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RECONSTRUCTIONS

Historical Consciousness
and Critical Transformation

EMILY HOUGH, KRISTIN KALSEM, AND Verna Williams

Once upon a time, the Freedom Center Journal ("FCJ") was merely
a great idea. Intended to provide a nontraditional law review experi-
ence for students, the FCJ unfortunately lacked the necessary fund-
ing and staffing to be more than an informal course. However, due to
the persistence and unwavering support of our partner, the National
Underground Railroad Freedom Center ("Freedom Center"), the gen-
erosity of Harry and Ann Santen, and the commitment of Professor
and Dean Emeritus Joseph Tomain, Professors Bert Lockwood, Michael
Solimine, and Dean Louis Bilionis, the FCJ many envisioned is now a
reality. During the past two academic years (2006-2008), the FCJ has
transitioned from an independent research and writing class to a stu-
dent-run journal that provides a diverse group of highly motivated stu-
dents with a meaningful journal experience.

With the inaugural symposium, Reconstructions: Historical Consciousness
and Critical Transformation, the FCJ begins its work of engaging the
public about the pressing issues of today, informed by the legacy of his-
toric struggles for freedom. There is no better place than Cincinnati,
no better vehicle than the FCJ to facilitate that conversation. We are a
city rich in history of the struggle for freedom, as the Freedom Center

1 Professors, University of Cincinnati College of Law, and faculty advisors to the
Freedom Center Journal.
so aptly illustrates. The College of Law has an impressive history of its own: it is home to the first endowed institute at an American law school devoted to the study of international human rights law and the first joint degree program in law and women’s studies, for example. We are engaged in an intellectual endeavor that reaches far beyond the so-called ivory tower. As such, we are more than well-situated to launch a publication that will give voice to the various struggles for freedom, and provide interdisciplinary lenses with which to understand them.

This first volume of the FCJ, which includes articles written by the participants in the symposium, focuses on history and freedom. Specifically, we invited some of today’s leading thinkers to examine how history might be used to understand current manifestations of subordination and to craft strategies for social change. In terms of the symposium’s theoretical grounding, we were inspired by the work of legal scholars and critical race feminists Angela Harris and Kimberlé Crenshaw, whose pathbreaking and germinal articles on anti-essentialism and intersectionality, respectively, in legal theory (and specifically feminist legal theory and critical race theory) have recently had their 15 year anniversaries. In talking with Professor Harris during earlier stages of planning, she called on us to “go beyond anti-essentialism and intersectionality.” We took her call seriously.

Thanks to the impressive scholars who agreed to participate, we have assembled works that move these important theories forward, employing historical analyses of freedom movements. In the pages that follow, Alfred Brophy, Adrienne Davis, and James Campbell examine and posit strategies for overcoming barriers to historical consciousness concerning subordination. Kevin Maillard and Courtney Cahill reconstruct untold histories to examine the current state of subordinated groups in particular substantive areas. Finally, Katherine Franke, Margaret

2. See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 585 (1990) (defining gender essentialism as “the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience” and critiquing the use of gender essentialism in feminist legal theory).

Montoya, and Christine Zuni Cruz explore how we might effect a critical and activist transformation that is truthful about our historical legacies of subordination and committed to overcoming them. Keynote speaker Angela Harris provides outstanding concluding remarks that provide the basis for moving ahead.

The articles assembled in this first volume of the FCJ are true to the vision of its founders, providing, in the words of Naiya Patel, its first editor-in-chief: "a forum of vibrant debate, critical reflection, and rewarding self-education." She correctly has observed that the FCJ, with this volume and beyond, will be "a resource for the broader law school and legal communities, and ... a means of providing innovative analyses of the most pressing and cutting-edge issues of the day."
REALISTIC REPARATIONS

ALFRED L. BROPHY

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

1. Professor of Law, University of North Carolina, J.D., Columbia University; Ph.D., Harvard University. Parts of this essay have previously appeared in *Reparations Pro and Con* (Oxford University Press, 2006) and in “Considering William and Mary’s History with Slavery: The Case of President Thomas R. Dew,” 16 *William and Mary Bill of Rights Law Journal* 1091-1139 (2008). Contact the author at abrophy@email.unc.edu.

   I would like to thank Emily Hoh, Kristin Kalsem, and Verna L. Williams for their kind invitation to participate in the Freedom Center Journal’s conference and Megan Sites for her help in editing this piece.

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 superiority 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 Jube 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/612_0_1_0_0_G/; Do Blacks Deserve Billions for Slavery? http://www.vocabulary.com/forums/topic/4583.html.

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,\textsuperscript{13} the 1898 Wilmington Race Riot Commission,\textsuperscript{14} 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,\textsuperscript{15} and the Chicago Slavery Disclosure Era Ordinance, which has led to apologies by companies including JP Morgan Chase.\textsuperscript{16} 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; the Native Alaska Claims Settlement Act provided more than one billion dollars in relief for native tribes; 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.

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.

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. 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; 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

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."\textsuperscript{23}

Despite proclamations by people such as Richard Epstein that the legal case for reparations is defeated,\textsuperscript{24} 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.\textsuperscript{25}

Another lawsuit which no one has yet spoken of in reparations terms is \textit{United Daughters of the Confederacy v. Vanderbilt University}.\textsuperscript{26} 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

\textsuperscript{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, \textit{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.

\textsuperscript{24} Richard A. Epstein, \textit{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.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

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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{32} provides a reading list of historians, including Phillips.\textsuperscript{33} American Negro Slavery continues


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.

\textsuperscript{31} Carolyn Hentz, The Banished Son And Other Stories of the Heart 47 (Phila., T. B. Peterson, 1856), available at http://www.library.indiana.edu/cgi/t/text/text-idx?c=wright;idno=Wright2-1168


to influence and provide support today to those who see slavery as not so bad. 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.

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

---

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-EMYTHS.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.").

36 Steve Wilkins & Douglas Wilson Southern Slavery As It Was (1996).
37 The League of the South Institute: For the Study of Southern Culture and History, http://www.lsiinstitute.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 ante-bellum 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 "deconstruction" 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/POWReenactors.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.\textsuperscript{42}

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.\textsuperscript{43}

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:

> 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

\textsuperscript{42} Dunbar, \textit{supra} note 29.

\textsuperscript{43} One very nice start is, see Glory McLaughlin, \textit{A Mixture of Reform and Regret: The Memory of the Civil War in the Alabama Legal Mind}, 56 Ala. L. Rev. 285 (2004).
place "where master and slave loved and cared for each other
and had genuine family concern." Yet this is the kind of reac-
tion 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 ques-
tions we have today, giving rise to optimism that once people have facts
they will think the same. These same ideas are behind the administra-
tive 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 appro-
priately 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 apolo-
gies, many may find themselves less inclined to believe that apologies
are cheap. The multiple apologies that are now coming, from busi-
nesses, 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

(2005). This theme is developed in substantial depth in substantially more depth in
James O. Horton and Louis Horton eds., Slavery and Public History: The Tough Stuff of
45 Cf. Bernie Jones, When Critical Race Theory Meets Legal History, 8 Rutgers Race &
L.J. 1-25 (2006) (exploring ways that legal history is useful in advocacy).
46 See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16
(1971).
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*? 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.

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. 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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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 Conyer’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.”

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 Goree 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 2993-2998.
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

Ministers: An Oration Delivered at New Haven, Before the Phi Beta Kappa Society of Yale College... July 30, 1851 (New York, S.S. Chatterton 1851). See also Alfred L. Brophy, The Rule of Law in Antebellum College Literary Addresses: The Case of William Greene, 31 Cumb. L. Rev. 231-85 (2001) (exploring William Greene's 1850 address at Brown University, which supported the Fugitive Slave Act of 1850).

65 We continue to struggle with these issues, of course, as Jennifer Washburn's University, Inc. (2005) reminds us.

66 See Paul D. Carrington, Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years, 41 Mercer L. Rev. 673, 695-98 (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—impairs 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 occa-
sion 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{70} See, e.g., Alfred L. Brophy, "The Law of Descent of the Mind": Law, History, and Civiliza-

\textsuperscript{71} William Gaston, Address Delivered Before the Philanthropic and Dialectic Soci-
eties at Chapel-Hill, June 20, 1832 at 14 (Raleigh, Jos. Gales & Son, 1892).

\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. He also owned a number of humans.

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.

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

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75 See Sellers, supra note 23, at 236 (citing University of Alabama President Basil Manly’s Diary, 1849-55, at 85 (June 22)).

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.
CONFRONTING TRAUMATIC PASTS

Crimes Against Humanity, International Humanitarian Law, and the Problem of Retrospective Justice

JAMES T. CAMPBELL

An excerpt from the Slavery and Justice: Report of the Brown University Steering Committee on Slavery and Justice

INTRODUCTION

In 2003, Brown University President Ruth J. Simmons appointed a Steering Committee on Slavery and Justice. The committee, which included faculty, administrators, and students, was asked to investigate Brown's historical relationship to slavery and the transatlantic slave trade. It was also asked to organize public programs that might help Brown students and interested members of the public to reflect on the meaning of this history in the present, on the complex historical, political, legal, and moral questions posed by any present-day confrontation with historical injustice. In particular, the President charged the committee "to organize academic events and activities that might help the nation and the Brown community think deeply, seriously, and rigorously about the questions raised" by the national debate over reparations for slavery.

2 Id. at 4
3 Id.
Over the next five semesters, steering committee members gathered information about Brown’s past, drawing from both published sources and a variety of historical archives. The committee also sponsored some three-dozen public programs, including lectures, panel discussions, town meetings, and two international conferences, including one co-sponsored with Yale’s Gilder-Lehrman Center for the Study of Slavery, Resistance, and Abolition. In all, the committee entertained more than one hundred distinguished scholars, ranging from Professor John Hope Franklin, who discussed his tenure as chairman of “One America,” President Bill Clinton’s short-lived national commission on race, to Beatrice Fernando, a slavery survivor from Sri Lanka, who spoke of the problem of human trafficking today. Recognizing the interest in its work in the wider community, the committee also organized programs beyond the University’s gates, including workshops for local teachers and students, a traveling museum exhibition, and a new high school curriculum, “A Forgotten History: The Slave Trade and Slavery in New England,” which was distributed to every high school history and social studies classroom in Rhode Island.

The steering committee delivered its final report, with recommendations, in October 2006. Following a period of discussion and public comment, President Simmons and the Brown Corporation, the governing body of the University, issued a formal response in February 2007, outlining the specific steps that Brown would take in light of the committee’s findings. Both the report and the University’s response can be found on the committee’s website at http://www.brown.edu/slaveryjustice. The site provides detailed information about the committee’s activities, including video excerpts of sponsored events and a digital archive of historical documents uncovered by the committee in the course of its research. Included in this archive is a documentary reconstruction of the voyage of a Rhode Island slave ship, the “Sally,” sent to Africa in 1764, the year of the University’s founding, by members of its namesake family.

The pages that follow offer an excerpt of the steering committee’s final report. While the section’s purposes should be obvious, it may be helpful for readers to know that this is the second of three sections in the main body of the report. Section One, “Slavery, the Slave Trade, and Brown University,” details the committee’s historical findings, exploring different aspects of the University’s relationship to slavery, the transatlantic slave trade, and the embryonic abolitionist movement. As the report notes, ours is not the first generation to recognize Brown’s

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4 Id.
5 Id. at 5.
relationship to slavery or to debate our own responsibilities in light of it. Section Three, “Confronting Slavery’s Legacy: The Reparations Question,” explores the current slavery redress movement, recounting recent efforts to obtain reparations through legislation and litigation, as well as the sometimes bitter reaction that these efforts have provoked. It also examines the reparations controversy’s deeper historical roots, a context that has been almost completely ignored in the current political debate. In keeping with the committee’s charge from President Simmons, the report does not attempt to resolve the reparations issue but rather “to provide factual information and critical perspectives to deepen understanding”7 and enrich debate on an issue that has aroused great public passion but little constructive public dialogue.

The excerpt reproduced here, “Confronting Historical Injustice: Comparative Perspectives,” falls between these two sections. It also responds to an aspect of the committee’s charge from President Simmons, who suggested a careful examination of “comparative and historical contexts” that might illuminate Brown’s predicament and the broader problem of “retrospective justice.”8 How have other institutions and societies around the world dealt with historical injustice and its legacies, and what might we learn from their experience? As the following pages make clear, one of the signature developments of the last sixty years, and of the last twenty years in particular, has been the emergence of an international consensus on the importance of confronting traumatic histories, as well as the development of a variety of modalities and mechanisms for doing so. These modes and mechanisms include not only monetary compensation (the focus of most discussions in the United States) but also international tribunals, truth commissions, national and institutional apologies, the creation of public memorials and days of remembrance, and a wide array of other non-monetary reparative programs. One of the chief purposes of this section of the report is to bring this comparative, international experience to bear on the American case, to clarify the nature, possibilities, and potential pitfalls of different reparative approaches, as well as some of the specific circumstances in which they have been or might be used.

As even this short introduction makes clear, members of the steering committee view the report not as the last word on the subject, but rather as the first words in a conversation that we hope will continue on our campus and in the nation as a whole. We are pleased and proud to share some of our thoughts in this, the inaugural issue of the Freedom Center Journal, a periodical that promises to be an important venue for continuing dialogue on vital issues of history, race,

7 President Ruth J. Simmons Charge to the Steering Committee on Slavery and Justice (Apr. 30, 2008).
8 Id.
law, and justice. As the ensuing pages make clear, such issues can be awkward, intractable, and painful, but they are all the more essential for that. As President Simmons noted in a public statement following announcement of the steering committee’s appointment, “Understanding our history and suggesting how the full truth of that history can be incorporated into our common traditions will not be easy. But, then, it doesn’t have to be.”

—James T. Campbell
Chair, Brown University Steering Committee on Slavery and Justice

Confronting Historical Injustice: Comparative Perspectives
In her letter appointing the steering committee, President Simmons charged us not only to examine Brown’s history, but also to reflect on the meaning and significance of this history in the present. She particularly asked the committee to examine “comparative and historical contexts” that might illuminate Brown’s situation, as well as the broader problem of “retrospective justice.” How have other institutions and societies around the world dealt with historical injustice and its legacies, and what might we learn from their experience? A substantial majority of the committee’s public programs pertained to this aspect of our charge, to which we now turn.

Humanity in an Age of Mass Atrocity
Human history is characterized not only by slavery but also by genocide, “ethnic cleansing,” forced labor, starvation through siege, mistreatment of prisoners of war, torture, forced religious conversion, mass rape, kidnapping of children, and any number of other forms of gross injustice. Different civilizations at different historical moments have developed their own understandings of such practices, specifying the conditions under which they were allowed or forbidden and against whom they might legitimately be directed. Jews, Christians, and

Muslims all devised rules for slavery, the conduct of war, and the treatment of prisoners and civilian populations. Our era is hardly the first to grapple with humanity’s capacity for evil.\textsuperscript{10}

The idea that certain actions were inherently illegitimate and should be universally prohibited, no matter the circumstances or the particular target group, emerged in the eighteenth century. At the root of this belief was the idea of shared humanity, the belief that all human beings partook of a common nature and were thus entitled to share certain basic rights and protections. This conviction, which animated the early movement to abolish the slave trade, received its classic expression in the preamble to the American Declaration of Independence, with its invocation of “self-evident” truths about equality and “inalienable rights … [to] life, liberty, and the pursuit of happiness.” Obviously these rights have not been extended to all people at all times. The idea of race, itself an artifact of the eighteenth century, has played a particularly important role in blunting the claims of certain groups to full equality. Yet there is no question of the historical importance of the idea of shared humanity, which undergirds the whole edifice of international humanitarian law.

In bequeathing us the ideas of shared humanity and fundamental human rights, the eighteenth century also left us with a series of practical and philosophical problems. How are human rights to be enforced and defended? Do nation states have the right to treat their own citizens as they please, or are there occasions when the demands of humanity trump national sovereignty? How are perpetrators of human rights abuse to be held to account? Such questions are obviously most pointed in the midst or immediate aftermath of atrocities, but they have longer-term implications as well, for great crimes inevitably leave great legacies. Are those who suffered grievous violations of their rights entitled to some form of redress, and, if so, from what quarter? Do such claims die with the original victims, or are there occasions when descendants might also deserve consideration? How do societies move forward in the aftermath of great crimes?

These are not merely academic questions. On the contrary, the global effort to define, deter, and alleviate the effects of gross historical injustice represents one of the most pressing challenges of our time. The modern era will go down in history as the age of atrocity, an age in which the fundamental human rights that most societies profess to cherish have been violated on a previously unimaginable scale. No single factor accounts for this grim reality. The birth of modern nation states, with sophisticated bureaucracies and unprecedented industrial might; the creation of colonial empires; innovations in military technology; the rise of "total war," involving the mass mobilization of civilian populations and the deliberate targeting of non-combatants; the growth of totalitarian ideologies; the emergence of ever more virulent forms of racial, ethnic, and religious bigotry; the rise of mass media, and the use of those media to foment hatred and fear: All these developments and more have radically enhanced humanity's propensity and capacity for annihilation. Viewed in this context, the attempt to uphold basic principles of justice and humanity may seem a little like trying to hold back the tide, but few can doubt its urgency. 11

Defining Crimes Against Humanity

Broadly speaking, the history of efforts to restrain and redress the effects of gross human injustice has proceeded in two phases, both of which are of potential relevance to the current debate over slavery reparations in the United States. The first phase, stretching from the late eighteenth century to the aftermath of the Second World War, revolved

around efforts to define and enforce international norms of humanitarian conduct in regard to three scourges: slavery and the slave trade; offenses committed during times of war; and genocide. These efforts reached a climax of sorts at Nuremberg, where an international military tribunal prosecuted leaders of Nazi Germany, a regime that combined all the worst attributes of slavery, war crimes, and genocide. The second phase, beginning at Nuremberg and continuing to our own time, has focused less on prevention or prosecution than on redress – on repairing the injuries that great crimes leave. At the most obvious level, this entails making provision for the victims of atrocities and their survivors, but it also involves broader processes of social rehabilitation, aimed at rebuilding political communities that have been shattered.

In both guises, retrospective justice rests on the belief that some crimes are so atrocious that the damage they do extends beyond immediate victims and perpetrators to encompass entire societies. The most common label for such offenses is “crimes against humanity,” a term meant to convey not only their great scope and severity but also their distinctive logic. Crimes against humanity are not simply random acts of carnage. Rather, they are directed at particular groups of people, who have been so degraded and dehumanized that they no longer appear to be fully human or to merit the basic respect and concern that other humans command. The classic example is the Holocaust, the Nazi campaign to exterminate Jews and other “subhuman” races, but the same logic can be seen in a host of other episodes, from the slaughter of more than a million Armenians by Turkish authorities during World War I to the systematic rape of more than twenty thousand Muslim women by Serbian soldiers in Bosnia in the 1990s. While obviously directed against specific targets, such crimes attack the very idea of humanity – the conviction that all human beings partake of a common nature and possess an irreducible moral value. By implication, all human beings have a right, indeed an obligation, to respond – to try to prevent such horrors from occurring and to redress their effects when they do occur. At the most obvious level, this means trying to prevent further bloodshed, to break the “cycles of atrocity” that crimes against humanity all too often spawn. But it also means confronting the legacies of bitterness, contempt, sorrow, and shame that great crimes
often leave behind – legacies that can divide and debilitate societies long after the original victims and perpetrators have passed away.\textsuperscript{12}

\textit{Slavery and the Slave Trade in International Law}

The first international humanitarian crusade was the campaign to abolish the transatlantic slave trade, which stands historically and conceptually as the prototypical crime against humanity. As we have seen, Rhode Island played a conspicuous, if contradictory, part in the campaign, becoming the first state in the United States to legislate against the slave trade even as local merchants continued to play a leading role in the traffic. The movement’s crowning achievement came in 1807, when the British Parliament and the U.S. Congress both voted to abolish the transatlantic trade. While the United States made only a token effort to enforce the ban, Great Britain launched a major suppression effort, dispatching a naval squadron to the African coast and negotiating a series of bilateral treaties with other nations, permitting the boarding and inspection of vessels suspected of carrying slaves. Offenders were tried in special “Courts of Mixed Commission” scattered around the Atlantic World, an early example of the use of international judicial bodies to enforce humanitarian law. Africans redeemed from captured ships were taken to Freetown, in the West African colony of Sierra Leone, where they were settled in “receptive” villages, each with its own school.\textsuperscript{13}

It is difficult to appreciate, in retrospect, how remarkable this development was. In the course of a single generation, a commerce that had scarcely ruffled the world’s conscience for two and a half centuries was recast as a singular moral outrage. That the suppression campaign was led by Britain, the nation controlling the largest share of the transatlantic trade at the time, makes it more remarkable still. Yet the victory was less than complete. While the British Anti-Slavery Squadron apprehended hundreds of ships and liberated tens of thousands of people, it did not end the trade. Over the next half century, another two million to three million Africans were carried to the Americas, chiefly to Cuba and Brazil. Equally important, the growing consensus on the criminal-

\textsuperscript{12} All these cases are discussed in more detail below.

ity of the slave trade did not immediately extend to the institution of slavery itself, which continued to exist, and to enjoy wide acceptance, long after the trade had been banned. Britain abolished slavery in its colonies only in the 1830s, and it took another generation and a civil war to end the institution in the United States. In Brazil and Cuba, the last American nations to enact abolition, slavery survived until the 1880s.

The decade of the 1880s also saw the first multilateral anti-slavery treaties. At the Berlin Conference of 1885 and again at the Brussels Conference of 1889, delegates from fourteen nations—all the major European powers, plus the United States—solemnly pledged to use their offices to halt the trafficking of enslaved Africans, whether over land or water, anywhere in the world. But the rhetoric was deceptive, indeed rankly cynical. Alleviating the plight of enslaved Africans served as the chief rationalization for partitioning Africa into formal European colonies. While Britain and France came away with the greatest number of colonies, the single largest territory—the Congo Free State, an area equivalent in size to all of western Europe—was given as a protectorate to one man, King Leopold of Belgium. Over the next twenty years, Belgian officials in the Congo would oversee one of the most notorious forced labor regimes in human history in their relentless drive to produce more ivory and rubber. By the time Leopold was finally compelled to relinquish control of the territory in 1908, an estimated ten million people—about half of the population of the Congo—had died. It would take another two decades after that, until the 1925 League of Nations Slavery Convention, for the nations of the world to commit themselves formally to “the complete abolition of slavery in all its forms.”

War Crimes
The year of the last documented transatlantic slaving voyage, 1864, also witnessed the first international treaty regulating the conduct of war, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies of the Field. Signers of the convention pledged not only to provide medical attention to enemy combatants, but also to refrain from firing upon hospitals, ambulances, and other medical facilities, provided that they were clearly marked—hence the treaty’s

common name, the “Red Cross” agreement. Amended in 1906 and
1929, the convention was dramatically expanded after the Second
World War to guarantee proper treatment of prisoners of war as well as
the protection of civilians during times of war. (The terms of the 1949
agreements have recently come in for renewed debate, with American
officials disputing their applicability to prisoners apprehended in the
ongoing war on terror.) New protocols were added in 1977, extending
protection to civilian victims of armed conflicts, including those waged
within the borders of a single country.\footnote{See American National Association of the Red Cross, The Red Cross of the Geneva

The Hague Convention concerning the Laws and Customs of War
on Land, signed in 1899 and extended in 1907, was more ambitious in
scope but less effective in practice. The aim of the convention was to
establish basic rules of warfare, by prohibiting such tactics as the use of
chemical weapons (chiefly poison gas) and aerial bombing. The 1907
convention also created a permanent court of arbitration, designed
to resolve international disputes before they could escalate into war.
The convention obviously did not achieve its objectives. It did not pre-
vent the outbreak of World War I in 1914, nor did it deter belligerents
from employing precisely the tactics they had renounced. While poison
gas retained the odor of criminality, aerial bombardment soon lost it,
and the practice was freely indulged by all sides in the Second World
War, which ended with the deliberate incineration of civilian popula-
tion centers. At the end of World War I, the victorious Allies made an
effort to prosecute leaders of Imperial Germany, bringing indictments
against some eight hundred military and civilian officials for what were
described as “war crimes” and “crimes against humanity.” But the post-
war German government refused to hand them over, citing its precarious
political position, and the Allies did not press the point. A small
number of the accused were later prosecuted in German courts, but the
few who were convicted escaped with light sentences, on the grounds
that they had merely followed orders.\footnote{See A. Pearce Higgins, The Hague Peace Conferences and Other International Confer-
ences Covering the Laws and Usage of War: Texts of Conventions with Commentaries (1909); U.S. Department of the Navy, Hague and Geneva Conventions (1911); and Geoffrey E. Best, Humanity in Warfare (1980). On the Leipzig trials, see Gary Jonathan Bass, Stay the Hand of}
Genocide

The aftermath of World War I also saw the first international confrontation with genocide, the systematic attempt to eradicate an entire group of people on national, ethnic, racial or religious grounds. While the term is of recent vintage – it was coined in 1944 by jurist Raphael Lemkin from the Greek word for race and the Latin word for killing – the process it describes reaches back to Biblical times and beyond. The colonization of the Americas offers a host of examples, from the extermination of the Taínos, the Caribbean islanders who greeted Columbus, to the destruction of the Pequots in New England in the 1630s. The onset of European colonialism in Africa was also a genocidal business, as the exigencies of conquest intersected with racist ideology and imperial greed to produce murder on a mass scale. While the horror of the Congo Free State generated the greatest number of fatalities, the 1904-07 Herero genocide in German South West Africa was in some respects more ominous, given German commanders’ expressed determination to bring about the “complete extermination” of people described as “nonhumans.” No one was ever prosecuted for the Herero genocide, which is today the subject of growing scholarly interest and a budding reparations movement.17

If colonialism represents one of the historical seedbeds of genocide, then total war represents another. In 1915, shortly after the outbreak of World War I, Turkish authorities launched a campaign to eliminate the

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Ottoman Empire’s Armenian minority. Over the next two years, an estimated one million Armenians were killed, while thousands of others were lost to their communities through deportation and forced religious conversion. These events were widely noted at the time, including by leaders of the Allied powers, who issued a joint declaration in May 1915 condemning the Turkish campaign and pledging to prosecute all responsible for these “crimes ... against humanity and civilization.” Little ultimately came of the threat. In the 1920s, Turkish courts convicted several perpetrators, in absentia, for their role in the “deportation and massacre” of Armenians, but the effort collapsed in the face of international indifference and resurgent Turkish nationalism. By the end of the 1920s, the official Turkish position on the matter was that the Armenian genocide had never occurred, a position upon which the Turkish government still insists today. The lesson was certainly not lost on future genocidaires, including Adolph Hitler. “Who after all speaks today of the extermination of the Armenians?” he is reputed to have asked on the eve of the invasion of Poland. 18

Nuremberg and its Legacy

Ultimately it took the horrors of World War II to compel the international community to face squarely the problem of crimes against humanity. In 1945, the Allied powers created a special tribunal to prosecute some of the men responsible for the horrors of Nazism. In a powerful symbolic gesture, the tribunal was convened in Nuremberg, the city in which the Nazis had first promulgated the “race laws” that stripped Jews of citizenship. In 1946, a second court, the International Military Tribunal for the Far East, or Tokyo Tribunal, was convened to prosecute leaders of imperial Japan. Prosecutors and judges at Nuremberg and Tokyo were acutely aware of the unprecedented nature of the proceedings, which posed a variety of legal problems, not least deciding the specific charges on which perpetrators would be tried. They also appreciated the importance of their work in creating procedures and

precedents for future generations facing the challenge of mass atrocity. Probably the most important accomplishment of the tribunals, and of Nuremberg in particular, was to establish that those who committed crimes against humanity could be held to account even when their actions were “not in violation of the domestic law of the country where perpetrated” – in short, that people were responsible for their conduct even when they acted “legally” or “under orders.” 19

The primary institutional outcome of the postwar tribunals was the Convention on the Prevention and Punishment of the Crime of Genocide, formally adopted by the United Nations General Assembly in 1948. The convention not only clarified and codified the still novel concept of “genocide,” but also committed signatories to taking concrete action to prevent and punish it, whenever and wherever it occurred. While prompted by the Nazi attempt to exterminate the Jews, the convention revealed the continuing importance of slavery and the slave trade as the quintessential crimes against humanity. The list of offenses defined as constituting “genocide” included not only “enslavement,” but also forcible transfer of population, rape and other forms of sexual abuse, persecution on racial grounds, inhumane acts causing serious physical and mental harm, deprivation of liberty, and forced separation of children and parents. As one of the speakers hosted by the steering committee noted, had the Genocide Convention been in effect during the transatlantic slave trade or American slavery, signatories would have been obliged, at least in theory, to take action against them. 20

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International Humanitarian Law, National Sovereignty,
and the United States

The tribunals created after World War II and the international conventions and protocols to which they gave rise represent watersheds in the history of international humanitarian law. Yet the tribunals have not fully realized the hopes of their architects, either in terms of deterring future atrocities or of prosecuting perpetrators. The rapid onset of the Cold War was a severe blow, making it all but impossible for the international community to mount any united response to murderous regimes, a weakness vividly displayed in the late 1970s, as genocidaires in Cambodia, Guatemala, and East Timor slaughtered millions with virtual impunity. At the same time, the growing emphasis on international responsibility under the auspices of the United Nations collided with still powerful ideas about the sovereignty of individual nation states. This problem became apparent immediately after the signing of the Genocide Convention, when the U.S. Senate refused to ratify the treaty. Though the intellectual and political foundations of the convention were chiefly laid by Americans, Senate opponents still balked at the prospect of U.S. citizens being tried before international tribunals rather than in American courts, where they were guaranteed certain constitutional protections. (The Senate finally ratified the treaty, with reservations, in 1988, forty years after its drafting.)

Prospects for collective action have improved somewhat since the end of the Cold War. While the international community was fatally slow to acknowledge and respond to the outbreak of genocide in Rwanda and Bosnia in the early 1990s, the appointment of international criminal tribunals for both cases revives hopes that at least some murderers will be punished for their crimes. More recently, special “hybrid” tribunals, blending elements of national and international judicial systems, have been appointed to prosecute surviving perpetrators of the Cambodian and East Timorese genocides, as well as those responsible for more recent atrocities in Kosovo and Sierra Leone. Maintaining a multiplicity of courts, each with its own personnel and procedures, has inevitably produced complications and delays, but together these tribunals bespeak a new international determination to hold perpetrators accountable.

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21 For definitions in international law of crimes against humanity, genocide, and war crimes, see Crimes of War: What the Public Should Know (Roy Gutman & David Rieff eds., Norton, 1999). On the relationship of the United States to the international regime, see Samantha Power, A Problem from Hell: America and the Age of Genocide (2002).
of gross human rights abuse to account. In 1998, delegates from 140 nations signed the Rome Statute establishing a permanent International Criminal Court dedicated to investigating and prosecuting genocide, war crimes, and crimes against humanity, but the court’s stature and effectiveness remain unclear. In 2002, the United States formally withdrew its signature from the accord, again citing the issue of national sovereignty, as well as concerns that the court might be used to arraign American civilian and military personnel.22

At this writing, the primary challenge to the international humanitarian regime lay in Darfur, a region in western Sudan that is the site of an ongoing genocide. Whether the international community has the capacity and will to stop the killing or to bring those responsible to justice remains to be seen.

The Limitations of Retributive Justice
The tradition began at Nuremberg and continuing in the various international tribunals operating today represents a form of what is known as retributive justice. Justice, in this view, centers on punishing evildoers. Historically, this is the most common form of justice and it is generally uncontroversial. But it has limitations. It is time bound. While crimes against humanity are generally excluded from statutes of limitation, prosecution is obviously only possible while perpetrators live. It also raises questions about selectivity. In a world rife with injustice, how do we determine which offenses are sufficiently grievous to require prosecution? And how do we determine whom specifically to prosecute? In the Nazi Holocaust, hundreds of thousands of people, virtually an entire society, became implicated in genocide, yet the original Nuremberg trials featured only two dozen defendants.23


These problems point to others. Crimes against humanity typically involve not only large numbers of perpetrators but also vast numbers of victims, with a range of different injuries, some of which persist for generations. While seeing perpetrators in the dock may bring some satisfaction to victims or their descendants, it does little in itself to rehabilitate them, to heal their injuries or to compensate them for their losses. More broadly still, approaches focused solely on prosecution do little to rehabilitate societies, to repair the social divisions that great crimes inevitably leave. In other words, crimes against humanity raise issues not only of retributive but also of reparative justice.24

Reparative Justice and its Critics
As in the case of retributive justice, the history of reparative justice efforts is closely associated with the Holocaust. In the late 1940s and early 1950s, the government of West Germany, spurred in part by pressure from the United States, launched a series of programs intended to repair at least some of the damage wrought by Nazi atrocities. The West German effort, which included a formal acknowledgement of responsibility by the Chancellor on behalf of the German people, as well as the payment of substantial reparations to victims, remained a more or less isolated example during the decades of the Cold War; but in the years since the 1980s, the world has seen a proliferation of reparative justice initiatives, stretching from Argentina to Australia, South Africa to Canada. While it is too early to assess the long-term effects of many of these programs, the idea that victims of crimes against humanity are entitled to some form of redress is today a more or less settled principle in international law and ethics. This status was confirmed with the publication in 2003 of the United Nations’ “Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.”25

Not everyone has welcomed these developments. In every society, there are many people who dismiss the whole reparative justice project as divisive, foolish, or futile. In the United States, such criticisms have emanated from both ends of the political spectrum. For those on the right, the quest for historical redress, and for monetary reparations in particular, is just one more symptom of the “culture of complaint,” of the elevation of victimhood and group grievance over self-reliance and common nationality. For those on the left, the preoccupation with past injustice is a distraction from the challenge of present injustice, a reflection of the “decline of a more explicitly future-oriented politics” brought about by the collapse of socialist and social-democratic movements around the world. Advocates of reparative justice offer several rebuttals to these criticisms. Far from fomenting division, they argue, confronting traumatic histories offers a means to promote dialogue and healing in societies that are already deeply divided. This process, in turn, can generate new awareness of the nature and sources of present inequalities, creating new possibilities for political action. Viewed in this light, reparative justice is not an invitation to “wallow in the past” but a way for societies to come to terms with painful histories and move forward.26

While recent discussions of slavery reparations in the United States have chiefly focused on monetary payments, the history of reparative justice initiatives around the world suggests a wide variety of potential modes of redress. Broadly speaking, these approaches can be grouped under three rubrics: apologies (formal expressions of contrition for acts of injustice, usually delivered by leaders of nations or responsible institutions); truth commissions (public tribunals to investigate past crimes and to create a clear, undeniable historical record of them); and reparations (the granting of material benefits to victims or their

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descendants, including not only money but also nonmonetary resources such as land, mental health services, and education). Conceptually distinct, these approaches often overlap in practice. The 1988 U.S. Civil Liberties Act, for example, combined all three modes in addressing the internment of Japanese Americans during World War II, including a national commission to study the matter and collect public testimony, modest monetary reparations (§20,000 to each surviving internee), and a formal apology, tendered by the President on behalf of the nation.27

Apology
One of the most elementary ways to repair an injury, though often one of the most difficult in practice, is to apologize for it. In 1951, West German Chancellor Konrad Adenauer issued a formal statement acknowledging the responsibility of the German people for the crimes of the Holocaust. The statement, produced after long and rancorous negotiations, was something less than an unqualified apology. “The overwhelming majority of the German people abhorred the crimes committed against the Jews and were not involved in them,” Adenauer insisted, adding that many had risked their lives “to help their Jewish fellow citizens.” “However,” he continued, “unspeakable crimes were committed in the name of the German people, which create a duty of moral and material reparations.” While tentative, Adenauer’s acknowledgment of responsibility, together with his government’s agreement to pay substantial reparations to victims of Nazi persecution, represented a crucial step in Germany reclaiming its status within the community of nations. It also sharply distinguished the West German government from its counterpart in communist East Germany, which disclaimed any connection to or responsibility for the crimes of the Nazi regime.28

In 1995, the idea of a representative leader of a nation or institution formally taking responsibility for the offenses of predecessors was a novelty. Today, examples abound. In 1995, Queen Elizabeth II became the first British monarch to issue a formal apology to her subjects, directed to the Maori of New Zealand, for “loss of lives [and] the destruction of

property and social life" occasioned by British colonization. In 2000, Pope John Paul II used the occasion of the first Sunday of Lent to apologize and "implore forgiveness" on behalf of the Catholic Church for a long catalogue of sins, including the violence of the Crusades and Inquisition, the humiliation and marginalization of women, and centuries of persecution of Jews. In 2005, ninety-two U.S. Senators endorsed a resolution formally apologizing for the Senate's role in abetting the lynching of African Americans by refusing to enact a federal anti-lynching statute. The list goes on.\(^9\)

Several speakers hosted by the steering committee discussed the recent proliferation of national and institutional apologies, offering sharply different analyses. Some were critical, dismissing the wave of recent apologies as a vogue, "contrition chic," the triumph of the therapeutic and symbolic over the political and substantive. What can an apology possibly mean, one asked, when the people offering it neither enacted nor feel directly responsible for the offense for which they are apologizing, and when the people accepting the apology did not directly experience the offense? Others defended apology as an essential aspect of historical redress, particularly when accompanied by some material demonstration of seriousness and sincerity. Far from just "cheap talk," they argued, apologies offer an opportunity to facilitate dialogue, nurture accountability, and enrich political citizenship. As one speaker noted, most atrocious crimes in history begin with the denial of the equal humanity of a certain class of people; thus any project of social repair must begin with some acknowledgement of the dignity of that group and of the seriousness of what they suffered. Apologies are one vehicle to accomplish this.\(^9\)

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30 On the possibilities and limitations of apology, from the perspectives of political philosophy, theology, sociology, comparative history, and law, see Brian Weiner, Sins of the Parents: The Politics of National Apologies in the United States (2005); Donald Shriver, An Ethic for Enemies: Forgiveness in Politics (1995); Nicholas Tavuchis, Mea Maxima Culpa: A Sociology of Apology and Reconciliation (1991); Taking Wrongs Seriously: Apologies and Reconciliation (Elazar Barkan & Alexander Karn eds., Stanford University Press, 2006); and Brooks, supra note 26. For the range of popular opinion on apologies, see Walter Shapiro, Memo: Mia, That's a Max Culpa, time, June 30, 1997, and Jack E. White, Sorry Isn't Good Enough:
The Politics of Apology: Australia’s “Stolen Children” and Korean “Comfort Women”

As several speakers noted, apologizing can be a complicated business. As in relations between individuals, apologies between groups and institutions involve subtle assessments of sincerity and motive, timing and tone, all of which are inevitably complicated by the variety of actors and the passage of time. The case of abducted Australian Aboriginal children, the subject of one of the programs sponsored by the steering committee, offers a dramatic example. Between 1900 and the early 1970s, the Australian government, working with Christian missions, removed an estimated one-hundred thousand Aboriginal children from their families and consigned them to boarding schools and white foster families as part of a forced racial assimilation policy. (The policy focused on light-skinned, or “half-breed,” children; full-blood Aborigines were presumed to be unassimilable and destined for extinction.) In the 1980s and ’90s, the fate of the “stolen children” became an important political issue in Australia, culminating in the appointment of a government commission of inquiry; the commission, which issued its report in 1997, recommended a formal government apology to affected families.31

The commission’s recommendation was rejected by the newly elected conservative government of John Howard, who insisted that current Australians bore no responsibility for the sins of their forbears and should not “embroil themselves in an exercise of shame and guilt.” The prime minister also expressed fears that an official apology would lead to massive compensation claims against the Australian government. Howard’s position prompted an immediate outcry, leading to the passage of apology resolutions in several state parliaments and the organizing by community groups of an annual “National Sorry Day.” The groundswell prompted Howard to amend his position, and in 1999 he introduced a resolution that expressed “deep and sincere regret” for the forced assimilation policy, but also stopped short of apologizing or accepting responsibility for it. The controversy continues today.32

32 See Danielle Celimajer, The Apology in Australia: Re-Covenananting the National
The politics of apology have been even more contentious in East Asia, where the conduct of the Japanese Imperial Army during World War II—and the refusal of subsequent Japanese governments to accept full responsibility for that conduct—continues to shadow relations between Japan, China, and North and South Korea. Over the last fifteen years, Japanese leaders, including the current emperor and the prime minister, have issued numerous statements expressing regret and contrition for wartime atrocities, but the belatedness of the statements and their emphasis on personal remorse rather than collective responsibility have left many victims groups distinctly unsatisfied. The controversy has come to focus on the predicament of so-called “comfort women”—women and children from Korea, China, and other occupied territories who were abducted from their homes and forced to work as sex slaves in military brothels. In 2001, after more than half a century of denial, the Japanese government acknowledged “military involvement” in the system and offered survivors up to $20,000 in “atone-ment” money from a privately-funded “Asian Women’s Fund.” But a group of surviving comfort women, mostly from Korea, rejected the money, insisting that any funds should come directly from the Japanese government, accompanied by an unequivocal acceptance of responsibility and a formal apology.33

The comfort women controversy is doubly relevant here, because the case has become a political issue in the United States. Outrage over the treatment of the women was the main inspiration for the Lipinski Resolution, a joint U.S. Congressional resolution introduced in 1997 which called upon the government of Japan to “formally issue a clear and unambiguous apology for the atrocious war crimes committed by the Japanese military during World War II; and immediately pay reparations to the victims of those crimes.” The resolution attracted dozens of congressional sponsors but was eventually scuttled by the State Department, chiefly because of concerns that it would encourage other reparations claims. In April 2006, another joint resolution was introduced into Congress, again calling upon the Japanese government to

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“acknowledge and accept responsibility for” the enslavement of comfort women, and also to take steps to “educate current and future generations about this horrible crime against humanity.” The bill, which is pending, omits any reference to reparations, though it enjoins Japan to “follow the recommendations of the United Nations and Amnesty International with respect to the ‘comfort women’” – recommendations that include payment of monetary reparations.34

National Apologies in the United States

Leaving the question of monetary reparations momentarily aside, there is a distinct irony in demands for a governmental apology coming from Americans, who tend to be skeptical of the value of collective apologies for past wrongs, at least when their own history is concerned. As innumerable letters sent to the steering committee made clear, many American reject, indeed resent, the suggestion that they bear some responsibility for actions in which they took no part, actions that may have occurred before they were born. The very notion collides not only with deeply engrained beliefs about individual responsibility, but also with quintessentially American ideas about historical transcendence, the capacity and fundamental right of human beings to shake off the dead hand of the past and create their lives anew. This skepticism is reinforced by the nation’s litigious culture. In America today, there is a widespread sense that to apologize for or even to acknowledge an offense exposes one to legal liability and invites claims for damages.

Despite these constraints, there are several examples in recent American history of government apologies. Japanese Americans forcibly interned during World War II received a presidential apology – in fact three: one from Gerald Ford in 1976, one from Ronald Reagan, when he signed the 1988 Civil Liberties Act, and one from his successor, George H.W. Bush, when implementing the act. In 1993, Bill Clinton issued a formal apology to the indigenous people of Hawaii for the American government’s role in the destruction of Hawaiian sovereignty. Four years later, Clinton apologized to victims of the Tuskegee “Bad Blood” experiment, in which the U.S. Department of Health deliberately and deceptively withheld treatment from African

Americans infected with syphilis in order to study the effects of the unchecked disease. The 2005 Senate resolution on lynching represents the most recent example of a government apology, though it was offered on behalf of a particular institution rather than of the nation as a whole.35

Apologies Untendered: Native Americans and African Americans
American leaders have been notably slower to extend apologies to the two groups who would seem to have the most obvious claims to them: Native Americans and African Americans. While the indigenous people of Hawaii have received a presidential apology, native peoples on the mainland have not. In 2000, the Bureau of Indian Affairs apologized for its role in the "ethnic cleansing" of native lands and the deliberate annihilation of native culture, but the gesture’s impact was muted by the fact that it came from an assistant secretary of the Department of Interior, on behalf of a government agency, rather than from the President, on behalf of the nation. (The fact that the official who issued the apology was himself Native American further reduced its effect.) In 2004, a trio of senators, led by Ben Nighthorse Campbell, a Republican from Colorado and member of the Northern Cheyenne tribe, introduced a joint Congressional resolution to “acknowledge a long history of official depredations and ill-conceived policies by the United States Government regarding Indian tribes and offer an apology to all Native Peoples on behalf of the United States.” But the bill received a negative recommendation from the Senate’s Committee on Indian Affairs and died without reaching the Senate floor.36

The government has been even more reticent on the subject of slavery. While a growing number of American churches, corporations,


and universities have acknowledged their complicity in slavery and the slave trade, the nation as a whole has not. In 1997, Congressman Tony P. Hall of Ohio introduced a one-sentence concurrent resolution — “Resolved by the House of Representatives that the Congress apologizes to African-Americans whose ancestors suffered as slaves under the Constitution and the laws of the United States until 1865” — but the bill languished in committee without ever coming up for debate on the floor of Congress. In the meantime, the closest the U.S. government has come to a formal apology is a pair of statements by President Clinton in 1998 and President Bush in 2003, both delivered at the same spot: the old fortress at Goree Island in Senegal, West Africa. Both presidents expressed regret for the slave trade but they also carefully stopped short of apologizing for it. President Bush gave a particularly stirring speech, describing the slave trade as “one of the greatest crimes of history” and slavery itself as “an evil of colossal magnitude,” the latter characterization borrowed from his eighteenth-century predecessor, John Adams. Yet he offered no apology, nor any suggestions about what Americans in the present might do in light of this painful history. Whether the bicentennial of the abolition of the Atlantic slave trade in 2007 will provide the occasion for a more forthright apology remains to be seen.37

Telling the Truth

If there is a single common element in all exercises in retrospective justice it is truth telling. Whether justice is pursued through prosecution, the tendering of formal apologies, the offering of material reparations, or some combination of all three, the first task is to create a clear

37 See Congressman Hall’s proposed resolution, H. R. Con. 96, 105th Cong. (1997), available at http://thomas.loc.gov/cgi-bin/query/D?c105:1::temp/~mdbs1/CnYO4:: For recent presidential statements, see Ann Scales, Clinton, in Senegal, Revisits Slavery’s Horrors, Emotional End to Historic Trip, Boston Globe, Apr. 9, 1998; and John Donnelly, Bush Condemns Slavery as one of “Greatest Crimes,” Speech at Source of African Trade Gives No Apology, Boston Globe, July 9, 2003. For the full text of Bush’s speech, see Alfred Brophy, Reparations: Pro and Con 203-06 (2006). Clinton’s reticence was particularly noteworthy, given signals from the administration in the days before the speech that an apology was forthcoming. The retreat may have been in response to domestic opponents, who were already ridiculing Clinton’s Africa visit as the “contrition tour,” but at least one administration official attributed it to fears that an explicit apology might stimulate reparations claims; see U.S. News and World Report, Apr. 6, 1998.
historical record of events and to inscribe that record in the collective memory of the relevant institution or nation.

Of course, the truth is not always easy to discern. Most crimes against humanity are sprawling events, unfolding over months or years and involving vast numbers of actors, who often have very different perspectives, both at the time and in retrospect. Documentation is often in short supply, sometimes because records were not kept, sometimes because they were deliberately destroyed. Even the Holocaust, the most thoroughly organized and documented genocide in human history, has proved to be an elusive affair. Historians today estimate that only about half of those who perished under the Nazis died in death camps, the balance having been shot, stabbed, beaten, worked, or marched to death in a myriad of individual acts of atrocity. Even today, more than sixty years later, historians continue to uncover details of killings long forgotten or suppressed, including most recently a series of murderous pogroms launched by Poles against their Jewish neighbors, some after the war was over.38

As such revelations suggest (and as the controversy they have unleashed abundantly confirms), not everyone wishes to have the full truth told. As a general rule, perpetrators and their associates are particularly anxious to see societies “turn the page” on the past. But even after perpetrators have left the scene and the immediate threat of prosecution or retaliation has receded, the idea of unearthing the past often confronts significant opposition from people who fear that such inquiries may threaten their social standing or undermine cherished national myths. Both of these motives can be seen in the Turkish government’s continuing insistence that the Armenian genocide of 1915-1917 never happened, a claim flatly contradicted by thousands of eye-witness accounts, newsreel footage, and an abundant documentary record. (Under current Turkish law, anyone asserting that the genocide occurred is liable to prosecution for the crime of “denigrating Turkishness,” an offense punishable by up to three years in jail.) This is obviously an extreme example, but the same impulse to evade, extenuate, or deflect the full burden of the past can be seen in many other cases, from Konrad Adenauer’s insistence that the vast majority

of Germans had "abhorred" Nazi crimes and played no part in them to the time-honored refrain in New England that slaves in the region were treated kindly.

History and Memory
As these examples show, the struggle over retrospective justice is waged not only in courts and legislatures but also on the wider terrain of history and memory – in battles over textbooks and museum exhibitions, public memorials and popular culture. The steering committee organized many programs around these issues, on topics ranging from the design of Holocaust memorials to the efforts of some citizens of Philadelphia, Mississippi, to come to terms with the murder of three civil rights workers in their community in 1964. Many of these programs focused on the history and memory of American slavery, the focus of the committee's charge. Speakers discussed the erasure of slavery and the slave trade from New Englanders' collective memory; the history and mythology of the Underground Railroad; representations of slavery in twentieth-century African-American art and literature; the politics of slavery reenactments at historical sites like Colonial Williamsburg; and popular reactions to recent DNA tests that appear to confirm long-standing allegations that Thomas Jefferson fathered children by one of his slaves, Sally Hemings. While different speakers offered different conclusions, all agreed that slavery remains an extremely sore subject for many Americans, white as well as black. If one of the defining features of a crime against humanity is the legacy of bitterness, sensitivity, and defensiveness that it bequeaths to future generations, then American slavery surely qualifies.

Commissioning the Truth
The steering committee also organized several programs on truth commissions, which have emerged in recent years as one of the primary mechanisms for societies seeking to come to terms with atrocious pasts. The best-known example is the South African Truth and Reconciliation Commission, established in 1995 during that country's transition from racial apartheid to democratic rule, but South Africa is far from alone. Since 1982, at least two-dozen countries have convened truth commissions of one sort or another. While the United States government has never formally convened a truth commission, the model has been used
at the national, state, and even municipal level to examine specific historical injustices.

Though the particulars differ, truth commissions typically share certain features. Almost by definition, they are convened in societies that have seen massive violations of human rights, usually perpetrated by the state or its agents, thus creating a need for some kind of extraordinary body, beyond the normal system of judges and courts, to address them. Not surprisingly, they are usually associated with periods of political transition, as societies struggle to erect new, legitimate governments atop the ruins of old, discredited ones. At the same time, they tend to occur in societies in which leaders of the old regime continue to exercise substantial power, rendering prosecution impractical. In some cases, truth commissions have been part of broader reparative justice campaigns, including apologies, reparations payment, and other initiatives designed to promote social repair and reconciliation. In other cases, they have stood alone. In a few instances—Sierra Leone, for example—truth commissions have proceeded alongside prosecution efforts, but in most cases they have been convened in lieu of prosecution. In South Africa, the Truth and Reconciliation Commission was empowered to award amnesty to perpetrators who testified before it as long as they met certain criteria, including a demonstrable political motive and full disclosure of their crimes. 39

The Politics of Truth Commissions: The Latin American Experience

How well truth commissions succeed depends in large measure on the political circumstances in which they are appointed, a fact illustrated by the experience of Latin America, which has been the site of no fewer than ten commissions, most convened amidst transitions from military to civilian government. The earliest commissions, appointed to determine the fate of thousands of political opponents who “disappeared” during military rule, quickly ran up against the continuing

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political influence of military authorities and their elite allies. Several were forced to disband before they filed final reports, including the first one, the Bolivian National Commission of Inquiry into Disappearances, appointed in 1982. Argentina’s National Commission on the Disappeared, appointed in 1983, fared somewhat better. The commission’s report included information on some nine thousand disappearances, some of which was used to prosecute officers of the old junta. But growing opposition from the military and parliament forced the government to suspend the prosecutions. Under revised guidelines, officials in the military, police, and government were declared exempt from prosecution so long as they acted in accordance with the orders of superiors—precisely the defense rejected by the International Military Tribunal at Nuremberg four decades before.40

Some commissions were designed to fail. The Historical Clarification Commission of Guatemala was asked to investigate crimes committed over the course of a thirty-six-year civil conflict, but it was not given authority to subpoena witnesses or to name perpetrators in its final report. The National Commission for Truth and Reconciliation in Chile began in similarly unpromising fashion. Charged to investigate human rights abuses between the military coup of 1973 and the restoration of civilian rule in 1990, the commission was hampered not only by the blanket amnesty that leaders of the old regime had given themselves but also by the fact that the former president, General Augusto Pinochet, remained commander-in-chief of the Chilean armed forces. Yet despite these obstacles, the commission succeeded in collecting fresh evidence about government crimes, which was later used to overturn the amnesty provision and prosecute some perpetrators. (Because they had disposed of victims’ bodies, chiefly by dumping them in the ocean, military officials were unable to prove that they had actually killed the people they kidnapped, making it possible to prosecute them for “ongoing sequestration,” a crime not covered by amnesty provisions or statutes of limitations.)41


The South African Truth and Reconciliation Commission

South Africa's Truth and Reconciliation Commission is the best known of recent international commissions and the one that best illustrates such institutions' possibilities and potential limitations. Over a period of two years, the commission, which was chaired by Archbishop Desmond Tutu, collected more than twenty thousand statements from victims of gross human rights abuse, as well as more than seven thousand amnesty applications from perpetrators detailing their crimes. Several thousand of these people testified in public hearings—hearings that were televised nationally and discussed in innumerable public and private forums. The commission's report, along with volumes of supporting material, was widely distributed and is now an unerasable part of the historical record of the nation.42

Yet the South African process was not without flaws, as several speakers made clear. Many prominent political leaders refused to apply for amnesty or to testify before the commission, calculating (correctly) that the new government would not have the ability or will to prosecute them. The commission also interpreted its mandate in quite narrow ways, not only by confining itself to violations between 1960 and 1993 but also by limiting its attention to crimes that were "politically motivated"—crimes undertaken explicitly to defend or overthrow the apartheid regime. The effect of these decisions, as one speaker noted, was to focus attention on the struggle over apartheid and away from the inherent violence and depravity of the apartheid system itself. The creation of great wealth and great poverty; the denial of education; the destruction of families; the multifarious legacies of a half century of racially-driven social engineering, coming on the heels of three centuries of colonialism: All these concerns fell outside the commission's purview.43


Truth Commissions and Historical Repair

Yet as several speakers reminded us, the significant fact is not that truth commissions are imperfect but that they happen at all, that facts that in previous generations would likely have been forgotten or suppressed are today discussed and dissected in public forums. Obviously commissions cannot by themselves repair the legacies of trauma and deprivation that crimes against humanity leave behind, but they do create clear, undeniable public records of what occurred—records that provide an essential bulwark against the inevitable tendencies to deny, extenuate, and forget. Perhaps most important, truth commissions offer the thing that victims of gross human rights abuse almost universally cite as their most pressing need: the opportunity to have their stories heard and their injuries acknowledged.44

One speaker sought to illustrate the value of truth commissions by posing a counterfactual question: What if the United States had convened a truth and reconciliation commission following the abolition of slavery in 1865? The question is both anachronistic and unanswerable, but worth pondering. Suppose that large numbers of formerly enslaved African Americans had been given a public forum to describe their experiences in captivity: decades of unremunerated toil; physical and sexual abuse; loved ones consigned to the auction block. Suppose that those who participated in and profited from the institution—a category that included slaveowners and non-slaveowners, southerners and northerners—were likewise asked to account for their conduct. And suppose also that these testimonies were broadcast widely, provoking public discussion and becoming enshrined in the nation’s collective memory—in textbooks and public memorials, political speeches and Hollywood films. Would the nation’s subsequent history have unfolded

as it did? Would discussions about race provoke the misunderstandings and raw feelings that they so often provoke today?  

Truth Commissions in the United States

Though the United States has never formally convened a truth commission, the model has been used in more local contexts. The federal commission appointed to investigate the World War II internment of Japanese Americans is the obvious example, but truth commissions have also been established to examine injustices against African Americans. In 1993, the House of Representatives of the State of Florida funded a scholarly commission to investigate the 1923 Rosewood Massacre, a murderous assault on an all-black town by a white mob following (false) reports of the rape of a white woman by a black man. The legislature responded to the commission’s report by enacting the Rosewood Compensation Act, providing monetary compensation to families who had lost property in the attack and creating a small college scholarship fund for “minority persons with preference given to direct descendants of the Rosewood families.” (The legislature refrained from offering an apology.) More recently, two different cities in North Carolina launched truth and reconciliation initiatives: Wilmington, where a state-appointed commission investigated the city’s 1898 race riot, essentially an armed coup against one of the last municipal governments in the South with substantial black political participation; and Greensboro, where a group of private citizens, acting in defiance of white members of the local city council, convened a commission to investigate the 1979 massacre of union organizers by members of the Ku Klux Klan, allegedly abetted by the police.

45 The closest thing the country had to a truth commission after the Civil War was the Freedmen’s Inquiry Commission, appointed by Congress in 1863. Comprised of three prominent abolitionists, the commission collected some slave testimony, but the purpose was not to unearth the facts of the past as much as to make recommendations about future policies toward the freedpeople. See Eric Foner, Reconstruction: America’s Unfinished Revolution, 1863-1877, 68, 69 (1988).
46 On Rosewood, see Florida Board of Regents, A Documented History of the Incident Which Occurred at Rosewood, Florida, in January 1923 (1993) and Michael D’Orso, Like Judgement Day: The Ruin and Redemption of a Town Called Rosewood (1996). The work of the Greensboro Truth and Community Reconciliation Project can be reviewed at http://www.gtcrp.org; on Wilmington, see http://www.dcr.state.nc.us/1898-wrsc/report/report.htm. Details of other such initiatives, focusing on the 1906 Atlanta race riot and several of the South’s most notorious lynchings, can be found at http://www.southerntruth.org. One legal scholar has advocated the convening of a national truth commission to examine America’s history of lynching; see Sherilyn A. Ifill, Creating a Truth and
While the North Carolina commissions have been widely praised for providing information and facilitating dialogue on painful chapters in the state’s history, the experience of the Oklahoma state commission appointed to investigate the 1921 Tulsa race riot was more mixed. The riot, which destroyed the most prosperous African-American community west of the Mississippi, was one of the bloodiest in American history: An estimated three hundred black people were killed and thousands more were driven from their homes by a white mob armed and deputized by local authorities. The commission succeeded in recovering the truth of an episode that had been completely erased from official histories of the city and state, but its significance as a vehicle of reconciliation was attenuated when the Oklahoma legislature, rejecting one of the commission’s primary recommendations, refused to appropriate money to compensate the small number of surviving victims. Bitter survivors responded by filing a class-action reparations lawsuit in federal court. The suit, Alexander v. Oklahoma, was dismissed in 2005 on statute-of-limitations grounds. \(^{47}\)

**Reparations: Theory and Practice**

As many of these examples reveal, official apologies and truth commissions have often been accompanied by the payment of some kind of compensation or material reparation. Though “reparations” are sometimes dismissed by critics today as a recent innovation, the underlying legal principle is ancient and well-nigh universal: People who suffer injuries and losses through the malicious or culpably-negligent conduct of others have a right to redress – a right, as far as practicable, to be “made whole.” This principle, a cornerstone of common law, has a very long history in cases involving historical injustice. Family members of men and women executed during the Salem witchcraft trials of the 1690s, for example, were paid reparations by the Massachusetts colonial legislature. In recent years, this principle has been widely applied

to cases of human rights abuse, with literally scores of different groups around the world receiving reparations of various kinds.

But if the basic principle of reparations is straightforward enough, the application of that principle in specific cases is enormously complex, as various speakers sponsored by the steering committee made clear. What form should reparations take? Who is entitled to receive reparations and who is responsible to provide them? How is the value of an injury to be calculated? What happens to reparations claims with the passage of time? Beneath these practical matters lay deeper moral and political questions. What are reparations intended to accomplish? Are they an end in themselves or one aspect of a broader process of repair and reconciliation? While most of the speakers entertained by the steering committee acknowledged the importance of redressing injuries, several warned of the danger of “commodifying” suffering, of defining claims to justice in narrowly material terms. Others spoke of the “one-time payment trap,” in which a single check is taken to absolve society of any further responsibility for the legacies of historical injustice.48

Determining the Medium of Reparation
The easiest reparations claims to understand, if not always to implement, are simple restitution claims—returning stolen property, looted artworks, sacred relics, and other such personal and cultural property to the rightful owners. Unfortunately, most cases of gross historical injustice do not admit of such tidy resolution. How does one make restitution for a human life or time in a torture chamber? In such circumstances, reparation must be made in some other currency. In the American case, the medium of choice is usually money, but there are abundant examples, in the United States and elsewhere, of reparations being paid in other forms, including land, education, mental health services, employment opportunities, preferential access to loan capital, even the creation of dedicated memorials and museums to ensure that

a group's experience is not forgotten by future generations. In the case of the Tuskegee syphilis experiment, for example, the tendering of a presidential apology to the handful of surviving victims was accompanied by the commitment of federal funds to create a research center in bio-medical ethics on the Tuskegee University campus.49

What happens when those representing the interests of victims and perpetrators do not agree on the appropriate form of reparation? The history of Native American land claims illustrates the problem. Native Americans represent something of a special case in reparations theory, not only because of the scope of their injuries but also because of the existence of written treaties to undergird many of their historical claims. In 1946, the U.S. Congress, facing a raft of potential land disputes, created an Indian Claims Commission to hear and resolve all tribal claims against the United States, whether treaty-based or merely “moral.” The commission, which operated until 1978, was seen by its creators as a gesture of liberality, but it quickly became an adversarial body, enforcing strict eligibility standards and restricting awards to the minimum possible amount. The biggest bone of contention was the commission’s insistence that compensation be paid in money rather than land; to restore stolen land to its original owners, the commissioners reasoned, was both impractical and unfair to the land’s current owners, most of whom had purchased their property legally and in good faith. While many native nations accepted this logic, some did not, most notably the Sioux, who insisted on the actual return of ancestral lands in the Black Hills. With accumulated interest, the compensation awarded by the commission is today worth hundreds of millions of dollars, but the Sioux refuse to accept it, arguing that the Black Hills are sacred space and cannot be bought or sold.50

Calculating Compensation

Even where money is accepted as the medium of reparation, the question of determining the appropriate amount remains. Are such payments literally compensation, based on a calculation of actual losses, or are they more symbolic or broadly rehabilitative, in which case everyone in a given class should receive the same sum? The September 11

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Victims Compensation Fund pursued the former approach. Created by Congress to forestall potentially crippling legislation against airline companies, the fund has dispensed some $3 billion, an average of about $1 million per family, to survivors of the men and women killed in the terror attacks of September 11, 2001. Obviously the fund represents an unusual case in reparations history: The agency providing compensation, the U.S. government, was not responsible for the original offense; the perpetrators, Al Qaeda, have expressed no remorse for their crime nor any interest in repairing the resulting injuries. What makes the fund noteworthy here is both the size of the reparations and Congress’s decision to award different amounts to victims, based on income and a calculation of likely future earnings, a decision that ensured, in essence, that the largest sums went to the wealthiest families.51

Most recent reparations programs have taken the second, more symbolic approach. Under the terms of the 1988 Civil Liberties Act, for example, all surviving victims of the Japanese-American internment camps received $20,000, regardless of their actual losses in property and earnings. The sum of $20,000, in fact, has become something of a touchstone in the international reparations field. The government of Canada, which also interned citizens of Japanese descent during World War II, paid reparations in the amount of $21,000, reflecting the greater severity and duration of internment there. The private “atonement” money offered to surviving “comfort women” by the Japanese government in 2001 was the equivalent of $20,000, as was the sum recommended by South Africa’s Truth and Reconciliation Commission as reparations for victims of gross human rights abuse who had testified before the commission. (The amount eventually appropriated by the South African government was less than $4,000 per person.) $20,000 was also the sum recently offered to surviving Native Canadian children who were taken from their families and shipped to white mission schools in the Canadian counterpart to Australia’s forced racial assimilation policy.52

51 See procedures and payments under the September 11 Victim Compensation Fund, available at http://www.usdoj.gov/archive/victimcompensation/
Reparations and the Holocaust

The conceptual and practical problems inherent in any reparative program are well illustrated by the sixty-year struggle over Holocaust reparations, a struggle in which Americans have played a leading role. In 1947, as the tribunal at Nuremberg completed its work, U.S. military authorities in occupied West Germany imposed the country’s first Holocaust restitution law, providing for the return of real estate, factories, and other property stolen from Jews as part of the Nazi’s “Aryanization” of the economy. American occupation officials also helped to draft the first model law for paying reparations to individual victims of Nazi atrocities, a step that many U.S. officials held out as a precondition for the restoration of German national sovereignty. In the years that followed, the West German government enacted a series of reparations programs, providing monetary grants and pensions to individual victims and their survivors, with prescribed payments for loss of life, loss of health, losses of property and professional advancement, and other specified injuries. American officials also helped to facilitate the 1952 treaty between West Germany and the state of Israel, providing for the transfer of 3.5 billion DM worth of money, machinery, and other goods to assist in the resettlement of Jewish refugees.53

Even with the memory of Nazi atrocities still fresh, many Germans objected to the idea of paying reparations. Critics decried reparations as victor’s justice, an exercise in guilt-mongering, even as a Jewish conspiracy against the German nation. In the early days in particular, opponents sought to undermine the program by imposing tight deadlines and strict eligibility standards, including, for a time, a requirement that victims prove that their injuries flowed from “officially approved measures.” Entire categories of victims were excluded from receiving reparations, including homosexuals, communists, and victims of the Nazi’s vast forced labor regime. Yet even admitting these limitations, the Holocaust programs represent the most ambitious social repair project in history. By the time of German reunification in 1990, the government of West Germany had dispensed some 80 billion DM in reparations, the bulk of it to individual victims and their survivors.54

53. For the range of Holocaust restitution and reparations programs, see Christian Press, Paying for the Past: The struggle for reparations for surviving victims of the Nazi Terror (1998).
54. Id.
Holocaust Litigation in American Courts

Half a century after the end of World War II, the Holocaust reparations issue was reborn in a new venue: American courts. In 1996, a class-action lawsuit was filed in federal district court in Brooklyn against the three largest private banks in Switzerland, charging them, in essence, with trying to defraud Holocaust victims and their descendants by refusing to release assets deposited in them prior to World War II. (Among other devices, the banks insisted that heirs produce death certificates for deceased account holders, a condition that was impossible to meet in the circumstances of the Holocaust.) Facing protracted litigation and a public relations nightmare, the banks settled the suit for $1.25 billion. In exchange, plaintiffs agreed to drop all future litigation against the banks, as well as the Swiss government and other Swiss corporations.\(^55\)

Even at the time, there were some who saw the settlement more as a victory for the banks, which escaped future litigation for a relatively modest sum, than for Holocaust victims, the vast majority of whom received only token $1,000 payments. But the precedent had been set, and more than forty class-action lawsuits followed, all filed in American courts against private corporations alleged to have profited from Nazi atrocities. Most of the suits pertained to the exploitation of forced laborers, a group excluded from previous Holocaust reparations programs. At least ten million people were compelled to work in the Nazi war machine during World War II, including Jews (many of whom labored in a dedicated “extermination through work” program) as well as non-Jews. Fifty years later, more than a million of those people survived, as did many of the companies for which they had labored. Some of these firms had operations in the United States, making them vulnerable to suit in American courts.\(^56\)

Viewed purely in legal terms, the German cases were considerably weaker than the Swiss bank cases. In 1999, courts in New Jersey dismissed suits against Ford Motor Company (whose German subsidiary

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had employed slave labor during World War II), Siemens, and several other major multinational firms, citing the expiration of statutes of limitations as well as terms of the treaties ending World War II. But the barrage of bad publicity, as well as mounting pressure from American political leaders, prompted the companies to offer a settlement. According to the terms of the eventual agreement, German companies, with the assistance of the German government, made a one-time payment of $7,500 to surviving “slave” laborers, chiefly Jewish survivors of the extermination-through-work program, with smaller payment to other surviving “forced” laborers, chiefly Eastern Europeans. The entire settlement, including a fund for indigent survivors and a small “Remembrance and Future Fund” to promote Holocaust education, totaled about ten billion DM ($5 billion). In exchange, German companies and the German government were guaranteed “legal peace” from any further litigation in American courts. Appreciating the value of such an arrangement, the government of Austria and Austrian corporations immediately offered a forced-labor settlement of their own, valued at $500 million, or one-tenth of the value of the German settlement.57

Limits of Litigation

We shall return to the Holocaust reparations litigation, which served as the direct inspiration and model for a series of class-action lawsuits brought in the early 2000s by African Americans seeking reparations from American corporations alleged to have profited from slavery and the slave trade. In the present context, the Holocaust example is useful for illuminating the possibilities and pitfalls of litigation as a vehicle for pursuing reparations claims. As the Swiss and German suits showed, litigation often generates publicity, raising awareness of an injustice and increasing public pressure for action. Being linked to atrocious crimes can also be embarrassing to corporations, perhaps inducing them to settle. Should defendants refuse to settle, however, the impediments to successful reparations litigation are enormous, at least in American courts. As several of the speakers invited to Brown by the steering committee noted, reparations lawsuits, whether directed against the federal government or private corporations, face a host of procedural hurdles.

57 On the disbursement of funds, see Burt Neuborne, A Tale of Two Cities: Administering the Holocaust Settlement in Brooklyn and Berlin, in Holocaust Restitution: Perspectives on the Litigation and its Legacy (Michael J. Bazyler & Roger P. Alford eds., NYU Press, 2006).
before they can even be heard on the merits, including the government’s sovereign immunity from suit, expired statutes of limitations, problems of establishing standing and a justiciable case (essentially the need to establish a link between a specific injury in the past and a specific plaintiff in the present), and the so-called “political questions” doctrine (the idea, first articulated by John Marshall in the 1820s, that courts have no business intervening in matters properly belonging to the legislature). Some of these obstacles might be overcome: Congress has the authority to waive sovereign immunity and extend statutes of limitations; courts can be more or less strict in interpreting standing or the meaning of political questions. But in the present political circumstances, it is very difficult to imagine lawsuits seeking reparations for slavery or other historical injustices making any headway in American courts.

Some of the scholars invited by the steering committee went further, questioning not just the practicality but also the wisdom of using litigation as the medium for confronting questions of historical injustice and social repair. While acknowledging that reparations suits are often filed as a last resort, these speakers suggested that courts of law, with their inherently adversarial structure, their focus on past injuries, and their narrow conceptions of “injury” and “settlement,” are precisely the wrong venue for promoting reconciliation and a better future. Not only does litigation risk pulling people into the “one-time payment trap,” but it also creates no opportunity for dialogue, for the descendants of victims and of perpetrators to exchange perspectives and to develop shared understandings of their past experience and present predicament. Such speakers were certainly not disavowing reparations per se, or the moral and political urgency of confronting legacies of injustice, but rather attempting to move a debate currently waged on narrowly legalistic grounds onto the broader terrain of history, memory, and moral obligation.58

58 The most systematic critique of the “tort” model of reparations is Ray L. Brooks, Atonement and Forgiveness: A New Model for Black Reparations, (2004) which offers an alternative “atonement” model rooted in dialogue and shared discovery of the meaning of the past. For other attempts to broaden the terms of the debate, see Charles S. Maier, Overcoming the Past: Narrative and Negotiation, Remembering, and Reparation: Issues at the Interface of History and the Law, in Politics and the Past: On Reparating Historical Injustices (John Torpey ed., 2003), and Thomas McCarthy, Coming to Terms with the Past, Part II: On the Morality and Politics of Reparations for Slavery, 32 Political Theory 750, 772 (2004).
Reparations Claims and the Passage of Time

Every exercise in retrospective justice is unique, as are the horrors that prompt it. Yet great historical crimes have at least one thing in common: All direct participants, both perpetrators and victims, eventually die. Their passing raises one final, thorny set of questions. What happens to reparations claims with the passage of time? Are the descendants of victims of gross human rights abuse ever entitled to redress (as they would be, say, in the case of a stolen painting) or do all such claims die with the original victim? Is the responsibility to make reparation ever handed down, or is that obligation also expunged after one generation? What about crimes—such as slavery and the transatlantic slave trade—that produced great wealth? Are the descendants of those responsible free to enjoy the fruits of injustice simply because they took no part in the original offense? All of these questions have both legal and ethical dimensions. They also have obvious relevance to the current American debate over reparations for slavery, an institution that ended in the United States before all currently living Americans were born.

If recent public opinion polls are any guide, a large majority of Americans, or at least of white Americans, are extremely skeptical of historical claims, insisting that only those who directly perpetrated an injustice can be held responsible for it and that only those who directly experienced the injustice have a right to reparation. This standard has the virtue of clarity. As vexed as reparations claims involving living victims can be, the conceptual and practical problems presented by multigenerational cases are far greater. Specifying the nature of the injury; determining the appropriate form of reparation; establishing the boundaries of the class of eligible recipients; All these problems and more escalate as the original offense becomes more remote in time. But there are also obvious problems with limiting one’s moral and political concern to “current” injustices. Not only does such a standard ignore the profound and lasting legacies of crimes against humanity—an issue to which we shall return—but it also invites societies emerging from atrocious pasts to temporize, to delay confronting historical injustice until all victims and perpetrators have passed away, at which point it becomes “too late” to act. Consider again those Korean “comfort women,” doggedly insisting on their rights to an unequivocal apology and state-funded reparations from the government of Japan for the horrors they experienced during World War II. These people are
the direct victims of atrocious crimes. But the people upon whom their demands fall – the current government and population of Japan – are not, except in a tiny number of cases, direct perpetrators. Indeed, the vast majority of Japanese people were not yet born when the offenses occurred. Does this fact absolve them of all moral obligation? Will delaying another decade or two, until all the women are dead, absolve them?

*Time, Responsibility, and the Immigrant Problem*

Such questions turn not only on the meaning of time but also on our understanding of the nature of responsibility. As several speakers noted, one of the distinctive features of the current slavery reparations controversy in the United States, particularly when compared to retrospective justice debates in other societies, is its narrowly individualistic cast. Is person A responsible to pay reparations? Is person B entitled to receive them? To some extent, this reflects the legalistic terms in which the debate has recently been waged, but it also bespeaks a deeply individualistic strain in American culture. Yet societies, even societies like the United States, are not merely aggregations of individual atoms colliding in space. We live in communities, many of which began before we were born and will continue after we die. We are members of families, students and teachers in universities, employees of corporations, adherents of religious organizations, members of voluntary associations, and citizens and residents of cities, states, and a nation. We draw a host of material and non-material benefits from these affiliations. To study or teach at an institution like Brown, to live in a country like the United States, is to inherit a wealth of resources and opportunities passed down from previous generations. Is it so unreasonable to suggest that, in assuming the benefits of these historical legacies, we also assume some of the burdens and responsibilities attached to them?

This question also casts light on the “immigrant problem,” which is frequently cited in popular discussions in the United States as an unanswerable objection to historical redress claims. As critics of slavery reparations note, a majority of the people living in America today are either immigrants or descendants of immigrants who entered the country after the final abolition of slavery in 1865. What possible responsibilities can people bear for an institution that ended before their ancestors even arrived in the country? Yet as several visiting speakers argued, the issue is more complicated than it initially appears. In the first place,
immigration and naturalization were not privileges accorded to all. One of the very first laws enacted after the adoption of the U.S. Constitution, the 1790 Naturalization Act, specified that only immigrants who were free and white could become American citizens. This linking of race and citizenship was a direct outgrowth of slavery, and it persisted, for most practical purposes, until the 1950s and '60s. In the second place, immigrants came to the United States chiefly because of the wealth and opportunity it offered — wealth and opportunity piled up by the labors of previous generations of Americans, including the unpaid labor of slaves. To be sure, newly arrived immigrants endured discrimination and hardship, but they also drew immediate and substantial benefits from these accumulated assets. They drank from municipal water systems, walked city streets, and sent their children to public schools, all of which had been built by the labor and taxes of previous generations. In accepting these benefits, they also accepted certain responsibilities. Immigrants were (and are) required to pay taxes on the national debt, for example, even though that debt was accumulated before they entered the country. The underlying principle — that one who assumes the benefits of a legacy also assumes any attendant liabilities — is the same whether one is an immigrant or a native-born American.

Whether slavery constitutes some kind of historical burden or liability on the current generation of Americans is, of course, a question on which different people have sharply different opinions. It is also one of the central questions in the slavery reparations debate, to which we now turn.
RHETORICAL ATAVISM AND
THE NARRATIVE OF PROGRESS IN THE
DEBATE OVER MARRIAGE EQUALITY

COURTNEY MEGAN CAHILL

*Progress, far from consisting in change, depends on retentiveness . . . . Those who cannot remember the past are condemned to repeat it.*

—George Santayana,
*The Life of Reason*¹

A recurring theme in the legal discourse surrounding the same-sex marriage question is that of the quest: Same-sex couples specifically, and sexual minorities more generally, are ‘on their way’ (or ‘on the path’) to becoming citizens in the most robust sense of that term. If *Lawrence v. Texas*² marked the moment in time when certain sexual minorities at last shed the final vestiges of their criminal outlaw status, then same-sex marriage will arguably mark an even more significant moment in time when sexual minorities will have at last embraced the full incidents of citizenship—the moment when they will have, quite literally, achieved full in-law status. The right to marry, under this view, is not only a necessary condition of citizenship, but also the holy grail of the gay rights movement—a veritable magic chalice imbued with the power to heal the wounds caused by decades of prejudice and discrimination and to protect its holders in the future from the same.

¹ *George Santayana, The Life of Reason, or The Phases of Human Progress,* vol. 1 284 (1906).
That the metaphor of the quest has emerged, often implicitly but sometimes explicitly as well, from the rhetoric surrounding the same-sex marriage question or controversy is hardly surprising. The metaphor of the quest (or the journey, pursuit, search, expedition) is but one small part of a much larger narrative of progress—a narrative of progress on which legal actors in the same-sex marriage context have in particular relied to chart just how far both marriage and sexual minorities have come in the past one hundred years (the former becoming increasingly less discriminatory and the latter increasingly less discriminated against). Indeed, the narrative of progress is one on which legal actors in general rely to chart the extent to which the “legal system . . . obey[s] a long-term process of historical transformation—e.g., from feudalism to liberal capitalism, status to contract, subordination to equality.” Where the Latin poets and their descendents were wont to bemoan just how far we have strayed (or lapsed) from some mythical golden age, legal actors as a general matter, and legal advocates in the same-sex marriage context in particular, are wont to invoke the quest motif and the larger narrative of progress that it betokens to celebrate just how far we have come—and, of course, just how close we are to some mythical telos or end point.

What is surprising, however, is the extent to which the narratives of progress that have emerged from the same-sex marriage controversy are blind to a certain kind of historical repetition in that controversy. To be sure, at times, the narrative of progress that is told by jurists, commentators, and same-sex marriage advocates is punctured by an

3 See infra Part II.A.
4 Robert W. Gordon, *Forward: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1023 (1997). Literary critic, Northrop Frye, refers to progress narratives as “progress myths,” which, he explains, “come into all the phony history that people use when they say that someone is a ‘Puritan,’ meaning that he’s a prude, or that someone else is ‘medieval’ or ‘mid-Victorian,’ meaning that he’s old-fashioned. The effect of such words is to give the impression that all past history was a kind of bad dream, which in these enlightened days we’ve shaken off”). NORTHROP FRYE, THE EDUCATED IMAGINATION 145 (1954).
5 FRYE, supra note 4, at 144 (describing the “mythology about the ‘good old days,’ when everything was simpler and more leisurely and everybody was much closer to nature and got their milk out of cows instead of out of bottles. Literary critics call these reveries pastoral myths . . . .”).
6 But see Gordon, supra note 4, at 1023 (observing that legal actors sometimes invoke “narratives of recovery” to explain the relationship between the past and the present, a narrative which is “often accompanied by a jeremiad lamenting recent lapses and corruptions” and “in which the legal system is seen as ready to be guided to recover the purity of its original principles”).
explicit acknowledgement that history is repeating itself rather than properly progressing in the sense of getting better, that is, in the sense of “purging or shedding the bad parts” of the past. Many advocates, for example, have argued that a legal regime that allows same-sex couples to enter into civil unions but not marriage represents an instance of “separate but equal” — and that doctrine’s infamous spokesperson, Plessy v. Ferguson — redux. In acknowledging the structural similarities between the Jim Crow laws that once discriminated on the basis of race and the same-sex marriage prohibitions that currently discriminate on the basis of sexual orientation, and in highlighting the common denominator that draws these two sets of laws within the same doctrinal ambit, these advocates have surely engaged history “critically” by “reveal[ing] traces of” the ‘bad parts of history’ in the present.

Less commonly acknowledged by jurists, commentators, and advocates who have embraced a narrative of progress in the same-sex marriage context is the extent to which the “bad parts of history” are repeating themselves or resurfacing not just on a structural and doctrinal level, but also, and more elementally, on a rhetorical level — a rhetorical resurfacing, or what I call a “rhetorical atavism,” that is the subject of this paper. More specifically, those who oppose same-sex marriage, and support a legislative or constitutional ban prohibiting the same, have invoked the metaphors of the slippery slope and the counterfeit to support their position. They have argued, for instance, that same-sex

7 d. at 1024.
9 Gordon, supra note 4, at 1028 (stating that “a critical historicism reveals traces of [the bad parts of history] continuing pervasively into the present”).
10 In biology, atavism is the “[r]ecurrence of the disease or constitutional symptoms of an ancestor after the intermission of one or more generations.” OXFORD ENGLISH DICTIONARY, entry for “atavism.” Rhetorical atavism might be defined as the reappearance in legal rhetoric of a more primitive rhetorical trait or stereotype after a period of absence. Some jurists and commentators have already observed the atavistic or episodic character of discrimination against sexual minorities. See, e.g., Boy Scouts of Am. v. Dale, 530 U.S. 640, 699 (2000) (Stevens, J., dissenting) (stating that “[u]nfavorable opinions about homosexuals ‘have ancient roots,’” and “[i]ke equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine”) (citations omitted); Edward L. Tulin, Note, Where Everything Old is New Again—Enduring Episodic Discrimination Against Homosexual Persons, 84 TEX. L. REV. 1587, 1587 (2006) (stating that “[c]urrent legal treatment of homosexuals is best understood as a new episode of discrimination, in which old paradigms combine and coalesce in novel ways”).
marriage will lead to incest, polygamy, bestiality, necrophilia and other
disgust-provoking relationships, and that same-sex marriage is a coun-
terfeit or fraud.11 Moreover, this particular anti-gay rhetoric is not ‘just’
rhetorical, so to speak, but rather subtly shapes and influences the law,
as this paper will show. As to be expected, the typical liberal or progres-
sive response to such rhetorical claims is outright dismissal: ‘Is it not
absurd to think that same-sex marriage will lead to incest or that same-
sex marriage is a kind of fraud? Clearly same-sex marriage opponents
are pulling these claims out of thin air as a last-ditch effort to ‘save’ the
institution of marriage.’12

However absurd, not only are these particular rhetorical claims both
intuitively appealing and influential in driving the law, but also, and
more important here, they have a history which has long gone unno-
iced. Far from emerging out of thin air, the metaphors of the slippery
slope to incest (and other sexual taboos) and the counterfeit have a his-
tory, and in some instances a very long history, in the legal regulation
of miscegenation and in the cultural and legal prohibition of sodomy.
An examination of the episodic appearance of the sexual slippery slope
and counterfeiting tropes over time in those different contexts is useful
for a symposium that looks to history to understand current manifesta-
tions of subordination for at least two reasons.

First, the fact that “the bad parts” of our rhetorical history continue
to rear their ugly head in either the same or very similar way that they always
have should signal to us that a healthy dose of skepticism is warranted
when we read or hear the progress narratives on which judges, com-
mentators, and same-sex marriage advocates have tended to rely when
they tell the story of, and recite the history behind, both marriage and
the status of sexual minorities in American law and culture. However
compelling, thinking about the state of marriage and the status of

11 I have elsewhere examined these two metaphors and their influence in driving
the law in this area in greater depth. See Courtney Megan Cahill, The Genuine Article: A
Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage, 64 WASH. & LEE
L. REV. 393 (2007) [hereinafter, Cahill, The Genuine Article]; Courtney Megan Cahill,
Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on
Contemporary Family Discourse and the Incest Taboo, 99 Nw. U. L. REV. 1543 (2005) [here-
inafter Cahill, Slippery Slope Rhetoric].
slate.msn.com/id/3642/entry/23844 (stating that “[i]f you want to argue that a life-
time of loving, faithful commitment between two women is equivalent to incest or child
abuse, then please argue it. It would make for fascinating reading. But spare us this
bizarre point that no new line can be drawn in access to marriage—or else everything is
up for grabs”).
sexual minorities in terms of a gradual progression might render us blind to the strong gravitational pull that the past—here, a rhetorical past—has on the present. Second, the atavistic quality of the subordinating rhetoric here surveyed suggests that such rhetoric will resurface again in another context. If past is indeed prologue, then it is not so much a question of whether certain subordinating rhetoric will suddenly vanish with same-sex marriage, but rather of where that rhetoric will surface again and against which groups—including, but not limited to, sexual minorities—it will be deployed.

This paper will proceed as follows. Part II will provide some examples of what I have here referred to as the narratives of progress that have emerged from the legal debate over same-sex marriage. Part III will then show how an examination of the history behind current anti-gay discourse highlights the atavistic character of that discourse—a rhetorical atavism which, in turn, invites us to look more skeptically upon the narratives of progress surveyed in Part II. Part IV, which turns from the past and the present surveyed in Parts II and III to the future, will provide some suggestions for how an examination of the history behind contemporary rhetorical deployments in the same-sex marriage context is useful for crafting strategies for legal change moving forward.

II. THE SAME-SEX MARRIAGE QUESTION AND NARRATIVES OF PROGRESS

The legal discourse surrounding the same-sex marriage question has generated a number of discrete narratives of progress that overlap or intersect with each other in the following way. They all embrace and apply a progressive model of history to constitutional law, marriage, and the status of sexual minorities under American law. As with most progressive narratives, this progressive model assumes that each of the aforementioned areas has only progressed, advanced, evolved, and improved over time. Moreover, this progressive model often assumes that same-sex marriage will mark a significant step forward for marriage as well as for sexual minorities, as each will be made more whole, so to speak, through the legal recognition of that relationship. Section A will provide a brief overview of some of those narratives of progress as they have variously appeared in cases where courts have considered the constitutionality of same-sex marriage prohibitions and in selected briefs filed either by, or on behalf of, same-sex-couple plaintiffs in
recent marriage equality litigation. Section B will then briefly consider how we might challenge those narratives of progress.

A. Narratives of Progress

Given our tendency as humans to read our own life experience in terms of a narrative of progress, it is no surprise that a range of legal actors in the same-sex marriage context have invoked a similar model when telling the story (or history) behind the key players in that debate—law, marriage, and sexual minorities. Sometimes, it is a story about the evolution of constitutional law. At other times, it is a story about the evolution of marriage. And at still other times, it is a story about the evolution of sexual minorities. Whatever its focus, the model of progress on which each story relies both reflects and reproduces a similar trajectory: While things used to be bad they have only gotten better, and in the fullness of time they will surely be great.

The first narrative of progress here considered is the one which assumes that constitutional law, and therefore the Constitution itself, has evolved over time to become an increasingly more representative and more capacious body of law. For instance, in *Goodridge v. Department of Public Health*, the majority opinion, quoting from Justice Ginsburg’s majority opinion in *United States v. Virginia*, stated that “[i]he history of constitutional law ‘is the story of the extension of constitutional rights and protections to people once ignored or excluded.’” Similarly, the plaintiffs in Connecticut’s marriage equality case, *Kerrigan v. Connecticut*, introduced their brief to the state superior court with that same quotation, noting that “‘[a] prime part of the history of our Constitution . . . is the story’” of this “extension” of constitutional “rights and protections” to formerly disenfranchised individuals. Under this view, constitutional “history” is itself a narrative or “story,” one that charts the increasingly progressive character or aspect of the Constitution.

The second narrative of progress here considered is the one which assumes that marriage has evolved over time to become an increasingly more democratic, pluralistic, and inclusive institution. The *Goodridge* majority opinion, for instance, is largely structured around a story about the evolution of marriage, from a time when “no lawful marriage

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was possible between white and black Americans”¹⁵ and when “[t]he common law was exceptionally harsh toward women who became wives,”¹⁶ the latter of whom once resembled the “condition of a slave,”¹⁷ to a time when “both the courts and the Legislature . . . acted to ameliorate the harshness of the common-law regime.”¹⁸ Under this view, marriage is no less progressive—or, in the court’s words, no less an “evolving paradigm”¹⁹—than are the Constitution and the story behind it.

The Goodridge court’s progressive marital vision serves two purposes. First, and more obvious, by highlighting the extent to which marriage has evolved throughout history (and come out strong in the end), the court is answering to marriage traditionalists’ fears that same-sex marriage will signal the end of the institution of marriage; indeed, if “[m]arriage has survived all of these transformations,”²⁰ the court observes, then surely it can weather same-sex marriage. Second, and more subtle, by situating the historical transformation of marriage within a narrative of gradual (and seemingly inevitable) progress, the Goodridge court at least suggests that same-sex marriage is merely the next, and perhaps even inexorable, step in that progression. Put differently, by talking about marriage in progressive terms, the Goodridge court makes same-sex marriage appear to be far less radical than its critics say that it is.

The Goodridge court is surely not alone in situating marriage within a larger progressive narrative. Recently, a trial court in Iowa found that that state’s same-sex marriage prohibition violated state constitutional equality and liberty guarantees. The court in that case, Varnum, v. Brien, began its discussion about the “changing nature and meaning of marriage” by remarking that “[m]arriage has evolved over time, in legislatures and courts, to meet the changing needs of American society and to embody fuller notions of consent and personal choice.”²¹ The Varnum court went on to chart the radical transformation of marriage over time both in Iowa and in the United States more generally; it observed that “[m]arriage in the United States is virtually unrecognizable from its earlier common law counterpart, having undergone

¹⁵ Goodridge, 798 N.E.2d at 958.
¹⁶ Id. at 967.
¹⁷ d. (quotations and citation omitted).
¹⁸ Id.
¹⁹ d. at 966-67 (stating that “[a]s a public institution and a right of fundamental importance, civil marriage is an evolving paradigm”).
²⁰ Id. at 967.
radical, unthinkable changes in laws governing who may marry, when, marriages may end, and the legal significance and consequences of marriage for the individuals involved.\textsuperscript{22} Like Goodridge, Varnum tells the story of the progressive advancement of marriage over the last three-hundred years, from a time when "[m] arried women were essentially chattel\textsuperscript{23} and "[s]laves . . . could not . . . legally marry,\"\textsuperscript{24} to the time when Iowa finally repealed its anti-miscegenation law (the third state to do so) and started to institute "fundamental" and "remarkable changes in marriage\textsuperscript{25}" that would change its face forever—changes like no-fault divorce and "the removal of criminal restrictions on extramarital and non-procreative sexual activities.\textsuperscript{26} The historians who filed an amicus brief in that case on behalf of the plaintiffs told a somewhat similar story, one which "chronicled\textsuperscript{[ed]} the state's devotion to the principles of equality and individual liberty, as well as its courage to live up to those principles in the face of popular prejudice.\textsuperscript{27} Under their view, marriage has progressed over time (by becoming an increasingly less discriminatory institution), and Iowa has stood at the vanguard of that progression (by being among the first states to institute such radical, though necessary, changes to that institution).

The third and final narrative of progress here considered is the one which posits that sexual minorities have progressed over time in the sense of assuming their true identities and shedding the vestiges of their criminal past—a progression that will ostensibly end, or culminate, with same-sex marriage. The Supreme Court's landmark decision in \textit{Lawrence v. Texas}, or at least the public's reaction to it, no doubt laid the groundwork for this narrative; indeed, commentators have well documented the extent to which \textit{Lawrence} was perceived by same-sex marriage advocates and opponents alike as the "prelude" to same-sex marriage and as "an entirely new chapter in [the] fight for equality for lesbians and gay men.\textsuperscript{28} In other words, \textit{Lawrence} encouraged a way of

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id. at 38.}

\textsuperscript{25} \textit{Id. at 39.}

\textsuperscript{26} \textit{Id.}


thinking and talking about the status of sexual minorities in America in terms of progress—not just progress, in fact, but progress cast in narrative-like terms, e.g., "prelude," "chapter," etc.

Courts have at times conceptualized same-sex couples' legal struggle for the right to marry as the next—or, perhaps, the final—step in a progressive journey from outlaw to in-law status. For instance, in Lewis v. Harris, the New Jersey Supreme Court found that equal rights and benefits (and responsibilities) were constitutionally required under the state constitution but that the "name," marriage, was not. The court remarked that while its "decision today significantly advances the civil rights of gays and lesbians," sexual minorities' "quest does not end here." Rather, "[t]heir next appeal must be to their fellow citizens whose voices are heard through their popularly elected representatives." Similarly, in In re Marriage Cases, in which a California appeals court held that same-sex marriage was not constitutionally required under that state's constitution, a concurring judge observed that "[h]aving endured the often long and difficult process of claiming their true identities, gay men and lesbians are now asking to be recognized as the equally loving and committed partners and capable family units they are, and to be afforded the same responsibilities and protections available to other families." While "we are being called upon to work together toward a mutual goal of liberty and justice," the judge continued, "we must be careful about where the achievement comes from. If respect for the rule of law is to be maintained, courts must accept and abide by their limited powers."

Both of these courts contextualized the plaintiffs' struggle for the right to marry in those cases within a larger narrative of progress. In Lewis, same-sex couples, or sexual minorities more generally, were on a "quest" for "social acceptance" and the name, marriage—a quest that was "significantly advance[d]" by the court's decision in that case. In In re Marriage Cases, sexual minorities, having "claim[ed]" their true identities, were "now" poised to reach a "mutual goal of liberty and justice." The rhetoric of "quest" and "process" invoked by these courts is reminiscent of the Lawrence majority opinion's final remarks: "As the

29 Lewis v. Harris, 908 A.2d 196, 260 (N.J. 2006).
30 Id. at 225.
31 Id.
33 Id.
Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."34 In reading this concluding line, where the idiom of 'quests' and progression is explicit, one can easily see why the public read Lawrence as 'paving the way,' so to speak, to same-sex marriage,35 notwithstanding the majority's suggestions to the contrary elsewhere in that case.36

This notion that sexual minorities as a class not only have 'advanced' and become more 'true' over time, but will likely achieve their 'goal' or 'quest' for equality with the right to marry, is commonplace in liberal pro-marriage commentary. Professor William Eskridge, for instance, has stated that "law's civilizing movement will not be complete until the same-sex married couple replaces the outlawed sodomite as the paradigmatic application of law to gay people."37 Similarly, Evan Wolfson has suggested that the right to marry is a necessary—and perhaps even a sufficient—condition of equality and citizenship for sexual minorities.38 Under these views, same-sex marriage will mark the end (or, at least, the very significant beginning of the end) of sexual minorities’ quest for full inclusion and belonging.

B. Challenging Narratives of Progress

The narratives of progress surveyed above represent but a small sample of the various discourses of progress that have come to pervade the rhetoric surrounding same-sex couples' struggle (or "quest") for marriage equality. Why has the quest or progress narrative had such resonance in the same-sex marriage context? For one thing, progress narratives are seductive and compelling; not only do we like to think in terms of progress, but perhaps we naturally structure human experience

35 See, e.g., Nelson Lund and John O. McGinnis, Lawrence v. Texas and Judicial Hubris, 102 Mich. L. Rev. 1535, 1556-57 (2004) (stating that "we expect to see powerful efforts to ensure that Lawrence [sic] paves the way for a broader attack on traditional marriage laws").
36 See, e.g., Lawrence, 539 U.S. at 578 (stating that "[i]n the present case... does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").
more generally in terms of progress. If that is the case, then it should come as no surprise that legal actors have invoked such a narrative to structure the same-sex marriage experience as well. Moreover, in addition to being intuitively appealing, the progress narrative is also legally persuasive and strategically savvy. As I suggested above, the progress narrative—whether it be the narrative of constitutional history, marriage, or sexual minorities—pulls us blithely along in a way that makes it seem as if same-sex marriage is merely the inevitable and inexorable next step in the successive stages of marriage’s (and sexual minorities’) evolution.

However compelling, the narrative of progress is often blind to the extent to which history might be repeating itself in the present. For instance, the statement that “[m]arriage in the United States is virtually unrecognizable from its earlier common law counterpart,” assumes that the vestiges of coverture are no longer with us, or at the very least “virtually unrecognizable.” Many commentators would and do argue, however, that the effects of coverture are still very much an integral part of women’s (and not just married women’s) lived experience today. Indeed, Professor Katherine Franke has nicely suggested that some of the recent arguments made in support of same-sex marriage themselves “echo[] a longing for a kind of contemporary coverture, whereby one or both previously individuated subjects are dissolved into a joint legal and economic unit by and through the institution of marriage.”

In one marriage equality brief, plaintiffs referred to the common law regime of coverture not to contest it, but rather to emphasize just how important marriage is, and always has been, in the United States. In their words: “Marriage . . . was not only essential to the conception of human intimacy and relationships, but also played an indispensable role in social and economic ordering. The common law doctrine of coverture was central to the marriage relationship.”

To be sure, legal actors and commentators have at times resisted the allure of reading the same-sex marriage debate in terms of a straightforward, and forward-moving, narrative of progress. For instance, and as mentioned in this paper’s Introduction, some commentators have observed that a legal regime that allows same-sex couples to enter into

a civil union but not marriage is an instance of separate-but-equal and that doctrine's ignominious spokesperson, *Plessy v. Ferguson*, redux.⁴¹ An interpretation such as this one, which views the present as the virtually identical incarnation or avatar of the past rather than several steps removed from it, more accurately captures what is behind a statement like that which appeared in *Kerrigan v. Connecticut*, where the court held that the state did not violate constitutional equality guarantees by withholding the name, marriage, from same-sex couples: "Though the plaintiffs may feel themselves to be relegated to a second class status, there is nothing in the text of the Connecticut statutes that can be read to place plaintiffs there."⁴² One cannot read such a statement without seeing the ghost of *Plessy*, where the Supreme Court made not a similar, *but the same*, observation:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.⁴³

At the same time, however, legal actors and commentators have overlooked the extent to which history is repeating itself in the same-sex marriage controversy not just on a doctrinal level, but also, and more elementally, on a rhetorical level. It's not just that the same doctrine has come back to haunt a different subordinated class, but that the same rhetoric that has been deployed for centuries against subordinated groups—including sexual minorities—has resurfaced in the marriage context. As with the atavistic presence of certain doctrine, the atavistic presence of certain rhetoric makes it that much more difficult to read the same-sex marriage question in strictly progressive terms. The following Part will now consider what that rhetoric is and the history behind it.

### III. The History of Anti-Gay (or Anti-Same-Sex Marriage) Rhetoric

Contemporary anti-same-sex marriage rhetoric partakes of a much older history of conceptualizing non-traditional relationships in certain

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⁴¹ See, e.g., Buckel, supra note 8, at 74.
⁴² *Kerrigan*, 909 A.2d 89, at 97.
rhetorical terms. While it is easy to dismiss this rhetoric—specifically, the claims that same-sex marriage will lead to incest and other disgust-provoking horribles and that same-sex marriage is a fraud or counterfeit—as the fatuous rant of social conservatives, outright dismissal is a bad idea for two reasons: (1) first, this rhetoric has been influential in driving the laws which flow from it—laws, like same-sex marriage prohibitions, which play a critical role in the continued subordination of sexual minorities in our legal and cultural order; and (2) second, this rhetoric is merely the contemporary avatar of something that far antecedes it. The fact that the same rhetoric that was once used to talk about sodomy and miscegenation has resurfaced in the same or very similar way in the same-sex marriage context should force us to look more skeptically upon the narratives of quest, advancement, evolution, and progress surveyed in the previous Part.

Before looking at that rhetoric and its history, however, it is useful at this point to compare the theory of rhetorical atavism put forth here to other theories of law and rhetoric that have arisen in similar contexts. Rhetorical atavism assumes that primitive rhetoric that was once deployed to justify the subordination of certain individuals and groups—racial and ethnic minorities in the nineteenth century, “sodomites” in the fourteenth—does not recede or diminish with time, but rather reappears or resurfaces in the same or very similar form over time. As such, it can be distinguished from other theories of law and rhetoric, including Professor Reva Siegel’s theory of “preservation through transformation” and Professor Eskridge’s theory of “sedimentation,” which posit that the so-called ‘bad’ rhetoric of a former era in time either morphs into, or is covered over by, something that sounds better—and that therefore makes the bad rhetoric, and the legal justifications that flow from it, harder both to detect and to challenge.

More specifically, Siegel’s theory of “preservation through transformation” posits that the rhetoric which once justified a status hierarchy will transform or morph into something else—something more modernized and innocuous ‘sounding’—once that regime is legally and socially contested; in turn, it is that very rhetorical transformation which helps to perpetuate that same status hierarchy. For instance,

46 See Siegel, supra note 44, at 2119 (stating that “[w]hen the legitimacy of a status
the eighteenth-century rhetoric of marital chastisement that was once deployed to justify a regime of gender hierarchy and violence within marriage over time morphed into a rhetoric of companionate marriage and family privacy once that regime was legally and socially contested—a more innocuous sounding rhetoric that made it harder to detect, and therefore easier to justify, that same regime.47 Similarly, Eskridge’s theory of “sedimentation” posits that ‘bad’ rhetoric and justifications will eventually be ‘covered over’ by ‘better-sounding’ rhetoric and justifications that appeal to more people and on a wider level. For instance, the early rhetoric of disgust that once justified why “homosexuals” were legal outlaws has over time been covered over by a more politically appealing rhetoric of values and of what he calls “no promo homo”—more palatable rhetoric that overlies, and thus never fully displaces, the older rhetorical deployments.48

Unlike those theories, rhetorical atavism posits that the same subordinating rhetoric that once justified one regime (e.g., the criminalization of miscegenation and sodomy) will in time resurface in the same or very similar form in order to justify a different regime (e.g., the prohibition of same-sex marriage). That is, whereas “preservation through transformation” and “sedimentation” assume that rhetoric undergoes transformation over time to justify (and thereby preserve) pre-existing legal regimes, rhetorical atavism assumes that the same rhetoric will appear over time, in episodic fashion, to justify different legal regimes. It recognizes that while the law might progress in any particular context—e.g., we no longer have criminal anti-miscegenation and sodomy laws—the rhetoric of subordination remains the same (and largely

regime is successfully contested, lawmakers and jurists will both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend”).

47 See id. (using as an example of preservation through transformation “a case study of domestic assault law as it evolved in rule structure and rationale from a law of marital prerogative to a law of marital privacy”).

48 See Eskridge, supra note 45, at 1346 (observing that “[d]efenders of sodomy laws modernized their justifications by making medical and republican arguments, but the defenses were sedimentary, layering the new arguments onto old natural law ones”). It should be noted, however, that Eskridge’s theory of sedimentation differs from Siegel’s theory of preservation through transformation insofar as modernized justifications, in his view, will not invariably succeed in maintaining or preserving pre-existing status hierarchy. See id. at 1342 (stating that while “[i]n many ways, the gay legal experience illustrates Reva Siegel’s theories about social change,” sedimentation theory and “[n]o promo homo” also [suggest] that her thesis is too pessimistic: Modernization of justification does not necessarily rescue unjust entitlements”).
unchallenged). In other words, even as we might progress in the sense of ending one form of subordination, we stay the same in the sense of never really getting beyond the rhetoric that helps to shore up that subordination in the first place. With this brief description in mind, this Part now turns to a consideration of what contemporary anti-same-sex marriage rhetoric looks like and how it is driving the law, as well as an overview of the history behind it.

A. Contemporary Anti-Same-Sex Marriage Rhetoric

While contemporary anti-same-sex marriage rhetoric is manifold and diverse, marked by both more and less bizarre and outlandish claims, I focus briefly here on the two which have a history that long predates their more recent appearance on the proverbial public stage in the same-sex marriage context. As mentioned above, those two rhetorical deployments are that of (1) the slippery slope to incest and other sexual abominations, and (2) the counterfeit. Both claims, as I have elsewhere argued, are widespread, and both claims, as I have there suggested, are influential in driving the law in this area.49 While slippery slopes are, of course, commonplace in legal rhetoric, my focus here is on a particular kind of slippery slope claim—namely, that of the sexual variety.

Same-sex marriage opponents routinely invoke the figure of the slope to sexual deviance in order to presage not only a world of sexual abandon, but also the end of marriage should same-sex marriage receive legal recognition. For instance, conservative commentator, Stanley Kurtz, relied on slippery-slope like logic when he argued that “[g]ay marriage would set in motion a series of threats to the ethos of monogamy from which the institution of marriage may never recover.”50 Similarly, and more recently, a group of law professors who submitted an amicus brief in Rhode Island’s same-sex divorce case contended that, if Rhode Island were to recognize a marriage validly contracted in Massachusetts for the purpose of granting a divorce, even more “absurd” things could follow:51 “[A] man or woman from Rhode Island might enter into a [sic] inter-species marriage in another jurisdiction

49 See, e.g., Cahill, The Genuine Article, supra note 11, passim; Cahill, Slippery Slope Rhetoric, supra note 11, passim.
(as permitted under tribal law, for instance),” and then ask the state of Rhode Island to recognize it, the brief noted.52 Worse yet, the brief continued, a man or woman from Rhode Island “might marry a corpse or dead person (as reportedly allowed in France).”53 As mentioned above, slippery slope arguments are an integral part of legal and political discourse, and therefore surely not unique to the same-sex marriage context.54 That said, they are particularly widespread in that context because slippery slope rhetoric is particularly well-suited to triggering disgust—an intuitive emotion that goes hand-in-hand with sexual and cultural taboos like same-sex relationships and same-sex marriage.55

The metaphor of the counterfeit, no less than the metaphor of the slippery slope, has played a critical role in driving and shaping traditionalist marriage discourse. In May 2003, Marilyn Musgrave, United States Representative and co-sponsor of the original proposed Federal Marriage Amendment (FMA), publicly declared that such an amendment was necessary because “[t]he traditional values Americans hold are being traded in for counterfeit marital unions.”56 Since that time, same-sex marriage opponents have variously intoned that same-sex marriage is a form of “counterfeit marriage that devalue[s] traditional marriage in the same way counterfeit money devalues real money,”57 that “[j]ust as counterfeit $20 bills impact our economy . . . counterfeit [i.e., same-sex] unions have an impact on our culture,”58 that “[c]ounterfeit money hurts our wallets . . . [c]ounterfeit marriage will do the same to real marriage,”59 that same-sex marriage “devalues the currency of marriage in the law” because “[i]t’s Monopoly money—not the

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52 Id. at 32.
53 Id. at 32-33; see also id. at n.19 & n.11 (variously observing that “[i]nterspecies marriage arguments have salted the academic debate over same-sex marriage” and that “[m]arriage to a dead person . . . is possible in jurisdictions where proxy marriages may be performed”).
54 On slippery slope rhetoric in legal discourse, see generally Frederick Schauer, Slippery Slopes, 99 Harv. L. Rev. 361 (1985).
55 See, e.g., Cahill, Slippery Slopes, supra note 11, at 1577.
real thing,” and that same-sex marriage amendments are necessary in order to “[p]revent the courts or other government officials from subverting [the definition of traditional marriage] by authorizing counterfeit marriage.”

This notion that same-sex marriage is a species of fraud no doubt signals an anxiety over passing. The federal criminal statute that targets counterfeiting, 18 U.S.C. § 472, imposes penalties on those who either “pass,” or attempt to “pass,” counterfeit currency in the United States. Thus, to call same-sex marriage a counterfeit, and to pass a law that is intended to prohibit such counterfeits, is effectively to punish same-sex couples for passing, or attempting to pass, too well.

Our first impulse, I think, upon hearing sexual slippery slope and counterfeiting rhetoric is straightway to dismiss it as ‘mere’ rhetoric—‘mere’ rhetoric, moreover, that seems to come out of nowhere and that represents an absurdly desperate attempt on the part of reactionaries to save traditional marriage from sexual deviance and fraud. Such outright dismissal, however, fails to recognize that this rhetoric has a well-documented history, one which I will survey below. Moreover, such outright dismissal overlooks the extent to which sexual slippery slope and counterfeiting rhetoric has been influential in driving the law in this area in both more and less explicit ways, an influence that I would like briefly to address.

First, and with respect to the influence of slippery slope rhetoric on the law surrounding marriage, courts that have recently upheld same-sex marriage prohibitions have engaged in slippery-slope like reasoning—even if they have not overtly invoked the actual figure of the slope. For instance, in Conaway v. Deane, the Maryland Court of Appeals, the highest court in that state, dismissed the plaintiffs’ fundamental right to marry argument on the ground that such a right “was not absolute.” If it were, the court reasoned, then how could the plaintiffs explain the state’s prohibition of “bigamous relationships” and relationships between “[i]ndividuals within a certain degree of lineal

63 Conaway v. Deane, 923 A.2d 571, 623 (Md. 2007).
or collateral consanguinity." While certainly less incendiary than the slippery slope claim that same-sex marriage will inevitably beget bigamy and incest, the Deane court’s justification for why the right to marry is relative rather than absolute merely represents a kinder, gentler way of saying the same. Similarly, the New Jersey Supreme Court’s statement in *Lewis v. Harris* that legal recognition of same-sex marriage (as opposed to a marriage-equivalent, such as civil unions) would represent the “overthrow of the long established definition of marriage” and would “render a profound change in the public consciousness of a social institution of ancient origin,” sounds strikingly similar to Mr. Kurtz’s claim that same-sex marriage would lead us headlong into the end or “destruction” of traditional marriage.

Second, and with respect to the influence of counterfeiting rhetoric on the law surrounding marriage, many of the same-sex marriage amendments that have been passed in more than half the states over the last four years literally embody the concept of “same-sex relationships as fraud.” While these amendments, unlike the policy rhetoric that gave rise to them, do not explicitly contain the language of counterfeits, they do explicitly conceptualize same-sex relationships—and unmarried relationships more generally—as approximations or imitations of the real thing. For instance, Ohio’s amendment prohibits the state from recognizing “[a] legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.” In *City of Cleveland v. Knipp*, an Ohio court explained that the purpose of that amendment was to “define[s] marriage” and to identify it “as having a unique place in our society and protects it from any counterfeits.” Similarly, Wisconsin’s amendment prohibits the state from recognizing “[a] legal status identical or substantially similar to that of marriage for unmarried individuals.” One hears echoes of fraud and counterfeits in both of these amendments, which legally prohibit that which “approximate[s],” or that which is “identical or substantially similar to,” traditional marriage. As with the appearance of slippery-slope like reasoning in recent decisional law,

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64 Id.
66 Ohio Const. art. XV, § 11.
68 Wis. Const. art. XIII, § 13.
the appearance of counterfeit-like language in the state constitutional amendments which have swept the nation throws into relief just how influential ‘mere’ rhetoric has been in driving the law in this area.

Indeed, one might even say that the rhetoric of slippery slopes and counterfeit has influenced not only the law surrounding same-sex marriage, but also the kinds of arguments that same-sex marriage advocates and plaintiffs are making in same-sex marriage litigation. Some advocates, for instance, have employed a kind of slippery slope claim when arguing why same-sex marriage prohibitions are unconstitutional. For instance, a brief filed this past April by the city of San Francisco in California’s marriage equality case contended that the state must extend the right to marry to same-sex couples because it already extends that right to all sorts of unsavory characters, including sex offenders. We might read this statement and others like it, as I have done elsewhere, as a kind of reverse slippery slope, that is, an argument that same-sex marriage necessarily flows (or at least should necessarily flow) from the legal recognition of something worse.”

Similarly, many plaintiffs in recent marriage equality litigation have testified that without marriage they feel ‘less real’ or even ‘unreal.” One plaintiff, for instance, testified that the state’s refusal to grant the name “marriage” to same-sex couples “discount[ed] and cheapen[ed]” her relationship with her partner. This plaintiff seemed to internalize the counterfeit metaphor, if only to invert it, by suggesting that a relationship without the label “marriage” was somehow less real and less valuable than one with it. This is all just to say that slippery slope and counterfeiting rhetoric has played an influential role in driving not just

69 Petitioner City and County of San Francisco’s Opening Brief on the Merits at 2, In re Marriage Cases (Case No. S147999), available at http://www.sfgov.org/site/uploadedfiles/cityattorney/SUPCT-OPENINGBRIEF.pdf (stating that “the marriage exclusion tells lesbians and gay men that they are less worthy than child abusers, or sex offenders, or convicts in prison for murder. Because after all, those people do have the right to get married”).


71 See, e.g., In re Marriage Cases, 49 Cal. Rptr. 3d 675, 760 n.22 (Cal. App. 1st Dist. 2006) (Kline, J., dissenting) (citing affidavits submitted to the trial court in which plaintiffs testified, among other things, that “[i]n the eyes of the law and of much of society, our commitment and our union, to each other and to our families, is not legitimate and not real”).

law, but also the style and substance of legal arguments made by those who support and seek same-sex marriage.

B. The History of Anti-Same-Sex Marriage Rhetoric
Section A set forth in brief the two varieties of anti-same-sex marriage rhetoric here under consideration, and challenged the claim that such rhetoric is merely rhetorical. This Section now challenges the claim that such rhetoric comes out of nowhere by showing that it has a history, and in some instances a very long history, in the legal regulation and cultural prohibition of miscegenation and sodomy. Subsection 1 will first examine the history behind the rhetorical deployment of the slippery slope in those contexts. Subsection 2 will then examine the history behind the rhetorical deployment of the counterfeit in those same contexts. Part IV will finally consider what this rhetorical history tells us about the narratives of progress surveyed in Part II, as well as the ways that advocates might put that history to productive use in marriage equality litigation.

1. The History of the Slippery Slope Metaphor
As mentioned above, the sexual slippery slope has a way of rearing its head in the law whenever the law is confronted with tabooed intimate relationships and practices. The slippery slope to polygamy and incest in particular did not suddenly appear on the scene with same-sex relationships, but rather first surfaced in mid-nineteenth-century America as a response to that century’s paradigmatic sexual taboo, miscegenation. For instance, in 1872, the Tennessee Supreme Court upheld a defendant’s criminal indictment for violating that state’s criminal anti-miscegenation statute, notwithstanding the defendant’s argument that he had been validly married in Mississippi before moving to Tennessee. The *State v. Bell* court invoked the metaphor of the slippery slope to incest and polygamy in order to presage the Pandora’s Box that would surely be unleashed if it were to recognize an interracial marriage validly contracted in another state:

Extending the rule to the width asked for by the defendant, and we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without
remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.73

Similarly, in 1883, the Supreme Court of Missouri upheld the indictment of a white woman who had "intermarried" with a man "having more than one-eighth part of negro blood" against a federal constitutional challenge. The *State v. Jackson* court reasoned that "the right to marry any one who is willing to wed him" was not "one of the rights attached to American citizenship." If it were, the court continued, then "all our marriage acts forbidding intermarriages between persons within certain degrees of consanguinity are void, and the nephew may marry his aunt, the niece her uncle, and the son his mother or grandmother."74

Finally, if incest was the relationship that miscegenation would inevitably lead to in *Bell* and *Jackson*, it was something that was *like* miscegenation in *Eggers v. Olson*.75 In that case, decided in 1924, the Oklahoma Supreme Court stated not only that it would be a "fraud upon the laws of [the] state [of Oklahoma]" if the court were to recognize interracial marriage, but also that "the inhibition [against miscegenation], like the incestuous marriage, is in the blood, and the reason for it is stronger still."76 By observing that the taboo against miscegenation was even *greater than* the taboo against incest ("the reason for it is stronger still"), the *Eggers* court at least implied that the legal recognition of the greater taboo might logically compel the legal recognition of the lesser one. In addition, the court characterized state-sanctioned miscegenation in terms that curiously prefigure the counterfeiting trope discussed below, namely, as a variety of "fraud."

The examples of slippery slope rhetoric in the miscegenation context here provided represent but a small sample of the common tendency during this period to talk about one sexual taboo, miscegenation, in terms of other sexual taboos generally and in terms of the *incest* taboo specifically. Elsewhere, I have shown that those who supported civil and criminal anti-miscegenation statutes routinely collapsed the taboo against miscegenation into the taboo against incest, each of which constituted a ‘blood’ violation and each of which was

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73 State v. Bell, 66 Tenn. 9, 9 (1872). It is interesting to note that the *Bell* court here deployed a kind of reverse slippery slope: Interracial marriage is already the most "revolting" evil rather than that into which we will precipitously plunge.

74 State v. Jackson, 80 Mo. 175, 176 (1883).

75 Eggers v. Olson, 291 P. 483 (Okla. 1924).

76 Id. at 486.
conceptualized in terms of the other: incest was considered to be a form of "intermarriage" no less than miscegenation was considered to be a form of incest. As Henry Hughes, white supremacist and pro-slavery apologist, wrote in 1852: "The same law which forbids consanguineous amalgamation forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest." In addition, I have suggested that the reason why miscegenation and incest were so closely linked—and at times conflated—during this time was because incest was (and still is) an easy target and because incest represented (and continues to represent) a prototypical form of "boundary violation" that readily elicits disgust. Incest was therefore strategically placed at the bottom of the slippery slope in order to trigger disgust not only against incest but also, and more important, against the relationship to which it was being compared, here, miscegenation.

If the slippery slope to incest and, occasionally, polygamy was the figure of choice for eighteenth- and early-twentieth-century courts that were considering the miscegenation question, then the slippery slope to incest, polygamy, bestiality, and a whole host of sexual and cultural taboos was the figure of choice for late-twentieth-century courts and policymakers considering the sodomy question. In Bowers v. Hardwick, the Supreme Court invoked the figure of the slippery slope—or, in the Court's terminology, the "road"—as a short and not-so-sweet way of expressing why it simply could not recognize a so-called "right to homosexual conduct" under the federal Constitution. As the majority there stated: "[I]t would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road."

Similarly, and immediately prior to the Court's decision in Lawrence v. Texas, which overruled Bowers and struck down the criminal sodomy law at issue in that case, then Senator Rick Santorum invoked the metaphor of the slope in a statement for which he received public censure (and for which he refused to apologize): "If the Supreme Court says that you have the right to consensual [gay] sex within your home, then..."
you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything." Judge William Pryor, then Attorney General for the state of Alabama, made a similar argument in his Lawrence amicus brief, which contended that the right asserted by the petitioners in that case "must logically extend to activities like prostitution, adultery, necrophilia, bestiality, possession of child pornography, and even incest and pedophilia (if the child should credibly claim to be ‘willing’)." Finally, dissenting in Lawrence, Justice Scalia fulminated that "criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity" could not "survive rational basis review" if, "as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest."

As this brief history of slippery slope rhetoric shows, the slippery slope to incest and other sexual taboos has an atavistic quality in the sense that it has made an episodic appearance throughout time rather than dwindled, diminished, or dramatically transformed itself over time. Indeed, the Jackson court's statement in 1883 that the legal recognition of miscegenous marriage would inexorably lead to a situation where the "nephew [could] marry his aunt, the niece her uncle, and the son his mother or grandmother," does not sound a whole lot different from the more recent statements that sodomy would inexorably lead to "adult incest" and same-sex marriage to the same. Remarkably, then, the contemporary incarnation of the slippery slope in the same-sex marriage context retains, rather than altogether transforms, the structural and substantive features of its miscegenation and sodomy antecedents.

Admittedly, the sexual slippery slope has experienced some change over time in at least two respects. First, it has come to sound more desperate (and disgust-driven) insofar as it has come to envision ever-more-absurd (and ever-more-disgusting) sexual scenarios: from the incest and polygamy scenarios that coalesced around the miscegenation question, to the incest, polygamy, adultery, bestiality, and necrophilia scenarios that have more recently coalesced around the sodomy and same-sex marriage questions. Second, and relatedly, the sexual slippery slope has, if anything, lost persuasive traction: whereas it was wielded by the

majority in Bowers, it makes its only appearance in Lawrence seventeen years later in the dissent. In other words, history suggests that irrational slippery slope rhetoric in any given legal context (e.g., miscegenation, sodomy) will eventually lose out to the rhetoric of equality and rights that over time comes to dominate in that same context.

At the same time, however, history also suggests that the same or very similar sexual slippery slope rhetoric will resurface again in another legal context. While the slippery slope from miscegenation to incest and from sodomy to incest might be a relic of the past, and while the slippery slope from same-sex marriage to incest might soon be a relic of the past, history suggests that slippery slope rhetoric from something to incest will be in the ascendant once again—in which legal context that is, of course, it remains to be seen. The point here is that while any particular slippery slope argument might eventually die out, the sexual slippery slope itself—its basic structure, substance, and disgust-driven logic—remains an integral part of the way in which our law and culture respond to the deviant, taboo, and unfamiliar. Indeed, disgust and its linguistic vehicle, the sexual slippery slope, have a habit of returning in ways that make it more difficult to read history in strictly progressive terms.

2. The History of the Counterfeit Metaphor
The notion that same-sex marriage specifically, and same-sex relationships more generally, are a kind of counterfeit hearkens back to a much older tradition of conceptualizing non-normative sexuality and identity in terms of numismatic fraud. With respect to the history behind homosexuality and counterfeit, scholars of language and early-modern literature have traced the contemporary phrase, “queer as counterfeited,” or “queer as a three dollar bill,” back to “early sexological formulations in which homosexuality was seen as an illegitimate, or counterfeit, imitation of heterosexuality.” They have demonstrated that early-modern texts cast sodomy—and the homosexual sodomite—and counterfeiting in interchangeable terms. As one scholar has remarked: “Sometimes, the language of counterfeiting is used to describe a sodomitical relationship; sometimes, the sodomite is actually accused of making false coins . . . . In [these texts], sodomy and counterfeiting are coterminous.”

84 Will Fisher, Queer Money, 66 ENGLISH LITERARY HISTORY 1, 14 n. 5 (1999).
85 Id. at 5.
King Edward II, for instance, a renowned homosexual, was described by early-modern historians as a kind of counterfeiter, someone who regularly sought out young men in his court—or, in the words of one historian writing in the early seventeenth century, someone who sought "out some Piece, or Copper metal, whom by his Royal stamp he might make current."\(^{86}\) Around that same time, counterfeiters themselves were figured in eroticized terms. For instance, historical accounts from the early seventeenth century relate that castration was a common punishment for counterfeiters—those "false coyners" who routinely had their "privy members ... sund[e]red from [their] bod[i]es"—no less than it was for men who engaged in sodomy.\(^{87}\)

Indeed, it has been suggested that the counterfeiter-sodomite connection goes as far back as Dante, who wrote the *Divina Commedia* in the early fourteenth century. In that canonical text, Dante implicitly links counterfeiters and homosexuals by, among other things, quite artfully alluding to Narcissus, a latent homosexual for medieval readers,\(^{88}\) in the very canto where the counterfeiters are punished in hell for their fraudulent conduct.\(^{89}\) While Dante explicitly places the homosexual sodomites alongside the usurers in a different level of hell, he nevertheless implicitly suggests that the homosexual sodomites share salient characteristics with both categories of sinners from the *Commedia* who engage in unnatural monetary production.

What was it, exactly, about counterfeit ing and sodomy that allowed the early-modern mind to shuttle fluidly and almost effortlessly between the two? Three explanations here come to mind. First, counterfeiting and sodomy represented non-procreative monetary and sexual conduct, respectively—non-procreative conduct, moreover, that posed a serious threat to the continuity of the state. Counterfeiting was non-procreative in the sense that the coins which the counterfeiter bred were sterile because they did not naturally spawn 'true' money; the

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punishment meted out to the counterfeiters, sterilization, therefore symbolized the essence of the crime itself. Sodomy was non-procreative in the much more obvious sense that it was conduct that did not naturally spawn children; the punishment meted out to the sodomites, sterilization, therefore symbolized the essence of the crime itself.

Second, counterfeiting and sodomy were both unnatural and non-procreative *imitations* of the natural and procreative forms of monetary and sexual production, respectively. Counterfeiting was a crude imitation of the proper form of monetary production that tried to pass itself off as the real thing—monetary production which was itself, from Aristotle onward, conceptualized in biological terms. In much the same way, sodomy was a crude imitation of the proper form of sexual reproduction, an imitation that also tried to pass itself off as the real thing by virtue of the fact that it was, after all, an imitation.

Third and last, counterfeiting and sodomy both threatened to devalue the originals that each was purportedly copying. An influx of counterfeit currency into the market could compromise the worth or value of real money. Similarly, an influx of sodomy into the sexual market, so to speak, could compromise the value of the heterosexual family, “that most basic unit of the social fabric.”

If sodomy was linked to counterfeiting during the early-modern period because the former was an unnatural and sterile imitation of the real thing that tried to pass for the real thing (and devalued it in the process), then it should come as no surprise that counterfeiting terminology resurfaced in mid-nineteenth-century America in response to the threat of miscegenation. During that time, legal actors on occasion invoked the language of counterfeit when confronted with the difficulty of ‘proving’ one’s ethnic background in court. In those cases, the ‘science’ of determining race—and of whether someone was ‘passing’ for white—was analogized to the science of determining the difference between a genuine and a fraudulent banknote.

In *State v. Jacobs*, for instance, the North Carolina Supreme Court remarked that experts on race were needed in cases where the race of a defendant was in issue, cases that involved certain crimes for which the penalties were higher if the defendant had a certain percentage of “African blood” in him—a percentage, that is, that might not be discernible based on sight alone. The *Jacobs* court observed that, just as

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experts on money were needed in cases where it was disputed whether "a particular note [was] genuine or counterfeit," so too were experts needed in cases where it was disputed whether a defendant was white (i.e., "genuine") or merely passing as white (i.e., "counterfeit").

Similarly, in another case from around the same time, a lawyer for a black defendant on trial for allegedly raping a white woman argued to the court that the jury should not be allowed to determine the race of the defendant and the victim based on sight alone. He reasoned that, just as "in a case of passing counterfeit money" it would be impossible to determine whether "the money was counterfeit or genuine from seeing it in court," so too would it be impossible to determine whether the victim was counterfeit (i.e., merely passing for white) or genuine (i.e., truly white) simply by looking at her—a determination that really mattered given that the penalties for rape were not as great if the victim were non-white.

Counterfeiting metaphors coalesced around the miscegenation question during this time for similar reasons that counterfeiting metaphors coalesced around the sodomy question in early-modern Europe, namely, because they expressed a fear over fraudulent imitation and non-normative sexuality. Moreover, these metaphors represented a way to denote, in symbolic terms, the boundary between genuine/authentic and counterfeit/inauthentic sexuality and identity. Put most simply, the counterfeiting analogy was a catchy and convenient way to signify "difference, unnaturalness, [and] fraudulence," as well as, of course, a deeply-rooted cultural anxiety over passing and over the devaluation of the normative that such passing could lead to.

As this brief history of counterfeiting rhetoric in the sodomy and miscegenation contexts shows, the counterfeiting trope, no less than the sexual slippery slope, has an atavistic quality in law and culture—a habit of surfacing, that is, when law and culture are confronted with dangerous, unnatural, and potentially fraudulent imitation. When we hear that the purpose behind Ohio's same-sex marriage amendment was to protect marriage from "counterfeits," that the purpose behind Arkansas' same-sex marriage amendment was to prevent "counterfeit marriage that devalue[s] traditional marriage in the same

93 Casey Charles, Queer Writes, 28 WOMEN'S STUD. 32, 36 (2005).
94 Cahill, The Genuine Article, supra note 11, at 418.
way counterfeit money devalues real money,"95 and that the purpose behind the proposed FMA is to save marriage from "counterfeit marital unions,"96 it is impossible not to read or interpret what is happening today as an instance of a very old way of thinking redux. Indeed, if anything, what was for a very long time a counterfeit metaphor has now become an integral part of the law itself.

IV. What The Atavistic Character of Subordinating Rhetoric Tells, or at Least Should Tell, Us

Part III surveyed some, although by no means all, of the history behind certain subordinating rhetoric in the same-sex marriage context. Part IV now returns to the present and gestures toward the future. Specifically, this Part considers how, and why, the historical approach that I have advocated here, rhetorical atavism, is a useful one for a conference that looks in general to the use of history to understand current manifestations of subordination and to craft strategies for social change, and for a panel that looks in particular at what reconstructed histories—in this case, a reconstructed rhetorical history—tell us about the current state of subordinated groups in particular substantive areas. I would like to suggest that understanding the history behind current anti-same-sex marriage rhetoric—to be sure, recognizing that this rhetoric even has a history—serves three interrelated ends, a descriptive end, a strategic end, and a normative end.

First, and descriptively, the atavistic character of certain subordinating rhetoric makes it that much more difficult to read history, whether it is the history of constitutional law, marriage, or sexual minorities, in strictly progressive terms. Regardless of whether the law stops conceptualizing a particular group or particular conduct in terms of slippery slopes and counterfeit, the very recurrence of those terms in rhetoric and law—indeed, the law’s recurring need to conceptualize the non-normative in terms of disgust and fraud—should make us look more skeptically upon the legal narratives of unimpeded progress surveyed in Part II. As I suggested above, it’s not so much a question of whether, but rather of when and against whom those same terms will be deployed in the future.

95 Id.
96 Supra note 54 and accompanying text.
In addition, and more specifically, it is not altogether clear that sexual minorities will not continue to be thought of as counterfeit even after the holy grail of marriage is obtained. Part II examined the narrative of progress that tells the story of sexual minorities’ progressive “quest” for dignity and freedom under the law, that is, of their progressive advancement from outlaw to in-law status. As I there suggested, such a narrative is largely predicated on the assumption that marriage will mark a significant and necessary chapter in that story—indeed, perhaps even a sufficient chapter in that story, the moment when sexual minorities will have at last “claimed their true[st] identities” and no longer be made to feel, in the words of one marriage equality plaintiff, like a “fraud.” At the risk of downplaying the importance of marriage, which it is not necessarily my intention to do here, I would argue that the fact that sexual minorities have been conceptualized in terms of counterfeit at different moments in time for at least seven-hundred years should force us to examine more carefully whether, or really how, marriage will signal the end of thinking about sexual minorities in terms of fraud and deceptive imitation. Unfortunately, that is a conversation that hasn’t really taken place because of the largely unquestioned assumption that same-sex marriage will magically signal the end (or at least the penultimate stage) of discrimination against sexual minorities as a class.

Second, and strategically, the atavistic character of certain subordinating rhetoric provides a valuable opportunity for same-sex marriage advocates to demonstrate the extent to which law and history have not necessarily progressed over time. Rhetorical atavism assumes that, at least some of the time, the ‘bad’ rhetoric or the “bad parts of the past,” far from being ‘transformed into’ or ‘covered over by’ something that sounds more innocuous and politically palatable, is still very much alive and well today. It assumes that, while sometimes we might have to dig deep, so to speak, to establish a connection between the rhetorical present and a ‘transformed’ or ‘sedimented’ rhetorical past, at other times the connection between the rhetorical present and rhetorical past is quite transparent—sometimes, in fact, the rhetorical present is


98 Aff. of Cindy Meneghin, dated September 21, 2003, P 15, Lewis v. Harris, 2003 WL 23191114 (N.J. Sup. Ct. 2003) (No. MER-L-15-09). ("We work hard enough to be good parents, good employees, and good tax-paying citizens, and we should not have the extra work of explaining ourselves all the time, as if we are unworthy and as if our family is a fraud").
a case of our rhetorical past redux. This transparency, in turn, has certain strategic advantages. Challenging the constitutionality of a same-sex marriage amendment, the purported aim of which is to prohibit counterfeits and marriage approximations, becomes that much easier once we situate it within a much larger and much longer tradition of conceptualizing non-normative conduct and relationships—sodomy, miscegenation—in terms of counterfeit and deceptive imitation.

Third, and more normatively, the atavistic character of certain subordinating rhetoric should signal a word of caution to marriage advocates with respect to the ways in which such rhetoric might curiously be surfacing in their own progressive arguments. If, as I have suggested, the disgust-driven rhetoric of the slippery slope and the fraud-driven rhetoric of the counterfeit will inevitably resurface in time in other contexts, then there is no reason to believe that it will only resurface in conservative arguments and never appear in progressive ones. That ‘bad’ rhetoric, or traditionally conservative (and even reactionary) styles of legal argument, can (and perhaps inevitably will) be appropriated by progressives to serve progressive goals and ends is not a novel idea. Professor Dan Kahan, for instance, has pointed to the ways in which the conservative idiom of disgust has at times been “appropriated” by liberals to serve a “progressive” agenda. Similarly, Professor Jack Balkin has reminded us that “styles of legal argument . . . do not have a fixed normative or political valence.” Rather, “[t]heir valence varies over time as they are applied and understood repeatedly in new contexts and situations.”

Balkin refers to this phenomenon as “ideological drift,” and cites numerous examples in the law where certain ideologies and “styles of legal argument” have drifted from conservative camps over to progressive camps, and vice versa. What I would like to suggest here is that rhetorical atavism and ideological drift might together explain why marriage progressives have recently appropriated their own version of the slippery slope to incest and other sexual taboos. Traditionally the darling of reactionary discourse, the slippery slope, as I have suggested above, has of late reappeared or resurfaced in a form in progressive

101 Id.
102 Id. at 870-71.
marriage discourse, namely, in the claim that gays and lesbians should be allowed to marry a person of their choice because all sorts of unsavory folks—pedophiles, murderers, sex offenders, and even welfare recipients among them—already can.\textsuperscript{103} I have elsewhere argued that such a claim, which has appeared widely in progressive marriage discourse, mimics the slippery slope in a number of substantive and structural ways.\textsuperscript{104} If I am correct, then the ‘even sex offenders can do it’ claim could very well be an instance of rhetorical atavism and ideological drift working hand-in-hand—something which marriage progressives should take seriously if they are truly committed to legal progress above and beyond the quest for same-sex marriage.

V. Conclusion
My aim in this paper has been threefold. First, to demonstrate that what might at first blush appear to be ‘mere’ rhetoric in the debate over marriage equality has played a critical role in driving the law in this area. Second, to demonstrate that this rhetoric has a history, and in some instances a very long history, in the legal regulation and cultural prohibition of sodomy and miscegenation. And third, and most important here, to suggest that the history behind contemporary anti-gay rhetoric, as well as the atavistic character of that rhetoric, should force us not only to look more skeptically upon the narratives, or myths, of uninterrupted progress that elsewhere emerge from marriage equality discourse, but also to adopt a more critical stance vis-à-vis at least two things: (1) the kinds of arguments that marriage advocates are making in the struggle for marriage equality (\textit{i.e.}, to what extent might those arguments be perpetuating the same rhetoric of fraud/counterfeit and disgust/slippery slopes that has traditionally been deployed against sexual minorities and other subordinated groups?); and (2) the capacity of marriage to signal the end of discrimination against sexual minorities (\textit{i.e.}, precisely how will marriage signal the magical end of discrimination against sexual minorities when discrimination against

\textsuperscript{103} See, \textit{e.g.}, Brief and Argument of Appellant – Regina Pavone at 31, \textit{In re Estate of Hall} 707 N.E.2d 201 (Ill. App. Ct. 1998 (No. 97-3454) (arguing that the claim that gays and lesbians make bad parents doesn’t “hold water” because “[a]lcoholics, drug addicts and those on welfare are...given the right to marry and bring children into this world although, both financially and emotionally, they are ill-equipped to raise the children they conceive in a manner consistent with traditional values and morals”).

\textsuperscript{104} Cahill, supra note 11, passim.
that class, or at least the rich expressive idiom of discrimination, has an episodic quality that suggests that it is not going away any time soon).

I would like to conclude by noting that my intention here has not been to suggest that legal progress is itself a myth—surely one cannot deny that the move from *Bowers* to *Lawrence* represented progress for sexual minorities in a very real sense. Rather, it has been to suggest that the legal struggle for marriage equality has been largely structured around a narrative (or series of narratives) of uninterrupted progress, and that that narrative not only has taken on a mythic or legendary quality, but also fails to provide a fully accurate account of the way in which the forms of subordination, or at least the language of subordination, have recurred in similar ways throughout history. However alluring, the myth of progress might lull us into overlooking the most obvious traces of the bad parts of the past in the present. Worse yet, the myth of progress might even render actors with so-called good intentions and progressive goals—in this case, marriage equality—blind to the way in which they are repeating the bad parts of the past by forgetting them.
REDWASHING HISTORY

Tribal Anachronisms in the Seminole Nation Cases

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In Oklahoma, the Seminole Freedmen and their descendants have struggled for equal recognition and membership rights as Afro-Indian members for over a century. Freedmen have been marginalized, disenfranchised, expelled and somewhat restored to and from membership in the Seminole Nation, generating cries of unbridled racism on behalf of “black” members and cries of political sovereignty by “Indian” members. These demands for inclusion raise important questions about interracial memory and selective remembrance.

Both Freedmen and Seminoles view their intertwined history differently, and these understandings emerge in a heated contemporary conflict. This clash stems from the Nation’s effort to “redwash” history, that is, to paint a tribal past rooted in indigenous autonomy—one imagined to be completely unblemished by nontribal influences. “There is no Black Seminole,” exhorted past Chief Kenneth Chambers.1 A majority of tribal members concurred with Chambers in the belief that people of African descent had no place in the Seminole Nation. In addition, recent changes in tribal law severed an historic tie between blacks and Indians that had existed since the seventeenth century. In fervent objection to these changes in membership policy, affected bicultural

members filed a lawsuit in federal court, in an appeal to have their tribal status restored. Roosevelt Davis, "a man as dark as any of African descent," exemplifies the indefatigable resolve of the Freedmen who balk at such efforts to redefine their identity. "My folks is Indian," he declares, "I'm Seminole."

The yes/no dialectic of tribal membership is now familiar: on one side sits a group of racially mixed people who have been denied inclusion in a group which they had previously and historically been members. Narrative accounts and subjective beliefs comprise their evidence of membership in addition to treaties and court cases that declare tribal parity between Black and Blood Seminoles. On the opposing side, tribal members and government agents argue that personal stories and historical interpretation fail to qualify the Freedmen as Indians for tribal and federal purposes. This latter group has erected a standard for proving Indian identity that they argue cannot be met by mere desire and belief. Ironically, they require "hard evidence" as proof of membership.

Yet, disagreement abounds over what defines "hard evidence." Federal court cases and treaties declare Freedmen as equal members within the Seminole Nation. At the same time, other federal documents portray Freedmen as lacking "Indian blood." This absence of blood precluded them from participating in tribal programs, and invoked an atmosphere of differential treatment. Despite compelling claims on both sides for exclusion and inclusion, the Nation relied upon sovereignty to define membership as it chooses, without accountability. In response to this assertion of Indian political freedom, the federal government refused to acknowledge the Nation's existence during the policy of exclusion, which included curtailing federal funding and

2 Id.
3 Id.
4 Treaty With the Seminole, 1866.
http://digital.library.okstate.edu/kappler/Vol2/treaties/sem0910.htm. See also Seminole Nation v. US, 78 Ct.Cl. 455 (1933) (ruling that Seminole Nation cannot exclude Freedmen from receiving benefits).
5 Letter from Patricia Buckley, Coordinator of the Seminole Nation Judgment Fund Program, to Sylvia Davis (Jan. 12, 1995) (claiming that Donnell Davis did not have Seminole blood to participate in the Clothing Assistance Program).

(A legal brief written by government attorneys reads; "Presuming the plaintiffs have no Seminole Indian blood, they cannot legitimately claim harm from exclusion of funds to which they are not entitled").
tribal programs. As of October 26, 2003, the Nation restored the Freedmen as members in order to regain the federal funding and governmental recognition.

The status of people of African descent in indigenous nations generates important questions about what it means to be Indian. A fair understanding of the Freedmen controversy necessitates an explanation of the historical sites of contention that affect the Freedmen's inclusion in the Nation. This essay critically examines the plasticity of memory—how both parties remember and forget the past in order to justify the present. It directly addresses the radically disparate interpretations of government documents by "Indians" and "blacks," and how these readings of federal texts are constitutive of Seminole membership. The rigid adhesion to "Indian blood" by tribal governments marks a curious manifestation of sovereignty and self-determination. This dogged claim to autonomy and authenticity exemplifies a misapplied and dangerous discrimination hiding behind the mask of political ideology.

Memory in the Courts

Case #1: U.S. v. Davis

In 1996, Donnell Davis, a twelve year old registered member of the Seminole Nation of Oklahoma, applied to his tribe for a $150 school clothing allowance. As a federally recognized Indian tribe, the Seminole Nation provides financial assistance to its members for education, clothing, health care, food, and other family expenses from a federal land claims settlement. Enrolled members may apply to the tribe for such assistance, and the fund distributes aid regardless of one's financial

7 For a period, the BIA ceased federal monies to the tribe, and federal courts ordered their accounts frozen. This included a threat to close the Nation's Head Start program. Momentarily, the tribe remains at a standstill, and its government stands reluctant to accept Freedmen as equal members. Yet, as of September 2003, the BIA, circumventing the Seminole Nation, announced its recognition of enrolled Freedmen. See Carol Cole, Hancey Recognized as Seminole Chief, SHAWNEE NEWS-STAR (Okla.), Dec. 6, 2002; Government Recognizes Seminole Freedmen, SHAWNEE NEWS-STAR (Okla.), October 26, 2003.

8 See Government Recognizes Seminole Freedmen, supra note 7.

background—membership stands as one of the necessary requirements. The Tribe rejected Davis’s application because he failed to provide a copy of a Certificate of Degree of Indian Blood (“CDIB”). Davis and his mother, Sylvia, brought a discrimination suit in federal court against the Bureau of Indian Affairs (“BLA”). The plaintiffs sought declaratory and injunctive relief on two grounds: that federal officials wrongfully allowed the Seminole Nation to exclude them from participation in its assistance programs, and that the BLA improperly refused to issue CDIBs to members of the Freedmen bands.

At trial, Judge Vicki Miles-LaGrange dismissed the case on grounds that the Seminole Nation was an indispensable party and not named as a defendant. This left the plaintiffs in a legal bind—they could not sue the tribe because of the doctrine of sovereign immunity, yet the court ruled that the Nation was an indispensable party. The Davises appealed in 1999, and the Tenth Circuit remanded the case back to the district court to “determine whether, in equity and good conscience, Plaintiffs’ Judgment Fund Award claim can proceed in the absence of the Tribe.” On remand, the district court dismissed the Plaintiff’s case once again, which led to a final appeal in 2003, with the 10th Circuit affirming the lower court’s decision. After two appeals and two remands, the Freedmen lost their fight to gain equality within the Seminole Nation.

The Davis’es legal problem stems from federal documentation that prioritizes their black ancestry over their tribal identification. As members of the Dosar-Barkus band of the Seminole Nation, they were not eligible for CDIB cards, thus precluding their full membership. Tribal membership rolls define these registered members as black Freedmen: part of the Seminole Nation, but without Indian blood—a necessary standard for full tribal membership.

13 Davis v. United States, 192 F.3d 951, 961 (10th Cir: 1999).
15 See Daniel E. Dawes, Unveiling the Mask of Interred Injustices: The Seminole Nation’s Implicitly Endorses Dred Scott and Plessy, 50 How.L.J. 319, 320 (2007) (eligibility to receive tribal benefits rests upon whether a person has descended from a member of the Seminole Nation as it existed in Florida in the 1800’s).
The plaintiffs object to this racial delineation which taints the Freedmen’s legacy in the tribe. Sylvia Davis argues, “My ancestors came to Indian Territory on the Trail of Tears with these people. This is something that I’m not going to be denied.”\(^{16}\) In the collective memory of Seminole Freedmen, the past prevails as a definitive element in their contemporary identity. This retreat to history reveals an avoidance of discussion about a modern day-to-day connection with tribal affairs or strong identification with Blood Seminoles, who view Freedmen’s attenuated connection to the Nation as persuasive evidence for their exclusion.

Aside from the Freedmen and Seminoles by Blood, money is the third major component of the dispute. To support the contested assistance programs, the Nation draws upon the Judgment Fund, a $56 million dollar settlement awarded to the Seminoles as payment for aboriginal lands ceded in Florida in 1823.\(^ {17}\) Most Seminole Freedmen did not have CDIB cards and were thus excluded, because the BIA required proof of Indian blood to participate in the federal programs. Blood Seminoles capitalized upon this restriction as justification for excluding the Freedmen.\(^ {18}\) In addition to the principal from the Judgment Fund, the Nation has lobbied Congress for additional settlements for mineral rights from oil and gas leases that were taken by the federal government in 1908. The tribe has valued these leases at $95 million, almost twice the amount of the Judgment Fund.\(^ {19}\) Simple mathematics shows that fewer members means larger payouts.\(^ {20}\)


\(^{17}\) See supra note 15.

\(^{18}\) See Carla Pratt, Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estel Usui, 11 Wash. & Lee Race & Ethnic Anc. L.J. 61, 104 (2005) (Carla Pratt has characterized the exclusion as “not only dignitary or psychological, [but] also economic and educational”).


\(^{20}\) See John Rockwell Snowden, Wayne Tyndall, David Smith, American Indian Sovereignty and Naturalization: It’s a Race Thing, 80 Neb. L. Rev. 171 (2001) (Full-blood council member Dwayne Miller believes that Freedmen should receive compensation, but from an alternative, non-tribal source. In an interview, he conceded, “I don’t think they should take it out of our money.” Gaberson, supra note 6 (emphasis added). Other scholars have argued that increased economic potentials of tribes, such as government settlements and Indian gaming, have created an atmosphere of greed. This monetary interest leads tribes to disenroll people to increase benefits for remaining members).

While U.S. v. Davis generated interest from Freedmen who wanted to reassert their right as tribal members, Seminole Nation v. Norton generated a greater deal of political and racial strife that literally threatened the unity of the Seminole Nation. Norton concerned the political prerogative of a sovereign Indian nation to determine membership as it chooses. In July 2000, “Blood” tribal members passed a general-vote resolution to dissolve the Freedmen bands, along with a constitutional amendment to restrict membership to those Seminoles who could prove 1/8 degree of Indian blood.21 One year later, in July 2001, the Nation held an election for Chief, and voting officials did not allow Freedmen to participate.22 Before the onset of a possible multimillion dollar settlement, Freedmen status and blood dilution did not obscure one’s right to vote as a member of the Seminole Nation. With the subject of the vote excluded from the electoral pool, a majority of Blood Seminoles succeeded in excluding the Freedmen from membership.23 The Nation also held an election for Principal and Assistant Chief, with Ken Chambers and Mary Ann Emarthle defeating Jerry Haney and James Factor in a run-off.24 Freedmen did vote in this election, but their votes were not counted.25

With a majority vote supporting the blood minimum, band dissolution, and Chiefs selection, Seminoles of African descent became pariahs within the Nation.26 The common link between Africans and Seminoles came to an abrupt halt. Freedmen were no longer considered a part of the Seminole Nation, and tribal privileges which had previously existed disappeared quickly. Freedmen could not vote in elections, hold tribal office or participate in health, educational, and food benefits.27 The new government aimed to streamline the tribe into a group of “real” Seminoles, based on a platform of indigenous sovereignty that boasted

22 Id.
23 Metz, supra note 1 at A7.
25 Id.
27 Id.
self-determination and governmental autonomy. Chambers spokesperson Jackie Warledo asked, "The issue is, does our tribal government have the right to govern itself and amend its constitution? The issue still remains one of sovereignty." Her statement invites the question: at what point does sovereignty become a political veil for irreproachable autocracy and questionable ethics?

Accusations of racial injustice and threats of social opprobrium failed to deter the ambition of the new administration, as the protective cloak of sovereignty stood as their argumentative vehicle for discrimination. As a result, the Bureau of Indian Affairs, in a bold move, refused to recognize these elections or the new government without the electoral participation of the Freedmen. The Seminole Nation filed suit in federal court, challenging the BIA's action. In response, the court upheld both the Bureau's dismissal of the tribe's leadership and their repudiation of the constitutional amendment.

**Shared History, Severed Ties**

"Historically we have exhaustive historical and anthropological research proving that African Seminoles not only owned land, but were also essential chiefs, military and diplomatic leaders, and gave up their lives defending the Seminole Nation for almost two hundred years...I believe you will find there can be no doubt that Estelusti (Freedmen) held an equal interest in the Florida lands they were forced to exchange for their "Trail of Tears" to Indian Territory." —*Memorandum of the Dosar-Barkus Band*, Feb. 23, 1995


29 See Letter from Assistant Secretary of Indian Affairs to Hon. Jerry Haney, Seminole Nation of Oklahoma (Nov. 29, 2002) (on file with author) (The Department of the Interior, refusing to give credence to the restrictive platforms and policies of the Chambers administration, publicly recognized Jerry Haney, chief for twelve years prior to the election dispute, as Principal Chief). See Michael Dodson, *Tribe's Old Leadership Won't Back Down*, SHAWNEE NEWS-STAR, (Okla.), May 9, 2002 (Still, neither contender conceded defeat, with Chambers recognized by the people and Haney recognized by the government. The conflict escalated to a tense standoff in May 2002, with Chambers refusing to vacate tribal offices after an express order by the tribal court Judge Phil Lujan froze all tribal assets, giving control to Haney).


31 On file with Author.
The cases above discuss the roots of the Seminole Nation of Oklahoma, a racially mixed Indian tribe distinguished by its historic connection to freed blacks and escaped slaves. Historically, escaped slaves and freed blacks found refuge and freedom among Indian tribes in Florida, and the Seminoles adopted these emigrants into their ranks. Freedmen adopted the customs, language, and manners of the Seminoles, and developed extensive agricultural skills, which led the Seminoles to dependency on the blacks, as argued by Joseph Opala:

They were the chief agriculturalists of the Seminole Tribe, but they were required to turn over only a token share of the harvest as a tribute to their Indian masters ... They owned their homes, carried guns, and dressed in the same fashion as the Seminoles. Several observers noted that the blacks were better off materially than the Indians.

The freedmen lived in harmony with the Seminoles in Florida, and accompanied them during the 1838 removal to Indian Territory (now Oklahoma), after the Tribe’s defeat by the United States. This close community of red and black led to extensive intermixing, which created a hybrid group of Seminoles of African and Native descent. The extent of racial blurring led colonial whites to express disdain at the inability to classify the Seminoles as simply black or Indian. United States Senator Joshua Giddings described the black Indians as “mostly half breeds, and are rapidly becoming amalgamated with the Indian race.”

Contemporary Freedmen’s arguments for inclusion rely heavily on the memory of their distant ancestors’ indispensability to the Tribe. In recounting this past, Freedmen demonstrate the historic existence of

32 Natsu Taylor Saito, *From Slavery and Seminoles To AIDS in South Africa: An Essay on Race and Property in International Law*, 45 Vill. L. Rev. 1135, 1144 (2000) (Describing that, “some of the members of the Seminole Nation who were of African descent had never been enslaved, some had escaped from slavery, and other were the descendants of fugitive slaves.”). Daniel F. Littlefield, Jr., *Africans and Seminoles* 5 (1997); Kenneth Porter, *The Black Seminoles* 4-6 (1996).


interracial cooperation to counter the Nation’s racially based restrictions. Accounts of military allegiance recur as standard arguments. Prior to Indian Removal, which occurred after 1838 and before 1866, blacks and Indians fought together against American forces that sought possession of Native ancestral lands in south Florida. Seashores of African descent played a strong role in helping their comrades resist the encroachment of the government, to such an extent that Thomas Sidney Jesup, an American military commander attested, “This you can be assured is a Negro, not an Indian war.” In 1896, General Jesup also wrote that, “Throughout my operations I found the negroes the most active and determined warriors; and during the conference with the Indian chiefs I ascertained that they exercised an almost controlling influence over them.” Dosar Barkus band chief Rosetta Noble Finney champions this history: “After we fought, bled and died right here to help them with their freedom, they want to delete us. We’re warriors, we’re fighters, we’re not going to give up.” A similar narrative account of military memory emboldens Sylvia Davis, who claims that her fifth great-grandparents died in the Second Seminole War, and that another great grandparent walked on the Trail of Tears.

Rejected by their tribal cousins as non-Indians, many Freedmen remain dedicated to the steadfast belief that the conjoined past of the Seminoles entitles them to equal membership with blood Indians. Because their ancestors lived with, intermarried with, and fought with the Seminoles, they consider themselves “real Indians.” One Freedman describes the history in the same rhetoric as naturalization: “We were Indian. It’s like a white man who grows up in Mexico. He speaks their language, eats their food and thinks the way they do. He’s Mexican; we’re Indian.” Recognition of the shared history would validate the

39 Opala, *supra* note 33 at 10.
41 Davis states, “Not a day doesn’t go by that I don’t think about my ancestors. Sometimes I place myself back in history and think about the hard times they had to suffer through. A lot of them died at an early age. A lot of them died on the Trail of Tears.” *Fighting To Be Heard Black Seminoles Sue For A Place In History*, THE SUNDAY OKLAHOMAN, November 7, 1999, at City Edition.
42 Scott Thybony, *Against All Odds*, SMITHSONIAN, August 1991 at 90.
Freedmen’s subjective conception of themselves as legitimate members of the Seminole Nation.

Categorical denial by Blood Seminoles of this shared heritage invokes a notable dilemma: Black and Blood Seminole inherit legacies from their ancestors, but only the latter inherit a tribal legacy. An alternative argument may be made that full membership is unnecessary to verify the Freedmen’s origins. Tribal ratification of this ancestry would not change what Black Seminoles think about themselves. This may be true, but Freedmen persist in seeking external validation and equal treatment. “We consider ourselves a part of the Seminole Nation. We want no more than what they get. We want to be included as members of the tribe,” says Lawrence Cudjoe, a Freedman and former tribal council member. Like other Freedmen, he asserts a personal belief that he deserves membership in the tribe because his parents, grandparents, and great-grandparents viewed themselves as Seminoles. Cudjoe’s argument for inclusion finds root in ancestral allegiances to the Nation. In this appeal to the past, he, like other Freedmen, eclipses the doctrine of hypodescent to assert a tribal connection. Another Freedman, Polly Gentry, of Seminole County, Oklahoma, does not allow her African American appearance to steer away from her subjective conception of identity. When interviewed by the New York Times in January of 2001, she described herself as “an Indian. A black Indian.”

Freedmen’s accessions to the past sharply contrast with Blood Seminoles’ conception of a rightful claim to membership. Despite historical links between blacks and Indians, Blood Seminoles insist on streamlining the tribe to “real Indians.” Former Chief Jerry Haney justified the opposition by arguing that current Freedmen have drifted away from cultural identification as Indians. Blood Indians, comfortably situated within the irreproachable ranks of secure membership, question the authenticity of a faction that rests upon a historical and past, rather than a cultural and current, claim to membership. In the effort to streamline the Nation, a majority of Blood Indians have divested themselves of the burden of history to forge a new, singular identity divorced from the influences of Freedmen. In this rupture with the

44 Id., supra note 6 at A1.
45 Id.
past, the Seminole Nation redwashes history by turning a blind eye to a substantial portion of its Afro-Indian population.

The Nation’s policy of exclusion in part conforms to other patterns of interracial denial, yet still differs from previous examples because of the issue of Indian sovereignty. While amnesia towards mixed race may take the form of Chesnutt’s familial avoidance, Mrs. Hubbell’s testamentary interests, or the Jeffersons’ categorical exclusion, the Seminoles, under the umbrella of sovereign immunity, may safely invoke racially restrictive policies. Even though the Nation’s policy openly promotes race-based exclusion, the Nation, as a sovereign entity, nevertheless may determine membership as it chooses. Courts refrain from questioning tribes’ political policies, particularly regarding membership issues where race and gender would otherwise receive a form of heightened scrutiny. As Justice Marshall opined in Santa Clara Pueblo v. Martinez, a tribe should “maintain itself as a culturally and politically distinct entity,” a necessity which he saw as incompatible with judicial review.46 Thus, courts shy away from alarming examples of discrimination in the interest of sensitivity to the autonomy of Indian nations.

Examples of isolated soundbites from “Blood” Seminoles generate additional sympathy for the Black Seminole’s plight while revealing racially charged sentiments from the other side. Chambers supporter Yogi Harjo curtly revealed, “We’re not black—we’re Indians...We’re trying to keep the black people out.”47 A local official in Seminole Indian Country chided Sylvia Davis with outspoken hostility, telling her that the Freemens needed to “go back to Africa.”48 Davis, a former Freedman representative on the tribal council, attests that at meetings, other members were “calling them animal names, cows, stomping feet, roaring at ‘em, telling them to get out.”49 At a curiously titled “Walk for Unity” march organized by Chambers supporters, participants sported T-shirts emblazoned with the slogan, “Seminole by Blood.”50 These

47 http://www.siestandvieve.com/showArticle.asp?articleid=14
48 Brent Staples, The Seminole Tribe, Running From History, N.Y.
(last visited August 2, 2004).
examples speak clearly of the racial tension that characterizes this historically Afro-Indian tribe.

This sympathy has its limits, however. Although I stand partial to the merits of Freedmen claims to interracial heritage, I question the singular reliance on the past as a method of establishing a contemporary identity. As a method of legitimating a claim to membership, Freedmen and their representatives recall unified glory days of the past as irreproachable arguments for inclusion. The oral and legal history that they employ undoubtedly prove the existence of an intertwined history, yet these demonstrations fail to trump the Nation’s reliance on federal determinations of blood as definitive proof of tribal membership. This bureaucratic hurdle stands as a somewhat necessary evil, yet in this case, the established standard is tautologically exclusionary. Because Freedmen records remain silent on the subject of ancestry, their contemporaries cannot calculate a degree of ancestry that would make them eligible for membership.

The Blood Seminoles’ motivation for denial runs less on suppressing miscegenistic shame than capitalizing upon opportunities for economic gain. This alternative approach considers the subjective eye of memory as the basis for an authoritative belief in one’s Seminole identity. This way, we may witness the formulation of one history, but with two attendant interpretations of its facts. These opposing versions harbor respectively forgotten and suppressed facts that do not comport with a unified picture of the past. By expunging the unfavorable and venerating the flattering, narrators conflate fact and fiction to present a contrasting version of the past—an engaging model on which to base the present.

One Treaty, Two Versions

In 1866, the federal government entered into a treaty with the Seminole Nation. The clause in Article 2 of the 1866 Treaty stands as the Freedmen’s crucial argument for legal and political inclusion:

[1]nasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants...shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all person of whatever
race or color, who may be adopted as citizens or members of
said tribe.51

The treaty flows from an inability to separate black from red and
also from the government’s acknowledgement of a multiracial tribal
population. The federal establishment of interracial citizenship marks
the basis for the Black Seminoles’ claim to equal membership in the
Nation. From this juridical framework, Freedmen circulate an oral his-
tory of equality that “as long as grass grows and water flows ... if the
Indian gets a dollar, the Freedman gets a dollar.”52 According to these
oral, legal and historical narratives, Freedmen and Blood Seminoles
shared a common history as conjoined citizens of an Indian nation.

For Freedmen, 1866 marks the legal culmination of their long his-
tory with the Seminoles. It also solidifies the alliance of escaped slaves
and free blacks with the accepting Natives. Thus 1866 does not rep-
resent a beginning for the Freedmen, but memorializes a past that
until then had not been formalized. From this variegated background,
Freedmen have passed down an oral history securely established in
legal and historical documentation. This notion of equality and part-
nership establishes a collective consciousness of Freedmen entitle-
tment to inclusion. Seeing themselves as kin of the Seminoles, modern-day
Freedmen pledge to retain and celebrate this cultural inheritance.

Blood Seminoles maintain that Freedmen overstate the extent of
their historical integration into the tribe. Under this interpretation,
the 1866 Treaty represents a federal imposition of equal citizenship.
The Seminoles recall the past from a paradigm of slavery, precluding
consideration of the relationship as one of equality. This interpreta-
tion imagines the Nation’s past as an agricultural state characterized
by black enslavement. Similar to the Indian-black relations of the other
“Five Civilized Tribes,” the Seminoles view themselves as southern slav-
ecowners: distinct, separate, and over the Freedmen.53

51 Treaty With the Seminole Indians, March 21, 1866, 14 Stat. 755 (hereinafter
"TREATY").
52 Josephine Johnston, Resisting a Genetic Identity: The Black Seminoles and Genetic
Tests of Ancestry, J. L. Med & ETHICS, 31.2, 264 (Summer 2003), quoting Rebecca Bate-
man, “We’re Still Here”: History, Kinship, and Group Identity Among the Seminole
versity) (on file with the Schomburg Center for Research in Black Culture, New York,
NY).
53 The Five Tribes are: Seminole, Creek, Cherokee, Choctaw, and Chickasaw. Pri-
mary based in Oklahoma, these Indian nations each have Freedmen branches in their
This interpretation insists on the fundamental difference between Black and Blood Seminoles. Former Chief Haney maintains, "they were always looked at as non-Indian. They were always a separate people." Freedmen’s slave status, they argue, precluded them from ownership of Seminole lands in Florida. Citing the same Treaty that energizes the Freedmen’s case for inclusion, Blood Seminoles insist that Freedmen had "no interest or property in the soil." Because Freedmen did not have citizenship or property before the treaty, they cannot receive contemporary money judgments, which concern compensation for the removal from Florida in 1838.

Freedmen perceive their interest in the soil less literally. Their conception of the past downplays their historical status within the Nation as slaves of the Seminoles. While Freedmen do not deny this fact, they distinguish this form of servitude as "nominal slavery." Lena Shaw, a Freedmen band chief, insists that, "In order to keep the American people from taking the people of African descent from them, they decided to say, 'We’re your slaves.'" Joseph Opala succinctly explains: "Technically, a Seminole black was owned or controlled by an Indian master who could either free him or bequeath him to a relative at his death. Seminole blacks or 'Indian Negroes,' as the Americans called them at that time, were, however, free in almost every other way." Opala explains further that the Afro-Indians served the tribe as "warriors, war leaders, interpreters, negotiators and spies." Contemporary Freedmen gather this information proudly, insisting that they were not "true" slaves, but "Brothers in Arms" who played a significant historical role in tribal culture and warfare. As argued by Freedmen attorneys and supported by historical treaties, Black Seminoles were a part of the Seminole Nation at the time of removal from Florida, and these

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54 Metz, supra note 1.
55 Treaty, supra note 51 at Article 2.
57 Opala, supra note 33 at 4-5.
58 Opala, supra note 33 at 8.
59 Treaty, supra note 51 at Article 2.
"Indian" citizens too experienced the appropriation of lands on the part of the federal government.

The citizenship clause of the Treaty does not influence the Nation's arguments for exclusion. Language exists that argues for the inclusion of the black Seminoles, but the scope of this inclusion remains unsettled. Does "enjoy all rights" extend to tribal benefits based upon events before 1866? Blood Seminoles, as arbiters of their own membership, emphatically say no. However, it seems counterintuitive that the Freedmen's evidence of legal precedent from the 1866 Treaty fails to convince courts that their claims to inclusion are valid. The treaty provides an external declaration of equality within the tribe that attests to a variegated group whose members may enjoy the benefits and protections of tribal membership. Yet, the plain language of the citizenship clause fails to influence the Seminole's interpretation of their tribal history. As law may establish a posterity of knowledge that declares some facts as true and others as false, the language of the treaty stands as a problematic site for the interpretation of past events and their intentions. According to language in the 1866 Treaty, it appears that the Freedmen were unequivocally intended to be absorbed into the body politic. At the same time, however, the membership standards of the Seminole Nation incite racial distinctions that stultify the egalitarian rhetoric of the 1866 treaty.

If the Seminole Nation is to foment a contemporary tribal identity that balks its African ties, is it feasible for courts to accept this revised version of history as legitimate? It appears counterintuitive to assert claims of indigenous ancestry as necessary elements of reparations while selectively ignoring the qualifying circumstances. In this partial remembrance of the past, the Nation runs the risk of declaring the 1866 Treaty as coerced, misrepresentative and therefore illegitimate. Their belief that the treaty was not meant to genuinely extend full tribal citizenship to Freedmen jeopardizes the legal authority of all treaties between Indian nations and the federal government. To reject clear and convincing legal language that records a binding promise between governments can only endanger the historical foundation of federal recognition of the Seminole Nation. The treaty marks a basis for the government's payment for lands ceded in Florida, which provides the monetary foundation of the Judgment Fund. Its legitimacy is only as good as the Seminole's loyalty and faith to abide by it. Selective atten-
tion to treaty language not only defies the treaty’s purpose, but also compartmentalizes its effectiveness.

**Dawes Commission, Freedmen Omission**

In the late 19th century, agents of the Unites States government, liberal intellectuals, and Christian missionaries convened annually at Lake Mohonk in upstate New York to propose speeches and papers addressing solutions to the “Indian problem.” Overwhelmingly, the majority of participants (collectively known as “Friends of the Indian”) believed that the practice of communal living on Indian reservations entrenched indigenous people in pitifully savage ways of living. They perceived this problem as stemming from the absence of the stabilizing providence of property ownership. Their perceived solution, then, was the allotment of land in severalty, known as the General Allotment Act. Each adult citizen of the various Indian nations would receive plots of land—a physical testament to the Indians’ “entry wedge” into the mainstream of American culture. Senator Henry Dawes, the primary author of the Act, said at the Fifth Lake Mohonk Conference,

> We had better be employed taking, one by one, all these Indians, and making citizens of them, and planting them on their 160 acres of land, telling them how to go forth among the white men of this country and learn the ways of the white man, and stand up and take their part in the great work of the governing of the Union.⁶⁰

Reformers hoped that property would eradicate the savage ways of Indians and replace them with tenets of civilization. Moreover, property conveyed Lockeian values of use and Jeffersonian principles of entitlement through the political and theoretical enchantment of the tilling of land. Through ownership, the reformers sought to replace Indian cultural traditions with American cultural values, in addition to opening up ceded land for white settlement. The reformer Carl Schurtz argued, “They will have advances in immense step in the direction of the ‘white man’s’ way.”⁶¹

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⁶¹ *Id.*
The policy of instituting ownership strangely figures as the basis for membership in the Seminole Nation. From the reformer's intentions to supplant Native pathologies with American pragmatism emerges a contemporary paradox that challenges the authority of tribal sovereignty. The Dawes Commission imposed "the ways of the white man" to eradicate Native culture, but this scheme underscored the notion of membership in a particular tribe. Thus, in order to receive the spoils of assimilation, federal officials had to answer the question "Who is Indian?" Today, their determination of membership stands as the irreproachable basis for tribal sovereignty. From the Seminole Nation's perspective, the proposals from Lake Mohonk do not taint the integrity of tribal history. Exposing this foundation facilitates an analysis of the persistent and divisive anathema of Indian blood.

Formalizing the concept of "Indian blood" underscored bureaucratic and political peculiarities of racial intermixture. Federal bureaucrats, in the task of determining membership, separated the tribe into two groups, Seminoles by Blood, and Seminole Freedmen. Generally, applicants of mixed Afro-Indian ancestry became Freedmen, while fullbloods and mixed-blood white Indians claimed membership as Seminoles by Blood. In certain cases, bureaucratic officials placed Black Indians on the Blood rolls, but only after meeting certain requirements. Paradoxically, white European ancestry did not categorically threaten membership as a Blood Seminole. Thus, the Dawes Rolls, as they became known, could declare a person who was 1/4 Indian and 3/4 white as "Indian," while a person 3/4 Indian and 1/4 black received "Freedman" status. Consequently, those declared Freedmen at the time of the Dawes Rolls, even with incontrovertible proof of Seminole blood, were stripped of a juridical nod to their dual heritage as their record as Freedmen lists no evidence of Indian blood. Under this system, racial identity was not determined by each individual, but rather withstood review by a government agent. At the time of allotment, Seminoles numbered approximately 3,000, one-third being Freedmen. This membership roll, drawn over 100 years ago, remains the authoritative source for determining Seminole ancestry.

Although the institutionalization of Indian blood aimed to create order from chaos, this basis of identification gave birth to problematic ambiguities. At present, the membership rolls preclude contemporary

62 Pratt, supra note 37 at 1250.
Freedmen from obtaining CDIB cards as a result of the failure of the Dawes Commission to recognize the “Indian blood” of their predecessors. This weight of the past on the present forces inheritance of the cultural constraints of previous generations in order to affirm the impossibility of the obvious. While an individual Freedman may claim Seminole ancestry, the authoritative source for determining membership declares otherwise. Even though Freedmen may rally to declare “we know who we are,” their foes point to the rolls to protest, “we know who you are not.” This purgatory of identity, where subjective beliefs clash with purportedly objective proof, reduces one’s conception of personhood to an historic aberration.

The lasting influence of the Dawes Rolls does not appear to dissipate, yet these seemingly overwhelming forces belie a fragile foundation that finds little basis in irreproachable fact. To assume the authority of 19th century racial categorizations without a critical eye to their historic influences presents a case of fatuous objectivism. Accepting without question the racial constructions of Indianness as represented by the Dawes Commission necessarily privileges those who benefit fully from its provisions, while subordinating those who do not. Expectably, those Seminoles whose full access to the tribe is protected and secured by membership rolls pose few questions about the derivation of their inclusion. Those on the margins, however, find themselves at the mercy of antiquated standards that persist in exercising total authority over contemporary manifestations of identity.

**A Bad Case for Sovereignty**
The historic delineation of black and red standardizes racial segregation within the Seminole Nation, and to a larger extent, racial supremacy. At the same time, it propels the past into the present by serving as a point of mutual contention. Blood Seminoles wish to uphold the separation of the rolls because they testify to the initial intention of the government to disenfranchise those of African descent. In their view, the rolls clarify the misintentions of the Freedmen in their struggle for inclusion. Conversely, Freedmen point to the racial bias they view as inherent in the rolls, and argue for dissolution of the restrictive standards that preclude access to their birthright.

The Nation argues that the determination of membership marks a fundamental right of tribal sovereignty. This assertion of autonomy
revels in the fact of exerting power within a political sphere unadulterated by non-Indian influences. Regarding racial exclusion in the tribe, tribal spokesperson Jackie Warledo states, “It should be our decision to make.” This image and ideal of sovereignty raises the controversy to a fevered pitch—as accusations of racism and discrimination increase, Blood Members turn to this bedrock concept as political refuge. In resisting the encroachment of traditional American jurisprudence, the Seminoles ask outsiders to respect their assertion of self-determination. Their survival and authority, they argue, depends heavily on the ability to maintain a distinct tribal identity at whatever cost. This premium on autonomy receives support from scholars who sharply describe federal intrusion as a “smothering paternalism that could ruin traditional Indian modes of social, political and religious life.”

But the question remains of separating oneself from the chain of earlier generations. Tribal leadership cannot persuasively spin the Dawes Rolls as internal articulations of Seminole nationhood. This method of maintaining a past of tribal independence reveals a crucial element of recollection. In order for Seminoles to assess the truth of their history, they must regulate the numerous details of their past. Forgetting and remembering exist as essential functions in the management of memory. As Richard Terdiman argues, “loss is what makes our memory of the past possible at all.”

The Nation downplays the impact of the Dawes Rolls on membership and sovereignty. Reformers aggressively advocated their support of assimilation through property. Carl Schurz, a self-professed “Friend of the Indian,” predicted that “[w]hen the Indians are individual owners of property, and as individuals enjoy the protection of the laws, their tribal cohesion will necessarily relax, and gradually disappear.” Surely, the goal of solving the “Indian problem” actually weakened the authority of cohesive Indian nations. The historical distinction of the Dawes Act is its paradoxical benevolence of claiming to aid Natives by eroding their societies. Without question, tribal members know its original

66 Carl Schurz, Present Aspects of the Indian Problem (July 1881), in Prucha, supra, note 60.
intentions, and with fewer questions, tribal officials derive authority from it. Thus, the federal plan of eventual dissolution strangely reigns as the primary rubric for inclusion on the membership rolls.

The hyperbolic reaction to what the Seminoles see as encroachment on sovereignty matches the level of irony that makes their self-determination appear completely non-indigenous. The current tribal rubric for membership is fundamentally based on the draftings of the Dawes Commission. Even though the tribe retains the prerogative to determine membership as it chooses, it accepts the external and inorganic racial articulations of the all-white Commission. This internalization of extra-tribal standards marks a peculiar flaw in the Seminoles’ logic. The imposed and arbitrary concept of blood quantum as a current variable in the all-important area of membership haunts the idea of an unfettered and sovereign development of nation. The impossibility of avoiding and circumventing the past may be conceded, but this indefatigable specter of government incursion sets up a conundrum of memory.

The journey of the Dawes Act from a destructive policy conceived by whites to an irrefutable doctrine fortified by Indians is nothing short of a remarkable transformation. The Seminoles have overturned the negative aspects of the Dawes Act into an unavoidable tenet of indigenous authenticity. Indian blood remarkably retains its Victorian legitimacy; defined by whites and essentialized by Natives, it persists unchecked. Tribal spokesperson Jackie Warledo declares, "If you are not Seminole by blood, you are not a tribal member. If we can’t pass that inheritance to our future, we will cease to be Seminole tribal members." This dogged loyalty to the Dawes Rolls confounds a traditional understanding of self-determination and self-identification. In appropriating the external articulation of membership as a prerogative of sovereignty and a symbol of independence, the Seminoles fail to escape the state power they claim to be sovereign from. Notably, the Nation’s redwash of the Dawes Rolls concedes nothing to the influence of "Friends of the Indian." Even though the tribe retains the prerogative to determine membership as it chooses, a 21st century Indian tribe accepts the external and inorganic racial articulations of dead white Victorians in upstate New York.

Andrea Parrot & Nina Cummings

Reviewed by Lara Pierce

I. Introduction
Numerous books focused on violence against women have been published in the last several years. The scope of their subject matter is geographically narrow and a large number of them concentrate on domestic violence. Foresaken Females: The Global Brutalization of Women is unique because it offers a global perspective and identifies violence against women as a universal problem.

Authors Andrea Parrot and Nina Cummings are both educators of women’s health in New York. At Cornell University, Parrot is a professor in the Department of Policy Analysis and Management and at


2 See generally Hilary Abrams, Supporting Women after Domestic Violence: Loss, Trauma and Recovery (2007); Eavan Boland, Domestic Violence: Poems (2007); Evan Stark, Coercive Control: The Entrapment of Women in Personal Life (2007); These are Our Stories: Women’s Stories of Abuse and Survival (Jan Rosenberg, ed., 2007); Interpersonal Violence in the African American Community: Evidence-Based Prevention and Treatment Practices (Robert L. Hampton & Thomas P. Gulatta, eds., 2006).
Upstate Medical University she is a clinical professor of Psychiatry. She is best known, however, as one of the nation's leading experts on sexual assault, particularly with respect to college campuses and athletes, and date and acquaintance rape. Her books, Rape 101: Sexual Assault Prevention for College Athlete and Sexual Assault on Campus: The Problem and the Solution significantly influenced the services provided to college students and were featured on several media outlets, including The Oprah Winfrey show. Parrot co-founded Cornell Advocates for Rape Education (CARE) in Ithaca, New York. Forsaken Females is her first book about violence against women and her first with an international focus. It is one of many writing collaborations between Parrot and Cummings.

Cummings specializes in women's health. She is a Health Educator and Victim Advocate at the Gannett Health Services of Cornell University and at Ithaca College she is an adjunct women's health professor. She is also an active member of CARE and has co-authored and contributed to several books, including Rape 101.

In Forsaken Females, Parrot and Cummings do not focus on one type of violence or a single locale of violence, rather they emphasize the irrelevance of geography. For example, sexual slavery and domestic violence occur in the United States, Asia, and Africa alike. The scope of the book is broad and shallow, rather than narrow and deep; it acts as a survey of violence against women on a global scale. Provided in each chapter is a description of one or more violent practices and examples of two or more countries of origin. Significantly, the authors also examine the cultural context of the violence, whether social practices, economic conditions, political pressures, or religious customs condone it.

Parrot and Cummings rely heavily on anecdotal data. They explain their decision to do so by emphasizing the need for a deeper understanding of the violence women face than statistics alone can offer. The voices of the victims play a vital role in eliciting the systemic nature of the violence and offer valuable insight into the consequences of

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4 She has written several books about sexual slavery and sexual violence, but not about other violent practices.

the violence. Forsaken Females successfully conveys the universality of violence against women by considering gender violence on a global scale, examining the social, political, economic, and religious context of the violence, and including anecdotal evidence in a straightforward format.

II. SUMMARY OF CONTENTS

The book is organized into three parts. Part One places violence against women in context by examining the history, methods, and theories surrounding the issue, as well as the social and political circumstances that facilitate the brutalization of women. Part Two describes several forms of violence, including femicide, genital cutting, sexual violence, sexual slavery, trafficking, domestic violence, and honor killing. Finally, Part Three describes the impacts of this widespread violence and what the role of women in the future can and may be.

III. TEXTUAL ANALYSIS

Parts One and Three are relatively theoretical, examining the broader concepts of women’s role in societies around the world, the impacts of violence on women, and the possibilities for ending the violent practices aimed at them. Part Two is the core of the book.

The authors explain in Part One the theoretical approach they adopt.

It is our contention that the more viable theories challenge existing power frameworks and call for a complete reordering of the race, class, and gendered norms that exist . . . of particular note, is the feminist theoretical framework that establishes socially constructed male dominance and female subordination as the primary cause of violence against women.6

This is an appropriate perspective because research indicates a direct correlation between patriarchy and the severity of violence against women.7 The authors also justify their use of anecdotal evidence as

7 Id.
necessary: "[w]ithout individual experiences highlighted, it would be impossible to "connect-the-dots" between cultures."8

To a reader unfamiliar with either feminism or the subject of violence against women, Part One is effective. In fifty pages, Parrot and Cummings offer a thorough overview of the structural framework of Part Two. An explanation of violent practices against women around the world, without context would have prevented Forsaken Females from achieving its goal. Without Part One, the book would have failed to persuade readers that violence against women is connected globally through the subordination of women. To a feminist or a scholar familiar with feminism or violence against women, it will likely be redundant.

Totaling just sixteen pages, Part Three is the least insightful section. Chapter Eleven serves well, if not briefly, as a conclusion highlighting ongoing and potential international efforts to eliminate the violence against and subordination of women. Chapter Ten, which reiterates the impacts violence has on women socially, physically, mentally, and economically is less successful. It is unnecessary because the impacts discussed, such as low self-esteem, reduced mobility, heightened anxiety, and economic dependence, are fairly obvious and could have easily been incorporated into Part Two. The physical impacts described are especially superfluous: "Women whose feet were bound suffer pain and have difficulty walking. There will be painful scarring after bride burning attempts or acid attacks."9

Ultimately, this chapter does not provide additional information, but reiterates what was discussed in Part Two or adds information that should have been included in Part Two. For example, the impacts of Female Genital Cutting (FGC) on a young girl's mental health are explained as particularly harmful because mothers often encourage the ritual. This could have been discussed in the chapter in Part Two devoted to FGC, in which a poem by a ten-year-old Kenyan girl was featured, "... I screamed, and my Mum came running to check on me. / My loving parents, is this what I really deserved? / I'm asking all of you, is this what I really deserved?"10 This chapter could have been more effective if the substance was worked into the previous chapters or if it was covered more elaborately in the current chapter.

8 Id. at 17.
9 Id. at 193.
10 Id. at 70.
Part Two, on the other hand, is long and serves an important purpose. It consists of six chapters that examine numerous violent practices. They are divided into categories of violence, some of which include several different forms of violence. For example, the chapter about Femicide discusses infanticide and feticide, and Sexual Violence includes marital rape, gang rape, child rape and assault, along with the conditions in which sexual assault often occurs, such as war, prison, and refugee camps. To set the tone, the authors introduce each chapter with a relevant quote about violence against women. “How to Beat Your Wife without Leaving Prints,” a title in a Playboy article in Romania, introduces the chapter on Intimate Partner Violence.¹¹

Within each of these chapters, the authors first consider the “scope of the problem,” by explaining context.¹² Generally, they consider the pervasion of sociopolitical, economic, and religious factors that influence the existence of violence against women. They also explore how these factors serve to “justify” the practices. For example, intimate partner violence is often an invisible crime because the socially constructed excuse that all marriage-related matters are private overrides the potential danger of the situation. The attitude that the privacy of marriage should prevent law enforcement from interfering is further justified by the patriarchal notion that a wife is the property of her husband. Women abused by intimate partners run the economic gamut; poor women are not the only women vulnerable. One detailed example involves a Random House editor whose attorney husband beat their daughter to death.¹³ The cultural context of violent practices is also covered in this section, describing acid attacks as occurring most frequently in Southeast Asia and bride burning and Sati in India.

As in Part One, the use of a straightforward framework to introduce the issue is effective, particularly in the general-to-specific approach the authors take. The authors provide brief examples of social conditions that influence violent practices against women around the world and then delve into specific examples within cultures, which paint a more complete picture. The section on Gang Rape in the chapter about Sexual Violence provides a good example of this. The discussion begins with the various causes attributed to the act worldwide, like ethnic hatred or war, then recounts three infamous attacks in the

¹¹ Id. at 151.
¹² See id. at 53, 71, 93, 115, 135, 151, and 173.
¹³ See id. at 155-56.
U.S.,\textsuperscript{14} and includes a specific incident in India, which is strengthened by a vivid description of the rape by the victim’s husband.\textsuperscript{15}

The voices of victims and witnesses have a constant presence throughout each chapter. Recognizing that victims and witnesses of violence provide a unique perspective more insightful than statistics alone, the authors use many excerpts from interviews conducted by Human Rights Watch and other non-governmental organizations. They serve to clarify or elaborate on practices and incidents after a general description and act as transitions and comparisons, both highlighting differences and emphasizing similarities. Set apart in italicized text, each chapter contains between five and twenty accounts of victims or witnesses. The anecdotal evidence adds substantial value to the book, evidenced by one of the four stories used to explain the obscure West African system of Trokosi Slavery.

Once you are sent to the shrine, you usually stay there until you die. And even after you die, your family may have to replace you with another virgin. . . . Once, when I was three months pregnant, I decided to go to the farm and get a cob of corn and roast it. The priest caught me and got very angry. He asked three other men to hold me down and tie me to a table. . . . I was beaten mercilessly.”\textsuperscript{16}

Parrot and Cummings compare this woman’s account to the Devadasi System of slavery in India. “[T]he Devadasi practice, like that of the Trokosi, is a religious-based system that makes it difficult to change.”\textsuperscript{17} By making this comparison, strengthened by the details provided by personal accounts, the authors are able to elicit the shared experiences of women in starkly contrasting cultures. This furthers their goal of emphasizing the universality of violence against women.

Finally, each chapter in Part Two ends with “Success Stories and Promising Practices” and the authors’ conclusions about further action that needs to be taken. It includes specific instances of programs

\textsuperscript{14} One incident in Glenridge, NJ in 1989 involved a victim who was mentally handicapped, another in 1991 at St. John’s University resulted in the rape of a female student by several male student athletes, and in 1993 the “Spur Posse” gang tracked points for each sexual assault. \textit{Id.} at 98-99.
\textsuperscript{15} \textit{Id.} at 99.
\textsuperscript{16} \textit{Id.} at 120
\textsuperscript{17} \textit{Id.} at 121.
achieving the elimination of violence against women. This section serves two important purposes: it equips the readers with practical tools to address violence by implementing solutions and it offers hope. Both are equally vital components for eradicating violence against women.

Despite these successful aspects of the Forsaken Females, it is not entirely faultless. The simplicity of the format, although helpful to underscore the commonality of the themes surrounding violence against women, becomes repetitive and mundane at times. Repetition weakens the longest chapter, which discusses FGC.\(^\text{18}\) Approximately three pages are devoted to "Reasons for Genital Cutting," such as conformity to tradition and culture, which often treats the cutting as a rite of passage deeply rooted in women's sexuality. In the next section, "Religious and Political Justifications for FGC," traditional perceptions of a woman's sexuality are the common rationale. Additionally, the former section focuses on African cultures, the latter on Islamic cultures initially but then shifts back to Africa. By sticking to a uniform format, echoed in each chapter, the authors are unable to deal with the subject matter flexibly.

The book would benefit from an organization by country. Once the authors give specific examples and specific rationales, the common themes could be explored, pulling from the country-specific examples to create a less confusing flow. The chapter could instead consider the African practices and rationales, then the Islamic, and finally a discussion on how these practices and justifications are similar or different. This organization would likely prevent the reader from feeling confused by the ebb and flow of the conversation.

If the reader is able to overlook the organizational flaws, the reader will find that the strengths of Forsaken Females outweigh its weaknesses. The broad scope of violence examined and the proffered causes of it outshine the organizational problems. The feminist theoretical framework employed by the authors, the inclusion of anecdotal evidence along with statistical data, and the pragmatic tools they provide in the success stories are what ultimately make this book successful.

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\(^\text{18}\) The authors suggest adopting this term or Female Genital Circumcision instead of the "pejorative" Female Genital Mutilation because the latter can be received as insensitive and offensive by the practicing cultures, thereby lessening the chance of cooperation in ending the practice. Id. at 88, 89.
IV. DISCUSSION

Overall, Forsaken Females is successful. Parrot and Cummings achieve their objective of educating the reader about the violence women face around the world. The book highlights individual violent practices that transcend cultural differences and geographical separation, which underscores the interconnectedness of gender violence and poses the problem of violence against women as pandemic, the "global brutalization." It persuasively argues that the subordination of women is the root cause.

While it may seem logical for Parrot and Cummings to include information about international laws governing women and violence, they posit that laws are not yet workable. Making and enforcing laws addressing violence and discrimination against women, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 19 is premature. The nature of the violence itself must first be examined. "Once the phenomenon of violence against women is understood within the cultural justification that supports it, it can be challenged."20 They seek to do just this.

Despite their position, Parrot and Cummings could have afforded to include a section about CEDAW. Instead they mention it only twice. While it is perhaps obvious to the authors why laws are ineffective, that information is not obvious to their readers. How current laws fail to understand the "phenomenon of violence" and how that understanding could be incorporated in the laws, would be insightful. That information would likely strengthen their argument and it also might have overshadowed the failings of Part Three, where such a discussion would fit well.

Another way in which the book could be improved involves the chapter about Femicide. The term "femicide" is not necessarily familiar to the intended audience and the authors do not define it. It is used as a way to characterize "feticide" and "infanticide," yet that does not seem to complete the definition. The statement, "[i]n other countries, where infanticide is the primary method of femicide,"21 implies that additional practices of femicide exist. In at least one other publication, femicide is an alternative term for domestic violence.22 Thus, without

19 For detailed information about signatories, committees, and developments see http://www.un.org/womenwatch/daw/cedaw/.
20 Supra note 6, at 20.
21 Id. at 55.
22 See California Women’s Law Center, Murder at Home: An Examination of Legal and
an explanation of the term, the reader may be confused by the authors' treatment of it.

Another definitional flaw in the femicide chapter weakens the discussion about "feticide." The chapter essentially focuses on the cultural consequences of laws and policies limiting child birth combined with the availability of sex determination ultrasound technology. In countries like China and India, where female children are either outlawed or rejected, women have long practiced infanticide, the intentional killing of an infant child. Today, however, when more women are able to determine whether their fetus is male or female, they more commonly destroy their fetuses instead, to avoid criminal liability and the additional emotional trauma of killing a born child.23

Given that feticide, the intentional destruction of a fetus, closely resembles abortion, the intentional termination of a pregnancy, the authors should have addressed their choice of terms. They complicate the matter by mentioning abortion in passing and apparently using it interchangeably with feticide.24 This is confusing to the reader. Is feticide not abortion? How do the practices differ? Additionally, the reader is not educated about the cultural connotations of the terms. Is feticide more acceptable than abortion? Are they equally disdained? In light of their detailed explanation for referring to female genital circumcision as "cutting" (FGC) versus "mutilation" (FGM) because of cultural sensitivity, the authors likely made a conscious decision to use the feticide instead of abortion. Not only does this omission leave the curiosity of readers unquenched, it ignores the opportunity to engage the reader more completely in the discussion. Abortion is a familiar term to, at the very least, their U.S. audience. Had the authors addressed the relationship between feticide and abortion, they would have greatly enriched the reader's frame of reference. They should have offered the same enlightened explanation to the reader about feticide as for FGC.

These few weaknesses, however, do not detract from the authors' successful argument that the subordination of women is an integral part of the violence practiced against them. In each chapter of Part Two the authors present several cultural and societal beliefs about women that tie directly to a form of violence. The chapter about

23 See supra note 6, at 57.
24 See id. at 58 and 59.
trafficking provides a vivid example of the direct links they are able to make between observations about the status of women and the resulting, or connected, violence. Greece is examined in the section on "forced prostitution." In that country, "prostitution is thought of as a threat to societal order," and the women are thus perceived as "dirty and diseased." Regardless, prostitution is legal because it serves the needs of men. Not only does prostitution legitimize the sexual urges and "needs" of men, but it solidifies the role of women as servants to the needs of men while simultaneously punishing women for taking on this role. Additionally, the contemptuousness of Greek society towards these women relegates prostitutes to a lower status among women, placing them in direct opposition to the virtuous women whose partners need the promiscuity of a prostitute.

The continued legalization of prostitution in Greece, and in turn the affirmation of men's "needs," naturally raises the demand of customers. When this demand surpasses the supply of prostitutes, women are trafficked within and into Greece. Prostitution is a lucrative business. To achieve freedom, women who are trafficked as prostitutes must overcome social stigma of prostitution. This is "enormously difficult," and their chances of succeeding are even further jeopardized if they contract diseases.

The authors paint the complete picture. Men have "needs" that must be met by women who are punished for meeting them. Not only are men not punished for their sexually promiscuous "needs," but the accommodation of men by women is reinforced and strengthened by the notion that these are in fact needs and not desires. This hierarchy is enforced by the legalization of a practice otherwise viewed as reprehensible and societally destructive.

Women, on the other hand, who are permitted and even forced to serve men both by fulfilling their needs and by providing financial wealth to pimps and traffickers, are treated as the societally destructive force.

While Greece is certainly not a country featured prominently in the book, the authors do provide a second example of violence against women that occurs in parts of Greece. This second example, coupled

25 Id. at 138 (quoting G. Lazaridis, Trafficking and Prostitution: The Growing Exploitation of Migrant Women in Greece, 8 Eur. J. of Women's Stud. 1, 75 (2001)).
26 Id. at 138.
27 Id.
with the above example, reinforces their argument. While men, even married, are permitted to address their needs by patronizing prostitutes, women who seek to fulfill their needs with men to whom they are not married, are severely punished. To protect the family’s honor, they may be killed. In the context of women who stray, “adultery betrays the entire family because the family expects to have control over the sexual behavior of all females in the family.” Men are not punished for straying to prostitutes and are even authorized to exercise control over the sexuality of women. This power justifies “honor killings.”

Examining numerous aspects of a single country’s society, like Greece, allows Parrot and Cummings to persuade the reader that violence against women is caused by the subordination of women. Additionally, they powerfully illustrate the extent to which this violence-subordination link exists on a global scale by providing examples from several countries and regions. Their comprehensive approach to considering socially constructed contributing factors along with geographical irrelevance, they provide the reader with a well-researched and well-formulated argument.

V. CONCLUSION
Parrot and Cummings produce an excellent conduit for catalyzing and framing the necessary discussion about women and the violence perpetuated against them on a global scale. As a survey of shared experience of the violence women face, despite the geographical boundaries that separate them, it is a powerful resource. By analyzing the sociopolitical, economic, and religious factors that enable and condone violence against women from a feminist theoretical approach, and by providing numerous personal accounts, Parrot and Cummings successfully convey the global nature of violence against women.

Those interested in combating the subordination of women, and in turn the violence practiced against them, will benefit from reading Forsaken Females. Parrot and Cummings offer pragmatic suggestions for implementing policy and practices that may, and in some cases already have, curtail the violence women face. Though it may seem redundant to a feminist scholar, or a scholar who specializes in the study of violence against women, it is worth reading nevertheless. It fills a
unique gap in the related research by taking a global perspective, shedding light on numerous obscure violent practices and linking violent practices that may not otherwise be discussed in one volume. Forsaken Females is an excellent resource for readers who want to understand the nature of violence against women on a global scale.
Michael Eric Dyson,  
*Come Hell or High Water: Hurricane Katrina and the Color of Disaster*  
Basic Civitas Books, 2006 Pp. 270, $14.95,  
ISBN 046501772X

Reviewed by Josh Cohen

I. Introduction
In the days after Hurricane Katrina assaulted the Louisiana coast in the summer of 2005, newspapers and television sets overflowed with shockingly revealing accounts and images that captivated readers and viewers across the nation and the globe. As Michael Eric Dyson indicates in *Come Hell or High Water*, the issue of race was, whether directly or indirectly, at the center of these accounts and images. In the first major book to chronicle the days before and after Katrina, Dyson emphasizes that Katrina’s impact can not be understood without addressing the ways in which race affected the residents of New Orleans, influenced the government’s response to the hurricane, and pervaded the media’s coverage of the disaster.

Dyson’s primary purpose is to explain why race should be at the forefront of the discussion about Katrina. Dyson, a professor at Georgetown University and a respected voice on race-related matters as they pertain to black America, also has a secondary purpose: to critique the Bush administration. However, even this critique, derisive at times, is ultimately intended to defend the social, political, and economic rights of

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1 Associate Member, 2007-2008 *Freedom Center Journal*.
poor black America. This defense is a theme that is common to Dyson’s publications, including his 2005 book *Is Bill Cosby Right?: Or Has the Black Middle Class Lost Its Minds?*, in which he explains why the comedian’s harsh portrayal of lower class blacks is naïve, misguided, and counterproductive.

*Come Hell or High Water* is an appropriate and necessary read for Americans of all generations, races, and classes. It effectively combines an open discussion about race with a critical discussion about politics. Through this combination, Dyson offers a thorough and straightforward evaluation of why Americans saw such disheartening images, how Americans reacted to these images, and what Americans owe to the many who perished.

II. SUMMARY OF CONTENTS

Dyson opens his work by offering a brief overview of the concentrated poverty that enveloped the areas of New Orleans that Katrina most adversely impacted and by considering Americans’ reactions when the post-hurricane media coverage exposed this poverty. He then broadly discusses how race played a role in the recovery efforts and examines the implications of Kanye West’s now famous assertion that “George Bush doesn’t care about black people.” Over the next several chapters, Dyson focuses on the various ways in which government agencies and key officials, both pre and post-Katrina, were responsible for both the extent of damage that the hurricane caused and the delayed and ineffective response to the needs of the hurricane victims. Following this lengthy assessment, the author describes the effect of “disaster capitalism,” a trend through which large businesses benefit economically from disasters such as Katrina. Dyson then evaluates the post-Katrina responses of black elites and the media’s impact on the country’s racial framework. The concluding chapter addresses varying explanations of God’s role in natural disasters and explains that black faith has an important function in post-Katrina America. Dyson’s epilogue details the means that different social sectors can employ to establish structures of justice for the country’s most vulnerable people.

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III. Textual Analysis

Dyson begins chapter one by presenting the reader with a vivid textual translation of the images that millions of Americans witnessed in the days after Hurricane Katrina struck New Orleans: corpses floating in water or scattered on sidewalks; families huddled together, clinging to the hope that somebody would rescue them; the squalid conditions of make-shift evacuation centers. By including these descriptions in the opening pages, Dyson immediately elicits the reader’s sympathy for the victims of Katrina and prompts the reader to question what caused these images. Setting the background for the remainder of the book, Dyson posits that these images were the result of more than just one of the greatest natural disasters in American history. These images were the result of years of concentrated poverty that had left the poor “abandoned by society and its institutions, and sometimes by their well-off brothers and sisters, long before the storm.” The author uses a series of statistics to demonstrate the effects of this concentrated poverty. For example, at the time of Katrina, New Orleans, a city that was two-thirds black, had a poverty rate that was seventy-six percent higher than the national average. Dyson effectively uses such statistics to indicate the extent to which the government and the rest of society have seemingly neglected the poor black communities of New Orleans.

When the media flashed images that symbolized this societal neglect and exposed the poverty that had encompassed black residents of New Orleans, many Americans were shocked, saddened, and brimming with compassion. Yet this same shock, sadness, and compassion would not have surfaced absent Katrina or another disaster of similar magnitude. As Dyson suggests, “it is the exposure of the extremes, not their existence, that stumps our national sense of decency.” Dyson conducts a psychological evaluation when he deduces that this ability to selectively tune in to the plight of poor blacks allows the rest of the country to appear concerned without actually questioning the systemic forces that create and prolong poverty. Although Dyson does not necessarily use this assessment to censure non-black or non-poor society, he does implicitly suggest that society address its complicity in the long-

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3 Michael Eric Dyson, Come Hell or High Water: Hurricane Katrina and the Color of Disaster 1-2 (2007).
4 Id. at 2.
5 Id. at 2-3.
6 Id. at 4.
term suffering of poor blacks. From the book’s earliest pages, Dyson’s sympathies for the impoverished black community are obvious.

Dyson continues to display these sympathies by drawing a distinction between what “we” saw as the non-poor, non-black American public and what “they” saw as the poor black victims of Katrina. Because much of the Katrina coverage centered on what “we” saw, Dyson wants to ensure that the reader is more concerned with what “they” saw. For this, the author references Michael Ignatieff’s “The Broken Contract,” an article that appeared in The New York Times Magazine three weeks after Katrina. To Ignatieff, what “they” saw was the U.S. government breaking the “contract of American citizenship,” which “defines the duties of care that public officials owe to the people of a democratic society.” In this chapter, Dyson effectively establishes that federal and state officials owed it to the black residents of New Orleans to heed the constant warnings of the city’s susceptibility to a major hurricane and to ensure that an effective and comprehensive evacuation plan was in place. He sets the groundwork for later chapters, in which he details how the government failed these obligations that arise from the “contract of American citizenship.”

Dyson opens his discussion of the government’s failures by resolutely asserting that “[o]f course race colored the response to Katrina.” However, Dyson seems astutely aware that most Americans, and perhaps some of his readers, would interpret such an assertion as an accusation that the government purposely offered an inadequate response because the victims were black. Therefore, the author quickly clarifies that racial consequences do not necessarily require racial intent.

For instance, he points to the inability of the Bush administration and Federal Emergency Management Agency (FEMA) officials, most of whom were white, to identify with the victims, most of whom were black. Had the victims been white, sentiments of empathy, as opposed to sympathy, may have pushed government officials to act more quickly and more proficiently in the interest of saving lives that more closely resembled their own.

7 Id.
9 Id. at 19.
10 Id. at 20.
11 Id. at 25-26.
Dyson further supports the notion that racial consequences do not require racial intent by analyzing one of the more controversial statements that was made post-Katrina. During a telethon in support of the disaster relief efforts, rapper Kanye West strayed from his script and asserted, among other things, that “George Bush doesn’t care about black people.” Many listeners, including Bush’s family, believed that West was commenting on the president’s racial intent, i.e. his personal sentiments about the black community. Dyson references interviews with both Laura Bush and George H.W. Bush, in which they label West’s remarks as “disgusting” and “vicious” and defend the president as somebody who cares about and is sensitive to issues of race. Although this interpretation of West’s remark may have been understandable and necessary in light of the racial outcry following Katrina, Dyson suggests that it was incorrect. According to Dyson, West’s blunt assertion did not comment on Bush or his administration’s racial intent; rather, it commented on the racial consequences of administrative and institutional decisions that Bush has made during his tenure as the country’s chief political figure.

These decisions have largely not benefited the poor black communities of the U.S. The reason for this is not, Dyson proposes, a result of Bush’s racial prejudice as much as it is a result of the Republican lack of concern for the black vote. A vast majority of blacks have voted along Democratic lines since the New Deal Era, and Republican politicians have since realized that they do not have to cater to the needs of the black constituency to achieve political office. For this particular topic, Dyson defers to the insight of political journalist Jacob Weisberg, who, shortly after Katrina, noted that “it’s a demonstrable matter of fact that Bush doesn’t care about black votes,” which “in the end, may amount to the same thing” as not caring about black people. To emphasize this point, Weisberg contrasts the Bush administration’s response to Hurricane Katrina with its response to Hurricanes Charley and Frances, which struck largely white and majority Republican regions of Florida in 2004. In response to the latter hurricanes, “Bush visited hurricane victims four times in six weeks and delivered relief checks personally,

12 Id. at 28.
13 Id. at 29.
Michael Brown of FEMA... was so responsive that local officials praised the agency’s performance.”

Dyson fails to mention that Katrina’s magnitude and the circumstances of her aftermath make it difficult to compare her with other storms. Nevertheless, the differences in the adequacy of the responses are noticeable and revealing. Both Dyson and Weisberg suggest that, had the vulnerable residents of New Orleans been actual or prospective constituents, Bush would have acted out of “the instinct of self-interest” to ensure that pre-storm mitigation and post-storm recovery efforts were more satisfactory.

Dyson’s clarification that racial intent is different from racial consequences is essential, given that many non-blacks, including President Bush, are unable to understand the covert role that race played in Hurricane Katrina. When Bush was asked whether race played a role in the government’s delayed response, he answered that Coast Guard helicopters did not check skin color when saving people from rooftops. When the American public was asked the same question, only twelve percent of whites, as opposed to sixty percent of blacks, answered affirmatively. Dyson uses these answers to stress the need for a less simplistic understanding of how race operates in American culture and how it shapes the policy decisions of American government leaders.

Having established that race should be an integral part of the discussion about Katrina, Dyson unnaturally shifts to an historical overview of emergency management in the United States. Although the author claims that such an overview is necessary to understand FEMA’s current role in disaster relief, the section is too lengthy and leads the reader astray from the book’s focus. When Dyson finally arrives at FEMA under Bush’s leadership, however, he offers the reader a clear explanation of why FEMA failed the people of New Orleans: in 2000, Bush’s first head of FEMA cut the funding for Project Impact, an endeavor of the Clinton administration that encouraged grassroots efforts to build disaster-resistant communities; in 2002, FEMA became part of the Department of Homeland Security, which shifted the agency’s focus to terrorism; in 2005, five out of the top eight FEMA officials had almost no prior experience in disaster management. Dyson effectively uses

15 Id. at 31 (quoting Weisberg).
16 Id. at 30 (quoting Weisberg).
17 Id. at 31.
18 Id. at 33.
19 Id. at 47-51.
this background information to suggest to the reader that the reasons behind FEMA’s failures before and during Katrina are no mystery. He also uses this information to further his anti-Bush agenda, repeatedly commenting on Bush’s pervasive cronyism, his obsession with fighting terror, and his aversion to the government’s role in assisting vulnerable citizens. These anti-Bush tendencies set the tone for the next several chapters.

Dyson uses chapters four through seven to illustrate and to emphasize the dysfunction, unresponsiveness, and general ineffectiveness of Bush’s administration pre and post-Katrina. Primarily through news transcripts, press releases, periodicals, and archives from the National Hurricane Center, Dyson traces the government’s actions, inaction, and reactions from the years preceding Hurricane Katrina, to August 29, 2005 when Katrina made landfall, to the first week of September when recovery and relief efforts were still being conducted. Dyson’s attention to detail in these accounts is effective in several ways. Firstly, it lends credence to the notion that the government’s mismanagement was not the result of an entirely unexpected natural disaster. Dyson cites to a significant number of sources that indicate that the government was fully aware of the potential damage of a hurricane like Katrina, such as a 2004 FEMA report that determined that a catastrophe hurricane in New Orleans was one of the most likely disasters facing the U.S.20

Secondly, Dyson’s detail lends credence to the conclusion that the government’s mismanagement was not the result of a few isolated misguided decisions during the chaotic days before and after Katrina. Rather it was the result of years of failing to adequately address obvious domestic needs. For instance, Dyson refers to a 2004 fictional hurricane emergency response drill for New Orleans that was conducted by a private company hired by FEMA. After the company completed the hurricane simulation, its funding was cut before it was able to complete the second phase of its commission, designing a plan to address issues like evacuating the sick and providing housing for New Orleans citizens.21

Lastly, Dyson’s detail serves to quiet possible critics who might maintain that Dyson is simply benefiting from the convenient use of hindsight. In these chapters, Dyson is not merely searching for opportunities to nitpick or looking for holes in the government’s disaster

20 Id. at 78.
21 Id. at 81-82.
prevention and emergency response plans. On the contrary, Dyson is emphasizing themes of the Bush presidency that have left this nation's previously vulnerable citizens even more vulnerable. On several occasions, Dyson mentions the effects of Bush's budget cuts in the domestic arena. For instance, in 2005, a $71 million cut in funds for the New Orleans District prevented the Army Corps of Engineers from executing an intended levee-strengthening project. Examples such as this do not constitute second-guessing on Dyson's part; they constitute proof that President Bush's administration has neglected to assist the citizenry.

Dyson suggests that this domestic neglect is directly related to another theme of the Bush presidency, increasing attention to and expenditures on the military and the "War on Terror." For example, Bush's focus on terrorism forced forty percent of Louisiana's National Guard into active duty in Iraq. In addition, the National Guard units who responded to Katrina had to use outdated and inadequate radios, trucks, and medical gear, the newer equipment having been sent to Iraq and Afghanistan. Dyson's emphasis on this theme shows the reader the extent to which Bush has prioritized this country's international goals over the needs of U.S. citizens. However, his emphasis might also be intended to display to the reader his overall lack of support for President Bush and the administration's military efforts abroad. At times, Dyson seems too focused on simply criticizing "Bush's obsession with fighting terror." But behind this criticism lies Dyson's primary point: Bush's government has been inattentive to the needs of certain American citizens, regardless of whether these needs arise from natural disasters, environmental issues, poverty, or racial inequality.

This chasm between Bush and the needs of ordinary American citizens is not just reflected in Bush's decisions in an administrative context. Dyson implies that it is also reflected in Bush's decisions in a personal context. The author's attention to detail emphasizes this detachment as another theme of the Bush presidency. For one example, Dyson recalls that two days after the storm hit New Orleans, Bush flew over the Gulf Coast in Air Force One to get a bird's eye view instead of landing to get an up-close view. Dyson also points to Bush's remarks in

22 Id. at 82.
23 Id. at 36.
24 Id. at 112.
25 Id. at 100.
which he singled out Senator Trent Lott as a victim: “Out of the rubbles of Trent Lott’s house – he’s lost his entire house – there’s going to be a fantastic house. And I’m looking forward to sitting on the porch.”

This comment was made during a staged photo-op, in which Bush was joined by fifty firemen serving as props and not by actual victims of Katrina. Dyson uses these examples to highlight Bush’s unwillingness to reach out to ordinary citizens and to evince Bush’s “tone-deaf empathy for the vulnerable.”

Although Dyson may be correct in his assessment of the president, he fails to consider that, in these particular instances, safety, health and security concerns may have necessitated a more detached response.

Throughout these four chapters, Dyson focuses on his secondary purpose, to critique the Bush administration for its pre-Katrina neglect of obvious domestic needs and for its post-Katrina inability to effectively respond to desperate citizens. Dyson’s substantial support leaves the reader convinced that, had the Bush administration been more responsible, extensive damage could have been prevented and many lives could have been saved. However, throughout this critique, Dyson loses sight of his primary purpose, to demonstrate the role that race played in Katrina. He occasionally attempts to bring race back into his discussion, such as when he recalls how the evacuation of the Superdome was temporarily suspended in order to allow 700 guests and employees of the Hyatt Hotel, who were mainly white, to move to the front of the school bus-boarding line. But Dyson largely leaves it to the reader to presume that the people most affected by the themes of Bush’s presidency were primarily black and primarily poor.

Having fully discussed why the people of New Orleans were physically vulnerable to the effects of Hurricane Katrina, in chapter eight Dyson discusses how these people became more economically vulnerable after Katrina. The title of the chapter, Capitalizing on Disaster, refers to author Naomi Klein’s notion of “disaster capitalism,” a trend through which large engineering companies, for-profit consulting firms, and government agencies reap massive economic benefits by reconstructing areas struck by natural disaster or war.

26 Id. at 94-95.
27 Id. at 94.
28 Id. at 71.
29 Id. at 96.
how disaster capitalism was manifest in New Orleans, Dyson offers the reader several examples of lucrative contracts that were given to major construction firms with previous ties to the government, largely excluding minority-owned companies. He also points to Bush’s temporary suspension of the Davis-Bacon Act of 1931, which effectively permitted reconstruction companies to pay their workers wages that were less than the prevailing local rates. Dyson appropriately concludes that these examples of disaster capitalism will have a disproportionately negative impact on black residents of New Orleans who are attempting to recover from Katrina.

At this point, Dyson could have reminded the reader of his chapter one citation to remarks that Bush made in his first post-Katrina nationally televised speech: that this country must rise above the legacy of inequality that has prevented generations from enjoying the opportunity that America offers. By failing to make this connection, Dyson misses a chance to emphasize to the reader that Bush does not practice what he preaches or that Bush fails to acknowledge how his government’s actions are perpetuating, rather than rising above, this “legacy of inequality.”

After Dyson exhausts his criticisms for the government’s role in Katrina, in chapter nine he expresses his disapproval of the black elite and the media’s responses to both Katrina and the black poor who were most affected. In regards to the black elite, or as Dyson refers to them – the Afriostocracy – Dyson notices episodic compassion for the black poor. He rightly commends members of the black upper-class for their significant financial contributions and moral support in the wake of Katrina. However, he also chides the black elite for their absence during periods of continuing struggle. To elicit more consistent support for the black poor, Dyson quotes Martin Luther King, Jr.: “True compassion is more than flinging a coin to a beggar; it is not haphazard and superficial. It comes to see that an edifice which produces beggars needs restructuring.” Dyson’s quotation of Dr. King is a tactful way of urging black elites to use their influence to draw national attention to the injustices that Katrina laid bare.

Dyson also attacks the media’s role in shaping this country’s racial framework. For this argument, he primarily relies on two Associated
Press photographs that appeared in newspapers around the country. The first photo pictured a young black man holding items in each arm as he waded through the city’s waters. The accompanying caption described the man as having looted a grocery store. In the second photo, a young white couple held similar items in their arms, but the caption described them as having found food from a grocery store. Dyson maintains that these captions communicate a strong, albeit implicit, value judgment: the black man’s action is legally and morally wrong, notwithstanding the desperate circumstances; the white couple’s action is understandable, given the desperate circumstances. He accurately concludes that, through such images, the media contributes to the perpetuation of a distorted racial framework. However, a more thorough study of other Katrina photograph captions would be helpful to determine if the difference in the descriptions of black and white victims was pervasive.

Continuing his attack of the media, Dyson addresses how the media relentlessly reported rumors that blacks were engaging in criminal activity in both the flooded streets and the overcrowded shelter centers. In regards to the looting in the streets, Dyson quotes journalist Jordan Flaherty: “No sane person should classify someone who takes food from indefinitely closed stores in a desperate, starving city as a ‘looter,’ but that’s just what the media did over and over again.” In regards to the shelter centers, Dyson cites multiple television news reports and newspaper articles to demonstrate how the media painted a disturbing picture of theft, murder, rape, gang violence, and general unrest. He then cites a FEMA physician, the Orleans Parish District Attorney, and The Times-Picayune to indicate that these reports and articles were exaggerated and largely unfounded. Despite the spurious nature of many of these reports, the media did not hesitate to broadcast them, because “such rumors seemed to confirm a widely held view about poor blacks.” Instead of combating this view, the media perpetuated it.

Dyson’s critique of the media is effective in several respects. First, it explicitly shows the reader how instrumental the media can be in shaping the general public’s notions of race. More importantly, it shames the media for shifting the country’s focus to the desperate actions of

34 Id. at 165.
36 Id. at 172-173.
37 Id. at 174.
desperate citizens and away from the responsibilities of an irresponsible government. Lastly, it challenges the media to bring to light the reality of poor black life in the U.S. without resorting to "stale stereotypes and callous clichés."\textsuperscript{38}

In the concluding chapter, Dyson shifts to a discussion of religion. For most of this chapter, the author focuses on theodicy, a branch of theology that attempts to reconcile the existence of global suffering with the existence of God. Dyson does not offer his own reconciliation as much as he reviews the reconciliations of various religious figures and factions, particularly conservative Christians. Although this section's connection to the work's overall theme is tenuous at times, Dyson still manages to defend the black poor when he criticizes religious zealots who contend that God was punishing New Orleans for its sins.\textsuperscript{39} Dyson also manages to scold President Bush, because "[u]nder the guise of supporting faith, President Bush has shifted the burden of social services from the government to faith-based institutions."\textsuperscript{40} However, this chiding is not only intended to condemn the President. It is also intended to urge black churches to renew their commitment to the most vulnerable and most desperate members of society. As a professor of theology, Dyson explicitly includes himself as part of the black church when he states that "we [must] act on the horror we have witnessed."\textsuperscript{41} This self-inclusion as part of the solution is a fitting way to conclude a book that primarily focuses on the faults of external forces.

Also fitting is Dyson's epilogue, in which he suggests that all sectors of society should play a role in addressing the injustices that Hurricane Katrina exposed. He emphasizes that this role should not be limited to charitable donations that are made in the wake of disaster. Rather, "[w]hat is needed are structures of justice that perpetuate the goodwill intended in charity."\textsuperscript{42} According to Dyson, these structures can not be built without the cooperative and dedicated efforts of the media, black society, non-black society, and all levels of government. These structures also require a truthful national dialogue on "poverty, race, class, envi-

\textsuperscript{38} Id. at 178.
\textsuperscript{39} Id. at 183.
\textsuperscript{40} Id. at 199.
\textsuperscript{41} Id. at 201.
\textsuperscript{42} Id. at 203.
ronment, government, the media, and our culture." In *Come Hell or High Water*, Dyson has responsibly and effectively begun this dialogue.

**IV. DISCUSSION**

Dyson’s comprehensive work successfully weaves together a discussion about race and a discussion about politics. These discussions owe their effectiveness to Dyson’s considerable detail and support. They also owe their effectiveness to Dyson’s blatant compassion for the black poor and his blatant disfavor for the Bush administration, which has continuously abandoned the black poor. At the same time, these blatant sentiments are one of Dyson’s few flaws. Throughout the text, Dyson often expresses his disapproval of Bush and other members of the administration in overly derisive terms. For instance, in describing how key Bush officials seemed personally removed from the response, Dyson remarks that Secretary of State Condoleezza Rice was “not to be outdone by Rumsfeld or Bush in blithe disentanglement from the suffering at hand.” Comments such as this are entertaining for the reader, but they detract from the book’s substance and may prevent the work from being considered serious or scholarly.

While most of Dyson’s discussion is fluid, there are isolated segments that interrupt the natural flow of the book. For instance, Dyson’s ten pages on the progression of emergency management in the United States are interesting from a historical standpoint, but they only narrowly contribute to the book’s purpose. In addition, certain segments of the book seem to be included merely because Dyson is knowledgeable about subject areas other than race and class. These segments come at the expense of the book’s fluidity. For example, spurred by his title as the “Hip-Hop Intellectual,” Dyson devotes ten pages to a discussion of how numerous hip-hop artists have addressed Hurricane Katrina in their music. This section is useful in that it shows the reader how certain non-media entities framed the racial consequences of the hurricane. However, the several pages of lyrics may be a distraction to the reader.

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43 *Id. at 213.*
44 *Id. at 74.*
Despite these minor flaws, Dyson offers an engaging and thought-provoking work. His use of detailed support is more than ample, and his compassion for the black poor is obvious. This compassion, coupled with outrage at how the government has treated the black poor, are the driving forces behind *Come Hell or High Water*, which ultimately fills the reader with these same sentiments.

V. CONCLUSION

*Come Hell or High Water* is a powerful book that achieves its objectives: it demonstrates how a discussion of Hurricane Katrina is incomplete without a discussion of race, and it illustrates exactly how the American government neglected its own citizens. Although Dyson’s slightly informal tone and occasional sarcastic tendencies may disturb a scholarly or legal audience, all readers will find that Dyson effectively captures why New Orleans was so devastated by Katrina. More importantly, Dyson will cause most readers to contemplate their own individual roles in the post-Katrina United States and to facilitate open discussions of race and class. Dyson’s work is sure to inspire individuals to question the media’s racial framework and pressure their representatives to act on behalf of the nation’s poor.
Shelby Steele

White Guilt: How Blacks and Whites Together Destroyed the Promise of the Civil Rights Era


Reviewed by Kelly Ryan

I. Introduction

In his latest book, White Guilt: How Blacks and Whites Together Destroyed the Promise of the Civil Rights Era, Shelby Steele, a research fellow at Stanford University’s Hoover Institute, offers an in-depth perspective on the forces created by the Civil Rights Era and how those forces created a societal construct that is still very much in place. Though the Civil Rights Era was originally thought to have held much promise for the improvement of race relations in American society, the guilt experienced by whites coming to terms with racism was turned into a type of “black currency” which ultimately led to a rejection of individual responsibility by blacks. This allowed whites and American institutions to accept responsibility for black advancement as a means to relieve the guilt and stigmatization associated with the racist past. However, this redistribution of responsibility has resulted only in the illusion of social justice, rather than a true advancement of the black minority.

Steele has written extensively on race and the effects of social programs on race relations in America. White Guilt is an extension of the

1 Associate Member, 2007-2008 Freedom Center Journal
3 Id.
ideas found in Steele’s earlier books, The Content of Our Character: A New Vision of Race in America (1991) and A Dream Deferred: The Second Betrayal of Black Freedom in America (1999). White Guilt is an insightful and important book that should be read by both blacks and whites, especially those that are concerned with current social justice issues or work within academic or social welfare institutions. Steele, voicing the black conservative perspective, is extremely critical of the white liberal agenda and its intent on creating a dichotomy between the two. Unfortunately, he leaves other prospective viewpoints entirely out of the picture, leaving the reader curious about the views of white conservatives and black liberals. Despite this, Steele’s analysis of the events of the Civil Rights Era and his focus on moral authority and white guilt are crucial to gaining a comprehensive understanding of past and current social and political issues. While some readers may feel alienated or attacked due to his obvious disdain toward white liberals and discussion of the political left versus the political right, ultimately, Steel delivers insightful ideas and powerful examples that are right on target.

II. Summary Of Contents

White Guilt is divided into four parts. Part One, titled “The Story of White Guilt”, constitutes the bulk of the book. It gives much of the background information pertinent to Steele’s later revelations. Steele includes historical data highlighting the events of the Civil Rights Era, as well as some of his personal history and its relevance to the topic. More importantly, Steele describes the transformation of white supremacy into white guilt, as well as his belief that white guilt and black power are essentially the same thing. In Part Two, “An Expanding Guilt”, Steele discusses the white counterculture, the baby-boomer generation, and the need of whites to dissociate from the evils of the past. Part Three, “The Ways of Blindness”, centers around the “white blindness” which occurs when whites, specifically white liberals, do not see their true motivations in racial matters or that these motivations actually have a negative effect on racial minorities. Part Four, “Dissociation and Culture”, discusses the current emphasis on social morality. Steele explains that social morality is really nothing more than dissociation
by whites that has led to blacks experiencing "race fatigue", a sort of schizophrenia which results from blacks feeling pressured to wear a mask for the world while internally experiencing something different. The book ends with an explanation for Steele's dislike of the political left and his reasons for believing that the political right is poised for political and cultural ascendancy.

III. TEXTUAL ANALYSIS

The backdrop of Steele's book is his drive through California. As he drives along listening to radio personalities discussing the Clinton - Lewinsky scandal, questions of moral relativism and moral authority begin to form in Steele's mind. He allows the reader to enter his head and travel along with him on his physical journey through the state. The stops he makes during his drive lead to examples from both the past and present and seem to indicate Steele's appreciation of the journey in its entirety. Obviously symbolic, it creates a minor, yet, very interesting sub-plot that compliments Steele's intellectual journey throughout the years perfectly.

As Steele's journey from Los Angeles progresses, a discussion of moral relativism including an illustrating comparison of President Clinton's sexual mishaps and President Eisenhower's rumored use of the word "nigger" on the golf course in the 1950's indicates that in addition to black vs. white, the book will address past vs. present. Steele claims that while Eisenhower's presidency never would have survived a sex scandal, he got away with something that Clinton's presidency never would have survived today. Morality is relative to the time period; the time determines moral and social responsibility. When Steele makes a stop in San Luis Obispo, he remembers traveling during his youth when his father would have to find a black person simply to resolve where they could eat or sleep. Since this is no longer the case, Steele realizes that much has been gained from the shift from individual morality to social morality.

Abundant examples reflecting Steele's personal experiences are arguably what give the book its persuasive edge. As the book progresses,

6 Id. at 5
7 Id. at 6
8 Id. at 8
it becomes harder to question Steele’s perspective because after all, he saw firsthand these societal developments. They are incorporated into his very life experience. Thus, it becomes very difficult for the reader, especially a young reader, to challenge his position as an authority on the subject. From being a twelve-year-old boy who desperately wanted to be a batboy for an all white YMCA baseball team, to storming into his college president’s office to make demands, and to being marginalized by a white academic colleague, Steele’s examples are sometimes shocking and always thought-provoking. While Steele may have done this intentionally to dissuade the reader from challenging his ideas, it is not likely. Over the years, his own experiences have taught him much and developed his character. His choice to use personal experiences was most likely to aid in the explanation of his ideas. Steele allows the reader to travel with him on his journey from the Civil Rights Era to the present day and his examples show a real-life manifestation of his ideas. For example, Steele, the son of Civil Rights activists, recalls the moment when he flew into a rage at the sight of his mother crying over Bobby Kennedy’s assassination and hearing her lament that “history had lost a chance.” Rejecting the idea that black advancement could be dependent on a white man in office, Steele realized in that moment that his generation had to replace passivism with militancy, which would provide opportunity and power to blacks. The Civil Rights Movement forced white America to acknowledge its racism and that the very idea of “white supremacy” was wrong. But white supremacy and white power is what gave white America its moral authority and when the era of white supremacy ended, white America, having lost that authority, was no longer qualified to speak on the subject of race. Whites replaced their lost moral authority with moral ambivalence and guilt, which could be exploited by blacks. Steele illustrates this point beautifully with the example of storming into his college president’s office to make demands on behalf of him and other black students. The president did not exert his authority as one would expect, Steele explains,

9 Id. at 12-13
10 Id. at 18
11 Id. at 157-158
12 Id. at 16
13 Id. at 18, 21
14 Id. at 24
15 Id. at 21
16 Id. at 22
because the president knew that behind the outrageous behavior of the students was "a far greater American outrage": the racism experienced by black Americans. In this moment, Steele first saw "white guilt" in action; "white guilt" being the vacuum of moral authority that comes with knowing that one's race is associated with racism. Steele further explains, "Whites (and American institutions) must acknowledge historical racism to show themselves redeemed of it, but once they acknowledge it, they lose moral authority over everything having to do with race, equality, social justice, poverty, and so on. They step into a void of vulnerability." This is precisely why, according to Steele, white guilt is the same thing as black power; the authority lost by whites is transferred to the victims of historical racism and becomes their power in society.

With white skin came the stigma of racism. Since America acknowledged that racism was wrong, white Americans and American institutions had to prove themselves; they were racist until proven otherwise. Steele claims that efforts by whites and American institutions were not motivated solely by goodwill toward minorities, but rather by the need to refute a racist stigma. To regain moral authority, whites needed blacks; only the acknowledgement by blacks that a white individual or an American institution was not racist could restore such authority. This is precisely what blacks, according to Steele, knew to exploit; blacks knew that white guilt created a sense of obligation toward blacks as a group rather than toward any particular individual or particular principle. At this point, the reader may, and probably should, become fairly uncomfortable with some of Steele's assumptions. While it may be believable that white America was not motivated by good intentions alone, the claim that blacks, as a group, intentionally sacrificed individual freedom to exploit white guilt is a bit harder to accept. Serious questions will most likely begin forming in the reader's mind at this point. As Steele readily acknowledges, the teachings of Dr. King were that whites were only obligated to morality and to democratic principles, not to

17 Id. at 24
18 Id. at 24
19 Id.
20 Id.
21 Id. at 27
22 Id.
23 Id. at 34
24 Id. at 34:35
black people.25 Steele believes that it was the new black leadership of the time that paved the way for such exploitation; leaders that, unlike Dr. King, would not appeal to the nation’s moral character, but leaders that would “set up a trade with white guilt.” 26 Steele refers to these men as “bargainers, bluffers, and haranguers” as well as “specialists in moral indignation”, yet identifies only one, Dick Gregory, by name.27 Instead of encouraging blacks to accept full responsibility for their individual lives, leaders such as Dick Gregory led blacks to believe that accepting responsibility made blacks complicit in their own oppression because a racist society had pushed responsibility onto them while “denying them the freedom to do anything with it.”28 Blacks needed to trigger white guilt in order to be excused from responsibility, moral constraints, and in some cases, the law.29

Modern black leaders with philosophies similar to Gregory’s use the concept of “global racism”, with which even a small racial incident could prove systemic racism, to seize everything they can from white guilt without actually showing widespread acts of racism.30 The beating of Rodney King and the subsequent Los Angeles riots are used as examples of this technique. The riots were held out as the product of black rage toward systemic racism, which reinforced black leverage against white guilt. The only appropriate response to systemic racism is systemic redress.31 Thus, instead of redress for Rodney King, the only actual victim of an act of racist violence, systemic redress in response to these events benefited blacks across America.32 Although Steele’s ideas make complete sense, they tend to come across as some type of conspiracy theory and the reader may wonder what point Steele is ultimately going to make.

Soon enough, however, Steele takes a different direction and the reader will begin seeing a more complete picture. Suddenly, Steele focuses much more on the behavior of whites than on blacks. Beginning with President Johnson’s Howard University speech, Steele swiftly moves into his revelation of how the denial of responsibility by blacks

25 Id. at 34
26 Id.
27 Id.
28 Id. at 52
29 Id. at 54
30 Id. at 56
31 Id. at 57
32 Id. at 57-38
allowed whites to regain their moral authority. President Johnson, launching his "Great Society", indicated that it would be morally wrong, considering what blacks had been through, to expect them to be fully responsible for pulling themselves up and asked white America to assume much of the necessary responsibility for the advancement of black America.\(^3\)\(^3\) There was no mention of black responsibility, nor any mention of shared responsibility. The President was essentially agreeing with the new militants that it would be morally wrong to ask blacks to be fully responsible for their own development.\(^3\)\(^4\) The implication was that racial inequities could be overcome solely by the efforts of whites and American institutions. At first, this seems chronologically amiss because modern-day examples of the exploitation of white guilt have already been discussed. However, upon re-examination, it appears that Steele only fast-forwarded to fully explain certain concepts such as white guilt. Additionally, many of the psychological processes of blacks and whites are intertwined and played out even today. Thus, while Johnson’s “Great Society” speech pushed white America to accept responsibility for black advancement thereby alleviating some of white America’s guilt, it did not strip black America of its power to exploit white guilt. It actually allowed for a continuation of such exploitation.

According to Steele, no worse fate could have befallen black America.\(^3\)\(^5\) Never in human history has an oppressed group been lifted into excellence by another group; the group can only transform if it takes full responsibility for itself.\(^3\)\(^6\) Assistance by others is acceptable but only after the group has taken complete responsibility for its advancement.\(^3\)\(^7\) By allowing whites and American institutions to take responsibility from them, blacks ended up with no more than an illusion.\(^3\)\(^8\) To regain moral authority, whites needed only to provide a display of social justice, not actual developmental progress. Instead of holding blacks to the same standards, which would force them to accept responsibility, American institutions simply focus on affirmative-action style reforms which generate results, in the form of diversity, without having to bother with actual minority development.\(^3\)\(^9\) To get away with

\(^{3}\) Id. at 58
\(^{4}\) Id.
\(^{5}\) Id. at 62
\(^{6}\) Id.
\(^{7}\) Id.
\(^{8}\) Id. at 63
\(^{9}\) Id. at 64
this, minority underdevelopment is portrayed as a problem of social
injustice.40

One can easily see how this is a never-ending cycle leading to more
"reforms" and less development. Steele makes an interesting com-
parison of black achievement in academics versus black achievement
in sports and entertainment to illustrate the effects of such a cycle.
Whites and American institutions do not assume responsibility for
black achievement in athletics or the entertainment industry as they
do for academics.41 Yet, blacks have no problem being successful in
sports or music. As Steele puts it, "the same poverty and deprivation
that afflict us as we walk to school in the morning afflict us later in
the same day on the playground or in the tenement basement where
we practice obsessively on a cheap electric keyboard."42 There are no
excuses and no pity. Steele compares a young black boy that cannot
dribble a basketball to a young black boy that cannot read or write
well.43 No one will view the basketball deficiency as a result of injustice;
yet, his academic deficiency will most certainly be viewed as the result
of racial and psychological determinisms. He will be expected to take
full responsibility for his basketball skills; yet, no one will expect him or
his family to be responsible for his academic shortcomings.44 By allowing
white America to take responsibility instead, Steele claims, black
America threw away the greatest power they have: complete respon-
sibility for their own development.45 Steele is fairly quick to dismiss the
belief that athletic and musical abilities are innate.46 While hard work
is absolutely an integral part of being a successful athlete or musician,
there are certain individuals of all races that have innate skills and tal-
ets in these areas. Others, no matter how dedicated or hard-working,
will never be successful in sports or music. While Steele might be on to
something with this example, it would benefit from a more in-depth
discussion. Claiming that an acceptance of responsibility will lead to
success in music and sports while a denial of responsibility will lead to
failure in academics is insufficient.

40 Id.
41 Id.
42 Id. at 65
43 Id. at 66
44 Id.
45 Id. at 68
46 Id. at 64
Additionally, the reader may wonder how this denial of responsibility came about and who was to blame. Steele’s answer will seem obvious, yet incomplete. He claims that white guilt is to blame, for it wanted nothing more than to confuse black America’s relationship to responsibility.47 This almost seems to personify a psychological concept. Although Steele follows up with a more direct accusation of white people, he fails to fully explain who, specifically, is responsible for such a widespread phenomenon. Implicating every white American seems irresponsible and even malicious, just as implicating the majority of black Americans in the complete denial of responsibility is unwise.

In addition to his examination of black America’s response to white guilt, Steele makes an effort to show other societal responses to white guilt. He addresses the movements of young white America during the mid-Sixties or the “counterculture”, which included feminism, environmentalism, and opposition to the war in Vietnam.48 The discussion of the youth consciousness of the mid-Sixties serves its purpose by allowing the reader to understand exactly how broad the phenomenon of white guilt really is.49 White America’s moral authority was vanishing right before the eyes of young people; the escalating war, women’s rights issues, degradation of the environment, and black and white poverty “converged spectacularly to give the impression that oppressiveness, greed, exploitation, and violence were the essence of the American character.”50 Due to the moral vacuum created by white guilt, the youth rebellion of the mid-Sixties was able to overpower the older generation. Consequently, this gave the young generation an inflated sense of authority and an entitlement to break recklessly from the past instead of taking direction from it.51 This inflated sense of authority led to an expansion of white guilt into issues other than race; stigmatization could be used with any issue. To illustrate this point, Steele discusses the issue of environmentalism by describing America as the oppressor and the environment as the victim: America was an environmental “racist”. The same foul qualities that were behind racism were presumed to be behind anti-environmentalist attitudes.52 This is not one of Steele’s best examples as it could certainly be offensive to those

47 Id. at 68
48 Id. at 80
49 Id. at 82
50 Id. at 83
51 Id. at 86
52 Id. at 88
that have experienced racism. Likening careless attitudes about the environment to the hateful, oppressive attitudes of racist white America will certainly make some readers feel uneasy. Steele’s point, however, is understood; the moral authority and power lost by the older generation was transferred to the baby boomer generation. Steele claims that the baby boomer generation happened upon one of the greatest political, social, and cultural forces in American history: white guilt. The reader may question: did not the transfer of moral authority move from white America to black America after white America acknowledged its racist past? The reader may also wonder who actually holds the moral authority: Black America? The white baby-boomers? Or both? Steele never directly answers those questions, but the remainder of the book indicates that there is an ongoing struggle for moral authority between groups.

The power of the political left, including the white liberals of the baby-boomer generation, came from their ability to restore moral authority to American institutions by promising to take responsibility for inequality and poverty even though they had no authority to define such problems. Steele clearly has a strong dislike of the political left which, by itself, does not have to influence the effect of the book. However, it starts to feel as though Steele is not talking about the entire political left, but only the white political left. The reader will wonder why the black political left is not taken into account and if Steele feels differently about that segment of the left. The reader will, however, temporarily become unconcerned with those questions when Steele delivers what is arguably the most powerful example in the book. The example and subsequent discussion are so thought-provoking and important that consideration of alternative political viewpoints seem rather irrelevant to the point Steele makes. Through an examination of Grutter v. Bollinger, the University of Michigan affirmative action case decided by the Supreme Court in 2003, Steele illustrates the struggle for moral authority. The court opinion, written by Justice O’Connor, is typical of the white liberal mindset and is an excellent example of white blindness. In holding that universities should be allowed to use affirmative-action style programs, the majority reaffirms the role of responsibility for white Americans and American institutions. The

53 Id. at 94
54 Id. at 122
55 Id. at 127
majority insinuates that without such programs minorities could not possibly be adequately represented in higher education. Instead of holding minorities to the same standards as their white counterparts, schools are allowed to fill their “quotas” without addressing the question of whether those students are actually as qualified. These programs do not advance or improve the ability of minorities to compete for such highly sought-after positions; they simply give the illusion that social justice and equality are occurring in order to restore their own moral authority. In addition, O’Connor fails to address an issue of the utmost importance: the constitutionality of preferring one race over another.

Steele also points to a newspaper article criticizing Justice Thomas’ dissent. Thomas’ dissent was a scathing rejection of racial preferences and a demand that blacks be seen and understood first and foremost as human beings. He further asserts that affirmative-action style programs are actually an insult to minorities and, more importantly, unconstitutional. Thomas’ dissent, driven by the “rage of invisibility”, calls out the social morality of white liberals as being nothing more than dissociation and gives them zero credit for being on the side of good.

The article criticizing Thomas’ dissent was written by New York Times writer, Maureen Dowd. In her criticism, Dowd was standing in for white liberals everywhere. After Dowd’s conception of herself as a morally and socially responsible human being was virtually annihilated by Thomas’ dissent, she was sent into an “invisibility rage” of her own. Dowd goes as far as to say that Thomas should show “gratitude” for programs such as the one employed by University of Michigan, not so subtly insinuating that he was accepted by Yale Law School and became a member of the United States Supreme Court not because of his accomplishments but because he was black. Her insinuation that Thomas’ achievements only exist because of affirmative-action type programs is, at the very least, offensive. Steele does not hold back his

56 Id. at 128
57 Id.
58 Id. at 144, 145
59 Id. at 145
60 Id.
61 Id. at 147
own opinion of her statement; according to him, although Dowd thinks she is incapable of racism, "she effectively called Thomas a nigger." 62

While Steele fully explains the concepts of "white blindness", "rage of invisibility", and "dissociation", this example really illustrates how these concepts tie together and are exhibited in everyday life. The reader gains understanding of the attempts by both white liberals and blacks to claim or reclaim moral authority, and the emotions and thought processes that drive such attempts. Steele’s argument that the American struggle is no longer over betrayed principles, but over moral authority is significantly strengthened by the use of the Grutter example. Steele uses this and another striking example of these concepts as a build up before he moves into the last segment of the book.

Steele briefly discusses “red” states, “blue” states, and the role of both John Kerry and George W. Bush in the 2004 election. The reader may be disheartened and wonder whether such insightful ideas and examples were all just a build up to an unnecessary political rant. Steele, however, follows through with a powerful explanation for his dislike of the political left. The political left of Steele’s youth was not the same political left that exists today. For the left of Steele’s past, race was not taken seriously. There was merely an illusion of race that needed to be punctured so that all could live freely, as individuals. 63 The new left is one of dissociation, one that devolved from a left of democratic principals and individual responsibility. 64 By using affirmative-action style programs instead of encouraging individual responsibility within black America, white liberals are able to completely dissociate from white guilt. However, doing this has resulted in the complete abandonment of the traditional principles of the political left. The big problem is that the dissociational left destroys the principles that would realize its goals, and the right lacks the authority to enforce those same principles. 65 In the current culture war, the left is impotent before social problems and alienated from the very principles that could solve them. 66 Steele believes that the political right "enjoys a new political and cultural ascendency." 67 The left ceded to the right the democratic principles and values of individual freedom and responsibility while

62 Id.
63 Id. at 173
64 Id. at 174
65 Id. at 175
66 Id. at 177
67 Id.
the right has learned that racism, sexism, and reckless militarism are morally wrong. A politically-aware reader has to question the truth of that statement; the current American military policy would surely be viewed by many as "reckless."

Regardless, Steele feels that George W. Bush is only the current face of an ascending historical judgment. Just as the baby-boomer generation used historical corrections to shame and defeat its parents' generation, historical corrections are moving toward the dissociational left. Steele is not self-righteous about his own departure from the political left, which almost comes as a surprise. He simply states that he could not handle being caught in the contradictions of the culture war. One of the last statements of the book sums up Steele's view quite succinctly: "if you want to be free, you have to make yourself that way and pay whatever price the world exacts." Such a simple statement leaves the reader feeling that, in spite of lingering questions, missing evidence, and a complete disregard of the views of certain political factions, Steele ultimately knows what he is talking about.

IV. Discussion

_White Guilt_ is without a doubt a very persuasive book. Steele's derives his strength from incorporating historical and personal examples to examine conceptual problems and illustrate their real-life applications. His ability to maintain a very personal relationship with the subject matter is an effective persuasion tactic; he never shies away from including his own past behavior in his criticisms of black America. This leaves the reader believing that while Steele may be overly harsh at times, he is not particularly self-righteous in his beliefs. The closeness of his relationship with the subject matter, however, also contributes to some of the negative qualities of Steele's writing. The subject is so personal to Steele that his extreme dislike of white liberals and the political left can be off-putting at times, even to those that do not identify as white liberals. There are times when Steele seems to be doing nothing more than taking cheap shots at whites and liberals. While this may be understandable to many, a perceptive reader will find this unnecessary. Steele's

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68 _Id._
69 _Id._ at 180
70 _Id._
71 _Id._
ideas are solid enough; the bitterness and hostility that have seeped into some of the writing do not add to the persuasiveness of Steele’s work. Overall, Steele’s not-so-objective viewpoint is perfect for the tone of the book. Steele makes criticisms of both black Americans and white Americans and while he indicates that white America is more to blame for the current state of affairs, this is supported by solid arguments. However, Steele focuses only on the opinions and agendas of white liberals and, through his own voice, black conservatives. The reader would benefit greatly from a brief discussion of the perspectives of black liberals and white conservatives. Considering that these groups make up a rather large percentage of the American population, Steele was slightly careless by failing to include them.

In addition, Steele would have done well to include a brief discussion on how black musicians and athletes are regarded in black communities compared to black academics. If black athletes and musicians are fully responsible for their own success, as opposed to blacks that have been aided by whites and American institutions in their academic endeavors, the reader has to wonder if black musicians and athletes are more respected in the black community. If that was the case, Steele would have to query whether part of the problem was a perpetuation of black America’s attitude toward academics. The reader must wonder if even a general description of such perspectives would negate any of Steele’s ideas. Such an effect is unlikely, however, and Steele’s arguments do not suffer too much from their omission. A more important omission is Steele’s failure to include statistical proof. While Steele’s arguments are persuasive, there is no statistical evidence to substantiate claims that are of great importance to the book itself.

Steele’s claim that American institutions produce only the illusion of social justice rather than actual minority development is not supported by any research or statistical evidence. While his claims are not incredibly difficult to believe, especially for readers with experience in teaching or social work, they would benefit from a short discussion of sociological or educational studies. Readers with little knowledge of the American school system or social welfare programs may be skeptical of Steele’s blanket statement that American institutions produce merely an illusion. Such a statement also will likely offend those that put much time and energy into their employment within such institutions. Since there is little doubt that such evidence exists, Steele would have done well to include some of it in his book. While the inclusion of statistical
evidence would have added strength to Steele's claim, its omission does not necessarily detract from the overall effectiveness of the book. The reader may wonder about the statistical backing of certain claims, but will not likely dismiss the entire piece simply because it is lacking.

Upon finishing the book, the reader will likely be persuaded by Steele's arguments, despite some lingering questions. After taking a step back and allowing those questions to percolate, there may be some hesitation to buy into Steele's arguments completely. Accepting that such huge psychological concepts are in play throughout the entire American population and that both white America and black America are capable of such destructive "group-think" is quite difficult. However, after taking a moment to peruse back through the book and re-examine Steele's arguments and examples, the reader should be ready to view sociology and politics quite differently.

V. CONCLUSION

White Guilt, despite its omissions of statistics and certain perspectives, is a book that should be read and considered carefully by all. Steele's ideas and examples are insightful and thought-provoking. Both whites and blacks will gain a deeper understanding not only of their own race, but more importantly, of each other. In addition, White Guilt would certainly be an informative read for anyone working in an American institution, such as the education or social welfare systems; questioning whether real results are being achieved is, no doubt, of the greatest importance to such readers. Those readers that will feel attacked or alienated are perhaps Steele's most important audience and should make every effort to move past Steele's occasional disdainful tone to perceive the deeper purpose of his arguments.