Reconciliation, Reparations, and Forgiveness
An ancient Greek sea divinity, herdsman of seals, Proteus could be elusive by changing his form at will appearing as a lion, a serpent, a boar, water, or a tall tree. However when those who caught him succeeded in holding him fast, Proteus assumed his proper shape of an old man and told the truth.

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How we feel about reparations often rests on a number of factors such as our sense of justice, our proximity to opposing levels of power, and our personal stakes in the future. In this issue of Proteus, our authors deconstruct the issues of reconciliation, reparations, and forgiveness. Cradling these words like parentheses are justice and balance.

In her review of The Sense of Justice: Empathy in Law and Punishment, D. S. Emmelman, tells us a sense of justice is neither about vengeance nor benevolence. Instead, a sense of justice is defined as a sensibility about, a conscious awareness of, or empathy with our fellow human beings as human beings equal to ourselves.

In Homer’s artful telling of the Trojan War in the Iliad, balance is interrupted, offences are exchanged, and retribution is sought. Stephen Bertman and Lois Parker make the case in their article, Retribution and Reconciliation in Homeric Epic, that through the eyes of Homer, retribution is dangerous and lacking in full satisfaction. The story begins with an unnatural marriage between a mortal and a goddess; as is the case with many feuds, clashes among characters spin out of control as they repeatedly lose track of the underlying source of their disagreements. Only those who recognize the common humanity of their opponents succeed in transcending their self-defeating conflicts. The Iliad reminds us reconciliation and forgiveness are possible only when both parties are fully aware of the power differentials and historic injustices dividing them. If only conflict and pain could always be experienced from the safe distance of an ancient classic.

Ultimately, it is possible the balance of power can be redistributed through forgiveness. Through the process of forgiveness, the victim can become less of a victim. For the perpetrator, there can be two responses to forgiveness: 1) recognition of complicity, atonement, and moral growth or 2) dehumanization of the targeted person or persons and a refusal to recognize oneself as the aggressor rather than the aggrieved party.

Kimetta Hairston suggests a possible byproduct of No Child Left Behind is the neglect of a curriculum that may lead to enhanced cross-cultural collaboration. She makes the case multicultural education increases the understanding of the experiences, circumstances, and resulting implications of those associated with cultures tied to opposing arms of subjugation. Citing race as an example, Hairston would appear to agree with most of the other authors in this edition by suggesting reconciliation evolves through a close examination of critical events.

Empathy requires us to acknowledge a commonality. Julie Green explores this sense of empathy, retribution, and compassion from the perspective of the state in granting the final meal to condemned prisoners. The details of the crimes of the condemned are barely explored as Green chooses to focus our attention not only on the often humble

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meal selected but also on the events and circumstances surrounding the meal. She explores our generosity as a final act of charity and plumbs the sources of that compassion. Green is an artist. She paints pictures of plates of food selected at that final meal. As readers gaze at the plate laid out in front of them, they literally see the world through the eyes of the condemned and imagine what they would request for their own last supper.

Archbishop Desmond Tutu would recognize the potential healing encouraged by this process. According to Jermaine McCalpin, Tutu felt forgiving the crimes of apartheid in South Africa, would free both the victims and the perpetrators from their past. Yet as McCalpin points out, restorative justice in South Africa has been far more successful in promoting an abstract appreciation for justice than substantive social and economic equality.

It is McCalpin’s argument the burden of the process in the Truth and Reconciliation Commission rested largely on the victims. As he indicates, the victim was to forgive the perpetrators, forgo seeking punishment of the criminal, move on with his or her life, and then reconcile with the offender. Certainly there were those victims who were not ready to forgive or accept the continued economic and social disparities perpetuated by torture and violence under the apartheid regime. Restorative justice has begun to address the political inequality of the black South African. McCalpin questions whether true healing and justice are possible unless social and economic inequalities are addressed.

The approach of the representatives from the State of Israel and twenty Jewish organizations in October 1951 differed from the South African Truth and Reconciliation Commission. While the TRC focused on moral forgiveness, the Conference on Jewish Material Claims Against Germany underscored the importance of monetary reparations. The conference was equally clear there could be no atonement for crimes against the Jews. The Luxembourg Agreements in 1952 determined the Federal Republic of Germany would compensate individual victims of Nazi persecution, the representative Jewish organizations, and the State of Israel. Rosemary Horowitz tells us in her article, “Rachel Auerbach and German Reparation,” that Rachel was conflicted about reparations and wondered “how one can take money for their deaths” even as she acknowledged the importance of supporting the organizations concerned with Jewish affairs and rights.

This issue of Proteus offers us an opportunity to reexamine the growing debate over reparations in America from a global perspective that acknowledges the moral and political complexities of redistributive justice. Interest convergence theory suggests the balance of group self determination is less likely to be achieved unless the interests of the power group converges with the interests of the disenfranchised. In addition, the redistribution of resources or reparations is less likely to be embraced by the resource holders, who do not see any substantial benefit to themselves, than it would be embraced from distant parties. In other words, it should be easier for people in one country to support reparations in another country than it would be for those same people to support it within their own country. Recognizing the guilty party in another land is also easier than seeing it in ourselves.

As Proteus contributor and American reparations advocate Charles Ogletree writes:

Reparations is controversial and distinctive, however, because race is one of the criteria justifying the redistribution: those who are to pay should do so because they injured a racially identifiable group of people. In fact, the link between race and injury is closer than this; those who inflicted the injury did so using race as perhaps one of many justifications. Demanding payment from whites on the basis of their government’s or their ancestors’ racism results in a relatively predictable and forceful denial of liability for restitution to the victims of those injuries.

Ogletree makes the case for American reparations by demonstrating the convergence of interests. For example, final authority and most of the resources in the U.S. are controlled in large part by a very small minority of wealthy Caucasians; both working class and middle class Caucasians, African Americans, and others can benefit from policies that correct basic inequities. In a gathering of Equal Employment Opportunity officers, one white politician was questioned as to why it was in his interest to support minority rights; he replied that it kept the peace. It is in the best interest of the majority of Americans to support programs that address resource inequalities and affirm our commitment to openness and fundamental fairness.

This issue of Proteus offers us both intimate and broad considerations in the discussion on reparations and reconciliation. The varied articles that follow remind us that empathy, generosity, and respect are vital to healing the legacies of injustice and violence both in our personal lives and our public policies.
The reparations debate, in America and globally, has gained momentum in recent years, and it will only grow in significance over time. The claim that America owes a debt for the enslavement and segregation of African Americans has had historical currency for over 150 years. Occasionally, the call for repayment of the debt for slavery has reached a fever pitch, particularly in the post–Civil War period. The demand for reparations has coincided with other civil rights strategies, reaching a national stage during the resolute leadership of Dr. Martin Luther King, Jr. The reparations movement has experienced ebbs and flows through periods of both forceful repression and abject depression. Today, in America and worldwide, we again face one of those historically significant moments when the momentum for reparations efforts rises and arguments that seemed morally and legally unfeasible reemerge with renewed political vigor and legal vitality.

These legal and legislative initiatives raise complementary and, in some cases, conflicting issues. Often the litigation and legislation focus on different periods of harm to African Americans, although all of the efforts fall under the broad claim of reparations. On the one hand, the multi-district litigation consolidated in Chicago, H.R. 40, the California Slavery Era Insurance statute, and the Chicago Slavery Era Disclosure Ordinance focus upon reparations for injuries inflicted during and through the institution of slavery. In contrast, the Oklahoma and Rosewood statutes, as well as the Oklahoma litigation, address injuries inflicted during the Jim Crow era.

Public response has varied according to the audience and the nature of the reparations claims. Not surprisingly, supporters and critics fall along racial lines: African Americans overwhelmingly support the efforts, and whites overwhelmingly oppose them. These generalizations, however, miss the more subtle and nuanced responses to claims for reparations. For example, many of the reparations movement’s most vocal critics seem less critical of some forms of reparations claims, such as those focusing on claims raised during the Jim Crow era and involving survivors of twentieth-century racial violence; some even support these claims.

Jim Crow reparations present a range of distinct legal and political options that are in contrast to claims made in the lawsuits focusing on slavery claims. Many of the differences are obvious and perhaps explain the greater level of public and scholarly support for one form of reparations litigation over another. In contrast to the slavery reparations context, Jim Crow litigation usually includes a more readily identifiable set of harms, plaintiffs, and defendants. Nevertheless, it is far more difficult to morally distinguish Jim Crow from slavery reparations cases. Legal formalism tends to erect overly lofty hurdles to slavery lawsuits while attempting to narrowly cabin the consequences of the Jim Crow suits. This approach fails to accept the necessity of...
reparations as a first, and final, response to the horrors of slavery as well as of Jim Crow.

The Compelling Need for Reparations

Reparations for African Americans are controversial and highly divisive, not just among whites but also among African Americans. For example, since its introduction in 1989, H.R. 40, Representative John Conyers’s reparations bill, has failed to generate broad support or approval each year that he has filed it in Congress. At the state and local level, the reparations movement has been dramatically different. The movement has gained public momentum in recent years, as evidenced by the growing number of legislative initiatives, and remains a compelling argument for social justice.

At its most basic level, reparations seeks something more than token acknowledgment of the centuries of suffering of African Americans at the hands of the state and federal governments, corporations, and individuals during the three centuries of chattel slavery and Jim Crow. As Randall Robinson notes in his book The Debt: What America Owes to Blacks, many of our greatest public monuments, including the White House, the Capitol, and the Jefferson Memorial, were built by slaves. Sadly and remarkably, the nation’s Capitol offers no tribute to those who constructed our nation’s most venerable monuments. The sacrifices of the African American community for the American nation during slavery, Reconstruction, and Jim Crow are too often forgotten.

This is not a casual oversight. Randall Robinson argues persuasively that it is more insidious. The national consciousness of the terrible history of slavery and Jim Crow has been deliberately repressed into a national subconscious as an ugly part of our national history that we choose to ignore.

The failure to acknowledge this history greatly influences the national debate about race. If we refuse to consciously confront the nation’s complicity in enslaving millions of its subjects and brutalizing millions of its citizens during Jim Crow, then we cannot engage in a conscientious discussion of race. To invoke our nation’s responsibility for discrimination is not to play the “victim” card but to demand the same treatment that other races and ethnicities receive. Accordingly, the first goal of reparations is to remember and celebrate these forgotten African Americans and insist that our nation fully acknowledge their many contributions to our country’s economic and political well-being.

But reparations can—and must—go further than educating the public and erecting monuments to the nation’s slave forefathers and foremothers. Reverend Dr. Martin Luther King, Jr., lamented our failure to recognize these historic contributions when he pleaded that for genuine social reconciliation to occur, America must engage in a process of acknowledging its past and repairing the enduring injustices it has created at home. In the rush to embrace Dr. King’s vision of a color-blind society, many have conveniently ignored the importance of restitution and repair at the heart of Dr. King’s philosophy. What many Americans fail to remember is that, during King’s historic “I Have a Dream” speech, he phrased the demand for justice in terms of reparations. This speech required the nation to conceive of the guarantees of life, liberty, and the pursuit of happiness in the form of a check, what he called:

a promissory note in so far as [America’s] citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check; a check which has come back marked “insufficient funds.” We refuse to believe that there are insufficient funds in the great vaults of opportunity in this nation. And so we’ve come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.

The issue of race-based reparations concerns a fundamental issue of social justice as well: the responsibility that the community as a whole shoulders for the enslavement of and continuing discrimination against African Americans. The general moral obligation to eradicate racism from our society requires coordinated efforts to work toward correcting the chronic fragmentation along racial lines that exists in so much of our country today. The moral force of reparations arguments is simply to suggest that the African American community cannot shoulder the burden of redeeming American society, as Dr. King put it, on our own.

Instead, Dr. King persuasively argues that all Americans must engage as full participants in a dialogue examining the cost of repairing our society to make it a place for all citizens to and their home.

A central goal of the reparations movement is to repair the damage that still affects the black community by targeting the most needy within that community. One of the primary tenets of the reparations debate should be focused, in my view, on repairing the harm that has been most severe and correcting the history of racial discrimination in America where it has left its most telling evidence. The areas of harm are well documented. Race-based disparities are illustrated through racial profiling policies and practices, discriminatory insurance and lending practices, and barriers preventing equal access to housing, employment, health care, and other social goods while at the same time providing disproportionate access to this country’s criminal justice and penal systems.

The issue of inclusion for all in Dr. King’s vision of the “Beloved Community” has reached a critical stage. For America to move forward in unity, we must ensure all Americans enjoy the equality of opportunity that is so uniquely an American concept and, to go further, receive a fair share of our enormous wealth and considerable resources. All citizens must engage as full participants in a dialogue examining the cost of repairing our society to make it equally accessible to everyone. Reparations is the way to start that dialogue. Its goals should be applauded
by everyone who is committed to establishing a nation that will stand as a model of equal justice for all.

Reparations: A Long and Nuanced History

The African American reparations movement is commonly perceived as a recently developed political and litigation strategy resting on the shoulders of the lawsuits and legislation designed to achieve justice for Japanese American World War II internees and victims of the Holocaust. African American reparations arguments, however, began long before both these movements, growing out of a larger debate over the place of African Americans in American society as well as the proper response of both whites and African Americans to slavery, Jim Crow, and the persistence of racism from the founding of this country until the present. This Part will first give a brief overview of the history of the African American reparations movement in order to suggest that the characterization of African American reparations as both recent and derivative has important political consequences. This rhetorical and political strategy enables reparations’ opponents to discount history and African Americans’ constant demand for reparations, instead presenting reparations’ proponents as opportunistic latecomers, attempting to get something for nothing. This Part will also briefly examine the work of reparations critics, tracing the major arguments that have been raised to counter the movement for reparations.

A. Brief History of Reparations Activism

Many people believe the demand for reparations for African Americans is a movement spawned by, and derivative of, either the Holocaust reparations movement or the battle to obtain an apology from the government and reparations for the Japanese Americans interned during World War II. To some extent, that misperception is based on Rep. John Conyers’ filing of H.R. 40 in 1989, the most notable reparations activity in the late twentieth century. In fact, the African American claim for reparations preceded these movements. Reparations, along with other elements of the Civil Rights movement, has a long and contentious history, and it may be more accurate to say that the Holocaust and Japanese American cases are derivative of the African American experience.

The African American demand for reparations precedes the Civil War. While reparations activism has not been a constant feature of the civil rights struggle, it has periodically manifested itself in what Vincen Verdun calls different “waves” of activism. The first wave “was inspired by the tension between the Union and the Confederacy and the attendant desire to restructure the South in order to enhance the Union’s military advantage.” A broad, multi-racial coalition of activists sought to use reparations to complete the emancipation of slaves and to achieve compensatory justice by tying the award of property to freed slaves to disenfranchisement by former slave owners.

Verdun identifies the second wave of reparations as the attempt by African Americans to escape the South and achieve a semblance of freedom and economic parity in the North, including an effort to force “Congress to pass legislation appropriating economic relief to freedmen.” This effort and subsequent reparations initiatives contained a strong “black nationalist” element.

The third wave broke during World War II when a white Senator from Mississippi, Theodore Bilbo, proposed to appropriate newly acquired territories for colonization by African Americans. Black nationalists such as Marcus Garvey’s United Negro Improvement Association supported this essentially segregationist effort.

Verdun identifies a fourth and final stage of reparations activism as arising during the 1960s and 1970s as an outgrowth of the Civil Rights movement. Martin Luther King, in his famous I Have a Dream speech, iterated a demand for justice in terms of reparations. This speech, broadly embraced by most Americans as a result of King’s strong appeal for color-blind justice, also called on the nation to conceive of the guarantees of life, liberty, and the pursuit of happiness in the form of a check for African Americans.

At roughly the same time, the Nation of Islam demanded the federal government set aside three states for African Americans and contended that “our former slave masters are obligated to maintain and supply our needs in this separate territory for the next 20 to 25 years—until we are able to produce and supply our own needs.” Perhaps the single most important reparations demonstration during this period was James Forman’s interruption of a Sunday morning service at Riverside Church in New York City to introduce the “Black Manifesto,” which demanded five hundred million dollars not from the federal government but from churches and synagogues. While King did not endorse the Nation of Islam’s brand of nationalism and demand for land, the organization’s efforts represented a powerful strand in the reparations debate.

One of the most important reparations activists during this period was Queen Mother Audley Moore, who is widely celebrated as the matriarch of the twentieth-century African American reparations movement. Born in 1898, Audley “Queen Mother” Moore was initially a follower of Marcus Garvey and subsequently a member of the Communist Party of the United States, thanks to the Communists’ support of the Scottsboro Boys. In 1938, she ran as a Communist Party candidate for the New York State Assembly. By the 1950s she had left the Communist Party to found the Universal Association of Ethiopian Women, and in the 1960s she was one of the signatories of the Republic of New Africa’s independence charter. Throughout the 1960s and 1970s she was a fierce advocate of reparations.

From the late 1970s to the 1990s, reparations was the subject of a few law review articles but received little mainstream interest. The efforts of the National Coalition of Black Reparations Activists (N’COBRA) were pivotal in preserving the reparations movement. Without
N’COBRA’s continued activism, the legacy of reparations for African Americans, stretching from David Walker to Queen Mother Moore, might have disappeared.44

More recently, two events have spurred on claims for reparations for African Americans. First, the publication of Randall Robinson’s book The Debt powerfully indicted society’s failure to acknowledge slavery and reignited the reparations debate. Robinson wrote:

No race, no ethnic or religious group, has suffered so much over so long a span as blacks have, and do still, at the hands of those who benefited, with the connivance of the United States government, from slavery and the century of legalized American racial hostility that followed it.45

Robinson forcefully argued that, while the causes of African American poverty are complex, they are based in part on a history of racism and discrimination that politically, culturally, socially, and psychologically disenfranchised African Americans.46 It is worth quoting a large block of Robinson’s argument, since he has so often been misrepresented:

Race is and is not the problem. Certainly racism caused the gap we see now. The discriminatory attitudes spawned to justify slavery ultimately guaranteed that, even after emancipation, blacks would be concentrated at the bottom of American society indefinitely. . . . [However], the use of race by itself as a general category for comparison is a dangerously misleading decoy. . . . [African American children] fail [educationally and socially] for the same reasons that Appalachian white children fail. Grinding, disabling poverty. Unfortunately, blacks are heavily overrepresented among the ranks of America’s desperately poor. Owing to race and only race, it was American slavery that created this bottom-rung disproportion.47

A central plank of Robinson’s critique is simply that African American lives and values are discounted—worth less—in America today, much as they were discounted at three-fifths value in the Constitution.48 Professor Randall Kennedy has independently made this claim, noting that the Supreme Court’s race rhetoric evinces remarkable solicitude for the feelings of whites and little or none for those of African Americans.49 Kennedy has identified “racially selective patterns of emotional response” in which the Supreme Court has generally “show[n] an egregious disregard for the sensibilities of black Americans . . . [even though] the Court has been careful to avoid hurting the feelings of whites.”50

Kennedy found this disregard to be especially pronounced in the Court’s disparate attitude to the manner in which race may be taken into account in the civil and criminal spheres. The conservative justices, including Chief Justice Rehnquist and Justices Scalia and Thomas, “have been hawks in the war against affirmative action . . . [but] strike a different note when they confront the use of race by public authorities in the administration of criminal justice.”51 Kennedy states “the conservatives have been ‘very willing to allow public authorities to racially discriminate to pursue law enforcement aims even in the absence of an articulated compelling justification.’”52

One of Robinson’s major contributions stems from his use of these racially selective patterns of emotional response to explain the failure of white Americans and Europeans to acknowledge the suffering of Africans and African Americans (as well as Native Americans and other minority groups) caused by institutionalized racial discrimination.44 As I suggest below, such an outlook denies the impact of slavery and Jim Crow on its victims—what might be called “slavery denial”—and minimizes the effects of that institution that persist to the present day. In The Debt, Robinson made the case that such denial—and the devaluation of the sensibilities of individual African Americans—should no longer be permissible. This claim remains one of the most difficult implications of reparations for America at large.

Representative John Conyers’s introduction and continued support for H.R. 40 in the House of Representatives is a second major event precipitating a renewed interest in reparations.60 H.R. 40 was first presented to Congress in 1989. The bill calls for the establishment of a commission to investigate the extent to which the United States government benefited from slavery and make appropriate recommendations. H.R. 40 was inspired by, and mirrors, the Civil Liberties Act of 1988,53 the statute granting reparations to Japanese American victims of the government’s internment policy and also Aleut Americans removed from their homes for defense purposes during World War II. H.R. 40 does not demand that money be paid but only that an investigation be conducted. Nonetheless, over the first fourteen years, the initiative has faced substantial opposition. A bipartisan Congress passed the Civil Liberties Act of 1988, yet Representative Conyers still waits to see H.R. 40 pass fourteen years after first presenting it to Congress. Indeed, dissent persists among African Americans in general and even within the Congressional Black Caucus about whether reparations is a viable political program. Nonetheless, Representative Conyers files the bill every year in a symbolic effort to keep the reparations demand alive at the highest level of the legislative branch.

B. A Brief History of Criticism: Legal Arguments Against the Feasibility of Reparations Lawsuits

In this essay’s analysis of the different types of reparations lawsuits, suits are divided by the litigation strategy and underlying legal claim. Critics, however, split reparations suits into those cases in which (a) there are no identifiable victims, or direct descendants of the victims, of a particular act or set of acts committed by a particular defendant; and (b) there exist identifiable victims, or direct descendants of the victims, of a particular act or set of acts committed by a particular defendant. Generally, this division corresponds to those lawsuits seeking redress for wrongs inflicted by involvement with slavery (where the victims will be hard to identify) and wrongs inflicted
by specific acts of violence taken to ensure the establishment of a Jim Crow system of segregation (in which the particular victims may be more readily identifiable). Critics’ voices are far more muted when confronted with the Jim Crow suits.

1. Early Legal Critiques

The most frequently referenced critique of slavery reparations was made by Yale Law Professor Boris Bittker in the early 1970s. In 1969, one of Bittker’s African American students asked him if this country’s courts would ever award damages to African Americans for the value of their labor during slavery. While he initially answered the question with a resounding no, Bittker came to see that he had probably misunderstood the question. Instead of an analysis of black-letter law, Bittker determined the question could be reformulated in the following way: Is or should there be a right to recover for slavery or for the century of segregation that was its aftermath? Bittker thought then that the question was a weighty one, deserving of a serious and considered answer; however, his conclusion remained that the possibility of legal recompense was small or nonexistent.

Bittker distinguished between the “recent” wrongs of the Jim Crow era and the “ancient” ones of slavery. He suggested that slavery was too far in the past. The perpetrators of slavery are now dead; thus no legal claim could be maintained against those individuals, and it would be unfair to seek redress from their descendants. Bittker also argued slavery claims against the government faced too many legal impediments. However, he did concede that the behavior of state and municipal officials during the Jim Crow era following slavery could subject states or municipalities to liability under the Constitution as enforced through the Civil Rights Act of 1871, commonly referred to as § 1983 of the United States Code.

Bittker argued that official state violation of the “equal” prong of the “separate but equal” rubric of Plessy v. Ferguson constituted a practice of discrimination that provided a legally cognizable warrant for reparations. Bittker admitted that, despite the passage of time “racial discrimination has not proved to be a blessing in disguise. Unless and until it is [such a blessing], the case for compensation cannot be regarded as barred by the passage of time.” Despite his general recognition of a moral case for reparations, Bittker contended that there would have to be substantial changes made through legislation and in legal doctrine before reparations, even for the Jim Crow era discrimination, could be paid.

Critics of Professor Bittker’s work demonstrate that the distinction between Jim Crow and slavery reparations lacks any ethical basis. Professor Derrick Bell, in a contemporaneous review of Bittker’s book, argued that Bittker’s Jim Crow arguments were “divorced . . . from the reality of factual situations in which serious reparations proposals would be likely to arise.” As Bell noted, “there is a tactical loss in excluding the slavery period: setting this voluntary limitation on coverage sacrifices much of the emotional component that provides the moral leverage for black reparations demands.” As we shall see, recent lawsuits and litigation have demonstrated the potential for recovering damages for slavery reparations.

In addition to doctrinal concerns regarding the possibility of reparations lawsuits, Bittker raised a second, practical concern. Even if reparations could be paid, the costs of doing so might be prohibitive. For Bittker, the cost was not only financial but societal as well. He believed white fraudsters as well as blacks would attempt to claim the reparations due African Americans and that there would have to be some separating out and labeling of the races in a manner reminiscent of Nazi Germany or apartheid South Africa. If reparations were not to be paid to individuals but to groups, it would create the problem of determining who would “represent” African Americans and the legitimacy of such a group.

Professor Ewart Guinier, chairman of Harvard University’s Afro-American Studies department, poured scorn on Bittker’s suggestion that there would be no way to administer a reparations fund. The problem, in Guinier’s eyes, was an administrative one: how best to achieve the redistribution of wealth to those who need it most. Guinier argued that “[a]n administrative agency given adequate staff and proper statutory guidance could produce equity for individuals.” Guinier was unapologetic about the possibility of over-inclusion of African Americans in such a redistribution; rather, he was eager to celebrate over-inclusion. For Guinier, reparations were likely to help whites as well as African Americans because “the cure for difficulties in correcting institutionally-imposed inequity is more correcting of inequity. In short, legislation for reparations could be generalized to erase societal disadvantages suffered by whites as well as blacks.”

Apart from limited commentary on Bittker’s work, there were few serious legal or scholarly attempts to continue to engage the issue of reparations. For many, if not most, scholars, Bittker had provided the definitive answer.

2. Recent Critiques of Reparations Lawsuits As Doctrinally Implausible

The apparent dichotomy between slavery and non-slavery lawsuits is mirrored in the modern discourse surrounding reparations. Even some of the most vocal critics of reparations are placated, or to some extent mollified, by the Jim Crow reparations lawsuits. For example, David Horowitz, who believes reparations are an essentially racist solution to the issue of racial disparities in American society, recognizes the legitimacy of lawsuits claiming damages for “racial outrages” such as Rosewood, Florida. He differentiates this “outrage” from the more general outrage of slavery by noting the presence in the former situation of either direct victims of the injustice or their immediate families. Similarly, E. R. Shipp distinguishes African Americans from Jews who received compensation from the German government or Japanese Americans who received compensation from the United States government by stating that these “groups received reparations
for specific acts of injustice that they, not their ancestors suffered.”77 She concurs with Horowitz that where African Americans “have such clearly defined grievances—as in losses suffered during twentieth-century atrocities in Rosewood, Florida, and in Tulsa, Oklahoma—they have the legitimate right to demand compensation.”78 In essence, both Horowitz and Shipp accept as valid the precedent of making payments to identifiable victims where there is an identifiable harm.

Many of the recent academic criticisms of reparations for African Americans focus on the slavery reparations context and assume that it is impossible to frame reparations claims in traditional civil rights terms. For example, Professor Eric Yamamoto describes five general obstacles to bringing African American reparations claims under the traditional individual rights paradigm used in civil rights cases:

a. the statute of limitations;
b. the absence of directly harmed individuals (“all ex-slaves have been dead for at least a generation”);
c. 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 forbears”);
d. the lack of direct causation;
e. the indeterminacy of compensation amounts (“it is impossible to determine who should get what and how much”).79

However, other reparations claims have been brought under this traditional, rights-based model. Most notably, the Japanese American internment reparations claims closely at the structure of traditional civil rights suits, with only the statute of limitations posing a major obstacle.80 These concerns are not trivial and raise important perspectives that require reparations advocates to craft arguments that squarely address claims within the traditional individual rights framework.

III. Achieving Reparations: Litigation and Legislative Approaches

A. Justice Through the Courts: The Current Crop of Reparations Lawsuits

Reparations lawsuits have almost as long a history as reparations activism. The first known reparations lawsuit, Johnson v. MacAdoo,81 was filed in 1915. The Johnson plaintiff, Cornelius J. Jones, sued the United States Department of the Treasury claiming that the government’s taxation of raw cotton produced by slave labor constituted an unjust enrichment from the labor of African Americans.82 The D.C. Circuit Court of Appeals found against Jones, holding that the government was immune from suit on sovereign immunity grounds.83

More recent reparations lawsuits frame their cases in more sophisticated ways. Currently, there are at least three different types of lawsuits filed in the United States. First, a growing number of federal lawsuits have been consolidated in the Northern District of Illinois seeking reparations for a class of plaintiffs descended from African American slaves. These lawsuits raise at least five distinct claims: conspiracy, demand for accounting, human rights violations, conversion, and unjust enrichment.84 All these cases are suits against corporations for their involvement in slavery; the plaintiffs have developed their causes of action on the basis, in part, of the Holocaust litigation model of suing corporations. These lawsuits face strong opposition from defendants arguing that plaintiffs lack standing to bring suit and that the claims are barred by the statute of limitations.

The lawsuits filed in California under California Business and Professions Code section 17200 also sue corporations.85 The statute permits suit for any type of fraudulent business practice and so appears to include slavery. The statute allows the plaintiffs to avoid some of the statute of limitations and standing problems due to the vagaries of California law.86

The Oklahoma litigation,87 filed by the Reparations Coordinating Committee and local counsel in Tulsa, Oklahoma, is not a slavery lawsuit but instead focuses on the violent repression African Americans suffered under Jim Crow. In contrast to the other two types of suits described above, the Jim Crow litigation provides a discrete group of plaintiffs and thus avoids standing problems. The harms are relatively recent and easy to identify. And the suit has been limited (so far) to state and municipal actors so as to focus on the government entities that advocates of reparations have traditionally argued should be held responsible for the official policies of discrimination endorsed by large segments of this nation.

The Tulsa lawsuit stems from a fairly commonplace activity beginning in Jim Crow America. On the night of Tuesday, May 31, 1921, in Tulsa, Oklahoma, a rumor spread around the African American community that there was going to be a lynching. Dick Rowland, a nineteen-year-old African American man, was accused of assaulting seventeen-year-old Sarah Page, a white woman.88 The African American community of Greenwood grew anxious as the evening wore on, and eventually between fifty and seventy-five Greenwood residents went down to the jail to protect Rowland and let the legal system handle the accusations. Their goal was to do something to stop the lynching.89

In the white community, rumors also flew. Someone made a speech stating that African American men were wandering around with high-powered pistols.90 When a group of whites confronted the African Americans at the courthouse, a melee erupted and a gun went off. Shooting had begun in earnest.91 The police department reacted to the fast-developing events by deputizing and arming hundreds of white men, many of whom were described as intoxicated and angry.92 The police commandeered a local gun shop and a pawn shop, stripping them of fire-
arms. At about the same time, the mayor of Tulsa called in local elements of the National Guard. According to statements of survivors of the riot, these Guardsmen and the newly deputized white citizens attempted to destroy Greenwood, the African American district of Tulsa. The rioting white mob fought a pitch battle throughout the night as a small group of African American World War I veterans attempted to defend themselves. All in all, the rioting white mob killed up to three hundred African Americans.

At 5:00 A.M. the next morning, a whistle blew and “the invasion of Greenwood began.” The National Guard, called in to restore order, only succeeded in worsening the situation. At 6:30 A.M., it moved in to transport the Greenwood residents to the state fairground and McNulty Baseball Park on the outskirts of town and held them there in “protective custody.” Then the white mob began burning the empty buildings. Over twelve hundred buildings were destroyed, and the property damage was $16,752,600 in 1999 dollars.

In the immediate aftermath, the white citizens of Tulsa accepted reparations for the riot were required. For example, in the June 15, 1921, issue of the Nation, the Chair of Tulsa’s Emergency Committee stated that “Tulsa weeps at this unspeakable crime and will make good the damage, so far as it can be done, to the last penny.” At about the same time, the mayor of Tulsa promised to compensate the victims of the riot for the losses they had suffered. He declared a claims commission would be established to compensate the victims of the riot. Finally, the Tulsa Chamber of Commerce stated that as “quickly as possible rehabilitation will take place and reparation made…. Tulsa feels intensely humiliated.” Some eighty years after the riot, the Oklahoma Commission to Investigate the Tulsa Riot of 1921, a body created by the Oklahoma state legislature to investigate and report on the riot, released a report, reiterating that “[r]eparations are the right thing to do.”

Despite all of these statements, the African American victims of the Tulsa Race Riot have never been fully compensated for the injuries they suffered at the hands of state and municipal officers. The events in Greenwood make a powerful case for reparations. Despite ample evidence of state action in the instigation and execution of the riot—members of both the local police and the National Guard were among the rioting mob—neither the federal government, the state of Oklahoma, the city of Tulsa, nor the Tulsa police department has ever compensated the victims of the riot for the substantial loss of lives and property incurred. Furthermore, the Guardsmen and police were present as part of a state and municipal policy decision to invade Greenwood and attack its residents.

The state and municipal action was plainly discriminatory. Greenwood was razed to the ground because its inhabitants were black. To that extent, the Tulsa riot was simply one of the infamous “nigger drives” taking place around Oklahoma in the 1910s and 1920s that were designed to force African American people from desirable towns or other pieces of land.

The Tulsa riot marks not only a pivotal moment in America’s history of race relations but also a seminal case in African American reparations litigation. Because the state’s and municipality’s acts were so violent and so plainly discriminatory, the merits of the case are stark: the state of Oklahoma and city of Tulsa participated in a race riot that outstrips even Rosewood in its ferocity. The case presents none of the problems traditionally associated with reparations lawsuits: a number of the victims are still alive and still uncompensated; the appropriate institutional defendants are clearly identifiable; and the constitutional basis for suit is clear. As with other reparations litigation, one legal obstacle is the statute of limitations.

B. Creating Viable Lawsuits: Addressing the Doctrinal Challenges Faced by Reparations Cases

The obstacles identified by critics of reparations—both friendly and hostile—are real and impede both slavery and Jim Crow era lawsuits. In principle, however, there is no necessary difference between the two types of claims. The challenge for slavery litigation is not that the injury, the defendants, or the plaintiff class is somehow radically different from that of the Jim Crow lawsuits, but only that these elements are harder to identify due to the passage of time. The major difficulties are essentially the same: all these suits must identify the parties with some specificity, they must overcome the statute of limitations and (should the state or federal government be named as a party) sovereign immunity, and they must provide some form of definite remedy. In what follows, I suggest some ways to address these challenges so that the Jim Crow model can be extended into the realm of slavery litigation.

1. Specifying the Parties

The modern critics of reparations litigation particularly focus on cases, such as Cato v. United States, that fail to specify with any precision either the parties seeking relief or those from whom relief is sought. In other words, suits seeking damages on behalf of all African Americans from “the government” for injuries suffered during slavery do not at the traditional model and are unlikely to succeed. In Cato, the court found that the plaintiff proceed[ed] on a generalized, class-based grievance; she neither allege[d], nor suggest[ed] that she might claim, any conduct on the part of any specific official or as a result of any specific program that has run afool of a constitutional or statutory right and caused her a discrete injury. Without a concrete, personal injury not abstract and that is fairly traceable to the government conduct that she challenges as unconstitutional, Cato lacks standing.

Identifying defendants has not been an issue in any of the recent cases filed in federal or state court: all the recent reparations cases focus on suing institutions and thus pose no problem of distinguishing discrete defendants. The cases currently in multi-district litigation before
the district court in the Northern District of Illinois all identify corporations as defendants; indeed, that has been their most significant advance over the *Cato*-style lawsuits. The California cases against corporations avoid *Cato*'s standing problem by suing under the state private attorney general statute, thereby making the state the plaintiff. Finally, the California lawsuits allege specific conduct—the company’s business practices—as the wrong committed by defendants.

Jim Crow era lawsuits also avoid *Cato*-like legal challenges. In the Oklahoma lawsuit, the complaint identifies several state actors: the governor of the state of Oklahoma, the city of Tulsa, the Tulsa police department, and the Tulsa chief of police. The plaintiffs are over three hundred survivors of the race riot or their descendants, and the harms are outlined in the body of the complaint. This form of Jim Crow lawsuit responds to the modern critique of reparations lawsuits and conforms to the traditional litigation model.

These cases illustrate the attempts to bifurcate the reparations cases into slavery cases and non-slavery cases is misleading. Each type of lawsuit can be framed using discrete plaintiffs and defendants and alleging discrete harms. The primary challenge for slavery reparations plaintiffs is to conceptualize litigation in narrow terms that identify discrete parties and injuries while at the same time applying that technique to a broad range of situations relying on differing legal theories of liability.

2. **Statute of Limitations**

For many commentators, the major legal obstacle to African American reparations is the various statutes of limitations preventing recovery for injuries inflicted more than two years prior to the filing of any lawsuit. Courts toll the statute of limitations when there is some form of government malfeasance, and some form of misrepresentation or concealment is usually required. In *Pollard v. United States*, the first successful Jim Crow reparations case (although it was not identified as such at the time), a group of African Americans sued the federal government. Government doctors had conducted an experiment on them as part of a syphilis study and failed to inform them that a cure had been found for the disease. Judge Frank M. Johnson of the Middle District of Alabama found that such a failure to inform constituted malfeasance sufficient to toll the statute of limitations.

Equitable remedies tolling the statute of limitations are routinely available where filing suit is untimely due to the defendant’s affirmative misconduct or because the relevant facts are unavailable to plaintiffs through no fault of their own. Equitable estoppel “hinges on the defendant’s representations or other conduct that prevents the plaintiff from suing before the statute of limitations has run,” and is required where the defendant’s affirmative misconduct undermines fairness or justice in its dealings with its citizens.

Equitable tolling “halts the running of the limitations period so long as the plaintiff uses reasonable care and diligence in attempting to learn the facts that would disclose the defendant’s fraud or other misconduct.”

Two recent cases have indicated that in certain circumstances, statutes of limitations must be tolled, often for extremely long periods of time. Specifically, the statute of limitations is to be tolled where there is:

- violent repression, followed by
- active concealment of relevant facts surrounding the history of that repression, and an
- officially sanctioned study that uncovers the truth of that repression.

The reasons for tolling the statute in such circumstances are reasonably clear. In general, those who attempt to engage in genocidal attacks should not be able to preclude their victims from recovery by threats of violence and active concealment. Equitable estoppel and equitable tolling are both available to reparations plaintiffs where the defendant has acted to prevent the filing of a lawsuit, and the plaintiffs have been unable to file through no fault of their own.

Furthermore, in such circumstances, the limitations period should be equitably tolled because the purpose underlying the statute of limitations as a statute of repose is not served. The rationale behind the statute of limitations—that at some point a legal controversy must come to an end so that the defendant may have a fair opportunity to defend himself before memories fade and evidence becomes stale—is inapplicable. To the contrary, where contemporaneous evidence was buried and unavailable to the plaintiff and has only recently been rediscovered through the defendants’ actions (by forming a commission to investigate the events, for example), then the defendant has reopened the underlying issues and should not be able to escape its legal responsibility for the crime identified.

In Oklahoma, for instance, the state and municipal defendants engaged in a conspiracy of silence so successful that even the district attorney of Tulsa did not know of the riot: “I was born and raised here, and I had never heard of the riot.” Oklahoma created the Commission to Study the Tulsa Race Riot of 1921 in large part precisely to discover hidden or suppressed facts surrounding the riot that could not otherwise have been discovered by plaintiffs. The report of the Commission revealed information never before made available to the public, leading the Commission itself to describe the report as a “tower of new knowledge” that enabled “visions never seen before.” Specifically, the Commission conceded that its report:

[i]ncluded . . . records and papers long presumed lost, if their existence had been known at all. Some were official documents, pulled together and packed away years earlier. Pages after pages laid open the city commission’s deliberations and decisions as they affected the Greenwood area.
Overlooked records from the National Guard offered overlooked perspectives and illuminated them with misplaced correspondence, lost after-action reports, obscure field manuals, and self-typed accounts from men who were on duty at the riot.  

These circumstances appear to provide a particularly compelling reason for tolling the statute of limitations and one that is by no means limited to Jim Crow lawsuits.

Similarly, the current set of slavery reparations lawsuits on file in various jurisdictions around the country and consolidated in the Northern District of Illinois seek to toll the statute of limitations. Tolling, however, is not the only possible approach to overcoming the statute of limitations hurdle.

Waiver, for example, provides an alternative avenue to address the statute of limitations. Both public and private institutions have waived the statute of limitations when the statute stands as the plaintiff’s only impediment to trial. The federal government’s waiver of the statute of limitations in the Japanese American litigation and its enactment of the Civil Liberties Act of 1988 to compensate the victims of the internment program is one example of this phenomenon.

Several other recent examples of federal waiver involve African Americans. In Pigford v. Glickman, African American farmers sued the government claiming a violation of the Equal Credit Opportunity Act (“ECOA”), which had a two-year statute of limitations. Throughout the 1980s and 1990s, federal and state officials routinely discriminated against African American farmers. When African American farmers sought government grants to start or improve farms, their requests were denied and their applications destroyed or discarded; at the same time, grants were routinely made available to whites. Despite the two-year statute of limitations, Congress provided relief to plaintiffs in 1998 by passing legislation that tolled the statute of limitations for all those who had filed discrimination complaints with the Department of Agriculture before July 1, 1997, and had alleged discrimination at any time during the period beginning on January 1, 1981, and ending on or before December 31, 1996. After the government agreed to settle the case, the district court in Pigford began its consent decree by invoking General Sherman’s “forty acres and a mule” military order. The court clearly linked the federal government’s establishment and abandonment of the Freedmen’s Bureau to the discrimination engaged in by the Department of Agriculture.

Private defendants have also waived statute of limitations defenses due to the merits of the underlying claim. In what was described as “a warm-up match for the forthcoming battle over slavery reparations,” MetLife Inc., the nation’s largest life insurance company...announced it [would] set aside a quarter-of-a-billion dollars to settle a class-action lawsuit brought by former black policyholders.

Nearly 60 years ago, MetLife sold life insurance policies to blacks that were more expensive and provided fewer benefits than policies marketed to whites.

MetLife, in effect, waived its statute of limitations defense by settling the case. Unfortunately, in the currently pending reparations lawsuits, none of the defendants have been so reasonable in acknowledging their culpability for discriminatory practices, and all defendants have asserted statute of limitations defenses.

Even absent tolling or waiver, it is important to note at least two types of lawsuits are not subject to the statute of limitations barriers. These include (1) suits for the return of property; and (2) suits brought under statutes, such as California Business and Professions Code section 17200, that impose liability for fraudulent business dealings without determining that the triggering event initiates the statute of limitations. Each option presents its own problems, but both remove the statute of limitations from the central place it occupies in much reparations litigation.

One advantage of property-based actions—for example replevin or unlawful detainer—is that they are structurally similar to takings claims that have found a certain amount of favor with courts in reparations litigation. For example, the district court in Hohri v. United States held the plaintiffs were able to state a claim under the Takings Clause to recover property confiscated by federal authorities and property lost as a result of the government’s exclusion of the plaintiffs from their homes and businesses. In this vein, the court noted, “Plaintiffs’ claim is in essence an inverse condemnation proceeding, in which a citizen is deprived of property by the government and then must initiate judicial action to obtain just compensation.”

Although the district court eventually dismissed Hohri’s takings claim on statute of limitations grounds, such a defense would not bar replevin and wrongful detainer claims. If title to the property is defective, it cannot be passed on. The true owner is entitled to return of the property or to compensation for its loss. The problem in the slavery reparations context is that slaves did not own property. Free Africans were, however, sold into slavery by a number of Southern coastal states after the Constitution abolished the slave trade in 1807. Certainly, the slaves had a property interest in the money illegally obtained by their sale. A slavery reparations suit could demand the return of property; and (2) suits brought under statutes, such as California Business and Professions Code section 17200, that impose liability for fraudulent business dealings without determining that the triggering event initiates the statute of limitations. Each option presents its own problems, but both remove the statute of limitations from the central place it occupies in much reparations litigation.

Plaintiffs seeking reparations also pursue fraudulent business practice claims in an effort to circumvent the statute of limitations. Taking advantage of California’s private attorney general statute and the prohibition under California Business and Professions Code section 17200 of any “unlawful, unfair or fraudulent business act or practice,” plaintiffs have sued a variety of corporations for...
their involvement in slavery. This type of lawsuit has the potential to demonstrate the practice of slavery supported, and was supported by, a diverse range of businesses both in and out of the South. Furthermore, it brings suit on behalf of the community, instead of individual plaintiffs, and thus avoids the standing issues that plague traditional slavery reparations lawsuits. Finally, the California statute applies to any unlawful business practice, not only those within a certain period of time. Hence, this type of claim avoids obstacles traditionally placed in the path of slavery reparations suits.

3. Sovereign Immunity

A subsidiary, but nonetheless important, issue is the sovereign immunity doctrine’s preclusion of suits against states unless the state consents to suit or Congress expressly abrogates its immunity. Recently, the government has used the sovereign immunity doctrine to defend against slavery reparations claims. In Cato v. United States, an African American woman brought an action for damages against the United States government alleging the kidnapping and enslavement of African Americans, as well as continuing discrimination on the part of the government. She also sought a court acknowledgment of the injustice of slavery and Jim Crow oppression, as well as an official apology from the United States government. The Ninth Circuit Court of Appeals failed to award the relief sought, citing standing and sovereign immunity grounds for denying relief.

Unfortunately, the major civil rights statute, § 1983, does not abrogate sovereign immunity. While states are not immune from suit, they may be sued only in the person of a state representative in his or her official capacity and then only for non-monetary relief. This exception is not without significance: prospective injunctive relief such as a government apology and acknowledgment of its racist practices has a place in reparations lawsuits and may be more important than monetary relief in promoting the litigation’s goal of racial reconciliation.

Of course, sovereign immunity only applies to suits against the state or federal government; suits against municipalities are not covered by the doctrine. A municipality may be sued under § 1983 when its official policy or custom results in a violation of the Constitution. As a matter of fact, the state may elect to pay for the municipality’s wrongdoing; nonetheless, the doctrine of sovereign immunity does not come into play.

Keeping the state as a party, however, has important symbolic and practical consequences. For many victims of state-sponsored discrimination, the goal is not simply to achieve payment of damages but to identify the state as the perpetrator of the wrong. Furthermore, since one of the major goals of the reparations movement is to educate the public about the wrongs and recency of state-sponsored discrimination, injunctive relief requiring the state to engage in educative efforts is a vital part of the restitution sought through such litigation.

4. Formulating Effective Remedies

Fashioning a remedy poses a major challenge, particularly for slavery reparations lawsuits. Even where it is possible to sue a state under a state’s private attorney general statute, there is no plaintiff to pocket a remedy framed in terms of monitory damages. Although the doctrine of cy pres could be employed to ensure disbursements of such funds, an open question remains over who would be the beneficiaries of any trust fund.

The relative indeterminacy of beneficiaries is generally not a problem for Jim Crow lawsuits. In the Oklahoma litigation, the plaintiffs are individually listed, and many are still alive. However, focusing on the differences between slavery and non-slavery lawsuits in this manner ignores the potential and importance of non-monetary relief.

Money damages are certainly a principal remedy. Virtue lies in making defendants pay up; defendants may not feel their “investment” in racial reconciliation until they are hit in their pockets. However, non-monetary relief is also important. The broader goal of reparations suits is to develop ways of crafting forward-looking initiatives for racial reconciliation. As MetLife has attempted to address the past and present by payments to actual victims and creating programs to prevent future forms of discrimination, its forward-looking approach is one model for corporate defendants to consider. A state’s acknowledgment of its complicity in a history of discrimination lasting from slavery or Jim Crow through the present day is an essential, non-monetary prerequisite to the reparations goal of racial reconciliation. Many more individuals than could be named in a Jim Crow reparations complaint would benefit from inventive, broad-ranging initiatives. Financial remedies such as the creation of business funds to aid African Americans and broad-ranging educational, housing, and health care initiatives might overcome individual remedy difficulties and assist in combating racial inequality.

C. Legislative Approaches to Litigation Challenges

Most academic discussions of the legislative approaches to reparations have largely focused on litigation concerns, such as clearing statute of limitations and sovereign immunity hurdles to litigation. But scholars recognize the potential for legislative efforts to achieve reparations; scholars on occasion envision sweeping reparations legislation taking the form of H.R. 40 and the Civil Liberties Act of 1988. Legislation addressing the Rosewood, Florida, and Tulsa, Oklahoma, race riots was couched in terms similar to those two statutes. Furthermore, these statutes mirrored other legislation designed to compensate victims of twentieth-century slavery. In particular, the California Second World War Slave Labor Victim Act waived the statute of limitations for suits against private corporations that used slave labor during World War II. Such a statute, if applicable to African American slavery, would enable reparations lawsuits.
Recent legislation, however, has taken a different approach and requires some accounting of corporate involvement in slavery rather than a waiver of the statute of limitations so as to permit suits against such corporations. The California Slavery Era Insurance Act requires insurance corporations licensed in California to disclose any slavery insurance policies issued by a predecessor arm. The Act is not perfect: apart from lacking any cause of action for private enforcement, it narrowly defines the manner in which insurance corporations may have been implicated in slavery, permitting some prevarication and evasion. Nonetheless, since one of the goals of reparations is to make public the number of corporations that benefited from slavery, it is an important asset—especially in light of California Business and Professions Code section 17200. Even without the power to sue for unlawful business practices under the California statute, these “accounting” acts are vitally important in publicizing the wrongs inflicted by slavery and Jim Crow discrimination.

IV. A Response to Reparations Critics

The political attack on slavery reparations has been forcefully pursued by David Horowitz. His ten-point list is the locus classicus for anti-reparations arguments, condensing all the objections into an easily digestible list that he sought to have published in every campus newspaper in the country. Most of the popular critiques of reparations reflect Horowitz’s arguments.

The anti-reparations arguments can be grouped into three main categories. The first category of arguments asserts that the perpetrators of the injury are unidentifiable: slave owners are long dead, their descendants should not have to suffer for the wrongdoing of their ancestors, and many Americans are descended from people who immigrated after the end of slavery. The second category of arguments makes the equitable defense of “clean hands.” According to this argument, since some Africans participated in the slave trade and some African Americans owned slaves, blacks are implicated in the slave trade as well. The third category alleges overpayment: African Americans have been paid, in various forms and at various times, for the injuries inflicted by the American system of chattel slavery, and so should not continue to milk white guilt for yet more money.

Professor Emma Coleman Jordan is also critical of reparations litigation based upon claims stemming from slavery. Jordan has suggested that there are serious problems with litigation seeking reparations for injuries inflicted during slavery. Primarily, she suggests that there is a serious problem of “correlativity… the expectation that there must be a ‘nexus between two particular parties.’” According to Jordan, the relevant nexus is “between the defendant’s liability and the plaintiff’s entitlement, as well as between the plaintiff’s entitlement and the remedy.” Jordan points to two primary problems with correlativity. First, there is the difficulty of identifying defendants and plaintiffs. Here, establishing a linkage between defendant and plaintiff is particularly challenging when it is difficult even to identify who those defendants and plaintiffs are.

Interestingly, this problem is not so overwhelming—at least as far as the defendants are concerned—when corporations are the object of a slavery litigation lawsuit. In that type of case, where the harm can also be clearly identified, the potential for tracing plaintiffs with the requisite nexus is high. For example, in the lawsuits currently consolidated in the Northern District of Illinois, some of the corporations facing suit are insurance companies sued for having written insurance contracts for the owners of slaves. Having identified the defendant and the insurance contracts, it is potentially a simple matter of historical research to determine the slaves covered by those contracts and trace their descendants.

Jordan also suggests that the nexus between entitlement and remedy is obscure in slavery reparations cases. Again, that is most true when plaintiffs sue for the general harm of being enslaved: clearly a variety of specific harms may be inflicted during slavery, ranging from deprivation of liberty to physical injury or death. Certain harms may not survive the passage of time; others might. Clearly, much work remains to be done to specify which harms transfer from generation to generation (although, I suggest, infra, that deprivation of property, remedied by an action in replevin, is one such harm). Nonetheless, there is no conceptual impediment to determining a range of harms that may be actionable.

Despite these concerns, Jordan does, however, support the type of reparations lawsuit that is based upon riots of the nineteenth and twentieth century, such as the Tulsa Race Riot:

My research on the legacy of lynching convinces me that the problem of lynching and race riots in the period 1865–1955 provides a promising and ultimately more satisfying fertile field for undertaking the same project as the reparations-for-slavery movement, with far fewer of the disabilities of the slavery-focused effort.

A. The Perpetrators of the Injury Are Unidentifiable

Horowitz’s first major attack on reparations focuses upon what he claims is the impossibility of identifying appropriate defendants because no “single group [is] clearly responsible for the crime of slavery.” As historian John Hope Franklin noted in an open-letter reply to Horowitz, this is an odd claim. Most people would not dispute that Western powers, most notably Spain, Great Britain, France, and the United States, began and promulgated the slave trade. Slavery was made possible through a practice of colonization in which the European powers subjugated indigenous Africans and engaged in a policy of underdevelopment.

In the same vein, another argument suggests that reparations is “racist” precisely because it is over-inclusive, treating “all blacks as victims and all whites as villains.” It is fair to recognize an essentialist and overly
accusatory strand of reparations activism—a strand that I reject—that Horowitz’s view exaggerates and parodies. What is true is that all African Americans are subject to forms of discrimination that do not apply to whites. From the inception of this nation until 1967, the federal government sponsored a system of racial discrimination based first upon slavery and then upon Jim Crow segregation. These laws applied to every African American from every part of the nation, slave and freedman, traveling through the South, parts of the Midwest, and the District of Columbia. It was whites who passed and maintained laws denying African Americans the right to vote. The point is not that all whites were villains—many whites voted against such laws—but that state and federal governments, acting on behalf of all citizens, upheld those laws. There should be no moral or political difficulty in holding our national institutions to account for institutionalized racism. Noted historian John Hope Franklin has responded forcefully to Horowitz’s criticism of racism, and his argument addresses why all white Americans must understand how race mattered in the distribution of goods and services in America:

Most living Americans do have a connection with slavery. They have inherited the preferential advantage, if they are white, or the loathsome disadvantage, if they are black; and those positions are virtually as alive today as they were in the 19th century. The pattern of housing, the discrimination in employment, the resistance to equal opportunity in education, the racial profiling, the inequities in the administration of justice, the low expectation of blacks in the discharge of duties assigned to them, the widespread belief that blacks have physical prowess but little intellectual capacities and the widespread opposition to affirmative action, as if that had not been enjoyed by whites for three centuries, all indicate that the vestiges of slavery are still with us.159

B. African Americans Are Implicated in the Wrongs of Slavery

Professor John McWhorter, a linguistics professor at U.C. Berkeley, another reparations critic, offers an additional argument against reparations, contending that there is “painful clarity… [that] most slaves were obtained by African kings in intertribal wars, and were sold in masses to European merchants in exchange for material goods.”160

McWhorter’s argument commits a logical fallacy and fails to adequately respect the historical record and the moral implications of black collaboration in slavery.162 Slavery continued after and independently of the international slave trade. The U.S. Constitution commanded that international trade in slaves should cease in 1808, yet slavery in America (and the domestic trade in slaves) continued for almost sixty years after that. To the extent that African Americans engaged in this domestic slave trade, generally the African American purchasers of slaves were family members purchasing their siblings, fathers and mothers, or sons and daughters out of slavery.164 Such a detail is problematic for those who seek to deny or minimize the effects of slavery. While a relatively small group of African American slave owners may have acted as badly to their fellow African Americans as whites did, the moral repugnance of their actions does not undermine the case for reparations.

Reparations critics are willing to discount a history of colonial oppression, underdevelopment, and exploitation. As a moral argument, some accounting of the African involvement in the slave trade is urgent and necessary. However, as Professor Henry Louis Gates has noted:

The export of human beings from Africa led mainly to more such exporting, and to a dramatic net economic loss to exporting nations as a whole. By contrast . . . many Western nations reaped large and lasting benefits from African slavery, while African nations did not. African regrets, profound indeed, do not have to be other than regrets, because the results of African slave trading have, in Africa, been negative, an economic curse.165

C. African Americans Are Overcompensated Free-loaders

Horowitz advances additional arguments that seek to demonstrate that reparations hurts the group that it purports to help.166 These arguments generally allege that reparations constitutes a type of reverse discrimination that will do more harm than good for African Americans.167 Implicit in this depressing view of race relations is the stereotype of the shiftless, feckless African American, too lazy to do anything for him or herself, that has been argued to such damaging effect in disparaging everything from affirmative action to welfare mothers. These arguments may generate blistering responses but, on balance, are so misguided that they hardly deserve a serious response.

1. Too Many Would Be Paid

One of the often repeated arguments against reparations is rather straightforward: it is impossible to create a concrete list of individual grievances and harms traceable to slavery, refuting the need to provide a single mass reparations payment to all African Americans. Reparations opponents argue that such a payment would be overinclusive, benefiting individuals who were not descended from slaves and who would be unjustly enriched, as though they did not suffer any economic consequences of slavery and discrimination.168

This issue presents one of the most interesting features of the reparations claim. By undermining the nexus between harm and beneficiary, some of the symbolism of the reparations claim may be lost, along with some of the legitimacy of the suit.169 But this argument ignores that reparations is about repair—in particular, the repair of a community for the stigma harm occasioned by slavery. The social construction of people of African descent in
America depends not simply upon the fact of personal or familial slavery. Rather, racial difference has been mediated through the stigma of slavery and Jim Crow and contained in perceptions lasting through the present time.

2. All African Americans Are Already Paid

Opponents of reparations also assert that a form of reparations has already been paid to African Americans. Horowitz states that this payment came in the form of the Civil Rights Act and the “advent of the Great Society in 1965.” McWhorter concurs, stating that the War on Poverty and affirmative action ought to be seen as the payment sought by supporters of reparations. McWhorter also states that in the “mid-1960s welfare programs were deliberately expanded for the ‘benefit’ of black people, in large part due to claims by progressive whites that the requirements of the new automation economy made it unfair to expect blacks to make their way up the economic ladder as other groups had.” McWhorter believes that although such programs were not “termed ‘reparations’ in the technical sense,” they did “provide unearned cash for underclass blacks for decades.” Some vast program of social healing and uplift is, after all, the goal of the reparations movement.

President Johnson’s 1965 commencement speech at Howard University certainly enunciated the political vision of a Great Society, but it did not even last the three years until Nixon’s election in 1968. Welfare, as we know it and have always known it, is a program designed to benefit poor families. The fact that popular culture and the media frequently put a black face on it does not alter the fact that most of the beneficiaries are white, and single, mothers, and appropriately so. Meanwhile, if the War on Poverty is measured by results, then it is a huge failure; the difference between the richest and poorest in this society grows wider each day, with African Americans disproportionately stuck at the bottom.

Reparations does not seek to replace the Great Society but to push it toward its meaningful and ambitious goals. Reparations provide a voice through which those most acutely affected by the failure of the Great Society (and those most particularly identified by President Johnson) can protest their exclusion from the benefits of American society that others take for granted.

Another claim alleges that whites expiated the sin of slavery by fighting the Civil War. Quite apart from ignoring that Southern whites fought the Civil War to perpetuate slavery, this argument ignores President Lincoln’s quite categorical statement that the Union side did not fight the Civil War only to abolish slavery. In a letter to James Conkling in Illinois, sent as a proxy stump speech during his second campaign for the Presidency during 1863, Lincoln wrote:

“[F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights.”

According to Lincoln, then, African Americans made a pivotal contribution to a war to preserve the Union, not abolish slavery. In fact, Lincoln did not free a single slave in territory occupied by the Union when he issued the Emancipation Proclamation. Those slaves were not freed in 1861 but rather by the ratification of the Thirteenth Amendment in 1865.

3. Co-Dependent “Victims”

Finally, reparations critics claim that reparations is yet another political strategy that seeks to “turn African-Americans into victims.” The argument, in essence, is that those within the African American community will be burdened with a “crippling sense of victim-hood” if such reparations are paid. E. R. Shipp, for example, complains that African Americans are a people who are “desperate for excuses to explain their own failures.” McWhorter echoes this sentiment when he states that “black America” ought to “focus on helping people to help themselves” and not wait for the handouts of others. In denouncing Randall Robinson’s contention that “black” is essentially a shorthand for “poor,” McWhorter contends the “reparations movement is founded in large part upon a racist stereotype” that robs African Americans of “individual initiative.”

President Lyndon B. Johnson provided the most direct response to this line of argument. When speaking to the graduating class at Howard University on June 4, 1965, President Johnson made the case for his proposed “Great Society” revolution. Reviewing the civil rights struggle to date, President Johnson recognized that:

“[F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights.”
President Johnson was aware that there were many “subtle”\(^2\) and “complex”\(^3\) reasons for the failure of African Americans to achieve equality in America. But there were also two “broad basic reasons”\(^4\) for this lack of equality: one was poverty, which affected all races; the other was “much more difficult to explain, more deeply grounded, more desperate in its force.”\(^5\) The President identified:

the devastating heritage of long years of slavery; and a century of oppression, hatred, and injustice. For Negro poverty is not white poverty. Many of its causes and many of its cures are the same. But there are differences—deep, corrosive, obstinate differences—radiating painful roots into the community, and into the family, and the nature of the individual. These differences are not racial differences. They are solely and simply the consequence of ancient brutality, past injustice, and present prejudice. They are anguishing to observe. For the Negro they are a constant reminder of oppression. For the white they are a constant reminder of guilt. But they must be faced and they must be dealt with and they must be overcome, if we are ever to reach the time when the only difference between Negroes and whites is the color of their skin.\(^6\)

Professor Ewart Guinier argues that, in 1965, President Johnson was making the case for reparations in terms that had existed for a century or more.\(^7\) The President explicitly recognized that reparations required whites and blacks to face America’s history of oppression and take positive action in order to overcome that history. Poverty and lack of opportunity were the tangible expressions of that history, but President Johnson recognized that the different races experienced poverty differently. His laudable political effort to overcome those differences failed as his legacy was tarnished as a result of the United States involvement in the Vietnam War.

**D. Understanding the Goals of the Reparations Movement**

Perhaps the real locus of the objection to reparations is its perceived divisiveness. Reparations opponents appear to consider reparations a separatist demand that pits one set of Americans against another. But if reparations are nationalist, it is so only in the sense of laying claim to a place in this nation. The reparations movement demands that all of American history be fully acknowledged, accounted for, and valued.\(^8\) Thus the movement must make one of its vital political and educational tasks the goal of combating the willful ignorance and ahistoricism exhibited by those who would deny the immediate and subsequent effects of slavery and Jim Crow.

John Hope Franklin argued adamantly against the modern denial of the history of slavery and Jim Crow:

as long as there are pro-slavery protagonists among us, hiding behind such absurdities as “we are all in this together” or “it hurts me as much as it hurts you” or “slavery beneated you as much as it beneated me,” we will suffer from the inability to confront the tragic legacies of slavery and deal with them in a forthright and constructive manner.\(^9\)

Instead of forgetting the past and “moving on,” it is vital that we remember the past. It matters, as President Johnson suggested, that one group benefited from slavery and Jim Crow segregation and that one group was crippled by it. It also matters that President Johnson’s efforts to undo that history were subsequently undermined. To forget that—to claim that a false start on the road to social justice is adequate to remedy the systematic oppression of African Americans as a people—is shortsighted and dangerous. Denying that this nation bears a responsibility for its history of slavery is disingenuous and morally wrong. It devalues the legitimate claims of African Americans who, as President Johnson acknowledged, are harmed particularly and differently by poverty. The current generation of African Americans are the first to be able to make their way without facing the legal hurdle of segregation. The lower income bequeathed them by the practice of segregation and the continuing hurdle of discrimination should not be ignored.\(^10\)

The demand for a reexamination of the historical and cultural record requires us to evaluate this nation’s tradition of fairness and equality in the manner and spirit of Supreme Court Justice Thurgood Marshall.\(^11\) We should not forget that Marshall argued, as did Frederick Douglass before him, that the Constitution was drafted precisely to exclude various segments of population, including women and slaves, and that the challenge for America has been to redeem the flawed basis of its founding.\(^12\) Accordingly, the Constitution we have now is not the one enacted in 1787 but one reformed by the Civil War and the Civil Rights movement. The reparations movement demands that some accounting be made of the sacrifices that one segment of this nation required of another through state-sponsored institutional racism.

**Conclusion**

African American reparations are premised upon vital and viable legal, moral, and political arguments. These arguments are premised upon the complicity of state, municipal, corporate, and individual actors in perpetuating violent acts of discrimination and repression against African Americans throughout the lifetime of this country. Reparations arguments were made before emancipation and continue to be made today. The same type of discrimination discussed by David Walker in 1829 and addressed by the MacAdoo lawsuit in 1915 is replayed in the Pigford lawsuit in 1999 and the Tulsa case in 2003. American political discourse is crippled to the extent that it fails to acknowledge the constancy, continued relevance, and validity of such arguments. American political discourse is undermined to the extent that such ignorance is willful.

There are very few meaningful distinctions between the claims presented on behalf of large classes of African
Americans and small groups of identifiable victims of Jim Crow discrimination. While critics of reparations tend to distinguish between slavery and non-slavery reparations, to the detriment of the former, the appropriate legal distinction is not made on the basis of the institution attacked nor on some evaluation of time elapsed. Reparations suits are most likely to be successful when the broad redress sought can be presented in narrow legal claims. Such a tactic fits both slavery and non-slavery cases.

More importantly, the underlying goals of both slavery and non-slavery lawsuits are the same. Both seek to end a tradition of denying the consequences of slavery and Jim Crow era segregation, and both seek to force the nation to engage in an informed debate about race and racism in America. Ignorance can no longer be an excuse nor a rhetorical posture.

Legislative initiatives tolling the statute of limitations are welcome and useful. Recently adopted accounting statutes, such as the Slavery Era Insurance Act in California and the Slavery Era Disclosure Ordinance passed by the city of Chicago, may have an even broader impact on addressing reparations in public forums. These statutes are important initiatives that mark an alternative strategy to H.R. 40’s attempts to investigate and compensate the city of Chicago, may have an even broader impact on addressing reparations in public forums. These statutes are important initiatives that mark an alternative strategy to H.R. 40’s attempts to investigate and compensate the wrongs of slavery and Jim Crow segregation. The diversification of strategies and the strength of some of the currently filed lawsuits suggest that there has never been a broader, more intellectually well-grounded moment in the reparations campaign.

We should celebrate this move away from narrow nationalism and welcome reparations as an opportunity for all Americans to participate in a debate over what a truly just and inclusive society will look like in the next millennium. The issues are clear, the venues are identified, and the time is now.

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ENDNOTES


1. See, e.g., Martin Luther King, Jr., I Have a Dream, in I Have a Dream: Writings and Speeches That Changed the World 101 (1992) [hereinafter King, I Have a Dream]; Martin Luther King, Jr., A Time to Break Silence, in I Have A Dream, supra, at 135.

2. There are also a variety of lawsuits filed seeking reparations for theft of the belongings of Jews during World War II. See, e.g., Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (granting in part and denying in part a motion to dismiss a suit brought by Hungarian Jews arising from the Hungarian government’s refusal to return their property after World War II), reconsideration denied, No. 01-1859-CIV, 2002 WL 31954453 (S.D. Fla. Nov. 26, 2002); Deutsch v. Turner Corp., No. 00-56673, 2003 WL 751576 (9th Cir. Mar. 6, 2003) (affirming the dismissal of claims brought against Japanese and German corporations for damages suffered by plaintiffs forced to work as slave laborers during World War II).


8. See Hurdle v. FleetBoston Fin. Corp., No. 02-CV-4653 (N.D. Cal. filed Jan. 17, 2003) (class action lawsuit on behalf of all


10. Minute Order, In re African American Litig., No. 02-CV-7764 (N.D. Ill. Jan. 17, 2003) (noting that the following cases had been transferred to the Northern District of Illinois pursuant to 28 U.S.C. § 1407 (2000): “02c6180 [Porter], 02c7765 [Carrington], 02c9180 [Johnson], 02c9181 [Bankhead], and . . . Timothy Hurdle v. FleetBoston Financial Corp. [02-CV-4653]”).


19. Id. at 5–6 (2000).

20. Slaves were not citizens before the ratification of the Thirteenth Amendment. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).


23. See King, I Have A Dream, supra note 1.

24. Id. at 102.

25. Martin Luther King, Jr., Facing the Challenge of a New Age, in I Have a Dream, supra note 1, at 14, 22–23.


27. Professor Derrick Bell has persuasively articulated the principle of America’s need to address the race problem and to not simply expect African Americans to shoulder the blame. See Derrick A. Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 524–26 (1980) (white self-interest is the only way to achieve black progress in America on issues of race).

28. For a useful synopsis of the modern attempts to obtain reparations from corporations that profited from the Holocaust, see Michael J. Bazyler, Nuremberg in America: Litigating the Holocaust in United States Courts, 34 U. Rich. L. Rev. 1 (2000) (comprehensive study of litigation against banks, insurance companies, and German corporations).


32. Id.

33. Id. at 602.

34. Id. at 603.

35. Id.

36. Id.

37. Id. at 603-04.

38. See supra quotation accompanying note 24.


41. I met Queen Mother Moore when we both attended the Sixth Pan-African Conference in Dar es Salaam, Tanzania in 1973. She spurred my interest in reparations before the topic was discussed and debated in national forums.


44. Jonathan Tilove, Slavery Payback Proposal Moves to Forefront; Once Far-Fetched, Idea Being Taken Seriously, Times-

45 Robinson, supra note 17, at 8.
46 Id. at 61–63.
47 Id. at 76–79.
48 Id. at 52.
50 Kennedy, supra note 49, at 1417.
51 Id. at 1417–18.
53 Id.
54 Robinson, supra note 17, at 214–21.
55 Certainly Professor Kennedy would not see this as an African American sensibility (a group sensibility), nor does Robinson necessarily suggest some “group feeling” is being hurt or discounted.

58 See, e.g., Lori Horwitz, Race Adviser Says Payback Impractical, Orlando Sentinel, Apr. 28, 1998, at C1, 1998 WL 5346152 (noting that African American historian John Hope Franklin, head of the advisory board to President Clinton’s Initiative on Race, objected to the payment of reparations).
59 Some of the members of the Black Caucus still have not endorsed H.R. 40, 107th Cong. (2003).
60 Bittker, supra note 43.
61 Id. at 27–29.
62 Id. at 24–28.
63 Id. at 30–35.
64 Id. at 19–20.
65 By this, Bittker meant that racial discrimination has not provided the sorts of cultural benefits that make it hard to say of other discriminated-against groups that they have suffered an unmitigated wrong.
67 Id. at 135–37.
69 Id.
70 Bittker, supra note 43, at 99.
71 Id. at 71–86.
72 Guiner, supra note 30, at 1722.
73 Id.
74 Id. at 1723.
75 Horwitz, supra note 16, The Rosewood massacre stemmed from a reported assault by an unidentified black man on Fannie Taylor, a white woman. Shortly after, Aaron Carrier, a black man, was arrested. White vigilantes attacked the Carrier house, killing or wounding the occupants. Afterward, the residents of Rosewood, an African American town, fled to the swamps to avoid the white mob, which swelled up to two to three hundred. A number of African Americans were murdered and Rosewood was burned down. No whites were ever prosecuted. See Displays for School, Inc., Remembering Rosewood, at http://www.displaysforschools.com/rosewood.html. (last visited Apr. 25, 2003).
76 Id.
77 Ogletree & Shipp, supra note 16, at 129.
79 Yamamoto, Racial Reparations, supra note 29, at 491.
80 The internees’ claims presented the following features: (1) their challenge addressed a specific executive order and ensuing military orders; (2) the challenge was based on then-existing constitutional norms (due process and equal protection); (3) both a congressional commission and the courts identified specific facts amounting to violations of those norms; (4) the claimants were easily identifiable as individuals (those who had been interned and were still living); (5) the government agents were identifiable (specific military and Justice and War Department Officials); (6) these agents’ wrongful acts resulted directly in the imprisonment of innocent people, causing them injury; (7) the damages, although uncertain, covered a fixed time and were limited to survivors; and (8) payment meant finality. In the end, the traditional legal rights/remedies paradigm bolstered rather than hindered the internees’ reparations claims. Id. at 490.
81 45 App. D.C. 440 (1916), aff’d, 244 U.S. 643 (1917).
82 Id. at 441.
83 Id.
84 See cases cited supra notes 3, 5–7 and discussed infra notes 145–147 and accompanying text.
85 See cases cited supra note 8.
89 Id. at 49–51.
91 See Ellsworth, supra note 88, at 51.
92 Id. at 54.
93 Id.
94 Id.
96 Brophy, supra note 90, at 157.
97 Brophy, supra note 95, at 41–43.
98 Id. at 42.
100 Brophy, supra note 95, at 107 & n.85.
101 Id.


104 See id. at ¶ 5 n.5, (citing Norman Mob After Single Smith Jazz, Okla. City Black Dispatch, Feb. 9, 1922).

105 See Deutsch v. Turner Corp., No. 00-56673, 2003 WL 751576 (9th Cir. Mar. 6, 2003).


112 Id. ¶¶ 39–416.

113 Id.


115 The time period depends upon the type of injury asserted. In tort cases, the statute of limitations period is typically two years.


117 Id. at 309–10.

118 See *Young v. United States*, 122 S. Ct. 1036, 1041 (2002) (citing *Irvin v. Dept’l of Veterans Affairs*, 498 U.S. 89, 96 (1990)); see also *Glus v. Brooklyn E. Dist. Terminal*, 399 U.S. 231, 323–33 (1963) (”No man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statute of limitations.”).

119 The statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights. A corollary of this principle, often found in cases where wrongful concealment of facts is alleged, is that a party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense.

120 Reeb v. Econ. Opportunity Atlanta, Inc., 516 F.2d 924, 930 (5th Cir. 1975). Equitable “toling ‘focuses on the plaintiff’s excusable ignorance of the limitations period and on lack of prejudice to the defendant.’” (while estoppel ‘focuses on the actions of the defendant.’”) *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001) (en banc) (quoting *Naton v. Bank of Cal.*, 549 F.2d 691, 696 (9th Cir. 1978)). There is “‘clearly some overlap,’” id. at 1185 (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995)), between the two doctrines, and they are often conotated. See *McAllister v. FDIC*, 87 F.3d 762, 767 n.4 (5th Cir. 1996) (“Several courts, including the Supreme Court in *Irvin* [v. Department of Veterans Affairs, 488 U.S. 89 (1991)], have used the terms ‘equitable tolling’ and ‘equitable estoppel’ interchangeably.”); 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1056, at 239 (3d ed. 2002).

121 4 Wright & Miller, supra note 118, § 1056, at 263.


123 Bodner, 114 F. Supp. 2d at 123 (noting that a French government commission, comprised of historians, diplomats, lawyers, and magistrates, studied the circumstances of how goods were illicitly acquired and made recommendations); Rosner, 231 F. Supp. 2d at 1209 (It was only when the “Presidential Advisory Commission on Holocaust Assets released its report on the Gold Train’ that the facts necessary to file their Complaint came to light.”) (quoting the Complaint ¶ 90).

124 See *Bodner*, 114 F. Supp. 2d at 136 (E.D.N.Y. 2000) (“Defendants are not entitled to benefit from whatever ignorance they have perpetuated in the plaintiffs.”).


126 Goble, supra note 102, at 8.

127 Id. at 4.

128 See Sebok, supra note 106.

129 See, e.g., *Brophy, supra note 114*, at 506, 516–18.


131 The African American farmers and MetLife insurance lawsuits, discussed infra notes 133–138 and accompanying text, provide additional models of waivers where there is compelling evidence of signficant legal harm to deannable classes of African Americans and compelling moral reasons to address the matter many years after its occurrence. Both involve African Americans who have been the subjects of historical discrimination and who only discovered that discrimination after the time for aling suit in compliance with the statute of limitations has passed. These suits are not true reparations suits, however, because they both deal with events most people would consider too recent to qualify. But, plainly, they demonstrate that the behavior complained of in more “traditional” reparations suits continues even to this day, a fact recognized by the judge in *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999), aff’d, 206 F.3d 1212 (D.C. Cir. 2000).

132 Id.


134 See *Pigford*, 185 F.R.D. at 86–89.


136 Pigford, 185 F.R.D. at 85. Forty acres and a mule. As the Civil War drew to a close, the United States government created the Freedmen’s Bureau to provide assistance to former slaves. The government promised to sell or lease to farmers parcels of unoccupied land and land that had been confiscated by the Union during the war, and it promised the loan of a federal government mule to plow that land. Some African Americans took advantage of these programs and either bought or leased parcels of land. During Reconstruction, however, President Andrew Johnson vetoed a bill to enlarge the powers and activities of the Freedmen’s Bureau, and he reversed many of the policies of the Bureau. Much of the promised land that had been leased to African American farmers was taken away and returned to Confederate loyalists. For most African Americans, the
promise of forty acres and a mule was never kept. Despite the government’s failure to live up to this promise, African American farmers persevered. By 1910, they had acquired approximately 16 million acres of farmland. By 1920, there were 925,000 African American farms in the United States.  


138 Id.


140 Suits for the return of slave property are problematic due to the difficulty of tracing what property slaves owned. Suits under section 17200 are limited to suits against corporations, and as such, do not address the wider issues of slavery reparations against the state or federal governments.


142 Id. at 783.

143 Id. at 784, 791.


147 See cases cited supra note 8.

148 70 F.3d 1103 (9th Cir. 1995).

149 Id. at 1106. Cato sought damages for “forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character.” Id.

150 Id.

151 42 U.S.C. § 1983 (2000); see also Cato, 70 F.3d at 1107.

152 See, e.g., Kentucky v. Graham, 473 U.S. 159, 166 (1985) (holding that official-capacity lawsuits are, “in all respects other than name, . . . treated as a suit against the entity”).

153 See Ex parte Young, 209 U.S. 123, 154 (1908) (holding that there is an exception to Eleventh Amendment immunity for actions seeking declaratory and injunctive relief against state officials for alleged violations of federal law).

154 See Monell v. Dept. of Social Servs., 436 U.S. 658, 691–94 (1978); City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (plurality opinion); see also Bd. of County Comm’rs v. Brown, 520 U.S. 397, 397, 403 (1997) (“A municipality may not be held liable under § 1983 solely because it employs a tortfeasor” and “[w]e have consistently refused to hold municipalities liable under a theory of respondeat superior.”).


158 One reason why sovereign immunity is not detrimental to reparations lawsuits is precisely that the object is to obtain broad-based injunctive relief.


162 Horowitz, supra note 16.


164 Id.

165 Id.

166 Id.


168 Id. at 558.

169 Id. (quoting Hanoch Dagan, The Fourth Pillar: The Law and Ethics of Restitution (forthcoming 2003)).

170 Id. at 557.


172 Jordan, supra note 167, at 559.

173 Id.


If David Horowitz had read James D. DeBow’s The Interest in Slavery of the Southern Non-slaveholder, he would not have blundered into the fantasy of claiming no single group benefited from slavery. Planters did, of course. New York merchants did, of course. Even poor whites benefited from the legal advantage they enjoyed over all blacks as well as from the psychological advantage of having a group beneath them.

Meanwhile, laws enacted by states forbade the teaching of blacks any means of acquiring knowledge—including the alphabet—which is the legacy of disadvantage of educational privatization and discrimination experienced by African Americans in 2001. Id.

175 See, e.g., Walter Rodney, How Europe Underdeveloped Africa (1982).


177 I use the year 1967 on the assumption that Loving v. Virginia, 388 U.S. 1 (1967), marks the end of federal de jure segregation. As late as 2000, however, the Alabama State Constitution still mandated separate schools for whites and African Americans and rendered illegal any marriage between African Americans and whites. See Ala., Const. art. XIV, § 256 (“Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.”); Ala. Const. art. IV, § 102 (“The Legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro.”).

178 As one journalist has pointed out, on this argument, blacks with some white ancestry ought to be held partly accountable for slavery. See Jeff Jacoby, No Reparations for Slavery, Boston Globe, Feb. 5, 2001, at A15. Although Jacoby does not mention it, W. E. B. DuBois famously identified all African Americans as culturally or psychologically bifurcated in this way. See W. E. B. DuBois, The Souls Of Black Folk 203 (Modern Library 1995) (1903) (arguing that reparations set an individual’s cultural heritage at war within him or her and seem to be taking self-hate and “double consciousness” a little too far).
179 Franklin, supra note 174.


181 The fallacy is to move from a major proposition containing a limited term (some) to a conclusion containing a universal term (all).

182 I doubt that reparations opponents would get far with an argument that is structurally the same but less venal: because certain Jewish people worked for the Nazis in staffing the concentration camps, or impeded efforts to resist the Polish and Nazi massacre and destruction of the Warsaw ghetto, then no Jewish people deserve reparations or commemoration. Similarly, the idea that Holocaust reparations are part of a Jewish victimology is equally repugnant.

183 See U.S. Const. art. 1, § 9, cl. 1: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” Interestingly, slaves were “persons” for the purposes of importation, but three-fifths of a person for the purposes of representation. See U.S. Const. Art. 1, § 2, cl. 3. Professor Eric J. Miller has recently argued the concept of underdevelopment can be applied to the condition of African Americans during slavery and Jim Crow. See Miller, supra note 86.


186 Horowitz, supra note 16.

187 Id.

188 Id.

189 Derrick Bell and Ewart Guinier refute this argument. See Bell, supra note 68, at 163, 164; Guinier, supra note 30, at 1722, 1723.

190 Horowitz, supra note 16.


192 McWhorter, supra note 180, at 37.

193 Id.

194 See, e.g., Miller, supra note 86 (discussing reparations as addressing separation of America into two different societies based on race).


196 See Abraham Lincoln, Final Emancipation Proclamation, *in Abraham Lincoln: Great Speeches* (John Grafton ed., 1991) (noting that the Emancipation Proclamation did nothing to free slaves in states loyal to the Union and that such slaves were freed only by the ratification of the Thirteenth Amendment in December 1865).

197 Horowitz, supra note 16.

198 Id.

199 Ogletree & Shipp, supra note 16, at 127.

200 McWhorter, supra note 191.

201 McWhorter, supra note 180. In fact, Robinson makes clear that he does not regard “black” as a shorthand for “poor”: the passage quoted supra text accompanying note 45 expressly states that, while racial discrimination has caused disproportionate African American poverty, race and poverty are not direct correlates. See Robinson, supra note 17, at 77, 78.

202 President Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), available at http://www.ibiblio.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp. President Johnson continued:

  We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result. For the task is to give 20 million Negroes the same chance as every other American to learn and grow, to work and share in society, to develop their abilities—physical, mental and spiritual, and to pursue their individual happiness. To this end equal opportunity is essential, but not enough, not enough. Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood you live in—by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man. Id.

203 Id.

204 Id.

205 Id.

206 Id.

207 Id.

208 Guinier, supra note 30, at 1721.

209 See Robinson, supra note 45, at 52; Kennedy, supra note 17, at 1417.

210 Franklin, supra note 174.

211 See Robinson, supra note 17, at 76, 78.


213 Id.


On October 25, 1951, representatives from the State of Israel and twenty Jewish organizations from eight countries gathered in New York City for a two-day meeting to discuss the matter of reparations from the Federal Republic of Germany. At the end of the meeting, called the Conference on Jewish Material Claims Against Germany, the participants issued the following resolution:

This Conference was called together for the sole purpose of considering Jewish material claims against Germany. The Conference, recalling the appalling martyrdom and losses suffered at the hand of Nazi Germany, declares that crimes of the nature and magnitude perpetrated by Nazi Germany against Jews cannot be expiated by any measure of material reparations. No indemnity, however large, can make good the destruction of human life and cultural values for the agony of the men, women, and children tortured or put to death by every inhuman device. Every elementary principle of justice and human decency requires that the German people shall, at the least, restore the plundered Jewish property, indemnify the victims of persecution, their heirs and successors, and pay for the rehabilitation of the survivors.1

In this opening paragraph, the conference participants state their underlying principles. They emphasize their focus is on tangible, not intangible matters. Indeed, the phrase “cannot be expiated” indicates their belief that no atonement for crimes against the Jews is possible. Even the choice of words to describe the payments was a principled position. The Germans used the word Wiedergutmachung or to make good again; whereas the Hebrew word, shilumim or recompense, was the preferred term of the Jews.2 Thus, the phrase “no indemnity...can make good” may be taken as a reference to the German idea of Wiedergutmachung.

Not surprisingly, the conference prompted discussions about reparations among Jews worldwide. In Israel, Prime Minister David Ben-Gurion was in favor of dealing with Bonn; whereas several of the country’s political parties were opposed to any negotiations. During the first week of January 1952, in a series of street protests, members of Israel’s Herut, Mapam, and other political parties expressed their opposition to Israeli plans to negotiate with Bonn. Newspapers in Israel and the United States carried stories about demonstrations in Tel Aviv and Jerusalem. For instance, on January 8, the New York Times ran an article describing how during the debates on the subject of negotiations in the Israeli parliament, the building was surrounded by more than 3,000 guards.3 Then on January 10, the New York Times reported the “foes” of the negotiations had been defeated by the vote. The paper reported Israeli politicians voted 61-50 in favor of the negotiations, with five abstentions and four absences.4 After the vote, supporters of the Herut party led a riot in Jerusalem. In spite of the opposition, the vote led to the start of talks between the State of Israel, the consortium of Jewish organizations, and the Federal Republic of Germany.

After months of contentious negotiations between the parties, on September 10, 1952, the Federal Republic of Germany signed agreements with the State of Israel and with the Jewish organizations. Under the terms of the agreements, the Federal Republic of Germany would compensate three sets of beneficiaries: individual victims of Nazi persecution, the representative Jewish organizations, and the State of Israel. Officially called the Luxembourg Agreements, the documents are also known as the Conference on Jewish Material Claims Against Germany, and more simply, the Claims Conference.

Echoing the resolution of October 26, 1951, the Claims Conference negotiators reiterate their focus:

We are ready to negotiate on certain claims of a material nature. But we want to make it clear from the beginning that there can be no negotiations on moral claims. Moral amends cannot be made here. If such amends are possible, they can only be made through the regeneration of those who

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Rachel Auerbach and German Reparations

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committed what Chancellor Adenauer termed “unspeakable crimes,” and by those who allowed those crimes to be committed in their name. It is for posterity to judge whether and when such amends have been made.3

From the start, the representatives distinguish the material from the moral aspects of reparations. Since then, the scope of the material claims has been expanded to include agreements between the Claims Conference and various companies that used slave labor, such as Friedrich Krupp, AEG-Telefunken, Siemens-Halske, and Dynamit Nobel. To date, the Claims Conference has distributed billions of deutsche marks to the various classes of beneficiaries.

Leslie Sebba points out while the 1952 vote in the Israeli parliament effectively ended the “macrodebate,” or the public discourse, on reparations, the “microdebate,” or the personal discourse, continued to take place. He notes these microdebates have gone unrecorded, and there is little systematic knowledge available as to how the issue was resolved and how the ultimate decision was rationalized. 4

Although detailed analyses of the original macrodebates may be found,5 from Sebba’s point of view, analysis of the ways in which individuals accepted or rejected reparations and the ways in which individuals explained their decisions is still lacking. This suggests that along with analyses of the moral, legal, historical, economic, and theological aspects of reparations, analyses of the personal aspects would contribute to theories of repayment.

Writing more than twenty years later and building on Sebba’s work, Andrew Woolford and Stefan Wolenszco note “scant attention has been paid to the victimology of state crime, and even less to the victimological implications of genocide and mass violence.” 6 They write a set of critical tools for the study of victims is still needed. One way to address that need is to study the life of prominent Holocaust survivors. Focusing on the life and work of Rachel Auerbach, in particular, provides insights into how one survivor dealt with the matter of reparations.

David Engel has called Auerbach one of “the pioneers of Holocaust history.” 7 From 1939 until her death in 1976, she told and retold the events of wartime Warsaw. Because so few survived the war, and even fewer were writers, her writings provide a rare synchronic and diachronic perspective on the war and postwar periods. In addition to her own chronicles, her collections of survivor testimonies helped to lay the foundations of documentation, research, and education centers in Poland and Israel.

She was a life-long advocate for Polish Jewry, which may partially explain why on the matter of reparations, she told and retold the events of wartime Warsaw. Because so few survived the war, and even fewer were writers, her writings provide a rare synchronic and diachronic perspective on the war and postwar periods. In addition to her own chronicles, her collections of survivor testimonies helped to lay the foundations of documentation, research, and education centers in Poland and Israel.

Auerbach was born in Lemberg in 1903, graduated from Lemberg University with a graduate degree in philosophy in 1928, and then moved to Warsaw in 1933, where she was active in Zionist and literary circles.8 In 1939, at the onset of the Nazi occupation of Poland, Emanuel Ringelblum, the organizer of the secret Warsaw ghetto archive, code-named Oyneg Shabes, asked her to remain in Warsaw, which she did. Her writings from the Warsaw ghetto and from the Aryan side of the ghetto offer a remarkable contemporaneous perspective of the times. In addition to her own works, there are the testimonies and documents she collected from others during the war. Afterwards, from 1945–1950, she worked for the Central Jewish Historical Commission, Jewish Historical Institute, and Central Commission for the Investigation of German Crimes in Poland helping to create the archives for those organizations. In 1950, when she left for Israel, debates about reparations were already underway among Israelis and others.

In 1952, Auerbach expressed her opposition to reparations in the twenty-four page pamphlet, Undzer Heshbn Mitn Daytshn Folk [Our Reckoning with the Germans]. In that work, she criticizes those who willingly dealt with Germans. She feared a hasty reconciliation with Germany and notes only six years had passed since the killings stopped. Furthermore, concerning Auerbach’s opposition to negotiating with Germany, Ruth Wisse points out “Auerbach argued (vainly) that Jews should not accept monetary reparations from the Germans, lest this be construed as a form of expiation.”9 Wanting to avoid any possibility of atonement, Auerbach objected to compensation in any form.

By choosing to write Undzer Heshbn Mitn Daytshn Folk in Yiddish, Auerbach aims the work directly at the survivor community. In the work, she uses a writing strategy similar to the one she used in her poem, Yizkor, 1943. She wrote that poem while she was in hiding on the Aryan side of Warsaw ghetto.10 She uses the first-person to address her readers and provides specific details about the destruction of Warsaw Jewry. Her descriptions are very graphic; there is no vagueness in this work. She enumerates one-by-one the groups of people in the ghetto who were killed. She names the children, the beggars, the girls, the young men, the artisans, the orthodox, the parents, the thieves, and others. Likewise, in Undzer Heshbn Mitn Daytshn Folk, she personalizes Polish Jewry by listing categories of people and by writing directly to her readers. She writes about what happened to her relatives and then asks her readers:

Tsi hot ir oykh gehot a tatt oder a mame, a zan, oder a tschter, a frey, a bruder, a svestere, a feter, a mame, a shokn—a gutn freynt—tzwishn di vos zenen gevorn fargazirt?11
[Whether you also had a father or mother, a son or a daughter, a wife or a husband, a brother, a sister, an uncle, an aunt, a neighbor—a good friend—among those who were gassed?]
In this way, she reminds readers what was done to actual people, friends, and families. Later in the work, she wonders how one can take money for their deaths. At the end of the pamphlet, she calls on her readers to resist dealing with the Germans:

Farhandlt nis n mit derder? Tut op ayere hent.
Tut op ayere ponim fun talyen vos bohn oysehgeret ayere folk. 14

[Don’t negotiate with murderers! Turn away your hands. Turn away your face from the hangmen who have killed our people.]

Her anger is clear, and her language is bold. Other opponents of reparations used similar language, referring to the compensation as blood money and to the Nazis as Amalek, an ancient enemy of the Jews. By contrast, the writers of the Claims Conference documents use legalistic language. For example, Protocol 1, the agreement between the Federal Republic of Germany and the coalition of twenty-four Jewish organizations notes the agreement is “settling the liabilities of the former German Reich.” That formulation of responsibility serves to distance the current members of the Federal Republic from the Nazis. In contrast, Auerbach labels the representatives of the Republic as murderers.

However, at the same time debates about compensation were taking place among Israelis, debates about how to commemorate and document the life and death of Eastern European Jewry were also going on. One outcome of those debates was the establishment of Yad Vashem by the Israeli government on August 19, 1953. Yad Vashem was established as a Holocaust memorial and research center. By law, its mission is to establish memorial projects; to gather, research, and publish testimony of the Holocaust and its heroism and to impart its lessons; to grant commemorative citizenship to the victims; and to represent Israel on international projects aiming at perpetuating the memory of the victims of the Holocaust and of World War II. 15

To fulfill its mandate, a number of documentation and commemoration projects were undertaken by Yad Vashem. The primary funding for those projects came from the Claims Conference. Ronald Zweig has suggested that without the Claims Conference money, Yad Vashem might never have been created, and certainly it would have not been so productive. 16 Major Yad Vashem projects funded by Claims Conference include the multivolume Pinkas Hakholiot, an encyclopedia project describing Jewish communities destroyed during the Nazi occupation; the multivolume The Sources and Literature of the Holocaust, a bibliographical series; and a number of archival publications. 17

In addition to supplying funds for the organization, Claims Conference officials also were involved in the operations of Yad Vashem. As Zweig notes “everything that Yad Vashem did, and much that it failed to do, came under the constant scrutiny of the Claims Conference.”18 While their roles were sometimes at odds with the execu-

tives of the organization, Holocaust survivors took part in the running of Yad Vashem. In fact, as Orna Kenen writes: “[f]unded by money paid by West Germany as collective indemnity to the Jews, Yad Vashem was obligated by its contractual arrangements to employ Holocaust survivors.”19 With the requirement to employ survivors, Yad Vashem hired a number of Holocaust survivors, including Rachel Auerbach.

Auerbach joined the staff of Yad Vashem in 1955. Given her early opinion about reparations, the ties between the Claims Conference and Yad Vashem must have troubled her. However, Yad Vashem offered her the chance to keep the vow she made twelve years earlier in the poem, Yizkor, 1943:

And if, for even one of the days of my life, I should forget how I saw you then my people desperate and confused, delivered over to extinction, may all knowledge of me be forgotten and my name be cursed like those traitors who are unworthy to share your pain.20

This pledge to remember the fate of Eastern European Jews drove Auerbach to work on their behalf, and Yad Vashem provided a base from which she could carry out that work.

The German money funded a number of projects she championed, in particular, a collection of survivor testimonies. Auerbach introduced an initiative to the directorate of Yad Vashem to collect testimonies from survivors. After the initiative was approved, she was appointed director of the Collection of Testimonies Department. In that capacity, she turned to a practice she had learned in the Warsaw ghetto, namely, document everything. Applying that dictate in her new job, Auerbach issued a call to Holocaust survivors to submit their testimonies to Yad Vashem. Thousands of pages of written materials, along with photographs and other materials were submitted. She also conducted interviews with survivors.

In her administrative role at Yad Vashem, Auerbach influenced the publication of at least one yizkor book, the memorial books written by Holocaust survivors dedicated to the life and death of Eastern European Jewry. She earns credit for revitalizing Sefer Przemysl [The Memorial Book of Przemysl] from the members of the editorial board:

At the beginning of 1958, the manager of the Tel Aviv branch of Yad Vashem, author Rachel Auerbach, contacted one of the Przemysl people in Tel Aviv and proposed a renewed effort at preparing the book. The member agreed...21

Auerbach regularly privileged the testimony of the survivors, and in doing so, she had major disagreements with the officials of Yad Vashem. During those early years of the organization, there were a number of differences between the survivor-chroniclers and scholar-historians. For example, Auerbach, along with three other survivors on staff, challenged the executive board of Yad Vashem on matters relating to the organization’s mission. Ultimately, the four were fired. All except Auerbach, agreed to be reinstated.22

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What seems clear is during her tenure at Yad Vashem, she distinguishes the use of reparations for individual purposes from the use of reparations for communal ones. By viewing the survivors and their testimonies as cultural treasures, she could accept Claims Conference money in the name of Polish Jewry. Those funds allowed her to keep her commitment to preserve their memory. After her departure from Yad Vashem in 1958 and until her death in 1976, Auerbach continued to work to honor the memory of Polish Jewry. In 1977, Baym Letstn Veg: In Gotze Varshke un Oyf der Arisher Zayt [On The Last Road: In the Warsaw Ghetto and On the Aryan Side], her Yiddish-language memoir was published. In his afterward, Joseph Kermish, a colleague in Poland and Israel, praises Auerbach's chronicling and collecting activities.

Elazar Barkan points out "the writing of history has shifted focus from the history of perpetrators to the history of victims." He notes the victim perspective provides an important historical narrative. Auerbach's reparations story is a tale of survivor anger followed by survivor memory. Her willingness to work at Yad Vashem despite her opposition to reparations underscores the influence of other priorities. One was most likely the biblical injunction from Deuteronomy 25:17-19, which is generally cited as the instruction to remember. In those verses, the Jews are instructed to remember what their enemy Amalek did to them. So, if the Nazis are the modern-day Amalek, then the surviving Jews are obligated to remember what the Nazis did. Since it is not necessary the case that other victim groups place the same value on the preservation of memory, Auerbach's actions make it clear theories of reparations need to take into account specific religious and cultural influences on victims.

The influence of anger on victims also needs to be addressed. In Holocaust studies, survivor anger does not receive proportionate attention, especially when compared to survivor trauma. This is curious in light of Henry Greenspan's analysis of survivor testimony, which finds: "there appears to be more outrage expressed in the early testimony, perhaps echoing the wider public condemnations of Germany at this time with which survivors realistically, could feel solidarity."

Studying the appearance and disappearance of outrage in survivor accounts provides insights into the ways in which victims frame their experiences. A useful tool for the study of victims would be looking at the discursive practices of other survivors and how they mobilized their efforts for different goals.

Auerbach's decision to privilege memory over anger enabled her to make her contribution to the historiography of the Holocaust.

ENDNOTES


13 Auerbach, Under Heshbn, 4-5 (my translation).

14 Ibid., 22 (my translation).


18 Zweig, German Reparations, 164.


22 Kenan, Between Memory and History, 61.


The themes of retribution and reconciliation are central to Western Civilization's earliest surviving literary works, the *Iliad* and *Odyssey* of Homer. Both are wartime epics. The *Iliad* describes the tragic events of the Trojan War and the role played in them by the Greek hero Achilles, while the *Odyssey* recounts the dramatic exploits of the Greek hero Odysseus as he struggled to return home after the war's conclusion.

**Retribution and Reconciliation in Homer's *Iliad***

The tragic events of the Trojan War described in Homer's *Iliad* clearly show the futility of retribution and the need for reconciliation within the context of human affairs. Here at the headwaters of Western literature an extraordinarily gifted storyteller crafted together the legends of his time to capture the final days of a long ten-year struggle. And, in so doing, he provided his audiences, as well as untold generations to follow, a reflective image of the larger legendary conflict that provoked the war in the first place. Additionally, he told his story in such a way as to allow his audiences to see both sides of the conflict. It was, in fact, this neutrality of vision that created a perfect vehicle for him to explore the futility of retribution and the need for reconciliation.

But what was this story, this legend? And how did Homer make his point?

The legend began with the unnatural marriage of the mortal Peleus to the goddess Thetis. At that wedding, the uninvited goddess of discord provoked a quarrel between three goddesses, Hera, Athena, and Aphrodite, as to which one was the fairest. Zeus, king of the gods, was called upon to settle the issue, but wisely deferred it to a shepherd named Paris, who just happened to be the son of Priam, the powerfully rich patriarch of Troy. Each of the goddesses tried to bribe Paris with gifts befitting her status, with Aphrodite promising him the most beautiful woman in the world for his wife. Without hesitation, the young and impressionable prince opted for Aphrodite's gift.

Years later, Paris went on an adventurous mission to Sparta, a Greek city ruled by Menelaus, who was married to Helen, the most beautiful woman in the world. With Menelaus away on a journey, Aphrodite fulfilled her promise by making Paris and Helen fall passionately in love, after which they eloped to Troy.

Incensed by this insult to his honor, Menelaus turned to his brother Agamemnon, ruler of the Greek city of Mycenae, who summoned all the Greek chiefs—among them Achilles, the son of Peleus and Thetis, and Patroclus, Achilles’ comrade and closest friend—to help restore Menelaus’ honor by sailing against the gold-rich city of Troy. Thus was initiated perhaps the first major conflict between West and East.

The real subject of Homer's *Iliad* is what happens in the final days of that conflict. The Greeks, so we learn, have pounded the smaller, coastal cities allied with Troy for ten long years, plundering their riches, killing their men, and abducting their women. Now they are camped before the walls of Troy itself, weary with battle but restless to lay siege to the city. A plague is besetting the Greek camp, a situation that results in an internal conflict between Achilles and Agamemnon. To divert the plague, Achilles insists Agamemnon must return the woman he has been awarded to her father, an aged priest and now a suppliant on behalf of his daughter. Although Agamemnon relents, he then demands Briseis, the woman Achilles has been awarded. With his honor insulted, Achilles withdraws from battle, takes all his troops with him, and grieves with only Patroclus by his side.

But without Achilles on the field, the Greeks are clearly at a disadvantage, especially since Hector, noble son of Priam, is leading the Trojan charge. For the next few days, the bloody battle ebbs and flows, favoring now the Greeks, then the Trojans. Under pressure from his chiefs, Agamemnon sends an emissary to beseech Achilles to return to battle, with promises of gifts and the return of...
Briseis. Achilles hosts the emissaries as befits their status, but spurns Agamemnon’s offer, refusing to be bribed.

When all seems lost for the Greeks, Patroclus seeks permission to go into battle wearing Achilles’ armor. That granted, he storms the walls of Troy and is slaughtered by Hector. Achilles, newly outfitted with armor made by the god Hephaestus, reenters the fight to avenge his beloved comrade. After a prolonged chase, he kills Hector, then, still possessed by uncontrollable anger and grief, brutally drags the body back to the Greek camp, where he periodically drags it about the pyre now prepared for Patroclus’ funeral.

As we come to the end of the Iliad, we come also to Homer’s dynamic statement concerning retribution and reconciliation. The final chapter is framed by two funeral scenes—of Patroclus, and of Hector—a framing that seems fitting, given Homer seems to be saying revenge ends in death.

Homer did not have the language of modern psychology at his disposal to make his final statement. Nor did he need it. He was a master storyteller, and the story itself and the telling of it were the tools of his trade.

The events that transpire in this chapter are orchestrated by the gods, so he tells us, yet Homer makes clear the meaning of those events run deeply personal for both Priam and Achilles. Under the cover of night and the protection of Hermes, Priam comes to the hut of Achilles to beg for his son’s body. Achilles, forewarned and instructed by the gods, knows already Hector’s body has been divinely protected from deterioration; and knows also he cannot refuse a suppliant. What he does not know is how the sight of an aging father begging for his son’s body will affect him. And affect him it does, as, when he looks on the magnificent figure of Priam, he thinks of his own father, of the extreme desolation wrought on the plains of Troy, and of the cruel realities of our own mortality.

After the feasting and prior to the truce—with Priam still uncertain about the outcome of his mission, and Achilles still struggling with his loyalty to Patroclus—the two men, so we are told, gaze upon each other for a sustained, silent moment. Homer does not tell us what ripples of sensation each man experienced or what cognitive shifts took place; rather, like the master storyteller he was, he leaves all that to our imagination. But no audience could fail to recognize a change did occur, one that arose out of the ashes of the past. Even though both men knew, as we know from legend, the fighting would resume, Troy would fall, and neither of them would survive, no audience could fail to understand retribution brings only destruction and reconciliation offers our only hope for peace.

**Retribution and Reconciliation in Homer’s Odyssey**

When Troy fell after a decade of fighting, the battle-worn Greek army packed up their ships with the spoils of war and sailed for home. Almost all returned to Greece as conquering heroes and did their best to pick up their lives again. But of all those who had said goodbye to Troy one veteran remained unaccounted for.

His name was Odysseus, though later tradition would call him Ulysses. He was the king of a small island named Ithaca and had joined the war against Troy unwillingly, for his young wife Penelope had only recently given birth to their first child, a son named Telemachus, and Odysseus wanted nothing more than to stay home with his family and shepherd his people. But the gods had other plans.

As it turned out, it took Odysseus ten more years to get back home, swept across the sea by storm winds, attacked by monsters, and seduced by temptresses who wanted to keep him from reaching his goal. In the interim, his lonely wife and his young son, now grown to manhood (but without a male role model for guidance) had lost virtually all hope of ever seeing him again alive. Meanwhile, a pack of arrogant nobles who had not sailed off to war took advantage of their king’s absence to camp out in his palace, where they slept with the serving maids, gambled, swilled Odysseus’ wine, and devoured his livestock, all the while pressuring Queen Penelope to pick one of them to be her next husband and Ithaca’s next king. Indeed, they had even conspired to murder Prince Telemachus.

Once Odysseus finally returned to Ithaca, he came to see reclaiming his throne would be no easy matter. Penelope’s suitors and their armed hangers-on numbered over a hundred, and even with the help of Telemachus and a few loyal servants the odds against success were formidable. What Odysseus needed was a plan, a plan to give him a tactical advantage and even the odds. A brainy more than a brawny hero, he was the ideal man to devise such a plan, a man who time and again had used his shrewdness, imagination, and quick wits to evade any trap and escape any peril.

With the help of his Olympian “guardian angel,” Athena, the Greek goddess of intelligence, Odysseus was transformed into an old and shabby beggar, just the kind of person none of his enemies would fear or even pay much attention to. Such a disguise would enable Odysseus to gain entry to the palace grounds and, once inside, personally gauge the character and intent of the suitors while formulating a plan for victory that would employ the element of surprise. When it came, retribution would be swift and merciless, for the nobles in his palace had not only dishonored him and his family but also represented a form of corruption that could only imperil the future of his kingdom. Rather than contributing to society, they abused the power and privilege they possessed to take what was not rightfully theirs.

Unlike the Iliad that reflects the martial spirit of Greece’s Mycenaean Age, the Odyssey echoes the despair and hope of the Dark Ages of Greece that followed the fall of the Mycenaean Empire and persisted for centuries—an era of lawlessness and disorder brought on by the destruction of palaces and the collapse of royal power. Though most people tend to think of the Odyssey as a tale of exotic
adventures in far-flung places, only eight of the *Odyssey*’s twenty-four books, are set in a fairy-tale landscape. Two-thirds of the epic takes place in the very Greece Homer and his audience knew first-hand. Rather than mostly being about fantasy, the *Odyssey* is mainly about reality, about the reconstruction of domestic society. Seen from this historical perspective, the hubris of Ithaca’s aristocracy signified a set of values that, if permitted to thrive, would inevitably undermine the moral foundations of civilization itself. Homer is telling his audience, yearning for the return of social stability and justice, you *can* go home again, the lost world they and their ancestors once knew can be reclaimed for future generations. That is why Odysseus must prevail and why the suitors must be defeated. They are a cancer growing in the body of the state, a tumor that must be excised before it can metastasize.

This social context also explains why the suitors are dispatched so mercilessly by Odysseus once he has shocked his enemies by revealing his true identity. Having trapped the suitors and their allies in a single room where they lack the weaponry to defend themselves, with Telemachus by his side, Odysseus picks them off with bow and arrow one by one, spurning an offer from their leader for financial compensation for the damage they had done. In rejecting that offer, Odysseus’ hardness of heart parallels the inflexibility Achilles demonstrated in the *Iliad* when he refused financial compensation from Agamemnon for the insult done to his honor. Some crimes, Homer seems to be saying, cannot be paid for in the currency of material goods, nor can forgiveness be bought for a simple price.

Odysseus’ problems, however, do not end with his execution of the suitors and their allies. Their relatives, learning of their deaths, rise up and march on Odysseus’ palace, thirsting for revenge. In the melee that follows—described in the *Odyssey*’s final book—Odysseus and Telemachus are about to kill all the relatives of the suitors when Athena steps in and orders an end to the fighting. Frightened by her sudden appearance, the remaining relatives panic and run with Odysseus in hot pursuit. Insistent upon an end to all fighting, Zeus hurls a lightning-bolt at Athena’s feet to make his point. Prompted by this lightning strike and the goddess’ further appeal, Odysseus at last relents.

In the concluding verses of the epic, Homer describes how Athena, the goddess of intelligence, helped to draw up a peace treaty between both sides. Significantly in his final verse, Homer says she did so not in her divine form but in the shape and voice of a human being, disguising herself as Odysseus’ old and trusted friend Mentor.

Why did she not do so in her full splendor as a goddess? Why did she not hand down the peace treaty from heaven? Because, Homer the humanist argues, it is only we humans who can build a lasting peace. Ultimately, peace cannot be imposed from on high. Instead, guided by intelligence, we must sit down and reason together as individuals united by a shared hope for a better way of life, a way that transcends the instinctual demand for retribution. For only *we* can save ourselves from ourselves.

In the final books of both the *Iliad* and the *Odyssey*, Homer makes the case reconciliation must triumph over retribution. Thus, directed by the gods, Odysseus controls his desire for revenge and instead chooses reconciliation with his enemies’ kin. Similarly Achilles, also in keeping with a divine directive, relinquishes the body of Hector and returns it to his enemy’s father.

For Odysseus, the issue was simple. Athena, then Zeus, said “stop” and he stopped, mindful one must respect the will of the gods. But for Achilles there was no external lightning bolt, only an inner pragmatic realization retribution is useless. Achilles saw dragging his enemy’s body around his best friend’s grave could not bring his best friend back to life. Nor could dragging the corpse even serve to mutilate his enemy’s flesh. For Odysseus, unrestrained violence would have been unproductive as well, for rather than bringing lasting peace to Ithaca, it could have only fueled endless vendetta. Reconciliation, Homer argues, allows us to move forward; retribution keeps us stuck in the rut of the past. And if we ourselves cannot immediately see that truth, the gods from their higher vantage point can.

Yet if reconciliation is preferable to retribution, how do we apply that ancient lesson to bridge the sea of seething hatred that separates peoples and nations today? Perhaps it is by following the example of Priam and Achilles. Though warring enemies, they looked into each other’s eyes and recognized the fragile links of mortality that connected them. Perhaps it is by similarly recognizing our common humanity we can—Israeli and Palestinian, Sunni and Shia, Muslim and Christian—rise above the differences that threaten to destroy us all.

Ever the realist, however, Homer understood the war between Trojan and Greek would go on even after the interlude in Achilles’ hut. That is the tragedy of his time—and ours.
Racial conflicts are at the forefront of America’s media and sociopolitical context from local, state, national and international perspectives. Nieto (1999) explains "A sociopolitical context in education takes into account the larger social and political forces operating in a particular society and the impact they may have on student learning" (May, 192). Recent events of racism in America include incidents from localized acts by two Texas whites who dragged James Byrd, an African American, down the streets of their city just because he was black, to institutionalized forms of racism like the long-term neglect of the levees in New Orleans and the slow response to the numerous victims of Hurricane Katrina stranded by their own national government. In the War on Terror, in Iraq the battle is fought like other American battles: by disproportionate numbers of poor people and people of color compared to the numbers of sons and daughters of wealthy white American U.S. forces. In America race and education still dictate how individuals are judged in society and remain indicators of potentials for success.

The quality and even the purpose of children’s existence in schools is shaped through their educational environment and personal experiences. Within each experience, a person’s cultural beliefs and values play an intricate role in how the experience will be interpreted by others. Dewey (1938, 7) points out, "It is not enough to insist upon the necessity of experience, or even activity in experience. Everything depends on the quality of the experience which is had." Today, in America’s public schools, children are educated based on the No Child Left Behind Act and curriculum decisions that are driven by individual state standards. Research shows these policies directly affect students from lower socioeconomic statuses and those from diverse cultural backgrounds. According to Mafucci (2006), Gerald Bracey, an independent, highly regarded education researcher, No Child Left Behind (NCLB) is deceptive in social and economic ways because it affects the incredible amount of poverty in America that is concentrated in rural and urban areas. The demands of NCLB leave most teachers with little time to devote to multicultural curriculum. By ignoring the need to take multiculturalism in education seriously, we risk overlooking the diverse needs of the student population. Educators can begin to address the social situations of their students and use the implications to enhance both what they learn in school and how these conditions will continue to exist in America through multicultural education. It is time for America’s schools to reconcile (accept) the importance of multicultural education and emphasize race in education in order to avoid the slippery slope toward total evasion of the importance of ethnicity for all hyphenated Americans.

Critical Race Theory

Critical race theorists recognize race and ethnicity are the primary determining factors that affect a person’s status in American society, and they are dedicated to researching, writing, and exposing racism to society. They are content with using radicalism and liberalism as frameworks for addressing America’s racial problems. Tate (1997) pointed out that within multicultural education there is a need to address racism up close and personal and use it as an analytical tool rather than a biological or socially constructed one. Banks (1994) points out one dimension of multicultural education is to reduce prejudice and race through the curriculum so children can learn about and relate to experiences of the past or ones they may encounter in the future. He discusses multicultural education goals address racism and the focus is on practice skills, curriculum reform, assessment and evaluation tools, educating teachers and pre-service teachers to be culturally responsive, and reducing discrimination against children of color.

Both critical race theory and multicultural education focus on particular groups that have been the target of racism in America. The focus is on people of color and minorities who have historical experiences with racism

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and oppression. “Critical race theory aims to reexamine the terms by which race and racism have been negotiated in American consciousness, and to recover and revitalize the radical tradition or race-consciousness among African Americans and other peoples of color” (Delgado, 1995: p. xiv). While multicultural education analyzes the myths, presuppositions, and perceived wisdoms about societies’ views of racism it does not exclude the Western view, but incorporates it with other cultures so students can get a broad perspective of experiences, histories, cultural values, and beliefs.

**Multiculturalism**

Multiculturalism is the inclusion of the study of different cultures within the classroom environment. Without it, in the spectrum of education, children are deprived of important learning practices and understandings. Multicultural education is for all children. To effectively integrate multiculturalism into the curriculum, teachers must be aware of the nature, quality, and value of how to implement it in ways that are relevant to students across all subject areas and not just during social studies.

Over the years, multicultural and other educational scholars have been concerned with the academic achievement problems among low socioeconomic students and children of color. Banks (1993) explains a main goal for multicultural curriculum is to help students develop cross-cultural understandings of others, and learn how each ethnic group can get along in society. Gay (2000, 62) explains, "Caring teachers are distinguished by their high performance expectations, advocacy, and empowerment of students as well as by their use of pedagogical practices that facilitate school success." Teaching effective multicultural education requires cultural accountability because it constructs a framework for a student and community centered classroom. When teachers combine deep content knowledge, sound teaching techniques, positive perceptions of themselves as professionals, and affirming relationships with all students, they are practicing culturally relevant teachings (Ladson-Billings, 1994). They will gain knowledge that shows them being different is a part of being an American.

In order for students to learn multiculturalistically, teachers must be prepared and able to effectively implement a multicultural curriculum. Teacher education programs are requiring pre-service teachers to take courses in multicultural education. In many programs, teacher education students must complete at least one field experience with a diverse student population (see for example, Kahne and Westheimer, 1996; Sleeter and Montecinos, 1999). Moreover, May (1999) found “teacher education programs] needs to make available experiences that help them [pre-service teachers] to politicize their understanding of racism, help them understand how formal schooling is connected to the home and community life of their students, and help them understand how to translate their cultural knowledge into pedagogical practices” (128). Implementing an effective multicultural curriculum can bridge gaps among different cultural groups. Focusing on multiculturalism and diversity are two components teacher education programs must continue to require of their pre-service teachers. May (1999) points out how research indicates “Teacher preparation programs in the United States are increasingly discussing the use of community based learning experiences as a part of preparation for cultural diversity” (p. 125). Within the training of multicultural education for pre-service teachers, the issue of racism needs to be addressed up close and personal and used as an analytical tool.

Banks (1995) explains, “Multicultural education undermines students’ prejudices through a transformation of the curriculum… and as a result, the knowledge that is constructed more closely reflects the experiences of traditionally disenfranchised groups. Rather, it may help students understand the intellectual and moral roots of racism and weaken it” (p. 289). Within this explanation, it is evident racism is a key component being addressed in multicultural education. From the range of meanings and pedagogy attached to multicultural education derive two other dimensions that primarily focus on racism as a social entity in American education and link multicultural education to critical pedagogy. Antiracism strives and encourages individuals to be without racist attitudes and work against racial injustice in society more generally with a focus on culture. Critical multiculturalism links racism to political action and community/student awareness while the implementation is taking place through curriculum development in the classroom.

**Critical Multiculturalism**

Many contemporary scholars of multicultural education often examine the pedagogy without connecting it to power or critical analysis of racism. According to McCarthy (1990), critical multiculturalism links the micro dynamics of the school curriculum to larger issues of social relationships that occur outside the school environment. Similarly, May (1999, 7-8) stated critical multiculturalism “incorporates postmodern conceptions and analyses of culture and identity, while holding onto the possibility of emancipator politics.”

Critical multiculturalism is a social action and change. It is an outgrowth of multicultural education and an analysis of the inequities in the community from the minority perspective. It is the most radical and political form of multicultural education because it links the dimensions of the school curricula to larger issues of social relations outside the school, and it combines culture, identity, and lived experiences with an analysis of power structures and pedagogy. In addition, it systematically supports experiential learning approach, employs critical thinking skills, and can permanently institutionalize positive changes to a community (McLaren, 1995).

Ross and Pang (2006) discuss three areas when teaching critical multiculturalism that include: enabling students to hear discursively voices which conflict with and struggle against the voices of academic authority; urging them to negotiate a position in response to these colliding voices; and asking them to consider their choice of position in the
context of the socio-political power relationships. These relationships are within and among diverse discourses and in the context of their personal life, history, culture, and society can and will impact the way they learn to cease to exist in society and in America’s schools.

Race at the forefront of curriculum development has to be reconciled with education in a standards based educational environment informed by No Child Left Behind. May (1999) explains using critical multiculturalism with a focus on race can directly impact students’ lives. Race issues in education address self-esteem and place emphasis on diversity in public schools. The implementation of critical multiculturalism within a classroom setting influences students’ learning and the likelihood they will do well on tests. It empowers them in terms of self-esteem and socialization.

**In the Classroom – Effective implementation of critical multicultural curriculum**

The implementation of multicultural education can help unify a divided nation (Banks, 1994; Derman-Sparks, 1995; Delpit, 1995; Gay, 2000). The outcomes of the lessons taught demonstrate how students can benefit from direct connections and confrontations with racism, social interactions, and community change.

In 2001, a fourth-year fifth grade teacher (with a M.Ed. and academic concentration in multicultural education) in a southeastern state, was confronted with an inclusive classroom of twenty-nine students from diverse backgrounds. Nine were special education students, seven were African-American, six were bi-racial/multi-ethnic (four African-American/Caucasian, one African-American/Japanese and one Thai/Caucasian), two were Latina and ESL learners, three were Asian, eight were Caucasian, ten had parents on active duty in the United States military, and seven were living in single-parent households. Parental involvement was approximately 75 percent. Community issues ranged from poverty to middle class. There were a number of incidents of racism among the diverse groups living within the local community of civilians and military personnel. Teachers were supported by the principal with regard to making curriculum adjustments, although the school was governed by NCLB. The school environment was a safe haven for many students. The school curriculum included pre-packaged curriculum, standards based lesson plans, and very few multicultural connotations. Although the school hallways included a diverse array of cultural posters, the students were not immersed in multicultural education curricula prior to having this teacher.

During the first week of school the teacher connected with the students by identifying personal experiences, cultural backgrounds, and beliefs. She surveyed students for suggestions of what they wanted to learn and achieve in fifth grade. She began the first day of school with the questions: Do you consider yourself a cultural being? Why or why not? What is your race and ethnicity? Why are these attributes and cultural inferences important to you as an individual with regard to what you want to achieve in school?

After a week of getting to know the students on a one-on-one personal level, the teacher began to reach out to the parents and community. She encouraged her students to discuss racial incidents in the community and in the world. There was an array of multicultural textbooks, activities, lesson plans, and implementations the students accessed on a daily basis. The teacher encouraged parents to come into her classroom unannounced, and she contacted parents to report both positive and negative behaviors of their children.

During the first month of school something unexpected happened. One of her students was the unintended victim during a drive-by shooting at a local teen club. Some local high school students were in conflict with one another. Evidently a white female was dating a black male and there had been tension amongst the students for the past two weeks. It escalated, and on that particular night, white students decided to shoot the black student for dating the white girl. Unfortunately, the fifth grade student, 11-years-old at the time, was in the wrong place at the wrong time. The teen club, for 13-20 year olds, did not card students, so the entire situation was a disaster waiting to happen.

The teacher had to make a conscious decision on how to address the matter at hand: a racial incident, under-aged children attending a club, gun violence, and a community in an uproar with the local government for allowing such a club to exist. The teacher decided to create a critical multiculturalism unit to address the social and learning needs of her students. She anticipated the unit would run concurrent with the standard curriculum, capitalizing on available teaching moments, for six to eight weeks. The first lesson was to organize a town meeting, however she wanted to address the issue with her class first.

The students were upset. They wanted the club to close. They expressed how upset they were that racism could cause so much harm to innocent bystanders. The teacher gathered information about the teen club from the community. The students contacted the school board, city council, and local government officials and began writing letters protesting what happened at the club. Parents were actively involved and came into the classroom to discuss and debate issues. Finally the students managed to organize a town meeting. The teacher made her classroom into a community space that could address multicultural community concerns. The principal and parents from the high school attended, and so did local officials and parents of the children from the community.

Social action was in action and the students were learning and excelling in school. Grades in all subject areas were rising. The teacher integrated reading, writing, math, science, social studies, and technology into the project. It lasted four months. While other fifth grade classes were engaged in daily routines and pre-processed school curricula, these particular classes were emotionally, personally, and academically informed with social action addressing issues of race and politics of a community.
As result of the effectiveness of unit, the teacher continued to integrate critical multiculturalism throughout the year. At the end of the year, the teacher’s entire fifth grade class passed the state’s standardized tests. They were talking with their parents about world views and events. They were talking amongst themselves about race and ethics in America. And most importantly, they were learning through critical multiculturalism. Knowingly, the teacher proved critical multiculturalism can be effective in an American public school driven by standards and NCLB. Students’ cognitive abilities were being grown along with their meta-cognitive capacities.

**Reconciling the importance of critical multiculturalism**

The dynamics of racial politics affect people on individual and institutional levels. The effort to reconcile critical multiculturalism with classroom methodology can be helped by reframing teacher and curricular conceptions of the role of race in education. Much like the way sociologist Orlando Patterson suggested scholars of freedom, slavery, and other forms of domination stop thinking of power as a rock (which few can wield and which encourages the impulse to choose separate sides) but instead conceive of it as a rope (which many can pull on, weak or strong), we can reframe our views of how race fits into and informs teaching and learning. If we see race as DuBois’s veil, it hides or covers only. If we see it as a tool, like the critical multiculturalists, we see opportunities for removing its charged nature, and see it is not only there for us to cover over things. It can be used to help us hammer out solutions to today’s problems, and tighten screws of progress made since *Brown vs. the Board of Education*.

The fifth grade teacher in the narrative put her multicultural education expertise and training into action and taught her students using race and social action as tools to create a critical multicultural unit. In this particular situation, students learned and achieved more in school when they were allowed to express themselves and connect with real life events and situations. Sleeter and Montecinos (1999) discuss critical multicultural techniques linked to social movements are effective strategies for students and “The social movement metaphor brings into focus concerns with group rights and agency and the commitment to teaching students how to exercise power and responsibility as they materialize democratic ideals” (116). In addition, critical pedagogy would encourage this reconciliation of integrating critical multiculturalism as a natural part of America’s public school system.

Reconciliation is acceptance. Once America’s educational system fully accepts the notion race is a factor in student learning, critical multiculturalism can be naturally incorporated and implemented into classroom environments.

**References**


FOR THE FUTURE? RESTORATIVE JUSTICE, FORGIVENESS, AND RECONCILIATION IN DEEPLY DIVIDED SOCIETIES

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Context of Restorative Justice and the Truth and Reconciliation Commission (TRC)

Restorative justice owes much of its prominence to the South African Truth and Reconciliation Commission’s appropriation of the concept. In deeply divided societies in general but South Africa in particular, restorative justice has the ideal of the creation of a nation and the restoration or the reclamation of personhood for individuals who had this claim or right taken from them. Restorative justice seeks to reconstruct a just society. Where one did not exist as in South Africa, then restorative justice becomes the architect of a new moral order.

Besides the political circumstances that destined restorative justice as the choice in South Africa, one has to discuss the explicit and specific appropriation of Christianity as the foundation of restorative justice and national reconciliation. With its emphasis on human redemption, Christianity becomes an important but problematic foundation of restorative justice.

Restorative justice is identified as greatly ambitious primarily because it aims at going beyond conventional ideas of justice that focus on the guilt of the offender and towards measures that can lead to a restoration of some semblance of just relations between erstwhile unequal relationships. This model of justice is developed or embraced in the immediate transition from authoritarianism and towards democracy as an alternative to justified but often improbable calls for large scale retributive and prosecutorial measures for perpetrators under or against the previous regime. Further, rather than taking the offender and his crime to be the centerpiece of justice; it is the victim, offender, and the larger community (society) that occupies this position.

Given the pervasive divisions enacted by white dominated politics and especially cemented by apartheid’s exclusivist policies from 1948, South Africa came into the transitional era (1990-present) as a deeply divided society. By 1991 the elites of the incumbent Afrikaner government and the opposition (primarily ANC) attempted to broker a deal that would not throw the country into transitional chaos. Translated this meant in order to secure against white population and capital flight as well as to rebuild a deeply torn country, transitional justice would have to compromise some of its more retributive elements for the sake of peaceful coexistence.

The challenge in South Africa was to find a kind of transitional justice that would be history-honoring, to give as much as possible a truthful historical account of South Africa’s past as well as develop measures to deal with the legacies of injustice.

The mechanism of choice became a truth and reconciliation commission founded in 1993 by a bill tabled in Parliament entitled the National Unity and Reconciliation Bill. The spirit of this bill was South Africa’s deeply conflictive past had created a chasm and as difficult as it was, the process of truth and reconciliation was to be a “bridge building exercise.” It was felt that beyond threatening the prospects of a peaceful transition from apartheid, a culture of retribution and prosecution would not reveal what was most important to the prepubescent moral order.

The decision for Archbishop Desmond Tutu to serve as chairperson for the TRC and oversee the national goal of restorative justice and reconciliation was not accidental. He embodied the ideal of a united South Africa and he was a legitimate broker between both blacks and whites. Restorative justice emerged as a “morally appropriate” compromise solution with Tutu and the TRC steering its course.

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Restorative justice for transitional societies centers on the reality punitive models of justice may offset the prospects of the often negotiated transition. It does not however mean restorative justice is only a second best option in deeply divided societies made possible primarily because retributive justice is anathema to reconciliation. In such societies with deeply divided and authoritative pasts, to avenge injustice by fitting crime to punishment may be difficult given the nature of systemic and institutional culpability. This is not to abrogate the imperative of accountability for violations of human rights. Restorative justice presents an opportunity to achieve justice and accountability without risking a reversion to deep divisions in such societies.

With its focus on the desire to create a just future, restorative justice is said to put "energy into the future, not into what is past." Essentially restorative justice is a community process which invites full participation and consensus, sets out to heal what has been broken, seeks full and direct accountability, bridges what has been divided, and strengthens the community to prevent further harm. The central assumption of this kind of justice is humans, even those who injure or harm others, are essentially good.

More than an epiphenomenon of conventional criminal justice, restorative justice from the TRC's point of view is defined as a process aimed at achieving four goals:
1. the redefinition of crime so that it is not seen as an offence against a "faceless state", but as wrongs or injuries done to other persons…,
2. the healing and restoration of all concerned, of victims in the first place, but also of offenders, their families and the larger community;
3. the encouragement of victims, offenders and the community to be directly involved in resolving conflict, with the state and legal professionals as facilitators, and
4. the promotion of a criminal justice system that aims at offender accountability, full participation of both victims and offenders and making good or putting right what is wrong.

When the chairman of the TRC was asked about the commission’s commitment to justice, he suggested “the African understanding [of justice] is far more restorative— not so much to punish as to redress or restore a balance that has been knocked askew… the justice we hope for is restorative of the dignity of the people.” This notion of justice is laden with concerns regarding the idea of a balance. Restoring harmony (reconciliation) and balance between offender and victim/survivor is only a just action if the “balance” that prevailed before the historical harm, in this case apartheid, was a morally decent one to begin with. There is no historical balance within the context of South Africa and many other deeply divided societies worth restoring. The apartheid state had no universal morality that can function as a common procedure. A system based on the ethic and practice of racial exclusivism and internal domination of a majority by a minority requires a more substantive restorative justice. Therefore restorative justice in deeply divided societies like South Africa may be more creative than restorative.

South Africa’s appropriation of restorative justice attempted to focus on the underlying injustice that caused the imbalance in the first place and how to rectify this by creating some kind of moral equilibrium between erstwhile unequal moral agents. Although moral worth cannot be institutionalized it can be developed through concrete measures directed at providing an egalitarian distribution of wealth. It is not that the securing and granting of rights is not important. These rights are incomplete without the ability of all South Africans to have equal access to wealth and its distribution.

Moral Underpinnings of Restorative Justice

The TRC emerged in South Africa as a promulgator of the gospel of forgiveness, harmony, and reconciliation. It was a message that unearthed pain, anger, and deep divisions about South Africa’s violent and divisive past. From its inception the TRC’s central dogma was that of restorative justice through forgiveness. It claimed justice was necessary but it need not be based on retribution.

The great and profound belief in the redeemable capacity of humans was to figure prominently in how a theory of restorative justice was to be developed and practiced by the TRC. In its essence, the restorative justice evinced by the TRC was based on two noble but highly contested moral underpinnings: the religious (primarily Christian) ethic of forgiveness and contrition, and the African philosophy of ubuntu.

The Christian doctrine of forgiveness appeared to be the most effective vehicle to the atonement of wrongs. This moral underpinning suggests as painful as the past was, the act of forgiveness is better for reconciliation than retribution would ever be. With the emphasis on the religiosity of forgiveness it meant the process of truth and reconciliation could become a “pageant of cosmetic religious sentiments.” It is not that I am against forgiveness or the healing it can bring in deeply divisive contexts. My apprehension centers on how this process seemed to be hegemonic in its influence on the morality of the TRC.

The moral worth of religion is not to be trivialized as too contested to give much meaning to the discovery of truth and the process of reconciliation. The Christian context of religion as a moral underpinning of the TRC’s restorative justice meant an adversarial climate was to yield to a more benevolent, humanistic one that facilitated victims not being intimidated with telling their and their families’ stories. However it can be argued it fostered too much benevolence and was not treated with much respect by perpetrators. The prevailing challenge for transitional justice is not only compassionate but firm justice.

Forgiveness was not automatic but it appeared indispensable to the ideal of reconciliation. To forgive meant to not forget the wrongs done to oneself or family but to remember without bitterness or to pardon the wrong done. Forgiveness was likened unto a “liberator” from the prison of the past. What appeared difficult about the whole process was it appeared to burden the victim. The
victim was to forgive the perpetrators, possibly forego the perpetrator’s punishment as well as move on with one’s life, and finally reconcile with the perpetrator. Forgiveness was trumped as the ace in achieving reconciliation and a more just future.

The philosophy of ubuntu can be interpreted as an all-encompassing world view of life and humanity. The word is Nguni or Zulu in origin and has come to be a mantra for the authenticity of African humanism. It is derived from the expression umuntu ngumuntu ngabantu which literally means a person can only be a person through others, that the wellness of individuals is dependent on the wellness of the community. It is a maxim of basic respect and compassion for others. The argument can be made ubuntu is both a factual description as well as a rule of conduct. The individual is always defined in his/her relationship with the larger community.

Ubuntu encompasses the primacy of group solidarity, human dignity, conformity to basic norms, and collective unity. Individuals’ rights, needs, entitlements, and demands though important are subordinated to the needs of the community. Communal respect is the absolute measure of values. In this regard ubuntu appropriates a non-adversarial dispute resolution process which focuses on comprehending the harm against the individual which is really harm against the community and not premised on vengeance; it pursues reparations, not retaliation, and strives for communitarian healing.

The Christian ethics of forgiveness and reconciliation and ubuntu are morally ambitious in informing the basis of a restorative justice that should touch all aspects of South African life and people. The TRC’s chair in his own way justifies the choice of ubuntu as one inspired and given by God himself and in doing so draws the two moral underpinning together almost like a destined union. He articulates we “must do whatever it takes to maintain this great harmony (the result of ubuntu) which is perpetually undermined by resentment, anger, and desire for vengeance. That is why African jurisprudence is restorative rather than retributive.”

Both moral underpinnings aim at facilitating resolution in a non-adversarial manner, focusing on the future rather than the past. It is necessary to focus also on the offense, whose resolution is to be the concern of justice. The base requirement of any model of transitional justice must be the victims and those most harmed by the deep divisions ought to be the primary recipients of (material) justice.

**Implications of Restorative Justice**

Restorative justice strongly implies forgiveness, reconciliation, and humanness are morally superior to retributive punishment. Retributive punishment is chided for being chasm-inducing and societies that choose restorative justice have effectively taken the humane approach to justice. Supporters of this idea of the moral superiority of reconciliation and forgiveness over punishment argue restorative justice is not a “pious renunciation of justice.” Rather it means if the reestablishment of a moral order may be similarly achieved through either path, the road to forgiveness and reconciliation is preferable. Defenders of restorative justice argue even if apartheid was overthrown by revolutionary means and recourse for victors’ justice, restorative justice was the only kind of justice that could move South Africa from a culture of enmity and division to one of minimal decency and reconciliation.

Healing is for all parties involved in the wrongful act and not just the victims. The victim is at the center of justice concerns but the perpetrator is also in need of healing. On the matter of cost efficiency restorative justice is also superior. It does not amount to the necessity of spending state revenue on uncertain trials in a weak judicial system when this money could be purposively directed towards victims. I am not suggesting trials and prosecution ought not to be features of justice in deeply divided societies. It is just not possible on a large scale.

Restorative justice aspired to restore black human dignity. While I believe this is very important to the new moral order, non-material restoration is incomplete. True restoration will never be tenable if the offender and his offense goes scot-free, as long as this is so the offense still exists. It is only when the criminal or offender is adequately punished (or the victim adequately compensated) the crime is expunged. The annulment of the crime doesn’t seem to be possible through mere acknowledgement of its occurrence that suggests revelation not resolution, realization but not reparation. The idea of time as the “ultimate punisher” though true in one sense, suggests an abrogation of the moral obligation to address the present circumstances of victims and their sufferings rather than bartering their justice for an indefinite salvation of the future.

**Assessing Restorative Justice**

### Reclamation of Personhood

Restorative justice was extremely strong in its counteraction of one of apartheid’s lasting legacies: the denial of black personhood. It presented a very formidable claim to the necessity, even indispensability, of the moral worth of blacks as the basis for any theory of justice in South Africa. Although moral worth and the reclamation of personhood cannot be orchestrated by an institution, the TRC provided a space and a process through which this could develop.

This reclamation of personhood and moral worth is indispensable to get to a more democratic version of justice. In transitional justice the recognition of persons qua persons and therefore full political equals is no insignificant part of justice. The recognition of formal political equality in a society like South Africa in which race was the sole criterion for personhood and legitimate political participation is very important. Nonetheless, status equality though necessary is not sufficient for a theory of justice.

### Ideals of Democracy

Although restorative justice has not responded to this challenge as effectively as the previous, it still provided some basis for the development of a more democratic vision of
justice. The South African TRC and its restorative justice served as a mediating influence not only between the past and the present, it also moderated between those who committed atrocities and were unrepentant and those who were victims of apartheid’s atrocities who were unforgiving. It was a space to include the perpetrator as well as victims and survivors. Any viable transitional justice must provide a politically transparent process. The TRC’s restorative justice was accused of being both a “white witch hunt” and a betrayal of justified black resistance to apartheid. Nonetheless its motivation was to “present as complete as possible a picture of the past.” Its emphasis on the recognition of the human in blacks and the legitimacy of their justified hatred for the system of oppression figured prominently within the TRC’s restorative justice.

Moreover restorative justice was founded on some other ideals of democracy: equality, openness, and participation. The central motivation was both victims/survivors and perpetrators got the opportunity to share their stories in a non-adversarial climate. Restorative justice is strong on the moral dimensions of justice. It is not to suggest other justice models are not morally aligned, but restorative justice, more than other models of justice, presents the moral dimensions of justice. It is not to suggest a non-adversarial climate. Restorative justice is strong on the moral dimensions of justice. It is not to suggest other justice models are not morally aligned, but restorative justice, more than other models of justice, presents an explicit argument for the necessity of justice not being aversive justice a la TRC, was “distinctively Christian, and therefore inappropriate to inject into the public sphere of civil religion akin to how America’s motto of “in God we trust” or “one nation under God” works as harbingers of civil religion in a country that prides itself in religious secularism.” To pressure persons deeply wounded by oppressors to reconcile with those selfsame offenders is morally unacceptable. Jean Hampton believes the TRC denied the true ethic of forgiveness: the legitimacy of moral hatred and anger, coupled with a righteous recalcitrance in reconciling with the wrongdoers.

A further problem with the idea of forgiveness as the liberator from the past is the reality that individual forgiveness and reconciliation does not inevitably lead to national healing. After all national healing is at best indeterminate and at worst impossible.

**Christianity as Civil Religion?**

A second problem is how Christianity became a kind of civil religion akin to how America’s motto of “in God we trust” or “one nation under God” works as harbingers of civil religion in a country that prides itself in religious secularism. To forgive and reconcile according to restorative justice is what ought to have wide acceptance by the people to whom it was applied. In other words the democratic criterion of legitimacy relies on a shared/common notion that ought to be the basis for organizing justice and society.

It is evident the TRC’s employment of restorative justice is a case of excessive ambition (coupled with excessive ambivalence). Restorative justice has aimed to achieve too much in South Africa while under great constraints especially those imposed by the goals of national reconciliation and political stability.

**Excessive Pressure**

With the emphasis on forgiveness as the portal to reconciliation the TRC process ended up in many ways being a coercive exercise. Legitimacy can never be true if consent was somehow fabricated. To many the process of national reconciliation was unjust in that it placed too much psychological pressure on people who refused to or struggled with forgiveness. To pressure persons deeply wounded by oppressors to reconcile with those selfsame offenders is morally unacceptable. Jean Hampton believes the TRC denied the true ethic of forgiveness: the legitimacy of moral hatred and anger, coupled with a righteous recalcitrance in reconciling with the wrongdoers.

There are several problems with this appropriation of Christianity as a civil religion. First it suggests the non-religious would be unfairly biased by the religious sentiments of restorative justice and its usage. For those whose values are not religious-based, the emphasis on forgiving the guilty and reconciling with them may not be comprehensible.

Second, the religious disposition of restorative justice reflects the hegemony of Christianity as a religion in a context of religious plurality. Functioning as the moral underpinning of the TRC strongly suggested that as a state sponsored commission, the state was imposing or endorsing religious hegemony. How can these religious underpinnings be comprehended by other South Africans who did not have the same reference to religion?

The preoccupation or myopic look on forgiveness and reconciliation fails to convincingly account for the “other side” Christianity also has retributive dimensions that pronounce justice in terms of condemnation and punishment on grounds of desert for wrongs committed. If the process was truly inclusive then versions of the retributive God and his just punishment based on the offenders’ desert would be prominent if even not prioritized. In order not to be unfair to Christianity as a religion of variant interpretations and practices, it is necessary to argue the criticisms were directed against a particular political deployment of Christianity. It was a political deployment that was blessed and sanctioned by the political leadership. Apart
from Chairman Tutu, several leaders and elites elevated quasi-Christian sentiments as means of impacting on the Christian sentiments of many South Africans. So in effect Christianity didn't willingly become a civil religion it was strategically deployed as such.

**Problematic humanism**

The TRC attempted to overcome this highly contested religiosity by appropriating ubuntu. As a version of African humanism, often elevated as “the” version, it focused on the reclamation of humanity of both victim and offender in ways I believe still leaves the original wrong “safely kept in time.”

Restorative justice was a deliberate choice based almost exclusively on the political circumstances in South Africa before and during the democratic transition. Forgiveness, as the mechanism to reconciliation, was often elevated as the inevitable choice in a society deeply divided and one in which healing this brokenness was more prioritized than the punishment (or even compensation of victims) of the guilty.

There were alternatives to the TRC’s version/vision of Christianity and humanism. Within the repertoire of liberation theology there is the almost standard emphasis, not on forgiveness, on the vindication of the victims and their subsequent liberation from the strangleholds of oppression. This liberation theology is often fueled by ideas of other African humanisms. Anthony Bogues argues many versions of African humanism are less about restoring a version of the human; it is the creation of the human not as an atomistic individual but as part of a community.23 This he argues is the essence of African humanism; it is premised on liberating the African personality from the handicapped liberation revealed in European humanism. It is handicapped because European humanism liberated the European man and therefore African humanism is the attempt to (re) create the African personality. This notion is highly controversial but was necessary to reveal the choice of ubuntu and Christian forgiveness did not have to be the only choices for underpinning restorative justice’s emphasis on the human.

**Incomplete of Status Equality/Need for Material Egalitarianism**

If only status equality is achieved, justice, the legacy of chronic socio-economic inequality, is unaffected by the democratic transition. The truth is justice requires not one or the other but both.

I believe the chronic socio-economic inequality in deeply divided societies prevents the achievement of meaningful justice and therefore requires an “aggressive notion of compensation for historic injustice.” Restorative justice, although providing a minimal account in the way of the material challenge, has proven itself inadequate in addressing the most seemingly indefeasible legacy of apartheid—chronic socio-economic inequality.

It is not enough that blacks constitute a political majority and have now been endowed with political equality. Political equality is only one part of justice. If the income inequality gap is not rectified or convincingly lessened then it might cause a black backlash against a black-led regime. And for South Africa that would be a serious set-back to the process of justice and nation-building.

While transitional justice will not be able to achieve a complete rectification of historic injustice, the question of redistribution of wealth has to begin to be answered in the transitional era. The TRC’s restorative justice did present a context for reparations and compensation in a material sense but it was not urgent or aggressive enough in targeting the neediest of individuals. In all fairness to the TRC, it did make recommendations to the ANC-led government on policies of reparations. Reparations though meaningful and necessary should not have been taken just to mean a one-time monetary payment as the TRC recommended. Addressing chronic socio-economic inequality gaps requires a more comprehensive notion of reparations. A viable theory of transitional justice must have reparations as a critical and comprehensive part of it.

**Excessive Reconciliation**

In direct relation to the first objection of restorative justice as tantamount to excessive pressure, from a realist perspective, reconciliation seemed to be imposed or coercively encouraged. But how do you force reconciliation upon people who have been bitter and murderous enemies, upon victims and perpetrators of terrible human rights abuses, upon groups of individuals whose very self-conceptions have been structured in terms of historical and often state-sanctioned relations of dominance and submission? ... [given the ambivalence and indeterminacy of reconciliation] proposing [it] reconciliation will seem like a political sop aimed at masking a moral defeat.25

From the TRC’s perspective, reconciliation is the ideal on which the new South Africa is to be created, where the culture of enmity will recede and die, and in its place will be the genesis of a truly inclusive nation for all. Reconciliation affirms the reality of correcting deep divisions. However reconciliation for a society like South Africa, divided as it was (and still is) by the scourge of race and privilege, will take more than a great belief in the humanity of South Africans to effect change.

Elizabeth Kiss argues the very idea of restorative justice embraced by the TRC requires a great “...leap of faith, a belief in the possibility of moral transformation of both persons and institutions.”24 Moreover the very morally ambitious goal of reconciliation (precised on an orientation towards the future) undermines the ability to achieve peaceful coexistence for the present.35

The lingering question is whether reconciliation is tenable. Rajeev Bhargava argues that societies:

cannot bring about reconciliation through the process of collective acknowledgement of grave wrongs—cum-forgiveness, because reconciliation requires a profound change in people— a deep and drawn out process...such reconciliation, if and when it happens, can only be a fortunate
by-product of the whole TRC process, and not intentionally brought about by it.  

The indeterminacy and uncertainty of reconciliation suggests deeply divided societies like South Africa ought to focus on truth and reparations and less on truth and reconciliation. It is not to surrender reconciliation but to work under the constraints of the immediate post-authoritarian phase in these societies may require more modest goals. Although I consider truth commissions to be moral architects, they cannot by themselves (or ever at all) effect moral transformation in the short term. Further, reconciliation cannot be imposed even with the best of intentions, it has to be individually generated, and this suggests a bottom up approach rather than the imposition or top down approach.

In the final analysis, the TRC’s restorative justice has many useful lessons to offer and inform transitional justice but it cannot stand as transitional justice itself. Elevating the human/person as the frontispiece of justice is necessary. However the critical failure is restorative justice was based on foundations that are too comprehensive. Additionally, it fails to provide an urgent model of rectification for socio-economic inequality in deeply divided societies. Its well intentioned efforts end in a conclusion of excessive ambition and illegitimacy. Moral idealism cannot by itself correct actual injustices. Status equality is incomplete without material equality.

The assessment of the legacy of the TRC’s model of restorative justice must focus on the content but also the context within which it operated. I suggest restorative justice as exemplified in South Africa is a case of “revolutionary by context and circumstances.” It operated under great duress while aiming to chart the course of a prepubescent nation; a conglomerate of former enemies, combatants, countless innocent victims, and survivors. Even amidst its grave difficulties, I believe South Africa’s experiences with restorative justice as a transitional justice model is powerfully instructive for other societies that will make that transition.

**ENDNOTES**

1 Transitional justice as I define it is the process of situational justice that mediates between adequately dealing with perpetrators and the legacies of their regime, and building a common future while addressing the present circumstances of injustice as direct consequences of the previous regime.

2 A deeply divided society is simply a society characterized by longstanding historical divisions among groups that more often than not results in tension, conflict and domination.

3 Capital flight has been a chronic problem since the 1980’s and only intensified after the weakening and demise of the Apartheid regime, although there is not much evidence to suggest a causal relationship between capital flight and declining authoritarianism, some correlation is evident. Nonetheless capital flight as a percentage of GDP from 1980-2000 was on average 6.6 per cent. See Seeraj Mohamed and Kate Finnoff “Capital Flight from South Africa 1980-2000” in From Capital Flight and Capital Control in Developing Countries edited by Gerald Epstein (Northampton, MA: Edward Elgar Publishing, 2005)


5 Susan Sharpe, p. 7-8.

6 Jonathan Allen, Between Retribution and Restoration: Justice and the TRC (via personal communication, April 2000), see also TRC Final Report Vol 1, 1999, p.9

7 Quoted in Martha Minow’s, Between Vengeance and Forgiveness: facing history after genocide and mass violence (Boston: Beacon Press, 1998), p. 81.


9 The Christian undercurrent of the TRC’s restorative justice owes much of its development to the larger than life morality of its Chair, Archbishop Desmond Tutu who felt that to forgive would free both the victim and the perpetrator from the prison of the past. He also attempted to incorporate the African idea of ubuntu (an Nguni-Zulu term), which in its common and acceptable usage means, people are people only through other people. It was the essence of being human, or further that the wellness of the society is critically influenced by the wellness of individuals.


14 This is the view of former Chilean Truth Commissioner and legal scholar Jose Zalaquett quoted in Alex Boraine and Janet Levy (Eds.). *The Healing of a Nation?* (Cape Town: Justice in Transition, 1995) p.46

15 J.L Mackie argues that this interpretation of Hegel’s idea of the annulment of a crime is critical. It suggests that it is not with repayment or restitution that “right” is “restored but just by trampling on the previously flourishing crime.” See J.L Mackie, “Retributivism: A Test Case for Ethical Objectivity”, *Philosophy of Law*, (Eds) Joel Feinberg and Hyman Gross (Belmont, California: Wadsworth Publishing Company, 1991) p.681


18 Jean Hampton and Jeffrey Murphy, *Forgiveness and Mercy* (New York: Cambridge University Press, 1988) pp. 80, 149.

19 The concept is first discussed in Rousseau’s work on the social contract and has come to mean the act of creating quasi-religious values or visions of public life where the state or its branches appropriates public policy using explicitly religious sentiments.

20 Elizabeth Kiss, What is Restorative Justice?, supra note 17, 2000, p.85.


23 Susan Dwyer makes this very terse claim in an article whose title declares its premise, “Reconciliation for Realists”, *Ethics and International Affairs*, Volume 81, 1999, pp.82, 89.


25 This very scathing but justified criticism comes from Timothy Garton Ash’s work on the South African Truth and Reconciliation Commission; it is discussed by Elizabeth Kiss 2000 pp. 86-8.

Empathy and the Disturbing Paradox of Forgiveness

ruth henderson

“I am human. I do not think of any human thing as foreign to me.” —Terence

It is well-known among psychologists that victims and their perpetrators are bonded together in a profound and uncanny intimacy. From incest survivors to hostages, the injured are psychologically galvanized to their abusers. Forgiveness offers victims an opportunity to be freed from this terrible bond. And while the reward of forgiving is nothing less than liberation, the process itself can be terrifying.

Perhaps there are two key reasons that prevent more people from choosing forgiveness. First, in order to forgive, the injured must re-experience the injury in the process. To forgive, one must look directly at the traumatic experience and the devastation it has caused. In the process of forgiving, one addresses the perpetrator—directly, or in one’s mind—and says, “I know what you did to me and I know how horribly it has affected me. I know all about the damage to my life and as I look at it all, I forgive you.”

The other reason more people may not choose forgiveness concerns the demanding nature of empathy. Empathy, a crucial ingredient in any forgiveness process, is defined by the American Heritage Dictionary, as the “identification with and understanding of another’s situation, feelings, and motives.” The very notion of empathy highlights the inherent injustice of forgiveness: The injured is called to have feelings for the perpetrator’s situation when the perpetrator showed no regard for the injured.

Yet that is the awful paradox of forgiving: One gives the perpetrator compassion when it is justifiable to maintain one’s anger and resentment, and as a result of this unwarranted response, gets freed from the torment of the injury. But to be kind to someone who has been mean-spirited and destructive to you takes a great deal of courage. Indeed, our hearts and minds know the hurt that was caused and are quick to tell us it is dangerous to have any association with the perpetrator at all—physical or otherwise. And those voices of warning are not without merit.

So forgiveness can be seen as a homeopathic remedy where like cures like. Our normal impulse is to stay as far away as possible from the person who has hurt us, to maintain those physical and psychological boundaries we have necessarily erected when we were first injured. But forgiveness requires we find some way of taking the hurtful perpetrator into our hearts; and that by holding this “toxic” person in some loving way, we get released from this individual. Only the act of forgiveness seems to have the power to melt that death-grip bond between perpetrators and victims.

Ancient Greek notions of forgiveness reflected this kind of empathy and focused on the merging of spaces or the removal of boundaries. “This concept is related to our idea of coming together,” classicist Carl Ruck told me. The merging of places or removal of boundary lines can be thought of as undefining the differences between us. Here, one can imagine that the wounded enters into an empathic consciousness, finding a way to dwell with the offender. With this sharing of space, it is as if the wounded says, “Since there is nothing separating us and you and I are really one, I should refrain from retaliating, because I would only be hurting myself. In fact, it behooves me to draw closer to you, for in doing so, I draw closer to myself.”

In such a situation, instead of “Love thy neighbor as thyself,” it is, “Love,” for “thy neighbor is thyself.”

Christians have a spiritual practice to help develop this empathy: praying for one’s enemies. The late short story author, Andre Dubus, spoke of this process when asked how he thought of forgiveness:

“I learned as a young Catholic boy to pray for people I didn’t like, people who hurt me, and I still do...
that and one reason is, for my own soul. [One of the saints] said, “If you hate someone, the sword of hatred has to first pierce your own soul,” and there was a time in my life, where I was full of hatred and I realized, “I can’t go through my life this way, I have to pray for this person.” And of course, it worked. It took a long time, I had to pray for that person everyday, even though my emotions did not feel like doing that. Personal forgiveness—it’s work.

Dubus was then asked by the interviewer, “What is the effect on your own heart and soul of forgiving someone?”

I feel free, and the hatred and all that malignancy is gone, it feels like getting well. I can actually reach a point—I don’t reach a point, I’m taken there through prayer—of wishing the other person well, maybe not wanting to be with that person, you know, but hoping that person’s life is good. (Lydon, 1997)

Prayer is an essential tool for many who forgive. While there are a number of ways to pray, even the simplest, compassionate thought can be a prayer. I once heard a woman discuss how she started praying for the convict who had victimized her. “I started small,” she explained. “I began by trying to have one kind thought toward him each day, something like, ‘I hope he is better, ‘I wish him well,’ or ‘I hope he has a good day.’ Just to have this one thought every day was difficult. Over time it got easier.”

This kind of prayer starts to smooth down the psychic walls erected against the perpetrator. The reward for the lowering of these walls is the release of precious energy. Hypervigilance, often the normal state for a traumatized person who hasn’t forgiven, is psychically consuming. Such guardedness siphons off energy from life-affirming endeavors, keeping one’s life deadlocked. While the development of empathy may need to begin as a mechanical exercise, over time, this practice not only releases energy, it yields insight.

Indeed, through empathy, a victim can begin to understand aspects of the situation that were completely obscured before. Seeing the situation from new angles offers a comprehensive, three-dimensional image. This allows victims to take the situation less personally; that is, while the victimization has had a profound personal impact, victims can begin to see, for example, how they could have been someone else—and the situation, given the circumstances—would have unfolded, nonetheless. When victims can see other parts of the picture, they are no longer trapped in an image that exclusively identifies them as victim.

Another important empathic tool in the development of a forgiving attitude is the act of seeking an aspect of the perpetrator that is in some way positive or good, and focusing on that in meditation. Again, this is normally difficult to do and might need to be approached as a mechanical exercise at first. Yet, such meditation serves to release energy and offer new insight. At some point in this empathic development, the victim asks, what might have influenced the offender’s behavior? What kind of background did the person come from? With this approach, one’s view of the perpetrator continues to move from a flat, static image to that of a three-dimensional human being.

In the cases of perpetrators who are strangers, it may be difficult to discover something good about the person. It is best to look for something small. It could be some detail from a newspaper article by which one could infer something positive about the person. However small the detail may be, it can offer entry into compassionate consciousness.

It’s also valuable for the injured to consider if any good has come out of the injurious situation. Whether it is the satisfaction of developing new job skills after a vicious divorce or some other discovery of inner strength, forgers look for what’s positive and recognize it. I once heard a peasant proverb that went something like this: He was wicked, it is true. In his wickedness, he once threw an onion at me. But you know, I cooked it.

By imagining other aspects of the perpetrator and situation, victims start to detach from the trauma. As this metamorphosis continues, empathy for the perpetrator becomes a state of heart and mind the injured wants to return to for the relief it provides—until one day this empathy becomes a part of the forgiver’s every-day consciousness. The victimized forgiver now feels a new form of intimacy with the offender, and this one is not hostile, fearful, and obsessive. It is a closeness that offers comfort and peace.

I am not suggesting people who have been seriously harmed eliminate the physical boundaries between themselves and their perpetrators. It’s important to make clear forgiving does not mean one has deemed the offender trustworthy. Indeed, many perpetrators are so sick they should never be given the opportunity to re-offend. One does not have to directly contact the perpetrator to forgive. Forgiveness is the spiritual experience of letting go with love. It releases the injured, and may also free the perpetrator, regardless of the injured’s decision to remain separate from the offender.

It can be done in a private ritual, alone, or shared with a person or persons who feel safe. A forgiving person who wants to include the perpetrator may do so by letter or phone. Or, if one feels safe enough to forgive face-to-face, one could bring a friend to the meeting. These decisions are deeply personal and should be approached with careful consideration, in consultation with a wise person genuinely concerned about the victim’s well being.

Many people view forgiveness as reconciliation—particularly, as the re-establishment of trust. In many situations, forgiveness can be exactly that. But in situations involving violent trauma, it is paramount a victim not get re-traumatized. It is possible to forgive a remorseless, violent offender—but this must be done with great caution. How does one empathize with a rapist and not...

Yet forensic psychiatrist James Gilligan challenges, “I would agree … that sadistic sexual psychopaths lack empathy. . . . But that is no reason for us to lack empathy for them” (1992, 183). Gilligan understands severely abusive offenders as people who hate themselves so much all their actions revolve around trying to protect themselves from the shame and ridicule that would come through others seeing their perceived inferiority. According to the violent offender, the best way to keep someone from laughing at you is to make them cry (77). Indeed, the psychopath turns the spiritual view of empathy upside down: Rather than concluding “Since you and I are one, I must treat you, as I treat myself, with love,” the psychopath seems to say, “If you and I are one, I’ll treat you with the same hate and disdain I have for myself.”

Empathizing with someone so profoundly disturbed requires substantial internal skills and a highly competent support system. Anyone who is able to empathize with a severely disturbed perpetrator quickly understands this person is also a victim of severe abuse. When a schoolboy learned about the problems the class bully had, he replied, “It takes all the fun out of hating her” (Shriver, 1995, 8). That’s just what empathy does—it draws out the venom of hate so one is free to love again.

Indeed, the power of empathy cannot be overstated. “Cynthia” is a successful professional who was sexually abused by her father when she was growing up. She went to an ivy-league college despite being reared in a family where, “The police were at our house so often, I knew each of them by name.” Cynthia describes her forgiveness attitude:

I feel sorry for the perpetrators because I think they go through more than we [survivors] do. There isn’t any clearly effective treatment for sex offenders. At least we can get help. Can you imagine how horrible they must feel about themselves?

While sex offenders can get help, Cynthia’s words strike me for their strength of compassion. Every time a person can muster up empathic compassion in situations like this, it is returned a hundred-fold.

The Power of Empathy

The principle of healing through empathy encompasses such a vast spectrum of experience it includes murderers. I am thinking of a man I worked with at Bridgewater State Hospital. Suffering from paranoid schizophrenia, “Ed” had killed his father in the midst of a paranoid delusion. The courts found him not-guilty-by-reason-of-insanity and sent him to Bridgewater, where he was given antipsychotic drugs that worked miracles for him.

The medication cleared his mind profoundly, and he awoke to the reality of what he had done. I have never met a person more deeply remorseful. Like so many murderers, Ed had tried to kill himself because of the ultimate nature of his offense. During our work together, he struggled with whether he had a right to live—if he could be forgiven.

Ed took full responsibility for what he had done. He understood he couldn’t blame his mental illness for killing his father, realizing there are many delusional people whose visions are benign.

He came to recognize he had hated his father. The more I learned about his upbringing, it was not hard to understand why. His father engaged in torturous mind games like taking an eye dropper full of water and dropping little puddles onto the kitchen counter; his father would then accuse him of not cleaning up properly—using the water as an excuse to beat him. While he came to understand his father’s behavior was sick, he never used it to excuse or justify what he had done. In fact, he also had some love for his father and grieved the fact he had taken away his life—grieved there was no way to make restitution to him now.

The only place Ed found consolation was in helping his fellow patients—serving them from a place of profound empathy. Whether it was in helping a delusional man dress himself in the morning or giving cigarettes to a guy who ran out a week before he’d have money to buy more, Ed looked around and acted on his compassion for those worse off than he was. The only way he could live with himself was through empathic giving. It is this empathy that allows me to make sense of the fact Ed had copied the following words into his journal and used them as a meditation:

The growth of a person is the progressive liberation of desire. The liberation of desire, is not getting what I want, but coming to want what ultimately, I am. (Moore)

Astonishing words for a murderer to want to contemplate. I think they inspired him because of the compassion he had for himself. He could have compassion for himself because he knew himself to be a person who not only hated, but someone who loved. He was confident of the love he had inside himself, and this empathic love made life meaningful.

If compassion and empathy can help transform a dangerous murderer into a caring, patient-leader, the elimination of empathy enables killing. While all governments in wartime dehumanize the enemy to eliminate empathy, the Nazis were masterful in this arena. Himmler created many rhetorical devices to prevent empathy. According to philosopher Hannah Arendt, his speeches were full of remarks such as, “The order to solve the Jewish question, this was the most frightening order an organization could ever receive” (Scarry, 1985, 58). In The Body in Pain, literary critic Elaine Scarry quotes Arendt further.

The problem was how to overcome...the animal pity by which all normal men are affected in the presence of physical suffering. The trick used by Himmler . . . was very simple . . . it consisted in turning these instincts around... in directing them toward the self. So that instead of say-
ing: What horrible things I did to people, the murderers would be able to say: What horrible things I had to watch in the pursuance of my duties, how heavily the task weighed upon my shoulders! (58)

Scarry explains, “Power . . . bases itself in another’s pain and prevents all recognition that there is “another” by looped circles that ensure its own solipsism” (59). The denial of the “other” brought about by such looped language can also be seen in the violent domestic abuser, who says to his victim, “Don’t make me have to do this to you.” In this classic scenario, the victim is “making him” hurt her. Through the denial of empathy, the perpetrator gets to view himself as the victim, and thus be relieved of guilt.

If an absence of empathy enables people to rape and kill, an abundance of empathy seems to empower people to die for the sake of others. In the late 19th century, Father Damien Deveuster served leprosy patients for sixteen years before contracting their disease and dying of it himself. In a letter to his brother shortly before his death, Damien described his experience:

I am gently going to my grave. It is the will of God, and I thank Him very much for letting me die of the same disease and in the same way as my lepers. I am very satisfied and very happy. (Cahill, 1990, 31)

While such words baffle normal consciousness, they point to the dynamic force of empathy. Empathy heals and empowers people. Crucial to the perpetrator as well as the victim’s healing process, empathy facilitates both remorseful restitution and forgiveness.

ENDNOTES:

1 Perpetrators are also psychologically dependent on their victims. In Trauma and Recovery, Judith Herman clearly articulates this need: “simple compliance rarely satisfies [the perpetrator]; he appears to have a psychological need to justify his crimes, and for this he needs the victim’s affirmation. Thus he relentlessly demands from his victim professions of respect, gratitude, or even love. His ultimate goal appears to be the creation of a willing victim. Hostages, political prisoners, battered women and slaves have all remarked upon the captor’s curious psychological dependence upon his victim. George Orwell gives voice to the totalitarian mind in the novel 1984: ‘We are not content with negative obedience, nor even with the most abject submission. When finally you surrender to us, it must be of your own free will. We do not destroy the heretic because he resists us; so long as he resists us we never destroy him. We convert him, we capture his inner mind, we reshape him. We burn all evil and illusion out of him; we bring him over to our side, not in appearance, but genuinely, heart and soul.’ The desire for total control over another person is the common denominator of all forms of tyranny.” (Herman, Trauma and Recovery 75-76).

2 Thanks to Dr. Carl Ruck for reviewing the ancient Greek in this section and confirming that my suppositions here were appropriate to the cultural connotations of the word.

3 Arthur Schopenhauer offers the following explanation of how humans can sacrifice their lives for others, defying the natural law of self preservation: “Such sacrifice happens as a result of the metaphysical realization that you and I are one. According to Schopenhauer, our normal sense of separateness is only an effect of our experience of time and space, but our true reality is in unity with all of life. “The Altruist discerns in all other persons, nay, in every living thing, his own entity, and feels therefore that his being is commingled, is identical with the being of whatever is alive” (279). See “The Metaphysical Groundwork” in The Basis of Morality (264-282).

4 This quote was slightly altered to protect Cynthia’s anonymity.


6 Scarry elaborates: “A motive is [one] way of deflecting the natural reflex of sympathy away from the actual sufferer. The war did not cause but permitted Hitler’s mass executions. According to Bruno Bettelheim, concentration camp guards repeatedly said to their prisoners, “I’d shoot you with this gun but you’re not worth the three pfennig of the bullet,” ... a statement...that...had been made part of the SS training because of its impact on the guards [not the inmates]. Every weapon has two ends . . . the torturer experiences the entire occurrence exclusively from the nonvulnerable end of the weapon. If his attention begins to slip down the weapon toward the vulnerable end...back to the...prisoner’s sentence...[this] backward fall can be stopped...his movement toward a recognition of the internal experience of an exploding head and loss of life is interrupted and redirected toward a recognition of his own loss of three pfennig. It does not matter that there is always an extraordinary disjunction between the two levels of need...for the work of the false motive is formal, not substantive; it prevents the mind from ever getting to the place where it would have to make such comparisons” (58-59).

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The Last Supper

Julie Green, Oregon State University

His right foot, clad in a blue slipper, shook nervously... After officials began administering the drugs at 12:09 a.m., Johnson blinked three times and let out a breath through puffed cheeks. His foot stopped shaking. His eyes slowly dimmed, became glassy and closed to a crescent.... He asked for a final meal of three fried chicken thighs, 10 or 15 shrimp, tater tots with ketchup, two slices of pecan pie, strawberry ice cream, honey and biscuits and a Coke.

This inmate’s execution details were printed in the January 7, 2000 Norman Transcript. Seventy years ago Virginia Woolf called the daily paper “history in the raw.” Her words still ring true.

It is my habit to begin the day reading the paper with my tea and toast. That morning in Oklahoma I first learned about the last meals of death row inmates. A final meal request represents an individual, and for me, humanizes death row statistics. For the past seven years, I have collected final meal requests, researched the history of final meals in the United States, and painted 283 porcelain plates illustrating the menus. The ongoing project is titled The Last Supper. My interest in final meals comes from an opposition to capital punishment. It is also related, I am sure, to my life-long passion for food. We all want and need food. At least on this one level, we can relate to the condemned. We have food in common.

Final Meal Requests

Last meals are not, as one might assume, an unqualified act of generosity on the part of the state. Maryland does not offer a final meal selection; Texas and Virginia inmates are limited to food in the prison kitchen, a modest pantry indeed. States with fewer executions, however, do offer genuine choices. These meals tend to be more personal and revealing about the inmate’s race, region, and class.

According to Department of Corrections records, no state allows cigarettes. In 1997 Larry Wayne White requested a meal of liver and fried onions, tomatoes, cottage cheese, and a cigarette. Under a new order by former Texas Governor George W. Bush, cigarettes were banned on “health grounds.” White didn’t receive his
is granted a stay of execution and has eaten his last meal, eggs is served. Only one last meal is allowed. If an inmate from Maine. If no request is made, a meal of steak and surprisingly, the executioner in Florida is a private citizen, avoid extravagance. Food must be available locally. Sur-
dollars spent on the prisoner's last meal.

gave an identical reply. The warden then asked if I was script
to ask why final meals were in the newspaper and

eats alone in his or her cell. I called the
public information officer (PIO), not the warden. Most public information offices are quick to respond. I begin inquiries with "This is Professor Julie Green from Oregon State University, doing research on death row inmates' final meals." I never mention I am an artist, a title I imagine might equate to "troublemaker."

To examine variations among the final meal policies, I contacted the Department of Corrections in all thirty-eight death penalty states (currently thirty seven, New York no longer has a death penalty). Each PIO was asked the following questions:

Is there a dollar limit for the meal? Is the meal eaten alone? What is the purpose of the special meal? Who cooks the meal: staff or an inmate? Any other information on the special meal? Most states replied to my questions, answering one or two of the five questions. Department of Corrections replies, listed below along with state information, are in order of highest numbers of executions:

Texas has carried out 405 executions. Since 1976, Texas accounts for one-third of all U.S. death penalty executions. Well-practiced procedures are in place. There is a dollar limit, and foods must be available in the prison kitchen. A 3:30 p.m. meal is served before the 6 p.m. execution.

In Virginia, until 2004, repeated requests for information were denied. There is a policy of not providing menu details in order to protect inmates' privacy. Virginia's gesture of civil liberty is curious—at 98 executions its record is second only to that of Texas. Virginia menus are never elaborate or personal; the choices, evidently, are limited to foods on hand in the prison kitchen.

Oklahoma allowed a twenty-dollar meal limit in 2000; it has since been lowered to fifteen dollars. The inmate eats alone in his or her cell. I called the Norman Transcript to ask why final meals were in the newspaper and was told the "public wants to know." The prison warden gave an identical reply. The warden then asked if I was one of those people calling to complain about the twenty dollars spent on the prisoner's last meal.

Florida has a twenty-dollar meal allowance limit to avoid extravagance. Food must be available locally. Surprisingly, the executioner in Florida is a private citizen, paid $150 per execution.

Georgia will prepare local lobster, but will not fly it in from Maine. If no request is made, a meal of steak and eggs is served. Only one last meal is allowed. If an inmate is granted a stay of execution and has eaten his last meal, on subsequent execution days he will eat what everyone else eats. (Note the use of "he" and "his" is common usage in many states although females are also executed).

South Carolina says the last meal is U.S. tradition, seen as a humanitarian gesture afforded to the condemned.

Missouri, North Carolina, Nevada, Arkansas, Delaware, and Utah did not respond to repeated inquiries.

Alabama allows meals made of food available in the prison kitchen. This means no steak and no lobster. The meal is usually eaten while visiting with family and friends.

Louisiana prisons did not respond to my repeated inquiries. Information on three Louisiana inmates' last suppers at Angola Prison comes from Sister Helen Prejean, author of Dead Man Walking:

Sister Prejean joined Patrick Sonnier for his final meal. After Sonnier completes his large meal, he comments, "There, finished, and I wasn't even hungry." To the warden he says, "Warden, tell that chef, tell him for me that he did a really great job. The steak was perfect and the potato salad, and really great apple pie... I am truly, truly, appreciative."

Prejean also describes Antonio James's final meal. Menu and guests are selected by the warden and prisoner. The table is dressed with a nice white tablecloth. Warden Cain, at the head of the table, is showing his Christian fellowship by providing a feast of boiled crawfish. The group holds hands, prays, sings hymns, and laughs during the pleasant meal.

Dobie Gillis Williams declined sharing a meal with Warden Cain. Williams said, "I ain't going to eat with those people. It's not like, you know real fellowship. When they finish eating they're going to help kill me." Dobie Gillis Williams had an IQ of 65; a score of 70 indicates mental retardation.

Arizona allows food available at local grocers. Ohio writes the purpose of the meal is to allow the inmate to have what he really wants for one last time.

Indiana prisons prefer to call it a "special meal," not a final meal.

California, with a fifty-dollar limit, has the most generous meal allowance. The meal can be made in the prison or picked up from Burger King, Domino's Pizza, or other nearby restaurants.

Illinois has a moratorium in place. DNA testing has altered the landscape of death row at state and national levels, and Illinois has become an important state for the study of changes in death penalty policy. In 2003, Governor Ryan granted clemency to 167 death row inmates after new DNA testing identified wrongful convictions. Illinois released thirteen innocent men from death row. Prior to the moratorium, Illinois requests for filet mignon and cannoli suggest bountiful final meals.

Mississippi inmates can have a meal made in the prison or by a local restaurant. Mississippi explains the final meal is just a tradition.
Maryland is the only state that doesn't allow any type of final meal. In Maryland, the condemned eats the regular prison menu of the day.

Washington inmates have very limited options, selecting from the regular prison menu of the day, often salmon or pizza.

Pennsylvania has a unique pre-established menu form, not unlike the menus found at sushi restaurants. The condemned checks off items in each category:

- **Main Course:** Choice of steak (not like T-Bone), chicken, fish, or pizza.
- **Side Dishes:** Choice from a variety of sides such as rice, vegetables, or potatoes.
- **Beverages:** Choice of non-alcoholic drinks.

This system is more extravagant than the Maryland system, accommodating requests like "maybe steak, but not 'T-Bone' steak."

Nebraska, Idaho, Kentucky, Connecticut, Montana, Colorado, New Mexico, Tennessee, and Wyoming have few executions and generous last supper allowances. These allow for more extravagance, as seen in the sole Idaho final meal: 6 January 1994: Prime rib, lobster, 2 pints of black walnut ice cream, rolls, 1/2 gallon milk, 2 liter bottle of Coca Cola.

New Jersey, South Dakota, and New Hampshire have the death penalty on the books but have not had an execution since reinstatement in 1976.

Kansas has had no executions since reinstatement in 1976. The Kansas State Supreme Court ruled its death penalty statute unconstitutional in 2004, due to a provision giving the state an advantage in sentencing. In 2006, the U.S. Supreme Court overturned the Kansas State Supreme Court ruling.

In all states, records of specific final meals prior to 1950 are not available. We do know, though, that in the early part of the twentieth-century in Washington State, a condemned man tried to eat so much as to be too fat to fall through the trapdoor when he was hanged. Around this time, a convict named Donald Schneider also attempted to gorge himself so he wouldn't fit into the electric chair. Neither succeeded.

Until a few years ago, one needed to call the prisons to obtain final meal requests. Texas was the exception, in this as in other aspects of capital punishment. For years the Texas Department of Corrections website listed over 300 final meal requests from 1982 - 2003. Recently the website was revised, and final meals were omitted due to negative publicity. The deleted record of Texas inmates’ meals can now be found at The Memory Hole website at http://www.thememoryhole.org/deaths/texas-final-meals.htm

The Death Penalty Information Center, at www.deathpenaltyinfo.org, is an excellent resource covering all aspects of capital punishment. There is another website which focuses on the final meals: deadmaneating.com includes all death penalty states and lists each final meal since 2002. This site is a strange combination of information about the crime, last words, and the final meal, alongside bad jokes and thong underwear, printed with “Dead Man Eating,” for sale. Attempts at gallows’ humor are also found in the book, *Meals to Die For*, by Brian Price. Price, a former non-death row inmate and a chef who prepared 218 final Texas meals, provides insider details not found elsewhere. Body Bag Baked Beans and Gas Chamber Chicken are a few of the recipes found at the end of the book. In April 2006, I attended Price’s articulate and compassionate talk at The Last Supper event at The New School in New York. He spoke of being changed by his experiences as a death-row chef. With a new wife and a career as a Christian radio show host, Price now appreciates the smallest of daily freedoms many of us take for granted.

Whatever our stand on capital punishment, as when Brian Price talks about preparing last meals, emotions are often complex and conflicting. Sometimes it was a moving experience; sometimes it was just part of a day’s work. When a crime takes place in familiar territory, it becomes more personal and worrisome. “I was driving through the Houston area shortly after these murders (of four young men) at the raceway took place. I remember thinking what a terrible loss it had to have been to these young victims’ families. I was enraged at whoever had done this unnecessary deed. I’m glad he declined a last meal.”

Price describes another experience: “When I was preparing Kenneth Gentry’s last meal, I found myself trying to get into the mind of the man who would request butter beans for his last supper. I began to picture him as a child, sitting at the dinner table with his siblings as their mother spooned out a big helping of the buttery leguminous seeds to each of her children.”

“The big feed” is prison slang for last meals. When analyzing the meals, I am struck by the quantity and modesty of the foods. There is a great deal of American diner food: burgers, sandwiches, fries, ice cream, some fruits, and fewer green vegetables. Gourmet food or international food is scarce, except for Mexican food ordered by Hispanic inmates in the Western states.

Food choices are as personal and telling as the homes, cars, and clothing we select. For adults, in prison or not, food choices often reflect childhood and regional favorites. Pomegranate ordered by a Middle Eastern inmate no doubt reminded him of his ancestral home:

Figure 2: Sci-Rockview Final Meal Selection, 2005 (provided by Pennsylvania Department of Corrections)

Oregon inmates eat alone, under staff supervision. The meal is a courtesy, cooked by staff. Reasonable requests are accommodated: “maybe steak, but not ‘T-Bone’ steak.”

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Locale plays a large part in menu selection. Death-row inmates represent a fraction of the population, yet from this small group we learn which foods are popular in each state. Florida serves a great deal of seafood. In the south we find scotch eggs and butter beans. Missourians are big steak eaters. The healthy meals stand out, being few and far between.

One inmate had a non-food request:

Some inmates provide a specific and lengthy list, such as a Texas request for two 16 oz. ribeyes, one lb. turkey breast; twelve bacon strips; two hamburgers with mayo, onion & lettuce; two large baked potatoes, butter, sour cream, cheese, & chives; four slices of cheese or 1/2 lb. of grated cheddar cheese; chef salad; blue cheese dressing; two corn on the cob; one pt. mint chocolate chip ice cream; four vanilla Cokes or Mr. Pibb (Note: The steaks will not be provided to this Texas inmate).

As Brian Price mentioned, only he knows if his wish was filled.

Another made a request for communion:

Other requests are surprisingly small:
One of the few women executed requested a Supreme pizza, garden salad with ranch dressing, pickled okra, strawberry shortcake, cherry limeade.

I ponder this request for cake decorated with the date of 23 February 1990 and seven pink candles. What did that day symbolize to an inmate who spent twenty-two years on death row? The year 1990 came around during the time he was in prison: eleven years after being locked up, and eleven years prior to execution—1990 marks the halfway point. The most obvious guess is the date represents an eleven-year-old girl’s birthday. But perhaps the date has no special meaning to the inmate. Perhaps it is a test to see if prison staff would make the extra effort on his behalf. Perhaps the inmate was born again on this date. His final words do speak of love and God: “Stop the violence. Let my death change society. You don’t need the death penalty. We need more loving fathers and mothers.” Whatever 23 February 1990 symbolizes, the request is a good example of the personal meaning foods have for all people. We can analyze, we can guess, but we will not know for certain what specific foods mean to the condemned—with their execution goes the answer.

Substitutions

There are inconsistencies among prison, newspaper, and online records of final meals. There are also discrepancies between what is requested and what is served, although substitutions are rarely noted. For instance, the Texas Department of Corrections records the inmate’s request but makes no mention of menu changes by the prison. Brian Price, the death-row chef, notes requests are limited to foods on hand in the Texas prison pantry, and unusual requests such as catfish, liver, chitterlings, and eggplant are usually not provided unless a chaplain brings in the item. Since prison and media records make no mention of substitutions, readers assume requests are filled. I asked historian Daniel Rosenberg for his reflections on final meals:

“It is very tempting to read records of last meals as requests. From one perspective, they undoubtedly are, and in some cases, there is an evident pleasure associated with not only the particular foods named but with their combination: some of these texts express unity, others dissonance; some draw upon vernaculars of speech and taste in surprising ways. Still, as I read them, I am most struck by their expressive inertia. Consider the following remarkable case: “In 1990, an inmate, in cynicism, requested dirt. Instead of dirt, he received yogurt.” There are two notable things about this text. First is the request itself. According to the famous formulation of Mary Douglas, dirt is matter out of place. And it is hard to think of matter more out of place than food before the condemned. But in our cultural order, food is the very thing that defines the space of execution, and so the request for non-food here appears an attack on the space itself as, in effect, an attempt at escape. Second, the notion that such a statement could be interpreted as cynicism is an attempt to render legible something that barely is, as is the presentation of yogurt, non-food rendered in the native language of the last meal. In classical philosophy, a cynic is an ascetic. But, in this context, such an interpretation would be even more out of place than the request itself.”
The Texas request, below, was significantly altered. Inmate’s writing is on the left and Department of Corrections revisions on the right:

![Image of a last meal request for inmate TDCJ 93, executed 5 January 1999, Texas Department of Corrections (image provided by Brian Price)]

Another request begins with twenty-four soft shell tacos, instead that inmate was served four hard shell tacos. His two cheeseburgers were omitted. A request for wild game becomes a cheeseburger and fries. One inmate requested his meal be given to a homeless man, request denied.

**Consumption**

Final meal procedures, as well as request allowances, vary from state to state. Prisoners are often provided with special last meal utensils so they cannot injure themselves. Many times the inmate dines alone. In some states prison staff or a spiritual advisor may share a meal or sit with the condemned while he or she eats.

Looking at requests for Diet Coke, one cannot help but wonder about the uselessness of calorie counting. In this case, Diet Coke must be a taste preference. Requests for Rolaids have questionable value for digestion of the final meal, as they will have little time to be effective. But the Rolaids might help settle stomach pain due to high anxiety.

The massive quantity of food ordered by some inmates is striking. On a normal day, it would be a feat for a hearty eater to consume it all. On execution day, how hungry would we be? I am a champion eater, yet can’t imagine consuming much a few hours before execution. This was the case for Karla Fay Tucker. She didn’t touch her meal. It came back to the kitchen still in plastic wrap and covered in butcher paper. In 1992, Ricky Ray Rector, a brain-damaged inmate from Arkansas, saved half of his pecan pie to enjoy after his execution. Recently the country followed inmate Stanley “Tookie” Williams’s last days in California. He refused the option of a special meal, eating nothing but oatmeal and milk. Larry Todd, from the Texas Department of Corrections, says, “Some eat heartily and others scantily.”

Nationally, about ninety-five percent of death row inmates take advantage of their choice and order a personal meal selection. There are no statistics available on the quantity of food consumed. Whatever is eaten is not a life-sustaining meal. Pathologist autopsy reports reveal food will not have time to be digested prior to execution.

**Purpose of Final Meals**

Americans love the spectacle from the time of public hangings to the present. If death penalty executions were televised, people would watch.

Samuel Pepys stated it is “strange to see how a good dinner and feasting reconciles everybody.” Swedish artist Mats Bigert thinks the contemporary American practice of a final meal has an aspect of forgiveness to it. It may be a way of saying, “We don’t like it, but we have to do this.”

An Oklahoma prison staff member explained the meal choice serves as “motivation for good behavior.” The prisoner, like a young child, is offered an enticement. If you behave and do not make a scene about your imminent execution, you will be rewarded with a nice supper.

I believe another purpose of the final meal is to help alleviate the guilt of prison workers. It must be a difficult job to carry out an execution. I have heard about wardens against capital punishment who would quit their job before overseeing an execution at their prison. Yet another warden oversaw a number of executions of male inmates, but said he would quit rather than execute a woman. For the wardens and staff who process executions, providing a last supper shifts the focus from the execution to a kind gesture they provide the condemned.

Food offers strength and energy, health, comfort, ritual, and pleasure in our lives. Speaking of The Last Supper project, curator Deborah Gangwer mentioned the significance and sacredness to food in all cultures. She continued, “We, as non-inmates, have a great deal of choice every day in what we eat. For the first time in perhaps years, and for the very last time, inmates are given a choice, a menu choice.”

In a few states, a last meal includes family members. Mothers sometimes accompany their offspring through the death penalty procedure. In 1998, a Texas inmate declined the option of selection for a special meal but, “at the last minute he decided to eat a hamburger at his mother’s request.”
At least one mother cooked a last supper.

Figure 10: plate: 9 x 7 in., Indiana 14 March 2001, German ravioli and chicken dumplings prepared by his mother and prison dietary staff.

There is No Blue Food

A passion for food and a strong anti-death penalty stance led me to the final meal project. To date, The Last Supper project consists of 283 mineral-painted plates illustrating final meal requests of United States death row inmates, and a video collaboration with Colin Murphey. Each state with capital punishment executions since 1976 is represented in the plates.

I paint about fifty new plates a year. Completed plates roughly parallel the execution ratio per state: Texas has the most plates in The Last Supper and in life, followed by Virginia and Oklahoma. The plates are a wide variety of shapes and sizes. Some are new, some are used, some are Martha Stewart brand. They are all cobalt blue mineral paint applied to white pre-fired ceramics. Technical advisor Toni Acock fires each plate at 1400 degrees.

As I spend long days in the back garden painting plates, many thoughts go through my head. I think about the terrible crimes committed. I think about the victims. I think about fair punishment. I think about the margin for error in the judicial process. I think about litigation and that a death penalty conviction costs more than life without parole. I paint each menu as a meditation, not unlike retablo painting. I think about the food I am painting. When working long hours, items being painted sometimes make me hungry. I crave the cantaloupe I paint. I am ashamed to admit this, yet it speaks to the power of food for us all.

Since 2002, exhibitions of The Last Supper are accompanied by a Comment Book in which viewers can record their thoughts. From the three hundred viewers’ comments at Copia, the following are consecutive responses on one page from 26 October 2002:

- Your message is very powerful.
- May the last supper be served soon.
- One can not take even one life with diminishing our humanity as a society.
- Forget the meals— Fry ’em as soon as possible!
- I agree.

Frequently viewers will respond to the comment directly above. In another page of Copia comments, one can imagine those traveling together, as well as those clearly not:

- Love to look better to dine!
- Such fun dinner conversation.
- Go back to Oregon, you stinky HIPPIE!
- I am glad Copia provides a forum for conscious discussion/ art about social justice. We can not continue to live in a society blind to economic, racial etc. oppression. The Last Supper is very powerful and thought-provoking. Such consciousness hopefully deflates some of the hate illustrated by the previous comment. Peace.

Dialogue among these viewers takes on a life of its own. Many comments are not about final meals. They are conversations on capital punishment between strangers, coming and going, who at some point stood in the same place on the same day.

The question of what you would have for your final meal seems to have replaced the question of what book you would bring to a desert island. In the Sunday New York Times recently there were two separate interviews in which celebrities were asked what they would have for a final meal. Wildly, both said black cod in miso from Nobu’s in New York. It does make one want to taste this black cod. Black cod and miso is not kept in the prison pantry, so most states would not provide this dish, if requested.

The Last Supper has pathos. I am upbeat, and death row is not. In this ongoing project, several times I have nearly quit. In Tulsa recently, a woman came up to me at the opening of The Last Supper at Living Arts. She said she was a Republican and, until that day, solidly pro-death penalty. Looking at the exhibition, she decided to reverse her position, and to be against capital punishment. In such moments, the project seems positive.

I plan to continue painting plates until we no longer have capital punishment. I hope to see the last supper served.
Thank you to The Center for the Humanities at Oregon State University and to Daniel Cottom, Clay Lohmann, and Roger Shimomura for their support.

NOTES


5 Brian Price, Meals to Die For (Dyna-Paige, 2004), 87.

6 Price, Meals to Die For, 42.

7 Price, Meals to Die For, 449

8 Price, Meals to Die For, 21.

9 Daniel Rosenberg, personal communication, fall 2005.

10 Price, Meals to Die For, 308.

11 Price, Meals to Die For, 295.

12 Price, Meals to Die For, 181.

13 Price, Meals to Die For, 141.


16 Price, Meals to Die For, 293.
True forgiveness deals with the past, all of the past, to make the future possible.

—Desmund Tutu, South African Archbishop

As we began writing this book, we soon faced a challenge: what should we title it? We settled on the main title, Amish Grace, quickly, but the subtitle, How Forgiveness Transcended Tragedy, took much longer. The problem was the verb between forgiveness and tragedy. To put it simply, we couldn’t quite decide what the act of forgiveness had done to the tragic events of October 2, 2006.

We discussed the word redeemed. Had Amish forgiveness redeemed the tragedy that befell their community? For a book about the Amish, the word redeemed had the advantage of carrying Christian connotations. It also suggested, as many Amish people told us, that good is more powerful than evil. Still, the more we thought about it, the less comfortable we became with the notion that forgiveness had redeemed the tragedy at Nickel Mines. The tragedy remains. Five girls died, others carry scars, and one remains semicomatose. Amish families continue to grieve, Amish children still have nightmares, and Amish parents pray for their children’s safety with an urgency they didn’t know before. The expression of forgiveness that flowed in the aftermath of Robert’s rampage brought healing, but it didn’t bind up all the wounds of the shooting. The word redeemed claimed too much.

We settled on transcended for two reasons. First, transcended conveys very well how the Amish of Nickel Mines rose above — far above — the evil that visited their schoolhouse. Whether good is more powerful than evil may be a matter of philosophical debate, but who can dispute the fact that the Amish responded to absolute horror with an amazing generosity of spirit? Second, the story of Amish forgiveness quickly eclipsed the story of the shooting itself. Devastating violence visits our world every day, but rarely is violence greeted with forgiveness. In Nickel Mines it was, and that response became the big story to emerge from a small village in Lancaster County.

But what should we make of that story? Like some of the Amish people we interviewed, we are glad the story of Amish forgiveness received wide play after the shooting. At the same time, we have reservations about the way the story was used and celebrated. As much as we were impressed, even inspired, by the Amish response in Nickel Mines, we wondered: Is there anything here for the rest of us? The longer we worked on this book, the more vexing the question became.

The Amish Are Not Us

If there’s one thing we learned from this story, it’s this: the Amish commitment to forgive is not a small patch tacked onto their fabric of faithfulness. Rather, their commitment to forgive is intricately woven into their lives and their communities — so intricately that it’s hard to talk about Amish forgiveness without talking about dozens of other things.

When we first broached the subject of forgiveness with Amish people, we were struck by their reluctance to speak of forgiveness in abstract ways. We did hear forgiveness defined as “letting go of grudges.” More frequently, however, we heard responses and stories with forgiveness interspersed with other terms such as love, humility, compassion, submission, and acceptance. The web of words that emerged in these conversations pointed to the holistic, integrated nature of Amish life. Unlike many of their consumer-oriented neighbors, the Amish do not assemble their spirituality piecemeal by personal preference. Rather,
Amish spirituality is a precious heirloom, woven together over the centuries and passed down with care. To hear the Amish explain it, the New Testament provides the pattern for their unique form of spirituality. In a certain sense they are right. The Amish take the words of Jesus with utmost seriousness, and members frequently explain their faith by citing Jesus or other New Testament texts. But the Amish way of life cannot be reduced simply to taking the Bible—or even Jesus—seriously. Rather, Amish spirituality emerges from their particular way of understanding the biblical text, a lens that has been shaped by their nonviolent martyr tradition. With the martyrs hovering nearby, offering admonition and encouragement, the Amish have esteemed suffering over vengeance, Uffegevva over striving, and forgiveness over resentment. All Christians can read Jesus’ words in Matthew’s Gospel—"forgive us our debts, as we forgive our debtors”—but Amish people truly believe that their own forgiveness is bound up in their willingness to forgive others. For them, forgiveness is more than that a good thing to do. It is absolutely central to the Christian faith.

All of this helps us understand how the Nickel Mines Amish could do the unimaginable: extend forgiveness to their children’s killer within hours of their deaths. The decision to forgive came quickly, almost instinctively. Moreover, it came in deeds as well as words, with concrete expressions of care for the gunman’s family. For the Amish, the test of faith is action. Beliefs are important, and words are too, but actions reveal the true character of one’s faith. Therefore to really forgive means to act in forgiving ways—in this case, by expressing care for the family of the killer.

In a world where the default response is more often revenge than forgiveness, all of this is inspiring. At the same time, the fact that forgiveness is so deeply woven into the fabric of Amish life should alert us that their example, inspiring as it is, is not easily transferable to other people in other situations. Imitation may be the sincerest form of flattery, but how does one imitate a habit that’s embedded in a way of life anchored in a five-hundred-year history?

Most North Americans, formed by the assumptions of liberal democracy and consumer capitalism, carry a dramatically different set of cultural habits. In fact, many North Americans might conclude that certain Amish habits are problematic, if not utterly offensive. Submitting to the discipline of fallible church leaders? Forgoing personal acclaim? Converting intellectual exploration? Abiding by restrictive gender roles? Deciding to stand up for one’s rights? Refusing to fight for one's country? Could any set of cultural habits be more out of sync with mainstream American culture?

Many observers missed the countercultural dimension of Amish forgiveness, or at least downplayed it, in the aftermath of the Nickel Mines shooting. Outsiders, typically impressed by what they saw, too often assumed that Amish grace represented the best in “us.” Few commentators did this as crassly as the writer who equated the faith of the Amish with the faith of the Founding Fathers. In his mind, the Nickel Mines Amish were not acting counterculturally; they were simply extending a long American tradition of acting in loving, generous, and “Christian” ways. Other commentators, eager to find redemptive lessons in such a senseless event, offered simple platitudes. Rather than highlighting the painful self-renunciation that forgiveness (and much of Amish life) entails, they extolled Amish forgiveness as an inspiring expression of the goodness that resides in America’s heartland.

We are not suggesting that the Amish response to the shooting was not praiseworthy. We contend, however, that the counterculture value system from which it emerged was too often neglected in the tributes that followed in the wake of the shooting. As if to drive home the depth of this cultural divide, ministers in one Ohio Amish community forbade a member from giving public lectures on Amish forgiveness. Ironically, the very value system that compelled the Nickel Mines Amish to forgive Charles Roberts constrained a member’s freedom to talk about forgiveness with curious outsiders. No, the Amish response at Nickel Mines was not so much the “best of America” as it was an expression of love by people who every day challenge many of the values the rest of us hold dear.

The Perils of Strip Mining

If some observers detached Amish forgiveness from its countercultural weave, others severed it from its social context—drawing dubious lessons the Amish could teach the world. For instance, numerous writers cited the Amish example at Nickel Mines to score points against violence so prominent in U.S. foreign policy, particularly the Bush administration’s war on terror. Many of these critiques contrasted the Christianity of President Bush with the faith of the Amish and then asked readers which one Jesus himself would endorse. From a rhetorical standpoint, the contrast worked well, though its proponents failed to mention that the two-kingdom Amish would never expect the government to operate without the use of force. Even as the Amish use their own disciplinary procedures to prune unrighteousness within their churches, they expect the government to restrain evil-doers in the larger society, often by force. For that reason, it’s unlikely the Amish would encourage a U.S. president to pardon someone like Osama bin Laden.

Of course, it’s possible that these commentators were talking not about pardoning terrorists (releasing them from punishment) but rather about forgiving them (replacing rage with love). Still, in their quick application of Amish forgiveness to complex, entrenched conflicts, many pundits neglected a key point: the schoolhouse shooter was dead and his offenses in the past. As horrible as the shooting was, it was a single event that dawned unexpectedly and ended quickly. Contrast this, for instance, with the centuries-long history of oppression of African Americans, the calculated extermination of six million Jews, or the feat that families living amid ethnic conflict experience every day. Offering forgiveness is much more complicated,
and much more challenging for ongoing offenses. Even minor offenses—demeaning comments from a supervisor, for instance—can obstruct forgiveness when they continue day after day.

Other factors made this forgiveness story distinct, even within Amish life. The Nickel Mines Amish had neighborly ties with the gunman’s family, relationships they hoped to mend and keep. In this small-town environment, extending grace quickly was both practical and uncomplicated, for the Amish knew exactly whom to approach and could even walk to their homes. Furthermore, the scale of the offense meant that no one person of family had to bear the burden of forgiveness alone. The wider Amish community, in a spirit of mutual aid, carried one another along. Moreover the enormity of the evil made the Amish more open to the possibility that the shooting might have a place in God’s providential plan. Together these factors help to explain why some Amish people suggested that forgiving Charles Roberts was easier than forgiving a fellow church member for a petty, run-of-the-mill offense.

Again, we are not minimizing Amish generosity in the face of this horrific shooting. We are suggesting, however, that this uniqueness of Amish culture—and the details of the tragedy—should chaste us as we apply the Amish example elsewhere. The Amish do not simply tack forgiveness onto their lives in an individualistic fashion, nor do they always forgive as quickly and as easily as media reports seemed to suggest. For these reasons, Amish-style forgiveness can’t be strip-mined from southern Lancaster County and transported wholesale to other settings. Rather, the lessons of grace that the rest of us take from Nickel Mines must be extracted with care and applied to other circumstances with humility.

Extracting Lessons from Nickel Mines

Although the Amish approach the task of forgiveness with rich cultural resources, they also approach the task as fallible human beings. In that respect the Amish are like the rest of us, and we are like them. This point should be obvious, but some people assume the Amish have access to otherworldly resources that the rest of us have not found. To be sure, that assumption contains some truth: the God the Amish worship fully expects human beings to love their enemies and forgive their debtors. Nevertheless, the ability to forgive is not restricted to the Amish, or to Christians, or to people who believe in God. To forgive may be divine, as the poet Alexander Pope suggested, but if so, it’s a divine act that is broadly available to the human community.

Indeed, in the course of writing this book, we encountered stories of forgiveness that were every bit as moving as the Nickel Mines story: stories of people shot and left for dead, people whose children were abducted and harmed, people whose marriages were shattered by unfaithfulness, people whose reputations were destroyed by so-called friends. Most of these people had no connection to the Amish and few of the cultural resources the Amish bring to bear when they face injustice. Yet they forgave—not quickly or easily, but eventually and for the good of all involved.

Psychologists who study forgiveness find that, generally speaking, people who forgive lead happier and healthier lives than those who don’t. The Amish people we interviewed agreed, citing their own experience of forgiving others. Some said they were “controlled” by their offender until they were able to forgive; others said the “acid of hate” destroys the unforgiving person until the hate is released. Coming from members of a religious community that emphasizes self-denial, these comments show that the Amish are nonetheless interested in self-care and personal happiness. Forgiveness may be self-renouncing in some respects, but it is not self-loathing. The Amish we interviewed confirmed what psychologists tell us: forgiveness heals the person who offers it, freeing that person to move on in life with a greater sense of vitality and wholeness.

Still, if the Amish provide evidence that forgiveness heals the forgiver, they provide even more evidence that forgiveness benefits the offender. Forgiveness does not deny that a wrong has taken place, but it does give up the right to hurt the wrongdoer in return. Even though Charles Roberts was dead, opportunities to exact vengeance upon his family did not die with his suicide. Rather than pursuing revenge, however, the Amish showed empathy for his kin, even by attending his burial. In other words, the Amish of Nickel Mines chose not to vilify the killer but to treat him and his family as members of the human community. Amish forgiveness was thus a gift to Charles Roberts, to his family, and even to the world, for it served as the first step toward mending a social fabric that was rent by the schoolhouse shooting.

These acts of grace astounded many people who watched from afar. Living in a world in which religion seems to nourish vengeance more often than curb it, the Amish response was a welcome contrast to a barrage of suicide bombings and religiously fueled rage. What is less clear is whether the rest of us saw the Amish response as something to emulate, or as just a noble but impossible ideal.

Perhaps the answer to that question lies somewhere in the middle. Perhaps we were awed and truly impressed that the Amish sought to counter evil with a loving and healing response. At the same time, we may know that had our children been the ones gunned down in the West Nickel Mines School, our response would have been rooted in rage rather than grace. It’s an honest perspective, but also a problematic one, because it assumes that revenge is the natural response and forgiveness reserved for folks like the Amish who spend their lives stifling natural inclinations.

We often assume that humans have innate needs in the face of violence and injustice. For instance, some who said that the Amish forgave Roberts “too quickly” assumed that Amish people denied a basic human need to get even.
But perhaps our *real* human need is to find ways to move beyond tragedy with a sense of healing and hope.

What we learn from the Amish, both at Nickel Mines and more generally, is that how we choose to move on from tragic injustice is culturally formed. For the Amish, who bring their own religious resources to bear on injustice, the preferred way to live on with meaning and hope is to offer forgiveness—and offer it quickly. That offer, including the willingness to forgo vengeance, does not undo the tragedy or pardon the wrong. It does however constitute a first step toward a future that is more hopeful, and potentially less violent, than it would otherwise be.

How might the rest of us move in that direction? Most of us have been formed by a culture that nourishes revenge and mocks grace. Hockey fans complain that they haven't gotten their money's worth if the players only skate and score without a fight. Bloody video games are everywhere, and the ones that seemed outrageously violent ten years ago are tame by today's standards. Blockbuster movie plots revolve around heroes who avenge wrong with merciless killing. And it's not just the entertainment world that acculturates us into a graceless existence. Traffic accidents galvanize hoards of lawyers who encourage victims to get their "due." In fact, getting our due might be the most widely shared value in our hyperconsumerist culture. "The person who volunteers time, who helps a stranger, who agrees to work for a modest wage out of commitment to the public good...begins to feel like a sucker," writes Robert Kuttner in *Everything for Sale*. In a culture that places such a premium on buying and selling, as opposed to giving and receiving, forgiveness runs against the grain.

Running against that grain, finding alternative ways to imagine our world, ways that in turn will facilitate forgiveness, takes more than individual willpower. We are not only the products of our culture, we are also producers of our culture. We need to construct cultures that value and nurture forgiveness. In their own way, the Amish have constructed such an environment. The challenge for the rest of us is to use our resources creatively to shape cultures that discourage revenge as a first response. How might we work more imaginatively to create communities in which enemies are treated as members of the human family and not demonized? How might these communities foster visions that enable their members to see offenders, as well as victims, as persons with authentic needs? There are no simple answers to these questions, though any answer surely will involve the habits we decide to value, the images we choose to celebrate, and the stories we remember.

In fact, forgiveness is less a matter of forgive and forget than of forgive and *remember*—remembering in ways that bring healing. When we remember we take the broken pieces of our lives—lives that have been *dismembered* by tragedy and injustice—and re-member them into something whole. Forgetting an atrocious offense, personally or corporately, may not be possible, but all of us can and do make decisions about how we remember what we cannot forget.

For the Amish, gracious remembering involves habits nurtured by memories of Jesus forgiving his tormentors while hanging on a cross and of Dirk Willems returning to pull his enemy out of the icy water. When thirteen-year-old Marian said "shoot me first" in the schoolhouse, and when adults in her community walked over to the killer's family with words of grace a few hours after her death, they were acting on those habits. And just as surely their actions at Nickel Mines will be recounted around Amish dinner tables for generations to come, creating and renewing memories about the power of faith to respond in the face of injustice—even violence—with grace.

In a world where faith often justifies and magnifies revenge, and in a nation where some Christians use scripture to fuel retaliation, the Amish response was indeed a surprise. Regardless of the details of the Nickel Mines story, one message rings clear: religion was used not to justify rage and revenge but to inspire goodness, forgiveness, and grace. And that is the big lesson for the rest of us regardless of our faith or nationality.
Our narrative of Amish grace comes to a close in November 2006. Since then the Nickel Mines community has returned to “a new normal” that includes joy, sadness, occasional fears, expressions of courage, and moments of grace.

By Christmas 2006, four of the five injured girls had returned to school and were functioning well. Some of them continued various types of rehabilitation and faced additional reconstructive surgeries. The most seriously injured girl remained semicomatose in the care of her parents but showed small signs of improvement. One of the girls who returned to school successfully completed all the homework assignments she had missed in the weeks after the shooting.

In late February 2007, Amish carpenters had a new school under roof. Located less than half a mile from the old school, the new building sits in a more secluded spot, close to several homes and away from the road. After attending classes in a temporary facility on a nearby Amish property, the pupils moved to their new building, named New Hope School, on Monday, April 2, exactly six months after the tragedy. A new family with several daughters moved into the area, increasing the number of girls at New Hope. The killer’s widow and members of her family visited the new school. State troopers and the police commissioner also visited the school, speaking with the children, playing ball with them, and showing off the lights and sirens on their patrol cars.

The forgiveness and grace of October 2006 were first steps in an ongoing, sometimes awkward, but always insistent effort at reconciliation—at mending the relationships so strained by the shooting. The emotional meeting at the Bart firehouse at the end of October between Charles Roberts’s relatives and the Amish families was not their final contact. For example, Roberts’s widow, Amy drove one of the mothers to see her injured daughter recovering in a hospital, and at Christmas time the Amish schoolchildren went to the Roberts home to sing carols. Although Amy and her children eventually moved away from Georgetown, other family members remain in the area and continue to have contact with the Amish families.

Roberts’s parents visited the temporary school, attended the Amish school Christmas program, and visited the parents involved in the tragedy. Amish people who had used the taxi service provided by the gunman’s father assured him that they still wanted him to drive them and have continued to use his services. Amish fathers around Georgetown welcomed the reassignment of Robert’s milk route to his father-in-law so that they would still have contact with the family. One Amish parent, reflecting on the graceful response of the Roberts family said, “Their kindness has helped us a lot in the healing process.”

Nevertheless, the pain from the trauma continues. “The half-year mark has been pretty rough on some of us,” said Sylvia. Certain images, sounds, and words still provoke anxious thoughts and reactions. Some of the schoolchildren have nightmares, but others are sleeping well. Some adults still flinch at the sound of helicopters flying in the area. Everyone understands that finding a new normal will take time and hard work. Two new babies born to parents who lost children in the shooting helped the quest for a return to normal life.

The parents of the schoolchildren have found meaningful support among Amish and English friends and particularly among one another. The mothers continue to meet periodically in one of their homes to share their grief and find encouragement. The fathers get together too, but on a less regular schedule. A father who lost a daughter said, “We get our most support just meeting and talking with the other parents.” Six months after the shooting one church leader noted, “We are still processing some anger, but we are moving in the direction of forgiveness.”

Members of the broader community continue to support one another in many ways. A few financial gifts still trickle in to the Accountability Committee, which oversaw and distributed the more than $4 million it received. The annual Bart Township “mud sale,” a fund raiser for the fire company that is named for the soggy spring conditions in which it is often held, took place on March 3 and 17, 2007. The sale provided an opportunity for the community members, Amish and English, to gather again, this time for a festive occasion. The auction features antiques, quilts, furniture, buggies, farm equipment, livestock, and food donated by Amish and English alike. Always a much-anticipated event, this year’s sale assumed additional meaning, reminding local residents that their community, which had experienced an unimaginable tragedy, was on the road to recovery.
Locals are looking forward to a summer 2007 picnic—a reunion, they call it—which they are hosting for police officers, fire company personnel, emergency responders, Amish parents and families, and the Roberts family. An Amish artist has crafted a large wooden plaque for the event, with messages of gratitude for the state police. Pupils from the West Nickel Mines School used a wood-burning pen to inscribe their names on the plaque which will be presented to the police at the reunion.

By then the fall communion season will be just a few months away. Revisiting a New Testament scripture they know so well, the Amish will read Matthew 18 and ponder again Jesus’ words about forgiving seventy times seven.

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