents showed that in July 1957, the British

nation's legal system to ensure that torture victims "obtain redress," including "adequate compensation" and "as full rehabilitation as possible." *Mutua v. Foreign & Commonwealth Office*, [2011] EWHC (QB) 1913, [156] (Eng.) (citing U.N. Charter art. 73; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51 (1984)).

¹⁸⁶ *Id.* at [2].

¹⁸⁷ *Id.* at [3].

¹⁸⁸ See *supra* notes 135-37 (noting American courts threshold dismissals of reparations lawsuits).

¹⁸⁹ Summary of Judgment at 5, *Mutua*, [2011] E.W.H.C. 1913 (Q.B.) (No. HQ09X02666).

¹⁹⁰ Ian Cobain & Peter Walker, *Secret Memo Gave Guidelines on Abuse of Mau Mau in 1950s*, THE GUARDIAN (Apr. 11, 2011, 4:11 PM), <http://www.guardian.co.uk/world/2011/apr/11/mau-mau-high-court-foreign-office-documents>.

¹⁹¹ *Id.*

¹⁹² *Mutua v. Foreign & Commonwealth Office*, [2011] EWHC (QB) 1913, [33] (Eng.).

¹⁹³ *Id.* at [5].

¹⁹⁴ *Id.* at [12].

government authorized a policy encouraging the gross abuse of detainees.¹⁹⁵

2. High Court Rulings: A Group-Based Notion of Perpetrator, Opening the Door to British Government's Liability, and Extending the Statute of Limitations

After careful review,¹⁹⁶ the British High Court issued a historic ruling in July 2011.¹⁹⁷ Instead of granting the motion to dismiss, Judge McCombe of the High Court determined that the Mau Mau claimants presented an "arguable" claim against the British Government on four of the five asserted legal grounds.¹⁹⁸ Conflicting evidence made it impossible to rule out the strong inference that British General Erskine, the colonial Commander-in-Chief, and those under his command, "instigat[ed] or procur[ed]" the system of torture of detainees¹⁹⁹ pursuant to "a common design" that benefitted both the British Government and its colonial arm in Kenya.²⁰⁰

In so ruling, the High Court appeared to reject the Government's narrow construction of "perpetrator." The Government had argued that the "UK government" was not liable for the "assaults for which only the actual perpetrators and their employers, the Kenyan government were liable."²⁰¹ Separate from the possibility of vicarious liability which the Court recognized in its October 2012 ruling,²⁰² the Court employed a broad notion of fault and causation. Consistent with Matsuda's expanded liberal legal notion of a group-based perpetrator, it rejected the Government's individualized notion of fault because "the claimants would [then] have to identify individuals who they could say procured the commission of the torts," which would be difficult long after the events.²⁰³ Rather, the Court construed perpetration not only as individual acts by individual actors, but also as organizational participation in a "common design to commit torture."²⁰⁴

To underscore this group-based notion of perpetrator in this colonial torture setting and to focus on the human rights harms suffered by those at the bottom, the High Court quoted from a 1954 Kenyan court opinion finding a "system of torture."²⁰⁵ Without identifying individual perpetrators, that opinion cited to

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at [45].

¹⁹⁷ *Mutua v. Foreign & Commonwealth Office*, [2011] EWHC (QB) 1913 (Eng.).

¹⁹⁸ *Id.* at [58].

¹⁹⁹ *Id.* at [125]. A historian testified that Commander-in-Chief Erskine and his successor knew about the grave abuses and, despite a statement to the contrary, supported the atrocities by "play[ing] || central role[s] . . . [in] screening, interrogations, villagisation and detention policies . . ." *Id.* at [124-25].

²⁰⁰ *Id.* at [125].

²⁰¹ *Id.* at [114].

²⁰² *Id.* at [115].

²⁰³ *Id.* at [118].

²⁰⁴ *Id.* at [116].

²⁰⁵ *Id.* at [126].

“common [torture] practice” by “screening teams”²⁰⁶ and observed that “[w]hat legal powers of detention these teams have or under whose authority they act we do not know.”²⁰⁷ Given the emergency regulations authorizing detentions, however, that court observed that “whatever the authority responsible, it is difficult to believe that these teams could continue to use methods of unlawful violence without the knowledge and condonation of the [organizational] authority.”²⁰⁸ And it concluded that the government organization would be held responsible because “[s]uch methods are the negation of the rule of law which it is the duty of courts to uphold.”²⁰⁹

The Mau Mau litigants also bolstered their reparation claim by asserting the British government’s “joint liability” for assaults after July 1957.²¹⁰ Secret telegrams and documents between the governor of the colony and the British Secretary of State in London from July 1957 appeared to expressly authorize detainees’ torture.²¹¹ Rather than respond to the documents’ content, the defendant FCO contended that the communications amounted to the British Secretary of State’s mere approval of a proposed action by the colonial government and therefore did not reflect independent action by the British government, thus shielding it from liability.²¹² Indeed, an earlier English case, *R (Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs*, had announced a broad doctrine clearly designed to prevent claims against the colonial power for acts of the local colonial government installed and overseen by the colonizer.²¹³ However, Judge McCombe noted legal ambiguity about precisely what circumstances triggered the liability shield.²¹⁴ In view of this “uncertainty,” he opted to narrowly construe the *Quark* rule.²¹⁵ By doing so, he removed the threshold shield to British Government accountability, finding preliminarily that “the Secretary of State acted as one of Her Majesty’s Ministers in the United Kingdom.”²¹⁶

The final leg of the Mau Mau’s reparation claim, the Government’s negligence in failing to stop the abuses, also survived the defendant’s motion to dismiss.²¹⁷ Generally, under English common law, mere omissions do not impose liability.²¹⁸ Moreover, Judge McCombe acknowledged that “courts have expressed reluctance

²⁰⁶ ELKINS, *supra* note 159, at 63 (according to Caroline Elkins, one of Plaintiff’s expert historians, British security forces, European settlers, and the Kenyan police force, collectively formed screening teams that “spearheaded a campaign to interrogate anyone suspected of Mau Mau involvement” – “no Kikuya—man, woman, child—was safe from the screening teams. Every Kikuya was a suspect”).

²⁰⁷ *Mutua v. Foreign & Commonwealth Office*, [2011] EWHC (QB) 1913, [126] (Eng.).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at [129].

²¹¹ *Id.* at [103].

²¹² See *id.* at [105] (effectively although not expressly arguing for a shield from liability).

²¹³ *Id.* at [50-56].

²¹⁴ *Id.* at [109].

²¹⁵ *Id.* at [109-11].

²¹⁶ *Id.* at [111].

²¹⁷ *Id.* at [159].

²¹⁸ *Id.* at [140].

to impose a duty in areas where public policy issues, in the sense of political judgments, arise,” noting that normally courts are “ill-equipped and ill-suited to assess [matters of policy].”²¹⁹ But Judge McCombe cited a recognized opening for judicial intervention and creativity: in “exceptional cases,” the court will “accept that the interests of justice justify” an extension of governmental accountability for passive negligence.²²⁰

Employing the context-dependent test of “interests of justice,” Judge McCombe ruled that “judicial policy might positively demand the existence of a duty of care [rule]” in this “exceptional case.”²²¹ He explained that “[t]he time must come when standing by and doing nothing, by those with authority and ability to stop the abuse, becomes a positive policy to continue it.”²²²

In similar fashion Judge McCombe disposed of the British Government’s second procedural maneuver aimed at evading a decision on the substantive merits — the statute of limitations.²²³ Because the Mau Mau sustained initial injuries over 50 years ago, the Government argued that the Limitations Act barred their personal injury filing in 2009.²²⁴ For contextual reasons similar to those just described, however, and consistent with Matsuda’s notion of an expansive statute of limitations for historic group-based injustice with persisting harms, Judge McCombe rejected the British Government’s time-bar argument. In late 2012, after full briefing and factual presentations, the High Court determined that the limitations period had not expired.²²⁵ In light of the legal ban on the very existence of the Mau Mau until 2003 (and indirectly on even mention of the British government’s suppression of the Mau Mau rebellion), in light of the extreme emotional barriers to claimants’ acknowledgment of their suffering (surviving women could not speak of their sexual torture to their later husbands),²²⁶ and in light of the British government’s possibly inadvertent misplacement of key documents bearing on liability (located after the litigation

²¹⁹ *Id.* at [151] (quoting *Barrett v. Enfield LBC*, [1989] 3 W.L.R. 83 (Eng.)). This is akin to the American law doctrine of “political question” where courts refuse to rule where important political policies issues are at stake.

²²⁰ *Id.* at [152] (quoting *Reeman v. Dept. of Transp.*, [1997] P.N.L.R. 618, 625 (Eng.)).

²²¹ *Id.* at [153].

²²² *Id.* at [144].

²²³ *Mutua v. Foreign & Commonwealth Office*, [2012] EWHC (QB) 2678, [158] (Eng.).

²²⁴ Limitations Act (1980), c. 58 § 11(4) (Eng.). The 1980 Limitations Act requires that personal injury claims be filed within “three years from (a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured.”

²²⁵ *Mutua v. Foreign & Commonwealth Office*, [2012] EWHC (QB) 2678, [160] (Eng.). Justice McCombe acknowledged “the present case is not quite like any other” decided under section 33 of the Limitation Act. *Id.* at [10]. Therefore, case law “offer[s] only limited assistance . . . on overarching principles.” *Id.*

²²⁶ *Id.* at [35] (“[T]he claimants point to the seriously humiliating (and partly sexual) torture and other ill-treatment to which each was subjected. They say that this had a psychologically debilitating effect upon their ability to speak openly, or in some cases even privately, about what had happened to them. By way of example, Mrs Mara has still not felt able to discuss these matters with her husband.”). Cf. Devika Hovell, *The Gulf Between Tortious and Torturous*, 11 J. INT’L CRIM. JUST. 65 (2013) (critiquing Judge McCombe’s reliance on tort law rather than human rights law on torture, including non-resort to the European Convention on Human Rights to decide statute of limitations issue).

commenced),²²⁷ the Court declined to terminate the case on time-bar procedural grounds and instead ordered the Mau Mau reparative justice claim to full public trial.²²⁸

D. Looking Forward

In his opinion, Judge McCombe underscored the significance of reclamation of a nation's "honour" and the legitimacy of its legal system.²²⁹ He observed that the "use of torture is dishonorable. It corrupts and degrades the state [and] . . . the legal system which accepts it."²³⁰ Revealing the heart of his thinking about "symbolic significance," he quoted at length a case that poignantly noted the evolving international "revulsion" with torture in concluding "the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system."²³¹ In doing so, Judge McCombe presented what Matsuda termed the "symbolic significance" of the Mau Mau campaign for reparations.

Through these statements, Judge McCombe endeavored to legitimate his technically explained refusal to summarily dismiss the Mau Mau's claims. His statements highlighted the importance of judicial intervention "in the interests of justice," even though traditional doctrines had to be flexibly construed and "public policy issues, in the sense of political judgments" were implicated.²³² The High Court conceptualized the Mau Mau's claim as far different from an ordinary common law personal injury suit, and alluded to the colonial context of the claims and the larger interests of those "at the bottom," as well as the British government's stake in just adjudication. In doing so, the High Court's rulings indeed reflected far more than the standard legal judgment.

V. CONCLUDING THOUGHTS: REPARATIONS (AND SOCIAL HEALING THROUGH JUSTICE) AS CRITICAL LEGALISMS

In broadly construing "perpetrator," in creatively narrowing the *Quark* rule and rejecting the Government's negligence-immunity argument, in stretching the limitations period for initiating suit, in underscoring the Government's temporary loss of key documents and the claimants' continuing suffering, and in thereby expanding potential government accountability for historic transgressions in the "interests of justice," Judge McCombe implicitly embraced both an expanded liberal legal view of the Mau Mau's claim and what Matsuda terms "reparations as a critical legalism."

²²⁷ *Mutua v. Foreign & Commonwealth Office*, [2011] EWHC (QB) 1913, [32] (Eng.); Cobain & Walker, *supra* note 190.

²²⁸ *Mutua v. Foreign & Commonwealth Office*, [2012] EWHC (QB) 2678, [160] (Eng.).

²²⁹ *Mutua v. Foreign & Commonwealth Office*, [2011] EWHC (QB) 1913, [154] (Eng.);

²³⁰ *Id.* at [153].

²³¹ *Id.*

²³² See *supra* notes 189-96.

The 2011 and 2012 rulings signaled the High Court's assessment about the importance of publically ventilating the entire Mau Mau rebellion story at trial – it noted media publicity – and the significance of determining the British Government's accountability for historic human rights abuses during the waning days of its colonial empire. By acknowledging the “exceptional” nature of the claims and the colonial context, by invoking the “interests of justice,” the Court underscored evolving social healing concerns characterized by evolving fourth generation reparations theory: the acknowledgment of historical wrongs (based upon the voices of those oppressed and the government's own files), the recognition of continuing individual and group-based injuries, and a commitment to appropriate redress (which implicates broad relief, including raising the standard of living, promoting cultural survival and political participation and fostering a “new [public] consciousness”²³³) – all while “looking always to victims for guidance”²³⁴ and recognizing a national interest in reestablishing or enhancing legitimacy as a democracy committed to human rights.²³⁵

Even though a public trial or an unlikely public settlement is yet to come, and although serious reparations claims often invoke potent backlash and the risk of commodification,²³⁶ the High Court's rulings move the Mau Mau's claim down a potential path toward some fashion of social healing, both for the Mau Mau as a group and British society as a whole.²³⁷ Serious contemplation of reparation claims in the court of global public opinion as well as courts of law may re-open doors to *social healing through justice* for others elsewhere. Perhaps for women suffering war-inflicted sexual violence through gender-sensitive redress. Perhaps for indigenous peoples struggling to reclaim lands and self-governance. Perhaps for the descendants of those enslaved and subjected to harsh segregation by law. Perhaps not, in light of the “underside” risks of reparations process. Perhaps not, but potentially so.

Conceived as critical legalism, reparations as a key component of redress for historic injustice is both practical and aspirational. It is practical because reparatory justice claims, like those of the Mau Mau in *Mutua*, trigger grassroots and organizational campaigns for public acknowledgment, government

²³³ Matsuda, *Looking to the Bottom*, *supra* note 2, at 388 (“CLS [critical legal studies] reveals the flexibility of legal doctrine and invites new consciousness”).

²³⁴ *Id.* at 397 (emphasizing the importance of fashioning redress by looking to the victims for guidance).

²³⁵ Eric K. Yamamoto & Sara Lee, *Korean “Comfort Women” Redress 2012 Through the Lens of U.S. Civil and Human Rights Reparatory Justice Experiences*, 11 J. KOREAN L. 123, 139 (2012) (positing the significance of “legitimacy of a democracy committed to civil and human rights” as an aspect of redress strategy).

²³⁶ See *supra* Section III.

²³⁷ Of course, continued litigation might result in a formal judgment against the Mau Mau claimants – factual and legal questions at trial will include the extent to which the British Government is liable directly for its own actions and indirectly for actions of its colonial government. On the one hand this might deepen reopened wounds. On the other, the litigation process, illuminated by journalists, scholars and rights organizations, might transform a narrow adverse legal judgment into expanded public consciousness with implications for political forms of redress. See Yamamoto et al., *Crossroads*, *supra* note 14, at 56 (observing how successful legislative reparations initiatives have been “galvanized and informed” by “unsuccessful” litigation).

accountability, and personal and community repair. It is aspirational because, in Mari Matsuda's words, "reparations is at its heart transformative. It recognizes the crimes of the powerful against the powerless. It condemns exploitation and adopts a vision of a more just world."²³⁸

POSTSCRIPT

As this article was going to press, the British government finalized an unprecedented out-of-court settlement with the Mau Mau in *Mutua*, believed to be first time Britain expressed regret for its colonial era atrocities.²³⁹ Cast in the language of social healing, British Foreign Secretary William Hague, on behalf of the government, acknowledged Britain's acts of torture and the resulting "suffering and injustice," and expressed the country's sincere regret:

I would like to make clear now and for the first time, on behalf of Her Majesty's Government, that we understand the pain and grievance felt by those who were involved in the events of the Emergency in Kenya. The British Government recognises that Kenyans were subject to torture and other forms of ill treatment at the hands of the colonial administration. The British government sincerely regrets that these abuses took place, and that they marred Kenya's progress towards independence. Torture and ill treatment are abhorrent violations of human dignity which we unreservedly condemn.

...

[T]his settlement provides recognition of the suffering and injustice that took place in Kenya. . . . and it is my hope that the agreement now reached will receive wide support, will help draw a line under these events, and will support reconciliation.

...

The ability to recognise error in the past but also to build the strongest possible foundation for cooperation and friendship in the future are both hallmarks of our democracy.²⁴⁰

The historic settlement followed intense social scrutiny about the British government's colonial past and political debate about the import of the High Court's earlier rulings refusing to dismiss the Mau Mau reparations suit. Through

²³⁸ Matsuda, *Looking to the Bottom*, *supra* note 2, at 394.

²³⁹ Robyn Dixon & Nicholas Soi, *British Government Apologizes for Colonial Abuses in Kenya*, LOS ANGELES TIMES, Jun. 6, 2013, <http://articles.latimes.com/2013/jun/06/world/la-fg-britain-kenya-compensate-20130607>.

²⁴⁰ William J. Hague MP, Statement to Parliament on Settlement of Mau Mau Claims, Foreign and Commonwealth Office (June 6, 2013), available at <https://www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims> [hereinafter Hague, Statement to Parliament]. See also Ian Cobain & Jessica Hatcher, *UK to Expect More Colonial-Era Compensation Claims*, THE GUARDIAN (June 6, 2013), <http://www.guardian.co.uk/politics/2013/jun/06/uk-more-colonial-era-compensation-claims> (describing British High Commissioner Christian Turner's "deep expression of regret and acknowledgement of the wrongs" to an audience of successful claimants in Kenya).

the settlement, the British government agreed to pay about \$31 million (approximately \$5,700 each) to the 5,228 surviving claimants²⁴¹ and to construct a memorial to the victims in Nairobi, Kenya.²⁴² However, it denied legal liability for the colonial administration's actions, cautioned that the settlement does not establish a precedent for other former British colonies, and warned that it would defend against future claims.²⁴³

As anticipated by Professor Matsuda's initial reparations theorizing and the later work of fourth generation reparations scholars, Britain's settlement with the Mau Mau for historic injustice is necessarily forward-looking and much more than a standard monetary legal judgment: Britain formally acknowledged "torture and other forms of ill treatment at the hands of the colonial administration," recognized the continuing "pain and grievance felt by those who were involved," and committed itself to redress (including monetary compensation, the construction of a monument, and support for public recognition, reconciliation, and future cooperation).²⁴⁴ For all practical purposes, the settlement is a political resolution cast in judicial clothing—that is, a political step toward reconciliation engendered by still pending reparations litigation.

Indeed, for some, the group-based settlement, with its fourth generation language of reconciliation, is transformative. Mzee Gitu Wakahengeri, head of the Mau Mau War Veterans Association and survivor of the atrocities, calls the settlement the "beginning of reconciliation between the Mau Mau freedom fighters of Kenya and the British government."²⁴⁵ Matheng Irengi, one of the successful claimants, also acknowledges the long-lasting impact of the settlement: "Forget the money they're going to give us. Money comes and goes but the word sorry will last for ever."²⁴⁶

The settlement is also aspirational because it may further open political doors to *social healing through justice* for others in Kenya and elsewhere (despite Britain's

²⁴¹ Dixon & Soi, *supra* note 239.

²⁴² *Mau Mau Torture Victims to Receive Compensation – Hague*, BBC NEWS UK (June 6, 2013, 11:54 AM), <http://www.bbc.co.uk/news/uk-22790037>.

²⁴³ *UK to Compensate Kenya's Mau Mau Torture Victims*, THE GUARDIAN (June 6, 2013, 8:22 AM) <http://www.theguardian.com/world/2013/jun/06/uk-compensate-kenya-mau-mau-torture>.

²⁴⁴ See Hague, Statement to Parliament, *supra* note 240. *But cf.* Olive Burrows, *Don't Focus on the Money, British Envoy Tells Mau Mau*, CAPITAL NEWS (June 14, 2013), <http://www.capitalfm.co.ke/news/2013/06/dont-focus-on-the-money-british-envoy-tells-mau-mau/> (quoting British High Commissioner Christian Turner as stating that the settlement is limited to "this particular group of veterans" for a specific "set of personal injury claims").

²⁴⁵ Gregory Warner, *Britain Apologizes For Colonial-Era Torture Of Kenyan Rebels*, NPR (June 9, 2013), <http://www.npr.org/2013/06/09/189968998/britain-apologizes-for-colonial-era-torture-of-kenyan-rebels>.

²⁴⁶ Cobain & Hatcher, *supra* note 240 (reporting the Mau Mau claimants' lawyer saying: "The elderly victims of torture now at last have the recognition and justice they have sought for many years. For them the significance of this moment cannot be over-emphasised"). Some, however, viewed the settlement amount as too small. See Warner, *supra* note 245 (noting that some were not satisfied with the modest amount of the settlement); Dixon & Soi, *supra* note 239 (reporting that the veterans association accepted the settlement because they feared the appeal would take too long); Rawlings Otieno & Caroline Rwenji, *Victims: Cash Not Enough But Better Than Nothing*, STANDARD DIGITAL (June 7, 2013), http://www.standardmedia.co.ke/?articleID=2000085379&story_title=victims-cash-not-enough-but-better-than-nothing&pageNo=1.

refusal to view the settlement as legal precedent). Another 8,061 Mau Mau have a pending case in the High Court seeking damages for personal injury and losses from torture, mistreatment, forced labor and wrongful detention.²⁴⁷ The British Foreign Office was also put on notice that Cypriots will file a claim alleging mistreatment during the 1950s decolonization conflict in Cyprus.²⁴⁸

As predicted by the expanded social healing framework's "underside of reparations process," however, some criticize the settlement and warn of the limits of the reparations claiming process going forward. Although the settlement amount is modest, the "ideology of reparations" highlights the settlement's separation of the Mau Mau into "haves" and "have nots." Only 5,228 victims are slated to receive compensation, leaving many others—perhaps up to 15,000—"anxious" to receive redress.²⁴⁹ "The distorted legal framing of reparations claims" underscores the risks in similarly framed reparations lawsuits. Practical obstacles like the statute of limitations, the unavailability of historical evidence, and the absence of expert forensic analysis, may allow judges to reject other reparations suits at the procedural threshold.²⁵⁰

Still, some Mau Mau, while accepting the symbolic nature of the monetary award, see the healing power of Britain's acknowledgment of its past injustices. As Mau Mau freedom fighter Mzee Gitu Wakahengeri recognized, "no amount of compensation [] can cover for the loss we suffered. But the fact that the U.K. government has acknowledged and accepted that something bad happened and regret is given[,] the simple apology statement is enough for us."²⁵¹

²⁴⁷ *It's Not Over As 8,000 More Seek Mau Mau Cash*, ALLAFRICA (June 10, 2013) <http://m.allafrica.com/stories/201306100742.html/> (noting the existence of a third lawsuit on behalf of 700 Mau Mau); *Mau Mau Torture Victims to Receive Compensation – Hague*, *supra* note 242.

²⁴⁸ Cobain & Hatcher, *supra* note 240.

²⁴⁹ *It's Not Over*, *supra* note 247 (reporting that the settlement "has created anxiety with all Mau Mau victims expecting to receive payments" and that "the actual number of those entitled to compensation may be in the region of 15,000").

²⁵⁰ Cobain & Hatcher, *supra* note 240 (noting that other claims for colonial abuses may face obstacles because damages claims arising from events before June 1954 cannot be brought in British courts); Caroline Elkins, *Britain Has Said Sorry to the Mau Mau. The Rest of the Empire is Still Waiting*, THE GUARDIAN (June 6, 2013), <http://www.guardian.co.uk/commentisfree/2013/jun/06/britain-maumuau-empire-waiting> (observing that for other potential lawsuits, "the chances of descendants of victims filing successful claims are slim, and the watermark for overcoming the statute of limitations is exceedingly high, as is the amount of historical evidence and expert forensic analysis").

²⁵¹ Dixon & Soi, *supra* note 239.