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Reconsidering Reparations

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Eric Posner's and Adrian Vermeule's essay, Reparations for Slavery and Other Historic Injustices*, seeks a framework for defining reparations and evaluating reparations claims. It explores a limited set of past reparations, as well as the connections between those asked to pay reparations and past wrongdoers, and the connections between those receiving reparations and those injured in the past. Posner and Vermeule use that framework to evaluate the morality of reparations and the legal problems that arise in implementing reparations proposals.*

This Essay takes up the Posner-Vermeule analysis at several points. It challenges their limited definition of reparations and their limited catalog of reparations in American history. In contrast to Posner and Vermeule, who date the origin of reparations action in the United States to 1946, this Essay presents a series of legislative "reparations" throughout American history. Using that historical evidence and a "legislative model" of reparations, the Essay proposes a relaxation of the relationship between wrongdoer and payer, and injured and recipient. Then it suggests several factors for a legislature to consider in designing reparations for historical injustice. This Essay, thereby, proposes an alternative framework for evaluating the morality and utility of reparations.

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INTRODUCTION

Recently in the pages of the *Columbia Law Review*, two of the nation's most respected legal academics, Eric Posner and Adrian Vermeule, aimed at the important task of filling a chasm in writings on reparations. They proposed a framework for evaluating reparations claims.[1] Given the frequency and volume of reparations talk in the legal academy, it is well past time that we develop a framework for understanding reparations claims.[2] For there are complex decisions to be made before we can answer questions like, who has the best moral claims?[3] Who should pay? What should a reparations scheme look like? Yet each of those questions must be answered before we can have serious, wide-ranging discussions and reparative action.

Posner and Vermeule offer a definition of reparations, then provide some examples of previous reparations claims. They focus on the connections between wrongdoers and those who pay, as well as those who were injured and who receive reparations. They aim to refine the issues surrounding reparations, to explain how to deal with cases where there is loosening of the connections between past wrongdoers and the people who pay reparations, as well as the connections between people who were harmed in the past and present recipients of payments. Their task of bringing additional precision to reparations talk is needed to advance to the next generation of reparations scholarship.[4]

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1. Eric Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

2. *See, e.g.*, WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks ed., 1999); Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2547–51 (2001); Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657 (1999); Alfred L. Brophy, *Losing the Understanding of the Importance of Race*: *Evaluating the Significance of Race and the Utility of Reparations*, 80 TEX. L. REV. 911 (2002) (book review).

3. *See* Obadele v. United States, 52 Fed. Cl. 432, 441–44 (2002).

4. They point out that "the legal and moral analysis of reparations is dramatically under-theorized." Posner & Vermeule, *supra* note 1, at 690; *see also* Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 82–83 (2004) (discussing recent reparations scholarship). Indeed, we desperately need a literature that takes reparations seriously, orders the priority of claims, asks who should pay, who should receive reparations, and what reparations should look like. While there has been much talk of reparations in the context of the Holocaust, lawsuits for Nazi era crimes have been remarkably unsuccessful. *See, e.g.*, Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1146 (7th Cir. 2001). Reparations in those instances have come through negotiation and political pressure, rather than litigation.

We also need an expanded literature on reparations litigation. There is now a series of

However, Posner and Vermeule present an incomplete model of reparations, and thus, make reparations look more problematic than they should.[5] They narrowly define reparations and fail to present the context of reparations history. They present a skewed view of both reparations schemes in history and the connections that we typically find in legislation between those harmed and those who are responsible for paying. That incomplete view affects their analysis, for we are misled into believing that reparations are much more problematic than they are. Moreover, they adopt a "litigation model" of reparations, which focuses on the connections between payers and wrongdoers.[6] So what looks at first blush like a moderate attempt to frame the issues becomes—through narrowly defining reparations, as well as through narrow construction of the connection between wrongdoers and payers—an article that inappropriately undermines reparations claims. Although they speak in terms of moderation and

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decisions dismissing reparations claims. *See* Alexander v. Oklahoma, 382 F.3d 1206 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2257; Cato v. United States, 70 F.3d 1603 (9th Cir. 1995); Hohri v. United States, 847 F.3d 779 (Fed. Cir. 1988); *In re* African-American Slave Descendant Litig., 375 F. Supp. 2d 721 (N.D. Ill. 2005); *In re* African-American Slave Descendant Litig., 304 F. Supp. 2d 1027 (N.D. Ill. 2004). And if reparations litigation is going to advance, there must be serious engagement with the statute of limitations, the most common basis for dismissal. *See* Charles J. Ogletree, *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. REV. 279, 298–307 (2003) (addressing issues such as statute of limitations, sovereign immunity, and formulating remedies); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 491 (1998).

The *Boston University Law Review* has recently published a symposium, which has seriously explored unjust enrichment and presents more serious critiques of the legal and moral problems with reparations. Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. 1135 (2004).

5. Roy L. Brooks has recently provided a critique of Posner and Vermeule. *See* Roy L. Brooks, *Getting Reparations for Slavery Right: A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 272–79 (2004). This essay and Brooks's are complementary, although they differ in significant ways. Brooks focuses on Posner's and Vermeule's emphasis on monetary reparations, which pays insufficient attention to the purposes of reparations. Brooks points out that reparations plans can be much broader than Posner and Vermeule allow. I agree with Professor Brooks's critique and offer this essay as other grounds for reconsidering reparations and for guiding a legislature that is contemplating reparative action.

6. Many scholars have cataloged the problems with a "litigation" model. For example, the standard legal claim requires privity between wrongdoer and defendant. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 373–88 (1987) (discussing problems with American law's liberalism). This standard is often hard to reach in reparations claims. *Id.* That is why all serious reparationists have stated that reparations will come about through legislation. *See, e.g.*, Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 436 (1998) ("It is Congress, and perhaps the legislatures of the former slave states, that must be persuaded to enact reparations."). And that is why they have focused their energy on making the case for legislative reparations, even as they pursue limited litigation-based remedies.

The joint motion to dismiss in In re *African-American Slave Descendant Litigation*, provides the most comprehensive legal response yet to slave reparations lawsuits. *See* Memorandum in Support of Defendants' Joint Motion to Dismiss, *In re* African-American Slave Descendant Litig., 375 F. Supp. 2d 721 (N.D. Ill. 2005) (No. 02-7764), *available at* http://www.aetna.com/legal_issues/suits/reparations.html.

dispassionate analysis,[7] their reasoning runs one way: toward an indictment of reparations.

This Essay discusses the Posner-Vermeule formulation of reparations, then offers an alternative, functional definition of reparations. Reparations are designed to address historic injustices; they include a broad range of programs, such as apologies, truth commissions, civil rights legislation, and payments to communities and individuals. This essay also offers an alternative vision of the moral basis of reparations claims (using a legislative rather than litigation model), as well as a greatly expanded historical catalog of reparations. With that expanded catalog, it proposes a different framework for evaluating reparations claims, which takes account of the many reparations granted throughout American history. It suggests that reparations claims, which relax the connection between wrongdoer and payer, and between victim and beneficiary, are not so morally problematic as Posner and Vermeule suggest. From there, it argues for a legislative model of reparations where there is a close connection between the injured and the beneficiaries and a weak connection between the wrongdoers and the payers. The suggestion is that reparations plans are morally acceptable. Finally, it proposes a series of factors to use in ordering reparation claims, so that the limited resources available are used in the most efficient manner.

I. DEFINING AND REDEFINING REPARATIONS

Posner and Vermeule identify three central features of reparations. First, there is a relaxation of the typical requirements of a private lawsuit of an identified victim against an identified perpetrator.[8] They cite the Civil Liberties Act of 1988, which provided compensation to every then-living Japanese American person interned during World War II, as an example of such a reparations plan.[9] In that case, the victims are identified (even though there was no effort made to link harms they suffered to specified damages), but there is little connection between the payers (i.e., those taxed by the federal government) and the people who interned the victims. Second, reparations plans are advanced on backward-looking reasons (such as remediation or compensation for past injuries), rather than forward-looking reasons (such as "increasing utility, deterring future wrongdoing, or promoting distributive justice").[10] They use this second factor to distinguish reparations claims from social welfare programs, like the New Deal and the Great Society. Finally, reparations only involve cases where money is paid voluntarily—that is, there is no legal compulsion to pay.[11]

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7. Posner & Vermeule, *supra* note 1, at 746–47 ("In this Essay we have been less concerned with attacking or defending particular reparations proposals than with illuminating the relevant ethical, legal, and institutional problems. In this way we hope both to lower the temperature of the reparations debate and to lower the level of abstraction at which the discussion occurs. Many participants in the debate vehemently support or oppose particular proposals; we simply seek to provide an accurate map of the intellectual terrain, one that will prove useful to all concerned.").

8. *Id.* at 691.

9. *Id.* at 691–93 (citing Civil Liberties Act of 1988, 50 U.S.C.A. App. §§ 1989b–1989b-9 (West 1988) (expired 1998)).

10. *Id.* at 692.

11. *Id.* at 692–93.

Defined in that way, Posner and Vermeule suggest that such reparations schemes are "morally intriguing" yet also potentially "morally incoherent." "At least, it often renders academic discussions of reparations prime facie incoherent."[12] As an example of what they maintain is an incoherent—or at least puzzling—combination of views, they ask why some reparations advocates urge that reparations only be paid to the victims (and not non-victim members of the victims' group), while permitting reparations payments to be extracted from taxpayers (the majority of whom are innocent of any wrongdoing).[13] That is a commonly asked question among reparations opponents. Posner and Vermeule expand on the moral problems with such a scheme.

A. The Posner-Vermeule Account of Reparations: Reparations Definitions and Examples

Before they turn to moral issues, Posner and Vermeule provide a sampling of reparations cases. This is one of the most puzzling parts of their article. It is historically incomplete, for—leaving aside their treatment of reparations outside of the United States (an enormously difficult subject that must include, for example, South Africa's Truth and Reconciliation Commission)—they do not acknowledge that reparations have been made for generations.[14] Table 1 reproduces their admittedly selective list of reparations schemes in the United States. Although this is not apparent from their table heading, "Major Reparations Programs,"[15] the table includes both proposed and enacted reparations. They believe that the earliest program in the United States is the Indian Claims Commission, which Congress passed "in 1946 in order to redress a wide range of claims pressed by Indian tribes, including violations of treaties for which a judicial remedy was denied, and the loss of lands under treaties signed under duress."[16] Labeling reparations as something that began only in 1946 misleads us into thinking that reparations are rarer—and more problematic—than they are.

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12. *Id*. at 693.

13. *Id*.

14. Posner and Vermeule list six programs enacted by countries other than the United States. *Id.* at 697. Surprisingly, given the amount of literature focused on the South African Truth and Reconciliation Commission, they do not mention it. *See, e.g.*, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).

15. Posner & Vermeule, *supra* note 1, at 696 tbl.1.

16. *Id.* at 695.

Table 1. Posner-Vermeule's selective list of reparations programs enacted and proposed

Program	Year(s)	Payer	Recipient	Payment	Total cost	Cause
Indian claims	1946	U.S.	Indian tribes	Various	~$800 million	Land taken by force or deception
Japanese internment	1988	U.S.	Internees	$20,000	~$1.65 billion	Internment of Japanese Americans during World War II
Radiation exposure	1990	U.S.	People exposed to radiation	$50,000–$100,000	~$117 million	Exposure to radiation from nuclear tests or mining
Hawaiian annexation	1993	U.S.	Descendants of native Hawaiian groups	(apology)	$0	Loss of lands after annexation in 1897
Rosewood	1994	Florida	Survivors, descendants	$375–$150,000	$2.1 million	Murder and destruction of black town in 1923
Syphilis experiments	1997	U.S.	Victims of experiments	$5000–$37,500	~$9 million	Denied treatment for syphilis without telling victims, 1932–1972
Mexican American land titles	1997–98	U.S.	Descendants of property owners	(investigation of claims)	$0	Failure to recognize Mexican or Spanish land titles under 1848 treaty

Source: Posner & Vermeule, *supra* note 1, at 696 tbl.1.

NOTE: Citations to each program are available in Posner & Vermeule, *supra* note 1, at 696 n.21.

B. Expanding the Understanding of Reparations in American History

In fact, reparations are much more common than Posner and Vermeule suggest. This Part first explores the many cases of reparations that legislatures have granted in American history, which Posner and Vermeule ignore. Even under the narrow Posner-Vermeule definition of reparations, there have been dozens, perhaps hundreds, of reparations schemes, and those plans stretch back to the earliest period of American history. Quite simply, it is wrong to date the origins of reparations to 1946.

Moreover, there are other ways of conceptualizing reparations. There is no need to limit them to backward-looking programs only. An alternative definition of reparations—which tracks the definition of most people who write in the area—is that they are efforts to address historic injustices. They may include apologies, truth commissions, civil rights legislation, community development programs, and payments to individuals. The next Part presents a dramatically expanded vision of reparations and uses a more common definition: reparations are programs designed to repair past

injustice, but that need not focus on the exact amount of harm or repair the exact nature of that harm.

1. Missed Examples of Reparations Under the Posner-Vermeule Definition

Stretching back to the early eighteenth century, American legislatures have paid reparations. One prominent example is the payments to the families of women executed as witches in Salem by the Massachusetts government in 1692.[17] Those families received money from the state treasury; there is little connection between the people who falsely accused the witches (or participated in the shameful detention and trials) and the payers. The payments were seen as compensation for past injuries (however one distinguishes that from something forward-looking). A court did not compel the payments.[18] However, one should not think that those early reparations schemes were limited to cases where there was some connection between the government's wrongdoing and the harm imposed on victims. In the aftermath of the American Revolution, many soldiers received compensation for losses suffered in the war. And part of the treaty settling the war ensured that loyalist merchants would have their debts paid.[19] The pensions given to Revolutionary War veterans fit within the Posner-Vermeule reparations scheme, as, one supposes, did the huge pension program that developed in the wake of the Civil War.[20]

Throughout the nineteenth century, we hear of private bills, which fit within the Posner-Vermeule formulation, that provided compensation (i.e., reparations) to people who had been injured. One important example from early American history involves slaves who were guilty of crimes. When the slaves were punished with imprisonment or death, their owners lost the use of the slaves, at least temporarily, and frequently permanently. Legislatures often compensated owners, even though that was not required.[21] Antebellum Americans recognized the value of property rights and sought

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17. *See* PETER C. HOFFER, THE DEVIL'S DISCIPLES: MAKERS OF THE SALEM WITCHCRAFT TRIALS 179–98 (1996).

18. *Id.*

19. *See, e.g.*, Ware v. Hylton, 3 U.S. 199 (1796). As Christine Desan has shown, there was an alternative world of legislative adjudication that existed in early America. *See* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1384 (1998). Professor Desan's recovery of an alternative history of legislative adjudication provides an important basis for understanding reparations programs as a natural outgrowth of a long-standing commitment in Anglo-American legal thought to provide an alternative locus for pleading one's case for relief. We frequently forget that forum.

20. *See* THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992); Norman Stein, *Civil War Pensions*, *in* 1 MAJOR ACTS OF CONGRESS 121 (Brian Landsberg, ed. 2004). The pensions were paid by people who did not commit the harm, they were at least partially backward-looking, and the money was paid voluntarily.

21. *See* United States v. Amy, 24 F. Cas. 792 (Taney, Circuit Justice, C.C.D. Va. 1859) (No. 14,445) (denying owner's claim that imprisonment of his slave, Amy, without compensation to him was an unconstitutional deprivation of property); PHILIP SCHWARZ, TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAW OF VIRGINIA, 1705–1865 (1988). *Amy* is of central importance in understanding antebellum property rights. Chief Justice Taney upheld the United

to spread risks of loss of property among the entire community, thus testifying to the dual nature of property: it was something that was respected and protected from state interference and something that the state actively sought to promote and protect.[22]

Many of those private bills involve mob injuries. One of the most famous cases of mob injury never received compensation. In a preplanned attack, Nativists in Boston attacked and burned the Charlestown Convent in 1838. For ten years, members of the Massachusetts legislature urged compensation for the Convent, without success. The opposition was based in part on religious hatred.[23]

In other instances of mob violence, however, there were payments. Indeed, beginning in the 1830s, many state legislatures enacted general mob liability acts, which gave victims of violence a cause of action.[24] Throughout the late nineteenth century into the mid-twentieth century mob victims frequently received compensation.[25]

Sometimes courts read the legislation to impose a requirement of culpability.[26] Such legislation led in later years to acts that provided a general cause of action for mob victims against the municipalities where mob violence occurred.[27] The Illinois mob

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States government's right to punish Amy without compensating her owner. *Amy* presented a clash between property rights and state power; in that instance, the state's power prevailed. And frequently legislatures relieved owners from bearing the loss by themselves.

22. A series of recent studies of the history of property in the nineteenth century suggests two approaches to property: both a respect for rights of property and a recognition of public interest in its regulation. *See* GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 1–4 (1997); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 16–17 (1996); DANIEL W. HAMILTON, THE LIMITS OF SOVEREIGNTY: LEGISLATIVE PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY (forthcoming Fall 2006); Alfred L. Brophy, The Intersection of Slavery and Property in Southern Legal Thought: From Missouri Compromise through Civil War (June 2001) (unpublished Ph.D. dissertation, Harvard University) (on file with the *Indiana Law Journal*).

23. Ray Allen Billington, *The Burning of the Charlestown Convent*, 10 NEW ENG. Q. 4, 4 (1937) (legislature refused compensation, employing arguments similar to those involving reparations for slavery). Theodore Hammett's brilliant article in the *Journal of American History* delves into the meaning of the fight over compensation and reveals the fears over the breakdown of the rule of law that the riot represented. Theodore M. Hammett, *Two Mobs of Jacksonian Boston: Ideology and Interests*, 62 J. AM. HIST. 846 (1976). Hammett recovers an important strain in the American mind of the search for the rule of law. That strain drew upon the belief that riots represent a collective breakdown of the rule of law, which is best repaired when there is compensation to the victims from the entire community that owes the duty of protection to each of its members. For further discussion of Jacksonian mobs, see Thomas Grimstead, *Rioting in Its Jacksonian Setting*, 77 AM. HIST. REV. 361 (1972).

24. *See, e.g.*, Commissioners of Kensington County v. Philadelphia, 13 Pa. 76 (1850) (permitting recovery under Pennsylvania mob-destruction statute). *See also Municipal Liability for Property Damage under Mob Violence Statutes*, 26 A.L.R.3d 1198 (1969) (summarizing cases from nineteenth and twentieth centuries).

25. *See* Susan S. Kuo, *Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence*, 79 IND. L.J. 177, 181–82 (2004).

26. *See* Duffy v. City of Baltimore, 7 F. Cas. 1169, 1171 (Taney, Circuit Justice, C.C.D. Md. 1852) (No. 4118) (reading Maryland act that imposed liability on a governmental unit for damage done by riot to impose a negligence standard; Baltimore authorities were not liable unless they had knowledge of danger and could have prevented the damage).

27. *See, e.g.*, Act to Suppress Mob Violence, ILL. HURD REV. STAT. ch. 38, § 256a (1915–

violence statute led to an early opinion on strict liability, which upheld the statute over a dissent by Justice Holmes.[28] Should such legislation be considered reparations? It meets two of the three requirements; and would meet the third—that there was no legal right—until the legislature created that right.

There are important programs, which Posner and Vermeule left out of their table, such as the Alaska Native Claims Settlement Act,[29] which provided nearly one billion dollars to native Alaskan tribes to compensate them for land. Then there are other programs, which might reasonably be considered reparations, such as the Native American Graves Protection and Repatriation Act.[30] That act required organizations receiving federal funding to return property once held by native tribes. It required repatriation of personal property, similar to the mandatory return of art stolen during the Holocaust. Table 2 represents a very eclectic, alternative version of what reparations legislation looks like.

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28. *See* City of Chicago v. Sturges, 222 U.S. 323 (1908) (upholding constitutionality of Illinois statute imposing liability on cities for three-quarters value of mob damage, regardless of fault); Barnes v. City of Chicago, 323 Ill. 203 (1926) (interpreting same statute and concluding that police officer was not "lynched"); Arnold v. City of Centralia, 197 Ill. App. 73 (1915) (imposing liability without negligence under § 256a, on city that failed to protect citizens against mob); Wells Fargo & Co. v. Mayor of Jersey City, 207 F. 871 (D.N.J. 1913), *aff'd*, 219 F. 699 (3d Cir. 1915); Dale County v. Gunter, 46 Ala. 118 (1871) (interpreting 1868 act that made countries liable for any person murdered by "outlaw"); Moore v. City of Wichita, 189 P. 372 (Kan. 1920); Easter v. City of El Dorado, 177 P. 538 (Kan. 1919) (construing KAN. GEN. STAT. § 3822 (1915) broadly to provide cause of action against city when mob that assembled in city caused damage outside the city); Yalenezian v. City of Boston, 131 N.E. 220 (Mass. 1921) (MASS. REV. LAWS ch. 211, § 8); Butte Miners Union v. City of Butte, 194 P. 149 (Mont. 1920) (applying Montana's act); St. Michael's Church v. Philadelphia County, 7 Pa.L.J. 181 (1847); Cantey v. Clarendon County, 85 S.E. 228 (S.C. 1915) (interpreting South Carolina statute providing for liability for failure to protect from lynching). Other cases are collected in the *Centennial Digest*'s entry for Counties, section 213. *See generally* Russell Glazer, Comment, *The Sherman Amendment: Congressional Rejection of Communal Liability for Civil Rights Violations*, 39 UCLA L. REV. 1371 (1992) (discussing the effect of community culpability on civil rights and constitutional doctrine); Jed Handelsman Shugerman, Note, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of* Fletcher v. Rylands *in the Gilded Age*, 110 YALE L.J. 333 (2000) (discussing the effect of community culpability on civil rights and constitutional doctrine); Note, *Municipal Tort Liability: Statutory Liability of Municipalities for Damage Caused by Mobs and Riots*, 50 CORNELL L.Q. 699 (1965) (discussing a New York City municipal law provision allowing recovery against the city for property lost or damaged in a mob or riot).

29. 43 U.S.C. §§ 1601–1629 (2000).

30. 25 U.S.C. § 3005 (2000).

Table 2. Expanded list of reparations programs & proposals

Program	Year(s)	Maker of reparations	Recipient	Payment	Total cost	Cause
Salem witchcraft trials	1725	Massachusetts legislature	Families of victims	£ 20	Unknown	Unjust prosecution of suspected witches[31]
Charleston Convent	1834	Massachusetts legislature	Convent & Catholic church	$0 (proposed)	$0	Mob destruction of Catholic convent[32]
Compensation to D.C. slaveowners	1864	U.S. Congress	Loyal slaveholders	$3,000 per person	<$.5 million	Emancipation Proclamation
Freedman's Bureau Act	1865	U.S. Congress	Freed slaves		Unknown	Reconstruction
Anti-Ku Klux Klan Act	1871	U.S. Congress	U.S. citizens	Investigation and Act that permitted lawsuits	Unknown	Quasi-governmental actors who deprived citizens of constitutional rights[33]
Illinois Anti-Mob Violence Law	1887–1919	Illinois legislature & Illinois municipalities	Riot victims and their families	Up to $5,000 per family member	~$.5 million	Municipalities failed to protect against violence[34]
Dyer Anti-Lynching Bill	1919–22	U.S. Congress	Families of lynching victims	$10,000 per lynching (proposed)	$0	Rampant lynchings[35]
Kerner Commission	1968	U.S. President		(investigation)	$0	Investigation of urban violence[36]
Alaska Native Claims Settlement Act	1971	U.S. Congress	Native American tribes	Payments to tribes	$962.5 million and 40 million acres of land	Settlement of native claims to Alaska[37]

31. HOFFER, *supra* note 17, at 8.

32. Theodore M. Hammett, *Two Mobs of Jacksonian Boston: Ideology and Interest*, 62 J. AM. HIST. 845, 856 (1976).

33. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13; George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 940–41 (2003); *see also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 454–59 (1988).

34. An Act to Suppress Mob Violence, ILL REV. STAT. ch. 38 ¶¶ 512–17 (1905) (repealed 1962); An Act to Indemnify the Owners of Property for Damages Occasioned by Mobs and Riots, ILL REV. STAT. ch. 38 ¶¶ 518–24 (1887) (repealed 1962); Slanton v. City of Chicago, 130 N.E. 2d 205 (Ill. App. 1955) (payments made to victims of East St. Louis Riot of 1917 and Chicago Riot of 1919); *see also* ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921, at 108 (2002).

35. *See* BROPHY, *supra* note 34, at 108.

36. THE KERNER REPORT, REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS (1968).

37. 43 U.S.C. §§ 1601–1629 (2000); Gail Osherenko, *Indigenous Rights in Russia: Is Title to Land Essential for Cultural Survival?*, 13 GEO. INT'L ENVTL. L. REV. 695, 696 (2001); John F. Walsh, *Settling the Alaska Native Claims Settlement Act*, 38 STAN. L. REV. 227 (1985).

Civil Liberties Act of 1988	1988	U.S. Congress	Internees	$20,000	~$1.65 billion	Internment of Japanese Americans during World War II[38]
Reparations study proposal	1989–date	U.S. Congress	Descendants of slaves	(proposed investigation)	$0	Proposal to study slavery and reparations[39]
Native American Graves Reparation Act	1993	U.S. Congress	Native American tribes	Various	Unknown	Return of tribal property held by government-funded institutions[40]
Apology for sins of racism	1995	Southern Baptist Convention		Apology	$0	Southern Baptist Convention's historical corrections to slavery[41]
Tulsa Riot of 1921	1998–2003	City of Tulsa & State of Oklahoma	Survivors of riot	Recommended payment of $20,000 & up	None, but recommended payment of $2 million & up	Destruction of black community by deputized mob[42]
Apology for slavery	1998 & 2003	Presidents Clinton and Bush	Descendants of slaves	Contemplated (apology)	$0	Trans-Atlantic slave trade[43]
Lawsuit for denial of loans to black farmers	1999	Federal government	Farmers denied credit, 1981–96	(lawsuit)		Violation of Equal Credit Opportunity Act [44]
Disclosure of insurance for slaves	2000–02	California legislature & insurance companies	Descendants of slaves	(disclosure)		Disclosure of details of insurance policies on slaves' lives[45]

38. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).

39. H.R. 3745, 101st Cong. (1989).

40. 25 U.S.C. § 3005 (2000).

41. John Blake, *An Unfulfilled Promise?*, ATLANTA J.-CONST., June 14, 2003, at B1; Gustav Niebuhr, *Baptist Group Voters to Repent Stand on Slaves*, N.Y. TIMES, June 21, 1995, at A1.

42. Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131 (N.D. Okla. Mar. 19, 2004), *aff'd*, 2004 U.S. App. LEXIS 18957 (10th Cir. Sept. 8, 2004); BROPHY, *supra* note 34.

43. John F. Harris, *Coming Out of Africa*, WASH. POST, Apr. 3, 1998, at A1; Richard W. Stevenson, *Bush, in Africa, Promises Aid but Offers No Troops for Liberia*, N.Y. TIMES, July 8, 2003, at A8. Neither President Clinton nor President Bush apologized, but both publicly acknowledged the harm of slavery.

44. Pigford v. Glickman, 185 F.R.D. 82, 85 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000); Ogletree, *supra* note 4, at 302–03.

45. CAL. CODE REGS. tit. 10, §§ 2392–2398 (2004).

Apology for slavery advertising	2001	*Hartford Courant*	Descendants of slaves	Apology	$0	*Courant*'s advertising for runaway slaves[46]
Disclosure of companies' complicity with slavery	2002–04	Chicago City Council, Los Angeles City Council, Detroit City Council	Descendants of slaves	(disclosure)		Disclosure of companies' complicity in slavery[47]
Apology for use of slave labor	2004	University of Alabama	Descendants of slaves	Apology	$0	University's ownership of slaves and abuse of slaves by faculty members[48]
University benefit from slave labor	2004	Brown University		Study		Study of University's complicity and benefit[49]
Apology and scholarship for bank's culpability in slavery	2005	J.P. Morgan Chase	African-American students in Louisiana	Various	$5 million	Bank's apology for using slaves as collateral[50]

46. Matthew Kaufman, *The Debt—The Cost of Slavery Was High. But Who Will Pay for It?*, HARTFORD COURANT, Sept. 29, 2002, at A1; Jesse Leavenworth & Kevin Canfield, *Courant Complicity in an Old Wrong*, HARTFORD COURANT, July 4, 2000, at A1; Paul Zielbauer, *A Newspaper Apologizes for Slave-Era Ads*, N.Y. TIMES, July 6, 2000, at B1.

47. Slavery Era Business/Corporate Insurance Disclosure Ordinance, CHI., ILL. MUN. CODE § 2-92-585 (2002); John M. Broder, *The Business of Slavery and Penitence*, N.Y. TIMES, May 25, 2003, § 4, at 4 (mentioning Los Angeles and Chicago City Councils' action to require disclosure of companies' culpability in slavery); Marisol Bello & Ben Schmitt, *Detroit, County Ponder Slavery Disclosure Law*, DETROIT FREE PRESS, May 6, 2004, at A1. The Chicago Ordinance has produced disclosure by Lehman Brothers, J.P. Morgan Chase, and Bank One. *See, e.g.*, Fran Spielman, *Bank One 'Probably' Dealt with Slave Business*, CHICAGO SUN-TIMES, June 24, 2004, at 23; Fran Spielman, *Company Admits Its Ties to Slavery—Lehman Brothers News Gives Spark to Reparations Drive*, CHICAGO SUN-TIMES, Nov. 24, 2003, at 9.

48. *See, e.g.*, Jay Reeves, *University of Alabama Apologizes for Slavery*, CHI. TRIB., Apr. 21, 2004, at 21.

49. Pam Belluck, *Brown U. to Examine Debt to Slave Trade*, N.Y.TIMES, Mar. 13, 2004, at A10; Ruth J. Simmons, *Facing Up to Our Ties to Slavery*, BOSTON GLOBE, Apr. 28, 2004, at A13.

50. *See J.P. Morgan Discloses Past Links to Slavery*, WASH. POST, Jan. 21, 2005, at E02. The J.P. Morgan apology is available at: http://www2.bankone.com/presents/home/.

Thus, there have been many more reparations programs that fit within the narrow Posner-Vermeule definition than they discussed. Indeed, reparations are common in American history and predate the United States government. This is a critical, though rarely discussed, piece of the reparations debate: we have been granting reparations for generations and they are programs with which legislatures are familiar. When we begin to talk about large-scale programs, designed to repair the lives of African Americans, however, they become substantially more controversial.

2. An Expanded Reparations Definition and Historical Examples

There is another, equally important part of the story. There are other programs that Posner and Vermeule should have classified as reparations that they excluded from their narrow definition. Posner and Vermeule only classify programs as reparations if they are backward-looking. Yet, most reparationists define reparations more broadly.[51] They define reparations as programs designed to make life better, searching for a way, as Ralph Ellison wrote in his posthumously published book *Juneteenth*, for "the future [to] deny the Past."[52] Reparations are commonly defined as programs designed to repair for past injustice, without necessarily fitting the program to the exact amount or nature of the harm.

The forward-looking/backward-looking distinction that Posner and Vermeule employ provides a bright line distinction. But that bright line may hinder analysis of the issues at stake. Every policy is, of necessity, going to be both backward and forward looking in certain ways. Straightforward compensation schemes are both backward and forward looking, for they provide compensation for past injuries, but the payment is not necessarily closely tied to harm. Moreover, the backward/forward distinction that Posner and Vermeule seek to draw confines the definition of reparations too greatly. Most serious reparations scholarship is premised in large part, though not exclusively, on the idea that by repairing past harm, our country can build something better for the future. Reparations are justified because past harm is causing current inequality.

Robert Westley, for instance, promoted reparations that helped build institutions for the injured community.[53] He rests his case for reparations on economic inequalities that

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51. It is suggestive of their approach that Posner and Vermeule cite no scholarship when they define reparations. *See* Posner & Vermeule, *supra* note 1, at 691–92.

52. RALPH ELLISON, JUNETEENTH 19 (1999); *see also* Charles J. Ogletree, *Reparations for the Children of Slaves: Litigating the Issues*, 33 U. MEM. L. REV. 245, 261 (2003) ("We can only solve these problems if reparations money, and substantial amounts of it, are used at the local level to address issues of health care, education, and housing.").

53. *See, e.g.*, Westley, *supra* note 6, at 437 ("[R]eparations present an opportunity for institution-building that is badly needed, and should not be squandered in the consumer market."); *id.* at 468 ("[B]eyond 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 the possibility created by group reparations."). Professor Westley, like many other reparationists, justifies reparations as part of a program aimed at correcting past injustice. However, it is difficult, if not impossible, to separate out the claim for a better future from the correction of past injustice. In the view of reparationists, that past injustice is the cause of the present injustice.

he says are traceable to "legally enforced exploitation of Blacks and socially widespread anti-Black racism."[54] Westley premises reparations on past harm that was not corrected and professes that reparations would not be appropriate but for continuing harm:

> There is no need to recount here the horrors of slavery. Suffice to say that, if the land redistribution program pursued by Congress during Reconstruction had not been undermined by President Johnson, if Congress'[s] enactments on behalf of political and social equality for Blacks had not been undermined by the courts, if the Republicans had not sacrificed the goal of social justice on the altar of political compromise, and Southern whites had not drowned Black hope in a sea of desire for racial superiority, then talk of reparations—or genocide—at this point in history might be obtuse, if not perverse.[55]

Other leading works of the reparations movement similarly see reparations as premised on both backward-looking goals, like corrective justice, as well as forward-looking goals, like distributive justice and the reconstruction of American society.[56] The most optimistic (many people would say unrealistic) assessment of reparations appears in the *Harvard Law Review* Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*.[57] It recognizes that reparations will happen primarily through legislative means. It also, optimistically, predicts a remaking of American society through a gradual, political process of accommodating the national conscience to reparations: first, through study of the effects of slavery and Jim Crow, then through exploration of remedies, which emphasize issues of justice and economics, rather than race.[58] For many reparationists, the focus is upon past harm as a way of arguing for reparations. It is a form of advocacy, which seeks to point out the multiple ways that past racial crimes decisions by the government have affected people in the present. A case for social welfare spending can be made at least in part by pointing out ways that past discrimination has led to current harm. Yet, the case is also centrally concerned with improving lives into the future.

Indeed, looking forward is the primary way that reparations can hold out the promise of repairing past harm. It is trite to observe that we cannot bring back the lives lost under slavery or undo the generations of psychological harm. All that is possible is building something better in the future—and that is an important part of most

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54. *Id.* at 438.

55. *Id.* at 464.

56. *See, e.g.*, Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959 (2000); Matsuda, *supra* note 6; Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659 (2003).

57. 115 HARV. L. REV. 1689, 1693 (2002) ("[B]efore achieving victory in a court of law, African-American reparations must succeed in the court of public opinion.").

58. *Id.* at 1706 ("Incrementalism that focuses first on the creation of a commission to investigate the wrong will provide politicians and reparationists with the opportunity to lay the evidentiary groundwork necessary to educate the public regarding the effects, past and present, of slavery and Jim Crow—creating a strong moral and economic claim for reparations in the second phrase.").

reparations plans. Indeed, looked at in that way, reparations fit neatly with corrective justice theory.[59] The Posner and Vermeule restriction of reparations to only programs that are exclusively backward-looking is fraught with political meaning, because reparations are frequently attacked on the basis that they are backward-looking and divisive.[60] If we accept a definition of reparations as exclusively backward-looking programs, then we exaggerate the divisive nature of reparations.

Reparations talk, it is true, is concerned with the present effects of past actions; yet, reparations talk is fully invested in repairing the past by building a better future. Even many reparations skeptics recognize as much when they define the Great Society's wealth-transfer programs as reparations.[61] Phrased another way, the Posner and Vermeule definition counters how many writers define reparations, including those who oppose reparations. That is, those who talk about reparations construe them more broadly, as programs designed to address historic injustices, even if not specifically backward-looking.

For instance, University of California, Berkeley linguistics professor John McWhorter, writing in *The New Republic* in 2001, thought that reparations had already been paid in the form of the Great Society:

> [F]or almost forty years America has been granting blacks what any outside observer would rightly call reparations. . . . For surely one result of that new climate of the 1960s—of the official recognition that America owed its black citizens some sort of restitution—was a huge and historic expansion of welfare.[62]

Similarly, David Horowitz, perhaps the single most prominent reparations opponent in the country right now, explains, "nearly forty years ago the American government set out on exactly the path of repairing the wrong of slavery and its legacies, an effort that . . . the reparationists stubbornly deny was ever attempted."[63] And while even these reparations opponents contend that the government has already paid reparations, Posner and Vermeule have defined out of the reparations world the most important reparations program ever undertaken—the Great Society.[64] For many reparationists,

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59. *See* Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 685, 694–709 (2004); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992); Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES L. 1 (2000).

60. *See, e.g.*, DAVID HOROWITZ, UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY 14 (2002) ("To focus the social passions of African-Americans on what some other Americans may have done to their ancestors 50 or 150 years ago is to burden them with a crippling sense of victimhood.").

61. *See, e.g.*, *id.* at 109, 124 (referring to billions of dollars of social welfare programs); Stephen Kershnar, *The Inheritance-Based Claim to Reparations*, 8 LEGAL THEORY 244, 262 (2002).

62. John McWhorter, *Against Reparations*, NEW REPUBLIC, July 23, 2001, at 32, 36–37.

63. HOROWITZ, *supra* note 60, at 123. Horowitz quotes President Lyndon Johnson's speech at Howard University that initiated the Great Society, what Johnson referred to as "the next and the more profound stage of the battle for civil rights. . . . So it is the glorious opportunity of this generation to end the one huge wrong of the American Nation." *Id.*

64. Posner & Vermeule, *supra* note 1, at 692; *see* Mary F. Berry, *Reparations for Freedmen, 1890–1916: Fraudulent Practices or Justice Deferred?*, 57 J. NEGRO HIST. 219

the focus is upon past harm as a way of arguing for future payments. Among others, there may be little interest in reconciliation or other forward-looking goals.[65] But those voices do not represent the mainstream of reparations writing by law professors.

The Civil War and Reconstruction eras provide some other examples of how the backward-looking definition skews Posner's and Vermeule's analysis of reparations. They treat the Reconstruction-era reparations programs in cursory fashion and mention only one by name: General Sherman's Field Order 15,[66] which provided for newly freed slaves to receive forty acres. There was also congressional action designed to assist the newly free slaves, like the Freedman's Bureau Act of 1866. The limited attention to Reconstruction-era reparations is surprising, because it has become commonplace in reparations literature to claim that there were promises made to former slaves to pay reparations.[67] The Reconstruction era is an important context for thinking about reparations in American history. Yet, Posner and Vermeule exclude the Reconstruction-era acts from their definition of reparations, because the most common justification for those acts was "the forward-looking idea, grounded in republican principles of 'free soil and free labor,' that the development of a politically independent class of small, civically engaged stakeholders required that former slaves be given sufficient land for farming."[68] Leaving aside for a moment that there was much more than the Republican Party's pre-war slogan of "free soil, free labor, free men" at stake in the Reconstruction Congress's political philosophy,[69] it is an error to exclude programs from consideration as reparations when they are designed to improve life in the future.

Sherman's Order 15 is well-known in reparations literature, but substantially less important from a historical perspective than the Freedman's Bureau Act.[70] While that order was subsequently repealed and leases provided for under the first Freedman's Bureau Act were not renewed, those actions represented limited reparations. The leading historians of the Reconstruction Congress all agree that the Freedman's Bureau was premised on the idea that repair of past harm would make the freed slaves better citizens. It was a vision of repairing past harm to build a better future.[71]

(1972).

65. *See, e.g.*, Lee A. Harris, *Political Autonomy as a Form of Reparations to African Americans*, 29 S.U. L. REV. 25 (2001); Lee A. Harris, *"Reparations" as a Dirty Word: The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409 (2003).

66. The Order is conveniently reprinted in SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS 321–33 (Raymond A. Winbush ed., 2003).

67. *See, e.g.*, RANDALL ROBINSON, THE DEBT: WHAT WHITE AMERICA OWES BLACK AMERICA (2000); Ogletree, *supra* note 52, at 248–49.

68. Posner & Vermeule, *supra* note 1, at 733–34.

69. The idea of republicanism, with its attraction to farming, had changed dramatically by the post-war era. It sought to give every person the means for independence and included education as a part of that plan. *See generally* CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW & POLITICS, 1839–1865 (2001); HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, & POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901 (2001).

70. Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457, 458–59 (2003); Milner S. Ball, *Reparations and Repentance: A Response to Professor Cook*, 68 GEO. WASH. L. REV. 1015 (2000); Phyliss Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER L.J. 45, 57 (1998).

71. *See* FONER, *supra* note 33, at 130–35; PEYTON MCCRARY, ABRAHAM LINCOLN &

Although Posner and Vermeule do not mention the Freedman's Bureau Act, one suspects that their analysis of it would be substantially the same as for Sherman's Order 15: that the Act was forward-looking rather than reparative.[72] Posner and Vermeule are certainly correct that Congress's resistance to ideas about redistribution of property crushed more radical plans of redistribution of Southern wealth.[73] One thing that the Reconstruction demonstrates with great clarity is the power of property and the opposition to its redistribution. Reasonable minds differ, it seems to me, on whether the Freedman's Bureau can be counted as reparations.[74] But even if we do not consider the moderate Freedman's Bureau Act as reparations, there is one Civil War Act that seems to fit the Posner-Vermeule definition of reparations: the District of Columbia's Emancipation Act,[75] for when Lincoln emancipated slaves in the District of Columbia he provided compensation to their owners. Thus, we can speak about reparations for slavery in the Civil War—to the slaveholders who lost their property in slaves during the war.[76] That act fits the Posner-Vermeule three-part definition. Compensation paid by the U.S. taxpayers reduced the link between payer and beneficiary; it was designed to compensate for past harm; and the law probably did not require it.

RECONSTRUCTION (1978).

72. Posner & Vermeule, *supra* note 1, at 733–34.

73. ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF CIVIL WAR 128 (1980); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 392, 398 (1979); Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987).

74. Robert Westley joins Posner and Vermeule in denying that Reconstruction Acts constituted reparations. *See* Westley, *supra* note 6, at 462 ("The purpose of the land redistribution plan, as with many of the programs instituted during Reconstruction, was not only to punish the Confederates, but to create among the freedmen a landowning yeomanry, to indebt the freedmen politically to the Republicans, and to ensure the future economic independence of the freedmen. The purpose of land redistribution, however, was *not* by any means to pay reparations to Blacks for their loss of freedom and uncompensated labor."). I believe that programs designed to assist the newly freed slaves in achieving economic independence ought to be considered reparative regardless of the intent behind them. But both Westley and Posner-Vermeule focus on the efforts to distinguish programs aimed at promoting future growth from those that aim at repairing past harm. One could make the backward-forward distinction to the extent that one measures reparations by past harm and other plans based on current need. But because the goal is the same—and there are often appeals to both corrective justice and forward progress—I think it is proper to define as reparations programs that repair for past harm, even if there is no linking of specific remedy to specific harm. To require some kind of more specific linkage would convert reparations back into something like the first-lawsuit model that Posner-Vermeule have rejected.

The question becomes, can we define a program as reparations if it is not closely connected to past harm? That is a problem in defining the connection between injury and benefit.

75. District of Columbia Emancipation Act, ch. 54, § 1, 12 Stat. 376 (1862) (providing compensation to loyal Union slaveholders of up to $300 for each slave).

76. They might argue that the compensation was done in the shadow of legal compulsion. *See, e.g.*, Corbin v. Marsh, 63 Ky. (2 Duv.) 193 (1865) (arguing that the emancipation statute was unconstitutional); Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865–1910*, 70 CHI.-KENT L. REV. 439 (1994) (arguing that courts gave too much protection to slave masters' property interests and that this ideology continued after Civil War). But that argument is unlikely to be persuasive.

The previous Parts point out two key problems with the Posner and Vermeule understanding of reparations history. First, they have missed many legislative programs designed to repair past harm, which have taken place throughout American history. Second, they have narrowly defined reparations, excluding programs like the Great Society, and thus have left us again with the sense that reparations are rarer than they have been. Those two problems are then magnified when Posner and Vermeule turn to the ethical theories surrounding reparations. For once we are left thinking that reparations have been granted only rarely, we are more likely to view them quite skeptically. Posner and Vermeule then turn to an analysis that suggests that reparations are problematic as the connections between wrongdoers and payers, and injured and beneficiaries, are weakened. But if we think that reparations have been granted only rarely in the past, then we are likely to overlook the common practice of legislatures to allow a weakening of the connections between wrongdoers and payers. The following Part addresses their analysis.

C. Ethical Theories of Reparations

After exploring historical examples of reparations, Posner and Vermeule address the moral claims for reparations. They isolate three problems: the basis for asserting a reparations claim; the connections between those harmed and those benefited; and the connections between those who commit wrongs and those who pay reparations.

There are two bases for asserting a reparations claim. First is a claim for compensation for past harm, which is akin to a tort claim for past harm. Here we want evidence of how much harm the past injustice caused. The second basis is unjust enrichment.

1. Connecting Wrongdoers to Payers

Each of the reparations schemes that Posner and Vermeule discuss, as well as those listed in table 2, identify the victim group with specificity, but allow only a loose connection between the payers and the people who committed the harm. That poses two important questions: how closely must payments be connected to the people harmed, and how closely must the payers be linked to the wrongdoers? These relationships can be depicted graphically:

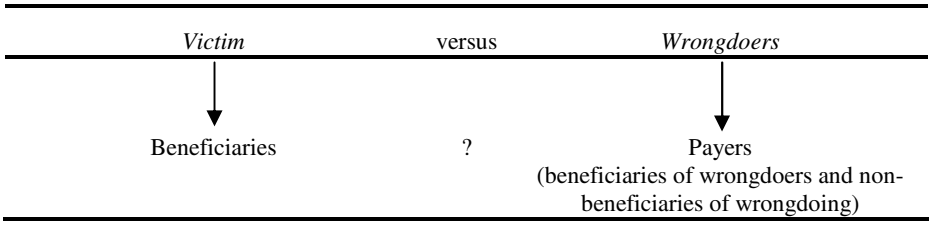

Figure 1. Diagramming victims, beneficiaries, wrongdoers, and payers

Posner and Vermeule turn to the problems of connecting payers and beneficiaries to past harm. They employ the language of "ethical individualism," which is becoming

commonplace in legal scholarship.[77] They analyze the corrections using two categories, as problems with individuals and those with collectivism and moral taint.

The language of "ethical individualism" is based on (and describes) the legal system's typical requirement of an identified plaintiff who an identified defendant has harmed. Posner and Vermeule describe models of "hard" ethical individualism, which is the most stringent in requiring identified plaintiffs and defendants, and allows only compensation for proven harm. One can think of this as a typical lawsuit by an individual against another individual for money damages.

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77. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 250–54 (1996). Dworkin explained what he meant by ethical individualism in a discussion over euthanasia in 1996:

> In our society, a society that is marked by the point of view that I recently have been calling ethical individualism, one master idea is accepted: that it is not only the case that human beings each have a life to live, but that each human being has a life to make something of—a responsibility to create a life such that he or she can look back on that life with pride rather than misery and take pride in it rather than account it a waste. That is a fundamental human responsibility. It has been denied over many areas and tracks of human history, but not by us. And it carries with it, I want to suggest, a further responsibility. This is the responsibility that—in our moral tradition—is often referred to as autonomy or self-respect or similar names. I think the nerve of that responsibility is this: so far as decisions are made primarily affecting a person's life, and so far as those decisions are made with the aim that that person's life go better, be more successful, run less of a risk of waste, then those decisions must be made by the person whose life it is or, when that's not possible, in accordance, so far as this is possible, with the standards that that person chose.

Ronald Dworkin, *Euthanasia, Morality, and the Law*, 31 LOY. L.A. L. REV. 1147, 1149 (1998) (publishing Professor Dworkin's comments from the Fritz B. Burns Lecture, Loyola Law School, Los Angeles on Nov. 22, 1996); *see also* Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165 (1999) (referring to ethical individualism's concern for "the enhancement of community values"); Frank I. Michelman, *Relative Constraint and Public Reason: What Is "The Work We Expect of Law"?*, 67 BROOKLYN L. REV. 963, 971 n.20 (2002).

Others have taken up his phrase, but seem to have given it somewhat different meanings, which focus on liberalism's requirement that individual desert relate closely to an individual's claim against another. *See, e.g.*, James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 LAW & HIST. REV. 275, 286 (1997) ("The core of the antistatist stance as articulated in *Serfdom* grew out of the belief in the uniqueness of individual activity and thought ('ethical individualism'). It was unacceptable, in fact impossible, for anyone other than the individual to make decisions for the individual without imposing an alien set of values. At that point, seemingly benign policy prescriptions dissolved into naked, unjustifiable coercion. Thus, 'individuals should be allowed, within defined limits, to follow their own values and *preferences* rather than somebody else's[.]'") (quoting FRIEDRICH A. HAYEK, ROAD TO SERFDOM 59 (1956 ed.)) (emphasis in original); Jeremy Waldron, *Does Law Promise Justice?*, 17 GA. ST. U. L. REV. 759, 777 (2001) ("It is a commitment to a particular kind of reason-giving—a kind of reason-giving closely connected to the sort of ethical individualism or individualization of reasons that is identified with justice in the most substantive sense of the word.").

Posner and Vermeule also discuss "soft" ethical individualism, which contemplates some weakening of the connections between wrongdoers and payers. Here they use the example of individuals against corporations.[78] They suggest the morality of imposing liability on corporate shareholders is somewhat more problematic than on individuals—or at least that the connections between corporate shareholders and corporate decision makers are more problematic than individual defendant decision makers.[79] Of course, U.S. corporate law sees no problem in imposing liability on corporate shareholders for decisions made by corporate executives. For Posner and Vermeule to move the corporation's liability into the "soft" category suggests their sympathy for shareholders—and their desire to make such claims look more problematic than they are.

Similarly, and as one would expect, they also place governmental liability in the soft ethical individualism category. Here, they suggest that asking taxpayers to pay for government decisions are problematic because, as in the case of corporations, the taxpayers are not responsible for the decisions made by government actions. The separation between taxpayers and culpable actors is, indeed, more attenuated than the separation between corporate shareholders and corporate decision makers. Nevertheless, we typically expect that taxpayers must pay for the torts of their government.

When we talk about moral (and therefore political) claims, rather than legally cognizable claims, these moral links deserve scrutiny. However, we need to realize that when we talk about legislative reparations, the people who pay are in almost no case going to be the exact people who made those decisions. The payers are the successors to those decision makers, and those successors may not have benefited from those decisions. If we require a one-to-one connection between the person who makes a decision with pen in hand and the person paying, that is a lawsuit.

If there will ever be a resolution of historic injustices (for which there are no lawsuits possible), taxpayers will have to provide money. And because the costs of reparations are spread among the entire community, then the culpability is diminished. There are even more attenuated connections, which Posner and Vermeule term "ethical collectivism,"[80] which involve claims of a racial group, some or all of who are victims of another racial group, and some of who are wrongdoers (or beneficiaries of wrongdoing). Some slave reparations claims fit this model. A claim of reparations for slavery by descendants of slaves against "whites" fits this model. Many reparationists predicate this case on the existence of "white privilege" and see all white people as having an advantage, by virtue of skin-color. They seek a disgorgement of that advantage. It is a difficult issue to determine whether there is white privilege and its extent, if it exists.[81] We see that loose connection between wrongdoers and payers

78. Posner & Vermeule, *supra* note 1, at 704–05.

79. *See id.* at 705; Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, *in* COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS 111, 111–32 (Larry May & Stacey Hoffman eds., 1991).

80. Posner & Vermeule, *supra* note 1, at 690.

81. One might contrast David Lyons's questioning of the extent of "white privilege" with John Powell and Christian Sundquist. *Compare* David Lyons, *Reparations and Equal Opportunity*, 24 B.C. THIRD WORLD L.J. 177 (2004) (arguing that reparations are justified in part because of the current inequality resulting from a failure to compensate freed slaves

frequently. Throughout much of recent United States social policy, the government's power has been used to repair the lives of people who have been harmed. Thus, we rarely seek a close connection between payer and recipient.[82] Talk of culpability is, of course, central to both reparationists and reparations skeptics. Reparations skeptics frequently invoke lack of culpability as an argument against reparations. "Why should those whose ancestors arrived after slavery ended pay[?]" asked reparations opponent David Horowitz.[83] Horowitz drew on a common theme among reparations skeptics: that there is no possibility of culpability unless one is descended from a slaveholder (or at least from one who was in the United States during the era of slavery and, thus, might have benefitted from slave labor).[84] Moreover, reparations skeptics frequently argue that Northern expenditures during the Civil War and subsequent social programs paid off any debt. They further contend that culpability is decreased because other groups—particularly Africans and Muslims—have culpability for the trans-Atlantic slave trade.[85] Some argue that slavery was, on balance, beneficial to the slaves and their descendants.[86]

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generations ago), *with* John A. Powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 U.S.F. L. REV. 419, 420 (2000) (assuming the existence of white privilege of the "negative kind"); Sundquist, *supra* note 56, at 672–81 (discussing "white privilege" and "white innocence"). You could also phrase a claim by descendants of slaves against "whites" as a version of Posner and Vermeule's soft-ethical individualism—as a claim by descendants of victims against the government, which is composed of taxpayers. But even with such a reformation, there is still a need to show the governmental culpability that led to the harm, as well as the percentage of the harm that was caused by the federal government. If there is a viable lawsuit—a proposition, which is highly suspect—there is less need for discussion of reparations.

82. *See*, *e.g.*, Albert Mosley, *Affirmative Action as a Form of Reparations*, 33 U. MEM. L. REV. 353 (2003); McWhorter, *supra* note 62, at 37 ("And there is also the policy of affirmative action—a reparative policy if ever there was one, designed to address the injustices of the past."). Much reparations writing is focused on unjust enrichment claims. That is, reparationists ask for a return of benefits held by white society. There is much that is appealing in that formulation, for if you can prove money is wrongfully held, there is an intuitively appealing case for its return. There is no requirement that the person unjustly enriched be a wrongdoer. *See*, *e.g.*, Bernard Boxhill, *The Morality of Reparations*, *in* REVERSE DISCRIMINATION 270 (Barry R. Gross ed., 1977). Nevertheless, claims of unjust enrichment face the limitation that you can only recover the benefit that is *still retained*. One of the great tragedies of slavery and Jim Crow is that they produced more harm to their victims than benefits to society. Moreover, unjust enrichment claims are subject to setoffs for benefits conferred, such as social welfare programs. For more on unjust enrichment, see Brophy, *Reparations Talk*, *supra* note 4, at 126–28; Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURVEY AM. L. 497, 521–22 (2003) [hereinafter Brophy, *Some Conceptual and Legal Problems*]; Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. Rev. 1443 (2004).

83. HOROWITZ, *supra* note 60, at 13 ("What logic would require Vietnamese boat people, Russian refuseniks, Iranian refugees, Armenian victims of the Turkish persecution, Jews, Mexicans[,] Greeks, or Polish, Hungarian, Cambodian and Korean victims of Communism, to pay reparations to American blacks?").

84. *Id.*

85. Posner & Vermeuele, *supra* note 1, at 708 ("[T]o calculate the harm that whites did to blacks, we must answer extremely difficult questions. Is the guilt of whites affected by the participation of Arabs and Africans in the slave trade? Is the relevant comparison the standard of

Horowitz looks only to the case of unjust enrichment. There are several ways of thinking about culpability. First, government may be culpable for imposing the harm of slavery, from benefiting from it, or for establishing the legal framework of slavery. Second, taxpayers as representatives of the government, are subject to the debts already in existence. Take the case of people descended from those who emigrated after slavery ended. The later immigrants take the debts of the United States, and so they are liable for the harms for which the government is responsible, as is every other member of the community. Reparations skeptics want to refocus the debate on individuals' claims against other individuals, for that makes claims more difficult.[87]

However, reparations claims to a legislature—as opposed to a court—should not be burdened by calculations of complicity. Indeed, if we require that talk of complicity, we are likely to encourage more division. For this is not *necessarily* one victim group against an opposing group.[88] In a great many cases of governmental action—indeed, the vast majority—there is action to help protect or advance the interests of the community, independent of government's fault. Conceptualized in this way, reparations fit squarely within other legislative programs like the New Deal, Great Society, GI Bill, and more recently, the 9/11 Victim Compensation Fund (established

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living of Africans and African Americans (and which ones?) prior to slavery and during slavery, or prior to slavery and today? And what is the relevant measure—mortality rates, population size, satisfaction of basic needs, wage differentials, or something else? Are the sacrifices by (Northern) whites during the Civil War to be taken into consideration? If so, should this sacrifice count as reparations, partial or full?"). David Horowitz makes many of those same points. His criticisms of reparations include: that reparations have already been paid through social programs; that blacks are better off in the United States than if they lived in Africa; that the North paid reparations through the Civil War; that others than those asked to pay (Africans, European merchants, and southerners who are no longer alive) are to blame for slavery. HOROWITZ, *supra* note 60, at 8, 121.

86. *See* HOROWITZ, *supra* note 60, at 121 (quoting BOOKER T. WASHINGTON, UP FROM SLAVERY 11 (New York, 2000) ("[W]e went into slavery pagans; we came out Christians. We went into slavery pieces of property; we came out American citizens. We went into slavery with chains clanking about our wrists; we came out with the American ballot in our hands. . . . [W]e must acknowledge that, notwithstanding the cruelty and moral wrong of slavery, we are in a stronger and more hopeful position, materially, intellectually, morally, and religiously, than is true of an equal number of black people in any other portion of the globe.").

87. *See*, *e.g.*, Stephen Kershnar, *Reparations for Slavery and Justice*, 33 U. MEM. L. REV. 277, 283 (2003); Boxhill, *supra* note 82.

88. *See* HOROWITZ, *supra* note 60, at 15 (complaining that reparations talk is divisive); *id.* at 134 ("The reparations claim is a hostile assault on America and its history. Its divisive message and fallacious views can only have a profoundly adverse effect on those who embrace it, making it impossible for them to see their own past clearly, or to find a way to an American future."); CAROL M. SWAIN, THE NEW WHITE NATIONALISM IN AMERICA: ITS CHALLENGE TO INTEGRATION 181 (2002) ("Current reparations talk inflames the white electorate, undermines the bridge-building process across racial lines, fuels white nationalist sentiments, and is insufficiently targeted in its aims to help those members of minority groups who are most in need. . . . [T]he whole matter should be dropped."); Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1192 (2004) ("We have to live life going forward. We cannot make collective amends for all the wrong in the past. But we can create new and unnecessary hurts by trying to remedy past wrongs. A divisive campaign for reparations will undercut the efforts that we all want to make a stronger, more vital, more productive and more caring nation.").

by the Airline Stabilization Act89), to say nothing of taxpayer bailouts of industry. The list of programs that draw upon the federal government's enormous power to repair is effectively endless. The legislative welfare model is a central element of contemporary thinking on tort compensation. That welfare principle seeks to assist those in need, independent of fault.[90] One is left to ask of Posner and Vermeule, why must reparationists demonstrate a particular culpability that other claimants on legislative grants are not expected to show? Maybe, if we are talking about a "debt" as reparations, like Randall Robinson does, then there is some need to show continued benefit (or harm).[91] If we are talking about reparations as repair of past torts, then it is understandable that skeptic payers will forever ask questions about culpability. It is less obvious that culpability is demonstrated in other legislative programs—in those cases, the focus is on *entitlement* and *need*. The calculus of entitlement frequently comes from a showing of *harm* imposed by past government actions.

2. Connecting the Injured to Beneficiaries

Thus arises a second question: how closely must we link those injured and the recipients of reparations? For we must be concerned, not only with who pays, but also with who receives payment. Here we face troubling questions of how much groups have been injured and how much that injury continues to have an effect.[92] There is a contentious debate swirling around regarding how much the institution of slavery continues to affect black Americans today.[93] Here the problems of valuation very

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89. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 401, 115 Stat. 230, 237 (2001).

90. *See, e.g.*, W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 612 (W. Page Keeton ed., 5th ed. 1984); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 269 (2d ed. 2002) ("Compensation was provided because of a perceived obligation on the part of all citizens to help redress the injuries of others.").

91. *See*, *e.g.*, Hopkins, *supra* note 2, at 2547–51. Often the term "debt" is used not in unjust enrichment terms, but in a more general sense to imply the amount owed, which includes a calculation for harm caused. *See*, *e.g.*, ROBINSON, *supra* note 67; Albert Mosley, *Affirmative Action as a Form of Reparations*, 33 U. MEM. L. REV. 353 (2003); George Schedler, *Responsibility for and Estimation of the Damages of American Slavery*, 33 U. MEM. L. REV. 307–51 (2003) (proposing ways of estimating damages); Sundquist, *supra* note 56, at 663–72 (exploring elements of "the debt").

92. Forde-Mazrui, *supra* note 59, at 710–23; *see also* Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 157, 163 (2004) ("[W]hite racism is not the sole and exclusive cause of the social ills that beset black Americans. It is a plausible thesis that the well-meant culture of the welfare state has been a significant contributor to the disadvantages that beset many black Americans today."); Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45, 55–56 (2004) ("Moving away from torts or unjust enrichment as the central reparations strategy enables a reorientation of the reparations debate to focus on group uplift as a national imperative rather than as a sectional imperative, as an 'American thing' rather than as a 'black thing.'").

93. *See, e.g.*, STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997); HOROWITZ, *supra* note 60, at 126–27 ("It is a well-

quickly become enormous. How, for instance, does one identify the harm imposed by slavery? How much is that still affecting claimants today? Or, to take a much simpler problem, what is the value of services that were rendered?[94] This is a question about measuring the value of what is to be given in reparation. Reparations skeptics have focused on that question in several ways. First, they ask philosophical questions like, how does one measure harm if, absent the injustice, someone would not have been born?[95] Second, they ask how much wealth—had proper compensation been made—would still be retained? Finally, they question whether current inequalities are due to past injustice.[96] One of reparations skeptics' most common arguments is that differentials in income, educational achievements, and wealth are due to black culture, rather than a legacy of slavery and racism.[97] Both of those issues—connections between the wrongdoers and payers and the connections between the injured and beneficiaries—are central to making and evaluating legislative reparations.

II. REDEFINING REPARATIONS: TOWARDS A COMMUNITY-BASED WELFARE MODEL

The Posner-Vermeule formulation of reparations is strangely narrow. It excludes cases where truth commissions or apologies are sought instead of money; cases where there is a viable legal claim; and cases where repairing the past is not the primary goal.[98] The narrow definition of reparations, as well as the focus on the "litigation model" of victim versus wrongdoer, leads Posner and Vermeule to a more skeptical assessment of the morality of reparations than is warranted.

Let me suggest that we construe reparations more broadly in several ways. Our definition of reparations ought to include symbolic gestures, as well as monetary transfers; it ought to include cases where repair is linked to forward-looking action. This essay suggests that we ought to allow expansion of the harm-doer/payer nexus. There is no reason to expect *only* those at fault to pay reparations (or even *only* the beneficiaries of past wrongdoing). Those more recent immigrants, for example, assume the United States' obligations, as well as the benefits it offers. For while most lawsuits

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established fact that the black poverty gap is greatly impacted by astronomical out-of-wedlock birthrates of black Americans: 83 percent of black children who are poor have been born out of wedlock and are being raised in homes with no fathers. A child raised in a single-parent female-headed household is five times more likely to be poor—regardless of race or ethnic background—than a child raised in a two-parent family. This cannot be attributed to slavery (as it often is) because it is a recent phenomenon, postdating the end of slavery by more than a hundred years. As late as 1960, two-thirds of all black children were born into two-parent families. Fifty years later, two-thirds of black children are born of out of wedlock."); Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L.J. 31, 34–36 (2004) (pointing to the difference in family structure between blacks and whites and maintaining that "if black families below the poverty line had the same marriage rate as white families below the poverty line in 1999, the general level of black poverty rate would be 12.3%, nearly half the 22% level reported for that year.").

94. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 565–603 (3d ed. 2002).

95. Kershnar, *supra* note 61.

96. *Compare* Hylton, *supra* note 93, at 34–36, *with* Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209 (2004), *and* Massey, *supra* note 92, at 162–64 (questioning amount of inequality due to slavery as opposed to black culture).

97. *See*, *e.g.*, John McWhorter, *Against Reparations*, *supra* note 62, at 34–35.

98. *See* Posner & Vermeule, *supra* note 1, at 691–93.

demand a one-to-one connection between wrongdoer and beneficiary, we rarely see such a close connection in legislation. Even a cursory exploration of legislative action discloses many reparations programs that fit the legislative rather than litigation model. Not only should we conceive reparations as legislation that permits a loose fit between payer and wrongdoer, we should also conceive reparations as places where civil rights laws permit a lawsuit for victims. Such cases include the Tuskegee syphilis study, as well as the payments for wrongful denial of loans to black farmers by the Department of Agriculture. Reparations ought to be defined as cases where there is repair for past crimes against groups. One of the most often-quoted statements regarding reparations is Martin Luther King's "I Have a Dream" speech. As reparationists remind us, King spoke about reparations and what black society might ask of reparations:

> [A] promissory note in so far as [America's] citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check; a check which has come back marked "insufficient funds." We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. And so we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.[99]

Given the problems of fixing an exact figure for reparations and even discussing general figures, we need to think about the goals of reparations. From there, we can work towards progress that will achieve those goals. In the process of bringing some clarity to the reparations debate, it will be helpful to define reparationists' goals. Then we can more accurately view what is at stake and evaluate the morality of those plans, as well as investigate which reparations proposals, if any, ought to be pursued.

A. Why Reparations and What Might They Do?

In contemplating reparations, we ought to ask, why reparations? What is it that reparationists want to accomplish? For in evaluating the morality or feasibility of any plan it is imperative that we have a sense of what that plan entails. After distilling the literature, it appears that there are three key goals: (1) acknowledge past contributions and harms,[100] (2) change the public understanding about the present impact of past injustice,[101] and (3) effect justice and freedom through community empowerment.[102]

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99. Ogletree, *supra* note 4, at 283–84 (quoting Martin Luther King, *I Have a Dream*, in I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 101, 102 (1992)) (alterations in original); Cook, *supra* note 56, at 960–63 (discussing King as a reparationist).

100. Christopher Kutz, *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 PHIL. & PUB. AFF. 277 (2004); Charles J. Ogletree, *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1062–65 (2003) [hereinafter Ogletree, *Current Reparations Debate*]; Ogletree, *supra* note 4, at 282–83.

101. For, as Charles Ogletree has phrased it, "And just when did things become so good that we ceased to be victimized? . . . If we can't seem to get over it, it is because it is still going on." Ogletree, *Current Reparations Debate*, *supra* note 100, at 1066.

102. Community empowerment includes huge transfer payments. *See*, *e.g.*, CHARLES J. OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004); Westley, *supra* note 6, at 467–71; Molefi Kete Asante, *The African American Warrant for Reparations: The Crime of European Enslavement of Africans*

These goals are broad and general. However, it is important to explore the goals of reparations in order to understand what we want reparations to accomplish. Understanding the goals will allow us to assess which reparations plan best meets the goals and to order the reparation plans according to those priorities. As Charles Ogletree has observed, "We will not solve these problems by just giving individuals a check. We can only solve these problems if reparations money, and substantial amounts of it, are useful at the local level to address issues of health care, education, and housing."[103]

There are important issues of prioritization, and scholars may then ask whether broadly defined reparations make the connection between race and reparations too attenuated. There is the question whether race has been lifted out of its historical context and made it impossible to do anything about continued racial inequality.

B. The Forms and Functions of Reparations: Design Options in Reparations

There are five key forms of reparations: truth commissions, apologies, civil rights legislation, cash or in-kind payments to groups/communities, and cash or in-kind payments to individuals. They are listed in roughly the order of opposition, from least controversial to most controversial.

Each of those has important consequences. The first two are surprisingly important, for although they do not immediately involve the transfer of money, they involve how history is viewed. Those views, as historians increasingly understand, have significant consequences for subsequent action, including legislators' and judges' decisions.[104] As there are more studies concerning how (sometimes selective) memory of the Civil War and Reconstruction shaped legal doctrine,[105] we may come to more fully understand

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and Its Consequences, *in* SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS 3, 12–13 (Raymond A. Winbush ed., 2003) (arguing for community-based payments); Jeffery M. Brown, *Deconstructing Babel: Toward a Theory of Structural Reparations*, 56 RUTGERS L. REV. 463, 503–05 (2004) (exploring possible content of reparations aimed at making institutions responsive to black needs). We are also beginning to have a serious discussion about what corporate reparations might look like. *See* Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309 (2003). For an earlier formulation, see ROBERT S. LECKY & H. ELLIOTT WRIGHT, BLACK MANIFESTO: RELIGION, RACISM, AND REPARATIONS (1969).

103. Ogletree, *supra* note 52, at 261.

104. *See, e.g.*, DAVID BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2000) (providing a wide-ranging analysis of the ways that memory of the era of slavery, Civil War, and Reconstruction appeared in and influenced United States policy). Robert C. Post provides a recent assessment on the connections of culture to legal doctrine in *The Supreme Court 2002 Term Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

105. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (justifying approval of Louisiana statute mandating separate seating in railroads, justified in part because of the Court's belief that "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."); Palmer v. Concord, 48 N.H. 211 (1868) (memory of civil war freed municipality from liability for mob that destroyed Southern-sympathizing newspaper, because mob had been incensed by the memory); BLIGHT, *supra* note 104 (discussing the ways that the memory of the Civil War affected post-war politics and society). The only area of postwar American culture that Blight

how the knowledge (or ignorance) of the past shapes our current behavior. That framing of issues happens every time a legislature considers a social program. And that framing is initially important, because it determines, in turn, how we view claimants. Eric Yamamoto, for instance, provides a detailed study of that process in the Supreme Court's 2000 decision in *Rice v. Cayetano*.[106] *Rice* struck down a provision in a Hawaiian trust that limited voting for trustees to native Hawaiians. Yamamoto illustrates how Justice Kennedy's majority opinion employed a conquest narrative to justify the decision.

There are elusive questions, which have occupied generations of legal and intellectual historians, for we constantly have questions about how ideas relate to judicial action.[107] And that is not an issue likely to be settled anytime soon. The

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did not explore was the memory of the war in the judiciary. Recently, Glory McLaughlin has begun the process of exploring the memory in the judiciary in one important state. *See A 'Mixture of Race and Reform': The Memory of the Civil War in the Alabama Legal Mind*, 56 ALA. L. REV. 285 (2004) (exploring ways that Alabama judges discussed the Civil War in their opinions and the meanings of those memories for changes in doctrine in civil rights of blacks, as well as property, and contract rights). Much remains to be done, however, to explore the ways that the memory of the war (and perhaps even more importantly the desire for reconciliation) shaped judicial opinions. *See, e.g.*, Reva B. Sigel, *Collective Memory and the Nineteenth Amendment: Reasoning About "The Woman Question" in the Discourse of Sex Discrimination*, in HISTORY, MEMORY, AND THE LAW 131 (Austin Sarat & Thomas R. Kearns eds., 1999); Norman W. Spaulding, *Constitution as CounterMonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003) (arguing for alterations in federalism jurisprudence based on a newly recalled memory of Reconstruction).

One might also think along these lines about the recent decision in *United Daughters of the Confederacy v. Vanderbilt University*, 2005 WL 1033520 (Tenn. Ct. App. May 3, 2005), in which a concurring judge quoted extensively from Union General Joshua Chamberlain's memoirs, published in the early twentieth century. Vanderbilt University wanted to change the name of a dormitory on its campus from "Confederate Memorial Hall" to "Memorial Hall" and the United Daughters of the Confederacy sought enforcement of a contract from the 1930s, which provided $100,000 for the dormitory in exchange for naming rights (among other benefits). The concurrence argued that the building name honored the men who died, rather than the purpose of the war. The focus on the honor of individual actors—rather than the focus on the war's purpose—was part of the compromise reached between North and South that led to reconciliation in the years after the war. *See, e.g.*, PETER S. CARMICHAEL, THE LAST GENERATION: YOUNG VIRGINIANS IN PEACE, WAR, AND REUNION 1–3, 213–36 (2005) (discussing the postwar reconciliation). Thus, compromises on historical vision, reached some years ago, continue to influence the writing of judicial decisions these many years later. *See* WOLFGANG SCHIVELBUSCH, THE CULTURE OF DEFEAT: ON NATIONAL TRAUMA, MOURNING AND RECOVERY (2003); JOHN DAVID SMITH, AN OLD CREED FOR THE NEW SOUTH: PROSLAVERY IDEOLOGY AND HISTORIOGRAPHY, 1865–1918 (1985).

106. 528 U.S. 495 (2000); Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1760–77 (2000); *see also* Eric K. Yamamoto, *Practically Reframing Rights: Cultural Performance and Judging*, 33 U.C. DAVIS L. REV. 875 (2000).

107. *See, e.g.*, PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR (1965) (discussing the relationship of ideas like romanticism and transcendentalism to judicial thought in the antebellum era); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35 (1988) (exploring the Marshall Court's concern with "republicanism" and its influence on their decisions regarding such areas as constitutional protection for property, slavery, and commerce).

ferocity with which competing sides struggle to establish their competing visions is, however, testimony to the prevalent belief in the power of historical narratives.[108] This is a topic on which there is an enormous body of literature and on which legal historians have been particularly engaged in recent years. The role of how official histories of the world shape behavior is subject to substantial debate. One can speculate on such diverse issues as the role of the Washington Monument, the Declaration of Independence, and Cold War propaganda on national character.[109] Each of those examples represents important cultural values, which have the potential to shape belief systems and, in turn, action. Elazar Barkan described the process by which historical scholarship has shifted its perspective. "As vicarious histories of the elite and the rich are replaced by the lives of the conquered, the poor, and the victimized Other, the public is confronted by history as the territory of injustice."[110] We need substantial further studies to link how "official" versions of history might shape the public reaction to injustice.[111]

In January 2005, J.P. Morgan Chase apologized for the actions of two of its predecessors: the acceptance of nearly 13,000 slaves as collateral and the ownership of approximately 1250 people when the loans went into default. "We apologize to the African-American community, particularly those who are descendants of slaves, and to the rest of the American public for the role that Citizens Bank and Canal Bank played," J.P. Morgan chief executive William Harrison and chief operating officer James Dimon wrote.[112] The bank then took the even more unusual step of pledging $5 million for college scholarships for black students from Louisiana.

The road to apology and scholarships is a strange one. It started in October 2002 when the Chicago City Council passed an ordinance that required companies that do business with the city to search all available records for their connections to slavery. The Chicago ordinance has led to important disclosures. First, in 2003 the great investment bankers Lehman Brothers disclosed that they owned at least one slave,

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108. The literature on controversies over teaching of divergent historical perspectives narratives is immense. It is well summarized in JOSEPH MOREAU, SCHOOLBOOK NATION (2003). Two broader analyses are PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY" QUESTION AND THE AMERICAN HISTORICAL PROFESSION (1988), and THOMAS L. HASKELL, OBJECTIVITY IS NOT NEUTRALITY: EXPLORATORY SCHEMES IN HISTORY (1998). For additional examples, see BLACK ATHENA REVISITED (Mary R. Lefkowitz & Guy MacLean Rogers eds., 1996); JAMES LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG (1996).

109. *See, e.g.*, MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000); SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998); PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE (1997).

110. Elazar Barkan, *Restitution and Amending Historical Injustices in International Morality*, *in* POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES 91, 101 (John Torpey ed., 2003).

111. Some assessments of the connections appear in CHARLES S. MAIER, THE UNMASTERABLE PAST: HISTORY, HOLOCAUST, AND GERMAN NATIONAL IDENTITY (1988) and Alan Cairns, *Coming to Terms with the Past*, *in* POLITICS AND THE PAST, *supra* note 110, at 63.

112. Cathleen Flahardy, *Chicago Forces J.P. Morgan to Disclose Slavery Ties*, INSIDE COUNSEL, Mar. 2005, http://www.insidecounsel.com/issues/insidecounsel/15_160/circuits/166-1.html.

Martha, when such practices were legal. They started as a partnership in Montgomery, Alabama, before the Civil War and then moved to New York City after the war. Then, in April 2004, as J.P. Morgan Chase was bidding on financing for a city project, it filed a disclosure stating that it had no connections to slavery. Then, Alderman Dorothy Tillman uncovered evidence that J.P. Morgan's predecessors had financed the slave trade. And that set off a searching investigation by historians hired by J.P. Morgan Chase. They rummaged through dozens of archives and found, in the Tulane University archives, records of two banks that were reorganized during the Great Depression and later acquired by J.P. Morgan Chase.[113]

The action is important for two reasons. First, it provides money in memory of those enslaved, with the goal of building a better future. The people who were used as collateral to finance the growth of fortunes probably never dreamed that they would be remembered or that their suffering might be turned to a good cause. Their labor has taken on new meaning. Second, and perhaps most importantly, the bank pledged the scholarships after it learned of its past. Once we see that dark history, we are often motivated to do something about it. As the bank's executives recently stated, "We all know slavery existed in our country, but it is quite different to see how our history and the institution of slavery were intertwined."[114] The disclosure ordinance led to additional information, which then led to reparative action. But for the disclosure ordinance, there would never have been reparative action.

But even beyond the power of apologies and truth commissions to shape the public's understanding of history and the current effects of that history, apologies and truth commissions shape our identity. They tell us how we view ourselves and how those left "outside of history"—left outside of the American dream—are included (or excluded). It is an enormous project to reframe the collective memory of events, to more fully incorporate those who have been excluded and to have a history that is fair to them. As Yamamoto elegantly phrased it, "group members, lawyers, politicians, justice workers, and scholars possess often unacknowledged power at the very foundational stages of every redress movement. The power resides in the potential for constructing collective memories of injustice as a basis for redress."[115] Yet, even if we

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113. Rebecca Mowbray, *Bank Reveals Slavery Links; 2 Louisiana Firms Named*, TIMES-PICAYUNE, Jan. 21, 2005, at 1. In June 2005, Wachovia also disclosed the connections of several of its predecessor firms to slavery and apologized. Press Release, Wachovia, Wachovia Completes Research of Predecessor Companies (June 1, 2005), *available at* http://www.wachovia.com/inside/page/0,,134_307^1191,00.html. Wachovia's website collects much of the historical data. Wachovia, Wachovia Completes Research, http://www.wachovia.com/misc/0,,877,00.html (last visited Nov. 1, 2005).

114. *JP Morgan Admits US Slavery Links*, BBC NEWS, Jan. 21, 2005, http://news.bbc.co.uk/2/hi/business/4193797.stm.

115. Hom & Yamamoto, *supra* note 106, at 1764. These themes are explored in more depth in ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1998) and ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2000). There is a growing and sophisticated body of scholarship on the relationship of apologies to lawsuits. *See, e.g.*, Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002) (providing multi-factored analysis of apology in litigation); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003).

can change that collective conscience, it remains to be seen how that change will affect legislative and judicial policy.

The third group of reparations, civil rights legislation, permits those who have suffered to gain access to the courts or grants additional rights to inclusion. That legislation, such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, puts additional rights in the hands of those who have been injured. Such legislation gives power in court and at the ballot box to those who have an incentive to enforce rights. There have been some important—many would say critical—victories, through expanded voting and employment rights. It is the expansion of voting rights, for instance, that has purchased additional rights.

The final two—transfers to communities and to individuals—are both the most costly and the most controversial. They are also the ones by which repair and future progress can be most directly and quickly affected. Few reparationists advocate direct cash payments to individuals; most recent reparations writing focuses on cash and in-kind payments to communities.[116]

We need to think about specifics, which no one has seriously done yet. Once we move beyond fantasies like a separate black state[117] or repatriation,[118] there are general ideas of trusts for community development and empowerment. Even before we begin to look at specifics, however, we need to explore the meta-issues of those programs' constitutionality. Posner and Vermeule, as well as several other authors, address the constitutionality of reparations.[119] A quick analysis suggests that it is impossible to see how a separate state could be constitutional. However, the programs that are seriously proposed—like a trust fund for community development—have some likelihood of passing equal protection scrutiny, for programs designed to repair specific past discrimination are acceptable. To stand a reasonably strong chance of survival, reparations should link specific discrimination by governmental entities and private actors to the location where reparations will be spent. Those findings should demonstrate the precise constitutional and statutory violations (or what would now be statutory violations, if the events occurred before the contemporary civil rights acts) and demonstrate the current impact they have. That link is critical, although the Supreme Court has cast doubt on whether it will accept multi-step arguments that past discrimination has limited current opportunities.[120] There should be specific remedial

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116. *See, e.g.*, Ogletree, *supra* note 4, at 298–307 (discussing trust for community development); Westley, *supra* note 6, at 467–71. The trust idea is intriguing, in large part because it promises to put the power of decision making in the hands of the community. It also allows us to avoid difficult choices right now of advancing realistic plans for repair. I suspect that before legislatures will grant significant finding for such plans, they will expect to receive a reasonable estimate of the ways the money will be used and the good it will accomplish.

117. *See* Thomas Bray, *Granholm Tries to Slip Reparations Hook*, DETROIT NEWS, Oct. 9, 2002, at 11A ("We cannot settle for some little jive token. We need millions of acres that black people can build." (quoting Nation of Islam leader Louis Farrakhan)).

118. Robert Johnson, *Repatriation as Reparations for Slavery and Jim Crowism*, *in* WHEN SORRY ISN'T ENOUGH, *supra* note 2, at 427.

119. Brophy, *Some Conceptual and Legal Problems*, *supra* note 82, at 525–35; Massey, *supra* note 92, at 163; Posner & Vermeule, *supra* note 1, at 738.

120. At several places in *City of Richmond v. J.A. Croson Co.*, for instance, Justice O'Connor suggested there was a need for evidence that there had been discrimination *in* the

goals, so that the remedies have a logical, definite stopping point. There also has to be consideration of whether the goals of reparations might be accomplished through some basis other than race.[121] Are there community-building plans aimed at low-income communities, for example, that might increase educational and economic opportunities for victims of racial crimes—and others, too? This is an exceedingly complex issue, which deserves ample consideration.

Computing the value of transfer payments requires substantial attention. Here one might begin with several alternative formulas, roughly in ascending order of expense: (1) value of slaves' services still retained; (2) money needed to bring African-American poverty rate to the non-Hispanic white poverty rate; (3) difference in per capita wealth of African Americans and non-Hispanic white Americans; (4) amount needed to bring African-American educational performance, health care, and wealth to that of non-Hispanic whites.[122]

Selection among the competing formulas depends on theories of what it is that one seeks to repair. If the reparations theory is based only on unjust enrichment, then the right formula is quite modest: only the amount of wealth that is still retained, as offset by benefits that have been conferred. If the reparations theory is a tort theory of past harm, in the nature of a survival action, then the damage formula is the harm to the slaves themselves. If the theory is yet broader, that there is a tort of slavery that recognizes the harm to the slaves' descendants, in the nature of a loss of consortium action, the damages formula will take account that the harm continues for generations. It is this last formula that is most popular among reparationists. They conclude that there was a failure to pay, coupled with violence and restraints on education, marriage, and families[123]—and that each generation has suffered from those initial harms. As Randall Robinson has stated, slavery is a crime that continues, because it inflicts on its victims generations of harm:

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local construction industry. 488 U.S. 469, 500 (1989) (questioning whether there is "'strong basis in evidence'" that remedial action is necessary, because "[t]here is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry" (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (emphasis in original))). By implication, discrimination against African Americans that occurred outside the industry, but had negative effects on the number of African Americans in the industry, is an insufficient basis for race-based action. *See id.* at 501 (rejecting evidence that minorities are underrepresented in employment when there are special qualifications); *id.* at 507 (questioning "'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population").

121. *See Croson*, 488 U.S. at 507 (observing that the City of Richmond never considered whether there were race-neutral alternatives that would accomplish the same purpose). *Croson* suggested one race-neutral program—city funding for small businesses—that might increase minority participation in the construction industry. *Id.*

122. For other formulations, see Brophy, *supra* note 4, at 129–30.

123. As Randall Robinson has said,

> [T]hrough keloids of suffering, through coarse veils of damaged self-belief, lost direction, misplaced compass, shit-faced resignation, racial transmutation, black people worked long, hard, killing days, years, centuries—and they were never *paid*. The value of their labor went into others' pockets—plantation owners, northern entrepreneurs, state treasuries, the United States government.

ROBINSON, *supra* note 67, at 207 (emphasis in original).

> Like slavery, other human rights crimes have resulted in the loss of millions of lives. But only slavery, with its sadistic patience, asphyxiated memory, and smothered cultures, has hulled empty a whole race of people with inter-generational efficiency. Every artifact of the victims' past cultures, every custom, every ritual, every god, every language, every trace element of a people's whole hereditary identity, wrenched from them and ground into a sharp choking dust. It is a human rights crime without parallel in the modern world. For it produces victims *ad infinitum*, long after the active state of the crime has ended.[124]

If we consider slavery as a continuing tort—if the victims are considered to be people other than the generation of people actually enslaved—then the damage formula will likely include some calculation of harm to the present generation. Thus, the latter formula will be appropriate. There is, according to reparationists, a claim for continuing harm through the generations. And it becomes more complex because we have to compute the current harm and what it will take to repair that harm.

C. Re-Exploring the Moral Bases for Intergenerational Claims: Towards a Welfare Model

So, even as some scholars, like Saul Levmore, are beginning to offer sophisticated plans for designing reparations by private groups[125] and as Roy L. Brooks is advancing a sophisticated atonement model,[126] intergenerational reparations claims face several key problems. Those who committed the harm are no longer able to pay. Payment will have to come from their successors (the taxpayers). Those successors may not be successors to benefits extracted from the slaves or blacks during the period of Jim Crow. Quite simply, whatever benefit was conferred may no longer exist. Thus,

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124. ROBINSON, *supra* note 67, at 216. Posner and Vermeuele provide a more clinical description of the reparationists' case for continuing harm today:

> Proponents of slavery reparations argue that the wrong done to blacks did not end with slavery, but has continued to this day. This argument could be understood in a number of ways. Slavery disrupted family relationships and social conventions among blacks, and these ruptures continue in the form of various family pathologies—illegitimacy and so forth. Slavery, by depriving blacks of education, placed them at a competitive disadvantage after the Civil War, pushing blacks into economic relationships with peonage-like elements. Slavery promoted negative stereotypes about blacks which have been passed down from generation to generation. If these arguments are correct, calculating reparations is not a matter of determining, say, the difference between the market wage and the actual implicit wage paid to slaves, but must include some assessment of the harm incurred by blacks, and the benefits (if any) obtained by whites, since the Civil War.

Posner & Vermeuele, *supra* note 1, at 742 (footnotes omitted). Posner and Vermeule miss critical elements of the continued harm—the continued limitation of educational opportunities, vocational opportunities of Jim Crow, and other social opportunities. Those lack of opportunities—enforced through statutes and norms—continued through the Jim Crow era and, in altered form, through a misdirected welfare policy.

125. *See* Saul Levmore, *Privatizing Reparations*, 84 B.U. L. REV. 1291 (2004) (suggesting a combination of public and private action for reparations for slavery).

126. ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (2004).

successors may be asked to pay for harm imposed and still felt. And there are questions about benefit retained and harm still felt. Most frequently, great historic tragedies may not have left much in the way of benefit. However, the harm may continue for generations.

In the case of slavery reparations, for instance, there are two calculations to make. First, to what extent do those who purchased and consumed the produce of slavery (such as cotton) still retain the benefits from the great wealth that slaves created for slave owners? (I suspect this will be a difficult computation to establish, to say the least.) Second, to what extent are there still harms traceable to the institution of slavery? Those two calculations are akin to calculations of unjust enrichment and to a typical tort case: benefit retained by defendant and harm imposed on plaintiff.

The image of unjust enrichment is pervasive in reparations literature. Randall Robinson's 2000 book *The Debt* did much to popularize that imagery. He asked, why should American society retain money made from the work of slave laborers? That is indeed a powerful moral question; it is, however, a difficult question to pose to the courts.[127] There is much difficulty in applying unjust enrichment because there must, it seems, be an offset for benefits received. And one suspects that the benefit must include welfare payments.[128] On that score, it is at least a debatable question whether the debt owed to slaves has been paid.[129] In the more rare cases where a benefit is retained (even after there is an offset for benefits conferred on claimants), it is intuitively appealing to see the moral claim on benefits retained by subsequent generations.[130] However, even (and perhaps especially) in cases of continued harm,

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127. The dismissal in early 2004 of a class action lawsuit against corporations that benefited from slavery suggests the difficulties of successful lawsuits. *See, e.g.*, *In re* African-American Slave Descendant Litigation, 304 F. Supp. 2d 1027 (N.D. Ill. 2004); Epstein, *supra* note 88. The difficulties are further illustrated by the dismissal of the lawsuit brought by victims of the Tulsa riot of 1921 on statute of limitations grounds. Alexander v. Oklahoma, 382 F.3d 1206 (10th Cir. 2004).

128. Applying the requirement of the RESTATEMENT (SECOND) OF TORTS that the offset be made to the injured interest raises the question whether the welfare payments (that are made on race-neutral grounds) are offsetting the same interest or another one. *See* RESTATEMENT (SECOND) OF TORTS § 920 (1977) ("When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.").

129. Assuming that welfare payments are offset, which seems likely, then it is not so clear that there is an existing debt. There are other common arguments, such as the United States's expenditures in lives and money during the Civil War also extinguished the debt. *See, e.g.*, HOROWITZ, *supra* note 60, at 120; THERNSTROM & THERNSTROM, *supra* note 93.

130. Professor Emily Sherwin has argued recently that unjust enrichment is not such an easy case, even when there is a benefit retained. *See* Sherwin, *supra* note 82. Sherwin views unjust enrichment as a punitive measure, which takes from one (now probably innocent owner) and gives to another. Part of the problem turns on isolating cases where there is property held that would not have been held absent the prior unjust enrichment. There may be relatively few such cases, for in many instances subsequent possessors may have expended money or effort to preserve the property now claimed as unjustly retained. Thus, what Sherwin identifies as a problem with taking from one innocent person and giving to another may have more to do with problems in meeting the demands of unjust enrichment than with the inherent unfairness of

there is a solid precedent for compensation. Many have received compensation in similar circumstances. No one, for instance, believes that the United States government was responsible for the terrorist attacks of 9/11. However, all U.S. taxpayers contributed to a generous compensation program.[131] In fact, the 9/11 Victims Compensation Fund led—not surprisingly—to requests by other victims of mass violence (like the 1995 Oklahoma City bombing) for compensation.[132]

When we talk about even a modest reparations program, we will want to determine with something approaching scientific precision the harm that continues, as well as the benefits that have been conferred.[133] Thinking about moral culpability leads us to two avenues: First, are there benefits that have been retained, serving as justice belonging to an oppressed group? Second—and most importantly—is there a connection between past injustice and current inequality? That is, has harm been entailed upon a group? And is that harm in any way the "responsibility" of the community to repair? At base, these are questions, as Ralph Waldo Emerson stated, about continuing justice or injustice of distribution of property. Writing about the movement for the abolition of slavery, Emerson stated:

> Every reform is only a mask under cover of which a more terrible reform, which dares not yet name itself, advances. Slavery & Antislavery is the question of property & no property . . . and Antislavery dare not yet say that every man must do his own work, or, at least, receive no interest for money. Yet that is at last the upshot.[134]

When we think about the first basis for reparations—continued retention of a benefit—we are faced with difficult questions of tracing out the benefit as well as complex issues of offset. To borrow the terms of the Restatement (Second) of Torts, what benefits have been conferred to the same interest that was harmed?[135] This is a hugely controversial assessment, one fraught with moral questions. Against a claim, for

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unjust enrichment itself. Sherwin may, in fact, be identifying the problems of trying to determine what benefit, if any, rightly belongs to a claimant. This is a problem that Gregory Alexander has phrased somewhat differently, as what would the counter-factual world have looked like absent the unjust taking? *See* Gregory S. Alexander, The Limits of Property Reparations (May 7, 2003) (unpublished manuscript), *available at* http://ssrn.com/abstract=404940.

131. The growing literature on the Air Transportation Safety and System Stabilization Act, 49 U.S.C.A. § 40101 (Supp. 2005), which established the 9/11 Victims Compensation Fund, creates implications for the design of reparations programs. *See*, *e.g.*, Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627 (2003); Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, 53 DEPAUL L. REV. 251 (2003).

132. *See* Oklahoma City Victims Compensation Act, H.R. 3633, 107th Cong. (2002).

133. *See* Massey, *supra* note 92, at 158–66.

134. RALPH WALDO EMERSON, EMERSON IN HIS JOURNALS 358 (Joel Porte ed., 1982).

135. *See*, *e.g.*, Brophy, *Some Conceptual and Legal Problems*, *supra* note 82, at 521–23 (discussing unjust enrichment factors and off-setting the benefits); Kershnar, *supra* note 61, at 292–95 (discussing set-off of benefits from slavery). *Compare* RESTATEMENT (SECOND) TORTS § 920 (1979) (limiting offset of benefits to "the interest of the plaintiff that was harmed"), *with* RESTATEMENT (SECOND) CONTRACTS §§ 347, 349 (1983) (containing no limitation on the interests benefited).

instance, by a descendant of someone who worked for Brown University, one must ask, what benefits has Brown retained? How much did individual slaves who conferred those benefits receive in response? There are likely few benefits still held. The problem is more complex when one considers claims against a larger entity, like the United States federal government. Then we may need to take into consideration the government's payments, as well as the benefits retained. Such is a common argument of reparations skeptics.

We need to reexamine the bases for reparations. As long as people think in terms of unjust enrichment, a measure of relief that is solely backward looking may seem appropriate. And Posner and Vermeule follow the formulation of reparations as programs designed to repair quite specific past harm. Yet, because reparations rely on legislative grants, we need to think in legislative terms—a public welfare perspective.[136] Robert Westley has boldly phrased the case as involving entitlement.[137] That perspective ought to focus on harm, not the substantially more limited benefits that are retained. It is much easier to see continued harm than continued retention of benefit because one of the many tragedies of slavery and of Jim Crow is that harm continues for generations. The evils of slavery—destruction of families, of hope, of desire for education, of humanity—continue across generations.

We ought to think about reparations as part of a social welfare program. For, as Yale Law School Professor George Priest has stated, "Welfare is provided by the government to those individuals who have suffered loss—or who are in economic positions that resemble the suffering of a loss—but who have no claim in tort law against another person on account of their position, and who have not adequately protected themselves through savings or private insurance."[138] Professor Priest concludes that "[t]he internal logic of our public welfare systems is not compensation, it is basic need."[139] Reconceptualized in that way, reparations are seen as part of a system of justice, which focuses on need as well as past injury, and then it is consistent with generations of legislation. When viewed as a program that is both corrective—designed to repair past damage—and distributive—designed to provide a fair distribution of benefits—slave reparations look like other legislative programs. The difficulty is not the nature of reparations, but determining their amount and figuring who the beneficiaries ought to be.

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136. Much of the reparations writings make the case for legislative grants, rather than judicial action. *See*, *e.g.*, Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677 (1999); Rhonda V. Magee, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993).

137. Westley, *supra* note 6, at 436 ("Under reparations, Blacks more readily may position themselves as creditors seeking payment of an overdue debt, rather than as racial supplicants seeking an undeserved preference.").

138. George L. Priest, *The Problematic Structure of the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 527, 538 (2003).

139. *Id.*

III. DESIGNING REPARATIONS: TOWARDS A REPARATIONS MODEL

Posner and Vermeule have performed the noble task of advancing a dialogue on when reparations are possible; I seek to expand that dialogue, with an alternative conception of reparations. I have a broad vision of where that road might lead. The analysis must begin with a calculation of the magnitude of the harm. Then we need to figure who the appropriate beneficiaries and payers are. The moral structure of reparations claims may be diagramed in this way:

Table 3. Moral structure of reparations claims

Claimants, who are entitled because they		*Payers, who have responsibility because they*
(1) are the immediate victims of injustice or		(1) caused harm,
(2) are injured in an identifiable and significant way.	*versus*	(2) benefited from harm, or
		(3) are successors to harm.

We must deal with claimants who have not suffered, as well as payers who are innocent because they have not committed a wrong or benefited from past wrongdoing. Sometimes payers may be only successors to harm. They take as successors to those earlier communities. And in those cases, the claim on their checkbooks is weakened, even if not entirely eliminated. Those members of a community may be liable for the community's debts, just as they are entitled to its benefits. Because of the loosening of connections between payers and wrongdoers, which this essay contemplates, we must have other factors to rank the order of the competing claims on limited public resources. Because those reparations claims must be judged against other claims to limited resources, such a calculus should include considerations of (1) the magnitude of connections of victims to claimants and bad actors to payers, (2) the need of claimant (magnitude of current injustice), and (3) the ability to resolve claims in other ways.

We could diagram this concept another way, illustrating the relationship between the strength of claims against payers based on the connection between wrongdoer and payer and the connection between the people harmed and the beneficiary of reparations. As the connections on either axis weaken, the case for reparations becomes weaker. The litigation model's requirements of a close connection between wrongdoers and payers, as well as injured and beneficiary, makes most sense if one is dealing with a lawsuit. As one moves away from a litigation model and towards a legislation model, then other factors, such as the size of the harm and the amount of restorative justice that can be purchased, become increasingly important.

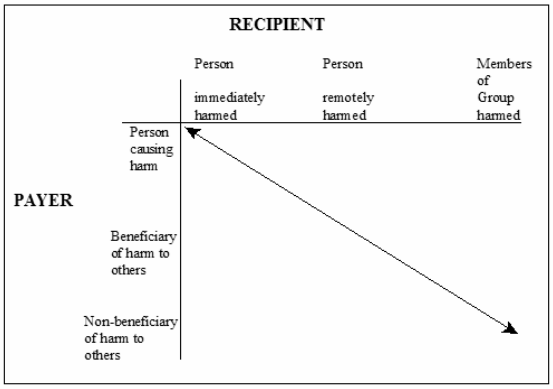

Figure 2. Visualizing the connections (and disconnections) between payers and recipients

From there, let me suggest several issues to consider regarding reparations. These considerations draw inspiration from Posner and Vermeule's analysis. (1) Is the harm so great that individuals cannot repair it? (2) Do the benefits extracted from the group seeking reparations (as well as the reparations offered) go to the entire society? (3) Will the reparations go to those with the greatest need and to places where the most repair can be effected? (4) Was the injustice perpetuated against groups? Was the injustice imposed by governmental action or neglect and is it having an impact on people currently? (5) Are there programs that repair the damage in ways that are meaningful and related to the harm that has been suffered? (6) Will the reparations in this case bring closure? (7) Will there be reconciliation or will the reparations aid the goal of restorative justice?

CONCLUSIONS

Reparations are a divisive issue. There are very few white people who believe in reparations for slavery.[140] And, in fact, it is highly unlikely that there will be congressional action for something styled as "reparations for slavery" anytime in the near future. However, at this stage in the debate, we can move toward a plan of reparations by establishing "realistic reparations." Yet, that remains difficult, because reparations are a proxy for so much that is controversial in American politics. For reparations represent yet another front on the culture war. Reparations talk taps into questions such as: Do we view American history as a place where there was opportunity or as a place where legal and social barriers limited equality? Are current imbalances in education, health care, and income due to discrimination against blacks or to the black culture? Or, should there be more social programs to equalize education, health care, and income?

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140. Harbour Fraser Hodder, *The Price of Slavery*, HARV. MAG., May–June 2003, at 12 (reporting that four percent of whites support reparations); Sam Hodges, *Slavery Payments a Divisive Question*, MOBILE REG., June 23, 2002, at A1 (reporting that five percent of white Alabamians support reparations).

While Posner and Vermeule spend much energy on the links between payers and recipients of reparations, their argument—like that of others discussing reparations—is about using distribution of property to address past imbalances. The reparations argument is, at bottom, about the distribution of wealth.[141] Apologies are controversial because they signal liability and subsequent claims for money, but also because they signal guilt. And many think there is no guilt—no benefit retained, no harm imposed. That process of figuring whether there is guilt is a long and potentially painful one.[142]

Posner and Vermeule have done the important work of stimulating thought about how to analyze reparations claims. There are a series of factors that must be addressed in framing reparations claims. We must determine the basis for asserting such a claim. What is the nature of the harm claimants are asserting? Are claimants' harms related to payers' culpability (as wrongdoers, beneficiaries of others' wrongdoing, members of a community that committed wrongs, or something else)? Then, recognizing, as we must, that not all past wrongs can be remedied, we must devise factors for determining which of the many past harms ought to be remedied in some sense. This is, at bottom, a question about distributive justice, and one that involves complex issues of ensuring that those who have been injured for the sake of everyone have their share of the benefits. These questions will not be solved soon, but at least we are beginning to understand the contours of the debate.

We move the agenda through a political process that is calculated to move voters. That is, there are people who might be asked to pay, who are beneficiaries—perhaps fairly remote—of the harm imposed on others. Then, there are some who are not beneficiaries at all. But as we spread the cost of programs, we move closer to a system that looks like one that recognizes the power and obligation of the federal government to improve the lives of its citizens.

If one believes Derrick Bell's interest-convergence theory, which postulates that whites take action to improve the lives of blacks only when it is in their self-interest, then there is a lesson here.[143] Reparations must be sold as something that will benefit white voters. Those benefits may be in the amorphous form of an increased sense of justice or atonement. But it may be doubted whether the self-interested whites hypothesized by Bell will pay much for such values. A more promising avenue is an argument that reparations programs be aimed at those in need, because this is a

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141. Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181–1213 (2004); Lyons, *supra* note 81.

142. *See, e.g.*, JANNA THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL INJUSTICE (2002); Janna Thompson, *Historical Injustice and Reparations: Justifying Claims of Descendants*, 112 ETHICS 114 (2001).

143. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). And I suspect that most people are adherents of some form of Bell's theory, since it is at base a restatement of the political principle that legislatures act when there is a majority of voters that believe it is in their best interest. On rare occasions, moral calculations are part of the consideration. And sometimes, maybe even judges will act according to moral rather than economic principles. *See, e.g.*, Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161 (1999) (discussing the role of moral philosophy in guiding jurists) (reviewing PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA (1997)).

common mission we are engaged in. And there is still some hope that we might achieve some measure of building something positive for the future, which may yet be the best way of remembering and repairing past injustice. A reparations plan that addresses those who have been injured and are suffering the most identifiable and continued harm offers a fairly tight connection between the injured and the beneficiaries and, thus, reduces controversy over reparations.

Perhaps we can next try to understand how we can move forward, in the most productive and least divisive fashion possible. We can look forward to realizing that "we have the opportunity to move not only toward the rich society and the powerful society, but upward to the Great Society."[144]

144. Lyndon B. Johnson, The Great Society, *in* 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON BAINES JOHNSON, 1963–1964, at 704–705 (1965).