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Reparation, Restoration, Incarceration: Comparative Perspectives on the African-American Reparations Problem

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Reparation, Restoration, Incarceration:
Comparative Perspectives on the African-American
Reparations Problem

Michael A. Livingston¹

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I. Introduction

The proposal of reparations to African-Americans for slavery and subsequent offenses has stimulated a great deal of academic attention but little practical action. One reason for this is the indifference of non-black Americans and the lack of historical consciousness in a pragmatic, forward-looking culture. Yet some African-Americans also have mixed feelings about reparations, preferring to concentrate on current problems rather than seek repayment for past

1. Professor of Law, Rutgers Law School. A. B., Cornell, 1977. J.D., Yale, 1981. The author thanks Leora Bilsky, Philip Harvey, Stacy Hawkins and Assaf Likhovski for helpful comments on an earlier draft of this article.

wrongs, and perhaps even considering the debate as a divergence from more pressing, immediate problems.

While the debate about reparations has flickered, two related but distinct developments have taken place. The first involves a growing awareness of continuing discrimination against African-Americans. The most dramatic example of which is the mass incarceration of black males that is frequently for behavior bearing a dubious relationship to the penalties imposed.² This development is significant because it suggests that the mistreatment of African-Americans is an ongoing and growing phenomenon, not just a past injustice, that the mistreatment may actually be growing while the discussion takes place, and that it is time for the injustices to be compensated. While this development arguably strengthens the case for reparations, it also makes them more difficult to obtain, since a full accounting would require not only confronting the past but also making substantial changes in contemporary public policy.

Second, while the reparations debate continues a substantial literature has emerged alternative forms of redress for genocide and other historical injustices. Organized loosely around the term “restorative justice,” this literature emphasizes apology, institutional memory, and a complete and systematic factual accounting in place of more traditional methods such as criminal punishment and financial remuneration.³ This development is likewise important, because it suggests that conventional reparations may not be the only or even the best form of redress for politically controversial wrongs. The concept is not purely theoretical. Restorative justice has been attempted, with varying degrees of success, in South Africa, the former Soviet Union, and other countries, some of which face issues such as continuing discrimination, a rhetoric of innocence, and fear of the political ramifications of reparation payments that is broadly reminiscent of the American situation.

This essay considers the reparations issue in light of the developments above, while examining a series of books published or republished in the last decade. The texts examined include: one work which summarizes the traditional reparation arguments (Brophy), two

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2. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, THE NEW PRESS, 1-6 (2010); ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY*, THE UNIV. OF CHICAGO PRESS (2014).
 3. See *infra* text accompanying notes 17-27.

books primarily concerned with mass incarceration (Alexander and Goffman), two collections devoted to restorative justice (Barkan and Johnstone), and two books that implicate Stalin's crimes and efforts to address them in the former Soviet Union (Conquest and Kotkin).⁴

I am aware that the combination of these subjects, especially the subject of the last two books, is somewhat unconventional in nature. To the extent that it considers foreign countries at all, the reparation debate has typically focused on the European Holocaust and perhaps South Africa, while Russia, China, or similar places seemingly far removed from the question at hand. Yet the very novelty of such comparisons makes them especially productive. Many of the issues that complicate American reparations turn out to be surprisingly common, and the experience of other countries provides useful insights into approaches that are promising and approaches that are best avoided.

This essay proceeds topically, with the aforementioned texts appearing and reappearing as the discussion progresses. Part One summarizes the reparations debate and the usual arguments for and against the proposal.⁵ Part Two addresses the mass incarceration issue and its implications for the reparations problem.⁶ Part Three introduces the restorative justice concept and its application in real-world situations, including South Africa and (with rather less success) the former Soviet Union.⁷ Part Four discusses the Russian example further, including its many, however imperfect, parallels to the contemporary American situation.⁸ Part Five incorporates the author's conclusions and suggestions for future research.⁹

Because this is a review essay rather than a standard article, some of the more persuasive arguments may appear later, while some of the earlier points may strike readers as unconvincing. The practical viability of reparations, which is discussed in the latter sections, may strike some readers as logically prior to more theoretical concerns. Those readers finding themselves impatient are encouraged to skip ahead, and return to the prior sections if they so desire.

4. See *infra* text accompanying notes 42-43.

5. See *infra* text accompanying notes 22-30.

6. See *infra* text accompanying notes 27-31.

7. See *infra* text accompanying notes 31-44.

8. See *infra* text accompanying notes 43-44.

9. See *infra* text accompanying note 45 and following.

II. The reparations debate: politically daring, philosophically conventional

Although the case for reparations is politically daring, in a legal sense it is actually rather conventional, proceeding from the assumption that slavery produced a large economic surplus for which the slaves were not compensated. This is often supplemented by the argument that even after slavery African-Americans continued to be denied the fruits of their labor under the black codes, Jim Crow laws, and similar arrangements.¹⁰ From a jurisprudential perspective, these arguments are similar to those made in other reparation cases, including several in North America (Native Americans, Japanese-Americans, etc.) and a larger number in other countries. The legal barriers to reparation claims, including sovereign immunity, statutes of limitations, and a range of technical problems—whom to compensate, how much, and who should be responsible to pay them—are likewise similar to those in other cases.¹¹

Alfred Brophy's book, *Reparations: Pro and Con* (2006), provides a useful summary of the relevant arguments, together with a brief history of the movement's successes and failures in recent decades. While generally sympathetic to reparations, he includes a reasonable list of opposing viewpoints, including the supposed absence of moral or legal liability; the notion that compensation has already been paid by means of affirmative action, welfare, and other government programs; and the politically divisive nature of reparation claims.¹² The book is a summary, rather than a new analysis, and most of the positive arguments (Charles Ogletree, Mari Matsuda) and opposing viewpoints (notably David Horowitz) have appeared elsewhere. Regardless, it is an unusually fair treatment, and provides a helpful bridge between the theoretical and the practical side of analysis.¹³

10. ALFRED BROPHY, *REPARATIONS: PRO CON* OXFORD UNIV. PRESS (2006).

11. See generally, BROPHY, *supra* note 10 (describing the arguments for and against reparations); Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U.L. REV. 1139 (2004) (discussing more arguments on reparation).

12. BROPHY, *supra* note 10, at 55-96.

13. See CHARLES J. OGLETREE, JR. REPAIRING THE PAST: NEW EFFORTS IN THE REPARATIONS DEBATE IN AMERICA, 38 HARV CIV. RTS. -CIV. LIB. L. REV. 279 (2003);

While primarily focused on African-Americans, *Reparations: Pro and Con* denotes the payment of reparations to Japanese-Americans and (in limited cases) Native American tribes, as well as the European Holocaust and South Africa cases.¹⁴ The author recognizes the trend toward apology, truth commissions, and so forth but appears to regard these trends primarily as intermediate steps on the way toward reparations.¹⁵ The book also includes a lengthy discussion of practical issues in reparations litigation, including the identification of victims and the establishment of a sufficient nexus between the victims and the alleged harm.¹⁶

Since Brophy's book emerged, there has been a revival of interest in reparations, spurred by positive energy and, in part, by frustration with the persistence of racial inequality, notwithstanding the election of a black President and the supposed dawn of a new, "post-racial" era.¹⁷ The most popular expression of this sentiment was a June 2014 edition article published in *The Atlantic* magazine by Ta-Nehisi Coates, a journalist and social critic, with the deceptively simple title, "The Case For Reparations."¹⁸ Rather than philosophy, Coates emphasizes the real-world experience of African-Americans, beginning with a man (Clyde Ross) who migrated from Mississippi to Chicago only to see his home redlined by mortgage bankers and his neighborhood delineate from middle class status to extreme poverty¹⁹ Using this story as a focal point, Coates re-tells American history as a story of white wealth financed in large part by black plunder, while describing previous efforts at compensation, including affirmative ac-

MARI MATSUDA, *LOOKING TO THE BOTTOM: CRITICAL LEGAL STUDIES AND REPARATIONS*, 22 HARV. CIV. RTS. -CIV. LIB. L. REV. 323 (1987); DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* (2001).

14. BROPHY, *supra* note 25, at 19-54.

15. BROPHY, *supra* note 25, at 11-16.

16. BROPHY, *supra* note 10, at 97-166.

17. On the Obama Administration and the limits of post-racialism, see BREANNA M. BACON, *THE MYTH OF OBAMA'S POST-RACIAL PRESIDENCY: WHY BARACK OBAMA'S ELECTION DIDN'T END RACIAL INEQUALITY IN AMERICA*, *INQUIRIES J.* vol.2,7, <http://www.inquiriesjournal.com/articles/988/the-myth-of-obamas-post-racial-presidency-why-barack-obamas-election-didnt-end-racial-inequality-in-america> (2015).

18. Ta-Nehisi Coates, *The Case for Reparations*, *THE ATLANTIC* (Jun. 2014) <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

19. COATES, *supra* note 18, at Part I.

tion, as either inadequate or disingenuous in nature.²⁰ “Reparations,” Coates concludes, “by which I mean the full acceptance of our collective biography and its consequences __ is the price we must pay to see ourselves squarely.”²¹

Although attracting less public attention, the past few decades have also been witness to a number of symposia, individual articles, and other academic treatments of the reparations issue, some of them generic in character and others specific to African-American claims. For example, Hanoch Dagan argued in a 2004 symposium that restitution for slavery is consistent with existing principles of unjust enrichment, and that neither the difficulty of identifying specific victims nor the fact that slavery was “legal” at the time the harms were inflicted need serve as a barrier to successful claims.²² By contrast, Emily Sherwin argued that these and other problems make a claim for unjust enrichment unconvincing, although Sherwin did not rule out the possibility of claims based on alternate legal theories.²³ Other scholars have addressed the issue from the perspective, *inter alia*, of tort law, economic redistribution, and the history of previous reparation claims.²⁴ While these scholars disagree on numerous points, their work makes clear that slavery reparations are not merely a political cause, but are a legal argument with strong precedents both in academic theory and previous historical practice.

To the extent that scholars cite a precedent for reparations, it is most frequently the European Holocaust (1941-45), which killed six million Jews and numerous others, resulting in a series of reparation payments made by the Federal Republic of Germany from the 1950s on.²⁵ The Holocaust precedent carries enormous moral weight, but can be something of a two-edge sword, since there is a tendency to

20. COATES, *supra* note 18, at Parts II-VIII.

21. COATES, *supra* note 18 at Part IX.

22. HANOCH DAGAN, RESTITUTION AND SLAVERY, 84 B.U. L. REV. 1139 (2004).

23. EMILY SHERWIN, REPARATIONS AND UNJUST ENRICHMENT, 84 B.U. L. REV. 1443 (2004)

24. *See generally Symposium: The Jurisprudence of Reparations*, B.U. L. REV. 84 (2004).

25. *See generally*, THE DESTRUCTION OF THE EUROPEAN JEWS (1961); SAUL FRIEDLANDER, NAZI GERMANY AND THE JEWS, VOLUME TWO: THE YEARS OF EXTERMINATION HARPER PERENNIAL (2007) I, ISRAEL GUTMAN, ENCYCLOPEDIA OF THE HOLOCAUST MACMILLIAN (1990). (The literature on the Holocaust is vast. Hilberg’s book is classic first generation treatment. Friedlander and Gutman’s works are both respected recent treatments).

regard it as a unique event. People sometimes distinguish the Holocaust from slavery because it involved murder rather than enslavement, and because reparations were paid quickly after the event, rather than after a substantial lapse of time. Each of these arguments can be overstated: Holocaust reparations were in theory for lost property rather than lives, and the oppression of African-Americans continued well after 1865, making the lapse of time may be less of a factor than first appears. A more significant practical difference may be that Germany was defeated in 1945, and faced political pressures to accommodate Jewish victims as well as other victims, a precedent that cannot be easily applied to America. Still, the Holocaust remains the universal paradigm for human rights abuses, and will likely continue to be cited by both sides of the aisle for the foreseeable future, in spite of its relevance.²⁶

The Brophy text, the Coates article, and various academic treatments provide a welcome range of opinions on the reparations problem. But it is hard to escape the feeling that the debate is circular, with the two sides converging only slowly and perhaps moving further apart. Specifically, three problems present themselves.

First, the debate is largely an internal one, pitting mainstream liberals against “progressives” or “radicals” who believe that liberal policies regarding race have failed and that a stronger prescription is required. Unlike (say) the debate over the Confederate flag, which crosses party lines, it is hard to think of many conservatives or even moderates who take the debate very seriously. That doesn’t mean reparations is wrong—no one expected gay marriage to win such widespread support so quickly; but after a generation of debate one could hope for a wider audience, or at least a wider range of opinions on the subject.

26. On the uses and (sometimes) abuses of the Holocaust, *see, e.g.*, BEREL LANG, *THE FUTURE OF THE HOLOCAUST: BETWEEN HISTORY AND MEMORY* CORNELL PRESS (1999); ALVIN ROSENFELD, *THE END OF THE HOLOCAUST* INDIANA UNIV. PRESS (2011); MICHAEL NOVICK, *THE HOLOCAUST IN AMERICAN LIFE* HOUGHTON MIFFLIN (2000). For a critical treatment of the use of the Holocaust in Israel, *see* IDIT ZERTAL, *ISRAEL’S HOLOCAUST AND THE POLITICS OF NATIONHOOD (Hebrew Title: HA-UMAH VE’HAMAVET)* CAMBRIDGE MIDDLE EAST STUDIES 21(2010). A somewhat more offbeat approach is JUDITH MILLER, *ONE BY ONE BY ONE: THE LANDMARK EXPLANATION OF THE HOLOCAUST AND THE USES OF MEMORY* SIMON & SCHUESTER (1991).

Second, the debate seems oddly disconnected from current realities. Successful reparations claims tend to involve what tax lawyers call “closed and completed” transactions; that is, situations in which the behavior complained of is finished and unlikely to repeat itself in the future. For example, most people doubt that Japanese-Americans will be interned again, or that Europe will have a second Holocaust. By contrast, today’s national news is filled with stories of violence or degradation involving African-Americans, from the case of Trayvon Martin to police shootings to poverty, to incarceration, and so forth. None of these events are meant to articulate that reparations are wrong or even unnecessary. But it’s hard to build a case for compensating past injustice while the injustice is continuing. It is a bit like a man offering to compensate his neighbor for a car accident and then plowing into the same neighbor on the commute to the courthouse. Continuing discrimination also complicates the legal issues in reparation. Should payments be made to descendants of slaves, of Jim Crow-era blacks, or all African-Americans on the basis of ongoing or even future harm?

Finally, the reparations debate is sometimes too legalistic for its own good. The imperative to condense everything into a legally cognizable claim—such-and-such plaintiffs, such-and-such defendants, such-and-such formulas for determining the amount to be paid—threatens to “squeeze the juice” out of the proposal and forfeit much of its moral stature. Alternatives like apology, cultural compensation, and simple factual accounting are frequently downgraded as lacking the “seriousness” of reparations or constituting a merely intermediate stage in its path. Again, none of the issues discussed thus far are indicative that reparations are wrong, but the time has come to update the arguments in accordance with current realities.

III. Mass incarceration and the problem of continuing harm

In the past two years, racial dialogue has been dominated by a series of violent events involving African-American victims. The highest profile of these instances involved a series of killings of unarmed black men by police, including Michael Brown, Eric Garner, Tamir Rice or by neighborhood watch security guards, like Trayvon Martin, all in situations where the danger posed to the victims was at very least subject to questioning. These events were followed by the

killing of nine unarmed victims by a young white supremacist in Charleston, South Carolina, an event which triggered the removal of the Confederate flag from the South Carolina and Alabama state houses and sprung a national debate on Confederate symbols in general. Many observers suggested that these were not random events, but rather a part of a pattern of white violence against African-American citizens.

Some observers have suggested that police violence is not merely systematic in nature, but represents a continuation of patterns established in the slavery and Jim Crow eras. In her book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander argues that the mass incarceration of African-American males, which originated in the 1980s-era “war on drugs,” has numerous characteristics in common with the Jim Crow era. Commonalties include the criminalization and incarceration of a substantial portion of the black community (especially young black males), the use of discriminatory legislation and enforcement tactics so that African-Americans are disproportionately punished for broader societal ills, and the creation of a racial caste system between both whites and blacks and, to some degree, within the black community.

Alexander strongly suggests that this pattern is not accidental, but part of an intentional strategy of subjugating African-Americans following the early successes of the Civil Rights movement. Alexander is especially hard on white liberals, noting that President Clinton signed legislation resulting in a record number of incarcerations, and (to an only slightly lesser degree) the black middle class, whom she suggests have effectively abandoned poor blacks in pursuit of other goals.²⁷ Alexander’s book created a huge sensation, drawing descriptions like s “explosive,” “devastating,” and “classic.” The book is not without its critics—one reviewer asserted, *inter alia*, that it misstated the historical origins of mass incarceration, ignored class distinctions, and overlooked the experience of other minority groups—but even these critics are unable to deny the book’s intellec-

27. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* NEW PRESS (2010).

tual impact, including the book's ability to frame the debate on criminal punishment, particularly as related to drug crimes.²⁸

Moving from law to sociology is Alice Goffman's book, *On the Run: Fugitive Life in an American City*. Goffman, a white sociologist, spent the better part of a decade living in a poor black neighborhood of Philadelphia while describing what she saw. She focused on a group of young black men ("The Sixth Street Boys") whose principle rites of passage centered around arrests, trial dates, and parole hearings rather than graduations, parties, proms, and similar events usually associated with growing up. While not idealizing her subjects—several were involved in robberies, shootouts, or other violent crimes—Goffman suggests that a significant percentage of the Sixth Street Boys legal problems arose from essentially procedural offenses (minor parole violations, failure to make court dates, etc.) or other behaviors like schoolyard fights and possession of small quantities of controlled substances. Offenses, she argues, that would almost certainly go unpunished in a white, suburban environment.

Goffman's book also describes a pattern of police harassment and violence against inner-city residents that frequently crossed the line from law enforcement procedure and protocol to something more reminiscent of an occupation force.²⁹ In a TED talk delivered after the book's publication, Goffman suggests that the criminal justice system has become a sort of alternative educational system for a substantial minority of the population, with predictably dire consequences.³⁰

Alexander's and Goffman's arguments have a contradictory effect on the reparations debate. On one hand, the mass incarceration

28. See, JAMES FORMAN, JR., RACIAL CRITIQUES OF MASS INCARCERATION: BEYOND THE NEW JIM CROW, 87 N.Y.U. L. REV. 101 (2012) (book review).

29. GOFFMAN, *supra* note 2.

30. See generally GIDEON LEWIS-KRAUSS, THE TRIALS OF ALICE GOFFMAN, N.Y. TIMES MAGAZINE, (Jan. 17, 2016). The principal criticisms appear to be that the author became too emotionally close to her subjects and too credulous regarding their assertions of police misconduct; one reviewer went so far as to suggest that she had committed a felony by accompanying one of her subjects on a car ride with the intent of taking revenge for another subject's murder. My instinct is that her real crime was admitting that she, an upscale white woman, had feelings for one or more poor African-American males—something no less threatening to liberal whites than to law-and-order conservatives, and perhaps more so—but I am not a sociologist and I am in no position to judge her.

phenomenon suggests the continuing absence of racial equality and supports the case for compensation. For example, Ta-Nehisi Coates, in his Atlantic article, refers repeatedly to ongoing injustices in making the moral argument for a reparations program. These injustices include not only mass incarceration and police violence, but numerous other forms of economic, social, and cultural discrimination.

The continuing nature of discrimination, however, complicates the issue in many ways. Reparation payments are based on the assumption of a measurable wrong at some identifiable point in the past for which the victim is to receive compensation. If the wrong continues to accumulate while payments are made, it is at the very least more difficult to determine the amount of the payments, and at its worst actively hypocritical to do since the perpetrators would be compensating wrongful behavior in the past while continuing to engage in the same or similar conduct simultaneously. Of course, reparation advocates don't intend for this to occur, instead they wish to end wrongful behavior and pay compensation concurrently. But this is asking for a great deal, very quickly. It would seem a higher priority to end current mistreatment rather than to compensate past wrongs, a situation that may account for the tepid support the reparation movement has received in the African-American community.

Continuing injustice also has troublesome political implications. Most Americans are probably willing to admit that slavery, Jim Crow, and other manifestations of outright segregation were unjustified. However, Alexander and Goffman are asking them to admit that the current generation of Americans—i.e., the same people who would make reparation payments—are themselves guilty of oppression and not much better, and in some cases worse, than previous generations. That's one reason that people have attacked them so forcefully. For good measure, they are suggesting—Alexander explicitly, Goffman by implication—that white liberals and the black middle class are, to a significant degree, complicit in the problem. This suggests that a long and difficult debate will be required to solve the problem, and that reparations may not be the only or even the best solution.

IV. Restorative justice and the South African model

The factors that complicate reparations in the United States—continuing discrimination, legal and political resistance, problems in identifying victims and computing correct payments—are by no means limited to this country. To some degree, they arise in all cases that involve major human rights violations and subsequent demands for compensation. There is also a widespread sentiment that traditional legal remedies—criminal prosecution, restitution of lost or stolen property, and reparations for broader economic losses—are inadequate to the task of compensating such vast losses. In particular, there is a concern that traditional remedies provide only a limited role for the victims and their families, and make political reconciliation and emotional “closure” more difficult than they ought to be.

Given these limitations, and the practical difficulty in pursuing traditional remedies, the concept of restorative justice has gained traction in human rights circles. As compared to traditional remedies, which emphasize the search for truth, restorative justice stresses the role of the victims and the importance of an encounter between victim and perpetrator, in an effort to repair the harm caused by the behavior in question. In practice, this requires the utilization of alternate methods, such as a formal apology, truth or fact-finding commissions, educational and cultural programs as a substitute or (in some cases) a supplement to standard legal procedures. Restorative justice originated as a theory of domestic criminal law, but it has found especially fertile ground in the human rights arena for the reasons described above.³¹

One of the leading theorists of restorative justice, particularly at the international level, is Elazar Barkan, who has addressed the issue in a number of works over the past fifteen years. In *The Guilt of Nations: Restitution and Negotiating Historical Injustices* Barkan argues that restitution for large-scale human rights violations (note that he

31. The literature on restorative justice is large and growing, although the number of influential texts remains small. *Supra* note 19-23. The term “transitional justice” is often used together with restorative justice but it has a more specific meaning, referring to judicial or other proceedings following a change in governments and/or major historical wrongs: transitional remedies are often restorative in nature but may not always be so. *See generally* RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000), *See also* *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz ed., 1995).

never uses the term “restoration”) should be understood to include apology and other non-monetary compensation as well as traditional legal measures.

Barkan further argues that this approach is both practical and philosophically appropriate, given the broader transition from an individualistic, modern consciousness to a more group-oriented, post-modern worldview.³² In a later collection, *Taking Wrongs Seriously: Apologies and Reconciliation* Barkan and his co-editor, Alexander Karn, present a collection of case studies ranging from Vichy, France to Australia, evaluating the successes and failures of the apology approach. Interestingly, the collection includes at least one case (Abu Ghraib) in which there has been no apology and considers what the consequences of that refusal might be.³³

Another important contributor is Gerry Johnstone, an English law professor whose two collections, *A Handbook of Redistributive Justice*, co-edited with Daniel W. Van Ness, and *A Restorative Justice Reader*, have served as important source materials for the restorative justice movement. Johnstone is concerned with restorative justice in a domestic criminal law context as well as for major atrocities. Johnstone sees it as a new paradigm—“repair” rather than “revenge,” as one selection puts it—rather than a fallback when traditional remedies fail. The emphasis on victim participation and dialogue between perpetrators and victims, as well as the effort to restore wrongly acquired property, are constant themes in Johnstone’s work.³⁴

Martha Minow, a law professor and later Dean of Harvard Law School, approaches the subject with a more nuanced view. Minow’s book, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, evaluates a range of responses to atrocity including trials, truth commissions, and financial reparations, ar-

32. ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* W.W NORTON, INC. (2000) (hereinafter *Barkan I*).

33. ELAZAR BARKAN & ALEXANDER KARN, *TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION* W.W. NORTON, INC. (2006) (hereinafter *Barkan II*).

34. GERRY JOHNSTONE & DAVID W. VAN NESS (eds.), *A HANDBOOK OF RESTORATIVE JUSTICE* WILLIAN PUBLISHING (2007); (Gerry Johnstone ed., 2006), *A RESTORATIVE JUSTICE READER* WILLIAN PUBLISHING (2d ed. 2013).

guing that various combinations of these responses may be appropriate in different circumstances.³⁵

Minow suggests considering a number of factors, including: the population distribution in the country in question the length of time since the atrocity took place, the role of international organizations, and whether the regime that perpetrated the injustice remains in power or has been replaced by a different government. Interestingly, Minow considers commemorations and other displays of public memory such as museums and monuments as part of the reconciliation process along with more conventional remedies, using the American Civil War (and in particular the treatment of Black Union soldiers) as an example.³⁶

The restorative justice movement has also touched the slavery reparations debate, most prominently in the work of Roy L Brooks, whose book *“Atonement and Forgiveness: A New Model for Black Reparations”* proposes a mixture of apology, reconciliation, and more traditional remedies as a means of providing redress to Black Americans. While viewing reparations as a moral imperative, Brooks is willing to consider a mix of remedies both for practical reasons and to encourage an ongoing discussion among the affected groups. An earlier collection edited by Brooks, with the provocative title *“When Sorry Isn’t Enough,”* addressed the issue of non-economic compensation in a variety of historical contexts.³⁷

Everyone’s favorite example of restorative justice is South Africa, which empaneled the so-called Truth and Reconciliation Commission (TRC) to deal with the transition from apartheid to post-apartheid eras. The essential concept of the TRC was that, in return for accurate and complete testimony regarding the abuses of the

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35. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* BEACON PRESS (1998). The author picks up on similar themes, including additional historical studies in: *BREAKING THE CYCLES OF HATRED: MEMORY LAW AND REPAIR* (Martha Minow & Nancy L. Rosenblum eds., 2002).
 36. *Id.* at 118-48. *See also*, DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* KNOPF (2001) This text provides an extensive discussion of the role of monuments in constructing historical memory.
 37. Roy L. Brooks (ed.), *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (1999). *See also*, ROY L. BROOKS, *ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS* (2004).

apartheid era, the perpetrators would be granted amnesty from criminal prosecution. This system was intended to emphasize national reconciliation rather than vengeance and, not entirely coincidentally, provide the victims of apartheid with an active, prominent role that might have been missing in a more conventional approach.³⁸

The South African example was indeed inspiring, and the TRC functioned better than many observers expected. But the example is more ambiguous than it first appears. For one thing, the goals of “truth” and reconciliation are often conflicted: the very name of the commission was a compromise between two conflicting and at times contradictory objectives. A number of victims and the families of murdered victims were left unconvinced that justice had been done, all while some of the more flagrant perpetrators refused to cooperate with the commission.³⁹

Second, the TRC was only one part—albeit an important part—of the South African transition. The central goal of the transition was, of course, the unfettered end of apartheid itself, and the institution of a new political system designed to prevent its recurrence. For example, the new constitution enshrined the right of affirmative action as a way of undoing part of the damage of the apartheid era. South Africans, however, are still debating whether these changes were sufficient, and whether some form of reparations should be paid to the victims of apartheid, as well.⁴⁰

Finally, to the extent the TRC did succeed, the special features of South Africa must be taken into account. These features include: the Mandela Government, which emphasized reconciliation over revenge, the economic structure of the country, which made it imperative to ensure a minimum of good will in the white population, and the nearly universal discrediting of apartheid, both within the country and in the world at large. Truth commissions and similar approaches

38. Transcripts of TRC Proceedings (2009) <http://www.justice.gov.za/trc/>.

39. For an evaluation of the TRC *see, e.g.*, ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* (2001); RICHARD A. WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (2001).

40. The South African Constitution, like that of India, includes a section specifically allowing affirmative action to address the consequences of past injustice. S.AFR. CONST. 1996, s. 9.

have been attempted in a number of other locations, most recently in Canada, with largely mixed results.⁴¹

One reason some Americans like the South African parallel is that it appears to be dealing with the same issue, i.e. racial segregation, which they face at home. Like similar comparisons, this ideal is only partially true. While there are many common features between South African apartheid and the segregation of black and white Americans, there are also substantial differences. Perhaps the most insurmountable difference is the question of continuity. Since at least 1865, there are no events in the American experience to compare with the collapse of apartheid and its replacement of a new political system. Americans, or in any event, white Americans, are more likely than South Africans to believe that their racial problems can be solved by the existing political and legal process without so called extraordinary measures, like special commissions or reparations. For their part, blacks may be suspicious that talk of reconciliation is a scapegoat for substantive inaction. This does not mean there is nothing to be learned from South Africa; only that one must be careful about applying the South Africa's lessons to a uniquely different situation.

V. Alien but familiar: accounting for the “excesses” of Stalin and Mao

The preceding sections suggest that foreign precedents must be approached with care. The European Holocaust, perpetrated under Nazi Germany's regime was defeated, occupied, and thoroughly discredited on a political and ideological level. Similarly, South Africa's apartheid ultimately resulted in a peaceful transition, but the apartheid regime has become an international pariah and ideologically exhausted. By contrast, the United States remains a strong, independent country with a great deal (some might say too much of) pride and rhetoric of innocence regarding racial issues. It is inherently difficult for many Americans to accept that their behavior has much in common with that of pariah nations. One can finesse this issue by noting that the Confederacy was defeated and occupied, but this de-

41. See *CALLING POWER TO ACCOUNT: LAW, REPARATIONS, AND THE CHINESE CANADIAN HEAD TAX CASE* (Mayo Moran & David Dyzenhaus eds., 2005).

duction is a bit too clever. The Southern states were quickly readmitted to the Union after the end of the Civil War, and racism has long been recognized as a national problem in the United States.

One interesting if unhappy precedent comes from a somewhat unlikely source. When the Soviet Union experienced glasnost and perestroika in the late '80s and early '90s, Russian citizens learned what many foreigners already knew: the country had experienced massive human rights catastrophes during the period of Joseph Stalin's rule (1924-1953) and to a significant degree before and after. These atrocities included the death of at least five million people in the artificial famines, accompanying the forced collectivization of agriculture (1929-1933); several million more deaths in the so-called Great Purge (1936-38); and numerous others in the vast gulag (prison) system, culminating in the death of nearly fifteen million people. What, if anything, should be done to compensate Russian citizens, or at least account for their losses?

The most systematic description of Stalin's crimes is detailed in two books by Robert Conquest, *The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine* (1986) and *The Great Terror: Stalin's Purge of the Thirties*, which was originally published in 1968, and substantially revised in a 40th anniversary edition, *The Great Terror: A Reassessment in 1990*, that includes a lengthy new forward in 2007. These books are significant because they establish, beyond a reasonable doubt, two points. One, that a vast number of human beings, almost certainly more than 10 million, were killed in one manner or another. Secondly, Stalin had direct personal knowledge that the events occurred, and either continued the relevant policy anyway (in the case of the famine) or continued to seek out more victims (in the case of the Great Purge).

The 1990 and 2008 editions of *The Great Terror* are integral because a substantial number of new archives have been opened in the period since the original edition was published. Not only do these new materials support Conquest's thesis, but some cases suggest that circumstances were even worse than the author had presented. A rather feisty character and distinguished poet, Conquest died recently at 98. Conquest, not bashful about pointing out his opponents' errors, expressed in the preface to the 40th Anniversary Edition of his book, that an alternate title for the book might have been: "*I told you so*,

you . . . fools!” although he subsequently admitted that this was not his own idea.⁴²

Conquest is not alone in addressing the Stalin era, and there continues to be extensive debate regarding the purges and other matters, although the degree of the tragedy is no longer in serious doubt. The most recent articulation is Stephen Kotkin’s book, *Stalin*, a three-volume set of which the first volume, *Paradoxes of Power: 1878-1928*, was published in 2014. Kotkin’s book covers only the first part of Stalin’s career, ending with the onset of collectivization. However, the book is significant because it makes clear the author’s belief that Stalin’s policies cannot be attributed solely to personality flaws, but resulted in large part from ideology. The book also argues that Stalin’s policies were different in degree, but not in nature, from policies pursued by Lenin and other Soviet leaders before Stalin came to power. Indeed, in perhaps his most noteworthy chapter, Kotkin argues that Lenin’s supposed testament, in which he noted Stalin’s extreme tendencies and warned against making him leader, may have been a forgery and was, in any case, not indicative of the author’s actual views. This point, and the broader continuity of Soviet policy, both before and after the Stalin era, is enormously important for his historical legacy, as we will observe.⁴³

During the Khrushchev period (1953-1964), and more extensively the Gorbachev period (1985-1991), the excesses of the Stalin Era began to come to light, although there was a strong tendency to attribute these to Stalin’s personal flaws--the so-called “cult of personality”—rather than to the underlying political system or to Lenin, who remained unassailable in the Soviet world. In progressive cir-

42. See generally ROBERT CONQUEST, *THE HARVEST OF SORROW: SOVIET COLLECTIVIZATION AND THE TERROR-FAMINE* (1986); ROBERT CONQUEST, *THE GREAT TERROR: STALIN’S PURGE OF THE THIRTIES* (1968); ROBERT CONQUEST, *THE GREAT TERROR: A REASSESSMENT* (40th Anniversary Ed. 2007). For a recent work discussing Hitler and Stalin in a comparative perspective, see TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* (2010). For an alternate view of the purges, savaged by Conquest in his later editions, see J. ARCH GETTY, *ORIGINS OF THE GREAT PURGES: THE SOVIET COMMUNIST PARTY RECONSIDERED, 1933-1938* (1987).

43. STEPHEN KOTKIN, *STALIN (VOLUME I): PARADOXES OF POWER, 1878-1928* (2014). Kotkin, who it seems fair to call a prolific scholar, has also published an in-depth study of Stalinism as experienced in one city and a book on the collapse of Soviet communism a generation after Stalin’s death. STEPHEN KOTKIN, *MAGNETIC MOUNTAIN: STALINISM AS A CIVILIZATION* (1995); STEPHEN KOTKIN, *ARMAGEDDON AVERTED: THE SOVIET COLLAPSE, 1970-2000* (2001).

cles, there was a feeling that some type of amends should be made, a feeling which became stronger after the Soviet Union collapsed in 1991 and even more evidence became available. But what form should these amends take—reparations, apology, a full historical accounting--and how could they take place at all without calling in to question the legitimacy of the Soviet Union or Russia as its successor thereafter?

The Russian story is not a happy one, and provides a sober counterpoint to the South African experience. In Russia, a Law on the Rehabilitation of Victims of Political Repression was passed in 1991, including limited reparation provisions, followed by the so-called trial of the Communist Party, which in theory found the party to be a criminal organization and barred its re-constitution in the Russian Federation. These official activities were supplemented by the work of Memorial and other NGOs, whom gathered evidence, constructed memorials, and generally attempted to bring the issue to the forefront of political consciousness. Following the ascension to power of Vladimir Putin, however, these efforts were slowed or abandoned: indeed, there has been legal, political, and at times physical pressure placed on Memorial to discontinue its activities, frequently coupled with the assertion that critics of the regime are collaborating with the country's enemies. A narrative has emerged—or perhaps re-emerged—that the excesses, if any, of previous eras were a necessary step in the emergence of the Soviet Union as a world power, and questioning this narrative has, in recent years, been tantamount to treason.⁴⁴

It must be emphasized that Russia is hardly alone in its reticence regarding past abuses. China, which in theory remains a Communist state, has been less than forthcoming. Thus, while there have been scattered apologies for individual behavior during the period of the Cultural Revolution (*wen hua da ge ming*) (1966-1976) and, to a lesser extent, Great Leap Forward (*da yue jin*) (1958-1961), there has been no public acknowledgment of responsibility, let alone an apology, compensation, or similar behavior, elicited from the Chinese government. Indeed, under Xi Jinping, China appears to be moving in a more authoritarian direction, with nationalism on the upswing and the cult of Mao Zedong remaining vibrant at the popular

44. See *Infra* note 46.

level. This is notwithstanding an estimated 20 million plus deaths during the Great Leap Forward and the near-total destruction of society in the Cultural Revolution period. While it is possible that the future will bring a change in attitudes, there is little sign of change as of now.

The Russian and Chinese experiences suggest there is nothing inevitable about a country confronting the more painful aspects of its history. In addition, the Russian case illustrates that efforts to do so may indeed provoke a reaction that pushes the country in an opposite direction. This is especially true when such efforts are made without a secure political foundation and a broad consensus that an accounting is justified. To be sure, the undemocratic nature of the Putin and Xi Governments, and the unique features of Russia and China generally, make any comparison difficult. It is perhaps best to think of these examples, not as precluding the possibility of restorative justice or some other form of justice, but as cautionary tales suggesting one should proceed carefully in its obtainment.

VI. Reparation and Restoration: Applying the Lessons of History in a Domestic Context

Applying the lessons of history is always a risky business. In the pages above, we can find examples of traditional justice (the early approach to the Holocaust), restorative justice (South Africa), and a mix of the two approaches (as in Rwanda or some of the more recent Holocaust initiatives). We can also find examples, like post-Soviet Russia, where no effort, as of yet, has succeeded, at all. Some scholars consider the problem of transitional justice following regime changes to constitute its own separate subject matter, although others have cast doubt on this approach.

While it is difficult to learn from history, it is not impossible. Three lessons in particular stand out from this study. They concern, in no particular order, (i) the uncertain boundary between traditional and restorative justice, (ii) the need to design remedies that are appropriate for the country and people concerned, and (iii) the necessity of political consensus for any approach to succeed. Together they point in a different direction than that identified by most previous scholars. I consider these items in turn.

VII. Traditional and restorative justice: an uncertain boundary.

While scholars like to classify different procedures, in practice there is no clear line between restorative justice and other more traditional modes. The Holocaust is perhaps the best example of this phenomenon. While the Nuremberg and Eichmann Trials were an example of traditional, retributive justice, the Holocaust has also given rise to numerous apologies, truth, or fact-finding commissions (notably in France and Italy), and cultural activities, (museums, educational programs, etc.) that suggest a restorative approach.

South Africa, while emphasizing restoration, is also debating the payment of reparations, a more traditional remedy. The very name of the South African commission appears to have been a compromise between those who wished to emphasize truth (a more traditional objective) and those preferring reconciliation (a largely restorative aspect). Reparations themselves have a compensatory but also restorative aspect, particularly when they take the form of credits which encourage contacts between the perpetrator and victim groups.

Although there is no clear line between remedies, there is a difference in emphasis. Thus, allowing for some inevitable overlap, it seems fair to say that certain countries, including but not limited to, South Africa lean toward a restorative approach, while others emphasize traditional remedies. From this perspective, it is interesting that the American debate has, with notable exceptions, taken a by and large traditional approach, with both sides assuming that the alternatives are payment or non-payment of reparations, rather than a third, restorative alternative. The debate has similarly emphasized a rhetoric of guilt and innocence—the kind one would expect in a criminal trial or a civil tort litigation—rather than an effort to find common ground between the two parties. Of course, there have been numerous efforts to improve race relations outside the reparations context: affirmative action/diversity efforts are one, although by no means the only example. But it is noteworthy that the American discussion, rhetorically speaking, remains frozen in a rather traditional matrix; this may account in part for the failure of the reparations movement to achieve more than it has thus far.

VIII. The need to design fact-specific remedies

If different countries have taken opposing approaches to the reparations problem, this results not only from philosophical differences, but contrasting fact situations. The Holocaust involved a defeated power (Nazi Germany) that had been defeated, at least in part, because of its habit of launching aggressive wars and murdering substantial parts of neighboring populations. The Jews constituted a minority, although by no means an insignificant minority, of the country's victims. This situation plainly called for the punishment of at least the top Nazi officials, and the payment of some kind of indemnity before restorative measures could be contemplated. By contrast, South Africa involved a negotiated transfer of power from the white minority to the majority population, which might not have been possible had the former been treated in the manner of a defeated adversary rather than a political partner. Although the choices made were by no means inevitable, these situations plainly called for two different approaches.

Historical situations diverge, not only in political circumstances, but in their susceptibility to legal remedies. The internment of Japanese Americans during World War II was an unquestioned outrage, which almost no one would justify today. But by the 1980s the outrage quelled, and people of Japanese descent were reasonably well integrated into American society. In this situation, the payment of reparations, coupled with a sincere if rather belated apology, was an acceptable and a bittersweet solution for both sides.⁴⁵ By contrast, the mistreatment of African-Americans—somewhat akin to the repression of dissident groups in the Soviet Union or China—is an ongoing phenomenon that, many believe, is inherent in the country's present day institutions and behavior patterns. This latter situation is

45. For an overall history of the Japanese-American internments *see* RICHARD REEVES, *INFAMY: THE SHOCKING STORY OF THE JAPANESE AMERICAN INTERNMENT IN WORLD WAR II* (2015). For a scholarly treatment of the internment and the (much later) reparations process, *see* ERIC K. YAMAMOTO AND MARGARET CHON, *RACE RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICA INTERNMENT* (2001). The pain inflicted by the internment of Japanese Americans never really touched the author until—on a visit to the Museum of Tolerance—he chanced upon a coffee shop in West Los Angeles in a neighborhood that was obviously different from those surrounding it. A walk around the block revealed a large number of Japanese-American historical references but relatively few current Japanese residents. It didn't take long to figure out what had happened.

more difficult to resolve with a one-time monetary payment, or at very least requires a long and painful discussion before such a payment can be made.

There is a perverse element here, in that traditional legal remedies are most effective when an offense is securely in the past and the government or institutions that put it into effect are no longer in existence. Yet this is an unavoidable tension in the reparations problem and perhaps law itself. We will have occasion to revisit this issue in our concluding section.

IX. The necessity of political consensus

Perhaps the most transparent lesson of this study is the need for broad political agreement before embarking upon remedies, restorative or otherwise, for human rights abuses. This is especially true when the abuse complained of is of a recent or continuing nature and there is no substantial discontinuity—military defeat, change of regime, etc.—in governing structures. If there was a mistake in Russia, it consisted in advancing an agenda of rehabilitation, reparation, and apology before the larger population had come to recognize the evils in the country's past and its own complicity in them. A similar line separates the Federal Republic of Germany, which has for three generations tried to educate its citizens regarding the country's responsibility for the Holocaust and World War II. This is unlike other regions like Austria, the former East Germany, and arguably Japan whom have made less substantial efforts in this area. Not surprisingly, reparations or other remedies proved more difficult to achieve in the aforementioned regions.

X. Proposals and Recommendations

How does the U.S fit into the matrix set out above? The American debate has gone on for more than a generation and, with a few exceptions, has been conducted in traditional, rather than restorative, terms. The harm to African-Americans appears to be of an ongoing nature, although it is arguably less intense than in the slavery or Jim Crow eras. There is little political consensus regarding reparation payments, and it is possible that the two sides are diverging rather than converging, a situation compounded by the ongoing polarization

of the broader political system, both within and between the two major United States political parties.

These factors suggest that the U.S. could benefit, at least in the short term by shifting from a retributive approach to a more restorative approach. Undertaking this shift is a difficult proposition, outlined below.

XI. Suggestions

First, Congress and the President should convene a blue-ribbon commission, involving prominent figures, and having appropriate subpoena powers, to create an official, systematic record of harm done to African-Americans by slavery, Jim Crow, and subsequent discrimination and publish that record as an official document. Like the Truth and Reconciliation Commission in South Africa, the goal of this commission would be not to punish individuals or to impose financial penalties, but to create a full and complete factual record that precludes anyone in the future from denying that these events took place. The role of national institutions—banks, commercial enterprises, the Federal Government itself and the questions of continuing, as well as, past harm would be a specific focus of these hearings. The national commission would, ideally, be paralleled by smaller commissions that would conduct equivalent work in all fifty states, using the work of the national commission as a starting point.

Second, upon completion of its work, the commission should issue an unconditional apology for slavery and subsequent discrimination against African-Americans. Apologies of this nature are easy to minimize, but they carry significant moral weight and are frequently a prerequisite for more substantive steps. The United States Congress passed a resolution apologizing for slavery in 2009⁴⁶, but it received very little attention and it was not accompanied by any substantive actions.

Finally, upon completion of its work, the commission should recommend specific actions designed to compensate African-Americans for past injustices and prevent their recurrence in the future. Initially these might emphasize educational and cultural activities,

46. *Senate Apology For Slavery Gets Mixed Reaction*, NPR, (June 24, 2009), <http://www.npr.org/templates/story/story.php?storyId=105850676>.

such as a national curriculum on the accurate history of slavery and discrimination, or more funds allocated to African-American museums and Historically Black Colleges and Universities (“HBCU’s”). Activities like this have been undertaken in the past, but usually on a state or local level as opposed to the national stage, and rarely with this sort of official sanction.

At a later stage the commission’s recommendations might include some form of symbolic reparations, payable either to individual African-Americans or (more likely) to representative community institutions, as a way of closing the book on slavery and signifying a commitment that neither slavery nor its moral equivalent will return. Issues like affirmative action or government set-asides might also be raised, although these would require separate legislation at a federal or state level, and because reparation/restitution is only one of many arguments to be made. As with all legislation, those who oppose, as well as those who support them would be afforded a chance to testify. But all this would come at the end of the process rather than the beginning, and only at such point, if any, at which a national consensus had been created regarding the validity of such activities and the historical record that supported them. This is the inverse of the current situation, in which specific proposals are debated in the absence of a genuine political and moral consensus and a situation that foreign experience teaches us is a recipe for failure.

I recognize that this proposal is likely to satisfy no one: too little for those who want immediate reparations, and too much for those who oppose them. But proposals must be evaluated against the background of likely alternatives. Right now, the reparations debate is stalled in the first gear, generating controversy rather than conversation and increasingly distant from the reality of present-day race relations. A restorative approach is both more consistent with the experience of comparable countries and, in my judgment, more likely to achieve success than the current approach. Even if it does not succeed, the process I have suggested will set the table for a candid conversation to take place. The alternative of continued litigation—literally in the courts and metaphorically in the wider political arena—becomes less appealing each day.

Lawyers like to argue, and we do it very well. Every once in a while, someone has to step back and admit that an issue cannot be resolved by progressively cleverer arguments and that a conversation, rather than a debate, is what’s needed. This issue is one of those

times. The conversation has to come sooner or later. If not now, when?