Beyond Reparations: Accommodating Wrongs or Honoring Resistance

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Introduction

Reparations for race-related wrongs have become a common subject of both popular and scholarly discourse. There is a great deal of public discussion—and some remedial action—with respect to wrongs arising out of World War II,¹ and the subject of reparations to African Americans has once again become a subject of widespread debate.² Accordingly, it is important to recognize that reparations can serve either of two diametrically opposed purposes. They purport to redress wrongs, but can quite easily end up reinforcing the structures that created those wrongs. The effect of redress hinges, I believe, on how we frame the wrongs. Are they seen as aberrations from a basically acceptable status quo, or reflecting injustices intrinsic to the system?³ How we answer this question will determine the kinds of remedies we pursue.

Considering instances in which reparations have been granted in this country, or at least seriously considered, we see repeated attempts to “contain” the wrongs as mistakes, deviations from a status quo that is at its core equitable and democratic. Thus, there are a number of cases related to World War II,³ and some related to

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³ See WHEN SORRY ISN’T ENOUGH, supra note 1. Redress to interned Japanese
specific events, such as the white riots in Rosewood, Florida,\textsuperscript{4} and Tulsa, Oklahoma,\textsuperscript{5} or the syphilis experiments on African American men at the Veterans Administration hospital in Tuskegee, Alabama, in which some redress has been obtained.\textsuperscript{6} The implicit assumption in these cases, however, is that such events were aberrations, and the implication is that there is no need for structural change; a return to the status quo is, at least in theory, the desired result.

This essay begins with one of the apparently “successful” movements for reparations—redress for the Japanese American internment—and argues, first, that the internment itself was not an aberration; second, that structural changes which would prevent its recurrence have not been made; and finally, that the apparent intent of the redress granted was to reward accommodation to the wrong, not to honor those who recognized it and resisted it.

The subject of reparations to African Americans makes many people nervous, as illustrated by the controversies over the suggestion of a government apology\textsuperscript{7} and recent ads opposing reparations run in school newspapers.\textsuperscript{8} I believe that this is because the subject has not been securely “contained,” and runs the risk of calling into question our basic social, political, and economic structures. In the second part of this essay I address how a “successful” campaign for reparations to African Americans could strengthen resistance to race-based wrongs or could end up reinforcing accommodation of such wrongs.

Finally, I conclude by framing these movements in a broader


context of social reconstruction. Fundamentally, this reframing boils down to moving from a “we deserve a bigger slice of the pie” argument to questioning the legitimacy of the pie itself. I find it interesting that even the most so-called “progressive” activists balk when someone raises the issue of returning land to American Indian nations, because the idea questions the legitimacy of the very institutions we are petitioning for redress. Yet I believe that the “wrongs” with which we are most concerned—from genocide and slavery to the color-coded disparities we see around us every day—are structural, necessary to the creation and maintenance of the status quo. If this is true, we need to look honestly at the larger context of what we are struggling to build, because otherwise, we may find that our efforts to create a more just and equitable society, in fact, reinforce the very system we purport to oppose.

Japanese American Redress as Lens

In the spring of 1942, the United States government imprisoned nearly 120,000 Japanese Americans—men and women, children and the elderly, citizens and noncitizens (or, in the military’s words, “aliens and non-aliens”). The government individually scrutinized Japanese Hawaiians and German and Italian Americans, but all Japanese Americans on the West Coast were forced to leave their homes and store or sell all of their possessions, with just a few days’ notice. They were tagged with numbers and taken under armed guard to “assembly centers”—the most familiar being the converted racetracks at Tanforan and Santa Anita. From there, they were


10. Good general accounts of the internment include ROGER DANIELS, PRISONERS WITHOUT TRIAL, JAPANESE AMERICANS IN WORLD WAR II (1993); ROGER DANIELS, CONCENTRATION CAMPS, USA: JAPANESE AMERICANS AND WORLD WAR II (1971); MICHI NISHIMURA WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA’S CONCENTRATION CAMPS (1976).


shipped off to ten concentration camps, euphemistically designated "relocation centers," in the interior of the country, where they were held for the duration of the war. In the words of the government’s official “apology,” detention was an unfortunate byproduct of "wartime hysteria and racial prejudice." 

Legal challenges to the internment were brought at the time by Gordon Hirabayashi, Minoru Yasui, Fred Korematsu, and Mitsuye Endo. In these cases, the United States Supreme Court avoided addressing the internment and upheld the curfew (in Hirabayashi and Yasui), then upheld the evacuation (in Korematsu). By the time the Court decided Endo’s case, she had been certified “loyal” by the War Relocation Authority, and the Court held that the government, after making such a determination, could not continue to hold her. In so doing, the Supreme Court upheld the internment without ever directly addressing whether the indefinite imprisonment of U.S. citizens deprived the internees of due process.

As the war ended, Japanese Americans were not allowed to return to their homes or communities. Initially, people could only leave the camp to go to the Midwest or the East, and only to communities where anti-Japanese sentiment was not too

13. That they were concentration camps has been acknowledged by those who were responsible for creating them. President Roosevelt said in 1944 that “it is felt by a great many lawyers that under the Constitution [the nisei, i.e., those born in the U.S.] can’t be kept locked up in concentration camps.” WEGLYN, supra note 10, at 217. After retiring from the Supreme Court, Associate Justice Tom Clark said, “We picked the [Japanese Americans] up and put them in concentration camps. That’s the truth of the matter.” Id. at 114.


19. Hirabayashi, 320 U.S. at 102; Yasui, 320 U.S. at 117.


21. Ex parte Endo, 323 U.S. at 304.

The internment was not publicly discussed, and it appeared that the story might be lost to history. By the late 1960s, however, as third generation Japanese Americans came of age in the midst of the civil rights and antiwar movements, the issue resurfaced.24

Community activists in the Japanese American communities began a concerted program of public education that continued through the latter part of the 1970s and the 1980s.25 William Hohri filed a lawsuit against the United States, which created the possibility that the government could be held liable for billions of dollars in compensation.26 Additionally, Congress created the Commission on Wartime Relocation and Internment of Civilians, which held a series of hearings across the country and, in 1982, issued a report recognizing that Japanese Americans suffered a "grave injustice" as a result of "race prejudice, war hysteria, and a failure of political leadership."27 These events were really the heart of the struggle for reparations—an instance in which the government actually sought and recorded the truth, and people finally came forward to tell their stories, many of them for the first time ever.28

In the meantime, coram nobis petitions were brought to vacate the Yasui, Hirabayashi, and Korematsu convictions, based on newly discovered evidence that government officials had deliberately altered, destroyed, and suppressed evidence that the military's allegations of disloyalty and espionage on the part of Japanese Americans were false.29 Min Yasui died before the cases could be heard, but the Fred Korematsu and Gordon Hirabayashi convictions were vacated in the mid-1980s,30 providing some vindication of the

23. See DANIELS, CONCENTRATION CAMPS, supra note 10, at 144-70.
25. See TAKAKI, supra note 12, at 484-87.
29. IRONS, supra note 27, at 361-64.
30. See Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984). For documents related to these cases, see JUSTICE DELAYED 125-224 (Peter Irons ed., 1989).
positions they had taken without actually overturning the precedent set by the Supreme Court.\textsuperscript{31}

In 1988, Congress passed the Civil Liberties Act which, based on the recommendations of the Commission, provided $20,000 for each surviving internee, a letter of apology from President Reagan, and a public education fund.\textsuperscript{32} The latter is a particularly significant but often over looked aspect of the redress program. Had the monies for the fund been properly invested and a board timely appointed, they could have supported educational projects for ten years with $50 million. As it turned out, the fund lasted only two years and allocated $5 million.\textsuperscript{33} Nonetheless, the fund acted as a catalyst for a great deal of creative work in the fields of elementary and secondary education, legal analysis and education, the production of documentary films, art programs, and various kinds of memorials.\textsuperscript{34}

Many Japanese Americans of my generation, the \textit{sansei},\textsuperscript{35} were critical of the redress movement, fearing that what proponents purported to be redress would simply sweep the wrong under the rug. However, like many others, I have come to believe that it did, in fact, accomplish a great deal. Socially and psychologically, it was

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\item \textsuperscript{31} In vacating Korematsu's conviction in 1984, the district court noted that in issuing a writ of \textit{coram nobis} it could only correct errors of fact and not law, and "[t]hus, the Supreme Court's decision stands as the law of this case and for whatever precedential value it may still have." 584 F. Supp. at 1420. According to Fred Yen, "Unfortunately, proclamations of Korematsu's permanent discrediting are premature. The Supreme Court has never overruled the case. It stands as valid precedent, an authoritative interpretation of our Constitution and the 'supreme Law of the Land.'" Yen, \textit{supra} note 22, at 2.
\item \textsuperscript{32} See 50 U.S.C. § 1989a-b9.
\item \textsuperscript{33} See National Coalition for Redress/Reparations \textit{et al.} v. United States (9th Cir. 2001) (unpublished decision), available at 2001 WL 133143, D.C. No. CV-98-03932-CAL (Memorandum opinion issued Feb. 15, 2001) (holding that the NCRR's claims for losses suffered due to the government's failure to invest funds allocated to the Civil Liberties Public Education Fund were not redressable because the fund had been terminated and its board no longer existed); Jason Ma, \textit{Redress-fund Suit Thrown Out; Restoring Lost Interest Is Up To Lawmakers, Not Courts, Judge Rules}, ASIAN WEEK, Nov. 25, 1999 (reporting district court's dismissal of case, and noting that only $5 million of the $50 million authorized for educational programs was spent before the fund ran out).
\item \textsuperscript{34} The Hirasaki National Resource Center of the Japanese American National Museum, through its Civil Liberties Archives and Study Center, is attempting to collect the products of the research and educational projects sponsored by the Civil Liberties Public Education Fund, as well as other materials documenting the internment. See The National Resource Center (2002), at http://www.janm.org/clasc.
\item \textsuperscript{35} Because all Japanese immigration was cut off in the early 1900s, the Japanese American community was composed of distinct generations: \textit{issei} were the first generation immigrants, prevented by law from becoming U.S. citizens, \textit{nisei} were the second generation, U.S. citizens by birth, and \textit{sansei} were their children, born for the most part after World War II. See generally TAKAKI, \textit{supra}, note 12 at 179-229.
\end{itemize}
very important for the *nisei*—our parents’ generation—many of whom had never discussed these early traumatic experiences. The redress movement also brought about a shift in public opinion from a presumption that the internment had been justified because we were somehow the enemy, to an acknowledgement that it had been unjust. Perhaps most importantly, redress kept the internment from being erased from history altogether.

These aspects of redress are very important, but it is not enough that some benefit was achieved. We need to look beyond these accomplishments to see what the long-range impact of the reparations will be. As discussed thus far, redress for the internment is a feel-good story: a terrible thing happened, but the nation recognized the wrong and stepped forward to provide some compensation. The moral of this story is that despite occasional aberrations, this is a nation committed to democracy and the equality of peoples. Most people I encounter are open to this version of the story—and, like many Japanese Americans, I get invitations to talk about the internment and reparations at high schools, at churches, and even on military bases. But there are problems with this version. First, it accepts the notion, implicit or explicit, that the internment was an aberration, a product—in the words of the U.S. government apology—of wartime hysteria and racial prejudice.

This essay is not the place for a comprehensive history of Asian Americans in the United States, but a quick survey of that social, political, economic, and legal history illustrates that from the enforcement of the 1790 Naturalization Act’s limitation of citizenship to “free white persons,” which kept first generation

36. Janice Mirikitani records her mother’s response when, breaking forty years of silence to testify before the Commission on Wartime Relocation and Internment of Japanese American Civilians, she was told she had a limited time to speak: “Mr. Commissioner . . . so when you tell me I must limit testimony, when you tell me my time is up, I tell you this: Pride has kept my lips pinned by nails, my rage coffined. But I exhume my past to claim this time.” Janice Mirikitani, “Breaking Silence” in SHEDDING SILENCE 33 (1987), quoted in Chang, supra, note 28 at 1305 n.314.

37. See, e.g., Lawson Inada’s description of how John Okada’s searing novel, *NO-NO BOY*, first published in 1957, almost disappeared from history and how Okada’s discouraged widow burned the manuscript of his only other novel. Lawson Fusao Inada, Introduction to JOHN OKADA, NO-NO BOY, at iii (1976).


39. The Naturalization Act of 1790, 1 Stat. 103 (repealed by the Act of Jan. 19, 1795,
Asian immigrants from becoming citizens, to the exploitation of Chinese labor for mining and building railroads, to lynchings and Jim Crow laws, the Asian Americans were subjected to racial discrimination and violence. The Chinese Exclusion Act of the 1880s, Japanese exclusion in the 1910s, and alien land laws preventing those persons “ineligible to citizenship” from owning land followed over the next several decades. This history illustrates that the military orders to exclude and then imprison “all persons of Japanese ancestry, both alien and non-alien” were not an aberration, but a logical extension of all that had come before.

This can also be seen in the perpetual “enemy” status afforded Asians in popular American culture. Starting with depictions of the “yellow peril” hordes waiting to take over the country in the 1800s, Asians have been routinely portrayed as sneaky, inscrutable, fanatical, inassimilable and, on top of that, fungible. We were

which re-enacted most of its provisions, including its racial restrictions) provided that only “free white persons” could become naturalized citizens. After passage of the Fourteenth Amendment, this was amended to include persons of “African nativity and descent.” Act of July 14, 1870, 2555, § 7, 16 Stat. 254. The racial restriction on naturalized citizenship was not eliminated with respect to persons of Japanese ancestry until the passage of the Immigration and Nationality Act of June 27, 1952, ch. 477, 66 Stat. 163 (1952) (also known as the McCarran-Walter Act). For a history of the cases addressing this racial prerequisite for citizenship, see IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

40. TAKAKI, supra note 12, at 79-113.

41. See People v. Hall, 4 Cal. 399 (1854) (overturning conviction of white man for murder because it was based on the testimony of a Chinese witness and interpreting California law precluding testimony by “black, mulatto person or Indian” to preclude testimony by Chinese); SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY 45-61 (1991) (describing mob violence and lynchings); Chang, supra note 28, at 1254-55 (describing 1877 and 1885 massacres of Chinese in California and Wyoming); TAKAKI, supra note 12, at 201 (describing school segregation in San Francisco); see generally Charles J. McLain, Jr., The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870, 72 CAL. L. REV. 529 (1984).


43. TAKAKI, supra note 12, at 46-50 (describing restrictions on Japanese immigration, including the “Gentlemen’s Agreement” of 1908).


foreign, disloyal and therefore an enemy—just as portrayed in the rhetoric of the internment.\textsuperscript{47} In this context, the anti-Japanese sentiments and actions of the 1940s were unusual only in scope and consequence, not in nature.

The second problem with the standard narrative of the internment is that it implies that the wrong has been recognized and corrected, or at least that it could not happen again. But has it?

From a social or cultural perspective, many of the problems I just described have persisted. The Chinese, who were “our friends” in World War II, rapidly became the enemy as China “went communist,” and the wars in Korea and Vietnam reinforced this image, despite the fact that Asians were, of course, allies as often as they were enemies.\textsuperscript{48} Anti-Asian sentiment, compounded by a refusal to distinguish among individuals and ethnic groups, can be seen in the hate crimes against “gooks” and “chinks” still recorded every year.\textsuperscript{49} We continue to see in contemporary American society a well-entrenched pattern of discrimination rooted in a racialized identification of Asian Americans as perpetually “foreign.”\textsuperscript{50} Furthermore, the “wrong” being addressed by the internment persists not just in popular culture, but in the structures of law as well. To understand this problem we need to look more closely at just what the wrong was.

The way the story is usually told, it is one of racial prejudice playing out against a group of people in ways we now recognize to have been excessive. But while racism is inextricable from this story, the problem is more complex. In what is still probably the best analysis of the internment cases, Yale Law School professor Eugene Rostow, in 1945, summarized it as follows:

The Japanese exclusion program . . . rests on five propositions of the utmost potential menace:

(1) protective custody, extending over three or four years, is a permitted form of imprisonment in the United States;

\textsuperscript{47} Saito, \textit{Model Minority}, supra note 46, at 83-86; see also Saito, \textit{Alien and Non-Alien}, supra note 11, at 301-04.
\textsuperscript{48} See \textit{Takaki}, supra note 12, at 370; Saito, \textit{Alien and Non-Alien}, supra note 11, at 301-08.
\textsuperscript{50} See generally Saito, \textit{Alien and Non-Alien}, supra note 11.
(2) political opinions, not criminal acts, may contain enough clear and present danger to justify such imprisonment;

(3) men, women, and children of a given ethnic group, both Americans and resident aliens, can be presumed to possess the kind of dangerous ideas that require their imprisonment;

(4) in time of war or emergency the military, perhaps without even the concurrence of the legislature, can decide what political opinions require imprisonment, and which ethnic groups are infected with them; and

(5) the decision of the military can be carried out without indictment, trial, examination, jury, the confrontation of witnesses, counsel for the defense, the privilege against self-incrimination, or any of the other safeguards of the Bill of Rights.\footnote{Rostow, supra note 22, at 532.}

This describes a wrong that goes beyond the denial of the civil rights and liberties of Japanese Americans to a dismantling of the most fundamental of rights guaranteed by the Constitution.

Have these problems been corrected? The 1943 and 1944 Supreme Court opinions in the Korematsu and Hirabayashi cases have never been overturned. The coram nobis cases decided in the 1980s vacated the convictions, but the original holdings that the military had the power to do what it did still stand.\footnote{See text accompanying notes 29-31 supra.} Could it happen again? Would it? Given the publicity and the reparations, it is unlikely that it will happen again to Japanese Americans, but that does not mean it could not happen to other groups.

A very practical test of whether the wrongs of the Japanese American internment have actually been righted is to look at how our political and judicial systems, and the media, are responding to discrimination against Arab Americans and Muslims in the United States today.\footnote{For a more detailed analysis of this problem, see generally Natsu Taylor Saito, Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”, 8 ASIAN L.J. 1 (2001).} The possibility that Arab Americans could be interned, just as Japanese Americans were, lies just below the surface of popular consciousness, occasionally emerging as it did in the movie The Siege.\footnote{See Matthew Sweet, Movie Targets – Arabs Are the Latest People to Suffer the Racial Stereotyping of Hollywood, THE INDEPENDENT (London) July 30, 2000, at 1; Moin “Moon” Khan, Film’s Bias Ought to Mobilize Muslims, CHI. TRIB., Nov. 12, 1998, at 23, avail. at 1998 WL 2918786; John Donnelly, Again, Film Sparks Arab Fury, PORTLAND OREGONIAN, Apr. 17, 2000, at C10, avail. at 2000 WL 5394289. See also Seth Hilton, American Conceptions of the Middle East and Islam, 1 U.C. DAVIS J. INT’L L. & POL’Y 355 (1995).} However, we need not postulate the mass internment of Arab Americans to see distressing parallels.

Just as Asian Americans have been “raced” as foreign, and from there as presumptively disloyal, Arab Americans and Muslims have
been “raced” as “terrorists”—foreign, disloyal, and imminently threatening, all at once.\textsuperscript{55} Although Arabs are from Middle Eastern countries and are of many religious backgrounds, and Muslims come from all over the world, these distinctions are blurred—as Ibrahim Hooper put it, “The common stereotypes are we’re all Arabs, we’re all violent and we’re all conducting a holy war.”\textsuperscript{56}

The “racing” of a particular group has once again been combined with the portrayal of that group as a threat to national security, and laws have been passed that reinforce this portrayal. Even though it was almost immediately known that the Oklahoma City bombing was the work of “home-grown” terrorists, the incident was used to pass bills purporting to clamp down on terrorism in both criminal and immigration law.\textsuperscript{57}

Thus, the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)\textsuperscript{58} made any contribution to any group deemed a “foreign terrorist organization” a crime, and created special deportation procedures for aliens accused of being terrorists.\textsuperscript{59} As reported by the \textit{Detroit News}, “The law explicitly puts support for social or charitable programs affiliated with terrorist groups in the same class as providing money for guns or bombs.”\textsuperscript{60}

The ban on fundraising has had a chilling effect in Arab American communities, as Islamic social groups and mosques have come under scrutiny across the country.\textsuperscript{61} Federal grand juries in


\textsuperscript{61} Id.; see also Steve McGonigle, \textit{Mosques, Islamic Groups Under Scrutiny in Terrorism Probes}, THE RECORD (Northern New Jersey), Oct. 10, 1999 at A19, available at 1999 WL
New York, Chicago and Tampa have investigated as many as twenty organizations, and the threat of grand jury investigations is being used to harass and intimidate people into reporting on their friends and neighbors. Calling it "one of the worse assaults on the Constitution in decades," David Cole and James Dempsey say:

It resurrected guilt by association as a principle of criminal and immigration law. It created a special court to use secret evidence to deport foreigners labeled as "terrorists." It made support for the peaceful humanitarian and political activities of selected foreign groups a crime. And it repealed a short-lived law forbidding the FBI from investigating First Amendment activities, opening the door once again to politically focused FBI investigations.

This law and the Illegal Immigration and Immigrant Responsibility Act of 1996, which followed on the heels of AEDPA, codified special "alien terrorist removal procedures," including a special court and provisions for the use of secret evidence. In recent years, the INS has attempted to deport at least two dozen people on the basis of secret evidence, almost all of them Muslim; most of them Arab American. People have been detained indefinitely, often for years, without knowing anything more than that the INS intends to deport them as a "national security risk." In every case where the government has been forced to reveal its "evidence," there has been no evidence of terrorism. These actions are not being taken against all Arab Americans, at least not yet, but against individuals on the basis of their association to that larger group. In all other respects, this program seems to rest quite comfortably on Rostow's "five propositions of the utmost potential menace."

7125342 (noting that New York judges had jailed a Palestinian American and a Palestinian student on civil contempt charges for refusing to testify before a grand jury).

62. Akram, supra note 57, at 70.
67. See text accompanying note 51 supra. I have developed this analysis in greater detail in Symbolism Under Siege, supra note 53, at 24-26. Also, note that this article was
In the case of the Japanese American internment, given that the wrongs have not been accurately identified and institutional changes which would prevent it from happening again have not been made, just what does redress mean? What was received was clearly symbolic—no governmental proclamation 50 years after the fact or token payment of money can compensate for the families torn apart, communities scattered, property and lives lost, psyches scarred—but just what does it symbolize?

As noted earlier, the reparations given to Japanese Americans accomplished many positive purposes; but is redress moving us in a positive direction in the long run? University of Hawai‘i Law School professor Chris Iijima argues that it was Congress’ intent in passing the Civil Liberties Act to reward the “superpatriotism” of Japanese Americans. Much of the discussion in Congress centered on the cooperation that Japanese American communities exhibited, and the exploits of the all-\textit{nisei} military units whose members, many straight from concentration camps at home, became the most decorated units (per capita) in World War II. Proponents argued that redress was due because Japanese Americans were both heroic and stoic, because we went along with the program and “proved” our loyalty.

In other words, we are being rewarded for acquiescing in the wrong. If this is not the case, why are those who recognized it at the time, who spoke the truth and stood up for it, not being honored? There were many resisters, not only those who brought legal challenges, but draft resisters and the “no-no boys” who refused to cooperate with the “loyalty questionnaire,” as well as others who fought to expose the hypocrisy of the U.S. government’s position.

written prior to the September 11th attacks and the subsequent passage of the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). Although a discussion of the PATRIOT Act is not essential to my argument, it is clear that both the content of the PATRIOT Act and its subsequent enforcement are consistent with this thesis. See generally Marie A. Taylor, \textit{Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern and Immigrant Communities}, 17 GEO. IMMIGR. L.J. 63 (2002).

69. \textit{Id.} at 397.
70. \textit{Id.} at 394. Everyone over age 17, men and women, citizens and noncitizens, had to complete a questionnaire which asked if they were willing to serve in the armed forces of the United States, and if they would swear unqualified allegiance to the United States and forswear any allegiance to the Japanese emperor or any other foreign government, power or organization. Those who answered “yes” to both questions were deemed “loyal;” those who answered “no” were “disloyal,” regardless of their reasons. See WEGLYN, \textit{supra} note 10, at 136-40; Iijima, \textit{supra} note 68, at 403; see generally OKADA, \textit{supra} note 37.
These resisters, many of whom are still alive, still have not been recognized or honored.

This is a good starting point for assessing when a wrong has really been recognized as wrong—are those who resisted the wrong, not just those victimized by it, honored? If not, then what is supposed to be a remedy not only reinforces the wrong and de-legitimates the resistance to it, it also works to de-legitimize the struggles of other groups who are being harmed by the same forces. Thus, we can see Japanese American redress being used, as the “model minority” myth is, to say to African Americans and Latinos (as well as, other less fortunate groups of Asian Americans), “Look, this minority made it against all odds, why can’t you?” And we can expect that it will be used to say to Arab Americans, “Prove your loyalty, just as the Japanese Americans did, by cooperating with repressive measures being taken in the name of national security.”

**African American Redress**

The issues addressed above need to be considered in the context of reparations to African Americans. Recently a “forum” on reparations was published in *Harper’s Magazine* entitled: “Making the Case for Racial Reparations: Does America owe a debt to the descendants of its slaves?” This would seem to be a good place to start, but the discussion was immediately narrowed as follows:

[A]cademics discuss . . . a slavery suit in moral, historical, or metaphysical terms. That’s nice. But in this, the land of show-me-the-money, the thinking quickly becomes practical: Who gets sued? For how much? What’s the legal argument? How do you get a case into court?

This kind of thinking, this kind of “practicality,” is, I believe, fraught with danger. By presuming that money damages will be the appropriate remedy, it starts from the position that the wrong was an aberration and limits our vision of redress to only those options

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71. Iijima quotes as typical of the Congressional debates, the statement of Congressman Yates who noted that Japanese parents had sent their sons off to fight in the U.S. military despite the harsh conditions of the internment, which “should have been enough to kill the spirit of a less responsible group of people.” Iijima, supra note 68, at 397, citing 13 CONG. REC. H7582 (DAILY ED. SEPT. 17, 1987). On the contradictions and dangers of the “model minority” myth, see generally Aoki, supra note 46; Saito, supra note 46.


73. Forum, supra note 72, at 37.
that reinforce the status quo. If race-related injustices and inequities are not aberrational, but an organic result of our social, economic, political and legal structures, this approach effectively preempts any meaningful redress.

The issue at the heart of the struggle for African American reparations today is in many respects the same issue I described as being contested with respect to Japanese American redress.\textsuperscript{74} Can the wrong be captured as a narrow aberration, a mistake as it were, and redressed without fundamental social restructuring? Can we maintain the "master narrative"\textsuperscript{75} that the United States is a nation of democracy and equality; that slavery and legalized racial discrimination were just passing problems of an otherwise good system, perhaps a benign tumor that can be cut away rather than a cancer that pervades the body? Or will the struggle to understand the legacy of slavery force us to acknowledge that contemporary economic and political structures are functioning in much the same way, and to the same ends, as they did during slavery?

The path we take will depend to a large degree on how we define the wrong. In discussions of reparations for African Americans, we often assume that we know what the wrong is—of course, it is slavery and racism—but we rarely stop to see what we mean by those terms. I often find myself in conversation with people who assume that the wrong of slavery was racism. Racist beliefs, practices and laws certainly emerged to preserve and perpetuate the institution of slavery and slavery, in turn, nourished racism. But why? There seems to be a real reluctance to understand slavery as a race-based system of economic exploitation that determined so much of our current hierarchies of power and privilege. Perhaps it's easier for us to condemn racism than to see if we can agree on what is actually wrong with exploitative economic relations, for where would we stop?

The narrow focus on race in the United States, avoiding the complications of economic relations and social hierarchy is, in part, what led us down the limited—perhaps dead-end—path of 14\textsuperscript{th} Amendment equal protection jurisprudence.\textsuperscript{76} We have attempted

\textsuperscript{74} See text accompanying notes 32-71 supra.


\textsuperscript{76} After declaring "all persons born or naturalized in the United States, and subject to the jurisdiction thereof," to be citizens, the 14\textsuperscript{th} Amendment says that no State shall
to right the wrongs of slavery and institutionalized racism through “equal protection” and “equal opportunity.” But the wrong of slavery was much bigger than the slavemaster’s failure to enslave in a colorblind manner, and it is cruelly cynical to talk of equal opportunity in a world where color-coded structures of power and privilege are so firmly entrenched.

It would be more productive, I think, to look at the 13th Amendment, which outlawed slavery and involuntary servitude (except, we must note, as punishment for crime), and to develop a jurisprudence of the legacy of slavery—social, political and economic. Perhaps it would force us to acknowledge the history which takes us quite seamlessly from slavery to the use of convict labor and the expansion of the “criminal justice” system to current racial disparities in incarceration rates and the oft-discussed “criminalization” of being black and male in America today.

With the supposed abolition of slavery, slave codes in many southern states were replaced with “black codes,” which made crimes of such things as idleness, vagrancy, and “disrespect” of white persons. Prisons, by and large, did not exist and those

“deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV. However, the effectiveness of this amendment and implementing legislation was quickly limited by the Supreme Court. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); United States v. Reese, 92 U.S. 214 (1875); United States v. Cruikshank, 92 U.S. 542 (1875); Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 193 U.S. 537 (1896). While some believed that this trend was reversed by the Warren Court with cases such as Brown v. Board of Education, 347 U.S. 483 (1954), the Court has limited the reach of 14th Amendment equal protection in various ways, including a requirement of proof of discriminatory intent. See Washington v. Davis, 426 U.S. 229, 239 (1976) (requiring showing of discriminatory intent, not simply disproportionate impact, in challenging a standardized test used in employment of police officers); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266-68 (1977) (summarizing factors to be considered in analysis of discriminatory intent); McCleskey v. Kemp, 481 U.S. 279 (1987) (requiring defendant to prove discriminatory intent despite showing of significant racial disparities in sentencing in capital cases).


79. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . . ." U.S. CONST. amend. XIII.


81. See Slaughter-House Cases, 83 U.S. (16 Wall) 36, 70-71 (1873) (noting that the black codes had been passed so that “the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before”); see also
convicted of such offenses were often sentenced to "hard labor" and immediately "leased" to local landowners. Thus, former slaves often found themselves doing the same work, on the same land, for the same plantation owner, still for no pay—but now it was labeled "punishment for crime" rather than "slavery." Thus, prisons and the criminal justice system in many respects replaced slavery as both a means of social control and a source of cheap labor.

Over the years, as the convict labor system came under harsh criticism, many states built prisons and then used prisoners as a source of profitable labor for the state. With the recent explosion in the prison population and the willingness to spend tax dollars on incarceration, prisoners themselves are becoming a profitable commodity, especially with the advent of private prisons and the practice of shipping people as commerce to prison facilities around the country. Thus, although the state of Georgia has said it will not utilize private prisons, at least in rural areas, it has allowed private corporations to buy land and build prisons in Georgia, and the legislature is debating the extent to which it will allow them to house prisoners from other parts of the country.

In light of this history, the fact that one-third to one-half of all African American men in their twenties are or will be in prison, or on probation or parole, must be seen as something other than a response to "crime." And when we combine these realities with the rates at which young black men are being killed, addicted, or rendered completely hopeless, it is difficult to see the system as anything less than genocidal.

Thus, as we start from the

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82. See LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA 273 (6th ed. 1987) ("chain gangs were integral parts of the system ... leased to private individuals and companies, which made large fortunes on their miseries"); see generally ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH (1996); MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICA SOUTH, 1866-1928 (1996); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

83. See LICHTENSTEIN, supra note 82, at 152-85.


85. See Editorial, Don't Let Georgia Become A Penal Colony, ATLANTA CONST., Mar. 13, 2001, at A10 (referencing HB 413, which passed the Georgia House but was rejected by the Senate).

understanding that this nation simply would not have come into being without the extensive protections of slavery built into the Constitution, and then look at how successfully political, economic and social hierarchies have been reorganized to replicate racially coded systems of exploitation after slavery was declared illegal, it is difficult to see how the problem can be characterized as aberrational, rather than structural. That is a large question, which cannot be made thoroughly within the confines of this essay. As a general matter, however, what most of us who work for reparations care about is not only that the unimaginable horrors of slavery are acknowledged and somehow compensated for, but also that the society we live in today is made more just and equitable.

How we characterize the wrong makes all the difference in the kind of remedies we should be striving for. And, in turn, that which we accept as a “remedy” establishes the parameters of the “wrong.” With respect to both slavery and the subsequent disabilities imposed on African Americans, we have been conditioned from an early age to have a constricted view of the wrong and, therefore, of the appropriate response to the wrong.

Harriet Tubman is rightfully portrayed as a hero because she helped slaves escape to “freedom” in the North. In this narrative, slavery is bad and the aberration; the North is both good and the status quo, as it represents what the whole country became after slavery was abolished. We are not told how important the slave trade was to northern shipping interests, how the Fugitive Slave Act of 1850 was ratified by the U.S. in 1866, includes “[c]ausing serious bodily or mental harm to members of the group” and “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,” if “committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.” See Ward Churchill, The United States and the Genocide Convention: A Half-Century of Obfuscation and Obstruction in A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS, 1492 TO THE PRESENT 363-98 (1997). On the conditions faced by the African American community, see Andrew Hacker, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 31-49, 179-98 (1992); see generally Miller, supra note 80.

87. Without using the words “slave” or “slavery” the Constitution provided that the slave trade could not be banned before 1808, that even jurisdictions that forbade slavery must use their police powers to return fugitive slaves, and that the militia would be available to suppress slave uprisings. See U.S. CONST. art. I, § 8, cl. 15; art. I, § 9, cl. 1; art. IV, § 2, cl. 3; art. V. On the critical nature of these provisions to the establishment of the Union, see generally Paul Finkelman, A Covenant with Death: Slavery and the Constitution, AM. VISIONS, May-June 1986; Staughton Lynd, Slavery and the Founding Fathers in BLACK HISTORY: A REAPPRAISAL (Melvin Drimmer ed., 1968).

88. See A. Leon Higginbotham, Jr., Rosa Parks: Foremother and Heroine Teaching Civility and Offering a Vision for a Better Tomorrow, 22 FLA. ST. U. L. REV. 899, 901-02 (1995); for an otherwise excellent article which uncritically associates “the North” and “freedom,” see Steven Lubet, John Brown’s Trial, 52 ALA. L. REV. 425 (2001).

89. See Finkelman, supra note 87.
clause in the Constitution and the Fugitive Slave Act made all Black people easy prey for slave catchers,\textsuperscript{90} how segregation and discrimination were the norm,\textsuperscript{91} or how many “free” states solved the problem by simply excluding Black people altogether.\textsuperscript{92}

Risking life and limb to escape to this kind of “freedom” is honored, but those who escaped by the tens of thousands to the swamps of Florida, where they formed independent maroon communities, are not part of the “master narrative.” Black Seminoles, whose ancestors had united with indigenous peoples to form the Seminole Nation in the early 1700s,\textsuperscript{93} resisted enslavement by engaging in what became the United States’ longest and costliest war until the war in Vietnam.\textsuperscript{94} This, known as the Second Seminole War, is not even talked about in the context of African American history, despite the fact that commanding General Jesup said in 1836, “This, you may be assured, is a negro and not an Indian war.”\textsuperscript{95} If slavery really is acknowledged as one of the most basic violations of human rights, why would those who resisted effectively, who escaped and formed self-sufficient communities and attempted to defend them, not be honored as heroes, too?

Similarly, Jim Crow laws and the systematic subjugation of African Americans following the abolition of slavery is


\textsuperscript{94} See George Klos, Blacks and the Seminole Removal Debate, 1821-1835 in THE AFRICAN AMERICAN HERITAGE OF FLORIDA 150 (Colburn & Landers, eds., 1995); see also Giddings, supra note 93, at 315; Porter, supra note 93, at 106.

\textsuperscript{95} See Mulroy, supra note 93, at 29.
condemned, but those who effectively resisted these wrongs have either been erased from standard histories—as happened to Marcus Garvey and almost happened to Malcolm X—or have been redefined so as to be almost unrecognizable.

Martin Luther King, Jr. has been turned into a prophet of civil rights (most often narrowly interpreted to mean integration) and nonviolence (generally construed as passivity), a man who dreamed of little black children and little white children riding in the same carpool to school, not the man who condemned U.S. imperialism in Vietnam and who was murdered on the eve of the Poor People’s March. It is rarely pointed out that he called for “a redistribution of economic power” and urged the SCLC to keep struggling until “the tragic walls that separate the outer city of wealth and comfort and the inner city of poverty and despair shall be crushed by the battering rams of the forces of justice.” What happened to the man the FBI called “the most dangerous Negro” in America?

It is hoped, I think, that if the real history of resistance and the alternatives envisioned by the resisters can be wiped from our consciousness, our energies can be more easily diverted to remedies that shore up rather than dismantle the status quo. So, what are


97. Anecdotally, I recently witnessed a class of approximately 30 college students at an historically Black university asked if anyone had heard of Marcus Garvey. Only two students raised their hands, and neither knew anything specific about Garvey. On the history of Garvey and the UNIA, which at one point had well over a million African American members, see generally MARCUS GARVEY: LIFE AND LESSONS (Robert A. Hill & Barbara Bair eds., 1987); JOHN HENRIK CLARKE, MARCUS GARVEY AND THE VISION OF AFRICA (1974); E. DAVID CRONON, BLACK MOSES: THE STORY OF MARCUS GARVEY AND THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION (1969).


100. Id. at 87.


some ways in which we can identify particular wrongs and work for remedies that promote positive social reorganization?

Much important work has been done in the past decade to save affirmative action, something that is often characterized as a remedy for the legacy of slavery and subsequent racism.103 Of course, we can never sit by and watch any gains be taken away from us, particularly when the excuse is "because the playing field is level now," i.e., there's not even a wrong any more. But we have to engage in such struggles conscious that this is the quintessential accommodationist remedy.

Affirmative action was deliberately designed in the wake of the urban rebellions of the late 1960s to preserve as much as possible of the status quo. In the summer of 1967 alone, over 300 cities burned; the national guard was called in, with tanks and bayonets; America was literally at war with her poor.104 Affirmative action was Lyndon Johnson's and Richard Nixon's and large corporate interests' way of saying, "Don't destroy all of our wealth; we'll give you a little piece of it, in the form of jobs and schools; don't tear down the system; we'll help you 'make it' within the system."105 It did not involve structural change, just a little more inclusion within the structure.

A remedy with more potential for structural change could be a program to expose the government's suppression of movements that have worked to better conditions for African Americans, from Marcus Garvey and the United Negro Improvement Association ("UNIA")106 to the Southern Christian Leadership Conference ("SCLC")107 and the Student Nonviolent Coordinating Committee

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104. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS ("KERNER COMMISSION REPORT") 1-29, 112 (1968).


106. See CHURCHILL AND VANDER WALL, THE COINTELPRO PAPERS, supra note 102, at 12, 94.

107. See id. at 93-101; ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA FROM 1870 TO 1976 450 (2001); see generally DAVID J. GARROW, THE FBI AND
("SNCC") to the Black Panther Party. In what passes for history these days, an imaginary version of the civil rights movement is glorified, one in which the victims knew that racial discrimination and Jim Crow laws were wrong, but protested peacefully until the system saw the error of its ways and reformed. In fact, those who resisted racism faced concerted government efforts to "neutralize" them and many were, in fact, killed, imprisoned, or driven into exile.

The real Martin Luther King, Jr. did resist, and not only was he killed, his actual message was buried. Other resisters have been shot down in cold blood, set up for assassination, framed, and sent to prison for decades. It has been public knowledge since the Church Committee hearings of the mid-1970s that the FBI's stated goals were the elimination of black leadership, and they used all of these tactics, and worse, against not only African American organizations but the American Indian Movement, the Puerto Rican Young Lords, the Chicano Brown Berets, war resisters, those who protested U.S. policies in Latin America—literally hundreds of organizations engaging in what should have been constitutionally protected protests and acts of resistance.

Exposing the government's concerted plans, such as the FBI's COUnter INTELligence PROgram ("COINTELPRO") whose stated purpose was to "expose, disrupt, discredit or otherwise neutralize" these movements and "their leadership, spokesmen, membership and supporters," would accomplish much that cannot be done with what are usually considered remedies for race-based wrongs. It would expose the systemic and ongoing suppression movements for racial justice and it has the potential for


108. See CHURCHILL AND VANDER WALL, THE COINTELPRO PAPERS, supra note 102, at 103-05, 166-71; see also GOLDSTEIN, supra note 107, at 450.


110. See GARROW, supra note 107, at 173-203; DYSON, supra note 99, at ix-xi.

111. These tactics are summarized in WARD CHURCHILL, 'To Disrupt, Discredit and Destroy': The FBI's Secret War Against the Black Panther Party, in LIBERATION, IMAGINATION AND THE BLACK PANTHER PARTY: A NEW LOOK AT THE PANTHERS AND THEIR LEGACY 78-117 (Kathleen Cleaver and George Katsiaficas, eds., 2001); see also CHURCHILL AND VANDER WALL, AGENTS OF REPRESSION, supra note 109, at 37-62.


113. See generally CHURCHILL AND VANDER WALL, AGENTS OF REPRESSION, supra note 109; CHURCHILL AND VANDER WALL, THE COINTELPRO PAPERS, supra note 102.

114. GOLDSTEIN, supra note 107, at 449; see also CHURCHILL AND VANDER WALL, AGENTS, supra note 109, at 37-62; CHURCHILL AND VANDER WALL, THE COINTELPRO PAPERS, supra note 102, at 1-20.
obtaining the release of political prisoners, compensation for victims and their families, and the legitimizing of resistance rather than the rewarding of accommodation to wrong. Some redress to the victims of these injustices would expose the way in which such wrongs are institutionally generated and allow us to envision a real restructuring of power and privilege.

Reparations, by definition, relate to the past for they are designed to remedy wrongs that have already occurred, and asking for redress from the government implies a recognition of that government as the legitimate arbiter of wealth and political power. Therefore, before we can have meaningful discussion about the remedy to be sought, we not only have to clearly define the wrong but, if the wrong is perceived as structural rather than aberrational, we must also envision social structures or institutions that are less likely to reproduce such wrongs. Put most generally, in struggling against the injustices and inequities we see around us today, most of us do not want compensation for its own sake, or retribution, but an acknowledgement of the harm done, the best possible redress for its victims, and lasting changes that will ensure a decent life for those in what we define as our communities.

The importance of sorting out which wrongs we are addressing and what we hope to accomplish in the process was brought home to me quite starkly in a recent visit to Capetown, South Africa. Capetown was stunningly beautiful, of course, and after so many years of anti-apartheid struggles, it felt like a miracle to be in the “new” South Africa. Nonetheless, the dominant feeling I had was one of distressing familiarity. In the townships, I felt much as I did in rural black communities across the South twenty years ago. The

115. On political prisoners who are or were victims of COINTELPRO or related governmental operations, see Jack Olsen, Last Man Standing: The Tragedy and Triumph of Geronimo Pratt (2000) (Pratt was framed by the FBI and incarcerated for 27 years); Still Black, Still Strong: Survivors of the U.S. War Against Black Revolutionaries (Jim Fletcher, et al., eds., 1993) (containing interviews with Dhoruba Bin Wahad, whose conviction was vacated after he spent 19 years in prison; Mumia Abu-Jamal, still on death row; and Assata Shakur, currently in exile in Cuba); Scott Fleming, “Lockdown at Angola: The Case of the Angola 3” in Cleaver and Katsiaficas, supra note 111, at 229-36. See also Human Rights Research Fund, Human Rights in the U.S.: The Unfinished Story of Political Prisoners/Victims of COINTELPRO (2001) (summarizing hearing held by Rep. Cynthia McKinney in Sept. 2000); see generally Churchill and Vander Wall, The COINTELPRO Papers, supra note 102.

fascistic police presence of apartheid was gone from the city, of course, but color-coded class stratification was everywhere.\textsuperscript{117} It felt a lot like Atlanta with its overwhelmingly “white” economic power, a group of those previously identified as “black” or “coloured” in positions of political power, and a huge sector, all “black,” with almost nothing.\textsuperscript{118}

It was disheartening to have to confront the reality that the dismantling of apartheid, per se, does not provide real opportunities to the residents of the shanty towns that surround Capetown,\textsuperscript{119} for the structures of inequality and injustice that they are dealing with are the legacy of hundreds of years of colonialism, not just 40 years of apartheid.\textsuperscript{120} I think the same is true—if somewhat more veiled—for us in the United States. If we address slavery in isolation, we will find that we still face all of the problems of living in a settler colonial regime that uses color-coded structures of exploitation to create its wealth and power.\textsuperscript{121}

Thus, as we consider reparations for African Americans, and particularly reparations for slavery, we are faced with a choice of directions. We can frame the problem as an aberration: a narrowly defined wrong generated by a fundamentally acceptable social and political structure. In that case, a fairly straightforward remedy might be agreed upon—perhaps acknowledgement that slavery and race-based discrimination was wrong (something most Americans

\begin{itemize}
  \item \textsuperscript{117} See Linda Human, \textit{Affirmative Action as Reparation for Past Employment Discrimination in South Africa: Imperfect and Complex} in \textit{WHEN SORRY ISN'T ENOUGH}, supra note 1, at 506, 508 (noting that according to South Africa’s Employment Equity Bill of 1997 the bottom 20% of the population earned 1.5% of the national income, and that 95% of South Africa’s poor are black).
  \item \textsuperscript{118} See generally Lundy R. Langston, \textit{Affirmative Action, A Look at South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field?}, 13 AM. U. L. REV. 333 (1997); while somewhat dated, I believe the best description of racial hierarchy in Atlanta is still found in JAMES BALDWIN, \textit{THE EVIDENCE OF THINGS NOT SEEN} (1985) (describing his experiences investigating the Atlanta child murders of 1979-1982).
  \item \textsuperscript{120} In 1959 Martin Luther King, Jr. said to Kenyan leader Tom Mboya, “I am absolutely convinced that there is no basic difference between colonialism and segregation.” \textit{DYSON, supra} note 99, at 245. The parallels between contemporary social relations in the U.S. and South Africa may best be understood as consequences of colonialism.
  \item \textsuperscript{121} On the United States as a settler colonial state, see Ward Churchill, \textit{The Indigenous Peoples of North America: A Struggle Against Internal Colonialism}, in \textit{STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION} 15, 25 (1999) (“settler-state colonialism” exists when the colonizing power exports a sufficient portion of its own population to supplant rather than merely subordinate the indigenous people(s) of the colony). On the color-correlated nature of the economic hierarchy, see generally HACKER, \textit{supra} note 86.
\end{itemize}
agree upon) and symbolic compensation paid to individuals and groups who still suffer its consequences. As in the case of Japanese American redress, this would doubtless have much social, economic, and psychological value. However, if a more structural analysis is correct, if the institutions that generated the horrors of slavery and subsequent injustices are left intact, they will continue to perpetuate systemic inequalities that will be compounded by the public perception that the playing field is now truly level and therefore, that society has no general responsibility for ongoing problems encountered by African American communities.

As noted earlier, this is not the place for a full-blown argument that the problems we generally lump under the headings of "legacy of slavery" are, in fact, structural. But to the extent that we believe that they are, and that the positive potential of the reparations movement is its ability to take us from narrow views of remedies to a broader discussion of creating more equitable structures of social, political and economic power, then we must address another level of the discussion.

A Broader Context

If we are just looking for the elimination of a specific problem, or a slightly bigger piece of the American pie, then we do not have to think about larger institutional questions. But if we see current problems as the inevitable outcome of current structures, and believe that we need fundamental social reorganization, then we have to be willing to look honestly at the bigger picture; there is no point in trying to build just and equitable institutions on a foundation of exploitation. To do this, we must properly name the underlying problems and identify remedies that concretely lead to needed structural change. This, in turn, requires recognizing the wrongs we struggle against and developing a more comprehensive vision of a just world.

The contradictions lurking within Japanese American reparations\textsuperscript{122} reflect potential dangers that need to be addressed in the increasingly popular discussions of reparations for African Americans—one of the foremost, I think, being that we could get a mealy-mouthed expression of "regret" from the government, coupled with some token payments or programs, and a foreclosing of deeper responses for another generation. However, raising the issue of reparations for race-based injustices can also open up a real discussion of what is right, what is wrong, and what we want to do about it.

This raises fundamental questions about which even those of us

\textsuperscript{122} See text accompanying notes 69-71 supra.
who advocate deep structural change in this country are generally in denial. At some point, each of us finds a level of comfort with the status quo that we are not really ready to relinquish, even when we know that we are comfortable with it because we benefit disproportionately from that status quo. Nonetheless, before we get too far down the path of dividing up the pie of American wealth and resources, if we are really being honest about the wrongs at issue and committed to fashioning principled remedies, we must be willing to question the legitimacy of the pie itself. Just where does this pie come from? And from whose apples was it made?

Here we approach the structural foundations of inequality and oppression and must look critically at attempts to obtain "redress" within a framework that accepts the legitimacy of the system which was built on the foundation of slavery and genocide. Slavery is a tremendously important source of the contemporary wealth of the United States, but in facing that reality, we must also look honestly at the whole picture of the United States' history as a settler colonial regime. This means that we must be honest about at least two other major issues.

First, we have to acknowledge that the United States only occupies this land by virtue of genocide, genocide that continues in various forms today, and we must take seriously the claims of indigenous peoples to the land, much of which is, even under current U.S. treaties and law, illegally occupied. Second, we have to be honest about the extent to which the wealth we want to distribute more equitably comes from the expropriation of others' labor and natural resources both here and in the rest of the world.

I initially noted that we seem to be willing to acknowledge wrongs to the extent we can portray them as aberrations, and the more systemic the wrong, the more doggedly we hold on to our denial. We can see this in one of the many ironies of the Japanese American internment story.

123. See Westley, supra note 2, at 438-45.


126. See generally NOAM CHOMSKY, PROFIT OVER PEOPLE: NEOLIBERALISM AND GLOBAL ORDER (1999); NOAM CHOMSKY, WORLD ORDERS, OLD AND NEW (1996).
It is well known that one of the camps was at Poston, Arizona, but we are rarely told that it was put on an Indian reservation—without, it might be added, informing or obtaining the consent of the community.\textsuperscript{127} What the Indian residents there saw was the government coming in and building “nice” barracks, at least ones with electricity and plumbing, for people they were told were “Japanese spies.”\textsuperscript{128} The barracks, shoddy as they were, were better than most of the structures on the reservation, and the community wanted to retain them at the end of the war. However, instead of leaving the barracks and the trees and crops that had been planted, the government insisted on plowing everything under, digging huge trenches and burying all the wood, plumbing, and fixtures, allegedly because it had promised to “leave the land in its original state.” When the army left and the local residents began trying to dig up and salvage some of the building supplies, the army arrested them, re-buried the materials, and put tons of rock and boulders on top so that the native residents could not get to it.\textsuperscript{129}

How is it that we are so comfortable with redress for Japanese Americans and cannot even consider reparations to American Indian nations? Some people think the awards made by the Indian Claims Commission constitute redress, but those simply represent the government’s attempt to “quiet title” to all the land taken by imposing a monetary settlement on peoples who never agreed to the taking in the first place.\textsuperscript{130} Even among the most “progressive” critics of United States policies, we see virtually no discussion about enforcing existing treaty rights, much less redress for the wrongs of dispossession, mass murder, and ongoing forms of physical and cultural genocide.

President Clinton’s Commission on Race did not even have token American Indian representation on it.\textsuperscript{131} And yet we live with easy access to the knowledge that American Indians now control perhaps 2.5 per cent of the territory currently claimed by the United States, even though under currently acknowledged treaties they

\textsuperscript{127} See Chris K. Iijima, supra note 68, at 386-87.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
should control something like thirty per cent; that even with current holdings, they should be among the richest subgroup of the population, especially if mineral and water rights are included. Instead, they are the poorest, living in “third world” conditions by any measure of income, education, housing, health care, or mortality rates.

If we pursue claims for reparations for race-based wrongs that do not include claims for an equitable settlement of American Indian claims for land and sovereignty (not the imposition of a monetary settlement on peoples who do not want it), we could find ourselves in the contradictory position of taking direct advantage of the United States’ history of genocide and illegal occupation of these lands. As Joseph Singer said, in the context of property rights being used to justify the taking of Indian lands, “If those who benefit from this history of injustice claim a vested right to its benefits, they should be aware that what they claim is a right to the benefits of a system of racial hierarchy.” And to that we might add, a system of internal colonialism.

It is most likely that our failure to unite on these issues will simply render all groups too weak to obtain reparations of any consequence. If, however, by some miracle of political organization or moral persuasion, significant reparations for slavery were to be paid without addressing the questions of land and native sovereignty, these reparations, too, would have the effect of accommodating the larger wrong of which slavery was a part. Their acceptance would serve to legitimize the wealth and power that has been built on genocide, slave labor, and the illegal occupation of the land and the expropriation of its resources.

That said, we must also be willing to recognize and address other issues of colonial exploitation, furthered—perhaps rendered more palatable—by racism, but not remedied simply by a more equitable distribution of “American” resources. These include, to name just a few, the claims underlying the movement for native Hawaiian sovereignty; the U.S. occupation of Puerto Rico; the occupation of the lands and resources of the inhabitants of the United States on which the Hawaiian Islands were settled; and the occupation of the lands and resources of the inhabitants of the United States on which the Hawaiian Islands were settled.

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132. See STRICKLAND, supra note 124, at 52-54; see also CHARLES F. WILKINSON, THE EAGLE BIRD: MAPPING A NEW WEST 22-42 (1992); Churchill, Charades, supra note 130, at 44-45.

133. See STRICKLAND, supra note 124, at 52-54.


“U.S.” Virgin Islands, the Marshall Islands, Saipan and Guam;\textsuperscript{138} and the United States’ peculiar relationship with the now nominally independent Philippines.\textsuperscript{139} This leads us, in turn, to an examination of U.S. economic, legal, military and political relationships with the rest of the world, and requires us to develop an understanding of the extent to which what we consider “American” wealth is or has been obtained by the exploitation of the resources and labor of other peoples and nations.\textsuperscript{140} We know that what used to be accomplished by direct forms of colonial rule is now most often accomplished by less direct forms of military, economic, and political control. We need to apply this knowledge to our proposals for redistribution of wealth and our calls for self-determination.

I take us down this path of ever-expanding injustices not to say that we need to fix all of the world’s inequities at once, but to urge us to be brutally honest—with ourselves, first of all—in identifying the wrongs we are addressing and in ensuring that the redress we struggle for takes us toward our broader goals of social and economic reconstruction. I say this because I believe that every movement to obtain reparations contains within it both the potential to further other struggles for justice and the potential to reinforce existing structures of power and privilege. We may be tempted to think that because there are so few people, relatively speaking, who are willing to work for reparations, we should not be too critical.


140. For example, the United States has only five percent of the world’s population, but consumes twenty-five to thirty percent of its natural resources. See Arlie Russell Hochschild, A Generation Without Public Passion, ATLANTIC MONTHLY, Feb. 2001, available at www.theatlantic.com/issues/2001/02/hochschild.htm (last visited June 1, 2003) (citing a thirty percent consumption rate and noting that the U.S. produces twenty-five percent of the world’s pollution.) On the benefits accruing to U.S. interests from economic exploitation of other nations, see note 126 supra.
But I think that there are very serious long-term dangers in a movement for social, political, or legal change that is built on a false foundation. Thus, while we can all agree that it is necessary to struggle against racism, a more "racially equitable" distribution of resources obtained from an ongoing destruction of indigenous people would only serve to exacerbate the underlying wrongs.

As I have noted, reparations can serve the purpose of reinforcing the status quo by framing the wrong as an aberration and seeing the redress as a way of returning to "business as usual." However, if we are clear about calling attention to these particular wrongs because they illustrate fundamental, structural problems with the status quo, we can insist that any remedies we obtain are part of a larger process of dismantling and reconstructing the institutions that perpetuate injustice.

Assessing proposals for reparations in light of their reconstructive potential requires something of a collective vision. Trying to articulate such a vision in too much detail can distract us from concrete action. Nonetheless, I think we should be able to agree on some basic principles. If so, we can then assess whether concrete political, social or legal movements for reparations are moving us toward the realization of those principles. This is what can get us away from arguing about who has a "right" under this system of law and property ownership to have or control which "stuff," and to focus instead on what kind of world we want to live in. It can also let us see that it is our society we are attempting to repair, that this is not about particular groups—those "insular minorities"—asserting claims for particularized harms. If the fundamental question is what kind of world we want to live in, the struggle for reparations and reconstruction becomes our collective struggle, not someone else's problem.

We are capable of envisioning a world that is actually just; one in which we can live without having to be in denial about the extent of human suffering that our privilege is built on. I hope that is what we will do as we look beyond reparations.