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AMERICAN REPARATIONS THEORY AND PRACTICE AT THE CROSSROADS

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I. INTRODUCTION

Slowed by controversial legal claims, skeptical judges, and flagging mainstream public support,¹ American reparations theory and practice stand at a crossroads. The path they next traverse will likely determine the long-term viability of reparations claims, not only for African Americans, but also for anyone suffering the persistent wounds of injustice. The stakes are high and include both healing for

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1. See *infra* Part II.A-B (describing past scholarly and public support for reparations and addressing judicial handling of legal claims and public opposition to reparations).

those still hurting and progress for America's communities marked by misunderstanding, mistrust, and division.² Indeed, at stake is the healing of the nation itself. All have an abiding interest.

The deep economic and psychological wounds of social injustice sometimes persist over generations.³ Yet, reparations opponents, who argue simply that "it's time to move on" have made strong headway in policy arenas and courts,⁴ and despite intermittent success of reparations,⁵ pro-reparations scholars and advocates disagree

2. See *infra* Part III.B.

3. See JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 16 (1994) (describing study results of middle-class African Americans, including findings on the ways deeply-embedded discrimination generates economic and psychological harms that tend to carry across generations).

4. See *infra* Part II.B (describing reparations opponents' arguments and impacts).

5. One recent success is the Virginia Joint Resolution expressing regret and sorrow for the state's former slavery industry and its harms to African Americans, as well as for the state's exploitation of Native Americans. See S.J. Res. 332, 2007 Reg. Sess. (Va. 2007). In March 2007, Maryland became the second state to apologize for its role in the slave trade, expressing "profound regret" that it once "trafficked in human flesh." See S.J. Res. 6, 2007 Reg. Sess. (Md. 2007). Following the lead of Virginia and Maryland, North Carolina became the third state to apologize for its role in promoting slavery and Jim Crow laws, expressing "profound contrition for the official acts that sanctioned and perpetuated the denial of basic human rights and dignity to fellow humans." S.J. Res. 1557, Sess 2007 (N.C. 2007). In May 2007, as the fourth state to formally apologize for slavery, Alabama expressed "profound regret" for the state's role in slavery. H.J. Res. 321, Sess. 2007 (Ala. 2007). Other states debating an apology for slavery include Georgia and Missouri. See *Better Late than Never? Some States Apologize for Their Role in Slavery*, CURRENT EVENTS, Apr. 23, 2007, at Vol. 106, Issue 24. A number of cities also have recently passed ordinances that require each company doing business with the city to disclose any historical connections the company has with slavery or the slave trade. In October of 2002, Chicago became the first city to pass a Slavery Era Disclosure Ordinance. CHI., ILL., MUN. CODE 2-92-420 (2002). See also L.A., CAL. ADMIN. CODE ch. 1, art. 15 (2003); DETROIT, MICH., CITY CODE ch. 18, § V, div. 7 (2004); PHIL., PA. CODE § 17-104(2) (2004). States have also enacted disclosure legislation. In 2000, California passed a law requiring insurance companies that do business with the state to disclose past ties to slavery. CAL. INS. CODE § 13810 (West 2007). In 2003, Illinois adopted a similar law. 215 ILL. COMP. STAT. 5/155-39 (2007). In 2005, the United States Senate apologized for its failure to enact anti-lynching legislation. See S. Res. 39, 109th Cong. (2005). In direct response to this city and state legislation, investment giants J.P. Morgan and Wachovia acknowledged and apologized for their corporate involvement with the slave trade. In 2005, J.P. Morgan Chase & Company filed a disclosure statement with the city of

markedly over how best to repair long-standing damage.⁶ Professor Alfred Brophy's influential writing thus calls for "reconsidering reparations."⁷

In this spirit, in light of the stakes and in the hope of generating *practical theory* that links scholars and frontline advocates with legal policymakers and the American public,⁸ we offer an American reparations path that elevates the role of "social healing" and links group and societal healing to "doing justice." To help chart this path, we suggest that reparations-as-repair⁹ scholars and advocates generate a strategic framework that draws deeply from multidisciplinary understandings of social healing and multifaceted global reparations attempts at symbolic and practical justice.¹⁰

The suggested framework of *social healing through justice* bears three distinct markers. First, it builds upon the substantial scholarship embracing reconciliation (rather than compensation) as a conceptual foundation for reparations.¹¹ It diverges, however, by expressly highlighting the role of justice in social healing and by using language

Chicago, which reported that two of the companies' predecessor banks had accepted enslaved individuals as collateral on loans. This discovery resulted from J.P. Morgan's research in compliance with the 2003 Chicago ordinance. *See J.P. Morgan Discloses Past Links to Slavery*, WASH. POST, Jan. 21, 2005, at E02. Wachovia Investments Company also revealed that one of the banks put hundreds of slaves to work on railroads, and another accepted more than 100 more as collateral on defaulted loans in the 1800s. Darryl Fears, *Seeking More than Apologies for Slavery*, WASH. POST, June 20, 2005, at A1.

6. *See infra* Part II-III (describing differing theoretical approaches to reparations claims).

7. *See generally* Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811 (2006) [hereinafter Brophy, *Reconsidering Reparations*] (offering an alternative vision of the moral basis of reparations claims and expanded historical catalog of reparations).

8. *See* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 874-76 (1997) [hereinafter Yamamoto, *Critical Race Praxis*] (calling for critical theory development that translates into frontline progressive practice).

9. *See infra* Part III (describing scholarship grounding reparations in the concept of "repair").

10. *See infra* Part IV (coalescing multidisciplinary commonalities concerning social healing).

11. *See generally infra* notes 195-235 and accompanying text.

that is less controversial than “reconciliation.”¹² Second, it casts reparations not as the end in itself, but instead as an integral aspect of the larger project of social healing—as the culmination of a series of strategic efforts targeting recognition, responsibility, and reconstruction.¹³ In doing so, social healing through justice identifies repairing damage to group members and building new relationships as focal points for fostering an interest-convergence among the victims of injustice, citizens’ groups, and society itself.¹⁴ And third, the path is marked by an emphasis on reparations practice; or more specifically, on the insights drawn from recent ground-level struggles worldwide to redress the harms of injustice as a pivotal element of a country’s democratic legitimacy—a globalization of American reparations.¹⁵

To ground these broad observations, consider the following three modern global snapshots of reparations theory in action.

A. *Gender and Reparations*

A Timor-Leste woman, raped repeatedly by soldiers during the violent Indonesian occupation, urged the country’s Commission on Reception, Truth and Reconciliation to look to the future by healing wounds of women:

I ask for help to put my . . . children through school. . . . Because of the war I was used like a horse by the Indonesian soldiers who took

12. For instance, following post-invasion elections, the new Prime Minister of Iraq, Nouri al-Maliki, pushed a highly-publicized plan of “reconciliation” to address the violent conflicts between Sunni and Shiite groups. Many observers perceived the plan to be poorly conceived and more political grandstanding than serious bridge-building; the reconciliation plan failed immediately despite continuing references to “reconciliation.” See Bobby Ghosh, *Behind the Sunni-Shi’ite Divide*, TIME, Feb. 22, 2007, available at <http://www.time.com/time/printout/0,8816,1592849,00.html> (“Prime Minister Nouri al-Maliki . . . has shown little patience for Sunni grievances and has failed to start an oft-promised national reconciliation process.”).

13. See *infra* Part IV (describing dimensions of social healing through justice).

14. See Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 497-98 (1998) [hereinafter Yamamoto, *Racial Reparations*] (describing a potential convergence of interests of the harmed groups and society itself through reparations).

15. See *infra* Part V.B (assessing the role of reparations in a country’s claim to legitimacy as a democracy).

me in turns and made me bear many children. But now I no longer have the strength to push my children towards a better future.¹⁶

Indeed, with the Korean Comfort Women's ten-year international struggle for reparations from Japan as a backdrop,¹⁷ the Commission's reparations program, presented to the Timor-Leste Parliament in 2005, stressed gender redress as one of its five guiding principles.¹⁸ The comprehensive program was the first to initiate ground-level social healing for women and the first to recommend reparations specifically for gender-based human rights violations.¹⁹

These groundbreaking steps are part of the larger Timor-Leste effort to build the country anew by repairing "[damage] not only to those who participated on the side of the resistance, but . . . all victims

16. Galuh Wandita et al., *Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims*, in *WHAT HAPPENED TO THE WOMEN?: GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS* 284, 307 (Ruth Rubio-Marín ed., 2006) (describing the Timor-Leste Commission for Reception, Truth and Reconciliation and the political struggles for gender reparations for the atrocities of the Indonesian occupation) (quoting interview with "AG," in Afaloicai, E. Timor (Sept. 18, 2003)).

17. See generally Shellie K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 *ASIAN-PAC. L. & POL'Y J.* 23 (2002) [hereinafter Park, *Broken Silence*] (critiquing the Japanese government's response to former sex slaves' claims for redress).

18. The Commission proposed the following program:

[A] reparations program with five guiding principles—feasibility, accessibility, empowerment, gender, and prioritization [sic] based on need—with the aim to repair, as far as possible, the damage to their [victims'] lives caused by the violations, through the delivery of social services to vulnerable victims and symbolic and collective measures to acknowledge and honor victims of past violations.

Wandita et al., *supra* note 16, at 308. One of its main recommendations was that "at least 50% of resources in this program shall be earmarked for female beneficiaries." *Id.*

19. *Id.* at 306 ("The healing workshops conducted by the [Commission] also reflect gender-sensitive aspects of its urgent reparations program. . . . [T]elling stories, singing, and other theater-type exercises, provided a safe and supportive environment where victims were helped to view healing as a life-long journey. They looked at the painful past, reflected on the well-being in their current lives, and expressed their hopes for the future, including what they needed to help repair their lives.").

of human rights violations.”²⁰ For the emerging, yet struggling democracy, fostering healing through reparations is key to its legitimacy.²¹

*B. The Tulsa Race Riots and the Inter-American
Court of Human Rights*

Democratic legitimacy is also at issue in the Inter-American Court of Human Rights. Survivors of the 1921 Tulsa Race Riots charged that the United States and its state and local governments violated human rights three times without redress. The first instance was the city and state backed murder, mayhem, and utter destruction of the African American township of Greenwood (the “Black Wall Street”).²² The second instance was the ensuing virtual confiscation of all African American lands in Greenwood, and the abject denial of African American legal claims through the courts—which were covered up for decades by a government- and media-imposed code of silence.²³ And, the third instance is the federal court’s rejection of the survivors’ 2002 redress claims; a ruling based on the untimeliness of the claim, not on the merits,²⁴ despite a truth commission’s recent uncovering of stark, previously hidden evidence of the racial atrocities and the failure of state legislative redress.²⁵

20. *Id.* at 308. The Commission also demanded that the Indonesian government publicly apologize and pay into the reparations funds established for victims. It urged the Governments of Portugal, France, the United States, and the United Kingdom, “as members of the United Nations Security Council who provided military assistance to Indonesia during the commission of atrocities, to assist the Government of Timor-Leste in providing reparations for victims.” *Id.*

21. As sometimes occurs in countries struggling to establish democracy after years of colonization, Timor-Leste experienced serious factional fighting. In 2006, international peacekeepers arrived and restored calm by bolstering the new democracy and installing new government leaders. See *4 Rebels Killed in Timor Operation*, HONOLULU ADVERTISER, Mar. 5, 2007, at A8.

22. See generally ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921—RACE, REPARATIONS, AND RECONCILIATION (2002) [hereinafter BROPHY, RECONSTRUCTING THE DREAMLAND] (describing the Tulsa Race Riot, the subsequent cover-up, and the truth commission investigation).

23. *Id.* at 69-74, 95-102.

24. *Alexander v. Oklahoma*, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *34 (D. Okla. Mar. 19, 2004), *aff’d*, 382 F.3d 1206 (10th Cir. 2004).

25. See BROPHY, RECONSTRUCTING THE DREAMLAND, *supra* note 22, at 88-95.

Simultaneous with the litigation of the Tulsa survivors' petition in the Inter-American Human Rights Court, the Seventh Circuit Court of Appeals twisted the notion of untimeliness in the *Farmer-Paellman* reparations class action lawsuits.²⁶ The lower federal court had rejected the African American class actions, asserting state law and human rights claims, against businesses profiting from slavery—not on the merits, but because the plaintiffs lacked standing and the statute of limitations expired.²⁷ Writing for the Court of Appeals in 2006, conservative Judge Richard Posner first opened a crack in the courthouse door. He recognized a reed-slim category of African American “consumer rights” claims against companies which had recently defrauded Blacks regarding their historical connections to the slavery industry.²⁸ Posner then slammed the door shut on all the main slavery-based reparations claims—again, based on tardy filing and lack of standing.²⁹

Yet, African American reparations litigation persists. This litigation continues because the economic and psychological wounds of slavery and segregation persist in the form of well-documented discrimination in housing and employment,³⁰ denial of access to adult health care, high infant mortality,³¹ and negative cultural stereotyping.³² Despite the existence of an emergent small African

26. *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 762-63 (7th Cir. 2006) (dismissing on statute of limitations grounds consolidated class actions asserting tort and unjust enrichment claims against successors to corporations involved in the slavery industry).

27. *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721, 752, 779 (N.D. Ill. 2005) (finding plaintiffs-representatives could not identify injuries caused by defendants-predecessors' actions).

28. *See infra* notes 121-24 and accompanying text (describing the Seventh Circuit's treatment of the “consumer claims” to reparations).

29. *See In re African-American Slave Descendants Litig.*, 471 F.3d at 759 (describing the Seventh Circuit's dual approach to the reparations claims).

30. *See* Russell Sage Foundation, Multi-City Study of Urban Inequality, <http://www.russellsage.org/programs/recent/inequality> (last visited May 30, 2007).

31. *See* Jewel Crawford et al., *Reparations for Health Care for African Americans: Repairing the Damage from the Legacy of Slavery*, in *SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS* 251, 271-72 (Raymond A. Winbush ed., 2003).

32. *See* *ETHNIC NOTIONS* (Marlon Riggs 1986) (depicting cultural stereotypes of African Americans from the slavery, post-civil war reconstruction, Jim Crow

American middle class and a core of African American elected officials,³³ bolstered by now declining affirmative action programs,³⁴ continuing harms to African Americans are apparent in the vast economic inequality between African Americans and other races. The median net worth of an African American family in 2002 was \$6000—fourteen times less than the net wealth of a White family (\$88,000).³⁵

segregation, Civil Rights and post-Civil Rights eras).

33. There is no monolithic “African American community.” Many differences exist among African Americans, ranging from ancestral countries to political affiliations to experiences with discrimination. The early pre-presidential debate about whether Barack Obama, son of an African father and white mother, was “black enough” to be considered an African American candidate is indicative of the complexities of African American identity. See Orlando Patterson, *The New Black Nativism*, TIME, Feb. 20, 2007, available at <http://www.time.com/time/magazine/article/0,9171,1587276,00.html>; see generally BARACK OBAMA, DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE (Three Rivers Press 1995) (discussing Obama’s struggle to withstand the pressures he faced as the son of a African father and white American mother). Nevertheless, some broad generalizations are established by social science surveys. A large majority of African Americans report experiencing discrimination and also favor some form of reparations for slavery and segregation. Alfred L. Brophy, *The Cultural War over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1184 (2004) (citing surveys showing that 67% of African Americans support reparations for slavery); GALLUP ORG. FOR AARP, CIVIL RIGHTS AND RACE RELATIONS 7, 55 (2004), http://assets.aarp.org/rgcenter/general/civil_rights.pdf (indicating that 69% of blacks reported at least one instance of discriminatory treatment in the past thirty days). And, even “successful” African Americans are stressed by the obstacles of often subtle racial prejudice and discrimination. See FEAGIN & SIKES, *supra* note 3, at 16, 26-29 (explaining how the emerging African American middle class faces discrimination); see generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (discussing recent social cognitive psychological studies of implicit bias and resulting subconscious discrimination).

34. See Michigan Civil Rights Initiative, <http://www.michigancivilrights.org> (last visited May, 30, 2007) (describing ballot initiative passed by Michigan voters in 2006 ending race-conscious public programs in the state); see also Leslie Fulbright, *Connerly Gearing Up for Wider Crusade*, S.F. CHRON., Dec. 14, 2006, at A1 (describing ongoing efforts to ban affirmative action nationwide).

35. See RAKESH KOCHAR, PEW HISPANIC CTR., THE WEALTH OF HISPANIC HOUSEHOLDS: 1996 TO 2002 2 (2004), available at <http://pewhispanic.org/files/reports/34.pdf>. “The median net worth of Hispanic households in 2002 was \$7,932,” or 9% of the median wealth of non-Hispanic white households at the time (\$88,651), while the “net worth of Black households was only \$5,988.” *Id.* This recent study found that, after adjusting for inflation, the net worth for white

With the ascension of reparations supporter Congressman John Conyers to the chair of the House Judiciary Committee in 2007,³⁶ and with Virginia's 2007 call for racial reconciliation³⁷ through its legislative statement of regret over the harms of African American slavery and exploitation of Native Americans,³⁸ the political reparations landscape is shifting. The decision in *Farmer-Paellman* reflects United States courts' restricted legal focus, while the refiled

households increased 17% between 1996 and 2002, and rose for Hispanic homes by 14%, but decreased for blacks by 16%. *Id.* at 5.

36. In each session since 1989, Congressman Conyers has introduced a resolution calling for a congressional commission to study the impacts of slavery and make appropriate recommendations. *See, e.g.*, The African American Reparations Study Commissions Act, H.R. 40, 108th Cong. (2003), H.R. 40, 107th Cong. (2001). *See also* Congressman John C. Conyers, Jr. Home Page, <http://www.house.gov/conyers> (last visited Oct. 13, 2007). The proposed commission is patterned after the commission that studied the Japanese American World War II internment and recommended a government apology and reparations payments. *See* COMM'N ON WAR & RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982).

37. *See infra* notes 198-201 and accompanying text, for a discussion of the Virginia legislative resolution.

38. Virginia is the first, and thus far the only state to include Native Americans in its apology for historic injustices. Virginia's apology resolution formally recognizes the status of Native Americans in Virginia as an indigenous people of America: "Native Americans inhabited the land throughout the New World and were the 'first people' the early English settlers met upon landing on the shores of North America at Jamestown in 1607." S.J. Res. 332, 2007 Sess. (Va. 2007). The state's resolution further acknowledges Virginia's "maltreatment and exploitation of Native Americans" sanctioned by state law:

[P]ublic education was denied Native American children . . . Virginia enacted laws to restrict the rights and liberties of Native Americans, including their ability to travel, testify in court, and inherit property, and a rigid social code created segregated schools and churches for whites, African Americans, and Native Americans.

Id. The resolution further emphasizes the harsh impact of Virginia's former legal definition of "Native Americans":

[T]he Racial Integrity Act of 1924 which institutionalized the "one drop rule," required racial description of every person to be recorded at birth and banned interracial marriages, effectively rendering Native Americans with African ancestry extinct, and these policies have destroyed the ability of many of Virginia's indigenous people to prove continuous existence in order to gain federal recognition and the benefits such recognition confers.

Id.

Tulsa Race Riots case evidences the broadened human rights reach of the international tribunal. These conflicting trends offer a fresh perspective on the “healing” versus “compensation” debate, on the comparative utility of state law and human rights claims, and on the strategic educational value of litigation in achieving reparations in political arenas.

C. Canada’s Multifaceted Reparations for Systemic Abuse of Aboriginal Children

These perspectives on healing are deeply implicated in Canada’s recent reparations effort. In 2005, after intense political haggling and a pending native people’s class action lawsuit,³⁹ the Canadian government negotiated an encompassing reparations settlement with aboriginal groups, religious organizations, and the victims of long-term horrific abuse.⁴⁰

The Canadian government’s “educational assimilation” program, operating for decades prior to the 1990s, aimed to disconnect Canada’s indigenous people from their lands and culture.⁴¹ The settlement generated \$1.9 billion to fund a comprehensive four-part reparations-healing program that includes symbolic monetary payments to survivors, the creation of a Truth and Reconciliation Commission for future storytelling and healing initiatives, the establishment of a public commemoration and education fund, and payments to the Aboriginal Healing Foundation.⁴²

39. *Baxter v. Canada (Attorney General)*, [2006] 83 O.R.3d 481, 486 (Can.) (concluding the proposed compensation components of the settlement were fair and reasonable).

40. See *\$2B Package Unveiled for Residential School Survivors*, CBC.CA, Nov. 13, 2005, <http://www.cbc.ca/story/canada/national/2005/11/23/residential-package051123> [hereinafter *\$2B Package*]. The native children victims in the case were forcibly taken wholesale from their homes and placed by the government in exploitative, abusive religious schools. *Id.*

41. See Jennifer J. Llewellyn, *Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice*, 52 U. TORONTO L.J. 253, 256 n.7-8 (2002) (discussing the history of Native Residential Schools in Canada).

42. See *id.* for a detailed description of the underlying circumstances and reparations settlement.

Questions remain about the moderate level of financial commitment and the program's silence on issues of cultural genocide.⁴³ Still, its comprehensive and multidimensional approach to healing the lasting wounds of aboriginal injustice provides a possible template for assessing contemporary reparations efforts in the Western World.

* * *

Collectively, these global snapshots offer glimpses into possibilities for further development of *practical theory* at America's reparations crossroads.⁴⁴ As a backdrop, Part II surveys three generations of recent reparations scholarship. In particular, it critiques and suggests moving away from the third generation's tight framing of reparations as legal compensation.⁴⁵ Part III describes scholarly reaction to that narrow legal framing through a fourth generation's renewed repair paradigm for reparations. Part III then advances this article's main theme and offers a refashioning of the repair paradigm explicitly to cast reparations as a critical aspect of the broader project of *social healing through justice*.

To do this, and to encourage critique and further development, Part IV first updates multidisciplinary understandings of social healing—broadly revisiting often overlooked commonalities among theology, social psychology, socio-legal studies, political theory and indigenous people's healing practices.⁴⁶ Part IV then coalesces those commonalities into a framework of recognition, responsibility, reconstruction, and reparation to guide the kind of justice effort that promotes social healing.⁴⁷ Part V enlivens this justice aspect of social

43. See Greg Schlais, Canadian Native Residential School Reparations 9 (Sept. 27, 2006) (unpublished manuscript, on file with author).

44. See Yamamoto, *Critical Race Praxis*, *supra* note 8, at 874-76.

45. See *infra* Part II for a discussion of the tort and unjust enrichment legal framing of reparations claims.

46. See YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 153-70 (1999) [hereinafter YAMAMOTO, *INTERRACIAL JUSTICE*] (drawing out commonalities about social healing from varying disciplines). See *infra* Part IV (updating social healing research and expanding the synthesis of multiple disciplines).

47. See *infra* Part IV.

healing by exploring the salutary impact of international human rights norms and litigation on two levels: first, by shaping public consciousness about what is right and just, even when courts are unable to officially enforce human rights norms; and second, by building new reparations alliances across geographic and ideological borders.⁴⁸ Finally, Part V discusses the globalization of contemporary American reparations theory and practice.

This approach highlights the centrality of African American claims and also expands the horizon to encompass other groups struggling for redress in the United States, including: Native Americans,⁴⁹ Native Hawaiians,⁵⁰ Japanese-Latin Americans,⁵¹ Mexican Americans,⁵² Puerto Ricans⁵³ and, in some instances, black

48. See *infra* Part V. See generally THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE (2007) (analyzing Martin Luther King's evolution from champion for equality through civil rights to proponent of justice rooted in human rights).

49. See Mary Clare Jalonick, *U.S. Offers \$7 Billion to Settle Suits over Indian Trust Lands*, HONOLULU ADVERTISER, March 7, 2007, at A8. See also Jodi Rave, *Cobell Calls Trust Offer 'Insulting,'* MISSOULIAN, Mar. 30, 2007, <http://www.missoulian.com/articles/2007/03/30/jodirave/rave10.txt>. See generally William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1 (2005) (advancing an alternative theory of justice for Native Americans, "Justice as Indigenism," which commits practitioners to an eight-stage process: "acknowledgment, apology, peacemaking, commemoration, compensation, land restoration, legal reformation, and reconciliation").

50. See S.J. Res. 19, 103d Cong. (1st Sess. 1993) [hereinafter Apology Resolution] (acknowledging the 100th Anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii).

51. See Eric K. Yamamoto, *Reluctant Redress: The U.S. Kidnapping and Internment of Japanese Latin Americans*, in BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 132, 132 (Nancy L. Rosenblum ed., 2003) (describing the denial of redress for Peruvian citizens of Japanese ancestry kidnapped from their Latin-American homes by the United States, imprisoned in American internment camps and held as hostages during World War II).

52. See Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643 (2004). The "Bracero Program" brought temporary workers to the United States from Mexico to work on farms. *Id.* at 660-61. Under the program, which lasted from World War II through the 1960s, ten percent of the workers' wages were deducted and deposited in banks in both the U.S. and Mexico. *Id.* at 660. This money was to be given to the workers upon their return to Mexico, but none received the money. *Id.* at 660-61. In 2001, a class action on behalf of the braceros was filed against the U.S. and Mexican governments and banks as "part of an effort to use the courts to secure a form of

women.⁵⁴ It also more closely links American reparations with reparation movements in other countries, for instance, the Pan-African campaign for European reparations for slavery and the harms of colonization.⁵⁵

The salience of an encompassing reparations approach was underscored recently in England. As the 200th anniversary of Britain's abolition of slavery approached, British, African, European and Caribbean groups, led by the Pan-African Coalition for Reparation and the Rendezvous of Victory,⁵⁶ pushed then-British Prime Minister Tony Blair to acknowledge England's imperialist history and apologize for its role in promoting the transatlantic slave trade.⁵⁷ In a

reparations for Mexican workers." *Id.* at 661. *See also* Cruz v. United States, 219 F. Supp. 2d 1027 (N.D. Cal. 2002). Although the district court dismissed the lawsuit, the litigation brought attention to the mistreatment of temporary agricultural workers in the United States and Mexico. In 2002, the U.S. House of Representatives passed a resolution commending the work of the braceros in the U.S. World War II effort. *See* Johnson, *supra*, at 661.

53. *See* Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 412-20 (2002) (calling for economic, political, and psychological reparations for Puerto Ricans). Malavet's proposed reparations for Puerto Ricans included the construction of Puerto Rican sovereignty, the "reconstruction of the citizenship of Puerto Ricans through constitutional legal reform," the return of property and monetary compensation for the United States' occupation of the island, full disclosure by the U.S. government of the benefits that it has derived from the U.S.-Puerto Rico relationship, and an apology. *Id.* at 412-420. *See also* Ediberto Roman, *Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits*, 13 BERKELEY LA RAZA L.J. 369, 373 (2002) (suggesting that the "Puerto Rican reparations effort should be re-conceptualized as a coalescing political effort" that raises awareness of the wrongs committed against the Puerto Rican people as a result of Puerto Rico's colonial dilemma, and that "promote[s] political coalition building based on colonial commonalities").

54. *See infra* notes 357-66 and accompanying text (discussing Tuskegee Syphilis Experiment reparations that excluded injured women from the African American reparations discourse and settlement).

55. *See* Jonathan Petre, *Blair's Deep Sorrow for Slavery 'Is Not Enough,'* DAILY TELEGRAPH (London), Nov. 28, 2006, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/11/28/nslave28.xml>.

56. *See id.* (describing groups advocating for a government apology and reparations).

57. *Id.*

widely publicized written statement in late 2006, Blair first acknowledged:

The transatlantic slave trade stands as one of the most inhuman enterprises in history. At a time when the capitals of Europe and America championed the Enlightenment of man, their merchants were enslaving a continent. Racism, not the rights of man, drove the horrors of the triangular trade . . . [and] three million died.⁵⁸

Blair then recognized Britain's active role in the slave trade and acknowledged that Britain's "rise to global pre-eminence was partially dependent on a system of colonial slave labour"⁵⁹ He also expressed regret in saying "how profoundly shameful the slave trade was—how we condemn its existence utterly . . . [and] express our deep sorrow"⁶⁰ His language of mutual engagement hinted at social healing⁶¹:

Community, faith and cultural organisations . . . [and] [w]e in Government, with local authorities, will be playing our full part. And the UK is co-sponsoring a resolution in the UN General Assembly, put forward by Caribbean countries, which calls for special commemorative activities to be held by the United Nations⁶²

Blair's acknowledgment and apology for slavery and commitment to broad-ranging community activities were significant because they were the first by a leader of a former world colonial power instrumental in fueling the slave industry and casting millions into untold misery. Nevertheless, Blair did not commit England to reparations, and some therefore criticized his statement as little more than usual politics—all image, no substance.⁶³ Others, however,

58. *Tony Blair Talks Candidly About Britain's Role in 'The Shame of Slavery,'* NEW NATION (London), Nov. 27, 2006, at 2, available at <http://www.ethnicmedia.co.uk/news/newnationpage2.pdf>.

59. *Id.*

60. *Id.*

61. *See id.*

62. *Id.*

63. *See* Petre, *supra* note 55 (quoting reparations advocate Esther Stanford's characterization of Blair's statement as "empty words").

viewed his tone and substantive acknowledgments as a beginning step toward a much needed national reckoning with the divisive effects of historical slavery and present-day racism.⁶⁴

Will the United States government and its people take the next steps down a path of national reckoning? The process thus far has been marked by fits and starts, and has been riddled with controversy. Will Americans chart a new path toward healing the long-standing wounds of injustice in ways that benefit those harmed, the general populace, and the country itself? The stakes are high: diminishing or perpetuating racial misunderstanding, mistrust, and social division, as well as bolstering or undermining American democracy. The available paths toward reparations are complex and difficult. In light of the impact on America and the world, all have an abiding interest in the future of American reparations theory and practice.

II. REPARATIONS THEORY: A BACKWARD GLIMPSE

With roots in Professor Mari Matsuda's group-rights reparations model⁶⁵ and Professor Derrick Bell's interest-convergence thesis,⁶⁶ the

64. *See id.*

65. *See infra* Part II.A.

66. Derrick Bell's interest convergence theory suggests that dominant groups only recognize "rights" of minorities when the recognition of those rights benefits the dominant group's larger interests. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). Reparations theorists have employed Bell's theory to argue that it is only when whites themselves derive benefit from reparations that redress will become politically feasible. *See Yamamoto, Racial Reparations, supra* note 14, at 497 ("[A] government will rarely simply do the right thing; rather, it is likely to confer reparations only at a time and in a manner that furthers the interests of those in political power."). Reparations for interned Japanese Americans were successful, in part, because awarding reparations to this small number of "highly deserving" citizens enabled the United States "unblushingly to tout democracy and human rights in its hard push against Communism in the Soviet Union and Central Europe." *Id.* at 501. *See also* Charles J. Ogletree Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13, 15-17 (2004) (arguing that a dominant group will only confer benefits on a minority group when it also benefits them; and therefore, arguments for reparations need to be framed in a way that benefits the majority); Rhonda V. Magee, Note, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 908 (1993) (employing the interest-convergent thesis to explain why African Americans have not received reparations for slavery).

theory of reparations-as-repair recently reemerged from the shadows of the stumbling tort litigation-compensation model. It focuses on repairing breaches in the American polity by healing the persisting wounds of injustice.⁶⁷ Those wounds, both material and psychological, damage present-day relations between specific groups and the larger community, ultimately creating divisiveness and distrust.⁶⁸ Reparations aim to repair damage to both group members and the community itself.

This reemergence of repair reflects the latest development in reparations theory—a fourth generation, addressed in depth in Part III. In 2004, Professor Brophy⁶⁹ aptly identified three recent generations of reparations scholarship.⁷⁰ As a backdrop for this article’s main themes, discussed in Part IV and V, we update and summarize the three generations.

A. First and Second Generations Reparations Theory

According to Brophy, beginning in 1986, the first generation “opened the idea that reparations for slavery and other racial crimes

67. See Yamamoto, *Racial Reparations*, *supra* note 14, at 522.

68. *Id.*; see generally YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46.

69. ALFRED L. BROPHY, *REPARATIONS PRO & CON* 62-74 (2006) [hereinafter BROPHY, *REPARATIONS PRO & CON*] (delineating three generations of reparations theory); Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 82 (2004) [hereinafter Brophy, *Reparations Talk*] (describing the evolution in reparations discourse).

70. Brophy, *Reparations Talk*, *supra* note 69, at 81-84. Reparations claims have long been part of the justice landscape in the United States. African[-]American reparations claims “emerged immediately following the Civil War, and the first reparations lawsuit was attempted and failed in 1915.” Eric K. Yamamoto, Susan K. Serrano & Michelle Rodriguez, *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1284 (2003) [hereinafter Yamamoto et al., *American Racial Justice*]. The earliest reparations were with the “forty-acres and a mule” award to freed slaves immediately following the Civil War. *Id.* at 1284 n.79. Dr. Martin Luther King, Jr. also demanded justice in the form of reparations. Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 283 (2003) [hereinafter Ogletree, *Repairing the Past*]. The “first generation” discussed by Professor Brophy, and built upon here, refers to the initial generation of recent reparations theory development emerging out of the modern Civil Rights movement.

were possible”⁷¹ as a group-based remedy for historic injustices.⁷² Most importantly, it introduced the idea of repair as a moral justification for reparations.⁷³ The first generation’s ideas and vocabulary sparked new reparations debates.

More specifically, Professor Matsuda suggested that repairing group-based harms provided conceptual footing for reparations.⁷⁴ She explained that reparations were justified by the “continuing stigma and economic harm,” and the injuries suffered often remained fresh over generations.⁷⁵ Matsuda also urged that the remedy for these harms be forward-looking—it must do more than simply buy off protest or assuage guilt; it must move “us away from repression and toward community.”⁷⁶ Critical race scholars drew upon Matsuda’s insights and began to argue for reparations in different settings.⁷⁷

71. Brophy, *Reparations Talk*, *supra* note 69, at 82.

72. *Id.* at 82 n.2 (citing Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) as the “fountainhead of serious reparations talk”). Brophy also acknowledges that Professor Bittker’s book provided an important model for later reparations theorists. *Id.* (citing BORIS BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973)). See generally Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677 (1999); Magee, *supra* note 66. See also Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483 (2002); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. THIRD WORLD L.J. 429 (1998). In his recent book, Brophy observes that Professor Vincene Verdun’s article, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993), was the first law review article to squarely and exclusively explore the issue of reparations for slavery. BROPHY, *REPARATIONS PRO & CON*, *supra* note 69, at 65-66.

73. See, e.g., Matsuda, *supra* note 72, at 390 (“Reparations recognizes the personhood of victims. Lack of legal redress for racist acts is an injury often more serious than the acts themselves, because it signifies the political non-personhood of victims.”).

74. See *id.* at 374. See also *supra* notes 72-73.

75. Matsuda, *supra* note 72, at 381.

76. *Id.* at 397 (arguing that reparations are not equivalent to a “standard legal judgment,” but instead encompass “formal acknowledgments of historical wrongs, the recognition of continuing injury, and the commitment to redress”). Reparations look to “human experience to guide compensation to those in need.” *Id.*

77. See *supra* note 72 (citing scholars drawing upon Matsuda’s insights).

According to Brophy, the Civil Liberties Act of 1988⁷⁸ encouraged a second generation of contemporary reparations theory through its mandated presidential apology to, and reparations for, World War II Japanese American internees.⁷⁹ That generation linked

78. Civil Liberties Act of 1988, 50 U.S.C. § 1989 (1988) (setting out a presidential apology to and reparations for Japanese Americans interned by the United States during World War II). The Civil Liberties Act of 1988, signed by President Reagan, committed the President to formally apologize for the WWII racial internment and authorized “the payment of \$1.2 billion in reparations to Japanese Americans incarcerated by the USA without charges or trial on account of their race during World War II.” Eric K. Yamamoto & Liann Ebesugawa, *Report on Redress: The Japanese American Internment*, in THE HANDBOOK OF REPARATIONS 257, 257 (Pablo de Grieff ed., 2006). In addition to the monetary reparations, Japanese American redress in the United States contributed to movements worldwide for reparations for historic injustice. See Matsuda, *supra* note 72 (articulating a theory for Native Hawaiian reparations for the illegal United States overthrow of the sovereign Hawaiian nation); Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study*, 40 B.C. L. REV. 275 (1998) (discussing the United States’ denial of reparations for interned Japanese Latin Americans under the Civil Liberties Act); Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER, RACE & JUSTICE 47 (1997) [hereinafter Yamamoto, *Race Apologies*] (assessing the reconciliation process between whites and blacks in South Africa for the racial suppression of black South Africans); Yamamoto, *Racial Reparations*, *supra* note 14 (framing African American arguments for slavery and Jim Crow reparations); Kristl K. Ishikane, Comment, *Korean Sex Slaves’ Unfinished Journey for Justice: Reparations from the Japanese Government for the Institutionalized Enslavement and Mass Military Rapes of Korean Women During World War II*, 29 U. HAW. L. REV. 123 (2006) (analyzing the Japanese government’s failure to redress the horrific harms of sexual enslavement of Korean women during World War II).

79. Brophy, *Reparations Talk*, *supra* note 69, 82 n.3 (citing YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46). See also ROY L. BROOKS, *INTEGRATION OR SEPARATION? A STRATEGY OF RACIAL EQUALITY* (1996); BROPHY, *REPARATIONS PRO & CON*, *supra* note 69, at 69-74 nn.55-70 (citing RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS*, at ix (2000) (arguing that reparations are owed, not just morally but legally and crediting Ibrahim Gassama and Robert Westley with providing the grounding for that argument)); Martha Minow, *Memory and Hate: Are There Lessons from Around the World?*, in *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR*, *supra* note 51, at 14; William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 99-100 (2002); David Lyons, *Reparations and Equal Opportunity*, 24 B.C. THIRD WORLD L.J. 177 (2004); Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S.U. L. REV. 25 (2001); Yamamoto, *Critical Race Praxis*, *supra* note 8; Manning Marable, *In Defense of Black Reparation*, *ALONG THE*

reparations discourse to legal and political movements in an attempt to make reparations a reality for many groups.⁸⁰ In particular, it helped ignite public organizing around prospects for African American redress.⁸¹ In doing so, the second generation contemplated what reparations might encompass and how reparations might foster group healing.⁸² Indeed, in the late 1990s, South Africa's Truth and Reconciliation Commission⁸³ showed the world that reparations and reconciliation could go hand in hand—repairing the long-standing harms to group members in order to mend broken inter-group relationships.⁸⁴ The second generation thus aspired to offer something

COLOR LINE, Oct. 2002, *available at* <http://www.manningmarable.net/works/pdf/oct02a.pdf> (viewing the goals of reparations as justice and equity and the reparations movement as a movement to reconceptualize politics and a society structured around white supremacy).

80. Yamamoto, *Cultural Race Praxis*, *supra* note 8, at 874-75 (calling for enhanced attention to theory translation and deeper engagement with frontline action).

81. *See, e.g.*, Adjoa A. Aiyetoro, *The National Coalition of Blacks for Reparations in America (N'COBRA): Its Creation and Contribution to the Reparations Movement*, in SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS, *supra* note 31, at 209-10.

82. *See, e.g.*, ROBINSON, *supra* note 79, at ix (proposing a trust fund to aid the poorest and most disadvantaged African Americans who have been left the furthest behind as well as aid for both the economic and spiritual growth of those injured from the legacy of slavery); YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, 172-209. *See also* Marable, *supra* note 79 (arguing for a wholesale remaking of American institutions).

83. *See* Roy L. Brooks, *Introduction to WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 10-11 (Roy L. Brooks ed., 1999) (describing the South Africa's Truth and Reconciliation Commission's work and impact); Yamamoto, *Race Apologies*, *supra* note 78, at 48 (discussing the use of apologies and reparations as peaceful solutions to current conflicts among racial groups).

84. Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 *ASIAN PAC. AM. L.J.* 33 (1995) (discussing the concept of interracial justice, which places responsibility and agency between continued subordination and emerging power); *see generally* Yamamoto, *Racial Reparations*, *supra* note 14 (discussing racial reparations in the context of Japanese Americans and African Americans). *See also* Brophy, *Reparations Talk*, *supra* note 69, at 82 n.3 (discussing Yamamoto's focus on reparations for racial healing).

more than monetary compensation. It aimed for reparations as an integral aspect of a larger mutually engaged project of repair.⁸⁵

The second generation theory-building also strategically identified a “darker side” to reparations efforts.⁸⁶ That dark side encompassed “the distorted legal framing of reparations claims,”⁸⁷ the “dilemma of reparations process,”⁸⁸ and the “ideology of reparations.”⁸⁹ These

85. See Eric K. Yamamoto, *Beyond Redress: Japanese Americans' Unfinished Business*, 7 ASIAN L.J. 131, 136-37 (2000); see also YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 196 (discussing forgiveness as a reaction and describing it as a “mutual transformation”); Yamamoto, *Racial Reparations*, *supra* note 14.

86. Yamamoto, *Racial Reparations*, *supra* note 14, at 487.

87. *Id.* This distorted legal framing subjects reparations claims to dismissal by courts on technical legal grounds, but makes them appear meritless to the public. Yamamoto argues that framing reparations claims as traditional common-law tort claims, which focus on individual rights and remedies, erects inordinately high barriers in practical legal application. See *id.* at 487-88. Opponents respond to reparations claims framed in this way with tight legal defenses. *Id.* at 489-91. First, opponents suggest that “existing civil rights laws already afford individuals equal opportunity,” and “there is no need for additional reparations” *Id.* at 487-88. Second, opponents focus on narrow legal concerns:

They argue the criminal law defense of bad intent on the part of the wrongdoers; they assert the procedural bar of lack of standing by claimants (the difficulty of identifying specific perpetrators and victims); they cite the lack of legal causation (specific acts causing specific injuries); and they cite the impossibility of accurately calculating damages (or compensation).

Id. at 488. Those reparations claims that have been successful, like the Japanese American internment claims, have succeeded “not because they transcended the individual rights paradigm, but because they were able to fit their claims tightly within it.” *Id.* at 490.

88. *Id.* at 487. Reparations claims inevitably engender backlash and negative reaction. According to Yamamoto, the dilemma of reparations speaks to the potential backlash or victim entrenchment:

Reparations, if thoughtfully conceived, offered and administered, can be transformative. . . . When reparations stimulate change, however, they also generate resistance. Proponents suffer backlash. Thus, when reparations claims are treated seriously, they tend to recreate victimhood by inflaming old wounds and triggering regressive reactions.

Id. at 494.

89. *Id.* at 497. Ideology separates the reparations “haves” from the “have nots,” ideologically defining who is “worthy” of redress. The third aspect of the underside of reparations process, the ideology of reparations, is illuminated by Derrick Bell’s interest-convergence thesis. See Bell, *supra* note 66. This thesis suggests that “dominant groups only recognize ‘rights’ of minorities when the recognition of

potentially negative dimensions to the pursuit of reparations did not argue against asserting redress claims. Rather, they counseled careful strategic attention by those seeking reparations to the full range of bright and dark socio-legal consequences.⁹⁰

Finally, the second generation argued that because reparations claims are complex, they needed to be approached with a sound conceptual framework and a comprehensive strategic legal and political plan.⁹¹ The next generation of reparations scholarship largely centered its plan on the legal system.

B. The Third Generation: Reparations as Legal Compensation

As Professor Brophy describes, the third generation focused on the specifics of “what the case for reparations looks like and how it fits within well-established legal principles,” particularly tort and contract claims.⁹² Early in the millennium, bolstered by Randall Robinson’s highly publicized book, *The Debt*, this generation endeavored to construct a legally enforceable claim for reparations,

those rights benefits the dominant group’s larger interests.” Yamamoto, *Racial Reparations*, *supra* note 14, at 497. This creates the danger that when reparations are received, and supported by the dominant group, the reparations are only a “monetary buy-off of protest, an assuaging of white American guilt” *Id.* at 501. Therefore, leaving undisturbed the social structural sources of racial grievance may “neutralize the need to strive for justice.” *Id.* (quoting Edmonds, *Beyond Prejudice Reduction*, MCS CONCILIATION Q., Spring 1991, at 15).

90. See Yamamoto, *Racial Reparations*, *supra* note 14, at 487.

91. *Id.*

92. Brophy, *Reparations Talk*, *supra* note 69, at 85 (citing to many reparations theorists who advocate a tort-law approach). See generally Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003) (discussing problems with theories involving lawsuits and the constitutionality of legislatively granted reparations, while suggesting ways that reparations might be implemented); CLARENCE J. MUNFORD, RACE AND REPARATIONS 207-21 (1996); Malavet, *supra* note 53, at 390-92; Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309, 358-84 (2003) (exploring how reparations claims might work against corporations); Roman, *supra* note 53, at 371; Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191 (2003); Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES L. 1 (2000) (arguing that restitution for any wrongful gain is “unsatisfactory because it fails to link the damages that the plaintiff receives to the normative quality of the defendant’s wrong”).

asking how African Americans can, individually and as a group, obtain reparations through the courts.⁹³

In response to this query, third generation reparations scholars aimed to fit reparations claims into a traditional tort law framework.⁹⁴ Many scholars focused on slavery-based claims and argued both intentional torts and unjust enrichment as viable bases of recovery.⁹⁵ Others suggested similar tort claims, but rooted them in Jim Crow segregation rather than slavery.⁹⁶ Still, others focused on discernable instances of violence against African Americans, limited in time and space,⁹⁷ like the Tulsa Race Riots⁹⁸ and the destruction of the town of Rosewood.⁹⁹ While acknowledging sizeable hurdles,¹⁰⁰ this third

93. See generally ROBINSON, *supra* note 79; see also Brophy, *Reparations Talk*, *supra* note 69, at 85 (“[The] third generation . . . seeks to identify how reparations lawsuits might work and how the law might be used to frame reparations claims to a legislature.”).

94. Brophy, *Reparations Talk*, *supra* note 69, at 103-04, 120, 126 (analyzing whether the torts of assault, battery, conversion of property, and false imprisonment, as well as unjust enrichment, provide viable claims for reparations, and whether those claims create an apt framework for understanding the harms of slavery, past and present); see also Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209 (2004) (critiquing the limits of the traditional tort law model); Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45 (2004) [hereinafter Miller, *Reconceiving Reparations*] (describing tort-based reparations litigation).

95. See BROPHY, REPARATIONS PRO & CON, *supra* note 69, at 122-26 & n.94 (citing Hannoeh Dagen, *Restitution and Slavery*, 84 B.U. L. REV. 1139 (2004); Andrew Kull, *Restitution in Favor of Former Slaves*, 84 B.U. L. REV. 1277 (2004); Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443 (2004)).

96. Some proponents argued that Jim Crow claims were more compelling than slavery claims because the victims are often still alive, the evidence is often stronger than in slavery cases, it occurred more recently than slavery, the victims and perpetrators are easy to identify, and it was illegal at the time. See BROPHY, REPARATIONS PRO & CON, *supra* note 69, at 85-86.

97. *Id.* at 127-28 & n.107 (citing Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263 (2003); Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557 (2003)).

98. *Alexander v. Oklahoma*, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131 (D. Okla. Mar. 19, 2004), *aff'd*, 382 F.3d 1206 (10th Cir. 2004). See BROPHY, RECONSTRUCTING THE DREAMLAND, *supra* note 22, for a detailed examination of the riot.

99. In 1923, in the town of Rosewood, Florida, a group of whites burned the town which was inhabited entirely by African Americans (except for the sole white

generation laid the foundation for formal reparations claims,¹⁰¹ pushing reparations theory beyond academia and into the courtroom¹⁰² and the legislature.¹⁰³

These formal reparations claims cast reparations as legally enforceable demands for compensation (i.e., repayment of “the debt”) and generated heated opposition from many sources.¹⁰⁴ The demands

store owner), and killed at least eight people. Emma Coleman Jordan, *The Non-Monetary Value of Reparations Rhetoric*, 6 AFR.-AM. L. & POL’Y REP. 21, 21-22 (2004). The precipitating event was the claim by a white woman in a neighboring town that she had been raped by a black man, although no such man was ever found. Martha Minow, Not Only for Myself: Identity, Politics, and Law, Address at the Colin Ruagh Thomas O’Fallon Memorial Lecture (Mar. 7, 1996), in 75 OR. L. REV. 647, 679-80 (1996). In May 1994, the Governor of Florida signed into law a claims bill to compensate families of residents who lost property, and to create a minority college scholarship fund with preferences to descendants of Rosewood. See FLA. STAT. ANN. § 1009.55 (West Supp. 2003); 1994 Fla. Sess. Law Serv. 94-359 (West) (repealed 2000).

100. Brophy, *Reparations Talk*, *supra* note 69 (observing that there are high hurdles to overcome in such a suit: statute of limitations, sovereign immunity, identification of victims, identification of plaintiffs, causation and measurement of harm); Hylton, *supra* note 94 (recognizing that the derivative nature of tort claims for slavery, as well as the passage of time, and the sufficiency of tort law to provide compensation for the worst evils of slavery present special obstacles for plaintiffs, but arguing that the fact that slavery was entirely within the law during the time it was practiced does not present a substantial obstacle); Ogletree, *Repairing the Past*, *supra* note 70 (identifying the difficulties facing lawsuits for slavery and Jim Crow: the suits must identify the parties with some specificity, overcome the statute of limitations and perhaps sovereign immunity, and provide some form of a definite remedy).

101. See *supra* note 93.

102. See, e.g., *In re African-American Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006); *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).

103. Congressman John Conyers has introduced a resolution every congressional session since 1989. See *supra* note 36 and accompanying text. However, the resolution has never made it out of a committee hearing for a vote. See also BROPHY, REPARATIONS PRO & CON, *supra* note 69, app. 3, at 191. Also, a number of cities have recently passed ordinances that require companies doing business with a city to disclose any historical connections the company has with slavery or the slave trade. See *supra* note 5.

104. See, e.g., PETER FLAHERTY & JOHN CARLISLE, NAT’L LEGAL & POLICY CTR., THE CASE AGAINST SLAVE REPARATIONS (2004), available at http://www.nlpc.org/pdfs/Final_NLPC_Reparations.pdf (arguing that reparations attorneys, including the Reparations Coordinating Committee are engaged in a shakedown of the American people via the courts); David Horowitz, *Ten Reasons*

generated tight legal defenses from lawyers (standing, statute of limitations),¹⁰⁵ strong rebukes from conservative scholars (why give money to Michael Jordan and Oprah Winfrey?),¹⁰⁶ and general skepticism (why should I pay when I didn't do anything illegal?).

C. *The Faltering Federal Court Litigation*

The staccato failure of recent reparations lawsuits fueled a growing sense that traditional tort and contract law were a misfit in the reparations context.¹⁰⁷ For example, the slavery-based class action by

Why Reparations for Blacks is a Bad Idea for Blacks—and Racist Too, FRONTPAGE MAG., Jan. 3, 2001, available at <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=1153>.

105. For example, corporate defendants have successfully argued that the statute of limitations prevents such suits from proceeding. *In re African-American Slave Descendants Litig.*, 471 F.3d at 763.

106. See, e.g., John McWhorter, *Against Reparations*, in SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS, *supra* note 31, at 180; Shelby Steele, . . . *Or a Childish Illusion of Justice?: Reparations Enshrine Victimhood, Dishonoring Our Ancestors*, NEWSWEEK, Aug. 27, 2001, at 23.

107. The traditional tort framework with its focus on individual rights and remedies has erected high barriers for reparations claims, including:

- (1) the statute of limitations (“this all happened over one hundred years ago”);
- (2) the absence of directly harmed individuals (“all ex-slaves have been dead for at least a generation”);
- (3) the absence of individual perpetrators (“white Americans living today have not injured African Americans and should not be required to pay for the sins of their slave master forbearers [sic]”);
- (4) the lack of direct causation (“slavery did not cause the present ills of African American communities”);
- (5) the indeterminacy of compensation amounts (“it is impossible to determine who should get what and how much”); and
- (6) sovereign immunity (where the claims seek damages from government).

Yamamoto et al., *American Racial Justice*, *supra* note 70, at 1302-03. The tort law approach equates remedy with “reparations” and reparations with “monetary compensation.” By demanding findings that individuals were at fault based on specific acts of wrongdoing resulting in injuries to identifiable direct victims whose injuries are quantifiable (in dollars), it sets the participants on a wild goose chase—searching for answers appropriate in a car accident suit but not for most “repairation” situations. The narrow “ordinary” legal framing of an “extraordinary” social reparatory process thus generates well-established legal objections that can never (or rarely) be overcome. Thus, for example, opponents of African American reparations easily framed their objections in narrow legalistic terms—the federal court dismissed the *Farmer-Paellman* suit in part because the plaintiff lacked “standing to

Deadria Farmer-Paellmann against corporate defendants¹⁰⁸ succumbed at the threshold.¹⁰⁹ In 2004, amid heightening controversy about African American reparations,¹¹⁰ Federal District Court Judge Charles Norgle dismissed the Farmer-Paellman class action along with other similar suits. Judge Norgle held that the plaintiffs lacked standing to assert the aging tort and unjust enrichment claims and advised African Americans to look to legislatures rather than courts for redress.¹¹¹

On appeal from the dismissal of the consolidated class actions, in *In re African-American Slave Descendants Litigation*,¹¹² the Seventh Circuit firmly closed the federal courts to all major slavery reparation claims. The court upheld the lower court's ruling that the slave descendants lacked standing to pursue their tort and unjust enrichment claims.¹¹³ Writing for the court, Judge Richard Posner observed that "[i]t would be impossible by the methods of litigation to connect the defendants' alleged misconduct with the financial and emotional harm that the plaintiffs claim to have suffered as a result of that conduct."¹¹⁴ Moreover, "there is a fatal disconnect between the [slaves] and the plaintiffs."¹¹⁵ The "causal chain is too long and has too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all, let alone in an amount that could be estimated without the wildest speculation."¹¹⁶

In a single broad swoop, Posner dismissed all the detailed economic studies showing connections between the enslavement of individuals and subsequent economic effects on ancestors. He ignored the studies' specific empirical findings and observed simply that

sue" because she could not show a personal harm directly traceable to the slavery business operations of the defendants.

108. Complaint and Jury Trial Demand, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, (E.D.N.Y. Mar. 26, 2002) (No. CV-02-1862).

109. Yamamoto et al., *American Racial Justice*, *supra* note 70, at 1318.

110. *See, e.g.*, PETER FLAHERTY & JOHN CARLISLE, *supra* note 104.

111. Lori Rotenberk, *Slavery Reparations Lawsuit Dismissed: Families Had Argued that Firms Benefited*, BOSTON GLOBE, Jan. 27, 2004.

112. *In re African-American Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006).

113. *Id.* at 759.

114. *Id.*

115. *Id.*

116. *Id.*

“these are studies of aggregate effects, not of the effects of particular acts, affecting particular individuals, on the wealth of specific remote descendants.”¹¹⁷ Citing no sources, Posner then concluded with language clearly intended to foreclose all major African American reparations claims: “There is no way to determine that a given black American today is worse off by a specific, calculatable sum of money (or monetized emotional harm) as a result of the conduct of one or more of the defendants.”¹¹⁸

Posner did note two exceptions to the court’s broad rejection of slavery-based claims.¹¹⁹ First, a slave descendant may state a cognizable legal claim if:

[O]ne or more of the defendants violated a state law by transporting slaves in 1850, and the plaintiffs can establish standing to sue, prove the violation despite its antiquity, establish that the law was intended to provide a remedy (either directly or by providing the basis for a common law action for conspiracy, conversion, or restitution) to lawfully enslaved persons or their descendants, identify their ancestors, quantify damages incurred, and persuade the court to toll the statute of limitations¹²⁰

Only in those extremely limited circumstances, which the court indicated would be impossible to prove, would a cognizable claim exist.¹²¹

Second, an individual today may be able to state a claim under state law for fraud or consumer protection violations.¹²² The plaintiffs alleged that they bought products or services that they “would not have bought had the defendants not concealed their involvement in slavery.”¹²³ Posner recognized that the plaintiffs were asserting injuries from alleged fraud by the defendants in recent business

117. *Id.* at 760 (citing Kerwin Kofi Charles & Erik Hurst, *The Correlation of Wealth Across Generations*, 111 J. POL. ECON. 1155 (2003); Hylton, *supra* note 94, at 1239-41).

118. *Id.*

119. *Id.* at 762-63.

120. *Id.* at 759.

121. *Id.* at 758-59.

122. *Id.* at 762.

123. *Id.*

transactions.¹²⁴ While recognizing a possible claim for consumer fraud in concept, Posner practically foreclosed maintenance of those claims in federal court by stating that “under no consumer protection law known . . . has a seller a general duty to disclose every discreditable fact about himself that might if disclosed deflect a buyer.”¹²⁵ Thus, the two possible claims noted by the Seventh Circuit are largely illusory. The court set an insurmountable evidentiary bar for the first, and found the second to be unsupported by law.

The Seventh Circuit’s decision mirrored much of the Tenth Circuit’s earlier affirmation of the dismissal of the Tulsa Race Riots suit against the city of Tulsa and government officials.¹²⁶ The court in *Alexander v. Oklahoma* found that although there existed exceptional circumstances that tolled the statute of limitations¹²⁷ in the immediate aftermath of the 1921 Riot and for several decades thereafter, the tolling ended at an unspecified time before the filing of the suit.¹²⁸

D. The Brown University Illustration

Despite the federal courts’ rejection of these reparations suits, the third generation litigation-compensation model continues to dominate public perceptions. The public’s reaction to Brown University’s reparations steering committee illustrates this. In April 2003, Brown’s President, Ruth Simmons, announced the creation of a committee “to help the campus and the nation come to a better understanding of the complicated, controversial questions surrounding the issue of

124. *Id.* at 762. The court provided an example of such a claim: a manufacturer who represents that his products were made in the United States by companies that employ only union labor, whereas in fact they were made in Third World sweatshops. *Id.* at 763 (citing *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002); *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 19 (Ill. 2005), *cert. denied*, 127 S. Ct. 685 (2006); *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 154-55 (Ill. 2002); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1185 (3d Cir. 1993)).

125. *In re African-American Slave Descendants Litig.*, 471 F.3d at 762-63.

126. *See generally* *Alexander v. Oklahoma*, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131 (D. Okla. Mar. 19, 2004), *aff’d*, 382 F.3d 1206 (10th Cir. 2004).

127. *Alexander*, 382 F.3d at 1219. The court explained that “at the time of the Riot the victims were powerless against the white majority. Meaningful access to the courts was denied, as was any ability to obtain damages for property losses. Also, a widespread fear of reprisals pervaded the African-American community.” *Id.*

128. *Id.* at 1219-20.

reparations for slavery.”¹²⁹ Specifically, President Simmons charged the faculty-student committee with organizing educational forums to foster rigorous historical inquiry and “provide factual information and critical perspectives that will deepen our understanding.”¹³⁰

As the Committee’s inquiry later revealed, the University had links to the slave trade, mostly through the Brown family, the namesake of the University.¹³¹ Brown’s connections to the slave trade are complex. The Brown family profited from the slave trade, yet prominent members opposed slavery.¹³² Because the University was “founded using money made from the slave trade, partly as recompense for the evils of the trade,”¹³³ Brown appeared to provide an ideal educational platform for public discussion about the history of slavery and present-day responsibility for healing any lasting wounds.

Yet, President Simmons’ singular act of forming a committee to inquire and educate generated a flurry of heated reactions within and beyond the university—almost entirely rooted in the notion of reparations-as-compensation.¹³⁴ President Simmons’ instructions to

129. Letter from Ruth J. Simmons, President, Brown University, to Steering Committee on Slavery and Justice, Brown University (Apr. 30, 2003), *available at* http://brown.edu/Research/Slavery_Justice/about/charge.html. The Universities of Alabama and North Carolina also issued apologies for their involvement with slavery. *See* Wendy Koch, *Va. 1st State to Express ‘Regret’ over Slavery*, USA TODAY, Feb. 26, 2007, at 5A.

130. Letter from Ruth J. Simmons, *supra* note 129.

131. *Slavery, the Brown Family of Providence and Brown University*, Brown U. News Service, http://www.brown.edu/Administration/News_Bureau/Info/Slavery.html (last visited June 30, 2007) [hereinafter *Brown Family*]; STEERING COMM. ON SLAVERY & JUSTICE, BROWN UNIV., *SLAVERY AND JUSTICE* (2006) [hereinafter *COMM. ON SLAVERY*], *available at* http://brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf; *see also* Alfred L. Brophy, *Considering Universities’ Moral Culpability in Slavery*, 18-22 (2005) (unpublished manuscript, on file with author) [hereinafter Brophy, *Moral Culpability*].

132. The Brown family profited from slavery. *Brown Family*, *supra* note 131. Indeed, the Rhode Island economy was a center of the northern slave trade in the eighteenth century. *See id.* However, there was also an anti-slavery strand within the Brown family; Moses Brown became a staunch abolitionist in the late eighteenth century and was instrumental in achieving anti-slavery legislation. *Id.*

133. Brophy, *Moral Culpability*, *supra* note 131, at 1.

134. *See* Laura Martin, *Committee on Slavery and Justice Will Accomplish Little*, BROWN DAILY HERALD, Oct. 21, 2004 (suggesting that the reason for Brown’s creation of the Steering Committee was to “cover its rear end from

the Committee did not mention money.¹³⁵ Even before it convened, critics charged that the Committee's planned process of inquiry, assessment, and recommendation was nothing more than a prelude to massive University-paid compensation to blacks.¹³⁶ Critics argue that the committee was actually a cover to avoid paying reparations and to preempt potential lawsuits.¹³⁷

Placed on the defensive from the outset, the Committee's chair worked continually to diffuse the notion that the Committee's work was simply a veil for the University's forthcoming reparation payments.¹³⁸ Indeed, the Committee's final report in 2006 concluded by focusing on repair rather than monetary payments¹³⁹:

lawsuits" and therefore, the formation of the committee was "not a sincere academic exploration, but rather a politically motivated program to benefit Brown University—and not the state that surrounds it"); see also Stephen Beale, *Brown's Reparations Ruse*, FRONTPAGE MAG., Jan. 20, 2005, available at <http://www.frontpagemag.com/Articles/printable.asp?ID=16696>.

135. Beale, *supra* note 134 (citing Simmons as stating to the *Boston Globe* that the "committee's work is not about whether or how we should pay reparations." However, Beale notes this statement suggests that President Simmons is "very open to the idea of [paying] reparations"). The *New York Times* reported that Brown convened the committee to undertake "an exploration of reparations for slavery and specifically whether Brown should pay reparations or otherwise make amends for the past." *Id.*

136. See generally *id.*

137. *Id.* (referring to attorneys who had listed Brown as a probable defendant in future lawsuits).

138. E-mail from James Campbell, Chair of Brown's Steering Committee on Slavery and Justice, to Camille Kalama & Eric K. Yamamoto (April 1, 2005) (on file with author).

139. COMM. ON SLAVERY, *supra* note 131. The final Report focused on three elements of the President's original charge. First, the Report provided a historical examination of the institution of slavery and the University's relationship to slavery. *Id.* at 7-31. This section gives a brief overview of the history of slavery, focused primarily on the New England slave trade. *Id.* at 8-11. In examining these issues, the Report focused on the Brown family and its role in slavery and the founding of Brown University. *Id.* at 12-18. The Brown family, which contained both pro-slavery and abolitionist members, became entwined with Brown University. The family provides an example of the complicated issues surrounding slavery and the formation and early years of Brown University. *Id.* at 14-25. Second, the Report "examine[d] 'comparative and historical contexts' that might illuminate Brown's situation, as well as the broader problem of 'retrospective justice.'" *Id.* at 32. The Report briefly discussed international reparations attempts, including Nuremburg, the South African Truth and Reconciliation Commission, the National Commission

In the course of its research, the Steering Committee examined dozens of examples of retrospective justice initiatives from around the world. It found that while each case is unique, the most successful initiatives generally combine three elements: formal acknowledgement of an offense; a commitment to truth telling, to ensure that the relevant facts are uncovered, discussed, and properly memorialized; and the making of some form of amends in the present to give material substance to expressions of regret and responsibility.¹⁴⁰

for Truth and Reconciliation in Chile, the Historical Clarification Commission of Guatemala, the Holocaust litigation, and Korean “comfort women.” *Id.* at 32-58. The Report also touched on instances of international apology: West German Chancellor Konrad Adenauer’s 1951 statement acknowledging the responsibility of the German people for the crimes of the Holocaust; Queen Elizabeth II’s 1995 apology to the Maori of New Zealand for the “loss of lives [and] the destruction of property and social life”; Pope John Paul II’s 2000 apology on behalf of the Catholic Church for a long catalogue of sins; and the U.S. Senate’s 2005 resolution formally apologizing for the Senate’s role in abetting the lynching of African Americans by refusing to enact a federal anti-lynching statute. *Id.* at 41, 68. The Report also recognized the challenges facing reparations efforts, including the difficulty of calculating damages, the passage of time, and the limits of litigation. *Id.* at 50-54. Third, the Report examined the current national reparations debate taking place in this country. The Report does not resolve any issues; it only claims to “illuminate questions and contexts that are often overlooked in public discussion today.” *Id.* at 6. This section ends with a picture of the persistence of racial inequality in America today, exemplified by Hurricane Katrina and its lingering questions:

How does a society “repair” such deeply-rooted economic, political, and psychological divisions? Is the discourse of reparations, with its emphasis on “healing injuries” and remedying past injustice, a useful medium for thinking about our responsibilities in the present? Are exercises in retrospective justice inherently divisive and backward looking, as some critics have alleged, or can they provide a way to nurture common citizenship and awaken new visions of the future? How might such programs work in practice?

Id. at 79.

140. *Id.* at 83. The Report concludes with a number of recommendations based on these three elements. The first is “[a]cknowledgment” or apology, which at a minimum, acknowledges “formally and publicly the participation of many of Brown’s founders and benefactors in the institution of slavery and the transatlantic slave trade, as well as the benefits that the University derived from them.” *Id.* The second is to “[t]ell the truth in all its complexity.” *Id.* To accomplish this, the Committee recommends that the University release the entire Report, sponsor public

III. THE REEMERGENCE OF “REPAIR”

Because of the severe limitations of the third generation litigation-compensation approach to reparations, an emerging fourth generation now recalls and expands on the original repair paradigm for reparations. This reemphasis on repairing the lasting harms of injustice shifts the focus of reparations theory and practice away from tight legalities. Instead, it refocuses efforts on the language and strategies for healing the lasting material and psychological wounds of slavery and Jim Crow segregation, both for African Americans and the rest of American society.¹⁴¹ As discussed later, this fourth generation theory is both compelling and a work-in-progress.¹⁴²

Focusing primarily on African American reparations claims, this fourth generation coalesces generally around three dimensions of “repair”¹⁴³: recognizing and accepting responsibility for historic injustice;¹⁴⁴ repairing present-day damage traceable to past injustice;¹⁴⁵ and building productive group relationships.¹⁴⁶

forums, include discussions of the University’s history in freshman orientation, commission a new history of the University, and help other institutions. *Id.* at 83-84. The third is “[m]emorialization,” including a public competition to design and build a slave memorial and a designated day of remembrance. *Id.* at 84. The fourth is to “[c]reate a center for continuing research on slavery and justice.” *Id.* at 84. The fifth is to “[m]aintain high ethical standards in regard to investments and gifts.” *Id.* at 85. The sixth is to “[e]xpand opportunities at Brown for those disadvantaged by the legacies of slavery and the slave trade.” *Id.* The seventh is to “[u]se the resources of the University to help ensure a quality education for the children of Rhode Island.” *Id.* at 86. And finally, the eighth is to “[a]ppoint a committee to monitor implementation of these recommendations.” *Id.* at 87.

141. See generally ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (2004) [hereinafter BROOKS, ATONEMENT AND FORGIVENESS]; BROPHY, REPARATIONS PRO & CON, *supra* note 69, at 7; Roy L. Brooks, *The Slave Redress Cases*, 27 N.C. CENT. L.J. 130 (2005) [hereinafter Brooks, *The Slave Redress Cases*]; Brophy, *Reconsidering Reparations*, *supra* note 7; Miller, *Reconceiving Reparations*, *supra* note 94, at 61-78; Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051 (2003) [hereinafter Ogletree, *The Current Reparations Debate*].

142. See *infra* text accompanying notes 147-61.

143. See Ogletree, *Repairing the Past*, *supra* note 70, at 284.

144. See, e.g., YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 46, at 174-90 (describing “recognition” and “responsibility” as key dimensions of “repair”).

145. See BROPHY, REPARATIONS PRO & CON, *supra* note 69, at 7 (stating that reparations proponents advocate for “‘corrective-justice,’ which refers to

The current scholarship of Professor Charles Ogletree, leader of the Reparations Coordinating Committee that initiated the Tulsa Race Riots suit,¹⁴⁷ is emblematic of the fourth generation of reparation theory.¹⁴⁸ Briefly stated, Ogletree emphasizes the need to repair a society damaged by its deep history of racism, including slavery, segregation, and modern-day discrimination.¹⁴⁹ Repair efforts by governments, businesses, and social groups should target damage where it is most severe: in education, health care, housing, insurance, employment, and social welfare.¹⁵⁰ Scholarly writing similarly suggests a repair-informed justification for reparations—healing the wounds of African Americans and simultaneously repairing tears in America’s social fabric.¹⁵¹

Professor Roy Brooks’ recent writing also embraces the reemergent repair approach. Brooks sees the underpinnings of the tort law litigation model as a misfit for African American reparations claims.¹⁵² He argues instead for a non-law, moral reconceptualization of reparations, suggesting an atonement model infused with Christian religious concepts.¹⁵³ Professor Eric Miller also criticizes the tort model but does not counsel abandoning reparations litigation

acknowledging and repairing past harm, and to ‘distributive justice,’ which refers to distributing property in a fair manner”).

146. See, e.g., YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 172-74 (addressing intergroup healing as a key aspect of “repair”).

147. *Alexander v. Oklahoma*, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131 (D. Okla. Mar. 19, 2004), *aff’d*, 382 F.3d 1206 (10th Cir. 2004).

148. See generally Ogletree, *The Current Reparations Debate*, *supra* note 141.

149. *Id.* at 1055-56.

150. *Id.* at 1071. Professor Ogletree suggests the formation of a “Reparations Trust Fund” to benefit the “poorest of the poor.” The trust fund would finance social recovery for the “bottom-stuck,” enabling individuals of all races “to participate in a movement away from poverty and towards an acceptable standard of living.” Improving the “quality of life for the poorest of the poor” would improve “the quality of our entire nation.” *Id.*

151. See Yamamoto, *Racial Reparations*, *supra* note 14.

152. BROOKS, *ATONEMENT AND FORGIVENESS*, *supra* note 141 (arguing that there will be no success for slave redress cases unless the United States litigation system adopts a “moral justice” norm to justify reparations claims); Brooks, *The Slave Redress Cases*, *supra* note 141, at 133 (surveying slave-redress lawsuits that failed because “[c]ivil litigation in this country operates under a retributive model of justice—‘legal justice’—rather than a restorative model—‘moral justice’”).

153. BROOKS, *ATONEMENT AND FORGIVENESS*, *supra* note 141.

altogether.¹⁵⁴ Instead, he conceives reparations claims as integral in the process of educating the “community about the state of race relations in the community affected.”¹⁵⁵ Whether through lawsuits, such as the Tulsa Race Riots suit,¹⁵⁶ or legislative proposals, his process-oriented “conversational” model aims to repair damage to African Americans and society through dialogue and mutual action.¹⁵⁷ Professor Brophy aptly identifies a common thread: “[m]ost serious reparations scholarship is premised in large part, though not exclusively, on the idea that by repairing past harm, our country can build something better for the future.”¹⁵⁸

This renewed attention in the repair paradigm is important because it moves past the flagging tort litigation-compensation model for reparations, offers a forward-looking remedy, and aims to generate an interest-convergence among the varying slices of the American polity.¹⁵⁹ The fourth generation is also significant because it frames the moral justification for reparations away from repaying “a debt owed”¹⁶⁰ toward social healing.¹⁶¹

The reemergent repair paradigm, however, is itself limited. First, it does not fully engage multidisciplinary understandings of healing, either for individuals, social groups, or society itself.¹⁶² Without this

154. Miller, *Reconceiving Reparations*, *supra* note 94, at 46. Professor Miller suggests that the current “confrontational” model of reparations and its legal expression in tort and unjust enrichment lawsuits have led to the characterization of reparations as a racist, divisive attack on white America, exemplified in David Horowitz’s controversial anti-reparations advertisement. *See, e.g.*, Horowitz, *supra* note 104. Miller argues that what is needed is a “conversational” model for reparations. Miller, *supra*, note 94, at 64-71.

155. Miller, *Reconceiving Reparations*, *supra* note 94, at 63.

156. *Alexander v. Oklahoma*, 2004 U.S. Dist. LEXIS 5131 (D. Okla. March 19, 2004), *aff’d*, 382 F.3d 1206 (10th Cir. 2004).

157. *See* Miller, *Reconceiving Reparations*, *supra* note 94, at 65. This approach to reparations embraces the precept that “morality should be considered as a process of argument—of stating one’s position in relation to another, and elaborating the claims that one can make on the other, or the other can make on oneself.” *Id.*

158. Brophy, *Reconsidering Reparations*, *supra* note 7, at 823.

159. *See* Bell, *supra* note 66, at 523 (describing interest-convergence thesis).

160. ROBINSON, *supra* note 79.

161. *See generally* HARLON L. DALTON, *RACIAL HEALING* (1995) (introducing “healing” into the discourse on racial justice).

162. *See infra* Part IV (describing commonalities among varying disciplines

engagement, the paradigm tends to elude the complex dynamics of how groups experience long-term injustice and struggle to build relationships at ground level.¹⁶³ Second, the fourth generation also tends only to glance at rich and varied international reparations experiences in terms of both the promise and the “dark side” of the reparations process.¹⁶⁴ Truth and Reconciliation Commissions throughout the world are struggling to repair human damage inflicted by repressive regimes. Moreover, those with social healing experience offer insights into what methods are successful under widely varying circumstances.¹⁶⁵

Third, as currently framed, the renewed repair paradigm is cast primarily as a moral justification for reparations—repairing the damage to a group helps heal its wounds and benefits the larger society by diminishing social divisions.¹⁶⁶ But it does not provide advocates a strategic framework for assessing conceptually and guiding practically a reparations process in the rough and tumble realpolitik world.

For these reasons, although valuable, the fourth generation repair paradigm is incomplete and has gained only limited traction. It has neither replaced the tort litigation-compensation model, nor has it generated a practical framework for strategically guiding and rigorously assessing the efficacy of on-going reparations efforts. The present-day need for a workable framework leaves diverse reparations proponents on unstable footing. They are left arguing about specifics without a common language or strategic guideposts.

Neo-conservatives opposed to reparations generally have jumped into the fray. Most prominently, Professors Eric A. Posner and Adrian Vermeule proffer a comprehensive approach for judging the propriety of reparations claims.¹⁶⁷ Posner and Vermeule first identify a

concerning social healing).

163. See DALTON, *supra* note 161.

164. See *infra* Part V (describing international human rights based reparations efforts).

165. See generally THE HANDBOOK OF REPARATIONS, *supra* note 78 (examining in depth the successful reparations efforts worldwide).

166. See *supra* notes 141, 152-58 and accompanying text.

167. See Brophy, *Reconsidering Reparations*, *supra* note 7, at 812 (critiquing Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003)).

framework void in reparations scholarship.¹⁶⁸ They then offer their framework for assessing the reparations claims for slavery and other historical injustices.¹⁶⁹ However, their exceedingly constricted framework is less about assessing when reparations are appropriate and more about an ideological hostility toward African American reparations particularly, and all redress claims generally.

From the outset, Posner and Vermeule choose to define reparations in the narrowest possible sense. For them, reparations “schemes” share three major features.¹⁷⁰ First, reparations claims involve an identified victim harmed by an identified perpetrator.¹⁷¹ Second, reparations claims are solely backward-looking, focusing on compensation for past injuries, and the claimant cannot seek forward-looking relief, such as “increasing utility, deterring future wrongdoing, or promoting distributive justice.”¹⁷² Finally, reparations entail money paid voluntarily—there can be no legal compulsion to pay.¹⁷³

By defining reparations so narrowly—as voluntary group-based monetary compensation for past individuals’ injuries caused by specific perpetrators—Posner and Vermeule erect a straw man for their ensuing attack on all reparations claims.¹⁷⁴ Their argument bears

168. Posner & Vermeule, *supra* note 167, at 690 (“[C]ommentators on all sides of the issue focus excessively on abstract questions about the justice of reparations while ignoring institutional and prudential questions about how reparations schemes should be designed.”).

169. *See generally id.*

170. *Id.* at 691-93.

171. *Cf. id.* at 691-92 (stating that a reparations scheme typically relaxes conditions). Posner and Vermeule cite to Japanese American reparations, claiming that in such circumstances, although the victims are identified there is little connection between the payers, those taxed by the federal government, the victims, and those who were interned.

172. *Id.* at 692 (arguing that this factor distinguishes reparations schemes from compulsory transfers which will make “society” better off, such as welfare maximization or end-state distributive justice).

173. *Id.* (asserting that to include reparations which are paid under legal compulsion “would collapse the topic of reparations into the larger topic of constitutional remedies for government wrongs”).

174. The broader reparations community views reparations as a process for repairing the wounds of slavery. Reparations proponents define reparations by its goals, instead of strict legal constraints such as the ones erected by Posner and Vermeule. *See* BROPHY, REPARATIONS PRO & CON, *supra* note 69, at 9 (arguing that

an anyone-can-see-it's-so-obvious tone, drawing directly from the tort compensation model's objections to reparations. These objections ask why "one group of people [should] pay another group of people even though the latter group, the victims or their descendants or relations, do not have a prior legal right against the first group."¹⁷⁵

In his sharp critique of their essay, Professor Brophy identifies many salutary instances of reparations missed by the narrow Posner-Vermeule definition of reparations.¹⁷⁶ More significantly, Brophy's critique cites the ideological underpinnings of their framework: a skewed a-historical view of reparations that amounts to a pre-determined indictment of all reparations claims:

[T]hey adopt a "litigation model" of reparations, which focuses on the connections between payers and wrongdoers. So what looks at first blush like a moderate attempt to frame the issues becomes—through narrowly defining reparations, as well as through narrow construction of the connection between wrongdoers and payers—an article that inappropriately undermines reparations claims. Although they speak in terms of moderation and dispassionate

social movements in their early stages are identified by goals and identifying several key goals of the black reparations movement: "identification of past injustice and bringing those injustices to the public's attention so that they can be addressed, compensation and redress of those injustices to bring about racial justice, and reconciliation"); Ogletree, *The Current Reparations Debate*, *supra* note 141, at 1055. Ogletree defines four features of reparations:

1) a focus on the past to account for the present; 2) a focus on the present, to reveal the continuing existence of race-based discrimination; 3) an accounting of past harms or injuries that have not been compensated; and 4) a challenge to society to devise ways to respond *as a whole* to the uncompensated harms identified in point

Id.

175. Posner & Vermeule, *supra* note 168, at 698.

176. Posner and Vermeule's sampling of reparations cases is historically incomplete. They ignore reparations outside the United States, an enormously difficult subject that must include South Africa's Truth and Reconciliation Commission. Additionally, they erroneously state that the earliest reparations program in the United States is the Native American claims program administered by the Indian Claims Commission, created by Congress in 1946. See Brophy, *Reconsidering Reparations*, *supra* note 7, at 817, 820-23.

analysis, their reasoning runs one way: toward an indictment of reparations.¹⁷⁷

Although Posner and Vermeule correctly identify a widening gap in practical reparations theory, their own flawed framework reveals itself as little more than a veiled attempt to define reparations out of existence.

The question thus arises: how is the gap to be productively filled by those genuinely interested in a framework that helps both guide and assess on-going reparations efforts. Our response starts with an observation about the relationship of reparation to reconciliation and then suggests reconfiguration of the repair paradigm on three levels.

Legal historian Sherrilyn Ifill aptly observes that reparations “cannot fully ‘repair’ the damage done by racial . . . violence. Nor can reparations ‘return’ a victim or victimized community to the state it would have been in.”¹⁷⁸ She therefore concludes that reparations alone cannot fully accomplish the heavy lifting that some repair advocates desire. “At best, reparation is a symbolic effort to balance the scales and an articulation of responsibility for the harm done.”¹⁷⁹ Though limited, these upsides to reparations are significant for victims’ communities, perpetrators, and their descendants, collectively aiming at something larger—a move toward reconciliation.¹⁸⁰

Professor Ifill thus locates reparations within the larger and more daunting task of reconciliation, or social healing, which aims to create a “new community” out of one “plagued by division.”¹⁸¹ The “alternatives—silence, lies, disconnection, and continued cycles of violence—make the project of reconciliation an urgent one.”¹⁸²

Indeed, if the larger imperative is to heal the wounds of those suffering injustice and to thereby create a new community from one plagued by division, what is now needed is a nuanced

177. *Id.* at 813-14.

178. See IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 241 (2007) [hereinafter IFILL, LEGACY OF LYNCHING].

179. *Id.* at 124.

180. *Id.*

181. *Id.* (stating that reconciliation aims to “create something new—not return to something old”).

182. *Id.*

multidisciplinary grounding of the repair paradigm so that it functions in three ways. First, it provides a broader common language of social healing through justice that speaks to the hearts and minds of conflicting groups and the American public. Second, it serves as a strategic guide to, and tool for, assessing the practical viability of the entire process of redress. And third, it directly addresses African American reparations claims but also illuminates reparations movements worldwide.

As a *common language*, while emphasizing the healing of persisting group wounds, the framework needs to cast reparations less as “winner versus loser” (creditor/debtor) and more as an interest-convergence—those receiving and those conferring reparations both seeing marked benefits. Mainstream America and its legal policymakers need to understand that they also have a strong interest in reparations.

As a *strategic guide*, the framework needs to identify stages of reparations process, including the recasting of a history of injustice (collective memory),¹⁸³ the deployment of litigation as public education, the garnering of political and community support, the building of coalitions, the handling of opposing groups, and the anticipation of likely material and psychological impacts of the process itself (including the dark side of the reparations process).¹⁸⁴

As a *tool of assessment*, the framework needs to provide workable criteria for analyzing the dynamics—the successes, failures, pitfalls, and long-term paths—of contemplated, as well as on-going reparations efforts. The framework is needed to enable proponents to assess what does and does not work in the world of reparations law and politics.

Finally, as a *framework that speaks directly to and also beyond African American redress* claims, a reenergized, broadened repair

183. See Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History and Justice*, 47 UCLA L. REV. 1747, 1764 (2000).

184. See Julie A. Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis*, in CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 379, 382-84 (Francisco Valdes, et al. eds., 2002) (calling for new theory development and coalitional strategies in legal arenas to address public controversies); Yamamoto, *Racial Reparations*, *supra* note 14, at 494-97 (describing three components of the dark side of the reparations process).

paradigm is needed to spark global attention and support from new American and international constituencies.

With these needs in mind, we refocus the fourth generation's renewed repair paradigm on the core concept of *social healing through justice*. This refocusing deepens social psychological notions of group healing by linking healing to justice. Because the wounds are the material and psychological harms of injustice, the prescriptions for healing those wounds must be informed by justice. *Social healing through justice* thus addresses the ways that "experiencing justice" can contribute in realpolitik fashion to healing individuals suffering continuing wounds of social injustice as well as to repairing the damage to society as a whole.

Explicitly focusing the repair paradigm on the dynamics of social healing through justice entails two infusions. Part IV sketches the first—an updated, multidisciplinary approach to social healing.¹⁸⁵ This multidisciplinary grounding has yet to be fully embraced and refined, or critiqued and redirected. Then, Part V discusses global redress insights into the ways that international human rights claims contribute to the shaping of public consciousness about what is right and just and when reparations for injustice are warranted.

IV. SOCIAL HEALING THROUGH JUSTICE: A MULTIDISCIPLINARY APPROACH

Many assume that legal justice addresses physical and emotional harms as well as economic harms.¹⁸⁶ The primary legal remedy, monetary compensation, however, does not respond to a group member's need for "dignity, emotional relief, participation in the social polity, or institutional reordering."¹⁸⁷ Even in race or gender cases where courts grant injunctive relief—for instance, ordering a

185. This discussion of "social healing through justice" updates the theory developments and sharpens the focus of Yamamoto's earlier work on inter-group reconciliation in YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46.

186. *Id.* 154-59.

187. *Id.* at 156. For instance, Carl Hansberry's 1940 civil rights victory, in which the U.S. Supreme Court procedurally barred landowners from enforcing a racially exclusionary covenant, failed to account for the loss of personal dignity and emotional and psychological destruction of family relationships. The legal victory for the civil rights movement was a horrendous personal and family loss for Hansberry. *Id.* at 156-57.

company to halt discriminatory policies—the injunction only stops the offending behavior. In short, tort, contract, and antidiscrimination law prescribe legal remedies without reference to social healing.¹⁸⁸

The renewed repair paradigm acknowledges the stark limitations of the tort litigation-compensation model, but does not fully grapple with the dynamics of the link between reparations and social healing. Yet, without attention to social healing, proffered remedies for injustice are destined to falter. Joe Feagin and Melvin Sikes' study of middle-class African Americans reveals the complexity of the wounds of injustice, encompassing, among other things, the "psychological warfare games that we have to play just to survive."¹⁸⁹ Feagin and Sikes' primary research in cities across the United States assesses psychological as well as material impacts of historical and present-day discrimination. Three of their propositions illuminate the multifaceted nature of racial wounds.¹⁹⁰

First, the harms of serious discrimination and violence are not isolated abstract ideas but are found in people's "lived experiences," grounded in their "every day lives."¹⁹¹ Second, those experiences are not only "very painful and stressful in the immediate situation . . . but also have a *cumulative* impact on particular individuals, their families, and their communities."¹⁹² The harms of injustice are "stored not only in individual memories but also in family stories and group recollections" over time.¹⁹³ And third, individual and community experiences of racism shape both "one's way of living . . . and one's life perspective."¹⁹⁴ They generate a picture of a fundamentally unjust society, where hard work and achieved status are inadequate protection against those with power and privilege.¹⁹⁵

188. *See id.* at 154-59.

189. FEAGIN & SIKES, *supra* note 3, at vii. *See generally* DALTON, *supra* note 161.

190. FEAGIN & SIKES, *supra* note 3, at 15-17. Despite their struggles, a common perception among non-blacks is that middle-class African Americans are now living the American dream. *Id.* at 9.

191. *Id.* at 15.

192. *Id.* at 16.

193. *Id.* *See also* Hom & Yamamoto, *supra* note 183, at 1757-60.

194. FEAGIN & SIKES, *supra* note 3, at 171.

195. *Id.*

In light of the complexity of the wounds of injustice, repair theory invites scholars to look to disciplines other than domestic American law for insights into social healing. What we call “social healing through justice” involves healing with a bite—messy, conflicting efforts that require give-and-take, particularly by those in power. This type of healing allows all sides to realize that peaceable and productive relations are much better than the alternative—social divisions, mistrust, and a failure of the moral underpinnings of democracy.¹⁹⁶ Prophetic theology, social psychology, socio-legal studies, political theory (peace studies), and indigenous healing practices, deepened by human rights norms of redress for universal harms (discussed in Part V), coalesce with American legal notions of equality and fairness into common insights about this type of healing. Those insights, grounded in notions of reconciliation and restorative justice, bear the potential for speaking to the hearts and minds of conflicting groups and the American public—be it over slavery, segregation and violence, immigrant discrimination, or indigenous culture destruction and land dispossession.

Christian, Protestant, and Muslim theologians ground reconciliation in atonement. More specifically, they ground reconciliation in the acknowledgment of injury, the expression of remorse, and acts of repentance.¹⁹⁷ Emerging from these ideas,¹⁹⁸ and acknowledging the kinds of harms described by Feagin and Sikes, local reconciliation efforts in America are ongoing. For instance, in 2007, the Virginia legislature unanimously passed a groundbreaking resolution “[a]cknowledging with profound regret the involuntary servitude of Africans and the exploitation of Native Americans, and calling for reconciliation among all Virginians.”¹⁹⁹ In unprecedented

196. See generally YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46.

197. *Id.* at 160.

198. *Id.* For instance, the theological precepts of confession and atonement shaped the 1995 African American “Million Man March,” which sought to bring together black men and their families and communities. See Louis Freedberg et al., *Black Men Heed Unity Call*, S.F. CHRON., Oct. 17, 1995, at A1.

199. S.J. Res. 332, 2007 Sess. (Va. 2007). The great-grandsons of slaves, the drafters of the original resolution, initially employed the word “atonement” with regards to slavery reparations, but lawmakers objected to its use due to its potential to generate claims for reparations, which some believe would have disrupted the reconciliation effort. Koch, *supra* note 129. See also Tyler Whitley, *Apologies Sought for Slavery and Indian Treatment*, RICHMOND TIMES DISPATCH, Jan. 4, 2007,

fashion, the state's resolution formally recognized the harms of both slavery and post-slavery discrimination:

[T]he ethos of the Africans was shattered, they were brutalized, humiliated, dehumanized, and subjected to the indignity of being stripped of their names and heritage, and families were disassembled as husbands and wives, mothers and daughters, and fathers and sons were sold into slavery apart from one another . . . and [with] the abolition of slavery . . . followed . . . systematic discrimination, enforced segregation, and other insidious institutions and practices toward Americans of African descent that were rooted in racism, racial bias, and racial misunderstanding.²⁰⁰

The legislative expression of "regret" recognized the manifold injuries of slavery and also accepted responsibility for the harms.

Equally important, by using language of repentance and healing, the Virginia resolution also acknowledged that an expression of regret is only a beginning. Regret cannot be the sole basis for healing long-standing social wounds: "the most abject apology for past wrongs cannot right them; yet the spirit of true repentance on behalf of a government, and, through it, a people, can promote reconciliation and healing, and avert the repetition of past wrongs and the disregard of manifested injustices."²⁰¹ The resolution thus linked social healing to a state response to "manifested injustices." It also indicated that while the politically negotiated process moved Virginia's people toward social healing through words of recognition and responsibility, actual healing entails more.

Indeed, words of peace and reconciliation alone are often insufficient.²⁰² Prophetic Kairos theologians challenged the Catholic Church's support of white apartheid in South Africa and rejected the Church's entreaties to preserve peace by stopping black resistance.²⁰³ The theologians characterized the Church's stance as an appeasement

at A1 (reporting that the early draft of the slavery-apology resolution "calls on the commonwealth to apologize for its role in the enslavement of Africans, the state's history of racial discrimination and an acknowledgement of the pain it has caused").

200. *Id.*

201. *Id.*

202. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 161.

203. *Id.* at 161-62.

of apartheid leaders in the name of God's peace—as false grace.²⁰⁴ They argued that no reconciliation is possible in South Africa without justice.²⁰⁵ Cheap grace or peace at the expense of justice does not heal. It infects the wounds of injustice.²⁰⁶

Thus, in the 1990s, the Ecumenical Dialogue for Reconciliation called for reparatory justice at the end of inter-ethnic and inter-religious Balkan hostilities, “includ[ing] restoring homes, caring for the bereaved, providing jobs, reaching out to youth, promoting multicultural education, discouraging misleading media portrayals, and monitoring elections.”²⁰⁷ As Professor Brooks observes, theology's notion of atonement provides a moral basis for peace through both words of apology and acts of community-building.²⁰⁸

This precept of peaceable relations through justice underscores what Professor Ifill calls the “very serious and long-term work of racial reconciliation”²⁰⁹ Reparations are an integral part of justice, but only a part. As Ifill notes, “[n]o single conversation, criminal prosecution, or form of reparation can itself produce reconciliation.”²¹⁰ With the experiences of Rwanda, Bosnia, the former Yugoslavia, Cambodia, Chile, and South Africa as an international backdrop, Ifill locates reparations payments and symbols within a larger process of reconciliation that aims to “become part of the daily fabric of the community,” influencing “local public policy decisions, school curricula, law enforcement policy, land use and planning, and cultural resource allocations”²¹¹ Thus situated, when linked to reconstruction of local institutions, on-going

204. *Id.* See also THE KAIROS COVENANT: STANDING WITH SOUTH AFRICAN CHRISTIANS 9 (Willis H. Logan ed., 1988).

205. YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 46, at 161-62 (summarizing prophetic theologians' arguments).

206. See DIETRICH BONHOEFFER, THE COST OF DISCIPLESHIP 35 (1984).

207. YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 46, at 161 (citing Jim Forest, *A Dialogue on Reconciliation in Belgrade*, in THE RECONCILIATION OF PEOPLES: CHALLENGE TO THE CHURCHES 110, 116-17 (Gregory Baum & Harold Wells eds., 1997)).

208. See generally BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 141.

209. IFILL, LEGACY OF LYNCHING, *supra* note 178, at 126.

210. *Id.*

211. *Id.*

community dialogue, and group relationship building,²¹² reparations become an essential step in the process of social healing.²¹³

In addition to reparatory acts that address material losses, social healing requires attention to the psychic harms.²¹⁴ Psychology recognizes that healing involves confronting emotional trauma instead of internalizing unresolved anger and loss.²¹⁵ The entire process can be facilitated when the aggressor conveys signs of remorse and takes responsibility for the harm.²¹⁶ Moving through this difficult process, “although marking a loss, also eventually brings a kind of new power.”²¹⁷

Psychological healing in this sense is far more complicated when it involves group members suffering collectively.²¹⁸ Each individual member may experience injustice differently. Social psychology nevertheless recognizes the importance of group healing— succeeding generations often bear the unhealed wounds of their ancestors.²¹⁹

Joseph Montville acknowledges the difficulty of applying the individual psychological healing model of repentance and forgiveness to group relationships.²²⁰ Yet, in his practice of intergroup conflict

212. *Id.*

213. This kind of confrontation involves stages of denial, anger, self-blame, guilt, acceptance, and forgiveness in order to reach a “capacity for trust, autonomy, initiative, competence and intimacy.” See YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 162 (describing stages of group healing).

214. *See id.* at 163.

215. *See id.* at 162.

216. *Id.* at 163.

217. VAMIK D. VOLKAN, *THE NEED TO HAVE ENEMIES AND ALLIES: FROM CLINICAL PRACTICE TO INTERNATIONAL RELATIONSHIPS* 155 (1988). *See* JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* (1992); ROBERT JAY LIFTON, *THE PROTEAN SELF: HUMAN RESILIENCE IN AN AGE OF FRAGMENTATION* (1993); DAVID M. NOER, *HEALING THE WOUNDS: OVERCOMING THE TRAUMA OF LAYOFFS AND REVITALIZING DOWNSIZED ORGANIZATIONS* 5 (1993).

218. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 163.

219. *See generally* JOSEPH V. MONTVILLE, *CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES* (1989) [hereinafter MONTVILLE, *CONFLICT AND PEACEMAKING*] (discussing the complexity of group healing versus individual healing). *See also* YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 170 (“Clinical literature reveals little about the cathartic effect of forgiveness as a part of a group mourning process.”).

220. Joseph V. Montville, *The Healing Function in Political Conflict Resolution*, in *CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND*

resolution he finds a compelling linkage of social psychological concepts of group mourning to theological notions of forgiveness.²²¹ For Montville, a combination of psychological and religious forgiveness is key.²²² Cautioning against unilateral forgiveness or simply “moving on,” he focuses on a mutually engaged process of contrition and forgiveness.²²³

Similar to theology, aspects of political theory support reparations for deep social injustice.²²⁴ Broadly stated, western democracy is rooted in people’s participation in the socio-economic and political life of the polity.²²⁵ The role of reparations in fostering peaceable relations lies in its potential to “lift[] the barriers to liberty and equality in education, housing, medical care, employment, cultural preservation, and political participation.”²²⁶ The South African concept of *ubuntu* embraces these kinds of “healing efforts through notions of co-responsibility, interdependence, and enjoyment of rights by all.”²²⁷ *Ubuntu*—if one is injured, the entire community suffers—guided endeavors of South Africa’s leaders to repair the devastating harms of forty years of white apartheid.²²⁸

Theologian Donald W. Shriver deepens these understandings through a mix of theology and political theory.²²⁹ Concerned with repairing political associations, he observes that intergroup healing emerges from a justice process that:

APPLICATION 112 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993).

221. *Id.* at 113-19.

222. *See id.* at 112.

223. *Id.* at 115.

224. *See* YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 164.

225. *Id.*

226. *Id.* (citing Elazar Barkan, *Payback Time: Restitution and the Moral Economy of Nations*, *TIKKUN*, Sept. 19, 1996, at 52).

227. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 165. *See also* Charles Villa-Vicencio, *Telling One Another Stories*, in *THE RECONCILIATION OF PEOPLES* 30, 38 (Gregory Baum & Harold Wells eds., 1997); Tina Rosenberg, *Recovering from Apartheid*, *NEW YORKER*, Nov. 18, 1996, at 90.

228. *See* YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 165-66.

229. *See generally* DONALD W. SHRIVER, JR., *AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS* (1995) (articulating a theological basis for group forgiveness).

[C]alls for a collective turning from the past that neither ignores past evil nor excuses it, that neither overlooks justice nor reduces justice to revenge, that insists on the humanity of enemies even in their commission of dehumanizing deeds, and that values the justice that restores political community above the justice that destroys it.²³⁰

Restorative indigenous healing practices also provide insight into group healing, usually at a tribal or local community level.²³¹ For instance, the conflict resolution procedures of the Rwanda tribunals drew upon indigenous Gacaca practices.²³² Gacaca, “which literally means ‘justice on the grass,’ is . . . a traditional form of dispute resolution in Rwanda that addresses conflicts between neighbors”²³³

230. *Id.* at 9. John Dawson, drawing specifically on aspects of prophetic theology, Zen Buddhism, psychology, and political theory, suggests that the path to meaningful change in group relationships requires acknowledging sincere apologies, historical group harms, and reparatory acts. JOHN DAWSON, *HEALING AMERICA’S WOUNDS* 278-280 (1995). Based on an examination of the annihilation of Cheyenne Indians by white Christians, America’s white supremacy, race violence against New Zealand’s Maoris, the Jewish Holocaust, and Korean and Japanese hostility, he calls for Americans to repent and reconcile as a step toward healing the nation. *Id.* at 26, 30, 135-36.

231. Indigenous Hawaiians employ a similar method of communal healing through a process called *ho’oponopono*. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 166. In order to heal physical and psychological wounds created by conflicts, *ho’oponopono* utilizes a process that is “complex and potentially lengthy . . . [and] includes prayer, statement of the problem, discussion, confession of wrongdoing, restitution when necessary, forgiveness and release.” E. VICTORIA SHOOK, *HO’OPONOPONO: CONTEMPORARY USES OF A HAWAIIAN PROBLEM-SOLVING PROCESS* 11, 46 (1985). *See also* Karen Ito, *Ho’oponopono, to Make Right: Hawaiian Conflict Resolution and Metaphor in the Construction of a Family Therapy*, in *CULTURE, MEDICINE & PSYCHIATRY* 9, 201 (1989). It is a therapeutic process that examines the past and uncovers thoughts and feelings leading to conflict in order to loosen and then cut the negative entanglements of those involved and their communities. *See generally* Stephen T. Boggs & Malcolm Naea Chun, *Ho’oponopono: A Hawaiian Method of Solving Interpersonal Problems*, in *DISENTANGLING: CONFLICT DISCOURSE IN PACIFIC SOCIETIES* 123 (Karen-Ann Watson-Gedeo & Geoffrey M. White eds., 1990).

232. *E.g.*, IFILL, *LEGACY OF LYNCHING*, *supra* note 178, at 121 (“Traditionally, a dispute would be presented to an elder and a coterie of community members, who together would propose solutions. The procedure would end with the disputing parties sharing a drink of banana beer from a common vessel.”).

233. *Id.* at 121.

through mutually proposed and selected remedies. In the aftermath of the Rwanda genocide, indigenous leaders urged integration of the Gacaca process to “enable community members to actively participate in fashioning punishment and reconciliation for crimes committed during the genocide.”²³⁴ Professor Ifill suggests that by partially employing a traditional form of dispute resolution and allowing members of the community to play a vital role, the Gacaca practices empowered the indigenous people who suffered the injustice.²³⁵

Four commonalities emerge from these diverse disciplines about the dynamic linkage between social healing and justice.²³⁶ Those commonalities point to the kind of justice that fosters social healing. The first commonality is that these disciplines tend to draw upon potent legal concepts of equality and fairness, but move beyond law to embrace the equivalent of the South African idea of “ubuntu”—we are all members of the polity, and injury to any one harms the entire community, and therefore healing the injured one is the responsibility of all, because it is necessary to repair the damage to the larger community.²³⁷

The second commonality is the precept that all groups must actively participate in the process. Interaction is necessary in two realms simultaneously—the intensely local, where people interconnect on a personal level, often face-to-face (classrooms, community halls, churches, area newspapers);²³⁸ and also the social structural, where

234. *Id.* at 121-22.

235. *Id.* at 122. The Gacaca tribunals were also criticized as an unsuitable method for addressing genocide. *Id.* One criticism views Gacaca’s focus on reconciliation instead of punishment as fitting for resolving disputes concerning “missing goats and stolen bananas,” but not as providing adequate closure for crimes such as rape, torture, and murder. *Id.* Others believe that restricting the healing process to local traditions with an individual focus undermines the political dialogue and fluidity of roles required to address crimes like genocide and keeps the status of victims and oppressors static. *Id.* at 122-23.

236. The distillation of commonalities is done in sweeping fashion, without attention to the many nuances or disciplinary complexities. The distillation nevertheless is important both for purposes of constructing a framework for guiding and assessing reparation efforts and for encouraging further research and theory-building.

237. See YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 170, 174.

238. See IFILL, *LEGACY OF LYNCHING*, *supra* note 178, at 127 (describing the importance of local reconciliation efforts).

ideas of injustice and redress are broadly shaped and cultural images of conflicting groups are formed (mass media, movies, music, scholarly publications). Mutuality of group action in these realms signals that all have a stake in healing—all in differing ways have a role to play and a benefit to derive.²³⁹

The third commonality distills specific types of interactions. Group healing requires some combination of recognition, responsibility, reconstruction, and reparation. People must *recognize* the humanity of others and the historical roots of group-to-group grievances.²⁴⁰ This includes articulation of the group harms and acknowledgment of the deeply embedded prejudices reflected in the stock stories we tell about others. The afflicting party must accept *responsibility* for healing group-based wounds, whether grounded in personal culpability, receipt of privileges and benefits, or a simple desire to build community.²⁴¹ Acts of *reconstruction* are aimed at building a new productive relationship, including apologies and other acts of atonement, along with efforts to restructure social and economic institutions.²⁴² *Reparations* encompass public education, symbolic displays, and financial support for those in need.²⁴³

239. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 191-200.

240. The first dimension, *recognition*, involves empathizing with the other group through listening and storytelling, and acknowledging the past specific incidences so that both groups are humanized. *Id.* at 176-77. Humanizing both the harmed group and the group that inflicted harm is a particularly crucial part of the healing-through-justice process when both groups have suffered historical exclusion and may even currently be in positions of power and subservience simultaneously. *Id.* at 176, 186. Thus, recognition also entails unraveling the stock stories and history of each group's relationships with the other. *Id.* at 180-85.

241. Linked to recognition is the dimension of *responsibility*, which "asks racial groups to assess group agency and accept responsibility for racial wounds." *Id.* at 185. After the groups unravel the stock stories, they analyze ways in which one group exercised power and privilege over the other group. *Id.* at 186. For example, a group may have unconsciously discriminated, and then also systematically discriminated through its oppressive organizational structures. *Id.* at 186-87. Thus, it is crucial for both groups to comprehensively and actively partake in the recognition dimension, understanding their subconscious acts and the subsequent harmful effects.

242. Though recognition and responsibility are integral parts of healing, *reconstruction* may provide the necessary support that assures both groups that the exchange was more than mere empty words or apologies. *Id.* at 190-91. An apology unaccompanied by changes in the apologizer's underlying belief system may be

The final commonality is the imperative of *material change* in socio-economic conditions underlying the group relationship.²⁴⁴ In order to heal, acknowledgments and actions must entail significant changes in institutional structures, public attitudes, and economic support for those still hurting—lest the danger of empty apologies, all words and no action, or “cheap grace.”²⁴⁵

As a starting foundation, the book, *Interracial Justice*, distills these commonalities into a four-dimensional framework of inter-group conciliation, or social healing—of which reparations is one (but only one) integral part. These dimensions, updated and refined here, are termed “the four R’s”: recognition, responsibility, reconstruction, and reparation.²⁴⁶ Enlivened by international human rights norms and

“cheap reconciliation,” that is, “self-serving in self-renewing pursuit of the meaningless.” Ann Calhoun, *A World of Empty Apologies*, HONOLULU ADVERTISER, July 24, 1995, at A6. In order to prevent harmful and meaningless apologies that do not bring about enduring forgiveness, the groups must work together to restore those who have been wronged by injustices through reparatory acts. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 195-96. *See generally* GEIKO MÜLLER-FAHRENHOLZ, *THE ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION* 28 (1997).

243. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 208.

244. Yamamoto, *Race Apologies*, *supra* note 78, at 55 (describing the significance of “material change” in socio-economic conditions and institutional structures).

245. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 194-95 (describing empty apologies as efforts to achieve “cheap grace”).

246. *See generally* Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 WASH. & LEE R.E.A.L.J. 61 (2005). Carla Pratt advances a framework to analyze historical and present-day conflicts between African Americans and Native American Indian tribes. *Id.* Native American tribes participated in the oppression of African Americans by using them as slaves, benefiting from their free labor, and then failing to recognize part-blood Native Americans who were African American. *Id.* at 75-79. Professor Pratt looks to the “four R’s” framework to shape a method of repair that addresses the psychological suffering that arose from the harm, the restructuring of institutional forces that allow harm to continue, and the oppression suffered by Native American tribes. *Id.* at 129-31. First, within the recognition dimension, Professor Pratt urges Native Americans and African Americans with Native American ancestries who were harmed to exchange dialogue and seek understanding about the history of the harm and its effects over the generations. *Id.* at 129-130. Next, she urges the Native American tribes to accept the role that they played in contributing to the current oppression of the African Americans. *Id.* at 130. Professor Platt then suggests healing wounds through reconstruction by apologizing

deepened by global experiences at group reconciliation,²⁴⁷ these four reparatory process dimensions inform a kind of justice experience that fosters group healing—*social healing through justice*.²⁴⁸

to lost African American members of their tribe and creating a tribal writing memorial. *Id.* at 130-31. Finally, Professor Platt seeks multiple forms of reparations, including changing tribal membership rules to allow the inclusion of African Americans with Native American ancestry, and educating Native Americans about their connection to black Native Americans. *Id.* at 131.

247. This kind of framework also can be useful in assessing reconciliation between countries. For example, the “four R’s” framework reveals deep flaws in Chinese-Japanese efforts to achieve reconciliation in the wake of atrocities committed during Japan’s World War II occupation of Manchuria, particularly the “Rape of Nanking.” See DOCUMENTS ON THE RAPE OF NANKING (Timothy Brook ed., 2002). See generally Jamie Sheu, Clash of Asia’s Titans: China and Japan’s Struggle for “Reconciliation” (May 1, 2006) (unpublished seminar paper, University of Hawaii) (on file with author). With each country vying for the title of Asia’s preeminent power, the focus of the “reconciliation process” has turned from healing the wounds of those harmed to the acquisition of economic and military leverage in the realm of international opinion, with public “reconciliation efforts” amounting to little more than empty posturing. Natasha Pickowicz, *China vs. Japan: Will It Ever End?*, CHINA DIGITAL TIMES, Sept. 1, 2005, http://chinadigitaltimes.net/2005/09/china_vs_japan_1.php.

248. Several legal scholars have recently employed a similar framework to assess social healing efforts in a variety of situations. See, e.g., ERIN DALY & JEREMY SARKIN, RECONCILIATION IN DIVIDED SOCIETIES: FINDING COMMON GROUND (Bert B. Lockwood ed., 2007) (examining the difficulties and possibilities of healing among social groups in conflict); Brophy, *Reparations Talk*, *supra* note 69, at 110 (contending the reparations process involves more than addressing white privilege, but also “the redistribution of wealth and political power”); 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, 126 (2004) (“Reparations for whiteness as property satisfies many of the concerns and goals of a class action lawsuit for slavery reparations in a way that . . . would also promote racial understanding and healing rather than further divisiveness.”); Miller, *Reconceiving Reparations*, *supra* note 94, at 56 (“[W]hat links the various demands for reparations is that there be both an accounting of and for past behavior, and some kind of reckoning for that behavior.”); Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law that is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 103 (2004) (contending that because “racial prejudice continues to touch the lives of America’s racial minorities,” some form of racial healing is needed); Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207, 220 (2006)

V. THE “JUSTICE” DIMENSION OF SOCIAL HEALING: ENLIVENING
AMERICAN JUSTICE THROUGH GLOBAL HUMAN RIGHTS
CLAIMS AND RECONCILIATION PRACTICES

The *social healing through justice* framework is deepened by international perspectives on justice. Human rights claims and wide-ranging, successful and failed, global redress efforts shed light on how recognition, responsibility, reconstruction, and reparation shape a kind of justice that affects social healing.²⁴⁹

International experience is especially important in three realms. First, the international arena illuminates the significance of human rights redress litigation, even when unsuccessful, to larger political strategies for achieving government and private bodies’ acceptance of responsibility for historic injustice. Second, emerging global justice movements offer insights into the reconstruction dimension of social

(highlighting the growing number of scholars who have explored “justice claims and the legal basis for reparations as well as the societal and psychological basis for reparations”); Brent T. White, *Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1265 (2006) (“[C]ivil rights plaintiffs in lawsuits against government defendants should be entitled to pursue court-ordered apologies as an equitable remedy.”); Verna L. Williams, *Reading, Writing, and Reparations: Systemic Reform of Public Schools as a Matter of Justice*, 11 MICH. J. RACE & L. 419 (2006) (arguing that a step toward healing of slavery’s harms may involve the rebuilding of communities through improvement of the public education system); Melissa Nobles, Assoc. Professor, M.I.T., *Official Apologies and Their Effects on Political Membership in Democracies*, Presentation Before the American Political Science Meeting (Aug. 2003), *available at* http://web.mit.edu/polisci/research/mnobles/official_apologies_in_democracies.pdf (discussing the effects and reasoning of government apologies in democracies). Professor Pedro Malavet employs a restorative justice framework to analyze the need for United States reparations to address the harms of colonization and continuing United States control over Puerto Rico—the loss of lands, the lack of autonomy, and second-class citizenship status. Malavet, *supra* note 53. Malavet emphasizes that the path toward healing does not lie solely in redressing the economic and political injuries of colonization, but also in addressing the psychological harm of “the crisis of self-confidence.” *Id.* at 417. He therefore calls for a combination of economic restitution, recognition of past and current injuries, restructuring of social and cultural institutions, and governmental apology. *Id.* at 412-20.

249. See Penelope Andrews, *Introduction to THIRD WORLD LEGAL STUDIES 2000-2003: INTO THE 21ST CENTURY: RECONSTRUCTION AND REPARATIONS IN INTERNATIONAL LAW 1* (2003), for a discussion on the range of global “reconstruction and reparations” efforts under international human rights law.

healing. These movements highlight proactive reparatory responses to injustice in order to bolster moral authority for building and sustaining healthy democracies.²⁵⁰ Third, international reparations movements, particularly for gender reparations, open fresh possibilities for new cross-border alliances around broader ideas of injustice and repair. These alliances can engage and mobilize new constituencies in the United States and abroad.

Reparations theory's fourth generation has yet to fully engage international reparations in these realms. To highlight their relevance to prospects for domestic reparations for distinctly American injustices, we next explore international human rights reparations claims and their linkage to global efforts to foster social healing.

A. Reparations Claims and the Transformation of Legal Consciousness About What Is Right and Just

Human rights law is shaped by conventions and covenants agreed upon by international bodies, treaties among countries, and judicial declarations of customary international law norms. For instance, the 1948 Universal Declaration of Human Rights delineates the right to freedom from involuntary servitude and torture.²⁵¹ The 1966 International Covenant on Civil and Political Rights guarantees that anyone whose human rights have been violated "shall have an effective remedy."²⁵² Reparations as a remedy for human rights violations "can involve restitution, rehabilitation, and measures of

250. See discussion *infra* Part V.B; see generally Yamamoto et al., *American Racial Justice*, *supra* note 70. American reparations theory has yet to make a persuasive case that reparations for the harms of long-standing injustice are integral to genuine democracy in the United States. International experiences can help make that case.

251. See Universal Declaration of Human Rights, G.A. Res. 217A(III), at 71, U.N. GAOR, 3rd Sess., art. 4, U.N. Doc. A/810 (Dec. 10, 1948). See generally U.S. Const. art. VI, § 8, cl. 3; Torture Victim Protection Act of 1991 art. II, § 2, 28 U.S.C. § 1350 (2007); American Declaration of the 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, U.N. Doc. A/RES/39/46/Annex (Dec. 10, 1984).

252. See 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).

satisfaction, such as public apologies, public memorials, guarantees of non-repetition, and changes to relevant laws and practices.”²⁵³

Most recently, in 2005, the United Nations Human Rights Commission approved the “Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law.”²⁵⁴ These basic principles specify forms of reparation for victims of gross human rights violations, including restitution, compensation, rehabilitation, and guarantees of non-repetition.²⁵⁵

Some scholars argue that these international norms collectively mandate reparations for the enslavement of African Americans.²⁵⁶ Framing reparations legal claims in these substantive human rights terms also offers a way around the procedural limitations of traditional domestic law because human rights law does not embody a formal statute of limitations.²⁵⁷

253. See Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 325 (Louise Henkin ed., 1981) (describing the range of potentially “effective remedies” for human rights violations); *Reparations in the Inter-American System: A Comparative Approach*, 56 AM. U.L. REV. 1375, 1386 (2007) (describing a wide range of non-monetary reparations measures for serious human rights violations).

254. Basic Principles and Guidelines on the Right to a Remedy and Reparations 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 also Dinah Shelton, *The United Nations Principles and Guidelines on Reparations: Context and Contents*, in OUT OF ASHES: REPARATIONS FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 11 (K. De Feyter et al. eds., 2005).

255. See Ruth Rubio-Marín, *Introduction to WHAT HAPPENED TO THE WOMEN?: GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS* 20 (Ruth Rubio-Marín ed., 2006).

256. See Jon M. Van Dyke, *Reparations for the Descendants of American Slaves Under International Law*, in SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS 57, 58 (Raymond A. Winbush ed., 2003). See also Stanley A. Halpin, *Looking Over a Crowd and Picking Your Friends: Civil Rights and the Debate Over the Influence of Foreign and International Human Rights Law on the Interpretation of the U.S. Constitution*, 30 HASTINGS INT’L & COMP. L. REV. 1, 40 (2006) (describing compensation as a cornerstone principle of United States constitutional law and customary international law).

257. See Theo van Boven, *The Administration of Justice and the Human Rights*

The problem with asserting human rights claims in United States courts is that, with one narrow exception,²⁵⁸ American courts refuse to enforce international human rights law.²⁵⁹ Human rights norms remain largely aspirational.

of Detainees, U.N. Commission on Human Rights, 48th Sess., Annex 1, Agenda Item 10, U.N. Doc.E/CN.4/Sub.2/1996/17 (stating that “civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statute of limitations”); Susan Jenkins Vanderweert, *Seeking Justice for “Comfort” Women: Without an International Criminal Court, Suits Brought by World War II Sex Slaves of the Japanese Army May Find Their Best Hope of Success in U.S. Federal Courts*, 27 N.C. J. INT’L L. & COM. REG. 141, 166 (2001).

258. Customary international law claims have been recognized under the Alien Tort Claims Act in narrowly defined situations. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (stating that United States courts may independently enforce “a narrow class of international norms” under the Alien Tort Claims Act); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000), authorized suit in United States court by Paraguayan relatives of victims of state-sanctioned torture and murder in Paraguay against a Paraguayan government official); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994) (holding that the Alien Tort Claims Act encompassed the plaintiff’s claim because political torture and summary executions violated customary international law); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (holding that customary international law prohibits genocide, war crimes and torture by a *de facto* government). Customary international law has not matured into a source for reparations because reparations are not a “consistent practice of a state.” RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW § 102(2) (1987).

259. Even for human rights similar to United States-recognized civil and political rights, “this area must overcome major hurdles” to reach American courts. RICHARD B. LILlich et al., *INTERNATIONAL HUMAN RIGHTS PROBLEMS OF LAW, POLICY, AND PRACTICE* 502 (2006). For economic, social and cultural human rights, “[f]ew federal or state laws exist that provide firm entitlements to such rights,” and American courts generally treat those rights as unenforceable. *Id.* United States courts tend to invoke the four extant human rights enforcement models conservatively in ways that operate largely to prevent enforcement. *See Halpin, supra* note 256, at 3-12 (describing the four enforcement models). First, the international enforcement model “asserts that international norms are directly binding on the United States and can be enforced through an international tribunal.” *Id.* at 4. Historically, this model achieved little success because of “the United States’ strong influence over international organizations.” *Id.* For instance, African Americans petitioned the United Nations to end racial discrimination in 1946, 1947, and 1951 to no avail. These unsuccessful efforts “set the tone that prevails today” in a world where the U.S. increasingly views itself as exempt from international norms. *Id.* at 6. Second, the domestic enforcement model rests upon two mechanisms: treaties and customary international law. Neither, however, operates in practice to assure enforcement. Human rights “treaties signed and ratified by the United States

Yet, despite the difficulty of achieving favorable United States court judgments, “framing reparations claims partly in human rights terms may prove an effective strategy—if not a narrow *legal* strategy, then as part of a larger reparations *political* strategy” of social healing through justice.²⁶⁰ What emerges from recent history of reparations

may not necessarily be enforced domestically by U.S. courts because of the non-self execution rule [that requires congressional approval before enforcement], and because the United States insists on extensive” reservations. *Id.* at 10. Customary international law is not generally viable because courts define it narrowly and apply it only in the most extreme situations like state-sanctioned torture or genocide. *See supra* note 258. Third, the interpretive mandate model provides that the U.S. Constitution “must be interpreted consistently with international law.” Halpin, *supra* note 256, at 11. However, this “model does not necessarily establish that the United States is bound by an international norm in the absence of a constitutional basis.” *Id.* Finally, the persuasive model views international human rights as influential or “persuasive.” *Id.* at 4. While the persuasive model does not promise actual enforcement, it provides a sometimes useful tool for raising legal consciousness and increasing public awareness about injustice and redress. *See infra* note 260 for a discussion of the persuasive model.

260. Yamamoto, *American Racial Justice*, *supra* note 70, at 1319. One legal-political strategy to expand the American public’s awareness of myriad international human reparations efforts is to describe those efforts in light of the Supreme Court’s recent treatment of international law as “persuasive.” *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“[I]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage”); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing the world community’s “overwhelming[] disapprov[al]” of the execution of intellectually disabled people as persuasive in prohibiting the execution of the mentally disabled). Supreme Court justices have also individually endorsed the persuasive value of international law. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994) (“‘[I]nternational law is part of our law’ and [] courts should construe our statutes . . . and our Constitution . . . consistently with ‘the customs and usages of civilized nations.’”); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Right Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999) (declaring international law “emphatically is relevant” to interpreting the Constitution); Stephen Breyer, Supreme Court Justice, Keynote Address, 97 AM. SOC’Y INT’L L. PROC. 265, 265 (2003) (endorsing Ginsburg’s view). According to Stanley Halpin, Justices Kennedy, Souter, Breyer, Ginsburg, and Stevens “appear quite open to the idea of international human rights law influencing constitutional interpretation.” Halpin, *supra* note 256, at 18. While Justices Thomas and Scalia expressly disavow the use of international law even for its persuasive value, Chief Justice Roberts and Justice Alito have not expressed a firm opinion on the issue. *See id.* at 20-21.

claims is a dialectic. On the one hand, reparations legal claims in United States courts rarely succeed.²⁶¹ “On the other hand, every politically successful reparations movement has been galvanized and informed by reparations litigation” that contributes to new understandings of past injustice and the present-day need for redress.²⁶²

Socio-legal research identifies the reason. Aspirational human rights norms asserted legally have been, and can be, integral to sparking and shaping domestic political processes. More specifically, research on legal consciousness suggests that “over time, international law norms may alter what both governmental actors and larger populations view as ‘right,’ ‘natural,’ ‘just,’ or ‘in their interest.’”²⁶³ Even unsuccessful litigation of redress claims can help generate new understandings of history (recognition), sources of group harm (responsibility), and remedy (reconstruction).²⁶⁴

261. Yamamoto, *American Racial Justice*, *supra* note 70, at 1322. The only favorable United States court-approved resolution of Holocaust reparations claims occurred in the world-wide class action suit against the Swiss banks, and that litigation was resolved through a politically orchestrated global settlement approved by the federal judge. *See generally* Morris Ratner & Caryn Becker, *The Legacy of Holocaust Class Action Suits: Have They Broken Ground for Other Cases of Historical Wrongs?*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 345, 346 (Michael J. Bazyler & Roger P. Alford eds., 2006); Robert A. Swift, *Holocaust Litigation and Human Rights Jurisprudence*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY *supra*, at 50; Roger M. Witten, *How Swiss Banks and German Companies Came to Terms with the Wrenching Legacies of the Holocaust and World War II: A Defense Perspective*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY *supra*, at 80.

262. Yamamoto, *American Racial Justice*, *supra* note 70, at 1322. *See generally* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY *supra* note 261 (addressing how legal claims and litigation changed collective memories of the Holocaust and facilitated political reparations for the Nazi death camps, slave labor, and looted property).

263. Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1269 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)). *See generally* Edward R. Korman, *Rewriting the Holocaust History of the Swiss Banks: A Growing Scandal*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY *supra* note 261, at 115.

264. *See* Hom & Yamamoto, *supra* note 183, at 1765.

Professor Paul Schiff Berman cautions critics of international law not to “misconceive the ways in which international law is most likely to operate.”²⁶⁵ International human rights law does not bind state actors because generally it is not backed by enforcement mechanisms.²⁶⁶ Berman nevertheless draws upon socio-legal studies to show how human rights norms can help change attitudes in large populations.²⁶⁷ Public debate about those norms, including redress for historic injustice, can do this over time by “effecting [sic] shifts in ideas of appropriate state behavior” and by empowering “constituencies within a domestic polity and provid[ing] them with a language for influencing state policy”²⁶⁸

Socio-legal scholars have illuminated this dynamic with respect to human rights claims in general. They have demonstrated that law not only operates through coercive government power, but also operates as much by “influencing modes of thought . . . [and] is a constitutive part of culture, shaping and determining social relations and providing ‘a distinctive manner of imagining’” what is morally right and just.²⁶⁹ In the right setting, justice norms, particularly those shaped by human rights concepts, “affect how both policy makers and ordinary citizens think about the state’s interests” in reparations for past or continuing government-sponsored injustice.²⁷⁰

Globally evolving ideas about justice and morality are thus integral to what socio-legal scholars call legal consciousness—a combined sense of what the law *is* and, equally important, what the law *should be*.²⁷¹ This legal consciousness is “expressed by the act of going to court as well as by talk about rights and entitlements.”²⁷²

265. Berman, *supra* note 263, at 1266.

266. *See id.*

267. *Id.*; *see also* Thomas Buergenthal, *International Law and the Holocaust*, in *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* *supra* note 261, at 17, 26. Human rights debate has “made people around the world ever more aware of the existence of international human rights guarantees and of the obligations assumed by their governments to honor them.” *Id.*

268. Berman, *supra* note 263, at 1266.

269. *Id.* at 1281.

270. *Id.* at 1280.

271. *Id.* at 1281.

272. SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 5 (1990) (empirical study of

Through those expressions courts become public sites of “cultural performances” in which contested narratives about injustice and appropriate reparation are debated and continually reshaped.²⁷³ It is this public framing of injustice and reparation²⁷⁴ that at times influences the policy “contest among various bureaucratic power centers, all of which are themselves influenced by outside pressure groups, lobbyists, [and] NGOs”²⁷⁵

For instance, Professor Berman describes a post-World War II rights revolution in international law, including broad development of international human rights instruments, courts, and monitoring bodies.²⁷⁶ Although the United States refused to ratify the formation of the International Criminal Court, a legal consciousness informed by the “basic idea of a crime against humanity under international law is no longer seriously in doubt, signifying an important shift from World War II to the present day.”²⁷⁷ It is a broadening of this consciousness that made news headlines of the U.N. Human Right’s Committee’s 2006 declaration that the United States’ indefinite secret prison detention practices violated the 1966 International Convention on Civil and Political Rights.²⁷⁸ And it is this legal consciousness that is reflected in protests by past and present military lawyers and officers who “have been among the loudest opponents of the Bush administration’s lack of concern for abiding by the Geneva Conventions” in the United States’ war on terror.²⁷⁹

peoples’ perceptions of rights as a basis for action).

273. See generally Eric K. Yamamoto, Moses Haia & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians’ Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994) (characterizing courts as sites of “cultural performances” where contested narratives are publicly articulated).

274. See Witten, *supra* note 261, at 80.

275. Berman, *supra* note 263, at 1280.

276. *Id.* at 1285 (describing a rights revolution parallel to the development of American rights consciousness commencing in the 1960s).

277. *Id.* at 1290-91 (citing David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 86 (2004)).

278. Alexander G. Higgins, *U.N. Rights Panel Wants U.S. to Close Secret Jails*, HONOLULU ADVERTISER, July 29, 2006, at A12 (noting that “U.S. officials refused to confirm or deny reports that there have been secret detention centers in Europe and elsewhere”).

279. Berman, *supra* note 263, at 1291.

The Korean Comfort Women reparations movement illustrates the impact of human rights claims on evolving global legal consciousness. Although the ianfu's legal reparations claims failed in the courtrooms,²⁸⁰ the litigation process in Japan²⁸¹ and later in the United States,²⁸² elevated the status of women internationally as worthy candidates for reparations.²⁸³ The Korean women's stories of suffering created a searing widely publicized official record.²⁸⁴ Through litigation, the women exposed documents long hidden by the Japanese government that directly refuted the government's denial of involvement in the sex slave industry.²⁸⁵ The filing of the high-profile lawsuit created political education forums that sparked worldwide

280. Park, *Broken Silence*, *supra* note 17, at 24, 36-43. The Korean Comfort Women were also known as the jugun ianfu (ianfu) or "comfort women." *Id.* at 25.

281. See Timothy Tree, Comment, *International Law: A Solution or a Hindrance Towards Resolving the Asian Comfort Women Controversy*, 5 UCLA J. INT'L L. & FOREIGN AFF. 461, 475-80 (2000) (discussing the persistent failure of the ianfu's domestic litigation in Japan); see also Kyeyoung Park, *The Unspeakable Experience of Korean Women Under Japanese Rule*, 21 WHITTIER L. REV. 567, 587-91 (2000) (recognizing the ianfu's losses in the Japanese courts and the difficulty of raising any future claims under Japanese law).

282. See Byoungwook Park, Comment, *Comfort Women During WWII: Are U.S. Courts a Final Resort for Justice?*, 17 AM. U. INT'L L. REV. 403, 404-05 (2002). The Alien Tort Claims Act (ATCA) authorizes a foreign national to bring international law claims against another foreign national in United States courts. 28 U.S.C. § 1350 (1994). In *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52, 54 (D.D.C. 2001), fifteen ianfu sued the Japanese government under the ATCA for damages for sexual slavery and torture before and during World War II. *Id.* After considerable international publicity, the district court dismissed on grounds of sovereign immunity, citing the Foreign Sovereign Immunities Act of 1976 (FSIA). *Id.* at 56-57. See also L. David Nefouse, *Trials & Errors: The Rights of the Korean Comfort Women and the Wrongful Dismissal of the Joo Case by the District of Columbia Federal Courts*, 12 CARDOZO J. L. & GENDER 559, 559 (2006) (discussing how the American judicial forums denied both "jurisdiction and justice" on the ianfu's legal claims).

283. See Annette Demers, *Women and War: A Bibliography of Recent Works*, 34 INT'L J. LEGAL INFO. 98, 98 (2006).

284. See ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATIONS: LAW AND THE JAPANESE AMERICAN INTERNMENT 435-38 (2001) [hereinafter YAMAMOTO ET AL., RACE, RIGHTS AND REPARATIONS].

285. Clayton Jones, *Japan Looks into 'Comfort Women' Charges to Save Face*, 12 CHRISTIAN SCI. MONITOR, Mar. 11, 1993, at 7 (discussing how buried documents were finally located from Japan's Defense Agency's archives).

awareness of the war sex slave industry as a human rights atrocity—a grave injustice orchestrated by the government of one of the world’s most powerful countries.²⁸⁶

Consistent with socio-legal research on legal consciousness and courts as sites of cultural performances, the ianfu’s legal claims of sexual enslavement brought worldwide attention²⁸⁷ to Japan’s gross violation of the women’s human rights.²⁸⁸ With the public eye on Japan, the United Nations initiated independent investigations specifically about Japan’s wartime violence against women.²⁸⁹ The

286. Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 BERKELEY WOMEN’S L.J. 174, 200 (2001). See also Brooke Say, Comment, *Ripe for Justice: A New UN Tool to Strengthen the Position of the “Comfort Women” and to Corner Japan into its Reparation Responsibility*, 23 PENN ST. INT’L L. REV. 931, 935 (2005).

287. This attention continues in diverse forums. In February 2007, the Asia, the Pacific, and the Global Environment Subcommittee of the House Foreign Affairs Committee held a highly publicized hearing to provide a forum for the ianfu on the current lack of reparations. *Protecting the Human Rights of Comfort Women: Hearing Before the Asia, the Pacific, and the Global Environment Subcomm. of the House Foreign Affairs Comm.*, (2007), available at <http://www.etan.org/legislation/0702cwomen.htm>. The committee allowed surviving comfort women Yong Soo Lee and Jan Ruff O’Herne to testify about their experiences of sexual slavery by Japanese soldiers and the resulting mental and emotional suffering. *Id.*

288. Countries learned that Japan’s sexual enslavement broke several international treaties and laws. For example, Japan was a party to the 1907 International Convention Concerning the Laws and Customs of War on Land (Hague IV). Under Hague IV, the sexual enslavement was a violation of humanitarian law. This prompted Japan to hide evidence to shield itself from international embarrassment. As a result, rape of the women victims received international attention. Afreen R. Ahmed, Note, *The Shame of Hwang v. Japan: How the International Community has Failed Asia’s “Comfort Women,”* 14 TEX. J. WOMEN & L. 121, 134-35 (2004).

289. Vanderweert. *supra* note 257, at 164. In 1995, Radhika Coomaraswamy of the United Nations Commission of Human Rights (UNCHR), for the United Nations Special Rapporteur, investigated violence against women in Japan and Korea. The report concluded that sexual slavery was real and that the “monetary reparation was not as important to them as what it symbolized.” *Id.* at 158-59. In 1998, Gay McDougall, UNCHR Special Rapporteur analyzed Japan’s involvement in the comfort stations. U.N. Comm. on Human Rights, Subcomm. on Prevention of Discrimination and Prot. of Minorities, *Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, 50th Sess., Provisional Agenda Item 6, ¶ 102, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (prepared by Gay McDougall). McDougall recommended that nations enact

resulting reports confirmed the sexual slavery and found a *jus cogens* violation of human rights law.²⁹⁰ Long treated as an unfortunate incident of war, or worse, a right of conquering soldiers, the harsh global spotlight on government-sponsored sexual violence against women transformed mass rape into an internationally-recognized crime against humanity.²⁹¹

As a result of the Korean women's legal claims and public fight for redress,²⁹² and the justice struggles of women in other countries,

legislation incorporating international human rights and criminal law standards into their own legal systems, and that they provide universal jurisdiction for violations of *jus cogens* norms such as slavery, crimes against humanity, genocide, torture, and other international crimes.

290. Despite a 1993 apology by chief cabinet secretary Yohei Kono, new Japanese Prime Minister Shinzo Abe recently announced that there was no evidence of coercion of the *ianfu*. Justin McCurry, *Japan Rules Out New Apology to 'Comfort Women,'* THE GUARDIAN (London), Mar. 5, 2007, available at <http://www.guardian.co.uk/international/story/0,2026525,00.html>. In a later interview, following withering criticism, Abe partly recanted, "we continue to stand by the Kono Statement. We feel responsible for having forced these women to go through that hardship and pain as comfort women under the circumstances at the time." Lally Weymouth, *A Conversation with Shinzo Abe*, WASH. POST, Apr. 22, 2007, available at http://www.washingtonpost.com/wpdyn/content/article/2007/04/20/AR2007042001930_pf.html. Japan persists in refusing to accept full responsibility for the mistreatment of the women during WWII. The apology in 1993 expressed remorse for the pain and suffering of the women, but not for its responsibility for the brothels. AMNESTY INT'L, STILL WAITING AFTER 60 YEARS: JUSTICE FOR SURVIVORS OF JAPAN'S MILITARY SEXUAL SLAVERY SYSTEM (2007), available at <http://web.amnesty.org/library/print/ENGASA220122005>. Furthermore, Japan continues to refuse to compensate the women, claiming "all payout claims were settled in postwar treaties with its former enemies." McCurry, *supra*.

291. Joseph P. Nearey, *Seeking Reparations in the New Millennium: Will Japan Compensate the "Comfort Women" of World War II?*, 15 TEMP. INT'L & COMP. L.J. 121, 128 (2001). See also Vanderweert, *supra* note 257, at 169.

292. The Japanese government only begrudgingly admitted to its organizational efforts of sexual slavery when documents surfaced from the government archives and the personal testimonies of the women contradicted the government's position. Christopher P. Meade, *From Shanghai to Globocourt: An Analysis of the "Comfort Women's" Defeat in Hwang v. Japan*, 35 VAND. J. TRANSNAT'L L. 211, 216 (2002). According to one observer, the Japanese government failed to take any action to undo the harms of the sexual slavery program. Although the government proposed educational and vocational training, it failed to fulfill these promises. See Tong Yu, *Reparations for Former Comfort Women of World War II*, 36 HARV. INT'L L.J. 528, 529 (1995); Vanderweert, *supra* note 257, at 156. The government created the Asian Women's Fund as a source of

for the first time, the international community warned military and political leaders about their obligation to prevent gender crimes.²⁹³ Indeed, Rwanda and Yugoslavia now recognize and prosecute wartime rape as a crime against humanity and as a form of torture and genocide.²⁹⁴ And the United States may now be on the political hot seat because of American soldiers' recently-revealed possible sexual exploitation of Asian women during the post-war occupation of Japan.²⁹⁵

reparations, but declined to contribute to the fund; only private companies donated to the fund. Christine Wawrynek, *U.N. Report: World War II Comfort Women: Japan's Sex Slaves or Hired Prostitutes?*, 19 N.Y.L. SCH. J. HUM. RTS. 913, 920 (2003). Almost all of the women rejected the money from the AWF because the women saw the private fund as an elusive mechanism for Japan to escape liability for its involvement in trafficking military sex slaves. See YAMAMOTO ET AL., RACE, RIGHTS AND REPARATIONS, *supra* note 284, at 437. Enraged at this attempt of "cheap grace," the women rejected the fund, viewing it as nothing more than "sympathy money." *Id.*

293. Ahmed, *supra* note 288, at 147-48. See also Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women Into International Criminal Law*, 46 MCGILL L.J. 217, 222 (2000).

294. Vanderweert, *supra* note 257, at 169-70. In 1996, the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY) made a groundbreaking decision "to define rape as a war crime when it indicted Bosnian Serb military and police officers for the rapes of Muslim women during the Bosnia War." *Id.* at 169. The gender-related crime of rape was no longer considered a "secondary offense." *Id.* The International Criminal Tribunal for Rwanda (ICTR) further recognized rape and sexual violence as genocide. *Id.* at 169-70.

295. In 2007, news reports for the first time revealed that the Japanese government had established an ianfu system for American soldiers after the WWII surrender. Brothels reportedly forced women to service between 15 and 60 men a day. U.S. officials in charge of the occupation initially condoned the brothels, setting up prophylactic stations nearby and providing the Japanese government with penicillin. *Documents: U.S. Troops Used 'Comfort Women' After WWII*, CNN NEWS (2007), <http://www.cnn.com/2007/US/04/25/comfort.women.ap/index.html> (last visited May 16, 2007). A memorandum from Lieutenant Colonel McDonald written at the time indicated that most ianfu were working under coercion. *Id.* American authorities condoned the ianfu sexual abuse from August 1945 to Spring 1946 (when General Douglas MacArthur ordered the closing of the brothels). *Id.* MacArthur reportedly was not primarily concerned with the immorality of coerced sex slaves, but rather, with the fact that more than one-fourth of the occupation forces had contracted a sexually-transmitted disease. *Id.* For ten years, the U.S. government hid its involvement while Congress pushed for a formal apology by the Japanese government. *Id.*

This kind of human rights legal consciousness and the processes that shape it are significant for American reparations in at least two ways. First, socio-legal research finds that a “most stunning example of law’s constitutive powers is the willingness of persons” to try to shape themselves into the “kind of beings the law implies they are—and needs them to be.”²⁹⁶ Some among the citizenry will aspire to conform their behavior to publicly acknowledged human rights justice norms, even if courts will not coerce that behavior.

Second, government policymakers addressing controversial issues are concerned about their perceived legitimacy. Adhering to international human rights norms, even when contrary to immediate interests, can advance the government’s (or policymaker’s) long-term interest by “allowing the state to have legitimacy and a certain morally persuasive voice in the eyes of other[s].”²⁹⁷ The clearest and most potent illustration of this phenomenon is the United States Supreme Court’s invalidation of the separate-but-equal doctrine in its 1954 *Brown v. Board of Education* decision.²⁹⁸ As Professor Mary Dudziak’s compelling legal historical research demonstrates,²⁹⁹ the primary motivation for the United States’ sudden about-face from its earlier support for legalized segregation was its perceived need to respond to harsh international criticism about the injustice of a thriving American apartheid. As the cold war heightened, communist countries and supporters labeled American democracy both hypocritical and violative of newly emerging human rights norms³⁰⁰—espousing freedom and equality while legally subordinating an entire

296. Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERYDAY LIFE* 21, 28 (Austin Sarat & Thomas R. Kearns eds., 1993).

297. Berman, *supra* note 263, at 1292. See also Christine Chinkin, *Normative Development in the International Legal System*, in *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL SYSTEM* 21 (Dinah Shelton ed., 2000); Kenneth W. Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT’L ORG.* 421 (2000).

298. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

299. See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

300. See Hom & Yamamoto, *supra* note 183, at 1765 (describing a petition to the United Nations, titled “We Charge Genocide,” by African American groups, charging the United States with human rights violations in the subordination of African Americans).

race of its people. Prominent United States officials urged the Supreme Court to overrule the *Plessy v. Ferguson* doctrine for one reason, and one reason only: to bolster America's international legitimacy as a just society in its efforts to foster democracy worldwide.³⁰¹

This concern for legitimacy strategically links the generation of legal consciousness about the human right to redress for injustice, to America's much-publicized embrace of democratic principles.

B. Reparations as Integral to Democratic Legitimacy

Today, the context for reparations claims is dramatically different from the setting for Japanese American redress in 1988. The world is now in the midst of what has been described as an Age of Reparations.³⁰² Globally, governments and advocacy groups are increasingly embracing reparations for historic harms inflicted by government and business as a lynchpin for legitimizing present-day democratic governance.³⁰³

The new *Handbook of Reparations*³⁰⁴ provides a glimpse into this emerging phenomenon. The *Handbook* is the first sweeping description of successful international reparations efforts. Published in 2006 by the International Center for Transitional Justice³⁰⁵ and authored by a group of scholars and practitioners from multiple disciplines and varying countries, the book provides in-depth discussions of ten reparations programs worldwide and offers insights into the breadth and technical operations of international reparations. While the *Handbook* identifies some larger reparations themes, such as redress for gender violence,³⁰⁶ the book endeavors mainly to

301. DUDZIAK, *supra* note 299, at 31.

302. See Yamamoto, *Race Apologies*, *supra* note 78, at 47-48.

303. See *id.*

304. THE HANDBOOK OF REPARATIONS, *supra* note 78.

305. "The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved." See International Center for Transnational Justice, <http://ictj.com/aboutus.asp> (last visited Mar. 9, 2007).

306. Colleen Duggan & Adila Abusharaf, *Reparations of Sexual Violence in Democratic Transitions: The Search for Gender Justice*, in THE HANDBOOK OF

recount history and provide practical benchmarks for reparations advocates and policymakers.

The *Handbook* focuses on countries transitioning out of repressive regimes into new governments marked by democratic processes (e.g. voting) and principles (e.g. equality and rule of law).³⁰⁷ Its elucidation of practical approaches to repairing harms countries have inflicted upon their people highlights two key points: first, reparations programs designed to further democratic governance vary widely; and second, every transitioning government expressly committed to democracy and to repairing the damage of prior regimes links its legitimacy in part to its capacity to redress the continuing harms of past injustice.

However, as is expected for collected essays, the *Handbook* only begins the theory-building and does not engage in multi-layered analyses of the role of reparations in democratic governance. In-depth investigation into and theorizing about reparations and democracy has yet to be conducted. For example, the *Handbook* thoughtfully examines Chilean reparations, but only touches upon the significance of reparations to democracy in Chile. The *Handbook* documents the Pinochet military dictatorship's gross human rights violations from 1973 to 1990 and the immense human suffering.³⁰⁸ When the country transformed into the Republic of Chile, the new democratically-elected president, Patricio Aylwin, created the National Truth and Reconciliation Commission. With the Commission's findings on political torture, murder and disappearances, the new government quickly began monetary and nonmonetary efforts to heal the families of the victims. The new government bestowed wide-ranging reparations in the form of pensions, social services, educational benefits, public recognition, monuments, sites of memory, and health assistance.³⁰⁹

REPARATIONS, *supra* note 78, at 623, 626.

307. Richard Falk, *Reparations, International Law, and Global Justice: A New Frontier*, in THE HANDBOOK OF REPARATIONS, *supra* note 78, at 478, 478.

308. Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile*, in THE HANDBOOK OF REPARATIONS, *supra* note 78, at 55, 55. See generally Eric K. Yamamoto, Carly Minner & Karen Winter, *Contextual Strict Scrutiny*, 49 HOW. L.J. 241 (2006) (describing a post-*Grutter* "racial realism" informed by a plethora of socio-legal empirical research).

309. Lira, *supra* note 308, at 56.

The *Handbook's* practical depiction of Chilean reparations does not directly address one crucial dimension of the reparations dynamic: whether and how adherence to human rights norms has been integral to social healing and to the democratic legitimacy of the new regime. Chile's effort to comply with the Convention Against Torture,³¹⁰ indicates that Chilean democracy is endeavoring to embrace human rights.³¹¹ In that effort, the Chilean people and government are grappling with the continuing harm of past abuses and debating what punishment to impose on perpetrators. This public debate about responsibility for injustice, appropriate punishment, and meaningful redress reveals traits of an incipient self-governing democracy.³¹²

The *Handbook* similarly highlights South Africa's Truth and Reconciliation Commission (Truth Commission). Created by the new democratically-elected legislature and inspired by President Nelson Mandela's words of reconciliation, the Truth Commission gave voice to the thousands suffering apartheid violence and offered them prospects of material recompense while granting amnesty to confessed perpetrators.

310. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]. The Convention Against Torture is a multilateral treaty and instrument of international law that was "developed and adopted at the international level, and . . . is binding under international law." Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1067 (2004).

311. See Orentlicher, *supra* note 310, at 1118. Chileans are following an international treaty that includes domestic law because states who are parties to the treaty must use "legislative, administrative, judicial, or other measures to prevent torture." *Id.* at 1067 (citing Convention Against Torture, *supra* note 310, at art. 2(1)).

312. *Id.* Similarly, according to the *Handbook*, Brazil's President Joao Goulart's twenty-one year regime banished, imprisoned, tortured, and killed thousands. Ignacio Cano & Patrícia Salvão Ferreira, *The Reparations Program in Brazil*, in THE HANDBOOK OF REPARATIONS, *supra* note 78, at 102, 106. The surviving victims later sued the state and simultaneously fought for the 1995 Law of Victims of Political Assassination and Disappearance. *Id.* at 111. In response, the president of the new Republic, Fernando Henrique Cardoso, established a truth commission to expose the Goulart atrocities. *Id.* Spurred by the legal claims of the victims' relatives and the Commission's work, the new government formally recognized the existence of the previously invisible government perpetrators and their human rights violations for the first time. *Id.*

What the *Handbook* leaves largely unexplored is how the creation of the Truth Commission and its amnesty and reparations components were integral to the political compromise in which the White National Party agreed to allow democratic elections (and thereby give up its power) in exchange for peace and the maintenance of private property ownership rights.³¹³ The elections that flowed from the compromise radically shifted political power to Black South Africans and created a new, though struggling, system of democratic governance. Thereafter, the government-created Truth Commission identified apartheid as a gross human rights violation and, according to the compromise, selectively conferred amnesty to those who publicly confessed to apartheid crimes. The Truth Commission also recommended monetary payments, institutional restructuring, and symbolic reparations³¹⁴ to rehabilitate and restore “human and civil dignity.”³¹⁵ Indeed, the Truth

313. See generally Johan D. van der Vyver, *National Reconciliation Under the Norms of International Law for the New Millennium*, in *THIRD WORLD LEGAL STUDIES 2000-2003: INTO THE 21ST CENTURY: RECONSTRUCTION AND REPARATIONS IN INTERNATIONAL LAW* 61, 73 (2003) (summarizing the controversy over truth commissions and amnesty).

314. Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, in *THE HANDBOOK OF REPARATIONS*, *supra* note 78, at 176. Other countries have also started reparations initiatives. In Malawi, citizens born in detention, exile, or subjected to wrongful imprisonment are eligible to file reparations claims. Diana Cammack, *Reparations in Malawi*, in *THE HANDBOOK OF REPARATIONS*, *supra* note 78, at 215. Under former President H. Kamuzu Banda, the people of Malawi suffered from state repression. *Id.* at 215-16. Anyone merely suspected of disloyalty was imprisoned by police and paramilitary forces. *Id.* Confined in filthy living conditions, the detained Malawians were stripped naked, starved, and subjected to degrading treatment. *Id.* Surviving Malawians continue to suffer psychologically and physically. *Id.* To “set the stage for a new democratic dispensation,” the new Malawian government highlighted the importance of redressing past abuses. *Id.* at 215. To bring closure, the government initiated reparations in five ways to repair continuing harms: (1) addressing the past by truth seeking, including the naming of perpetrators; (2) awarding detainees compensation based on length of imprisonment; (3) encouraging exiled Malawians to return, resettle, and rehabilitate through the government’s Disaster Preparedness, Relief and Rehabilitations program; (4) granting special payments to civil servicemen and the political elite wrongfully dismissed from their duties; and (5) creating the National Compensation Tribunal to organize compensation for “wrongful imprisonment, forced exile, personal injury, and loss of property/business/employment benefits and educational opportunities during the Banda years.” *Id.* at 218-23.

315. *Id.* at 181. The preamble of the act that created the TRC restated the Interim Constitution and the need for reparations instead of retaliation. *Id.*

Commission's Committee on Reparations recognized that "without adequate reparation and rehabilitation measures, there can be no healing or reconciliation."³¹⁶

The South African government's financial inability to pay the individual compensation recommended by the Truth Commission is significant, although less important than originally anticipated.³¹⁷ In 2006, twelve years after the fall of apartheid, sixty percent of South Africa's populace perceived race relations to be improving; they no longer found racism or affirmative action to be significant social issues.³¹⁸ One factor appears crucial—the government's reconstruction programs designed to implement its "flagship policy to try and redress the gross economic inequalities inherited from apartheid."³¹⁹ That commitment to economic justice³²⁰ bolstered its legitimacy as a fledgling democracy. It worked to embrace repair in terms of reconstruction rather than individual compensation.

316. *Id.* at 193.

317. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 46, at 270 (expressing concern that unfunded reparations promises will signal "false reconciliation").

318. *Shades of Black*, *ECONOMIST*, Sept. 7, 2006.

319. *Id.* Some of those programs, such as affirmative action in government contracting to ensure opportunities for the "previously disadvantaged," particularly Blacks, Indians, and those of mixed-race, have been criticized for "creating costly distortions rather than new jobs and for lining the pockets of a small elite . . ." *Id.* See generally Philip F. Iya, *From Lecture Room to Practice: Addressing the Challenges of Reconstructing and Regulating Legal Education and Legal Practice in the New South Africa*, in *THIRD WORLD LEGAL STUDIES 2000-2003: INTO THE 21ST CENTURY: RECONSTRUCTION AND REPARATIONS IN INTERNATIONAL LAW* 141 (2003).

320. See generally EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS* (2005) (addressing reconstruction programs designed to further economic justice for subordinated groups).

Although repair approaches differ,³²¹ policymakers and political activists from countries attempting to build or sustain stable democracies coalesce around an emerging precept undergirded by human rights principles: redress for injuries of past injustice are foundational to a government's democratic legitimacy. This precept applies to established as well as emerging democracies. Indeed, the developed world's legacy of unredressed human rights violations means that even established democracies have much to account for in terms of the continuing harms of earlier colonization.³²² Established democracies, like Canada on the one hand and Australia on the other, are responding to this call in divergent ways. In 2005 the Canadian Government actively undertook several sustained truth-seeking and reparations initiatives in response to its long-standing, harsh, discriminatory treatment of Canada's indigenous peoples.³²³ In

321. Cammack, *supra* note 314, at 223. The *Handbook's* examples of successful international reparations movements are useful as broad guidelines for future efforts—they shed light on political-legal strategies and practical possibilities. They are also limited, however. The reparations efforts discussed in the book were successful for some countries for differing reasons, but key theoretical insights are yet to be developed. For instance, the same reparations methods are not necessarily appropriate for other countries with differing social norms and values and political structures. Where monetary compensation for the loss of a family member may be acceptable as reparations by some individuals, it may not be for others who may view the act as putting a price tag on a loved one. Time, social and economic status, and the country's type of government are just some of the relevant factors that call for a different reparations approach tailored to the needs of the particular group or country seeking redress.

322. INT'L CTR. FOR TRANSITIONAL JUSTICE, LEGACIES OF INJUSTICE IN ESTABLISHED DEMOCRACIES 11 (2006).

323. *See id.* Beginning in the late 1800s, the Federal Government of Canada forcibly removed aboriginal children from their families and placed them in a system of Native Residential Schools. Llewellyn, *supra* note 41, at 255 (discussing the history of Native Residential Schools in Canada). The schools were operated by four of Canada's Christian denominations on behalf of the Federal Government's Department of Indian Affairs. J.R. Miller, *Troubled Legacy: A History of Native Residential Schools*, 66 SASK. L. REV. 357, 362 (2003) [hereinafter, Miller, *Troubled Legacy*] (discussing the history of Native Residential Schools). The stated purpose of the system was to assimilate native children into White Canadian society. Llewellyn, *supra* note 41, at 255. The schools controlled every aspect of students' lives. Students were stripped of their culture; they were forbidden to speak their mother tongue and had little or no contact with their families and native communities. Sexual and physical abuse were rampant. *Id.* at 257. Students, their families and native communities across Canada began resisting the native residential

contrast, despite ten years of organized, widely-supported calls for reconciliation, the Australian government flatly refused to engage the call for moral accounting for its genocidal and discriminatory treatment of its aboriginal people.³²⁴

As both established and emerging democracies struggle to acknowledge and redress human rights violations, they do so with a watchful eye on the United States. What other countries see leads many to seriously question the United States' stated commitment to democracy and human rights. The Bush administration's hostility toward international agreements on the environment, nuclear testing,

school system, and in the 1990s residential school litigation raised the Canadian public's awareness of the school system abuses. *See generally* NATIVE WOMEN'S ASSOC. OF CAN., *THE CLASS ACTION AS A REMEDY FOR ABUSE EXPERIENCE, IN RESIDENTIAL SCHOOLS* (1992). In 1996, the Royal Commission on Aboriginal Peoples similarly reported on the horrors, *see* Llewellyn, *supra* note 41, at 259, and the Canadian Government established a limited healing fund and issued a tepid apology. Miller, *Troubled Legacy*, *supra* at 380. Most perceived these actions as woefully inadequate. As a result, 12,000 individual claimants launched lawsuits, including two class actions, against the Canadian government and complicit religious organizations. *Id.* *See* *Baxter v. Canada* (Attorney General), [2006] 83 O.R.3d 481 (Can.). The Baxter Class Action recently settled and was incorporated into the Final Agreement between the Canadian Government, the Assembly of First Nations, religious organizations, and the student survivors on May 10, 2006. *Id.* Some estimated that this immense litigation could take over fifty years, bankrupt many Christian denominations in Canada, and cost the government \$2.3 billion. Miller, *Troubled Legacy*, *supra* at 380. Media coverage of the litigation heightened public awareness and began to generate pressure on the government to consider reparations. Under tremendous political and legal pressure, the Canadian Government negotiated an Agreement in Principle (The Agreement) with the Assembly of First Nations comprised of the legal representatives of former students and religious organizations in 2005. *\$2B Package*, *supra* note 40. The Agreement allots \$1.9 billion to fund a comprehensive four-part reparations program: (1) direct symbolic monetary payments to surviving students; (2) the establishment of a Truth and Reconciliation Commission; (3) the establishment of a commemoration fund; and (4) funds for the communal Aboriginal Healing Foundation. *Id.* The Agreement is pending approval by courts in the seven jurisdictions where native residential school lawsuits were brought. *Id.*

324. *See* Chris Cunneen, *Reparations, Human Rights and the Challenge of Confronting a Recalcitrant Government*, in *THIRD WORLD LEGAL STUDIES 2000-2003: INTO THE 21ST CENTURY: RECONSTRUCTION AND REPARATIONS IN INTERNATIONAL LAW* 183 (2003); Pamela O'Connor, *Reparations for Australia's Removed Aboriginal Children: Defining the Wrong*, in *THIRD WORLD LEGAL STUDIES 2000-2003: INTO THE 21ST CENTURY: RECONSTRUCTION AND REPARATIONS IN INTERNATIONAL LAW* 219 (2003).

human rights,³²⁵ and the International Criminal Court, as well as its near-unilateral prosecution of the Iraq war,³²⁶ initially fueled their skepticism.³²⁷ The United States' stark yet unacknowledged human rights violations in its Guantanamo Bay and Abu Ghraib prisons,³²⁸ its secret indefinite detention centers in unnamed foreign locales,³²⁹ and its apparent embrace of torture as a mode of "interrogation,"³³⁰ collectively, are transforming skepticism into widespread international disdain.

One realpolitik consequence of this disdain is intensifying disbelief in America's actual commitment to genuine democracy.³³¹ Another related consequence is the dramatic loss of international support for American efforts to foster democracy worldwide. As Journalist Julia Sweig aptly describes, the disjuncture between American ideals and actions has had profound effect—while the "ideal of the United States as beacon of justice, democracy, freedom, and human rights still garners grudging respect abroad," America's "moral standing in the world has precipitously declined since

325. Yamamoto et al., *American Racial Justice*, *supra* note 70, at 1290. The United States refused to accept the jurisdiction of the International Criminal Court (ICC); threatened to withdraw peacekeeping troops in Kosovo unless American United Nations peacekeepers were exempt from the ICC jurisdictions; withdrew unilaterally from the Kyoto global warming protocol; announced it would not sign the Anti-Ballistic Missile Treaty; refused to participate in the 2001 United Nations Conference on Racism in South Africa; and reluctantly acknowledged Palestinian human rights violations in the Israeli-Palestinian conflict. *Id.*

326. *Id.* at 1291.

327. *Id.* at 1290-91. See Helen Thomas, *Arrogance Pushes United States Further into Diplomatic Isolation*, HONOLULU STAR BULL., Aug. 25, 2002, at D3.

328. Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, available at http://www.newyorker.com/fact/content/articles/040510fa_fact?040510fa_fact. See also *Allegations of Human Rights Violations at Guantanamo Bay*, CANIMUN GAZETTE, May 12, 2004, available at <http://www.canimun.org/francais/Issue%202.pdf> (stating that the United States Security Council denied human rights violations and called the allegations "incorrect and speculative").

329. *US Commits Serious Human Rights Violations at Guantanamo Bay: UN Report*, PEOPLE'S ONLINE DAILY, Feb. 22, 2007, http://english.people.com.cn/200602/17/eng20060217_243422.html (last visited Nov. 3, 2007).

330. *Id.*

331. Yamamoto et al., *American Racial Justice*, *supra* note 70, at 1293, 1326-28.

2001.”³³² Departing United Nations Secretary General Kofi Annan splashed that same message onto news headlines worldwide, when in late 2006, he challenged the United States under President George Bush to stop behaving like a rogue state and instead act cooperatively and abide by human rights.³³³

This international loss of the United States’ moral authority as a democracy is, or should be, deeply implicated in America’s reparations debate—much more so than currently evident in reparations theory. The increasingly shaky claim to moral authority abroad reveals a significant self-interest for the United States in redressing American injustices. For reparations advocates, this self-interest lies strategically at the heart of Derrick Bell’s interest-convergence calculus.³³⁴

The United States cannot convincingly cast itself as a model of democracy committed to justice and human rights because of its actions abroad. United States leaders have refused to engage recent American redress efforts,³³⁵ including reparations for African Americans, land reclamation for Native Americans,³³⁶ and self-determination for Native Hawaiians.³³⁷ Further, the United States dramatically pulled out of the widely publicized 2001 United Nations Conference on Contemporary Racism in Durban, South Africa, in fear

332. Julia E. Sweig, *Why They Hate Us*, L.A. TIMES, Aug. 15, 2006, at A10.

333. See Reynolds Holding, *A Law of Convenience*, TIME, Mar. 5, 2007, at 48 (“In the Iraq War, the White House has little use for international law—except when it comes in handy.”).

334. Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522 (1980).

335. Yamamoto et al., *American Racial Justice*, *supra* note 70, at 1291 (describing the international uproar at the Bush Administration’s refusal to participate in the Durban South Africa international Conference on Racism because of the Conference’s consideration of reparations for African Americans).

336. See generally WARD CHURCHILL, *THE STRUGGLE FOR LAND: NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION* (1999); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615 (2000).

337. S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 311-19 (1994). See also S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993) (apologizing for the United States-backed unlawful overthrow of the sovereign Hawaiian Nation in 1893, and committing the United States to “reconciliation” with Native Hawaiians).

of a resolution naming slavery a crime against humanity (warranting redress).³³⁸ In order to become a model of democracy, the United States will need to demonstrate fealty to internationally-respected precepts of democratic governance—particularly, redressing the continuing wounds of injustice inflicted on its own people.³³⁹

The salutary potential of a more vivid international dimension to America's reparations efforts thus lies not only in the fight for new United Nations declarations.³⁴⁰ It also lies in the power of human rights redress claims in multiple forums to challenge America's commitment to democratic principles at the very moment the United States strains to find moral high ground.³⁴¹ It is this same kind of international criticism of America's Jim Crow democracy during the Cold War that compelled the administration to argue for ending separate-but-equal in *Brown v. Board of Education*.³⁴² Today, as the United States searches for moral grounding in the face of intensifying criticism, the globalization of American redress efforts becomes increasingly important—a globalization now informed by human rights instead of free trade.³⁴³ By framing American reparations claims at least partially in human rights terms, reparations advocates target broader American audiences concerned about viable democracy, while also engaging international communities in their efforts to reconstruct what was destroyed and repair what was damaged.³⁴⁴

As Ruth Rubio-Marín aptly observes in her study of international gender reparations, conceived in this fashion as opposed to solely individual compensation, “reparations become measures that promote a minimal degree of both interpersonal trust and trust in the institutions of the ‘new state’ as well as its overall legitimacy and

338. Roger Wareham, *The Popularization of the International Demand for Reparations by African People*, in *SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS* 226, 234 (Raymond A. Winbush ed., 2003).

339. Yamamoto et al., *American Racial Justice*, *supra* note 70, at 1294.

340. *See* Wareham, *supra* note 338, at 231 (describing the international political struggle in 1998, when western countries resisted the Declaration of the Trans-Atlantic Slave Trade as a Crime Against Humanity).

341. Yamamoto et al., *American Racial Justice*, *supra* note 70, at 1293.

342. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); DUDZIAK, *supra* note 299, at 104-07.

343. Yamamoto et al., *American Racial Justice*, *supra* note 70, at 1294.

344. *Id.* at 1315.

efficacy.”³⁴⁵ The interpersonal trust reflects a kind of healing among groups. The trust in institutions speaks to a country’s moral legitimacy as a democracy.³⁴⁶

C. Reimagining Groups Worthy of Redress and Building Cross-Border Alliances

To deepen this idea of democratic legitimacy, or democracy building through justice, international reparations efforts provide insight into the importance of remaking societal understandings of who is worthy of redress and building broader alliances across national as well as ideological borders.³⁴⁷ International reparations efforts are remaking those understandings by addressing gender subordination.³⁴⁸

1. Gender Reparations

Women historically have been targeted for sexual violence during times of political upheaval, and that violence has long been considered an acceptable secondary effect of war.³⁴⁹ Reparations movements, such as the initiative led by the Korean Comfort Women,³⁵⁰ shed light on how mass rape during war not only batters the individual women but also destroys women’s cultures and communities.³⁵¹

In practice, gender redress theory bears the potential for breaking through traditional barriers and changing how the American public perceives women’s redress claims.³⁵² For example, the Tuskegee

345. Rubio-Marín, *supra* note 255, at 25.

346. *Id.*

347. Yamamoto, *Racial Reparations*, *supra* note 14, at 499-501.

348. Duggan & Abusharaf, *supra* note 306, at 626.

349. *Id.*

350. See generally Arakawa, *supra* note 286, at 178-79; Park, *Broken Silence*, *supra* note 17, at 27; Say, *supra* note 286, at 933.

351. Ahmed, *supra* note 288, at 148. See also Vanderweert, *supra* note 257, at 152.

352. See generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997); STEPHANIE M. WILDMAN, PRIVILEGED REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996); Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257 (1998); Penelope E. Andrews, *Globalization, Human Rights and Critical Race*

Syphilis Experiment shows how reparations in the past did not address harms uniquely experienced by women. The claims made and paid addressed only injuries to men. The absence of the gender in the reparations process did not mean that sex was irrelevant. Rather, it signaled the invisibility of gender harms in reparations litigation and politics. When the layers of the reparations process are now peeled away gender's salient role is revealed.

The Tuskegee Syphilis Experiment, ongoing for forty years (1932-1972), was an experiment flatly lacking scientific merit—a racist exercise—that simply used African American human beings as laboratory animals.³⁵³ The United States Public Health Services (PHS) initiated the experiment using only Black men. The purpose of the experiment was to discover the effects of late stage syphilis. PHS denied the 399 Black men penicillin—the known treatment for the disease—and let them die slowly like lab rats. Forty years of test research and numerous unnecessary deaths and untold suffering yielded nothing to help cure or even control venereal disease in the United States.³⁵⁴

Ultimately during the experiment, 28 men died from syphilis, 100 died from related complications, 40 of the men's wives contracted the disease, and 19 of the men's children were born with congenital syphilis.³⁵⁵ The scandal erupted when a former PHS researcher blew the whistle. Although the PHS initially asserted that the Black men and their advocates were attempting to “make a mountain out of a molehill,” the public exposure shamed the government into ending its experiment.³⁵⁶

Feminism: Voices from the Margins, 3 J. GENDER RACE & JUST. 373 (2000); Elvia R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Critical Legal Theory and Gender at the U.S.-Mexico Border*, 49 DEPAUL L. REV. 729 (2000); Angela Onwuachi-Willig, *This Bridge Called Our Backs: An Introduction to "The Future of Critical Race Feminism,"* 39 U.C. DAVIS L. REV. 733 (2006).

353. Borgna Brunner, *The Tuskegee Syphilis Experiment: The U.S. Government's 40-year Experiment on Black Men with Syphilis*, INFOPLEASE, <http://www.infoplease.com/spot/bhmtuskegee1.html> (last visited Sept. 8, 2007) (citing JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1993)).

354. *Id.*

355. *Id.*

356. See generally JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1993).

Following a decade of post-experiment denial and obfuscation, and amid litigation and intensifying public scrutiny,³⁵⁷ the PHS finally accepted responsibility and awarded reparations to the surviving male African Americans.³⁵⁸ In 1997, as a prelude to monetary payments, President Bill Clinton admitted that “[t]he United States government did something that was wrong” and that “[t]he American people are sorry.”³⁵⁹

Significantly, however, the women who suffered because their husbands were dying from a curable disease, in addition to the women who were infected by their husbands, received nothing. The women were the experiment’s invisible victims—the official apology addressed only the 399 men, as if only the Black men suffered.³⁶⁰ Race trumped all. Indeed, President Clinton declared in his apology to the eight survivors that the experiment was “clearly racist.”³⁶¹

What Clinton did not acknowledge was the invisible factor—gender. The women who also suffered the obliterating effects of the experiment were largely excluded from the lawsuits, the reparations payments, and indeed the reparations debate itself. Their gender rendered them and their suffering invisible.

There is little United States scholarship exploring reparations claims for gender-related injustice. Indeed, the discourse on

357. See *Pollard v. United States*, 384 F. Supp. 304 (M.D. Ala. 1974). The lawsuit originally sought \$1.8 billion in damages. After considerable publicity, the government settled the litigation politically by conferring \$10 million in reparations. See Carole Cannon, *The Un-Tuskegee Experiment*, JACKSON FREE PRESS, Mar. 24, 2004, available at http://www.jacksonfreepress.com/comments.php?id=2653_0_9_0_C.

358. *Talk of the Nation: Government Apologies* (NPR radio broadcast Jan. 20, 1998), <http://www.npr.org/transcripts/>.

359. Chad W. Bryan, *Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599, 606 (2003) (citing President Bill Clinton, Remarks by the President in Apology for Study Done in Tuskegee (May 16, 1997), available at <http://clinton4.nara.gov/textonly/New/Remarks/Fri/19970516-898.html>).

360. See generally TUSKEGEE SYPHILIS STUDY LEGACY COMM., FINAL REPORT OF MAY 20, 1996 (1996), available at <http://www.tuskegee.edu/Global/story.asp?S=1141982>.

361. Bill Clinton, President of the United States, Remarks by the President in Apology for Study Done in Tuskegee (May 16, 1997), available at <http://clinton4.nara.gov/textonly/New/Remarks/Fri/19970516-898.html>.

reparations claims for slavery tends to overlook claims for sexual violence against Black women.³⁶² Professor Brophy suggests that people generally do not take gender into account because of an implicit male bias reflected in the history of misogyny in legislation.³⁶³

The first effort to theorize about gender reparations appeared in 2006 in the *Handbook of Reparations*. A lengthy international justice chapter by Colleen Duggan and Adila Abusharaf addressed reparations for sexual violence in formerly repressive societies transforming into democracies.³⁶⁴ In addition to highlighting the appropriateness of gender specific reparations in selected situations, the chapter provided a stark evaluation of how “gender bias . . . undermine[s] women’s ability to access reparation[s]”³⁶⁵ By highlighting discrimination in the denial of reparations access to a group of potential claimants, the chapter sought to recast the debate about who suffers injustice and whose harms are worthy of repair. Perhaps most important, in a manner unimagined until now, the chapter hinted at gender reparations’ potential for bringing women to the coalitional table as allies to American racial reparations advocates.³⁶⁶

362. Andrea Smith, *Conquest and Compensation: Blacks and Native Americans Haven’t Agreed on a Reparations Framework—It’s Time to Change the Debate*, COLORLINES MAG., July-Aug 2006. Smith highlighted sexual violence under the slavery system: “Black women were deemed inherently rapeable by slave masters Black men were also often forced by their masters to rape Black women.” *Id.* Scholar Traci West documented that “the colonial ideology that Black women are inherently rapeable is evidenced in popular culture—public support for Clarence Thomas and Mike Tyson and public scorn for their victims” *Id.* See generally ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE (2005).

363. Interview with Alfred L. Brophy, Professor of Law, Univ. Ala., in Honolulu, Haw. (Mar. 1, 2006).

364. Duggan & Abusharaf, *supra* note 306, at 627.

365. *Id.* at 626.

366. *Id.* at 634. As chapter authors Duggan and Abusharaf observe, “[r]eparations schemes—while not a panacea for reversing all forms of gender bias and capture—offer interesting possibilities to lay the social and political groundwork needed for this process to advance, and in the interim could offset some of the gendered harm caused by sexual violence.” *Id.* at 627. At the same time, perhaps because the *Handbook* offers only initial studies, the analytical framework offered and its application in specific gender-related examples at times appears diffuse and

2. *Reparations at the Intersection of Gender and Race*

In 2007, building on Duggan and Abusharaf's initial inquiry, the ground-breaking book *What Happened to the Women?* placed gender reparations for human rights injustice in the spotlight. It is the first and only book of its kind. The case studies of women systemically degraded and injured are juxtaposed to the general absence of women in reparations processes.³⁶⁷

What Happened to the Women? acknowledges the novelty of gender reparations in both scholarship and politics, noting "there is little research on, and even fewer concrete examples of, why or how gender analysis and gender-sensitive policies for reparations might make a difference in societies recovering from mass violence."³⁶⁸ The book's essays provide both vital information and impetus for further theory development.

As an initial effort, the book is limited in important ways. For example, the book mentions that gender is "cross-cut by other axes of difference, including age/life-cycle position, marital status, ethnicity, race, religion, class, and caste."³⁶⁹ It declines, however, to examine the deep complexities of the harm women endure when gender is coupled with other forms of discrimination; most commonly race.

Intersectionality, or cross-axes discrimination, describes the dimension where gender and race connect.³⁷⁰ Intersectionality is a

over-generalized. For instance, the description that gender and reparations need to be "contextually grounded and based upon a full understanding of how gender identities interact with race, class, age, religion, and other social divisions" appears too broadly framed to be of practical value. *Id.* at 634.

367. Colleen Duggan, *Foreword* to *WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS* 15, 16 (Ruth Rubio-Marín ed., 2006) ("Emerging research continues to highlight a growing understanding of the root cause of gender-based violence as a phenomenon often anchored in gendered definitions of masculinity and femininity.").

368. *Id.* at 16.

369. *Id.* at 15.

370. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (exploring a ground-breaking intersectionality analysis); Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (or Other-Isms)*, 41 DUKE L.J. 397 (1991) (describing that women of color traditionally "are implicitly viewed as belonging to mutually exclusive categories,

powerful concept because it explains how the simultaneous crossing of gender and racial discrimination creates unique kinds of harms to women of color.³⁷¹ Women are “targetted [sic] in gender-specific ways, such as rape and sexual torture”³⁷² During war or within oppressive regimes, women of color are also often specially targeted because of perceived racial inferiority. They suffer a unique kind of oppression—submerged at the bottom of gender and race hierarchies of human unworthiness.³⁷³

Further, after the repression stops, women of color become “often doubly or even triply marginalized when it comes to post-conflict reparations schemes.”³⁷⁴ As discussed earlier, one failing of the Tuskegee reparations was the invisibility of the African American women—more particularly, the unique ways that the Black women suffered as Black women first during the experiment, and then later

rendering women of color invisible”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) [hereinafter Harris, *Race and Essentialism*] (explaining that black women’s experience of discrimination and sexual violence differ from that of white women because of race). See generally BELL HOOKS, *AIN’T I A WOMAN? BLACK WOMEN AND FEMINISM* (1981) (analyzing the impact of sexism on black women during slavery and the historic harms against black women that continue to have repercussions today); BELL HOOKS, *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* (1990) (explaining the propensity of ignoring race and gender in political discourse involving differences).

371. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence*, 43 STAN. L. REV. 1241, 1242 (1991) (explaining how experiences of black women should not be politicized as either black experiences or female experiences).

372. Susanna George, *Why Intersectionality Works*, ISIS INT’L-MANILA, http://www.isiswomen.org/index.php?option=com_content&task=view&id=637&Itemid=217 (last visited Sept. 8, 2007).

373. See Linda Burnham, *The Wellspring of Black Feminist Theory*, 28 S.U. L. REV. 265, 265 (2001) (describing how “race, class and gender are interrelated dynamics of power and oppression”); Robert S. Chang & Jerome McCristal Culp, Jr., *After Intersectionality*, 71 UMKC L. REV. 485, 485 (2002) (explaining that “race and gender do not operate independently but are woven together”); Harris, *Race and Essentialism*, *supra* note 370 (revealing the implicit white woman norm in feminist legal theory and identifying differing experiences with combined racism and sexism for women of color); Mary Jo Wiggins, *Foreword: The Future of Intersectionality and Critical Race Feminism*, 11 J. CONTEMP. LEGAL ISSUES 677, 678 (2001) (noting “how race, gender, and class interact for women of color within a system of white male patriarchy and racist oppression”).

374. Duggan, *supra* note 367, at 17.

during the reparations process. Examining gender alongside race does not displace race in reparations theory; rather it complements and expands reparations analysis as a whole—crossing conceptual borders and opening new coalitional possibilities.

The utility of intersectionality reparations analysis is revealed by the Korean Comfort Women reparations claims against the Japanese government for mass rape by Japanese soldiers during World War II. The existing racial hierarchy in Japan prompted the Japanese government to kidnap or conscript Korean women to serve as sex slaves for soldiers. Of the 200,000 “comfort women,” or “*jugun ianfu*,” taken from Japan, eighty percent were women of Korean ancestry.³⁷⁵ The horrific harms they suffered are illuminated by an intersectionality analysis of two distinct points.

First, the Japanese government mainly forced Korean women in Japan, instead of “superior” Japanese women, to serve as prostitutes. Gender oppression lay at the heart of the atrocity—sending women was the obvious “solution” to the Japanese males’ sexual needs. But race or ethnicity was also crucial. The Japanese government was compelled by racial norms to target expendable Korean women.³⁷⁶ They were targeted for degradation, and even death, not just because they were women or just because they were of Korean ancestry, but because they were Korean women.³⁷⁷

375. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATIONS, *supra* note 284, at 435; see also Jennifer Kwon, *The Comfort Women Litigation and the San Francisco Treaty: Adopting a Different Principle of Treaty Interpretation*, 73 GEO. WASH. L. REV. 649, 651 (2005). The women, young as eleven, were used as sex slaves for Japanese soldiers. *Id.*; see also Park, *Broken Silence*, *supra* note 17, at 27. The racial inferiority of the Korean women deemed them “a logical choice for exploitation” for the gender-related crime of rape. *Id.*

376. Kyeyoung Park, *The Unspeakable Experiences of Korean Women Under Japanese Rule*, 21 WHITTIER L. REV. 567, 581 (2000) (citing Hyunah Yung, *Revisiting the Issue of Korean “Military Comfort Women”: The Question of Truth and Positionality*, 5 POSITIONS 51, 64 (1997)). The racial hierarchy caused Japan to aggressively seek young Korean women to serve as sex slaves because Japan believed the quickest way “to obliterate the Korean people” was to “eliminate its women.” *Id.* Many Korean women also ended up sterile as a result of forced abortions. *Id.*

377. The Japanese military also conscripted into sexual slavery smaller numbers of women from China, Taiwan, the Philippines, Malaysia, and the Netherlands. See YAMAMOTO ET AL., RACE, RIGHTS AND REPARATIONS, *supra*: note 284, at 435. These women, too, were targeted because of their mix of gender and

Second, Japan was able to evade prosecution for some of its major war atrocities when post-war trials failed to focus on crimes against humanity.³⁷⁸ Consequently, Japan's program of mass rape went unacknowledged and unprosecuted. What resulted was a chilling message to the victims: their suffering as women—more distinctively, as Korean women—was unworthy of international legal scrutiny.³⁷⁹ Racial unworthiness when intersected with gender notions of inferiority made the Korean women “close to invisible” to not only the Japanese government, but also to the World's justice system.³⁸⁰ The disturbing reality is that these Asian women were expected to suffer³⁸¹—first, at the hands of soldiers, then later by the legal system.

But no longer. The ianfu's struggles for reparations in courts of law and world opinion have contributed to a changing legal consciousness about gender as well as racial redress. The Timor-Leste Truth and Reconciliation Commission's recommendation highlighting gender in the reparations calculus is indicative of this new frontier.³⁸² The Commission's pro-active shelters, workshops, and counseling to promote recovery for Timorese women suffering “systematic patterns of [gender] abuse” by Indonesian occupiers, also signal revitalized attention to the ground-level dynamics of social healing.³⁸³ Those efforts underscore the significance of multi-layered redress in Timor-Leste's process of democratic nation-building. The salience of gender as well as race in these international redress movements marks a new dimension to reparations theory and practice. It blurs established conceptual boundaries to address badly needed social healing through justice, and in doing so opens strategic alliance-forging possibilities for American reparations advocates.

ethnicity. *Id.* at 436.

378. Ahmed, *supra* note 288, at 137-38.

379. *See id.*; *see also* Barry A. Fisher, *Japan's Postwar Compensation Litigation*, 22 WHITTIER L. REV. 35, 43-44 (2000).

380. Ahmed, *supra* note 288, at 139.

381. Interview with Alfred L. Brophy, Professor of Law, Univ. Ala., in Honolulu, Haw. (Mar. 1, 2006).

382. *See* Wandita et al., *supra* note 16, at 294-96.

383. *Id.* at 290.

VI. CONCLUDING THOUGHTS

In March 2007, Virginia, the former capital of the Confederacy and largest slaveholding state, authored a lengthy legislative resolution expressing deep regret for Virginia's pivotal role in African American slavery and the exploitation of Native Americans.³⁸⁴ The unanimous resolution employed language of healing. The resolution recognized that "the spirit of true repentance on behalf of a government, and, through it, a people, can promote reconciliation and healing."³⁸⁵ The resolution also aimed to link the lessons of the past to Virginia's future to "avert the repetition of past wrongs and the disregard of manifested injustices."³⁸⁶

But, despite its acknowledgments, expressions of "profound regret" and "call for reconciliation,"³⁸⁷ the resolution stopped short. After political wrangling and compromise, the resolution omitted any language that might have been construed as a springboard for reparations. Indeed, even the word "atonement" in the initial draft was stricken because the "word could prompt claims for reparations—monetary compensation."³⁸⁸ Claims for compensation would doom the resolution.

Yet, for Ron Walters of the African American Leadership Institute, even though Americans may never agree on reparations, the Virginia resolution was significant because "'the discussion about it is extremely important' for national healing"³⁸⁹ Similarly, for Vonita Foster of the U.S. National Slavery Museum, the expression of regret was a "'very positive step."³⁹⁰

Virginia's pro-active "step," the first of its kind by a state, may well have been momentous. Yet that step generated a slew of questions. How significant are the words of acknowledgment, responsibility and regret? Are they enough to foster healing? If they are only a step in the healing process, what are the other steps? And

384. S.J. Res. 332, 2007 Sess. (Va. 2007).

385. *Id.*

386. *Id.*

387. *Id.*

388. Koch, *supra* note 129.

389. *Id.* (quoting Ron Walters, African American Leadership Institute at the University of Maryland).

390. *Id.* (quoting Vonita Foster, U.S. National Slavery Museum).

why did the language of reconciliation and healing generate an interest-convergence (unanimous approval), while even a rhetorical hint of reparations or compensation raised enough hackles to ensure defeat? Why did the resolution speak of horrific harms, but remain silent about the reconstruction of economic and social institutions needed to respond to the present-day effects of slavery, segregation, and colonial exploitation?

In the face of these multi-layered questions generated by the Virginia resolution, how should African Americans and the American populace respond? How does Virginia as a former slaveholding state, and how do we as a society, assess this effort to promote reconciliation and healing? Is it truly a reparatory act, or merely empty words? Are the efforts complete, or are more steps to come? And should those assessments be altered by the recent federal court rejection of all major slavery-based reparations claims and bolstered by the chorus of reparations nay-sayers?³⁹¹

At this moment, standing at the crossroads, American reparations theory charts a murky path. In light of the stakes and in hopes of generating *practical theory* that links scholars and frontline advocates with policymakers and the American public, we have suggested next steps down an American reparations path that elevates the role of “social healing” and links group and societal healing to “doing justice.” To help chart this path we have suggested that reparations-as-repair³⁹² scholars and advocates generate a strategic framework that draws more deeply from multidisciplinary understandings of social healing as well as from multifaceted global reparations attempts at symbolic and practical justice.³⁹³

The suggested framework of *social healing through justice* bears three distinct markers. First, it builds upon the scholarship embracing reconciliation (instead of compensation) as the conceptual foundation for reparations.³⁹⁴ It diverges, however, by expressly highlighting the role of justice in social healing and by deploying language that is less

391. See *supra* Part II.B.

392. See *supra* Part III (describing scholarship grounding reparations in the concept of “repair”).

393. See *supra* Part IV (describing multidisciplinary commonalities concerning social healing).

394. See *supra* notes 141-61 and accompanying text.

controversial than “reconciliation.”³⁹⁵ Second, it casts reparations not as an end in itself but instead as an integral aspect of the larger project of social healing—as the culmination of a series of strategic efforts targeting recognition, responsibility, and reconstruction.³⁹⁶ In doing so, it identifies repairing damage to group members and building new relationships as focal points for fostering an interest-convergence among the subjects of injustice, citizens’ groups, and society itself. And third, the path is marked by an emphasis on reparations practice; or more specifically, on the insights drawn from recent ground-level human rights struggles worldwide to redress the harms of injustice as a pivotal element of a country’s democratic legitimacy.³⁹⁷

Through this framework’s lens of recognition, responsibility, reconstruction, and reparation, Virginia’s resolution emerges in sharper focus—both as a promising first step and as a starkly incomplete embrace of the kind of justice that “promotes healing and reconciliation.” Briefly stated, the legislative resolution for the first time officially *recognizes* the history and harms and acknowledges Virginia’s *responsibility*. Yet, the extent of popular support is unclear.

More important, although calling for healing through reconciliation, the resolution does not commit to, or even hint at, forthcoming state acts of *reconstruction* to repair the very foundations of present-day damage in the schools, workplaces, housing, and financial practices. And passage of the resolution was premised on supporters’ apparent renunciation of claims for *reparations*. Perhaps more will follow, but if Virginia moves no further, believing that nothing more can or should be done, then the *social healing through justice* framework predicts major stumbling on the path to Virginia’s stated goal of healing and reconciliation. The framework’s assessment reveals that without meaningful acts of reconstruction and reparation, there will not likely be the kind of ground level experience of justice that promotes social healing for African Americans or for the people of Virginia.

Nevertheless, the framework also illuminates the potential role of Virginia’s statement of regret as a catalyst for shifting national “public

395. See *supra* Part IV.

396. See *id.* (describing dimensions to social healing through justice).

397. See *supra* Part V.B. (assessing the role of reparations in a country’s claim to legitimacy as a democracy).

consciousness” over time about what is right and just. The articulation of human rights principles of equality, freedom, self-determination and redress for injustice in courts of public opinion as well as law (even when legally unenforceable), bear on the United States’ legitimacy as a democracy at the very moment America is struggling to find moral grounding in the eyes of much of the world. Whether the United States redresses the continuing harms of American injustice to people within its borders, will speak loudly about its actual commitment to democratic principles and human rights.

Indeed, several states are now considering legislative statements of apology or regret similar to Virginia’s and to the Senate’s apology for inaction in the face of widespread Jim Crow lynching.³⁹⁸ Some states may even move further toward reconstruction and reparation. Virginia’s resolution may turn out to be a long-range catalyst for southern states and possibly for America as a whole.

But, we submit, this will only occur if reparations scholars and advocates chart and walk a strategic path that far more deeply engages mainstream America in a project that explicitly locates reparations within the larger project of social healing through justice. With this in mind, along with the urgency of pending reparations claims of African Americans, Native Americans, Native Hawaiians, Mexican Americans, Japanese-Latin Americans and Puerto Rican Americans, all have an abiding interest in the next steps for American reparations theory and practice at the crossroads.

398. See Koch, *supra* note 129.

