Exploring Jethroe’s Injustice: The Impact of an Ex-Ballplayer’s Legal Quest for a Pension on the Movement for Restorative Racial Justice

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INTRODUCTION

In 1950, at the end of a triumphant season with the Boston Braves, outfielder Sam Jethroe earned Major League Baseball’s National League Rookie of the Year award.1 Forty years later, Jethroe found himself destitute with no home and without his Rookie of the Year trophy, which he sold in desperation for money.2 A variety of factors conspired to pull Jethroe into poverty, and one such factor was racially motivated employment discrimination. As an African-American, Jethroe was barred from playing Major League Baseball (MLB) for the majority of what would otherwise have been his most productive playing years.3 Limited, as a consequence of his race, to three full seasons and one partial season in the big leagues, Jethroe fell narrowly shy of the four-year eligibility requirement for a Major League Baseball pension.4 With no money and no other recourse, Jethroe sued Major League Baseball and related entities in March of 1995 for the pension he felt he was wrongly denied,5 but he gained no redress, as the United States District Court for the Eastern District of Pennsylvania dismissed the suit as untimely.6 With the dismissal, the case lost the little media attention it initially attracted, and Jethroe receded into the obscurity in which he had lived for years. He died several years later,7 and his suit has received scarce attention since.

The obscurity of Jethroe’s suit is, however, unfortunate. While on first blush Jethroe’s claim may seem a minor matter of one retired ballplayer’s fight for supplemental income in his golden years, the basic characteristics of Jethroe’s suit—a claim for pension funds denied as a consequence of past racial discrimination—present a uniquely powerful claim for delayed racial justice. And as America continues to debate, with increasing intensity, the merits of compensating people for

1. Brad Snyder, Jethroe Seeks Legal Victory in Bid for Baseball Pension, BALT. SUN, Apr. 22, 1995, at 1C.
3. Snyder, supra note 1, at 1C.
5. Snyder, supra note 1, at 1C.
6. Lawsuit Dismissed, supra note 4, at 13; Enders, supra note 2.
7. Richard Goldstein, Sam Jethroe is Dead at 83; Was Oldest Rookie of the Year, N.Y. TIMES, June 19, 2001, at A21.
decades- and centuries-old racial injustice through reparations and other means, the characteristics of Jethroe’s claim deserve a closer look.

Under analysis, Jethroe’s claim avoids criticisms routinely launched at claims for delayed racial justice. It thus presents a model for claims potentially open to scores of people of color formerly employed in any number of industries who, by virtue of racial discrimination suffered during their working years, are deprived pension benefits in their later years. Although Jethroe’s particular claim failed, claims brought under the same model, hereinafter “Jethroe claims,” have the potential to provide many former employees with restorative racial justice.

Part I of this Article explores Sam Jethroe’s claim—examining his attempts to play Major League baseball, his race-based rejection, and his legal challenge to recover pension funds denied him as a consequence of that racial discrimination—and raises the possibility of other retirees, hereinafter “Jethroe claimants,” bringing claims for denied pensions. Part II analyzes the utility of 42 U.S.C. § 1981 (Section 1981) as a mechanism for asserting Jethroe claims and concludes the statute is well suited for such use. Part III examines Jethroe claims in light of the recent movement for reparations in this country, noting the inapplicability of traditional anti-reparations arguments to a claim of delayed justice for pension denial. Part IV explores the policies supporting statutes of limitations as well as the circumstances under which the law disfavors statutes of limitations application and engages the possibility that despite legal and policy arguments against time-barring Jethroe claims, the statutes of limitations defense, if pled, would prevent adjudication on the merits and thus block the remedy such adjudication would potentially yield. Recognizing this possibility, Part IV explores whether (1) common law exceptions to statutes of limitation, (2) legislative action, or (3) traditional notions of professional responsibility might provide access to that remedy. Finally, Part V concludes that Jethroe claims, if freed from statutes of limitations attack, could serve to deliver long-denied justice to scores of retirees and, in doing so, help to heal the festering wound of racial animosity that has persisted in America for centuries.
I. JETHROE’S INJUSTICE

“I gave baseball a lot more than it gave me.”

A. Discriminatory Denial

Sam Jethroe was the son of a farmer and a domestic worker, and was raised in East St. Louis, Illinois. From his earliest days, Jethroe exhibited tremendous athletic prowess. Known for his speed, he excelled playing semi-pro baseball in East St. Louis, Illinois and St. Louis, Missouri. Despite his unquestionable talent, however, Jethroe was initially unable to play Major League Baseball because of his skin color. Major League Baseball consists of two separate leagues, the National League and the American League, which, since 1903, have operated in tandem under a joint organizational structure. Although teams in both Leagues employed black players during the late 1880s, members of some of the Leagues’ fully segregated teams refused to play against integrated teams, and eventually the Leagues’ blacks were expurgated. Indeed, consequent to a “gentlemen’s agreement” among Major League owners, blacks would be barred from Major League play until 1947.

Without access to the Major Leagues, blacks organized among themselves and created baseball leagues for black players, which would come to be known as the Negro Leagues. Like scores of other black baseball players discriminatorily denied the opportunity to play Major League ball, Jethroe played for years in the Negro Leagues. In 1942, Jethroe joined the Cincinnati Buckeyes, and during his first year with the team, his on-field success was unrivaled. He led the Negro American

8. Enders, supra note 2 (quoting Sam Jethroe).
10. Id.
11. See Rich Marazzi, Batting the Breeze, SPORTS COLLECTORS DIGEST, Nov. 11, 1994, at 110.
14. ROBERT PETERSON, ONLY THE BALL WAS WHITE, at v (1970); HOWARD BRYANT, SHUT OUT: A STORY OF RACE AND BASEBALL IN BOSTON 24 (2002) (“The desire to keep blacks out of the major leagues existed in great degree from the players all the way to the commissioner’s office . . . ”).
15. PETERSON, supra note 14, at v. The most successful and renowned of these leagues was the Negro National League, organized in 1920 by “the Father of Black Baseball,” Rube Foster. WILLIAM C. RHODEN, FORTY MILLION DOLLAR SLAVES: THE RISE, FALL, AND REDEMPTION OF THE BLACK ATHLETE 100 (2006).
16. BIOGRAPHICAL DICTIONARY OF AMERICAN SPORTS: BASEBALL, supra note 9, at 282. After the 1942 season, the Buckeyes moved from Cincinnati to Cleveland. See id.
League in batting average, runs scored, doubles, triples, stolen bases, and base hits. In 1944, Jethroe again led the League in batting average and did so once more in 1945, when he led the Buckeyes to the Negro League World Series. On the heels of his triumphant 1945 season, the Boston Red Sox invited Jethroe—as well as Marvin Williams, who was then starring for one of the Negro Leagues’ most storied franchises, the Philadelphia Stars, and future MLB great Jackie Robinson, who would eventually be the first black player in the Majors—to their stadium, Fenway Park, for what the club described as a tryout. It was preordained, however, that none of the three would make the team. As then Red Sox manager Joe Cronin has since said of the sham tryout, “I was in no position to offer them a job. The general manager did the hiring and there was an unwritten rule at that time against hiring black players.”

The empty tryout only came about, in fact, as the result of a political compromise between the Red Sox and Boston councilman Isadore Muchnick. Muchnick, whose constituency consisted of many blacks, threatened the Red Sox that he would seek to ban Sunday baseball games if they did not integrate. At the time, professional baseball could only be played on Sundays in Boston by permit, and permit issuance required a unanimous city council vote. Muchnick indicated his intention to vote against issuance if the team did not offer black players a tryout. The Red Sox were undaunted in their segregationist view, but the team agreed to hold a tryout if it would placate Muchnick. For this reason, and no other, Jethroe had his first Major League tryout. During the following years, Jethroe continued to excel

17. Id.
18. Id.
20. Id. at 24–29. Cronin’s sentiments against integration may have been a great deal stronger. Indeed, Clif Keane, a Boston Globe reporter at the time, said he heard the statement “[g]et those niggers off the field” as Jethroe, Robinson, and Williams played. Id. Keane believed then-Red Sox owner, Tom Yawkey, made the taunt, but it has also been attributed to Cronin as well as then-Red Sox General Manager, Eddie Collins. Id.
21. Id. at 24–29.
22. Id. During an era before television broadcast revenue deals and before baseball games were regularly played in the evening, gate receipts from weekend baseball games—which fans, free from weekday employment obligations, could patronize—were of great financial import to teams. See id. at 29. To ban Sunday baseball, therefore, would have been a “potentially crippling blow.” Id.
23. Id. at 24.
24. Id.
25. Id. at 29.
26. That the tryout was a complete sham was not lost on Jethroe, as his teammate with the Buckeyes, Willie Grace, explained:

Sam told us what a joke that so-called tryout was . . . . He said you just knew it was a farce because when the guys were out there Joe Cronin—who was managing the club—
with the Buckeyes, as well as in Cuba’s winter baseball League, where he led the League in stolen bases in two consecutive years.

In 1947, the Brooklyn Dodgers promoted Jackie Robinson from their Montreal-based minor league team, which competed in the International League, and officially desegregated the Major Leagues. Robinson’s promotion did not “smash the color barrier” as is often suggested. Rather, it created a crack in the barrier wide enough for a fortunate few black players to squeeze through, but far too narrow to allow in all those who were deserving. In 1947, five black players competed on three of MLB’s sixteen teams—the Brooklyn Dodgers, the Cleveland Indians, and the St. Louis Browns. In the following year, 1948, the Browns resegregated and did not hire another black player for three years, leaving the Dodgers and the Indians as the only MLB teams to employ black players. In 1949, the New York Giants employed two black players, bringing the number of desegregated teams back to three and the total number of black players in the Major Leagues to nine.

B. Making the Majors

In 1950, the number of blacks in Major League Baseball remained nine, a mere two percent of a League employing 400 players, and despite the long odds of being one of the few blacks permitted to play in the League, Jethroe finally broke in. Two years earlier, the Dodgers bought Jethroe’s rights from the Buckeyes and sent him to play minor league ball in Montreal, where Robinson previously played. Jethroe met with great success in his first season playing with primarily white teammates. During the 1948 season, Jethroe batted an impressive .322

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27. All told, in his six seasons with the Buckeyes, Jethroe compiled a remarkable batting average of .342 and was selected to the play in the Negro Leagues’ annual All-Star game in four of those seasons. See Historic Baseball, http://www.historicbaseball.com/players/jj/jethroe_sam.html (last visited Aug. 8, 2007).

28. BIOGRAPHICAL DICTIONARY OF AMERICAN SPORTS: BASEBALL, supra note 9, at 282.


30. Id. at 11–25.

31. Id. at 13–14, 23–36.

32. Id. at 15–47.

33. See id. at 47.

34. BIOGRAPHICAL DICTIONARY OF AMERICAN SPORTS: BASEBALL, supra note 9, at 282.
and stole 18 bases in 76 games.\textsuperscript{35} His next season, however, was even more remarkable. He raised his batting average to .326, hit 17 home runs, led the League with 154 runs scored, and set an all-time International League record by stealing 89 bases.\textsuperscript{36}

Although Jethroe starred in the Negro Leagues and again in the Dodgers’ minor league organization in 1948 and 1949, during which time he was arguably their best minor league player, the Dodgers had no room for him.\textsuperscript{37} They had reached their limit for black players. Indeed, even the few teams deciding to employ black players were careful to limit the number of black players on their rosters.\textsuperscript{38} So, rather than promote Jethroe to the Dodgers’ major league club and add a fourth black face to the team photo, the Dodgers sold him to the Boston Braves in the spring of 1950.\textsuperscript{39} Unable to look past his talent, the Braves, an organization that had never previously employed a black player, took a chance, bucking Major League tradition, and became only the fourth of the sixteen MLB clubs to employ a black player.\textsuperscript{40}

The Braves benefited mightily from their decision. Jethroe quickly became the Braves’ starting centerfield, proceeded to have an excellent year, and won the National League’s Rookie of the Year award.\textsuperscript{41} Jethroe repeated his success in 1951.\textsuperscript{42} His production in 1952,
however, did not match that of his previous two years. This was certain due, in part, to Jethroe’s age. As a consequence of the discrimination that barred him from entering the Majors earlier, as a third year player in 1952, Jethroe was 35 years old, an advanced age for an elite athlete.\textsuperscript{43} As an additional matter, the Braves changed managers during the season, and the new manager, Charlie Grimm, apparently hostile to African-Americans, alienated and marginalized Jethroe by calling him “Sambo,”\textsuperscript{44} a racially derogatory term dating to the days of chattel slavery.\textsuperscript{45} In the following year, 1953, the Braves traded Jethroe to the Pittsburgh Pirates, where he played sparingly before being demoted to the Pirates’ minor league team in Toronto, where he played until his retirement from baseball in 1958.\textsuperscript{46} As of Jethroe’s demotion, half of the Major Leagues’ teams remained segregated, and the Leagues’ final segregated team—the same Boston Red Sox that staged the sham 1945 tryout for Jethroe, Sam Williams, and Jackie Robinson—did not accept its first black player until halfway through the 1959 season.\textsuperscript{47}

C. Life After Baseball

Jethroe’s life in retirement was quiet. After leaving the game, he opened a mildly successful Erie, Pennsylvanina, dining establishment called Jethroe’s Bar and Restaurant. Although not particularly profitable, the restaurant served to help support a modest lifestyle for Jethroe and his family for over thirty years.\textsuperscript{48} In the early 1990s, Jethroe was pressured to sell his restaurant to allow for construction of a

\begin{itemize}
  \item \textsuperscript{43} Marazzi, \textit{supra} note 11, at 111.
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} See 14 \textit{Oxford English Dictionary} 426 (2d ed. 1989). In spite of his age and his manager’s derision, in 1952, Jethroe hit a respectable 13 home runs and stole an impressive 28 bases, but his batting average dropped to a career low .232. \textit{Moffi & Kronstadt, supra} note 29, at 52.
  \item \textsuperscript{46} \textit{Biographical Dictionary of American Sports: Baseball, supra} note 9, at 283.
  \item \textsuperscript{47} \textit{See Moffi & Kronstadt, supra} note 29, at 212. The Red Sox commitment to segregation is legendary. In addition to forfeiting opportunities to sign Jethroe and Robinson, the Red Sox, in 1949, refused, on the basis of race, to sign “a young and already supremely talented Willie Mays, who would go on to become arguably the best player in the history of baseball.” N. Jeremi Duru, \textit{Fielding a Team for the Fans: The Societal Consequences and Title VII Implications of Race-Considered Roster Construction in Professional Sport, 84 Wash. U. L. Rev.} 375, 384 (2006) (citing Steve Fainaru, \textit{In Racism’s Shadow: Red Sox Working to Shed Longtime Image, but Blacks In and Out of Baseball Still Uneasy, Boston Globe}, Aug. 4, 1991, at 1). Indeed, the Red Sox epic World Series championship drought, which lasted from 1918 through 2004 and was long attributed to a curse baseball great Babe Ruth imposed upon the Red Sox after they sold his playing rights to the Yankees, might be more appropriately attributed to the team’s rejection of talent consequent to its long-standing bigoted personnel decision-making. \textit{See id. at} 395 n.142.
  \item \textsuperscript{48} Enders, \textit{supra} note 2, at 1.
\end{itemize}
municipal development project. Intent on resurrecting Jethroe’s Bar and Restaurant, but fiscally constrained from purchasing in many locations around Erie, Jethroe had little choice but to buy in one of Erie’s rougher areas. Not long after re-launching his business, a man was shot and mortally wounded in the restaurant. The incident frightened Jethroe’s customers and potential customers, and business suffered badly. With his business unable to generate income, Jethroe fell into poverty and, desperate for cash, sold the Rookie of the Year Trophy he earned some forty years earlier for a mere $3,500.

Coincidentally, and tragically, as Jethroe’s finances unraveled, his home burned to the ground. Homeless and impoverished, Jethroe turned to living in his defunct restaurant. Aged, with no money, and no job prospects, Jethroe found himself in the situation against which employee retirement benefits are designed to protect. Because, however, Jethroe was denied an MLB pension, he gained no such protection. Believing the denial to be the consequence of race-based discrimination in employment, Jethroe, in March of 1995, filed a federal suit against Major League Baseball and related entities. Alleging several violations of law, Jethroe sought, among other remedies, compensation for the denied pension payments.

Jethroe was correct in asserting that he was denied a pension many other former MLB players received. In 1947, MLB initiated a pension program for all retired players who logged four years in the League.

49. Id.
50. Id.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
Jethroe, by his own admission, only played Major League baseball for three full years and part of a fourth. Jethroe did not, however, challenge the four-year requirement. Rather, he proceeded under several theories, arguing that although he did not play in the Major Leagues for the requisite four years, his tenure was unlawfully restricted on the basis of race, and that he was, therefore, entitled to the pension he would have received absent the discrimination. On September 30, 1996, after significant motions practice, Judge Sean McLaughlin of the United States District Court for the Western District of Pennsylvania dismissed Jethroe’s suit with prejudice, effectively ending Jethroe’s fight for racial justice in the courts. Sam Jethroe died five years later, in June of 2001.

Although Jethroe was unable to prevail with his suit, he left behind the skeletal model of a unique delayed racial justice claim deserving of attention.

60. Jethroe, No. 95-72, slip op. at 6.
61. In addition to claiming violation of 42 U.S.C. § 1981, the claim addressed at length in this Article, Jethroe claimed violation of 42 U.S.C. § 1983, the Fifth and Fourteenth Amendments to the United States Constitution, the Sherman Antitrust Act, the Employment Retirement Income Security Act (ERISA), the Racketeering Influenced and Corrupt Organizations Act (RICO), various trademark laws, and common law fraud doctrine. Id. at 2–3.
62. Id. at 6–7.
63. Jethroe filed an appeal with the Third Circuit, but shortly thereafter agreed to dismiss the appeal. See Docket Sheet, Jethroe v. Major League Baseball Props., Inc., No. 95-72 (W.D. Pa. Sept. 30, 1996) (showing appeal filing on October 29, 1996). In 1997, perhaps in response to equity concerns raised by Jethroe’s suit, Major League Baseball agreed to issue annual supplemental income payments of between $7,500 and $10,000 to Negro League players who eventually entered the Major Leagues but who did not play four years in the majors as well as those who never entered the majors but who played four or more years in the Negro Leagues prior to 1947—the year Jackie Robinson entered the Major Leagues. Enders, supra note 2, at 3; Editorial, ‘Negro’ Players Finally Get Their Due, TAMPA TRIB., May 18, 2004, at A8. This plan, of course, did nothing for the numerous players who were not permitted to play Major League baseball “for many years after [1947] when in fact the [M]ajor [L]eagues were not really integrated.” Id. at A8. Due largely to the lobbying of Robert “Peach Head” Mitchell, who pitched for the Negro Leagues’ Kansas City Monarchs from 1954–1957, and United States Senator Bill Nelson of Florida, the Major Leagues, in May of 2004, reached a second agreement granting all Negro League players who played portions of at least four Negro League seasons after 1947 the option of receiving: (1) $833.33 per month for four years; or (2) $375 per month for life. Dan Steinberg, MLB Agrees to Make Payments to Negro League Players, WASH. POST, May 15, 2004, at D9. Notably, in 2003, a group of retired white players who played fewer than four MLB seasons sued the Commissioner of Major League Baseball, Bud Selig, together with all Major League teams, claiming that, by excluding them from MLB’s 1997 Negro League player supplemental income plan as well as a 1993 MLB medical coverage plan for former Negro League players, Major League Baseball discriminated against them on the basis of race. Moran v. Selig, 447 F.3d 748, 751–53 (9th Cir. 2006). Finding the retired white players were not similarly situated with the Negro League players and that MLB’s reasons for issuing the supplemental income and medical plans were both legitimate and non-discriminatory, the Ninth Circuit affirmed the lower court’s summary judgment dismissal. Id. at 760.
64. See Goldstein, supra note 7, at A21.
II. Section 1981 as a Basis for Jethroe Claims

A. Section 1981’s Origins

Section 1981 provides the most likely and obvious avenue for retirees bringing Jethroe claims. Indeed, as much as any statute in our body of laws, Section 1981 exists to protect people of color from discrimination. About this, there can be no doubt. Section 1981 reads, in relevant part, as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

Section 1981 finds its origins in the Civil Rights Act of 1866 (the 1866 Act), enacted in the year following the Civil War’s conclusion to shield non-whites from race-based oppression. As Senator Lyman Trumball, then chairman of the Senate Judiciary Committee, explained in introducing the legislation that would become the 1866 Act, it was designed to strengthen the impact of the Thirteenth Amendment to the United States Constitution. That Amendment, which prohibits slavery and involuntary servitude except as punishment for a crime, was at the time under assault throughout America’s southern states by way of legislatively enacted “Black Codes.” The Black Codes served essentially to re-institutionalize slavery on a state-by-state basis,
restricting blacks in seemingly innumerable ways. For instance, Black Codes typically prevented blacks from owning land, traveling without passes, gathering together in even small numbers, living in certain areas, owning firearms, speaking to whites without prescribed deference, and engaging in certain professions and occupations.

While Congress was certainly concerned with all of these Black Code-created deprivations in passing the 1866 Act, it was primarily concerned with guaranteeing to blacks non-abridgment of their economic rights. Specifically, the Act was aimed at actions taken to promote black economic subservience following emancipation and, in particular, the discriminatory abridgement of employment opportunities. Indeed, “Congress clearly believed that freedom would be empty for black men and women if they were not also assured an equal opportunity to engage in business, to work, and to bargain for sale of their labor.” Congressional debate and testimony presaging the legislation’s passage reveal as much. In advocating for what would become Section I of the 1866 Act, legislators made clear that the section was squarely about protecting economic rights and, specifically, the right to work. For instance, Representative William Windom of Minnesota stated the legislation’s “object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil.” During further discussion on the same legislation, Representative William Lawrence of Ohio also advocated for its passage stating, “It is idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live.”

B. Section 1981’s Scope

Few scholars question the 1866 Act’s applicability to employment rights, but some have questioned the 1866 Act’s applicability to private, as opposed to state-sponsored, discrimination. Scrutinizing the origins of the 1866 Act, however, reveals that, from its inception, Section 1981 has indeed forbidden private discrimination. This is clear for several

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71. See id.
73. Goodman, 482 U.S. at 674.
74. Id.
75. Id.
76. CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866).
77. Id. at 1833.
reasons.

First, the plain language of the statute is unambiguous. Section I of the Act of 1866, the precursor to what is currently Section 1981 and 42 U.S.C. § 1982 (Section 1982), reads in relevant part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens...

Section I of the Act of 1866 was reenacted, but materially unaltered, in 1870 and recodified under the Revised Statutes of 1874 as 42 U.S.C. § 1977 (the current Section 1981) and 42 U.S.C. § 1978 (the current Section 1982).

Section II of the Act of 1866 reads, in relevant part, as follows:

That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

To read the 1866 Act as proscribing only state-sponsored

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78. 42 U.S.C. § 1982 prohibits discrimination specifically with regard to property, stating, "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (2000).


81. Id. at 422 n.28.

82. Act of Apr. 9, 1866, ch. 31, § 2.
discrimination, and not private discrimination, renders it senseless. Section II establishes no entitlement to rights. The only rights granted by the Act are the rights set forth in Section I, namely the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." Section II exists solely to provide a criminal punishment mechanism to accompany Section I. Section II, however, is carefully worded to apply not to any person who deprives a citizen of the rights granted under Section I, but to any person who does so "under color of any law, statute, ordinance, regulation, or custom." The statute as a whole essentially grants a general right, but it explains that only state actors and state entities violating the right, as opposed to private actors and private entities violating the right, can be criminally prosecuted for it. If one were, therefore, to read Section I as providing a right to be free from state discrimination only, Section II, as written, would be nonsensical.

Second, additional evidence that Section 1981 has forbidden private discrimination since its inception lies in the debate preceding enactment, which was inundated with discussion of injustices African-Americans suffered at the hands of private individuals, including white farmers agreeing to refuse to hire black workers and white employers refusing to remunerate their black employees. And the debate made clear that such individual acts represented the ills the 1866 Act was designed to cure. In passing the 1866 Act, Congress had before it significant evidence of African-Americans being unfairly treated by white individuals and organizations of individuals with no connection to state actors. Among such evidence was a comprehensive report revealing the pervasive private animosity and hostility prevalent against blacks at the time and emphasizing the importance of protecting them from the

84. Act of Apr. 9, 1866, ch. 31, § 1.
85. Ford, supra note 67, at 461.
86. Act of Apr. 9, 1866, ch.31, § 2.
87. Ford, supra note 67, at 461–62. When taking up the issue in 1968, the Court explained its belief that perhaps Congress “thought it appropriate to confine criminal punishment to state officials, oath-bound to support the supreme federal law, while allowing only civil remedies—or perhaps only preventive relief—against private violators.” Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426 n.33 (1968).
88. Ford, supra note 67, at 462.
89. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866); Jones, 392 U.S. at 427.
90. Jones, 392 U.S. at 428 n.40.
91. Id. at 427.
discrimination such hostility creates.\textsuperscript{92} The report ultimately concluded that “even if anti-Negro legislation were ‘repealed in all the States lately in rebellion,’ equal treatment for the Negro would not yet be secured.”\textsuperscript{93}

Finally, as further evidence that Congress sought to prohibit private discrimination as well as state-sponsored discrimination, when Congress convened in 1865 to discuss the crafting of anti-discrimination legislation, it thrice rejected proposed legislation nullifying discriminatory state laws as being “to [sic] narrowly conceived.”\textsuperscript{94}

Considering the structure of the 1866 Act, the congressional discussion preceding its enactment, and the evidence Congress considered while crafting the legislation, Congress clearly intended the statute to prohibit all violations of the rights granted thereunder, whether or not the violation was state-sponsored.

The Supreme Court’s decision in \textit{The Civil Rights Cases}\textsuperscript{95} did nothing to change this. In those cases, decided in 1883, the Supreme Court considered together several challenges to discrimination in public accommodations brought under the Civil Rights Act of 1875.\textsuperscript{96} The Court ultimately found against the plaintiffs, finding Sections 1 and 2 of the statute—the two sections relevant to the suit—unconstitutional.\textsuperscript{97} While some scholars have suggested \textit{The Civil Rights Cases} robbed the 1866 Act of its vitality,\textsuperscript{98} these cases’ holdings actually had no definitive bearing on the 1866 Act; they ruled strictly with reference to the 1875 Act.\textsuperscript{99} Any discussion of Section I of the 1866 Act was, therefore, necessarily limited to non-binding dicta. The same is true regarding the Supreme Court’s decision in \textit{Virginia v. Rives}, which did deal with the 1866 Act but ruled only on the circumstances under which Section 3 of the Act (recodified as section 641 of the Revised Statutes of 1874) permitted removal of a state action to federal court.\textsuperscript{100}

\textsuperscript{92} \textit{Id.} at 428.
\textsuperscript{93} \textit{Id.} at 429 (quoting \textit{CONG. GLOBE}, 39th Cong., 1st Sess. 2, 17-25 (1866) (Report of C. Schurz)).
\textsuperscript{94} \textit{Id.} at 429 & n.46 (citing \textit{JACOBUS TENBROEK, EQUAL UNDER LAW} 177 (Collier Books rev. ed. 1965) (1951)).
\textsuperscript{95} 109 U.S. 3 (1883).
\textsuperscript{96} \textit{Id.} at 4–5.
\textsuperscript{97} \textit{Id.} at 26.
\textsuperscript{99} \textit{The Civil Rights Cases}, 109 U.S. at 26. In his dissent, Justice Harlan, while noting the court declined to explicitly rule on the 1866 Act’s constitutionality, explained that portions of the majority’s opinion, in fact, served to confirm the Act’s constitutionality. \textit{Id.} at 35 (Harlan, J., dissenting). In light of the Court’s reasoning, Harlan states, “[I]t is impossible . . . to question the constitutional validity of the civil rights act of 1866.” \textit{Id.} at 36.
\textsuperscript{100} 100 U.S. 313, 319–22 (1879). \textit{See also} \textit{Jones v. Alfred H. Mayer Co.}, 392 U.S. 409, 420
Despite being good law dating to its inception in 1866, Section 1981—which prohibits private discrimination in contract formation and was passed with an eye toward guaranteeing blacks economic rights and equal employment opportunity—was in relative disuse for over a century. While various factors may have contributed to its disuse, the myriad obstacles to African-Americans effectuating their legal rights—including severe socio-economic inequities and violent intimidation—must certainly have played a part. Whatever the case, the statute’s latency, together with the aforementioned dicta, prompted some commentators to conclude that by the mid-1900s, Section 1981’s “breadth had been in question for nearly a century” and that section 1981 “stood on shaky ground.”

Whether or not Section 1981 truly stood on shaky ground, it stood nonetheless, and no decision or legislative pronouncement had stripped its ability to protect citizens from private discrimination in pursuing economic rights. This is further crystallized by the cases in which the Supreme Court began articulating Section 1981’s power to prohibit private discrimination, the 1975 case of Johnson v. Railway Express Agency, Inc., and the 1976 case of Runyon v. McCrary. Neither case endeavors to overrule any previous case, because neither case is stating new law. Rather, each case is articulating the law as it had existed for a century and dusting off an out-of-use but fully valid statute. So, while Johnson and Runyon may be credited with opening the door to Section 1981 challenges to private discrimination, in fact, they merely shed the light on a door that has long stood open. A Section 1981 claim of employment discrimination in the private sector has been viable since the statute was established.

n.25 (1968).

102. See infra text accompanying notes 204–217.
106. In Johnson, the Court introduced Section 1981 as it would introduce any valid statute in our body of laws and made no reference to it ever being nullified or otherwise rendered impotent:

Title 42 U.S.C. § 1981, being the present codification of § 16 of the century-old Civil Rights Act of 1870, 16 Stat. 144, . . . on its face relates primarily to racial discrimination in the making and enforcement of contracts. Although this Court has not specifically so held, it is well settled among the federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race.

As such, Section 1981 provides a promising vehicle for those bringing Jethroe claims for intentional discrimination in employment during the pre-Civil Rights era, when such discrimination was rampant.

III. THE JETHROE CLAIM: A REPARATIONS ARGUMENT?

However meritorious, Jethroe claims are likely to be perceived in the public eye, in some sectors of academia, and perhaps in some courts, as claims for reparations and will be consequently subjected to the avalanche of opposition reparations claims tend to attract. Whether such characterization is correct and whether, if correct, such characterization indicates decreased viability for Jethroe claims, deserves exploration.

Over the course of the past decade, African-Americans have mightily demanded legal redress for deprivations suffered under slavery and the system of Jim Crow segregation that reigned through the majority of the twentieth century. Although the modern movement for delayed racial justice does not represent the first ever such claims, these suits have, in recent years, been filed with unprecedented frequency. And while critics may view the suits as disparate and unmerited claims brought by eccentric dreamers, any such view would be wildly off base. Indeed, established lawyers and scholars have banded together in organizations to take up the reparations banner. Perhaps most renowned among these is the Reparations Coordinating Committee (RCC), whose membership comprises some of the nation’s most accomplished and established lawyers, scholars, activists, and public officials.

A. The Wide World of Reparations

“Reparation,” defined by Black's Law Dictionary as “[t]he act of


108. Reparations claims are not a new phenomenon. Indeed, the first recorded reparations lawsuit reached court in 1915. RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 206-07 (2000). Cornelius J. Jones sued the Treasury Department claiming that the U.S. government profited from a tax it levied on cotton picked by enslaved African-Americans. Id. The claim failed as violative of the Eleventh Amendment’s Sovereign Immunity Clause. Id. The claim failed as violative of the Eleventh Amendment’s Sovereign Immunity Clause. Id.

109. See Yamamoto, Serrano & Rodriguez, supra note 107, at 1295.

making amends for a wrong,"\(^{111}\) would seem to adequately characterize a Jethroe claim’s desired result. The word “reparation,” in the context of African-Americans’ long quest for delayed racial justice, however, has transcended its dictionary definition and come to represent something far more specific. While there exists no authoritative definition of reparations in the context of delayed racial justice for African-Americans, RCC co-chairperson and Law Professor Charles Ogletree’s definition of reparations seems to capture the spirit of the term. He explains that a reparations claim “is an attempt to obtain restitution for the wrongs inflicted through slavery and segregation and persisting through the current landscape of racial discrimination in America.”\(^{112}\)

Ogletree’s definition gives contextual flesh to Black’s skeletal definition, providing a fuller explanation of reparations vis-a-vis restorative racial justice in America. Notably, the size of the group seeking restitution is not ultimately important to characterization as a reparations claim, as evidenced by two recently filed claims. In 2002, an African-American woman named Deadria Farmer-Paellmann brought an action on behalf of herself and other similarly situated persons, including millions of African-American slave descendants, against numerous corporations seeking restitution for profits the corporations made through their economic involvement in slavery.\(^{113}\) In 2003, surviving African-American victims of a horrific 1921 race riot in Tulsa, Oklahoma, together with descendants of individuals killed in the riot, brought suit against the Governor of Oklahoma, other state actors, and the city of Tulsa seeking restitution for the crimes and torts committed during the massacre.\(^{114}\) The former suit sought compensation for millions; the latter, *Alexander v. Oklahoma*,\(^{115}\) sought compensation for hundreds. Both indisputably are reparations claims.

While helpful in creating the parameters of reparations claims, Professor Ogletree’s characterization, by his own admission,\(^{116}\) creates a

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\(^{111}\) BLACK’S LAW DICTIONARY 1301 (7th ed. 1999).


\(^{115}\) 2004 U.S. Dist. LEXIS 5131.

\(^{116}\) Professor Ogletree recognizes subcategorizing reparations claims assists in assessing their...
large pool, the contents of which are certainly all claims for reparation, but some of which are starkly different from others. Indeed, claims brought by undisclosed millions seeking broad-based community-wide restitution for generations of slavery profits seem only marginally related to claims brought by one hundred-plus victims (and descendants of victims) of a deadly race riot seeking restitution for the particular injuries the victims suffered. Though a theme of racial justice runs through both suits, one is not like the other.

B. Deconstructing the Monolith

Law Professor Keith Hylton recognized this truth, examined the large pool of cases often grouped as reparations claims, and created a framework subcategorizing such claims. In his article, A Framework for Reparations Claims, Professor Hylton argues that reparations claims can be divided into two types: “social welfare” claims and “doing justice” claims. Hylton uses the two above-described cases, the Farmer-Paellmann case and the Alexander case, to illustrate the two models.

Under Hylton’s theory, social welfare claims aim to achieve a redistribution of resources from those who profited from slavery and Jim Crow segregation to the community whose forbearers suffered from them. These claims “[do] not seek to do justice in any discrete case,” but rather serve broader “distributional goals.” The Farmer-Paellmann claim is paradigmatic of this group. Brought on behalf of millions of unnamed individuals against several named corporate defendants and one thousand unnamed “Corporate Does,” the claim certainly does not seek justice in any “discrete case.” Rather, the claim seeks broad resource redistribution. A victory, in addition to securing a general accounting from the defendants and establishing an independent historic commission, would result in the transfer of wealth, in the form of damages, from thousands of companies to millions of people. The award, resulting in this massive redistribution, would accrue to a large segment of society—all African-Americans descended from slavery—as back-pay and interest together with some


118. Id. at 32–34.

119. Id.

120. Id.

121. Id.

122. Id.

123. Complaint and Jury Trial Demand, supra note 113, at 19.
The extent to which this model is truly a broad-based societal initiative is underscored by many reparationists’ view that any award in such a case not be issued to millions of individuals directly, but rather be pooled and used to effectuate social programs aimed at benefiting the entire African-American community. For instance, numerous scholars, including Professor Ogletree and activist and reparation pioneer Randall Robinson, advocate that proceeds from a lawsuit such as Farmer-Paellmann’s should serve to guarantee the prevailing plaintiffs (members of the African-American community descended from slavery) fully subsidized educational opportunities. A remedy of this sort further elucidates the extent to which a claim brought by millions of African-Americans against thousands of companies is truly a social welfare claim.

Separate from these social welfare reparations claims, Hylton argues, are doing justice reparations claims. The latter claims, unlike the former, seek justice in discrete cases. As Hylton explains, this approach “involves identifying particular individuals or entities that committed bad acts and particular victims who were injured [and] specifying the precise acts that led to injury, and the sums necessary to compensate victims for the injuries.” Hylton, thus, essentially sets out a four-prong test to identify doing justice reparations claims. Such claims are characterized by:

(1) identifiable victim(s);
(2) identifiable perpetrator(s);
(3) identifiable bad act(s); and
(4) a specified compensatory sum.

Just as the Farmer-Paellman claim illustrates the social welfare model of reparations, the Alexander claim illustrates the doing justice model. In the Alexander case, the plaintiffs are the precise people victimized during two brutal days of rioting in Tulsa, Oklahoma as well as the descendants of victims who have since died. And the bad actors are similarly identifiable: among them the Tulsa police force,
which deputized many of the rioters, and the Oklahoma State National Guard, whose officially activated members contributed to the identifiable acts of terror. Finally, specific damages amounts are easily calculable based on the identifiable bad acts. Rather than broad redistribution of wealth, the Tulsa case seeks justice for the particular identifiable people injured in the riots as well as their descendants.

Like the Tulsa plaintiffs' claims, Jethroe claims—which meet Hylton's four prongs—illustrate the doing justice model. The victims are easily identifiable, namely, they are the retired employees who suffered employment discrimination resulting in reduced or denied pension payments. The perpetrators, too, are easily identifiable: they are the victims' former employers. The identifiable bad acts are the discriminatory actions leading to the reduced or denied pensions. And the compensatory sum is the sum of denied pension payments. Jethroe claims are, indeed, paradigmatic doing justice claims.

Hylton's deconstruction of the reparations monolith makes clear that some adverse reactions to reparations may be of limited scope and apply only to social welfare reparations claims, such as Farmer-Paellmann's claim seeking restitution for the stolen labor of slavery. Doing justice claims, such as Jethroe claims, on the other hand, are "far more consistent with tort doctrine and likely to meet their goals than the

130. See id. at 17.
131. Hylton, supra note 117, at 37.

Horowitz's arguments are facially inapplicable to doing justice reparations claims. Instead, they are aimed squarely at social welfare claims and focus on slavery-based causes of action that do not satisfy Hylton's four prongs. Indeed, in making the fifth of his ten anti-reparations arguments, Professor Horowitz himself essentially endorses the doing justice model of reparations. He juxtaposes slavery-based reparations claims with claims in which "the recipients of reparations were the direct victims of the injustice," id., and argues against the former while recognizing the viability of the latter. Thus, even Professor Horowitz, long identified as hoisting the anti-reparations banner, would seemingly agree that Jethroe claims surmount the obstacles he believes quash other reparations claims.
Although Jethroe claims qualify as doing justice claims under Hylton’s framework and are thus likely more viable than their social welfare-based counterparts, any litigated Jethroe claim would encounter resistance on statutes of limitations grounds. As such, analysis of statutes of limitations and their purposes, the manner in which they would impact Jethroe claims, and the possibility of Jethroe claimants avoiding their application, follows.

IV. JETHROE CLAIMS AND STATUTES OF LIMITATIONS

“[W]hat is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?”

Former Supreme Court Justice Oliver Wendell Holmes posed the above question in a vigorous critique of statutes of limitations in his 1897 Harvard Law Review article titled *The Path of the Law.* By the time Justice Holmes expressed his displeasure with statutes of limitations, however, they were long entrenched as an element of this nation’s legal system. Statutes of limitations have been a part of this nation’s legal landscape, serving to limit the time period during which a plaintiff can bring a claim against a defendant, since the earliest days of

133. Hylton, supra note 117, at 31.
134. This is not to say any movement for social welfare reparations, born of stolen slave labor or otherwise, will or should fail. Indeed, as Professor Ogletree has argued, despite the challenges such claims face, “the rejection of slavery reparations is a little too convenient. . . . [in that it] allows us to forget or deny that slavery imposed a holocaust that resulted in the extermination of millions of Africans.” Ogletree, supra note 112, at 29. Recognizing this concern, Eric Yamamoto, Susan Serrano, and Michelle Rodriguez propose an alternative approach to asserting slavery reparations and other social welfare reparations claims—one that reframes the “notion of reparations” as not only repair of “the material conditions of . . . those dispossessed” but as the “repair[] of breaches in the polity.” Yamamoto, Serrano & Rodriguez, supra note 107, at 1302–03. They describe their approach and its practical benefits as follows:

This repair paradigm of reparations does not rely on individual rights and remedies and focuses instead on (1) historical wrongs committed by one group, (2) which harmed, and continue to harm, both the material living conditions and psychological outlook of another group, (3) which, in turn, has damaged present-day relations between the groups, and (4) which ultimately has damaged the larger community, resulting in divisiveness, distrust, social disease—a breach in the polity. Within this framework, reparations by the polity and for the polity are justified on moral and political grounds—healing social wounds by bringing back into the community those wrongly excluded.

*Id.* at 1303.
136. *Id.*
colonial law.\textsuperscript{137}

\textit{A. Statutes of Limitations: The Justifications; the Concerns}

The primary justification underlying statutes of limitations "is undoubtedly one of fairness to the defendant."\textsuperscript{138} There is an understanding in the law that defendants should, at some point, have a reasonable expectation that old claims not be brought to bear against them.\textsuperscript{139} As such, they can be secure in the knowledge that they will not be called on to defend a suit when "evidence has been lost, memories have faded, and witnesses have disappeared."\textsuperscript{140} In essence, by encouraging plaintiffs to assert claims in a timely manner, statutes of limitations serve to relieve defendants from the burden of facing stale claims.\textsuperscript{141} While fairness to defendants may provide the primary justification for statutes of limitations, other justifications have been posited as well. Among these are the importance of prompt enforcement of the laws and diligent action in asserting legal claims, reducing the volume of litigation, and avoiding retrospective application of societal standards.\textsuperscript{142} These justifications, among perhaps others, have inspired and supported the implementation of statutes of limitations throughout American legal history.

Still, despite the enduring legacy of statutes of limitations, Justice Holmes's concern resounds today, just as it did in 1897. Indeed, one hundred years after Justice Holmes examined the subject, Law Professor Tyler Ochoa and Judge Andrew Wistrich took up the inquiry in their article, \textit{The Puzzling Purposes of Statutes of Limitations}.\textsuperscript{143} Key to any


\textsuperscript{138} \textit{Developments in the Law: Statutes of Limitations}, 63 \textit{Harv. L. Rev.} 1177, 1185 (1950). \textit{See also} Howard W. Wasserman, \textit{Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure}, 25 \textit{Cardozo L. Rev.} 793, 813 (2003) ("Limitations periods protect a range of interests inuring primarily to potential defendants."); United States v. Kubrick, 444 U.S. 111, 117 (1979) (stating that statutes of limitations "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise").

\textsuperscript{139} \textit{Developments in the Law: Statutes of Limitations}, supra note 138, at 1185; Wasserman, supra note 138, at 813–14; Kubrick, 444 U.S. at 117.


\textsuperscript{141} \textit{See Developments in the Law: Statutes of Limitations}, supra note 138, at 1185; Wasserman, supra note 138, at 813; Kubrick, 444 U.S. at 117.


\textsuperscript{143} Id.
examination of statutes of limitations is an understanding that such rules serve to effectuate a legal system whose duty it is to resolve substantive claims. As Ochoa and Wistrich explain:

[T]he fundamental reason for having a legal system is to resolve disputes on their merits under the substantive law. Procedural rules are necessary to maintain order and to promote efficiency within the legal system. However necessary such rules may be, they are not the legal system's reason for being. Rather, they are subordinate to the more fundamental purposes of the substantive law.144

Eight years later, in 2005, Law Professor Suzette Malveaux furthered the inquiry, launching a comprehensive examination of statutes of limitations and expressing significant concern as to their potential role in extinguishing racial justice claims.145 These works have revealed that just as several policies cut in favor of statutes of limitations, many other policies cut against statutes of limitations. Principally, because the legal system exists to resolve disputes on the substance, disposition on procedural rather than substantive grounds would seem to undermine that purpose.146 Indeed, in light of this purpose behind the legal system, one could certainly argue that “deciding an issue on some ground other than the substantive merits seems to miss the point.”147 It may be reasonably argued, therefore, that statutes of limitations may hinder the law more than they help by seeking to improve the legal system at the expense of the system’s ultimate mission.

As a related, yet distinct, matter, the “dignitary value” of the legal system rests in large part on the premise that people with valid complaints are entitled to their “day in court.”148 The denial of that day may cause the denied plaintiff significant frustration and disenchantment with the legal system and perhaps the entire political system in which it exists.149 Indeed, “no democratic political theory can ignore the sense of injustice that smolders in the psyche of the victim of injustice. If democracy means anything morally, it signifies that the lives of all citizens matter, and that their sense of their rights must prevail. Everyone deserves a hearing at the very least . . . .”150 When

144. Id. at 501.
146. Ochoa & Wistrich, supra note 142, at 500.
147. Id. at 501.
148. Id. at 501–02; Malveaux, supra note 145, at 82.
149. Ochoa & Wistrich, supra note 142, at 501–02.
150. Malveaux, supra note 145, at 84 (quoting JUDITH N. SHKLAR, THE FACES OF INJUSTICE 35 (1990)).
dispossessed of that hearing, disaffection may reasonably flow, and the damage to individuals denied their day in court may be severe.\textsuperscript{151} They may, as a result of the denial, lose confidence in society to protect them, and may, therefore, feel alienated from society and be less inclined to abide by its rules.\textsuperscript{152} Any such result would certainly weaken society.

Despite the policies cutting against statutes of limitations and the scholarship that has elucidated them, statutes of limitations remain part and parcel of our legal system. Considering the arguments against statutes of limitations, however, a system of statutes of limitations without exception would be irrational and would stand at odds with a legal system intent on resolving disputes on the merits. And, indeed, the American legal system does not apply statutes of limitations without exception. Rather, when considerations militate against the application of statutes of limitations, the law casts them aside, going directly to the merits of a dispute in spite of the aforementioned general justifications for time-barring claims.\textsuperscript{153}

Disputes between the state and an individual accused of a crime are particularly likely to proceed without regard for the time elapsed between crime and prosecution. For instance, no prosecution in Wyoming or South Carolina can be time-barred, as neither state has any criminal statute of limitations.\textsuperscript{154} While a statute of limitations exists in Kentucky for misdemeanors, no such statute exists for felonies.\textsuperscript{155} The majority of states do have statutes of limitations for most felonies, but no state has such a statute for the crime of murder.\textsuperscript{156} And ten of the fifty states have no statutes of limitations for rape.\textsuperscript{157} Some jurisdictions have identified various felonies other than murder and rape for which no statutes of limitations apply. For instance, in Illinois, prosecutions for arson, treason, and forgery are not time barred.\textsuperscript{158}

The arguments in favor of criminal statutes of limitations mirror the arguments in favor of civil statutes of limitations. Some arguments emphasize a potential defendant’s right to repose.\textsuperscript{159} Others stress that

\begin{footnotesize}
\textsuperscript{151} Ochoa & Wistrich, \textit{supra} note 142, at 502–503.
\textsuperscript{152} \textit{Id.} at 503.
\textsuperscript{153} Malveaux, \textit{supra} note 145, at 83.
\textsuperscript{155} See \textit{KY. REV. STAT. ANN.} § 500.050 (West 2007).
\textsuperscript{156} \textit{Story}, 721 P.2d at 1027.
\textsuperscript{157} \textit{Id.}
\end{footnotesize}
evidence grows weaker over the course of time, and that an untimely prosecution is less likely than a timely prosecution to render a correct result. Still others stress the inherent importance of prompt, rather than delayed, investigation and action on the part of the wronged party, namely the state.

For many crimes, however, as noted above, the arguments against statutes of limitations win out. Foremost among these may be society's need to see justice done. The idea that a person has wronged an individual or individuals within a society, and thus harmed society itself, but has avoided being held accountable for the wrong solely because of time's passage, may be reasonably viewed as problematic. The severity and consequences of the injustice, however, seemingly correlate with the severity of societal displeasure with time-barred prosecution. For instance, while time-barred prosecution for the theft of one dollar may not stoke passions among many, time-barred prosecution for ending a human life more likely will. This explains why no state time-bars murder prosecutions, while forty-eight of fifty states time bar misdemeanor prosecutions. When considering murder, the importance of justice being served outweighs all countervailing rationales for time-barring prosecution. When considering misdemeanor offenses, however, the rationales for time-barring prosecution generally outweigh the importance of justice being served. As noted, between the extremes of murder and misdemeanor offenses, different communities balance the equities with different outcomes, resulting in different statutes of limitations in different jurisdictions.

We see, then, that balancing policies favoring criminal statutes of limitations against policies disfavoring criminal statutes of limitations reveals that sometimes the latter outweigh the former. The same is true in the civil realm. Where policies opposing statutes of limitations outweigh policies favoring statutes of limitations, statutes of limitations are disfavored. This is the case for civil actions to determine paternity. The U.S. Congress has rejected short statutes of limitations periods in paternity cases, determining that paternity claims should, as a matter of timing, be viable until at least eighteen years after the subject child's birth. And, indeed, some states impose no statutes of limitations—of

162. See United States v. Quinones, 196 F. Supp. 2d 416, 418 (S.D.N.Y. 2002), rev'd, 313 F.3d 49 (2d Cir. 2002) ("[T]here is typically no statute of limitations for first-degree murder—for the obvious reason that it would be intolerable to let a cold-blooded murderer escape justice through the mere passage of time . . . ").
163. 42 U.S.C. § 666(a)(5)(A)(ii) (2000) (demanding that states, as a condition of receiving federal funds, not establish shorter statutes of limitations periods for paternity actions); see also Clark v.
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any length—on paternity actions. Such legislation suggests that, as a policy matter, the interest in establishing parental obligation outweighs the repose of a narrow statute of limitations period, or, in some states, any statutes of limitations period, would otherwise offer a non-acknowledging father.

In addition, descending from “the ancient principle that time does not run against the king,” many civil actions brought by the government are not subject to statutes of limitations. Modern justification for this age-old principle lies in the belief that “public rights, revenues, and property should not be forfeited due to the negligence of public officials” in bringing timely claims for the benefit of the populace. Among claims to avoid time-bars under this theory are civil proceedings across all states against taxpayers for payment of assessed and owed federal income tax, where the defendant files a fraudulent return or fails to file a return altogether. Having weighed the policies for and against statutes of limitations governing the government’s ability to bring such actions, Congress has turned away from the rationale for statutes of limitations and chosen to allow such proceedings regardless of time passage.

B. Seeking to Shelter Jethroe Claims

Clearly, none of these per se exceptions to the general application of statutes of limitations in civil actions is of use in considering the viability of a Jethroe claim. Jethroe claimants, however, comprise a class of plaintiffs for whom the opportunity to vindicate their rights is paramount. As Malveaux explains, “Access to the courts is particularly important for minorities, the poor, lower socioeconomic classes, and other disenfranchised groups who must rely on the legal system for protection of basic human and civil rights.” Such access, therefore, seemingly is particularly important for Jethroe claimants. Absent shelter

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167. Rind, 991 F.2d at 1491.
168. See I.R.C. § 6501(c)(1)–(3) (2000 & Supp. IV 2004). Notably, regarding criminal prosecutions for failure to file a return, the statute of limitations is six years. Id. § 6531(4).
169. Malveaux, supra note 145, at 84.
from statutes of limitations, these statutes will operate to thwart Jethroe claimants despite both the discrimination they suffered during their employment and the current financial implications of that discrimination. And in that statutes of limitations are "relatively crude" rules ill-equipped to separate "wheat from chaff," they may thwart compelling Jethroe claims and weak Jethroe claims alike.\footnote{170}

Thus, the concern that statutes of limitations "will sometimes be used to defeat claims which are both substantively just and otherwise relatively provable,"\footnote{171}—the precise concern which Holmes, Ochoa, Wistrich, Malveaux, and others have expressed—endures in the Jethroe context. Avoiding the festering injustice of race-based pension denial born of decades old racial discrimination, the financial consequences to the denied pensioners, and the consequential disenchantment they breed, therefore, requires inhibiting statutes of limitations dismissal. Common law doctrine, legislative action, and traditional notions of professional responsibility provide potential avenues toward such inhibition. These avenues are addressed in turn.

1. Common Law Tolling and Accrual


a. Equitable Tollsing

The equitable tolling doctrine permits plaintiffs to bring suit "after the expiration of the applicable statute of limitations, provided they have been prevented from doing so due to inequitable circumstances."\footnote{173} While the origin of the equitable tolling doctrine is not entirely clear, it dates back in American jurisprudence to at least 1944, when the

\footnotesize{170. Chaplin, \textit{supra} note 137, at 1589.\
171. \textit{id}.\
172. Malveaux, \textit{supra} note 145, at 86.\
173. Rosner v. United States, 231 F. Supp. 2d 1202, 1208 (S.D. Fla. 2002). While courts have occasionally required a showing of a defendant's bad action or fraud in considering equitable tolling application, see, e.g., Bodner v. Banque Paribas, 114 F.Supp.2d 117, 135 (2000), such an approach seems a confused conflation of equitable estoppel and equitable tolling. Equitable estoppel requires a defendant's "fraudulent concealment" or unfulfilled "promise to provide restitution," Malveaux, \textit{supra} note 146, at 99, while "[e]quitable tolling applies even if there is no concealment" or unfulfilled restitution promise. Alexander, 2004 U.S. Dist. Lexis 5131, at **24–25. Indeed, the equitable tolling inquiry focuses on whether inequitable circumstances—to which defendant may not have contributed—prevented timely filing.}
Supreme Court tolled the statute of limitations running against a plaintiff’s civil action while the plaintiff was locked in a prolonged administrative proceeding regarding the claim.\textsuperscript{174} The Court did not endeavor to set forth its rationale for the doctrine at that time, but it did so twenty years later in deciding \textit{Burnett v. New York Central Railroad Co.}, a case involving an employee’s suit against his employer alleging injury on the job.\textsuperscript{175} A series of procedural gaffes resulted in the plaintiff, Otto Burnett, filing his Federal Employees’ Liability Act (FELA) suit in federal court after the statute of limitations had elapsed.\textsuperscript{176} The district court dismissed the case as time-barred, and the Court of Appeals affirmed.\textsuperscript{177}

On appeal, the Supreme Court noted that it had, in previous cases, relaxed time-bars to bringing suit when “a plaintiff has not slept on his rights but, rather, has been prevented from asserting them.”\textsuperscript{178} The Court recognized the validity of statutes of limitations but articulated that the policy of repose reflected in statutes of limitations, which is “designed to protect defendants, is frequently outweighed . . . where the interests of justice require vindication of the plaintiff’s rights.”\textsuperscript{179} In determining when “the interests of justice require vindication of the plaintiff’s rights,” and thus when equitable tolling is appropriate, the Court looked largely to the statute underlying the cause of action, FELA, and the congressional intent in passing it.\textsuperscript{180} Noting FELA’s “humanitarian purpose,”\textsuperscript{181} the Court felt it “clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitations is served in doing so.”\textsuperscript{182} With this foundation, the equitable tolling doctrine has developed as a legitimate means of pursuing claims otherwise blocked by statutes of limitations.

As the doctrine of equitable tolling has developed, courts have turned to it in resolving claims for restorative justice. Most notable perhaps is \textit{Rosner v. United States}, a case Malveaux explores in detail.\textsuperscript{183} In that case, heard by the United States District Court for the Southern District of Florida in 2002, plaintiffs asserted a federal class action lawsuit against the United States on behalf of Jewish individuals of Hungarian


\textsuperscript{175} 380 U.S. 424, 434 (1965).

\textsuperscript{176} See id. at 425.

\textsuperscript{177} Id.

\textsuperscript{178} Id. at 429.

\textsuperscript{179} Id. at 428.

\textsuperscript{180} Id. at 434.

\textsuperscript{181} Id.

\textsuperscript{182} Id.

\textsuperscript{183} Malveaux, supra note 145, at 106–07.
descent and their descendants who were deprived of their property during the World War II era Nazi-occupation of Europe.\textsuperscript{184} Plaintiffs pled that in the spring of 1944, shortly after Germany invaded Hungary, Hungarian officials, beholden to the Nazi regime, decreed that all Jewish property would become property of the state and began to confiscate it.\textsuperscript{185}

As 1944 turned to 1945 and the Nazi’s loosening grip on Europe became evident, Nazi officials demanded that Hungarian officials send the confiscated property to Germany aboard a train.\textsuperscript{186} The train, numbering over forty cars full of stolen property and known as the “Hungarian Gold Train” made it as far as Salzburg, Austria before being intercepted and seized by the United States military.\textsuperscript{187} The military did not return the property to the rightful owners, but instead sold or otherwise distributed it to various individuals and organizations.\textsuperscript{188}

The U.S. government moved to dismiss the suit on statute of limitations grounds, noting the applicable statute of limitations was six years and had run by 1953, decades before plaintiffs initiated suit.\textsuperscript{189} The Court, however, relying on the equitable tolling doctrine, refused to dismiss the case.\textsuperscript{190} In finding equitable tolling to be appropriate, the Court turned to the U.S. Supreme Court’s 2002 decision in \textit{Young v. United States}, in which the Court considered the applicability of equitable tolling to the IRS’s attempt to collect back taxes against a debtor.\textsuperscript{191} The \textit{Young} Court first reemphasized a basic principle of \textit{Burnett}, that “limitations periods are ‘customarily subject to “equitable tolling,” unless tolling would be ‘inconsistent with the text of the relevant statute,”’ and it then set forth two principle sets of circumstances under which equitable tolling is permitted: (1) where a plaintiff filed a defective pleading during the limitations period and (2) where a plaintiff was induced into allowing the limitations period to run.\textsuperscript{192} The Court went further, however, making clear that equitable tolling is not limited to such circumstances and that it might also be

\begin{footnotes}
\item \textsuperscript{184} Rosner v. United States, 231 F. Supp. 2d 1202, 1203–04 (S.D. Fla. 2002).
\item \textsuperscript{185} Id. at 1204.
\item \textsuperscript{186} Id.
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Id. at 1204–05.
\item \textsuperscript{189} Id. at 1206.
\item \textsuperscript{190} Id.
\item \textsuperscript{191} 535 U.S. 43, 44 (2002).
\item \textsuperscript{192} Id. at 49 (quoting Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 95 (1990); United States v. Beggerley, 524 U.S. 38, 48 (1998)).
\item \textsuperscript{193} Id. at 50.
\end{footnotes}
appropriate in other cases. The Rosner Court seized on the second of Young's articulated grounds for equitable tolling, finding that equitable tolling was applicable based on plaintiffs' allegations that the government for years falsely claimed the property on the train was not labeled sufficiently to allow redistribution to its former owners and that the government refused to answer repeated inquiries about the property. Because the Court was obligated to accept the plaintiffs' allegations as true under Federal Rule of Civil Procedure 12(b)(6) analysis, the allegations of inducement were sufficient to defeat the government's motion to dismiss. Like the Young Court before it, however, the Rosner Court explained that equitable tolling may be appropriate when there is neither inducement nor the filing of a defective pleading.

Jethroe claimants' circumstances arguably set forth the "other" type of case the Young Court and the Rosner Court were contemplating when defining equitable tolling's applicability. As an initial matter, in determining whether equitable tolling is appropriate with reference to a statutory claim, "the basic inquiry is whether congressional purposes are effectuated by tolling the statute of limitations." The Burnett Court made this point in establishing the parameters of the equitable tolling doctrine. Indeed, as previously noted, in deciding to toll the statute of limitations under the principle of equitable tolling, the Court was motivated by the "humanitarian purpose" of FELA—the underlying statute—suggesting FELA to be the sort of statute for which statutes of limitations tolling might effectuate congressional purposes.

Like FELA, Section 1981 serves a humanitarian purpose, a purpose Congress would likely not want undercut on procedural grounds. Indeed, Section 1981 is arguably as humanitarian as any statute in American law. As noted in Part II of this Article, what currently exists as Section 1981 is an amalgam of two statutes enacted in the years following slavery's abolition to protect blacks in the tumultuous aftermath of slavery from race-based discrimination of various sorts, including abridgment of economic rights. They served to give blacks

194. Id.
196. See id.
197. See id. at 1208–09.
an opportunity to live in America as free persons rather than chattel and to relieve them of the stigma long associated with their skin color.\textsuperscript{201} Equality, fairness, and relief from oppression sit at the root of Section 1981. The statute, without question, serves a humanitarian purpose. Further, nothing in Section 1981 suggests tolling is inconsistent with the statute, thereby making the limitations period "subject to 'equitable tolling'" under \textit{Young}.\textsuperscript{202} If any statute's causes of action deserve adjudication on the substance and thus a waiving of the limitations period, Section 1981's do.

Recognizing the humanitarian nature of Section 1981, and thus the potential application of equitable tolling in the Jethroe claims context, it is necessary to determine the nature of the inequitable circumstances impacting potential Jethroe claimants. While Jethroe claimants may or may not have an argument that they were induced to let time run or that they filed a defective pleading, \textit{Young} teaches us neither showing is necessary.\textsuperscript{203} Instead, seizing upon \textit{Young}'s "other" category, Jethroe claimants may seek to show that the conditions African-Americans suffered after slavery and through much of the twentieth century created inequitable circumstances, essentially preventing the assertion of their claims.

To understand the conditions facing Jethroe claimants, it may be helpful to consider the circumstances facing one of their generation, Jethroe himself. Jethroe, like other African-Americans of his generation, was born into and reared in an American society in which being black equated with abridged rights and agitation for effectuation of those rights elicited a violent and oppressive backlash.\textsuperscript{204}

Jethroe was born January 20, 1917,\textsuperscript{205} just over fifty years after his nation condoned the bondage and forced labor of his ancestors and one and a half years before the "Red Summer" of 1919.\textsuperscript{206} The "Red Summer" was so named because of the blood spilled throughout the country in unprecedented racial clashes catalyzed when African-American soldiers, returning from the comparatively non-racially

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\textsuperscript{201} \textit{See} \textit{Act of Apr. 9, 1866}, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)) ("[A]ll persons born in the United States...of every race and color, without regard to any previous condition of slavery or involuntary servitude, ...shall have the same right, in every State and Territory in the United States,...as is enjoyed by white citizens.").

\textsuperscript{202} \textit{Young} v. United States, 535 U.S. 43, 49 (2002) (quoting \textit{Irwin} v. \textit{Dep't of Veterans Affairs}, 498 U.S. 89, 95 (1990)).

\textsuperscript{203} \textit{See id.} at 50.

\textsuperscript{204} \textsc{Lee E. Williams & Lee E. Williams II,} \textsc{Anatomy of Four Race Riots: Racial Conflict in Knoxville, Elaine (Arkansas), Tulsa and Chicago,} 1919–1921, at 7 (1972).

\textsuperscript{205} \textit{See supra} note 11, at 110.

\textsuperscript{206} \textsc{William M. Tuttle, Jr.,} \textsc{Race Riot: Chicago in the Red Summer of 1919,} at 14 (1970).
charged atmosphere of Europe, insisted on the rights to which they were entitled as American citizens and were consequently attacked for their insistence. This adverse and hostile reaction to African-Americans asserting their rights characterized the world Jethroe and his contemporaries knew during their early formative years.

Lynchings, defined as “killing[s] done by several people acting in concert outside the legal process to punish a person perceived to have violated a law or custom,” and systematically used to terrorize the African-American community, occurred with relative frequency. During the decade in which Jethroe was born, 622 lynchings were recorded, and over 4,700 lynchings were recorded through 1968. This number, of course, does not approximate the true number of lynchings perpetrated, as many occurred in back woods and other isolated areas, unknown to all but the perpetrators and, until their last breaths, the victims. Even in the absence of actual violence, the threat it presented was omnipresent for blacks in America. For a black person, any expression of equality or upward mobility carried with it the risk of fierce reprisals from race-hating individuals or groups. Chief among these groups was the Ku Klux Klan, which was, at the time, easily America’s largest and most organized terrorist organization. With ranks swelled on the heels of D.W. Griffith’s 1915 racial propagandist film, Birth of a Nation, the Klan’s members numbered in the millions.

Facing the ubiquitous threat of violence, most blacks had little choice but to accept their lot in America, however meager and subservient it was. Under the Supreme Court’s decision in Plessy v. Ferguson, racial segregation was the law of the land. Blacks were restricted to certain living spaces, restaurants, sections of trains and buses, schools, public restrooms, water fountains, and other public accommodations.

207. WILLIAMS & WILLIAMS, supra note 204, at 6–7.
211. See WILLIAMS & WILLIAMS, supra note 204, at 38.
213. Id.
And while the separate accommodations were theoretically equal, they were, in fact, generally far inferior.\textsuperscript{217}

Blacks fared no better in terms of employment opportunities. Only decades removed from chattel slavery, forced servitude in various forms continued to reign when Jethroe came of age. As slavery ended, tenant farming and sharecropping burgeoned, as limitations on blacks’ ability to own land left many with little choice but to tend whites’ land for wages insufficient to meet their cost of living.\textsuperscript{218} There thus developed “a system of peonage under which White landowners placed Black workers into debt and then obtained a version of servitude and debt recycling in order to keep workers beholden and available.”\textsuperscript{219}

So, while formal enslavement of blacks was eradicated, oppressive post-emancipation employment relationships between white landowners and black workers essentially replaced it. Rather than root out such forced servitude, local law enforcement officers often supported, and, indeed, effectuated it.\textsuperscript{220} For instance, throughout the American South there developed “convict-lease system[s] whereby Black workers would be rounded up through charges and convictions of minor, vague offenses, such as vagrancy, and then rented out to ‘employers’ who could use the labor in neo-servitude.”\textsuperscript{221} To the extent blacks were not subjected to forced labor, employment discrimination generally yielded them “[l]ow wages and limited employment options.”\textsuperscript{222}

So, as Sam Jethroe and his contemporaries grew into adulthood, race-based exploitative employment and employment discrimination were standard practice. So, too, was enduring the exploitation and discrimination without legal complaint. Blacks who challenged white authority with respect to employment relationships, like blacks who challenged white authority in other ways, were, as noted above, often subject to lynchings and other forms of racial violence. On the other hand, blacks who “did not challenge labor controls [were] able to call upon White ‘benevolence’ to intervene in situations which could otherwise have led to” such violence.\textsuperscript{223}

Thus, while the law granted African-Americans the right to equal
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opportunity in employment under Section 1981, the entitlement was largely empty, because its assertion invited the threat of intimidation, brutality, and death. Indeed, for much of the twentieth century, to be black meant to know one's place, to avoid threatening Caucasian authority, and to refrain from challenging the societal status quo, legally or otherwise.

Such disenfranchisement, and the consequent inaccessibility to the courts, has been central to equitable tolling application in the past. Malveaux notes that the Rosner court found the "brutal reality of the Holocaust, and the resulting extraordinary circumstances that Plaintiffs were forced to endure" were important pieces of its equitable tolling analysis" and that the United States District Court for the Eastern District of New York in a similar case involving Nazi property appropriations, Bodner v. Banque Paribas,224 found that the "plaintiffs could hardly have been expected to bring [their] claims at the end of World War II."225 Similarly, in the context of African-American subjugation in the United States, the Alexander court, in 2004, determined that equitable tolling of plaintiffs' claims was appropriate in view of "a legal system that was openly hostile to them, courts that were practically closed to their claims, ... and the era of Jim Crow."226

These World War II-era Nazi appropriations cases and the Alexander case provide powerful support for a Jethroe claimant seeking to prevail upon the equitable tolling doctrine.227 Alexander is particularly analogous and, thus, particularly helpful. Like the Alexander plaintiffs, Jethroe claimants suffered injury in the Jim Crow era because of their race, and like the Alexander plaintiffs, Jethroe claimants seek redress decades later, after the civil rights movement prompted a shift in our nation's legal regime. It merits noting that the injury for which the Alexander plaintiffs sought redress—bodily injury and damage to property during the course of a deadly race riot—was a great deal more harrowing than the injury for which Jethroe claimants would seek redress—discriminatory denial of pension benefits. That said, economic

227. While both the Rosner defendants and the Alexander defendants seemingly obfuscated information potentially helpful to plaintiffs' claims, neither court explicated such obfuscation was necessary to its finding that equitable tolling was appropriate, suggesting that inequitable circumstances not born directly of defendants' actions could have sustained the courts' decisions to apply the equitable tolling doctrine. See Rosner, 231 F. Supp. 2d at 1208-09. See also Alexander v. Oklahoma, 382 F.3d 1206, 1216 (10th Cir. 2004). Therefore, even if no evidence suggests defendants have hampered Jethroe claimants' suits, equitable tolling is potentially applicable although equitable estoppel is not.
injury through employment discrimination is, indeed, grave injury—sufficiently grave to motivate Congress’s attention a mere one year after the civil war’s conclusion in the form of the Civil Rights Act of 1866 and to spur Congress’s enactment nearly one hundred years later of Title VII of the Civil Rights Act of 1964 (the 1964 Act), an employment discrimination statute that has, of all the 1964 Act’s provisions, “emerged as having the most significant impact in helping to shape the legal and policy discourse on the meaning of equality.”

While the injuries suffered by the Alexander plaintiffs and the Jethroe claimants were different, whether injury involves physical or economic damage is irrelevant to the equitable tolling inquiry. The relevant question is whether plaintiffs were “prevented from [timely filing] due to inequitable circumstances.” As discussed, supra, the circumstances facing Jethroe and his contemporaries were certainly inequitable and could well have prevented timely filing.

Whether circumstances remained sufficiently inequitable to justify equitable tolling of the statute of limitations through the end of the twentieth century and into the twenty-first century is a separate matter. It is arguable that the Supreme Court’s Brown v. Board of Education decision in 1954 overruling Plessy, together with Congress enacting the 1964 Act, the Voting Rights Act of 1965, and the Fair Housing Act of 1968, sufficiently altered America’s societal landscape such that a Jethroe claimant was no longer prevented from pursuing his claims. Indeed, the defendants in the Alexander case made, and the Alexander Court accepted, essentially this argument in concluding that the equitable tolling doctrine initially tolled the statute of limitations for the Alexander plaintiffs, but that the tolling ceased with the legal reforms of the 1960s.

Another view, however, would suggest these alterations in law did not truly alter the nation’s societal structure and that the inequitable circumstances preventing Section 1981 suits remained for decades. While the Alexander Court declined to adopt this view, the view is eminently reasonable. As the Alexander plaintiffs argued, years of race-based brutality, forced subservience, and second class status understandably create—among those who have suffered the

oppression—an enduring sense that “pressing [legal] claims would be futile and possibly dangerous.” Plaintiffs may well “still suffer from fear and intimidation long after the initial injury has occurred,” and indeed, “the oppressive conditions may continue to exist on a more limited scale,” thereby rendering impossible any serious attempt to identify a bright-line date by which equitable tolling should cease.

Applying the equitable tolling doctrine in Jethroe cases, and other cases in which plaintiffs suffered their initial injuries in the Jim Crow era, therefore, requires “a more nuanced approach”—an approach recognizing barriers to suit born of Jim Crow era terrorism and inequity that may last decades after the era’s end. While no court has heretofore adopted such an approach, the equitable tolling doctrine provides courts the discretion to do so, and such an approach would potentially shelter Jethroe claims from statutes of limitations dismissal.

It is clear, then, that the equitable tolling doctrine may, indeed, reasonably serve to toll statutes of limitations for Jethroe claims. Once a court makes this finding, it can move on to the nettlesome investigation as to the appropriate duration of the tolling, an investigation that may or may not result in a tolling sufficient to protect Jethroe claimants, but that is enabled by the realization that equitable tolling is applicable to pre-Civil Rights era Section 1981 claims.

b. Continuing Violation

Under the continuing violations doctrine, “a claim, which otherwise would be precluded because it is based on conduct which falls outside the limitation period, may nonetheless be considered timely if there is a ‘substantial nexus’ between that conduct and conduct occurring within the limitations period.” The continuing violation doctrine would, therefore, appear to be a potential candidate for tolling the statute of limitations against Jethroe claims. The discrimination that impacts an employment relationship resulting in pension ineligibility or partial pension eligibility certainly constitutes conduct falling within the limitations period. And an employer’s failure to provide a Jethroe claimant (in his or her retirement) pension checks for which he or she would have been eligible but for the discrimination may be deemed conduct falling outside the limitations period, but with a “substantial nexus” to the conduct occurring within the period.

233. Id. at 109.
234. Id. at 110.
235. Id.
While the Supreme Court has not historically granted the continuing violations doctrine extensive treatment in its decisions, it has fleshed out the doctrine to some extent. Unfortunately for Jethroe claimants, the Court's most recent continuing violations decisions have narrowed the doctrine's reach, thus potentially reducing its impact in the Jethroe context.

For several years, the Court seemed to draw a distinction between violations of law occurring in the past and continuing into the present—to which the continuing violations doctrine applied—and the present impact of past violations, to which the continuing violations doctrine did not apply. However, in 1986, the Court arguably softened that distinction and broadened application of the doctrine in the case of Bazemore v. Friday. That case involved the North Carolina Agricultural Extension Service (the Service), which, as a division of the North Carolina State University's School of Agriculture and Life Science, serves to disseminate "useful and practical information on subjects relating to agriculture and home economics." Prior to 1965, the Service consisted of two branches, the Negro branch, which employed only black personnel, and the white branch, which employed only white personnel. In light of the 1964 Act, however, the Service merged its two branches into one in late 1965. Prior to the merger, there existed some disparities between salaries of white branch employees and those of Negro branch employees performing the same job. Once the merger became complete, however, the impact of the pre-1965 discrimination lingered.

A class of Service employees, recipients of its services, and others filed suit in 1971 for unlawful discrimination in pay. After lengthy lower court proceedings, the Supreme Court reversed the Court of Appeals and found for plaintiffs, concluding, among other things, that regardless of time elapsed from the initial discrimination, and whether in

237. See, e.g., United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977) ("[T]he emphasis should not be placed on mere continuity; the critical question is whether any present violation exists."); Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980) ("[T]he proper focus [is] upon the time of the discriminatory act, not upon the time at which the consequences of the act became most painful . . . .").
239. Id. at 388–89.
240. Id. at 390.
241. Id. at 390–91.
242. Id. at 394.
243. Id.
244. The United States intervened in 1972 with a complaint adding new causes of action, including a Title VII cause of action, and essentially tracking the claims of the petitioners. Id. at 391. Petitioners, then, amended their complaint to add a Title VII claim. Id.
fact the cause of action existed at the time of the initial discrimination, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is . . . actionable." The Bazemore decision seemed to suggest, therefore, that if initial discrimination resulted in a pay disparity and each check thereafter reflects the initial disparity, each check effectuates the initial discrimination, and is thus discriminatory.

While the Court takes its analysis no further, a hypothetical illustrates the logic seemingly motivating the decision. Consider a black person who is discriminated against in Year X on the basis of race. Assume the discrimination manifests in decreased salary, such that she receives $20,000 per year in salary while her white counterpart receives $25,000 per year in salary for doing the same job. Further assume that going forward the two employees receive race-blind year-end salary increases of $1,000 per year. In Year X+10, the black employee will be salaried at $30,000 per year and the white employee will be salaried at $35,000 per year. Despite race-blind salary increases, and thus no new discriminatory act bearing on salary, the black employee will receive less pay and less in each paycheck than her white colleague on the basis of race and for no other reason. Under Bazemore, it would seem, the black employee in question would be able to rely on the continuing violations doctrine in bringing action in Year X+10 for the discriminatory salary determination in Year X. And this would appear the correct result, for, in the alternative, the black employee would receive less pay in every check based solely on her race and would have no remedy.

Jethroe claimants might argue that they, like the above-described hypothetical black employee, suffered discrimination in employment based on race. Whereas the hypothetical black employee was given a discriminatorily low salary, Jethroe claimants might argue they were discriminated against in some other manner, such as unwarranted demotion or termination, which rendered them ineligible for a pension in retirement. And whereas the hypothetical black employee years later experienced the perpetuation of that discrimination in each inequitably devalued paycheck, Jethroe claimants can argue they experienced the perpetuation of the discrimination each time their former employer failed to provide a periodic pension payment. The continuing violation doctrine demands that "the limitations period for a continuing offense does not begin until the offense is complete." Each non-issued pension payment would, under this argument, reveal the offense which

245. Id. at 395–96.
the Jethroe claimant suffered to be not yet complete, and therefore, under the continuing violations doctrine, the time during which Jethroe claimants could bring suit should extend into the period during which they should have been, but for the discrimination, receiving pension payments.

Considering application of the continuing violations doctrine in the context of a claim for restorative racial justice is not novel. Indeed, in *Cato v. United States*, the first modern claim for reparations in federal court, the Ninth Circuit conceded the doctrine's propriety as a tool for seeking to toll statutes of limitations. In that case, several pro se plaintiffs sued the U.S. government for damages resulting from slavery and post-slavery discrimination. The district court dismissed the claim, noting that plaintiffs identified no violated constitutional or statutory right, thus stating no cause of action, and that plaintiffs asserted neither a basis for subject matter jurisdiction nor a waiver of sovereign immunity.

On appeal, the Ninth Circuit entertained plaintiffs' argument that a statute of limitations could be tolled by the continuing violations doctrine as a reasonable and appropriate argument, but it did not reach the issue of timeliness, having already concluded plaintiffs did not establish a basis upon which to sue the United States. The Court explained that the continuing violations doctrine was useless to plaintiffs unless the plaintiffs could, in fact, "sue the United States for the acts complained of." It follows from *Cato*, then, that if plaintiffs were able to obtain waiver and sue the government, or like Jethroe, sue a private entity, thus avoiding the sovereign immunity problem altogether, the continuing violations doctrine would be a legitimate candidate for use in tolling the statue of limitations. And it proved to be.

Indeed, five years after *Cato*, in the aforementioned *Bodner v. Banque Paribas* case, Jewish plaintiffs asserted in federal court claims for damages arising from French financial institutions' expropriation of their assets during the World War II Nazi occupation of France. The Court accepted plaintiffs' argument that, under the continuing violations doctrine, their claim for damages stemming from the World War II era abuses was timely. Although the taking occurred decades earlier, the

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247. *Cato v. United States*, 70 F.3d 1103, 1108–09 (9th Cir. 1995).
248. *Id.* at 1105–06.
249. *Id.* at 1106–07.
250. *See id.* at 1108–09.
251. *Id.* at 1109.
253. *Id.* at 134–35.
deprivation plaintiffs suffered in the form of the continued withholding of assets, constituted an actionable continuing violation. Nothing new was taken, but the Court determined that defendant’s subsequent failure to provide the previously seized assets sufficed to extend the time period for filing. Like the Bodner plaintiffs, Jethroe claimants would be able to demonstrate an initial violation and the defendant’s subsequent failure to provide them benefits to which they should be entitled.

Despite what appears a promising foundation, a continuing violations argument in the Jethroe claim context would face difficulty. First, the Bodner court explained, “The circumstances meriting application of the continuing violation exception must be compelling.” While the circumstances giving life to a Jethroe claim, are, as discussed above, seemingly compelling, the Bodner court appeared to view the defendant’s “repeated denials of information” related to the withheld assets as the compelling circumstances sufficient to prompt the doctrine’s application in that case. The Bodner court did not explicate that such information denial is necessary to trigger the continuing violations doctrine, but if a court found it to be, only Jethroe claimants able to prove such information denial could gain shelter under the doctrine.

Of even greater concern to a potential Jethroe claimant, however, is the impact the U.S. Supreme Court’s decisions in National Railroad Passenger Corp. v. Morgan and Ledbetter v. Goodyear Tire & Rubber Co. have had on the continuing violations doctrine. In Morgan, a 2002 case, Abner Morgan filed a Title VII racial discrimination claim against his employer, Amtrak, citing some discriminatory acts which occurred within the timely filing period and some which fell outside the timely filing period. Amtrak won summary judgment as to the untimely claims at the district court level, but the Ninth Circuit reversed on continuing violation grounds, finding that “a plaintiff can establish a continuing violation that allows recovery for claims filed outside of the statutory period . . . . [by showing] ‘a series of related acts one or more of which are within the limitations period.”

254. Id.
255. See id.
256. Id. at 134.
257. Id.
260. Morgan, 536 U.S. at 105–06.
On appeal, the Supreme Court reversed the Ninth Circuit’s decision and found for Amtrak, holding, among other things, that “discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.”262 A Jethroe claimant’s continuing violations argument would be that each non-issuance of a pension check is an act related to the initial discriminatory employment decision rendering the claimant ineligible and is thus a continuation of the initial discrimination. As such, the Supreme Court’s Morgan decision, which is, as a consequence of its reasoning, widely viewed as restricting the continuing violations doctrine’s application largely to hostile work environment claims,263 would seem to significantly weaken that argument.

The Court’s 2007 Ledbetter decision deals the argument an even more crippling blow. In that case, plaintiff Lily Ledbetter sued the Goodyear Tire & Rubber Company under Title VII for sex discrimination in compensation.264 She alleged that several of her supervisors had given her negative performance evaluations because of her sex and, because employees’ salary raises were based on their performance evaluations, her compensation was discriminatorily suppressed.265 In making her argument, she relied heavily on Bazemore, which, as noted supra, held that “each week’s paycheck that delivers less to a black than to a similarly situated white is . . . actionable.”266

The Court, however, rejected Ledbetter’s interpretation of Bazemore and, therefore, her continuing violations argument. The Court found that the passage upon which Ledbetter relies, and upon which a Jethroe claimant would likely rely, stands for the proposition “that when an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees.”267 Since the initial discrimination of which Ledbetter complained was not consequent to a policy of giving women negative evaluations, but rather was consequent to a supervisor’s individual decision within the context of an evaluation “system that [was] ‘facially nondiscriminatory and neutrally applied,’” the Court

262. Id. at 113.
264. Ledbetter, 127 S. Ct. at 2165.
265. Id. at 2165–66.
266. Id. at 2172 (quoting Bazemore v. Friday, 478 U.S. 385, 395 (1986)).
267. Id. at 2173.
concluded Bazemore did not support her claim.\textsuperscript{268}

Sam Jethroe, and Jethroe claimants generally, as defined in this Article, would not claim the existence of a discriminatory pension system, but rather they would claim adverse employment actions, the consequence of which rendered them ineligible for an otherwise "facially nondiscriminatory and neutral\[\]" pension policy.\textsuperscript{269} As such, their reliance on Bazemore, together with Bodner, would likely yield them the same result Ledbetter suffered.\textsuperscript{270}

The continuing violations doctrine is, therefore, ultimately an unlikely candidate to protect a Jethroe claim against statutes of limitations dismissal.

c. Discovery Rule

The discovery rule offers Jethroe claimants another option for shielding their claims from statute of limitations attacks. Under the rule, "a plaintiff's claim does not accrue until the plaintiff knows, or in the exercise of reasonable diligence should know, of certain facts underlying the claim."\textsuperscript{271} The rule sprouts from basic principles of fairness.\textsuperscript{272} The

\textsuperscript{268} Id. at 2174 (quoting Lorance v. AT&T Techs., Inc., 490 U.S. 900, 911 (1989)). It bears noting the decision in Lorance was superseded by statute through the passage of the Civil Rights Act of 1991, the purpose of which was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071.

\textsuperscript{269} A plaintiff able to establish he or she was denied a pension pursuant to a discriminatory pension system might fare better under Ledbetter. The Ledbetter Court, however, makes clear Ledbetter's claim is distinguishable from the claims dismissed in Morgan only in that it alleges discriminatory salary adjustment—the precise issues at play in the Bazemore case—suggesting perhaps that a case not specifically regarding salary adjustment would lose under Morgan without discussion. See Ledbetter, 127 S. Ct. at 2174.

\textsuperscript{270} A Jethroe claimant might seek to distinguish the Ledbetter case and, indeed, the Morgan case on the grounds that both cases dealt with Title VII claims while the Jethroe claim is a § 1981 claim. This distinction, however, would work to little effect. First, as noted, a Jethroe claimant's continuing violations argument would rely upon Bazemore, which was itself a Title VII case. Second, in that Title VII claims and § 1981 claims are often pleaded together and interpreted by courts in a similar manner, see Judith J. Johnson, A Uniform Standard for Exemplary Damages in Employment Discrimination Cases, 33 U. RICH. L. REV. 41, 58 (1999) ("Because § 1981 and Title VII provide different remedies for the same wrong, they are often considered together . . . ."), a court would not likely shield a Jethroe claim from the weight of Ledbetter simply because the Jethroe claim invoked § 1981 instead of Title VII. In fact, distinguishing a Jethroe claim as such might weaken the continuing violations argument from a policy perspective, as the continuing violations doctrine developed in the Title VII, rather than the § 1981, context as a response to Title VII's uniquely short filing period of 180 or 300 days. See Leading Cases, III. Federal Statutes and Regulations, B. Civil Rights Act, 116 HARV. L. REV. 352, 356–57 (2002) ("The [continuing violations] doctrine is partly the product of Title VII's comparatively short filing deadline: whereas Title VII claims must be filed with the EEOC within 180 (or 300) days, individuals bringing a tort claim can usually wait two or three years . . . .").

\textsuperscript{271} James R. MacAyeal, The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims, 15 VA. ENVTL. L.J.
theory is that a person should not be required to pursue a claim during a particular time window if the person has no knowledge of the basis of the cause of action during that time window. Courts tend not to apply the discovery rule in cases in which the injury is immediately evident, because under such circumstances immediate discovery is assumed. Rather, Courts deem the rule applicable when an injury is "not immediately evident or not readily discernible." And in assessing whether a claim is readily discernable such that the discovery rule applies, courts are more likely to apply the rule when there exists "a significant disparity in the ability of the plaintiff, as compared to the defendant, to become aware of critical information necessary to know that a wrong has occurred."

The discovery rule was born in the personal injury context. In 1949, the United States Supreme Court entertained the case of Urie v. Thompson, which involved a suit brought by Tom Urie, a firefighter employed by Missouri Pacific Railroad, against his employer. During his working tenure from 1910 to 1940, Urie spent substantial time riding in steam locomotives and during that time contracted a pulmonary disease called silicosis from emissions he was forced to breathe in the locomotives' cabs. By 1940, he lost his ability to work and, after being diagnosed, filed suit arguing that the railroad subjected him to air contaminated with substances it knew or should have known to be harmful. The matter reached the Supreme Court where the railroad asserted, as it had in lower court proceedings, that the applicable three-year statute of limitations expired in 1913, three years after Urie began suffering his injury. The Court, however, concluded the statute of limitations had not run, noting Urie had no knowledge of his

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273. See id.
274. MacAyeal, supra note 271, at 596. While some courts have indicated the discovery rule is only applicable when a claim is "inherently unknowable," such a formulation would eviscerate the rule, as no inherently unknowable claim could ever be known and, therefore, asserted. Id. at 595–96. It would be irrational for a Court to render a rule meaningless through the standard it applies in conducting its analysis as to the rule's applicability, so "inherently knowable" language is generally deemed to equate to the "not immediately evident or not readily discernible" language many courts employ. Id. at 596.
275. Id. at 596–97.
277. Id. at 165–66.
278. Id.
279. Id. at 168–69.
employment-related ailment until his diagnosis. The Court found that because Urie did not know, and had no reason to know, that he was developing an employment-related injury during this tenure, depriving him his cause of action on statute of limitations grounds would be unjust and could not be "reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of... rights." Indeed, under such circumstances, the policy justifications for statutes of limitations fall flat.

Since Urie, the discovery rule has expanded beyond the realm of occupational diseases and has seen increasing application. While the rule is now most closely associated with medical malpractice and products liability cases, it is by no means limited to those areas of the law. As the rule has developed, some courts have applied it when a plaintiff suffers an injury that is not easily detectable, without regard to the area of law implicated. Indeed, some courts have found the discovery rule applicable to all civil cases.

While perhaps applicable to all civil cases, unfortunately for Jethroe claimants, the rule only rarely salvages a claimant's otherwise time-barred claim in the employment discrimination context because courts have found time begins to run for statutes of limitations purposes when plaintiffs know or should know they are injured and know or should know the injury is a result of their employer's conduct. Whether the adverse employment decision is demotion, negative evaluation, salary reduction, or termination, the impacted employee generally knows or should know of the injury and almost certainly knows the identity of the party inflicting it, i.e., the employer.

280. Id. at 169.
281. Id. at 170.
282. MacAyeal, supra note 271, at 602.
283. See Gordon, supra note 272, at 1376.
284. MacAyeal, supra note 271, at 601.
285. Id.
287. The rare circumstance in which an employment discrimination plaintiff is aware of an injury but unaware of the party causing the injury is illustrated by Weinandt v. Kraft Pizza Co., 217 F. Supp. 2d 923 (E.D. Wis. 2002). In that case, Anthony Weinandt interviewed for a job with Kraft Pizza Company (Kraft) and several days later was informed he would not be hired. Id. at 926. Three weeks thereafter, in March of 2000, he filed state and federal anti-discrimination charges against Kraft. Id. Kraft, however, did not conduct the hiring for the position Weinandt sought, but rather contracted with Seaton Corporation, a personnel company, to do it. Id. Weinandt did not learn of Seaton's involvement until after the filing period. Id. The Court found that because "plaintiff knew that he had been injured in March 2000, [but] did not learn until mid-September 2001 that his injury had been caused by Seaton," the discovery ruled demanded the statute of limitations governing his claim not begin to run until that realization. Id. at 928.
A Jethroe claimant, however, might seize upon two areas of relative uncertainty in the discovery rule doctrine to press a case for its application. The first regards what it means to know of an injury. Courts are divided as to whether an employee’s knowledge of the actual adverse employment action triggers the statute of limitations to run or whether an employee’s realization that the injury was consequent to unlawful discrimination triggers its running. Under the former interpretation, Jethroe claimants are unlikely to prevail as they almost certainly would have known of the adverse employment action they suffered when they suffered it. It is, however, quite possible they would not have known it to be illegal, particularly in light of rampant Jim Crow-era discrimination and Section 1981’s infrequent application. Thus, under the latter interpretation, perhaps the statute of limitations should not start running until the Jethroe claimant would, or should, have known of the adverse action’s illegality. Under that circumstance, the discovery rule might serve to preserve an otherwise untimely claim.

Assuming a Jethroe claimant knew the adverse employment action suffered stemmed from unlawful discrimination, the Jethroe claimant might argue, alternatively, that the injury at the heart of the suit is not the known adverse employment action, but the injury flowing from that adverse employment action—the pension ineligibility, of which the Jethroe claimant neither knew nor had reason to know until discovering former colleagues were receiving pensions and the Jethroe claimant was not. The argument would seemingly find support in a line of reasoning most fully explored in Thomas v. Eastman Kodak Co. In that case, a Kodak employee received several poor employment evaluations which she believed to be racially motivated, but was not discharged from her employment until years later. She brought legal action after the firing, and while the defendant argued that the allegedly discriminatory evaluations were too remote to form the basis of a discrimination suit, the Court expressed greater concern with the timing of consequences flowing from the initial injury than with the timing of the initial injury itself. Finding for the plaintiff, the First Circuit held the limitations period should not begin to run until "the implications [of the evaluation] have crystallized."
Seizing upon this reasoning, a Jethroe claimant might argue that the denied pension payments are the crystallized implications of the earlier adverse employment action and, therefore, the pension non-payment, and nothing else, should trigger the statute’s running. It is not clear, however, that the First Circuit’s reasoning reaches quite so far. Indeed, any analysis of the Jethroe claimant’s argument would occur against the backdrop of the general rule the Supreme Court articulated in Delaware State College v. Ricks regarding accrual: “The proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful.”293 To the extent the Eastman Kodak case crafted out an exception to this Ricks rule, the Court seemed to focus on the evaluation context in particular, a context in which a plaintiff might reasonably take no action, as the evaluation may well never have tangible effects. Other adverse employment actions such as demotion, salary reduction, and termination tend to have obvious and immediate tangible effects. In that an adverse employment action other than a negative evaluation typically results in “some tangible effects of the discrimination . . . apparent to the plaintiff,”294 the Eastman Kodak reasoning may not extend beyond the evaluation context and thus may not prove generally helpful to Jethroe claimants.

So, while the discovery rule, like the equitable tolling and continuing violations doctrines, may aid a Jethroe claimant’s cause, depending on the circumstances of the claim, it may, like those doctrines, be of no help.

Indeed, in light of the Alexander Court’s refusal to equitably toll delayed racial justice claims beyond the 1960’s and the post-Bodner evisceration of the continuing violations doctrine, absent circumstances allowing discovery rule application, a Jethroe claimant may be unable to rely upon the common law in fending off a statutes of limitations defense.

2. Legislative Action

Occasionally, if sufficiently grievous and renowned, a wrong enjoys a remedy outside of the judicial system, often in the form of legislative action. For instance, in 1994, seventy-one years after a mob of white policemen and others torched the small black community of Rosewood, Florida and killed six of its residents in a race riot, the Florida legislature voted to compensate the riot’s living survivors as well as its decedents’

294. Thomas, 183 F.3d at 50 (quoting Johnson, 840 F.2d at 137).
The U.S. Congress took similar steps to compensate Japanese Americans interned during World War II. Such legislative action is, however, rare, and in that legislatures disperse public funds, such action, when taken, generally works to remedy publicly, as opposed to privately, inflicted wrongs. Such action, therefore, is unlikely to remedy the wrongs Jethroe claimants have endured.

Legislative action, however, need not be compensatory to preserve the possibility of a remedy for Jethroe claimants. "The shelter of statutes of limitations [of course] . . . has come into law by legislative grace, not as a natural right." And just as statutes of limitations exist by virtue of legislative enactment, legislative enactment can prevent their application. As noted above, per se exceptions to statutes of limitations application exist in a variety of realms. These exceptions are the work of legislatures. While legislative action to compensate Jethroe claimants is unlikely, legislative action to free their claims from statutes of limitations application seems more feasible. The latter action would not require appropriation of public funds to individuals claiming pension deprivation as a consequence of decades old race-based employment

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297. The rarity of such action, even regarding publicly inflicted wrongs, is highlighted by the heretofore failed attempts to secure legislative reparations for the victims of the Tulsa riots and their descendants. Despite the incontrovertible evidence of carnage and destruction at the hands of public officials, the Oklahoma state legislature has done nothing to compensate those who, but for the statute of limitations, would almost certainly be entitled to legal remedy. See Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *33 (N.D. Okla. Mar. 19, 2004), aff'd, 382 F.3d 1206 (10th Cir. 2004) ("Moreover, nothing in the Commission Report is binding on the legislature, and there is no evidence that the Oklahoma Legislature has promised to pay restitution or reparations to the race riot survivors.").

The United States Congress has been no more willing to legislate reparations for African-Americans than has the Oklahoma legislature. Since 1989, Congressman John Conyers of Michigan has annually introduced a bill titled, "Commission to Study Reparation Proposals for African-Americans Act." Ogletree, supra note 112, at 25 (citing Commission to Study Reparations Proposals for African-Americans Act, H.R. 40, 108th Cong. (2003)). Although the bill does not seek to legislate reparations, but merely to study the possibility of doing so, it "has been defeated every year since its introduction." Ogletree, supra note 112, at 25.


299. Malveaux, supra note 145, at 92.
discrimination. Rather, it would extricate such claims from the statutes of limitations yoke. Jethroe claimants’ former employers would not be ordered to compensate the plaintiffs, but would simply be required to respond to their claims on the merits. The legislature would essentially be saying, “as strongly as we may desire finality, we desire justice even more,” and denial of justice for Jethroe claimants is an unacceptable sacrifice in the name of finality.

If Congress enacted such legislation, it would be doing so with strong historical precedent. Indeed, Congress has previously done for Native Americans with delayed justice claims, what this Article proposes it could do for African-Americans with Jethroe claims. In passing the Indian Claims Commission Act of 1946 (ICCA), Congress provided a mechanism for Native Americans to assert “claims in law or equity arising under the Constitution, laws, [or] treaties of the United States” to which statute of limitations defenses were impermissible.

300. Chaplin, supra note 137, at 1588.

301. Notably, Congressman Conyers has proposed such legislation as a means of providing the Tulsa race riot’s survivors and decedents’ descendents a day in court. On April 23, 2007, he introduced the “Tulsa-Greenwood Race Riot Claims Accountability Act of 2007,” which would “provide a mechanism for a determination on the merits of the claims brought by survivors and descendants of the victims of the Tulsa, Oklahoma Race Riot of 1921 but who were denied that determination.” Tulsa-Greenwood Race Riot Claims Accountability Act of 2007, H.R. 1995 100th Cong (2007). Specifically, the legislation would proclaim timely any Tulsa claimant’s suit brought within five years from the date of the legislation’s enactment. See id.

302. Consideration of an analog in the African-American context to legislation designed to support Native Americans’ delayed justice claims is not unprecedented. Nearly forty years ago, New York University Law Professor Graham Hughes wrote:

If a proper sense of shame at our forerunners’ dealings with the Indians prompted the Act of 1946, can we feel any less sense of shame at their dealings with the black population of America? . . . [And] if a public confession can be made in statutory form of the just claims of American Indians for compensation . . . why should we not initiate similar schemes for reparation to black Americans?


Although Hughes ultimately concludes such a reparations scheme would be facially infeasible, his analysis considers claims characteristic of distributional social welfare reparations, rather than reparations designed to do justice under plaintiffs’ particular facts. See id. In that Jethroe claims, if viewed as reparations claims, must certainly be what Hylton has coined “doing justice” reparations claims, see supra Part III.B., analogous legislation in the Jethroe context would seem a reasonable possibility.

303. Indian Claims Commission Act of 1946, ch. 959, § 2(1), 60 Stat. 1049, 1050 (repealed 1978). Under the statute, plaintiffs were entitled to bring their claims before the Indian Claims Commission for resolution and, so long as the claims were filed with the Commission within five years of the ICCA’s enactment, statute of limitations defenses were inapplicable. Id. § 2. The Commission’s decisions were appealable to the Court of Claims and ultimately to the United States Supreme Court. Patrick W. Wandres, Note, Indian Land Claims: Sherrill and the Impending Legacy of the Doctrine of Laches, 31 AM. INDIAN L. REV. 131, 134 (2006–2007).

It bears noting that while the ICCA initially “held out much promise,” “it failed to meet the expectations of nearly everyone involved in its creation.” Nell Jessup Newton, Indian Claims for
Recognizing the injustice to which Native Americans have been subjected in this nation and the difficulty of bringing timely claims to remedy those injustices, Congress legislated a statute of limitations exception, which provided disenfranchised plaintiffs a taste of justice. Congress could certainly do the same in the Jethroe context.

3. Prevailing upon Professional Responsibility

In the absence of a legislative exception to statutes of limitations application in the Jethroe claim context, defense lawyers should be encouraged to advise their clients against pleading statutes of limitations defenses in the Jethroe claim context. While this proposal may, at first blush, appear radical, an examination of current scholarship regarding the lawyer's role, together with an exploration of the American legal system's foundations, attests to its reasonability.

In considering the lawyer's professional role, Law Professor Michael Krauss, turns his attention to 1991, a landmark year in any endeavor to explore the state of the legal profession. In that year, a Johns Hopkins University study revealed that among 104 professions analyzed, lawyers were most likely to consider committing suicide, most likely to regret entering their profession, and least likely to desire that their children take up their profession. In that same year, Newsweek published an essay a Colorado-based attorney named Sam Benson penned, entitled Why I Quit Practicing Law, which sheds light upon the broad-based disenchantment. Benson writes:

The code of ethics states that an attorney must zealously represent his or her client. In practice, this creates a warlike atmosphere for attorneys

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Reparations, Compensation, and Restitution in the United States Legal System, in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 261, 262-63 (Roy L. Brooks ed., 1999). The failure sprung largely from administrative and procedural foibles, as well as a focus on monetary compensation above land restoration and other non-monetary relief. See id. at 263-66 ("The idea was not merely to transfer money to all tribes, but to tailor justice in light of each tribe's history.").


305. The ICCA differs from legislation Jethroe claimants would desire in one principal respect—the ICCA provides for suit against the United States government rather than private parties. See Wands, supra note 303, at 134. There is no reason, however, that such legislation, passed in the Jethroe claim context, need be similarly restrictive.


307. Id. at 330.

308. See id. at 329.
in which they are pressured by clients to win at any cost and by any means available. . . . Many attorneys believe that “zealously representing their clients” means pushing all rules of ethics and decency to the limit. The sad thing is, they may be right.309

They may, indeed, be right. But they may be wrong. The very foundations of the American legal profession suggest the latter. The European legal traditions upon which the American legal profession is based demanded that legal representation be overlaid with a moral sensibility.310 The lawyer was to be “supportive of client autonomy but protective of the collective morality,” and in that context, the hired gun of whom Sam Benson wrote, “would be a dysfunctional lawyer.”311

David Hoffman’s and George Sharswood’s works on the legal professional in the early and mid-nineteenth century reveal that the lawyer’s role as protector of the public morality endured at least through the start of the civil war.312 As Krauss explains, “For Sharswood, the duties of the lawyer to the client and to moral value exist in harmony.”313 Indeed, Sharswood was fond of the following “poetic ode to the lawyer’s credo” by Sir William Blackstone:

To Virtue and her friends a friend
Still may my voice the weak defend
Ne’er may my prostituted tongue
Protect the oppressor in his wrong:
Nor wrest the spirit of the laws,
To sanctify the villain’s cause.314

Hoffman, even more unyielding than Sharswood in his “contention that representation of clients in no way absolves lawyers from the dictates of conscience,” drafted the famous Fifty Resolutions in Regard to Professional Deportment to set forth his view of the lawyer’s professional role.315 Hoffman’s resolutions are particularly notable in that they reveal the extent to which applying the statute of limitations defense requires a moral judgment. Indeed, one of Hoffman’s

309. Id. (quoting Sam Benson, Why I Quit Practicing Law, NEWSWEEK, Nov. 4, 1991, at 10.).
310. See id. at 327–29.
311. Id. at 328, 329.
312. While some scholarship suggests divergence between these two scholars’ view of professional responsibility, in that Sharswood gave “more weight to the client’s wishes than would Hoffman,” Krauss argues they are more similar in perspective than different. See id. at 332–33.
313. Id. at 333.
314. Id. at 333–34 (quoting GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 75–76 (T. & J.W. Johnson & Co. 1854)).
315. Id. at 332.
resolutions explains that if his client "acknowledged a plaintiff's civil claim,"\footnote{Id. (quoting 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY: ADDRESSSED TO STUDENTS AND THE PROFESSION GENERALLY 754 (Baltimore, Joseph Neal, 2d ed. 1836)).} he would never "plead the Statute of Limitations, when based on \textit{mere efflux of time}."\footnote{2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY: ADDRESSSED TO STUDENTS AND THE PROFESSION GENERALLY 754 (Baltimore, Joseph Neal, 2d ed. 1836) (emphasis added).} Even in the absence of such an acknowledgment, Hoffman suggests, the statute of limitations defense among others should not, under some circumstances, be pressed. Hoffman writes, "If, after duly examining a case, I am persuaded that my client's claim or defence (as the case may be . . . ) cannot, or rather ought not, to be sustained, I will promptly advise him to abandon it."\footnote{Id. (emphasis added).} Hoffman was not idiosyncratic in his concern about the ethics involved in asserting a statute of limitations defense. Indeed, through the early twentieth century, "one of the great ethical debates in professional circles concerned how . . . lawyer[s] should counsel [their] clients about pleading the Statute of Limitations."\footnote{M. H. Hoeflich, \textit{The "Good Lawyer" & Rule 2.1}, J. KAN. B. ASS’N, June/July 2000, at 38, 40.} Legal Scholar M. H. Hoeflich explains that these lawyers tested their ethical compasses with the following hypothetical:\footnote{Id.}

Assume a client comes to you and tells you that he contracted a valid debt ten years ago. His creditor has now died and had, during his life, failed to collect the debt he owed. Your client’s creditor’s widow now finds herself in difficult financial circumstances which would be greatly improved if she could collect the debt. Should you, as a lawyer, counsel your client to plead the Statute of Limitations and, thereby, avoid paying what was otherwise a valid debt?\footnote{Id.}

The answer to the question for many of the lawyers who considered it, was simply no.\footnote{Id.}

The context in which Hoffman and Sharswood wrote, and which Hoeflich describes, however, has, of course, shifted. Indeed, "modern conceptions of zealous advocacy vary considerably from the limits to

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\footnote{Id. \textit{Id.}} Professor Larry Gantt notes, however, that some evidence indicates the "golden age of ethical lawyering may be illusionary," suggesting current scholars may, to some extent, idealize the approach their predecessors in the law took to plying their profession. Larry O. Natt Gantt II, \textit{Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counseling in the Attorney-Client Relationship}, 16 REGENT U. L. REV. 233, 237 n.24 (2003–2004) (quoting Robert Granfield & Thomas Koenig, \textit{"It’s Hard to be A Human Being and A Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice}, 105 W. VA. L. REV. 495, 499 n.15 (2003)).}
\end{footnotes}
EXPLORING JETHROE'S INJUSTICE

such advocacy accepted in the nineteenth century." The shift occurred gradually as the bar expanded during the post-Civil War era and began developing rules to govern those among its ranks. While the first state ethics codes furthered, in large part, Hoffman's vision of the lawyer as accountable to the collective moral good, the ABA's Ethical Canons of 1908, the first nationwide code of ethics, reflected a fierce tension as to attorneys' lawyering obligations: "two visions of legal ethics stood opposed to one another: one asserting the united metaphysical and epistemological necessity of ethical obligation, and the other denying the existence of any normative system not enacted by someone backed by force." Today's codes of professional legal ethics—the Model Rules, which apply in forty-one of the nation's state jurisdictions, and the Model Code, which applies in the other nine—retain some of the tension imbedded in the Ethical Canons of 1908, but do seem to "tilt in favor of the 'hired gun'" and away from Hoffman's vision of the morally obligated attorney.

This shift, however, cannot alone account for the decrease of moral or other non-legal client counseling, as the contemporary guideposts for lawyers' professional comportment, while certainly far removed from the mores of the nineteenth century, leave room for such counseling. For instance, Model Rule 2.1 reads: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that [sic] may be relevant to the client's situation." Similarly, the ABA's Lawyers' Manual on Professional Conduct states "a lawyer's recommendations arguably should go beyond advising the client about that which is merely legally permissible and ought to incorporate moral and ethical considerations as well." The American Law Institute's Restatement of the Law Governing Lawyers speaks to the same effect.

So, while the common conception of the lawyer's role and the codes

323. Gantt, supra note 322, at 237.
325. See id.
326. Id. at 336–37.
327. Id. at 338.
328. Gantt, supra note 322, at 235 (alteration in original) (quoting MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003)).
329. Id. (quoting ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 31:701 (1998) (emphasis added)).
330. See id. at 236.
reflecting it have shifted over the past 200 years, they have not shifted so as to prohibit moral and other non-legal counseling. The movement away from such counseling, according to Krauss and fellow law professor Larry Gantt II, is attributable largely to increased fiscal pressure on attorneys, an increasingly morally nihilistic American populous, and a host of other causes, which have motivated a hired gun approach to lawyering, but which decidedly do not mandate such an approach.\textsuperscript{331}

And, indeed, perhaps the two most thorough explorations of legal ethics in the past thirty years, David Luban’s \textit{Lawyers and Justice: An Ethical Study} and William Simon’s \textit{The Practice of Justice}, take strong exception to the hired gun model.

In \textit{Lawyers and Justice}, Luban seeks to defend the law “against a professional vision based only on client service and the bottom line” through “urging a professional ethic” that might guide lawyers in their decision making.\textsuperscript{352} Luban does so by considering the interaction between “role morality,” which he describes as “the special obligations attached to certain social roles,” and “common morality,” a morality that binds all persons.\textsuperscript{333} Luban recognizes the importance of role morality, but insists lawyers view it within the context of, and generally not allow it to supersede, the greater common morality.\textsuperscript{334} The moral lawyer, as Luban sees it, therefore, “will challenge her client if the representation seems to her morally unworthy; she may cajole or negotiate with the client to change the ends or means; she may find herself compelled to initiate action that the client will view as betrayal; and she will not fear to quit.”\textsuperscript{335}

Faced with Hoeflich’s “destitute widow” hypothetical set out above, therefore, Luban’s moral lawyer would counsel the client against pleading the statute of limitations defense.\textsuperscript{336} William Simon purports to

\begin{thebibliography}{9}
\bibitem{331} Krauss, \textit{supra} note 306, at 339–40; Gantt, \textit{supra} note 322, at 238–48.
\bibitem{332} \textsc{David Luban}, \textit{Lawyers and Justice: An Ethical Study}, at xvii–xviii (1988).
\bibitem{333} \textit{Id.} at 105.
\bibitem{334} \textit{Id.} at 104–47. Notably, Luban concedes role morality may trump common morality in the criminal law context: “The criminal defense lawyer is one of the clearest cases of a role occupant who will often find that the justifications of the role are so crucial that they override all but the most stringent demands of common morality.” \textit{Id.} at 145.
\bibitem{335} \textit{Id.} at xxii. Robert Cochran notes that Luban and others espousing moral activism tend to engage factually unambiguous situations in which what is “morally unworthy” is entirely clear. \textit{Symposium: Client Counseling and Moral Responsibility}, 30 \textsc{Pepp. L. Rev.} 591, 621 (2003). Cochran suggests that in reality, however, “clients and client agents do not present unambiguous stories of injustice . . . or unconscionabilty,” making a lawyer’s determination as to what is “morally unworthy” a much more difficult question. \textit{Id.}
\bibitem{336} Luban’s exploration of statutes of limitations in \textit{Lawyers and Justice: An Ethical Study}, \textit{supra} note 332, makes this clear. Luban explores the 1957 case of \textit{Zabella v. Pakel}, 242 F.2d
base his approach to the issue in contextual judgment—that is, the view that a lawyer should scrutinize the purposes of the law in question before seeking its application—but, ultimately, would agree with the counsel given. While Simon does not explicitly appeal to morality, as Luban does, there seems, in substance, little difference between the two scholars’ perspectives. Indeed, Simon’s approach may simply “cloak the lawyer’s moral judgment in legal jargon.”

However their perspectives are categorized, both Luban and Simon reject hired-gun lawyering, recognize the potential impropriety of pleading the statutes of limitations defense even under circumstances when it would be legally acceptable, and appreciate the permissibility of non-legal and moral client counseling.

Law Professor Peter Margulies rejects the hired gun approach with even greater vigor, arguing that ethics rules should, indeed, require lawyers to engage in non-legal and moral counseling of the sort that would suggest a client forgo the statutes of limitations defense. Margulies proposes a regime of ethics rules demanding that a lawyer advise his or her client to alter the client’s decision or proposed action if, among other reasons:

- “The action or decision will harm others;”
- “The action or decision violates the norm of equality of all persons;”
- “The action or decision is one that the client would not wish for everyone in society;”
- “The action or decision may engender guilt;”
- “The action or decision will harm others in a way that ultimately will require a remedy from society at large;”

452 (7th Cir. 1957), which he describes as “concern[ing] a wealthy man attempting to evade a five thousand dollar debt to an ‘old friend, countryman and former employee’ by pleading the statute of limitations.” Luban, supra note 332, at 9 (quoting Zabella, 242 F.2d at 455). Pressing the statutes of limitation defense, under these circumstances, would, in Luban’s view, be immoral. See id. at 47–48.


339. Symposium: Client Counseling and Moral Responsibility, supra note 335, at 594 n.13. “Under Simon’s model, the lawyer looks to the values underlying the law to resolve moral issues[, which] . . . clearly leaves the lawyer in charge of the moral issues that arise in legal representation.” Id. at 594.

• "The action or decision will result in a net cost to society if all individuals behave in a like manner."341

So, while Hoeflich suggests that few if any contemporary lawyers would respond to the above ‘destitute widow’ hypothetical as their predecessors did,342 this divergence would, again, seem more a consequence of the aforementioned market forces than of any rule-based prohibition,343 and would seem to run against the great weight of the literature on the subject.344

341. Id. at 221.
342. Hoeflich, supra note 319, at 40.
343. Hoeflich suggests that, under the KANSAS RULES OF PROF’L CONDUCT (2007), available at http://www.kscourts.org/rules/Rule-List.asp?rl=Rules+Relating+to+Discipline+of+Attorneys, counseling a client against pleading a statute of limitations defense would “almost certainly be a violation of Rules 1.1, 1.3 and 1.4.” Hoeflich, supra note 319, at 40. It is difficult, however, to see how this is so. The rules Hoeflich cites read as follows:

Rule 1.1 Client-Lawyer Relationship: Competence
A lawyer shall provide competent representation to a client. Competent representation requires the knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Client-Lawyer Relationship: Diligence
A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 Client-Lawyer Relationship: Communication
a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.


None of these rules seemingly would, on their face, bar an attorney from counseling a client to forgo pleading a statute of limitations defense. While Kansas courts have sanctioned lawyers under KANSAS RULES OF PROF’L CONDUCT R. 1.1, 1.3, 1.4 for mismanaging statutes of limitations, see, e.g., In re Daniels, 159 P.3d 995 (Kan. 2007); In re Watson, 121 P.3d 982 (Kan. 2005); In re Coggs, 14 P.3d 1123 (Kan. 2000), the mere act of advising a client against pressing the statutes of limitations argument would seem non-sanctionable.

In that KANSAS RULES OF PROF’L CONDUCT R. 1.1 and 1.3 mirror MODEL RULES OF PROF’L CONDUCT R. 1.1 and 1.3 and that KANSAS RULES OF PROF’L CONDUCT R. 1.4 does not substantively differ from MODEL RULES OF PROF’L CONDUCT R. 1.4, it seems clear that counseling a client against pleading a statute of limitations defense would be no more violative of the MODEL RULES OF PROF’L CONDUCT than it would be of the KANSAS RULES OF PROF’L CONDUCT. Indeed, on the issue of competence at least, Gantt argues, quite to the contrary, that MODEL RULES OF PROF’L CONDUCT R. 1.1 “implies that lawyers may be required to discuss moral considerations with their clients,” and as discussed, questions concerning the application of statutes of limitations certainly involve moral considerations. Gantt, supra note 322, at 266.

344. The great weight of the literature is, of course, not without exception. See, e.g., Anand, supra note 338, at 653 (recognizing that Luban’s and Simon’s perspectives represent the “most powerful contemporary thinking” on an attorney’s moral obligations, but offering what he describes as “the definitive response” to that literature in arguing that, among other things, “a lawyer’s professional responsibility . . . [may] require[e] him or her to assert the statute of limitations to frustrate a plaintiff’s
Perhaps then, considering long-standing, indeed foundational, concerns as to the ethical propriety of the statutes of limitations defense and the continued resonance of those concerns, defense lawyers faced not with a ‘destitute widow,’ but with a ‘destitute retiree’—an impoverished elderly African-American who brings suit because she was decades ago discriminated against by the lawyer’s client such that the destitute retiree is denied the pension her Caucasian former co-workers are receiving—might do what their predecessors’ response to the ‘destitute widow’ hypothetical suggests they would have done. That is to say, if, indeed, the lawyers embrace their role as guardian of a profession in which one is admonished to not “[p]rotect the oppressor in his wrong: [n]or wrest the spirit of the laws, [t]o sanctify the villain’s cause[,]” and are obliged to consider advising their client to abandon a defense that “ought not . . . be sustained” even if the letter of the law would permit it, those lawyers might reasonably counsel their clients to not mount a statutes of limitations defense against the destitute retiree’s claim. Lawyers seeking contemporary grounding for their advice could turn to Luban, Simon and any number of the Margulies factors. Even if wary of following these scholars, lawyers could confidently rely upon, among other sources, Model Rule 2.1, the ABA’s Lawyers’ Manual on Professional Conduct, and the American Law Institute’s Restatement of the Law Governing Lawyers.

The ‘destitute retiree’ claim, discussed in the above paragraph, is, of course, the paradigmatic Jethroe claim. Although a lawyer defending an employer against a Jethroe claim may argue against broaching moral considerations in the belief that doing so would inappropriately broaden the attorney’s role to the client’s detriment, in fact, “[a] lawyer who offers moral advice is no more compromising client autonomy than one who offers purely legal advice. . . . [A] lawyer who thinks about such concerns but does not discuss them may, perhaps even unconsciously, manipulate his client’s actions more problematically than a lawyer who fosters an open dialogue.”

Defense lawyers, therefore, who recognize the importance of justice even at the expense of finality, should, in defending Jethroe claims, consider counseling their clients against pleading a statute of limitations violation. Such counsel does not violate the profession’s ethical

345. Krauss, supra note 306, at 333, 334 (quoting GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 75–76 (T. & J.W. Johnson & Co. 1854)).
346. HOFFMAN, supra note 317, at 754 (emphasis added).
347. See SIMON, supra note 337, at 420.
348. Gantt, supra note 322, at 239–40.
standards; indeed, the standards may be reasonably viewed as encouraging it.

V. CONCLUSION

In recent decades, legal scholars, practitioners, and members of the broader American community have debated the wisdom, reasonability, and practicality of remedying injuries inflicted upon African-Americans during our nation’s troubled history of racial discrimination and disenfranchisement. And as the debate has raged, many of those most acutely impacted by the discrimination and disenfranchisement—the African-Americans who suffered through the Jim Crow era, such as Sam Jethroe—have grown old and died, having never reaped justice. Justice, however, remains a possibility for scores of African-American retirees through the prosecution of Jethroe claims.

As detailed in this Article, Jethroe claims are actionable under Section 1981, do not fall victim to traditional anti-reparations arguments, and potentially avoid statutes of limitations dismissal by way of common law tolling and accrual doctrine. Even if statutes of limitations would otherwise apply: (1) legislators may, and should, ensure that Jethroe claims are heard on the merits through legislating per se exceptions to statutes of limitations in the Jethroe claim context; and (2) in the absence of per se exceptions, defense lawyers may, and should, counsel their clients against prevailing upon statutes of limitations in defending Jethroe claims.

Jethroe claims carry with them the potential to provide some semblance of justice to scores of African-American retirees and, in doing so, to, by whatever increment, heal this nation’s racial wound. Their extinguishment “in consequence of the lapse of time,”349 would, therefore, be tragic.

349. Holmes, supra note 135, at 476.