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Too Big to Remedy - Rethinking Mass Restitution for Slavery and Jim Crow

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"TOO BIG TO REMEDY?" RETHINKING MASS RESTITUTION FOR SLAVERY AND JIM CROW

Kaimipono David Wenger *

Slavery and Jim Crow inflicted horrific harms on Blacks in America. Official silence aggravated that harm, as neither victims nor their descendants received monetary restitution, nor even (until very recently) any official apology. Reparations advocates have repeatedly called for compensation to slave descendants. But how exactly does society compensate for slavery?

Of course, compensation for mass injustice is always difficult to calculate and administer. Slavery puts the normal concerns of mass compensation into sharp relief and adds a whole new set of unique concerns for courts, legislators, and scholars.

In this Article, I use slavery and Jim Crow harms as a case study to examine some of the difficult questions that arise in mass restitution cases. I argue that some reparative action is needed in the case of slavery and Jim Crow; the longstanding lack of response only reinscribes injury. However, traditional tort compensation is inadequate. Victims cannot be truly compensated—only symbolic restitution is possible. Ultimately, slavery and Jim Crow seem "too big to remedy" under the legal system.

Because true restitution is impossible, we must consider other options based on our ideas of justice. Thus, responding to slavery challenges us to rethink both the goals of restitution and our underlying conceptions of justice. Reparative measures, while they cannot make victims whole, can play important roles in society and benefit victims in other ways. I examine how the goals of restitution can be advanced

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* Assistant Professor of Law, Thomas Jefferson School of Law. Thanks to Avi Bell, Al Brophy, Roy Brooks, Jack Chin, Marc Galanter, Rebecca Tsosie, Jack B. Weinstein, Jenny Wriggins, Eric Yamamoto, and Adam Zimmerman for their helpful comments. I also received excellent feedback on portions of this article at a Southern California Junior Faculty Workshop. A special thanks to Anne Bloom and John Nockleby for the opportunity to present this Article at the Injuries Without Remedies Symposium, and to the symposium participants for their excellent feedback and discussion. Thanks to Trisha Bryniczka for her excellent research assistance. Thanks to Mardell, Sullivan, Kace, and Indigo for their support. And thanks to Elena Grieco, Lauren Kulpa and the editors and staff of the *Loyola of Los Angeles Law Review* for outstanding editorial assistance. All errors are my own and are probably too big to remedy in any event.

though various non-tort or otherwise non-traditional approaches, including restorative justice and atonement, microreparations and apology, storytelling, and the traditional Hawaiian remedy of ho'oponopono.

Just as some insurance companies may be viewed as "too big to fail,"[1] *are there some mass harms that are simply "too big to remedy"?*[2] *This Article examines that question using the lens of claims arising from slavery and Jim Crow.*

1. On the origin of the "too big to fail" phrase, see Thomas L. Friedman, Op-Ed., *The Price Is Not Right*, N.Y. TIMES, Apr. 1, 2009, at A31.

2. I am indebted to Marc Galanter for suggesting the phrase "too big to remedy." *See also* Marc Galanter, *Righting Old Wrongs*, *in* BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 107, 107–10 (Martha Minow ed., 2002) (discussing historical efforts to reform past harms).

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I. HARMS OF SLAVERY AND JIM CROW

Slavery and Jim Crow inflicted horrific harms upon Blacks[3] in America. Slaves were subjected to physical injury, mental anguish, loss of property, loss of wages, loss of liberty, and loss of family relations.[4] Slave families were destroyed, and slave women were regularly subjected to rape and reproductive abuse.[5] The entire system of slavery depended upon a series of massive deprivations of basic human rights.

A number of scholars have provided extensive evidence of the human rights violations that slavery created here in the United States, and also of the extensive official participation in the process. For instance, we can read chilling accounts of courthouse slave auctions, enforcement of fugitive slave laws, and many other instances of widespread brutality and inhumanity carried out by still-extant state entities.[6] Slavery was not a minor wrinkle or a quirky anomaly; rather, it was "deeply embedded in the social, political and legal structure of the nation."[7]

Slavery as an institution also inflicted harm on society, severely undermining the rule of law in America.[8] Government entities were directly and intimately involved in enforcing this regime and in

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3. Throughout this Article I will use the term "Black" rather than "black" or "African-American." *Cf.* Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) ("I shall use 'African-American' and 'Black' interchangeably. When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun.").

4. *See* Keith N. Hylton, *Slavery and Tort Law*, 84. B.U. L. REV. 1209, 1213–37 (2004) (discussing types of harms arising from slavery); Anthony J. Sebok, *Two Concepts of Injustice in Reparations for Slavery*, 84 B.U. L. REV. 1405, 1417 (2004); Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2534 (2001) ("[T]he wrongs done to African slaves during slavery, such as the physical capture and exploitation of Africans for labor, the inhumane treatment and abuse of slaves by white slaveholders, and the psychological abuses in failing to acknowledge and respect African personhood, to name only a few, were horrible and unfathomable."); *see also* ALFRED L. BROPHY, REPARATIONS PRO AND CON 19–40 (2006) (describing the harms of slavery).

5. *See* Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89, 126–28 (2005).

6. *See* Paul Finkelman, *Introduction* to SLAVERY AND THE LAW 3, 14–19 (Paul Finkelman ed., Rowman & Littlefield Publishers, Inc. 2002) (1997).

7. *Id.* at 4; *see also* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 3–13 (2d ed. 2001) (describing the degree to which support for slavery was not aberrational, but rather well understood and accepted by the founders).

8. *See* Kaimipono David Wenger, *Reparations Within the Rule of Law*, 29 T. JEFFERSON L. REV. 231, 232–39 (2007).

inflicting egregious harms on slaves. The regime of slavery restricted Black participation in society and undermined Black confidence in the rule of law.[9] "It involved the creation and maintenance of a legal regime that removed rights from one class of citizens and allowed others to treat them as property."[10]

Jim Crow continued the legacy of slavery and its marginalization of Blacks.[11] During Jim Crow, Blacks suffered a number of specific harms, including voter suppression,[12] peonage and slave-like convict-labor practices,[13] segregation and cultural theft,[14] educational inequity,[15] violence and lynching,[16] and many other effects of racism.[17]

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9. ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 38–40, 201–04 (2004); *see* Joe R. Feagin, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are in Order for African Americans*, 20 HARV. BLACKLETTER L.J. 49, 51, 78–79 (2004); Eric Miller, Taking Reparations Seriously: Reparations Manifesto, Presentation at the Thomas Jefferson School of Law (Mar. 20, 2006) (on file with author).

10. Wenger, *supra* note 8, at 232; *see also*BROOKS, *supra* note 9, at 133–34.

11. *See* BROPHY, *supra* note 4, at 35–36 (discussing Jim Crow harms); Kaimipono David Wenger, From Radical to Practical (and Back Again?): Reparations, Rhetoric and Revolution 33–35 (2010) (unpublished manuscript), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=kaimipono_wenger/.

12. *See generally* Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 87–94 (2008) (giving history of disenfranchisement of Black voters in the South, even in majority areas); *id.* at 122 ("In violation of the letter and spirit of the Constitution, African Americans were denied the opportunity to control or significantly influence Southern governments following the Civil War. That injury violated the democratic principles that the U.S. Constitution established.").

On racialized use of criminal law to suppress voting, see JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 64–79 (2006) and Gabriel J. Chin, *Felon Disenfranchisement and Democracy in the Late Jim Crow Era*, 5 OHIO ST. J. CRIM. L. 329, 334–37 (2007), both of which discuss the racial effects of felon disenfranchisement in the Jim Crow era.

13. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 355–56, 360 (2008); Aziz Z. Huq, Note, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351, 352–55 (2001) (discussing history of peonage).

14. *See generally* K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1187–89 (2008) (describing how Black cultural property, especially music, was unjustly appropriated).

15. *See generally* Maurice Dyson, *When Government Is a Passive Participant in Private Discrimination: A Critical Look at White Privilege and the Tacit Return to Interposition in* PICS v. Seattle School District, 40 U. TOL. L. REV. 145, 176–77 (2008) (describing the Supreme Court's recent jurisprudence regarding racial desegregation of schools).

16. *See* Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 NYU ANN. SURV. AM. L. 557, 557–59, 566, 612–13 (2003); *see also* SHERRILYN IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 8–16, 20–56 (2007) (describing the mob lynching mentality on Maryland's Eastern

One important subset of Jim Crow harms was mass violence inflicted on Black communities, often with the complicity of local authorities. One of the most well-known examples took place in Tulsa, Oklahoma, where in 1921 white rioters destroyed the prosperous Black section of town and killed hundreds of Blacks, while thousands more were driven from the city as their homes and businesses burned.[18] The Black section of Tulsa was completely destroyed. Local police and militia aided the rioters by providing weapons and by attacking Blacks.[19] Similar incidents took place in Rosewood, Florida; East St. Louis, Illinois; Chicago, Illinois; Wilmington, North Carolina; and Colfax, Louisiana.[20] Each incident

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Shore between 1931 and 1933 and highlighting the story of the thwarted attempt to lynch accused rapist Isaiah Fountain); 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, 894 (1993) (describing the "post-Reconstruction terrorism" of beatings and lynchings).

17. Gabriel J. Chin, *Jim Crow's Long Goodbye*, 21 CONST. COMMENT. 107, 126 (2004) ("In large part because of Jim Crow's gradual rather than abrupt decline, even at the level of formal, written law there was never a systematic, sustained effort to identify the scope of racial discrimination and eliminate all of its manifestations."). Incredibly, a large number of Jim Crow–era segregation laws remain on the books in Southern states. Though these laws are not enforced, their continued existence is troubling. Some attempts to remove them from legal codes have succeeded, but others have not. *See* Gabriel J. Chin et al., *Still on the Books: Jim Crow and Segregation Laws Fifty Years After* Brown v. Board of Education, 2006 MICH. ST. L. REV. 457, 462–75 (cataloguing Jim Crow segregation laws that remained on the books as of 2004, as well as the mixed results of reports to state legislatures about those laws); *cf.* David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1388–97 (2004) (describing post–Civil War acts).

18. ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921—RACE, REPARATION, RECONCILIATION, at xvii (2002); BROPHY, *supra* note 4, at 128. *See generally* OKLA. COMM'N, TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921 (2001), *available at* http://www.okhistory.org/trrc/freport.pdf (outlining the 1921 Tulsa Race Riot Commission's findings and its recommendations for reparations). The event is colloquially known as the Tulsa Race Riot. That term conjures images of Watts or the like, which is misleading. Tulsa was more of an organized and efficient expulsion of a group of people, akin to a pogrom or massacre. *See* Okla. Historical Soc'y, *Tulsa Race Riot*, ENCYCLOPEDIA OF OKLA. HISTORY & CULTURE, http://digital.library.okstate.edu/encyclopedia/entries/T/TU013.html (last visited Aug. 23, 2010).

19. BROPHY, *supra* note 4, at 128.

20. *See id.* at 50–51 (describing Rosewood); Kenneth B. Nunn, *Rosewood*, *in* WHEN SORRY ISN'T ENOUGH 435–36 (Roy L. Brooks ed.1999) (same). *See generally* CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008) (describing Colfax); LERAE UMFLEET, 1898 WILMINGTON RACE RIOT COMM'N, 1898 WILMINGTON RACE RIOT REPORT (2006), *available at* http://www.history.ncdcr.gov/1898-wrrc/report/report.htm (considering the commission's findings regarding the riot and its economic impact on Blacks in North Carolina); Kaimipono David Wenger, Towards Microreparations (2010) (unpublished manuscript) (on file with author) (discussing massive Jim Crow harms in these communities).

was then buried, effectively erasing the stories of those communities from the public consciousness.[21]

Slave descendants suffer today from residual racism, a consequence of slavery and Jim Crow.[22] According to the 2000 census, levels of poverty and high school dropout rates among Blacks remain double those among whites.[23] As a group, the per capita income and higher-education rates of Blacks are approximately half those of whites.[24] For example, Black median family income in 1998 was $29,404, while white median family income was $49,023.[25] In 1999, the incarceration rate of Black males was eight times higher than that of white males.[26] Department of Justice statistics show that in 1997 Blacks as a whole had a 16.2 percent chance of going to prison at some point in their lives, compared with a 2.5 percent chance for whites.[27] Among homicide defendants, the chances that a Black defendant will be charged with a capital crime and receive the death penalty continue to rise.[28]

Slavery and Jim Crow also led to the exclusion of Blacks from political power.[29] Blacks were forced to struggle for the civil rights they eventually received under law.[30] To this day, Black exclusion from meaningful participation in the political process continues, as does Black distrust in the rule of law in America.[31]

In summation, the accumulated effects of slavery, Jim Crow, residual racism, and official silence have continued the marginalization and subordination of the Black community.

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21. *See supra* note 20 and accompanying text.

22. *See, e.g.*, Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 224–26 (2003).

23. *See id.* at 223.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* Feagin, *supra* note 9, at 54.

30. *See* JACK GREENBERG, CRUSADERS IN THE COURTS 212–24, 509–12 (1994).

31. BROOKS, *supra* note 9, at 169–71; ROY BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA 89–108 (2009).

II. LEGAL CLAIMS FOR RESTITUTION

Since slavery ended, advocates have sought redress for the harms it caused.[32] Some of the suggested remedies, such as Marcus Garvey's movement for land in Africa, were radical in nature, while others were purely political in scope.[33] However, a number of the claims for restitution have been legal in nature. Advocates framed these claims using legal language and positioned them within traditional legal structures. This part describes some of those legal claims for redress. Section A describes several of the most important reparations lawsuits. Section B catalogues some of the important legal theories used by reparations advocates. Finally, Section C gives a brief recap and summary of the legal developments.

A. Legal Theories for Reparations

Over the past several decades, reparations advocates have suggested bringing claims for restitution for slavery and Jim Crow under a variety of legal theories. The two major strands are tort and unjust enrichment.[34]

Tort claims are relatively straightforward. Slavery clearly involved a large number of actions that meet the standard definitions of intentional torts.[35] These tort claims underlie a number of reparations proposals. For instance, Randall Robinson describes the harms of slavery in arguing that the aggregate unpaid labor that

32. *See* Wenger, *supra* note 11, at 4–10.

33. *Id.* at 18.

34. This is generally recognized in the literature. *See, e.g.*, Alfred Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 516 (2002) ("As to substantive basis, the most commonly cited bases are unjust enrichment and tort.").

Other theories are also possible. Some commentators have suggested bringing human rights claims. For example, in provocative language that evokes the possibility of a human rights claim, Randall Robinson suggests that slavery was "[a] massive crime against humanity[,] . . . an American holocaust." RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 33 (2000). And in another article, I have argued that slave descendants could seek recompense under the takings clause for taken self-ownership. Wenger, *supra* note 22. Despite these and other intimations, the two dominant approaches in reparations thus far are tort and unjust enrichment.

35. The murders, assaults, kidnappings, and rapes involved would satisfy the tort of battery, for instance. *See generally* Judith Kelleher Schafer, *"Details Are of a Most Revolting Character": Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana*, *in* SLAVERY AND THE LAW 241 (Paul Finkelman ed., 2002) ("[E]xcessive violence and cruel treatment of slaves was not uncommon in Louisiana."); Hylton, *supra* note 4, at 1213–37 (discussing types of harms arising from slavery).

slaves performed created a debt, payable by America to Blacks.[36] Similarly, in his 1998 article *Many Billions Gone*,[37] Robert Westley argued that it was time to "reconsider and revitalize the discussion of reparations" using tort claims to "map[] a legal path to enforcement of Black reparations."[38] Other advocates make similar arguments.[39]

Unjust enrichment claims, on the other hand, require a claimant to show only that a defendant unjustly obtained some benefit from the claimant and that the benefit should be refunded.[40] The measure of damages is the amount of unjust gain.[41] Unjust enrichment claims provide certain tactical advantages in mass compensation litigation and have been successfully used in Holocaust and tobacco cases. However, advocates disagree about their appropriateness in the reparations context[42] because they also may create particular disadvantages.[43]

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36. ROBINSON, *supra* note 34, at 1–10. Robinson's book was instrumental in helping further popularize the topic of reparations. *See, e.g.*, BROPHY, *supra* note 4, at 69–71 (discussing the effects of Robinson's book).

37. Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 432 (1998).

38. *Id.* at 432–33.

39. *See generally* BROOKS, *supra* note 9, at 98–140 (discussing the tort model of reparations); Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 283–84 (2006) (discussing tort approaches to reparations).

40. Sebok, *supra* note 4, at 1427 ("The minimum requirements for a claim of unjust enrichment based on *quantum meruit* are: (1) A benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value."); *see also* Brophy, *supra* note 34, at 521 (discussing reparations advocates' arguments in favor of using an unjust enrichment framework); Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651, 654–55 (2003) [hereinafter Sebok, *Knowing the Difference*] (discussing the history of unjust enrichment).

41. *See* Anthony Sebok, *Prosaic Justice*, LEGAL AFF. Sept.–Oct. 2002, at 51, 51; Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443, 1447–49 (2004).

42. *Compare* Sebok, *supra* note 4, at 1440–42 (suggesting that restitution for deceased persons such as slaves is not conceptually coherent and should be avoided), *and* Sherwin, *supra* note 41, at 1454–65 (arguing that unjust enrichment reparations claims are inappropriate because they rely on resentment and retaliation), *with* Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139, 1158–63 (2004) (arguing that restitution claims are descendible and appropriate in the reparations context), *and* Feagin, *supra* note 9, at 49–51 (arguing in favor of reparations under an unjust enrichment model).

43. *See* Sebok, *Knowing the Difference*, *supra* note 40, at 654–55 (acknowledging that statute of limitations problems are not avoidable simply by using a claim of equity, although courts are willing to bend statutes of limitations under certain circumstances); *see also* Sebok, *supra* note 4, at 1418 (noting that states in the tobacco litigation used unjust enrichment claims since these were less susceptible to affirmative defenses than suits for personal injury). They may

Both tort and unjust enrichment approaches to slavery reparations drew explicitly on previous mass restitution cases. For instance, Alfred Brophy noted,

> A . . . factor leading to the reinvigoration of talk about reparations for slavery and Jim Crow are the models of reparations that other groups—Native Americans, Holocaust victims, Japanese Americans interned during World War II, South Africans—have obtained. . . . [A]dvocates of reparations for slavery have drawn from other reparations precedents.[44]

Westley also cited Japanese Americans and Holocaust victims as potential precedents.[45] The prior precedents were important in the development of the legal reparations narrative. Reparations advocates hoped to build upon past instances of mass restitution.[46]

Some advocates also suggested other potential legal avenues for compensation. For instance, Boris Bittker argued that desegregation claims might be brought under § 1983.[47] Similarly, I have argued that a takings clause remedy might be available.[48] Finally, some advocates have proposed using human rights law approaches.[49]

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have other tactical advantages. Sherwin, *supra* note 41, at 1448–51 (discussing other advantages of unjust enrichment claims, including serving as a vehicle for novel legal claims, avoiding problems of proof that affect compensation claims, allowing the plaintiff to bring forth a claim without the burden of proving the defendant is a wrongdoer, and being less vulnerable to objections based on harm and responsibility).

Unjust enrichment was included in the Holocaust cases through a circuitous route—the cases were originally replevin claims, and restitution was later added as an additional effective tool. Sebok, *supra* note 4, at 1407. The restitution claims ended up playing a central role in the Holocaust cases. *See id.* at 1408; *see also* Sebok, *supra* note 41, at 52 (explaining the success of the unjust enrichment claims in the context of the Holocaust slave-labor cases). Unjust enrichment claims, however, are uniquely susceptible to equitable defenses. Sebok, *Knowing the Difference*, *supra* note 40, at 655. They are also subject to difficulties when a long period has passed since the initial injustice, including problems of proof, fairness, and logic. Sherwin, *supra* note 41, at 1451–53. In addition, advocates caution that reducing the discussion of slavery reparations claims to unjust enrichment claims and matters of property runs the risk of degrading the human values at stake. Sebok, *Knowing the Difference*, *supra* note 40, at 657; Sebok, *supra* note 41, at 52–53.

44. Brophy, *supra* note 34, at 499–501 (discussing why the reparations movement has gained substantial strength in both academic and political discussions in the last fifteen years).

45. *See* Westley, *supra* note 37, at 449–58.

46. Wenger, *supra* note 11, at 24.

47. BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 135–37 (Beacon Press 2003) (1973); *see also* Magee, *supra* note 16, at 901–03 (discussing Bittker's analysis of using § 1983 as a foundation for reparations).

48. Wenger, *supra* note 22, 249–50.

49. *See* BROOKS, *supra* note 9, at 133.

There were some important conceptual and structural obstacles to the major legal claims for redress. For one, it was unclear whether slave owners owed a legal duty to slaves (or slave descendants), a condition necessary before tort liability arises.[50] Showing causation was also a major problem because it is unclear, as Brophy notes, "whether tort law would provide compensation for harm to subsequent generations" after harm.[51] Ultimately, the tort approach to reparations becomes entangled in difficult questions of causation, including how to link modern claimants with slave ancestors. Unjust enrichment legal claims also were limited in their scope and faced descendability problems.[52] Moreover, all of the claims faced a variety of procedural hurdles, particularly statutes of limitation.[53]

Brophy's 2006 book, *Reparations Pro and Con*, gives the best explanation and analysis of legal claims relating to reparations. Brophy sets out in detail the legal issues presented by these lawsuits, the types of claims brought, and the types of defendants, plaintiffs, and damages, as well as the differences between tort and unjust enrichment claims.[54] Furthermore, he discusses questions of causation that arise in the reparations context,[55] specific defenses like the statute of limitations,[56] and specific rulings from courts in reparations cases.[57]

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50. If no duty were owed to either slaves or to future generations (or to some other party harmed under slavery), then there would be no tort claim. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 301–20 (W. Page Keeton ed., 5th ed. 1984) (noting the need to establish duty). In addition, if the duty owed to a party were particularly weak, it could be viewed as affecting other aspects of tort liability, such as causation. *See generally* Brophy, *supra* note 34, at 516 nn.84–85 (discussing conceptual problems with tort liability for slavery).

51. *See* BROPHY, *supra* note 4, at 108; *see also* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 374–85 (1987) (addressing the issue of whether subsequent generations can recover under tort law by arguing that a horizontal connection exists within the victim and perpetrator groups for purposes of reparations claims).

52. *See* Matsuda, *supra* note 51, at 374–85.

53. *See* BROPHY, *supra* note 4, at 102–03 (noting that the statute of limitations is the most difficult hurdle).

54. *Id.* at 97–117.

55. *Id.* at 101–02.

56. *Id.* at 102–03.

57. *Id.* at 117–33 (discussing reparations lawsuits, including Japanese Americans' internment suits, Holocaust-Era suits, and slavery and Jim Crow suits, as well as other reparations litigation).

B. Reparations Lawsuits

Advocates put these theories to the test, seeking redress in a variety of lawsuits.[58] This section sets out three of the most important reparations suits: *Cato v. United States*,[59] *In re African-American Slave Descendants Litigation*,[60] and *Alexander v. Oklahoma*.[61]

1. Cato v. United States

Not surprisingly, some lawsuits targeted government actors complicitly tied to slavery. Government involvement in slavery was extensive and created horrific consequences.[62] Government actors were involved in enforcement of slave laws, and slavery was a huge financial benefit for government entities. The plaintiffs in *Cato* sought redress from the United States "for damages due to the enslavement of African Americans and subsequent discrimination against them, for an acknowledgement of discrimination, and for an apology."[63] In particular, the complaint sought

> compensation of $100,000,000 for forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character. [Plaintiffs] also request[] that the court order an acknowledgment of the injustice of slavery in the United States and in the 13 American colonies between 1619 and 1865, as well as of the existence of discrimination against freed slaves and their descendants from the end of the Civil War to the present. In addition, [Plaintiffs] seek[] an apology from the United States.[64]

However, the Ninth Circuit dismissed the *Cato* case. The court found the complaint deficient for a number of substantive reasons.

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58. *Id.* at 117–40 (discussing reparations lawsuits).

59. 70 F.3d 1103 (9th Cir. 1995).

60. 375 F. Supp. 2d 721 (N.D. Ill. 2005).

61. 382 F.3d 1026 (10th Cir. 2004).

62. *See* Wenger, *supra* note 22, at 215–18.

63. *Cato*, 70 F.3d at 1105; *see also* BROPHY, *supra* note 4, at 121–23 (discussing *Cato*); Wenger, *supra* note 22, at 248, 256–58 (same).

64. *Cato*, 70 F.3d at 1106.

The major problem was sovereign immunity: the complaint "does not refer to any basis upon which the United States might have consented to suit" and "neither identifies any constitutional or statutory right that was violated, nor asserts any basis for federal subject matter jurisdiction or waiver of sovereign immunity," leading to its dismissal on sovereign immunity grounds.[65] In addition, the plaintiffs' claim was brought too late,[66] and "[w]ithout a concrete, personal injury that [was] not abstract and that [was] fairly traceable to the government conduct that she challenge[d] as unconstitutional, Cato lack[ed] standing."[67] The court concluded with a broad assessment that "the legislature, rather than the judiciary, is the appropriate forum for this relief."[68]

2. In re African-American Slave Descendants Litigation

While *Cato* was a setback, it left the door open to suits against private actors, who cannot use sovereign immunity as a defense. In addition, *Cato* predated the shift in mass restitution that occurred in the late 1990s, when innovative legal strategies and claims of unjust enrichment resulted in an eventual settlement and reparations for Holocaust victims.[69] Advocates suggested that similar strategies could be used in the Black reparations movement.[70]

In 2002, Deadria Farmer-Paellman filed suit in federal court, seeking reparations from a variety of corporate defendants under tort and unjust enrichment theories.[71] The corporate claims were consolidated to the District Court for the Northern District of Illinois, which dismissed the consolidated claims in *Slave Descendants*, finding that the claims were barred by a variety of legal hurdles, including standing and statute of limitations.[72] Despite academic

65. *Id.*

66. *Id.* at 1106–08.

67. *Id.* at 1109.

68. *Id.* at 1111.

69. BROPHY, *supra* note 4, at 45–46; *see* Sebok, *supra* note 4, at 1406.

70. Sebok, *supra* note 4, at 1416–18.

71. Complaint and Jury Trial Demand at 7, Farmer-Paellmann v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. Mar. 26, 2002); *see* BROPHY, *supra* note 4, at 123–25; Dagan, *supra* note 42, at 1158–63; Sebok, *supra* note 4, at 1427; Wenger, *supra* note 39, at 297–301.

72. BROPHY, *supra* note 4, at 124; Wenger, *supra* note 39, at 316–26.

criticism of that ruling,[73] it remained essentially unchanged in the district court's later decisions. The Court of Appeals for the Seventh Circuit then affirmed the dismissal of the major claims.[74]

The district court in *Slave Descendants* dismissed claims based on the lack of causal connection between defendants' actions and plaintiffs' harms. The court wrote, "Plaintiffs cannot establish a personal injury sufficient to confer standing by merely alleging some genealogical relationship to African-Americans held in slavery over one-hundred, two-hundred, or three-hundred years ago."[75] Ultimately, the district court was unwilling to find liability where causation was this attenuated. The appellate court agreed, writing that "this causal chain is too long and has too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all, let alone in an amount that could be estimated without the wildest speculation."[76]

The statute of limitations was also a fatal barrier.[77] The *Slave Descendants* court noted:

> Many of the torts set out in the instant complaint occurred prior to the formal end of chattel slavery in the United States of America. These claims would have accrued by 1865 at the latest. The longest limitations period for any of Plaintiffs' claim is ten years, which would have run well over a century prior to the filing of the instant Complaint. If cognizable claims ever existed, those claims were owned by former slaves themselves, and became time-barred when the statutes of limitations expired in the nineteenth century.

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73. *See* Wenger, *supra* note 39, at 316–26. *See generally* James R. Hackney, Jr., *Ideological Conflict, African American Reparations, Tort Causation and the Case for Social Welfare Transformation*, 84 B.U. L. REV. 1193, 1194–1201 (2004) (discussing general problems with bringing slavery reparations lawsuits).

74. *In re* African-American Slave Descendants Litig., 471 F.3d 754, 763 (7th Cir. 2006). One peripheral claim relating to fraud was not dismissed. *Id.*; *see also* Farmer-Paellman v. Brown & Williamson Tobacco Corp., 552 U.S. 941 (2007) (denying certiorari).

75. *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 752.

76. *In re African-American Slave Descendants Litig.*, 471 F.3d at 759.

77. There are potential ways around the statutes of limitations in some cases; as Brophy notes, courts could toll the statute, or legislators could pass legislation allowing a suit to go forward. BROPHY, *supra* note 4, at 126–27. None of those avenues have been adopted by courts. *Id.*

> As such, Plaintiffs' century-old claims are barred by the statutes of limitation in every jurisdiction.[78]

Ultimately, the court ruled that plaintiffs were entitled to no legal remedy.

3. Alexander v. Oklahoma

In 2003, advocates filed suit seeking compensation in *Alexander*.[79] Although the riot had been buried for decades, the Tulsa Race Riot Commission's 1997 investigation and subsequent 2001 report detailed the government's involvement in the massacre and provided hundreds of pages of history about the previously little-known event.[80] The Commission recommended various responses, including some types of reparations;[81] however, the legislature passed a more limited bill that did not include any reparations.[82]

In response, advocates filed suit in *Alexander*, but that case was also dismissed.[83] Like other cases, it was unable to avoid the statute of limitations.[84]

C. Lawsuit Failures in General

To date, no lawsuit for slavery reparations has succeeded, and only one major post-slavery reparations lawsuit has had any success.[85] The Black farmers' case, *Pigford v. Glickman*,[86] resulted in a settlement, but that case is anomalous in many ways.[87] For example, it covered egregious discrimination during a period after

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78. *In re* African-American Slave Descendants Litig., 304 F. Supp. 2d 1027, 1070 (N.D. Ill. 2004) (citations omitted).

79. *See* BROPHY, *supra* note 4, at 128–32 (describing *Alexander* lawsuit).

80. *See* Jim Yardley, *Panel Recommends Reparation in Long-Ignored Tulsa Race Riot*, N.Y. TIMES, Feb. 5, 2000, at A1; Okla. Historical Soc'y, *supra* note 18.

81. FRANK KEATING ET AL., TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, at ii (2001), *available at* http://www.okhistory.org/trrc/freport.pdf.

82. *See* BROPHY, *supra* note 18, at 117.

83. BROPHY, *supra* note 4, at 131–32.

84. *See id.*

85. BROOKS, *supra* note 9, at 119 (describing lawsuits).

86. *See* Pigford v. Glickman, 182 F.R.D. 341 (D.D.C. 1999) (approving settlement); Pigford v. Glickman, 206 F.3d 1212 (D.C. Cir. 2000) (discussing settlement history). *See generally* Tadlock Cowan & Jody Feder, The *Pigford* Cases: USDA Settlement of Discrimination Suits by Black Farmers, Congressional Research Service, Dec. 10, 2010, *available at* http://www.nationalaglawcenter.org/assets/crs/RS20430.pdf.

87. *See* BROPHY, *supra* note 4, at 132.

the end of Jim Crow (through the 1980s and 1990s); and even in that case, armed with a formal settlement, claimants struggled to receive compensation.[88]

III. THE REPARATIONS DILEMMA

Claims for restitution for slavery and Jim Crow create a dilemma of sorts. They are neither easily granted nor easily denied, and serious problems arise for either answer. This part will examine this reparations dilemma.

A. Problems with Denying Restitution

There are serious problems with denying claims for slavery reparations. Slavery was a massive violation of human rights. Normally, our legal system requires that society address rights violations—even for relatively minor violations. Of course, legal avenues vary depending on the specifics of a particular case. However, as Judge Jack B. Weinstein notes, "It is important to recall the central theme of our legal system: *ubi jus, ibi remedium*—every violation of a right should have a remedy in court."[89] This idea has substantial support in the common law.[90] Professor John C.P. Goldberg goes even further, arguing that there is a constitutional right to tort law remedies.[91] He argues that under the Due Process Clause, "American citizens have a right to a body of law for the redress of private wrongs."[92]

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88. BROOKS, *supra* note 9, at 124–30; BROPHY, *supra* note 4, at 132; *see* Associated Press, *Deal Nearer for Farmers in Bias Case*, N.Y. TIMES, Feb. 19, 2010, at B2.

89. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 166 (2008).

90. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 532 (2005); Natsu Taylor Saito, *At the Heart of the Law: Remedies for Massive Wrongs*, 27 REV. LITIG. 281, 300–05 (2008) (discussing the history of the idea).

91. *See* Goldberg, *supra* note 90, at 596 (arguing that there is a constitutional right to a tort remedy for the redress of private wrongs).

92. *See id.* at 524. This idea is not universally accepted. *See* McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 219 (2d Cir. 2008) (quoting FDA v. Williamson Tobacco Corp., 529 U.S. 120 (2000)) (reversing certification of a class of light cigarette smoker plaintiffs); Weinstein, *supra* note 89, at 166 n.813 (citations omitted) (noting that the Court of Appeals for the Second Circuit has written that "not every wrong can have a legal remedy . . . at least not without causing collateral damage to the fabric of our laws"). On a similar note, Marc Galanter writes that "[r]emedies cost in time, expense, attention, and lost opportunities, so all injustices cannot be remedied." Galanter, *supra* note 2, at 111.

Tort law has been the traditional avenue to obtain remedies in these kinds of cases.[93] As Adam Zimmerman notes, "[F]or years, private lawsuits in the United States have been the primary tool to ensure people pay damages to those they harm."[94] Similarly, Judge Weinstein notes that "[t]he subject of torts is crucial in providing 'for' the people because they should be able to use the law in order to be compensated for their private injuries."[95]

Of course, slavery is multiple orders of magnitude more serious than the minor violations that we expect society to address. As such, it seems all the more unacceptable not to address it. Weinstein elaborates further that "the tort model provides an effective democratic and egalitarian means for protecting victims and ensuring that their injuries are properly compensated."[96] It protects "'the default norm that the civil justice system will provide a remedy for every wrong.'"[97]

Terms like "civil justice" and "civil recourse" are used to describe a system or process of access to justice. Zimmerman notes that "corrective justice and civil recourse are distinct concepts, but both have been used to describe values that underlie access to private civil litigation . . . both terms refer to an interpersonal form of justice that, in turn, requires a wrongdoer to repair damages to a particular person through a public process."[98] That is, suggests Zimmerman,

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93. "In our legal system, redressing private wrongs has tended to be the business of tort law . . . ." Goldberg, *supra* note 90, at 524; *see also* Saito, *supra* note 90, at 287 (arguing that the "core function of movements for redress" is the "bringing to light of historical facts and their human consequences").

More pessimistic observers have suggested that tort did not develop as a system to compensate victims, but as an industry subsidy. Joyce Sterling & Nancy Reichman, *The Cultural Agenda of Tort Litigation: Constructing Responsibility in the Rocky Mountain Frontier*, *in* FAULT LINES 287, 287 (David M. Engel & Michael McCann eds., 2009) (discussing the literature on the history and development of tort law). Obviously a tort system still focused on that purpose would be unhelpful for slave claims.

94. Adam Zimmerman, *Distributing Justice*, 85 N.Y.U. L. REV. (forthcoming May 2011); *see also* Goldberg, *supra* note 90, at 541–49 (discussing the history of tort law in providing redress for private harm); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 954 (2001) (noting that the function of tort law is "the compensation of victims and deterrence of future bad acts").

95. Weinstein, *supra* note 89, at 166.

96. Weinstein, *supra* note 94, at 969.

97. *Id.* at 981 (quoting John C. Goldberg & Benjamin C. Zipursky, *The Third Restatement and the Place of Duty in Negligence*, 54 VAND. L. REV. 657, 723 (2001)).

98. Zimmerman, *supra* note 94 (manuscript at 10–11). *See generally* Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 422 (2003) (discussing which types of losses deserve mere compensation

"they force a specific wrongdoer to restore victims' specific losses, resulting from a specific wrongful act through an individualized, but otherwise public, forum."[99] Jason Solomon suggests that "the characteristics of civil justice might promote something called 'equal accountability.' When we evaluate how well the civil justice system works by looking at whether there are injuries that go unremedied, accountability (along with more familiar metrics like compensation and deterrence) ought be a primary metric that we use."[100] As Marc Galanter notes, both injury and remedy are bound up with our theories of justice and what wholeness means.[101]

Ultimately each of these theories is based on the intuition that it is morally unacceptable not to address harms of this magnitude. It is wrong to expect that victims will let the harms go unaddressed or simply "lump it" and absorb the harm themselves.[102]

Furthermore, the potential lapse in justice relates the harm to the rule of law. As various writers have suggested, reparations are an important step in restoring confidence in the rule of law. This is not unlike insights from other areas of tort law. For instance, David Engel notes in interviews with villagers that one common perception of harm and restitution is the idea of repairing the social fabric—that society itself demands a remedy for some harms.[103]

Failure to respond, on the other hand, lets a major moral wrong go unredressed. As Roy Brooks notes, "When a government commits an atrocity against an innocent people, it has, at the very least, a moral obligation to apologize and to make that apology believable by

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and from which the law should "exact retribution from harmdoers"); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 733–53 (2003) (offering a theory of civil recourse in place of a theory of corrective justice).

99. Zimmerman, *supra* note 94 (manuscript at 10–11).

100. Jason M. Solomon, *What Is Civil Justice?*, 44 LOY. L.A. L. REV. 317, 337 (2010). This is similar in some ways to Don Braman's approach, which is also based on the idea of accountability. Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1147 (2006).

101. Marc Galanter, *The Dialectic of Injury and Remedy*, 44 LOY. L.A. L. REV. 1,1 (2010).

102. *See* David M. Engel, *Lumping as Default in Tort Cases: The Cultural Interpretation of Injury and Causation*, 44 LOY. L.A. L. REV. 33, 36 n.12 (2010).

103. *See id.* at 25 in manuscript. *See generally* ROSALEE A. CLAWSON & ERIC N. WALTENBURG, LEGACY AND LEGITIMACY: BLACK AMERICANS AND THE SUPREME COURT 3–5 (2008) (discussing how legitimacy can maintain the effectiveness of a political system); TOM R. TYLER, WHY PEOPLE OBEY THE LAW: PROCEDURAL JUSTICE, LEGITIMACY, AND COMPLIANCE 19–68 (2006) (noting that justice creates legitimacy, which leads to buy-in and voluntary cooperation with laws).

doing something tangible called 'a reparation.'" [104] Further, "[t]he perpetrator's duty to atone for a past atrocity is a moral imperative . . . . So long as the perpetrator or its successor-in-interest is alive, the atrocity's moral stain does not perish with the victims." [105]

Tort law is not designed only to address minor violations. Instead, it includes potential avenues for relief for various kinds of massive harms. For instance, class action cases are designed to provide some level of restitution for large numbers of people who have been injured by another party's bad actions. [106] These cases often result in some sort of mass distribution. Zimmerman notes that "large settlements hold defendants accountable for wide and diffuse harms that are too costly to be prosecuted through individual litigation. Class action settlements, at least theoretically, serve an important democratic function, allowing groups of individuals to collectively petition and redress widespread harm." [107]

Natsu Taylor Saito suggests that "[t]he basic principles we take for granted in everyday instances of legal analysis, if they have any legitimacy, should be equally applicable to large cases." [108] That is, the legal system should be able to accommodate even large cases. Indeed, not only would one expect the same rules to apply to these cases, but a contrary policy of not applying them would be seriously problematic. Saito notes that "it raises questions about the legitimacy of the entire legal project, for a system capable of providing remedies only for minor violations of law, but not massive wrongs, promotes neither justice nor the rule of law." [109] If the law can only address

104. BROOKS, *supra* note 9, at ix.

105. *Id.* at 143, 145.

106. Weinstein, *supra* note 96, at 953–54.

107. Zimmerman, *supra* note 94 (manuscript at 9); *see also* Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 382 (1996) ("[C]ourts offer . . . opportunitites for public participation . . . ."; Weinstein, *supra* note 94, at 953 (describing class-action lawsuits as a method involving plaintiffs that may otherwise have not sought a remedy). As Judge Weinstein notes, "In the past century tort law has expanded its primary role to compensate." Weinstein, *supra* note 94, at 959. Tort law has traditionally had additional punitive functions as well. *See id.* at 954. *See generally* Kaimipono David Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 WISC. L. REV. 1115, 1120–25 (2003).

108. Saito, *supra* note 90, at 282. Those basic principles are: "Was there a right or a duty? Was it violated and, if so, who is responsible? What damage accrued as a result? How can the wrong be rectified?" *Id.* at 282–83.

109. *Id.* at 282; *see also* ELAZAR BARKAN, THE GUILT OF NATIONS, RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES 283–95 (2000) (discussing reparations for slavery);

minor scrapes and bruises, what good is it? Thus, one might reasonably expect a system of corrective justice under the rule of law to have some remedy in place for a set of egregious wrongs like slavery. [110]

Yet, reparations claims have already been denied for well over a century. Despite repeated attempts to secure redress over the past 150 years, [111] neither courts nor legislatures have ever made restitution in any meaningful way. Westley writes of the reparations project:

> If there is a substantive view of oppression embedded in the claim for slavery reparations, it is that state-sponsored transgenerational private and public expropriation of labor and wealth accumulation potential through force and violence is unjust, that those who suffer such a fate deserve material and symbolic redress from perpetrators, and that the obligation of corporate or government wrongdoers to make redress is not extinguished so long as they continue to exist. [112]

Thus, very good arguments can be made to show that restitution claims should not be denied. Given these arguments, repeated court and legislative punting is outrageous. The Black community is justified in feeling moral indignation about the failure to address a longstanding harm. The law has figured out ways to address other harms, so why not this one?

B. Problems with Granting Restitution

On the other hand, the *Slave Descendants* court is right that reparations cases are very complicated and raise difficult legal issues. For a variety of reasons, courts are not well situated to address classic tort or unjust enrichment claims for slavery reparations.

MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 25–26 (1998) (noting the necessity of a legal proceeding in responding to atrocity, in order to restore the rule of law).

110. *See* Wenger, *supra* note 8, at 238–41.

111. *See* Wenger, *supra* note 11, at 4–11 (discussing the history of reparations claims).

112. Robert Westley, *Reparations and Symbiosis: Reclaiming the Remedial Focus*, 71 UMKC L. REV. 419, 429 (2002). Further, "[a]gainst the proper defendants, the idea of some kind of legal action designed to punish and to secure compensation seems not only sensible, but also compelling." Sebok, *supra* note 4, at 1417.

Courts in the private law context traditionally focus on private actions such as tort and contract claims. A variety of requirements in those contexts—such as tort law's causation rules—do not map well onto reparations claims. This is a problem that advocates have known about for some time. For instance, Mari Matsuda challenges conventional understandings of causation in the reparations context.[113] Matsuda argues that reparations could be achieved only if the law bypassed traditional ideas of proximate causation and individual connection between wrongdoer and victim, in favor of "an expanded version of liberal legalism" based on "new connections between victims and perpetrators."[114] Similarly, in a prior article, I note that reparations claims do not fit well with traditional tort theories of causation because they suffer from attenuation problems relating to victims, wrongdoers, and actions: "[I]t is not an overstatement to say that no case that suffered from all three kinds of attenuation has successfully proceeded to a successful resolution through trial or settlement. This is a dire diagnosis for reparations."[115]

Reparations claims are also a poor fit with some tort views of justice. Tort claims often rely on the concept of corrective justice, which is designed to make whole parties that have been wronged. Corrective justice attempts to put people in the position they would have been in if the wrongful act had not occurred.[116] Corrective justice ideas in reparations are backward-looking and would require society to compensate for harms suffered by Blacks.[117]

On the surface, this approach would seem to be a good fit. After all, reparations claims often are framed using corrective ideas. Robinson famously writes that reparations should be viewed as a

113. Matsuda, *supra* note 51, at 381–83. Brophy calls this article "the fountainhead of academic writing on reparations." BROPHY, *supra* note 4, at 278.

114. Matsuda, *supra* note 51, at 374.

115. Wenger, *supra* note 39, at 305 (emphasis omitted).

116. *See generally* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 61–75 (1995) (discussing differences between corrective and distributive justice ideas); Stephen Perry, *On the Relationship Between Corrective and Distributive Justice*, *in* 4 OXFORD ESSAYS IN JURISPRUDENCE 237 (Jeremy Horder ed., 2000) (same); Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 515–30 (1992) (same).

117. *See* Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 683, 685, 707–09 (2004); Lyons, *supra* note 17, at 1375–79.

payment due on a debt. [118] This framing is simple and suggests clear liability.

However, the corrective approach does not fit well with reparations claims for a number of reasons. Corrective justice typically demands a close link between victim and accused—exactly the characteristic reparations claims lack. This means that corrective justice is not always a good fit for reparations. Robinson's debt framework has been criticized precisely because it does not capture the complexity of the variety of harms claimed in reparations or the causal links involved. [119]

There are other concerns with a corrective justice framework. Corrective justice seeks to put people in the position they would be in if the wrong had not occurred. However, there are tricky theoretical questions as to how to treat that concept in the case of slavery. [120] True compensation for these kinds of harms is impossible because the value of the damage done is incalculable. As I note in another article, "[r]eparations are always dealing in the realm of fundamentally inadequate responses because money cannot truly compensate victims . . . [r]ather, reparations for mass harm will almost always be limited to ultimately symbolic gestures of acknowledgement and regret." [121] Similarly, Martha Minow notes that "the actual effects of the reparations law[] illustrate the symbolic significance of official acknowledgement of wrongdoing," rather than being compensatory in nature. [122] However this does not mean that claims should remain unpaid. Martha Chamallas notes that "[a]lthough some legitimately worry about the commodification of

118. ROBINSON, *supra* note 34, at 8–10.

119. This argument also fails to address the protection that law gives debtors.

120. BROPHY, *supra* note 4, at 7–8.

121. Kaimipono David Wenger, *Apology Lite: Truths, Doubts, and Reconciliations in the Senate's Guarded Apology for Slavery*, 42 CONN. L. REV. CONNTEMPLATIONS 1, 6 (2009), http://connecticutlawreview.org/documents/Wenger-FINALforonline.pdf.

122. MINOW, *supra* note 109, at 100 ("The point of these payments was not to make up for the loss of home, business, opportunity, and standing in the community which these people had suffered." (quoting Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4 (1992))). Another scholar notes that "there has never been 'adequate' compensation for nontangible . . . losses." BARKAN, *supra* note 109, at 290. And Matsuda notes that restitution is important even if it is inexact: "Exactitude is less important than other social goals of the law. Better a windfall to non-victims than to wrongdoers; better rough justice than no justice at all." Matsuda, *supra* note 51, at 385–87. *See generally* Dayna Nadine Scott, *Body Polluted: Questions of Scale, Gender and Remedy*, 44 LOY. L.A. L. REV. 297 (2010) (discussing remedy options in cases where no compensation is possible).

intangible losses, in my view, the only thing worse than having one's pain reduced to money is having one's pain reduced to very little money." [123]

Reparations arguments draw on distributive justice theory as well. [124] Distributive justice focuses on achieving fair distribution of resources. [125] This goal matches many of the forward-looking goals of some conceptions of reparations and also avoids some of the conceptual difficulties of reparations based on corrective justice.

However, distributive justice ideas do not always fit particularly well with the tort system, which has historically reflected a corrective justice approach in many cases. [126] Distributive justice remedies are more difficult to receive through the judiciary and are often legislated instead. [127]

Tort law's reliance on corrective justice should not be overstated; it is also true that, to some degree, "both corrective and distributive justice ideals, including a concern for group equality, can be found in tort law . . . ." [128] But distributive justice ideas most often

123. Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1437–38 (2005).

124. *See* Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L.J. 31, 32 (2004) ("They reflect two distinct and in some ways conflicting policies behind reparations litigation. One approach is driven in large part by social welfare and distributional goals. The other approach is based on a desire to correct historical injustices; simply to 'do justice.'"); Matsuda, *supra* note 51, at 375–80. *But see* Katrina M. Wyman, *Is There a Moral Justification for Redressing Historical Injustices?*, 61 VAND. L. REV. 127 (2008) (arguing that distributive justice does not provide a moral basis for reparations).

125. *See* Hylton, *supra* note 124, at 33 ("At the heart of the *FleetBoston* [reparations] suit is a belief that reparations litigation will compensate or correct for years and years of inattention, or insufficient attention, to the welfare of African Americans."). This is similar to the redistributive goal of the tobacco class action litigation. *Id.*; *see also* BROPHY, *supra* note 4, at 8; Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 157, 158–67 (2004) (discussing the two different approaches).

126. *See* Forde-Mazrui, *supra* note 117, at 685, 707–09; Lyons, *supra* note 17, at 1375–78.

127. *Cf.* Richard A. Epstein, *The Case* Against *Black Reparations*, 84 B.U. L. REV. 1177, 1186 (2004) ("[W]hy think of the claim as one for reparations when the program looks far more like some legislative initiative that does not have to observe the standard constraints of corrective justice, but simply has to command sufficient political support to pass."). One interesting aspect of reparations lawsuits is their use of corrective justice tools, the tort system, to try to create the pressure to ultimately lead to a remedy from the legislature, which would be a distributive justice remedy. Of course, distributive justice may not be a perfect fit either. As Galanter notes, "Distributive justice is forward looking, but cool, reflective, detached; corrective justice is warm but retrospective, emphasizing continuity and identity . . . ." Galanter, *supra* note 2, at 121.

128. Chamallas, *supra* note 123, at 1457.

manifest in settlement.[129] And reparations claims, which would benefit from a distributive justice approach, are nowhere near settlement.[130] A settlement would require more political will than exists. And even if advocates took different strategic approaches, the basic problem remains. Reparations claims neither fit well into the court system, nor fit well into corrective justice theories.[131]

Other tort theories are also unhelpful. For instance, many scholars have suggested that tort law should promote economic efficiency.[132] However, it is not clear that reparations would be an efficient use of resources. And even if reparations claims were clearly economically efficient, tying them to economic outcomes threatens to commodify the harm of slavery in problematic ways.[133]

It is also not clear that reparations would be justified for deterrence reasons.[134] Reparations advocates disagree on whether reparations would have deterrent value. Matsuda suggests that reparations would give at least some deterrent effect.[135] Other

129. As Zimmerman notes, "[C]lass action settlements increasingly straddle the line between tort and public benefit compensation" in part because they "seek rules that further distributive justice among many people who suffer many different kinds of loss, and stem[] from many, sometimes indistinguishable, causes." Zimmerman, *supra* note 94 (manuscript at 10); *see also* TSACHI KEREN-PAZ, TORTS, EQUALITARIANISM AND DISTRIBUTIVE JUSTICE 8 (2007) (discussing distributive justice in tort law).

130. In addition, the moral claims of reparations may be a bad fit for the pragmatic bargaining of the settlement table. *Cf.* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1084–85 (1984) (describing settlements as the "products of a bargain between the parties rather than of a trial and an independent judicial judgment").

131. For instance, as Brophy notes, it is unclear "whether tort law would provide compensation for harm to subsequent generations" after the harm occurred. BROPHY, *supra* note 4, at 108; *see also* Matsuda, *supra* note 51, at 374–85 (discussing ways to establish the proximate causal connection between the past wrong and present claim despite a generational time gap).

132. *See* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 64 (2010) (discussing prominent tort scholars' focus on law and economics).

133. *See* Sebok, *supra* note 4, at 1426–27 (explaining how focusing on the value of slave labor "commodifies" the wrongs of slavery); Wenger, *supra* note 22, at 204–05 (discussing the danger of commodification).

134. *See generally* Weinstein, *supra* note 94, at 954 (discussing the role of deterrence in tort law).

135. *See* Matsuda, *supra* note 51, at 383–84 ("Deterrence is particularly advanced by reparations doctrine. The very process of determining the validity of claims will force collective examination of the historical record. The discovery and acknowledgement of past wrongs will educate us, and help us to avoid repeating the same errors. Acknowledging and paying for the wrong of the World War II relocation, for example, would help us analyze current proposals for preventive detention. Victim-consciousness, including an acute awareness of threats to freedom, could become part of mainstream consciousness.").

scholars are less sure.[136] Slavery is sufficiently removed in time, and an anti-slavery norm sufficiently engrained, that reparations would likely have little deterrent effect.

Finally, it is not clear that tort law or unjust enrichment has the moral heft to handle reparations claims. Writing about the lack of moral dimension in unjust enrichment, Anthony Sebok notes that unjust enrichment provides "an impoverished understanding" of reparations claims because it merely turns them into claims that slaves were not paid.[137] Similarly, Brooks writes with regards to tort claims that "[t]he final problem with the tort model" is "its moral deficiency. . . . [T]he tort model clouds the black redress movement's identity with international human rights movements."[138] Thus, the fit may frustrate not just courts but reparations advocates as well.

The *Slave Descendants* court, like many other opponents of tort reparations, is both right and wrong. It is correct that the tort system does not fit well with reparations claims in many ways. It is also true, however, that lack of redress is unacceptable. The result is a paradox of sorts—the reparations dilemma. Tort compensation is a poor fit, but nonremedy is an outrage. This dilemma frames the following discussion.

IV. MASS HARM AND THE LIMITS OF JUDICIAL REMEDIES

Slavery and Jim Crow, then, illustrate some of the difficult questions that arise in mass restitution cases. Some reparative action is needed in the case of slavery and Jim Crow; the community has

136. Ken Cooper-Stephenson, *Theoretical Underpinnings for Reparations: A Constitutional Tort Perspective*, 22 WINDSOR Y.B. ACCESS JUST. 3, 8–10 (2003) (discussing reparations' lack of deterrent effect on future government behavior); *see* Wyman, *supra* note 124, (arguing that reparations are not justified under theories of deterrence).

137. Sebok, *supra* note 41, at 52–53. The unjust enrichment concept was introduced for pragmatic reasons. *See* Sebok, *supra* note 4, at 1414–16 (discussing how states turned to an unjust enrichment claim in tobacco litigation when other strategies failed); *see also* BROPHY, *supra* note 4, at 109–14.

Unjust enrichment offers only a small potential recovery, for price of services, while adding additional conceptual problems: it undercuts the moral force of reparations claims, and it is unlikely to fully compensate for harm. This is because of a particular conceptual disconnect—as Brophy notes, in reparations cases, "[h]arm almost always is greater than benefit"—meaning that unjust enrichment claims, unlike tort claims, will typically undercompensate. Unjust enrichment is also a sort of conceptual cul-de-sac, with none of the moral force of other claims. *See* BROPHY, *supra* note 4, at 104; Sebok, *supra* note 4, at 1426–30, 1440–42; Wenger, *supra* note 39, at 285 n.25.

138. BROOKS, *supra* note 9, at 140.

sustained severe moral harm, and the longstanding lack of response only reinscribes injury. However, traditional tort approaches are inadequate. Of course, individual compensation for mass injustices is always difficult to calculate and administer. Slavery, as a "super-wrong," puts the normal concerns of mass compensation into sharp relief and adds a whole new set of unique concerns for courts, legislators, and theorists.[139] Ultimately, the breakdown of the judicial approach in reparations cases helps to illustrate some of the limits of courts.

Court limits are not the sole explanation for the failure of reparations lawsuits. Denial of claims stems from a variety of factors. Racism and related biases have been involved in several stages of the process. However, the rejection of claims by the *Slave Descendants* and *Alexander* courts is ultimately about more than just the particular harms at issue in those cases or the underlying race issues. It also makes a statement about the role of courts. In the end, courts are not situated to address damages without causation. It is not what we expect courts to do. The indirect effect of this type of litigation is to show the limits of law.

Slavery and Jim Crow illustrate the problem of injury without remedy, the topic of this symposium. This problem challenges our notions of how we address wrong in society. If a wrong cannot be addressed by courts, how should it be addressed? And in particular, how should we treat harms that are focused on marginalized minorities—the groups who are not well represented in the democratic process and who disproportionately rely on courts for protection? This part discusses ways that the existing framing of tort questions reflects and reinforces certain societal values.

A. Mass Restitution and Its Limits

One initial note is that tools do exist for addressing some massive harms. Courts and legislatures have addressed large harms multiple times in the past.[140] In the process of addressing such harms,

139. *See* Galanter, *supra* note 2, at 109 ("[T]he claim for reparations for American slavery . . . raises so abundantly the perplexities of righting old wrongs.").

140. *See* BROPHY, *supra* note 4, at 30–31 (listing instances of reparations); *cf.* Zimmerman, *supra* note 94 (manuscript at 16) (citations omitted) ("In the early 1800s, Congress passed laws designed to compensate victims of natural disasters, the Revolutionary War, and other calamities.").

court roles have been fluid, and judges have sometimes engaged in flexible "judging for the situation" to address mass harms with novel tools.[141]

We see one instance of novel legal approaches in *In re "Agent Orange" Products Liability Litigation*[142] in which Judge Weinstein adopted a number of novel tactics to bridge the gap.[143] "To address a complex problem of underdetermination, Judge Weinstein applied statistical causation using a type of proportional liability in allocating damages."[144] Statistical, pro rata distribution of damages was used because of the problem of indeterminate defendants and indeterminate plaintiffs.[145] Recognizing the relative novelty of this approach, the judge wrote: "We are in a different world of proof than that of the archetypical smoking gun. We must make the best estimates of probability that we can using the help of experts such as statisticians and our own common sense and experience with the real universe."[146]

Similarly, some class action cases have resulted in compensation to a community through use of a "fluid recovery" model or through

141. *See* Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2019–21 (1997) (discussing Judge Weinstein's use of "judging for the situation").

142. 597 F. Supp. 740 (E.D.N.Y. 1984).

143. Minow, *supra* note 141, at 2013–14.

144. Wenger, *supra* note 39, at 313; *see In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 836–37 (E.D.N.Y. 1984). *See generally* PETER H. SCHUCK, AGENT ORANGE ON TRIAL 26, 30, 271–72 (1986) (describing trial and resolution, including process of arriving at settlement).

145. *In re "Agent Orange,"* 597 F. Supp. at 840–43. The court later wrote that causation could not be established to allow liability. *See In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1229 (E.D.N.Y. 1985) (granting summary judgment to defendants against plaintiffs who had opted out of certified class, since plaintiffs could not show a "causal link between exposure to Agent Orange and the various diseases from which they are allegedly suffering"), *aff'd*, 818 F.2d 187 (2d Cir. 1987); *id.* at 1267 (also granting summary judgment against an opt-out plaintiff).

146. *In re "Agent Orange,"* 597 F. Supp. at 838; *see also In re* Joint E. & S. Dist. Asbestos Litig., 52 F.3d 1124, 1131 (2d Cir. 1995) ("Causation in toxic torts normally comprises two separate inquiries: whether the epidemiological or other scientific evidence establishes a causal link between *c* (asbestos exposure) and *d* (colon cancer), and whether plaintiff is within the class of persons to which inferences from the general causation evidence should be applied."); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 859–60 (1984) (advocating proportional liability for defendants "in proportion to the probability of causation [of harm]" to the plaintiff class members). *But cf.* Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1822–23 (1985) (arguing that mere statistics, even when based on causal generalizations, cannot adequately show legal causation).

other approaches distinct from individual checks.[147] For instance, courts have used the *cy pres* power in a variety of mass restitution settings in the past.[148] Judge Weinstein notes that "[m]any mass tort resolutions have moved away from the traditional courtroom individual remedies, and have instead set up aggregated settlements, compensation-administrative plans, and insurance-type installment payment programs supervised by the courts."[149]

Even more creative remedies are an option. For instance, there are various hybrid litigation models. Judge Weinstein and others have addressed the possibility of administrative agency–like actions. In a 2001 article, Judge Weinstein discussed how administrative, civil, and criminal law could work in concert to provide responses for some mass private harms.[150] At its most complicated, the process could involve political action, judicial action, and administrative hearings, all linked together. This sort of joint action took place with the 9/11 Victim Compensation Fund, under the direction of Special Master Kenneth Feinberg.[151]

In theory, at least, reparations could similarly be addressed by a broad application of legal theories.[152] Many advocates have suggested this sort of approach. For instance, I have suggested that reparations claims could be analyzed under statistical causation models, such as those used in mass restitution cases brought by

147. *See* Weinstein, *supra* note 94, at 979–80 ("Private actions by individuals or private nongovernmental groups to obtain remedies for the population generally against abuses in prisons, mental institutions, schools, toxic dumps, or the like in this category."). There are criticisms of flexible tort models. For instance, some critics have pointed out potential problems in the mass tort model, including the danger that verdicts will be outliers, not representative of community beliefs, or otherwise problematic. *See, e.g.*, Bryon Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 TEMP. L. REV. 1013, 1018, 1028–30 (2007). However, additional procedural protections may be able to lessen these problems. Weinstein, *supra* note 94, at 979–80.

148. *Cf.* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 132–36 (1995) (discussing historical mass tort action doctrines).

149. Weinstein, *supra* note 94, at 971.

150. *Id.* at 948–56.

151. *See generally* KENNETH R. FEINBERG, WHAT IS LIFE WORTH?: THE INSIDE STORY OF THE 9/11 FUND AND ITS EFFORT TO COMPENSATE THE VICTIMS OF SEPTEMBER 11TH 16–190 (2005) (discussing the history and functioning of the 9/11 Victim Compensation Fund).

152. Alternatively, some observers have suggested that reparations claims may work as a type of "rough justice." *See generally* Adrian Vermeule, *Reparations as Rough Justice*, 2–14 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 105, 2005), *available at* http://www.law.uchicago.edu/files/files/105.pdf.

plaintiffs harmed by the drug diethylstilbestrol (DES).[153] Similarly, reparations advocates have suggested that an expanded use of human rights law could help claimants avoid statute of limitation concerns.[154] Reparationists have also focused on derivative harms to claimants. There are limited tort analogies, such as DES granddaughters who have suffered real derivative harm.[155]

But, in the current judicial climate, it is not clear that this will ever happen. Courts are becoming more entrenched in conservative legal positions and less willing to adopt novel approaches to legal questions.[156]

The type of harm here does not seem particularly "torty." The structure of tort law assumes and builds on certain ideas of harm. The generational problem, in particular, is one that is difficult to reconcile with current judicial approaches. In cases about Japanese Americans, Holocaust slave labor, and other mass torts, courts have been unwilling to go past the generation where the initial harm occurred. Even exceptions like DES granddaughters are extremely limited. Ultimately, even courts that are more receptive to novel theories of law are still limited by the underlying rule of proximate causation.

B. The Fluidity of Causation

As discussed above, issues of causation have proven fatal to reparations claims. Causation is a basic element of tort claims. However, as numerous scholars have noted, causation cannot always be defined or determined.[157] Any event will have infinite potential causes, but only some of these will be recognized at law. People like to create stories of causation with clear narrative arcs. But, causal

153. Wenger, *supra* note 39, at 313–15, 318–22. "DES was a drug commonly given to pregnant woman over a period of time, and it ultimately proved to have deleterious effects on many children of those women." *Id.* at 307. DES litigants "faced victim attenuation defenses, since the daughters and granddaughters of women who took DES brought claims for harms done to them." *Id.*

154. *See* Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45, 60–61 (2004).

155. *See* Wenger, *supra* note 39, at 306–07 (discussing the DES granddaughters analogy).

156. *See* Weinstein, *supra* note 89, at 34–37 & n.115 (discussing conservative shift in Supreme Court jurisprudence).

157. *See* CHAMALLAS & WRIGGINS, *supra* note 132, at 120–28; H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 1–3 (2d ed. 1985); Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 88–89 (1956); Wenger, *supra* note 39, at 286–89.

chains tend to be much more complex than the simple narratives that people use. [158]

The related concept of duty is also complex. William L. Prosser and W. Page Keeton note:

> The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct . . . . It is a shorthand statement of a conclusion, rather than an aid to analysis in itself . . . . It should be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection. [159]

It is no surprise then that, as Galanter notes, injury and remedy form a sort of "moving frontier." [160] Not only are these frontiers moving, they are also self-defined and fluid. Society has moved the boundaries in the past. [161] In fact, injury as a concept may emerge from the process of remedy. [162] Thus, the areas that are designated as "not subject to remedy" reflect a particular set of societal values and choices. When we say that reparations claims fail, we are reflecting certain societal values.

And the complexities of causation can be used to downplay the claims of less-favored groups. [163] Tort law routinely undervalues harms to disadvantaged groups. For instance, scholars have pointed out how tort law has historically undervalued harms to women, tending to accord those damages less weight. [164] Chamallas notes that "[h]idden race and gender bias in tort awards is also present in the standards used to calculate economic harm." [165] There are several ways that this occurs. For instance, courts may rely on gender- and

158. *See generally* MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (Back Bay Books 2007) (2005) (discussing tendencies to overattribute causation); Michael B. Dorff, *Confident Uncertainty, Excessive Compensation and the Obama Plan*, 85 IND. L.J. 491, 507–08 (2010).

159. KEETON, ET AL., *supra* note 50, at 357–58 (citations omitted).

160. Galanter, *supra* note 101, at 2.

161. Cases like *Hernandez v. Texas*, 347 U.S. 475 (1954), have significantly altered our understanding of the legal regime. *See* Ian Haney Lopez, *Race and Colorblindness After* Hernandez *and* Brown, 25 CHICANO-LATINO L. REV. 61, 61–62 (2005).

162. *See* Galanter, *supra* note 101, at 3.

163. CHAMALLAS & WRIGGINS, *supra* note 132, at 119–53.

164. Chamallas, *supra* note 123, at 1437–38.

165. *Id.* at 1438.

race-based wage tables in damage calculations. This approach leads to systematic undervaluation of harms to minority groups, which are underrepresented in higher-wage jobs. [166]

One cause of this disparity among tort awards is overt bias. Courts have a long history of reducing awards to Black claimants simply because courts viewed the claims as less important, or because the courts chose to apply stereotypes in determining the amount of an award. [167]

Minority groups have also been excluded by the flexibility of tort doctrines, which allow legal actors to define some harms as outside of the law's protection. [168] As Chamallas notes:

> [C]ausation [is] a value-laden inquiry that cannot be separated from considerations of social policy.... [A]ssessments of causation are influenced by the identity of the injured parties and that causal attribution is a dynamic process, the product of cultural as well as intellectual developments. Gender ideology may affect which injuries are regarded as "remote" and which are classified as "proximate." The core notion of "injury" also is being mined for its cultural and ideological dimensions.... [New critiques of harms] disproportionately inflicted upon women and racial minorities have the potential to generate a broader critical discussion about the inadequacy of traditionally recognized categories of legal injuries. [169]

166. *Id.* at 1438–40.

167. *Id.* at 1440–42; *see also* Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007*, 27 REV. LITIG. 37, 48, 50–51 (2007) (discussing a 1909 case where the jury awarded a Black man who had been falsely accused of stealing with the sum of $2,500; but the trial judge reduced the award to $300, stating that "[i]n one sense, a colored man is just as good as a white man, for the law says he is, but he has not the same amount of injury under all circumstances that a white man would have").

168. A variety of legal and societal barriers serve to block many claims. *See generally* John Nockleby, *Faces of the Tort Pyramid: Compensation, Regulation, and the Profession*, *in* AN UNFINISHED PROJECT: LAW AND THE POSSIBILITY OF JUSTICE (Scott Cummings ed., 2010) [hereinafter Nockleby, *Faces*] (discussing how tort rules, economics, and societal norms effectively filter claims, creating a "pyramid" where only some claims will be valued); *see also* John Nockleby, *Access to Justice: It's Not for Everyone*, 42 LOY. L.A. L. REV. 859, 860 (2009) [hereinafter Nockleby, *Access*] (discussing symposium papers that show that "the American legal system does not, in fact, provide 'access' to everyone").

169. Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 74–75 (1994).

Chamallas elaborates elsewhere in her work that "[w]hen seemingly neutral tort rules replicate an unequal status quo, it becomes that much more difficult for disadvantaged social groups to bring about social change."[170] This is because "rules created within a predominately white, male-dominated system often fail to take into account the differing experiences of more marginalized social groups in society."[171]

For instance, tort law focuses on a narrow definition of injury, which privileges the claims of dominant groups. As Chamallas notes, feminist scholars have written about how "tort law tends not to see the social dimension of an injury and to conceptualize harm simplistically and dichotomously."[172] Law is designed with certain assumptions. The limits society places on legal tools reflect the assumptions and privileges of the majority. Tort law is designed to protect individuals against specific deprivations. The tort system does not contemplate some types of mass harm because the parties in power—those who create the rules of tort law—do not face those types of harm.

In addition, tort law's focus on corrective justice and preservation of the status quo is an approach that reinforces the dominant groups while continuing to disadvantage marginalized groups. Chamallas notes that,

> As Canadian scholar Elizabeth Adjin-Tettey has pointed out, to insist that distributional concerns have no place in tort law presupposes that the status quo is fair and equitable and deserves to be replicated. In criticizing such a narrow corrective justice position, she argues that "corrective justice is only aimed at formal equality. It does not question the justice of the status quo or the relative positions of the parties."[173]

C. Too Big to Remedy

Another idea, which comes up sometimes in tort law, is that some harms may simply be too big to remedy. In the famous case of

170. Chamallas, *supra* note 123, at 1458.

171. Chamallas, *supra* note 169, at 73.

172. Chamallas, *supra* note 123, at 1437 (discussing the work of Catherine MacKinnon).

173. *Id.* at 1457–58.

Strauss v. Belle Realty Co.,[174] the court used precisely this logic to dismiss a tort claim. *Strauss* involved a 1977 blackout caused by a utility company's gross negligence. As the court noted, "a failure of defendant Consolidated Edison's power system left most of New York City in darkness,"[175] and the elderly plaintiff was harmed in a foreseeable way, slipping and falling in the dark and sustaining injuries.[176]

However, the court held that public policy proscribed any finding of liability: "[I]n the case of a blackout of a metropolis of several million residents and visitors, each in some manner necessarily affected by a 25-hour power failure, liability for injuries in a building's common areas should, as a matter of public policy, be limited by the contractual relationship."[177] Why was this? The court elaborated:

> [I]t is still the responsibility of courts, in fixing the orbit of duty, "to limit the legal consequences of wrongs to a controllable degree," and to protect against crushing exposure to liability. "In fixing the bounds of that duty, not only logic and science, but policy play an important role." The courts' definition of an orbit of duty based on public policy may at times result in the exclusion of some who might otherwise have recovered for losses or injuries if traditional tort principles had been applied.[178]

As the court further clarified, the potential universe of plaintiffs harmed by a system-wide power failure included tenants, guests, invitees, store customers, and many others.[179] Given the broad scope of potential claimants, "permitting recovery to those in plaintiff's circumstances would . . . violate the court's responsibility to define an orbit of duty that places controllable limits on liability."[180] Since liability could be enormous and sui generis, it was acceptable to limit

174. 482 N.E.2d 34, 36 (N.Y. 1985).

175. *Id.* at 35.

176. *Id.* at 36.

177. *Id.* at 35.

178. *Id.* at 36 (citations omitted).

179. *Id.* at 38.

180. *Id.*

the liability. [181] Consolidated Edison's actions had created a harm that was too big to remedy.

Other cases have held that liability should be limited in this kind of way so as to avoid the specter of unlimited liability in cases where the harm might be too big to remedy. For instance, in *Waters v. New York City Housing Authority*, [182] the court denied a tort recovery against a building owner where a young woman was accosted on the street, forced into an unlocked area of the building, and raped. [183] The court wrote that if the victim had been a tenant, she would have had a claim against the negligent building owners. However, because she was not a tenant, the building owners owed her no duty. [184] To expand the owners' duty to include her would open the floodgates of potential liability: "Another significant factor is the virtually limitless liability to which defendant and other landowners would be exposed if their legal obligations were extended to plaintiff and to all others in her position." [185]

Similarly, in *Hamilton v. Beretta U.S.A. Corp.*, [186] the court reasoned that gun manufacturers may have caused a foreseeable harm. The manufacturers were not liable, though, because they did not have a practical way to stop third party harms. [187] Thus, once again the potential size of the universe of claims suggested that the court should limit liability: "This judicial resistance to the expansion of duty grows out of practical concerns . . . about potentially limitless liability." [188] This was again because of the sheer number of potential claims: "The pool of possible plaintiffs is very large—potentially, any of the thousands of victims of gun violence." [189] In effect, the court narrowed what would otherwise be a duty to the world. In *532*

181. *Id.* at 36.

182. 505 N.E.2d 922 (N.Y. 1987).

183. *Id.* at 922–23.

184. *Id.* at 925.

185. *Id.* at 924 (citation omitted); *see also* Jacqueline S. by Ludovina S. v. City of New York, 614 N.E.2d 723, 726 (N.Y. 1993) (Bellacosa, J., dissenting) (arguing that the ultimate effect of the majority's denial of the landlord's motion for summary judgment, in a negligence action brought by a tenant who had been sexually assaulted by an intruder, would be to render the landlord "an unlimited insurer" against urban crime—an unwarranted result).

186. 750 N.E.2d 1055 (N.Y. 2001).

187. *Id.* at 1061.

188. *Id.*

189. *Id.*

Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.,[190] after defendants' negligent acts damaged business owners over several blocks, the court similarly ruled that tort law precluded "exposing defendants to unlimited liability to an indeterminate class of persons."[191] Similar arguments were used repeatedly during the World Trade Center litigation.[192]

In short, the argument draws on multiple strands of tort law. It is ultimately an impracticability claim, an argument that aggregate damages are simply too big to award. However, courts attach this concept to the legal doctrine of duty. Because the damages would be too large, there is no duty, and because there is no duty, the defendant is not liable.

Similar impracticability arguments are often raised in the context of slavery reparations. For instance, the *Cato* court wrote that "the legislature, rather than the judiciary, is the appropriate forum for this relief."[193] On the surface, this may seem to be simply a case of judicial deference. However, the court was fully aware that the legislature had no intention of addressing the issue.[194] In that case, the court effectively threw up its hands and said, "[T]his is too big to remedy." Similarly, the *Slave Descendants* court pointed to features of slavery—passage of time, amount of people involved, and other factors—as reasons for denying restitution.[195]

Critics of reparations often make this argument as well.[196] For instance, one conservative political group's report "The Case Against Slave Reparations" contains repeated references to the size of the claims.[197] It criticizes reparations proposals as "a massive

190. 750 N.E.2d 1097 (N.Y. 2001).

191. *Id.* at 1099, 1101 (N.Y. 2001).

192. Anthony J. Sebok, *What's Law Got to Do with It? Designing Compensation Schemes in the Shadow of the Tort System*, 53 DEPAUL L. REV. 501, 513–18 (2003) (discussing the *Strauss* case in the context of the World Trade Center litigation).

193. Cato v. United States, 70 F.3d 1103, 1111 (9th Cir. 1995).

194. *See* Saito, *supra* note 90, at 295 (criticizing the courts' invocation of the political question doctrine to avoid having to deal with politically sensitive questions, as exemplified by the Ninth Circuit in *Cato*).

195. *In re* African-American Slave Descendants Litig., 471 F.3d 754, 754–60 (7th Cir. 2006).

196. *See* Gladys L. Knight, *Reparations*, in ENCYCLOPEDIA OF AMERICAN RACE RIOTS 563 (Walter C. Rucker & James N. Upton eds., 2007) (noting that "other popular arguments include the points that a reparations plan would be too expensive").

197. PETER FLAHERTY & JOHN CARLISLE, THE CASE AGAINST SLAVERY REPARATIONS 1, 5 (2004), *available at* http://www.nlpc.org/pdfs/Final_NLPC_Reparations.pdf; *see also* BARKAN,

government program that would pay billions of taxpayer dollars."[198] It later notes that "demands for reparations reach into the trillions of dollars"[199] and that the *Slave Descendants* lawsuit "puts the value of slave labor at $1.4 trillion—almost as much as the federal government collects in individual and corporate income taxes each year."[200] The authors suggest that no restitution is appropriate because "[t]he potential for reparations inflation is infinite."[201]

The impracticability argument may be framed in various ways. One framing focuses on the potential disruptiveness of a remedy. Saito notes that, under these views, "only political solutions are viable" in reparations because of "overwhelming disruptions to the status quo."[202] Yet, using these sorts of reasons to argue against reparations seems counterintuitive. Indeed, denying such a claim for impracticability seems to reward bad behavior. It sends the message that some harms are so great that no restitution is needed: "the greater and more systemic the wrong, the less likely . . . [the] remedy."[203] That is, of course, upside-down reasoning.

Saito sets out in some detail why this view is wrong. He notes that "[i]f legal remedies are available only when potential disruption of existing relations of power or property rights are minimal, then the inevitable result is that the most egregious of wrongs receive the least legal or political redress."[204] In such a case, "we run the risk of allowing the most particularized articulations and mechanisms of law—all of which are supposed to ensure the smooth functioning of the rule of law, not its avoidance—to subvert the most significant legal principles."[205] And he notes that "each massive wrong that is accepted as somehow inevitable, if unfortunate, or incapable of being remedied, generates its own complications."[206] This is certainly the

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supra note 109, at 290 ("There seems to be an obsession among activists and critics with estimating the magnitude of the anticipated restitution.").

198. *Id.* at i.

199. *Id.* at 1.

200. *Id.* at 5.

201. *Id.* at 19.

202. Saito, *supra* note 90, at 284.

203. *Id.* at 295.

204. *Id.* at 300 (emphasis omitted).

205. *Id.* at 303.

206. *Id.* at 304.

case with slavery, where plaintiffs bring claims this late because racist courts and legislatures denied earlier attempts.[207]

Thus, both the requirement of a coherent justice system and the need to avoid rewarding bad behavior strongly suggest that reparations claims should not be rejected on the basis that the harm is "too big to remedy."

D. Too Complex to Remedy?

A related impracticability argument draws on the idea that reparations claims are simply too complex to remedy. One recent example comes from Henry Louis Gates, Jr. who writes that a traditional approach to reparations is insufficient because it does not adequately consider the culpability of African tribes. Gates writes:

> There are many thorny issues to resolve before we can arrive at a judicious (if symbolic) gesture to match such a sustained, heinous crime. Perhaps the most vexing is how to parcel out blame to those directly involved in the capture and sale of human beings for immense economic gain.
>
> While we are all familiar with the role played by the United States and the European colonial powers like Britain, France, Holland, Portugal and Spain, there is very little discussion of the role Africans themselves played. . . .
>
> . . . .
>
> Given this remarkably messy history, the problem with reparations may not be so much whether they are a good idea or deciding who would get them; the larger question just might be from whom they would be extracted.[208]

This argument echoes other objections to reparations.[209] Gates's article has been rightly criticized—because, for instance, it suggests a false moral equivalence between the two groups.[210]

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207. BROPHY, *supra* note 4, at 130–31 (arguing that statutes of limitations should be tolled because at the time the cause of action occurred, the courts were "effectively unavailable" due to racism).

208. Henry Louis Gates, Jr., Op-Ed., *Ending the Slavery Blame-Game*, N.Y. TIMES, Apr. 22, 2010, at A27.

209. *See, e.g.*, FLAHERTY & CARLISLE, *supra* note 197, at 20 (discussing African involvement in the slave trade); David Horowitz, *Unsavory Black Insinuations: A Reply to David Boyle*, 105 W. VA. L. REV. 699, 706 (2003) (arguing that black Africans enslaved the vast majority of slaves).

First, as noted by many reparations scholars, this is a false equivalency because: (1) African nations did not instigate the transatlantic slave trade, (2) African nations did not reap most of the profits from the slave trade, and (3) many African countries have apologized for their participation.[211] I would add to that list that any successor liability chain from African nations is also far less clear. The United States is the very same legal entity that existed in 1800. However, it is much less clear that any sort of chain of responsibility passed from, say, Queen Njinga to Belgium's King Leopold (who himself orchestrated one of the great genocides of the past century)[212] and from there to the current governments of African states.

In addition, even if there is some moral culpability that can be attributed to current political entities in Africa, this does not necessarily block reparations claims. Culpability of African participants in slavery "would not," as Brooks notes, "absolve our government of its own moral duty to apologize for its role in slavery.... Each wrongdoer is responsible for its own wrongdoing."[213]

Gates's argument illustrates some of the reasons why a straightforward corrective justice account is complicated in the case of slavery. Slavery involved many culpable actors, in a wide variety of roles. This makes a corrective justice story harder to tell. Gates's argument focuses on that broad-scope complexity. It fits into the category of similar statements that reparations claims are too complex to remedy. Such objections broaden the scope of the reparations discussion until it includes African tribes, the British, and a dozen other participants—and of course someone always

210. Eric Foner, Letter to the Editor, *Africa's Role in the U.S. Slave Trade*, N.Y. TIMES, Apr. 26, 2010, at A22; *see also* Kaimipono David Wenger, *Reparations and Gates-keeping*, CONCURRING OPINIONS BLOG (Apr. 24, 2010, 10:10 PM), http://www.concurringopinions.com/archives/2010/04/reparations-and-gates-keeping.html (arguing that Gates's arguments may have been politically motivated).

211. *See* BROOKS, *supra* note 9, at 180; *see also* Feagin, *supra* note 9, at 52–53 (discussing how the profitable enterprises around African and African-American slavery are part of the reason the United States developed as a modern industrial nation).

212. *See generally* ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA 225–34 (Houghton Mifflin 1999) (1998) (discussing the history of genocide during Belgian rule in the Congo).

213. BROOKS, *supra* note 9, at 181 (emphasis omitted); *see also* BROPHY, *supra* note 4, at 79, 81–82.

eventually brings up the Romans and Vandals.[214] The real complexity of slavery is then used to justify hand-wringing about the impossibility of redress.

These objections ignore the law's ability to routinely address complex issues by focusing on the specifics of a case and ignoring fanciful counterfactuals. Courts can analyze *Palsgraf v. Long Island Railroad Co.*,[215] for instance, without needing to inquire whether any other package anywhere ever exploded on any other known train platform. Courts simply examine the facts in the specific case to determine whether there is liability. Political actors can enact 9/11 victim compensation without needing to bootstrap in every victim of every plane hijacking in history;[216] they rightly focus on one discrete set of victims.[217]

Reparations claims are similar. There is a clear moral case for slavery reparations based on very clear actions (government and private) of massive human rights violations right here in America.[218] The complexity of the slave trade as a whole (or the vastness of the universe of human injustice in its entirety) is not a good excuse for avoiding responsibility where culpability is clear.

E. "No Harm, No Foul": Tort Law and the Feedback Loop

Tort law can have the effect of cementing in place our ideas about what harm looks like.[219] The concepts of harm and duty are intermixed in the "too big to remedy" cases. These cases suggest that where the harm is too big to address, there is no duty. This creates a potential ripple effect: members of society may take away the

214. Eugene Volokh, *More Reparations*, VOLOKH CONSPIRACY (Nov. 13, 2003, 3:40 AM), http://volokh.com/2003_11_09_volokh_archive.html; FLAHERTY & CARLISLE, *supra* note 197, at 18, 28–30 (suggesting that reparations would require payment to a variety of other groups, including Irish immigrants).

215. 164 N.E. 564 (N.Y. 1928).

216. *See* BROOKS, *supra* note 9, at xi ("The [American] government came forward in short order with $3 billion for the 3,016 people who died in the attacks on the World Trade Center and the Pentagon."). *See generally* FEINBERG, *supra* note 151 (discussing the history and functioning of the 9/11 Victim Compensation Fund).

217. *Cf.* Galanter, *supra* note 2, at 122 (noting that there is an endless supply of historical injustice).

218. BROOKS, *supra* note 9, at ix–xi.

219. Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357, 382–413 (2010) (discussing ways in which tort law can construct and reinforce social narratives about the reality of claimants' sexual identities and the value of their claims).

message that there was no duty to abstain from the racist and invidious behaviors associated with slavery and Jim Crow.

Similarly, because remedy and injury are mutually constitutive,[220] people will to some extent define injury backward from the existence of a legal remedy. Under that definition, an injury is something that the legal system addresses.[221] Thus, if there is no legal harm, then there was no foul to begin with. And if that is the case, then the lack of a remedy could undermine the perceived moral value of the underlying claims in a negative feedback loop.

This becomes a self-reinforcing narrative, where denial of restitution sends an important message. Because no recovery is given by the courts, the majority views this as evidence that the claims are not required by justice. And after all, justice itself is also a social construct. Ultimately, tort claims can become a sort of surrogate for the line between frivolous and real claims, and as such, a proxy indicator of a claim's moral strength. Courts will then be both a barometer and a catalyst—eventually both mirroring and reinforcing public opinion.[222]

Jennifer Wriggins notes that when a society decides that an injury really needs to be compensated, it will generally find a way to provide restitution.[223] For example, auto insurance is one complex vehicle for compensation; it allows society to address the harms of auto accidents.[224] Ultimately, then, society makes policy choices about what exactly is too big to remedy. Thus, it is a deliberate choice that "tort rules reflect a devaluation of particular social groups."[225] Indeed, as Galanter notes, the concept of justice can arise

220. *See* Galanter, *supra* note 101, at 1.

221. *See* Nockleby, *Faces*, *supra* note 168 (discussing ways that filters result in not all claims being addressed); *see also* Nockleby, *Access*, *supra* note 168 (noting that many victims of harm lack real access to any judicial remedy).

222. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT (2009) (providing a detailed historical analysis of how the American people came to shape the role played by the Supreme Court justices, thus defining the terms of their constitutional democracy).

223. Jennifer Wriggins, Sumner T. Bernstein Professor of Law and Associate Dean for Research, University of Maine School of Law, Panelist at the Loyola Law Review Symposium: Injuries Without Remedies (Mar. 26, 2010).

224. Jennifer Wriggins, *Automobile Injuries as Injuries with Remedies: Driving, Insurance, Torts and Changing the "Choice Architecture" of Auto Insurance Pricing*, 44 LOY. L.A. L. REV. 69, 74–76 (2010).

225. Chamallas, *supra* note 123, at 1437.

from the conversations that clarify the standard.[226] While this can expand views of justice, it can also limit or contract them; denial of restitution can then reinscribe the harm.

The objection that certain harms are too big or too complex to remedy paints a false dichotomy with other remediable harms that are neither big nor complex and do not take time to address. And yet, as Galanter notes, "justice tolerates some passage of time," and "the ordinary administration of justice assumes that some delay is unavoidable."[227] Reparations claims are not unique in seeking a remedy after the passage of time.

Reparations advocates thus face a problematic feedback loop. Causation rules, a societal construction, limit recovery. However, the result of nonrecovery serves to reinforce those sorts of ideas about causation and may bleed over into society's views on other aspects of the claims, including whether any harm occurred in the first place.

How can advocates break this cycle? There have been a few instances of shifts in thinking about and perception of causation. For example, with tort claims stemming from tobacco usage, courts were unreceptive for decades.[228] However, attorneys were able to break through with some claims, and then suddenly the dam broke. Now causation and harm in tobacco cases are widely accepted.[229] Slavery differs in many ways. Securing a change in the public and legal perceptions of causation in the slavery context may require the creative use of remedies.

V. RETHINKING RESTITUTION: REMEDYING THE IRREMEDIABLE

This part will explore some potential responses to the harms of slavery and Jim Crow.

A. Political Limits

Public opinion on reparations is very negative. As Brophy notes, "When the *Mobile Register* polled Alabama citizens in the summer of 2002, it found that the question of reparations was the most racially divisive issue it had ever studied. . . . Only 5% of white

226. Galanter, *supra* note 2, at 117.

227. *Id.* at 111.

228. Sebok, *supra* note 4, at 1410–11.

229. *Id.* at 1411–12.

Alabamians support reparations for slavery from the federal government, but 67% of black Alabamians support them."[230] Given political realities, reparations may be politically impossible.[231]

Interest convergence may mean that political challenges will be particularly difficult to overcome. Interest convergence suggests that there are no truly altruistic actions and that white contributions to Black progress happen despite white intent, not because of it.[232] Decisions like *Brown* came about only when white political elites felt that they were necessary to achieve the "economic and political advances at home and abroad that would follow abandonment of segregation."[233] The same can be said about abolition itself—it only happened when it was in whites' interests to do so, that is, when the

230. BROPHY, *supra* note 4, at 4; *see also* Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 915–17 (2003) (discussing demographics of Americans opposed to reparations); Alfred L. Brophy, *The Cultural War over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1182–84 (2004) (discussing the *Mobile Register* survey and the controversial nature of reparations in general);Michael Kranish, *Blacks Rally on Capital for Slavery Reparations: Farrakhan Seeks Transfer of Land*, BOSTON GLOBE, Aug. 18, 2002, at A3 (discussing findings from a CNN and *USA Today* Gallup Poll in February 2002 that found that "90 percent of white respondents opposed cash payments by the government, while 55 percent of black respondents supported the idea").

231. Jack Greenberg, *Reparations: Politically Inconceivable*, 29 T. JEFFERSON L. REV. 157, 159 (2006).

232. Bell's theory of interest convergence was first proposed in 1980, in both an influential article and an equally influential treatise. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980). The idea was originally presented at a conference in 1978. *See id.* at 518 n.a1. Since then, dozens of other writers have expanded on the theory, making it one of Critical Race Theory's most important contributions to legal scholarship. *See, e.g.*, Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62–66 (1988). The first edition of Bell's treatise was published in 1973, but the more influential second edition was published in 1980, around the same time as the *Brown v. Board of Education* article. *See* DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 9–12 (Vicki Been et. al. eds., 6th ed. 2008) [hereinafter BELL, RACISM AND AMERICAN LAW] (discussing interest convergence theory and its development). *See generally* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 49–68, 106 (2004) [hereinafter BELL, SILENT COVENANTS] (discussing *Brown* and the importance of interest convergence theory).

233. Bell, *supra* note 232, at 524. This theme has been further developed by later writers. *See, e.g.*, Dudziak, *supra* note 232, at 62–66 (developing a historical argument to support Bell's interest-convergence idea that *Brown v. Board of Education* came about because of white political necessity).

Specifically, desegregation would allow America to assert a moral high ground in its cold war with Russia, would allow the economy of the South to become more fully developed, and would calm the unrest among American Black veterans of World War II, which threatened to undermine national stability. *See* BELL, SILENT COVENANTS, *supra* note 232, at 59–68; *see also* Dudziak, *supra* note 232, at 77–84 (discussing moral high ground and Black veterans).

white benefit from freeing slaves outweighed the white loss in doing so. [234]

Interest convergence likely underlies some of the resistance to reparations. Derrick Bell argued, in his review of Bittker, that white self-interest would prevent reparations. [235] Rhonda Magee argues that reparations for Blacks have been ignored because there is no white self-interest in such reparations and that inherent racism in the political system drives inattention to reparations. [236] Magee argues that Japanese American redress came because of interest convergence relating to trade with Japan; as she notes, no similar pressure exists for Blacks. [237]

Similarly, Bell's story of the space traders illustrates ways in which majority society is willing to sacrifice the interests of minority groups if the majority's self-interest dictates. [238] It is a parable that describes a world in which fictitious space aliens trade gold, resources, and technology for Blacks in America, who are led away in chains. [239] The moral is clear: majority society will sell out the interests of minority groups if this benefits the majority. [240]

These political hurdles have proved insurmountable for many political reparations efforts, including Representative John Conyers's proposed H.R. 40, which would put in place a commission to study the effects of slavery. [241] Advocates have experimented with alternate approaches, which may provide a level of flexibility, a type of "political *cy pres*," [242] to avoid the problem of political intractability.

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234. BELL, SILENT COVENANTS, *supra* note 232, at 50–58; *see* BELL, RACISM AND AMERICAN LAW, *supra* note 232, at 44–45.

235. *See* Derrick Bell, Jr., *Dissection of a Dream*, 9 HARV. C.R-C.L. L. REV. 156, 162–65 (1974) (reviewing BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973)); *see also* Magee, *supra* note 16, at 908–09 (discussing Bell's analysis).

236. Magee, *supra* note 16, at 908–12.

237. *Id.* at 908–09.

238. Derrick A. Bell, Jr., *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, *in* CRITICAL RACE THEORY, THE CUTTING EDGE 2, 3–5 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).

239. *Id.*

240. *See id.*

241. *See* BROPHY, *supra* note 4, at 12, 143 (discussing H.R. 40); *see also* Brophy, *supra* note 230, at 1185 (same).

242. I am indebted to Bryon Steir for this idea.

B. Need for New, Creative Remedies

Since traditional tort remedies are not going to be sufficient—and even those insufficient remedies are not being given—advocates must focus on new and creative approaches. There are many potential responses or second-best solutions, not all of them located in the legal system. [243]

However, in a variety of ways, law can continue to advance the movement, even if the tort claims themselves fail. The following sections discuss the potential remedies of storytelling, microreparations, and community-focused reparations. These remedies are imperfect in different ways. However, an imperfect remedy is better than no remedy at all. [244]

Orly Lobel's work illustrates the potential gain from new collaborations between public and private approaches, in which law serves a problem-solving function rather than providing all of the remedies sought. In a cooperative regime, "[t]he role of government changes from regulator and controller to facilitator and coordinator," and "[l]aw becomes a process of shared problem-solving rather than an ordering activity." [245] Drawing on the work of a number of diverse scholars, Lobel examines the potential for this new governance approach in a variety of fields, including workplace safety, antidiscrimination law, and environmental regulation. Lobel notes that

> [a] recurring theme of the new model is that state and government agencies should learn from the practices of private organizational models and market-based management theories. The use of private firms as an analogy to other social spheres reflects the growing opinion that broad developments in the market economy trigger direct changes in law. In many contexts, the interconnections between the object of regulation (the

243. Galanter notes that different approaches—including balancing, apology, and revenge—provide a number of ways to frame a remedy. *See* Galanter, *supra* note 101, at 2.

244. *See* Galanter, *supra* note 2, 123–24, 125 n.16 (arguing that, while proposed solutions may be flawed, acquiescence in injustice is worse). Galanter notes that "[w]hen it comes to justice, we don't have the choice of the unbroken vase. A patched and blemished world is the only one we can attain." *Id.* at 124.

245. Orly Lobel, *Crowding Out or Ratcheting Up? Fair Trade Systems, Regulation and New Governance*, *in* FAIR TRADE, CORPORATE ACCOUNTABILITY AND BEYOND: EXPERIMENTS IN GLOBALIZING JUSTICE 313, 319 (Kate MacDonald & Shelley Marshall eds., 2010).

> economy) and the strategy by which it is regulated (law) motivate the push for renewal through the adoption of market practices in the public sphere.[246]

In fact, advocates have already noted ways that new governance approaches can address some of the concerns of tort and causation. For instance, Amy Cohen notes that some scholars have discussed ways that new governance approaches could seek to "remedy historical injustices that elude individual causation."[247]

Creative remedies may not always provide the same sorts of outcomes as tort liability, but they may also be more effective than traditional legal responses in some areas. For instance, they could focus on remedying the harms of white privilege.[248] In doing so, these remedies could advance the anti-subordination goals of Critical Race Theorists.[249]

C. Storytelling

One important tool is storytelling. Richard Delgado has argued that storytelling can be used to challenge prevailing ideas about race in a way that gives voice to minority groups, which are often excluded from the traditional legal framework and discussion.[250]

Of course, storytelling can and often does take place in the court system. In the court system, storytelling can allow individuals the psychological and emotional benefits from the catharsis of sharing their stories and the opportunity to voice claims.[251] It can allow

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246. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 365–66 (2004).

247. Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357, 387.

248. Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1638–40 (1999).

249. *See* Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *in* PHILOSOPHICAL PROBLEMS IN THE LAW 339, 339–43 (David M. Adams ed., 4th ed. 2005) (noting that Critical Race Theory exposes the facets of law and legal discourse that create racial categories and legitimate racial subordination); Culp, *supra* note 248, at 1638.

250. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413–14 (1989); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 95–96 (1990).

251. *See* Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1129 (2010) (noting "the political and psychological value that comes with meaningful participation in a formal court process"); *see also* Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, LAW & CONTEMP. PROBS., Autumn 1990, at 204 ("[H]aving one's day in court often leads to a more satisfactory claiming experience than does a swift procedure in which litigants are minimally involved.").

parties to have "transformative exchanges about . . . social and moral values."[252] Anne Bloom notes that Agent Orange veterans were discontent with class-action resolution because "the veterans wanted to tell their stories and have them heard by a court of law."[253]

In the reparations context, storytelling serves another important function, that of education and consciousness-raising. Storytelling can change public perception in important ways, such as reshaping society's views to overcome political hurdles to reparations.

One problem is that most Americans think (wrongly) that they already know everything there is to know about slavery and Jim Crow, as well as about race issues generally.[254] This perception can be challenged by storytelling.[255] That type of approach worked very effectively for Japanese Americans. The storytelling about Japanese American internees and about wrongful conviction was jarring and caught the public's attention.[256]

Slavery reparations can take the same tack—attacking myths such as the idea that slavery was limited to the South, that it cleanly ended in 1865, or that it was a minor part of U.S. history. The abysmally low level of white support[257] reflects in part an impoverished public understanding of the breadth and effects of slavery. As Brooks notes, "When whites reject reparations on the ground that they had nothing to do with slavery, they fail to

252. Zimmerman, *supra* note 94 (manuscript at 14).

253. Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719, 749 (2006).

254. Even well-educated readers are often terribly underinformed. In a nonscientific blog poll, I found that a large number of readers had never heard of major Jim Crow acts of violence like the Tulsa Race Riot. *See* Kaimipono D. Wenger, *Knowledge of Jim Crow Events: A Quick, Informal Survey*, CONCURRING OPINIONS (May 18, 2009, 11:15 PM), http://www.concurringopinions.com/archives/2009/05/knowledge-of-jim-crow-events-an-informal-survey.html.

255. *See* Eric L. Muller, *Fixing a Hole: How the Criminal Law Can Bolster Reparations Theory*, 47 B.C. L. REV. 659, 660–61 (2005) (discussing recent publications that challenge the mainstream consensus that certain historical events should be condemned as injustices); Eric Yamamoto et. al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 48 n.240 (2007) (noting that listening and storytelling are crucial to the healing-through-justice process).

256. *See generally* ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 258–441 (2001) (discussing the experience of Japanese American internees).

257. *See supra* note 230 and accompanying text.

understand the centrality of slavery in the socioeconomic development of this great country."[258]

Americans disagree about the history of slavery.[259] As Ariela Gross notes, people often subscribe to very different versions of history and of the role of slavery in the country's history.[260] Different sides have not only different conclusions about but also different perceptions of the relevant underlying facts and history.[261]

Many people today associate slavery exclusively with stories of plantations and the South. Few people are aware of the widespread use of and history of slavery outside of that context. White filmmaker Katrina Browne attacks that myth in her work, explaining that slavery "was the foundation of our country, not some Southern anomaly. We all inherit responsibility."[262] Browne's film documents the way that her own Northern family's wealth and political power were based on its ties to the slave trade.[263]

Similarly, Theodore Kornweibel, Jr. recounts the little known story of railroad slavery.[264] Use of slave labor "was nearly universal on antebellum southern railroads,"[265] which often rented slaves from plantations.[266] Railroad slavery was difficult and dangerous work.[267] Female slaves on railroads were expected to perform the same hard labor as men but were also subject to sexual exploitation.[268] Railroad work took a great toll on slave families, which were often broken up due to the demands of railroad labor.[269] As Kornweibel notes, in comparison to plantation work, "[b]y every criterion, railroad slavery

258. BROOKS, *supra* note 9, at 148.

259. *See, e.g.*, Horowitz, *supra* note 209, at 704.

260. Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283, 284–87 (2008).

261. *Id.* at 303–05; *see also* BROPHY, *supra* note 4, at 176 (arguing that advocates and skeptics need to find consensus on the issues of harm).

262. *Advocates Quietly Push for Slavery Repayment*, USA TODAY, July 9, 2006, http://www.usatoday.com/news/nation/2006-07-09-slavery-reparations_x.htm.

263. *See id.*

264. Theodore Kornweibel, Jr., *Reparations and Railroads*, 29 T. JEFFERSON L. REV. 219, 221 (2007).

265. *Id.*

266. *Id.* at 222.

267. *Id.* at 224.

268. *Id.* at 225.

269. *Id.* at 228.

was worse."[270] Storytelling by voices like Browne's and Kornweibel's combats the perception that slavery's impact was limited and regional. It also combats the idea that only a small number of Southern whites benefited from slavery.[271]

One avenue for official storytelling is through proposed studies about slavery, such as Conyers's bill.[272] As Brophy notes, such a study could "lay the groundwork for a national consensus on reparations and also serve a cathartic purpose, which would offer emotional closure for victims."[273] Brooks suggests creating a national slavery museum to "commemorate the contributions slaves made to our country and educate Americans about them, as well as about the lingering effects slavery has on [B]lacks today."[274] Statues, memorials, and other forms of public recognition would dovetail with the storytelling approach.[275] For instance, I have suggested elsewhere that the Senate and House should make their recent apology for slavery more sincere by setting aside Juneteenth as a national holiday.[276]

Similarly, storytelling can expand an understanding of the law's role in addressing mass harms. Conyers has written that advocates must "expand the concept of reparations."[277] He suggests, as one instance of such expansion, that "[d]ealing with Katrina is a reparations concept."[278] Contrary to popular perception, there have been many instances of mass restitution in history, and such acts do

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270. *Id.* at 226.

271. For example, David Horowitz argues: "Did a dirt-poor squatter in the Dakota territory circa 1860 really get some kind of psychological boost from the fact that Blacks were enslaved two thousand miles away?" DAVID HOROWITZ, UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY 81 (2002).

272. *See* BROPHY, *supra* note 4, at 170 (discussing truth commissions).

273. Brophy, *supra* note 34, at 537.

274. BROOKS, *supra* note 9, at 157.

275. *See* Galanter, *supra* note 2, at 108 (discussing the use of statues and memorials to show society's "repudiation of hatred, prejudice, and violence inflicted on racial, ethnic, or religious grounds"). *Cf.* Alfred Brophy, *I Don't Know Why Jack Chin Says Goodbye; the Virginia Legislature Says Hello*, CONCURRING OPINIONS (Nov. 15, 2005, 8:58 PM), http://www.concurringopinions.com/archives/2005/11/i_dont_know_why_1.html#more-14820 (discussing the Virginia legislature's modest grant—$5 per grave per year—for maintaining graves of Confederate soldiers).

276. Wenger, *supra* note 121, at 11.

277. John Conyers, Jr., *Reparations: The Legislative Agenda*, 29 T. JEFFERSON L. REV. 151, 152 (2007).

278. *Id.*

not always involve money payments to individuals.[279] The reality is, as Brophy and others have demonstrated, that legislatures have granted compensation to many harmed classes without requiring a strict causal connection; there has been a "common practice of legislatures to allow a weakening of the connections between wrongdoers and payers."[280] Thus, Brophy defines reparations as "legislative and court action designed to address historic injustices."[281]

A better understanding of the broad scope of reparations refutes the claim that they are unique or unprecedented. A better understanding of and broader definition of reparations also answers some of the concerns of interest convergence. When we expand the concept of racial justice, such as to include responses to Katrina, society may view the concept more favorably. No one opposes rebuilding after Katrina. To the extent that a broader definition of reparations allows majority citizens to identify with and support reparations projects, it becomes a way to potentially change the low public support for reparations.

Storytelling can sometimes be more valuable than legal victories. For instance, the *Alexander* litigation failed. However, Tulsa has been a success in important ways. The state commission has led to unprecedented acceptance of blame.[282] The web site continues to raise consciousness.[283] The Tulsa case may have been dismissed, but the storytelling of the Tulsa report is a form of reparations itself. That is a reparations success story.[284] Building on those kinds of stories is the future of the movement. As Brooks

279. BROPHY, *supra* note 4, at 19–52 (discussing reparations history). Brophy also notes that "most reparationists construe reparations more broadly." Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 823 (2006). Brophy criticizes a narrower definition suggested by Eric Posner and Adrian Vermeule that reparations are backward-looking only and limited in practice to post-1946 programs that are monetary in nature. *Id.* at 816–25.

280. Brophy, *supra* note 279, at 828.

281. BROPHY, *supra* note 4, at xiii. To illustrate, Brophy provides an in-depth chart showing dozens of different instances of reparations. *Id.* at 30–33.

282. *See* Miller, *supra* note 9, at 60–65 (discussing Tulsa).

283. *See* Okla. Historical Soc'y, *supra* note 18 ("One of the great tragedies of Oklahoma history, the Tulsa race riot has lived on as a potent symbol of the ongoing struggle of black and white Oklahomans to forge a common destiny out of an often troubled past.").

284. *See* MINOW, *supra* note 109, at 93 ("The process of seeking reparations, and of building communities of support while spreading knowledge of the violations and their meaning in people's lives, may be more valuable, ultimately, than any specific victory or offer of a remedy.")

suggests in *Atonement and Forgiveness*, storytelling "provides the factual foundation for apology."[285]

The ultimate goal, after all, is not any particular legal victory. It is rebuilding the community. Reparations are an "essential criterion for the restoration of social harmony between communities . . . ."[286] This rationale provides whites with a reason to support reparations—a vital step, given the problems of interest convergence.

Storytelling is especially important because of the limits that recent Supreme Court jurisprudence has placed on race-based benefits to individuals.[287] It is likely that reparations payments to individuals would be challenged as unconstitutional.[288] However, there is no constitutional limit on storytelling.

This can lead to a better understanding of what the law does and what it should do. There is always the chance that claims can be reconceived in a way that places them within the ambit of the law. As Galanter suggests, storytelling may allow people "to be sensitized by contemplation of the past to the traces of past wrongs that infect the present according to [their] own standards."[289] Or, our understanding of the law may evolve such that claims would be viewed as subjects of redress. As Saito notes:

> If we were to start by attempting to understand, in human terms, what has happened to whom, why it happened, who is responsible, and what would come closest to repairing the wrong . . . a vision of substantive justice might emerge that can then be correlated to the core legal principles

285. BROOKS, *supra* note 9, at 148.

286. Linda Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 T. JEFFERSON L. REV. 189, 190 (2007) (quoting Claude Jorda & Jerome de Hemptinne, *The Status and Role of the Victim*, *in* 2 THE ROME STATUTE: OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1387, 1398 (Antonio Casesse et al. eds., 2002)).

287. *See* BROPHY, *supra* note 4, at 158–60 (discussing constitutional limits); Meera E. Deo, The Promise of *Grutter*: Diverse Interactions at the University of Michigan Law School (Feb. 2011) (unpublished manuscript), *available at* http://works.bepress.com/meera_deo/1 (discussing constitutional limits on affirmative action in education).

288. *See* BROPHY, *supra* note 4, at 158–64 (discussing constitutionality of reparations).

289. GALANTER, *supra* note 2, at 121. Similarly, it can allow for a better understanding of the shifting expectations of justice. Society's views of right and wrong have shifted, with a greater emphasis on rights, empathy, and responsibility. *Id.* at 117 (discussing shifts in society's views), 120 (discussing the move towards greater empathy); *see also* BROOKS, *supra* note 9, at ix–x (noting the expanded use of apology).

articulated in the Constitution and the foundational instruments of human rights and humanitarian law.[290]

D. Restorative and Community Approaches

There are a variety of promising restorative—and community-based—approaches.

One of these is *microreparations*. At the same time that public support in polls remains low, different varieties of localized reparations programs have become increasingly popular. Indeed, one striking feature of *Pro and Con* is a detailed chart documenting the increase in these programs over the past ten years.[291] The popularity of microreparations is unaffected by the public distrust of more broad-scale reparations. As one of the few bright spots for reparationists, microreparations present a stark contrast with the failed lawsuits, failed legislation, and alarmingly low poll support for broad-scale reparations. Further work needs to be done to catalogue these microreparations efforts and analyze their effects and potential.[292]

Another promising avenue is *restorative justice*. Restorative justice is "focused on attempting to make the victim and society whole."[293] Linda Keller writes that "[r]estorative justice tends to be community-oriented, aimed at restoring society through reconciliation. It may take the form of truth commissions and symbolic gestures of atonement and forgiveness between victim and perpetrator . . . ."[294] As I note in another article: "Restorative justice, a concept drawn from the international human rights context, is not focused on punishment or on the redistribution of wealth; rather, restorative justice seeks to repair society through reconciliation,

290. Saito, *supra* note 90, at 303.

291. BROPHY, *supra* note 4, at 30–32. Surprisingly, Brophy gives this topic relatively little further analysis in *Pro and Con*. A few instances (such as Rosewood and Tulsa) are addressed briefly. *See id.* at 3, 12, 50. However, Brophy does not discuss the microreparations movement in detail.

292. I do some of this in my draft article *Towards Microreparations*. *See* Wenger, *supra* note 20.

293. Keller, *supra* note 286, at 191; *see also* BROOKS, *supra* note 9, at 141 (noting the racial reconciliation will rely on restorative justice ideas).

294. Keller, *supra* note 286, at 190; *see also* Magee, *supra* note 16, at 913 (arguing that reparations would have a powerful symbolic value and would be an "extreme expression of official responsibility" but, because of that, they are particularly susceptible to majority attack).

ultimately healing both victims and society itself."[295] Thus, "restorative justice seeks to repair the injustice, to make up for it, and to effect corrective changes in the record . . . ."[296] This can ultimately lead to reconciliation and community healing.[297] Solomon makes a similar argument, noting that civil justice includes a moral and restorative quality:

> Consistent with the inescapable moral quality of the word "justice" . . . I would postulate that the injuries common to civil and criminal justice are moral injuries. They are moral injuries because they violate our terms of interaction and social bonds, our obligations to others . . . . [T]he wrongs in both civil and criminal justice constitute abuses of our own liberty at the expense of others' security and well-being, or in Kantian terms, use others as means to our ends.[298]

Another promising approach is *atonement*. Atonement provides a moral foundation for reparations claims. The idea of atonement comes from the religious context and signifies a few different interrelated concepts. It is a setting straight of records, a reconciliation.[299] It also implies an expiatory act, an act designed to heal harms done in the past, a religious sacrifice.[300] Similar to a religious atonement, reparations involve sacrifices designed to show contrition, to cleanse, and to make the community whole.

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295. Wenger, *supra* note 121, at 3.

296. *Id.* (quoting MINOW, *supra* note 109, at 91); *see also* Keller, *supra* note 286, at 190–91 (describing restorative justice); *see* Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 575 (2006).

297. *See generally* YAMAMOTO ET AL., *supra* note 256, at 421–41 (discussing the experience of Japanese American internees).

298. Solomon, *supra* note 100, at 326; *see also* Galanter, *supra* note 101, at 3 (noting that the concept of injury is "morally infused").

299. BROOKS, *supra* note 9, at 143–47, 165–69. Brooks pointedly disavows the debt analogy espoused by advocates like Robinson. *Id.* at 14, 138–43.

300. The English word "atonement" is, quite literally, a creation of Christian theology and history. William Tyndale, when first translating the Bible into English, was unable to find a noun in the impoverished language of his time that adequately conveyed the sense of moral and spiritual reconciliation in the biblical narrative of Jesus—and so he made a word up. Prior to Tyndale's time, the verb "atone" simply meant to set records straight, such as with a financial partner. Tyndale adapted the existing word "atone" and created the noun "atonement"; in the process, he infused them both with new moral meaning. "Atonement" became a word representing the religious act of Jesus paying for the sins of the world; more broadly, the idea of atonement came to represent a form of moral cleansing and reconciliation. *See generally* Paul S. Fiddes, *Salvation and Atonement*, *in* THE OXFORD HANDBOOK OF SYSTEMATIC THEOLOGY 176, 178 (John Webster et al. eds., 2007).

Atonement focuses on community healing. "[A]tonement can heal old wounds that otherwise might be left to fester," writes Brooks.[301] To accomplish this, an apology comes first, emphasizing the focus on reconciliation.[302] Reparations then make the apology believable.[303] This creates an environment of healing and forgiveness. When this happens, Blacks will have a reason to buy into the legal system and the community. Thus, by decreasing racism and racial tension, atonement helps all of society.[304] Brooks writes, "atonement—apology and reparation—plus forgiveness leads to racial reconciliation."[305] Atonement offers the best moral framework for reparations advocates going forward.[306]

Other possibilities exist, like importing the idea of *ho'oponopono*—the traditional Hawaiian concept of reconciliation among members of a family or community—into the reparations context.[307] The process is described in detail by Rebecca Tsosie, who notes:

> Native Hawaiian peoples have a long tradition of resolving interpersonal conflicts through a process called "Ho'oponopono," which means "to make right." This process has been used within families to heal the wounds caused by particular transgressions. The healing process is both emotional and spiritual and is premised upon the idea that the perpetrator and the person wronged are bound together in a relationship of negative entanglement called "hihia." This tangling of emotions hinders forgiveness, and thus, the healing process must untangle these negative

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301. BROOKS, *supra* note 9, at 170.

302. *Id.* at 142. Brooks notes that "Racial reconciliation should be the primary purpose of slave redress." *Id.* at 141. He also writes that "[o]nly apology is sufficiently endowed to perform such heavy moral lifting." *Id.* at 142; *see also* Wenger, *supra* note 121, at 2–4 (discussing the uses and limits of apologies).

303. BROOKS, *supra* note 9, at 142–43.

304. *See* Wenger, *supra* note 8, at 241–44.

305. BROOKS, *supra* note 9, at 143; *see also id.* at 148–51 (discussing atonement as a chance to clarify the historical record).

306. *See id.* at 141–69 (discussing Brooks's atonement model). Brophy discusses the moral strength of Brooks's model. *See* BROPHY, *supra* note 4, at 73–74, 149; *see also* Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959, 977–78 (2000) (also discussing moral basis for reparations).

307. *See* Andrew J. Hosmanek, *Cutting the Cord: Ho'oponopono and Hawaiian Restorative Justice in the Criminal Law Context*, 5 PEPP. DISP. RESOL. L.J. 359, 359–68 (2005) (discussing history and current uses of *ho'oponopono*).

> emotions to facilitate a mutual understanding of the emotional truth of what happened, a sincere appreciation of the effects of the bad behavior, a confession of the wrongdoing and seeking of forgiveness by the perpetrator, and ultimately, the act of granting forgiveness and the release of the negative emotions.[308]

Ho'oponopono has the benefit of drawing on the traditions of another marginalized group, and as such, may be an especially effective tool.[309]

Each of these approaches moves beyond the adversarial framework and engages the community.[310] As Conyers notes, "we have got to reach out beyond the African-American community."[311] Engaging with all views is a part of the process. By failing to communicate with or appreciate arguments made by opponents, both sides lose. Both sides miss out on the sort of internal vetting and intellectual refinement that comes from addressing opposite views. In addition, reparationists especially suffer, since they are in the minority position and have the most to gain from engaging the other side.

E. The Role of Law in Facilitating Creative Remedies

Thus far, law's engagement with reparations has come in the tort framework. However, law can make invaluable contributions to these alternate approaches.

Law can help increase the power of storytelling. This happened in the Japanese American context. The legal strategy of attacking wrongful convictions focused the public's attention on sympathetic cases of clear injustice. The increased public consciousness of the wrong helped contribute to a shift in perception, which ultimately led to restitution.[312] Similarly, Holocaust cases led to storytelling that

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308. *See* Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1666 (2000).

309. *See* Matsuda, *supra* note 51, at 368–73 (discussing Native Hawaiian restitution claims).

310. Each of these ideas relates to Matsuda's suggestion that law "look to the bottom" and respond to the experiences of the oppressed. *Id.* at 324–25, 398–99.

311. Conyers, *supra* note 277, at 154.

312. *See generally* YAMAMOTO ET AL., *supra* note 256 (discussing the role of consciousness-raising in the Japanese American context).

raised public consciousness of previously unknown incidents.[313] Some similar consciousness-raising may have already happened in the slavery reparations context. The publicity from the failed tort claims may have contributed to consciousness-raising or to shifts in public opinions that contributed to the movement for microreparations.

Law can reinforce microreparations efforts. For instance, changes to the statute of limitations were vital in the microreparations cases that facilitated some recovery for Armenian genocide victims.[314] Legal scholars must continue to examine the microreparations phenomenon.[315]

Microreparations ordinances may provide opportunity for additional storytelling or spotlighting. For instance, recent slavery ordinances may provide a platform for storytelling in the context of the law. These ordinances call for businesses to disclose past ties to slavery.[316] Reparations advocates can use these as a platform by bringing litigation or other enforcement actions. These kinds of measures allow advocates to keep the spotlight on the issues without opening the door to criticisms of individual plaintiffs. They also allow for broader storytelling, as advocates can highlight the many lesser-known links to slavery.

Other legal rights may provide the context for storytelling and public consciousness-raising about slavery. For instance, Brophy has written recently about rights to access graveyards.[317] This is an evocative image, which may serve as a platform for storytelling and consciousness-raising. Many stories remain to be told. For instance,

313. *See* Deborah Sturman, *Germany's Reexamination of Its Past Through the Lens of the Holocaust Litigation*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 215, 215–16 (Michael Bazyler & Roger P. Alford eds., 2006).

314. BROPHY, *supra* note 4, at 120 (discussing California's suspension of statute of limitations in suits against insurance companies by descendants of the Armenian genocide victims).

315. A limited amount of discussion has already occurred. For instance, Brophy briefly addresses whether smaller endeavors, called truth commissions, are enough. *See id.* at 170–71. I address this and other questions in some depth in my draft article *Towards Microreparations*. *See* Wenger, *supra* note 20.

316. *See* BROPHY, *supra* note 4, at 143–47.

317. *Id.* at 133. *See generally* Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. REV. 1469 (exploring in depth the long-standing right to visit the graves of one's ancestors).

the East St. Louis riot story is, in some ways, as compelling as Tulsa and may be the next microreparations front.[318]

VI. CONCLUSION

The traditional tort model has not succeeded in securing compensation for slavery. This failure illustrates some of the limits of the law in addressing mass harms. However, the emergence of a variety of creative potential remedies suggests that even for harms like slavery, some sorts of legal responses may be beneficial. These illustrate that, for a society intent on achieving social justice, no harm is really too big to remedy.

318. BROPHY, *supra* note 4, at 133–35 (comparing and contrasting Tulsa's and East St. Louis's reparations prospects).