

STRUCTURAL RACISM AND THE REDRESSING OF FOUNDATIONAL WRONGS

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Being aware of who's land we're on, and its history, helps us have grounded conversations. This awareness is also critical to understanding the particular forms that racism, patriarchy, and xenophobia have taken in this country. I'm writing from Atlanta, Georgia, where I'm on Muskogee land. Land from which most of the Muskogee Creek Nation was violently removed; land that has been claimed and transformed into property by European settlers and rendered profitable by the labor of enslaved and exploited people of color.

I come from a Japanese American family deeply scarred by internment during World War II, and that motivated me to try to understand the dynamics of racialized power and privilege in this society. As I studied our history, I realized that I couldn't make sense of the mass incarceration of Japanese Americans without understanding the push-pull dynamics affecting other Asian immigrant groups, as well as Latinx folks, both immigrants and those whose lands are occupied by the U.S. Living in the South, I had to reconcile those dynamics with the longstanding exploitation of people of African descent in this country. I realized that to understand *that* history, I had to come to terms with what has been done, and continues to be done, to the Indigenous peoples of this land.

I came of age during the civil rights movement and the era of global decolonization. Wars of independence against colonial domination were being fought across Africa and Asia, and people of color within the United States often saw ourselves as engaged not only in struggles for equality but also for self-determination.

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Like many Japanese Americans of my generation, I was very skeptical of the redress movement of the 1980s. The United States government had quite deliberately violated our families' constitutional rights as well as their basic human rights, and these actions had been rubber-stamped by the Supreme Court on bogus claims of national security. What good could possibly come from an apology or token compensation?

Luckily, the redress movement did not wait for my approval and as I watched it unfold, I realized how much it meant to my parents' and grandparents' generations to have their stories move from a painfully personal realm into the light of publicly acknowledged history.

Most internees had been so traumatized they never spoke about their experiences, even to their children. This is why I love the poet Janice Mirikitani's rendition of her mother's response, when informed that she had used up the 10 minutes allotted for her testimony to the Congressional Commission on redress:

"Mr. Commissioner . . . when you tell me I must limit testimony, when you tell me my time is up, I tell you this: Pride has kept my lips pinned by nails, my rage coffined. But I exhume my past to claim this time."¹

It was only when asked for testimony that would become part of an official record, I believe, that those who had been interned could be assured that their survival was no longer contingent on the determined pride that had kept their "rage coffined." Based upon the findings of the Commission, the U.S. government for the first time in its history apologized for a large-scale, race-based wrong and provided token compensation that was not contingent on a forced expropriation of property. It was a vindication that many had spent their whole lives waiting for.

That said, the Japanese American experience also illustrates many of the dangers inherent to "winning" a struggle for reparations. Is it really acknowledging a wrong, making amends, and ensuring it won't happen again? Or is it just checking a box; framing the problem as an aberration and thereby legitimizing the state; telling us it's time to move on? What's the moral of the story being told?

The late Chris Iijima made a very powerful argument that in passing the Civil Liberties Act of 1988 Congress was rewarding the

¹ JANICE MIRIKITANI, *SHEDDING SILENCE* 35 (1987).

“superpatriotism” of Japanese Americans.² Much of the discussion in Congress centered on the heroism of the segregated all-*nisei* military forces who came out of concentration camps to demonstrate extraordinary heroism on the battlefield, and how the community more generally had proven its loyalty by being so “cooperative” in our own displacement and incarceration. In other words, we were rewarded for acquiescing in the wrong. Those who resisted—and there were many—should have been but are not recognized as the heroes of this story.

This brings us to the question of whether the redress is addressing the underlying factors responsible for the injuries that have been inflicted. Are the racialized wrongs we seek to redress aberrational? Can we address them in isolation and trust that the problem has been solved?

If we look at instances in which reparations have been granted, or at least seriously considered, within the United States, we see repeated attempts to “contain” the wrongs as mistakes, deviations from a status quo that is at its core equitable and democratic. Thus, there are a number of cases related to World War II, and some related to specific events—such as the white riots in Rosewood, Florida, and Tulsa, Oklahoma, or the syphilis experiments on African American men at the VA hospital in Tuskegee, Alabama—in which some redress has been obtained.

Implicit to the narrative surrounding these cases is that such instances were exceptional and, therefore, there is no need for structural change. Similarly, the Indian Claims Commission, established in the 1940s, acknowledged the wrongful taking of much American Indian land but was not empowered to return any of it. Congress has apologized for what it called the illegal overthrow of the Kingdom of Hawai’i, but it continues to disregard Native Hawaiian sovereignty. None of these cases reflect recognition of a need for fundamental change.

Recently we’ve seen a much-needed revival of serious discussions about reparations for African Americans, and particularly reparations for slavery. Here, too, the problem can be seen as an aberration: a narrowly defined wrong generated by a fundamentally acceptable social and political structure. As such, a fairly

² Chris K. Iijima, *Reparations and the Model Minority Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385, 19 B.C. THIRD WORLD L.J. 385 (1998).

straightforward remedy might be agreed upon—perhaps acknowledgement that slavery and race-based discrimination was wrong and symbolic compensation paid to individuals and groups who still suffer its consequences. As with Japanese American redress, this would doubtless have much social, economic, and psychological value.

Nonetheless, if the problems we are trying to address are structurally rooted and the institutions that generated the horrors of slavery and subsequent racial subordination are left intact, they will continue to perpetuate systemic inequalities. These inequalities will then be compounded by the public perception that the playing field is now truly level and, therefore, society has no general responsibility for ongoing disparities faced by African American communities.

This is the problem of foundational wrongs, the racialized injustices upon which the state has relied (and relies to rely) for its wealth, power, and its very existence.³ Even a superficial look at American history reveals that in the process of appropriating the lands and natural resources of Indigenous peoples, Angloamerican settlers have attempted to eliminate American Indians, Alaska Natives, and Native Hawaiians both literally and conceptually. The economic, political, and military power of the state rests on wealth generated from the land through centuries of enslaved or convict labor, particularly that of Afrodescendant people and, still, by using people of color as easily accessible and readily disposable sources of low-cost labor. As a consequence, our history is fraught with massive violations of basic human rights.

Can a state provide meaningful redress for wrongs necessary to its very existence, conduct from which much of its population continues to benefit? I expect the answer is both yes and no. It can provide much-needed reparations, but it's not likely to be the source of the fundamental changes we need to see.

I think we have to start from the premise that reparations can take many forms and serve many purposes to those who have been wronged, while recognizing that they can also entrench the problem or exacerbate the harm. There's always the danger that financial compensation, apologies, and memorials will be invoked to legitimize the state, to relegate the harm to the past, to sow division by

³ Much of this analysis is drawn from Natsu Taylor Saito, *Redressing Foundational Wrongs*, 51 U. Tol. L. Rev. 13 (2019).

“rewarding” certain groups but not others, to silence those who remain dissatisfied, and to subvert attempts to identify and address the sources or causes of the injustice. Yet they can also be healing and empowering. And that’s what we need in order to make the changes that the state is not going to make.

Remedial options under U.S. law are very limited, so it’s useful to step back and look at the issues through the lens of international law. Under international law, when a wrongful act has occurred, the party responsible for the injury is obligated to provide redress. The object of that redress is to restore the status quo ante, to put things back to where they would have been absent the violation. Where full restitution is not possible, we look to compensation, satisfaction, and measures of rehabilitation.

Compensation is intended to address actual losses that cannot be remedied by restitution, and satisfaction addresses non-material injuries. States are also responsible for ceasing illegal actions and, where appropriate, providing guarantees of non-repetition. Perhaps most importantly, the perpetrator does not get to determine the form or extent of the redress provided.

We may not be able to get international law enforced. Nonetheless, thinking about things from this perspective can broaden our vision, freeing us to contemplate what kind of society we want to live in and to leave to future generations. But we also realize that we build such a future one step at a time.

The real question is whether the steps we’re taking *now* are reinforcing our dispossession or leading us in a liberatory direction. I’d like to suggest that we consider three touchstones in answering that question: dignity, power, and truth.

Dignity.

Dignity is a precept foundational to all of the human rights norms found in international law. It’s rooted in a framework of respect for human life in the dynamic, organic context of community, culture, history, and identity. To quote legal scholar Oscar Schacter, “nothing is so clearly violative of the dignity of persons as treatment that demeans or humiliates them. This includes not only attacks on personal

beliefs and ways of life but also attacks on the groups and communities with which individuals are affiliated.”⁴

Dignity also means being respected as a full human being and having the freedom to act on one’s responsibilities. This is significant because in many cultures, human dignity is manifest not by the defensive assertion of rights but by the fulfilling of responsibilities, not only to one’s immediate family but also to the community in a broader sense, to future generations, to other forms of life, and to the earth itself. It is not a right “granted” by state power, but one that can be realized—albeit at great personal cost—even under the most repressive of conditions.

Power.

As we engage in struggles to obtain meaningful redress for past injustices, we cannot cede power to those who perpetrate injustice. Instead, we have to recognize and build on the power of our communities. Justice is not going to come in the form of charity, economic development, government aid, or grants from nonprofits. These may be necessary to the survival of our communities, but they cannot liberate us.

Likewise, justice will not come in the form of equal protection or assimilation. Equality under law helps prevent further abuse, but it does not constitute a remedy for past or current violations of fundamental rights.

Assimilation is an illusory goal because those who have been, and continue to be, excluded from a society cannot simply decide to merge with it. It’s a two-way street, also requiring acceptance by those who have chosen to exclude them. It is also illusory because its offer of access to societal benefits is contingent on the relinquishing of our independent identities, cultures, histories, and worldviews. We are not free to define ourselves or maintain our cultures except in the most superficial of ways, and we certainly are not free to restructure core institutions in ways that might truly benefit our communities. Assimilation represents the ceding of power.

Real empowerment entails exercise of the right to self-determination, the idea, in Robert Williams’ words, “that human

⁴ Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 849 (1983).

beings, individually and as groups, should be in control of their own destiny, and that systems of government should be devised accordingly, and not imposed upon them by alien domination.”⁵

Truth.

Finally, we can't build a liberated future on lies about the present or the past. We can't have meaningful redress without ensuring that all peoples' histories are reflected in the historical record and incorporated into social narratives. Even if actual restitution is impossible at this point, accurate accounts of the wrongs are critical.

Thus, for example, we have the data and the tools to calculate the economic benefits that the institution of chattel slavery provided for colonizing powers generally, and here in the United States. As of 1860, some four million enslaved persons of African descent lived in the United States, accounting for more than 40% of the population in southern states. We don't yet have an accurate understanding of how much wealth they created, but the so-called “market value” of enslaved Black people in 1860 has been estimated at four billion dollars, indicating their importance to the American economy.

We are told that such considerations are a waste of time because it's “unrealistic” to expect those who are now wealthy and powerful as a result of such exploitation to consider repaying such tremendous sums. There is no doubt that fact-based redress for enslavement would be met with resistance. Nonetheless, establishing the truth provides us with a reference point from which we can begin to negotiate, and it clarifies that we are not asking for handouts, or charity, or development aid, but just a small portion of that which is legally due. Such strategies, I believe, can help to change the power dynamics and the discourse on reparations and, in the process, empower for those who struggle for justice.

Law professor Dorothy Roberts asks: “How do we rectify a system that so brilliantly serves its intended purpose?”⁶ This question sums up the dilemma inherent to the quest for redress for injustices foundational to the establishment of the state.

⁵ Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights to Self-Determination*, 8 *ARIZ. J. INT'L & COMP. L.* 51, 51 (1991) (paraphrasing Professor S. James Anaya).

⁶ Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 *COLUM. HUM. RTS. L. REV.* 261, 265 (2007).

Ultimately, I don't think there is an "objective" answer to what will remediate structural, foundational wrongs, but we can assess what measures are empowering—what enhances our collective wellbeing, respects our dignity, and restores balance to our worlds. By pursuing those measures, we may bring about foundational change.