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## Reparations and Restorative Justice: A Path to Racial Healing

Darryl Heller

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# Reparations and Restorative Justice: A Path to Racial Healing

Darryl Heller\*

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## INTRODUCTION

As we settle into the first quarter of the 21<sup>st</sup> century, we are still haunted by Du Bois’ 1903 observation that the color-line stood as the outstanding problem of his time,<sup>1</sup> and remains so in ours. Evidence for this abounds, from current US immigration policy that prevents brown people from seeking asylum at the southern border, even when presenting clear evidence of fleeing danger, to the rise of white supremacist groups and white nationalism, manifest by the prominence of such groups as the Oath Keepers, the Proud Boys, and other self-defined “patriots.” Over the past decade there has been a series of anti-Black policies and practices. The 2012 killing of seventeen-year-old Trayvon Martin and the subsequent acquittal of his killer gave birth to the hashtag, *#BlackLivesMatter*. The murder of Michael Brown catapulted the hashtag turning into a full-blown movement as an unbearable parade of videos streamed across social and media showing unarmed Black people being killed by the police or others claiming to act in the “public” interest.<sup>2</sup> The presidency of Donald Trump in 2016 and his

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1. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* xxiii. (1996).

2. Three white men, Gregory and Travis McMichael, along with William Bryan accosted and killed Ahmaud Arbery, who was jogging through a neighborhood near Brunswick, GA in February 2020. They claimed they suspected Arbery of burglarizing houses in

“Make American Great Again” slogan harked back to the ‘good ole days’ when white supremacy reigned, well, supreme. His tenure as chief executive opened the space for racist views that were thought but not said to be spoken aloud once again, and the conservative Supreme Court justices he appointed is on the verge of driving the final nail in the coffin of affirmative action.<sup>3</sup> As if this were not enough, the Covid-19 pandemic exposed the long disparity in healthcare access as Black and brown people died in disproportionate numbers.<sup>4</sup> While grappling with the uncertainty, fear, and isolation engendered by the pandemic, the world was shocked by the very public execution of George Floyd. A captive audience watched the cell phone video of Floyd, hands cuffed behind his back and lying face down on the ground with a cop’s knee bearing down on his neck, cry for his mother with his dying breath. These incidents were preceded by the 2008 economic crash that hit the nation when the inflated housing bubble broke, sending the country into a spiraling recession. Those hardest hit and who suffered the greatest loss were once again those most economically vulnerable, Black and brown people.<sup>5</sup> Understated by the mainstream media and political pundits, but understood within the communities that were most affected, was that the tie that binds all of these crises together is the legacy of slavery followed by a century of poverty, violence, dehumanization, segregation, disenfranchisement mass incarceration, and marginalization, all of which remain hallmarks of historical racial injustice in the US.

Unquestionably tremendous harms have been done to Black people in America over multiple generations, beginning in 1619 with the arrival of the first 20 Africans who were traded off of a Dutch slave ship in

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the neighborhood, though no evidence was presented. In another incident, Kyle Rittenhouse killed two people and wounded a third when he showed up with an AR-15 assault rifle at a Black Lives Matter march protesting the police killing of an unarmed Black man in Kenosha, MN. He claimed self-defense and asserted he was in Kenosha to “protect” property.

3. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 980 F.3d 157 (1st Cir. 2020), *cert. granted* (No. 20-1199) and *Students for Fair Admissions, Inc. v. University of North Carolina*, 567 F. Supp. 3d 580 (N.C. Dist. Ct. M.D. 2021), *cert. granted* (No. 21-707) both argued at the Supreme Court on October 31, 2022. See SUPREME COURT, [https://www.supremecourt.gov/oral\\_arguments/calendars/MonthlyArgument-CalNovember2022.html](https://www.supremecourt.gov/oral_arguments/calendars/MonthlyArgument-CalNovember2022.html) [<https://perma.cc/6ATN-WRBB>] (last modified Oct. 14, 2022). A ruling is expected in June or July, but given the Court’s conservative leaning, it is very likely that it will decide that race can never be a consideration in hiring or college admission, thus eliminating one of the few remaining pathways to achieving racial justice.

4. CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> [<https://perma.cc/M7WW-C5N8>] (last modified Dec. 28, 2022).

5. Gillian B. White, *The Recession’s Racial Slant*, THE ATLANTIC (June 24, 2015), <https://www.theatlantic.com/business/archive/2015/06/black-recession-housing-race/396725/> [<https://perma.cc/TN9K-3LS9>]; Sarah Burd-Sharps, *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations*, SOC. SCI. RSCH. COUNCIL (June 2015), <https://www.ssrc.org/publications/impact-of-the-us-housing-crisis-on-the-racial-wealth-gap-across-generations/> [<https://perma.cc/K9J9-W8AZ>]. This report was commissioned by the American Civil Liberties Union.

Jamestown.<sup>6</sup> At the moment of emancipation in 1865, when the nation could have atoned for the sins of slavery and worked to repair the particular harm that had been done to the formerly enslaved, it refused to give newly freed people land, protection, or a means to ensure their well-being and ability to flourish. Even during the brief period of Reconstruction, violence was a persistent and destabilizing threat. Almost a century of racial segregation and discrimination followed Southern redemption in which Black people were subjected to violence, relegated to second-class citizenship, and denied equal access to the resources available to most whites, all with full governmental complicity if not outright participation. The cumulative effect of Black oppression has been tremendous, and given the scale of the harm, it is no surprise that Black people still carry the scars of the violence they have borne and continue to bare. Most justice systems hold that those responsible for such harms should be held accountable; one incurs an obligation when responsible for harming others.<sup>7</sup> Reparations have become the rallying cry to name that obligation and demand some form of redress. This is not a new concept and reparations for harms have been used as a vehicle for justice throughout human history.<sup>8</sup>

I am in full agreement that reparations for slavery and its aftermath is a just response to the centuries of racial injustice that has hobbled Black life and Black advancement. The question of what to do about this, how to remedy this terrible wrong, is the force behind the demands for reparations and the crux of the debate that swirls around the issue. The obligation is often framed as a debt that is owed with justice being met when that debt is paid, either monetarily or otherwise. This paper will argue that compensation as a form of reparations for slavery and its aftermath is a critical step towards meeting the obligation of righting a long-standing injustice, but that in and of itself does not provide the full measure of justice that is deserved or required. Instead of relating to reparations as paying a debt that is owed, it suggests that reparations and the need for racial healing is better served within a restorative justice framework grounded in an understanding of relational equality that offers a new vision of a just society.

#### REPARATIONS AS A RESPONSE TO RACIAL INJUSTICE

It is possible to draw a direct line between slavery, the failure to fully incorporate newly freed people into American society and the body politic, and racial disparities today. The Federal Reserve found that in 2020 the median wealth of Black households was less than 15% of white households

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6. See generally THOMAS HOLT, *CHILDREN OF FIRE: A HISTORY OF AFRICAN AMERICANS* 53 (2010) (noting that the first Africans disembarked at Jamestown in 1619).

7. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 31-34 (2015).

8. Susan Sharpe, *The Idea of Reparations*, in *HANDBOOK OF RESTORATIVE JUSTICE* 26 (Gerry Johnstone and Daniel W. Van Ness eds., 2007).

(\$24,100 versus \$188,200, a difference of \$164,100).<sup>9</sup> Likewise, the Brookings Institute found that homes in Black neighborhoods were undervalued by \$48,000 on average per home, amounting to some \$156 billion in cumulative losses.<sup>10</sup> These disparities are operative in health outcomes as well, with Black infant and maternal mortality more than twice that of white women.<sup>11</sup> The call for reparations for slavery are reflections of these facts and the failure address them at other historic moments.

The issue of reparations to Black people for the injustices for slavery first arose during the period when the United States of America was in the process of being born. In 1783, Belinda Royall, a formally enslaved woman, filed a petition with a Massachusetts court to request compensation for her fifty plus years of previously uncompensated labor she endured after being stolen from Africa.<sup>12</sup> This was, ironically, at the end of the Revolutionary War when newly created white Americans were debating the meaning of freedom for themselves.

In the immediate aftermath of emancipation at the end of the Civil War, the promise of forty acres and a mule, reasonable expectations for people who had created the nation's wealth, was quickly disabused when President Johnson rescinded General Sherman's order to redistribute land to newly freed people.<sup>13</sup> Callie House, another formerly enslaved woman, launched the National Ex-Slave Mutual Relief, Bounty and Pension Association of the United States of America in 1897 as a campaign for pensions to be given to elderly people who had formerly been enslaved. Her efforts were thwarted by Congress and the US Post Office, who blocked every effort and the movement eventually failed, leaving Black people once again to

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9. Neil Bhutta, et. al, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYST. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html> [https://perma.cc/G272-JUAT].

10. Andre M. Perry, Jonathan Rothwell & David Harshbarger, *The Devaluation of Assets in Black Neighborhoods: The Case of Residential Property*, <https://www.brookings.edu/research/devaluation-of-assets-in-black-neighborhoods/> [https://perma.cc/DG48-9ZBB] (Nov. 27, 2018).

11. Caleb J. Jang & Henry C. Lee, *A Review of Racial Disparities in Infant Mortality in the US*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8870826/> [https://perma.cc/Y53Y-8HAU] (Feb. 14, 2022).

12. See TA'NEHISI COATES, *WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY* 176 (2017). The historical record shows that Belinda was enslaved by Isaac Royal. After 50 years of servitude, she petitioned for compensation. Apparently, she was married for a time and signed one of her petitions as Belinda Sutton, which is viewed as a name she chose for herself, rather than imposed by her enslaver. See ROYAL HOUSE, <https://royall-house.org/slavery/belinda-sutton-and-her-petitions/> [https://perma.cc/989L-5CXV] (last visited Feb. 11, 2023).

13. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 70-71, 158-64 (Henry S. Commager & Richard B. Harris eds., 1988); W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860-1880*, at 393-395 (August Meier ed., 1983).

fend for themselves.<sup>14</sup> Sporadic efforts to build a movement for reparations for slavery and its aftermath surfaced periodically throughout the 20<sup>th</sup> century, most notably led by Rep. John Conyers (D-MI), who introduced H.R. 40 in 1989 as a bill to study the feasibility of reparations for slavery. It never made it out of committee despite Conyers reintroducing it at the beginning of each Congressional session for almost 30 years.<sup>15</sup>

A signal moment in pushing the issue of reparations into mainstream discourse was the 2014 article, “The Case for Reparations,” written by journalist Ta’Nehesi Coates for the Atlantic Magazine.<sup>16</sup> In this long-form journalism piece, Coates details the history of reparation efforts as well as a compelling argument for why they are justified. He based his argument on the wealth that was stolen from Black people in the form of exclusion from homeownership through such tactics as redlining, predatory lending, contract buying, and the denial of credit to purchase a home. By exclusion from the housing market, which is the source of intergenerational wealth accumulation for most Americans, Coates argues that Black wealth has been plundered by a governmental structure that was steeped in white supremacy such that on average white households are worth roughly twenty times as much as Black households, leaving Black people impoverished and vulnerable to economic crises like the one in 2008.

Coates’ article was followed by several book length treatments of the issue.<sup>17</sup> Katherine Franke’s, *Repair: Redeeming the Promise of Abolition*, makes an important observation in noting that *freed* people are not necessarily *free* people.<sup>18</sup> Her suggestion for reparations is to develop collective land ownership solutions such as community land trusts.<sup>19</sup> William A

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14. See DAINA R. BERRY & KALI N. GROSS, *A BLACK WOMAN’S HISTORY OF THE UNITED STATES* 119-20 (2020); Miranda B. Perry, *No Pensions for Ex-Slaves: How Federal Agencies Suppressed Movement to Aid Freedpeople*, 42 No. 2 PROLOGUE MAG. (2010), <https://www.archives.gov/publications/prologue/2010/summer/slave-pension.html> [<https://perma.cc/2NM2-5Y39>]. For more detailed information on Callie House’s life and work, see MARY FRANCIS BERRY, *MY FACE IS BLACK IS TRUE: CALLIE HOUSE AND THE STRUGGLE FOR EX-SLAVE REPARATIONS* (2005).

15. This bill was not a bill for reparations, but rather it called for a commission to study the impact of slavery and make recommendations for a remedy. It never got out of committee during Conyers lifetime (he died in 2019). Sheila Jackson Lee (D-TX) picked up the torch the bill made it out of Committee for the first time in 2021, although its future remains uncertain.

16. Ta-Nehesi Coates, *The Case for Reparations*, THE ATLANTIC MAG. (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/6E45-7YV9>].

17. Two notable monographs that preceded Coates’ article are BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973), and RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000). Both of these texts argued for some form of compensation for slavery and the regime of Jim Crow, however, neither caught the public imagination in the way that the article penned by Coates managed to do.

18. KATHERINE FRANKE, *REPAIR: REDEEMING THE PROMISE OF ABOLITION* 8-11 (2019).

19. *Id.* at 131-35.

Darity and A Kirsten Mullen published, *From Here to Eternity: Reparations for Black Americans in the Twenty-First Century* makes an argument that reparations need to take some form of cash payment to American descendants of slavery, and that the most practical mechanism for this to happen is through congressional legislation rather than by an order from the courts.<sup>20</sup> More recently, *Reconsidering Reparations*, by Olúfemi O. Táíwò, argues that reparations should be forward rather than backwards looking; that instead of thinking of reparations as a form of social justice to compensate for past wrongs or amends for present harms, a more optimal view is to look forward to creating a more equitable future by tying reparations to addressing the issues of climate change that is disproportionately affecting nonwhite people (including in the US) on a global scale.<sup>21</sup>

Questions about reparations were pushed further into public discourse when it became an issue in the 2020 presidential election campaign. Several of the candidates running in the Democratic Party primary race voiced agreement on the need for some form of reparations if only to empanel a commission to study the issue, though there is no consensus on what it would actually look like or how it would be accomplished. Some candidates, such as Elizabeth Warren, suggested that creating a pathway for home ownership in minority neighborhoods that were subject to redlining is an important step in closing the racial wealth gap.<sup>22</sup> Along the same lines, Cory Booker advocated addressing the racial wealth gap by creating an account for every child born in America that would then become available when they are eighteen to either buy a house or pay for higher education.<sup>23</sup> Others, such as Kamala Harris, supported some form of monetary compensation, whether in the form of a tax credit for low income persons or a monetary account that would be dispersed by and for the African American community.<sup>24</sup> Pete Buttigieg's Douglas Plan proposed the creation of lending institutions and instruments that would lend money for home ownership or home improvements in low income high minority areas.<sup>25</sup> Marianne

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20. WILLIAM A. DARITY & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* 256-266 (2020).

21. Olúfemi O. Táíwò, *What's Next, Why Reparations Require Climate Justice*, in *RECONSIDERING REPARATIONS* (New York: Oxford Univ. Press, 2022).

22. Gregory Krieg, *Five Takeaways from Elizabeth Warren's CNN town hall*, CNN POL. (Mar. 19, 2019), <https://www.cnn.com/2019/03/18/politics/elizabeth-warren-town-hall-takeaways/index.html> [<https://perma.cc/ALW6-6J4W>].

23. Fabiola Cineas, *Baby bonds could shrink the Black white wealth gap*, VOX (Feb. 17, 2021), <https://www.vox.com/22268500/baby-bonds-black-white-wealth-gap-booker-pressley> [<https://perma.cc/3GZG-2FEA>].

24. Zachary B. Wolf, *2020 Democrats are trying to redefine the idea of reparations*, CNN POL. (Feb. 26, 2019), <https://www.cnn.com/2019/02/26/politics/democrats-reparations-support-2020/index.html> [<https://perma.cc/3XQ4-WDR7>].

25. Jeff Parrott, *South Bend Mayor Pete Buttigieg says new initiative could be example of reparations*, SOUTH BEND TRIB. (June 4, 2019), <https://www.southbendtribune.com/story/news/local/2019/06/04/south-bend-mayor-pete-buttigieg-says-new-initiative-could-be-example-of-reparations/45931253/> [<https://perma.cc/28G7-GP2H>].

Williamson was the only candidate to advocate for a straight up cash payment to descendants of slavery with a dollar amount attached.<sup>26</sup> Not all candidates were on board with reparations going specifically to Black people. Most notable was Bernie Sanders, did not support reparations that targeted the descendants of slaves, but favored addressing the wealth gap by creating a living wage and tax cuts on the wealthy, which he (and others) say would benefit African Americans.<sup>27</sup>

While there is wide agreement that reparations for racial injustice means some form of repair of the harm that was inflicted by two and a half centuries of slavery and its aftermath, there is little agreement as to what exactly this should look like, how it would be distributed, who would qualify to receive the benefits, and what amount or form of compensation would actually accomplish the repair desired. These remain thorny questions. Various communities and institutions around the country have been debating answers without arriving at any consensus.<sup>28</sup> The shifting mechanisms through which racial injustice has carried out, the span of time over which they have been sustained,<sup>29</sup> and the complexity of the issue of race<sup>30</sup> itself are hints that repair through compensation alone will not be enough; a

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26. Devan Cole, *Marianne Williamson wants up to \$500 billion for reparations plan*, CNN POL. (Aug. 7, 2019), <https://www.cnn.com/2019/08/07/politics/marianne-williamson-reparations-plan-cnntv/index.html> [https://perma.cc/2HG2-PRJD].

27. Hubert Adjei-Kontoh & Oliver Laughland, *Democrats and slavery reparations: Where do 2020 candidates stand?*, THE GUARDIAN (Mar. 21, 2019, 1:00 AM), <https://www.theguardian.com/us-news/2019/mar/21/reparations-slavery-2020-democratic-candidates> [https://perma.cc/CN25-U22Q].

28. Asheville, NC: Sarah Honosky, *What does reparations mean? 8 months into process, Asheville still finding its way*, CITIZEN TIMES (Dec. 26, 2022, 5:03 AM), <https://www.citizen-times.com/story/news/local/2022/12/26/asheville-reparations-whats-been-done-in-historic-process/69735396007/> [https://perma.cc/442Z-UASE]; Philip Marcelo, *Rhode Island reparations report suggests programs, not cash*, BOSTON (Aug. 24, 2022), <https://www.boston.com/news/local-news/2022/08/24/rhode-island-reparations-report-suggests-programs-not-cash/> [https://perma.cc/TAF7-VMCM]; Kevin Rector, *California reparations task force starts to dig in on specifics*, L.A. TIMES (Sept. 25, 2022), <https://www.latimes.com/california/story/2022-09-25/california-reparations-task-force-hears-from-experts-as-it-starts-to-dig-in-on-specifics> [https://perma.cc/5GHX-KDS7].

29. The mechanisms that rationalized and sustained racial injustice have ranged from legalized chattel slavery to state inaction even when clear evidence of perpetrators of injustices could have been identified. This was the case in many instances lynchings in which there was photographic evidence of participants in racial violence, yet coroner's reports would come back with the cause of death being at the "hands of persons unknown. A useful text detailing such accounts is Philip Dray's, *At the Hands of Persons Unknown: The Lynching of Black America*, (The Modern Library, 2002).

30. As a social construction, race has been a shifting category across time and as applied to different groups. It not only includes the "whitening" of some European immigrants, includes the fact that different states had different legal definitions of race. See, NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (Routledge, 1995); *State v. Treadaway*, 126 La. 300; F. JAMES DAVIS, *WHO IS BLACK: ONE NATION'S DEFINITION* (Pa. St. Univ. Press, 1991); IAN F. HANEY LOPEZ, *WHITE BY LAW* (N.Y.U. Press, 1996).



social transformation of structures and institutions, along with attitudes and ideologies, will be necessary for long-term healing.<sup>31</sup>

#### RESTORATIVE JUSTICE: A NEW PARADIGM FOR REPARATIONS

Most advocates for reparations are concerned with addressing specific wrongful acts, such as the taking the property of Black people or the denial of access to resources by identifiable parties as was done by some elite institutions of higher education, as well as the existing state of injustice operative in systems that maintain structural and institutional racism. Restorative justice, understood within an expansive framework, provides a way to address all of these various harms.

Restorative justice is an approach to justice that responds to crimes, harms, and injustices<sup>32</sup> by asking what harm has occurred and responds by involving all those who are affected by the harm, including community members and others who have a legitimate stake in repairing the harm done. Likewise, the goal of the restorative process is not to punish the wrongdoer, but rather to restore balance in relations that have been violated by the wrongdoing. This is a qualitative shift from a retributive model in which punishment of the offender is delivered as a just response to the offense. Restorative justice, on the other hand, as generally practiced, is grounded in several core principles that include centering the harms or injustices that have been done rather than focusing on rules or laws that have been broken; an understanding that those responsible for producing the harms are accountable and have an obligation to those they have harmed to making it right; and that all who are affected by the harm or injustice should be participants in the justice process.<sup>33</sup> In this regard, restorative justice has been seen as a paradigm shift away from the traditional criminal legal system that defines justice as punishment for the perpetrator of a crime in proportion to the harm that they inflicted on others.<sup>34</sup> Instead, restorative justice seeks to identify what harm has been done and make it right to the extent possible without vilifying and isolating the person responsible. A core value that guides the restorative process is respect for all affected.<sup>35</sup> The

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31. For example, the question of how race is to be defined and thus who would qualify for reparations is a hotly debated topic. Somewhere along the path to racial healing will require that the notion of race itself is interrogated and reconsidered.

32. I use the terms injustice, harms, and crime somewhat interchangeably since there is considerable overlap between all three. For example, a crime, in most cases, is also a harm, though not all harms are crimes. The exceptions to crimes being harms in themselves are laws that criminalize behaviors with the purpose of subordinating a group and/or being applied unevenly to one group and not another. Examples of this were the Black Codes that arose in the immediate aftermath of slavery to ensnare newly freed people back into a condition as close to slavery as possible. Many Jim Crow laws would also fit this category.

33. ZEHR, *supra* note 7.

34. Declan Roche, *Retribution and Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE*, 77-78 (Gerry Johnstone and Daniel W. Van Ness, eds., 2007).

35. ZEHR, *supra* note 7, at 47.

most common application of restorative justice practices has been in addressing interpersonal harms between individuals. In many cases it serves as an alternative to incarceration or as a prison diversion tool.<sup>36</sup> It has been used effectively in community settings as well as in schools and other institutions.<sup>37</sup>

What makes restorative justice a powerful framework for reparations is its grounding in a relational understanding of justice. Jennifer Lewellyn work on relational justice is especially helpful in this regard. While this paper cannot detail all of the nuances of her relational theory of justice, the core principles she describes are useful to the reparations debate. Viewing justice relationally entails “understanding the world and human beings as relationally constituted.”<sup>38</sup> Instead of the Western view in which individuals are primary and personal independence and autonomy are privileged, Lewellyn argues that “human beings are constituted *in and through* relationships at interpersonal, institutional, and structural levels.”<sup>39</sup> If this is the case, justice also has to be understood relationally in the sense that it is fundamentally concerned with the “nature of the connections between and among people, groups, communities, and even nations.”<sup>40</sup> Understood as such, justice exists when we behave in ways that respects the dignity and humanity of others. Lewellyn posits that recognizing the equality that we share is essential to understanding justice. The animating values that define this notion of equality are *respect* that recognizes, and does not violate or interfere with, the rights and needs of others and for their position in relation to others; *concern* for, having the knowledge of, and the interest in, others and their well-being; and regarding one another with *dignity* such that we are attentive to the needs and interests that give fundamental meaning to those involved in relationships and that their satisfaction be an animating concern for justice.<sup>41</sup> Another way of putting this is that “justice viewed restoratively is fundamentally about just relations.”<sup>42</sup> It is not something to be achieved and then moved on from. Justice is an ongoing process

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36. Gerry Johnstone and Daniel W. Van Ness, *The Meaning of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE, 5 (2007). An inspiring example of how this being applied is the work of Common Justice in Brooklyn, NY.

37. See e.g., KATHERINE EVANS & DOROTHY VAANDERING, *THE LITTLE BOOK OF RESTORATIVE JUSTICE IN SCHOOLS* (2016).

38. Jennifer J. Lewellyn, *Transforming Restorative Justice*, 4 INT’L J. RESTORATIVE JUST. 374, 382 (2021).

39. *Id.*

40. Jennifer J. Lewellyn, *Restorative Justice: Thinking Relationally about Justice*, in BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY AND HEALTH LAW, 91 (Jocelyn Downie & Jennifer J. Lewellyn, eds., 2012).

41. Lewellyn, *supra* note 40, at 90-95.

42. Jennifer J. Lewellyn, *Realizing the Full Potential of Restorative Justice*, POL’Y OPTIONS (2018), <https://policyoptions.irpp.org/magazines/may-2018/realizing-the-full-potential-of-restorative-justice/> [<https://perma.cc/3CMH-KEVE>].

and activity that is defined by the lived experiences and interrelationships between all concerned parties.

Relational justice, as a core premise of restorative justice presumes that what we think of as ‘fair,’ ‘equal,’ or other normative concepts of justice gain their meaning because these concepts constitute what are needed to live and flourish in a world in which “all parties exercise their power in a way that is consistent with the humanity of everyone involved and in the interest of the greater good.”<sup>43</sup> Simply put, justice exists when we are in relation with one another according to these values. Injustice exists when that they are violated. Thus, justice a process and activity that is co-created through the interrelationship that we share with one another. Violations occurs when power exercised in a way that disrespects the humanity of another through domination. In this sense, domination is also a process and not a thing. It operates in the relationships and interaction between people.

Justice viewed through a relational lens must also be attentive to the interplay between the interpersonal and the systemic.<sup>44</sup> White supremacy and institutionalized racism operates on both levels. There are numerous examples of Black youth who have daily encounters with police who denigrate their humanity through racial profiling, over-surveillance, and other intimidation tactics. These direct encounters on an interpersonal level cannot be neatly separated from the manifestation of institutional racism that produce mass incarceration and the disproportionate representation of Black and brown people in the criminal legal system. Likewise, there are individuals and communities today that have direct experience with redlining and other mechanisms of housing injustice, which has resulted in a racial wealth gap that put Black people, as a group, in the bottom percentile. While it may be possible to arrive at some quantifiable measure of compensation for harms that have a clear victim and perpetrator, institutional and structural harms are harder to measure in a similar quantifiable manner because there is often not a discernable perpetrator to hold to account. This is especially true in which the harmed party is a group in which all members are not harmed in the same way or to the same degree.<sup>45</sup> However, both types of harms need and deserve redress. Justice, then, is necessarily only fully realized when repair is made to identified interpersonal harms and also

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43. DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION AND A ROAD TO REPAIR* 95 (2019).

44. Llewelyn, *supra* note 38.

45. A classic example is the different treatment between house slaves and field slaves. House slaves may, in general, been treated slightly better and perhaps may have even had access to a better diet, but they were still enslaved. For example, disparities in disciplinary practices in schools between Black and white students does not mean that every Black student is punished. Nonetheless, the implicit biases that lead teachers to view all Black students as more of a threat when compared to their white counterparts does affect and harm all Black students as a group.

to structures that produce harms themselves and/or produce the conditions that engender interpersonal harms.

It is a demand that justice, defined as living in just relations with one another, be attentive to not just the personal and collective harms that Black people experience, but to the transformation of systems, institutions, and structures that are the genesis of harm. As Fania Davis has taught,

Healing interpersonal harm requires a commitment to transforming the context in which injury occurs: the socio-historical conditions and institutions that are structured precisely to precisely to perpetrate harm. This commitment may mean viewing restorative justice as not only healing individual harm, but also transforming social structures and institutions that are themselves purveyors of massive harm.<sup>46</sup>

From this perspective, reform falls short of justice because although immediate needs may be met in a form that repairs the immediate instances of injustice, the internal mechanisms of harm production embedded in the structures remain to do harm in the future.<sup>47</sup> This means that the repair sought by reparations advocates will not go far enough. Restorative justice as described above is necessary for the transformation that is called for to address the full measure of racial harm

#### ACCOUNTABILITY, REPARATIONS, AND RESTORATIVE JUSTICE<sup>48</sup>

Justice viewed relationally implies that when we cause harm, we incur an obligation. We are to be held accountable, not only because it is the right thing to do, but because when we are the cause of harm, the injustice that it creates is a violation of our core relationality with others by which we ourselves are defined. Accountability is taking the responsibility to participate in restoring justice within our network of relations. In this regard, accountability, like justice, is a process. It is a series of steps that operate to acknowledge the relation between all affected parties and to create the possibility from the harm. This notion of accountability is central to the restorative process, which, as noted above, operates on an interpersonal as well as a systemic level. Danelle Sered makes an eloquent statement about how and why white people can and should lean into accountability for racial injustice.<sup>49</sup> She is speaking primarily about mass incarceration and the harm to communities of color wrought by the criminal legal system, but it is applicable to the wider call for reparations for the myriad of harms caused by white supremacy and white racial privilege.

Taking accountability for slavery and its aftermath in this context would entail the nation acknowledging responsibility for slavery and the

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46. FANIA DAVIS, *THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE: BLACK LIVES, HEALING, AND U.S. SOCIAL TRANSFORMATION* 35 (2019).

47. Lewellyn, *supra* note 38, at 386-387.

48. *See generally* SERED, *supra* note 43, at 91-128 (2019).

49. *See generally* SERED, *supra* note 43, at 246-253.

generations of racialized violence, disenfranchisement, and disadvantages that continue to haunt Black life. It also means examining the structures that persist from practices and policies which continue to negatively impact Black people. These include the many life-affecting disparities in healthcare, incarceration rates, wealth, and other markers of well-being. A critical part of acknowledgment is realizing that there has been and continues to be real and life-affecting impacts to Black people. Although some government officials claim that the nation has already paid for its sins and the election of a Black president, is evidence of a post-racial society,<sup>50</sup> the evidence is overwhelming that racism is deeply embedded in the structures and institutions that affect each of us daily.

Getting at and identifying how race and racism operates is no easy matter given that overt markers, such as ‘whites only’ signs, are no longer present. However, it is possible. Methodologies such as critical race theory are useful tools to explore the ways that institutional racism hides in the corners of legal structures and decisions. Founded in the mid-1970’s, right around the same time that restorative justice was first emerging, critical race theory grew out of a realization by a number of lawyers, legal scholars, and activist around the country, mostly in law schools, that the successes and promises of the Civil Rights Movement had fallen short of creating the kind of liberatory equality that was anticipated.<sup>51</sup> An important insight that critical race theorists made was that arguments for racial justice that underpinned the Civil Rights Movement were being turned against Black people. Although there were important legislative successes to end *de jure* segregation and overt discrimination, most notably the passage of the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act, affirmative action efforts that could have been helpful to remediate the long history of racial injustice were quickly thwarted by a white backlash. At the very moment that Black people would benefit from racial preference as a mechanism to correct historical wrongs, conservatives cried foul amid cries of “reverse racism” and lawsuits.<sup>52</sup> The courts, for their part, began dismantling affirmative action remedies under the banner of “color-blindness.” Critical race scholars, such

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50. As the Senate Majority Leader, Mitch McConnell declared that fighting the Civil War, passing landmark civil rights legislation, and electing a Black president absolved that nation of the need for reparations. See Tedd Barrett, *McConnell opposes paying reparations: ‘None of us currently living are responsible’ for slavery*, CNN (June 19, 2019), <https://www.cnn.com/2019/06/18/politics/mitch-mcconnell-opposes-reparations-slavery/index.html> [<https://perma.cc/494A-TRJJ>] (last visited Feb. 6, 2023).

51. Richard Delgado and Jean Stefancic, *CRITICAL RACE THEORY: AN INTRODUCTION* 3-4 (2001).

52. See e.g., *Defunis v. Odegaard*, 416 U.S. 312 (1974); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

as Chery Harris<sup>53</sup>, Neil Gotanda<sup>54</sup>, and Kimberlé Crenshaw<sup>55</sup> have challenged this backlash by revealing how race and racism remain integral parts of our legal system. Their work and that of others who have applied the methodology of critical race theory to education, psychology, and public health are valuable resources for identifying and acknowledging the harms that continue to be perpetrated against Black and other nonwhite people.

Beyond identifying and acknowledging the facts of racial injustice and the impact it continues to have on Black people, accountability also calls for acts of remorse, often in the form of a sincere apology. The resolutions apologizing for slavery that were passed separately by the US House and Senate passed in 2008 and 2009 respectively, were a step in the right direction but fall short of the full nature of accountability.<sup>56</sup> The lack of depth is obvious from the disclaimer that the Senate resolution added at the end to clarify that “Nothing in this resolution— (A) authorizes or supports any claim against the United States; or (B) serves as a settlement of any claim against the United States.” Needless to say, a qualified apology could be interpreted as a cynical response to the harm caused and fails to communicate a level of sincerity or accountability. A truly meaningful expression of remorse is, as Mark Medish and Daniel Lucich noted, “not just about making the wronged party feel better or whole. It is an act of self-correction: The apologizer is declaring that in spite of what was done, they are no longer that type of person — or nation.”<sup>57</sup> This is critical step to rebalancing power and reestablishing relational equality. Thus, expressing sincere remorse goes a long way in repairing the harm done. However, it is not enough.

The obligation that is incurred when harm is done requires not just saying sorry, but, in the words of Daniel Sered, it demands that one actually “do sorry;” that one actually take concrete steps to make right and repair the harm to the extent possible. This is where reparations fit into the restorative process. The harm done to Black people is inestimable. No price can be put to the centuries and generations of slavery, violence, and injustice that have been wrought by public and private institutions, acts that were often directly initiated by governments or condoned through their inaction or failure to enforce their own laws. One egregious example is lynching,

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53. Chery Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

54. Neil Gotanda, *A Critique of Our Constitution is Color-Blind*, 44 STAN. L. REV. 1 (1991).

55. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

56. H.R. 194, 110<sup>th</sup> Cong. (2007); S. Con. Res. 26, 111<sup>th</sup> Cong. (2009).

57. Mark Medish & Daniel Lucich, *Congress Must Officially Apologize for Slavery Before America Can Think About Reparations*, NBC NEWS (Jan. 29, 2019), <https://www.nbcnews.com/think/opinion/congress-must-officially-apologize-slavery-america-can-think-about-reparations-ncna1047561> [https://perma.cc/H3NC-FVR3].

which all too often was done with full complicity or participation of state actors. States in which lynchings took place, especially when those responsible were known, are culpable and accountable for failing to protect citizens under its jurisdiction.<sup>58</sup> Likewise, the failure of the federal government to pass federal anti-lynching legislation to condemn these atrocities or intervene within its powers enabled them to continue.<sup>59</sup> The Equal Justice Initiative has documented more than 4400 racial terror lynchings in the United States between Reconstruction and World War II.<sup>60</sup> Lest one think the effects of lynching is in the past, there are still people living who were directly traumatized by the lynching of relatives or others in their community.<sup>61</sup> Additionally, transgenerational trauma caused by racial violence, including lynching, has been documented to affect life expectancy of Black people who live in counties where documented cases took place.<sup>62</sup> Symbolic acts, such as apologies or memorials, cannot by themselves provide the necessary redress or heal the depth of the wound that have been created. Reparations is a necessary part of restorative justice and of the accountability that is an integral component of the process.

Reparations, as a component of a restorative justice framework that is committed to racial healing would be a monumental undertaking, but it is not without precedent. There are examples from South Africa, Rwanda, Germany, and Japan of what it could look like. What that will look like in the US will be different than those examples because the context and history is different, but they do show that with commitment and intentionality, a process can be designed. Restorative justice informs us that the voice of those who have been the most egregiously harmed must be centered, their pain heard, and their desires considered in considering the remedy to be made.

Finally, to be more than merely compensation, justice requires that whatever form reparations take, the harms perpetrated in the past and present cease; that the systems, structures, institutions, and interpersonal dynamics that cause harm are transformed so that they are aligned with supporting and nurturing relations that further the recognition of the everyone's humanity. This is an undoubtedly a huge task given the long history of racial injustice and depth in which racism is embedded in the structures and

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58. *United States v. Cruikshank*, 92 U.S. 542, 549-60 (1875).

59. EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR*, 48-50 (3d ed. 2017).

60. *Lynching in America*, EQUAL JUST. INITIATIVE (2021), <https://eji.org/reports/lynching-in-america/> [<https://perma.cc/MV2C-383V>].

61. *Lynching Survivor Mamie Lang Kirkland Returns to Mississippi*, EQUAL JUST. INITIATIVE, <https://eji.org/news/lynching-survivor-mamie-lang-kirkland-returns-to-mississippi/> [<https://perma.cc/QTE6-QWG8>] (last accessed Jan. 26, 2023).

62. Laura Kihlstrom & Russell S. Kirby, *We Carry History Within Us: Anti-Black Racism and the Legacy of Lynchings on Life Expectancy in the U.S. South*, 70 *HEALTH & PLACE* 47 (July 2021).

institutions of society. Nevertheless, the goal of restorative justice demands that we engage in a process of figuring this out.

### CONCLUSION

Reparations is derived from the same root as the word repair. Restore has similar connotations and they are sometimes used interchangeably.<sup>63</sup> Critics of restorative justice have often argued that this understanding is backwards looking and limited, or even perhaps wrongheaded, because to restore implies a return to a previous condition, which is not always possible or desired, especially if the previous conditions were themselves unjust.<sup>64</sup> Far from the case, restorative justice, viewed relationally, seeks to understand what happened, as well as why and how it happened, not “to mete out blame and punish, but, rather, to identify matters about the past to inform a different and more just future.”<sup>65</sup> Asking what “what happened?” is a necessary step to clearing the ground for a future that is more just than the existed that led to the production of the harm in the first place. Reparations understood as a step in the restorative process, rather than as an end in itself, offers a vision of what that future can be.

I will end with a thought exercise. Imagine, if you will, what our society might look like if, 168 years ago, the four million newly freed people, traumatized by 246 years of being related to as chattel property, had been given consistent support and nourishment to heal. What if they had been given the resources to locate and be reunited with their family members who had been sold away from them so that they could reestablish their kinship ties? What if they had been given land, land that they had enriched and had a claim to through generations of forced labor, which would have allowed them to begin accumulating wealth to pass on to their children and the generations that followed? What if they had been given time and space to recover, in their own way and according to their expressed needs? Imagine further what it would have meant if the 14<sup>th</sup> and 15<sup>th</sup> Amendments had actually provided the rights and protections that were enjoyed by all white citizens? What if newly freed people could have made claims in court and had their cases judged fairly? What if liberty and justice for all applied to them? What if the democratic process, including unfettered access to the ballot, was fully open to Black people, who formed the majority in many southern counties? What would congress have looked like and what kind

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63. Oxford English Dictionary, “Reparation,” in O.E.D. ONLINE (1st ed. 1989) (defining “reparation” as “An act of replacing or fixing parts of an object or structure in order to keep it in repair, or of restoring an object or structure to good condition by making repairs”).

64. M. Kay Harris, *Transformative Justice: The Transformation of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE, 557-558 (Dennis Sullivan & Larry Tift eds., 2008).

65. Lewellyn, *supra* note 38, at 389.



of priorities would have been made? What if the 15<sup>th</sup> Amendment had applied to women, Black and white, as well as Black men? What if their voices and their votes had helped shape national policies over the past 160 years? What if there had been a national reckoning with slavery's horrible past as a way of healing and moving forward as part of the emancipation process? And imagine where we will end up if we do not do it now?

I suggest that had emancipation meant that these conditions were fulfilled, the conversation about reparations would likely be unnecessary today because the conditions required for justice, restorative as well as relationally, would have been met. Perhaps that was too much to expect in the context of an entrenched ideology of white supremacy which questioned the humanity of Black people. However, I hold a deep belief in the present that our human capacity for good and decency can lead to different choices that speak to the better part of ourselves. I also believe it is never too late to make things right.