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Alfred L. Brophy

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REPARATIONS TALK: REPARATIONS FOR SLAVERY AND THE TORT LAW ANALOGY

Alfred L. Brophy*

Abstract: This Article examines the current landscape of reparations for slavery, identifying the contours of reparations lawsuits and exploring the ability of tort law to help apportion moral culpability in the reparations context. It first examines several possibilities for lawsuits for Jim Crow, discussing constitutional requirements and identifying specific incidents—such as lynchings and Jim Crow legislation—that might be appropriate subjects of litigation. The Article then assesses the viability of obtaining reparations through tort and unjust enrichment claims by addressing issues such as causation and damages, exploring the obstacles presented by American law's liberalism, and identifying the various goals of reparations advocates. Finally, the Article moves beyond litigation to contemplate the ability of tort law to serve as a vehicle for framing discussions about moral culpability. It concludes with an optimistic assessment of the role of tort law in the reparations movement.

Introduction

Reparations talk[1] has reached a new level in the past two years. We have advanced well beyond the first generation of scholarship,

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It was a great pleasure—and honor—to present an earlier version of these thoughts at the *Boston College Third World Law Journal*'s symposium at Boston College Law School, where I spent the most enjoyable (and one of the most educational) years of my life. I would like to thank Wasana Punyassena for organizing the symposium, as well as Erin Han, Joanna Bratt, Melissa Cook, Mike O'Donnell, Naomi Kaplan, and the rest of the *Boston College Third World Law Journal* for inviting me. The symposium reminded me of The Clash's Joe Strummer's statement—widely publicized at the time of his death—that "If you ain't thinkin' about [hu]man[s] and God and law, then you ain't thinkin' about nothin'." *See* Jon Pareles, *Joe Strummer Is Dead at 50; Political Rebel of Punk Era,* N.Y. Times, Dec. 24, 2002, at B6. Reparations talk combines all three of those!

I would also like to thank Dedi Felman, John Dzienkowski, Sanford Katz, Sara Patterson, Angela Kupenda, Andrew R. Klein, David Lyons, David Bernstein, David Levine, Calvin Massey, Eric J. Miller, and David Thelen for discussing these issues with me. I also benefited greatly from the comments of participants of the University of Windsor Law School's June 2003 roundtable on reparations.

[1] With apologies to Mary Ann Glendon. *See* Mary Ann Glendon, Rights Talk (1991).

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written in the 1980s, that opened the idea that reparations for slavery and other racial crimes were possible and that identified the problems with lawsuits. Much of that scholarship was critical of the existing system—critical of American law's liberalism and its seeming inability to provide a language for thinking about reparations.[2] The second generation, building on prominent precedents like the Civil Liberties Act of 1988, which provided compensation to Japanese-Americans interned during World War II, recognized that legislative reparations were possible. That scholarship contemplated what reparations might provide and how they might lead to interracial justice, as well as reparations in specific contexts, like the Tulsa Race Riot.[3]

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[2] The fountainhead of serious reparations talk within the legal academy is Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations,* 22 HARV. C.R.-C.L. L. REV. 323 (1987). A generation earlier, Professor Bittker took those arguments seriously with his monograph, *The Case for Black Reparations. See generally* BORIS BITTKER, THE CASE FOR BLACK REPARATIONS (1973). Bittker's book provides an important model for later reparationists; he applies well-established civil rights law as a framework for understanding the moral case for reparations. Nevertheless, the time was not then ripe for reparations talk and his ideas sat and waited to make their appearance in the next generation.

Building on Matsuda, three other articles advanced the cause in significant ways. Two were student notes. *See* Tuneen E. Chisholm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations,* 147 U. PA. L. REV. 677 (1999); Rhonda V. Magee, Note, *The Master's Tools,* 79 VA. L. REV. 863 (1993). Magee has recently expanded significantly upon her earlier work. *See* Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America,* 54 ALA. L. REV. 483 (2002). The third was Professor Westley's brilliant statement of the case for reparations from a moral standpoint. *See* Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. THIRD WORLD L.J. 429 (1998).

[3] The second generation is perhaps best represented by Professor Yamamoto's humane work, particularly *Interracial Justice. See* ERIC YAMAMOTO, INTERRACIAL JUSTICE (1999); *see also* Julie A. Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis, in* CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 379 (Francisco Valdes et al. eds., 2002); Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color,* 2 HARV. LATINO L. REV. 495 (1997); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America,* 95 MICH. L. REV. 821 (1997); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims,* 19 B.C. THIRD WORLD L.J. 477 (1998); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice,* 3 ASIAN PAC. AM. L.J. 33 (1995). Professor Yamamoto's unceasing efforts to emphasize racial healing through reparations are critical, I believe, to advancing the cause of reparations.

In the wake of the Civil Liberties Act of 1988, some states began investigating their own complicity in racial crimes, such as the Rosewood riot of 1923, which destroyed a black town in central Florida. The most ambitious of the state investigations was the commission that investigated the 1921 Tulsa Race Riot. The commission was remarkably successful in recovering an understanding of the riot's origins in the racial violence of the United States after World War I. Despite that history, however, there were no reparations paid. *See generally* ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921 (2002).

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Reparations talk is the focus of serious discussions on college campuses and on the editorial pages of leading newspapers.[4] It has gained credibility throughout the world, as nations begin to discuss how they can repair past damage and obtain closure.[5] Or, as Nontombi Tutu has said, "The honest discussion of reparations has come of age in the United States and the world. Maybe I should say that the world has come of age for the discussion of reparations."[6]

Reparations has even infiltrated federal courtrooms around the country. In 1995, the Ninth Circuit Court of Appeals dismissed a lawsuit for reparations.[7] In March of 2002, a class action case was filed in

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[4] The growth in the public debate can be roughly gauged by a search for references to "slavery" and "reparations" in the same story in the "major papers" database of Lexis-Nexis. There were 85 stories before 1991, 83 stories in 1995, 103 in 1999, 396 in 2000, and 1117 in 2001. One suspects that the effect of September 11, 2001, is seen in a decline to 698 stories in 2002. The decline is continuing. In the first quarter of 2003, there were only 105 stories. *Available at* http://www.lexis.com (last visited Oct. 16, 2003).

Another indicium of the importance of reparations for slavery within the legal academy is that the nation's finest law journals have begun to publish on the topic. In recent years the *Harvard Law Review, Columbia Law Review, Texas Law Review,* and *Georgetown Law Journal* have all published articles, essays, or comments devoted to reparations for slavery. *See* Alfred L. Brophy, *Losing an Understanding of the Importance of Race,* 80 Tex. L. Rev. 911 (2002); Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery,* 89 Geo. L. J. 2531 (2001); Saul Levmore, *Changes, Anticipations, and Reparations,* 99 Colum. L. Rev. 1657 (1999); Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future,* 115 Harv. L. Rev. 1689 (2002). Moreover, there are frequent, thoughtful discussions of reparations on the radio and the internet. *See, e.g.,* Hugh LaFollett & Andrew Valls, *Ideas & Issues* (WETS-FM radio broadcast), *available at* http://www.etsu.edu/philos/radio/valls.htm (last visited Oct. 17, 2003); *Leading Scholars Discuss "Forty Acres and a Mule: The Case for Black Reparations," at* http://www.columbia.edu/cu/news/vforum/03/struggle_black_reparations/ (Mar. 10, 2003).

[5] *See generally* Elazar Barkan, The Guilt of Nations: Restitution and Negotiating Historical Injustices (2000).

[6] Nontombi Tutu, *Afterword* of Should America Pay? Slavery and the Raging Debate over Reparations 321, 322 (Raymond A. Winbush ed., 2003).

[7] *See* Cato v. United States, 70 F.3d 1103, 1111 (9th Cir. 1995). More recently, the United States Court of Claims entered summary judgment against plaintiffs seeking reparations for slavery based on an Equal Protection argument, who claimed that victims of slavery are entitled to share in the Civil Liberties Act of 1988, which provided compensation to Japanese Americans interned during World War II. *See* Obadele v. United States, 52 Fed. Cl. 432, 441, 444 (2002). Other recent cases seeking reparations for slavery have been dismissed. *See* Abdullah v. United States, No. 3:02–CV–1030, 2003 WL 1741922 (D. Conn. Mar. 25, 2003); Bell v. United States, No. 3:01–CV–0338–D, 2001 U.S. Dist. LEXIS 14812 (N.D. Tex. 2001) (dismissing suit for reparations for slavery and observing that without a concrete, personal injury that is not abstract and that is not fairly traceable to government, plaintiff lacks standing); Powell v. United States, No. C94–01877 CW, 1994 U.S. Dist. LEXIS 8628 (N.D. Cal. 1994); Jackson v. United States, No. C94–01494 CW, 1994 U.S. Dist. LEXIS 7872 (N.D. Cal. 1994); Lewis v. United States, No. C94–01380 CW, 1994 U.S. Dist. LEXIS 7868 (N.D. Cal. 1994). *Cf.* United States v. Bridges, 46 F. Supp. 2d 462, 463 (E.D. Va. 1999) (defendant charged with tax

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federal district court in New York.[8] In February, 2003, the victims of the 1921 Tulsa Race Riot filed a serious claim.[9]

Legal scholars who oppose reparations are currently responding with a third generation of scholarship. Those opponents are taking reparations arguments much more seriously by closely parsing advocates' legal claims. By doing so, they greatly expand the opportunity for serious discussion.[10] Serious debate always needs people to present op-

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fraud for claiming non-existent reparations tax credit), *aff'd*, 217 F.3d 841 (4th Cir. 2000); Wilkins v. Commissioner, 120 T.C. 109 (2003) (denying tax credit for reparations for slavery).

[8] *See* Plaintiffs' Complaint & Jury Trial Demand, Farmer-Paellmann v. FleetBoston Fin. Corp., No. 02–CV–1862 (E.D.N.Y. filed Mar. 26, 2002). The complaint is available at http://www.nyed.uscourts.gov/02cv1862cmp.pdf and is conveniently reprinted in SHOULD AMERICA PAY?, *supra* note 6, at 354–66. Farmer-Paellmann has also filed suit in California. *See* Hurdle v. FleetBoston, No. CGC–02–412388 (Cal. Super. Ct. filed Sept. 10, 2002). These and other cases are discussed in John S. Friedman, *Corporate Bill for Slavery,* NATION, Mar. 10, 2003, at 6. The cases have recently been consolidated. *See In re* African American Slave Descendant Litig., 231 F. Supp. 2d 1357 (J.P.M.L. 2002). There has also been a joint motion to dismiss filed by the defendants. Some judicial opinions have addressed various problems with slave reparations suits. *See, e.g., Cato*, 70 F.3d at 1106–11. Nevertheless, the joint motion is the most comprehensive legal response yet available to slavery reparations claims. It advances four main claims: that the plaintiffs lack standing, that the statute of limitations bars claims, that the claims are barred by the political question doctrine, and that the plaintiffs have not alleged facts sufficient to support a cause of action. Of those claims, the most damaging in my mind are the statute of limitations and lack of standing claims, which might also be considered as a common law problem—a lack of connection between those who are harmed and those who are asserting a claim. The standing problem might be cured fairly easily by identifying people who are descended from those who were employed as slaves by the defendant companies and their predecessors. There may still be problems, as the defendants argue, that descendants are not the proper claimants—that the claims must be asserted by a representative of the estate. *See* Memorandum in Support of Defendants' Joint Motion to Dismiss at 6–7, *In re* African American Slave Descendant Litig., 231 F. Supp. 2d 1357 (N.D. Ill. 2003) (No. CV 02–7764). One suspects, however, that the intestate heirs—or testate, to the extent that there were wills—would be the appropriate representatives at this point. An obvious, enormous problem, which is not so easily handled, is the statute of limitations. I find it surprising that the motion, which was prepared by counsel from many of the nation's very finest law firms, has such limited discussion of the equitable tolling arguments.

[9] *See* Plaintiffs' Second Amended Complaint, Alexander v. Oklahoma, No. 03–CV–133 (N.D. Okla. filed Apr. 29, 2003), *available at* http://www.tulsareparations.org/Complaint 2ndAmend.pdf (last visited Nov. 12, 2003); *see also* Brent Staples, *Coming to Grips with the Unthinkable in Tulsa,* N.Y. TIMES, March 16, 2003, § 4, at 12 (discussing the lawsuit and concluding, "The courts will have to decide whether or not the riot survivors have a plausible case. But in the moral sense at least, Tulsa and Oklahoma have already lost. They did so by failing to accept responsibility for one of the most blood-curdling events in American history."). Given the amount of discussion, I have to disagree with those who maintain that reparations talk is impoverished. *See, e.g.,* Lee A. Harris, *"Reparations" as a Dirty Word: The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, 435 (2003) ("To say the least, the literature on slavery reparations is threadbare.").

[10] Sometimes those who contribute to the discussion of the problems with reparations also support them. *See generally* Alfred L. Brophy, *Some Conceptual and Legal Problems with*

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posite sides. Reparations discussion is expanding well beyond critical race scholars who first advanced reparations arguments, along with attacks on law's liberalism. Now the arguments focus on the details of cases: the statute of limitations, identifying the appropriate plaintiff class members and the appropriate defendants, and the cultural arguments surrounding reparations. That third generation of scholarship also includes work by reparationists, which explores in detail what the case for reparations looks like and how it fits within well-established legal principles.[11] And still, reparations scholarship and talk continues to grow. Our age of apology, coupled with some limited reparations in other contexts, is leading to calls for reparations beyond the context of slavery.[12] All of which points to the problems with every group seeking limited governmental resources: it is difficult to rank the claims of competing groups to government-funded reparations.[13] This third generation of scholarship is going to be very helpful in setting the agenda for future legislative (and perhaps court) action. Once we have a dialogue, we can more clearly see what we want to do about reparations.

This Article is part of that third generation because it seeks to identify how reparations lawsuits might work and how the law might be used to frame reparations claims to a legislature. Part I assesses the possibilities of lawsuits for Jim Crow. Part II then turns to the case for reparations for slavery through tort law and unjust enrichment. It deals with common objections to tort suits for reparations—such as causation and proof of damages. It then turns to the role that lawsuits might play in the cultural war over reparations. Part III discusses the goals of reparations, and whether reparations are well-suited toward meeting those goals. This Article concludes that using tort law for

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Reparations for Slavery, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003) (discussing problems with theories involving lawsuits and constitutionality of legislatively granted reparations, while suggesting ways that reparations might be implemented). Alfreda Robinson, for example, has recently explored how reparations claims might work against corporations. *See* Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309, 358–84 (2003).

[11] *See, e.g.,* Kim Forde-Mazrui, *Taking the Right Seriously: America's Moral Responsibility for Effects of Past Racial Discrimination* (2002), *at* http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID311860_code020613630.pdf?abstractid'311860; Kaimipono Wenger, *Slavery as a Takings Clause Violation* (2003), *at* http://ssrn.com/abstract=420540.

[12] *See, e.g.*, Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts,* 13 BERKELEY LA RAZA L.J. 387, 390–92 (2002); Ediberto Roman, *Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits,* 13 BERKELEY LA RAZA L. J. 369, 371 (2002).

[13] *See* Eric Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices,* 103 COLUM. L. REV. 689, 722–23 (2003) (discussing the difficulty of ordering priority of claims on government's scarce resources).

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reparations may provide relief for some of the victims of slavery and Jim Crow. Most importantly, tort law is an ideal vehicle for framing discussions about moral culpability. In short, the time for serious discussion of reparations is now. The future of the movement undoubtedly will be determined in large part by our success in making a compelling moral argument for reparations that gains political support.

I. Contemplating Lawsuits for Jim Crow

In the United States, lawsuits are often the harbingers of social revolutions. We see lawsuits at the beginning of movements—and at the end of them, as well. We see suits when a movement is first gaining momentum, because people turn to courts to work out their claims and to gain statements of their rights. We also see lawsuits at the end of social movements, when other methods have failed.

Reparations lawsuits are part of a larger movement. That movement has many goals, including bringing attention to the contributions that African Americans have made to the American economy and society, for which they received too little compensation, and correcting that unjust under-compensation. The movement for reparations for Jim Crow—the period between the end of Reconstruction and the beginning of the modern civil rights movement, when African Americans were subject to state-sponsored discrimination in education, housing, employment, and public accommodations—aims at the entire system of racial crimes during that era. Legislatures and municipalities passed acts that limited voting rights, provided grossly disproportionate funding of schools, and mandated racial segregation in housing and on streetcars. Private actors then followed the government's lead by limiting employment opportunities. Together, government and private actions led to dramatically limited opportunity for African Americans to rise economically. There was a continuation of what United States Senator James Henry Hammond from South Carolina had referred to as a "mud-sill" class: former slaves and their descendants became the "defenseless scapegoat[s]" used for cheap labor while segregated from the life of the white community.[14] A par-

[14] *See* Cong. Globe app., 35th Cong., 1st Sess. 68, 71 (1858) (speech of Sen. Hammond, Mar. 4, 1858); *see also* Ralph Ellison, *Going to the Territory, in* The Collected Essays of Ralph Ellison 591, 595 (John F. Callahan ed., 1995) ("Having won its victory, the North could be selective in its memory, as well as in its priorities, while leaving it to the South to struggle with the national problems which developed following the end of Reconstruction. And even the South became selective in its memory of the incidents that led to its rebellion and defeat. Of course a defenseless scapegoat was easily at hand, but my point

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allel community developed, sometimes with benefits for those segregated, but most often with low wages, long hours, and little opportunity for advancement.[15]

A. *Constitutional Requirements*

When we are talking about lawsuits as the vehicle for reparations, we need to identify a class of plaintiffs and specific defendants and link them together with a cause of action. The United States Supreme Court requires a close connection between proof of harm and the remedy.[16] As the Supreme Court said in striking down minority-owned construction businesses in *City of Richmond v. J.A. Croson, Company*:

> It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as "identified discrimination" would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor. . . . These defects are readily apparent in this case. The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone.[17]

Requiring a close connection between harm and relief is inherent in American law, which looks to individual plaintiffs and individual defendants. Reestablishing the requirement of a close connection between harm and relief, the Supreme Court stated repeatedly in the

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here is that by pushing significant details of our experience into the underground of unwritten history, we not only overlook much which is positive, but we blur our conceptions of where and who we are."); CLARENCE J. MUNFORD, RACE AND REPARATIONS 207–21 (1996).

[15] *See* MUNFORD, *supra* note 14, at 207–21.

[16] For the requirements of reparations lawsuits, see Brophy, *supra* note 10, at 502–20 (discussing the need to have identifiable plaintiffs and defendants, causation, and a cause of action); *infra* Part II (discussing the requirements of a lawsuit for reparations for slavery).

[17] City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 499 (1989); *see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276–77 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . [A] public employer . . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.") (internal quotations omitted).

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1980s and early 1990s that generalized societal discrimination cannot be the basis for supporting race-based affirmative action.[18] In more recent years the Supreme Court has imposed similar lawsuit-like restrictions on Congress's powers under Section Five of the Fourteenth Amendment, referring to the limited power of findings of societal discrimination to support race-based action.[19]

The Supreme Court's increasingly strong demand for a connection between harm and relief is best evidenced in its school desegregation decisions. Desegregation injunctions permit, by their nature, a loose fit between past harm and current remedy; their purpose is making a future that looks different from the past. Desegregation injunctions attempt to create a school system that looks like what the school system might have looked like without the past illegal conduct.[20]

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[18] *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 909–10 (1996); Adarand Constructors v. Pena, 515 U.S. 200, 220 (1995); *Wygant*, 476 U.S. at 274–776, 288.

[19] *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368–74 (2001).

[20] Professor Fiss perceptively explored desegregation injunctions in *The Civil Rights Injunction*:

> In contrast to damage judgments or criminal prosecutions, the injunction could more easily accommodate the group nature of the claim, it could provide the requisite specificity and continuing supervision over long periods of time, and it introduced a desired degree of softness—it has a prospective quality, and directives could easily be modified as the courts enhanced their understanding of the constitutional goal and how that goal might be achieved.

OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 87 (1978). Looking now at twenty-five years of subsequent development in injunctions, we might think that injunctions are being reformed to look more like traditional legal relief. As Professor Laycock has argued in a different context, the special nature of equity is being tamed and made to look increasingly like legal relief. *See generally* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991). Indeed, a follower of Professor Laycock might be tempted to speak in terms of the resurrection of the connection between harm and remedy! Of course, one familiar with Joseph Story's *Commentaries on Equity* would not find that surprising. For, more than 150 years ago, Justice Story was already trying to make equitable relief conform to legal relief. *See generally* JOSEPH STORY, *Commentaries on Equity Jurisprudence as Administered*, *in* ENGLAND AND AMERICA (1836). *Cf.* PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 121–43 (1965) (discussing the intellectual elegance of the common law and the ways that jurists, particularly Story, sought to bring rationality to it).

Similarly, when the demand was to compensate for the systematic and thorough harms of slavery, the Jim Crow era, or more subtle and recent forms of discrimination, cash payments seem particularly inadequate. The inadequacy stemmed from considerations much deeper than difficulties of measurement, for these same difficulties inhere in the reparative injunction—in identifying the victims and perpetrators of the past wrong and knowing what conduct (e.g., preferences) would constitute adequate compensation. The inadequacy stemmed from the group nature of the underlying claim and a belief that only in-kind benefits would effect a change in the *status* of the group.

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The Supreme Court's decision in *Grutter v. Bollinger* may signal a change in the requirement that reparative action must be linked to harm. Indeed. *Grutter*, by finding that diversity itself is a compelling state interest,[21] produces an independent ground for race-conscious action that is completely separate from remedying past discrimination. Justice O'Connor's inclusion of a time limitation on the race-conscious action—she suggests twenty-five years—is particularly puzzling in this context.[22] While it pays homage to the Court's previously announced requirement that race-conscious action have a definite stopping point, that limitation seems to come from out of thin air. There is no reason why the race-conscious action should last twenty-five, as opposed to ten, fifty, or one-hundred years. Moreover, if diversity itself is a compelling interest, then one wonders why there is a time limitation at all. Assuming that we can take as good law that diversity (not remedying past discrimination) is now a compelling state interest, that opens up great possibility for race-conscious action in school desegregation. Perhaps we will see a departure from the requirements of desegregation cases, like *Missouri v. Jenkins*, where the remedy must be designed to repair the constitutional harm.[23] In rejecting the need for an attempt to find non-racial bases, *Jenkins* supports a broad remedial program that may remove constitutional objections to reparations.[24] The larger effect of *Grutter* may be to shift dialogue away from reparations and more toward consideration of race as part of a campaign for diversity. It remains to be seen what *Grutter* does to the race debate. Perhaps, in recognizing that diversity is a goal, we will move away from consideration of the past and the history of racial crimes and discrimination.[25] Or perhaps the decision will reinforce consideration of race throughout American politics.

Yet the entire process of class action lawsuits—in which the plaintiff is little more than a stand-in for an entire group of claimants—has undergone such transformation that one is tempted to believe we have returned to the world Professor Lon Fuller described in *The Forms and Limits of Adjudication*.

[21] Grutter v. Bollinger, 123 S. Ct. 2325, 2339 (2003).

[22] *See id.* at 2347.

[23] *See* Missouri v. Jenkins, 515 U.S. 70, 88 (1995). Of course, *Jenkins* places limits on what courts can do and *Grutter* is dealing with what are essentially legislative and executive decisions.

[24] *See* Brophy, *supra* note 10, at 525–35 (discussing the likely constitutional problems with reparations and suggesting what findings would be necessary to support them); Posner & Vermuele, *supra* note 13, at 711–25 (discussing the constitutional problems with reparations for slavery).

[25] *See* Stuart Eizenstat, *Racial Preferences as Slavery Reparation,* L.A. Times, Mar. 31, 2003, at B11.

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There are other, important questions about the effect of *Grutter* on reparations. *Grutter* revitalizes race as a category of legal analysis and restores discussion of race to the center of contemporary American law. One wonders, however, if there is less need for discussion of reparations, with its requirement of demonstrating how past harm has an effect on people today, now that there is an independent basis for race-conscious action. Reparations may continue to be a way of justifying affirmative action, but now that diversity opens up a separate rationale, there is less need for discussing it. Nevertheless, the people who most need reparations—and the people it would help the most—may not be the same people who receive preferential treatment through diversity programs.

B. *Requirements for Jim Crow Law Suits*

In brief, to succeed on a lawsuit for reparations for slavery or Jim Crow, plaintiffs will have to show that they (or someone for whom they hold the right to sue) were injured, that the injury was caused by some person who owed them a duty, and that the injury resulted in damage. Of course, all of this must have happened within the statute of limitations.[26]

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[26] Commentors have begun to explore in some depth the problems with the lawsuit against Aetna and CSX. *See, e.g.,* Paige A. Fogarty, *Speculating a Strategy: Suing Insurance Companies to Obtain Legislative Reparations for Slavery,* 9 CONN. INS. L.J. 211, 224–41 (2002); Anthony Sebok, *Prosaic Justice*, LEGAL AFF., Sept. 10, 2002, at 51 (evaluating the efficacy of relying on property law, rather than human rights law, in slavery reparations suits). Farmer-Paellmann framed the lawsuit in a way that created problems. There is no evidence linking her to any of the behavior of any of the defendants. At the very least, one would expect that a court would demand that the plaintiffs show a connection between the people harmed by the defendants' predecessors and themselves. In essence, one might reasonably demand that the plaintiffs show some connection between the defendants' predecessors and their predecessors. *See* Fogarty, *supra*, at 233.

A more credible suit would have located the descendants of slaves who worked for CSX's predecessors, or whose lives were insured by Aetna. One might, for instance, construct a claim for the descendants of the slaves who worked on Isaac Royal's plantation in Barbados. Royal donated money made on that plantation to Harvard Law School. *See* Justice Joseph Story, A Discourse Pronounced at the Funeral Obsequies of John Hooker Ashmun, Esq., Royal Professor of Law in Harvard University, Before the President, Fellows, and Faculty in the Chapel of the University (April 5, 1833). Because a donee takes a gift subject to all the claims against the donor, those descendants might assert a claim against Harvard Law School, as the stand-in for Isaac Royal. There would, of course, be serious problems with the statute of limitations. However, one might find a court—perhaps in Barbados—willing to toll the statute of limitations because the courts were unavailable to the plaintiffs at the time. One might also apply the rule that the statute of limitations does not begin to run on stolen personal property until a claim is made for its return. *See* Elizabeth Tyler Bates, *Reparations for Slave Art*, 55 ALA. L. REV. (forthcoming 2004).

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Some cases for Jim Crow crimes and discrimination seem particularly compelling.[27] The Tulsa riot lawsuit holds out promise, precisely because we are able to fit it into a framework that the law is able to recognize. There are identifiable plaintiffs—more than 100 people still survive who were alive during the riot and were victimized by it—and there are identifiable defendants—the city and state. Moreover, there are some identifiable causes of action that are particularly strong in the case of the city, which deputized hundreds of men who subsequently participated in the riot. The city and local units of the state guard also participated in the mass arrest of everyone in the black section of Tulsa.[28]

The largest problem to overcome in the Tulsa litigation is the statute of limitations. Even there, a reasonable argument exists for tolling the statute of limitations: the courts were effectively unavailable at the time. When blacks tried to assert their legal rights, they were subject to lynchings and other violence—such as the destruction of their homes by rioters. Shortly after the riot, the Ku Klux Klan so dominated the state of Oklahoma and the Tulsa and Oklahoma City courts that Governor Jack Walton declared martial law throughout the state and convened a military tribunal to investigate the Klan. Blacks as well as others—like Native Americans and Greek immigrants—were subject to violence, which the Tulsa police department probably encouraged. At best, the department failed to intervene or

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[27] Several articles recently have made the case for reparations in the Jim Crow—rather than slavery—context. *See* Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 L. & INEQUALITY 263, 309–10 (2003); Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557, 559 (2003). Both focus on the ugly legacy of lynching, which has captured the attention of historians in recent years. The new lynching studies offer detailed evidence of communities' complicity. As a result, lynching cases often offer compact sites for viewing both the evils of Jim Crow and for tracing out its effects on the present.

In many ways, Jim Crow cases are more compelling than reparations for slavery. Often, victims are still alive, the evidence is often stronger than in slavery cases, and instances of harm are closer in time than slavery. The common refrain—that all the slaves are dead—does not apply to Jim Crow, where there are victims still living. Reparations for Jim Crow may offer the way to bridge supporters and detractors of reparations for slavery.

[28] For more on the Tulsa riot, listen to *Fresh Air* (NPR radio broadcast, Feb. 22, 2000), *available at* http://freshair.npr.org/day_fa.jhtml?display=day&todayDate=02/22/2000 (last visited Nov. 12, 2003); *Talking History* (Dec. 3, 2002), *available at* http://talkinghistory.oah.org/shows/2002/TulsaRiots.mp3 (last visited Oct. 17, 2003); *The Tavis Smiley Show* (NPR radio broadcast, Feb. 26, 2003), *available at* http://www.npr.org/rundowns /rundown.php?prgId=14&prgDate=26-Feb-2003 (last visited Oct. 17, 2003). *See generally* BROPHY, *supra* note 3.

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investigate. No fair-minded observer will claim that Tulsa riot victims had a chance at justice in the Oklahoma state courts at the time.

Unavailability of relief is a key situation in which courts typically toll the statute of limitations.[29] Here, the argument is as follows: Because courts were unavailable, we should not expect plaintiffs to have sought relief. We then enter into an equitable argument about whether the complete failure of the legal system to provide justice should, at least in limited circumstances, be remedied. Particularly where someone asserts claims based on heinous and discrete crimes—rather than general societal discrimination—the case for tolling the statute of limitations is compelling. In such a situation, the courts serve their intended function in ways that work well. Courts in the Tulsa riot cases can provide relief in limited cases where there are identifiable victims and defendants, where there is a well-defined cause of action, and where damages are proven with specificity and at the level of detail required in other lawsuits. When there is a claim for limited relief, where relief should have been available through the courts at the time, and where relief would have been available had the world been even mini-

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[29] There are some suggestive cases in which the statute of limitations has been tolled over many years in certain limited and extraordinary circumstances. *See, e.g.*, Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 134–35 (E.D.N.Y. 2000). In cases where the plaintiffs could not gain effective relief, particularly when the government made it impossible to pursue the claims, some federal courts have tolled the statute of limitations. In *Rosner v. United States*, 231 F. Supp. 2d 1202, 1208 (S.D. Fla. 2002), for instance, the plaintiffs alleged that the government mistakenly reported that gold taken from French holocaust victims was unidentifiable and unreturnable. The government's culpability in cases like Tulsa, where the courts were effectively unavailable, goes beyond the failure of the government to mislead owners about the identity of property.

Alternatively, legislation might extend the statute of limitations. In *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003), the Ninth Circuit Court of Appeals invalidated a California statute that extended the period of limitations for victims of World War II-era forced slave labor on the grounds that the statute ran afoul of the Foreign Affairs Doctrine and was therefore unconstitutional. *See id.*; CAL. CIV. PRO. CODE § 354.6 (West 2003). A similar law focused on purely domestic slave labor might avoid such difficulties. Nevertheless, such legislation extending the statute of limitations against the government is unlikely in states where the legislature refuses to take action, as happened in Tulsa. However, state legislatures may be willing to impose the liability on companies, particularly if they do most of their business outside the state, as was the case with the California statute that required insurance companies to disclose life insurance policies written by their affiliates in Europe from 1920 to 1945.

For more on the unavailability of relief for Tulsa riot victims, see Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 19 HARV. BLACKLETTER L.J. (forthcoming 2004); Alfred L. Brophy, Racial Legislation, Violence, and the Breakdown of Law in the Tulsa Riot Era (2003) (unpublished manuscript, on file with author).

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mally fair, riot victims or victims of other Jim Crow crimes have a compelling argument.

The bases for statute of limitations defenses are under-theorized. Most commentators are content to say that there should be repose at some point so that institutions, corporations, and people can move forward. Repose is a relatively weak argument when weighed against the argument that there was never an opportunity—during the statute of limitations—to challenge the defendants or to hold them accountable.[30] Statutes of limitation also preserve against the need to defend against stale claims, an argument that has been made recently in the wake of old claims being asserted in sexual abuse cases.[31] A court weighing a statute of limitations claim may want to take account of the quality of evidence in deciding whether to toll. A court should consider, then, a series of factors: the availability (or unavailability) of relief at the time of the racial crime, the identity of the victims (and whether they are still alive), the identity of the defendants, the significance of the crime, the continuing impact of the crime on victims, and the quality of the evidence.

C. *The Tulsa Race Riot as a Model*

One might ask, to what remedies would the Tulsa victims be entitled? Each victim would receive compensation for deprivation of property and temporary liberty. To that extent, Tulsa is a typical civil rights lawsuit. Is other relief available, too, that might permit a more community-wide remedy? Tulsa is a strong case for reparations of some sort, either through the courts or through the legislature. Indeed, four limiting factors suggest that the legislature owes Tulsa victims reparations: (1) some of the victims are still alive, (2) the Tulsa riot is concentrated in time and place, (3) the government sponsored the harm, and (4) promises were made at the time to help rebuild the city. Tulsa is, however, at once compelling and limiting: as we move

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[30] There may, of course, be other claimants to the property, who—if we are willing to toll the statute of limitations—may have a superior claim to those seeking to use it for reparations purposes. *See generally* Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice,* 1 THEORETICAL INQUIRIES L. 1 (2000) (arguing that restitution for any wrongful gain "is unsatisfactory because it fails to link the damages that the plaintiff receives to the normative quality of the defendant's wrong").

[31] *See, e.g.,* Ralph Ranalli, *Push Made to Toughen Abuse Laws: Romney, Reilly Weigh Changes,* BOS. GLOBE, July 26, 2003, at A1 (discussing a proposal to remove statutes of limitation for sexual abuse claims in Massachusetts).

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into larger reparations programs beyond Tulsa, the case becomes more amorphous.

1. Riots

There are a series of riots for which we can use Tulsa as a model. One might look to the East St. Louis riot of 1917, for instance, where a combination of racial hatred, fueled by race-baiting politicians and the use of African Americans as strikebreakers in the local iron and meat packing plants, led the African-American community to take action to protect itself. The community armed, and, following an attack on the evening of July 3, some African Americans fired into an unmarked police car, believing that it contained passengers who had shot into African-American homes earlier that evening. That misunderstanding, which left a police officer dead, led to random attacks on African Americans working in the white section of East St. Louis the next day. Throughout the morning, the attacks escalated. By the afternoon, African Americans were being attacked throughout the city. Then, the state guard, in conjunction with local police, began to invade the African-American section of East St. Louis. Many members of the state guard stood by as the mob attacked the helpless community; some state guard members even joined in the attacks.

Following the riot, a congressional investigation focused on the causes of the violence. It laid blame on local industry for using recent African-American migrants from the South to keep wages low. The Special Committee's report concluded that:

> The strike in the plant of the Aluminum Ore Company was caused by a demand on the part of the organized labor for an adjustment of wages, a reduction in hours and an improvement of conditions under which the men worked. The company refused to meet any of these demands, declined to discuss the matter with the workmen's committee, and added insult to injury by importing negro strike breakers and giving them the places of the white men . . . [T]he bringing of negroes to break a strike which was being peaceably conducted by organized labor sowed the dragon's teeth of race hatred that afterwards grew into the riot which plunged East St. Louis into blood and flame.[32]

[32] Report of the Special Committee Authorized by Congress to Investigate the East St. Louis Race Riots, H.R. Doc. No. 65–1231, at 1, 15 (1918). Several books

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The Special Committee report on East St. Louis taught whites an important lesson regarding how to talk about the riot—namely, as at least partially the fault of blacks who had armed to protect themselves. It also taught blacks an important lesson: do not give up your guns, because you will be shot anyway. After East St. Louis, riots became somewhat more violent because the black community was better prepared to defend itself—and less likely to sit passively by as it was attacked.

The story of East St. Louis is compelling and deserves an important monographic treatment. The most recent study is now nearly forty years old.[33] East St. Louis presents a somewhat different case from Tulsa, however, because riot victims received reparations. An existing Illinois statute gave victims of mob violence a cause of action against the municipality where the violence occurred. The statute was in essence an attempt to provide an incentive for municipalities to protect their citizens against mob violence; when the sheriff knew he was liable to victims, he would be more vigilant in guarding against violence. The statute was an early form of strict liability. The idea of liability without regard to fault, so novel in the early twentieth century, was tested in the Supreme Court. The Court upheld the statute.[34]

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provide further examples of race-related labor conflicts. *See generally* Eric Arneson, Brotherhoods of Color: Black Railroad Workers and the Struggle for Equality (2001); James R. Grossman, Land of Hope: Chicago, Black Southerners & the Great Migration (1989); Rick Halpern, Down on the Killing Floor: Black and White Workers in Chicago's Packinghouses, 1904–54 (1997).

[33] *See* Elliott M. Rudwick, Race Riot at East St. Louis, July 2, 1917 (1964). Mr. Rudwick's monograph, so pioneering at the time, brought attention to the tragedy. Nevertheless, it is seriously outdated in its failure to provide attention to African-American culture. The victims of the riot appear in the monograph as little more than pawns in a historical tragedy; we need a study that gives the African-American community more attention. How, one wonders, did the great ideas of the renaissance influence the community's arming for self-protection? How did the great migration lead to conflict between African-American and white workers? How did the manufacturing and meat packing companies in East St. Louis manipulate racial dynamics, to set the stage for riot? Moreover, we now have much more sophisticated methods of interpreting the narratives told before the Congressional Committee investigating the riot and in the pages of white and black newspapers throughout the country than were available in Mr. Rudwick's time. There are many questions that need answers and, fortunately, hundreds of pages of congressional testimony, as well as civil and criminal lawsuits, that can help answer those questions. Finally, there is a great need for exploration of the results of the riot—essentially, how it was remembered and how that memory affected Chicago, Elaine, Arkansas, and Washington in 1919 and Tulsa in 1921.

[34] *See* City of Chicago v. Sturgis, 222 U.S. 313, 322–24 (1911) (upholding the constitutionality of Illinois statute imposing liability on cities for three-quarters value of mob damage regardless of fault); *see also* Morton J. Horwitz, The Transformation of American Law, 1870–1960, at 123–26 (1992) (discussing Justice Holmes's views on strict liability in tort law).

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East St. Louis represents a case, then, where some victims received reparations. The statute limited recovery, however, to family members of those who died. It provided nothing for those who merely lost property; it also failed to provide compensation to the entire community for its losses. As with Tulsa, there are some identifiable immediate victims and there is a community currently in terrible shape. One might seek a remedy that provides something for the victims themselves. But what of the community? The important issue is finding some theory for large-scale repair of the community, rather than merely providing money to a very limited number of now elderly plaintiffs. What are the theories that one might use to repair wounded communities? Here a class action might make sense, on behalf of residents of East St. Louis. The problem will be in linking relief to the harms caused by the riot. Unfortunately, the tragedy of East St. Louis is that there are so many problems that have little connection to the riot itself, such as willful neglect borne of decades of urban policy.

Other riots raise similar issues. There are well-known riots, like those in Chicago and Washington in 1919. Those limited riots might provide a way of getting money into the hands of a relatively limited group of individuals. They may even suggest the limitations on greater harms. One need not move much further back in time before there are no survivors. Contrast, for example, the Atlanta riot of 1906 with East St. Louis. It is unlikely that any survivors of the Atlanta riot are still alive today—or if they are, they would have to be at least ninety-seven years old. Yet the African-American community in Atlanta suffered greatly during the riot and afterward. As John Godshalk has demonstrated, there was substantial police involvement in the riot—and it reinforced the racial segregation of Atlanta.[35] How does one repair that damage? What might reparations for that riot look like, if there are no survivors? What present harm would we repair? The problems are worthy of serious consideration, but they quickly become almost insurmountable.

2. Lynchings

One could also work in a different direction, looking toward individual cases of lynching. What do we make of lynchings that often took

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[35] John F. Godshalk, In the Wake of Riot: Atlanta's Struggle for Order, 1899–1919, at 35–39 (unpublished Ph.D. dissertation, Yale University) (on file with Southwest Missouri State University); *see* Dominic J. Capeci, Jr. & Jack C. Knight, *Reckoning with Violence: W.E.B. Du Bois and the 1906 Atlanta Race Riot,* 62 J. S. Hist. 727, 741–46 (1996).

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place under the supervision of local officials? For lynching cases, one might identify factors similar to those in Tulsa. There are several particularly well-documented cases. In Oklahoma, for instance, the attorney general began investigating lynching in the early 1920s. Those investigations, though they did not result in successful prosecutions, provide important details about the role of government officials in the lynchings of African Americans. In those cases, as with riots, one can identify victims (the family members of lynching victims) and governmental defendants. Because lynching provides a discreet event, the case is particularly compelling. Reparations might come in the form of payments to family members of the victim, or in the more general form of a historical truth commission that reminds us of the harm of lynching and associated Jim Crow crimes to communities. Targeting the perpetrators of lynchings is an opportunity to use a single event as a site for viewing the legacy of Jim Crow and for understanding how the whole system of racial legislation, extralegal violence, and private discrimination functioned.[36] For many lynching victims, however, the case is not so easily made because there is less evidence of direct governmental involvement. At best, there is evidence of failure to protect the victims. Moreover, the statute of limitations plagues lynching lawsuits just as it does riot lawsuits.

This raises critical issues of legalized lynching. What do we make of criminal defendants convicted of crimes on minuscule evidence, before politically motivated judges and prosecutors and an inflamed jury? One might look to cases like *Moore v. Dempsey*, which arose out of the 1919 Elaine, Arkansas massacre, for evidence of how legalized lynchings worked.[37] Fortunately for the defendants in that case, Justice Holmes overturned the convictions of eight African American men who had been railroaded into death sentences for their "role in [that] negro uprising."[38]

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[36] *See generally* Alfred L. Brophy, *The Tulsa Race Riot Commission, Apologies, and Reparations: Understanding the Functions and Limitations of a Historical Truth Commission*, *in* APOLOGIES AND TRUTH COMMISSIONS (Alexander Karn ed., forthcoming 2004) (discussing what truth commissions can accomplish as well as their limitations); Ifill, *supra* note 27, at 309–11 (discussing the roles that truth commissions for lynchings might fill).

[37] *See* Moore v. Dempsey, 261 U.S. 86, 88–89 (1923).

[38] *See id.* at 91–92.

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The prosecutions of Jesse Hollins[39] and the Scottsboro boys[40] are further examples of laughably biased proceedings. It is difficult, however, to contemplate how one would file lawsuits for reparations in those cases. Is there a possibility of suing for wrongful prosecution? What is the standard? What if the defendants are no longer alive? Alternatively, as David Levine has suggested, one form of reparations might be the individualized review of African Americans who were convicted of crimes with substandard due process protections.[41] That might result in, at least, the return of voting rights for those wrongfully convicted of felonies. It might also result in compensation for those wrongfully convicted.[42]

3. Jim Crow Legislation

Let us move a little further away from what are rather typical civil rights cases. How might we conceptualize lawsuits for other Jim Crow legislation? Jim Crow legislation affected entire communities. In some communities, for instance, virtually no African Americans were entitled to vote. How do we take account of statutes that limited voting rights? There are identifiable defendants: the state legislatures that passed discriminatory voting legislation and the state officers charged with implementing the legislation. Some of the victims are still alive. This leaves open the problem of finding an appropriate remedy. Remedies for voting rights violations are notoriously difficult to devise. Just after Oklahoma gained statehood, for instance, the Oklahoma legislature passed a restrictive voter registration statute. It was not just the discriminatory statute, however, that kept blacks from voting. The voter registrars went beyond the statute and, in many cases, imposed ridiculously difficult literacy tests. In *Guinn v. United States*, the Eigth Circuit Court of Appeals discussed several outrageous denials of voting rights.[43] In one instance, J. Hilyard, the principal of the

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[39] *See* Hollins v. Oklahoma, 295 U.S. 394, 395 (1935).

[40] *See* Powell v. Alabama, 287 U.S. 45, 50–51 (1932). *See generally* Dan T. Carter, Scottsboro: A Tragedy of the American South (1969) (providing a narrative account of the Scottsboro case, addressing such issues as racism, radicalism, and the southern judicial system); James E. Goodman, Stories of Scottsboro (1994) (telling the story of Scottsboro and addressing controversial issues ignored by past authors).

[41] Email from David I. Levine, Professor of Law, University of California at Hastings College of Law, to Alfred L. Brophy, Professor of Law, University of Alabama (Oct. 31, 2003. 16:29 EST & 16:53 EST) (on file with author).

[42] *See* Alberto B. Lopez, *$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted,* 36 Ga. L. Rev. 665, 721–22 (2002).

[43] Guinn v. United States, 228 F. 103, 109–10 (8th Cir. 1915).

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Cimarron Industrial Institute, who had graduated from Alcorn A&M College in Mississippi, Lincoln University of Pennsylvania, and the Bryant & Stratton Institute in Buffalo, New York, was prevented from voting. As the court concluded, "There is not the slightest room for doubt as to whether he could vote. . . . There seems no room for doubt that the defendants knew that fact."[44] In other instances, blacks who were entitled to vote because their ancestors had been entitled to vote were denied their rights.[45] In some instances, there were no literacy tests administered; African Americans were simply turned away.[46]

When the Supreme Court struck down Oklahoma's grandfather clause—which denied voting rights for all who could not read except for those people (and their descendants) who had been allowed to vote prior to 1866—in *Guinn v. Oklahoma* in 1915, it provided only a limited remedy: it struck down the statute.[47] The Oklahoma legislature subsequently re-passed the voter registration statute, which again limited the right to register. That statute was struck down, too, in the 1930s.

What is the harm? One would have to show that voting would have made a difference, as well as the type of difference it would have made, which is a difficult task.[48] The entire community suffered a harm that may be compensable in some way,[49] but this begins to look like a claim for general societal discrimination, which is unlikely to succeed.[50] Recalling that racially neutral statutes can have discriminatory effects might provide an important contribution, but overreliance on this legal principle might be at odds with the requirement

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[44] *Id.* at 109.

[45] *See id.* at 109–10.

[46] *See id.* at 110.

[47] *See* Guinn v. Oklahoma, 238 U.S. 347, 363–64 (1915).

[48] *See* Michael J. Klarman, *Race and the Court in the Progressive Era,* 51 VAND. L. REV. 881, 914–15 (1998); Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960–1990,* 5 U. PA. J. CONST. L. 665, 669–70 (2003); Mark V. Tushnet, *Progressive Era Race Relations Cases in their "Traditional" Context,* 51 VAND. L. REV. 993, 996–97 (1998).

[49] In some cases, the mere deprivation of a constitutional right—even if there is no harm—may be compensable. *See, e.g.,* Carey v. Piphus, 435 U.S. 247, 266 (1978). Or in some cases there may be injunctive relief to re-vote, even if there is little evidence that the vote will come out differently. *See* Bell v. Southwell, 376 F.2d 659, 664–65 (5th Cir. 1967). The latter remedy is obviously ineffective unless the election misbehavior occured recently.

[50] *See* City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 498 (1989) (requiring more than a "generalized assertion that there has been past discrimination in an entire industry"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

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of *Washington v. Davis*[51] that Equal Protection challenges to facially-neutral statutes have to show discriminatory motive.[52]

Perhaps lawsuits against the counties and municipalities that limited funding to segregated schools might fare better. There are identifiable victims—all the school-aged children in an entire community who suffered the harm. There are also identifiable governmental actors—the bodies that provided different (and very frequently inadequate) funding to African-American schools. Would a class action recover for the lost educational value? Even determining damages would be difficult. How much did poor schooling limit students' later job prospects? The problem is that even well-educated African Americans faced poor job prospects during the Jim Crow era. Might there be a more limited recovery for negative unjust enrichment for the value of money saved by under-funding segregated schools? Such recovery would grossly underestimate the harm, but it might avoid other proof problems of linking education to later income. Some of these problems were worked out in the years after *Brown v. Board of Education*,[53] when plaintiffs sought relief for segregated schools. It may be hard to go back now and ask for additional relief—even though the potential plaintiffs are different. At any rate, these lawsuits merit substantial consideration.

Other segregation statutes—like those that segregated libraries, or that kept people segregated on railroads and on street cars, or that limited where people might live—also merit consideration. The library statute poses a particularly intriguing problem. The sadness of segre-

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[51] 426 U.S. 229, 239–45 (1976) (holding that a law is not unconstitutional solely because it has a racially disproportionate impact, regardless of whether it reflects a racially discriminatory purpose).

[52] Obviously, the discriminatory motive was demonstrated in the legislation struck down in *Guinn*. *See* 238 U.S. at 363–64. Nevertheless, we might learn from the history of voting rights discrimination that we need to be especially vigilant in the protection of voting rights. *See* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action,* 88 GEO. L.J. 2331, 2346 n.70 (2000) (discussing voting rights). The Voting Rights Act of 1965 ought, in that case, to be considered a key piece of reparations legislation, for it was based so fully on the history of discrimination. 42 U.S.C. § 1973 (Supp. 1982); *see* H.R. REP. NO. 89-439, at 21–22 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2445–44. Indeed, the Supreme Court has recently re-acknowledged the role of history in supporting the constitutionality of the Act. *See* Univ. of Ala. v. Garrett, 531 U.S. 356, 373 (2001) ("Congress documented a marked pattern of unconstitutional action by the States. State officials, Congress found, routinely applied voting tests in order to exclude African-American citizens from registering to vote. Congress also determined that litigation had proved ineffective and that there persisted an otherwise inexplicable 50-percentage-point gap in the registration of white and African-American voters in some States.") (citation omitted).

[53] 347 U.S. 483 (1954).

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gated libraries precisely suggests the insidious nature of Jim Crow: white Americans decided that they would even attempt to limit access to knowledge. Although people like Ralph Ellison demonstrate that it was possible to overcome those barriers (his mother brought home magazines for him to read, which she collected from the white homes where she worked as a maid), the barriers to education were imposing.[54]

Who could sue for unavailability of libraries? One supposes every African American who lived in a municipality where there were no accessible libraries might have a cause of action. The remedy cries out for some kind of injunctive relief, akin to desegregation of schools, with increased library facilities in the community in which the discrimination took place. Drawing upon Patterson Toby Graham's important book on segregated libraries in Alabama, which demonstrates the ways that libraries were segregated by law,[55] one might construct an argument along these lines: as a result of governmental decisions, blacks had fewer opportunities to access public libraries in the state of Alabama than did whites.[56] The harm was a decrease in educational opportunities at the time—and decades later, such harm is extremely difficult to calculate or compensate. Present decisions regarding library locations, however, could be a valuable means of remedying for past harm. The magnificent, once all-white central library in Birmingham, for instance, could have been located somewhere else; similarly, decisions about collection development, which continue to have effect to this day, might be shown to have been racially motivated. Future decisions about library location and collection devel-

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[54] *See* Arthur LeFrancois, *Our Chosen Frequency: Norms, Race, and Transcendence in Ralph Ellison's* Cadillac Flambé, 26 Okla. City U. L. Rev. 1021, 1022 (2001) (discussing Ellison's experience with a segregated library in Oklahoma City). *See generally* Patterson Toby Graham, A Right to Read: Segregation and Civil Rights in Alabama's Public Libraries 1900–65 (2002) (discussing segregation in Alabama's libraries).

[55] *See generally* Graham, *supra* note 54.

[56] Although one might expect that in an area like libraries, whose sole function is to provide education (and therefore educational, social, moral, and economic growth), the forces supporting improvement for all would suppress tendencies toward racial exclusion, libraries were hotly contested sites of integration. *See, e.g.,* Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212, 213 (4th Cir. 1945) (showing discrimination in providing training for library workers); Hainsworth v. Harris County Comm'rs' Court, 265 S.W.2d 217, 218 (Tex. Civ. App. 1954) (refusing relief from allegation that county law library was segregated). Perhaps because of the symbolic value of libraries, they became an important site for sit-ins during the Civil Rights movement. *See generally* Brown v. Louisiana, 383 U.S. 131 (1966) (reversing convictions of African Americans who conducted a sit-in at a public library).

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opment may be excellent subjects for injunctive relief.[57] Moreover, the redirection of library funds to promote education has important symbolic value. Indeed, it is difficult to think of a project better designed—at least symbolically—to repair both for past Jim Crow discrimination in education and to make a statement about the future.[58]

In selecting targets of a Jim Crow lawsuit, one must ask, what do we want to accomplish? Partly, we want to tell a story about the past, to educate ourselves and others about the role that Jim Crow played in the lives of African Americans, and others, too. Then we ought to try to repair the lives of those who suffered discrimination. That requires locating cases in which we can overcome statute of limitations defenses, as well as locate substantive bases for recovery. At the same time, we should look for areas where there may be some community-wide relief, which might be forward-looking. Victories on those issues might then be tied together with legislative reparations, which are not so bounded by the requirements of lawsuits.

The remedy must take into account the entire history of Jim Crow—a system that used extralegal violence and legislation to limit educational and voting opportunities, which ultimately limited opportunities for African Americans and allowed whites to use their labor at below what its cost otherwise would have been. A remedy for such a widespread harm becomes difficult to contemplate because it is difficult to show how much loss any particular harm caused. How does

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[57] There is some record of court-directed collection development. *See* Taylor v. Perini, 421 F. Supp. 740, 749–54 (N.D. Ohio 1976) (listing more than 100 books on black experience to be added to a prison library).

[58] As long as we are thinking about lawsuits for segregated facilities, one might consider segregated parks and swimming pools. *See, e.g.,* Palmer v. Thompson, 403 U.S. 217, 228 (1971) (upholding Jackson, Mississippi's closing of public swimming pools instead of integrating them). The problems with those suits is that the behavior was legal at the time. If the behavior was legal, it becomes difficult to find a cause of action. How do we go back and impose liability on the city of Jackson—where, because of changing demographics, 70.6% of the city was black in 2000? *See* U.S. Census Bureau, 2000 Census of Population and Housing: Mississippi Summary Population and Housing Characteristics 74, tbl.4 (2003), *available at* http://www.census.gov/prod/cen2000/phc-1-26.pdf (last visited Nov. 26, 2003). This is a strange phenomenon, whereby the current taxpayers, who are descended from the people who were discriminated against (and some of whom were victims themselves), are being asked to pay reparations to themselves. They are asked to pay for decisions that were legal at the time—and presumably still are legal.

The case works much better when the Jim Crow discrimination was illegal at the time—or at least questionable—and was subsequently prohibited. It also works better in cases where there is a continuing effect (as in library collections or location) of past illegal conduct.

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one measure the damage of a failure to obtain an adequate secondary school education?

There is no question that there has been damage, but attributing it to particular individuals, businesses, or entities is difficult. This is one of the reasons attempts at remedies for general societal discrimination have become so popular. Yet constructing a remedy through a lawsuit, even using tort as a model, involves problematic issues of proof. One is then left with thinking about three types of recoveries: (1) disgorgement of benefits retained by the community, (2) recovery in which specific proof of loss is provable, and (3) recovery where community-based relief is appropriate. In each case, the problems with proof of loss are reduced. Each of those models can be applied to Jim Crow crimes.

II. Framing the Issues in Tort Law and Reparations for Slavery

Legal scholars have begun to take seriously the possibility of lawsuits for slavery—and they have begun to assess some of the problems with such suits. Professor Hylton's provocative paper, "Slavery and Tort Law,"[59] identifies three major problem areas with the use of tort law as a vehicle for reparations for slavery. First, tort law cannot provide compensation for the worst evils of slavery—what Hylton calls social torts, such as the destruction of family life, or the destruction of slaves' religious beliefs. Second, derivative claims (claims of descendants) are too remote to serve as the basis for reparations. Finally, the cultural war over reparations suggests that we should have an accounting of the benefits from slavery and then allow the community to gauge for itself what to do about past injustice.

Tort law can provide two separate ways of approaching reparations claims. First, one might try to use tort law as a means of obtaining limited reparations. That is, one could file a lawsuit and use tort as the substantive basis for recovery.[60] There are some high hurdles to overcome in such a suit: statute of limitations, sovereign immunity, identification of victims, identification of plaintiffs, causation, and measurement of harm. Second, and more broadly, tort law might provide a basis for apportioning moral culpability. Instead of thinking about only a lawsuit, one might employ the well-developed principles

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[59] Keith N. Hylton, Slavery and Tort Law 2–4 (Boston Univ. Sch. of Law, Working Paper No. 03–02, 2003 Soc. Science Research Network Elec. Paper Collection), *at* http://www.bu.edu/law/faculty/papers/pdf_files/HyltonK012803.pdf (last visited Nov. 9, 2003).

[60] Reparations claims are often phrased as lawsuits. *See* Arthur Serota, Ending Apartheid in America: The Need for a Black Political Party and Reparations Now 137–42 (1996) (explaining reparations using the example of a personal injury lawsuit).

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that jurists have developed as a framework for understanding the harm of slavery and its effects on the current generation. That framework might be used for two larger purposes: to educate the public about the effects of slavery, and to construct a program of legislative reparations. The following section addresses both Professor Hylton's critique of tort law as a basis for recovery and the ways that tort law might be stretched to provide for reparations for slavery—either through the courts or through a legislature.

A. *The Problems of American Law's Liberalism*

> *[J]ust as a court's power to correct injustice is derived from the law, a court's power is circumscribed by the law as well.*
>
> —*Cruz v. United States*[61]

An important part of the difficulty with using tort law as an analogy is that it simply is not well-designed to address questions of group harm. In the nineteenth century—indeed, until well into the twentieth century—lawsuits provided only very limited relief. They established the rights of individual parties when there were well-established rights.[62] Sometimes the legal system adjudicated rights of major segments of the population—such as the rights of states, as happened in *Dred Scott v. Sandford*.[63] Within the slave system, lawsuits typically adjusted rights between owners and their overseers, or hirers of their slaves, or, less frequently, with people who interfered with the slave relationship. The legal system enforced norms of obedience to orders of owners and overseers through criminal prosecution of slaves or through the failure to criminally prosecute those who abused slaves. There are cases that protected the master's rights when borrowers of slaves misused them. Similarly, there are cases that protected the mas-

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[61] 219 F. Supp. 1027, 1046 (N.D. Cal. 2002).

[62] *See* WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980, at 1 (2001) (analyzing courts as a way of integrating—and controlling—inter-group conflict). *See generally* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958 (1992) (discussing caseload of federal district courts and the distinct types and uses of litigation). Nelson suggests that courts were the vehicle for integrating the diverse New York communities. NELSON, *supra*, at 1.

[63] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); *see* Alfred L. Brophy, *Let Us Go Back and Stand Upon the Constitution: Federal-State Relations in* Scott v. Sandford, 90 COLUM. L. REV. 192, 193 (1990) (discussing the implications of *Dred Scott* for rights of states in areas such as taxation and slavery). Most frequently, however, the common law protected narrow claims.

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ter's property rights when slaves were injured. Those who abused slaves in their custody might have been liable to the slaves' owners for harm to the slave, but they were not criminally liable. "From the great institutions in society," as Harriet Beecher Stowe once said, "no help whatever is to be expected."[64]

The legislative system might confer rights on individuals, as through pensions to war veterans and their families.[65] Nevertheless, there was little opportunity—or desire—for individuals to use the legal process to overcome inequality during slavery and Jim Crow. Indeed, to the extent that anyone thought about these issues at the time, they recognized that the legal system primarily served property interests.[66] In recent years, there have been several heavily criticized

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[64] Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe's Vision in* Dred: A Tale of the Great Dismal Swamp, 78 B.U. L. Rev. 1113, 1150 n.143 (1998) (quoting 2 Harriet Beecher Stowe, Dred: A Tale of the Great Dismal Swamp 76 (1856)).

[65] *See* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition,* 111 Harv. L. Rev. 1382, 1421–23 (1998) (discussing the petitioning by soldiers to the New York legislature for reimbursement of expenses and the government's acquiescence in the form of a pension). Pensions have historically been an important part of American social welfare policy. Indeed, Theda Skocpol has suggested that they were the major source of social welfare before the New Deal, and that they served as a model for other social welfare programs. *See* Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States 7–11 (1992). *See generally* Laura Jensen, Patriots, Settlers, and the Origins of American Social Policy (2003) (interpreting pensions and land grants as part of early American origins of entitlement); Elizabeth Regosin, Freedom's Promise: Ex-Slave Families and Citizenship in the Age of Emancipation (2002) (discussing Civil War pensions for African Americans).

[66] One might look in particular to "the outsiders"—the people left without the protection of the antebellum legal system—to understand its reverence for property rights. *See What Is the Reason? How Much Land and Property and I Have None!,* 16 U.S. Mag. & Demo. Rev. 17, 18 (1845), *at* http://cdl.library.cornell.edu/cgibin/moa/pageviewer?coll=moa&root=moa/usde/usde0016/&tif=0025.TIF&view=50&frames=1 (last visited Oct. 16, 2003). But one can also gain a picture of its reverence from leading periodicals. *See generally The Common Law,* 19 N. Am. Rev. 411 (1824) (discussing the veneration and obedience paid to authority and precedent in law). Another often-overlooked indicium of the reverence of the age (and particularly jurists) for order through law comes from college lectures. *See* William Gaston, An Address Delivered Before the American Whig and Cliosophic Societies of the College of New Jersey 31 (Sept. 29, 1835) (discussing the importance of law in the protection of freedom); William Greene, Some of the Difficulties in the Administration of a Free Government: A Discourse, Pronounced Before the Rhode Island Alpha of the Phi Beta Kappa Society (July 8, 1851), *in* Alfred L. Brophy, *The Rule of Law in Antebellum College Literary Addresses: The Case of William Greene,* 31 Cumb. L. Rev. 231, 261 app. (2001) (discussing the duty of a citizen to sustain the law while it exists, no matter how wrong he finds it); Daniel Lord, On the Extra-Professional Influence of the Pulpit and the Bar: An Oration Delivered at New Haven, Before the Phi Beta Kappa Society of Yale College (July 30, 1851) (saying that the highest triumph of jurisprudence has been the appli-

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attempts to reinterpret antebellum legal thought as designed to protect the poor—what some might call "little people."[67] Yet even the most aggressive of those interpretations does not begin to move us away from a model of the liberal judicial mind, which has historically found the protection of property at its center.[68]

1. Past Cases

In the twentieth century, civil rights litigation and complex civil litigation have stretched the boundaries of how courts might be used. Structural injunctions have reordered prisons and school systems, to the point where we might now expect to fit a wholesale reordering of American society into a lawsuit.[69] Reparations suits offer the promise of repairing the damage to particular plaintiffs who can show some kind of particularized harm. But that may be precisely the problem: it is enormously difficult to show particularized harm, at least with the

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cation of old principles, not the invention of new ones), *at* http://www.law.ua.edu/directory/bio/abrophy/Brophy_Lord%201851.html (last visited Nov. 12, 2003); Timothy Walker, The Reform Spirit of the Day: An Oration Before the Phi Beta Kappa Society of Harvard University (July 18, 1850) (addressing the spirit of reform and its use for improving society), *at* http://www.law.ua.edu/directory/bio/abrophy/ walker.html (last visited Nov. 12, 2003).

[67] The most vigorous interpretation is Peter Karsten, Heart Versus Head: Judge-Made Law in Nineteenth-Century America 4–5 (1997). For critical responses, see Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists,* 79 B.U. L. Rev. 1161 (1999); Lawrence M. Friedman, *Losing One's Head: Judges and the Law in Nineteenth-Century American Legal History*, 24 L. & Soc. Inquiry 253 (1999).

[68] The recent scholarship that has refocused our attention on the ways that the community regulates property, such as Professor Novak's *People's Welfare,* does little to alter our understanding that American law—particularly the common law—had as its primary goal the protection of property, not its redistribution. *See* William Novak, People's Welfare (1996); *see also* James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Proprty Rights 59–81 (1992) (discussing property rights in the antebellum era); Alfred L. Brophy, The Intersection of Property and Slavery in Southern Legal Thought: From Missouri Compromise Through Civil War (2001) (unpublished Ph.D. dissertation, Harvard University) (on file with University of North Carolina, Chapel Hill Library) (discussing reverence for property and the judiciary's protection of property in the old South). While it is certainly appropriate to focus on the ways that legal doctrine protected the community in the antebellum era, the dominant interpretation continues to be of the ways that legal doctrine promoted economic growth. *See* Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 63–108 (1977).

[69] *See generally* Davison M. Douglas, Reading, Writing and Race: The Desegregation of the Charlotte Schools (1995) (examining the legal effort to integrate the Charlotte schools); Larry W. Yackle, Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System (1989) (explaining the implications of prison reform in Alabama's penal institutions).

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degree of precision that the Supreme Court currently demands.[70] In addition, hurdles like sovereign immunity and statutes of limitation plague many cases. Moreover, there is often a lack of a substantive basis for recovery.

The near-term history of reparations damages claims suggests that such claims are often unsuccessful in the court system. Beginning with the suit filed by Japanese Americans interned during World War II in the 1980s,[71] running through the recent claims by American soldiers who were forced to work as slave laborers by the Japanese military during World War II, such claims have been remarkably unsuccessful.[72] While there have been several notable successes, most often the successes involve a favorable ruling on a motion that keeps cases alive long enough for a settlement.[73] The more common result is dismissal.[74] As recently as the summer of 2003, the Supreme Court declared unconstitutional a California law that required insurance companies to disclose their connections (and those of affiliated companies) to insurance policies sold in Europe from 1920 to 1945.[75] The statute was a preliminary legislative attempt to discover the connections between insurance companies and policies that were taken by the Nazis.[76] The president's foreign affairs power, however, preempted the act. The decision, there-

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[70] *See* Milliken v. Bradley, 433 U.S. 267, 280 (1977) (saying that remedial action "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'").

[71] *See* Hohri v. United States, 586 F. Supp. 769 (D.C. 1984), *aff'd,* 847 F.2d 779 (Fed. Cir. 1988). Even after the Civil Liberties Act of 1988 provided compensation for Japanese Americans interned during World War II, some of those interned could not recover. *See* Higashi v. United States, 225 F.3d 1343, 1349 (Fed. Cir. 2000) (denying claim of daughter of individuals interned during World War II); Kanemoto v. Reno, 41 F.3d 641, 647 (Fed. Cir. 1994) (transferring claim of person who was forcibly relocated to Japan as part of "prisoner" exchange to Court of Claims); Jacobs v. Barr, 959 F.2d 313, 321–22 (D.C. Cir. 1992) (denying claim of German American interned during World War II). *But see* Mochizuki v. United States, 43 Fed. Cl. 97, 98 (1999) (approving class action settlement for Japanese people living in Latin America who were interned during World War II).

[72] *See* Deutsch v. Turner Corp., 324 F.3d 692, 697 (9th Cir. 2003), *modifying* 317 F.3d 1005, 1010 (9th Cir. 2003) (dismissing claim as barred by treaty ending World War II).

[73] *See* Abrams v. Societe Nationale des Chemins de Fer Francais, 332 F.3d 173, 176 (2d Cir. 2003) (vacating the district court's grant of defendant's motion to dismiss); *In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000) (approving settlement of $1.25 billion of claims arising from assets retained by Swiss banks in aftermath of World War II).

[74] *See* Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1146 (7th Cir. 2001); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1168 (D.C. Cir. 1994); *In re* Nazi Era Cases Against German Defendants Litig., 129 F. Supp. 2d 370, 389–90 (D.N.J. 2001).

[75] *See* Am. Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2379 (Supp. 2003).

[76] Holocaust Victim Insurance Relief Act of 1999, CAL. INS. CODE §§ 13800–13807 (Supp. 2003).

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fore, has little bearing on statutes that require U.S. companies to disclose their dealings with slavery.[77]

There is a developing body of cases holding companies and organizations liable for their role in contemporary human rights crimes.[78] For purposes of considering African-American reparations for Jim Crow and slavery, it is best to consider those as involving issues so distinct that they are not relevant here.

2. Goals of Reparations

Most people who talk about reparations as a serious goal envision a wholesale reordering of American society. Their agenda includes redistribution of wealth and a breakdown of racism and white privilege. How the latter goals will be accomplished is rarely specified. Indeed, a critical problem with reparations is that reparationists have not yet specified what they want.[79] It is exceedingly difficult to get somewhere until you know where it is you are going. Put another way, as Arthur Serota has phrased the problem, "Revolutions cannot work without a realistic finance plan."[80] Professor Munford in *Race and Reparations* said that we should "demand it all!"[81]

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[77] *See id.* § 13812. *See generally* V. Dion Haynes, *Report Names Slaves, Owners and Insurers,* CHI. TRIB., May 2, 2002, § 1, at 1 (discussing California's report on insurance companies that insured slaves and lawsuits seeking reparations from those companies); *L.A. Council Moves Toward Slavery Law,* SAN DIEGO UNION-TRIB., June 21, 2003, at A6 (discussing city ordinances that require disclosure of corporations' connections with slavery). The California law has resulted in a registry of names of insurance companies that wrote policies, as well as the names of people whose slaves were insured. CAL. DEP'T OF INS., SLAVERY ERA INS. REGISTRY BY NAME OF SLAVEHOLDER (2002), *at* http:// www.insurance.ca.gov/SEIR/main.htm (last modified July 26, 2002).

[78] *See* Lisa Girion, *1789 Law Acquires Human Rights Role,* L.A. TIMES, June 16, 2003, at 1 (discussing increased efforts by plaintiffs to hold corporations liable for their human rights abuses in the developing world, including a pending case against California-based Unocal Corporation before the Ninth Circuit Court of Appeals).

[79] *See* Calvin Massey, *Some Thougts on the Law and Politics of Reparations for Slavery,* 24 B.C. THIRD WORLD L.J. 157 (2004) (listing problems with reparations and asking questions about implementation); Peter Schuck, *Slavery Reparations: A Misguided Movement,* JURIST, Dec. 9, 2002 (listing questions in implementation, which must be answered in order to determine the content of reparations programs), *at* http://jurist.law.pitt.edu/forum/forumnew78.php (last visited Nov. 12, 2003).

[80] SEROTA, *supra* note 60, at 147.

[81] MUNFORD, *supra* note 14, at 413. Munford continues:

> Insist on collecting everything owing to us as a people historically, down to the last penny, and not one whit less. Make indemnification item number one on the Black political signboard. We need to calculate the gigantic debt owed the African creators of the wealth luxuriated in by the white industrialized North and once that is done, get right down to negotiating the forms, ac-

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Some sense of what reparationists want may be gained by looking more generally towards critical race scholarship. One key tenet is white privilege.[82] The breakdown of white privilege entails a whole host of other assumptions, probably including the redistribution of property, so that it is distributed equally on a per capita basis among racial groups. Or, as Professor Bradford has recently summarized, the opposition to reparations comes in large part because it is about breaking down privilege:

> More than any other remedy, reparations transforms the material condition of recipients. Moreover, it connotes culpability: for a majority that rejects group hierarchy, harm, and responsibility, reparations is a radical redistribution of wealth, rather than a disgorgement and reallocation of an unjust acquisition, that exacerbates unrest. Reparations thus yields resistance, backlash, and "ethnic elbowing." As it would strip their racial privileges along with their currency, reparations is opposed by all but the most altruistic whites.[83]

There is, I suspect, a considerable debate that has yet to take place on the value of white privilege. What does white privilege mean?

> crued interests and period of amortization. As Manning Marable observes, public policy toward Afro-Americans has been up in the air ever since desegregation was legally won 30 years ago and more. *Reparations*—and its Siamese twin, Black empowerment—are imperative if the end of formal segregation is ever to amount to anything but a sham leading absolutely nowhere.

Id. at 413–14 (citation omitted).

[82] *See* Erin E. Byrnes, *Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education,* 41 ARIZ. L. REV. 535, 554 (1999) ("Unmasking the operation of white privilege is essential to the goal of reaching equality under modern theories of affirmative action."); Cheryl Harris, *Whiteness as Property,* 106 HARV. L. REV. 1707, 1721 (1993) ("White identity and whiteness were sources of privilege and protection; their absence meant being the object of property."); John A. Powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege,* 34 U.S.F. L. REV. 419, 422–27 (2000) (reviewing the "negative" nature and function of white racial privilege). *See generally* PAULA S. ROTHENBERG, WHITE PRIVILEGE: ESSENTIAL READINGS ON THE OTHER SIDE OF RACISM (2002) (compiling essays and articles that examine the nature of white privilege and that suggest ways to use that privilege as a weapon against racism); STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996) (describing the reinforcing effect of white privilege on "the existing racial status quo").

[83] William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice,* 27 AM. INDIAN L. REV. 1, 99–100 (2002–2003) (citations omitted).

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How is it measured?[84] What is the value of the privilege for white people living in poverty, who have no college education, or who are above the poverty line, but are trapped in low-paying jobs? One wonders what privilege is possessed by the 10.2% of white Americans living in poverty.[85]

Reparationists, however, have a somewhat different and wider goal than simply addressing white privilege: the redistribution of wealth and political power.[86] Several articles in Professor Winbush's *Should America Pay?* provide a general game plan.[87] Professor Westley's article in the

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[84] *See generally* KIRBY MOSS, THE COLOR OF CLASS: POOR WHITES AND THE PARADOX OF PRIVILEGE (2003) (challenging the assumptions of racial privilege associated with certain categories of color and class); STEPHEN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE (1997) (providing a framework for the debate on race and racism in America).

[85] *See* BERNADETTE D. PROCTOR & JOSEPH DALAKER, U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES 2 tbl.1 (2003), *available at* http://www.census.gov/hhes/www/poverty02.html (last visited Nov. 18, 2003).

[86] Recently, Christian Sundquist has criticized reparations for aiming too narrowly and failing to attack white privilege. Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations,* 58 N.Y.U. ANN. SURV. AM. L. 659, 661–62 (2003) ("Current models of reparations present a narrow understanding of the 'debt' owed, limit the potential of spirit-healing within the Black community, do not seek to undermine privilege, and promote white backlash and intra-community divisiveness.") (citation omitted). I am not quite sure what scholarship Mr. Sundquist has in mind. To my reading, Randall Robinson's *The Debt* is largely about redistribution of property and, hence, white privilege. *See generally* RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (2000). Nevertheless, the differences between the demands of reparations activists and critical race theorists certainly warrant attention. *See generally* ERIC YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 3 (advancing goals of interracial justice and peace); Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations,* 68 GEO. WASH. L. REV. 959 (2000) (emphasizing redistribution of privilege); Matsuda, *supra* note 2 (advancing the goal of corrective justice); Jerome McCristal Culp, *To the Bone: Race and White Privilege,* 83 MINN. L. REV. 1637 (1999) (also emphasizing redistribution of privilege); Roy Brooks, Slave-Redress Litigation in the United States (June 14, 2003) (unpublished manuscript on file with author) (advancing a mixture of distributive and corrective justice). Such a comparison suggests the differences in reparationists' goals—interracial justice and peace (in Yamamoto's case), corrective justice in Matsuda's, and a mixture of distributive and corrective justice in Brooks's case, and more of an emphasis on redistribution of privilege in Cook's and Culp's case. It is becoming difficult to answer the question, "What do reparationists want?" because they have so many different—and perhaps even contradictory—goals.

[87] One of the surprising elements is that even in the most recent major book on this topic, we have hundreds of pages of discussion on whether the United States government and corporations should pay reparations. But there is very little discussion on *what* they would pay, if they were going to do so. *See generally* SHOULD AMERICA PAY?, *supra* note 6 (providing comprehensive view of reparations history, legal issues, and various opinions); WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks, ed., 1999) (compiling essays on redress for human injustice).

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Boston College Third World Law Journal establishes a general goal: aiding blacks as a group.[88] He sees distinct advantages to group-focused remedies: the payment of group reparations would create the need and the opportunity for institution-building that individual compensation would not. Additionally, beyond any perceived or real need for blacks to participate more fully in the consumer market, which is the inevitable outcome of reparations to individuals, there is a more exigent need for blacks to exercise greater control over their productive labor, which is a possibility created by group reparations.[89] Even though there will not be payments to individuals, Westley sees money as the central element of a reparations plan because of its symbolic importance and because freedom in America means "economic freedom and security."

> Compensation to Blacks for the injustices suffered by them must first and foremost be monetary. It must be sufficient to indicate that the United States truly wishes to make Blacks whole for the losses they have endured. Sufficient, in other words, to reflect not only the extent of unjust Black suffering, but also the need for Black economic independence from societal discrimination. No less than with the freedmen, freedom for Black people today means economic freedom and security. A basis for that freedom and security can be assured through group reparations in the form of monetary compensation, along with free provision of goods and services to Black communities across the nation. The guiding principle of reparations must be self-determination in every sphere of life in which Blacks are currently dependent.[90]

Westley proposes a private trust, with blacks as beneficiaries. The beneficiaries, who would also have power of appointment over the

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[88] *See* Westley, *supra* note 2, at 468 ("Because it is my belief that Blacks have been and are harmed as a group, that racism is a group practice, I am opposed to individual reparations as a primary policy objective.").

[89] *Id.*

[90] *Id.* at 470. Others see money as central to reparations, even though they do not propose payments to individuals. As Professor Asante has phrased the issue, "[O]ne way to approach the issue of reparations is to speak about *money*, but not necessarily about *cash*. Reparations will cost, but it will not have to be the giving out of billions of dollars of cash to individuals, although it will cost billions of dollars." Molefi Kete Asante, *The African American Warrant for Reparations: The Crime of European Enslavement of Africans and Its Consequences*, *in* SHOULD AMERICA PAY?, *supra* note 6, at 3, 12.

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trust funds, would elect trustees. Nevertheless, as Westley acknowledges, his plan needs considerable refinement.[91]

Professor Asante provides a statement similar to Westley's about the range of potential reparations strategies: "Among the potential options are educational grants, health care, land or property grants, and a combination of such grants. Any reparations remedy should deal with long-term issues in the African American community rather than be a onetime cash payout."[92]

Professor McWhorter's generally anti-reparations article argues that African Americans are already benefitting from his version of an ideal reparations system. In his view, community development corporations, incentives for banks to give loans to inner-city residents, and some affirmative action measures are sufficient forms of reparations.

> If I were assigned to develop a plan for black reparations, here is what I would do. I would institute a program for supporting poor black people for a few years, while stewarding them into jobs—which is currently in operation. I would have the government and private organizations channel funds into inner-city communities to help residents buy their homes—which is what Community Development Corporations have been doing for years, working under publicized miracles in ghettos across the country. I would give banks incentives to make loans to inner-city residents to start small businesses—which is what the Community Reinvestment Act has been doing since 1977. I would make sure that there are scholarships to help black people go to school—which are hardly unknown in this country. I would propose affirmative action policies—of the thumb-on-the-scale variety designed to choose between equally qualified candidates—be imposed in businesses, where subtle racism can still slow promotions.[93]

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[91] *See* Westley, *supra* note 2, at 470 ("In the end, determining a method by which all Black people can participate in their own empowerment will require a much more refined instrument than it would be appropriate for me to attempt to describe here.").

[92] Asante, *supra* note 90, at 12. Asante also proposes a commission to study reparations, educate the public about their importance, and make recommendations about further reparations. *Id.*

[93] John McWhorter, *Against Reparations, in* SHOULD AMERICA PAY?, *supra* note 6, at 193. Professor McWhorter concludes, "I do not believe that blacks should be left simply to pull ourselves up by the proverbial bootstraps. Our grim history is real. Yet so, too, are the reparations that we have already secured in the form of all these government programs and government monies." *Id.*

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Many reparationists will see McWhorter's demands as too small, or as merely a list of the affirmative action programs already in place, which they believe have failed. Nevertheless, it is illuminating to read his catalog of existing programs, which he views as reparations.

It is often easier to state aspirations rather than concrete plans. Sometimes even general goals are hard to articulate. Perhaps Arthur Serota has given us the best statement of what reparations promise:

> [T]here can be no elimination of poverty in America, no rebuilding of lives for millions of Black Americans sweltering in urban chaos and isolated by rural deprivation, no chance for millions of urban black youth staring through prison bars, hiding from warrants, dropping out of school or negotiating the violence of urban battlefields, to contemplate and develop their futures without reparations. Reparations is not merely long overdue, it is a finance plan to implement a change.[94]

Let us assume for the moment that a reparations plan includes the redistribution of wealth, so that it is distributed more or less equally on a per capita basis across racial groups. How might that be accomplished through a lawsuit? Or, to follow the agenda of critical race scholarship more generallv. how might a court order lead to the breakdown of white privilege?[95] It is an interesting thought-experiment to contemplate what such an opinion might look like.

In working toward any of these broad goals, reparationists will face problems with the dominant value in American law: that relief must be tied closely to harm, and that relief should meet with dessert.[96] There

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[94] SEROTA, *supra* note 60, at 147.

[95] Professor Bell provides one example in his re-writing of the *Brown* decision. *See* Derrick Bell, *Bell, J., dissenting., in* WHAT "BROWN V. BOARD OF EDUCATION" SHOULD HAVE SAID 185–99 (Jack M. Balkin ed., 2002). But even that is phrased as a dissent, rather than a majority opinion. *See* Jordan Steiker, *American Icon: Does It Matter What the Court Said in Brown?*, 81 TEX. L. REV. 305, 313–14 (2002) (discussing Bell's requirement of material equality rather than integration). Bell's "dissent" illustrates the extent to which critical race scholarship has (at least temporarily) abandoned integration as an ideal. Reparations fits with that goal, abandoning integration in favor of money. Or, phrased another way, reparations embraces the belief that money is a better way than equal treatment of purchasing equality.

[96] *See* Jeffrey J. Pyle, Note, *Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism,* 40 B.C. L. REV. 787, 806 (1999) (discussing critical race scholarship's focus on group-based relief rather than relief to individuals). The issue warrants substantially greater analysis, which should explore the ways that racial groups have been created, then subordinated, by law. *See, e.g.*, Westley, *supra* note 2, at 438–39. Of course, there remain critical issues of fairness: is continuing group-identification the best way (or even a good way) of remedying past race-conscious action? Every fair-minded person acknowledges the sordid nature of race-conscious actions of the federal and state govern-

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will have to be an enormous reworking of American law to bring it into line with ideas about group-based reparations. Even the most radical structural injunctions, such as the busing in *Swann v. Charlotte-Mecklenburg Board of Education* and *Keyes v. School District No. 1, Denver, Colorado,* pale by comparison with what is necessary for reparations.[97] There were defined goals for those injunctions, where courts issued system-wide orders that restructured the entire distribution of benefits in society by addressing who attended which schools. There was not necessarily a close connection between the children being bused and those who had been subject to de jure segregation. Nevertheless, such relief was upheld as a forward-looking remedy; the Supreme Court sought to place the children in the position they would have been in absent past de jure segregation. As the Supreme Court phrased the issue, "As with any equity case, the nature of the violation determines the scope of the remedy."[98] Put another way, as I often ask my students in remedies: how closely must we tie relief to evidence of harm?[99]

Swann represented the high-water mark for the idea of equity—that a court has broad remedial powers to take action in order to place a plaintiff in a fair position. *Swann* seems to stand for the proposition

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ments; however, there is substantial debate over how to best remedy that legacy. How closely must the remedy be tied to the evidence of harm?

[97] *See* Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, 29–31 (1971).

[98] *Swann*, 402 U.S. at 16.

[99] Professor Laycock has phrased the issue similarly in Douglas Laycock, Modern American Remedies 1080 (2d ed. 1994). He begins his casebook with a takings case, in which Native Americans' animals were taken by the Department of Interior without due process. The court must then decide how to compensate the plaintiffs for the loss of their animals. The Tenth Circuit Court of Appeals concludes that there cannot be a generalized finding of the value of animals; the trial court must make individual assessments. *See id.* at 11–15 (reprinting United States v. Hatahley, 257 F.2d 920 (10th Cir. 1958)). Laycock returns again at the end of the casebook with the observation that the court's "decision reflects our legal system's traditional view that litigation remedies particular wrongs to particular plaintiffs. To change that practice as a general matter would require a wholly different law of remedies, and perhaps a wholly different role for courts in the constitutional scheme." *Id.* at 1079. From that observation flows the question that reparations plaintiffs would have to answer to a court reviewing their claim for group relief: "If a remedy is not designed to restore someone to his rightful position, in what sense is it a remedy?" *Id.* at 1179. One answer is that the court might be remedying past generalized discrimination by the Department of the Interior against the Native Americans who lost their livestock by granting a generous lump-sum payment. *See id.* at 1179.

Of course, reparationists might reasonably argue that reparations payments *are* restoring plaintiffs to their rightful positions. But that will require extensive documentation about the nature of the past injury, as caused by the defendants (or their predecessors). *See* Brophy, *supra* note 10, at 517–19 (discussing the problems of linking past harm to current plaintiffs).

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that once a constitutional violation is established, an equity court has power to make broad injunctions to repair that damage.[100]

Plaintiffs now face a dramatically increased burden when seeking structural relief. They must show that the measure of relief is responsive to the amount of harm. For instance, in the school discrimination context, the Supreme Court stated in *Dayton Board of Education v. Brinkman*[101] that the courts must first determine how much past discrimination by the school board has led to segregation within the school system. Then, "The remedy must be designed to redress that difference. Only if there has been a system-wide impact may there be a system-wide remedy."[102]

Because lawsuits require a close connection between harm and relief and between wrongdoer and the person for whom relief is granted, it will be enormously difficult for reparations advocates to gain relief in many instances. Despite examples like *Brown v. Board of Education*,[103] it is difficult to see how a lawsuit will rework fundamentally the distribution of power and wealth in this country in a way that fits with reparationists' goals. Nevertheless, tort suits hold out appeal as vehicles for limited reparations in specific contexts—like the Tulsa riot of 1921 or cases where descendants of enslaved people are able to identify the successors to the companies that benefited from their ancestors' labor. Tort suits hold out even more promise as models for apportioning moral liability.

B. *Tort Law and the Elements of a Lawsuit: Remedying the Evils of Slavery*

As both Professor Massey and Professor Hylton point out, a tort lawsuit requires an identifiable plaintiff[104] who has suffered some harm that is caused by an identifiable defendant where the defendant

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[100] *See* Owen M. Fiss, *The Forms of Justice,* 93 HARV. L. REV. 1, 46 n.94 (1979) (stating that "*Swann* sustained the most untailored remedy imaginable"). Or, as Professor Laycock has called it, "an attempt to do complete equity, unconstrained by any direct link to a defined violation or the plaintiff's rightful position." LAYCOCK, *supra* note 99, at 283.

[101] 433 U.S. 406 (1977).

[102] *Id.* at 420.

[103] 347 U.S. 483 (1954).

[104] *See* HYLTON, *supra* note 59, at 2–4; Massey, *supra* note 79, at 161–62. In the case of a class action, a group of plaintiffs must have claims or defenses typical of those of the identifiable plaintiffs. *See* FED. R. CIV. P. 23; Morris A. Ratner, *Factors Impacting the Selection and Positioning of Human Rights Class Actions in United States Courts: A Practical Overview*, 58 N.Y.U. ANN. SURV. AM. L. 623, 642 (2003). One of the most troubling aspects of the lawsuit against CSX and Aetna is that the plaintiff has not identified her relationship to *anyone* who was enslaved by CSX's predecessor or whose life was insured by Aetna. In essence, she asks for money for a harm that she has not suffered. *See supra*, note 26.

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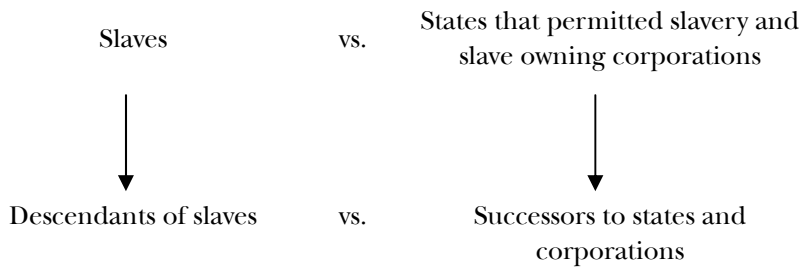
has a duty to the plaintiff.[105] What we need to show—skipping over problems of statutes of limitation for now—is that a duty was violated, leading to injury. The legal system responds well to an individualized plaintiff who can link harm directly to individualized defendants. It becomes harder to find a way for judges and the legal system to respond as the connections between plaintiff and defendant become more tenuous. Causation is, indeed, a critical problem. One might diagram the problem like this:



1. Framing the Debate

Much of the scholarship on slavery reparations—by both reparationists and opponents—addresses the inability of the American legal system to respond adequately to system-wide racial crimes like slavery. Reparationists point critical fingers at the liberalism of American law, which is heavily based on the claims of individuals against other individuals. Professor Bradford blames the fundamental ideas of American law, arguing that "[b]ecause liberal law is essentially politics, and because U.S. politics is essentially white supremacy, liberal law is structurally incapable of yielding racial equality even if it formally rejects malign racial classifications and hierarchies."[106] At other times, the criticism is directed more narrowly against the requirement that there be identified defendants who caused harm to specified plaintiffs, as Professor Cook has done.[107]

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[105] The issue of identifying a defendant might be relaxed slightly in the case of enterprise liability, if the defendant is part of an industry that caused the plaintiff harm. In such a case. liability could be imposed based on the defendant's share in the industry.

[106] Bradford, *supra* note 83, at 96 n.458.

[107] Cook argues:

> A new paradigm is needed because the conventional paradigm of Constitutional Liberalism limits our ability to draw legal and moral connections between the past injuries inflicted by slavery, segregation, and present racial disparities in

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Many reparationists focus on community-based remedies, which draw more upon analogies to structural injunctions and other class action remedies than upon payments to individuals. Such remedies, which focus on community-building measures like health and education funds, could expand their focus to entire communities that are suffering. In some instances, though no one has written about this in the reparations context yet, we might construct an entire bureaucratic system to weigh individuals' merits and award reparations according to their dessert. The social security system might serve as one example.[108]

Opponents similarly emphasize the limitations of lawsuits, though they may focus less on attacking law's liberalism. Professor Hylton presents a particularly well thought out attack on tort law's inadequacy for compensating for the evils of slavery.[109] Let me establish what I believe his key points are. In opposition to many writers on American slavery, Hylton sees slavery as the absence of government. Defining slavery as essentially private conduct carries with it an important implication for later analysis: it limits federal and state governments' liability. By defining slavery as the absence of law, rather than, as I believe is more accurate, the creature of the deliberate actions of generations of American voters and legislators, Hylton leaves us with the sense that slavery is solely the fault of private actors. Now that those private actors are all dead, a logical conclusion is that there is no one from whom descendants of slaves might appropriately seek compensation.

The fact that slavery was legal—indeed protected by the federal Constitution in the years before the Thirteenth Amendment—may have other implications for the imposition of liability under tort law. Or, as Hylton says,

> There is no getting around the fact that any attempt to apply tort law to slavery means applying today's law to an institu-

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> income, wealth, employment, education, etc. This conventional Liberal paradigm discusses injury and remedy within carefully drawn parameters of individual fault and causation. Having to identify a specific perpetrator who has caused a concrete injury to an identifiable victim makes it difficult to talk about society's responsibility for the present effects of slavery and segregation.

Cook. *supra* note 86, at 964–65 (citation omitted).

[108] *See, e.g.,* Jerry L. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims 92–93 (1983) (focusing on the social security system). Professor Leslie Mansfield of the University of Tulsa, who is one of the lawyers in the case for the Tulsa riot victims, has suggested several other administrative models, including the mine workers' compensation program.

[109] *See* Hylton, *supra* note 59, at 10; *see also* Massey, *supra* note 79, at 158–61 (pointing out the difficulty of applying modern-day tort principles to the institution of slavery).

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> tion that existed within the law a century and [a] half ago. . . . Applying today's law to events that happened within the law yesterday opens up a messy can of worms, to say the least. And once courts go along with plaintiffs and open up that can, it is not easy to see why the plaintiff's approach should be confined to slavery lawsuits.[110]

Hylton proposes one solution: to view slavery as an institution that was not legal. "[T]he appropriate model is one in which warlords have displaced the state and held it at bay while they imposed their own law on their subjected populations."[111] Yet that is completely wrong as a model for what happened in the United States. There were no conquering warlords; the vast majority of voters, northern and southern, embraced slavery. Hylton makes much of the legality of slavery. Nevertheless, the tort system can recognize a change in operative principles. We have seen in a series of products liability areas retroactive application of liability.[112] Indeed, one virtue of a lawsuit is the ability to impose liability on past conduct. The fact that slavery *was* recognized by the federal and state governments, however, suggests the level of the problem, not that we cannot now rectify the problem through a lawsuit.

Hylton advances another argument regarding tort law: that "the institution [of slavery] may not have been as harmful as many have asserted."[113] Hylton develops his argument with several pages of discussion, taken largely from Adam Smith's theorizing about the institution of slavery and from the work of economic historians Robert Fogel and Stanley Engermen. The point seems to be that "[i]f Fogel and Engermen are correct, slavery's victims would be unable to prove that they suffered substantial damages."[114] From there Hylton hypothesizes that

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[110] HYLTON, *supra* note 59, at 10.

[111] *Id.* at 11.

[112] *See, e.g.,* Costello v. Unarco Indus., Inc., 490 N.E.2d 675 (Ill. 1986) (reversing dismissal of a strict liability action in tort despite retroactive effect and an existing statute of repose).

[113] HYLTON, *supra* note 59, at 12.

[114] *Id.* at 12–13. It is unnecessary to enter the Fogel-Engerman world in order to contemplate reparations. Nevertheless, it is important to recall that their work is largely discredited. Many of the findings of *Time on the Cross* were called into disrepute in the years afterwards. *See, e.g.,* PAUL A. DAVID ET AL., RECKONING WITH SLAVERY 339–57 (1976); HERBERT GEORGE GUTMAN, SLAVERY AND THE NUMBERS GAME: A CRITIQUE OF TIME ON THE CROSS 8–13 (1975). *See generally* ROBERT FOGEL & STANLEY ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974). It is similarly significant that legal scholars cite *Time on the Cross* far more frequently than they cite either of the two books responding to it—and largely demolishing it. A recent Westlaw search in the "jour-

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slavery probably was more physically abusive in the deep South,[115] which is consistent with the general understanding of slavery. And that may suggest that the administrative system I suggested earlier would be the best model: we might use particularized inquiries about how slavery affected each individual's ancestors.

Hylton's underlying point appears to be that slavery did not lead to the vast disparities in wealth and educational achievement between the black and white communities today. Instead he blames subsequent events, perhaps Jim Crow, although the typical argument among reparations opponents is that black culture is to blame. Opponents, like Professor McWhorter and Abigail and Stephen Thermstrom, point to the high rate of single parents as a critical explanation for the differential wealth achievement.[116] Indeed, there is substantial question about the continued impact of slavery. Here tort law might provide a helpful framework for evaluating causation. What percentage of the harm, one might ask, is caused by slavery as opposed to other, intervening causes? Although some might have been able to overcome the harms of slavery, others might not have been so successful. Slavery, because of the magnitude of the harm, may have led to further destruction.

Would the claims for reparations be false imprisonment, assault and battery, wrongful death, and, though Hylton fails to discuss this, common law enslavement? Hylton worries that there is an entire series of harms, like inability to marry or have a conventional marriage, that tort law does not contemplate.[117] He labels these harms "social torts."[118] Hylton suggests that "the standard tort categories appear to

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nals and law reviews" database turned up forty-eight articles citing *Time on the Cross,* nine citing *Reckoning with Slavery,* and eleven citing *Slavery and the Numbers Game. Available at* http://www.westlaw.com (last visited Nov. 26, 2003).

[115] *See* supra note 108.

[116] *See, e.g.,* JOHN MCWHORTER, LOSING THE RACE: SELF-SABOTAGE AND BLACK CULTURE 9–10 (2000); THERNSTROM & THERNSTROM, *supra* note 84, at 337–41.

[117] *See* HYLTON, *supra* note 59, at 23.

[118] *Id.* Let me leave aside for the moment the question of whether slaves were able to marry or have a conventional marriage. Hylton's assumption that they could not suggests that from the vantage of the twenty-first century, it is difficult for us to see that slaves might have carved out a life within the system of slavery. In fact, much of the finest work of the 1970s was devoted to showing that slaves could create a life independent of their slave masters. *See, e.g.,* EUGENE GENOVESE, ROLL, JORDAN, ROLL, at xv–xvii (1973); CHARLES JOYNER, DOWN BY THE RIVERSIDE: A SOUTH CAROLINA SLAVE COMMUNITY, at xvii–xxii (1984). Ralph Ellison, author of *Invisible Man,* condemned modern social scientists for failing to see that slaves could carve out a productive life. Ellison's review of Gunnar Myrdal's *American Dilemma* built upon the idea—as did much of Ellison's work—that too much of American culture viewed African Americans as objects rather than *actors.* Ellison struggled his whole life to correct that misperception:

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be inadequate for many of the injuries connected to social torts."[119]

Many of the social torts may be compensated through typical tort damages. Wrongful death incorporates loss of consortium; false imprisonment would also incorporate payment for loss of religion and loss of consortium. There is also the potential for a common law claim for slavery. Yet the damages are so great for typical torts associated with slavery that no one need worry that there may be other claims that are not compensable. The fact that there may be no tort known as "stealing a person's religion" does not mean that we cannot collect damages for such harm under common law false imprisonment or assault and battery.[120] There may be some constitutional tort there, involving deprivation of religious freedom, but let me leave that aside for the moment. The fact that southern states made it a crime to teach slaves how to read—just one of the many horrible aspects of slavery—suggests to me that the states should now have some liability for the harm caused by that deprivation.

Moreover, if this is a question about the use of tort law as a model for gauging reparations claims, then tort law could still provide a useful framework. There are substantially greater problems if we are talking about using the legal system, because tort claims are so dependent upon evidence of harm. This leads to other questions about the nature of the harm. Can descendants of slaves stand in the shoes of their ancestors?

The question becomes one of how we might use tort law for a reparations lawsuit. What is the harm that slave owners imposed on slaves? Here one sees multiple torts: assault and battery, conversion of property, false imprisonment. One wonders what to make of the fact that slavery was legal; indeed, that it received state sanction. It would have been laughable for a slave to file a suit in the antebellum era to recover for the evils of slavery, precisely because slavery was state-

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> [C]an a people (its faith in an idealized American Creed notwithstanding) live and develop for over three hundred years simply by *reacting?* Are American Negroes simply the creation of white men, or have they at least helped to create themselves out of what they found around them? Men have made a way of life in caves and upon cliffs; why cannot Negroes have made a life upon the horns of the white man's dilemma?

RALPH ELLISON, *An American Dilemma: A Review, in* COLLECTED ESSAYS OF RALPH ELLISON, *supra* note 14, at 339.

[119] HYLTON, *supra* note 59, at 23.

[120] There may be some constitutional tort there, involving deprivation of religious freedom, but this discussion should be left for another time.

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sanctioned. Does that mean, however, that there could be no retroactive liability imposed once slavery ended? One of the virtues of lawsuits is that courts can impose retroactive liability more easily than could a legislature.

A related issue is whether a claim exists against states for permitting slavery. The states established the legal framework that permitted the exploitation of African Americans. They established laws with the understanding that particular people would be enslaved, separated from their families, denied education—just about everything that can be done to destroy a person's humanity was contemplated or mandated by the laws of the slave states.[121] It seems likely that former slaves could assert a claim against states if they could surmount problems of sovereign immunity.

The problem becomes more complex, however, when one considers subsequent generations. Descendants of slaves who sue corporations essentially stand in the shoes of their ancestors. They might assert at least the same claims their ancestors had, in the nature of a survival action. A further problem is how to measure damages when lawsuits recognize subsequent generations. Certainly, the harm to the slaves was enormous. But can subsequent generations recover for those harms? Are harms to the children of victims recoverable? Is there an analogy to loss of consortium?[122] Would that analogy allow those who were not born at the time of the torts to recover? Would those who were not born to the immediate tort victims be eligible for recovery? Alternatively, might those remote descendants have an independent claim? In such a scenario, there would be no direct relationship between the descendants and the defendants; nevertheless, there would be harm. Might there be a claim—as some descendants of those who ingested harmful medicine have asserted—against the original tortfeasors?[123] Liability for preconception torts is limited,

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[121] *See generally* HARRIET BEECHER STOWE, A KEY TO UNCLE TOM'S CABIN 124–223 (William Loren Katz ed., Arno Press 1968) (1854) (summarizing statutory law of slave states).

[122] Typically in cases of loss of consortium, those who may make a claim are limited to close family members, and sometimes even to those who are dependent on the decedent for support. *See, e.g.*, Mitchell v. United States, 141 F.3d 8, 19–20 (1st Cir. 1998) (holding that adult nondependent children may recover); Masunaga v. Gapasin, 790 P.2d 171, 176–77 (Wash. Ct. App. 1990) (disallowing recovery for nondependent parents). Or maybe there is an argument for loss of inheritance. *See* LAYCOCK, *supra* note 99, at 153–54.

[123] *See, e.g.*, Albala v. New York, 429 N.E.2d 786, 787 (N.Y. 1981) (limiting claims based on the belief that it would "require the extension of traditional tort concepts beyond manageable bounds"); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 55, at 367–70 (5th ed. 1984) (discussing legal right of child to sue for the consequences of prenatal injuries). *See generally* Julie A. Greenberg, *Reconceptualizing Preconception Torts,* 64

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largely for prudential reasons of trying to maintain questions of proof and liability within reasonable boundaries.

As the discussion above indicates, simply trying to frame reparations claims is problematic. The task for reparationists is to create a line of causation linking past harm to present conditions. Reparationists then must fit such a causal line into a framework that courts will be willing to recognize.[124]

2. Identifying the Tort of Slavery

The compulsion to labor constitutes a main contour of the tort of slavery. Several cases from the post-Civil War federal courts provide useful guidance on this point.[125] Damages are substantially more difficult to determine. Following the lead of the *Restatement (Second) of Torts*, one might first define the tort of slavery, then define what is recoverable under it. Perhaps we would consider the harm of the tort of slavery as continuing down to each generation for which one could prove damage. Even though the harm took place in 1850, there may be continuing harm. That raises substantial problems of proof. It also leads to significant questions of whether slavery or subsequent discrimination during the era of Jim Crow caused the present harm. Are those subsidiary claims? The cause of action might be in the name of the original enslaved person, with descendants entitled to bring suit in the nature of a survival action.

If we consider that there might be a separate action—something independent of a survival action—then we need evidence for causation. How much did the institution of slavery affect its direct victims and their descendants? For purposes of considering tort law as a basis for a lawsuit, I would argue that there is ample connection and liability. Resolving the problem of linking past torts to present harm is critical to discussing reparations within the context of tort law. In order to resolve these issues, we need systematic research that links current harm to slavery. The legacy of slavery on African Americans is one of the most hotly contested issues throughout the social sciences

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Tenn. L. Rev. 315 (1997) (discussing whether limiting liability in preconception actions is consistent with the purposes of tort law).

[124] Courts tend to limit compensable harm to that which is proximately caused by the harm. *See, e.g.*, Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 978–83 (E.D. Va. 1981) (limiting liability for damage caused by dumping chemicals in the James River and Chesapeake Bay).

[125] *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 934–40 (1988) (providing a contemporary example of an involuntary servitude case).

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from the 1940s through today.[126] There is no easy answer to these questions. One might look to Stephen and Abigail Thernstrom's *America in Black and White: One Nation, Indivisible,* which blames African-American culture, not American society, for the chasm between white and black economic status.[127] On the other side, a leading work is Douglas Massey and Nancy Denton's *American Apartheid: Segregation and the Making of the Underclass*. Massey and Denton's book, while not as comprehensive in scope as the Thernstroms'—it focuses on racial segregation—lays much of the blame on factors external to the African-American community. *American Apartheid* concludes that "racial segregation" and its characteristic institutional form, the black ghetto, are the key structural factors responsible for the perpetuation of black poverty in the United States.[128] As we explore the legacy of slavery in its present manifestation of gross inequality, we can apportion damages based on how much we determine slavery caused that inequality.

3. Derivative Claims

Reparations litigation raises several further questions: what is the purpose of the tort cause of action, and what is the measure of damages? Is the damage only located in the slave? Or do we take into consideration succeeding generations?

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[126] *See* ELLISON, *supra* note 14, at 332 (noting Gunar Myrdal's attempt to debunk pseudo-scientific literature that had used slavery to confirm African-American inferiority).

[127] THERNSTROM & THERNSTROM, *supra* note 84, at 337–41; *see also* Stephen Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River,* 46 UCLA L. REV. 1583, 1606 (1999) (criticizing evaluations of black academic underperformance that fail to account for the effect of peer culture).

[128] DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 9 (1993). The appropriate measure of relief for slavery reparations ought to be the amount of damage that the institution of slavery imposed on subsequent generations. *Cf.* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) ("[T]he District Court . . . must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference."); George Schedler, *Responsibility for and Estimation of the Damages of American Slavery*, 33 U. MEM. L. REV. 307, 338 (2003) ("We need to be certain that the the difficulties African Americans now face are due to slavery, rather than racism that would have pervaded the United States even if it had no history of slavery."). I think Professor Schedler overstates the level of proof reparationists need to advance when he states, "We need assurance that factors apart from the legacy of slavery, such as religious beliefs, cultural values, and genetics, play no role before we can be assured that slavery is the cause." Schedler, *supra*, at 338–39. The question is not one of eliminating all other causes, but of determining with reasonable certainty the extent of slavery's impact on subsequent generations.

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Professor Hylton speaks of the problem of suits by succeeding generations as a problem with derivative claims. He uses analogies to cases like *Ryan v. New York Central Railroad,* which is a favorite of torts casebooks. In that case, a railroad engine threw off sparks igniting a house on fire, which ultimately resulted in numerous homes burning down. The moral of *Ryan* is one of courts using judicial doctrine to limit the liability of an industry courts wanted to promote. The New York Court of Appeals considered distinguishing cases where fire was the result of negligence—as in that case—and cases where fire was the result of intentional actions. Perhaps those who commit intentional torts should have greater culpability for the harm they cause than those who are merely negligent, the court seemed to suggest. The court rested on another distinction, though—that the destruction of the first house was the "ordinary and natural result of its being fired." The court thought the destruction of the other houses was "not a necessary or a usual result." Moreover, imposing liability would potentially ruin the defendant:

> In a country where wood, coal, gas, and oils are universally used, where men are crowded together into cities and villages, where servants are employed, and where children find their home in all houses, it is impossible, that the most vigilant prudence should guard against the occurrence of accidental or negligent fires. . . . No community could long exist, under the operation of such a principle.[129]

Ryan receives frequent criticism because it made those unfortunate enough to live along the railroad bear the costs of development. All of this suggests that we can impose a different set of standards if we view the equities differentlv—if, for instance, we do not want to protect the institution of slavery.[130]

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[129] Ryan v. N.Y. Cent. R.R. Co., 35 N.Y. 210, 216–17 (1866). After reading *Ryan,* one might ask Professor Schwartz to remind us why he thinks nineteenth century tort law was so plaintiff-friendly. *See* Gary T. Schwartz, *The Character of Early American Tort Law,* 36 UCLA L. Rev. 641, 685–87 (1989); *cf.* Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law,* 51 Ohio St. L.J. 1127, 1151–57 (1990) (discussing cases recognizing right of common carriers to exempt themselves from strict liabilty and gross negligence).

[130] Of course, some tort cases in the nineteenth century were premised on that idea that slavery should be promoted. *See, e.g.,* Snee v. Trice, 3 S.C.L. (1 Brev.) 178 (S.C. 1802) (limiting liability for field burned by slaves' negligence); *see also* William W. Fisher, *Ideology and Imagery in the Law of Slavery,* 69 Chi. Kent L. Rev. 1051, 1060 & n.49 (1993) (discussing *Snee*). *Snee* is a remarkable case, a strong parallel to *Ryan.* And it is one that (I think) ought

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Professor Hylton also discusses the nineteenth century's limitation of wrongful death claims. The limitations Hylton discusses should not be a precedent for us now, because we are currently trying to undo the problems we have inherited from that era. Throughout the slavery era, owners *did* have a cause of action for someone who killed their slave.[131] I would actually like to know a lot more about wrongful death in the nineteenth century. That is an important topic and a quick reading of cases discloses that some courts were willing to impose liability in the absence of a statute and that legislatures frequently imposed liability by statute.[132] All of that suggests that it is not unreasonable to impose liability for torts associated with slavery. But for our purposes, we can safely say that even at the time, law protected masters' interests in slaves' lives. It is therefore not much of a leap for us to recognize a cause of action that protects the slaves' interest in their own lives![133]

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to be included in casebooks along with *Ryan,* for it illustrates the economic and social bases underlying decisions regarding proximate cause in tort.

[131] *See* Hedgepeth v. Robertson, 18 Tex. 858 (1857); Harvey v. Epes, 53 Va. (12 Gratt.) 153 (1855); Gray v. Crocheron, 8 Port. 191 (Ala. 1838). Some cases employed the language of moral philosophy, holding a person who sold liquor to a slave liable for the slave's death. *See* Harrison v. Berkley 32 S.C.L. (1 Strob.) 525 (S.C. 1847); Delery v. Mornet, 11 Mart. (o.s.) 4 (La. 1822). One might inquire how courts' desire to impose liability on those who interfered with the slave system led to innovation in tort law?

[132] *See, e.g.,* Knightstown & S.R. Co. v. Lindsay, 8 Ind. 278 (1856) (Indiana statute); Doedt v. Wiswall, 15 How. Pr. 128 (N.Y. Sup. Ct. 1857) (imposing liability, relying upon New York wrongful death statute); Langlois v. Buffalo & Rochester R.R. Co., 19 Barb. 364 (N.Y. Sup. Ct. 1854) (imposing liability in absence of statute); Dunhene's Adm'x v. Ohio Life Ins. & Trust Co., 12 Ohio Dec. Reprint 608 (Ohio Super. Ct. 1856) (Ohio wrongful death statute). The common law's reasons for refusing compensation for wrongful death are surveyed in *Connecticut Mut. Life Ins. Co. v. New York & N.H.R. Co.*, 25 Conn. 265 (1856). Justice Storrs discloses the bases for limiting liability and suggests how cold-hearted the common law was in this area. *See also* Carey v. Berkshire R. Co., 55 Mass. 475 (1848) (noting Massachusetts' lack of a wrongful death statute).

[133] But the larger point is not just that tort law in the nineteenth century was narrow and generally unprotective of individuals. Hylton is correct, of course, that it is unclear how much slavery, as opposed to other factors, has hindered individuals and led to the current chasm between African-American and non-Hispanic white income. That is a topic that needs much more evidence and discussion. *See generally* Michael K. Brown et al., Whitewashing Race: The Myth of a Color-Blind Society (2003) (arguing that racism remains a prevalent force in America and questioning the analysis of those who promote "color-blind" social policy). Reparations skeptics are beginning to explore this question: to what extent did slavery harm the current generation? *See, e.g.*, Stephen Kershnar, *Reparations for Slavery and Justice*, 33 U. Mem. L. Rev. 277, 278–82 (2003) (arguing that contemporary slave descendants are not unjustly harmed by the enslavement of ancestors).

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4. Unjust Enrichment and Slavery Reparations

There is yet another approach to considering the torts related to slavery: contemplating the use of unjust enrichment actions.[134] While it is suggestive to say—as reparationists sometimes do—that those who have benefited from slavery are "unjustly enriched,"[135] those rhetorical statements merely postpone "to a separate inquiry whether a particular transaction is productive of unjust enrichment or not."[136] As the American Law Institute's discussion draft of the *Restatement (Third) of Restitution and Unjust Enrichment* points out, there are "numerous cases in which natural justice and equity do not in fact provide an adequate guide to decision, and would not do so even if their essential requirements could be treated as self-evident."[137] The *Restatement*'s drafters point out the difference between moral and legal objections to retention of property. Only those transactions where there is "unjustified enrichment" contain a necessary prerequisite for a lawsuit.[138]

The critical question then becomes, was there an "adequate legal basis for taking the labor?"[139] The *Restatement* provides a limited foundation for determining when benefits are conferred without adequate basis. In the context of slavery, one might argue that the benefits were conferred under duress, which left the taker without title.[140] Alternatively, one might conclude that the benefits were obtained by tort, such as conversion or trespass.[141] In both cases, one confronts the problem that slavery was recognized as legal in its time. Thus a court approaching a claim of unjust enrichment might well conclude that during the period when slavery was recognized as legal in the United

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[134] Sometimes we consider unjust enrichment under the heading of tort and other times under a separate heading of "unjust enrichment." While most of the following discussion derives from the consideration of unjust enrichment as an independent action—not as a tort—I think it is important to discuss here, for the sake of completeness. *See* Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1279–83 (1989).

[135] *See* Restatement (Third) of Restitution and Unjust Enrichment § 1 (Discussion Draft, Mar. 31, 2000).

[136] *Id.*

[137] *Id.*

[138] *Id.* Elsewhere the *Restatement* refers to unjust enrichment as the "transfer of a benefit without adequate legal ground." *Id.*

[139] *See id.*

[140] Restatement, *supra* note 134, at § 14(3) ("If a wrongful threat is tantamount to physical compulsion, a transfer induced thereby is void, and the purported transferee obtains no title.").

[141] There is not yet a section exploring the nature of those breaches, but they are scheduled to appear as § 37. *Id.* at xxi.

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States, benefits extracted from enslaved people are not recoverable in restitution.

There is some recent precedent, however, to suggest that courts will look beneath a transaction to ask whether it is legal in some fundamental sense, rather than merely technically or temporarily legal. In *Altmann v. Republic of Austria*,[142] for example, the Ninth Circuit Court of Appeals revived a claim for six Gustav Klimt paintings that had been stolen from a family during the Holocaust. Though the actions might have been legal under the existing regime, the court concluded the actions could not be legal under international law. Therefore, the heirs of the people from whom the property was taken *might* assert an unjust enrichment claim for its return.[143] In the case of slavery, a similar unjust enrichment claim is particularly compelling. Because unjust enrichment focuses on benefits or tangible property that is still retained, there is a connection between past wrongdoing and present benefit that is much easier to see than in many reparations cases. Moreover, the moral claim that one person has property that rightfully belongs to another is easier to establish than the claim that taxpayers who may have no benefit and who took no part in the wrongdoing must pay.

There remains a critical problem with an unjust enrichment claim for slavery: that slavery was legal at the time. Grappling with the former legality of slavery requires a court to examine the legality of a system that has since been rejected and was subject to challenge at the time. Those working within the southern legal system recognized property rights in humans as the basis for the slave system. Reparationists are now asking for an accounting of the benefits of that labor. In some ways, the legality of slavery, the recognition that slaves produced something valuable, can be the basis for a claim.[144]

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[142] 317 F.3d 954 (9th Cir. 2002)

[143] *Id.*

[144] There is a series of cases that recognized the slave owner's property interest in slaves, and protected that interest. *See, e.g.*, Wilkinson v. Moseley, 30 Ala. 562, 573–77 (1857) (limiting subcontractor's rights to employ slave in trade specified in contract); Carter v. Streator, 49 N.C. (1 Jones) 62, 63 (1856) (upholding judgment against defendant who wrongfully seized and sold slave belonging to plaintiff). When other people injured slaves, those people were liable to the owners. *See, e.g.*, Seay v. Marks, 23 Ala. 532, 536–37 (1853) (permitting owner to sue contracting party for value of slave who was killed while engaged in activity not covered by the contract); Harrison v. Lloyd, 17 S.C.L. (9 Rich.) 161, 166–67 (S.C. 1851) (providing that slaveowner may recover value of slave who was wrongfully killed while in custody of defendant); Lacoste v. Pipkin, 11 Miss. (13 S. & M.) 589, 591 (1850) (reversing judgment against defendant, but reiterating that injuring party may be liable for damage to slaves).

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It is not outlandish to make a claim for what everyone understood was property. At the time, when someone else took slaves' labor without permission from their owners, those converters were liable. Why should we not now recognize the slaves' rights in their own labor, at least to the extent that their labor continues to provide benefits in 2003? Even if a court is unwilling to impose a quasi-contract basis of recovery based on the conclusion that slavery was legal, it might be willing to use restitution as a *measure* of recovery for torts associated with slavery, such as assault. In that case, restitution might provide a measure of recovery.[145]

The unjust enrichment rationale is particularly complicated because it deals with rights to identifiable property. There are two claimants in this model: the descendant of the slave and the subsequent purchaser of the property; often both are innocent, but the property must be apportioned to one or the other. There are particularly strong equities in the case of the current possessor who is a gratuitous beneficiary of the original wrongdoer. The statute of limitations does not offer strong support for disgorging a benefit from someone who has received it unjustly. If there still were slaveholders alive, the case against unjust possessors would be compelling. In a manner of speaking, there still are some who hold property from slaveholders—the gratuitous beneficiaries of those slaveholders.[146]

Moreover, courts recognized the owner's property rights in slaves when others injured them. *See, e.g.*, Knox v. N.C. R.R. Co., 51 N.C. (1 Jones) 415, 416–17 (1859) (placing burden of proof of cause of death on hirer and otherwise permitting suit for wrongful death); Helton v. Caston, 8 S.C.L. (2 Bail.) 95 (S.C. 1831) (permitting suit by owner against contractor who beat slave). Such cases illustrate the well-developed rules around slave labor as property and the liability of whites who abused slaves to slave owners. Those rules establish a complex network of duties among whites and illustrate the relationship of white owners, white non-owners, and slaves. That world of property relationships established that, while owners might have virtual license to treat their slaves however they would like, whites who "rented" slaves from their owners were responsible to the owners for harm to the slave.

[145] *See* LAYCOCK, *supra* note 99, at 1279 (observing that restitution is both a recovery for unjust enrichment and a measurement of enrichment). There are several instances in which to invoke restitution, for example, when it provides a *substantive basis* for recovery. That is the case for those who claim restitution based on their ancestors' work with pay. Alternatively, there may already be a basis for recovery—such as tort—but the measure of damages is inadequate or difficult to prove. For example, it may be impossible to show amount of harm. Restitution provides a concrete, though often rather limited, measure of harm. *See, e.g.* Olwell v. Nye & Nissen Co., 26 P.2d 282, 286 (Wash. 1946) (holding that for an action in restitution, respondent is entitled to the measure of restoration that accompanies the remedy).

[146] I have suggested how this claim might work against a charitable organization that is the beneficiary of a gift by a slaveholder. There is still a problem with the statute of limitations. *See* Brophy, *supra* note 10, at 514–15.

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Here tracing is important, because it allows us to follow assets into a new form—the innocent beneficiary of another's wrong. Professor Palmer has stated the case as "[o]ne who is the innocent recipient of a benefit that came from the plaintiff by virtue of a wrongful act of a third person is obliged to make restitution, unless he gave value for the benefit."[147] When we have a beneficiary of a gratuitous transfer, there is at least the possibility of treating that beneficiary as standing in the shoes of, and taking the property subject to the same obligations as, the grantor.[148]

Altman points to the utility of an unjust enrichment claim, particularly where there is identifiable property: one can trace that wrongfully acquired property through other hands, even those of subsequent innocent purchasers. While I recognize that such a claim is fanciful and requires a suspension of the statute of limitations, one might conduct a thought-experiment along the following lines:

(1) The labor of enslaved people was unjustly converted and used to build a plantation home or some other tangible property that continues to exist today; that labor can then be traced into a new form—the plantation house.
(2) Particularly in cases where the property is gratuitously transferred, there is a claim between descendants of the enslaved people and the current possessor of the property.
(3) Even in cases where the property has been sold, the people whose labor was converted might have a claim against the subsequent purchaser. In a limited number of cases, constructive trusts imposed on real property allow the trust beneficiary to trump the claims of a bona fide creditor.[149]

5. Sample Damages Formulas

If we are going to have a tort that seeks to compensate for the harms of slavery to subsequent generations—that is, unless we are going to limit the recovery of damages to the immediate victim and refuse to permit consideration of harm to subsequent generations—then we need to prove with specificity how slavery affected each sub-

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[147] *See* 1 George Palmer, Law of Restitution § 2.20 (1978).

[148] *See* U.S. for Use of Palmer Constr., Inc. v. Cal. State Elec., 940 F.2d 1260, 1262 (9th Cir. 1991).

[149] Such cases are limited, but on occasion either constructive trust or equitable liens can be used to trump a prior, bona fide purchaser or creditor.

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sequent generation. That will make for some interesting trials. Let me suggest several possible models of liability in a suit by descendants of enslaved people for the torts of slavery imposed on their ancestors:

(1) in the nature of a survival action: damages are calculated according to the damage done to the decendants' ancestors.
(2) in the nature of loss of consortium claim: damages are the harms that slavery imposes on the subsequent generations, which involve proof of damage due to torts of slavery.
(3) in the nature of unjust enrichment: damages are the benefits ancestors conferred on others, which are still retained.

There remains, however, the problem of calculating the harm of slavery. To what extent does the institution of slavery continue to have an effect on the decendants of slaves? One way to investigate the effects of slavery is to look at the current gap between African-American and white income. Let me suggest the following as a basic measure for damages: *the measure of the harm to each individual slave is the difference between that slave's descendants' income and the average income of white Americans.* Perhaps the equation should be altered in order to account for causes other than slavery that contributed to slave's descendants' poverty. Such a formula would offer a starting point for a compensation scheme, but it does not necessarily work justice for individuals because it offers no compensation to those descendants of slaves who earn above white income, regardless of how much they were injured by the institution of slavery. Another possible formulation of the harm is that it is *the difference between a descendant's income and the amount necessary to reach the poverty line.* That would offer a much more modest accounting of the damage, though it would also focus the government's limited resources on those in the worst financial plight.

A formula that only takes account of differences between the income of African Americans and white Americans cannot address the host of other legacies of slavery and Jim Crow—decades of undercompensated labor, lost educational opportunities, and the lack of hope that derive from it. The list of harms is nearly interminable. However, the difference in current income is something that is easily measured and is—reparationists will argue—a continuing harm of slavery that ought to be addressed.

III. The Purposes of Reparations

Reparations discourse ultimately demands an answer to the question, what is the purpose of reparations? What do we want to achieve

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with them? The movement for reparations is at bottom a question about the distribution of wealth and whether long-ago crimes that continue to have effects ought to be remedied. Professor Marable, one of the leading reparations advocates, recently stated in a speech at Columbia Law School that reparations is not about integration. "This is a black freedom struggle. Two things we've never had are freedom and justice."[150]

It is sometimes difficult to fit reparations claims within a legal framework, because it is sometimes difficult to frame the African-American experience within the (somewhat arbitrary) boundaries of the law. One might think of Ralph Ellison's posthumous novel *Juneteenth*, which aims at exploring how people constructed a life independent of the law. Jazz-musician-turned-minister Alonzo Hickman tried to bring up his adopted son, Bliss, to appreciate his ideals in hopes that Bliss, who could pass for white, would later teach those values to the white community. Hickman remembered that "we took the child and tried to seek the end of the old brutal dispensation in the hope that a little gifted child would speak for our condition from inside the only acceptable mask."[151] Indeed, the young child's mother, who had falsely accused Hickman's brother of raping him, for which he was lynched, thought that Bliss might be a vehicle for spreading such lessons. "Take him, let him share your Negro life and whatever it is that allowed you to help us all these days. Let him learn to share the forgiveness your life has taught you to squeeze from it," she instructed Hickman.[152]

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[150] Manning Marable, 40 Acres & A Mule: The Case for Black Reparations, Remarks at the Paul Robeson Lecture, Columbia Law School (Feb. 27, 2003), *available at* http://www.law.columbia.edu/law_school/education_tech/streaming/video_1 (last visited Nov. 12, 2003).

[151] RALPH ELLISON, JUNETEENTH 271 (John F. Callahan ed., 2000) (1999).

> [T]here are facts and there is truth; don't let the facts ever get in the way of your recognizing and living out the truth. And don't get the truth confused with the law. The law deals with facts, and down here the facts are that we are weak and inferior. But while it looks like we are what the law says we are, don't ever forget that we've been put in this position by force, by power of numbers, and the readiness of those numbers to use brutality to keep us within the law. Ah, but the truth is something else. We are not what the law, yes and custom, says we are and to protect our truth we have to protect ourselves from the definitions of the law. Because the law's facts have made us *outlaws*. Yes, that's the truth, but only part of it; for Bliss, boy, we're outlaws in Christ and Christ is the higher truth.

Id. at 354.

[152] *Id.* at 308.

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Some reparationists believe that reparations talk may be a way of teaching the larger community about the values of love.[153] This is a task that will involve the entire community—and one that will require both payment and forgiveness. Reverend Hickman spoke in *Juneteenth* about the mutuality of relationships:

> It takes two to make a bargain or to bury a hatchet, or even to forget words uttered in dedication and taken deep into the heart and made sanctified by suffering[.] Blood spilled in violence doesn't just dry and drift away in the wind, no! It cries out for restitution, redemption[.][154]

Bliss did not fulfill those hopes, instead becoming the racist, race-baiting Senator Sunraider! Yet in his last speech in the Senate, given as an assassin focused his gun sights on him, Sunraider spoke through that mask. He said that history has given us three questions: "How can the many be as one? How can the future deny the Past? And How can the light deny the dark?"[155] This is certainly a mission that many, many people will have to be involved in if we are to find a way for "the future to deny the past," by which Ellison meant overcoming the past and creating a future in which all people participate.[156] We are fortunate that, on the day that I finished the draft of this Article in the summer of 2003, President Bush delivered a speech in Senegal recognizing the atrocity of slavery and the slave trade—and urging something to repair that damage.[157] That speech, it seems to me, is a product of the reparations movement.

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[153] *See* Cook, *supra* note 86, at 981. I wonder whether Cook's suggestions actually will achieve his goal. While he speaks a language of love, his demands run all one way: towards more payments to the African-American community. Much is owed; however, articles that demand payments in the name of love and yet offer no forgiveness in return—or even the suggestion of forgiveness—are, at best, incomplete.

[154] ELLISON, *supra* note 151, at 271.

[155] *Id.* at 19.

[156] *Id.* Sunraider's—Ellison's—answer to the second question is to remember that:

> [G]iven the nature of our vision, of our covenant, to remember is to forget and to forget is to remember selectively, creatively! Yes, and let us remember that in this land to create is to destroy, and to destroy—if we will it so and *make* it so, if we pay our proper respect to remembered but rejected things—is to make manifest our lovely dream of progressive idealism.

Id. at 19–20. Ellison works out some of his themes of selective history in his essay, *Going to the Territory*. *See* ELLISON, *supra* note 14, at 595–96.

[157] *See* Richard W. Stevenson, *Bush, in Africa, Promises Aid but Offers No Troops for Liberia,* N.Y. TIMES, July 9, 2003, at A8.

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Another important part of the reparations movement is recovering our shared history and showing how it differs from the myths we hold in our collective conscience. That new history—if people will believe it—might lead to a remaking of society. It might break down what Ralph Ellison referred to in *Invisible Man* as the myths that "keepers [of power] keep their power by."[158]

If those are the goals, then reparations may indeed prove difficult to obtain. Often when people speak about justice, particularly in the context of reparations and unjust enrichment, there is a repeated theme of trying to place people in the position they would have been in but for the harm. Professor Nozick speaks about these issues in terms of rectification—how judgments that aim to correct injustice inform us about the ways property should have been distributed:

> This principle uses historical information about previous situations and injustices done in them, and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out not to be one of the descriptions yielded by the principles, then one of the descriptions must be realized.[159]

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[158] RALPH ELLISON, INVISIBLE MAN 432 (Modern History ed. 1992) (1952). Ellison is talking about the execution of brother Tod Clifton and how the knowledge of the true history is erased by the failure to record it:

> I tried to step away and look at it from a distance of words read in books, half-remembered. For history records the patterns of men's lives. . . . All things, it is said, are duly recorded—all things of importance, that is. But not quite, for actually it is only the known, the seen, the heard and only those events that the recorder regards as important that are put down, those lies his keepers keep their power by. But the cop would be Clifton's historian, his judge, his witness, and his executioner, and I was the only brother in the watching crowd. And I, the only witness for the defense, knew neither the extent of his guilt nor the nature of his crime. Where were the historians today? And how would they put it down?

Id.

[159] Nozick's description has captured much attention. It is quoted in Jeremy Waldron, *Redressing Historic Injustice,* 52 U. TORONTO L.J. 135, 144 (2002) and GREGORY S. ALEXANDER, THE LIMITS OF PROPERTY REPARATIONS 5 (Soc. Sci. Research Network, Working Pa-

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Professor Waldron emphasizes the problems entailed in trying to follow Nozick's suggestion that we try to put people back into the position they would have been in without the past injustice. Waldron uses the example of a native tribe whose land was taken wrongfully generations ago. Where would they be now without that taking, he asks? Perhaps they would have sold the land and spent the income from the sale generations ago. Indeed, it is possible they would be in the same position they are in today. The problems with such counterfactual hypotheticals are, even after a few generations, immense. Waldron speaks in elegant terms, but I prefer to think about this as a problem similar to science fiction movies that permit time travel, which end up with mind-bending (and heart-rending) scenarios of "what-might-have-beens."

We can try to unravel what would have been by utilizing typical principles of tracing and causation. Or we can search for alternative measures, such as what helps to best promote the future interests of the group that has been harmed. It may be impossible to know what would have happened to individuals without past injustice—although we can often trace out the harms they have suffered.[160] It *is* possible, however, for a legislature to make judgments about the magnitude of harm and then to take steps to repair that harm. Another alternative, given the complexity of what-might-have-beens in the slavery context, is to think more about community-based repair.[161]

Many reparationists focus on community-based remedies, which draw more upon analogies to structural injunctions and other class action remedies, than upon payments to individuals. Such remedies, which focus on community-building, like health and education funds, could be aimed at entire communities. In those cases, we should consider using tort principles of causation as a means of apportioning moral culpability. Reparations is a moral as much as a legal struggle–and one that requires changing the hearts and minds of Americans. The vanguard may very well come through the courts, but this is a struggle that will succeed by moral persuasion.

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pers Series, 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=404940. *See* Ernest J. Weinrib, *Corrective Justice,* 77 Iowa L. Rev. 403, 412 (1992).

[160] The thing to think about in this context may not be where an individual descended from enslaved people would be without the slavery, but how much harm has that individual suffered? In the former calculus, the question involves complex issues of proof of where someone might have ended up. The later calculus involves only questions of how much one has been disadvantaged.

[161] *See* John Greenleaf Whittier, *Maud Muller, in* The Complete Poetical Works of Whittier 48 (1848) ("For of all sad words of tongue or pen, The saddest are these: 'It might have been!'").

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In the context of Tulsa, we can see problems emerging regarding how to form an argument that grants reparations to individuals, as well as to the larger community. We have already had important reparations in Tulsa—a state truth commission that acknowledged the culpability of the government and then an apology from the state.[162] There are significant questions, unfortunately, about how much these means of redress have helped Tulsa heal itself. As an observer of the riot commission process, I must confess that the riot commission stirred painful emotions. I hope that it has led many in Tulsa to believe that the city cares about recovering the history—and respecting the memory—of all of Tulsa's citizens, not just those who were the "victors" in the Tulsa tragedy.[163] Hopefully such acknowledgment will lead to a greater sense of community and respect for others. Perhaps that greater respect, which is endorsed by the government in the form of the Riot Commission Report and legislation, is the most that one can hope for. It may also be a great victory—for it will likely influence how subsequent generations view themselves and others.

Conclusion

There are two ways of viewing tort law in the debate over reparations for racial crime. First—and most commonly—tort law is a way of providing substantive relief through the courts. In some cases, tort law may actually provide relief: where there are identifiable plaintiffs, people who have sufficient connection to the most immediate victims of slavery or Jim Crow, and identifiable defendants—municipalities, people, or corporations[164] who can be identified and held liable. In some instances, there are compelling justifications for tolling the statute of limitations, and, in those instances, lawsuits may offer some relief to victims.

Tort law also offers, however, a way of framing discussions of moral culpability. We can use analogies to tort law to apportion moral culpability to governmental entities (and the communities they repre-

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[162] *See, e.g.*, Okla. Stat. Ann. tit. 74, § 8000.1 (West 2002) (providing legislative findings about the Tulsa Race Riot). The findings are reprinted as an appendix to this Article. *See* pages 137–38, *infra*.

[163] *Cf.* Ellison, *supra* note 14, at 595.

[164] *See* Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. Third World L.J. 13, 23–24 (2004) (discussing the challenges faced by reparations suits that target corporations); Fran Spielman, *Company Admits Its Ties to Slavery*, Chi. Sun-Times, Nov. 24, 2003, at 9 (discussing the recent disclosure by Lehman Brothers that it purchased a slave in 1854, and that its principals may have owned other slaves as well).

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sent) for their role in slavery and Jim Crow. Perhaps most importantly, tort law offers the possibility of framing connections between past victims and current victims—those who are suffering the harms of slavery and Jim Crow today. Part of the problem with determining the appropriate amount of reparations is gauging the continuing harm that slavery has enacted upon people currently living. In that respect, tort law offers important analogies, which can lead to a greater appreciation of how legislators could choose to remedy the harms of slavery and Jim Crow. The paradox continues, however, that when we are talking about enormous crimes like slavery, our ability to adequately respond diminishes.[165] We are left to struggle to find a way for the future to deny or overcome the past.

Whether reparations legislation is the best way of addressing both the inequality in income and educational opportunities, as well as the despair that plagues the African-American and white communities, whether reparations is the best way—or even an effective way—of achieving racial reconciliation, and whether reparations or some other program is the most effective way of moving towards a more just and humane American society, are issues best left to another day.[166]

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[165] *See* JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 194 (2000).

[166] For further discussion of the conflict over the goals of reparations and the ability of reparationists to meet those goals, see Alfred L. Brophy, *The Cultural Wars over Reparations for Slavery*, 59 DEPAUL L. REV. (forthcoming 2004).

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Appendix

Oklahoma Legislature's Findings on the Tulsa Riot
74 Oklahoma Statutes Annotated § 8000.1

The Oklahoma Legislature hereby finds, pursuant to the final report of The 1921 Tulsa Race Riot Commission regarding the 1921 Tulsa Race Riot of May 31–June 1, 1921, and the riot's place in the history of race relations in Oklahoma:

1. The root causes of the Tulsa Race Riot reside deep in the history of race relations in Oklahoma and Tulsa which included the enactment of Jim Crow laws, acts of racial violence (not the least of which was the 23 lynchings of African-Americans versus only one white from 1911) against African-Americans in Oklahoma, and other actions that had the effect of "putting African-Americans in Oklahoma in their place" and to prove to African-Americans that the forces supportive of segregation possessed the power to "push down, push out, and push under" African-Americans in Oklahoma;

2. Official reports and accounts of the time that viewed the Tulsa Race Riot as a "Negro uprising" were incorrect. Given the history of racial violence against African-Americans in Oklahoma, including numerous lynchings by white mobs, and the breakdown of the rule of law in Tulsa on May 31–June 1, 1921, it is understandable that African-Americans believe they needed to assist Tulsa police in protecting Dick Rowland, an African-American accused of attempting to rape a white woman, against an assembled white mob. The documentation assembled by The 1921 Tulsa Race Riot Commission provides strong evidence that some local municipal and county officials failed to take actions to calm or contain the situation once violence erupted and, in some cases, became participants in the subsequent violence which took place on May 31 and June 1, 1921, and even deputized and armed many whites who were part of a mob that killed, looted, and burned down the Greenwood area;

3. The staggering cost of the Tulsa Race Riot included the deaths of an estimated 100 to 300 persons, the vast majority of whom were African-Americans. It also included the destruction of 1,256 homes, virtually every school, church and business, and a library and hospital in the Greenwood area, and the loss of personal property caused by rampant looting by white rioters. The Tulsa Race Riot Commission estimates that the property costs in the Greenwood district was [sic] approximately $2 million in 1921 dollars or $16,752,600 in 1999 dol-

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lars. Nevertheless, there were no convictions for any of the violent acts against African-Americans or any insurance payments to African-American property owners who lost their homes or personal property as a result of the Tulsa Race Riot. Moreover, local officials attempted to block the rebuilding of the Greenwood community by amending the Tulsa building code to require the use of fire-proof material in rebuilding the area thereby making the costs prohibitively expensive;

4. Perhaps the most repugnant fact regarding the history of the 1921 Tulsa Race Riot is that it was virtually forgotten, with the notable exception of those who witnessed it on both sides, for seventy-five (75) years. This "conspiracy of silence" served the dominant interests of the state during that period which found the riot a "public relations nightmare" that was "best to be forgotten, something to be swept well beneath history's carpet" for a community which attempted to attract new businesses and settlers;

5. The work of many individual Oklahomans and now of The 1921 Tulsa Race Riot Commission has forever ended the "conspiracy of silence" surrounding the events in Tulsa of May 31–June 1, 1921, and their aftermath. The Commission has subsequently turned the responsibility for how the State of Oklahoma will respond to the historical record to the 48th Oklahoma Legislature; and

6. The 48th Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 concurs with the conclusion of The 1921 Tulsa Race Riot Commission that the reason for responding in the manner provided by this act is not primarily based on the present strictly legal culpability of the State of Oklahoma or its citizens. Instead, this response recognizes that there were moral responsibilities at the time of the riot which were ignored and has [sic] been ignored ever since rather than confront the realities of an Oklahoma history of race relations that allowed one race to "put down" another race. Therefore, it is the intention of the Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 to freely acknowledge its moral responsibility on behalf of the state of Oklahoma and its citizens that no race of citizens in Oklahoma has the right or power to subordinate another race today or ever again.

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