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PENELOPE ANDREWS

A Commission on Recognition and Reconstruction for the United States: Illusory or Inspirational?

66 N.Y.L. SCH. L. REV. 359 (2021–2022)

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I. INTRODUCTION

The United States remains a deeply divided society, with the fault line continuing to be that of race and racism. Of course, this is not new, as W. E. B. Du Bois famously noted more than a century ago that the problem of the color line would be the central issue of the United States in the twentieth century.¹ And so it remains today.

The statistics reflect this reality. For example, in 2020, *The New York Times* ran a story that illustrated the lack of racial diversity and inclusivity in the most influential of the nation's institutions, including the media, business, the U.S. Supreme Court, Congress, and higher education.² On the Court, three justices out of nine are persons of color.³ Of the ten most-read magazines in the United States, all editors are white.⁴ Of the leaders of the twenty-five most valuable companies in the United States, six are of color.⁵ These statistics exist despite the reality that those who identify as African American, Hispanic, Native American, and Asian comprise around 40 percent of the population.⁶

This story in *The New York Times* was another in a string of disclosures that highlighted just how disproportionately resources and influence are spread within and between Americans, with race and ethnicity being the fault line. More than sixty years after the landmark decision of *Brown v. Board of Education*, meaningful desegregation in the United States has yet to occur.⁷

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1. W. E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK*, at vii (8th ed. 1909).
 2. Denise Lu et al., *Faces of Power: 80% Are White, Even as U.S. Becomes More Diverse*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/interactive/2020/09/09/us/powerful-people-race-us.html>.
 3. When the author began writing this article, Associate Justices Clarence Thomas and Sonia Sotomayor were the only persons of color—Black and Latina, respectively—serving on the Court. Carrie Blazina & John Gramlich, *5 Facts About the Supreme Court*, PEW RSCH. CTR., <https://pewrsr.ch/3HQAcb> (Feb. 25, 2022). Since then, Ketanji Brown Jackson was confirmed as Associate Justice, making her the third Black jurist ever to serve on the High Bench and the first Black woman to do so. *Id.*; *The Senate Confirms Ketanji Brown Jackson to Serve on the U.S. Supreme Court*, WHITE HOUSE, [whitehouse.gov/KBJ](https://www.whitehouse.gov/KBJ) (last visited Apr. 27, 2022).
 4. Lu et al., *supra* note 2.
 5. *Id.*
 6. *Id.*; see also MEHRSA BARADARAN, *THE COLOR OF MONEY* 201 (2017) (noting that Black people made up 11 percent of the American population in 1970 yet held under 2 percent of the nation's assets).
 7. 347 U.S. 483 (1954). “White students make up 48[percent] of the students enrolled in public schools.” Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2389 (2021). “Yet, in 2016, the average white student attended a school in which 69[percent] of their peers were also white, 8[percent] of their peers were Black, nearly 14[percent] were Latino, and 4[percent] were Asian.” *Id.* Social science research shows that white student segregation and isolation is intentional rather than inadvertent. *Id.* at 2386–87. In addition, the polarization of Americans, mostly along ideological or philosophical lines, appears to be at the highest it has been for generations. See Samara Klar et al., *Is America Hopelessly Polarized, or Just Allergic to Politics?*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/opinion/polarization-politics-democrats-republicans.html>; see also ROBERT D. PUTNAM WITH SHAYLYN ROMNEY GARRETT, *THE UPSWING* 6 (2020) [hereinafter PUTNAM WITH GARRETT] (“The result is a nation more and more fragmented along economic, ideological, racial, and ethnic lines, and more and more dominated by leaders who prove shrewdest at the game of divide and conquer. . . . America’s democratic institutions strain under the burden of polarization.”).

So here we find ourselves at another moment of racial reckoning in the United States, and collectively and individually we have become preoccupied with the perennial and now resurfacing question of “what to do?” Because this issue is not a novel one—indeed, it has been the American question since the end of slavery and through the many iterations of civil rights struggles and progress, starting with Reconstruction and now at the moment of Black Lives Matter (BLM)—a comparative perspective may be instructive.

In this article I suggest that President Joe Biden issue an executive order to establish a Commission on Recognition and Reconstruction (CRR) to comprehensively confront the ongoing challenges to racial justice. I envisage the CRR as an adjunct to, and not a replacement for, the several measures currently being undertaken in law and policy to address these challenges. I imagine the CRR providing a national focus on the many ways that public and private institutions have responded to this current moment of racial distress, while also highlighting the obstacles and omissions toward the attainment of racial justice. The proposed CRR would then establish goals to be measurable in the short-, medium-, and long-term.

This call for a CRR raises a range of questions: Why is there a need for such an institution in the United States at this historical juncture and what are the inflection points? What would be the purposes and goals of such a mechanism? Would those goals be measurable and, if so, how? How would the CRR define racial harms and how would such harms be examined? Would such harms be considered individual or collective, and how would such a determination be made? If a harm is recognized and acknowledged, should such recognition and acknowledgement include an apology? Should the idea of forgiveness feature during the process and, if so, how and when? Will a process of recognition and reconstruction lead to a reimagining of social and economic relations, including reparations and other forms of compensation and redress? Should it? In summary, how does the United States comprehensively confront the legacy of slavery, or the scourge of lynching, or the totality of subordination and subjugation by Jim Crow laws in its many guises, including its ongoing impact? How could the legacy of race-driven loyalties and solidarities by the majority be replaced by ones that reify an inclusivity based on justice, equity, and dignity? In other words, how do we as a society disrupt habitual racial allegiances or preferences that reproduce traditional racialized relationships as a default, despite America’s formal commitments in law and policy to discard those allegiances or preferences?

Part II of this paper explores the need for a CRR at this historical juncture. I use the South African Truth and Reconciliation Commission (TRC) as the yardstick, highlighting significant convergences and divergences between it and the proposed CRR. Part III describes the TRC’s structure and processes to identify what can be extrapolated from it and then applied to a similar project in the United States. I explore especially its engagement with the concepts of “victims,” “truth,” and “justice.”⁸ The limitations of the TRC are also particularly important as a cautionary tale for

8. I also highlight the many achievements of the TRC, including its institutional hearings and its limitations, especially the short shrift that it gave to questions of structural and institutional inequalities. *See infra* Part III.

those in the United States who view the TRC as something of a panacea for resolving racial conflict. Indeed, in the past two decades, the racial reconciliation that was to be ushered in by the TRC has not materialized. This is evidenced by alarming incidents of xenophobic violence,⁹ as well as heightened racial tensions between South Africans.¹⁰ In Part IV, I pursue the idea of a CRR for the United States and point to the atrocities in Greensboro and Wilmington, North Carolina, and in Tulsa, Oklahoma, as examples of commissions that have already been established in the United States. In Part V, I suggest ways that Americans may consider the approach of a CRR for this country. Part VI concludes with a reminder to Americans that such an institution is a bridge from the past to the future that must be crossed with purpose by a great many members of society one step at a time.¹¹

II. RATIONALE FOR A CRR AND POINTERS FROM SOUTH AFRICA

The broad purpose of this paper might seem utopian in the midst of this contemporary phase of great conflict, cynicism, strife, and widespread questioning of the role and status of traditional institutions, especially of government. Arguably many ideas at first mention seem utopian, but as Frederick Douglass observed a long time ago, all reforms begin with an idea, and for a time, they have to rely solely on the “pen and tongue” for progress.¹² So why should we now consider the possibilities

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9. “*They Have Robbed Me of My Life*,” HUM. RTS. WATCH (Sept. 17, 2020), <https://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south#>.
 10. See Nqobile Dlodla & Alexander Winning, *South Africa Violence, Looting Ebbs but Death Toll Up to 117*, REUTERS, <https://www.reuters.com/world/africa/safrica-looting-dies-down-places-more-troops-expected-2021-07-15/> (July 15, 2021); John Eligon & Zanele Mji, *Indian vs. Black: Vigilante Killings Upend a South African Town*, N.Y. TIMES, <https://www.nytimes.com/2021/09/04/world/africa/South-Africa-Phoenix-riots-deaths.html> (Oct. 19, 2021); John Eligon, *South African Military is Called in to Quell Violence*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/07/12/world/africa/zuma-protests-violence.html>.
 11. It is unclear whether the Biden administration is amenable to the idea of pursuing some formal process of reckoning, reconciliation, and reconstruction. See Kevin Freking, *Biden Backs Studying Reparations as Congress Considers Bill*, AP NEWS (Feb. 17, 2021), <https://apnews.com/article/biden-study-reparations-congress-e3c045ece4d0e0eae393a18a09a4a37e>. But see Jack Brewster, *Biden Administration Wary of Backing Reparations Ahead of Tulsa Visit*, FORBES, <https://www.forbes.com/sites/jackbrewster/2021/06/01/biden-administration-wary-of-backing-reparations-ahead-of-tulsa-visit/?sh=42b98ea1f159> (June 2, 2021). Even if it is, however, the administration may face resistance and attempts to undermine the structure and process of a CRR. Cf. *Prosecutors v. Hirohito*, Case No. PT-2000-1-T, Judgement on the Common Indictment and the Application for Restitution and Reparation, ¶¶ 973–89 (Women’s Int’l War Crimes Tribunal Dec. 4, 2001). However it may unfold, it is imperative that the purported CRR be accompanied by some official imprimatur of the process; an informal process may prove to be cathartic, but it may also lack the resources and the capacity to engage in methods of redress and reparations. *E.g., id.* (discussing the obstacles to reconciliation resulting from the Japanese government’s refusal to fund organizations established to repair for human rights violations against women). This is a perennial problem with informal structures that purport to deal with past human rights atrocities. See *id.*
 12. Frederick Douglass, *Our Position in the Present Presidential Canvass*, FREDERICK DOUGLASS’ PAPER (Sept. 10, 1852), reprinted in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 213 (Philip S. Foner ed., 1950); see also David W. Blight, *Our Debt to Frederick Douglass*, N.Y. TIMES, Nov. 6, 2018, at A27.

of a CRR as a way of pursuing the project of social and racial justice in the United States? For a few reasons.

First, ever since the BLM protests restarted in May 2020, I have been struck by the frequent public and private calls for the establishment of something like a truth and reconciliation commission in the United States. I have also been struck by advocates having referred specifically to the South African TRC as a model that the United States ought to emulate.¹³ The array of voices, possibilities, and goals of the BLM protests were energetic and cacophonous, sometimes complementary and also contradictory, and affected almost all sectors of American society: the media and entertainment industries, educational institutions, the political realm, business, the medical community, sporting bodies, and others.

Second, the insurrection at the U.S. Capitol in Washington, D.C., on January 6, 2021, has signaled an urgency to address the polarization that led to that event, especially because many of the sentiments expressed on that day reflected the unfinished racial reckoning and reconciliation in the United States.

Third, I am one of the professors in the New York Law School Race, Bias, and Advocacy seminar. Taught by a team of NYLS professors, the seminar examines the ways in which issues of race and implicit racial bias manifest in the law, and the invisible ways in which law reflects, facilitates, or ignores racial disparities and racially differential results, including in its processes and practices as well as in the structure of the legal profession. In particular, the seminar explores the societal forces that shape racial inequality, their impact, and possible responses from legal advocates in dealing with racial inequality in their range of legal practices. In linking the idea of a CRR to the goals of the course, my aim is to raise pertinent issues regarding the pursuit of reflection and acknowledgement through a vehicle like South Africa's TRC. In this way, students may hopefully be encouraged to think creatively about the meanings and possibilities of justice, beyond notions of punitive justice, and to explore ways that personal narratives might shape the quest for justice and accountability for those who experience racism in daily encounters, in discrete and structured ways. Particularly, this article is an invitation for students to consider facts beyond the empirical ones and to begin (or continue) to appreciate that the experiences of racism by individuals may also generate "experiential" or "dialogic" truth.¹⁴

13. See generally Symposium, *Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence and the Transition to Democracy*, 60 N.Y.L. SCH. L. REV. 13 (2015–2016).

14. The South African TRC defined four kinds of truths: (1) factual or forensic truth (truth that is corroborated and verifiable); (2) personal and narrative truth (stories of South Africa's painful past told by victims and perpetrators); (3) social (or dialogue) truth ("established through interaction, discussion and debate"); and (4) healing and restorative truth (full and public acknowledgment of past human rights violations). See 1 TRUTH & RECONCILIATION COMM'N, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 110–14 (1998) (quoting *THE HEALING OF A NATION?* 105 (Alex Boraine & Janet Levy eds., 1995)).

The "experiential" truth concept was later introduced by former South African Constitutional Court Justice Albert Louis "Albie" Sachs, and it is one that I have since adopted. Varushka Jardine, *The Truth and Reconciliation Commission: Success or Failure?* 38 (Dec. 2008) (Master Hereditatis Culturaeque Scientiae (History) mini-dissertation, University of Pretoria); see *Judge Albert Louis "Albie" Sachs*, S. AFR. HIST. ONLINE, <https://www.sahistory.org.za/people/judge-albert-louis-albie-sachs> (Feb. 26, 2021) (adding that Justice Sachs was appointed to the Constitutional Court by President Nelson

This article is also premised on two general propositions. First, despite the current political discord and the raucous (and sometimes violent) contestations about the nature and pervasiveness of racism in the United States today, there is somewhat of an agreed understanding or appreciation across large sectors of American society about the legacy of slavery and Jim Crow and their impact on the continuing well-being and dignity of African Americans.¹⁵ The effects of this legacy can be observed in a variety of ways, including the unequal levels of wealth between African Americans and whites;¹⁶ the disproportionate incarceration rates of Black males in relation to their percentage of the overall population;¹⁷ the segregated and inferior public schools in the largest cities in the United States which largely educate Black children;¹⁸ the health disparities between white Americans and African Americans, as highlighted by the infection and death rates during the COVID-19 pandemic;¹⁹ the rates of homeownership between Black Americans and white Americans;²⁰ and the response of police to white protestors compared to Black protestors.²¹ These dire realities reflect the unfinished business of racial justice.

Second, the advances toward racial justice can be observed in a range of positive developments. Indeed, considerable racial progress since the end of slavery is

Mandela in 1994). Experiential truth looks to a person's circumstances and "experiences in a particular place." Jardine, *supra*, at 38.

For a discussion of this multi-truth approach (basically, the idea that different assertions about one matter could be equally truthful), see Kris Franklin, *Meditations on Teaching What Isn't: Theorizing the Invisible in Law and Law School*, 66 N.Y.L. SCH. L. REV. 387, 403–04 (2021–2022) (discussing the different encounters that Black and white Americans have had with the rhyme, "eenie, meenie, minie, moe").

15. Juliana Menasce Horowitz, *Most Americans Say the Legacy of Slavery Still Affects Black People in the U.S. Today*, PEW RSCH. CTR. (June 17, 2019), <https://www.pewresearch.org/fact-tank/2019/06/17/most-americans-say-the-legacy-of-slavery-still-affects-black-people-in-the-u-s-today/>.
16. See Tami Luhby, *These Charts Show How Economic Progress Has Stalled for Black Americans Since the Civil Rights Era*, CNN POL., <https://www.cnn.com/2020/07/05/politics/inequality-black-americans-civil-rights-economic-progress/index.html> (July 5, 2020). See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 5 (10th anniv. ed. 2006) (providing a new perspective on racial inequality based on private wealth).
17. See John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/>.
18. See EMMA GARCÍA, *ECON. POL'Y INST., SCHOOLS ARE STILL SEGREGATED, AND BLACK CHILDREN ARE PAYING A PRICE* (2020).
19. See Latoya Hill & Samantha Artiga, *COVID-19 Cases and Deaths by Race/Ethnicity: Current Data and Changes Over Time*, KAISER FAM. FOUND. (Feb. 22, 2022), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/covid-19-cases-and-deaths-by-race-ethnicity-current-data-and-changes-over-time/> (disparities in COVID-19 deaths).
20. Rashawn Ray et al., *Homeownership, Racial Segregation, and Policy Solutions to Racial Wealth Equity*, BROOKINGS (Sept. 1, 2021), <https://www.brookings.edu/essay/homeownership-racial-segregation-and-policies-for-racial-wealth-equity/>.
21. See Tasnim Motala, *'Foreseeable Violence' & Black Lives Matter: How Mckesson Can Stifle a Movement*, 73 STAN. L. REV. 61, 71–72 (2020) (differentiating police action against Black and white protestors).

confirmed by the statistics,²² including by the number of college-educated Black Americans today compared to fifty years ago; the number of Black Americans who have entered professions in law, medicine, engineering, science, and other fields; and the number of Black Americans who have served in important political positions at the local, state, and federal level.²³ The story of the entry and upward mobility of Black Americans in the U.S. military is a storied one, including four-star General Colin Powell, who rose to become the first Black American secretary of state, and the appointment of General Lloyd Austin as the current secretary of defense.²⁴ The story is therefore a mixed one, reflecting the unfinished business of eradicating the vestiges of slavery and institutionalized racial subordination.

Today the country finds itself at a pivotal moment, mostly wrought by the 2020 BLM protests. The 2020 spring of discontent began with a once-in-a-century global pandemic and was accelerated by the recorded actions of a sadistic police officer in Minneapolis, Minnesota, pressing his knee to the neck of a Black man, George Floyd, during an arrest.²⁵ That fatal encounter laid bare the paradoxes and fissures in American society and opened a Pandora's box of pent-up rage, resentment, and recrimination.²⁶ In the cold light of day, the twin events of pandemic and protest highlighted the ongoing and widespread subordination, subjugation, and discrimination that Black Americans continue to suffer in the United States.

And yet the United States was established on laudable principles of liberty, sovereignty of the people, and governance by democracy, albeit by some Founding

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22. For example, Professors Henry L. Gates and Kevin M. Burke point out the advances made by Black Americans in the past few decades, affording great benefits to some but creating an apparent class gap within Black America. See HENRY LOUIS GATES, JR. & KEVIN M. BURKE, *Introduction to AND STILL I RISE* (2015). Professor William Julius Wilson has also contextualized significant Black advancement in his work. See WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE* 126–29 (3d ed. 2012) (reporting that the favorable climate for collective bargaining after the New Deal increased Black participation in labor unions).
 23. For example, Black Americans have served at the local level as mayors of major metropolitan centers like Atlanta, Chicago, Los Angeles, and New York City; at the state level as governors; and at the federal level as president. Anna Brown & Sara Atske, *Black Americans Have Made Gains in U.S. Political Leadership, but Gaps Remain*, PEW RSCH. CTR., <https://www.pewresearch.org/fact-tank/2021/01/22/black-americans-have-made-gains-in-u-s-political-leadership-but-gaps-remain/> (Jan. 22, 2021); e.g., Emma G. Fitzsimmons, *Daunting Tasks Ahead, the New Mayor Punches In*, N.Y. TIMES, Jan. 2, 2022, at A1 (NYC's second Black mayor).
 24. See *Biographies of the Secretaries of State: Colin Luther Powell (1937–2021)*, DEPARTMENT HISTORY, OFF. HISTORIAN, <https://history.state.gov/departmenthistory/people/powell-colin-luther> (last visited Apr. 25, 2022); *Lloyd J. Austin III*, U.S. DEP'T DEF., <https://www.defense.gov/About/Biographies/Biography/Article/2522687/lloyd-j-austin-iii/> (last visited Apr. 25, 2022).
 25. See Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd*, CNN, <https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html> (Apr. 21, 2021). For more on the relationship between law enforcement and Black males, see Deborah Ramirez & Tamar Pinto, *Policing the Police: A Roadmap to Police Accountability Using Professional Liability Insurance*, 73 RUTGERS U. L. REV. 307, 310–11 (2021).
 26. See David Schultz, *George Floyd and the Fourth Racial Turning Point in American Politics*, IMPAKTER (Jan. 11, 2021), <https://impakter.com/george-floyd-and-the-fourth-racial-turning-point-in-american-politics/>.

Fathers who were also themselves slaveowners.²⁷ Of course the irony is that, at the same time that these commendable principles were inscribed into a written Constitution, the wealth and economic well-being of the nascent republic was dependent on the labor of enslaved people brought here as cargo from Africa. And the principles in the Constitution were distorted for validation and perpetuation of the status quo.²⁸ Upending this Kafkaesque arrangement would take more than two hundred years—and the process is still unfolding.

For the reasons outlined in this paper, I am in agreement with those who advocate for the United States to seriously consider a mechanism like South Africa's TRC.²⁹ I would suggest a commission that would allow for official recognition of harms as well as the consideration of steps toward a social and economic reconstruction with

27. RICHARD BEEMAN, *PLAIN HONEST MEN* 397–98 (2009) (James Madison was a Virginian slaveowner); MICHAEL J. KLARMAN, *THE FRAMERS' COUP* 5 (2016) (“The men who wrote the Constitution . . . were not demigods; they had interests, prejudices, and moral blind spots.”).

28. U.S. CONST. art. I, § 2, cl. 3 (providing that the number of representatives for each state “shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years”); *id.* art. I, § 9, cl. 1 (providing that “a Tax or duty may be imposed” for each person admitted by and to any of the states); *id.* art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State . . . escaping into another, shall . . . be discharged . . . but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”); *see also* David Azerrad, *What the Constitution Really Says About Race and Slavery*, HERITAGE FOUND. (Dec. 28, 2015), <https://www.heritage.org/the-constitution/commentary/what-the-constitution-really-says-about-race-and-slavery>.

29. The call for a mechanism like a CRR is not new; several commentators have suggested that the United States embark on a process similar to South Africa's. *E.g.*, ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE* 13–14, 254–75 (1999). For example, in 2000, Professor Jamie L. Wacks advocated for federal legislation to set up a U.S. Commission on Knowledge and Acknowledgement. Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories*, 7 *VA. J. Soc. POL'Y & L.* 195, 197–99, 221–34 (2000). Wacks envisaged that forums would be created in communities across the United States for testimonies about an individual's experiences with racism, similar to the human rights hearings held by South Africa's TRC. *Id.* at 199–200. These forums would be made public through various media outlets and would serve a vital educational function. According to Wacks,

[L]istening to the testimony of individuals who have experienced varied forms of racism firsthand would educate Americans about racism's pervasiveness and its damaging effects. It would also equip the government with more detailed information about the needs of the American people so that it can tailor solutions to address those needs. The acknowledgment that accompanies this process would facilitate individual and public healing to further the long-term goal of racial reconciliation.

Id. at 199. Wacks proposed that a permanent body would be located in every state for the sole purpose of airing narratives of racial animus that did not rise to illegal conduct under U.S. law, or in which the racist conduct was unlawful, but victims believed that embarking on a legal fight would be counterproductive for financial, emotional, strategic, and other reasons. *Id.* at 220–22. Despite these thoughtful proposals, however, Professor Wacks' paper appears not to have gained traction in official circles, although cited in several academic papers. *See, e.g.*, Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 *RUTGERS L. REV.* 903, 905 & n.9 (2003) (citing Wacks, *supra*); Chuck Henson, *Reflections on Ferguson: What's Wrong with Black People?*, 80 *MO. L. REV.* 1013, 1013 & n.1 (2015) (citing Wacks, *supra*, at 237).

Wacks appears to have been inspired, at least in part, by Timothy Garton Ash, who also has referred to a TRC-like entity as a Commission on Knowledge and Acknowledgement. Wacks, *supra*, at 198 & n.7 (citing Timothy Garton Ash, *True Confessions*, *N.Y. REV.*, July 17, 1997, at 33, 38).

an eye on the removal of racial and social inequalities.³⁰ Such a mechanism would consider not just historical harms and their current effects, but also how to achieve a societal consensus about the type of society Americans envisage as a shared space for being and belonging, one hopefully underpinned by notions of justice, equity, and dignity. It would certainly encapsulate the U.S. Constitution, and among its purposes would be to “establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”³¹

Although South Africa’s TRC offers a useful example of a mechanism that may provide a blueprint for our country’s reconciliation and healing, it still may be of limited value. Such limitation stems from significant historical and demographic differences between the United States and South Africa, including the fundamental starting points of South Africa’s TRC and the current context of the United States. Four points of distinction are worth mentioning: First, South Africa emerged from a period of authoritarianism and apartheid in 1994 with the goal of transforming the entire edifice of law and policy. The old laws were replaced by an expansive late-twentieth-century constitution³² and Bill of Rights.³³ In addition, a new court of last resort, the Constitutional Court of South Africa, was established to implement and enforce the rights in the new constitution.³⁴ South Africa’s TRC was seen as part of this political and legal transformation, an essential element of transitional justice.³⁵ This is a different project from the one embarked upon after *Brown*,³⁶ the landmark case that is largely seen as foregrounding the civil rights era of the 1960s and beyond.

30. The CRR name was suggested to me in a private conversation by my dear friend and colleague, Professor Kendall Thomas. We both agree that a CRR would aptly address the particular quandary in which the United States finds itself and which is explored in this paper. The ideas of reconstruction and reparations are also taken from my previous paper on this subject, in which I noted that the TRC process in post-apartheid South Africa was tied to a legacy of gross economic inequalities, and that such legacy would considerably obstruct the TRC’s reparations, reconstruction, and reconciliation project. Penelope E. Andrews, *Reparations for Apartheid’s Victims: The Path to Reconciliation?*, 53 DEPAUL L. REV. 1155, 1175 (2004) [hereinafter *Reparations for Apartheid’s Victims*].

31. U.S. CONST. pmbl. In 2020, Americans elected President Biden, who had campaigned on unity, national reconciliation, and national healing. Christina Wilkie, *Biden Calls for Unity and Healing After Electoral College Certifies His Victory*, CNBC, <https://www.cnbc.com/2020/12/14/biden-calls-for-unity-and-healing-after-electoral-college-cements-his-victory.html> (Dec. 15, 2020). And indeed, after the insurrection by a predominantly white mob on January 6, 2021—in the heart of America’s legislative authority, the U.S. Capitol—it seems that the only way forward (in addition to the criminal prosecution of the culprits) is some process of national dialogue and reconstruction. See *Inside the Capitol Riot: An Exclusive Video Investigation*, N.Y. TIMES, <https://www.nytimes.com/2021/06/30/us/jan-6-capitol-attack-takeaways.html> (Jan. 6, 2022).

32. S. AFR. CONST., 1996.

33. *Id.* ch. 2.

34. *Id.* ch. 8, §§ 165–67.

35. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 89–90 (2000).

36. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

There, the idea was to hearken to the ideals in the U.S. Constitution and not upend the legal and political framework.³⁷

Second, the TRC was mandated as part of the constitutional framework to provide a “historic bridge”³⁸ between the apartheid order and South Africa’s new democratic society. There is currently no such constitutional mandate in the United States, or even legislation of the kind that enabled the TRC. Although Rep. Sheila Jackson Lee (D-TX)³⁹ promoted a bill in the 117th Congress for the establishment of a commission “to study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent . . . racial and economic discrimination against African Americans, and the impact of these forces on living African Americans, [and] to make recommendations to the Congress on appropriate remedies,” its mandate is narrower and more limited than the statute that established the TRC in South Africa.⁴⁰

Third, the mandate of the TRC was not to investigate the system of apartheid, which had been declared a crime against humanity by the U.N. General Assembly in 1966,⁴¹ but rather to investigate gross violations of human rights which were committed in furtherance of the system of apartheid.⁴² That is a very different project

37. Even during Reconstruction, the emphasis was on attaining a “more perfect union” by amending the original document to accommodate the contemporary reality. It was therefore a process of legal continuity with the necessary modification. Cynthia Nicoletti, *The Rise and Fall of Transcendent Constitutionalism in the Civil War Era*, 106 VA. L. REV. 1631, 1659 (2020). Contrarily, in South Africa, the democratic constitution adopted in 1994 was a complete break from centuries of colonialism and decades of apartheid.

38. Promotion of National Unity and Reconciliation Act 34 of 1995 pmbl. (S. Afr.).

[T]he Constitution of the Republic of South Africa . . . provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race, class, belief or sex . . .

Id.

39. Sheila Jackson Lee serves as the representative of Texas’ 18th Congressional District; she has served in this position since 1995. *Representative Sheila Jackson Lee*, CONGRESS.GOV, <https://www.congress.gov/member/sheila-jackson-lee/J000032> (last visited Apr. 25, 2022).

40. To review the federal legislation proposed by Jackson Lee, see Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 117th Cong. § 2(b) (2021).

41. G.A. Res. 2202 (XXI) (Dec. 16, 1966); *see also* Ronald C. Slye, *Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission*, 20 MICH. J. INT’L L. 267, 295 (1999) (“By 1976 it was clear that much of the international community agreed that apartheid was a crime against humanity.”).

42. To further this end, the TRC defined “victim” as follows:

[P]ersons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights . . . (i) as a result of a gross violation of human rights; or (ii) as a result of an act associated with a political objective for which amnesty has been granted . . .

Promotion of National Unity and Reconciliation Act 34 ch. 1. In effect, this definition distinguishes between “ordinary” victims of apartheid, namely, those who were routinely subjected to the degradations

from a proposed CRR, which should not only interrogate historical atrocities and structural racism, but also the daily degradations of racism in the United States and the myriad ways that it has impacted the lives of racially marginalized individuals.

Finally, South Africa's TRC adopted a comprehensive approach to dealing with one aspect of South Africa's history, namely, gross violations of human rights committed in the name of apartheid, by channeling the investigation of those violations into a process that incorporated acknowledgement through human rights hearings and granted amnesty to perpetrators and reparations to victims. A proposed CRR might explore the issue of reparations, as discussed below, but its concern would primarily be about reflection, dialogue, acknowledgment, and redress. It is doubtful that amnesty would feature in consideration of the issues—in South Africa, amnesty related to named perpetrators seeking to escape criminal punishment.⁴³

III. SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION

In this section I explore the South African TRC, including the structure and processes adopted and its role in truth telling, racial reconciliation, and reparations. Specifically, I examine whether there are pertinent lessons to be learned from South Africa's TRC process, and its relevance, if any, to the United States today.

One of the most prominent aspects of the TRC has been the adoption of restorative justice as its animating predicate.⁴⁴ "Restorative justice" is the term given to a variety of different practices, including restitution, acknowledgment of wrongdoing, apologies, and recognition of harm and injury. Its essential function is to provide healing for victims, offenders, and bystanders.⁴⁵ Restorative justice

and humiliations of apartheid, and "extraordinary" victims, who were subjected to a substantial impairment of their human rights. *Reparations for Apartheid's Victims*, *supra* note 30, at 1163. Only the latter class of victims were considered in the TRC process. *Id.* The TRC did, however, look at the major institutions in South Africa and their role in strengthening and maintaining apartheid, including the media, the legal and medical establishments, the religious community, and businesses. *Id.* at 1167; Ntombizozuko Dyani-Mhango, *South Africa's Accountability for International Crimes: Revisiting the (Non) Prosecution of Perpetrators of Apartheid for Crimes Against Humanity*, in NATIONAL ACCOUNTABILITY FOR INTERNATIONAL CRIMES IN AFRICA 471–526 (Emma Charlene Lubaale & Ntombizozuko Dyani-Mhango eds., 2022).

43. See James L. Gibson, *Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa*, 46 AM. J. POL. SCI. 540, 541 (2002) (researching the inherent injustice of amnesty). Many spoke out against South Africa's amnesty process, "arguing that international law and convention forbade granting amnesty to crimes against humanity." *Id.*; see, e.g., Press Release, Amnesty Int'l, South Africa: Reforms Promise Solid Foundation for a New Society Based on Human Rights but Questions Remain on Other Issues 3 (Nov. 14, 1995) ("[We] remain[] concerned that the amnesty provisions under the Truth and Reconciliation Act might contribute to the perpetuation rather than the eradication of human rights violations.").
44. See generally Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355, 357, 372 (1999).
45. Carrie Menkel-Meadow has provided a typology of restorative justice approaches. Some foundational concepts include a direct and very personalized participation in a public process of speaking and listening, involving both the perpetrator and the victim. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 164 (2007).

In this personal (and often public) engagement, there is a narration of the elements of the wrongdoing and the harm or the injury that it caused not just to the victim, but also to the victim's family

mechanisms were deemed to underpin the structure of the three committees that made up the TRC: the Human Rights Committee, mandated to designate victim status to applicants and to provide designated victims with a forum to tell their personal stories of human rights violations;⁴⁶ the Amnesty Committee, empowered to grant amnesty to individuals who make full disclosure of all the relevant facts relating to acts associated with a political objective⁴⁷ during that period; and the Reparations and Rehabilitation Committee, to consider various forms of reparation, rehabilitation, and restoration of human and civil dignity,⁴⁸ and to advise the government on how to appropriately compensate victims.

The enabling statute⁴⁹ mandated that the TRC establish as complete a picture as possible of the nature, causes, and extent of gross violations of human rights⁵⁰ from March 1, 1960, to the end of 1993 (just before South Africa's first democratic elections in April 1994). Throughout its five-year period of operation, and especially during the two-year period of the publicly televised hearings of the Human Rights Committee, where victims and perpetrators testified, South Africans collectively observed the unfolding of a national public narrative of pain, grief, and remorse. The harrowing stories recounted by victims relating to their torture, or the torture, disappearances, or murders of their loved ones, which were committed by agents of the apartheid state, and the recounting of the atrocities committed by the liberation movement in exile and within the country, were poignant and painful, including to the wider South African audience.⁵¹ So too were the testimonies of the perpetrators who had committed heinous acts to ostensibly further political objectives, whether in service of the apartheid state or in opposition to it. South Africans had to confront, in the starkest manner, the detailing and range of gross human rights violations that had been committed in the name of apartheid to fight this discredited system and achieve national liberation.⁵²

and/or loved ones, and to the wider community. *Id.* Part of the process also involves an explanation from the offender as to the details and reason for the harm caused. *Id.* Sometimes the perpetrator acknowledges fault and accepts blame, and asks for the forgiveness of the victim and/or the victim's family or loved ones, which could be accompanied by an apology. *Id.* This often public iteration of blame and forgiveness is followed by discussions of reparations or restitution, which could comprise a range of approaches, such as financial compensation or symbolic restitution to a community in the form of statues, museums, public memorials, various naming commitments, and the like. *Id.*; see also RESTORATIVE JUSTICE IN PRACTICE (Sheila M. Murphy & Michael P. Seng eds., 2015) (advising on implementation of restorative justice practices in the law and community); *Restorative Justice: Changing the Lens*, 64 N.Y.L. SCH. L. REV. 11 (2019–2020) (making the case for restorative justice as a matter of law).

46. Promotion of National Unity and Reconciliation Act 34 ch. 3.

47. *Id.* ch. 4.

48. *Id.* ch. 5.

49. *Id.* ch. 2.

50. *Id.*

51. See ANTJIE KROG, *COUNTRY OF MY SKULL* 37–127 (Three Rivers Press 2000) (1998).

52. See ALEX BORAINÉ, *A COUNTRY UNMASKED* 98–144 (2000).

The *TRC Final Report*, Volume Five, was published in 1998, with several recommendations.⁵³ The report placed great emphasis on the need for reconciliation and noted that reconciliation was vital and necessary for enduring peace and stability.⁵⁴ The report specifically requested that the president of South Africa host a “National Summit on Reconciliation, not only to consider the specific recommendations made by the [TRC], but to ensure maximum involvement by representatives of all sectors of [South African] society in the pursuit of reconciliation.”⁵⁵ The report also called for monetary reparations to victims in the form of an individual reparation grant, an official apology, institutional symbols such as monuments, affirmative action programs in education and health, and the expunging of victims’ criminal records.⁵⁶

What are the major takeaways, then, from the South African experience, namely, from the TRC’s structure, operation, and recommendations, and how might they be useful for establishing a CRR in the United States? First, there is the official imprimatur of the South African government, with its attendant commitments of support and resources. The TRC is a good illustration of official governmental commitment to a mechanism that is empowered to pursue and unearth some of a country’s past, which continues to burden its present.⁵⁷ Second, the TRC encountered what may have appeared to some to be an intractable conflict devoid of resolution (and therefore reconciliation) but approached the goal of reconciliation with purpose and determination. The performative aspects, which the TRC embraced, reinforced its official commitment. In particular, the role of the Chairperson of the TRC, Archbishop Desmond Tutu, was often to intervene at moments of anger and recrimination during the Human Rights Committee hearings, and to interject a tone

53. The *TRC Final Report* consisted of seven volumes, with Volume Seven published in 2002; the report’s recommendations are outlined in Volume Five. 5 TRUTH & RECONCILIATION COMM’N, *supra* note 14, at 304–49.

54. *Id.* at 304. The report invites South Africans to

accept [thei]r own need for healing; reach out to fellow South Africans in a spirit of tolerance and understanding; work actively to build bridges across the divisions of language, faith and history; strive constantly, in the process of transformation, to be sensitive to the needs of those groups which have been particularly disadvantaged in the past, specifically women and children; encourage a culture of debate so that, together, [South Africans] can resolve the pressing issues of [thei]r time; initiate programmes of action in [thei]r own spheres of interest and influence, whether it be education, religion, business, labour, arts or politics, so that the process of reconciliation can be implemented from a grassroots level; address the reality of ongoing racial discrimination and work towards a non-racial society; [and] call upon leaders in local, provincial and national government to place the goal of reconciliation and unity at the top of their respective agendas.

Id.

55. *Id.*

56. *Reparations for Apartheid’s Victims*, *supra* note 30, at 1165.

57. Johnny de Lange, *The Historical Context, Legal Origins and Philosophical Foundation of the South African Truth and Reconciliation Commission*, in LOOKING BACK, REACHING FORWARD 14–17, 22 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000).

of religious piety.⁵⁸ These moments, often emotionally charged, allowed the proceedings to unfold while effectively sidelining the expressed emotions of retribution and revenge, and to center feelings of reconciliation and restitution.⁵⁹

Third, the public's exposure to both victim and perpetrator testimony at the Human Rights Committee hearings helped the country to imagine itself moving away, at least symbolically, from a culture of racism and repression and toward a culture of human rights, dignity, and inclusion. The symbolism of the process was an important way of demonstrating the mechanics of reconciliation and forgiveness. It gave the victims an opportunity to be heard and provided a cathartic process for victims who testified, and it enabled the rituals of healing. This process was seen as benefiting not just the victims, but also witnesses to the testimony, which included a large portion of South African society. It educated and forced bystanders and beneficiaries of racism to observe the process and to recognize how the institutions and formal processes of apartheid were utilized to protect their benefits and white privilege.⁶⁰ Fourth, the TRC process and the *TRC Final Report* (as well as various other pieces of documentation) became part of official South African history, and denial of such history was no longer acceptable or feasible.⁶¹

Comparisons between the United States and South Africa, countries that continue to be mired in racial conflict, have some, albeit limited, value. But there are also cautionary tales for the United States from South Africa's TRC. As a general rule, these kinds of commissions, despite their importance, rarely result in satisfaction to all who are involved, whether victims, perpetrators, or bystanders.⁶² In the United States, it is clear that no single process will satisfy everyone involved for a range of reasons and issues, including deep societal division. Similarly, in South Africa, reparations provided to the victims were unsatisfactory considering perpetrators could possibly receive amnesty and immunity from civil or criminal liability. In the United States,

58. The hearings of the Human Rights Committee were particularly poignant: Victims recounted their stories and perpetrators disclosed their deeds—and in some cases, sought forgiveness from victims. *LONG NIGHT'S JOURNEY INTO DAY* (Reid-Hoffmann Productions 2000).

59. This approach was not without its critics, as TRC proceedings were heavily partial to religious rituals and practices. See generally Lyn S. Graybill, *South Africa's Truth and Reconciliation Commission: Ethical and Theological Perspectives*, 12 *ETHICS & INT'L AFFS.* 43 (1998) (highlighting theological objections to the TRC's function).

60. *DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS* 217–20 (1999).

61. Many scholars and advocates have argued that the possibilities for reconciliation surface when facts and evidence emerge. See, e.g., Caleb Gayle, *No Reconciliation Without Truth*, *NEW REPUBLIC* (Apr. 23, 2018), <https://newrepublic.com/article/148066/no-reconciliation-without-truth> (reporting that emerging evidence of the 1921 Tulsa Race Riots has led to a public reconsideration of this history). These scholars further argue that accountability is tethered to truth telling and is the first step toward justice. *Id.* The disclosure of the truth also starts the process of disinfecting the societal toxicity that gives rise to the harm. See François du Bois, "Nothing but the Truth": *The South African Alternative to Corrective Justice in Transitions to Democracy*, in *LETHE'S LAW* 98–114 (Emilios Christodoulidis & Scott Veitch eds., 2001).

62. In South Africa, for example, the definition of "victim" was so circumscribed that millions of potential victims were excluded from the process. *Reparations for Apartheid's Victims*, *supra* note 30, at 1172.

the question of civil or criminal immunity would unlikely be part of the framework for the proposed CRR, but reparations would no doubt be on the table.⁶³

White South Africans, the greatest beneficiaries of apartheid, showed far less interest in the TRC, especially its most notable lessons, while Black South Africans largely viewed the TRC as a vital national process even as they were disappointed with some of the outcomes.⁶⁴ Might this be a concern in the United States as well, where white Americans (and maybe others) may approach the CRR with indifference or even disdain?⁶⁵ Most significantly, the TRC largely left untouched a robust discussion of the structural economic aspects and legacy of apartheid. Would there similarly be a reluctance in the United States to confront slavery and Jim Crow's economic legacy?⁶⁶

IV. EXAMPLES OF TRUTH AND JUSTICE COMMISSIONS IN THE UNITED STATES

As an immigrant to the United States, I am struck by how frequently the description of the United States, as seen through the eyes of the French aristocrat and philosopher, Alexis de Tocqueville, is mentioned. His reflections, provided in his writing after a visit to the United States in the early 1830s, are frequently offered as a testament to the superiority of the American system of government, as compared to that which then existed in Europe.⁶⁷ He was particularly impressed with the commitment to liberty and equality that he observed in Americans, and a representative system of government that he found more democratic than the European systems, which were typified by the nobility and aristocracy. He especially admired the individualism, social mobility, and innovation that he observed, but he also saw a strong communitarian ethic, with citizens committed to problem solving and building vibrant communities.⁶⁸

Of course, de Tocqueville was talking about America as a new country, fresh and energetic, as compared to most countries in Europe then burdened by centuries of aristocratic despotism. But his observations of the United States reflected white American society. His positive views of the United States in the 1830s did not incorporate a candid and comprehensive account of the system of slavery that intersected with that America.⁶⁹ This aspect of his work has been commented on and explored in

63. See, e.g., Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations*, 3 COLUM. J. RACE & L. 147, 187–95 (2013) (discussing legal arguments for and against reparations).

64. TOM LODGE, *POLITICS IN SOUTH AFRICA* 203 (Ind. Univ. Press 2003) (2002).

65. Cf. Audio tape: Markup of H.R. 40, Legislation to Study and Develop Slavery Reparations Proposals, held by the House Judiciary Committee, at 9:45:55–11:46:07 (Apr. 14, 2021), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4500> (debating H.R. 40).

66. *Economic Oppression, JIM CROW: NOW & THEN*, <https://cibonayrae.github.io/jimcrow/economic.html> (last visited Apr. 25, 2022).

67. PUTNAM WITH GARRETT, *supra* note 7, at 1–2 (citing 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 37–39 (Francis Bowen ed., Henry Reeve trans., Sever & Francis 2d ed. 1863) (1835)).

68. *Id.*

69. de Tocqueville wrote separately about slavery in the United States. See generally Sally Gershman, *Alexis de Tocqueville and Slavery*, 9 FRENCH HIST. STUD. 467 (1976).

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greater depth, highlighting the paradox that has haunted this country since its formation, namely, an admirable system of democracy undergirded by a repugnant system of slavery.⁷⁰

This is also the paradox that plagues America's founding documents, including the Declaration of Independence⁷¹ and the U.S. Constitution. The Preamble to the Constitution is especially hopeful:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.⁷²

And yet the Preamble (in addition to the various amendments that incorporate equal protection, due process, and other civil rights)⁷³ provides the appropriate aspirational touchstone by which to consider a CRR. A commitment to a reconsideration of the institutional racial problems that mar the “more perfect Union” at this historical juncture would establish a compelling moral narrative—and it might even alter political behavior and revive faith in this country's institutions, as well as its laws and legal processes.⁷⁴

But to reach such goals requires a bridge that is forward-looking and a commitment to interrogate the past, looking backwards as it were, as to how the United States arrived at this inflection point. This means confronting not just the atrocities committed to sustain white supremacy since the establishment of the republic,⁷⁵ but also examining the systemic racism that appears embedded in institutions, processes, and culture. Over the decades, the United States has attempted to come to grips with

70. E.g., Richard W. Resh, *Alexis [d]e Tocqueville and the Negro: Democracy in America Reconsidered*, 48 J. NEGRO HIST. 251 (1963).

71. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

72. U.S. CONST. pmbl.

73. *Id.* amends. XIII, XIV, XV.

74. See generally *Public Trust in Government: 1958–2021*, PEW RSCH. CTR. (May 17, 2021), <https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/>.

75. Although this paper focuses on racism against those who were enslaved in the United States, white supremacy has been firmly planted on American soil since the arrival of the first settlers. SCOTT L. MALCOMSON, *ONE DROP OF BLOOD* 36 (2000) (writing that white settlers believed Native Americans were destined for servitude and labor).

In addition to slavery, the litany of American massacres and other activities constituting gross violations of human rights are numerous and have been extensively recorded. They include acts of racial terror like lynching, and they comprise riots and massacres of Black people carried out by white mobs, including in Colfax, Louisiana, in 1873; Wilmington, North Carolina, in 1898; Atlanta, Georgia, in 1906; Elaine, Arkansas, in 1919; Tulsa, Oklahoma, in 1921; and Rosewood, Florida, in 1923. Jordan C. Burke, *White Discipline, Black Rebellion: A History of American Race Riots from Emancipation to the War on Drugs* (Nov. 2, 2000) (Ph.D. dissertation, University of New Hampshire).

Some of these massacres have been investigated at various levels and through official and unofficial mechanisms, which have resulted in reports and recommendations for further action, including redress and reparations. Monica C. Bell et al., *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, 1319 (2021).

the legacies of slavery and institutionalized racial subordination, but with some reticence. These attempts have almost always been met with resistance, both official and unofficial.⁷⁶

Two significant and relatively successful efforts at redress stand out, namely, reparations for the internment of Japanese Americans during World War II⁷⁷ and the 1999 settlement for Black farmers who were illegally deprived of their land.⁷⁸ The U.S. government paid \$20,000 per person to those Japanese Americans (or their next of kin) who were interned during the war.⁷⁹ The 1999 settlement stemmed from a class action lawsuit; billions of dollars were paid to Black farmers as compensation for racial discrimination between 1981 and 1996, through the allocation of farm loans and other forms of financial assistance by the U.S. Department of Agriculture.⁸⁰

There are also several ongoing, university-led investigations into the involvement of prominent American colleges and universities in the Atlantic slave trade, including Brown, the College of William & Mary, Georgetown, Harvard, Princeton, and the University of Virginia.⁸¹ In 2015, for example, the president of Georgetown University initiated a comprehensive effort to make amends for Georgetown's role in the sale of

76. *E.g.*, Taylor v. Northam, 862 S.E.2d 458 (Va. 2021), *cert. denied Sub. nom.* Heltzel v. Youngkin, 142 S. Ct. 1416 (2022).

77. *See generally* ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION (2d ed. 2013).

78. Pigford v. Glickman, 185 F.R.D. 82, 111–13 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000), *enforcement denied sub nom.* Pigford v. Schafer, 536 F. Supp. 2d 1 (D.D.C. 2008). Congress more recently passed legislation providing for debt relief payments for socially disadvantaged farmers and ranchers, but their issuance has been preliminarily enjoined pending litigation. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005, 135 Stat. 4, 12–13 (2021); U.S. Dep't of Agric., *American Rescue Plan Act Section 1005 Litigation FAQs*, FARMERS.GOV, <https://www.farmers.gov/loans/american-rescue-plan/litigation-update> (last visited Apr. 9, 2022); Emma Hurt, *The USDA Is Set to Give Black Farmers Debt Relief. They've Heard That One Before*, NPR (June 4, 2021), <https://www.npr.org/2021/06/04/1003313657/the-usda-is-set-to-give-black-farmers-debt-relief-theyve-heard-that-one-before>.

79. YAMAMOTO ET AL., *supra* note 77, at 390.

80. *Pigford*, 185 F.R.D. at 111–13; *see also* Valerie Grim, *Between Forty Acres and a Class Action Lawsuit: Black Farmers, Civil Rights, and Protest Against the U.S. Department of Agriculture, 1997–2010*, in BEYOND FORTY ACRES AND A MULE 271–96 (Debra A. Reid & Evan P. Bennett eds., 2012). In recent decades, truth and reconciliation commissions have also been established in the United States, for example, in response to the Rosewood Massacre of 1923 in Florida's Levy County, to confront the Boston school busing violence of the 1970s, and to fight for civil rights in Mississippi and against the violent reaction to that struggle from 1945 to 1975. *See* SANDRA JOHNSON WITT, THE ROSEWOOD MASSACRE REPORT: ROSEWOOD AND THE RACIAL VIOLENCE OF JANUARY 1923 (2002); CHRIS GALLAGHER ET AL., UNION OF MINORITY NEIGHBORHOODS, CAN WE TALK ABOUT EQUITY, ACCESS, AND EXCELLENCE?: CONNECTING OUR HISTORY TO OUR FUTURE (2012); RONALD STORY & BRUCE LAURIE, THE RISE OF CONSERVATISM IN AMERICA 1945–2000, at 93–95 (2008).

81. *See* Scholars' Lab, Univ. of Va., *Universities Studying Slavery*, PRESIDENT'S COMM'N ON SLAVERY & UNIV. (Mar. 18, 2016), <https://slavery.virginia.edu/universities-studying-slavery/> (listing more than seventy-five institutions with commitments to the "research, acknowledgment, and atonement" of slavery); Charles T. Clotfelter et al., *Public Universities, Equal Opportunity, and the Legacy of Jim Crow: Evidence from North Carolina* 2–39 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21577, 2015).

272 slaves in 1838.⁸² He committed the university to a range of options to address the legacy of slavery, racism, and segregation in the United States generally, and at Georgetown in particular. One step taken was the removal from two buildings of the names of two nineteenth-century university presidents, both of whom had played an advisory role in the sale of slaves owned by the Jesuit order.⁸³

Georgetown also set up a working group of administrators, faculty, students, and alumni to explore questions on “slavery, memory, and reconciliation,” which issued its report on the university’s history with slavery and with recommendations to the university president in 2016.⁸⁴ Recommendations in the report included an apology to the descendants of the sold slaves; the further renaming of buildings; memorializing Georgetown University’s role in the slave trade, including in its research, and teaching and engaging the entire university in projects of diversity and inclusion.⁸⁵ The report also recommended that the university “grant the descendants of those owned by the Maryland Province an advantage in the admissions process,” and “increase financial assistance . . . to eligible descendants of the Maryland Jesuit slaves.”⁸⁶

Over the past several decades, some cities including Chicago, Detroit, and Los Angeles, have also established truth and/or reparations commissions⁸⁷ and have

82. One result of this effort was the creation of the Georgetown Slavery Archive, “a repository of materials relating to the Maryland Jesuits, Georgetown University, and slavery.” GEO. SLAVERY ARCHIVE, <http://slaveryarchive.georgetown.edu/> (last visited Apr. 25, 2022).

83. John J. DeGioia, *An Update Regarding Mulleddy Hall and McSherry Hall*, GEO. UNIV., <https://president.georgetown.edu/update-on-slavery-memory-and-reconciliation-november-2015/> (last visited Apr. 25, 2022). The buildings were temporarily renamed Freedom Hall and Remembrance Hall. *Id.* Freedom Hall was later permanently renamed Isaac Hall, honoring the first listed enslaved person of the 1838 sale; Remembrance Hall was later permanently renamed Anne Marie Becraft Hall, honoring “a free woman of color who founded a school for [B]lack girls in the neighborhood of Georgetown in 1827.” John J. DeGioia, *Next Steps on Slavery, Memory, and Reconciliation at Georgetown*, GEO. UNIV., <https://president.georgetown.edu/slavery-memory-reconciliation-september-2016/> (last visited Apr. 25, 2022).

84. See DAVID COLLINS ET AL., REPORT OF THE WORKING GROUP ON SLAVERY, MEMORY, AND RECONCILIATION TO THE PRESIDENT OF GEORGETOWN UNIVERSITY 3 (2016).

85. *Id.* at 35–41.

86. *Id.* at 22; see also Rachel L. Swarns, *Georgetown Confronts Its Role in Nation’s Slave Trade*, N.Y. TIMES, Apr. 17, 2016, at A1 (“[E]nslaved African-Americans had belonged to the nation’s most prominent Jesuit priests. And they were sold . . . to help secure the future of the premier Catholic institution of higher learning at the time, known today as Georgetown University.”).

87. See DAVID WHITAKER, LEGIS. POL’Y DIV., CITY OF DETROIT CITY COUNCIL, MODELS FOR STRUCTURE OF DETROIT REPARATIONS TASK FORCE (2022) (reporting on the structure of eleven “reparations communities” as models for Detroit’s Reparations Task Force, the creation of which voters approved by ballot proposal in November 2021); Giulia Heyward, *Interest Grows in Making Reparations to Black Residents at Local Level*, N.Y. TIMES, Sept. 26, 2021, at A13; *Mayors Organized for Reparations and Equity*, MORE MAYORS, <https://moremayors.org/mayors> (last visited Apr. 25, 2022).

States have also proposed reparations but with little success. See Piper Hudspeth Blackburn, *Despite Racial Reckoning, State Efforts Stall on Reparations*, AP NEWS (Apr. 25, 2020), <https://apnews.com/article/race-and-ethnicity-legislature-legislation-coronavirus-pandemic-california-dddb07baefbbc0a3f3484b7b7ee9cdf0>; CAL. GOV’T CODE §§ 8301–8301.5, 8301.7 (Deering, LEXIS through Ch. 14 of 2022 Reg. Sess) (establishing the Task Force to Study and Develop Reparation Proposals for African Americans).

allocated money to racial justice funds.⁸⁸ Leaders in Asheville, North Carolina, have taken a historic step to repair centuries of racial prejudice by unanimously voting to provide reparations.⁸⁹ Recently, the Asheville City Council voted 7-0 on a resolution that formally apologized to its Black residents for the city's role in slavery, discriminatory housing practices, and other racist policies throughout its history.⁹⁰ Some cities have also adopted laws that require companies seeking to do business with the city to disclose any profits that they may have received from slavery.⁹¹ District attorneys in Boston, Philadelphia, and San Francisco, are also creating commissions intended to review the often fractured relationships between law enforcement and communities—many primarily comprised of people of color.⁹²

The atrocities committed to bolster white supremacy have left an indelible mark on the communities affected and beyond.

Americans tend to think of lawless nations in Africa and Eastern Europe when the discussion turns to mass murder and crimes against humanity. But a commission created by the Oklahoma Legislature spent the late 1990's searching for mass graves in and around Tulsa. The missing dead—who could number as many as 300—were shot, burned, lynched or tied to cars and dragged to death during the Tulsa Race Riot of 1921. This was a nightmarish disturbance in which an army of white Tulsans reduced to ashes 35 square blocks of what was then the most affluent [B]lack community in the United States.⁹³

Not reckoning with these atrocities may suggest a level of impunity that Americans more typically associate with societies considered undemocratic or authoritarian, as

88. See Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 160–95 (2020) (discussing New York City's investment in racial justice advocacy programs); Kelli L. Cover, Comment, *Baltimore City Schools Need Many Things—A Personal Police Force Is Not One of Them*, 48 U. BALT. L.F. 69, 76, 89, 92 (2018) (highlighting Baltimore's use of grants to reduce racial disparities in schools).

89. Res. 20-128, 2020 City Council of the City of Asheville, Regular Meeting (N.C. 2020) (on file with the *New York Law School Law Review*).

90. *Id.*; City of Asheville, *City Council Meeting*, YouTube (July 14, 2020), <https://www.youtube.com/watch?v=NRDzVFY2g1k>.

91. *E.g.*, CHI., IL., BUSINESS, CORPORATE AND SLAVERY ERA INSURANCE ORDINANCE § 2-92-585 (2002).

Each contractor with whom the city enters into a contract, whether subject to competitive bid or not, must complete an affidavit verifying that the contractor has searched any and all records of the company or any predecessor company regarding records of investments or profits from slavery or slaveholder insurance policies during the slavery era. The names of any slaves or slaveholders described in those records must be disclosed in the affidavit. The chief procurement officer shall make the information available to the public and provide an annual report to the city council.

Id.

92. *WBUR's Morning Edition: Boston Creates Truth, Justice and Reconciliation Commission* (WBUR radio broadcast June 30, 2020); see also Ximena Conde, *Krasner Launches Truth and Reconciliation Panel Inspired by Post-Apartheid South Africa's Efforts*, WHYY (July 1, 2020), <https://whyy.org/articles/krasner-launches-truth-and-reconciliation-panel-inspired-by-post-apartheid-south-africas-efforts/>.

93. Brent Staples, *Editorial Observer; Coming to Grips with the Unthinkable in Tulsa*, N.Y. TIMES, Mar. 16, 2003 (§ 4), at 12.

noted above. The challenge is to confront them to move forward, but to do so in a spirit of deliberation and not blame and defensiveness. Three truth commissions conducted in the United States in the light of racial transgressions, and their outcomes, are worth highlighting to illustrate the possibilities generated by these kinds of processes.

The Greensboro Massacre. The Greensboro Truth and Reconciliation Commission was established in 2004 to consider the 1979 murders of five protestors, Black and white, by a group of Ku Klux Klan and American Nazi Party members⁹⁴ who were later acquitted of criminal charges by all-white juries in both state and federal court.⁹⁵ Seven commissioners were appointed to investigate the incident through research and the collection of statements from individuals and public hearings. A comprehensive report containing five areas of recommendation was issued in May 2006.⁹⁶ Recommendations under the first area (acknowledgement) included formal recognition and a proclamation by the City of Greensboro; a public or private apology; restitution which could include monetary contributions and a public monument; the hosting of community forums to discuss the report; and a healing workshop or retreat for those affected by the massacre, including children of both the victims and the perpetrators of the tragedy.⁹⁷

The Wilmington Massacre. A thriving African American community in the town of Wilmington, North Carolina, was destroyed in 1898 in a rampage of violence and destruction driven by a fierce commitment to white supremacy.⁹⁸ In response to a well-run and racially integrated city government, the white mob (all Democrats) wanted to crush Black electoral power and destroy the economic strength and stability of the Black community.⁹⁹ The violence and destruction led to the deaths of dozens of Black American citizens and resulted in droves of Black flight from the

94. Sally Avery Bermanzohn, *A Massacre Survivor Reflects on the Greensboro Truth and Reconciliation Commission*, 97 RADICAL HIST. REV. 102, 103–05 (2007); LISA MAGARRELL & JOYA WESLEY, LEARNING FROM GREENSBORO 3–4 (2008).

95. Rebecca Boger et al., *The Greensboro Massacre, Highlights and Exhibits*, UNC GREENSBORO UNIV. LIBRS., <http://libcdm1.uncg.edu/cdm/essay1979/collection/CivilRights> (last visited Apr. 25, 2022). Subsequently, several Ku Klux Klan and American Nazi Party members were found liable under federal civil wrongful death claims. *Id.*; MAGARRELL & WESLEY, *supra* note 94, at 9.

96. CYNTHIA BROWN ET AL., GREENSBORO TRUTH & RECONCILIATION COMM'N, GREENSBORO TRUTH AND RECONCILIATION COMMISSION REPORT EXECUTIVE SUMMARY 28 (2006). The five areas of recommendation contained in the report were as follows: (1) acknowledgement; (2) institutional reform (including anti-racism training for county and city government employees); (3) criminal justice and civil remedies (such as criminal or civil proceedings against city agents related to alleged police corruption); (4) citizen transformation/engagement (involving institutional and individual commitments to anti-racism and diversity education programs, among other things); and (5) the way forward (calling on local institutions, community organizations, and religious leaders to collectively implement the report's recommendations). *Id.* at 28–30.

97. *Id.* at 29–39.

98. John DeSantis, *Wilmington, N.C., Revisits a Bloody 1898 Day and Reflects*, N.Y. TIMES (June 4, 2006), <https://www.nytimes.com/2006/06/04/us/04wilmington.html>.

99. See JANET F. DAVIDSON, CAPE FEAR MUSEUM OF HIST. & SCI., THE 1898 WHITE SUPREMACIST CAMPAIGN AND MASSACRE, A BRIEF NARRATIVE 1–2 (2020). The events have been described as “the only successful coup d’état in the history of the United States and a story of racial terror largely obscured from the annals of

city.¹⁰⁰ In addition to the drastic depletion of its Black American population, Wilmington would not have another Black elected official for almost a century.¹⁰¹

In 2000, North Carolina established the 1898 Wilmington Race Riot Commission to create a historical record and assess the impact of the riot on the lives and livelihoods of Black Americans.¹⁰² In drafting its 2006 report, the Commission held public hearings and examined research and scholarship.¹⁰³ The report stated its purpose clearly: “to repair the moral, economic, civic and political damage wrought by the violence and discrimination [of 1898].”¹⁰⁴ It also recommended an acknowledgement that the democratic process had failed in Wilmington, and that the massacre was the result of a conspiracy orchestrated by a well-organized and determined “white elite.”¹⁰⁵

The report further recommended the creation of a commission “to examine the broader impact of slavery, Jim Crow, and discrimination on the lives of African Americans.”¹⁰⁶ Regarding economic redevelopment, the report called for “judicial redress to compensate heirs of victims who can prove loss [of] and relationship to [the 1898] victims,” business incentives to “develop[] . . . areas impacted by the Wilmington Race Riot,” and mechanisms to “[i]ncrease minority home ownership in [those] impacted areas.”¹⁰⁷

The Tulsa Riots. On May 31 and June 1, 1921, after a Black man was arrested in Tulsa, Oklahoma, for allegedly assaulting a white woman, rumors spread that he would be lynched.¹⁰⁸ Thousands of people gathered at the local courthouse.¹⁰⁹ Angered by this display of solidarity, a mob of armed white men, aided and abetted by local officials, went to the Black neighborhood of Greenwood and, in addition to killing dozens of people, looted, burned, and destroyed the entire community.¹¹⁰ In

American history.” Aaron Randle, *America’s Only Successful Coup d’Etat Overthrew a Biracial Government in 1898*, HIST. STORIES (Oct. 7, 2020), <https://www.history.com/news/wilmington-massacre-1898-coup>.

100. Randle, *supra* note 99.

101. *Id.*

102. LERAE UMFLEET, *Introduction to 1898 WILMINGTON RACE RIOT REPORT* 11 (2006).

103. *Id.* at 11–15.

104. 1898 WILMINGTON RACE RIOT REPORT, *supra* note 102.

105. *Id.* Another recommendation included the establishment of “a Restructuring [and] Development Authority . . . to supervise implementation of a strategic vision . . . [to be] supported by federal, state, and local governments, as well as media and businesses, especially those which benefited from the consequences of 1898.” *Id.*

106. *Id.*

107. *Id.*

108. See *Tulsa Race Massacre*, OKLA. HIST. SOC’Y, <https://www.okhistory.org/publications/enc/entry.php?entry=TU013> (last visited Apr. 25, 2022).

109. HUM. RTS. WATCH, *THE CASE FOR REPARATIONS IN TULSA, OKLAHOMA: A HUMAN RIGHTS ARGUMENT* 5 (2020) [hereinafter *THE CASE FOR REPARATIONS*].

110. See SCOTT ELLSWORTH, *DEATH IN A PROMISED LAND* 6–7 (1982); ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND* 33–39 (2002).

1997, just over seventy-five years later, the Oklahoma Commission to Study the Tulsa Race Riot of 1921 (the “Oklahoma Commission”) was created to examine the events and provide a historical account.¹¹¹ The Oklahoma Commission’s work was divided into five categories encompassing education, arts and culture, tourism, commemoration, and economic development.¹¹²

The Oklahoma Commission issued its report on February 21, 2001.¹¹³ Several recommendations were made, including direct payment of reparations to survivors and descendants of survivors, scholarship funds to students, establishment of an economic development enterprise zone in the Greenwood district, and a memorial for the reburial of remains.¹¹⁴ In June 2001, the Oklahoma legislature also passed the 1921 Tulsa Race Riot Reconciliation Act, but omitted some of the Commission’s recommendations, most notably the provision regarding financial compensation to survivors of the massacre or their descendants.¹¹⁵

What might we then learn from these reports and how may they assist a proposed CRR at the national level? Each illustrates ways to approach the legacy of racial injustice and suggests appropriate redress for racial harms. In this respect, U.S. history and its legacy of racial subordination overlap with that of South Africa. As mentioned earlier, the TRC examined the gross violations of human rights committed in the name and in furtherance of apartheid. Similarly, in the United States, the massacres (gross violations of human rights) were performed to further racial animus and racial hatred. But even more profoundly, these massacres were committed to thwart Black self-determination in all of its manifestations, including Black political and economic power.

111. OKLA. COMM’N TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, at ii (2001). The Oklahoma Commission was renamed the 1921 Tulsa Race Massacre Commission in 2021. *Tulsa 1921 Race Riot Commission Renamed Race Massacre Commission*, 2 NEWS OKLA., <https://www.kjrh.com/news/local-news/tulsa-1921-race-riot-commission-to-be-renamed-tulsa-race-massacre-commission> (Mar. 19, 2021).

112. *Tulsa 1921 Race Riot Commission Renamed Race Massacre Commission*, *supra* note 111.

113. *Id.*

114. *Id.*; see RANDY KREHBIEL, TULSA 1921, at 214–19 (2019) (discussing Oklahoma government resistance to the report’s recommendations).

115. 1921 Tulsa Race Riot Reconciliation Act of 2001, OKLA. STAT. tit. 74, § 8000.1 (LEXIS through Ch. 7 of 2022 2d Reg. Sess.). Reasons for omitting the financial compensation provision include the absence of legislative support and the lack of public funds to compensate victims and survivors. THE CASE FOR REPARATIONS, *supra* note 109, at 39–40. Again, as argued in Part V, governmental support, especially the commitment of resources, is an important precondition to the success of a body like the CRR. See *id.* Survivors and descendants later sued for reparations (perhaps in light of this statutory omission), but in one example the U.S. Court of Appeals for the Tenth Circuit affirmed dismissal of the case because the statute of limitations had expired. *Alexander v. Oklahoma*, 382 F.3d 1206, 1220 (10th Cir. 2004). Accordingly, meaningful steps toward repair are ongoing. See, e.g., THE CASE FOR REPARATIONS, *supra* note 109, at 61–66; John Hope Franklin Tulsa-Greenwood Race Riot Claims Accountability Act of 2009, H.R. 1843, 111th Cong. (2009) (lingering in Congress since 2009).

V. CONSIDERATIONS FOR ESTABLISHING THE COMMISSION ON RECOGNITION AND RECONSTRUCTION IN THE UNITED STATES

In considering the values, goals, structure, organization, and timeframe of the proposed CRR, an important consideration is what we would want it to achieve. What are the shared assumptions and values that would undergird the workings of the CRR and provide the basis and focus for its deliberations? What would the structure and legal status of the proposed CRR be? How would members of the CRR be chosen, and based on what criteria? What legal effect would testimony provided to the CRR have, if any? What role would there be for the general public, beyond bearing witness to the hearings? Of course, the most important consideration is the issue of funding and resources, without which the CRR would be unable to achieve anything of consequence.

In imagining the CRR, the following approach might be helpful and productive. First, because of its significance, its structure and process should emanate from an executive order,¹¹⁶ the imprimatur of the highest governmental authority.¹¹⁷ Second, its structure should identify clear-cut goals, outcomes, and identifiable tasks assigned to designated individuals or groups, as well as measurable timelines to ensure operational effectiveness and efficiency.¹¹⁸ Third, the underlying or animating values

116. Past presidents have issued executive orders to establish organizations and committees, including ones tasked with the promotion of racial equality. *See, e.g.*, Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948) (creating the President's Committee on Equality of Treatment and Opportunity in the Armed Services); Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 23, 1957) (desegregating public schools in Little Rock, Arkansas). The Peace Corps was also established through executive order, issued by President John F. Kennedy on March 1, 1961, after he campaigned on the idea six months earlier at the University of Michigan. Exec. Order No. 10,924, 26 Fed. Reg. 1789 (Mar. 1, 1961); Senator John F. Kennedy, Campaign Speech at the University of Michigan (Oct. 14, 1960) (transcript available at *The Founding Moment*, PEACE CORPS, <https://www.peacecorps.gov/about/history/founding-moment/> (last visited Apr. 25, 2022)).

The issuance of executive orders is considered an inherent aspect of presidential power to “take Care that the Laws be faithfully executed,” U.S. CONST. art. II, § 3, but no constitutional or statutory provision expressly authorizes such executive action. VIVIAN S. CHU & TODD GARVEY, CONG. RSCH. SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 2 (2014). Their issuance can therefore be controversial and the legislative and judicial branches of government may seek to handicap such an order's effectivity: Congress, by legislation pursuant to Article I, Section 7, Clause 2; the courts, by ruling that the order exceeds the president's Article II power. *Id.* at 4, 9; *see* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952) (declaring unconstitutional President Harry S. Truman's executive order allowing the military to commandeer U.S. steel mills); *see also id.* at 635–38 (Jackson, J., concurring) (establishing the framework by which courts analyze the validity of executive action).

117. An executive order to establish a body like the CRR might go some way to continuing and contributing to the recognition of racial harms as a consequence of America's history of colonization, slavery, and exclusion, while at the same time addressing the ongoing consequences of such legacy. Structured thoughtfully and resourced adequately, it may also provide the opportunity for a national dialogue on social justice for all Americans.

118. The South African TRC designated two groups in its structure: victims (or their descendants); and perpetrators (which could include media, medical, legal, business, and religious institutions). 1 TRUTH & RECONCILIATION COMM'N, *supra* note 14, at 59–65. This may be a useful designation for the proposed CRR as well. Because one function of the CRR would be educating the American public on racial histories, its duration should be carefully tailored to avoid waning public interest; a time period of

of the CRR should be decidedly articulated, and should include truth, accountability, transparency, and inclusion. Fourth, forms of redress, whether reparations, apologies, or some other mechanism, should be considered at the outset.¹¹⁹

Fifth, in addition to individual acts of racism and racial animus, accommodation should be made to seriously address institutional mechanisms that reinforce racial and social inequalities, including mechanisms in corporate, medical, and legal communities, and in media, military, and religious institutions. Sixth, the CRR's structure and processes should include forums for personal narratives, whether for purposes of recognition or atonement. A public space for personal testimony is a significant first step in the process of recognition. Seventh, the CRR should issue a final report, and there should be an undertaking by the CRR that its recommendations therein would be considered and pursued across all sectors of American society. Finally, and perhaps most importantly, there should be a clear and initial financial commitment from the federal purse, upon which public and private partnerships can then build, to ensure the success of the CRR and its ultimate recommendations.¹²⁰

VI. CONCLUSION

The question remains whether the proposed CRR should focus only on gross violations of human rights or also incorporate the mundane regularity of racism. Should the United States adopt what South Africa did by focusing its TRC only on gross violations of human rights? Or should it address the violence of racism illustrated in those gross episodes together with all the ordinary processes and attributes of racism,

eighteen to twenty-four months should suffice for public hearings, with a six-month period (roughly) for writing a report with recommendations.

119. The question of reparations is likely to be the most fraught in the proposed CRR. *Cf. All Things Considered: Recent Polling Data Shows Why Nearly 2/3 of Americans Oppose Cash Reparations* (NPR radio broadcast June 18, 2021). In South Africa, the recommendations for reparations consisted of direct payments to victims or their descendants, and redress in the form of scholarship funds, the building of libraries and monuments, and other resources. 5 TRUTH & RECONCILIATION COMM'N, *supra* note 14, at 304–49.

I propose that the CRR consider reparations somewhat more creatively—without direct payments to individuals. Reparations should be targeted at improving the structural conditions within communities through educational, cultural, and other programs. In South Africa, where reparations were paid, they were not only inadequate but they also came from state coffers. Ginger Thompson, *South Africa to Pay \$3,900 to Each Family of Apartheid Victims*, N.Y. TIMES, Apr. 16, 2003, at A7. The CRR should form a public-private partnership between local, state, and federal governments and communities, and the corporate community.

120. In Part II, *supra* pp. 362–69, I indicated that the proposals in this article may seem utopian at this juncture in American history, considering the deep fissures within our society. In addition, the structure of American governance, especially a strong federal system with relatively autonomous states and cities, may preclude a shared vision of how to transcend those fissures. Another impediment deals with the fallout from the COVID-19 pandemic and its impact on American society.

The obstacles to the proposed CRR are many. But the ideas and proposals raised are built on what others have been calling for—and maybe several or some of the proposals highlighted will eventually have legs. These ideas of recognition, reconstruction, reconciliation, and reparation have also already been pursued in various ways across the United States with helpful reports and recommendations. *See* discussion *supra* pp. 373–80. My contribution is an attempt to encourage a coordinated and united effort.

including racial bias? I propose that the CRR consider all forms of racism. In other words, the victims or the descendants of the victims who suffered or were killed in the massacres carried out on U.S. soil ought to be able to participate in the CRR¹²¹—indeed, the knowledge gained from prior commissions focusing only on specific atrocities prove that such participation would be a useful resource for the CRR. But the structural nature of racial inequality ought to also come under the spotlight.

The United States is somewhat different from South Africa and many other countries that would affect the context and nature of a CRR. Truth commissions that have operated in countries like South Africa have been established because of the violent nature of the conflict in those societies, and they almost always have involved a revolutionary movement pitted against an authoritarian and unrepresentative government.¹²² Truth commissions in those contexts have ideally provided some kind of bridge or mechanism to move the country from authoritarianism and violent conflict to peace or representative democracy. Built into the political and legal arrangement was a complete break or discontinuity of the old order.¹²³ Very often, the break or discontinuity involved compromises or political bargains to cajole prior warring parties to move toward the shared goal of peace and democracy. In those societies where truth commissions were pursued, they signaled both the beginning and the end of particular political processes. The beginning of the process was the idea that a truth commission was needed to move the society from conflict to reconciliation.¹²⁴ The end of the process was the end of the conflict.

In the United States, post-Civil War and with the exception perhaps of the events of January 6, 2021, there has not existed a traditional conflict in which combatants clearly engaged in an insurgency or revolution. Rather, what exists in America today is a legacy of racial subordination, beginning with genocide (of indigenous people) and then enslavement (of Black people) and then exclusion (in particular, of people of color).¹²⁵ The CRR could serve many functions, including ones that are cathartic,

121. The commissions established for Greensboro, Wilmington, and Tulsa allowed victims or their descendants to participate and testify at hearings held by the respective commissions. *E.g.*, *Survivors of 1979 Greensboro Massacre Testify Before Truth and Reconciliation Commission*, DEMOCRACY NOW! (July 19, 2005), https://www.democracynow.org/2005/7/19/survivors_of_1979_greensboro_massacre_testify; The Studies Act of 2000, 2000 N.C. Sess. Laws 138, § 17; *Continuing Injustice: The Centennial of the Tulsa-Greenwood Race Massacre: Hearing Before the Subcomm. on the Const., C.R., & C.L. of the H. Comm. on the Judiciary*, 117th Cong. (2021). The participation of victims or their descendants at a CRR hearing should also be considered. In addition to their merit, such testimonies are often the most compelling.

122. PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS* 3–4 (2002).

123. Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 HARV. INT'L L.J. 1, 6–7 (2019).

124. For example, in South Africa, the perpetrators' testimony for purposes of obtaining amnesty was predicated on linking their human rights violations to a "political objective." See Promotion of National Unity and Reconciliation Act 34 of 1995 ch. 4 (S. Afr.).

125. See S. James Anaya, *The United States Supreme Court and Indigenous Peoples: Still a Long Way to Go Toward a Therapeutic Role*, 24 SEATTLE U. L. REV. 229, 230 (2000) (discussing the "slaughter" of indigenous people); GEORGE M. FREDERICKSON, *THE ARROGANCE OF RACE* 192–93 (1988) (discussing

ameliorative, educational, and reaffirming, but the ultimate goal would be to reach a societal consensus that is wedded to the principles embodied in the U.S. Constitution and, in particular, the Bill of Rights.

A body like the CRR has the capacity to perform a vital function at this historic moment. The institutional structures and procedures of the federal and state judicial systems make it difficult to effectively uncover racial attitudes and recognize fully the trauma that is a byproduct of historic and institutionalized racism.¹²⁶ Relatedly, more than many other democracies, the United States is vigilant about protecting speech—an important right to be sure.¹²⁷ Yet racist words can have a devastating impact on the psychological well-being of racial minorities and may even result in trauma to some.¹²⁸ That is why truth and reconciliation commissions are often seen as more viable options to deal with legacies of racial subordination that impact groups and individuals. As Professor Martha Minow pointed out years ago,

[v]ictims and other witnesses undergo the ordeals of testifying and cross-examination, usually without a simple opportunity to convey directly the narrative of their experiences. . . . If the goals are to gain public acknowledgment for the harms and accounts, as full as possible, of what happened, the trial process is at best an imperfect means.¹²⁹

The CRR would complement the civil rights gains of the past decades while cementing a new societal direction that is clearly committed to the goals of social and racial justice. Its aim would be to reinforce an ethos of accountability, dignity, compassion, and empathy in public life that will undergird the major institutions of American society. These aims are not new and are in fact already being pursued in

the enslavement of Black people in Southern colonies during the seventeenth century); Edward A. Purcell, Jr., *Race and the Law: The Visible and the Invisible*, 66 N.Y.L. SCH. L. REV. 141 (2021–2022) (discussing the systematic exclusion of Blacks in the United States).

126. For example, the adversarial process, in which litigation is the primary vehicle to vindicate rights, has proven ineffective in recognizing claims brought by victims who do not often have “objective” evidence to bolster their claims. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2426–29 (1989). See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (expressing dissatisfaction with stare decisis and the decision-making process). Likewise, the intent requirement in discrimination lawsuits is a difficult burden to overcome. See, e.g., *Washington v. Davis*, 426 U.S. 229, 238–40 (1976) (“[T]he basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”). So too is the notion of state action, which shields private actors from discrimination lawsuits despite the fact that so much racism is embedded in the private realm. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1002–04 (1982) (“[C]onstitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.”).

127. Some constitutional democracies have very powerful hate speech provisions. See, e.g., Penelope Andrews et al., *Jail Time for South African Woman Using Racist Slur Sets New Precedent*, CONVERSATION (Mar. 29, 2018) [hereinafter *Jail Time*], <https://theconversation.com/jail-time-for-south-african-woman-using-racist-slur-sets-new-precedent-94179>; Joseph Magnet, *Hate Propaganda in Canada*, in *FREE EXPRESSION* 223, 229 (W.J. Waluchow ed., 1994).

128. See JEREMY WALDRON, *THE HARM IN HATE SPEECH* 116 (2012).

129. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 58 (1998).

various ways and in various locations across the United States.¹³⁰ The CRR would merely serve as a nucleus to gather and record these goals. It will, I hope, become part of American history and a profound illustration of a public commitment to the ideals of the Constitution.

I commenced this article by highlighting the structural nature of racism in the United States and by providing statistics on the effect of ubiquitous exclusion of people of color from America's most notable institutions: media, business, the Supreme Court, Congress, higher education, and elsewhere. I also highlighted the gross violations of human rights that have occurred in the United States, including the series of massacres and race riots by whites against Blacks and especially against thriving Black business communities. I suggest that we give serious consideration to a mechanism like the CRR, which may serve as a bridge that links our nation's past to its more noble future.

130. *E.g.*, Emma G. Fitzsimmons, *New York City Creates Commission to Fight Structural Racism*, N.Y. TIMES, Mar. 23, 2021, at A18; N.C. Exec. Order No. 145, 35 N.C. Reg. 23 (July 1, 2020); Order Renewing the Wash. State Minority & J. Comm'n, No. 25700-B-654 (2021); CAL. STRATEGIC GROWTH COUNCIL, CAPITOL COLLABORATIVE ON RACE & EQUITY (CCORE): INFORMATION SHEET (2020–2021).