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RECONCILIATION

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RACIAL JUSTICE DEMANDS TRUTH & RECONCILIATION

Michael A. Lawrence*

*The Negro race in America, stolen, ravished and degraded, struggling up through difficulties and oppression, needs sympathy and receives criticism; needs help and is given hindrance, needs protection and is given mob-violence, needs justice and is given charity, needs leadership and is given cowardice and apology, needs bread and is given a stone. This nation will never stand justified before God until these things are changed.*¹

—National Declaration of Principles (W.E.B. Du Bois), 1905

I. INTRODUCTION

Ever since Europeans first settled the continent over four hundred years ago, racial injustice has existed in North America. The attempted destruction of Indigenous Nations and families in the pursuit of land and resources, along with the formal legal recognition of human bondage in the United States for nearly a century following the nation’s birth in 1776, created fundamental cracks that have never been addressed. While the Thirteenth Amendment officially abolished slavery in 1865, and the Fourteenth Amendment mandated equal protection in 1868, nearly another century passed before “separate but equal” was repudiated and some progress was made.²

Today we still see persistent racial inequities throughout American society. The criminal justice/prison complex disproportionately targets, captures and incarcerates persons of color; and police shootings of unarmed black victims—such as of Michael

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¹ NIAGARA MOVEMENT, NIAGARA’S DECLARATION OF PRINCIPLES (1905).

² U.S. CONST. amend. XIII, XIV; *Brown v. Board of Education*, 347 U.S. 483 (1954).

Brown in Ferguson, Missouri in August 2014—are grimly commonplace.³ Even more recently, the propriety of continuing to honor the Confederacy’s memory (and, necessarily, its core organizing principle—slavery) has led to violent clashes in Charlottesville, Virginia, and elsewhere.⁴ It is difficult to deny, in light of this history, that America has a major problem of race.

What can be done? Truth and Reconciliation is a process that has been used effectively in other nations and cultures (*e.g.*, South Africa; Rwanda; Germany; Indigenous Nations) following times of deep racial discord/violence.⁵ The idea is that true healing can begin only when past atrocities and injustices are first acknowledged and addressed. Scholars, policymakers, activists and thought-makers must fully embrace—and act upon—the Reverend Dr. Martin Luther King, Jr.’s insight that: “Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.”⁶

It is time for Americans to engage, finally, in processes of Truth and Reconciliation; first to acknowledge the atrocities of slavery and the sobering realities of its aftermath, then to attempt, through conscious acts of reconciliation and healing, to account for the massive harms done.

Part II of this Article details the truth of four centuries of racial injustice in North America, from the days of slavery through Jim Crow and the Civil Rights Era to the present day. Part III addresses the bases for reconciliation, and discusses the necessary elements of awareness, acknowledgement and remediation. It then provides examples of truth and reconciliation processes at the local, state, national and international levels.

³ Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), <https://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html>.

⁴ Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html>.

⁵ See Gideon Rose, *The Undead Past*, FOREIGN AFFAIRS (Jan.–Feb. 2018) (exploring the issue of atonement in the context of atrocities that have occurred over the past century in six different nations). See also *infra* notes 221–42 and accompanying text.

⁶ MARTIN LUTHER KING, JR., *Letter from a Birmingham Jail*, in WHY CAN’T WE WAIT (1964).

II. TRUTH—FOUR CENTURIES OF RACIAL INJUSTICE

That W.E.B. Du Bois’s anguished words spoken in 1903 lamenting racial injustice still ring true today, over a century later, is morally indefensible. It is past time for Americans to take a sober, honest account of the truth: of America’s “original sin” of slavery, together with its subsequent history of systemic racial injustice.

Du Bois noted in 1903 that “the problem of the Twentieth Century is the problem of the color line”;⁷ some sixty years later in 1967, the Reverend Dr. Martin Luther King, Jr. observed that “there has never been any single solid, determined commitment on the part of the vast majority of white Americans . . . to genuine equality for Negroes.”⁸ Both of these statements remain true today, nearly two full decades into the twenty-first century. The “color line” remains this nation’s singular problem; and most white Americans have still failed to embrace a truly egalitarian approach to race-relations. Du Bois and King both “spoke the truth that we have yet to fully acknowledge.”⁹

It is never too late to try to make amends. The first step is to acknowledge the truth. “I’m for Truth, no matter who tells it. I’m for Justice, no matter who it’s for or against,” declared Malcolm X.¹⁰ “Truth has a power of its own,” Howard Zinn explained. “[T]hat everything we do matters is the meaning of people’s struggle here . . . and everywhere.”¹¹

So, then, how do we discover the “truth?” Because histories are written by the powerful (the conquerors), not by the weak (the conquered), too often the full truth of any situation is opaque and elusive. In his monumental work, *The Peoples History of the United States*, Howard Zinn explains how “[t]he history of any country . . . conceals fierce conflicts of interests . . . between conquerors and conquered, masters and slaves, capitalists and workers, dominators and dominated in race and sex.”¹² In such a world of conflict, a world of victims and executioners, Zinn continues, “it is

⁷ W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK*, at vii (1903).

⁸ MICHAEL ERIC DYSON, *TEARS WE CANNOT STOP* 39–40 (St. Martin’s Press 2017).

⁹ *Id.*

¹⁰ MALCOLM X, *AUTOBIOGRAPHY OF MALCOLM X* (1973).

¹¹ HOWARD ZINN, *A POWER GOVERNMENTS CANNOT SUPPRESS* 16 (2007).

¹² HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 10 (2005).

the job of thinking people, as Albert Camus suggested, not to be on the side of the executioners.”¹³

Taking Zinn’s advice, this section looks to the experiences of people of color in outlining the truth of four hundred years of racial oppression in America, beginning with slavery in the colonial era and continuing into the new Nation; then running through another century of racial apartheid; through to the present day, where mass incarceration and policing tactics, along with the lingering effects of an economic system stacked against people of color, have all combined to the present-day *status quo* marked by widespread systemic racial injustice.

A. Slavery

From the earliest days of the slave markets of Virginia in 1619, to the economic disadvantages and disproportionately-skewed criminal justice system of 2018, a persistent, deeply-rooted systemic racism has worked, without interruption, to oppress people of color on this continent.

Slavery in North America was a 250-year nightmare of unimaginable proportions for black folks. Husbands and wives were regularly separated from each other and their children after being sold to different masters. Ta’Nehisi Coates elaborates:

Forced partings were common in the antebellum South Twenty-five percent of interstate trades destroyed a first marriage, and half of them destroyed a nuclear family.¹⁴

When the wife and children of Henry Brown, a slave in Richmond, Virginia, were to be sold away, Brown searched for a white master who might buy his wife and children to keep the family together. He failed:

The next day, I stationed myself by the side of the road, along which the slaves, amounting to three hundred and fifty, were to pass. The purchaser of

¹³ *Id.* (“[I]n that inevitable taking of sides which comes from selection and emphasis in history, I prefer to try to tell the story of the discovery of America from the viewpoint of the Arawaks, of the Constitution from the standpoint of the slaves, of Andrew Jackson as seen by the Cherokees, of the Civil War as seen by the New York Irish, of the Mexican War as seen by the deserting soldier of Scott’s army, of the rise of industrialism as seen by the young women in the Lowell textile mills, of the Spanish-American War as seen by the Cubans, the conquest of the Philippines as seen by black soldiers on Luzon, the gilded Ages as seen by southern farmers, the First World War as seen by socialists, the Second World War as seen by pacifists, the New Deal as seen by blacks in Harlem, the postwar American empire as seen by peons in Latin America.”).

¹⁴ Ta’Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, June 2014, at 54.

my wife was a Methodist minister, who was about starting for North Carolina. Pretty soon five wagon-loads of little children passed, and looking at the foremost one, what should I see but a little child, pointing its tiny hand towards me, exclaiming, "There's my father; I knew he would come and bid me good-bye." It was my eldest child! Soon the gang approached in which my wife was chained. I looked, and beheld her familiar face; but O, reader, that glance of agony! may God spare me ever again enduring the excruciating horror of that moment! She passed, and came near to where I stood. I seized hold of her hand, intending to bid her farewell; but words failed me; the gift of utterance had fled, and I remained speechless. I followed her for some distance, with her hand grasped in mine, as if to save her from her fate, but I could not speak, and I was obliged to turn away in silence.¹⁵

In a time when telecommunications were primitive and blacks lacked freedom of movement, the parting of black families was a kind of murder. Here we find the roots of American wealth and democracy—in the for-profit destruction of the most important asset available to any people, the family. The destruction was not incidental to America's rise; it facilitated that rise. By erecting a slave society, America created the economic foundation for its great experiment in democracy.¹⁶

Folks were routinely beaten to force compliance, resulting in lasting scars and injuries and, not infrequently, death. Slavery "was not merely the antiseptic borrowing of labor," Coates explains in his book, *Between the World and Me*, but also "rape so regular as to be industrial. There is no uplifting way to say this."¹⁷

1. 1600s and early-1700s

In the early colonial days, race was not the defining characteristic of the ill-treated subjugated classes. "In the early years of slavery," Howard Zinn explains, "before racism as a way of thinking was firmly ingrained, . . . white indentured servants were often treated as badly as black slaves, [thus leading to] a possibility of cooperation" between black slaves and white servants.¹⁸ Historian Edmund Morgan, in his voluminous studies of slavery in Virginia, notes:

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ TA'NEHISI COATES, *BETWEEN THE WORLD AND ME* 103 (2015).

¹⁸ ZINN, *supra* note 12, at 37.

There are hints that the two despised groups saw each other as sharing the same predicament. It was common, for example, for servants and slaves to run away together, steal hogs together. It was not uncommon for them to make love together. In Bacon's Rebellion, one of the last groups to surrender was a mixed band of eighty negroes and twenty English servants.¹⁹

White masters, "initially at least, perceived slaves in much the same way they had always perceived servants . . . [as] shiftless, irresponsible, unfaithful, ungrateful, [and] dishonest," Morgan explains.²⁰ "Only one fear was greater than the fear of black rebellion in the new American colonies," Zinn elaborated.²¹ "That was the fear that discontented whites would join black slaves to overthrow the existing order."²²

The white ruling class therefore took action. First, the Virginia Assembly passed slave codes authorizing discipline and punishment for slaves.²³ Around the same time, Zinn recounts, "Virginia's ruling class, having proclaimed that all white men were superior to black, went on to offer their social (but white) inferiors a number of benefits previously denied to them."²⁴ A law was passed in 1705 "requiring masters to provide white servants whose indenture time was up with ten bushels of corn, thirty shillings, and a gun, [while guns were banned to blacks, and] women servants were to get 15 bushels of corn and forty shillings. Also, the newly freed servants were to get 50 acres of land."²⁵ Morgan adds, "Once the small planter felt less exploited by taxation and began to prosper a little, he became less turbulent, less dangerous, more respectable. He could begin to see his big neighbor not as an extortionist but as a powerful protector of their common interests."²⁶ In the early

¹⁹ *Id.* (citing EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975)). Bacon's Rebellion was an armed rebellion in 1676 of around one thousand Virginia settlers led by Nathaniel Bacon—including an alliance of white indentured servants and black slaves—against the rule of Governor William Berkeley. Susan McCulley & Jen Loux, *Historic Jamestowne: Bacon's Rebellion*, NATIONAL PARK SERVICE, <https://www.nps.gov/jame/learn/historyculture/bacons-rebellion.htm> (last updated Feb. 26, 2015).

²⁰ ZINN, *supra* note 12, at 37.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 38 (citing MORGAN, *supra* note 19).

years of the 18th century, “the distinctions of status between white and black servants [were becoming] more and more clear.”²⁷

Then, “[i]n the 1720s, with fear of slave rebellion growing, white servants were allowed in Virginia to join the militia as substitutes for white freemen. At the same time,” Zinn explains, “slave patrols were established in Virginia to deal with the ‘great dangers that may . . . happen by the insurrections of negroes’ Poor white men would make up the rank and file of these patrols, and get the monetary reward.”²⁸

In short, Zinn suggests, “[r]acism was becoming more and more practical . . . [as] a realistic device for control.”²⁹ “If freemen with disappointed hopes should make common cause with slaves of desperate hope,” Morgan adds, “the results might be [catastrophic] . . . [t]he answer to the problem . . . was racism, to separate dangerous free whites from dangerous black slaves by a screen of racial contempt.”³⁰

2. Late 1700s—The Revolution; the Constitution’s Protection of Slavery

The Declaration of Independence famously declares the existence of certain self-evident Truths: “[T]hat all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”³¹ Inspiring language—but dimmed by the reality that black slaves were never intended to be included among the “all Men” who would possess these natural rights. Indeed, the primary drafter of the phrase, Thomas Jefferson, was himself an active slaveholder and trader, as were forty of his other compatriots who signed the Declaration.³²

So, black Americans were understandably reticent on the topic of the Revolution. Howard Zinn explains:

²⁷ *Id.* at 56.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (citing MORGAN, *supra* note 19).

³¹ THE DECLARATION OF INDEPENDENCE (U.S. 1776).

³² Dan Heintz, *How Many Signers of the Declaration of Independence Owned Slaves?*, MRHEINTZ.COM, <http://www.mrheintz.com/how-many-signers-of-the-declaration-of-independence-owned-slaves.html> (last visited May 24, 2018).

Thousands of blacks fought with the British. Five thousand were with the Revolutionaries, most of them from the North, but there were also free blacks from Virginia and Maryland. The lower South was reluctant to arm blacks. Amid the urgency and chaos of war, thousands took their freedom—leaving on British ships at the end of the war to settle in England, Nova Scotia, the West Indies, or Africa. Many others stayed in America as free blacks, evading their masters.³³

No doubt it is jarring to Americans' sense of their country as "the Land of the Free and Home of the Brave" to understand the Founding Fathers' racist attitudes and practices. It is similarly disconcerting to recognize that the Nation's founding governing document, the United States Constitution, expressly endorsed racist principles when ratified in 1789.

Specifically regarding black Americans, the Constitution in its original formulation, as proposed in 1787 and ratified in 1789, contained four provisions supporting the institution of slavery.

First, Article I, Section 2, clause 3 requires apportionment of the House of Representatives based on the "whole Number of free Persons" and "three fifths of all other Persons."³⁴ While the representatives of the Northern free states at the Constitutional Convention did not think the Southern slave states should be able to use the fact that they held many thousands of people in human bondage as a way to increase their representation in the new government, in the end they compromised with the southerners, who refused to support the Constitution without this and the other three provisions, by counting every slave as three-fifths of a person.

Next, Article IV, Section 2 contains the Fugitive Slave Clause:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be

³³ ZINN, *supra* note 12, at 88 ("In the northern states, the combination of blacks in the military, the lack of powerful economic need for slaves, and the rhetoric of Revolution led to the end of slavery—but very slowly. As late as 1810, thirty thousand blacks, one-fourth of the black population of the North, remained slaves. In 1840 there were still a thousand slaves in the North. In the upper South, there were more free Negroes than before, leading to more control legislation. In the lower South, slavery expanded with the growth of rice and cotton plantations.").

³⁴ U.S. CONST. art. I, § 2, cl. 3.

discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.³⁵

In other words, any efforts by an anti-slave state, such as Pennsylvania, to provide refuge for escaped slaves—legislative or otherwise—would be ineffective.

This provision, along with the Fugitive Slave Act of 1793,³⁶ was the basis for federal cases striking down Northern states' attempts to aid escaping slaves. In *Prigg v. Pennsylvania* in 1842, for example, the U.S. Supreme Court struck down two Pennsylvania laws prohibiting the removal of slaves who had escaped into the state.³⁷ Writing for the Court, Justice Joseph Story reasoned that the very existence of the Union depended on slavery:

The full recognition of this right and title [of ownership of slaves] was indispensable to . . . all the slaveholding States; and indeed was so vital . . . that it cannot be doubted that it constituted a fundamental article without the adoption of which the Union could not have been formed.³⁸

Story continued, “under and in virtue of the constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence.”³⁹

In one respect, however, *Prigg* softened the Fugitive Slave Act, by holding open the possibility for a given state to forbid state officials from assisting in the capture and return of escaped slaves: “[S]tate magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.”⁴⁰ Even this allowance, though, was foreclosed by Congress less than a decade later with the Fugitive Slave Act of 1850, which “forcibly compelled citizens to assist in the capture of runaway

³⁵ U.S. CONST. art. IV, § 2.

³⁶ *Fugitive Slave Acts*, HISTORY, <http://www.history.com/topics/black-history/fugitive-slave-acts> (last visited May 24, 2018).

³⁷ *Prigg v. Pennsylvania*, 41 U.S. 539, 611 (1842).

³⁸ *Id.*

³⁹ *Id.* at 613.

⁴⁰ *Id.* at 622.

slaves.⁴¹ It also denied slaves the right to a jury trial and increased the penalty for interfering with the rendition process to \$1,000 and six months in jail.⁴²

For its part, Article I, Section 9, clause 1 prevented Congress from banning the importation of slaves until 1808: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year [1808].”⁴³ While banning the slave trade at any time—present or future—is laudable, the fact it was allowed to continue *at all*, for *any* period of time, is highly problematic from a moral standpoint. It should also be noted that existing slaveholders before 1808 would benefit tremendously from the cessation of the importation of slaves, because overnight their “property” would suddenly become a scarce commodity. Under such circumstances slaveholders would have economic incentives to hoard slaves—especially women, who could reproduce new generations of slaves; and children, who could be expected to live longer beyond 1808 than adult slaves.

Finally, Article V (the Constitution’s “how to amend” section) prohibits the Article I 1808 importation provision (described above) from being altered by constitutional amendment—one of only two provisions to be so limited.⁴⁴ The fact that the 1808 provision was one of the only two “un-amendable” constitutional provisions indicates just how deeply ingrained the institution of slavery is in America’s DNA.

It is understandable, then, that when it comes to America’s original sin—the Nation’s foundational accommodations to slavery—many regard the Constitution as an immoral “pact with the devil” that never should have happened in the first place. Abolitionist William Lloyd Garrison in 1832 declared:

[W]e recognize the [Constitution], but with feelings of shame and indignation; and it will be held in everlasting infamy by the friends of justice and humanity throughout the world. It was compact formed at the sacrifice of the bodies and souls of millions of our race, for the sake of achieving a political object—an unblushing and monstrous coalition to do evil that good might come. . . . Who or

⁴¹ *Fugitive Slave Acts*, *supra* note 36.

⁴² *Id.*

⁴³ U.S. CONST. art. I, § 9, cl. 1.

⁴⁴ The other un-amendable provision designated by article V is the article I, section 3 requirement that each state will have an equal number of Senators. U.S. CONST. art. V.

what were the framers of our government, that they should dare confirm and authorize such high-handed villainy—such a flagrant violation of all the precepts and injunctions of the gospel—such a savage war upon a sixth of our whole population? . . . They had no awful power to bind themselves, or their posterity, for one hour—for one moment—by such an unholy alliance. It was not valid then—it is not valid now. . . . A sacred compact! A sacred compact! What, then, is wicked, and ignominious?⁴⁵

And it is little surprise that the Nation's holidays celebrating freedom and independence have long been met by African-Americans with more than a little ambivalence. Frederick Douglass, speaking at an 1852 Independence Day event of the Ladies of the Rochester [New York] Anti-Slavery Sewing Society, asked:

What, to the American slave, is your 4th of July? I answer: a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciations of tyrants, brass fronted impudence; your shouts of liberty and equality, how mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade, and solemnity, are, to him, mere bombast, fraud, deception, impiety and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages. There is not a nation on the earth guilty of practices, more shocking and bloody, than are the people of these United States, at this very hour.⁴⁶

⁴⁵ Horace Seldon, *The Constitution and a Call for Disunion*, THE LIBERATOR FILES, <http://theliberatorfiles.com/5-the-constitution-and-a-call-for-disunion/> (last visited May 24, 2018) (quoting William Lloyd Garrison).

⁴⁶ Frederick Douglass, *What to the slave is the 4th of July?*, in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 188–206 (Philip S. Foner ed., 1999); see also David Remnick, *American Dignity on the Fourth of July*, THE NEW YORKER (July 10, 2017), <https://www.newyorker.com/magazine/2017/07/10/american-dignity-on-the-fourth-of-july>. Regarding another institution, the *Star-Spangled Banner*, African-Americans have ample reason to object in principle to the Anthem's verse three couplet likely celebrating the massacre of former slaves who took the side of the British in the War of 1812: "No refuge could save the hireling and slave/From the terror of flight or the gloom of the grave." Beatrice Dupuy, *Is The National Anthem Racist? The California NAACP Wants it Gone*, NEWSWEEK (Nov. 8, 2017), <http://www.newsweek.com/naacp-urges-congress-replace-racist-national-anthem-705207>. Francis Scott Key, who wrote the *Star-Spangled Banner*, "opposed abolition, owned slaves and once remarked that blacks were 'a distinct and inferior race of people, which all experience proves to be the greatest evil that afflicts a community.'" *Id.*

3. The 1800s—Civil War; Emancipation Proclamation; Reconstruction Amendments

Despite the claims of revisionist Southern histories to the contrary,⁴⁷ there is little question the formation of the Confederate States of America in 1861 was based on the southern states' desire to maintain the institution of slavery. As Confederate Vice President Alexander Stephens explained in his infamous "cornerstone speech" shortly before the Civil War: "[The Confederacy's] corner-stone rests upon the great truth, that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth."⁴⁸ And Mississippi, when seceding from the Union, stated unequivocally: "Our position is thoroughly identified with the institution of slavery—the greatest material interest of the world."⁴⁹

For his part, Abraham Lincoln, at the beginning of his Presidency and the virtually-simultaneous onset of the Civil War, was equivocal on the issue of slavery. While personally opposed to the practice (stating in the 1850s, "[Slavery is] an unqualified evil to the negro, the white man, and the State"), as a lawyer he understood the Constitution's unqualified support of the States' authority to embrace the institution.⁵⁰ Assessing the politics of the day, he doubted the support of moderate Republicans in the North and border-state South for seeking to ban slavery as a basis for prosecuting the War. Accordingly, in his first inaugural address he stated his willingness to allow the institution to continue in the South: "[I have] no purpose, directly or indirectly, to interfere with slavery in the States where it exists."⁵¹

⁴⁷ See *infra* notes 104–11 and accompanying text.

⁴⁸ Alexander H. Stephens, "Corner Stone" Speech (Mar. 21, 1861) by Henry Cleveland, in ALEXANDER H. STEPHENS, IN PUBLIC AND PRIVATE: WITH LETTERS AND SPEECHES, BEFORE, DURING, AND SINCE THE WAR 717–29 (1886). Prior to secession, Stephens had been a Democratic Congressman from Georgia. Representative Alexander Stephens, GOVTRACK, https://www.govtrack.us/congress/members/alexander_stephens/410317 (last visited May 25, 2018).

⁴⁹ Roger Cohen, *Confederate Statues and American Memory*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/opinion/confederate-statues-trump.html>.

⁵⁰ James M. McPherson, *Emancipation Proclamation and Thirteenth Amendment*, in THE READER'S COMPANION TO AMERICAN HISTORY (Eric Foner & John A. Garraty eds., 2014) (ebook).

⁵¹ *Id.* For taking such positions, Lincoln's reputation among many African-Americans was decidedly mixed. Frederick Douglass, for example, in a May 1876 event dedicating the Freedman's Memorial near the U.S. Capitol, commented, "Abraham Lincoln was not, in the fullest sense of the word, either our man or model." RONALD C. WHITE, AMERICAN ULYSSES: A LIFE OF ULYSSES S. GRANT 573 (2016). Early on

After nearly two years of War, however, Lincoln's position on the slavery question had evolved; and on September 22, 1862, shortly after the Union's military victory at Antietam, Lincoln signed the Emancipation Proclamation, stating that as of January 1, 1863, all slaves in the rebellious Southern states—3.1 million of the 4 million persons enslaved at the time—"shall be then, thenceforward, and forever free."⁵² In a stroke of a pen, "the stakes of the Civil War shifted dramatically. A Union victory would mean no less than revolution in the South, where the 'peculiar institution' of slavery had dominated economic, political and social life [for many decades] in the antebellum years."⁵³

At roughly the same time as Lincoln signed the Emancipation Proclamation, Congress was discussing amending the Constitution to officially abolish slavery in all of the United States. The first of three "Reconstruction Amendments," the Thirteenth Amendment was finally passed in Congress on January 31, 1865: "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, or any place subject to their jurisdiction."⁵⁴ This Amendment, which mooted (or nullified) most of the constitutional provisions described above (e.g., the Fugitive Slave Clause; the 1808 Importation Clause) that had enabled slavery to exist in the United States, was ratified by the requisite three-quarters of the states and became part of the Constitution on December 6, 1865.⁵⁵

Lincoln was not optimistic about the prospect of blacks and whites being able to live in harmony in America, stating in August of 1862, for example: "Even when you cease to be slaves, you are yet far removed from being placed on an equality with the white race. . . . [So] it is better for us both, therefore, to be separated." COLLECTED WORKS OF ABRAHAM LINCOLN, 1809–1865, at 372–75 (Roy P. Bassler ed., 1953).

⁵² McPherson, *supra* note 50. The Proclamation did not free slaves in the non-rebelling border states of Kentucky, Missouri, Delaware and Maryland, or in "all or parts of three Confederate states controlled by the Union army on the grounds that these areas were not in rebellion against the United States." *Id.*

⁵³ *Black Codes*, HISTORY, <http://www.history.com/topics/black-history/black-codes> (last visited Apr. 17, 2018).

⁵⁴ U.S. CONST. amend. XIII, § 1; McPherson, *supra* note 50.

⁵⁵ McPherson, *supra* note 50. Ironically and tragically, the "except as a punishment for crime whereof the party shall have been duly convicted" language of the Thirteenth Amendment has been turned in such a way to allow the continued oppression of people of color in the succeeding 150 years, especially in the last sixty years since the demise of Jim Crow laws. U.S. CONST. amend. XIII.

Partly in response to Southern intransigence following the War,⁵⁶ the Fourteenth Amendment was passed by Congress on June 18, 1866, and ratified by three-quarters of the states on July 9, 1868.⁵⁷ Section Two expressly supersedes the Article I three-fifths clause described above: “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”⁵⁸

Section One of the Fourteenth Amendment contains the majestic language that forms the core of so many of Americans’ guaranteed liberties. It states:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.⁵⁹

The first sentence, the Citizenship Clause, guaranteeing that all persons born or naturalized in the United States are citizens, was a direct repudiation of the *Dred Scott v. Sandford* case, where the Supreme Court held that a slave was *not* a citizen entitled to sue for his freedom in federal court.⁶⁰ The second sentence contains three guarantees against State infringement: privileges and immunities, intended originally to apply the protections contained within the Bill of Rights (the first eight amendments), and more, to the States.⁶¹ This intent was thwarted, however, by the Court’s narrow interpretation of the Clause in *The Slaughter-House Cases*.⁶² The

⁵⁶ See *infra* notes 67–68 and accompanying text for discussion of the Southern states’ swift passage of “black codes” which further discriminated against the freedmen.

⁵⁷ *14th Amendment to the Constitution Was Ratified*, AMERICA’S LIBRARY, http://americaslibrary.gov/jb/recon/jb_recon_revised_1.html (last visited May 27, 2018).

⁵⁸ U.S. CONST. amend. XIV, § 2.

⁵⁹ *Id.* § 1.

⁶⁰ *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1856) (“[African-Americans] are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”).

⁶¹ *Id.*

⁶² *The Slaughter House Cases*, 83 U.S. 36 (1872). By its terms, the Bill of Rights applies only to actions of the federal government. See *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833). Over time, primarily during the mid-twentieth-century, most of the protections contained within the Bill of

second and third protections against State infringement, the Due Process and Equal Protection Clauses, have proven to be substantial (though uneven) sources of protection.

The Fifteenth Amendment, passed by Congress on February 26, 1869 and ratified by the states in February, 1870, protected the right of the freed slaves and their descendants to vote: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”⁶³ Despite this guarantee, Southern states for many decades were able to prevent massive numbers of people of color from voting, through devices such as poll taxes, literacy tests, and various other intimidation tactics. It was not until after passage of the Voting Rights Act of 1965 that a majority of African-Americans in the South were even registered to vote.⁶⁴

In sum, a common element of the three “Reconstruction Amendments” (the Thirteenth, Fourteenth, and Fifteenth) is that they were all motivated by the decision to end slavery and its manifestations. Notably, the final provision in all three are substantively identical in authorizing *Congress* the power to enforce the specific provisions of each.⁶⁵ The Nation’s experience of the first eighty years following the framing of the Constitution had shown that the States could not be trusted to protect the liberties of all, especially people of color, so the Amendments empowered Congress to guarantee those liberties when the States would not.

B. *Post-Slavery—Reconstruction & Resistance; Jim Crow Era*

For a brief time following the Civil War, hopes for improved racial justice were high. In addition to Congress’ proposal of the Constitutional Amendments described

Rights have been applied to the States through the process of “selective incorporation” of the provision into the Fourteenth Amendment Due Process Clause. *See generally* Michael A. Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1 (2007).

⁶³ U.S. CONST. amend. XV, § 1.

⁶⁴ *Voting Rights Act of 1965*, HISTORY, <http://www.history.com/topics/black-history/voting-rights-act> (last visited Apr. 17, 2018). Efforts to protect the right to vote suffered a substantial setback in 2013, when the Supreme Court struck down Congress’s latest renewal of the Voting Rights Act, which required jurisdictions that had previously engaged in discriminatory practices to have any change to their voting practices pre-approved by the U.S. Department of Justice. *Shelby County v. Holder*, 570 U.S. 529 (2013) (overturning a statute which had passed Congress by the overwhelming margins of 390-33 in the House and 98-0 in the Senate); *Id.* (Ginsburg, J., dissenting).

⁶⁵ The Fourteenth Amendment section 5 states, for example: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

above, the federal government undertook various other actions to attempt to aid the former slaves' transition to freedom. General William T. Sherman, for example, following his famous "March to the Sea" from Atlanta to Savannah in the War's last year,⁶⁶ issued Special Field Order No. 15 in January 1865 confiscating certain coastal land in Florida, Georgia, and South Carolina and dividing it into parcels of up to forty acres for the benefit of some 18,000 freed slaves and other blacks in the region.⁶⁷

1. 1865-1877—Reconstruction

With Abraham Lincoln's assassination on April 14, 1865, President Andrew Johnson inherited the executive responsibility for rebuilding the post-War Union. Under Johnson's Reconstruction policies, which started in May 1865 (with which he was often at great odds with Congress), "the former Confederate states were required to uphold the abolition of slavery . . . swear loyalty to the Union and pay off their war debt. Beyond those limitations, the states and their ruling class—traditionally dominated by white planters—were given a relatively free hand in rebuilding their own governments."⁶⁸

Perhaps not surprisingly, the Southern states did not go quietly into the night—rather, nearly all of them quickly began passing laws ("black codes") designed, ultimately, to ensure the availability of African-Americans as a cheap labor force.⁶⁹ "While the codes granted certain freedoms . . . including the right to buy and own property, marry, make contracts and testify in court (only in cases involving people of their own race)—their primary purpose was to restrict blacks' labor and activity."⁷⁰ Further:

Some states limited the type of property that blacks could own, while virtually all the former Confederate states passed strict vagrancy and labor contract laws, as well as so-called "antenticement" measures designed to punish anyone who offered higher wages to a black laborer already under contract.

⁶⁶ DAVID J. EICHER, *THE LONGEST NIGHT: A MILITARY HISTORY OF THE CIVIL WAR* 739 (2001).

⁶⁷ Special Field Order No. 15, Order by the Commander of the Military Division of the Mississippi (Jan. 16, 1865), in 1 *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, vol. 47, pt. 2, at 60–62 (1895).

⁶⁸ *Black Codes*, *supra* note 53.

⁶⁹ *Id.*

⁷⁰ *Id.*

Blacks who broke labor contracts were subject to arrest, beating and forced labor, and apprenticeship laws forced many minors (either orphans or those whose parents were deemed unable to support them by a judge) into unpaid labor for white planters.

Passed by a political system in which blacks effectively had no voice, the black codes were enforced by all-white police and state militia forces—often made up of Confederate veterans of the Civil War—across the South.⁷¹

The passage and enforcement of the black codes enraged many in the North, who thought the codes, besides denying blacks their basic human rights, breached core ideals underlying notions of free labor.⁷² Partly in response to the black codes, the radical Thirty-Ninth Republican Congress passed a series of measures designed to cement and guaranteed the fair and equal treatment of African-Americans.⁷³

For example, Congress created the U.S. Bureau of Refugees, Freedmen and Abandoned Lands (the Freedmen’s Bureau) through the Freedmen’s Bureau Acts of 1865 and 1866.⁷⁴ In addition to providing medical aid, housing, food, schools, and legal assistance, the Freedmen’s Bureau was authorized to set apart for freedmen “such tracts of [not more than forty acres of] land within the insurrectionary states as shall have been abandoned, or to which the United States shall have acquired title by confiscation or sale, or otherwise.”⁷⁵ By such representations, the prospect of “forty acres and a mule” thus became the great hope toward greater independence for millions of newly-freed slaves.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Freedmen’s Bureau*, HISTORY, <http://www.history.com/topics/black-history/freedmens-bureau> (last visited Apr. 18, 2018) (quoting Freedmen’s Bureau Act, ch. 90, 13 Stat. 507 (1865)).

⁷⁴ *Id.*

⁷⁵ *Id.* The Bureau could boast of a number of accomplishments during its years of existence from 1865–1872: [T]he Freedmen’s Bureau fed millions of people, built hospitals and provided medical aid, negotiated labor contracts for ex-slaves and settled labor disputes. It also helped former slaves legalize marriages and locate lost relatives, and assisted black veterans. The bureau also was instrumental in building thousands of schools for blacks, and helped to found such colleges as Howard University in Washington, D.C.; Fisk University in Nashville, Tennessee; and Hampton University in Hampton, Virginia. The bureau frequently worked in conjunction with the American Missionary Association and other private charity organizations. *Id.* That said, ultimately the Bureau failed in its efforts to meaningfully redistribute land to black ownership, when “most of the confiscated or abandoned Confederate land was eventually restored to the original owners.” *Id.*

In 1866 Congress passed the Civil Rights Act and the Fourteenth Amendment (ratified by the states in 1868), requiring states to provide “equal protection” to all persons.⁷⁶ Then, Congress passed the Reconstruction Act of 1867, which mandated southern states ratify the Fourteenth Amendment before they could rejoin the Union and passed the Fifteenth Amendment in 1869 (ratified by the states in 1870).⁷⁷

The laws were enacted over the vetoes of President Johnson, himself a Tennessean who firmly opposed the radical Republicans’ Reconstruction plans for protecting African-Americans.⁷⁸ Among his other disruptive actions, besides the vetoes of legislation, Johnson restored land to former Confederates whom he had pardoned, and fired Freedmen’s Bureau employees whom he viewed as too assertive in promoting black Americans’ rights.⁷⁹

After Andrew Johnson’s disappointing tenure in serving out Lincoln’s term, the election of President Ulysses Grant in 1868 was a positive development from the standpoint of black Americans. Grant, as Lincoln’s highest ranking General during the Civil War, had long-before established himself as sympathetic to the plight of the slaves, and that concern continued into his Presidency.⁸⁰

⁷⁶ *The Civil Rights Bill of 1866*, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/> (last visited May 27, 2018). See also *On This Day, Congress Approved the 14th Amendment*, CONSTITUTION CENTER, <https://constitutioncenter.org/blog/it-was-150-years-ago-today-congress-approved-the-14th-amendment> (last visited May 27, 2018).

⁷⁷ See *supra* notes 54–63 and accompanying text.

⁷⁸ *Great Moments in White Victimization: Johnson Vetoes the Civil Rights Act of 1866*, <http://www.chronicle.com/blognetwork/edgeofthewest/2008/03/27/great-moments-in-white-victimization-johnson-vetoes-the-civil-rights-act-of-1866/> (last visited May 27, 2018). See also *Veto for the First Reconstruction Act, March 2, 1867*, <http://www.let.rug.nl/usa/presidents/andrew-johnson/veto-for-the-first-reconstruction-act-march-2-1867.php> (last visited May 27, 2018).

⁷⁹ *Freedmen’s Bureau*, *supra* note 73. Johnson was impeached by the House of Representatives on eleven counts on February 24, 1868, spurred by his firing of Secretary of War Edwin M. Stanton in violation of the Tenure of Office Act. *President Andrew Johnson Impeached*, HISTORY, <http://www.history.com/this-day-in-history/president-andrew-johnson-impeached> (last visited Apr. 18, 2018). See U.S. CONST. art. I, § 2 cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”). The vote on May 26, 1868 after Johnson’s trial in the Senate was 35-19 in favor of removing him from office, one short of the requisite two-thirds required by the Constitution. *President Andrew Johnson Impeached, supra*; see also U.S. CONST. art. I, § 3 cl. 6 (“The Senate shall have the sole Power to try all Impeachments. . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

⁸⁰ WHITE, *supra* note 51, at 439, 472, 523–24.

The efforts of President Grant and others toward greater racial justice were fiercely opposed by Southern (and Northern) racists, most notably evidenced by the particularly virulent and violent actions of the Ku Klux Klan. In his recent biography of Ulysses Grant, Ronald White describes the situation:

In the name of white supremacy, the KKK beat, whipped, maimed, kidnapped, and hanged thousands of black citizens. Their main aim became voter suppression of newly franchised African Americans, who they know would vote overwhelmingly Republican in local and state elections. In the 1870 state elections, the Klan's tactics allowed white Democrats to make substantial gains in several southern states.

At first the Klan applied economic pressure, threatening black laborers with the loss of employment if they voted for Republicans. As they moved into other southern states, night-riding Klansmen terrorized African-Americans in their homes and churches.⁸¹

In response, and at the urging of President Grant, Congress passed three Enforcement Acts in 1870 and 1871 (the last known as the “Ku Klux Klan Act”) to end the terrorism and authorize the president to use armed forces and to suspend habeas corpus, if necessary, to protect the freedmen.⁸² In the face of strong resistance from the states, Grant proclaimed, “I will not hesitate to exhaust the powers thus vested in the Executive . . . for the purpose of securing to all citizens of the US the peaceful enjoyment of the rights guaranteed to them by the Constitution and laws.”⁸³ Grant firmly believed the federal government should provide a leading role in protecting the rights of the black freedmen and Native Americans, since most states had shown themselves to be unwilling or unable to do so.⁸⁴

Grant worried, though, that increasing numbers of Republicans in Congress were beginning to capitulate to the “retreatist attitudes” of many in the North, and waffle on the issue of protecting African-Americans in the South.⁸⁵ Within the South

⁸¹ *Id.* at 519–20 (stating the Ku Klux Klan was first formed in 1866 in Pulaski, Tennessee by six young Confederate veterans as a social club, but very soon it adopted its racist agenda as its primary *raison d’etre*).

⁸² *Landmark Legislation: The Enforcement Acts of 1870 and 1871*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm> (last visited May 27, 2018).

⁸³ WHITE, *supra* note 51, at 523–24.

⁸⁴ *Id.*

⁸⁵ *Id.*

itself, racism was rampant. As Grant's Attorney General Amos Akerman, himself a Georgia Republican, put it, "[There is] a perversion of moral sentiment among the Southern whites which bodes ill to that part of the country for this generation."⁸⁶

In late 1871, after "outrages" were committed against hundreds of black voters (including two murders) in South Carolina, and the Klan refused to disperse after a presidential order, Grant went against his cabinet's advice in sending troops into the state, suspending the writ of habeas corpus, and empowering Akerman and his federal agents to arrest more than one hundred racist agitators.⁸⁷ "In 1871 alone, federal grand juries brought three thousand indictments."⁸⁸

Despite "charges that he was acting like a tyrant," and the fact that his "aggressive campaign against the KKK alienated many of his former Republican allies," Grant won reelection by overwhelming margins in 1872, largely due to his support among the black vote in both the South and North.⁸⁹ Frederick Douglass, for his part, enthusiastically endorsed Grant, declaring: "To me, it does not seem likely that the Republican party will find a candidate of equal strength as General Grant . . . I know Grant well . . . At all times he gave every aid to the development of the industry and of the improvement of the colored race."⁹⁰

The year 1872 also saw, however, the demise of the Freedmen's Bureau, created seven years earlier with such high hopes, which demonstrated the continuing erosion of support among Republicans for racial justice.⁹¹ The Bureau had been beleaguered for some time, to the point where "even among the agency's supporters in Congress and its own personnel, there was disagreement over what type of assistance the government should provide and for how long."⁹² So, in response to the

⁸⁶ *Id.* at 526–28.

⁸⁷ *Id.* at 527, 536.

⁸⁸ *Id.*

⁸⁹ *Id.* at 534–36.

⁹⁰ *Id.* ("[Grant got] 56 percent of the vote—a larger margin than his election in 1868 and the highest winning percentage of any president between Jackson in 1828 and Theodore Roosevelt in 1904."). Douglass spoke of Grant as "the honored and trusted President of the United States." *Id.* at 573. White explains that "'trusted' was a special word seldom used in the Douglass lexicon—a singular encomium because Douglass did not trust white leaders." *Id.* The fiery reformer would later say of Grant, "He was the first of our generals to see that slavery must perish that the Union might live, and to protect colored soldiers from insult by military order." *Id.*

⁹¹ *Freedmen's Bureau*, *supra* note 73.

⁹² *Id.*

politics of race and Reconstruction, Congress, in part under pressure from white Southerners, shut down the Bureau.⁹³

Clearly, serendipity was not smiling upon supporters of racial equality after 1872. Progress was stunted by the huge gains made by Democrats in the 1874 mid-term elections (made possible by concerted voter suppression efforts as well as a crippling economic depression in 1873 and 1874), and Grant's advocacy was further weakened by political scandals within his administration.⁹⁴ The *coup de grace* was the "Compromise of 1877," involving the disputed presidential election of 1876—again with reports of widespread voter intimidation by Democrats—when Republicans agreed, in exchange for the Southern Democrats' support for Republican nominee Rutherford Hayes, to remove federal military oversight and to support home rule in the South.⁹⁵ Without such oversight, the Southern States—which had always fiercely resented and resisted the Freedman's Bureau and other aspects of Reconstruction—were free to enact their racially discriminatory practices and policies, and "the endeavor to reconstruct the nation on a platform of civil rights for the freedmen had essentially ended."⁹⁶

2. 1877–1954—Post-Reconstruction; "Jim Crow"

The 1877 withdrawal of federal troops from the South allowed terrorism against blacks—lynching, rape, and arson—to resume virtually unchecked; and any hopes for providing greater opportunities for many blacks living under a sharecropping system, which was little better than slavery, were dashed. Even then, a small silver lining remained as late as 1885, however, in that some measure of African-Americans' political gains still remained. While touring South Carolina for several weeks that year, black journalist T. McCants Stewart wrote: "I can ride in first-class cars on the railroads and in the streets . . . I can stop in and drink a glass of soda and

⁹³ *Id.* ("Over its course of existence, the bureau was underfunded and understaffed, with just 900 agents at its peak. Bureau agents, who acted essentially as social workers and were frequently the only federal representatives in Southern communities, were subjected to ridicule and violence from whites (including terror organizations such as the Ku Klux Klan) who viewed the agents as interfering in local affairs by trying to assist blacks.").

⁹⁴ WHITE, *supra* note 51, at 542, 550, 569, 571–72.

⁹⁵ *Id.* at 572–73, 578, 580–81.

⁹⁶ *Id.* ("[A joint electoral commission appointed by the House and Senate] awarded Hayes all twenty electoral votes—by a vote of 8 to 7. Hayes, while still losing the popular vote. 4.2 million to 4.0 million, won the electoral vote 185 to 184.").

be more politely waited upon than in some parts of New England.”⁹⁷ Stewart reported that he “saw a black policeman arrest a white criminal, and he saw whites casually talk with black strangers The morning light is breaking,” he told his readers.⁹⁸

That optimism proved to be fleeting. Very quickly, “blacks would lose almost all they had gained Worse, denial of their rights and freedoms would be made legal by a series of racist statutes, the so-called Jim Crow laws.”⁹⁹ Jim Crow created a system of apartheid that separated whites from non-whites in virtually every aspect of society: jobs, schools, restaurants, restrooms, public transportation, and recreational facilities.¹⁰⁰

White supremacist dogma prevailed. “In the depression-wracked 1890s, racism appealed to whites who feared losing their jobs to blacks. Politicians abused blacks to win the votes of poor white ‘crackers.’ Newspapers fed the bias of white readers by playing up (sometimes even making up) black crimes.”¹⁰¹ The crowning blow occurred when a black man sued to challenge an 1890 Louisiana law mandating separate train cars for blacks and whites, and the U.S. Supreme Court upheld the law in *Plessy v. Ferguson* in 1896, reasoning that the Fourteenth Amendment equal protection clause allows for “separate but equal” accommodations for people of different races, thus paving the way for another sixty years of blatant, officially-sanctioned oppression.¹⁰²

⁹⁷ *A Brief History of Jim Crow*, CONSTITUTIONAL RIGHTS FOUNDATION, <http://www.crf-usa.org/black-history-month/a-brief-history-of-jim-crow> (last visited May 24, 2018) (quoting T. McCants Stewart).

⁹⁸ *Id.*

⁹⁹ *Id.* Jim Crow laws were finally fully eliminated only with the passage of the Civil Rights Act of 1964, nearly a century later.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896). Justice Harlan, in dissent, penned these noble words:

[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Soon, laws were passed across the South separating blacks from whites; and blacks' voting rights were also targeted through a variety of measures—such as limiting the “voting right to those who owned property or could read well, to those whose grandfathers had been able to vote, to those with ‘good characters,’ [or] to those who paid poll taxes.”¹⁰³ The Supreme Court upheld these measures, too, and they worked as intended: “In 1896, Louisiana had 130,334 registered black voters. Eight years later, only 1,342, 1 percent, could pass the state’s new rules.”¹⁰⁴

The oppression of African-Americans during this period was all-encompassing:

Jim Crow laws touched every part of life. In South Carolina, black and white textile workers could not work in the same room, enter through the same door, or gaze out of the same window. Many industries wouldn't hire blacks: Many unions passed rules to exclude them. . . .

By 1914, Texas had six entire towns in which blacks could not live. Mobile passed a Jim Crow curfew: Blacks could not leave their homes after 10 p.m. Signs marked “Whites Only” or “Colored” hung over doors, ticket windows, and drinking fountains. Georgia had black and white parks. Oklahoma had black and white phone booths.

Prisons, hospitals, and orphanages were segregated as were schools and colleges. In North Carolina, black and white students had to use separate sets of textbooks. In Florida, the books couldn't even be stored together. Atlanta courts kept two Bibles: one for black witnesses and one for whites.¹⁰⁵

Racist groups were ascendant around the turn of the century. Groups like the Ku Klux Klan, revived in 1915, used terror and expressly promoted violence as a way to keep African-Americans “in check.” These decades were marked by horrendous crimes. Nearly 3,000 lynchings occurred throughout the South during this period (some estimates range much higher).¹⁰⁶ Racist representations of blacks permeated popular culture, such as in D.W. Griffith's film *Birth of a Nation*, (which was even

Id. (Harlan, J., dissenting). On the issue of the constitutionality of “separate but equal,” it was Harlan's position that ultimately carried the day six decades later in *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁰³ *A Brief History of Jim Crow*, *supra* note 97.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ DAVID LEVERING LEWIS, W.E.B. DU BOIS: BIOGRAPHY OF A RACE, 1868–1919, at 514 (1993).

screened—to President Woodrow Wilson’s enduring disgrace—at the White House in 1915).¹⁰⁷ Southern whites, “literally were put to the torture” by “emissaries of hate” who inflamed “the negroes’ egotism” and even inspired “lustful assaults” by blacks upon white womanhood.¹⁰⁸

Ta’Nehisi Coates described the reality of African-American life in the early twentieth century:

[P]olitical violence was visited upon blacks wantonly Black schools and churches were burned to the ground. Black voters and the political candidates who attempted to rally them were intimidated, and some were murdered. At the end of World War I, black veterans returning to their homes were assaulted for daring to wear the American uniform. The demobilization of soldiers after the war, which put white and black veterans into competition for scarce jobs, produced the Red Summer of 1919: a succession of racist pogroms against dozens of cities ranging from Longview, Texas, to Chicago to Washington, D.C. Organized white violence against blacks continued into the 1920s—in 1921 a white mob leveled Tulsa’s “Black Wall Street,” and in 1923 another one razed the black town of Rosewood, Florida—and virtually no one was punished.¹⁰⁹

Lawyer and Equal Justice Initiative founder Bryan Stevenson, a frequent modern-day public commentator, added:

[W]hen I teach my students about African-American history, I tell them about slavery, I tell them about terrorism, the era that began at the end of Reconstruction that when on until World War II. [Most people] don’t really know very much about it, but for African-Americans in this country, that was an era defined by terror. In many communities, people had to worry about being lynched, they had to worry about being bombed. It was the threat of terror that shaped their lives. And these older people come up to me now, and they say “Mr. Stevenson, you give talks, you make speeches. You tell people to stop saying we’re dealing with

¹⁰⁷ *Id.* at 507, 509–12.

¹⁰⁸ ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 609–10 (Harper Perennial 2014) (1988).

¹⁰⁹ COATES, *supra* note 17.

terrorism for the first time in our nation's history since 9/11." They tell me to say, "We grew up with that."¹¹⁰

a. The Dunning School of History

The attitude that developed among Southern whites in the decades after the Civil War was one of profound victimization. "By the turn of the century . . . Reconstruction was widely viewed as little more than a regrettable detour on the road to reunion," historian Eric Foner explains. "To the bulk of the white South, it had become axiomatic that Reconstruction had been a time of 'savage tyranny' that 'accomplished not one useful result, and left behind it, not one pleasant recollection.'"¹¹¹

A major factor in the perpetuation of these racist attitudes—for nearly another *one hundred years* after the Civil War, both in the South *and* North—was the virtual takeover of the American History branch of the academic establishment by Southern sympathists in the early twentieth-century. Specifically, a group of young scholars from the South studying Reconstruction at Columbia University were taught by the eminent Professor William Archibald Dunning that blacks were "children" utterly incapable of appreciating the freedom that had been thrust upon them.¹¹²

Foner comments, "[t]his rewriting of Reconstruction's history was accorded scholarly legitimacy—to its everlasting shame—by the nation's fraternity of professional historians [and] shaped historical writing for generations Few interpretations of history have had such far-reaching consequences as this image of Reconstruction," Foner continues, "[which] did much to freeze the mind of the white South in unalterable opposition to outside pressures for social change and to any thought of eliminating segregation, or restoring suffrage to disenfranchised blacks. They also justified Northern indifference to the nullification of the Fourteenth and Fifteenth Amendments."¹¹³

Among the first to call the Dunning School's accounts into question was W.E.B. Du Bois in various papers and his monumental 1935 book, *Black Reconstruction*. Du Bois argued in 1909 that, contrary to the conventional wisdom

¹¹⁰ Bryan Stevenson, *We Need to Talk About an Injustice*, TED.COM (Mar. 2012), at 9:00, https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice#t-748427.

¹¹¹ FONER, *supra* note 108, at 608–09; *see also* Lawrence, *supra* note 62, at 54.

¹¹² FONER, *supra* note 108, at 608–09.

¹¹³ *Id.* at 609–10.

told by the Dunning historians, “[t]he Negro governments in the South accomplished much of positive good We may recognize three things which Negro rule gave to the South: . . . (1) Democratic government; (2) Free public schools; and (3) New social legislation.”¹¹⁴ He added that Reconstruction’s failure to improve the plight of blacks could be explained by the federal government’s failure to support the Freedman’s Bureau “for ten, twenty or forty years with careful distribution of land and capital and a system of education for the children.”¹¹⁵ Du Bois’s work was essentially ignored by mainstream historians, however, even though many of his perspectives would be validated generations later by acclaimed professional historians.¹¹⁶

By the mid-twentieth century, the Dunning School had come under increasing criticism, leading to its ultimate demise by the end of the 1960s.¹¹⁷ “Despite its remarkable longevity, the demise of the traditional [Dunning School] interpretation was inevitable,” Professor Foner suggests.¹¹⁸ “Once objective scholarship and modern experience rendered its racist assumptions untenable, familiar evidence read very differently, new questions suddenly came into prominence, and the entire edifice of the Dunning School had to fall.”¹¹⁹

b. Federal Government Collusion

Racial prejudice was not limited to private citizens or, for that matter, to state and local governments; in fact, discriminatory practices “extended even into the upper reaches of American government,” explains Coates.¹²⁰ “The New Deal is today remembered as a model for what progressive government should do—cast a broad social safety net that protects the poor and afflicted while building the middle

¹¹⁴ LEWIS, *supra* note 106, at 383–85. Du Bois’s book, *The Negro*, released in 1915, offered broad revisions to the Southern-sympathetic histories foisted on the public by the Dunning School of historians, and sought to counteract the *Birth of a Nation*’s racist portrayal of a victimized South, “with the Negro represented either as an ignorant fool, a vicious rapist, a venal or unscrupulous politician or a faithful but doddering idiot.” *Id.* at 507, 509–12 (numerical list includes typographical modifications).

¹¹⁵ *Id.* at 383–85.

¹¹⁶ See, e.g., FONER, *supra* note 108, at 608–10.

¹¹⁷ *Id.* at xxi–xxii.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ COATES, *supra* note 17.

class . . . [But] progressives rarely note that Roosevelt’s New Deal . . . rested on the foundation of Jim Crow.”¹²¹

Columbia University Professor of History Ira Katznelson suggests that “[t]he Jim Crow South was the one collaborator America’s democracy could not do without.”¹²² Evidence of that sorry relationship during the New Deal abounds:

The omnibus programs passed under the Social Security Act in 1935 were crafted in such a way as to protect the southern way of life. Old-age insurance (Social Security proper) and unemployment insurance excluded farmworkers and domestics—jobs heavily occupied by blacks. When President Roosevelt signed Social Security into law in 1935, 65 percent of African-Americans nationally and between 70 and 80 percent in the South were ineligible. The NAACP protested, calling the new American safety net “a sieve with holes just big enough for the majority of Negroes to fall through.”

[Moreover, t]he oft-celebrated G.I. Bill similarly failed black Americans, by mirroring the broader country’s insistence on a racist housing policy . . . The historian Kathleen J. Frydl observes in her 2009 book, *The GI Bill*, that so many blacks were disqualified from receiving Title III benefits “that it is more accurate simply to say that blacks could not use this particular title.”¹²³

Moving then into the 1940’s, 50’s, and 60’s, the federal government systematically excluded African-Americans from federal home mortgage loan programs, thus denying them the single greatest long-term wealth generation opportunity among twentieth-century Americans.¹²⁴ “It was the Home Owners’ Loan Corporation, not a private trade association,” Coates explains, “that pioneered the practice of redlining, selectively granting loans and insisting that any property it insured be covered by a restrictive covenant—a clause in the deed forbidding the sale of the property to anyone other than whites.”¹²⁵ As a result of redlining, “[m]illions of dollars flowed from tax coffers into segregated white neighborhoods.¹²⁶ One man said his black

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

neighbor was ‘probably a nice guy, but every time I look at him I see \$2,000 drop off the value of my house.’”¹²⁷

With these practices, “[f]or perhaps the first time, the federal government embraced the discriminatory attitudes of the marketplace,” suggests historian Kenneth T. Jackson.¹²⁸ “Previously, prejudices were personalized and individualized; FHA exhorted segregation and enshrined it as public policy. Whole areas of cities were declared ineligible for loan guarantees.”¹²⁹ The Fair Housing Act officially banned redlining in 1968, but “[b]y then the damage was done—and reports of redlining by banks have continued.”¹³⁰

The federal government’s active role in the widespread, systemic discrimination against African-Americans throughout much of the twentieth century is an outrage. After all, “[t]he federal government is premised on equal fealty from all its citizens, who in return are to receive equal treatment. But as late as the mid-20th century, this bargain was not granted to black people, who repeatedly paid a higher price for citizenship and received less in return.”¹³¹

c. Southern Memorialization

Another aspect of the historical revisionism of the period was the effort by various groups such as the United Daughters of the Confederacy (UDC) to literally memorialize the Old South by erecting hundreds of statues and monuments, glorifying Confederate figures and principles throughout the South and beyond.¹³² The Southern Policy Law Center reports that most of the 718 statues and monuments to the Confederacy identified as of April 2016 were erected during the period from

¹²⁷ *Id.* (“[The new long-term, low down payment mortgages were] not to be awarded to blacks. The American real-estate industry believed segregation to be a moral principle. As late as 1950, the National Association of Real Estate Boards’ code of ethics warned that ‘a Realtor should never be instrumental in introducing into a neighborhood . . . any race or nationality, or any individuals whose presence will clearly be detrimental to property values.’ A 1943 brochure specified that such potential undesirables might include madams, bootleggers, gangsters—and ‘a colored man of means who was giving his children a college education and thought they were entitled to live among whites.’”).

¹²⁸ *Id.* (quoting KENNETH T. JACKSON, *CRABGRASS FRONTIER* (1985)).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Max Kutner, *As Confederate Statues Fall, the Group Behind Most of Them Stays Silent*, NEWSWEEK (Aug. 17, 2017, 3:06 PM), https://www.yahoo.com/news/confederate-statues-fall-group-behind-190647381.html?.tsrc=jtc_news_article.

1900–1920, with a smaller spike again during the Civil Rights Era from 1955–1965.¹³³

Today, and in recent years, the presence of these symbols and memorials is finally being challenged.¹³⁴ The Confederate Battle Flag was banished from the South Carolina State Capitol following the murder of nine African-American parishioners in their Charleston church by white supremacist Dylann Roof on June 17, 2015.¹³⁵ However, the Battle Flag still “maintains a publicly supported presence in at least six Southern states,” as of April 2016, most prominently as the dominant feature of the Mississippi state flag.¹³⁶

Many other Confederate statues have been removed or are slated for removal.¹³⁷ A statue of Robert E. Lee was covered and scheduled for removal in Charlottesville, Virginia—which prompted the white supremacist gathering last August leading to clashes with counter-protestors and the murder of Heather Heyer.¹³⁸

The heated debates over Confederate statues have shown a nation in denial and at war with its past. “America has been adept at evasion,” suggests columnist Roger Cohen.¹³⁹ While America has plenty of monuments to the horrors of the European Holocaust,

[b]y comparison, the great American crime of slavery, the laceration and lynching of black bodies, was scarcely memorialized . . . How, after all, could those Confederate statues stand for so long and so prominently in so many American

¹³³ S. POVERTY LAW CTR., “WHOSE HERITAGE: PUBLIC SYMBOLS OF THE CONFEDERACY” 9, 12–13 (Special Report, Apr. 2016), <https://www.splcenter.org/data-projects/whose-heritage>.

¹³⁴ *See id.*

¹³⁵ Jason Horowitz, Nick Corasaniti & Ashley Southall, *Nine Killed in Shooting at Black Church in Charleston*, N.Y. TIMES (July 17, 2015), <https://www.nytimes.com/2015/06/18/us/church-attacked-in-charleston-south-carolina.html>.

¹³⁶ S. POVERTY LAW CTR., *supra* note 133, at 9.

¹³⁷ Kutner, *supra* note 132.

¹³⁸ Jim Murphy, *If You're Not Outraged, You're Not Paying Attention—Heather Heyer's Last Facebook Post*, HUMAN RIGHTS WATCH (Aug. 18, 2017, 10:29 AM), <https://www.hrw.org/news/2017/08/18/if-youre-not-outraged-youre-not-paying-attention-heather-heyers-last-facebook-post>.

¹³⁹ Cohen, *supra* note 49.

cities when they memorialized men who took up arms for slavery and in opposition to the Union?¹⁴⁰

It was on the occasion of the removal of the last of four Confederate statues in New Orleans in May 2017 that Mayor Mitch Landrieu commented:

[There are] truths about our city that we must confront. New Orleans was America's largest slave market: a port where hundreds of thousands of souls were bought, sold and shipped up the Mississippi River to lives of forced labor of misery of rape, of torture

These monuments purposefully celebrate a fictional, sanitized Confederacy; ignoring the death, ignoring the enslavement, and the terror that it actually stood for Surely we are far enough removed from this dark time to acknowledge that the cause of the Confederacy was wrong.¹⁴¹

Mayor Landrieu thus touches upon the elements required for successful processes of truth and reconciliation—first, the truth: honest, unblinking acknowledgement of, and acceptance of responsibility for, mistakes of the past.¹⁴² He moves then to reconciliation:

[U]nlike when these Confederate monuments were first erected as symbols of white supremacy, we now have a chance to create not only new symbols, but to do it together, as one people

Let us remember what the once exiled, imprisoned and now universally loved Nelson Mandela and what he said after the fall of apartheid. "If the pain has often been unbearable and the revelations shocking to all of us, it is because they indeed bring us the beginnings of a common understanding of what happened and a steady restoration of the nation's humanity."¹⁴³

¹⁴⁰ *Id.*

¹⁴¹ Mitch Landrieu, Opinion, *Mitch Landrieu's Speech on the Removal of Confederate Monuments in New Orleans*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/opinion/mitch-landrieus-speech-transcript.html> ("After the Civil War, these statues were a part of that terrorism as much as a burning cross on someone's lawn; they were erected purposefully to send a strong message to all who walked in their shadows about who was still in charge in this city.").

¹⁴² *Id.*

¹⁴³ *Id.*

C. Modern Era—1954–2018

By the middle of the twentieth century, some four score years had passed since the Nation's ratification of the Reconstruction Amendments, which had been designed with the express purpose of placing African-Americans on equal footing with whites. And yet, as discussed above, these decades were marked instead by the systematic oppression of people of color.

The middle decades of the century saw the emergence of advocates like Thurgood Marshall, Malcolm X, and Martin Luther King, Jr., whose efforts helped spawn the Civil Rights Era (following in the footsteps of the likes of Frederick Douglass and W.E.B. Du Bois). The U.S. Supreme Court's school desegregation decision in *Brown v. Board of Education* in 1954, which struck down *Plessy v. Ferguson*'s holding of "separate but equal" was key, although it took another ten years and the involvement of Congress for true progress to be seen in integrating schools and society.¹⁴⁴ Specifically, two provisions in the Civil Rights Act of 1964 had big impacts: (1) allowing the Attorney General to intervene in lawsuits on behalf of black students, and (2) prohibiting schools receiving federal funds from discriminating.¹⁴⁵ Then, the Voting Rights Act of 1965 made it illegal for States to engage in many of the tactics—some that Southern States had employed virtually since the Civil War—used to systematically disenfranchise African-Americans, thereby allowing greater representation in local, state and national legislatures.¹⁴⁶

And so, approaching today, the third decade of the twenty-first century, we can agree that much progress has been made. And yet, despite the progress, rampant systemic racial injustice continues.

1. Modern-Day Issues: Criminal Justice; Policing

If there is one thing in America still as certain as the sunrise, it is the regularity of incidents of racial discrimination in the Criminal Justice system. The news sometimes comes in bunches—police killings of unarmed black men, for example,¹⁴⁷

¹⁴⁴ *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁴⁵ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 807 (5th ed. 2017).

¹⁴⁶ *Voting Rights Act of 1965*, *supra* note 64.

¹⁴⁷ Victims include (to name a few): Michael Brown, Eric Garner, Walter Scott, Tamir Rice, Freddie Gray, Philando Castile, Samuel DuBose, Stephon Clark, and Diante Yarber. *See, e.g.*, Bosman & Fitzsimmons, *supra* note 3 (Mr. Brown); Ray Sanchez, *Choke Hold by NY Cop Killed NY Man, Medical Examiner Says*, CNN.COM (Aug. 2, 2014), <https://www.cnn.com/2014/08/01/justice/new-york-choke-hold-death/index.html> (Mr. Garner); Jamelle Bouie, *Broken Tail Light Policing: When Cops Stop Black Drivers for Minor Traffic Violations, It's Often a Pretext for Something More Sinister*, SLATE.COM (Apr. 8, 2015),

and then the acquittal of the responsible police officer—but make no mistake: systemic racial injustice is playing out day in and day out like a repeating thread in the American social and legal fabric.

In her 2010 book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander explains:

The majority of black men in major urban areas are under correctional control or saddled with criminal records for life. Jim Crow laws were wiped off the books decades ago, but today an extraordinary percentage of the African American community is warehoused in prisons or trapped in a parallel social universe, denied basic civil and human rights—including the right to vote; the right to serve on juries; and the right to be free of legal discrimination in employment, housing, access to education and public benefits We have not ended racial caste in America; we have merely redesigned it.¹⁴⁸

Bryan Stevenson adds:

This country is very different today than it was forty years ago. In 1972 there were 300,000 people in jails and prisons. Today there are 2.3 million. The United States now has the highest rate of incarceration in the world. We have 7 million people on probation and parole, and mass incarceration has fundamentally changed our world. In poor communities and communities of color, there is this despair, this hopelessness, that is being shaped by these outcomes: that one out of three black

http://www.slate.com/articles/news_and_politics/politics/2015/04/north_charleston_shooting_how_investigatory_traffic_stops_unfairly_affect.html (Mr. Scott); Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html> (Mr. Rice); *Freddie Gray's Death in Police Custody—What We Know*, BBC.COM (May 23, 2016), <http://www.bbc.com/news/world-us-canada-32400497> (Mr. Gray); Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html> (Mr. Castile); Jess Bidgood & Richard Pérez-Peña, *Mistrial in Cincinnati Shooting as Officer Is Latest Not to Be Convicted*, N.Y. TIMES (June 23, 2017), <https://www.nytimes.com/2017/06/23/us/raymond-tensing-samuel-dubose-cincinnati.html> (Mr. DuBose); Laurel Wamsley, *Video Shows Sacramento Police Shooting Unarmed Black Man In Grandparents' Backyard*, NPR.COM (Mar. 22, 2018), <https://www.npr.org/sections/thetwo-way/2018/03/22/59605107/video-shows-sacramento-police-shoot-unarmed-black-man-in-grandparents-backyard> (Mr. Clark); Matt Stevens, *Police Kill Black Man in Barrage of Bullets Outside California Wal-Mart*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/2018/04/19/us/diante-yarber-barstow-shooting.html> (Mr. Yarber).

¹⁴⁸ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

men between ages of 18 and 30 is in jail, in prison, or on probation or parole. In urban communities across the country—Los Angeles, Philadelphia, Baltimore, Washington—50 to 60 percent of all young men of color are in jail or prison or on probation or parole

[Moreover, m]y state of Alabama, like a number of states, permanently disenfranchises you if you have a criminal conviction. Right now in Alabama, 34% of the black male population permanently lost the right to vote. We're actually projecting in another ten years that the level of disenfranchisement will be as high as it's been since prior to the passage of the Voting Rights Act. And there is this stunning silence.¹⁴⁹

Systems of policing are, and have long been, heavily skewed against the rights of people of color.¹⁵⁰ A sampling of reputable studies, as well as data from the FBI and elsewhere, shows “evidence of a significant bias in the killing of unarmed black Americans relative to unarmed white Americans, in that the probability of being black, unarmed, and shot by police is about 3.49 times the probability of being white, unarmed, and shot by police on average.”¹⁵¹ And, according to a *Washington Post* summary of a Stanford study of police practices in Oakland, California:

Regardless of the area of the city, disproportionate treatment by race was similar and the raw totals were stunning . . . 2,890 African-Americans [were] handcuffed but not arrested in a 13-month period, while only 193 whites were cuffed. When Oakland officers pulled over a vehicle but didn't arrest anyone, 72 white people were handcuffed, while 1,466 African-Americans were restrained [Moreover, u]sing only the words an officer uses during a traffic stop, we can

¹⁴⁹ Stevenson, *supra* note 110.

¹⁵⁰ Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011–2014*, PLOS (Nov. 5, 2015), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0141854>.

¹⁵¹ *Id.*; see also Kia Makarechi, *What the Data Really Says About Police and Racial Bias*, VANITY FAIR (July 14, 2016), <https://www.vanityfair.com/news/2016/07/data-police-racial-bias>; *Police Shootings and Brutality in the US: 9 Things You Should Know*, VOX.COM (May 6, 2017), <https://www.vox.com/cards/police-brutality-shootings-us/us-police-shootings-statistics> (stating: “There are huge racial disparities in how US police use force—Black people are much more likely to be shot by police than their white peers. . . . [A]nalysis of the available FBI data . . . found that US police kill black people at disproportionate rates: Black people accounted for 31 percent of police killing victims in 2012, even though they made up just 13 percent of the US population.”).

predict [with 66 percent accuracy] whether that [officer] is talking to a black person or a white person.¹⁵²

Clearly, America needs to think hard about alternative approaches to policing.

2. Modern-Day Issues: Economic Injustice

Some of the more insidious effects of decades and centuries of racial discrimination are economic. The sobering fact is that, despite some progress in racial justice in the last half-century, African-Americans still lag shockingly behind whites in economic terms, due to the endemic, systemic discrimination they have always faced, and continue to face to this day.¹⁵³ As Paul Campos reports in a July 29, 2017 article in *The New York Times*:

- The income gap between black and white Americans remains every bit as extreme as it was five decades ago, at every income level. (Black households in 1967 earned an average of between 55–67 percent as much as white households. Those ratios remain the same today.)
- The median white household has about 13 times the wealth of the median black household—and much of that wealth is transferred between generations. This remarkable gap helps perpetuate the consequences of centuries of social and economic injustice.
- Many black children attend schools that once again are as segregated as they were in the 1960s, and they are far more likely to become trapped in a prison-industrial complex.
- Recent research shows black job applicants for low-wage jobs receive callback interviews or job offers at half the rate of equally well-qualified white applicants and that black and Latino applicants with clean records “fare no better” than white applicants just released from prison.¹⁵⁴

“These numbers should shock us,” Campos suggests.¹⁵⁵ “Consider that in the mid-1960s, Jim Crow practices were still being dismantled and affirmative action

¹⁵² *Id.*

¹⁵³ See Coates, *supra* note 14.

¹⁵⁴ Paul Campos, Opinion, *White Economic Privilege is Alive and Well*, N.Y. TIMES (July 29, 2017), <https://www.nytimes.com/2017/07/29/opinion/sunday/black-income-white-privilege.html>.

¹⁵⁵ *Id.*

hardly existed. Yet a half-century of initiatives intended to combat the effects of centuries of virulent racism appear to have done nothing to ameliorate inequality between white and black America.”¹⁵⁶ How can it be that these efforts have had so little effect? The deep roots of centuries of racism “offer more than adequate explanations for what should be considered a scandalous state of affairs in regard to race-based economic inequality.”¹⁵⁷ Campos concludes, adding that “[a] genuine populist movement would unite working- and middle-class Americans of all backgrounds, rather than dividing them by exploiting false beliefs about the supposed loss of white economic privilege.”¹⁵⁸

These economic inequalities exist throughout the nation, regardless of geography. From around 1916–1970, huge numbers of African-Americans (more than six million) moved in the “Great Migration” from the South to the North, Midwest and West for jobs in factories and relief from the indignities of Southern racism.¹⁵⁹ While migrants were able to escape the overt discrimination of the South, they encountered more subtle, but no less damaging, discriminatory practices in the North.

One such practice that has greatly hindered generations of African-Americans’ financial well-being is the so-called redlining of neighborhoods, where the federal Home Owners Loan Corporation long required that any property it insured be covered by a restrictive covenant; and real estate agents—even long after the practice was banned in 1968—guided prospective buyers, based on their race, only to certain neighborhoods.¹⁶⁰ This process triggered a self-fulfilling prophecy of lessened economic prospects for black people. First, they are guided to less affluent, more economically depressed areas, which forces them to resort to more risky loans provided by lenders engaging in an array of predatory lending practices.¹⁶¹

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (commenting that conservatives like Charles Murray blame the “pathological” black working-class culture—but note that some of this “pathology” now manifests itself in the white working class as well (who themselves are also suffering economically, at the expense of the rich, much more than they were 50 years ago)).

¹⁵⁹ *Great Migration*, HISTORY, <http://www.history.com/topics/black-history/great-migration> (last visited May 4, 2018).

¹⁶⁰ See *supra* notes 115–19 and accompanying text.

¹⁶¹ Coates, *supra* note 14. See *infra* notes 185–99 and accompanying text for discussion of reparations.

People of color were disproportionately affected, for example, by the 2008 recession and foreclosure crisis, when millions of Americans lost their homes under the terms of subprime mortgages and other risky loan practices.¹⁶² Ta’Nehisi Coates explains:

In 2005, Wells Fargo promoted a series of Wealth Building Strategies seminars. Dubbing itself “the nation’s leading originator of home loans to ethnic minority customers,” the bank enrolled black public figures in an ostensible effort to educate blacks on building “generational wealth.” But the “wealth building” seminars were a front for wealth theft. In 2010, the Justice Department filed a discrimination suit against Wells Fargo alleging that the bank had shunted blacks into predatory loans regardless of their creditworthiness According to *The New York Times*, affidavits found loan officers referring to their black customers as “mud people” and to their subprime products as “ghetto loans.”

“We just went right after them,” Beth Jacobson, a former Wells Fargo loan officer, told *The Times*. “Wells Fargo mortgage had an emerging-markets unit that specifically targeted black churches because it figured church leaders had a lot of influence and could convince congregants to take out subprime loans. . . .”

In 2009, half the properties in Baltimore whose owners had been granted loans by Wells Fargo between 2005 and 2008 were vacant; 71 percent of these properties were in predominantly black neighborhoods.¹⁶³

III. RECONCILIATION: A TIME FOR HEALING

*Everything now . . . is in our hands If we—and now I mean the relatively conscious whites and the relatively conscious blacks, who must, like lovers, insist on, or create, the consciousness of the others—do not falter in our duty now, we may be able, handful that we are, to end the racial nightmare, and achieve our country, and change the history of the world.*¹⁶⁴

—James Baldwin, 1963

¹⁶² Coates, *supra* note 14.

¹⁶³ *Id.*

¹⁶⁴ JAMES BALDWIN, *THE FIRE NEXT TIME* 105 (1993).

Whether one subscribes to the mythic view of America as “shining city on the hill,”¹⁶⁵ the grittier class-warfare view,¹⁶⁶ or the more pragmatic economic self-interest perspective,¹⁶⁷ the centuries-long subjugation of people of color is, in any case, morally and ethically indefensible.

From the mythic standpoint, one might argue that Americans are better than that—and that they should strive to live up to their reputation as fair-minded, freedom-loving, equality-conscious people. It is their birthright, after all, that there exist “certain unalienable truths . . . that all men [people] are created equal, [and are] entitled to life, liberty and the pursuit of happiness.”¹⁶⁸ When they fail to actively

¹⁶⁵ “American’s story *is* remarkable: a Nation, sprouting from the seeds of Enlightenment principles where ‘tolerance was a moral virtue, even a duty; no longer merely the prerogative of calculating monarchs, but a fundamental elements of the “rights of man.”” MICHAEL A. LAWRENCE, *RADICALS IN THEIR OWN TIME: FOUR HUNDRED YEARS OF STRUGGLE FOR LIBERTY AND EQUAL JUSTICE IN AMERICA 2* (2011) (citing AMY CHUA, *DAY OF EMPIRE* xxxii (2007)).

¹⁶⁶ “Under Howard Zinn’s quasi-Marxist view, where virtually any political conflict may be reduced to a conflict between the classes of society, even the Revolution itself was driven primarily by class interests. . . . It is pretended,” Zinn observes, “[that] it is ‘we the people’ who wrote that document, rather than fifty-five privileged white males whose class interest required a strong central government. That use of government for class purposes, to serve the needs of the wealthy and powerful, has continued throughout American history.” LAWRENCE, *supra* note 165, at 309–10 n.5 (quoting ZINN, *supra* note 12, at 59, 684).

¹⁶⁷ “‘The movement for the Constitution,’ Charles Beard explains, ‘was originated and carried through principally by four groups of personal interests which had been adversely affected under the Articles of Confederation: money, public securities, manufactures, trade and shipping.’” *Id.* at 310 n.5 (quoting CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 324–25 (1913)). Moreover, Beard notes that the interests of certain unrepresented groups—slaves, indentured servants, men without property, women—were not included in the Constitution. As Zinn elaborates, “Charles Beard warned us that governments . . . are not neutral, that they represent the dominant economic interests, and that their constitutions are intended to serve these interests.” ZINN, *supra* note 12, at 98. The Constitution “serves the interests of a wealthy elite, but also does enough for small property owners, for middle-income mechanics and farmers, to build a broad base of support. The slightly prosperous people who make up this base of support,” Zinn continues, “are buffers against the blacks, the Indians, the very poor whites.” *Id.* at 99.

¹⁶⁸ THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776). That the primary drafter of the Declaration, Thomas Jefferson, was himself a slaveholder was an irony not lost on the U.S. Supreme Court in the infamous *Dred Scott v. Sandford* (1856) decision holding that slaves in free territories were not “persons” entitled to bring a case in federal court. See *supra* note 60 and accompanying text. Nonetheless, despite Jefferson’s hypocrisy, the Declaration stands (and has always stood) as noble aspirational language. Public intellectual Cornel West comments, “we need to view the founders with perspective. . . . Jefferson and Washington had much to teach about bravery; they were magnificent, in the face of the British Empire. But if we do not say a mumbling word about the fact they were slaveholders, then we have a ‘deodorized discourse.’” Cornel West, *MSU Slavery to Freedom lecture*, MICH. ST. U. (Feb. 18, 2016), <https://alumni.msu.edu/learn/online/livestream-and-video-content/video-content-details.cfm?id=49>.

ensure that *all* human brothers and sisters enjoy the same liberties and opportunities, they betray that birthright. “This nation,” Du Bois insists, “will never stand justified before God until these things are changed.”¹⁶⁹ Or, as King put it in Mississippi in 1966 a bit more pointedly: “[Our nation] has a choice. Either you give the Negro his God-given rights and his freedom or you face the fact of continual social disruption and chaos. America, which will you choose?”¹⁷⁰

A. A Dream for Reconciliation—The Power of Empathy

This Article adopts the hopeful view that most people are basically good. Human nature allows for empathy and charity—qualities born of love that become especially apparent, for example, in times of natural disasters when many go out of their way to assist others in need, regardless of race, religion, or class.¹⁷¹ It follows, arguably, that most Americans operate in good faith, and consider *fairness* as a core guiding principle.¹⁷²

This underlying desire for fairness is exemplified by the extraordinarily broad criticism of President Trump for his failure to unequivocally condemn the actions of white nationalists in Charlottesville, Virginia in August 2017.¹⁷³ In response to the President’s equivocations, the United States Congress voted *unanimously* to condemn displays and expressions of white supremacy.¹⁷⁴

The collective reaction to Charlottesville and the President’s response—massive demonstrations, the exodus of business executives from Donald Trump’s

¹⁶⁹ LEWIS, *supra* note 106, at 218.

¹⁷⁰ DYSON, *supra* note 8, at 39 (quoting Martin Luther King, Jr.).

¹⁷¹ There are stories of legions of Americans of all descriptions reaching out to lend helping hands to others, for example, in the aftermath of natural disasters such as the devastating hurricanes in Texas (Harvey) and Florida (Irma) in 2017.

¹⁷² See, e.g., ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN: UNCOMMON THOUGHTS ON COMMON THINGS 2 (2003) (stating, “These are the things I learned [in Kindergarten]: 1. Share everything; 2. Play fair . . . 7. Say you’re sorry when you hurt somebody. . .”).

¹⁷³ The President’s moral equation was epitomized by his blaming “many sides” for the clash. Rosie Gray, *Trump Defends White-Nationalist Protesters: “Some Very Fine People on Both Sides,”* THE ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/>.

¹⁷⁴ *Congress Overwhelmingly Approves Resolution Condemning White Nationalists*, NBC NEWS (Sept. 12, 2017), <https://www.nbcnews.com/politics/congress/senate-unanimously-approves-resolution-condemning-white-nationalists-n800816>. When Congress, with its corrosive hyper-partisanship of recent times—even on such previously unquestioned bipartisan interests on, for example, protecting the nation’s institutions from outside (Russian) infiltration—is able to agree unanimously on anything, it is noteworthy indeed.

commissions, the broad denunciations by establishment Republicans, and the actions of a unanimously-united Congress—suggests, paradoxically, that a rare opportunity for progress may be at hand. The overwhelming agreement signals there is indeed something that reasonable folks—right and left—can agree upon: *the utter unacceptability of white supremacy in civil society*.

Might Americans of good faith from across the political spectrum be ready to engage in a thoughtful process of self-examination on the topic of racial justice? Might a bipartisan majority see the merits in addressing how manifestations of white supremacy have worked to create a massively unjust system toward people of color, and then to take steps to account for those injustices? Might our common humanity prevail over hate?

It would not be easy because Americans are more polarized today than they have been in a good long while, but this is all the more reason to try. Many Americans hunger for a greater sense of community than currently exists, and it is hard to imagine more powerful potential for unity than bipartisan efforts resulting in true progress toward addressing the systemic racial injustices that have plagued this continent for nearly four hundred years. We could all feel good about *that*.

B. Awareness & Acknowledgement

A widespread awareness and acknowledgement of the full truth of America's history of racial oppression (as touched upon in Section II above) is necessary before there can be any hope for systemic improvement and ultimate reconciliation.

1. Awareness

People wonder what they, individually and collectively, can do to try to correct injustice, understanding, as they do, deep down that “injustice anywhere is a threat to justice everywhere.”¹⁷⁵ It is easy to be discouraged by the sheer scope of the problem, considering that systemic racism has existed on this continent, after all, for nearly half a millennium. So, we struggle with what we can do. Our isolated ability and limited wherewithal lead us to question our capability to help. In the face of such daunting doubts, it is useful to remember that a single person *can* make a difference.¹⁷⁶ Public intellectual Michael Eric Dyson discusses the idea of “personal reparations”:

¹⁷⁵ KING, *supra* note 6 and accompanying text.

¹⁷⁶ *Id.*

There are all sorts of ways to make reparations work at the local and individual level. You can hire black folk at your office and pay them slightly better than you would ordinarily pay them. You can pay the black person who cuts your grass double what you might ordinarily pay. Or you can give a deserving black student in your neighborhood, or one you run across in the course of your work, scholarship help.¹⁷⁷

For those unable to do more, reconciliation can be as little as having a friendly smile for the “other.” As Nainoa Thompson, captain of the Polynesian traditional sailing vessel *Hokule’a*, says, “[e]very act of kindness of any person . . . is an act to better the entire earth.”¹⁷⁸

Anyone interested in promoting an ethos of fairness might consciously imagine standing in the shoes of certain individuals or groups, minority or otherwise, who are most adversely affected by existing social systems; and then to consider, based on one’s own self-interest while standing in those shoes, how those systems might be changed to improve their circumstances. This technique, which John Rawls described as operating from behind a “veil of ignorance,” leverages a basic human instinct—survival—to guide people in making fair and just decisions.¹⁷⁹ In other words, because people naturally tend to operate in their own self-interest, folks of good faith can help historically-oppressed groups by deeply imagining themselves as members of those groups, and taking (self-interested) action accordingly.¹⁸⁰

In the racial justice context, Michael Eric Dyson puts it in terms of empathy:

It sounds simple, but [empathy’s] benefits are profound. Whiteness must shed its posture of competence, its will to omniscience, its belief in its goodness and purity, and then walk a mile or two in the boots of blackness. The siege will not end until white folk imagine themselves as black folk—vulnerable despite our

¹⁷⁷ DYSON, *supra* note 8, at 197. See *infra* notes 184–98 and accompanying text for additional discussion of reparations.

¹⁷⁸ Nainoa Thompson, *Right Direction*, PATAGONIA MAG., May 2017, at 25.

¹⁷⁹ JOHN RAWLS, A THEORY OF JUSTICE (1973). See also Michael Anthony Lawrence, *Justice-as-Fairness as Judicial Guiding Principle: Remembering John Rawls and the Warren Court*, 81 BROOK. L. REV. 673 (2016).

¹⁸⁰ Or, given how nature equips human beings to go to extraordinary measures to protect their own children (e.g., parents speak of willingly stepping in front of a bus if it means saving the life of their child), one might think about how it would affect one’s own child, if s/he were the one being affected by the discriminatory social systems.

virtues. If enough of you, one by one, exercises your civic imagination, and puts yourself in the shoes of your black brothers and sisters, you might develop a democratic impatience for injustice, for the cruel disregard of black life, for the careless indifference to our plight.

Empathy must be cultivated. The practice of empathy means taking a moment to imagine how you might behave if you were in our positions. Do not tell us how we should act if we were you; imagine how you would act if you were us. Imagine living in a society where your white skin marks you for disgust, hate, and fear. Imagine that for many moments. Only when you see black folk as we are, and imagine yourselves as we have to live our lives, only then will the suffering stop, the hurt cease, the pain go away.¹⁸¹

Awareness also requires an understanding of the role played by *privilege* in matters of race.¹⁸² Imani Michelle Scott explains:

[I]n today's America, white skin is still highly privileged skin; just ask the number of Asians, Cubans, and others of non-European ancestry who classify themselves with the coveted white label. To those who are born "white," little thought is likely given to this socially constructed birthright until they feel somehow threatened that it may be losing its power as a consequence of some major social change, e.g., voting rights legislation, affirmative action, or the election of a black president. But no one should doubt that most, if not all, whites in America instinctively know the value of their white skin.¹⁸³

¹⁸¹ DYSON, *supra* note 8, at 211–12.

¹⁸² "Privilege" refers to unearned advantages that certain groups in our society have based solely upon the fact that they belong to that group. If you are a part of a 'privileged' group, it means that you have access, opportunity, and power that is denied to other groups. Privilege often comes from those things we are born with—our race, our gender, our class background, whether we have a disability etc." *What is Privilege? A Reflective Activity*, adapted from Shayla R. Griffin, Ph.D. (Nov. 2013). See *infra* Appendix A.

¹⁸³ IMANI MICHELLE SCOTT, CRIMES AGAINST HUMANITY IN THE LAND OF THE FREE: CAN A TRUTH AND RECONCILIATION PROCESS HEAL RACIAL CONFLICT IN AMERICA? 6 (2014). If Newt Gingrich can recognize his own white privilege, most white Americans can certainly do so as well. (On July 8, 2016, Gingrich said: "It took me a long time, and a number of people talking to me through the years, to get a sense of this: If you are a normal white American, the truth is you don't understand being black in America and you instinctively under-estimate the level of discrimination and the level of additional risk.") Eugene Scott, *Newt Gingrich: 'Normal White Americans . . . Don't Understand Being Black in America,'* CNN.com (July 8, 2016), <https://www.cnn.com/2016/07/08/politics/newt-gingrich-white-americans/index.html>.

Scott speculates that most whites are likely unaware of their privilege:

They are, through no fault of their own, simply ignorant of the fact. They do not think twice about stepping outside to take a walk around the block in a strange neighborhood; whereas a black person knows someone might view them as “suspicious” and call the cops. White parents do not think twice about sending their teen children out of the house without instructions on how to interact with the police, should they encounter them; whereas black parents know they must instruct their teens that they must be “twice as good.”¹⁸⁴

Black folks do not need to be reminded about the history of racial oppression in this country and continent. They live it every day. Their ancestors lived it every day. White folks, on the other hand, *do* need some remedial work. Randomly, they happened to have been born in a place where, for four centuries, whites have occupied the dominant social and political position. As a result, they simply do not have the experience of what it is like to be the “other.” The first step in their remediation is *awareness*.¹⁸⁵ Every white person would be well-served to take his or her own private “privilege inventory” for an eye-opening exercise in the markedly different subjective realities faced by different persons depending on the color of their skin.¹⁸⁶

It is telling to ask, “what do white people do then once they become aware of their racial privilege?” Do they say, “good for me,” and act in ways that perpetuate the privilege-divide, while completely ignoring the challenges of the less-privileged? Or do they recognize the sheer chance or dumb luck involved in being born into whatever conditions or surroundings they enjoy, and seek to aid in advancing opportunity for the less-privileged?

¹⁸⁴ SCOTT, *supra* note 183, at 6.

¹⁸⁵ It should perhaps go without saying, but it is the responsibility of white people—not black people—to “bring along” other white people into greater awareness.

¹⁸⁶ A typical privilege inventory exercise instructs participants “to consider the privilege and oppression you have experienced in your own life” and asks a list of questions, assigning one point if it applies, or zero if not. *See, e.g.*, Appendix A. *See also* Harvard University’s “Project Implicit” for additional awareness-heightening exercises, including various Implicit Association Tests for measuring bias based on race, religion, gender, socio-economic class, and more. *Project Implicit*, HARVARD U., <https://implicit.harvard.edu/implicit/takeatest.html> (last visited May 4, 2018).

2. Acknowledgement

After awareness comes acknowledgement. True healing can begin only when past atrocities and injustices are acknowledged. “We cannot be afraid of our truth,” New Orleans Mayor Mitch Landrieu says, adding, “[t]he Confederacy was on the wrong side of history and humanity.” Fundamentally, “a great nation does not hide its history. It faces its flaws and corrects them.”¹⁸⁷

Acknowledgement of America’s history of racial injustice needs to happen not only in Congress, but also at the state, local, and personal levels. Consider, for example, Georgetown University’s September 2016 acknowledgement of its sale of 272 slaves nearly two centuries ago in order to stabilize the institution’s finances. At a special ceremony, the university president announced plans “[to issue] a formal apology on behalf of the university, establish an institute to study slavery, and erect a public memorial to the slaves who labored to sustain Georgetown, including those men, women, and children . . . whose sale in 1838 saved the school.”¹⁸⁸

In the last ten years, there have been the beginnings of acknowledgement at a national level. In 2008, the U.S. House of Representatives issued a formal apology in the form of H.R. Res. 194, which:

- (1) acknowledges that slavery is incompatible with the basic founding principles recognized in the Declaration of Independence that all men are created equal;
- (2) acknowledges the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow;
- (3) apologizes to African-Americans on behalf of the people of the United States, for the wrongs committed against them and their ancestors who suffered under slavery and Jim Crow; and
- (4) expresses its commitment to rectify the lingering consequences of the misdeeds committed against African-Americans under slavery and Jim Crow and to stop the occurrence of human rights violations in the future.¹⁸⁹

And in 2009, the U.S. Senate unanimously passed Concurrent Resolution 26, resolving (with the House of Representatives concurring):

That the sense of the Congress is the following:

¹⁸⁷ Landrieu, *supra* note 141 (quoting George W. Bush).

¹⁸⁸ DYSON, *supra* note 8, at 216.

¹⁸⁹ H.R. Res. 194, 110th Cong. (2008).

(1) Apology for the Enslavement and Segregation of African-Americans.

The Congress:

- A. acknowledges the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow laws;
- B. apologizes to African-Americans on behalf of the people of the United States, for the wrongs committed against them and their ancestors who suffered under slavery and Jim Crow laws; and
- C. expresses its recommitment to the principle that all people are created equal and endowed with inalienable rights to life, liberty, and the pursuit of happiness, and calls on all people of the United States to work toward eliminating racial prejudices, injustices, and discrimination from our society.¹⁹⁰

These efforts are a very good first start; now they need to be expanded upon and embraced more broadly.

A logical next step would be for Congress to take up H.R. 40 (“Commission to Study and Develop Reparation Proposals for African-Americans Act”), first introduced by Rep. John Conyers in 1989 and reintroduced in every subsequent Congress.¹⁹¹ The Bill proposes:

To address the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.¹⁹²

Why has H.R. 40 never been advanced out of committee? Nkechi Taifa (co-founder N’COBRA) suggests: “[i]t’s because it’s black folks making the claim People who talk about reparations are considered left lunatics. But all we are talking about is studying [reparations].” Taifa continues, “[a]s John Conyers has said, we study

¹⁹⁰ S. Con. Res. 26, 111th Cong. (2009). Notably, the Resolution next issues a disclaimer: “(2) 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.”

¹⁹¹ H.R. 3745, 101st Cong. (1989).

¹⁹² H.R. 40, 115th Cong. (2017).

everything. We study the water, the air. We can't even study the issue? This bill does not authorize one red cent to anyone."¹⁹³ Coates suggests it is past time for Congress to take up H.R. 40. After all, "[a] crime that implicates the entire American people deserves its hearing in the legislative body that represents them."¹⁹⁴

C. Remedies

After awareness and acknowledgement, the next step in a process of Truth and Reconciliation is to consider what sort of remediation should occur. Areas demanding attention in the context of racial justice in America include criminal justice reform and reparations.

1. Criminal Justice Reform

Professor Paul Butler, commenting on the mind-numbing regularity of instances of criminal injustice and police brutality toward blacks, says, "[t]he system is now working the way it is supposed to, and that makes black lives matter less. That system must be crushed, and the United States of America must, in President Obama's words, be 'remade.'"¹⁹⁵

What steps might be taken to begin re-making the system? Regarding police brutality, we must demand greater police accountability, which is sadly lacking under current state laws. Only when the bad police are held *truly* accountable for their brutal tactics will it be possible for racial justice to improve. Police are supposed "to serve and protect," but too often in past decades (and centuries) in this country, that trust has been fundamentally breached.

Two changes would help improve police accountability: (1) require an independent prosecutor and venue in all police shootings; and (2) replace the current legal standard for use of deadly force from merely "reasonable" to the more demanding "necessity" standard.

¹⁹³ Coates, *supra* note 14 (quoting Nkechi Taifa). N'COBRA stands for: "National Coalition of Blacks for Reparations in America." See *infra* note 192.

¹⁹⁴ *Id.*

¹⁹⁵ Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1475 (2016) (suggesting a "Third Reconstruction" frame alignment for seizing this moment in history). If the First Reconstruction was the roughly-ten-year period following the Civil War, and the Civil Rights Era of the 1950s and 1960s was the Second Reconstruction, the new current-day Third Reconstruction would include "a strategic bifurcation of labor among activists where traditional civil rights organizations would focus on liberal reform, while the Movement for Black Lives would focus on more Critical-Race-Theory-type transformations." *Id.*

Regarding the first, whenever a police shooting occurs, the case should be immediately transferred to a state (or federal) investigator, *away* from the local prosecutor and courts, where under our current criminal justice system police, prosecutors and courts exist in a cozy day-to-day symbiotic relationship of handling and moving cases, which is bound to be biased in favor of the police. As Kate Levine, Acting Assistant Professor of Lawyering at the NYU School of Law, says, “the conflict of interest between local prosecutors and police-defendants is so anathema to our system of justice that it requires removal in every case where an officer is accused of committing a crime.”¹⁹⁶

The independent investigation of officer-involved deaths was a primary recommendation of President Obama’s Task Force on 21st Century Policing.¹⁹⁷ This is not impossible; indeed, one state, Wisconsin, has established such a system by requiring independent investigations in instances where police shoot and kill somebody.¹⁹⁸ This reform has been widely embraced, as evidenced by the fact that “outside agencies were also called in to evaluate virtually every nonfatal police shooting in Wisconsin last year, despite no legal requirement to do so [The process] can be an effective way to protect the interests of the public and the officers who risk their lives to protect it.”¹⁹⁹

Second, the current “reasonableness” legal standard used in almost every state fails to consider if alternatives to deadly force were available.²⁰⁰ The difference between this and the “necessity” standard, which is required for *federal* officers, is simple but crucial.²⁰¹ Even when the police have a reasonable belief that a person is

¹⁹⁶ See, e.g., Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447, 1447 (2016) (stating, “a structural conflict of interest arises when local prosecutors are given the discretion and responsibility to investigate and lead cases against the police”).

¹⁹⁷ *Department of Justice Announces New Guidebook on 21st Century Policing*, DEP’T OF JUSTICE (Oct. 27, 2015), <https://cops.usdoj.gov/Default.asp?Item=2828>.

¹⁹⁸ Jim Palmer, *Wisconsin a Model with Outside Investigations of Police Shootings*, S.F. CHRON. (May 26, 2016), <https://www.sfchronicle.com/opinion/article/Wisconsin-a-model-with-outside-investigations-of-7948437.php>.

¹⁹⁹ *Id.*

²⁰⁰ Olevia Boykin, Christopher Desir & Jed Rubenfeld, *A Better Standard for the Use of Deadly Force*, N.Y. TIMES (Jan. 1, 2016), <https://www.nytimes.com/2016/01/01/opinion/a-better-standard-for-the-use-of-deadly-force.html>.

²⁰¹ *Id.*

dangerous, the necessity standard does *not* permit deadly force if less deadly alternatives are available.²⁰²

Individual police departments are instrumental in establishing the use of force practices in any particular community. Progress has been made in some jurisdictions. The nation’s largest police force, the New York Police Department, a couple years ago established a new set of use-of-force policies, for example, no doubt prompted in part by the shocking chokehold death of Eric Garner on Staten Island by one of its officers on July 17, 2014—for the crime of selling loose cigarettes.²⁰³

Bryan Stevenson explains that the Criminal Justice system “isn’t just being shaped in ways that seem to be distorting around race; they’re also distorted by poverty”:

We have a system of justice in this country that treats you much better if you’re rich and guilty, than if you’re poor and innocent. Wealth, not culpability, shapes outcomes. And yet we seem to be very comfortable. The politics of fear and anger has made us believe that those are problems that are not our problems. We’ve been disconnected.²⁰⁴

2. Reparations

Any discussion about remediation for centuries of racial injustice should also include “reparations”—the compensation for damages caused by past harmful actions and policies.

The notion of providing some sort of compensation for past wrongs is not new. Indeed, as originally conceived, race-conscious affirmative action programs—providing express preferences to people of color for admission to educational institutions, for instance—are examples of governmental efforts to begin to balance past inequalities.²⁰⁵ “The whole point of racial balance,” Professor Girardeau Spann

²⁰² *Id.*

²⁰³ Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

²⁰⁴ Stevenson, *supra* note 110, at 6:29–6:54.

²⁰⁵ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003).

suggests, “is to stop giving whites the resources that they have in the past secured through societal discrimination, rather than through more legitimate means.”²⁰⁶

Unfortunately, the U.S. Supreme Court’s current equal protection doctrine, with its requirement for minimizing race-consciousness, misses the entire point of trying to provide affirmative assistance to compensate for past transgressions. Professor Spann explains:

The whole point should be to *highlight* our race consciousness so that we can no longer complacently pretend that we live in a race-neutral culture. *Grutter v. Bollinger*²⁰⁷ and *Gratz v. Bollinger*²⁰⁸ allow the continued use of race-conscious affirmative action, but only with the understanding that it will not be used in ways that makes any systemic modifications in the current allocations of resources. The opinions take great pains to ensure that the continuing effects of societal discrimination will remain beyond the reach of race-conscious remedies. And that, in turn, perpetuates the invidious discrimination against racial minorities that has always characterized American culture.²⁰⁹

The Court’s approach has insidious effects:

By reading the Constitution to preserve the racial status quo in the allocation of significant societal resources, the Nation’s white majority is able to continue discounting the interests of racial minorities in ways too passive to be immediately recognized as oppressive [T]he Supreme Court’s refusal to allow even majoritarian political remedies for societal discrimination fits comfortably within a long tradition of Supreme Court impediments to the advancement of racial equality.²¹⁰

In his June 2014 *Atlantic* article, *The Case for Reparations*, Ta’Nehisi Coates makes the direct case for economic reparations:

²⁰⁶ Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 241 (2004).

²⁰⁷ *Grutter*, 539 U.S. 306.

²⁰⁸ *Id.*

²⁰⁹ Spann, *supra* note 206, at 249.

²¹⁰ *Id.* at 231–32.

And so we must imagine a new country. Reparations—by which I mean the full acceptance of our collective biography and its consequences—is the price we must pay to see ourselves squarely Reparations beckons us to see America as it is—the work of fallible humans. . . .

What I'm talking about is more than recompense for past injustices—more than a handout, a payoff, hush money, or a reluctant bribe. What I'm talking about is a national reckoning that would lead to spiritual renewal Reparations would mean a revolution of the American consciousness, a reconciling of our self-image as the great democratizer with the facts of our history.²¹¹

The notion of reparations finds strong support in the political philosophy of John Locke, whose work formed the basis for much of the political theory underlying the Declaration of Independence and United States Constitution.²¹² Locke wrote:

Besides the crime which consists in violating the law . . . there is commonly injury done to some person or other, and some other man receives damage by his transgression: in which case he who hath received any damage, has, besides the right of punishment common to him with other men, a particular right to seek *reparation* from him that has done it and any other person, who finds it just, may also join with him that is injured, and assist him in recovering from the offender so much as may make satisfaction for the harm he has suffered.²¹³

It is not surprising, then, that we are able to find examples of reparations during the founding era. In the late 1700s, at a time when “black people in America had endured more than 150 years of enslavement, the idea that they might be owed something in return was, if not the national consensus, at least not outrageous.”²¹⁴ As Quaker John Woolman wrote in 1769, “A heavy account lies against us as a civil society for oppressions committed against people who did not injure us, and that if the particular case of many individuals were fairly stated, it would appear that there was considerable due to them.”²¹⁵

²¹¹ Coates, *supra* note 14.

²¹² DYSON, *supra* note 8, at 214.

²¹³ *Id.* (quoting John Locke).

²¹⁴ Coates, *supra* note 14.

²¹⁵ *Id.* (“As the historian Roy E. Finkenbine has documented, at the dawn of this country, black reparations were actively considered and often effected. Quakers in New York, New England, and Baltimore went so far as to make ‘membership contingent upon compensating one’s former slaves.’”).

And there is no question that for centuries, harm (of the sort envisioned by John Locke) has been suffered:

[This is] a country whose existence was predicated on the torture of black fathers, on the rape of black mothers, on the sale of black children Having been enslaved for 250 years, black people were not left to their own devices. They were terrorized. In the Deep South, a second slavery ruled. In the North, legislatures, mayors, civic associations, banks, and citizens all colluded to pin black people into ghettos, where they were overcrowded, overcharged, and undereducated. Businesses discriminated against them, awarding them the worst jobs and the worst wages. Police brutalized them in the streets. And the notion that black lives, black bodies, and black wealth were rightful targets remained deeply rooted in the broader society.²¹⁶

Besides the overt physical abuses, slaves literally built the early American economy through their unpaid labor; Coates explains:

Nearly one-fourth of all white Southerners owned slaves, and upon their backs the economic basis of America—and much of the Atlantic world—was erected. In the seven cotton states, one-third of all white income was derived from slavery. By 1840, cotton produced by slave labor constituted 59 percent of the country's exports. The web of this slave society extended north to the looms of New England, and across the Atlantic to Great Britain, where it powered a great economic transformation and altered the trajectory of world history. "Whoever says Industrial Revolution," wrote the historian Eric J. Hobsbawm, "says cotton." . . . In 1860 there were more millionaires per capita in the Mississippi Valley than anywhere else in the country.²¹⁷

As for how reparations might be evaluated and calculated, Coates explains:

²¹⁶ *Id.*

²¹⁷ *Id.* (adding, "The wealth accorded America by slavery was not just in what the slaves pulled from the land but in the slaves themselves. 'In 1860, slaves as an asset were worth more than all of America's manufacturing, all of the railroads, all of the productive capacity of the United States put together,' the Yale historian David W. Blight has noted. 'Slaves were the single largest, by far, financial asset of property in the entire American economy.'").

Scholars have long discussed methods by which America might make reparations to those on whose labor and exclusion the country was built. In the 1970s, the Yale Law professor Boris Bittker argued in *The Case for Black Reparations* that a rough price tag for reparations could be determined by multiplying the number of African Americans in the population by the difference in white and black per capita income. That number—\$34 billion in 1973, when Bittker wrote his book—could be added to a reparations program each year for a decade or two. Today Charles Ogletree, the Harvard Law School professor, argues for something broader: a program of job training and public works that takes racial justice as its mission but includes the poor of all races.²¹⁸

More recently, in their 2003 *Columbia Law Review* article, *Reparations for Slavery and Other Historic Injustices*, Eric Posner and Adrian Vermeule offer “a framework to evaluate the morality of reparations and the legal problems that arise in implementing reparations proposals.”²¹⁹ They detail the “best known reparations programs . . .[,] those for Japanese Americans who were interned by the United States government during World War II, and for victims of the Nazi Holocaust,” . . . and purport to “fill[] the gap in the literature by analyzing the various design options for reparations programs, their legal and constitutional bases, and their relationship to the standard moral and political arguments about reparations.”²²⁰

In his 2006 Essay, *Reconsidering Reparations*, Alfred Brophy challenges Posner-Vermeule’s “limited definition of reparations and their limited catalog of reparations in American history.”²²¹ Utilizing his “‘legislative model’ of reparations, Brophy proposes a relaxation of the relationship between wrongdoer and payer, and injured and recipient. Then [he] suggests several factors for a legislature to consider in designing reparations for historical injustice.”²²² The Essay’s goal is thus to propose “an alternative framework for evaluating the morality and utility of reparations.”²²³

²¹⁸ *Id.* (explaining, “In the 20th century, the cause of reparations . . . coalesced in 1987 under an umbrella organization called the National Coalition of Blacks for Reparations in America (N’COBRA). The NAACP endorsed reparations in 1993.”).

²¹⁹ Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 811 (2006).

²²⁰ Eric Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 689–91 (2003).

²²¹ Brophy, *supra* note 219, at 811.

²²² *Id.*

²²³ *Id.*

Speaking to white readers in the second person in his 2017 book, *Tears We Cannot Stop*, Michael Eric Dyson offers some intriguing thoughts on more personal forms of reparations:

It may be best to think of reparation as a secular tithe, a proportion of money and other resources set aside for causes that are worthy of support There are thousands upon thousands of black kids whose parents cannot afford to send them to summer camp or to pay fees for a sports team, or to buy instruments to play if they attend one of the ever-shrinking number of schools that has a band. Their parents cannot pay for tutors for math or science or English or whatever subject their kids need help with. . . .

You can choose five black children to sponsor on an annual trip to the local zoo. You can begin a film club for black children to attend movie theaters in more affluent areas where they might also enjoy a trip to the museum. Or you can pay for the textbooks of ten black college students each year. The point is to be creative in transferring a bit of your resources, even in modest amounts, to deserving and often struggling descendants of the folk who gave this country its great wealth.²²⁴

In sum, “surely you can see the justice of making reparation, even if you can’t make it happen politically,” Dyson suggests.²²⁵ “Please don’t say that your ancestors didn’t own slaves. Your white privilege has not been hampered by that fact. Black sweat built the country you now reside in, and you continue to enjoy the fruits of that labor.”²²⁶

In the end, Coates suggests, it is not so much the monetary amount, but rather the very process of engaging in the inquiry, which would be the most profound outcome of a concerted effort toward providing reparations for slavery:

No one can know what would come out of such a debate. Perhaps no number can fully capture the multi-century plunder of black people in America. Perhaps the number is so large that it can’t be imagined, let alone calculated and dispensed. But I believe that wrestling publicly with these questions matters as much as—if not more than—the specific answers that might be produced. An America that asks what it owes its most vulnerable citizens is improved and humane. An

²²⁴ DYSON, *supra* note 8, at 197–99.

²²⁵ *Id.*

²²⁶ *Id.*

America that looks away is ignoring not just the sins of the past but the sins of the present and the certain sins of the future. More important than any single check cut to any African American, the payment of reparations would represent America's maturation out of the childhood myth of its innocence into a wisdom worthy of its founders.²²⁷

D. *Formal Truth and Reconciliation Processes*

Racial justice in America requires the creation of formal truth and reconciliation processes at the national, state and local levels. What forms these processes will take is an open question, and will no doubt vary depending on the history of racial oppression in any particular jurisdiction. A nation or community engages in the necessary work toward healing only when it undertakes a sincere effort to acknowledge its role in past atrocities and to atone for the harm done to its victims.

1. Truth and Reconciliation in America

a. National Efforts

Congress's formal acknowledgement in 2008 and 2009 of the truth about the nation's history of slavery, Jim Crow and racial oppression are important first steps.²²⁸ However, more must now be done at the national level to begin tackling the sources of the persistent, systemic racial injustices that still exist in America.

In her 2014 book, *Crimes Against Humanity in the Land of the Free: Can a Truth and Reconciliation Process Heal Racial Conflict in America?*, Imani Michelle Scott proposes the creation of an official U.S.-based truth and reconciliation process (U.S. TRP) "to move the nation towards healing interracial relationships, improving its international standing as a peace builder, and strengthening its commitment to human rights throughout the world."²²⁹

Among other things, Scott suggests, the U.S. TRP could:

- Review previous initiatives and recent advancements in worldwide truth and reconciliation efforts for guidance . . . ;
- Establish an oversight committee to elicit . . . [options] that incorporate local concerns . . . ;

²²⁷ Coates, *supra* note 14.

²²⁸ See *supra* notes 167–71 and accompanying text.

²²⁹ SCOTT, *supra* note 183, at 1.

- Facilitate the education of the American populace about the United States' . . . [history of] racial oppression . . . ;
- Initiate and continue a campaign of awareness programs to highlight the contributions and achievements of blacks throughout the nation's history . . . ; and
- Establish specific initiatives that would involve the nation's citizenry in . . . activities to assure equality, fairness, and justice for all Americans.²³⁰

A U.S. TRP is as necessary now, in the second decade of the twenty-first century, as it ever has been: "It is 2014 in the United States of America, but sometimes I wonder if it is really 1914—or maybe even 1814, when blacks in this country were routinely targeted, hunted, and maimed or murdered by whites," Scott suggests.²³¹ "[U]ntil this nation adequately addresses this disturbing history, acknowledges the social ordeals it continues to inflame, and provides a way for all in our society to work through the [conflicts] . . . , U.S. citizens will forever be caught in a cycle of discord, tension, amoral conduct, and animosity based on race. . . ."²³²

b. State efforts

More must be done at the state and local levels as well, beginning with acknowledgement of the hard truths and realities of racial discrimination and oppression in their own states and communities. The events in Charlottesville, Virginia in August 2017, when white supremacists clashed in violent confrontations with counter-protestors, opened the eyes of many to the necessity of addressing matters of race relations in America. The idea that such efforts are necessary is gaining traction, as reflected, for example, in the publication, following the Charlottesville riot, of "Virginia Needs a Truth and Reconciliation Commission on Race" in *The Washington Post* by mainstream Virginia Democrat, Tom Pereillo.²³³

²³⁰ *Id.* at 2.

²³¹ *Id.*

²³² *Id.* at 2, 5.

²³³ Tom Pereillo, *Virginia Needs a Truth and Reconciliation Commission on Race*, WASH. POST (Sept. 6, 2017), https://www.washingtonpost.com/opinions/virginia-needs-a-truth-and-reconciliation-commission-on-race/2017/09/06/8f1a5bde-8e6d-11e7-8df5-c2e5cf46c1e2_story.html?utm_term=.d587e6138263.

As state and local governments consider how to structure processes of truth and reconciliation, they may look to other efforts that have preceded them. In 2013, for example:

The governor of Maine and the five tribal chiefs signed as equals to authorize the [the Maine Wabanaki Child Welfare Truth and Reconciliation] Commission to investigate whether or not the removal of Wabanaki children from their communities has continued to be disproportionate to non-Native children and to make recommendations . . . that “promote individual, relational, systemic and cultural reconciliation.”²³⁴

The Commission sought to implement the intent of the federal Indian Child Welfare Act (ICWA), which was passed in 1978 to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families,” but had been poorly applied at the state level.²³⁵ After two years of research, investigation, and heartfelt testimony, the Commission accomplished much in the way of enabling truth-telling, and offered in its 2015 Report the following suggestions for moving forward:

From our perspective, to improve Native child welfare, Maine and the tribes must continue to confront:

1. Underlying racism still at work in state institutions and the public;
2. Ongoing impact of historical trauma, also known as intergenerational trauma, on Wabanaki people that influences the well-being of individuals and communities;
3. Differing interpretations of tribal sovereignty and jurisdiction that make encounters between the tribes and the state contentious.²³⁶

c. Local and/or Private Efforts

Another effort, the Greensboro Truth and Reconciliation Commission (GTRC), occurred at the local level, and is especially noteworthy because it was a grassroots

²³⁴ THE MAINE WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM’N, BEYOND THE MANDATE, CONTINUING THE CONVERSATION 10 (2015).

²³⁵ 25 U.S.C. § 1902 (2018).

²³⁶ THE MAINE WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM’N, *supra* note 234, at 12.

initiative by private citizens unsupported by public officials (indeed, the government *resisted* the efforts). This demonstrated that governmental involvement is not always necessary in order to initiate truth and reconciliation processes.²³⁷

The GTRC formed in 2004 to address the tragic events of November 3, 1979, when a protest by the Communist Workers Party against the Ku Klux Klan escalated into a riot where members of the Klan and American Nazi Party shot and killed five protesters and wounded ten others.²³⁸ During the murder trials of six Klan and Nazi members the next year, evidence came to light that “the Greensboro police, and perhaps the federal government, were aware of the probability of violence at the rally but did little to prevent it.”²³⁹ Those six were acquitted on self-defense claims by all-white juries, as were the defendants in a 1984 federal criminal trial, and in a 1985 civil trial, “a North Carolina jury found two Greensboro police officers and six others . . . liable for the “wrongful death” of one of the demonstrators . . . and ordered them to pay nearly \$400,000 in damages.”²⁴⁰

By the time of the twentieth anniversary of the killings in 1999, “many in the Greensboro community still did not feel that justice had been served,” so a coalition of people in the community “launch[ed] a democratic process that engaged the community in nominating and selecting the seven members of this independent Commission, empaneled on June 12, 2004.”²⁴¹ After two years of “assess[ing] the evidence gathered from the three trials, internal records from the Greensboro Police Department and federal law enforcement, newspaper and magazine articles, academic literature, and some two hundred interviews and personal statements given in private and at our public hearings,” the GTRC presented its Final Report to the public on May 25, 2006, commenting, “[w]e view this report as the beginning of a citizen effort toward investigation and dialogue, rather than the end.”²⁴²

²³⁷ GREENSBORO TRUTH AND RECONCILIATION COMMISSION, EXECUTIVE SUMMARY 15 (2006) [hereinafter GTRC].

²³⁸ JOVANOVIĆ SPOMA, DEMOCRACY, DIALOGUE AND COMMUNITY ACTION: TRUTH AND RECONCILIATION IN GREENSBORO 7 (2012).

²³⁹ *Communists and Klansmen Clash in Greensboro*, HISTORY: THIS DAY IN HISTORY, <https://www.history.com/this-day-in-history/communists-and-klansmen-clash-in-greensboro> (last visited May 4, 2018).

²⁴⁰ GTRC, *supra* note 237, at 15 (2006); see also *Communists and Klansmen Clash in Greensboro*, *supra* note 239.

²⁴¹ GTRC, *supra* note 237.

²⁴² *Id.*

The GRTC, believing “positive steps toward reconciliation, justice and reparations can be undertaken,” offered a number of recommendations in the Final Report, summarized into the major categories of: (1) Acknowledgement;²⁴³ (2) Institutional Reform;²⁴⁴ (3) Criminal Justice & Civil Remedies;²⁴⁵ and (4) Citizen Transformation/Engagement.²⁴⁶

The Report concludes with thoughts regarding “The Way Forward”:

To other communities considering processes to seek the truth and work for reconciliation around tragic, unjust events in their own histories, we heartily recommend the truth and reconciliation model as such a tool. . . . Our individual and collective commitment to the truth helped us persevere. And the human stories and emotions we encountered along the way moved us to do our best to leave behind a legacy we hope will serve Greensboro for years to come [W]e hope that this process also serves as a learning tool for others in this country who, like Greensboro, are burdened by a legacy of hurt and inspired by the possibility of honestly coming to terms with their own history.²⁴⁷

The GTRC is a fine example of the sort of highly meaningful effort that can be put forth by concerned citizens dedicated to seeing justice served, even when the government itself is doing little to assist, or is even resisting, those efforts. Those looking for a model on how to proceed with their own local or state efforts would be well-served to review the GRTC’s impressive comprehensive online Final Report.²⁴⁸

²⁴³ *Id.* at 29–30 (stating, for example, “c. The Greensboro Police Department and the City of Greensboro should issue public apologies for their failure to protect the public. . . . These institutions also should issue an apology to city residents for not appropriately acknowledging the event and taking the necessary steps for community healing. . . . h. A public monument should be built on the site of the shootings to honor those killed and wounded on Nov. 3, 1979.”).

²⁴⁴ *Id.* at 31–36 (offering specific recommendations for City and County government; the justice system, local media outlets, and other institutions such as the Chamber of Commerce).

²⁴⁵ *Id.* at 36–37 (recommending, “current investigations into the alleged corruption in the Greensboro Police Department, including the surveillance of citizens, should be thoroughly and expeditiously completed”).

²⁴⁶ *Id.* at 37 (suggesting “individual community members must commit to understanding issues of capital, labor, race, poverty, oppression, privilege and justice, and exploring ways to have a positive impact on the way they play out in the community”).

²⁴⁷ *Id.* at 38.

²⁴⁸ See *What is STAR?*, SOUTHERN TRUTH AND RECONCILIATION (STAR), <http://www.southerntruth.net> (last visited May 24, 2018) for additional resources. STAR, whose founding was inspired by Archbishop

2. Lessons from International Experience

In exploring what sorts of processes would be appropriate in the United States, it is useful to look also to the experiences of other nations. Since the much-lauded Truth and Reconciliation Commission in South Africa in the mid-1990s, for example, “there have been over 1,000 other truth-and-reconciliation commissions established across the world, from Chile and Guatemala to Nepal and Sierra Leone.”²⁴⁹

The Undead Past, a special report in the January/February 2018 issue of *Foreign Affairs*, explores the issue of atonement in the context of atrocities that have occurred over the past century in six different nations:

How do nations handle the sins of the fathers and mothers? Take genocide, or slavery, or political mass murder. After such knowledge, what forgiveness—and what way forward? . . . There have been all too many crimes in all too many places, but six cases stand out—two of genocide [Germany and Rwanda], two of political mass murder [Russia and China], and two of enduring racial oppression [South Africa and the United States] . . . [E]ach country has processed its tragic past [in its own way]. Together, they reveal interesting patterns and lessons. Worst practices are easy to identify: denying what actually happened. Best practices are more scattered, but . . . responsible engagement with the past . . . [and] facing a problem . . . directly and brutally . . . is a smart idea after all.²⁵⁰

a. Listening and Acknowledging

A common theme among nations that have engaged in successful truth and reconciliation processes is the importance of the perpetrators’ *listening* to the victims and *acknowledging* the transgressions that have occurred; several nations have been effective in this regard.²⁵¹

Desmond Tutu during his residence at Emory University between 1998 and 2000, “partners with communities to adapt the truth and reconciliation process to local needs.” *Id.*

²⁴⁹ Sisonke Msimang, *All Is Not Forgiven: South Africa and the Scars of Apartheid*, FOREIGN AFF., Jan.–Feb. 2018, at 28, 32.

²⁵⁰ Rose, *supra* note 5.

²⁵¹ See, e.g., Msimang, *supra* note 249, at 31–32; Richard J. Evans, *From Nazism to Never Again: How Germany Came to Terms With Its Past*, FOREIGN AFF., Jan.–Feb. 2018, at 8, 9.

In South Africa, for example, the Truth and Reconciliation Commission (TRC) headed by Archbishop Desmond Tutu accomplished much in the way of healing and restoring dignity to black South Africans brutalized by the minority white government's apartheid regime.²⁵² "The TRC's work was premised on the idea that truth was an essential first step toward healing," Sisonke Msimang explains further in *All is Not Forgiven: South Africa and the Scars of Apartheid*:

For the first time in South Africa's history, whites would be forced to listen to blacks. Victims even had the right to question perpetrators, who in turn were encouraged to tell the truth in the interests of national unity and reconciliation. For many black people whose lives had been defined by taking orders from whites, whose daily routines and living patterns had been shaped by the whims of whites, and whose opinions and needs had been dismissed by whites and by the system of apartheid they had built to protect themselves, the TRC offered more than the truth; it offered a chance to regain their dignity.²⁵³

In Rwanda, "one of the most striking features of [the nation's] approach" following an episode of ethnic genocide in the mid-1990s where more than 800,000 of a total population of seven million people were murdered, "has been the state's concerted effort to heal old wounds," Phil Clark suggests in *Rwanda's Recovery: When Remembrance Is Official Policy*.²⁵⁴ "Indeed, substantial government intervention has been the key to the country's recovery—a point reinforced by comparison with neighboring Burundi, Congo, and Uganda, where the absence of systematic official responses to mass atrocity has allowed deep societal divisions and violence to persist."²⁵⁵ Further:

Perhaps the most ambitious—and most controversial—of the Rwandan government's responses to the genocide was the prosecution of 400,000 genocide suspects in 12,000 community courts called gacaca, a process that took place

²⁵² Msimang, *supra* note 249, at 31–32.

²⁵³ *Id.* (adding, "There was a strongly confessional element to the TRC's operation; sinners came to the hearings seeking absolution, and victims came seeking to forgive so they might be liberated from their pain. Some people saw the entire process as a religious experience.").

²⁵⁴ Phil Clark, *Rwanda's Recovery: When Remembrance Is Official Policy*, FOREIGN AFF., Jan.–Feb. 2018, at 35, 36 (further commenting: "And yet by intervening so heavily in people's lives, the powerful Rwandan state has sometimes hindered citizens' attempts to truly come to terms with the past.").

²⁵⁵ *Id.*

between 2002 and 2012. These courts, which sat every week under trees and in village courtyards across Rwanda, heard more than one million cases and were overseen by lay judges who could hand down sentences as severe as life imprisonment (although most consisted merely of community service).

Underpinning the [success of the] gacaca system was the belief that justice is indispensable to reconciliation, that *without a public acknowledgment of crimes and the punishment of all levels of perpetrators, anger and resentment would fester* and could lead to further mass violence.²⁵⁶

In Germany, “Germans ultimately had to confront what the Hitler regime had done in their name,” explains Richard J. Evans, in *From Nazism to Never Again: How Germany Came to Terms With Its Past*.²⁵⁷ “The process of doing so was halting and hesitant at first, and complicated by the country’s division during the Cold War.”²⁵⁸ Since around the time of the 1989 fall of the Berlin Wall, however:

Germany has accomplished an undeniably impressive feat: a collective acceptance of moral responsibility for the terrible crimes of its recent past. The country has given material expression to this acceptance by preserving physical traces of the Nazi era and building fresh memorials to its victims. These memorials serve more than just a symbolic function: in the face of increasingly influential far-right groups and parties that reject contemporary German norms of tolerance, seek an end to what they consider the “shaming” of Germans, and encourage pernicious forms of historical revisionism, these monuments to the past act as constant, unavoidable, and visceral reminders of the truth. . . .

Such physical reminders of the crimes of Hitler and the Nazis confront Germans every day, and while a small minority may not like this, they have no choice but to put up with it. When it comes to accepting the sins of the past, there is, in the end, no alternative for Germany.²⁵⁹

²⁵⁶ *Id.* at 38 (emphasis added).

²⁵⁷ Evans, *supra* note 251.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 9–10, 13, 15 (explaining: “In 1992, the artist Gunter Demnig launched the Stolpersteine (‘stumbling blocks’) project, in which small brass plaques the size of cobblestones were laid into the sidewalks of German towns and cities outside the houses where the murdered victims of Nazism had lived until their arrest. . . . To date, more than 56,000 Stolpersteine have been placed in urban locations in some 22 countries, the vast majority in Germany itself. By placing them where people would walk over them, the artist intended to remind passersby of the complicity of ordinary Germans in the violence. . . . Larger,

In distinct contrast to South Africa, Rwanda and Germany, the nations of China, Russia and the United States²⁶⁰ have done poorly in providing adequate responses for their respective atrocities. There remains in each nation a significant portion of the victimized population who have simply never had their grievances addressed or acknowledged in a meaningful way.

Regarding China, given its current relative political and economic stability, “[s]omeone unfamiliar with the country might be forgiven for assuming that it had reckoned with its recent past and found a way to heal its wounds and move on.²⁶¹ Far from it,” suggests Orville Schelle, in *China’s Cover-up: When Communists Rewrite History*. Rather, the Chinese Communist Party (CCP) “is wagering that it can undo, or at least dodge, the long-term damage it has inflicted on the Chinese people by simply erasing history”:

[A] visitor wandering the streets of any Chinese city today will find no plaques consecrating the sites of mass arrests, no statues dedicated to the victims of persecution, no monuments erected to honor those who perished after being designated “class enemies.” Despite all the anguish and death the CCP has caused, it has never issued any official admission of guilt, much less allowed any memorialization of its victims.²⁶²

It is unlikely that the CCP will engage in any sort of campaign of openness anytime soon, since that would “risk undermining the party’s legitimacy and its right to rule unilaterally.” China has thus become “the People’s Republic of Amnesia,” where “[a] single act of public remembrance might expose the frailty of the state’s carefully constructed edifice of accepted history, scaffolded in place over a generation and kept aloft by a brittle structure of strict censorship, blatant falsehood and willful forgetting.”²⁶³ And if too much more time passes, Schelle soberly suggests that even if some loosening were to occur someday, “its impact might be less than dramatic,

more elaborate forms of memorialization took shape, as well. The sites of former concentration camps were turned into large-scale memorials to the victims, with elaborate exhibitions. . . .”).

²⁶⁰ See *supra* Section II for a discussion of the relevant U.S. history.

²⁶¹ Orville Schelle, *China’s Cover-Up: When Communists Rewrite History*, FOREIGN AFF., Jan.–Feb. 2018, at 22–23.

²⁶² *Id.*

²⁶³ *Id.* at 24 (quoting LOUISA LIM, THE PEOPLE’S REPUBLIC OF AMNESIA: TIANANMEN REVISITED (2014)).

because so much has been suppressed and repressed.²⁶⁴ In the words of the dissident Liu Xiaobo: ‘Eyes kept too long in the darkness do not easily adapt to dazzling sunlight when it suddenly pours through a window.’²⁶⁵

And in Russia, following the communist government’s fall in 1991, “it seemed that history would be laid bare. Declassified archival documents demonstrated that the country had been run by a group of criminals led by Stalin and that the mass murders they perpetrated were crimes against humanity. Unfortunately,” laments Nikita Petrov in *Don’t Speak, Memory: How Russia Represses Its Past*, “the new Russian government, busy with more immediate problems, never got around to passing a legal verdict on the Soviet past and calling its crimes by their names.”²⁶⁶

Paradoxically, since 1991 there has been a rise of nostalgia for Stalin, who was responsible for the deaths of between ten million and 12 million people; and Russian leadership today—as contrasted with the 1987 glasnost (liberalization) campaign, when Soviet leader Mikhail Gorbachev commented that “Stalin had committed ‘enormous and unforgiveable’ crimes”—is vague or unforthcoming on the Soviet past and leaders in particular.²⁶⁷ As a result of these positions, together with “the growing human rights violations in Russia and the fact that the archives containing the records of the security services’ crimes remain closed,” Petrov reports that “the Russian public has been left disillusioned by lackluster economic reforms, widespread official corruption, and politicians who have turned their backs on the people As long as Russia refuses to officially acknowledge the darkness in its past, it will be haunted by ideas that should have died long ago.”²⁶⁸

As for the United States, Bryan Stevenson explains:

[W]e have in this country this dynamic where we really don’t like to talk about our problems. We don’t like to talk about our history. And because of that, we really haven’t understood what it’s meant to do the things we’re doing. We’re constantly running into each other; we’re constantly creating tensions and

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 27.

²⁶⁶ Nikita Petrov, *Don’t Speak, Memory: How Russia Represses Its Past*, FOREIGN AFFAIRS, Jan.–Feb. 2018, at 16, 20–21.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

conflicts. We have a hard time talking about race. And I believe that's because we're unwilling to commit ourselves to a process of truth and reconciliation.²⁶⁹

b. Addressing Economic Concerns

Another common theme among the nations surveyed is the importance of providing for the victims' *economic* concerns, both in terms of compensating for past damages and enhancing prospects for future opportunities.

In South Africa, while the TRC *was* effective in allowing the victims to speak and be heard, as discussed above, it is possible to see with the benefit of hindsight that the TRC did not do enough to hold the oppressors fully accountable for the longer-term systemic effects of apartheid's "systematic dispossession of blacks, . . . through forced removals from cities, separate and unequal education, the deprivation of basic democratic rights, and, most important, the explicit reservation of certain kinds of jobs for whites and the exclusion of black people from certain categories of study and employment."²⁷⁰ The effects of the TRC's shortcomings in this area are evident in the dire circumstances of many black South Africans today.

Sisonke Msimang suggests:

A genuine truth-and-reconciliation process would have aimed to address not just serious human rights violations but also the socioeconomic effects of apartheid . . . [A more effective TRC] would have calculated the economic costs of apartheid for black South Africans and set aside resources to redress them. It would also have looked at such issues as land seizures, forced removals, pass laws, and [homelands] with a view toward working out financial compensation packages, which could have been paid in cash or taken the form of state benefits, such as pensions or grants for higher education. To fund these payouts, the new government could have made arrangements with large banks, mining companies, and other institutions that profited handsomely from apartheid To put it simply, in the years after 1994, the [TRC] ought to have been bolder.²⁷¹

Similarly, in the United States, still-present systemic inequalities have led to the situation where "[t]he income gap between black and white Americans remains

²⁶⁹ Stevenson, *supra* note 110, at 9:29–9:57.

²⁷⁰ Msimang, *supra* note 249, at 32.

²⁷¹ *Id.* at 34.

every bit as extreme as it was five decades ago, at every income level.²⁷² (Black households in 1967 earned an average of between 55-67 percent as much as white households.) Those ratios remain the same today,” Paul Campos explains.²⁷³ Today the “median white household has about 13 times the wealth of the median black household—and much of that wealth is transferred between generations.”²⁷⁴

By marked contrast, Rwanda, through its truth and reconciliation process, has focused much more on the victims’ long-term economic well-being, as Phil Clark writes:

Beginning shortly after the genocide, . . . the Rwandan government undertook a four-pronged strategy to heal the country. This comprised commemoration, civic education, socioeconomic development, and reconciliation through justice Recognizing that socioeconomic inequality was a key driver of the genocide, the government also embarked on an ambitious development program, focusing on rural health care and education. . . .

When prompted to explain . . . [the success of the process,] Rwandans tend to highlight two factors: the gacaca courts provided a release valve for people’s anger and resentment, and the reduction in socioeconomic disparities between ethnic groups has taken the sting out of historical antagonisms.²⁷⁵

And the leadership in China, for all of its censorship and restrictions on freedoms, has since undertaking market reforms in 1978 enabled more than *800 million* people to escape poverty.²⁷⁶ Quality of life, in terms of satisfying basic needs, has improved dramatically.²⁷⁷ One might conclude that the CCP leadership has imposed something of a devil’s bargain on the nation’s population in order to maintain its iron grip on power: in exchange for relative economic prosperity, the government strictly limits other freedoms.

²⁷² Campos, *supra* note 154.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Clark, *supra* note 254, at 36–37, 40.

²⁷⁶ *The World Bank in China*, THE WORLD BANK, <http://www.worldbank.org/en/country/china/overview> (last updated Apr. 19, 2018).

²⁷⁷ *Id.*

CONCLUSION

This article has argued that the time is now for Americans to engage in serious processes of Truth and Reconciliation: first, to truly acknowledge the Nation's four-hundred-year history of racial oppression, then, to attempt, through conscious acts of reconciliation and healing, to begin to atone for the massive harms done. If enough Americans of goodwill were to commit to such efforts, "we may be able," as James Baldwin says, "to end the racial nightmare, and achieve our country, and change the history of the world."²⁷⁸

²⁷⁸ BALDWIN, *supra* note 164, at 105.

APPENDIX A

WHAT IS PRIVILEGE?: A REFLECTIVE ACTIVITY, Adapted from an activity developed by Shayla R. Griffin, Ph.D. November 2013.

1. I rarely think about my race.
2. In my K–12 education, the majority of my teachers were from my racial background.
3. I have never experienced being the only person from my racial background in a classroom, school, or workplace.
4. Students of my race in public schools are those least likely to be written up, suspended, or placed in special education.
5. Students of my race are those most likely to be in advanced, honors, and AP classes.
6. The majority of characters in the books I read, the shows I watched, and the toys I played with as a child were from my racial background.
7. I have never been asked, “What are you?” or mislabeled as a race other than my own.
8. No one has ever asked if they could touch my hair because it was different.
9. My ancestors came to this country voluntarily.
10. I have never been discouraged or prevented from pursuing academic or vocational goals, or tracked into a lower level at school because of my race or ethnicity.
11. I can go shopping alone fairly well-assured that I will not be followed or harassed by store employees who consider me suspicious.
12. People in my family were not barred from moving to the suburbs or given subprime mortgages because of their race.
13. Conversations about national heritage or “civilization” prominently and positively feature people of my race as instrumental in making our society what it is.
14. I have never been told that I am “well spoken” or “articulate” because I speak Standard English.
15. People do not question whether or not I am the one in charge because of how I look.
16. I can go into any bookstore and count on finding the writing of people from my race represented.

17. I have never been denied a job because of my race or ethnicity.
18. I can go into any supermarket and find the staple foods that fit with my cultural traditions.
19. I can go into most any hairdresser's shop and find someone who can deal with my hair.
20. I am confident that I have never been denied a job because my name sounds "too ethnic."
21. Schools populated predominantly by students from my racial background are usually thought of as good or high quality schools.
22. I can be hired or promoted at work without worrying that my co-workers believe I got the position because of affirmative action efforts on the part of the employer.
23. I can swear, dress in second-hand clothes, not answer email, or be late to meetings without having people attribute these choices to my race.
24. My K-12 academic experience was rich with information about the history, culture, scientific inventions, writings, poetry, and other contributions of people from my racial background.
25. To my knowledge, no American president who shares my racial background has ever been questioned about their national origin or told to produce their birth certificate.
26. I generally think of police as people I would call in the case of an emergency.
27. I have seldom, if ever, felt uncomfortable or angry about a remark or joke made about people of my race or ethnicity, and felt it wasn't safe to confront it.
28. Members of my extended family have not been targets of harassment, bullying, or violence based on their race or ethnicity.
29. The neighborhoods I can move to where I feel "at home" are considered "good" school districts.
30. The school I attended as a child had updated textbooks, technology, and facilities.
31. It is impossible for students in my school district to succeed academically without knowing the language, culture, inventions, and history of people from my racial background.