

What Every Law Student Needs to Know About Reparations©

By Robert Westley ¹

DO NOT DUPLICATE WITHOUT THE PERMISSION OF THE COPYRIGHT HOLDER

UNDERSTANDING THE TERM “REPARATIONS”

Prior to the Second World War, the term “reparations” only referred to indemnities that countries defeated in war were forced to pay to victorious countries.² The usage changed when West Germany agreed in effect to pay reparations to civil society victims of the Holocaust. In some contexts, the term still implies a measure of forced indemnity extracted by victors in war from losers. However, since the beginning of West German *wiedergutmachung* (literally translated as “make good again”), reparations have come to include material compensation paid to civil society victims of state sponsored injustices.³ This kind of reparations also includes symbolic gestures aimed at acknowledgement of wrongdoing, reconciliation, and restoration of peaceful relations among civil society groups.⁴

¹ Louisiana Outside Counsel Health and Ethic Foundation (LOCHEF) Professor in Legal Ethics and Professional Responsibility at Tulane Law School, New Orleans, LA.

² See The Editors of Encyclopaedia Britannica, *Reparations: History, Definition, & Examples*, ENCYCLOPÆDIA BRITANNICA (2019), <https://www.britannica.com/topic/reparations> (last visited Mar. 1, 2020).

³ See WEST GERMAN FEDERAL INDEMNIFICATION LAW, Claims Conference, <http://www.claimscon.org/what-we-do/compensation/germany-payments/beg/> (last visited Feb. 13, 2020).

⁴ See REPARATIONS, The International Center for Transitional Justice, <https://www.ictj.org/our-work/transitional-justice-issues/reparations> (last visited Mar. 4 2020).

The problem with reparations, when it is understood as material compensation paid to civil society victims of state sponsored injustices, is that not all victims who have suffered these types of injustices have received reparations. Even West German *wiedergutmachung* did not include reparations to certain groups who were victimized alongside the primarily Jewish victims of the Holocaust—such as the Roma people, sexual minorities, or political prisoners.⁵ Not until after reunification of the two Germanys did reparations include compensation to foreigners whom the Nazi regime had used as forced workers.⁶ Moreover, Germany has yet to pay reparations for the near genocide of the Herero people that occurred during the country's colonial occupation of Namibia during the early years of the twentieth century.⁷

Nevertheless, using the German model of Holocaust reparations, other groups across the globe have sought reparations for more recent injustices, as well as for historical injustices, with varying degrees of success. Victims of apartheid in South Africa, for example, sought and obtained partial reparations as part of the Truth and Reconciliation Commission process, which pioneered an alternative model of restorative justice based on an exchange of truthful testimony about atrocities in return for amnesty for perpetrators.⁸ As its title indicates, the South African TRC process was more focused on racial reconciliation, believed to be essential to the

⁵ See Sewell Chan, *Germany Says It Will Rescind Convictions for Homosexuality*, THE NEW YORK TIMES, May 11, 2016, <https://www.nytimes.com/2016/05/12/world/europe/germany-says-it-will-rescind-convictions-for-homosexuality.html> (last visited Mar. 4, 2020).

⁶ For a general work in German on the legal and political history of German *wiedergutmachung*, see Constantin Goschler, *SCHULD UND SCHULDEN: DIE POLITIK DER WIEDERGUTMACHUNG FÜR NS-VERFOLGTE SEIT 1945* (2005).

⁷ See Daniel Gross, *Why The Herero Of Namibia Are Suing Germany For Reparations*, NPR, May 6, 2018, <https://www.npr.org/sections/goatsandsoda/2018/05/06/606379299/why-the-herero-of-namibia-are-suing-germany-for-reparations> (last visited Feb. 24, 2020).

⁸ TRUTH AND RECONCILIATION COMMISSION, <https://www.justice.gov.za/trc> (last visited Feb 23, 2020).

establishment of a democratic political system, rather than material compensation to victims of apartheid.

A. WHO AND WHAT ARE INCLUDED IN REPARATIONS

In the United States there is an increasing number of cases in which states and localities have attempted small scale reparations. These include reparations to survivors of police torture and abuse in Chicago,⁹ reparations to victims of forced sterilizations in North Carolina,¹⁰ and reparations to survivors of a racist massacre in the hamlet of Rosewood, Florida.¹¹ More recently, since the slaughter of worshippers inside the Mother Emanuel African Episcopal Church in Charleston, South Carolina,¹² there has been a movement across the former Confederacy to remove Confederate iconography from public places of honor.¹³ On a larger scale, the United States federal government has paid reparations to Japanese Americans for interning them and violating their civil rights during the Second World War,¹⁴ to Native

⁹ See Peter G Baker, *In Chicago, reparations aren't just an idea. They're the law*, THE GUARDIAN, March 8, 2019, <https://www.theguardian.com/news/2019/mar/08/chicago-reparations-won-police-torture-school-curriculum> (last visited Mar. 3, 2020).

¹⁰ See North Carolina Department of Administration, NC OFFICE OF JUSTICE FOR STERILIZATION VICTIMS, <https://ncadmin.nc.gov/about-doa/special-programs/welcome-office-justice-sterilization-victims> (last visited Mar. 4, 2020).

¹¹ See Carmelita Pickett, *Rosewood Riot of 1923*, ENCYCLOPÆDIA BRITANNICA (2020), <https://www.britannica.com/topic/Rosewood-riot-of-1923>. (last visited Feb. 23, 2020).

¹² See Jason Horowitz, Nick Corasanti & Ashley Southall, *Nine Killed in Shooting at Black Church in Charleston*, THE NEW YORK TIMES, June 17, 2015, <https://www.nytimes.com/2015/06/18/us/church-attacked-in-charleston-south-carolina.html> (last visited Mar. 2, 2020).

¹³ See Brigit Katz, *AT LEAST 110 CONFEDERATE MONUMENTS AND SYMBOLS HAVE BEEN REMOVED SINCE 2015*, SMITHSONIAN MAGAZINE (2018), <https://www.smithsonianmag.com/smart-news/least-110-confederate-monuments-and-symbols-have-been-removed-2015-180969254/> (last visited Mar. 4, 2020).

¹⁴ See Bilal Qureshi, *FROM WRONG TO RIGHT: A U.S. APOLOGY FOR JAPANESE INTERNMENT*, NPR (2013), <https://www.npr.org/sections/codeswitch/2013/08/09/210138278/japanese-internment-redress> (last visited Mar. 5, 2020).

Americans to compensate them for the federal government's seizure of their tribal lands,¹⁵ and to Black farmers who suffered racial discrimination as part of Department of Agriculture policies.¹⁶

A common thread that runs through these examples is the targeting of victims based on their presumed difference from the perpetrators, whether the difference is thought of as racial or ethnic or biological. Unifying each of these examples as instances of reparations, as opposed to ordinary civil justice, are other factors, including the inability of victims to obtain ordinary justice at the time that the violations occurred, the role of government in sanctioning (or not prohibiting) the actions that took place, and acceptance by the party making reparations of some version of entity liability.¹⁷

Entity liability refers to a moral and political concept of accountability based on a relationship of privilege. In any large association with a complex structure, such as a corporation, city, or nation-state, the entity represented by the cooperative efforts of its members is conceptualized as distinct from its members. Privilege resides in the fact that those who benefit by reason of their association may exercise their power as members to exclude non-members from those benefits. In exchange, however, society holds current members to account for debts incurred on behalf of the association by previous members in a succession that can last so long as the entity is

¹⁵ See Adeel Hassan & Jack Healy, *America Has Tried Reparations Before. Here Is How It Went.*, THE NEW YORK TIMES, June 19, 2019, <https://www.nytimes.com/2019/06/19/us/reparations-slavery.html> (last visited Mar. 1, 2020).

¹⁶ See TADLOCK COWAN & JODY FEDER, CONG. RESEARCH SERV., RS20430, *THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS* (2013).

¹⁷ Government and corporate liability are exemplary of so-called entity liability, since individual constituents may have to contribute towards recompense without any showing of personal responsibility for the victims' injuries.

permitted to survive. Thus, even when current members are not personally liable for actions that other members may have taken long ago on behalf of the association, entity liability ensures that the association will remain accountable. On the other hand, acceptance of entity liability tells us nothing about who should benefit from reparations, or what should be included in reparations.

Defining the beneficiary class in reparations claims, when class members are not restricted to direct victims, can be controversial. Depending on the nature and extent of the injuries inflicted, it may be difficult or impossible to locate and identify surviving direct victims. This difficulty becomes even more intractable when the injuries inflicted can be accurately described as historical—as when there are no living victims or witnesses who can verify events or identify participants. Investigators of historical claims must rely on remaining tangible or written records of events that occurred long ago. For these reasons, the scope of the beneficiary class typically includes not only surviving direct victims, but also indirect victims and close remaining relatives of victims. The pattern of succession of entitlement to reparations can then follow the pattern of succession used in cases of intestacy,¹⁸ at least in cases where the material claims are based on restitution rather than personal injury.¹⁹ Even reparations claims based in restitution can become stale if the property to be returned has been fundamentally altered or destroyed and cannot, for some reason, be monetized or replaced by the payment of money.

¹⁸ See BLACK'S LAW DICTIONARY ABRIDGED FIFTH EDITION 422 (5th ed. 1983) (defining "intestacy" as the state or condition of dying without having made a valid will, or without having disposed by will of a part of one's property). In such cases, state statutes prescribe the manner of devolution and the order in which heirs will be recognized.

¹⁹ Unlike restitution claims, under the doctrine of *actio personalis* tort rights were treated at common law as personal and not inheritable. See Ernest J. Weinrib, "Restitutionary Damages as Corrective Justice," *Theoretical Inquiries in Law* 1, 14-15 (1999) (explaining that the *actio personalis* rule barred "actions to repair a wrongful loss" while allowing "actions to recover a gain").

The difficulties of defining the beneficiary class can also be surmounted by agreement of the parties involved; however, the profound challenges of reaching agreement on this point should not be minimized. A strong and recurrent criticism of reparations claims is that they seek material redress from persons who are not responsible for injuries inflicted by deceased perpetrators—figures with whom those currently asked to pay may have no personal or ideological connection—in order to give material benefits to other persons who have not suffered any of the alleged harm. Although the coherence of this criticism, upon examination, is more apparent than real, its persuasive force for opponents of reparations, as reflected in public opinion polling on the issue,²⁰ is nevertheless undeniable.

Given the variability of public opinion in matters of both social justice and compensation for state sponsored injustice, the form that reparations take also matters a great deal. A common reaction to the suggestion that there should be reparations for slavery and Jim Crow segregation in the United States, for example, is that the sums involved are so enormous that such an undertaking would never be feasible.²¹ Moreover, critics sometimes assert that advocates for slavery reparations are overly concerned with the past and backward-looking remedies, when there is more to be gained by forward-looking policies of racial inclusion and reconciliation.²² This criticism, however, overlooks a paramount moral concern about the establishment of

²⁰ See *Poll finds most Americans oppose reparations for slavery*, New York Post, October 25, 2019, <https://nypost.com/2019/10/25/poll-finds-most-americans-oppose-reparations-for-slavery/> (last visited Apr. 6, 2020); see also, ABC News Poll, June 18, 1997 (Accession number 0288792-0288793, University of Connecticut: Roper).

²¹ See John McWhorter, *Against Reparations*, in *SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS* 191 (Raymond Winbush ed., 2010).

²² *But see* ALFRED BROPHY, *REPARATIONS PRO & CON* 7-8 (2008) (arguing that reparations can be both forward-looking and backward-looking).

political and social norms and the creation of moral hazards. If we decide to neglect or ignore serious past wrongdoing that occurred on a massive scale, wrongdoing that lasted for several generations as an intrinsic feature of our legal and social infrastructure, for the sake of implementing future policies that appear feasible, what kind of policies will they be and who will benefit most from them? In other words, we should hesitate long, and then reconsider, before deciding that it is better for the sake of future benefits to lock in place the injuries of mass atrocity visited on minorities in the past. The lesson that such policies teach is that the injuries inflicted on minority communities may at most require expungement from political and social discourse but not redress, and can be safely ignored, glossed over, or even worse, repeated.

A similar concern relates to the difficulty of defining the beneficiary class for purposes of reparations. We can expect that those who benefit from the current distribution of privilege without the institution of reparations will deny the intergenerational effects of prior acts of dispossession, violence, and discrimination on current members of previously targeted groups. However, a genuine transition to a new regime based on fairness and equality cannot take for granted the impacts of prior policies of exclusion and subordination. In the United States, there is a huge racial wealth gap between Blacks and whites that decreasing income disparities can never eliminate.²³ The most probable cause of this racial wealth gap is the disadvantages implemented during slavery and Jim Crow.²⁴

²³ See ANDREA FLYNN & RAKEEN MAHUD, FORD FOUNDATION RACIAL WEALTH GAP EVALUATION, https://www.fordfoundation.org/media/4513/rwg-evaluation-summary_042219_final.pdf (last visited Feb. 20, 2020).

²⁴ See Calvin Schemerhorn, *Why the Racial Wealth Gap Persists, More than 150 Years after Emancipation*, THE WASHINGTON POST, June 19, 2019, <https://www.washingtonpost.com/outlook/2019/06/19/why-racial-wealth-gap-persists-more-than-years-after-emancipation> (last visited Feb. 20, 2020).

Recent gestures toward reparations for America's "original sin" of slavery have been primarily symbolic, rather than taking the form of material redress. These symbolic gestures include the movement to remove Confederate iconography in the former Confederacy, the construction of memorials to the victims of lynching, and the renaming of buildings on university campuses that had previously been named after slave owners and slave traders. The reparations that Georgetown University made to the descendants of those whom the school's founders enslaved and sold to pay the university's debts may be an exception to the tendency of reparations to Blacks to take the form of mere symbolism. In that case, students at Georgetown voted in favor of a tuition increase that would benefit descendants of the 272 enslaved Africans whom the Jesuit administration sold nearly two hundred years ago to secure the school's financial future. The university's board of directors must approve the measure before it can take effect.²⁵ Moreover, political support for reparations for slavery seemed to grow during the Democratic Presidential primary when several of the candidates spoke out forcefully in favor of reparations to African Americans.²⁶

²⁵See Stephanie Ebbs, GEORGETOWN UNIVERSITY ANNOUNCES REPARATIONS FUND TO BENEFIT DESCENDANTS OF SLAVES ONCE SOLD BY THE SCHOOL ABC NEWS (2019), <https://abcnews.go.com/Politics/georgetown-university-announces-reparations-fund-benefit-descendants-slaves/story?id=66642286>. (last visited Feb. 21, 2020).

²⁶ See Astead W Herndon, *2020 Democrats Embrace Race-Conscious Policies, Including Reparations*, THE NEW YORK TIMES, February 21, 2019, <https://www.nytimes.com/2019/02/21/us/politics/2020-democrats-race-policy.html> (last visited Feb. 21, 2020).

B. WHY REPARATIONS FOR HISTORICAL INJUSTICE?

There are several reasons that a society may decide to offer reparations to victims of historical injustice in the absence of an existing legal obligation to do so. As the moral views of a society evolve, past practices that many may have once considered acceptable can become unacceptable to the majority. In order to demarcate a clear break with a prior regime that promoted or tolerated the newly unacceptable behavior, it may be insufficient simply to prohibit that behavior in the future, especially when the consequences of the behavior have a lasting impact on those who were harmed by it. Reparations provide a means for society to show regret or remorse for unjust harms inflicted in the past. Ideally, reparations should be accompanied by an apology to those who were harmed by the wrongful behavior. However, even apologies may be viewed by victims of state sponsored injustices as meaningless words, unless accompanied by both material and symbolic acts that demonstrate a sincere intention to repair any harm that has been done, as well as firm resolve not to inflict similar harm in the future. Through the acceptance of accountability for past wrongdoing, reparations can make reconciliation between formerly adverse social groups possible.

1. ACCOUNTABILITY

The importance of the relationship between accountability and entity liability in cases of reparations for historical injustice has already been observed. Nevertheless, accountability and blameworthiness should not be considered synonymous. The most general sense of accountability is an obligation to give an account of one's own actions. The need to give an account implies that the person held accountable has a story to tell in which access to important

aspects of what happened are not transparent to those to whom the account is given. Thus, those held accountable inevitably tend to appeal to mitigating circumstances, such as excuse, justification, or even denial. It is only when certain facts have been established beyond doubt that accountability can lead to a conclusion of blameworthiness. In the case of reparations for an historical injustice, a recurrent difficulty for advocates who wish to hold others accountable is the refusal by those sought to be held accountable to offer any meaningful account of their actions. The assertion of accountability is most often met by its denial in the form of silence or refusal to give an account.

Because those directly involved in the enforcement of the apartheid regime in South Africa refused to be held accountable, it became necessary through the Truth and Reconciliation Commission process to offer amnesty in exchange for accountability. As a result, the victims of apartheid were required to accept a political process that valorized reconciliation without providing punishment to perpetrators for wrongdoing or meaningful material reparations to victims.²⁷

Advocates of reparations have occasionally resorted to litigation as a means of compelling accountability. This approach, while leading to mixed results, most often results in failure.²⁸

Lawsuits seeking reparations for slavery and Jim Crow segregation have established a record of

²⁷ See TRUTH AND RECONCILIATION COMMISSION, <https://www.justice.gov.za/trc> (last visited Feb. 23, 2020).

²⁸ See e.g., *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004) (in the modern era, this case was the last slavery-related claim to be brought by reparations activists in federal court against private defendants). See also *Cato v. United States*, 70 F. 3d 1103 (9th Cir. 1995).

courts denying jurisdiction on the grounds of lack of standing by the litigants, sovereign immunity of state actors, or the statute of limitations on the relevant acts of violence—without ever reaching the merits of the claims brought before them.²⁹ In the language of the courts, these cases were dismissed “without prejudice.” This language seems to have the legal effect of preserving the underlying substantive claims for further adjudication, but, thus far, this legal formula has functioned as a final disposition on the merits in the courts.

Even when the parties bringing forth claims for reparations are state actors, as is the case with the nations which compose the membership of the Caribbean Community (aka “CARICOM”), those claims for reparations have thus far mostly succeeded in prompting denials and silence from former colonial powers such as Great Britain and the other European countries that participated in the African Slave Trade and the racial enslavement of Africans throughout what was once known as the West Indies.³⁰ None of the former colonial powers in Europe has appropriated money to compensate descendants of enslaved Africans. However, there has been a modest effort to sponsor further collaborative research between the University of the West Indies and Glasgow University in Scotland on the topic of slavery.³¹

²⁹ See Robert Westly, *The Accursed Share: Genealogy, Temporality, and the Problem of Value in Black Reparations Discourse*, 92 REPRESENTATIONS 81–116 (2005), <https://www.jstor.org/stable/10.1525/rep.2005.92.1.81> (last visited Mar. 2, 2020).

³⁰ See Kris Manjapra, *When Will Britain Face Up to Its Crimes Against Humanity?*, THE GUARDIAN, <https://www.theguardian.com/news/2018/mar/29/slavery-abolition-compensation-when-will-britain-face-up-to-its-crimes-against-humanity> (last visited Feb. 20, 2020).

³¹ See Palko Karasz, *Glasgow University Pledges Millions for ‘Reparative Justice’ for Slavery Ties*, New York Times, August 24, 2019, <https://www.nytimes.com/2019/08/24/world/europe/university-of-glasgow-slavery-reparations.html?searchResultPosition=1> (last visited Apr. 6, 2020).

2. COMPLICITY

Just as not everyone who is held accountable is blameworthy, not everyone who is blameworthy is equally so. From a moral standpoint, there can be degrees of blameworthiness—where some may be considered directly and personally responsible for unacceptable behavior as a result of their intentional acts, there are others who are only indirectly responsible by virtue of their associations or affiliated status. Still others may have an even more attenuated relation to bad acts that other actors commit. These individuals with attenuated relations to bad acts may derive unjust benefits, whether knowingly or unknowingly; however, they would have never given direct assent or approval to the bad acts. These distinctions among those who might be considered blameworthy express the possible range of statuses that the notion of complicity encompasses. Because the range is so broad, some may argue that complicity has little or no value in moral reasoning. One can imagine a moral universe in which only those in the first category—those who are directly and personally responsible as a result of their intentional acts—are considered blameworthy. However, if we then reflect on the example of racism, it should become clear why a more complex moral universe is desirable—one that includes some allowance for considering those who are *merely* complicit in the evil acts of others who are directly blameworthy for those acts.

One argument that defenders of the European colonial powers who engaged in the African Slave Trade have made is that the Africans themselves willingly both participated in the trade and

benefitted from it.³² Since the Africans practiced enslavement among themselves and voluntarily traded other Africans in exchange for goods that European traders offered, the Africans should be considered complicit with any harm that the African Slave Trade inflicted. Another complicity-based argument to which opponents of reparations for slavery sometimes resort is that during the antebellum period in the United States, there were some free Black people who held other Black people as slaves.³³ Again, the argument implies that since some Black people were complicit in slavery, then there should not be reparations paid to any Black people for slavery.

Those who make such arguments against reparations seem to fail to understand how deeply racist these arguments in fact are. The premise that underlies both is that collaboration in, association with, or profit from an enterprise that inflicts harm on some members of a group is somehow negated when it is done by other members of the same group. This form of argument trades on the assumption that the Africans who profited from the sale of other Africans to Europeans would have accepted the common characteristic of race as uniting them with their victims. It trades, in other words, on the false assumption that identity characteristics that might have mattered to European buyers of enslaved Africans also mattered to the African sellers (or buyers) of other Africans. No evidence has ever shown that to be true. By contrast, there is overwhelming evidence that when it came to enslavement, race was a matter of great and

³² See Walter Williams, *REPARATIONS FOR SLAVERY* (2019), <https://www.creators.com/read/walter-williams/06/19/reparations-for-slavery> (last visited Mar. 6, 2020).

³³ See Henry Louis Gates Jr., *Ending the Slavery Blame-Game*, *THE NEW YORK TIMES*, April 22, 2010, <https://www.nytimes.com/2010/04/23/opinion/23gates.html> (last visited Mar. 6, 2020).

determinate importance to European enslavers.³⁴ The default assumption of racists is that once someone's race has been identified, that label tells everything one needs to know about that person's views and interests.

On the other hand, these complicity-based arguments also show that in order to combat racism, it may be necessary to consider blameworthy members of the victimized group who collaborated with or profited from the bad acts of those more directly and personally responsible. Plainly some Africans were complicit in the African Slave Trade, just as some free Blacks in the antebellum United States were complicit in slavery. This does not negate the need to repair the damage of the slave trade and slavery for the vast majority of persons of African descent who suffer continuing harm due to these practices.

3. CONTINUING HARM

There are many possible measures of the continuing harm of historical injustices such as slavery. Racism is the most blatant and pervasive indicator of continuing harm. Too often, however, racism is dismissed as a matter of the prejudiced beliefs of unnamed others, rather than a structural feature of society that limits access to opportunity and advancement for people of color. By contrast to this minimizing view of racism's effects, the racial wealth gap is perhaps the most concrete measure of continuing harm that is directly traceable to the conditions that slavery and Jim Crow segregation imposed. From a purely economic perspective, slavery was a

³⁴ See e.g. WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (2012).

system of theft and plunder of Black labor. It allowed some white Americans to become wealthy, some of them staggeringly so, by legalizing ownership of persons of African descent and sanctioning the forced extraction of their uncompensated labor. Slavery was the origin of the racial wealth gap; additional acts of plunder and racial exclusion in the generations that followed the constitutional prohibition of involuntary servitude augmented and replenished this gap.³⁵ The racial wealth gap that exists today—on average white Americans possess seven times the wealth of Black Americans—constitutes an ineliminable barrier to genuine equality measures such as equal income for equal work and equal opportunity, even assuming that these measures could be consistently enforced.³⁶

After the constitutional prohibition of involuntary servitude, states of the former Confederacy, led by the example of Mississippi, attempted to enact so-called Black Codes that would have had the effect of re-imposing slavery by other means. These laws were intended to restrict African American's freedom by compelling them to work using a labor system based on debt and low wages. The Black Codes were enacted during the postwar period known as Presidential Reconstruction under which Andrew Johnson, a Southerner who had been Abraham Lincoln's vice president, served as President.³⁷ President Johnson was an avowed white supremacist and

³⁵ See Calvin Scherhorn, *Why the Racial Wealth Gap Persists, More than 150 Years after Emancipation*, THE WASHINGTON POST, June 19, 2019, <https://www.washingtonpost.com/outlook/2019/06/19/why-racial-wealth-gap-persists-more-than-years-after-emancipation> (last visited Feb. 20, 2020).

³⁶ See Christian E. Weller, *AFRICAN AMERICANS FACE SYSTEMATIC OBSTACLES TO GETTING GOOD JOBS*, CENTER FOR AMERICAN PROGRESS (2015), <https://www.americanprogress.org/issues/economy/reports/2019/12/05/478150/african-americans-face-systematic-obstacles-getting-good-jobs/> (last visited Mar. 6, 2020).

³⁷ See Jennifer Szalai, *Impeachment, the First Time Around*, New York Times, May 15, 2019, <https://www.nytimes.com/2019/05/15/books/review-impeachers-andrew-johnson-brenda-wineapple.html?smid=em-share> (last visited Apr. 3, 2020).

an opponent of giving land to the former slaves as reparations for their prewar enslavement. Although the enactment of civil rights legislation and the passage of the Fourteenth and Fifteenth Amendments to the federal constitution during the period known as Radical Reconstruction thwarted the first attempt to re-impose slavery using the Black Codes, by the end of Radical Reconstruction, states and localities once again began to enforce many of these laws, which had never been repealed and remained in the statute books.

Thus, in the immediate aftermath of the constitutional prohibition of slavery, the then existing wealth gap was reinforced by the denial of land grants as reparations to African Americans who had suffered for generations under the system of plunder that legal enslavement sanctioned. Next, many Southerners viewed the economic gains that some African Americans made as freedmen and freedwomen during Reconstruction as an affront to white supremacy. As a result, when Reconstruction ended, these Southerners immediately set about reversing those gains through both legal and extra-legal means. During this period of Southern history known as Redemption, state and local governments once again enforced Black Codes while also enacting new Jim Crow laws. Even worse, many whites, impatient of legal means of plundering the formerly enslaved, resorted to mob violence and lynching to strip African Americans of their freedom, lives, and property.³⁸

While the present American historiography typically refers to “race riots” during this period, these events might in another context be referred to as “pogroms”—if this latter term did not

³⁸ See generally, Douglas A. Blackmon, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

have a connotation exclusively connected to the Jewish experience of Russian antisemitism. As historian David Engel writes, "there can be no logically or empirically compelling grounds for declaring that some particular episode does or does not merit the label [pogrom],"³⁹ adding that the majority of incidents habitually described as pogroms "took place in societies significantly divided by ethnicity and/or religion where the violence was committed by the higher-ranking group against a stereotyped lower-ranking group against whom they expressed some complaint, and with the belief that the law of the land would not be used to stop them."⁴⁰ This happened all over the former Confederacy wherever African Americans became prosperous—in Wilmington, North Carolina in 1898,⁴¹ in the Greenwood neighborhood of Tulsa, Oklahoma in 1921,⁴² and all over the nation during the Red Summer of 1919. During that summer, the bloodiest events took place in Elaine, Arkansas, with other violence occurring in Chicago, Illinois, and in Washington, D.C., the nation's capital.⁴³

The turn of the twentieth century marked the lowest point of African American experience since the end of the Civil War. The loss of interest or support among erstwhile allies within the Republican party accompanied disenfranchisement and Jim Crow rule in the South. Under the control of Dixiecrats, segregationists, and imperialists, the federal government openly practiced

³⁹ See Jonathan L. Dekel-Chen et al., eds., *ANTI-JEWISH VIOLENCE: RETHINKING THE POGROM IN EAST EUROPEAN HISTORY* (2011).

⁴⁰ *Id.*

⁴¹ See 1898 Wilmington Race Riot Commission, NORTH CAROLINA DEPT. OF NATURAL AND CULTURAL RESOURCES, <https://www.ncdcr.gov/learn/resources-topic/1898-wilmington-race-riot-commission> (last visited Mar. 6, 2020).

⁴² See 1921 Tulsa Race Massacre, TULSA HISTORICAL SOCIETY & MUSEUM, <https://www.tulsaohistory.org/exhibit/1921-tulsa-race-massacre/> (last visited Mar. 6, 2020).

⁴³ See Olivia B. Waxman, WHAT IS RED SUMMER? WHAT TO KNOW ON 1919'S DEADLY RACE RIOTS, TIME (2019), <https://time.com/5636454/what-is-red-summer/> (last visited Mar. 6, 2020).

racial discrimination throughout the first half of the twentieth century. Discriminatory policies of the Veterans Administration and the Federal Housing Administration excluded African Americans from participation in wealth-building programs.⁴⁴ Instead of federally insured private banks helping African Americans to become financially independent through home ownership, these banks subjected them to redlining.⁴⁵ Further, African Americans' neighborhoods and schools were often neglected by public officials and deprived of public services, encouraging the creation of slums and ghettos.⁴⁶

By the time the efforts of the Civil Rights Movement began to bear fruit in the form of effective federal antidiscrimination legislation in the middle of the 1960s, the racial wealth gap had already reached near the proportions that we see today, in which the median family wealth of white people is \$171,000, compared with just \$17,600 for Black people.⁴⁷

⁴⁴ See Erin Blakemore, HOW THE GI BILL'S PROMISE WAS DENIED TO A MILLION BLACK WWII VETERANS HISTORY.COM (2019), <https://www.history.com/news/gi-bill-black-wwii-veterans-benefits> (last visited Mar. 6, 2020).

⁴⁵ So-called “redlining” was the systematic denial of both public services and private financing opportunities by federal government agencies, local government, and the private sector, to residents of predominantly black and minority neighborhoods or communities. The denial occurred either directly or through the selective raising of prices. Neighborhoods with a high proportion of minority residents were far more likely to be redlined than white neighborhoods with similar household incomes, housing age and type, and other objective determinants of risk. The most prominent examples of redlining involved the use of this practice by financial institutions and insurance companies. However, other services such as health care or the provision of retail businesses like supermarkets have been denied to residents of minority communities.

⁴⁶ See A 'Forgotten History' Of How The U.S. Government Segregated America, NATIONAL PUBLIC RADIO (2017), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america> (last visited Mar. 6, 2020).

⁴⁷ See generally, MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (2006).

It does not require much reflection to understand that this gap will only grow unless we take active measures to equalize access to wealth. It also does not require much reflection to understand why attitudes about reparations have a significant impact on policies that might redress the gap.

C. WHY REPARATIONS ARE NOT JUST AN ORDINARY LEGAL PROBLEM

In an ordinary legal case, there is a living plaintiff and an identifiable defendant. There is a complaint that must be filed with a court within a predetermined time, while the controversy is still fresh, and an answer. There are existing legal standards and precedents to guide the resolution of the controversy. The outcome may affect parties with similar claims who wish to pursue them through litigation, but it does not impact the norms by which the entire society views its history and governs its citizens. Reparations are different in almost every respect from an ordinary legal case.

Although claims for reparations often begin as lawsuits, courts have rarely resolved these claims, especially when they involve historical injustices. Typically, reparations litigation is either settled before a court is required to render judgment, or when a court must render judgment, the lawsuit is dismissed on procedural grounds. In the case of reparations for the internment of Japanese Americans during the Second World War, advocates used lawsuits to raise the profile and the stakes involved; a case even reached the Supreme Court in 1987 before it was eventually

dismissed by the Federal Circuit court.⁴⁸ Before a final judgment could be rendered by the courts, however, Congress passed, and the President signed, legislation resolving the issue.⁴⁹

Because reparations often involve cases of mass atrocity and abuse of law, legal advocates cannot rely on established law to make reparations available to victims or their surviving descendants. For reparations to happen in the first place, a political transition is required to establish the rule of law from a condition of lawlessness in which government or private actors target social groups for legally sanctioned violence. Nevertheless, even a political transition to the rule of law is no guarantee of reparations.⁵⁰ Additionally, a society that is attempting to transition from mass violence must have both the means to repair past harm and share a vision of what accountability requires. It may be that law can never prevent injustice. The question remains, nevertheless, how should decent people respond when mass injustice disrupts or destroys the lives of ordinary human beings?

⁴⁸ *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part, rev'd in part*, 782 F.2d 227 (D.C. Cir. 1986), *vacated*, 482 U.S. 64 (1987) (with instructions to transfer the case to the Federal Circuit), and *aff'd*, 847 F.2d 779 (Fed. Cir. 1988), *dismissed per curiam*.

⁴⁹ See Civil Liberties Act of 1987, H.R. 442, 100th Cong. (1988); 50 U.S.C.A. § 4201 (West 2020); See also Stephen I Vladek, *A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen "Enemy Combatants"*, 112 THE YALE LAW JOURNAL 961–68, <https://www.jstor.org/stable/3657495> (last visited Feb. 11, 2020).

⁵⁰ What constitutes “the rule of law” is a matter beyond the scope of this essay. Minimally, the rule of law should include safeguards for procedural fairness and respect for human rights. I have argued in my upcoming chapter on transitional justice, “Tainted by the Past While Settling Accounts,” that global concern for the rule of law was tied to international human rights regimes instituted in the wake of Nazi atrocities during World War II, wherein Nazi Germany was condemned by the Allies in part for having used law as an instrument of state oppression, terror and discrimination. I argue in that chapter that a norm of redress for the atrocities of the prior regime is a necessary component of the rule of law, and indispensable to the credibility of transitional justice. However, as the example of post-apartheid South Africa shows, the rule of law as a safeguard for procedural fairness and respect for human rights, does not alone guarantee reparations to previously victimized groups.