

# Symposium Introduction: Walking with Destiny

ROY L. BROOKS\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	455
II.	REDRESS FRAMES .....	461
	<i>A. Models of Redress</i> .....	462
	<i>B. Forms of Reparations</i> .....	465
	<i>C. Transitional Justice</i> .....	466
III.	THE INTERIM REPORT .....	468
IV.	FRAMING THE INTERIM REPORT .....	471
V.	CONCLUSION .....	478

## I. INTRODUCTION

During the Enlightenment, the poet Robert Burns lamented, “Man’s inhumanity to man [m]akes countless thousands mourn.”<sup>1</sup> Burns was looking back over centuries of human injustices—atrocities—as the empirical basis for his mournful reflection. But even now, long after the Enlightenment, we have not been able to curb our proclivity for committing atrocities.<sup>2</sup>

---

\* © 2023 Roy L. Brooks. Warren Distinguished Professor of Law (1995-present) & University Professor (2005-2006; 2018-2019), University of San Diego School of Law. The students and I are indebted to the kindness and support of Dean Robert A. Schapiro, Vice Dean Margaret Dalton, Catherine Spray, and Brigid Ann Bennett.

1. ROBERT BURNS, MAN WAS MADE TO MOURN: A DIRGE (1784), *reprinted in THE COMPLETE WORKS OF ROBERT BURNS* 95, 96 (Allan Cunningham ed., 1855).

2. An atrocity can be defined as an “exceptional act of human degradation.” ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 142 (2004) [hereinafter BROOKS, ATONEMENT AND FORGIVENESS].

What we have been able to do after all these centuries, however, is enlarge the human capacity for redressing—repairing—the damage wrought by our atrocities. As atrocities do not appear to be ending, redress has become our destiny.<sup>3</sup>

California is attempting to walk with this destiny. Our most populous state is poised to become the first government entity in the country to offer significant redress for slavery.<sup>4</sup> Through the work of a government

---

3. Since World War II, criminal redress and civil redress have become not only acceptable but common responses to past atrocities. See Roy L. Brooks, *Postconflict Justice in the Aftermath of Modern Slavery*, 46 GEO. WASH. INT'L L. REV. 243, 252–83 (2014) [hereinafter Brooks, *Postconflict Justice*] (discussing international criminal and civil redress). Civil redress, the subject of this Symposium, is particularly important because it speaks to the victims' interest rather than the state's interest, which is otherwise addressed through criminal redress. For a detailed discussion of civil redress, see generally WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks ed., 1999) [hereinafter WHEN SORRY ISN'T ENOUGH] (discussing civil redress claims in response to acts of injustice throughout the nineteenth and twentieth centuries). It behooves one to note that outside the field of atrocities, the U.S. has compensated a wide range of individuals injured through no fault of their own. *Harvard Magazine* reports:

[T]he federal government in fact has a long history of providing compensation to people who have suffered harms of all kinds through no fault of their own: from people exposed to pesticides or nuclear radiation, to indigenous peoples, to farmers who've lost crops, to people harmed by vaccines or the closure of a factory or military base. These payments amount to "billions of dollars every year to millions of Americans. . . . The government uses a range of financial tools to pay for reparatory compensation: excise taxes, special assessments, and trust funds.

Jonathan Shaw, *Reparations for Slavery?*, HARV. MAG. (Nov.–Dec. 2022), <https://www.harvardmagazine.com/2022/11/right-now-reparations-for-slavery> [<https://perma.cc/V53T-67JY>]. I am indebted to my colleague Herbert Lazerow for bringing this important source to my attention.

4. Although Black Americans, the primary victims of the "peculiar institution," have been seeking redress since the end of the Revolutionary War, see BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 4–19, governments and private institutions began taking seriously the redress demand only in the late twentieth century. For example, Florida in 1994 provided redress in the form of limited reparations for African Americans who suffered proven property damage in the Rosewood race massacre in 1923. See H.R. 591, 13th Leg. Reg. Sess. (Fla. 1994). Los Angeles, Chicago, and other cities have also responded to demands for redress by requiring companies conducting business in their cities to investigate and disclose any profits derived from slavery. See BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 15–16. These local laws have exposed private businesses to demands for reparations. But it was not until the public execution of an unarmed African American by the name of George Floyd in 2020—a murder performed with excruciating deliberation and nonchalance by a White police officer unafraid of being videotaped—that slave redress in the form of reparations began to pick up significantly. For a discussion of this incident that sparked protests against police brutality around the world, see, for example, Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/76EE-X8PB>]. Since the murder of George Floyd, billions

commission, the Task Force to Study and Develop Reparation Proposals for African Americans (Task Force), California has begun a process that is calculated toward using reparations as the principal mechanism for redressing slavery—“Black Reparations.”<sup>5</sup> With the excellent assistance of talented and energetic lawyers in the California Department of Justice, the Task Force has issued what is by any measure the most important study of and proposals for Black Reparations to date: a 500-page Interim

---

of dollars in Black Reparations have been paid or pledged. For example, the mayors of 11 cities have agreed to pay Black Reparations to small groups of their Black residents. *See, e.g., 11 U.S. Mayors Commit To Developing Pilot Projects For Reparations*, NPR (June 18, 2021, 7:16 PM), <https://www.npr.org/2021/06/18/1008242159/11-u-s-mayors-commit-to-developing-pilot-projects-for-reparations> [<https://perma.cc/LY9A-LB3K>]. Harvard University has pledged \$100 million in Black Reparations. *See* Michela Moscufo, *Harvard Sets Up \$100 Million Endowment Fund for Slavery Reparations*, REUTERS (Apr. 26, 2022, 10:33 AM), <https://www.reuters.com/world/us/harvard-sets-up-100-million-endowment-fund-slavery-reparations-2022-04-26/> [<https://perma.cc/CT7N-QW5A>]. Georgetown University has promised to pay \$1 billion, but descendants of the enslaved, as well as Georgetown students, have raised concerns about how the money is going to be spent. *See* Jesse Washington, *Amid Push for Reparations, Jesuits and Georgetown to Spend \$1 Billion on Racial Reconciliation and Education*, ANDSCAPE (May 19, 2022), <https://andscape.com/features/amid-push-for-reparations-jesuits-and-georgetown-to-spend-1-billion-on-racial-reconciliation-and-education/> [<https://perma.cc/U4EL-TYBD>]; *see also* Gigi De La Torre, *Slave Descendants Question Georgetown’s \$1 Billion Reparations Fund*, THE COLL. FIX (May 25, 2022), <https://www.thecollegetfix.com/slave-descendants-question-georgetown-1-billion-reparations-fund/> [<https://perma.cc/ES33-LC47>]. For a discussion of private reparations, *see* Courtenay Brown, *Corporations Grapple with Slavery Reparations*, AXIOS (June 26, 2020), <https://www.axios.com/2020/06/26/corporations-slavery-reparations> [<https://perma.cc/M3B8-7FCQ>]. The federal government has not responded so favorably to the redress claim. Congress has yet to vote on a bill, H.R. 40, calling for, inter alia, the creation of a national commission to study the issue of slave redress. This bill has been introduced in Congress in one form or another nearly every year since 1989, when first proposed by an African American Congressperson, John Conyers. *See* H.R. 40, 117th Cong. (2021); *see also* Sheila Jackson Lee, *H.R. 40 is Not a Symbolic Act. It’s a Path to Restorative Justice*, ACLU (May 22, 2020), <https://www.aclu.org/news/racial-justice/h-r-40-is-not-a-symbolic-act-its-a-path-to-restorative-justice> [<https://perma.cc/K3VE-XGJH>].

5. A “reparation” is a tangible act of restitution provided by the perpetrator of an atrocity to its victims. *See* Roy L. Brooks, *Reparations*, in 3 *ENCYCLOPEDIA OF RACE AND RACISM* 490–94 (Patrick L. Mason ed., 2d ed. 2013). “Black Reparations” are reparations given to African Americans to make amends for slavery or Jim Crow. *See* BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* 8 (1973) (“[I]t is often assumed that the primary objective of reparations is compensation for the value of slave labor.”); *see also* WILLIAM A. DARITY JR. & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* 239–55 (2d ed. 2020) [hereinafter *DARITY & MULLEN, FROM HERE TO EQUALITY*]; ALFRED L. BROPHY, *REPARATIONS: PRO & CON* xi–xii (2006).

Report issued in June 2022.<sup>6</sup> The articles in this Symposium Issue provide scholarly, non-partisan guidance to the Department of Justice as it prepares, on behalf of the Task Force, a final report on Black Reparations which is mandated by Assembly Bill 3121 to be delivered to the State Legislature before July 1, 2023.<sup>7</sup> Department of Justice lawyers have had an opportunity to consult with the student authors in a timely fashion prior to the publication of this Symposium.<sup>8</sup>

Collectively, the articles are responsive to two major perceived defects in the Interim Report—the absence of framings and the lack of specificity. Discursive framings are critical to our understanding of the atrocity. They also help us comprehend how, or even whether, we ought to proceed with redress.<sup>9</sup> Specificity is also important to any redress initiative; it clarifies what precisely the victim is getting. These defects—the absence of framing and specificity—are not unrelated. A brief discussion of the deficiencies may be useful at this point.

In his public announcement about the Interim Report, California Attorney General Rob Bonta articulated the state’s reason for redressing slavery: “Without accountability, there is no justice. For too long, our nation has ignored the harms that have been—and continue to be—inflicted on African Americans in California and across the country.”<sup>10</sup> This statement of purpose is poorly framed and, hence, too vague to convey any useful information. Neither the attorney general nor the Interim Report itself specifies what the state expects to accomplish with slave redress. Is it victim compensation, racial reconciliation, or another purpose? In other words, what model or form of redress is California deploying? Without a predicate for redress, it is difficult to determine the basis for and likely effectiveness of the proposed redress program. Engaging the Models of Redress clarifies these matters.<sup>11</sup> This exercise yields a more concrete understanding of what Attorney General Bonta means by *justice*—e.g., compensatory justice, retributive justice, or restorative justice—and forces

---

6. CAL. TASK FORCE TO STUDY & DEVELOP REPARATION PROPOSALS FOR AFR. AMS., INTERIM REPORT (2022) [hereinafter INTERIM REPORT].

7. *Id.* at 5. Assembly Bill 3121 was passed in 2020, thus giving the Task Force three years to do its work. *Id.*

8. Vince Ghazzawi & Meena Visvanathan, Cal. Dep’t of Just., Consultation Between Department of Justice Attorneys and Symposium Authors (Mar. 17, 2023).

9. For a more detailed discussion of framings, see Carol Klier, *Understanding Discursive Framings of Reparations for Slavery and Jim Crow*, 60 SAN DIEGO L. REV. 481 (2023).

10. *California Reparations Task Force Releases Interim Report Detailing Harms of Slavery and Systemic Discrimination on African Americans*, OFF. OF THE ATT’Y GEN. (June 1, 2022), <https://oag.ca.gov/news/press-releases/california-reparations-task-force-releases-interim-report-detailing-harms> [<https://perma.cc/65U5-GF8F>].

11. *See infra* Section II.A.

the state to reflect upon the “best” means of marketing its redress program to the citizens of California. Critically important, by considering the Models of Redress, the state avoids unwittingly framing redress in a way that helps opponents of redress defect the program.

As the official name of the Task Force explicitly indicates,<sup>12</sup> reparations are the main component of California’s redress program. However, the deployment of reparations laid out in the Interim Report is rather murky. It fails to make crucial distinctions found in reparatory discourse that can, to a large extent, determine the success of redress. Are community-directed reparations (“rehabilitative reparations”), whether monetary or nonmonetary, better suited to achieve the purpose of redress—which, again, we do not know what California’s purpose is—than individual reparations (“compensatory reparations”)? Whether monetary or nonmonetary, the latter entails difficult questions of identifying specific victims and calculating and distributing payments. On the other hand, there is evidence to suggest that compensatory reparations, if structured as a stream of supplemental income rather than the typical one-time payment, can effectively create individual wealth.<sup>13</sup> But should compensatory reparations be restricted rather than unrestricted to protect the integrity of redress?<sup>14</sup> The absence of this framing—parsing through the Forms of Reparations<sup>15</sup>—certainly contributes to the absence of specificity in many of the reparations the Interim Report proposes.

Although the Task Force’s interim reparations are presented with the expectation that the legislature is unlikely to accept all of them, the vast array of proposed reparations might suggest to lawmakers, especially those on the fence, that Black Reparations is too large a subject to try to tackle. Indeed, the Interim Report seems to express the hopeful belief, held by victims and well-respected scholars, that reparations mean nothing unless they transform the American social order, unless they change the relationship between race and power in our society, and unless they eradicate the norms and conditions that gave rise to the atrocity in the first

---

12. The official name for the Task Force is the Task Force to Study and Develop Reparation Proposals for African Americans. *See supra* notes 4–5 and accompanying text.

13. *See* Brandee McGee, *No Apology Until Abolition: Redressing the Ongoing Atrocity of Slavery*, 60 SAN DIEGO L. REV. 535, 555, 563 (2023).

14. *See id.* at 561.

15. *See infra* Section II.B.

place. This mainly means eliminating White hegemony.<sup>16</sup> Accomplishing this goal calls for a regime of “transformative reparations”—reparations that seek transformative racial justice or social transformation—rather than “prudential reparations”—reparations that carry transformative properties and, hence, move in the direction of social transformation.<sup>17</sup> Although the Interim Report does not explicitly engage this important discussion, its tenor and tone unquestionably adopt transformative reparations *sub silentio*. The final report ought to confirm or deny this implication by engaging a particular frame—Transitional Justice.<sup>18</sup> Importantly, the Task Force must understand that reparations have never been used successfully to transform a social order.<sup>19</sup> Social transformation may be better suited for a country’s symmetrical program of development and social service.<sup>20</sup>

---

16. “The goal is to fundamentally alter the structural terms for interaction among members of a political community where [the] atrocity occurred . . . .” Colleen Murphy, *Transitional Justice and Redress for Racial Justice*, in RECONCILIATION AND REPAIR: NOMOS LXV 181, 186 (Melissa Schwatzberg & Eric Beerbohm eds., 2023) [hereinafter Murphy, *Transitional Justice and Redress for Racial Justice*].

17. Transformative reparations change the social order; prudential reparations do not. See Roy L. Brooks, *Black Boarding Academies as a Prudential Reparation: Finis Origine Pendet*, 13 COLUM. J. RACE & L. 790, 793 (2023) [hereinafter Brooks, *Black Boarding Academies*] (“Demands for public reparations typically attempt to transform the American social order, changing the relationship between race and power in our society.”); see also *infra* note 19. Prudential reparations include: transitioning to a democratic government in South Africa, see Roy L. Brooks, *What Price Reconciliation?*, in WHEN SORRY ISN’T ENOUGH, *supra* note 3, at 434 (“Nelson Mandela’s election marked the beginning of a period of transition in South Africa. The government’s desire to move from a regime of racial oppression and exclusivity to one of racial harmony, national unity, and democratic process is no less overriding today than it was in 1994.”); unrestricted monetary reparations to victims, see McGee, *supra* note 13, at 562–65; housing vouchers, see Jessica Robertson, *California Assembly Bill 3121’s Claim for Black Redress: The Case for a State Truth and Reconciliation Commission and Housing Vouchers*, 60 SAN DIEGO L. REV. 513, 520–21 (2023); healthcare reparations, see Chelsea J. Gaudet, *Healthcare Reparations in California*, 60 SAN DIEGO L. REV. 569, 579–84 (2023); lactation reparations, see Dorothy Couchman, *Affirming and Supporting Black Women’s Lactation Agency as Redress*, 60 SAN DIEGO L. REV. 587, 591–92 (2023); and Black Boarding Academies, see Brooks, *Black Boarding Academies*, *supra*, at 797.

18. See *infra* Section II.C.

19. While there has been a transformation of political power in South Africa, socioeconomic power remains in the hands of White South Africans, and racial discrimination in such areas as housing and education continues. Reparations transformed an institution—politics—but not society as a whole. See Brooks, *Black Boarding Academies*, *supra* note 17, at 796–97 (citing Antony Sguazzin, *South Africa Wealth Gap Unchanged Since Apartheid*, *Says World Inequality Lab*, TIME (Aug. 5, 2021, 7:05 AM), <https://time.com/6087699/south-africa-wealth-gap-unchanged-since-apartheid> [<https://perma.cc/9X56-DWSW>]).

20. For a more detailed discussion of this point, see Emily J. Kawahara, *Transformative Dynamics: Reframing the Role of Reparations in Transforming Social Order*, 60 SAN DIEGO L. REV. 497, 510–11 (2023).

After discussing applicable redress frames—Models of Redress, Forms of Reparations, and Transitional Justice—in greater detail in Part II, I will summarize relevant features of the Interim Report in Part III and highlight the articles contained in this collection in Part IV. Each article offers insights into the Interim Report and redress discourse more generally. The articles do not cover every redress issue, many of which, including the constitutionality and economics of Black Reparations, have been engaged elsewhere.<sup>21</sup>

## II. REDRESS FRAMES

There are three redress framings that are particularly useful in transforming the Interim Report into a compelling final report: *Models of Redress*, *Forms of Reparations*, and *Transitional Justice*. Models of Redress<sup>22</sup> establish the primary objective of redress. What do the victims or the perpetrator, especially the former, want from redress? Is it, for example, victim compensation (Tort Model) or racial reconciliation (Atonement Model)? A redress program can have multiple objectives. The Forms of Reparations<sup>23</sup> are concerned with the most effective way(s) to achieve the redress objective. Reparations can be victim/individual directed (compensatory reparations) or community/institutional directed (rehabilitative reparations). Both forms of payment can be restricted or unrestricted. The final frame, Transitional Justice,<sup>24</sup> intersects with the previous frames. It concerns the extent to which the redress objective can be fulfilled without making fundamental changes in the socioeconomic, political, cultural, or legal norms—all the norms—that gave rise to the atrocity and that sustain the lingering effects of the atrocity. This frame begs the question of whether reparations *alone* are potent enough to fundamentally change mainstream institutions or the social order?<sup>25</sup>

---

21. For a discussion of the constitutionality of Black Reparations, see Brooks, *Black Boarding Academies*, *supra* note 17, at 840–50. For a discussion of the economics of Black Reparations, see, for example, DARITY & MULLEN, *FROM HERE TO EQUALITY*, *supra* note 5.

22. See *infra* Section II.A.

23. See *infra* Section II.B.

24. See *infra* Section II.C.

25. Redress scholars have developed these framings over decades of studying redress movements around the world—from the Nazi’s persecution of Jews, Roma, and other groups (the Holocaust) to the Japanese Imperial Army’s sexual enslavement of the “Comfort Women,” from the United States government’s internment of Japanese

## A. Models of Redress

Redress must have a purpose. What do the victims want? What is the perpetrator willing to give up? Is it to uncover the truth about the atrocity, to clarify the historical record? Is it to seek the perpetrator's remorse? Is it to compensate or punish the victims, or is it to mend a broken relationship between victims and perpetrators? The purposes of redress are limited only by the imagination. Redress purposes are pursued through Models of Redress, the most common being truth commissions,<sup>26</sup> truth trials,<sup>27</sup> apologies,<sup>28</sup> and reparations. My discussion will focus on reparations as that is the Task Force's preferred Model of Redress.<sup>29</sup>

Reparations are deployed with purpose. When victims or perpetrators picture reparations as a means of repayment for past harms, they are proceeding under the Tort Model.<sup>30</sup> Whether at the individual or institutional level, whether compensatory or rehabilitative,<sup>31</sup> reparations under the Tort Model are all about balancing the accounts. Yet, reparations can never return the victims to the status quo ante; in fact, nothing can. An atrocity can never be undone or fully compensated. For that reason, some victims have refused to accept reparations. Other victims have rejected reparations on the ground that they constitute "blood money."<sup>32</sup>

---

Americans during World War II to its genocidal treatment of Native Americans, from Argentina's "Dirty War" to South Africa's system of Apartheid, and from chattel slavery practiced in the Americas, in which color became its social marker, to racial oppression of Black Americans mandated and sanctioned by the United States government. These and other atrocities provide the empirical basis for the conceptual tools redress scholars use to understand how atrocities arise and how they can be prevented. See generally WHEN SORRY ISN'T ENOUGH, *supra* note 3, at xix–xx.

26. Truth commissions are established mainly to get at the truth of the atrocity, to clarify the historical record, and to make clear the reasons for going forward with redress. For a more detailed discussion, see Brooks, *Postconflict Justice*, *supra* note 3, at 262–65.

27. Like truth commissions, truth trials seek to establish the truth about the facts surrounding atrocities. But whereas truth commissions are conducted through legislative bodies, truth trials are judicial proceedings. Given the constitutional limitations placed on the exercise of judicial power in most countries, truth trials are uncommon. In the United States, the writ of *coram nobis* (the decision had been made in error) has been used to establish the truth and rectify unjust actions involving the internment of Japanese Americans during World War II. See *id.* at 265. For a more detailed discussion, see BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 114–17.

28. When the perpetrator of an atrocity apologizes, "it does four things: confesses the deed; admits the deed was an injustice; repents; and asks for forgiveness." BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 144. Properly crafted, an apology "is an acknowledgment of guilt rather than a punishment for guilt." *Id.* (emphasis omitted).

29. See generally *supra* text accompanying notes 4–5.

30. See BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 98.

31. See *infra* Section II.B.

32. See Roy L. Brooks, *The Age of Apology*, in WHEN SORRY ISN'T ENOUGH, *supra* note 3, at 6.



When victims or perpetrators view reparations as a path to reconciliation, they advance under the Atonement Model.<sup>33</sup> In the context of American slavery, the living victims are mainly African Americans, and the main perpetrator is the government, particularly the United States and individual states like California where slavery was legal.<sup>34</sup> Hence, for present purposes, reconciliation means racial reconciliation.

Unlike the Tort Model, the Atonement Model is driven by the perpetrator's apology. In fact, the idea of a perpetrator apology is absent from the Tort Model. But under the Atonement Model, the apology begins the process of atonement that can lead to racial reconciliation or repair—repair of the broken relationship between the perpetrator and the victims occasioned by the atrocity and repair of the perpetrator's moral character sullied by the atrocity. The apology must, however, be genuine. It must confess the deed, admit that the deed was an injustice, express remorse, and ask for forgiveness.<sup>35</sup> Elie Wiesel, the great philosopher of humanity, strongly believes that asking for the victim's forgiveness enriches the moral quality of the apology.<sup>36</sup>

The Atonement Model, then, places the burden of redress on the perpetrator rather than on the victims. This burden inheres less in the apology than in reparations. For, when the perpetrator apologizes, it must solidify the apology and make it believable by performing a redemptive act; to wit, tender reparations. Thus, apology and reparations function symbiotically under the Atonement Model. The weight of the reparations demonstrates the sincerity of the apology.<sup>37</sup> Simply saying "I'm sorry" is not enough.

If, and only if, the apology is genuine—confesses the deed, admits that the deed was an injustice, is remorseful, and asks for forgiveness—and the reparations are acceptable to the victims, the victims have a civic obligation to forgive. Under these Wieselian circumstances, the matter of

---

33. See BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 142 (“[T]he atonement model . . . embraces the core belief that redress should be about apology *first and foremost*.”).

34. See *id.* at 151–54; see also *infra* text accompanying note 63.

35. See BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 141–42.

36. See *id.* at 146–47 (citing Roger Cohen, *Wiesel Urges Germany to Ask Forgiveness*, N.Y. TIMES (Jan. 28, 2000), <https://www.nytimes.com/2000/01/28/world/wiesel-urges-germany-to-ask-forgiveness.html> [<https://perma.cc/MU8G-VH9T>]).

37. See *id.* at 155 (“[T]he perpetrator of an atrocity cannot expiate the sin it has committed against an innocent people until it has undertaken a great and heroic task of redemption. That task of redemption is a reparation. . . . It is the act that transforms the rhetoric of apology into a meaningful, material reality.”).

forgiveness arrives on the victim's desk like a subpoena; it cannot be ignored. How shall it be answered?

Forgiveness is an omnipresent theme in literature, religion, and culture worldwide. A famous Chinese aphorism states: "He who opts for revenge must dig two graves."<sup>38</sup> Paul Lauritzen defines forgiveness as "a two-part response to a situation of injury; negatively, it is the remission of an attitude of resentment evoked by the injury; positively, it is an effort to reestablish a broken relationship."<sup>39</sup> Forgiveness does not equate with amnesia. Archbishop Desmond Tutu, Chair of the South African Truth and Reconciliation Commission, constantly advised all victims of atrocities to forgive but not forget.<sup>40</sup> On the other hand, Nietzsche believed that forgiveness manifests a "slave morality," and S.J. Perelman once quipped: "To err is human, to forgive supine."<sup>41</sup>

The Atonement Model accepts the proposition that forgiveness is needed for reconciliation when the perpetrator and victims are locked into a long-term relationship, as is the case with the federal and state governments and African Americans. In this context, African Americans, like any other victims of an atrocity, have an obligation to forgive. This obligation is, however, conditional and civic rather than personal—civic forgiveness rather than personal forgiveness. Civic forgiveness is a process that unfolds over a period of time at a pace set by the victims. Its sole purpose is to facilitate the victims' desire for racial reconciliation, the success of which will improve the quality of civic life for all.<sup>42</sup>

The Atonement Model, then, has two basic components: atonement and forgiveness. Atonement is the perpetrator's moral duty. The perpetrator must tender an apology and concretize it with sufficient reparations. Thus, apology plus reparations constitute atonement. Forgiveness is the victims' civic duty. If the atonement is acceptable to the victims, then the victims should forgive in deference to the civic health of the country. Though forgiveness is civic rather than personal, it can be the latter if it contributes to the psychological or physical health of a victim.

Reparations, then, serve distinctly different purposes under the Tort Model and the Atonement Model. Under the former, reparations are compensatory.

---

38. *See id.* at 164.

39. *Id.* at 164–65 (quoting Paul Lauritzen, *Forgiveness, Moral Prerogative or Religious Duty?*, 15 *J. RELIGIOUS ETHICS* 141, 149–50 (1987)).

40. *See* DESMOND MPIOLO TUTU, *NO FUTURE WITHOUT FORGIVENESS* 271 (1999) ("In forgiving, people are not being asked to forget. On the contrary, it is important to remember, so that we should not let such atrocities happen again.").

41. BROOKS, *ATONEMENT AND FORGIVENESS*, *supra* note 2, at 166 (citing Jeffrie G. Murphy, *Forgiveness*, in *ENCYCLOPEDIA OF ETHICS* 561, 562 (Lawrence C. Becker & Charlotte B. Becker eds., 2d ed. 2001)).

42. *See id.* at 163–69.

Nothing beyond compensation is demanded of the perpetrator, and nothing beyond accepting payment is required of the victims. Under the Atonement Model, reparations serve a higher purpose. They are restorative, the revelation and realization of an apology, a means of turning the rhetoric of an apology into a relevant, material reality which, in turn, sets up conditions for the victims' civic forgiveness and, ultimately, racial reconciliation.

Clearly, the Tort Model and Atonement Model make different normative claims. The Tort Model is backward-looking, victim-focused, and compensatory. It seeks compensatory justice. In contrast, the Atonement Model is forward-looking, perpetrator-focused, and restorative. It seeks restorative justice.<sup>43</sup> The choice between two framings could not be starker.

### B. Forms of Reparations

Reparations can operate at the individual or institutional levels. The former are victim-directed (*compensatory*) reparations, and the latter are community-directed (*rehabilitative*) reparations.<sup>44</sup> Compensatory reparations “are directed toward the individual victim or the victim’s family.”<sup>45</sup> They are compensatory, but only in a symbolic way, as “nothing can undo the past or truly return the victim to the *status quo ante*.”<sup>46</sup> South Africa paid 30,000 rand (which is about \$3,890 in 1999 dollars) each to about 19,000 people identified as victims of gross human rights violations. These compensatory reparations were designed to “acknowledge the suffering caused by the gross violations of human rights.”<sup>47</sup> Rather than attempting to compensate the victim or the victim’s family, rehabilitative reparations seek to repair the damage the atrocity has visited upon the victims’ community writ large. Rehabilitative reparations bring assets into the victims’ community. Hence, in contrast to victim-directed compensatory reparations, community-

---

43. It is significant to note that forgiveness does not nullify our civil rights laws. These laws are symmetrical; redress is asymmetrical. Forgiveness only means that the victims have reason to feel invested in the country—the relinquishment of anger and resentment—and that the perpetrator has an additional reason to believe that redress is worth the effort. Indeed, without forgiveness, the perpetrator and non-victim citizens (e.g., White Americans regarding slave redress) would feel less inclined to support redress. By offering forgiveness, the victims’ request for redress looks more reasonable.

44. See BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 156.

45. *Id.*

46. *Id.* (emphasis added).

47. Eric K. Yamamoto & Susan K. Serrano, *Healing Racial Wounds?: The Final Report of South Africa’s Truth and Reconciliation Commission*, in WHEN SORRY ISN’T ENOUGH, *supra* note 3, at 492, 496.

directed rehabilitative reparations can indirectly benefit non-victims, as in the case of reparations given to Black institutions like HBCUs where White and other non-Black students are in attendance.<sup>48</sup>

Compensatory and rehabilitative reparations are typically paid in cash as monetary reparations or in kind as nonmonetary reparations. Thus, the victims or their descendants can receive cash (the use of which can be restricted, as in the case of scholarships or housing vouchers, or unrestricted), services, programs, new laws (e.g., affirmative action), or commemorating monuments.<sup>49</sup> Members of the victims' group can also be given monetary or nonmonetary reparations. The latter might consist of business loans, job training or job placement, special educational programs—e.g., special admissions—medical or psychological assistance, monuments or other public recognitions honoring the victims' group.<sup>50</sup>

### C. *Transitional Justice*

As used in redress scholarship today,<sup>51</sup> Transitional Justice speaks to the relationship between reparations and the norms that gave rise to the atrocity, which continue to wreak havoc on the lives of the victims. It raises the question of whether reparations should be calculated to fix “the broader structural context within which particular interactions occur.”<sup>52</sup> In the case of slavery, the question is whether Black Reparations should be designed to fix the American race problem—White hegemony.<sup>53</sup>

---

48. JEFFREY M. HUMPHREYS, HBCUs MAKE AMERICA STRONG: THE POSITIVE ECONOMIC IMPACT OF HISTORICALLY BLACK COLLEGES AND UNIVERSITIES 8 (2017), [https://cdn.uncf.org/wp-content/uploads/HBCU\\_TechnicalReport\\_5-17L.pdf](https://cdn.uncf.org/wp-content/uploads/HBCU_TechnicalReport_5-17L.pdf) [<https://perma.cc/MM2N-55MH>].

49. See BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 155–56.

50. See *id.* at 156.

51. In her seminal book on the subject, Ruti Teitel argued a quarter of a century ago that the idea of “transitional justice” should be limited to political transformation and the rule of law, and that the goal of “transitional justice” should be to further democracy. See RUTI G. TEITEL, TRANSITIONAL JUSTICE 5–7 (2000). Others have since questioned this limited conceptualization of a useful term, raising the issue of just what the regime is transitioning to. See COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE 119 (2017) (“In my view, the societal transformation at which processes of transitional justice aim is best conceptualized as relational transformation. Relational transformation alters the terms of political interaction among citizens, and between citizens and officials. A relational analysis provides an account of what specifically must be changed if relationships are to be transformed and of the moral significance of such transformation.”).

52. Murphy, *Transitional Justice and Redress for Racial Injustice*, *supra* note 16, at 188.

53. See ROY L. BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA 107 (2009) (“If we as a society are serious about doing anything about disparate resources—about resolving the nation’s longest running moral problem—then we must first do something about white hegemony.”).

Activists and important reparatory scholars argue that Black Reparations should target the norms and structures sustaining racial disadvantage generated by slavery.<sup>54</sup> “The goal of such transformative reparations is to extinguish the menace of white supremacy and systemic racism across the board.”<sup>55</sup> Clearly, the Interim Report’s wide range of reparations is transformative.<sup>56</sup>

Although restructuring society in a way that fundamentally changes the relationship between race and power is, in my view, a necessary predicate for resolving the American race problem, transformative reparations seem problematic. The American race problem may simply be too big for reparations alone to fix. It would take decades of massive amounts of government spending and the sustained moral commitment of the American people to achieve transformative, transitional racial justice in this country. The inflationary impact of the “requisite spending (estimated at \$6.4 trillion to \$59.2 trillion)”<sup>57</sup> would give opponents of reparations an easy target. Furthermore, reparations have not to my knowledge ever been used to engineer social transformation. While South Africa has successfully deployed transformative reparations to transform political power within the country, giving Black South Africans a strong voice in a new democratic government, other centers of power have not been successfully transformed. Socioeconomic power remains in the hands of White South Africans. Racial discrimination and racial imbalance in mainstream institutions such as housing, employment, and education continue. South Africa ended the atrocity—Apartheid—some three decades ago but has failed to redress all the major lingering effects of the atrocity. The failure to achieve promised social transformation has contributed to racial despair among Black South Africans.<sup>58</sup> Carol

---

54. See Murphy, *Transitional Justice and Redress for Racial Justice*, *supra* note 16, at 187 (“The kind of structural change required of political relationships after atrocity is capacious, encompassing the norms and rules that structure action and interaction, as well as the attitudes underpinning and supporting such rules and norms.”); see also DARTY & MULLEN, *FROM HERE TO EQUALITY*, *supra* note 5, at 5 (“[T]he bill of particulars for black reparations must also include contemporary, ongoing injustices—injustices resulting in barriers and penalties for the black descendants of persons enslaved in the United States.”). I have participated in numerous conferences and meetings with activists who advocate for transformative reparations.

55. Brooks, *Black Boarding Academies*, *supra* note 17, at 790.

56. See *infra* Part III.

57. See Brooks, *Black Boarding Academies*, *supra* note 17, at 790.

58. See, e.g., *Why South Africa’s Born-Free Generation is Not Happy*, BBC NEWS (Oct. 26, 2015), <https://www.bbc.com/news/world-africa-34570761> [<https://perma.cc/5VPS-Z48S>].

Klier’s article counsels against employing frames that “feed into . . . oppositional frames.”<sup>59</sup>

Prudential reparations offer a different way of framing Black Reparations. Rather than mandating normative restructuring of society writ large, prudential reparations step toward social transformation, toward transitional racial justice. They promise progress rather than achievement. Prudential reparations carry transitional properties into the struggle for racial justice, or what Emily J. Kawahara terms “transformative dynamics.”<sup>60</sup> Stated differently, a transformative-dynamic frame takes a prudential approach to reparations in that it moves incrementally toward fundamental change in the social order rather than requiring immediate, potentially inflationary social transformation.<sup>61</sup>

Transitional Justice considerations are absent from the Interim Report. Similarly, the Report gives little attention to other framings—Models of Redress and Forms of Reparations. A brief description of the Interim Report follows.

### III. THE INTERIM REPORT

The California Legislature began studying the matter of redressing slavery in 2020. Assembly Bill 3121, introduced by Dr. Shirley Weber, a distinguished university professor turned successful political leader and first African American California’s Secretary of State, established the Task Force to Study and Develop Reparation Proposals for African Americans (Task Force).<sup>62</sup> The Task Force understood its charge to be to “study[] the institution of slavery and its lingering negative effects on society and living African Americans” and to “recommend appropriate remedies of compensation, rehabilitation, and restitution for African Americans with a special consideration for descendants of persons enslaved in the United States.”<sup>63</sup> Pursuant to this charge, the Task Force, with a staff consisting

---

59. Klier, *supra* note 9, at 483.

60. Kawahara, *supra* note 20, at 498 (“[E]stablishing a clear limitation of what reparations can achieve properly situates individual transitional justice mechanisms as markers to establish what this Article calls ‘transformative dynamics.’”).

61. See *supra* text accompanying note 57.

62. See Monica Montgomery Steppe, Opinion, *California is Studying Reparations for African Americans. Here’s How the Program Might Work*, SAN DIEGO UNION TRIB. (Aug. 6, 2022, 6:00 AM), <https://www.sandiegouniontribune.com/opinion/commentary/story/2022-08-06/california-reparations-task-force> [<https://perma.cc/FX9U-WR7W>].

63. INTERIM REPORT, *supra* note 6, at 5. This investigation is certainly within the expressed legislative mandate to obtain “evidentiary documentation,” CAL. GOV’T CODE § 8301(a)(4) (West 2021), of the institution of slavery that existed within the “United States and the colonies that became the United States from 1619 to 1865, inclusive,” *id.* § (a)(2), recommend ways to educate the public about these findings, and delineate

of academics, community leaders, and dozens of talented lawyers within the California Department of Justice, published an approximately 500-page Interim Report on June 1, 2022.<sup>64</sup> In this report, the Task Force provides a “general survey” of the “badges and incidents of slavery” in the United States that have adversely impacted Black Californians and other Black Americans since the end of slavery and recommends a wide range of reparations to redress this atrocity.<sup>65</sup> A final report will be presented to the legislature before July 1, 2023.<sup>66</sup>

The Interim Report begins with an Executive Summary followed by thirteen chapters discussing the enslavement of Black Americans and the lingering effects of that atrocity.<sup>67</sup> Laws enacted at both the federal and state levels denied both enslaved and free Blacks political, economic, and social rights.<sup>68</sup> Although California entered the Union as a free state in 1850, “[p]roslavery white southerners held a great deal of power in the state legislature, the court system, and among California’s representatives in the U.S. Congress.”<sup>69</sup> Buttressed by a reign of terror, racially discriminatory state laws and practices continued to victimize Black Americans well after slavery ended.<sup>70</sup> Emancipated Blacks, free Blacks, and their descendants experienced systemic racial disadvantage, both as “harms of reduction” (the denial of opportunities in voting, housing, education, income, wealth, health care, the environment, and infrastructure) and “harms of repression” (racial hatred, stigma or profiling).<sup>71</sup> It is not surprising that California did not ratify the Fourteenth Amendment to the Constitution until 1959.<sup>72</sup>

---

“appropriate remedies in consideration of the [T]ask [F]orce’s findings on the matters described in this section,” *id.* § (b)(3).

64. See INTERIM REPORT, *supra* note 6, at 1–3, 37.

65. *Id.* at 5.

66. *Id.*

67. See *id.*

68. See *id.* at 5–6.

69. *Id.* at 7 (citing STACEY L. SMITH, FREEDOM’S FRONTIER: CALIFORNIA AND THE STRUGGLE OVER UNFREE LABOR, EMANCIPATION, AND RECONSTRUCTION 8 (2013)).

70. See *id.* at 93–128 (discussing the continued racial terror inflicted upon African Americans within the United States after the abolition of slavery).

71. See BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 42 (quoting STUART HENRY & DRAGAN MILOVANOVIC, CONSTITUTIVE CRIMINOLOGY: BEYOND POSTMODERNISM 103 (1996)). For a discussion concerning specific instances of such harms, see, for example, INTERIM REPORT, *supra* note 6, at 129–474.

72. INTERIM REPORT, *supra* note 6, at 7 (citing Kevin Waite, Editorial, *Early California Lawmakers Also Preached #resistance-but Against Immigration*, L.A. TIMES (Aug. 3, 2018, 4:05 AM), <https://www.latimes.com/opinion/op-ed/la-oe-waite-california-14-amendment-20180803-story.html> [<https://perma.cc/7LD9-QEGL>]).

Responsive to the lingering effects of slavery it identifies as the “badges and incidents of slavery,” the Task Force recommends a wide range of Black Reparations from which lawmakers can select in fashioning a specific piece of redress legislation.<sup>73</sup> However, not only do these recommendations lack specificity,<sup>74</sup> but (more importantly at this stage) they do not employ redress frames. For example, asking the Legislature to “[r]aise the minimum wage”<sup>75</sup> is not technically recommending a reparation, least of all a Black Reparation,<sup>76</sup> and, hence, reaches beyond the scope of the legislative mandate.<sup>77</sup>

If not fixed, the Interim Report’s framing problem could sink redress legislation. For while the Interim Report’s analyses of American slavery and the American race problem are quite impressive in their scope, detail, sophistication, and intellectual effort, the Interim Report’s proposed reparations lack conceptualizations that can help the reader make sense of what is being proposed. Framing is important because it shapes, organizes,

---

73. INTERIM REPORT, *supra* note 6, at 5.

74. The Task Force does not develop reparations it recommends, such as paying restitution for the theft or destruction of Black-owned businesses and property in California and making “housing grants, zero-interest business and housing loans and grants available to Black Californians,” *id.* at 19; compensating “individuals forcibly removed from their homes due to state action, including but not limited to park construction, highway construction, and urban renewal,” *id.* at 20; funding “for free tuition to California colleges and universities,” *id.*; compensating “families who were denied familial inheritances by way of racist anti-miscegenation statutes, laws, or precedents, that denied Black heirs resources they would have received had they been white,” *id.* at 21; providing “financial restitution and compensation to athletes or their heirs for injuries sustained in their work if those injuries can be linked to anti-Black discrimination policies,” *id.* at 22; compensating “individuals who have been deprived of rightful profits for their artistic, creative, athletic, and intellectual work,” *id.*; and compensating “individuals whose mental and physical health has been permanently damaged by anti-Black healthcare system policies and treatment,” *id.* at 23. Recommended reparations also include establishing the following: a “state-subsidized mortgage system that guarantees low interest rates for qualified California Black mortgage applicants,” *id.* at 20; “free healthcare programs,” *id.* at 23; the creation of “The California African American Freedmen Affairs Agency,” a cabinet-level secretary position tasked with, *inter alia*, implementing mandated reparations, processing eligibility claims, and coordinating free legal services (“including criminal defense attorneys”), *id.* at 24; and “a fund to support the development and sustainment of Black-owned businesses,” *id.* at 22.

75. *Id.*

76. Scholars frame reparations as *asymmetrical* measures because these measures are responsive to the atrocity in question and, hence, apply only to the victims of that atrocity. Thus, reparations are structurally different from general social or economic policies and even from garden-variety civil or human rights laws, all of which operate *symmetrically*; that is, they apply to all classes protected under such policies or laws, such as any “race,” “color,” “sex,” or “citizen.” See BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 155, 192–93 (quoting 42 U.S.C. § 2000e-2(a)(1)). For additional discussion of the definition of a reparation, see *supra* text accompanying note 5.

77. See *supra* notes 62–63 and accompanying text.



connects, and clarifies one's thinking about complex problems. It helps one to absorb or process complicated information. Framing connects concepts and categories, providing new pathways of understanding. It guards against misinformation and transports us to new knowledge and fresh thinking.

The articles in Part IV suggest various ways in which the Interim Report might be rewritten as an effective final report, one that frames in sufficient detail a purpose (Models of Redress), supporting reparations (Forms of Reparations), and a position on the relationship between its reparative regime and the American race problem in California (Transitional Justice). After discussing the importance of discursive framings and the Transitional Justice issue, the articles construct specific reparative programs. Each program contains features that can be woven into an effective final report.

#### IV. FRAMING THE INTERIM REPORT

Reparations is the Model of Redress chosen by the Task Force to satisfy its legislative mandate.<sup>78</sup> In *Understanding Discursive Framings of Reparations for Slavery and Jim Crow*,<sup>79</sup> Carol Klier discusses the importance of discursive framing in reparative discourse. Framing impacts how one conceptualizes a subject. It also affects one's ability to effectively communicate thoughts, especially complex thinking, about the subject to others. To illustrate the point, Klier discusses several discursive frames frequently employed by scholars in reparative discourse.<sup>80</sup> These frames cover basic questions about reparations: why reparations should be paid; what form reparations should take; and how reparations should be calculated and distributed.<sup>81</sup> Klier teases out some of the communicative or discursive difficulties of these frames, primarily dealing with the why and what of Black Reparations.<sup>82</sup> Framing, then, is critical to our understanding and deployment of Black Reparations, including the ability to even see Black Reparations as an issue.

---

78. See *supra* text accompanying note 62–63.

79. Klier, *supra* note 9.

80. See *id.*

81. See *id.* at 481. These questions lead to holistic thinking about reparations. They track questions that engender comprehensive thinking about the larger question of redress—the why, what, and how of redress. See *id.*

82. *Id.* at 484–95.

Emily J. Kawahara's article, *Transformative Dynamics: Reframing the Role of Reparations in Transforming Social Order*,<sup>83</sup> is invaluable in understanding what reparations can and cannot do, knowledge that is crucial to the construction of an effective reparative program. Her framing will enable the Legislature to craft a reparative program that is both feasible and responsive to slavery in a way that Black Californians can "begin to trust the government's commitment to racial justice."<sup>84</sup> If the Legislature fails to communicate realistic expectations, if it crafts a reparative program that promises fundamental changes in the way the state operates, the victims, in the end, will become disillusioned. Not only the victims but the entire nation will see Black Reparations as a failure. The stakes could not be any higher. Kawahara's framing rests upon an empirical observation: reparations have never addressed all the needs of the victims, they have never extinguished all the norms and conditions that gave rise to the atrocity, and they have never effectuated a change in the social order—what Critical Race Theorists call "social transformation."<sup>85</sup> Reparations transformed the government in South Africa into a democracy, but did not transform economic, educational, employment and other mainstream institutions. Racial transformation in South African society writ large has simply not been achieved.<sup>86</sup>

Kawahara argues that reparations cannot function as a substitute for state development programs designed to transform the health and welfare of citizens. Kawahara argues against "muddling the line" between the state's "*symmetrical* obligation" for development and social services and its "*asymmetrical* recognition" of its moral duty to atone for its atrocity.<sup>87</sup> Within these strictures, reparations can function as a "[t]ransitional justice mechanism[]" that, while not having the power to transform the social order, can establish "transformative dynamics"—e.g., the transformation of specific institution—that step toward social transformation.<sup>88</sup> Transitional dynamics "serve as benchmarks for systemic change."<sup>89</sup> Viewed in this way, reparations are "distinct but related" to development and social service programs as "reparations can serve as a jumping-off point for" development

---

83. Kawahara, *supra* note 20, at 497.

84. BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 204.

85. *See supra* note 55 and accompanying text.

86. *See supra* notes 57–59 and accompanying text.

87. *See* Kawahara, *supra* note 20, at 509 (emphasis added) (emphasis omitted).

88. *Id.* at 498.

89. *Id.*

and social service.<sup>90</sup> The latter “can pick up where transitional justice stops short of transforming [the] social order.”<sup>91</sup>

Reparations, like other Models of Redress, are framed as postconflict measures. It makes sense that they come into play only after the atrocity has ended.<sup>92</sup> Brandee McGee’s article, *No Apology Until Abolition: Redressing The Ongoing Atrocity of Slavery*, argues that “mass incarceration is Jim Crow by another name” and, therefore, this remnant of the atrocity must end before redress can be implemented.<sup>93</sup> McGee argues that ending the remains of Jim Crow requires dismantling the prison-industrial-complex (PIC). Indeed, no dearth of well-established scholars have described PIC as an aspect of slavery left standing after the Thirteenth Amendment abolished slavery.<sup>94</sup> McGee expertly explains why abolition is necessary—such as the PIC in its modern form, created by the Nixon Administration’s undisputed racism, charges, convicts, and sentences Black defendants significantly more harshly than similarly situated White defendants,<sup>95</sup> mythologizes Black crime with the canard that Black Americans commit more crime than Whites,<sup>96</sup> and has devastated Black lives and Black communities as evidenced by the fact that “*there are more Black adults under correctional control today than were enslaved at the height of slavery in the United States.*”<sup>97</sup>

90. *Id.* at 507 (first quoting Roger Duthie, *Transitional Justice, Development, and Economic Violence*, in JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION 170 (Dustin N. Sharp ed., 2014); and then quoting NAOMI ROHT-ARRIAZA & KATHERINE ORLOVSKY, A COMPLEMENTARY RELATIONSHIP: REPARATIONS AND DEVELOPMENT 2 (2009), <https://www.ictj.org/sites/default/files/ICTJ-Development-Reparations-ResearchBrief-2009-English.pdf> [<https://perma.cc/7QS3-N2LA>]).

91. *Id.*

92. See, e.g., Brooks, *Postconflict Justice*, *supra* note 3, at 245–46 (“Postconflict, the final stage of modern slavery, begins at the end of exploitation. It occurs when the victims are no longer under the thumb of the perpetrator.”).

93. McGee, *supra* note 13, at 537, 539–45.

94. See generally Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4–6 (2019) (describing the PIC as a modern development or “apparatus of surveillance, policing, and incarceration the state increasingly employs to solve problems caused by social inequality, stifle political resistance by oppressed communities, and serve the interests of corporations that profit from prisons and police forces”).

95. McGee, *supra* note 13, at 540.

96. *Id.* at 556 (citing MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 210 (rev. ed. 2012)).

97. *Id.* at 536 (emphasis added) (citing ALEXANDER, *supra* note 96, at 180).

McGee indicates that abolition would include abolishing the racially discriminatory death penalty, charging young children with felony crimes that not only carry longer sentences but also limit the types of jobs ex-felons can hold, life sentences for nonviolent crimes, solitary confinement, and other measures that effectively eliminate mass incarceration.<sup>98</sup> McGee proposes a reparative regime that proceeds after or during abolition through the Atonement Model as opposed to the Tort Model.<sup>99</sup> Thus, the social objective of redress is racial reconciliation.<sup>100</sup> Solidifying a state apology and, hence, creating conditions necessary for racial reconciliation, McGee's reparations would in large part transfer funds currently devoted to carceral systems, such as police, prisons, and detention centers, to meet the dire needs of the Black community, thereby tackling conditions that cause crime. While most of these reparations are rehabilitative, McGee also proposes unrestricted compensatory reparations.<sup>101</sup> These reparations are quite powerful as they are likely to pull a sizable number of African American families out of poverty as other types of income supplemental programs have done.<sup>102</sup> McGee does not favor South Africa's one-time cash payment, which left families poor after they spent the payment.

In *California Assembly Bill 3121's Claim for Black Redress: The Case for Compensatory Reparations*, Jessica Robertson begins by sizing up the deficiencies in the Interim Report, which she identifies as the absence of framing and specificity.<sup>103</sup> The goal of redress, she argues, should be "reconciliatory and restorative."<sup>104</sup> She believes the legislative mandate may well call for an apology, which sets in motion the conditions for the Atonement Model, provided the apology is genuine,<sup>105</sup> and the reparations are sufficient to make the apology believable.<sup>106</sup> Yet, Robertson would not require the victims' forgiveness under *any* circumstances. Her modified version of the Atonement Model is designed to give more power to the victims. In addition, Robertson argues that the Task Force should embrace an additional Model of Redress—a Truth and Reconciliation Commission (TRC). Robertson's TRC is patterned after the legendary South Africa

---

98. *See id.* at 558.

99. *See id.* at 561 ("The purpose of redress should be racial reconciliation.").

100. For a discussion of the Atonement Model and the Tort Model, see *supra* Section II.A.

101. For a discussion of the forms of reparations, see *supra* Section II.B.

102. *See* McGee, *supra* note 13, at 564–65.

103. Robertson, *supra* note 17, at 514–15.

104. *See id.* at 522.

105. *See* BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2 ("Simply providing slave redress without a prefatory statement of deep remorse . . . is too inelegant a response to slavery and Jim Crow.").

106. *See generally id.* ("Reparations are essential to atonement[] because they make apologies believable.").

Truth and Reconciliation Commission, and it would adopt the same goal of racial reconciliation.<sup>107</sup> Although the Task Force limited redress to reparations,<sup>108</sup> one might be able to argue that the legislative mandate allows for a truth and reconciliation commission as well as other Redress Models in addition to reparations.<sup>109</sup> Robertson’s TRC works well with the Atonement Model, as both Models of Redress seek racial reconciliation. In Robertson’s opinion, the best way to facilitate racial reconciliation is through compensatory reparations in the form of housing vouchers. These restricted compensatory cash reparations have transformative properties by helping close the racial wealth gap, Robertson argues. In contrast to McGee’s supplemental income reparations,<sup>110</sup> Robertson’s reparations, though going directly to individual victims like McGee’s, could only be used for rent, mortgage, or utility payments. Robertson would also support certain compensatory housing reparations proposed in the Interim Report, such as a state-subsidized, low-interest mortgage program for qualified Black applicants and a program for compensating Black individuals whom the state had forcibly removed from their homes.<sup>111</sup> Finally, Robertson digs into the matter of financing Black Reparations, specifically suggesting how her housing reparations might be financed.<sup>112</sup>

Chelsea J. Gaudet, in *Healthcare Reparations in California*, proposes prudential reparations for the California healthcare system.<sup>113</sup> Gaudet views the healthcare system as a failed system in its treatment of African Americans. Constant racial discrimination, traceable to slavery, is largely responsible for the outsized negative health outcomes—physical and psychological—in the Black community, a condition researchers call “weathering.”<sup>114</sup> On average, Black Americans across socioeconomic strata have poorer health than their White counterparts. Black Americans live under racialized conditions that, over time, accelerate the aging process and shorten their life span. From her pre-law experience

---

107. See Robertson, *supra* note 17, at 526–28.

108. See INTERIM REPORT, *supra* note 6, at 5 (“The law requires the Reparations Task Force to recommend appropriate remedies of compensation, rehabilitation, and restitution for African Americans . . .”).

109. See *id.* at 19 (noting within the “preliminary recommendations for future deliberation” section the possibility for “funding a long-term truth and reconciliation commission”).

110. See *supra* note 13 and accompanying text.

111. See Robertson, *supra* note 17, at 528–29.

112. See *id.* at 532–33.

113. See Gaudet, *supra* note 17.

114. See *id.* at 570–73.

as a systems-failure engineer—facilitating a problem-solving approach that mirrors Critical Race Theory’s focus on systemic operations—Gaudet argues that a failed system requires a structural remedy. Accordingly, Gaudet fashions health care reparations that are designed “to change the foundational structure that creates and maintains healthcare inequity for Black Californians.”<sup>115</sup>

Gaudet proposes rehabilitative reparations that establish a system of state-wide clinics wherein healthcare professionals can study and treat racial disparities in the healthcare system. These clinics would have first-rate facilities and equipment. With Black Americans in leadership positions—heeding Black voices—the new clinics would be staffed by superb doctors, nurses, and administrators, all of whom can “direct process improvement in diagnosis and treatment.”<sup>116</sup> Research drives fundamental change in the healthcare system Gaudet envisions. Using race-conscious diagnostic techniques, researchers would seek to unearth data that will enable clinics to identify and remedy the myriad of healthcare problems the Black community has been experiencing since slavery. Restructuring the healthcare system in the way Gaudet proposes requires not only an acknowledgment of the role race plays in the current healthcare system but also requires “rerouting state and private funds from historically advantaged institutions” to institutions that serve a predominantly Black population.<sup>117</sup> Gaudet acknowledges these race-conscious procedures could violate extant California law requiring race-neutral government initiatives.<sup>118</sup> But Gaudet argues that deep-rooted, race-conscious reparations are the only way of achieving the Task Force’s healthcare objectives.<sup>119</sup>

In *Affirming and Supporting Black Women’s Lactation Agency as Redress*, Dorothy Couchman raises an important issue of intersectionality the Interim Report overlooks—namely, lactation.<sup>120</sup> Couchman frames this reparation as the expected mode of infant feeding. The Interim Report gives the matter of breastfeeding just two sentences, “the same number of sentences that it spends considering tennis star Serena Williams’ postnatal

---

115. *Id.* at 570.

116. *Id.*

117. *Id.* at 577.

118. *Id.* at 578 (citing INTERIM REPORT, *supra* note 6, at 419). For a discussion of the constitutionality of Black Reparations, see Brooks, *Black Boarding Academies*, *supra* note 17, at 840–50.

119. *See id.* at 579 (citing Chandra L. Ford & Collins O. Airhihenbuwa, *Critical Race Theory, Race Equity, and Public Health: Towards Antiracism Praxis*, 100 AM. J. PUB. HEALTH S30, S31 (2010) (“Because race is inextricably tied to the root causes of both issues, effective solutions must be developed from research that employs a race-conscious framework within which to analyze public health data.”).

120. Couchman, *supra* note 17.

blood clots,” Couchman notes.<sup>121</sup> Slavery harmed Black women in unique ways, one of which was the denial of their reproductive autonomy and agency over how they fed their infants. Forcing Black women to wetnurse their enslavers’ infants in place of their own babies, slavery created an intergenerational trauma—a historical indignation—relating to breastfeeding. Systems of racism and misogyny abetted this condition, denying Black women agency over their own lactation.

After slavery, many Black women could only find work as wetnurses, following in the path of their mothers and grandmothers. Lactation agency was undermined for scores of Black women in each succeeding generation by systems that separated them from their infants, including a discriminatory labor market that made it necessary for them to work outside the home far more often than their White counterparts, a racialized carceral system, and the loss of child custody. Couchman points out that today “Black women with infants in California are almost 18% less likely than White or Hispanic women to have ever attempted breastfeeding”<sup>122</sup> and 10.4 out of every 1,000 Black infants die.<sup>123</sup> In addition, mothers who do not lactate face myriad health risks, including Type 2 diabetes, hypertension, and high cholesterol, and heart disease. Couchman’s redress plan features rehabilitative reparations that reform prenatal care and education, restrict advertising of breastmilk substitutes and supplementations, remove exemptions from California breastfeeding accommodation laws that disproportionately impact Black women, provide subsidized childcare at community colleges to facilitate on-campus breastfeeding, assist women with part-time custody who wish to maintain their milk supply between visits, and increase the capacity of the state prison program that provides space for incarcerated women to breastfeed their infants and toddlers. Couchman argues that lactation redress must be informed by the intersectional voices of peer breastfeeding groups, doulas, and resource centers if it is to be successful.

---

121. *Id.* at 591 (citing INTERIM REPORT, *supra* note 6, at 427).

122. *Id.* at 590.

123. *Infant Mortality and African Americans*, U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. OF MINORITY HEALTH (2022), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=23> [<https://perma.cc/VPT6-TPP7>] (referencing infant mortality statistics compiled by the CDC from 2020).

## V. CONCLUSION

Against the backdrop of a masterful Interim Report, the Task Force must now write a final report that is more focused and detailed in recommending how California should redress slavery. Framing is essential as Klier's article instructs.<sup>124</sup> Hence, the final report should at the outset clearly indicate what California hopes to achieve by redressing slavery—victim compensation (Tort Model) or racial reconciliation (Atonement Model) appear to be the major candidates. The final report should then propose a reparative program (Forms of Reparations) that supports California's stated redress purpose and, as Kawahara's article suggests,<sup>125</sup> make clear the relationship between its reparative regime and the race problem in California so as not to raise false expectations (Transitional Justice). Each of the remaining articles deploys these frames in varying degrees.

The articles either explicitly or suggestively find racial reconciliation to be a superior redress objective than victim compensation. Racial reconciliation gives redress a restorative rather than a compensatory or punitive purpose. It will also bring more people on board. Californians of probity and intelligence will have added incentive to go through the turbulent redress process knowing that redress is not a zero-sum endeavor.

Should the final report opt for racial reconciliation, it will have to decide whether it will proceed under a modified version of the Atonement Model; that is, forgo forgiveness. If it proceeds in this fashion, the genuine apology will not ask for forgiveness. The apology will confess the deed, admit that the deed was an injustice, and repent but not ask for forgiveness.<sup>126</sup> Elie Wiesel argues that asking for the victim's forgiveness enriches the moral quality of the apology.<sup>127</sup> Robertson argues that it disempowers the victims while empowering the perpetrator.<sup>128</sup> The Task Force, which represents both the victims and the perpetrator, will have to decide this issue before sending the matter to the lawmakers.

The articles offer a wide range of compensatory and rehabilitative representations designed to make the state's apology believable. McGee proposes abolishing the prison-industrial complex that fuels mass incarceration of millions of Black Americans and using the savings to help fund rehabilitative reparations to tackle conditions that cause crime. Presumably,

---

124. See *supra* notes 79–82 and accompanying text.

125. See *supra* notes 83–91 and accompanying text.

126. See *generally supra* note 35 and accompanying text.

127. See *supra* note 36 and accompanying text.

128. Robertson, *supra* note 17, at 526 (“To demand forgiveness would take more autonomy away from the victim and give more power to the perpetrator.”).



these funds would also help finance unrestricted compensatory reparations as supplemental income.<sup>129</sup>

In contrast to McGee's unrestricted compensatory reparations, Robertson argues for restricted compensatory cash reparations in the form of housing vouchers that could only be used for rent, mortgage, or utility payments. These housing vouchers are in addition to housing reparations recommended in the Interim Report, which include a state-subsidized low-interest mortgage program for qualified Black applicants and a program for compensating Black individuals whom the state had forcibly removed from their homes.<sup>130</sup> Robertson also recommends the establishment of a Truth and Reconciliation Commission which would work in conjunction with the Atonement Model toward racial reconciliation.<sup>131</sup>

Gaudet and Couchman believe rehabilitative reparations are the best vehicles for solidifying the state's apology. Gaudet recommends rehabilitative reparations that establish a system of state-wide clinics wherein healthcare professionals can study and treat racial disparities in the healthcare system. These clinics would have first-rate facilities, equipment, and medical staff led by Black Americans.<sup>132</sup> Couchman's reparative regime would give lactation agency to the community of Black women. Her rehabilitative reparations include restricting advertising of breastmilk substitutes and supplementations, removing exemptions from California breastfeeding accommodation laws that disproportionately impact Black women, improving perinatal care and education, and assisting Black women with part-time custody who wish to maintain their milk supply between visits.<sup>133</sup>

Each article proposes prudential, rather than transformative, reparations. The reparative regimes are designed to help create a "radically different society."<sup>134</sup> Each takes a step toward changing the social order. The final report will likewise have to decide whether it will frame redress as an attempt to effectuate Transitional Justice or as a step toward Transitional Justice.<sup>135</sup>

---

129. See McGee, *supra* note 13, at 562–65 (discussing unrestricted compensatory cash reparations as a means of redress).

130. See *supra* note 111 and accompanying text.

131. See Robertson, *supra* note 17, at 526–27.

132. See Gaudet, *supra* note 17, at 580–81.

133. See Couchman, *supra* note 17, at 600, 602, 607, 609.

134. Roberts, *supra* note 94, at 119.

135. See generally Kawahara, *supra* note 20, at 510–11.

Collectively, the articles suggest an array of paths forward available to the Task Force.<sup>136</sup> Decisions will have to be made. Each decision should be carefully framed.<sup>137</sup> The stakes are extremely high. For if redress fails in California, it will likely never be taken seriously in this country.

---

136. An important rehabilitative reparation not discussed in the articles has been discussed elsewhere—Black Boarding Academies. These academies would provide a safe and nurturing environment for Black students PK-12. Pedagogically, Black Boarding Academies would prepare students not just to survive but to thrive. Students would be prepared to assume positions of leadership in our society whether they go directly into the job market or matriculate at HBCUs or predominantly White institutions. For a more detailed discussion, see Brooks, *Black Boarding Academies*, *supra* note 17.

137. The constitutional frame must also be considered. On the constitutionality of Black Reparations, see *id.* at 840–50.