

**Indiana University**

---

**From the Selected Works of Carlton Waterhouse**

---

April 21, 2009

**THE GOOD, THE BAD, AND THE UGLY:  
MORAL AGENCY AND THE ROLE OF  
VICTIMS IN REPARATIONS PROGRAMS**

Carlton Waterhouse, *Florida International University*



Available at: [https://works.bepress.com/carlton\\_waterhouse/4/](https://works.bepress.com/carlton_waterhouse/4/)

# **THE GOOD, THE BAD, AND THE UGLY: MORAL AGENCY AND THE ROLE OF VICTIMS IN REPARATIONS PROGRAMS**

Carlton Waterhouse\*

<b>INTRODUCTION.....</b>	<b>3</b>
<b>COMPENSATION.....</b>	<b>5</b>
<b>RESTITUTION.....</b>	<b>6</b>
<b>APOLOGY, ATONEMENT, AND RECONCILIATION.....</b>	<b>8</b>
<b>REPARATIONS RECONSIDERED.....</b>	<b>11</b>
<b>REPARATIONS CASES REVIEWED.....</b>	<b>13</b>
<b>INSTITUTIONAL REPARATIONS: THE SOUTH AFRICAN EXPERIMENT.....</b>	<b>19</b>
<b>THE EMPLOYMENT EQUITY ACT AND THE BLACK ECONOMIC EMPOWERMENT ACT.....</b>	<b>24</b>
<b>CONCLUSION.....</b>	<b>29</b>

**ABSTRACT**

*Despite the growing interest in reparations, at the domestic and international level, little attention has been given to the role of victims in the design and implementation of reparations programs. Instead, most programs and commentators place emphasis upon the apology, recompense, or restitution required by former wrongdoers rather than the restoration and recovery of victims. This prevailing approach neglects the critical role that communities and individuals suffering from past abuses should play in order to reestablish their personal well being and societal standing. This methodology replicates the past subordination of victims by rendering them the passive recipients of government actions that they have little or no control over. Over the past fifty years, reparations programs have varied in their overall quality and in their attention to this issue. This article examines some of the most well known domestic and international reparations programs and evaluates them based on how well they facilitate victims' participation in their own recovery. The analysis concludes that programs that enable victims to play a part in critical societal institutions offer a more thorough remedy to past harms by fostering victims' moral agency.*

## Introduction

Despite the ongoing debate over reparations for slavery and its legacy in the United States, most reparations scholarship pays little attention to the quality of past reparations programs domestically or abroad.<sup>1</sup> Instead, most reparations commentators emphasize the need for apology, recompense, or restitution made by former wrongdoers over the restoration and recovery of victims.<sup>2</sup> The problem is not limited to theorists and scholars. Repeatedly, political contests over guilt and innocence preceding the development of reparations programs obscures consideration of the critical role that communities and individuals suffering from past abuses should play in order to reestablish their personal well being and societal standing. The focus on wrongdoers that results replicates the former subordination of the victims of past abuse by rendering them the passive recipients of government actions that they have little or no control over. This article advances an important but overlooked measure for evaluating reparations programs: the role of victims in the design and implementation process.

The increased use of reparations by governments to redress past injustices and bring closure to the misdeeds of the past, characterized the latter half of the

---

\* Carlton Waterhouse, Associate Professor of Law, Florida International University, College of Law; B.A. Penn State University; J.D. Howard University; M.T.S. Emory University; Ph.D. Emory University. I would like to thank all conference participants who provided valuable feedback when I was invited to present this Article at the Comparative Constitutionalism and Rights: Global Perspectives Conference, held in Durban, South Africa; and the Southeastern Association of Law Schools, West Palm Beach, Florida. I would especially like to thank Adjoa Aiyetoro, Bernadette Atuahene, Emma Coleman Jordan, and Michele Anglade for their valuable input and insights. My thanks also extend to Valquisha Morris and Shannon O'Shea for the critical research assistance they provided.

<sup>1</sup> *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (Roy L. Brooks ed., New York: New York University Press 1999) offers the most comprehensive examination of domestic and international reparations programs to date and serves as an excellent though rare counter example to this point.

<sup>2</sup> In light of the rejection of reparations as a viable response to past injustice by some commentators and the popular disapproval of reparations for slavery in the United States, a narrow emphasis upon the legal and moral warrants for reparations has dominated the literature. See Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev. 689 (2003) for a rejection of reparations programs on legal and moral grounds and Alfred Brophy, *Reconsidering Reparations*, 81 Ind. L.J. 811 (2006) for an adept rejoinder.

twentieth century.<sup>3</sup> While this development, and the accompanying focus upon reparations by the human rights community, represent genuine improvements over the historic neglect of those abused by former regimes, few reparations programs have been particularly “good” when viewed from the perspective of victims.<sup>4</sup> In fact, when evaluated based on their substantive rather than their symbolic restoration of victims and their families most programs should be classified as either “bad” or “ugly.”<sup>5</sup> My basis of this characterization arises from most programs failure to afford injured groups and individuals a meaningful role in the design and implementation of reparations programs.<sup>6</sup> As I have written elsewhere, “efforts to redress past harms can actually be counter-productive, cruel, or insulting when they are not accompanied by actions that attend to both the needs and agency of the injured group.”<sup>7</sup> When using these criteria, the inadequacy of most reparations schemes becomes apparent, due to their primary focus on the needs and the moral agency of the former violators.<sup>8</sup> This article engages the discourse on reparations by focusing on the quality of domestic and international reparations programs, in light of their routine failure to attend to the moral agency of the victims of past human rights abuses.

Governments guilty of past injustices express moral agency through formal apologies and even tacit acceptance of responsibility for past human rights abuses. Through their willingness to acknowledge past injustices and the injuries they caused, governments act as moral agents. Their agency is further expressed through financial or other measures directed toward victims. Historically, victims have been denied this same opportunity as most reparations programs limit injured groups and individuals to the passive acceptance of government actions.<sup>9</sup> This

---

<sup>3</sup> *Id.* See also Elazar Barkan, *The Guilt of Nations* (Baltimore: John Hopkins University Press, 2000).

<sup>4</sup> For a survey of programs see Brooks, *supra* Note 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Carlton Waterhouse, *Avoiding Another Step In A Series of Unfortunate Legal Events*, 26 B.C. Third World L.J. 207. As used here, “moral agency” refers to the ability to make moral judgments and to act in accordance with those judgments in the world. For a fuller consideration of moral agency and its relationship to oppressive social norms see *Women and Moral Theory* (Eva Feder & Diana T. Myers eds., Totowa, New Jersey: Rowman & Littlefield, 1987). See also Susan J. Hekman, *Moral Selves*, (University Park: Pennsylvania State University Press, 1995).

<sup>8</sup> Brooks, *supra* Note 1.

<sup>9</sup> While victims retain the ability to exercise their agency through the out an out rejection of government efforts, this take it or leave it approach to reparations frustrates both the reconciliation of the political community and the remediation of victims’ harms. See Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (Berkeley: University of California Press, 2004) for a thoughtful examination of atonement and

article maintains that injured parties can best express moral agency through their participation in the development and implementation of reparations programs. This approach allows injured parties to play an important role in the political community through their participation in the active remediation of their injuries.

This article consists of three sections. The first section briefly examines characteristics of the most common reparations approaches used domestically and internationally: compensation, restitution, and reconciliation. The second section assesses the quality of four well-known reparations programs based on their attention to victims' moral agency in the design and implementation process. The final section considers an institutional based approach to reparations as an underutilized means of redress that may best facilitate the moral agency of victims.

## Compensation

The most well known approach to reparations requires that wrongdoers pay damages to persons harmed by their past conduct.<sup>10</sup> Popular among lawyers, compensatory reparations authorize the payment of damages for physical, political, psychological, economic, and other harms suffered.<sup>11</sup> They can issue from the ruling of a court, the enactments of a legislature, or the funds of a commission responsible for administering transitional justice.<sup>12</sup> Compensatory schemes range from the establishment of victim funds used for education, or health care, to individual payments to the families or descendants of deceased victims.<sup>13</sup> As a method of making reparations, compensation schemes can be beneficial or deleterious, depending on their design.<sup>14</sup>

Through compensation, past violators can offer monetary payments in a

---

forgiveness as a complimentary set of moral obligations placed on both perpetrators and victims of past injustices.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* See also Roy L. Brooks, 475-77 *Rehabilitative Reparations For The Judicial Process*, 58 N. Y. U. Ann. Surv. Am. L. 475.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>As discussed below, compensation schemes have accompanied the best and the worst reparations programs. *Infra* pp. 13-17. See also Hurbert Kim, *German Reparations: Institutionalized Insufficiency in When Sorry Isn't Enough: A Controversy Over Apologies and Reparations for Human Injustice* 77-80 (Roy L. Brooks ed., New York: New York University Press, 1999). See also *When Sorry Isn't Enough: A Controversy Over Apologies and Reparations for Human Injustice* 88-90 (Roy L. Brooks ed., New York: New York University Press, 1999).

collective fund or in individual payments.<sup>15</sup> Accordingly, their role in reparations can be resolved through a lump sum disbursement or one time payout.<sup>16</sup> Under either approach, past violators fulfill their obligation through a discrete financial transaction that restores their moral standing and brings ready closure to a shameful past.<sup>17</sup> Unlike models that require the return of land or property, discussed below, monetary compensation offers a relatively efficient way for those making reparations to bring finality to the process.<sup>18</sup>

Individual payment-based compensation mechanisms also carry some advantages for recipients. Due to their individual nature, they allow recipients to use reparations in the way that they feel best addresses the past harms suffered by them or their family.<sup>19</sup> Cash payments can be used for innumerable goods and services to redress past harms, or meet existing needs or desires. In this way, recipients can exercise autonomy in the reparations process that can function to remedy the powerlessness and subjugation they may have suffered in the past.<sup>20</sup> Accordingly, compensation may be used as a valuable part of a reparations scheme that meets the needs of victims and facilitates their involvement in the reparations process.<sup>21</sup> However, as discussed below, compensation can represent a cheap payoff or blood money when it fails to reflect the needs or wishes of victims.<sup>22</sup>

## Restitution

Restitution represents one of the most wide-ranging reparations options.<sup>23</sup>

---

<sup>15</sup>*When Sorry Isn't Enough: A Controversy Over Apologies and Reparations for Human Injustice* 8-9 (Roy L. Brooks ed., New York: New York University Press, 1999). See also United States Department of Justice Foreign Claims Settlement Commission, *German Compensation for National Socialist Crimes* in *When Sorry Isn't Enough: A Controversy Over Apologies and Reparations for Human Injustice* 61-67 (Roy L. Brooks ed., New York: New York University Press, 1999). See also *When Sorry Isn't Enough: A Controversy Over Apologies and Reparations for Human Injustice* 126-131 (Roy L. Brooks ed., New York: New York University Press, 1999).

<sup>16</sup>*Id.*

<sup>17</sup>*Infra* pp.13-17.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>*Infra* pp. 15-17. See also Mark William Bakker, 1497-8 *Repairing The Breach And Reconciling The Discordant: Mediation In The Criminal Justice System*, 72 N.C. L. Rev. 1479.

<sup>23</sup>*Politics and the Past: On Repairing Historical Injustices* 91-102 (John Torpey ed.,

Amenable to diverse applications, it can serve to facilitate the return of real and personal property to previous individual owners, provide stolen wages and lost profits to forced laborers, or repatriate tribes and clans to ancestral lands.<sup>24</sup> This variety of uses also means that restitution's efficiency, effectiveness, and efficacy varies as well.<sup>25</sup> In implementation, restitution can range in procedural and technical complexity, from the intricacies associated with courtroom litigation to the relative simplicity associated with obtaining a driver's license. Schemes can mandate strict burdens of proof requiring documentary ownership rights superior to all others, but may just as readily admit oral histories that establish personal or familial possession during a particular time.<sup>26</sup> Accordingly, the appeal of restitutionary reparations for past violators as well as victims will vary widely.

Highly technical restitution mechanisms provide past violators with a bureaucratized process that limits the number of recipients through quasi-legal administrative procedures.<sup>27</sup> Nevertheless, the individualized nature of the claims and the evidentiary burdens result in lengthy claim procedures that may involve repeated court appeals to resolve intractable ownership questions.<sup>28</sup> As a general matter, these approaches construe reparations narrowly and limit awards to those victims capable of successfully navigating the established procedural hurdles.<sup>29</sup> Past violators may benefit from these mechanisms by limiting the range of recipients and the scope of restitution in each particular year.<sup>30</sup> However, the administrative costs and the political exposure associated with slow moving

---

Lanham: Rowman & Littlefield Publishers, Inc., 2003). See also Elazar Barkan, *The Guilt of Nations* (Baltimore: John Hopkins University Press, 2000).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> An alternative approach used by some governments to address land claims provides qualifying claimants with compensation or available land tracts rather than restoration of original lands. Under this policy, governments can avoid the technical and legal challenges associated with resolving competing claims for specific property. Moreover, this methodology offers past violators a more efficient and less costly way to administer restitution programs to a larger number of recipients by decreasing administrative and legal costs. For the claimants, this mechanism offers a less bureaucratic and technical system to recover lost property or its value. In exchange, however, claimants surrender their right to obtain specific property that may have an incommensurable sacramental or sentimental value. Under either approach, Barkan makes clear that restitution awards represent negotiated redress of past injustices that fit into a larger narrative about national identity that reconciles past actions with contemporary notions of justice and desert. Elazar Barkan, *The Guilt of Nations* 320-321 (Baltimore: John Hopkins University Press, 2000).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

individual based mechanisms can present significant challenges to the long-term viability of these mechanisms. An additional benefit of these means for some past violators will be the ability to construct the future society by determining the beneficiaries of substantial assets reverting to private ownership.<sup>31</sup> Elazar Barkan makes clear that in Eastern Europe, more often than not, members of the pre-communist middle class typically benefited from restitution schemes.<sup>32</sup> This results from the temporal nature of restitution and its dependence upon a “rightful ownership” rooted in history.<sup>33</sup> Rather than restoring property to those with earliest ownership or those “most entitled to it,” restitution seeks a particular time that predates a recent injustice to support a claim.<sup>34</sup> In Eastern Europe, this meant that countries considered restitution claims for property taken under the communist regime, but excluded claims rooted in procommunist property appropriations.<sup>35</sup> In doing so, governments sought to redress communist injustices but not those of the preceding regimes.<sup>36</sup> This temporal characteristic creates difficult legal and moral challenges when claimants offer competing prior claims of ownership for restitution. As seen with the history of the United States Indian Claims Commission, discussed below, restitution can be a nightmare for victims.<sup>37</sup> Although restitution holds the unique potential to return the real and personal property wrongfully taken from victims, the procedures accompanied with it can easily deteriorate into a bureaucratic nightmare for victims that rob the process of its reparative potential.<sup>38</sup>

### **Apology, Atonement, and Reconciliation**

In some cases, reparations take the form of a reconciliation process. These processes consist of apologies and symbolic awards or projects as part of a broader process of reconciling victims and those responsible for harming them.<sup>39</sup> Roy Brooks argues that awards offered in conjunction with an apology constitute atonement by past violators that warrant forgiveness by victims.<sup>40</sup> Under this

---

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 118-119.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 120.

<sup>36</sup> *Id.*

<sup>37</sup> *Infra* pp. 14-15.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* See also Roy L. Brooks, 274-5 *Getting Reparations For Slavery Right—A Response To Posner And Vermeule*, 80 *Notre Dame L. Rev.* 251 (Nov. 2004).

<sup>40</sup> Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* 155-6

theory, the reconciliation of the parties represents the primary component of reparations.<sup>41</sup> The primary goal of these approaches flows from a drive to repair broken relationships caused by past injustices.<sup>42</sup> Atonement awards represent a symbolic gesture by past violators of the good faith of their apology.<sup>43</sup> When past injustices resist material redress, symbolic acts provide past violators with an opportunity to show their remorse and commitment not to repeat the unjust behavior.<sup>44</sup> These actions can take a variety of forms including individual compensation awards, community memorial funds, the creation of monuments and museums, the development and support of educational and cultural awareness programs, the establishment of national holidays, and the national commemoration of victims.<sup>45</sup> Most of these activities seek to enshrine the recognition of past injustices in the national memory and to honor the communities or individuals who suffered at the hands of past violators.<sup>46</sup> In a discussion of the “anatomy of apology” Brooks explains:

A tender of apology is no trivial matter, particularly when made by state officials on behalf of their governments. It is an act fraught with deep meaning and important consequences...Let us begin with some understanding of what apology is and is not in the context of atonement. Apology, most importantly, is an acknowledgment of guilt rather than a punishment for guilt. When a government perpetrates an atrocity and apologizes for it, it does four things: confesses the deed; admits the deed was an injustice; repents; and asks for forgiveness.<sup>47</sup>

This process and other reconciliation efforts offer victims recognition and standing in the current social order and allows past violators to regain moral

---

(Berkeley: University of California Press, 2004).

<sup>41</sup> *See generally Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* See also Roy L. Brooks, 67 *Toward A Perpetrator-Focused Model of Slave Redress*, 6 *Afr.-Am. L. & Pol’y Rep.* 49 (2004).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Brooks, *supra* note 37, at 144. Brooks goes on to note that government based apologies play the vital role of clarifying, often contentious, historical records regarding past injustices. *Id.* at 148-151. In South Africa, the need to elaborate the record of past injustices led to a grant of amnesty for perpetrators of gross human rights abuses in exchange for open testimony detailing the atrocities inflicted during the previous regime. See Desmond Tutu, *No Future Without Forgiveness* (New York: Doubleday, 1999) (explaining the South African reconciliation process and the subordination of retributive justice in order to discover the truth about the past).

standing domestically and internationally.<sup>48</sup> Although these mechanisms themselves can provide past violators with the smallest financial burden associated with reparations, the strong repudiation of the behavior of past regimes as well as the fear of future civil suits can deter governments from adopting this approach because of its political and/or psychic costs.<sup>49</sup> In contrast, victims focused on current societal standing, as well as those focused on addressing the emotional cost of a painful history, may gravitate toward reconciliation as a reparations mechanism because of the social and psychic benefits it provides.<sup>50</sup>

The contemporary focus on truth commissions works within the reconciliation model because of its ability to promote healing between victims and violators in the wake of gross human rights abuses.<sup>51</sup> These commissions take diverse approaches, but regularly focus on unveiling the mystery surrounding the fate of disappeared and murdered community members. To facilitate this, governments may offer amnesty to perpetrators of human rights abuses in exchange for their testimony.<sup>52</sup> This mechanism allows societies to promote healing between perpetrators and victims using amnesty and confessions rather than tribunals and retribution. In countries like South Africa and Chile, the clandestine nature of many abuses created considerable angst about the death and disappearance of countless loved ones.<sup>53</sup> The truth and reconciliation commissions in these and other countries facilitate a very public process of confession, to allow perpetrators and victims to reconcile and shape a new future for their society.<sup>54</sup> Admittedly, in both countries, the status of officials and others involved in atrocities who refuse to participate raises unresolved questions about the effectiveness of the reconciliation process, as known perpetrators avoid both criminal prosecution and confession.<sup>55</sup>

---

<sup>48</sup>*Id.*

<sup>49</sup>The 1996 election of a more conservative government in Australia that de-emphasized and de-funded the reconciliation efforts of the previous administration exemplifies the rejection of reconciliation by some governments as a way of preserving dominant political ideologies rooted in historic notions of national identity. Brooks, *supra* note 37, at 234.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* See also Naomi Cahn, 269 *Beyond Retribution And Impunity: Responding To War Crimes of Sexual Violence*, 1 *Stan. J. Civ. Rts. & Civ. Liberties* 271 (April 2005).

<sup>55</sup>*Politics and the Past: On Repairing Historical Injustice* (John Torpey ed., Lanham: Rowman & Littlefield Publishers, Inc., 2003) (discussing the work of truth commissions in Latin America). See generally *When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice* (Roy L. Brooks ed., New York: New York University Press, 1999)

## Reparations Reconsidered

The historic implementation of reparations schemes across the globe often consists of a mixture of the above approaches. In some cases, governments limit reparations exclusively to one of the above mechanisms, while in exceptional cases governments implement a comprehensive scheme using a configuration of all the above mechanisms.<sup>56</sup> The Federal Republic of Germany (FRG) provides the seminal case of comprehensive reparations. In that instance, the FRG used compensation, restitution, and reconciliation in providing redress for the victims of the Holocaust.<sup>57</sup> The program used by Germany included compensation to individual victims and the state of Israel, restitution for stolen property and forced labor, apology, and a variety of domestic reconciliation projects.<sup>58</sup>

Unlike reparations undertaken by the FRG, reparations schemes routinely emphasize the actions of past violators to define and evaluate reparations, thereby maintaining the continued subordination of victims and the primary importance of violators.<sup>59</sup> This approach can provide past violators with an almost unilateral ability to decide, if, when, and how to make reparations, with little regard to the victims' views or role in the design and implementation of reparations programs.<sup>60</sup> The actions of victims under this model are a secondary consideration relative to the chief concern over what actions past violators take.<sup>61</sup> The typical reparations scheme also provides inadequate attention to the material needs of victims.<sup>62</sup> Instead, these approaches emphasize the restoration of the moral standing of past violators in the political community. This routinely manifests in reconciliation efforts intended to symbolize the restoration of social harmony within the political community.<sup>63</sup> These efforts regularly sacrifice attention to the material needs and loss of past victims in favor of restoring social accord among community members. Instead of a careful assessment of the steps required to enable victims to overcome the deficits of past injustices, reparations typically emphasize the remorse and

---

<sup>56</sup>*Id.* See also *Bridging the Color Line: The Power of African-American Reparations To Redirect America's Future*, 115 Harv. L. Rev. 1689 (April 2002).

<sup>57</sup>*Id.*

<sup>58</sup> United States Department of Justice Foreign Claims Settlement Commission, *German Compensation for National Socialist in When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice* 61-65 (Roy L. Brooks ed., New York: New York University Press, 1999).

<sup>59</sup>*Id.*

<sup>60</sup>*Id.* See also Naomi Roht-Arriaza, 171 *Reparations Decisions and Dilemmas*, 27 *Hastings Int'l & Comp. L. Rev.* 157 (Winter 2004).

<sup>61</sup>*Id.*

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

recalcitrance of violators over the needs of victims.<sup>64</sup> While all of the above efforts can represent important aspects of good reparations programs, they hinder effective reparations when they are out of balance with the proper attention to the well-being and engagement of past victims.<sup>65</sup>

The result of the imbalance manifests in negative and harmful results that undermine the ultimate efficacy of reparations programs. The first of these is the continued subordination of victims relative to governmental actors. Most reparations programs reflect government efforts to redress past governmental harms perpetrated against citizens or other residents of a country.<sup>66</sup> Because the original wrongs redressed by reparations flowed from the misuse or abuse of government power relative to persons or groups within a society, the creation of reparations based primarily on government concessions or symbolic gestures to past victims continues the neglect of those harmed.<sup>67</sup> Consequently, government violators may avoid responsibility for the deterioration of victims' socio-economic conditions following reparations or reconciliation efforts, by noting that in light of either or both, any failure by victims to succeed is unrelated to past injustices.<sup>68</sup> This rationale can easily become the dominant discourse in societies where victims belong to minority groups that suffered historic mistreatment.<sup>69</sup> In these cases, officials and other segments of society expect victimized persons and communities to compete equally, despite the failure of reparations schemes to adequately redress the harms caused by past injustices.<sup>70</sup>

An equally significant shortcoming in many reparations schemes takes place in the design process. When countries contemplate ways to overcome the misdeeds of the past, they may see victims as passive agents who receive compensation or accept symbolic gestures as recognition of their mistreatment.<sup>71</sup> This view of victims fails to recognize the importance of victims' active engagement in the reparations process, from its design and implementation, to its conclusion and evaluation. Victims' participation in the design of reparations enables them to see themselves healing and to articulate the steps needed to see that healing accomplished. Moreover, victims' involvement in the design process enables them

---

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Many contemporary views in American society regarding African Americans reflect this phenomenon. See Joe Feagin, *Racist America: Roots, Current Realities and Future Reparations*, 105-136 (New York: Routledge, 2001).

<sup>70</sup> *Id.*

<sup>71</sup> The official Japanese response to the harms done to Korean comfort women serves as one example. *When Sorry Isn't Enough*, *supra* note 55, at 126-131.

to make sacrifices as well as demands, in order to promote the good of the larger community in addition to their own.<sup>72</sup> Further, victims' involvement in designing reparations also helps elevate their status in the reparations process in its initial stages, increasing the likelihood that they will be included as equal parties throughout.<sup>73</sup>

In the implementation stages, victims' ability to participate actively in a reparative process bolsters their healing, as well as the society's advancement. Through active participation and engagement, victims become vested participants in a reformed or changed society, transcending their former identity as those aggrieved by a former regime.<sup>74</sup> This visible engagement, accompanied with the support needed to overcome past mistreatment, not only provides superior short-term benefits for victims, but also improves the long-term prospects for healing societal wounds by increasing victims' ability to overcome the harms of the past and to take part in society. This approach can decrease the likelihood that bitterness and anger will pass down through generations to destabilize countries long after original transgressions. Although the shape of reparations programs should always reflect the context of the situation and the country in which they take place, I elaborate below on how institutional development represents one way that victims of reparations can actively engage in the reparative process and meaningfully exercise their moral agency.

### Reparations Cases Reviewed

Reparations typically flow from efforts to redress historical practices that contemporary moral theory deems anathema.<sup>75</sup> Current understandings of reparations, as a practice related to individuals or groups rather than entire countries, can be traced back to the Federal Republic of Germany's response to the gross atrocities committed by Nazi Germany.<sup>76</sup> This resulted in the first provision of reparations to a non-state entity. In the wake of the Holocaust, the Federal Republic of Germany provided a robust reparations scheme.<sup>77</sup> The program

---

<sup>72</sup> *Politics of the Past*, *supra* note 52, at 93.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Brooks, *Atonement and Forgiveness*. See also Teitel, Ruti, *Transitional Justice* (Oxford: Oxford University Press, 2000). See also Adrian Vermeule, *Reparations For Slavery And Other Historical Injustices*, 103 *Colum. L. Rev.* 689, 694-5 (April 2003).

<sup>76</sup> *When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice* 17-19 (Roy L. Brooks ed., New York: New York University Press, 1999).

<sup>77</sup> United States Department of Justice Foreign Claims Settlement Commission, *supra* note 55, at 62.

provided for three reparations mechanisms to redress Nazi atrocities: first supplying the State of Israel with goods and services; second directly compensating Jews victimized by Nazi's; and third funding the relief and resettlement of persecuted Jews to Israel.<sup>78</sup> The next reparations example begins with the decision of the United States to intern Japanese Americans during World War II, based on their Japanese heritage. In 1988, forty-six years after the internment decision, the United States government passed the Civil Liberties Act of 1988.<sup>79</sup> In addition to an apology, the Act authorized the expenditure of \$1.25 billion for compensation to surviving internees and the establishment of an educational fund.<sup>80</sup>

Another reparations case related to World War II is that of the Korean Comfort Women. This matter originated in the sexual enslavement and forced prostitution of women and girls by the Japanese army from 1931 to 1944.<sup>81</sup> During this period, Japan used deception and abduction to force some two hundred thousand, mostly Korean, women and girls into prostitution.<sup>82</sup> In response to international and domestic pressure, Japan established a reparations fund for surviving victims and the Japanese President personally apologized for the atrocities.<sup>83</sup> In the wake of World War II, the United States began its own reparations process for Native Americans with the establishment of the Indian Claims Commission (ICC).

---

<sup>78</sup>*Id.* See also Eric A. Posner and Adrian Vermeule, 694 *Reparations for Slavery and Other Injustices*, 103 Colum. L. Rev. 689 (April 2003). See generally Kurt Schweririn, *German Compensation for Victims of Nazi Persecution*, 67 Nw. U. L. Rev. 479 (1972); Roy L. Brooks, *The Slave Redress Cases*, 27 N.C. Cent. L.J. 130, 141-2 (2005).

<sup>79</sup>Leslie T. Hatamiya, 'Institutions and Interest Groups', in *When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice* 190 (Roy L. Brooks ed., New York: New York University Press, 1999). See Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* (Washington, D.C.: Commission on Wartime Relocation and Internment of Civilians, 1982). See also Irma Jacqueline Ozer, *Reparations For African Americans*, 41 How. L.J. 479, 498-9 (Spring 1998).

<sup>80</sup>\*War and National Defense Restitution for World War II Internment of Japanese-Americans and Aleuts, Pub. L. No. 100-383, 102 Stat. 903 (1988), codified at 50 USC 1989 (1988). See also Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S.U. L. Rev. 25, 47-48 (Fall 2001).

<sup>81</sup>Barkan, at 47. See *When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice*, (Roy L. Brooks ed., New York: New York University Press, 1999).

<sup>82</sup>United States Department of Justice Foreign Claims Settlement Commission, *supra* note 55, at 126-131. See also Carlton Waterhouse, *Avoiding Another Step In A Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law From 1619 to 1972 And A Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. Third World L.J. 207, 222 (Spring 2006).

<sup>83</sup> *Id.*

Beginning in 1946, the ICC presided over the restitution and reparations of tribal claims against the United States and its citizens for the taking of Indian properties, treaty violations, and other infractions against tribes and their members.<sup>84</sup>

Looking at the four reparations programs above, under this analysis, two could be considered bad, none could be considered good, and two could be considered ugly. The FRG program for Jewish victims of the holocaust represents the most sweeping and extensive reparations program in modern history.<sup>85</sup> Though some consider it a highly successful reparations program, under my analysis, it approximates a good program while still falling short.<sup>86</sup> Because the program grew out of negotiations with a well-organized group representing holocaust victims, the mechanism reflected a deeper appreciation for victims' wishes and desires than most.<sup>87</sup> Moreover, the program directed substantial resources that supported institutional development in Israel that would benefit victims over the long term. This aspect was reflected in Germany's provision of goods and services to Israel and in conjunction with the resettlement and relief of persecuted Jews to Israel.<sup>88</sup> Although this mechanism failed to achieve the goal of reforming institutions within German society that allow the active engagement and participation of victims in the type of reparative process articulated above, it served a similar function by supporting the development of a society focused on and committed to creating and sustaining those institutions. Consequently, Israel's development as a society provided holocaust victims with both the responsibility and the opportunity to participate in their own repair and restoration. In terms of the victims' moral

---

<sup>84</sup>Nell Jessup Newton, 'Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System', in *When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice* 261-66 (Roy L. Brooks ed., New York: New York University Press, 1999). See also Zachary F. Bookman, *A Role For Courts In Reparations*, 20 Nat'l Black L.J. 75, 86-7 (2006-2007).

<sup>85</sup>*When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice* 61-67. See also Hubert Kim, *supra* note 11, at 77-78.

<sup>86</sup>*Id.* at 17. See generally Menachem Z. Rosensaft and Joana D. Rosensaft, *The Early History of German-Jewish Reparations*, 25 Fordham Int'l L.J. 1 (Nov. 2001).

<sup>87</sup>It bears noting that the quick response following the end of the war effectively increased the overall accomplishments of the program. In most of the other cases considered, the substantial time lag between the harms inflicted upon victims and the decision to provide redress significantly hindered the success of the program. Expedient attention to the development of reparations programs increases both the quantity and quality of victim participation. Even when enduring hostilities impede expedient attention to reparations, a government can improve the quality and the effectiveness of reparations programs by engaging a reparations process at the conclusion of hostilities.

<sup>88</sup>German Compensation for National Socialist Crimes, provided by Foreign Claims Settlement Commission of the U.S. Department of Justice (March 6, 1996), available at <http://www.ushmm.org/assets/frg.htm>.

agency, the FRG program provides significant glimpses of how prioritizing victims' engagement in the design and implementation of reparations can help improve the long-term success of reparations programs by supporting victims' participation in their own repair and restoration.

Unfortunately, the FRG program still suffered from substantial problems that mar its standing as a model for future reparations programs. The limited scope of the program in reaching all the victims of the Nazi regime, particularly Eastern European Jews, Roma, and homosexuals, was one significant flaw and the inadequacy of the assistance provided former victims was another.<sup>89</sup> These issues keep the FRG settlement from being classified as "good."

The reparations for Korean comfort women and the ICC each exemplify what bad reparations programs look like. These programs share bad attributes. In both cases, the victims played a minimal role in the program design, development, and implementation.<sup>90</sup> Instead, Japanese and American bureaucrats created a scheme and then informed the victims of its existence. This top down approach to reparations increases the likelihood that programs will fail to redress past injustices in a meaningful way.

Through legislation following World War II, the United States established the Indian Claims Commission (ICC) to settle all Indian claims that arose before 1946.<sup>91</sup> Although the ICC made some monetary awards, claimants found themselves enmeshed in highly technical adversarial litigation against the Department of Justice that frustrated and impeded their success.<sup>92</sup> Despite its substantial importance to claimants, the ICC refused to provide the restoration of land rights that held unique importance to victims.<sup>93</sup> Claimants suffered additional adversity in the process through their interaction with private counsel, whose interests often differed with their clients and resulted in the loss of claims.<sup>94</sup> Although Congress authorized a less formal and more cooperative program through its legislation, allowing the Commission to address moral as well as legal claims, the ICC gave little thought to the affect of the program on victims, and imposed a rigid legal structure that marginalized claimants and their cultural perspective.<sup>95</sup> Instead, victims had to prove claims and meet substantial procedural

---

<sup>89</sup> Hurbert Kim, *supra* note 11, at 77-80.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Newton, 'Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System', in *When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice* 263 (Roy L. Brooks ed., New York: New York University Press, 1999).

<sup>94</sup> *Id.* at 270.

<sup>95</sup> *Id.* at 263. See generally George Hicks, *The Comfort Women: Japan's Brutal Regime of*

barriers to participate in the program. Beyond this, the adversarial nature of the proceedings alienated victims and frustrated attempts to obtain restitution for the gross injustices they suffered. The ICC process not only neglected the moral agency of victims to participate actively in the repair or restoration of their communities and their well-being, but failed to provide sufficient restitution for many claimants in light of the losses they suffered as well.<sup>96</sup>

Likewise, the fund set up by the Japanese parliament for the “Korean Comfort Women” suffered from the insufficient participation of victims in its design and intended operation.<sup>97</sup> Under the program, the Japanese government created the “The Asian Women’s Fund” for the benefit of former comfort women.<sup>98</sup> The Japanese Parliament only funded administrative operations, however, and left it up to the Japanese people to fund the corpus through their charity.<sup>99</sup> The fund made amounts available to “support medical and welfare projects” which would “be of service” to the former “comfort women” and fund representatives engaged in dialogues with former comfort women regarding projects that the fund might undertake.<sup>100</sup> Ultimately, the fund provided “atonement money” for each individual consisting of approximately \$17,000 USD, a letter of apology from both the Prime Minister of Japan and the fund President, and access to some medical services to less than 20 women in the Republic of Korea.<sup>101</sup>

Rather than meaningfully aiding Korean women, the fund further stigmatized and marginalized past victims who saw it as a provision of charity donated by Japanese citizens, rather than a just compensation scheme as requested by victims and others.<sup>102</sup> The program failed to recognize the cultural context of victims and

---

*Enforced Prostitution in the Second World War* (New York: W.W. Norton & Company, 1995) (an in depth examination of the history of the “comfort women” and the events leading up to the development of the fund).

<sup>96</sup>Newton, ‘*Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System*’, in *When Sorry Isn’t Enough: The Controversy Over Apologies and Reparations for Human Injustice* 263-4 (Roy L. Brooks ed., New York: New York University Press, 1999).

<sup>97</sup>*Id.* See also Byoungwook Park, *Comfort Women During WWII: Are U.S. Courts A Final Resort For Justice*, 17 Am. U. Int’l L. Rev. 403 (2002).

<sup>98</sup>*When Sorry Isn’t Enough: The Controversy Over Apologies and Reparations for Human Injustice* 129-131 (Roy L. Brooks ed., New York: New York University Press, 1999).

<sup>99</sup>*Id.*

<sup>100</sup>*Id.* See also Jon M. Van Dyke, *Development and history Reconciliation between Korea and Japan*, 5 Chinese Judge Int’l L. 215, notes 104 - 109.

<sup>101</sup>*Projects in Republic of Korea, Asian Women’s Fund, at*

<http://www.awf.or.jp/english/project2.html>.

<sup>102</sup>Hicks, ‘*The Comfort Women Redress Movement*’, in *When Sorry Isn’t Enough: The Controversy Over Apologies and Reparations for Human Injustice* 124 (Roy L. Brooks ed., New York: New York University Press, 1999).

neglected to address the numerous concerns of past victims.<sup>103</sup> The fund also placed a burden on past victims to prove their victimization.<sup>104</sup> Further, the Japanese government failed to accept responsibility for the deception and force used to abduct and then hold over one hundred thousand Korean women in sexual slavery.<sup>105</sup> Out of protest against the Japanese government, few of the nearly 200 surviving victims participated in the program. To support victims rejecting the Japanese award, the South Korean government provided comparable benefits to Korean victims who refused the Japanese offer.<sup>106</sup>

Japan's failure to take meaningful account of the surviving Korean comfort women's moral agency in their initial design and development of the program doomed it from the onset.<sup>107</sup> Rather than honoring the victims' views and working collaboratively with them to establish an acceptable program of reparations, the government initially resisted claims of responsibility and only sought to "dialogue" with victims as an afterthought. Japan further alienated victims in two ways.<sup>108</sup> By offering meager awards to survivors, the Japanese government conveyed the message that these atrocities were mere inconveniences rather than drastic blows to the mental and physical health of the victims. Japan also alienated victims by refusing their request to identify and in some public way acknowledge the responsibility of the persons responsible for the atrocities committed.<sup>109</sup>

Consistent with the growing number of reparations and restitution-based actions worldwide, the United Nations formally addressed these issues in the 90s through the work of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>110</sup> This work formally developed through the efforts of Special Rapporteurs, Theo van Boven and M. Cherif Bassiouni, ultimately resulted in the development of the UN "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human

---

<sup>103</sup>*Id.* See generally Mary Margaret Penrose, *Impunity—Inertia, Inaction, and Invalidity: A Literature Review*, 17 B.U. Int'l L.J. 269 (Fall, 1999).

<sup>104</sup>*Id.*

<sup>105</sup>Hicks, *supra* note 102, at 262.

<sup>106</sup>*Projects in Republic of Korea*, *supra* note 101.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Hicks, *supra* note 102, at 262-271.

<sup>110</sup>*Draft: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, "hereinafter Draft" Office for the United Nations High Commissioner for Human Rights, Aug. 5, 2004, available at <http://www.ohchr.org/english/events/meetings/index.htm>. See generally, Zakia Afrin, *Foreign Direct Investments and Sustainable Development in the Lease-Developed Countries*, 10 Ann. Surv. Int'l & Comp. L. 215, 223-4.

Rights Law and Serious Violations of International Humanitarian Law.”<sup>111</sup> These principles present specific obligations on states guilty of human rights violations.<sup>112</sup>

The aforementioned principles relating to the victims of human rights violations formally embody restitution and compensation as remedial or reparative mechanisms to address past injustices.<sup>113</sup> Like the principles, the aforementioned reparations cases envision diverse means and mechanisms for addressing historic injustices. Redress, restitution, reconciliation, remediation, rehabilitation, recollection, retribution, compensation, and apology are all associated with the issue of reparations.<sup>114</sup> The shared character of each of these terms is the intention to correct or otherwise harmonize the past and the present. As a compliment to these mechanisms, I propose an institutional model of reparations that promotes the participation of victims in the existing institutions of the societies in which they suffered historic injustices.

### **Institutional Reparations: The South African Experiment**

The focus of human rights community and commentators on truth commissions, compensation, and restitution in response to historic injustices, has overshadowed the role of political, economic, and educational institutions in the reparations process. Although space does not allow a full elaboration of the

---

<sup>111</sup> Adopted and proclaimed by the General Assembly resolution 60/147 of 16 Dec. 16, 2005. Available at <http://www.ohchr.org/english/law/remedy.htm>. See also Christopher Keith Hall, *UN Convention on State Immunity: The Need for A Human Rights Protocol*, 55 Int'l & Comp. L.Q. 411, 413-14 (April, 2006).

<sup>112</sup> *Id.* at ¶¶ 19, 20 provide:

19. Restitution should, wherever possible, restore the victim to the original situation before the violations of international human rights law or serious violations humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty; enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

<sup>113</sup> *Draft, supra* note 107.

<sup>114</sup> *Id.* See generally Roy L. Brooks, *Getting Reparations For Slavery Right—A Response To Posner and Vermeule*, 80 Notre Dame L. Rev. 251, 270-272 (November 2004).

importance of these institutions in the reparations process, in the remainder of the article I seek to point out this theoretical limitation through consideration of the role of economic institutions in the reparations process for groups subjected to historic injustices.<sup>115</sup>

Post apartheid South Africa highlights the need for structural reparations due to the systemic exclusion of blacks from land ownership, political participation, and economic ownership for most of the twentieth century.<sup>116</sup> Rather than an assessment of South Africa's reparations policies, this article intends to highlight the limitations of traditional reparations approaches to address broad ranging group based injustices, and the possibility of remedying those injustices using a structured institutional based approach. Although I use South Africa as an example where this approach is being tried, space does not allow a full-scale assessment of the quality and sufficiency of the government's implementation of the program. Instead, this article serves to highlight the way that an institutional rather than an individual based approach to reparations, can address structural injustices neglected by traditional reparations approaches while fostering the moral agency of victims in redressing past harms.

South Africa's Promotion of National Unity and Reconciliation Act directed the Reparations and Rehabilitation Committee of the Truth and Reconciliation Commission to consider matters referred by the Committee on Human Rights Violations and the Committee on Amnesty, in addition to its responsibility for recommending "Urgent Interim Reparations" for qualifying victims.<sup>117</sup> Through these provisions, the legislation directed the Committee to consider individual reparations applications and awards for "the victims of gross human rights violations" consistent with the testimony received from the two other committees comprising the TRC.<sup>118</sup> In theory, this focus allowed the Committee to match

---

<sup>115</sup> For a detailed discussion of the role of economic, political, and educational institutions in providing reparations for slavery and segregation to African Americans, see Carlton Waterhouse, *The Full Price of Freedom: African American Responsibility to Repair the Harms of Slavery and Segregation* (August 2006) (unpublished Ph.D. dissertation, Emory University) (on file with author).

<sup>116</sup> Heather Deegan, *The Politics of the New South Africa: Apartheid and After* 3-67 (Essex, England: Pearson Education, 2001). The Australian aborigines, the Native Americans of North America, and African Americans represent additional groups who would benefit from structural reparations designed to produce long-term remediation of long standing injustices. See generally *When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice* (Roy L. Brooks ed., New York: New York University Press, 1999).

<sup>117</sup> Promotion of National Unity and Reconciliation Act, No. 34 of 1995, in 1 1995 JSRSA 2-385 available at <http://www.polity.org.za>. Ch. 5, P 25(1)(a)(i)(aa)- 25(1)(a)(i) (bb) and Ch. 5, P 25(1)(b)(i). See also Penelope E. Andrews, *Reparations for Apartheid's Victims: the Path to Reconciliation?*, 53 DePaul L. Rev. 1155, 1163-5 (Spring 2004).

<sup>118</sup> *Id.* at Ch. 5, P 25(1)(a)(i)-(1)(b)(i). This group of roughly 20,000 victims contrasts with

individual reparations investigations with the corresponding testimony of victims regarding gross human rights violations and perpetrators in pursuit of amnesty.<sup>119</sup> This process did not work as originally contemplated, however, since the provision of reparations experienced considerable delays relative to the grants of amnesty.<sup>120</sup>

Ultimately, the TRC submitted a host of recommendations addressing the individual needs of “victims,” their relatives, and community’s in addition to the broader society.<sup>121</sup> Regarding the larger society, the TRC proposed affirmative action for the business sector generally, and the media sector specifically; the creation of a Business Reconciliation Fund to finance black entrepreneurship, land redistribution, compensation for loss of businesses or wages during the unrest of the 1980s and 1990s; and a mandatory scheme requiring restitution by business “for those who have suffered from the effects of apartheid discrimination”.<sup>122</sup> In 1998 the TRC offered the following in its Final Report:

The road to reconciliation, therefore, means both material reconstruction and the restoration of dignity. It involves the redress of gross inequalities and the nurturing of respect for our common humanity. It entails sustainable growth and development in the spirit of ubuntu ... It implies wide-ranging structural and institutional transformation and the healing of broken human relationships. It demands guarantees that the past will not be repeated. It requires restitution and the restoration of our humanity—as individuals, as communities and as a nation.<sup>123</sup>

To this end, the TRC recommended two forms of reparations for those persons

---

the millions of black South Africans who suffered daily human rights abuses under apartheid from 1960 to 1994. *See also* Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 394-6 (Winter, 2003).

<sup>119</sup>*Id.* at Ch. 5, P 25(1)(a)(i). *See also* Marianne Geula, *South Africa’s Truth and Reconciliation Commission As An Alternative Means of Addressing Transitional Government Conflicts in A Divided Society*, 18 B.U. Int’l L.J. 57, 65-8 (Spring 2000).

<sup>120</sup>Alex Boraine, *A Country Unmasked: Inside South Africa’s Truth and Reconciliation Commission* (Oxford University Press: Oxford, 2000), pp. 334-335. Although the first Urgent Interim Reparations award took place in July 1998, from 1996 to 1998 the TRC had ruled on almost 200 amnesty applications. Members of the Reparations Committee expressed frustration that human rights violators received amnesty for their crimes long before their victims received reparations. *See* Geula, *South Africa’s Truth and Reconciliation As An Alternative Means of Addressing Transitional Government Conflicts in A Divided Society*, *supra* note 116.

<sup>121</sup>TRC Report Vol. 5, Ch. 5.

<sup>122</sup>*Id.* at Ch. 8. *See also* *A Dream Deferred: Comparative and Practical Considerations for the Black Reparations Movement*, 58 N.Y.U. Ann. Surv. Am. L. 497, 499 (2003).

<sup>123</sup>Truth and Reconciliation Commission of South Africa Report (hereinafter “TRC”), Vol. 6, sec. 2, ch. 4, p. 138.

it certified as claimants.<sup>124</sup> The Reparations and Rehabilitation committee of the TRC recommended immediate reparations, titled “Urgent Interim Reparations,” for those facing pressing needs at the time the Commission submitted its first report, and a long-term reparations program, titled “Individual Reparations Grants,” requiring payments over a six-year term for the entire class of recipients.<sup>125</sup> The interim reparations recommended took the form of compensation for health care, education, housing, welfare and other services and included compensation as high as R 12000 (approximately \$1,630).<sup>126</sup> After receiving the final volume of the TRC report, on April 15, 2003, the President’s Fund decided to provide a one-time payment of R 30,000 to the 19,000 designated victims, instead of the six-year award of R 17000 to R 23000 rand, totaling R 80 million.<sup>127</sup> Under the TRC recommendation, however, the government would have provided up to R 2.8 billion for Individual Reparations Grants.<sup>128</sup> This difference resulted from a philosophical disagreement between President Thabo Mbeki and the TRC regarding financial priorities and the benefit of individual reparations grants. President Mbeki saw individual grants in the least favorable light, arguing that the transformation of the society best reflected reparations for the victims of apartheid.<sup>129</sup> The TRC, in contrast, saw reparations for the TRC designated victims of apartheid as an important symbolic and material response to the injustice they suffered at the hands of the previous government.<sup>130</sup>

Under the United Nations “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, millions of South Africans arguably qualified for compensation based on physical and

---

<sup>124</sup>*Id.*

<sup>125</sup>TRC, Vol. 6, Sec. 2, Ch. 8, p. 172. See also Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 391-2 (Winter 2003).

<sup>126</sup>*Id.* See also Susan Ayres, *Helene Cixous’s The Perjured City: Nonprosecution Alternatives To Collective Violence*, 9 N.Y. City L. Rev. 1, 27-8 (Winter 2005).

<sup>127</sup> South African President Thabo Mbeki Statement to the National Houses of Parliament and the Nation (hereinafter “President’s Statement”) at the tabling of the Report of the Truth and Reconciliation Commission, April 15, 2003, at <http://www.pmg.org.za/docs/2003/appendices/030610presrec.htm>.

<sup>128</sup>TRC, *supra* note 122.

<sup>129</sup>*President’s Statement, supra* note 124. See also Brandon Hamber, *Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 Fordham Int’l L.J. 1074, 179 (April 2003).

<sup>130</sup>TRC Final Report, Vol. 6, Sec. 2, Ch. 2, pp. 105-109. Susan Ayres, *Helene Cixous’s the Perjured City: Nonprosecution Alternatives to Collective Violence*, 9 N.Y. City L. Rev. 1, 28 (Winter 2005).

mental harm; lost opportunities; moral damage; and legal and medical expenses.<sup>131</sup> The TRC reparations grants paled in comparison to the harms inflicted on South African blacks, yet an award of compensation to the majority of South Africans was also untenable.<sup>132</sup> The harms of apartheid could not be meaningfully redressed by a single R 30,000 grant or a six year R 23,000 award.<sup>133</sup> Apartheid robbed the majority of South Africans of the skills and opportunities needed to participate fully in the economic sector of South African society.<sup>134</sup>

In 1998, 85% of the country's managers were White while, in addition, Whites made up 93% and 92% respectively of the senior and executive managers.<sup>135</sup> Blacks made up 15% of all levels of management and Native African women accounted for only 2% of the country's managers, though they represented roughly 35% of the working age population.<sup>136</sup> Relative to income, of South Africans making R 6401 or more per month, Whites outnumber Africans three to one, though in population Africans outnumber whites eight to one.<sup>137</sup> At the bottom of the income scale, the inverse is true: Of South Africans making less than R 1600 per month, Blacks outnumber Whites eighteen to one.<sup>138</sup>

To address the legacy of apartheid, the government passed a series of laws.<sup>139</sup> These include: the Higher Education Act, the Skills Development Act, the Employment Equity Act, the Black Economic Empowerment Act, the Land Restitution and Reform Act, Restitution of Land Rights Act, and the Land Reform (Labour Tenants) Act.<sup>140</sup> Although each of these address some reparative purpose

---

<sup>131</sup> TRC Final Report, Vol. 6, Sec. 2, Ch. 7 pp. 160-1. *See also Draft, supra* note 107.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Deegan, *supra* note 113, at 120.

<sup>136</sup> *Id.*

<sup>137</sup> Seven hundred seventy five thousand one hundred sixty five (775,165) whites in South Africa earned R 6401 per month or more. In contrast, only two hundred twenty three thousand one hundred sixteen (223,116) Native Africans did so. For every Native African making R 6401 or more per month, there are three whites making as much or more. 2001 South African Census Report, Table 16.3, available at <http://statssa.gov.za/census01/HTML/RSAPrimary.pdf>

<sup>138</sup> Four million two hundred forty one thousand three hundred seventy one (4,241,371) Native blacks make R 1600 or less per month. Only two hundred thirty seven thousand five hundred and five whites (237,505) made R 1600 or less per month. Accordingly, for every white person making R 1600 or less per month, there are eighteen blacks making that or less. *Id.*

<sup>139</sup> *President's Statement, supra* note 124.

<sup>140</sup> <http://www.info.gov.za/documents/acts/index.htm>. *See Higher Education Act*, No. 101 of 1997, *Skills Development Act*, No. 97 of 1998, *Employment Equity Act*, No. 55 of 1998. Ch.

relative to the history of apartheid, the rest of this article will examine the Employment Equity Act and the Black Economic Empowerment Act because of their direct relation to the society's economic institutions. Each of these statutes will be described in brief, including the reparative function they perform, before discussing the combined impact of the individual programs.

### **The Employment Equity Act and the Black Economic Empowerment Act**

The Employment Equity Act establishes affirmative employment practices for training and hiring suitable persons from designated groups.<sup>141</sup> For companies with fifty or more employees or with substantial annual receipts for their industry, the Act requires numerical goals and preferential treatment to ensure equitable representation.<sup>142</sup> The Act directs employers to implement measures that identify and eliminate employment barriers that adversely affect people from designated groups; further diversity in the workplace; make reasonable accommodation for people from designated groups to ensure representation; and to implement appropriate training measures.<sup>143</sup>

The specified purpose of the Act includes:

Implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.<sup>144</sup>

As a reparative measure, the Act seeks to create job opportunities and training across professions and career paths for Blacks excluded from occupying most

---

1, s 1., *Black Economic Empowerment Act*, No. 53 of 2003, *Land Restitution and Reform Amendment Act*, No. 18 of 1999, *Restitution of Land Rights*, No. 22 of 1994, *Land Reform (Labour Tenants) Act*, No. 3 of 1996. See also *Affirmative Action in the United States and South Africa: Lessons From the Other Side*, 13 Temp. Int'l & Comp. L.J. 187, 213-4 (Fall 1999).

<sup>141</sup> Designated groups consist of black South Africans, women, and people with disabilities. *Employment Equity Act*, No. 55 of 1998. Ch. 1, s 1. Black South Africans include Native Africans, Indians, and Coloureds. See generally Karin van Marle, "Meeting the World Halfway"- *The Limits of Legal Transformation*, 16 Fla. J. Int'l L. 651, 658- 660 (September 2004).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at Ch. 3, s 15(2).

<sup>144</sup> *Id.* at Ch. 1, s 2.

positions under apartheid.<sup>145</sup> The goal of the Act is to bring the masses of the South African population slowly into offices, positions, and career paths consistent with their numerical representation within the society.<sup>146</sup>

In South Africa, this means the reversal of a century-long structural exclusion of these groups from gaining the training and skills required for these jobs, as well as the economic benefit of the higher salaries they provide. Because the Act mandates implementation at all levels for designated employers, its faithful implementation will racially reform those institutions, ensuring that the victims of apartheid benefit from the power and positions from which they were excluded. Although the process will likely take a generation or more for completion, due to the extreme level of deprivation caused by apartheid, it ultimately places Blacks, along with Whites, in control of the economic institutions of the nation. Although this program operates primarily as an individual, rather than a communal based approach to reparations, the transfer of power within these institutions to the former victims of apartheid means the redistribution of the benefits associated with their operation, as well as those gained from the positions held within them. In the South African context, where the apartheid victims constitute the majority of the population, this methodology addresses a significant aspect of the group-based injury caused by apartheid. The status, money, and power associated with positions obtained through the Act directly reverse the former denial of the same positions based on race.

Substantial debate exists regarding the benefits of affirmative action and related programs in both United States and in South Africa. As a nation in transition, South Africa's approach may be viewed as unique to situations of transitional justice inapplicable to other frameworks.<sup>147</sup> However, the distinction between ordinary and transitional justice should not be overstated.<sup>148</sup> South Africa employs affirmative action along with a host of other reparative programs, all of which should be viewed as part of a comprehensive strategy to redress the harms of apartheid.<sup>149</sup> The program in the United States, however, originated along similar

---

<sup>145</sup>*Id.* at Preamble

<sup>146</sup>*Id.*

<sup>147</sup>For an examination of transitional justice theory see Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

<sup>148</sup>A rigid distinction between transitional and ordinary periods neglects the dynamic nature of justice and the importance of backward looking justice not just in transitional periods but at all times. See Aeyal M. Gross, *The Constitution, Reconciliation, And Transitional Justice: Lessons From South Africa And Israel*, 40 *Stan. J. Int'l L.* 47, 50-52 (2004).

<sup>149</sup>The debate over affirmative action as a tool for addressing historic injustices continues. The chief complaints against programs in the U.S. and elsewhere fit a few primary forms: 1) affirmative action is unfair to non-beneficiaries; 2) affirmative action is unfair to beneficiaries; 3) affirmative action lowers quality; and 4) affirmative action promotes

lines.<sup>150</sup> Because of the historic discrimination against Blacks and others, the American government instituted affirmative action in hiring and contracting in the wake of the civil rights movement as a way to remedy the discrimination of the past.<sup>151</sup>

However, I distinguish South Africa from America's affirmative action program on two primary bases: the continued minority status of black beneficiaries in the American context; and the limited scope of the American program. Affirmative action in the United States could have functioned reparatively to remedy some harm of slavery and segregation; however, as designed and implemented it failed to do so.<sup>152</sup> The continued minority status of Blacks in the United States, coupled with the persistence of racism, restricted the ability of Blacks to gain offices and positions in American society that they and their ancestors were denied based on race. The limited scope of mandatory affirmative action in America further exemplifies this point, since it was restricted to government positions and contractors and never applied to large segments of the private sector.<sup>153</sup> Moreover, even in government contracting women, minorities and other small disadvantaged businesses combined only received a five percent set aside under some programs for federal contracts, even though they numerically represented the vast majority of the country's population.<sup>154</sup>

The South African program, in contrast, places the country's vast resources in the hands of the former victims, providing them with an institutional structure to support the long-term remediation of the harms of apartheid.<sup>155</sup> I do not suggest that affirmative action should be viewed as a panacea or potential cure for all of

---

division. Thomas Sowell, *Affirmative Action Around the World: An Empirical Study* 166-184 (New Haven: Yale University Press, 2004). See also Faye J. Crosby, *Affirmative Action is Dead: Long Live Affirmative Action* 221-239 (New Haven and London: Yale University Press, 2004). For a favorable examination of affirmative action policies in the United States and South Africa see, Michael Higginbotham, *Affirmative Action In The United States And South Africa: Lessons From The Other Side*, 13 Temp. Int'l & Comp. L.J. 187 (1999). See also Adila Hassim, *Affirmative Action Policies In The United States And South Africa: A Comparative Study*, 2000 St. Louis-Warsaw Transatlantic L.J. 119 (2000).

<sup>150</sup> Philip Rubio, *A History of Affirmative Action: 1619—2000* 151-167 (University Press of Mississippi, 2001).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 188.

<sup>153</sup> For an examination of Affirmative Action case law, see Roy L. Brooks, Gilbert Paul Carrasco & Gordon A. Martin, Jr., *Civil Rights Litigation*, 1071-1171 (Carolina Academic Press, 1995).

<sup>154</sup> Consider the National Defense Authorization Act, Public Law 99-661, section 1207 which established a 5% contract goal on Department of Defense awards to small disadvantaged businesses (SDB).

<sup>155</sup> *Supra* note 124.

South Africa's ills. Rather, I seek to emphasize the program's potential to provide new opportunities to large numbers of South Africans that enables them to take an active role in redressing the historic discrimination of the South Africans employment sector through their role in staffing and managing the nation's businesses.

The Black Economic Empowerment Act (BEE) also promotes an institutional approach to remedying apartheid's harms. Under the terms of this Act, companies doing business with the South African government or any organ of state for procurement, licensing, or public private partnerships, must diversify their equity ownership to include blacks at levels set by the cabinet members that oversee the particular industries.<sup>156</sup> Along with set targets, officials use a scorecard that examines the following: direct empowerment through ownership and control of enterprises and assets; procurement from the aforementioned designated groups; the development of enterprises involving designated groups; and corporate investment that benefits members and communities from the designated groups and other workforce related categories.<sup>157</sup> This program could provide substantial institutional reparations through redistributing ownership of South Africa's corporations to the victims of apartheid.

Criticisms of the BEE abound. Substantial challenges exist to enable it to meet its potential.<sup>158</sup> Because the program has turned some ANC elites into instant millionaires, critics see it as a vehicle for enriching the party faithful rather than a genuine means of transforming South African society.<sup>159</sup> The early criticism of the BEE's exclusive enrichment of a few individuals seems well placed. To meet its reparative potential, the benefit of equity ownership in South Africa's businesses must be spread across those communities and groups harmed by apartheid to remedy the exclusionary practices of the previous political and economic regime.

---

<sup>156</sup> *Broad-Based Black Economic Empowerment Act*, No. 53 of 2003. See generally Daniel M. Ludlam, *From Mandela and MLK to Beecom and the SBA: Laying the Groundwork For Equity Through Business Development Programs in South Africa and the United States*, 35 Ga. J. Int'l Comp. L. 369, 389-90 (Winter 2007).

<sup>157</sup> *Id.* See also *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment*, available at <http://www.thedti.gov.za/bee/bee.htm>.

<sup>158</sup> As a part of the ANC's adoption of a neo-liberal market philosophy to transform South African society, the BEE faces many of the same criticisms. For a detailed analysis and critique of the ANC's move to a right of center neo-liberal economic approach, see Ian Taylor, *Stuck in Middle GEAR: South Africa's Post Apartheid Foreign Relations* (Westport, Connecticut: Praeger Publishers, 2001), pp. 67-83. See also Hein Marais, *South Africa: Limits to Change: The Political Economy of Transition* (Capetown: University of Capetown Press), 2ed. 2001, pp. 160-195.

<sup>159</sup> Gumede, 'Down to business but nothing to show', in *Thabo Mbeki's World: The Politics and Ideology of the South African President*, 206-217 (S. Jacobs & R. Callan eds., Scottsville: University of Natal Press, 2002)

In response to the perceived abuse and the narrow initial approach to the program, the government has more recently directed the program to communities, civil society, and workers.<sup>160</sup> This approach flows from the adoption of a broad based BEE “aimed at redressing the imbalances of the past by seeking to substantially and [sic] equitable transfer ownership, management, and control of South Africa’s financial and economic resources to the majority of its citizens.”<sup>161</sup>

Succeeding in this task presents a challenge that will require greater governmental monitoring and private sector cooperation than has occurred so far.<sup>162</sup> The potential offered by the program to redress some of the economic harms of apartheid and to enable its former victims to own, control, and participate in the institutions that once excluded them, underscores the potential of institutional based reparations to redress deep structural inequities untouched by the prevailing models of reparations.<sup>163</sup> In short, institutionally based reparations that focus on providing the former victims of human rights abuses with the ability to own and manage resources from which they were formerly excluded represent an important and under explored reparations mechanism.<sup>164</sup>

Beyond the position, status, and income redistributed by the Employment Equity Act, the BEE can potentially redistribute wealth in the society and the power that accompanied it. Moreover, this institutional mechanism for addressing the harms of apartheid in South Africa highlights the way that institutional reparations can alter the fundamental distribution of goods in a society and its communities. Together these two Acts, along with the political reform that places the former apartheid victims in power and other measures, can change the institutional structure of the South African economic sector. The distinctness of these institutional approaches underscore my argument that reparations focused on reforming or creating institutional structures can create a wealth of new opportunities for harmed communities, their individual members, and the societies in which they operate. Moreover, unlike the passive receipt of compensation, participation in South Africa’s institutionally based programs can empower victims to engage their society as political and economic agents who play a vital role in

---

<sup>160</sup>*Id.* at 212- 17.

<sup>161</sup>*Id.* at 214.

<sup>162</sup>*Id.* at 215- 17.

<sup>163</sup>*Id.*

<sup>164</sup> This approach fits into the transformative model of justice that focuses on institutional changes that transform the society at multiple levels rather than a mere governmental transition. Eric Daly, *Transformative Justice: Charting A Path To Reconciliation*, 12 Int'l Legal Persp. at 74 (2002). Although Daly describes the comprehensive nature of transformative justice in theoretical terms, his analysis of South Africa omits consideration of the panoply of legislative and executive based programs intended to redress the injustices of apartheid focusing exclusively on the TRC as an agent of transformative justice.

shaping its future.

### **Conclusion**

Clearly, the successful implementation of institutional schemes in the South African context also faces many challenges.<sup>165</sup> Making sure that all victims can take advantage of opportunities and participate equally in reforms, minimizing resentment held by other members of society not directly benefiting from reparative programs, and ensuring that new or reformed institutions deal fairly and openly within the society represent a few of the many difficulties that institutional based reparations need to address in South Africa and elsewhere.<sup>166</sup> Nonetheless, developing more inclusive reparations programs that engage victims in their design and implementation serves an overlooked but important role in the process of redressing historic injustices. Accordingly, institutional reparations can go a long way toward decreasing the number of bad and ugly reparations programs and may even produce a good program—one day.

---

<sup>165</sup>See generally Hein Marais, *South Africa: Limits to Change: The Political Economy of Transition* (Capetown: University of Capetown Press), 2ed. 2001 for an assessment of the substantial obstacles facing the ANC's market based approach to societal transformation. See also Guy Arnold, *The New South Africa* (New York: St. Martin's Press, 2000).

<sup>166</sup>*Id.*