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Restorative Justice, Honest Patriotism, and the  
Legacy of Ethnic Cleansing

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# Healing the Trauma of America's Past: Restorative Justice, Honest Patriotism, and the Legacy of Ethnic Cleansing

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## INTRODUCTION

We grow up and live our lives surrounded by stories. In this sense, each of us participates in an experience that is found in many cultures across the ages even while that experience varies widely among individuals and peoples. Stories can delight us, but they can also tell us who we are, what is true, and what we are called to do in this world. Because of this, we might say that stories live in our hearts, and our heads, indeed, in significant ways we are shaped by the stories we have heard.

As a teacher of law students, I spend large amounts of time analyzing stories because lawyers are storytellers. They listen to the stories brought to them by their clients and remember them and retell them in the language of the law for the purpose of claiming a particular meaning for those stories that will be of benefit to the client. The law in which these client-stories thus become embedded itself has a story—found in the texts of law and the larger context of

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† Professor of Law, Hamline University School of Law. Comments and questions are invited by the author who may be contacted at: hvogel@hamline.edu. I am grateful to the editors of the *Buffalo Law Review* for giving me the opportunity to write this Essay. In doing so they have furthered the major project, of the same name as this Essay's title, on which I am currently embarked, to explore the promise of restorative justice to address deep and pervasive issues of social justice involving conflict between groups of people. Thanks also to Professor Jace Weaver, Director of the Institute of Native American Studies (INAS), University of Georgia, for constructive criticism offered on an early version of this Essay presented in the public lecture series of the INAS in Spring 2007. I am also grateful to my colleague Tom I. Romero, II, for his helpful criticism and to Barb Kallusky, J.D., Faculty Services Librarian of the Hamline Law Library, for her expert research assistance.

social life from which those texts sprang and to which they speak. Life and law are symbiotically related and each is influenced and, from time to time, changed by the other. Through their storytelling work, lawyers are engaged in a culture of argument, trained in what James Boyd White calls the practice of “constitutive rhetoric”<sup>1</sup>—a practice that involves argument about how to talk about stories, the language, and even the metaphors we bring to our work, and what legal significance to make of the stories we tell.

But lawyers are not alone or unique in this respect. We all listen to stories, tell stories, are shaped by stories and sometimes even find that we are changed by new stories or old stories retold in a new way—for stories are bearers of truth, and that, in the words of Thomas King, is “The Truth About Stories.”<sup>2</sup> That is what brings me to my task—to speak of how storytelling might offer hope in healing the trauma of America’s past through the practices of restorative justice as a response to the legacy of what Michael Mann calls the “murderous ethnic cleansing”<sup>3</sup> practiced against the Indigenous people of this land.<sup>4</sup> In doing so, I find myself, in the words of Milner Ball, “Called By Stories”<sup>5</sup> of the Indigenous people called Dakota—the allies. In particular, I am called by the stories they tell

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1. JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 28 (1985). The activity of legal argument, understood as rhetorical and constitutive, White says, has three characteristics which mark it as a cultural act for creating community. First, it works empirically with the inherited language. Second, it involves an argument about the terms of the language itself. Third, it involves an argument about the character of the community in which the language is used. *See id.* at 33-35. *See also* JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (abr. ed., U. Chi. Press 1985) (1973) and JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984) for further development of White's view.

2. THOMAS KING, *THE TRUTH ABOUT STORIES: A NATIVE NARRATIVE* (2003).

3. MICHAEL MANN, *THE DARK SIDE OF DEMOCRACY: EXPLAINING ETHNIC CLEANSING* 1-10 (2005).

4. *See id.*

5. MILNER S. BALL, *CALLED BY STORIES: BIBLICAL SAGAS AND THEIR CHALLENGE FOR LAW* (2000). For helpful earlier studies by Ball on law and storytelling, see MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* (1985); MILNER S. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF PROCESS* (1981); MILNER S. BALL, *THE WORD AND THE LAW* (1993).

today about the river valley in the state of Minnesota, where I grew up, which continues to be their homeland even though they were forcibly removed from it in the winter of 1862–63.

I want to speak about the story the Dakota people tell about the terrible truth of the Dakota–U.S. War of 1862, and how we might engage it today through *restorative dialogue*—the living heart of restorative justice practices that have begun to sweep across the world. Restorative justice practices are deeply influenced by certain Indigenous practices such as, most notably, the talking circle practiced in various parts of North America. Later, I shall have a good deal more to say about restorative justice, in general, and the use of talking circles, in particular, as a restorative practice. For now, I offer a brief capsule statement of how I have come to understand it for those readers for whom it may be new or unfamiliar: restorative justice is a value-based, dialogue-driven approach to conflict resolution that is rooted in a *wager* about the nature of reality and the human condition, namely that “every human being wants to be connected in a good way,” and in a “safe space” we are able to take action through dialogue to build community so that all life might flourish.<sup>6</sup> This wager embraces the idea that deep within every human heart there is a restorative impulse to seek social healing that is taking form in the world through the practices of restorative justice. Grounded in this wager, restorative justice offers a refreshingly *different framework* for thinking about crime, wrongdoing, and conflict. It moves beyond the confines of traditional justice systems to embrace social justice principles. Restorative justice acknowledges the *damaged relationships*, as well as the injuries sustained by victims, that result from any wrongdoing and focuses on *healing* for all those involved, *including communities and offenders*. Applied within the criminal justice system, restorative justice shares the concern of retributive justice with putting right the wrong that has been done, but restorative justice takes a broader and deeper approach because there is much more involved in crime and wrongdoing than law breaking. Therein lies its potential for application beyond the concerns of

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6. See KAY PRANIS, BARRY STUART & MARK WEDGE, PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY 9-10 (2003).

start—with a story. Down through the years I have heard this story told many times. I will need to tell it twice in order to convey its full import as I have come to understand it. The story I wish to tell is one in which my own life is embedded and has been so for as long as I can remember. I first heard it as a young boy and I now tell it whenever I get a chance to do so—the story has fascinated and horrified me and come to take on different meanings over the years. It is a story about the Minnesota River Valley, the place where I was born and in which I grew up. I have traveled widely, but my life and experience continues to be deeply shaped by that river valley and its environs. Over the years, I have continued to make trips up and down that valley and, as I have done so, my appreciation for the story of that valley has taken on new meaning. I have come to see how my life is deeply shaped by the story about the valley. In sum, that story and the valley of my childhood are an important part of the context in which my life was lived as a boy and is lived today as a teacher in an American law school. Answering the call of this story today must begin with an acknowledgment that it is a story that needs to be twice told—for it is a story with a dynamic history that continues to unfold.

Some time around six decades ago I first heard this story. As I heard it then, it was a story about Milford Township, situated on the south bank of the Minnesota River just east of a disputed boundary with the Sioux Reservation established in 1851, and the nearby town of New Ulm, Minnesota, located on that river just upstream of where the Cottonwood River joins it, where in my adolescent years we would play and fish. For me it was the story of hardy German-speaking immigrant settlers, like my earliest ancestors who arrived in the valley from Bavaria in 1854 and Bohemia in 1856. They came in search of land and the new life that land would give them. They encountered hardship after hardship as they struggled to wrest a better life from the land and build the town that today is still the most German town in America.<sup>12</sup> These “pioneers,” as they came to understand themselves,<sup>13</sup>

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12. See DANIEL J. HOISINGTON, *A GERMAN TOWN: A HISTORY OF NEW ULM* 28-41, 53, 60-63 (2004).

13. Soon after the founding of New Ulm in Brown County, Minnesota, an organization called “The Junior Pioneers” was established to recall and

overcame a plague of locusts, destruction of much of the city by fire on one occasion, a cyclone that destroyed parts of Main Street on another, and the humiliation of being suspected as sympathizers of the German Kaiser during World War I by a Swedish-American governor gone wild—when the mayor was removed from office.<sup>14</sup> To hear the oldest generation talk about it when I was a child was to hear a story of adventure and heroic struggle crowned by the prosperity they came to enjoy—it was a triumphant tale of what their earliest American immigrant ancestors had done and who they had become in one generation in this new land.

To my young ears, the most dramatic of the many incidents in this story was the one they called the “Sioux Massacre” of August of 1862 when the “Two Battles of New Ulm” took place—battles in which my first American ancestors were deeply involved. In the telling of the first version of the story, I listened with great fascination as I heard accounts of how waves of “Indian savages”<sup>15</sup> assaulted the innocent settlers who threw up a barricade

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commemorate the deeds of the first generation of immigrant settlers to the area. Membership is open to anyone, like the author, whose ancestors arrived in the early years of European immigration to this area. A small private park on the bluffs overlooking the Cottonwood River, not far from its confluence with the Minnesota River on the south edge of the present day environs of New Ulm, serves as the site for an annual gathering. In addition, meetings are held from time to time during the year that feature programs of historical interest. The author was enrolled as member of The Junior Pioneers as a young man by his father, who was also a member. The foregoing is based on information that is common knowledge among members of The Junior Pioneers and thus is known to the author based on his personal experience as a member down through the years.

14. See HOISINGTON, *supra* note 12, at 129-37.

15. Characterization of the Indigenous people as “savages” has an early and enduring history in North America. Thus, for example, following the French and Indian war, George Washington, who was deeply involved as a British army officer in that war, referred to the Indigenous people as “Savage as the Wolf.” ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 33-45 (2005). This characterization became the basis for United States Indian policy. Its first appearance in a document of the young republic is found in the Declaration of Independence where the signers of that declaration complain of King George that he has not protected the colonists from the “merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions.” *THE DECLARATION OF INDEPENDENCE* para. 29 (U.S. 1776).

around a handful of downtown buildings. The barricades held while most of the other buildings of the town, founded only eight years earlier, burned to the ground. Behind the barricades the women and children were gathered into a building on Main Street. Gathered, we were told, with dynamite that would be detonated in a mass act of suicide if the Indians broke through, so as to avoid the horrors of what might become of them at the hands of the "savages." The building bore a plaque describing this event that I often stopped to read and ponder during my childhood. I understood at the time that the young girl who would later marry and become my great-grandmother Vogel and her mother were among those seized with terror that had gathered in the building. In my childhood imagination, I could "see" and "hear" the building being blown to bits by the dynamite in one last desperate act of defense against the onslaught of the Indian warriors.

In grade school, the time came for me to "learn how to handle money." So, with encouragement from my parents, I took a job as a newspaper carrier for the afternoon and Sunday morning edition of the Minneapolis newspaper. As I delivered the papers, I often found myself in two worlds—the larger world of national and international affairs that I learned of from reading the paper on my route—and the world of 1862 conjured up by my youthful imagination and my fascination with the events known then as the "Sioux Massacre." Beyond the story of the building on Main Street that I recounted above, my imagination was fueled by the sight of bullet holes in the soft, locally-made brick outer side wall of one of the buildings that I passed as I climbed the outside wooden steps each day to deliver a paper to the apartment above where a gravestone shop now occupied the lower floor. This building, I thought, was a defense outpost located just outside the barricades, from which the successful defense of New Ulm was mounted in August 1862.

As for the two sets of my great-great-grandparents and their children who lived through these days, I never heard from others in my family the many details of their involvement in the two battles except that they were among the fortunate who survived. Of my great-grandmother Vogel, it was said that as a young girl she had known and played with Indian children. Of the man who would become her husband four years after the war, it was said that he

had been one of the honored defenders of New Ulm.<sup>16</sup> References to the Indian people in this story were few, and generally based on pejorative stereotypes.<sup>17</sup>

The rest of the details would have to wait until I had reached the beginning of my seventh decade of life. The first telling of this story told me that I, a young boy, born in the valley to parents who were descendants of German-speaking immigrants that first arrived in the valley in 1854, was growing up in Indian country—but when I went out to find them, none could be found! As I learned over the years, there was much more to this story than what I heard in its first telling. As the years rolled on, the name given to this event by the descendants of the first immigrants changed to reflect the beginning of a different relationship to this story than was had by the first generation. No longer the “Sioux Massacre” it became variously the “Sioux” or “Indian Uprising,” the “Dakota Conflict” and eventually the “U.S.–Dakota” or “Dakota–U.S. War of 1862.” The change in name suggests the dynamism in the history of this story over time and leads me to its second telling.

*B. Broken Promises and Ethnic Cleansing in the Valley: A Second Telling of the Story*

The second telling of this story is one that I make as the

16. For a compilation of the names of those who were involved in the defense of New Ulm, see *NEW ULM AREA DEFENDERS OF AUGUST 1862: DAKOTA INDIANS AND PIONEER SETTLERS* (Elroy E. Ubl ed., 1992). The author’s great-grandfather, Joseph Vogel, is listed as a member of “the New Ulm Company.” *Id.* at 20. Joseph’s father, Simon Vogel, is listed as a member of “the Cottonwood Company.” *Id.* at 22.

17. The references I heard as a young boy characterized Indian people as “primitive” and sometimes as “savage” in a way that conveyed the idea of the European–American superiority of the immigrant settlers, the earliest of which were portrayed as stalwart “pioneers.” These stereotypes, and others, even more pejorative in character may be readily found in the early published eyewitness accounts. See, e.g., RUDOLF LEONHART, *MEMORIES OF NEW ULM: MY EXPERIENCES DURING THE INDIAN UPRISING IN MINNESOTA* (Don Heinrich Tolzmann trans., Edinborough Press 2005) (1862). An early work that contains a sympathetic appreciation for the grievances of the Dakota people is ALEXANDER BERGHOLD, *THE INDIANS’ REVENGE; OR DAYS OF HORROR: SOME APPALLING EVENTS IN THE HISTORY OF THE SIOUX* (1891). See also, ISAAC V. D. HEARD, *HISTORY OF THE SIOUX WAR AND MASSACRES OF 1862 AND 1863* (1864) and CHARLES S. BRYANT & ABEL B. MURCH, *A HISTORY OF THE GREAT MASSACRE BY THE SIOUX INDIANS IN MINNESOTA* (1864).



result of two experiences in my adulthood. As I noted a few lines above, the name by which the events of 1862 were known changed over time. As the name changed, so did my understanding of the context of these events. The change in name reflected the fact, recognized by historians in more recent works, that the Indigenous peoples had been provoked by a string of broken promises that had reached a critical point in August 1862, when payments in gold from the United States to the Dakota people, due them under terms of the Treaty of Traverse des Sioux concluded in 1851, were late. The Dakota people confronted the Indian Agent Andrew Myrick at the Lower Sioux Agency on the river only to have their entreaties brushed aside when he said, "let them eat grass or their own dung."<sup>18</sup> Winter was now fast approaching and with little means to purchase the supplies they would need, the Dakota people were desperate. It is no wonder that war was declared on the United States by a contingent of warriors who rode into battle on August 17 under the leadership of Taoyetaduta (Little Crow), the grandson of the man also named Little Crow who was one of two that signed a treaty with the United States in 1805.<sup>19</sup>

This acknowledgment by historians of the circumstances under which the war was started was deepened in my case by many years of teaching American constitutional law to first-year law students in a way that offered them a glimpse of United States policy and broken promises on Indian affairs.

Two experiences that followed proved to be important in my gaining a deeper understanding of the Dakota-U.S.

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18. ROY W. MEYER, HISTORY OF THE SANTEE SIOUX: UNITED STATES INDIAN POLICY ON TRIAL 114 (rev. ed. 1993) (citing and quoting Little Crow's letter to Henry Hastings Sibley, EXECUTIVE DOCUMENTS (state of Minnesota) at 444 (1864)).

19. The Treaty of 1805 was negotiated by Lieutenant Zebulon Pike for the United States and is often referred to as "Pike's Treaty." It was the first treaty negotiated in Louisiana Territory following the Louisiana Purchase of 1803. Ratified by the Senate but never proclaimed by the President, it was apparently relied on by the War Department which viewed the land described therein as having been ceded to the United States. *Treaty with the Sioux Nation of Indians 1805*, in 2 INDIAN AFFAIRS: LAWS AND TREATIES 1031 (Charles J. Kappler ed., 1904). For Lieutenant Pike's notes concerning the actual treaty negotiations, see 1 THE JOURNALS OF ZEBULON MONTGOMERY PIKE WITH LETTERS AND RELATED DOCUMENTS 37 (Donald Jackson ed., 1966).

War of 1862 and its aftermath. The first was study, research, and writing about the nature and problem of cultural conflict in a pluralistic setting. The second was what I learned, and am still learning, from the Dakota commemorative marchers of the twenty-first century.

The first of these experiences led me to see cultural conflict in the courts, such as, most notably, the conflict over Native American sacred sites on "public" land in the United States as conflicts between the *master stories* of different *groups of people* who held vastly *different world views*. No wonder efforts to protect such sites in court proceedings had been so disastrously unsuccessful for Indigenous people.<sup>20</sup>

The second experience came through the retelling of the story and its aftermath through the dramatic 120-mile commemorative marches in the valley by the Dakota people of today who are descendants of those Indigenous people I heard about as "savages" in the first telling. The marches take place in the Minnesota River Valley over seven days in November every other year, having been started in 2002. They commemorate the forced march of the Dakota Oyate to a concentration camp, on the river flats at the confluence of the Minnesota and Mississippi rivers, just below Fort Snelling on the bluffs above, that took place over seven days of infamy in November of 1862.

Several of the twenty-first century marchers, including two of the handful of main organizers who are descendants of the first marchers, are people I have come to know: Waziyatawin Angela Wilson, a Wahpetunwan Dakota woman from the Pezihutazizi Otunwe in southwestern Minnesota and an enrolled member of the Upper Sioux Reservation, and Gabrielle Wynde Tateyuskaskan, a Sisseton-Wahpeton Dakota woman from Lake Traverse Reservation near the border between Minnesota and North and South Dakota. In telling the story a second time below, especially after listening to it told to me by Waziyatawin and Gabrielle Tateyuskaskan and their Dakota relatives, I hear their voices and see their faces. Because of what I am learning from them and my study of conflict over sacred

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20. See Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land*, 41 SANTA CLARA L. REV. 757, 770-78, 798-806 (2001).

sites, my second telling of the story is one crowned by horror and trauma that continues today, rather than the memory of a glorious triumph as in the first telling.

Retelling the story of the Dakota–U.S. War of 1862 in a way that includes the forced march is to tell the story in a way that is different from the way in which I first heard it told. To do so is risky for someone like me, a descendant of European immigrants, who settled on Dakota land. It is risky, first of all, because the world in which I grew up and was socialized still remembers the Dakota–U.S. War of 1862 and its aftermath as a glorious triumph of the “pioneers” over the “savagery” they experienced on the prairie even though it might have been provoked by a string of broken promises. It is also risky for me as an academic because, as Waziyatawin—herself an historian—notes, the written accounts of these events by non-Indian scholars, while in recent years more openly sympathetic to the Dakota experience, often take the view that they are part of a sad, but closed chapter of history.<sup>21</sup> In a word—it is in the past—and not part of, or relevant to the present. I sound this note of caution because these same somewhat sympathetic sources are ones that I have drawn on to retell the story of 1862 for the purpose of acknowledging the challenge that story poses for those who are inspired, as I am, by the possibilities of restorative justice today to address the trauma of America’s past.<sup>22</sup>

My second telling starts with the Dakota people, a diverse people with a rich culture who ranged over the woodlands and prairies of what are now several states stretching from Minnesota in the east to Montana in the west. Bound together by the Dakota language and variants

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21. Wilson, *supra* note 9, at 6.

22. See, e.g., GARY CLAYTON ANDERSON, *LITTLE CROW: SPOKESMAN FOR THE SIOUX* (1986); KENNETH CARLEY, *THE DAKOTA WAR OF 1862* (2d ed. 1976); 2 WILLIAM WATTS FOLWELL, *A HISTORY OF MINNESOTA* (rev. ed. 1961); RHODA R. GILMAN, HENRY HASTINGS SIBLEY: *DIVIDED HEART* (2004); ROY W. MEYER, *HISTORY OF THE SANTEE SIOUX: UNITED STATES INDIAN POLICY ON TRIAL* (rev. ed. 1993); CORINNE L. MONJEAU-MARZ, *THE DAKOTA INDIAN INTERNMENT AT FORT SNELLING, 1862-1864* (2005); *THROUGH DAKOTA EYES: NARRATIVE ACCOUNTS OF THE MINNESOTA INDIAN WAR OF 1862* (Gary Clayton Anderson & Alan R. Woolworth eds., 1988). Two documentary videos have been made on the Dakota–U.S. War of 1862 and the dispersal of the Dakota people. *The Dakota Conflict* (Twin Cities Public Television broadcast 1992); *Dakota Exile* (Twin Cities Public Television broadcast 1995).

of it, they are now often referred to as the Oceti Sakowin (Seven Council Fires). These people have sometimes been referred to as the "Sioux Nation of Indians," as in the Treaty of 1805, the first concluded between the United States and Indigenous people after the Louisiana Purchase of 1803. The phrase in that treaty—"Sioux Nation of Indians"—suffers from ambiguity. In the first instance, the word "Sioux" is a shortened form of a pejorative word of the Ojibwe people used to refer to the Dakota Oyate (or Dakota Nation). The shortened form came from fur traders who heard this word from Ojibwe people in their travels.<sup>23</sup> So the term "Sioux" is not the peoples' name for themselves, but rather has been imposed on them by an outsider.

Beyond that, however, there are other sources of ambiguity. The Dakota Oyate (Nation) today is most often understood as the easternmost four of the seven council fires known as the Oceti Sakowin. Today, the seven council fires are typically described as three groupings known as the Dakota to the east, the Nakota next to them to the west, and the Lakota further to the west. There is a close relation by tradition and language between these groups. According to the understanding of Dakota people with whom I have talked, the seven groups within the three broad groups that make up the Oceti Sakowin, are identified, from east to west, as follows: the Bdewakantunwan (or Mdewakanton), "Dwellers by Mystic Lake"; the Wahpekute, "Shooters In the Leaves"; the Wahpetunwan (or Wahpeton), "Dwellers In The Leaves"; the Sisitunwan (or Sisseton), "Dwellers By the Fish Camp-Ground"; the Ihanktunwan (or Yankton), "End-Village Dwellers"; the Ihanktunwanna (or Yanktonai), the "Little End-Village Dwellers"; and the Titunwan (or Teton), "Dwellers on the Prairies or Plains." The first four of these council fires (Bdewakantunwan, Wahpekute, Sisitunwan, and Wahpetunwan), are commonly referred to as the Dakota people and are indigenous to what is now the state of Minnesota.<sup>24</sup>

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23. See GUY GIBBON, *THE SIOUX: THE DAKOTA AND LAKOTA NATIONS 2* (2003); CARLEY, *supra* note 22, at 214 n.1 (describing "Sioux" as a contraction of an Ojibwe word that is a pejorative. The Ojibwe people, often referred to as "Chippewa" in earlier times, also resided in Minnesota and were frequently in conflict with the Dakota).

24. See Affidavit of Howard J. Vogel in *United States v. Chris Mato Nunpa* No. H5038700 (D. Minn. 2006) (citing a communication from Chris Mato

herded onto steamboats that traveled down the Mississippi and up the Missouri rivers. The convicted warriors were imprisoned in Davenport, Iowa, while the rest were dispersed to reservations across the prairies stretching from Nebraska to Alberta.

All of the Dakota people in Minnesota became subject to forced removal through a government policy formally adopted by the United States, following strong advocacy by Minnesota and its wartime governor, Alexander Ramsey. This was pursued by (1) reallocation of annuities due to the Dakota under the treaties of 1851 to the immigrant settler refugees thus depriving the Dakota of an important source of means for their maintaining their communities and (2) removal of the Dakota from the state of Minnesota by military attack beginning in the summer of 1863.<sup>28</sup>

Before the dispersal of the Dakota came about in the spring, and after review of the action of the military tribunal by President Lincoln, thirty-eight warriors who had been convicted at the military trials<sup>29</sup> were executed in one pull of the hangman's rope on December 26, 1862 in the town of Mankato, Minnesota, thirty miles down stream from the city of New Ulm where I was born. It stands today as the largest mass execution in United States history. For decades no marker noted the events of that day at the site. Only in recent years has the site been marked by the sculpture of a white buffalo—a sacred symbol to the Dakota people.<sup>30</sup> I had heard about this execution and asked my mother to point out the site when we visited Mankato, but there was no marker then to which she could point. What I found out over fifty years later is that present at the execution was twenty-four year old Joseph P. Vogel, one of my great-grandfathers who had participated in the defense of the town of New Ulm during the two pitched battles that took place there the previous August. During those battles, Joseph took up a position of great daring when he and several companions set up themselves in a house outside the safety of the barricades that had been drawn up around

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28. See CARLEY, *supra* note 22, at 76-82, 88-92.

29. *Supra* note 27 and accompanying text.

30. See Sheryl L. Dowlin & Bruce Dowlin, *Healing History's Wounds: Reconciliation Communication Efforts to Build Community Between Minnesota Dakota (Sioux) and Non-Dakota Peoples*, 27 PEACE & CHANGE 412, 427 (2002).

downtown. At the end of the battle, they slipped across the Minnesota River under cover of night to join the townspeople who had been evacuated to St. Peter, thirty miles down stream. This experience, plus his presence at the mass execution and subsequent participation in the military campaign to drive the Dakota out of Minnesota in 1863, was remembered in stories of that time told by Joseph throughout the remainder of his long life.<sup>31</sup>

Margaretha Serr, a young girl of fourteen at the time of the War, who would eventually become Joseph's wife and one of my great-grandmothers, also remembered these events vividly throughout her long life. At the time of the war, she lived in Milford Township, just outside the eastern border of the reservation established under the treaties of 1851 and 1858, and two miles from the edge of New Ulm. Here the greatest loss of life among immigrant settlers occurred during the war. On August 18, she was at a neighboring farmhouse located a quarter-mile from that of her parents, Conrad and Anna Serr. When it came time for the noon-day meal, she left to return to her home. A short time later, perhaps less than an hour, while the farm family she had visited sat with its hired hand at the meal, several warriors broke into the house. Two members of the household were killed at the dining table and others were wounded. When news of what occurred reached my great-grandmother's house, they fled to New Ulm and joined other terrified immigrants who took up the defense of New Ulm. It was the women and children of this terrified group that gathered themselves with dynamite in the building on Main Street behind the barricades. In her seventies, Margaretha would write a brief note about those days.<sup>32</sup>

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31. See *Todesfälle: Joseph P. Vogel*, NEW ULM POST, Apr. 12, 1918, at 12 (obituary of Joseph P. Vogel in German language newspaper); *Des grimmigen Schnitters Ernte, Jos. P. Vogel*, NEW ULM VOLKSBLATT, Apr. 11, 1918, at 6 (obituary of Joseph P. Vogel in German language newspaper); *Deaths of a Week: Jos. P. Vogel*, BROWN COUNTY J., Apr. 13, 1918, at 12. For general works that include detail on the Battles of New Ulm, see CHARLES E. FLANDRAU AND THE DEFENSE OF NEW ULM (Russell W. Fridley, Leota M. Kellett & June D. Holmquist eds., 1962); ELROY E. UBL, THE MATTER LIES DEEPER (2004); NEW ULM AREA DEFENDERS OF AUGUST 1862: DAKOTA INDIANS AND PIONEER SETTLERS (Elroy E. Ubl ed., 1992).

32. Margaretha Serr Vogel, Handwritten Note (June 18, 1922) (on file with Brown County Historical Society, New Ulm, Minn.); see *Obituaries: Mrs. Margaretha Vogel*, NEW ULM REVIEW, Feb 22, 1928, at 2; *Mrs. Jos. P. Vogel*

The forced marches of November 1862 were the first phase of the forced removal of the Dakota from their homeland. The second phase occurred in 1863 with the mounting of a military campaign composed of two columns of over 1,000 men, each charged with the mission to carry out the ethnic cleansing Governor Alexander Ramsey had called for when he convened the extra session of the Minnesota state legislature on September 9, 1862 for the purpose of addressing what to do in the aftermath of the war. At the opening session Governor Ramsey laid out in detail what should be done when he declared:

We must, therefore, for the present, depend upon our own resources to make good to our citizens the protection which the General Government owes them, and it is to this end chiefly that I have called you together . . . to adopt . . . the measures necessary for our effectual protection.

Our course then is plain. The Sioux Indians of Minnesota must be exterminated or driven forever beyond the borders of the State.

. . . They have themselves made their annihilation an imperative social necessity. Faithless to solemn treaty obligations, to old friendships, to the ties of blood, regardless even of self interest when it conflicts with their savage passions, incapable of honor, of truth or of gratitude; amenable to no law; bound by no moral or social restraints—they have already destroyed in one monstrous act of perfidy, every pledge on which it was possible to found a hope of ultimate reconciliation.

They must be regarded and treated as outlaws. If any shall escape extinction, the wretched remnant must be driven beyond our borders and our frontier garrisoned with a force sufficient to forever prevent their return.<sup>33</sup>

In this speech, Ramsey explicitly embraced the long-established pattern of hatred of Indians that took hold in the United States history following Pontiac's War, which came on the heels of the end of the French and Indian War in 1763.<sup>34</sup> As such, it is an example of the "dark side of

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*Stricken Suddenly*, BROWN COUNTY J., Feb. 24, 1928, at 3.

33. ALEXANDER RAMSEY, MESSAGE TO THE LEGISLATURE OF MINNESOTA, DELIVERED AT THE EXTRA SESSION, SEPTEMBER 9, 1862, at 19 (1862), available at [http://dlxs.library.cornell.edu/m/mayantislavery/browse\\_M.html](http://dlxs.library.cornell.edu/m/mayantislavery/browse_M.html) (scroll down to "Minnesota.Governor (1860-1863: Ramsey)"; then select "Message of Governor Ramsey to the Legislature of Minnesota: delivered at the extra session, September 9, 1862.").

34. Fred Anderson, a leading historian of the French and Indian War,

democracy” in which “murderous ethnic cleansing” has played such a powerful role.<sup>35</sup> The story of United States government policy toward the Indigenous people of North America down through the years is the American version of this horrific pattern.<sup>36</sup> On the collective hatred of the Indian people that set in and shaped the American character after Pontiac’s War and the desire to displace Indigenous people from their land, the United States policy of removal was built and systematically implemented, tribe by tribe. In the 1850s, the policy had reached Minnesota with a vengeance. The military campaigns of 1863 that followed the 1862 war, coupled with a state bounty placed on the head of Dakota people in Minnesota that would reach \$200 for dead Indians,<sup>37</sup> would now be carried out to

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locates the origin of the widely held pattern of “Indian hating” in the aftermath of “Pontiac’s War” in 1763. FRED ANDERSON, *THE WAR THAT MADE AMERICA: A SHORT HISTORY OF THE FRENCH AND INDIAN WAR* 236-38, 264-65 (2005). Robert Williams, Jr. locates the Euro-American pattern of subjugation of Indigenous peoples as far back as two papal communications from Pope Innocent IV delivered to the Great Khan of the Mongols in 1246. ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 3-9 (1990). Removal as the heart of Indian policy had been made famous, of course, by President Andrew Jackson in the 1830s. This policy was grounded in the vesting of title to Indigenous land in the United States under the so-called “doctrine of discovery.” See generally Johnson v. M’Intosh, 21 U.S. 543 (1823). For an extended discussion of the history of *Johnson v. M’Intosh*, see LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005).

35. This is a core phenomenon of modern democracies, and the subject of extended inquiry, in MANN, *supra* note 3. Mann sets out his argument in the preface to his book in the following words:

[M]urderous ethnic cleansing has been a central problem of our civilization, our modernity, our conceptions of progress, and our attempts to introduce democracy. It is our dark side. . . . [P]erpetrators of ethnic cleansing . . . are created by conflicts central to modernity that involve unexpected escalations and frustrations during which individuals are forced into a series of more particular moral choices. Some eventually choose paths that they know will produce terrible results. . . . The proposition underlying this book is that murderous ethnic cleansing comes from our civilization and from people, most of whom have not been unlike ourselves.

*Id.* at ix.

36. See *id.* at 83-98.

37. THE WINONA DAILY REPUBLICAN, Sept. 25, 1863, at 2. The state reward for dead Indians has been increased to \$200 (from \$25) for every red-skin sent to Purgatory. This sum is more than the dead bodies of all the Indians east of the Red River are worth. Little Crow, the leader of the Dakota warriors in the



drive the Dakota from the gently rolling prairies and beautiful valleys of the place they called "*Minisota Makoce*"—their homeland known to them as "the Land Where the Waters Reflect the Skies."<sup>38</sup> When it was over, only a few Dakota remained. In the quarter century that followed the war, four tiny Dakota communities were established in Minnesota on very small pieces of land and recognized by the United States government. In part, this was a recognition of the protection given by many Dakota people to the immigrant settler refugees who had fled in the face of the outbreak of the war. The vast majority of Dakota today, however, reside in diasporas spread out across the plains of the United States and Canada to the west of Minnesota—yet for the Dakota people Minnesota is still *Minisota Makoce*—the homeland in which their individual and collective identity as Dakota is rooted.

C. "*The Terrible Truth of a Beautiful Landscape*"<sup>39</sup>: A Dakota Telling of the Story

The circumstances of the Dakota people today, that I mentioned earlier, are one indicator of the disastrous legacy of the implementation of U.S. policy on Indian affairs in Minnesota. But the depth of the ongoing transgenerational trauma of what took place in 1862–63 is most poignantly and compellingly described by the Dakota writer and poet Gabrielle Wynde Tateyuskanskan, one of the march organizers, who has written of it in heart-wrenching terms in an essay of haunting and sobering beauty entitled *The*

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Dakota–U.S. War of 1862, was killed in the summer of 1863 when he and his son Wowinapa were spotted picking raspberries near Hutchinson, Minnesota. Nathan Lamson and his son Chauncey both shot Little Crow. Subsequently, Little Crow's body was scalped and mutilated before being displayed in public in the town. Nathan was awarded \$500 from the state of Minnesota for his part in the killing of Little Crow, while Chauncey collected the bounty of \$75 for Little Crow's scalp. See CARLEY, *supra* note 22, at 83–86.

38. This is the translation given by Chris Mato Nunpa, a Dakota elder from Upper Sioux Community in Minnesota and a participant in the Dakota Commemorative Marches, as recorded by Wazyatawin Angela Wilson, *Decolonizing the 1862 Death Marches*, 28 AM. INDIAN Q. 185, 185, 212 n.1 (2004).

39. This phrase is the title of an essay by Gabrielle Wynde Tateyuskanskan, entitled *The Terrible Truth of a Beautiful Landscape: The Dakota Commemorative Walk of November 7-13, 2004*, in FOOTSTEPS, *supra* note 8, at 165.

*Terrible Truth of a Beautiful Landscape.*<sup>40</sup> In it she tells the story of 1862 as one of deep and enduring historical trauma that continues today. I am grateful for her telling of the story and for her permission to reprint here a lengthy excerpt from her heart-wrenching written account. As you read that account, imagine that you are hearing it as I first heard her tell it in a voice filled with sorrow and determination while tears stream down her face.

During November 7-13, 2004, the second Dakota Commemorative Walk was held. The walkers gathered at 6:00 A.M. on Sunday morning to share breakfast at the Lower Sioux Community Center in Morton, Minnesota. The prayer to bless the meal symbolized the beginning of my spiritual journey to return to the beauty of the sacred Dakota ancestral homeland, reunite with a community of my relatives, and reaffirm my spiritual inheritance. The walkers of 2004 traveled a route using present-day roads that follow approximately the original route that vulnerable Dakota women and children were forced to walk from present day Morton, Minnesota, to a concentration camp at Fort Snelling in November, 1862.

The Dakota Commemorative Walk of 2004 began with words of support from David Larson of the Lower Sioux Community. I also spoke on behalf of the Dakota Commemorative March Committee, thanking the participants for their generosity, encouragement, and support of the walk. Then a prayer flag was held up and a Dakota elder read two Dakota names and translated the names into English. This ritual began the long journey to Fort Snelling. Each red prayer flag had a Dakota name written on each side to represent two families imprisoned at Fort Snelling. The prayer flags were placed every mile along the 150-mile journey. As a prayer flag was planted into the earth, Leo Omani of Saskatchewan, Canada, sang a Dakota prayer song. Then each walker offered tobacco and prayers to the relatives. At times a walker recognized the name of an ancestral relative. It was heartbreaking to observe the emotions expressed when individuals reconnected with their relatives intimately. Individuals openly displayed their most painful and heartfelt grief for their ancestors. The reality of how close we are to those horrendous events was difficult to witness.

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40. *Id.* For an extended set of reflections by a participant in the marches, see DIANE WILSON, SPIRIT CAR: JOURNEY TO A DAKOTA PAST (2006).

As I began my own personal journey on that first day early Sunday morning, my sense of the scared world became heightened in appreciation of the beauty of the earth around me. I observed the warming glow of early morning sunlight slowly illuminating the corn stalks in golden fields. I wondered about the spirit of the land and our Dakota ancestors. Does creation remember their relatives, the Dakota Oyate? Has creation been waiting for the reappearance of visible prayers and songs, the eagle feather staff, and the return of the People? The feel of the fresh cold autumn air and the sounds of the birds in the nearby trees and fields increased my gratitude for the goodness in the world. My heart fluttered, the palpitation a sign that I had come home. It was a bittersweet feeling to be walking in the beauty of the Minnesota River valley, the Dakota place of origin, however, because the prayer flags were grim reminders of the brutality, oppression, injustice, and human suffering that took place during and after the U.S.-Dakota War of 1862.

Dakota families were torn apart and endured horrific atrocities. This devastating mistreatment was in extreme opposition to the Dakota ideal of respect for life. In the Dakota language, the root word *ni*, which is translated as "life" or "to live" in English, is an important cultural value. *Mini* means water in the Dakota language, and this word contains the root word *ni* meaning "life." The Dakota understand that life could not exist without water. One of the Seven Sacred Rites of Dakota ceremonial life is the *Inipi* or the Rite of Purification. The ceremony affirms gratitude for all life on earth and the human responsibility to actualize the sacredness of life.

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Many of the walkers, descendants of the Dakota prisoners, shared powerful narratives of heartache. As we walked in the beauty of the Dakota landscape, their stories of anguish and grief stood in sharp contrast to the beauty of our surroundings. Solemn voices related the malicious killing of relatives by soldiers and crowds of angry Euro-American citizens. Dakota relatives suffered beatings; they had boiling water poured on them and rocks hurled at them by ruthless, angry mobs. People were murdered during the forced march and in the concentration camp. Many died on the way from their injuries. Those imprisoned at Fort Snelling died of exposure, disease, and starvation. Today many Dakota still do not know what happened to our relatives. There is no known burial site to mark the final resting place of those who died on the walk or at Fort Snelling. One measure of our humanity is a civilized culture's practice of respect for the dead. The living Dakota relatives are left to wonder whether our relatives were given a burial at all.

All human beings despair when beloved relatives disappear. The faces of lost children on present-day milk cartons show the fierce determination of families to find their loved ones. The human mind craves the peace that comes with finally knowing the fate of a loved one. It is difficult to realize that the perpetrators and murderers have gone unpunished. The worst human crime is to deprive families of the knowledge of the fate of the disappeared, since wondering about lost beloved relatives causes ongoing anguish for the human heart.

It is troubling when high ideals such as equality and justice are not applied to all human beings in America. Where are those individuals who believe in moral accountability? Are their numbers so small, or are their voices silent? Why is there no dialogue in academia about the double standards in America in regard to human rights, atrocities, and political oppression? Where are the theologians who speak of the struggle against evil in the world? Is everyone a bystander to inhumanity in the modern world? American history includes many examples of atrocities committed against human beings other than Dakota people, and the majority of Americans stood by and did nothing.

Does it matter that millions of Indigenous people have been massacred, starved, or allowed to die of disease? Who mourns the death of African slaves brought to this country to provide free labor? What about the thousands of Mexicans who were killed for the purpose of conquest? Who grieves for the Black men who were lynched? What is to be done about the mistreatment and internment of Japanese Americans during World War II? The country that committed these acts believes that its society is progressive and civilized and that it demonstrates high levels of cultural achievement and respect for human life. In spite of these beliefs, however, America has blood on its hands.

Tolerance of atrocities is too terrible a price to pay for any society where progress means failure to practice human ideals. Will America's crimes against humanity go unresolved? The dialogue cannot begin if people are uninformed and history textbooks only lightly address the issues of the inequality, atrocities, and oppression that have taken place in diverse communities throughout the country. Double standards need to be erased, and diversity needs to be acknowledged. In a diverse world, America must have this internal dialogue in order to promote a healthy society. Collective denial does not support the well-being of a nation. It is the obligation of thinking people to protest injustice. We must face up to our responsibilities as human beings to walk on this earth.

Each step of my spiritual journey during the Dakota Commemorative March is a reminder that the 150-mile walk is a war crime scene. The names on the red prayer flags belong to the victims. The political oppression and human rights violations committed against our Dakota relatives must be acknowledged. This Dakota narrative is not finished. The bones of our ancestors need to tell their truth. Forensic anthropologists must assist the Dakota Oyate in the truthful inquiry to document the victim's story. I believe goodness can come out of terrible events. This does not, however, excuse the perpetrator or the bystander who watched and did not act. As human beings, we must recognize the suffering of others and respond to it. Healing from the evil and terror of war can begin only if the truth is spoken. My historical grief will not find peace until the crimes against the 1,700 vulnerable prisoners find justice.

Until this happens, I will continue to walk in the beauty of the Minnesota River valley, acknowledge my spiritual tie to the earth of Dakota origin, work for social change by seeking recognition of Dakota historical trauma, and bear witness to the disappeared. As the story continues to the present, questions arise: How has this painful history affected subsequent generations? Are contemporary social ills linked directly to our past? Challenges exist today, such as poor mental health, poverty, alcohol abuse, suicides, and homicides. One way I choose to contribute is to educate others by continuing the Dakota oral tradition of telling the story, but others must be willing to listen.

The account of the U.S.–Dakota War of 1862 is a story that has been told numerous times before in many cultures as a consequence of the human obsession with pursuing material possessions. It is a theme often found in classic literature, such as Homer's *Iliad* and *The Odyssey*, Steinbeck's *The Pearl*, and Hemingway's *The Old Man and the Sea*. In the twenty-first century, the story is America's pursuit of oil resources in the Middle East and Alaska.

Many times in my life, I have been told by teachers, college professors, and other Euro-Americans, "Why don't you just get over it?" or "That was the past, forget about it," when I have attempted to have a dialogue about the genocide and forced removal of Dakota People from our ancestral homeland. These Euro-Americans were unable to comprehend the gravity of the injustice that happened to the Dakota in 1862. Humanity must meet the challenge of learning from the stories of past generations in order to uncover the flaws and uncomfortable truths about human character. The heartbroken and shattered lives of Dakota people need to be healed from the trauma of our historical grief. Validating the story and recognizing the human spirit will bring

the light that will finally allow the healing to begin.<sup>41</sup>

This excerpt only begins to disclose the depth of trauma that Dakota people continue to live with today. The full version by Gabrielle Tateyuskanskan, along with the stories of others on the commemorative march, can be found in the book titled *In the Footsteps of Our Ancestors*.<sup>42</sup>

In her introduction to the collection of stories by the participants and witnesses to the commemorative marches, Waziyatawin Angela Wilson, a leading contemporary scholar of Indigenous history, notes that the marches pose two challenges, one to the Dakota people and another to the non-Native people of Minnesota. For the Dakota people, the marches are first and foremost an act of remembering. But they are also an occasion in which the marchers have taken on the task of fostering healing among the Dakota people for the transgenerational trauma that has been carried forward from the first march of 1862. For non-Native people, the marches are a call to face the full truth of United States history in dealing with Indigenous people and consider what, in light of that history and its burden, we should do today.

In her essay in *In the Footsteps of our Ancestors*, Waziyatawin Angela Wilson, who is currently working to create Oyate Nipi, an organization dedicated to decolonization of Indigenous people in the United States, writes that the marches are a Dakota effort to recall the forced march of 1862 in order to remember those who walked—*Manipi Hena Owas'in Wicunkiksuyapa (We Remember All Those Who Walked)*.<sup>43</sup> Moreover, it is an act of *decolonization* taken on by Dakota people who insist that the truth of that first march be remembered and made known to all, Indian and non-Indian alike, despite the pain that facing such truth entails. Ultimately, it is one step, she writes, on the long journey of healing among the Dakota for the transgenerational trauma that the events recounted here have brought across the years to the descendants of

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41. Tateyuskanskan, *supra* note 39, at 167-72.

42. FOOTSTEPS, *supra* note 8. *In the Footsteps of Our Ancestors* is published by Living Justice Press ([www.livingjusticepress.org](http://www.livingjusticepress.org)), a non-profit publisher of restorative justice books.

43. Wilson, *supra* note 9, at 2, 6-7.

that first march.<sup>44</sup>

Outside the Dakota Oyate, these marches pose a challenge to those non-Indigenous people who embrace restorative justice as a means to secure social healing. If restorative justice is to offer a constructive response to the disastrous legacy of the ethnic cleansing conducted against the Dakota people in Minnesota in 1862–63, it must embrace its transformative potential through *courageous remembrance of the truth of the past* as a first step in order to foster dialogic acts of hope that manifest respect in its deepest sense, including reparations, so that life may be lived beyond the burden of the past. Waziyatawin poses this challenge clearly when she writes:

I would encourage any non-Dakota who is interested in demonstrating solidarity with us and our ongoing struggles to walk with us and to help us in our struggle for justice . . . . For non-Dakota people, you can begin to help us when you come to terms with your own role as oppressor. Although you cannot gift us our freedom from oppression, as only we can do that for ourselves, you can help to educate those around you and assist us in overturning colonial systems and institutions.

For the next Commemorative March . . . you can think creatively about developing ways in which the non-Dakota people of Minnesota can begin their own decolonization process in regards to the U.S.–Dakota war of 1862. . . . We need people who are willing to stand with us and commit themselves to fighting injustice. In addition, our non-Dakota allies can help us uncover the truth about Minnesota's history. . . . Help us make sure the truth survives.<sup>45</sup>

A non-Native supporter of the marches, Denise Breton, takes that challenge seriously in the context of the future of restorative justice when she writes:

According to restorative justice, harms alert us that we need to look deeper into our relationships and how we are going about life.

. . . [T]he very essence of restorative justice as a philosophy and way of life calls us to expand our focus to include more than person-to-person harms. What about our history—how we got to

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44. Wilson, *supra* note 11, at 43, 62-64.

45. Wilson, *supra* note 9, at 19-20.

where we are as Peoples?

. . . [W]e are challenged to apply what restorative justice practitioners have learned about healing harms between people to healing harms between Peoples. This is the direction restorative justice must go, I believe, or it will fall short of fulfilling its promise. Indeed, it will risk joining the other side and becoming part of the institutions that not only deny the greatest cases of suffering but also actively perpetuate harm.

. . . .

. . . The challenge for restorative justice today, I believe, is to apply this determinedly reparative, healing approach to addressing harms between Peoples—harms that go back generations.<sup>46</sup>

Taking the challenge of the Dakota commemorative marchers seriously, I now turn directly to consider the possibilities of restorative justice practices to engage the story they tell in the hope of sharing with them a different future than what has been true in the past.

## II. THE PROMISE OF RESTORATIVE JUSTICE<sup>47</sup>

Restorative justice is practiced through many variations of four major forms that have emerged and been developed around the world. In North America, victim-offender mediation arose out of the experiments of the victim-offender reconciliation project conducted by Mennonite groups in Kitchener, Ontario in 1974 and Elkhart, Indiana in 1977–78.<sup>48</sup> Recently victim offender

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46. Denise Breton, *Decolonizing Restorative Justice*, in FOOTSTEPS, supra note 8, at 212, 212, 215; see also Denise C. Breton, *Digging Deeper: Challenges for Restorative Justice*, in JUSTICE AS HEALING: INDIGENOUS WAYS 409 (Wanda D. McCaslin ed., 2005).

47. For an extended discussion of restorative justice theory based on the idea of the *wager* of restorative justice, see Howard J. Vogel, *The Restorative Justice Wager: The Promise & Hope of a Value-Based, Dialogue-Driven Approach to Conflict Resolution for Social Healing*, 8 CARDOZO J. OF CONFLICT RESOL. \_\_\_ (forthcoming 2007).

48. For works on VOD, see, for example, the extensive work by a leading scholar, practitioner, and trainer in this field, Mark Umbreit, Director of the Center of Restorative Justice and Peacemaking (formerly the Center for Restorative Justice and Mediation). MARK UMBREIT, THE HANDBOOK OF VICTIM



mediation has been renamed victim offender *dialogue* to clarify the nature of the engagement victim and offender as a *dialogue* (VOD) rather than a mutual settlement of a dispute that seeks reconciliation.<sup>49</sup> The Family Group Conferencing (FGC) initiative that arose in New Zealand in the 1980s led to the emergence around the world of what is now often called community conferencing. The New Zealand initiative arose out of the tragic experience of large numbers of Indigenous Maori young people caught up in the court system. The effort to construct an alternative approach that took Maori culture seriously in the design and implementation was so successful that it led to the replacement of the entire juvenile justice system in New Zealand with FGC in 1989.<sup>50</sup> In the 1980s, the use of peacemaking circles (Circles) by courts was started in the Yukon Territory of Canada. Circles were adapted from the Indigenous practice of talking circles for the purpose of determining sentences in criminal cases.<sup>51</sup> The widespread

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OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH (2001); MARK S. UMBREIT, ROBERT B. COATES & BORIS KALANJ, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION (1994). Umbreit is especially well-known for his VOD/VOM work in cases of severe violence. See Mark Umbreit, William Bradshaw & Robert B. Coates, *Advanced Mediation and Dialogue in Crimes of Severe Violence*, in THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH 255 (2001).

49. Tim Hansen, Restorative Justice Planner for the state of Minnesota, Department of Corrections, described this recent change in comments made during his presentation to the summer 2007 course in Restorative Justice offered at Hamline University School of Law on July 19, 2007 (notes on file with the author).

50. For a short introduction to its New Zealand origins and current practice, see ALLAN MACRAE & HOWARD ZEHR, THE LITTLE BOOK OF FAMILY GROUP CONFERENCES NEW ZEALAND STYLE (2004). For other works on FGC, see, for example, FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE (Gale Burford & Joe Hudson eds., 2000); MARK S. UMBREIT, OFFICE FOR VICTIMS OF CRIME, FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS (2000); Leon Fulcher, *Cultural Origins of the Contemporary Family Group Conference*, 37 (Am. Humane Ass'n, Family Group Decision Making Roundtable Proceedings, 2000); Cheryl Waites et al., *Increasing the Cultural Responsiveness of Family Group Conferencing*, 49 SOC. WORK 291 (2004).

51. While many people have written about some form of dialogue practiced in a format that includes a circle, the foundational work in the adaptation of the "talking circles" of Indigenous communities for restorative justice purposes, as well as beyond the criminal justice system, has come out of the origin of that practice in the Yukon Territory of Canada and its subsequent introduction to

attention given in many news reports of the dramatic public hearing process used by the South African Truth and Reconciliation Commission in the 1990s made it the most well-known contemporary example of the many variations of the Truth Commission for restorative justice.<sup>52</sup>

In each case, the news of these initiatives spread through poignant stories of healing that victims, offenders, and the wider community seemed to experience as a result of these initiatives. The euphoria that was palpable in the stories of people who had experienced some measure of genuine healing and the impact that had in opening a new future for them evoked the empathic capacity of those who heard these stories and led many people to explore how these initiatives might be replicated in their own communities. Consequently, the forms spread rapidly around the world. Variations of each of the forms and combinations of some of them with each other led to the flowering of many new initiatives, each of which in some way expressed the particular context in which these new initiatives were launched.

While different from each other in how they operate, VOD, FGC, Circles, and truth commissions all share a basic orientation to crime and other forms of wrong doing that

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the United States and beyond through its use in the state of Minnesota and beyond. This adaptation is now known as "peacemaking circles." For a short introduction to Circles and their use in a variety of settings within and beyond the criminal justice system, see KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES: A NEW/OLD APPROACH TO PEACEMAKING* (2005). See also PRANIS, STUART & WEDGE, *supra* note 6 (providing the only book-length description of Circles).

52. Truth commissions have been around for many years and come in vastly different forms from each other. The most notable feature of the South African TRC is its inclusion of "conditional amnesty." For an important comparative study of truth commissions, see PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 291-97 (2002) which provides a chart comparing twenty-one truth commissions. The literature on the South Africa TRC is enormous. Leading representative works by South Africans involved in the process are: ALEX BORAINÉ, *A COUNTRY UNMASKED* (2000); PUMLA GOBODO-MADIKIZELA, *A HUMAN BEING DIED THAT NIGHT: A SOUTH AFRICAN WOMAN CONFRONTS THE LEGACY OF APARTHEID* (2002); DESMOND MPIOLO TUTU, *NO FUTURE WITHOUT FORGIVENESS* (1999); LOOKING BACK, REACHING FORWARD (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000). For an extensive bibliography, see Tyrone Savage, Barbara Schmid & Keith A. Vermeulen, *Truth Commissions and Transitional Justice: A Select Bibliography on the South African Truth and Reconciliation Commission Debate*, 16 J.L. & RELIGION 73 (2001).

marks them as a restorative justice practice. They all approach crime and wrongdoing from a radically different perspective than the conventional criminal justice system by taking the concerns and the well-being of victims as their starting point. Restorative justice practitioners point out that in the conventional criminal justice system the needs of the victim are largely left out and any satisfaction the victim might receive for the conviction and punishment of the offender is limited to the retributive satisfaction of the statement that “justice was served because the offender got what was coming to him or her.” To the contrary, restorative justice practitioners challenge the effectiveness of the conventional criminal justice system, claiming that it can not satisfactorily address the harms to victims and communities caused by wrongdoing nor repair the relationships damaged by that wrongdoing as long as the criminal justice system continues to be based on a pure unalloyed retributive notion of justice rooted in vengeance.

A. *Restorative Justice and Trauma from Violent Conflict  
Between Groups of People*

Despite the fact that many of the practitioners of restorative justice often speak of it as a “movement” that makes a universal definition elusive,<sup>53</sup> there are some distinctive recurring features that are shared by all of the variations in form. Howard Zehr, a leading American figure whose work is foundational and whose influence has reached around the globe, offers a succinct minimalist definition that captures these distinctive features when he writes that “[r]estorative justice requires, at a minimum, that we address victims’ harms and needs, hold offenders accountable to put right those harms, and involve victims, offenders, and communities in this process.”<sup>54</sup>

Contained within this compact definition are what Zehr calls the “three pillars of restorative justice”: (1) “harms and

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53. See Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251 (2005).

54. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 25 (2002) [hereinafter *THE LITTLE BOOK*].

needs,” (2) “obligations,” and (3) “engagement.”<sup>55</sup> In his most recent writing, Zehr elaborates on this minimalist definition as follows:

Restorative justice . . .

1. Focuses on *harms* and consequent *needs* (the victims’, as well as the communities’ and the offenders’).
2. Addresses *obligations* resulting from those harms (the offenders’, but also the communities’ and the society’s).
3. [Through *engagement* that u]ses *inclusive, collaborative* processes.
4. Involves those with a *stake* in the situation (victims, offenders, community members, society).
5. Seeks to *put right* the wrongs.<sup>56</sup>

This involves a paradigm shift in how we come to understand both crime and justice. For Zehr, it requires a change in the “lens” through which we see crime and justice.<sup>57</sup> We make such a change in the face of conflict, Zehr says, when we seek answers to six “[g]uiding [q]uestions” in the practice of restorative justice:

1. Who has been *hurt*?
2. What are their *needs*?
3. Whose *obligations* are these?
4. What are the causes?
5. Who has a stake in this situation?
6. What is the appropriate process to *involve stakeholders* in an effort to address causes and put things right?<sup>58</sup>

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55. *Id.* at 22-24.

56. LORRAINE STUTZMAN AMSTUTZ & JUDY H. MULLEN, *THE LITTLE BOOK OF RESTORATIVE DISCIPLINE FOR SCHOOLS* 25-26 (2005) (citing *THE LITTLE BOOK*, *supra* note 54).

57. HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 83-94 (3d ed. 2005) (describing “justice as paradigm shift”) [hereinafter *CHANGING LENSES*]. For contrasting paradigmatic understandings of crime and justice, see *id.* at 184-85, 211-14.

58. *Id.* at 271 (emphasis added to show the presence of Zehr’s “three pillars” in his six guiding questions).

When he first wrote about restorative justice in 1990, Zehr described restorative and retributive approaches to crime and wrongdoing as mutually exclusive—contradictions of one another.<sup>59</sup> Over time, however, he has come to see them as polar positions on a continuum of approaches that share the aim of putting right the wrong. Nonetheless, he continues his critique of the limits of retributive approaches in his more recent work and that leads him to call for maximization of restorative approaches to the extent that is possible in any given situation.<sup>60</sup>

Zehr's conception of "justice" as "fairness" for victims has, over time, taken on a broader meaning to include social "healing" between victims and offenders. Thus, for example, he now explicitly embraces the transformative potential of restorative justice to address systemic dimensions of injustice that are bound up in the structures that order our relationships in society and the metaphors we use to describe and define our experience within those structures.<sup>61</sup> In doing so, he notes that this expands the meaning of justice as "putting [things] right"<sup>62</sup> and makes the term "*transformative justice*" more appropriate than "restorative justice."<sup>63</sup> This reflects his longstanding concern with "re-words" that tend to suggest the need to "go back to a previous state of being" when what is needed is an effort to go "forward to new or better conditions . . . to find a *new reality*."<sup>64</sup> In sum, Zehr's broadened understanding of justice now includes instances that (1) embrace the possibilities for healing in wrongdoing and conflict beyond the traditional criminal justice system and (2) go beyond the concern for interpersonal conflict between individuals in that setting to include conflict *between groups of people* in a variety of settings.

The transformative potential of restorative justice noted by Zehr invites us to take seriously the challenge

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59. CHANGING LENSES, *supra* note 57, at 209-10 (citing the original 1990 text carried over into the 2005 3d ed.).

60. THE LITTLE BOOK, *supra* note 54, at 58-61; CHANGING LENSES, *supra* note 57, at 272-75.

61. CHANGING LENSES, *supra* note 57, at 270, 274-75.

62. *Id.* at 270.

63. *Id.* at 274 (emphasis added).

64. *Id.* (emphasis added).

posed to restorative justice by the Dakota commemorative marches. Thus, if we are to take the promise of restorative justice seriously in the context of conflict between groups of people, we need to engage the possibilities it presents as we come face to face with the trauma of the past that is so often borne forward into the present over many generations as the result of long-running conflict between groups of people, as seen most immediately in the American context in the tragic history and continuing harm caused by the policy of the United States in its relations with the Indigenous nations of North America.

This kind of broadened understanding of restorative justice as a transformative approach to enduring conflict between peoples is well stated in a recent article, by my teaching colleague Penelope Harley, as follows:

Restorative justice seeks to address the harms of conflict, the wounds to relationships, as a matter of priority. Restorative justice recognizes that *the trauma of conflict* presents the opportunity for re-weaving relationships and building a sense of community among all those touched by crime or wrongdoing. Restorative justice is explicit in articulating the importance of the values that lie at its core, values that include: honesty, compassion, respect and inclusion. The values at the heart of restorative justice drive its various practices. All restorative justice practices seek to create space for deep and respectful listening and complete honesty in expression. Restorative justice practices seek to ensure fair and equal participation of all parties, particularly those more traditionally marginalized in society. Restorative justice practices recognize the power of *co-creation* when addressing the harms of conflict.<sup>65</sup>

The restorative dialogue process that lies at the “core” of restorative justice, Harley argues, is “by definition highly sensitive to context, emphasizing as it does the values of inclusivity and collaboration” with “priority given to deep, honest ‘truth telling’”<sup>66</sup> and careful “attention to emotions

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65. Penelope Harley, *The Globalization of ADR: Feeling the Way Forward? (Ruminations of a “Female, Peace-Making Interested, Restorative Justice Oriented Flake!”)*, 27 HAMLIN J. PUB. L. & POL’Y 283, 290-91 (2006) (emphasis added).

66. *Id.* at 291. The importance of truth telling through honest recognition of the trauma rooted in the past but still felt today is discussed at length in DONALD W. SHRIVER, JR., AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS 7 (1995) [hereinafter SHRIVER, AN ETHIC FOR ENEMIES]; DONALD W. SHRIVER, JR.,

or significant focus on relationship repair.”<sup>67</sup>

Harley’s rich and expansive definition of restorative justice embraces the expanded vision of restorative justice emerging in Howard Zehr’s thought, and clearly describes the broad horizon of possibilities opened up by restorative justice in a way that discloses the community-building promise and transformative potential of restorative justice to address the trauma of America’s past. To explore the contribution that such an enlarged understanding of restorative justice makes to conflict resolution between groups of people in a way that can heal the trauma of America’s past, I now turn to explore the wager of restorative justice that I mentioned at the outset of my remarks, as the key to understanding the practice of the open dialogue that is the living heart of restorative justice in action.

### B. *The Restorative Justice Wager*

The practices of restorative justice are based on a *wager* about the human possibility for entering into community through dialogue in the midst of conflict. This wager expresses a particular view of the nature of reality and the human condition that “[e]very human being wants to be connected to others in a good way,” and in a “safe place” we are able to take action through dialogue to promote social healing and build community so that all life might flourish.<sup>68</sup>

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HONEST PATRIOTS: LOVING A COUNTRY ENOUGH TO REMEMBER ITS MISDEEDS (2005) [hereinafter SHRIVER, HONEST PATRIOTS].

67. Harley, *supra* note 65, at 292.

68. PRANIS, STUART & WEDGE, *supra* note 6, at 9-10. This statement of the wager is abstracted from the description of the deep assumptions that are at the foundation of Circle practice, one of the four forms of restorative justice. These deep assumptions are most clearly expressed by three leading practitioners: Kay Pranis, Barry Stuart, and Mark Wedge in their book, entitled *Peacemaking Circles: From Crime to Community*. *Id.* They identify four core assumptions of Circle practice as follows:

[E]very human being wants to be connected to others in a good way. . . .

. . . [E]verybody shares core values that indicate what connecting in a good way means. . . .

. . . [B]eing connected in a good way and acting from our values are not always easy to do, especially when conflicts arise. . . .

Kay Pranis, Barry Stuart, and Mark Wedge, in their book-length treatment of Circles, write that restorative justice requires and promotes a paradigm shift in which we move “from justice as ‘getting even’ to justice as ‘getting well.’”<sup>69</sup> While their work on Circles addresses crime, their description of Circles discloses the potential of restorative justice to address deep enduring conflict and harm like the trauma of America’s past. Pranis, Stuart, and Wedge describe how Circles offer a safe place in which people in conflict with each other may gather and collectively engage each other in order to undertake *dialogic acts of hope in the wilderness of conflict* that can lead to community because of that engagement in the midst of conflict. This occurs in the structure of what they call the “inner” and “outer” frames of Circles. The outer frame is a structure for ordering the work done by the participants as well as the commitments to sharing life in a new reality that can emerge in the practice. The inner frame consists of a number of active attitudes and commitments of the participants in Circle practice. These attitudes and commitments are rooted in the deep assumptions about reality and human possibility that make up the restorative justice wager. The outer frame provides a safe and protective order where the deep dialogic work of the participants can take place. The collaborative engagement of participants thus arises from within a framework for the practice of a particular Circle that is itself a product of the practice within that Circle rather than imposed from without. Thus, the new reality between the participants that emerges in Circle practice is both a product of, as well as constitutive of, the new paradigm for addressing conflict that grows out of the shared work of the participants.

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. . . [G]iven a safe space, we can rediscover our core values, and that as we do, we also uncover our deep-seated desire to be positively connected [in a good way, and become able to act on that desire in order pursue social healing].

*Id.* at 9-10. These four deeply inter-related statements express the core claim of restorative justice that community and shared life in which all may flourish can occur in the midst of conflict rather than in the denial or negation of conflict.

69. *Id.* at 10.



C. *A Structure for Open Dialogue: The Outer Frame of Peacemaking Circles*

The outer frame of Circles that provides the basic structure for practice is composed of five features which are easily observed from the outside by non-participants.

1. Ceremony
2. Guidelines
3. Talking Piece
4. Keeping/Facilitation
5. Consensus

These features serve to provide a structure within which the deep assumptions and the work of the inner frame described below is conducted. They help shape the practice of restorative dialogue as a potentially transformative practice, embodied and expressed through Circle practice. In practice each of the aforementioned five features is shaped by the action of the Circle participants. Thus, the kind of ceremony, content of the guidelines, identity of the talking piece, role of the keeper who facilitates, and the consensus developed in the Circle are all a product of the ongoing dialogue within the Circle.

Adoption of the trappings of the outer frame, without the deep work dialogic work of the Circle, rooted in the deep assumptions of the nature of reality and human possibility found in faithful Circle practice, is a false appropriation of the Circle process that is unlikely to bring the desired results because the entire practice of Circles depends on building relationships between people who are in conflict. Thus, despite the fact that guidelines are to be created by the members of the Circle, Pranis, Stuart, and Wedge identify six guidelines as essential to promote the dialogic work of the Circle.

- Respect the talking piece [respect for the process];
- Speak from the heart [respect for self];
- Speak with respect [respect for others and self];
- Listen with respect [respect for others];
- Remain in the Circle [respect for others and the process]; and

Honor confidentiality [respect for others].<sup>70</sup>

Note how each of these six essential guidelines are a subset or important detail of the value of “respect” that has a depth that goes far beyond mere civility or the observation of the rules of etiquette in discourse. Instead, the guidelines express a depth of respect that resonates with the Dakota idea of *Ohoda*. *Ohoda* defines respect in a way that expresses the deep relation of all that is encountered in the cosmos in the Dakota worldview.<sup>71</sup> From this deep recognition of the relatedness of all that is encountered in the cosmos springs an obligation to care for the well-being of the relations in which we are embedded. The guidelines are an important manifestation of how that might be done in the restorative dialogue practiced in Circles. Thus, the guidelines when applied to the talking piece, keeper and the process of consensus decision-making, along with ceremonies to mark off Circle practice from routine experience, all play an important role in establishing and maintaining the Circle as a safe place for participants to engage each other in dialogue in a good way on difficult issues.<sup>72</sup>

Ultimately it is the shared collaborative work of the participants that creates the trust that makes any particular Circle a safe place for dialogue about conflict. The outer frame that I have described merely supports it and makes it possible—but it is up to the participants to

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70. *Id.* at 106-11.

71. See the definition and audio pronunciation of *Ohoda* at the Dakota Dictionary Online of the Department of American Indian Studies, U. of Minn., <http://fmdb.cla.umn.edu/dakota/FMPro?-db=dakota.fp5&-format=definition.htm&-lay=entry&-sortfield=entry&-op=eq&word=Ohoda&-recid=33011&-find=> (last visited Nov. 13, 2007). A “cultural note” at the dictionary webpage linked to the one describing *Ohoda* states that “Respect is part of the traditional Dakota *wico@aã* [sic].” This means that respect is part of the Dakota “culture, way of life, lifestyle.” See the definition of “*wico@aã* [sic].” See also Joe Williams, Sr., of the Upper Sioux Reservation located on the Minnesota River, Remarks at the “Sacred Grounds Forum” co-sponsored by the Minnesota Indian Affairs Council and the Minnesota Historical Society held at the Jeffers Petroglyphs Interpretive Center maintained by the Minnesota Historical Society (Apr. 22-23, 2005) (DVD disk 3 of 10, part 13, of the event made by Joe Williams, Jr. on file with the Jeffers Petroglyphs Interpretive Center, Comfrey, Minn.).

72. For a detailed discussion of the five elements of the outer frame of Circles, see PRANIS, STUART & WEDGE, *supra* note 6, at 81-125.

bring the safe place for dialogue into being through their dialogic action with each other. This is the work that Pranis, Stuart, and Wedge describe as taking place within the inner frame of Circles to which I next turn my attention. The outer frame sets up the beginning parameters in which the inner frame work can proceed and bear fruit.

D. *Learning from the Medicine Wheel to Cultivate the Transformative Possibilities of Restorative Dialogue: The Inner Frame of Peacemaking Circles*

In describing the inner frame of Circle practice, Pranis, Stuart, and Wedge call upon the guidance of the medicine wheel as an important resource. The medicine wheel is an important part of the tradition of many of the Indigenous peoples of North America. It is filled with, and expresses, an enormous store of wisdom that is a guide to understanding the meaning of the cosmos and what humans are called upon to do to maintain the integrity of themselves and the cosmos in relation to each other, for those who take it seriously within their tradition. The tradition of the medicine wheel includes the truth that to live in a way that is faithful to the many teachings bound up in the wheel is a task so vast that one can spend a lifetime of study and reflection on the medicine wheel without exhausting its capacity for illuminating the understanding of those who do so.<sup>73</sup>

The medicine wheel, in its simplest form of expression, is described as a circle with four equal sized quadrants inscribed inside the circle. The circle is dependent upon the four quadrants, and each of the four quadrants is dependent on each other—they are all related in balanced harmony. The unity of all depends on the diversity of the quadrants and the integrity of the quadrants depends upon the unity of all. This image of holistic balance and harmony is thus both a depiction of reality and what the Indigenous

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73. Interview with Angelique A. EagleWoman (Wambdi WasteWin), Assistant Professor of Law, Hamline Univ. Sch. of Law, in St. Paul, Minn. (Jan. 30, 2007) (notes on file with the author). Professor EagleWoman is a member of the Sisseton-Wahpeton Dakota Oyate of the Lake Traverse Reservation. As a Dakota woman, her tradition includes the medicine wheel as an important feature.

people who take it seriously are called upon to do—namely to recognize their *relations* with the universe including the plants, animals, and minerals of the land on which they reside and to foster the well-being of all. To live in this way is to foster the well-being of ourselves and our communities.<sup>74</sup>

This powerful image of deep interconnectedness can be found in many cultures, wherever one encounters a vision of individual human experience as being ultimately an expression of *communal interdependency* in which we, in our being, are part of one another, and need each other if we are to be whole selves.

The common phrase of greeting between people raised in the Dakota tradition *Mitakuyapi Owas'in* (All My Relations),<sup>75</sup> sometimes rendered as “we are all related,”<sup>76</sup> expresses the deep sense of interconnectedness of everything in the cosmos accompanied by a deep respect (*Ohoda*) for this interconnectedness that marks the Dakota worldview. Waziyatawin Angela Wilson explains this phrase in the following words:

[W]hile [the phrase *Mitakuyapi Owas'in*] translates easily enough, the worldview associated with this phrase becomes apparent only when used in the context of the extensive network of other kinship terms. This is language that reflects the sacredness and interconnectedness of all creation and . . . . It is used in greetings, in prayers, in ceremonies, in speeches, and any other time one wants to call upon all or part of creation. Thus, uttering the phrase in English does not have the same depth of meaning, because in English, other spiritual beings are not referred to with a kinship term in everyday speech, even siblings.<sup>77</sup>

Dakota people, everywhere I have encountered them,

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74. This understanding of the author has been gained from experience in the dialogue on cooperative stewardship with Native people, archaeologists, and government officials in Minnesota who today are seeking to establish a collaborative relationship on how to recover, preserve, and protect the thousands of Indian burial sites in Minnesota.

75. WAZIYATAWIN ANGELA WILSON, REMEMBER THIS!: DAKOTA DECOLONIZATION AND THE ELI TAYLOR NARRATIVES 62 (2005).

76. This expression of the Dakota phrase referred to here, along with an alternate spelling of that phrase, is the title of a book on the view that “we are all one people.” ALLEN C. ROSS (EHANAMANI), MITAKUYE OYASIN: “WE ARE ALL RELATED” (rev. ed. 1997).

77. WILSON, *supra* note 75, at 62.

explain this phrase as the expression of the depth and quality of relationship that Dakota people have with each other in their extended kinship system and to the land, water, and skies in which the Dakota people encounter the sacred and other spiritual beings as expressed in Waziyatawin's words set out above. In this way, *Ohoda* (respect) takes on an active meaning among Dakota people in the context of everything and everyone they encounter. Relationality, rather than mere time and space, is primary in the Dakota understanding of reality.

This deeply relational Dakota view of the world, and their intimate experience of relationship with it, marks the Dakota people as understanding themselves individually and collectively as closely related to their homeland. One has only to be in the company of Dakota people today to see how another Dakota phrase, *Minisota Makoce*<sup>78</sup>—which identifies the “homeland” of the Dakota—evokes tender feelings of connection on the part of Dakota people who live at great distances from this homeland as the result of the expulsion of their ancestors from the state of Minnesota through military violence undertaken by the United States and the state of Minnesota in 1862 and 1863.

This view, not surprisingly, gives rise to a responsibility to live and take action to create a relationship with the land in a good way so that both the land and the people may flourish together in that relationship. Thus, the very idea of being separated from the land is to suffer being split off from the core of one's individual and collective identity. To be so separated and split off threatens one's very self as Dakota. As such, it helps to disclose the depth of transgenerational trauma to which the words of the Dakota commemorative marchers of the twenty-first century give testimony.

Another expression of deep understanding and respect for the interconnectedness of human beings is found in the African idea of *ubuntu* as explained by Archbishop Desmond Mpilo Tutu, chair of the South African Truth and Reconciliation Commission.

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78. See Wilson, *supra* note 38, and accompanying text (One way of rendering this phrase in English is as “the land where the water reflects the skies.”).

[*Ubuntu* expresses the idea that my humanity is caught up in your humanity. I am a human being only because you are a human being. There is no such thing as a solitary human being . . . . And for that reason, the highest value is accorded to harmony, communal harmony, and anger and revenge and bitterness are corrosive of this harmony. And in a sense, it is the best form of self-interest to forgive you, because if I do not, my anger against you, which goes towards dehumanizing you, dehumanizes me in the process. The minute you are diminished, whether I like it or not, I am diminished. And so if I can enhance your humanity, ipso facto, my humanity is enhanced . . . . And when we forgive, it is, in many instance [sic], for our own sakes.<sup>79</sup>

In 1854, the Suquamish Chief Seattle gave eloquent testimony to the vision of reality marked by recognition of interconnectedness in a speech he made in response to an offer from the United States to enter into a treaty for tribal lands:

So we will consider your offer to buy our land. If we decide to accept, I will make one condition. The white man must treat the beasts of this land as his brothers.

I am a savage and do not understand any other way. I have seen a thousand rotting buffaloes on the prairie, left by the white man who shot them from a passing train. I am a savage and I do not understand how the smoking iron horse can be more important than the buffalo that we kill only to stay alive.

What is man without the beasts? If all the bests were gone, man would die from a great loneliness of spirit. For whatever happens to the beasts, soon happens to man. All things are connected.

You must teach your children that the ground beneath their feet is the ashes of our grandfathers. So that they will respect the land, tell your children that the earth is rich with the lives of our kin. Teach your children what we have taught our children that the

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79. *Tutu and Franklin: A Journey Towards Peace* (PBS Television broadcast, Feb. 9, 2001) (quoted section available at Teacher's Guide 9, <http://www.pbs.org/journeytopeace/teachers/guide.pdf>). Archbishop Tutu's words are a succinct statement of *ubuntu*, the African concept of the relational character of individual identity bound up in community. TUTU, *supra* note 52, at 31, 45, 166, 264-65. *Ubuntu* is a prominent feature of Archbishop Tutu's description of the underlying spirit of the Truth and Reconciliation Commission of South Africa (TRC) which he chaired. *Id.* at 44-46. See also BORAINÉ, *supra* note 52, at 362, 425-26, for a further description of how *ubuntu* gained legal status and informed the restorative justice approach of the TRC, and Tony Freemantle, *Crying for Justice: Searching for Truth: Light Shines at Last into Apartheid's Darkest Corner*, HOUSTON CHRONICLE, Nov. 18, 1996, at A1, noting that Boraine was deputy chairman of the TRC.

earth is our mother. Whatever befalls the earth, befalls the sons of the earth. This we know. All things are connected like the blood which unites one family. All things are connected.

Whatever befalls the earth befalls the sons of the earth. Man did not weave the web of life; he is merely a strand in it. Whatever he does to the web, he does to himself.<sup>80</sup>

More recently one can even find an expression of appreciation for the interconnectedness of our lives in the writings of contemporary descendants of the European immigrant settlers of North America.

In times such as these, if we are cognizant—and honest—about the circumstances that make up our common life, we must admit to the thick interdependency of our lives. We cannot be what we are, we cannot do what we do, we cannot accomplish what we accomplish apart from one another. Perhaps more than we can ever fully discern, our lives are but expressions, albeit creative expressions, of a communal matrix that sustains us, inspires us, and constitutes the origin of our dreams and yearnings, our obligations and our rights. We are members of each other. We belong together. That is the source of our joy in life, although that is, as well, the source of the tragedies of life, the dark side of our history, which, on all too many occasions, makes us shudder and anxious about our destiny.<sup>81</sup>

The vision of deep interconnectedness seen in Dakota culture and tradition, resonances of which may be found in many lands and cultures, is present at the heart of the restorative justice wager and the practice of restorative dialogue at its best. This image of deep interconnectedness is explicitly drawn on by Pranis, Stuart, and Wedge to

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80. WILLIAMS, *supra* note 34, at 329 n.13 (quoting Chief Seattle of the Suquamish).

81. DOUGLAS STURM, *SOLIDARITY AND SUFFERING: TOWARD A POLITICS OF RELATIONALITY* 7 (1998). Douglas Sturm is among those theologians who draw on the resources of Process Thought in their approach to social ethics. For a description of how the resources of Process Thought, in general, and the work of Douglas Sturm in particular, might be drawn upon in developing a theory of constitutional law and human rights, see Howard J. Vogel, *The Possibilities of American Constitutional Law in a Fractured World: A Relational Approach to Legal Hermeneutics*, 83 U. DET. MERCY L. REV. 789 (2006) and Howard J. Vogel, *Reframing Rights from the Ground Up: The Contribution of the New U.N. Law of Self-Determination to Recovering the principle of Sociability on the Way to a Relational Theory of International Relations*, 20 TEMP. INT'L & COMP. L.J. 443 (2006).

emphasize that Circles focus on building relationships *before* going on to identify issues and creating plans of action.<sup>82</sup> Problem solving is not minimized—it is grounded in relationships. This is a striking departure from typical problem solving approaches in the dominant culture of the United States, where “getting down to business” by defining issues first, in order to be “efficient,” holds sway in meetings to take up problems and plans for their resolution. In Circles, the participants start out simply by meeting one another, taking time to get acquainted for the purpose of building relationships and trust. On this foundational and relational work, Circle dialogue can eventually expand to address the questions of individual and shared vision as well as issues that have emerged in a conflict. Only then is the Circle ready to move into developing plans with a sense of unity for their implementation. The dynamic flow of energy built up by dialogic engagement within the inner frame, and expressed in the features of the outer frame, is the vortex out of which community can emerge through open dialogue in the midst of conflict. When a plan of action is developed by a Circle, a community that can bring the action into being has first been created through the dialogue leading up to the creation of the plan.

The guidance of the medicine wheel I have briefly described here is carried further in the fact that Circle practice invites participants to enter the Circle and engage in restorative dialogue as *whole persons*—bringing their head with its mental and intellectual processes, their body with its physical processes, their heart with its emotional processes, and their soul with its spiritual processes. Everyone is invited to enter the Circle as an equal in the fullness of their personhood. In addressing conflict and the possibility of collaboratively creating community in the midst of that conflict, as an expression of open dialogue between whole persons in which all are respected, the members of the Circle become capable of facing the truth with courage in the company of others, including those with whom one might be in profound conflict or disagreement arising out of the trauma of the past.

The practice of restorative dialogue in the distinctive manner in which it is found in Circles calls forth the

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82. PRANIS, STUART & WEDGE, *supra* note 6, at 104.



*restorative impulse* in the heart of each member of the Circle, and opens up the possibility for community deeply shared. When restorative dialogue is practiced in this way, it can unleash the transformative power of dialogue. If we are able to experience that power in our practice of restorative dialogue, it can make us all midwives to the birth of a new way of sharing life that is built on facing the truth of the past and the continuing trauma that is its legacy today, so that all may flourish now and in the future. This vision of hope holds out the possibility that restorative justice can address and promote healing of the grievous continuing effects of the ethnic cleansing of Minnesota in 1862–63. It is a vision that holds out the possibility that when we bring our best selves into the safe place of the Circle, we can engage each other in the face of the full truth and take up the opportunity that this presents us to engage in collaborative dialogue that can spawn dialogic acts of hope to forge the bonds of community among us in the midst of conflict without erasing our different and distinctive identities and the cultures that gave them birth.

In sum, restorative dialogue practiced in this way is an invitation borne along on the hope that we can enter into conversation in the midst of conflict in a way that can enable us to both face the truth and trauma of the past as well as become open to healing the burden of that past in the present that we share. Restorative dialogue understood in this way demonstrates the far reaching potential of restorative justice to offer hope for healing not only the wrongdoing between individuals, but also holds out the hope that we, together in dialogue, may lift the heavy burden of human history and open up a future in which all life may flourish. In its practice, restorative dialogue, therefore, is both a means for pursuing that vision, as well as a present realization of it. It discloses that we are embarked on a journey of dialogue that embodies our interconnectedness while it moves toward its fuller embrace of that fact in our work together on the way.

### III. FORGIVENESS IN PUBLIC LIFE: THE FAR HORIZON OF RESTORATIVE JUSTICE<sup>83</sup>

Discussion of restorative justice with people to whom its practices and principles are unfamiliar inevitably turns to “forgiveness” and “reconciliation.” Thus, it is important to emphasize that while forgiveness and reconciliation can occur in restorative justice practices, that is not their purpose or even their orientation. This point is even more important in the context of restorative justice initiatives to address trauma from violence between groups of people. To demand or rush to forgiveness and reconciliation in such instances is likely to cover up and cast off the past without any needed reparation essential to the construction of a basis for trust between the groups of people involved. The hazard of a *rush to reconciliation* is especially evident in instances of effort to collectively address the trauma of America’s past.<sup>84</sup> “Forgiveness” in such instances, when it does occur, has been called *forgiveness in public life*.<sup>85</sup>

Forgiveness in public life is a special form of forgiveness. It can include the well recognized “therapeutic” form of forgiveness that is needed to “get on with one’s life” after the experience of life shattering harm from wrongdoing, regardless of whether such wrongdoing was criminal in character. In such a therapeutic sense, forgiveness is about me and my life and offers new life to individuals. Thus, even in the face of “unforgivable wrongs” there may be a sense in which the victim needs to come to some level of acceptance that might be called “forgiveness”

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83. The reflections offered in this section are primarily adapted from the work of SHRIVER, AN ETHIC FOR ENEMIES, *supra* note 66, and June O’Connor, *Fostering Forgiveness in the Public Square: How Realistic a Goal?*, 22 J. SOC’Y CHRISTIAN ETHICS 165 (2002). The phrase “Forgiveness in Public Life” comes from O’Connor who explains her preference for this phrase over “political forgiveness” by explaining that relevant literature on the subject, such as Shriver’s AN ETHIC FOR ENEMIES, *supra*, and Desmond Tutu’s NO FUTURE WITHOUT FORGIVENESS, *supra* note 52, seem to be limited to forgiveness as it relates to politics while she calls for an expansion of the conversation about forgiveness in public to include forgiveness in social, cultural, and economic relations as well as in political relationships. O’Connor, *supra*.

84. See, e.g., MARIO GONZALEZ & ELIZABETH COOK-LYNN, THE POLITICS OF HALLOWED GROUND: WOUNDED KNEE AND THE STRUGGLE FOR INDIAN SOVEREIGNTY (1999).

85. O’Connor, *supra* note 83, at 169.

without “forgiving the wrongdoer” so as to open up new possibilities of living life rather than to be psychologically imprisoned by the harm that has occurred. In public life, forgiveness can certainly include forgiveness in this therapeutic sense—indeed the poignant stories of the South African TRC hearings give evidence of that—but forgiveness in a public setting differs from forgiveness in a private setting because it has the potential to move from being about me and my life to being about us and our life *together*. In its fullest sense, forgiveness in public life would open up possibilities for new life shared by all in the larger society. Such forgiveness requires a much wider and deeper understanding of the conditions necessary for such forgiveness as well as of the requirements for action in the future that go with it.

Donald W. Shriver, Jr. has written at length about “forgiveness in *politics*.”<sup>86</sup> In doing so he emphasizes that forgiveness in a public setting is about *truthful remembering rather than about forgetting* the past. In describing what forgiveness entails in a public *political* setting Shriver says: “*Forgiveness begins with a remembering and a moral judgment of wrong, injustice, and injury.*” Rather than forgiving and forgetting as is talked about in popular usage, “Remember and forgive’ would be a more accurate slogan.” It continues with “*the abandonment of vengeance . . . forbearance from revenge*” . . . and includes the embodiment of “*empathy for the enemy’s humanity.*” If forgiveness is “genuine [it] *aims at the renewal of a human relationship.*”<sup>87</sup>

Forgiveness in a political context, then, is an act that joins moral truth, forbearance, empathy, and commitment to repair a fractured human relation. Such a combination calls for a collective turning from the past that neither ignores past evil nor excuses it, that neither overlooks justice nor reduces justice to revenge, that insists on the humanity of enemies even in their commission of dehumanizing deeds, and that values the justice that restores political community above the justice that destroys it. . . .

So defined, political forgiveness links realism to hope. It aims at delivering the human future from repetitions of the atrocities of

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86. This is the subtitle and core theme under inquiry in SHRIVER, AN ETHIC FOR ENEMIES, *supra* note 66. Shriver offers an extended definition of “forgiveness in *politics*” at 6-9.

87. *Id.* at 7-8 (emphasis added).

the past. Given the scale of politically engineered atrocity in the twentieth century, nothing could be a more practical or more urgent gift to our neighbors of the twenty-first.<sup>88</sup>

In other words, we do not, Shriver argues, “forgive and forget” but rather “remember and forgive.” In doing so we do not achieve reconciliation but instead take the first steps toward that possibility. Reconciliation is a process in which forgiveness begins, and which can only be completed by ongoing reparative action in the relationship that emerges within the process.<sup>89</sup>

June O'Connor takes Shriver's formulation of “political forgiveness” expansively when she observes that such an approach to forgiveness in the shared life people have within a larger society is best called “forgiveness in public life.”<sup>90</sup> This, O'Connor observes, is best understood as taking up harms to four interrelated relationships that occur in public life of people who are citizens and residents of modern nations states: *social, cultural, economic*, as well as *political*, because political forgiveness alone, without the other dimensions of relatedness “can be misleading.”<sup>91</sup> Each of these must be taken into account if the reparative justice sought by application of the principles of restorative justice is brought to bear on deep and persistent harms experienced by people in their public life with each other, and especially those which may be embedded as systemic features of that shared life. Indeed, she argues, that if the social, cultural and economic relationships are not included along with the political relationships, the forgiveness that may be offered in public settings may not be worth the pain that attends them.

In her reflection on forgiveness in public life, O'Connor identifies five “activities constitutive of forgiving” in situations that address the terror and torture of past regimes:

1. . . . [R]ecognizing the truth of the moral evil at issue. Forgiveness in public life cannot occur unless attention is paid to

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88. *Id.* at 9.

89. *Id.* at 8-9.

90. O'Connor, *supra* note 83, at 169.

91. *Id.*

the evil deed, process, system, policy, and law, also known as moral betrayal, moral violation, moral cruelty, moral horror, moral atrocity, and crimes against humanity. . . .

. . . .  
2. . . . [S]eeking justice as well as truth, with attention to the need for reparations. . . .

. . . .  
3. . . . [D]etaching from revenge and retaliation as motivating forces in righting wrongs and effecting change . . . . [This activity is] psychological, emotional and spiritual in nature. . . .

. . . .  
4. . . . [R]ecognizing the humanity of the enemy. This recognition requires realistic acknowledgement of the moral vulnerability of human beings, the power of social conditioning, the easy surrender to rage, the appeal of power and privilege, and the compromising and fear-inducing pressures that regimes of terror place on their people. . . .

. . . .  
5. . . . [Embracing the] goal of reconciliation, that is, engaging in the work of renewing and transforming human relationship such that "never again" becomes possible—if only for a time, given the ways which history does repeat itself . . . . [Reconciliation]... like the truth, is a process, one that requires the attention and hard work of all parties, with an eye toward the future . . . . [I]f good relationships never existed, the challenge is one of conciliation not reconciliation.<sup>92</sup>

O'Connor sums up by observing that forgiveness in public life is aimed at the well-being of the children in the future—holding out hope that they may "not be held hostages to the past. . . . Forgiveness in public life thus places the focus on the good of the commons and the rehabilitation of community with an eye on the well-being of the next generation."<sup>93</sup>

In these words, O'Connor presses beyond Shriver's apparent willingness to accept "coexistence," pointing out that he himself recognizes that coexistence may be little more than passive tolerance. A relationship of passive tolerance may be without open warfare, but it is a long way from what is usually thought of when the term relationship is used in a positive, life-affirming way.

As for reparations, O'Connor recognizes the limits

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92. *Id.* at 170-76.

93. *Id.* at 177.

present in a history of terror and torture to provide what would be truly *adequate* reparations. She closes with the suggestion that:

[T]he only almost-adequate reparation for a history of moral violations would be the moral conversion of the perpetrator so that the future can be different than the past. By "moral conversion" I mean the radical realization and sense of moral outrage in the face of the deeds enacted: the felt-pain inflicted on the recipients on every level (physical, emotional, psychological, spiritual, moral); the fears of recurrence and feelings of revenge inherited by future generations who must cope with a legacy of hatred and horror; and the diminishing effects on the self among those inflicting or tolerating those atrocities.

. . . [This involves an] internal shift in ways of seeing, feeling, valuing, judging, deciding, and acting, . . . [which] occur according to the rhythms of internal receptivity and outer circumstance . . . [that] cannot be programmed or predicted. [Moral conversion as a form of reparation] must function as a hope in the heart of the victim... and cannot coexist with revenge, for vengeful actions are likely to prevent or abort that conversion process from happening. . . .

Thus a willingness to forgo and forgive the indebtedness grounded in moral atrocities seems to be a feature of the limitations and uncertainties inherent in human life and knowledge.<sup>94</sup>

It is worth noting, that the difference between Shriver and O'Connor is more in the nature of a difference in emphasis than in substance. Shriver himself embraces the need for reparations, and in a sequel to his work on forgiveness in politics focuses on how "honest patriotism"<sup>95</sup> might be a form of that. It also bears remembering that in the face of complex long-running histories of moral wrongdoing that have taken on a systemic character, the need for forgiveness may run in two directions: from

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94. *Id.* at 178-79.

95. SHRIVER, *HONEST PATRIOTS*, *supra* note 66. The book is about the need for, and examples of, how to go about active concrete "political repentance" for the misdeeds of the past as an act of hope for social healing that opens up a shred future that is life-affirming. It is nothing short of a restorative/reparative approach to the horrors of history on all sides that includes and does not shrink from our American role in that history. Without taking it seriously, the commitment to respect self-determination for all, and the virtues that are evidence of active embodiment of this commitment that we claim as "Americans" are betrayed.

perpetrator to victim, and back again from victim to perpetrator—for such is the cycle of violence extended over time that it leaves no one untouched and few innocents in its wake. When reparative action is taken, in the spirit and with the features that Shriver and O'Connor have outlined, it bears with it the hope that a new story of our shared life may be written and passed on to the benefit of the children yet to be born. That is a true legacy worth being known for—it can be shared by all.

#### IV. "HONEST PATRIOTISM" AND THE "UNREFLECTED ABSENCE" OF NATIVE AMERICANS IN THE AMERICAN STORY

In his most recent book, Donald Shriver describes what concrete acts of forgiveness in public life look like in Germany and South Africa, in order to call forth our imagination for what they might look like in the United States in addressing the trauma of slavery in African American experience and the dispossession of the Indigenous people from their homeland. He announces this purpose in the opening pages of his book entitled *Honest Patriots: Loving a Country Enough to Remember its Misdeeds* in the following words:

My chief aim in writing has been to demonstrate that it is both possible and necessary for societies to *face* and to *repent* of certain evils in their past. . . . The important thing is for a society to learn to acknowledge and turn away from those evils in firm, institutionalized forms of collective commitment. . . .<sup>96</sup>

Shriver goes on to describe in detail how forgiveness in public life entails a kind of public confession through embrace of the truth of the past to acknowledge the trauma America's past has brought forward into the life of this land as a first step in taking reparative action to promote healing. In specifically taking up the misdeeds of the American past in U.S.-Indian affairs policy, Shriver notes that our journey into the "unreflected absence" of Native Americans in the American Story as well as the story of origin of each of our families "cannot be a happy excursion"—but it might be a healing one if it becomes the occasion for concrete action taken in many ways to address

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96. *Id.* at ix (emphasis added).

the 500+ years of trauma that surrounds the full story of the Native American–European contact.<sup>97</sup> That journey, if we have the will and courage to take it, begins with the fact that:

Every contemporary American lives in places where once lived members of one or another of the 550 Indian nations who we know populated the current bounds of the United States. . . .

What windows on Native Americans, past and present, might be fashioned from patient inquiry into their presence in certain localities that have hosted one's own American life from birth to maturity?<sup>98</sup>

In prompting us to answer the question he raises, Shriver says that we need to get our story straight about this tragic and traumatic past—by getting all the story out in the open and making American history complete, rather than partial, so that we can experience the “dawn of understanding at a deeper level.”<sup>99</sup> Against the background of the centuries of injustice—invasion, military attack, forced removal, and colonization—we need to ask two questions: “(1) Can we at least begin to remember and understand the *depth* of the injustices? and (2) What restorations of land and political independence should the United States accord Indian peoples in a country and world of growing interdependence?”<sup>100</sup>

As we contemplate such questions as these posed here, Shriver reminds us near the end of his book that:

[T]here are two ways down which a body of humans can go after its members have experienced gross damages from each other: They can retreat into memory as into a prison, nourish mutual hostility, and make plans for reprisal. Or, having revisited the memory, they can search together for keys that unlock the prison. They can covenant not to repeat the past and can commit mutually to finding new ways of living together.<sup>101</sup>

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97. *Id.* at 209 (citing JAMES LOEWEN, *LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG* (1996)).

98. *Id.* at 210.

99. *Id.* at 246 (citation omitted).

100. *Id.* at 246.

101. *Id.* at 260.



That is in fact what I take to be the promise of the United Nations Declaration on the Rights of Indigenous Peoples adopted by the U.N. General Assembly on September 13, 2007.<sup>102</sup> The new U.N. law of self-determination embodied in that document embraces an old and cherished idea in the American story that traces its origin back to the Declaration of Independence of 1776. To honor that idea today, we might consider what it would mean to us, the descendants of immigrant settlers, in our relations with Native Americans and how these relations might change if we fully embraced and concretely embodied the new U.N. law of self-determination that has emerged in the last twenty-five years. Elsewhere I have summed up the dynamic, relational character of this law in the following terms: “the [new understanding of the] right to self-determination serves the well-being of groups who define themselves as a people by addressing the conditions under which they live and are governed through an on-going process of negotiation of the terms on which they live with their neighbors.”<sup>103</sup>

V. FACING ETHNIC CLEANSING AND GENOCIDE IN THE NEW AMERICAN NATION: GETTING THE AMERICAN STORY RIGHT AT ITS BEGINNING

In Indian rights cases decided by the Supreme Court in the nineteenth century, the Court routinely relied on racial stereotyping language of Indians as “savages” in deciding cases that are regularly cited as precedent in the twentieth century.<sup>104</sup> The first formal instance of this is found in the Declaration of Independence. In that document, to which many Americans trace the origin of American identity,

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102. G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). Full text of the resolution and the Declaration on the Rights of Indigenous Peoples may be found at <http://www.un.org/esa/socdev/unpfi/en/declaration.html>.

103. Howard J. Vogel, *Reframing Rights from the Ground Up: The Contribution of the New U.N. Law of Self-Determination to Recovering the Principle of Sociability on the Way to a Relational Theory of International Human Rights*, 20 TEMP. INT'L & COMP. L.J. 443, 478 (2006) (emphasis omitted). This view is derived through a critical assessment of developments leading to the “new U.N. law of self-determination.” *Id.* at 447-78.

104. See generally Robert A. Williams, Jr., *The Algebra of Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

drafted by Thomas Jefferson in 1776, the Indigenous people of North America are expressly mentioned in the list of grievances drawn up against the Crown. These grievances constituted a bill of particulars to justify the colonies exercise of the right to revolt to secure their independence from the rule of the King. Among these grievances was the charge that the King had “excited Domestic Insurrections amongst us” and sought “to bring on the inhabitants of our Frontiers the merciless Indian Savages, whose known Rule of Warfare, is undistinguished Destruction of all Ages, Sexes and Conditions.”<sup>105</sup> President George Washington embraced this view in the development of policy on Indian affairs when he described Indian people as “Savage as the Wolf.”<sup>106</sup>

The work of Robert A. Williams, Jr. is especially important in coming to understand the origin of this view and its manifestation in the work of the Supreme Court of the United States. Williams argues that the origin of U.S. policy on Indian affairs springs out of a report by George Washington to the Continental Congress at the close of the American war for independence from Great Britain.

On September 7, 1783, just four days after the signing of the definitive peace treaty in Paris ending the war with Great Britain, George Washington, commander-in-chief, at the specific request of the Continental Congress, delivered what turned out to be the basic blueprint for the Founding Fathers’ first Indian policy for the United States. That blueprint is contained in Washington’s carefully considered set of recommendations “relative to Indian Affairs” in the “Western Country.” Notably, Washington’s entire plan for dealing with the tribes of the Western Country was organized around the basic idea that the Indians on the frontier were bestial, war-loving savages and should be dealt with accordingly as a matter of U.S. policy. They should be kept apart from the civilized population of the United States, behind a boundary line drawn to facilitate the gradual and planned colonial

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105. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

106. WILLIAMS, *supra* note 15, at 42 (quoting Letter from George Washington to James Duane on Sept. 7, 1783), *reprinted in* DOCUMENTS OF U.S. INDIAN POLICY 1-2 (Francis Paul Prucha ed., 2d ed. 1990). Williams describes how Washington’s characterization of the Indian as “Savage as the Wolf” came to dominate American Indian Affairs policy. *Id.* at 39-45.

expansion on the country's western frontier.<sup>107</sup>

Washington specifically advised against military engagements with the tribes, seeking rather to acquire Indian lands through "peaceful" means including treaty making. As he put it in his set of recommendations to the Continental Congress:

"I repeat it again, that policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their land in preference to attempting to drive them by force of arms out of their country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our settlements will as certainly cause the *Savage as the Wolf* to retire; both being beasts of prey though they differ in shape."<sup>108</sup>

The government policy that grew out of Washington's report guided the young United States in its relations with the Indigenous people as the frontier moved west with the Louisiana Purchase of 1803. It was implemented in the new territories, including what was to become Minnesota, for example, by Lewis Cass, who served first as Governor of Michigan Territory (1813–1831), and later as Secretary of War under Andrew Jackson (1831–1836). Cass was a central figure in implementing Jackson's policy of removal and he described that policy in the following words:

Like the bear, and deer, and buffalo of his own forests, an Indian lives as his father lived, and dies as his father died. He never attempts to imitate the arts of his civilized neighbors. His life passes away in a succession of listless indolence, and of vigorous exertion to provide for his animal wants, or to gratify his baleful passions. . . .

Under such circumstances, what ignorance, or folly, or morbid jealousy of our national progress does it not argue, to expect that our civilized border would become stationary, and some of the fairest portions of the globe be abandoned to hopeless sterility. That a few naked wandering barbarians should stay the march of cultivation and improvement, and hold in a state of perpetual

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107. *Id.* at 40 (citations omitted).

108. *Id.* at 42 (emphasis added) (quoting Letter from George Washington to James Duane on Sept. 7, 1783), reprinted in DOCUMENTS OF U.S. INDIAN POLICY 1-2 (Francis Paul Prucha ed., 2d ed. 1990).

unproductiveness, immense regions formed by Providence to support millions of human beings?<sup>109</sup>

Furthermore Cass declared, “[w]e must frequently promote their interest against their inclination, and no plan for the improvement of their condition will ever be practicable or efficacious, to the promotion of which their consent must in the first instance be obtained.”<sup>110</sup>

The work of the federal executive in formulating national policy on Indian affairs, most notably under George Washington and Andrew Jackson, was embraced and sanctioned by the work of the federal Supreme Court under the leadership of the so-called “great Chief Justice” John Marshall. His opinions in three cases traditionally referred to as the “Marshall Trilogy”<sup>111</sup> committed the Court to embrace the *doctrine of discovery* in service of the expansion of the American Empire. In doing so the Court became intimately involved in the dispossession of the Indigenous peoples from their homelands.

*Johnson v. M’Intosh*<sup>112</sup> is the earliest of the three cases that make up the Marshall Trilogy that stand as the foundation of Federal Indian Law. In *Johnson*, Chief Justice Marshall, writing for the Court, sets out the “Doctrine of Discovery” that has become the core principle on which dispossession of the Indigenous peoples’ land has been legitimated under the rule of law in the following words:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.<sup>113</sup>

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109. *Policy and Practice of the United States and Great Britain in Their Treatment of Indians*, 24 N. AM. REV. 265, 391-92 (1827), reprinted in FRANCIS PAUL PRUCHA, *LEWIS CASS AND THE AMERICAN INDIAN POLICY* 13 (1967).

110. DOCUMENTS OF U.S. INDIAN POLICY, *supra* note 108, at 8-9.

111. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 24 (1987).

112. 21 U.S. (8 Wheat.) 543 (1823).

113. *Id.* at 587; see WILLIAMS, *supra* note 15, at 52-53 (referring to

Marshall goes on to base this doctrine and the legal sanction it provides for dispossession on the view we saw in Washington's report to Congress in 1763 that became the heart of United States policy on Indian affairs. Marshall refers to the Indigenous people of North America as "heathen[s]" and "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."<sup>114</sup>

In *Cherokee Nation v. Georgia*,<sup>115</sup> the second of the three cases that make up the Marshall trilogy that stands as the foundation of Federal Indian Law, Chief Justice Marshall wrote that Indian people sought redress for their grievances in disputes with others by resorting to the "tomahawk"<sup>116</sup> rather than going to courts like non-Indians. In making this last comment, Marshall took a view that later courts and government officials embraced when they referred to the Indigenous people in North America as composed of warlike tribes.<sup>117</sup> In considering the status of the Indigenous people of North America he characterizes them as a people who were "once numerous, powerful, and truly independent" and who had, over time, sunk "beneath our superior policy, our arts and our arms."<sup>118</sup> Thus, Marshall concludes, the Indian tribes were merely domestic dependent nations and the relationship they had to the United States was one of a ward to its guardian.

In *Worcester v. Georgia*,<sup>119</sup> the third of the three cases that make up the Marshall Trilogy that stand as the foundation of Federal Indian Law, Chief Justice Marshall, writing for the Court, held that the federal government, and not the states had exclusive jurisdiction over Indian affairs.<sup>120</sup> In doing so Marshall refers to the Indigenous people of North America as "a people who had made small progress in agriculture or manufactures, and whose general

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Marshall's quote as the "doctrine of discovery").

114. *Johnson*, 21 U.S. at 577, 590.

115. 30 U.S. (5 Pet.) 1 (1831).

116. *Id.* at 15.

117. *Id.* at 15, 18.

118. *Id.* at 15.

119. 31 U.S. (6 Pet.) 515 (1832).

120. *Id.* at 592-94.

employment was war, hunting, and fishing.”<sup>121</sup>

Professor Williams identifies three elements in *Johnson v. M'Intosh* that are part of the racist dimensions of the Marshall Trilogy and five elements of the doctrine of discovery that is rooted, in part, in these racist dimensions. For Williams the three racist dimensions in Chief Justice Marshall's trilogy of opinions that stand as the foundation of Federal Indian Law are:

[1.] European racial and cultural superiority over the Indians of the New World.

[2.] [T]he doctrine of discovery functioned under the European Law of Nations as part of a transnational legal discourse, considered authoritative, for regulating the claims of European racial superiority . . . . [T]he rights of conquest and colonization belonging to Great Britain as first European discoverer of the tribes of North America and the lands they occupied had devolved to the United States when it won the Revolutionary War. Under the doctrine of discovery, the United States possessed the “exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.”

[3.] Marshall uses the same stereotypes and imagery of Indian savagery to validate the denial of Indian rights in *Johnson* that the Founders had used to construct their exclusionary Indian policy paradigm following the Revolutionary War.<sup>122</sup>

Williams then goes on to summarize the doctrine of discovery and its origin in the racist dimensions of Federal Indian Law by identifying five elements in what he calls the “Marshall Model of Indian Rights”:

[1. It] recognizes the exclusive right of the United States to exercise supremacy over Indian tribes on the basis of the Indians' presumed racial and cultural inferiority.

[2. It] applies the European colonial-era doctrine of discovery as a regulative legal principle to define the scope and content of that right to white privilege as covering the entire continent of North America.

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121. *Id.* at 543.

122. WILLIAMS, *supra* note 15, at 53-54 (citing *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823)).

[3. It] perpetuates a long-established language of racism to justify the specific set of rights and prerogatives of conquest and privilege under the discovery doctrine.

[4. I]t absolves the justices for perpetuating the discovery doctrine as part of U.S. law by viewing it as "indispensable" to the European-derived "system" of colonial governmentality "under which the country had been settled."

[5. It took] an approach to defining Indian rights under the Constitution and laws of the United States . . . [that] traces to the contemporary international law of Marshall's day.<sup>123</sup>

In retrospect, it is not hard to see how American policy on Indian affairs, as originated and established by the federal executive and judiciary, arose out of the experience of the early immigrant settlers. This experience was influenced by both their ambitions as well as their fears. But how are we to look at it today? Consider what we see when we examine this history through the lens of contemporary international law on ethnic cleansing and genocide.

In his study of the "dark side of democracy," Michael Mann defines "ethnic cleansing" in the following terms: "An *ethnicity* is a group that defines itself or is defined by others as sharing common descent and culture, so *ethnic cleansing* is the removal by members of one such group of another such group from a locality they define as their own."<sup>124</sup>

"Genocide" as defined by the United Nations, includes:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

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123. *Id.* at 58, 172-73 (citing Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 74 (1996) (proposing that the Marshall trilogy "embraced pre-constitutional notions of the colonial process, rooted in the law of nations")).

124. MANN, *supra* note 3, at 11.

- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>125</sup>

Even the most casual acquaintance with the experience of the Indigenous people of North America in general, and of the Dakota Oyate in particular, suggests that ethnic cleansing and genocide are terms that must be included in any restorative dialogue that seeks to address the trauma of America's past. This will not be easy to do, especially against the background of descriptions of that experience as an example of what Michael Mann calls, "murderous ethnic cleansing."<sup>126</sup> Thus, when we look at the foundational contributions by the federal executive and judiciary to the establishment of United States Policy on Indian affairs in the context of international law today, we are likely to be led to the sobering conclusion that it fits the definition of "ethnic cleansing" or "genocidal" proportion. This should lead us to consider moving in a different direction in the future. What might that be? And who can we look to, to lead us there?

#### VI. THE TWO ROW WAMPUM: RECONSTRUCTING INDIAN LAW BEYOND THE DOCTRINE OF DISCOVERY

Turning again to Robert Williams we find him calling today for the "decolonization" of law through rejection of the doctrine of discovery at the heart of the Marshall Trilogy. The trouble with that doctrine, Williams argues, is that "[i]t permits the West to accomplish by law and in good conscience what it accomplished by the sword in earlier eras: the physical and spiritual destruction of indigenous people."<sup>127</sup> In a search for resources to undertake such a program of decolonization, Williams suggests two sources—one Indigenous in origin and one non-Indigenous in origin.

As the first step in a program of decolonization of

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125. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 278, 280.

126. MANN, *supra* note 3, at 70; *see also id.* at 83-98 (describing the action of the United States as an example in chapter four surveying the action of the "Genocidal Democracies in the New World").

127. WILLIAMS, *supra* note 34, at 326.



American federal Indian law, Williams urges us to turn our attention to the Gus-Wen-Tah (Two Row Wampum) which he offers as an “indigenously articulated New World discourse of peace, suggesting the beginnings of a differently oriented vision of a law to govern the relations between the West and non-Western peoples.”<sup>128</sup>

The set of principles expressed in the Two Row Wampum, William’s notes, were at one time:

[T]he basis for all treaties and agreements between the great nations of the Haudenosaunee Confederacy (called the Confederated Iroquois Nations by the European colonial powers) and the great nations of Europe. These basic principles were the covenant chain linking these two different peoples by which each agreed to respect the other’s vision.<sup>129</sup>

What this meant in more detail is set out in a Canadian government report quoted by Williams:

“When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize two paths or two vessels, traveling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other’s vessel.”<sup>130</sup>

Relying on this history, Williams concludes that: “At the core of this Americanized vision of law is the idea that freedom requires different peoples to respect each other’s vision of how their respective vessels should be steered.”<sup>131</sup>

Deep respect for the unique identity of nations that are very different from each other is at the heart of what the

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128. *Id.*

129. *Id.* at 326-27.

130. *Id.* at 327.

131. *Id.* at 327.

Two Row Wampum teaches. This respect, and the principles that flow from it, can be recovered by drawing on the new U.N. law of self-determination in order to engage in the judicial decolonization of American law that Williams calls for, by using applicable contemporary international law, in the spirit of Chief Justice Marshall “as an ‘important framework for interpreting constitutional interpretation’ of Indian rights.”<sup>132</sup> This is an outcome that we can embrace if we today take seriously the fifth element of Marshall’s Model of Indian Rights—the use of international law—that exercised a profound influence upon the Supreme Court’s original approach to defining Indian rights under the Constitution and laws of the United States.<sup>133</sup>

VII. THE WAY OF RESTORATIVE DIALOGUE IN THE CIRCLE:  
TALKING WITH RESPECT THAT HONORS THE OTHER

It might be too much to ask of the Court to undertake the decolonization of law as an act of reparation for the trauma of the past sanctioned by law. But we need not despair, for restorative dialogue—talking with deep respect that honors the other—can implement the vision of the Two Row Wampum in our culture and thus lead to fruitful changes in our life which ultimately will come to be reflected in our law. The hope that restorative justice offers, requires work that we do from the values we hold when we engage others as our best selves. If we take the promise of restorative justice seriously there surely is a role for the people at the grass roots to participate in collective acts of co-creation of the new paradigm needed to embrace the vision of the Two Row Wampum through dialogic acts of hope which restorative dialogue at its best can produce.

Circle practice in particular is well suited for this work. It starts with relationship building by taking seriously the possibility of creating a safe place where deep respect is the hall mark and core value of dialogue in difficult conversations. To address the trauma of America’s past, Circles offer an opportunity to bring people together at the

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132. WILLIAMS, *supra* note 15, at 172 (quoting Frickey, *supra* note 123, at 74).

133. *Id.* at 172-73; see also *supra* note 122 and accompanying text.

grassroots in a way that is connected to the larger society through an interconnected set of circles to foster the conversation. Here in the Circle there may well be an opening, once we have met and engaged each other with deep respect, for ourselves, our communities and the stories that we bring to the Circle, to engage in dialogue about how to constructively acknowledge and live together in a way that provides the measure of separation and self-governance. Indigenous people rightfully claim for themselves and their communities while breaking the master hegemonic narrative that has dispossessed them from their land and right to self-determination.

#### VIII. REPARATIONS IN PARTNERSHIP ON THE WAY: TAKING THE PAST SERIOUSLY ON THE ROAD TO A TRANSFORMED FUTURE

The true test of any restorative dialogue that we might engage in about the truth of the past in an effort to heal the trauma of America's past, will ultimately require that we take the past seriously by thinking and acting imaginatively in a way that repairs the harm and saves us from being ravaged by it in the future. And that will surely require that we think, talk and act long and hard about the subject of reparations.

"Reparative justice" can contribute much to any effort to develop a restorative response to the trauma of the past, but it has not received the extended study that has been given to "positive justice" and "retributive justice." To do so we would do well to consider the work of Janna Thompson, who has developed an extended study of "historical obligation and entitlement."<sup>134</sup> She argues that "as members of nations and of other organized groups and communities we *do* have historical obligations."<sup>135</sup> She grounds this claim "in a conception of a society or nation as an intergenerational community. Its institutions and moral relationships persist over time and through a succession of generations, and it depends for its moral and political integrity on its members accepting transgenerational

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134. JANNA THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL JUSTICE, at xviii (2002).

135. *Id.*

obligations and honouring historical entitlements.”<sup>136</sup>

This view leads Thompson to go on to defend what she calls a “reconciliatory” approach to reparative justice<sup>137</sup> that leads her to embrace a theory of reparations that is “obligations-dependent” rather than “rights-centered.”<sup>138</sup> In doing so, she takes seriously the fact of historical injustices in our shared life in a way that can enable us to take seriously the historical injustices to which the Dakota Commemorative Marches offer testimony. As she puts it at the outset of her study:

History is a tale of unrequited injustice. Treaties have been broken, communities wiped out, cultures plundered or destroyed, innocent people betrayed, slaughtered, enslaved, robbed, and exploited, and no recompense has even been made to victims or their descendants. Historical injustices cast a long shadow. Their effects can linger long after the perpetrators and their victims are dead. They haunt the memories of descendants, blight the history of peoples, and poison relations between communities.<sup>139</sup>

Thompson’s work embraces the hope of restorative justice in the context of historical injustice that challenges us to see our relationship to both the past and the future within a framework that takes moral obligation seriously within this relationship. Her approach to the task of restorative justice in the face of historical injustice puts our imagination to the test by calling us to think and act out of a sense of justice that is not simply tied to our own experience, severed from the past or the future as it is in the conventional individual rights-centered approach of American law. In the context of claims by Indigenous peoples, such as the Dakota, the challenge is significant, because, as Donald Shriver recognizes, any serious engagement with the question of reparations in an American context must address the fact that “Indian Claims for tangible redress have long clustered around two daunting issues: *sovereignty* and *land*.”<sup>140</sup> This will require

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136. *Id.*

137. *Id.* at xix.

138. *Id.* at 39.

139. *Id.* at vii.

140. SHRIVER, *HONEST PATRIOTS*, *supra* note 66, at 251.

acknowledgement of the often suppressed truth that America was built on a three-legged stool—one leg is the *land*, fraudulently acquired from the Indigenous peoples; another leg is the forced, uncompensated *slave labor* performed by African slaves torn from their homeland across the Atlantic Ocean and held as chattel property by slave owners to work the land; the third leg is the idea of *possession*. These three became combined in the *law of property* which served as the seat of the stool on which the American republic and its prosperity were constructed with legally enforceable rights under the common law imported from England to the Colonies, allowing title holders to protect their possessory interests against all others. We shall have to learn how to get up off of that stool and face each other, different as we are, and consider how we might share life together without erasing those differences or subordinating one people to the narrative and will of another.

#### CONCLUSION

In closing I come back to the story I started with. I now know that the earliest of my immigrant ancestors came to settle upon land stolen from the Dakota people by the United States, through the Treaty of Traverse des Sioux in 1851, when that land was opened to settlement by the United States government. This is the treaty which the non-Native historian Roy Meyer refers to as a “monstrous conspiracy” of fraudulent negotiation.<sup>141</sup> Less than ten years after my earliest ancestors’ arrival they would be among those who took up arms in citizen militias that were engaged in the two battles of New Ulm near where the greatest loss of life occurred in the Dakota–U.S. War of 1862. They would also participate in the ethnic cleansing of the Dakota people from the state of Minnesota that followed that war. Most particularly, the images called forth in my mind by that story today vividly pose the challenge we face to recover the truth of the trauma of America’s past so that it may be known and addressed in the hope of constructing a more hopeful future. In hearing the story of the Dakota forced march and its aftermath retold by the Dakota

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141. MEYER, *supra* note 22, at 87 (quoting NEWTON H. WINCHELL, *ABORIGINES OF MINNESOTA* 554 (1911)).

commemorative marchers, I now see the past and therefore the present in a different way. I continue to view the Minnesota River Valley as my home but I have come to experience it in a vastly different way. I now experience my home as a place that I have found in a new, yet very old land—*Minisota Makoce*, that ancient and current homeland of the Dakota Oyate. I experience this as a new consciousness about where I live while continuing to call it home. This new consciousness has taken me down old paths in a new way. That new consciousness manifests itself in my recognition of the sites of various Dakota villages that once dotted the landscape of the Twin Cities of Minneapolis and St. Paul. There are few, if any, signs of these villages today—but I am now keenly aware of them as I travel through my daily routine and pass by them from time to time. They seem very present to me and have become markers of the geography that I know as home. While the physical artifacts of these villages are no longer here, these communities are no longer absent in my consciousness. Thus, I find myself as a non-Indian building my life and home on Indian land.

The Dakota Commemorative Marches, first held in November of 2002 and planned by the organizers to be repeated every other year through the year 2012, are a reminder of that past as well as the consequences of it that we face today. As William Faulkner once famously wrote, “[t]he past is never dead. It’s not even past.”<sup>142</sup> But there is more here for us to consider—the Dakota Commemorative Marches are not only a reminder of the truth of the past and how it bears on the present—they are also a challenge that calls us to act in recognition of that past and its legacy in our present life. Restorative justice dialogue, especially as practiced in Circles, can help us answer that call because restorative justice takes Faulkner’s observation about the presence of past in our lives today seriously when it faces the burden of the past with the courage and compassion that enables people to stand together, in dialogue, to face the truth that the trauma of the past bears forward into the present.

Restorative justice, considered in the context of the trauma of America’s past, invites us to enter a conversation

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142. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951) (emphasis added).

in which we are able to both face and heal the trauma of ethnic cleansing in America's past that people like me, who, as descendants of European immigrant settlers, are the beneficiaries of, here in *this* place, we have come to call home.

Can we find the commitment, the courage, and the compassion, to undertake the difficult journey of open dialogue about events such as those which happened in that beautiful valley in 1862, with the patience and care that can enable us to construct the safe place that is needed for that dialogue, so that we can bring our best selves to face each other in the presence of the truth we share in such stories as the one which I have so briefly recounted here? If we can, a new future may yet be born.