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**The Constitution of History and Memory
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The Constitution of History and Memory

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Almost twenty years ago, the historian Pierre Nora wrote about the growing number of “lieux de mémoire” – museums, monuments, and memorials – where post-modern society situates public remembrance of traumatic or triumphant events. Yet he devoted little sustained attention to what may be the quintessential “lieu de mémoire” today, the courtroom or truth commission hearing room. Traces of our contemporary obsession with the encounter among law, history and memory are everywhere. It is a rich bonanza for lawyers: writing new constitutions for new republics, staffing international tribunals for war criminals, taking testimonies for truth commissions. Much of the enthusiasm for legal strategies to “come to terms with” the past draws on individual psychoanalytic metaphors for collective traumas, and relatively simplistic theories of historical practice, law, and narrative—whether that personal narrative will humanize law, or that justice will be secured by the search for historical truth.

This essay will discuss efforts by scholars of law and the humanities to address law’s relationship to history and collective memory, often through the lens of psychoanalytic or literary theory. This work began with a focus on trials of war criminals, especially Holocaust perpetrators, and has developed to consider alternative political and legal mechanisms to address a shameful past, such as truth commissions, apologies, and reparations, with growing attention to the aftermath of apartheid in South Africa, as well as the legacy of slavery and the slave trade in the U.S., Europe, and Africa.

The vast body of work about remembering the mass atrocities of the twentieth century – the Holocaust and apartheid, especially – centrally concerns itself with the relationship between law/justice (trials, truth commissions, and constitutions, in particular) and the history and memory of those atrocities. Some of this work is quite practical: do truth commissions help uncover the truth about atrocity? What is the best way to frame a truth commission? But some of it is also highly theoretical, including subtle and sophisticated treatments of the contemporary obsession with memory, and the obsession with the obsession with memory, and how to understand memory's relation to history and to the post-modern self. Yet little of this work theorizing history and memory has taken seriously the legacy of slavery and colonialism as crimes against humanity, as epitomized by Pierre Nora's seven volumes on "lieux de mémoires" with only a single article devoted to France's colonies. Thus, these two fields of academic endeavor have remained quite separate.

So far, the new surge of scholarship on the memory of slavery and the slave trade has not engaged with law to the same extent. Most social scientists have concentrated on drawing the connections between collective memory of slavery and black (or African-Caribbean, or African, or African-American) identity, and historians have chiefly been engaged in a work of excavation, drawing public attention to the slave past. The kind of critical debates that have arisen in the mass-atrocity context about the dangers of too much memory have not played a large part in this literature. Even more surprisingly, although much of the public discussion about remembering slavery and the slave trade has dealt with the possibilities and pitfalls of turning to law to repair the harms of slavery – whether through commemorative laws or through some form of reparations—very

little academic writing has contended critically with the relationship between law and the history or memory of slavery.

What has the new (almost entirely Anglophone) “inter-discipline” of law-and-humanities contributed to these burgeoning fields? While some legal scholars have tried to apply the social science of collective memory and cultural trauma in a fairly straightforward way to thinking about law, and the best ways to achieve justice and mend society, legal humanists are also trying to go beyond practical questions of whether law can do a good job of constructing collective memory or preserving history, or whether justice can be done, to analyze the ways law, history and collective memory interact. They draw on close readings of trials or truth commission hearings, and literary or filmic representations of trials, to analyze the formation of national identity and the shaping of collective memory through legal processes. So far, however, most law and humanities scholars, as well, have focused on the mass atrocities of the twentieth century, and in particular the Holocaust. What little law and humanities work has touched on the memory of the United States’ racial past has focused on the meaning of the Constitution in light of the memory of Reconstruction. Therefore, my essay will end by sketching some possibilities raised by the juxtaposition of theoretical insights on law, history, and memory from the twentieth-century mass-atrocity context, with questions regarding the history and memory of slavery in the U.S. and the international slave trade, and in particular, the question of reparations for slavery.

The turn to memory studies in the humanities

The rise of collective memory as an object of study in the last two decades can be traced to several sources: the sociology of Maurice Halbwachs; Pierre Nora's influential *Lieux de Mémoire*; psychoanalytic approaches to history; Jewish history; the history of nationalism; and the ferment stirred up by certain public events, such as the "Historians' Debate" in Germany and the trial of Klaus Barbie in France.

Sociologists were the first to name "collective memory" as distinct from individual memory. Maurice Halbwachs coined the term in order to emphasize the way even individual memories are formed socially, through families, religious communities, and even social classes. Most scholars who have taken Halbwachs' conception as a starting point define collective memories as "collectively shared representations of the past."¹ The social science of collective memory and cultural trauma shows the centrality of collective memory to the reproduction of society and the formation of identity. This work emphasizes that in the aftermath of "collective trauma," it is dangerous for a society to "repress" the trauma; society needs to make it part of collective memory in order to move forward. Sociologists and political scientists have generally seen political trials and truth commissions from this perspective as valuable tools in the creation of collective memory.²

Pierre Nora's influential work on sites of memory emphasizes the materiality of collective memory creation at particular cultural locations – from childrens' books to archives to new media. Nora's Europe-centered view traces the proliferation of commemorative sites to the rise of the modern nation-state, and the end of shared traditions of memory. Nora refers to this replacement of traditional rituals with public,

official memory-making as the “patrimonialization of history,” by which “national pasts” are transformed “into ‘heritage’ cultures.”³

Some historians have also applied psychoanalytic theory to the study of the past, and especially “the past in the present,” to draw the links between history and memory. In the U.S., perhaps the leading practitioner of psychoanalytic history has been Dominick LaCapra. LaCapra’s project is to apply psychoanalytic concepts like transference, repression, acting-out, and working-through to collectivities, and to allow memory to be a starting point for mourning.⁴ To LaCapra, public memory guides historians to ask the right questions, and good history helps a nation with its memory-work, allowing the nation to work through the traumatic event collectively, come to terms with shameful episodes, and take a stand in favor of justice for the future.⁵

In addition to its roots in psychoanalysis, some of the inspiration for this kind of history of memory can be found in Benedict Anderson’s conception of “invented traditions.”⁶ Anderson describes nation-building through what an earlier generation of scholars might have termed “myth-making.” For example, Yael Zerubavel’s *Recovered Roots* traces the formation of Israeli national identity through the creation of collective memories of heroic pasts, like the Bar Kokhba Revolt or the martyrs at Masada.⁷

Finally, there is also an important tradition of tracing the relationship between history and memory in Jewish history. In *Zakhor: Jewish History and Jewish Memory* (1996), Yosef Yerushalmi explored the puzzle that Jews are commanded to remember, yet “nowhere is it suggested that [Israel] become a nation of historians,” and indeed, Jewish history is a very new field. Traditions, remembrance, and memory took the place of historiography for centuries of Jewish life. “Only in the modern era do we really find,

for the first time, a Jewish historiography divorced from Jewish collective memory and, in crucial respects, thoroughly at odds with it. To a large extent, of course, this reflects a universal and ever-growing modern dichotomy.”⁸ Thus, Jewish history, itself a relatively new field, has always been self-consciously concerned to distinguish itself from collective memory, and more recently, to trace the history of Jewish memory. When coming to terms with the Holocaust became a pressing matter on the agenda of many European nations and the U.S. in the 1970s, there was a natural historiographic tradition for Holocaust studies to draw on.⁹

Debating the turn to memory

The sharpest critique of memory studies within history, but also of the rise of commemoration in the public sphere, comes from historian Charles Maier, who suggests that our society’s “pathological” fixation on memory is related to a politics of victimhood, in which identity as a people is linked to a traumatic past. In an influential article entitled “A Surfeit of Memory?”, Maier warns that memory-work can become an end in itself rather than a means to a goal.¹⁰ Maier refers to memory as an “addiction” that “can become neurasthenic and disabling.”¹¹ He attributes the turn to memory to disillusion with the future, “the late-twentieth-century diminution of what we believe politically possible, our age of failing expectations.”¹² What has been lost, according to Maier, is the possibility of a shared political future based on collective institutions.¹³ We have replaced such a vision with loyalty to fragmented ethnic identity groups, based on memories that “exclude others who do not share a group’s particular past.”¹⁴

Defenders of the turn to memory, Dominick LaCapra and Michael Roth, actively celebrate the sacred aspect of memory, and disparage critics as themselves “fixated” or “obsessed.” In particular, LaCapra insists that professional historians need to pay attention to the questions raised by collective memory. He believes that the turn to memory can be explained both by the social trauma of the Holocaust, the individual trauma of widespread child abuse, and by the proliferation of first-person testimonies.¹⁵ Michael Roth argues that even if Maier is correct, we need “to understand why claims to remember how one has been oppressed have extraordinary power at particular times for particular purposes.” While he acknowledges that “the cultivation of traumatic memory can lead to a harvest of hatred and violence,” he also argues that memory “can be used to expand that group of people who count for us, those who we do not consider merely strangers.”¹⁶

Ultimately, there is a contrast between the way a national identity is created around a positive memory, even one of martyrdom – the Confederate soldier, the Masada fighters – as opposed to the memory of a shameful past. The commemorative narratives Yael Zerubavel writes about are invented traditions starkly in counterpoint to the Holocaust story. Yet Habermas and others believe that it is possible for a nation to discipline itself to memory-work that involves acknowledging guilt rather than triumph, and that Germany has to some extent succeeded in doing so. Historians of memory defend this effort, and argue that historians should remain engaged with memory.

Relationship between history and memory

In all of this debate, still very much an open question is the relationship between history and memory. Some historians use the term “memory” to refer to official, public efforts at commemoration; others to more amorphous, popular understandings of the past. Conventional historians of memory tend to draw a relatively sharp dichotomy between history, as practiced by historians according to professional norms, and collective memory, more of a vernacular or folk representation of the past. U.S. historian Ira Berlin sees the relationship between history and memory as one of inevitable conflict. Professional historians’ understanding of history as contested, contingent, and incomplete put them “on a collision course with popular understanding, which is prone to fix institutions in time and place and to see events marching inevitably forward to the present, thus accentuating aspects of the past that shape contemporary life.”¹⁷ He emphasizes a series of dichotomies: history is skeptical, “memory presumes the truth”¹⁸; history is global, memory is local;¹⁹ history and memory “speak past one another.”²⁰ Another historian of the U.S., David Blight defines “*History*--what trained historians do” as “a reasoned reconstruction of the past rooted in research; it tends to be critical and skeptical of human motive and action, and therefore more secular than what people commonly refer to as memory. ...*Memory*, however, is often treated as a sacred set of potentially absolute meanings and stories, possessed as the heritage or identity of a community.”²¹ Memory, then, can only be the object of history, although public history may attempt to shape collective memory.²²

Some critics of “memory studies” argue that there is no meaningful separation between history and memory; both are simply representations or interpretations of the

past, and “memory” is just another word for popular culture, or perhaps for “public history.” Others suggest that the line between history and memory is blurred, that the two overlap, but that there is still a meaningful distinction.²³ Even some who distinguish between history and memory consider professional history a subset of the general category of memory. Michael Roth agrees with Nora that historical consciousness has to some extent replaced traditional forms of memory, but Roth believes that in this modern stage, the writing of history itself can become “one of the crucial vehicles for reconstructing or reimagining a community’s connections to its traditions,” especially for subaltern groups. Thus, historiography is a kind of substitute for collective memory, in terms of creating a usable past. Yet he also believes that to the extent grave traumas like the Holocaust make the past “unmasterable,” this is both an obstacle and a spur to historians to engage with public memory.²⁴ LaCapra criticizes historians’ tendency to either conflate memory with history, or to lock memory and history in a binary position, “rather than implicate” memory “in a more problematic, mutually questioning relation to” history.²⁵ Gabrielle Spiegel likewise warns of the dangers of the “current tendency to theorize a reciprocal conversion of memory into history and history into memory,”²⁶ because memory “cannot be severed from its sacral and liturgical—its ‘commemorative’—contexts” and made analytical.²⁷ Most scholars end up with some kind of admonition for historians and memory-makers to be informed by one another.

How does law shape memory?

As legal scholars have turned to look at history and memory, most have kept a practical and normative focus on the best way for a society to achieve justice and healing

after traumatic events. However, law and humanities scholars have also analyzed descriptively the various ways law shapes collective memory, interpreted legal texts as sites of memory, or compared them to literary models of memory.²⁸

How do societies use law to reform the past?

American legal scholars became interested in history and memory primarily in the context of “transitional justice,” legal responses to regime change or democratization in formerly unjust societies. However, some have tried to apply these insights more broadly to a variety of societies, including the United States, who have not undergone such radical regime changes – or at least, not recently. Marc Galanter, in an essay about “reforming the past,” looks at “ordinary practices of justice” in the private-law contexts of property, tort, contract, and criminal law, in order to help us think about new practices of transitional justice, which “elevate the themes of memory, witness, and redemption over the closure and finality that are a major component of the law.”²⁹ Galanter maps out the axes along which to classify the universe of old wrongs, as well as issues regarding the class of wrongdoers, the class of victims, the forum to adjudicate their claims, and the standards by which to judge them.³⁰ Finally, Galanter catalogues a series of responses: “doing the right thing belatedly”; “setting the record straight”; apology; commemoration; restitution; token payment; programmatic reconstruction; or full reparations.³¹

Like Maier, Galanter argues that the new interest in reforming the past stems from contemporary politics, but he has a rosier view of its sources; he believes that post-1960s critical views of established authority, an “extension of the frontiers of empathy,” and

“optimism about institutions” lead us to enthusiasm for righting old wrongs. At the same time, he notes that hopefulness about corrective justice goes hand in hand with “pessimism about comprehensive distributive justice.” This is akin to Maier’s belief that we focus on righting individual or group wrongs of the past when we have given up hope for transformative collectivist politics in the future.³² Yet, despite all of Galanter’s reservations, he believes we really have no choice but to pursue these flawed efforts.³³

Robert Gordon considers transitional societies’ responses to an unjust past, and in particular, the historical narratives in which these responses are embedded. In these narratives, “the period of injustice usually figures as a deviation from, or a distortion of, the history that should have happened instead.”³⁴ Gordon distinguishes among three approaches to historical injustice: narrow-agency framing; broad-agency approaches; and structural responses. Narrow-agency models focus on compensating, correcting, or punishing wrongs by specific perpetrators to specific victims. Broad-agency approaches focus on correcting or compensating harms to entire groups by collective or state entities. Finally, structural models aim to alter entire systems or institutions in a “forward-looking” manner rather than focusing on liability, looking to the past. Gordon characterizes the most “radical proposals” of American Reconstruction as structural ones, the confiscation of slaveholders’ property and redistribution of land to ex-slaves. “The results of Allied occupation ‘democratization’ policies in Germany were more mixed—and still very much disputed among historians.”³⁵ Denazification was an “expensive fiasco.”³⁶ Gordon ends by analyzing America’s “Second Reconstruction,” again coming down in favor of structural, forward-looking approaches to affirmative action over reparations.

Political scientists, as well, show new interest in reparation, restitution, and historical justice. Janna Thompson, for example, writes a “defence of historical obligation and entitlement....grounded in a conception of a society or nation as an intergenerational community.”³⁷ Likewise, some critical race scholars have insisted that law can reform the past through reparations to injured communities, and that scholars can assist through telling stories that give voice to those communities’ collective memories. For example, Sharon Hom and Eric Yamamoto view courts as one arena for “the struggle over recognition of competing collective memories.” They argue that “through those struggles we have the potential to remake our, and society’s, understandings of justice – for good or ill.”³⁸ They re-interpret the case of *Rice v. Cayetano* through this lens; in that case, the U.S. Supreme Court recited its version of Hawai’ian history, in effect denying Hawai’ian collective memory. The case resulted in injustice to native Hawai’ians, in part because of the way it “remembered” Hawai’ian history. “Justice claims of ‘right’ start with struggles over memory...The construction of collective memory implicates power and culture...of which legal process, and particularly civil rights adjudication is one, but only one, significant aspect.”

All of these works critically examine political and legal efforts to use law to achieve historical justice in one way or another. For the most part, they come out of the “transitional justice” literature, but these are also pieces that put the issues facing nations in transition in a broader context, side by side with the challenges facing any society, including the U.S., when it faces its unjust past.

What are the limitations of trials in shaping public memory and reforming the past?

A great deal of the writing on law, history and memory has focused on trials, especially trials for mass atrocities, and the limitations of criminal prosecution as a vehicle both for the creation of history and collective memory, and for doing justice in the aftermath of such collective trauma.

Several scholars devote attention to the mismatch between a criminal trial, organized around the rights of the defendant, and the societal goal of shaping collective memory about a past atrocity. Zealous advocacy by defense counsel will (and should) challenge state efforts to shape collective memory. Mark Osiel, in a seminal work on trials of mass atrocities, warns that such trials “unwittingly provide more *miseducation* than accurate historical instruction.”³⁹ In a number of trials, a major problem has been that the charge of the court is much more limited or narrow than the scope of the atrocity. For example, the International Military Tribunal at Nuremberg had jurisdiction to focus on the Nazis’ “aggressive war” as opposed to all of their crimes against humanity, so the prosecutors had “to weave the Holocaust into a larger story that was primarily about perverted militarism.”⁴⁰ This misfocus also affected historiography, “skew[ing historians’] analysis in favor of what came to be known as the ‘intentionalist’ interpretation of the period. This focus subtly drew attention away from institutional dynamics and the ‘machinery of destruction,’ particularly the crucial role of minor bureaucrats and functionaries at all levels of German society.”⁴¹ By looking at top leaders, “the courts not only missed the macropicture: the story of mass collaboration and institutional support for administrative brutality. They also missed the micropicture: the

story of the victims—the human experience of uncomprehending suffering that official brutality produced.”⁴²

This problem, of missing both the larger and the smaller picture, also arose in the most recent criminal trials based on crimes of the Holocaust, which took place in France: the trial of Klaus Barbie in 1987; the trial of Paul Touvier in 1994; and the trial of Maurice Papon in 1997-98. All three were prosecuted long after the crimes they committed during World War II, but each presented unique problems. Barbie was known as the “Butcher of Lyon” and presented the most clear-cut case of personal responsibility for the deaths of Jews in concentration camps. Touvier was in the SS, but his main function had been as part of the *milice* who were trying to wipe out the Resistance. Finally, Papon was a Vichy bureaucrat. His trial was the most controversial because it implicated the entire Vichy regime – he was being tried less as an individual than as a representative of the faceless bureaucracy. His prosecution also raised the mismatch between France’s law about crimes against humanity, which seemed to require collaboration with the Germans, and the actual crimes that were probably committed.⁴³

Historians have weighed into the public debate in France on the role of the trial in preserving and creating public memory and history. Most famously, Henry Rousso, the author of *The Vichy Syndrome*, a blistering critique of French society’s collective forgetting of the Vichy regime’s collaboration in Nazi crimes, refused to participate in the trials of Touvier and Papon, writing publicly to the Papon court when subpoenaed by the defendant. In *The Haunting Past: History, Memory, and Justice in Contemporary France*, Rousso explained why he disapproves of criminal trials of aging Nazis. Rousso argued that it distorts historians’ search for truth to be expert witnesses in such trials and

deplored the “judicialization” and moralization of history entailed in the use of law to revisit a shameful past. Rousso voiced the fear that by “judicializing” the past, courts affirm an “illusion that the verdict delivered will take the place of ‘history as the world’s court of judgment.’”⁴⁴ Indeed, law is presented as an alternative – a bad alternative – to historiography, attempting to render a verdict on the past. While it is acceptable for criminal trials to render individual verdicts of guilt, and to establish boundaries between “good and evil, the tolerable and the intolerable, the permissible and the punishable,” trials should not try to render a verdict on an entire era. The goals of “belated reparation” or “catharsis on a national scale” are illicit or at least, ill-advised.⁴⁵ As a narrower matter, he argued that historians should not be expert witnesses at such trials because it is misleading to present general historical context for a case when one is not tying that context to the specifics of the individual, given that his freedom hangs in the balance, and when one’s testimony will give the impression that the part stands for the whole and vice-versa.⁴⁶

Others who have written about the French trials similarly criticize the mismatch between law and history, as well as the inability of law to “serve the needs of history, memory and justice simultaneously.” Nancy Wood concludes that even “if we accept that ‘working-through’ a traumatic past is a precondition of the moral health of democratic states,” at some point the process “demand(s) some form of provisional closure so that it does not become an end in its own right, preventing future-oriented perspectives that are also vital to social dynamism.”⁴⁷ Similarly, Leila Sadat Wexler argues that Paul Touvier’s trial was an unsatisfactory vehicle for reexamining the Vichy period. The court was ill equipped to evaluate history; and, given the ill-fitting aims of a

criminal trial, there was always the danger that Touvier would be acquitted and, by implication, Vichy France as well.⁴⁸

How can trials shape memory and national identity in a meaningful way?

A substantial number of scholars remain optimistic about the possibilities for public trials of shameful national events to contribute to national identity formation, to social solidarity, to collective memory formation, and to some kind of historical justice. Mark Osiel argues that criminal trials for mass atrocities can “contribute significantly to a certain, underappreciated kind of social solidarity.” The defense tells the story as a tragedy, the prosecutors as a morality play; the task of comparative historical sociology, according to Osiel, is to understand why these narrative tropes are used and to assess their success in influencing collective memory. He hopes to use this analysis of law’s influence on collective memory to help design future prosecutions.⁴⁹ Osiel argues that law can play “a significant role in the process of ‘mastering the past,’” and that it did so in Germany, with the prosecution of concentration camp guards in 1964 and 1975-1981. “In German public awareness, these trials effected a symbolic severing of ties to the past.”⁵⁰ Thus, Osiel appears to believe that trials can help make it possible to “break with the past, through guilt and repentance,” although he acknowledges the difficulty for courts in balancing individual justice for the criminal and the goal of shaping collective memory for the larger society.⁵¹

Most of the interventions of law-and-humanities scholarship into the debates about trials of mass atrocities have taken a favorable view of the possibilities of law’s engagement with history and memory. For example, Lawrence Douglas views trials of

Holocaust perpetrators as serving a salutary pedagogical purpose; however, he sees trials of Holocaust deniers negatively because of their implications for freedom of expression.⁵² Looking at the Nuremberg trial, as well as the trials of Eichmann, Demjanjuk, Barbie, and Holocaust denier Ernst Zundel, Douglas's concern is less whether trials do justice to the defendant, than whether trials do justice to the crimes of the Holocaust. He judges trials in terms of the way they teach history and shape collective memory, which he considers the central reason such trials are staged. For example, Gideon Hausner, the Israeli attorney general in the Eichmann trial thought it would help young Israelis answer, "How did they allow themselves to be led like lambs to the slaughter?"⁵³ In other words, trials offer "didactic legality." Some scholars "argue that the procedural norms that govern a criminal trial render it a flawed tool for comprehending traumatic history."⁵⁴ Trials are too individualized, too focused on pathology, and cannot comprehend mass bureaucratic murder. Yet Douglas tries to show "the intense, creative labors of the law to master the problems of representation and judgment posed by the Holocaust."⁵⁵ Douglas shows the ways in which the Eichmann trial showcased stories that "buttressed a specifically Israeli ideology of nationhood and Jewish identity."⁵⁶ He concludes, "My criticisms notwithstanding, I believe the Eichmann trial and aspects of Nuremberg possessed greatness—as dramatic and necessary acts of legal and social will—that fully justified their historic undertaking."⁵⁷

Leora Bilsky's analysis of Israeli "political trials" is one of the most nuanced efforts to address the relationship of law to collective memory with the tools of legal and literary theory. She defines a "political trial" as one in which "political authorities seek to advance a political agenda through criminal prosecution," but not necessarily a show

trial in the sense that there is “no element of risk about the outcome.” Her question is whether a trial can transform national consciousness, and promote democratic politics. She distinguishes political trials in Israel from “transitional” trials in post-authoritarian societies. “My claim in a nutshell is that the Zionist revolution did not end with the Declaration of Independence and the establishment of the State of Israel but has continued for the last fifty years, transformed through ‘constitutional moments,’ many of them involving a transformative trial.”⁵⁸

In Bilsky’s chapter on the trial of Kastner, she gives a literary reading of Halevi’s opinion, which likened Kastner’s deal with the Germans to the Faustian contract with Satan; she argues that Halevi used the contract metaphor to focus on collaboration with Eichmann as a *choice*, a Faustian bargain. This narrative draws on the image of Jews as world conspirators. Supreme Court Justice Agranat reversed Halevi’s decision, and also reordered the time frame of his narrative through administrative law doctrine.

Bilsky also distinguishes contrasting historical narratives between Hausner and Arendt in the Eichmann trial: Hausner wanted to give victims a chance to tell their stories on a public stage, in order to develop a more tolerant society in Israel. Arendt had a more universal narrative: “Transitional trials proceed on two levels. On one level, the judges ascertain the guilt of the defendant as in ordinary criminal trials. But on the other level their judgment is also a performative act through which society’s collective identity is formed in opposition to an Other (the defendant) whose values are contrasted with the fundamental values of society.”⁵⁹ Bilsky both uses the tools of narrative theory to analyze the trials as cultural performances, and also judges the success of these trials in national identity formation and collective memory creation.

Other law-and-humanities scholars who take a more skeptical view of trials as vehicles for memory-creation have taken different approaches. One of the most interesting is that of Devin Pendas, who critically analyzes the claim that trials for mass atrocity serve a pedagogical function, “engendering a historical narrative of truth.”⁶⁰ Pendas argues that such a function depends on the public reception of these trials, and he finds that there was a great deal of public ambivalence towards the Auschwitz trials. Much of this ambivalence he attributes to a doctrinal problem with German criminal law, the distinction between two types of homicide based on the motivations of the perpetrator: Totschlag, which is murder; Mord – homicide for “base motives,” which has no statute of limitations. Thus trials of Auschwitz guards had to be prosecuted as “Mord”, but focusing on the motives of individuals and the most “inhuman” atrocities made it easy for the public to distance themselves from the crimes of the Holocaust. Other scholars take at face value the pedagogical function of trial narratives, but analyze those narratives in order to pronounce moral judgment on them. Guyora Binder, for example, critiques both Klaus Barbie’s prosecutors for defining Jews as unique sacrificial victims of Nazism, and Vergès, his defense attorney, a well-known anti-colonialist who drew on a French leftist tradition that Binder finds, like “Holocaust Judaism,” to be a “symptom[s] of a common culture of despair that paralyzes moral choice in the wake of Nazi atrocities.”⁶¹

Can truth and reconciliation commissions overcome the limits of law?

While legal scholars are ambivalent about the possibility of justice through criminal trials, they are almost universal in their praise for truth and reconciliation

Comment [TLS1]: I don’t want to cut Bilsky, since this is one of the few examples of the best work I want to discuss. And I’ve got the other two down to just a couple of sentences each, so it’s hard to cut without cutting them completely.

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commissions as alternative paths to restorative justice. Truth commissions appear to offer not only the possibility of uncovering more of the history of evil regimes and the crimes they committed, but of honoring the collective memory of victims, and even healing victims, perpetrators, and the society itself. In legal scholarship on truth commissions, especially by scholars of law and literature, we see sometimes romantic and sometimes hard-headed assessments of the power of story-telling. This work melds psychoanalytic and social-work approaches to trauma with literary romanticism and narrative theory.⁶²

In one of the most influential works by a legal scholar on transitional justice, *Between Vengeance and Forgiveness*, Martha Minow compares trials, truth commissions, and reparations in a broad international context. Minow asks what paths lie “between vengeance and forgiveness, *if legal and cultural institutions offered other avenues for individuals and nations?* . . . [Legal institutions] need to ask, what would it take...to come to terms with the past, to help heal the victims, the bystanders, and even the perpetrators? What would promote reconstruction of a society devastated by atrocities?” While Minow notes that trials have the advantage of creating a permanent record, they are also flawed by their dependence on political actors for their operations and resources, as well as the problems of “fairness, neutrality and predictability posed by retroactive application of norms.”⁶³ By contrast, Minow finds that the “potential restorative power of truth-telling, the significance of sympathetic witnesses, and the constructive roles of perpetrators and bystanders each suggest promising features of a truth commission.”⁶⁴ Although she notes the criticism that this therapeutic approach “seems to ignore politics, shortchange justice issues, and treat survivors and their recovery as a means toward a

better society rather than as persons with dignity and entitlements to justice,” she nevertheless thinks truth commissions may promote justice even more effectively than trials if we consider “restoring dignity to victims” and promoting reconciliation as goals of justice.⁶⁵

Political theorist Jean Bethke Elshtain argues in favor of the South African Truth and Reconciliation Commission’s version of reconciliation, not as a demand for victims to forgive nor for perpetrators to express remorse or apologize, but only to tell the truth, to acknowledge the harms of the past, and to “bring matters into a framework within which conflicts can be adjudicated short of bloodshed and in the name of cooperation and tolerance.”⁶⁶ Elshtain and other advocates of truth commissions argue that reconciliation itself is a form of justice-- restorative rather than retributive or punitive justice, that holds out the hope of breaking the cycle of violence.

André du Toit, a participant in the South African TRC process, argues that the South African understanding of reconciliation shifted over time from a more political meaning (enabling former victims and perpetrators to work together in a new polity) to a more religious and therapeutic sense (expressing remorse and forgiveness, to achieve personal healing), especially because of the influence of Archbishop Desmond Tutu. Later in the process, the quasi-judicial and adversarial procedures of amnesty hearings took center stage. The final stage was the publication of the TRC Report, in which data processing and corroboration of statements actually led the TRC to make victim and perpetrator “findings”; however, it is unclear what legal standing these findings have. The operative notions of truth and justice in the TRC process, according to du Toit, were truth as acknowledgment and justice as recognition.⁶⁷

Numerous political theorists have joined the chorus of voices praising truth commissions. The basic descriptive work is Priscilla B. Hayner's *Unspeakable Truths*. Hayner describes the "turn toward truth" as "partly due to the limited reach of the courts, and partly out of a recognition that even successful prosecutions do not resolve the conflict and pain associated with past abuses."⁶⁸ She defines truth commissions as temporary bodies, officially authorized by the state, that "focus on the *past*" and "investigate a pattern of abuses over a period of time, rather than a specific event."⁶⁹ Such commissions are set up in order to "respond to the needs and interests of victims," to "outline institutional responsibility and recommend reforms," to "promote reconciliation," and to contribute to, rather than to replace, other forms of justice.⁷⁰ Hayner insists that there is no "trade-off" between truth and justice, given the difficulties and costs of reaching justice through prosecutions of wrongdoers. While in certain cases (El Salvador), a truth commission led to blanket amnesty, in other cases, truth commissions have forwarded information to the justice system for prosecution. Even with an amnesty in place, as in Chile, the truth commission was a source for some names of perpetrators.⁷¹ Hayner also argues that some victims will find testimony healing, even if others feel worse afterwards.⁷² Hayner argues that truth should not be a substitute for justice, but can be a complement, and that we cannot assume healing and catharsis from truth-telling, but that healing and reconciliation may be the result, if truth commissions are well designed.

Robert Rotberg notes that most scholars of law and politics "affirm truth commissions as a modern instrument capable of strengthening civil society and providing restorative justice," yet there are also critics who warn that the search for "truth" can

mask or suppress healthy political conflict.⁷³ Amy Gutmann and Dennis Thompson, in “The Moral Foundations of Truth Commissions,” argue that reconciliation as forgiveness is “a utopian aim, and not even a positive one.” In their view, democracies should foster political disharmony rather than agreement on one historical truth. They also criticize the “historicist” justification of truth commissions, that such commissions are the best way to uncover facts about the shameful past that would otherwise be buried, on the grounds that such commissions will unduly focus on a single history rather than a multiplicity of competing interpretations. Gutmann and Thompson suggest that “the aim of truth-seeking, with its strong intimations of singularity and finality, is not the most appropriate model for political judgment in an emerging democratic society.” Instead there should be an “assumption of ongoing disagreement and continuing conflict.” They note the “remarkable section of [South Africa’s TRC’s] *Final Report* entitled ‘The Commission’s Shortcomings’” as a salutary feature because it contains within itself the acknowledgment of its own flaws and the recognition that there is not one historical “truth.”⁷⁴

Some analysts of truth commissions specifically address the potential for truth commissions to tell good histories – and even for historical production to be a form of justice. Charles Maier argues that truth commissions can produce material for historians, and that doing justice and doing history can complement one another.⁷⁵ In a chapter entitled “Historical Justice,” Ruti Teitel goes even farther, exploring the possibility that “historical accountability [could be] a corrective, ushering in liberalization,” or that “collective history making regarding the repressive past [could] lay the necessary basis for the new democratic order.”⁷⁶ While she warns of the danger in confusing history with a single truth, she also traces the historical narratives at work in various trials and

truth commissions to assess whether they achieved some form of historical justice. For example, she examines the links between successive Holocaust criminal trials and shifts in Holocaust historiography. First, Nuremberg shaped memory of the Nazis for a long time by its focus on “aggressive war” and military leaders. Then, the Eichmann trial “coincided with Raul Hilberg’s *The Destruction of the European Jews*.”⁷⁷ Later a historiographic focus on the lower echelons of wrongdoers led to the trials of Touvier, Papon, and others.

Teitel also puts truth commissions in context, comparing them to the realistic alternatives; truth commissions were an antidote to impunity in Latin America and South Africa. She concludes that the truth process has virtues: Historical justice as a way of setting the record straight gives victims some reparation and “delineates a line between regimes.”⁷⁸ Teitel also applies literary analysis to the question, arguing that the narrative of historical justice in transition is one of tragedy narrowly averted – a tragedy-romance in which “an awful fate is averted, as in a dramatic narrative, by the introduction of a magical switch.” She compares the transitional narrative to romances like the Jacob-Esau story or Shakespeare’s *The Tempest*, the movement from exile to home. Yet Teitel, like most students of truth commissions, remains optimistic.

What are the limitations of truth commissions?

While Teitel and Minow are unabashed supporters of the truth and reconciliation process, a few law-and-literature scholars evince more ambivalence about truth commissions, in part because they question the power of narrative and testimony, both

Comment [cof3]: I don’t quite see the transition here—can you generalize a bit about the law-lit scholars you’ve just covered to offset this “other” group?

for the victim and for society. Mark Sanders' literary rendering of the South African Truth and Reconciliation Commission's work sees the process as ambiguous but ultimately offering healing through mourning. He writes: "The dominant tendency among scholars interpreting Truth Commission testimony has been to point to the inadequacy of the commission's procedures in allowing stories to be told, or to its facilitating only certain kinds of stories....the problem may not always lie solely with the legal body and its rules and procedures. Although it is clear enough in traumatic cases that a quasi-judicial hearing may do nothing to mend the break between recollection and observation, either for the witness or for the inquiry, it is not obvious that it will fail to do so *because* of its demand for particular evidence."⁷⁹ Of course, there were inadequacies to the human rights framework: "Speaking as a witness before the commission implied being enjoined to frame one's testimony according to the demands of universal human rights. As a perpetrator or a victim, one testified to a transgression of human rights . . . Soliciting testimony in this way revealed ambiguities in cases that did not fit, in an obvious way, into the paradigm of human rights that guided the commission's work."⁸⁰ Denials of funeral rites violated custom but not law, for example. Sanders suggests that the truth commission offered the possibility of mourning, forgiveness, reparation—the very antithesis of apartheid, which he portrays as a denial of mourning and condolence.

Comment [cof4]: Needs transition

Julie Stone Peters offers perhaps the most brilliant example of a literary critique of law's potential to heal a society through the use of narrative.⁸¹ Peters critiques the assumption that narrative will humanize, that we can get catharsis and redress from giving testimony to atrocities. Peters is skeptical about the psychoanalytic model of trauma and repair as well as what she considers the naïve belief in the healing power of

storytelling. She presents a tale of the narrative foundation for “rights” in the Enlightenment era, the moment at which early advocates for human rights first made the spurious connection among humanitarianism, narrative, and rights/justice. She notes ironically the fact that even post-structuralists like Jacques Derrida and Gayatri Spivak have climbed on the human-rights bandwagon. Critiques of rights that are mainstream in the domestic context are left at the doorstep of international human rights work.

Finally, several legal scholars and political theorists have also considered the usefulness of government apologies. Martha Minow considers that apology is valuable both because it indicates “full acceptance of responsibility by the wrongdoer” and because it gives the victims the power to accept or reject it.⁸² Elazar Barkan and Alexander Karns argue that although apology seems like a flaccid remedy, it “has great flexibility and potential when considered as part of a larger framework of transitional justice.”⁸³ They compare Australia’s apology to the aborigines to Governor’s apology to Indians on behalf of the BIA. Ruti Teitel calls the transitional apology “a leading ritual of political transformation.”⁸⁴ She traces executive apologies historically through monarchies and now in democracies; at last, apologies have gone global, as epitomized by Kofi Annan’s apology to Rwanda on behalf of the U.N.

The new frontier in memory studies: slavery and the slave trade

How can we remember a centuries-old history?

In recent years, the U.S. has seen an outpouring of public remembrances of slavery – museum exhibits, films, and other public efforts to recapture the history and memory of slavery – and a growing academic focus on recovering the memory of slavery in the U.S. North as well as South. This new public attention to slavery has not been limited to one side of the Atlantic. Recent anniversaries of the abolition of the slave trade in the U.K. and of slavery in the French colonies have been the occasion for public commemorations of the trade and its abolition, and historians have begun to write about their experience of involvement in such commemorations. Most of this writing describes, and to some extent critiques, recent efforts to overcome the forgetting of slavery, and advocates for better ways to bring public memory in line with history. Some of this work itself historicizes collective memory, narrating as an intellectual history the changing images of slavery over time. But overall, it remains relatively under-theorized in terms of the relationship between history and collective memory, the definition of “memory,” and the potential of public memory to heal a society or lead to social justice. And while this new attention has led to some public debate about the role of law in the memory of slavery – most particularly in France, which declared slavery and the slave trade to be crimes against humanity in a 2001 law – most academic writing on the subject has not focused on law. Slavery is a crime with no perpetrators to try, and although some institutions have attempted something like truth commissions on slavery, reparations talk has yet to become wholly mainstream, and to the extent that in France law has become a site of memory, mainstream historians have lined up against it.

While sociologists have concentrated primarily on the relationship between African-descended people’s collective memory of slavery and the formation of black identity,

historians have been writing about the history of collective *forgetting* of slavery. David Blight's *Race and Reunion* and Nina Silber's *The Romance of Reunion* tell the story of the U.S. North and South united in the post-Civil War era by a joint commitment to white supremacy and to burying the memory of slavery. Joanne Pope Melish and Brown University's Committee on Slavery and Justice remind us of the way New Englanders and other Northerners "disowned" their own history of slavery.⁸⁵ Other historians have begun to write about the new flood of public memory-work about slavery, primarily in a celebratory fashion, but also in an attempt to historicize it as connected to contemporary civil rights struggles.⁸⁶ Ira Berlin notes that public debate over the relationship between Thomas Jefferson and Sally Hemings and the huge success of the New York Historical Society's exhibit on slavery demonstrates that "slavery has become a language, a way to talk about race in a society in which race is difficult to discuss."⁸⁷ Similarly, French historian Alyssa Sepinwall celebrates new efforts to remember the French history of enslavement, while disparaging the "amnesia" about slavery that formerly governed. She argues that francophone history teaching is far behind Anglophone writing in its lack of attention to the Haitian Revolution or an Atlantic perspective more generally. The 2004 CAPES exam, for students going into teaching in France, focused on the years 1773 to 1802, excluding 1804 from consideration.⁸⁸

Taking a more critical view, Elizabeth Kowaleski Wallace examines fiction, museum exhibits, and films in the United Kingdom that focus on the history of the British slave trade, and criticizes these efforts to shape collective memory in terms of the degree to which they "play[] into stereotypes of dehumanized slaves, ineffectual subjects rendered passive, weak and silent through their enslavement." She also raises questions

about whether it is possible to “convey the extraordinary human affliction” of the slave trade “without reducing that suffering...potentially cheapening the experience or suggesting that it can be vicariously assumed?” She concludes that the most successful efforts to remember slavery are those that “remain self-conscious about themselves as expressions” and “allow[] people to recognize both the human capacity for evil and the human ability to retain agency.”⁸⁹

Christine Chivallon describes the public memory-work about the slave past in Bristol, U.K., passing “from silence to ‘too much memory.’” She compares this surfeit of memory with the absence of memory at another slave trading post, Bordeaux, France.⁹⁰ France has commemorated slavery by celebrating the Republican abolition, especially the white abolitionist leader Victor Schoelcher. Jacques Chirac, then President, gave a speech at the commemoration which referred to abolition as a “founding act” that “reinforced the unity of the Nation.”⁹¹ By contrast, Chivallon suggests that Bristol city may have even gone too far in reshaping its public history to put its grand houses and personages in the context of the slave trade. Public controversy ensued over taking down the statue of Colston, an early leader who had also been a slave trader; eventually this was resolved by an explanatory plaque.⁹²

In Africa, there has been increased tourism to slave trade sites, a rise in commemorations of the slave trade in museums and anniversary ceremonies, as well as a growing discourse of reparations, including demands for apology, debt forgiveness, and other forms of repair. Historians outside the U.S. who have chronicled this memory-work with regard to the slave trade have taken a somewhat more sophisticated approach to the divisions between professional historiography and public memory-work. For

example, several scholars have critiqued the commemorations at African slave trade sites. Ralph Austen compares African and African American memory of the slave trade. He tells the story of Ndiaye, a Senegalese man who worked to have the Maison des Éclaves at Gorée restored, turned it into a pilgrimage destination for African Americans, and now exaggerates the story of the “Door of No Return” in his tours. U.S. historian of the slave trade Philip Curtin denounced Ndiaye’s project as a “hoax” and a “scam,” and his words were reported in the French newspaper *Le Monde*. This criticism caused such a firestorm of controversy, that eventually a conference was held on Gorée Island in April 1997 to repair the damage. African critics of empirical work on the slave trade insist on a larger historical context and more use of African oral tradition to give meaning to the numbers. Austen tries to bridge divisions between professional historians and this memory-work by drawing on Eric Williams, the most powerful black figure in slave trade historiography.⁹³

The historian Emmanuel Akyeampong also writes about the slave trade in terms of both history and memory. He describes the upsurge of slave-trade tourism in Ghana, turning slave trade castles and forts into World Heritage Sites maintained by UNESCO funds. In his story, he links the Anlo people’s effort to have the village of Atorkor declared an international slave-history site to another recent development, the new international media attention to ritual female bondage in the Volta and Greater Accra regions of Ghana. He argues that slaveholding is an embarrassing memory in Anlo – there are still current distinctions made between descendants of free persons and slaves, and a “complex identity politics about how people choose to present themselves in the present and reflect on their past.”⁹⁴ Thus, while oral traditions of the Atorkor slave story persist in song, people prefer to keep these memories in the private domain, rather than

publicizing them to attract tourists. This complicates any effort to draw political analogies between contemporary and historical slavery in the region.

An American literary scholar, Saidiya Hartman, has written some of the most incisive criticism of the memory-work going on at tourist sites of the slave trade in Ghana, from a U.S. perspective. She describes the experience of African American tourists “returning” to Africa to grieve for the slave trade. Her own reaction was anger at the sentimentalized staging of the “Door of No Return,” in which the tour guide declared, “It is not really the Door of No Return because now you are back!”⁹⁵ Yet she also envied the other women on her tour their tears. She finds it “difficult, if not impossible, to separate the mourning that exceeds tourism from the contained catharsis promoted by it.”⁹⁶ Hartman affirms that mourning at these memory sites can center the tragedy of the slave trade in public consciousness; yet at the same time, “the work of mourning is not without its perils, chief among these are the slippage between responsibility and assimilation and witnessing and incorporation.”⁹⁷ Hartman asks whether there is a “necessary relation between remembrance and redress?” Is it possible to reach any kind of redemption by “working through” the past.⁹⁸ Nevertheless, she concludes that such representations of the past are necessary, but require critical engagement rather than “facile invocations of captivity, sound bites about the millions lost.”⁹⁹

All of this writing about slavery remains very much in the domain of memory-work – whether telling the history of collective memory and forgetting of slavery, drawing the links between collective memory of trauma and identity formation, or lauding the work of memory recovery. Unlike in the context of twentieth-century mass atrocities, there has been little scholarship that stands outside of this memory work to

critique the efforts to shape collective memory or the historical narratives at play in political or legal debates. Few critical voices have suggested problems with the way we are remembering slavery, or the costs of remembering slavery, for example. And little of this work has engaged with law, in part because legal efforts to redress slavery seem utopian or remote.

How does the public memory of slavery shape the law?

In a recent essay, I have written about the public memory of slavery and its relation to legal responses to slavery's legacy in the United States. The essay details the competing historical narratives in the public political sphere and in jurisprudence regarding redress for racial injustice based in slavery. The resurgence of memory of slavery can play out in both conservative and liberal modes, as can a turn to popular constitutionalism. I begin by examining three chief strategies in conservative historical argument: first, depicting slavery as part of a teleological progression towards freedom, glossing over the Jim Crow era and post-slavery racial injustice; second, portraying slavery and Jim Crow as temporary deviations from a continuous American tradition of freedom and color-blindness; and third, decoupling slavery from race by arguing that slavery was not caused by racism, and emphasizing the blacks who owned or traded slaves and the whites who did not.¹⁰⁰

The essay then canvasses several approaches to history among liberals or radicals who defend efforts to redress racial injustice: first, an emphasis on the legacies of slavery, and in particular on the continuing harms of the Jim Crow era; second, a progressive view of American history, emphasizing the "living Constitution," not as ratified in 1787 but as

it has evolved over the last two centuries to embody anti-subordination principles; and third, a history of the interdependence of black slavery and white freedom and privilege. The “remember Jim Crow” story is an effective counterpoint to the “slavery to freedom” story, and yet it has rarely been elaborated to argue against the celebration of antislavery as the Christian West’s gift to the rest of the world. The “living Constitution” view is opposed to the “continuous color-blindness” history that celebrates the 1787 Constitution, yet most proponents of the evolving Constitution do not directly dispute the view that slavery was a temporary aberration from a continuous color-blind principle. Finally, the most promising and least-developed historical narrative is the “black slavery/white privilege” story, which counters conservatives’ strategy to “decouple slavery from race”.

I also consider two other liberal or radical approaches to history, neither of which is represented in judicial opinion but both of which have found articulation among legal academics: first, a more pessimistic approach, in some ways an anti-progressive view of history, emphasizing the static nature of racism and inequality in the United States; second, a more optimistic embrace of “popular constitutionalism” for alternative visions of the Constitution (in some ways building on the liberal justices’ version of “living constitutionalism”).

I conclude by suggesting that to strengthen arguments in favor of remedies for racial injustice, liberals must not only refute the conservative histories but build on histories of slavery, anti-slavery and movements for racial redress “from the bottom up.” Furthermore, I argue that even structural, forward-looking remedies require historical grounding. The most compelling historical narratives are those that emphasize the links between black slavery and white freedom, as well as the connections between the

relatively recent injustices of the Jim Crow era and the inequality that continues today. This essay is one of the first efforts to consider explicitly the relationship between law and the memory of slavery.

Reconstructing the Constitution of history and memory

While less explicitly focused on the memory of slavery, several U.S. legal scholars have trained their attention on the history and memory of Reconstruction and the Civil War, seeking to recapture the meaning of the Constitution through the lens of a recovered history. Akhil Amar first paved the way for re-reading the Constitution through the lens of the history of slavery and Reconstruction with his neo-originalist reading of the Thirteenth Amendment. Richard Primus and Norman Spaulding have extended his approach, reconstructing the meaning of federalism and other basic constitutional structures by re-imagining the history of Reconstruction from the perspective of the freed slaves, rather than the Northern Democratic version of history espoused by the post-Civil War Court. Both Mark Graber and Pamela Brandwein, political scientists, have begun to critique the way constitutional scholars use the history of *Dred Scott* and Reconstruction to argue for their own interpretive theories. All of this work points to the possibility of a constitutional discourse that is historicist without being originalist.¹⁰¹

Norman Spaulding explores the architectural theory of “countermonument” to imagine ways of interpreting the Constitution, not through traditionally didactic memory, with its “authoritarian propensity,” but in a less reductionist way. Spaulding argues for the “deep legal and political salience” of collective memory, and writes that “it is primarily the courts that bear the explicit institutional burden of collective memory.”

Courts are “mnemonic institutions par excellence.” Can courts use the method of countermemory, as other lieux de mémoires, like countermonuments, have done? “Can a constitution be written or read against itself? Or is constitutional law accessible only in monumental form, with all its didactic, demagogic, and amnesic liabilities?” Spaulding argues that the Reconstruction Amendments should be interpreted as countermonuments; “monuments against the axioms that justified slavery”; an interpretation hinted at by Thurgood Marshall’s assertion that the Constitution did not survive the Civil War. According to Spaulding, this mode of interpretation, applying the method of countermemory, requires more rigorous memory-work than traditional monuments, resisting “the dependence of collective memory on didactics and collective amnesia.”¹⁰²

Spaulding finds just such didactics and collective amnesia in American memory of the Civil War, the revising of that war into the “war between ‘brothers’ rather than between – as they briefly were – two sovereign nation-states.” Just as public monuments have accepted this essentially Southern version of the War and of Reconstruction as a regrettable and corrupt period of readjustment, the Supreme Court, in its recent federalism decisions, has forgotten “the structural significance of the Civil War and Reconstruction Amendments.” This forgetting stems from a desire for closure, just as many Northerners as well as Southerners desired an end to “the Negro question” after the Civil War. “If this corrupt desire for closure indeed lies behind the survival thesis; then it is not unfair to conclude, having begun to emerge more than a century later from the atrocities of segregation and racial oppression invited by the Compromise of 1877, that the federalism revival is chillingly amnesic.”¹⁰³

How can constitutional interpreters resist this kind of forgetting? Spaulding

suggests that we must accept Marshall's invitation to "remember something we have always already forgotten." The three aspects of War and Reconstruction of which he reminds federalism revivalists all challenge the "monumentalist narrative of reassuring fratricide supporting the survival thesis": "(1) the fact of secession, with its deep roots in robust antebellum federalism principles; (2) the fact of federal coercion in the ratification of all three Reconstruction Amendments by southern states; and (3) the original Thirteenth Amendment, which would have avoided war by canonizing robust federalism and guaranteeing the right to slavery." If we remember these events, Spaulding argues, we cannot share the Court's monumentalist interpretation of the relationship between the states and the Federal government.¹⁰⁴

Richard Primus has also undertaken a project of memory-work, recovering a forgotten episode in Reconstruction history, in order to challenge and reshape constitutional interpretation. Primus tells the story of the Senate debate over seating Hiram Revels, an African American from Mississippi, who may or may not have been born a citizen, depending on whether the Senators considered the *Dred Scott* case (holding that free blacks could not be citizens) to be good law. In the debate, some Republicans argued that *Dred Scott* had never been good law, while some Southern Democrats believed that it was still good law. Ultimately, Revels was seated. But Primus argues that the significance of the debate can be understood if we view it in the context of transitional justice, and therefore, we should interpret the Reconstruction Amendments as the product of transition.

Primus suggests "two deeper and potentially more satisfying justifications (than those offered at the time) for seating Revels. The first is that the Civil War and

Reconstruction nullified antebellum legal authority limiting the rights of African Americans to a greater extent than was codified in the Thirteenth, Fourteenth, and Fifteenth Amendments. The second is that once black men were recognized as equal participants in the American polity, the legitimacy of the (amended) Constitution rested less on its ‘democratic’ pedigree and more on other considerations, including substantive justice and the subjective identification of citizens with the regime – factors that would be enhanced by seating Revels and vitiated by barring him.” In the first view, “we can understand the Civil War and Reconstruction as having nullified aspects of the prior legal order that harmed African Americans.” This understanding stems not only from a reading of the Amendments but of the entire historical context, “a narrative, or a set of images, with a social meaning that speaks to the changed status of black Americans and says more than the Amendments say on their own.” In the second view, Reconstruction was “an incompletely democratic expansion of the polity that required further extension as a matter of transitional justice.”¹⁰⁵

Finally, several authors draw on the work of philosopher Walter Benjamin to offer new possibilities for the interpretation of the Constitution in light of history and memory. Amy Kapczynski contrasts the method of “redemptive history” to both “historicism” and “progressivism,” which she sees as dominating contemporary American constitutionalism. “Constitutional historicism is preoccupied with returning to the past” whereas progressivism “is preoccupied not with the past but with the future.” What are the problems with these two modes? “First, historicism attributes a false certainty to its history, and by doing so, fails to take responsibility for its own acts of interpretation. Second, in order to defend its conflation of the past and authority,

historicism reduces history to heritage. It thus serves the victors of the past, and undermines historicism's claim to the contemporary legitimacy that it seeks." By contrast, the problem with progressivism is the belief in human perfectibility and its inevitability.¹⁰⁶

As alternatives, Kapczynski offers several examples, foremost among them reckoning with the "legacy of slavery in our nation's constitutional and political life." She contrasts the progressive view with "Saidiya Hartman's attempt to theorize the period of Reconstruction from the point of view of the freed slaves," for whom slavery did not come to an end in 1865. Kapczynski proposes "redemptive history" as an alternative, using "the past to free up rather than constrain interpretation, to make new meanings in the present, rather than reiterate meanings that were ostensibly fixed in the past." As examples of redemptive approaches, she includes Norman Spaulding's work as well as that of other historians, like Reva Siegel and Risa Goluboff, who explore forgotten constitutional meanings and paths not taken in legal and constitutional history.¹⁰⁷

Can law help the U.S. to redress slavery?

While my essay looks at the narratives about slavery embedded in legal debates about affirmative action and other programs of racial remediation that could be conceived broadly as redress for the slave past, the last decade has also seen the rise of a public discourse specifically focused on slavery reparations. Academic writings in favor of reparations are the only works to take seriously a turn to law to redress the history and

memory of slavery. Most of the new writing, however, takes the form of advocacy, making the case for or against reparations; a few pieces either tell the history of the debate or analyze the arguments on both sides. However, at this stage, with a few exceptions, very little has been written that critically approaches reparations or redress claims in terms of the relationship between law, history and memory.

Why reparations talk now? One answer is that reparations has been an ever-present demand in African American politics, but has only received public attention at certain moments. Historians Martha Biondi and Mary Frances Berry have recently published histories of black reparations movements, beginning with that of Callie House and the campaign for ex-slave pensions after the Civil War. Civil rights activists from Martin Luther King, Jr. to black nationalist leaders demanded reparations for slavery.¹⁰⁸ But reparations discourse may appear more prominent today to the extent that other avenues to racial justice have been closed off. Al Brophy, in *The Cultural War over Reparations*, argues that reparations debates represent “another front on ... the culture wars.”¹⁰⁹ They remain enormously divisive, with great majorities of African Americans supporting apology and compensation for slavery, but only tiny minorities of whites. To the extent that affirmative action and other programs of the Second Reconstruction have faded and come under attack, reparations appears no less radical or viable, no less divisive, and potentially energizing. Claims for reparation have also gone hand and hand with public educational efforts for “historical justice”; for example, the Brown University Committee on Slavery and Justice coupled historical research on Brown’s role in slavery and the slave trade with an apology for the university’s complicity, and efforts to inaugurate programs of redress.

An emphasis on the continuing legacies of slavery animates all arguments in favor of reparations for slavery, but, in the U.S., these have taken three forms with regard to legal claim: debt (contract), unjust enrichment (restitution), or corrective justice (tort). All three of these legal and moral approaches rely on a version of history in which slavery is the direct cause of continuing harm. Some reparations advocates focus on continuing racial harms; others draw causal connections between slavery and present-day inequality involving cultural or material deprivations inherited by the descendants of ex-slaves.

The idea of a debt to be repaid is based not only in the history of slavery and its legacy, but also on the history of ex-slaves' claims for compensation. In *The Debt: What America Owes to Blacks*, Randall Robinson argues most forcefully: "Black people worked long, hard, killing days, years, centuries – and they were never paid . . . There is a debt here."¹¹⁰ Similarly, Charles Ogletree, Jr., the Harvard Law professor who has coordinated recent reparations litigation efforts, argues that reparations require "acceptance, acknowledgment, and accounting" for the debt of slavery.¹¹¹ This argument builds not only on the history of slavery and its legacy, but also on the history of ex-slaves' claims for compensation for stolen labor, beginning with the demands of ex-slaves for "forty acres and a mule," through the ex-slaves' pension movement of the late nineteenth-century.

The legal principle of restitution or unjust enrichment involves not a debt for a voluntarily assumed obligation, like a contract, but rather the disgorgement of a benefit it would be unjust to retain. The remedy of restitution focuses not on the loss to the slave but on the benefit to the slaveholder. In this sense, restitution may be a better model for slavery reparations than debt. Thus, legal commentators have been attracted to unjust

enrichment theory. Robert Westley writes, “Belief in the fairness of reparations requires at the intellectual level acceptance of the principle that the victims of unjust enrichment should be compensated.”¹¹² Those who advocate an unjust enrichment theory also focus on history, but turn their lens towards the history of institutions and corporations that benefited from slavery. The recent efforts by universities to acknowledge the role that slavery and the slave trade played in building the institutions partake of this approach, as do lawsuits aimed at insurance companies like Aetna who benefited from insuring the lives of slaves.¹¹³ Some also widen the lens to paint a broad picture of white privilege and benefit; for example, the sociologist of race Joe R. Feagin emphasizes the “transgenerational transmission of wealth” and “labor stolen under slavery” as well as government programs that benefited only whites, such as the Homestead Act and a variety of New Deal programs.¹¹⁴

Finally, some advocates of reparations for slavery view it as morally necessary as a matter of corrective justice broadly conceived, as a remedy for the harms of slavery and its aftermath, akin to a tort remedy rather than damages for breach of contract. A corrective justice argument too depends heavily on drawing the causal connections between past and present, the harms of slavery and the harms of today.¹¹⁵

Some critics of reparations, especially those focused on the terrible harms of Jim Crow, have raised concerns about the exclusive focus on reparations for slavery, as opposed to more recent harms. The first major academic treatment of reparations, Boris Bittker’s *The Case For Black Reparations*, published in 1973, concluded that reparations should be paid for the harms perpetrated on African Americans under Jim Crow in the recent past, and for as specific claims as possible. More recently, Emma Coleman Jordan

has urged reparations advocates to concentrate on the crime of lynching as a way to avoid the “formidable obstacles and conceptual challenges” of a slavery-reparations strategy.¹¹⁶ Sociologist Ira Katznelson describes the period “when affirmative action was white” by characterizing the mid-twentieth century programs of the New Deal, especially Social Security and the GI Bill, as a massive wealth transfer to white Americans for which blacks should be repaid.¹¹⁷

Shifting the temporal focus from slavery to Jim Crow not only reduces the practical problems of lawsuits, as Jordan emphasizes, but undermines the moral weight of the “no liability” argument against reparations. As Bittker wrote, “This preoccupation with slavery, in my opinion, has stultified the discussion of black reparations by implying that the only issue is the correction of an ancient injustice, thus inviting the reply that the wrongs were committed by persons long since dead, whose profits may well have been dissipated during their own lifetimes or their descendants’, and whose moral responsibility should not be visited upon succeeding generations, let alone upon wholly unrelated persons. . .to concentrate on slavery is to understate the case for compensation, so much so that one might almost suspect that the distant past is serving to suppress the ugly facts of the recent past and of contemporary life.”¹¹⁸

Critics of slavery reparations who urge reparations for Jim Crow also fear that a focus on slavery will minimize continuing racial harms, allowing us to believe that injustice was part of the deep past. These critics urge us to remember Jim Crow, and argue that the most direct cause of present-day inequality are these more recent harms. Some also contend that the harms of slavery are too great to be remedied: “There is no adequate rejoinder to losses on this scale,” writes Ira Katznelson. “In such situations, the

request for large cash transfers places bravado ahead of substance, flirts with demagoguery, and risks political irrelevance.”¹¹⁹

By contrast, reparations advocates argue that removing slavery from the set of harms to be redressed “eliminates the most compelling basis for claims and damages” and deals the reparations movement “a near-fatal blow.”¹²⁰ This debate may be unresolvable, as people come to it with very different moral intuitions about where the most compelling claims for redress lie.

Elazar Barkan chronicles the rise of claims for reparation for slavery around the world in 1990s, especially after Japanese Americans won reparations for internment.¹²¹ An apparently spontaneous movement for reparations in 1993 occurred when a significant number of blacks withheld taxes, calling it reparations for slavery. Affirmative action could be seen as restitution, but it is also most constitutionally vulnerable on those grounds. Paul Starr proposes a “national endowment” for blacks: Barkan believes that perhaps that could be the basis for affirmative action as restitution.¹²² Is restitution a copout, an easy way for rich nations to remake their past? “Successful restitution...transforms a traumatic national experience into a constructive political situation. By bringing a conflict to closure and opening new opportunities while creating new rights, it facilitates changes in national identities and is becoming a force in resolving international conflicts.”¹²³ Roy L. Brooks argues that most progress on rights comes in times of war, so maybe also with the “war on terror,” it will be possible to advance the cause of apology or reparations for slavery.¹²⁴

Stephen Best and Saidiya Hartman, in “Fugitive Justice,” come closest to a law and humanities reading of narratives of reparation or redress. They convened the

“Redress Project” at the University of California Humanities Center to address “questions of slavery, fugitive forms of justice, and the role of history in the political present.” They asked, “Why is justice fugitive?” Why was it elusive even “from within the crucible of slavery and at the height of the slave trade”? “Is this elusiveness then an index of the incommensurability between grief and grievance, pain and compensation?” And “What is the time of slavery?” Is slavery in the present, “a death sentence reenacted and transmitted across generations?” They focus on the impossibility of adequate redress, the violence of slavery that is “ongoing and constitutive of the unfinished project of freedom.”¹²⁵

Thus, they critique recent efforts to win reparations through lawsuits as emblematic of political resignations, in essence suits for “back wages,” aimed at corporations who benefited from slave labor rather than the “racial state” that made it all possible with its “slaveholders’ constitution.” Locked into a “liberal legal conception of law and property,” recent efforts for slave reparations have lost sight of the gap between grief and grievance, all that has been lost that can never be compensated or restored. This emphasis on mourning and condolence suggests a way of thinking about reparation that might draw on the critical readings of truth commissions and trials. Law has a role to play in shaping history and memory, but law cannot remake the past.¹²⁶

Can law redress the slave past in France?

In 2001, France became the first of the former slaveholding nations to declare slavery and the slave trade a “crime against humanity” in the “loi Taubira.” This law decreed that slavery and the slave trade should be taught in public schools,

commemorated in museums and monuments, and otherwise be a subject of public education and memory. While historians of slavery advocated for this law, and since its passage have worked on committees and in research groups to effectuate its goals, other historians publicly opposed the Taubira law, lumping it together with laws against Holocaust denial and other “historical” laws in a public “call for the liberty of history (appel de la liberté de l’histoire).” These historians argue that “history is not a religion,” and that the state should have no role in declaring historical truth. Pierre Nora and other historians of memory have been leaders in this effort to separate law from history and memory.

In France, as in the U.S., the politics of commemoration implicate contemporary racial politics. The campaign to publicly recognize France’s role in the slave trade, which culminated in the 1998 commemoration of the 150th anniversary of the abolition of slavery in the French colonies, was spearheaded by a black movement that modeled itself on the Holocaust-reparations movement.¹²⁷ The date for the 1998 commemoration occasioned vociferous public debate: April 27, the first day chosen, was the day in 1848 that the Republicans, led by Victor Schoelcher, abolished slavery. Many advocates of commemoration found this date too celebratory because it “emphasized only the positive aspects of *Républicain* historiography,” ignoring the re-establishment of slavery. Conflict also arose within the black movement over its relationship to the French Jewish community. Radicals argue not only that there is a direct analogy between the slave trade and the Holocaust, but take it farther to compare Zionism to Nazism. The recent public controversy over comedian Dieudonné M’Bala M’Bala’s “Isra-Heil” exemplifies this black supremacist trend. By contrast, moderates “seek to use slavery as a starting point

for organizing their community as a political lobby”; that is the goal of the Conseil Représentatif des Associations Noires (CRAN), a center-right umbrella group. Camus concludes: “‘Black consciousness’ has emerged around the issues of slavery and cultural/racial domination, and today it plays an important role in the fundamental transformation of French society from an assimilationist into a multicultural society.”¹²⁸

At the same time, despite the overwhelming passage in Parliament of the Taubira law, all elected officials have hastened to clarify that they do not support either apology or any form of reparations for slavery. Among academics, A. F. Ade Ajayi argues in favor of reparation; he compares the French situation to that of the U.S.; and finds slavery both a crime and a sin, focusing on church involvement.¹²⁹ By contrast, Michel Giraud, while chronicling the fact that the moral reparation of calling slavery a crime against humanity has led to claims for material reparations, finds it unlikely that there will be material reparations because slavery is too distant temporally to justify reparations. He argues that France should focus on inequality as a problem for the future, rather than approaching justice by looking backward.¹³⁰

Conclusion

As nations turn a critical eye on their own pasts, scholars have begun to ask whether we have an obsession with memory or an obsessive fear of it. While historians of memory urge a joining of history and memory, allowing collective preoccupations to shape historiography as we attempt to introduce new historical interpretations to a public audience, legal scholars are asking whether law can help. Can law repair traumatic memories or establish historical justice? Can law reform the past?

With regard to the Holocaust and South African apartheid, as well as other twentieth-century mass atrocities, trials of perpetrators and truth commissions have been the most common legal efforts to repair the past, although apologies and limited forms of reparation have also been attempted. Scholars of law and humanities have subjected both of these legal forms to intense scrutiny, analyzing trial narratives for the way they shape and distort history, and transform national identities. Truth and reconciliation commissions have emerged as the chief humanistic alternative, with scholars posing the possibility that testimony and story-telling can heal victims, offer “restorative justice,” and repair the social fabric.

What about slavery? There has been a great deal of public memory-work recently with regard to slavery, especially histories of memory and forgetting, and calls to join history to memory. This approach to history and memory is more overtly political, an effort to shape contemporary politics in favor of affirmative policies to further civil rights and social justice for the descendants of slaves by recalling –and demanding repair for— past injustice. So far, fewer concerns have been voiced about a surfeit of memory of slavery, although perhaps this is what is being expressed in the political conservatives’ narratives warning of the dangers of identity politics or a “politics of victimhood.” Finally, while reparations for slavery lurk on the horizon as a logical outgrowth of the turn to memory, reparations discourse has yet to become mainstream.

Law has yet to become a chief site of memory for the slave past. Trials of perpetrators are impossible, although there are beginning to be a few quasi-truth commissions – for example, Brown University’s Committee on Slavery and Justice, or the truth commissions focused on twentieth-century racial atrocities in the U.S., as have

taken place in Tulsa, Oklahoma and Rosewood, Florida to investigate racial cleansings in the 1920s. Yet, because big political questions in the U.S. always become constitutional questions, most scholars who have thought about law, history and memory have constitutionalized the issues, re-imagining the meaning of the Constitution as a way to achieve historical justice. By contrast, in France, questions of identity and memory are nationalized through commemorative laws, yet many historians of memory have resisted treating slavery comparably to other crimes against humanity. The discourse of reparations exists in both countries, but despite renewed academic attention, remains marginal. The next stage of public discourse about slavery will be to consider seriously what harms of the past can be redressed, and which legal strategies hold out danger as well as promise.

¹ Wulf Kansteiner, "Finding Meaning in Memory: A Methodological Critique of Collective Memory Studies," *History and Theory* 41 (May 2002): 179-197, at 181.

² Maurice Halbwachs, *On Collective Memory* (Chicago: University of Chicago Press, 1992) (showing how memory is socially constructed, esp. connected to particular places/locations; collective memory as central to the reproduction of society, formation of identity); Ron Eyerman, "The Past in the Present: Culture and the Transmission of Memory," *Acta Sociologica* (2004), at 160 (discussing cultural trauma, "a dramatic loss of identity and meaning, a tear in the social fabric, affecting a group of people who have achieved some degree of cohesion."); Jeffrey Alexander, "Toward a Theory of Cultural Trauma," in Jeffrey C. Alexander, et al., *Cultural Trauma and Collective Identity* (Berkeley: University of California Press, 2004) ("Cultural trauma occurs when members of a collectivity feel they have been subjected to a horrendous event that leaves indelible marks upon their group consciousness, marking their memories forever and changing their future identity in fundamental and irrevocable ways," 1; "there is an increasing body of literature that addresses the effects of the repression in terms of the traumas it caused. The aim is to restore collective psychological health by lifting societal repression and restoring memory." 7); W. James Booth, *Communities of Memory: On Witness, Identity, and Justice* (Ithaca: Cornell University Press, 2006) (presenting a positive view of memory as identity, necessary to creating community, doing justice).

³ Pierre Nora, "Between Memory and History: Les Lieux de Mémoire," *Representations* 26 (Spring 1989): 13-14. See also Nancy Wood, *Vectors of Memory: Legacies of Trauma in Postwar Europe* (Oxford; New York: Berg Publishers, 1999), 31-32. Kerwin Klein puts forward "several alternative narratives of the origins of our new memory discourse" to that offered by Nora: one attributes the rise of memory discourse to "the modernist crisis of the self in the nineteenth century"; another "sketches a tale in which Hegelian historicism took up premodern forms of memory that we have since modified through structural vocabularies. A fourth implies that memory is a mode of discourse natural to people without history, and so its emergence is a salutary feature of decolonization. And a fifth claims that memory talk is a belated response to the wounds of modernity." Klein, "On The Emergence of 'Memory' in Historical Discourse," *Representations* 69 (Winter 2000): 127-150.

⁴ LaCapra sees this kind of history of memory, and historical memory-work, to be answering the call of the philosopher Jurgen Habermas, who took a public stand during the famous "Historians' Debate" in Germany

in the 1980s in favor of an “obligation that we in Germany have—even if no one else any longer assumes it—to keep alive the memory of the suffering of those murdered by German hands, and to keep it alive quite openly and not just in our own minds.” According to LaCapra, Habermas theorized a new relationship between history and public memory: “Habermas’s arguments indicate that a historical consciousness ideally performs critical work on memory in order to undo repression, counteract ideological lures, and determine what aspects of the past justifiably merit being passed on as a living heritage. Conversely, the workings of memory, including its significant lapses or repressions, help to delineate significant problems for historical research and criticism.” Dominick LaCapra, *History and Memory after Auschwitz* (Ithaca: Cornell University Press, 1998), 43.

⁵ Ibid., 63-64. See also Wood, *Vectors of Memory*, 40 (“Habermas believes that only memory’s constant performativity in the public sphere can generate in individuals a subjective foundation receptive to the kind of critical memory-work in which he believes the German national polity must constantly engage”). This public “working-through” is of “collective liability” not guilt. Ibid., 44.

⁶ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London; New York: Verso, 2006).

⁷ Yael Zerubavel, *Recovered Roots: Collective Memory and the Making of the Israeli National Tradition* (Chicago: University of Chicago Press, 1997); see also Nadia Abu El-Haj, *Facts on the Ground: Archaeological Practice and Territorial Self-Fashioning in Israeli Society* (Chicago: University of Chicago Press, 2002).

⁸ Yosef Yerushalmi, *Zakhor: Jewish History and Jewish Memory* (Seattle: University of Washington Press, 1996), 93. Yerushalmi ends *Zakhor* with a quotation from Borges’ *Funes the Memorious* about the dangers of too much memory, yet in a postscript on “forgetting,” Yerushalmi writes, “Historiography, I will continue to insist, cannot be a substitute for collective memory, nor does it show signs of creating an alternative tradition that is capable of being shared. But the essential dignity of the historical vocation remains, and its moral imperative seems to me now more urgent than ever...I will take my stand on the side of ‘too much’ rather than ‘too little,’ for my terror of forgetting is greater than my terror of having too much to remember.” Ibid., 116-17.

⁹ Yet the Holocaust appears to present to Jewish history a decisive rupture in that dichotomization. Saul Friedlander discusses the German “historians’ debate” as evidence that “when past and present remain interwoven, there is no clear dichotomy between history and memory.” Friedlander sees the Shoah as an “unmasterable past” that leads to “the inability to say, the apparent pathology of obsessive recall, the seemingly simplistic refusal of historiographical closure.” Despite the increasing identification of the Shoah with Jewish and Israeli national identity, “its interpretation is increasingly multifaceted and lacking in consensual interpretation.” Friedlander notes that this is a true departure from the Jewish tradition presented by Yerushalmi in *Zakhor*, in which catastrophic events were routinely integrated into the tradition “through a set pattern of archetypal responses.” By contrast, Friedlander argues, fifty years after the Holocaust, “no mythical framework seems to be taking hold of the Jewish imagination, nor does the best of literature and art dealing with the Shoah offer any redemptive stance. In fact, the opposite appears to be true.” Saul Friedlander, *Memory, History, and the Extermination of the Jews of Europe* (Bloomington: Indiana University Press, 1993), 32, 62.

¹⁰ Charles S. Maier, “A Surfeit of Memory? Reflections on History, Melancholy and Denial,” *History and Memory* 5 (Winter 1993): 138.

¹¹ Ibid., 141.

¹² Ibid., 143.

¹³ Ibid., 147.

¹⁴ Ibid., 148-50. See also Wood, *Vectors of Memory*; Henry Rousso, *The Haunting Past* (Philadelphia: University of Pennsylvania Press, 2002), 19 (“Jewish identity cannot be eternally rooted in the suffering of an older generation, a generation which will soon become ancestral. Sooner or later, Jewish identity must have a new project that points it toward the future, giving it an active, forward-looking content. After all, the state of Israel is in large part built against this image of the Jew as victim.”).

¹⁵ LaCapra, *History and Memory after Auschwitz*, 8-16.

¹⁶ Michael S. Roth, *The Ironist’s Cage: Memory, Trauma, and the Construction of History* (New York: Columbia University Press, 1995), 12.

¹⁷ Ira Berlin, “American Slavery in History and Memory and the Search for Social Justice,” *The Journal of American History* 90 (No. 4, 2004): 1263.

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- ¹⁸ Ibid., 1265.
- ¹⁹ Ibid.
- ²⁰ Ibid., 1267.
- ²¹ David W. Blight, *Beyond the Battlefield: Race, Memory, and the American Civil War* (Amherst: University of Massachusetts Press, 2002), 2.
- ²² Ibid., 224.
- ²³ See, e.g., Rousso, *The Haunting Past*, 8-9; Berlin, "American Slavery in History and Memory"; Blight, *Beyond the Battlefield*.
- ²⁴ Rousso, *The Haunting Past*, 10.
- ²⁵ Ibid., 16.
- ²⁶ LaCapra, *History and Memory after Auschwitz*, 20; Gabrielle M. Spiegel, "Memory and History: Liturgical Time and Historical Time," *History and Theory* 41 (2002): 160.
- ²⁷ Spiegel, "Memory and History," 161-62.
- ²⁸ Recent works in the law and society tradition include Inga Markovits' article on selective memory in East Germany, and Savelsberg and King's more general essay on law and collective memory. Markovits describes the way law can shape history and collective memory through legal decisions of what to keep in archives. Savelsberg and King essentially offer a catalog of law's effects on collective memory, including: shaping history in courts of law; selectivities in law's construction of history; law's interaction with other social institutions; complementary or alternative mechanisms such as truth commissions; as well as indirect effects: the regulation of mnemonic content by law; structuring historical memories by controlling access to archival information; the dissemination of knowledge. A somewhat unusual example of a primarily descriptive piece that also takes a normative stand is Brian Havel, "In Search of a Theory of Public Memory: The State, the Individual, and Marcel Proust," *Indiana Law Journal* 80 (2005): 605, which discusses the way the Austrian government uses public law to establish the official memory of Austria as a victim of the Nazis. He shows that states use law for mythmaking, but the professional practice of historiography, because its method is revisionism, makes it unlikely to offer an alternative. Havel draws on Halbwachs for the concept of non-official "collective memory" as a counter-point to official public memory, but then turns to literature, using Proustian "transcendent memory" to pose individual affective memory as a better alternative to the official story.
- ²⁹ Marc Galanter, "Righting Old Wrongs," in Martha Minow, ed., *Breaking the Cycles of Hatred: Memory, Law, and Repair* (Princeton, N.J.: Princeton University Press, 2002), 107, 110.
- ³⁰ Ibid., 117.
- ³¹ Ibid., 118-119.
- ³² Ibid., 121.
- ³³ Ibid., 123-24.
- ³⁴ Robert W. Gordon, "Undoing Historical Injustice," in Sarat and Kearns, eds., *Justice and Injustice in Law and Legal Theory* (Ann Arbor: University of Michigan Press, 1996), 35.
- ³⁵ Ibid., 46.
- ³⁶ Ibid., 47.
- ³⁷ Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Malden, Massachusetts: Blackwell Publishers, 2002), xvii. See Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: W.W. Norton & Co, 2000); Nigel Biggar, ed., *Burying THE Past: Making Peace and Doing Justice after Civil Conflict* (Washington, D.C.: Georgetown University Press, 2001).
- ³⁸ Sharon Hom & Eric Yamamoto, "Collective Memory, History, and Social Justice," *UCLA Law Review* 47 (August 2000): 1764.
- ³⁹ Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, N.J.: Transaction Publishers, 1997), 82.
- ⁴⁰ Ibid., 96.
- ⁴¹ Ibid., 100.
- ⁴² Ibid., 103.
- ⁴³ Ibid., 110.
- ⁴⁴ Rousso, *The Haunting Past*, 50.
- ⁴⁵ Ibid., 56-57.

⁴⁶ See also Richard Evans, "History, Memory, and the Law: The Historian as Expert Witness," *History and Theory* 41 (No. 3, 2002): 326-45 (reviewing Rousso).

⁴⁷ Wood, *Vectors of Memory*, 115, 136 (following Maier, she finds that sometimes "memory's performativity has served primarily as grist to the mill of identity-politics, encouraging a retreat from, rather than participation in, 'transformative politics'."). See also Jean-Paul Jean & Denis Salas, *Barbie, Touvier, Papon...Des procès pour la mémoire* (Paris: Editions Autrement, 2002) « La justice entre Histoire et Mémoire » Denis Salas. Historian at the trials of Papon, Touvier, etc. : "Lui pour qui l'archive judiciaire est un objet d'étude se trouve place en position d'acteur du process." 22 (Salas is a judge) Salas is more optimistic about recent trials because of focus on victims, but asks, Are these trials too late?; Richard J. Golsan, *The Papon Affair: Memory and Justice on Trial* (New York: Routledge, 2000) (Intro by Golsan: Papon got ten years; widely viewed as putting Vichy itself on trial; "virtual trial" outside the courtroom with protests, vigils, readings of names of victims. Trial complicated by addition of Papon's actions killing Algerians as prefect of police in 1961. Compare to Barbie, the butcher of Lyon, and Touvier, the *Milice* officer who "used his power and authority to rob, intimidate, and brutalize his victims...a thug...a pimp." (8) When court dropped charges against Touvier because he didn't represent a regime of "ideological hegemony," it whitewashed Vichy. (14) Is a courtroom the proper place to fulfill the "duty to memory"? (22) Expresses skepticism about any goals achieved through trial, aligns self with Rousso & Maier). See also "Today, Everything Converges on the Haunting Memory of Vichy," Interview with Pierre Nora in *Le Monde*, October 1, 1997, reprinted in Golsan, *The Papon Affair*, at 171 (Nora attributes the fact that Vichy doesn't die to two international phenomena beginning 1967-68, "the creation of a special Jewish identity, and the creation of an identity belonging to one generation whose beginning was marked by the events of May 1968"); interview with Rousso about the trial.

⁴⁸ Leila Sadat Wexler, "Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes against Humanity in France," *Law and Social Inquiry* 20 (No. 1, 1995): 191-221, 225.

⁴⁹ Osiel, *Mass Atrocity, Collective Memory, and the Law*, 3.

⁵⁰ *Ibid.*, 192-93.

⁵¹ *Ibid.*, 292.

⁵² Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001).

⁵³ *Ibid.*, 3.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 4.

⁵⁶ *Ibid.*, 158.

⁵⁷ *Ibid.*, 261. Douglas has also written in a law-and-literature mode about the role imaginative literature can play, along with law, in "safeguarding historical truth." He writes that the novel *Wartime Lies*, written by a lawyer, "vindicates the prerogatives of fiction...less because it provides a poignant narrative of the Holocaust, than because it defines, in exemplary fashion, the limits of such representations- whether imaginatively or juridically conceived." Lawrence Douglas, "Wartime Lies: Securing the Holocaust in Law and Literature," *Yale Journal of Law & the Humanities* 7 (No. 2, Summer 1995): 369.

⁵⁸ Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (Ann Arbor: University of Michigan Press, 2004), 7.

⁵⁹ *Ibid.*, 117.

⁶⁰ Devin O. Pendas, "'I didn't know what Auschwitz was': The Frankfurt Auschwitz Trial and The German Press, 1963-1965," *Yale Journal of Law & the Humanities* 12 (Summer 2000): 397.

⁶¹ Guyora Binder, "Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie," *Yale Law Journal* 98 (May 1989): 1344, 1372-73. Other law and humanities scholarship about trials include studies of trials of Holocaust deniers. See, e.g., Lawrence McNamara, "History, Memory and Judgment: Holocaust Denial, The History Wars and Law's Problems with the Past," *Sydney Law Review* 26 (2004): 353, on the *Irving v. Lipstadt* libel case and Australia's "History Wars," a vociferous public debate about the history of Australia's conquest of aboriginal peoples. See also Shoshana Felman, "Forms of Judicial Blindness: Traumatic Narratives and Legal Repetitions," in Austin Sarat & Thomas Kearns, eds., *History, Memory and the Law* (Ann Arbor: University of Michigan Press, 2002) (applying psychoanalytic and literary theory to the O.J. Simpson trial).

⁶² On the power of story-telling and the possibility that narrative and literature can humanize law, see Shulamit Almog, "Healing Stories in Law and Literature," in Austin Sarat et al., eds., *Trauma and*

Memory: Reading, Healing, and Making Law (Stanford: Stanford University Press, 2007), 307; Shoshana Felman & Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis and History* (New York: Routledge, 1992); Kathryn Abrams, "Hearing the Call of Stories," *California Law Review* 79 (July 1991): 971; Robin West, *Narrative, Authority, and Law* (Ann Arbor: University of Michigan Press, 1993).

⁶³ Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998), 21.

⁶⁴ *Ibid.*, 65.

⁶⁵ *Ibid.*, 80, 88-89.

⁶⁶ Jean Bethke Elshtain, "Politics and Forgiveness," in Neal Biggar, ed., *Burying the Past*, 59.

⁶⁷ Andre du Toit, "Experiments with Truth and Justice in South Africa: Stockenström, Gandhi and the TRC," *Journal of Southern African Studies* 31 (No. 2, June 2005): 440-41. See also Cynthia E. Milton, "At the Edge of the Peruvian Truth Commission: Alternative Paths to Recounting the Past," *Radical History Review* 98 (Spring 2007): 3-33; Jacqueline Rose, "Apathy and Accountability: South Africa's Truth and Reconciliation Commission," *Raritan* 21 (No. 4, 2002): 175-95; Beth Rushton, "Truth and Reconciliation? The Experience of Truth Commissions," *Australian Journal of International Affairs* 60 (No. 1, 2006): 125-41; Jay A. Vora & Erika Vora, "The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans," *Journal of Black Studies* 34 (No. 3, 2004): 301-22.

⁶⁸ Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001), 14.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, 28-30.

⁷¹ *Ibid.*, 97.

⁷² *Ibid.*, 152-53.

⁷³ Robert I. Rotberg, "Truth Commissions and the Provision of Truth, Justice, and Reconciliation," 10-11, in Robert I. Rotberg & Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions* (Princeton, N.J.: Princeton University Press, 2000).

⁷⁴ Amy Gutmann & Dennis Thompson, "The Moral Foundations of Truth Commissions," 32-35, in Rotberg & Thompson, eds., *Truth v. Justice*. Other critics, particularly among legal scholars, focus on individual criminal justice, warning about the dangers of amnesty for perpetrators. Kent Greenawalt argues that amnesty for murderers or torturers is immoral. Sandy Levinson sees amnesties by truth commissions as a special form of plea bargaining. Kent Greenawalt, "Amnesty's Justice," 189-210, in Rotberg & Thompson, eds., *Truth v. Justice*; Sanford Levinson, "Trials, Commissions, and Investigating Committees: The Elusive Search for Norms of Due Process," 211-234, in Rotberg & Thompson, eds., *Truth v. Justice*.

⁷⁵ Charles Maier, "Doing History, Doing Justice: The Historian and the Truth Commission," 18, in Rotberg & Thompson, eds., *Truth v. Justice*.

⁷⁶ Ruti G. Teitel, *Transitional Justice* (Oxford; New York: Oxford University Press, 2000), 69.

⁷⁷ *Ibid.*, 74.

⁷⁸ *Ibid.*, 90.

⁷⁹ Mark Sanders, *Ambiguities of Witnessing: Law and Literature in the Time of a Truth Commission* (Stanford: Stanford University Press, 2007), 8.

⁸⁰ *Ibid.*, 60.

⁸¹ Julie Stone Peters, "'Literature,' the 'Rights of Man,' and Narratives of Atrocity: Historical Backgrounds to the Culture of Testimony," *Yale Journal of Law & the Humanities* 17 (Summer 2005): 253.

⁸² Minow, *Between Vengeance and Forgiveness*, 115.

⁸³ Elazar Barkan & Alexander Karn, "Group Apology as an Ethical Imperative" in *Taking Wrongs Seriously: Apologies and Reconciliation*, Elazar Barkan & Alexander Karn, eds. (Stanford: Stanford University Press, 2006).

⁸⁴ Ruti Teitel, "The Transitional Apology" in *Taking Wrongs Seriously*, 101.

⁸⁵ Ron Eyerman, *Cultural Trauma: Slavery and the Formation of African American Identity* (Cambridge; New York: Cambridge University Press, 2001); Iyunolu Folayan Osagie, *The Amistad Revolt: Memory, Slavery, and the Politics of Identity in the United States and Sierra Leone* (Athens, Georgia: University of Georgia Press, 2000); Saidiya Hartman, "The Time of Slavery," *The South Atlantic Quarterly* 101 (No. 4, Fall 2002): 757; Shelley Fisher Fishkin, "Race & the Politics of Memory: Mark Twain and Paul Laurence Dunbar," *Journal of American Studies* 40 (No.2, 2006): 283; Elizabeth Rauh Bethel, *The Roots of African-American Identity* (New York: St. Martin's Press, 1997); Berlin, "American Slavery in History and

Memory,” 1251-68; Fredrick Harris, “Collective Memory, Collective Action, and Black Activism in the 1960s,” in Martha Minow, ed., *Breaking the Cycles of Hatred: Memory, Law, and Repair* (Princeton, N.J.: Princeton University Press, 2002); Julie Saville, “Circuits of Memory: Modern Routes to Slave Pasts,” *Georgia Historical Quarterly* 83 (No. 3, 1999): 539; W. Fitzhugh Brundage, ed., *Where These Memories Grow: History, Memory, and Southern Identity* (Chapel Hill: University of North Carolina Press, 2000); David Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge, Mass.: Harvard University Press, 2002); *Slavery and Justice*, Report of the Brown University Steering Committee on Slavery and Justice (2006); James Oliver Horton & Lois E. Horton, eds., *Slavery and Public History: The Tough Stuff of American Memory* (New York: The New Press, 2006).

⁸⁶ See, e.g., Ira Berlin, “American Slavery in History and Memory,” at 1 (connecting the new public “engagement over the issue of slavery” to “a crisis in American race relations” that makes engagement with the past especially important in struggles for justice).

⁸⁷ *Ibid.*, 19.

⁸⁸ Alyssa Sepinwall, “Atlantic Amnesia? French Historians, the Haitian Revolution, and the 2004-2006 CAPES Exam.” See also Rex Nettleford, “The Haitian revolution and the struggle against slavery: challenges to knowledge, ignorance, and silence,” *International Social Science Journal* 58 (No. 188, 2007): 202; Nicolas Argenti & Ute Röschenthaler, “Between Cameroon and Cuba: Youth, Slave trades and translocal memoryscapes,” *Social Anthropology* 14 (No. 1, 2006): 33-47; Jean-Michel Deveau, « Silence and reparations, » *International Social Science Journal* 58 (No. 188, 2007): 248.

⁸⁹ Elizabeth Kowaleski Wallace, *The British Slave Trade and Public Memory* (New York: Columbia University Press, 2006), 207-08, 212.

⁹⁰ Christine Chivallon, “Bristol and the Eruption of Memory: Making the Slave-Trading Past Visible,” *Social & Cultural Geography* 2 (2001): 347-61.

⁹¹ *Ibid.*, 350.

⁹² See also Catherine Reinhardt, *Claims to Memory: Beyond Slavery and Emancipation in the French Caribbean* (New York: Berghahn Books, 2006), 153 (describing the commemoration of slavery in the former French colonies of Martinique, Guadeloupe, and Haiti).

⁹³ Ralph Austen, “The Slave Trade as History and Memory: Confrontations of Slaving Voyage Documents and Communal Traditions,” *William and Mary Quarterly* 58 (Third Series, No. 1, January 2001): 229-44.

⁹⁴ Emmanuel Akyeampompong, “History, Memory, Slave-Trade and Slavery in Anlo (Ghana),” *Slavery & Abolition* 22 (No. 3, December 2001): 18.

⁹⁵ Hartman, *The Time of Slavery*, 766.

⁹⁶ *Ibid.*, 769.

⁹⁷ *Ibid.*, 771.

⁹⁸ *Ibid.*, 773.

⁹⁹ *Ibid.*, 774.

¹⁰⁰ Ariela Gross, “When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument,” *California Law Review* 96 (February 2008): 283.

¹⁰¹ Akhil Amar, “Child Abuse as Slavery: A Thirteenth Amendment Response to *DeShaney*,” *Harvard Law Review* 105 (April 1992): 1359; Richard Primus, “The Riddle of Hiram Revels,” *Harvard Law Review* 119 (April 2006): 1680; Norman W. Spaulding, “Constitution as Counter-Monument: Federalism, Reconstruction and the Problem of Collective Memory,” *Columbia Law Review* 103 (December 2003): 1992; Mark Graber, *Dred Scott and The Problem of Constitutional Evil* (Cambridge: Cambridge University Press, 2006); Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham, N.C.: Duke University Press, 1999). This brief discussion is drawn from Ariela Gross, “When Is The Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument.”

¹⁰² Spaulding, “Constitution as Counter-Monument,” 2000-2003.

¹⁰³ *Ibid.*, 2005-2006, 2036.

¹⁰⁴ *Ibid.*, 2026, 2036-37.

¹⁰⁵ Primus, “Riddle of Hiram Revels,” 1703, 1709-10, 1716.

¹⁰⁶ Amy Kapczynski, “Historicism, Progress, and the Redemptive Constitution,” *Cardozo Law Review* 26 (February 2005): 1044-45, 1063.

- ¹⁰⁷ Ibid., 1091, 1102. But see Christopher Tomlins' critique of Kapczynski in Christopher Tomlins, "The Strait Gate: The Past, History, and Legal Scholarship," unpublished paper on file with author, on Walter Benjamin and legal history.
- ¹⁰⁸ Martha Biondi, "The Rise of the Reparations Movement," *Radical History Review* 87 (Fall 2003): 5-18; Mary Frances Berry, *My Face Is Black Is True: Callie House and the Struggle for Ex-Slave Reparations* (New York: Knopf Publishing Group, 2005).
- ¹⁰⁹ Alfred L. Brophy, "The Cultural War Over Reparations for Slavery," *DePaul Law Review* 53 (Spring 2004): 1181-.
- ¹¹⁰ Id. at 207.
- ¹¹¹ Charles J. Ogletree, Jr., "The Current Reparations Debate," *U.C. Davis Law Review* 36 (June 2003): 1055. For an early exponent of this position, see Vincene Verdun, "If The Shoe Fits, Wear It: An Analysis of Reparations to African Americans," *Tulane Law Review* 67 (February 1993): 597.
- ¹¹² Robert Westley, "Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?," *Boston College Law Review* 40 (December 1998): 436. See also Hanoch Dagan, "Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions," *Boston University Law Review* 84 (2004): 1139-?; Andrew Kull, "Restitution in Favor of Former Slaves," *Boston University Law Review* 84 (2004): 1277-?; Emily Sherwin, "Reparations and Unjust Enrichment," *Boston University Law Review* 84 (2004): 1443-?.
- ¹¹³ U.-Va. Expresses Regret Over Past Link to Slavery, *The Washington Post*, April 25, 2007, B6; Brown focuses on ills of slavery, *The Providence Journal (Rhode Island)*, February 25, 2007, A1; Slavery Funds Helped Found Brown University, *The New York Sun*, October 19, 2006, 6.
- ¹¹⁴ Joe R. Feagin, "Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are In Order for African Americans," *Harvard BlackLetter Law Journal* 20 (Spring 2004): 55-62.
- ¹¹⁵ For the best summary of reparations arguments, see Brophy, "The Cultural War Over Reparations for Slavery"; Alfred L. Brophy, "Some Conceptual and Legal Problems in Reparations for Slavery," *New York University Annual Survey of American Law* 58 (2003): 497.
- ¹¹⁶ Emma Coleman Jordan, "A History Lesson: Reparations for What?," *New York University Annual Survey of American Law* 58 (2003): 557.
- ¹¹⁷ Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: W.W. Norton & Co., 2005).
- ¹¹⁸ Boris I. Bittker, *The Case for Black Reparations* (New York: Random House, 1973), 9-12.
- ¹¹⁹ Katznelson, *When Affirmative Action Was White*, 157-58.
- ¹²⁰ Rhonda V. Magee, Note: "The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse," *Virginia Law Review* 79 (May 1993): 901 ("[The] post-slavery focus, though it may appeal to some pragmatists, eliminates the most compelling basis for claims and damages. The reparations argument derives considerable moral and emotional power from the 'super-wrong' propagated by the institution of slavery, and any presentation of the case for reparations which concedes the impracticality of remedying the injury caused by slavery has likely dealt itself a near-fatal blow.")
- ¹²¹ Barkan, *The Guilt of Nations*.
- ¹²² Ibid., 296.
- ¹²³ Ibid., 345.
- ¹²⁴ Roy L. Brooks, "The New Patriotism and Apology for Slavery," in *Taking Wrongs Seriously*.
- ¹²⁵ Stephen Best and Saidiya Hartman, « Fugitive Justice, » Special Issue on Redress, 92 (No. 1, Fall 2005) *Representations*: 3-4.
- ¹²⁶ Ibid., 6-9.
- ¹²⁷ Jean-Yves Camus, "The Commemoration of Slavery in France and the Emergence of a Black Political Consciousness," *The European Legacy* 11 (No. 6, 2006): 647-655, at 648-650. COFFAD, the Collectif des Filles et Fils d'Africains Déportés, is modeled on the Jewish Association des Fils et Filles des Déportés Juifs de France, led by the Klarsfelds. Ibid., 651.
- ¹²⁸ Ibid., 649-650, 652, 654. See also Salah Trabelsi, "Memory and Slavery: the Issues of Historiography," *International Social Science Journal* 58 (No. 188, June 2006): 237-43; Anthony Holiday, "Slavery and denial," *International Social Science Journal* 58 (No. 188, June 2006): 203-214.
- ¹²⁹ J.F. Ade Ajayi, "La politique de Réparation dans le contexte de la mondialisation," *Cahiers d'Études africaines* 44 (No. 173, 2004): 41-63.
- ¹³⁰ Michel Giraud, "Le passé comme blessure et le passé comme masque," *Cahiers d'Études africaines* 44 (No. 173, 2004): 65-79.