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Apartheid and Jim Crow: Drawing Lessons from South Africa's Truth and Reconciliation

*Benjamin Zinkel**

I. INTRODUCTION

South Africa and the United States are separated geographically, ethnically, and culturally. On the surface, these two nations appear very different. Both nations are separated by nearly 9,000 miles¹, South Africa is a new democracy, while the United States was established over two hundred years² ago, the two nations have very different climates, and the United States is much larger both in population and geography.³ However, South Africa and the United States share similar origins and histories. Both nations have culturally and ethnically diverse populations. Both South Africa and the United States were founded by colonists, and both nations instituted slavery.⁴ In the twentieth century, both nations discriminated against non-white citizens. South Africa implemented a series of legislation and institutionalized segregation named “apartheid,” and the United States implemented similar measures through “Jim Crow” laws.⁵ Both institutions were designed to segregate and disenfranchise the non-white population.

When apartheid ended in 1994, the South African government attempted to heal the open wounds of apartheid by establishing the Truth and Reconciliation Commission (TRC).⁶ The TRC was established in the interest of full disclosure. The goal of the TRC was to inform the citizens of South Africa of the atrocities

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1. *Distance from United States to South Africa*, DISTANCE FROM TO (2018), <https://www.distance-fromto.net/distance-from-united-states-to-south-africa>.

2. *See South Africa- First 20 Years of Democracy (1994-2014)*, S. AFR. HIST. ONLINE (Jan. 14, 2014), <http://www.sahistory.org.za/article/south-africa-first-20-years-democracy-1994-2014>. *See also U.S. History and Historical Documents*, USA.GOV (March 21, 2018), <https://www.usa.gov/history>.

3. *See Geography and Climate*, S. AFR. GOV'T (2018), <https://www.gov.za/about-sa/geography-and-climate>; *see also United States of America Weather*, WORLD ATLAS (Apr. 7, 2017), <https://www.worldatlas.com/webimage/countrys/namerica/usstates/usweather.htm>.

4. *Pre-Colonial History of Southern Africa*, S. AFR. HIST. ONLINE (Mar. 21, 2011), <http://www.sahistory.org.za/article/pre-colonial-history-southern-africa>; *Slavery in the United States: A Brief History*, AM. BATTLEFIELD TR., <https://www.civilwar.org/learn/articles/slavery-united-states> (last visited Oct. 5, 2018).

5. *A History of Apartheid in South Africa*, S. AFR. HIST. ONLINE (May 6, 2016), <http://www.sahistory.org.za/article/history-apartheid-south-africa>; *A Brief History of Jim Crow*, CONST. RTS. FOUND., <http://www.crf-usa.org/black-history-month/a-brief-history-of-jim-crow> (last visited Oct. 5, 2018).

6. *Truth and Reconciliation Commission (TRC)*, S. AFR. HIST. ONLINE (Mar. 21, 2011), <http://www.sahistory.org.za/topic/truth-and-reconciliation-commission-trc>.

committed during apartheid and learn from the mistakes of the past.⁷ Both witnesses and perpetrators of human rights violations were invited to testify in front of a committee, and if perpetrators gave full disclosure of their crimes, they were granted amnesty.⁸ By implementing the TRC, South Africa attempted to bring a finite end to apartheid.

The United States never had an absolute end to its racial segregation. After the American Civil War, a series of amendments were passed to guarantee the rights of all citizens, regardless of race.⁹ However, this did not stop states from passing Jim Crow legislation that limited the rights of black Americans.¹⁰ From the 1880s to the 1960s, Jim Crow laws spanned the United States and legalized discrimination against and segregation of black Americans.¹¹ In 1964, the United States passed the Civil Rights Act of 1964 in attempt to remedy the toxic culture created by segregation.¹² Although the Civil Rights Act guaranteed equal protection to all Americans, it did not eradicate the hatred and animosity shown by certain groups toward black Americans. Though not as explicit as during Jim Crow, such racism and prejudice still exists in the United States today.¹³ Many people of many races and cultures were affected by Jim Crow¹⁴, and their suffering should not be diminished. However, the scope of this paper will focus on the persecution and continuing discrimination of black Americans before, during, and after Jim Crow.

The United States needs a way to remedy the racism that is still prevalent in its culture.¹⁵ The United States can learn from South Africa and use truth and reconciliation to help heal the wounds of the past. Whether the South African TRC was successful will be addressed later in this paper, but truth and reconciliation can be an effective way to ease racial tensions and resolve disputes in the United States.

II. HISTORY OF SOUTH AFRICA, APARTHEID, AND THE AFTERMATH

A. History of South Africa

The history of South Africa is as rich and dynamic as its citizens. Before European colonization, the area now known as South Africa was a nation consisting of diverse tribes, including the Zulu and Bantu-speaking people.¹⁶ These tribes settled throughout South Africa, with dense populations on the coasts and in the

7. *Id.*

8. *Id.*

9. U.S. CONST. amends. XIII, XIV, XV.

10. See *Examples of Jim Crow Laws*, THE JACKSON SUN, http://orig.jacksonsun.com/civil-rights/sec1_crow_laws.shtml (last visited Oct. 5, 2018).

11. *Id.*

12. *The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, NAT'L ARCHIVES (Apr. 25, 2018), <https://www.archives.gov/education/lessons/civil-rights-act>.

13. See Keesha Gaskins, *Jim Crow Legacy Continues Today*, BRENNAN CTR. FOR JUST. (Apr. 12, 2012), <https://www.brennancenter.org/blog/jim-crow-legacy-continues-today>.

14. See *U.S. v. Bhagat Singh Thind*, 261 U.S. 204 (1923) (rejecting attempts by South East Asians to gain U.S. citizenship); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (ruling that Asian Americans in a Mississippi township had to attend the colored school system); CARLOS KEVIN BLANTON, GEORGE I. SANCHEZ: THE LONG FIGHT FOR MEXICAN AMERICAN INTEGRATION (Yale University Press 2014).

15. Gaskins, *supra* note 13.

16. *Pre-Colonial History of Southern Africa*, *supra* note 4.

Limpopo Valley (located at the junction of South Africa, Botswana, and Zimbabwe).¹⁷

Dutch colonists arrived in South Africa in the mid-seventeenth century.¹⁸ The Dutch East India Trading Company originally established a trade settlement in Cape Town, and the Dutch planned to use the settlement merely as a port for ships sailing to India and Indonesia.¹⁹ Eventually, the Dutch settlement expanded, and the Dutch settlers began farming in the region to support themselves.²⁰ As the colony became more active, the Dutch emigrated slaves from Indonesia to South Africa to handle the additional work load.²¹ The Dutch later used peoples from the Khoikhoi and San tribes as indentured servants.²²

British settlers arrived in the late seventeenth century, and the Dutch colony officially transferred to British sovereignty in 1814.²³ The British put an end to the local slave trade and forced the Dutch out of Cape Town.²⁴ The Dutch-speaking people were forced to move to southwestern regions of South Africa where they established the Boer Republics.²⁵ While the British controlled Cape Town and Eastern South Africa, the Dutch were forced to move westward into Xhosa and Zulu territory.²⁶

Meanwhile, the native populations in South Africa were consolidating and expanding. The Zulu people, a tribe of Western South Africa, organized and established the Zulu kingdom.²⁷ The Zulu king, Shaka kaSenzangakhona, reformed the Zulu military and used it to expand the Zulu kingdom.²⁸ The Zulu kingdom and the Boer Republics expanded into British territory, and several wars were fought for control of the region.²⁹ Ultimately, the British Empire was victorious and exerted its control over the region.³⁰

17. *Id.*

18. *The Dutch Settlement*, S. AFR. HIST. ONLINE (June 30, 2011), <http://www.sahistory.org.za/article/dutch-settlement>.

19. *Id.*

20. *Id.*

21. The people who were brought to Cape Town from Indonesia would later be known as Cape Malays, and later classified as “coloreds” under apartheid. See *History of Slavery and Early Colonisation in South Africa*, S. AFR. HIST. ONLINE (June 2, 2011), <https://www.sahistory.org.za/article/history-slavery-and-early-colonisation-south-africa>.

22. *Id.*

23. *Id.*

24. *Id.*

25. The Editors of Encyclopaedia Britannica, *Great Trek: South African History*, ENCYCLOPAEDIA BRITANNICA ONLINE, <https://www.britannica.com/event/Great-Trek> (last visited Oct. 5, 2018).

26. *Id.*

27. *The Zulu Kingdom and the Colony of Natal*, S. AFR. HIST. ONLINE (Nov. 8, 2011), <http://www.sahistory.org.za/topic/zulu-kingdom-and-colony-natal>.

28. *Id.*

29. The British first fought the Zulu kingdom in the Anglo-Zulu war, then the Boer republics in two Boer wars. The aftermath of these wars resulted in British victory and ultimate control of the region. See *Anglo-Zulu Wars 1879-1896*, S. AFR. HIST. ONLINE (Mar. 21, 2011), <http://www.sahistory.org.za/article/anglo-zulu-wars-1879-1896>. See also *First Anglo Boer War*, S. AFR. HIST. ONLINE (Mar. 21, 2011), <http://www.sahistory.org.za/article/first-anglo-boer-war>; *Second Anglo-Boer War 1899-1902*, S. AFR. HIST. ONLINE (Mar. 21, 2011), <https://www.sahistory.org.za/article/second-anglo-boer-war-1899-1902>.

30. *Id.*

The Union of South Africa was established by the British empire in 1910.³¹ Upon establishment, South Africa was segregated into white and non-white populations. White South Africans were mainly divided into two groups: the Afrikaans³²-speaking Afrikaners of Dutch origin and the English-speaking former British colonials.³³ The non-white population consisted of former Indonesian slaves, Indian slaves and immigrants, and the native peoples of South Africa.³⁴ White Colonists established South Africa as a white nation, and non-white South Africans were given significantly fewer rights than the white colonists who established the nation.³⁵

Several laws were passed that limited the rights of non-white South Africans.³⁶ Two examples of such legislation were the Mines and Works Act and the Natives Land Act. The 1911 Mines and Works Act restricted employment of non-white South Africans to low-paying labor jobs.³⁷ The Mines and Works Act was initially enacted to establish regulations for the mines and works of South Africa.³⁸ Although the act did not explicitly mention discrimination or oppression of non-white South Africans, it did give significant economic power to white South Africans.³⁹ White South Africans used the Mines and Works Act to set a “coloured bar” for employment and seize executive control of the mining industry.⁴⁰

The 1913 Natives Land Act established reservations for non-white South Africans.⁴¹ The Natives Land Act’s structure for land ownership restricted non-white South Africans to 13% of the landmass of South Africa, despite non-white South Africans being a majority of the population.⁴²

When the British founded the nation of South Africa in 1910, it was met with sharp dissent from Afrikaner nationalists, many of whom were former members of the Boer Republics.⁴³ These Afrikaner nationalists founded the National Party (“NP”) in 1914, and the party slowly gained political power throughout World War I and World War II.⁴⁴ The NP was fiercely nationalistic (despite the Dutch being colonizers themselves), and the members of the party opposed anything that was

31. *A History of the South African Constitution 1910-1996*, S. AFR. HIST. ONLINE (Mar. 21, 2011), <https://www.sahistory.org.za/article/history-south-african-constitution-1910-1996>.

32. Afrikaans, also known as Cape Dutch, was originally a Dutch dialect but is now considered a unique language due to its English influences. Irene Thompson, *Afrikaans*, ABOUT WORLD LANGUAGES (Sept. 14, 2017), <http://aboutworldlanguages.com/afrikaans>.

33. *Race and Ethnicity in South Africa*, S. AFR. HIST. ONLINE (Mar. 23, 2015), <http://www.sahistory.org.za/article/race-and-ethnicity-south-africa>.

34. *Id.*

35. *History*, S. AFR. GOV’T, <https://www.gov.za/about-sa/history> (last visited Oct. 5, 2018).

36. See *1856-1910 Masters and Servants Acts*, SOUTH AFRICA HISTORY ONLINE (2018), http://sabctrc.saha.org.za/originals/finalreport/volume1/split/BMvolume1_s1ch13_pg2.pdf.

37. MINES & WORKS ACT 12 OF 1911.

38. Pdraig O’Malley, *1911: Mines and Works Act No 12*, O’MALLEY: THE HEART OF HOPE, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/031v01538/04lv01646/05lv01736.htm> (last visited Oct. 5, 2018).

39. *Id.*

40. *Id.*

41. *The Natives Land Act of 1913*, S. AFR. HIST. ONLINE (Mar. 6, 2013), <http://www.sahistory.org.za/topic/natives-land-act-1913>.

42. *Id.*

43. *National Party (NP)*, S. AFR. HIST. ONLINE (Mar. 30, 2011), <http://www.sahistory.org.za/topic/national-party-np>.

44. *Id.*

not Afrikaans, including non-white South Africans and white British-South Africans.⁴⁵ Following World War I, South Africa fell into an economic depression, and the NP pinned most of the blame on the non-white population.⁴⁶ The NP supported and enforced the discriminatory legislation preceding apartheid.⁴⁷ By the end of World War II, the NP became the ruling party in South Africa, and it began a staunch nationalistic campaign that eventually culminated as apartheid.⁴⁸

B. Apartheid

Apartheid began in 1948.⁴⁹ “apartheid,” which means “apartness” in Afrikaans, created a culture of institutionalized racism in South Africa.⁵⁰ During apartheid, legislation was passed that discriminated against and persecuted the non-white population. The Population Registration Act under apartheid established four ethnic groups: white (white South Africans), black, colored⁵¹, and Indian (non-white South Africans).⁵² The NP passed legislation exclusively in the interest of white South Africans and to the detriment of the non-white population.

Additional legislation was passed that expressly limited rights of non-white South Africans. “Pass laws” were one example of such legislation. Under pass laws, non-white South African citizens were issued identification cards or “passes,” which identified the ethnicity of the holder.⁵³ The passes were used to easily identify non-white South Africans, and holders of passes could neither enter certain businesses, nor travel outside of certain areas in South Africa.⁵⁴ Most businesses during apartheid were owned by white South Africans, and pass laws gave business owners a way to easily identify and refuse service to non-white South Africans.⁵⁵

Another act passed during apartheid was the Reservation of Separate Entities Act of 1953.⁵⁶ This act legalized the segregation of public and private establishments.⁵⁷ Business owners and government entities had the legal right to exclude

45. *Id.*

46. *Id.*

47. *Id.*

48. *National Party (NP)*, *supra* note 43.

49. *A History of Apartheid in South Africa*, *supra* note 5.

50. *Id.*

51. The term “colored” as used under apartheid, differs from the pejorative term used in the United States. South African “coloreds” were merely any non-white citizens of mixed race. Many South Africans today refer to themselves as colored, as the term does not carry the same pejorative context as in the United States. To distinguish coloreds from whites, the South African government would conduct the “pencil test.” During the pencil test, a pencil was pushed through a person’s hair, and the person was then asked to shake their head. If the pencil fell out, the person was classified as white. If the pencil stayed, they were classified as colored. If the person had no hair, the width of the person’s nose was used to determine their ethnic classification. Nosimilo Ndlovu, *The 21st Century Pencil Test*, MAIL & GUARDIAN (May 24, 2008), <https://mg.co.za/article/2008-05-24-the-21st-century-pencil-test>.

52. *Population Registration Act, Act No 30 of 1950*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/archive/population-registration-act%2C-act-no-30-of-1950> (last visited Oct. 5, 2018).

53. *Id.*

54. *Pass Laws in South Africa 1800-1994*, S. AFR. HIST. ONLINE (Mar. 21, 2011), <https://www.sahistory.org.za/article/pass-laws-south-africa-1800-1994>.

55. *Id.*

56. *Reservation of Separate Amenities Act, Act No 49 of 1953*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/archive/reservation-of-separate-amenities-act%2C-act-no-49-of-1953> (last visited Oct. 5, 2018).

57. *Id.*

anybody based on race or skin tone.⁵⁸ This act coincided with pass laws, and citizens of South Africa holding passes were excluded from specific establishments.⁵⁹

Apartheid legislation did not end with passes and segregation. In 1950, the Group Areas Act was passed.⁶⁰ The Group Areas Act allowed the government to limit certain areas of land to occupation and ownership by a single race.⁶¹ This act led to redistricting and removal of many homes. In the 1970s, the South African government forcibly removed over 60,000 people from their homes in the district six region of Cape Town.⁶² District six was a historically working-class area of Cape Town, occupied predominantly by colored people.⁶³ In the 1970s, the apartheid government forced the residents to relocate, then the government razed the land in anticipation of future development.⁶⁴ Significant efforts have been made to restore District Six to its pre-apartheid status as a vibrant neighborhood, but progress has been slow.⁶⁵ The Group Areas Act resulted in racially segregated communities that still exist today.⁶⁶

Non-white South Africans could not own land in white areas during apartheid, and their homesteads were limited to the 13% of land granted by the Natives Land Act.⁶⁷ Due to the Natives Land Act, if a non-white South African wanted to own a home outside of the Native Land Act territories, they needed the guaranty of a white South African.⁶⁸ This guarantor system provided additional means for white South Africans to further segregate the population.⁶⁹

Apartheid was marked by internal resistance against the NP from those oppressed by apartheid.⁷⁰ The African National Congress (“ANC”) was the primary opposing party during apartheid, and the ANC actively fought back during apartheid.⁷¹ Guerilla warfare, terrorism, assassinations, and violent protest were all tactics utilized by the ANC to resist the oppression by white South Africans.⁷² These acts of resistance included bombings of buildings and assassinations of prominent leaders.⁷³ The NP retaliated, causing casualties on both sides.⁷⁴

Some of South Africa’s most notorious revolutionaries forged their legacies in the conflict. Albie Sachs, an ANC member and post-apartheid Constitutional Court

58. *Id.*

59. *Id.*

60. *Group Areas Act of 1950*, S. AFR. HIST. ONLINE (Dec. 19, 2014), <http://www.sahistory.org.za/article/group-areas-act-1950>.

61. *Id.*

62. *District Six*, CAPE TOWN HIST., http://capetownhistory.com/?page_id=238 (last visited Oct. 5, 2018).

63. *Id.*

64. *Id.*

65. See Michael Worsnip, *District Six Lives Again, 35 Years Later*, BRAND S. AFR. (May 28, 2014), <https://www.brandsouthafrica.com/people-culture/arts-culture/district-six-lives-again-35-years-later>.

66. See Oliver Wainwright, *Apartheid Ended 20 Years Ago, So Why is Cape Town Still “A Paradise for the Few”?*, THE GUARDIAN (Apr. 30, 2014), <https://www.theguardian.com/cities/2014/apr/30/cape-town-apartheid-ended-still-paradise-few-south-africa>.

67. *The Natives Land Act of 1913*, *supra* note 42.

68. *Land, Labour, and Apartheid*, S. AFR. HIST. ONLINE (May 6, 2011), <http://www.sahistory.org.za/article/land-labour-and-apartheid>.

69. *Id.*

70. *Id.*

71. *African National Congress (ANC)*, S. AFR. HIST. ONLINE <https://www.sahistory.org.za/article/african-national-congress-anc> (last updated Aug. 16, 2018).

72. *Land, Labour, and Apartheid*, *supra* note 68.

73. *What is the African National Congress?*, *supra* note 71.

74. *Id.*

Justice, lost his arm during a failed car bombing assassination attempt.⁷⁵ Nelson Mandela, a leader in the ANC, was arrested during this time and spent 27 years of his life imprisoned.⁷⁶

In 1990, the ruling National Party began negotiations with the African National Congress.⁷⁷ These negotiations were intended to be peaceful, but violence soon erupted between white Afrikaners and non-white militia.⁷⁸ While the NP and ANC negotiated in Johannesburg, fighting erupted all over the country.⁷⁹ These skirmishes were mainly between Afrikaners and people of Zulu heritage.⁸⁰ Although war was never declared, the fighting during negotiations was so extreme it nearly forced South Africa into another civil war.

Although the post-apartheid negotiations were tense and marked by bloodshed, the negotiations resulted in the first election in which non-white South Africans were allowed to participate.⁸¹ For the first time since South Africa became a nation, all South Africans were allowed to vote and run for parliament.⁸² The newly inclusive elections were held in 1994 over a four-day voting period.⁸³ Following the election, the ANC won 62 percent of seats in parliament and became the ruling party overnight.⁸⁴ The reformed government elected Nelson Mandela as president and took steps toward repairing the damage caused by apartheid.⁸⁵ The ANC abolished all apartheid legislation and ratified a new constitution which established South Africa as one of the most progressive democracies in the world. Although the South Africa constitution guaranteed rights and dignity to all South African citizens, the effects of apartheid still linger in South Africa today.

C. The Current State of Discrimination in South Africa

Following apartheid, South Africa sought to end discrimination and give every citizen recognition. South Africa adopted a constitution⁸⁶, recognized eleven official languages⁸⁷, and declared itself an all-inclusive "rainbow nation."⁸⁸ South Africa's constitutional provisions and new legislation guaranteed the equality of all South African citizens under the law. The intentions of the new South African government were good, but the application of these ideals proved challenging. Even though apartheid officially ended, there were still lingering attitudes of racism and segregation. Additionally, the government made promises to South African citizens that it did not have the capital to fulfill, such as granting each South African citizen

75. ALBIE SACHS, *WE, THE PEOPLE: INSIGHTS OF AN ACTIVIST JUDGE* (Wits University Press, 2016).

76. *Nelson Rolihlahla Mandela*, S. AFR. HIST. ONLINE (June 28, 2011), <http://www.sahistory.org.za/people/nelson-rolihlahla-mandela>.

77. *Negotiations and the Transition*, S. AFR. HIST. ONLINE (June 30, 2011), <http://www.sahistory.org.za/topic/negotiations-and-transition>.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Negotiations and Transition*, *supra* note 77.

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* S. AFR. CONST., 1996.

87. *Africa: South Africa*, CIA: THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (last updated Sept. 26, 2018).

88. *Id.*

an education, healthcare, and housing.⁸⁹ South Africa's lack of resources to support its initiatives is an ongoing issue today.⁹⁰

When the ANC became the ruling party in South Africa, it sought to bring lasting change to South Africa.⁹¹ While the ANC has been a positive influence in South Africa, its tenure as the majority party has opened the door to corruption within the party itself. In 2009, ANC member Jacob Zuma was elected president⁹², and his presidency proved to be damaging to both the ANC and South Africa as a nation. Throughout his presidency, Zuma was accused of accepting bribes from brothers Ajay, Atul, and Rajesh (Tony) Gupta in exchange for political capital and government funding for their businesses.⁹³ After several attempts to oust Zuma from outside and within the ANC, including a failed parliamentary vote of no confidence⁹⁴, Zuma resigned on February 14, 2018.⁹⁵

While Zuma eventually resigned, his actions caused lasting damage to the ANC and South Africa. Zuma is estimated to have cost the government billions of rand (millions of USD)⁹⁶, and the corruption created by the Guptas has had lingering effects on South Africa's government. A weakened and corrupt ANC is a party markedly distant from Nelson Mandela's original vision. While the ANC originally attempted to reverse the segregation and discrimination created during apartheid through its new constitution, Zuma's corruption and degradation of the ANC have stymied such progress.⁹⁷

III. THE JIM CROW ERA AND THE AFTERMATH

A. *Jim Crow and Segregation in the United States*

Before the United States became an independent nation, it consisted of different colonies of various European nations.⁹⁸ When the Europeans settled in the Americas, they did so at the expense of the Native American population.⁹⁹ Europeans

89. Wainwright, *supra* note 66.

90. The South African social welfare system has faced many challenges since its implementation by the ANC. Various factors have contributed to these challenges, including balancing many social programs and corruption within the new government. See Leila Patel, *South Africa's Social Welfare System Faces Deepening Challenges*, THE CONVERSATION (Mar. 16, 2016), <https://theconversation.com/south-africas-social-welfare-system-faces-deepening-challenges-55962>.

91. *What is the African National Congress?*, *supra* note 71.

92. *Jacob Zuma Biography*, BIOGRAPHY.COM (Apr. 2, 2014), <https://www.biography.com/people/jacob-zuma-262727>.

93. *The Guptas and Their Links to South Africa's Jacob Zuma*, BBC NEWS (Feb. 14, 2018), <http://www.bbc.com/news/world-africa-22513410>.

94. Peter Granitz, *South African President Jacob Zuma Survives No-Confidence Vote by Parliament*, WASH. POST (Aug. 8, 2017), https://www.washingtonpost.com/world/weakened-south-africa-president-faces-new-no-confidence-vote-by-parliament/2017/08/08/b1524160-7baf-11e7-b2b1-aeba62854dfa_story.html?utm_term=.17866dfb5254.

95. Azad Essa, *Jacob Zuma Resigns as South Africa's President*, AL JAZEERA (Feb. 14, 2018), <https://www.aljazeera.com/news/2018/02/jacob-zuma-resigns-south-africa-president-180209204724335.html>.

96. Gareth van Onselen, *The Billion Rand President: How Much Jacob Zuma Costs the Taxpayer*, INSIDE-POLITICS.ORG (Aug. 20, 2012), <https://inside-politics.org/2012/08/20/the-billion-rand-president-how-much-jacob-zuma-costs-the-taxpayer/>.

97. See Wainwright, *supra* note 66.

98. *Slavery in the United States: A Brief History*, *supra* note 4.

99. See JARED DIAMOND, GUNS, GERMS, AND STEEL (W.W. Norton & Co., 1997).

brought guns and disease into the Americas, and displaced the Native Americans from the majority of their land.¹⁰⁰ With expanding industries and agricultural enterprises came a severe need for labor.¹⁰¹ The colonists originally addressed this problem with white indentured servants, but there were still unmet labor demands.¹⁰²

In the early seventeenth century, the Dutch East India Trading Company began trafficking African people to North America to use as slaves.¹⁰³ Slaves worked on plantations and helped solve the need for manual labor.¹⁰⁴ Slavery continued after the United States became an independent nation, and slavery was not outlawed until after the American Civil War in 1865.¹⁰⁵

The conditions imposed upon American slaves were abhorrent, as the enslaved endured hard working conditions, torture, and abuse from slave owners.¹⁰⁶ Furthermore, slaves were born into slavery and could not win their freedom.¹⁰⁷ Tensions between the American North and South over slavery became so great that eventually the South seceded from the North, and the American Civil War began.¹⁰⁸ The American Civil War ended after five years, and slavery was declared unconstitutional. Despite slavery's demise, former slaves and their descendants endured hardship for many years after the end of the war, making the United States an undesirable place for black Americans to live.

After the end of the American Civil War, the United States entered an era of rebuilding called the Reconstruction Era.¹⁰⁹ Most reconstruction efforts were dedicated toward rebuilding the American south, both physically and morally.¹¹⁰ Additionally, Congress passed the thirteenth, fourteenth, and fifteenth constitutional amendments, which declared slavery unconstitutional and protected the rights and freedoms of former slaves.¹¹¹

However, Reconstruction was less effective than intended. After President Lincoln was assassinated, Andrew Johnson as vice president, assumed Lincoln's position. President Johnson openly opposed Reconstruction, and most of the country slowly gave up Reconstruction efforts during Johnson's presidency. During this time, former slave owners regained political power, and laws were passed that limited the rights and freedoms of black Americans.¹¹² These laws were collectively called "Jim Crow Laws," named after the blackface minstrel show conducted by Thomas Dartmouth Rice called "Jump, Jim Crow."¹¹³ Jim Crow laws segregated

100. Native Americans have suffered persecution by white colonists and white Americans ever since the first Europeans arrived in America. The suffering and persecution endured by Native Americans is tragic and extensive, and it should not be diminished. And while their suffering is not expounded upon in this paper due to the limited scope, it should not be discredited. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. James McPherson, *A Defining Time in Our Nation's History*, AM. BATTLEFIELD TR., <https://www.civilwar.org/learn/articles/brief-overview-american-civil-war> (last visited Oct. 5, 2018).

106. *Slavery in the United States: A Brief History*, *supra* note 4.

107. *Id.*

108. *Id.*

109. *Reconstruction*, U.S. HIST., <http://www.ushistory.org/us/35.asp> (last visited Oct. 5, 2018).

110. *Id.*

111. U.S. CONST. amends. XIII, XIV, XV.

112. *A Brief History of Jim Crow*, *supra* note 5.

113. The Jump Jim Crow minstrel show was so popular that "Jim Crow" became a pejorative term for black Americans. Due to this colloquialism, racial segregation laws were referred to as "Jim Crow laws".

schools, businesses, and public transportation.¹¹⁴ Other Jim Crow laws barred hospitals and service industries from hiring black Americans.¹¹⁵

Jim Crow legislation was upheld as constitutional in the 1896 seminal Supreme Court case *Plessy v. Ferguson*.¹¹⁶ *Plessy v. Ferguson* challenged a Louisiana law requiring separate accommodations for blacks and whites on rail cars.¹¹⁷ The plaintiff argued that Louisiana's law violated the Fourteenth Amendment's guarantee against laws that "abridge[d] the privileges and immunities of citizens of the United States."¹¹⁸ The Supreme Court rejected this argument and held that the Louisiana law did not violate the Fourteenth Amendment.¹¹⁹ *Plessy v. Ferguson* set the standard that facilities for blacks and whites could be separate, as long as the separate facilities afforded blacks and whites the same privileges and immunities.¹²⁰ This "separate but equal" standard established by *Plessy v. Ferguson* was used as a justification for discrimination and segregation laws passed during the Jim Crow era.

During the Jim Crow era, black Americans were treated as second-class citizens. Jim Crow legislation forced black and white Americans to attend separate schools, drink from separate water fountains, and ride in different sections of public transportation.¹²¹ Segregation of black Americans through Jim Crow legislation lasted until 1954, when the United States Supreme Court declared that "separate educational facilities are inherently unequal" in the case *Brown v. Board of Education*.¹²² However, life for black Americans did not automatically improve after the *Brown v. Board of Education* decision. Although Jim Crow laws became unconstitutional, black Americans still endured discrimination.¹²³ In 1964, congress passed the Civil Rights Act which guaranteed equal protection and opportunities to all Americans regardless of gender or race.¹²⁴ Although slavery and racial discrimination are now unconstitutional in the United States, black Americans still suffer discrimination due to the discriminatory events in United States history.

B. The Current State of Discrimination in the United States

Rather than confronting the past, the United States has turned its back to it. The amount of time passed, combined with the gradual repeal of Jim Crow legislation, has caused racial tensions to stagnate rather than improve. Racial tensions exist today, and atrocities are still committed against non-white Americans.

Institutional racism is still prominent in the United States. Black Americans are the most widely incarcerated class in the United States, comprising 900,000 of

Becky Little, *Who Was Jim Crow?*, NAT'L GEOGRAPHIC (Aug. 6, 2015), <http://news.nationalgeographic.com/2015/08/150806-voting-rights-act-anniversary-jim-crow-segregation-discrimination-racism-history/>.

114. *A Brief History of Jim Crow*, *supra* note 5.

115. *Id.*

116. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

117. *Id.* at 538.

118. *Id.* at 543.

119. *Id.* at 551.

120. *Id.* at 552.

121. *A Brief History of Jim Crow*, *supra* note 5.

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

123. *A Brief History of Jim Crow*, *supra* note 5.

124. *The Civil Rights Act of 1964*, *supra* note 12.

the 2.2 million total incarcerated population.¹²⁵ The incarceration gap between black and white Americans has grown since the 1970s, and as of 2010, black men were six times as likely as white men to be incarcerated in federal and state prisons.¹²⁶ The increased incarceration rates of black Americans is attributed to institutional racism by several scholars, including Michelle Alexander in her book *The New Jim Crow*.¹²⁷ Alexander posits that mass incarceration of black and minority Americans has created a racial caste system in which black Americans are oppressed by the United States government.¹²⁸ The thirteenth amendment abolished slavery for all Americans, but left an exception for penal labor.¹²⁹ The post-Jim Crow mass incarceration of black Americans has been a vehicle for slavery after the thirteenth amendment. Former convicts, especially former felons, also have much more limited rights after release from prison. It is harder for felons to find jobs and get mortgages and credit cards, and felons cannot vote.¹³⁰ In many ways, the life of a felon parallels the life of a black American during Jim Crow. While many things have improved after Jim Crow, mass incarceration remains a looming vestige of Jim Crow culture.

Institutional racism in America does not end with mass incarceration. Alexander claims that the war on drugs, which began in the 1980s, was utilized by the government to “round up” and incarcerate black Americans.¹³¹ While this is a bold claim, the government’s involvement in the war on drugs is well-documented. In 1998, the Central Intelligence Agency (CIA) released two reports describing its involvement with South American cocaine trafficking.¹³² The reports stated that the CIA trafficked cocaine into California and used the profits to fund Contra rebels during the Contra War in Nicaragua.¹³³ In a series of editorials named *Dark Alliance*, Gary Webb claimed that the majority of the cocaine trafficked by the CIA was purchased by the Bloods and Crips, street gangs in Los Angeles, and this action started a crack-cocaine epidemic in urban neighborhoods.¹³⁴

When the Reagan administration started the war on drugs, the government began giving more funding to police departments with higher drug arrests.¹³⁵ Drug

125. Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, THE SENT’G PROJECT 1 (July 2007), <https://www.sentencingproject.org/publications/uneven-justice-state-rates-of-incarceration-by-race-and-ethnicity/>.

126. Bruce Drake, *Incarceration Gap Widens Between Whites and Blacks*, PEW RES. CENT. (Sept. 6, 2013), <http://www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens/>.

127. See Alfred Blumstein, *On the Racial Disproportionality of United States’ Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (Oxford University Press, 1995); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press, 2010).

128. ALEXANDER, *supra* note 127, at 6.

129. U.S. CONST. amend. XIII, § 1.

130. ALEXANDER, *supra* note 127, at 190-200.

131. *Id.* at 185.

132. OFFICE OF INSPECTOR GENERAL, REPORT OF INVESTIGATION – VOLUME I: THE CALIFORNIA STORY: ALLEGATIONS OF CONNECTIONS BETWEEN CIA AND THE CONTRAS IN COCAINE TRAFFICKING IN THE UNITED STATES (96-0143-IG) (Jan. 29, 1998); OFFICE OF INSPECTOR GENERAL, REPORT OF INVESTIGATION – VOLUME II: THE CONTRA STORY: ALLEGATIONS OF CONNECTIONS BETWEEN CIA AND THE CONTRAS IN COCAINE TRAFFICKING IN THE UNITED STATES (96-0143-IG) (Oct. 8, 1998).

133. *Id.*

134. Gary Webb, *America’s ‘Crack’ Plague Has Roots in Nicaragua War*, LIBCOM.ORG (June 7, 2015), <https://libcom.org/history/americas-crack-plague-has-roots-nicaragua-war-gary-webb>.

135. ALEXANDER, *supra* note 127, at 72-74.

arrests were given top priority in police departments across the United States due to the promise of money and firearms to use for drug task forces.¹³⁶ Police departments made additional money from the civil forfeiture of property from those arrested for drug offenses.¹³⁷ The war on drugs saw an expansion of police power and a limitation on the rights of Americans, which culminated in a perfect storm of post-Jim Crow oppression of black Americans. The war on drugs limited rights for all Americans, but black Americans were disproportionately affected by it. The Constitution exists to protect the rights and freedoms of all Americans, but the war on drugs caused an erosion of liberties for black Americans that circumvented the fourth and thirteenth amendments of the constitution.

The *Terry v. Ohio* Supreme Court decision expanded police power even more. In 1968, the Supreme Court ruled that random searches by police officers (known colloquially as “Terry stops”) did not violate the fourth amendment.¹³⁸ Terry stops gave police officers wide discretion and more power to conduct selective searches and seizures.¹³⁹ Black Americans are particularly affected by these searches, and Terry stops provided yet another means for discrimination to take place.¹⁴⁰ *Terry v. Ohio* allowed police officers to act on “reasonable suspicion” when deciding to search or make arrests.¹⁴¹ The reasonable suspicion standard is a low bar to meet and has given police officers broad discretion in who they choose to stop and search.¹⁴² Terry stops have made the fourth amendment all but irrelevant in citizen interactions with police officers, and just like the war on drugs, Terry stops have disproportionately affected black Americans and provided another vehicle for institutional racism.¹⁴³

Racism in the United States does not stop at the institutional level. While racism is not as explicit as it was during Jim Crow, it may have survived through the “colorblindness” movement. In his book *Racism without Racists*, Professor Eduardo Bonilla-Silva states that the “colorblind” movement, in which all people are treated equally regardless of race, gender, or ethnicity, is inherently racist.¹⁴⁴ The color-blind movement ignores the privileges enjoyed by white Americans for decades and does nothing to attempt to remedy the past discrimination of non-white Americans.¹⁴⁵ Reparation of past discrimination is something the United States has failed to achieve, and truth and reconciliation should be utilized to fix this issue.

C. Comparing Apartheid and Jim Crow

Apartheid and Jim Crow share many similarities. Both were institutionalized forms of racism: both were carried out by white citizens and directed at non-white citizens; and both resulted in discrimination that persisted after each institution’s

136. *Id.*

137. *Id.*

138. *Terry v. Ohio*, 392 U.S. 1 (1968).

139. ALEXANDER, *supra* note 127, at 63-64.

140. *Stop-and-Frisk Data*, NYCLU: NEW YORK CIVIL LIBERTIES UNION <https://www.nyclu.org/en/stop-and-frisk-data> (last visited Oct. 21, 2018).

141. *Id.*

142. *Id.*

143. *Id.*

144. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* (Rowman & Littlefield, 5th ed. 2018).

145. *Id.*

respective end. Apartheid and Jim Crow were long-lasting and affected every aspect of non-white citizens' lives.

The major difference between apartheid and Jim Crow is the responsiveness of the respective governments to the lingering effects. Apartheid ended in 1994, and South Africa established the Truth and Reconciliation Commission in 1995, merely one year later.¹⁴⁶ South Africa made significant efforts to remedy the harm caused by apartheid soon after the end of apartheid. The United States did not make such efforts. Although the Civil Rights Act passed in 1964, the United States did nothing to remedy the past discrimination and harm caused by Jim Crow. No reparations were paid nor was there any form of reconciliation. This has caused Jim Crow sentiments to linger long past the official "end" of the era.

Jim Crow legislation was also geographically broader than apartheid.¹⁴⁷ Apartheid laws were passed by the South African national government and affected every province in South Africa.¹⁴⁸ When apartheid ended, the new ANC-led government reversed all apartheid legislation in one fell swoop. The United States government, however, functions differently than South Africa's government. Due to federalism in the United States, the several states govern themselves and are at liberty to pass laws not the exclusive domain of the federal government.¹⁴⁹ The Civil Rights Act of 1964 made discriminatory legislation unconstitutional, but many states retained Jim Crow laws that were not patently discriminatory.¹⁵⁰

At first glance, it would appear black Americans under Jim Crow were better off than non-white South Africans under apartheid. However, while Jim Crow may not have been as authoritarian as apartheid, many black Americans lived terrible lives during and after the Jim Crow-era. Many states instituted poll taxes, which targeted poor black Americans.¹⁵¹ Jim Crow legislation made it harder for black Americans to receive mortgages and credit cards, making upward mobility all but impossible.¹⁵² Many black Americans feared for their lives due to lynchings and violence against black Americans.¹⁵³ Life was not better, even in so-called progressive Northern states. Many black Americans moved to urban centers such as Boston and Chicago, only to be met with the same limitations they faced in Southern states.¹⁵⁴ Jim Crow may not have been as authoritarian as apartheid, but it was just as widespread and damaging to black Americans.

Black Americans and non-white South Africans are still discriminated against today.¹⁵⁵ The main difference between the two cultures today is the size of the black and non-white populations in the United States and South Africa respectively. Black Americans are a minority, comprising 13.3% of the United States population¹⁵⁶, while non-white South Africans comprise 91.6% of the population of South

146. *Truth and Reconciliation Commission*, *supra* note 6.

147. *See Examples of Jim Crow Laws*, *supra* note 10.

148. *A History of Apartheid in South Africa*, *supra* note 5.

149. Indep. Hall Ass'n., *Federalism*, U.S. HIST., <http://www.ushistory.org/gov/3.asp> (last visited Sep. 23, 2018).

150. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. Wainwright, *supra* note 66.

156. Quickfacts: United States, U. S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045216> (last visited Oct. 5, 2018).

Africa.¹⁵⁷ As of 1994, non-white South Africans have held a majority in parliament¹⁵⁸, while black Americans comprise only 9.4% of the United States congress.¹⁵⁹ Non-white South Africans have a voice, but have struggled with entrenched societal norms, while black Americans do not even have a strong presence in government. This has contributed to less recognition for black Americans, and is yet another reason why the United States needs truth and reconciliation.

IV. THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION

A. The Commission

When the ANC became the ruling party in 1994, its members wanted to reflect the values of equality and dignity in the new South African constitution.¹⁶⁰ Adopted in 1996, the South African constitution guarantees many basic rights to its citizens including housing, healthcare, education, and the inherent right to dignity.¹⁶¹ The constitution holds dignity to be the highest human value, and any law that offends a person's dignity is declared unconstitutional in South Africa.¹⁶²

The South African constitution sought to create *ubuntu*, a Bantu word meaning "community."¹⁶³ *Ubuntu* is a multi-faceted concept that promotes humanity, dignity, and compassion above all else.¹⁶⁴ The ANC emphasized *ubuntu* as the central ideological pillar of the Constitution and the nation.¹⁶⁵ The concept of *ubuntu* places human dignity above everything, and the value South Africa's constitution places on human dignity strongly reflects *ubuntu*.¹⁶⁶

Since many human rights violations that occurred during apartheid offended the dignity of South African citizens, the ANC wished to provide a way to heal the wounds inflicted by these human rights violations.¹⁶⁷ The ANC found a solution in the Truth and Reconciliation Commission (TRC). The TRC was established under the Promotion of National United and Reconciliation Act of 1995, and it provided a platform for apartheid-era human rights violators to confess their crimes in front of a hearing committee.¹⁶⁸ The TRC consisted of three committees: the Human Rights Violations committee, Reparation and Rehabilitation committee, and the Amnesty committee.¹⁶⁹

157. *South Africa Demographics Profile 2018*, INDEX MUNDI, https://www.indexmundi.com/south_africa/demographics_profile.html (last updated Jan. 20, 2018).

158. *How Parliament is Structured*, *supra* note 92.

159. Jennifer E. Manning, *Membership of the 115th Congress: A Profile*, CONG. RES. SERV. 7 (Oct. 1, 2018), <https://www.senate.gov/CRSPubs/b8f6293e-c235-40fd-b895-6474d0f8e809.pdf>.

160. *What is the African National Congress?*, *supra* note 71.

161. S. AFR. CONST., 1996.

162. *Id.*

163. *What is Ubuntu*, HUMAN.'S TEAM S. AFR., <http://www.humanitysteamsa.org/ubuntu/> (last visited Oct. 5, 2018).

164. *Id.*

165. *Id.*

167. *Truth and Reconciliation Commission*, *supra* note 6.

168. TRUTH & RECONCILIATION COMM'N, <http://www.justice.gov.za/trc/> (last visited Oct. 8, 2017).

169. *Id.*

People that committed human rights violations were encouraged to confess their crimes in front of one of the three TRC committees.¹⁷⁰ The TRC was interested in full disclosure, and testifiers were encouraged to explicitly describe their acts.¹⁷¹ If a testifier fully disclosed their crimes and human rights violations, they were granted amnesty.¹⁷² Victims of human rights violations were encouraged to attend the hearings and even discuss apartheid with their perpetrators.¹⁷³ This was intended to provide closure and catharsis to victims and their friends and family.

The idea behind the TRC was one of reparation and healing. The ANC found apartheid so heinous and atrocious it sought to prevent any potential revival. The ANC established the TRC to help South African citizens learn from the mistakes of apartheid.¹⁷⁴ The ANC believed apartheid should not be censored, and the ANC wanted all South African citizens to hear and learn from the atrocities committed during apartheid.¹⁷⁵ The ANC also believed that truth could not be uncovered through a system of punishment, so it decided to grant amnesty to those involved with apartheid crimes.¹⁷⁶

The TRC was also a form of dispute resolution. Dispute resolution is a term that describes a wide range of processes which can be used to resolve a conflict or dispute.¹⁷⁷ While the most common forms of dispute resolution are negotiation, mediation, and arbitration, dispute resolution encompasses other more cooperative ways to resolve disputes.¹⁷⁸ One method, facilitation, involves resolving disputes between two or more groups of people through a facilitator.¹⁷⁹ The facilitator helps the parties move toward a general goal, such as building community or coming to a consensus.¹⁸⁰

The TRC, while providing a platform for atonement and closure, functioned as a facilitation device to resolve disputes and promote the sense of community in South Africa. Apartheid victims were encouraged to confront the perpetrators of their crimes, and the TRC facilitated these meetings.¹⁸¹ While this was intended to provide closure, it also created situations of dispute resolution. In one TRC hearing, the mothers of deceased anti-apartheid rebels confronted the killer of their sons.¹⁸² All the mothers were angry with the man who murdered their sons, but eventually some of the mothers could make peace with their son's murderer through discussion of apartheid and what they had to endure.¹⁸³ This is just one example of how the TRC functioned as a facilitation device to resolve disputes.

170. *Id.*

171. *Id.*

172. *Id.*

173. TRUTH & RECONCILIATION COMM'N, *supra* note 168.

174. *Truth and Reconciliation Commission*, *supra* note 6.

175. *Id.*

176. *Id.*

177. *Dispute Resolution Processes*, AM. B. ASS'N (2017), https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses.html.

178. *Id.*

179. *Facilitation*, A.B.A., https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/facilitation.html (last visited Oct. 5, 2018).

180. *Id.*

181. *Truth and Reconciliation Commission*, *supra* note 6.

182. *LONG NIGHT'S JOURNEY INTO DAY* (Reid-Hoffman Productions 2000).

183. *Id.*

B. Evaluating the South African Truth and Reconciliation Commission

When South Africa adopted its constitution in 1996, it was at the time one of the most progressive constitutions in the world. The constitution guaranteed basic rights for all South African citizens, and the ANC promised to give every South African citizen free healthcare, housing, and education.¹⁸⁴ In theory, the new constitution created a progressive socialized government which promised a utopia-like society for the citizens of South Africa. In practice, however, this was not attainable. South Africa did not have the infrastructure nor the economic resources to provide all its citizens the rights guaranteed by the constitution.¹⁸⁵

Even after apartheid ended, South African citizens were segregated geographically by race and ethnicity due to the Group Areas Act of 1950.¹⁸⁶ In major cities during apartheid, non-white South Africans were pushed to the outskirts into areas known as townships.¹⁸⁷ Townships became a way to house the non-white labor force, and the citizens of townships were forced to live in close proximity with little access to food, water, and electricity.¹⁸⁸ Most township citizens lived in shanties or shipping containers and had no resources to build proper houses.¹⁸⁹ Providing housing, education, and healthcare to townships following apartheid proved challenging. The government set up schools and hospitals within the townships, but the schools and hospitals were subpar compared to the white establishments and did not solve the segregation problem.¹⁹⁰ The government later built houses outside townships and attempted to re-locate township citizens.¹⁹¹ However, most relocated citizens ended up selling their government house and moving back into the townships.¹⁹² Lack of economic resources, coupled with the long-standing apartheid culture, made change very difficult. Townships still exist today, and the South African government has still failed to implement a complete paradigm shift from apartheid-era customs. The township problem is but one example of how South Africa has failed to implement the changes outlined in its constitution.

The TRC was proposed as a way to preserve the dignity of the citizens of South Africa and promote caring and compassion for all people.¹⁹³ To be fair and equal to all citizens, the government decided to grant amnesty to anybody that gave full disclosure of their crimes committed during apartheid.¹⁹⁴ Although this was a progressive move by the government, the public response was mixed.¹⁹⁵ Some citizens

184. S. AFR. CONST., 1996.

185. Wainwright, *supra* note 66.

186. *Group Areas Act of 1950*, *supra* note 60.

187. Andile Mngxitama, *Nelson Mandela: South Africa's Townships, Then and Now*, TELEGRAPH (Dec. 6, 2013), <http://www.telegraph.co.uk/news/worldnews/nelson-mandela/9465026/Nelson-Mandela-South-Africas-townships-then-and-now.html>.

188. Lisa Findley & Liz Ogbu, *South Africa: From Township to Town: After Apartheid, Spatial Segregation Remains*, PLACES (Nov. 2011), <https://placesjournal.org/article/south-africa-from-township-to-town/>.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Truth and Reconciliation Commission*, *supra* note 6.

194. *Id.*

195. Mary Kay Magistad, *South Africa's Imperfect Progress, 20 years After the Truth & Reconciliation Commission*, PUB. RADIO INT'L (Apr. 6, 2017), <https://www.pri.org/stories/2017-04-06/south-africas-imperfect-progress-20-years-after-truth-reconciliation-commission>.

believed granting amnesty helped promote unity by holding perpetrators and victims equal.¹⁹⁶ Others believed in the power of closure and promoted the TRC as a way for victims to heal.¹⁹⁷ However, a significant portion of South Africans called for retributive punishment for the human rights abusers.¹⁹⁸ Full disclosure was not enough for this group of South Africans, and many people in this group did not believe the TRC reflected their views.¹⁹⁹

Qualitative criticisms concerning the TRC mainly revolved around issues concerning reconciliation versus retribution. Much like the culture surrounding the townships, the majority of South Africans were accustomed to retributive justice.²⁰⁰ Closure for most victims involved their perpetrator being thrown in prison, not walking the streets as a free person.²⁰¹ Even when victims confronted and forgave their perpetrators, many still wished they were punished for their actions.²⁰² What constitutes genuine apology and forgiveness is an area of law and social science is contested²⁰³, but a significant portion of South Africans believed that the TRC fell short of promoting genuine apology and forgiveness.²⁰⁴ According to Nicholas Tavuchis, in his book *Mea Culpa*, a genuine apology: (1) acknowledges legitimacy of the grievance and that it violated rule or moral norm; (2) admits fault; (3) admits responsibility for the violation; (4) expresses genuine regret and remorse; (5) expresses concern for future good behavior; (6) gives appropriate assurances that the act will never happen again; and (7) compensates the injured party.²⁰⁵ While the TRC may have succeeded in respect to some of these elements, it failed in other respects as well. While the TRC helped admit fault and attempted to assure apartheid will never happen again, it failed to properly compensate injured parties and did not properly express concern for future behavior. By granting amnesty to the abusers, the TRC's message of forgiveness was interpreted as weakness.

Similar to the rights guaranteed in the South African constitution, the TRC was good in theory, but in practice it was executed poorly. The TRC was given a shoestring budget of \$18 million USD²⁰⁶, which was not enough to accommodate and give appropriate analysis of all 7,706 statements given during hearings spanning from 1995 to 1998.²⁰⁷ Approximately 2,000 of the 7,000 perpetrators requested amnesty, and only 1,000 received amnesty from the government.²⁰⁸ Citizens were further concerned that the TRC granted amnesty to more white perpetrators over

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Magistad, *supra* note 195.

201. *Id.*

202. *Id.*

203. See NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* (Stanford University Press, 1991).

204. Magistad, *supra* note 195.

205. TAVUCHIS, *supra* note 203.

206. *South African Truth Commission*, CORNELL L. SCH., https://www.law.cornell.edu/wex/south_african_truth_commission (last visited Oct. 6, 2018).

207. 3 DESMOND TUTU ET AL., *TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, TRUTH & RECONCILIATION COMM'N* (Oct. 29, 1998), <http://www.justice.gov.za/trc/report/finalreport/Volume%203.pdf>.

208. Magistad, *supra* note 195.

non-white perpetrators, although there are no conclusive statistics to support this claim.²⁰⁹

The feeling of incomplete reconciliation was felt in South Africa's parliament as well. In March 2018, South Africa enacted legislation that will transfer land from white farmers to black farmers without compensation.²¹⁰ The purpose of this legislation is to give reparations to those wronged by apartheid and slavery. Parliament's actions regarding the legislation show that South Africa as a nation is not over apartheid, and reconciliation did not give adequate closure to those wronged by apartheid. This recent land transfer is highly controversial and has received criticism from many interest groups.²¹¹ Critics point out that it is never prudent to shake up agriculture and food sources, especially in the midst of a drought.²¹² Regardless of whether this land grab legislation is a good idea, the enacting of this legislation is a sharp departure from the peaceful and reconciliatory rhetoric brought by the TRC.

While the TRC was criticized for its inability to promote reconciliation, it was not a complete failure. One of the goals of the TRC was to inform the citizens of South Africa of the atrocities committed during apartheid.²¹³ Unlike the de-nazification of post-WWII Germany, South Africa did not want to hide the infamy of apartheid from its citizens or the world. The government believed that the only way to learn from the mistakes of the past was to know all the details.²¹⁴ Following World War II, the allied powers prosecuted Nazi officers in the Nuremberg Trials.²¹⁵ The Nuremberg Trials saw twelve Nazi officers put to death, and following the Nuremberg trials, Germany began a de-nazification process to completely erase any and all Nazi influence within Germany.²¹⁶ Any mention of the holocaust, Hitler, or Nazis became strictly taboo, and certain symbols and actions associated with nazism became illegal.²¹⁷ South Africa took a different approach, and instead encouraged citizens to speak about apartheid. The government turned an embarrassing stain on its country's history into a nationwide learning experience. South Africa is still ironing out political and cultural issues, but it has succeeded in its goal to educate the public about apartheid. Today, South African citizens speak freely about apartheid and encourage each other to have an open dialogue concerning the topic.

209. *Id.*

210. Haley Britzky, *South Africa Votes to Transfer Land from White to Black Farmers*, AXIOS.COM, <https://www.axios.com/south-africa-land-seizure-5f215d14-c7ba-4839-97fb-3cdd4ebb6067.html> (last visited Oct. 6, 2018).

211. *South Africa is Getting Land Reform Wrong*, ECONOMIST (Jan. 25, 2018), <https://www.economist.com/news/middle-east-and-africa/21735655-why-70-redistributed-land-now-lies-fallow-south-africa-getting-land-reform>.

212. *Id.*

213. *Truth and Reconciliation Commission*, *supra* note 6.

214. *Id.*

215. *The Nuremberg Trials*, HOLOCAUST ENCYCLOPEDIA, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007722> (last visited Oct. 6, 2018).

216. *Id.*

217. *World War II: Denazification*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/denazification-2> (last visited Oct. 6, 2018).

V. OTHER TRUTH AND RECONCILIATION COMMISSIONS

Truth and reconciliation is a concept not unique to South Africa. Other countries, such as Nepal and Sierra Leone, have established truth and reconciliation commissions.²¹⁸ Similarly, other countries have developed dispute resolution processes that resemble truth and reconciliation commissions. One example is the *Gacaca* courts, established by Rwanda after the Tutsi genocide by the Hutu government.²¹⁹ The United States has even attempted truth and reconciliation and reparations to address specific incidents throughout its history.²²⁰

The United States can create its own dispute resolution system to address the discrimination against black Americans before, during, and after the Jim Crow era. Truth and reconciliation, however, can be achieved in more ways than one, and the United States can learn from several other forms of truth and reconciliation to build a commission that truly achieves its goal.

A. The Greensboro Truth and Reconciliation Commission

The United States has attempted Truth and Reconciliation in the past. In 2004, Greensboro, North Carolina established the Greensboro Truth and Reconciliation Commission (Greensboro TRC) to address the events that happened during the “Greensboro Massacre” in 1979. The Greensboro Massacre occurred on November 3, 1979 when members of the Ku Klux Klan (KKK) and the American Nazi Party open fired on a group of Communist Workers’ Party (CWP) protestors in Greensboro, North Carolina, resulting in five deaths and eleven injuries.²²¹ Since CWP protestors were protesting for racial equality of marginalized black workers, the Greensboro massacre had deep race implications.²²²

The aftermath of the Greensboro massacre revealed several instances of ongoing discrimination in Greensboro, and it opened a wound that never fully healed in the following decades. To help the healing process, the city of Greensboro established a Truth and Reconciliation Commission.²²³ The Greensboro TRC differed from the South Africa TRC in both form and function. While South Africa urged full disclosure and individual healing, the Greensboro TRC fought discrimination at the institutional level. The Greensboro TRC uncovered racism in the police department and discriminatory hiring practices in several Greensboro government offices.²²⁴ The Greensboro TRC addressed these problems by setting up covenants by which the Greensboro government must abide and urging citizens to be do their

218. *Witness to Truth*, SIERRA LEONE TRUTH AND RECONCILIATION COMM’N, <http://www.sierraleonetrc.org/> (last visited Oct. 6, 2018); Surya Kiran Gurung, Message from Chairperson, TRUTH AND RECONCILIATION COMM’N, NEPAL (Jan. 1, 2017), <http://trc.gov.np/>.

219. History, GACACA CMTY. JUST., <http://gacaca.rw/about/history-3/> (last visited Oct. 6, 2018).

220. See, e.g., GREENSBORO TRUTH & RECONCILIATION COMM’N (May 25, 2006), <http://www.greensborotrc.org/>.

221. *November 3, 1979*, GREENSBORO TRUTH & RECONCILIATION COMM’N (May 25, 2006), <http://www.greensborotrc.org/november3.php>.

222. *Id.*

223. *Id.*

224. Muktha Jost et al., *Greensboro Truth and Reconciliation Commission Report: Executive Summary*, GREENSBORO TRUTH & RECONCILIATION COMM’N (May 25, 2006), http://www.greensborotrc.org/exec_summary.pdf.

part to end racism.²²⁵ The Greensboro TRC emphasized the importance of community and declared that retributive punishment was detrimental to the individual citizens of Greensboro and the community as a whole.²²⁶ The Greensboro TRC report included the following recommendations: the police should issue a formal apology for their failure to mitigate the situation preceding the massacre; the city should publicly acknowledge the massacre; and anybody personally involved in the massacre should testify (similar to the South African TRC).²²⁷ Other institutional reforms suggested in the report included paying government employees a living wage and requiring the city to release annual reports on race relations and disparities.²²⁸

While the Greensboro TRC helped Greensboro heal through testimony, it also addressed the underlying racial issues in the city. If the United States hopes to heal through Truth and Reconciliation, it should address underlying race issues like in Greensboro.

B. The Rwanda Gacaca Courts

Following the Rwandan genocide, the Rwandan government established the *Gacaca* courts. Created in 2001, the goal of the *Gacaca* courts was to address the pain and suffering following the Hutu's genocide of over 800,000 Rwandan Tutsis.²²⁹ The word *Gacaca* is loosely defined as "justice amongst the grass," and true to its name, the *Gacaca* courts focused on community justice to bring the genocide's perpetrators to justice and heal the wounds caused by the genocide.²³⁰ While the *Gacaca* courts did strive for truth and reconciliation, they were much more retributive than the South African TRC. The *Gacaca* courts were similar to the South African TRC in that the courts compelled perpetrators to testify and confess their crimes.²³¹ The *Gacaca* courts differed, however, in that the courts did not grant amnesty to those who confessed. In exchange for confessions, the perpetrators of the Rwandan genocide were given reduced sentences.²³²

While truth and reconciliation in the United States could take the form of retribution, the United States should not serve punishment as extreme as the *Gacaca* courts. The *Gacaca* courts were set up to address a singular event. The justice was swift, and the genocide was still a salient issue in 2001. The aftermath of Jim Crow, while still prevalent in the United States, is not as patently discriminatory today as it was thirty to forty years ago.²³³ The United States should address truth and reconciliation similar to South Africa, but it can learn something from the retribution and justice delivered by the *Gacaca* courts.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. History, *supra* note 219.

230. *Id.*

231. *Achievements*, GACACA CMTY. JUST., <http://gacaca.rw/about/achievements/> (last visited Oct. 6, 2018).

232. *Id.*

233. *See* Coates, *supra* note 150.

C. Reparations Lawsuits

Another way to seek reconciliation is to sue for reparations. There have been several reparation cases in the United States, but many have been unsuccessful for various reasons.²³⁴ The case *In re African-American Slave Descendants Litigation* was class action reparations case in which descendants of slaves sought reparations from private corporations which profited from the slave trade.²³⁵ The plaintiffs brought suit in nine district courts before consolidating the case in the Northern District Court of Illinois.²³⁶ The Northern District Court of Illinois granted defendants' motion to dismiss, and the plaintiffs subsequently appealed.²³⁷ The plaintiffs alleged they had derivative harm and continuing injury from the institution of slavery, and they sought reparations for such injuries.²³⁸ The court ultimately held that the plaintiffs lacked standing, and the statute of limitations had run out on most of their claims.²³⁹ Another reparations case, *Prince v. State*, involved a *pro se* slave descendant that sued the state of Alabama for reparations.²⁴⁰ The case was also dismissed due to lack of standing.²⁴¹

Lack of standing is an ongoing issue in reparation cases. Even if plaintiffs can get past the issue of derivative harm, there are still statutes of limitations issues attached to most claims brought in reparations cases.²⁴² Because many slave descendants were not directly affected by slavery, and because slavery existed in the United States nearly one hundred fifty years ago, courts have thrown out reparations cases for lack of standing.²⁴³ This is a huge issue that severely limits reparation attempts, and this issue contributes to the lack of successful reparations cases in the United States. One solution to the lack of standing issue is to extend the statutes of limitations on claims brought in Jim Crow-era reparations cases,²⁴⁴ but even if cases can be brought more easily, incentivizing people to bring cases is a different battle entirely.

Reparations lawsuits have also been brought outside of the United States.²⁴⁵ In 2013, fourteen Caribbean nations sued the United Kingdom, France, and the Netherlands for the lingering legacy of the Atlantic slave trade.²⁴⁶ The Caribbean nations claimed the European nations caused an ongoing and lingering legacy of slavery that has negatively impacted the Caribbean.²⁴⁷ The lawsuit is still ongoing.

234. *In re African-American Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006); *Prince v. State*, 2015 WL 7822686 (N.D. Ala. 2015).

235. *In re African-American Slave Descendants Litig.*, 475 F. Supp. 2d 721 (N.D. Ill. 2005).

236. *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 756 (7th Cir. 2006).

237. *Id.*

238. *In re African-American Slave Descendants Litig.*, 475 F. Supp. at 748.

239. *In re African-American Slave Descendants Litig.*, 471 F.3d at 756.

240. *Prince v. State*, 2015 WL 7822686.

241. *Id.*

242. Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68-122, (2005).

243. *Id.*

244. Graham P. Shaffer, *The Leesburg Stockade Girls: Why Modern Legislatures Should Extend the Statute of Limitations for Specific Jim-Crow-Era Reparations Lawsuits in the Wake of Alexander v. Oklahoma*, 37 STETSON L. REV. 941 (2008).

245. Dexter Mullins, *14 Caribbean Nations Sue European Countries for Slavery Reparations*, AL JAZEERA AM. (Sept. 27, 2013), <http://america.aljazeera.com/articles/2013/9/27/14-caribbean-nations-sue-european-countries-for-reparations-over-slavery.html>.

246. *Id.*

247. *Id.*

In theory, lawsuits are an excellent way to collect reparations and remedy the harm of slavery. However, lawsuits in this context are difficult to bring and defend, especially with the issue of standing.²⁴⁸ Some reparations lawsuits, such as *In re African-American slave descendants litigation*, have lofty goals and attempt to remedy the situation entirely. These lawsuits are largely ineffective, and plaintiffs would likely benefit from a larger number of smaller cases with fewer claims.

D. Reparations in the United States

The United States has attempted reparations in the past, although these efforts have been largely unsuccessful. After the Civil War, a series of field orders were issued by General William Tecumseh Sherman to grant freed slaves land along the Atlantic coast of South Carolina, Georgia, and Florida.²⁴⁹ Sherman planned to seize 400,000 acres of land from white farmers to grant to approximately 18,000 freed slaves as reparations for slavery.²⁵⁰ Sherman's plan became known colloquially as "40 acres and a mule," referring to the 40 acre parcels Sherman planned to divide among the freed slaves.²⁵¹ While Sherman's plan would have given actual reparations to freed slaves, the plan did not see fruition, due to the plan's revocation by President Andrew Johnson after succeeding President Lincoln.²⁵²

In 2008, the United States House of Representatives passed a resolution in which it, on behalf of the United States, apologized for slavery and Jim Crow-era legislation.²⁵³ The resolution cited human rights abuses against African-Americans during slavery in the United States, and it recognized that although efforts were made to eliminate Jim Crow in the 1960s, its "vestiges still linger to this day."²⁵⁴ The house resolution official acknowledged the past pain and suffering endured by black Americans and expressed congressional commitment to address the "lingering consequences of the misdeeds committed against African Americans under slavery and Jim Crow."²⁵⁵ The resolution acknowledges that a "genuine apology is an important and necessary first step in the process of racial reconciliation."²⁵⁶

The resolution was not the first time the United States has apologized for past misdeeds.²⁵⁷ In 1988, the Civil Liberties Act was passed to address the internment of Japanese American citizens during World War II pursuant to Executive Order 9066.²⁵⁸ The act formally apologized for executive order 9066 and offered \$20,000 to any surviving internees.²⁵⁹ The Civil Liberties Act, while not perfect, was a good example of a significant effort taken by the United States to address past misdeeds. Due to the scale and distribution of misdeeds against black Americans, the United

248. Shaffer, *supra* note 244.

249. Special Field Orders, No. 15 (series 1865).

250. *Id.*

251. *Id.*

252. *Id.*

253. H.R. Res. 194, 110th Cong. (2008) (enacted).

254. *Id.*

255. *Id.*

256. *Id.*

257. See Danny Lewis, *Five Times the United States Officially Apologized*, SMITHSONIAN (May 27, 2016), <https://www.smithsonianmag.com/smart-news/five-times-united-states-officially-apologized-180959254/>.

258. Civil Liberties Act of 1988, 50 U.S.C. § 4211 (1988).

259. *Id.*

States will need to take substantially more sweeping measures to address slavery and Jim Crow for true reconciliation to be realized.

VI. HOW THE UNITED STATES CAN BENEFIT FROM TRUTH AND RECONCILIATION

A. A Model for Reconciliation

The United States can learn from South Africa, Greensboro, and Rwanda to create an effective truth and reconciliation commission that addresses the United States' need for racial harmony.

First, the United States should not compel testimony in exchange for amnesty for any crimes committed during the Jim Crow era. In South Africa, the recency of apartheid called for the need for testimony. This was an important aspect of the South African TRC, and full disclosure was an effective way to bring catharsis to families affected by apartheid crimes. In the United States, however, the majority of atrocities committed during the Jim Crow era happened too long ago to derive any real healing from testimony. Some Jim Crow events occurred more than one hundred years ago, and therefore, it is impractical or impossible for the parties involved to testify.²⁶⁰

However, truth and reconciliation through testimony could be applied to hate crimes which have occurred within the last twenty to thirty years. These crimes are more recent, and the victims of these crimes could still benefit from the catharsis that comes from a perpetrator's testimony. The United States should not grant amnesty to those compelled to testify. Amnesty was the most controversial aspect of the South African TRC, and granting amnesty to perpetrators of hate crimes would run counter to the United States' culture and legal system. Following apartheid, South Africa rebuilt an entire government focused around human dignity and individual rights. Therefore, the government could more easily establish a large-scale system that granted amnesty to many people. The South African TRC was not only necessary for healing and atonement, but it also acted as a form of transitional government.²⁶¹ South Africa needed to move past apartheid, and pardoning those who were involved was one way to do that.²⁶² The United States has an established government and therefore has no need for transitional government measures. The United States should avoid truth and reconciliation through testimony, but if it is used, amnesty should not be granted.

Truth and reconciliation in the United States should not be too retributive, however. The *Gacaca* courts in Rwanda were quick to issue harsh sentences (albeit mitigated by testimony), and the courts were community driven. The *Gacaca* courts were also established only five years after the end of the genocide.²⁶³ In the United States, compelling people to testify about events that happened more than fifty years ago, then subsequently punishing those that come forward, would set a bad precedent and likely discourage any future testifiers.

260. Little, *supra* note 113.

261. Marianne Geula, *South Africa's Truth and Reconciliation Commission as an Alternative Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L. J. 57, 84 (2000).

262. *Truth & Reconciliation Commission*, *supra* note 6.

263. History, *supra* note 219.

Rather than focusing on testimony and amnesty, the United States should address the underlying racial issues present in American institutions, such as police precincts and city governments.²⁶⁴ The most effective form of truth and reconciliation for the United States should come from a series of legislation to address institutional racism and discrimination. Truth and reconciliation should start at the federal level, and congress should pass legislation mandating states and cities to form truth and reconciliation commissions, or congress should establish a Federal Truth and Reconciliation Commission. These commissions should address institutional issues similar to how the Greensboro TRC handled the aftermath of the Greensboro massacre. These commissions should all be similar yet tailored toward their respective jurisdictions.

C. The Reparations Solution

While the 2008 House Resolution was a good first step toward reconciliation, it was just that: a first step. The resolution offered a genuine apology, but did nothing to address reparations for the past pain and suffering endured by black Americans. Again, the question of genuine apology is raised and may raise doubt about whether the resolution was enough. One solution for the United States would be to pay reparations to all black Americans affected by slavery, Jim Crow, and the aftermath of each institution. This is a solution endorsed by many organizations including the United Nations.²⁶⁵ While this solution would show effort by the government to remedy the discrimination of the past, it would be disingenuous. While reparations are appropriate and would be a good start to remedying past discrimination, reparations would likely not help the current state of discrimination in the United States. Black Americans need a voice, and the United States needs true dialogue to remedy the discrimination of the past and help remedy the strained race relations today. Merely awarding reparations will not solve the issue, but it is a good first step.

D. The National Commission Solution

One option for the United States is to establish a national Truth and Reconciliation Commission. The South African TRC was comprised of three committees: the Human Rights Violation Committee; the Reparation and Rehabilitation Committee; and the Amnesty Committee.²⁶⁶ The Human Rights Violation Committee investigated human rights abuses; the Reparation and Rehabilitation Committee formed proposals for reparations and rehabilitation; the Amnesty committee granted or denied amnesty to those that sought it.²⁶⁷

The United States would benefit from a Human Rights Violation Committee and a Reparation and Rehabilitation Committee. The Human Rights Violation Committee would investigate atrocities committed during Jim Crow and, at the very

264. ALEXANDER, *supra* note 127, at 72-74.

265. Ishaan Tharoor, *U.S. Owes Black People Reparations for a History of 'Racial Terrorism,' Says U.N. Panel*, WASH. POST (Sept. 27, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/09/27/u-s-owes-black-people-reparations-for-a-history-of-racial-terrorism-says-u-n-panel/?utm_term=.4fa1bbd898bf.

266. *Truth & Reconciliation Commission*, *supra* note 6.

267. *Id.*

least, publish the atrocities to make them known to the United States population. If the crimes are severe enough, the perpetrators are still alive, and the statutes of limitations (if any) have not run out, the Committee could also be given judicial power to make judgments against perpetrators of human rights abuses during Jim Crow. The Reparation and Rehabilitation Committee could award reparations and help establish rehabilitation services for those wronged during Jim Crow.

The United States would likely not benefit from an Amnesty Committee. Amnesty is a good gesture toward peaceful resolution, but it would likely not work in the United States for reasons previously discussed.

The United States could create a national Commission comprised of lawyers, judges, and other political or civil rights activists. Because of the size of the United States and the structure of the States, it would be impractical to have only one federal commission. A better model would be to establish several regional commissions, possibly using the District Court system²⁶⁸ as a model. The commissions could also be established to travel around the United States, similar to the bankruptcy courts.²⁶⁹

E. The Arbitration Solution

Another solution for the United States involves not creating a new commission, but rather using arbitration and mediation resources already available. There are many organizations already established in the United States that organize and facilitate arbitration and mediation. For example, the American Arbitration Association (AAA) is an organization that certifies arbitrators for a wide range of practice areas including commercial, labor, and governmental.²⁷⁰ The AAA also specializes and provides mediators for mediation.²⁷¹ Since organizations such as the AAA already provide arbitrators, mediators, and forum for proceedings, using these established resources is one way to implement reconciliation and reparation adjudication. Since AAA arbitrators and mediators already specialize in various governmental disputes, adding reparation and reconciliation adjudication to their repertoire should not be a huge leap. The AAA has a thorough vetting process²⁷², and it would make more economic sense to use this vetting process to set up reconciliation proceedings using established AAA forums.

The first issue with this solution is that arbitration and mediation are often private, and an important aspect of truth and reconciliation is to give victims and perpetrators a public forum. To pivot the arbitration system to a public forum would require an overhaul that would potentially be time consuming and costly. One way to achieve this would be to give arbitrators and mediators the role of facilitators, and mandate all reconciliation proceedings be released to the public. Arbitrators and mediators would likely have to be trained as commission facilitators, and reconciliation proceedings would look much different than traditional arbitration and mediation. While this is easily said, it would take a massive repurposing of the

268. *Court Role and Structure*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited Oct. 6, 2018).

269. *Id.*

270. *Arbitration*, AM. ARB. ASS'N, <https://www.adr.org/Arbitration> (last visited Mar. 11, 2018).

271. *Mediation*, AM. ARB. ASS'N, <https://www.adr.org/Mediation> (last visited Mar. 11, 2018).

272. *Arbitration*, *supra* note 270.

arbitration system to fully implement. Additionally, arbitration is an inherently adversarial process, and the purpose of the proposed tribunals is one of reconciliation and cooperation. In this respect, the proposed solution would look markedly different than the United States' current arbitration system.

The second issue with this solution is that it relies on individual initiative to bring reparation lawsuits in the first place. Just because the forum exists to bring reparation cases does not mean that people will be incentivized to do so. There are several solutions to this issue that involve incentivizing individuals and States to bring more reparation lawsuits. No one idea is perfect, which makes this "economic solution" more ideological than practical.

One way to help incentivize individuals to bring more reparations cases is to extend or abolish the statute of limitations for Jim-Crow era reparations causes of action. Jim Crow affected almost every black American in some way, and many families are still suffering from the effects of Jim Crow today. Additionally, many courts in the United States were closed off to black Americans until relatively recently.²⁷³ Typical statutes of limitations for Jim Crow-era tort claims range from two to six years.²⁷⁴ Most people affected by Jim Crow are barred by the statute of limitations for such claims even after equitable estoppel and tolling, if they even apply in the first place.²⁷⁵ By extending or abolishing the Statute of Limitations on these tort claims, more individuals will be able to bring these claims in their respective forums. The push to abolish or extend statutes of limitation would need to come from State legislatures, a concept which is discussed in the forthcoming paragraph.

The federal government can incentivize state governments to set up forums for reparation and reconciliation, to extend the statute of limitations on Jim Crow-era reparation claims, and to generally incentivize state governments to prioritize reparation and reconciliation through the taxing and spending clause. The Taxing and Spending Clause of the United States Constitution grants the federal government its taxation power.²⁷⁶ The federal government can use its taxation power to influence legislation in state governments and incentivize states to enact legislation for certain tax incentives. The federal government has used the Taxing and Spending Clause in the past for agendas, such as labor laws and the drinking age.²⁷⁷ The Taxing and Spending Clause is used as both a carrot and stick: the carrot of spending and government funding, and the stick of taxation. The federal government can impose taxes on states that do not comply with reparation and reconciliation standards, and it can give funding (for infrastructure, social programs, etc.) to states that do comply.

This "economic solution" is by no means perfect. First, it relies on either a congressional incentive for organizations to set up reconciliation proceedings or the individual organizations to do it themselves. The initial push would need to be a lobbying effort to nudge Congress in the right direction, which is in and of itself a pipe dream. Furthermore, merely setting up a forum and making it easier to bring reparation and reconciliation cases does not mean enough cases will be brought to

273. Shaffer, *supra* note 244.

274. *Id.* at 966.

275. *Id.* at 968.

276. U.S. CONST. art. I, § 8, cl. 1.

277. See *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); see also *South Dakota v. Dole*, 483 U.S. 203 (1987).

these forums, nor does it mean just compensation will be afforded to Jim Crow victims. This solution leans more toward a reparation solution, and reconciliation based solely on reparation will not help the United States overcome true discrimination. While not a perfect solution, it does simultaneously give reconciliation commissions a forum, while making it easier for black Americans to bring reparation cases.

Enforcement and funding are the two main issues preventing the United States from establishing truth and reconciliation commissions. Ideally, the federal government would set aside money for truth and reconciliation commissions, but the impracticality and expense would most likely warrant state funding. This could prove problematic, as southern states, such as Mississippi and Alabama, have vast racial issues but do not have robust state budgets. Nor do these states have legislatures that are particularly inclined to pursue race relations. The other issue is one of enforcement. Failure to establish commissions would likely result in a fine, which would lead to many states weighing the benefits of paying the fine over spending money to establish a commission.

VII. CONCLUSION

Racial discrimination has persisted in the United States long after the end of the Jim Crow era. One way to address this issue and remedy the scars of the past is through truth and reconciliation. The United States can learn a lesson about truth and reconciliation from South Africa's TRC, established at the conclusion of apartheid. While the South African TRC was not perfect, it was a good start in the right direction. Black Americans have never received true reconciliation, and a TRC in the United States could serve as a means to relax the racial tensions straining the American social fabric.

South Africa still feels the effects of apartheid, and the ANC has seen a recent demise. While South Africa is far from the "rainbow nation" it strove to establish, it at least made a good faith effort to remedy the mistakes of the past. If there is any take-away from this comment, it is that the United States needs to make a similar good faith effort. There is no perfect solution, but truth and reconciliation is a good start.