

Roundtable on the Future of Justice Policy

Examining Criminalization, Punitive Excess and the Courts in the United States: Implications for Justice Policy and Practice

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Recognition, Reparation, and the Reconstruction of 'Square One'

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"History is not the past. It is the present."

– James Baldwin

Introduction: The Palimpsest Problem

The concept of a "Square One" in societal organization is a curious thing, and challenging analytic, particularly from the vantage of our embodiment of the past. This is an important problem to consider within the organizing query of the Square One Project, which asks: "if we start over from 'square one,' how would justice policy be different?" Even if the phrase is not meant literally, the project like much of the polity envisions a new starting point, where social policy and practice might turn in a more equitable and inclusive direction. Yet we must grapple with what this restarting point is, in a sociological rather than political sense, and how the present moment can reasonably be conceived as an opportunity to start over.

In this essay, which focuses on the potential future of racial justice, I consider the palimpsest problem central to the idea of Square One, where this restarting point remains an overlay on what has come before, with visible traces of the past remaining present. As we surely cannot literally recreate or return to societal Square One, since we can neither undo definitive American histories of settler colonialism, genocide, enslavement, apartheid, and mass imprisonment, nor easily escape their haunting shadows in contemporary social relations, we must instead recognize and address this presence of the past, employing it as a light to better conceptualize, build, and sustain a just future.¹

In this sense, the *Square One Project* offers an important site of democratic deliberation over the scope and terms of a potentially *transformative* transitional justice process (Gready and Robins 2014). The project arises at an historically familiar cross-road, a moment of national reflection on the past, present and future of social (in)justice. We have been here before, of course, and failed to make the turn toward an open society substantively organized by mutual respect, equality of opportunity, and protection in law. Though such opportunities have typically been lost, often sabotaged or otherwise squandered, they remain vital to articulating, building, and maintaining the society we want for ourselves and generations to come.

Forks in the Road

The Square One Project imagines societal reconstruction, and attending to legacies of historical racial violence will be critical to achieving this sustainable vision and practice of equal justice. As Danielle Sered (2019, p.

¹ I borrow here from the framing of the recent international conference on transitional justice, *The Light and Shadow Trauma: Recognition, Reparation, Reconciliation*, held December 5-9, 2018, at Stellenbosch University, Cape Town, South Africa.

251) writes in *Until We Reckon*, “[we’ll] be tempted to look only forward because what is behind us is so hard to face,” but failure to confront this difficult past will deprive us of transformative change, as it has so often before.

These are great challenges, but they are not new, nor is the sense that an opportunity for transformative justice might again be near. Contradictions of American democratic proclamations, including the unjust rule of law and flaunting of vaunted freedoms have long been clear to see, and have always been contested. This historical pattern includes a relatively constant longing for transformative social change, a cyclical sense that this new day draws near, and finally, lament over opportunity lost, resetting the routine. Even before white settler colonialism took firm root as the orienting principle of these lands, rationalizing genocide, enslavement, and an explicitly white democracy, the people faced a similar choice of whether to institutionalize freedom and equality, or exploitation and exclusion. W.E.B. Du Bois (1998, p. 6) wrote of this early period of American history that, “The opportunity for real and new democracy in America was broad,” as investments in liberty were substantial, and the choice of white racial tyranny was not a foregone conclusion. That opportunity was lost.

Centuries later, the nation came to a similar fork in the mid-to-late 1800s, where brief interludes of emancipation and reconstruction would turn out to merely bridge eras of chattel slavery and reconstituted apartheid. Then too, questions of ambition and organization of social change were paramount. Radical abolitionists warned in the 1840s that the nation could not easily transition from a society built on enslavement to one respecting freedom. The U.S. Constitution, which Garrisonians called a “covenant with death,” would have to be reconstructed, having been explicitly designed as a bulwark of racial slavery, rationalizing and institutionalizing America’s democratic contradictions. Instead, the Constitution was merely amended, and, as Eva Duvarney’s film *13th* dramatically portrays, continued to facilitate racist exploitation and exclusion, including black codes, convict leasing and more contemporary regimes of racialized social control.

At each turn, the nation has proved unwilling to reconstruct law and society to a truly transformative extent. Rather than prioritize or fashion that “Square One” where a genuinely open society might grow anew there has been opting instead for more reformist transitions, limited in commitments to equal opportunity and protection, with predictable results. Several of my black ancestors lived in Wilmington, North Carolina in the 1880s, a place that was for a fleeting moment regarded as the most progressive city in the post-Emancipation South, owing to its integrated neighborhoods and relative economic and political equality. These ancestors owned their own businesses and considerable property in Wilmington. They held public offices, serving in the state legislature and municipal government, including fire and police services, and were leaders in city schools. That experiment in racial democracy ended violently in 1898 when black political and economic competition enflamed white rage, leading to a racial massacre and coup whose legacies linger. Uncommitted as they were to radical reconstruction, state and federal government turned a blind eye to the atrocities, enabling coup conspirators to remove the democratically-elected government, installing their leader as mayor, and many of the paramilitaries who had carried out the massacre as a new city police force (Prather 1984). Their racial terror would continue, now under the color of law, contributing to legal estrangement (Bell 2016) and cynicism that endure still today. What was for a brief slice in time the most progressive southern city was thus rebranded the capital of white supremacy, inspiring a reign of racial terror and Jim Crow over the ensuing half century and more.

We blew past another fork in the road during and after WWII, where the fight against fascism abroad cast a critical light on American racial tyranny. The “Double V” campaign of black soldiers – demanding victory abroad and at home – envisioned a democratic transition that was not to come, including in policing and other realms of the American legal system. One of the demands then, as now, was representative systems of social control, which required a dismantling of the white supremacist legal system built on the ashes of Reconstruction. “To extinguish the memories of black jurors, judges, police and legislators during Reconstruction was to make clear the

undisputed and permanent authority of whites,” Leon Litwack (1998) writes. In the subsequent build-out of American Apartheid, “The entire machinery of justice—the lawyers, the judges, the juries, the legal profession, the police—was assigned a pivotal role in enforcing these imperatives . . . underscoring in every possible way the subordination of black men and women of all classes and ages” (249). Many city police forces only began to reintroduce non-white officers in the aftermath of World War II, yet these officers were incorporated in ways which reflected and reinforced the entrenched white supremacist political system (Dulaney 1996), or the imprint of the past. Black soldiers were particular targets of white supremacist violence, given the distinct threat and outrage of their status, coupled with their emboldened challenges to American apartheid (Burnham 2015). That history still rings, ironically and traumatically, amid contemporary complaints that anti-racist protests – such as kneeling during the national anthem – disrespect “our troops.”

Freedom movements of the middle-20th century forged another fork in the old road of American history, again drawing scrutiny to racist police violence and otherwise undemocratic policing. There were familiar calls to end police occupation of poor communities, dismantle the police state, extend and enforce Constitutional rights to due process and equal protection, and otherwise increase the democratic accountability of government. Despite important legal gains, these were soon overshadowed by racialized wars on crime and drugs, with poor youth of color defined as enemies within. As a high school student in Los Angeles in the late 1980s I grew used to the harassment and threats of police authorities, who routinely used a pretext of “gang investigation” to train their guns on us, to physically and verbally abuse us, and to deprive us of constitutional rights no one seemed to take serious, notwithstanding all of the progress promised over the preceding century, at all those earlier crossroads.

If the past is prelude, prospects for truly transformative change look dim still today. Yet we are in a unique historical moment in terms strategies and resources. Technological and other changes have created new forms of political capital – such as camera footage more challenging to white norms of willful ignorance, and coordinated protest actions spanning virtual and physical space, and grievance areas, fueling movement alliances and pressures which did not exist in earlier moments I have mentioned (e.g., resisting “Toxic prisons”). There are also new ideas, including growing and compelling calls for a society *without* police or prisons, born of recognition that police often violently escalate situations, especially in encounters with non-white and otherwise marginalized populations, and that there are better options to social problem solving than policing or imprisonment. This latest wave of critical analysis and political mobilization has clearly pushed us to this point of reckoning, another fork in the road of our national story, where the plot just might turn toward a realization racial justice, or so we want to believe.

Square One is Haunted Ground

The living history of racial violence, or the problem of the presence of the past, is perhaps the greatest challenge to the concept of “Square One.” Racist violence has been perpetrated regularly under the color of law, typically with civil and criminal impunity for its perpetrators, the aiding and abetting of legislators and executives, and the willful ignorance and indifference, explicit endorsement, and active involvement of the polity. Besides the spectacular violence of police and vigilante killings there is the subtler state violence of criminalization and incarceration, dispossession and dislocation, including deportation, which has played out over centuries, exacting immeasurable economic, political, and cultural tolls on generations of Americans. Even if this were all to end today, this toll would remain unresolved, lingering as the haunting shadow of historical racial violence.

Long histories of racialized violence affecting Native American, black, Latino, Asian and Pacific Islander populations are not merely losses of well-being, opportunity or standing for immediately impacted populations, but conveyed inter-generationally as inheritances of historical trauma and dispossession. Further, these harms have

correspondingly advantaged generations of white Americans, materially and otherwise, in what amounts to a continuous transaction, often through extraction, congealing in the structural and cultural sinew of “durable inequality” (Tilly 1999). This matrix of social opportunity and closure, of white opportunity hoarding and accumulation reliant on disinvestment and disaccumulation, is not bound by the present borders of the United States. Rather, these relations of extraction must ultimately be viewed from a transnational perspective, in the relationship between the global south and north, for instance, and in relation to the formation of the U.S. nation-state itself, within a much larger racist world system. If not always plain to see, mechanisms and legacies of these relations of racial dominance continue to circulate the globe, and it is questionable whether the U.S. can transform justice policy and practice without corresponding changes in this inter-connected world system.

Setting that global question aside, and recalling Frederick Douglass’ 1852 speech reflecting critically on the meaning of American Independence Day to the enslaved (Foner 1999), we might productively ask, “what to the black or brown American is Square One?” The answer is clearly complicated by centuries of racialized violence – direct, cultural, and structural – which remain bound up with group identities, experiences and prospects today. As Saidya Hartman (2007, p. 6) writes, reflecting on legacies of enslavement,

“Slavery established a measure of man and a ranking of life and worth that has yet to be undone. If slavery persists as an issue in the political life of black America, it is not because of an antiquarian obsession with bygone days or the burden of a too-long memory, but because black lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago. This is the afterlife of slavery--skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment.

This entrenched racial calculus and its peril does not originate the era of enslavement alone, but draws on other atrocities rooted in our national history as a white settler society, and its intergenerational impacts continue.

There is a broad and deep body of scholarly work charting these intergenerational impacts of historical racial violence, demonstrating their continued presence. In *City of Inmates*, for example, historian Kylie Hernandez (2017) traces historical linkages between the white racial project of conquest, rationalized as Manifest Destiny, and a series of “eliminatory” measures on lands reconstructed as California, including ethnic cleansing, settlement through displacement, and mass imprisonment. Monica Martinez (2018) traces similar histories and legacies of injustice in *The Injustice Never Leaves You*, showing how atrocities of the Texas Rangers (e.g., massacres and dispossession), and subsequent denials of recognition and recourse by politicians, courts, historians, and journalists, sustain the traumatic stress of this state violence for descendants in the region. Similar research examining historical trauma in American Indian and Black community contexts, such as genocide and forced relocation, suggests its legacies are literally embodied by descendants, contributing to health disparities, loss of collective efficacy, and other adverse outcomes (Walter et al., 2011; Fullilove, 2016).

Further illustrating this problem of the imprint of the past, and suggesting social ecological dimensions of embodied trauma, a series of empirical analyses similarly report that histories of genocide, enslavement, lynching, and other race-based violence and repression correspond with heightened conflict, violence, and inequality in the same places today (see Ward 2016). Scholars have shown that racial animus and political conservatism are consistently heightened among whites living in U.S. counties with more pronounced histories of enslavement, in comparison to whites in neighboring counties, historically and today (Acharya et al., 2016). Similarly, scholars have shown that contemporary support for punitive crime policy (Stewart et al.), including capital punishment (Messner et al., 2006), is greater among white Americans in counties marked by histories of lynching, net of other factors. Area histories of enslavement and lynching correspond with many other contemporary patterns of conflict, violence, and inequality, as well, including black victim homicide rates (Messner et al., 2005; Petersen and Ward,

2015), hate crime (King et al., 2009), white supremacist mobilization (Durso and Jacobs, 2013; McVeigh and Cunningham, 2012), heart disease mortality (Kramer et al., 2017), infant death rates (Krieger et al., 2013), and the use of corporal punishment in public schools (Ward et al., n.d.). There is urgent need for greater recognition of these legacies and reparative interventions that might break observed cycles of repetition. These are problems of reconstruction for Square One, as embodiments of past injustice – including person and place-based toxic stress – pose substantial obstacles to starting over in justice policy and practice.

Reckoning with Whiteness

Histories of racial violence and their legacies have always been countered through resistance (Hernandez, 2017; Martinez, 2018; Ward, 2016), and there is evidence continued harms may be significantly attenuated by collective action that impedes temporal transmission of underlying racist schemas (Gabriel and Tolnay 2017). If we are to embark on a new direction in justice policy it seems particularly important that this moment of national reckoning take stock of and address the historical significance of racial violence – of settler colonialism and genocide, enslavement and racial terror, hyper-segregation and mass incarceration – for *white* populations. What Hartman (2008) called the “racist ranking of human worth” (see also Young 2011; Mills 2014) continues to trivialize black and other lives relative to those of whites. The Black Lives Matter (BLM) movement and reactionary opposition to it are illustrative here. Opposition to the trivialization of Black lives (i.e., BLM) has been met with considerable resentment, and one of the more durable challenges counters that blue (police) lives matter more. This weighting of racially-defined lives, including equations between police and anti-blackness, and even whiteness itself, which I return to further below, is a critical challenge for the Square One agenda. To turn away from a history of justice policy and practice in the service of white racial dominance, and associated anxieties and entitlements of white supremacy (whether explicit or implicit), interventions cannot focus on the circumstances and interests of nonwhite population alone; we must reckon with the Square One problem of whiteness.

We might broadly conceive of the Square One challenge, therefore, as abolishing the “Racial Contract” (Mills 2014), that racially violent ‘rider’ on the social contract defining whites alone as full-persons, entitled to its provisions of trust and cooperation. We cannot reasonably envision a new direction in justice policy without an end to this privileging of white bodies and their putative interests. Reconstructing Square One requires disabusing white Americans of a clearly deep-seated if often unconscious sense of their being “masters of national space” (Calavita 2007), constantly threatened, and deserving of their social dominance. This identity and associated roll play, rooted in noted histories of white settler colonialism, and manifest in slave patrols, white citizens councils, all-white police forces, juries, and court and legislative bodies, to name a few forms, has recently been animated by the likes of “Barbeque Becky” and “Permit Patty,” whose individualized and playful memes distort the historically persistent threat of collective racist actions (Jerkins 2018; Farzan 2018).

It will be incredibly challenging to center these problems of whiteness in reimagining justice policy, given routine denials that they exist. Political philosopher Charles Mills (2014) argues that moral and political dimensions of *The Racial Contract*, wherein nonwhites are diminished relative to whites in terms of their moral and political standing, are facilitated by an epistemological dimension, involving “agreement to misinterpret the world.” He explains,

“...white misunderstanding, misrepresentation, evasion and self-deception on matters related to race are among the most pervasive mental phenomena of the past few hundred years, a cognitive and moral economy psychically required for conquest, colonization, and enslavement.” (19)

This problem of “motivated ignorance” (Hayward 2017) has to be anticipated and overcome in reckoning with injustices of whiteness central to Square One, given its historically longstanding role in obstructing movements for freedom and equality, and rationalizing racism.

Vitriolic retorts to the anti-racist recalibration claim that “Black Lives Matter” are again instructive here. Rejoinders to BLM protests, including that Blue Lives Matter (more, or instead, it would seem), belie an oppositional and relational orientation to the valuation of black life. The demand of equal regard for black life registers as a threat to, or unjust imposition upon, racially-defined others, within our political culture. This zero-sum orientation toward white standing (where white freedom is equated with dominance) is clearly evident, historically and today (Norton and Sommers 2011).

Juxtapositions of Black and police lives are particularly important in the context of the Square One Project, and relevant here, as they draw to the case of policing noted abolitionist warnings that the Constitution cannot be revised to ensure freedom and equality but must be reconstructed instead. Is American policing a “covenant” with black death? Can American policing be *reformed* when explicitly and implicitly understood to prioritize services to and protection of white society? If policing has long been integrated with white nationalism in the United States, and continues to be today (e.g., blue lives are not Black), what is Square One in police policy, or police-community relations?

An extreme but telling example of this enduring association is the present production and appeal of a “Thin Blue Line” rendering of the battle flag of the Confederate States of America (Fig. 1). One store pitches the flag as a great way to “Back the Blue,” encouraging its (presumably white) customers to “support Southern police,” adding that this best-seller “Makes a perfect gift for your favorite peace officer” (Hawkins, 2019). The flag design explicitly trades in the white supremacist politics of the Confederacy, wielding these in opposition to an existential threat in the Movement for Black Lives. Indeed, consumers on another site commented on utilities of the flag itself in their fantasies of white conquest, and expressions of identity. A reviewer named KKKsupporter comments that the flag is, “great choking supply for BLM scum.” Another named Racistguy writes, “I mean, how are people going to know that I support white supremacy and police brutality against minorities without a flag? Oh yeah, my Trump bumper sticker does it. But a flag is nice” (Rebel Nation, 2019).

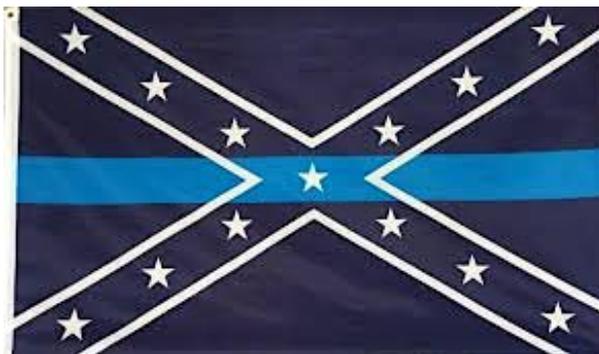


Fig. 1. Confederate Blue Line Flag. Source: Hawkins, 2019.

There are myriad examples of the relationship between white supremacy and policing, historically and today, including police themselves engaged in white supremacist violence, or withholding protection from white supremacist threats (Ward 2018). These relationships are not limited to police officers, of course, but may involve any formal and informal operative of (criminal) social control. A formerly incarcerated student recently shared with me that he was incarcerated in a midwestern state prison when President Obama was elected to office. He explained that

although he had not been able to vote, he and other black prisoners responded with joy to the news of the outcome of the national election. That celebration was construed by generally white conservative prison guards as, “causing a disturbance,” who further abused their incredible discretion by placing Obama celebrants in solitary confinement. As recent revelations of police corruption rooted in alliances with white nationalists illustrate (Suebsaeng 2015; Levin 2018), white supremacy continues to course through the veins of U.S. legal and law enforcement institutions, limiting the prospects of starting over from Square One, or perhaps, keeping us where we began.

The Square One problem of whiteness is not only the long history of associated racist violence, and its legacy today, but that anti-racist policy will be framed and countered as “anti-white” measures, rational interests be damned. Many white Americans remain unwilling to relinquish a social status and perceived advantages rooted in non-white subordination and disadvantage (Norton and Summers 2011), even as this sustained “covenant with death” – manifesting as educational divestment, limited healthcare access, increased gun ownership and lethal gun violence – yields a growing toll of Americans “dying of whiteness” (Metzl 2019).

The ‘Brownfields’ of Square One

Whereas problems of justice are often framed in relation to policing, courts, and prisons, it is clear from a substantial body of work that these systems interface with numerous other sites of punitive excess (e.g., labor markets, schools, and environment), historically and today. This complex array struck me while participating in a dialogue in Birmingham, Alabama, where police and community leaders gathered to discuss how that city might reconcile its long and traumatic history of racist police violence, and the role of police in denials of human and civil rights. The aim of the conversation was police-community “reconciliation,” a term related to the mirage of Square One, alluding to a prior conciliatory relation that has never really existed. Yet it is surely the case that many people in that community were invested in more legitimate and democratic policing, most of all for its apparent promise to improve the quality of life (incl. public safety), increase trust and cooperation, and enhance group (incl. youth) prospects, in part by lessening the intensity and toll of racialized criminalization and control. This determination to institutionalize and routinely experience equal opportunity and protection under law raises a vast complex of cultural and institutional forces, ranging from the various branches of government, to the endogenous determinations of legal meaning in everyday life; municipal policing would be a start, but even this impact would be limited by the narrow way we tend to conceive of law enforcement roles, or public safety personnel.

At the meeting I became fixated on the reality that improving police-community relations, or emptying prisons, or revising criminal codes, would be unlikely to stop the cascade of punitive excess. I have already stressed the more complex and compounding array of injustice this better future would have to negate, not only in the sense of a cessation, but in terms of the already embodied trauma we must also somehow resolve. There are other tributaries as well, including the punishing toll of environmental racism, a problem of public safety reflecting the injustice of under-protection in law, policy, and practice.

Square One is not only figuratively contaminated by past use, but often literally a “Brownfield,” with complex justice implications.² Before heading to Alabama I scanned the recent news, hoping to get some bearings on the kinds of issues local residents and police might be working through. I was struck by this headline, “On a hot day, it’s horrific: Alabama kicks up a stink over shipments of New York poo.” Indeed, human waste from New York and New Jersey, no longer permitted to be dumped into the rivers and sea, was instead being shipped to hazardous waste sites in Alabama. The state has become a leading recipient of various types of toxic waste (Milman

² Brownfields are pieces of land where future use is affected by their real or perceived environmental contamination by past users.

2018). One of the largest of these sites is in the black settlement of Uniontown, AL, where the population is nearly ninety percent black, the median income is less than \$14,000 per year, and where garbage from thirty-three states is dumped, along with four million tons of coal ash generated from a coal mine in a ninety-percent white community in Tennessee (Lombardi 2015).

The Uniontown landfill occupies a former plantation, around which generations of enslaved people were buried in unmarked graves, and now under this hazardous waste. “If this had been a rich, white neighborhood, the landfill would never have gotten here,” one black resident protested, noting that a county commission had continuously granted permits to the site over the objections of black Uniontown residents. This complainant, whose sharecropper and enslaved ancestors toiled on local plantations, reasoned the punishing waste was located there because state and county officials who are tasked with policing these sorts of threats to public safety, “knew we couldn’t fight back” (Lombardi 2015). This is but one of the many disproportionately poor and nonwhite populations residing amidst stewes of “toxic oppression and oppressive toxins” across the U.S. (Bergman 2019), including scores of prisoners and workers toiling in “toxic prisons,” or penal institutions sited in areas of environmental contamination (Russell 2016).

Communities are fighting back, opposing additional exposure, and challenging that punishing decisions to selectively expose them to hazardous waste violate civil rights law. Meanwhile, residents in Uniontown and similar places accumulate a number of adverse health effects and associated costs of this environment of racism (e.g., in cognitive development, chronic illness, present and future education and employment outcomes), many of which correlated with criminal justice system contact. The ordeal signals the vast scale of the Square One problem, where a complex circulatory system of historical and contemporary injustice – histories of enslavement and other exploitation, of lynching and other racial terror, of hyper segregation, surveillance, criminalization, and control – course through human and social bodies, keeping the “covenant with death.” This historical system of recirculated racial violence, sustaining cycles of racial violence, conflict, and inequality, poses an incredible challenge of reconstruction, if justice policy and practice are indeed to take root in a new Square One.

Conclusion: Reconstructing Square One

The Square One Project is a crucial contributor to dialogic and other aspects of transformative justice, but also an incredible undertaking, given the inescapable presence of the past. Delusions and falsehoods are certain obstacles to truly transformative change. I am reminded of a recent interaction where, after learning that I work on problems of racial justice, a retired white executive in Manhattan turned to me and asked, earnestly, “is there *really* bias in the criminal justice system?” During the last presidential election, the democratic candidate surprised me with her claim that we must “restore trust between police and black communities,” as if it was once widespread. Former President Obama also perpetuated the illusion, declaring a few years ago that “our systems for maintaining the peace and our criminal justice systems generally work, *except for this huge swath of the population that is incarcerated at rates that are unprecedented in world history*” (emphasis added, cite). This incredible and telling exception to a claim that all is well otherwise not only downplayed the punitive excess of mass incarceration but ignored problems of impunity for economic and political elites.

Such delusions and falsehoods prevent the transformation of political culture we can only achieve through truth-telling, and by building new norms and institutions on the foundations of those truths. This foundation of truth and reconciliation would provide the closest possible approximation of Square One, and the only realistic basis for a future of social justice. As Ta-Nehisi Coates (2014) observed in *The Case for Reparations*, the norms and compounding harms of injustices accumulated over generations of American history mean, “we must imagine a new country.” Channeling Garrisonian calls to rewrite the Constitution and reimagine the American Union over a

century earlier, Coates (2014) stresses that we cannot define and institutionalize a new idea and practice of justice, through which populations actually enjoy equality of opportunity and protection, without acknowledging and addressing these legacies. “Reparations – [or] the full acceptance of our collective biography and its consequences,” he writes, “is the price we must pay to see ourselves squarely” (Coates 2014).

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