REALISTIC REPARATIONS

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August Wilson’s play *The Piano Lesson* is about the choices we make, to remember history or to seek money to live in the present. It revolves around a dispute between two heirs to a piano, which was carved by their grandfather. One wants to sell the piano, so that he can buy land that his father had worked—and where their ancestors had labored as slaves. The other wants to keep the piano, because it connects her to her family. It is her prized possession. Reparations presents a similar set of problems, where people try to come to terms with, and remember and overcome the past—perhaps through memories of the past, perhaps through money. As of right now, however, there is not the option of memory or money. It’s a question of whether we can have a memory of the past.

Historians have told us much about the violence that supports claims for reparations. The case is presented in graphic form with such images as postcards made up following the Tulsa riot, which commemorated it: “Running the Negro Out of Tulsa.” We see the extraordinary violence that led to the destruction of the African American community

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at the end of May 1921. Throughout a series of meticulous studies, we are beginning to get a mosaic of the violence and intimidation that pervaded Jim Crow. But it was not just the riots and associated "negro drives" that led to the segregation of housing and then of memory. There were extensive laws establishing Jim Crow. As one NAACP official declared, the laws ensured "white supremacy' in every way in which that superiority is real."  

Yet law was not working alone to accomplish the purposes of Jim Crow; legal segregation was supported by the norms of segregation and white supremacy. George Bellows gives us a graphic depiction of this with his print, The Law is Too Slow. It is a picture of a lynching. The movement against lynching sought for decades to end only the most brutal of outrages—lynching—while leaving other violations of the rule of law still unaddressed.

We hear much talk about the moral case for reparations. Important work remains to be done to establish the moral case for reparations. Some of the issues that must still be addressed are the connections of the government to slavery, the ways those crimes continue to have


4 Quoted in Brophy, supra note 2, at 15.

5 Alfred L. Brophy, Race, Law, and Norms: The Case of the Ku Klux Klan in 1920s Oklahoma, 20 Harv. Blackletter L.J. 17 (2004). There is much subtle recent work that explores the complex negotiations that went on in the Jim Crow South. That literature recovers the ways that black culture fit within Jim Crow and how it overcame the limits of Jim Crow. See id. at 19-22. One recent example of this is Mark Roman Schultz, The Rural Face of White Supremacy (2004). And then histories of the Civil Rights movement emphasize what was possible within (or around) Jim Crow. See, e.g., John Dittmer, Local People: The Struggle for Civil Rights in Mississippi (1994). That literature should not, however, cause us to forget the limitations that Jim Crow placed on the black community, as some of the great literature of the Harlem Renaissance reminds us. See, e.g., Langston Hughes, Let America Be America Again, in Let America Be America Again and Other Poems by Langston Hughes (2004).

6 Many important authors of early twentieth-century fiction wrote of lynchings. See, e.g., Theodore Dreiser, Nigger Jeff, in The Best Short Stories of Theodore Dreiser (1956); Paul Laurence Dunbar, The Lynching of Jubie Benson, in The Heart of Happy Hollow (1904); Clement Wood, Nigger (1922) (telling of a lynching in Alabama). The setting of Wood’s novel may be Tuscaloosa, Alabama.

an impact today, and why the entire community should pay for those crimes.\(^8\)

But we hear relatively little about how we are going to get reparations. Poll data reveals that reparations advocates have a very, very long way to go. When the Mobile Register polled on reparations for slavery in 2002, the paper found it was the most racially divisive issue they had ever polled on. Something like 67% of black Alabamians were in favor, while something like 5% of white Alabamians were in favor. It is “something like,” because some white people became so enraged at the mere suggestion of reparations that they could not complete the poll. As a result, it was difficult to get an accurate sample.\(^9\) Lest one engage in that fallacious thinking that Alabama is different from the rest of the country on this issue, those figures are pretty much the same in the United States as a whole.\(^10\) We have a long way to go before people are even willing to contemplate, let alone vote for, reparations. However, a refrain can be heard among a few of the most vocal opponents of reparations: “No reparations without repatriation.”\(^11\) This thinking is reminiscent of Derrick Bell’s science fiction story, “The Chronicle of the Space Traders,” in which he asks whether Americans would resist an offer from aliens to give them extraordinary riches in return for all of our black citizens.\(^12\) Bell might write a story along those lines, called “The Chronicles of Reparations Traders.”


\(^11\) For websites discussing the idea in various levels of offensiveness, see No Reparations without Repatriation, http://www.asininity.com/comments/61z_0_1_q_C/; Do Blacks Deserve Billions for Slavery? http://www.vocaboly.com fora/topic4583.html.

\(^12\) Derrick Bell, The Chronicle of the Space Traders, in The Derrick Bell Reader 57-72
Thus, a conflict is apparent between the collective memory of some white people and some black people. Part of this relates to our self-image as Americans; we may view our country as a place of unbounded opportunity or of oppression. The question arises: how do we bridge this chasm, when white people do not want to talk about these issues? Reconciliation talk may (and I emphasize may—perhaps not even that is possible) be what most people want to hear; it is not necessarily what those seeking reparations want. How can we effect this discussion? This is a coalition-building project. But each coalition likely has different goals. I think we need a much more specific plan of what reparations will look like, in terms of specific programs before the public will agree to any serious discussion. The voting public wants to know what is on the table before they will even permit discussion. So that leads to some very practical questions. What is it that reparations proponents are talking about? What are some practical strategies for advancing the goals of reparations? What can individuals do now that will be most positive? How can actions be positive and still be significant?

I. Reparations Past

Some people have gotten reparations in the form of truth commissions, apologies, community-based payments, even individual payments. There was the Tulsa Riot Commission, the 1898 Wilmington Race Riot Commission, the California Slavery Era Insurance Disclosure Act, which led to the “Slavery Era Insurance Registry,” a registry of names of slaves who were insured by companies still doing business and the slave-owners who insured them, and the Chicago Slavery Disclosure Era Ordinance, which has led to apologies by companies including JP Morgan Chase. Native Hawaiians received an apology from the Federal government in 1993, which was subsequently used

(Richard Delgado and Jean Stefancic eds., 2005).


as a basis for granting relief in a case involving a trust for Hawaiian children;\textsuperscript{17} the Native Alaska Claims Settlement Act provided more than one billion dollars in relief for native tribes;\textsuperscript{18} many believe the Great Society was a form of reparations; and, of course, Japanese Americans interned during WWII who survived until 1986 received limited compensation.\textsuperscript{19}

There are other cases, which are not so well-known, like the Armenian genocide, echoes of which were addressed through legislation and then litigation that followed up on that legislation. The California legislature repealed the statute of limitations for lawsuits against insurance companies that failed to pay on insurance policies for the Armenian genocide. Then a class action settled for pennies on the dollar.\textsuperscript{20}

And there are other cases, which are even more obscure and surprising. In the wake of President Lincoln’s Emancipation Proclamation, the United States Congress provided compensation to loyal slaveholders whose slaves were freed in the District of Columbia.\textsuperscript{21} Thus, when we speak of reparations for the era of slavery, it is important to remember that they have already been paid—just not in the form that one might typically think of.

When people speak about reparations in Alabama they sometimes ask (perhaps only partly in jest): when will money be paid for the plantations that were burned during the Civil War,\textsuperscript{22} or, when will the campus of the University of Alabama receive compensation, for it, too, was burned during the war? Actually, it did receive compensation. A

\textsuperscript{17} See \textit{Doe v. Kamehameha Sch.}, 295 F. Supp. 2d 1141, 1154 (D. Haw. 2003), reversed 416 F.3rd 1025 (9th Cir. 2005).


\textsuperscript{22} See Reparations for Southerners Petition, http://www.petitiononline.com/LoS/petition.html. (The League of the South’s petition for such reparations.)
plaque outside of Clark Hall on the University of Alabama’s campus tells us that the building is named for Mobile businessman Willis G. Clark, who headed a University committee that “managed the 46,080 acres of public lands Congress gave the Institution in reparation for the 1865 destruction of the campus by Federal Troops.”

Despite proclamations by people such as Richard Epstein that the legal case for reparations is defeated, there have been some successful reparations lawsuits. One that fits a more typical reparations mold is the Hawaiian Native Land Trust case, which settled recently for $600 million in 1995.

Another lawsuit which no one has yet spoken of in reparations terms is United Daughters of the Confederacy v. Vanderbilt University. That case revolved around a dormitory on what was once Peabody College Campus and is now Vanderbilt University. The United Daughters of the Confederacy (UDC) gave money in the 1930s for a dormitory on Peabody Campus. Peabody agreed to name the dorm “Confederate Memorial Hall” and to house young women descended from Confederate soldiers for free. In the 1970s, Vanderbilt acquired

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23 Senator John Tyler Morgan was responsible for that legislation. See James Sellers, History of the University of Alabama 346-50 (1958) (discussing the “Morgan Land Act”). Senator Morgan played critical roles in other issues of the time. Before the Civil War he was an important advocate of secession. After the war he advocated the institution of Jim Crow; towards the end of his career he sat on a committee that justified the annexation of Hawaii. Strangely enough, a report so tainted by Morgan’s views has become important in the twenty-first century as a centerpiece of discussion among those who oppose reparations to native Hawaiians. See James Kawika Riley, Morgan Report Being Abused by Apologists, Honolulu Advertiser (February 13, 2006). (discussing the way the Morgan report has been misused by individuals attempting to “attack the rights of Hawaiians and Hawaii’s indigenous people.” Id.)

24 Richard A. Epstein, The Case Against Black Reparations, 24 B. U. L. Rev. 1177 (2004) (“The legal case for black reparations has been rejected. The political struggle for black reparations continues.”). Professor Epstein is certainly correct that the lawsuits for reparations for slavery and Jim Crow have been resoundingly defeated. See, e.g., In re African American Slave Descendants, 375 F. Supp. 2d 721 (N.D. Ill. 2005); Alexander v. Oklahoma, 382 F.3d 1206, 1219 (10th Cir. 2004).


Peabody and stopped the free housing. In 2002, it announced plans to take the name “Confederate” off the building and off of campus maps; it would then be called “Memorial Hall.” The UDC sued to enforce the agreement and enforcement a right against a successor to an original agreement that dated back decades. No one at Vanderbilt made the decision to name the building, but Vanderbilt was still held liable for the acts of its long-dead predecessors.

There are some important differences between the UDC grant and reparations claims. For one, Peabody and then Vanderbilt abided by the contract for decades; it’s only now that there’s a departure from that long-held right. But the parallels are important as well. Take for example the court’s current enforcement of a right created decades ago. Vanderbilt’s action is controversial in large part because it attempts to change how we honor people on the campus. The great Vanderbilt University is now telling the community that it no longer wants to emphasize the memory of the Confederacy and the contributions made in memory of those who fought in the Confederacy. Much can be said about the UDC case and about monument law more generally. They admit of no easy answers.\textsuperscript{27}

II. Goals of Reparations

If we are thinking about achieving reparations, then it is important to think about the goals of reparations. What is it that we might want from reparations? Once we know this, then we can begin to work towards those goals. And perhaps we can do this in ways that do not invoke the same level of opposition as have been invoked in the past. Perhaps there are ways to mobilize moral and political support.

1. Applied Legal History: Understanding Our History

At a basic level, we need to address the public memory and understanding of our history, which respects the contributions of African Americans and respects and understands the suffering and disability that is the legacy of slavery and Jim Crow. We have an exceedingly long way to go in bringing understanding of basic facts of American

\textsuperscript{27} See generally Sanford Levinson, Written in Stone: Public Monuments in Changing Societies (1998). These issues are, as James Horton and Louis Horton subtitled their recent edited collection Public History and Slavery, “The Tough Stuff of American Memory.”
history—like the horror that was slavery, as well as the role of slavery in impelling the South towards Civil War—to the public. One example is the current dispute at Sewanee: The University of the South about the meaning of the University’s connections to the Confederacy. Sewanee has multiple connections to Nathan Bedford Forrest, the founder of the Ku Klux Klan, including a statue of him placed there in the early twentieth century by the United Daughters of the Confederacy; it has a mace given by a donor in 1965, which features a Confederate battle flag; it used to display the battle flags of the Confederate states in its chapel.

In November 2005, the New York Times provided extensive coverage of the controversies surrounding Sewanee, which include the University’s downplaying of its connections to the Confederacy. It no longer uses the 1965 mace; it has removed all state flags from the chapel; it now emphasizes the “Sewanee” part of its name. Some fear that the school may go further.28 One outraged alumnus has written a sixty-page, single-spaced manifesto to defend Sewanee’s unique place and what he called its “provincialism.” Among his defenses for the display of Confederate symbols on the campus is his claim that slavery was a benign Christian institution:

The Nazis had a very different relationship with the Jews than the slave owners had with their legal property, whom they fed, clothed, housed, and lovingly baptized into Christ’s redeeming salvation. On the Old South plantation, the Master and his Lady and servants and the field hands constituted an interdependent family community, and when most successful, it was noted for mutual affection and shared devotion.29

While slavery may have been benign in some instances, this description has more to do with the moonlight and magnolia school than with what happened on the plantations of the old South. The moonlight and magnolia school has deep roots in American culture; it existed before the Civil War in the proslavery sentimental novels such as Mary H. Eastman’s novel Aunt Phyllis’ Cabin and in Carolyn Hentz’ long-

neglected short story "Wild Jack, or, The Stolen Child." Both stories emphasized a beneficent paternalism on the plantations. In *Aunt Phyllis' Cabin*, for instance, one slave, Susan, who is enticed away from her owner by abolitionists begs to be returned to slavery because she finds freedom too hard.\(^\text{30}\) In "Wild Jack, Or, The Stolen Child" a college president takes action to help return a young, free black boy to his mother after he is kidnapped by a slave trader. In that way, Hentz portrays affluent white southerners as beneficent and concerned with the welfare of blacks, even if they have no property interest in them.\(^\text{31}\)

This mode of thinking took off after the Civil War, when Southern novelists and pro-southern historians romanticized the plantation south. While there are many examples of this thinking, one of the most prominent examples is Yale University historian U.B. Phillips’ 1918 *American Negro Slavery*. It was surely an important book, for it has influenced generations of students and in more recent years much has been written against it. The League of the South, a leading neo-Confederate group that proudly says it is interested in results,\(^\text{32}\) provides a reading list of historians, including Phillips.\(^\text{33}\) *American Negro Slavery* continues

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In speaking about Susan’s request to be taken back into slavery, one of the characters remarks that Mr. Casey will not consent to it. He says that his wife was made very sick by the shock of losing Susan, and the over-exertion necessary in the care of her child. The baby died in Boston; and they cannot overlook Susan’s deserting it at a hotel, without any one to take charge of it; they placing such perfect confidence in Susan, too. . . . [B]esides, after having lived among Abolitionists, he fancies it would not be prudent to bring her on the plantation. Having attained her freedom, he says she must make the best of it . . . . I felt very sorry for her.

*Id.* at 65.


to influence and provide support today to those who see slavery as not so-bad. 34 There are modern analogs to Phillips' work, like *Time on the Cross*, a two volume work by economic historians Robert Fogel and Stanley Engerman, published in 1972. And while Fogel and Engerman did not share Phillips' racial views, their work—now largely discredited, or so it seems—has been interpreted as supporting the thesis that slavery was not actually so bad. 35

In fact, one of the key intellectual supporters of the League of the South, Professor Clyde N. Wilson of the University of South Carolina, 36 includes on his list of recommended books Phillips' *Life and Labor in the Old South* and Fogel and Engerman's *Time on the Cross*. 37 At the same

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34 See, e.g., John Curtis Perry, *Myths & Realities of American Slavery: The True History of Slavery in America* (2002). G. Waltrip, *Myths and Realities of American Slavery: Review of a Book by that Title, Written by John C. Perry*, http://www.rebelgray.com/SLAYER-MYTHS.htm (recommending, among other works, ULRICH B. PHILLIPS AMERICAN NEGRO SLAVERY (1918); ULRICH B. PHILLIPS, *LIFE AND LABOR IN THE OLD SOUTH* (1929)). Waltrip argues that at the Library of Congress' Slave Narratives, "you will find the 2,300 slave narratives that were recorded in the 1930s. Since the narratives represent 10,000 pages of print, reading all of them would take some time. . . . It is common for Yankee historians to attempt to put a spin on the Slave Narratives. We are told that the old former slaves were aged when they told their stories, and probably forgot how bad things really were. Also, they were living in the great depression, and the hard times of the 1930s only made slavery seem favorable by comparison, yada yada yada." *Id.*

35 See, e.g., Herbert Gutman, *Slavery and the Numbers Game* (1977). *But see*, Clyde N. Wilson, *The South and Southern History*, July 9, 2001, available at, http://www.knowsouthernhistory.net/south_and_southern_history.html (recommending Fogel and Engerman and commenting that it is "one of a number of books on the South that have been announced to have been disproved, though they haven't really been.").


37 The League of the South Institute: For the Study of Southern Culture and History, http://www.lsinstitute.org/index.htm (listing Wilson as one of the lead scholars for the "League of the South Institute").

38 See Wilson, *supra* note 35. Of Phillips, Wilson says: "Now out of favor, Phillips was in fact a great historian who did more research about American slavery than anyone ever has and who was a progressive for his time." Wilson comments in his bibliography that the image of the slaveholding south as a place of "whips and chains" is largely untrue—and more untrue than the moonlight and magnolia school: Mention of the antebellum South, not too long ago, commonly brought up pleasant images of a peaceful, dignified, charming way of life. (You can still get that feeling from surviving plantations, like Mount Vernon.) Now the mention brings up lurid images of chains and whips. Both ideas of the Old South are caricatures that have been believed mainly by outsiders. The latter image, as a generalization, is as much or more untrue as the former. Other parts of Wilson's bibliography are worth reading for his comments on modern American history literature, such as his comments on Yale University historian C. Vann Woodward: Woodward was a native Southerner who was negative about nearly everything that Southerners hold dear and highly successful at it. But the works
time, others are preserving the memory of the sufferings of Confederate soldiers. For instance, there is now an annual re-enactment by "Lee's Miserables" of the POW experience for Confederate Soldiers at Point Lookout in Maryland. 39

Related to the moonlight and magnolia school was scholarship that looked to the idea that the Reconstruction was a disastrous result of the breakdown of the rule of law. Thomas Dixon's 1902 book The Leopard's Spots: A Romance of the White Man's Burden and his 1905 book The Clansman, which appeared about the same time that southern states were passing constitutional amendments to disfranchise black men, exemplify this school. 40 Dixon's books and D.W. Griffith's movie rendition of The Clansman, Birth of a Nation, are outstanding ways to see how all these diverse ideas fit together: the charges that the foolish, blundering generation brought us into Civil War; then the breakdown of the rule of law during Reconstruction; and the "redemption" of the south from those silly and corrupt Yankees and Negroes. This is what historians are increasingly calling the period of "de-construction" after the Civil War. 41

Like Dixon in The Clansman, the modern-day Sewanee manifesto author also misrepresented the first Ku Klux Klan:

The news reports linking Sewanee, Tennessee, to the Klan injured the University of the South with their worst inaccuracy.

mentioned remain interesting because Woodward, while he criticized the South, did not accept the moral pretensions of the North. He was a good writer who was capable of an ironic detachment from American as well as Southern mythology. Other Woodward works, Reunion and Reaction, The Strange Career of Jim Crow, and The Burden of Southern History need no longer be read. They are exercises tailored perfectly to appeal to the leftist mentality at a particular point in time, and their ideas have been shown to be of doubtful validity. Woodward, alas, left a large company of talented Ph.D. students, most of them renegade Southerners from well-to-do families, who have managed to take over and distort many of the areas of major interest to students of the South.

39 Point Lookout POW Descendants Organization, http://www.plpow.com/POWRReenactors.htm. The main purpose of Lee's Miserables is to tell the TRUE story of Point Lookout's POWs' environmental/physical/mental/emotional conditions and their unmerciful treatment. Be sure to see how it was between 1863-1865 in this Confederate POW Camp as Lee's Miserables re-enacts prison portrayals in the Living History area each year during our annual pilgrimage.


41 See Pamela Brandwein, Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth (1999). There are problems with historical interpretation—which lead to what one might call the truth and what one makes of that truth.
No distinction was made, as educated and reading Southerners demand, between the first Ku Kluxers of early Reconstruction and the latter ones who were wickedly inspired by the Birth of a Nation movie which President Woodrow Wilson screened in the White House. The brutal racial atrocities committed by that latter KKK still horrify all good Americans, and the menace of them is indelibly linked in our minds to the white robes and American flags marched through Washington, D.C., with the United States Capitol visible in the background.\footnote{Dunbar, supra note 29.}

This is the kind of historical misinformation that we are dealing with—and this informs and structures how voters, legislators, and judges respond to issues of race. If one sees Reconstruction as an era of corrupt black politicians and Yankees, one is unlikely to have a favorable view of the Reconstruction-era amendments or of the need for federal protection of voting rights or of the need for civil rights legislation, or of any kind of social programs, to say nothing of reparations.

All of this invokes important questions about how ideology relates to action. Much could be written about the connections of college history professors to the dissemination of a false (or incomplete or incorrect) history. Southern interpretations of war and Reconstruction helped win the hearts and minds of Americans in the era of Jim Crow, such that by 1896 it was almost unthinkable for the United States Supreme Court to uphold even a limited right of integration. Relatively little attention has been focused on the intellectual monuments left in the judicial opinions—the ways that courts attempted to channel and settle disputes and to portray the scientific and moral correctness of Jim Crow.\footnote{One very nice start is, see Glory McLaughlin, A Mixture of Reform and Regret: The Memory of the Civil War in the Alabama Legal Mind, 56 Ala. L. Rev. 285 (2004).}

Lest you think such sentiments could only be voiced by someone who was educated in and belongs to the pre-Civil Rights era South, these sentiments can be found in many places in public debate. As James Horton stated in his presidential address to the Organization of American Historians:

\begin{quote}
It is alarming that at the end of the twentieth century, in a public statement, [the president of Virginia's Heritage Preservation Association] could call the slave plantation of the old South a
\end{quote}
place “where master and slave loved and cared for each other and had genuine family concern.” Yet this is the kind of reaction that most public historians who deal with these volatile history matters find all too familiar.44

In essence, what we need is a useable past—an understanding of the past. And this is what one might call “applied legal history.”45 That is, a history of law—of court decisions, statutes, and the practices of law enforcement—that is both accurate and relevant to understanding questions we have today, giving rise to optimism that once people have facts they will think the same. These same ideas are behind the administrative law of the 1960s and 1970s. The requirement of hard-look review, for example, was premised on the very 1960s belief that knowledge will set you free. When Justice Thurgood Marshall required agencies to give a “hard look” at the arguments regarding agency action, he seemed to have the belief that if agencies would just look at the evidence, they would arrive at the right result.46 We now recognize people will draw very different conclusions from the same evidence. Thus, we are appropriately skeptical of the impact that an accurate history of the eras of slavery, Reconstruction, and Jim Crow will have on public policy. Still, it is even harder to be free when you’re still confined by a false history.

2. Recognition and Apology for Those Injuries
We are beginning to see truth commissions and apologies—but many will think them cheap. Given how difficult it is to obtain these apologies, many may find themselves less inclined to believe that apologies are cheap. The multiple apologies that are now coming, from businesses, newspapers, and schools, remind us of the connections of past and present. Yet more places exist to look for apologies. We ought to think about the organizations that promulgated the ideas of proslavery thought and supported the Jim Crow system. We have seen apologies for the practice of slavery, but we have seen few apologies for the ideas

supporting the institution and Jim Crow in more recent times. The Hartford Courant's July 4, 2000 apology was for printing advertisements for runaway slaves, not for its promulgation of proslavery thought, for instance. The culpability of the great printing houses in supporting Jim Crow has yet to be discussed. When, we are led to ask, will Random House, which has absorbed the Doubleday publishing house, visit Doubleday's culpability for publishing Thomas Dixon's *The Leopard's Spots* and *The Clansman?*\(^\text{47}\) As the reparations movement turns to looking at the importance of cultural ideas, rather than focusing on monetary reparations, there will likely be more investigations of the ideas behind slavery and Jim Crow. Indeed, the reparations movement correlates with a revitalization of interest in the study of conservatism and of the ways that historical narratives correlate with changes in judicial doctrine.\(^\text{48}\)

As we increasingly revisit the past, however, it is important to ask questions about the wisdom of doing so. Is discussion of the past a bad idea? It destabilizes, of course—so people who are in power are unlikely to want that discussion at all.\(^\text{49}\) Universities, because of their function and their power, are good places to begin to overcome this reluctance. Brown University is the school that has accomplished the most. Its Steering Committee on Slavery and Justice, under the direction of Professor James Campbell, has conducted an intensive study of Brown University's connections to slavery and anti-slavery, as well

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\(^\text{47}\) The Random House website discusses a little bit of Doubleday's history: Doubleday's century of publishing began in 1897, when Frank Nelson Doubleday founded Doubleday & McClure Company in partnership with magazine publisher Samuel McClure. Among their first bestsellers was *The Day's Work* by Rudyard Kipling. While the alliance between Doubleday and McClure lasted only three years, a long and profitable friendship grew between Doubleday and Kipling, who, using Mr. Doubleday's initials, "F.N.D.," nicknamed him "effendi," the Turkish word for "chief"; this name remained with Doubleday for his entire career. Random House Inc., http://www.randomhouse.com/doubleday/history/.


as Rhode Island’s connections to slavery. Then it moved outward to further investigation and discussion of how other institutions have dealt with legacies of violence and injustice. Emory University’s investigation, which is funded in part by the Ford Foundation’s “Difficult Dialogues” project, is focused on reconciliation on its campus, as well as its history.

However, there are substantial limitations, of course, on universities’ power. One of the problems has been that they have been historically closely connected to the powerful. But they have an independence, too, which allows them to explore alternative paths. Schools, like Brown University, Emory University, the University of Alabama, and the University of Virginia that have the courage to deal with their past and, obviously, the issues of national memory that are attached to those histories ought to be rewarded for their courage. They deserve the positive attention that such actions bring.

3. Substantive Repair

All of this, of course, is about substantive repair and putting power into the hands of the dispossessed. Reparations talk may end up in a request for redistribution of wealth. But issues of wealth are far from the minds of many. Congressman John Conyers’s H.R. 40, it is important to recall, aims to study the contributions of slaves and the legacy of slavery. It studies reparations proposals, but it is not about cash payments. Instead, the focus of reparations talk is increasingly on memory of the history of slavery and Jim Crow and understanding how those events are related to today. It is, as Ralph Ellison wrote in Invisible Man a question of understanding the past, the present, and, of course, the future—or what he called at one point in the novel, “The Rainbow of America’s Future.”

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50 Brown University Steering Committee on Slavery and Justice, http://www.brown.edu/Research/Slavery_Justice/
Leslie Harris, (Re)Writing the History of Race at Emory, Academe (September 2006), http://findarticles.com/p/articles/mi_qa3860/is_200607/ai_n17172174/print.

It was a symbolic poster of a group of heroic figures: An American Indian couple, representing the dispossessed past; a blond brother (in overalls) and a leading Irish sister, representing the dispossessed present; and Brother Tod Clifton and a young white
V. How can we get there?

If, then, we are interested in understanding the connections of past and present and of the changes in public attitudes that may correlate with such altered understandings, then we should look for ways of achieving those goals. Which of the "multiple strategies," to use Eric L. Miller's phrasing, is most likely to be successful?54

Sometimes there may be national action, like the Senate Lynching Apology; as well as President Clinton's apologies on everything from the overthrow of Hawaiian sovereignty to the syphilis experiments at Tuskegee, and President Bush's speech at Gorse Island in 2003. We need to be careful to make the moral and political case; to be measured in our rhetoric and our demands. We need to make this topic look like something that is reasonable and necessary morally. And in that perhaps it will look like a new call for the Great Society.

In order to understand the connections between past and present, we must begin at the local level. The Tulsa Riot Commission provides an important model. We hear of increasing apologies—of understanding of the harm done in places like Hawaii, where the United Church of Christ recently issued an apology for the role of its missionaries in the overthrow of native sovereignty. This year brought the Washington State Senate's apology for failure to prosecute for a lynching of an Indian boy who was framed in the murder of a white man. A lot of this has to happen at the municipal and state level, such as the Chicago City Council's Slavery Era Disclosure Ordinance,55 the California insurance disclosure legislation,56 and Maryland legislation supporting the slavery reparations study bill.57 These rays of sunshine come again all the time. Local people working together can accomplish this on their own; there is no need to wait for the call from headquarters. Groups of historians and economists, for example, working together can replicate the

couple (it had been felt unwise simply to show Clifton and the girl) surrounded by a group of children of mixed races, representing the future, a color photograph of bright skin texture and smooth contrast.


56 See Calif. Ins. Code, sec. 13810 et seq. The regulations promulgated under it are in Title 10, Chapter 5, Subchapter 3, Article 7-3, California Code of Regulations Sections 2393 - 2398.

Congressional Commission to investigate slavery, which Congressman Conyers proposes in H.R. 40. This works in conjunction with businesses—and then with local action, like the Wachovia and JP Morgan Chase apologies. Brown University, Emory University, the University of North Carolina, Sewanee–The University of the South, and the University of Virginia are starting the process from within.

We need to encourage study and action from students and faculty at other schools, such as the University of South Carolina (formerly South Carolina College), the University of North Alabama, Randolph Macon College, and the College of William and Mary, to name several schools that come immediately to mind. Those were all schools where proslavery thought was once an important part of the curriculum and the public discussion. There remains, of course, much to explore in northern schools as well. Even a cursory inspection of the speeches given in the wake of the Fugitive Slave Act of 1850 discloses much support for the law and little sympathy for the slaves at Harvard and Yale. Given the connections of the powerful to proslavery

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59 See, e.g., Brown University Committee on Slavery and Justice http://www.brown.edu/Research/Slavery_Justice/;


62 William A. Smith, Lectures on the Philosophy and Practice of Slavery, As Exhibited in the Institution of Domestic Slavery in the United States... (Stevenson and Owen, Nashville 1857) (lectures given by President of Randolph Macon College).


64 See, e.g., Timothy Walker, The Reform Spirit of the Day: An Oration Before the Phi Beta Kappa Society of Harvard University, July 15, 1850 (Boston, James Munroe & Company 1850); Daniel Lord, On the Extra-Professional Influence of Lawyers and
interests at the time, the schools' behavior is more than understandable. Universities were connected to the wealthy and the powerful, in an era when the idea of academic freedom had not yet even begun to emerge. Moreover, one may reasonably argue that by supporting the Fugitive Slave Act, emancipation became more likely a decade later. These are all issues worth substantial discussion. This hard work must be done at the local level.

There are also stories, however, of schools and faculty who opposed slavery. Those people provide profiles in courage, which ought also to be told. Take three examples. First, Professor Henry Tutwiler brought enlightenment ideas from the University of Virginia, where he was educated in the 1820s, to the University of Alabama. In a little-recognized speech given to students in 1834, Tutwiler spoke of the need for independence of thought: "We must think for ourselves, and not be the mere passive receptacles of the thoughts of others." More frequently

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65 See Paul D. Carrington, Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years, 41 Mercer L. Rev. 673, 696-98 (1990) (suggesting contributions of Transylvania University’s law school to the rule of law and thus to emancipation). Cf. David Potter, The Impending Crisis 95 (1974) (how you feel about the compromise depends on how you feel about slavery, blundering generation interpretation, which could have prevented war). Or, as Professor Potter explained, "Even as for antislavery, it is difficult to see that the Compromise ultimately served the purpose of the antislavery idealists less well than it served those who cared primarily for peace and union, though it is easy to see why antislavery men found the medicine more distasteful. If, as Lincoln believed, the cause of freedom was linked with the cause of Union, a policy which dealt recklessly with the destiny of the Union could hardly have promoted the cause of freedom." Id. at 119.


68 Part of this task involves putting information in front of people. And while I don’t want in any way to trivialize the reparations movements’ goals, I think a lot of this process of expanding knowledge comes in small steps. The University of North Carolina’s documenting the history of the south website makes important books available for reading by students. Projects like that hold the promise of making knowledge more accessible and I think ought to be classified as part of the reparations project, just as the Works Progress Administration’s valuable slave narratives ought to be. See http://docsouth.unc.edu/.

69 Henry Tutwiler, Address Delivered Before the Erosophic Society at the Uni-
though, such curiosity was openly dismissed in colleges in the north and south.\textsuperscript{70}

Second, at the University of North Carolina, Justice William A. Gaston openly questioned slavery in an 1832 address to students. For he told the students:

Disguise the truth as we may, and throw the blame where we will, it is Slavery which, more than any other cause, keeps us back in the career of improvement. It stifles industry and represses enterprise—it is fatal to economy and providence—it discourages skill—inimical to our strength as a community, and poisons morals at the fountain head. How this evil is to be encountered, how subdued, is indeed a difficult and delicate enquiry, which this is not the time to examine, nor the occasion to discuss. I felt, however, that I could not discharge my duty, without referring to this subject, as one which ought to engage the prudence moderation and firmness of those who, sooner or later, must act decisively upon it.\textsuperscript{71}

Third, at Brown University, President Francis Wayland served as a staunch supporter of the anti-slavery cause.\textsuperscript{72} These stories need much further exploration. And as we look deeply at our history, we see how complex it is. For example, at the University of Mississippi, Chancellor Frederick Barnard expelled a student who assaulted one of his female slaves and was subsequently investigated by the board of trustees for taking the testimony of the slave against the student.\textsuperscript{73} Barnard's


\textsuperscript{71} William Gaston, Address Delivered Before the Philanthropic and Dialectic Societies at Chapel-Hill, June 20, 1832 at 14 (Raleigh, Jos. Gales & Son, 1832).

\textsuperscript{72} See Domestic slavery considered as a Scriptural institution: in a correspondence between the Rev. Richard Fuller of Beaufort, S. C., and the Rev. Francis Wayland, of Providence, R. I. (New York, L. Colby, 1845).

\textsuperscript{73} Record of the testimony and proceedings, in the matter of the investigation, by the trustees of the University of Mississippi, on the 1st and 2nd of March, 1860, of the charges made by H.R. Branham, against the chancellor of the University (Jackson, Miss., Mississippi Office, 1860).
relationship with slavery is complex. While a professor at the University of Alabama, he gave a Fourth of July speech on the virtues of Union.\textsuperscript{74} He also owned a number of humans.\textsuperscript{75}

There are yet other places to look for further investigation. To take two instances, the Montgomery Advertiser newspaper was part of supporting the institution of slavery and secession. The great publishing house of Random House has, through the Doubleday House that it has absorbed, a history of promoting an incorrect history of Reconstruction, which led in turn to segregation and violence against African Americans. To suggest how far Doubleday changed over the twentieth century, one might refer to Debby Applegate’s *The Most Famous Man in America: The Biography of Henry Ward Beecher*, published in June 2006. The transformation of the Doubleday imprint over the course of 100 years is yet another of the great American stories of change.

One kind of slavery-era reparations lawsuit has a reasonable chance of success, though no one has yet spoken about it. It is based on the ancient and virtually unknown right of descendants of people buried on private property to visit the graves of their ancestors. The right—what property scholars call an implied easement in gross—has been recognized for generations. And so descendants of enslaved people buried on the plantations where their ancestors labored have the right to visit those plantations. Perhaps lawsuits are unnecessary because descendants of slaves and current owners of properties that once were plantations are frequently interested in their common histories. The property right exists; it remains to be discussed and exercised in the way that descendants of enslaved people deem appropriate.\textsuperscript{76}

Lawsuits must be used only with the greatest of caution. They are unlikely to be successful and when they are dismissed, then people will conclude there is no moral (as well as no legal) liability. But perhaps


\textsuperscript{75} See Sellers, supra note 23, at 236 (citing University of Alabama President Basil Manly’s Diary, 1848-55, at 85 (June 22)).

\textsuperscript{76} See Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. Rev. 1469. One place where these issues have crystallized recently is Thomas Jefferson’s grave, which is closed to visits by Sally Hemings’ descendants. See Dan Berry, *Atop a Hallowed Mountain, Small Steps Toward Healing*, New York Times (March 31, 2008).
in the right places—in formerly segregated libraries and in cemeteries and in jurisdictions where a riot has occurred, they may be of use. If the United Daughters of the Confederacy can successfully get reparations, then so too, will African Americans—and in increasing numbers. But we must pick our places exceptionally carefully. In the not too distant future, descendants of slaves may cross the plantations where their ancestors labored, to visit their ancestors’ graves and there may be truth commissions investigating and disclosing the connections of the powerful and well-educated to slavery and to Jim Crow. And most importantly, there will be talk about the connections of the past to the present.

The road will be very, very long. Public education is a slow process; it may take generations to wear away the haze of ignorance and historical misinformation. Yet, the world is being remade.