# A NO-EXCUSE APPROACH TO TRANSITIONAL JUSTICE: REPARATIONS AS TOOLS OF EXTRAORDINARY JUSTICE

**DAVID C. GRAY**[*]

ABSTRACT

*It is sometimes the case that a debate goes off the rails so early that riders assume the rough country around them is the natural backdrop for their travels. That is certainly true in the debate over reparations in transitions to democracy. Reparations traditionally are understood as material or symbolic awards to victims of an abusive regime granted outside of a legal process. While some reparations claims succeed—such as those made by Americans of Japanese descent interned during World War II and those made by European Jews against Germany after World War II—most do not. The principal culprits in these failures are objections that reflect commitments to "ethical individualism."*

*By way of response, some advocates attempt to put reparations back on course by appealing to theories of collective responsibility. Where put strongly, these theories suffer from basic conceptual deficits. Weaker versions, such as theories based on moral taint and related efforts that seek atonement or reconciliation, turn on moral sentiments, such as regret, and therefore cannot give rise to objective and externally enforceable duties of repair. More creative solutions, such as approaches pursuing "restorative justice," have some intuitive appeal but want for theoretical clarity and therefore fail to provide persuasive practical guidance.*

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* Assistant Professor of Law, University of Maryland School of Law. This Article is part of an extended project addressing jurisprudential issues core to transitional justice debates. *See* David Gray, *Constitutional Faith and Dynamic Stability: Thoughts on Religion, Constitutions, and Transitions to Democracy*, 69 MD. L. REV. 26 (2009); David C. Gray, *Devilry, Complicity, and Greed: Transitional Justice and Odious Debt*, 70 LAW & CONTEMP. PROBS., Summer 2007, at 137; David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621 (2006); David C. Gray, *What's So Special About Transitional Justice? Prolegomenon for an Excuse-Centered Approach to Transitional Justice*, 100 AM. SOC'Y INT'L L. PROC. 147 (2006). For helpful comments and criticism the author wishes to thank Fionnuala Ni Aoláin, Richard Boldt, James Boyle, Danielle Citron, Ronald Dworkin, Martha Ertman, Martha Fineman, Barry Friedman, Mitu Gulati, Jürgen Habermas, Sherrilyn Ifill, Richard Kraut, Thomas McCarthy, Thomas Nagel, Jedediah Purdy, Amanda Pustilnik, Pamela Scully, Neil Siegel, Sonja Starr, and those who provided valuable feedback during presentations at Law and Society, Emory University, the "Constitutional Schmooze," and the University of Maryland. Benjamin Levin has set a standard future research assistants will be hard-pressed to meet. Nancy Bonifant provided valuable service as a technical editor.

*This Article proposes a new approach. Rather than conceiving of reparations as solely retrospective, which implicates knotty issues of responsibility, or solely prospective, which raises problems of enforceability and political practicality, this Article argues that reparations are Janus-faced. In keeping with a larger project arguing that transitional justice is not just a special case of ordinary justice, this Article suggests treating transitions as liminal moments and contends that reparations ought to reflect the extraordinary conditions implied by this temporal status "betwixt and between"*[1] *an abusive past and a future committed to democracy, human rights, and the rule of law.*

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1. VICTOR TURNER, FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL 93 (1967) [hereinafter TURNER, FOREST OF SYMBOLS].

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## I. INTRODUCTION

"It wasn't me!"[2] There is, perhaps, no defense claim more fundamental. It reflects the basic proposition that we can only be held to account for what we do and the harm we cause. This intuition is ubiquitous in normative fields of law and moral philosophy, where oceans of ink have been spilled[3] teasing out the nuances and applications of a proposition that all three-year-olds understand: we do not punish people for crimes they did not commit.[4] With few exceptions, we do not hold people liable for harms they did not cause. We do not bind people to agreements to which they have not bound themselves.

Perhaps because the claim that innocence matters is so ubiquitous, or perhaps because it is just True, there is no better way to poke the limbic bear of moral outrage than to hold one person responsible for conduct not his own or to order him to compensate for harms he has not caused. Thence the most basic challenges to theories of vicarious and strict liability—which usually respond by identifying a voluntary act or informed decision that may serve to anchor liability—arise and, thus, our ready willingness to let ten guilty men go free rather than embrace procedures that risk convicting one innocent man.[5]

This quaint little commitment to punish only the guilty and to hold liable only those responsible is also at the heart of contests over

2. SHAGGY, *It Wasn't Me*, *on* HOT SHOT (MCA Records 2000); *see also* David Gray, *It Wasn't Me*, CONCURRING OPINIONS, Jan. 5, 2009, http://www.concurringopinions.com/archives/2009/01/it_wasnt_me.html (discussing Paul Bloom, *First Person Plural*, ATLANTIC, Nov. 2008, at 90).

3. *See, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS, bk. III, chs. 1–5 (Terence Irwin trans., Hackett Publishing Co., Inc. 2000); A.J. AYER, *Freedom and Necessity*, *in* PHILOSOPHICAL ESSAYS 271 (1954); H.L.A. HART, *Acts of Will and Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY 90 (1968); Gideon Rosen, *Skepticism About Moral Responsibility*, 18 PHIL. PERSP. 295 (2004); Peter Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 1 (1962); B.A.O. Williams & T. Nagel, *Moral Luck*, 50 PROC. ARISTOTELIAN SOC'Y 115, 137 (1976).

4. *See* Morissette v. United States, 342 U.S. 246, 246 (1952) (emphasizing standards of liability and the central role of presumption of innocence in American jurisprudence).

5. 4 WILLIAM BLACKSTONE, COMMENTARIES *358; *see also* Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) ("[F]or my part I think it a less[er] evil that some criminals should escape than that the Government should play an ignoble part."); Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 174–77 (1997).

reparations.[6] The protest is particularly pronounced in domestic debates about reparations for slavery.[7] Contemporary whites asked to contribute directly or through taxes protest that they have never owned slaves[8] and were born generations after the practice was abolished.[9] Some even point out, with varying degrees of accuracy, that nobody in their family has ever owned slaves.[10] If they have no direct, or at least personal, connection to the abuses, it seems beyond contest that they should not be held responsible for paying compensation[11]—an objection only amplified by the fact that the proposed beneficiaries were never themselves slaves.[12] These same concerns were cited in the record of a recent Senate

6. *See, e.g.*, When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice 3, 8 (Roy L. Brooks ed., 1999) [hereinafter Brooks, When Sorry Isn't Enough]; Lawrie Balfour, *Reparations After Identity Politics*, 33 POL. THEORY 786, 794 (2005); Roy L. Brooks, *Getting Reparations for Slavery Right—A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251 (2004) [hereinafter Brooks, *Reparations*]; Thomas McCarthy, *Coming to Terms with Our Past, Part II: On the Morality and Politics of Reparations for Slavery*, 32 POL. THEORY 750, 752–53 (2004); Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45, 49–52 (2004); Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1052 (2003); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1765–68 (2005); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691, 698–704 (2003) [hereinafter Posner & Vermeule, *Reparations*]; Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J.L. & POL'Y 183, 185–86 (2006).

7. *See* JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS (2000); SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS (Raymond A. Winbush ed., 2003) [hereinafter SHOULD AMERICA PAY?]; Brooks, *Reparations*, *supra* note 6; Posner & Vermeule, *Reparations*, *supra* note 6; Sepinwall, *supra* note 6; Robert W. Tracinski, *America's "Field of the Blackbirds": How the Campaign for Reparations for Slavery Perpetuates Racism*, 3 J.L. SOC'Y 145 (2002); Watson Branch, Comment, *Reparations for Slavery: A Dream Deferred*, 3 SAN DIEGO INT'L L.J. 177 (2002); *cf.* RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (Eric K. Yamamoto et al. eds., 2001).

8. *See* Sepinwall, *supra* note 6, at 184 n.10 (quoting Rep. Henry Hyde claiming that "I never owned a slave. I never oppressed anybody. I don't know that I should have to pay for someone who did [own slaves] generations before I was born.") (alteration in original).

9. *See* Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, *in* 2 AFFIRMATIVE ACTION AND THE CONSTITUTION: THE SUPREME COURT "SOLVES" THE AFFIRMATIVE ACTION ISSUE 83, 88 (Gabriel J. Chin ed., 1998); Tracinski, *supra* note 7, at 151; *see also* Bob Gibson, *Slavery Apology Measure Ignites Legislative Debate*, CHARLOTTESVILLE DAILY PROGRESS, Jan. 16, 2007, *available at* http://www.dailyprogress.com/cdp/news/local/local_govtpolitics/article/slavery_apology_measure_ignites_legislative_debate1/13699/ (quoting Del. Frank D. Hargrove in opposition to a proposed resolution apologizing for slavery saying, "The present commonwealth has nothing to do with slavery.").

10. Balfour, *supra* note 6, at 794. For example, Sen. John McCain famously denied that his family owned slaves when, in fact, they did. *See* Douglas A. Blackmon, *Two Families Named McCain*, WALL ST. J., Oct. 17, 2008, at A1.

11. *See* Roy L. Brooks, *Toward a Perpetrator-Focused Model of Slave Redress*, 6 AFR.-AM. L. & POL'Y REP. 49, 61 (2004) [hereinafter Brooks, *Perpetrator-Focused*]; Gregory Kane, *Why the Reparations Movement Should Fail*, 3 MARGINS 189, 197 (2003).

12. Miller, *supra* note 6, at 52; Tracinski, *supra* note 7, at 151.

Resolution apologizing for slavery and Jim Crow laws, which declined to endorse claims for reparation.[13] While cast historically, these objections are nothing more than the familiar "I didn't do it. It wasn't me."[14]

Similar objections play a common and powerful role in transitional justice debates.[15] Transitional justice asks what a successor regime committed to democracy, human rights, and the rule of law can and should do to achieve justice for human rights abuses perpetrated by and under an abusive forebear.[16] "Transitional justice is a field on an upward trajectory"[17] that recently has emerged as an interdiscipline in its own right,[18] but the animating question dates back at least to 405 BC after the fall of the twelve tyrants.[19] Contemporary interest in transitional justice reflects the encouraging decline over the last twenty years or so of autocratic states committed to institutionalized human rights violations as part of the "Third Wave" of democratization.[20] In the wake of this tsunami, a number of states have proposed reparations as at least a partial response to past wrongs.[21]

While the atrocities addressed in transitional justice debates are of more recent vintage than the United States' history of slavery, the

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13. S. Con. Res. 26, 111th Cong. (2009) (officially recognizing and apologizing for the wrongs and persisting consequences of slavery and Jim Crow laws but disclaiming, "Nothing in this resolution . . . authorizes or supports any claim against the United States . . . .").

14. *See* Tracinski, *supra* note 7, at 146; *see also* Miller, *supra* note 6, at 53–54 (recounting two comedy gambits, one by Chris Rock and the other by Wanda Sykes, in which these black comedians approached whites on the streets to request reparations payments and were met variously with disbelief and outrage).

15. *See, e.g.*, KARL JASPERS, THE QUESTION OF GERMAN GUILT 41–43 (1948) (noting that claims of innocence were common in post-World War II Germany).

16. David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621, 2621–23 (2006) [hereinafter Gray, *Excuse-Centered*].

17. Kieran McEvoy, *Letting Go of Legalism: Developing a 'Thicker' Version of Transitional Justice*, *in* TRANSITIONAL JUSTICE FROM BELOW 15 (Kieran McEvoy & Lorna McGregor eds., 2008).

18. Contemporary conversations about transitional justice began with a debate in print between Professors Diane Orentlicher and Carlos Nino published in the *Yale Law Journal*. *See* Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991); Diane F. Orentlicher, *A Reply to Professor Nino*, 100 YALE L.J. 2641 (1991); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

19. JON ELSTER, CLOSING THE BOOKS 3–23 (2004); PLATO, APOLOGY 32b–e (G.M.A. Grube trans., 1981).

20. *See generally* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

21. For example, reparations have been part of transitional justice efforts in Argentina, Brazil, Chile, El Salvador, Germany, Japan, Malawi, South Africa, and the United States in response to the internment of persons of Japanese descent during World War II, among others. *See* PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 7 (2002); THE HANDBOOK OF REPARATIONS (Pablo De Greiff ed., 2008).

objections are familiar.[22] Many asked to pay disclaim the past regime and contend that they did not personally commit human rights abuses.[23] Those directly connected to atrocities argue that they relied on existing law, which told them that targeted abuses against a particular group were right, necessary, or at least not illegal.[24] While those in this latter group cannot claim that they did not do it, they can displace responsibility to the state or protest that imposing liability would violate prohibitions against ex post facto enforcement of law. Whether packaged as "I didn't do it" or "I didn't do anything *wrong*," the core objection is the same.

Reparations advocates share the foundational belief that only the guilty should be punished and only those responsible can be held liable. Unfortunately, this commitment seems to impose an insurmountable barrier against collective funding of reparations, which is the only realistic way to provide the necessary finances. The halfhearted solution has been to sketch theories of associational responsibility, derivative collective responsibility, or moral taint.[25] These attempts seldom persuade, and for good reason. They run full-force into the individualism fundamental to our common intuitions of blame and responsibility.[26] Other reparations supporters have sought to change the debate by appealing to theories of "restorative justice" that eschew entanglement with the past in favor of a future-oriented focus on reconciliation[27] or redemption.[28] These novel efforts raise their own conceptual concerns.[29] Perhaps worse, they fail to

22. *See generally* ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2000); HAYNER, *supra* note 21; MICHAEL HENDERSON, FORGIVENESS: BREAKING THE CHAIN OF HATE (2d rev. ed. 2003); HUMAN RIGHTS IN DEVELOPMENT: YEARBOOK 2001 (George Ulrich & Louise Krabbe Boserup eds., 2003); POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES (John Torpey ed., 2003); THE HANDBOOK OF REPARATIONS, *supra* note 21.

23. Ogletree, *supra* note 6, at 1052.

24. Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 711 (2004); Gray, *Excuse-Centered*, *supra* note 16, at 2631–36; Posner & Vermeule, *supra* note 6, at 691. This is precisely the question with which the German Constitutional Court struggled in the "Border Guard Cases." *See* 3 TRANSITIONAL JUSTICE 576 (Neil J. Kritz ed., 1995) (English translation of proceeding in Berlin State Court, No. (523) 2 Js 48/90 (9/91)).

25. *See, e.g.*, CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 113–45 (2000); LARRY MAY, SHARING RESPONSIBILITY 151 (1992); Anthony Appiah, *Racism and Moral Pollution*, 18 PHIL. FORUM 185 (1987); Marina A. L. Oshana, *Moral Taint*, *in* GENOCIDE'S AFTERMATH: RESPONSIBILITY AND REPAIR 71 (Claudia Card & Armen T. Marsoobian eds., 2007). For an extended explanation and critique of these concepts, *see infra* Part III.

26. Morissette v. United States, 342 U.S. 246, 251 (1952) ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind and an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.").

27. *See infra* Part III.C.

28. Brooks, *Reparations*, *supra* note 6, at 255.

29. *See infra* Parts III.B and III.C.

lay any foundation for claims that reparations are imperative and also fail to provide a robust normative justification for any particular form of reparation.

More troubling than these theoretical worries are concerns that reparations do not work. This is the most significant and least addressed objection to reparations. Even where reparations are paid, the money itself is insufficient to the task of reparation.[30] Moreover, recipients frequently remain in a persistent condition of material and social inequality. "Forty acres and a mule," the reparation promised by General Sherman to former American slaves[31] and codified by Section Four of the Freedmen's Bureau Act,[32] was not even paid,[33] and lesser grants of land, goods, and money certainly did not leave former slaves in a condition of justice.[34] Many now trace the absence and inadequacy of those reparations efforts to contemporary achievement gaps between black and white Americans.[35] Native American groups have, for the most part, fared no better despite large land grants, mineral rights, and sovereign exemptions from state regulations.[36] Reparations paid in South Africa[37] have done almost nothing

30. Pablo De Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 21, at 451, 465–66.

31. *See* William T. Sherman, Special Field Order No. 15 (Jan. 16, 1865), *reprinted in* THE FORTY ACRES DOCUMENTS: WHAT DID THE UNITED STATES REALLY PROMISE THE PEOPLE FREED FROM SLAVERY? 51 (House of Songhay Commission for Positive Education, 1994); Kane, *supra* note 11, at 194.

32. Act of March 3, 1865, ch. 90, 13 Stat. 507 (lapsed 1869), *quoted in* Berry v. United States, No. C-94-0796-DLJ, 1994 WL 374537, at *1 n.1 (N.D. Cal. July 1, 1994). The Act expired in 1869. *Berry*, 1994 WL374537, at *1.

33. Brooks, *Perpetrator-Focused*, *supra* note 11, at 52; Kane, *supra* note 11, at 195.

34. *See Berry*, 1994 WL 374537, at *1 (plaintiff seeking forty acres of land in San Francisco or $3 million as compensation for slavery).

35. S. Con. Res. 26, 111th Cong. (2009) ("African-Americans continue to suffer from the consequences of slavery and Jim Crow laws—long after both systems were formally abolished—through enormous damage and loss, both tangible and intangible, including the loss of human dignity and liberty. . . ."); *cf.* Forde-Mazrui, *supra* note 24, at 697–707; Miller, *supra* note 6, at 49; Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 173–74 (2004).

36. Brooks, *Perpetrator-Focused*, *supra* note 11, at 53. This is not true of all Native American groups. Leveraging their sovereignty, a number of tribes have established successful gaming businesses, sometimes for group benefit and sometimes enriching a select few. *See* Edward D. Gehres III, *Visions of the Ghost Dance: Native American Empowerment and the Neo-Colonial Impulse*, 17 J.L. & POL. 135, 141–45 (2001); Donald L. Bartlett & James B. Steele, *Playing the Political Slots*, TIME, Dec. 23, 2002, at 52; Donald L. Bartlett & James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002, at 44. However, credit for those successes cannot credibly be traced to minimal reparations. *See generally* Gehres, *supra*, at 144–45.

37. *See* Regulations Regarding Reparation to Victims R1660/2003, *reprinted in* THE HANDBOOK OF REPARATIONS, *supra* note 21, at 816; *Reparation and Rehabilitation Policy*, *in* 5 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, vol. 5, ch. 5 (1998), *reprinted in* THE HANDBOOK OF REPARATIONS, *supra* note 21, at 791; Warren Freedman, *The Restitution of Land*

to improve the lot of black South Africans and arguably have left them in a worse condition, occasioning deep ambivalence with the entire transitional justice process.[38] Some victims of institutionalized human rights abuses have made gains, but seldom if ever due to reparations. For example, contemporary Japanese Americans bear the marks of internment,[39] but, measured by demographic achievement, have made significant economic and social gains in the interim. However, those gains cannot credibly be explained by reparations, which were not paid until 1988[40] and, at any rate, were minimal and regarded as symbolic by most recipients.[41] Even where the amount of reparation paid is more significant, such as in Argentina, political realities and abiding guilt among survivors concerned with spending "cursed money" limit the capacity of reparations to significantly change the lot of victims or recipients.[42] The simple fact that reparations programs largely fail to achieve any demonstrative gain for victims has largely been ignored in practice and the literature.[43]

This Article proposes a new path. It contends that normative objections to and the practical failures of reparations derive from some combination of two conceptual mistakes. The first is to treat transitional justice generally as a special case of ordinary justice, and reparations in particular as a species of tort claim. The second is to engage in a temporal bias, viewing reparations as either solely retrospective or entirely prospective. In keeping with prior work contending that transitional justice is extraordinary justice,[44] this Article argues that "I didn't do it" is a non

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*Rights in South Africa as Reparation for Past Injustices*, 22 WINDSOR Y.B. ACCESS TO JUST. 157 (2003).

38. Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 21, at 176, 189–90, 200.

39. LESLIE T. HATAMIYA, RIGHT A WRONG: JAPANESE AMERICANS IN THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988, 130–36 (1993).

40. *See* Civil Liberties Act of 1988, 50 U.S.C. § 1989b (2000); Civil Liberties Act Amendments of 1992, Pub. L. No. 102-371, 106 Stat. 1167.

41. *See* Eric K. Yamamoto & Liann Ebesugawa, *Report on Redness: The Japanese American Internment*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 21, at 257, 276.

42. *See* María José Guembe, *Economic Reparations for Grave Human Rights Violations: The Argentinean Experience*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 21, at 21, 46–47.

43. This is not to denigrate reparations entirely. Quite to the contrary, as is argued here, reparations have an important role to play in a broader transitional justice program. Neither is it to suggest that past reparations programs are entirely without merit or success. Rather, the point is that because those programs have largely been limited in their scope, imagination, and attachment to a broader program of transitional justice, those programs have at best achieved modest compensation for material loss without addressing the underlying sources of those harms as consequences of targeted violence. *See infra* Part IV.

44. *See generally* David C. Gray, *Devilry, Complicity, and Greed: Transitional Justice and Odious Debt*, 70 LAW & CONTEMP. PROBS. 137 (2007) [hereinafter Gray, *Devilry*]; Gray, *Excuse-Centered*, *supra* note 16.

sequitur in debates about reparations where the fundamental question is "How do we make it right?".

Part II provides an overview of the reparations debate. "Reparations" encompasses a variety of potential responses to mass atrocities. This section attempts to bring some order to the debate by charting the potential forms reparations may take alongside their corresponding objections. Part II then describes how these objections depend on one or both of the cited conceptual mistakes: (1) treating reparations as tort claims, or (2) assuming that reparations either are entirely retrospective or entirely prospective. Part III reviews some of the most common justifications for and defenses of reparations and points out how they too fall victim to one or both of these cognitive mistakes and therefore fail to meet some or all of the most compelling objections to reparations proposals. Part IV sets the stage for a novel approach to reparations that takes seriously the unique characteristics of transitions and transitional justice. In particular, it argues that transitional justice is Janus-faced and that reparations are liminal tools for addressing the social conditions that lie beneath pretransitional abuses.

## II. A FOUR-DIMENSIONAL MODEL OF REPARATIONS

All transitions are characterized by a disparity between needs and resources. In addition to justice, new governments must ensure the peace, achieve stability, reform public institutions, repair infrastructure, shift social norms, and institutionalize commitments to human rights and the rule of law.[45] These demands are extraordinary, and even with aid from friendly states and international institutions, all transitions must make difficult decisions. Some of the most troubling decisions are presented by justice initiatives.

After the impulse to seek revenge, or perhaps as a consequence of it, the most common instinct in the face of mass violence is to prosecute everyone responsible.[46] Unfortunately, this is almost always impossible.[47] The abusive regimes that give way to transition are characterized by large-scale abuses that involve the participation and complicity of tens, and often hundreds, of thousands of individuals, agencies, and corporations.

45. HAYNER, *supra* note 21, at 11.

46. *See* ALEX BORAINE, A LIFE IN TRANSITION 203 (2008); HAYNER, *supra* note 21, at 12; Lisa J. Laplante & Kimberly Theidon, *Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru*, 29 HUM. RTS. Q. 228, 242–43 (2007).

47. Laplante & Theidon, *supra* note 46, at 243.

The resources—material, human, institutional, and political—needed to prosecute everyone implicated in pretransitional violence far exceed those available to transitional regimes, a shortfall only made worse by the fact that justice programs must compete with other high-priority goals, including stability and security.[48]

This disparity between needs and resources confronts transitional regimes with a "justice gap."[49] Much of the practice of and academic debate over transitional justice is caught up in attempts to span this gap, usually by resort to hybrid programs featuring truth commissions, reparations, formal or de facto amnesties, lustration, and limited criminal trials focusing on those most responsible for past violence.[50] However, these efforts often are ad hoc and under theorized, leaving transitional regimes and their constituents with the sense that they are settling for the best justice possible given "very imperfect" circumstances[51]—one more jab in the ribs of a people who have already borne extraordinary hardship.

The most common gap-filling measures deployed by transitional regimes are truth commissions and reparations.[52] Truth commissions offer a procedure for examining and detailing past violence and attempt to fill the forensic vacuum left in the wake of decisions not to prosecute by providing an opportunity for victims, perpetrators, and witnesses to say what happened in a forum imbued with official status.[53] Reparations, whether paid directly by wrongdoers or in their stead by the transitional regime, attempt to fill accountability and compensation gaps by providing recognition and partial redemption for victims while imposing on abusers direct or derivative liability.[54] Some form of reparation has been a part of almost every hybrid program of transitional justice.[55] "Forty Acres" were

48. I am in debt to now-Representative Tom Perriello (D-Va.) for making the point that transitional justice and security are not always at odds and for sharing his views on the role of justice initiatives in achieving both short- and long-term stability.

49. Gray, *Excuse-Centered*, *supra* note 16, at 2624–29.

50. Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355 (2002).

51. Pablo De Greiff, International Courts and Transitions to Democracy, 12 PUB. AFF. Q. 79, 79 (1998); *see also* Michel Rosenfeld, Restitution, Retribution, Political Justice and the Rule of Law, 2 CONSTELLATIONS 309, 310 (1996); Paul van Zyl, Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission, 52 J. INT'L AFF. 647, 648 (1999).

52. HAYNER, *supra* note 21, at 170–73.

53. *Id.* at 14–23.

54. Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 124–32 (2004); De Greiff, *supra* note 30, at 460–61; Laplante & Theidon, *supra* note 46, at 245; Posner & Vermeule, *Reparations*, *supra* note 6; Ruth Rubio-Marín & Pablo De Greiff, *Women and Reparations*, 1 INT'L J. TRANSITIONAL JUST. 318, 318–21 (2007).

55. *See supra* note 21; Balfour, *supra* note 6, at 787; Rubio-Marín & De Greiff, *supra* note 54, at 318. *See generally* Roht-Arriaza, *supra* note 35.

offered to former slaves during Reconstruction as partial reparation for their period of servitude, though the benefit was never paid.[56] Germany paid reparations both to individual victims of the Holocaust and to the state of Israel.[57] Japan offered monetary compensation to Korean "comfort women," despite denying the fact of the abuse, much less Japan's responsibility.[58] Reparations in various forms have been paid in South Africa to victims of Apartheid.[59] Pursuant to legislative action, the United States paid reparations to Japanese Americans and others confined to internment camps during World War II.[60] Native Americans have also received a string of purportedly reparatory payments and compensation from the government of the United States.[61] More recently, some have proposed truth and reconciliation committees in combination with reparations, as partial justice for slavery,[62] Jim Crow laws,[63] and for the legacy of lynching.[64]

Each of these efforts has met with varying degrees of opposition. In some cases, this opposition has simply limited the extent of the reparative effort. In others, it has required that all payments be accompanied by a denial of responsibility.[65] In the case of contemporary claims for slavery

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56. *See supra* notes 31–33 and accompanying text. In 2009, the Senate passed a resolution formally apologizing for slavery, but specifically declined to recognize any right to reparation. S. Con. Res. 26, 111th Cong. (2009). Whether the United States is a transitional regime, still coming to terms with slavery and institutional racism, or posttransitional, is highly contested. While this Article does not take a firm stand in the debate, the theory proposed here suggests that the United States would benefit from addressing issues of racial inequality using insights and tools from the theory and practice of transitional justice.

57. Ariel Colonomos & Andrea Armstrong, *German Reparations to the Jews After World War II: A Turning Point in the History of Reparations*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 21, at 390; FOREIGN CLAIMS SETTLEMENT COMM'N, U.S. DEPT. OF JUSTICE, GERMAN COMPENSATION FOR NATIONAL SOCIALIST CRIMES (1996), *reprinted in* BROOKS, WHEN SORRY ISN'T ENOUGH, *supra* note 6, at 61–67.

58. George Hicks, *The Comfort Women Redress Movement*, *in* BROOKS, WHEN SORRY ISN'T ENOUGH, *supra* note 6, at 113, 124.

59. Colvin, *supra* note 38, at 176–214.

60. *See* Civil Liberties Act of 1998, 50 U.S.C. § 1989b (2000); BROOKS, WHEN SORRY ISN'T ENOUGH, *supra* note 6, pt. 4; Yamamoto & Ebesugawa, *supra* note 41, at 257.

61. BROOKS, WHEN SORRY ISN'T ENOUGH, *supra* note 6, at 266–67.

62. *See, e.g.*, BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973) (advocating reparations for slavery); Brooks, *Reparations*, *supra* note 6, at 273–74 (noting important role for truth-seeking procedures as part of larger project of slavery reparations); John Conyers Jr. with Jo Ann Nichols Watson, *Reparations: An Idea Whose Time Has Come*, *in* SHOULD AMERICA PAY?, *supra* note 7, at 14 (advocating reparations for slavery).

63. BROOKS, WHEN SORRY ISN'T ENOUGH, *supra* note 6, at 395–400.

64. *See* SHERRILYN IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 150–53 (2007).

65. *See supra* note 56; *see also* Guembe, *supra* note 42, at 46 (describing how concerns for opposition driven by denials of responsibility limited public discussion of reparations efforts in Argentina).

reparations in the United States, opposition has frozen claims in their political and legal tracks. Much of that debate and its consequences is both deeply confused and deeply confusing. That is due in no small part to imprecision. Therefore, the next section proposes a more refined model of reparations on the way to a directed account of the main arguments in opposition.

### *A. A Four-Dimensional Model of Reparations*

As we will see in the next section, reparations[66] present a number of challenges, both theoretical and concrete.[67] While much of the literature is abstract,[68] there is a justifiable plea for a more structured debate attached to specific proposals.[69] It seems intuitive, after all, that the nature of challenges to reparations will depend on the form of the proposed program, its intended beneficiaries, and the identity of those expected to contribute.[70] Any topography of the debate landscape must then start with typology of its inhabitants. That is the task in this section.

Broadly, the benefits distributed by reparation programs can be categorized as either material or nonmaterial.[71] That is, reparations can take the form of concrete benefits, such as cash payments,[72] social welfare entitlements, or guaranteed access to education and employment.[73]

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66. I am conscious of the fact that the extension of "reparation" is not a given in the literature. Roy Brooks, for example, would limit "reparation" to forms of redress accompanied by a fulsome and heartfelt apology. *See* Brooks, *Reparations*, *supra* note 6, at 255–56. A more common definition is a form of material or symbolic compensation provided in the absence of legal obligation or outside legal process. *See, e.g.*, De Greiff, *supra* note 30, at 452–53; Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1660 n.8 (1999); Posner & Vermeule, *Reparations*, *supra* note 6, at 691–94. This Article, reflecting realities of the academic and public debate, will use "reparation" more generally, achieving precision descriptively, rather than by contesting semantics.

67. *See infra* Part II.B.

68. *See, e.g.*, Brooks, *Reparations*, *supra* note 6, at 288 (calling for a "high-minded discussion of morality and justice" before thinking about "the forms of redress, in all their possible configurations").

69. *See, e.g.*, Posner & Vermeule, *Reparations*, *supra* note 6, at 689–90. *But see* Brooks, *Reparations*, *supra* note 6, at 287 (asserting that examining concrete proposals in order to better understand the form, content, and application of potential objections is "so *very* wrong").

70. Erin Daly, *Transformative Justice: Charting A Path To Reconciliation*, 12 INT'L LEGAL PERSP. 73, 77–78 (2001); Posner & Vermeule, *Reparations*, *supra* note 6, at 689.

71. Roy L. Brooks, *The Age of Apology*, *in* BROOKS, WHEN SORRY ISN'T ENOUGH, *supra* note 6, at 9 [hereinafter Brooks, *The Age of Apology*]; De Greiff, *supra* note 30, at 468–70; Posner & Vermeule, *supra* note 6, at 725–36; Roht-Arriaza, *Reparations*, *supra* note 35, at 159–60; Rubio-Marín & De Greiff, *supra* note 54, at 330–32; Ernesto Verdeja, *A Normative Theory of Reparations in Transitional Democracies*, *in* GENOCIDE'S AFTERMATH: RESPONSIBILITY AND REPAIR 166, 171–78 (Claudia Card & Armen T. Marsoobian eds., 2007).

72. *See, e.g.*, 1994 Fla. Laws 3296–98 (providing cash payments to victims and heirs of the Rosewood Massacre); Eileen Finan, *Delayed Justice: The Rosewood Story*, 22 HUM. RTS. 8–9 (1995).

73. *See* Civil Liberties Act of 1988, 50 U.S.C. § 1989b (2000) (providing education funds for

Reparations can also be more ethereal, including apologies, memorials, and efforts to achieve social, cultural, and institutional reform.[74] Beyond form, reparations also can be categorized according to who benefits and who contributes. For example, reparations can be directed either toward specific individuals or a group.[75] Likewise, those asked to contribute may be selected individuals, groups, or states.[76]

Starting with the nature of the program and the proposed recipients, we can understand the possibilities graphically, plotting the relationship between recipients and benefits in two dimensions with one axis marking nonmaterial from material benefits and the other distinguishing programs benefitting identified individuals from programs designed to benefit a group.[77] Populating the quadrants yields a helpful preliminary view of the major forms that reparation programs have taken thus far.[78]

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subjects of World War II internments of Japanese Americans).

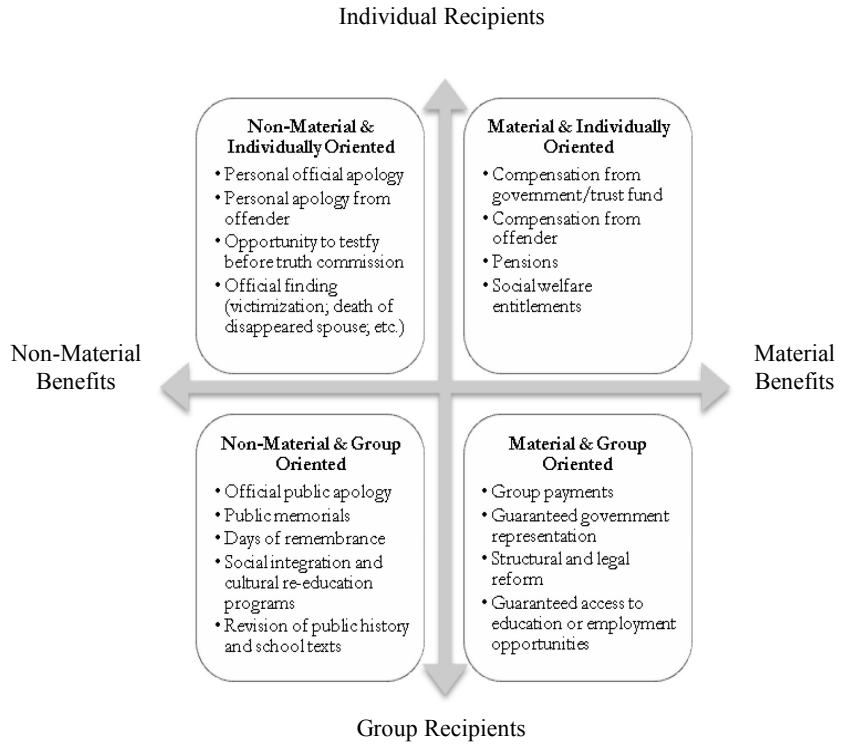
74. *See* Civil Liberties Act of 1988 § 1 ("acknowledg[ing] the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II" and "apologiz[ing] on behalf of the people of the United States"); S. Con. Res. 26, 111th Cong. (2009); Brooks, *Reparations*, *supra* note 6, at 268–72 (discussing various forms of reparation and redress); Martha Minow, *Breaking the Cycles of Hatred*, *in* BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 14, 23 (Nancy L. Rosenblum ed., 2002).

75. Brooks, *The Age of Apology*, *supra* note 71, at 9; De Greiff, *supra* note 30, at 453; Posner & Vermeule, *Reparations*, *supra* note 6, at 739–41; Rubio-Marín & De Greiff, *supra* note 54, at 330–32; Verdeja, *Reparations*, *supra* note 71, at 171–78.

76. *See* De Greiff, *supra* note 30, at 455–59; Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Societies in Transition*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 21, at 560, 568–71; Posner & Vermeule, *Reparations*, *supra* note 6, at 736–39.

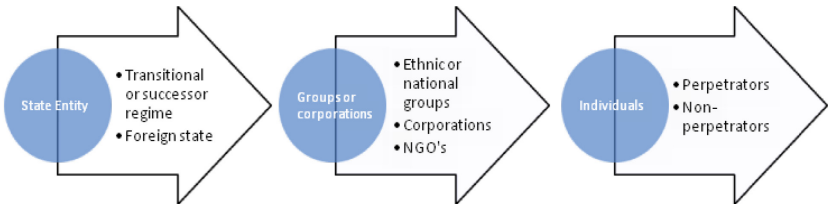
77. Ernesto Verdeja has suggested a similar approach. *See* Verdeja, *supra* note 71, at 171–78 (suggesting a more limited typography of reparations proposals).

78. For examples of material and nonmaterial reparations directed at groups and individuals, see Colvin, *supra* note 38, at 195.

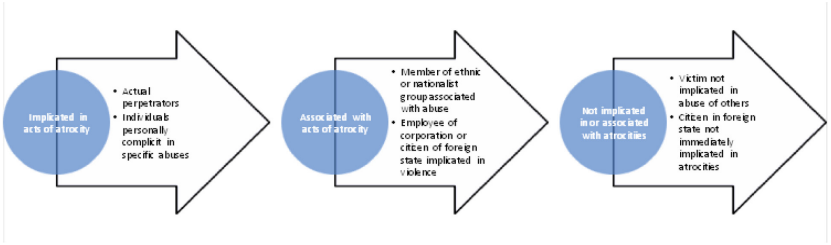



Other than the dimensional leap, adding payers to the picture appears relatively straightforward. After all, individual wrongdoers are not in a position to make an official apology or to establish days of remembrance, just as the state cannot make personal apologies or payments from wrongdoers' accounts. However, upon closer examination there appears to be much more involved than adding a z-axis. There are more variations in possible contributors, suggesting a broader spectrum than can be captured bimodally. For example, funding for group reparations or trust funds may be drawn from public funds, from a particular group, or from individuals. A potential w-axis raises similar concerns. Specifically, there is a range of relationships with past atrocities that payers might have, running from actual participation to complicity, to affiliation with offending groups, or to no apparent relationship at all. So, while payers and the relationships of payers to past abuses can be viewed graphically, spectrums better capture the range of possibilities.

Spectrum of Payers from State to Individual




Spectrum of Payers from Guilty to Not Associated




Of course, the actual party who bears the cost of a reparations program may not be readily apparent. For example, some argue that affirmative action programs, while administered generally, may actually impose costs only on a relatively small group of individuals who, when not admitted to a school or favored with a particular job, claim to have been displaced by an affirmative action candidate.[79] There are many other distinctions that might be made. For example, material payments may be classified as settlements without admission of wrongdoing or as forms of atonement entailing an apology.[80] While interesting in their own right, these are downstream issues. For now, we can put to use this admittedly schematic model to organize a discussion of arguments for and against reparations.

We are, then, presented with a four-dimensional picture of reparations programs. We can locate any particular program as either providing material or nonmaterial benefits to individuals or groups by states, groups, or individuals who are actually responsible for, merely associated with, or

79. Posner & Vermeule, *Reparations*, note 6, at 713, 729. *But see* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1768 (1993) (arguing that these objections defend background racial injustices as status quo). The consequent emotions of resentment that occasion such circumstances may seed a backlash of identity politics. *See* Balfour, *Reparations*, *supra* note 6, at 788–89.

80. BROOKS, WHEN SORRY ISN'T ENOUGH, *supra* note 6, at 8–9; Roy L. Brooks, *Reply*, *in* BROOKS, WHEN SORRY ISN'T ENOUGH, *supra* note 6, at 169–70.

not associated at all with past atrocities. It is tempting when presented with such a tool to play Linnaeus with actual cases. While engaging as an intellectual exercise, that is not the project here. We are out for normative rather than descriptive game. In that context, the most immediate question is not where a particular program might be located in the overall scheme, but the opportunities and challenges salient to any specific location. That is the project for the next section.

### *B. Major Objections to Reparations*

The mind numbs at the prospect of toiling through the details of the thirty-six cells yielded by the outline proposed above. Fortunately, that is not necessary. With few exceptions, the main objections to reparations programs attach to the category distinctions, and therefore are common across the cells in which any one appears. As is evidenced below, this analytic approach identifies a few important themes.

#### *1. Material Reparations*

Reparations advocates frequently argue for some form of material response to atrocity.[81] Material reparations, whether in the form of cash or other compensation, face one main objection: fit. The principal justification for material reparations is as compensation for harms suffered.[82] That begs the question of how harms are measured, suggesting an array of counterfactual possibilities, none of which seems fully appropriate.[83] In language familiar from domestic tort contexts, recipients frequently object that the compensation they receive is insufficient to make them whole,[84] does not adequately account for their loss,[85] or is nothing more than "blood money."[86] Pressing the point farther, some

81. *See, e.g.*, Brooks, *Reparations*, *supra* note 6, at 275; Eric K. Yamamoto, *Racial Reparations: Japanese Redress and African American Claims*, 40 B.C. L. REV. 477, 520 (1998).

82. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 104 (1998) [hereinafter MINOW, VENGEANCE & FORGIVENESS].

83. McCarthy, *supra* note 6, at 755.

84. MINOW, VENGEANCE & FORGIVENESS, *supra* note 82, at 104–05; Balfour, *supra* note 6, at 801; Kane, *supra* note 11, at 197.

85. MINOW, VENGEANCE & FORGIVENESS, *supra* note 82, at 104; IFILL, *supra* note 64, at 24; McCarthy, *supra* note 6, at 755; Anthony Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651, 656–57 (2003).

86. Colvin, *supra* note 38, at 189; Colleen Duggan et al., *Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru*, 2 INT'L J. OF TRANSITIONAL JUST. 192, 210 (2008); Forde-Mazrui, *supra* note 24, at 751; Miller, *supra* note 6, at 52–57.

critics of material reparations argue that they constitute a "one-time pay-off trap,"[87] essentially closing the door on any subsequent justice claims.[88] Again singing familiar refrains, payers may object that material reparations are too generous, too expensive, or not justified in light of the harm suffered by recipients.[89] There are also broader administrative and procedural difficulties with measuring harms,[90] which vary dramatically between individuals and may become murky with the passage of time.[91] Cast as quasi-tort claims, material reparations also face heavy substantive legal burdens that frequently cannot be met.[92]

There is, of course, a host of other objections to material reparations depending upon the combination of other elements, such as who pays and who receives the compensation. However, as opposed to nonmaterial reparations, the principal concern with material reparations is whether, how, and to what extent payments fit the purported harm[93] because compensation is the *raison d'être* of material reparations.[94] These objections connect to debates in critical theory and political science over whether to measure social justice in terms of recognition or distribution of resources.[95] Nancy Fraser and Axel Honneth, for example, have engaged in a book-length debate over whether the fundamental unit of injustice in contemporary global society is material or status inequality.[96] If the fundamental wrong suffered by victims of injustice is a refusal of recognition in cultural and political institutions, then material remedies not

87. McCarthy, *supra* note 6, at 756.

88. Balfour, *supra* note 6, at 803; Westley, *supra* note 62, at 476.

89. Miller, *supra* note 6, at 52–57.

90. *Id*.

91. Ryan Fortson, *Collective Liability, the Limited Prospects of Success for a Class Action Suit for Slavery Reparations, and the Reconceptualization of White Racial Identity*, 6 AFR.-AM. L. & POL'Y REP. 71, 96 (2004).

92. *In re* African-American Slave Descendents Litig., 471 F.3d 754, 759–62 (7th Cir. 2006) (Posner, J.); Brophy, *supra* note 54, at 121–29; Keith Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209 (2004).

93. Miller, *supra* note 6, at 59.

94. Emma Coleman Jordan, *The Non-Monetary Value of Reparations Rhetoric*, 6 AFR. AM. L. & POL'Y REP. 21, 25 (2004); Dinah Shelton, *Right Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 844 (2002) (explaining that the purpose of reparations is "to rectify the wrong done an injured party and correct injustice by restoring the status quo ante" and noting that the International Law Commission has "opted for remedial justice" as the proper ground for reparations claims).

95. *See* NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? (2003); AXEL HONNETH, THE STRUGGLE FOR RECOGNITION (1995); Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, *in* MULTICULTURALISM 105 (Amy Guttmann ed., 1994); Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM 25 (Amy Guttmann ed., 1994).

96. FRASER & HONNETH, *supra* note 95, at 71.

only fail to address the problem,[97] but can actually reify the ontology underlying the discrimination[98] or even inspire backlash.[99] Likewise, if the manifest harm suffered is simply a matter of unjust denial of access to resources, then apologies and days of remembrance are rendered symbolic in the pejorative.[100] As is argued here, most abuses perpetrated by pretransitional regimes have elements of both distributional and status injustice. A successful reparations program must be cognizant of this duality.

*2. Nonmaterial Reparations*

Objections to nonmaterial reparations are more multifarious. Those asked to give apologies may object that they have nothing to apologize for,[101] while recipients frequently complain that an apology is not nearly enough.[102] Establishing a historical record of abuse inevitably casts blame—frequently quite broadly—raising objections from those implicated who may claim innocence while, again, providing victims at most a "symbolic" benefit. Moreover, such histories are by necessity incomplete, abstract, and essentializing,[103] which may leave many former victims without even a sense of recognition,[104] raising serious concerns about the animating purpose of such programs.[105]

As constituents of an effort to establish an official narrative, truth commissions, public monuments, and days of remembrance meet with similar objections.[106] Those associated with blame may protest innocence.

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97. Randall Robinson, *What America Owes Blacks and What Blacks Owe to Each Other*, 6 AFR.-AM. L. & POL'Y REP. 1, 12–13 (2004).

98. Balfour, *supra* note 6, at 787–89.

99. FRASER & HONNETH, *supra* note 95, at 75–76; Richard Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1187–88 (2004); Kane, *supra* note 11, at 199; Glenn C. Loury, *Little to Gain, Much to Lose*, BLACK ISSUES IN HIGHER ED., Nov. 8, 2001; Miller, *supra* note 6, at 46–47, 48–56; Tracinski, *supra* note 7, at 146, 156–57.

100. FRASER & HONNETH, *supra* note 95, at 75–76; Balfour, *supra* note 6, at 794; David Hall, *The Spirit of Reparation*, 24 B.C. THIRD WORLD L.J. 1, 8 (2004).

101. Epstein, *supra* note 99, at 1188; Forde-Mazrui, *supra* note 24, at 715; Eva Jefferson Paterson, *The Importance of Slavery Reparations*, 6 AFR.-AM. L. & POL'Y REP. 15, 19 (2004); Tracinski, *supra* note 7, at 146.

102. FRASER & HONNETH, *supra* note 95, at 75–76; Hall, *supra* note 100, at 8.

103. Balfour, *supra* note 6, at 796–97; Brooks, *Perpetrator-Focused*, *supra* note 11, at 665; McCarthy, *supra* note 6, at 768.

104. Colvin, *supra* note 38, at 193.

105. *See* Thomas McCarthy, *Vergangenheitsbewältigung in the USA: On the Politics of Memory of Slavery*, 30 POL. THEORY 623, 638–43 (2002) (arguing for reparations based on capacity of the movement to maintain public memory and recognition of past and persisting wrongs).

106. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 390 (1987).

Of course, their grousing will be far more muted than it might be if the implied findings underlying nonmaterial awards implied a material obligation.[107] However, the blame and shame entailed in nonmaterial reparations still inspires resentment among those whose guilt is presumed.[108] Further, any implied guilt preserves the sense of insecurity among those associated with past wrongs that symbolically recognized debts will one day be redeemed in material form.[109]

Posttransitional preservation and extension of the oppositional logic[110] underlying abuses may also be fed by victims' resentment. Because nonmaterial reparations necessarily are limited and often are perceived by victims as incomplete, recipients inevitably will feel that they have not been recognized and that their harms have not been fully compensated by the very people who perpetrated abuses against them and their kin.[111] Perhaps out of this sense of inadequacy, former victims, their associates, and their heirs, may perceive something less than full authenticity in claims of regret advanced by those associated with past abuses when all they are willing to provide as reparation are monuments, holidays, and other purely "symbolic" measures.[112]

### *3. Individual Reparations*

Objections to reparations programs that focus on individual former victims vary according to the form of the program and its awards. However, all individually awarded reparations are vulnerable to line-drawing problems. In an ideal world, transitions would be in a position to order or provide reparations for all victims, whether they suffered direct or indirect harm. However, transitions present a very imperfect world[113]

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107. These concerns led the Senate, in passing a resolution condemning and apologizing for slavery and Jim Crow laws, to specifically disclaim any obligation to pay material reparations. *See* S. Con. Res. 26, 111th Cong. (2009).

108. Balfour, *supra* note 6, at 790–95.

109. A similar concern motivated "Full Stop," the termination of trials targeting leaders of the Argentine juntas when middle- and lower-ranked military officials became fearful that they might become targets for prosecution. *See* JAIME E. MALAMUD-GOTI, GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE 63–67 (1996); CARLOS NINO, RADICAL EVIL ON TRIAL 71, 84–94 (1996).

110. *See* MALAMUD-GOTI, *supra* note 109, at 83–91; *see also* ELSTER, *supra* note 19, at 93.

111. *See* Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation*, *in* FRASER & HONNETH, *supra* note 95, at 7, 76–77.

112. Hall, *supra* note 100, at 8.

113. Pablo De Greiff, *International Courts and Transitions to Democracy*, 12 PUB. AFF. Q. 79, 79 (1998); *see also* BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 74–75 (1992).

characterized by severe material limitations[114] made worse by the reluctance of payers to sacrifice, often because they feel they are not responsible. Any program that provides individual reparations will therefore be faced with making choices about whom to compensate for which harms and to what degree.[115] No matter the decisions made, they will inspire objections from someone. Those compensated may object that their compensation is incomplete.[116] Those not compensated will object that their suffering has been denied by implication.[117] Those asked to pay will express concerns that the net has been cast too widely, including too many beneficiaries.[118] Others may object that individual reparations come at the expense of public projects with greater potential to advance collective welfare,[119] including the institution-building projects necessary to prevent future abuses.[120]

*4. Group Reparations*[121]

While objections to group reparations come from all quarters, the driving concern is one of scope.[122] Reparations provided to a group as a whole fail to distinguish among former victims, providing benefits to all members without regard to the degree of harm suffered,[123] potentially even benefitting some who did not suffer at all or who are themselves implicated in abuses.[124] This indiscriminate approach to reparations raises concerns for victims and payers alike. Affirmative action,[125] for example,

114. Gray, *Excuse-Centered*, *supra* note 16, at 2624–25.

115. Colvin, *supra* note 38, at 201–02; Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51, 52–53 (2007).

116. Colvin, *supra* note 38, at 89–90.

117. Balfour, *supra* note 6, at 797.

118. Brophy, *supra* note 54, at 121.

119. Colvin, *supra* note 38, at 201–02.

120. Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 468 (1988).

121. For group-based reparations proposals see RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES BLACKS 244–47 (2000) (arguing for group-based reparations for contemporary black Americans); Kevin Hopkins, *Forgive U.S. Our Debts? Right the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2554 (2001).

122. Epstein, *supra* note 99, at 1189; Art Alcausin Hall, *There Is A Lot to Be Repaired Before We Get to Reparations: A Critique of the Underlying Issues of Race that Impact the Fate of African American Reparations*, 2 SCHOLAR 1, 39 (2000); Kane, *supra* note 11, at 201.

123. Fortson, *supra* note 91, at 92–95.

124. Chad W. Bryan, *Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599, 610–11, 613–14 (2003); Miller, *supra* note 6, at 52.

125. Out of concern for some of the difficulties cited here, some scholars have argued that

frequently is met with objections from critics on all sides that the access it guarantees goes mainly to those who, by virtue of their social, economic, and educational backgrounds, do not need the help and therefore take opportunities from others who do.[126] In response to concerns of this sort, Germany limited reparation payments to victims or their direct heirs.[127]

Standing and privity represent another species of scope objection, particularly in conversations about historical reparations. Standing and privity are concepts core to stable state contract and tort law, and generally limit obligations and claims of benefit to those who directly incurred a duty, entitlement, or loss, or those who have a sufficiently close relationship with an original claimant or obligor.[128] Standing plays a spoiler role in reparations debates, challenging recipients to demonstrate not only harm, but harm distinct from that suffered by the public at large.[129] Privity also suggests that only those who suffered direct or indirect harm may claim a right to reparation.[130] Group reparations frequently threaten this intuition by failing to distinguish between victims and nonvictims. Privity is particularly relevant in the case of historical claims, such as proposals for slavery reparations in the United States. In this context, critics ask how "a claimant (or alleged victim) [can] establish privity between himself (or his group) and the perpetrator when the latter belongs to a different era"[131] and judges point out that "there is a fatal disconnect between the [slaves] and the plaintiffs."[132]

Finally, group-based reparations must confront the twin concerns of essentialism and perpetuating a culture of victimhood.[133] Paying

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affirmative action should not be treated as a form of reparation. *See* Albert Mosely, *Affirmative Action as a Form of Reparations*, 33 U. MEM. L. REV. 353 (2003).

126. *See* Forde-Mazrui, *supra* note 24, at 749 (suggesting that this objection can be met by justifying group reparations in light of broader social justice goals).

127. *See* BROOKS, WHEN SORRY ISN'T ENOUGH, *supra* note 6, at 12–81.

128. *See* 17A AM. JUR. 2D CONTRACTS § 416 (2004) ("Ordinarily, the obligations arising out of a contract are due only to those with whom it is made; a contract cannot be enforced by a person who is not a party to it or in privity with it . . . ."); 59 AM. JUR. 2D PARTIES § 34 (2002) ("One cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy."); 74 AM. JUR. 2D TORTS § 23 (2001) ("Traditionally, to authorize a recovery in tort, privity must exist between the act of the wrongdoer and the injury complained of.").

129. Epstein, *supra* note 99, at 1179–81.

130. *In re* African-American Slave Descendents Litig., 471 F.3d 754, 759–62 (7th Cir. 2006) (Posner, J.).

131. Brooks, *The Age of Apology*, *supra* note 71, at 8; *see also* Forde-Mazrui, *supra* note 24, at 723–27.

132. *In re* African-American Slave Descendents Litig., 471 F.3d at 759.

133. ERIC YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL

reparations to a group ignores differences among individuals in the beneficiary group.[134] So doing risks reifying and perhaps providing renewed legitimacy to the lines of opposition implicated in past abuses.[135] Perhaps more troubling is that beneficiaries may again and forever be identified as victims, denying full autonomy to individuals and the authority of identity creation to groups.[136] For example, Justice Clarence Thomas, among others, has argued that affirmative action should be abandoned because it casts a shadow over the accomplishments of all African Americans and marks blacks as victims, incapable of succeeding on their individual merits.[137]

*5. State Sponsored Reparations*

The principal objections to state sponsoring of reparations programs derive from the fact that funding comes from public coffers and therefore implies guilt[138] and entails contributions from abusers, purported innocents, and even victims who contribute to the public weal.[139] While the decibel level of complaint goes down in cases of more symbolic reparations, it seldom reaches zero because there is still a diversion of public resources, whether as money, time, or attention, that might otherwise be directed to other public projects.[140]

There are also a number of theoretical and practical concerns relating to state-sponsored reparations that frequently are overlooked. For example, when a state pays reparations it assumes the mantle of justice provider, which may obscure the role of the state in past abuses.[141] For those deeply

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RIGHTS AMERICA (1998); Alfred Brody, *The Culture War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1201, 1209–10 (2004); Tracinski, *supra* note 7, at 149.

134. Balfour, *supra* note 6, at 790–95.

135. *Id*.; McCarthy, *supra* note 6, at 767.

136. McCarthy, *supra* note 6, at 768.

137. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring); Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 402 n.3 (1987).

138. Stacy Elmer, *Health Disparities And Historical Injustice In Sierra Leone: A Case For Reparations?*, 57 U. KANSAS L. REV. 971, 988 (2009); McCarthy, *supra* note 6 at 757.

139. DAVID HOROWITZ, UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY 12–13 (2002); Brody, *supra* note 133, at 1203; Forde-Mazrui, *supra* note 24, at 715–16; McCarthy, *supra* note 6, at 755; Tracinski, *supra* note 7, at 152 (advancing the facially specious argument that the United States government cannot be asked to pay reparations for slavery because North and South both expended blood and treasure in a Civil War to end slavery); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 652–54 (1993).

140. *See* Gibson, *supra* note 9 (quoting Virginia Del. Hargrove for opposition to a proposed resolution to apologize for slavery in part on grounds that focusing on the past is "counterproductive").

141. Balfour, *supra* note 6, at 796.

skeptical of state power, particularly in light of past abuses, putting the state at the center of reparations programs may expand state power by perpetuating a subservient relationship between the state and its subjects.[142] That continued domination is both physical (victims remain dependent upon the state for justice and for material support) and more metaphysical—defining former victims as dependants while potentially cleansing the state of its role as a moving force behind past atrocities.[143]

Making the state the primary payer of reparations also puts it in the role of final arbiter of who the real victims are, picking winners and losers in contests among former victims over limited resources.[144] That selection process pits victim groups against one another, fragmenting populations that might ordinarily form coalitions along aligned interests. Lawrie Balfour has suggested that this potential was in full relief in the movement for Japanese reparations in the United States where advocates made their case for compensating victims of internment during World War II by contrasting Japanese Americans with African Americans to suggest that the former were intrinsically more deserving than the latter.[145]

Finally, and from a more practical point of view, some public choice theorists have argued that, as the final arbiter of normative change, governments may be less likely to support or allow social shifts away from abusive practices if the state is required to pay retroactive reparations.[146] The insight is simple: in an environment of rapid social change, if the entity negatively affected by the shift has the capacity to stop or delay change, then it will be more likely to do so if that strategy will best serve its interests. If a state will be called upon to pay reparations posttransition, then that serves as motivation to delay, stop, or constrain transitional movements and reforms.[147]

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142. *Id.*

143. *Id.* at 796–97; *see also* Brian F. Havel, *In Search of a Theory of Public Memory: The State, the Individual, and Marcel Proust*, 80 IND. L.J. 605 (2005) (discussing how Austria constructed a postwar narrative denying state complicity in Nazi crimes).

144. Balfour, *supra* note 6, at 797.

145. *Id.*

146. Levmore, *supra* note 66, at 1687–88.

147. *Id.* at 1687. Levmore's concern certainly has some anecdotal support. For example, victims of internment in the United States during World War II and of the Argentine juntas waited decades for reparation.

*6. Group Sponsored Reparations*

Reparations funded by contributions from the group or groups associated with past abuses may cast a smaller net but are still vulnerable to protests by group members who claim innocence.[148] Those objections are twofold. First, those who regard themselves as innocent may object to making contributions meant to compensate harms caused by others.[149] Second, they may object to the implication, by association, that they are themselves guilty.[150] As opposed to state-sponsored reparations, then, programs that attempt to tap a narrower group may actually meet with louder objection by those who regard themselves as innocent because the targeting carries with it an implication of blame that is absent when the contributions come from state accounts. That implication of guilt may also meet with objections even from those who were perpetrators, for the reasons set forth in Part II.B.8.

*7. Individually Funded Reparations*

Reparations paid by individuals meet a host of justification challenges depending on who the individuals are and how they fit in the matrix of past wrongs. These are elaborated below, but foremost among them are objections relating to selectivity and line drawing. Those actually implicated in past abuses cannot object based on innocence or lack of responsibility, but may express concerns based on the fact that they only did what the law allowed or required and that it would be unfair or unjust to hold them solely or individually to account.[151] Of course, individuals not implicated will object to their being made to bear the burdens of compensating for harms caused by others.[152] Claims based on unjust enrichment may quell the implications of wrongdoing[153] but must themselves face objections sounding in innocent title.[154] Finally, no matter their relation to past abuses, individuals asked to carry the full weight of responsibility for harms perpetrated in the name of a collective enterprise

148. Brody, *supra* note 133, at 1201 (quoting David Horowitz); Epstein, *supra* note 99, at 1188; Forde-Mazrui, *supra* note 24, at 715–16; Tracinski, *supra* note 7, at 153.

149. Miller, *supra* note 6, at 52–53.

150. Forde-Mazrui, *supra* note 24, at 716.

151. *Id.* at 711; Hylton, *supra* note 92, at 1222; Posner & Vermeule, *Reparations*, *supra* note 6, at 691.

152. Epstein, *supra* note 99, at 1188–90.

153. Fortson, *supra* note 91, at 124.

154. Sebok, *supra* note 85, at 655. *But see* Harris, *supra* note 79, at 1773–74, 1778–79.

supported by a predecessor regime, its laws, and its institutions are bound to demand that responsibility be distributed more widely.[155]

*8. Reparations Funded by Perpetrators*

Reparations paid solely by those implicated in past abuses solve the scope problems suffered by more general funding models but, by virtue of that focus, entail discriminate blame of a kind with assignments of criminal or tort liability. That leads to objections born of legality, similar to those raised against criminal prosecutions in transitions.[156] Those asked to pay protest that they should not be held legally liable because the prevailing law under the abusive regime sanctioned, or at least did not punish, their conduct. Legality concerns lead, in turn, to further concerns about line drawing that require determining which levels of involvement or blame are sufficient to trigger duties of contribution and which are not.[157] No matter where those lines are drawn, they will meet with resentment for at least two reasons. First, these selections, by virtue of their selectivity, will face objections of over and under inclusiveness as to who suffered and as to who is responsible. Second, those finally determined to owe duties of repair inevitably will protest that they have been made to carry the water for atrocities that were a function of broader social realities, including an abusive regime, its institutions, and its laws. That protest implicates again concerns with emphasizing group-based oppositions at the center of past wrongs.[158] This reification of social lines of inclusion and exclusion runs the danger of entrenching rather than diffusing social tensions, what Lawrie Balfour, Susan Bickford, and Wendy Brown describe as "ressentiment."[159]

*9. Reparations Funded by Those Associated with Atrocities*

For those actually implicated in past wrongs, none of these line-drawing concerns are resolved by the addition to the pool of payers associated but not actually implicated in abuses. Moreover, those captured

155. Forde-Mazrui, *supra* note 24, at 723.

156. Gray, *Excuse-Centered*, *supra* note 16, at 2638–42; Forde-Mazrui, *supra* note 24, at 711.

157. I address these concerns in the context of criminal trials in Gray, *Excuse-Centered*, *supra* note 16.

158. Brody, *supra* note 133, at 1201 (quoting David Horowitz); Epstein, *supra* note 99, at 1187–88; Kane, *supra* note 11, at 199; Levmore, *supra* note 66, at 1689; Loury, *supra* note 99, at 158; Miller, *supra* note 6, at 46–47; Tracinski, *supra* note 7, at 146, 156–57.

159. Balfour, *supra* note 6, at 788.

by the widened net will repeat now familiar objections. Those merely associated with past abuses who are asked to contribute to reparations programs will object that they are not those most responsible and that lines of obligation should be drawn more narrowly, excluding them, or more broadly, including others. Legality concerns, while not completely salient, only add fuel to these fires of resentment,[160] and, again, resentment raises the risk of reinvigorating lines of social opposition implicated in past abuses.

*10. Reparations Paid by those Not Implicated in Past Abuses*

Line-drawing concerns reach their apex in cases where those not implicated in past abuses are asked to pay reparations to victims.[161] While acute in cases of state-sponsored reparations, "It wasn't me" objections are far more powerful where someone not implicated is asked to pay for the wrong of another even if the wrongdoer is also made to pay.[162] The source of that objection is so ubiquitous that it can make a plausible claim to Truth, or at least to being fundamental to the human condition. Manuel G. Velasquez puts it as elegantly as anyone, pointing out that:

> [N]either blame nor punishment are appropriate (i.e., morally justified) when a person is not morally responsible for an act in the sense . . . . [that] if an act is not the (causal or conventional) result of my own, direct bodily movements (or omissions) or if it is not an intentional consequence of these movements, then it is not appropriate to blame or punish me for the act.[163]

That a request might be only for a partial contribution may mute some of the outrage but certainly does not moot objections from those not implicated in past abuses that they simply are not to blame and should not be forced to pay for harms caused by another.

*11. Persistent Themes*

Several themes emerge from this brief overview. Two deserve particular attention. First, whether reparations are symbolic or material, there are problems with distribution and fit. Reparations programs may

160. Forde-Mazrui, *supra* note 24, at 707.
161. *Id.* at 715–16.
162. *See* Scalia, *supra* note 9, at 88.
163. Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, *in* COLLECTIVE RESPONSIBILITY 111, 115 (Larry May & Stacey Hoffman eds., 1991).

benefit too many or too few, providing benefits that some will find insufficient and others will deem excessive. Second, reparations programs will face vigorous opposition if contributions are drawn from those who claim that they did not do anything wrong.[164] This second concern is particularly acute in circumstances of historical abuses, where the original abusers are long dead.[165] "It wasn't me" objections are not limited to this circumstance, however, and even if a reparations program seeks funds only from those implicated in past abuses, payers will challenge their liability on the grounds that they only did what was expected of them, or at least did not violate then-existing law.[166]

Both of these themes and their variations get traction from problems of desert, which bespeaks what Pablo De Greiff has called a juridical bias[167] and treats reparations as special tort awards. On the juridical view, reparations seek to compensate for harm measured historically, as *status quo ante*[168] or, counterfactually,[169] as *utinam aliter esset*.[170] This tort model implicates basic moral considerations and fundamental notions of fairness[171] that, in turn, give substance to the most common objections to reparations programs. "It wasn't me" is only relevant in light of background commitments that one should not be held to account for harm caused by another and one should not be blamed for doing what, at the time, seemed right under the law.[172] Reparation payments are only

164. Brody, *supra* note 133, at 1202–06; Brophy, *supra* note 54, at 121; Posner & Vermeule, *Reparations*, *supra* note 6, at 703–04; Tracinski, *supra* note 7, at 151–55. There are many other objections that can be made. For example, both victims and contributors might object if the class of beneficiaries includes nonvictims or if the nature and degree of benefits does not reflect variations in abuses and harms suffered. For present, however, I will limit myself to two of what I take to be the most significant objections, noting that the theory developed in the process will provide grounds for responding to many other challenges to reparations programs.

165. McCarthy, *supra* note 6, at 757.

166. Forde-Mazrui, *supra* note 24, at 711; Hylton, *supra* note 92, at 1222; Posner & Vermeule, *Reparations*, *supra* note 6, at 691 (noting that reparations are typically provided "on the basis of wrongs that were substantively permissible under the prevailing law when committed").

167. De Greiff, *supra* note 30, at 451–53; *see also* McEvoy, *supra* note 17, at 16.

168. *See, e.g.*, Shelton, *supra* note 94, at 844. While not central to the present analysis, it is worth noting that any measure of harm based on *status quo ante* assumes a historical moment of justice that can serve as a point of comparison. In many abusive regimes there is no such moment. *See* De Greiff, *supra* note 30, at 457; Rubio-Marín & De Greiff *supra* note 54, at 325.

169. Brophy, *supra* note 54, at 133; Harris, *supra* note 79; McCarthy, *supra* note 6, at 755.

170. I owe this translation to Professor Andrew Miller by way of our student Katie O'Malley, who recommended it to capture the concept of the world as it would have been now had the past event not occurred, a sighing comparative measure related to, but distinct from, the more familiar *status quo ante*. *See* Brophy, *supra* note 54, at 133; Posner & Vermeule, *Reparations*, *supra* note 6, at 691; Roht-Arriaza, *supra* note 35, at 158.

171. *See* Brophy, *supra* note 54, at 135–36 (advocating for a reparations model focusing on assignments of moral culpability).

172. Brody, *supra* note 133, at 1202.

inadequate if tied to some claim of harm. Line-drawing problems with respect to beneficiaries only matter if there is some sense that only those who suffered harm ought to receive compensation and only to the degree or extent of their suffering.

These intuitions are born of an "ethical individualism"[173] that is foundational to most tort and criminal law,[174] not to mention the rule of law itself.[175] However, they are relevant in the present context only insofar as reparations are viewed retrospectively and as compensation for harm. That retrospectivity and focus on harm forms the core of the juridical bias. That bias reflects a presumption that transitional justice is just a special case of ordinary justice[176] and reparations in the transitional justice context just a special kind of tort award susceptible to constraints familiar from criminal law and tort. This Article argues that this bias is misplaced. Transitional justice is not just a special case of ordinary justice. Therefore, no matter how laudable the moral intuitions of ethical individualism may be, they provide no grounds for objecting to well structured and properly conceived reparations programs deployed as part of a broader program of transitional justice. Part IV charts that course. Before getting there, however, it is worth taking a few moments to consider some of the alternative approaches proposed in the literature.

## III. POTENTIAL RESPONSES

"Responsibility" is a notoriously elusive concept, a fact H.L.A. Hart captured in a delightful exercise of ambiguation:

> As captain of the ship, X was *responsible* for the safety of his passengers and crew. But on his last voyage he got drunk every night and was *responsible* for the loss of the ship with all aboard. It was rumored that he was insane, but the doctors considered that he was *responsible* for his actions. Throughout the voyage he behaved quite *irresponsibly*, and various incidents in his career showed that he was not a *responsible* person. He always maintained that the exceptional winter storms were *responsible* for the loss of the ship,

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173. Posner & Vermeule, *Reparations*, *supra* note 6, at 703; *see also* McCarthy, *supra* note 6, at 759.

174. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 246 (1952).

175. Tracinski, *supra* note 7, at 146 (asserting that one of the "basic moral principles at the foundation of American law" is "that justice is *individual*").

176. *See, e.g.*, Eric Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004) [hereinafter Posner & Vermeule, *Ordinary Justice*].

> but in the legal proceedings brought against him he was found criminally *responsible* for his negligent conduct, and in separate civil proceedings he was held legally *responsible* for the loss of life and property. He is still alive and he is morally *responsible* for the deaths of many women and children.[177]

Some of the distinctions Hart suggests are quite fine.[178] "Responsibility" may mean an obligation to compensate for harm because one's actions were culpable, because those actions caused the harm, or simply because one has assumed a duty of repair.[179] In addition to purely retrospective responsibility for past harms, "responsibility" may attach to a condition of character or practice, what Manuel G. Velasquez has called responsibility's "aretaic" sense.[180] "Responsibility" may also be more prospective, as in "the captain is *responsible* for the safety of his passengers and crew."

Any claim for reparations must rest on some theory of responsibility. As the preceding section revealed, much of the debate about reparations assumes that the sense of responsibility germane to transitional justice is akin to ordinary justice claims in tort or criminal law. This assumption leads most reparations claims into an argumentative or political dead end and raises serious practical difficulties. In the remainder of Part III, this Article examines some of the most prevalent efforts to avoid this cul-de-sac and describes how each is insufficient to the meet the unique demands of justice in transition. Part IV capitalizes on this discussion to sketch a more descriptively appealing and normatively powerful account of reparations based on a conception of responsibility tailored to transition.

### *A. Collective Responsibility*

> "[M]embership in a collective entity brings with it certain benefits and costs, rights and obligations, as incidents of membership. A principal reason for forming and joining a collective group is to gain certain advantages not available to disassociated individuals. The consideration for such advantages gained from group membership is

177. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 211 (1962).

178. *See, e.g.*, Michael Moore, Law and Psychiatry: Rethinking the Relationship 49–53 (1984).

179. Velasquez, *supra* note 163, at 112.

180. *Id.* "Aretaic" has ancient roots in Plato and particularly Aristotle, whose work on eudaimonism provides the foundation for contemporary virtue ethics propounded by, among others, G.E.M. Anscombe, Phillipa Foot, Martha Nussbaum, Linda Zagzebski, Lawrence Solum, and Richard Kraut.

> that burdens incurred or experienced by the collective group may fairly be shared by the entire membership. A member cannot fairly claim the right to retain membership in the collective entity, including any benefits flowing therefrom, while denying any share in the burdens of membership."
>
> —Kim Forde-Mazrui[181]

In the face of objections borne of ethical individualism, some reparations proponents turn to theories of collective responsibility.[182] The insight is fairly straightforward. There is no contest that horrific wrongs occurred under an abusive regime. Those acts were widespread, implicating thousands of individuals and diffusing responsibility. Abuses also were institutionalized, and approved or supported by a background set of legal and social norms. If those facts make it either unfair or unrealistic to identify and hold responsible a discrete set of individuals, then for those same reasons it makes sense to hold responsible the group as a whole.[183] If a group pursued abuses through state institutions, then it likewise makes sense to hold the state liable for resulting harms.[184]

Shifting from individual to collective responsibility has a number of salutary effects. First, it limits claims for reparation to the group or the state, thereby avoiding most line-drawing problems. Second, because no individuals are held personally liable, defenses based on ethical individualism appear to melt away. Those advantages are particularly evident where the claim for reparation is based on unjust enrichment.[185] In general, unjust enrichment claims focus on redistribution of resources rather than blame,[186] rendering irrelevant assertions of personal innocence.[187] Measuring unjust enrichment on a group, rather than

181. Forde-Mazrui, *supra* note 24, at 717–18.

182. *See, e.g.*, JASPERS, *supra* note 15, at 25; Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992); George Fletcher, *Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002); Forde-Mazrui, *supra* note 24, at 715–26; Peter A. French, *The Corporation as a Moral Person*, *in* COLLECTIVE RESPONSIBILITY 133 (Larry May & Stacey Hoffman eds., 1991); Heinrich Gomperz, *Individual, Collective and Social Responsibility*, 49 ETHICS 329, 333 (1939); McCarthy, *supra* note 6, at 756–58; Miller, *supra* note 6, at 72–73; Sepinwall, *supra* note 6, at 202–28.

183. *See* Brooks, *supra* note 6, at 276.

184. *See* McCarthy, *supra* note 6, at 762; Sepinwall, *supra* note 6, at 215–16.

185. *See, e.g.*, Bernard Boxill, *Morality of Reparation*, 2 J. SOC. THEORY & PRAC. 113, 120 (1972); Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139 (2004); Forde-Mazrui, *supra* note 24, at 694–710; *see also* Fortson, *supra* note 91, at 80.

186. *See* Brooks, *supra* note 6, at 284.

187. Fortson, *supra* note 91, at 111–15, 123–24.

individual, basis makes matters even more comfortable for individuals since nobody's personal property or wealth is singled out as being the product of atrocity.

For example, in a recent article on domestic claims for material reparations, Kim Forde-Mazrui contends that slavery and subsequent practices of racial discrimination implicate American society at large.[188] Contesting popular conceptions that intense racial discrimination is limited to Southern states, she contends that current disparities in achievement between whites and blacks are "not surprising,"[189] but are bound to a set of racist practices to which American society at large subscribed and from which the nation as a whole has profited.[190] Signaling basic agreement, the United States Senate recently found that "African-Americans continue to suffer from the consequences of slavery and Jim Crow laws."[191] Evidence supporting that view is striking. As Randall Robinson has pointed out, while black Americans account for only fourteen percent of nonviolent drug crime, they represent seventy-five percent of prison admissions for nonviolent drug crime.[192] Thomas McCarthy recounts the history of housing law and practice in the United States, describing how segregation, redlining, and exclusion from historic federal housing programs has resulted in a tremendous wealth gap in the United States along racial lines.[193] Relying on "corrective justice," Professor Forde-Mazrui concludes that since all of America engaged in racial discrimination from its inception, all of America is responsible for contemporary harms caused by that discrimination.[194] Thus, "[e]ach American child born today into a life worse off than it would be had society not practiced slavery, segregation, and other discrimination, or had society adequately remedied their effects, is a new individual victim of societal discrimination" entitled to redress based on that counterfactually measured harm.[195]

Ryan Fortson takes a different, but related, tack, relying on Cheryl Harris's groundbreaking work on the property value of racial identity.[196] Fortson argues that contemporary material disparities between groups

188. Forde-Mazrui, *supra* note 24, at 698, 716–20.
189. *Id.* at 704.
190. *Id.* at 694–710; *see also* Fortson, *supra* note 91, at 80.
191. S. Con. Res. 26, 111th Cong. (2009).
192. Robinson, *supra* note 97, at 2.
193. McCarthy, *supra* note 6, at 758–64.
194. Forde-Mazrui, *supra* note 24, at 708–09.
195. *Id.* at 708–09; *see also* Harris, *supra* note 79, at 1784.
196. Harris, *supra* note 79, at 1784; *see also* Brooks, *Reparations*, *supra* note 6, at 280.

reflect a property interest enjoyed by the dominant or oppressive group.[197] On his view, as on Forde-Mazuri's, that property interest is best addressed by group-level redistribution of material and opportunity resources.[198]

This associational view of collective responsibility is echoed in the literature on moral taint.[199] Moral taint relies on linking the pride one often feels for accomplishments of a group or its members to the shame one ought to feel for harms caused by a group or associates.[200] This taint is independent of any causal connection to harm. So, moral taint theorists conclude, one can feel shame for the crimes of a child, sibling, or friend even if one has no knowledge of or connection to those acts.[201]

A more sophisticated view of collective responsibility that bears some resemblance to moral taint relies on the existential fact of membership. For example, Amy Sepinwall argues that groups exist only by virtue of the voluntary association of their members.[202] To persist over time, groups must recruit new members. All groups have a history, some good, some bad, and that history implies both benefits and burdens. From this, Sepinwall argues, it follows that present-day members of a group bear responsibility for duties of repair owed by the group because it is their very membership in the group that allows it to exist and persist.[203]

The application of collective responsibility and moral taint to claims for reparation is obvious. To the extent those asked to pay are identified, at least in part, according to membership in a group whose members perpetrated atrocities, those payers are tainted and should contribute to reparations in order to recognize and cleanse that taint.[204] However, there are a number of difficulties with resting reparations claims on grounds of collective responsibility, many of which derive from the ethical individualism group liability hopes to avoid.

To start, reparations claims that rely on contemporary disparities in achievement or wealth still bear a burden of showing a causal connection to the history of abuse. That may be a difficult task, particularly in cases

197. Fortson, *supra* note 91, at 111–15.

198. *Id.* at 111, 114–27.

199. *See, e.g.*, KUTZ, *supra* note 25, at 113; OSHANA, *supra* note 25, at 76; Appiah, *supra* note 25, at 185; May, *supra* note 25, at 151 (1992); Sepinwall, *supra* note 6, at 216–28.

200. *See* JASPERS, *supra* note 15, at 73; Forde-Mazrui, *supra* note 24, at 717–18; H. D. Lewis, *Collective Responsibility (A Critique)*, *in* COLLECTIVE RESPONSIBILITY 17, 19–21 (Larry May & Stacey Hoffman eds., 1991).

201. David Kaczynski cited moral taint as his motivation for turning in his brother Ted, the famed "Unabomber," to authorities. OSHANA, *supra* note 25, at 72.

202. Sepinwall, *supra* note 6, at 202–05.

203. *Id.* at 191, 205–08.

204. OSHANA, *supra* note 25, at 76.

where reparations claims are based on historical wrongs. The offer of proof is usually statistics documenting disparities in wealth, achievement, or opportunity, and the verdict depends on inferring a causal connection.[205] However, correlation does not entail causation.[206] That fallacy presents a particular danger to material reparations programs, including affirmative action, because awards made to groups and institutions necessarily devolve upon individuals. As Judge Posner put the point in *In re African-American Slave Descendents Litig.*, "[t]here is no way to determine that a given black American today is worse off by a specific, [calculable] sum of money (or monetized emotional harm) as a result of the conduct of one or more of the defendants."[207]

This is yet another instance of the by now familiar objection that reparations ought not to benefit those who have not suffered harm and certainly should not go to those whose hands are not clean.[208] As Judge Posner suggests, reparations claims implicate a potential beneficiary's personal history. In the case of historical wrongs, that history may involve so many variables that it becomes impossible to disentangle the impact of personal decisions, talents, and ambitions from external constraints imposed by an abusive regime. That leaves reparations programs vulnerable to arguments that any potential beneficiary's contemporary material conditions are the consequence of mistakes and failures of his or her forebears.[209] In this context, the successes of some members of a targeted group during the history of an abusive regime may be used to argue that a potential beneficiary's situation is not a result of social injustice at all, but a personal failure on his part or that of his forebears.

Just as group reparations devolve upon individuals, collective duties to fund reparations ultimately fall on individual members, even if only in the form of taxes. This again implicates complicated personal narratives, particularly in the case of historic wrongs where disparities in wealth provide primary evidence of abuses. Some potential contributors will argue that their personal success is consequent of hard work, not injustice. Alternatively, members of the payer group may acknowledge that their

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205. *See, e.g.*, S. Con. Res. 26, 111th Cong. (2009); McCarthy, *supra* note 6, at 758–64; Robinson, *supra* note 97, at 2; *see generally* Sebok, *supra* note 85.

206. *See* Bruce Sacerdote, Slavery and the Intergenerational Transmission of Human Capital (Sept. 10, 2002) (unpublished manuscript, *available at* http://www.dartmouth.edu/~bsacerdo/wpapers/Slavery3.pdf) (arguing that the economic effects of slavery dissipated several generations ago).

207. *In re* African-American Slave Descendents Litig., 471 F.3d 754, 760 (7th Cir. 2006) (Posner, J.).

208. *See* Laplante, *supra* note 115, at 52–53.

209. *See, e.g.*, Tracinski, *supra* note 7.

wealth is in part a function of historical wrongs but maintain that for them this is a matter of moral luck,[210] providing ground to argue that they are not "responsible" for duties of repair because they are not to blame. Setting aside blame in favor of claims based on unjust enrichment are unlikely to move the conversation very far in light of the common law bar of innocent title.[211]

Collective responsibility advocates confronted with these responses inevitably cry foul, pointing out that these critiques revert to the normative vocabulary of ethical individualism and therefore constitute a non sequitur.[212] However, it is not at all clear that this is responsive. What these practical objections reveal is a conceptual error at the core of collective responsibility: groups do not act, only individuals act.[213] While internal decision structures may allow individuals to commit structured groups to courses of action,[214] those decisions are made by individuals and those initiatives can only be carried out by individuals. That simple fact has two consequences.

First, because a collectivity cannot act, it frequently is the case that the conduct of individuals cannot rightly be attributed to the whole. At the very least, making that case will require demonstrating that the actions of those individuals were directed or condoned according to the rules of internal decision making that governs the group.[215] That may be easy for corporations, but it becomes much more difficult for states and impossible for ethnic or religious groups.[216] Therefore, collective responsibility and moral taint are simply too blunt to serve as tools for distributing duties of repair that will be borne by individuals directly or derivatively. After all, literal application will capture for equal blame, by virtue of ethnicity or other group affiliation, full-fledged abusers, those who simply did not know what was afoot, and those who battled heroically, perhaps at great personal peril, to prevent or limit the impact of abuses perpetrated by others.

Second, the fact that there often is diversity in the relationships between individual members of a group and abuses purportedly committed

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210. On the question of moral luck, *see* Williams & Nagel, *supra* note 3. I am in debt to my student Adam Sharpe for our exchanges on this point.

211. Sebok, *supra* note 85, at 655.

212. JASPERS, *supra* note 15, at 84–91; Forde-Mazrui, *supra* note 24, at 724–25.

213. *See* JASPERS, *supra* note 15, at 33–36; Lewis, *supra* note 200, at 20; Velasquez, *supra* note 163, at 124.

214. *See, e.g.*, French, *supra* note 182.

215. *Id.* at 133.

216. JASPERS, *supra* note 15, at 33–36.

in the name of that group reveals a devolution problem at the core of collective responsibility. Put succinctly, just because the conduct of some individuals is attributed to a corporation or group does not mean that the consequences as duties of repair can rightly fall upon all members, many of whom may be innocent. Advocates might respond that such disparities are of no consequence in light of failures by the group and its individual members to protect oppressed populations[217] or the fact that they have allowed the group to persist.[218] However, that requires reliance on a theory of liability by omission, which is no small feat, and further ignores the fact that some group members may in fact have been moral heroes who fought against policies of slavery, segregation, or torture but simply failed to stop abuses.

The conceptual difficulties with collective responsibility are not limited to actus reus. To make a claim of group liability requires some theory of mens rea as well. Again advocates must confront the fact that groups can only act through individuals. This presents one of two options. First, collective responsibility advocates can assume that each agent's acts reflect his individual mental state. However, to do so would be to revert to individual responsibility, opening the door to objections based on ethical individualism that theories of collective responsibility seek to avoid. Alternatively, advocates can embrace some theory of collective consciousness exercised through agents akin to the way that our individual intentions are exercised through our hands. This view is hard to square with subjective experience and closely held commitments to free will.[219] Even were one to accept such a notion, however, it appears that any collective consciousness engaged in targeted atrocities has a ready defense of mistake.[220]

Atrocities on a scale warranting transitional justice rely on a belief that victims are rightly the objects of abuse, sometimes as a matter of convenience, but more often because victims are regarded as less than human[221] or as posing an imminent threat.[222] To hold a group responsible for abuses perpetrated under the influence of such false beliefs requires holding that group liable for the beliefs themselves. That, in turn, requires identifying a moment in the historical genesis of those beliefs when it can

217. *See, e.g.*, Forde-Mazrui, *supra* note 24, at 722.
218. *See, e.g.*, Sepinwall, *supra* note 6, at 213–15.
219. *See generally* Strawson, *Freedom and Resentment*, *supra* note 3.
220. I am in debt to Ronald Dworkin for conversations and exchanges on this point.
221. McCarthy, *supra* note 6, at 623, 632–33 (noting "scientific" rationalizations for slavery and anti-Semitism).
222. *See* Gray, *Excuse-Centered*, *supra* note 16, at 2629–42; *infra* Part IV.A.

rightly be said that the group as a whole acted willfully, knowingly, or at least recklessly in allowing itself to pursue an epistemic path to atrocities.[223] That is a hard story to tell. Moreover, it entails a regress that, even if not infinite, is bound to extend to a time long before contemporary constituents of the group were around. This puts collective responsibility advocates on the hook for not just a theory of collective consciousness, but also for a theory of group identity over time sufficiently robust to capture as one hundreds of thousands, if not millions, of individuals separated by space, time, and experience.

Among others, Amy Sepinwall and Thomas McCarthy offer a potential response.[224] Assuming as an abstract matter that groups can maintain continuous identity over time,[225] these scholars argue that those who associate themselves with a group and claim the benefits of membership must also assume the burdens of that association, including responsibility for past wrongs.[226] This view certainly has some footing in corporate law, where companies routinely are held liable for the conduct of predecessor entities.[227] However, this approach to collective responsibility fails to appreciate the nature of transitions, fails to address critical questions about the terms of membership in the relevant group, and endorses an account of historical-group responsibility that is far too dangerous to garner support in the context of transitional justice debates.

First, transitional regimes are defined in opposition to the very conduct of their predecessors that gives rise to reparations claims.[228] Therefore, it is not at all clear that a theory of group identity over time would apply in transitions.[229]

Second, the most common targets for collective responsibility are states, racial groups, or ethnic groups.[230] For most members of these groups, membership is a matter of birth. As a consequence, there is no moment of voluntary association upon which advocates can rest claims of

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223. *See generally* Rosen, *supra* note 3.

224. *See, e.g.*, Forde-Mazrui, *supra* note 24, at 717–18; McCarthy, *supra* note 6, at 757–58; Sepinwall, *supra* note 6, at 205–09.

225. Sepinwall, *supra* note 6, at 202–03.

226. McCarthy, *supra* note 6, at 757–58; Sepinwall, *supra* note 6, at 205–09.

227. *See*, *e.g.*, Ramirez v. Amsted Indus., Inc., 431 A.2d 811, 825 (N.J. 1981) ("[W]here one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line . . . .").

228. RUTI TEITEL, TRANSITIONAL JUSTICE 28–33 (2002).

229. For an argument in favor of holding successor regimes liable for the debts incurred by their forbears, see Gray, *Devilry*, *supra* note 44, at 147–57.

230. *See, e.g.*, Sepinwall, *supra* note 6, at 209.

responsibility for the group. Reversion to implied consent is of little assistance in light of the fact that exiting one's racial or ethnic identity is impossible and exiting one's state of birth practically so.[231]

Third, and most troubling, is that the associational view of group responsibility seems to endorse group consciousness and a brand of group responsibility that is heavily implicated in atrocities. The Balkans provide the most ready example,[232] but many atrocities are driven at least in part by a sense of duty held by members of one group to seek justice for historical offenses.[233] Therefore, unless one is willing to endorse the theory behind intergenerational blood feuds, reserving criticism only for methods, it is hard to endorse collective responsibility as a ground for reparations.

A moment's reflection on the foregoing discussion reveals that the real problem with reparations claims based on theories of collective responsibility is that they run aground on the same shoals upon which individually oriented theories founder. Most objections to reparations programs rest on the presumption that reparations claims are meant to compensate for past harms.[234] Reparations theories that appeal to collective responsibility confront similar or identical objections because they embrace, rather than examine, this retrospective bias and commitment that reparations are a form of compensation for harm. These conceptual choices make inevitable the practical objections set forth here. Those objections can only be avoided if reparations advocates take seriously the source and nature of pretransitional abuses and the liminal position of reparations in the context of a broader effort to achieve justice in transition.

### *B. Atonement*

Some reparations advocates recognize the dangers of applying compensatory frameworks familiar from ordinary justice to transitional circumstances. For many of the reasons discussed above, these theorists

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231. For a useful overview of the debate, see Linda Barclay, *Liberalism and Diversity*, *in* THE OXFORD HANDBOOK OF CONTEMPORARY PHILOSOPHY 155 (Jackson & Smith eds., 2005).

232. Richard Rorty, *Human Rights, Rationality, and Sentimentality*, *in* ON HUMAN RIGHTS 111, 112–15 (Shute & Hurley eds., 1993).

233. DANIEL GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 27–163, 416–54 (1996); PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 47–62, 96–131 (1998); MINOW, VENGEANCE & FORGIVENESS, *supra* note 82, at 10–11.

234. *See infra* Part II.B.

conclude that retrospective tort models "undermine [social] harmony and reconciliation," "result in an insufficient development of the historical record," and suffer a "moral deficiency" by mistaking compensation for acceptance of responsibility.[235] As an alternative to retrospective compensation, some of these critics argue for a model of reparation as atonement and redress. As described by one of its most sophisticated advocates, the "atonement model is crafted from th[e] post-Holocaust spirit of heightened morality, identity between victim and perpetrator, egalitarianism, and restorative justice."[236]

Atonement theories are entirely prospective[237] and focus on achieving reconciliation between former abusers and victims.[238] The core of the model is a substantial apology composed of "(1) confess[ion] of the deed, (2) admi[ssion] that the deed constitutes an atrocity, (3) repent[ance], and (4) ask[ing] for forgiveness."[239] So conceived, symbolic reparations are not merely hollow efforts to fill compensation gaps; rather, they reflect "remorse," the "taking [of] personal responsibility," and a sincere effort at reconciliation.[240] As opposed to ordinary justice approaches, atonement regards material reparations not as compensation for harms suffered, but as a "tangible . . . redemptive act . . . [that makes] the apology believable"[241]; reparations are not "punishment for guilt, but rather, [they are] an acknowledgement of guilt."[242]

The instinct to turn away from ordinary justice models of retrospective compensation in favor of a more prospective focus on transitional goals of social healing and reconciliation is laudable. Unfortunately, putting the weight of reparation programs on apology and forgiveness commits advocates to conceptual constraints that render the entire approach practically naïve and potentially oppressive. These difficulties become apparent upon closer investigation of the internal dynamics of atonement.

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235. Brooks, *Perpetrator-Focused*, *supra* note 11, at 65 (2004); *see also* Anthony J. Sebok, *Two Concepts of Injustice in Restitution for Slavery*, 84 B.U. L. REV. 1405, 1424–27 (2004).

236. Brooks, *Perpetrator-Focused*, *supra* note 11, at 66.

237. Brooks, *Reparations*, *supra* note 6, at 255.

238. *See, e.g.*, BROOKS, WHEN SORRY ISN'T ENOUGH, *supra* note 6, at 6–7; Brooks, *Perpetrator-Focused*, *supra* note 11, at 63; Brooks, *Reparations*, *supra* note 6, at 254, 273–79; Miller, *supra* note 6, at 71–79; Roht-Arriaza, *supra* note 35, at 159; Lewis Beale, *Seeking Justice for Slavery's Sins*, L.A. TIMES, Apr. 22, 2002, at 1 (quoting Deadria Farmer-Paellmann, plaintiff in *In re* African-American Slave Descendents Litig., 471 F.3d 754 (7th Cir. 2006)).

239. Brooks, *Perpetrator-Focused*, *supra* note 11, at 67.

240. *Id.* at 67; *see also* Sebok, *supra* note 235, at 1424–27.

241. Brooks, *Perpetrator-Focused*, *supra* note 11, at 67.

242. *Id*.

The acceptance of responsibility at the heart of the atonement model is akin to what Karl Jaspers has called "moral guilt" in that it is internal and can only be assessed internally.[243] That is, as compared to criminal guilt, which is determined and imposed externally regardless of the criminal's acceptance of responsibility,[244] the moral guilt that gives rise to apology is wholly a function of subjective acceptance of responsibility. Apologies therefore cannot be demanded. By definition, they must be internally generated, spontaneous, and reflect a genuine acceptance of responsibility.[245] The internal genesis of apology is crucial to atonement theory and marks the distinction for advocates between punishment and acceptance of guilt.[246] The atonement approach therefore avoids "It wasn't me" objections born of ethical individualism by persuading those asked to pay or support reparations that, in fact, it was them.[247] Advocates further contend that this brand of spontaneous and genuine apology provides a more promising basis for social reconciliation, healing, and reconstruction than tort-based models.[248]

However attractive atonement and apology may be in the abstract, this approach to reparations raises daunting practical concerns. Principally, because apology and atonement are tied to spontaneous subjective mental, ethical, and moral states,[249] there can be no procedural guarantees of success. No matter how comprehensive a truth commission or other process might be, it may reach its conclusion and still find a recalcitrant abuser who clings to the fiction of his innocence, is steadfast in his belief of entitlement in past abuses or present enrichment, or for any other reason declines or refuses to apologize and pay material reparations. Ironically, then, atonement advocates ultimately seem to assume or endorse, rather than avoid, basic principles of ethical individualism. As a consequence, when faced with a contumacious abuser, any model that depends upon apology for its success has no way to proceed. Any enforcement

243. JASPERS, *supra* note 15, at 25–26.

244. *Id.* at 25.

245. Brooks, *Perpetrator-Focused*, *supra* note 11, at 64; *see also* Jean Hampton, *Correcting Harms vs. Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1677 (1992).

246. Brooks, *Perpetrator-Focused*, *supra* note 11, at 67.

247. *See, e.g.*, Brooks, *Perpetrator-Focused*, *supra* note 11, at 66–67; Matsuda, *supra* note 106, at 390; *see also* Hampton, *supra* note 245, at 1677.

248. *See* STRAWSON, *supra* note 3, at 191 (noting that "to forgive is to accept the repudiation and to forswear the resentment [of a wrong done]"); Fortson, *supra* note 91, at 123; Richard Weisman, *Showing Remorse at the TRC: Towards a Constitutive Approach to Reparative Discourse*, 24 WINDSOR Y.B. ACCESS JUST. 221 (2006).

249. STRAWSON, *supra* note 3, at 191; Hampton, *supra* note 245, at 1677.

mechanism, whether carrot or stick, taints the apology and renders it insufficient to the task of atonement.[250]

Whether viewed in the abstract or through the lens of history, the practical likelihood that abusers will refuse to apologize is quite high, suggesting that sincere apology is and will be the exception rather than the rule.[251] Foremost among these concerns is the obvious psychological stake that former abusers have in avoiding acceptance of responsibility. Atonement requires that former abusers acknowledge and accept responsibility for horrific acts of violence. Given how hard it is for most people to truly accept responsibility for minor offenses and sexual dalliances, it is hard to imagine that perpetrators of murder, rape, torture, and genocide will be ready and willing to confront their past acts with sufficient depth and honesty to offer the kind of apology atonement requires. Such apologies are certainly the exception in the case of stable state crimes, not the rule. Even where guilt is admitted, offenders routinely seek refuge from full accountability in their upbringing or their social and economic circumstances.[252] Participants in mass atrocities have a more persuasive case on this score than most. Whether true believers, followers, or abettors, participants in mass atrocities act within background social norms and black letter law that presents targeted violence as right, necessary, or at least not illegal.[253] That fact provides a ready and psychologically appealing option to full and honest apology: blaming the system. That remains a common defense in the United States for those who owned slaves,[254] participated in Jim Crow laws, and it is even advanced as an excuse for those who participated in lynching.[255]

The natural psychological resistance to admitting participation in unfathomable evil is only stronger when coupled with the prospect of material loss. Central to the case for atonement is the necessity that apology be made manifest in the form of material reparation.[256] The

250. Roy Brooks, for one, admits this limitation. *See* Brooks, *Perpetrator-Focused*, *supra* note 11, at 67.

251. For example, some of the most high-profile perpetrators of abuses during Apartheid refused to participate in the South African Truth and Reconciliation process. *See* ALEX BORAINE, A COUNTRY UNMASKED, 216–20, 257, 303–05 (2000).

252. *See* 18 U.S.C. § 3661 (2000) (allowing judges to consider a defendant's background in sentencing); Williams v. New York, 337 U.S. 241 (1949).

253. Gray, *Excuse-Centered*, *supra* note 16, at 2629–36 (arguing that, while an excuse based on background norms has no moral validity, it does have legal weight under the principle of legality in the form of a duty of fair warning).

254. *See* David Lowenthal, *Thomas Ruffin And The Perils Of Public Homage: On Arraigning Ancestors: A Critique Of Historical Contrition*, 87 N.C. L. REV. 901, 935 (2009).

255. IFILL, *supra* note 64, at 17, 64–66.

256. Brooks, *Perpetrator-Focused*, *supra* note 11, at 67.

sacrifice entailed by material reparations stands as a significant barrier to apology. For example, passage of the 2009 resolution apologizing for slavery by the United States Senate was only possible when sponsors added language disclaiming any obligation to pay material reparations.[257] Fears of material sacrifice also played an important role in South Africa's Truth and Reconciliation Commission, which famously offered amnesty from criminal and civil liability in exchange for public admission of participation in Apartheid abuses.[258] It is hard to take too seriously an apology given in exchange for protection from material or personal loss.

In short, while we might hope that the process of transition will inspire some to take responsibility for their contributions to past abuses and to express those sentiments by apologizing and making sincere offers of material reparation, experience and common sense suggest that this will be the exception rather than the rule. The atonement model, while attractive in the abstract, therefore holds little practical promise, leaving justice at the whim of former abusers who have little motivation to apologize at all, much less with the sincerity required to achieve atonement. These difficulties are not resolved by turning to collective apologies. Just as with other forms of collective responsibility, the expectations and requirements of atonement devolve upon individuals. Without the full and meaningful engagement of individual citizens, the apologies of political leaders are symbolic in the pejorative.

These concerns certainly should trouble any advocate of the atonement model of reparations. However, the most compelling objections are revealed when we turn to the role played by former victims in the atonement scheme. According to advocates, atonement is a reciprocal relationship between abuser and victim.[259] Atonement requires not only a sincere, self-generated apology, but also acceptance and forgiveness by former victims.[260] This implies that genuine apology constitutes a redeemable claim for forgiveness by a former abuser and a consequent duty on the part of victims to forgive. In Brooks's view, for example, a genuine apology coupled with a substantial offer of reparation constitutes a "civic subpoena," imposing upon victims a "civic responsibility to forgive and thereby begin the process or repairing a broken

257. *See* S. Con. Res. 26, 111th Cong. (2009).

258. BORAINE, *supra* note 46, at 201–02; Colvin, *supra* note 38, at 193.

259. Brooks, *Reparations*, *supra* note 6, at 273.

260. Brooks, *Perpetrator-Focused*, *supra* note 11, at 67; Brooks, *Reparations*, *supra* note 6, at 255; Jens Meierhenrich, *Varieties of Reconciliation*, 33 LAW & SOC. INQUIRY 195, 207 (2008).

relationship."[261] This view is not only incoherent, it is oppressive, denies the dignity of victims, and constitutes a perpetuation of abuse.

Like apology, forgiveness is a spontaneous subjective mental state with no procedural or ontological predicates.[262] A victim will forgive or not as she will; the decision lays solely within her power.[263] Forgiveness is never owed.[264] There are no objective conditions of sufficiency and there certainly are no standard conditions the fulfillment of which makes forgiveness necessary.[265] Furthermore, giving an apology on the condition that forgiveness will be owed renders the sincerity of the apology suspect. Some victims of atrocity may choose to forgive, but many will not.[266] To ignore, and thereby fail to respect, the authority of victims not to forgive is to deny their dignity and autonomy.[267] The oppressiveness of such a demand is only magnified if, as Martha Minow has suggested, forgiveness entails or invites forgetting past wrongs.[268]

An objective demand for forgiveness imposes upon the victim a duty that is not hers.[269] More dangerous still, it implies that the victim is to blame if she declines or refuses to forgive. Any effort to enforce an obligation to forgive by, say, withholding reparations payments, just makes matters worse and carries a flavor of abuse and manipulation. Reparations movements simply cannot engage in such behavior and still carry the mantle of justice. To claim otherwise, as the atonement model does and must in order to pursue its vision of interpersonal reconciliation,[270] just raises anew the specter of abuse.

The very idea of demanding apology and forgiveness—and the prospect of enforcing those demands—is sufficient to demonstrate that the atonement model is in some combination incoherent, oppressive, or facile. Such demands simply do not comport with the moral foundations of apology and forgiveness. To ignore that incoherence is to engage in a new round of abuse. Alternatively, to respect those limitations and simply hope that abusers will apologize and victims forgive puts the project of

261. Brooks, *Perpetrator-Focused*, *supra* note 11, at 68.
262. Panu Minkkinen, *Ressentiment as Suffering: On Transitional Justice and the Impossibility of Forgiveness*, 19 CARDOZO STUD. L. & LIT. 513, 515 (2007).
263. MINOW, VENGEANCE & FORGIVENESS, *supra* note 82, at 20.
264. BORAINE, *supra* note 46, at 213–14.
265. Minow, *Memory*, *supra* note 74, at 18.
266. *Id.*
267. MINOW, VENGEANCE & FORGIVENESS, *supra* note 82, at 17.
268. *Id.* at 14–19.
269. Minow, *Memory*, *supra* note 74, at 18.
270. Brooks, *Perpetrator-Focused*, *supra* note 11, at 67; Brooks, *Reparations*, *supra* note 6, at 255.

transitional justice on wholly uncertain grounds without any procedural guarantees.[271] The only way to avoid both horns of this dilemma is to set aside atonement as the organizing goal of transitional justice and reparations. Atonement should, of course, be encouraged and celebrated where it occurs,[272] but it simply cannot carry the normative and practical burdens of transitional justice generally and reparations specifically.

### *C. Transformative Justice*

Some scholars have argued for reparations not on terms of accountability but with a focus on social transformation.[273] Titled variously as "transformative justice,"[274] "restorative justice,"[275] or "social healing,"[276] these approaches to reparations are mostly or entirely prospective[277] and consequentialist,[278] measured and justified by the larger project of "promot[ing] healing"[279] or "reconciliation."[280] This is a goal shared with atonement theories. However, unlike atonement, transformative justice and reconciliation focus less on assuming blame, favoring instead the goal of "internal healing."[281]

The modern historical genesis of transformative justice is in the South African Truth and Reconciliation Commission (TRC). There, confronted with a past marked by institutionalized violence, the newly elected representatives of the post-Apartheid government faced the familiar questions ubiquitous among transitions: "Shall we punish or offer amnesty?" and "Shall we linger on the past or indulge in oblivion and just

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271. *See* BORAINE, *supra* note 46, at 213–14 (noting that many victims of Apartheid chose not to forgive their abusers, even after the abusers appeared before the TRC).

272. *Id*. at 214–15.

273. *See, e.g.*, IFILL, *supra* note 64, at 128–31; Eric Yamamoto et al., *American Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1335 (2003); Eric Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 52 (2007) [hereinafter Yamamoto et al., *American Reparations*].

274. *See, e.g.*, Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73 (2001–2002))

275. *See, e.g.*, MINOW, VENGEANCE & FORGIVENESS, *supra* note 82, at 91; Laplante & Theidon, *supra* note 46, at 248.

276. Yamamoto et al., *American Reparations*, *supra* note 273, at 3.

277. Matsuda, *supra* note 106, at 397; *cf.* Fortson, *supra* note 91, at 122 (focusing on capacity for reparations to effect a redistribution of resources deemed unjust in light of past wrongs).

278. Yamamoto et al., *American Reparations*, *supra* note 273, at 4 (contending that reparation is not an "end in itself, but instead [i]s an integral aspect of the larger project of social healing").

279. Jordan, *supra* note 94, at 25.

280. IFILL, *supra* note 64, at 131; Meierhenrich, *supra* note 260, at 196.

281. Susan Dwyer, *Reconciliation for Realists*, 13 ETHICS & INT'L AFF. 81, 90, 96 (1999); Jordan, *supra* note 94, at 25.

move on?" Relying on indigenous concepts of justice based on "ubuntu," leaders of the transition, most prominently Nelson Mandela, Archbishop Desmond Tutu, and Alex Boraine, settled on the TRC as the locus of transitional justice efforts.[282] By design, the TRC traded truth for punishment, offering amnesty to all former abusers who came forward and offered truthful and complete testimony.[283] The hope was that by shining a light on the past and removing the threat of prosecution, the TRC could transform society and reconcile victims and abusers even if they did not apologize and forgive.

While ubuntu, both within and between different African traditions, is elusive, the fundamental focus is on interconnectedness.[284] Individuals are conceived of as artifacts of social connections.[285] They feel that connection such that they are diminished when others are harmed and raised when others are respected.[286] The consequence of putting ubuntu at the core of transitional justice is to place priority on rebuilding social connections among members of society going forward.[287] Reconciliation and institution building take precedence over punishment. Like atonement, reconciliation as a goal for transitional justice puts a priority on outcomes. Reparations are part of the process only where and to the extent that they may serve the broader goal of reconciliation.[288]

Some reconciliation scholars are not so outcome oriented. They emphasize process and dialogue as the key to reconciliation.[289] In this context, material reparations may provide an important locus for dialogue.[290] That was a self-conscious goal of the TRC, which appreciated the importance of letting victims tell their stories in their own words in order to provide a moment of recognition. Particularly in the domestic

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282. BORAINE, *supra* note 251, at 268; DESMOND MPILO TUTU, NO FUTURE WITHOUT FORGIVENESS 45 (1999); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the 'Rule of Law'"*, 101 MICH. L. REV. 2275, 2335 (2003) [hereinafter Ehrenreich Brooks]; Promotion of National Unity and Reconciliation Act 34 of 1995, *reprinted in* THE HANDBOOK OF REPARATIONS, *supra* note 21, at 770, 771, 773 [hereinafter Reconciliation Act]; *see also* State v. Makwanyane 1995 (3) SA 391 (CC) at 84–85 (S. Afr.) (Chaskalson, C.J., relying in part on "ubuntu" to hold the death penalty unconstitutional).

283. Reconciliation Act, *supra* note 282, at 773.

284. TUTU, *supra* note 282, at 31–32.

285. BORAINE, *supra* note 46, at 215.

286. TUTU, *supra* note 282, at 31–32; Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER, RACE & JUST. 47, 52 (1997).

287. TUTU, *supra* note 282, at 54–55.

288. *Id.* at 45, 61.

289. *See, e.g.*, IFILL, *supra* note 64, at 131.

290. Raymond Winbush, Reparations Conference Keynote Speech: *Should America Pay?*, *in* 2 AM. U. MODERN AM. 43, 44 (2006).

reparations context, many scholars also highlight the value of keeping alive the memory of past abuses and highlighting the need to correct present inequities.[291] This dialogical process also promises a more expansive historical record[292] than might be accomplished in the narrow confines of criminal trials or tort claims.[293] Finally, if they are transparent, the procedures designed around reconciliation can model public procedures and provide legitimacy for the new regime.[294]

There is much to recommend reconciliation as a guide in transitions generally and for reparations in particular. The principal concerns are imprecision and mission creep. As Laurel Fletcher and Harvey Weinstein have pointed out, "There is no theoretical foundation that underlies the concept of social repair."[295] Too often in elaborating the fundamental insights of reconciliation, advocates alternatively collapse into atonement[296] or indulge in abstractions, failing to describe precisely both the unique potential of process and, derivatively, what "reconciliation" would mean in light of a commitment to process.[297] That leaves reparations claims based on reconciliation bereft of clarity as to justification and form. As a consequence, familiar objections based on ethical individualism make an easy reappearance. These blame games,[298] far from sponsoring reconciliation, only serve to reinforce lines of division.[299]

### *D. Rapid Social Change*

One of the great strengths—and weaknesses—of utilitarian analyses of legal issues is that troubling but abstract moral issues seldom gain much traction. Given this, it is perhaps ironic that Eric Posner and Adrian Vermeule identify "ethical individualism" as a key component of the debate about reparations.[300] Setting aside these sorts of deontological concerns, Saul Levmore argued some ten years ago that reparations and

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291. Paterson, *supra* note 101, at 19–20.
292. Brophy, *supra* note 54, at 133; Jordan, *supra* note 94, at 25.
293. IFILL, *supra* note 64, at 126, 128–31.
294. BORAINE, *supra* note 46, at 175–76; Yamamoto et al., *American Reparations*, *supra* note 273, at 64–74.
295. Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 618 (2002).
296. *See, e.g.*, Meierhenrich, *supra* note 260, at 206–07 ("Forgiveness is a necessary condition for reconciliation . . . .").
297. *Id.* at 196–97 (citing Dwyer, *supra* note 281, at 81–82).
298. Brophy, *supra* note 54, at 135–36.
299. *See* Jordan, *supra* note 94, at 23.
300. Posner & Vermeule, *Reparations*, *supra* note 6, at 698.

other posthoc compensation policies ought to be features of regulatory change.[301] Professor Levmore, and others who have looked at the problem of retroactivity using tools from law and economics and public choice,[302] concede that there are elements of unfairness inherent in retroactive compensation for violations of "new" norms. Nevertheless, they maintain that retroactive reparations ought to be standard policy in some contexts in order to encourage anticipatory change.

The insight is straightforward. Assume that widget manufacturing requires the combustion of a particularly noxious chemical resulting in the release of a carcinogenic agent. Emission control technology is available, but would add one unit of cost to each widget, an expense the manufacturer cannot pass along to its customers and still remain competitive on price. In the absence of regulations limiting emissions or requiring controls, the widget manufacturer is a present winner and future loser. That is, in the present regulatory environment, polluting reduces costs. However, that is a temporary condition. Pollution is not without costs; failure to regulate simply shifts those costs to the public. As those costs coalesce and become manifest, public policy will shift in favor of stricter controls. When that day comes, the widget maker will be forced to assume additional costs. Until then, it has no economic reason to adopt more costly production methods. In fact, the widget maker has strong economic incentives to obstruct and delay as long as it can.

From a policy perspective, this familiar incentive structure should find no favor. It compromises public interests and imposes costs on innocent parties. The solution, Levmore suggests, is retroactive enforcement.[303] Establishing a habit and pattern of retroactive enforcement of new regulations protects public interests by changing the incentive structure.[304] Polluters usually have the best information regarding both the impact of their practices and the technological options available to diminish those impacts. They are, then, in the best position to anticipate regulatory changes.[305] If polluters know that they will be held accountable for harms accruing from the time when they knew or ought to have known about production options that cause less environmental impact, then they will

301. Levmore, *supra* note 66.

302. *See, e.g.*, DANIEL N. SHAVIRO, WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY (2000); Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47 (1978); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986).

303. Levmore, *supra* note 66, at 1657–61.

304. *Id.* at 1663.

305. *Id.*

have powerful incentives to regulate their own behavior on an anticipatory basis.[306] Therefore, an aggressive approach to transition, characterized by consistent pattern of implementing legal changes that reflect new knowledge and technical capacity, coupled with retroactive enforcement, will encourage polluters to react quickly in order to limit their future retroactive liability. In the alternative, by delaying changes to the law and their own behavior, polluters in an aggressive-change environment only increase their future costs.

The potential application of this analysis to transitions is obvious. Agents and subjects of pretransitional abuse will have less motivation to continue abuses and otherwise delay transition if they know that they are only adding to the consequences that inevitably will come. Policies of retroactive reparation may even encourage earlier adoption of human rights practices by adding costs to abusers who choose to delay. By contrast, a general environment of impunity that is perfectly respectful of basic principles of legality actually encourages abusive regimes to continue with their activities and to delay transitional movements at all costs.

While this approach is novel, Levmore recognizes that what may be true for regulatory regimes found in stable states does not carry over to the dramatic political change entailed in transitions to democracy.[307] The rapid change hypothesis must assume that there is some external source of change that makes liberal revolution and transition a relative certainty from the point of view of those perpetrating bad acts under an abusive regime.[308] In domestic regulatory environments, certainty of change is provided by background regulatory schemes, governmental agencies, advocacy groups, laws, and dedicated political units. Together these entities ensure that regulations will move toward the "best" standards. To posit that same certainty in the transitional justice context it is necessary to make three difficult assumptions. The first is that there is a stable background of human rights agencies that provide assurance of eventual enforcement. Second, agents of abuse must consider themselves to be within the present or future control of these agencies. Third, this purely economic analysis assumes that abusers act out of self-interest that is both narrow—bound to material gain—and enlightened—adopting a relatively long-time horizon. None of these assumptions is warranted.

306. *Id.*
307. *Id.* at 1686–98, 1700.
308. *Id.* at 1690–92.

The economic advantage afforded abusers is bound up with sincerely held ontological and teleological commitments backed by law.[309] These abusive paradigms create for abusers a sense of entitlement and rationalize abuse by marking victims as lesser beings with a dark future at the end of history.[310] Consequently, there is much more than material wealth at stake in preserving an abusive regime. For abusers, the prospect of social change threatens core identities and jealously guarded ways of private and public life. Commitments to preserve these lifeways provide a far more powerful motive to maintain conditions of injustice than can be overcome by banal material interests or even the abstract threat of punishment.[311]

Assumptions about the inevitability of social change are also suspect in the context of pretransitional regimes. While the period since the 1948 signing of the Universal Declaration of Human Rights has marked a new era in internationalism and the progressive advancement of an international system of human rights norms and transnational agencies charged with reviewing and encouraging respect for these norms, there is no organization with sovereign reach and authority sufficient to guarantee the prosecution and punishment of all human rights violations.[312] Without some certainty of both a normative shift toward the "best" laws and eventual retroactive enforcement of these norms, the aggressive-change hypothesis simply does not work for abusive regimes.[313]

The subjective positions of abusers in pretransitional regimes further indicate that the cognitive processes that ground the aggressive-change hypothesis are not present in abusive regimes. Followers and leaders are unlikely to see themselves as living under the authority of an international or transnational human rights regime.[314] This is in part due to the reality of the international system. It is also a reflection of the immediate environment in abusive regimes. Most abusers are not high-level leaders but, rather, are beholden to more immediate institutional norms supported and enforced by an abusive regime.[315] Leaders, while perhaps directly

309. Gray, *Excuse-Centered*, *supra* note 16, at 2629–36.

310. *Id.* at 2632–34.

311. *Id.* at 2670: *see also* Ehrenreich Brooks, *supra* note 282, at 2305. These matters often are complex. For example, Thomas Jefferson and George Washington, with many of their contemporaries, admitted the evils of slavery but nevertheless could not bring themselves to abandon the practice for fear of social and personal cost.

312. The International Criminal Court aspires to this role, but is saddled with limited jurisdiction constrained by the consent of signatory nations. *See* Rome Statute of the International Criminal Court, July 17, 1998, art. 4, ¶ 2, U.N. Doc. A/CONF.183/9 (2002).

313. Levmore, *supra* note 66, at 1680.

314. Gray, *Excuse-Centered*, *supra* note 16, at 2667–76.

315. *Id.* at 2671–72.

exposed to international human rights institutions, are likely to see themselves as immune from international agents and as preserving a way of life in which they and their followers are deeply invested.[316] Given these dispositions, abusers are likely to fight at all costs to stop liberal revolutions and transitional movements that present a direct threat to their beliefs, authority, wealth, and personal security.[317] Moreover, they have more capacity to thwart transitions than do bit players in regulatory schemes.[318] While a widget manufacturer knows that an anticipatory shift in behavior will further his interests, the despot and his followers face quite different consequences. Rather than merely altering their market, anticipatory change guarantees total loss and potential criminal prosecution.

The aggressive-change hypothesis also makes assumptions about the shared interests and motives of those in a regulatory environment that may not be apt in the transitional justice context. While it may be true that governments, regulatory agencies, watchdog groups, and industries have a set of shared interests that binds them together, this cannot be said of abusers and the international human rights community. According to aggressive change, industries and their regulators see their enterprises in terms of long-term costs and benefits. Abusers do not see the world this way. For abusers, anticipating change to reflect international human rights norms is not a way to continue their business; it is the end of their particular enterprise.[319] A power plant would not anticipate regulatory shifts to the point of closing its doors. We certainly would not expect a successful abusive regime to close shop even if abusers know, in their deepest hearts, that their regime one day will fall.

Some argue, not without merit, that amnesties and pardons are seldom the key factors in catalyzing transitions, which may suggest that the threat of obstruction suggested here is overblown.[320] A transition might, indeed, be a historical inevitability, but leaders in the outgoing regime usually do not see things this way. If leaders and other contributors to an abusive regime are facing retroactive liability for reparations, then they have every motivation to delay the transition by whatever means, and they are in a

316. *Id.* at 2676.

317. José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, *in* 1 TRANSITIONAL JUSTICE 3, 18–20 (Neil J. Kritz ed., 1995).

318. Levmore, *supra* note 66, at 1680.

319. IFILL, *supra* note 64, at 17, 43–44, 64–66.

320. *See, e.g.*, Douglass Cassel, *International Truth Commissions and Justice*, 5 ASPEN INST. Q. 77 (1993).

position to add significantly to transitional costs even if they cannot stop the transition altogether.[321] It is important to keep in mind that these costs do not accrue to the international community. It seems unfair to establish international policies based on abstract theory when the potential cost in blood will be borne by an already victimized population.

Levmore, at least, shares in these concerns and therefore concludes that reparations are only advisable in the transitional justice context after a sufficient period of repose during which time the legal and social changes attending transition have become well established.[322] However, there may be one exception to this. International agents who benefit from human rights abuses, such as corporations and financial institutions, may be deterred from future dealings with abusive regimes if the international human rights community, including states, transnational organizations, nongovernmental organizations, consumers, and stockholders, can establish reliable precedents for detecting and "punishing" beneficiaries and opportunists in the business world.[323] Financial institutions might, as an example, be motivated to use their informational advantage to avoid dealing with human rights abusers if they know that they will be found out and made to pay. Actions like those recently brought against Swiss banks by Holocaust survivors might create just the reliable regulatory environment that the aggressive-change hypothesis requires with respect to truly international actors.[324] Serious doubts would remain with respect to domestic agents.

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321. Foday Sankoh represents a significant present-day example of this. He was able to exercise considerable influence over the terms of the Lome Peace accords precisely because he represented a present threat to peace and stability in Sierra Leone and because he approached the peace negotiations with the subjective belief that he could fight into perpetuity if necessary rather than sacrifice his primary goals of power-sharing, amnesty, and control of mineral resources—particularly diamonds. *See* Michael O'Flaherty, *Sierra Leone's Peace Process: The Role of the Human Rights Community*, 26 HUM. RTS. Q. 29, 33–35 (2004).

322. Levmore, *supra* note 66, at 1698–99.

323. Gray, *Devilry*, *supra* note 44, at 159–64.

324. *See, e.g.*, *In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139 (E.D.N.Y. 2000).

## IV. A LIMINAL ROLE FOR REPARATIONS IN TRANSITIONS TO DEMOCRACY

> "Every human being is fated to be enmeshed in the power relations he lives by."
>
> —Karl Jaspers[325]

"Reparations" commonly are defined as "payment[s] justified on backward-looking grounds of corrective justice, rather than forward-looking grounds such as the deterrence of future wrongdoing."[326] Reparations are about remedying "long-ago crimes."[327] While straightforward enough, this definition is far too limiting in the transitional justice context.[328] First, it is avowedly and exclusively retrospective.[329] Second, as is demonstrated by the expanded typology set forth above, the category of "reparations" is much broader than is implied by a narrow focus on compensation, whether construed historically or counterfactually.[330] More problematic from a practical perspective is that this constrained view of reparations makes almost inevitable objections based on the common commitment that individuals can be held accountable only for their own conduct and not that of others.[331] This ethical individualism has significant resonance in the common law, and is almost axiomatic in American criminal jurisprudence. Writing for the Court in *Morissette v. United States*,[332] for example, Justice Jackson noted that "an intense individualism" is at the heart of the "compound concept" of criminal liability, constituted by the "concurrence of an evil-meaning mind with an evil-doing hand" that "took deep and early root in American

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325. JASPERS, *supra* note 15, at 34.

326. Rodney C. Roberts, *The Counterfactual Conception of Compensation*, *in* GENOCIDE'S AFTERMATH 132 (Claudia Card & Armen T. Marsoobian eds., 2007) (limiting the "species of justice" to "distributive justice and rectificatory justice"); *see also* Posner & Vermeule, *Reparations*, *supra* note 6, at 691.

327. Brophy, *supra* note 54, at 131.

328. IFILL, *supra* note 64, at 126, 128–31; Brooks, *Reparations*, *supra* note 6, at 272; Yamamoto et al., *American Reparations*, *supra* note 273, at 35–37.

329. Yamamoto et al., *American Reparations*, *supra* note 273, at 35–37.

330. Harris, *supra* note 79, at 1784. For a description of these two approaches to measuring harm and compensation see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 57 (1974); Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, *in* FREEDOM AND FULFILLMENT 7 (1992); Roberts, *supra* note 326, at 133–34; *see also* Brophy, *supra* note 54, at 133 (noting that reparations claims often rely on counterfactual measures).

331. Posner & Vermeule, *Reparations*, *supra* note 6, at 703; *see also* Lee Harris, *"Reparations" as a Dirty Word: The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, 414–20 (2003).

332. Morissette v. United States, 342 U.S. 246 (1952).

soil."[333] For the purpose of assigning criminal liability, the constraints entailed by faith to ethical individualism are hard to contest. Indeed, I have argued elsewhere that for most perpetrators and participants in pretransitional abuses, criminal punishment cannot be imposed consistent with faith to ethical individualism in the form of the legality principle.[334] However, it is not at all clear that concern with ethical individualism is relevant in reparations debates. To the contrary, the fact that reparations proposals in the transitional justice context frequently confront seemingly intractable objections based on ethical individualism is evidence of a conceptual mistake in the form of a readiness to treat transitional justice as a case of ordinary justice.[335] A more careful accounting of the unique practical and normative conditions that define pretransitional abuses and transitions to democracy holds significant hope for resolving frequent objections to reparations as elements of a broader hybrid approach to transitional justice, including limited criminal prosecutions and truth commissions.

In addition to cash compensation, the reparations literature recognizes a broad diversity of material reparations and more "symbolic" measures, including apologies (whether private, public, or official), days of remembrance, and monuments.[336] One might regard these sorts of efforts as "compensatory" in a broad sense. However they are much more than that. In particular, they reflect a significant but little understood fact about transitions: while even stable states constantly undergo change, transitions present a uniquely liminal moment for societies "betwixt and between"[337] an abusive past and a future peace guarded and preserved by commitments to democracy, human rights, and the rule of law. Recognizing the liminal status of transitions provides valuable context for understanding the role of reparations in transitions to democracy. In particular, it focuses attention on the need in transition to assume the posture of Janus, facing simultaneously the past and the future in order to recognize and by affirmative steps correct, reform, and reshape the underlying causes of pretransitional abuses. This duty to achieve justice for the future in light of the past keeps faith with core transitional commitments to democracy,

333. *Id*. at 251–52 (1952).

334. Gray, *Excuse-Centered*, *supra* note 16, at 1636–48.

335. *See, e.g.*, Ken Cooper-Stephenson, *Theoretical Underpinnings for Reparations: A Constitutional Tort Perspective*, 22 WINDSOR Y.B. ACCESS JUST. 3, 3 (2003); Posner & Vermeule, *Ordinary Justice*, *supra* note 176; Posner & Vermeule, *Reparations*, *supra* note 6.

336. Posner & Vermeule, *supra* note 6, at 725–36; Rubio-Marín & De Greiff *supra* note 54, at 330–32; Verdeja *supra* note 71, at 171–78.

337. TURNER, FOREST OF SYMBOLS, *supra* note 1.

human rights, and the rule of law. Recognizing and enforcing such a duty does not entail blame and therefore renders moot excuses based on ethical individualism while avoiding the mistakes, pitfalls, and insufficiencies of atonement, reconciliation, and other commonly discussed theories of transitional justice.

### *A. Radical Evil*[338] *and Extraordinary Justice*

I have argued elsewhere that prominent contributors to the transitional justice literature misunderstand the nature of challenges in transition and therefore miss significant theoretical and practical opportunities because they view transitional justice as "ordinary justice."[339] In particular, they fail to take normative account of both the "justice gap"[340] (the radical disparity between justice needs and resources available to transitional regimes seeking some form of justice) and the underlying cause of that gap (the complex of cultural norms, social practices, institutional regimes, black letter law, official policies, institutional practices, social norms, cultural ideology, and historical teleology) that together provide the organizing ontology and justificatory ethic of abusive regimes and which ratify, induce, and sustain programs of mass violence.[341] In those earlier works, I argued that taking account of the unique features of pretransitional atrocities, abusive regimes, and the transitions that follow provides considerable assistance in understanding the justice gap and in providing a framework for justifying and organizing programs of selective prosecution[342] and posttransitional financial recovery.[343] By contrast, ignoring these features and treating transitional justice as ordinary justice (1) dooms transitions to accept the best justice possible; (2) inspires deep suspicion in public institutions that appear to have only a limited or ad hoc commitment to justice; (3) preserves a sense that those not prosecuted got away with it, thereby opening the door to self-help solutions that threaten

338. I allude to NINO, *supra* note 109.

339. Gray, *Excuse-Centered*, *supra* note 16, at 2622, 2639–42; David C. Gray, *What's So Special About Transitional Justice? Prolegomenon for an Excuse-Centered Approach to Transitional Justice*, 100 AM. SOC'Y INT'L L. PROC. 147, 148 (2006). *Contra* Posner & Vermeule, *Ordinary Justice*, *supra* note 176.

340. Christine Bell & Catherine O'Rourke, *Does Feminism Need a Theory of Transitional Justice*, 1 INT'L J. TRANSITIONAL JUST. 23, 35 (2007); Gray, *Excuse-Centered*, *supra* note 16, at 2624–29.

341. Gray, *Excuse-Centered*, *supra* note 16, at 2629–36.

342. *Id.* at 2636–49.

343. Gray, *Devilry*, *supra* note 44, at 157–64.

peace and stability; and (4) fails to provide a sensible model for justice institutions established by a new regime.[344]

That same short-sightedness is manifest in reparations debates. Here, the mistake is to treat reparations as gap-filling measures, meant to provide partial vindication for retributive impulses[345] or restitution claims residual of the ordinary justice familiar in stable states.[346] This ordinary-justice approach views reparations through a retrospective legal lens, analogizing them to tort and quasi-tort remedies[347] that "provide payment (in cash or in kind) . . . on the basis of wrongs . . . [for] which the payment is justified on backward-looking grounds of corrective justice . . . ."[348] Even more creative proponents of alternative models, such as atonement, maintain a retrospective focus. They just cast reparations in personal terms by demanding apology and forgiveness.

Indulging this retrospective bias marks a serious mistake for reparations advocates. Reparations, like criminal prosecution programs, certainly must take account of the past. There is no doubt that reparations programs are driven by past atrocities. However, as part of broader transitional justice programs, reparations must cast an eye to the future as part of a broader effort to sow the ground for future peace and stability. In the transitional context, taking account of the past means much more than documenting wrongdoing and measuring harm. Likewise, achieving justice for the future means much more than shaking hands and moving on. Justice in transition means recognizing past wrongs as oppositional markers for future conduct and policy. Taking seriously this goal of pursuing the future with a view toward the past requires as a first step understanding the sources and causes of atrocities.

Anthropologist Victor Turner defines social paradigms as "sets of 'rules' from which many kinds of sequences of social action may be generated but which further specify what sequences must be excluded."[349] Paradigms draw and maintain social boundaries and designate roles and positions for individuals within society.[350] As the rules governing

344. Gray, *Excuse-Centered*, *supra* note 16, at 2622.

345. Brooks, *Reparations*, *supra* note 6, at 284–87; Posner & Vermeule, *Reparations*, *supra* note 6, at 691.

346. Jordan, *supra* note 94, at 25; Shelton, *supra* note 94, at 844.

347. Brooks, *Reparations*, *supra* note 6, at 284–87.

348. Posner & Vermeule, *Reparations*, *supra* note 6, at 691.

349. VICTOR TURNER, DRAMAS, FIELDS, AND METAPHORS 17 (1974) [hereinafter TURNER, DRAMAS].

350. MARC J. SWARTZ, VICTOR TURNER, & ARTHUR TUDEN, POLITICAL ANTHROPOLOGY 31 (1966).

acceptable conduct and social identities, paradigms are both the subject and the object of social action. That is, paradigms generate their own subjects, but also compete with other paradigms.[351] As described by Turner, paradigms bear a close resemblance to what Michel Foucault describes as "regimes of truth": the circular relationships between "Truth," conceived as "systems of ordered procedures for the production, regulation, distribution, circulation and operation of statements," "systems of power which produce and sustain [Truth]," and "effects of power which [Truth] induces and which extend [Truth]."[352] In abusive regimes the dominant social paradigm demands, or at least tolerates, targeted abuse against an identified group.[353] These abusive paradigms, though as varied as the capacity for creative evil resident in our species,[354] share a few salient features. First, they tend to reduce society to a single dyadic opposition with all subjects assigned to one side of a definitive line.[355] Second, following this "bi-polar logic,"[356] an abusive paradigm characterizes those in one group as subhuman and naturally subservient,[357] or at least not people "like us,"[358] deserving of treatment as equals. Third, those targeted for abuse are regarded as a persistent and emergent threat against the survival of the dominant group and its ability to achieve its rightful place at the end of history.[359]

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351. TURNER, DRAMAS, *supra* note 349, at 17.

352. MICHEL FOUCAULT, *Truth and Power*, *in* POWER/KNOWLEDGE 109, 133 (1980). Foucault's less esoteric histories document the life in society of various regimes of truth. *See, e.g.*, MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1995) (criminology); MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (1988) (psychology).

353. *See* MARK DANNER, THE MASSACRE AT EL MOZOTE (1993); GOLDHAGEN, *supra* note 233, at 27–163, 416–54 (1996); GOUREVITCH, *supra* note 233, at 47–62, 96–131; INDEPENDENT INT'L COMM'N ON KOSOVO, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 33–64 (2000); SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002); Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 59 (2002); Malamud-Goti, *supra* note 109, at 29–99; Nino, *supra* note 109, at 41–60; Rorty, *supra* note 232, at 112–15.

354. *See* Brooks, *The Age of Apology*, *supra* note 71, at 4 ("[*A*]*ll* societies have the capacity to do evil. No society holds a monopoly on the commission of human injustices, nor is any society exempted. To Max Frankel's question—'Is there a beast in each of us waiting to be unleashed by extraordinary fear, greed or fury?'—I would have to answer, yes.").

355. Malamud-Goti, *supra* note 109, at 29–99; *see also* ELSTER, *supra* note 19, at 93.

356. Malamud-Goti, *supra* note 109, at 83–89.

357. Brooks, *Reparations*, *supra* note 6, at 267; Rorty, *supra* note 232, at 112–15.

358. Fortson, *supra* note 91, at 77 ("Whiteness is based principally on the oppression of minority groups by defining them as Other.") (citing Harris, *supra* note 79, at 1737).

359. GOLDHAGEN, *supra* note 233, at 3–24, 49–50; SIMON WIESENTHAL, THE SUNFLOWER: ON THE POSSIBILITIES AND LIMITS OF FORGIVENESS 15 (1997); *see also* Swartz, Turner, & Tuden, *supra* note 350, at 15 (attaching conformance to consensual power and to the preservation of a desired social order).

The role of an abusive paradigm at the core of pretransitional abuses is widely recognized in the transitional justice literature.[360] Roy Brooks, for example, has noted that "atrocities can only occur when the perpetrator fails to *identify* with [his] victims and fails to recognize a common humanity between [himself] and the victims."[361] Richard Rorty echoed this view in an essay on the Balkans, noting that those who participate in mass atrocities do not regard their victims as "fellow human beings," but as mere "animals" or, at best, "pseudohumans."[362] In a variation on the theme, Daniel Goldhagen has argued that, like the German perpetrators of the Holocaust, "the Argentine [and] Chilean murderers of people who opposed the recent authoritarian regimes thought that their victims should die" and that "Tutsis who slaughtered Hutus in Burundi [and] Hutus who slaughtered Tutsis in Rwanda . . . [and] Serbs who have killed Croats or Bosnian Muslims, did so out of conviction in the justice of their actions."[363] Philip Gourevitch has seconded Goldhagen's assessment of the Rwandan genocide, adding that genocide is "an exercise in community building" for abusers.[364] W.E.B. Du Bois linked racial oppression to, inter alia, German abuse of Jews, noting the centrality of intergroup fear at the heart of violence.[365] In her careful history of twentieth-century lynching on the eastern shore of Maryland, Sherrilyn Ifill documents "the role of ordinary members of the community in supporting or condoning [lynching as an] act of racial terrorism," linking that support to a background racism that cast blacks as dangerous, prone to violence, and lesser evolved.[366]

While assault, rape, and murder are relatively infrequent and broadly condemned in stable states, the paradigm that holds sway in pretransitional regimes provides a view of the world for abusers in which that same conduct targeted against members of a specific group[367] is at least not

360. *See* PHILLIP G. ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 296 (2007); Roberta Senechal de la Roche, *Collective Violence as Social Control*, 11 SOC. FORUM 97, 106 (1996); Roberta Senechal de la Roche, *The Sociogenesis of Lynching*, *in* UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH 48 (W. Fitzhugh Brundage ed., 1997).

361. Brooks, *Reparations*, *supra* note 6, at 267.

362. Rorty, *supra* note 232, at 112.

363. GOLDHAGEN, *supra* note 233, at 14–15.

364. GOUREVITCH, *supra* note 233, at 95.

365. W.E.B. Du Bois, *The Shape of Fear*, *reprinted in* THE SOCIAL THEORY OF W.E.B. DU BOIS 56 (Phil Zuckerman ed., 2004).

366. IFILL, *supra* note 64, at 17, 43–44, 64–66.

367. Brooks, *supra* note 6, at 3–11; Rorty, *supra* note 232, at 112 (Rorty writes about dehumanization of targets for violence in the Balkans, noting that "they are not doing these things to fellow human beings, but to Muslims" who are regarded as "pseudohumans." He then connects that ontologically grounded targeting to Jefferson's ability to both own slaves and to "think it self-evident that all men were endowed by their creator with certain inalienable rights.").

prohibited, and more often is a moral or historical imperative. That public sanction often manifests subjectively as a sense of entitlement on the part of abusers.[368] They are "willing executioners"[369] because they are defending their view of the world and carrying out their destiny as a people, group, or society.[370] That individual willingness, cast widely, is the animating core of abusive regimes and provides a descriptive explanation for the large numbers and broad array of individuals implicated in acts of violence.[371]

Some form of abusive paradigm is at the heart of all mass violence. In some cases abusive paradigms are motivators, in other cases simple catalysts. In all cases, however, some socio-normative grounding is a *sine qua non* for pretransitional violence.[372] To argue the contrary is to claim that mass violence is mere happenstance, a coincidence of uncoordinated and independent action by thousands or tens of thousands of unconnected agents. That view is simply not tenable and bears no descriptive weight. It is the role played by an abusive paradigm that distinguishes pretransitional violence from the common street violence more familiar in stable states.

### *B. Repairing Paradigms of Abuse*

This Article contends that most of the reparations literature evidences one or both of two conceptual biases. First, most reparations proposals follow a tort model familiar from ordinary justice which focuses on compensating harm. Second, most reparations proposals evidence a temporal bias. Most are exclusively retrospective, but some, including atonement, evidence a prospective bias. By succumbing to one or both of these theoretical mistakes, most reparations proposals open the door to objections based on ethical individualism. Those objections only appear to have merit if the discussion of reparations is limited to backward-facing justifications. As is suggested here, transitional justice is by definition Janus-faced. It begs the question to define any particular policy of transitional justice as exclusively retrospective or exclusively prospective. More troubling, however, is the fact that these biases lead advocates to misunderstand the fundamental challenge in transitions to democracy and

368. *See, e.g.*, GOLDHAGEN, *supra* note 233, at 14–15.
369. GOLDHAGEN, *supra* note 233.
370. *See supra* notes 358–66.
371. JASPERS, *supra* note 15, at 34–35.
372. *See* Rorty, *supra* note 232, at 112–16.

therefore to miss the strongest normative case for reparations as part of a broader effort to achieve justice in transition.

Transitions and, therefore, transitional justice programs, live in an explicitly liminal[373] space between the downfall of the abusive regime and the reintegration of members, victims, and abusers alike into a fully reconstituted successor regime. In this land "betwixt and between,"[374] transitional justice can only be understood as processes of symbolic, material, and substantive transformation, defined by the project of recognizing victims, achieving an acceptable level of parity among victims and abusers, instantiating necessary reforms of public institutions, and reforming official and public practices. Putting the question this way makes the solution to the reparations conundrum described in this Article relatively straightforward. Answering the call of "Nunca Mas"[375] requires situating reparations and other elements of a transitional justice program in the broader liminal process of transition.

Taking the transitional justice project seriously reveals a significant distinction between reparations as part of a liminal process and tort awards or other compensatory measures. Even the most apparently compensatory reparations that might, in the stable state context, accomplish nothing more than restoration of the *status quo ante*, retain both a forward- and backward-looking face in the transitional justice context.[376] That is because reparations, as part of the process of transition, are always cast against the backdrop of an abusive society and its attendant paradigms. Reparations, therefore, are illuminated by the past. At the same time, as part of a project designed to achieve sustainable peace, justice, security, and the rule of law in and post transition, reparations also cast an image on the future. As a utopian project, transitional reparations must be justified by the goal of achieving reconstruction and reform. In particular, reparations must reflect the primary goal of achieving new social and material conditions[377] for former victims and new relationships between

373. I adopt the term "liminal" from the anthropological literature on rites of passage. *See, e.g.*, TURNER, DRAMAS, *supra* note 349; TURNER, FOREST OF SYMBOLS, *supra* note 1; VICTOR TURNER, THE RITUAL PROCESS (1969); V. W. TURNER, SCHISM AND CONTINUITY IN AN AFRICAN SOCIETY: A STUDY OF NDEMBU VILLAGE LIFE (1957); ARNOLD VAN GENNEP, THE RITES OF PASSAGE (1960).

374. TURNER, FOREST OF SYMBOLS, *supra* note 1.

375. Nat'l Comm'n on the Disappearance of Persons (CONADEP), *The Doctrine Behind the Repression*, *in* NUNCA MÁS (NEVER AGAIN) pt. 5, *available at* http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_281.htm.

376. Fortson, *supra* note 91, at 123.

377. Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107, 107–20 (2000); Hall, *supra* note 100, at 8.

members of former abuser and victim groups.[378] This last is a crucial measure of the transitional process. Transitions must achieve a sustainable new equilibrium among members of groups whose identities in the past marked the line between abuser and abused—lines that rendered abuse rational or necessary in relation to group identity and goals.

To borrow from John Rawls, transitional states are "burdened" societies.[379] Those burdens are many, but what Rawls highlights is the social and structural weight of an abusive paradigm.[380] The highest imperatives in transition are (1) to elaborate that paradigm, and (2) to develop and deploy public policies. Those polices must be capable both of deconstructing the ontological and teleological commitments core to that abusive paradigm and of putting the abusive paradigm's animating classificatory structure in a broader social context that evidences a healthy diversity of overlapping associations and oppositions.[381] This proposal is a bit abstract. While full elaboration of the approach proposed here must wait for another day,[382] it is worth a moment in closing to suggest one application and how the approach commended here can respond to or avoid objections inspired by ethical individualism.

The targeted violence characteristic of abusive regimes expresses a persistent social ontology and historical teleology that places individuals in a normalized hierarchical typology, identifying members of specified groups as subhuman and therefore rightful targets of abuse. That is, abusive regimes "institutionalize[] patterns of cultural value that pervasively deny some members the recognition they need in order to be full, participating partners in social interaction."[383] Treating reparations as liminal tools of transition reveals their potential to reconstruct both society and its constituents before reintegrating them into a posttransitional world.

First, reparations provide a formal and official recognition of past wrongs. However, the focus is not on measuring harm. Rather, the justification and goal is to situate victims in a developing social context

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378. Fraser, *supra* note 111; Nancy Fraser, *Recognition Without Ethics?*, 18 THEORY, CULTURE & SOC'Y 21–42 (2001).

379. JOHN RAWLS, THE LAW OF PEOPLES 5, 106 (1999).

380. *Id.*

381. *Cf.* MAX GLUCKMAN, CUSTOM AND CONFLICT IN AFRICA 17–26 (1956) (describing role of overlapping political identities in maintaining political stability); Kanchan Chandra, *Ethnic Parties and Democratic Stability*, 3 PERSP. ON POL. 235, 236, 242 (2005) (same).

382. *See* David Gray, *Constitutional Faith and Dynamic Stability: Thoughts on Religion, Constitutions, and Transitions to Democracy*, 69 MD. L. REV. 26 (2009) (describing the role of religion in achieving and maintaining dynamic stability in plural societies); David Gray, *Extraordinary Justice* (draft on file with author).

383. Fraser, *supra* note 111, at 49.

where they are identified as individuals capable of being wronged.[384] Recognizing harm, then, is an exercise in using the past as a point of contrast, illuminating, guiding, and regulating a present and future commitment to parity[385] between those who populated the social categories of victim and abuser.

Second, the form of any reparation should be justified by and measured according to the goal of reshaping status arrangements among former victims and abusers.[386] A public apology by state officials is a good start. It recognizes past wrongs and the wrong thinking that led to abuses. However, public recognition, even if heartfelt, may not be sufficient to provide victims with the material conditions necessary to achieve, maintain, and exercise equal status.[387] Again cast in the light of deprivations characteristic of systematic abuse, transitions frequently will need to provide some form of material reparation. The form will be highly context dependent.[388] If the abusive paradigm that held sway in the past systematically denied those in the targeting group with fair and equal access to housing, for example, then reparations in the form of loan programs or building projects may be necessary to put victims on equal footing going forward.[389] Similarly, if the abusive paradigm that dominated the past regime systematically denied those in the targeted group access to economic, social, and political opportunities that serve as gateways to full status, such as education, then reparations in the form of access guarantees, integration, preschool and tutoring programs, and targeted institutional development may be necessary to accelerate the arrival of former victims into circles of privilege and power.[390] However, neither in form nor scope can reparations be justified by an exclusively

384. Brandon Hamber & Richard A. Wilson, *Symbolic Closure Through Memory, Reparation and Revenge in Post-Conflict Societies*, 1 J. HUM. RTS. 1, 10 (2002).

385. Patricia Lundy & Mark McGovern, *The Role of Community in Participatory Transitional Justice*, *in* TRANSITIONAL JUSTICE FROM BELOW 99, 107, 108–12 (Kieran McEvoy & Lorna McGregor eds., 2008).

386. Verdeja, *supra* note 71, at 167.

387. *See* Ellen Waldman, *Restorative Justice and the Pre-Conditions for Grace: Taking Victim's Needs Seriously*, 9 CARDOZO J. CONFLICT RESOL. 91, 93 (2007) ("Victims of serious crime and violation may need more tangible help . . . before they can be expected to dispense the spiritual balm and experience the psychological release that restorative theorists envision.").

388. *See* Daly, *supra* note 70, at 77–78 (arguing that transitional periods are periods of social transformation away from past abuses such that the transitional approach must be highly particularized to the local context).

389. McCarthy, *supra* note 6, at 758–64.

390. Fraser, *supra* note 111, at 73; Erika R. George, *After Atrocity Examples from Africa: The Right to Education and the Role of Law in Restoration, Recovery, and Accountability*, 5 LOY. INT'L L. REV. 59, 78–85 (2008).

retrospective focus on compensating for past harms. Rather, out of respect for the liminal status of transitions and the unique goals of transitional justice, reparations programs must specify the source and form of past wrongs, identify constraints on individual and broader social justice, and tailor reparations strategies that enhance the ability of former victims to participate as equals in society, culture, politics, and the economy.[391]

## V. CONCLUSION

While further elaboration of the approach to reparations as part of a broader transitional justice program must wait for another day, its potential to avoid or moot common objections motivated by ethical individualism is apparent. The goal in transition is not to return from a high-point of mass atrocity to a baseline of persistent injustice—the view that is implied by tort models and counterfactual measures of harm.[392] Rather, the animating justification for transitional justice is to open a society up entirely, to examine and correct the causes of abuse, and to exploit positively the liminal period of transition to achieve the cognitive and structural changes that will ensure peace, justice, and stability going forward. This is an obligation to justice that inheres to every transitional society and to each of its members in the wake of institutionalized human rights abuses. Objections to reparation such as "It wasn't me" that reflect a background commitment to ethical individualism are therefore non sequiturs. For heirs to an abusive paradigm, there simply is no excuse for refusing to make it right.

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391. Kristen McConnachie & John Morison, *Constitution-Making, Transition and the Reconstitution of Society*, *in* TRANSITIONAL JUSTICE FROM BELOW 75, 88–96 (Kieran McEvoy & Lorna McGregor eds., 2008).

392. *See* De Greiff, *supra* note 30, at 457; Rubio-Marín & De Greiff, *supra* note 54, at 325.