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# THE SYMBOLISM AND SUBSTANCE OF REDRESS AND RECONSTRUCTION

Natsu Taylor Saito\*

The interplay of symbolism and substance in redress and reconstruction is the broad topic I would like to address as we open this conference on reparations and reconstruction in the new century, and I would like to start with the importance of speaking truth. Not speaking truth to some power *out there*, but speaking truth to ourselves, for if we believe that power resides in the people, then we have both the power and the responsibility to change that which we know is wrong.<sup>1</sup>

Speaking truth begins with a willingness to call things by their proper names, and in the context of redress and reparations, the first thing we must name is the wrong. Many of us here focus our energies on obtaining redress through various legal systems, for the law promises a remedy for every wrong. But, at least in the United States, in our discussions about reparations we have been too quick to jump to debates about the remedy – who should get what, and when – before we have specifically identified the wrong for which we seek a remedy.<sup>2</sup>

A theme of this plenary is what we can learn from South Africa's Truth and Reconciliation Commission (TRC). In identifying the wrongs it would address, the TRC limited its inquiry to gross violations of human rights committed between 1960 and 1994.<sup>3</sup> With respect to these wrongs, the TRC had two major goals: The first was to "out" the truth. This was the primary

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<sup>1</sup> Noam Chomsky says, "It has been said that I dare to speak truth to power. Maybe so, but that's never been my objective. My job . . . is to speak the truth to the great mass of people without political or economic power . . . I take this as my task out of a firm conviction that knowledge of the truth is itself empowering." *Quoted in* WARD CHURCHILL, *FANTASIES OF THE MASTER RACE: LITERATURE, CINEMA AND THE COLONIZATION OF AMERICAN INDIANS* (1998) at ix.

<sup>2</sup> *See, eg. Forum: Making the Case for Racial Reparations*, HARPER'S MAGAZINE, Nov. 2000, at 37 (interviewing "four of the country's most successful class-action lawyers to strategize about how to bring America's most peculiar sorrow into a court of law").

<sup>3</sup> *See generally*, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, vols. 1-5 (1998) [hereinafter, TRC REPORT]; DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* (1999); Albie Sachs, *Truth and Reconciliation*, 52 SMU L. REV. 1563 (1999).

justification for individual amnesties, conditioned on full disclosure, and for an emphasis on obtaining the stories of the victims through testimony provided to the Human Rights Violations Committee.<sup>4</sup>

The TRC's second goal was to provide redress, through the Reparation and Rehabilitation Committee. This goal, while never adequately compensating the victims, would, in the words of former Justice Minister Abdullah Omar, "restore the dignity of victims, the dignity of communities, and ultimately, the dignity of the nation as a whole."<sup>5</sup> While presenting a daunting task, these goals are nonetheless fairly clearly defined and somewhat limited in scope. One can, at least, point to a concrete wrong and debate the effectiveness of the remedy.

From my very limited observations here in Capetown, it seems that part of the problem South Africa still faces is that while the TRC was quite clear in acknowledging its mandate and its limited capacity, observers both inside and outside South Africa hoped it would do more. That it would respond not only to all the injustices of nearly fifty years of apartheid, but those created by centuries of colonial rule, with its legacy of genocide, enslavement, confiscation of land, and exploitation of natural resources and human labor.<sup>6</sup> Two things that we learn from the work of the Truth and Reconciliation Commission are the importance of clearly identifying the wrong being redressed, and the importance of not acting as if all other wrongs have been remedied in the process.<sup>7</sup>

Recent discussions of redress in the United States have focused on reparations for African Americans.<sup>8</sup> In this context, we often assume that we know what the wrong is. Of course, it is slavery and racism, but we rarely

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<sup>4</sup> See Hon. Abdullah Omar, *Truth and Reconciliation in South Africa: Accounting for the Past*, 4 BUFF. HUM. RTS. L. REV. 5, 8 (1998) (explaining the purpose of the three subcommittees of the TRC).

<sup>5</sup> *Id.*, at 11.

<sup>6</sup> For a summary of this history, see generally, 1 TRC REPORT, *supra* note 4, at ch. 2.

<sup>7</sup> For a discussion of the Truth and Reconciliation Commission in the broader context of South Africa's efforts to create institutions explicitly incorporating human rights norms, see Makau wa Mutua, *Hope and Despair for a New South Africa; The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63 (1997).

<sup>8</sup> See generally, Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 19 B.C. THIRD WORLD L.J. 429 (1998) (joint issue); RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000); ROY L. BROOKS, ed., *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (1999).

examine these concepts to see if we are, in fact, talking about the same wrongs. For example, I often find myself in conversation with people who assume that the wrong of slavery was racism. There is a real reluctance to dissect what specifically was wrong with that brutally inhuman system of economic exploitation which not only used and perpetuated racism, but determined so much of our current hierarchies of power and privilege. One reason for this is that it is much easier to condemn racism than it is to find agreement on what is actually wrong with exploitative economic relations. Where would we stop?

The desire to focus narrowly on race in the United States and to avoid the complications of economic relations is, in part, what led us down the limited, perhaps dead-end, path of Fourteenth Amendment equal protection jurisprudence.<sup>9</sup> This path has led us to attempt to right the wrongs of slavery and institutionalized racism through "equal protection" and "equal opportunity."<sup>10</sup> But the "wrong" of slavery was much bigger than the slavemaster's failure to enslave in a colorblind manner, and it is cruelly cynical to talk of equal opportunity in a world where color-coded structures of power and privilege are so firmly entrenched. We can see here in South Africa that dismantling apartheid, in its legal form anyway, does not provide real opportunities to the residents of the shanty towns that surround Cape Town. The same is true, if somewhat more veiled, for us in the United States.

To have a meaningful discussion of reparations for African Americans, we must start, I believe, with an honest discussion of the wrongs. Within the U.S. legal system, perhaps this would mean starting with the Thirteenth Amendment, which outlawed slavery and involuntary servitude,<sup>11</sup> to

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<sup>9</sup> The Fourteenth Amendment to the United States Constitution says, in part:  
 . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. XIV (1868). See generally, Boris I. Bittker & Roy L. Brooks, *The Constitutionality of Black Reparations in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE*, *supra* note 9, at 374.

<sup>10</sup> For critiques of "equal rights" jurisprudence, see generally, Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth Century Race Law*, 88 CALIF. L. REV. 1923 (2000); Lisa M. Fairfax, *The Silent Resurrection of Plessy: The Supreme Court's Acquiescence in the Resegregation of America's Schools*, 9 TEMP. POL. & CIV. RTS. L. REV. 1 (1999); Alan Freeman, *Rights and The Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, reprinted in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 29, 30 (Kimberle Crenshaw et al. eds., 1995).

<sup>11</sup> The Thirteenth Amendment reads in full:

develop a jurisprudence of the legacy of slavery – social, political and economic.<sup>12</sup> Perhaps it would force us to acknowledge the history which takes us quite seamlessly from slavery to the use of convict labor and the expansion of the “criminal justice” system<sup>13</sup> to current racial disparities in incarceration rates and the oft-discussed “criminalization” of being black and male in America today.<sup>14</sup>

Reparations, by definition, relate to the past for they are designed to remedy wrongs that have already occurred. But I believe that what we care most about are the injustices and inequities we see around us today. We do not seek retribution, but a decent life for those in our communities, however broadly we define those. Thus, as we begin a truthful discussion of the wrongs suffered by African Americans we will move, inevitably, from narrow views of the wrongs and the remedies to a broader discussion of how current structures of social, political and economic power have emerged

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Section 1. 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.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. Const., Amend. XIII (1865). Attempts to use the Thirteenth Amendment to eliminate discriminatory practices have generally been unsuccessful. See, eg., *Plessy v. Ferguson*, 163 U.S. 537 (1897) (upholding the policy of “separate but equal” and dismissing plaintiff’s attempt to have Louisiana’s policy of segregating railroad cars struck down as a “badge of servitude.”)

<sup>12</sup> A good start might be to analyze current social, political and economic structures in the terms of Higginbotham’s “ten precepts of American slavery jurisprudence” (which he explicates in terms of inferiority, property, powerlessness, racial “purity,” manumission and free blacks, family, education and culture, religion, liberty, and “by any means possible”). See A. Leon Higginbotham, Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney’s Defense and Justice Thurgood Marshall’s Condemnation of the Precept of Black Inferiority*, 17 *CARDOZO L. REV.* 1695 (1996).

<sup>13</sup> On the history of convict labor and its relationship to slavery, see generally, DAVID OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996); MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 (1996); ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH (1996).

<sup>14</sup> See generally, JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996) (noting the disparate impact of current trends in criminal justice and the crime control industry on African American men); MARC MAUER, RACE TO INCARCERATE (1999) (the Sentencing Project’s critique of current criminal justice policies that result in the incarceration of nearly one in three black men); RANDALL KENNEDY, RACE, CRIME AND THE LAW (1997) (generally addressing the history of racial disparities in law enforcement).

from those wrongs, and how we can now change those structures to make them more equitable.<sup>15</sup>

But before we consider dividing up the pie of American wealth and resources, in the interest of honesty about the wrongs, and to fashion principled remedies, we must be willing to question the legitimacy of the pie itself. Just where does this pie come from? And from whose apples was it made?

Slavery is a tremendously important source of the contemporary wealth of the United States.<sup>16</sup> However, a further enquiry would entail an analysis of the United States' history as a settler/colonialist regime. This means assessing at least two other major issues. First, we have to take seriously the claims of indigenous peoples to the land, much of which, even under currently acknowledged treaties is illegally occupied by the United States.<sup>17</sup> Second, we have to acknowledge the extent to which the wealth we want more equitably distributed comes from the expropriation of the labor and natural resources of the rest of the world.<sup>18</sup>

I take us down this path of ever-expanding injustices not to say that we need to fix all of the world's inequities at once, but to urge us to be brutally honest - with ourselves, first of all - in identifying the wrongs we are addressing and ensuring that the redress we struggle for takes us toward our broader goals of social and economic reconstruction. I say this because I

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<sup>15</sup> See generally, Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

<sup>16</sup> See generally, Donald Aquinas Lancaster, Jr., *The Alchemy and Legacy of the United States of America's Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations*, 43 HOW. L.J. 171 (2000).

<sup>17</sup> See generally, WARD CHURCHILL, *THE STRUGGLE FOR LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION* (1999); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615 (2000); Anthony Peirson Xavier Bothwell, *We Live on Their Land: Implications of Long-Ago Takings of Native American Indian Property*, 6 ANN. SURV. INT'L & COMP. L. 175 (2000); Nell Jessup Newton, *Compensation, Reparations, and Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 454 (1994).

<sup>18</sup> These issues are addressed in contexts far too numerous to cite here. For a few examples, see generally, *International Law and the Developing World: A Millennial Analysis*, 41 HARV. INT'L L.J. 595 (2000); Obijiofor Aginam, *Global Village, Divided World: South-North Gap and Global Health Challenges at Century's Dawn*, 7 IND. J. GLOBAL LEGAL STUDIES 603 (2000); Penelope E. Andrews, *Globalization, Human Rights and Critical Race Feminism: Voices from the Margins*, 3 J. GENDER, RACE & JUST. 373 (2000); Elvia R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Legal Theory and Gender at the U.S.-Mexico Border*, 49 DEPAUL L. REV. 729 (2000).

believe that every movement to obtain reparations contains within it both the potential to further other struggles for justice and the potential to reinforce existing structures of power and privilege.<sup>19</sup>

The experience of the Japanese American community in obtaining redress for its internment during World War II provides us with a microcosm which illustrates both of these possibilities. In the case of redress for Japanese Americans, it looks as if the wrong has been identified clearly enough: the wartime imprisonment and confiscation of the property of nearly 120,000 people, over 70% of them U.S. citizens by birth, on the basis of their race and national origin, with no regard for due process of law.<sup>20</sup> The redress provided was clearly symbolic. It consisted of an apology, \$20,000 cash payments to surviving internees, and a fund for public education.<sup>21</sup> However, it was symbolism that meant a great deal to the affected community. The movement for redress culminated in an acknowledgment of the suffering, which allowed for much-needed psychic healing and laid the groundwork for important educational work.

Many of my generation (the children of internees) were initially quite skeptical of the redress movement. We did not see how any token payment made by the government could possibly compensate our parents and grandparents for the trauma and losses that forever scarred their lives. Most of us, however, came to appreciate the importance of truth-telling, of public acknowledgment and apology, and of symbolic reparations. What we were not vigilant enough about was the symbolic meaning of these reparations on a larger scale.

Chris Iijima has written a wonderful piece examining the extent to which Japanese American redress, rather than righting wrong, has been positioned

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<sup>19</sup> See Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 487-501; 19 B.C. THIRD WORLD L.J. 477, 487-501 (1998) (acknowledging the "potential underside of reparations" and the need for "careful strategic framing of debate and action and anticipatory grappling with a reparations movement's both bright and darker potential").

<sup>20</sup> On the internment generally, see MICHIE WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS* (1996); for what is still arguably the best analysis of the "wrong" see Eugene V. Rostow, *The Japanese American Cases - A Disaster*, 54 YALE L. J. 489 (1945).

<sup>21</sup> These were provided for by the Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified at 50 app. U.S.C. § 1989). Educational projects were supported by the Civil Liberties Public Education Fund, established by the Act.

to reward accommodation to wrong.<sup>22</sup> He points out how the congressional debates on the redress legislation emphasized why redress should be granted: the "superpatriotism" of the Japanese American community and its willingness to co-operate with and accommodate injustice. It is the Japanese American community's "loyalty" that is praised, never the resisters who had the courage to call the wrong what it was.<sup>23</sup> Yet, if the wrong is really being redressed, shouldn't they be the heroes?

We see, in fact, that there has been very little attempt to call the wrong by its true name. Instead, it is generally referred to as a "mistake," caused by "wartime hysteria" and racial prejudice.<sup>24</sup> There is no recognition that this was not an aberration in the stream of Asian American history;<sup>25</sup> and thus no recognition that it could happen again. We are, for example, quite oblivious to the parallels that exist with respect to the treatment of Arab Americans today.<sup>26</sup>

We are thus, as Japanese Americans, still contesting the symbolism of the redress received by our community. This is, I believe, an illustration of how important it is in our broader discussions of reparations and reconstruction, to focus on what direction we're taking, and how we wish to use the power we hold to transform our societies. This is particularly true with respect to reparations for African Americans.

We have seen how the Truth and Reconciliation Commission narrowly defined the scope of the wrongs it would address, and how the reconciliation it hopes to achieve is, at best, the first step on a long road to de-constructing the hierarchies of power and privilege created by centuries of colonial rule.

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<sup>22</sup> Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence; The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385, 19 B.C. THIRD WORLD L.J. 385 (1998).

<sup>23</sup> *Id.* at 396-410.

<sup>24</sup> This perspective is reflected in the report of the Congressional Commission appointed to study the internment, which concluded that a "grave injustice" was suffered by Japanese Americans as a result of "race prejudice, war hysteria, and a failure of political leadership." REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982); see also PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* 361 (1999).

<sup>25</sup> See generally, Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997); Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 19 B.C. THIRD WORLD L.J. 37 (1998).

<sup>26</sup> See Natsu Taylor Saito, *Symbolism Under Siege; Japanese American Redress and the Racing of Arab Americans as "Terrorists,"* 8 ASIAN L. J. 1 (2001).

Similarly, any apologies, token payments to individuals or groups, or programs instituted by the government to redress the legacy of slavery must be seen as small steps in a long process of social reconstruction. They are not "solutions," for if they are perceived as resolving the problem, they will simply serve to reinforce existing structures of inequality and exploitation.

We must always ask, as we struggle for compensation, for reparations, and for the reconstruction of our societies, whether we are struggling in ways that support accommodation to and reconciliation with wrong, or whether we are honoring resistance to wrong and participating in the dismantling of the broader structures of oppression. What is the symbolism of the redress we pursue, and what kind of society are we, in fact, constructing?