

EXTRAORDINARY JUSTICE

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ABSTRACT

This Article strikes a contrast to views advanced by Eric Posner, Adrian Vermeule, and others that transitional justice can be sufficiently described and understood as a special case of “Ordinary Justice.” Paying special attention to debates about reparations, this Article argues that transitional justice is extraordinary, reflecting the source and nature of atrocities perpetrated under an abusive regime, and focused on the challenges and goals that define transitions to democracy. In particular, this Article argues that transitional justice is not profane, preservative, and retrospective, but, rather, Janus-faced, liminal, and transformative.

The literature on reparations in transitions is divided between critics who regard reparations as quasi-tort awards that violate basic commitments to individual fairness and those who appeal to collective responsibility, atonement, or reconciliation as special transitional justice theories. These debates have not reached a persuasive resolution because both camps fail to recognize and take full normative account of the extraordinary conditions in abusive regimes. What distinguishes pretransitional abuses from ordinary crime is the role played by an abusive paradigm. An abusive paradigm is a combination of social norms, law, and institutional practice that utilizes a bipolar logic to justify targeted violence. Abusive paradigms gain authority after the collapse of dynamic stability—the overlapping network of associations and oppositions that restricts violence and

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violent impulses in stable regimes. Once dominant, abusive paradigms rationalize and enforce a pathological status inequality that excludes those in an oppressed group from cross-secting identities, allowing abusers to regard them as appropriate targets for exclusion and abuse.

The primary task in transition is to seize the liminal moment between an abusive past and a future committed to human rights, democracy, and the rule of law in order to achieve some level of parity between victims and abusers, in part by creating or reconstituting the network of overlapping identities reflective of a dynamically stable society. Reparations and other transitional justice tools, liberated from the constraints of ordinary justice models, have a role to play in this extraordinary endeavor as sites for what Rosa Ehrenreich Brooks has called “effective norm change.” For example, symbolic reparations can provide official recognition of victims. Material reparations can provide former victims with meaningful access to spheres of public and private life once denied to them as a consequence of their status. Treating reparations as part of the extraordinary endeavor of social transformation also provides ready responses to common objections, including those prominent in debates about historical reparations.

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I. ORDINARY JUSTICE

“This storm is what we call progress.”¹

—Walter Benjamin

Transitional justice asks what a successor regime committed to democracy, human rights, and the rule of law can and should do to achieve justice for the targeted violence and institutionalized human rights abuses perpetrated by and under a predecessor regime.² This is the question Athenians faced upon the fall of the twelve tyrants.³ More recently, “Third Wave” democracy movements⁴ have led to an explosion in the literature on transitional justice⁵ and have spawned wide-ranging interdisciplinary exchange,⁶ a dedicated Oxford journal,⁷ specialized centers and centers in law schools and universities,⁸ and a high-profile NGO that advises transitional regimes on topics ranging from constitutionalism to economic reform and justice programs.⁹

The instinct in transitions is to prosecute and punish everyone.¹⁰ Unfortunately, transitions have limited political and material resources that fall far short of what is necessary to satisfy a host of demands ranging

1. WALTER BENJAMIN, *Theses on the Philosophy of History*, in ILLUMINATIONS 253, 258 (Hannah Arendt ed., Harry Zohn trans., 1968); see *infra* Part 0.

2. David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621, 2621–23 (2006); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 574 (2002).

3. JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 3–23 (2004); PLATO, FIVE DIALOGUES: EUTHYPHRO, APOLOGY, CRITO, MENO, PHAEDO 32 (G.M.A. Grube trans., 2d ed. 2002).

4. See generally SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

5. Kieran McEvoy, *Letting Go of Legalism: Developing a ‘Thicker’ Version of Transitional Justice*, in TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE 15 (Kieran McEvoy & Lorna McGregor eds., 2008); Fletcher & Weinstein, *supra* note 2, at 574.

6. Contemporary conversations about transitional justice began with a debate in print between Professors Diane Orentlicher and Carlos Nino published in the Yale Law Journal. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991); Diane F. Orentlicher, *A Reply to Professor Nino*, 100 YALE L.J. 2641 (1991).

7. INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE, available at <http://ijtj.oxfordjournals.org> (last visited Oct. 2, 2010).

8. See, e.g., Ctr. for Human Rights & Global Just., NYU School of Law, TRANSITIONAL JUSTICE, www.chrgj.org/projects/transitional.html (last visited Oct. 2, 2010); Univ. of Ulster, TRANSITIONAL JUSTICE INSTITUTE, www.transitionaljustice.ulster.ac.uk (last visited Oct. 2, 2010).

9. INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, www.ictj.org (last visited Oct. 2, 2010).

10. ALEX BORAINÉ, A LIFE IN TRANSITION 203 (2008); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 12 (2001); Lisa J. Laplante & Kimberly Theidon, *Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru*, 29 HUM. RTS. Q. 228, 242–43 (2007); Fletcher & Weinstein, *supra* note 2, at 575.

from economic reform to infrastructure reconstruction.¹¹ As a consequence, most transitions cannot punish everyone associated with past wrongs, and international tribunals, including the International Criminal Court, simply cannot make up the difference.¹² In the face of this “justice gap,”¹³ transitional states usually adopt a hybrid approach to transitional justice featuring limited criminal prosecutions that focus on high-level leaders, truth commissions, and reparations.¹⁴

In a characteristically clear-headed essay, Eric Posner and Adrian Vermeule define reparations as “payment[s] . . . justified on back-ward-looking grounds of corrective justice, rather than forward-looking grounds such as the deterrence of future wrongdoing.”¹⁵ Alfred Brophy agrees with this definition, noting that reparations claims are about remedying “long-ago crimes.”¹⁶ On this view, reparations are exclusively retrospective and focused on compensation for past harm, measured historically or counterfactually.¹⁷ This approach to reparations reflects a broader view held by

11. Laplante & Theidon, *supra* note 10, at 243.

12. Fletcher & Weinstein, *supra* note 2, at 579, 584.

13. Christine Bell & Catherine O'Rourke, *Does Feminism Need A Theory of Transitional Justice? An Introductory Essay*, 1 INT'L J. OF TRANSITIONAL JUST. 23, 35 (2007) (citing Gray, *supra* note 2, at 2624–29).

14. Stef Vandeginste, *Reparation, in RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK* 145, 161 (David Bloomfield et al. eds., 2003); Fletcher & Weinstein, *supra* note 2, at 579–80, 605, 625. As examples, reparations have been part of transitional justice efforts in Argentina, Brazil, Chile, El Salvador, Germany, Japan, Malawi, South Africa, and the United States. *See generally*, THE INT'L CTR. FOR TRANSITIONAL JUST., THE HANDBOOK OF REPARATIONS 21–450 (Pablo de Greiff ed., 2008); HAYNER, *supra* note 10, at 7. *See also* Adrian Vermeule, *Reparations as Rough Justice* 3 (John M. Olin Law & Economics, Working Paper No. 260, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=813086 (draft cited with permission of author) (describing reparations as expressions of “rough justice [which] is the intuition that sometimes it is permissible, even mandatory, to enact a scheme of compensatory reparations that is indefensible according to any first-best criterion of justice.”) (italics added).

15. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691 (2003). *See also* Rodney C. Roberts, *The Counterfactual Conception of Compensation, in GENOCIDE'S AFTERMATH: RESPONSIBILITY AND REPAIR* 132 (Claudia Card & Armen T. Marsoobian eds., 2007) (limiting the “species of justice” to “distributive justice and rectificatory justice”). “Reparations” here are to be distinguished from “restitution,” which, rather than compensating for harm, simply seeks to return that which was taken. While the distinction may appear muddy in some cases, the line is between compensating for a measurable loss and compensating for harm done or wrong suffered. Claims for return of seized property, therefore, are claims for restitution. Claims for damages based on the wrongfulness of that seizure are claims for reparation. The central claim of this Article is that reparations programs ought focus on the source and nature of the targeted wrongs central to transitional justice. *See infra* Part 0.

16. Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 131 (2004); *see also* Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51, 57–58 (2007); Eric K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 35–37 (2007) (noting the retrospective justification of reparations claims).

17. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 104 (1998); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1784 (1993); Brophy, *supra* note 16, at 133; Lisa Magarrell, *Reparations for Massive or Widespread Human Rights Violations: Sorting Out Claims for Reparations and the Struggle for Social Justice*, 22 WINDSOR Y.B. ACCESS TO JUST. 85, 89 n.9

Posner, Vermeule, and others that transitional justice is best described and understood as a special case of ordinary justice.¹⁸ Reparations on this view are much like familiar tort remedies, though usually justified on political rather than purely legal grounds.¹⁹

This ordinary justice approach to reparations makes almost inevitable a host of objections based on “ethical individualism,” which holds “that only individuals have moral rights and duties” such that individuals can only be held accountable for their own conduct, and not that of others, with a few exceptions.²⁰ That individualism has significant resonance in the common law and is almost axiomatic in American criminal jurisprudence. Writing for the Court in *Morrisette v. United States*, for example, Justice Jackson noted that “an intense individualism” is at the heart of the “compound concept” of criminal liability constituted by the “concurrence of an evil-meaning mind with an evil-doing hand” that “took deep and early root in American soil.”²¹

Ethical individualism spawns a host of objections to reparations, all of which are variations on a simple theme: “It wasn’t me.”²² Take, as an example, debates in the United States over reparations for slavery.²³ Con-

(2003); *see also* 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, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006); Rome Statute of the International Criminal Court art. 79.2, July 17, 1988, 2187 U.N.T.S. 90. For a description of these two approaches to measuring harm and compensation see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 57 (1974); Roberts, *supra* note 15, at 133–34; Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, in FREEDOM AND FULFILLMENT 3, 7 (1992); Vermeule, *supra* note 14, at 5–6, 9, 14–15. For a critical insider’s account of the history of the Basic Principles and challenges for their implementation, see M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUM. RTS. L. REV. 203 (2006).

18. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762 (2004); Vermeule, *supra* note 14, at 5–7.

19. Posner & Vermeule, *supra* note 15, at 691; Vermeule, *supra* note 14, at 9.

20. Posner & Vermeule, *supra* note 15, at 703, *see also* Lee A. Harris, “Reparations” as a Dirty Word: *The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, 414–20 (2003).

21. *Morrisette v. United States*, 342 U.S. 246, 251–52 (1952).

22. *See, e.g.*, Roy L. Brooks, *The Age of Apology*, in WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 7–9 (Roy L. Brooks ed., 1999) [hereinafter WHEN SORRY ISN’T ENOUGH]; Lawrie Balfour, *Reparations After Identity Politics*, 33 POL. THEORY 786, 794 (2005); Roy L. Brooks, *Getting Reparations for Slavery Right—A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 256–57, 279–80 (2004) [hereinafter Brooks, *Getting Reparations Right*]; Thomas McCarthy, *Coming to Terms with Our Past, Part II: On the Morality and Politics of Reparations for Slavery*, 32 POL. THEORY 750, 752–53 (2004); Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45, 49–52 (2004); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1765–68 (2005); Charles J. Ogletree Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1052 (2003); Posner & Vermeule, *supra* note 15, at 691, 698–704; Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J.L. & POL. 183 (2006); Vermeule, *supra* note 14, at 4.

23. *See generally*, RAYMOND A. WINBUSH, SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS (2003); JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS (2000); WHEN SORRY ISN’T ENOUGH, *supra* note 22; Posner & Vermeule, *supra* note 15; Sepinwall, *supra* note 22; Robert W. Tracinski, *America’s “Field of the Black-*

temporary whites, asked to contribute directly or through taxes, protest that they never owned slaves,²⁴ that nobody in their family ever owned slaves,²⁵ and that, at any rate, they were born generations after the practice was abolished.²⁶ Critics also point out that the proposed beneficiaries were never themselves slaves and therefore do not have standing to raise a claim.²⁷ These objectors acknowledge, as has the United States Senate,²⁸ that slavery and Jim Crow were wrong, but maintain that because they have no personal or direct connection to past abuses, they cannot be liable for compensation claims.²⁹ “It wasn’t them,” so forcing them to pay for “reparations would be a gross injustice, punishing innocent people for a crime they did not commit.”³⁰

Similar objections dominate other transitional justice debates.³¹ Contemporary transitions do not face the historical concerns that confront proposals for slavery reparations. However, the objections are familiar.³²

birds”: *How the Campaign for Reparations for Slavery Perpetuates Racism*, 3 J.L. SOC’Y 145 (2002); Comment, *Reparations for Slavery: A Dream Deferred*, 3 SAN DIEGO INT’L L.J. 177 (2002). See also ERIC K. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATIONS: LAW AND THE JAPANESE AMERICAN INTERNMENT (Richard A. Epstein et al. eds., 2001).

24. See Sepinwall, *supra* note 22, at 184 n.10 (quoting Rep. Henry Hyde as claiming that “I never owned a slave. I never oppressed anybody. I don’t know that I should have to pay for someone who did . . . generations before I was born.”).

25. Balfour, *supra* note 22, at 794. For example, Sen. John McCain famously denied that his family owned slaves when, in fact, they *did*. See Douglas A. Blackmon, *Two Families Named McCain*, WALL ST. J., Oct. 17, 2008, at A1.

26. Antonin Scalia, *The Disease as Cure*, in 2 AFFIRMATIVE ACTION AND THE CONSTITUTION: THE SUPREME COURT “SOLVES” THE AFFIRMATIVE ACTION ISSUE, 1978–1988, 88 (Gabriel J. Chin ed., 1998); Tracinski, *supra* note 23, at 151; see also Bob Gibson, *Slavery Apology Measure Ignites Legislative Debate*, CHARLOTTESVILLE DAILY PROG., Jan. 16, 2007 (quoting Del. Frank Hargrove in opposition to a proposed resolution apologizing for slavery as saying “[t]he present commonwealth has nothing to do with slavery.”).

27. Miller, *supra* note 22, at 52; Tracinski, *supra* note 23, at 152. This view is not without critics of its own. For example, Cheryl Harris famously argued that the continuing injustices of slavery and Jim Crow are so ubiquitous in American society that whites have become accustomed to asserting a property interest in their racial identities. Harris, *supra* note 17, at 1714–15. See also McCarthy, *supra* note 22, at 758–64; Randall Robinson, *What America Owes to Blacks and What Blacks Owe to Each Other*, 6 AFR.–AM. L. & POL’Y REP. 1, 2 (2004) (documenting racial disparities in imprisonment rates and home ownership). The United States Senate recently acknowledged these continuing effects. See S. Con. Res. 26, 11th Cong. (2009) (“African-Americans continue to suffer from the consequences of slavery and Jim Crow laws—long after both systems were formally abolished—through enormous damage and loss, both tangible and intangible, including the loss of human dignity and liberty . . .”).

28. S. Con. Res. 26, 11th Cong. (2009) (maintaining that “Nothing in this resolution . . . authorizes or supports any claim against the United States”).

29. See Tracinski, *supra* note 23, at 146.

30. *Id.*

31. See, e.g., BORAINÉ, *supra* note 10, at 190–91; KARL JASPERS, THE QUESTION OF GERMAN GUILT 41–44 (E.B. Ashton trans., 1948) (2001). As I will argue in Part 0, claims for slavery reparations, and other “historic abuses,” present transitional justice questions and are amenable to the extraordinary justice approach advanced in this Article.

32. See generally THE INT’L CTR. FOR TRANSITIONAL JUST., *supra* note 14; ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2000); MICHAEL HENDERSON, FORGIVENESS: BREAKING THE CHAIN OF HATE (2d rev. ed. 2003); HUMAN RIGHTS IN DEVELOPMENT: YEARBOOK 2001 (George Ulrich & Louise Krabbe Boserup eds., 2003); POLITICS

Many asked to pay disclaim the past regime and contend that they did not personally commit abuses.³³ Those directly connected to atrocities argue that they relied on existing law, which told them that targeted abuses against a particular group were necessary, or at least not illegal.³⁴ While those in this group cannot claim that they did not do it, they can displace responsibility to the state or protest that imposing liability would violate prohibitions against enforcement of law *ex post facto*.³⁵ Whether packaged as “I didn’t do it” or “I didn’t do anything *wrong*,” the core objection is the same.³⁶

This focus on guilt and innocence is evidence of a legalistic bias in transitional justice debates generally,³⁷ and conversations about reparations in particular.³⁸ That bias is a consequence of the common view that reparations constitute special tort awards justified by the need to compensate for harm.³⁹ This tort model implicates basic moral considerations and fundamental notions of fairness.⁴⁰ One should not be held to account for harm caused by another,⁴¹ and one should not be blamed for doing what was lawful at the time.⁴² For the purpose of assigning criminal liability, the constraints entailed by faith in individualism are hard to contest. Indeed, with a few exceptions, criminal punishment cannot be imposed in transitions without compromising the legality principle, which also has its roots

AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES (John Torpey ed., 2003); HAYNER, *supra* note 10, at 12.

33. Ogletree, *supra* note 22, at 1052.

34. Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 711 (2004); Posner & Vermeule, *supra* note 15, at 691; Gray, *supra* note 2, at 2631–36; Fletcher & Weinstein, *supra* note 2, at 597, 616.

35. Keith Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209, 1217–18 (2004); Forde-Mazrui, *supra* note 34, at 711; Posner & Vermeule, *supra* note 15, at 691 (noting that reparations are typically provided “on the basis of wrongs that were substantively permissible under the prevailing law when committed”).

36. Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1202–03 (2004); Brophy, *supra* note 16, at 117; Posner & Vermeule, *supra* note 15, at 699; Tracinski, *supra* note 23, at 150–56. There are many other objections that can be made. For example, both victims and contributors might object if the beneficiary class includes non-victims or if the nature and degree of benefits do not reflect variations in harms suffered. For present, however, this Article will focus on two of the most significant objections, though the theory developed here does provide grounds for responding to many other challenges.

37. McEvoy, *supra* note 5, at 16; see also Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275, 2337–38 (2003) (criticizing the fetish for “the rule of law” in transitional justice and foreign policy debates) [hereinafter Ehrenreich Brooks].

38. See Pablo de Greiff, *Justice and Reparations*, in THE HANDBOOK OF REPARATIONS, *supra* note 14, at 451–53; See Vandeginste, *supra* note 14, at 145.

39. See Vermeule, *supra* note 14 (describing reparations as “rough justice,” meant to attend to the intuition that compensation is owed in transition to victims of abusive regimes).

40. See Brophy, *supra* note 16, at 135–36 (advocating for a reparations model focusing on assignments of moral culpability).

41. Brophy, *supra* note 36, at 1202.

42. Forde-Mazrui, *supra* note 34, at 711.

in ethical individualism.⁴³ However, it is not at all clear that such faith is salient to reparations debates. To the contrary, a more careful accounting of the role reparations can and should play in the process of transition reveals that the personal affront implied by a normative individualism applies only if reparations are treated as tools of ordinary justice designed as whole or partial compensation for harm. The more promising alternative suggested here is to take seriously the unique practical and normative conditions that define transitions.⁴⁴

In addition to cash compensation, the reparations literature recognizes a broad diversity of material reparations, including access guarantees.⁴⁵ The literature also recognizes a host of more “symbolic” measures, including apologies (whether private or public, personal or official), days of remembrance, and monuments.⁴⁶ One might regard these sorts of efforts as “compensatory” in a broad sense. However, they are much more than that. In particular, they reflect a significant but little understood fact about transitions: while even stable states⁴⁷ constantly undergo change, transitions present a uniquely liminal moment for societies “betwixt and between”⁴⁸ an abusive past and a future peace guarded and preserved by commitments to democracy, human rights, and the rule of law.⁴⁹ Recognizing the liminal status of transitions provides valuable context for understanding and organizing the elements of a hybrid approach to transitional

43. See generally Gray, *supra* note 2.

44. As is argued in Part 0, the theory developed here encompasses a range of transitions, including some that are lingering and slow moving.

45. Vandeginste, *supra* note 14, at 146-47.

46. *Id.* See S. Con. Res. 26, 111th Cong. (2009) (apologizing for slavery and Jim Crow); Civil Liberties Act of 1989, 50 U.S.C. app. § 1989 (2006) (“apologiz[ing] on behalf of the people of the United States” for the “internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II”); MARTHA MINOW, *Memory and Hate: Are There Lessons from Around the World?*, in BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 14, 23 (Nancy L. Rosenblum ed., 2002); SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 126, 128-31 (2007); Brooks, *Getting Reparations Right*, *supra* note 22, at 268-72 (discussing various forms of reparation and redress); Ruth Rubio-Marin & Pablo de Greiff, *Women and Reparations*, 1 INT’L J. OF TRANSITIONAL JUST. 318, 330-32 (2007); de Greiff, *supra* note 38, at 452-53; Posner & Vermeule, *supra* note 15, at 725-36; Magarrell, *supra* note 17, at 89-90; Ernesto Verdeja, *A Normative Theory of Reparations in Transitional Democracies*, in GENOCIDE’S AFTERMATH, *supra* note 15, at 166, 171-78; Yamamoto et al., *supra* note 16, at 35-37.

47. In this Article, I use terms, such as “stable state” and “abusive regime,” implying that they refer to clear categories. They do not. In fact, most states fall on a spectrum. Locutions reflecting that awareness are quite cumbersome, however, so rather than include a caveat every time, the reader should assume that use of these stark phrases implies a certain irony.

48. VICTOR TURNER, *THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL* 93 (1967).

49. See also Anna Simons, *Somalia and the Dissolution of the Nation-State*, 96 AM. ANTHROPOLOGIST 818, 822 (1994). For a useful definition of “the Rule of Law,” see Kaimipono David Wenger, *Reparations Within the Rule of Law*, 29 T. JEFFERSON L. REV. 231, 231-32 (2006) (defining “the Rule of Law” as “the idea that laws are equally applied, knowable, and distinct from arbitrary power”). Rosa Ehrenreich Brooks provides a thought-provoking discussion of foreign policy surrounding the rule of law in her work *The New Imperialism: Violence, Norms, and the “Rule of Law,”* *supra* note 37.

justice, including reparations. In particular, it focuses attention on the need in transitions to face the future as well as the past in an effort to recognize and, by affirmative steps, correct, reform, and reshape the social paradigms implicated in past abuses.⁵⁰ This transitional imperative requires an approach to justice that accounts for the source and nature of past abuses and the challenges and goals of a transitional moment. Where ordinary justice is retrospective, profane, and preservative, transitional justice as extraordinary justice can meet this challenge because it is Janus-faced, liminal, and transformative.

To make the full case for transitional justice as extraordinary justice requires more than can be accomplished here. This Article, therefore, uses reparations as an exemplar. Part II briefly examines two of the most prominent not-quite-ordinary justice theories deployed to defend reparations: collective responsibility and atonement. While the instinct behind these efforts is laudable, the discussion reveals significant reasons to be skeptical. Part III argues that any theory of transitional justice must take normative account of the role played by social paradigms in structuring and justifying pretransitional abuses. Part IV provides a novel account of mass violence based on the loss of “dynamic stability.” Parts V and VI describe a transformational role for reparations during the liminal process of transition. Part VII concludes.

II. TWO NOT-QUITE-ORDINARY THEORIES OF JUSTICE

Objections to reparations programs get traction from what Pablo de Greiff calls a juridical bias—a propensity to treat pretransitional abuses as ordinary torts or crimes amenable to compensation⁵¹—at least insofar as the harms subject to traditional tort claims are compensable.⁵² This ordinary justice leaning is evident in the view that reparations constitute special tort awards. As Adrian Vermeule has pointed out, reparations programs in transitions and elsewhere usually cannot achieve perfect justice.⁵³ In his view, reparations therefore are best regarded as “rough justice,” designed to acknowledge the common intuition that compensation is owed while accepting the fact that the program, its payments, and its funding sources are all subject to well-grounded objections. While refreshing for its clear-headed honesty, the instinct to compensate upon which Vermeule’s account rests is fundamentally an instinct born of ordinary justice in the form of a desire to compensate for harm. Most objections to repara-

50. Vandeginste, *supra* note 14, at 148.

51. de Greiff, *supra* note 38, at 451–53.

52. Vermeule, *supra* note 14, at 5 (noting that wrongful death suits and many other claims based on physical and emotional harms are not perfectly compensated by cash awards).

53. *Id.*

tions programs rest on the same grounds, treating reparations as creatures of ordinary justice. Those asked to pay claim innocence.⁵⁴ Recipients complain that awards are inadequate.⁵⁵ Those who claim harm but do not receive awards argue that reparations programs “pick winners.”⁵⁶

In the face of these objections, reparations proponents have floated some alternative approaches to transitional justice. Prominent among these are theories of collective responsibility⁵⁷ and those based on atonement and reconciliation.⁵⁸ In their current forms, these approaches are not sufficient to support reparations programs. These failures are due in part to conceptual difficulties. More damning, however, are the failures of these theories to take seriously the unique features of pretransitional abuses and the distinctive circumstances faced by transitions.

A. Collective Responsibility

The instinct behind collective responsibility is straightforward: Horrific acts of targeted violence are perpetrated in abusive regimes. Those acts are widespread, implicating thousands of individuals and diffusing responsibility.⁵⁹ Abuses also are institutionalized and backed by publicly endorsed legal and social norms. It therefore makes sense to hold responsible the group as a whole because abuses reflected collective will.⁶⁰ If the group uses state authority to perpetrate abuses, then it likewise makes sense to hold the state liable for resulting harms.⁶¹ Shifting from individual to collective responsibility has a number of salutary effects. First, it limits claims for reparation to the group or the state, clarifying whence funds can

54. Brophy, *supra* note 36, at 129.

55. See, e.g., Seymour J. Rubin, *The Washington Accord Fifty Years Later: Neutrality, Morality, and International Law*, 14 AM. U. INT'L L. REV. 61, 72–73 (1998) (explaining that German reparations under the Washington Accord was of an amount “generally conceded to be grossly inadequate”).

56. Laplante, *supra* note 16, at 65–66; Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, in THE HANDBOOK OF REPARATIONS, *supra* note 14, at 176, 201–02; Balfour, *supra* note 22, at 797.

57. See, e.g., Jaspers, *supra* note 31, at 25; Peter A. French, *The Corporation as a Moral Person*, in COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS 133 (Larry May & Stacey Hoffman eds., 1991); McCarthy, *supra* note 22, at 756–58; Miller, *supra* note 22, at 72; Forde-Mazrui, *supra* note 34, at 694–726 (“[T]he case for holding American society responsible for past discrimination depends on the plausibility of recognizing American society as a collective and continuing nation, the obligations of which fairly pass through time and generations.”); George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002); Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992); H. Gomperz, *Individual, Collective, and Social Responsibility*, 49 ETHICS 329, 333 (1939).

58. See, e.g., WHEN SORRY ISN'T ENOUGH, *supra* note 22, at 3.

59. PLATO, *supra* note 2, at 32c-d (reporting efforts by thirty tyrants to diffuse guilt by ordering Athenian citizens to participate in atrocities); Gray, *supra* note 2, at 2624–25; Brooks, *Getting Reparations Right*, *supra* note 22, at 276.

60. Brooks, *Getting Reparations Right*, *supra* note 22, at 276.

61. McCarthy, *supra* note 22, at 762.

come. Second, because individuals are not held personally liable, defenses based on ethical individualism appear to melt away.⁶²

While attractive at first glance, collective responsibility theories face serious practical and conceptual problems that make them unattractive as potential sources of support for reparations in transitions. Foremost among these is the simple fact that groups do not act; only individuals act.⁶³ This has two consequences. First, it may not always be clear that an individual's conduct can be attributed to a group. Internal decision structures may allow such attribution,⁶⁴ particularly in the case of corporations, but that case is harder to make for states and impossible in the case of ethnic or religious groups.⁶⁵ Second, there is always a diversity of relationships between group members and abuses. Some are abusers while others actively work to prevent atrocities, often at great personal peril.⁶⁶

These considerations reveal a distribution problem, which theories of collective responsibility cannot resolve. Just because the conduct of some individuals may rightly be attributed to a corporation or group does not mean that the consequences for that conduct can rightly fall upon all members in the form of obligations to contribute to reparations programs.

Advocates might respond that such disparities are of no consequence in light of failures by the group and its individual members to protect oppressed populations⁶⁷ or the fact that each individual member of a group allows the group to persist.⁶⁸ However, that requires reliance on a theory of liability by omission—no small feat—and ignores the fact that some group members were heroes while others were demons.⁶⁹ Collectivizing guilt also has the odd effect of diffusing responsibility into nonexistence. After all, “since everyone is guilty then no one is.”⁷⁰

62. See, e.g., Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139 (2004); Forde-Mazrui, *supra* note 34, at 694–710; Bernard Boxill, *Morality of Reparation*, 2 J. SOC. THEORY & PRAC. 113, 120 (1972); see also Ryan Fortson, *Correcting the Harms of Slavery: Collective Liability, the Limited Prospects of Success for a Class Action Suit for Slavery Reparations, and the Reconceptualization of White Racial Identity*, 6 AFR. –AM. L. & POL'Y REP. 71, 80 (2004).

63. George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES IN L. 163 (2004); H.D. Lewis, *Collective Responsibility (A Critique)*, in COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS, *supra* note 57, at 17, 20; Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, in COLLECTIVE RESPONSIBILITY, *supra* note 57, at 111, 124; Jaspers, *supra* note 31, at 33–36.

64. See, e.g., French, *supra* note 57, at 133.

65. Jaspers, *supra* note 31, at 33–36.

66. BORAINÉ, *supra* note 10, at 39–168 (recounting the risks he and other white and black leaders ran in helping to end Apartheid in South Africa).

67. Forde-Mazrui, *supra* note 34, at 722.

68. Sepinwall, *supra* note 22, at 213–15.

69. Fletcher & Weinstein, *supra* note 2, at 613; Prosecutor v. Nikolić, IT-02-60/1-S, ¶ 60 (Dec. 2, 2003).

70. Fletcher & Weinstein, *supra* note 2, at 599.

Because groups can only act through individuals, collective responsibility also raises *mens rea* problems. This presents one of two options for collective responsibility advocates. First, they can assume that each agent's acts reflect his or her individual mental state. However, to do so would open the door to objections based on ethical individualism. Alternatively, advocates can paint a picture of individual agents' manifesting collective consciousness just as our limbs manifest our own wills. However, such a view is hard to square with subjective experience and closely held commitments to free will.⁷¹

Even if one were to accept a thick account of collective will, however, there remains the problem of mistake.⁷² Atrocities on a scale warranting transitional justice rely on a belief that victims are rightly the objects of abuse, often because victims are regarded as less than human⁷³ or as posing an imminent threat.⁷⁴ To hold a group responsible for abuses perpetrated under the influence of such false beliefs requires holding that group liable for the beliefs themselves.⁷⁵ That, in turn, requires identifying a moment in the historical genesis of those beliefs when it can rightly be said that the group as a whole acted willfully, knowingly, or at least recklessly in allowing itself to pursue an epistemic path to atrocities.⁷⁶ That is a hard story to tell about a group because, again, groups cannot act. Consequently, any history of a group's consciousness will turn on the conduct of individuals over the course of years, decades, centuries, and millennia, leaving no post to which claims of liability for reparations can be tethered.

Amy Sepinwall and Thomas McCarthy advance a potential response.⁷⁷ They argue that groups can maintain continuous identity over time⁷⁸ and that those who associate with a group must assume responsibility for the group's past wrongs both because of that association and because their association allows the group to persist.⁷⁹ This approach to collective responsibility also fails to satisfy. First, transitional regimes are defined in opposition to abuses perpetrated by their forebears.⁸⁰ It is therefore hard to make the case that transitional and post-transitional regimes are the same "person" as the prior regime.⁸¹ Second, the most common targets for col-

71. See, e.g., Peter Strawson, *Freedom and Resentment*, 48 PROC. BRITISH ACAD. 1 (1962) (arguing that our conceptions of freewill should respect and reflect common "reactive attitudes").

72. I am in debt to Ronald Dworkin for conversations on this point.

73. See McCarthy, *supra* note 22, at 750, 758–59.

74. See *infra* Part 0; Gray, *supra* note 2, at 2629–42.

75. Gideon Rosen, *Skepticism About Moral Responsibility*, 18 PHIL. PERSP. 295 (2004) (arguing that wrongs reflective of moral mistakes are blameless unless the moral mistake is itself culpable).

76. See *id.* at 308.

77. See, e.g., Sepinwall, *supra* note 22, at 205–08; McCarthy, *supra* note 22, at 757–58.

78. Sepinwall, *supra* note 22, at 204–05; Forde-Mazrui, *supra* note 34, at 717–18.

79. Sepinwall, *supra* note 22, at 205–09; McCarthy, *supra* note 22, at 757–58. See also Bernard Boxill, *A Lockean Argument for Black Reparations*, 7 J. ETHICS 63 (2003).

80. RUTI G. TEITEL, TRANSITIONAL JUSTICE 28–33 (2000).

81. For an argument in favor of holding successor regimes liable for the debts incurred by their

lective responsibility are states, racial groups, or ethnic groups.⁸² For most members of these groups, membership is a matter of existential luck.⁸³ The moment of voluntary association assumed in McCarthy and Sepinwall's approach to collective responsibility is, therefore, fiction at best. Moreover, exit from one's racial or ethnic group is impossible, and exit from one's state of birth is practically so for most people, rendering any claim of implied consent implausible.⁸⁴ Most troubling, however, is that this view of group responsibility endorses a brand of intergenerational responsibility that is of a kind with the group consciousness implicated in blood feuds⁸⁵ and many examples of mass atrocity.⁸⁶ Transitional justice advocates should pause before embracing the cognitive and moral structures at the heart of what Samantha Power has called the "Problem from Hell."⁸⁷

B. Atonement and Reconciliation

Atonement theories focus on achieving reconciliation between former abusers and victims.⁸⁸ Apologies, composed of a "(1) confess[ion] [of] the deed, (2) admi[ssion] that the deed constitutes an atrocity, (3) repent[ance], and (4) ask[ing] for forgiveness[.]"⁸⁹ are central.⁹⁰ As symbol-

forbears, see David C. Gray, *Devilry, Complicity, and Greed: Transitional Justice and Odious Debt*, 70 L. & CONTEMP. PROBS. 137, 147–56 (2007).

82. See, e.g., Sepinwall, *supra* note 22, at 209.

83. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 197–98 (2007).

84. For a useful overview of implied consent and exit, see Linda Barclay, *Liberalism and Diversity*, in THE OXFORD HANDBOOK OF CONTEMPORARY PHILOSOPHY 155 (Frank Jackson & Michael Smith eds., 2005).

85. For discussions of the roles played by blood feuds in recent cases of mass atrocity, see Margaret Hasluck, *The Albanian Blood Feud*, in LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT 381 (Paul Bohannan ed., 1967); Richard T. Oakes, *The Albanian Blood Feud*, 6 J. INT'L L. & PRAC. 177 (1997). As Rosa Ehrenreich Brooks notes, the norms governing blood feuds do provide "order." *Supra* note 37, at 2309. However, it is not exactly the kind of order one would wish for a post-transitional society.

86. DANIEL JOHANN GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 27–163, 416–54 (1996); PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 47–62, 96–131 (1998); Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in ON HUMAN RIGHTS 111, 112–15 (Stephen Shute & Susan Hurley eds., 1993).

87. SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 1–16 (2002).

88. See, e.g., WHEN SORRY ISN'T ENOUGH, *supra* note 22, at 6–7; Lewis Beale, *Seeking Justice for Slavery's Sins*, L.A. TIMES, April 22, 2002, pt. 5 at 1 (quoting Deadria Farmer-Paellmann, plaintiff in *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 759 (7th Cir. 2006)); Brooks, *Getting Reparations Right*, *supra* note 22, at 254, 273–79; Roy L. Brooks, *Toward a Perpetrator-Focused Model of Slave Redress*, 6 AFR.-AM. L. & POL'Y REP. 49, 63 [hereinafter Brooks, *Toward a Perpetrator-Focused Model*]; Miller, *Reconceiving Reparations*, *supra* note 22, at 71–79; Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 159 (2004).

89. Brooks, *Toward a Perpetrator-Focused Model*, *supra* note 88, at 67.

90. *Id.* at 66–67.

ic reparations, apologies reflect “remorse,” “taking personal responsibility[,]” and a sincere effort at reconciliation.⁹¹ Material reparations on the atonement view constitute a “tangible . . . redemptive act . . . [that makes] the apology believable.”⁹²

While emotionally compelling, atonement theories commit advocates to conceptual constraints that render the entire approach practically naïve and potentially oppressive. First, apologies rest on regret, what Karl Jaspers calls “moral guilt,” which can only be assessed internally.⁹³ That is, as compared to legal liability, which is imposed by external authority,⁹⁴ the guilt that gives rise to apology is wholly a function of subjective acceptance of responsibility.⁹⁵ Apologies therefore cannot be the product of an external enforcement mechanism, but must reflect either a spontaneous⁹⁶ and genuine acceptance of responsibility⁹⁷ or a spontaneous and genuine commitment to coordinate a constructive relationship going forward.⁹⁸ This subjective constraint is not disputed by atonement theorists.⁹⁹ To the contrary, it is an essential feature of their theory.¹⁰⁰ However, because apology and atonement are tied to spontaneous mental, ethical, and moral states,¹⁰¹ there can be no procedural guarantees of success.¹⁰² Abusers may simply refuse to apologize because they regard themselves as innocent or justified,¹⁰³ or perhaps because they are afraid that apology implies a duty to pay reparations—which, according to atonement advocates, it does¹⁰⁴—or that it will threaten the world view upon which their identities and moral sense depend.¹⁰⁵ Where this occurs, atonement theories have no way to

91. *Id.* at 67; see also Anthony Sebok, *Two Concepts of Injustice in Restitution for Slavery*, 84 B.U. L. REV. 1405, 1424–27 (2004).

92. Brooks, *Toward a Perpetrator-Focused Model*, *supra* note 88, at 67.

93. Jaspers, *supra* note 31, at 25–26.

94. *Id.* at 25.

95. *Id.*

96. I use “spontaneous” here for its first meaning according to Merriam Webster, “proceeding from natural feeling or native tendency without external constraint,” rather than its second, and more colloquial meaning, “arising from a momentary impulse[.]” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1206 (11th ed. 2003).

97. Brooks, *Toward a Perpetrator-Focused Model*, *supra* note 88, at 64; Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1697–98 (1992). By adopting this definition, I bracket a whole category of acts entailing phrases like “I’m sorry” that have the form of apology but are in fact expressions of empathy or metaphysical regret such as when a friend shares sad news and you respond by saying “I’m so sorry.”

98. I am in debt to Stephen Galoob for suggesting this clarification.

99. Brooks, *Toward a Perpetrator-Focused Model*, *supra* note 88, at 67.

100. See, e.g., *id.* at 66–67; see also Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 390 (1987); see also Hampton, *supra* note 97, at 1697–98; Fortson, *supra* note 62, at 123; Strawson, *supra* note 71, at 191 (noting that “to forgive is to accept the repudiation and to forswear the resentment [of a wrong done]”).

101. See Hampton, *supra* note 97, at 1697–98; Strawson, *supra* note 71, at 191.

102. Minow, *supra* note 17, at 18–20.

103. See Ifill, *supra* note 46, at 17, 64–66; Gray, *supra* note 2, at 2629–36.

104. Brooks, *Toward a Perpetrator-Focused Model*, *supra* note 88, at 67.

105. See Ehrenreich Brooks, *supra* note 37, at 2305.

proceed. Any enforcement mechanism, whether as carrot or stick, just taints the apology and undercuts any hope for true atonement.¹⁰⁶

More compelling than these practical concerns is the potential that atonement processes will oppress former victims. Atonement is a reciprocal relationship between abuser and victim.¹⁰⁷ To succeed, atonement requires not only a sincere apology,¹⁰⁸ but also acceptance of that apology and forgiveness by the victim.¹⁰⁹ Also, like apology, forgiveness is spontaneous.¹¹⁰ There are no necessary or sufficient conditions that give rise to a duty to forgive, much less an enforceable obligation to forgive.¹¹¹ Perhaps out of concern for success, atonement theorists ignore this central feature of forgiveness and claim that genuine apology coupled with a substantial offer of reparation imposes upon victims “a civic responsibility to forgive.”¹¹² This view is not only incoherent, it is oppressive, denies the dignity of victims, and constitutes a perpetuation of abuse.¹¹³

There is much more to be said about atonement,¹¹⁴ but this brief discussion is sufficient to raise credible concerns that cases for reparation based on atonement are incoherent, oppressive, or facile. Such demands simply do not comport with the moral foundations of apology and forgiveness. To ignore that incoherence is to engage in a new round of abuse. Alternatively, to respect those limitations and simply hope that abusers will apologize and victims forgive puts reparation programs on uncertain foundations. Atonement should, of course, be encouraged and celebrated where it occurs, but it cannot be mandated¹¹⁵ and, as a theory, cannot carry the normative and practical burdens of organizing transitional justice programs generally or justifying reparations programs in particular.

106. Roy Brooks, for one, admits this limitation. See Brooks, *Toward a Perpetrator-Focused Model*, *supra* note 88, at 64.

107. See Brooks, *Getting Reparations Right*, *supra* note 22, at 255.

108. See *id.* at 256.

109. Brooks, *Toward a Perpetrator-Focused Model*, *supra* note 88, at 68 (“forgiveness is an essential component of the atonement model’s ultimate goal of reconciliation”); BROOKS, *supra* note 22, at 255.

110. Minow, *supra* note 17, at 20.

111. BORAINÉ, *supra* note 10, at 213–14; Minow, *supra* note 46, at 18; Panu Minkkinen, *Ressentiment as Suffering: On Transitional Justice and the Impossibility of Forgiveness*, 19 CARDOZO STUD. L. & LIT. 513, 515 (2007).

112. Brooks, *Toward a Perpetrator-Focused Model*, *supra* note 88, at 68.

113. See Richard Weisman, *Showing Remorse at the TRC: Towards a Constitutive Approach to Reporative Discourse*, 24 WINDSOR Y.B. ACCESS JUST. 221 (2006) (highlighting the importance of nonoppressive dialogue in the success of atonement and social reconstruction).

114. For a more extensive discussion of collective responsibility, atonement, and other not-quite-ordinary claims for reparation in transition see, David Gray, *A No-Excuse Approach to Transitional Justice*, 87 WASH. U. L. REV. 1043 (2010).

115. Minow, *supra* note 46, at 18; Fletcher & Weinstein, *supra* note 2, at 623.

III. EXTRAORDINARY INJUSTICE

“Man’s inhumanity to man [m]akes countless thousands
mourn!”¹¹⁶

—Robert Burns

Many prominent contributors to the transitional justice literature misunderstand the challenges in transitions and therefore miss significant theoretical and practical opportunities because they view transitional justice as “ordinary justice.”¹¹⁷ In particular, they fail to take normative account of both the “justice gap”¹¹⁸—the radical disparity between justice needs and resources available to transitional regimes seeking some form of justice—and the underlying cause of that gap—the complex of cultural norms, social practices, institutional regimes, black letter law, official policies, institutional practices, social norms, cultural ideology, and historical teleology that together provide the organizing ontology and justificatory ethic of abusive regimes and which ratify, induce, and sustain programs of mass violence.¹¹⁹ This same shortsightedness is manifest in reparations debates. Here, the mistake is to treat reparations as gap-filling measures meant to provide compensation,¹²⁰ imperfect compensation as “rough justice,”¹²¹ or vindication for retributive impulses residual of an ordinary justice mentality.¹²² Reparations programs certainly must take account of the past, and there is no doubt that transitional justice debates are driven by the fact of past atrocities. However, in the transitional context, taking account of the past means much more than documenting wrongdoing and measuring harm; it means recognizing past wrongs as oppositional markers for future conduct and policy. This call implies as a first step examining the underlying sources of mass atrocity. That is the program in this Part and the next.

116. ROBERT BURNS, *Man Was Made to Mourn*, in *THE POETICAL WORKS OF ROBERT BURNS* 203 (James T. Currie ed., 2009).

117. See, e.g., Posner & Vermeule, *supra* note 18.

118. Bell & O’Rourke, *supra* note 13, at 35; Gray, *supra* note 2, at 2624–29.

119. Gray, *supra* note 2, at 2629–36.

120. Brooks, *Getting Reparations Right*, *supra* note 22, at 284–87.

121. Vermeule, *supra* note 14, at 3.

122. Posner & Vermeule, *supra* note 15, at 691; Brooks, *Getting Reparations Right*, *supra* note 22, at 284–87; Emma Coleman Jordan, *The Non-Monetary Value of Reparations Rhetoric*, 6 *AFR.-AM. L. & POL’Y REP.* 21, 25 (2004); Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 *A.M. J. INT’L L.* 833, 844 (2002).

A. Power, Paradigms, and Truth Regimes

“Every human being is fated to be enmeshed in the power relations he lives by.”¹²³

—Karl Jaspers

Although selective prosecutions habitually focus on those “most responsible,”¹²⁴ the grueling labor of atrocities are carried out by cadres of “willing executioners”¹²⁵ with the knowledge, support, and assistance of public personalities, such as the military, police, political leaders, and members of the media.¹²⁶ These diverse agents of destruction are not independent entrepreneurs. Rather, their activities are organized and rationalized by black letter law,¹²⁷ institutional practice,¹²⁸ official policy,¹²⁹ and cultural norms, including a social ontology and historical teleology that sustains in abusers a sense of justification for their conduct¹³⁰ by presenting a view of the world in which victims are subhuman¹³¹ and by advancing a vision of the end of history in which the victims have been eliminated from society or existence.¹³²

The role of background social norms and institutional practice in the production of willing agents is well documented.¹³³ The ability of public expectations and bureaucratic structures to turn normal people into agents of destruction is at the center of Hannah Arendt’s famous account of the “banality of evil.”¹³⁴ Her journalistic account is consistent with the work

123. Jaspers, *supra* note 31, at 28.

124. Sorpong Peou, *The Limits of Collaborative Action on International Criminal Justice in East Asia*, in HUMAN SECURITY IN EAST ASIA: CHALLENGES FOR COLLABORATIVE ACTION 112 (Sorpong Peou ed., 2009); Fletcher & Weinstein, *supra* note 2, at 579; *see generally* Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT’L L. & POL. 355 (2002).

125. GOLDHAGEN, *supra* note 86; *see also* Prosecutor v. Banovic, Case No. IT-02-65/1-S, Sentencing Hearing, 108 (Sept. 3, 2003), <http://www.icty.org/x/cases/banovic/trans/en/030903ED.htm>.

126. *See generally* Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003), <http://www.rwanadainitiative.ca/resources/pdfs/judgment.pdf>.

127. Wenger, *supra* note 49, at 232.

128. Fletcher & Weinstein, *supra* note 2, at 576.

129. Harris, *supra* note 17, at 1777.

130. Brooks, *Getting Reparations Right*, *supra* note 22, at 276 (noting that government approval is a necessary contributor to mass atrocities).

131. Rorty, *supra* note 86; Ehrenreich Brooks, *supra* note 37, at 2327, 2332.

132. GOLDHAGEN, *supra* note 86, at 28–29; GOUREVITCH, *supra* note 86, at 96, 115; Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 59 (2002).

133. *See, e.g.*, FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE (1990); Fletcher & Weinstein, *supra* note 2, at 606–20; Ehrenreich Brooks, *supra* note 49, at 2327, 2331.

134. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963) (describing how ordinary Germans joined and contributed to the Holocaust out of banal commitments to professionalism, bureaucratic role, and public duty). Daniel Goldhagen makes a similar argument in

of politically sophisticated ethnographers like Victor Turner, who have documented the various uses of “consensual power,” as contrasted with “coercive” power.¹³⁵ Coercive power achieves its goals solely by the threat of force. In terms familiar to classic utilitarians and modern law-and-economics scholars, coercive power imagines its objects in the most cynical terms as behavior machines adopting courses of conduct according to personal calculations of risk and reward.¹³⁶ Consensual power operates quite differently. In contrast to coercive power, consensual power “is a symbolic medium” that encourages its subjects to identify with a view of the world, an ideology, and a certain way of doing things.¹³⁷ It seeks to connect its subjects’ senses of themselves to the production and maintenance of social states of affairs.¹³⁸ Consensual power conceives of its subjects not as objects for blunt manipulation by threat of force, but as a medium that can be shaped and formed into willing instruments.¹³⁹ Consensual power produces effects from within rather than from without. As compared to coercive power, consensual power pursues spontaneous conformance by willing subjects who are personally invested in the production and maintenance of a society and world in which those agents find fulfillment and meaning.¹⁴⁰

In both his concrete archaeologies and his more elusive theoretical work, Michel Foucault describes a similar conception of power. Foucault famously argued that power is not potential, but the demonstrated production of effects in the world through relationships.¹⁴¹ In his view, power’s most significant preoccupation is with the production of subjects within “regime[s] of truth.”¹⁴² Regimes of truth are, straightforwardly, circular relationships among “Truth”—conceived as “system[s] of ordered procedures for the production, regulation, distribution, circulation and operation

Hitler’s Willing Executioners, though there focuses on the power of an eliminationist anti-Semitism in the production of Nazi abuses. See generally GOLDHAGEN, *supra* note 86. Arendt, by contrast, is demonstrably struck by the fact that Eichmann apparently harbored no strong feelings of anti-Semitism and was driven by, at most, career aspirations and a sense of professional duty.

135. Marc J. Swartz et al., *Introduction*, in POLITICAL ANTHROPOLOGY 14 (Marc J. Swartz et al. eds., 1966). “Power” is, of course, a loaded word. Swartz et al. seem to agree with Foucault in the proposition that “power” is nothing more than the achievement of effects in the world through relationships. *Id.* See also MICHEL FOUCAULT, *The Ethic of Care for the Self as a Practice of Freedom: An Interview Translated by J.D. Gauthier, S.J.*, in THE FINAL FOUCAULT 1, 11 (James Bernauer & David Rasmussen eds., 1987) [hereinafter “FINAL FOUCAULT”].

136. See Ernesto Verdeja, *A Critical Theory of Reparative Justice*, 15 CONSTELLATIONS 208, 210 (2008); Ehrenreich Brooks, *supra* note 37, at 2321.

137. Swartz et al., *supra* note 135, at 14.

138. *Id.* at 14–17; see also Harris, *supra* note 17, at 1742–77.

139. Swartz et al., *supra* note 135, at 10.

140. *Id.* at 15.

141. 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 94 (Robert Hurley trans., Vintage Books 2d ed. 1990) (1976); FINAL FOUCAULT, *supra* note 135, at 11.

142. MICHEL FOUCAULT, *Truth and Power*, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977, 109, 133 (Colin Gordon, et al. trans., Colin Gordon ed., 1980).

of statements,”—“systems of power”—“which produce and sustain [Truth],”—and “effects of power”—“which [Truth] induces and which extend [Truth].”¹⁴³ That is, Truth and power enjoy a necessary relationship through public institutions and practices where Truth is elaborated and established by the production of phenomena, including subjects, which in turn reinforce and sometimes alter the norms of inclusion and exclusion, right and wrong, good and bad, that constitute and reflect Truth. In short, “Truth [as] a thing of the world . . . induces regular effects of power.”¹⁴⁴

Foucault spent his career tracing the history of various truth regimes. His archaeologies documented the interactions between normative systems and institutions in the creation of subjects.¹⁴⁵ Most intriguing for present purposes is his suggestion that “[e]ach society has its regime of truth, its ‘general politics’ of truth.”¹⁴⁶ That is, societies, by definition and as a matter of self-definition, are constantly engaged at all levels in the process of establishing, developing, and using institutions to sort truth claims, create norms, histories, teleologies, and social ideologies that regulate, order, and thereby create subjects.¹⁴⁷

The concept of a truth regime can be found in slightly less abstract form in the anthropology literature as the concept of “paradigms.” In terms similar to Foucault’s, Victor Turner defines “paradigms” as “sets of ‘rules’ from which many kinds of sequences of social action may be generated but which further specify what sequences must be excluded.”¹⁴⁸ Political paradigms are particularly salient to the current discussion because they draw and maintain the boundaries of society and designate the roles and positions of individuals within society.¹⁴⁹ Further, as the rules governing acceptable conduct and social identities, paradigms are both the subject and the object of social action; they generate their own subjects, but also enter into contest with competing paradigms.¹⁵⁰

143. *Id.* at 133.

144. *Id.* at 131.

145. See, e.g., FOUCAULT, *supra* note 141; MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (Richard Howard trans., Vintage Books 1988) (1961); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); 2 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: THE USE OF PLEASURE (Robert Hurley trans., 2d ed. 1990) (1984); 3 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: THE CARE OF THE SELF (Robert Hurley trans., 1988).

146. FOUCAULT, *supra* note 142, at 131.

147. Patricia Lundy and Mark McGovern, *The Role of Community in Participatory Transitional Justice*, in TRANSITIONAL JUSTICE FROM BELOW, *supra* note 5, at 99, 109 (noting the transitional justice goal of “gain[ing] a place at the knowledge-creating table”).

148. VICTOR TURNER, DRAMAS, FIELDS, AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY 17 (1974).

149. Swartz et al., *supra* note 135, at 30–31.

150. TURNER, *supra* note 148, at 17.

While essays and books can be and have been written on these powerful conceptual tools, for now all that need be pointed out is that political societies feature internal identity norms that are developed, established, and extended through public and private institutions, practices, rituals, and patterns of behavior. These norms are fundamental to society and its members, serving as markers of inclusion, exclusion, and therefore identity.¹⁵¹ While community identity is in one sense “imagined,”¹⁵² it is very real for society and its members. Richard Rorty’s being the exception,¹⁵³ there is seldom much irony in identity claims. For most people, the truths of inclusion and exclusion are fundamental to public and private identity.¹⁵⁴ This is the stuff of basic dignity and the fount of subjective and intersubjective accountings of worth and worthiness. Even in contested fields, basic disciplinary norms operate intersubjectively as standards for sorting and evaluating truth claims constitutive of who we are.

Bound up with social identity are conceptions of relative ontological position and teleological entitlement endorsed by historical narratives. Whether regarded as a truth regime or a social paradigm, the phenomenological output of the complex engagement of these ideological commitments and the social practices and public institutions with which they enjoy reciprocal relationships is the same: the construction of subjects who internalize core values, act in ways that reflect and extend dominant social ideologies, and pursue a transcendent view of the end of history.

I do not want to be misunderstood as claiming that projects of consensual power, truth regimes, or paradigms in societies and states are unitary or static. To the contrary, they are extremely dynamic. As is argued in the next sections, that very dynamism is central to the production of mass atrocities.

B. The Role of Abusive Paradigms in Pretransitional Abuses

“The Devil is the absence of doubt. He’s what pushes people into suicide bombing, into setting up extermination camps. Doubt may give your dinner a funny taste, but it’s faith that goes out and

151. JASPERS, *supra* note 31, at 28–29. *See also* EDMUND HUSSERL, THE CRISIS OF THE EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY 108–09, 133 (Northwestern Univ. Press ed. & trans., 1970) (1954) (adopting a similar view in his account of “lifeworlds”).

152. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991); Ehrenreich Brooks, *supra* note 37, at 2316.

153. *See generally* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989).

154. *See* DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 6–12, 17–18, 53 (1985).

kills.”

—John Updike¹⁵⁵

In abusive regimes the dominant paradigm, often backed by black letter law,¹⁵⁶ demands or at least tolerates targeted abuse against an identified group.¹⁵⁷ While as varied as the capacity for creative evil so characteristically human,¹⁵⁸ these paradigms share a few salient features. First, they tend to reduce society to two groups.¹⁵⁹ Second, following this “bi-polar logic,”¹⁶⁰ an abusive paradigm characterizes those in the targeted class as subhuman¹⁶¹ and naturally subservient,¹⁶² or at least not people “like us” deserving of treatment as equals.¹⁶³ Third, those targeted for abuse are regarded as a persistent and emergent threat against the survival of the dominant group and its ability to achieve its rightful place at the end of history.¹⁶⁴ Abusive paradigms allow perpetrators to justify their conduct to themselves and others, often making targeted violence a source of pride.¹⁶⁵

The role of an abusive paradigm at the core of pretransitional abuses is widely recognized.¹⁶⁶ For example, Roy Brooks points out that “atrocities can only occur when the perpetrator fails to *identify* with [his] victims and fails to recognize a common humanity between [himself] and the vic-

155. JOHN UPDIKE, *ROGER'S VERSION* 81 (1986).

156. Ehrenreich Brooks, *supra* note 37, at 2307.

157. See GOLDHAGEN, *supra* note 86, at 27–163, 416–54; GOUREVITCH, *supra* note 86, at 47–62, 96–131; THE INDEPENDENT INT’L COMM’N ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 33–64 (2000); JAIME MALAMUD-GOTI, *GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE*, 29–99 (1996); CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 41–60 (1996); POWER, *supra* note 87, at 1–16; Rorty, *supra* note 86, at 112–15.

158. See WHEN SORRY ISN’T ENOUGH, *supra* note 22, at 4 (“[A]ll societies have the capacity to do evil. No society holds a monopoly on the commission of human injustices, nor is any society exempted. To Max Frankel’s question—‘Is there a beast in each of us waiting to be unleashed by extraordinary fear, greed or fury?’—I would have to answer, yes.”).

159. MALAMUD-GOTI, *supra* note 157, at 29–99; see also BORAINÉ, *supra* note 10, at 104, 110–12; ELSTER, *supra* note 3, at 93.

160. MALAMUD-GOTI, *supra* note 157, at 29–99.

161. Ehrenreich Brooks, *supra* note 37, at 2327; Fletcher & Weinstein, *supra* note 2, at 609.

162. Alan Davies, *The German Third Reich and Its Victims*, in WHEN SORRY ISN’T ENOUGH, *supra* note 22, at 23, 26; Rorty, *supra* note 86, at 112–15.

163. Fortson, *supra* note 62, at 77 (noting that “Whiteness is based principally on the oppression of minority groups by defining them as Other”).

164. CHALK & JONASSOHN, *supra* note 133, at 29; see also GOLDHAGEN, *supra* note 86, at 3–24, 49–50; SIMON WIESENTHAL, *THE SUNFLOWER: ON THE POSSIBILITIES AND LIMITS OF FORGIVENESS* 15 (1997); Ehrenreich Brooks, *supra* note 37, at 2327; Swartz et al., *supra* note 135, at 15 (attaching conformance to consensual power to the preservation of a desired social order).

165. Fletcher & Weinstein, *supra* note 2, at 636.

166. PHILLIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 296 (2007); Roberta Senechal de la Roche, *The Sociogenesis of Lynching*, in UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH 48 (W. Fitzhugh Brundage ed., 1997); Ehrenreich Brooks, *supra* note 37, at 2313, 2327; Fletcher & Weinstein, *supra* note 2, at 581, 604–20; Roberta Senechal de la Roche, *Collective Violence as Social Control*, 11 SOC. F. 97, 106 (1996).

tims.”¹⁶⁷ Laurel Fletcher and Harvey Weinstein reach a similar conclusion, relying on social psychology studies.¹⁶⁸ In an essay on the Balkans, Richard Rorty notes that those who participate in mass atrocities do not regard their victims as “fellow human beings,” but as “animals” or “pseudohumans.”¹⁶⁹ Daniel Goldhagen has argued that perpetrators of atrocities “th[ink] that their victims deserved to die,” and that they kill “out of conviction in the justice of their actions.”¹⁷⁰ Philip Gourevitch has described genocide as “an exercise in community building.”¹⁷¹ W.E.B. Du Bois ties racial oppression to a bipolar logic, highlighting the role of inter-group fear in racial violence.¹⁷² Following his work, Sherrilyn Ifill has linked lynching in the United States to a background racism that casts blacks as dangerous, prone to violence, and lesser evolved.¹⁷³

As John Rawls points out, transitional states are heirs to abusive paradigms and are therefore “burdened.”¹⁷⁴ The paradigms that hold sway in pretransitional regimes provide a view of the world for abusers in which murder, rape, and assault targeted against members of a specific group¹⁷⁵ are at least not prohibited, and often are moral or historical imperatives.¹⁷⁶ That public sanction often manifests subjectively as a sense of entitlement on the part of abusers.¹⁷⁷ They are “willing executioners” because they are defending their view of the world and carrying out their destiny as a people, group, or society.¹⁷⁸

What makes transitional justice extraordinary is the need to address an abusive paradigm in a constructive way. Thus, the justice gap is not merely a material disparity between needs and resources; it is also a cognitive gap, reflecting the distance between an abusive paradigm and the paradigm that must be achieved for the new state to survive and vindicate its commitments to democracy, human rights, and the rule of law. Any attempt to deal with the challenges of justice in transitions that ignores this defining

167. Brooks, *Getting Reparations Right*, *supra* note 22, at 267.

168. Fletcher & Weinstein, *supra* note 2, at 606–20.

169. Rorty, *supra* note 86, at 112.

170. GOLDHAGEN, *supra* note 86, at 14–15.

171. GOUREVITCH, *supra* note 86, at 95.

172. W.E.B. DU BOIS, *Shape of Fear*, reprinted in *THE SOCIAL THEORY OF W.E.B. DU BOIS* 56 (Phil Zuckerman ed., 2004).

173. IFILL, *supra* note 46, at 43–44, 64–66; *see also* Ehrenreich Brooks, *supra* note 37, at 2327 (making the same point in the context of the Balkans and Rwanda).

174. JOHN RAWLS, *THE LAW OF PEOPLES* 5, 106 (1999).

175. WHEN SORRY ISN'T ENOUGH, *supra* note 22, at 3–5; Rorty, *supra* note 86, at 112.

176. *Prosecutor v. Banovic*, *supra* note 125, at 119–21.

177. GOLDHAGEN, *supra* note 86, at 14–15 (“Who doubts that the Argentine or Chilean murderers of people who opposed the recent authoritarian regimes thought that their victims deserved to die? Who doubts that the Tutsis who slaughtered Hutus in Burundi or the Hutus who slaughtered Tutsis in Rwanda, that one Lebanese militia which slaughtered the civilian supporters of another, that the Serbs who have killed Croats or Bosnian Muslims, did so out of conviction in the justice of their actions? Why do we not believe the same for the German perpetrators?”).

178. *See id.* at 28–30.

feature will always fail to satisfy.¹⁷⁹ It also will pose significant risks for the success of transition by ignoring the need for sustainable reform of public norms and institutions. Only by taking normative account of the unique circumstances of pretransitional abuses can practitioners and theorists hope to develop a practically sustainable and theoretically sound transitional jurisprudence. As the next Part argues, that path is best illuminated by a clear understanding of the historical genesis of mass violence.

IV. MASS VIOLENCE AND THE COLLAPSE OF DYNAMIC STABILITY

“There is no such thing as a people as a whole. All lines that we may draw to define it are crossed by facts. Language, nationality, culture, common fate—all this does not coincide but is overlapping.”

—Karl Jaspers¹⁸⁰

I do not mean to suggest that communities, states, and nations are homogeneous, inhabited by only one paradigm, truth regime, or source of consensual power—quite to the contrary. Most healthy political units are not limited to a single, fundamental, and ubiquitous line or mode of association. Rather, all societies, and particularly stable states, are “segmented,”¹⁸¹ comprised of many smaller groups and associations which stand in opposition to competing groups and associations.¹⁸² These divisions frequently follow the bipolar logic that drives abusive paradigms. Yet, despite these divisions, stable regimes do not fragment and descend into violent chaos in the way abusive regimes do. It is worth a moment to consider why. The answer is surprising and, for present purposes, revelatory.

It is common and relatively intuitive to say that oppositions divide us. Be they economic, racial, religious, cultural, or ethnic, be they fundamental or silly and petty, we all regard each as “other” in some way. In recognition of these divisions, many leaders implore us to set aside our differences and celebrate a universal essence that unites us in common above, beyond, and despite our differences.¹⁸³ That call is backed by some political scientists, who regard ethnic and racial divisions as inherently destabi-

179. Fletcher & Weinstein, *supra* note 2, at 633.

180. JASPERS, *supra* note 31, at 35.

181. MAX GLUCKMAN, CUSTOM AND CONFLICT IN AFRICA 8, 17 (1966); E.E. EVANS-PRITCHARD, THE NUER: A DESCRIPTION OF THE MODES OF LIVELIHOOD AND POLITICAL INSTITUTIONS OF A NILOTIC PEOPLE 147–48 (1940).

182. Kanchan Chandra, *Ethnic Parties and Democratic Stability*, 3 PERSP. ON POL. 235, 236, 242 (2005); GLUCKMAN, *supra* note 181, at 1–2, 24.

183. See, e.g., BARAK OBAMA, THE AUDACITY OF HOPE 13–14 (2006); THE BLACK-EYED PEAS, *One Tribe*, on THE E.N.D. (Interscope 2009).

lizing.¹⁸⁴ While rhetorically seductive, such pursuits are not only folly; they are dangerous and rely on “discredited ‘primordialist’ assumptions that ethnic identities are fixed, unidimensional, and exogenous to politics.”¹⁸⁵ Contrary to this view, ethnic and other core existential identities are “fluid . . . multidimensional,” and responsive to public and private events.¹⁸⁶ Further, a robust multiplicity and variety of segmentary oppositions allows societies to achieve and maintain stability.¹⁸⁷ That stability is by nature and necessity dynamic rather than static.¹⁸⁸ Societies that incorporate this dynamism in their cultural, political, and economic practices are supple and flexible in the face of internal and external challenges. It is by virtue of this dynamic stability that most societies maintain a relative level of peace and stability.¹⁸⁹ By contrast, societies that reify a single thread of universal association and raise to preeminence a particular line of association are terrifyingly brittle, unstable,¹⁹⁰ and poised on the precipice of disaster,¹⁹¹ awaiting only a trigger event to lead them into chaos.¹⁹² Behind calls to unity lies the specter of a final solution.

An understanding and appreciation of the multiplicity of associations and oppositions that intersect to form individual and collective identity is what marks the existential turn into modernity.¹⁹³ Post-modernity is defined by the view that this very diversity exposes the contingency of any particular mode of identity.¹⁹⁴ However, the ironic sensibility entailed by this insight is far from dominant in the rarified world of academe, much less the hurly-burly of public life in the modern nation-state, where gender, religion, race, ethnicity, culture, class, sexuality, and politics are central to public and private identity.¹⁹⁵ For most people, these identities carry

184. See Chandra, *supra* note 182, at 235–38 (describing this view and citing proponents).

185. *Id.* at 236–38.

186. *Id.*; see also Harris, *supra* note 17, at 1736–37 (discussing the creation of “whiteness” in response to economic and political factors).

187. HOROWITZ, *supra* note 154, at 134, 135–36.

188. Verdeja, *supra* note 136, at 217–218; Chandra, *supra* note 182, at 236–38.

189. Nicholas Sambanis, *Do Ethnic and Nonethnic Civil Wars Have the Same Causes?*, 45 J. OF CONFLICT RESOL. 259, 264 (2001); Chandra, *supra* note 182, at 24–44.

190. HOROWITZ, *supra* note 154, at 135–36.

191. Sambanis, *supra* note 189, at 280.

192. BORAINÉ, *supra* note 10, at 104, 110–12 (describing how the violent threads of the black power movement was occasioned, made necessary, and inspired by expressions of white power through the Apartheid state ultimately “leading to serious conflict”); Harris, *supra* note 17, at 1768 (noting the racial oppression of “colorblindness”).

193. Nancy Fraser, *Social Justice in the Age of Identity Politics*, in REDISTRIBUTION OR RECOGNITION: A POLITICAL-PHILOSOPHICAL EXCHANGE 7, 55–56 (Nancy Fraser & Axel Honneth eds., 2003); see generally JESSICA BENJAMIN, *Recognition and Destruction: An Outline of Intersubjectivity*, in LIKE SUBJECTS, LOVE OBJECTS: ESSAYS ON RECOGNITION AND SEXUAL DIFFERENCE (1995); K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in MULTICULTURALISM 149, 150–51 (Amy Guttmann ed., 1994).

194. See generally RORTY, *supra* note 153.

195. See generally JEDEDIAH PURDY, FOR COMMON THINGS: IRONY, TRUST, AND COMMITMENT IN AMERICA TODAY (1999).

real force, at times taking on a dominant role and echoing the bipolar logic characteristic of abusive paradigms.¹⁹⁶ Yet, stability is maintained in most states. Mass atrocities seldom occur, even in the face of the most suggestive and hate-filled speech; even when emotions appear too hot to cool; and even when thinly veiled rhetoric of violent hatred rises to such a din we fear the cacophony will never abate.¹⁹⁷

We need not, of course, cabin ourselves to political commentary on a grand scale to make the point. In even the smallest groups there are competing paradigms that angle for dominance, superiority, or entitlement. In any social or professional group, members indulge in the construction of normatively significant ontologies.¹⁹⁸ Who among us has not wondered who in our families, social cohorts, offices, or faculties is the smartest, best looking, wealthiest, or most popular? Likewise, we create and sustain narratives of entitlement—“Harry does not deserve Sally’s affection;” “Suzy didn’t earn her wealth;” “I was really the best qualified for the position.” We also foretell an end of history, a historical teleology, when the world will conform to our idiosyncratic conceptions of right—“I might be down now, but when all the cards are played, I’ll have the best job, the biggest house, and Sally’s love.” This is the stuff of society, and a mainstay for literary endeavors sublime¹⁹⁹ and primetime.²⁰⁰ However, petty slights and minor intrigues aside, we kill each other only infrequently over such things. On a larger scale, despite the fact that deep social and political oppositions are a given in modern states, with few exceptions these divisions, no matter how deep and emotional, do not produce violence and almost never descend into mass chaos. Despite our oppositions, we stay together. But why?

A. Dynamic Stability as a Function of Conflict Multiplicity

“Herein lies social cohesion, rooted in the conflicts between men’s different allegiances.”

—Max Gluckman²⁰¹

196. Brophy, *supra* note 36, at 1181 (quoting RALPH ELLISON, *Going to the Territory*, in THE COLLECTED ESSAYS OF RALPH ELLISON 591, 595 (John Callahan ed., 1995)).

197. Take the United States, for example. At least since the contests between Adams and Jefferson, we have regularly seen political battles so vociferous that they seem to rend the country beyond the point of darning. See DAVID MCCULLOUGH, JOHN ADAMS 462–66 (2001).

198. See Bert Useem, *Breakdown Theories of Collective Action*, 24 ANN. REV. SOC. 215, 232 (1998); see also Albert Bandura et al., *Disinhibition of Aggression Through Diffusion of Responsibility and Dehumanization of Victims*, 9 J. RES. IN PERSONALITY 253, 254 (1975).

199. Leo Tolstoy and Jane Austen are masters of this brand of interpersonal drama.

200. This is core material for most serial dramas, but the subtle and not-so-subtle interpersonal contests on *The Sopranos* deserve to be highlighted.

201. GLUCKMAN, *supra* note 181, at 4.

In abusive regimes and stable states alike, groups survive by competing for the loyalty of potential members and by marking their borders to exclude some and include others. The tools and strategies deployed in these common games of inclusion and exclusion bear an eerie similarity to the defining characteristics of abusive paradigms. Members look haughtily across lines of division secure in their privilege and natural superiority, confident that they are destined to prevail at the end of history. Stable states contain these divisions and oppositions, yet they seldom if ever engage in genocide.²⁰² “Why” may seem a riddle; but this Section and the next argue that the answer is both transparent and profound: states maintain stability by preserving a diversity of overlapping oppositions and associations.

There is no association without opposition.²⁰³ Inclusion by definition implies exclusion. Abusive regimes decay into chaos not because society is fractured by lines of opposition, but because a single opposition assumes dominance in the political field.²⁰⁴ The privilege entailed in that rise allows the familiar normative, ontological, and teleological features of oppositional logic to convert what otherwise might have been a peaceable disagreement into a paradigm of abuse poised to lead cadres of willing executioners. By contrast, stable states remain stable not because they eliminate all fissionary lines, but because they maintain a broad diversity of overlapping oppositions, each implying associations with some individuals and oppositions to others.²⁰⁵ In relatively peaceful states, this web of overlapping categories of inclusion and exclusion is what restrains violence and maintains overall social cohesion and stability.²⁰⁶

In stable states, individuals have a more complex identity than their association with a particular group might suggest. Pulling back a bit from the atomic level reveals that individuals mark points of intersection between different groups, their social identities implicating multiple dyads.²⁰⁷ The positions of individual group members at the intersections of various oppositions imposes constraints on dyadic groups’ capacities to develop and sustain long-term opposition.²⁰⁸ These intersections also create lines of

202. See *supra* note 197.

203. G. W. F. HEGEL, PHENOMENOLOGY OF SPIRIT 11–19 (A. V. Miller trans, 1977).

204. BORAINÉ, *supra* note 10, at 104, 110–12; see also Chandra, *supra* note 182, at 245–46.

205. GLUCKMAN, *supra* note 181, at 1–2; see also Chandra, *supra* note 182, at 241–44.

206. GLUCKMAN, *supra* note 181, at 17; Chandra, *supra* note 182, at 245, 247.

207. See Appiah, *supra* note 193, at 150–51; ARNOLD VAN GENNEP, THE RITES OF PASSAGE 1–3 (Vizedom & Caffee trans., Univ. of Chicago Press 1960) (noting that “[e]ach larger society contains within it several distinctly separate social groupings” and that “[t]he life of an individual in any society is a series of passages”).

208. Swartz et al., *supra* note 135, at 8; see also Chandra, *supra* note 182, at 241–45.

cohesion among groups with potentially conflicting agendas.²⁰⁹ Paradoxically, then, social cohesion implies internal opposition.²¹⁰

This dynamic cross-sectionality is highly visible in “primitive” societies.²¹¹ Take E.E. Evans-Pritchard’s account of the Nuer.²¹² According to Evans-Pritchard, the central term of group identity among the Nuer is agnatic, tracing patriarchal lineage and establishing duties of defense and vengeance.²¹³ However, these “feud” groups do not live in exclusive villages or territories; rather, members are dispersed throughout a larger region and cohabit with members of other groups.²¹⁴ As a result, agnatic identity cannot provide a source of cohesion for everyone living in the same village. Instead, immediate interests of social proximity create lines of association and interdependence binding members of competing agnates to one another along lesser lines of association.²¹⁵ Exogenous marriage rules, cleverly captured in the principle “[t]hey are our enemies; we marry them[,]”²¹⁶ create additional lines of association across agnate groups.²¹⁷ These are reinforced in daily domestic life and more persistently by duties of care and rights of succor between children and maternal uncles.²¹⁸ Add to these various other economic, ritual, historic, and social associations, and a picture emerges of Nuer society as constructed of dynamic competing cross-associations.²¹⁹ Even between sworn enemies, there exist associational forces of cohesion that dramatically reduce or control violence.²²⁰

Societies composed and recomposed by dynamic cross-sectional associations are far more stable than isolated groups or collections of unassociated individuals.²²¹ Intra- and inter-group conflict is, of course, inevita-

209. GLUCKMAN, *supra* note 181 at 1–2; Chandra, *supra* note 182, at 241–45.

210. GLUCKMAN, *supra* note 181, at 25.

211. Fraser, *supra* note 193, at 51.

212. See generally E.E. EVANS-PRITCHARD, *NUER RELIGION* (1956); E. E. EVANS-PRITCHARD, *KINSHIP AND MARRIAGE AMONG THE NUER* (1951) [hereinafter EVANS-PRITCHARD, *KINSHIP*]; EVANS-PRITCHARD, *supra* note 181. Evans-Pritchard, like many ethnographers of his generation, has been severely criticized for his close relationship with colonialism. While damning, those criticisms endorse by implication the validity of his account of dynamic social and political segmentation. His work could not have been such a successful tool for colonial control if his descriptions of social segmentation and the dynamics of fission and fusion were not, in some straightforward descriptive sense, “true.” That written, any reference to or use of his work cannot go forward without recognizing the troubling role played by him and his peers in atrocities perpetrated by colonial powers throughout the southern hemisphere.

213. EVANS-PRITCHARD, *KINSHIP*, *supra* note 212, at 156–57; EVANS-PRITCHARD, *supra* note 181, at 193–200.

214. GLUCKMAN, *supra* note 181, at 11; EVANS-PRITCHARD, *supra* note 181, at 209.

215. GLUCKMAN, *supra* note 181, at 13–15; EVANS-PRITCHARD, *KINSHIP*, *supra* note 212, at 5, 22–28; EVANS-PRITCHARD, *supra* note 181, at 209–10.

216. GLUCKMAN, *supra* note 181, at 13.

217. *Id.* at 13; EVANS-PRITCHARD, *supra* note 181, at 225.

218. EVANS-PRITCHARD, *KINSHIP*, *supra* note 212, at 165–67.

219. GLUCKMAN, *supra* note 181, at 17–18.

220. *Id.* at 24–26.

221. *Id.*

ble. In Evans-Pritchard's terms, segmentary forces of fission constantly arise, emphasizing particular lines of opposition and association.²²² If individuals existed in a one-dimensional social universe there would be no hope of limiting conflict or constraining violence when fissures appeared. However, individuals who exist at the nexus of numerous different lines of association inevitably find that self-interest is far more complex than might appear in the face of an immediate fission within or between groups. Thus, forces of fusion drive members and groups together even as fissionary forces push them apart.²²³

This is a dynamic process. Different lines of association wax and wane, often in reaction to the source and nature of a conflict or threat.²²⁴ Conflicts among nations drive intertribal conflicts into the background.²²⁵ Clan rivalries are suffused in the face of intertribal conflict. Associational identities may even be forgotten in the absence of an activating opposition.²²⁶ However, in functional and stable societies, cross-sectional associations never disappear entirely. It is by virtue of this dynamism that conflict, and, more importantly, violence inspired by any particular opposition is controlled, regulated, and constrained.²²⁷ Stability is maintained by offsetting vectors of association and opposition.²²⁸

The same dynamic cross-sectionality is evident in "advanced" societies as well.²²⁹ Social cohesion in modern nation-states is achieved not by ensuring fundamental loyalty to one shared norm, narrative, or institution. Rather, it is achieved through a complex interwoven web of competing and overlapping loyalties and associations.²³⁰ The nation is stabilized by the overlapping communities within its borders through intersecting lines of interest and allegiance among members.²³¹ The resulting picture is of an extensive system of overlapping circles. Each of us occupies a unique space created by the intersecting spheres of the communities in which we are members. Put differently, we are the residue of multiple claims of existential sufficiency, with each of those claims implicating associates for

222. *Id.* at 8, 17; EVANS-PRITCHARD, *supra* note 181, at 147–48.

223. Swartz et al., *supra* note 135, at 8; GLUCKMAN, *supra* note 181, at 24–26.

224. EVANS-PRITCHARD, *supra* note 181, at 139–91.

225. *Id.* at 142–43.

226. *Id.* at 147.

227. GLUCKMAN, *supra* note 181, at 8–9. Another controversial contributor to the ethnographic canon, Napoleon Chagnon, has made similar observations of the role that kinship and other political ties play in determining which forms of violence may be deployed in conflict. See NAPOLEON CHAGNON, *YUNOMAMÓ: THE FIERCE PEOPLE* 118–120 (1968).

228. EVANS-PRITCHARD, *supra* note 181, at 147–48; GLUCKMAN, *supra* note 181, at 24–26.

229. GLUCKMAN, *supra* note 181, at 4, 24–25.

230. Chandra, *supra* note 182, at 241–45; see Paul Schiff Berman, *An Observation and a Strange but True 'Tale': What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?*, 52 HASTINGS L.J. 123, 130–31 (2000) (arguing that trials play a "generative role" in society by providing a "discursive forum to tell alternative stories"); GLUCKMAN, *supra* note 181, at 18.

231. GLUCKMAN, *supra* note 181, at 24; Chandra, *supra* note 182, at 243–45.

whom the proposition also holds true. Some Democrats are Presbyterians; some Presbyterians are investment bankers; some investment bankers are Republicans; and so forth. It is by virtue of these intersections that we maintain relative social and political stability. Whenever a line of opposition is emphasized, pushing society to segment, corollary lines of collateral association are activated, limiting the destructive potential of the divisive force.²³²

In the Federalist Papers, Alexander Hamilton and James Madison engaged these issues during a debate over factions.²³³ In Hamilton's view, factions represented a tremendous threat to the stability of the proposed union.²³⁴ His fear was that, liberated to pursue their own interests, people would form insular groups and mobilize to pursue narrow agendas, thereby fragmenting and destabilizing the body politic with deleterious consequences to the fragile new union.²³⁵ Madison was sympathetic to these concerns, but disagreed with Hamilton's assessment of the danger. Madison recognized that the only way to prevent the formation of political factions was by tyrannical means. As a natural consequence of freedom, people will develop and pursue their own conceptions of the good life, forming associations with those who share their interests and goals.²³⁶ But Madison did not see the demise of the union in this exercise of freedom. To the contrary, he argued that the union was more likely to survive and thrive if, to borrow a colloquialism, a thousand flowers were allowed to bloom.²³⁷ According to Madison, the real danger in any democracy was not factionalization, but the emergence of a single tyrannical faction. Interest groups forced to swim in a diverse sea of competitors would have a harder time forming uncomplicated, dominant, and persistent majorities. Anticipating Kanchan Chandra's work on ethnic politics, Madison argued that, in a broad and diverse union, factions are forced to adopt moderate

232. It is often claimed that the United States is fundamentally divided between Democrats and Republicans. While hyperbolic, that claim is not a complete fiction. Why, then, have we not seen a genocidal confrontation between Democrats and Republicans? One possibility is shared faith to a higher level of association. We are all Americans first, and Democrats or Republicans second. That hypothesis is hard to maintain given that the contest between Democrats and Republicans is frequently cast as a battle over what America is or ought to be and who the "real" Americans are. The better description is that ours is a society divided by more and more varied oppositions and associations than is captured by the narrative of Red vs. Blue. To name just a few, we are divided by race, religion, economic status, education, alma mater, beer preferences, etc. We stay together not despite these differences but because of them. Each opposition implies a reciprocal and complementary association. That association implicates others, some of which are populated by members of other groups with which we are associated, and some of which are not.

233. THE FEDERALIST NO. 9, at 71–76 (Alexander Hamilton), NO. 10, at 77–84 (James Madison) (Clinton Rossiter ed., 1961).

234. THE FEDERALIST NO. 9, *supra* note 233, at 71–73 (Alexander Hamilton).

235. *Id.*

236. THE FEDERALIST NO. 10, *supra* note 233, at 78–79 (James Madison).

237. *Id.* at 81–84.

policy positions in order to form majorities and maintain the support of members who have cross-affiliations with other factions.²³⁸

The operation of dynamic stability is ubiquitous in persistent societies, even those that undergo episodes of turmoil. Among the Nuer, it is visible in the cross-secting affiliations of agnate group, lineage, village, economic engagement, and marriage. In “modern” society it is evident in the operations of politics and civil society. The same phenomenon is evident on the international stage, where trade, treaties, immigration, and the maintenance of diplomatic ties serve as essential tools for regulating and controlling conflict between sovereign countries by creating lines of interdependence, building bulwarks of affiliation against inevitable tides of conflict.²³⁹

There is, of course, much more that can be said about the details of dynamic stability and its role in preserving public order. For present purposes, however, it is enough to have this sketch in mind as we move in the next Subpart to a discussion of how regimes become abusive and how otherwise normal people, people just like you and me, become agents of atrocity.

B. Mass Violence and the Loss of Dynamic Stability

In most states, a robust system of overlapping associations provides overall stability by counterbalancing segmentary pressures with collateral lines of cohesion. What distinguishes abusive regimes from stable states is a catastrophic failure in this web of dynamic stability, a shift that is normally precipitated by crisis.²⁴⁰ In contrast with stable states, where there is a dynamic balance of diverse associations and oppositions, abusive regimes are dominated by one associational identity. That dominance reifies a corollary line of opposition and limits the ability of cross-secting terms of association and identification to preserve the broader and more inclusive systems of social cohesion that restrain violence.²⁴¹ This pathological segmentation leads to a momentary lapse in the “general need for peace, and recognition of a moral order in which this peace can flourish[.]”²⁴² opening the door to violent realization of the normative and teleological mainstays of abusive paradigms.

The collapse of dynamic stability was evident in Nazi Germany, for example. While eliminationist anti-Semitism was a persistent thread in the

238. *Id.*; Chandra, *supra* note 182, at 241–45.

239. See JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 83–106 (2005); GLUCKMAN, *supra* note 181, at 4.

240. Chandra, *supra* note 182, at 246.

241. BORAINÉ, *supra* note 10, at 104; see Harris, *supra* note 17, at 1741–42, 1760, 1767 (discussing inability of whites living under Jim Crow to identify with black class peers).

242. GLUCKMAN, *supra* note 181, at 25.

social fabric of early twentieth century Germany, Aryans, Jews, Romani, and other non-Aryans lived in relative peace because lines of social, economic, and even family association cross-cut the ethnic divide.²⁴³ What precipitated the Holocaust was the suppression of those cross-associations and the alignment of anti-Semitism with nationalism.²⁴⁴ The exclusive claim on authentic national identity asserted by a core group obsessed with racial purity rendered any commitment to continued association with those not of Aryan descent unpatriotic—an act of faithlessness not just to race but to country as well.²⁴⁵ Had race not assumed this position of dominance as the defining line of opposition and association, then the Holocaust simply would not have happened, at least not on a scale that required the service, support, and accommodation of countless willing executioners.

The Rwandan genocide followed a similar pattern. There was a history of ethnic tension in the country long before 1994.²⁴⁶ There were even episodes of violence.²⁴⁷ However, that violence was constrained by innumerable cross-cutting lines of association.²⁴⁸ Many Hutus and Tutsis were married.²⁴⁹ Hutus and Tutsis shared a common religion.²⁵⁰ All that changed in early 1994 when rumblings about a Tutsi uprising from Burundi gave Hutu Power leaders in Rwanda the evidence they needed to bind national security to ethnic purity.²⁵¹ As in Nazi Germany, national identity in Rwanda was collapsed into ethnic identity as the paradigm of Hutu Power rose to dominance with its historical narrative and social ontology of eth-

243. See MARTIN GILBERT, *THE HOLOCAUST: A HISTORY OF THE JEWS OF EUROPE DURING THE SECOND WORLD WAR* 35 (1987).

244. GOLDHAGEN, *supra* note 86, at 49–128; see ALAN ROSENBAUM, *PROSECUTING NAZI WAR CRIMINALS* 11–12 (1993); WIESENTHAL, *supra* note 164, at 15; Alan Davies, *The German Third Reich and Its Victims*, in *WHEN SORRY ISN'T ENOUGH*, *supra* note 22, at 24; see generally JEREMY COHEN, *THE FRIARS AND THE JEWS: THE EVOLUTION OF MEDIEVAL ANTI-JUDAISM* (1982); JOSHUA TRACHTENBERG, *THE DEVIL AND THE JEWS: THE MEDIEVAL CONCEPTION OF THE JEW AND ITS RELATION TO MODERN ANTI-SEMITISM* (1943).

245. GOLDHAGEN, *supra* note 86, at 8, 11–13, 416–54. See also 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 283–87 (U.S. Government Printing Office, 1950) (referring to Testimony of SS Officer Otto Ohlendorf before the Nuremberg War Crimes Tribunal on Oct. 8–15, 1947).

246. Christina M. Carroll, *An Assessment of The Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 166–171 (2000).

247. *Id.*

248. See Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 555, 577–578 (1998).

249. *Id.* at 555.

250. *Id.* at 570 n. 108, 577–578.

251. GOUREVITCH, *supra* note 86, at 47–62; see also Prosecutor v. Nahimana, Barayagwiza, and Ngeze, Case No. ICTR-99-52-T, Judgment, Int'l Criminal Tribunal for Rwanda, 102–109 (Dec. 3, 2003), <http://www.rwandainitiative.ca/resources/pdfs/judgment.pdf>; Colette Braeckman, *Incitement to Genocide*, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 192 (Roy Gutmann & David Rieff eds., 1999); ALISON LIEBHAFSKY DESFORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 80–113 (1999), available at <http://www.grandslacs.net/doc/1317.pdf>.

nic supremacy.²⁵² Those who retained a commitment to their Tutsi family members, friends, and associates were identified as sympathizers and put to death alongside their loved ones because they chose to identify with the wrong side of *the* defining social line.²⁵³

While it is at least conceptually possible that a society may permanently fall prey to a paradigm of abuse,²⁵⁴ far more common are cases of punctuated violence during which the paradigm—the truth regime—of one group gains temporary hegemony and exploits that dominance in an attempt to destroy permanently one or more opposing groups. In other words, mass atrocities mark moments of crisis. That crisis may be years or generations in the making. It may last months, decades, or even centuries. What is striking, however, is the near universal phenomenon of incomprehension among abusers and victims when the violence ends.

In the wake of mass atrocity, participants frequently join Walter Benjamin's Angel of History, looking in bewilderment at their bloody hands and destroyed lives and wondering how on earth this could have happened.²⁵⁵ That confusion signals the resurfacing of what had been forgotten, or at least suppressed: the lines of association between victims and abusers. The remainder of this Article suggests that this bewilderment signals a critical opportunity for transitional justice in general and reparations in particular. Part V sets the stage by placing transitional justice as extraordinary justice in the broader context of social transformations.

V. EXTRAORDINARY JUSTICE

Reviewing the transitional justice literature, Laurel Fletcher and Harvey Weinstein note that “there is no theoretical foundation that underlies the concept of social repair.”²⁵⁶ Recognizing that stability is actually a dynamic achievement consequent of multiple and diverse frontiers of alignment and dissociation helps span this lacuna by providing a crucial insight into both how transitions can achieve sustainable peace and the proper role of reparations in the process. Specifically, it suggests that the key to achieving peace is to reconstitute the web of cross-cutting and overlapping lines of association and opposition that allows healthy—or, at

252. GOUREVITCH, *supra* note 86, at 47–62.

253. *Id.*

254. Derrick Bell has argued that this is precisely the condition we find with race in the United States where, he argues, opposition to blacks allows whites from a host of otherwise opposed groups to unite behind their shared interest in perpetuating a racist society. See DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 29–30 (2d ed. 1980) (arguing that the same condition exists with race in the United States because otherwise opposed whites unite to oppose blacks under a white interest to perpetuate a racist society).

255. See *infra* Part 0.

256. Fletcher & Weinstein, *supra* note 2, at 618.

least, less pathological—states to maintain dynamic stability in the face of segmentary forces.

The political goal in transition is, then, less a project of wholesale creation than an effort to reconstitute a version of what was lost in crisis by re-presenting society to itself and its members to one another as co-residents in a social system more complicated than that which was accepted as Truth under the recently dominant abusive paradigm. That goal is best pursued not by erasing from the public political field the line of opposition implicated in past abuses. Rather, the goal is to situate that opposition in a broader context of overlapping associations²⁵⁷ so as to remove the ontological linkage between being Hutu and absolute economic, social, political, and historical privilege.²⁵⁸ Properly conceived, reparations are well suited to this task.

Transitions are Janus-faced.²⁵⁹ That is, in at least two respects, transitions occupy a unique place “[b]etwixt and [b]etween”²⁶⁰ the horrors of the past and the promise of the future. First, in addition to being fields of contest for the soul of a post-transitional society, transitions are fields of contest between the past and the future.²⁶¹ Transitions and transitional justice are not retrospective only;²⁶² neither are they strictly prospective.²⁶³ Rather, they are located in a temporal position between past and future. While that is trivially true *whenever* it is we find ourselves—the command to “live in the present” amounts to tautology, after all—it is true in a more significant sense in transitions, which must maintain an orientation to both the past and the future. “The past” in transitions is a period marked by systematic and targeted human rights violations perpetrated under the authority of an abusive paradigm and through the guidance of an abusive regime.²⁶⁴ “The future” is the aspiration for peace, security, and respect for human rights and the rule of law. So, while we all, at least in a colloquial sense, exist in the moment between past and future, transitions exist in a liminal period removed from a horrific past and not yet reintegrated into the world of the post-transitional future.²⁶⁵

Second, transitions are Janus-faced in a normative sense. Transitions are not solely concerned with documenting, accounting for, and punishing past wrongs based on preexisting norms. Neither are transitions solely

257. Chandra, *supra* note 182, at 243–45.

258. See Ehrenreich Brooks, *supra* note 37, at 2313, 2322.

259. Vandeginste, *supra* note 14, at 148.

260. TURNER, FOREST, *supra* note 48, at 93.

261. Fionnuala Ní Aoláin & Catherine Turner, *Gender, Truth & Transition*, 16 UCLA WOMEN’S L.J. 229, 247 (2007) (noting the significance of transition as an opportunity explore past abuse as a path to creating new terms of identity and integration).

262. See Posner & Vermeule, *supra* note 15, at 691.

263. *Contra* WHEN SORRY ISN’T ENOUGH, *supra* note 22; Fortson, *supra* note 62, at 122.

264. Ehrenreich Brooks, *supra* note 37, at 2330.

265. *Id.* at 2311.

prospective, indulging oblivion in favor of an exclusive focus on achieving peace and stability going forward.²⁶⁶ Rather, transitions are called upon to account for the past as a part of the effort to go forward toward an aspirationally described future.²⁶⁷ This is true in a definitional sense: the future of a transitional state is defined in many ways by its opposition to the past. It is also true in a transformative sense: the core transitional project, inclusive of transitional justice, is to transform an abusive and violent society into a peaceful regime committed to human rights and the rule of law.²⁶⁸ In this respect, transitions mark a moment of political liminality in which a transitioning society is called upon to achieve a change in status both for the whole and for individuals. So understood, the past serves as a sort of negative regulatory ideal cast prospectively as the transitional justice imperative: “Nunca Más.”²⁶⁹

The invocation of “liminality” and transformation here may seem a bit obscure, and deserves brief explanation. I take the term and concept from a group of mid-twentieth century anthropologists, including most prominently Victor Turner, who questioned the dominant modes of synchronic structural analysis in cultural ethnography.²⁷⁰ Rather than examining cultural phenomena as static structures, these ethnographers focused on cultural process.²⁷¹ They viewed culture generally, and politics in particular, not as frozen structures, but diachronically.²⁷² Much of that work came out of nineteenth century ethnographic work on rites of passage that was condensed in Arnold Van Gennep’s classic *The Rites of Passage*.²⁷³ Rites of passage are common to all societies²⁷⁴ and track the passage of an individual from one “relatively fixed or stable condition” to another.²⁷⁵ While the forms and purposes of rites of passage vary widely, ranging from ritual

266. Pablo de Greiff, *Trial and Punishment: Pardon and Oblivion*, PHIL. & SOC. CRITICISM., May 1996, at 93, 105.

267. Robert Cover famously made a similar argument with respect to law in general, which he characterizes as a forum for connecting “reality” to various “alternities.” See ROBERT M. COVER, *The Folktales of Justice: Tales of Jurisdiction*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 173, 176 (Martha Minow et al. eds., 1992); Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983); cf. VICTOR TURNER, FROM RITUAL TO THEATRE: THE HUMAN SERIOUSNESS OF PLAY 75 (1982) (arguing that legal procedures, as opposed to transformative “social dramas,” “reassert and reanimate the overarching values shared by all”).

268. See Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 474–75 (1995).

269. See NUNCA MAS (NEVER AGAIN), REPORT OF CONADEP (NATIONAL COMMISSION ON THE DISAPPEARANCE OF PERSONS) (1984) available at http://www.nuncamas.org/english/library/nevagain/nevagain_000.htm.

270. See, e.g., TURNER, DRAMAS, *supra* note 148; TURNER, FOREST, *supra* note 48; VICTOR TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE (1969); VICTOR TURNER, SCHISM AND CONTINUITY IN AN AFRICAN SOCIETY: A STUDY OF NDEMBU VILLAGE LIFE (1957).

271. See, e.g., TURNER, DRAMAS, *supra* note 148, at 24.

272. Swartz et al., *supra* note 135, at 30–31.

273. VAN GENNEP, *supra* note 207.

274. TURNER, FOREST, *supra* note 48, at 93.

275. *Id.*; VAN GENNEP, *supra* note 207, at 146–65.

circumcision²⁷⁶ and formal education,²⁷⁷ to marriage,²⁷⁸ and death,²⁷⁹ they all share the same basic form marked by separation from the profane social order, transformation from one status or role to another, and reincorporation into society in the new status or role.²⁸⁰

The main action in rites of passage is in the transformational or “liminal” phase.²⁸¹ The primary task in the liminal phase is to experiment with identities and to acquire the knowledge and skills necessary to life in a future role.²⁸² This transformation is accomplished through an abandonment of the status structure that orders profane society.²⁸³ Neophytes are altered in psychic, symbolic, intellectual, and frequently physical ways through a host of sometimes quite playful interactions that entail inversions of normal relations and identities that would otherwise constitute violations of cultural taboos.²⁸⁴ Experimentation in this liminal environment of “anti-structure”²⁸⁵ is part of a process both creative and constructive; a new identity for the initiate is simultaneously created and inscribed upon her. Stripped of external structural reference, liminal processes also frequently give rise to a spontaneous sense of collective enterprise among participants—what Turner calls “*communitas*.”²⁸⁶

The process structures revealed by ethnographic analyses of rites of passage appear wherever there is movement from one social status or condition to another,²⁸⁷ including contests between different cultural paradigms, which Turner calls “social dramas.”²⁸⁸ These contests focus on “exclusion rules,”²⁸⁹ the norms applied to organize social status by defining lines of opposition and association. Political conflicts on this view are contests among “boundary-maintaining mechanisms” for the privilege of assigning status to subjects and organizing social relations.²⁹⁰ These conflicts, like rites of passage, progress through the major stages of separation, liminal transformation, and reintegration.²⁹¹

276. TURNER, FOREST, *supra* note 48, at 103.

277. *Id.* at 93–94.

278. VAN GENNEP, *supra* note 207, at 116–45.

279. *Id.* at 146–65.

280. TURNER, FOREST, *supra* note 48, at 94; VAN GENNEP, *supra* note 207, at 3.

281. TURNER, RITUAL PROCESS, *supra* note 270, at 95–96.

282. TURNER, FOREST, *supra* note 48, at 97–110.

283. TURNER, RITUAL PROCESS, *supra* note 270, at 96–97.

284. VAN GENNEP, *supra* note 207, at 75, 105–07.

285. TURNER, DRAMAS, *supra* note 148, at 45, 272–98.

286. *Id.* at 96–97, 131–65.

287. *See* TURNER, FOREST, *supra* note 48, at 95.

288. TURNER, DRAMAS, *supra* note 148, at 17.

289. *Id.*

290. Swartz et al., *supra* note 135, at 31.

291. *Id.* at 5; TURNER, DRAMAS, *supra* note 148, at 17, 38–41; *see also* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1270–71 (2008) (drawing analogies between social dramas and legal crises in families).

The stages of rites of passage as replicated on the larger scale of social dramas have obvious application to transitions²⁹² and help to answer fundamental questions posed in the literature about how to achieve the “norm creation” necessary for sustainable peace and security in and after transition.²⁹³ Transitions are fields of contest between two competing paradigms.²⁹⁴ The first is the abusive paradigm, with its attendant ontological views on natural hierarchies—hopes for an end of history in which the dominant group’s position is permanently assured—and permissive views on targeting individuals in the oppressed group for violent treatment. The competing paradigm is partially defined by its opposition to the core elements of the old regime. However, it also features positive commitments to democracy, human rights, and the rule of law. Transitions standing “betwixt and between” these two paradigms are quintessentially liminal.

The challenge in any transition is to define for a post-transitional regime a new social paradigm, a new set of boundary maintaining mechanisms and exclusion rules, and new modes of public engagement that can provide grounds for a sustainable peace.²⁹⁵ This does not imply that the process of experimentation and definition in transitions is a free-flying balloon, unconnected from the real demands of a struggling society. Quite to the contrary, contests over post-transitional public identity quite often play out in concrete debates about constitutions, the allocation of resources, and access to institutional power. Liminal processes of transition are also tethered to the specific society, its history, the experiences of its members, and its hopes for the future.²⁹⁶ As set forth at length above, abusive regimes represent a loss of dynamic stability through the emergence of a particular line of opposition and association to near-complete dominance.²⁹⁷ When looking forward, transitions therefore look to the period before the abusive paradigm took control in order to access the diversity of collateral associations and oppositions that once restrained segmentary violence in that society.²⁹⁸ In an almost Rousseauvian²⁹⁹ sense, then, suc-

292. See Brandon Hamber & Richard A. Wilson, *Symbolic Closure Through Memory, Reparations, and Revenge in Post-Conflict Societies*, 1 J. OF HUM. RTS. 35 (March 2002); Osiel, *supra* note 268, at 473–74.

293. See Ehrenreich Brooks, *supra* note 37, at 2323–25.

294. See Simons, *supra* note 49, at 821–22.

295. Ruth Rubio-Marín, *Introduction: A Gender and Reparations Taxonomy*, in *THE GENDER OF REPARATIONS* 1, 17 (Ruth Rubio-Marín, ed. 2009); Ehrenreich Brooks, *supra* note 37, at 2335–36.

296. See BORAINÉ, *supra* note 10, at 198–99.

297. See *supra* Part 0.

298. Ní Aoláin & Turner, *supra* note 261, at 247.

299. See JEAN-JACQUES ROUSSEAU, *Considerations on the Government of Poland and on Its Projected Reformation*, in *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 177, 177–78 (Victor Gourevitch ed. & trans., 1997); see also G. W. F. HEGEL, *LECTURES ON THE PHILOSOPHY OF HISTORY* 79–110 (J. Sibree trans., 1991) (arguing that, in contrast to Universal Spirit, the spirit of a People and their forms of government are necessarily bound to context, including geography and history).

cessful transitions and post-transitional paradigms must pay attention to context and seek to offset the boundary maintaining mechanisms of an abusive paradigm with competing modes of association and opposition indigenous to and appropriate for that society and its members.³⁰⁰

To sum up a bit, post-transitional identities are not wholly novel. Rather, they are composed at least in part by restoring collateral social statuses that cross-cut groups and which provided stability in the past but were repressed or forgotten while the abusive regime held sway. As part of that agenda, transitions must reorder status distinctions at the core of abusive practices by connecting individuals in those groups to a broader web of associations and oppositions so that, for example, the line between Aryan and Jew, Hutu and Tutsi, Man and Woman, no longer marks a hierarchy of entitlement.³⁰¹ Transitions also require restructuring of society more broadly, which is best achieved through healthy political contests among competing social paradigms. Paying attention to these liminal goals provides useful guidance for the main components of a hybrid program of transitional justice.

Truth and reconciliation committees, for example, are sometimes touted as efforts to assert a “sense of control after a horrific and chaotic human tragedy.”³⁰² Part of that project is forensic, reflecting a need to come to terms with the past by establishing the facts of what happened free from the evidentiary constraints imposed in criminal trials.³⁰³ Set in the context of a broader effort to reestablish the overlapping associations constitutive of dynamic stability, another benefit of Truth Commissions comes to the fore. In addition to establishing facts, Truth Commissions provide an opportunity for victims to tell their stories and to be recognized in a formal, official setting.³⁰⁴ Abusers are invited to join the larger transitional society in recognizing former victims as full human beings who inhabited a lifeworld rich and diverse in points of association. They are asked to see their victims not only as Jews, but as mothers, botanists, oenophiles, and teachers as well.³⁰⁵

Criminal trials also have a liminal role in transitions.³⁰⁶ In addition to straightforward retributive and utilitarian demands that frequently provide ground and guidance for criminal trials in stable states, transitions also use trials as opportunities to mark a clear and definitive break with the past by

300. IFILL, *supra* note 46, at 126; Fletcher & Weinstein, *supra* note 2, at 637.

301. See Ruth Rubio-Marín, *The Gender of Reparations in Transitional Societies*, in *THE GENDER OF REPARATIONS*, *supra* note 295, at 63, 101–119 (arguing that transitional justice programs in general, and reparations in particular, should “subvert” preexisting structural inequalities).

302. Berman, *supra* note 230, at 167–68.

303. Fletcher & Weinstein, *supra* note 2, at 589.

304. BORAINÉ, *supra* note 10, at 185–91; Rubio-Marín, *supra* note 295, at 74–77.

305. See Hamber & Wilson, *supra* note 292, at 44.

306. Osiel, *supra* note 268, at 473–74.

condemning those responsible. Viewed through the lens of a broader effort to correct the status imbalance at the center of an abusive paradigm, criminal trials also provide an opportunity to raise the status of victims by putting public resources behind the effort to vindicate their rights as citizens. On the other side of the ledger, criminal trials, by condemning abusers, reject the claim of status entitlement that provided a foundation for their past wrongs.³⁰⁷ That opportunity is, of course, at its apex in prosecutions of high-level leaders and other public officials who propounded and institutionalized the paradigm of abuse.

As part of a larger hybrid program of extraordinary justice, reparations have an important role to play as well. The next Part makes that case.

VI. THE LIMINAL ROLE OF REPARATIONS IN TRANSITIONS TO DEMOCRACY

[T]he willingness to give compensation, even the recognition that one should give it, does not necessarily express agent-regret, and the preparedness to compensate can present itself at very different levels of significance . . . [This includes an awareness that] his actions might have some reparative significance other than compensation.

—Bernard Williams³⁰⁸

Commenting on a core deficit in the domestic reparations debate, Alfred Brophy notes that “a critical problem with reparations is that reparatologists have not yet specified what they want.”³⁰⁹ That omission is derivative of a broader failure to understand the unique conditions of mass violence and their normative and substantive consequences for transitional justice as extraordinary justice. Accounting for reparations as a core element of extraordinary justice reveals that reparations are best understood and justified as symbolic and material measures for achieving status and participatory parity among former victims and former abusers by reconstituting the robust web of association and opposition constitutive of dynamic stability.

307. Cf. Ruth Rubio-Marín, *supra* note 301, at 82–85 (making this point in the context of reparations).

308. B. A. O. Williams & T. Nagel, *Moral Luck*, 50 PROC. ARISTOTELIAN SOC'Y, SUPPLEMENTARY VOLUMES 115, 124–25 (1976).

309. Brophy, *supra* note 36, at 1198 (citing Peter Schuck, *Slavery Reparations: A Misguided Movement* (Dec. 9, 2002), <http://www.jurist.law.pitt.edu/forum/forumnew78.php>).

A. The Pathological Potential of Status Inequality

Deep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances, will divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race.

—Thomas Jefferson³¹⁰

If the account of abusive regimes set forth above is right, then mass atrocities are a special case of inequality consequent of a catastrophic failure in the system of overlapping associations and oppositions constitutive of a dynamically stable political society.³¹¹ The brand of inequality in evidence is not the traditional target of liberal politics and philosophy. There the concern is inequality in the distribution of resources.³¹² While distributional injustice frequently is a consequence of or consonant with the inequality at the core of abusive regimes, the main driver of atrocities is a version of what Nancy Fraser has called “status inequality.”³¹³

The phrase “status inequality” may seem redundant. For example, Max Weber defined “status” as “a specific, positive or negative, social estimation of *honor* . . . connected with any quality shared by a plurality.”³¹⁴ Following Weber’s lead, Fraser defines “status” as “represent[ing] an order of intersubjective subordination derived from institutionalized patterns of cultural value that constitute some members of society as less than full partners in interaction.”³¹⁵ “Status” in this sense documents a stratification of social identities and links position in that hierarchy to norms of affinity and association.³¹⁶ Status plays a prominent role in describing and regulating the lifeworlds of individuals. It encompasses horizontal and vertical relationships, ordering groups and, therefore, individuals according to a background ontology reflective of hard normative categories or common public and private practice.³¹⁷

310. THOMAS JEFFERSON, *Notes of the State of Virginia*, in THE SELECTED WRITINGS OF THOMAS JEFFERSON 24, 118–19 (Wayne Franklin ed., 2010).

311. Chandra, *supra* note 182, at 241–46; Fraser, *supra* note 193, at 67.

312. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed., Harvard Univ. Press 1999).

313. Fraser, *supra* note 193; Nancy Fraser, *Recognition Without Ethics?*, 18 THEORY CULTURE & SOC’Y 21 (2001); Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107, 108–18 (2000) [hereinafter Fraser, *Rethinking*]. I am in debt to Ernesto Verdeja for sparking this connection to Fraser’s work. See, e.g., Verdeja, *supra* notes 46 and 136.

314. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY, 187 (H. H. Gerth & C. Wright Mills eds., 1946).

315. Fraser, *supra* note 193, at 49.

316. WEBER, *supra* note 314, at 186–94.

317. Fraser, *supra* note 193, at 49 (“To say, likewise, that a society has a status hierarchy is to say

With this brief exposition, the oddity of the phrase “status inequality” is clear. The whole notion of status implies inequality: a vertical relationship among individuals or groups. Those vertical relationships can be quite consequential. Membership in a group frequently comes with entitlements. Life projects often are defined and measured by movement from one group to another. However, the hierarchical implications of status are usually constrained by the phenomenon of multiple overlapping memberships entailed in dynamic stability. That is, by virtue of the fact that all individuals are members of multiple groups, uncomplicated claims of superiority are impossible—or at least implausible—in relatively healthy societies. Taking a step back, the same phenomenon multiplied over a broader population makes impossible or implausible group claims of hegemony or permanent entitlement. “Status” in relatively healthy and stable societies does not, therefore, necessarily imply “inequality,” at least in any sense that would implicate serious justice concerns.

As evidenced by abusive regimes, the leveling effect of dynamic stability sometimes goes awry. Specifically, the significance of membership in a particular group may become so totalizing that the potential to establish meaningful collateral lines of affiliation through membership in other groups is effectively eliminated. In these circumstances, membership in a particular group assumes a position of such prominence that it conclusively determines access to material, social, or political goods, regardless of collateral associations through other group identities. It is this pathological extreme that marks abusive regimes.

“Status inequality” in this more pathological sense is “rooted . . . in the status order of society, as institutionalized patterns of cultural value” that presents those in the target group as “perverse and despised.”³¹⁸ “Pervasively institutionalized,” these “value patterns structure broad swaths of social interaction” and are “codified in many areas of law,” “entrenched in many areas of government policy,” and “also pervade popular culture and everyday interaction.”³¹⁹ The result is a structured “status subordination,” which imagines those in the target group as proper objects for a host of unsavory treatment, including “shaming and assault, exclusion from . . . rights and privileges,” “demeaning stereotypical depictions,” “harassment and disparagement,” and “denial of . . . full rights and equal protections of citizenship.”³²⁰

This description of status inequality arising to status subordination and its attachment to broader social norms and public practices is by now fa-

that it institutionalizes patterns of cultural value that pervasively deny some members the recognition they need in order to be full, participating partners in social interaction.”).

318. *Id.* at 18.

319. *Id.*

320. *Id.*

miliar. It is identical in all significant ways to Foucault's regimes of truth and Turner's social paradigms.³²¹ The application of these concepts is sharpened now, identifying the root of injustice—including institutionalized human rights abuses—as the production of pathological status inequality through social institutions such that members are presented as appropriate objects for abuse.³²² Abusive paradigms are simply engines for the ordered production of pathological status inequality.³²³ The next two Subparts elaborate the impact of this insight for reparations.

B. Recognition, Status Parity, and Reconstituting Dynamic Stability

The consequence of pathological status inequality is that it excludes some individuals from recognition despite their positions along many associational lines because they are members of an oppositionally defined target group.³²⁴ While conflict across groups is common and in many respects inevitable given that most social goods are limited, the effect of intersecting membership is to render members of groups subject to segmentary forces mutually comprehensible through collateral associations. As a consequence, oppositions usually play themselves out in stable societies outside of the shadow of mass or sustained violence because parties recognize each other as fellows and associates worthy of respect if not care. Where a network of collateral associations is functionally absent, or is limited in its capacity to provide this balance, societies produce abuses ranging from punctuated violence to persistent social injustice.

The ability to recognize self in other and the place of recognition in debates about social justice is a mainstay of political theory after Hegel³²⁵ and plays a key role in contemporary debates about public identity.³²⁶ Social justice claims by women and minorities are routinely cast as demands for recognition.³²⁷ While recognition deficits in fields of race and gender usually result in persistent patterns of injustice in relatively stable regimes, such as segregation and patriarchy, a brief history of how justice movements in these areas have developed is revealing of the task facing transitions.

321. See *infra* Part 0.

322. Fraser, *supra* note 193, at 67.

323. Yamamoto et al., *supra* note 16, at 40–41.

324. *Id.*

325. HEGEL, *supra* note 203, at 111–19.

326. See, e.g., AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS 1–2* (Joel Anderson trans., MIT Press 1996); Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in *MULTICULTURALISM* *supra* note 193, at 107; Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM* *supra* note 193, at 25.

327. Yamamoto et al., *supra* note 16, at 74–77, 84–85.

In the early stages of the women's movement, for example, status claims were couched in the language of equality.³²⁸ The critical agenda was to disclaim gender as an oppositional category in favor of identifying individual women along collateral lines of association. By focusing on citizenship rights or professional qualifications, women hoped to make the case that gender was not a significant status marker. Justice claims in these first waves of feminism therefore focused on formal equality.³²⁹

Later generations of feminists shifted the ground a bit, but also focused on recognition claims. Where early feminism sought recognition as equals by leaving gender at the door, later critics reintroduced difference into the debate, demanding recognition for women not as genderless participants in public life but *as* women.³³⁰ This shift was informed by the experiences of earlier feminists who found that full participation in a range of endeavors required women to exist as male beneficiaries of patriarchy with little or no domestic or reproductive responsibilities. Formal equality, therefore, came with an unacceptable price. Women faced the choice to pursue their careers at the cost of child-bearing and rearing or to sacrifice their careers in whole or significant part in order to reproduce or pursue a full family life.

Confronted with this Hobson's choice, feminists reformulated their demands for recognition, arguing that certain accommodations were necessary to provide women with full recognition. While maintaining calls for equal pay and a workplace free from gender discrimination, feminists began to foment for maternity leave, available day care, and flextime.³³¹ Rather than subordinating gender, this new vanguard of gender critics revealed that full recognition of women would require recasting the position of gender in the matrix of segmentary identity in such a way that women and men could make legitimate justice claims both in light of and despite their gender.

A similar shift in the form of recognition claims occurred in racial politics and debates about multiculturalism and group rights.³³² As opposed to earlier movements, where purported racial and ethnic differences were suppressed or dissolved in the context of claims for formal equality, multi-

328. See, e.g., BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963); Barbara Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *YALE L.J.* 871 (1971); Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 *WASH. U. L. Q.* 161 (1979); Ruth Bader Ginsburg, *Gender and the Constitution*, 44 *U. CIN. L. REV.* 1 (1975).

329. Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 *SUP. CT. REV.* 201, 201-02 (1987).

330. *Id.*

331. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993).

332. See WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1991); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM supra* note 193, at 25.

culturalism and claims for group rights proceeded on the ground that full recognition would require public appreciation for and, where appropriate, accommodation of, difference.

These shifts in the forms of recognition claims in contests over gender and racial justice precipitated a broader debate among liberals, who continued to pursue distributional justice as the end of equality, and postmodernists, who engaged in a critical hermeneutics of status and difference in pursuit of recognition as a standard of justice.³³³ I do not need to take a position in these debates. However, it is clear that pretransitional abuses cannot adequately be explained by distributional disparities. There certainly are distributional dimensions to abuses perpetrated by and under pretransitional regimes. However, the central driver of mass and institutionalized atrocities is an abusive paradigm which allows perpetrators to objectify their victims and to avoid recognizing shared associations.

Given that pretransitional abuses are, in essence, the product of recognition failures, the central transitional task is to achieve between former victims and former abusers an acceptable level of status parity. The path to that end is clear. First, transitions must construct or reconstitute a system of collateral associations that can serve as context for the dominant lines of opposition recruited to organize and justify past abuses.³³⁴ By reconstituting the network of associations constitutive of dynamic stability, transitions seek recognition of former victims as citizens, professionals, and spouses rather than as mere subhumans.³³⁵ Second, transitions must demand recognition for former victims *as* members of the targeted group who, by virtue of their shared history, occupy a unique place in society.³³⁶ In short, the project of seeking justice for victims in transitions is one not only of seeking equality but also of recognizing difference without reifying any particular line of opposition and association.³³⁷ Full recognition, and therefore status parity, requires both.

These concrete goals refer to a deeper effort to provide former victims “a place at the knowledge-creating table.”³³⁸ One of the primary tools of atrocity is occupation of truth-generating regimes. This includes dominance of the social pathways of identity generation: public histories, political institutions, and influential organs of civil society. Rewriting terms of inclusion and exclusion requires adding chairs at the table and providing former victims the opportunity to participate as equals in the creative

333. Fraser, *supra* note 193, at 7, 75–76; Fraser, *Rethinking*, *supra* note 313, at 107–08.

334. GLUCKMAN, *supra* note 181, at 25–26.

335. Ehrenreich Brooks, *supra* note 37, at 2327, 2332.

336. Vandeginste, *supra* note 14, at 148.

337. Chandra, *supra* note 182, at 247.

338. Lundy & McGovern, *supra* note 147, at 109 (quoting Budd Hall, *I Wish This Were a Poem of Practices of Participatory Research*, in HANDBOOK OF ACTION RESEARCH: PARTICIPATIVE INQUIRY AND PRACTICE 176 (P. Reason & H. Bradbury eds., 2001)).

process of statecraft and institution building at the heart of transitions.³³⁹ Constitution writing is one example,³⁴⁰ because it provides crucial opportunities to model participatory parity by including former victims in the process.³⁴¹ But there are others, including the political processes leading to truth commissions.³⁴²

Making this point re-emphasizes that the project of transitional justice is more than a process of mere “legalism.”³⁴³ Legal procedures may have an important role to play in an overall project of achieving parity between former victims and abusers. There is no more poignant way to make a statement that someone matters than to prosecute and punish those who abuse her. The opposite also is true, which is why impunity for acts of targeted violence is a mainstay of abusive regimes.³⁴⁴ Juridical approaches to justice have their role, then, but must be understood in a broader context. The true and proper goal of transition is the reconstruction of social order in such a way that former victims and abusers are captured in a more complicated web of associations and oppositions that renders impossible future violence consequent of pathological status inequality.³⁴⁵ As the next Subpart argues, reparations have a unique role to play in this process.

C. Reparations and Extraordinary Justice

Ordinary justice does not take a systematic interest in what inspires, compels, or justifies wrongdoers.³⁴⁶ Motive is not a necessary element of the prima facie case for common law crimes. That is because the psychosocial factors underlying most stable state crime is relatively idiosyncratic. Mass atrocities are extraordinary by comparison because they

339. Vandeginste, *supra* note 14, at 148.

340. See generally BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTIONS* (1992).

341. See, e.g., Kirsten McConnachie & John Morison, *Constitution-making, Transition and the Reconstitution of Society*, in *TRANSITIONAL JUSTICE FROM BELOW* *supra* note 5, at 75, 88–96.

342. BORAINÉ, *supra* note 10, at 175–76.

343. See de Greiff, *supra* note 38, 452–53; McEvoy, *supra* note 5, at 33.

344. IFILL, *supra* note 46, at 58–61, 130.

345. Brooks, *Getting Reparations Right*, *supra* note 22, at 267 (noting that identification among citizens enforced through public mechanisms make less likely the “barbaric ways” of abusive regimes).

346. This is not true of all statutory crimes. In particular, hate crimes require proof of motive and explicitly do connect the underlying crime to one or another abusive paradigm. See, e.g., Hate Crimes Statistics Act, 28 U.S.C. § 534 (2006) (defining “hate crimes” as “crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity”); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 280003, 108 Stat. 2097 (directing the United States Sentencing Commission to “provide sentencing enhancements . . . [for] hate crimes”); Federal Sentencing Guidelines Manual § 3A1.1(a) (2006) (assigning sentencing enhancements for crimes in which “the defendant intentionally [selects a] victim . . . because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person”). While there is much to be said about these laws, they do not constitute exceptions to the rule. Rather, these are extraordinary justice measures designed to combat the persistent impact of abusive paradigms.

access, reflect, and express an abusive paradigm that is endorsed and extended by public and private institutions and civil society. What distinguishes an instance of transitional justice from ordinary justice is the practical and normative demand to take account of the abusive paradigm underlying constituent acts of mass violence.³⁴⁷ Abusive paradigms vary in content but share a common path and structure. They isolate and privilege a particular line of opposition from the broader milieu of overlapping associational identities and link that opposition to a social ontology and historical teleology. The result is an institutionalized status inequality that organizes and justifies targeted violence. Transitions mark the liminal period between an abusive past and a future committed to human rights, democracy, and the rule of law. Transitional justice is extraordinary because it is an element of this transformation and, therefore, embraces as an imperative the need to address and correct status disparities between former victims and abusers.

While abusive regimes share a basic form, the history and nature of the abusive paradigms that lie beneath them are unique and give rise to distinct programs of abuse. There are similarities, of course, but indigenous differences reflect a real diversity among cultures of abuse. In recognition of these differences, I have argued elsewhere that the form and extension of criminal trials in any particular transition must be determined by an internal, deliberative process and tailored to past, present, and future circumstances in that state.³⁴⁸ Alex Boraine has made the same point in regard to truth commissions.³⁴⁹ Reparations programs also must be context sensitive and situation specific.³⁵⁰ Therefore, it would be only by folly or arrogance that this Article could draw conclusions about what forms of reparation are universally required. The claim here is much more modest and general: If abusive regimes act out abusive paradigms organized around maintaining structural disparities in status between those in the target group and those not, then reparations are most persuasively justified in the context of the transitional project of correcting those disparities.

To achieve parity for victims, transitions must focus on two goals. First, transitions must recognize former victims as equal members of society deserving of basic respect, protection, and equal access to all spheres of public and private life. This requires dismantling the normative and

347. Cf. Harris, *supra* note 17, at 1751–53, 1757 (making a similar point in critique of *Brown v. Board of Education*, 347 U.S. 483 (1954)).

348. Gray, *supra* note 2; see also IFILL, *supra* note 46, at 126; Fletcher & Weinstein, *supra* note 2, at 637; Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 85–87 (2006).

349. See BORAINÉ, *supra* note 10, at 198–99.

350. Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 77–78 (2001).

institutional structures that dominated the prior regime.³⁵¹ Given the bipolar logic implicated in an abusive paradigm, it is tempting to think that recognition is best advanced by dissolving entirely the oppositional line that marked the boundary between abuser and victim in the past. However, to do so would be to indulge in what Pablo de Greiff has condemned as “oblivion.”³⁵² Oblivion risks distorting the truth about the past, but it also denies former victims full recognition by disclaiming or ignoring the role of a shared history in shaping their identities.³⁵³ Rather than oblivion, the transitional goal of achieving recognition for victims is best pursued by constructing or reconstituting a robust web of collateral associations.³⁵⁴ The goal is not to be blind to race, gender, ethnicity, or religion. Rather, the task is to understand race, gender, ethnicity, and religion in a broader context in which these categories are important for personal identity but do not provide grounds for systematic inequality. At a minimum then, association with a particular ethnic group must be decoupled from pathological status inequality across parallel lines of association and opposition so that ethnicity does not imply poverty, exclusion from political participation, or denial of educational opportunities. By reconstituting a network of associations constitutive of dynamic stability, transitional justice programs can provide recognition for former victims while building bulwarks against resurgence of an abusive paradigm.

Even when explained in the broader context of abusive paradigms and dynamic stability, justice as recognition is in some ways an abstract pursuit. The second transitional condition of parity for former victims is more concrete. While formal recognition is nice, it may ring hollow if members of a victim group still find themselves on the outside of public and private life. Declarations that the age of discrimination and targeted violence is over are hard to take seriously if victims do not have the opportunity and means to participate as equals in politics, the economy, and civil society. The transitional commitment to parity, therefore, requires more than formal recognition; it requires providing the material means necessary to achieve what Nancy Fraser calls “participatory parity,” which allows “members of society to interact with one another as peers.”³⁵⁵ Transitions therefore must take practical measures to dismantle the “social arrange-

351. See Fraser, *supra* note 193, at 36 (arguing that a commitment to participatory parity “precludes institutionalized norms that systematically depreciate some categories of people and the qualities associated with them”).

352. See de Greiff, *supra* note 266.

353. Fraser, *supra* note 193, at 36 (noting that a commitment to justice as parity prohibits “institutionalized value patterns that deny some people the status of full partners in interaction—whether by burdening them with excessive ascribed ‘difference’ or by failing to acknowledge their distinctiveness.”); see Vandeginste, *supra* note 14, at 148.

354. GLUCKMAN, *supra* note 181, at 25–26.

355. Fraser, *supra* note 193, at 36.

ments that institutionalize deprivation”³⁵⁶ and the “systems of power which [otherwise would] produce and sustain”³⁵⁷ an abusive paradigm by excluding those in a targeted group from the full protections and privileges of public and private life.

So, achieving parity in the transitional justice context requires attentiveness both to the subjective experiences of former victims and to the social norms and public institutions constitutive of an abusive paradigm. Recognition, as part of this project, requires “return[ing] to victims some sense of moral worth and dignity,” “foster[ing] public trust in state institutions,” “forc[ing] a society to reconceptualize its sense of identity,” “help[ing to] undermine perpetrator narratives that justified past atrocities,” and “promot[ing] a critical reinterpretation of a nation’s history.”³⁵⁸ However, parity must be more than formal acknowledgement; it must provide a real path for former victims to participate as equals in public and private life.³⁵⁹ Reparations, as constituents of a holistic transitional justice program, are uniquely well placed to pursue these goals.

Jean Hampton has argued that what is at stake in moral wrongs is a concretized disequilibrium between abuser and abused.³⁶⁰ She explains:

A person behaves wrongfully in a way that effects a moral injury to another when she treats that person in a way that is precluded by that person’s value, and/or by representing him as worth far less [than] his actual value; or, in other words, when the meaning of her action is such that she *diminishes* him, and by doing so, represents herself as elevated with respect [to] him, thereby according herself a value that she does not have.³⁶¹

Understanding pretransitional abuses in this light clarifies the purpose and goal of symbolic reparations such as apologies, opportunities to testify before truth commissions, remembrance holidays, and public monuments. A public apology is not and should not be a pro forma *mea culpa*. Rather, it is elemental of a therapeutic process in which a transitional society acknowledges that what was done was wrong, condemns the public norms and institutional practices that enabled and rationalized the abuse, and states a commitment to prevent a recurrence by doing the hard work of analysis and reform.³⁶² An apology is a moment of mutual recognition in the present yet Janus-faced. It is a condemnation of the past but also a

356. *Id.*

357. FOUCAULT, *supra* note 142, at 133.

358. Verdeja, *supra* note 46, at 167.

359. Fraser, *supra* note 193, at 73.

360. JEFFRIE MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 125–31 (1990).

361. Hampton, *supra* note 97, at 1677.

362. Brooks, *Toward a Perpetrator-Focused Model*, *supra* note 88, at 66–67.

commitment to change.³⁶³ Official public apologies as symbolic reparations recognize that past abuses reified a pathological status inequality. Going forward, public apologies provide a redeemable commitment to reorder society and to respect the equal status of victims.³⁶⁴

Likewise, the opportunity to give testimony in a truth commission is not just an accommodation to a pitiable wretch so he or she may air his or her suffering. Rather, it is a moment of formal, institutional, and public recognition of both the speaker and his or her story.³⁶⁵ “[N]eglecting or expunging the historical record is a way of undermining and insulting [former victims].”³⁶⁶ Providing an opportunity for public testimony sends the clear message that this person matters, what happened to this person matters, and that this person’s suffering is deserving of official attention.³⁶⁷ This is precisely the recognition that victims of institutionalized abuses are denied under an abusive regime.³⁶⁸ Days of remembrance and public monuments provide recurring or permanent forms of recognition reconfirming the fact that former victims and the abuses they suffered matter and must not be forgotten.³⁶⁹

Symbolic reparations can also play an important role in creating or reconstituting the overlapping associations and oppositions constitutive of dynamic stability. Cast in the background of an abusive paradigm, abuses perpetrated in pretransitional regimes are material expressions of pathological status inequality. They express a strict parallelism among various lines of opposition and association, excluding as unworthy members of a targeted group from privileged social spheres—being Tutsi implies exclusion from jobs, schools, property ownership, membership in the country club, and basic protections from physical violence afforded to full citizens. Symbolic reparations provide public and official acknowledgement that this strict and exclusive parallelism is unjustified.

Looking back, symbolic measures recall with approval times when members of the victim class were numbered among the privileged even as they look forward, recognizing victims’ future right to equal access. For example, testimony at a truth commission might focus on the fact that Tutsi once worked alongside Hutus at all levels of government and industry,

363. See Fortson, *supra* note 62, at 122–23.

364. Hampton, *supra* note 97, at 1686–87 (“When we face actions that not merely express the message that a person is degraded relative to the wrongdoer but also try to establish that degradation, we are morally required to respond by trying to remake the world in a way that denies what the wrongdoer’s events have attempted to establish, thereby lowering the wrongdoer, elevating the victim, and annulling the act of diminishment.”).

365. See BORAINÉ, *supra* note 10, at 190–91.

366. Jeremy Waldron, *Superseding Historical Injustice*, 103 ETHICS 4, 6 (1992).

367. See HAYNER, *supra* note 10, at 28–29.

368. See Lundy & McGovern, *supra* note 147, at 109–10; Matsuda, *supra* note 100, at 390.

369. See Ernesto Verdeja, *Reparations in Democratic Transitions*, 12 RES PUBLICA 115, 124 (2006).

that they were members of the same church congregations and clubs, and that they were treasured friends, spouses, and family members. Public apologies can support that history by recognizing that ethnic identity never should have been used as a tool to exclude. Monuments and holidays can express a commitment to reject ethnic identity as a marker of exclusion and tool of status inequality going forward by providing continuous or recurring reminders in the public calendar that parity among ethnic groups is a key socio-ethical commitment. At the threshold of a new regime, then, a well-conceived program of symbolic reparations has the potential to advance the liminal goal of social transformation by laying the foundation for the dynamic stability necessary to guard against future atrocities.

It is tempting to think that symbolic measures are sufficient to achieve status parity. After all, if the foundation of abuse is all in the collective mind of an abusive regime, then it appears to follow that all justice requires is to tweak those beliefs. However, public recognition—even if heartfelt—may not be sufficient to provide victims with the material conditions necessary to achieve, maintain, and exercise equal status particularly in states where an abusive paradigm has held sway long enough to produce pervasive disparities in wealth, achievement, and access to public institutions.³⁷⁰ In these circumstances, providing symbolic reparations designed to express a commitment to status equality without addressing distributional disparities consequent of misrecognition is akin to granting title to the Duke of the Dump; amusing, but hardly justice.³⁷¹ Therefore, transitions frequently will need to provide some form of material reparation.

As with symbolic measures, material reparations are best justified and organized by the transitional justice goal of achieving parity for former victims. Money payments without context are dangerous. They can engender resentment among those made to pay, who may regard the shifting of resources from the dominant group to the oppressed group as a form of “oppressive communitarianism.”³⁷² Forced transfers also run the risk of inverting or at least reaffirming without contextualizing the lines of opposition central to a predecessor paradigm.³⁷³ To avoid these dangers, material reparations, whether given to individual victims or to targeted groups more broadly, should focus on reforming the public face of law and resolving status disparities going forward.

In this context, material reparations often are essential to providing former victims with meaningful access to social spheres to which they

370. I am grateful to Fionnuala Ní Aoláin for pressing this point. See also Fraser, *supra* note 193, at 87; McCarthy, *supra* note 22, at 758–64; Verdeja, *supra* note 136, at 212.

371. Fletcher & Weinstein, *supra* note 2, at 630; Fraser, *Rethinking*, *supra* note 313, at 113–20; Minow, *supra* note 46, at 14, 23–24.

372. See Fraser, *supra* note 193, at 7, 75–76.

373. *Id.* at 76–77, 92.

were structurally denied access under an abusive regime.³⁷⁴ This is an imperfect step on the path to establishing the network of overlapping identities necessary to achieving sustainable and dynamic stability. Material reparations also give physical dimension to losses and harms that otherwise would be lost to the fogs of oblivion.³⁷⁵ As an exchange, reparations can create a link between abusers and victims, individually and as members of groups.³⁷⁶ The process of negotiating reparations can also play an important role in achieving status parity by forcing former abusers to recognize their former victims as legitimate claimants of material and social justice.³⁷⁷ Finally, regardless of form, material reparations recognize the status of former victims as citizens whose suffering is worthy of acknowledgement.³⁷⁸

Material reparations may not be sufficient compensation for past harms, but to make that point is to miss the point. Like more symbolic measures, the measure of sufficiency for material reparations is their ability to advance or achieve the goal of status and participatory parity.³⁷⁹ Consistent with a point made by Saul Levmore and others, this approach to reparations does not advocate for compensating harm, which implies finality in the social processes of justice.³⁸⁰ Rather, reparations are justified only to the extent that they advance and concretize social change.³⁸¹ Reparations programs therefore must specify the source and form of past wrongs, identify constraints on individual and broader social justice, and tailor reparations strategies that enhance the ability of former victims to participate as equals in society, culture, politics, and the economy.³⁸²

While the main lines of an abusive paradigm can be painted with a broad brush, the realities frequently are more complicated at an atomic level. Achieving complete participatory parity for individual victims requires more bespoke measures.³⁸³ If the abusive paradigm that held sway in the past systematically denied those in the targeted group fair and equal access to housing, for example, then material reparations in the form of loan programs or building projects may be necessary to put victims on equal footing going forward and to help identify them as rightful members

374. See Vandeginste, *supra* note 14, at 157.

375. See Hamber & Wilson, *supra* note 292, at 48.

376. See *id.* at 47–48.

377. *Id.* at 48–49.

378. Cf. Brooks, *Getting Reparations Right*, *supra* note 22, at 270.

379. Verdeja, *supra* note 136, at 213.

380. Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1689 (1999).

381. See Lundy & McGovern, *supra* note 147, at 106.

382. See McConnachie & Morison, *supra* note 341, at 88–96.

383. See Laura Arriaza & Naomi Roht-Arriaza, *Social Repair at the Local Level: The Case of Guatemala*, in TRANSITIONAL JUSTICE FROM BELOW, *supra* note 5, at 143, 145–48, 154–58, 164–66.

of the propertied class.³⁸⁴ Similarly, if an abusive paradigm systematically denied those in the targeted group access to the educational, economic, social, and political opportunities that serve as gateways to full participation in society, then reparations in the form of preschool or tutoring programs, access guarantees, integration, and targeted institutional development may be necessary to accelerate the arrival of former victims into circles of privilege and power.³⁸⁵

Failing to attend to status parity as a core measure and goal of transitional justice opens the door to a host of legal and social response mechanisms that can effectively deny substantive justice to former victims even as they are afforded formal justice. For example, in the Antebellum South, efforts to end slavery met with a host of subtle responses evincing resistance to the prospect of recognizing blacks as social, political, and economic equals.³⁸⁶ Those strategies were expanded and deployed more broadly across the American South after the Civil War to form the structures of Jim Crow and segregation that perpetuated pathological status inequality even in the face of formal constitutional equality.³⁸⁷ In some cases, because the underlying social structures of abuse were not addressed in the transition, “[l]aws that were intended to bring about equality were used to reinforce the existing inequality that slavery had produced.”³⁸⁸ These reactionary responses were possible only because the transition represented by Reconstruction was woefully inadequate to the task of achieving for former slaves any semblance of parity with their oppressors. Race remained the defining feature of identity, limiting access to economic, professional, and social statuses. Linking justice initiatives, including reparations, to the achievement of participatory parity and dynamic stability is much more likely to achieve lasting peace than these ordinary justice approaches,³⁸⁹ which define reparations as nothing more than “payment[s] . . . justified on backward-looking grounds of corrective justice.”³⁹⁰

VII. REPARATIONS FOR HISTORIC ABUSES

[A]ll of the struggles of African Americans in this country since 1690 [have] been to repair the damage of enslavement and white

384. See McCarthy, *supra* note 22, at 758–64.

385. See Fraser, *supra* note 193, at 73.

386. See, e.g., David Bogen, Race and Law in Antebellum Maryland (Mar. 5, 2009) (unpublished manuscript) (on file with the Alabama Law Review).

387. See, e.g., David Hall, *The Spirit of Reparation*, 24 B.C. THIRD WORLD L.J. 1, 3–5 (2004).

388. *Id.* at 4.

389. Lundy & McGovern, *supra* note 147, at 107–12.

390. Posner & Vermeule, *supra* note 15, at 691. See also Roberts, *supra* note 15, at 132.

supremacy.

—Audrey Moore³⁹¹

One of the most hostile environments for reparations proposals are circumstances where decades and generations stand between those who will pay and receive reparations and those who perpetrated and suffered wrongdoing.³⁹² Those asked to pay protest that they did not do anything wrong and so should not be made to sacrifice.³⁹³ That objection is amplified by claims that heirs to victims have not, themselves, suffered any wrong and so should not receive what would amount to an undeserved windfall³⁹⁴ for disparities in achievement that are ascribable to their own lack of capacity or will to succeed.³⁹⁵ In the United States, these arguments are regular players in contests over affirmative action³⁹⁶ and debates about reparations for slavery and institutional racism.³⁹⁷ While the fact of past abuses is undeniable, those who oppose affirmative action and racial reparations argue that the past is the past.

The response to these objections is evident in light of the foregoing discussion. The case for reparations is not based on compensation for past wrongs. That is a tort concept germane to ordinary justice but ill-fitted to the central tasks for reparations in transitions, which are to pursue status parity for former victims as both recognition and a meaningful opportunity to participate as peers in public and private life. Those goals can only be achieved by keeping at the fore the role of an abusive paradigm in pretransitional abuses. So doing reveals that the path to justice in transitions is to recast the central ethnic, religious, or racial opposition implicated in past wrongs in the broader context of a varied pattern of overlapping associations and oppositions such that being black, say, does not entail exclusion from citizenship, the practice of medicine, or membership in the local golf club.

391. Raymond Winbush, *Should America Pay?*, 2 AM. U. MOD. AM. 43 (2006) (quoting Audrey Moore).

392. Vandeginste, *supra* note 14, at 160; Forde-Mazrui, *supra* note 34, at 737–43.

393. See, e.g., Ogletree, *supra* note 22, at 1052; Sepinwall, *supra* note 22, at 184–85 n.10 (quoting Rep. Henry Hyde (R-Ill.) for the claim that “I never owned a slave. I never oppressed anybody. I don’t know that I should have to pay for someone who did [own slaves] generations before I was born.”).

394. Chad W. Bryan, *Precedent and Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599, 610–11 (2003).

395. *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754, 760 (7th Cir. 2006); Forde-Mazrui, *supra* note 34, at 728; Tracinski, *supra* note 23, at 151–55.

396. Fortson, *supra* note 62, at 111–14; Albert Mosley, *Affirmative Action as a Form of Reparations*, 33 U. MEM. L. REV. 353, 353–54 (2003).

397. See, e.g., DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* (2002). Horowitz’s account of Rep. John Conyers’s efforts to introduce a slavery reparations bill to Congress is of particular interest. See *id.*, at 106–107 (discussing H.R. 1684, 102nd Cong. (1991)).

Reparations justified by and disciplined to this task are immune from claims by those asked to sacrifice that they did no wrong because their responsibility is not to pay for harms but to make it right for their contemporaries and for future generations.³⁹⁸ This basic duty to social justice, abstracted from particular harms, is not unlike the duty of all citizens to end institutionalized abuses in the first place. Claims of innocence in the face of such demands are simply irrelevant.³⁹⁹ What is relevant is what must be done to vindicate the transitional commitment to achieve a just society in the shadow of an abusive paradigm.

While broad political and institutional changes frequently mark a moment of historical recognition and commitment to change, the constituents of an abusive paradigm often linger,⁴⁰⁰ sometimes in pure and unadulterated form and sometimes as components of a synthetic post-transitional paradigm that preserves significant pathological elements. Where this occurs, disparate distribution of economic opportunities and success—along with continuing instances of documented abuse and discrimination—provide evidence that status inequality reflective of an abusive paradigm persists.⁴⁰¹ Reparations treated as tools for changing these social and cognitive structures of abuse and for achieving parity for contemporary members of the targeted group retain a role in these situations of continuing transition.

Denial and revisionist history frequently are at the heart of lingering injustice. Symbolic, group-centered reparations programs have a particularly useful role to play in these circumstances. Museums, monuments, and official histories, for example, can provide recognition of the past and express public commitments to “Nunca Más.” More material, group-based reparations may also have a role to play. For example, public funding for advocacy groups and community organizers can provide a valuable resource for those powerless to expose and oppose conduct reflecting persistent commitments to a discriminatory paradigm. Programs encouraging or guaranteeing access to education or even entry-level employment can help to correct for the residues of discrimination by, again, recognizing that distributional disparities consequent of historical injustices require affirmative action to correct⁴⁰² and by building patterns of connection between victim groups and the social spheres from which they have been historically excluded.

This approach to transitional justice and reparations is particularly useful in responding to concerns expressed about affirmative action.⁴⁰³ Some

398. McCarthy, *supra* note 22, at 758.

399. See Harris, *supra* note 17, at 1771–83.

400. Winbush, *supra* note 391, at 45; see McCarthy, *supra* note 22, at 758–64.

401. Robinson, *supra* note 27, at 2.

402. Fortson, *supra* note 62, at 114; Harris, *supra* note 17, at 1781–84.

403. See Mosley, *supra* note 396 (arguing that affirmative action ought not be treated as a form of

critics claim that affirmative action programs re-emphasize racial opposition, thereby preventing or delaying our transition to a race-blind society.⁴⁰⁴ By now, however, it is clear that this objection quite misunderstands both the problem and the solution. The problem is not racial identity. To the contrary, race is an important component of identity in a multiracial society and can provide an important line of association across perpendicular oppositions. Rather, the problem is when race, constructed as an existential condition, maps onto other contingencies of social status.⁴⁰⁵ This is the definition of a racist society: one that imposes and presupposes an alignment of race with a limited set of class, social, professional, religious, and cultural associations, confining members of a particular race to a social ghetto.⁴⁰⁶ The solution is not to abandon race as a component of identity but to disentangle race from these deleterious status implications. In fact, preserving race as a source of identity may be crucial. For those who aspire to a particular status, it is important to see racial colleagues among the cohort to which they strive. For a child, it matters that there are people who look like him or her walking the halls of government, business, and academe. It creates links to another life and sends the message that race is not an impediment, no matter the life one imagines for oneself.

VIII. CONCLUSION

“The past is never dead. It’s not even past.”
—William Faulkner⁴⁰⁷

In closing, it is worth considering Walter Benjamin’s image of the Angel of History:

“Angelus Novus” shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his mouth is open, his wings are spread. This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single ca-

reparation).

404. Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1187–88 (2004); Kane, *supra* note 29 at 199; Levmore, *supra* note 380, at 1689; Glenn Loury, *Little to Gain, Much to Lose*, BLACK ISSUES IN HIGHER EDUC., Nov. 8, 2001; Miller, *supra* note 22, at 46–56; Tracinski, *supra* note 23, at 146, 156–57 (2002).

405. Angelique M. Davis, *Multiracialism and Reparations: The Intersection of the Multiracial Category and Reparations Movements*, 29 T. JEFFERSON L. REV. 161, 170–75 (2006); Harris, *supra* note 17, at 1737–41.

406. See, e.g., Harris, *supra* note 17, at 1742.

407. WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1950).

tastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. This storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.⁴⁰⁸

The record provides much evidence to recommend this apocalyptic view of progress. However, we need not despair—at least not yet. This Article gives the Angel a second face. The progress Benjamin describes is the natural consequence, the argument *ad absurdum*, of a particular social paradigm allowed to define and pursue its own End of History. It is only in the wake of such “progress” that the Angel can see the destructive force of a pathological social order. It is tempting to think that real progress can be had by simply turning the Angel to face the future. To do so, however, would literally be to turn a blind eye, dooming the world to repeat anew the disasters of history shrouded by oblivion. The Angel of History therefore must adopt the equipoise of Janus. For him, the debris of the past serves as a negative ideal, describing an aspirational trajectory for the future. By facing simultaneously the past and the future, the Angel can see the prospect of true progress in the blood bath of history. While shame is a natural emotion when the Angel is forced to live with the disasters of the past, his dual orientation commits him to do justice in the liminal now for the future.⁴⁰⁹ To pursue such a goal is an occasion of the greatest pride, not shame.⁴¹⁰ Shame is appropriate only when the moment is wasted by hollow claims that “This travesty is not my fault.” As has been argued here, claims such as these in the wake of mass or institutionalized atrocities are simply non sequiturs. When presented the opportunity to pursue justice for those who suffer as a consequence of persistent pathological status inequalities, the only question is “Who will make it right?”

408. BENJAMIN, *supra* note 1, at 257–58.

409. Ehrenreich Brooks, *supra* note 37, at 2336–37.

410. Forde-Mazrui, *supra* note 34, at 753.