8

Reparations

8.1 INTRODUCTION

Reparations represent an opportunity for those responsible for harm to redress victim-survivors in material and symbolic terms. Responsible actors providing reparations can acknowledge their responsibility for wrongdoing, and directly recognise victim-survivors as rights bearers. If successful, reparations can provide financial support, contribute to survivor healing, and rebuild trust between survivors and responsible actors. However, despite a significant amount of money in several national redress schemes for historical abuses, the approach taken fails to achieve these goals. Instead, redress often functions as a form of settlement and closure of claims regarding past wrongs and is limited in addressing inter-generational dimensions of historical-structural injustices. Section 8.2 considers the role of reparations as an element of transitional justice and previews the analysis of reparations across the four dimensions of power and emotions. Section 8.3 assesses the conceptual contribution of reparations to addressing historical-structural injustices, while Section 8.4 evaluates the contribution of existing redress schemes. Section 8.5 concludes by examining the potential and limits of reparations to address the mythical dimension of historical-structural injustices in material and symbolic terms.

8.2 REPARATIONS AS AN ELEMENT OF TRANSITIONAL JUSTICE

'Reparation' has been recognised as an umbrella term for different forms of redress, such as restitution, rehabilitation, compensation, apologies, or memorials.[1] Restitution, re-establishing the situation prior to the illegal act, constitutes a key

[1] United Nations Human Rights Committee, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add. 1326 May 2004, para 16.

objective of reparation in international law.[2] Where restitution is impossible or inappropriate given the gravity of the violation, compensation can be provided for the harm suffered, akin to tort law.[3] Originally, reparations were conceived of as a post-war remedy for inter-state conflict but have shifted to a more individual- and victim-focused approach in the post-World War II era,[4] with some significant and complex processes in contemporary post-conflict settings, such as in Colombia providing a range of measures to over 9 million victims.[5]

Reparations can be conceived of as mechanisms across the four dimensions of power and emotion examined in this book. First, reparations can operate as a material form of empowerment for individual victim-survivors, aiming to meet health needs, provide some financial acknowledgement of the harm suffered, and enable access to specialised services that may address a lack of empowerment or experiences of neglect or marginalisation during the time a victim was unredressed. By accessing reparations, victims may exercise individual agency and have their harm recognised and acknowledged by state authorities.[6] Reparations intend to serve a healing function for individual victim-survivors and communities,[7] addressing emotional distress or trauma. However, there is growing awareness of potential psychological damage or re-traumatisation caused by ill-designed processes, which may scrutinise the life choices and experiences of abuse by victim-survivors,[8] in a non-therapeutic way.

Second, reparations can affirm or challenge the distribution of power in existing structures. To date, reparations regarding historical-structural injustices have largely remained predicated on a corrective or interactional conception of justice, based on responding to harm of a victim-survivor by a

[2] *Factory at Chorzów Case (Germany v Poland) (Claim for Indemnity) (The Merits)* [1928] Permanent Court of International Justice Docket XIV: I. Judgment No. 13.

[3] Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice* (Springer Berlin Heidelberg 2009).

[4] John Torpey (ed), *Politics and the Past: On Repairing Historical Injustices* (Rowman & Littlefield Publishers 2003) 4; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 17.

[5] Sanne Weber, 'Trapped between Promise and Reality in Colombia's Victims' Law: Reflections on Reparations, Development and Social Justice' (2020) 39(1) Bulletin of Latin American Research 5.

[6] Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006).

[7] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed, Routledge 2011) 171; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998) 92.

[8] Stephen Winter, 'Two Models of Monetary Redress: A Structural Analysis' (2018) 13 Victims & Offenders 293, 303.

responsible individual, organisation, or state.[9] However, in recent years, a discourse of transformative reparations has emerged to respond to the perceived limitations of a purely corrective approach, by emphasising the need to address distributive justice, which takes into account the current needs of the population affected.[10] For Anna Reading, such a transformative justice approach to reparations 'is more usefully conceived as an assemblage of acts and processes across space and time that includes seeking transformations of material and nonmaterial reality that might be understood as emotional, spiritual, and affective capital along with transformations of material inequalities and economic capital'.[11] Such an approach suggests the potential for reparations to address structural injustices, within current distributions of wealth and resources and symbolic, non-material resources but remains to date without significant practice.

Third, reparations can serve or hinder epistemic justice. The process of acknowledging harm and the victim's status as rights holder may make a significant contribution to reparative epistemic justice.[12] Providing reparations may enable survivors to express their experiences of harm, how it affected their lives, and have that lived experience officially believed and acknowledged, vindicating their truth about what happened. However, a failure of acknowledgement and recognition, a lack of engagement with the voices and preferences of victim-survivors, or a lack of clearly communicated and agreed meaning regarding reparations may compound existing epistemic injustices.

Fourth, and relatedly, reparations can also be understood as an ontological form of power. Claire Moon suggests that reparations can 'regulate the range of political and historical meanings with which the crimes of the past are endowed and through which they are interpreted and acted upon'.[13] Reparations may contribute to the recognition of victim-survivors as rights holders, as those to whom duties to repair are owed by state and church

[9] Catherine Lu, *Justice and Reconciliation in World Politics* (Cambridge University Press 2017) 19.

[10] Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 Netherlands Quarterly of Human Rights 625, 637.

[11] Anna Reading, 'The Restitutional Assemblage: The Art of Transformative Justice at Parramatta Girls Home, Australia' in Paul Gready and Simon Robins (eds), *From Transitional to Transformative Justice* (1st ed, Cambridge University Press 2019) 243.

[12] Ben Almassi and Philosophy Documentation Center, 'Epistemic Injustice and Its Amelioration: Toward Restorative Epistemic Justice' (2018) 34 Social Philosophy Today 95.

[13] Claire Moon, '"Who'll Pay Reparations on My Soul?" Compensation, Social Control and Social Suffering' (2012) 21 Social & Legal Studies 187, 188.

institutions and other non-state actors. However, such ontological power likely remains limited by the configuration of victim-survivors as rights holders within a liberal democratic framework, which is problematic in settler colonial contexts, as discussed below.

8.3 REPARATIONS AND HISTORICAL-STRUCTURAL INJUSTICES

In the case of gross violations of human rights, full healing, restitution, or compensation may be impossible: 'Nothing will restore a victim to the *status quo ante* after years of torture, sexual abuse, or illegal detention', or after the loss of a loved one.[14] In the absence of further meaning, compensation for human rights violations may function as 'hush money' or suggest a market value only for the experience of harm and loss.[15] In addition, addressing non-recent violence and/or violence beyond lived experience directly warrants a distinctive response, owing to the longer lapse of time between the harm experienced and attempts to redress it and the likelihood such reparations may extend to descendants of those originally harmed.

There are divergent views about the ability of reparations to achieve this. John Torpey finds that reparations are either commemorative: 'backward looking, not necessarily connected to current economic disadvantage'... or anti-systemic in nature: 'rooted in claims that a past system of domination (colonialism, apartheid, slavery, segregation) was unjust and is the cause of continuing economic disadvantage suffered by those who lived under these systems or their descendants'.[16] Torpey suggests that these two types of reparation should be regarded as the extremes on a spectrum.[17] Similarly, Janna Thompson distinguishes between synchronic and diachronic theories of reparations.[18] Synchronic theories refer to relationships between contemporaries, typically applicable to reparations in mainstream transitional justice, which concern relatively recent armed conflicts or authoritarian regimes. Reparations for historical-structural injustice are criticised when thought of

[14] United Nations, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (United Nations 2008) 10.

[15] Regula Ludi, *Reparations for Nazi Victims in Postwar Europe* (Cambridge University Press 2012) 8–9.

[16] John Torpey, '"Making Whole What Has Been Smashed": Reflections on Reparations' (2001) 73 The Journal of Modern History 333, 337.

[17] Torpey, *Politics and the Past* (n 4) 11.

[18] Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Polity 2002) 149.

in this way, where the original victim of injustice has perished.[19] Brophy notes that the highest profile argument against reparations in the United States is that 'the people currently asked to pay had nothing to do with the injustices of the past'.[20]

In contrast, diachronic theories refer to obligations incurred by past generations. For Thompson, as societies represent inter-generational communities, current members of these communities may claim reparations for past injustices, such as slavery and taking the lands of Indigenous peoples, committed against their ancestors.[21] On this account, reparations are not designed to primarily remedy the original wrongdoing per se but the loss of inheritance that acts negatively upon the link between generations. It remains a moral and political choice of current state and churches to accept the responsibility to provide reparations,[22] for harms where the original victims are now deceased, but their descendants are marginalised and harmed, based on the endurance and reproduction of historical-structural injustices.

8.3.1 *Reparation Schemes Considered*

Of the forty-one reparation schemes considered in this book in Appendix 2, the majority are commemorative and synchronic and fail to address the structural conditions that framed and created the context for specific abuses, or the structural conditions that have persisted or been reproduced after non-recent harms. A majority of the schemes provided to victim-survivors of historical abuse are *ex gratia*, arising as a gift, without admission of responsibility from the states or churches who administer the schemes. A second category of schemes represents the outcomes of the settlement of litigation. These range from private settlements with exclusively financial outcomes, to broad, complex, and public settlements, such as the Indian Residential Schools Settlement Agreement (IRSSA) in Canada.

In Ireland, the redress schemes have all been *ex gratia* and designed and administered by government. The Residential Institutions Redress Board

[19] Eric A Posner and Adrian Vermeule, 'Reparations for Slavery and Other Historical Injustices' (2003) 103 Columbia Law Review 688.

[20] Alfred Brophy, 'The Cultural War over Reparations for Slavery' (2004) 53 De Paul Law Review 1181, 1202.

[21] Thompson (n 13) 149; Margaret Urban Walker, 'Moral Vulnerability and the Task of Reparations' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) 112.

[22] David C Gray, 'A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice' (2010) 87 Washington University Law Review 1043.

(RIRB) scheme was the result of survivor political and legal pressure and ran concurrently with the Commission to Inquire into Child Abuse (CICA) investigation, discussed in Chapter 6. It is the only scheme to have a financial contribution (of 11 per cent of the total cost) from churches, which were indemnified from any litigation for their contribution.[23] The Magdalene Restorative Justice Scheme arose as a response to the state's McAleese commission report.[24] A redress scheme for survivors of mother and baby homes has been proposed by government in 2022 and is progressing through parliament at the time of writing. There is no aggregated data on the settlement of claims against state or religious orders regarding historical abuses.

In Australia, redress schemes have been mandated by state or national governments, with varying levels of survivor advocacy and engagement. The 2018 National Redress Scheme, arising from a recommendation of the Royal Commission into Institutional Responses to Child Abuse, involved negotiations between state and federal governments and non-government institutions in all Australian jurisdictions to join the scheme, including the Catholic Church, Anglican Church, Salvation Army, Scouts Australia, YMCA Australia, the Uniting Church, and the Lutheran Church of Australia.[25] In 2021, the Australian government authorised national redress for the Stolen Generations, which will build on existing redress schemes from two Australian states. In addition, aggregated data gathered by the Royal Commission on Institutional Responses to Child Abuse reveals that over 3,000 claims of child sexual abuse against religious orders were resolved between 1995 and 2015. Catholic Church authorities made total payments of $268 million to settle claims of child sexual abuse between 1 January 1980 and 28 February 2015.[26] Daly and Davis note the rarity and value of this data to compare validation rates and monetary payments between civil litigation and redress schemes.[27] In addition, successive cases and legislation purported to enable Indigenous people to claim limited land rights where traditional ownership could be proven, discussed in Chapter 7.

[23] Patsy McGarry, 'Religious Congregations Indemnity Deal Was "A Blank Cheque," Says Michael McDowell' *The Irish Times* (Dublin, 5 April 2019).

[24] Claire McGettrick and others, *Ireland and the Magdalene Laundries: A Campaign for Justice* (I B Tauris & Company, Limited 2021) 127.

[25] Kathleen Daly and Juliette Davis, 'Unravelling Redress for Institutional Abuse of Children in Australia' (2019) 42 University of New South Wales Law Journal 1254, 1255–61.

[26] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (Royal Commission into Institutional Responses to Child Sexual Abuse 2015) 112.

[27] Kathleen Daly and Juliet Davis, 'Civil Justice and Redress Scheme Outcomes for Child Sexual Abuse by the Catholic Church' (2021) 33(4) Current Issues in Criminal Justice 438, 458.

In contrast, Canada's reparations processes for historical abuse have been driven by litigation and facilitated by the ability of some groups of victim-survivors to leverage the class-action lawsuit mechanism. The highest profile and heavily used scheme relates to the IRSSA, established in 2006, as part of a settlement agreement of over 7,000 legal claims against the federal government and a number of churches. A second large settlement agreement in 2018 relates to the 'Sixties Scoop' of Indigenous children to foster care and adoption. Several other schemes result from class actions and concern abuse in closed institutions. In Canada, limited published data regarding the settlement of clerical abuse cases in non-residential settings makes a holistic evaluation challenging. In contrast to Australia, a Specific Claims Tribunal was established in 2008 to assess monetary damage claims made by a First Nation against the Crown regarding the administration of land and other First Nation assets. To date, CAN$ 8.8 billion has been paid out in 587 settlements.[28]

In the United Kingdom, a number of avenues of judicial reparation are available for victims of criminal harm. In England and Wales, victim-survivors can obtain reparation through awards of compensation by the criminal courts or by the Criminal Injuries Compensation Authority (CICA). However, the ongoing IICSA inquiry revealed that only around 0.02 per cent of criminal compensation orders relate to child sexual abuse.[29] In addition, a compilation of settlements against the English Catholic Church since 'records allow' to 2020 reveals that there have been 439 child sex abuse allegations against dioceses and forty-nine claims against religious orders.[30] On available data between 2003 and 2018, the Church of England addressed 217 claims for child abuse.[31] In addition, governments in Jersey, Northern Ireland, and Scotland have provided for reparations after and alongside public inquiries into institutional abuse. No aggregated settlement data is available in these jurisdictions.

[28] Government of Canada, 'Specific Claims Branch: Settlement Report on Specific Claims', Crown-Indigenous Relations and Northern Affairs Canada <https://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx>.

[29] Alexis Jay and others, 'Accountability and Reparations' (IICSA 2019) CCS0719581022 09/19 64 <www.iicsa.org.uk/reports>.

[30] Alexis Jay and others, 'The Roman Catholic Church Safeguarding in the Roman Catholic Church in England and Wales' (Independent Inquiry into Child Sexual Abuse) 95 <www.iicsa.org.uk/key-documents/23357/view/catholic-church-investigation-report-4-december-2020.pdf>.

[31] Alexis Jay and others, 'The Anglican Church Safeguarding in the Church of England and the Church in Wales' (IICSA) 64 <www.iicsa.org.uk/document/anglican-church-safeguarding-church-england-and-church-wales-investigation-report>.

In the United States, there are no national reparation schemes regarding racial injustice and limited and unsatisfactory schemes for Native peoples. Aggregated data on the settlement of clerical sexual abuse cases against the Catholic Church reveal that 5,679 survivors received a total of approximately $2.5 billion, with an average settlement of $268,466.[32] The United States was the first to establish a formal process for the hearing of Native American land claims[33] but could only order monetary redress, not the return of Native lands.[34]

This universe of reparation schemes and settlement agreements demonstrates the significant cost of redress to date. However, both the experience of these schemes and their limitations have been a source of challenge and frustration for victim-survivors and inhibit their contribution to any transitional justice for historical-structural injustices.

8.4 ASSESSING REPARATION SCHEMES AND HISTORICAL-STRUCTURAL INJUSTICES

Assessing these reparation schemes is challenging in a context of limited publicly available reports on their processes and outcomes for survivors.[35] The full scope may be difficult to calculate, particularly in private settlements with church institutions, which do not disclose comprehensive figures.[36] In Ireland, a legal prohibition on applicants discussing engagement with the statutory RIRB has made assessment of its work highly challenging.[37] With these caveats in place, reparation schemes can be assessed across the four dimensions of power.

[32] Bishop Accountability, 'Sexual Abuse by U.S. Catholic Clergy Settlements and Monetary Awards in Civil Suits' <www.bishop-accountability.org/settlements/>; figures have not been validated by governmental inquiry or process.

[33] The Indian Claims Commission (1946) 60 Stat. 1050, 25 USC § 70 et seq.

[34] Nell Jessup Newton, 'Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System' in Roy Brooks (ed), *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (New York University Press 1999) 285.

[35] Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan UK 2014) 112.

[36] Timothy D Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (Harvard University Press 2008) 164.

[37] But see Sinead Pembroke, 'Historical Institutional Child Abuse in Ireland: Survivor Perspectives on Taking Part in the Commission to Inquire into Child Abuse (CICA) and the Redress Scheme', Contemporary Justice Review (2019) 22 (January 2) 43.

8.4.1 *Dimension 1: Agency*

Reparations are a significant site of engagement between victim-survivors and states and churches, negotiating the establishment, cost, and procedure of any schemes. The record of such participation and ownership is mixed at best. Kathleen Daly notes that a majority of Canadian redress schemes and settlements involve negotiation with victim-survivors or, at least, their legal representatives, while four Canadian agreements only involved negotiations between legal representatives, with little or no victim participation.[38] In some instances, survivors were critical of the length of settlement proceedings that exhausted survivors and wasted funds of the defendants that could have helped survivors.[39] In the Jericho Hill, and Nova Scotia redress schemes, existing accounts from survivors were negative of the redress experience.[40] In contrast, the redress schemes for Grandview and St John's and St Joseph's were the product of significant participation from victim-survivor advocacy groups, leading to enhanced trust and reconciliation and a high validation and acceptance of claims by victim-survivors.[41] Both schemes allowed victims the opportunity to describe their own experiences and explain the consequences on their lives.[42] However, despite positive reviews from many victim-survivors, Daly noted that the language used for the Grandview redress scheme of 'healing' was misleading and premature.[43]

Within the Canadian cases, Daly notes the experiences of participation for victim-survivors, 'depend on the bargaining power of the advocacy group and the size and strength of the legal team'.[44] The most notable example was the IRSSA, which was the result of extensive engagement with victim-survivors,

[38] Daly (n 35) 146.

[39] 'Final Report: Review of the Needs of Victims of Institutional Abuse' (Law Commission of Canada 1998) 74.

[40] Lupin Battersby, Lorraine Greaves and Rodney Hunt, 'Legal Redress and Institutional Sexual Abuse: A Study of the Experiences of Deaf and Hard of Hearing Survivors' (2008) 10 Florida Coastal Law Review 67, 104–5; Fred Kaufman, 'Searching for Justice: An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse' (2002) 297 <https://novascotia.ca/just/kaufmanreport/fullreport.pdf>; 'Final Report: Review of the Needs of Victims of Institutional Abuse' (n 39) 84–5.

[41] Kaufman (n 40) 356.

[42] Daly (n 35) 172; Bruce Feldthusen, Oleana AR Hankivsky and Lorraine Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 Canadian Journal of Women and Law 66.

[43] Daly (n 35) 175.

[44] ibid 119–20.

advocates, and their legal representatives.[45] Reimer et al found that 31 per cent of survivors surveyed were positive about their experiences with the common experience payment component of IRSSA, with most saying reparations were pragmatically useful in providing financial assistance but went on to suggest that 'the satisfaction derived from the CEP money [Common Experience Payment] was for the most part temporary'.[46]

In contrast, a majority of Australian redress schemes are stipulated by government, with limited evidence of victim participation or consultation.[47] In contrast, the recent National Redress Scheme resulted from significant engagement by victim-survivors with the Royal Commission on child abuse that recommended a national approach and with subsequent government negotiations.[48] However, a recent review of this scheme found it fundamentally unsatisfactory despite this engagement, noting: 'The Scheme's enabling legislation states, "Redress under the Scheme should be survivor focussed." It currently is not ... The feedback of survivors has been consistent about the need for change.'[49]

In the United Kingdom, a 2019 review of criminal compensation schemes by the UK Victims' Commission was highly critical of its operation, finding it 'extremely traumatic for victims who have to repeat details of the crime numerous times'.[50] In 2019, the UK IICSA reported that 'none of the avenues for redress which we have examined – civil justice, criminal compensation (CCOs and CICA awards) or support services – is always able to adequately provide the remedies which are sought as accountability and reparations for victims and survivors of sexual abuse'.[51] IICSA's analysis indicated a number of limitations to even bespoke reparation schemes: acknowledgement and apology may not be feasible where offending individuals or institutions no longer exist or do not want to engage with a redress process;[52] a redress scheme may

[45] ibid 120.
[46] Gwen Reimer and others, *The Indian Residential Schools Settlement Agreement's Common Experience Payment and Healing: A Qualitative Study Exploring Impacts on Recipients* (Aboriginal Healing Foundation 2010) xiv.
[47] Daly (n 35) 123.
[48] Royal Commission into Institutional Responses to Child Sexual Abuse (n 26).
[49] Robyn Kruk, 'Second Year Review of the National Redress Scheme' (Department of Social Services 2021) 11–13.
[50] 'Compensation without Re-Traumatisation: The Victims' Commissioner's Review into Criminal Injuries Compensation' (Victims' Commissioner for England and Wales 2019) <https://victimscommissioner.org.uk/published-reviews/compensation-without-re-traumatisation-the-victims-commissioners-review-into-criminal-injuries-compensation/>.
[51] Jay and others, 'Accountability and Reparations' (n 29) vi.
[52] ibid 95.

not afford victim-survivors a 'day in court', which may be seen as beneficial; a common experience or tariff approach may seem limited or impersonal.[53] In addition, if the reparation scheme is not funded by the responsible institution, it bears little difference to existing statutory schemes and does not communicate any sense of accountability for the responsible institution.[54] The Northern Irish and Scottish redress schemes were the result of extensive lobbying and negotiation by victim-survivors.[55]

The RIRB and the Magdalene Laundries redress scheme in Ireland were the result of advocacy from victim-survivor organisations, but the implementation of the Magdalene scheme in legislation and policy resulted in the weakening of many of the benefits first proposed.[56] The Magdalene Scheme was subsequently found by the Ombudsman to have been maladministered.[57] In 2019 consultations with government, many survivors described their experiences of the RIRB process as adversarial, difficult, traumatic, and negative while Caranua was described as bureaucratic and unnecessarily unwieldy.[58] Sinead Pembroke found during her research on CICA and RIRB that, 'the majority of survivors that were interviewed, felt the inquiry and redress process triggered feelings of shame and stigma in relation to their time in the institution'.[59] In addition, many participants also felt that 'their solicitor had benefitted financially from their personal trauma'.[60] Fionna Fox and AnneMarie Crean note: 'Victims report that the Redress Board was

[53] ibid 96.

[54] ibid.

[55] Patricia Lundy and Kathleen Mahoney, 'What Survivors Want: Part Two A Compensation Framework for Historic Abuses in Residential Institutions' (Ulster University 2016) <https://pure.ulster.ac.uk/ws/portalfiles/portal/11546232/WSW+FINAL+APPROVED.pdf> (accessed 7 October 2022); Andrew Kendrick, Sharon McGregor and Estelle Carmichael, 'Consultation and Engagement on a Potential Financial Compensation/Redress Scheme for Victims/Survivors of Abuse in Care' (Centre for Excellence for Children's Care and Protection 2018) <https://strathprints.strath.ac.uk/70945/> (accessed 7 October 2022).

[56] McGettrick and others (n 24) 128–40.

[57] 'Opportunity Lost: An Investigation by the Ombudsman into the Administration of the Magdalene Restorative Justice Scheme' (Office of the Ombudsman 2017).

[58] Barbara Walshe and Catherine O'Connell, 'Consultations with Survivors of Institutional Abuse on Themes and Issues to Be Addressed by a Survivor Led Consultation Group' (2019) 4 <www.education.ie/en/Publications/Education-Reports/consultations-with-survivors-of-institutional-abuse-on-themes-and-issues-to-be-addressed-by-a-survivor-led-consultation-group.pdf>.

[59] Sinead Pembroke, 'Historical Institutional Child Abuse in Ireland: Survivor Perspectives on Taking Part in the Commission to Inquire into Child Abuse (CICA) and the Redress Scheme' (2019) 22 Contemporary Justice Review 43, 51.

[60] ibid 52.

adversarial, confrontational and often times antagonistic, particularly when their claims of abuse were denied by the respective Religious Order.'[61]

In the United States, while Congress hoped the Indian Claims Commission would be a means of avoiding litigation, it in fact adopted the culture and practices of the courts, and its hearings became long adversarial affairs.[62] Jennifer Balboni and Donna Bishop note that in Boston in the United States, clerical sexual abuse survivors 'detested' the sense that they were in competition with other survivors for a fixed pot of money, which was awarded based on a ranking of who was most 'damaged'.[63]

The majority of existing schemes consist of financial payments to victim-survivors. In a majority of cases, victim-survivors who engaged with a reparation scheme were obliged to waive rights to sue government or church entities for similar claims of abuse.[64] This requirement is typically intended to incentivise participation in the scheme and avoid double compensation. Disappointment with the amount received is a common finding across several schemes.[65] Survivors were unhappy when the Western Australian government reduced the maximum payment under its Redress WA scheme from $80,000 to $45,000, due to a larger than expected number of applicants.[66] In Ireland, Enright and Ring note that although the RIRB scheme was announced as being intended to provide compensation roughly equivalent to civil litigation, 'the average payment was roughly half that made in successful civil cases against religious orders'.[67]

In addition to financial payments, several schemes provided access to counselling or reclaiming medical, educational, or legal expenses.[68] Several schemes were also accompanied by apologies, addressed separately in Chapter 9. Several of the more ambitious schemes also contained elements of memorialisation and museums, regrettably beyond the scope of this book.

[61] Fionna Fox and AnnMarie Crean, 'Ryan Report Follow Up: Submission to the United Nations Committee against Torture Session 61' (Reclaiming Self 2017) 23.

[62] Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press 2008) 28–9.

[63] Jennifer M Balboni and Donna M Bishop, 'Transformative Justice: Survivor Perspectives on Clergy Sexual Abuse Litigation' (2010) 13 Contemporary Justice Review 133, 152.

[64] Daly (n 35) 136.

[65] ibid 144; James Gallen and Kate Gleeson, 'Unpaid Wages: The Experiences of Irish Magdalene Laundries and Indigenous Australians' (2018) 14 International Journal of Law in Context 43, 52.

[66] Royal Commission into Institutional Responses to Child Sexual Abuse (n 26) 96.

[67] Máiréad Enright and Sinéad Ring, 'State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice' (2020) 55 Éire-Ireland 68, 75.

[68] Daly (n 35) 139.

Some schemes address reparations for cultural property, such as the 1990 US Native American Graves Protection and Repatriation Act (NAGPRA).[69] In Australia, some reparation packages do not have financial payments to survivors but instead focus on access to services and other benefits. For Forgotten Australians, one of the principal forms of redress in this period was the establishment of Find & Connect Support Services in 2010. It provides information on family tracing, personal records, counselling, and other support for all those placed in Australian orphanages, children's homes, and other institutions. The website was developed by 'a team of historians, archivists, and social workers'.[70] A 2014 evaluation of the service found it 'demonstrated considerable progress in meeting the needs of the Forgotten Australians and Former Child Migrants who are using their services', though noting some regional and institutional variation in access to records.[71]

Existing empirical and anecdotal evidence suggests that while victim-survivor empowerment may be experienced in advocating and applying for reparations, the experience of satisfaction or benefit from such interactions may be fleeting. Daly also notes that participation can be both a justice interest and an emotional burden to survivors: 'Participation itself can create emotional turmoil and dredge up bad memories. Complex processes and delays compound the problem.'[72] As a result, while survivor participation in advocacy design and implementation of reparation schemes may offer an episodic experience of empowerment, without more it is unlikely to change the structural distribution of power or the manner in which knowledge is shared across power in state or church institutions. In doing so, participation may also cause significant distress to survivors. Schemes, such as the RIRB and Magdalene schemes in Ireland, have proved largely unsatisfactory from survivor perspectives. Although several schemes combine financial payments with access to health services or information tracing, further research is needed to assess whether and how these schemes contributed to improving outcomes for survivors.

8.4.2 *Dimension 2: Structure of Reparations*

Existing reparation schemes largely operate within, rather than change existing legal and political structures of power. First, victim-survivor

[69] Stephen E Nash and Chip Colwell, 'NAGPRA at 30: The Effects of Repatriation' (2020) 49 Annual Review of Anthropology 225.

[70] Shurlee Swain, 'Stakeholders as Subjects' (2014) 36 The Public Historian 38.

[71] Australian Healthcare Associates, 'Evaluation of the Find and Connect Services Final Report' (Department of Social Services 2014) 2–3.

[72] Daly (n 35) 170.

participation with these schemes is likely to intersect with the structural feature of the expertise (or lack thereof) of state and church officials who will negotiate, design, and implement reparation schemes and who, as Stephen Winter notes, have the advantage of being 'repeat players', including 'the capacity to deploy long-term strategies that develop favourable precedents and rules. Whereas survivors usually participate in only one case (their own), the state employs experts who conduct hundreds of cases, enabling those officials to develop personal relationships with adjudicators, cultivate a reputation for credibility, and learn from experience.'[73]

Second, no national reparation scheme has attempted to be comprehensive, and instead many schemes are received with victim-survivor unhappiness at perceived limitations in the completeness, scope, and comprehensiveness of reparation schemes. Completeness refers to the 'ability of a programme to reach every victim, that is, turn every victim into a beneficiary'.[74] In some instances, the geographical scope is narrow, excluding some victims in the state. In the absence of nationwide reparation schemes in the United States regarding racial violence, several state- and city-level reparation initiatives have emerged.[75] Similarly, some states in Australia provided reparations for the Stolen Generations, with the national government only doing so in 2021. Narrow scope can occur even in schemes related to closed institutions nationwide. The Irish Magdalene Laundries scheme also initially failed to include all relevant institutions associated with Magdalene Laundries.[76] In making such determinations of scope, Claire McGettrick et al emphasise how the state and church sought to retain power and control of the process of survivor applications, with the relevant religious order 'verifying' a survivors' 'duration of stay'.[77] Other criticisms relate to the comprehensiveness of the schemes, which refers to the types of crime or harm that reparations seek to redress.[78] The majority of reparation schemes for historical abuse relate to child sexual abuse. This reflects the focus both of inquiries and of accountability mechanisms discussed in Chapters 6 and 7. This can be seen in the Australia National

[73] Stephen Winter, 'State Redress as Public Policy: A Two-Sided Coin' (2019) 31 Journal of Law and Social Policy 34, 38.
[74] United Nations (n 14) 15.
[75] Desmond S King and Jennifer M Page, 'Towards Transitional Justice? Black Reparations and the End of Mass Incarceration' (2018) 41 Ethnic and Racial Studies 739.
[76] 'Opportunity Lost: An Investigation by the Ombudsman into the Administration of the Magdalene Restorative Justice Scheme' (n 57) 24–5; *MKL and DC v Minister for Justice and Equality* [2017] IEHC 389.
[77] McGettrick and others (n 24) 135.
[78] United Nations (n 14) 19.

Redress Scheme, limited to sexual abuse, or in the IRSSA, which excluded violations of Indigenous cultural rights. The Magdalene Laundries scheme only provided redress for the duration of stay in these institutions and not for forced labour or any other human rights violations.[79]

Even the broadest schemes do not claim to address the full scope of historical systems of harm and oppression, such as slavery, settler colonialism, or patriarchal power structures. Individualised schemes are important to recognise the lived experience of victim-survivors of particular harms. However, it is also significant to frame those individualised experiences as part of larger patterns of harm, particularly if reproduced over time as historical-structural injustices. Catherine Lu argues, 'In cases where structural injustice enables widespread, coordinated, legalized, and normalized individual, collective, or corporate wrongdoing ... a narrow account of reparation that aims to settle accounts only between the particular agents involved is no longer appropriate for determining the field of responsible agents for victim reparations.'[80]

There is some evidence of the potential for reparations to contribute in this way. Anti-systemic schemes begin by providing compensation for detention within an institutional context that was legal at the time it took place, which may offer flat reparation per year institutionalised, and/or additional reparation for specific harms alleged, such as physical and sexual abuse or neglect.[81] Daly is in favour of this approach: 'by linking money to time spent in an institution, the amount may better symbolize claimants' realities of institutional life than a tort logic of "pain and suffering", which is tied to incidents of abuse.'[82] The provision of reparation for detention within an institutional setting that was legal at the time it took place demonstrates the ability of states and churches to revisit historical contexts and recognise moral and political wrongdoing, rather than rely merely on the settlement of legal claims alone. This opens up the potential for reparations to be provided for other historical contexts outside institutional settings, including to descendants.

Providing reparations for historical-structural injustices, such as the legacy of slavery and Jim Crow in the United States, will require extending eligibility for reparations to the descendants of those who suffered historical harm as well as those who suffer contemporary forms of harm. Descendants may claim eligibility by arguing either that the historical injustice has enduring effects in

[79] McGettrick and others (n 24) 128.
[80] Lu (n 9) 235.
[81] Winter (n 8) 293–4.
[82] Daly (n 35) 128.

the present or that as heirs to original victims they are entitled to remedy.[83] Evans and Wilkins note that these arguments remain challenging, 'because the exact influence of specific past wrongs upon specific present conditions is difficult to determine'.[84] However, of existing schemes, eligible relatives or estates of deceased victims/survivors were able to apply for and/or receive payment in four schemes in limited circumstances, including the Irish RIRB scheme and Canadian Residential Schools scheme. Other schemes in Western Australia and Jersey explicitly excluded descendants. Other schemes, such as the Scottish Redress Scheme, have recognised the need for priority groups within the pool of eligible applicants, typically those of advanced age or subject to life-threatening or terminal illnesses. As a result, it remains possible to construct a reparations scheme with an inter-generational scope, where there is sufficient political will to support this. The problem is political, not legal, and reflects the limits of law's ability to change culture and power structures alone. Interrogating the critiques of the structure and limits of existing schemes reveals their formal elements are capable of adaption to address historical-structural injustices in a more direct and comprehensive manner.

8.4.3 *Epistemic Justice and Reparations*

Reparations are often delivered through administrative, rather than litigation-based processes, claimed to be more efficient and less traumatic for survivors than litigation.[85] However, the existing cases studied here challenge that assumption. Limited survivor voice and epistemic justice in these schemes compound their direct and structural limitations. In the cases of private settlements, it is impossible to assess whether any epistemic justice is achieved for survivors or indeed the broader emotional experience for survivors. The lack of transparency in church settlements of clerical sexual abuse cases makes it difficult for survivors to compare settlements and share experiences of engaging with church authorities and lawyers and for such settlements to have any public communicative value, even if individual victim-survivors receive private apologies or appropriate processes.

[83] Janna Thompson, 'Historical Injustice and Reparation: Justifying Claims of Descendants' (2001) 112 Ethics 114, 116.
[84] Matthew Evans and David Wilkins, 'Transformative Justice, Reparations and Transatlantic Slavery' (2019) 28 Social & Legal Studies 137, 147.
[85] de Greiff (n 6) 459.

Of government-mandated schemes, only some provided the opportunity for oral hearings, with others relying on the submission of documents or application forms by survivors. Daly also notes that the larger the pool of potential claimants, the less likelihood of oral hearings or provision of benefits and services beyond financial compensation.[86] Regarding the Canadian IRSSA, there was both a flat CEP and an individualised Independent Assessment Process. In evaluating the CEP, Reimer et al noted that a third of those in their sample 'felt they were not believed in their first application'.[87] Fifteen per cent recognised reparations as symbolically important as a form of acknowledgement and recognition of wrongdoing.[88] However, Reimer et al also note engagement with this redress process was re-traumatising and distressing for some and was associated with a rise in 'accidental deaths, suicides, and homicides', which contributed to a 'general demoralisation' in some communities.[89] Other victim-survivors viewed the payments as inadequate or as hush money.[90] Participants generally agreed that the compensation process seemed 'inconsistent, leaving them at the mercy of an outside agency in control of yet another aspect of their lives'.[91] In Jennifer Matsunaga's empirical research, survivors criticised the CEP process as both faceless and requiring them to prove their presence in a residential school, despite a lack of ease in retrieving state and church records.[92] This research indicates the limits of reparations as a site of epistemic justice, with one government official stating: 'many application forms would come in covered in writing and sometimes there would be pictures and we just didn't know what to do with all that extra information'.[93] Negative victim-survivor experiences were reported regarding the redress scheme for the Nova Scotia Institutions, concluding claimants were 'presumed to be guilty of fraud and not treated with respect'.[94] Subsequent interviews of victim-survivors describe negative experiences of feeling disrespected and not believed.[95]

Regarding Irish redress schemes, Sinead Pembroke notes: 'the redress scheme application procedure itself (writing a detailed statement, and an

[86] Daly (n 35) 138.
[87] Reimer and others (n 46) 32.
[88] ibid 50.
[89] ibid 44.
[90] Daly (n 35) 181.
[91] Reimer and others (n 46) xiii.
[92] Jennifer Matsunaga, 'The Red Tape of Reparations: Settler Governmentalities of Truth Telling and Compensation for Indian Residential Schools' (2021) 11 Settler Colonial Studies 21, 29.
[93] ibid 30.
[94] Kaufman (n 40) 297.
[95] 'Final Report: Review of the Needs of Victims of Institutional Abuse' (n 39) 84–5.

assessment by a psychologist in order to verify their trauma), resulted in psychological wounds being opened up after years of consignment to the deepest reaches of the mind. This had a negative effect on some survivors' personal lives, and resulted in marital breakdowns.'[96] AnneMarie Crean and Fionna Fox write, 'The Redress Board in effect became another forum where once again the balance of power was unfairly tilted against the victim.'[97] In particular, they emphasise that 'victims report a lack of understanding of their individual circumstances coupled with a failure by the Board to understand and empathise with their past experiences of abuse and ongoing issues as a result'.[98] Máiréad Enright and Sinéad Ring frame such experiences as testimonial injustices, 'where victim-survivors are prevented from acknowledgement as a giver of knowledge and as an informant', noting it a particular injustice arising where it relates to the survivors' construction of their own childhood.[99] They note the state's broader responses to historical abuses constitute a form of epistemic injustice: 'Redress schemes have financialized the wrongs done to victim-survivors and eclipsed other dimensions of their claims. Victim-survivors feel that the injuries they suffered are not heard and recognized as wrongs.'[100] The Magdalene Laundries scheme was criticised by the state's own Ombudsman for denying the evidential value of women's own testimony: 'There was an overreliance on the records of the congregations and it is not apparent what weight if any was afforded to the testimony of the women and/or their relatives.'[101] These forms of epistemic injustice confirm that administering reparations through less complex means is no guarantee of avoiding distress to survivors. Instead, the limitations of the approaches adopted across jurisdictions demonstrate the real risk of re-traumatisation for survivors seeking reparations. The lack of capacity of those administering redress schemes to hear, accept, and acknowledge the experiences and voices of victim-survivors confirms reparations as a major site of epistemic injustice in dealing with the past. In attempting to simplify processes, whether through documentary applications or individualised assessments, many redress schemes demonstrate the inability to address the needs of victim-survivors and caution expectations for reparations for historical-structural abuses.

[96] Pembroke (n 59) 52.
[97] Fox and Crean (n 61) 22.
[98] ibid.
[99] Enright and Ring (n 67) 85.
[100] ibid.
[101] 'Opportunity Lost: An Investigation by the Ombudsman into the Administration of the Magdalene Restorative Justice Scheme' (n 57) 8.

8.4.4 *Ontology and Reparations*

In some instances, particularly the settlement of class actions, reparations may represent the only mechanism for addressing the past and may by design fail to capture elements of truth seeking, accountability, or apology discussed in other chapters. As a result, reparations or settlements may be the sole contribution to the development of an ontological framing of victim-survivors. In the absence of an alternative narrative communicated around the redress, Daly concluded that survivors 'equated money with their injuries, suffering, and value as a person', which inevitably was re-traumatising.[102] Many survivors 'objected to the use of categories to define and rate their childhood abuse experiences', one saying 'it's like they were labelling beef'.[103] Negative experiences of Canadian redress schemes are united in the view that 'the payment was interpreted as monetary exchange for abuse or injuries suffered, and a survivor's "worth" was not recognized'.[104]

The absence of communicative messages may also be significant. For instance, the Irish government has failed to memorialise either context of the industrial schools or Magdalene Laundries, re-emphasising the financial dimensions of redress in both instances and rendering redress something provided to individual applicants alone. Instead, in the absence of any mention of rights or responsibility, the meaning of the scheme becomes nebulous. McGettrick et al write regarding the Magdalene scheme: 'The government's designation of the Scheme as "ex gratia" effectively functioned as a declaration that neither State departments not religious congregations were to be treated as wrongdoers who might be inclined to treat survivors with a lack of respect.'[105] The *ex gratia* approach excludes the possibility of recognising survivors as rights holders and the state and church as duty bearers.

Sunga argues that 'unless there is a clear articulation that a monetary award does not signify a market transaction, money will tend to indicate some form of exchange for abuse injuries.'[106] The consequences are that money payments may leave survivors to feel that 'their worth has not been understood or acknowledged by the party responsible for the abuse'.[107] For Sunga, an

[102] Daly (n 35) 179.
[103] 'Final Report: Review of the Needs of Victims of Institutional Abuse' (n 39) 83.
[104] Daly (n 35) 179.
[105] McGettrick and others (n 24) 135.
[106] Seetal Sunga, 'The Meaning of Compensation in Institutional Abuse Programs' (2002) 17 Journal of Law and Social Policy 39, 40.
[107] ibid 41.

alternative and explicit symbolism is necessary.[108] Sarah Pritchard suggests the potential for such money to communicate the vindication of survivor rights and the responsibility of offending actors.[109] Daly notes one common critique emerges that the opportunity for reparations to communicate a clear symbolic message was not taken: 'Most survivors did not see the payment as symbolic, as recognition for injury and solace for pain. Instead, they equated the amount received in an individualized scheme to the level of abuse and injury they had experienced and to their "worth". They did not understand why others received more money than they did.'[110] As a result, Daly concludes the word 'compensation' should be removed from redress schemes, which should avoid any link to a market value meaning and make explicit links to other non-monetary forms of redress or mechanisms to address the past.[111]

An emphasis on symbolism challenges the dominant *ex gratia* approach to reparations for historical abuses, based more on the benevolence of the provider of the scheme than as a matter of recognition of rights. As a result, the symbolism of reparations involves questions of the epistemic justice and ontological power involved in reparations – what are reparations understood to symbolise, who gets to be heard on this issue, and how does it relate to the broader meaning and knowledge in society? The role and participation of victim-survivors will be key in legitimating reparations in their content, processes, and potential symbolism. Lisa LaPlante argues that 'the "positionality" of victims will influence what they perceive to be necessary to feel repaired' and that a government should 'adopt a participatory approach while planning and implementing its reparation programs to accommodate better and manage the multiple justice aims and expectations of victims'.[112]

In the case of reparations in settler colonial contexts, existing schemes remain predicated on existing settler authority, structures, and social ontology, and involve 'inserting the Indigenous person into a reaffirmed colonial universe, where practices of economic, symbolic, and linguistic domination sit unchallenged'.[113] Rebecca Tsosie and others suggest that reparations for Indigenous peoples involve asserting claims for recognition of cultural and

[108] ibid 60.
[109] Sarah Pritchard, 'The Stolen Generation and Reparations' (1998) 4 University of New South Wales Law Journal 259, 264.
[110] Daly (n 35) 195.
[111] ibid 196.
[112] Lisa J Laplante, 'Just Repair' (2015) 48 Cornell International Law Journal 513, 514.
[113] Andrew Woolford, 'Nodal Repair and Networks of Destruction: Residential Schools, Colonial Genocide, and Redress in Canada' (2013) 3 Settler Colonial Studies 65, 77.

political rights as separate nations.[114] Regarding Indigenous land claims in Australia, Aileen Moreton-Robinson argues that 'Indigenous ontological relations to land are incommensurate with those developed through capitalism, and they continue to unsettle white Australia's sense of belonging, which is inextricably tied to white possession and power configured through the logic of capital and profound individual attachment'.[115] Recognition of these dimensions of Indigenous claims challenges a synchronic or commemorative account of reparations and requires reparations to be part of a broader dismantling of systems of assimilation, rather than part of them. To date, existing reparations processes neglect this dimension.

8.5 TRANSFORMING REPARATIONS FOR HISTORICAL-STRUCTURAL INJUSTICES: THE IMPACT ON NATIONAL MYTHS

The existing practice of reparations struggles to capture the distinctive circumstances of historical-structural injustices and continues a pattern of ambivalent success for reparation programmes familiar to mainstream transitional justice. Instead, the intention of reparations for historical-structural injustices should be not to undo or repair the harms done but to change the meaning of those harms by contributing to alleviating the material consequences of the harms today. In that way, reparations can contribute to either affirming or challenging the national and religious myths that undergird historical-structural injustices in each context explored in this book.

The design, process, and outcomes of reparations in Ireland miss the opportunity to communicate to victim-survivors and to society more broadly the acknowledgement of state and church responsibility, the status of victim-survivors as rights holders, and the admission of the inadequacy of the redress offered, despite significant expense. The processes of Irish redress schemes have been criticised by international human rights bodies and national civil society organisations.[116] Irish redress is inarticulate about its meaning and risks

[114] Rebecca Tsosie, 'Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations' in Jon Miller and Rahul Kumar (eds), *Reparations: Interdisciplinary Perspectives* (Oxford University Press 2006) 44.

[115] Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press 2015) xxi; 3–19.

[116] United Nations Committee on the Rights of the Child, Concluding Observations on Ireland, CRC/C/IRL/CO/3-4; United Nations Committee on Economic Social and Cultural Rights, United Nations Concluding Observation on Ireland, E/C.12/IRL/CO/3; United Nations Human Rights Committee, Concluding Observations on Ireland, CCPR/C/IRL/CO/4; United Nations Committee against Torture (n 57).

forming a type of state shame that both acknowledges and recovers state authority and control over survivors' lives and interests.[117] In the absence of clearly communicated public narratives around these schemes, the Irish approach results in amplifying the risk that the money values and the distressing processes of reparations are all that are remembered from this attempt to address the past. To transform the Irish practice of reparations requires at a minimum changing survivor and public access to state and church archives regarding historical-structural abuses, currently highly restricted for survivors.[118]

The Australian experience shows growing appreciation of the need for redress as a response to historical abuses. The role of information and access to records is particularly prominent in Australia as an alternative to non-financial forms of reparation. However, even the most ambitious schemes, such as the National Redress Scheme for child sexual abuse, reflect a divergence between a willingness to offer reparation to those who have experienced definable and closed categories of harm and resistance to the idea of transformative approaches to reparations that would involve more profound and existential public debates about justice for colonisation and harms to First Nations peoples.

In Canada, the IRSSA represents the most ambitious and complex reparations scheme regarding historical abuses completed to date. While its approach has much to commend it, its scope reveals the enormity of the challenges facing reparations for entire systems of settler colonisation, of which residential schools and closed institutions form only a part. It is possible to suggest that, although reflecting a significant legal victory for survivors, and significant cost to state and church institutions, the redress scheme may not disrupt a settler colonial or assimilationist ontology. Its failure to incorporate Indigenous forms of knowledge suggests the potential continuation of the peaceful settler Canadian myth.

In addition to existing settlement of child abuse cases in the United States, calls for reparations regarding slavery in the United States have a long heritage. The fundamental challenge to such proposals is the implications of what reparations would mean for the national US political self-image and national myth.[119] There were historical, unsuccessful attempts to provide reparations

[117] Enright and Ring (n 67) 86–8.

[118] Maeve O'Rourke, 'Ireland's "Historical" Abuse Inquiries and the Secrecy of Records and Archives' in Lynsey Black, Louise Branigan and Deirdre Healy (eds), *Histories of Punishment and Social Control in Ireland: Perspectives from a Periphery* (Emerald Publishing 2022).

[119] Charles P Henry, 'The Politics of Racial Reparations' (2003) 34 Journal of Black Studies 131, 132.

for slavery, intending to provide each family of ex-slaves 'not more than forty acres of tillable land'.[120] Instead, Congress enacted the Southern Homestead Act in 1866, which provided eight-acre plots in five Southern states for former slaves to purchase, requiring capital for such purchases and not functioning effectively as reparation, and was in any event repealed by 1876.[121] Jeffrey Kerr-Ritchie notes the ongoing resonance of forty acres: 'By the 1930s, "forty acres" had become a collective memory among older generations of former slaves, an indication of the failure of the federal government to fulfill its promise to make emancipation mean something tangible, material, and longlasting.'[122] The idea of forty acres thus moved from a synchronic and diachronic conception of reparations over time.

Reparations continue to be advocated for regarding slavery, racism, and racial violence into the present day,[123] but with significant focus on reparations for slavery and a lessened focus on reparations for lynching and other acts of racial violence within living memory.[124] In 1969, the civil rights leader James Forman presented the Black Manifesto to American churches, demanding that they pay blacks $500 million in reparations.[125] Similar demands for reparations were made in the twentieth century by groups such as the National Coalition of Blacks for Reparations in America, the Black Radical Congress, Student Nonviolent Coordinating Committee, the Black Panthers, and the Black Economic Development Conference.[126] In 1989, Congressman John Conyers Jr. (D-MI) introduced the Commission to Study Reparations Proposals for African Americans Act and has consistently reintroduced the bill in subsequent

[120] Roy Brooks (ed), 'W. Tecumseh Sherman, Special Field Order No. 15: "Forty Acres and a Mule"' in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (New York University Press 1999).

[121] Jeffrey Kerr-Ritchie, 'Forty Acres, or, an Act of Bad Faith' (2003) 5 Souls 8.

[122] ibid 21.

[123] Charles Ogletree, 'The Current Reparations Debate' (2003) 36 UC Davis Law Review 1051; Anthony Cook, 'King and the Beloved Community: A Communitarian Defense of Black Reparations' (2000) 68 George Washington University Law Review 959; Adjoa Aiyetoro, 'Formulating Reparations through the Eyes of the Movement' (2003) 58 NYU Annual Survey of American Law 457; Mari Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 323; Vincene Verdun, 'If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans' (1992) 67 Tulane Law Review 597; Alfred L Brophy, *Reparations: Pro & Con* (Oxford University Press 2006).

[124] Emma Coleman Jordan, 'A History Lesson: Reparations for What?' (2003) 58 NYU Annual Survey of American Law 557.

[125] Robert Fullinwider, 'The Case for Reparations' (2000) 20 Report from the Institute for Philosophy and Public Policy 1, 1.

[126] Robin DG Kelley, *Freedom Dreams: The Black Radical Imagination* (Beacon Press 2008) 118, 124–9.

years as House Resolution 40. In 2021, the resolution cleared the US House Committee on the Judiciary and at the time of writing was eligible for a full vote.

Thomas Craemer estimates the potential cost of slavery reparations by establishing 'the present value of U.S. slave labor in 2009 dollars to range from $5.9 to $14.2 trillion'.[127] In his view, the likelihood of such reparations depends less on legal process than on sufficient political will.[128] That political will, in turn, awaits a time when 'successors or descendants of the perpetrating side openly acknowledge the historical injustice'.[129] However, the debate about reparations has proven to be highly divisive.[130] A 2016 poll found that 81 per cent of whites were opposed to reparations.[131] It would seem implausible for the US federal government to shift from denial of the need to engage in truth telling or accountability mechanisms, but to move first towards a reparations model for historical abuses.[132] A gradual political process building national support for reparations may be necessary if highly challenging with an extremely partisan Congress and Senate.[133]

However, Native experience of reparations in the United States suggests a need for caution were any such reparations to be established. Regarding the Indian Claims Commission, Sandra Danforth notes: 'The idea that money could be substituted for land, not to consider the related grievances, did not accord with the meaning of the losses to the claimants ... Just redress would then have been viewed as an attempt to re-orient contemporary relations so as to change patterns which continue to produce grievances among Indians.'[134]

As in the United States, in the absence of meaningful national political investigation and public discourse regarding responsibility for historical abuses, it seems difficult to envisage circumstances where the British state and churches admit the need for reparations of historical-structural injustice caused by British imperialism. There is limited appetite for reparations in UK political discourse, particularly anti-systemic or diachronic reparations

[127] Thomas Craemer, 'Estimating Slavery Reparations: Present Value Comparisons of Historical Multigenerational Reparations Policies' (2015) 96 Social Science Quarterly 639.
[128] ibid 653.
[129] Thomas Craemer, 'International Reparations for Slavery and the Slave Trade' (2018) 49 Journal of Black Studies 694, 709.
[130] Evans and Wilkins (n 84).
[131] King and Page (n 75) 745.
[132] ibid 746.
[133] 'Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future' (2002) 115 Harvard Law Review 1689.
[134] Sandra Danforth, 'Repaying Historical Debts: The Indian Claims Commission' (1973) 49 North Dakota Law Review 359, 402.

regarding slavery or colonialism. In 2013, the fifteen countries that constitute the Caribbean Community (CARICOM) established the CARICOM Reparations Commission (CRC), to 'prepare the case for reparatory justice for the first peoples and African descended communities of the Caribbean whose ancestors suffered genocide, capture from Africa followed by enslavement in the Americas and racial apartheid'.[135] However, such proposals did not receive much media or political attention or support in the UK itself among politicians or church leadership.[136]

Early assessments of the Northern Ireland Historical Institutional Abuse Redress Board suggest it may replicate problems similar to the Irish RIRB and other redress schemes[137]. In 2018, the Scottish government accepted recommendations on the issue of financial redress/compensation for victims/survivors of abuse in care in Scotland, as a result of national consultation with victim-survivors. This redress scheme opened at the end of 2021. The scheme will operate a combined flat payment with individual experience payment.

8.6 CONCLUSION

Reparations can make a material and existential difference to the lives of victim-survivors and their descendants and contribute to redressing the past in a way that is symbolically and politically important for society at large. When designed to address historical abuses in specific institutional contexts, government-mandated reparation schemes can nonetheless grow to a considerable scale, as with the RIRB in Ireland or the IRSSA in Canada. Reparations seem to operate as a mechanism to enable states to respond to historical abuses, represent themselves as just and benevolent in doing so, while also serving the value of seeking to conclusively settle the financial and material dimensions of addressing past wrongdoing, thereby ultimately maintaining control and not fundamentally disrupting the social and political status quo.[138] In the settler colonial context, redress may function to reassert the dominance of the settler political and legal system over Indigenous peoples.[139] Other

[135] Gelien Matthews, 'The Caribbean Reparation Movement and British Slavery Apologies: An Appraisal' (2017) 51 Journal of Caribbean History 80, 80.
[136] Itay Lotem, *The Memory of Colonialism in Britain and France: The Sins of Silence* (Palgrave Macmillan 2021) 296; Matthews (n 135) 89.
[137] Rebecca Black, 'Historic Abuse Survivor Launches Legal Challenge to Redress Board' *Belfast Telegraph* (Belfast, 19 March 2021).
[138] Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Johns Hopkins University Press 2001) 343.
[139] Woolford (n 113) 77.

wrongs, notably British and American reparations for the legacy of transatlantic slavery, remain unaddressed and while expanding reparations to these contexts remains possible, existing practice cautions a thorough consideration of whether any reparations scheme would meet victim-survivors' and descendants' needs and expectations.

A range of approaches have been employed across the jurisdictions examined in this book. In seeking to achieve these goals of material difference and symbolic or existential difference, the process and messaging of reparations is likely to last longer than a financial award, which will be necessarily inadequate to the profound nature of the harm it seeks to remedy. At a minimum, the process of oral hearings, correspondence, and victim-survivor consultation must be respectful and take steps to credibly accept the accounts offered by victim-survivors. In particular, it seems perverse to require victim-survivors to produce information related to institutional abuse, when denial of access to archival information formed a significant basis of delaying initial investigations and transitional justice advocacy regarding historical abuse in the first instance.

In the absence of express messaging, it seems likely that victim-survivor experience with even the best designed and most expensive processes will be varied, with some finding the process and outcome inadequate or even distressing and re-traumatising. As a result, if reparations are to serve victim-survivors' and states' interest in settlement of claims, the process must communicate the necessary inadequacy of reparations alone.

Magdalena Zolkos argues that the desire for restitution and reparation may in fact also be a desire to suppress and overcome historical trauma, when in fact, this may be impossible in the case of 'unrectifiable' losses, which are not merely failures of implementation but instead mark 'a constitutive limit, or a threshold, for politics and for law in their encounter with situations of trauma, mourning, and dispossession."[140] Similarly, Brandon Hamber suggests reparations can be a 'double-edged sword' as the promise of full remedy to international standards can never be achieved, no matter how inclusive or sensitive the justice or administrative reparation process.[141] Instead, governments and perpetrators must carry on 'continually, and perhaps endlessly, trying to make substantial, personalised and culturally relevant symbolic,

[140] Magdalena Zolkos, '"The Return of Things as They Were": New Humanitarianism, Restitutive Desire and the Politics of Unrectifiable Loss' (2017) 16 Contemporary Political Theory 321, 335–6.

[141] Brandon Hamber, 'Repairing the Irreparable: Dealing with the Double-Binds of Making Reparations for Crimes of the Past' (2000) 5 Ethnicity & Health 215.

material and collective reparations'.[142] On this account, transformation means not only material reparation but also an inherent and explicit communication through the reparations process and content, that nothing will ever be enough to undo the harms done – a recognition of inherent inadequacy. This approach would eschew the liberal conception of progress inherent in mainstream transitional justice and instead embrace the paradox of a moral duty to respond to an abusive past but a frank and explicit accounting for the limits in doing so. The mission statement of the Conference on Jewish Material Claims against Germany recognises this: 'We know the horrors of the Holocaust can never be repaired and must never be forgotten.' Both elements must be acknowledged. However, for this to be meaningful and to communicate a credible transformation of relationship between victim-survivors, society, and state and churches, the process of reparations must also offer meaningful signals of a transforming or transformed relationship through the disruption of existing power dynamics.

[142] ibid 225.