



Foreward: Why Retry? Reviving Dormant Racial Justice Claims

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Citation	Martha L. Minow, Foreward: Why Retry? Reviving Dormant Racial Justice Claims, 101 Mich. L. Rev. 1133 (2003).
Citable link	http://nrs.harvard.edu/urn-3:HUL.InstRepos:12343476
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FOREWORD: WHY RETRY? REVIVING DORMANT RACIAL JUSTICE CLAIMS

*Martha Minow**

“A patched and leaky vase may be less desirable than an unbroken vase, but it is better than a pile of shards.”

— Marc Galanter¹

Two familiar arguments oppose lawsuits and legislative efforts to address racial injustices from our national past,² and a third tacit argument can be discerned. “Why open old wounds?”: this question animates the first argument. The evidence is stale — this expresses the second argument. The third, less explicit objection reflects worries that exposing some gross and unremedied racial injustices from the past will reveal the scale of imperfections in the systems of justice and government and thereby undermine the legitimacy of those systems. To introduce the meticulous and passionate essays in this Colloquium, I elaborate and respond to each of these questions. Like the Colloquium authors, I think it far more important that public attention come to these issues than that any particular remedy be secured. For inattention has been the insult laid upon the injuries of the past.

I. WHY OPEN OLD WOUNDS?

Reopening old wounds is treated as an argument against litigation when time has passed since the underlying events. To some, even two years can seem like sufficient time for injuries to recede into a past that should not be disturbed. One editorial writer recently urged a

* Professor, Harvard Law School. A.B. 1975, University of Michigan; Ed.M. 1976, Harvard University; J.D. 1979, Yale. — Ed.

1. Marc Galanter, *Righting Old Wrongs*, in MARTHA MINOW, *BREAKING THE CYCLES OF HATRED* 107, 124 (Nancy L. Rosenblum ed., 2002).

2. In 2001, the criminal justice system prosecuted Thomas Blanton for the deaths of Denise McNair, Carole Robertson, Cynthia Wesley, and Addie Mae Collins, four young African-American girls, in the bombing of a Birmingham, Alabama church. Robert Chambliss was also convicted of the bombing in 1977. See Stephanie McCrummen, *The Verdict: Guilty: Jury Convicts Man in '63 Church Bombing That Killed 4 Girls*, *NEWSDAY* (Long Island), May 23, 2002, at A7. For detailed consideration of this and similar efforts, see Anthony V. Alfieri, *Retrying Race*, 101 *MICH. L. REV.* 1141 (2003); Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 *MICH. L. REV.* 1201 (2003); Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 *MICH. L. REV.* 1225 (2003); and Eric K. Yamamoto et al., *American Racial Justice on Trial — Again: African American Reparations, Human Rights, and the War on Terror*, 101 *MICH. L. REV.* 1269 (2003).

district attorney to drop a potential prosecution that arose when a homeless couple accidentally started a fire in a vacant warehouse that led to the death of six firefighters.³ “All a trial would accomplish now is to reopen old wounds in a city that has already spent two years grieving.”⁴

In that situation, the pursuit of justice seems to interrupt or undermine a process of mourning, a process that involves ceremonies, memorials, grief, and private memory.⁵ Though blame could be found, the editorial argued that the wrongdoers needed no trial because they already suffered “the hell of living with what they have done.”⁶ This notion that wrongdoers have suffered enough, however, is absent when the underlying harms arose not by negligence but hate, and when the wrongdoers actually boast about their behavior and remain unrepentant.

Sometimes the worry about reopening old wounds comes with the acknowledgment that the conflicts are still raw. Proposed trials could “reopen old wounds and plunge the country back into civil war,” commented one observer after representatives of the United Nations withdrew from plans to set up a special court to prosecute former leaders of the Khmer Rouge for 1.7 million deaths in Cambodia during the 1970s.⁷ Although the underlying events reach back several decades, civil war persisted until 1998.⁸ It seems therefore a bit odd to talk of “old wounds.” Perhaps people warn against reopening the conflicts precisely because they are so fresh and barely ended. In other words, arguments against opening old wounds — whether in Cambodia, the United States, or elsewhere — may stand in for worry about current social disorder and the fragility of peace. Yet however uncomfortable discussions of the racial past may be in this country, can there be any honest worry about social instability if we address the old wounds concerning racial violence of the 1960s and 1970s? Of course, addressing past racial violence has a bearing on the present day examinations of affirmative action, racial profiling, and other social policies, but basic peace and social order are not in jeopardy.

Some worry that assessing past incidents risks undermining current efforts to build trust across racial lines. Shootings killed two white

3. Adrian Walker, *A Trial For What?*, BOSTON GLOBE, Apr. 1, 2002, at B1.

4. *Id.*

5. *Id.*

6. *Id.*

7. Irwin Arieff Ta Mok, *UN Walks Out of Cambodia Talks on War Crimes Courts*, THE INDEPENDENT (London), Feb. 9, 2002, at 13. Cambodian and U.N. negotiators subsequently reached a tentative agreement to create a tribunal to prosecute former Khmer Rouge leaders for genocide. See Ellen Nakashima, *Pact Raises Hope in Cambodia for Khmer Rouge Trials*, WASH. POST, Mar. 18, 2003, at A26.

8. Mok, *supra* note 7.

police officers and a black youth, allegedly a gang member, over a two-week period in August of 2002 in Minneapolis, Minnesota.⁹ Given long-standing friction between white police officers and African Americans in Minneapolis, one editorial warned that evaluation of each incident would risk reopening memories of prior incidents, clouding judgments about the present, and dissolving current efforts to build trust between the police and the community.¹⁰ Once again, this kind of worry cannot be raised in the notable recent efforts to bring litigation or seek reparations concerning civil rights abuses of the 1960s and 1970s or slavery. Indeed, it is precisely because of growing trust and real progress toward fairness and objectivity in the local legal systems that current-day efforts turn to these systems for redress for unremedied racial injustices.

Perhaps criminal prosecutions or any kind of adversarial litigation hold special jeopardy for opening old wounds from racial injustice. This point animates some features of the restorative justice movement, an international effort of theorists and practitioners, to engage victims and community members with wrongdoers in forward-looking processes of justice-seeking reparations and healing.¹¹ Is it a legitimate concern that focusing the machinery of justice on past, unremedied racial harms could produce pain for the perpetrators? Racial riots ripped York, Pennsylvania, in 1969, wounding sixty people; a white mob killed Lillie Belle Allen, a preacher's daughter.¹² Despite the filing of criminal charges, the prosecutions lay dormant for thirty years until local newspapers revived the matter; prosecutors then reopened the investigation. One man, apparently involved in killing Allen, called to assist the prosecutors but then committed suicide.¹³

The costs of adversarial justice might seem unwarranted if reparations and healing are genuine alternatives. But what are the possibilities for personal and communal healing after racial violence? This question animates the international restorative justice movement. Its

9. Editorial, *Take A Breath: Cops, Community Must Work Together*, STAR TRIB. (Minneapolis), Aug. 17, 2002, at 20A.

10. *Id.*

11. See RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES (Burt Gallaway & Joe Hudson eds., 1996); Elizabeth Latif, Note, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 292-93 (2001) (summarizing the restorative justice movement).

12. *Ex-Mayor Acquitted, 2 Convicted in '69 Race Killing*, TORONTO STAR, Oct. 20, 2002, at B07; see also Combined News Services, *Still Guilty in Some Eyes: Town Divided in Acquittal of Mayor in 1969 York Race Riot*, NEWSDAY, Oct. 21, 2002, at A12; Jennifer McMenamamin, *2 Convicted in York Case Handed Prison Sentences: Pair of White Men Guilty in Black Woman's Death Get at Least 4 1/2, 9 Years*, BALT. SUN, Dec. 19, 2002, at 3A.

13. McMenamamin, *supra* note 12. One of the police officers at the time, Charlie Robertson, later admitted that he shouted "white power" at a gang rally. Others blamed him for encouraging gunmen to shoot blacks during the riots. Robertson later was elected mayor for two terms; he also later apologized for his earlier racial views. *Id.*

adherents argue that restoring the dignity of individuals and the harmony of communities should be the goal of justice. Exemplified by the South African Truth and Reconciliation Commission ("TRC"), restorative justice does not mean doing nothing, but it may mean pursuing alternatives to criminal prosecutions and civil trials.¹⁴ Hence, to fulfill the aspiration of building a bridge between the Apartheid era and the vision of a new democratic South Africa, the TRC held hearings to give victims and survivors opportunities to tell their stories. The TRC also considered applications for amnesty from perpetrators of human rights violations, whether committed by police and government officials or by freedom fighters and resisters of the Apartheid regime. Some critics attacked the TRC for supplanting criminal prosecutions.¹⁵ Yet still others opposed the TRC and its hearings because they would reopen old wounds. Judge Richard Goldstone of South Africa's Constitutional Court noted that he heard such complaints from many white South Africans:

To whose wounds, I have wondered, are they referring? Surely not their own. And, what makes them think that the wounds of the victims have healed? And yet, when I said this to the playwright Ariel Dorfman, he corrected me in his always gentle and wise manner. He pointed out that those white South Africans are also victims of apartheid. Their discomfort with the truth is a symptom of their shame and that, too, makes them victims.¹⁶

Does this generous view from South Africa warn against legal responses to past racial injustice in America? Those who favor restorative justice could argue that whites along with blacks need the processes of social reconstruction that can emerge after a community faces its past. Criminal prosecution and civil litigation can also help communities face their past and establish how the current generation means to break from it. Rather than reopening old wounds, legal attention to past racial crimes could start the process of healing wounds that have festered for decades. Even the debate over whether to proceed with prosecutions, civil suits, or reparations can bring into the open secrets about the past, afford people on all sides a chance to tell the truth, explain their motivations and suffering, apologize, and make amends.

14. For a longer discussion, see MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 53-90 (1998) [hereinafter MINOW, BETWEEN VENGEANCE AND FORGIVENESS].

15. See *id.* at 56, 81.

16. Judge Richard Goldstone, *Foreword* to MINOW, BETWEEN VENGEANCE AND FORGIVENESS, *supra* note 14, at ix, xii; see also JAMES BALDWIN, THE FIRE NEXT TIME (1963), reprinted in JAMES BALDWIN, COLLECTED ESSAYS 286 (1998) (exploring harms to whites from white supremacy).

Thus, arguments using the metaphor of “opening old wounds” should not halt contemporary efforts to pursue legal redress for past racial injustices. There is no risk of societal disorder at the level of a civil war to cause hesitation in such pursuits. On the other hand, nor is there such harmony and mutual understanding that lawsuits and reparations claims arising from past race-based injustices could fairly be charged with introducing conflict to otherwise happy communities. To the extent that whites as well as blacks feel victimized by the past, attention and examination would be better than doing nothing. Should the lawsuits or reparations struggles prove controversial, the emerging debates themselves offer a chance for people to air their views and learn about the views of others on issues that have enduring significance and consequences for future relationships and rules.

II. BUT THE EVIDENCE IS STALE

An obvious objection to litigation proceeding decades after the underlying events occurred is that the evidence is stale, unreliable, or unavailable. The truth-seeking function of trials is jeopardized when evidence is absent or untrustworthy. With the passage of time, memories may become foggy or influenced by intervening events. Documents disappear. Witnesses die. Concerns about weakness in evidence underlie the statute of limitations that usually applies to any claim. Statutes of limitations also protect courts from excessive litigation and defendants from endless uncertainty about the possibility of future litigation.

As powerful as these goals may be in most areas of law, they fade in the context of gross violations of human rights. In U.S. law, there is no statute of limitations restricting prosecutions for murder.¹⁷ There is no statute of limitations on the prosecution and punishment of the crime of genocide.¹⁸ The International Criminal Court Statute mandates that crimes within its jurisdiction “shall not be subject to any statute of limitations.”¹⁹ European nations have joined a convention

17. See MARYANNE VOLLERS, *GHOSTS OF MISSISSIPPI: THE MURDER OF MEDGAR EVERS, THE TRIALS OF BYRON DE LA BECKWITH, AND THE HAUNTING OF THE NEW SOUTH* (1995); Todd Taylor, *Exorcising the Ghosts of a Shameful Past: The Third Trial and Conviction of Byron de la Beckwith*, 16 B.C. THIRD WORLD L.J. 359 (1996).

18. *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. Res. 2391, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968) (entered into force Nov. 11, 1970), available at <http://157.150.195.3/LibertyX::URd7xUu15qE8QjU1V2QmZG8x>; see Matthew Lippman, *Genocide: The Crime of the Century: The Jurisprudence of Death at the Dawn of the New Millennium*, 23 HOUS. J. INT'L L. 467, 488 (2001).

19. *Rome Statute of the International Criminal Court*, art. 29, July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (entered into force July 1, 2002), available at [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf) (last visited Feb. 20, 2003); see Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002).

exempting crimes against humanity as well as genocide from statutes of limitations.²⁰ These exemptions from statutes of limitations reflect the recognition that some offenses are so serious that they deserve response whenever possible. They may also reflect the understanding that loss of memory and evidence are less likely where the offenses are extreme and heinous. The French Criminal Code, for example, adopts the view that crimes against humanity are “imprescriptible,” meaning both exempt from the statute of limitations and unforgettable.²¹ Although it is not uncontroversial to exempt some matters from statutes of limitations,²² doing so reflects the commitment that “justice, no matter how late, can and will be served.”²³ Or, as Lord David Owen quoted Simon Wiesenthal who, in turn, attributed Robert Kennedy, “ ‘Moral duties have no term.’ ”²⁴ Here, as elsewhere, U.S. law should be informed by emerging international human rights ideas and accomplishments.²⁵ The U.S. thus could learn from emerging international norms that set no time limit on the pursuit of justice for gross violations of human rights.

Other considerations — such as the pursuit of social reintegration or reconciliation — may support the use of truth commissions rather than criminal prosecutions.²⁶ Concerns about the passage of time,

20. See *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, *supra* note 18. The United States is not a party to the Convention on Non-Applicability of Statutory Limitations. See <http://www.unhcr.ch/html/menu3/b/treaty6.htm> (last modified Oct. 9, 2001) (listing participants and signatories to the Convention).

21. Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1, 74 & n.254 (1998); see C. PÉN. ART. 213-5 (1994), reprinted in THE FRENCH PENAL CODE OF 1994 AS AMENDED AS OF JANUARY 1, 1999, at 93 (Edward A. Tomlinson, trans., The American Series of Foreign Penal Codes No. 31, 1999).

22. “The issue of whether crimes against humanity should be without any limitations period continues to divide France. One of France’s foremost philosophers, who was also a Jewish Resistance hero, answered the question resoundingly in the affirmative in his book, appropriately entitled *L’Imprescriptible*.” Curran, *supra* note 21, at 74 & n.254. (citing VLADIMIR JANKELEVITCH, *L’IMPRESCRIPTIBLE: PARDONNER? DANS L’HONNEUR ET LA DIGNITE* (1986)). For a French legal scholar’s similar conclusion, see Georges Levasseur, *Les Crimes contre l’humanité et le problème de leur prescription*, 93 J. DE DROIT INT’L 259, 273-86 (1966). For a recent discussion of the issue in the context of Paul Touvier’s trial, see Leila Sadat Wexler, *Reflexions on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 L. & SOC. INQUIRY 191 (1995).

23. Taylor, *supra* note 17, at 379.

24. Lord David Owen, *Reconciliation, Applying Historical Lessons to Modern Conflicts*, 19 FORDHAM INT’L L.J. 324, 329 (1995) (citing SIMON WIESENTHAL, *JUSTICE NOT VENGEANCE* 158 (1989)).

25. See Yamamoto et al., *supra* note 2.

26. See MINOW, *BETWEEN VENGEANCE AND FORGIVENESS*, *supra* note 14, at 55-89, 118-147; Rose Weston, Note, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT’L & COMP. L. 1017 (2001).

however, should not prevent concerted efforts to address mass injustices whose effects persist.

III. THE SCALE OF UNREMEDIED WRONGS COULD JEOPARDIZE FAITH IN THE SYSTEMS OF JUSTICE

I suspect that implicit in objections to legal redress for past racial crimes and atrocities is the fear of acknowledging the extent of those crimes and the resulting scope of official failure to prevent or respond. Such acknowledgment would raise questions about the legitimacy and reliability of a legal system intended to enact justice. It could also reveal the extent of reliance upon and benefits from the past injustices in the lives of people who currently feel innocent and indeed, did not themselves commit the atrocities. Reopening past injustices for legal treatment, in turn, might cast doubt on the legitimacy of current allocations of power and privilege or call upon people to make amends for conduct of others who are long gone. Resistance to making such amends — and assertions that justice does not so demand — may reinforce opposition to efforts to litigate or pursue reparations for past racial injustices. Such resistance is summarized in an aphorism in the United States: “After all, we can’t give back Manhattan.”²⁷

Fair questions can be raised about what obligations current generations do or should have for the violations of their ancestors or those of their same race who preceded them.²⁸ Why should children or grandchildren of wrongdoers or bystanders owe any duty to remedy their ancestors’ failures? Why would legal rulings pressing such an obligation rooted in the past better advance justice than collective actions designed to redress present day inequities, regardless of their provenance? Yet those questions do not themselves justify barring lawsuits or legislative investigations into past racial injustice. Determining what happened is a vital step in the pursuit of justice; it precedes but does not determine the rationale for or scope of remedies, nor indeed, who specifically should be liable.

Some may worry that contemporary use of courts in matters about which courts remained silent for decades exposes the vulnerability of the judiciary to politics and prejudice. That vulnerability remains all too apparent to those who have waited long for justice. If the judiciary becomes active now in allowing hearings of neglected criminal and civil complaints from decades earlier, it can start to rectify its own failures from those earlier periods. In so doing, the courts can help establish reasons for current and future generations to lodge faith in them. This is surely in the interests of whites, blacks, and members of

27. See Weston, *supra* note 26, at 1055 n.250.

28. See, e.g., Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4 (1992).

other minority groups.²⁹ Yes, prosecutors and courts proceeding now when they did not do so in a timely fashion will expose their own failures — or in Marc Galanter’s image, the patches and leaks in the vase. But, he continues, “When it comes to justice, we don’t have the choice of the unbroken vase. A patched and blemished world is the only one we can attain.”³⁰ Rather than dwell in the broken shards of justice, let us do the work of repair. The poignant and powerful essays in this Colloquium are part of that important work.

29. See Delgado, *supra* note 2.

30. Galanter, *supra* note 1, at 124.