Statement on International Frameworks for Redressing Past Atrocities

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Part I.

Introduction

The poet Robert Burns famously wrote during the Enlightenment in 1784: "Man's inhumanity to man makes countless thousands mourn." Burns was looking back over centuries of human injustices as the basis for his observation. But even now, long after the Enlightenment, we have not been able to reverse our proclivity to commit human injustices. Perhaps the only thing that has significantly changed through the centuries is the human capacity to offer some form of redress for past atrocities.

This capacity for redress did not, however, manifest itself until after the Second World War. In 1952, the global community was still staggering with intense fear, shock, dismay, and disgust from its discovery of the Holocaust at the end of the global conflict. Konrad Hermann Joseph Adenauer, the first chancellor of the Federal Republic of Germany, declared to the world: "In our name, unspeakable crimes have been committed and demand compensation and restitution, both moral and material, for the persons and properties of the Jews who have been so seriously harmed."[1] Significantly, Adenauer was speaking not just for himself personally, but on behalf of the German state—the people, laws, institutions, and culture of Germany.[2] A full length statute of Adenauer stands beside that of Eisenhower, Churchill, and De Gaulle in the Nixon Presidential Library as Adenauer was one of the big four world leaders who shaped international relations in the West in the decades after the Second World War.

[1] This quotation is taken from a report by the United States Department of Justice Foreign Claims Settlement Commission, *German Compensation for National Socialist Crimes*, *in* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks ed., 1999), at 61 [hereinafter WHEN SORRY ISN'T ENOUGH].
[2] *See id.*

The critical point to see here is that Adenauer's proclamation set the tone or attitude about international redress that still resonates with scholars, public officials, and activists today. This is a spirit—a post-Holocaust spirit—of heighten morality, egalitarianism, identity, and restorative justice. *Identity* is the key word. It means that the perpetrator of the atrocity has come to see its victims as its human equal for the very first time. How is it that a German officer (a human being) can make another human stand in the snow, cold and freezing, for half the night and through the entire next day? How is it that Japanese soldiers can throw newborn Chinese babies in the air and catch them at the end of their bayonets or slam the babies' heads against a brick wall? How is it that freedom-loving Americans can deny freedom to blacks for 2 1/4 centuries or intern patriotic Japanese Americans? It is because the perpetrator sees its victims as sub-human, not the perpetrator's equal. Adenauer's post-Holocaust vison greatly informs the International Redress Movement that came into existence in the years after the post-World War II Era.

Part II.

International Redress Movement (IRM)

Two broad strategies of redress give shape to IRM: criminal redress and civil redress. Criminal redress seeks, in the main, retributive justice in the form of state prosecution of crimes under both domestic and international law. Individual perpetrators are fined, imprisoned, or executed.[3] Civil redress, in contrast, works to the material benefit of the victims. It is an avenue

[3] Explaining international criminal law, Professors Beth Van Schaack and Ronald Slye, write:

> International criminal law imposes criminal responsibility on individuals for certain violations of public international law. The legal norms within international criminal law share several characteristics. First, offenses against this body of law are criminalized at the international level, although they may also find expression in domestic penal codes. Second, these violations give rise to individual *criminal* liability. At the same time, they may also generate state and individual *civil* (tort) responsibility such that violations may generate parallel proceedings against different classes of defendant/respondent under different theories of liability. In this way, international criminal law encompasses parts of both international humanitarian law (also called

for private redress.[4] Civil redress is the centerpiece of the IRM, and, therefore, the focal point of this statement.

Keeping in mind that most past atrocities were legal at the time of their occurrence, civil redress can be effectuated in a variety of ways. The most common ways (referred to as the forms of redress) are *truth commissions, truth trials, apologies*, and *reparations*. These forms of redress can be implemented through the *tort model* or the *atonement model*.

A. Truth Commissions and Truth Trials

Truth commissions and truth trials are relatively straightforward forms of civil redress models. Each seeks to get at the truth of the atrocity; clarify the historical record. South Africa and Sierra Leone employed truth commissions in their redress regimes. Argentina used both truth commissions and truth trials.

> the "law of war") and international human rights law, but transcends both. Third, international criminal law violations are prosecuted before international penal tribunals, such as the *ad hoc* war crimes tribunals created by the United Nations and the permanent International Criminal Court. At the same time, these violations are increasingly prosecuted before domestic courts under various jurisdictional principles, many of which accord domestic courts an expansive extraterritorial reach. And, fourth, international criminal law violations may trigger state obligations to prosecute offenders under treaty law and, some would argue, customary international law. Much of modern international criminal law is found in treaties and the burgeoning jurisprudence of the modern war crimes tribunals. The field also borrows heavily from the basic principles of domestic criminal law, at times sampling from, blending, and reconciling the civil law and common law penal traditions.

BETH VAN SCHAACK AND RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 1-2 (2007) [hereinafter INTERNATIONAL CRIMINAL LAW]. The Nuremberg and Tokyo war crime trials at the end of the Second World War may be the best known, certainly the prototypical, implementations of criminal redress. Since then, a number of international tribunals have been established to prosecute the perpetrators of past atrocities. The International Court of Justice (ICJ) has jurisdiction over all matters specifically provided for in conventions, such as the Convention on the Prevention and Punishment of Crimes of Genocide. or customary international law. Members of the United Nations are de facto signatories to the ICJ Statute and, hence, may refer cases to the ICJ. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810, at 174 (Dec. 9, 1948); The Statute of the International Court of Justice, U.N. Charter art. 110, para. 3. The Statute can also be found at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0. See Lucas Bastin, *International law and the International Court of Justice decision in Jurisdictional Immunities of the State*, 13 Melb. U. Int'l. L.J. 774 (2012).

[4] *See* INTERNATIONAL CRIMINAL LAW *supra* note 3 at 1. See, e.g., WILLIAM DARITY JR. AND A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY (2020); ALFRED L. BROPHY, REPARATIONS PRO & CON (2006); TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION (Elazar Barkan& Alexander Karn eds., 2006).

In many ways, the South African Truth and Reconciliation Commission (TRC) set the standard for the use of the truth commission. Two centuries of colonization culminated in the formation of the racially exclusive Union of South Africa in 1948.[5] The National Party (NP) came to power in that year.[6] Between 1948 and 1960, the NP enacted legislation (Apartheid) that gave current meaning to a tradition of racial segregation and discrimination.[7] In 1994, after decades of internal protest and international condemnation (including economic boycotts and exclusion from Olympic participation), the people of South Africa ended Apartheid.[8] They elected Nelson Mandela president in their first open election.[9] Mandela was not only black, but having spent 27 years incarcerated as a political prisoner, he had become the symbol of resistance to Apartheid.[10] He became head of a once-banned political party, the African National Congress (ANC).[11]

Nelson Mandela's election marked the beginning of a period of transition in South Africa. The government, but not all the country's citizens, expressed a deep desire to apologize for Apartheid and to move from a regime of racial oppression and exclusion to one of racial reconciliation and democratic process.[12] Racial reconciliation—or what is simply called "reconciliation" by South Africans—became a political imperative that drove the redress movement in South Africa.[13] Once the redress movement transitioned from the outside to the

[5] *African National Congress Statement to the Truth and Reconciliation Commission*, *in* WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 451.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *See* Brooks, *What Price Reconciliation?*, in *id*., at 445.
[13] Reconciliation has produced a unique form of redress: amnesty for the individual oppressors. *See infra*, text accompanying notes 17-19.

inside (from the streets to the government), the government-created Truth and Reconciliation Commission took over.[14]

The TRC had authority to conduct hearings for the purpose of uncovering the truth about Apartheid—who did what to whom and what were the individual and institutional consequences? To encourage individual perpetrators to come forward and speak the truth, the TRC was given a controversial additional power—the power to grant amnesty from criminal and civil prosecution for truth-tellers.[15] Headed by the world-renowned Nobel Laureate and Archbishop of South Africa, Desmond Tutu,[16] the TRC uncovered untold acts of violence and torture that proved useful for two purposes. First, it set he historical record straight. It provided single, authoritative view or understanding about what happened. Second, it established a factual predicate—a rational basis—for the creation of meaningful reparations.[17]

The TRC made the difficult and controversial judgment that it was better to pursue restorative and redistributive justice through a regime of civil redress rather than retributive justice in the form of criminal prosecutions.[18] This determination was manifested in the decision to grant amnesty to individual perpetrators who came before the commission and told the truth about their participation. These individuals escaped both civil and criminal prosecution in response to their honesty. The success of TRC's calculation is still very much unsettled; for, while there has been a meaningful redistribution of political power in South Africa (albeit too

[14] Brooks, *What Price Reconciliation?*, *in* WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 444.
[15] Alexander Boraine, *Alternatives and Adjuncts to Criminal Prosecution* in WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 472-74.
[16] *See* DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS (1999).
[17] Alexander Boraine, *Alternatives and Adjuncts to Criminal Prosecution* in WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 470.
[18] Wihelm Verwoerd, *Justice after Apartheid? Reflections on the South African TRC*, *in* WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 479.

often corrupt), there has not been a significant redistribution of educational and economic opportunities.[19]

Argentina used both a truth commission (the Argentine National Commission on the Disappeared) and truth trials in an attempt to clarify the facts surroundin its atrocity, the so-called "Dirty War" (1976-1983).[20] In this atrocity, Argentina's military government killed, tortured, and arrested thousands of suspected leftist dissidents.[21] Many innocent people, called "the disappeared," simply disappeared, never to be found.[22] Creating a historical record aided in the prosecution of war criminals and in the commission's recommendation of a regime of reparations. These reparations were in the form of economic assistance, educational grants, and employment to the family and relatives of the disappeared.[23] In addition, the commission proposed new laws declaring, *inter alia*, forced abduction a crime against humanity.[24]

Argentina's truth commission failed, however, to respond to a crucial need of the victims—finding out what happened to the disappeared.[25] In response to this deficiency, groups

[19] *See*, e.g., *South Africa's 'toxic' race relations*, BBC, December 18, 2018, https://www.bbc.com/news/world-africa-46071479.
[20] *See*, ARGENTINA COMISION NACIONAL SOBRE LA DESAPARICION DE PERSONAS, NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED; WITH AN INTRODUCTION BY RONALD DWORKIN 446 (1986).
[21] *Id*.
[22] *Id*.
[23] See COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS [COMMISSION ON THE DISAPPEARED], NUNCA MÁS [NEVER AGAIN], translated in: NUNCA MÁS (NEVER AGAIN): THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 446 (1986); Daniel W. Swartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the "Dirty War" in International Law*, 18 EMORY INT'L REV. 317, 333-37 (2004). These are victim-directed (compensatory) reparations in that they are directed toward the victim or the victim's family. For a more detailed discussion of this type of reparation, *see infra* Part IIC.
[24] Swartz, *Rectifying Twenty-Five Years of Material Breach, supra* note 23, at 351. These are community-directed (rehabilitative) reparations in that they are directed toward the victims' community. *See infra*, Part IIC. While the compensatory reparations were largely implemented years after the commission's final report, the rehabilitative reparations were not entirely implemented, although the Argentinean Constitution was amended in 1994 to provide that international law, including crimes against humanity, and treaty obligations trump domestic law. *See*, Swartz, *Rectifying Twenty-Five Years of Material Breach, supra* note 23, at 337.
[25] *See id.* at 333-37.

like the *Madres de Plaza de Mayo* called for the judiciary to initiate truth trials, which it did.[26] In these trials, perpetrators already under the protection of the amnesty laws were forced into court to testify about what they knew about the disappeared.[27] Unlike ordinary criminal trials, Argentina's truth trials were expressly limited to investigation and documentation. There was no possibility either for prosecution or punishment. The trials were based on the right (both of the victims' relatives and of society as a whole) to know the truth, and the right of the relatives to bury and mourn their dead. Argentina's truth trials' record of success is rather spotty. This is because the source of law is rather uncertain and the defendants in these cases (who were mostly government officials) refused to abide by court orders to up documents detailing incidents that took place twenty or more years ago. The appellate courts have generally sided with the defendants.[28]

B. Apologies

Apologies for past atrocities have come from all corners of the world—Britain's Queen Elizabeth apologizing to the Maori people; Australia to the stolen Aboriginal children; the Canadian government to the Canadian-Ukrainians; President Clinton to many groups, including native Hawaiians and African American survivors of the Tuskegee, Alabama syphilis experiment; South Africa's former President F.W. DeKlerk to victims of Apartheid; and Polish, French and

[26] INT'L CTR. FOR TRANSITIONAL JUSTICE, ACCOUNTABILITY IN ARGENTINA: 20 YEARS LATER, TRANSITIONAL JUSTICE MAINTAINS MOMENTUM 4 (2005), *available at* http://ictj.org/sites/default/files/ICTJ-Argentina-Accountability-Case-2005-English.pdf.

[27] *Id*. The writ of *coram nobis* (the decision had been made in error) is similar to truth trials in the United States. The statutory authority for the writ is in the All-Writs Act in the Judicial Code or 28 U. S. C. § 1651. Unlike the *habeas corpus* petition, the defendant filing the *coram nobis* does not have to be in-custody and there is no statute of limitations on filing the petition. Basically the writ of *coram nobis* seeks to vacate a federal (as opposed to a state) criminal conviction and must be directed to the sentencing court. It attacks the sentence. The Japanese American Redress Movement made use of this writ not only to get at the truth surrounding the internment of Japanese-Americans during World War II, but also to set aside previous convictions of victims arrested and tried for crimes growing out of their internment. *See,* Sandra Taylor, *The Internment of Americans of Japanese Ancestry*, in WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 168.

[28] See, e.g., The "Truth Trials," HUMAN RIGHTS WATCH, https://www.hrw.org/reports/2001/argentina/argen1201-04.htm.

Czech notables for human injustices perpetrated during Second World War.[29] These apologies are more complex than "contrition chic" or "the canonization of sentimentality."[30] They are "a matrix of guilt and mourning, atonement and national revival."[31] To that extent, an apology "raises the moral threshold of a society."[32]

An apology must, however, be genuine. It must, in other words, confess the deed, admit the deed was an injustice, repent, and ask for forgiveness.[33] In 2009 both Houses of Congress passed a Concurrent Resolution, S. Con. Res. 26, apologizing for slavery and Jim Crow.[34] While this apology confesses the deeds and admits that they were atrocities, it does not show remorse or ask for forgiveness. Moreover, Congress explicitly refused to grant the victims any reparations. That is an indication of the government's lack of repentance.[35] An apology by itself does not carry enough heft to elevate the level of humanity in the aftermath of an atrocity, in my opinion. Simply saying "I'm sorry" is not enough. Hence, the need for reparations.

C. Reparations

There are two basic forms of reparations: victim-directed (*compensatory*) reparations and community-directed (*rehabilitative*) reparations.[36] The former "are directed toward the individual victim or the victim's family."[37] They are compensatory, but only in a symbolic way, as "nothing can undo the past or truly return the victim to the *status quo ante*."[38] South Africa

[29] Brooks, *The Age of Apology*, *in* WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 3.
[30] *Id*.
[31] *Id*
[32] *Id*
[33] *See* ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 144 (2004) [hereinafter BROOKS, ATONEMENT AND FORGIVENESS].
[34] S. Con. Res. 26 (111th): "A concurrent resolution apologizing for the enslavement and racial segregation of African Americans," Govtrack, June 18, 2009, https://www.govtrack.us/congress/bills/111/sconres26/text (accessed February 3, 2020).
[35] *See id.*
[36] *See* BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 33, at 155-56.
[37] *Id*.
[38] *Id*.

paid 30,000 rand (which is about $3,890 in 1999 dollars) each to about 19,000 people identified as victims of gross human rights violations. These compensatory reparations were designed to "acknowledge the suffering caused by the gross violations of human rights."[39] Rather than attempting to compensate the victim or the victim's family, community-directed reparations—rehabilitative reparations—seek to repair the damage the atrocity has visited upon a large portion of the victim's group or community, whether or not a particular member was a direct victim of the atrocity. These are community-building, asset-building reparations. They can include access to services and quality education, institutional reform, scholarships, and museums or monuments commemorating the victims.[40]

Compensatory and rehabilitative reparations can be divided into monetary and nonmonetary (or in-kind) reparations. When cash (a direct or conditional payment) is given to the victims or their descendants on an individual basis, that constitutes a *monetary victim-directed (compensatory) reparation*.[41] When such cash is paid to the victims' community based upon their status as members of the victims' group, it is a *monetary community-directed (rehabilitative) reparation*.[42] When medical or psychological assistance, job training or job placement, special educational programs (e.g., special admissions) and other types of in-kind services, programs or laws are provided to the victims or their descendants on an individual basis, that is a *nonmonetary victim-directed (compensatory) reparation*.[43] Monuments or other public recognitions that honor the victim personally also fall into this category.[44] When such non-cash redress is directed toward the victims' community, it is a *nonmonetary community-*

[39] Eric K. Yamamoto and Susan K. Serrano, "Healy Racial Wounds? The Final Report of South Africa's Truth and Reconciliation Commission," in WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 496.
[40] *See* BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 33, at 155-56.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.

directed (rehabilitative) reparations.[45] Museums or monuments honoring the victims' group fall into this category.[46]

In short, whether cash or non-cash, compensatory reparations proceed at the individual level and rehabilitative reparations proceed at the community or institutional level.

Reparations are limited only by the human imagination and capacity for justice. They must, however, be contextualized if they are to be effective. In other words, they must be responsive to the particulars of the atrocity, the country's unique culture, and, most importantly, the victims' wishes. Competing redress models—the tort model and the atonement model—help to contextualized reparations.

D. Tort Model[47]

The tort model is backward-looking, victim-focused, and compensatory (sometimes punitive). Its driving force is the belief hat the victim or the victim's family should be compensated by the perpetrator for personal injury sustained as a result of the perpetrator's intentional acts of wrongdoing.[48] When rights have been ripped away, the victims deserve to be compensated. Redress is thus seen not as a moral imperative but as a legal or equitable claim. Consequently, the quotidian language of torts or restitution—causation, calculation of damages, statute of limitations—takes center stage.

Redress through the tort model can take the form of litigation or legislation. Seeking compensatory justice through litigation has not, however, been a successful strategy. Procedural hurdles (such as, the statute of limitations, sovereign immunity, and legally cognizable right of action) typically result in a dismissal of the lawsuit without any determination of the substantive

[45] *Id*.
[46] *Id.*
[47] *See generally id*. at Ch. 4.
[48] *See id.* at 139.

issues. This, indeed, has been the fate of the many lawsuits filed on behalf of African Americans seeking reparations for slavery from the United States.[49] Many of these procedural issues can, however, be resolve by legislative waivers.[50]

Aliens have not had much better luck suing under the Alien Torts Claims Act (also called the Alien Tort Statute, or ATS), which grants federal district courts "original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States."[51] As more fully discussed in Chapter 4 of *Atonement and Forgiveness*, most of these cases, such as the Japanese and Nazi forced labor cases brought against foreign governments, have been dismissed on procedural grounds. So too have the Japanese American removal and internment cases. One successful litigation under the ATS was litigated against the Ferdinand Marcos, the late president turned dictator of the Philippines, 1965-1986. Numerous private lawsuits alleging human rights violations, including summary executions and disappearances, were filed against the deposed dictator in Hawaii and California after he fled his country to live in Hawaii. These lawsuits were eventually consolidated in the federal district court for Hawaii and certified therein as a class action. In February 1994, the district court entered a judgment in favor of the 10,059 plaintiffs, awarding $1.2 billion in exemplary damages and $766 million in compensatory damages to the plaintiffs.[52] One of my graduate students worked on this case in his

[49] *See id.* at 119-31.
[50] For example, Congress passed legislation that tolled the statute of limitations in a case that is often mistaken as a slave-redress case. *See*, *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999); 182 F.R.D. 341 (D.D.C. 1998). *Pigford* is not a slave-redress case because, as I have written before, "Neither the complaint nor the court's approval of the settlement was based on slavery or Jim Crow or an event that took place during slavery or Jim Crow. . . . *Slave-redress cases succeed because of their connection to the past, not in spite of that connection*." Id. at 126=27 (emphasis in original).
[51] 28 U.S.C. § 1350.
[52] *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 910 F. Supp. 1460, 1463-64 (D. C. Haw. 1995). On interlocutory appeal, the Ninth Circuit affirmed the trial court's subject matter jurisdiction and award of $1.2 billion in exemplary damages (the award of compensatory damages was made after this decision). The appellate court held that the district court had subject matter jurisdiction because the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.S. §§ 1330, 1602 was inapplicable in that the alleged acts were not taken within any official mandate and were therefore not acts of an agency of foreign state within FSIA. The appellate court also stated that the district

law practice representing the plaintiffs. He reports that plaintiffs have faced an uphill battle with enforcement of the judgment because the Philippine government claims ownership of the Marcos ill-gotten assets.[53] Notwithstanding the partial success of this litigation, the judiciary in most countries are very reluctant to award damages for past atrocities, especially those that happened in the distant past, for fear of usurping legislative authority.[54]

The tort model has been more successfully implemented through legislation. In 1994, the Florida Legislature enacted the Rosewood Compensation Act.[55] The Act is designed to pay victims or their survivors for the white violence that destroyed the predominantly black town of Rosewood, Florida, in 1923. Although the Act declares that the State of Florida officially acknowledges that white violence demolished Rosewood, no apology was offered. Florida clearly desired to effectuate a settlement in order to make the matter go away, and nothing more than that. Some of the settlement payments are designed to be compensatory while others are intended to be rehabilitative in a strange way with reference to "minority persons" rather than black Floridians. Section 5(1) of the Act provides scholarships "for minority persons with preference given to the direct descendants of the Rosewood families, not to exceed 25 scholarship per year" for post-secondary education. Section 5(2) states that each scholarship is worth $4,000. Section 1 appropriates such funds from the General Revenue Fund of the Department of Education. Though the victims receive compensation for loss of property, the Act has been criticized as not being a

court correctly applied the ATS and correctly determined that money damages would be an inadequate remedy. *Hilao, et. al. v. Estate of Ferdinand Marcos*, 25 F. 3d 1467 (9th Cir., 1994) *cert. den. Estate of Marcos v. Hilo*, 513 U. S. 1126 (1995).

[53] On February 25, 2013, the Philippine Congress enacted Republic Act No. 10368 as redress in the form of tax-free compensation to eligible victims.

[54] *See* BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 33, at 98-100.

[55] Laws of Florida, 1994, c. 94-359, *as amended*, 1995 Bill Text FL S.B. 712.

"reparation" because it includes compensation to individuals who are not victims of descendants of victims.[56]

Cash compensation to victims or their descendants can be made as direct cash payments (DCP) or conditional cash payments (CCP). The former allows the money to be spent in any way the recipient desires—a trip to a casino or a vacation to Hawaii. In contrast, CCP are restricted. Cash payments can only be used for designated purposes, such as for education (as in the case of Rosewood) or the purchase of a home, payment of rent or start of a small business.

The perpetrator apology is the distinguishing feature between the tort model and atonement model. While such an apology is unnecessary for compensatory justice, certainly not for retributive justice, it is essential for restorative justice. The absence or presence of an apology necessarily determines the character of the reparations and, hence, the nature of redress.

E. Atonement Model[57]

If the tort model is backward-looking, victim-focused, and compensatory, the atonement model is forward-looking, perpetrator-focused, and restorative. The latter is driven by the perpetrator's apology, a condition absent from the tort model. The apology lays the foundation for the perpetration's side of restorative justice; that is, repair of the broken relationship between the perpetrator and the victim occasioned by the atrocity and to repair of the perpetrator's moral character sullied by the atrocity. Requiring the California government to tender a prefatory apology moves redress in the state in the direction in my opinion, which direction is one of racial reconciliation.

Unlike the tort model, the atonement model places the burden of redress on the perpetrator rather than on the victim. For, when the perpetrator apologizes, it must then demonstrate the

[56] *See, e.g.*, Kenneth B. Nunn, *Rosewood*, in WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 436-37.
[57] *See* BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 33, at Ch.5.

sincerity of the apology by a redemptive act. The weight of the reparations demonstrate the sincerity of the apology. Thus, unlike the tort model, the atonement model uses reparations as a means of turning the rhetoric of an apology into a relevant, material reality. Simply saying "I'm sorry" is not enough. The perpetrator must tender an apology and concretize it with sufficient reparations. Apology plus reparations constitute atonement.

The apology must be genuine, which is to say it must confess the deed, admit that the deed was an injustice, do so in a remorseful way, and ask for forgiveness.[58] A genuine apology is an acknowledgement of guilt rather than a punishment for guilt.[59] When Congress issued a Concurrent Resolution in 2009 "apologizing" for slavery and Jim Crow, it failed to do so in a genuine fashion.[60]

Most proponents of the atonement model believe rehabilitative reparations offer the best path to perpetrator/victim reconciliation. Restorative justice is best achieved with reparations that empower the victims' community rather than with reparations that merely compensate the victims directly. No amount of compensation, whether monetary or non-monetary, can return the victims to the *status quo ante*. But by targeting the lingering effects the atrocity has had on the victims' community, the perpetrator can provide a more effective means of redress. The argument is that rehabilitative reparations redress the lingering effects of an atrocity more effectively than compensatory reparations.

[58] *See supra,* Part IIB.
[59] *See* BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 33, at 141.
[60] *See supra*, Part IIB. The concurrent resolution is a watered-down version of the House Bill in which a provision suggesting that Congress would pay reparations was omitted from the Concurrent Resolution by Republicans in the Senate. The House Resolution, passed on July 29, 2008, stated that the House of Representatives "expresses its commitment to rectify the lingering consequences of the misdeeds committed against African Americans under slavery and Jim Crow. . . ." H. Res. 194 (110th): "Apologizing for the enslavement and racial segregation of African-Americans," Govtrack, July 29, 2008, https://www.govtrack.us/congress/bills/110/hres194/text (accessed July 4, 2020).

This is not to suggest that rehabilitative and compensatory reparations cannot coexist under the atonement model. The Civil Liberties Act of 1988, which provided redress for Japanese American evacuation, relocation, and interned during the Second World War, proceeded under the atonement model. Non-monetary rehabilitative reparations were issued in the form of research and educational programs, and monetary compensatory reparations were issued in the form of DCP of $20,000 each (tax free) to the approximately 82,250 surviving victims (of the approximately 120,000 people interned) totaling about $1.6 billion. Both conservative and liberals criticized the compensatory reparation; the former on the ground that only "symbolic" redress was warranted (if redress was warranted at all) and the latter on the ground that more money should have been given to the victims.[61]

A genuine apology and a sufficient reparation (collectively, atonement) lay the foundation for reconciliation. The perpetrator's request for forgiveness, one of the elements of a genuine apology, starts the reconciliation process. Provided that the reparations are sufficient—the determination of which is made by the victims through a long-term process of negotiations with the perpetrator—the request for forgiveness arrives on the victim's desk like a subpoena; it must be answered.

Forgiveness is an omnipresent theme in literature, religion, and culture worldwide. A famous Chinese aphorism states: "He who opts for revenge must dig two graves."[62] Paul Lauritzen

[61] The truth commission established by Congress to study the atrocity committed against Japanese Americans incorrectly estimated that there were approximately 60,000 surviving internees. The miscalculation was based on using actuarial tables relating to white male life expectancies. Ultimately the Office of Redress Administration (ORA) identified, located, and paid $20,000 to 82,250 former detainees for a total of more than $1.6 billion before it officially closed in February 1999. U.S. Department of Justice, *Ten Year Program to Compensate Japanese Americans Interned During World War II Closes Its Doors*, February 19, 1999, http://www.justice.gov/opa/pr/1999/February/059cr.htm. The ORA ran out of funds after paying only 145 claimants. A coalition sued the government for "breach of fiduciary duty" before Congress authorized an additional $4.3 million. Jason Ma, *Reparations Suit Dismissed*, ASIAN WEEK, November 25, 1999. *See generally Japanese Americans*, in WHEN SORRY ISN'T ENOUGH, *supra* note 1, at Part 4.

[62] *See* BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 33, at 164.

provides what can be viewed as a consensus definition of forgiveness. He defines forgiveness as "a two-part response to a situation of injury; negatively, it is the remission of an attitude of resentment evoked by the injury; positively, it is an effort to reestablish a broken relationship"[63] Forgiveness does not equate with amnesia. Archbishop Desmond Tutu,[64] constantly advised the victims of an atrocity to "forgive but do not forget." [65] On the other hand, Nietzsche believed that forgiveness manifests a "slave morality," and S. J. Perelman once quipped: "To err is human, to forgive supine."[66] I agree with Bishop Tutu; for, I believe in reconciliation when the perpetrator and victims are locked into a long-term relationship. Forgiveness is needed for reconciliation.

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

Whereas the perpetrator has a moral obligation to atone, the victims have a civic obligation to forgive. Precisely how forgiveness is to be manifested is a matter for discussion among the victims and by the victims individually. Of course, the question of forgiveness does not arise under the tort model. As my focus in this paper is on the perpetrator's redress, I do not discuss the question of forgiveness at this time.

[63] *Id*. at 164-65.
[64] *See supra,* Part IIA for a discussion of this historic figure.
[65] BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 33, at 165. *See* DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS (1999).
[66] *See* BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 33, at 166.

Part III

Conclusions and Recommendations

Thirty years ago, I was asked by the editor of an academic press to write a book on "black reparations." What I had known about the subject, mainly a book on the subject written by my former law professor while I was a student at Yale Law School and N'COBRA—left me uninterested in the topic. I did not see any value in spending several years researching and writing a book. The publisher, however, wanted me to take a different approach; one based on an international perspective. I agreed to write the book, and spent years researching atrocities around the world, visiting cities in Europe and the Far East with long histories of atrocities, and presenting papers at gatherings of scholars, government officials, NGOs, and activists worldwide. Here is what I know about the best practices in redressing slavery.

A. Purpose of Redress—Racial Reconciliation

Redress for slavery ought to be about racial reconciliation, racial healing. This means that what I (and now most redress scholars) call the "atonement model" should be pursued in lieu of the "tort model." These models of redress offer different visions of what post-conflict justice looks like. The tort model is driven by the desire for compensatory (and sometimes punitive) justice,[67] whereas the atonement model pursues restorative (and sometimes redistributive) justice.[68] The tort model seeks to simply settle the matter. Typical of any settlement, there is no admission of guilt by the perpetrator. This is justice on the cheap, in my view. In contrast, racial reconciliation—restorative justice—is more ambitious morally and civically. It seeks to repair the broken relationship between the perpetrator and its victims as well as repair the perpetrator's moral

[67] *See supra* Part IID.
[68] *See supra* Part IIE.

character in the aftermath of the atrocity. Both repairs are necessary for racial healing in California because the government and the victims of slavery are locked in a long-term relationship.

Racial reconciliation cannot be achieved without a *genuine* apology from the government and an acceptance of that apology from the victims of slavery.[69] Forgive but never forget, as Desmond Tutu constantly advised black, or indigenous, South Africans.[70] People of probity and intelligence are more likely to support elevated efforts at redress than endeavors that only involve writing a check. This suggests that the argument in favor of redress is both moral and civic.

B. The Case for Redress—Moral and Civic Obligations

Like many past atrocities, slavery was legal when it was extant. Ergo, the argument for redressing slavery post-conflict must be based on moral rather than legal grounds. Under the atonement model, the case for redress can be made consistent with the legal status of slavery. I made this argument with respect to the United States as follows:

> When a government commits an atrocity against an innocent people, it has, at the very least, a moral obligation to apologize and to make that apology believable by doing something tangible called a 'reparation.' The government of the United States committed atrocities against black Americans for two and one-quarter centuries in the form of chattel slavery and for an additional one-hundred years in the form of Jim Crow—what Supreme Court Justices Ruth Bader Ginsburg and Stephen Breyer refer to as 'a law-enforced racial caste system'—and it has not even tendered a genuine apology. The U.S. Government should, in fact, atone—

[69] For a discussion of who the victims of slavery are for purposes of redress in California, *see infra,* Part IIID.
[70] *See* DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS (1999).

> that is apologize and provide reparations—for racial slavery and apartheid. Saying 'I'm sorry' just isn't enough.[71]

This argument in favor of redress in California imbibes Adenauer's belief that when "unspeakable crimes have been committed" they "demand compensation and restitution, both moral and material."[72] Yet, my argument raises several questions, three of which are addressed here.

First, if the redress claim is essentially a moral claim, why isn't an apology sufficient to satisfy that claim? This question was raised in response to the Civil Liberties Act of 1988. An apology by itself is insufficient redress for a past atrocity because a redemptive act is needed to make the apology believable. Otherwise, the apology is simply rhetoric. Under the atonement model, the redemptive act is a reparation. Simply saying "I'm sorry" is not enough.

Second, does the presence of monetary reparations commodify the redress claim, contradicting its moral character? Money is often the only way to concretize rights, whether moral or legal. A monetary reparation, whether at the individual (compensatory) or institutional (rehabilitative) level is the present-day embodiment of a victim's morals claim. It concretizes the moral claim and, hence, gives redress meaning.

Finally, any redress program requiring legislation ultimately turns redress into a legal proposition regardless of the moral claim. Slavery was legal when it was extant. Why shouldn't we simply accept the consequences of our duly enacted laws? My response is straightforward. Given the substantial moral weight of the redress claim, it must be cognizable under current law—*lex scripta* at the very least. Otherwise, the legislature's failure to redress slavery stands as sequel to the state's worst atrocity and the laws that made the atrocity possible. A legislatively created

[71] *See* BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 33, at ix.
[72] *See supra* text at note 1.

redress program is a credibility check on the legislative branch of government no less than Brown *v. Board of Education* was a credibility check on the judicial branch in 1954.

In short, the case for redress in California identifies the state with the International Redress Movement. This connection embraces the conviction that the main argument for redressing a past atrocity and its lingering effects is to move the citizens of the state forward by accentuating a common humanity between the perpetrator and the victims. Indeed, a decision not to go forward with redress would be callous, cruel, morally reprehensible, and civically irresponsible.

C. Forms of Redress

The state's redress regime ought to contain the following elements: (1) a truth and reconciliation commission; (2) a genuine apology, and (3) mainly rehabilitative reparations. The victims' side of the atonement model—forgiveness—is not a proper subject for the perpetrator's consideration. It is left to the victims to determine among themselves whether they will forgive and, if so, how forgiveness will be manifested. No doubt, the weight of the reparations will be part of that calculation.

1. *Truth and Reconciliation Commission*

A California Truth and Reconciliation Commission (CTRC) should be established, similar to what was created for Japanese Americans. The purpose of the CRTC should be to educate the citizens of the state about the atrocity and the case for redress—racial reconciliation. It should make clear that it is legislating a redemptive act on behalf of the state, not alms for the victims.

The CTRC should present verifiable truth, not political truth with its alternative facts. Thus, "practical idealism" should be the commission's guiding principle in making its proposals, as it was for Frederick Douglass and Martin Luther King, Jr. in speaking out against racial injustice. This means that the CTRC should tender proposals that are within reach of morally motivated

individuals and institutions, proposal that set the moral compass of the citizens of the state.[73] For that reason, the CTRC should not be "balanced" with opposing *political* perspectives. Instead, its membership should consist of recognized experts on slavery in the state, experts on the lingering effects of this atrocity, and experts on the redress process. The people of California ought to be presented with the unvarnished truth before the horse-trading in the political process begins.

2. *Genuine Apology*

The failure to apology for a moral transgression undercuts any notion of a common humanity between the perpetrator and the victims of an atrocity. It is not unlike a person walking down the street who steps on your foot, looks back at you, and walks away without apologizing. How insulting. Hence, the California government must apologize to victims of slavery, and the apology must be genuine. It must confess the deed, admit the deed was an injustice, repent, and ask for forgiveness.[74] In the context of the atonement model, an apology is an acknowledgment of guilt rather than a punishment for guilt.[75]

3. *Reparations*

Keeping in mind that redress necessarily involves asymmetrical civil/human rights measure and that these measures do not obviate the need for ongoing symmetrical civil/human rights measures (e.g., garden-variety civil rights laws), California ought to pursue rehabilitative reparations. Such reparations are the best way to demonstrate the sincerity of the state's apology. I am not in favor of compensatory reparations. This puts me at odds with most African Americans who seem to be in favor of cash reparations in the form of direct cash payments (DCP).

[73] *See* ROY L. BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA 110 (2009).
[74] *See supra,* Part IIB.
[75]The Concurrent Resolution passed by Congress in 2009 apologizing for slavery and Jim Crow is not a good precedent for how California ought to apologize. *See id*.

I have several problems with DCP. First, they will likely not provide any sustainable redress. Not only will the individual amounts be too modest to make much of a difference in the lives of the victims, but they are likely to be misspent. John Cook, a lawyer who represented victims of Apartheid in South Africa, informed me at a meeting in Copenhagen, Denmark, that just one year after receiving DCP the victims were poor again. This gives support to Chris Rock's quip that "the only one who will benefit from reparations is KFC."

DCP could, however, be presented as an income supplement rather than as a one-time cash payment. But it would have to be substantial to be meaningful; something like a payment of $30,000/year/household member lasting for one or two generations. A family of four, for example, would receive $120,000/year/household.

But DCP is rather risky. The money could be gambled away at a casino. There is also the problem of what scholars refer to as "predatory inclusion." This problem occurs when unscrupulous vendors (e.g., insurance companies or investment schemers) or greedy relatives take advantage of unsophisticated recipients of reparative income.

Given these problems, conditional cash payments (CCP) could be used. Payments would be restricted, such as to establish school booster clubs that finance after-school activities in public schools attended by enslaved descendants, to pay for private tutors or to pay tuition at private schools, to purchase a home or pay rent in better school district, or to start up a small business. Determining the total amount of the reparations and how the program is to be financed are issues that can be address once an agreement in principle is reached.[76]

[76] The total amount of reparations could be equivalent to a desired increase in the percentage of the national wealth owned by blacks. "Today, Black Americans constitute approximately 13 to 14 percent of the nation's population yet possess less than 3 percent of the nation's wealth." William Darity Jr., Testimony concerning HR40, The Commission to Study and Develop Reparations Proposals for African-Americans, June 19, 2019 (116th Congress 2019-2020), https://sanford.duke.edu/sites/sanford.duke.edu/files/images/Dr.%20Darity%20Reparations%20Remarks%20for%20Congress.pdf (accessed December 12, 2019). Alternatively, the total amount of reparations could be determined by

CCP is, however, problematic. It denies agency to the victims of the atrocity. We do not place restrictions on the plaintiff's use of a jury award in a personal injury case. So why should we treat reparations differently? Are the victims not being disrespected, being treated like children? Also, victims who have received DCP have, in fact, made responsible choices. For example, I have spoken with several Japanese Americans who have used their funds to help put their grandchildren through Berkeley, as one recipient told me. But these were one-time payments. I do, in fact, concede the power of the agency argument. However, the power of that argument is predicated on tort-model thinking, which model I reject. I think rehabilitative reparations are in the best interest of enslaved descendants and, indeed, all Californians.

Rehabilitative reparations are asset-building reparations. CCP can also build asserts, such as by restricting them to home ownership, but like any compensatory reparation they are difficult to calculate and distribute when dealing with millions of victims. (There were only 60,000 Japanese Americans and around 90,000 South Africans who received reparations.) Rehabilitative reparations can avoid these administrative nightmares if fashioned properly as well as the agency issue.

Rather than pursuing a hodgepodge of rehabilitative reparations, I believe it is best to focus on one or two specific reparations tailored to one or two specific linger effects of slavery. I would focus on lingering effects in education. Charles Hamilton Huston and Thurgood Marshall made the strategic decision to focus the fight against segregation on education—children—as that was the least controversial battleground on which to fight. The great victory in education started a movement the spread to housing, employment, voting, and other areas of American life. California ought not ignore the wisdom of the Huston/Marshall strategy.

multiplying the average racial earnings gap by the number of enslaved descendants each year the program is in existence. *See* BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 33, at 162-63.

For K-12 education, one might consider the establishment of boarding schools in suburban areas (green communities) throughout the state for descendants of the enslaved. Students would live, eat, play, and go to classes in the same structure. Education takes place less in the classroom than in doing homework assignments in an academically supportive environment supervised by qualified individuals. (The Ivy League universities are set up in this way. Tutors are available in the dorms even at midnight.) Boarding schools for the rich are traditional in New England. Atonement Boarding Schools would serve two main purposes. First, they would remove promising students from challenged schools and challenged neighborhoods and place them in living conditions conducive to academic success. Second, they would provide a basis for intergenerational success—educational and socioeconomic—for enslaved descendants. A parents' academic success is usually passed down to children and grandchildren along with the socioeconomic success that goes along with it. The children and grandchildren of many of my black classmates of Yale Law School have not needed affirmative action to follow their parents' academic success.

D. Constitutionality of Redress

The constitutional question arises in relation to reparations as they can entail race-specific distributions of public monies, goods or services. Prop 209 and the fact that the Supreme Court is indisposed to permit race-conscious remedies even in response to a proven violation of law pose an existential threat to reparations. While I was not asked to respond to the constitutional question, I will offer the following preliminary thoughts.

Reparations should be based not on race but on slavery—the recipient's connection to slavery. Redress, after all, is about slavery even though slavery and race are closely connected. Awarding reparations on the basis of the recipient's connection to slavery does not raise Prop 209

or U.S. constitutional issues because the decision is not race-conscious. During the seventeenth and eighteenth centuries, more than 300,000 white people lived and died in bondage in the American colonies.[77] Color became the marker of slavery after that time. The white slave trade in America in no way plays down the horrors of the much larger black slave trade that followed it.[78] But it does indicate that slavery was not entirely binary. I do not see a state or federal constitutional issue if white slaves appeared in California and reparations is based on a connection to slavery.

[77] *See, e.g.*, DON JORDAN AND MICHAEL WALSH, WHITE CARGO: THE FORGOTTEN HISTORY OF BRITAIN'S WHITE SLAVES IN AMERICA (2008). Others also recognize the importance of the book. Joyce Lau writes: "Mainstream histories refer to these laborers as indentured servants, not slaves, because many agreed to work for a set period of time in exchange for land and rights. The authors argue, however, that slavery applies to any person who is bought and sold, chained and abused, whether for a decade or a lifetime. Many early settlers died long before their indenture ended or found that no court would back them when their owners failed to deliver on promises. And many never achieved freedom or the American dream they were seeking. . . . *White Cargo* is meticulously sourced and footnoted. . . . Quotations from 17th- and 18th-century letters, diaries and newspapers lend authenticity as well as color. Excerpts from wills, stating how white servants should be passed down along with livestock and furniture, say more than any textbook explanation could. . . . Joyce Lau, *Master and Servant*, NEW YORK TIMES BOOK REVIEW, APRIL 27, 2008, https://www.nytimes.com/2008/04/27/books/review/Lau-t.html.

[78] The authors of WHITE CARGO take care to quote African American sources and clearly state that their research and perspective does not diminish the significance of the much larger black slave trade that came later.