

# REDRESS, PROGRESS AND THE BENCHMARK PROBLEM

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The Federal Constitution clearly guarantees the right “to petition the Government for a redress of grievances.”<sup>1</sup> Yet, judicial decisions construing this guarantee are strikingly rare and there is little doctrinal or scholarly exploration of what, if anything, such a right ought to entail.<sup>2</sup> To be sure, virtually any legal claim premised on denial of the right to petition for redress of grievances seems merely to overlap with more familiar, “cognate” First Amendment rights such as freedom of expression and assembly.<sup>3</sup> Moreover, the citizenry in the United States have been comparatively free to seek redress throughout most of our history.<sup>4</sup> And the constitutional guarantee is phrased in terms of *seeking* redress; it certainly does not seem to guarantee actually

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\* Professor of Law, Boston College Law School. I would like to dedicate this essay to the wonderful BCLS students whose thinking and hard work produced the great success of the Fifth Annual Conference of Asian Pacific American Law Faculty and this important Symposium. I am also particularly grateful to Professor Fred Yen for all he did, to my exceptional research assistant, George Linge, and to the authors of the three first-rate articles that provoked these comments.

<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> For a fine recent exception, see Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153 (1998).

<sup>3</sup> In *Brown v. Louisiana*, 383 U.S. 131, 141 (1966), for example, in the course of invalidating a conviction for a silent protest against the segregation of a public library, Justice Fortas's plurality opinion described “an aspect of a basic constitutional right—the right [of] speech and of assembly, and freedom to petition the Government for a redress of grievances.” He went on to assert that these rights “are not confined to verbal expression.” *Id.* at 142. The right to petition for redress of grievances figured more prominently later the same year in Justice Douglas's dissent in *Adderley v. Florida*, 385 U.S. 39, 49 (1966) (Douglas, J., dissenting). Douglas, joined by Chief Justice Warren and Justices Brennan and Fortas, objected to the majority's decision to uphold the convictions of 32 college students for protesting outside a local Florida jail where their colleagues were incarcerated for demonstrating against racial segregation. *See id.* Quoting the Magna Carta, Douglas described a right with “an ancient history,” essential for those without funds or clout enough to use more regular channels to reach government officials, and not to be trumped by a peaceful trespass on public property. *See id.*; *see also* *Thomas v. Collins*, 323 U.S. 516, 529–30 (1945) (describing “cognate rights” of freedom of speech, press, peaceable assembly and petition for redress of grievances as “inseparable”); *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 512–13 (1939) (Roberts, J., concurring, with whom Black, J., joined and with whom Hughes, C.J., concurred in part) (identifying national privileges and immunities of citizenship with right to petition Congress for redress of grievances).

<sup>4</sup> The most famous exception was the Gag Rule in the 1830s and early 1840s, with which Congress simply refused to accept antislavery petitions. *See generally* 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854*, at 289–352 (1990).

*obtaining* redress. In our highly legalistic culture, however, it is appropriately difficult to ignore the basic claim that clear legal wrongs ought to have remedies.<sup>5</sup>

The excellent articles presented by Professors Chris Iijima, Robert Westley and Eric Yamamoto offer eloquent analyses of the pluses and minuses within diverse claims for reparations. They make thoughtful and hardheaded suggestions regarding various possible audiences for such claims. All three authors underscore the huge importance of remembering official sins of the past, yet they also suggest the difficulty in convincing anyone to do anything toward beginning to make amends. Beyond the obvious political difficulties and the need to overcome the remarkable ahistoricism of most Americans, those who seek redress must confront the fundamental presentist supposition that dominates our nation. The prevailing presumption is that somehow, sometime—perhaps when we weren't paying attention—sufficient justice and equality came to prevail. Therefore, it is assumed, we all now enjoy an equal, fair start in the cosmic race of life. We hold tightly to this credo as if it were self-evident, no matter what the actual evidence may be. At the end of this often-horrific century, to define reality with this baseless leap of faith seems particularly parochial, though this very leap dominates contemporary discourse in the United States.

Throughout the world today, however, people are seeking to formulate mechanisms to deal with the vast array of collective horrors of the recent past. As Martha Minow illuminates with great insight, balance and compassion in her latest book, nations and individuals are currently probing for new paths between vengeance and forgiveness.<sup>6</sup> By such means as war crimes tribunals, truth and reconciliation commissions, reparations and an array of innovative living memorials, there is a fundamental quest to right wrongs despite the clear understanding, shared by many, that the lasting impact of mass violence and collective persecution can never be truly remedied. It is also significant and fitting that these efforts proceed despite the lack of some clear-cut benchmark established in the past. This benchmark problem is an issue in the United States as well, but it is not, I maintain, an insurmountable obstacle.

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<sup>5</sup> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . [The] government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>6</sup> See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

### A. *No Baseline, No Nunc Pro Tunc*

The basic problem: Now is now, then was then, and now and then won't do. There can be no convincing *nunc pro tunc* ("now for then," a commonplace common law fiction), no persuasive legal fiction able to "roll back the tide of time."<sup>7</sup> To right past wrongs and to make victims, or the descendants of victims, whole again is deeply problematic for many reasons. Not the least of these is the impossibility of defining a baseline and holding to it, as if it were flash frozen, throughout subsequent changes. We are aware that the world is full of contingencies, and we cannot ignore multivariable causation that is the complicated stuff of good fiction, great history and chaos theory. Remembrance may be the essential key to redemption,<sup>8</sup> but redemption does not necessarily—nor even probably—entail going back.

It is painfully true that, at least in this life, "You Can't Go Home Again."<sup>9</sup> Even happy endings in classic myths and fairy tales do not deny this harsh truth. By the time Odysseus reaches Ithaca, for example, his hunting dogs do not recognize him. Along with Penelope and Telemachus, Odysseus and Ithaca can never be fully restored. They may be better for the transformation, but their old standard cannot hold. And in *The Wizard of Oz*, Dorothy might learn that there is no place like home, but perceptive members of the audience know that somehow both Dorothy and Kansas have changed forever.

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<sup>7</sup> *Hall v. United States*, 92 U.S. 27, 30 (1875). In *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 840 (1989) (Kennedy, J., dissenting), for example, Justice Kennedy, joined in dissent by Justice Scalia, observed, "[t]he charming utility of the nunc pro tunc device cannot obscure its outright fiction." The dissenters objected to the majority's willingness to allow federal appellate courts to use Rule 21 of the Federal Rules of Civil Procedure to dismiss dispensable non-diverse parties in order, retroactively, to assure proper diversity jurisdiction. *See id.* at 839. In *Hall*, the unanimous Court defined its duty to be to "roll back the tide of time, and to imagine" one's self back in Mississippi before abolition. 92 U.S. at 30. Having performed this feat of mental gymnastics, the Justices found it easy to deny a claim by a former slave to a share of cotton from the plantation on which he toiled, because everyone knew that slaves could not contract or own property in Mississippi before abolition. *See id.* at 31.

<sup>8</sup> This statement by the Ba'al Shem Tov is on the wall of Yad Vashem, the Holocaust memorial in Jerusalem. For a fine modern biography, see MOSHE ROSMAN, *FOUNDER OF HASIDISM: A QUEST FOR THE HISTORICAL BA'AL SHEM TOV* (1996).

<sup>9</sup> THOMAS WOLFE, *YOU CAN'T GO HOME AGAIN* (1940). Perhaps the fact that Wolfe was two years dead when his much-pared-down novel was published underscores the point. The Supreme Court clearly has had difficulty recently in sorting out retrospective and prospective relief in the context of federal courts and the Eleventh Amendment, for example. *See, e.g., Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); Carlos Vazquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective—Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1 (1998).

Provoked in the best sense by all three of these examples of first-rate legal scholarship, I will use this brief comment to focus on basic conceptual challenges that lurk within any effort to obtain legal or political redress for massive past depredations. Notwithstanding Justice Holmes's words,<sup>10</sup> I agree with these three authors that activists and government officials, advocates and judges all ought to pursue justice for past wrongs despite the full knowledge that justice can never be achieved fully. The same message may be even more important for everyone else. After all, redress almost surely must have grass-roots support to take hold effectively.

My argument is twofold. First, I claim that we should give special attention to the broad, open-ended promises of the past. We ought to do this not because those promises are specifically binding, but rather with acceptance of such promises as visionary—and even as changeable over time. Great past promises are thus to be understood partially as hortatory, yet also partly as binding upon the future. Second, and perhaps still more controversially, I maintain that there is some hope for progress after all. To realize that hope, it may be necessary to stretch analysis beyond the kind of equity familiar to lawyers and philosophers.

By expanding the boundaries of traditional analysis, we begin to move through the usual confines of legal justice to more contextual righteousness. Paradoxically, the very absence of a clear baseline renders use of the normative imagination more frightening and, perhaps, more accessible than most legal discourse. Enforcing old visionary words may appeal to people in venues far removed from the marble courtrooms that exist, at least in our imaginations, to dispense equal justice under law. This approach may help redeem key elements of the promise of America.

B. "A promissory note to which every American was to fall heir"<sup>11</sup>

In the course of his soaring "I Have a Dream" speech at the March on Washington in August of 1963, Dr. Martin Luther King, Jr. declared "the fierce urgency of *now*."<sup>12</sup> The trope that King used to illustrate this

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<sup>10</sup> Holmes delighted in denying that justice had anything to do with the work of the Justices, and he said so often. I quoted and discussed several characteristically pithy Holmesian examples, and some of the scholarly discussion about them that has ensued, in *AVIAM SOIFER, LAW AND THE COMPANY WE KEEP* (1995).

<sup>11</sup> Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), in *LENWOOD G. DAVIS, I HAVE A DREAM: THE LIFE AND TIMES OF MARTIN LUTHER KING, JR.* 261 (1969).

<sup>12</sup> *Id.* (emphasis added).

point, however, was mundane as well as visionary. He proclaimed that hundreds of thousands of marchers had arrived in Washington that sweltering day "to cash a check."<sup>13</sup> King elaborated:

When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men [yes, black men as well as white men] would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.<sup>14</sup>

In fact, King noted that instead of honoring "this sacred obligation," the check had been returned to the Negro people marked "insufficient funds."<sup>15</sup> But, he continued, "we refuse to believe that the bank of justice is bankrupt."<sup>16</sup>

King's image of a promissory note is noteworthy. When he sought to particularize his compelling Dream, King did so somewhat inaccurately in the language of everyday legalism. Images of "checks" and "promissory notes" seemed both simple and serious, without much need to reflect on the way the legal terms actually work in the world. And King clearly also mythologized the historical promise that he invoked. His blend of the Declaration of Independence and the Constitution in support of civil rights, for example, hardly makes specific sense historically.

In the tradition of Frederick Douglass, however, King reinterpreted the core American stories of origin.<sup>17</sup> Douglass, who famously declared that he could not celebrate Independence Day while slavery continued, began to interpret the Constitution as an antislavery document that, properly understood, imposed an ongoing duty on all Americans to end slavery and to restore the "plundered rights" of those who had been enslaved.<sup>18</sup> Like Douglass, King discerned what the promise of the founding documents ought to entail. In his soaring

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> King, *supra* note 11, at 261.

<sup>17</sup> See Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989).

<sup>18</sup> See WILLIAM S. McFEELY, FREDERICK DOUGLASS 204-07 (1991). In Douglass's famous Fifth of July Speech in 1852, which is "perhaps the greatest antislavery oration ever given," Douglass insisted that "[t]he 4th of July is the first great fact in your nation's history—the very ring-bolt in the chain of your yet undeveloped destiny." *Id.* at 173.

words, "[t]his note was a promise that all men would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness."<sup>19</sup> This founding promise is ongoing. It has created a kind of constitutional promissory estoppel—a promise enforceable beyond the usual formalities of contract law by the very nature of its relational, largely open-ended compulsion. The specific intention of the founders—whoever one includes in that group—is not determinative. The actions of those who subsequently rely on and interpret the promise also count.<sup>20</sup> The reasonable possibilities that the original words helped to create become crucial. That many people have relied to their great detriment also has significance. Founding promises thus can constitute a different kind of social contract, a contract that, over time, becomes a new manifestation of America's destiny.

King also underscored the complexity of any genuine promise of freedom—including the fundamental idea that true freedom entails being bound to the destiny of others. For example, King praised whites who "have come to realize that . . . their freedom is inextricably bound to our freedom. We cannot walk alone."<sup>21</sup> We are beginning to comprehend that victimizers and bystanders may also be victims, at least through the shame of the lasting effects of past injustices.<sup>22</sup> This, I believe, was a major element of King's elaboration of the promise of America and the appeal of his American Dream. It also might help explain some of the power of King's oft-quoted invocation of the words of the ancient prophet Amos: "[W]e will not be satisfied until justice rolls down like waters and righteousness like a mighty stream."<sup>23</sup> This

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<sup>19</sup> King, *supra* note 11, at 261. See generally the recent symposium, *Dr. Martin Luther King's Life in Proactive Engagement: The Lawyer as Social Activist in the Community*, 50 ALA. L. REV. 1 (1998) and, specifically, Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63 (1998).

<sup>20</sup> For a somewhat similar approach in quite a different context, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847, 901 (1992) (O'Connor, J., plurality opinion joined by Kennedy, J. and Souter, J.) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. . . . Our Constitution is a covenant running from the first generation of Americans to us and to future generations.").

<sup>21</sup> King, *supra* note 11, at 262.

<sup>22</sup> Judge Richard J. Goldstone of the South African Constitutional Court, who is also the former Chief Prosecutor of the International Criminal Tribunals on the former Yugoslavia and Rwanda, makes this point briefly but powerfully in his Foreword to MINOW, *supra* note 6, at xii. Goldstone credits the playwright Ariel Dorfman for pointing out to him that white South Africans are also victims of apartheid, at least in that their discomfort with truth is their shame, which also makes them victims. See *id.*

<sup>23</sup> King, *supra* note 11, at 262. The demand that Amos made of the Jewish people, who had grown soft and corrupt beneath their assumption that they were the chosen people, is translated as: "[L]et justice well up as waters/ And righteousness as a mighty stream." THE TWELVE PROPHETS 107 (A. Cohen ed. & trans., Soncino Press 1948). Frederick Douglass also had invoked powerful

combination of threat and promise—and the distinction between justice and righteousness at which it hints—deserves more attention as it pertains both to large issues of group redress and to the individual choices in everyday life.

Powerful recognition of the ongoing responsibility for others—even when one's own group has been horribly victimized—is one of the most salient aspects of these articles. By exploring some subtle and not-so-subtle costs of reparations, as well as a range of possible benefits, Professors Iijima, Westley and Yamamoto have called upon us to raise our eyes above the reports of appellate decisions. We can and should enlarge our perspective beyond the supposed rugged individualism that remains central to most American legal discourse. In so doing, all three scholars have done us a great service, though they have not freed us of responsibility.

C. *"Justice is a mode of action, righteousness a quality of the person."*<sup>24</sup>

It is well known that the Supreme Court struggled mightily in the 1950s to determine what might be constitutionally wrong with segregation in the public schools. What the Justices should say and do about the long-standing, pervasive evil of segregation seemed hardly self-evident. That the Court itself was implicated directly through its legitimization of the rise of Jim Crow and the stranglehold of racism compounded the problem. The strikingly vague reach and limits of *Brown v. Board of Education*<sup>25</sup>—and of the desegregation decisions that followed—is quite familiar. Less often noticed, however, is the way the Court supported its claim that it would be "unthinkable" to have one

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water imagery in his Fifth of July Speech as he warned of the terrible consequences to the United States were justice not done:

There is consolation in the thought that America is young. Great streams are not easily turned from channels, worn deep in the course of ages. They may sometimes rise in quiet and stately majesty, and inundate the land, refreshing and fertilizing the earth with their mysterious properties. They may also rise in wrath and fury, and bear away, on their angry waves, the accumulated wealth of years of toil and hardship. They, however, gradually flow back to the same old channel, and flow on as serenely as ever. But, while the river may not be turned aside, it may dry up, and leave nothing behind but the withered branch, and the unsightly rock, to howl in abyss-sweeping wind, the sad tale of departed glory. As with rivers so with nations.

McFEELY, *supra* note 18, at 173.

<sup>24</sup> ABRAHAM J. HESCHEL, *THE PROPHETS* 201 (1969).

<sup>25</sup> 347 U.S. 483 (1954). The Court proclaimed implementation "with all deliberate speed" the following year, *Brown v. Board of Education II*, 349 U.S. 294, 301 (1955), and, of course, Americans have been battling over desegregation and the relative color-blindness of the Constitution ever since.

rule about equality for the states and another for the federal government. When Chief Justice Earl Warren tried to explain why Washington, D.C. could not maintain racially segregated public schools once *Brown* was decided, he identified “our American ideal of fairness” as the source for both equal protection and due process.<sup>26</sup> It is instructive, albeit hardly surprising, that such an explicit concept of fairness—perhaps partially the product of Warren’s personal guilt over his own involvement in the internment tragedy—has not played a significant role in constitutional law since 1954.

Dissenting in *Romer v. Evans*, for example, Justice Scalia excoriated the majority for its “heavy reliance upon principles of righteousness rather than judicial holdings.”<sup>27</sup> This presumed disjunction between righteousness and the activity of judges is both commonplace and telling. Justice Scalia bitterly remonstrated about the “terminal silliness” of the majority’s holding that a state may not deny legal protection to a group because it is disfavored.<sup>28</sup> Actually, however, *Romer* recognized something crucial when the majority proclaimed: “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”<sup>29</sup> Denial of legal protection is itself injustice. This is so even without a clear benchmark. In the context of past inequities, moreover, acts of active righteousness are particularly necessary even to begin to provide redress. Juster justice for all demands nothing less from all of us.

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<sup>26</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Warren stated for the unanimous Court: The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

*Id.*

<sup>27</sup> 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (criticizing Court’s invalidation of Colorado constitutional amendment that prohibited all state and local government protection “based on homosexual, lesbian, or bisexual orientation”). The first line of Scalia’s unbridled *cri de coeur* is the memorable charge: “The Court has mistaken a Kulturkampf for a fit of spite.” *Id.* Beyond the unfortunate connotations of this beginning, the remainder of the dissent is startling for its acerbic passion. Observing that Chief Justice Rehnquist and Justice Thomas joined Scalia’s opinion and presumably tempered it somewhat, my student, David McCay, asked, “What did the first draft look like?”

<sup>28</sup> *Id.* at 639.

<sup>29</sup> *Id.* at 633.

Aristotle defined equity as follows: "This is the essential nature of the equitable: it is rectification of law where law is defective because of its generality."<sup>30</sup> What is at stake in reparations claims, as well as in related restorative justice efforts, is significantly different from the Aristotelian prescription. The key distinction may be that reparations claims usually seem anchored in perceived defects in law when law is not general enough.

Another problem inherent in relying on traditional legal processes is that the standard insistence on treating like cases alike tends to miss entirely the suffering brought about by extraordinary wrongdoing. This is the case whether the evil is banal, deep-seated or the product of either private or public collective violence. Moreover, a legal system that simply balances interests may prove too ready to accept any justification that seems reasonable—even when a statement of benign ends masks horrific means or balances away fundamental human dignity.

It may be expecting too much of judges and of a regular legal system to begin to make amends for drastic wrongs. It may also be asking too much of popularly-elected officials in other branches of government to attempt to afford justice to those who have suffered grievous wrongs in the past. Excessive focus on what ends are just tends to diminish attention to mundane, everyday needs. And the ability to heed nuances and to look beyond the anecdotal is hardly a strength of the legislative and executive branches with which we are familiar. It is unclear, therefore, to what, if any, institution we should address the petitions for redress of past wrongs.

Ultimately, it may be that the only way to begin to achieve justice is to try to act righteously in the particularities of everyday life. This helps explain why there is such power in Professor Iijima's riveting account of his father's medals, earned in service for the fabled 442nd Regimental Combat Team in World War II, and of his father's understanding of the need to fight for the rights of others during peacetime. Doing the right thing because it is the right thing to do is a common motif within the remarkable stories of those who sheltered Jews during World War II despite extraordinary personal risk.<sup>31</sup> As Martha Minow

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<sup>30</sup> AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW BEYOND EQUITY: HALAKHIC ASPIRATIONISM IN JEWISH CIVIL LAW xxiv (1991) (quoting Aristotle).

<sup>31</sup> See, e.g., ENRICO DEAGLIO, THE BANALITY OF GOODNESS: THE STORY OF GIORGIO PERLASCA (Gregory Conti trans., Notre Dame Press 1998); PHILIP PAUL HALLIE, LEST INNOCENT BLOOD BE SHED: THE STORY OF THE VILLAGE OF LE CHAMBON, AND HOW GOODNESS HAPPENED THERE (1979).

describes it, "[a]ffirming common humanity does not mean turning the other cheek or forgetting what happened."<sup>32</sup> Yet, too much remembering may also be dangerous. The repeated, gruesome violence in the former Yugoslavia exemplifies how intense, unresolved memories of past wrongs can fester and then explode. Nonetheless, affirmation of common humanity both in everyday life and in, at the least, symbolic public discourse concerning the past may be the necessary preconditions for the genuine redress of grievances, and for making halting steps toward progress.

### CONCLUSION

It remains striking how discussions of redress for past wrongs tend to reflect the particular background of the person trying to make a specific point or claim. Hardly immune, I thus think in terms of *tikkun olam* ("repair of the world")—a remarkable concept that is much in vogue in contemporary Jewish thought. Often, *tikkun olam* is invoked as a kind of traditional shorthand for the ongoing commitment to social justice. Yet the commitment to *tikkun olam* is hardly untroubled. One basic question, for example, revolves around how particular or universal this Jewish social justice commitment ought to be.<sup>33</sup> Another issue involves the extent of human agency in getting the world into a state of disrepair in the past or in being able to help mend the effects of our human ways for the present and future. Of course, such concerns are hardly unique to Jews. Yet, unsurprisingly, I find cogency and force in Rabbi Abraham Joshua Heschel's observations that "[t]he opposite of freedom is not determinism, but hardness of heart . . ."<sup>34</sup> and that "[t]he demand is not only to respect justice in the sense of abstaining from doing injustice, but also to strive for it, to pursue it."<sup>35</sup>

A repeated refrain in the Talmud is that: "Man must act beyond the rule of law."<sup>36</sup> Indeed, it is often acknowledged that one may be a scoundrel—or even worse—while remaining within the boundaries of the Torah, of the law. For individuals, as for groups and for governments, an inescapable challenge within a world full of wrongdoing is how to affirm common humanity alongside the demands of the law. It

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<sup>32</sup> MINOW, *supra* note 6, at 146.

<sup>33</sup> See generally *TIKKUN OLAM: SOCIAL RESPONSIBILITY IN JEWISH THOUGHT AND LAW* (David Shatz et al. eds., 1997).

<sup>34</sup> HESCHEL, *supra* note 24, at 191.

<sup>35</sup> *Id.* at 207.

<sup>36</sup> KIRSCHENBAUM, *supra* note 30; MOSHE SILBERG, *TALMUDIC LAW AND THE MODERN STATE* 61–130 (Marvin S. Wiener ed. & Ben Zion Bokser trans., Burning Bush Press 1973); Saul Berman, *Law and Morality*, in *THE PRINCIPLES OF JEWISH LAW* 153 (Menachem Elon ed., 1975).

may be that righteousness can only be reached through law's justice. Yet, paradoxically, it may also be the case that justice can never be accomplished without the pursuit of righteousness, actively sought and lived within the quotidian jurisdictions of the soul.

Martha Minow wisely articulates the essence of the daunting task that these three articles eloquently assign to us all. The challenge, she says, is to discover "the path of recollection and affirmation and the path of facing who we are, and what we would become."<sup>37</sup> Or, as Martin Luther King, Jr. put the point, "[i]n the process of gaining our rightful place we must not be guilty of wrongful deeds."<sup>38</sup> In fact, there may be no righteous ends—only righteous means. Even without clear benchmarks, substantial redress still has its claims. We must attend to that principle if we ever hope to make progress toward the remarkable old promise of reciprocal freedom.

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<sup>37</sup> MINOW, *supra* note 6, at 147.

<sup>38</sup> King, *supra* note 11, at 262.

